

The Virtue of Process:
Finding the Legitimacy of Judicial Fact-finding in Personal Injury Litigation

by

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*For Kaki and Murf,
two of my most favourites*

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ABSTRACT

This thesis is an inquiry into the legitimacy of judicial fact-finding in civil litigation. Judges make authoritative factual findings in conditions of uncertainty and the decision-making process cannot, and does not, guarantee the accuracy of those outcomes. Given the inevitable risk of error, on what basis is the authority of judicial fact-finding legitimate? This project provides a framework of procedural legitimacy that bridges two unavoidable aspects of adjudication: factual indeterminacy and the need for justifiably authoritative dispute resolution.

The first four chapters explain and justify the procedural legitimacy framework. Adopting a legal theory methodology, I examine H. L. A. Hart's, Joseph Raz's, Lon Fuller's, and Jurgen Habermas's notions of legal validity and legitimacy. Through this analysis, I claim that the implication of authority that inheres in legal validity requires legitimacy, and such legitimacy must be sourced in the virtues of legal processes. Drawing on Fuller's and Habermas's jurisprudence, I note that acceptable processes embody respect for human agency. Fact-finding rules must also demonstrate that respect in order to produce legitimate outcomes. This requires a process that is factually reliable, in the sense that fact-finding doctrines are genuinely aimed at ascertaining true facts, and that litigants are assured meaningful participation rights. Consistent and coherent adherence to such processes results in legitimate factual determinations.

I then apply the procedural legitimacy framework to three doctrinal discourses relating to negligently inflicted personal injuries, and arena strife with difficulties associated with factual uncertainty. First I address the critical concern around admissibility and use of scientific evidence. That debate focuses on ensuring that factual determinations are consistent with reliable scientific knowledge, and questioning whether fact-finding procedures are conducive to that. Second, I consider proof difficulties arising out of medical uncertainty over the cause of an allegedly tortious injury. Such evidentiary difficulties have caused perceptions of unfair liability determinations in the medical negligence context. Third, I discuss the inconsistent use of 'simple probability' reasoning, an alternative mechanism of managing factual indeterminacy, in the damages assessment phase. Each of these discourses, including proposals for reform, are assessed from the perspective of maintaining procedural legitimacy in judicial fact-finding.

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CHAPTER 1. INTRODUCTION

A. The Concerns

One of the first things to be done in resolving legal disputes is sorting out what happened – determining what facts gave rise to the litigation. Almost invariably, that involves guesswork. The unavailability of guesswork brings with it an inescapable risk of factual inaccuracy. The Canadian adjudicative system does not, because it cannot, promise factual accuracy.

Factual uncertainty permeates adjudication, whether the dispute centres on a tort, a contract, or a criminal matter. Consider a plaintiff who suffers an injury in a hit and run car accident. Based on whatever fragments of evidence she can gather, she brings a claim to the courts to have her right to be free from a negligently inflicted injury administered. Given the uncertainty over whose negligence, if anyone's, caused her injury and how, the judge finds that the requisite factual elements of her claim are not established on the balance of probabilities standard of proof. The legal outcome is that there is no liability, and the plaintiff is left uncompensated, even though she suffered a legal wrong. On the converse, consider a case where medical evidence suggests that a defendant doctor *probably* (say, a 60% likelihood) caused an injury to her patient. If the patient brings a claim, the doctor could be held liable, despite the fair chance (40% chance in this example) that she did not cause the injury at all.

Similarly, consider a case where parties contracted for delivery of some equipment needed for the construction of a commercial property. Suppose that failure to deliver the

equipment is clearly established, but the damages that flow from that breach, like prospective lost profits, are likely to be speculative. A judge will award damages based on the information available. If it turns out later that the lost profits were greater or less than the judicial award, then the compensation for breach of contract would be rendered inaccurate.

Even in the criminal context, where the standard of proof is heightened in favour of the accused, the risk of factual inaccuracy cannot be altogether escaped. And while the likelihood of factual error is less likely to adversely affect the accused person, the risk of false acquittal is amplified owing to the standard of proof in criminal matters: the elements of crimes must be established "beyond a reasonable doubt." For the sake of illustration, assume that this means the standard of proof is 95%. If the trier of fact concludes that she is anywhere from 0-94% sure that the accused committed the crime, then she must acquit the accused, even though there could be a high likelihood that the accused did commit the crime.

When material factual findings are inaccurate, the ultimate adjudicative outcome could fail to vindicate a legal right, or it could mistakenly impose legal obligations, like in the examples noted above. But because factual accuracy cannot be guaranteed in a plausible judicial system, there exists the possibility that factual determinations are inaccurate, yet legally valid. Being legally valid, those factual determinations are also authoritative in the

simple sense that legally valid outcomes are considered to settle a matter, and are understood to be properly enforceable in the community on the basis of their legal validity.¹

The question of why, and on what basis this is acceptable has not received sufficient jurisprudential attention, which leaves explanations about the legitimacy of the Canadian adjudicative system inadequate. It may be useful at this juncture to re-affirm that my focus on the validity of judicial fact-finding is just one aspect of adjudication. Although factual findings are a crucial element of arriving at a judicial outcome, they are not the only relevant questions when it comes to assessing the validity of adjudicative outcomes. Additional relevant aspects may include correct identification, articulation, interpretation, and application of the relevant laws that govern the dispute. Impropriety in any of these could render a judicial outcome invalid. For instance, if a judge finds that causation is not established on the balance of probabilities, but nonetheless holds the defendant liable to the plaintiff, that outcome lacks legal validity because it misapplies the law to the legal facts.² If

¹ I note that significant work has been done to define exactly what it means for law to be authoritative, and what that entails both descriptively and normatively, in terms of the nature of the obligations that valid law can and should invoke. I revisit these themes in my jurisprudential discussions in Chapter Two, and in more detail in Chapter Three, outlining notions of legal validity and its relationship to authority in positivist traditions, focusing on H.L.A. Hart's jurisprudence and on Joseph Raz's theory, which centralizes and develops novel notions of legal authority and its implications. I also consider Jurgen Habermas and Lon Fuller's ideas about legal validity and authority in Chapters Two and Three. But the development of the argument I present depends on an uncontroversial notion: that legal validity brings authoritative implications, where authoritative implications are taken to mean that legally valid rules are understood to be the enforceable rules for a political community. This descriptive claim about the inter-relation between legal validity and its implications of authority should sit comfortably with any legal theory.

² Conceivably, there are instances where judges may have misapplied substantive legal principles in a given case. If the error of law is not caught prior to the expiration of an appeal period, the outcome can remain legally valid and re-litigation barred. My point above is that in the usual course, a substantive error of law is cause to render a legal

judges misinterpret legislated laws or precedents, that can be cause for a legal invalidity of their ultimate decision. Questions about how to assess whether judges have correctly interpreted and applied indeterminate laws occupy most discourses on valid and legitimate adjudication. But in most trial decisions the law is not at issue but the facts are very much in dispute. My focus is on this less discussed, though no less significant question of the validity and legitimacy of judicial determinations of ‘what happened.’

Despite the potential inaccuracy of fact-finding in outcomes like those noted above, they can remain legally valid. On the basis of their legal validity, they are authoritative. I contend that recognizing the authority of such outcomes requires normative justification, or legitimacy. My thesis offers an answer for why and on what basis adjudicative fact-finding can be considered justifiably authoritative, or, legitimate.³

My exploration into fact-finding brings to light another arena that warrants more jurisprudential attention in Canada: the role of process in maintaining adjudicative legitimacy. Approaching adjudication through the lens of fact-finding highlights that

outcome invalid. The fact that even such substantive errors may maintain validity in order to protect the procedural rules of timely appeal constitutes a further endorsement of the idea presented in this chapter and my thesis generally: procedural propriety is a source of adjudicative validity and cannot be compromised.

³ As a general abstraction, my inquiry into legitimacy asks for the basis on which adjudicative decrees are justifiably authoritative, in the sense of being binding and backed by force if necessary. As the thesis progresses, I will present further expansions of this general notion of legitimacy, and will canvass theorists’ reflections on why legitimacy is significant and necessary in a theory of law, and especially on its relationship to legal validity.

procedural component, so this inquiry has opened an avenue for me to theorize how and why the right procedures lead to legitimate legal outcomes, particularly in the fact-finding context. In turn, applying the procedural legitimacy perspective to doctrinal discourses centering on factual uncertainty enables a display of its value as a jurisprudential orientation, and the grave consequences of under-emphasizing it.

Consistent adherence to adjudicative procedures of fact-finding that ensure equal respect for litigants as autonomous agents are necessary conditions for legitimizing the authority afforded to adjudicative fact-finding. This is the basic contribution of the procedural legitimacy perspective. It is under-theorized as a jurisprudential orientation in Canadian and other common law jurisdictions, and it is correspondingly under-emphasized in doctrinal discussions, particularly in private law spheres. In the upcoming chapters, I seek to expose the gravity, both theoretical and practical, of that under-emphasis by substantiating and defending a process-based approach to legitimacy and displaying its significance in jurisprudential terms as well as in contemporary doctrinal discourses. This is the primary contribution of this work.

I note at the outset that procedural propriety of fact-finding is one, among other necessary conditions of legitimate adjudication. Other necessary conditions may include the propriety of the substantive laws, and appropriate judicial interpretation and application of those laws. I leave those concerns aside in order to focus on my primary purpose of highlighting the importance of procedural

propriety as a crucial element of legitimate adjudicative fact-finding, and to demonstrate the significance of that claim in its own right.

Although the framework for procedurally legitimate fact-finding is applicable to adjudication generally, I maintain a special interest in civil disputes over negligently inflicted personal injuries. Such disputes are notorious for difficulties associated with factual uncertainty. The issues that arise out of that problem provide fertile grounds for displaying how under-valuing procedural legitimacy can lead to insufficient doctrinal analyses.

The first debate that I address is the increasingly critical concern around admissibility and use of scientific evidence. The focal point of that debate is ensuring that factual determinations are consistent with 'reliable scientific knowledge,' and questioning whether judicial fact-finding procedures are conducive to that. The second concern is proof difficulties arising out of medical uncertainty over the cause of an allegedly tortious injury. Such evidentiary difficulties have caused perceptions of unfair liability determinations in the medical negligence context. Third, I discuss the inconsistent use of 'simple probability' reasoning, an alternative mechanism of managing factual indeterminacy in the damages assessment phase.

These doctrinal discussions are thematically linked by the problem of factual uncertainty and how best to accommodate it in particular instances. But, as noted, adjudicative legitimacy is not often considered through the lens of factual uncertainty. This is a problematic gap because, without a normative account for why judicial fact-finding is

acceptable, it is difficult to offer or endorse solutions to discrete problems of factual uncertainty that pervade adjudication. The personal injury case studies that I have selected have doctrinal significance in their own right, but their utility in my project is primarily that they provide paradigmatic value for demonstrating the utility of developing a framework for procedurally legitimate fact-finding. The application to these doctrinal discussions enables a further elaboration on the procedural legitimacy frame and unfolds the nuances of its constituent elements.

B. The Approach

My purpose in this work is to articulate a procedural legitimacy perspective and to demonstrate its significance. Accordingly, the first half of my thesis is dedicated to explaining and justifying my claim that procedural propriety is essential to legitimate adjudicative fact-finding, and to outline the criteria that procedures must adhere to in order to uphold their justificatory demands. The proposal I offer has formal as well as substantive elements: it declares that legitimacy of fact-finding depends on consistent adherence to procedures (the formal aspect) when those procedures embody equal respect for legal subjects as free-acting agents (the substantive aspect). That requires that adjudicative procedures are genuinely oriented towards producing factually reliable and rational conclusions, and that they assure a full right of participation to affected parties.

Developing and defending this proposal requires me to approach and consider the often blurry dichotomy between substance and procedure. Wherever relevant, I return to various aspects of this theme throughout the thesis. For now I make the introductory comment that throughout my analysis, I draw a clear distinction between the rules that set out substantive legal rights, and the procedural rules around administration of those rights. Within the

context of negligently inflicted injuries, this means that the tort law principle ensuring a right to compensation if a party is negligently injured constitutes a substantive rule; the rules associated with the adjudication of a claim for such compensation are procedural rules. In my context of fact-finding, this includes the rules dictating the applicable standards of proof, processes of adversarial presentation of evidence and argument, evidentiary doctrines stipulating that only relevant and non-privileged evidence is admissible, and doctrines pertaining to presentation of expert evidence, for example.

The development of a framework for procedural legitimacy is the first phase of my thesis. In the second phase, I use the procedural legitimacy framework to provide theoretically grounded assessments of the scientific evidence, causal uncertainty, and simple probability questions. These discussions correspond to the two elements of the procedural legitimacy proposal. Much of the science and law discourse centers on the requirement of maintaining litigant autonomy in fact-finding procedures; the need for consistency and coherence in terms of the procedures adopted for accommodating factual uncertainty is the key concern in my discussions of causal indeterminacy in the medical negligence context and the availability of simple probability reasoning in assessing a successful plaintiff's damages entitlements. In the course of these three applications, I hope to demonstrate the value of procedural legitimacy as a jurisprudential orientation in concrete doctrinal arenas.

C. The Map

The opening chapter of the thesis sets the stage for the subsequent substantiation of procedural legitimacy and its application. It opens with a descriptive analysis of adjudicative fact-finding in order to demonstrate the initial and most basic derivation of the claim that valid legal fact-finding is contingent on the procedural integrity with which the

factual determination took place, and not on the correctness of the outcome itself. Studying the method of fact-finding in this way enables a clear understanding of when, how, and on what basis we accept and even embrace factual indeterminacy without compromising the authoritative nature of valid fact-finding. From this starting point, further implications about the nature of procedural legitimacy, including its normative aspects can be drawn.

I begin with the observation that an effective adjudicative system cannot guarantee factual accuracy, because factual indeterminacy cannot be eradicated. The result is a tension between the condition of factual uncertainty and the need for legitimate resolution of disputes. This tension is managed through the process of fact-finding on a 'less than certain' standard of proof. The greater than 50% standard of proof in the civil context suggests that the legal validity of a judicial outcome cannot be exclusively contingent on the factual accuracy of the outcome, because while valid legal facts must be *probably* true, they do not need to be *certainly* true. It follows that the validity of a legal fact does not depend on its accuracy. By implication, the validity of a legal fact depends on whether it constitutes a correct application of the process of fact-finding. That is, if parties were permitted to present their evidence in accordance with adversarial procedures, and the trier of fact measures the admissible evidence against the applicable standard of proof, then the factual finding is legally valid, even if there is a chance that it is inaccurate. So long as the applicable legal principles were applied correctly to the facts that were found, the judicial outcome will be valid and authoritative. With these observations as my premise, I turn to the normative aspects and implications of the conclusion that the validity of legal fact-finding depends on procedural propriety and not outcome accuracy.

I suggest that since being legally valid means that an outcome is authoritative for those governed by it, legal validity must be legitimate. That is, valid fact-finding must be justified. In order to develop this argument, I consider jurisprudential notions of legal validity and legitimacy, and situate my claim among them. Some argue that legal validity and legitimacy (understood as the justification of valid law) must remain conceptually distinct; others argue that the two concepts must be intertwined. Among those that argue that they must be intertwined, some suggest that both legal validity and legitimacy are derived from the propriety of the outcome. Others suggest that they are derived from the propriety of the process that leads to the outcome. Navigating through these different viewpoints and articulating my points of agreement and divergence from them makes the way for my initial conclusion that the validity of legal fact-finding depends on consistent and correct adherence to the processes of legal fact-finding, and the legitimacy of fact-finding is sourced in the virtues of those processes. This sets the stage for Chapter Three, where I further glean lessons from the theorists that I introduce and associate with in the first chapter for the purpose of substantiating the procedural legitimacy framework.

I then turn to applying the broad jurisprudential notions of validity and legitimacy in the specific context of fact-finding. This leads me to a discussion of various theories of adjudication, particularly those that consider the tension caused by factual uncertainty and comment on how that is best accommodated in judicial processes. Some theorists hold instrumental views where judicial processes are viewed as instruments to achieve the right outcome. Others hold non-instrumental views where judicial processes are seen to have certain inherent virtues irrespective of the outcome. In Chapter Two, I introduce some of the major themes that arise from within these two categories and place my views among them. This leads to the conclusion that judicial fact-finding processes must be

demonstrably oriented towards seeking truthful outcomes, and that there are also other inherent properties that must be present that may have no impact on the truthfulness of the outcome, but are nonetheless necessary in a legitimate fact-finding process. This conclusion, along with the wisdom of jurisprudential scholars that I canvass in Chapter Three, paves the way for my work in Chapter Four where I outline what values the processes of fact-finding should reflect, and delineate principles for how they should manifest in Canadian fact-finding rules.

In Chapter Three, as noted, I review jurisprudential thinking about the validity and legitimacy of law generally. The purpose of Chapter Three is to assess procedural paradigms and to apply that assessment to evaluate a procedural account of legitimate fact-finding. I begin by reviewing the basic tenets of Hart's positivist concept of law, followed by a review of Raz's additional nuanced and astute contributions. This review demonstrates the merits of proceduralist models, but also that purely procedural models have certain shortcomings. Most basically, they do not provide a justification for the authoritative implications that come with a legally valid outcome. My review of Hart and Raz leads to my first series of conclusions: first, law must contain an in-built normative commitment (i.e. legitimacy), otherwise law's authority has no basis. Second, that normative commitment cannot require the content of a legal outcome to adhere to some standard of morality. This is because modern societies can accommodate multiple moralities, but law is universally authoritative in its jurisdiction. Third, reconciling the need to stipulate a normative basis for legal status without turning to substantive moral criteria requires a turn to a thinly substantiated procedural model: in order to justify its authoritative status, the process of gaining status as law must display certain formal characteristics that uphold certain values. Those procedural virtues vindicate law's status. They make its authority acceptable even if

its content is not morally acceptable to one, some, or many people governed by it. In the same way, procedural virtues make legal fact-finding acceptable even if there is a potential for inaccuracy.

In the second part of Chapter Three, I draw on Fuller's and Habermas's insights, which provide thinly substantiated procedural models. By them, these theorists explain *why* the law that emerges from particular processes warrants its authoritative quality. I suggest that Fuller's and Habermas's ideas about law are thematically connected through the idea that the process of lawmaking must have demonstrable respect for the human agency of legal subjects, which grounds the rational acceptability of the emergent law. Habermas and Fuller's perceptions are transferable to my project because they reveal *why* legal facts that emerge from particular fact-finding procedures warrant their acceptability.

Making that analogy concrete is the work of Chapter Four. There, I explain how the procedural values of respecting legal subjects as autonomous agents must be reflected in adjudication so that factual findings can be considered legitimately authoritative. I conclude that a legitimate adjudicative process of fact-finding where respect for human agency is manifest must ensure factual reliability, and must provide a right to participate in factual determinations.

In Chapter Two, I introduce the tension between the importance of factual accuracy and the impossibility of guaranteeing it. In Chapter Four, I explain that this tension can be best reconciled by replacing the notion of outcome-accuracy as a necessary element of legitimacy with its procedural counterpart – a factually reliable process. A factually reliable process does not mean that outcomes will be accurate every time. But it means that we

demand a genuine effort to ascertain the true facts. That genuine effort is demonstrable when fact-finding occurs on the basis of all properly admissible evidence, rationally weighed against the applicable standard of proof. In addition, the standard of proof must be greater than 50%, so that facts are invariably more likely to be true than not true. If not, the genuineness of the claim to ascertaining true facts is questionable.

Along with factual reliability, I also endorse the necessity of participation rights in order to ensure respect for human agency within a fact-finding process. For this claim, I draw on the insights of Fuller, Habermas and Solum, all of who suggest that meaningful participation is foundational to legitimate legal outcomes.⁴ I argue that an adjudicative process that does not afford meaningful participation rights to affected litigants constitutes an affront to the agency of those governed.

Chapter Four completes the first phase of my research. My conclusion is that the fact-finding process must embody the virtue of respect for human agency in order to produce outcomes that have legitimate authority. When the process is factually reliable, the litigants are assured meaningful participation rights, and the applicable processes are applied consistently to all litigants, and then the factual determination is legitimate whether or not it is factually inaccurate. The legitimacy of the outcome is grounded in the systemic features of the process of fact-finding. These procedural virtues are transmitted into the outcome

⁴ Lawrence Solum, "Procedural Justice" 78 S Cal L Rev 181; Lon Fuller and Kenneth Winston, "The Forms and Limits of Adjudication" 92(2) Harv L Rev 353; Jurgen Habermas, *Between Facts and Norms: Contributions to Discourse Theory of Law and Democracy* (Cambridge, Massachusetts: MIT Press, 1996).

produced. This is the concept of substantiated procedural legitimacy in the fact-finding context.

The second phase of my thesis (Chapters Five, Six and Seven) is a demonstration of the utility of the procedural legitimacy framework in three doctrinal contexts where it has been problematically under-emphasized. In Chapter Five, I discuss the science and law discourse. My overarching claim is that discussions have aimed at changing adjudicative procedures of admissibility or presentation of scientific evidence in order to ensure that factual determinations are in line with reliable scientific evidence. I develop this claim in reference to proposals that advocate incorporating scientific criteria of reliability into legal admissibility tests, and calls to introduce novel methods of admitting scientific evidence, like through court appointed experts or joint experts in order to reduce the impact of adversarialism on scientific evidence.⁵ The general goal of ensuring appropriate use of science is not a problem. But from the procedural legitimacy perspective seeking to change adjudicative processes to better accommodate science or to achieve scientific reliability can bring impropriety due to procedural compromise. Adopting the procedural legitimacy frame re-orientes the discussion away from how to change legal procedures to better

⁵ See for example Gary Edmond & Kent Roach, "A Contextual Approach to the Admissibility of the State's Forensic Science and Medical Evidence" (2011) 61 UTLJ 343 at 366; Susan Haack, "Irreconcilable Differences? The Troubled Marriage of Science and Law" (2009) 72 Law & Contemp Probs 1; Justice Cromwell, "The Challenges of Scientific Evidence" (McFayden Lecture, Memorial Series, sponsored by the Scottish Council of Law Reporting, delivered at the Royal Society of Edinburgh, March 2, 2011), online: <<http://www.scottishlawreports.org.uk/publications/macfadyen-2011.html>> at 50-55; Justice Ian Binnie, "Science in the Courtroom: The Mouse that Roared" (2007) 56 UNB LJ 307.

accommodate science towards how and why to apply the existing fact-finding procedures appropriately to scientific evidence in order to maintain legal legitimacy.

I argue that the science and law discourse under-values the aspects of the legal process of fact-finding that assure full participation rights as well as factual reliability, while accommodating the adjudicative conditions of factual uncertainty. I explain in this chapter that the threshold reliability test for admissibility and weighing evidence against the balance of probabilities standard of proof constitutes legally reliable fact-finding procedures. And the ability to present one's choice of expert evidence in an adversarial context (within the ambit of ethical lawyering) maintains full participation rights. Since reliable fact-finding processes and full participation rights are key substantive elements of procedural legitimacy, consistent application of those fact-finding procedures is necessary for maintaining legitimate adjudication, even when scientific evidence is involved. On that basis, I generally endorse the Goudge Inquiry recommendations and the recently published *Science Manual for Canadian Judges* published by the National Judicial Institute, which provide tools for judges to apply the procedures of legal fact-finding skillfully when it comes to scientific expert evidence.⁶

In Chapter Six, I apply the procedural legitimacy framework in the context of proving causation. The causal uncertainty discourse arises out of a sense of injustice that results when a plaintiff has difficulty establishing causation under the usual method of proof.

⁶ Report of the Inquiry into Paediatric Forensic Pathology in Ontario (Toronto: Queen's Printer, 2008) (Chair: Stephen T Goudge); National Judicial Institute, *Science Manual for Canadian Judges*, available online <<

Driven by that sentiment, alternative approaches to causation have been suggested, but have not been assessed from the procedural legitimacy perspective. In Chapter Six, I show that the procedural legitimacy perspective is an essential evaluative tool for assessing propriety of outcomes, as well as assessing proposed changes to legal principles and procedures in the face of substantively uneasy outcomes.

My main focus in Chapter Six is on the loss of chance argument as a proposed solution to causal proof difficulties in the medical misdiagnosis context. In loss of chance cases, plaintiffs suffer medical adversities after being negligently misdiagnosed by health care providers. The issue is that the 'but for' causation connection between the negligent misdiagnosis and the ultimate adverse outcome cannot be proven on the balance of probabilities because the pre-negligence chance of survival was less than 50%. Accordingly, the plaintiff is denied recovery altogether. The discomfort associated with this outcome has prompted authors, including S.M. Waddams and E. Weinrib, to argue that the lost chance of a better medical outcome should be compensable in these contexts.

Despite its appeal in the misdiagnosis context, I conclude that loss of chance cannot meet the systemic demands of procedural legitimacy. I explain in Chapter Six that incorporating loss of chance would constitute arbitrarily subjecting doctors and patients to an altogether different scheme of tort liability and inconsistent application of legal principles and procedures of fact-finding, which is suggestive of illegitimate adjudication. On that basis, I endorse the Supreme Court of Canada's resistance to incorporating loss of chance in

Canadian medical negligence law.⁷ In Chapter Six, I elaborate on the value of consistency and coherence and its role in maintaining non-arbitrary, legitimate adjudication.

In Chapter Seven, I rely on the express comments in Chapter Six about the value of consistency and coherence in maintaining legitimate adjudication and particularly accommodation of factual uncertainty, to tackle the question of where probabilistic reasoning or, simple probability, should be available in personal injury claims. This constitutes my final demonstration for how the procedural legitimacy perspective benefits doctrinal discourses.

Simple probability is usually understood as an alternative fact-finding mechanism that can be used instead of the usual balance of probabilities. Cooper-Stephenson and Saunders, for instance, repeatedly describe it as such.⁸ It allows for proportionality in fact-finding. If, for instance, a 20% chance of future surgery can be established, then 20% compensation for that surgery can be awarded, while under the usual balance of probabilities method, no compensation can be awarded because the future surgery would not be established as a fact.

There is no doubt that simple probability reasoning is available in Canadian law, but there is confusion and irregularity with where it is applied in the personal injury context, which I

⁷ See *Laferriere v Lawson* [1991] 1 SCR 541, affirmed in *St-Jean v Mercier* [2002] 1 SCR 491.

⁸ Kenneth Cooper-Stephenson and Iwan Saunders, *Personal Injury Damages in Canada*, 2nd ed (Scarborough, Ontario: Carswell, 1996).

canvass in Chapter Seven. I use the procedural legitimacy perspective to address this concern. First, I evaluate whether simple probability can be accepted as a legitimate fact-finding process at all, and if so, in what circumstances. I conclude that the reliability and consistency demands of procedural legitimacy cannot be met when simple probability is characterized as an alternative proof mechanism. I argue that simple probability is better characterized as a mechanism for giving legal relevance and value to a chance. Understanding simple probability that way enables a more comprehensive approach to its availability that better preserves the systemic demands of procedural legitimacy. Accordingly, this chapter will contain not only a proposed solution to the problem of simple probability's availability, but also my final illustration that the procedural legitimacy perspective provides a valuable contribution to doctrinal concerns.

D. Contributions

There are three issues that this work addresses. First, that adjudicative legitimacy is not often considered from the perspective of fact-finding, which prevents theoretically grounded responses to doctrinal concerns rooted in factual uncertainty. Second, assessing adjudicative legitimacy from the starting point of factual uncertainty yields significant insights, the foremost being that procedural propriety is indispensable to maintaining legitimate adjudication. Problematically, procedural legitimacy is under-emphasized as a theoretical orientation despite its fundamental significance. Through my thesis, I aim to contribute to filling that jurisprudential gap by substantiating procedural legitimacy in the context of factual determinations, and displaying the theoretical and practical problems that result from its under-emphasis. Finally, through the applications phase, I address doctrinal problems where the role of procedural propriety in preserving legitimate fact-finding has not been adequately explored, thereby leading to incomplete analyses.

Although I address doctrinal problems in the second half of my thesis, I have often endorsed basic principles of Canadian fact-finding processes, including our balance of probabilities standard of proof, the adversarial nature of adjudication, and various evidentiary doctrines. But this should not be taken to mean that I began this project as an attempt to reinforce the status quo. My attempt has been to define justificatory principles that relate to fact-finding and consider how our system holds up against them. As it turns out, the Canadian fact-finding system has, *in its ideal form*, the requisite features of a legitimate process, but that does not mean that Canadian fact-finding, as well as judicial and scholarly commentary that relates to it, are not open to critique. My analysis is designed to make the justificatory features of a fact-finding system prominent and clear by articulating and defending them, and I do so through a critical analysis of various jurisprudential positions and philosophical ideas about the foundations of evidence doctrines and fact-finding processes which ultimately lead to the procedural legitimacy framework. That exercise gives rise to the critical comments that permeate my doctrinal discussions in the final three chapters. My central message is that in order to maintain the legitimacy of the adjudicative system of fact-finding, we need to articulate where that legitimacy comes from and why it is important. Whatever contribution I have made to this question defines the value of this thesis.

In closing, I note that the applications stage of my thesis demonstrates an implicit running message: the theoretical starting point that a scholar adopts, expressly or not, can have a significant impact on the sufficiency of his or her doctrinal analyses. Adopting a jurisprudential orientation that does not stipulate the normative legitimacy of law's

authority, as in the positivist approach, forces the scholar to assess doctrines on the basis of their substantive desirability – does it yield outcomes that seem fair? Is it economically sustainable? Is it in line with some public policy?, etc. But she is unlikely to contest the legal legitimacy of that doctrine or any proposed change to it. Of course, I do not suggest that evaluating doctrines on the basis of their substantive desirability is itself improper. Such analyses are essential, and often sufficient, but stopping the analysis there can usurp any question of satisfying or maintaining the normative demands of legitimacy. The result is a susceptibility to compromising legitimacy in the effort to improve particular outcomes. This susceptibility is visible in each of the doctrinal concerns that I assess in Chapters Five, Six, and Seven; highlighting that potential analytical pitfall is perhaps the most important contribution made by those chapters.

On the other hand, if a scholar adopts a jurisprudential orientation that does normatively stipulate the demands of legitimacy, her doctrinal analyses are less likely to inadvertently compromise those demands. That scholar may criticize a doctrine on the basis of its desirability, but whatever solutions emerge from her critique will also be assessed on whether they maintain consistency with the normative demands of legitimacy. That is essential because legitimacy grounds authority – if legitimacy is compromised, so is the justifiability of the authority of the adjudicative system and its outcomes.

E. Preliminary Challenges and Limitations

This project is my attempt at justifying an aspect of the legal system where its fallibility is very clear – the judicial inquiry into the facts that underpin a legal claim. An effort to provide a justificatory framework for fact-finding from the starting point of acknowledging that it cannot be perfect poses significant intuitive and analytical challenges. I have opted to

navigate these challenges through jurisprudential inquiry, and this has led me to some of the deepest questions about law, its authority, its validity and, of course, its legitimacy. The breadth of thinking that has occurred in relation to these topics and their interrelations is awesome and daunting. In order to manage the scope of the project, I have had to constrain my discussions in a number of ways, which I explain further within the body of the thesis, but I make two broad comments here as to the scope of this project.

First, I have attempted to be diligent in maintaining my focus on adjudicative fact-finding, and refraining from any suggestion that my arguments here extend beyond the realm of fact-finding into adjudicative interpretation and application of law. At times, this has been difficult because I have drawn on thinking that goes far beyond fact-finding. I have tried to ensure clarity when I have extrapolated ideas from broader contexts and applied them to the realm of fact-finding. But I reiterate here that my comments throughout pertain only to what makes judicial fact-finding legitimate; that does not mean that I claim that legitimate fact-finding exclusively defines the legitimacy of the judicial outcome. I do hold, though, that if the factual findings are illegitimate, so is the judicial outcome, no matter how aptly a judge interprets and applies the law.

I have additionally constrained my inquiry to civil fact-finding, and I refer to the criminal context only tangentially. Though much of my analysis could apply in the criminal context, my discussion here should not be taken to be simply transferable there, because there are important differences between civil and criminal adjudication that I do not fully address here.

CHAPTER 2: SETTING THE STAGE FOR PROCEDURAL LEGITIMACY

Introduction

The overall goal of my thesis is to come to an understanding of what constitutes legitimate judicial fact-finding. My aims in this opening chapter are to demonstrate why the legitimacy framework that I defend and apply here is a procedural model, and to situate my claims and analyses within a number of relevant scholarly landscapes. The discussion here sets the stage for my subsequent delineation of the demands of procedural legitimacy, and its application to doctrinal issues in the next chapters.

In Part One of this chapter, I start by posing a descriptive question – what constitutes valid fact-finding? My consideration of that question highlights the tension between the importance of authoritative and 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.

In my conception, the term ‘legally valid’ denotes only the descriptive conclusion that when procedural integrity is maintained, an outcome has legal validity. Legal validity does not imply that an outcome is just or good. 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 reason that legal validity means that a law is permissively

authoritative and enforceable in the community. That justifying reason is what I refer to here as 'legitimacy.'

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 chapter concludes, therefore, with two observations: First, that valid adjudicative fact-finding requires legitimacy, and second, that such legitimacy is the product of the *process* of resolving factual disputes.

In Part Two of this chapter, I situate these two propositions within broader jurisprudential and philosophical discourses. First, the question of whether legal validity must be justified, or legitimate, is perhaps the most pervasive debate in contemporary legal theory, being one cornerstone of the disagreement between positivist and non-positivist traditions. In this chapter, I provide a concentrated synopsis of some of the relevant positivist propositions, focusing on H.L.A. Hart's theory, juxtaposed with ideas contained in Ronald Dworkin's and Jurgen Habermas's theories, among others. My purpose is to display the jurisprudential alignments that form the foundations of my commitment to process-based legitimacy of judicial fact-finding. This discussion is designed to set the stage for the more in-depth jurisprudential analysis that I present in Chapter Three.

Next, I transition from broad jurisprudential notions into the narrower context of fact-finding, outlining scholarly conversations that grapple with the problem of factual uncertainty in adjudication. I discuss my agreement and disagreement with various ideas about the harms that result from factual inaccuracies, and the role that procedures play in rectifying those harms. Through that discussion, I aim to indicate my position on the normative value of procedural legitimacy in fact-finding: what the limits of procedural legitimacy are, and what must it achieve.

In particular, drawing on some aspects of Ronald Dworkin's theory of procedural rights related to fact-finding, I note that factual inaccuracies may lead to one particular type of injustice – the injustice that flows from the failure on the part of the legal system to vindicate a person's legal right. That specific type of injustice is impossible to eradicate, because factual uncertainty is impossible to completely avoid. Some procedural models of adjudicative legitimacy may under-value the injustice that accompanies factually inaccurate outcomes by masking that injustice beneath an overly broad notion of procedural *justice*. In doing so, such approaches may overstate the scope of the normative work accomplished by procedural legitimacy. I use Robert Bone's comment "Procedure, Participation, Rights,"¹ to illustrate this point. Duly appreciating the breadth and limits of what procedural legitimacy can, and must, achieve is integral to my ultimate purpose of defining what a sustainable framework of procedural legitimacy can, and must demand. It is the role of procedural legitimacy, I contend, to preserve the integrity of a judicial fact-finding system that must

¹ Robert Bone states in, "Procedure, Participation, Rights" (2010) 90 BUL Rev 1011 [Bone, "Procedure, Participation, Rights"].

accommodate the potential injustice that arises due to factual inaccuracy by ensuring a fair dispute resolution process. Given this justificatory role, the development of the procedural legitimacy framework is crucial for maintaining legitimate adjudication, particularly in relation to factual determinations which underpin nearly every judicial outcome.

In subsequent chapters of the thesis, I construct, defend and exhibit the procedural legitimacy framework. Here, my goal is to show why the framework for legitimacy of fact-finding that I adopt is a procedural one; substantiating the requisite features of a legitimizing fact-finding process is the ultimate aim of this thesis, and primarily the work of Chapters Two, Three, and Four.

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. In the context of a negligently inflicted injury, for instance, liability is established if the defendant owes the plaintiff a duty of care,² he breached his standard of care, and the breach caused the plaintiff's injury. The court is tasked with determining whether those facts are established. On the basis of the factual findings and subsequent application of legal principles, the court

² In some sense, the existence of a duty of care is not merely a question of fact: it presupposes a policy decision. Here, I do not presume a significant distinction between the question of the existence of a duty of care and the remaining factual elements that must be established for a finding of liability.

will determine whether the plaintiff is legally entitled to compensation. Quantifying the restoration that would compensate the plaintiff depends on further factual determinations – what losses she suffered as a result of the tortious injury; whether any pre-existing condition impacted the nature of her losses; what losses may occur in the future, and so on.³ 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.⁴

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.⁵ Moreover, since adjudication requires relative

³ Kenneth Cooper-Stephenson and Iwan Saunders, *Personal Injury Damages in Canada*, 2nd ed (Scarborough, Ontario: Carswell, 1996) at Chapter 2: Basic Principles [Cooper-Stephenson and Saunders, *Personal Injury Damages*].

⁴ 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) [Frank, *Courts on Trial*]. 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 guessey, if-y” in Frank, *Courts on Trial* at 27.

⁵ 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

efficiency to maintain its utility, waiting for additional evidence to become available may not be feasible.

In addition, sometimes the governing legal principles require the court to make factual inquiries that are inherently uncertain. This is particularly visible in injury litigation. For one, as Picard and Robertson note, relevant questions about physical injuries are often intrinsically uncertain: the “complexity of the human body and the uncertainties which still surround its nature...exacerbate the overwhelming task that the plaintiff often has in proving that the defendant’s conduct was the factual cause of the injury.”⁶ These issues are highlighted in medical negligence cases, where it is often very difficult to determine whether the patient’s inherent illness caused his losses, or the doctor’s negligence caused the loss. And the uncertainties are not only limited to lack of knowledge about the human body. Some relevant inquiries are questions that simply have no certain answer. When assessing damages for injuries, for instance, determining prospective losses is obviously uncertain but must be determined since the full compensation principles apply irrespective of inherent uncertainty.⁷

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.

⁶ Ellen I. Picard & Gerald B. Robertson, *Legal Liability of Doctors and Hospitals in Canada*, 4th Ed (Ontario: Thompson Carswell, 2007) at 269.

⁷ See Cooper-Stephenson and Saunders, *Personal Injury Damages*, *supra* note 3 at 150. See also Russel Brown, “The Possibility of ‘Inference Causation’: Inferring Cause-in-Fact and the Nature of Legal Certainty” (2010) 55 McGill LJ 1 (presenting his idea that causation is also an inherently uncertain factual question).

Along with these practical issues, some legal principles prevent judicial access to relevant evidence in a number of ways. First, our commitment to adversarial dispute resolution entitles parties to present evidence of their choice, and binds decision-makers to make decisions on the basis of evidence presented. The adjudicator is generally not at liberty to collect their own relevant information.⁸ 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.⁹ 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 if the privileged evidence would reduce the factual uncertainty.¹⁰ 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 introduction of fresh evidence on

⁸ 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”].

⁹ In Chapter Five, I offer comments on the propriety of the adversarial system of fact-finding as it relates to presentation of expert evidence.

¹⁰ 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.

appeals are an example. Where a party wishes to introduce new evidence during an appeal of an action,¹¹

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 indicate 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 this condition must be balanced against the need for an effective dispute resolution system. Accurate appraisal of the facts is necessary to ensure that the resolution of disputes accords with substantive legal principles. If adjudicative decision-makers were consistently inaccurate in their fact-finding, their subsequent application of the legal principles would be

¹¹ *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?

based on errors, and protection of substantive rights would be impossible. 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.”¹² The importance of accuracy in fact-finding is undeniable, yet it is impossible to guarantee that all adjudicative dispute resolution will invariably be factually accurate. Even so, in order to be a meaningful system of administration of law, the adjudicative system must provide legally valid outcomes that constitute final, authoritative resolutions to legal disputes.

On what basis, then, are adjudicative factual determinations legally valid? The first step to answering that question is to discern how factual uncertainty is accommodated when adjudicating claims, and in particular, 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

¹² 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 a 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.”

certain' standard of proof.¹³ In civil cases, facts are proven on the balance of probabilities.¹⁴ 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.'¹⁵ 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.¹⁶

¹³ I have presented a similar preliminary derivation of procedural legitimacy in Nayha Acharya, "Law's Treatment of Science: From Idealization to Understanding" (2013) 36 Dal LJ 1.

¹⁴ For the most recent commentary from the Supreme Court of Canada on the civil standard of proof, see *F.H. v McDougal* 2008 SCC 53 at para 40, where the Court opines, "Like the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities." My argument here does not require a discussion of why the balance of probabilities standard of proof is acceptable. The crucial point here 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 here 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.

¹⁵ 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.

¹⁶ 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. The majority of the Supreme Court of Canada noted that "The standard of review is...palpable and overriding error for findings of fact and inferences of fact... Stratas J.A. described the deferential standard as follows in *South Yukon Forest Corp. v R*, 2012 FCA 165 at para 46: 'Palpable and overriding error is a highly deferential standard of review "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.'" For more case-specific comments as to the deference owed to the trial judge's fact finding in the *Benhaim v St-Germain*, see paras 71-81.

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.¹⁷ This creates the potential for situations where, 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 that despite the violation of the plaintiff’s legal rights, the defendant will not be liable to compensate her. Similarly, a situation could arise where evidence suggests that a defendant’s negligence was more likely than not, the cause of a plaintiff’s harm. In that case, liability would be properly 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, that we accept the

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.

¹⁷ 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, 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.

validity of a determination of fact when it results from appropriate adherence to adjudicative procedures. The hypothetical outcomes noted above are acceptable despite potential incongruence with factual reality due to their procedural propriety. That is, when parties are allowed to present evidence in accordance with adversarial procedures, and when the trier of fact relies on properly admitted evidence and weighs that evidence against the requisite standard of proof, the factual finding is accepted. Where a plaintiff is unable to prove the requisite factual elements of her claim in accordance with the procedural rules of adjudication, the correct outcome is that the claim is dismissed, even if the plaintiff was wronged in reality.

Conversely, a legal outcome would be considered invalid in the event that the process of fact-finding is compromised. If, for instance, the trier of fact relies on inadmissible evidence, or misconstrues the applicable standard of proof, their factual determination would not be considered valid. That is true even if the factual finding is ultimately accurate. For instance, 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 it cannot be considered valid due to the failure to apply the civil standard of proof.

I have arrived at two observations so far about the validity of a judicial determination of fact. 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 the procedures of fact-finding 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 in fact accurate. The crux of these observations is that the validity of judicial factual findings does not depend on the ultimate accuracy of each determination, but on their procedural propriety.

Canadian courts have recognized and affirmed the significance of procedural propriety through their express resistance to tampering with the established principles of legal fact-finding in the face of perceived unfairness caused by factual uncertainty. This commitment has been especially visible in the personal injury context, where medical and scientific uncertainty over causation results in a perception of undue evidentiary disadvantage for plaintiffs.¹⁸ In *Snell v Farrell* for instance, medical evidence was inconclusive as to whether a doctor's negligence during an eye surgery caused the plaintiff's subsequent eye injury.¹⁹ The plaintiff argued that since the surgeon's negligence caused a material increase in the risk of her eye injury, the onus should shift to the surgeon to show that his negligence did not cause the injury.²⁰ The Supreme Court of Canada rejected the 'material increase in risk' and onus reversal approach to establishing the causal link. Instead, the Court advocated a

¹⁸ I discuss judicial use of scientific evidence and adjudicative accommodation of causal uncertainty from a procedural legitimacy perspective more comprehensively in Chapters Five and Six. At this point my purpose is limited to pointing out judicial commitment to the value of procedural propriety in injury litigation scenarios.

¹⁹ *Snell v Farrell* [1990] SCJ No 73 (QL). The plaintiff had undergone a cataract surgery. During the surgery, it became known that the anaesthetic had caused some bleeding behind the plaintiff's eye. Still, the surgeon continued the surgery, and this decision was found to be negligent. Later, the plaintiff lost sight in the eye. The medical experts, however, were unable to provide conclusive evidence that the surgeon's negligent decision to continue the surgery caused the plaintiff's blindness.

²⁰ This approach was adopted by the House of Lords in *McGhee v National Coal Board* [1972] 3 All ER 1008 (H.L.) and the Supreme Court of Canada was urged to adopt this reasoning in *Snell v Farrell*, *ibid*.

'robust and pragmatic' approach to the traditional 'but for' analysis to establish causation, with a reminder that scientific precision is not a pre-requisite to satisfying the 'but for' causal test on the balance of probabilities standard of proof.²¹

More recently, in *Clements v Clements*,²² the Supreme Court was tasked with making a liability determination where a plaintiff was severely injured in a motorcycle accident. Evidence was inconclusive as to whether the driver's negligence caused the passenger plaintiff's injuries. Affirming its discussion in *Snell*, the Supreme Court explained that "the law of negligence has never required proof of scientific causation.... If scientific evidence of causation is not required, as *Snell* makes plain, it is difficult to see how its absence can be raised as a basis for ousting the usual 'but for' test."²³ Thus the trial judge's insistence on scientific proof to satisfy the requisite balance of probabilities standard of proof for causation was found to be in error.²⁴ This was most recently affirmed yet again in *Benhaim v St-Germain*, where the court held, "Simply put, scientific causation and factual causation for legal purposes are two different things. Factual causation for legal purposes is a matter for the trier of fact, not for the expert witnesses, to decide."²⁵

²¹ See *Snell v Farrell* generally, and at para 29.

²² *Clements v Clements* 2012 SCC 32. The Supreme Court's caution that scientific precision is not required for valid legal fact-finding has been recently reiterated in *British Columbia Workers Compensation Appeal Tribunal v Fraser Health Authority* 2016 SCC 25. See especially, paras 32 and 38.

²³ *Ibid* at para 38.

²⁴ *Ibid* at para 49: "As discussed above, the cases consistently hold that scientific precision is not necessary to a conclusion that "but for" causation is established on a balance of probabilities. It follows that the trial judge erred in insisting on scientific precision in the evidence as a condition of finding "but for" causation."

²⁵ *Benhaim v St-Germain* 2016 SCC 48 at 47 (references removed).

In these opinions, the Supreme Court of Canada has provided a clear endorsement of the concept that despite the conditions of uncertainty and associated risk of inaccuracy, the adjudicative process and the outcomes it produces maintain legal validity through consistent observance to its own procedures.²⁶ Undeniably, the judicial inquiry into the relevant facts is significantly restricted and factual accuracy cannot be guaranteed. It follows that the legal validity of factual determinations and subsequent judicial outcomes cannot be contingent on factual accuracy. This conclusion implicitly highlights the role of procedural propriety in grounding legal validity: despite the unavoidable risk of inaccuracy, judicial decisions maintain legal validity through procedural propriety.

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. Those implications exist because when judicial outcomes are legally valid, they are authoritative in the sense that outcomes are acquiesced by the litigants and the society more generally as non-optional, and permissibly enforceable.²⁷ If not, adjudicative outcomes would have no

²⁶ This is not to say that factual accuracy is irrelevant. I elaborate the relationship between seeking truth and maintaining adjudicative legitimacy below and in Chapter Four. Here, my purpose is to show the significance of process-based approach to adjudicative legitimacy by recognizing the implications that can be drawn from the impossibility of guaranteeing factual, or substantive, accuracy. At this juncture, I offer the uncontroversial acknowledgement that an adjudicative system of fact-finding that does not seek to find out the truth at all could hardly be regarded as a fact-finding system, let alone a legitimate one.

²⁷ 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:

utility. Being authoritative in this way, I contend, judicial outcomes, including their factual determinations, require justification, which serves as a reason for *why* legally valid outcomes are permissibly authoritative and *why* litigants and community members can agree to that. I refer to that justificatory reason as legitimacy.²⁸

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.²⁹ On that basis, I hold that not only is the validity of judicial fact-finding grounded in procedural propriety, so is its legitimacy.

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. I take up questions of legal authority and its relation to legitimacy with particular reference to Raz's theory (which, as evidenced in the above quotation, extensively theorizes law as authority) in more detail in Chapter Three. 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.

²⁸ As I explain further in Chapter Three, 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*].

²⁹ 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, and in more detail in Chapter Three, drawing especially on the legal theories of Lon Fuller and Jurgen Habermas.

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 depend on their accuracy. Concluding that a factually inaccurate outcome is nonetheless legitimate may seem uncomfortable. How can an outcome that is wrong possibly still merit its authority, and how can there be a reason to accept such an outcome? I take up this question in more detail below, but it warrants some mention now.

In the case of criminal convictions that are put into doubt by subsequently available evidence, ministerial reviews to rectify potential wrongful convictions are necessary and wholly warranted. And granting motions to allow for introduction of fresh evidence on appeal in appropriate circumstances is also justifiable, as discussed above. However, a generalized commitment that factual inaccuracy can delegitimize an adjudicative outcome and revoke the acceptability of its authority is unsustainable. This view fails to duly appreciate the requirement that a fundamental purpose of the adjudicative system is to provide final, authoritative resolution of legal disputes.

If discovery of factual inaccuracy at some point after the conclusion of a trial could discredit the authority of adjudicative outcomes, then judicial dispute resolution could hardly be considered final and authoritative. Since the requisite factual elements are not decided on a standard of certainty, there is always a risk that the factual findings are inaccurate. Nearly all injury claims will bear a risk of some factual error. 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. 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.

So far, I have presented the propositions that (1) valid judicial fact-finding must be legitimate, and (2) such legitimacy is grounded in the process of arriving at a judicial outcome rather than the accuracy of the outcome itself, as observations. In order for the normative aspects of these propositions to hold, they can, and must, be considered through broader jurisprudential lenses. The assertion that legal validity and legitimacy must be intertwined in the context of fact-finding maps onto one of the most divisive debates in the philosophy of law: is the existence of valid law contingent on its justification? This question, often framed in terms of whether there is a necessary connection between law and morality, is the fulcrum of debates between positivists and their critics. Moreover, among those who conclude that legal validity requires legitimacy, there are varying conceptions of what the criteria for legitimacy can and should be. For instance, should legitimacy be grounded in certain substantive ideals, like equality or autonomy? Should legitimacy be grounded in formal or process values? Or some combination? Reviewing some of the major milestones of these debates enables me to situate my claims about legitimate fact-finding within a jurisprudential framework, and facilitates an uncovering of the underlying assumptions and implications of those claims.

In Chapter Three, I take up these jurisprudential questions in greater detail in order to defend and substantiate the concept of procedural legitimacy with respect to judicial fact-

finding. Here, I provide a synopsis of some jurisprudential and philosophical concepts that are relevant to the two propositions about fact-finding that I have posed above. Through this overview, I demonstrate which lines of reasoning I align with, foreshadowing and setting the groundwork for my deeper jurisprudential analyses in Chapter Three.

Part 2. Legal validity and legitimacy: my place among major positivist and non-positivist perspectives

The cornerstones of a positivist conception of law is what is sometimes referred to as the separation thesis, which holds that law and its justification are, and must be, distinct. John Austin delivered this message in 1832 in the lectures resulting in *The Province of Jurisprudence* as follows:³⁰

The existence of law is one thing; its merit or demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation.

While modern positivism has seen significant development since Austin, the general commitment to the separation of the questions ‘is it law?’ and the evaluative question of whether it is a good law remains the defining feature of modern positivism.³¹ H. L. A. Hart, who is usually seen as one of the most significant proponents of contemporary positivism,

³⁰ John Austin, *The Province of Jurisprudence Determined* (1832), excerpts reprinted in Keith Culver (ed), *Readings in the Philosophy of Law* 2nd ed at 92.

³¹ In Chapter Three, I undertake a much more detailed look at the positivist separation thesis, and particularly how the thesis unfolds in Hart’s and Joseph Raz’s legal theories.

holds that it is “in no sense a necessary truth that laws reproduce or satisfy certain demands of morality.”³²

In Hart’s famous conceptualization, law is seen as a system of two levels of rules.³³ The primary rules are the substantive rules that govern the conduct of citizens. For instance, the rule that a person who is negligently injured by another person has a right to compensation is a primary rule in Canadian society. Such a primary rule can be created, altered, and, importantly, recognized as a legally valid rule in a society through secondary rules. The most important of the secondary rules is the rule of recognition. The officials in a society refer to a rule of recognition in order to determine whether a rule has legal validity or not. For instance, officials in Canadian society could recognize the validity of a rule on the basis that it was passed by Parliament. Whatever criteria a society uses to determine whether a rule is authoritative within a community is called the secondary rule of recognition.³⁴ The legal validity of the rule is discernable by reference to the rule of recognition alone, so “what is law and what is not is a matter of social fact.”³⁵ This concept contains within it the separation thesis – legal validity is discernable by reference to the rule of recognition, whatever it may be. In other words, a rule’s validity depends only on whether it accords with the rule of recognition, and not by reference to any evaluative standard. As such,

³² H.L.A. Hart, *The Concept of Law*, 3d ed (Oxford, United Kingdom: Oxford University Press, 2012) at 185-186 [Hart, *The Concept of Law*].

³³ *Ibid.*

³⁴ *Ibid* at 92-95.

³⁵ Joseph Raz, *Authority of Law* (Oxford: Oxford University Press, 2009), at 37 [Raz, *Authority of Law*].

inefficient, silly, or unjustifiable rules can be valid laws, so long as they accord with the community's rule of recognition.³⁶

The positivist tradition of studying law through a separation between law and the evaluation of the justifiability of law is in tension with my view that the legal validity of a factual determination must be justified. Yet there are two significant undercurrents in my conception of legal validity and its derivation that align with the positivist tradition. First, positivists hold that validity of law is not necessarily contingent on any particular quality of the substance of the law itself. Even a law that is unacceptable in substance may nonetheless have legal validity, so long as the secondary rule of recognition is satisfied. This notion finds a parallel in my understanding of factual determinations, whose validity also does not depend on the correctness of the outcome. An incorrect factual determination may nonetheless have legal validity. In both conceptions, therefore, the validity of a legal outcome does not depend on the substantive quality/nature of the outcome itself; it depends on where that particular outcome came from.

³⁶ It is important not to over-state the thesis. There are those, particularly those advancing what has come to be known as “soft” or “inclusive” positivism, who note that in some legal systems the merits of a law may be recognized as necessary for legal validity to attach to a rule, so long as the conditions that define “merits” are themselves recognized as legal principles. Hart himself explicitly allows for this possibility in Hart, *Concept of Law*, *supra* note 32 at 204. For one of the most significant explanations of this version of positivism, see Jules Coleman, “Negative and Positive Positivism” (1982) 11 J Legal Stud 139. Other proponents include Mathew Kramer, “How Morality Can Enter the Law” (2000) 6 Legal Theory 83; David Lyons, “Principles, Positivism and Legal Theory” (1977) 87(2) Yale LJ 415. Still, the unifying feature of theorists in the positivist tradition is the thesis that: “In any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not on its merits.” John Gardner, “Legal Positivism: 5 ½ Myths” 46 *Am J Juris* (2001) 199 at 199. Gardner holds that despite the many unique aspects of various positivist propositions, this is a common ground among those that can fall within the positivist label.

The second positivist-like undercurrent in my approach relates to one of the reasons for why the separation thesis is an important methodology for understanding law: certainty. Hart holds that existence of the secondary rule of recognition is a remedy to uncertainty that results when a society (and its governing rules) become increasingly complicated.³⁷ Since legal validity depends only on adherence to the relevant rule of recognition, laws are, at least in theory, universally discernable by reference to that rule of recognition.³⁸ This is important from the perspective of maintaining a society that is meaningfully ordered by law. If legal subjects could constantly question the validity of law on the basis of its merit, then legal validity would have no certainty, and law could provide no stability.³⁹ This commitment to certainty is paralleled in my approach to legal fact-finding. When the procedures of fact-finding are adhered to, the resultant outcome is valid, and any further arguments as to the accuracy of the factual question are no longer relevant.⁴⁰ As such, judicial decisions maintain certainty – when they are produced through adherence to the applicable procedures, they are valid and authoritative for everyone concerned, even if one believes that the outcome is factually inaccurate. This is necessary, as I noted above, in order for the adjudicative process to be effective, and its outcomes meaningful.

³⁷ Hart, *Concept of Law*, *supra* note 32 at 94-95.

³⁸ *Ibid.*

³⁹ Hart comments on this danger in H.L.A Hart, “Positivism and the Separation of Law and Morals” (1957) 71(4) Harv L Rev 593 at 598 [Hart, “Separation of Law and Morals”].

⁴⁰ Subject to successful motions for introduction of fresh evidence on appeal, as noted above.

In sum, the notion of process-based validity of factual determinations aligns with some positivist conceptions of legal *validity*, yet the separation of validity and legitimacy is a key point of divergence. The positivist approach to understanding law is not oriented towards providing an answer for *why* a legally valid rule deserves to be authoritative for a given community within its concept of law.⁴¹ As such, it cannot further my goal of providing an answer for *why*, and on what basis, judicial fact-finding should be acceptable in our community. In other words, the positivist conception can provide a framework to say *that* a particular rule is a valid law, but its purpose is not to provide any framework for *why* the validity of law should be accepted.

The positivist commitment to the separation of legal validity and the justification for legal validity has been challenged from a variety of angles. Ronald Dworkin launched a

⁴¹ Holding that the positivist approach is not oriented towards providing an explanation of law's normative features suggests a *methodological* commitment among positivists. As Stephen Perry explains: "The more plausible way to understand the methodological claim is that Hart is simply setting out to describe the conceptual scheme that we apply to certain of our own social practices.... On this view, Hart is simply describing the content of the relevant concepts and the relationships between them, whatever that content and those relationships turn out to be. ... The idea is to describe and elucidate our conceptual scheme from the outside, as it were. In that way the theorist can remain neutral with respect to such questions as whether the social practice in question is justified, valuable, in need of reform, and so forth. He or she can simply describe what is there." (Stephen Perry, "Hart's Methodological Positivism" (1998) Faculty Scholarship. Paper 1136. <<online: http://scholarship.law.upenn.edu/faculty_scholarship/1136>> A similar methodological commitment is evident in Joseph Raz's approach, which I discuss further in Chapter Three. Roughly, Raz understands law as a system of rules that *claims* legitimate authority. The laws are justified when they actually have legitimate authority, but whether the authority is legitimate or not does not influence the question whether the system of rules claims such authority as a descriptive matter, and as such, classifies as law. See Raz, *Authority and Interpretation*, *supra* note 27 at 104, 111. And Raz, *Ethics in the Public Domain* (Oxford: Clarendon Press, 1994) at 215: "Though a legal system may not have legitimate authority, or though its legitimate authority may not be as extensive as it claims, every legal system claims that it possesses legitimate authority" [Raz, *Ethics in the Public Domain*].

prominent contemporary critique, which I briefly outline here.⁴² I caution, though, that it is far beyond my scope to provide a full summary and critique of Dworkin's jurisprudence and the voluminous scholarship that it has generated. What I offer below is a presentation of some of Dworkin's commitments that are particularly relevant to my purpose of situating my own discussion within various ideas about the relationship between legal validity and legitimacy, and the criteria for legitimacy offered by those scholars (including Dworkin, in my understanding) who demand legitimacy for legal validity.

A central feature of Dworkin's critique is that the positivist tradition cannot explain how judges resolve legal indeterminacy in 'hard cases' where laws are ambiguous or have multiple potential interpretations. He points out that when judges must determine what the law is, they do turn to moral principles to justify their interpretation, particularly when there is more than one viable interpretation. Accordingly, Dworkin argues, recognizing the legal validity of a rule *does* depend on justificatory and evaluative principles, including extra-legal principles of justice and fairness, contrary to the positivist tradition.⁴³ When

⁴² The debates and exchanges between Hart and Dworkin have generated significant scholarship. For a sampling, see, Scott Shapiro, "On Hart's Way Out" in *Hart's Postscript: Essays on the Postscript to the Concept of Law*, ed. J Coleman (Oxford University Press, 2001); Kenneth Himma, "H. L. A. Hart and the Practical Difference Thesis," (2000) 6 *Legal Theory* 43; Steven Burton, "Ronald Dworkin and Legal Positivism" (1987) 73 *Iowa L Rev* 1.

⁴³ As Scott Shapiro explains in "Hart-Dworkin Debate: A Short Guide for the Perplexed" (2007) University of Michigan Law School Public Law and Legal Theory Working Paper Series, Paper 77) at 14: "According to Dworkin, therefore, the Pedigree Thesis [referring to the idea that a rule's legal validity is determined by referring to the secondary rule which gives rise to it] must be rejected for two reasons. First, legal principles are sometimes binding on judges simply because of their intrinsic moral properties and not because of their pedigree. Second, even when these principles are binding in virtue of their pedigree, it is not possible to formulate a stable rule that picks out a principle based on its degree of institutional support." Dworkin's own formulation in *Taking Rights Seriously* (London: Ducksworth, 1977) at 22 is as follows: I want to make a general attack on positivism, and I

judges are called on to determine the legal validity of competing interpretations of a rule, they must grasp the interpretation that best comports with justice and fairness, which Dworkin calls the principle of integrity.⁴⁴ Doing so enables the judge to determine the valid interpretation of the law, *and* justifies that interpretation. Accordingly, unlike the positivist tradition, for Dworkin, legal validity and legitimacy are intertwined.⁴⁵

shall use H.L.A. Hart's version as a target, when a particular target is needed. My strategy will be organized around the fact that when lawyers reason or dispute about legal rights and obligations, particularly in those hard cases when our problems with these concepts seem most acute, they make use of standards that do not function as rules, but operate differently as principles, policies, and other sorts of standards. Positivism, I shall argue, is a model of and for a system of rules, and its central notion of a single fundamental test for law forces us to miss the important role of these standards that are not rules....I call a 'policy' that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community....I call a 'principle' a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality."

Note that Dworkin's critique has been met with numerous responses from positivists. For example, Genaro Carrio, *Legal Principles and Legal Positivism*, (Buenos Aires: Abeldo-Perrot, 1971) at 25, argues that the extra-legal principles that Dworkin refers to do indeed have a legal pedigree, because they are principles that judges have used in the past to guide their interpretation. Compare with Joseph Raz, "Postscript to 'Legal Principles and the Limits of Law'" in *Ronald Dworkin and Contemporary Jurisprudence*, ed Marshall Cohen (Totowa, NJ: Rowman & Allanheld, 1983), arguing that the fact that judges apply moral principles does not mean that these principles are legal in nature. Others have argued along the lines that Dworkin is inaccurate in his assumption that positivism prohibits moral questions from being part of the criteria for legal validity. See for example, Philip Soper, "Legal Theory and the Obligations of a Judge: The Hart/Dworkin Dispute" *Mich L Rev* 75 (1977) at 473; David Lyons, "Principles, Positivism and Legal Theory" (1977) *Yale LJ* 87 at 415; Wilfred Waluchow, *Inclusive Legal Positivism* (Oxford: Clarendon Press, 1994).

⁴⁴ Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986) at 225: "The adjudicative principle of integrity instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were created by a single author – the community personified – expressing a coherent conception of justice and fairness" [Dworkin, *Law's Empire*.]

⁴⁵ Dyzenhaus gives a similar reading of Dworkin, stating, "Whatever answer the theory gives

For Dworkin, determining legal validity occurs through constructive interpretation.⁴⁶ This interpretive process has two stages: a test of 'fit' and then an interpretive justification.⁴⁷ In the first step, a judge must consider which interpretation of a law fits within the existing legal landscape. A simplified example can help make this more tangible: consider a personal injury case where a negligently injured plaintiff claims compensation for the wages that she lost as a result of being unable to work due to her injuries. This claim fits simply into the existing tort law landscape, which calls for returning negligently injured parties to the position they would have been in absent the injures. This includes compensation for lost earnings. The judicial inquiry into the legal validity of the plaintiff's claim for lost wages can end there.

The 'fit' aspect of Dworkin's theory is complex, but it can, I suggest, safely be interpreted as a vigorous commitment to formal justice: when ascertaining whether a rule has legal

to the legal question posed by the case is the 'right answer', the answer that the judge is under a legal and moral duty to give. Dworkin's position is thus plausibly understood as claiming that the authority of law (as he would put it, law's ability to justify coercion) is grounded by that moral theory." David Dyzenhaus, "Dworkin and Unjust Law" in Will Waluchow and Stephan Sciaraffa eds, *The Legacy of Ronald Dworkin*, (New York: Oxford University Press, 2016) at 133.

⁴⁶ Dworkin introduces the concept of constructive interpretation as follows: "Roughly, constructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong." In Dworkin, *Law's Empire*, *supra* note 44 at 52.

⁴⁷ *Ibid* at 65-66: "First, there must be a "preinterpretive" stage in which the rules and standards taken to provide the tentative content of the practices are identified.... Second, there must be an interpretive stage at which the interpreter settles on some general justification for the main elements of the practice identified at the preinterpretive stage. This will consist of an argument why a practice of that general shape is worth pursuing, if it is."

validity, judges should consider law as an integrated whole which contains a unifying notion of what is fair and just, and fresh cases should be treated in accordance with that unifying notion. That ensures that community members are subject to a consistent and coherent concept of justice and fairness, whatever that concept may be in substance. This resonates with Dworkin's well-known commitment that the law must treat subjects with equal concern and respect. In Dworkin's words, the first stage of interpretation⁴⁸

asks judges to assume, so far as this is possible, that the law is structured by a coherent set of principles about justice and fairness and procedural due process and it asks them to enforce these in the fresh cases that come before them, so that each person's situation is fair and just according to the same standards.

But Dworkin's interpretive theory does not end there. Suppose that the plaintiff argues that she should also be compensated for the potential future earnings that she may lose in the event that she requires further debilitating medical treatment after the trial is over. This claim may not fit as neatly into the existing body of tort law. The judge will likely find that the existing law may support two or more interpretations of when and whether potential future losses are compensable. Therefore, whether the plaintiff has a legal right to the potential future losses that she claims is open to interpretation.

These types of 'hard' cases lead to the second step of Dworkin's interpretive analysis: the justification step. This step requires that judges decide which interpretation of the law is best by making an explicitly moral judgment that justifies their conclusion. That is, a judge

⁴⁸ *Ibid* at 243.

must decide which interpretation best reflects abstract principles of justice and fairness.⁴⁹ For Dworkin, then, rules have legal validity when they best reflect certain moral principles that can justify that validity. In his words:⁵⁰

Hard cases arise, for any judge, when his threshold test [i.e. the fit test] does not discriminate between two or more interpretations of some statute or line of cases. Then he must choose between eligible interpretations by asking which shows the community's structure of institutions and decisions – its public standards as a whole- in a better light from the standpoint of political morality. His own moral and political convictions are now directly engaged.

Although it is easiest to understand the fit and justification stages of Dworkin's analysis as distinct, Dworkin explains the two stages as closely intertwined. For instance, he notes that⁵¹

questions of fit arise at this [second] stage of interpretation as well, because even when an interpretation survives the threshold requirement, any infelicities of fit will count against it... in the general balance of political virtues.

This indicates that for Dworkin both stages of the analysis of legal validity involve justificatory components, and that coherence, which is the characterizing feature of the 'fit' analysis, is a relevant justificatory virtue. Dworkin's turn towards indicating that there are interconnections between legal validity and its justification lend support to my notion that legal validity must be legitimate. But can Dworkin's jurisprudential ideas about the nature

⁴⁹ *Ibid* at 249 and 250.

⁵⁰ *Ibid*.

⁵¹ *Ibid* at 256.

of legal validity usefully inform my consideration of the narrow context of valid fact-finding? And if so, to what extent?

As noted, there are aspects of Dworkin's theory of legal validity that have a formal character. The fit analysis seems to contain within it general commitment to treating litigants equally and fairly by ensuring that a coherent set of legal principles, including procedural principles, applies to everyone.⁵² These principles, for Dworkin, tell at least part of the story of how legal validity is justified. This aspect of his theory can translate into the fact-finding context, and can bolster the procedural legitimacy claim that I am aiming to present – guaranteeing that litigants are subjected to the same set of coherent processes of fact-finding can play a role in justifying the validity of factual determinations, because it ensures that litigants are treated equally and fairly.

But, there are also difficulties with applying Dworkin's theory to build a framework for legitimacy of legal fact-finding. The primary problem (for my purposes) arises because part of the test for legal validity in Dworkin's theory is grounded in the substantive merits of the judicial result. That is, a particular interpretation of the law is considered 'right' on the basis that it best expresses the community's moral principles of justice and fairness. The judge's duty is to arrive at this 'right' or 'best' result.⁵³ Ultimately, upon arriving at the best interpretation of the law, the judge will make a ruling that will signal to one party that their

⁵² See for instance Dworkin, *Law's Empire*, *ibid* at 176-186, describing that the political integrity principle is one of coherence at both the legislative level (where legislators try to make the law coherent) and at the adjudicative level (where judges try to give coherent interpretations).

⁵³ For Dworkin's comments on the 'right answer' thesis and his response to critics of it, see Ronald Dworkin, 'No Right Answer?' in *Law, Morality, and Society: Essays in Honour of H.L.A Hart* ed. P M S Hacker and Joseph Raz (Oxford: Clarendon Press, 1977).

viewpoint is wrong, or at least, not the best interpretation, and an authoritative ruling will be rendered. The legal validity of the judge's decision, as well as the justification for its authority, is grounded in the moral principles that are reflected in the result. This implies that the losing party's moral position is either irrelevant or wrong.

This implication seems problematically destabilizing in modern pluralistic societies because it does not embrace the reality of deeply held moral disagreements.⁵⁴ Estlund's comments on the issue of pluralism and impact on 'correctness' based theories of legitimacy are, to me, convincing, and express the concerns precisely (albeit in a democratic theory context), so they are worth reproducing here:⁵⁵

One thing to notice about a correctness theory of legitimacy is that in a diverse community there is bound to be little agreement on whether a decision is legitimate, since there will be little agreement about whether it meets the independent standard, say, justice. If the decision is made by majority rule, and voters address the question whether the proposal would

⁵⁴ Jeremy Waldron has given a parallel critique grounded in pluralism with respect to Dworkin's claim that appears in *Freedom's Law: The Moral Reading of the American Constitution* (Oxford: Oxford University Press, 1997) at 34, that developing and choosing standards that would apply to institutions that make decisions about democratic rights should be results driven. Dworkin writes, "I see no alternative but to use a result-driven rather than a procedure-driven standard. ... The best institutional structure is the one best calculated to produce the best answers to the essentially moral question of what the democratic conditions actually are, and to secure stable compliance with those conditions." In response, Waldron points out that a results-driven approach cannot fully account for moral disagreements: "Using a results-driven approach, different citizens will attempt to design the constitution on a different basis. ... How can they together design a political framework to structure and accommodate the political and ideological differences between them?" (Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999) at 294-295.

⁵⁵ David Estlund, *Democratic Authority: A Philosophical Framework* (Princeton, N.J.: Princeton University Press, 2008) at 99 [Estlund, *Democratic Authority*].

be independently correct, then at least a majority will accept its correctness. However nearly half of the voters might deny its correctness, and on a correctness theory, they would in turn deny the legitimacy of the decision – deny that it warrants state action and/or places them under any obligation to comply. Brute disagreement of this kind raises pragmatic questions about how to maintain stability. A morally deeper worry stems from the fact that much of the disagreement might be reasonable, or in our more generic term, qualified. First, there might be qualified disagreement on what counts as just. Second, even if there is an account of justice that is beyond qualified objection, I assume there will be qualified disagreement in many cases about what actual decisions and institutions meet the agreeable principles of justice. If so, correctness theories of legitimacy, those that say that a law is legitimate simply because it meets the independent standards of justice, will not have a justification that is acceptable to all qualified points of view. Correctness theories cannot meet the qualified acceptability requirement. I take this to be conclusive against them.

Dworkin's theory does not seem to go far enough to respond to the question of why someone should accept the authority of a judicial outcome even if they deeply and cogently disagree with it in substance. In my view, if there is to be an answer to that question, then it must be located within the acceptability of the process that leads to the particular outcome.⁵⁶ But Dworkin's theory suggests that laws are recognized, and simultaneously

⁵⁶ This is suggestive of Stuart Hampshire's contention that "within different moralities, liberal and conservative, the fairness of the actual outcome of a conflict will be evaluated differently, even though both sides recognize the fairness of the adversarial processes. Outcomes are by their nature open to dispute, but procedures need not be." (Quoted in Joshua Cohen, "Pluralism and Proceduralism" (1994) 69 *Chicago-Kent Law Review* 589 [Cohen, "Pluralism and Proceduralism"] and Stuart Hampshire, *Liberalism: The New Twist*, (New York: N.Y. Rev. Books, 1993) at 44.

justified, on the basis of the substantive merits of their judicial interpretation, largely ignoring the argumentative process that ultimately gives rise to the judicial decision.⁵⁷ The result is an exclusive emphasis on the judge's interpretation yielding a particular result and corresponding de-emphasis on the legitimizing virtues that may inhere in the adjudicative process.⁵⁸

The implications of pluralism on legal theory is, as it must be, a prominent theme in modern jurisprudence. It is far too large a question to fully canvas at this juncture, especially given that I intend to maintain a focus here on the utility of Dworkin's approach for the development of a framework for legitimate fact-finding. (For a sample of commentaries that focus on the problems posed by pluralism, see for example, Jack Winter, "Justice for Hedgehogs, Conceptual Authenticity for Foxes: Ronald Dworkin on Value Conflicts" (2016) 22(4) *Res Publica* 463; Avery Plaw, "Why Monist Critiques Feed Value Pluralism: Ronald Dworkin's Critique of Isaiah Berlin" (2004) 30(1) *Social Theory and Practice* 105; Martha Minow and Joseph William Singer, "In Favour of Foxes: Pluralism as Fact and Aid to the Pursuit of Justice" (2010) 90 *B U L Rev* 903.) I recognize the controversy in the claim that committing to the correctness of a particular outcome is difficult or impossible due to pluralism, yet agreeing on particular procedures remains possible. (See Joshua Cohen's important discussion in Cohen "Proceduralism and Pluralism" noted above.) As will become evident below and in Chapter Three, drawing on Jurgen Habermas's legal theory, I hold that the best response to finding a place for legitimacy within legal systems in pluralistic societies is to locate that legitimacy in the realm of processes rather than in the correctness of outcomes. Roughly, this is possible so long as the relevant processes *reflect* the pluralism of the society by ensuring that all opinions and viewpoints are given due importance. Such a process would require a fundamental commitment to certain substantive values, including equality and autonomy, and some may consider those commitments to be impossible to reconcile while duly noting a pluralistic context. But following that line of reasoning would suggest that a feasible theory of legitimacy is not possible in modern societies, and I disagree.

⁵⁷ This may seem surprising, considering that Dworkin opens *Law's Empire* arguing that law is special in character because it is argumentative. (Dworkin, *Laws Empire*, *supra* note 44 at 13.) Dworkin's point there is to show that an understanding of law as a "plain fact" is flawed because it does not account for legal disagreements about what the law is, notwithstanding that law is argumentative in nature. (see Dworkin, *Law's Empire*, *supra* note 44 from 4-13).

⁵⁸ Jurgen Habermas, *Between Facts and Norms*, *supra* note 28 at 225: "The critique of Dworkin's solipsistic theory of law must begin...in the shape of a theory of legal argumentation, ground the procedural principles that henceforth bear the brunt of the ideal demands previously directed at Hercules."

This poses obvious problems when trying to extrapolate principles from Dworkin's theory into the context of fact-finding. In the world of factual indeterminacy, neither the validity nor the legitimacy of an outcome can depend on the 'rightness' or accuracy of the outcome because that cannot be guaranteed.⁵⁹ In that context, as I have noted above, both the validity and the legitimacy of fact-finding must be grounded in process. Accordingly, while I agree with Dworkin's notion that legal validity is intertwined with legitimacy, and that the formal commitments to consistent and coherent treatment of litigants is an integral aspect of that legitimacy, the lack of emphasis on the structural process of decision-making which involves arguments and evidence presentation from both sides in Dworkin's theory limits its utility as a jurisprudential orientation that can *of itself* ground a framework for procedurally legitimate fact-finding, though it provides some very significant contributions, as I return to further below.

I turn, then, to theorists who have emphasized procedural/formal aspects of law and examined the relationship of those elements to notions of legal validity and legitimacy. Jeremy Waldron has presented an insightful commentary on the formal concept of rule of law and its role in maintaining legal validity. To begin, he explains rule of law as follows:⁶⁰

⁵⁹ Dworkin has discussed the problem of factual indeterminacy in a less known piece called "Principle, Policy, and Procedure" in *A Matter of Principle* (Massachusetts: Harvard University Press, 1985) [Dworkin, "Principle, Policy, and Procedure"]. There, he proposes two procedural rights in relation to factual indeterminacy. I discuss his ideas in that respect below, and offer critique that largely parallels my brief comments on Dworkin's theory of legal validity provided above.

⁶⁰ Jeremy Waldron, "The Concept and the Rule of Law" (2008) 43(1) *Georgia Law Rev* 1 at 6 (Waldron, "Rule of Law"). This, as Waldron notes at 6, is in keeping with Ronald A Cass's

The Rule of Law is a multi-faceted ideal. Most conceptions of this ideal, however, give central place to a requirement that people in positions of authority should exercise their power within a constraining framework of public norms, rather than on the basis of their own preferences, their own ideology, or their own individual sense of right and wrong.

The rule of law, Waldron explains above, can be understood as a framework that legitimizes legal authority. I have suggested above that legitimacy is necessary for adjudicative factual determinations, which ultimately underpin judicial outcomes, because of the authoritative implications that are necessarily parceled within those outcomes. Accordingly, considering (1) whether rule of law is a requisite feature of legal validity as well as legitimacy, and (2) why, and on what basis, rule of law can play its legitimizing role, are relevant questions for my inquiry into legitimate fact-finding. I note, though, that it is beyond my scope to engage fully with rule of law discourse, and what I offer below draws largely from Waldron's work on rule of law, given his alignment with my thinking, as I point out below.

The rule of law has two broad dimensions. The first highlights the formal characteristics of laws: a system of law that adheres to the rule of law has laws that are predictable and certain, and officials apply and enforce rules that have legal validity, and *only* those rules.⁶¹ As Waldron notes, that conception of rule of law is paralleled in what Lon Fuller describes

comments in *The Rule of Law in America* 17 (Baltimore, London: The John Hopkins University Press, 2001): "A central element of the rule of law, constraining from external authority, ... helps assure that the processes of government, rather than the predilections of the individual decisionmaker, govern."

⁶¹ *Ibid.*

as the *Internal Morality of Law*.⁶² He sets out the formal features that law must have – laws must be general in nature, they should be clear, ascertainable by the public, and consistent with one another; they should apply prospectively and not retroactively, they should be relatively stable, and there should be congruence between what the laws are and their application.⁶³ Adherence to these principles constrains lawmakers’ authority, and ensures, as the saying goes, that laws govern, not men.

The idea of rule of law is also used to denote ideals of natural justice or due process in the administrative law context.⁶⁴ That principle is violated when officials fail to administer the law in accordance with the relevant procedural safeguards. For example, in the fact-finding context, if a judge uses the criminal standard of proof to determine whether a doctor caused a patient’s injury in an action in negligence, a violation of due process should be asserted. Similarly, if a party is disallowed from calling an expert witness of her choice (assuming that the expert is qualified to give relevant evidence), that constitutes a violation of due process as well.

⁶² *Ibid* at 7: “A conception of the Rule of Law like the one just outlined emphasizes the virtues that Lon Fuller discussed in *The Morality of Law*: the prominence of general norms as a basis of governance; the clarity, publicity, stability, consistency, and prospectivity of those norms; and congruence between the law on the books and the way in which public order is actually administered.”

⁶³ Lon Fuller, *Morality of Law* (New Haven and London: Yale University Press, 1964) [Fuller, *Morality of Law*]. See also my discussion in Chapter Three, Part 2.

⁶⁴ The notion of rule of law that was popularized by Dicey in *The Law Of The Constitution* (1885) focused more squarely on this administrative aspect of rule of law. See also Richard Fallon, “The Rule of Law” as a Concept in Constitutional Discourse,” (1977) 97 Colum L Rev. 1, 18-19.

For me, the relevant disagreements that arise as to what rule of law denotes go to the precise value(s) that rule of law protects, what the normative value of rule of law is, and to what extent, if at all, rule of law is relevant to a concept of legal validity.⁶⁵ Waldron articulates these questions this way:⁶⁶

Suppose for a moment that the Rule of Law does represent a more or less coherent political ideal. How central should this be to our understanding of law itself? What is the relation between the Rule of Law and the specialist work that modern analytic philosophers devote to the concept of law, and to the precise delineation of legal judgment from moral judgment and legal validity from moral truth?

For Fuller, the eight formal principles that he outlines are the constituent features of law itself. For him, therefore, the idea of the rule of law is intertwined within the concept of legal validity. Absent the eight formal principles that constitute law's internal morality, a legally valid rule does not arise. This indicates that for Fuller, law requires adherence to a certain internal morality, or internal justification scheme, in order to be valid law, and that internal morality is a product of law's formal features.⁶⁷ I discuss Fuller's concepts in far greater detail in Chapter Three, including a discussion on why he refers to the formal

⁶⁵ For a discussion around the development of the concept of rule of law and confusion around what it means, see Brian Tamanaha, "On the Rule of Law: History, Politics, Theory" (Cambridge: Cambridge University Press, 2011).

⁶⁶ Waldron, "Rule of Law," *supra* note 60 at 10.

⁶⁷ Fuller, *Morality of Law*, *supra* note 62 at 96-97: "What I have called the internal morality of law is in this sense a procedural version of natural law...The term "procedural" is, however, broadly appropriate as indicating that we are concerned, not with the substantive aims of legal rules, but with the ways in which a system of rules for governing human conduct must be constructed and administered if it is to be efficacious and at the same time remain what it purports to be." I refer to this, and provide further commentary on Fuller's internal morality principles in Chapter Three, Part 2.

principles that he articulates as moral principles. For now, my purpose is to point out my alignment with his notions that legal validity requires justification, so validity and legitimacy are inextricably connected, and that this connection occurs within law's formal features as opposed to within its substantive content.⁶⁸

Unsurprisingly, theorists of the positivist tradition disagree with Fuller's notion that adherence to the internal morality of law principles is a pre-requisite for the existence of valid law. Hart, for instance, referred to Fuller's principles as simply concepts of 'efficacy,' which do not warrant the label of moral principles; accordingly, those principles may be useful in ascertaining the effectiveness of a legal system, but not its existence.⁶⁹ Joseph Raz has offered a different response, recognizing the rule of law as a virtue-laden concept, but in keeping with positivist tradition of separating law from any evaluation of that law, he holds that whether rule of law is upheld in a legal system or not has no bearing on legal validity. Contrasting his position with Lon Fuller's, Raz notes that "the principles of the rule of law which [Fuller] enumerated are essential for the existence of law [in Fuller's view].... I have been treating the rule of law as an idea, as a standard to which the law ought to conform but which it can and sometimes does violate most radically and systemically."⁷⁰ He goes on to argue that "...the Rule of Law is a negative virtue...the evil which is avoided is evil which

⁶⁸ As Dyzenhaus puts it, "Roughly, Fuller wished to focus debate about the legitimacy of the law on the process whereby decisions with the force of law are produced rather than on the content of the decisions." (David Dyzenhaus, "The Legitimacy of Legality" (1996) 46 U of T Law Journal 129 at 130.

⁶⁹ See H. L. A. Hart, "Book Review of *Morality of Law* by Lon Fuller" (1964-1965) 78 Harv L Rev 1281.

⁷⁰ Joseph Raz, "The Rule of Law and its Virtue" in Raz, *Authority of Law*, *supra* note 35 at 223.

could only have been caused by the law itself.”⁷¹ That is, a legal system that does not uphold rule of law may be a bad or evil legal system, but it can still be a legal system, in contrast to Fuller’s position.

Jeremy Waldron has critically referred to this viewpoint as “casual positivism.”⁷² He notes, “Not every system of command and control that calls itself a legal system *is* a legal system. We need to scrutinize it a little – to see how it works – before we bestow this term.”⁷³ In other words, for Waldron, a legal system has to *deserve* to be a legal system, and in parallel, a law has to deserve legal validity, and the law being legitimate achieves that.⁷⁴

Waldron’s comments about rule of law in relation to adjudicative bodies are the most relevant for my project. First, he notes that although Hart and Raz seem to suggest that some sort of administrative bodies, like courts, that have the authority to determine legal disputes and apply the valid legal norms of a society are a necessary feature of law, neither of them make any suggestions about the “mode of operation or procedure” of the administrative bodies they refer to.⁷⁵ As a result, “Star Chamber *ex parte* proceedings – without any sort of hearing”⁷⁶ would satisfy the requirement of an administrative body in

⁷¹ *Ibid* at 224.

⁷² Waldron, “Rule of Law,” *supra* note 60 at 13.

⁷³ *Ibid* 13-14.

⁷⁴ *Ibid* 13-14.

⁷⁵ *Ibid* at 22.

⁷⁶ *Ibid* at 21. Of course, that type of administrative system could be criticized, but the positivist tradition maintains that such evaluations are irrelevant to the conception of a legal system. All that is relevant is that there exists a body that has the power to make

the positivist view of law. For Waldron, however, *how* administrative decisions are made matters to whether an administrative system ought to be understood as a legal system:⁷⁷

the essential idea is much more than merely functional – applying norms to individual cases. Most importantly, it is procedural: the operation of a court involves a way of proceeding that offers to those who are immediately concerned an opportunity to make submissions and present evidence, such evidence being presented in an orderly fashion according to strict rules of relevance and oriented to the norms whose application is in question. The mode of presentation may vary, but the existence of such an opportunity does not.... Throughout the process, both sides are treated respectfully and above all listened to by a tribunal that is bound to attend to the evidence presented and respond to the submissions that are made in the reasons that are given for its eventual decision.

Waldron notes that none of these features of the administrative process is emphasized in positivist conceptions of law, yet all of them “should be regarded as an essential aspect of our working conception of law.”⁷⁸ Waldron’s viewpoints are aligned with both of the propositions that I outlined above. First, he finds the positivist conception of law lacking because it is empty of any commitment to why a legal system deserves its status as valid law. This supports my contention that legal validity requires legitimacy, and my parallel insistence that adjudicative determinations of fact must deserve their legal validity in the sense that there must be some reason why one can acquiesce to their authority. Second,

authoritative decisions about legal disputes and application of law. I make further arguments about the limitations of this conception of law in my discussions of Hart’s and Raz’s theories in Chapter Three.

⁷⁷ *Ibid* at 23.

⁷⁸ *Ibid* at 24.

Waldron's complaint that positivist legal theories do not set out any essential features of processes by which law should be administered indicates that for him, certain procedural features are pre-requisite for a legitimately valid legal system. I echo this sentiment in my complaint of lack of attention to the process of adjudicating legal claims in Dworkin's approach to legal legitimacy presented above, and in my general claim that legally valid fact-finding must emerge from legitimizing fact-finding processes.

My alignment with viewpoints that insist that legal validity requires legitimacy, and that legitimacy is properly placed in law's formal features (as in Fuller's and Waldron's theoretical commitments noted above), along with the points of divergence from Dworkin's approach, have led me to what I hold to be one of the richest procedural theories: the discourse theory offered by German philosopher, Jurgen Habermas.⁷⁹

I noted above that Dworkin's theory may have difficulties accounting for the legitimate disagreements that animate the political field in pluralistic societies; in contrast, the notion of plurality seems to permeate Habermas's legal theory. This, as I explain further below, makes Habermas's ideas more easily transferable to my context of factual determinations than Dworkin's theory, while maintaining the important commitments to equal and fair treatment that pervade Dworkin's legal philosophy. Habermas's concepts also, as I explain further in Chapter Three, further substantiate some of the shared ideas that thematically link him with thinkers like Fuller and Waldron.

⁷⁹ Habermas, *Between Facts and Norms*, *supra* note 28.

Habermas explains that in modern societies, there is no over-arching agreement on the ideals of morality or the related question of what constitutes substantively just or good laws. Many individuals, he notes, may genuinely disagree on whether a law aligns with their notions of what is just.⁸⁰ Nonetheless, the law is, and must be, authoritative for everyone in the society.⁸¹ Habermas notes that while a law's authority can be coercively enforced to ensure compliance, stable integrated societies require that people must have a *reason* to respect the law's authority, even if they disagree with that law in substance. That reason is law's legitimacy. "Such legitimacy," Habermas explains (and as I have noted above), "should allow law abiding behavior that, based on respect for the law, involves more than sheer compliance."⁸² Accordingly, for Habermas, the stability of modern societies demands that law be authoritative, and that its authority be legitimate. Therefore, legal validity and its legitimacy must be intertwined. Importantly, that legitimacy, Habermas holds, cannot be a product of the law's substance, because the law is authoritative even for those that disagree with the law. Accordingly, he proposes that:⁸³

Legality can produce legitimacy only to the extent that the legal order reflexively responds to the need for justification that originates from the

⁸⁰ See generally Jurgen Habermas, *Between Facts and Norms*, *supra* note 28 at Chapter 1; And at 200: "In a pluralistic society in which various belief systems compete with each other, recourse to a prevailing ethos...does not offer a convincing basis for legal discourse." A further discussion of Habermas's notions of law and legitimacy is undertaken in Chapter Three.

⁸¹ Though it is not necessarily true that everyone (including individuals and marginalized subgroups) subjectively regard the law as having equal authority, nor any moral authority.

⁸² Jurgen Habermas, *Between Facts and Norms*, *supra* note 28 at 197-198.

⁸³ Jurgen Habermas, "Law and Morality" (Tanner Lectures on Human Values, delivered at Harvard University, October 1 and 2, 1986) at 243-244. In this lecture, Habermas argues at 220 for the thesis that "legality can derive its legitimacy only from a procedural rationality with moral impact. The key to this is an interlocking of two types of procedures: processes of moral argumentation get institutionalized by means of legal procedures."

positivization of law and responds in such a manner that legal discourses are institutionalized in ways made pervious to moral argumentation.

Interpreting this quotation, Dyzenhaus observes, “Habermas’s own account of the legitimacy of law looks to the form of law to establish a connection between law and morality.”⁸⁴ In other words, the justification of legal outcomes comes from the *process* through which the law emerges. This gives rise to Habermas’s notion of rational discourse as a theory of law: where law emerges through a process that embodies the principles of rational discourse, whereby effected parties are ensured an equal right to freely and meaningfully voice their viewpoints and arguments, which may include whatever traditions or moral convictions they may have, there is a justifiable reason, grounded in that process, to recognize the emergent law as having legitimate authority. In my reading, the assurance of freedom and equality in the argumentative process is, in Habermas’s theory, the legitimizing feature of the law.⁸⁵ Since the justifying features of law arise from of the process of law-making, the law, in Habermas’s theory, refrains from grounding its authority on the law’s substantive moral content; rather, the legitimacy of its authority is on the basis that those affected are treated fairly in the process of legal decision-making.⁸⁶

⁸⁴ David Dylenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar* (Toronto, Oxford University Press) at 239.

⁸⁵ This is elaborated further in Chapter Three.

⁸⁶ Compare with Estlund’s brief account of Habermas’s theory in *Democratic Authority*, *supra* note 55 at 88-90, suggesting that legitimacy of a legal outcome, in Habermas’s theory, is grounded in the fact that it “*could* have been produced by ideal deliberative procedures,” not that it actually was. If that is true, Estlund suggests, Habermas’s theory of legitimacy is dependent on the merit of the outcome, and not on the particular procedures that gave rise to the outcome. I do not find this reading of Habermas to be accurate. A more detailed account of my interpretation of Habermas’s theory is presented in Chapter Three.

This idea of rational discourse is paralleled in the adjudicative context. Where the fundamental features of a rational discourse are reflected in the adjudicative process, those outcomes also have legitimacy. Applied in the fact-finding context, where the process of fact-finding enables free and equal ability to make arguments and present evidence as to the relevant facts, the authority of a valid legal fact-finding becomes legitimate, while simultaneously allowing for the inevitable acceptance of the possibility that it might be factually inaccurate.⁸⁷

In Chapter Three, I engage more deeply with Hart's and Raz's jurisprudence, representing positivist legal theories, and Fuller's and Habermas's theories, representing theories of law that I describe as 'thinly substantiated procedural models' for law and its legitimacy. At this stage, my purpose is to position my approach within a broader jurisprudential landscape. My ultimate focus, though, is on judicial fact-finding, one of the most arduous yet under-theorized aspects of judicial work. The jurisprudential notions that I have presented above form the deepest grounding for my ultimate goal of building a procedural legitimacy framework that can be used to assess the propriety of fact-finding processes. That requires proceeding now more squarely into the fact-finding context, which I introduce below.

Transitioning the broad jurisprudential principles that I canvass above (and which will be more fully unfolded in Chapter Three) into the context of fact-finding involves engaging in challenging and foundational debates about evidence doctrine and other procedural doctrines relating to factual determinations.

⁸⁷ The longer form of this argument appears in Chapter Three, Part 2(b).

The procedural legitimacy proposal that I am advancing stems from the observation that the authority of a factual finding is not (because it cannot be) dependent on the factual accuracy of the finding itself. This results in an unavoidable possibility of a factually inaccurate judicial finding that, nonetheless, has justifiable authority. But for some, being factually inaccurate is one way that an outcome can be unjust. An injured plaintiff who does not receive compensation due to factual error, for instance, can be thought to suffer an injustice. Those who believe this would raise the question of how it is possible that an unjust outcome, in the sense of its being factually inaccurate, can possibly merit its authority.⁸⁸ Below, I take up the question of the injustice that may be associated with factual inaccuracies, and how I perceive the procedural legitimacy proposal's response. I do so by providing an explanation of various viewpoints relevant to this question, and situating my own commitments, which will ground my conception of procedurally legitimate fact-finding, in relation to them.

I start with Robert Bone's proposal in "Procedure, Participation, Rights"⁸⁹ 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

⁸⁸ Hock Lai Ho, *Philosophy of Evidence Law: Justice in the Search for Truth* (Oxford, New York: Oxford University Press, 2008) at 65 suggests, for instance: "That someone has had a fair trial may justify our insistence that she accepts an adverse verdict in the absence of reason to doubt the court's finding. But we are not entitled to maintain that stance towards her once we realize that some crucial part of the material findings was false; we now have to acknowledge that there was a miscarriage of justice" [Ho, *Philosophy of Evidence Law*].

⁸⁹ Bone, "Procedure, Participation, Rights," *supra* note 1.

procedural rights.⁹⁰ 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:⁹¹

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 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.⁹²

⁹⁰ *Ibid* at 1022.

⁹¹ *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.

⁹² Bone, "Procedure, Participation, Rights," *supra* note 1 at 1021-2.

As Bone cautions, there is no doubt that depending on a procedure-substance divide is “notoriously problematic.”⁹³ Dworkin makes the point too: “the sharp distinction between substance and procedure is arbitrary from a normative standpoint...[A]ny descriptive theory that relies so heavily on that distinction, even if factually accurate, cannot be a deep theory about the nature of adjudication....”⁹⁴

Bearing in mind these cautions, it is useful to acknowledge that there are substantive aspects to procedural rules and procedural aspects of substantive rules. For instance, the degree of conviction that a standard of proof requires (e.g. balance of probabilities or reasonable doubt require different degrees of conviction) is a substantive aspect of the process of fact-finding. Still, in my view, it is descriptively accurate and analytically helpful to draw a distinction between the rights protected by tort laws and the process of fact-finding during adjudication of those rights.

The principles of tort law dictate that members of our society have rights against one another for injuries caused by a party who owed us a duty of care and who breached the standard of care owed.⁹⁵ These principles translate into the factual elements that must be established for a finding of liability when a dispute over that right occurs. As pointed out earlier, our process of fact-finding requires a 50% or greater chance of the relevant event to

⁹³ *Ibid.*

⁹⁴ Ronald Dworkin, “Principle, Policy, and Procedure,” *supra* note 59 at 77.

⁹⁵ Here, I am adopting the rights-based interpretation of tort law that can be defined as characteristic of Ernest Weinrib. See generally, Ernest Weinrib, *The Idea of Private Law* (Cambridge, Mass: Harvard University Press, 1995). I discuss Weinrib’s ideas around tort law and its necessary formal aspects in Chapter Six.

be established. But that does not mean that the *substantive* question at stake for a liability determination is whether there was a greater than 50% chance of causation, or any other required factual element. The *process* of proof demands at least a 50% chance of causation, but that does not influence the nature of the rights we have against one another in principle. Liability for negligent injury exists, in principle, when there is a duty of care, not the chance of a duty of care; when there is a breach of the standard of care owed, not the chance thereof; when an injury was caused by the defendant's negligence, not when an injury was potentially caused by his negligence. Those chances are relevant in the context of the process of proof; they are not relevant in terms of the substantive rights at stake. Conflating the rights protected in legal principles and the process of proving relevant facts to adjudicate disputes involving those rights is unsustainable because that would change the nature of the right to be free from negligent injury altogether. We have rights against each other in relation to negligently inflicted injuries, not the *chances* of injuries, even though those chances may be relevant as part of the process of administering those rights.⁹⁶

Treating substantive rights and the processes of making factual determinations for the purpose of resolving disputes about those rights as inextricable enables, for Bone, a denial of the injustice that occurs when a person who is entitled to compensation in principle is refused compensation due to factual error. For me, this denial constitutes an avoidance of the uncomfortable reality that an adjudicative outcome that denies compensation when it is

⁹⁶ Robert Stevens, *Torts and Rights*, (Oxford: Oxford University Press, 2007) at 43 points out, "the rights we have against everyone else are in relation to the outcome of injury, not its risk of occurring in the future." And see *Baker v Corus UK Ltd.*, [2006] 2 AC 572 at 579, Lord Hoffmann (House of Lords): "[t]he standard rule is that it is not enough to show that the defendant's conduct increased the likelihood of damages being suffered....It must be proved on a balance of probabilities that the defendant's conduct did cause the damages...."

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. Similarly, if an adjudicative outcome erroneously holds a party liable due to factual error, an injustice *does* occur, even absent procedural error. 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."⁹⁷ 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.⁹⁸ 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.⁹⁹ And, importantly, it is the inevitability of that possibility that gives rise to the normative work accomplished by the procedural legitimacy framework that I develop here and in upcoming chapters.

⁹⁷ Ho, *Philosophy of Evidence Law*, *supra* note 87 at 65.

⁹⁸ Dworkin, "Principle, Policy, and Procedure," *supra* note 59 at 81.

⁹⁹ This is not to say that factual inaccuracy is the only way that an adjudicative outcome can be rendered unjust. 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.

Bone's idea of conceptually comingling substantive rights with the procedural rules of adjudication, which contemplate 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 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 grounding 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). As Frank Michelman explains, there is nothing inherently problematic with having a gap between justice and legitimacy:¹⁰⁰

¹⁰⁰ Frank I. Michelman, "Justice as Fairness, Legitimacy, and the Question of Judicial Review: A Comment" (2004) 72 Fordham L Rev 1407 at 1414 [my emphasis] [Michelman, "Justice as Fairness, Legitimacy"]. For similar guidance on the distinction between Legitimacy and Justice, see Wilfried Hinsch, "Legitimacy and Justice" in Jorg Khunelt ed, *Political Legitimation Without Morality?* (Nurnberg, Germany: Springer, 2008) at 45. Echoing the sentiments presented above, Hinsch discussing the laws of constitutional democracies, notes that "political legislation may in many cases be put legitimately into effect, against which reasonable objections can be raised, at least on the part of some citizens." Making the case for procedural legitimization, he goes on to say, "such controversial decisions cannot be fully justified on the basis of substantive argument alone but only by appealing to the fact that they are the result of a fact decision-making process...."

There is nothing wrong or untoward about allowing in this way for the possibility of legitimacy in a governmental system whose performance observably fails to measure up to justice. For what purpose, after all, do we employ the term “legitimate,” if not to convey the complex judgment that a governmental system in the dock, so to speak, for its clear shortfalls from justice continues nevertheless to merit loyalty. On the other hand, the justice-legitimacy gap normally strikes us as something we have little choice but to accept in a partially fallen world, not as something we positively cherish....

In parallel to Michelman’s comments above, 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.¹⁰¹

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. For instance, where there is a difficulty in establishing causation of an injury due to medical uncertainty, it may never be possible to know for certain whether the defendant’s error really did cause the plaintiff’s injury, or some other medical condition caused it. By

¹⁰¹ Lawrence Solum, “Procedural Justice” 78 S Cal L Rev 181 at 267-268 [Solum, “Procedural Justice] at 190. And at 278, 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.”

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 burden: 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 factually erroneous. Given the significance of legitimacy, its essential features must be neither over-inclusive nor under-inclusive.¹⁰² The standard of legitimacy has to be practical – something that the legal system can actually achieve. Of course, factual accuracy cannot be absolutely guaranteed in an efficacious dispute resolution system. This means that adjudicative legitimacy cannot depend on the factual accuracy of outcomes; that, in turn, implicates the role of process in maintaining the legitimacy of authoritative judicial outcomes that unavoidably bear a risk of inaccuracy. The normative burden of maintaining legitimate adjudication, in light of factual uncertainty, must be borne by procedural propriety.

¹⁰² Michelman, “Justice as Fairness, Legitimacy,” *supra* note 99 at 1419. The same notion is evident in Habermas’s thinking presented above. He suggests that a criterion for legitimacy that depends on substantive moral justification would be overly stringent because the law cannot be guaranteed to have a substantive quality that will be acceptable to every individual’s moral sentiments. Law’s legitimacy must be achievable.

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.¹⁰³ 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 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 who 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. In order to provide additional background for my discussion in upcoming chapters, I provide an introduction to some pertinent aspects of various instrumental and non-instrumental viewpoints in relation to fact-finding, and situate myself among them.

¹⁰³ 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.

Part 3. Situating the Argument Among Instrumental and Non-Instrumental Approaches

Those who hold instrumental viewpoints of adjudication and, particularly adjudicative fact-finding, centralize the relationship between procedure 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.¹⁰⁴ Posner's economic analysis of law, for instance, refers to this as the balance between "the cost of erroneous judicial decisions" and "the cost of operating the procedural system."¹⁰⁵ Capturing the central tenet of such cost-balancing based analyses, Kaplow holds that¹⁰⁶

[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.

¹⁰⁴ 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.

¹⁰⁵ Richard Posner, *Economic Analysis of Law* 8th ed. (New York: Aspen Publishers, 2011) at 757.

¹⁰⁶ Kaplow, "Value of Accuracy," *supra* note 103 at 307-308.

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.¹⁰⁷ Therefore, I have found it appropriate to set out his approach in some detail below. This 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.

¹⁰⁷ 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.

In *Principle, Policy, Procedure*,¹⁰⁸ 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 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 accurate determination of whether we suffered an injury, and the extent of its damage?¹⁰⁹ 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:¹¹⁰

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.

¹⁰⁸ Ronald Dworkin, "Principle, Policy, Procedure" in *A Matter of Principle* (Massachusetts: Harvard University Press, 1985).

¹⁰⁹ Stated in a criminal law context, Dworkin asks, "Does it 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.

¹¹⁰ *Ibid* at 79.

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.¹¹¹ 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.”¹¹² 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:¹¹³

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....

¹¹¹ *Ibid.*

¹¹² *Ibid* at 80.

¹¹³ *Ibid* at 92. This is consistent with my comments above.

This harm arises whether the inaccurate outcome was an innocent mistake or deliberate (though there is greater harm when deliberate inaccuracy occurs).¹¹⁴ 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.¹¹⁵ It exists in addition to the bare harm that comes with an inaccurate outcome – frustration, irritation, even anger or outrage.¹¹⁶ 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.¹¹⁷

For Dworkin, the existence of the injustice factor grounds the requirement for procedural rights of 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

¹¹⁴ *Ibid.*

¹¹⁵ *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.”

¹¹⁶ *Ibid.*

¹¹⁷ 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.”

suffered in the event of inaccuracy. This is because the injustice caused by inaccuracy may not be “suffered” at all, but it exists nonetheless.¹¹⁸

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.”¹¹⁹

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.¹²⁰ These two principles of fair play manifest in Dworkin’s proposal as two procedural rights that involve ensuring a

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid* at 84.

¹²⁰ *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 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 when adopted – the fairness, for example, of abiding by the result of a coin toss when both parties reasonably agreed to the toss.”

coherent scheme for the distribution of the risk of factual errors, and consistent adherence to that scheme.¹²¹

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.¹²²

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.¹²³ 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 minimus* 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.

¹²¹ 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.

¹²² Dworkin, “Principle, Policy, and Procedure,” *supra* note 59 at 89 in the criminal context, and at 93 for the application in the civil context.

¹²³ *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....”

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.”¹²⁴ 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....”¹²⁵ Dworkin explains this as a “legal right. It holds, that is, against courts in their adjudicative capacity.”¹²⁶ This is the application aspect of Dworkin’s rights.¹²⁷ When a litigant asserts this right, she does not question 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.”¹²⁸ Dworkin provides a persuasive explanation of why procedural rights of accuracy are necessary in a society that guarantees certain substantive rights and uses a factually fallible adjudicative

¹²⁴ *Ibid* at 89.

¹²⁵ *Ibid* at 90.

¹²⁶ *Ibid* at 93.

¹²⁷ *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.”

¹²⁸ *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.

system to administer them. 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 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, as I explain further below.

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”¹²⁹ – 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.¹³⁰ Accordingly, Dworkin’s procedural rights guarantee fair distribution of the risk of factual error that duly notes the harm that accompanies inaccuracy.¹³¹ 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, within Dworkin’s proposal, it is possible that a litigant’s procedural rights are fully respected but her substantive rights were not vindicated due to manifestation of the risk of factual error. That is, 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

¹²⁹ Dworkin, “Principle, Policy, and Procedure,” *supra* note 59 at 78.

¹³⁰ *Ibid* at 78.

¹³¹ 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. I return to his argument more extensively in Chapter Four to demonstrate how it can be construed as an endorsement of some aspects of my ultimate procedural legitimacy proposal.

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 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 vindication of the procedural rights. That means that the legitimacy of *accurate* judicial factual decisions must *also* depend on observance of procedural rights.

Suppose, for instance, that a judge applies the criminal standard of proof in a civil case. 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 for the assurance of consistent and coherent treatment only in terms of managing 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 on the basis of 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.¹³² 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.

¹³² Compare to Owen Fiss, "The Allure of Individualism" (1993) 78 Iowa L Rev 965, where he argues that having a full representation of one's interests could satisfy a demand for participation in an adjudicative procedure. I take this up further in Chapter Four.

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 of these 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 outcome is clearly outrageous. In the second example, although the litigants are treated equally, it would seem that they are treated with equal disrespect, 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.

I reiterate that Dworkin's procedural rights, as they relate to ensuring equal, coherent treatment in terms of managing the risk of inaccuracy are entirely in keeping with the procedural legitimacy theme that I am developing. In Chapter Four, I discuss their precise role in a procedural legitimacy framework further. But since the procedural rights that Dworkin advocates are exclusively concerned with fair management of the risk of inaccuracy, they fail to take into account 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:¹³³

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.

¹³³ 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.

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.¹³⁴ 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, intelligibility of procedures, timeliness, and finality.¹³⁵ Others have focused on autonomy, and have often concluded that participation, in some form, is a key feature of acceptable legal procedures, grounded in those values.¹³⁶ 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.¹³⁷ Lawrence Solum has

¹³⁴ 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 the rule of law. See also Jeremy Waldron, "How Law Protects Dignity" (2012) 71 Cambridge L J 200.

¹³⁵ Bayles, "Principles for Legal Procedure," *supra* note 8 at 53-56. See also Robert Summers, "A Plea for 'Process Values,'" *supra* note 132.

¹³⁶ 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."

¹³⁷ Tom Tyler's work in this respect is 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

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.¹³⁸

Notably, Jurgen Habermas has 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 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.¹³⁹

My aim for offering a 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

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 the (non-empirical) comment that the intrinsic value of participation may be, in part, the psychological value that it affords to the individual.

¹³⁸ I take up this point further in Chapter Four.

¹³⁹ It is worth mentioning here that participation is also sometimes argued from an instrumental standpoint. From such points of view, participation is necessary because it improves outcome accuracy. I take this up further in Chapter Four.

another and how they can manifest in fact-finding rules. That is the work of the next two chapters. My answer to those questions will be grounded in jurisprudential scholarship tackling legal legitimacy generally, and will be informed by the insights of those who have considered fact-finding processes specifically, including both instrumental and non-instrumental approaches.

The differences between instrumental and non-instrumental approaches to adjudication map directly onto the tension inherent in adjudicative fact-finding that I presented at the beginning of the chapter: on one hand, 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 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:¹⁴⁰

¹⁴⁰ 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, and I reiterate this point in Chapter Four. But those epistemic features must be supplemented 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. I take up this crucial central question in Chapter Four.

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.¹⁴¹ 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 fact-finding system that has no demonstrable interest in truly ascertaining facts (like an arbitrary coin-toss process) 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.

¹⁴¹ 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 Legal Procedure,” *supra* note 8 at 39.

Accordingly, the procedural legitimacy model that I intend to offer is situated in-between the models of procedural justice that John Rawls famously describes as “imperfect procedural justice” and “pure procedural justice.”¹⁴² Imperfect procedural 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.¹⁴³

But for me, 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. The model I would propose 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. This aligns with Habermas’s contention where he suggests (albeit in the context of majority rule in the democratic process) that its legitimacy is derived from an “imperfect,’ but ‘pure’ procedural rationality.”¹⁴⁴

¹⁴² John Rawls, *Theory of Justice* Revised Edition (Harvard University Press, 1977, 1999) at 73-78.

¹⁴³ *Ibid.*

¹⁴⁴ 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-

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 is 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?

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

A theory of procedural legitimacy that can answer both of these questions is equipped to provide a framework that can be used to assess the propriety of fact-finding procedures, including assessing when, and to what extent epistemic concerns can be compromised in pursuit of other values.¹⁴⁵ In upcoming chapters, I will draw on the insights of the various

Habermas Debate" in Finlayson, J. G. and Freyenhagen, F., eds, *Habermas and Rawls: Disputing the Political* (New York: Routledge, 2011).

¹⁴⁵ As I noted in Part 1, the legal system has rules that clearly prioritize values besides outcome accuracy.

scholarly viewpoints presented here, and provide more detailed endorsements and critiques of them, culminating in my suggestion of a framework for procedural legitimacy in a fact-finding context that can provide grounding for these questions.

Conclusion and Next Steps

This chapter has been aimed at showing that valid and legitimate judicial fact-finding depends on a rich conception of procedural propriety. My first goal in this chapter was to demonstrate, through a description of judicial fact-finding, that the validity of factual determinations depends on procedural propriety. Then I proposed that valid factual determinations must also be legitimate because of the authoritative implications that come with legal validity. I then situated that conclusion within jurisprudential debates on intermingling legal validity and legitimacy. I showed that I am aligned with those anti-positivist theorists who hold that legal validity requires in-built justification, and that such justification is a procedural virtue. In Chapter Three, I provide more detailed accounts of my alignment and divergence from positivist traditions, through a more in-depth analysis of H. L. A. Hart's and Joseph Raz's theories. By the end of Chapter Three, I indicate the lessons that may be learned from turning to Lon Fuller's and Jurgen Habermas's proceduralist theses, particularly in terms of what substantive values legal procedures ought to manifest (and why) in order to play their legitimizing role. There, I show that Habermas and Fuller both argue that procedures must treat legal subjects as intrinsically equal, autonomous agents. Law-making procedures that fail in that respect cannot accomplish the normative work assigned to them. I use this jurisprudential foundation to substantiate my notion of procedural legitimacy in the specific context of fact-finding.

After my jurisprudential comments in this Chapter, I then turned to outlining discourses situated more squarely within the context of judicial accommodation of factual uncertainty to show that there are different viewpoints relevant to how fact-finding procedures should be assessed. That discussion informs my ultimate goal of showing how procedural legitimacy should manifest within fact-finding procedures in the civil litigation context, such that those procedures can fulfill their normative purpose of maintaining the legitimacy of factual determinations. This foreshadows my analysis in Chapter Four, where I discuss how the necessary values of equality and autonomy can and must be expressed through rational fact-finding processes. By the end of Chapter Four, I offer a substantiated notion of procedural legitimacy through engagement with the topics introduced here, including: why and to what extent does accuracy of outcome matter to procedural legitimacy, and how must it be relevant in the procedural legitimacy framework? What principles should guide the distribution of the risk of inaccuracy among litigants? How and why does participation matter, and how should it be reflected in legitimate fact-finding processes?

The remaining two chapters then demonstrate the significance of the procedural legitimacy framework in important doctrinal contexts. Chapter Five tackles the challenges posed by judicial reliance on scientific evidence, and Chapter Six takes on discourses around proof difficulties that are faced in medical negligence cases due to causal uncertainty. Neither of these debates has been approached from the procedural legitimacy perspective. Doing so, therefore, adds significantly to those debates, while providing apt arenas to demonstrate why the development of a robust theory of legitimate fact-finding is an unequivocally vital contribution to legal theorizing as well as to what I consider the overarching goal of much legal scholarship: calling for the preservation of the legitimacy (however we may uniquely define legitimacy) of legal systems and their outcomes.

CHAPTER 3: THE JURISPRUDENTIAL INQUIRY INTO LAW AND LEGITIMACY

Introduction

In Chapter Two, I introduced the idea that since valid judicial outcomes are final, binding and enforceable, their validity requires normative justification, or legitimacy. Legitimacy, I argued, must be contingent on procedural propriety, given that outcomes cannot be guaranteed to be factually accurate. In Chapter Two, I situated this claim within a jurisprudential landscape, outlining some major theoretical ideas about the nature of legal validity and its relationship to legitimacy.¹

I noted in Chapter Two that one aspect of the procedural legitimacy argument embodies the essence of formal justice – that everyone should be subjected to the consistent rules non-arbitrarily. But stopping at this ‘germ of justice,’ as Hart has described it,² gives rise to critical questions: can consistent application of *any* procedural rules yield legitimate outcomes? What qualities must the procedural rules embody in order to justify their legitimizing role? In this chapter, I aim to expand on some of the jurisprudential themes presented in the first chapter in order to answer these questions.

¹ Note that in this chapter, as in Chapter Two, the terms ‘legal validity’, ‘status as law’, and ‘legality’ are used interchangeably to connote the positivistic idea of formal legal validity.

² H.L.A. Hart, *The Concept of Law, 3d ed* (Oxford, United Kingdom: Oxford University Press, 2012) at 206 [Hart, *Concept of Law*].

I begin by revisiting H.L.A. Hart's concept of legal validity and its implications, followed by a review of Joseph Raz's incisive additions to the positivist proposal. Hart's proposal represents the beginning of contemporary positivism, and Raz's jurisprudence displays an arguably even stronger commitment to the central core of legal positivism, as I explain further below. As I suggested in Chapter Two, positivist accounts contain insights that further a proceduralist jurisprudential orientation, but their foundational insistence on maintaining a severance between legal validity and its justification displays the deficits of a form-based notion of legal validity that has no in-built normativity. These shortcomings translate as problems with a purely procedural notion of legitimate adjudicative fact-finding. Appreciating the root of the difficulty, which I attempt to demonstrate in my critique of Hart's and Raz's commitments, paves the road to overcoming them.

My review of Hart's and Raz's proposals serves as a more detailed argument in favour of the claims introduced in Chapter Two: first, that legal validity brings an implication of authority, and this requires legitimacy; second, that legal validity is best understood through a substantiated procedural declaration that *certain* procedures yield valid laws, and being products of that particular procedure, valid laws deserve, in a normative sense, their authoritative status. The procedural rules of determining facts must reflect those same substantive qualities. When they do, their consistent application yields legitimately authoritative outcomes. The second half of this chapter is oriented towards delineating the substantive qualities that legal procedures must possess in order to justifiably legitimize the outcomes that emerge from them.

In that effort, I draw on Lon Fuller's and Jurgen Habermas's insights. Both maintain a rich notion of legality that normatively accounts for the authoritative implications that come with it. Most importantly for my purpose, both authors affirm the theme presented in Chapter Two, that legal validity and legitimacy must occur simultaneously. That notion leads both to maintaining a fundamentally proceduralist paradigm. I suggest that Fuller's and Habermas's ideas about law are thematically linked through the idea that the process of lawmaking must demonstrate respect for legal subjects as autonomous agents who deserve non-arbitrary treatment. When that respect for autonomy is present in lawmaking procedures, then the emergent law is legitimate. That conclusion marks the end of this chapter. In Chapter Four, I use that grounding notion of respect for autonomy to formulate the necessary substantive qualities of legitimate fact-finding procedures.

Part 1. The Positivist Approach to Legal Validity: Hart and Raz

A. The Legal Theory of H.L.A Hart

i. Legal Validity and its Implications

Hart's positivism emerged at a time when positivist thinking was still influenced by writers such as Jeremy Bentham (1748-1832) and John Austin (1790-1859), who presented law as a command of a sovereign. Hart, however, while maintaining the positivist creed of separating the question of what law is and what it ought to be, presented a new positivism – one that did not depend on interpreting law as a command. Rather, Hart's positivism, presented in the book *The Concept of Law*,³ introduced the idea of law as a system of

³ *Ibid.*

primary and secondary rules, and stands as the starting point of contemporary positivist thinking. His explanation for how a rudimentary system of rules transforms into a legal system in complex societies reveals his conception of how societal rules gain status as law, that is, how those rules gain validity as law or legal validity.

According to Hart, very simple societies are governed by rules developed through habitual conduct of members of the group. These rules dictate acceptable behavior for the members.⁴ As societies become more complicated, however, governance through such rules alone becomes defective for three reasons. The first defect is uncertainty. As the complexity of a society begins to increase, there are likely to be ambiguities as to what the rules actually are, but there may not yet be a system in place to settle the doubts.⁵ Second, the rules of a society are relatively stagnant, because they are the product of habitual conduct. Changes to them are necessarily very gradual. This threatens to prevent the society from accommodating changing circumstances without losing stability.⁶ Third, as societies become larger and more sophisticated, enforcement of the rules becomes difficult. In rudimentary societies, obedience to the rules is maintained through social pressure. In more complex societies, this becomes infeasible.⁷

⁴ *Ibid* at 91-92.

⁵ *Ibid* at 92: "Hence if doubts arise as to what the rules are or as to the precise scope of some given rule, there will be no procedure for settling this doubt....This defect in the simple social structure of primary rules we may call its *uncertainty*."

⁶ *Ibid* at 92: "A second defect is the *static* character of the rules. The only mode of change in the rules known to such a society will be the slow process of growth, whereby courses of conduct once thought optional become first habitual or usual, and then obligatory...."

⁷ *Ibid* at 92-93: "The third defect of this simple form of social life is the *inefficiency* of the diffuse social pressure by which the rules are maintained."

These defects are accommodated, Hart explains, by adding secondary rules to complement the primary rules of a society. The primary rules impose duties and confer powers. These are the substantive rules of behaviour that govern simple societies. For instance, the tort law principle that negligently injured people should be fully compensated by the person who caused the injury constitutes a primary rule in our society. Secondary rules are procedural. They “specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined.”⁸ In doing so, the secondary rules remedy the defects that would occur as a society exclusively governed by primary rules becomes more complex.⁹

The uncertainty defect is remedied through secondary rules of recognition, which specify what features a rule must have in order to be recognized as a valid rule of the society.¹⁰ In our society, for instance, we recognize rules that have passed through legislative procedures as valid rules. We also recognize the legal validity of judicial decrees that have emerged out of adjudicative processes. We do not, however, recognize rules that are dictated by a religious institution as valid laws. The fact that a rule has emerged from parliamentary or judicial processes are included in our rules of recognition, but religious endorsement is not

⁸ *Ibid* at 94.

⁹ *Ibid*: “while primary rules are concerned with the actions that individuals must or must not do, these secondary rules are all concerned with the primary rules themselves. They specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined.”

¹⁰ *Ibid* at 94-95.

a rule of recognition in our society. But in societies where there is no separation between state and religion, religious endorsement can be a rule of recognition.

The remedy for stagnancy is another set of secondary rules called the rules of change. These define the procedure to be followed in legislating laws, and specify who has the authority to make changes to the rules.¹¹ Sections 91 and 92 of the Constitution of Canada, which delineate the areas of provincial and federal law-making authority, are examples of 'rules of change' in our society.¹² Third, the inefficiency of relying on diffuse social pressure to enforce rules is corrected through secondary rules that empower "individuals to make authoritative determinations of the question whether, on a particular occasion, a primary rule has been broken."¹³ These are the rules of adjudication. "Besides identifying the individuals who are to adjudicate," Hart explains, "such rules will also define the procedure to be followed."¹⁴ In Canada, for instance, all the provinces have enactments that set out the procedures to be followed in provincial courts.¹⁵ These rules of court processes are examples of Hart's rules of adjudication. So are the rules governing proof of facts in a tortious injury claim, such as admissibility of evidence, and the relevant standard of proof.

¹¹ *Ibid* at 95-96.

¹² *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

¹³ Hart, *Concept of Law*, *supra* note 2 at 96.

¹⁴ *Ibid* at 97.

¹⁵ E.g. *Supreme Court Rules*, B.C. Reg 221/90; *Alberta Rules of Court*, Alta. Reg 390/1968; *Ontario Rules of Civil Procedure* R.R.O. 1990, Reg 194; *Nova Scotia Civil Procedure Rules*.

Along with conferring decision-making power on judges, the rules of adjudication give authoritative status to judicial decisions. Since a judge has to decide whether a rule has been broken, she also has to decide whether a rule *exists*.¹⁶ Consequently, a judge must be equipped to make authoritative statements about what the law is and which rules are valid laws. In turn, this necessitates rules of recognition so that judges can determine whether a rule has legal validity according to some acceptable standard.¹⁷

For Hart, once secondary rules are introduced, a society has a concept of legal validity.¹⁸ Only those primary rules that have adhered to secondary rules of recognition, change, and adjudication are legally valid laws. This basic model explains how primary rules attain their status as law, but leaves open the question of where secondary rules derive their legal status. Hart explains that there is an upward chain of rules of recognition, ending with the 'ultimate rule of recognition.' All the secondary rules are subordinate to one supreme criterion contained in the ultimate rule of recognition. If the validity of a secondary rule is at issue (for instance, someone might question the authority of an administrative tribunal to make a certain decision, thus challenging the validity of the power-conferring secondary rule) then the validity of the secondary rule is tested by moving further up the chain of rules of recognition. Eventually, the inquiry will reach a stopping point, which is the ultimate rule of recognition. For England, Hart describes this ultimate rule of recognition as, "what the

¹⁶ Hart, *Concept of Law*, *supra* note 2 at 97.

¹⁷ *Ibid* at 97: "Indeed a system which has rules of adjudication is necessarily also committed to a rule of recognition of an elementary and imperfect sort. This is so because, if courts are empowered to make authoritative determinations of the fact that a rule has been broken, these cannot avoid being taken as authoritative determinations of what the rules are."

¹⁸ *Ibid* at 103: "We can indeed simply say that the statement that a particular rule is valid means that it satisfies all the criteria provided by the rule of recognition."

Queen in Parliament enacts is law.” There is no further rule that can be referred to in order to assess the legal validity of this ultimate rule of recognition.¹⁹ The question of legal validity ends with this rule, and any question of the derivation of the legal status of the ultimate rule is outside the scope of determining whether a rule has legal status.²⁰

It is this system of primary and secondary rules, Hart asserts, that “deserves, if anything does, to be called the foundations of a legal system.”²¹ There is evidence that a legal system exists when the population generally obeys legally valid laws, and when officials (like legislators and judges) actively accept and adhere to secondary rules that yield valid laws:

There are two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand, those rules of behavior which are valid according to the system’s ultimate criteria of legal validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be

¹⁹ *Ibid* at 107: “Finally, when the validity of a statute has been queried and assessed by reference to the rule that what the Queen in Parliament enacts is law, we are brought to a stop in inquiries concerning validity...”

²⁰ *Ibid* at 107. Hart’s concept of the ultimate rule of recognition may appear simple enough on its surface, but it has proven difficult to apply in contexts outside of 1960s Britain. Assessments of Hart’s theory on the basis of difficulties around the ultimate rule of recognition are beyond my scope, but see, for example, Scott Shapiro, “What is the Rule of Recognition (And Does it Exist)” (2009) Yale Law School, Public Law and Legal Theory Research paper Series no. 181, and Kent Greenawalt, “The Rule of Recognition and the Constitution” (1987) 85 Mich L Rev 621. Both authors examine the opposition to Hart’s concept of an ultimate rule of recognition and provide insightful commentaries on the difficulty of precisely defining Hart’s doctrine of the rule of recognition, and therefore applying it in other jurisdictions.

²¹ Hart, *Concept of Law*, *supra* note 2 at 100.

effectively accepted as common public standards of official behavior by its officials.²²

The development of the primary and secondary rules concept, and the two necessary conditions of a legal system, together indicate both the derivation of legal validity and its implications in Hart's analysis. The status of both primary and secondary rules is derived through adherence to secondary rules. Having that status as law infuses a rule with its authoritative quality: valid laws dictate the acceptable behavior for community members and legal officials, demonstrated by general obedience to primary laws, and acceptance of secondary rules by officials. The status as law, for Hart, implies that a rule is authoritative within a community, and so application and enforcement of that rule is considered justifiable on the basis of its legal validity. That inference can be drawn from Hart's conclusion that judges must be equipped with the secondary rules of recognition so that only the rules that have valid status as law are treated as authoritative – only such rules can authoritatively dictate behaviour, govern legal relationships, and be justifiably applied and enforced in the society. In other words, a judge would be unjustified in applying a rule that does not comply with the secondary rules of recognition and thereby gain legal validity. That suggests that legal validity enables officials to justifiably treat laws as authoritative, in the sense that the laws can be applied to resolve disputes with finality, and can be enforced in the society.

Hart's description of valid law is clearly analogous to how I have described the derivation of valid legal facts in Chapter Two. For both, adherence to some formal requirements results

²² *Ibid* at 116.

in legal validity, and having legal validity brings authoritative implications. As Hart explains, being a valid law implicates that the rule will be generally obeyed, and applied and enforced by officials; similarly, being a valid legal fact implicates that judges are justified in relying on that fact to arrive at an authoritative legal outcome – one that is final, binding and enforceable. In this form, both claims assert that adherence to procedural rules culminates in valid, authoritative legal outcomes (laws or legal facts), but neither substantiates the claim by explaining *why* adherence to secondary or procedural rules justifiably infuses the resultant law or legal fact with the authoritative implications that come with legal validity.

As introduced in Chapter Two, the authoritative implications that are parceled within legal validity demand normative justification.²³ But Hart's concept of law does not provide any. Under Hart's theory, so long as the rule adheres to some secondary rule, it gains status as law, irrespective of the quality of the law itself. The merit of the secondary rules is not relevant to their validity, because their validity is derived from adherence to superior secondary rules that are themselves unsubstantiated, in the sense that within Hart's theory, there is no stipulation about what secondary rules ought to be.²⁴ That being the case, a government could enact a rule that is improper in substance, that accords with the secondary rules in place, and that rule will have status as law. For instance, laws preventing homosexual marriage may be considered immoral by some community members, but they have had legal validity in Canadian society due to their adherence to secondary rules of

²³ This claim, as well as anti-positivist responses, are discussed at some length in Chapter Two.

²⁴ Hart, *Concept of Law*, *supra* note 2 at 107-108, and at 185-186: "Here we shall take Legal Positivism to mean the simple contention that it is in no sense a necessary truth that laws produce or satisfy a necessary truth, that laws produce or satisfy certain demands of morality, though in fact they have often done so."

recognition. The legal validity of such laws was not compromised by any perceived or actual immorality. The same goes for procedural laws. A legal system could have iniquitous procedural laws that have legal validity due to their adherence to superior secondary rules. A valid legal system could exist where, for instance, a rule is passed by the government (thereby satisfying the secondary rules) that only white community members were qualified to be witnesses in courts could be a valid adjudicative procedure, given its adherence to the secondary rules of recognition that exist and apply. Owing to its legal validity, a judge has reason to apply that rule in the course of making a judicial ruling.²⁵

This leads back to the fundamental criticism of notions of formal justice that any proceduralist account of legality must contend with – can consistent adherence to such laws be said to yield legitimate adjudicative outcomes, just because they have legal validity? Since valid laws can, in Hart’s theory, have any substantive character, and since he gives no further explanation for why valid laws nonetheless warrant their status as law, his theory, as I have noted in Chapter Two, is not oriented towards offering a justifiable answer to this critical question.

The express commitment to maintaining a separation between legal validity and the justification for that legality is defended in Hart’s writing. In “Positivism and the Separation

²⁵ I note that Hart tells us that officials, including judges, must actively accept the secondary rules, but he does not provide any reason for what would make a secondary rule legitimately acceptable. Evil officials of an evil regime could ground their acceptance of secondary rules on any self-serving motive. For the same argument, see Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Viking Press, 1963).

of Law and Morals,"²⁶ and in *The Concept of Law*, Hart defends the viewpoint that having legal validity is not, and must not be, dependent on a rule's adherence to some concept of what law ought to be. This is called the 'separation thesis,' referring to the famous theoretical cornerstone of positivism - disjoining legal validity, or the descriptive question of 'what *is* law,' (i.e. what is valid law) from the value-ridden question of 'what *should be* the law' (i.e. what is legitimate law). As Brian Bix has clearly articulated:

The rule of recognition expresses, or symbolizes, the basic tenet of legal positivism: that there are conventional criteria, agreed upon by officials, for determining which rules are and which are not part of the legal system; this in turn points to the separation of the identification of the law from its moral evaluation, and the separation of statements about what the law is from statements about what it should be.²⁷

As I discussed in Chapter Two, the separation thesis is in direct opposition to the claim that legal validity and legitimacy must occur simultaneously because of the authoritative implications that inhere in a rule that has status as law. Accordingly, it is worthwhile to consider and evaluate, in more detail, the positivist insistence on their separation. There are two categories of concerns that support Hart's commitment to separating legal validity and its justification: societal stability and theoretical shortcoming. First, if law and the moral defensibility of law (or the law's legitimacy) were inseparable, Hart advises, then any citizen could conclude that a law does not resonate with his or her morality, so it is not law,

²⁶ H.L.A Hart, "Positivism and the Separation of Law and Morals" (1957) 71(4) *Harvard Law Review* 593 [Hart, "Separation of Law and Morals"].

²⁷ Brian Bix, *Jurisprudence: Theory and Context*, 3d ed (London: Sweet and Maxwell, 2003) at 41.

so it is not authoritative.²⁸ That results in the danger “that law and its authority may be dissolved in man’s conceptions of what law ought to be.”²⁹ What is law would not be universally discernable, resulting in instability. Societal stability depends on a citizen’s ability to recognize authoritative law without resorting to his or her individual moral sentiments.

Along with that practical concern, Hart explains that combining law and morality requires adopting a narrow theoretical concept of law that would exclude all rules that displayed all the other qualities of being law, but were iniquitous. The broader definition, where all rules that adhere to the “formal tests of a system of primary and secondary rules” even if some of these offend morality, is preferable, Hart suggests, because it enables both a recognition and study of abuse of law, which the narrower definition would preclude.³⁰ For instance, as I explain below, for Hart, it would be better to understand the Nazi regime as constituting valid, though immoral law, rather than suggesting that it was not a legal regime at all and precluding those laws from study *as laws*. Hart concludes that practical and theoretical concerns are best addressed by a theory that enables a determination of what rules have status as law in a society, and to state the moral worth of those laws as a distinct declaration, enabling the statement, “this is law, but it is too iniquitous to be applied or obeyed.”³¹

²⁸ The separation thesis is often described as a separation between law and morality. Morality can be understood as the basis on which law can be justified. In the terminology that I have adopted, law’s morality constitutes what I refer to as law’s legitimacy.

²⁹ Hart, *Separation of Law and Morals*, *supra* note 26 at 598.

³⁰ Hart, *Concept of Law*, *supra* note 2 at 209.

³¹ *Ibid* at 208.

Hart's invitation to recognize the possibility of valid laws that are too improper to be obeyed unfolds in his discussion of the anti-positivist sentiments that arose post- Nazi Germany. The Nazi regime, where evils were carried out under the auspices of valid law, resulted in increased conviction that legal validity should be contingent on substantive morality. The issue was brought to the forefront when determining what ought to be done with individuals who had committed immoral acts that were endorsed, or at least, were not contrary to German law at the time. Judges often reasoned, Hart explains, that Nazi laws could be considered illegal due to their moral failure. In that sense, the evil acts endorsed by Nazi rules did not properly bear the status as law at all. Accordingly, people who engaged in evil acts could not escape punishment under the new legal regime by citing the legality of their acts under the Nazi regime. For many, this was a welcome and celebrated defeat of the positivist separation thesis.³²

While Hart recognized the worthwhile cause of lawfully punishing individuals who committed evils during the Nazi regime, for him, the judicial solution led to the improper result of calling something that was factually law, 'not law.' For Hart, the criticism of the thesis that what is posited as law is, in fact, law, "depended upon an enormous overvaluation of the importance of the bare fact that a rule may be said to be a valid rule of

³² Hart, "Separation of Law and Morals," *supra* note 26 at 615-618. Besides Lon Fuller's opposition to Hart's view on this topic discussed later in this chapter, Gustav Radbruch is famous for having 'switched camps,' from positivism to natural law after bearing witness to Nazi rule (but compare with Thomas Mertens, "Radbruch and Hart on the Grudge Informer: A Reconsideration" (2002) 15 Ratio Juris 186). See also, Frederick Schauer, "Positivism as Pariah," in *The Autonomy of Law Essays on Legal Positivism* (Robert George, ed.) (Clarendon Press: oxford, 1996) at 32 questioning the "caricature of positivism as an amoral mandate to unquestioning obedience," as may have been assumed after the Nazi Germany experience or American Fugitive Slave Laws, among others.

law, as if once declared, was conclusive of the final moral question: “ought this rule of law to be obeyed.”³³ What should have been recognized, Hart suggests, is that a valid law can exist in fact, but can also be too immoral to be obeyed and applied.³⁴ The better solution to the post-Nazi Germany problem, for Hart, would have been to accept that there were evil laws during the Nazi regime, and introduce laws in the new regime that permit retroactive punishment, given that many laws during Nazi rule were too evil to be obeyed. Since the new law would comply with the existing rules of recognition, they would have legal validity. For Hart, although retroactivity in law is clearly undesirable, this solution is a lesser evil than declaring that what was in fact valid law was not law at all.³⁵

Through this line of reasoning, Hart suggests that the possibility of valid though intolerably immoral laws is de-problematized by calling for recognition that there is no obligation to recognize the law as authoritative solely on the basis that it is a valid law. This is implicit in Hart’s assertions that a law can be too iniquitous to be obeyed and applied, because if that is the case, then the obligation to obey and apply law depends on external criteria of morality rather than legal validity alone. This, however, results in an internal tension in Hart’s theory. On the one hand, the theory asserts that a rule that is legally valid (i.e. a law) is

³³ Hart, “Separation of Law and Morals,” *supra* note 26 at 618.

³⁴ See David Dyzenhaus, “Dworkin and Unjust Laws” in Wil Waluchow and Stefan Sciaraffa, eds, *The Legacy of Ronald Dworkin* (Oxford: Oxford University Press, 2016) [Dyzenhaus, “Dworkin and Unjust Laws”] for a discussion of the distinction between the perspective of the citizen, who obeys or disobeys laws and the judge, or other official, who applies or refuses to apply laws. As Dyzenhaus explains, Hart suggests in “Separation of Law and Morals” that immoral laws ought not to be obeyed, but does not hold that they must not be applied by judges. In *Concept of Law*, *supra* note 2, Hart’s position is adjusted. There, he formulates his position as “This is law; but it is too iniquitous to be *applied* or obeyed” [emphasis added] at 208.

³⁵ *Ibid.*

authoritative – it will be applied and enforced by officials. But having status as law does not imply that a law’s authoritative quality is warranted, because that depends on some criteria of morality, which is necessarily external to the definition of law. If a law fails to live up to that external standard, then it is unworthy of its authoritative status, and according to Hart, it is in fact *not* authoritative; it is too evil to be obeyed or applied.³⁶

The result is that while the state of the law is discernable without any resort to external moral criteria, citizens need not feel obligated to obey law *just* because it is law, and officials need not feel bound to apply law *just* by virtue of its legal validity, because whether a law should be obeyed or applied ultimately depends on moral considerations of whether a law is ‘too evil,’ which is external to the question of what the law is, as a descriptive matter. This is problematic, because it means that Hart’s theory contains two conclusions that pull in opposite directions: that valid law *is*, by its very nature as law, applicable and enforceable and therefore authoritative for community members; at the same time, it is also not, by its nature alone, necessarily authoritative.³⁷

³⁶ Here, I agree with Dyzenhaus’s explanation of the tension within Hart’s theory: “The deep issue here is the question of the role of authority in Hart’s conception of law. If a central feature of law that any philosophy of law has to explain is law’s authority, legal positivism is faced with the puzzle of unjust law. If the commands of the powerful are incapable of sustaining a claim to be exercised with right on those subject to their power, the commands lack authority, and therefore lose any claim to legal status.” Dyzenhaus, “Dworkin and Unjust Laws,” *supra* note 34 at 146.

³⁷ As I elaborate further below, this point is Fuller’s fundamental complaint against Hart’s theory. See Lon Fuller, “Positivism and the Fidelity of Law – A Reply to Professor Hart” (1958) 71 Harv L Rev 630. It is one of the central features of the positivist versus natural law / anti-positivist debate, as well as a key aspect of debates about the tenability of exclusive versus inclusive legal positivism. See, for instance, contemporary natural law theorist John Finnis, “The Incoherence of Legal Positivism,” 75 Notre Dame L Rev 1613 (2000) for his defense of the claim that “positivism’s attempts to explain the law’s authority

Before elaborating on this difficulty and my response to it, I turn to a discussion of Joseph Raz's theory. Raz has demonstrated a resilient, and arguably even stronger commitment to the separation thesis than Hart. While Hart seems to have adopted an 'inclusive' version of legal positivism, accepting that a community can delineate moral criteria as the secondary rules that give rise to legal validity,³⁸ Raz has advocated 'exclusive' legal positivism, suggesting that moral criteria cannot be necessary and sufficient conditions for legal validity. This position, coupled with the fact that Raz's jurisprudence is focused on the relationship between law and authority, make a critical study of his thinking valuable because my central focus is also the relationship between legal validity, the authority that accompanies it, and the justifiability of that authority which I refer to as legitimacy.

His contributions contain too much breadth and intricacy to summarize briefly, but I have stated my understanding of Raz's jurisprudence below, bearing in mind my goal of demonstrating that the difficulty noted in Hart's approach above is paralleled in Raz's model of legal validity as well. After discussing Raz's stand, I will provide my diagnosis for the problem encountered in both theories, and explain why the positivist approaches

are doomed to fail" at 1608. And see Jules Coleman, "Authority and Reason," in Robert George ed, *The Autonomy of Law: Essays on Legal Positivism*, (Oxford: Clarendon Press, 1996) for a defense of a form of inclusive legal positivism called incorporationism on the basis that the normative justification of the authority of law is not accounted for in exclusive legal positivism [Coleman, "Authority and Reason"].

³⁸ Responding to Ronald Dworkin's criticism, Hart notes in his Postscript in *The Concept of Law*, *supra* note 2: "I expressly state both in this book and in my earlier article on 'Positivism and the Separation of Law and Morals' that in some systems of law, as in the United States, the ultimate criteria of legal validity might explicitly incorporate besides pedigree, principles of justice or substantive moral values, and these may form the content of legal constitutional restraints" at 247.

advanced by Hart and Raz do not further the goal of delineating the demands of legitimate adjudicative fact-finding. The solution, I suggest, is turning to a substantiated proceduralist model for legal validity that contains an in-built justification for the authoritative implication that accompanies legal validity. This conclusion marks the close of Part 1 of this Chapter, and prompts my turn to Fuller's and Habermas's jurisprudence in Part 2.

B. The Legal Theory of Joseph Raz

i. Legal Validity and its Implications

Raz's concept of law as a system of rules is similar to Hart's, but hinges more expressly on law as an authoritative structure.³⁹ For Raz, political communities are societies that authoritatively decide how their members should act. Rules that are endorsed by the political community, evidenced by the relevant actions of legal institutions, have status as law.⁴⁰ This is what Raz refers to as the "sources thesis": what the law is (i.e. the existence

³⁹ Demonstrating his alignment with Hart's theory, Raz summarizes his position on the validity of law in Joseph Raz, *Authority of Law* (Oxford: Oxford University Press, 2009) at 150 [Raz, *Authority of Law*] as follows: "The legal validity of a rule is established not by arguments concerning its value and justification but rather by showing that it conforms to tests of validity laid down by some other rules of the system which can be called rules of recognition. These tests normally concern the way the rule was enacted or laid down by a judicial authority. The legal validity of rules of recognition is determined in a similar way except for the validity of the ultimate rule of recognition which is a matter of social fact, namely those ultimate rules of recognition are binding which are actually practiced and followed by the courts." At footnote 10: "I am here following Hart's doctrine of the rule of recognition in a slightly modified form."

⁴⁰ Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (New York: Oxford University Press, 2009) at 101.

and content of law) is fully determined by its social sources – the law-conferring institutions in the society.⁴¹

A rule that comes from the appropriate source in a given society gains status as law. Gaining status as law marks a “decisive moment” where a standard of behavior becomes authoritative for the community - at that moment, any debate as to whether that rule is authoritative is settled.⁴² That authoritative quality becomes the reason that community members act in accordance with a legal directive:

law provides a reason for action for its subjects through being a decree laid down or endorsed by a legitimate authority. Its authoritative nature is itself sufficient to establish that the law is reason for compliance for its subjects, and that independently of and in addition to any sanctions or incentives it may provide.⁴³

The idea of an authoritative decree becoming the reason for action becomes clearer through an explanation of Raz’s conception of what constitutes legitimate authority.⁴⁴ Legitimate authority is achieved when it can be said that if a person follows the directives of the

⁴¹ For a detailed discussion of the social thesis which Raz dubs the ‘sources thesis,’ see Raz, *Authority of Law*, *supra* note 39 at 37-52.

⁴² Raz, *Authority and Interpretation*, *supra* note 40 at 109: “The authoritative laying down of standards is the decisive moment in the legal process not merely because in it new reasons are created. It is the decisive moment because those new standards, those new reasons, are to put an end to the argument and struggle about what is to be done....The pivotal place of the law in the organization of society is precisely in its authoritative nature. That is why I can say that for the time being, that is while it is in force, the law resolves the argument and the struggle about how things should be in society.”

⁴³ Raz, *Authority and Interpretation*, *supra* note 40 at 108.

⁴⁴ See generally, Raz, *Authority of Law*, *supra* note 39 at 1-33.

authority, their actions will tend to conform with reason better than they would if he or she made independent decisions on the best course of action in every situation. In accepting an authority as legitimate, a person acknowledges that heeding the directives of that authority will result in better-reasoned decisions than not heeding those directives. Since adherence to the authority is supposed to maintain better conformity with reason, the directives of that authority can justifiably pre-empt the person's other reasons for acting in a particular way.⁴⁵ Accordingly, a person can do something or refrain from doing something *because* (i.e. 'for the exclusive reason that') the authority so orders.⁴⁶

Consider, for instance, the student-teacher relationship. When a student accepts the authority of the teacher as legitimate, in Raz's conception, it means that the student will heed the directives of the teacher because she believes that those directives will result in better reasoned action compared to not following the teacher's directives. In that context, where the student has accepted the legitimacy of the teacher's authority, if the teacher directs the student to read a certain book, for example, the student can heed that directive for the exclusive reason that the teacher has so directed, without assessing for herself whether to read the book or not. In the same way, a citizen who accepts the legitimate

⁴⁵ Raz, *Authority and Interpretation*, *supra* note 40: "In postulating that authorities are legitimate only if their directives enable their subjects to better conform to reason, we see authority for what it is: not a denial of people's capacity for rational action, but simply one device, one method, through the use of which people can achieve the goal (*telos*) of their capacity for rational action, albeit not through its direct use," at 140.

⁴⁶ Joseph Raz, "The Problem of Authority: Revising the Service Conception" (2006) 90 *Minn L Rev* 1010, Reprinted in Raz, *Authority and Interpretation*, *supra* note 40 at 126.

authority of the legal system can say, 'I do 'X' because 'X' is the law,' without resorting to any other reason for doing 'X'.⁴⁷ In Raz's words:

The authority's directives become our reasons. While the acceptance of the authority is based on belief that its directives are well-founded in reason, they are understood to yield the benefits they are meant to bring only if we do rely on them rather than on our own independent judgment of the merits of each case to which they apply.⁴⁸

For Raz, legal systems, by their nature, claim to have legitimate authority, and claim that the rules and standards endorsed by their legal institutions are legitimately authoritative.⁴⁹ While Raz maintains that it is essential to law that it *claims* legitimate authority and be capable in principle of having it, a vital feature of his theory is that actually having

⁴⁷ The critique of Raz's position that I am offering now regards his notion that legal validity is contingent on a *claim* of legitimate authority but not on actual achievement of that legitimate authority. At this stage, contesting or endorsing the particulars of Raz's conception of what makes authority legitimate is not necessary. I will, however, return to Raz's idea of aligning conformity with reason and legitimacy when I turn to substantiating my own conception of legitimate adjudicative fact-finding in Chapter Four. Many authors have criticized Raz's perspective on authority from a variety of angles. For a sampling, see Stephen Lukes, "Perspectives on Authority" in Joseph Raz, ed *Authority*, (New York Press: New York, 1990) at 203-217; Ronald Dworkin, "Thirty Years On" (2002) 114 Harv Law Rev 1655 at 1671-1676; Kenneth Himma, "Just cause you're Smarter Than me Doesn't Give You a Right to Tell Me What to Do!" (2007) 27 Oxford J Legal Stud 121.

⁴⁸ Joseph Raz, *Practical Reason and Norms*, 2d ed (Princeton University Press: Princeton, 1990) at 193.

⁴⁹ Raz, *Authority and Interpretation*, *supra* note 40 at 104. See also Raz, *Ethics in the Public Domain*, *supra* note 41 at 194-221. In Raz, *Authority of Law*, *supra* note 39 at 33, Raz states, "The law presents itself as a body of authoritative standards and requires all those to whom they apply to acknowledge their authority."

legitimate authority is only an aspiration. It is not a necessary factual condition for the existence of law.⁵⁰

In other words, in order to be classified as a legal system, the Canadian political system must claim to have legitimate authority. That claim contains an assertion that when people adhere to its directives, their actions will maintain better conformity with reason. Still, the government may end up passing laws that do not, in fact, ensure the best-reasoned action. Take for instance the laws that criminalize all forms of assisted suicide. Some would argue that adherence to those criminal laws would not actually ensure the most reasonable actions. If that were true, then those laws would maintain legal validity, because they emerged from a legal system that claims legitimate authority, but their authority would not be legitimate, *in fact*.

For Raz, many or even all the citizens and officials of the political community may believe that the law has legitimate authority and therefore act according to its directives, but it does not follow that law actually does have the legitimate authority that it asserts. Neither the assertion of legitimacy nor the legal subject's acceptance of the law in fact *justifies* law's authority. Law's authority is only actually justified if it is in fact legitimate, in the sense that it best enables conformity with reason.⁵¹ Accordingly, under Raz's theory, like Hart's, legal validity is not contingent on the justifiability of law. Of course, Raz commits to the

⁵⁰ Raz, *Authority and Interpretation*, *supra* note 40 at 104, 111. And Raz, *Ethics in the Public Domain*, *supra* note 41 at 215: "Though a legal system may not have legitimate authority, or though its legitimate authority may not be as extensive as it claims, every legal system claims that it possesses legitimate authority."

⁵¹ Raz, *Authority and Interpretation*, *supra* note 40 at 112.

descriptive truth that law *is* authoritative on the basis of its legal validity. But like Hart, he maintains that its authoritative quality is not necessarily legitimate by virtue of legal validity.

Much like Hart, Raz is adamant that the question of law's justification must remain distinct from the question of what constitutes a valid law in a particular community. In fact, it is in-built within Raz's theory that law is identifiable without resort to any deliberation over what the law should be. For Raz, the authority of an institution is derived from its *claim* that adhering to its directives will better enable conformity with reason compared with disregarding the directives and attempting to conform to right reason on our own. This requires that the subjects of the authority be able to establish the content of the law. They can discern that content, Raz explains, "by establishing which rules were made or endorsed by the authorities."⁵² Subjects must not have to establish the legitimacy of the law's authority, because the very purpose of the institutions of authority is to pre-empt that reasoning.⁵³ Accordingly, the question of whether or not a rule has the status of law must be independent of considerations of what the law ought to be, which in Raz's conception is that it should enable conformity with reason.⁵⁴

⁵² *Ibid* at 114.

⁵³ Raz makes this point in *Ethics in the Public Domain*, *supra* note 40 at 219 as follows: People who are subjects to an authority "can benefit by its decisions only if they can establish their existence and content in ways which do not depend on raising the very same issues which the authority is there to settle."

⁵⁴ A similar argument is captured in Richard Friedman, "On the Concept of Authority in Political Philosophy" in R. Flathman, ed *Concepts in Social and Political Philosophy*, (New York: Macmillan, 1973) at 132 as follows, "[I]f there is no way of telling whether an utterance is authoritative, except by evaluating its contents to see whether it deserves to be

Consider the example of the teacher and the student again. When a student takes the teacher as a legitimate authority, she would not herself consider the legitimacy of each (or any) of the teacher's directives before acting on them. Doing so would defeat the purpose of the teacher's authority, which is to steer the student towards more reasonable actions than the student would take absent the teacher's directives. In the same way, a citizen should not have to evaluate the legitimacy of each law before considering it valid, because that defeats the purpose of law pre-empting that very reasoning. So, Raz's theory contains a clear and strong endorsement of the separation thesis: the validity of law and its legitimacy are separate questions.⁵⁵

Raz opines that opposition to the separation thesis is premised on the assertion of a necessary moral duty to obey the law. The existence of a duty to obey law implies a requisite connection between law and morality, because it would be contradictory to say that there is a moral duty to obey that which is immoral. Therefore, whatever is law must actually have the moral legitimacy that it claims.⁵⁶ Raz agrees that only legitimate authority

accepted in its own right, then the distinction between an authoritative utterance and advice or rational persuasion will have collapsed."

⁵⁵ Raz, *Authority and Interpretation*, *supra* note 40 at 114. Through his assertion that moral criteria can be neither necessary nor sufficient conditions for determining whether a rule has status as law, Raz sides with proponents of 'exclusive legal positivism'. Contemporary debates around inclusive versus exclusive legal positivism contain elaborate discussions of the claim that law does not have any *necessary* dependency on morality. For more on those discussions, see Kenneth Einar Himma, "Inclusive Legal Positivism," and Andrei Marmor, "Exclusive Legal Positivism," both in Jules Coleman and Scott Shapiro eds., *The Oxford Handbook of Jurisprudence and Philosophy of Law*, (Oxford: Oxford University Press, 2002); Jules Coleman, "Negative and Positive Positivism" (1982) 11 J Legal Stud 139.

⁵⁶ Raz, *Authority and Interpretation*, *supra* note 40 at 114.

can “vindicate a general obligation to obey the law in any country.”⁵⁷ Flowing from this assertion, Raz maintains that since the existence of a legal system and the status as law is not, and cannot be, contingent on the legitimacy of its authority, there also must not be any general obligation to obey law purely on the basis of its status as law.⁵⁸ Summing up his position in this respect, Raz states:

law is good if it provides prudential reasons for action where and when this is advisable and if it marks out certain standards as socially required where it is appropriate to do so. If the law does so properly, then it reinforces protection of morally valuable possibilities and interests and encourages and supports worthwhile forms of social cooperation. But neither of these legal techniques even when admirably used gives rise to an obligation to obey the law. It makes sense to judge the law as a useful and important social institution and to judge the legal system good or even perfect while denying that there is an obligation to obey its laws.⁵⁹

As noted above, Hart similarly acknowledged the possibility of valid laws that are morally reprehensible, and like Raz, reasoned that there is no necessary *moral* obligation to obey law on the basis of its status as law alone.

⁵⁷ Joseph Raz, “About the Morality and the Nature of Law,” in Joseph Raz, *Authority and Interpretation*, *supra* note 40 at 175.

⁵⁸ See generally, Raz, *Authority of Law*, *supra* note 39 at 233-249. Raz opens the chapter at 233 as follows: “I shall argue that there is no obligation to obey the law. It is generally agreed that there is no absolute or conclusive obligation to obey the law. I shall suggest that there is not even a prima facie obligation to obey it. Such a view may be the outcome of a very pessimistic outlook of the value of law and the possibilities of its reform. My argument will not be based on such pessimistic assumptions. I shall argue that there is no obligation to obey the law even in a good society whose legal system is just.”

⁵⁹ Raz, *Authority of Law*, *supra* note 39 at 249 [emphasis added].

By revoking any moral obligation of loyalty to the law, Hart and Raz effectively assert that there is in no *moral* dilemma when a person is faced with a valid law that is too morally reprehensible to be obeyed. The moral evaluation of the law is made by reference to considerations that are external to the question of legality.⁶⁰ David Dyzenhaus explains this point as follows: “when positivists use the example of a particular immoral law, they seem to assume that there is a legally unproblematic fact of the matter about the law’s immoral content, i.e. that it has a determinate content that is morally but not legally problematic.”⁶¹ Dyzenhaus goes on to explain criticisms of this position, which he attributes to Lon Fuller and Ronald Dworkin,⁶² as follows:

What legal positivism misses in this situation is that for there to be a genuine problem for the citizen, the citizen must find him or her self in a moral dilemma – pulled in different directions by conflicting moral values. That entails that law must exert its own independent moral force in order to create the dilemmas....⁶³

The criticism seems to go that positivism improperly disregards the fact that an individual *does* experience a dilemma when faced with an immoral law, which suggests that law *does* have some sort of moral pull. The existence of that moral pull indicates that there must be some necessary moral content in law. This may be persuasive, but my own assertion that

⁶⁰ David Dyzenhaus, *Hard Cases in Wicked Legal Systems: Pathologies of Law*, 2d ed (Oxford: Oxford University Press) at 167 [Dyzenhaus, *Wicked Legal Systems*].

⁶¹ *Ibid.*

⁶² Lon Fuller, “Positivism and Fidelity to Law – A Reply to Professor Hart” (1957) 71 Harv L Rev 630 and Ronald Dworkin, “A Reply” in Marshall Cohen ed, *Ronald Dworkin and Contemporary Jurisprudence* (New Jersey: Roman and Allenheld, 1984).

⁶³ Dyzenhaus, *Wicked Legal Systems*, *supra* note 60 at 167.

legal validity must contain normative legitimacy does not rest on this critique, and is also not contingent on the existence of a moral obligation to obey the law. Rather, my assertion is founded on the descriptive reality that both Hart and Raz point out: having status as law brings authoritative implications – the law is applicable and enforceable on the basis of its legal validity. Without legitimacy, that authority is ungrounded and unjustified.

Consider a citizen who has an ailing mother who is severely suffering and wishes to end her life. He is faced with the law prohibiting euthanasia or assisted suicide, which he considers an immoral law, given his circumstances. He interprets himself as having a moral obligation to disobey the law, and assist in his mother's death. At the same time, he is confronted with a distinct legal obligation to obey the law. That legal obligation is authoritative in the society – it is a binding and enforceable obligation on the basis of its legal status. Even if there is no moral obligation to obey the law, the son is nonetheless placed in a dilemma in terms of what action he should take, because of the authoritative quality of law, *whether that authoritative quality is moral or not*: if he does not assist in his mother's death, he prolongs her suffering, which he may reasonably consider immoral; if he fulfills his moral duty to relieve his mother, however, he faces legal consequences because of the legal validity of the criminalization of assisted death. In this situation, even if the son does not consider obedience to the law to be a moral duty, the validity of the law causes him a dilemma.

The fact that this dilemma can be imposed on a citizen requires justification. If not, then law, due to its authoritative quality, erodes a person's ability to engage in autonomous moral reasoning and take action purely on the basis of his own moral reasoning, without

any justification.⁶⁴ The son's moral obligation, at least in his own interpretation, is to relieve his mother, but the legal validity of the laws prohibiting assisted death prevents him from acting purely on the basis of his moral reasoning. For me, this is the most persuasive reason for why status as law requires in-built justification, or legitimacy.⁶⁵

For both Hart and Raz, having legal status brings the definitive implication that the rule is authoritative – both theorists are clear that as soon as a rule has legal validity, that rule will be enforced and applied to members of the community. But since they do not approach legal validity as a normative enterprise, they move to deny any moral implications that may come with having status as law. This denial also leaves them unable to account for the

⁶⁴ R.P. Wolff has offered a defense of anarchism upon a similar conclusion: "If the individual retains his autonomy by reserving to himself in each instance the final decision whether to co-operate, he thereby denies the authority of the state; if, on the other hand, he submits to the state and accepts its claim to authority then...he loses his autonomy." [Wolff, *In Defense of Anarchism*, (Berkeley, CA: University of California Press, 1970) at 9.] See also Neil MacCormick, "The Concept of Law and *The Concept of Law*" in Robert George ed, *The Autonomy of Law: Essays on Legal Positivism*, (Oxford: Clarendon Press, 1996) at 170 for a discussion around the distinction between legal obligations and moral obligations on the basis that "law is heteronomous, binding us from without, while morality is autonomous, binding us by our own reflective judgment and will."

⁶⁵ A number of theorists have denied an obligation to obey the law, while maintaining that law can still be entitled to have authority. See for example, M.B.E. Smith, "Is There a Prima Facie Obligation to obey the Law" (1972-1973) 82 Yale L J 950; William Edmundson, *Three Anarchical Fallacies* (New York: Cambridge University Press, 1998) and "Legitimate Authority without Political Obligation" (1998) 17(1) Law and Phil 43; A.J. Simmons, *Moral Principles and Political Obligations* (Princeton: Princeton University Press, 1979); and for a comprehensive review of the state of the discussion around the existence of a duty to obey the law see Leslie Green, "Law and Obligations" in Coleman and Shapiro, eds, *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2002).

legitimacy of the authoritative implications that come with legal validity. This gap is why I consider Hart's and Raz's positivist approaches problematic.⁶⁶

So far, my goal has been to outline the positivist approach to explaining legal validity, and highlighting my contention with the insistence on separating the validity of laws and their legitimacy. I have not yet commented, however, on those positivist notions that I consider agreeable. In the next section, my aim is to reconcile the meritorious aspects of the positivist separation thesis with my resolve that legal validity requires normativity in order to account for the authoritative quality of law, whether that law is substantively good or bad. This, as I explain below, paves the road for my turn to a substantiated procedural model for legal validity as well as its legitimacy.

C. Merging Description with Normativity, Validity with Legitimacy

Hart and Raz, and any proponent of the separation thesis, will hold that conceiving of law and its evaluation as wholly distinct is descriptively accurate, and essential to maintaining the discernibility of law. It enables individuals to know what the law is without having to evaluate it as good or bad, moral or immoral. In modern multi-moral communities where individuals may reasonably disagree on their evaluation of the law, this seems sound and

⁶⁶ Scholars have pointed to conceptual tensions arising from the idea that law claims legitimate authority without necessarily achieving it, but still maintains *de facto* authority. See for example: Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon Fuller* (Oxford and Portland, Oregon: Hart Publishing, 2012) [Rundle, *Forms Liberate*] at 154-159; W. J. Waluchow, *Inclusive Legal Positivism*, (Oxford University Press: Oxford, 1994) at 129-140; Kenneth I Himma (2001) "The Instantiation thesis and Raz's Critique of Inclusive Positivism" 20 *Law and Phil* at 61-79; Dale Smith, "Must the Law be Capable of Possessing Authority" (2012) 18 *Legal Theory* 69; and Jules Coleman, "Authority and Reason," *supra* note 37.

necessary.⁶⁷ Moreover, if the question of ‘what is the law’ depended on subjective deliberation on the merits of that law, then the authoritative rules that govern a society would be ambiguous. Applying and enforcing ambiguous or uncertain rules cannot be considered fair.⁶⁸ I share, therefore, Hart’s and Raz’s commitment to the discernibility aspect of the separation thesis – what rules have status as law in a society surely must be discernable by those for whom the law is authoritative. Owing to their commitment to the discernibility element, Hart and Raz hold that having status as law cannot depend on the justifiability of the content of a rule. This seems to be descriptively and logically accurate, as I noted in Chapter Two. It does not follow, however, that legal validity can be devoid of any necessary normativity altogether, as Hart and Raz hold.

As outlined above, in both Hart’s and Raz’s theories, valid law is authoritative for community members, but it is not necessary that valid law deserves its authoritative status. Accordingly, a valid law may lack moral aptness or any kind of legitimate authority.⁶⁹ Consequently, there is a gap between the ideal situation where all valid law would have legitimate authority, and the inescapable reality that a valid law may be immoral or does not enable better conformity with reason, in Raz’s sense. This means that there is the

⁶⁷ See Jurgen Habermas, *Between Facts and Norms: Contributions to Discourse Theory of Law and Democracy* (Cambridge, Massachusetts: MIT Press, 1996) at 200: “in a pluralistic society in which various belief systems compete with each other, recourse to a prevailing ethos developed through interpretation does not offer a convincing basis for legal discourse. What counts for one person as a historically proven topos is for another ideology or sheer prejudice.” [Habermas, *Between Facts and Norms*].

⁶⁸ As I note below, clarity is one of Lon Fuller’s criteria for legal validity and is therefore an essential characteristic of law.

⁶⁹ For example, Raz, *Authority and Interpretation*, *supra* note 40 at 112: “the law can fail morally. It may not justify the moral claims it is making. If it were not so then the very idea of criticizing the law, or at least of criticizing it on moral grounds would be incoherent.”

inevitable potential that a 'bad' law gains legal validity, and on that basis, it will be applied and enforced in a society. Hart's and Raz's theories demonstrate this gap, but their projects are not directed towards offering any normative justification for it. In my view, however, status as law must be substantiated in some way in order to legitimize the very fact that law may not live up to its substantive ideal, whatever that ideal may be, yet it can still bear the authoritative implications that are parceled within having status as law.

I am concerned with the justification for this gap, because that justification can indicate where the legitimacy of the status of law, in its own right, is ultimately derived from. That inquiry is analogous to my ultimate inquiry about the legitimacy of adjudicative fact-finding. My goal is to answer why adjudicative outcomes are legitimate when they are dependent on a process of fact-finding that allows for the potential that valid legal facts are factually inaccurate. I am seeking the normative justification for the gap between the obvious ideal of accurate fact-finding all the time, and the reality of factual uncertainty that causes us to accept that legal facts may not be substantively accurate, but nonetheless, valid.

This gives rise to the question of how the discernibility element of the separation thesis can be reconciled with the fact that status as law requires some justificatory substantiation. The reconciliation is possible by abandoning Hart's and Raz's commitment that the legitimizing virtue of law can only be located within its substantive content, and by shifting the location of the virtue into the process of *becoming* law. Through this shift, the justifying virtue that vindicates law's status, and the gaining of that status occur simultaneously because they are fused together. In other words, resolving the descriptive accuracy of the positivist approach against the problem of its substantive hollowness is possible through a thinly

substantiated procedural model that acts as a criterion for legal validity *and* the legitimacy of the authority that comes with legal validity, while simultaneously providing a justificatory reason for legal authority. This criterion will then provide a normative basis for the fact that a law, based on its legal validity, is applicable and enforceable in a community *even if* a community member disagrees with the law in substance.

By ensuring that the process of a rule becoming law is virtuous, the outcomes of that procedure emerge endowed with a form of legitimacy as a consequence of their being a product of a worthy procedure. The virtue located within the legal procedure transfers into the law, thus providing the law with some substantiation to justify its authoritative status. Only such an approach to legal validity can maintain that the question of what *is* law remains discernable without resort to justifying its content, because the law is whatever emerges from acceptable legal procedures. Simultaneously, this approach avoids law being devoid of any normativity. The substantiated procedural approach opens an avenue to responding to the fact that a law's substantive morality may be questionable, its content may be disagreeable, or even unjustified in a community member's reasonable opinion, and on the basis of his or her autonomous moral reasoning, a community member may decide to act in contravention of it, but the law is nonetheless legitimate and justifiably applicable and enforceable for all community members.

There is one point worth clarifying before proceeding: I do not suggest that a thinly substantiated procedural model invokes a moral obligation to obey the law. That is, even in a system that has a procedurally legitimate legal system, I do not suggest that community members *should* obey the law in a moral sense. My claim is that when a law is legitimate, its

authority is normatively grounded, so there is a justificatory reason for treating the law as authoritative even though a person might reasonably think that he or she has no *moral* obligation to obey that law.⁷⁰

Ending up with the claim that only a substantiated proceduralist account can provide an adequate explanation for the legitimacy of law's status as law reveals that my inquiry into the legitimacy of adjudicative outcomes cannot rest on the mere 'status as law' of adjudicative procedures. Although primary rules (to borrow Hart's terminology) may be legitimized based on their status as law, my inquiry refers to the propriety of procedural or secondary rules of adjudication. Adoption of a proceduralist theory of the legitimacy of law means that those procedures, which themselves must give rise to valid and legitimate law, must substantively embody the very same virtue that legitimized their own status as law. Being a product of a virtuous procedure can render any law worthy of its status as law, despite its potential substantive moral failing; in the same way, legal facts can be considered worthy of grounding adjudicative decisions through the virtues located in the process of adjudicative fact-finding, despite their potential for substantive inaccuracy.

My next step is to consider what virtue the procedure must reflect in order to support its legitimizing role. Essentially, this step can be described as a substantiation of Hart's foundational idea that laws are valid based on their adherence to secondary rules. I criticized Hart's theory because he does not provide any reason why adherence to the

⁷⁰ This is a point of divergence between Lon Fuller's jurisprudence and my understanding, as I explain further below.

secondary rules legitimately provides laws with their authoritative status. That lack, I suggested, rendered his theory descriptively accurate, but normatively hollow. I turn now to reviewing the contributions of two theorists who have offered a substantiation: Lon Fuller and Jurgen Habermas. Both authors have concluded that legal validity requires in-built normative justification, legitimacy, which serves as the reason that community members can rationally assent to law's authority.

Part 2: Proceduralist Paradigms: Lon Fuller and Jurgen

Habermas

In this Part, my first goal is to demonstrate how Lon Fuller's and Jurgen Habermas's insights support the assertion that gaining legal validity must simultaneously entail gaining legitimacy. My second aim is to delineate Fuller's and Habermas's conceptions of the source of law's legitimacy. The cornerstone of both accounts, in my interpretation, is that legal subjects must have a rational reason to assent to the fact of law's authoritative nature – that it will be enforced and applied in the community. That reason is law's legitimacy, and it is derived from the legal system's respect for its subjects as rationally acting autonomous agents. That commitment is demonstrable within lawmaking procedures. Not only do Fuller's and Habermas's accounts embolden the claim that law's legitimization occurs in the procedural arena; they also provide the substantive qualities that legal procedures must embody in order to play their role of legitimizing their emergent outcomes.

A. The Legal Theory of Lon Fuller

i. Why Law needs Legitimacy

My reactions to Hart's approach parallel Fuller's response to Hart in, "Positivism and Fidelity to Law – A Reply to Professor Hart."⁷¹ Ultimately, Fuller complains of lack of substantiation in Hart's theory, similar to my complaint that the positivist perspective leaves the status as law hollow. The central theme in Fuller's response to Hart in their famous 1958 exchange is that a complete concept of law must contain a reason that law warrants its demand for the fidelity of its subjects. According to Fuller, while Hart maintains that law is presumptively authoritative and requires obedience, his concept of law does not delineate any reason for those qualities, it only asserts them. On that basis, Fuller finds Hart's concept of law inadequate:

Professor Hart's thesis as it now stands is essentially incomplete and ... before he can attain the goals he seeks he will have to concern himself more closely with a definition of law that will make meaningful the obligation of fidelity to law.⁷²

And later,

I do not think it is unfair to the positivistic philosophy to say that it never gives any coherent meaning to the moral obligation of fidelity to law.⁷³

⁷¹ Lon Fuller, "Positivism and Fidelity to Law – A Reply to Professor Hart" (1957) 71 Harv L Rev 630 [Fuller, "Reply to Hart"].

⁷² *Ibid* at 634-635.

⁷³ *Ibid* at 656.

As the above excerpts indicate, Fuller maintains a presumption that there is a moral obligation of loyalty to the law. That presumption leads him to conclude that there must be some moral quality about law that vindicates the subject's moral obligation of obedience to it. As noted previously, I do not share the presumption that law necessarily invokes a moral obligation of fidelity, and my derivation of the claim that law requires legitimacy does not depend on that presumption. But I share Fuller's notion that law does, by its nature, demand and enforce fidelity, and the positivist conception of law falls short insofar as it refuses to vindicate that demand.

In his "Reply to Hart," Fuller reveals that he anticipated (erroneously) that Hart would arrive at the conclusion that the legitimizing virtue of law is located within the procedures of lawmaking, given Hart's conclusions that "the foundation of a legal system is not coercive power, but certain 'fundamental accepted rules specifying the essential lawmaking procedures.'"⁷⁴ Considering that legal validity hinges on those lawmaking procedures, Fuller's surprise that Hart leaves the question of the necessary nature of those procedures undefined is understandable.⁷⁵ The result is that Hart's concept of the status as law remains empty, leaving Fuller to wonder, "how are we to define the words 'fundamental' and

⁷⁴ *Ibid* at 639.

⁷⁵ The same surprise is shared by Dan Priel in "Reconstructing Fuller's Argument against Legal Positivism" Osgoode Hall Law School Comparative Research in Law and Political Economy Research Paper Series no. 16/2013 at 8: "Once Fuller's real position is acknowledged, it is Hart's view that appears surprising, or at least incomplete. It is surprising because it suggests that the considerations relevant for the first step – Hart's secondary rules – are utterly different from the factors relevant for the second step – the principles of legality. While this view is logically possible, it appears odd without further argument, and one that Hart never provides."

'essential' in Professor Hart's own formulation?"⁷⁶ These words require definition if there is to be a comprehensive concept of legal validity. Fuller's central contribution can be seen as providing some definition to these phrases, and thereby arriving at a richer concept of law that has in-built substantiation or legitimacy.

The seeds of this contribution are planted in Fuller's "Reply to Hart" when he discusses "the Morality of Law Itself".⁷⁷ Suggesting that Hart's position can be conceived as drawing a distinction between order (law) and good order (good law), Fuller proposes that order itself (whether good or bad) has a morality of its own. Defining the morality of order amounts to giving substance to Hart's 'fundamental' and 'essential' procedural rules of lawmaking. Even a tyrannical monarch, Fuller explains, would have to follow certain rules of form to achieve order. For instance, he would have to ensure that he rewards what he says he will reward, and punish what he says he will punish, whatever it is that warrants reward or punishment under his rule. And whatever his orders are in substance, they must be discernable, so the subjects know what is required of them. If such rules are not adhered to, the Monarch's decrees would hold no meaning, and order would not be achieved.⁷⁸ The formal principles that are necessary to achieve order at all, Fuller calls the implicit morality of order, or the internal morality of law. These formal principles, Fuller suggests, are the rules that make law possible.

⁷⁶ Fuller, "Reply to Hart," *supra* note 71 at 641.

⁷⁷ *Ibid* at 644.

⁷⁸ *Ibid* at 644-5.

In the “Reply to Hart,” Fuller introduces his theme that respecting the internal morality of law is essential to both gaining status as law and warranting that status. But he does not suggest that adhering to those principles makes law necessarily good: “The morality of order must be respected,” Fuller explains, “if we are to create anything that can be called law, even bad law”.⁷⁹ In his opening, Fuller also alludes to the possibility of bad law in his articulation of the two dimensions that must be explained in order to achieve a meaningful concept of law:

If laws, even bad laws, have a claim to our respect, then law must represent some general direction of human effort that we can understand and describe, and that we can approve in principle even at the moment when it seems to us to miss its mark.⁸⁰

Fuller’s insistence that law’s demand for loyalty must be defended requires him to argue that in order to properly have status as law, law must have some in-built virtuous quality that vindicates its authoritative status. Translated into the terminology that I have adopted here, Fuller’s claim is that valid law requires legitimacy. At the same time, evidenced by his clear acceptance of the possibility of ‘bad’ law, Fuller acknowledges that legal validity cannot be contingent on substantive morality. These commitments clearly map onto my view outlined above that there must be some source of legitimacy built into the status as law that can accommodate the potential for valid law that may be reasonably judged as bad.

⁷⁹ *Ibid* at 645, my emphasis.

⁸⁰ *Ibid* at 632.

Fuller locates the requisite virtue of law within the formal principles of lawmaking and calls it the internal morality of law:⁸¹

What I have called the internal morality of law is in this sense a procedural version of natural law...The term “procedural” is, however, broadly appropriate as indicating that we are concerned, not with the substantive aims of legal rules, but with the ways in which a system of rules for governing human conduct must be constructed and administered if it is to be efficacious and at the same time remain what it purports to be.

The internal morality of law is, for Fuller, the bridge between law requiring substantive morality and law being devoid of justification altogether. Given that Fuller locates the justifiability of law in the formal principles of lawmaking, my goal of determining the virtue that enables procedural/formal propriety to play its legitimizing role will be furthered by exploring and evaluating his internal morality of law proposal, which becomes his central theme in his book, *The Morality of Law*, which I turn to now.

ii. Locating Legitimacy in Fuller’s Account: The Internal Morality of Law

The principles of the internal morality of law that Fuller first introduces in his “Reply to Hart” in 1958 are further developed in his book, the *Morality of Law*. His approach involves analyzing the elements that make law valid, or, the elements of legality. As I demonstrate further below, the overarching implication that he derives from those elements is that the principles that make law possible are all underpinned with a requirement that lawmakers respect their subjects as rationally acting agents. Law is infused with that virtue as a result

⁸¹ Lon Fuller, *Morality of Law* (New Haven and London: Yale University Press, 1964) at 96-97 [Fuller, *Morality of Law*]

of being produced through adherence to the formal principles of legality, or the internal morality of law that Fuller delineates. Thereby, Fuller provides a reason that subjects can rationally accept the law just on the basis that it is law, even though they may not appreciate it in substance.

Conceiving of law as the “enterprise of subjecting human conduct to the governance of rules,”⁸² Fuller maintains that a system of governance that is incapable of meaningfully enabling citizens to govern their conduct cannot be considered a legal system at all. With this purposive concept of law as his starting point, Fuller discerns eight principles that are inherent to valid law, and that must be respected by lawmakers if a system of rules that is properly a ‘legal system’ is to come about. Taken together, these eight principles of legality reflect the internal morality of law, and overall compliance with each of them is a prerequisite to the existence of law at all.

Fuller unveils the eight principles by relating an anecdote of King Rex, who sets out to become a successful lawmaker. The story unfolds as a dialogue between Rex and his subjects, foreshadowing Fuller’s unique commitment that law cannot be conceived as a one-way flow of power but instead, as a two-way interaction where both parties have certain expectations of one another. In the course of his rule, Rex commits eight fatal mistakes, each of which are brought to his attention by his disgruntled subjects, prompting him to make various attempts to respond to them. Each attempt, however, results in an offense against law’s internal morality, resulting in a perpetually lawless state. Through the story,

⁸² *Ibid* at 96.

Fuller demonstrates that in order for law to guide the conduct of citizens, certain formal principles must be followed. Ensuring compliance with those formal requirements enables the law to be relevant to the subjects' reasoning when they make decisions to conduct their affairs.

First, for a legal system to exist, there must be general rules that govern conduct to begin with. Fuller refers to this principle as the requirement of generality.⁸³ The generality principle does not imply that every decree that has status as law must be a generalized rule in the sense that it should address general groups rather than specific individuals. If substantive generality were a requirement of the existence of law, then judicial decrees that direct an individual to act in a certain way could not have the force of law. Rather, the generality principle for Fuller denotes that "at the very minimum, there must be rules of some kind, however fair or unfair they may be."⁸⁴

Second, the governing rules must be publically available. If rules are unknown to the subjects, they obviously cannot influence their decision-making. Explaining the principle of promulgation, Fuller advises that the demand is not that every citizen must be made to know the law in order for the law to be valid. Rather, the principle requires that the law be made available to citizens so that they have the opportunity to know what rules govern their conduct. Protecting a similar requirement that rules must be knowable in order to govern conduct, the third principle of legality is that laws should generally be prospective,

⁸³ *Ibid* at 46.

⁸⁴ *Ibid* at 47.

not retroactive. In order to bear an impact on a citizen's actions, the rules must *exist* prior to conduct. As Fuller explains, "to speak of governing or directing conduct today by rules that will be enacted tomorrow is to talk in blank prose".⁸⁵

Fourth, a rule that nobody can understand also cannot guide human conduct. For Fuller, the requirement of clarity in laws is "one of the most essential ingredients of legality."⁸⁶ It, more obviously than the other principles, flies in the face of the positivist thesis that whatever the legislator (or otherwise appropriate source of law) asserts is law. For Fuller, if the legislator makes laws that are not sufficiently clear to guide human conduct, then it has failed to create law, and the fact that it is a legislative decree does not save its status as law.⁸⁷ "Being at the top of the chain of command does not exempt the legislature from its responsibility to respect the demands of the internal morality of law, indeed, it intensifies that responsibility."⁸⁸

Fifth, a system of laws cannot be self-contradictory. If obeying one law would mean breaking another, then it is fairly obvious that law would lose its ability to rationally guide conduct. This rule applies not only to contradictions within one statute, but also to contradictory requirements between statutes as well as laws that are incompatible or repugnant to each other: "legislative carelessness about the jibe of statutes with one

⁸⁵ *Ibid* at 53.

⁸⁶ *Ibid* at 63.

⁸⁷ *Ibid* at 63.

⁸⁸ *Ibid* at 64.

another can be very hurtful to legality and there is no simple rule by which to undo the damage.”⁸⁹

Sixth, the law must be possible for the subjects to comply with. Requiring the impossible is an absurdity when law is taken to have the aim of guiding conduct. Issuing laws that require the impossible would be nothing more than an exercise of brute power.

Seventh, legality requires that laws remain relatively constant in time. Just as it would be impossible to be guided by the laws of a legal system that made regular use of retroactive statutes, it would be impossible to be guided by law in a context of ever-changing rules.⁹⁰

Eighth and finally, Fuller advises that legality requires congruence between administration of the law and the declared law.⁹¹ Preserving this congruence, in most countries, is largely the task allotted to the judiciary. There are many threats to the congruence, Fuller explains, ranging from mistaken interpretation to a striving for personal gain. To his list of potential incongruences, I would add that the plain fact that adjudication occurs in circumstances of factual uncertainty sets the stage for incongruence as well. Although he does not expressly note factual uncertainty, Fuller does advise that the devices that are used to maintain congruence include “most of the elements of due process, such as the right to

⁸⁹ *Ibid* at 69.

⁹⁰ *Ibid* at 79-80.

⁹¹ *Ibid* at 81.

representation by counsel and the right of cross examining adverse witnesses,"⁹² which may be understood as preserving accuracy in terms of both law and fact, in order to protect congruence.

In addition to requiring congruence between the legislated law and judicial application, Fuller also notes that the internal morality principle of congruence applies in the context of judge-made law, as in the arena of torts, where the governing legal principles are, in large part, the product of judicial decree rather than legislation. Incongruence in court-made law is an affront against internal morality in its own right; it also leads to potential overstepping of other principles of the internal morality of law:

All of the influences that can produce a lack of congruence between judicial action and statutory law can, when the court itself makes the law, produce equally damaging departures from other principles of legality: A failure to articulate reasonably clear general rules and an inconstancy in decision manifesting itself in contradictory rulings, frequent changes of direction, and retrospective changes in the law.⁹³

In summary, in Fuller's conception, for the existence of a legal system and for the creation of valid laws, human conduct must (1) be governed through general laws that are (2) publically available, (3) non-retroactive, (4) clear, (5) constant in time, (6) free of contradictions, (7) do not require the impossible and finally (8), the declared rules and their administration must be congruent. Compliance with these principles ensures that laws are capable of being a rational influence for subjects as they decide how to conduct themselves.

⁹² *Ibid* at 81.

⁹³ *Ibid* at 82.

This is essential to law, given its purpose of subjecting human conduct to the governance of rules. Since adherence to the principles of legality is necessary for law to be law at all, in Fuller's view, just as the existence of law demands obedience from subjects, it also demands that lawmakers obey the internal morality principles. If not, then like Rex in Fuller's story, the lawmaker fails in his task, and his decrees cannot bear the authoritative implications that come with rules that are properly called laws.

iii. Addressing Critiques of the Internal Morality Principles

Fuller has faced the critique that the principles he enumerates are more properly characterized as morally neutral principles of efficacy, and as such, they do not confer legitimacy to law.⁹⁴ It is through his Reply to Critics that some of Fuller's more foundational insights into the values underpinning the legitimacy of legality emerge most clearly. In Hart's review of *Morality of Law*, he maintains that since Fuller derives the internal morality of law principles "solely through a realistic consideration of what is necessary for the efficient execution of the purpose of guiding human conduct by rules,"⁹⁵ his classification of these principles as ones of 'morality' rather than the principles required to bring about a purpose is improper and confusing:

The crucial objection to the designation of these principles of good legal craftsmanship as morality, in spite of the qualification of 'inner,' is that it

⁹⁴ Such critics include: H.L.A. Hart, *Book Review of Morality of Law* by Lon Fuller, (1964-1965) 78 Harv L Rev 1281 [Hart, *Review of Morality of Law*]; Ronald Dworkin, "Philosophy, Morality and Law – Observations Prompted by Professor Fuller's Novel Claim" (1965) 113 U P L Rev 668; Marshall Cohen, "Law, Morality and Purpose" (1965) 10(4) Vill L Rev 640; Robert Summers, "Professor Fuller on Morality and Law" (1966) 18 Journal of Legal Education 1.

⁹⁵ Hart, *Review of Morality of Law*, *supra* note 94 at 1284.

perpetrates a confusion between two notions that it is vital to hold apart: the notions of purposive activity and morality.⁹⁶

Hart explains the impropriety of equating elements that are necessary for a purposive activity and morality by relating the famous analogy of the ‘inner morality of poisoning.’ Poisoning has a definite purpose, and the fulfillment of that purpose can be brought about through adherence to certain principles of successful poisoning. But calling those principles ‘the morality of poisoning,’ would be to confuse the principles of fulfilling a purpose with morality. Fuller’s eight principles are aimed at fulfilling law’s purpose of guiding human conduct, but they are independent of any substantive aims of law, just like the principles of poisoning bring about its purpose but are neutral as to the immoral aim of poisoning someone. Therefore, adherence to Fuller’s eight principles of legality, Hart explains, does not ensure that law is aimed towards any moral purpose. On the contrary, adherence to them could be “compatible with very great iniquity.”⁹⁷

In *The Rule of Law and its Virtue*, Raz has advanced a more nuanced but essentially similar argument that Fuller’s principles relate to efficacy of law but do not constitute law’s necessary virtue. In that essay, Raz argues that the underlying principle of rule of law is that the “law must be capable of guiding the behavior of its subjects.”⁹⁸ He goes on to list some principles that can be derived from this view of rule of law. Given the common

⁹⁶ *Ibid* at 1286.

⁹⁷ Hart, *Concept of Law*, *supra* note 2 at 207.

⁹⁸ Raz, “The Rule of Law and its Virtue” in Raz, *Authority of Law*, *supra* note 39 at 214 [Raz, “The Rule of Law and its Virtue”]

starting point of law's ability to guide behavior, the list of principles that Raz articulates is very similar to Fuller's principles of legality.⁹⁹

Since rule of law is a formal concept, Raz maintains that adherence to it can provide law with some formal virtues, but those do not translate as substantive assurances. Raz argues that while adherence to the rule of law can decrease the possibilities of arbitrary laws and judicial decisions (procedurally), he points out that the rule of law does not guarantee non-arbitrary laws (substantively). He explains that the rule of law can help to secure individual freedom by providing predictability (a procedural/form concept), but he notes that the laws that might be made may not guarantee personal freedom (substantively). Similarly, he maintains that the rule of law is necessary if the law is to respect human dignity, but notes that even if the rule of law is observed, a law can still violate human dignity, substantively. "The law may, for example, institute slavery without violating the rule of law."¹⁰⁰ Raz argues, therefore, that since the rule of law is compatible with substantive aims that could violate the same virtues that adherence to it promotes, it would be incorrect to point to the virtues protected by the rule of law through its formal guarantees as the necessary virtue of law.

Being neutral to the substantive aims of law, critics complain, Fuller's principles are value-neutral, so they do not further his aim of showing that law has an inherent virtue that

⁹⁹ Raz's list includes prospectively, clarity, stability, general rules that provide a framework for particular rules, independence of the judiciary, observance of the rules of natural justice, review power for the courts, accessibility to the courts, and limiting the discretion of police and prosecuting authorities.

¹⁰⁰ Raz, "The Rule of Law and its Virtue," *supra* note 98 at 221.

vindicates its authoritative status. However, by extracting the underpinnings of the principles of legality, Fuller maintains an entirely different jurisprudential orientation than his critics – one that meaningfully accounts for the law’s inherent authoritative quality, *even though* it may be substantively unfavourable. And as such, his viewpoint aligns with my aim of accounting for the authority of judicial outcomes that may be substantively inaccurate.

Fuller’s analysis aims to explain *why* adherence to the principles of legality constitutes a “morality,” or a normative concept of legitimacy. That becomes Fuller’s explanation for why valid law emerges endowed with legitimacy, and therefore warranting its authoritative status. That analysis into legality, according to Fuller, is what his contemporary jurisprudence scholars had left undone:

With writers of all philosophic persuasions it is, I believe, true to say that when they deal with problems of legal morality it is generally in a casual and incidental way. The reason for this is not far to seek. Men do not generally see any need to explain or justify the obvious...From one point of view, it is unfortunate that the demands of legal morality should generally seem so obvious. This appearance has obscured subtleties and has misled men into the belief that no painstaking analysis of the subject is necessary or even possible.¹⁰¹

In his Reply to Critics, Fuller echoes the same lamentation contained in the excerpt above, as he diagnoses the divergence between his views and those of his positivist critics by showing the difference in their jurisprudential interests. In the Reply to Critics, he points out that all of his critics agree that some adherence to the principles of legality is necessary

¹⁰¹ Fuller, *Morality of Law*, *supra* note 94 at 98.

in order for law to come about.¹⁰² “On this general issue, then,” Fuller writes, “the agreement between my critics and me seems, in words at least, complete.”¹⁰³ But contrary to the positivists, Fuller orients himself towards the question of “*to what end* is law being so defined that it cannot ‘exist’ without some minimum respect for the principles of legality?”¹⁰⁴ In other words, Fuller’s very concept of law is shaped by discerning the implications that can be drawn from the fact that compliance with the principles of legality is necessary for the existence of a legal system and law.¹⁰⁵

The foundational implication that Fuller discerns is that law is properly conceived as a reciprocal relationship between lawmaker and legal subjects, where the lawmaker must respect the agency of the legal subject in order to expect any acceptance of its decrees.¹⁰⁶ Affirming Simmel’s comments, Fuller notes, “there is a kind of reciprocity between government and the citizens with respect to the observance of rules.... When this bond of reciprocity is finally and completely ruptured by government, nothing is left on which to

¹⁰² Fuller, “Reply to Critics” in *Morality of Law*, *supra* note 94 at 197-198.

¹⁰³ *Ibid* at 198.

¹⁰⁴ *Ibid* at 198, emphasis in the original.

¹⁰⁵ As Jeremy Waldron has observed in “Positivism and Legality: Hart’s Equivocal Response to Fuller” (2008) 83 NYUL Rev 1135 at 1137: “Fuller’s reflections on [the Nazi adherence to the principles of legality] suggest a two-fold agenda for jurisprudence. It might be worth asking, first: what exactly is the relation between the principles of legality and categories of law and legal system which we use to characterize systems of rule? And it might be worth asking, secondly: what exactly is the relation between the principles of legality and the norms like justice, rights, and the common good which we use to evaluate systems of rule?”.

¹⁰⁶ For an in-depth exposition of the relevance and implications of reciprocity and respect for human agency in Fuller’s jurisprudence, uniquely defended through references to Fuller’s personal correspondence and working notes, see Rundle, *Forms Liberate*, *supra* note 66].

ground the citizen's duty to observe the rules."¹⁰⁷ This reciprocity is implicit in the fact that the principles of legality are required for there to be law, because those principles translate as positive obligations on the part of lawmakers. Only when those obligations are met can law, with all its authoritative implications, even come about. And since all the lawmaker's obligations are directed towards ensuring that the law has the requisite characteristics to guide subjects in their own rational decision-making, they all contain the underpinning *value-laden* sentiment that a lawmaker must conceive of his subjects as free-acting agents. As Fuller explains:

Every departure from the principles of law's inner morality is an affront to man's dignity as a responsible agent. To judge his actions by unpublished or retrospective laws, or to order him to do an act that is impossible, is to convey to him your indifference to his powers of self-determination.¹⁰⁸

Accordingly, the principles of legality represent law's internal *morality*, in the sense that they contain an underlying value: law must respect the agency of its subjects. If the lawmakers fail to adhere to that principle by breaching any element of legality, then law is not created at all, so none of the implications that come with law can attach. By asserting that an attitude of respect for agency is implicit in the requirements of legality, Fuller provides a reason for why citizens can reasonably assent to the authoritative demands of law. As Colleen Murphy notes, "Fuller's account helps to explain why it is rational for citizens to participate in the system of cooperation which the legal system establishes."¹⁰⁹

¹⁰⁷ Fuller, *Morality of Law*, *supra* note 94 at 40.

¹⁰⁸ *Ibid* at 162.

¹⁰⁹ Colleen Murphy, in "Lon Fuller and the Moral Value of the Rule of Law" (2005) 24 *Law and Phil* 239 at 243 [Murphy, "Fuller and the Rule of Law"].

That constitutes Fuller's persuasive response to the critique that his internal morality of law is misnamed, and provides only morally neutral requirements of legality.¹¹⁰ Still, adopting a jurisprudential orientation that places the moral virtue in process rather than substance faces the critique that substantively immoral laws could pass the test of 'procedural morality.' That leads to the situation where the authority of a substantively immoral law could be considered morally justified. Fuller has offered a simple and persuasive response that I find convincing: though it may be possible in the abstract, it is difficult to imagine a society where virtuous law-making procedures are genuinely adhered to, but the laws are substantively evil. Responding to the critique that history provides many examples of iniquitous laws that were procedurally proper, Fuller retorts:

Since my book has been out I have discussed this question with a good many people, and I have yet to encounter a single case to prove this point. South

¹¹⁰ In the fairly recent past, a number of scholars, including Kristen Rundle in *Forms Liberate*, noted above, have offered interpretations of Fuller that are sympathetic to his position that the principles of legality are not properly characterized as ones of mere efficacy, and that they are, rather, value-underpinned. For instance, David Dyzenhaus, "Process and Substance as Aspects of the Public Law Form" (2015) 74(2) Cambridge L J 284 at 294 holds that Fuller argues "that compliance with the principles [of the internal morality of law] makes a positive moral and substantive difference to all legal systems"; Colleen Murphy, "Fuller and the Rule of Law," *supra* note 109 at 250 holds that Fuller presents the rule of law as "inherently respectful of people's autonomy;" David Luban, "Rule of Law and Human Dignity: Re-examining Fuller's Canons" (2010) 2(1) Hague Journal on the Rule of Law 29, claims that Fuller's principles are in fact substantive and make important contributions to protecting human dignity. Evan Fox-Decent, "Is the Rule of Law Really Indifferent to Human Rights?" (2008) 27 Law and Philosophy 533, offers an argument about the inherent value of rule of law as a protection of human rights, inspired by Fuller's theoretical underpinnings that "human agency underlies internal morality" at 538; and Jeremy Waldron, one of the pioneers in the efforts to reclaim Fuller's jurisprudence from the efficacy critique, in "Why Law: Efficacy, Freedom or Fidelity" (1994) 13 Law and Philosophy 259 at 276, argues that Fuller's jurisprudence should be considered the starting point for the important and difficult question of what it is about law that warrants its demand for fidelity.

Africa is probably as close as any. But as I tried to show in my final chapter, to the extent that an attempt has been made there to write racial prejudice into law, some impairment of legal morality has taken place.¹¹¹

In fact, even in earlier writing, Fuller had noted that the Nazi regime quite clearly failed to observe the inner morality of law.¹¹² Nazi rule routinely made use of retroactive and secret laws; Nazis were able to disregard legal forms altogether and rule by terror; Nazi courts could decide cases disregarding even Nazi made laws. These realities suggest that the Nazi regime was not oriented towards order at all and disregarded the internal morality of law. Accordingly, the Nazi regime and its decrees could be justifiably stripped of the title 'law':

When a system calling itself law is predicated upon a general disregard by judges of the terms of the laws they purport to enforce, when this system habitually cures its legal irregularities, even the grossest, by retroactive statutes, when it has only to resort to forays of terror in the streets, which no one dares challenge, in order to escape even those scant restraints imposed by the pretense of legality – when all of these things have become true of a dictatorship, it is not hard for me, at least, to deny to it the name of law.¹¹³

Making a similar point, Jeremy Waldron has noted that:

The outward appearance of the rule of law may be important for the external reputation of a regime. But those who reflect seriously on humanity's

¹¹¹ Correspondence from Fuller to Walter Berns, quoted in Rundle, *Forms Liberate* at 111. This retort was endorsed by John E. Murray, "Observations on the Morality of Law" (1965) 10(1) *Vil Law Rev* 667 at 668 after hearing Fuller make the same point in an oral presentation discussing his book, *The Morality of Law*, and the critiques proffered by Ronald Dworkin and Marshal Cohen.

¹¹² Fuller, *Reply to Hart*, *supra* note 71 at 650.

¹¹³ Fuller, *Reply to Hart*, *supra* note 71 at 660.

experience with tyranny know that, in the real world, this problem of the scrupulously legalistic Nazi is at best a question about the efficacy of cosmetics.¹¹⁴

The difficulty in providing an example of substantively evil laws that nonetheless adhere to virtuous legal procedures may be because the requisite procedures are themselves value-laden, and adherence to those procedures demonstrates a governmental commitment to those values. If the government is genuinely committed to the values that must be manifest in the lawmaking procedures, then it is unlikely that it will contradict those values in the substantive laws that it creates.¹¹⁵

Moreover, the problem of potentially immoral laws that, nonetheless, bear the title law and have the associated implication of authority is precisely the place where procedural legitimacy does its normative work. As I have noted in Chapter Two, modern pluralistic societies can, must, and do accommodate multiple moralities, so law's authority cannot depend on its adherence to particular moral principles. Even so, in order to be effective, law must be authoritative. Fuller's theory provides a reason to accept the law even if it

¹¹⁴ Jeremy Waldron, "Why Law – Efficacy, Freedom, or Fidelity?" (1994) 13 *Law and Phil* 259 at 264. Colleen Murphy, in "Fuller and the Rule of Law," *supra* note 109 makes the same point, endorsing Waldron's above comments at 252.

¹¹⁵ In Rundle, *Forms Liberate*, *supra* note 66, Kristen Rundle suggests that Fuller hinted at, but never elaborated, the point that the same values that underpin the form of law also constrain its ability to pursue iniquitous substantive goals, at least to some extent. According to Rundle, Fuller did so when he denied that laws instituting slavery were compliant with the internal morality of law. For Fuller, as I explain in the upcoming section, the form of law must manifest respect for human agency. A law that reduces a legal subject to a status akin to property is contrary to that virtue, and therefore constitutes an affront to a substantiated concept of procedural propriety. For Rundle's argument, see, *Forms Liberate*, *supra* note 66 at 111-114.

seems substantively questionable to some people, and that reason is derived from the virtues that are implicit in the formal principles of legality. The analogy to my question regarding the acceptance of legal fact-finding is clear. As noted, my goal is to ascertain what virtues the process of fact-finding must display in order for adjudicative decisions based on legal facts to be acceptable to litigants, despite the potential for substantive inaccuracy. Applying Fuller's concept, just as subjects can accept laws that are substantively disagreeable to them if the process of creating those laws demonstrated respect for their agency, litigants can accept adjudicative facts that are potentially inaccurate if the process of arriving at those facts ensured respect for the agency of those affected.

A number of the themes that emerge in Fuller's writing are present, and more expressly developed, in Jurgen Habermas's contributions. For one, the necessity for maintaining certain, authoritative law in pluralistic societies is more expressly prominent in Habermas's thinking. In addition, both authors understand law as a dialogical process. This is evident in Fuller's foundational idea of reciprocity, which unfolds as a dialogue between King Rex and his disgruntled subjects. Habermas's concept of law as a dialogue unfolds within the democratic context, making its applicability in modern western contexts more tangible. Finally, Fuller's approach into law as a guide for rational human conduct finds a parallel, and further development, in Habermas's insights into law as a rationally acceptable tool for the social integration of a diverse community. Below, I explain how these concepts unfold in Habermas's writing, and their relevance for my project.

B. The Legal Theory of Jurgen Habermas

i. Why Law Needs Legitimacy

The starting point of Habermas's paradigm is his observation that the modern world is largely made up of 'post-traditional' societies. These societies are not integrated through a singular, shared morality. Law, Habermas explains, substitutes as an integrative, stabilizing agent.¹¹⁶ His concept of law and its necessary characteristics is premised on this notion of law as a tool of social integration. That role requires that community members comply with the law, because law clearly cannot be socially integrative if nobody complies with it. That compliance is prompted through two necessary features of law: certainty and legitimacy.¹¹⁷

Certainty, for Habermas, means something close to predictable in that the law must be ascertainable, and whatever is law will also be enforceable. In that sense, law contains what Habermas refers to as a "facticity" component. He explains, though, that while compliance can be achieved through enforcement measures, if law is to be truly socially integrative and stabilizing for society, then citizens must have some reason to obey the law out of respect for it, not only out of fear of enforcement.¹¹⁸ Thus rejecting the positivist approach, which

¹¹⁶ See for example: Habermas, *Between Facts and Norms: Contributions to Discourse Theory of Law and Democracy* (Cambridge, Massachusetts: MIT Press, 1996) at 83: "law must do more than simply meet the functional requirements of a complex society; it must also satisfy the precarious conditions of a social integration...." And elsewhere at 1544: "Law is the only medium through which a 'solidarity with strangers' can be secured in complex societies." [Habermas, *Between Facts and Norms*]. For Habermas's discussion of law as a stabilizing tool of social integration, see generally Habermas, *Between Facts and Norms*, Chapter 1.

¹¹⁷ *Ibid* at 198.

¹¹⁸ *Ibid*.

conceives of law as a value-free fact without delineating its necessary normativity,¹¹⁹ Habermas offers a concept of law that recognizes that valid law must be discernable and enforceable, while simultaneously embodying some normative quality that justifies its demand for compliance.¹²⁰ In his own words:

We have already seen how the tension between facticity and validity is inherent in the category of law itself and appears in the two dimensions of legal validity. On the one hand, established law guarantees the enforcement of legally expected behavior and therewith the certainty of law. On the other hand, rational procedures for making and applying law promise to legitimate the expectations that are stabilized in this way; the norms *deserve* legal obedience.¹²¹

The foundation of Habermas's paradigm is that valid law requires legitimacy, and accordingly, law cannot be conceived as either only fact, or only norm, but it requires both.¹²² He writes:

¹¹⁹ For Habermas's brief critique of legal positivism, see *Ibid* at 201-203.

¹²⁰ Habermas, "Between Facts and Norms: An Author's Reflections," (1999) 76 Denv U L Rev 937 at 937 [Habermas, "Author's Reflections"]: "Law stands as a substitute for the failures of other integrative mechanisms...This integrative capacity can be explained by the fact that legal norms are particularly functional in virtue of an interesting combination of formal properties: Modern law is cashed out in terms of subjective rights; it is enacted or positive as well as enforced or coercive law; and though modern law requires from its addressees nothing more than norm-confirmative behavior, it must nevertheless meet the expectation of legitimacy so that it is at least open to the people to follow norms, if they like, out of respect for the law." For more on Habermas's discussion of facticity and validity, see Habermas, *Between Facts and Norms*, *supra* note 116, Chapter 1: Law as a Category of Social Mediation between Facts and Norms.

¹²¹ Habermas, *Between Facts and Norms* at 198. [Emphasis added].

¹²² James Gordon Finlayson, *Habermas: A Very Short Introduction* (Oxford: Oxford University Press, 2005) at 114: "A valid legal norm or law, Habermas argues, has both a normative and a factual side: on the one hand it is legitimate, and on the other it is positive. Hence the title of

I take as my starting point the rights citizens must accord one another if they want to legitimately regulate their common life by means of positive law. This formulation already indicates that the system of rights as a whole is shot through with that internal tension between facticity and validity manifest in the ambivalent mode of legal validity.¹²³

Recognizing both positivity and legitimacy as necessary characteristics of law, Habermas offers a paradigm for conceiving of law that bridges facticity and normativity of law in the realm of process. For Habermas, “the law receives its full normative sense neither through its legal form *per se*, nor through an *a priori* moral content, but through a procedure of lawmaking that begets legitimacy.”¹²⁴ He explains the requisite procedure of lawmaking by applying the principles of discourse theory to law.

ii. Locating Legitimacy in Habermas’s Account: The Discourse Principle

Discourse constitutes a deliberative process. Its foundation is that “just those action norms are valid to which all possibly affected persons could agree as participants in rational discourse.”¹²⁵ Habermas conceives of laws as the product of a discursive process, which makes the discourse theory of rational acceptability transferable to law. Laws have the requisite normative legitimacy, for Habermas, when they are amenable to the consent of community members who are participants in a rational discourse. That is, a law is

his book *Between Facts and Norms*, which literally translated would be ‘Facticity and Validity.’

¹²³ Habermas, *Between Facts and Norms*, *supra* note 116 at 82.

¹²⁴ *Ibid* at 135.

¹²⁵ *Ibid* at 107.

legitimate when all the members of the community, despite their different values and belief systems, *can* (not necessarily will) rationally assent to it, and that is possible when the law is a product of a sincere rational discourse.

It is the rationality of the discourse process that makes the law acceptable even if a community member finds it substantively disagreeable. For instance, a law preventing hunting may not be agreeable to some community members, but its authority is still justifiable, because the nature of the *process of arriving* at the law (which I elaborate further below) is fair and orientated towards making a rational decision; the law's legitimacy is not dependent on the actual acceptability of the law to every community member, which is obviously impossible to guarantee, but on the acceptability of the process. Accordingly, Habermas's proposed application of the rational discourse principle to law furthers my aim of uncovering requisite features of an acceptable process of arriving at legally valid and rationally acceptable fact-finding outcomes, even if participants cannot agree with the substantive outcomes.

What, then, makes a discourse process rational such that its outcome warrants a community member's rational assent? Understanding Habermas's answer to this question requires looking into his notions about assessing the validity of any action norms through rational discourse. Validity, for Habermas, expresses normative validity, and is akin to what I refer to as legitimacy.¹²⁶

¹²⁶ *Ibid* at 107: "The predicate "valid" (*gultig*) pertains to action norms and all the general normative propositions that express the meaning of such norms."

Rational discourses testing normative validity of claims, in Habermas's conception, occur often in everyday life, and they are easiest to explain and understand in such routine contexts.¹²⁷ Consider, for instance, that a man asks his partner to refrain from drinking alcohol while his parents visit them. The partner may refuse, asserting that her ability to do as she pleases should not be influenced by his parents' presence and preferences. She asks for the reasons behind his request, at which point the validity of his claim begins to get tested through a discourse. He explains that his father is a recovering alcoholic, and he does not want to prompt any temptation. Upon that explanation, the partner may agree to the validity of his request. If so, then the couple has reached a rational consensus through a discourse. The partner may also retort that the father will have to face alcohol temptation at some point. It may be beneficial for the couple to drink alcohol, as they normally would during the parents' visit so that the father can start to become accustomed to refraining from alcohol despite the actions of others. The man may accept this reasoning, and the couple will arrive at the rationally acceptable conclusion that they will not refrain from drinking during the parents' visit. The couple may decide to drink alcohol or to refrain from doing so, and both decisions can be rationally acceptable and valid outcomes. What, then, makes an outcome unacceptable? Suppose the man refuses to consider his partner's point of view and simply asserts that the couple will not drink during the parents' visit. That decision not to drink is not the product of a rational discourse, so the couple cannot be said to have arrived at a rationally acceptable outcome. The validity of their actions is

¹²⁷ Ibid at 107-108: "Rational discourse" should include any attempt to reach an understanding over problematic validity claims insofar as this takes place under conditions of communication that enable free processing of topics and contributions, information and reasons in the public space constituted by illocutionary obligations."

rationally acceptable to all parties as a result of the rational discourse process, irrespective of any external judgment on the moral 'rightness' of the outcome. David Dyzenhaus explains Habermas's point as follows:¹²⁸

What drives this process is what makes communication more than just an implicit threat to open hostilities in the face of disagreement. This is the assumption that there is something to the rightness beyond what we happen to think here and now. In the age of secularism, where things are not made right by tradition, the only candidate we have for rightness is the beliefs we have in the light of our deliberations about our experience.

A similar process occurs, Habermas explains, when assessing the validity of a truth claim. What is claimed to be true can also be amenable to rational consent, just like the validity of the husband's request above. The validity of a truth claim cannot, in Habermas's conception, depend on substantive accuracy because "there is no 'natural' end to the chain of possible substantial reasons; one cannot exclude the possibility that new information and better reasons will be brought forward."¹²⁹ Rather, the criterion of the validity of truth claims is indistinguishable from the criterion for the propriety of the process of settling a claim to truth. Where the argumentative process embodies the ideal conditions of rational discourse, the settled claim can be taken as true, and the assent of the parties to the argument is valid. This should not be taken to mean that there is no such thing as "Truth" that is independent of the outcome of a good procedure. Rather, it means that we can rationally accept the outcome of a claim of truth on the basis of the procedure that gave rise

¹²⁸ David Dyzenhaus, "The Legality of Legitimacy" (1996) 46 UTLJ 129 [Dyzenhaus, "Legality of Legitimacy."]

¹²⁹ Habermas, *Between Facts and Norms*, *supra* note 116 at 226-227.

to that claim. This aspect of Habermas's thinking lends support to my project, given my starting point that the truth of a factual finding cannot be guaranteed, yet litigants are expected to assent to judicial factual determinations.

Habermas uses discourse theory's criteria for rational assessment of the validity of claims as the criteria for determining the rational acceptability of law. Analogous to his approach to testing validity claims, for Habermas, the acceptability of a law or adjudicative outcome does not depend on substantive correctness or accuracy (just as the validity of the husband's claim did not depend on its 'rightness' and the validity of a truth claim does not depend on its actual accuracy) but on whether the process of arriving at the outcome reflects, as closely as possible, the conditions of rational discourse.¹³⁰

What are, then, the conditions that can give rise to rationally motivated discourse, and rationally acceptable outcomes? The first and foundational feature of achieving rationally motivated assent is that the parties agreed with the claim of validity on the basis of reason alone, and not on the basis of coercion or other extraneous considerations.¹³¹ In the example above, the partner agreed with the husband's request because of his reason, not because of any coercive influence that he asserted over her. Accordingly, a discourse process must be "immunized against repression and inequality."¹³² It must ensure "equal

¹³⁰ Lawrence Solum, "Procedural Justice," 78 S Cal L Rev 181 at 267-268 [Solum, "Procedural Justice"].

¹³¹ Habermas, *Facts and Norms*, *supra* note 116 at 227.

¹³² *Ibid* at 228.

communication rights for participants, it requires sincerity and, it must diffuse any kind of force other than the forceless force of the better arguments.”¹³³

Lawrence Solum has helpfully defined the necessary conditions of rational discourse in a formulation that was originally suggested by Robert Alexy, and then adopted by Habermas. Solum’s presentation of the conditions of rational discourse is as follows:

1. Rule of Participation: Each person who is capable of engaging in communication and action is allowed to participate.

2. Rule of Equality of Communicative Opportunity: Each participant is given equal opportunity to communicate with respect to the following:
 - a. Each participant is allowed to call into question any proposal;
 - b. Each participant is allowed to introduce any proposal into the discourse; and
 - c. Each participant is allowed to express attitudes, sincere beliefs, wishes, and needs.

3. Rule against Compulsion: No participant may be hindered by compulsion – whether arising from inside the discourse or outside of it – from making use of the rules secured under (1) and (2).¹³⁴

¹³³ Habermas, “Author’s Reflections,” *supra* note 120 at 940.

¹³⁴ Solum, “Procedural Justice,” *supra* note 130 at 270.

Habermas explains that these rules of rational discourse are, on the one hand, necessary presuppositions - they simply cannot be avoided if a truly rational discourse is to take place.¹³⁵ It would, for instance, be internally contradictory to say that a rationally motivated consensus was reached by lying, or by torturing all dissenting parties, or by disallowing certain parties from participating. At the same time, the conditions of rational discourse also represent an ideal.¹³⁶

Democratic principles, for Habermas, most closely approximate the ideal conditions of rational discourse, and thereby provide the requisite legitimacy component to emergent laws.¹³⁷ "Specifically," Habermas writes, "the democratic principle states that only those statutes may claim legitimacy that can meet with the assent of all citizens in a discursive process of legislation that in turn has been legally constituted."¹³⁸ The guarantee that laws are a product of a rational discourse process provides legal subjects with a reason, independent of fear of coercion, to assent to the law. That reason is the law's legitimacy,

¹³⁵ As Thomas McCarthy explains, "The very act of participating in a discourse involves the supposition that genuine consensus is possible and that it can be distinguished from false consensus. If we did not suppose this, then the very meaning of discourse would be called into question. In attempting to come to a rational decision about truth claim, we must suppose that the outcome of our discussion will be (or at least can be) the result simply of the force of the better argument and not of accidental or systematic constraints on communication." *The Critical Theory of Jurgen Habermas* (Cambridge, Massachusetts: MIT Press, 1978) at 306. Compare with David Dyzenhaus, "The Legality of Legitimacy," *supra* note 128, pointing out the problems associated with the idealization that inheres in the supposition of a genuine consensus being achievable.

¹³⁶ Stephen White, *Cambridge Companion to Habermas* (Cambridge: Cambridge University Press, 1995) at 44.

¹³⁷ Habermas, *Between Facts and Norms*, *supra* note 116 at 110.

¹³⁸ *Ibid.*

which it derives as a result of emerging from a process that, as closely as possible, reflects the principle of rational discourse. Habermas explains:

Valid legal norms are ... legitimate in the sense that they additionally express an authentic self-understanding of the legal community, the fair consideration of the values and interests distributed in it, and the purposive-rational choice of strategies and means in the pursuit of policies.¹³⁹

The virtue of the democratic principle, and of the rational discourse process generally, is that it ensures that all people who will be affected by the outcome had equal and free opportunity to engage in a sincere process of rational discussion leading to rational decision-making.¹⁴⁰ Without these basic guarantees, a rational discourse process is not possible. But through them, all members affected by the outcome, treated as equal, free, rationally acting agents, have a reason to assent to the law's authority beyond fear of enforcement. That, Habermas suggests, makes for a stable society.

David Dyzenhaus has highlighted an important point of vulnerability in Habermas's theory. He suggests that there are potentially dangerous impracticalities/idealizations in Habermas's application of the concept of rational discourse to a theory of legal legitimacy.

¹³⁹ *Ibid* at 156.

¹⁴⁰ I note that the concept of a rational discourse procedure is, of course, an idealization. Canadian civil litigation systems do not emulate these theoretical ideals in practical terms. One needs only to turn to the access to justice discourses in Canadian legal scholarship to learn that inability to participate due to inaccessibility to legal systems pose significant challenges to maintaining the justifiability of Canadian legal systems. My purpose in this project is not to assess the civil litigation processes from a pragmatic perspective. My aim is to outline what principles should guide the Canadian civil litigation system, and how they should manifest when it comes to judicial fact-finding.

Dyzenhaus reiterates that the principle underpinning Habermas's theory, based on the concept of ideal speech conditions as explained above, is that in order to determine right action, individuals must engage in a non-coercive argumentative process, which entails that they commit to understanding the others' viewpoints and having their own challenged, all with a view to coming to a final agreement that will bind the participants.¹⁴¹ This deliberative process results in a valid outcome. The problem, Dyzenhaus suggests, occurs when applying this ideal concept of rational discourse in the legal context.

Habermas's notion of true communicative action implies that all participants accept the ideal speech conditions and ultimately come to a consensus that is grounded in reason. As such, the outcome does not require coercion to ensure compliance. But such universal acceptance is impractical in a legal arena, and it can be dangerous to under-emphasize the potential for disagreement about legal outcomes.¹⁴² Dyzenhaus explains:¹⁴³

Given the fact of pluralism, it either seems utterly impractical or, if one attempts to bring it down to earth, it seems dangerous. It is dangerous just because a claim that any institutional order realizes this ideal seems to entail that those who disagree are simply wrong to do so. The dissenters exclude themselves from the community of participants by their disagreement, and hence it can be claimed that there is no coercion within the community. Those who disagree find themselves relegated to being at best marginal disruptions to the community of reasoners."

¹⁴¹ Dyzenhaus, "The Legitimacy of Legality," *supra* note 128 at 167.

¹⁴² *Ibid*, 167-168.

¹⁴³ *Ibid* at 167.

Dyzenhaus suggests, in my reading, that applying discourse theory as a concept that can legitimize legality can be problematic if it is understood as resulting in universal acceptability of legal outcomes, because that has the effect of disengaging with the inevitability of dissent *after* a law is rendered. The way around this problem, Dyzenhaus suggests, is to abandon the ideal of universalizability, because it is an impractical aspiration in a context of secularism along with plurality: "Secularism precludes appeal to religion or tradition, while pluralism requires recognition of the fact that not all will agree to any solution, no matter how reasonable."¹⁴⁴ Rather than striving to be universal, Dyzenhaus suggests, law should meet a threshold of "general interpretability," which requires that the law be public and understandable¹⁴⁵ so that it can be subjected to continued dialogue even after it is rendered:¹⁴⁶

In meeting that threshold, it does not attract the assent of everyone, since even the most reasonable citizens will disagree on what should be done. But what they can agree on, if they wish to conduct their affairs rationally, is that decisions should be taken as a result of deliberation and then made subject to further deliberation in light of experience.

Dyzenhaus uses the concept of deliberation itself to maneuver around the above noted problem. In making this turn, he seems to combine Habermas's approach with some of

¹⁴⁴ *Ibid* at 171.

¹⁴⁵ *Ibid* at 173: "In short, publicizability, or meeting a threshold of general interpretability, is a precondition of a communication being properly public. Not only does it have to have the marks of publicity that make it recognizable as law – positivism's exclusive focus – but its content must be understandable or interpretable by the public to which it is addressed."

¹⁴⁶ *Ibid* at 176.

Fuller's deepest insights.¹⁴⁷ Generality, publicity, and intelligibility (all of which are required in order for law to be continually deliberated on) are key features of Fuller's internal morality of law principles. As noted above, Fuller's principles implicitly recognize legal subjects as active, rational participants in legal discourse, much like Dyzenhaus does when he calls for continued public deliberation about the law.

Dyzenhaus's worthwhile contributions highlight, again, the impracticality of achieving perfection (defined here as universal acceptance) in the legal order. This is a helpful and relevant reminder, given that my project is premised on the impossibility of guaranteeing factual accuracy (and therefore universal acceptance, presumably) of judicial fact-finding decisions. Dyzenhaus explains that we do not need to expect universal acceptance in order to achieve legitimacy. This reminder is important, as is Dyzenhaus's insight as to the way forward. The idea that laws should be continually subjected to public debates and deliberation serves as an important recognition of law's fallibility, and accounts for the potential for dissent in a manner that is at least more clear and express than Habermas provided.

Ultimately, Dyzenhaus's proposal provides a necessary pragmatism to Habermas's sometimes extremely theoretical commitments. For now, most importantly, Dyzenhaus arrives at the same key principles that underpin both Fuller's and Habermas's

¹⁴⁷ Dyzenhaus notes his turn to Fuller throughout, and specifically points out that Habermas "can take a more direct route from the idea of deliberation to the idea of legitimacy of legality.... [a route that has] already been elaborated independently by two legal philosophers, Lon Fuller and the Weimar public lawyer Hermann Heller." *Ibid* at 169.

commitments. “As both Fuller and Heller saw, nothing more is needed,” he states, “to found this project than a commitment to institutionalizing the recognition by all citizens of each other as free and equal.”¹⁴⁸

C. Summing up Fuller and Habermas and their Relation to Hart and Raz

Fuller and Habermas offer ideas of law that align with my ultimate goal of explaining why we, as members of a political community, should accept the validity of adjudicative fact-finding. The positivist positions of Hart and Raz, while undoubtedly insightful, do not further my aim, because of their resistance to incorporating a normative concept into legal validity. Fuller and Habermas, in my understanding, offer a concept of law that accommodates the necessary aspects of positivism - the inability to make legal validity contingent on the substantive morality of the content of each law - but they pick up where Hart and Raz’s positivist theories fall short.

Fuller’s ‘completion’ of Hart’s theory is fairly express. He complains that Hart fails to give any substance or definition to the secondary rules of law-making, despite their being the foundation of legal validity. He sets out, then, to offer that substantiation through the internal morality of law principles, through which he offers a reason for why the law warrants the authoritative demands it makes, an answer that positivist jurisprudence does

¹⁴⁸ *Ibid* at 177.

not turn towards. I interpret Habermas's theory as providing a similar 'completion' to Raz's version of positivism.

Recall that for Raz, a law is a directive that is endorsed by an authoritative institution that makes a claim to having legitimate authority. But although law makes a claim to legitimate authority, it is not necessary that law achieve that legitimacy. Since status as law is dependent on a claim to legitimate authority, Raz's theory could provide a plausible answer for why the law's authority is justifiable if he provided some grounding for its claim of legitimacy. The first step at grounding the claim to legitimate authority is to draw a distinction between determining whether the authority is *in fact* legitimate versus whether *the claim* of legitimate authority is itself legitimate. In order to substantiate the claim to legitimate authority, without resorting to determining whether the claim is correct (i.e. without determining if there actually is legitimate authority), amounts to an assessment of whether the claim to legitimate authority is actually genuine.

To test the genuineness of the claim (without testing the truth of the claim itself), the inquiry must shift from a substantive determination of whether the law is *in fact* the most rational outcome, to whether the legal institution is sincerely *aimed towards* arriving at the most rational outcome. In other words, the relevant question in order to substantiate the claim to legitimate authority, is *how* the institution purports to discharge that claim, not whether the institution actually discharges it. If the procedures that an institution follows orient the institution towards the aspiration of providing directives that enable conformity with reason, which constitutes legitimate authority in Raz's conception, then the *claim* to legitimate authority may be vindicated.

Even though the claim to legitimate authority is the necessary characteristic of a valid legal system in his theory, Raz does not explain how a legal system's claim to legitimate authority is grounded or how it can be tested.¹⁴⁹ Habermas's theory does. The discourse principle provides the procedural characteristics that delineate a genuine rational discourse, where parties are sincerely motivated to arrive at rational and reasoned outcomes. When the elements of a rational discourse are present, the parties to the communication can defensibly claim that they aspire to arrive at an outcome that best conforms with reason. In the same way, testing a legal system's claim to legitimate authority can be accomplished by considering whether the elements of rational discourse are present, to the most feasible extent, in its decision-making processes. If so, then the claim to legitimate authority can be vindicated.

Conclusion

My conclusion in Chapter Two was that the legitimacy of factual judicial outcomes is contingent on consistent adherence to the legal procedures of fact-finding. This conclusion invoked the question of whether there must be some features that are present in legal procedures that enable their legitimizing role. The aim of this chapter was to find an answer to that question and, thereby, substantiate the claim of procedural legitimacy.

¹⁴⁹ Of course, Raz does maintain that since it is the nature of law that it claims legitimate authority, a source of law in a given legal system must also be *capable* of possessing legitimate authority: Joseph Raz, "Authority, Law and Morality," in Raz, *Authority of Law*, *supra* note 39 at 215: a legal system "must be a system of a kind which is capable in principle of possessing the requisite moral properties of authority." My point here is to note that Raz does not elaborate on how to test whether an institution's capacity for legitimate authority is being genuinely exercised.

In my discussion of positivist approaches, I intended to uncover the shortcomings of an approach to legal validity that does not simultaneously account for legitimacy. Through that commentary, I have re-affirmed the conclusion that legitimacy must be a procedural phenomenon. This claim is supported, in my reading, in Lon Fuller's and Jurgen Habermas's accounts of law. Their viewpoints have provided grounding for my upcoming discussions about the necessary features of legitimate procedures for adjudicative fact-finding.

For both Fuller and Habermas, law, being an integrative guide for human conduct, requires a vindicating virtue. For both, that virtue is not contingent on adherence to any standard of morality or substantive correctness, but is a procedural concept. The process of lawmaking, in both accounts, must manifest respect for legal subjects as free-acting rational agents. If so, then legal validity has legitimacy, and legal subjects would have a reason to accept the authority of a law on the basis of its legal validity.

As Fuller and Habermas maintain, just as the rational assent of subjects depends on the procedural qualities of law rather than its substantive moral qualities, similarly, litigants can rationally accept adjudicative facts that are potentially substantively inaccurate if the process of arriving at those facts genuinely respects their status as free-acting agents. In the next chapter, I open with a discussion of Fuller's and Habermas's relatively brief explanations for how their concepts of law generally translate in the adjudicative sphere. With that guidance as my starting point, I will consider how those concepts can be transferred into the specific context of adjudicative fact-finding procedures. That will

culminate in a notion that consistent adherence to particular fact-finding procedures infuses judicial fact-finding decisions with legitimacy, such that their authority is warranted.

CHAPTER 4. PROCEDURAL LEGITIMACY IN ADJUDICATIVE FACT-FINDING

Introduction

This chapter develops my central aim of delineating the key characteristics of a legitimate fact-finding process. It comprises an application of the jurisprudential analysis of law and its legitimacy in Chapter Three to the question of how and on what basis adjudicative fact-finding procedures can be considered legitimate.

In Chapter Three, I concluded that law must have an in-built source of legitimacy that forms the basis upon which legal subjects can rationally accept the law and its authoritative implications. In arriving at that conclusion, I adopted the jurisprudential insights of Lon Fuller and Jurgen Habermas. Fuller and Habermas both maintain that the legitimacy of law depends on the process of becoming law, and not an assessment of its substantive content. If that process embodies a genuine respect for citizens as autonomous agents, then the law is capable of eliciting the rational assent of its subjects. On that basis, its authoritative nature is grounded, even if the law appears substantively disagreeable. Along those lines, I maintain that the legitimacy of judicial fact-finding is also sourced in the process of making factual determinations. Litigants can rationally accept adjudicative fact-finding on the basis of an application of a fact-finding process that genuinely respects them as free-acting agents. And just as the substance of a law is not itself determinative of the law's legitimacy, the substantive accuracy of adjudicative fact-finding does not determine the legitimacy of that factual finding.

The goal of this chapter is to uncover how maintaining respect for litigants as autonomous agents can be reflected in judicial fact-finding. This provides the answer for my central question of why and on what basis community members can rationally accept judicial outcomes despite the inescapable reality of risk of factual inaccuracy.

Given my alignment with Fuller's and Habermas's jurisprudential thinking, in Part One, I consider how they transfer their concepts of legal legitimacy into the adjudicative sphere. Using their foundational insights as a springboard, in Part Two, I delineate the necessary features of legitimate adjudicative fact-finding.

I conclude that demonstrable respect for human agency in fact-finding procedures has two categories of necessary features: factual reliability and participation rights. I argue that judicial fact-finding should be factually reliable in the sense that the fact-finding process embodies a genuine effort towards achieving accurate factual determinations. Below, I expand further on what that entails, and suggest how to assess the justifiability of compromises to the likelihood of factual accuracy and manage the risk of inaccuracy while maintaining a genuine commitment to getting the outcomes factually right. Along with maintaining factual reliability, in order to give full expression to respecting human agency, fact-finding procedures must include meaningful participation rights for affected parties.

This chapter concludes with the assertion that when fact-finding procedures that reflect respect for litigants as rational agents are applied consistently, the fact-finding system is

legitimate, and the authority of a judicial factual determination can be rationally accepted despite the risk of inaccuracy.

Part 1: Fuller and Habermas on Adjudication

A. Lon Fuller on Adjudication: Participation, Rationality, and Agency

Lon Fuller's most comprehensive discussion on adjudication is found in his article, "The Forms and Limits of Adjudication," where he offers his study of the adjudicative process, its aims and its necessary elements.¹ Fuller's analysis of adjudication takes a similar form to his analysis of legality. In his discussion of the nature of law, Fuller starts with the premise that law's purpose is to guide human conduct, and then describes the distinguishing elements of law that enable it to discharge that purpose. From there, he infers the implicit normative values contained within those elements. That leads to his presentation of the eight principles of legality as the 'internal morality of law.'² In a similar form, Fuller premises his analysis of adjudication on his conception of the purpose of adjudication, then discerns the features of adjudication that are conducive to that purpose. Then, he infers the implicit normative commitments contained within those features.

¹ Lon Fuller and Kenneth Winston, "The Forms and Limits of Adjudication" (1978) 92(2) Harv L Rev 353 at 364 [Fuller, "Forms and Limits"] at 354: "By the forms of adjudication I refer to the ways in which adjudication may be organized and conducted...In general, the questions posed for consideration are: What are the permissible variations in the forms of adjudication? When has its nature been so altered that we are compelled to speak of an "abuse" or a "perversion" of the adjudicative process?"

² Lon Fuller, *Morality of Law* (New Haven and London: Yale University Press, 1964) Chapter Three [Fuller, *Morality of Law*]. I have summarized Fuller's concept of the internal morality of law in Chapter Three, part 2(a).

For Fuller, adjudication is both a mechanism of authoritative resolution of legal disputes, and a method of “social ordering.”³ Just like law generally, judicial decisions guide human conduct - parties will tend to govern themselves upon consideration of either actual judicial reasons, or upon some estimation of a likely judicial response.⁴

The distinguishing feature of adjudication as a method of social ordering is that parties participate through their “presentation of proofs and reasoned arguments.”⁵ It is that distinctive form of participation that, for Fuller, holds the key to determining the optimal form of adjudication and its normative value:

This whole analysis will derive from one simple proposition, namely, that the distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favour. Whatever heightens the significance of this participation lifts adjudication towards its optimum expression. Whatever destroys the meaning of that participation destroys the integrity of adjudication itself....The purpose of this paper is to trace out the...implications of the proposition that the

³ Fuller explains, “It is customary to think of adjudication as a means of settling disputes or controversies....More fundamentally, however, adjudication should be viewed as a form of social ordering, as a way in which the relations of men to one another are governed and regulated.” Fuller, “Forms and Limits,” *supra* note 1 at 357. See also Robert Bone, “Lon Fuller’s Theory of Adjudication and The False Dichotomy Between Dispute Resolution and Public Law Models of Litigation” (1995) 75 BUL Rev 1273 for his argument that Fuller’s theory of adjudication has sometimes been mischaracterized as being fundamentally a dispute resolution model [Bone, “Fuller’s Theory of Adjudication”]. That characterization, Bone argues, has resulted in a misunderstanding of Fuller’s normative commitments.

⁴ Fuller, “Forms and Limits,” *supra* note 1.

⁵ *Ibid* at 363.

distinguishing feature of adjudication lies in the mode of participation which is afforded to the party affected by the decision.⁶

What, then, is so significant about the nature of adjudicative participation? For Fuller, enabling parties to present their own evidence and argument for the purpose of adjudicating their claims implies an underpinning commitment to the rationality of a judicial outcome. He argues that if arriving at a reasoned, rational outcome were not a foundational feature of adjudication, then opportunities to present evidence and arguments to an impartial decision-maker would be superfluous and insincere.⁷ In other words, the fact that presentation of evidence and reasons is allowed means that the decision maker will *rely on* evidence and reasons. When a decision-maker commits to relying on evidence and argument to arrive at a conclusion, the implication is that she is committed to making a rational decision. Expressing this insight, Fuller describes adjudication as, “a device which gives formal and institutional expression to the influence of reasoned argument in human affairs.... A decision which is the product of reasoned argument must be prepared itself to meet the test of reason.”⁸

Fuller’s portrayal of adjudication as a method of arriving at a rational outcome, challenged the view that grew from Hume’s philosophy (which, Fuller notes, seems to have been gaining more widespread acceptance at the time), which claimed that empirical/scientific

⁶ *Ibid* at 364.

⁷ *Ibid* at 365-372. A specific example appears at 367: “If, as in adjudication, the only mode of participation consists in the opportunity to present proofs and arguments, the purpose of this participation is frustrated, and the whole proceeding becomes a farce, should the decision that emerges make no pretense whatever to rationality.”

⁸ *Ibid* at 366-367.

inquiry and logical inference were the only arenas where human reason could find meaningful expression.⁹ Fuller, however, finds this view improperly restrictive, because it excludes “rational discourse,” which for Fuller, also embraces the capacity for human rationality and constitutes a valid method of arriving at a reasoned outcome.¹⁰ It is that process of rational discourse that constitutes the framework for the essential conditions of adjudication.¹¹

There is not, unfortunately, much elaboration on the notion of “rational discourse” and its necessary features in Fuller’s writing, but his message is clear that rational discourse occurs in the adjudicative context by providing a space for full participation of partisan parties.¹² Accordingly, various procedural elements of adjudicative decision-making can be tested on the basis of whether they “affec[t] adversely the meaning of the affected party’s participation in the decision by proofs and reasoned arguments?”¹³ For instance, an adjudicator that had already made up his mind before hearing the parties’ evidence and

⁹ *Ibid* at 379-380.

¹⁰ *Ibid* at 381.

¹¹ *Ibid* at 381: “However we may define this third area [i.e. rational discourse], a rigid adherence to the Humean view is, I believe, destructive of any understanding of the problems of adjudication. It not only falsifies the conditions essential for the effective operation of adjudication but distorts the meaning of any adjudicative process that is functioning successfully.”

¹² This is consistent with Robert Bone’s assessment of Fuller’s views on adjudication. As he states, for Fuller, adjudication enables people to “motivate reason by purposive interaction and to provide a sufficiently broad field for the free play of ideas. With lively competition, the ideas that prevailed would be those that appealed to the sense of rightness and reasonableness that all people shared as part of their capacity for reason.” Robert Bone, “Fuller’s Theory of Adjudication” *supra* note 3 at 1289.

¹³ Fuller, “Forms and Limits,” *supra* note 1 at 382.

argument, or an adjudicator who had some interest in a particular outcome, would be unacceptable because those conditions would diminish the meaningfulness of the litigants' participation rights. If so, then the strong commitment to rationality in adjudication is diminished as a result of the compromise to the optimal process of adjudication.¹⁴

Fuller's critical insight is that adjudication is committed to rationality, evidenced by the form of participation that adjudication enables – presentation of evidence and argument by affected parties forms the basis of the adjudicative decision. This insight can be understood more holistically if Fuller's discussion of adjudication is read in light of jurisprudential thinking on legality generally. In Chapter Three, I endorsed the reading of Fuller's jurisprudence that understands his central theme to be that law-making procedures that embody respect for legal subjects as autonomous agents ground both the law's authoritative demands and elicit the subjects' acceptance of them.¹⁵ In other words, that respect for human agency, implicit in the necessarily formal principles of legality, provides law with legitimacy. Although Fuller does not expressly discuss this in "Forms and Limits," in my reading, that same respect for human agency can be defensibly read in as his implicit commitment in the adjudicative sphere as well.

First, Fuller notes that participation through proof and argument is inherent to adjudication.¹⁶ That implicitly characterizes litigants as free-acting, rational agents that are

¹⁴ Fuller notes this problem within his discussion of why an arbitrator should not "act on his own motion in initiating [a] case," in "Forms and Limits," *supra* note 1 at 385.

¹⁵ See Chapter 2 Part 2(a).

¹⁶ Fuller, "Forms and Limits," *supra* note 1 at 365-372.

capable of presenting their own cases on their own terms. Optimal adjudication, Fuller advises, preserves their right to do just that.¹⁷ Second, the value that Fuller places on the commitment to rational adjudicative outcomes implies, I suggest, that affected parties *deserve* and are entitled to rational outcomes. That implication embraces respect for human agency. Just as Fuller's account of legality stipulates that subjects cannot be subjected to irrational laws (like those that simply cannot be obeyed, or those that are retrospective) due to the associated affront to human agency, his analysis of adjudication similarly stipulates that litigants should not be subject to irrational adjudicative decisions. That would amount to an affront to their position as free, rationally-acting individuals who can only be justifiably guided in their actions if that guidance is itself rational.

This reading of Fuller on adjudication finds some express support in his comments in *Law in Quest of Itself* where he refers to adjudicative law as a system of "autonomous order" and comments that:¹⁸

The common law imperceptibly becomes part of men's common beliefs, and exercises frictionless control over their activities which derives its sanction not from its source but from a conviction of its essential rightness.

This comment, taken together with Fuller's discussion of adjudication as a mechanism of achieving a rational outcome, suggests a number of normative commitments. First, for Fuller, adjudication needs a normative sanction. That is, community members should be able to accept the adjudicative system and its outcomes for a reason beyond the bare reason

¹⁷ *Ibid.*

¹⁸ Lon Fuller, *The Law in Quest of Itself* (Boston: Beacon Press, 1940) at 134.

that it is an authoritative pronouncement of a judge. The adjudicative decision can be sanctioned on the basis of it being right. And second, for Fuller, “essential rightness” is synonymous with a rational decision based on the evidence and argument presented by affected parties. Taken together, this supports the interpretation that Fuller’s position is that adjudicative decision-making should demonstrably respect the litigants as autonomous agents whose sanction matters.

Fuller’s ideas set the stage for an argument that the right process for adjudicative fact-finding must (among other things) maintain the effectiveness of a party’s right to present her own evidence and argument. But his themes of participation, its connection to rationality, along with the implicit commitment to respect for human agency are underdeveloped, and somewhat ambiguous. For instance, Fuller is clear that meaningful participation rights are indicative of a commitment to a rational outcome, but if it is the rationality of the outcome that is the key normative feature of adjudication, is it possible to endorse a system of decision-making that provides rational results without promising participation rights? Moreover, although Fuller is clearly committed to the idea that adjudication should generate reasoned or rational decisions, he does not provide much by way of defining what exactly he means by “reasoned” and “rational.”

Habermas’s application of discourse theory to law contains strikingly similar themes of participation and rationality as Fuller’s account.¹⁹ But these core concepts are developed

¹⁹ Despite which Habermas offers Fuller only a passing reference as an example of an (unnamed) theorist who has analyzed the “rational implications” of the “classical concept of legal certainty,” in Jurgen Habermas, *Between Facts and Norms: Contributions to Discourse*

with more precision, more substantive content and more express normative heft in Habermas's discussion. Accordingly, some of the concepts introduced earlier by Fuller gain a more complete expression through reference to Habermas's demonstration of how rational discourse finds expression in adjudication and yields legitimate judicial outcomes.

B. Habermas on Adjudication: Rational Discourse

Like Fuller, Habermas's conception of adjudication develops in a parallel course to his jurisprudential presentation of law, its purpose, and its necessary features in light of that purpose. As I have illustrated in Chapter Three, for Habermas, law plays an integrative and stabilizing role in society and, in order to discharge this role, law must have two elements: certainty or facticity, and legitimacy.²⁰ Law must be certain in the sense that subjects should know (or be able to know) what the enforceable rules in the society are, and to know that those rules will indeed be enforced. Second, laws must also have a normative quality that grounds the legal subject's rational acceptance of them.²¹ Without that normative quality, law may be coercive, but would not function as a socially integrative agent.²²

Theory of Law and Democracy (Cambridge, Massachusetts: MIT Press, 1996) at 220 [Habermas, *Between Facts and Norms*].

²⁰ See my discussion in Chapter Three Part 2, and Habermas, *Between Facts and Norms*, *ibid* at 197-203.

²¹ *Ibid* at 198. Habermas refers to the normative element of law sometimes as 'validity' and sometimes as 'legitimacy'. The normative element is in line with what I have defined as the concept of 'legitimacy,' so for the sake of clarity and consistency, I use 'legitimacy' in my discussion of Habermas's account.

²² *Ibid*.

In Habermas's theory, a law is rationally acceptable when it is a product of a rational discourse process. When a law-making process embodies, as far as possible, an equal and free exchange of information and reasons, and participants are sincerely committed to arriving at an outcome motivated by the force of reason alone, the emergent law can be said to be rationally acceptable, irrespective of its ultimate substantive content. Accordingly, the legitimacy of the outcome depends on a process where legal subjects are treated as free acting agents whose voices matter equally.

A parallel line of reasoning gives rise to Habermas's application of discourse theory to adjudication.²³ First, adjudicative law plays a socially integrative function, just like legislative law.²⁴ Legislative law establishes a system of rights and adjudication interprets and gives content to that system of rights.²⁵ Consequently, just as the two aspects of facticity/certainty and legitimacy must be manifest in legislative law, they must also be present in adjudicative law:

Both guarantees, certainty and legitimacy, must be simultaneously redeemed at the level of judicial decision making... In order to fulfill the socially integrative function of the legal order and the legitimacy claim of

²³ I note that Habermas's grounding is in the German civil law tradition. In my view, this does not affect the applicability of his insights to the context of legal fact-finding.

²⁴ *Ibid.*

²⁵ This is consistent with Klaus Gunther's explanation of Habermas's theory: "Rational discourse is the internal procedural structure of legislation as interpreting and shaping the system of rights as it is laid down in the constitution. According to Habermas, legal adjudication also 'interprets and shapes' the system of rights within another form of communication, the legal discourse of application." Klaus Gunther, "Legal Adjudication and Democracy: Some Remarks on Dworkin and Habermas" (1995) 3(4) *European Journal of Legal Philosophy* 36 at 47. This also bears a similarity to Fuller's notion that adjudicative outcomes guide human conduct in a way comparative to legislative law.

law, court rulings must satisfy simultaneously the conditions of *consistent decision-making* and *rational acceptability*....²⁶

As the excerpt above indicates, Habermas advises that consistent decision-making ensures the certainty of law, at least in part, by maintaining a predictable and equally applicable application of law. But that basic value of formal justice through treating like cases alike is not itself sufficient to establish adjudicative legitimacy. Along with maintaining the minimal respect for equal treatment through bare formalism, judicial decisions must also be 'right' in the sense of being rationally acceptable.²⁷ If not, then by implication, the socially integrative function that is as much relevant to adjudicative law as it is to legislative law could not be discharged.

The task of his theory of adjudication, Habermas explains, is to harmonize the two elements of certainty and legitimacy, but as he notes, that harmonization is not always easy.²⁸ The difficulty is clearly discernable where legal principles are developed through common law. In the arena of tortious injury, courts have, for instance, introduced new tests for causation

²⁶ Habermas, *Between Facts and Norms*, *supra* note 19 at 198 (emphasis in the original). For Habermas, certainty is a derivative of the facticity of law, and legitimacy is derivative of rational acceptability: "On the one hand, established law guarantees the enforcement of legally expected behavior and therewith the certainty of law. On the other hand, rational procedures for making and applying law promise to legitimate the expectations that are stabilized in this way; the norms *deserve* legal obedience."

²⁷ This bears a notable similarity to Fuller's perception of what constitutes a "right" decision, as discussed above.

²⁸ Habermas, *Between Facts and Norms*, *supra* note 19 at 198.

into Canadian law to complement the 'but for' test,²⁹ or have extended tort liability to include psychiatric injury when it was once limited to physical injury.³⁰ The implication is that such new principles are "right," yet where there are shifts in what constitutes "right" law in Canada, legal certainty becomes compromised.

Habermas explains the tension between certainty and rightness as a problem of legal indeterminacy. Legislated law is necessarily general in character, so its content in terms of how it would apply in specific situations is not always clearly ascertainable. In that sense, the content of a legislated law is not fully defined, and judges are tasked with providing it with further definition through application.³¹

For Habermas, given that law and its application can be indeterminate, it is not possible to guarantee a consistent and predictable 'right' interpretation of exactly the nature of the rights protected by general laws especially in novel situations. This is because the rights guaranteed by laws are not empirical facts and are not discernable through some type of determinative empirical test.³² Rather, the correct expression of a particular right is subject to argument and competing reasons in favour of one interpretation over another. As Habermas explains, "there is no 'natural' end to the chain of possible substantial reasons;

²⁹ See for instance *Athey v Leonati* [1996] 2 SCR 458, *Resurfice v Hanke* and *Clements v Clements*, *Henry v British Columbia (Attorney General)*, 2015 SCC 24. I expand on this in Chapter Six.

³⁰ See for instance, *Mustapha v Culligan of Canada Ltd* [2008] 2 SCR 114, 2008 CarswellOnt 2824.

³¹ Habermas, *Between Facts and Norms*, *supra* note 19 at 198-199.

³² *Ibid* at 226.

one cannot exclude the possibility that new information and better reasons will be brought forward.”³³ Accordingly, a singular right answer does not necessarily exist³⁴. This gives rise to what Habermas calls, “the rationality problem”: “how can the application of a contingently emergent law be carried out with both internal consistency and rational external justification, so as to guarantee simultaneously *the certainty of law* and its *rightness?*”³⁵

This question that Habermas poses in light of legal indeterminacy parallels my purpose of reconciling the analogous tension that arises in adjudication due to *factual* indeterminacy. Just as judges are tasked with making authoritative conclusions with respect to the sometimes uncertain question, ‘what is the law?,’ they are also tasked with authoritatively resolving the often uncertain question, ‘what happened?’ Even in cases where the applicable legal principles are generally agreed upon, as in my arena of liability for tortious injury, resolving the relevant factual questions is often arduous. For instance, as I discuss in Chapters Five and FSix, determining the cause of an injury can involve consideration of contradicting medical expert opinions; determining financial losses can similarly involve making sense of challenging and potentially conflicting actuarial evidence. Still, in order to apply the legal principles to resolve the dispute, these factual questions require both timely and authoritative resolution. Given the inevitability of factual uncertainty and

³³ *Ibid* at 227.

³⁴ Habermas’s notion of no right answer can be contrasted with Ronald Dworkin’s position, which maintains the necessity and possibility of a right, or at least, best answer. See Chapter Two for my discussion of Dworkin’s approach. For Habermas’s discussion of Dworkin’s theory, see Habermas, *Between Facts and Norms*, *ibid*, at 203-222.

³⁵ *Ibid* at 199 [emphasis in original].

indeterminacy, accurate resolution to these factual questions cannot be guaranteed. How, then, can the adjudicative system reconcile the need for a final and certain legal outcome along with the need for a 'correct' resolution of the dispute?

Habermas offers an approach to adjudication that reconciles the certainty and legitimacy issue by turning to the same discursive principle that he applies to law generally. My goal is to use those insights as the starting point for understanding how to reconcile the comparable tension that arises in adjudication due to indeterminate or uncertain factual questions.

Habermas's move is to transfer both elements, certainty and rightness (i.e. legitimacy), from outcome to process. Rather than insisting on the existence of a particular substantively right answer, Habermas's theory places the rightness of the outcome within the process of arriving at that outcome: "Procedural rights," he explains, "guarantee each legal person the claim to a fair procedure that in turn guarantees not certainty of outcome but a discursive clarification of the pertinent facts and legal questions."³⁶ In other words, the certainty component does not guarantee any certain outcome, but it does guarantee that the outcome will be the product of a certain *procedure*.

Of course, satisfaction of the certainty element in this way is essentially an expression of formal justice, and does not account fully for the 'rightness' guarantee, which requires a stronger normative commitment. That normative commitment is also located in the realm of process – legitimacy is imported into the judicial outcome via the virtues of the process of

³⁶ *Ibid* at 220.

arriving at the outcome. As Habermas puts it, “procedural principles that secure the validity of the outcome of a procedurally fair decision-making practice require internal justification.”³⁷ That is, given that process is the source of the rightness of a legal outcome, that process itself needs to be a justifiable one. The internal justification of the procedural principles constitutes the ‘rightness’ or legitimacy guarantee. When an internally justified procedure is consistently employed for the purpose of adjudicative decision-making, the outcome contains not only the certainty guarantee, but also the legitimacy guarantee that legal outcomes are contingent on.

That internal justification, Habermas explains, comes from the principles of discourse theory. Just as the approximation of the discourse principles within democratic process gives rise to the rational acceptability of law in general, adjudicative procedures that approximate discourse principles give rise to the rational acceptability of judicial outcomes.³⁸ Accordingly, Habermas’s theory postulates that “‘rightness’ means rational acceptability supported by good reasons,”³⁹ which is attainable through an approximation of discourse principles. And certainty is achieved through a guaranteed, consistent adherence to these procedures in the resolution of legal disputes.

³⁷ *Ibid* at 225.

³⁸ *Ibid* at 226: As Habermas puts it, “A discourse theory of law...relies on a strong concept of procedural rationality that locates the properties constitutive of a decision’s validity not only in the logicosemantic dimension of constructing arguments and connecting statements but also in the pragmatic dimension of the justification process itself.”

³⁹ *Ibid* at 226. (Habermas’s statement here is somewhat obtuse because it seems redundant to express that rational acceptability must be supported by good reasons, as good reasons are inherent to rational acceptability.)

How, then, can the discourse principles be reflected in the adjudicative process? In its ideal manifestation, a rational discourse will contain a number of presumptive preconditions. The process will:⁴⁰

1. Prevent a rationally unmotivated termination of argumentation;⁴¹
2. Secure both freedom in the choice of topics and inclusion of the best information and reasons through universal and equal access to, as well as equal and symmetrical participation in argumentation;
3. Exclude every kind of coercion – whether originating outside the process of reaching understanding or within it – other than that of the better argument, so that all motives except that of the cooperative search for truth are neutralized.

Naturally these principles cannot be reflected in adjudication absolutely given the practical restrictions of timely and economically feasible dispute resolution.⁴² Rather, those ideal conditions provide guidance to the effect that justifiable procedural conditions should “ensure that all the relevant reasons and information available for a given issue at a particular time are in no way suppressed, that is, they can develop their inherent force for

⁴⁰ *Ibid* at 230, citing Robert Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification*, trans Ruth Adler and Neil MacCormick (Oxford: Oxford University Press, 1989).

⁴¹ I take this statement to mean that if a discourse is terminated for any reason other than rational assent of parties (for instance, termination due to frustration, hurt or fatigue), it cannot be considered a true rational discourse.

⁴² Habermas, *Between Facts and Norms*, *supra* note 19 at 235. “Practical realities” may also involve indiscretions including adversarial attempts at thwarting fact-finding. I discuss this briefly in Chapter Five in the context of the role of lawyers and experts when fact-finding depends on technical or scientific evidence.

rational motivation.”⁴³ Just as the ideal discourse conditions protect against unequal ability to participate, the requisite features of adjudicative decision making calls for free and equal ability for affected members to put forth arguments and reasons, bearing in mind the practical realities involved in maintaining adjudicative efficacy. As Habermas puts it:

Procedural law does not regulate normative-legal discourse as such but secures, in the temporal, social, and substantive dimensions, the institutional framework that *clears the way* for processes of communication governed by the logic of application discourses.⁴⁴

Put in another way, adjudicative procedural rules are a mechanism for ensuring a place where the essence of rational discourse can be maintained, limited by the pragmatics of legal adjudication. They “institutionally carve out an internal space for the free exchange of arguments in an application discourse.”⁴⁵ In doing so, they maintain that the judicial outcome will be rationally motivated by the evidence and argument presented by affected parties, and the outcomes, therefore, have a basis for acceptance. Accordingly, the adjudicative procedures are internally justified when they treat parties as equal and free autonomous agents who are entitled to present their cases, and who are entitled to rational decisions respecting their legal entitlements and obligations.

C. Summing Up Fuller and Habermas on Adjudication

⁴³ *Ibid* at 227.

⁴⁴ *Ibid* at 235 [emphasis in the original].

⁴⁵ *Ibid*.

Adopting the insights of Fuller and Habermas, adjudicative legitimacy lies in the *rationality* of the judicial outcome. In keeping with their normative commitments regarding law generally, as presented in Chapter Three, rationality of outcome is expressed through an adjudicative process that demonstrably recognizes legal subjects as autonomous agents by preserving their right to present evidence and arguments in advancement of their own claims. The assurance of a sincerely rationally motivated outcome, as evidenced through a process that relies on the evidence and argument freely presented by affected parties, provides a normative grounding – legitimacy - for the authority of judicial decisions.

Fuller's and Habermas's commentaries on adjudication provide the grounding for my ultimate question of locating the source of legitimacy of judicial resolution of factual indeterminacy. Although Fuller and Habermas, like most jurisprudential discussions of adjudication, focus on legal indeterminacy, and do not consider factual indeterminacy directly, their insights are applicable by analogy. As explained above, just as legal indeterminacy causes uncertainty in adjudication, so does factual indeterminacy, and litigants are entitled to legitimate resolution of factual questions, considering that the resolution of those questions underpins the subsequent application of legal principles leading to resolution of disputes.

Just as legal subjects have a reason to respect judicial resolution of legal indeterminacy by virtue of a rational decision-making process, they can similarly respect judicial resolution of factual indeterminacy so long as the fact-finding processes embody a genuine commitment to a rational determination of the relevant facts. As Fuller and Habermas suggest, this requires that parties are enabled to present evidence and argument in favour of a particular

factual determination, and are assured that the ultimate outcome will be sincerely rationally motivated. In this way, the process of fact-finding maintains a discernable respect for litigants as equal, autonomous agents, which provides the normative justification for an authoritative determination of the uncertain question, “what happened?” The remainder of this chapter is dedicated to a more specific delineation of how these virtues can be reflected in the basic features of adjudicative fact-finding in the civil litigation context.

Part 2. Delineating Legitimate Adjudicative Fact-Finding

In this Part, I consider the necessary features of an adjudicative fact-finding process that demonstrably respects legal subjects as autonomous agents, deserving of rational decision-making. I conclude that a legitimate adjudicative process of fact-finding has two independent, yet related features. First, as both Fuller and Habermas set out, the adjudicative process should assure meaningful participation rights that enable affected parties to present relevant evidence in furtherance of their positions. An adjudicative process that does not enable decision-making on the basis of parties’ evidence and reasons (within the confines of legal principles that justifiably restrict admissible evidence or arguments) cannot be considered either committed to rational outcomes or respectful of the agency of legal subjects.

Second, while fact-finding procedures cannot guarantee accuracy, the process must assure factual reliability. That is achieved, I suggest below, when the adjudication process is genuinely oriented towards achieving factually accurate outcomes. A fact-finding process

that is not committed to making a best effort to finding true facts is inherently irrational and disrespectful of legal subjects. Of course, compromises to accuracy are inevitable. Those compromises should be justifiable in light of the principles of legitimate fact-finding, which I outline below.

I begin my discussion below with my comments on why factual reliability is important, how it can be reflected in the adjudicative process, and how I suggest compromises to factual accuracy can be justified such that factual reliability is maintained. Where applicable, this discussion contains references to maintaining meaningful participation rights, but I provide a more express discussion of the necessity and form of participation rights at the end of the chapter.

A. Factual Reliability

i. Accuracy Matters: The Importance of Accuracy Expressed as Reliability

An argument for procedural legitimacy can be critiqued on the basis that it is improperly forgiving of the injustice caused by factual inaccuracy.⁴⁶ That criticism does not hold,

⁴⁶ See for instance Hock Lai Ho, *Philosophy of Evidence Law: Justice in the Search for Truth* (Oxford, New York: Oxford University Press, 2008) at 65 [Ho, *Philosophy of Evidence Law*], where he rejects the notion of pure procedural justice on the basis that: “A party is unjustly treated if and when the court withholds from her substantive entitlements under the law, however unintentional the error.” Similarly, in the criminal context, David Paciocco, “Balancing the Rights of the Individual and Society in Matters of Truth and Proof: Part II – Evidence about Innocence” (2008) 81 Can Bar Rev 39 at 44: “When we recognize a wrongful conviction we, quite rightly, consider it to be an inexcusable tragedy. It is no answer to the factually innocent to say, “Well. Even though you are factually innocent it is fair to leave you convicted because the law was applied with perfection during your trial.”

however, in the context of the case for procedural legitimacy that I endorse here. As I introduced in Chapter Two, although the procedural legitimacy notion refrains from the impractical ideal of pinning legitimacy to factual accuracy of each outcome, it does not follow that a process that is altogether unconcerned with outcome-accuracy is acceptable under a procedural legitimacy framework.⁴⁷ The goal of outcome-accuracy is, however, expressed as a genuine effort towards factual accuracy, demonstrable through a fact-finding procedure that is authentically oriented towards accuracy.

One way to understand the significance of a factually reliable system of fact-finding is through Fuller's notion that the inner morality of law depends on congruence between the declared law and its administration through the courts.⁴⁸ With that in mind, consider a society that employs a coin toss as its process of fact-finding. Suppose that in such a society, the declared law is that a person is legally entitled to compensation for a negligently inflicted injury. But rather than relying on evidence to assess the relevant factual claims

⁴⁷ David Estlund is well-known for advancing a theory known as "epistemic proceduralism" in the context of democratic legitimacy. He argues that democratic procedures produce legitimate results because they emerge from a process that *tends to* arrive at correct outcomes; importantly, the legitimacy of the outcome does not depend on its correctness – incorrect outcomes can also be legitimate on the basis of the democratic process from which they emerged. See David Estlund, *Democratic Authority: A Philosophical Framework* (Princeton, N.J.: Princeton University Press, 2008), particularly Chapter Seven [Estlund, *Democratic Authority*]. This idea clearly aligns with the notion of procedural legitimacy that I have been suggesting. However, I do not hold that the epistemic value of adjudicative fact-finding procedures can, itself, fully support a framework for legitimate adjudicative fact-finding, as I noted in Chapter Two, and outline further below. Though his ideas are developed in a different arena, Estlund's insights regarding the importance of epistemic value, and his steadfast insistence that legitimacy is located the realm of process and not outcome, support my position that the legitimacy of fact-finding is to be found in procedural virtues.

⁴⁸ Fuller, *Morality of Law*, *supra* note 2 at 81. See also Chapter Three Part 2.

over the course of the litigation, the adjudicator tosses a coin to determine factual issues. For instance, heads means that the defendant's negligence was the factual cause of the injury; tails means that factual causation is not made out for legal purposes. In that society, there would be no genuine attempt at congruence between the law and its administration through the courts. There may be accidental congruence if the coin flipping happened to yield accurate facts, but whether there is congruence or not would be unpredictable, arbitrary and irrational. That renders the law incapable of rationally guiding legal subjects. That, as Fuller notes, constitutes an unacceptable affront to the dignity of the legal subjects, and is unacceptable.⁴⁹ Even leaving aside the obvious affront to maintaining meaningful participation rights in respect of the factual determinations, this type of fact-finding process cannot be endorsed because it constitutes a wholly inauthentic and irrational attempt to ascertain the truth.

The general requirement for genuine truth-seeking is paralleled in Habermas's approach to adjudication as well.⁵⁰ For him, the rationality of a discourse aimed at assessing the truth of a claim breaks down if participants are insincere in their search for truth.⁵¹ Since legitimate adjudicative processes should provide a structure for decisions to be made on the basis of the logic of rational discourse, it follows that adjudicative procedures of fact-finding must enable and manifest a genuine inquiry into the truth. David Dyzenhaus's comments on the

⁴⁹ *Ibid.*

⁵⁰ See Chapter Three Part 2(b).

⁵¹ For rationally motivated discourse to ensure "equal communication rights for participants, it requires sincerity and, it must diffuse any kind of force other than the forceless force of the better arguments." Habermas, "Between Facts and Norms: An Author's Reflections" (1999) 76 *Denv UL Rev* 937 at 940 [Habermas, "Author's Reflections"].

relationship between the procedures of rational discourse and a search for truth set out the point clearly. He recognizes that truth may not be attained in every instance, but the pragmatic reality is that a decision must be rendered in spite of uncertainty as to the truth of it. But that does not give rise to any necessary conclusion that truth does not or cannot have the reverence that it is owed in any theory of legal legitimacy, and in particular in a theory of legitimate factual determinations. He states:⁵²

We must in fact make decisions or accept closures which seem to cut off debate even in the face of disagreement, which we should expect to persist and even intensify as a result of the decision. But what can make such closures legitimate and thus not arbitrary is that they are based on an appropriate (though not ideal) process of inquiry and that the closure is temporary – it remains open to revision in the light of future experience. And these conditions, combined with the fact that the closure is based on the best evidence and arguments available, are what can give us reason to believe that we are at least on the right path to the truth.

In keeping with the theme expressed in Dyzenhaus's comments above, I maintain that an authentic attempt at ascertaining facts is not only laudable, but necessary within a legitimate adjudicative process. In so holding, I distance myself from those writers who suggest that the adjudicative system cannot be considered a search for truth at all.⁵³

⁵² David Dyzenhaus, "The Legitimacy of Legality" (1996) 46 UTLJ 129 at 180.

⁵³ See for example: Keith Kilback & Michael Tochor, "Searching for Truth but Missing the Point" (2002) 40 Alta L Rev 333, argue that considering a trial as a "search for truth" is flawed for two reasons: first, because it is impossible for the trier of fact to know the truth, and second, since the concept of the "search for truth" has not been judicially defined, judges can pursue desired outcomes under its auspices; Note, "The Theoretical Foundations of the Hearsay Rules" (1980) 93 Harv L Rev 1786 at 1787: "Since no evidence can provide more than a basis for inferences, which are by definition uncertain (by contrast to

I aim to demonstrate that the tension between the importance of factual accuracy and the impossibility of guaranteeing it can be best reconciled by replacing the notion of outcome-accuracy as a necessary element of legitimacy with accuracy's procedural counterpart: a factually reliable process. A justifiable process must be factually reliable and, thereby, the outcomes that it yields are also factually reliable. This does not mean that the outcomes are necessarily accurate. Being products of a reliable procedure means that the outcomes are factually reliable, even though there is a risk that the outcome is not factually accurate, and irrespective of whether it is ever known if the outcome is factual or not.⁵⁴

Shifting the value of accuracy away from the actual accuracy of the factual finding and into the realm of process is similar in form to my discussion of Raz's concept of legitimacy on the basis of outcomes that enable conformity to reason and its relation to Habermas's theory of adjudication as a rational discourse process. Elaborating that similarity helps to clarify my notion of factual reliability and how it can be assessed. Recall that in Raz's jurisprudence,

deductions, where conclusions follow with certainty from the premises), trials cannot discover absolute truth." In addition, while extraneous to my analysis, some epistemologist viewpoints hold that knowledge is fallibilist, so establishing truth is impossible whether in the context of a trial or otherwise. See for example, Michael Williams, *Problems of Knowledge - A Critical Introduction to Epistemology* (Oxford: OUP, 2001). For a discussion of the pros and cons of the debate around the nature of knowledge, see Simon Blackburn, *Truth - A Guide for the Perplexed* (London: Allen Lane, 2005), and for critical reactions to skepticism over the ascertainability of truth or 'veriphobia,' see Susan Haack, "Confessions of an Old-Fashioned Prig," in Susan Haack, *Manifesto Of A Passionate Moderate - Unfashionable Essays* (Chicago: Chicago UP, 1999), and Alvin I Goldman, *Knowledge in a Social World* (Oxford: UOP, 1999).

⁵⁴ Ho's explanation of the relation and significant difference between accuracy and reliability is helpful: "The reference to 'accuracy' when speaking of a finding of fact must be to the likelihood of its truth, and not how close it is to the truth. If this is right, we would arguably do better to speak of 'reliability' instead...Reliability implies functional efficacy...A verdict is more or less reliable depending on the reliability of the trial system which produced it." Hock Lai Ho, *Philosophy of Evidence Law*, *supra* note 46 at 66-67.

law necessarily claims to have legitimate authority, in the sense that adherence to legal decrees best enable conformity to reason. Although legal institutions necessarily make this claim, they do not necessarily achieve it. I argued in Chapter Three that legal institutions can, nonetheless, maintain legitimacy on the basis of the *authenticity* of their claim of legitimate authority. That authenticity, I suggested, can be assessed by determining how well a legal system's law-making procedures coincide with Habermas's procedural principles of rational discourse, because those principles assure a genuine attempt at achieving a rational outcome.⁵⁵ Notably, this parallels Habermas's move discussed above of shifting the 'rightness' of the outcome into the 'rightness' of the process by suggesting that the 'right' outcome is achieved through adherence to the 'right' process.

Adopting the same logic, an acceptable process of fact-finding is necessarily a system that claims to ascertain the relevant facts accurately. Even though adjudicative fact-finding cannot promise to invariably achieve that claim, it can maintain legitimacy, in part, on the basis of the authenticity of that claim. That authenticity can be evaluated by considering whether the fact-finding procedures enable a sincere search for truth, subject only to justifiable limitations. Accordingly, in my conception, assessing the factual reliability of the fact-finding process depends on assessing the genuineness or sincerity of an adjudicative system's claim of fact-finding through an objective evaluation of the fact-finding procedures.

By shifting the importance of actual outcome accuracy to a procedural concept of an ensured 'best effort' at factual accuracy, I echo Fuller's observation that adjudication can be

⁵⁵ See Chapter Three Part 2(b).

understood as a method of “imperfect realization of justice.”⁵⁶ An authentic understanding of adjudication is contingent on accepting that imperfection.⁵⁷ With that in mind, I endorse Jerome Frank’s view that we do not, because we cannot, demand perfection from the adjudicative process, but that we must demand a genuine effort.⁵⁸ And it is that ‘genuine effort’ towards factual accuracy, as represented in its fact-finding procedures, which I use to assess the procedural concept of ‘factual reliability.’⁵⁹ In the upcoming section, I have attempted to delineate the features that a factually reliable fact-finding system should have.

⁵⁶ Lon Fuller, “Needs of American Legal Philosophy,” in *The Principles of Social Order: Selected Essays of Lon L Fuller*, (Durham, NC: Duke University Press, 1981) at 263: “I have already expressed my conviction that adjudication, as a means for organizing human relations, can be discussed intelligently even though we are unable to define with precision its assumed end, namely, justice. I have also suggested that we can arrive at a better understanding of the aim we call justice if we discuss critically the various means by which it is imperfectly realized.”

⁵⁷ *Ibid.*

⁵⁸ Jerome Frank, *Courts on Trial – Myth and Reality in American Justice* (New Jersey: Princeton University Press, 1973) at 36: “Perfect justice lies beyond human reach. But the unattainability of the ideal is no excuse for shirking the effort to obtain the best available.” Thomas Weigend, “Is the Criminal Process about Truth?: A German Perspective,” (2003) 26 Harv JL & Pub Pol’y 157 at 173, arrives at a similar conclusion: “The public will accept whatever is presented as ‘Justice’ only if justice is perceived to be based on an honest effort to find the ‘truth.’ There are no great expectations beyond that...What then are the necessary ingredients of procedural truth?...The essential element is a visible, honest effort to collect and introduce facts on which the decision-maker can base a rationally defensible verdict” [Weigend, “Is the Criminal Process about Truth?”].

⁵⁹ I note here that it is not my purpose to adopt a statistically grounded concept of assessing or quantifying reliability. Statistical reliability can only be assessed empirically by examining the percentage of errors that occur in a given fact-finding system. That approach to assessing reliability is impractical and potentially impossible, because confirming the truth of an outcome is often elusive. See for instance Shari Seidman Diamond, “Truth, Justice, and the Jury” (2003) 26 Harv JL & Pub Pol’y 143 at 150: “we cannot compare...a verdict with some gold standard of truth because no such dependable standard exists.” (This issue is particularly visible in the causal uncertainty cases that I discuss in Chapter 5). I assess reliability by considering whether the fact-finding process is genuinely orientated towards factual accuracy. This does not depend on empirical precision, but on an authentic

ii. How should reliability be reflected in the adjudicative process?

Assessing the reliability of a fact-finding process can bring many features of the civil litigation trial process under examination. While it is outside of my parameters to assess the merit of all relevant evidentiary doctrines, my aim in this section is to provide and endorse some overarching principles that should constitute the foundational features of fact-finding in a civil trial. Those basic elements would ensure that the fact-finding process demonstrably facilitates a genuine effort towards factual accuracy while maintaining an efficacious and fair adjudicative system.

First, the basic principle of enabling generous access to relevant evidence is key to maintaining a genuine fact-finding process. The Supreme Court of Canada has maintained that it is “a principle of fundamental justice that relevant evidence should be available ... in the search for truth.”⁶⁰ This principle is provided for within the basic rule of admissibility of evidence that stipulates that a trier of fact can consider any evidence that would tend to prove or disprove a fact in issue. In *R v Collins*, the Ontario Court of Appeal set out this principle as follows:⁶¹

consideration of whether the features of a fact-finding process can be considered as committed to seeking truth within only justifiable limits.

⁶⁰ *R v Jarvis* [2002] 3 SCR 757, 2002 CarswellAlta 1440. See also Paciocco and Steusser: “Given its role in serving the application of the substantive law, the law of evidence should ideally enable triers of fact to have orderly access to any information that could help them make an accurate determination about whether the substantive law applies.” In *The Law of Evidence* 7th ed (Toronto: Irwin Law Inc, 2015) at 2 [Paciocco and Steusser, *The Law of Evidence*].

⁶¹ *R v Collins* (2001) 160 CCC (3d) 85, OJ no 3894 (QL) (Ont CA) at para 18. See also Doherty JA’s discussion of relevance in *R v Watson* 1996 CarswellOnt 2884 (Ont CA). At para 33, Doherty JA states: “Relevance ... requires a determination of whether as a matter of human experience and logic the existence of “Fact A” makes the existence or non-existence of “Fact

Relevance is established at law if, as a matter of logic and experience, the evidence tends to prove the proposition for which it is advanced. The evidence is material if it is directed at a matter in issue in the case. Hence, evidence that is relevant to an issue in the case will generally be admitted.

The concept of maintaining access to relevant evidence is in keeping with Habermas's ideal discourse condition of a full and free exchange of information. Any system that unjustifiably excludes relevant evidence can have the legitimacy of its claim of fact-finding questioned on the basis that its commitment to truthful fact-finding lacks sincerity. Yet there are a number of necessary justifiable exclusions of relevant evidence, and many evidentiary doctrines in the Canadian legal system have that effect. Some such exclusionary rules further the goal of accurate fact-finding, like rules that purport to reduce unreliable evidence from the court process. For instance, preventing hearsay evidence for the purpose of proving the truth of a statement, or rules prohibiting prior consistent/self-serving statements, and rules requiring voluntariness for admissibility of confessions, are examples of evidentiary doctrines that are designed to prevent unreliable evidence from entering into the decision-making process. These rules can be understood as promoting (perhaps among other things) the commitment to accurate decision-making by preventing reliance on evidence that has a high risk of unreliability.⁶²

B" more probable than it would be without the existence of "Fact A." If it does then "Fact A" is relevant to "Fact B". As long as "Fact B" is itself a material fact in issue or is relevant to a material fact in issue in the litigation then "Fact A" is relevant and *prima facie* admissible."

⁶² Sopinka, Lederman & Bryant, *The Law of Evidence in Canada* 4th ed (Markham, Ontario: LexisNexis Canada, 2014) at 12-13.

Other exclusionary doctrines, however, may compromise the goal of factual accuracy in pursuit of other values.⁶³ Examples include privilege rules that prevent solicitor and client communications or spousal communications from being admitted at trial;⁶⁴ *Charter of Rights* principles that render improperly obtained evidence inadmissible;⁶⁵ or the principle of *res judicata* which prevents re-consideration of issues that have already been adjudicated, even if there is an indication of a factual discrepancy in a previous decision.⁶⁶

Inevitably, some doctrines that exclude probative evidence are necessary and justifiable despite their potential compromise to outcome accuracy. The existence and acceptance of these doctrines should not lead to the conclusion that the adjudicative process is not the business of seeking truth at all.⁶⁷ So long as the exclusionary doctrines are justifiable, a trial

⁶³ See Weigend, “Is the Criminal Process about Truth” *supra* note 58 at 168, “[exclusionary rules] limits the pool of (relevant) information available to the decision-maker and thus reduce the chances that the verdict will be based upon a completely “true” finding of fact.”

⁶⁴ For a discussion of the evidentiary principles of privilege, see Paciocco and Steusser, *The Law of Evidence*, *supra* note 60 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.

⁶⁵ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 24(2) [*Charter of Rights and Freedoms*]: “Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this *Charter*, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.” See also, Richard Fraser and Jennifer Addison, “What’s Truth Got to Do With It?” (2004) 29 *Queens L J* 823 for an argument urging caution in excluding evidence under s. 24(2) of the *Charter of Rights and Freedoms*.

⁶⁶ Donald Lange, *The Doctrine of Res Judicata in Canada* 2nd ed (Markham, Ontario: Lexis Nexis Canada Inc. 2004) [Lange, *Res Judicata in Canada*].

⁶⁷ Weigend, “Is the Criminal Process About Truth,” *supra* note 60, for example gestures towards this when he says of the adversarial system that, “because the system excludes

system can remain objectively genuine in its search for truth even though its commitment to factual accuracy cannot be absolute. In other words, we can still assess a system as factually reliable despite legally sanctioned doctrines that compromise accuracy by disallowing probative evidence. But on what basis?⁶⁸

In keeping with my central theme, I maintain that the same values that give credence to law-making processes should also guide the necessary compromises to achieving factual accuracy. Assessing the justifiability of exclusionary doctrines on that basis has two dimensions. First, where ensuring respect for the agency of legal subjects requires exclusion of evidence, such exclusion can be considered justifiable. Exclusions of evidence on the basis of *Charter* violations, or exclusions for the purpose of protecting fundamental human liberties, are examples of evidence-exclusion principles that are justifiable on this basis.⁶⁹ Second, an exclusionary doctrine that is necessary to enable adjudicative efficacy

from the court's view everything that cannot be introduced as evidence on the day set for the trial, the "truth" is based only on the relatively small array of materials then available, and valuable information will be ignored because one or both parties cannot present it at the right time in the legally prescribed manner. The adversarial system, at least in the form practiced in the Anglo-American world, therefore does not lead to the discovery of "true" truth but of an artificially generated set of facts euphemistically called "procedural truth" at 160.

⁶⁸ Recall that in Chapter Two, I claimed that a viable proposal of procedural legitimacy will be equipped to assess when, and to what extent, epistemic concerns can be compromised in pursuit of other values. My discussion here is a demonstration of that aspect of the procedural legitimacy proposal.

⁶⁹ It is outside my scope to engage in a more searching analysis into the underpinnings of *Charter* protections here, but I note that Lawrence Solum has made the point that compromises to accuracy on the basis of "ensur[ing] that the process of adjudication does not unfairly infringe on the substantive rights guaranteed by the basic liberties, such as rights of privacy and freedom of speech," must be considered acceptable. Lawrence Solum, "Procedural Justice" 78 S Cal L Rev 181 at 306 [Solum, "Procedural Justice"].

can be justifiable as long as any associated affront to respecting human agency is minimized.⁷⁰ In order to elaborate this further, below I demonstrate how the respect for agency justification scheme would apply to the doctrines of solicitor and client privilege, which illustrates the first dimension, and *res judicata*, which illustrates the second.⁷¹

Solicitor and client privilege constitutes an assurance that communications between a lawyer and his or her client remain confidential, including preventing disclosure of such

⁷⁰ The idea that rules of fact-finding and evidentiary exclusions are underpinned by the value of respect for human agency is present in arguments from a number of scholars. For example, Richard Peck has argued in "The Adversarial System: A Qualified Search for the Truth" (2001) 80 Can Bar Rev 465, in the criminal trial context that: "evidence ought to be excluded where it has been obtained through state actions which violate human rights. This engages the central debate as to whether the value of the search for the truth, which must, of necessity, involve trustworthiness, is of a higher ordinate than the worth and dignity of the individual." Alex Stein has similarly explained a justification on the basis of respect for agency regarding the rule against drawing incriminating inferences based on past crimes: "By treating personality and action as causally interrelated, such inferences undermine the anti-deterministic postulate of free agency, epitomized by the famous precept, 'Judge the act, not the actor'. Free agency indeed serves as a pillar of the liberal theory of criminal liability. From this perspective, using the defendant's personality as incriminating evidence undermines his or her autonomy and degrades her individuality." *Foundations of Evidence Law* (Oxford, New York: Oxford University Press, 2005) at 32 [Stein, *Foundations of Evidence Law*]. See also Alex Stein, "The Refoundation of Evidence Law" (1996) 9 Can JL & Jur at 293. In addition, David Wasserman, "The Morality of Statistical Proof and the Risk of Mistaken Liability" (1991) 13 Cardozo L Rev 935, argues for respect for individual autonomy as an underpinning moral value in fact-finding. On that basis, he argues, some statistical evidence is inadequate in establishing the requisite standard of proof because of its affront on treating people as part of a class rather than as individual agents. As Dworkin has held, "it is unjust to put someone in jail on the basis of a judgment about a class, however accurate, because that denies his claim to equal respect as an individual." Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1978) at 13.

⁷¹ Note that Chapters Five, and Six constitute applications of the procedural legitimacy claim within doctrinal debates around scientific evidence and causal uncertainty. I use these two doctrines here to provide a brief exposition of the smaller point that a factually reliable fact-finding system is not compromised by the existence of doctrines that promote values other than accuracy.

communications over the course of the litigation.⁷² Surely, communications between a solicitor and a client could facilitate the accuracy of an adjudicative outcome, but rendering those communications confidential is justified on the basis that it enables clients to frankly disclose relevant information in order to receive effective legal advice. Does this satisfy the notion that compromises to factual accuracy are justifiable if they are necessary to protect respect for human agency?

Upon closer consideration of the doctrine and its underlying commitments, I conclude that it clearly does. First, parties need legal representation because understanding the law and navigating through the legal processes is difficult. These complexities create a distance between community members and their legal system, and lawyers act as conduits to bridge that gap. The complexity of the legal system, which gives rise to the need for intermediaries, can render individuals unable to make fully informed, independent decisions in pursuit of their legal claims without the help of a third party. Needing an

⁷² See David Kaye, 1947, David Bernstein, Jennifer Mnookin, Richard Friedman, 1951, John Wigmore, 1863-1943, *The New Wigmore: A Treatise on Evidence* (Austin, Texas: Wolters Kluwer Law & Business, Aspen Publishers, 2011) at 2292: “Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived.” The Supreme Court of Canada stated in *Ontario (Public Safety and Security) v Criminal Lawyers’ Association* [2010] 1 SCR 815, 2010 CarswellOnt 3964 at para 53 that: “the only exceptions recognized to the privilege are the narrowly guarded public safety and right to make full answer and defence exception.” But for a discussion of solicitor-client privilege doctrine in Canada, including comments on the changing state of recognized exclusions, see Adam Dodek, “Solicitor-Client Privilege in Canada: Challenges for the 21st Century,” Canadian Bar Association Discussion Paper, 2011.

intermediary may require individuals to compromise their personal privacy in order to access legal knowledge and make decisions about their lives. This can be considered an affront to human agency.

Protecting the confidentiality of the communications between lawyers and clients helps to rectify this problem. When a client is assured that any communication with her lawyer is confidential, the compromise to personal privacy in order to access legal information is minimized, because the lawyer is bound never to disclose anything that the client reveals to her. That way, the client can gain access to the lawyer's legal knowledge, almost as if that knowledge were her own. Understood in this way, solicitor client privilege exists for the protection of litigant agency. This interpretation of the solicitor client privilege doctrine is consistent with Doherty J.A.'s comments in a partially dissenting judgment in *General Accident Assurance Co. v. Chrusz*:

The privilege is an expression of our commitment to both personal autonomy and access to justice. Personal autonomy depends in part on an individual's ability to control the dissemination of personal information and to maintain confidences.... The surrender of the former should not be the cost of obtaining the latter. By maintaining client-solicitor privilege, we promote both personal autonomy and access to justice.⁷³

The commitment to respecting the personal autonomy of individuals, which grounds solicitor-client privilege, serves as a path to justifying the potential increased risk of factual inaccuracy that comes with that evidentiary rule.

⁷³ *General Accident Assurance Co. v. Chrusz* (1999) 45 OR (3d) 321 at 92.

Now consider the doctrine of *res judicata*. *Res judicata* is a rule against re-litigation of previously decided matters. As a rule of evidence, *res judicata* is an exclusionary principle.⁷⁴ It prevents proffering of evidence, as well as a new theory of the case, on an issue that has already been decided, even if a party has new evidence or argument that might negate the finding in the previous adjudication.⁷⁵ According to Lange, the Supreme Court of Canada gave its “best pronouncement” on the doctrine in its 1894 decision in *Farwell v R*:

Where the parties (themselves or privies) are the same, and the cause of action is the same, the estoppel extends to all matters which were, or might properly have been, brought into litigation. Where the parties (themselves or their privies) are the same, but the cause of action is different, the estoppel is as to matters which, having been brought in issue, the finding upon them was material to the former decision.⁷⁶

The rule of disallowing re-litigation of issues already adjudicated is generally justified on the grounds that it protects the finality of adjudicative outcomes. That is a necessary worthwhile cause. For one, recognizing the finality of judicial disputes protects individuals from the expense of being “twice vexed by the same cause.”⁷⁷ And more fundamentally, if adjudicative outcomes were not to be considered final, and previously decided issues could

⁷⁴ Donald Lange, *The Doctrine of Res Judicata in Canada* 2nd ed (Markham, LexisNexis Canada Inc. 2004) at 10.

⁷⁵ *Ostapchuk v Ostapchuk* 1959 CarswellSask 13 at 180: “Assuming the requirements of the doctrine are met, the party against whom the issue was decided in the earlier litigation cannot proffer evidence to challenge that result.”

⁷⁶ *Farwell v R* (1894) 22 SCR 553, 1894 CarswellNat 21 at 558. And Lange, *Res Judicata in Canada*, *supra* note 66 at 2.

⁷⁷ *Ibid* at 4.

be re-litigated, then judicial decision-making could not be considered authoritative at all. Absent their authoritative quality, adjudicative dispute resolution would lose relevance.⁷⁸

The doctrine of *res judicata* suggests a preference for finality at the expense of a genuine commitment to factual accuracy. Recognizing finality is essential to an effective and useful adjudicative system, so *res judicata* seems acceptable. But can it be justified in light of its compromise to outcome accuracy along with the impairment on allowing litigants to present evidence and argument of their choice?

The answer is yes. This becomes clear when the doctrine is considered in light of the test for how *res judicata* must be argued in order to successfully prevent presentation of evidence on a previously decided issue. A party alleging *res judicata* must show that the evidence or argument being proffered was available at the time of the previous hearing, and if due diligence had been exercised, it would have been proffered and considered at the earlier adjudication. Accordingly, the *res judicata* doctrine does not deprive a litigant of making a full argument and full presentation of evidence; it deprives a litigant of a *duplicative* right thereof. That being the case, given the value of protecting adjudicative finality, and the minimal impairment to litigant agency, it cannot be said that the *res judicata* renders the adjudicative process inauthentic in its commitment to factual accuracy.

⁷⁸ See my discussion in Chapter Two: Introducing the Fact-Finding Tension and Legitimacy and its Relation to Authoritative Dispute Resolution.

Compromises to the goal of outcome accuracy can be accommodated within an adjudicative process that maintains a genuine commitment to factually accurate outcomes. The reality that adjudicative outcomes must be made on the basis of incomplete evidence does not suggest that the search for truth is not genuine. It does suggest, however, that there is a necessary risk of factual error owing to the unavoidable fact of evidentiary gaps. Given that the risk of error is unavoidable, adjudicative procedures must manage that risk in a justifiable way. In the next section, I endorse some general principles that would ensure a justifiable management of error risk while maintaining a reliable fact-finding system.

iii. Maintaining Reliability alongside Fair Management of Risk of Error

The adjudicative system cannot feasibly guarantee factually accurate outcomes, so there is inevitable risk of erroneous outcomes. Adjudicative procedures must manage that risk fairly in order to maintain the legitimacy of outcomes.⁷⁹ Ronald Dworkin has provided what I view to be one of the most valuable proposals for what principled risk management would entail.⁸⁰

⁷⁹ In Alex Stein's words: "There is no escape from deciding how to allocate the risk of error in adjudicative fact-finding." Alex Stein, *Foundations of Evidence Law*, *supra* note 70 at 3.

⁸⁰ As Dworkin notes, the conundrums caused by the inevitability of inaccuracy in adjudicating claims has largely "been left to the simple formula that questions of evidence and procedure must be decided by striking 'the right balance' between the interests of the individual and the interests of the community as a whole, which merely restates the problem." Dworkin, "Principle, Policy, and Procedure," in *A Matter of Principle* (Massachusetts: Harvard University Press, 1985) at 73 [Dworkin, "Principle, Policy, and Procedure"].

As I introduced in Chapter Two, in *Principle, Policy, and Procedure*,⁸¹ Dworkin explains that litigants have certain substantive rights, like the right not to be criminally convicted if not guilty, or the right to compensation if negligently injured, but since the adjudicative procedures cannot promise accurate outcomes every time, the vindication of those rights cannot be guaranteed. For Dworkin, the integrity of a legal system is nonetheless maintained through two procedural rights. Taken together, those procedural rights ensure appropriate recognition of the harm associated with factual errors, and a fair and consistent exposure to the inevitable risk of their occurrence.⁸² As Dworkin puts it, community members should have ⁸³

The right to procedures that put a proper valuation on moral harm in the calculations that fix the risk of injustice that they will run; and the related and practically more important right to equal treatment with respect to that evaluation.

Dworkin's procedural rights proposal calls for two types of consistency, one substantive and one formal. Substantively, adjudicative procedures must tolerate a similar risk of error for similar types of error. That is what Dworkin means when he says the procedures must put a "proper valuation" on the risk of factual error.⁸⁴ Suppose, for example, that a community decides to criminalize tobacco consumption. In that society, there is a minimum sentence of \$1000.00 fine for consumption of illegal drugs, and the same goes for tobacco

⁸¹ *Ibid.*

⁸² As I set out in Chapter Two, I critiqued Dworkin's approach because of the suggestion that risk distribution alone maintains adjudicative integrity. For me, fair risk distribution is one among other necessary characteristics of procedural legitimacy. But Dworkin's approach to credible risk distribution is, for me, a wholly endorsable starting point.

⁸³ Dworkin, "Principle, Policy, and Procedure," *supra* note 80 at 92.

⁸⁴ *Ibid.*

consumption. Suppose, though, that prosecuting for contravening all other illegal drug consumption requires proof beyond a reasonable doubt, but prosecuting for consumption of tobacco only requires proof on a balance of probabilities. That rule would violate Dworkin's first procedural right, because the harm associated with a factual error (i.e. being fined \$1000.00 and bearing a conviction for a crime not committed) is similar to other drugs, yet the risk of that harm manifesting is rendered higher for tobacco consumption.

Dworkin's second procedural right constitutes a demand for formal equality. The application of risk-allocating procedures must be applied consistently so that no party is arbitrarily visited with a different risk level. For instance, prosecuting violation of the tobacco prohibition should occur using the same standard of proof irrespective of whether the accused party is male or female, a Canadian born in Canada or abroad, has prior convictions or does not, and so on. That formal consistency, which promises non-arbitrary treatment of litigants is the backbone of procedural legitimacy.⁸⁵

Dworkin's rights require internal coherence and consistency in application, but notably, they do not dictate the substance of the risk-allocating procedures. This suggests that in Dworkin's view, a society can legitimately allocate and tolerate risk of error in any way it deems appropriate, so long as its risk tolerance is internally coherent and is applied consistently to litigants. I generally agree. As Stein notes, "Moral considerations that

⁸⁵ This element of procedural legitimacy is explored and articulated extensively in Chapter Six.

inform risk-allocating decisions belong to the domain of politics,"⁸⁶ and there can be different reasons that lead to different levels of risk tolerance. For instance, in the Canadian legal system, we accept a greater risk of inaccurately imposing civil liability compared with criminal conviction. And we tolerate a greater risk of false acquittal compared with false conviction.⁸⁷

How risk is allocated is substantively justified at the level of legislative lawmaking.⁸⁸ Within my narrower purpose of adjudicative legitimacy, it is coherence and consistency in risk allocation that is paramount in an adjudicative system where error must be tolerated while maintaining respect for legal subjects who will be subject to potential error. Arbitrary and inconsistent risk allocating procedures would constitute irrational adjudication and

⁸⁶ Stein, *Foundations of Evidence Law*, *supra* note 70 at 13.

⁸⁷ As David Paciocco has pointed out, "there is not the same virtue in a single-minded pursuit of truth about guilt, as there is in a single-minded pursuit of truth about innocence." David Paciocco, "Evidence About Guilt: Balancing the Rights of the Individual and Society," (2001) 80 Can Bar Rev 433 at 435.

⁸⁸ Relevant questions in that sphere could include questions of appropriate balancing between the different social costs of potential error, as presented in Erik Lillquist, "Recasting Reasonable Doubt: Decision Theory and The Virtues of Variability" (2002) 36 UC Davis L Rev 85; or Thomas J Miceli, "Optimal Prosecution of Defendants Whose Guilt is Uncertain" (1990) 6 JL Econ & Org 189. Appropriate risk allocation could also be based on questions of optimal deterrence: As Mike Redmayne explains in "Standards of Proof in Civil Litigation" (1999) 62 MLR 167 at 172, a common argument about setting the standard of proof is that it "should be set at a level which will ensure optimal deterrence of tortious conduct (i.e. it should not under-deter, increasing the number of accidents, but nor should it over-deter, increasing the cost of safety measures and encouraging potential victims to be careless." Similarly, Dominique Demougin and Claude Fluet, "Preponderance of Evidence" (2006) 50 European Economic Review 963 at 963, argue "that a 'more-likely-than-not' decision rule provides maximal incentives for potential tort-feasors to exert care." For a similar analysis in the criminal context, see for example, Tone Ognedal, "Should the Standard of Proof be Lowered to Reduce Crime?" (2005) 25 Int'l Rev of L & Econ 41 at 45. For one of the most comprehensive discussions of the burden of proof and factors to consider in setting it, see Louis Kaplow, "Burden of Proof" (2012) 121 Yale LJ 738.

impairment to respecting legal subjects as people capable and deserving of rational guidance through the legal system.

I maintain, though, that internal and systemic consistency in risk allocation must be accompanied by two additional conditions in order to maintain an authentic commitment to factual accuracy. The first, more simple in nature, is a necessary restriction on the adjudicative standard of proof. The standard of proof is the clearest place where the state can control the extent of risk of error that will be tolerated and the distribution of that risk.⁸⁹ Conceivably, a society may have reason to adopt different standards of proof in some class of cases. For instance, perhaps a society seeks to dissuade litigation and adopts a 60 or 70% standard of proof instead of 50%. So long as the consistency requirements are met, this does not seem to *necessarily* compromise adjudicative legitimacy.⁹⁰ But can a 30% or a 20% standard of proof be tolerated, even if that standard of proof satisfies coherence and consistency requirements?

Given my claim that a legitimate fact-finding system must display a genuine orientation towards factual accuracy, a standard of proof that falls below the 50% threshold cannot be accepted. If the standard of proof falls below 50%, then the fact-finding process cannot be

⁸⁹ As Louis Kaplow, *supra* note 88 states at 741: “The stringency of the proof burden determines how error is allocated between mistakes of commission – improper assignment of liability – and mistakes of omission – improper exoneration.”

⁹⁰ This approach may not be acceptable to those who might justify the civil standard of proof on the basis that it treats litigants equally through a roughly equal distribution of the risk of error. In my view, the risk distribution is a substantive aspect of the proof of facts principles, and is within the legislator’s jurisdiction to determine, subject to the qualification noted above.

genuinely oriented towards truth at all. That is because if the standard of proof falls below 50% then even facts that are not more likely to be true than false are accepted as true. Such a system would accept facts that are probably not true as true, resulting in a lack of reliability – it cannot be said that the commitment to factual accuracy in that system is genuine.

The second proviso is a stipulation of *how* the fact-finder should determine whether the standard of proof has been met. Picking up from Fuller's and Habermas's notions, rational decision-making is foundational to adjudication, and the same goes for the fact finder's determination about whether the standard of proof has been met. A fact-finding system is acceptable only if the standard of proof is applied *rationally*. For instance, if a judge concluded that an injured plaintiff established that the defendant caused her injury on a balance of probabilities on the basis that the plaintiff's expert witness has blue eyes, that factual conclusion is clearly irrational, even though the judge purported to apply the correct standard of proof. Similarly, if a judge decides to determine whether the standard of proof was met by considering only blue-eyed expert witnesses, her application of the standard of proof is irrational. Even if the ultimate finding of fact were correct in these examples, the process of concluding whether the burden of proof is discharged is irrational and unacceptable. The requirement for rationality in the application of the standard of proof finds well-stated support in Lock Hai Ho's account of acceptable fact-finding, as explained below.

iv. The Rationality Requirement

In *A Philosophy of Evidence Law*, Ho has argued that justifiable fact-finding depends not only on epistemic success, but also on ethical values. Those ethical values are, at least in part, represented in the process of arriving at factual conclusions. As he puts it, “it is not only the case that truth is needed to do justice; the court must do justice *in* finding the truth.”⁹¹ Whether justice is done in the process of finding the truth depends, Ho suggests, on the rationality of the fact-finding deliberation. If the deliberation process was irrational, then even if the ultimate outcome was accurate, one should conclude that an unjustifiable error occurred:

A particular verdict may be correct even though it was produced by irrational reasoning. In such a case, one might say that no harm was done after all. But one should insist that something has gone wrong: the fact-finder has failed to discharge her duty properly in not deliberating as she ought to. It is wrong to find the defendant guilty by consulting an Ouija board or by the toss of a coin. It is wrong even if the verdict happens to be correct and even where rational support for belief in his fault exists on the evidence admitted in court....Rationality is a demand in fact-finding that cannot be completely identified with the demand of reliability or accuracy.⁹²

Ho’s insistence on recognizing the value of rational fact-finding is grounded in the central value of being respectful of legal subjects’ human agency. Picking up from Raimond Gaita’s

⁹¹ Ho, *Philosophy of Evidence Law*, *supra* note 46 at 51.

⁹² *Ibid* at 73. Highlighting the significance of rational discharge of the standard of proof in the criminal context, Larry Laudan has posed the question, “If a juror feels doubtful about guilt but cannot even identify or formulate the reason for the doubt, then how can she possibly decide *whether* the doubt in question is rational or irrational?” Larry Laudan, *Truth, Error and Criminal Law – An Essay in Legal Epistemology* (Cambridge: Cambridge University Press, 2006) at 42.

poetic conception of justice as humanity,⁹³ and Markus Dubber's⁹⁴ and Michael Slote's⁹⁵ accounts of justice as empathetic engagement, Ho notes that "the fact-finder ought to care to find the truth because she ought morally to respect and care for the person standing before the court. In this sense, the trial is not only about accuracy; it is, more importantly, about affirming a common humanity."⁹⁶ That common humanity can be expressed when "through reflection and the conceptualization of another person as a fellow moral being, someone with equal capacity for autonomy as oneself...one comes to have respect for her and want to treat her in accordance with that respect."⁹⁷ Rational decision-making is foundational to maintaining that respect.⁹⁸

⁹³ Raimond Gaita, *A Common Humanity: Thinking about Love and Truth and Justice* (London: Routledge, 2000).

⁹⁴ Markus Dirk Dubber, *The Sense of Justice – Empathy in Law and Punishment* (NY: NYU Press, 2006).

⁹⁵ Michael Slote, *The Ethics of Care and Empathy* (London: Routledge, 2007); and Michael Slote, "Autonomy and Empathy" (2004) 21 *Social Philosophy and Policy* 293.

⁹⁶ Ho, *Philosophy of Evidence Law*, *supra* note 46 at 84. And also at 83: "In short, the trier of fact must appreciate, from the position of that person, the value of respect and concern. A verdict should be given against her only when it can be justified on grounds that she ought reasonably to accept. The standard of proof and evidential reasoning used in reaching the verdict must express adequate respect and concern."

⁹⁷ *Ibid* at 82.

⁹⁸ A commitment to rational decision-making on the basis of the evidence presented suggests that judges must approach their fact-finding task with neutrality and impartiality. On its face, that is an uncontroversial requirement, and has been expressly endorsed by the Supreme Court of Canada (See *R v S (RD)*, [1997] 3 SCR 484 and most recently in *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25 [*Yukon Francophone School Board v Yukon*]. For example at para 22 of *Yukon Francophone School Board v Yukon*, Abella J notes: "Impartiality and the absence of bias have developed as both legal and ethical requirements. Judges are required — and expected — to approach every case with impartiality and an open mind" at para 22 (reference removed). However, while I cannot offer a more thorough discussion here, the Supreme Court's application of the reasonable apprehension of bias test may suggest some dilution of the demand for judicial neutrality through commentary such as: "It is apparent, and a reasonable person

Much of Ho's proposition resonates with my understanding of legitimate fact-finding. The requisite respect for the litigants that underpins the legitimacy of fact-finding is contingent on rational deliberation when arriving at factual conclusions.⁹⁹ But before closing the discussion of the rationality proviso, there are two related considerations left to discuss: First, whether legitimacy of fact-finding demands express reasons for factual finding. I explain below why I think it does. And second, the question of whether judicial deliberation is the only place where rationality is expressed in the adjudicative process. Adopting Habermas and Fuller as my starting point leads to my conclusion that this is a too narrow approach to adjudicative rationality. That is a point of divergence between Ho's position and mine, as I explain below.

would expect, that triers of fact will be properly influenced in their deliberations by their individual perspectives on the world in which the events in dispute in the courtroom took place. Indeed, judges must rely on their background knowledge in fulfilling their adjudicative function" (*R v RDS* at paras. 38-39). If such a statement can be taken to suggest a compromise to the rationality requirement of judicial fact-finding, they are improper seen from the procedural legitimacy perspective that I am presenting here.

⁹⁹ Micah Schwartzman has argued that adjudicative legitimacy requires judicial sincerity and public justification in order to provide those affected a reason to accept the decision. Micah Schwartzman, "Judicial Sincerity" (2008) 94 Va L Rev 987 [Schwartzman, "Judicial Sincerity"]. For me, a judge's sincerity, while laudable, cannot handle the same normative load as Ho's principle of rationality. Suppose that a judge believes in a magic coin and tosses it in order to make factual findings. She may be sincere in her subjective belief, but I, as a litigant, would not care about her sincerity; I do care, however, about her irrationality, particularly when it results in an outcome that is authoritative for me. As Martin Golding puts it, "It would be unfortunate if a judge's argument was mere rationalization and if the judge did not sincerely hold the reasons that he explicitly gives. But in an important respect, this fact, whenever it is a fact, is irrelevant to the justifiability of the decision. The justifiability of the decision depends on how well the decision is reasoned." Martin Golding, *Legal Reasoning* (New York: A.A. Knopff, 1984) at 8. My own references to "sincerity" or "authenticity" should not be confused with requiring a sincere judge. Rather, they should be understood as denoting objective procedural qualities. The rationality of a judge's deliberation can be considered a part of assessing how sincere (in an objective sense) a fact-finding process is.

The requirement for having rational reasons for factual conclusions in order to maintain adjudicative legitimacy is suggestive of a requirement for *giving* those reasons as well. Such a requirement for express reasons is supported within my theme of maintaining respect for human agency on the basis that public justification demonstrates an acknowledgment that community members can, and have a right to scrutinize the rationality of judicial decisions.¹⁰⁰ As William Richman and William Reynolds hold:

When a judge makes no attempt to provide a satisfactory explanation of the reasons, neither the actual litigants nor subsequent readers of an opinion can know whether the judge paid careful attention to the case and decided the appeal according to the law or whether the judge relied on impermissible factors such as race, sex, political influence, or merely the flip of a coin.¹⁰¹

Providing express reasons for arriving at factual conclusions is an avenue for assessing the rationality of the deliberation process, and committing to providing those reasons contains an implicit respect for the litigants as rational, active players rather than mere passive

¹⁰⁰ Micah Schwartzman, “Judicial Sincerity,” *supra* note 99 at 1008.

¹⁰¹ William M. Richman & William L. Reynolds, “Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition,” (1996) 81 Cornell L Rev 273 at 282-283. Fuller has also noted that, “By and large, it seems clear that the fairness and effectiveness of adjudication are promoted by reasoned opinions. Without such opinions the parties have to take it on faith that their participation in the decision has been real, that the arbiter has in fact understood and taken into account their proofs and arguments.” Fuller, “Forms and Limits,” *supra* note 1 at 388. (Note that Fuller holds that while he supports a statement of reasons, he does not find them necessary for maintaining adjudicative integrity. His reasons for so holding are not particularly clear, but it seems that he finds that in some contexts like commercial arbitration, an absolute requirement for reasons may be too burdensome, particularly in the case of lay, volunteer arbitrators).

receivers of authoritative decrees.¹⁰² It sends a message that the community member's assessment of its decisions *matters*. That is a message of respect. Jules Coleman has explained that the practice of giving reasons "presupposes the values of autonomy and equality" as follows:

The commitment to equality flows from the fact that a practice of offering reasons and inviting criticism can arise only among people who believe that they owe it to others to justify their actions to others....The commitment to autonomy is exemplified in the very idea that individuals can respond to reasons and arguments, that others' judgments are formed as a result of reflecting on the reasons offered. Anyone who offers reasons designed to convince or persuade others makes it clear that he treats others as autonomous and equal in the same way that one regards oneself, worthy of the respect a practice of offering reasons presupposes and as capable of being moved by reasons as only autonomous agents can be.¹⁰³

On this basis, I maintain that giving full expression to respect for human agency within an adjudicative process requires that reasons for factual conclusions be expressed. This way, legal subjects are given a chance to discern the rationality of the deliberation that took place in the judge's mind, so far as that is reflected in the express reasons.¹⁰⁴

¹⁰² I noted in Chapter Three that David Dyzenhaus has also offered a compelling proposed addition to Habermas's theory by calling for a recognition of the importance of publicizing intelligible legal outcomes so that those outcomes can be subjected to further deliberation by the public. This, as I understand, is akin to calling for public reasons to be given in the fact-finding context as well, so that judicial outcomes can be reviewed publically. See Chapter Three, and David Dyzenhaus, "The Legitimacy of Legality," *supra* note 52.

¹⁰³ Jules Coleman, "Authority and Reason," in *The Autonomy of Law Essays on Legal Positivism* (Robert George, ed.) (Clarendon Press: oxford, 1996) at 312-313

¹⁰⁴ Note that the Supreme Court of Canada has commented that defects in the reasons provided by judges can amount to procedural impropriety. See *Cojocaru v British Columbia*

My second question is whether adjudicative rationality is expressed only in the mind of a judge, as Ho's discussion suggests. In arriving at his argument for why rational deliberation matters, Ho starts by advocating for and adopting the "internal" point of view of the fact-finder. This is in contrast to the more common "external" point of view which, if adopted, leads to the conclusion that the relevant criterion for acceptable adjudication is factual accuracy of the outcome, because if an outcome is correct, then justice is done.¹⁰⁵ Taking up the point of view of the trier of fact, Ho explains, this conclusion does not hold.¹⁰⁶ The judge, along with being concerned with what to believe, "must also be concerned about the morality of the process by which she reaches her verdict."¹⁰⁷ Given that Ho's operative perspective is that of the trier of fact, rationality or irrationality in arriving at a verdict is expressed entirely in her thought process. In other words, whether an outcome is rational depends exclusively on the fact-finder committing to being rational – she will rely on the evidence presented and weigh it fairly against the standard of proof.

Women's Hospital and Health Centre, [2013] 2 SCR 357. In that case, the appellants questioned the propriety of the trial judge's reasons due to extensive copying from the plaintiff's submissions. The Supreme Court of Canada held that the copying in the judge's reasons did not rebut the presumption of judicial impartiality, but noted that better practice is to refrain from extensive copying at (para 73-75). A more extensive discussion of the adequacy of judicial reasons is outside of my scope, but see for example: H.L Ho, "The Judicial Duty to Give Reasons," (2000) 20(1) *Legal Studies* 42; Richard Murphy, "Chenery Unmasked: Reasonable Limits on the Duty to Give Reasons," 80(3) *University of Cincinnati Law Review* 817.

¹⁰⁵ Ho, *Philosophy of Evidence Law*, *supra* note 46, chapter 2.

¹⁰⁶ *Ibid* at 51: "From an external standpoint, the relevant criterion is the correctness of the verdict. There is a contingent connection, to which terms like 'accuracy' and 'reliability' refer, between the outcome of fact-finding and truth. Truth is needed so that justice (in the sense associated with 'rectitude of decision') can be done."

¹⁰⁷ *Ibid* at 51.

Doubtless, the fact-finder's commitment to rationality is critical, but the judge's deliberations only tell part of the rationality story. Suppose that a litigant was coerced so as to prevent her from freely presenting her evidence and arguments. Even if a judge makes a reasoned decision on the basis of the evidence presented, the rationality of the outcome is questionable, at least in a sense that would be relevant to the coerced litigant.¹⁰⁸ Even if rationality motivates an adjudicator's conclusion, the outcome she arrives at may still be considered irrational. Encompassing rationality exclusively in the mind of the adjudicator misses this problem.

Adopting Fuller's and Habermas's approaches to adjudication provides an avenue to rectify this problem. They perceive the adjudicative process itself as an expression of rational decision-making, resulting in a more comprehensive understanding of rationality as a requisite feature of adjudicative legitimacy. Through the lens of Fuller's and Habermas's jurisprudence, it becomes clear that the adjudicative process itself must maintain a commitment to rational fact-finding, not just the fact-finder. The fact-finder's ultimate decision making is part of that system. She must make a rational decision by considering the evidence and the argument presented by parties and applying the relevant standard of proof on the basis of that evidence and argument. But her mind is not the only place where adjudicative rationality is expressed. Rather, the entirety of the process should be conducive to rational decision-making.

¹⁰⁸ On the question of whose perspective is important: Solum, "Procedural Justice," *supra* note 69 at 280: "When we seek to identify the conditions for the legitimacy of adjudication, we should assume the point of view of a citizen who is bound by a judgment that he or she has good reason to believe is in error and is adverse to the citizen's interests or wishes."

As Fuller and Habermas both prescribe, ensuring rational adjudication involves ensuring that litigants have meaningful ability to participate. If a fact-finder makes an irrational decision in the sense that she improperly fails to take into account evidence presented by one party, as in the blue-eyed witness example given above, she erodes the party's right to meaningful participation, because the right to participate through presentation of evidence is a façade if the evidence is not rationally relied on in concluding as to whether the standard of proof was satisfied.¹⁰⁹

This leads to the final question on the nature of participation rights and the underlying value they protect. So far, participation rights have been discussed in relation to their role in maintaining rational outcomes. This elicits the question whether participation rights are *only* significant in relation to rationality, or if ensuring litigant participation protects other

¹⁰⁹ Given the significance that I am giving to the rationality of the decision-making process, it is worth noting important social science evidence that suggests that judges, like all decision-makers, adopt certain heuristics that may unconsciously bias their decisions. See Daniel Kahneman, Paul Slovic & Amos Tversky ed. "Judgment Under Uncertainty: Heuristics and Bias" (1974) 185 *Science* 1124, and Daniel Kahneman, *Thinking Fast and Slow* (New York: Farrar Straus & Giroux, 2011); Stephen Porter and Leanne ten Brinke, "Dangerous Decisions: A Theoretical Framework for Understanding How Judges Assess Credibility in the Court Room" (2009) 14 *Legal and Criminal Psychology* 114; Eyal Peer and Eyal Gamliel, "Heuristics and Biases in Judicial Decisions" (2013) 49 *Court Review* 114; J. Rachlinski, "Heuristics and Biases in the Courts: Ignorance or Adaptation?" (2000) 79

Oregon Law Review 61; D. Langevoort, "Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review," (1998) 51 *VT L Rev* 1499; Emma Cunliffe, "Judging, Fast and Slow: Using Decision Making Theory to Explore Judicial Fact Determination" (2014) 18 *International Journal of Evidence and Proof* 139. The best answer to this literature is, in my view, to recognize its significance and encourage further study on biases and cognitive difficulties in complex decision making like trials, and continually make efforts through judicial education to maintain judges' awareness of decision-making pitfalls and provide tools to overcoming them to the best extent possible.

values as well. Answering this question is important because it influences the nature of the participation rights that should be maintained. I turn to this question below.

B. The Value of Participation Rights

Whether, and to what extent participation rights are valued in an adjudicative theory depends on the theorist's viewpoint as to the nature and purpose of adjudication. Theorists who place the ultimate value of the adjudicative system in its ability to produce accurate outcomes would conclude that a best effort towards accurate outcomes should wholly satisfy the requirements of legitimate adjudication.¹¹⁰ It follows that for them, participation only matters so far as it affects outcome accuracy, and does not add any independent value of its own. Louis Kaplow, for instance, suggests in "The Value of Accuracy of Adjudication," that:

One suspects that claimants who object to not being heard are those who are, for example, denied benefits. If only losers complain, however, one should be suspicious that the complaint is motivated by a concern for the result, and thus an objection to a lack of process may implicitly be an instrumental argument. An entirely plausible reason to object to not being heard is that one may believe (perhaps feel certain) that the decision was

¹¹⁰ I have already discussed that Dworkin is a proponent of an outcome-accuracy model of adjudication, and participation rights are notably missing from his procedural proposal. Similarly, even Ho, despite his commitment that outcome-accuracy must be accompanied by rationality, still maintains that outcome-accuracy is the paramount goal of adjudication, and as I have noted, participation rights do not find expression in his proposal.

adverse precisely because the decision-maker was deprived of information one had to offer. Thus, the decision may have been inaccurate.¹¹¹

In Chapter Two, I explained why, for me, the starting point adopted by instrumental or outcome-accuracy focused authors is problematic. In summary, there are two issues that cannot be responded to if an instrumental approach to adjudicative fact-finding is adopted. First, it does not offer a response to the problem associated with achieving an accurate outcome *improperly*. If only accuracy mattered in adjudication, then problems associated with irrational, arbitrary, or otherwise improper decision-making would dissolve if the outcome turned out to be factually accurate.¹¹² Second, and even more fundamentally, an effective adjudicative system cannot guarantee outcome accuracy, yet it also requires that its outcomes are authoritative. That means that inevitably, some outcomes will be inaccurate yet authoritative, whether anyone is aware of inaccuracy or not. A theory that centralizes outcome accuracy cannot provide sufficient grounding for that authority. Making a ‘best effort to achieve accuracy’ does not provide the full answer to a litigant who may accept that the adjudicative system rendered such a best effort, but ultimately failed in its task. Given the failure, why should she accept the authority of the outcome? As Lawrence Solum has expressed:

How can we regard ourselves as obligated by legitimate authority to comply with a judgment that we believe (or even know) to be in error with respect to the substantive merits? The answer to this question cannot be accuracy –

¹¹¹ Louis Kaplow, “The Value of Accuracy in Adjudication” (1994) 23 *Journal of Legal Studies* 307 at 390-391. And for Solum’s treatment of Kaplow’s argument, see Solum, “Procedural Justice,” *supra* note 69 at 291-295.

¹¹² I discussed this problem in Chapter 1, Part 2(c).

the hard question arises only when litigants have a warranted belief that the outcome was not accurate.¹¹³

As I have noted, it is legitimacy that grounds the authority of adjudicative outcomes *despite* its potential failure to achieve factual accuracy. Legitimacy does not, and cannot depend on outcome accuracy. Rather, drawing on Fuller's and Habermas's insights, legitimacy is achieved when legal procedures demonstrably respect human agency. In the adjudicative context, as I have elaborated above, that requires a demonstrable procedural commitment to genuine and rational effort towards achieving factual accuracy. Whether factual accuracy is ultimately achieved does not affect the legitimacy of the factual determination.

Given the normative foundations of legitimacy in my proposal, the relevant question for me is whether a genuine effort at accurate, rational fact-finding gives the fullest expression to respect for human agency in fact-finding procedures.¹¹⁴ In terms of participation rights, my question is whether they are necessary only in relation to their impact on achieving a rational outcome as discussed above, or if they have a role in preserving respect for human agency independent of rationality as well.

¹¹³ Solum, "Procedural Justice," *supra* note 69 at 274.

¹¹⁴ Robert Bone states in, "Procedure, Participation, Rights" (2010) 90 BUL Rev 1011, "Anyone arguing for dignity or legitimacy as a basis for participation rights must be prepared to explain why dignity is not fully respected and legitimacy fully secured by an adjudicative system that does its best to produce an outcome for each individual that conforms to the substantive law." [Bone, "Procedure Participation Rights"].

I have already noted that rational decision-making presumes participation rights, because if some affected party's position is not permitted or sincerely considered, then the rationality of the outcome is precarious. If enabling a rational outcome is the only value of participation rights, then the right to participate can be justifiably defined as a right to have one's interests represented in an adjudicative system. Owen Fiss has made the claim that representation of interests is key to grounding an authoritative outcome; a right of individual participation is not:

What the Constitution guarantees is not a right of participation, but rather what I will call a "right of representation": not a day in court but the right to have one's interests adequately represented. The right of representation provides that no individual can be bound by an adjudication unless his or her interest is adequately represented in the proceeding.¹¹⁵

On the surface, Fiss's argument seems agreeable. If a litigant's interests were adequately represented in the decision-making process, then on what basis would she complain that she was not allowed to participate in the decision? She could not, for instance, complain that the rationality of the decision was compromised due to her inability to represent her interests. Solum's answer to Fiss's argument is persuasive and demonstrates why individual rights of participation are necessary in terms of respect for human agency. He explains that it is not "interests" in their own right that are the primary concern in the adjudication of a claim. Rather, the primary concern is the individuals who hold those interests. Solum provides:

¹¹⁵ Owen Fiss, "The Allure of Individualism" 78 *Iowa L Rev* 965 (1993) at 978; and Solum, "Procedural Justice," *supra* note 69 at 301.

We are concerned about individual interests because we are concerned about individuals. Interests themselves have no moral standing. Individuals represent themselves, not because they are the best or most efficient representatives of their own interests; individuals represent themselves because they are human persons, who act on their own behalves, define their own interests, and speak for themselves.¹¹⁶

Given this response to Fiss's point, it is surprising that Solum does not clearly acknowledge that respect for human agency is at the heart of individual participation rights. According to Solum, "Dignity, equality, and autonomy are fundamental political values. The idea that they connect in some way to the value of participation is sound."¹¹⁷ He goes on to note, however, that "the error is to believe that any one of these values directly provides the value of participation – legitimacy plays that role."¹¹⁸

In Solum's account, however, the conception of legitimacy is unsubstantiated. He defines legitimacy in terms of its role and its significance, but not in terms of its requisite features. His account of legitimacy can be summarized as that which provides the grounding to

¹¹⁶ Solum, "Procedural Justice," *ibid*, at 302-303.

¹¹⁷ *Ibid* at 289.

¹¹⁸ *Ibid* at 289. And elsewhere [286-287] he notes: "The value of participation derives from the idea of legitimacy. Our focus on legitimacy contrasts with much of the prior literature, which has suggested three rival explanations – based on dignity, equality, and autonomy – for the irreducibly value of legitimacy. Each of these three rival explanations has a contribution to make, especially when considered in relationship to legitimacy. Considered in isolation, however, dignity, equality, and autonomy do not provide an adequate explanation of the value of participation."

adjudicative authority.¹¹⁹ But he does not delineate any underlying normative commitments that could answer *on what basis* legitimacy provides that grounding. Without identifying the key normative features of legitimacy, Solum's statement that participation rights are underpinned by legitimacy remains hollow. Since it is an unsubstantiated notion of legitimacy that grounds the requirement for participation rights, the question of *why* participation rights are necessary within a legitimate adjudicative process cannot be answered beyond the answer, 'because participation rights are necessary for legitimacy,' which simply elicits the question.

The better approach, in my view, is to recognize that respect for the human agent is at the heart of legitimacy, and to preserve that fully, individuals must have a right to participate in their own adjudication. That right cannot be subsumed into the rationality requirement. That is because a system where representation of litigant interests is guaranteed, but individual participation rights were not protected, could preserve the rationality of the outcome while also failing to fully respect litigant agency.

Despite the difficulty in Solum's approach, parts of his analysis support this notion. For one, he explains that participation rights are essential to legitimacy because denial would inflict

¹¹⁹ See generally Solum, "Procedural Justice," *supra* note 69 at 277-279. There, Solum explains the importance and role of legitimacy, but does not expound on its necessary features. For example at 277: "Why is legitimacy important? Citizens are not obligated to regard illegitimate laws as authoritative." And at 278: "The goodness of legitimacy flows from an intuitively appealing principle of political morality: each citizen, who is to be bound by an official proceeding for the resolution of a civil dispute should be able to regard the procedure as a legitimate source of binding authority creating a content independent obligation of morality for the parties to the dispute."

a certain “moral harm” on citizens.¹²⁰ The very reason that this moral harm exists is because denying participation rights constitutes a denial of “a concern and respect for individual dignity.”¹²¹ He also relates a helpful hypothetical situation that elicits the intuition that representation of interests is not enough to ensure respect for human agency.¹²² In his hypothetical, a fully competent adult is sued in a civil law suit, but is denied the ability to participate in the adjudication. Instead, the judge appoints a Guardian ad Litem to represent the person’s interests. The Guardian represents her interests well. But it still seems that the legitimacy of the proceeding can be denied. If I were that person, in the event of an unfavourable outcome, my intuition (shared by Solum) is that I have good reason to deny the authority assumed over me, because I was improperly denied the right to participate.¹²³

A number of authors have picked up on this intuition to argue that participation rights in the litigation process are necessary, and are underpinned by respect for human dignity and autonomy of legal subjects.¹²⁴ For instance, Lawrence Tribe provides that:

¹²⁰ *Ibid* at 298.

¹²¹ *Ibid*.

¹²² *Ibid* at 283-284.

¹²³ *Ibid* at 283-284.

¹²⁴ See for instance, Jerry Marshaw, *Due Process in the Administrative State* (New Haven: Yale University Press, 1985); Richard Saphire, “Specifying Due Process Values: Towards a More Responsive Approach to Procedural Protection” (1978) 127 U Pa L Rev 111, adopting a dignity-based approach to due process and arguing in favour of recognizing participation rights on that basis. Compare contrary position of Alex Stein, *Foundations of Evidence Law*, *supra* note 70 at 33: “The right to be heard, and, indeed, the entire package of trial participation rights, are rights that ultimately derive from epistemic fallibility, not from moral virtuousness.”

Both the right to be heard from, and the right to be told why, are analytically distinct from the right to secure a different outcome; these rights to interchange express the elementary idea that to be a person, rather than a thing, is at least to be consulted about what is done with one.¹²⁵

In a similar vein, Robert Bone has noted that:

I assume that the parties to mass tort cases have process-oriented participation rights that can trump utility and that those rights guarantee a robust form of individual control, including control over litigation of all significant issues relating to the determination of individual damages. I also assume that the intrinsic value of participation is historically tied to respect for individual autonomy: allowing a person to participate before subjecting him to the coercive power of the state respects his dignity as an autonomous moral agent.¹²⁶

These contributions lend credence to the position that participation rights are necessary features in my conception of legitimacy.¹²⁷ On this basis, I endorse the conclusion that

¹²⁵ Laurence Tribe, *American Constitutional Law* 2nd Ed (New York: Foundation Press, 1988) at 666-7.

¹²⁶ Robert Bone, "Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity" (1993) 46 Vand L Rev 561 at 619. He also states at 625: "A strong participation right can be justified only by a normative theory of process value that grounds the value of participation in the conditions of adjudicative legitimacy, such as respect for a party's dignity or autonomy."

¹²⁷ Some accounts hold that adjudicative legitimacy is tied exclusively to participation rights. That view over-extends the normative value of participation rights at the cost of failing to recognize that factual reliability is also necessary to legitimate adjudication. Solum alludes to this problem in "Procedural Justice," *supra* note 69 as well, at 272: "At this point, we can take stock of the participation model...[the interpretation which] emphasizes the dignity interest of litigants, at least gets off the ground, but the dignity-enhancing process is not sufficient for fairness in the face of skewed outcomes." Of course, my own approach to legitimacy does not suggest an exclusivity of participation rights, and includes a requirement for a genuine orientation to factual accuracy, as I have delineated above.

parties who will be substantially affected by the adjudication should have a right to participate in the sense of being allowed an equal and meaningful opportunity to present relevant evidence and arguments.¹²⁸ This is, of course, subject to justifiable admissibility rules discussed above.

Summing Up: The Procedural Legitimacy Framework

My purpose in this chapter has been to uncover the general principles for how respecting legal subjects as autonomous agents can be reflected in the adjudicative fact-finding process. That leads to a substantiated procedural legitimacy proposal, and constitutes my suggestion for why, and on what basis judicial fact-finding can be acceptable despite its unavoidable potential for factual inaccuracy.

The first part of the discussion centered on factual reliability. That is a central concern because of the underlying point that factual accuracy is an important goal in order to maintain congruence between the laws of a society and their administration through the

¹²⁸ See Solum, “Procedural Justice,” *ibid* at 305 for his statement of the “Participation Principle.” I note that the requirement for participation rights is suggestive of a possible defect in the inquisitorial model of dispute resolution from the procedural legitimacy perspective, but a full discussion of the merits and pitfalls of inquisitorial dispute resolution is beyond the scope of this chapter. I briefly return to a comparison with inquisitorial models in the context of expert witnesses in Chapter Five. In addition, I acknowledge that a call for participation rights would require further consideration and delineation, particularly in contexts beyond civil litigation. The question of who is substantially affected or directly affected can depend on the type of administrative decision at stake. Addressing the question of who could be affected in various instances goes beyond my scope in this project of providing guiding principles that may be used to assess fact-finding processes in the civil litigation context.

courts. Incongruence between law and their administration constitutes an affront to the human agent. At the same time, factual accuracy cannot be guaranteed while maintaining an efficacious adjudicative system. Preserving the integrity of the judicial system, therefore, depends on maintaining a genuine best effort at getting the facts right. In my definition, considering whether fact-finding procedures manifest and facilitate a sincere effort at achieving accuracy is the relevant question to assess factual reliability. The authenticity of that effort can be presumed when:

1. In general, all relevant evidence is admissible.
2. Exclusions to relevant evidence are justified on the basis of respecting human autonomy.
3. The system ensures internally coherent and consistent error-risk management.
4. The standard of proof is, at minimum, a balance of probabilities.
5. The evidence presented is weighed rationally against the standard of proof, and the factual findings are accompanied by reasons.

In addition to factual reliability, participation rights also requisite features of legitimate fact-finding. A fact-finding system must not exclude an affected party from participating in the decision-making by presenting evidence and argument. The two elements of factual reliability and participation together provide the fullest expression of respect for human autonomy in adjudicative fact-finding procedures. When fact-finding procedures reflect those qualities, consistent application of those rules gives rise to legitimate factual determinations.

The implicit message of committing to consistent application of a procedural system that manifests these principles is that while we cannot guarantee factually accurate adjudicative outcomes, we can promise judicial outcomes that are right in a different sense: they are right in that they are a product of a valuable procedure that ensures respect for the human agent while simultaneously acknowledging the reality that factual findings occur in a context of uncertainty.

The procedural legitimacy proposal that I have set out can be understood as having two parts: a substantive element which requires respect for litigant autonomy to be reflected in the fact finding procedures, and the formal element which requires that those fact finding procedures operate consistently whenever they apply. The next two chapters, where I apply the procedural legitimacy framework to two doctrinal debates in injury litigation, correspond to these elements. In Chapter Five, I use the procedural legitimacy frame to address the question of how judges should use scientific expert evidence in making factual conclusions. This discussion especially highlights and adds nuance to the substantive elements of procedural legitimacy. In Chapter Six, I evaluate the perceived unfairness in medical negligence cases which arises from questioning how the adjudicative system contends with factual uncertainty over causation. My argument in that context is driven largely by the formal element of procedural legitimacy, so I expand further on the value of consistency there. Finally, in Chapter Seven, I use the procedural legitimacy demand for coherence to offer a new framework for when judges should use probabilistic reasoning while fact-finding for the purpose of determining fair damages awards. Questions about the

nature of legitimate fact-finding underpin all of these discourses, making them ideal arenas for concrete illustrations of procedural legitimacy.

CHAPTER 5: IMPLICATIONS OF PROCEDURAL LEGITIMACY ON SCIENTIFIC EVIDENCE AND JUDICIAL FACT-FINDING

Introduction

This chapter demonstrates how and why the procedural legitimacy framework should be applied to the important question of how scientific evidence should be used in judicial fact-finding.¹ Examining the often cumbersome interaction between scientific expert evidence and judicial decision-making is no novel challenge, but it is increasingly urgent.² Fast-paced advances in scientific knowledge, and increasing utilization of science in litigation means that factual disputes that have scientific bases will increasingly confront the courts. Accordingly, determining the most appropriate method of presentation and use of scientific evidence will become correspondingly critical for preserving legitimate adjudication.³ I use the procedural legitimacy proposal as a framework for defining and assessing the fact-finding issues that arise when scientific evidence enters the courtroom. That serves as a

¹ Many of the ideas presented in this chapter were first conceived and presented in my LLM Thesis: *Science on Law's Terms: Implications of Procedural Legitimacy on Scientific Evidence* and in my paper, "Law's Treatment of Science: From Idealization to Understanding" (2013) 36 Dal LJ 1. This chapter constitutes an expansion of those ideas, informed by the further substantiated notion of procedural legitimacy developed in Chapters Two, Three and Four.

² For a historical survey of science and law concerns, see for example Stephen Landsman, "Of Witches, Madmen, and Product Liability: An Historical Survey of the Use of Expert Testimony," 13 *Behavioral Science and Life* 131. For another historical survey, see Glenn Anderson, *Expert Evidence 3rd ed* (Markham, Ontario: LexisNexis Canada, 2014) chapter 1.

³ Justice Ian Binnie, "Science in the Courtroom: The Mouse that Roared," (2007) 56 UNB LJ 307 at 307: "science disputes are hitting the courts at an increasing velocity. In cases involving tort, environmental, intellectual property and criminal law, the admission and use of expert scientific or technical testimony is often crucial to the outcome" [Binne, "Science in the Courtroom"]. Similarly, Mark Freiman and Mark Berenblut open their book, *The Litigator's Guide to Expert Witnesses* (Aurora, Ont: Canada Law Book, 1997) noting the "unprecedented expansion in the types of expert evidence being led" at 1.

demonstration of the significance and practical utility of maintaining procedural legitimacy as a jurisprudential orientation.

The urgency of ensuring an amicable interaction between science and law has prompted lively discussions among the judiciary and scholars around how scientific evidence should be admitted, presented and used in order to facilitate, rather than hinder, judicial fact-finding. Authors have insightfully discussed and diagnosed the problems associated with scientific evidence, and have generated a range of solutions. In order to contextualize my discussion, this chapter opens with a brief introduction to the science and law discourse. I suggest that while notable problems and solutions have been identified, they have not been adequately considered in light of the demands of procedural legitimacy. That, as I argue at the end of Part One, is problematic because it prevents a clear definition of the problems associated with scientific evidence in terms of maintaining adjudicative legitimacy, which should be the prioritized concern. Inadequate prioritization of adjudicative legitimacy sets the stage for offering solutions that are not fundamentally oriented towards maintaining adjudicative legitimacy, and may even compromise it.

On that basis, in Part Two of this Chapter, I attempt to superimpose the scaffolding of procedural legitimacy onto the science and law discourse. That enables me to assess and endorse solutions on the basis of their ability to maintain the demands of legitimate fact-finding while addressing the valid concerns that arise when scientific evidence poses a threat to adjudicative legitimacy. The discussion in this chapter is oriented towards displaying the nuances of the substantive features of the procedural legitimacy framework developed in Chapters Two, Three and Four, and implicitly points to its utility in a concrete

doctrinal context.

Part 1: Introducing the Concerns and the Procedural Legitimacy Frame

A. The Concerns around Scientific Evidence

The potential prejudicial impact of scientific evidence was originally summed up in the Supreme Court of Canada's decision *R v Mohan*.⁴ There, Justice Sopinka explained that the potential of science to distort legal fact-finding arises out of two types of deference. First, the expert's credentials may draw deference from triers of fact. Second, the natural 'impressiveness' that comes with scientific (or scientific sounding) evidence, could lead lay triers of fact to over-rely on such evidence without subjecting it to proper, if any, scrutiny. In Sopinka J's words:⁵

There is a danger that expert evidence will be misused and will distort the fact-finding process. Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves.

The problem of deference to science is clearly the most problematic for fact-finding when the expert evidence is itself factually unreliable. That possibility is rife in the adjudicative context for two reasons. First, the generalized lack of scientific understanding among the judiciary makes it difficult for judges to assess the reliability of expert evidence prior to admitting it into the trial process or weighing it once it has been proffered. Second, it is

⁴ *R v Mohan* [1994] 2 SCR 9, SCJ no 36 (QL), 1994 CarswellOnt 66. [*Mohan*]

⁵ *Ibid* at 23.

often suggested that the adversarial nature of Canadian fact-finding is predisposed to unreliable evidence making its way into the court process.

Highlighting the concern around judicial capacity to comprehend scientific issues, Rehnquist J made telling comments in his dissenting judgment in *Daubert v Merrell Dow Pharmaceuticals, Inc*, the landmark American decision on scientific expert evidence:⁶

I defer to no one in my confidence in federal judges; but I am at a loss to know what is meant when it is said that the scientific status of a theory depends on its ‘falsifiability,’ and I suspect some of them will be, too.

Empirical studies conducted in the United States lend support to Rehnquist J’s caution.⁷ Kapardis refers to a study that surveyed judges and found that key components of scientific reliability like “falsifiability” and “error rate” were not understood by most judges.⁸ Edmond et. al. similarly note, “among evidence scholars (and other observers), the U.S. courts’ handling of forensic evidence in admissibility hearings and trials has been soundly

⁶ *Daubert v Merrell Dow Pharmaceuticals, Inc.* (1993) 509 US 579 at 600 (Rehnquist CJ, dissenting) [*Daubert*].

⁷ Carol Krafka et al, “Judge and Attorney Experiences, Practices, and Concerns Regarding Expert Testimony in Federal Civil Trials” (2002) *Psychol, Pub Pol’y & L* 309.

⁸ Andreas Kapardis, *Psychology and Law: A Critical Introduction*, 3d ed (Cambridge: Cambridge University Press, 2010) at 239. Though a comprehensive empirical study of judicial capacity has not been conducted in Canada, it is safe to presume that Canadian judges would fair similarly considering that they share a similar educational background to their American counterparts.

and nearly universally excoriated.”⁹ Presumably, Canadian judges would fare similarly given that their educational background is similar to their American counterparts.

As a result of their inability to meaningfully assess scientific evidence, judges resort to the more familiar techniques of assessing witness evidence – through the witness’s demeanor rather than a more direct scrutiny of the evidence presented.¹⁰ Binnie J illustrated this quandary pointing to the telling comments of Frank Muldoon J of the Federal Court, Trial Division:

⁹ Edmond, Cole, Cunliffe and Roberts, “Admissibility Compared: The Reception of Incriminating Expert Evidence (i.e. Forensic Science) in Four Adversarial Jurisdictions” (2013) 3 University of Denver Criminal Law Review 31 at 40 [Edmond et al, “Admissibility Compared”] The authors also point to the National Research Council Report which comments on the ineffectiveness of judges to encourage or mandate forensic scientists “to establish either the validity of [their] approach or the accuracy of [their] conclusions.” [National Research Council at 53, cited in Edmond et al, “Admissibility Compared.”]

¹⁰ I am not suggesting that assessing the demeanor of a witness is improper. Certainly, the credibility of a witness, whether expert or a factual witness, is relevant to determining how much weight to give to his or her testimony, and the witness’s demeanor is relevant to assessing credibility. For instance, see *Unilever PLC v Procter & Gamble Inc* [1997] 3 SCR 320, SCJ No 77 (QL) at 29: “there may be something about a person’s demeanor in the witness box which will lead a juror to conclude that the witness is not credible. It may be that the juror is unable to point to the precise aspect of the witness’s demeanor which was found to be suspicious, and as a result cannot articulate either to himself or others exactly why the witness should not be believed. A juror should not be made to feel that the overall, perhaps intangible, effect of a witness’s demeanor cannot be taken into consideration in the assessment of credibility.” However, using a witness’s demeanor as the only method of assessing scientific evidence would leave the evidence itself un-scrutinized. For more on assessing credibility of witnesses, particularly through reliance on common sense judgment of demeanor, see Steven Friedland, “On Common Sense and the Evaluation of Witness Credibility” (1990) 40 Case W Res L Rev 165; Sarah Barmak, “The fallacy of lying eyes and guileless smiles; A new study shows judges and others form biases based on the faces of people in court”, *The Toronto Star* (August 15, 2010) (QL) for an accessible commentary; and for an empirical study assessing the relationship between juror’s personalities and expert witness demeanor, see Robert Cramer, Stanely Brodsky & Jamie DeCoster, “Expert Witness Confidence and Juror Personality: Their Impact on Credibility and Persuasion in the Courtroom” (2009) 37(1) J Am Acad Psychiatry Law 63.

A judge unschooled in the arcane subject is at difficulty to know which of the disparate, solemnly-mouthed and hotly contended scientific verities is, or are, plausible. Is the eminent scientist expert with the shifty eyes and poor demeanour the one whose “scientific verities” are not credible? Cross-examination is said to be the great engine for getting at the truth, but when the unschooled judge cannot perceive the truth, if he or she ever hears it, among all the chemicals and other scientific baffle-gab, is it not a solemn exercise in silliness?¹¹

As hinted in the judicial musings above, the problem of lack of judicial capacity to understand and appropriately scrutinize scientific evidence is augmented by the adversarial nature of judicial fact-finding, which results in a judge being faced with two-sided competing expert evidence. Adding difficulty to the already complex task that the judge is faced with is the commonly flagged concern around expert bias.¹² Experts have often been referred to as ‘hired guns’ who provide overstated opinions that favour the side that retains them. In the Osborne Commission, for instance, it was noted that “the issue of “hired guns” and “opinions for sale” was repeatedly identified as a problem during consultations.”¹³

¹¹ *Unilever PLC v Procter & Gamble Inc.* (1993), 47 CPR (3d) 479 at 488, cited in Binnie, “Science in the Courtroom,” *supra* note 3 at 309.

¹² See for example, David Paciocco, “Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune on Partial Experts” (2009) 34 Queen’s LJ 565; William G. Horton & Michael Mercer, “The Use of Expert Witness Evidence in Civil Cases” (2005) 29 *Advocates’ Q* 153 at 153; Paul Mitchell & Renu Mandhane, “The Uncertain Duty of the Expert Witness” (2005) 42(3) *Alta L Rev* 635 at 649 [Mitchell & Mandhane, “Uncertain Duty of the Expert Witness”]; Joseph Sanders, “Science, Law, and the Expert Witness” (2009) 72 *Law & Contemp Probs* 63.

¹³ Report of the Ontario Civil Justice Reform Project (2007) at 75 [Osborne Commission].

Judicial commentaries in a number of medical malpractice cases illustrate this concern in the injury litigation context. In *Burke-Pietramala v Samad*, for instance, the British Columbia court complained that the expert was “presenting advocacy in the guise of an expert report and evidence,” and had “no evidentiary value.”¹⁴ Similar comments were made in the Ontario decision, *Lurtz v Duchesne*, where the court criticized the expert as an advocate for the defendant doctors.¹⁵ In addition, the Goudge Inquiry highlighted the difficulties associated with partisan medical experts when it was revealed that Dr. Charles Smith, the forensic expert involved in the impugned cases, understood his role to be that of an adversary advocating for one party.¹⁶ Biased experts can result in impressive-sounding scientific testimony being presented by an expert whose aim is to campaign for an opinion rather than to facilitate the understanding of the trier of fact, and can obviously have distorting effects on fact-finding.

The consequence of the combination of lack of judicial understanding of scientific concepts, a tendency for deference, and issues of over-adversarialism, is a system that is susceptible to grounding factual determinations on unreliable scientific evidence, especially if it is presented by a well-spoken expert with commendable credentials.

¹⁴ *Burke-Pietramala v Samad* [2004] CarswellBC 775 at para 109.

¹⁵ *Lurtz v Duchesne* [2003] CarswellOnt1523 at para 201, 204. See also Daniel Durand et al Expert Witness Blinding Strategies to Mitigate Bias in Radiology Malpractice Cases: A Comprehensive Review of the Literature (2014) 11 J Am Coll Radiol 868, pointing out the biases that affect radiologists when they act as expert witnesses.

¹⁶ Ontario, Report of the Inquiry into Pediatric Forensic Pathology in Ontario (Toronto: Queen’s Printer, 2008) (Chair: Stephen T Goudge) online: <goudgeinquiry.ca> at 503 [Goudge Inquiry].

The stirring results of this problem are particularly obvious in light of the role that scientific evidence has played in wrongful convictions in Canada. An often-cited example is the wrongful conviction of Guy Paul Morin, where the hair and fiber comparison evidence that was relied on was found to be improperly understood.¹⁷ Another is the case of Tammy Marquardt. In that case, forensic pathologist, Dr. Charles Smith, erroneously testified that the cause of Marquardt's son's death was asphyxia. Judicial reliance on that expert testimony led to her wrongful conviction and thirteen-year prison term prior to exoneration.¹⁸

Additional instances of improper reliance on Dr. Charles Smith's testimony leading to wrongful convictions were uncovered in the Goudge Inquiry, which resulted in a number of re-opened cases leading to acquittals or new trials. The Goudge Inquiry was convened to investigate the wrongful convictions that occurred in relation to suspicious deaths of children in Ontario. Many aspects of the criminal justice system, as well as the profession of forensic pathology were considered over the course of the Inquiry, but of particular relevance here is Goudge J's consideration of the role of the court when confronted with scientific expert testimony.¹⁹

Although improper use and understanding of scientific evidence is perhaps most stark in

¹⁷ Canada, Kaufman Commission on Proceedings Involving Guy Paul Morin, Report, Recommendations (Toronto, Ontario Ministry of the Attorney General, 1998), Executive Summary at 5-6.

¹⁸ See Kent Roach, "Wrongful Convictions" (2012) 80 U Cin L Rev 1465 at 1479-1481.

¹⁹ Goudge Inquiry, *supra* note 16.

the context of wrongful convictions, similar difficulties exist in administrative and civil litigation. In the realm of personal injury litigation, most cases depend on expert evidence. “Without evidence from experts,” Picard and Robertson explain, “the Court is not in a position to assess whether the defendant physician was negligent...”²⁰ In the Civil Justice Reform Project in Ontario, Justice Osborne made comparable observations about the necessity of experts in resolving injury related disputes:

In [personal injury] actions it is frequently necessary to call more than three doctors. In addition, actuarial evidence is often required where there are future loss claims. Many personal injury claims raise “level of care” and more general “future care” cost issues. It is difficult to contemplate a serious personal injury case being presented (or defended) without more than three expert witnesses.²¹

Despite the necessity of expert witnesses to assist in fact-finding, lamentations of lack of understanding between legal actors and professionals who serve as expert witnesses are not unusual.²² When relevant and necessary expert evidence is not helpful to fact-finding,

²⁰ Ellen I. Picard & Gerald B. Robertson, *Legal Liability of Doctors and Hospitals in Canada*, 4th ed (Ontario: Thompson Carswell, 2007) at 393 [Picard and Robertson, *Legal Liability of Doctors and Hospitals*].

²¹ Civil Justice Reform Project, online <<www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp>> at 68.

²² Picard and Robertson, *Legal Liability of Doctors and Hospitals*, supra note 20 note, for instance at 413: “Differences in the education and experience of doctors and lawyers have sometimes led to misunderstandings between the professions. The doctor’s education emphasizes the assimilation of complex factual knowledge and objective scientific inquiry; the lawyer’s emphasizes the acquisition of a special type of reasoning power and the development of adversarial and debating techniques.” For a judicial example see *Mirembe v Tarshis* [2002] CarswellOnt 2240 at para 28 where the court complained that medical experts simply did not provide the “objective independent evidence that would have been helpful to ascertain the true standard of practice at the relevant time.”

the result is increased potential for erroneous fact-finding leading to misapplication of law and improper compensation for injured plaintiffs. The propriety of such decisions is, of course, questionable. As Binnie J puts it, “The task of making courts more science friendly is important to sustaining the legitimacy of courts as dispute resolution institutions.”²³

The problem has prompted commentators to offer a number of reforms designed to rectify the problem. Along with attempts to directly address the issue of judicial capacity by exploring and implementing judicial education efforts,²⁴ and introducing codes of conduct and procedural rules to ensure that experts understand their role as impartial assistants to the court,²⁵ the science and law discourse has seen two prominent responses. First, courts and scholars have experimented with incorporating scientific reliability factors into admissibility of evidence criteria, ultimately aiming to save the trial process from the distorting effects of unreliable science. Catching ‘bad’ science at the admissibility stage would prevent erroneous reliance on unreliable scientific evidence, and increase the

²³ Binnie, “Science in the Courtroom,” *supra* note 3 at 307.

²⁴ In 2013, the National Judicial Institute published its Science Manual for Canadian Judges. It states at 15: its purpose is to: “help judges appreciate and critique expert evidence [and]... to stimulate judges to ask incisive questions, to understand accepted theories, and matters of controversy in the scientific community, and to evaluate the reliability of expert evidence and expert qualifications.” Available online at <<
http://www.iojt.org/library/iojt20140310/NJI_Science_Manual_for_Canadian_Judges.pdf>.

²⁵ Ontario Rules of Civil Procedure Rule 48 requires experts to sign an acknowledgment that indicates their awareness that their duty is to provide an opinion to the Court that is “fair, objective and non-partisan,” and that this duty over rides any duty to the party that retained the expert; Nova Scotia Civil Procedure Rules Rule 55.04 requires that “an expert’s Report must be signed by the expert and state that...the expert is providing an objective opinion for the assistance of the Court, even if the expert is retained by a party.”

chances of a scientifically justifiable judicial outcome.²⁶

Second, in addition to changes to the admissibility criteria, more novel methods of admitting scientific evidence have also been suggested, like increasing the use of court appointed or jointly retained experts, or concurrent presentation of expert evidence known as “hot-tubbing,” where party-selected experts present their evidence in panels.²⁷ Such solutions, as I explain further in Part Two, are aimed most directly at reducing the impact of adversarialism on scientific evidence, again with the view to improving the quality of scientific evidence that reaches the courtroom, ultimately resulting in outcomes that are scientifically sound.

²⁶ Incorporating scientific standards of reliability into admissibility criteria began with the US decision *Daubert*, *supra* note 6. The *Daubert* approach was introduced into Canadian law in *R v J. L.J* [2000] 2 SCR 600, SCJ No 52 (QL). For a criticism of the *Daubert* constructs on the basis that it misconstrues the philosophy of science, see Susan Haack, *Trial and Error: The Supreme Court’s Philosophy of Science*, (2005) 95 AM J Pub Health (Supplement 1) S66. For a thorough explanation of the development of doctrine around scientific evidence, see David E. Bernstein, “Junk Science in the United States and the Commonwealth” (1996) 21 Yale J Int’l L 123 at 128. For an argument in favour of subjecting evidence to scientific admissibility criteria, particularly incriminating evidence, see Gary Edmond & Kent Roach, “A Contextual Approach to the Admissibility of the State’s Forensic Science and Medical Evidence” (2011) 61 UTLJ 343 at 366 [Edmond and Roach, “A Contextual Approach”].

²⁷ See for example: *Tahirih V. Lee*, “Court-Appointed Experts and Judicial Reluctance: A Proposal to Amend Rule 706 of the Federal Rules of Evidence” (1988) 6 Yale L & Pol’y Rev 480; P. Brad Limpert, “Beyond the Rule in Mohan: A New Model for Assessing the Reliability of Scientific Evidence” (1996) 54 U T Fac L Rev 65; Natasha I. Campbell and Anthony Vale “Encouraging More Effective Use of Court-appointed Experts and Technical Advisors” (2000) 67 Def Counsel J 196; Karen Butler Reisinger, “Court-Appointed Expert Panels: A comparison of Two Models” (1998) 32 Ind L Rev 225; Hon G L Davies, “Court Appointed Experts” (2005) 5 QUTLJ 89; David Sonenshein and Charles Fitzpatrick, “The Problem of Partisan Experts and the Potential for Reform Through Concurrent Evidence” (2013) 32 Rev Litig 1; Elizabeth Reifert, “Getting into the Hot-Tub: How the United States Could Benefit from Australia’s concept of “Hot-Tubbing” Expert Witnesses” (2011) 89 U Det Mercy L Rev. 103. I provide a further explanation of this method of expert evidence presentation in Part Two below.

The problem of unreliable science making its way into the adjudicative process, and being given undue weight without scrutiny presents a serious defect in judicial fact-finding. The concerns identified above are valid. And given the potential for erroneous outcomes with very serious implications, efforts to achieve judicial outcomes that are scientifically defensible are not surprising. Still, while efforts to prevent unreliable science from prejudicing fact-finding are appropriate and necessary, seeking scientifically justifiable outcomes must not eclipse the importance of procedural propriety in maintaining *legally* reliable, legitimate adjudicative outcomes. As will become more evident in my discussion in Part Two, this perspective has not been fully expressed in the science and law discourse. Applying the procedural legitimacy frame, as I explain below, helps to identify the problems associated with scientific evidence in terms of legitimate factual resolutions.

B. Introducing the Procedural Legitimacy Frame and Its Importance

The central premise of my thesis is that the foundational enterprise of judicial fact-finding is to arrive at a decision that has legitimate authority despite the risk of factual uncertainty. The key to understanding the importance of the procedural legitimacy perspective for the science and law discussion is expressly appreciating that the inevitability of factual uncertainty remains even when scientific evidence is involved in fact-finding. Of course, scientific defensibility is not synonymous with factual accuracy. For one, science itself is iterative – a theory or technique that has general acceptance today may not meet scientific muster tomorrow. As Justice Archibald and Heather Davies have observed:

By its very nature, science is iterative and recursive and consequently, the pursuit of knowledge never comes to an end; any conclusions reached are provisional.... When evidence is labeled as “scientific”, there may be a tendency to assume that the result is absolute and authoritative. But science and technological knowledge is fluid in nature. It is constantly changing and evolving. Many theories once believed to be true and scientifically “definitive” have since proven false. Indeed the history of science is littered with flawed theories once believed to be accurate and reliable, including the belief that the world is flat.²⁸

Moreover, it would constitute a naïve view of science to hold that there is one scientifically defensible understanding of a particular issue. Naturally, scientists often have valid disagreements with one another. And while those differences of opinion may be relevant to a legal decision, the courtroom is not, and cannot be the place to resolve scientific quandaries; it is the place to resolve legal disputes efficaciously, and most importantly, legitimately.

No matter what procedural or doctrinal changes are introduced to promote better accommodation of scientific evidence in the judicial sphere, guaranteeing factual accuracy, or even guaranteeing unequivocal scientific acceptability will inevitably remain elusive. Ultimately, the trier of fact will be left to resolve an uncertain factual dispute, taking into account the scientific information along with all other admissible evidence. That decision, despite any potential scientific uncertainties, will be authoritative for the litigants.

²⁸ Todd L. Archibald and Heather L. Davies, “Law, Science and Advocacy: Moving Towards a Better Understanding of Expert Scientific Evidence in the Courtroom” in *Annual Review of Civil Litigation 2006*, Archibald and Echlin (eds.) (Toronto: Thomson Carswell, 2007) at 21, cited in the Goudge Inquiry, *supra* note 16 at 480.

Understood in this light, the foundational concern associated with scientific evidence should be interpreted as a contextualized manifestation of the question that lies at the heart of my thesis: on what basis can the authority of adjudicative fact-finding be legitimate, given that it occurs in the context of factual and, here, scientific uncertainty? Accordingly, I suggest that the concerns stemming from scientific expert evidence should be defined and diagnosed in light of the demands of legitimate judicial accommodation of factual uncertainty generally. Approaching the problem in this way ensures that the scientific defensibility is not conflated with legal legitimacy. That is important because attempts to achieve scientific validity, while perhaps laudable, must not cause any drift into compromising the principles of legitimate adjudication. If that were to happen, then the judicial outcomes would lose their legitimate authority.

To be clear, prioritizing adjudicative legitimacy in the science and law discourse does not amount to de-problematizing the concerns identified above. If legal outcomes are systemically inconsistent with established science, or if judges rely on unequivocally unreliable science, the adjudicative system and its outcomes are clearly problematic and unacceptable. But centralizing the demands of adjudicative legitimacy appropriately orients the concerns around maintaining legitimate adjudicative outcomes, because that is what assures the justifiability of an authoritative judicial decision-making system – not factual accuracy, and not scientific defensibility, both of which may be excellent aspirations, but are impossible to achieve.

To recapitulate, my aim in Chapters Two, Three and Four was to substantiate the principle of procedural legitimacy, which constitutes my suggestion for why and on what basis judicial fact-finding can be acceptable despite the unavoidable potential for factual inaccuracy. Based on the jurisprudential analysis in Chapter Three, I endorsed Lon Fuller's and Jurgen Habermas's notion that a process that gives rise to legitimately authoritative legal outcomes will demonstrably respect legal subjects as autonomous agents. Applying that concept to the arena of judicial fact-finding in Chapter Four, I concluded that there are, broadly, two requisite procedural elements that give rise to legitimate fact-finding: a factually reliable process, in the sense that the procedures manifest and facilitate a sincere effort at achieving factual accuracy, and second, the assurance of the fullest possible participation rights for affected parties. Taken together, these elements provide the richest procedural expression of respect for human autonomy. Consistent application of procedures that meet these requirements is the source of adjudicative legitimacy.

A bulk of science and law commentaries are situated around the rules of admissibility of expert evidence. Accordingly, I start by offering comments on why the admissibility rules maintain a genuine commitment to ascertaining the truth along with assuring meaningful participation rights, and provide a critique of scholarly proposals for altering admissibility rules. I then turn to evaluating the perceived problems stemming from the adversarial nature of Canadian fact-finding, and assess procedural reforms grounded on that sentiment. These discussions provide an avenue to display some of the nuances of the substantive aspects of the procedural legitimacy frame. Most importantly, they also implicitly demonstrate the problem of under-emphasizing the procedural legitimacy perspective and

enable endorsement of principled solutions aimed squarely at maintaining adjudicative legitimacy.

Part 2: Science and Law in Terms of Procedural Legitimacy

A. Admissibility of Scientific Expert Evidence

i. Mohan Admissibility Analysis: Relevance, Necessity, Expert Qualification

In *Mohan*, Sopinka J set out the legal test for admissibility of expert evidence in Canada.²⁹ Under the *Mohan* analysis, experts are permitted to state opinions as an exception to the rule disallowing admissibility of opinion evidence. To fall within the exception, the expert's testimony must fulfill four criteria. First, the subject of the expert's opinion must be relevant.³⁰ Relevance includes logical relevance, meaning the evidence must tend to prove a fact at issue.³¹ Relevance additionally includes legal relevance—the probative value of the expert's opinion must outweigh any prejudicial impact it may have.³² Second, along with relevance, the expert's testimony must be necessary to the trier of fact (i.e., outside of the scope of a layperson's knowledge).³³ Third, the expert must be qualified to give the

²⁹ *Mohan*, *supra* note 4 at paras 17-32. The test in *Mohan* for expert admissibility was most recently re-affirmed by the Supreme Court of Canada in *White Burgess Langille Inman v Abbott and Haliburton* 2015 SCC 23.

³⁰ *Mohan*, *supra* note 4 at para 22.

³¹ *Ibid.*

³² *Ibid.*

³³ The commentary on necessity from *Mohan*: "The word "helpful" is not quite appropriate and sets too low a standard. However, I would not judge necessity by too strict a standard. What is required is that the opinion be necessary in the sense that it provide information "which is likely to be outside the experience and knowledge of a judge or jury. . . the evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature... "the subject matter of the inquiry must be such that ordinary

opinions offered.³⁴ Fourth, if no other exclusionary rule is applicable, then the expert's opinion is admissible.³⁵

From the perspective of procedural legitimacy, this framework for admitting expert evidence is acceptable. First, stipulating that admissible evidence must be both relevant and necessary is consistent with a demonstrable commitment to ascertaining the truth because only evidence that is relevant to the factual dispute and necessary for its resolution can meaningfully contribute to the ultimate determination of fact. Clearly, it is no affront to meaningful participation rights to disallow evidence that is neither relevant nor necessary to the factual determination.³⁶

people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge" (*Mohan, supra* note 4 at para 26). Additional questions that may be beneficial to assessing necessity were set out in *R v K (A)* (1999), 45 OR (3d) 641 at para 92: (1) Will the proposed expert opinion evidence enable the trier of fact to appreciate the technicalities of a matter in issue? (2) Will it provide information which is likely to be outside the experience of the trier of fact? (3) Is the trier of fact unlikely to form a correct judgment about a matter in issue if unassisted by the expert opinion evidence?

³⁴ *Mohan, supra* note 4, at 31. Note that in *Burgess Langille Inman v Abbott and Haliburton* 2015 SCC 23, the Supreme Court of Canada commented that a properly qualified expert is one who is able and willing to comply with the "special duty to the court to provide fair, objective and non-partisan assistance" (at para 2, 10). This threshold of non-bias should be met prior to admissibility. I return to this later in my discussion of adversarial bias below.

³⁵ *Mohan, supra* note 4 at 30.

³⁶ Note that establishing relevance is the basic principle of admissibility of evidence, whether expert evidence or otherwise. "Evidence is not admissible unless it is: (1) relevant; and (2) not subject to exclusion under any other rule of law or policy....Therefore, the trial judge will determine whether the proffered evidence is relevant. If it is not, it will be rejected." Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, (Markham, Ontario: LexisNexis Canada Inc., 2014) at 51-52 [Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*].

The requirement that an expert must have the necessary qualifications to provide his or her opinion is also consistent with maintaining a genuine orientation towards ascertaining the truth. As noted, the admissibility of an expert's opinion is an exception to the general principle that a witness must not give opinion evidence, and is limited to testifying as to her "knowledge, observation and experience."³⁷ The rationale for the exclusion of opinion evidence is that triers of fact should be left to make inferences and conclusions on the basis of the facts that are ultimately proven, so a witness's opinion on such inferences is unnecessary and irrelevant.³⁸ Moreover, allowing witnesses to express such opinions may usurp the fact-finder's role, particularly if the witness is especially influential.³⁹

Expert witnesses, however, are permitted to provide inferences and conclusions on technical matters, because a fact-finder may not be able to draw such conclusions owing to his or her lack of expertise. On that basis, the admissibility of expert opinion constitutes a valid exception to the general exclusion of opinion evidence - its purpose, at least ideally, is to assist in enabling accurate fact-finding by providing expertise on a factual matter that the court lacks. As Sopinka and colleagues note, "expert opinion evidence is permitted to assist the fact-finder [to] form a correct judgment on a matter in issue since ordinary persons are

³⁷ *Ibid* at 769.

³⁸ *Ibid* at 770. In *Burgess Langille Inman v Abbott and Haliburton* 2015 SCC 23 at para 14, the Supreme Court of Canada commented that: "witnesses are to testify as to the facts which they perceived, not as to the inferences - that is, the opinions - that they drew from them.... While various rationales have been offered for this exclusionary rule, the most convincing is probably that these ready-formed inferences are not helpful to the trier of fact and might even be misleading." (References removed.)

³⁹ Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, *supra* note 36 at 770.

unlikely to do so without the assistance of persons with special knowledge, skill or expertise.”⁴⁰

Given that requirements for relevance, necessity and witness qualification for admissibility of expert evidence are consistent with the demands of procedural legitimacy, they should be consistently adhered to by lawyers when proffering expert evidence, and should be properly applied by judges at pre-trial stages. If not, then the legitimacy of the ultimate outcome becomes compromised. There is indication, however, that experts are prompted to give evidence that is beyond their expertise⁴¹ and judges are not particularly rigorous when assessing the scope of expert qualifications.⁴²

⁴⁰ *Ibid* at 769. And as asserted over a hundred years ago by William Foster, “[A] moment’s consideration must convince all reasonable men that it is of the greatest importance that [fact-finders] charged with the duty of ascertaining the truth... should be assisted by the knowledge and opinion of men specially trained in those matters of science and skill with which the ordinary juror and judge are unacquainted; and to exclude such means of information must, in innumerable instances, compel a denial of justice, imperil rights of life, liberty, and property, and destroy the safeguards of society.” William Foster, “Expert Testimony – Prevalent Complaints and Proposed Remedies” (1897) 11 Harv L Rev 169 at 175.

⁴¹ Goudge Inquiry, *supra* note 16 at 471-472: “The problem of expert witnesses offering opinion evidence outside their area of expertise was shown by the evidence at the Inquiry to be significant. These excesses most often occurred not in written reports but in testimony, and often at the invitation of counsel. The challenge of roaming expert witnesses for the criminal justice system is substantial. All the admissibility safeguards...are for naught if experts are allowed to stray beyond their field of expertise and offer, under the guise of expertise, what are, in essence, only lay opinions that have no scientific value.”

⁴² This is also made evident by the Goudge Inquiry, *ibid*, considering that Dr. Charles Smith was permitted to give evidence beyond his expertise in a number of ways and on many occasions. See Goudge Inquiry at 471-475. At 473, the report of the Goudge Inquiry also refers to the Supreme Court of Canada decision in *R v Marquard* [1993] 4 SCR 223, where a witness with expertise in child abuse and pediatric was permitted to give evidence on the nature of the burns suffered, despite having no expertise in burns, and an expert in burns was permitted to give evidence on characteristics of abused children despite having no expertise in that area.

In the context of scientific evidence, this is particularly problematic, because the unqualified opinion could be given excessive weight due to the erroneous assumption of expertise. This problem may be heightened in the context of medical evidence. Marlys Edwardh, a participant in the roundtable discussion that took place during the Goudge Inquiry commented “that the legal system has ‘tended to defer to medicine without subjecting it to as much scrutiny as other areas.’”⁴³ These concerns echo Sopinka J’s comments in *Mohan* that, “impressive antecedents” can improperly sway fact-finders, and it is all the more problematic when those “antecedents” do not even relate to the opinion tendered.⁴⁴

This issue of misapplication of the qualification requirement and its gravity, was identified in the Goudge Inquiry Report, prompting the recommendation that scope of expertise should be carefully scrutinized and defined at the admissibility stage, and diligently policed thereafter. Entertaining an alternative solution, Goudge J considered the appropriateness of relying on instructions to the jury to give less weight to evidence that is beyond the scope of the witness’ expertise. Noting that it is very difficult for juries to tune out evidence they heard at trial when coming to their decision, Goudge J concludes that front-end gatekeeping in respect of scope of expertise is more desirable than relying on jury charges after the

⁴³ Goudge Inquiry, *ibid* at 474.

⁴⁴ The Goudge Inquiry made this problem clear at 470: “the evidence at this Inquiry demonstrated that the legal system is vulnerable to unreliable expert evidence, especially when it is presented by someone with Dr. Smith’s demeanour and reputation. An expert like this can too easily overwhelm what should be the gatekeeper’s vigilance and healthy skepticism...”.

fact.⁴⁵ Not only is this a justifiable conclusion; it is critical, based on the principle of procedural legitimacy.

An expert who tenders an opinion beyond the scope of her expertise constitutes a lay witness who tenders opinion evidence. The result is a violation of the *Mohan* criteria for admissibility of expert testimony, and of the general rule that opinion evidence is inadmissible. Neither the *Mohan* analysis nor the general rule of exclusion of opinion evidence requires that the trier of fact give less weight to opinion evidence; they require that opinion evidence does not come before the trier of fact at all (i.e. lay opinions are inadmissible evidence). If evidence that violates admissibility rules is admitted, the legitimacy of the resulting adjudicative decision is questionable due to a procedural impropriety, whether or not juries are later instructed to give less weight to the evidence. Calling for vigilant front-end gatekeeping in an effort to prevent admissibility of evidence beyond their scope of expertise is a sound and useful recommendation.

While the call on judges to administer and enforce this admissibility rule is sound, it is an arduous task. Defining the scope of expertise can be complicated, and can require expertise in its own right.⁴⁶ While judges will naturally have the heaviest burden in preventing

⁴⁵ *Ibid* at 474. In noting the jury's difficulty in tuning out evidence heard at trial, Goudge J refers to the comments of Professor Erica Beecher-Monas and Professor Gary Edmond, both of whom expressed this sentiment during the course of the inquiry.

⁴⁶ See David Faigman and John Monahan, "Psychological Evidence at the dawn of the Law's Scientific Age" (2005) 56 *Annu Rev Psychol* 631 at 639, exemplifying this concern in the context of ascertaining the scope of various psychology-based sub-specializations. In addition, a debate that took place between Dr. Henry Berry and L.N. Saxby and M.S. Macartney illustrates the contention that surrounds the scope of expertise within the

experts from testifying beyond their scope, and efforts to enhance their ability to do so are necessary, lawyers should also be called on to facilitate the task. Compared with the judge hearing a case, lawyers have more time with their own experts, along with having earlier access to reports of opposed experts. As such, counsel are in a practically better position than judges to understand and manage the scope of expertise among proffered expert evidence. Ensuring that their own experts do not testify beyond their scope of expertise, and pointing out instances where opposing experts may be doing so are part of the role that lawyers must play to help prevent improper reliance on scientific evidence in the courtroom. Failure to do so constitutes a contribution to compromising the procedural integrity of the adjudicative system and must be considered contrary to the lawyer's role as an officer of the court.⁴⁷

The question of admissibility of expert evidence does not end with relevance, necessity and witness qualification. One of the most prominent themes in the science and law discussions centers on the question of assessing reliability of evidence prior to admissibility. Although Sopinka J's test does not expressly require a demonstration of reliability, his cautionary comments that novel scientific technique should be subjected to "special scrutiny to determine whether it meets a basic threshold of reliability"⁴⁸ set the stage for an assessment

subspecialty of neuropsychology. Henry Berry, "The Evidentiary Nature of Neuropsychological Assessment in Medical Diagnosis: Nine Fallacies in Contemporary Legal Practice" (2000) 23 *Advocates' Q* 143; L.N. Saxby and M.S. Macartney, "Evidence-Based Analysis of Brain Injury Claims: A Neuropsychological Perspective" (1998-9) 21 *Advocates' Q* 20.

⁴⁷ I will return to the issue of lawyers' role in maintaining procedural propriety below in my discussion of adversarialism and its potential impact on faulty reliance on scientific evidence.

⁴⁸ *Mohan*, *supra* note 4 at 28.

of reliability becoming increasingly important in the admissibility of scientific evidence discussion in Canada. The judiciary and academic community alike have offered comments on testing reliability of expert evidence prior to admitting it into the trial process. Below, I canvass the inclusion of reliability assessment for admissibility analyses and consider its propriety from the procedural legitimacy perspective.

ii. Reliability in Admissibility Analysis: Highlights from Canadian Judiciary

After the *Mohan* decision, the Supreme Court of Canada's next substantive commentary on admissibility of scientific evidence came in 2000 in *R v J LJ*. There, assessing reliability of evidence was more expressly incorporated into Canadian admissibility analyses.⁴⁹ While *Mohan* had left the landmark American decision *Daubert* unmentioned, the Supreme Court interpreted *Mohan* in *J LJ* as having rendered the Canadian approach parallel to the "reliable foundation" admissibility analysis in *Daubert*.⁵⁰ In *Daubert*, Blackmun J had called on trial judges to use empirical constructs to determine whether evidence was scientifically reliable, and therefore, admissible. The questions that the trial judge was to ask were: (1) Has the technique or theory been tested—i.e., subjected to the scientific concept of falsification? (2) Has the theory or technique been published or peer reviewed? (3) Does the scientific technique have a known or potential rate of error? (4) Is the theory or technique generally accepted in the relevant scientific community?⁵¹ This marked the beginning of using scientific criteria to address legal reliability in Canada.

⁴⁹ *R v J. L.J.*, *supra* note 26.

⁵⁰ *Ibid.*

⁵¹ *Daubert*, *supra* note 6. Edmond et al note that although the Daubert criteria are often presented as a four-part test, it in fact involves a two-part analysis for admissibility:

While the Court in *J LJ* was careful to indicate that its intention was not to change the *Mohan* analysis, the two approaches were amalgamated in a 2007 decision of the Alberta Court of Queen’s Bench.⁵² This amalgamation was not intended to represent a strict test to be invariably applied, but it provides a useful synopsis of the considerations that could be relevant to admissibility of expert evidence, representing the *Mohan* analysis, supplemented by *J LJ*:

Criterion I. Relevance to an issue

- A. Does the evidence meet the threshold of logical relevance?
- B. Does the evidence meet the threshold of reliability?
 - a. Is the opinion based on novel science?
 - b. Does the opinion evidence pertain to the ultimate issue?
 - c. Does the novel science attain threshold reliability? [*Daubert* factors]
 - i. Has the theory/technique been tested?
 - ii. Has the theory or technique been subject to peer review/published?
 - iii. Is there a known or potential error rate?
 - iv. Is the theory/technique generally accepted?
- C. Do the costs of admitting the evidence out-weigh the benefits?

Criterion II. Necessary to assist the trier of fact.

- A. Is the subject matter of the expert opinion beyond that of the trier of fact?

Criterion III. Absence of any exclusionary rule

Criterion IV. Properly qualified expert.

Mohan and the subsequent cases could be taken to mean that the reliability analysis need only be undertaken for novel scientific evidence. But the novelty component in *Sopinka J*’s

relevance and reliability. The four factors noted above were intended to explicate the reliability factor. Edmond et al, “Admissibility Compared,” *supra* note 9 at 38-39.

⁵² *R v Wood*, [2007] A] 895 at para 50.

comments in *Mohan* have been given less emphasis in later interpretations, including Goudge J's explanation of *Mohan* in this respect:

In my view, [*Mohan*] should not be interpreted to suggest that the judge's gatekeeper role in ensuring the threshold reliability of expert evidence is limited to "novel scientific theory or technique." The reference to novel science is best seen as a particular example where the reliability of the purported science from which the expert opinion is drawn will need to be evaluated. This example is not, however, the only circumstance where judges should be concerned about the reliability of proposed scientific evidence. In recent years, the jurisprudence has been moving in the direction of recognizing the importance of reliability standards for all expert evidence and, indeed, for all evidence.⁵³

Even if *Mohan* and *J LJ* are taken to mean that the reliability analysis need only be undertaken for novel scientific evidence, the more recent *R v Trochym*⁵⁴ decision contains a clear expansion of that principle: the reliability analysis should be undertaken for scientific evidence, whether or not it is novel. In *Trochym*, the Supreme Court commented on the fluidity and fallibility of science. Translated into a comment on admissibility, a technique or theory that may have once been admissible may later be inadmissible as scientific inquiry progresses. In *Trochym*, the majority upheld a ruling that rejected admissibility of post-

⁵³ Goudge Inquiry, *supra* note 16 at 478. Emma Cunliffe also notes that the reference to novel science "seems to mean evidence that has not previously been accepted in a court, but may extend to new applications of established techniques," suggesting that evidence does not need to be novel in a scientific sense, but in a legal sense, for the reliability analysis to be triggered in Edmond et al "Admissibility Compared," *supra* note 9.

⁵⁴ *R v Trochym* [2007] 1 SCR 239, SCJ no 6 (QL) [*Trochym*].

hypnotic evidence⁵⁵ despite the concerns expressed by the dissenting judges that hypnosis evidence was in fact well established, had already been scrutinized by the courts, and had been admitted in many cases previously.⁵⁶ *Trochym's* contribution, therefore, is a confirmation that reliability of evidence should be assessed, whether or not evidence is grounded on a novel technique or theory.⁵⁷

From the procedural legitimacy perspective, the Canadian judiciary's commitment that expert evidence failing to pass a threshold of factual reliability cannot satisfy the relevance requirement for admissibility is sound. Allowing evidence that has little factual reliability into the trial process is contrary to a commitment to a genuine search for truth, given that such evidence cannot be said to assist in accurate fact-finding. Particularly in a context where there is susceptibility to deference, as in the case of expert evidence, the prejudicial impact of unreliable evidence outweighs its probative value, and is properly excludable on that basis. The exclusion of evidence in the *Mohan* decision provides an apt example, as noted in the Goudge Inquiry Report:

⁵⁵ Post-hypnotic evidence refers to witness statements that are obtained after the witness' memory has been (supposedly) refreshed through hypnosis. In *Trochym, ibid*, a key witness told police that she saw the accused come out of the victim's residence on a Thursday. After being hypnotized, she told them that she had in fact witnessed the accused emerge from the victim's residence on Wednesday. The post-hypnotic evidence was more consistent with the Crown's theory of how the accused had murdered the victim.

⁵⁶ In *R v Clarke* [1984] 13 CCC (3d), 117 AJ no 19 (QL) (ABQB), for example, post-hypnotic evidence was admitted.

⁵⁷ For a strong endorsement of the Court's approach in *Trochym*, particularly in respect of the importance placed on the reliability of evidence and the impacts of unreliable evidence in the criminal law context, see Gary Edmond & Kent Roach, "A Contextual Approach," *supra* note 26.

The Supreme Court unanimously upheld the trial judge's decision to exclude the expert evidence, noting that "there is no acceptable body of evidence that doctors who commit sexual assaults" have characteristics "that are sufficiently distinctive to be of assistance in identifying the perpetrator of the offences alleged...The expert's group profiles were *not seen as sufficiently reliable to be helpful*. In the absence of these indicia of reliability, it cannot be said that the evidence would be necessary in the sense of usefully clarifying a matter otherwise inaccessible, or that any value it may have would not be outweighed by its potential for misleading or diverting a jury.⁵⁸

Of course, the exclusion of evidence that is unreliable and, therefore, unnecessary and unhelpful to fact-finding cannot be considered an affront to participation rights, so the consistency with the procedural legitimacy demands are maintained. There are, however, some potential concerns relating to over-application of reliability criteria at the admissibility stage, which could constitute improper restriction on enabling litigants to present evidence of their choice. That constitutes a compromise to participation rights and a potential affront to procedural legitimacy. I discuss these concerns below in my comments on scholarly contributions to the reliability analysis.

iii. Reliability Criteria: Academic Contributions and Procedural Legitimacy Concerns

Scholarly discussion on the topic of assessing reliability of expert evidence at the admissibility stage includes two prominent sentiments.⁵⁹ First, empirical evidence suggests

⁵⁸ Goudge Inquiry, *supra* note 16 at 479, citing *Mohan*, *supra* note 4 at para 46 (Goudge J's emphasis).

⁵⁹ Note that the *Daubert* criteria for admissibility have prompted a line of literature calling for a more nuanced understanding of science that considers historical, sociological and philosophical accounts of science, rather than relying only on Popper's theory of

that although judicial reliability has been incorporated into admissibility criteria, it does not appear to have resulted in much difference in how much scrutiny is afforded to scientific evidence during admissibility hearings.⁶⁰ Emma Cunliffe's study of the courts of British

falsification. See for instance: Sheila Jasenoff, *Science at the Bar* (Cambridge, Harvard University Press, 1995); Gary Edmond, "Judicial Representations of Scientific Evidence" (2000) 63 Mod L Rev 216; David Caudill and Lewis LaRue, *No Magic Wand: The Idealization of Science in the Law* (Lanham: Rowman & Littlefield, 2006); Susan Haack, "Trial and Error: The Supreme Court's Philosophy of Science" (2005) 95 AMJ Pub Health (Sup. 1) S66. This line of literature explains the debate between science as a representation of natural reality and science as a social, political and historical construct. Certainly, a more nuanced understanding of science would benefit the interaction between science and law, but my purpose herein is not to engage in this debate. As Edmond and Roach comment, "In many ways, the question of whether *Daubert* embodies the essentials of genuine science and whether we can develop useful means of demarcating science from other types of knowledge and experience are distractions." [Edmond and Roach, "A Contextual Approach," *supra* note 26 at 399]. They are distractions because the question of whether evidence is "science" or "not science" is not foundationally relevant to the central issue of legal reliability and admissibility. As noted in Gary Edmond, "Pathological Science? Demonstrable Reliability and Expert Forensic Pathology Evidence" (Toronto: Government of Ontario, 2007), prepared as a research paper for the Goudge Inquiry at 40: "The invocation of scientific method doctrines and casting of empirical investigations as formal attempts at disproof should not become prerequisites to determinations of legal reliability." Below I express my disagreement with Edmond's ultimate approach of advocating for demonstrable reliability as a legal standard of admissibility, but I agree with the sentiment that legal reliability and scientific reliability should not be taken to be synonymous. Accordingly, while uncovering the best answer for what classifies as science may be foundational to assessing scientific legitimacy, it is not centrally relevant to my aim of assessing adjudicative legitimacy.

⁶⁰ A number of scholars have studied the impacts of the *Daubert* decision which first introduced empirical criteria as part of the admissibility analysis for expert evidence in the United States: Edward K. Cheng & Albert Yoon, "Does Frye or Daubert Matter? A Study of Scientific Admissibility Standards" (2005) 91 Va L Rev 471 at 511; Margaret A. Berger, "What Has Decade of Daubert Wrought?" (2005) 95 AM J. Pub Health S59; Dixon & Brian Gill, "Changes in the Standards for Admitting Expert Evidence in Federal Civil Cases Since the Daubert Decision," 8 Psychol Pub Policy and Law 251, 252, 285-286. In the Canadian context, Edmond et al note that "despite the relatively large number of Supreme Court of Canada decisions on the admissibility of expert evidence, much expert evidence (particularly evidence tendered by the Crown) is admitted with, at best, a perfunctory admissibility enquiry." Edmond et al, "Admissibility Compared," *supra* note 9 at 71.

Columbia, for instance, indicates that judges tend to admit expert testimony, and consider reliability at the later stage of assigning weight to evidence.⁶¹

Second, some suggest that while the efforts to improve reliability analyses at the admissibility stage are a step in the right direction, they have not gone far enough. Edmond and Roach, for instance, argue in favour of “more demanding standards for the admissibility of incriminating expert evidence. Indeed,” they advise, “we go beyond current legal practice and proposals for reform to argue for demonstrable reliability whenever the state adduces expert evidence to support a criminal conviction (or induce a plea).”⁶² Later, they comment:

For pragmatic reasons, we could contemplate tempering the strength of our asymmetrical commitments. While we believe that criminal justice systems should entrench different admissibility standard for expert evidence adduced by the state from those for expert evidence adduced by those accused of crime, the most important single reform would be to raise the admissibility standard across the board.⁶³

⁶¹ Edmond et al, “Admissibility Compared,” *supra* note 9 at 71. For similar results in the American context, see Edward Cheng & Albert H. Yoon, “Does *Frye* or *Daubert* Matter? A Study of Scientific Admissibility Standards” (2005) 91 VA L Rev 471; Lloyd Dixon & Brian Gill, Changes in the Standards for Admitting Expert Evidence in Federal Civil Cases since the *Daubert* Decision, 8 Psychol Pub Pol’y & L (2002) 251, at 252, 285-6; Beverly Lubt, “The Time Has Come for Doing Science: A Call for the Rigorous Application of Daubert Standards for the Admissibility of Expert Evidence in the Impending Silicone Breast Implant Litigation” (1988) 42 NY L Scl L Rev 147.

⁶² Edmond and Roach, “A Contextual Approach,” *supra* note 26 at 345; See also Carol Krafka et al, “Judge and Attorney Experiences, Practices, and Concerns Regarding Expert Testimony in Federal Civil Trials” (2002) Psychol, Pub Pol’y & L 309.

⁶³ Edmond and Roach, “A Contextual Approach,” *Ibid* at 408 (emphasis added).

More recently, Edmond, Cole, Cunliffe and Roberts made a similar argument in favour of a demonstrable reliability admissibility criterion:

In order to improve performances, and to align more closely with espoused goals of accuracy and fairness (or truth and justice) and increasing efficiency our lawyers and judges must be willing to exclude expert opinion evidence that is not demonstrably reliable.⁶⁴

The idea that evidence should pass a fairly high standard of factual reliability prior to admission is understandable, particularly considering that the values of “truth” and “justice” referenced above are at stake. But an over-commitment to such substantive values may bring an inadvertent compromise to the values that maintain adjudicative legitimacy.⁶⁵ Suggestions that evidence should pass a level of “demonstrable reliability” prior to admission into the trial process raises some concerns from a procedural legitimacy perspective, because over-application of stringent reliability analyses resulting in evidentiary exclusions could weaken the requisite commitment to litigant autonomy by diminishing participation rights.

This concern, and its impact on procedural legitimacy, is best explained through Edmond and Roach’s proposed application of their demonstrable reliability approach to the sociological evidence that was sought to be introduced in *R v Abbey*.⁶⁶ The trial judge in

⁶⁴ Edmond et al, “Admissibility Compared,” *supra* note 9 at 109.

⁶⁵ See Chapter Two, Part 2(C).

⁶⁶ *R v Abbey* 2009 ONCA 624 [*Abbey*]. Note that a previous version of my discussion of Edmond and Roach’s approach to *Abbey* was first presented in my paper, Nayha Acharya, “Science and Law: From Idealization to Understanding,” *supra* note 1.

Abbey had excluded a sociologist's evidence related to the potential meanings of a tear-drop tattoo. The Court of Appeal overturned the trial judge's attempt to impose *Daubert*-style admissibility criteria on the expert's opinion, holding that the sociologist "did not pretend to employ the scientific method and did not depend on adherence to that methodology for the validity of his conclusions."⁶⁷ The Court of Appeal in *Abbey* thus presented a malleable approach to admissibility where the relevant evidence is not typically considered scientific.

Edmond and Roach, however, suggest that the sociological evidence was not demonstrably reliable, so it would have been inadmissible under their framework. They agree that the sociologist's expertise was properly established, that it was appropriate for him to speak to the significance of tear-drop tattoos among North American gangs generally, and that his evidence was, "to some extent, even empirically predicated."⁶⁸ But they were concerned that his evidence lacked demonstrable reliability because the extrapolation from North American gangs generally to *Abbey's* gang specifically did not have empirical support.⁶⁹

At the Court of Appeal, the concern that the expert's opinion was generally relevant to North American gangs was addressed by limiting the scope of the sociologist's evidence. He was not permitted to testify that the tear-drop *meant* that the accused had murdered an opposing gang member, but he could testify as to what tear drop tattoos *tended* to mean among North American gangs. However, Edmond and Roach consider this a second-best

⁶⁷ *Ibid* at 108.

⁶⁸ *Ibid* at 392.

⁶⁹ *Ibid* at 392-393.

solution, suggesting instead that without empirical support for the extrapolation from general to specific, the evidence ought to be entirely excluded.⁷⁰ I interpret this as an excessively stringent approach to admissibility that would have the effect of improperly preventing evidence that is probative and otherwise admissible from reaching the trier of fact. Such prevention can be considered an unnecessary infringement on the litigant's participation.

Undoubtedly, the legal system is not foundationally concerned with whether there is a trend that a tear-drop tattoo might mean a murder was committed. Rather, the legal system is concerned with whether there is a reasonable doubt that the accused committed a crime. Surely, evidence indicative of a general tendency can be probative and relevant to making that legal determination. But Edmond and Roach's approach would require that the link between the sociologist's evidence and its applicability to the specific issue at trial must be empirically established before the trier of fact can even have access to the information. This approach problematically equates probative value with an empirical demonstration of the relevance of the evidence.

Consequently, Edmond and Roach's framework would prevent probative evidence from entering the trial process, where arguments can be advanced to convince the trier of fact of how much weight ought to be afforded to the evidence of a general tendency. The approach taken by the Court of Appeal in *Abbey* is preferable, because it would allow probative evidence, properly limited in scope, to be considered by triers of fact, who are then able to

⁷⁰ *Ibid.*

come to a legitimate legal determination based on all the evidence properly presented to them, as well as the argument relating to weight that should be given to the evidence. This approach better reflects the commitment to maintaining full participation rights for litigants in order to ensure legitimate adjudication. Edmond and Roach's approach under-emphasizes the notion of procedural legitimacy, so the affront to participation rights is not given due consideration in their proposal. Adopting the procedural legitimacy frame as a starting point results in a preferable solution that is grounded in the demands of legitimate adjudication.

The approach adopted in *Abbey* drew from the recommendations of the Goudge Inquiry. In his report, Goudge J draws an important distinction between threshold reliability and ultimate reliability.⁷¹ Threshold reliability is the relevant consideration for determining admissibility of evidence; ultimate reliability of evidence is then assessed at the later stage, where evidence is weighed and a factual determination is made.⁷² Clarity regarding this distinction, as I explain further below, is foundational for maintaining procedural legitimacy because it is instrumental to ensuring both a genuine commitment to factual accuracy simultaneously with the litigants' right to fully participate by presenting their choice of evidence and arguments.

Goudge J's recommendations are clear that evidence that attains a threshold level of reliability should be presented to the trier of fact, who will then determine ultimate

⁷¹ Goudge Inquiry, *supra* note 16 at 495.

⁷² *Ibid.*

reliability when the evidence is weighed to make a finding of fact.⁷³ This is consistent with the general approach to admissibility of evidence. It is not the case that evidence presented to judges must be demonstrably reliable before being allowed to form part of the evidence used for a factual determination. Lay witness recollections of events, for instance, are often admitted to assist fact-finding, yet the factual reliability of those memories can be questionable. Still, that evidence may be necessary and relevant, and is admitted into the trial process where parties can advance arguments as to the ultimate reliability of that evidence for the purpose of determining whether the requisite standard of proof has been met.

The same general principles should be true of expert evidence, notwithstanding the concerns around over deference to experts. It would be inappropriate for the trial judge to make a judgment about the ultimate reliability of evidence at the admissibility stage, which seems to be what proponents of the demonstrable reliability standard call for. That approach would prevent evidence that attains threshold reliability, and is necessary and relevant to factual determinations from entering into the fact-finding process where arguments as to how much weight to assign it can be advanced. That constitutes an affront to the litigant's ability to fully participate in the decision-making and is, therefore, contrary to the principles of procedural legitimacy.

Along with assessing the threshold reliability of expert evidence at admissibility hearings, Goudge J suggests that judges consider whether the trier of fact will be able to appropriately

⁷³ *Ibid.*

weigh the evidence when determining admissibility.⁷⁴ This recognizes that considerations at the admissibility stage are designed to ensure that the trier of fact receives appropriate evidence, which is then weighed against the relevant standard of proof in accordance with adjudicative procedures of fact-finding. Assessing threshold reliability as an admissibility procedure ensures that the genuine orientation to accurate fact-finding is maintained by requiring that evidence have some factual reliability before entering the decision-making process; ensuring that ultimate reliability is not confused with threshold reliability is foundational for maintaining litigant participation rights.⁷⁵ Absent the procedural legitimacy starting point, the importance of this distinction is susceptible to being missed.

Summing up, the Canadian procedural rules of admissibility of expert evidence are defensible from the procedural legitimacy perspective. Their appropriate application by judges is therefore instrumental to maintaining legitimate outcomes. Improper application of the rules can include failure to apply the rules vigilantly, resulting in potentially allowing evidence into the trial process that hinders accurate fact-finding. Improper application can also include applying the rules too rigidly, resulting in problematic evidentiary exclusions.

⁷⁴ *Ibid* at 495: When assessing threshold reliability, Judges should consider:

[W]hether there is a serious dispute or uncertainty about the science and, if so, whether the trier of fact will be reliably informed about the existence of that uncertainty”

...

[W]hether experts can express the opinion in a manner such that the trier of fact will be able to reach an independent opinion as to the reliability of the expert opinion.”

⁷⁵ Goudge provides some useful factors to help judges in this task in the Goudge Inquiry, *supra* note 16 at 495.

When evidence is excluded improperly, the result is a compromise to litigant autonomy.⁷⁶ Both of these concerns should be highlighted in order to ensure legitimate judicial outcomes when scientific expert evidence is involved.

The discussion so far presumes that the adversarial nature of adjudication is useful, even when scientific expert evidence is involved, and yields legitimate outcomes. But the adversarial system has been subjected to critique on the basis that it, by its very nature, promotes improper science from entering the court process and, thereby, contributes to factual inaccuracies in judicial decision-making. Next, I address this concern through a consideration of the adversarial process from the procedural legitimacy perspective, assessing its benefits and perceived pitfalls, particularly in the scientific evidence context.

B. Procedural Legitimacy and Adversarial or Alternative Processes

⁷⁶ Note that this is not to say that *any* evidentiary exclusion would improperly infringe on participation rights and therefore litigant autonomy. There are, as I have noted above as well as in Chapter 3, limitations on absolute participation rights by way of justifiable evidentiary exclusions. My point here is that when evidence is excluded improperly (that is, when justifiable admissibility rules are misapplied) such procedural compromise should be interpreted as unacceptable from the procedural legitimacy perspective.

The underpinning crux of the argument of a number of science and law scholars seems to be that a muddying of the truth inheres in the partisan climate of Canadian and other adversarial judicial systems.⁷⁷ Justice Davies comments, for instance, that

In the first place, the adversarial system tends to cause [questions involving expertise] to be presented to a court as a clear dichotomy between opposing views; whereas many such questions, including scientific ones, do not admit of resolution in that way. This polarization of opinions which the adversarial system causes, may result in distortion of both the real question and the real answer. That distortion is then exacerbated by adversarial bias, an almost inevitable consequence of evidence given in an adversarial context.⁷⁸

This sentiment can be understood as paralleling a more general critique of adversarial adjudication: since it is the parties, and most often their lawyers, who control the gathering

⁷⁷ Many of Susan Haack's important contributions to the science and law discourse, for instance, suggest that the adversarial nature of judicial decision-making is at the root of the tension between science and law. Illustrating the differences between science and law, Haack compares the role of the lawyer to the role of a scientist. While the inquiring scientist's role is to consider all the evidence and "assess it as fairly as possible," the partisan advocate presents evidence in the light that is most favourable to her client's position and seeks to persuade the judge that she has the best evidence. Susan Haack, "Irreconcilable Differences? The Troubled Marriage of Science and Law" (2009) 72 *Law & Contemp Probs* 1 at 13. Susan Haack, "Truth and Justice, Inquiry and Advocacy, Science and Law" in *Putting Philosophy to Work - Inquiry and its Place in Culture* (Amherst, New York: Prometheus Books, 2009) at 151 where Haack provides that while lawyers try to make a case by presenting evidence persuasively, scientists seek out all available evidence and assess it impartially; Justice Ian Binnie, "Science in the Courtroom," *supra* note 3 at 311: "From a scientist's point of view, a disturbing feature of litigation is the adversarial process itself, under which judges and lawyers assume that the truth is best arrived at by contending parties stating their own (one-sided) point of view as simply, forcefully and with the least amount of nuance possible." And see William G. Horton & Michael Mercer, "The Use of Expert Witness Evidence in Civil Cases" (2005) 29 *Advocates' Q* 153 at 153: "In our adversarial system, it is perhaps inevitable that experts are often recruited to serve as advocates for the cause of the party that retained them."

⁷⁸ Hon J Davies, "Court Appointed Experts" (2005) 5(1) *QUTLJ* 89 at 89.

and presentation of evidence to the court for a final determination, the adversarial system contains many opportunities for distortion of truth in order to promote a client's interests. Carrie Menkel-Meadow claims, for instance, that

Oppositional presentation...distorts the truth by making extreme claims, by avoiding any potentially harmful facts, by refusing to acknowledge any truth in the opposition, by limiting story telling to two, rather than allowing for a multiplicity of stories, by refusing to share information, or, conversely, by strategically giving or demanding too much information, [or] by manipulating information....⁷⁹

Contextualized within the science and law discussion, the adversarial process has sometimes been painted as causing inevitable expert bias. The underlying idea and, most significant from a procedural legitimacy perspective, is that at least in the context of scientific experts, an adversarial setting is not conducive to a genuine commitment to ascertaining the truth.⁸⁰ This claim requires evaluation because, if true, then the current

⁷⁹ Carrie Menkel-Meadow, "The Trouble with the Adversary System in a Postmodern, Multicultural World," (1996) 38 *Wm & Mary L Rev* 5, 21-22. See also the famous critiques of Jerome Frank: "partisanship of the opposing lawyers [frequently] blocks the uncovering of vital evidence or...distorts it." Jerome Frank, *Courts on Trial – Myth and Reality in American Justice* (New Jersey: Princeton University Press, 1973) and John H Langbein "The German Advantage in Civil Procedure" (1985) 52 *U Chicago L Rev* 823 at 823: "Our lawyer-dominated system of civil procedure has often been criticized both for its incentives to distort evidence and for the expense and complexity of its modes of discovery and trial. The shortcomings inhere in a system that leaves to partisans the work of gathering and producing the factual material upon which adjudication depend." See also, Ray Finkelstein, "The Adversarial System and the Search for Truth" (2011) 37 *Monash U L Rev* 135 at 135: "The topic of this essay is the adversarial system and the truth and how the former struggles to achieve the latter. My central premise is that the adversarial system is not well adapted to arrive at the truth."

⁸⁰ For example, P Brad Limpert, "Beyond the Rule in *Mohan*: A New Model for Assessing the Reliability of Scientific Evidence" (1996) 54 *U Toronto Fac L Rev* 65 at 7: "The adversarial processes of law, however, tend to prevent a rational assessment of scientific matters, and

system of adversarial expert evidence presentation may not be defensible from the procedural legitimacy perspective. Accepting the claim that the adversarial design is less conducive to truth-seeking has led to calls for less adversarial processes of expert evidence presentation, as I explain further below. The propriety of such alternative processes must be assessed in terms of maintaining procedural legitimacy as well.

Undoubtedly, biased expert evidence has the potential to distort fact-finding. But reasoning that an adversarial process of evidence presentation is inherently in tension with a search for truth is erroneous, as I elaborate further below. Moreover, procedural reforms designed to reduce the adversarial nature of judicial fact-finding can pose problems from a procedural legitimacy perspective. Below, I start with a discussion of why the adversarial fact-finding process is acceptable from a procedural legitimacy perspective.⁸¹ Those comments inform my critique of suggested procedural reforms to reduce the impact of adversarialism on expert evidence.

i. Adversarial Fact-Finding and Procedural Legitimacy

Proponents of the adversarial system generally respond to critiques through a two-pronged justification, which I find convincing and consistent with procedural legitimacy: the

can lead to a false impression of scientific controversy. Different procedures regarding the timing and format of expert evidence and more limited use of court-appointed experts could remedy many of these problems.” See also works cited in note 77.

⁸¹My purpose in this discussion is not to engage in a debate on whether adversarial models of adjudication are necessarily more appropriate than inquisitorial models, nor to evaluate the inquisitorial model of fact-finding. Rather, my central aim is to display that the adversarial model is consistent with the demands of legitimate adjudication, even, and perhaps particularly, where scientific evidence is relevant.

adversarial process is thought to be a mechanism that promotes ascertaining the truth while maintaining respect for the litigants' autonomy.⁸²

Adversarial fact-finding encompasses a commitment to ascertaining the truth through its inherent urge to legal representatives to act zealously for their clients within the confines of the procedural and substantive legal principles.⁸³ This calls on lawyers to seek out necessary, relevant and legally reliable evidence that supports their clients' position.⁸⁴ That obligation, if carried out well, should result in the greatest likelihood that the decision-maker will have as much of the best evidence available, enabling the most informed factual determination.⁸⁵ In a context where the arbiter rather than the advocate has the primary responsibility of evidence gathering, that obligation does not exist. As Gerald Walpin notes:

⁸² Gavin MacKenzie, "Breaching the Dichotomy Habit: The Adversarial System and the Ethics of Professionalism" (1996) 9 Can J L & Jur 33 at 41: "Two traditional justifications of the adversary system are frequently advanced. The first concentrates on the belief that truth is most likely to emerge where advocates of adverse positions compete before an impartial tribunal, each testing the merits of the other's position as comprehensively as possible...The second traditional justification concentrates on the belief that individual rights are better protected in the adversary system. The adversary system symbolizes such democratic ideals as individual liberty, autonomy and dignity."

⁸³ See Alice Woolley "In Defence of Zealous Advocacy" in *Understanding Lawyers' Ethics in Canada* (Markham, Ontario: LexisNexis Canada, 2011).

⁸⁴ Recall that these are the guiding principles that determine admissibility from the *Mohan* analysis.

⁸⁵ Of course, this does not mean that adversarial evidence collection will necessarily and always result in better evidence than non-adversarial evidence collection. That depends, naturally, on the diligence, efficiency and perhaps even luck of the parties involved in each particular case. My point here is that given the obligations that come within an adjudicative system, the chances that the fact-finder is availed of the most and best evidence may be higher compared to a system that does not have that obligation.

Zealous, faithful advocacy means the obligation to search out all favorable evidence, to seek, neutralize or destroy all unfavorable evidence, and to press the most favorable interpretation of the law for his client. That is simply not the obligation of an inquisitorial judge.⁸⁶

The obligation inherent to the lawyer's role as advocate for the client, and the corresponding likelihood of attaining the most relevant evidence, corresponds with the principle of reliability that I outlined in Chapter Four: in order to ensure a genuine commitment to factual accuracy, the general guiding principle should be that judicial fact-finding occurs on the basis of as much relevant evidence as possible.⁸⁷

An additional response to the charge that adversarial litigation is less suited to uncovering truth compared to non-adversarial models is premised on the notion of the inevitability of factual uncertainty. In the context of resolving legal disputes, the relevant questions of fact are often not discernable with certainty and, sometimes, are inherently uncertain.⁸⁸ As H. Richard Uviller observes:

In short, while the Truth (at least as to facts) may seem simple, admitting of no "legalistic" quibbles, no shadings or interpretations, law cases are tried only on evidence of the truth. And evidence is rarely unflawed and unambiguous. Since fact-finders must rely largely on human observation,

⁸⁶ Gerald Walpin, "America's Adversarial and Jury Systems: More Likely to Do Justice" (2003) 26 Harv JL & Pub Pol'y 175 at 177 [Walpin, "America's Adversarial and Jury Systems"].

⁸⁷ See Chapter Four, Part 2(a).

⁸⁸ Refer for Chapter 1 discussion on inevitability of uncertainty.

recall, and veracity, on interpretation and implication, the truth is often uncertain and unclear.⁸⁹

The design of the adversarial process bears, I suggest, an authentic appreciation of factual uncertainty by enabling various interpretations to be presented through advocates of different viewpoints. That process intrinsically acknowledges that there may be two (or many more) interpretations of the fundamental, if uncertain question of “what happened?” To be clear, it is not my view that fact-finders in inquisitorial models are necessarily unable to appreciate factual uncertainty in the process of their deliberations, nor that proponents of inquisitorial models are necessarily committed to an overly simplistic understanding of truth and its discoverability. My point is that through enabling two (or more) sided advocacy, the adversarial model inherently recognizes the reality of factual uncertainty, and that should not paint it as a system that is less genuinely committed to uncovering facts correctly. Rather, the adversarial process reflects a genuine commitment to legitimate resolution of disputes in an uncertain context by allowing, at least at its ideal, the best arguments and evidence in support of various plausible interpretations of events.⁹⁰

The inevitable reality of uncertainty coupled with the requirement that judges make factual conclusions in order to authoritatively resolve disputes, is the premise of the procedural legitimacy proposal. As argued throughout Chapters Two, Three and Four, despite the inevitability of uncertainty, a fact-finding system that is genuine in its commitment to

⁸⁹ Richard Uviller, “The Advocate, The Truth, and Judicial Hackles: A Reaction to Judge Frankel’s Idea” (1975) 123 U Pa L Rev 1079.

⁹⁰ This reflects the values of Habermas’s discourse principle, explained in Chapters Three and Four.

ascertaining truth while carefully maintaining respect for the autonomous agents who will be subject to the ultimate result is legitimate. Part of maintaining respect for that autonomy involves assuring participation rights. This leads to the second prong of the justification for the adversarial system. Maintaining neutrality of a judge and requiring that his decision is made on the basis of the evidence and argument advocated by the parties ensures that participation rights are given their most meaningful expression. As Fuller explains:

Certainly it is clear that the integrity of adjudication is impaired if the arbiter not only initiates the proceedings but also, in advance of the public hearing, forms theories about what happened and conducts his own factual inquiries. In such a case, the arbiter cannot bring to the public hearing an uncommitted mind; the effectiveness of participation through proofs and reasoned arguments is accordingly reduced.⁹¹

On these bases, I conclude that an adversarial fact-finding design does maintain a genuine commitment to truth-seeking while assuring meaningful participation rights for litigants. Accordingly, it has the systemic features necessary to render it acceptable from a procedural legitimacy perspective.⁹² This conclusion bears particular significance in the scientific evidence discourse, as I discuss next.

⁹¹ Lon Fuller and Kenneth Winston, "The Forms and Limits of Adjudication" (1978) 92(2) Harv L Rev 353 at 384-386 [Fuller, "Forms and Limits"].

⁹² I reiterate that my primary purpose here is not to suggest that the inquisitorial model is necessarily lacking in legitimacy, though I conclude here that the adversarial model provides more robust participation rights than the inquisitorial model does. This conclusion does not necessarily illegitimate inquisitorial fact-finding, but it illuminates the merits of an adversarial model in terms of maintaining both a commitment to ascertaining truth along with expansive participation rights.

ii. Assessing Non-Adversarial Presentation of Scientific Evidence

As noted above, when critiques of the adversarial system inform discussions of scientific evidence, the basic idea is that the adversarial nature of the adjudicative system is responsible for sullyng scientific evidence. Accordingly, it is sometimes suggested that neutralizing the perceived negative impact of the adversarial system through procedural reforms like increasing use of court appointed experts, mandating jointly retained experts, or having experts testify concurrently in panels would avail the court of better scientific evidence.⁹³

This view, I suggest, parallels the general critique of adversarial fact-finding: just as partisan evidence gathering is thought to inherently promote concealment of truth, adversarial presentation of scientific expert evidence is thought to reduce the chances of accurate fact-finding due to polarization of expert opinions. But the idea that a non-partisan scientific expert corresponds with better science is premised on a limited view of science that “discounts disagreements among scientists on matters of judgment.”⁹⁴ As Gerald Walpin comments:

I have found that recognized experts can sincerely hold divergent views on a given set of facts. For example, the judge’s decision to pick the expert who

⁹³ See works cited in note 26. Judges have the authority to appoint experts in Canada, but it is rarely done: *Supreme Court Civil Rules* B.C. Reg 168/2009, r. 11-5, *Alberta Rules of Court*, Alta. Red. 124/2010, r. 6.40(1), *Court of Queen’s Bench Rules*, Man. Reg. 553/88, r/ 52.03(1), *Rules of Civil Procedure*, O. Ref. 575/07, r. 52.03; *Nova Scotia Civil Procedure Rules*, r. 55.12(1).

⁹⁴ Goudge Inquiry, *supra* note 16 at 506, rejecting the suggestion of mandatory court appointed experts.

will espouse the majority view could have precluded expert testimony that the world was round prior to Christopher Columbus....⁹⁵

A court appointed scientist holds one among many potentially legitimate viewpoints on scientific matters, and neutrality in relation to litigation does not, of itself, lend any credence to one scientific opinion over another. In fact, as Goudge J notes, the expert witness whose testimony contributed to numerous wrongful convictions is precisely the type of expert that a court may have appointed, given his credentials and experience.⁹⁶

Problematically, however, "by designating [an expert] witness as court-appointed and 'impartial,'" as Levy has suggested long ago, "the court has in effect cloaked him with a robe of infallibility."⁹⁷ In other words, there is likelihood of over-deference to court appointed experts due to their perceived neutrality. Such deference is clearly problematic because it compromises the commitment to finding facts through rational deliberation on the part of the fact-finder, as well as having an adverse impact on participation rights.

First, determining which scientific opinion has more credibility and should be weighed more heavily in the course of fact-finding should depend on scrutiny of the evidence itself.

⁹⁵ Walpin, "America's Adversarial and Jury Systems" *supra* note 85 at 182. And Paul Michell and Renu Mandhane, "The Uncertain Duty of the Expert Witness," *supra* note 12 at 649: "Even where experts proceed from the same set of assumptions, they commonly reach different results. Disagreement is rife in the sciences, let alone the social sciences. This is not objectionable and is not itself evidence of expert partiality."

⁹⁶ Goudge Inquiry, *supra* note 16 at 506.

⁹⁷ Elwood S. Levy, "Impartial Medical Testimony-Revisited" (1960) 34 Temp L Q 416 at 424.

Using a court appointed expert might prevent that scrutiny, instead prompting deference to the objective expert. But in order for adjudication to be legitimate, a fact-finder must rationally weigh the evidence presented to assess whether the applicable burden of proof has been satisfied. As I noted in Chapter Four, even if the trier of fact happens to arrive at a factually correct or a scientifically defensible conclusion, irrationality in her deliberation process can illegitimate her conclusion. The potential for irrational deference to a neutral expert is high, given that the appointment of such an expert is likely premised on the notion that a neutral advisor is inherently more reliable than an expert hired by a party. Second, the impact of the risk of deference on participation rights is clear. If a fact-finder defers to a court-selected expert, the evidence presented by the parties becomes naturally less meaningful and has potentially less of an impact on the ultimate outcome than it would absent the neutral expert.

Considering the risks of compromise to procedural legitimacy along with the faulty premise that the adversarial system itself has an inherently negative effect on the scientific evidence presented in the courts, I endorse those viewpoints that reject increased use of court appointed experts to account for concerns around faulty scientific evidence.⁹⁸

Along with court appointed experts, mandating the use of joint experts has been advocated occasionally, and has been attempted in some jurisdictions. As noted in the Osborne Commission, single joint expert models have been tried in the United Kingdom and

⁹⁸ Note that the use of court appointed experts is rejected in the Goudge Inquiry (recommendation 137).

Australia. In such models, the starting point is that parties appoint a single joint expert, and additional experts are permitted only when a fair trial so requires.⁹⁹ In Canada, while adversarial expert evidence constitutes the usual route for evidence presentation, joint experts are expressly permitted in most jurisdictions.¹⁰⁰

Requiring the parties to agree on an expert could alleviate the potential for expert bias that comes with being retained by one party, and may result in less potential for improperly polarized expert opinions. Presumably, both parties would only agree on an expert who has the capacity and willingness to present their evidence objectively, and draw attention to the relevant disagreements and controversies within their field. Most importantly for my purpose here, from the procedural legitimacy perspective, appointing joint experts would seem to maintain better participation rights for parties compared with court appointed experts, because parties maintain the active role in expert selection.

In many cases, a joint expert may be a helpful method of presenting expert evidence, and their use, when parties choose to do so, does not of itself compromise the demands of procedural legitimacy. Use of joint experts may be considered comparable to instances

⁹⁹ Osborne Commission, *supra* note 13 at 71. The Osborne Report notes the “mixed reviews” of the single expert models in the UK and Australia, particularly in terms of its economic impact. The Report also points to other explorations, including the Alberta law Institute Consultation in 2003, and British Columbia Civil Justice Reform Working Group, where the single expert model was considered and rejected. Ultimately, Osborne also rejects a mandatory single expert model (at 71-74), which I endorse above.

¹⁰⁰ For example: Nova Scotia Rules of Court Rule 55.07; Ontario Rules of Civil Procedure O Reg 575/07, s. 6 (1), rule 20.05(2)(k); British Columbia Supreme Court Civil Rules B.C. Reg. 3/2016, Rule 11-3.

where parties submit joint statements of fact in order to reduce the controversy among them. Accordingly, while I suggest that court appointed experts should be avoided, appointment of joint experts can be allowed and even encouraged. But mandatory use of joint experts is not necessary for maintaining legitimate adjudication, and most importantly, a system that requires joint experts is ill-advised from the procedural legitimacy perspective.

Much like the issue arising in court appointed experts, calling for mandatory retention of a joint expert is premised on a view that one objective expert can satisfactorily present the divergent views in a particular field. That may be possible in some instances, but it constitutes a somewhat idealized notion of scientists and other experts. Naturally, as noted above, experts do hold divergent views and have legitimate disagreements, and those views impact the nature of their testimony. Requiring parties to agree on an expert, particularly in fields that are internally contentious, imposes an undue restriction on autonomous litigant participation, because requiring a joint expert can prevent a party from proffering an expert of their choice. Of course, this does not imply that parties have an absolute right to present any expert – parties must adhere to justifiable admissibility of expert evidence rules discussed above (i.e., that an expert must be properly qualified, and her opinion must be necessary, relevant, and meet the threshold reliability standard). Where parties, of their own accord, choose to appoint a joint expert, no such affront to participation rights and litigant autonomy occurs, so appointment of joint experts need not be disallowed altogether.

Another alternative method of presenting expert evidence that has gained increasing

prominence in Australia is through concurrent testimony in expert panels.¹⁰¹ This process typically involves two stages of concurrent expert presentation.¹⁰² First, rather than being called as witnesses and undergoing a direct examination followed by a cross-examination as in the general course in adversarial litigation, the experts present their evidence together, informally. At that stage, the experts are “freed from the constraints of formally responding to lawyers’ questions,”¹⁰³ and are allowed to make statements about their own evidence and the evidence of other experts. The judge leads the first stage of concurrent evidence presentation by asking questions and suggesting topics for the experts to discuss. At the second stage, lawyers are permitted to undertake a direct examination, though it is usually rendered unnecessary after the first stage, so the second stage consists largely of cross-examinations of opposing experts. Even during the second stage, though, experts are able

¹⁰¹ Edmond, “Merton and the Hot Tub: Scientific Conventions and Expert Evidence in Australian Civil Procedure” (2009) 72 *Law and Contemp Prob* 159 [Edmond, “Merton and the Hot Tub”]; David Sonenshein and Charles Fitzpatrick, “The Problem of Partisan Experts and the Potential for Reform Through Concurrent Evidence” (2013) 32 *Rev Litig* 1; Elizabeth Reifert, “Getting into the Hot-Tub: How the United States Could Benefit from Australia’s concept of “Hot-Tubbing” Expert Witnesses” (2011) 89 *U Det Mercy L Rev* 103 [Reifert, Getting into the Hot-Tub]. In 2010, expert witness panels were added to the *Federal Courts Rules*, SOR/98-106, r. 282:

282.1 The Court may require that some or all of the expert witnesses testify as a panel after the completion of the testimony of the non-expert witnesses of each party or at any other time that the Court may determine.

282.2 (1) Expert witnesses shall give their views and may be directed to comment on the views of other panel members and to make concluding statements. With leave of the Court, they may pose questions to other panel members.

(2) On completion of the testimony of the panel, the panel members may be cross-examined and re-examined in the sequence directed by Court.

¹⁰² Edmond, “Merton and the Hot Tub,” *supra* note 101 at 162.

¹⁰³ *Ibid* at 162.

to interject to offer clarifications or illuminate points of contention.¹⁰⁴

As in the case of court appointed experts, the undertone of advocating for concurrent expert evidence is an attempt to reduce the impact of adversarial evidence:

Judges from a range of civil jurisdictions have conscientiously sought to reduce expert partisanship and the extent of expert disagreement in an attempt to enhance procedural efficiency and improve access to justice. One of these reforms, concurrent evidence, enables expert witnesses to participate in a joint session with considerable testimonial latitude. This represents a shift away from an adversarial approach and a conscientious attempt to foster scientific values and norms.¹⁰⁵

Concurrent presentation of evidence has a certain appeal. It is thought to better foster judicial understanding of complicated evidence by freeing the fact-finding system from the formalities of evidence presentation and enabling the judge to ask questions and allowing the experts themselves to intervene to provide further clarification, particularly regarding the nature of the disagreement among themselves.¹⁰⁶ Compared with using court appointed experts, presenting adversarial experts jointly may seem to have less of an impact on party autonomy.¹⁰⁷ After all, parties remain at liberty to choose their own expert, and lawyers have opportunity to cross-examine opposing experts as well. Although concurrent evidence

¹⁰⁴ *Ibid* at 164.

¹⁰⁵ *Ibid* at 160, emphasis added.

¹⁰⁶ See for example Reifert, "Getting into the Hot-Tub," *supra* note 101 at 113-114.

¹⁰⁷ Karen Butler Reisinger "Court-Appointed Expert Panels: A comparison of Two Models" (1998) 32 *Ind L Rev* 225.

presentation may have some appeal, as Edmond suggests, its adoption may require some caution:

There are few reasons to believe that [concurrent evidence presentation] substantially reduces partisanship or improves the reliability of expert opinions. Concurrent evidence may change expert performances, but to the extent that experts conform to judicial expectations and engage in a more collegial discussion, this does not make the evidence or any consensus reliable or even more reliable.¹⁰⁸

This alert seems meritorious, and implicitly takes into account the fact that evidentiary uncertainty is unavoidable, whether it is presented through a court appointed expert, concurrent expert panels, or traditional adversarial expert testimony through direct and cross examinations. Given that context, the operative consideration should be maintaining legally legitimate fact-finding.

Concurrent expert evidence constitutes an “attempt to foster scientific values and norms,” but it may do so at the potential expense of the norm of respect for litigant autonomy that inheres in procedural legitimacy. For instance, the more active role that is allotted to both the judge and the experts themselves may be problematic from the perspective of maintaining party participation rights. Given that more active role, the decision may ultimately be made on the basis of argument and evidence presented by the expert and elicited by a judge rather than the argument and evidence presented by the parties. In

¹⁰⁸ Gary Edmond “Impartiality, efficiency or reliability? A critical response to expert evidence law and procedure in Australia” (2010) 42(2) Australian Journal of Forensic Sciences 83 at 92.

addition, valuing the increased latitude given to experts in this model seems to diminish the valuable role that lawyers can play in focusing the extensive evidentiary materials around the legal issues in order to maintain the relevance of the testimony. On that account, such a procedural reform seems undesirable, particularly given that the benefits in terms of improved reliability of evidence may be exaggerated in any event. Moreover, the benefits in terms of reducing and clarifying differences among expert opinions and thereby enhancing understandability of evidence may be accomplishable through pre-trial meetings between experts and counsel.¹⁰⁹

It is worthwhile to note here that my discussion is not aimed at suggesting that questions associated with biased expert testimony do not pose serious concerns for legitimate adjudication. My purpose, instead, is to suggest that pinning the problem of expert bias on the adversarial design of Canadian adjudication has limited utility, because adversarial processes are well-suited to maintain the demands of legitimate adjudication, even in the context of scientific evidence. Sheila Jasanoff notes, for instance, that the adversarial system, if properly executed, can and should bring to light legitimate scientific disagreements and uncertainties, thereby promoting a genuine attempt to resolve the legal dispute within an uncertain context.¹¹⁰

At their most effective, legal proceedings have the capacity not only to bring to light the divergent technical understandings of experts but also to disclose

¹⁰⁹ Both the Osborne Commission, *supra* note 13 (at 77, 83) and the Goudge Inquiry, *supra* note 16 (recommendation 137) encourage pre-trial meetings between experts.

¹¹⁰ Sheila Jasanoff, *Science at the Bar: Law, Science, and Technology in America* (Cambridge, Harvard University Press, 1995) at 215.

their underlying normative and social commitments in ways that permit intelligent evaluation by lay persons.

If the problems associated with expert bias should not be understood as a flaw of the system itself, then how should the problem be interpreted? I suggest that the answer lies in clarifying that my claim that adversarial adjudication is acceptable process should not be taken to mean that legal players execute that process appropriately. In other words, the concerns of faulty science ascribed to the adversary system itself may be more properly attributed to “improper excesses of advocacy.”¹¹¹ This implicates biased experts themselves as well as their retaining lawyers.

Recently, the Supreme Court of Canada addressed the problem of biased experts in a case arising from allegations of professional negligence against a group of auditors. For the first time, the Supreme Court provided guidance on how the law of evidence should respond to concerns arising from biased experts:

Expert witnesses have a special duty to the court to provide fair, objective and non-partisan assistance. A proposed expert witness who is unable or unwilling to comply with this duty is not qualified to give expert opinion evidence and should not be permitted to do so. Less fundamental concerns about an expert’s independence and impartiality should be taken into

¹¹¹ Richard Uviller, “The Advocate, The Truth, and Judicial Hackles: A Reaction to Judge Frankel’s Idea” (1975) 123 U Pen L Rev 1067 at 1068. Uviller comments here that Judge Frankel’s suggestion that the design of the adversarial system is “responsible for the dangerously recurrent violation of Truth,” may be “attributable to improper excess of advocacy.”

account in the broader, overall weighing of the costs and benefits of receiving the evidence.¹¹²

In my view, the Supreme Court's approach to biased experts is consistent with the principles of procedural legitimacy. Preventing an expert who is "unable or unwilling" to provide an unbiased opinion cannot assist the fact-finding task of the court. Rendering such an expert unqualified, and their evidence as inadmissible is consistent with the genuine commitment to ascertaining true facts.

The Court is clear, however, that the exclusionary rule should not be over-applied.¹¹³ Issues of potential bias beyond an unwillingness or inability to offer a fair opinion should be assessed at the time of weighing of the evidence.¹¹⁴ Ensuring such restraint at the admissibility stage maintains the fullness of parties' participation rights. This analysis is similar to the analysis in respect of reliability of expert evidence outlined in the previous section: evidence that does not have any reliable foundation is correctly excluded, but requiring a demonstration of ultimate reliability prior to admissibility can be problematic from the perspective of maintaining participation rights. In the same way, an obviously biased opinion must be excluded from the fact-finding process, but allowing arguments and calling for further assessment of bias at the trial stage ensures that parties are able to present relevant expert evidence of their choice.

¹¹² *White Burgess Langille Inman v Abbott v Haliburton* 2015 SCC 23 at para 2. Similar comments at para 10. Consistent with the approach suggested in Mitchel and Mandhane, "The Uncertain Duty of the Expert Witness," supra note 12.

¹¹³ *White Burgess Langille Inman v Abbott v Haliburton* at para 49.

¹¹⁴ *Ibid.*

Such an approach inherently values the adjudicative process and its capacity to enable assessment of conflicting evidence to arrive at a legitimate outcome. But confidence in this capacity depends on the integrity of legal players, and particularly highlights the role that lawyers can play both to contribute and to curtail problems associated with scientific evidence. After all, scientific evidence may be heard through an expert witness, but it is proffered in court at the hands of retaining lawyers.¹¹⁵

Skillful selection of experts, along with proficient direct and cross-examination and argumentation are aspects of the lawyer's role that can assist the fact-finding process. But over-zealous advocacy can undoubtedly cause distortion to fact-finding procedures, and can play, in my view, a significant role in the science and law tension.¹¹⁶ Fuller's commentary in respect of the lawyer's role provides a helpful explanation of the lawyer's ability to assist or detract from effective fact-finding and ultimately, legitimate adjudication:

¹¹⁵ The heart of the issue arising from adversarialism, implicating both experts and lawyers alike, was captured well in the caution expressed in the Ontario case *MacMillan v Moreau*:

Let this serve as a warning to those being asked to give expert testimony. Your job is not to tailor your opinions to fit the theory of those by whom you are engaged. And to those who would seek these opinions, your duty is not to shop around until you find a satisfactory and pleasing opinion.

¹¹⁶ Dick Thornburgh, former Attorney General of the United States, comments, for instance: "Broadly speaking, I hold that "junk science" in the courtroom emanates from testimony by expert witnesses hired not for their scientific expertise, but for their willingness, for a price, to say whatever is needed to make the client's case. Put simply, I believe that it is unethical lawyers who are largely to blame for introducing, or, in settlement negotiations, threatening to introduce this so-called "expert" testimony..." (Dick Thornburgh, "Junk Science - The Lawyer's Ethical Responsibility" (1998) 25 Fordham Urb LJ 448 at 449. See also Anthony Champagne, Daniel Shuman, and Elizabeth Whitaker, "An Empirical Examination of the Use of Expert Witnesses in American Courts," (1991) 31 Jurimetrics Journal 375, for an empirical study suggesting problems in how lawyers recruit and prepare experts.

The advocate plays his role well when zeal for his client's cause promotes a wise and informed decision on the case. He plays his role badly, and trespasses against the obligations of professional responsibility, when his desire to win leads him to muddy the headwaters of decision, when, instead of lending a needed perspective to the controversy, he distorts and obscures its true nature.

...

The lawyer's highest loyalty is at the same time the most intangible. It is a loyalty that runs, not to the persons, but to procedures and institutions. The lawyer's role imposes on him a trusteeship for the integrity of those fundamental processes of government and self-government upon which the successful functioning of our society depends.¹¹⁷

Applied to the scientific evidence context, while lawyers certainly have an obligation to bring to light favourable expert evidence, and to illuminate weaknesses in opposing evidence, they must be understood to overstep this duty when they do not have regard for the reliability or biases inherent in their own expert evidence, when they fail to advise experts as to their role as neutral advisors to the court, when they neglect to ensure that experts use helpful language, when they do not ensure that their experts draw attention to the shortcomings or limitations of their own evidence, and so on.¹¹⁸

¹¹⁷ Fuller, "Forms and Limits," *supra* note 91 at 364.

¹¹⁸ Here, I disagree with Glen Anderson's notion that "At present, lawyers do not have a duty to assess the independence of their own experts or the reliability of their evidence. In fact, lawyers do not have any responsibility to investigate the truthfulness of any witness." Glen Anderson, *Expert Witnesses*, *supra* note 2 at 523.

The procedural legitimacy proposal asserts that adjudication should be understood as a space for rational discourse.¹¹⁹ One of the requirements of a rational discourse is that participants present their evidence and arguments with sincerity, and with a genuine commitment to ascertaining the truth. When lawyers lose sight of that responsibility, they contribute to procedural compromises and embody illegitimate adjudication; when they revere this responsibility, they uphold the legitimacy of the judicial system and validate their vital societal station. Adopting a procedural legitimacy jurisprudential orientation makes this responsibility obvious.

Summing up, the problem posed by biased experts is real, but changing the adversarial nature of the adjudicative system is not necessary for maintaining legitimate adjudicative outcomes, and may even be detrimental. The issue is best addressed by disqualifying and rendering inadmissible the evidence of experts that are unable to provide non-biased opinions, ensuring that experts understand their role as neutral assistants to the court, calling on lawyers to commit to ensuring that biased and therefore unreliable attitudes do not enter into the trial process, and equipping judges to scrutinize and be aware of issues of bias and unreliability when assigning weight to expert evidence.

Conclusion

The primary purpose of this chapter has been to exhibit an application of the procedural legitimacy proposal. That application displayed the two major substantive aspects of procedural legitimacy, and showed how they interact with each other. Applying the procedural legitimacy frame to the science and law interface made clear how a genuine

¹¹⁹ See Chapter Four, Part 1(b).

commitment to ascertaining the truth and the maintenance of full participation rights may sometimes seem to be in tension with one another, but must be appropriately aligned in order to maintain legitimate adjudication. I have suggested in this chapter that the Canadian procedural rules for admissibility of scientific expert evidence are able to maintain that balance and thereby, maintain a commitment to a best effort at truthful fact-finding while assuring that litigant autonomy is protected. Accordingly, legitimate adjudication requires consistent and appropriate application of those rules. Efforts to enhance the legal players' (including judges, lawyers and expert witnesses) ability to understand, implement and abide by those rules are foundational to achieving legitimate adjudicative fact-finding where scientific evidence is relevant.

The science and law discourse provides an apt avenue to encourage authentically confronting the inevitability of uncertainty in adjudication. I have maintained throughout the thesis that the context of factual uncertainty coupled with the need for legitimately authoritative judicial outcomes necessitates prioritization of procedural legitimacy as a jurisprudential orientation. The underlying and most important theme of this chapter was to further uncover that central submission: Scientific defensibility, like factual certainty, is elusive and while efforts to achieve outcomes that are scientifically sound (and factually accurate) are laudable, the primary concern must remain adjudicative legitimacy. This is located in the realm of procedural integrity and the maintenance of its foundational values of recognizing and respecting litigant autonomy and their right to be treated fairly.

CHAPTER 6. EXPLORING CAUSAL INDETERMINACY THROUGH PROCEDURAL LEGITIMACY: THE MEDICAL NEGLIGENCE CHALLENGE

Introduction

The purpose of this chapter is to elaborate on the procedural legitimacy framework by using it to assess issues of fact finding where the cause of a personal injury is uncertain. The substantiated procedural legitimacy proposal that I have presented in Chapters Two, Three, and Four can be divided into its substantive and formal aspects. The substantive aspects are the required features of the fact-finding procedures, as set out in Chapter Four; consistent adherence to those procedures in order to maintain adjudicative legitimacy constitutes the formal aspect. My analysis in this chapter will highlight the latter.

Doubt around the cause of an injury is a prominent problem in personal injury litigation. Medical and scientific evidence is often inconclusive as to the cause of an injury, so establishing causation on a balance of probabilities, as required in order to establish tort liability, can be difficult. This leads to the perception that the current method of fact finding results in unfairness for hurt plaintiffs, prompting suggestions for alternative methods of accommodating causal uncertainty in injury adjudication. As stated by the Supreme Court of Canada:¹

¹ *Snell v Farrell [1990] 2 SCR 311, 1990 CarswellNB 82 at para 16 [Snell v Farrell].*

The traditional approach to causation has come under attack in a number of cases in which there is concern that due to the complexities of proof, the probable victim of tortious conduct will be deprived of relief.

In this chapter, I use the procedural legitimacy framework to assess this perceived unfairness, and evaluate proposed solutions that have been argued for in the course of litigation or by scholars. Ultimately, I endorse a commitment to the conventional balance of probabilities process of fact finding for determining causation on the basis that it best preserves procedural integrity, thereby maintaining consistent management of the risk of factual error, as well as coherent administration of the substantive principles of tort law. Both of these are essential to legitimate adjudication according to the procedural legitimacy proposal, as they ensure non-arbitrary treatment of litigants, and congruence between the law and its administration by courts. Accordingly, Canadian courts should not give in to calls for radical changes in their approach to causation in injury adjudication.

This chapter begins with an overview of the difficulties posed by causal uncertainty through recounting the major Supreme Court of Canada decisions on causation in personal injury litigation. This provides a brief contextual background for the issue of causal uncertainty. It is doubly useful because the Supreme Court's commentaries in this context have tended to implicitly endorse the procedural legitimacy proposal, and I agree with their conclusions largely on that basis.

Within the causal indeterminacy discourse, the loss of chance proposal in medical injury litigation is an ideal arena to showcase the value of procedural legitimacy as a jurisprudential commitment, and accentuate its formal components. As I set out in Part

Two, the loss of chance theory is a prominent reform proposal in response to causal uncertainty in the medical malpractice context. It stipulates that the difficulties in proving causation can be alleviated through enabling compensation of lost chances of medically better outcomes. Compensating for a lost chance removes the need to prove the causal link between negligence and injury itself. Given that loss of chance is a reaction to outcomes arising from the balance of probabilities method of fact-finding, examining it opens a door for assessing whether alternative methods of accommodating factual uncertainty are feasible and consistent with the demands of procedural legitimacy.

The loss of chance theory can, I argue, be characterized as piecemeal solution to causal uncertainty. As such, it risks compromising adjudicative legitimacy because of its multifaceted impact on adjudicative consistency: it gives rise to inevitable incongruities in the administration of substantive tort law principles, as well as inconsistencies in the method of managing the risk of factual inaccuracy. The result is incoherent outcomes, and incoherence compromises the legitimacy of the adjudicative system.

Implicit in my reasoning is the theme that procedural legitimacy prioritizes and demands systemic consistency (along with the other substantive requirements of legitimate fact-finding procedures) in order to achieve justifiable administration of legal disputes despite conditions of factual uncertainty. These systemic values can be masked when the desirability of a particular outcome is the prioritized concern. Adopting procedural legitimacy as an underlying jurisprudential commitment assures that efforts to fix uneasy adjudicative legal outcomes, which sometime occur because we do not know the facts for sure, do not compromise the demands of legitimate adjudication. This analysis calls for and

enables an explanation for why the formal element of the procedural legitimacy (i.e. consistent application of the fact-finding procedures to accommodate factual uncertainty) is significant. Below, I illustrate the value of consistency in terms of maintaining a coherent adjudicative system committed to non-arbitrary treatment.

I end this chapter by addressing a number of potential concerns that I anticipate may linger at the end of my discussion. In the last part of this chapter, I address the possible perception of an over-commitment to consistency, which could result in an inability to account for incremental developments in the law, which is a key feature of the common law system. I also respond to a potential concern that my analysis rests on an assumption that existing tort law principles and fact-finding principles are necessarily paramount. That discussion ends with a reiteration of my theme that the current fact-finding procedures are justified, and their consistent application ensures legitimate and coherent adjudicative outcomes. Ultimately, this furthers my foundational aim of displaying the value of maintaining a jurisprudential commitment that substantiates the legitimacy of adjudicative factual findings where there is a risk of inaccuracy.

Part 1. Introducing Causal Indeterminacy and the Procedural Legitimacy Frame

Typically, in order to establish causation, a plaintiff must show that but for the defendant's negligence, the injury would not have occurred. As the cases canvassed below demonstrate, scientific and medical uncertainty can render the causal link between the negligence and the injury impossible to prove, resulting in a denial of recovery to plaintiffs in that

circumstance, which can seem unfair. This situation of causal indeterminacy has received judicial and scholarly attention in Canada. In a number of personal injury cases, the Supreme Court of Canada has deliberated over whether a substantive change to establishing liability is warranted, given the difficulty of establishing the requisite causal link. The judicial decisions presented below indicate the difficulties around proving causation and show the Supreme Court's commitment to legitimacy of outcomes of the basis of procedural propriety, given the conditions of factual uncertainty.

In *Snell v Farrell*,² the plaintiff had undergone a cataract surgery. During the surgery, it became known that the anesthetic had caused some bleeding behind the plaintiff's eye. Still, the surgeon continued the surgery, and this decision was found to be negligent. Later, the plaintiff lost sight in the eye.³ The medical experts, however, were unable to provide conclusive evidence that the surgeon's negligent decision to continue the surgery despite the bleeding caused the plaintiff's blindness.⁴ The plaintiff argued that since the surgeon's negligence caused a material increase in the *risk* of her eye injury, the onus should shift to the surgeon to show that his negligence did *not* cause the injury.⁵ In considering this argument, the Supreme Court of Canada noted the difficulties that plaintiffs in medical malpractice suits often face due to causal uncertainty and limited availability of evidence as to cause. It observed:

² *Ibid.*

³ *Ibid* at paras 2-5.

⁴ *Ibid* at para 6.

⁵ This approach was adopted by the House of Lords in *McGhee v National Coal Board* [1972] 3 All ER 1008 (H.L.), and was adopted by the trial judge and the court of appeal in the *Snell v Farrell* litigation.

This concern is strongest in circumstances in which, on the basis of some percentage of statistical probability, the plaintiff is the likely victim of the combined tortious conduct of a number of defendants, but cannot prove causation against a specific defendant or defendants on the basis of particularized evidence in accordance with traditional principles.⁶

Fundamentally, the Court had to decide “whether the traditional approach to causation is no longer satisfactory in that plaintiffs in malpractice cases are being deprived of compensation because they cannot prove causation where it in fact exists.”⁷ Answering in the negative, the Court rejected the material increase in risk and onus reversal approach to establishing the causal link. Instead, the Court advocated what it called a “robust and pragmatic”⁸ approach to the traditional ‘but for’ analysis, which included a reminder that scientific or medical certainty is not a pre-requisite to legitimate legal fact-finding on the balance of probabilities standard.⁹ In the end, the Supreme Court held that the evidence presented supported a finding of causation in this case.¹⁰

⁶ *Snell v Farrell*, *supra* note 1 at para 16. At para 19, the Court notes, “Proof of causation in medical malpractice cases is often difficult for the patient. The physician is usually in a better position to know the cause of the injury than the patient.”

⁷ *Ibid* at para 26.

⁸ *Ibid* at para 35.

⁹ See *Snell v Farrell*, generally, and at paras 30-35. At para 35: “It is not therefore essential that the medical experts provide a firm opinion supporting the plaintiff’s theory of causation. Medical experts ordinarily determine causation in terms of certainties whereas a lesser standard is demanded by the law.”

¹⁰ *Ibid* at 40-46.

Six years later, the Supreme Court of Canada revisited the causation analysis in *Athey v Leonati*.¹¹ There, the plaintiff was involved in two consecutive motor vehicle accidents. About six months after the accident, he was injured while exercising. The injury was diagnosed as a disk herniation. He claimed damages for the losses suffered as a result of that injury.¹² His claim gave rise to a situation where both tortious factors (i.e. the car accidents) and non-tortious factors (i.e. Athey's bad back) contributed to the injury resulting in difficulty in establishing that but for the tortious conduct, the injury would not have occurred. While reaffirming the 'but for' test for causation, the Supreme Court also introduced the material contribution test for causation into Canadian law, where causation could be established if a plaintiff could prove that a defendant's negligence 'materially contributed' to an injury.¹³ The defendants were held fully liable to Athey. After this decision, however, there was some ambiguity over what the substantive test to establish causation was in Canada, because it became unclear exactly when the material contribution test would apply instead, or in addition to the 'but for' test.¹⁴

Just under a decade later, in *Resurfice Corp v Hanke*,¹⁵ where a plaintiff was injured while refueling an ice-resurfacing machine, the Supreme Court was again called on to re-confirm

¹¹ *Athey v Leonati* 1996 CarswellBC 2295 [*Athey*].

¹² *Ibid* at paras 1-7.

¹³ *Athey, ibid* at para 41: "The applicable principles can be summarized as follows: If the injuries sustained in the motor vehicle accidents caused or contributed to the [injury], then the defendants are fully liable for the damages flowing from the [injury]. The plaintiff must prove causation by meeting the 'but for' or material contribution test."

¹⁴ For a commentary on *Athey*, see Dennis Klimchuk and Vaughan Black, "A Comment on *Athey v. Leonati*: Causation, Damages and Thin Skulls" (1997) 31 UBC L Rev 163.

¹⁵ *Hanke v Resurfice Corp* [2007] 1 SCR 333, 2007 CarswellAlta 130 [*Hanke v Resurfice*].

the substantive test for causation.¹⁶ The operator of an ice machine was severely burned as a result of accidentally filling a gasoline tank with hot water.¹⁷ He brought an action against the manufacturer and distributor of the machine.¹⁸ The trial judge found that Hanke had not satisfied his burden of showing that his injuries resulted from any negligence on the part of the manufacturer or the distributor.¹⁹ On appeal, the trial judge's decision was set aside and a new trial was ordered. The Court of Appeal found that the trial judge erred in not applying the material contribution test for causation instead of the 'but for' test.²⁰

The Supreme Court of Canada commented that although the material contribution test is available in some limited circumstances, the 'but for' test remains the primary causation analysis, and was not established in this case.²¹ Curiously, the Court referred to circumstances of limited scientific knowledge as a condition that is "outside of the plaintiff's control," so it may trigger the availability of the material contribution test.²² The invocation of the material contribution test in *Resurface v Hanke* led some commentators to assert that the Supreme Court had effectively done away with the 'but for' test, because the material

¹⁶ *Ibid* at para 21-23.

¹⁷ *Ibid* at para 1.

¹⁸ *Ibid* at para 2.

¹⁹ *Ibid* at para 3. (Trial decision: [2003 ABQB 616](#).)

²⁰ *Ibid* at para 4. (Appeal decision: [2005 ABCA 383](#).)

²¹ *Ibid* at para 24 -28

²² *Ibid* at paras 25.

contribution test could be available simply whenever the 'but for' test could not be satisfied due to evidentiary uncertainty.²³

Some clarification, along with another express commitment to the 'but for' causation test to be established on a balance of probabilities came in *Clements v Clements*.²⁴ There, the Supreme Court of Canada was tasked with making a liability determination where a plaintiff was severely injured in a motorcycle accident. Evidence was inconclusive as to whether the driver's negligence caused the passenger plaintiff's injuries. In its decision, the Court conceded that its discussion of the availability of the material contribution test in *Resurfice* was incomplete.²⁵ A large part of the ambiguity after *Resurfice* arose because the material contribution test was supposed to be available when the 'but for' test was impossible for the plaintiff to establish, but what exactly 'impossible for the plaintiff to establish' meant remained uncertain.²⁶

²³ For instance, Brown argues that although the Court in *Resurfice v Hanke* affirmed the 'but for' test as the primary causation analysis, it is difficult to take that claim seriously when it is paired with a test that applies in conceivably every situation where, because of scientific or other evidentiary uncertainty, the but-for test does not work to a plaintiff's benefit, and which is satisfied, by definition, whenever negligence is proven. See Russell Brown, "Material Contribution's Expanding Hegemony: Factual Causation After *Hanke v Resurfice Corp.*" (2007) 45 Can Bus LJ 432 at 456.

²⁴ *Clements v Clements* 2012 SCC 32 at para 8 [*Clements*]: "The test for showing causation is the "but for" test. The plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred. Inherent in the phrase "but for" is the requirement that the defendant's negligence was *necessary* to bring about the injury – in other words that the injury would not have occurred without the defendant's negligence. This is a factual inquiry. If the plaintiff does not establish this on a balance of probabilities, having regard to all the evidence, her action against the defendant fails."

²⁵ *Ibid* at para 34.

²⁶ *Ibid* at paras 34, 35.

In *Clements*, the Supreme Court of Canada acknowledged that some circumstances may exist where causation is impossible for a plaintiff to prove using a 'but for' analysis, but re-affirmed that those instances must be understood as exceptional, and the traditional 'but for' causal analysis, to be proven on a balance of probabilities, is generally applicable.²⁷ To clarify, the Court started by opining on what 'impossible' *cannot* mean. The opinion confirms that the material contribution test is not available simply in any circumstance where proof of the 'but for' test for causation cannot be made out due to evidentiary difficulty.²⁸ The Court explained that impossibility of proof under the 'but for' test, as a prerequisite to applying the material contribution test, refers to situations of multiple tortfeasors where all have acted negligently and the negligence of one or more has factually caused the plaintiff's injury.²⁹ Moreover, the Court confirmed that scientific uncertainty is simply a variant of factual uncertainty; scientific uncertainty is not itself a justifiable reason to depart from ordinary principles of negligence law and proof of legal facts. Affirming the discussion in *Snell*, the Supreme Court held:

Scientific uncertainty was referred to in *Resurfice* in the course of explaining the difficulties that have arisen in the cases. However, this should not be read as ousting the "but for" test for causation in negligence actions. The

²⁷ *Ibid* at para 13: "To recap, the basic rule of recovery for negligence is that the plaintiff must establish on a balance of probabilities that the defendant caused the plaintiff's injury on the "but for" test. This is a factual determination. Exceptionally, however, courts have accepted that a plaintiff may be able to recover on the basis of "material contribution to risk of injury", without showing factual "but for" causation."

²⁸ *Ibid* at para 37, thus rejecting the interpretation that the availability of the material contribution test ousts the applicability of the 'but for' test altogether.

²⁹ I return to a discussion of *Clements* and its consistency with the requirements of procedural legitimacy below.

law of negligence has never required scientific proof of causation; to repeat yet again, common sense inferences from the facts may suffice. If scientific evidence of causation is not required, as *Snell* makes plain, it is difficult to see how its absence can be raised as a basis for ousting the usual “but for” test.³⁰

Accordingly, the trial judge’s insistence on scientific proof to establish causation under the ‘but for’ test was found to be in error.³¹ The trial judge also erred in holding that since the plaintiff could not establish that her injuries would not have occurred ‘but for’ the motorcycle driver’s negligence, the material contribution test should apply.³² Rather, the Supreme Court committed to the traditional mechanisms of proof of causation, allowed the appeal and ordered a new trial, in which the evidence should be evaluated in accordance with the ‘but for’ test for causation.

In *Ediger v Johnston*, a case involving a negligent birthing procedure, the Supreme Court was again called on to confirm the causation analysis. The trial judge found that the doctor’s negligence caused the birth defects in the child plaintiff.³³ The doctor appealed. The appellate court held that the trial judge erred in finding a causal link between the doctor’s

³⁰ *Clements* at para 38.

³¹ *Ibid* at para 48-49.

³² *Clements*, *supra* note 24 at para 50. [For further commentaries on the *Clements* decision, see Emir Crowne, Omar Ha-Redeye, “Clements v. Clements: A Material Contribution to the Jurisprudence - The Supreme Court of Canada Clarifies the Law of Causation” (2012) 2 *W. J. Legal Stud*; David Cheifetz “Factual Causation in Negligence After *Clements*” (2013) 41 *Advocates’ Q* 179; Vaughan Black, “The Rise and Fall of Plaintiff-Friendly Causation” (2016) 53 *Alta L Rev* 4.

³³ *Ediger v Johnston* 2013 SCC 18, (2013) CarswellBC 791 at 1.

negligence and the injuries sustained.³⁴ The plaintiff appealed to the Supreme Court of Canada.

Although this case turned on the factual finding of causation as opposed to the legal test for causation, the Supreme Court re-affirmed that the plaintiff in any action, including medical negligence claims, bears the burden of proving causation, but confirmed again that this does not require scientific precision.³⁵ The Supreme Court affirmed the trial judge's findings that the defendant doctor's negligence during the plaintiff's birth was a 'but for' cause of her medical adversities, and held the doctor liable to the plaintiff.³⁶

In 2016, the Supreme Court of Canada twice re-visited the causation analysis in two separate claims for compensation for a negligently inflicted injury. First, in *British Columbia Workers Compensation Appeal Tribunal v Fraser Health Authority*, the Court once again revisited the causal analysis. This case concerned a workers compensation tribunal decision on whether the plaintiffs' workplace conditions caused their cancer. The necessary causal connection in that context is governed by s. 250(4) of the *Workers Compensation Act*,³⁷ but the civil tort principles regarding reliance on expert opinions to establish causation were applicable. In response to arguments that the tribunal erred in finding a causal link between the workplace conditions and the subsequent development of cancer,

³⁴ *Ibid*, at paras 21-22.

³⁵ *Ibid* at para 36.

³⁶ *Ibid*.

³⁷ *Workers Compensation Act*, R.S.B.C. 1996, c. 492.

the Supreme Court re-affirmed that medical or scientific certainty is not required for legitimate legal proof, and held that the tribunal committed no palpable and overriding error in its factual finding that causation was established.³⁸

Second, in November 2016, the Supreme Court of Canada heard an appeal brought by the widow of a man who tragically lost his life to cancer following a negligently delayed diagnosis. The trial judge found that the plaintiff had not established that it was more likely than not that the doctors' negligence caused her husband's death, relying on evidence that suggested that even had he been properly diagnosed at an early date, the cancer would likely have claimed his life.³⁹ The Court of Appeal of Quebec reversed the decision, holding that the trial judge failed to apply an inference of causation, given that the doctors' negligence contributed to the factual uncertainty around causation, and that the plaintiff had adduced some evidence that supported a finding of causation.⁴⁰ The majority of the Supreme Court of Canada allowed the appeal, and upheld the trial judge's original decision.

The Supreme Court reasoned that although drawing an inference of causation was available to the trial judge as a matter of law, its availability does not usurp the duty to evaluate all the evidence presented and weigh it against the requisite standard of proof.⁴¹ The Supreme Court found that there was no overriding error in the conclusion that causation was not

³⁸ *British Columbia Workers Compensation Appeal Tribunal v Fraser Health Authority* 2016 SCC 25. See especially, paras 32 and 38.

³⁹ *Benhaim v St-Germain* 2016 SCC 48 at paras 17-24.

⁴⁰ *Ibid*, at paras 26-35.

⁴¹ *Ibid* at para 44.

established, because the trial judge considered all the evidence presented to it and weighed that evidence against the balance of probabilities standard of proof, as required by the processes of fact-finding.⁴²

On one hand, the cases canvassed above, taken together, display the Supreme Court of Canada's commitment to the fairness of the burden and standard of proof for establishing causation, even in the face of scientific and medical evidentiary uncertainty. Upholding findings of fact that adhere to the traditional principles of causation and of legal proof, or calling for such adherence sends the message from the Supreme Court of Canada that while causal uncertainty can pose difficulty for plaintiffs, appropriate application of the traditional analysis for establishing causation yields legitimate legal outcomes. This represents a clear endorsement of the concept that despite the conditions of uncertainty and the associated risk of substantive inaccuracy, the adjudicative process and the outcomes it produces maintain legitimacy through consistent adherence to its own procedures. As such, these judicial commentaries constitute implicit endorsements of the procedural legitimacy proposal.

The procedural legitimacy perspective enables a conceptual clarity between judicial outcomes that may seem unfair due to the encumbrance of uncertainty, and outcomes that are worthy of acceptance because they are legitimate. Outcomes that seem unfair because of evidentiary uncertainty can maintain legal legitimacy insofar as they maintain procedural integrity. This distinction between the perception of unfairness and legal illegitimacy is

⁴² *Ibid* at paras 77-86.

important. If it is not fully appreciated, then efforts to rectify sentiments of unfairness in particular circumstances can inadvertently compromise the demands of adjudicative legitimacy.

Although the series of cases noted demonstrates a commitment to the traditional approach of fact-finding on the part of the Canadian judiciary, it also reveals a fairly recent trend towards arguments that some change to the legal analysis for causation is warranted in the injury compensation context owing to difficulties posed by causal uncertainty.⁴³ At its heart, this issue is another manifestation of the question that is central to my thesis: on what basis can and should the authority of adjudicative outcomes be accepted given the reality of factual uncertainty? Given my conclusion that procedural propriety is a necessary condition of adjudicative legitimacy, proposals for alternate causal analyses should be approached within the procedural legitimacy frame in order to ensure prioritization of the demands of legitimate fact-finding in conditions of factual uncertainty.

⁴³ There is much discussion on whether the 'but for' test is always (or ever) the most appropriate analysis for establishing causation in law, and whether the legal definition of causation meets philosophical muster. It is outside the scope of this paper to comment on the merits of the substantive test for causation, but for a sampling of such commentaries, see for example Vaughan Black, "Decision Causation: Pandora's Tool-Box" and Richard Wright, "Acts and Omissions as Positive and Negative Causes" in J Neyers et al, eds, *Emerging Issues in Tort Law*, (Oxford: Hart Publishing, 2007); Jane Stapleton, "Unnecessary Causes" (2013) 129 *Law Q Rev* 39, and "Choosing What We Mean by 'Causation' in the Law" (2008) 73(2) *Mo L Rev* 433, and "An 'Extended But-For' Test for the Causal Relation in the Law of Obligations" (2015) 35(4) *Oxford J Leg Stud* 697; Richard Goldberg ed, *Perspectives on Causation* (Oxford and Portland, Oregon: Hart Publishing, 2011) [Goldberg, *Perspectives on Causation*]; Desmond Clarke, "Causation and Liability in Tort Law" (2013) 5(2) *Jurisprudence* 217; Allan Hutchinson, "Out of the Black Hole: Toward a Fresh Approach to Tort Causation" (2016) 39 *Dal L J* 561 [Hutchinson, "Out of the Black Hole"].

In order to demonstrate this further, I turn next to a class of cases in the personal injury context that gives rise to dissatisfaction with outcomes due to proof of causation difficulties, leading to calls for an alternative method of accommodating factual uncertainty through what is known as the 'loss of chance' doctrine.

Part 2. Loss of Chance: The Perceptions of Unfairness and Procedural Legitimacy

The cases that have given rise to the loss of chance argument are usually those where plaintiffs suffer medical adversities after having been misdiagnosed by their treatment providers. The causal link between the negligent misdiagnosis and the ultimate adverse outcome cannot be proven under the traditional 'but for' test and proof on a balance of probabilities analysis, so the plaintiff is denied recovery. Assessing the plausibility of incorporating the loss of chance doctrine to enable some partial recovery for such plaintiffs is an opportune showground for the value of maintaining and applying the procedural legitimacy framework where there is a perception of unfair liability outcomes due to difficulties associated with the usual process of fact-finding.

The procedural legitimacy proposal that I offer has both necessary substantive and formal elements, as noted above. Along with the requirement that fact-finding procedures demonstrably aspire towards factual accuracy and recognize the agency of litigants (which constitute the substantive elements), procedural legitimacy demands consistent application of acceptable fact-finding principles (the formal element). That ensures coherent and non-arbitrary treatment of litigants. As I demonstrate below, when these formal considerations

are under-emphasized in an effort to achieve more substantively desirable outcomes in certain instances, the legitimacy of the adjudicative system and its outcomes can be intolerably compromised. On that basis, I endorse the rejection of the loss of chance doctrine in Canadian law.

A. Loss of Chance Explained

The loss of chance doctrine, and the circumstances that give rise to it are best explained through a hypothetical example. Suppose a doctor negligently fails to inform a patient of a medical condition that the plaintiff has, causing a delay in the patient's treatment. Once the plaintiff's condition is appropriately diagnosed, it becomes clear that her prognosis is poor, and she sues the doctor in negligence. Eventually, the plaintiff dies of the medical condition.

In order to establish causation and, therefore, establish that the negligent doctor is liable to her, the patient (or her estate) must prove that it is more likely than not that but for the doctor's negligence, the adverse outcome (in this example, the patient's death from the undiagnosed condition) would not have occurred. Establishing this causal connection can pose difficulties, because the natural course of the plaintiff's illness itself, even if timely diagnosed and treated, could also be said to have caused the patient's eventual death.

Where the plaintiff's chance of survival prior to the misdiagnosis was less than 50%, it would not be possible for the plaintiff to establish on a balance of probabilities that but for the doctor's negligence, the plaintiff would have survived. That is because, even absent any act of negligence, the adverse outcome was already more likely to occur than not. Consequently, it would be impossible to establish causation and the action would have to

fail.⁴⁴ The House of Lords and the Supreme Court of Canada have both encountered this circumstance and have been presented with the argument that such an outcome is unfair to the plaintiff and that the reduction in the plaintiff's chance of avoiding the adverse outcome should be compensable through introduction of the loss of chance doctrine.

The House of Lords has met with this scenario on a number of occasions.⁴⁵ The most recent medical misdiagnosis case is *Gregg v Scott*,⁴⁶ where the House of Lords considered the loss of chance argument and denied its applicability in British medical negligence law. In that case, a claim was brought against Dr. Scott, who had acted negligently in failing to diagnose a malignant lump that afflicted his patient. The failure to diagnose led to a nine-month delay in the patient receiving treatment. During this period, the cancer spread. The plaintiff

⁴⁴ A number of sub-specialists in the medical field have commented on the loss of chance doctrine, offering examples of when the issue could arise in relation to particular specializations. See for example: Timothy Craig Allen, "Loss of Chance Doctrine: An Emerging Theory of Medical Malpractice Liability" (2012) 17(4) *Pathology Case Reviews* 172; Mark J Garwin, "Risk Creation, Loss of Chance, and Legal Liability" (2002) 16 *Hematology/Oncology Clinics of North America* 1351; K Leslie et al, "Loss of Chance in Medical Negligence" (2014) 42 *Anaesth Intensive Care* 298; James Tibballs, "Loss of Chance: A New Development in Medical Negligence Law" (2007) 187(4) *Medical Journal of Australia* 231.

⁴⁵ One such case which is often discussed in the loss of chance discourse is *Hotson v East Berkshire Area Health Authority* [1987] AC 750 [*Hotson*], where a boy fell out of a tree breaking his hip. The medical treatment he received was negligent in its failure to diagnose the fracture. The boy's hip joint was permanently damaged. However, the permanent damage was more likely caused by the fall itself, rather than by the negligent misdiagnosis, even though a proper diagnosis may have increased the chances that the permanent damage would not have occurred by 25%. The House of Lords rejected a loss of chance approach, and decided that causation was not made out to the requisite balance of probabilities standard, so recovery was not available.

⁴⁶ *Gregg v Scott* [2005] UKHL 2 [*Gregg v Scott*].

claimed that the doctor's negligence, leading to the delay in treatment, prevented him from being cured of his disease or, at least, reduced his chances of being cured.

The evidence presented at trial indicated that the plaintiff's chance of survival was 42% prior to any act of negligence. These prospects were reduced to 25% by the time of the trial.⁴⁷ Given this evidence, the trial judge found that he could not conclude that on a balance of probabilities, if it were not for the doctor's negligence, the plaintiff would not have been deprived of a cure because his chances of survival prior to the doctor's negligence were already less than 50%.⁴⁸ The plaintiff appealed the trial judge's decision, and the House of Lords considered his argument that rather than requiring proof that the delay in treatment caused the detrimental outcome itself (i.e. being prevented from being cured at all), the reduction in the *chance* of being cured should be compensated. If this were an acceptable analysis, then the causal link to be established would be between the doctor's negligence and the reduction in the chance of recovery, rather than the doctor's negligence and the actual adverse outcome.

Though the Lords' reasons emphasized different points, the majority of them rejected the invitation to apply the loss of chance doctrine, preferring the traditional approach that requires proof of the causal link between the negligence and the actual adverse outcome. I expand on the Lords' reasoning below, but it is notable here that all of their speeches demonstrate, either implicitly or expressly, the angst that comes with the factual

⁴⁷ *Ibid* at para 5.

⁴⁸ *Ibid* at para 6.

circumstances that give rise to the loss of chance claims, and the difficulty of adapting legal principles in response to particular factual circumstances. Lord Hope's dissenting opinion, for instance, expresses that sentiment most simply by opening his speech with the words, "This is an anxious and difficult case."⁴⁹ Similarly, Baroness Hale begins her judgment noting the tension between difficult factual circumstances and maintaining principled law:

The Court of Appeal were divided about this case, as are we. We have found it very difficult. Yet the vast majority of personal injury cases are not difficult.... Well settled principles may be developed or modified to meet new situations and new problems: the decisions in *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32 and *Chester v Afshar* [2004] 3 WLR 927 are good examples. But those two cases were dealing with particular problems which could be remedied without altering the principles applicable to the great majority of personal injury cases which give rise to no real injustice or practical problem.⁵⁰

The Supreme Court of Canada has considered the loss of chance argument in similar circumstances in *Laferrrière v Lawson*.⁵¹ There, the plaintiff, Fortier-Dupuis (by her testamentary executor), commenced an action under article 1205 of the Civil Code of Quebec alleging that her doctor treated her negligently in failing to inform her of her cancerous condition. She died of generalized cancer prior to the completion of the legal proceedings. On her behalf, it was argued that though it was impossible to prove on a balance of probabilities that her ultimate fate would have been any different absent the

⁴⁹ *Ibid* at para 92.

⁵⁰ *Ibid* at para 192.

⁵¹ *Laferrrière v Lawson* [1991] 1 SCR 541, 1991 CarswellQue 74 [*Laferrrière v Lawson*]. The Supreme Court affirmed its reasoning in respect of the loss of chance doctrine and the traditional causation analysis in *St-Jean v Mercier* [2002] 1 SCR 491, 2002 CarswellQue 142.

doctor's negligence, it could be established that the doctor's negligence decreased her *chance* of a more positive outcome. That reduction in chance, the plaintiff suggested, ought to be compensable. Gonthier J undertook a thorough review of the loss of chance doctrine to determine whether to introduce it into Quebec civil law on medical responsibility. Writing for the majority, he endorsed the traditional requirement to prove the causal link between the negligence and the injury itself, and upheld the outcome that the plaintiff was not entitled to compensation for the loss of chance:

In my view, the evidence amply supports the trial Judge's finding that the appellant's fault could not be said to have caused Mrs. Dupuis' death 7 years after the first diagnosis of cancer of the breast. Unfortunately, I must agree with the trial Judge that all the evidence clearly confirms the stubborn and virulent nature of this disease.⁵²

The Court did, however, recognize that "from 1975 until her death, she experienced the horrible rhythms of her disease and the regular and seemingly ineffectual treatments and medications in the knowledge that things might have been different had she known earlier and been treated earlier. Her chances may not have been sufficient for the law, but they were very real to her, no doubt."⁵³ Accordingly, the plaintiff was awarded damages for the psychological pain and suffering that the plaintiff endured upon learning that she was misdiagnosed and had gone without treatment for several years.⁵⁴

⁵² *Laferriere v Lawson*, *ibid* at 167.

⁵³ *Ibid* at 169.

⁵⁴ *Ibid*.

Echoing the basic message of procedural legitimacy, courts have upheld the legitimacy of outcomes denying recovery to medically misdiagnosed patients who are unable to establish 'but for' causation on the basis that those outcomes arise out of an appropriate application of the process of legal fact-finding, and a consistent application of governing legal principles to the established facts.⁵⁵ But this judicial commitment has received criticism, both academic and in dissenting judgments.⁵⁶ Outcomes where a plaintiff is treated negligently, endures some adverse outcome, yet is left uncompensated, have led to the understandable perception that the usual process of accommodating factual uncertainty through the balance of probabilities standard of proof yields unfair results in the liability for misdiagnosis context.⁵⁷

⁵⁵ Note that Canadian courts have accepted the loss of chance argument in some other situations, including cases where a defendant negligently failed to seek the relevant zoning approval from a planning authority. Courts have awarded damages on the basis of the chance that the zoning approval would have been obtained if the defendant had applied for it (e.g. *Eastwalsh Homes Ltd. v Anatal Developments Ltd.* (1993) CarswellOnt 587, leave to appeal to SCC refused (1993) SCCA No 225. It has also been accepted where a plaintiff claimed negligence on the part of a lawyer and was awarded damages on the basis of the chance that the legal claim would have been successful absent the lawyer's negligence (e.g. *Henderson v Hagblom* (2003) CarswellSask 283, leave to appeal to SCC refused (2003) SCCA No 278. For largely the same reasons that I express here, I may question the propriety of those decisions, but I confine my discussion here to whether introducing the loss of chance doctrine in the medical negligence context can maintain coherence within the general tort law framework.

⁵⁶ In *Gregg v Scott*, *supra* note 46, Lord Hope and Lord Nichols dissented, and in *Laferriere v Lawson*, *supra* note 51, Laforest J dissented.

⁵⁷ For instance, Jamie Cassells and Elizabeth Adjin-Tettey in *Remedies: The Law of Damages*, 2d ed (Toronto: Irwin Law Inc, 2008) [Cassells, Adjin-Tettey, *Remedies*] comment at 341-342 that: "In cases like *Laferriere v Lawson*, the defendant's negligence has indeed deprived the plaintiff of a valuable chance (to seek medical treatment). It is hard to discern why she should not receive compensation for this loss...It is to be hoped that the Supreme Court will revisit this issue." For early advocates of the loss of chance doctrine, see Jane Stapleton, "The Gist of Negligence, Part 2: The Relationship Between "Damage" and Causation," (1988) 104 Law Q Rev 389 [Stapleton, "Gist II"] and Joseph King Jr., "Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences"

The perceived unfairness can lead to two arguments, both of which I discuss in further detail below. First is the more common ‘gist’ argument in favour of making a lost chance of a medically better outcome a compensable injury, as advanced in the cases noted above.⁵⁸ That is, the loss of chance becomes the ‘gist’ of the tort action rather than the adverse outcome itself, and the liability attaches for causing the *chance* of the ultimate adverse outcome. Scholars and litigants usually propose this solution, in various forms and with different nuances, as explained below. In the next segment, I assess the plausibility of introducing loss of chance in tort litigation or in the limited context of medical negligence, through the procedural legitimacy frame.

Second, as I suggest and explain below, the perception of unfairness arising in the misdiagnosis cases can, at its foundation, be considered a generalized criticism of the existing approach to legal fact-finding. Dissatisfaction with the usual approach to fact-finding can conceivably lead to an argument in favour of a probabilistic approach to fact-finding, where chances of legal facts would remain legally relevant, rather than the current

(1980-1981) 90(6) Yale LJ 1353 [King, “Causation and Valuation”]. See also, Nils Jansen, “The Idea of A Lost Chance” (1999) 19(2) Oxford Journal of Legal Studies 271 [Jansen, “The Idea of a Lost Chance”]; S.M. Waddams, “The Valuation of Chances” (1998) 30 Can Bus LJ 86 [Waddams, “Chances”], and compare Vaughan Black, “Not a Chance: Comments on Waddams, the Valuation of Chances” (1998) 30 Can Bus LJ 96 [Black, “Not a Chance”]; Case Note (author unknown) *Falcon v Memorial Hospital: “A Rational Approach to Loss of Chance Tort Actions”* (1993) 9 J. Contemp. Health L. & Pol’y 545; Lara Khoury, *Uncertain Causation in Medical Liability* (Portland: Hart Publishing, 2006) [Lara Khoury, *Uncertain Causation*], Chapter 4: Probabilistic Assessment of Damages; Ernest Weinrib, “Causal Uncertainty” (2015) Oxford Journal of Legal Studies 1; and Rui Cardona Ferreira, “The Loss of Chance in Civil Law Countries: A Comparative and Critical Analysis” (2013) 20(1) Maastricht Journal 56.

⁵⁸ “Gist” terminology originally introduced in Jane Stapleton, “The Gist of Negligence, Part 1: The Relationship between ‘Damage’ and ‘Causation’” (1988) 104 Law Q Rev 389 [Stapleton, “Gist I”].

balance of probabilities and 'all or nothing' approach to fact-finding. The next segment ends with a brief discussion on the implausibility of that approach.

The most operative aspect of the procedural legitimacy proposal in this analysis is the call for consistency in application of substantive legal principles and in fact-finding procedures. My primary goal is to use this assessment as a means to highlight the importance of consistency and coherent application of legal principles to maintain legitimate adjudication. Below, I demonstrate how the process of managing factual uncertainty is inextricably linked with coherent application of substantive legal principles in the tort liability context, and why alternative options open the door to illegitimate adjudication.

B. Accommodating Causal Uncertainty Through Loss of Chance as 'Gist'

The primary thrust of the loss of chance argument arises from the perception that when a plaintiff loses a chance of a better outcome, she loses something of value. Urging that courts should be more receptive to the loss of chance argument, Waddams, for instance, comments that "people suffering from illnesses do, of course, often give money, even for an insubstantial chance of a cure."⁵⁹ Similarly, making a case for the imposition of liability for negligently inflicted risks of future harm (which can be stated as the loss of a chance of

⁵⁹ Waddams, "Chances", *supra* note 57 at 89.

better outcome) Porat and Stein persuasively explain that a chance or a risk has a definite value:⁶⁰

Consider two people who happen to be equal in all respects except one: one of those people has a prospect of developing a serious illness in the future, while the other has no such prospect. The second person's well-being outcores the well-being of the first person (if forced to live one of those people's lives, a rational individual would prefer to be the second person than the first).

If the lost chance is understood as something of value, the argument goes, then it should be understood as a compensable loss, and a defendant should be liable to a plaintiff for causing that loss. Defining the lost chance as the injury itself gives rise to the second major thrust of the loss of chance argument. When the lost chance is interpreted as a compensable injury, advocates argue, the problem of causal indeterminacy in the misdiagnosis cases is resolved without any change to the traditional approach to establishing causation in liability determinations, which the Supreme Court has displayed reluctance to alter, as explained above. Under the loss of chance approach, all the relevant facts are still subject to the balance of probabilities standard of proof, including the causal link between the negligence and the loss suffered, only now, the loss suffered is not the outcome of the chance, but the

⁶⁰ Ariel Porat and Alex Stein, "Liability for Future Harm" in Goldberg, *Perspectives on Causation*, *supra* note 43 at 234. In his speech in *Gregg v Scott*, *supra* note 46, Lord Nicholls also suggests that it is illogical to prevent compensation of a lost chance on the basis that the chance has some definitive value, at para 2-4: "The patient could recover damages if his initial prospects of recovery had been more than 50%. But because they were less than 50% he can recover nothing.

This surely cannot be the state of the law today. It would be irrational and indefensible. The loss of a 45% prospect of recovery is just as much a real loss for a patient as the loss of a 55% prospect of recovery....".

loss of the chance itself. As Lara Khoury succinctly summarizes, “this approach is *prima facie* compelling because it confirms the apparent conceptual validity of the notion and its conformity with the rules of civil liability.”⁶¹

Joseph King and, later, Jane Stapleton were among the first to provide early articulations of this argument. They (independently) commented that when courts have rejected the loss of chance argument, they have become distracted by their commitment to treating causation as an all or nothing proposition.⁶² Over-emphasizing this commitment, King suggests, “many courts have misperceived the nature of the interest destroyed by failing to identify the destroyed chance itself as the compensable loss.”⁶³ Similarly, Jane Stapleton’s formulation of the loss of chance argument is that “although the plaintiff fails to establish causation on the balance of probabilities, to one formulation of the damage forming the gist [of the action], he seeks to succeed in doing so to an alternative formulation based on loss of a chance.”⁶⁴ Those who endorse this line of thinking suggest that “the loss of chance is not a theory of causation but a theory of injury.”⁶⁵ When the lost chance is understood as the

⁶¹ Lara Khoury, *Uncertain Causation*, *supra* note 57 at 119.

⁶² King, “Causation and Valuation,” *supra* note 57 at 1363, and Stapleton, “Gist II,” *supra* note 57. Stapleton argues that the court’s rejection of the loss of chance argument in *Hotson*, *supra* note 45, did not provide an answer to the re-characterization of the plaintiff’s claim as a ‘loss of a chance.’ The House of Lords held that the plaintiff had to establish the causal link to the injury itself, on a balance of probabilities, and since this could not be done, the action failed.

⁶³ King, “Causation and Valuation,” *supra* note 57 at 1365.

⁶⁴ Stapleton, “Gist II,” *supra* note 57 at 391-392.

⁶⁵ Alice Ferot, “The Theory of Loss of Chance: Between Reticence and Acceptance” (2013) 8 Florida International University Law Review 591 at 594 [Ferot, “Theory of Loss of Chance”]; See also King, “Causation and Valuation,” *supra* note 57; Note, “Falcon v Memorial Hospital:

compensable injury, the concern that the lost chance argument erodes the balance of probabilities requirement for proof of causation is artificial.⁶⁶ That is because, since the gist of the action is shifted from outcome (or the actual physical injury) to loss of chance of a better outcome, or risk of the injury, the causal link that has to be proven is between the negligence and lost chance or increased risk. That causal link would still have to be proven on a balance of probabilities.

On the surface, this solution would seem to uphold the general requirements of procedural legitimacy: the traditional approach to proof of legal facts is maintained, and the uneasy outcome of leaving plaintiffs entirely uncompensated after being subjected to negligent medical treatment is also avoided. Undoubtedly, the loss of chance argument has a strong appeal. On closer consideration, however, incorporation of the loss of chance doctrine would compromise the systemic demands of procedural legitimacy, and its rejection by the courts must be endorsed on that basis.

C. Procedural Legitimacy and Lost Chance

The loss of chance doctrine is problematic because, as I explain below, there is no clear principled reason to enable compensability of lost chances in the medical negligence context without necessitating a generalized, radical change to the substantive principles of

'A Rational Approach to Loss of Chance Tort Actions'" (1993) 9 J Contemp Health L & Pol'y 545.

⁶⁶ See for instance, Ferot, "Theory of Loss of Chance," *ibid* at 594, claiming that the "the endorsement or rejection of the [theory of loss of chance] should not be based on arguments relating to the applicable causation standard or burden of proof." I disagree, as I explain above. An appropriate evaluation of the loss of chance should be based on an appreciation of the fact that it arises from difficulties around proving causation on the balance of probabilities standard.

tort law, as well as the principles of managing uncertainty in civil litigation. Absent advocating for fundamental and drastic changes to the law of negligently inflicted injury, introducing the loss of chance doctrine in the confined context of medical negligence (as argued in the negligent misdiagnosis cases where loss of chance is advanced) is systemically problematic because it would result in inconsistency and incoherence: it would unjustifiably subject defendant doctors to altogether different substantive principles of liability for negligence compared to other defendants, by eroding the requirement to prove causation of injury and by allowing a risk of an injury to be itself compensable. Furthermore, and especially significant for my project, the loss of chance doctrine represents an entirely different method of accommodating factual uncertainty in the adjudicative process. This would subject litigants involved in a medical negligence claim to an unjustifiably inconsistent scheme of tort liability and management of factual uncertainty, leading to incoherent outcomes. The procedural legitimacy framework helps to highlight these problems.

Coming to this conclusion requires a clear perception of the effects of the loss of chance doctrine in the context of tortious injury litigation, where medical negligence cases are situated. I start below by outlining why introduction of the loss of chance doctrine would give rise to foundational changes to tort law principles and then outline the incongruences that would result were loss of chance made available only in the limited context of medical negligence. The central purpose of this discussion is to show that while uncomfortable and lamentable outcomes may result in particular instances, some doctrinal changes cannot be tolerated in the interest of maintaining principled consistency, which provides coherence to the adjudicative system. I include, therefore, a discussion on why consistency matters, in

more general terms, in the upcoming section, reiterating my core purpose of showcasing the value of procedural legitimacy as a jurisprudential orientation.

i. Understanding the Large Scale Effects of Loss of Chance

The loss of chance doctrine could have two inter-related impacts on the principles of tort law and tort litigation: first, loss of chance can be understood as doing away with the need for a manifest injury in order to pursue a claim in tort, since the lost chance itself becomes the compensable loss; second, loss of chance can be seen to erode the requirement to prove a causal link between an act of negligence and an injury suffered in order to invoke tort liability. Either of these changes would result in tort law effectively transforming from an injury compensation scheme into a risk-compensation scheme. This, as I explain below, would change the substantive rights protected by tort law, along with the method of accommodating doubt over facts in tort litigation.

First, if a lost chance is taken as valuable, and therefore a compensable loss, then the manifestation of the injury, at least in principle, becomes irrelevant. As Jensen explains, “the very meaning of the idea of a lost chance is that it must not be questioned whether, on the balance of probabilities, the victim would have in fact suffered a final damage even in the absence of the tortious action.”⁶⁷ That question no longer arises because the chance of injury is itself the legally relevant loss. If the ultimate injury itself is truly irrelevant, then tort liability could result wherever a chance was lost, or a risk was created, irrespective of whether a person suffered any ultimate injury.

⁶⁷ Jansen, “The Idea of A Lost Chance,” *supra* note 57.

If the creation of a risk constituted an enforceable right as against another individual, a person may have suffered no physical injury, yet still have a right to recover damages from another party. Baroness Hale's comments in *Gregg v Scott* are helpful. She explains the large-scale impact of incorporating the loss of chance doctrine into tort law as follows:⁶⁸

The wide version of the argument would allow recovery for any reduction in the chance of a better physical outcome, or any increase in the chance of an adverse physical outcome, even if this cannot be linked to any physiological changes caused by the defendant. A defendant who has negligently increased the risk that the claimant will suffer harm in the future...would be liable even though no harm had yet been suffered. This would be difficult to reconcile with our once and for all approach to establishing liability and assessing damage.

If the loss of chance argument were taken to this logical extension, individuals could be liable to each other for creating any adverse risks of harm. For instance, a speeding driver could be liable to all other drivers he shared a road with, because he increased their risks of being harmed. Given these consequences, introduction of loss of chance in injury litigation would make regulation of negligently inflicted injuries unpredictable and unrealistic.

The state of unpredictability could be alleviated, at least to some extent, if loss of chance compensability were limited to situations where an injury *does* manifest. Some have suggested that courts should be receptive to the loss of chance argument in cases where an injury is sustained, but the plaintiff can only show that the defendant's negligence

⁶⁸ *Ibid* at 212.

contributed to the risk of that injury manifesting.⁶⁹ The effect of that proposal is that whenever causation cannot be established, a claimant will restate her claim as one of lost chance, and some recovery may become available.⁷⁰

Whether or not a manifest injury is required, enabling compensation for lost chance is underpinned by the idea that a lost chance of a better outcome is a valuable and, therefore, compensable loss. But while chances have value, it does not follow that they should be considered legally compensable losses. As Robert Stevens put it, “the mere fact that [a chance] is a real loss is an insufficient reason to hold it to be always actionable where inflicted through fault.”⁷¹ Framing the question of actionability of damage in terms of the rights that are protected by the substantive tort law principles, Stevens points out, “the rights we have against everyone else are in relation to the outcome of injury, not its risk of occurring in the future.”⁷² Where there is no right against others for increased risks, or lost chances of better outcomes, it follows that lost chances cannot and should not sustain a liability determination. Subscribing to this view, Ernest Weinrib suggests:

Injury is essential to liability for negligence; no matter how culpable the defendant’s act, the defendant cannot be held liable for negligence unless

⁶⁹ See for example, Waddams, “The Valuation of Chances,” *supra* note 57 ; Weinrib, “Causal Uncertainty,” *supra* note 57.

⁷⁰ For example, Vaughan Black, “Not a Chance”, *supra* note 57 at 98: “all cases of causal uncertainty may potentially be converted into loss of chance cases by such a description of the harm.”

⁷¹ Robert Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007) at 43.

⁷² *Ibid* at 44.

the defendant's act resulted in an injury to the plaintiff. Thus, without the materialization of the risk into injury, no liability can arise.⁷³

Allowing compensation for lost chances, with or without a requirement for a manifest injury, implies that tort law protects a right to be free from chances of injury or increased risks of injury, but there is no tort right (at least not traditionally) against a lost chance.⁷⁴ This is important from the perspective of maintaining procedural legitimacy, which requires that the adjudicative system properly administer the substantive rights that exist at a given time.⁷⁵ Since the loss of chance doctrine implies a right against lost chances, its introduction into tort law would constitute a foundational shift in the principles of tort liability.

Along with manipulating the rights protected by substantive tort law principles, the loss of chance doctrine would also alter the method of accommodating factual indeterminacy. In the normal course, factual indeterminacy and the associated risk of factual error is managed through the burden and standard of proof. As I argued in Chapter Four, consistent adherence to that scheme enables an effective adjudicative system that treats litigants fairly, despite conditions of uncertainty. Incorporating loss of chance erodes that

⁷³ Ernest Weinrib, *Tort Law: Cases and Materials*, 4th ed (Toronto: Emond Montgomery Publications Limited, 2009) at 217. Along similar lines, Arthur Ripstein notes that, "Only a completed wrong is an interference with the plaintiff's right. Nobody has authority to constrain others except with respect to their body and property" in Arthur Ripstein, *Private Wrongs* (Cambridge: Harvard University Press, 2016) at 116 [Ripstein, *Private Wrongs*].

⁷⁴ Later in this chapter, I discuss the infeasibility of a tort system that centers on risk-based rights.

⁷⁵ I discuss the possibility of incremental changes through common law development below, but as I suggest throughout this chapter, the loss of chance doctrine cannot be classified as an acceptable incremental change.

consistency, because in light of factual uncertainty around cause. plaintiffs could simply reframe their claims in terms of a lost chance and manage some recovery.⁷⁶

In this way, loss of chance constitutes an alternative mechanism for distributing the potential factual error around causation by making a defendant proportionately liable for risk of injury where causation cannot be established in respect of the manifested injury itself. Through loss of chance, neither the defendant nor the plaintiff is subjected to the 'all or nothing' response that accompanies the balance of probabilities method of proof; instead, they are subjected to liability and recovery that is proportional to the risk of injury that can be established. As such, loss of chance can be interpreted as a mechanism to avoid the application of the usual mechanism for accommodating causal uncertainty given the uneasy outcomes that may result in the medical misdiagnosis context.

Contrary to what is sometimes suggested, loss of chance is not a straightforward extension of liability for negligence. Rather, its introduction would constitute a fundamental shift in tort principles, both substantively, as well as in the process of litigating a tort claim. The House of Lords and the Supreme Court of Canada have appreciated that enabling loss of chance in all civil claims would be unacceptably radical.⁷⁷

⁷⁶ Baroness Hale's speech in *Gregg v Scott*, *supra* note 46 at 223: "Almost any claim for loss of an outcome could be reformulated as a claim for loss of a chance of that outcome...That is, the claimant still has the prospect of 100% recovery if he can show that it is more likely than not that the doctor's negligence caused the adverse outcome. But if he cannot show that, he also has the prospect of lesser recovery for loss of a chance."

⁷⁷ For example: Lord Hoffmann's speech in *Gregg v Scott*, *supra* note 46 at para 90: "But a wholesale adoption of possible rather than probable causation as the criterion of liability

Proceeding from the presumption that such a radical change is unlikely to be introduced by the judiciary in the Canadian tort context, the question remains as to whether there is some principled basis on which the doctrine can be applied in a limited context, which would make it available in the medical negligence situation, and attenuate the sympathetic situation of negligently treated, yet uncompensated plaintiffs.

ii. Loss of Chance in Medical Negligence

In general, if loss of chance were to be applied only in the medical negligence context, the result would be to subject doctors to an altogether different scheme for potential liability than tort law typically protects. It would imply that patients have a right, protected by tort law, to be free of risks of adverse medical outcomes, even if that adverse outcome did not occur, or cannot be causally connected to the negligence.⁷⁸ This is problematic because it would mean that medical providers are liable for increasing risks of injury, while no other tort law defendant is exposed to such liability. As Gonthier J states:

would be so radical a change in our law as to amount to a legislative act. It would have enormous consequences for insurance companies and the National Health Service.... I think that any such change should be left to Parliament.” See also Vaughan Black, “Ghost of A Chance: *Gregg v Scott* in the House of Lords” (2005) 14(2) *Health Law Review* 38 at 42 [Black, “Ghost of a Chance”]: “It is true that the traditional approach to causation was formulated by the judiciary, and some persons think that any rule that was initially formulated by a court can legitimately be discarded by that same institution. However, in the case of the balance-of-probabilities rule, which extends back at least 500 years and around which so many other rules, assumptions and social practices have been erected, it is difficult to dissent from the view that a wholesale adoption of loss of chance causation would represent such a drastic change that it should only be undertaken after the broad and extended consultation and multi-party injury that only the legislative process can offer.”

⁷⁸ As Weinrib notes: “tort law clearly does not, and indeed cannot, adopt wholesale the notion of liability for risk, for that would eliminate or transform the very idea of factual causation.” (“Causal Uncertainty,” *supra* note 57 at 25).

If, after all has been considered, the judge is not satisfied that the fault has, on his or her assessment of the balance of probabilities, caused any actual damage to the patient, recovery should be denied. To do otherwise would be to subject doctors to an exceptional regime of civil liability.⁷⁹

From the procedural legitimacy perspective, such inconsistencies constitute red flags, suggestive of potential adjudicative illegitimacy, even though the outcomes that could result from the introduction of the loss of chance doctrine in the medical negligence context may seem desirable in some instances.

For some, however, the medical negligence context gives rise to unique circumstances that would justify the availability of loss of chance. Given my focus on judicial accommodation of factual uncertainty, one of the most significant arguments in that respect is the notion that since medical prognoses are inherently uncertain and are usually articulated in probabilities as opposed to certainties, the law should operate in terms of probabilities and chances as opposed to certainties in that context.⁸⁰

Along these lines, some, like Chris Miller, note that “loss of chance represents a small minority of negligence cases in which uncertainty in evidence obliges the claimant to rely upon probabilistic concepts, such as chance and risk, in establishing cause.”⁸¹ On that basis,

⁷⁹ *Lafferriere v Lawson*, *supra* note 51 at 162 [emphasis added].

⁸⁰ Lord Nicholls: “prospects of recovery, expressed in percentage likelihood, represent the reality of his position so far as medical knowledge is concerned. The law should be exceedingly slow to disregard medical reality....” (*Gregg v Scott*, *supra* note 46 at 42). This argument appears in *Rufo v Hosking* [2004] NSWCA 391.

⁸¹ Chris Miller, “Loss of Chance in Personal Injury: A Review of Recent Developments” (2006) 5 *Law, Probability and Risk* 63 at 67.

it is suggested that the probabilistic nature of the evidence is cause for altering the applicable principles of tort liability and factual proof. Similarly, Nils Jansen has suggested that the uncertainty that is incumbent in a medical prognosis (for example, uncertainty over whether a plaintiff will survive a heart attack or a cancerous condition) can “only be answered in probabilities and is therefore perceived in terms of chance and risk.”⁸² He describes such uncertainties as “genuine, unavoidable uncertainty,” and distinguishes those from situations of lack of evidence, where, he suggests, a certain reality is presupposed, but evidence is unavailable to make that reality knowable.⁸³ Legally recognizable chances, he suggests, should only be those that can fit into the former category of “genuine uncertainty” as opposed to evidentiary difficulty.⁸⁴

The suggestion that there is some unique uncertainty in the medical context, which would justify the use of the loss of chance doctrine is, in my interpretation, faulty.⁸⁵ The relevant question for imposing tort liability for personal injury is whether the defendant’s negligence caused the plaintiff’s injury. That question is factually uncertain and that uncertainty ought

⁸² Jansen, “Idea of a Lost Chance,” *supra* note 57 at 279.

⁸³ Jansen gives the following example of an uncertainty that can be described as an evidentiary problem as opposed to a genuine uncertainty, which constitutes a ‘chance’ in his interpretation: “there might be a town, in which there are only four taxis, three blue, run by one company, and one yellow, run by another. If a person is struck by one of the four taxis without knowing its colour, that is not a case of a lost chance or of a risk. It is simply a problem of evidence” in Jansen, “Idea of A Lost Chance,” *ibid*, at 279.

⁸⁴ *Ibid*.

⁸⁵ See Vaughan Black, “The Ghost of a Chance,” *supra* note 77 at 43 for the argument that if medical uncertainty were the a reason to invoke loss of chance, then its availability would ultimately depend on whether or not there is disagreement among the medical experts as to the cause of the injury. That would seem to be an unprincipled reason to treat two plaintiffs differently in law.

to be accommodated through the usual process of fact-finding, irrespective of the probabilistic nature of the relevant evidence. Some claim that evidence as to causation is always probabilistic in nature, suggesting that the misdiagnosis cases may not be as unique as they may appear.⁸⁶ This reasoning is echoed in Gonthier J's judgment in *Laferriere v Lawson* as follows:

The loss of chance situation always presents evidentiary problems, but provided that adequate evidence has been furnished through facts and statistics relating to the particular case, the judge will attempt to assess the actual or final damage, in effect, the chance as realized. Even in cases where statistical evidence is heavily relied upon the evaluation of damages is still aimed at approximating the chance as realized.⁸⁷

This interpretation of medical uncertainty, along with express assertion that consistent application of the fact-finding principles is necessary to maintain adjudicative coherence (both of which I endorse from the procedural legitimacy perspective) are expressed most succinctly in Lord Hoffmann's and Lord Phillips's speeches in the House of Lords decision in *Gregg v Scott*.

Lord Phillips begins by considering whether the proof of causation difficulties in the medical negligence context do in fact lead to injustice. He concludes that the application of

⁸⁶ Kenneth Abraham, "Self-Proving Causation" (2013) 99 Va L Rev 1811 at 1817: "[I]n one way or another, evidence of causation in negligence cases is always evidence of the probability, based on the circumstances, that what actually happened would not have happened if the defendant had exercised reasonable care. Sometimes the circumstantial evidence supports an inference that this probability is extremely high, but the evidence is always necessarily circumstantial and always about probability."

⁸⁷ *Laferriere v Lawson*, *supra* note 51 at 150.

the current legal principles in the medical negligence context does not amount to an injustice that would justify the change to the law that the loss of chance doctrine would encompass.⁸⁸ Rather, he comments, “it seems to be that there is a danger, if special tests of causation are developed piecemeal to deal with perceived injustices in particular factual situations, that the coherence of our common law will be destroyed.”⁸⁹ Instead of solving an injustice, Lord Phillips implies that the introduction of the loss of chance doctrine may cause one by allowing inconsistency in the application of legal principles.

In so holding, Lord Phillips confirms that consistent application of principle and procedure is the paramount task that is assigned to courts: consistent and principled adjudicative decision-making; perceived injustices in particular situations are not, themselves, justifiable reasons to depart from maintaining such consistency in principle and procedure.

Like Lord Phillips, Lord Hoffmann expressly rejects the notion of injustice caused by medical uncertainty regarding the cause of an adverse medical outcome. Lord Hoffmann’s decision is clear that where the principles and procedures of proof are adhered to, it cannot be said that denying liability results in improper outcomes. Echoing Lord Phillips’s emphasis on coherence and consistency in the law, Lord Hoffmann’s speech dismissing the appeal approvingly refers to the following comments of an earlier House of Lords decision:

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⁸⁸ *Gregg v Scott*, supra note 46 at 171.

⁸⁹ *Ibid* at 172.

⁹⁰ *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32, cited in *Gregg v Scott*, *ibid* at 89.

To be acceptable the law must be coherent. It must be principled. The basis on which one case, or one type of case, is distinguished from another should be transparent and capable of identification. When a decision departs from principles normally applied, the basis for doing so must be rational and justifiable if the decision is to avoid the reproach that hard cases made bad law.

On this premise, Lord Hoffmann finds that scientific or medical uncertainty is not a justifiable reason to depart from the established principles of legal proof. On that basis, he rejects the argument that the loss of chance doctrine should have at least a limited applicability in medical negligence law since proof of causation in that context is often accompanied by scientific or medical uncertainty.⁹¹

Whether the evidentiary uncertainty is born of scientific or medical ambiguities, Lord Hoffmann comments, does not alter the applicability of the relevant legal principles, particularly the principle of finding the necessary legal facts on the basis of the relevant standard of proof:

The fact that proof is rendered difficult or impossible because no examination was made at the time, as in *Hotson*, or because medical science cannot provide the answer, as in *Wisher*, makes no difference...What we lack is knowledge and the law deals with lack of knowledge by the concept of the burden of proof.⁹²

⁹¹ *Gregg v Scott*, *ibid*, at 88.

⁹² *Ibid* at 79. Rejecting the loss of chance argument, a Texas Court similarly reasoned that: "We acknowledge that in searching for the truth, the law does not, and should not, require proof of an absolute certainty of causation or any other factual issue. It always settles for some lower threshold of certainty." Kramer, 858 S.W.2d at 407, cited in Brian Casaceli,

In this statement, Lord Hoffmann succinctly states the foundation of my thesis: legal determinations are made in conditions of uncertainty due to lack of knowledge. These knowledge gaps are dealt with through the standard of proof which allows legal facts to be found even in conditions of uncertainty. By holding that despite uncertainty, including scientific and medical uncertainty, it is unprincipled to manipulate the process of proving the requisite legal facts to establish liability, Lord Hoffmann implicitly endorses the significance of procedural legitimacy. Understanding the loss of chance argument as a method of avoiding the requirement to establish causation to the requisite balance of probabilities standard, Lord Hoffmann, along with the majority of the House of Lords, rejects its applicability in British medical law.

The judicial reasoning above asserts that the existing mechanism of accommodating factual uncertainty should be adhered to in order to resolve factual uncertainty, and that the outcomes that result are legitimate.⁹³ Doctors are, for the purposes of an action in tort, like any other party defending against a legal claim in negligence. The introduction of loss of chance as a response to perceived injustice in the medical misdiagnosis context amounts to applying altogether different substantive and procedural legal principles to defendants who are medical service providers.

“Losing a Chance to Survive: An Examination of the Loss of Chance Doctrine within the Context of A Wrongful Death Action” (2014) 9 *Journal of Health and Biomedical Law* 521 at 529.

⁹³ This judicial sentiment resonates in Ripstein’s comments that, “the task of the court ... is not to accurately discover or approximate a result that can be characterized without any reference to its procedures; its role instead is to resolve the dispute on its merits, consistent with the rights of both the plaintiff and the defendant. This is what it is for a dispute to be resolved in accordance with the law.” (Ripstein, *Private Wrongs*, *supra* note 73 at 275).

The call for consistent application of legal principles is, fundamentally, an expression of the adage of the formal aspect of adjudicative justice: relevant legal principles should be duly applied, consistently. That is the backbone of procedural legitimacy, which demands consistent application of legal fact-finding rules in order to translate factual uncertainty into certain, legitimate judicial outcomes. This may be objected to as an over-commitment to consistency or formalism, resulting in preventing what would otherwise be a desirable outcome. Below I offer a response to that concern by outlining how consistency maintains the coherence of the adjudicative system, and my views as to the indispensable value that it infuses into an adjudicative system and its outcomes.

ii. Why Consistency Matters

Most simply, consistency matters because it ensures that litigants are not treated arbitrarily.⁹⁴ But a fuller explanation of this idea requires a display of how the formal aspects of procedural legitimacy (that is, consistent application of legal principles, including fact-finding principles) work in conjunction with the substantive justifications that give rise to legal principles to maintain a coherent and acceptable adjudicative outcome. I begin that explanation below by outlining a number of examples of the incoherence that would result from introducing loss of chance in the medical negligence context, in spite of various

⁹⁴ See, for example, Lawrence Friedman, “Common Law Decision-Making, Constitutional Shadows, and the Value of Consistency: The Jurisprudence of William F. Batchelder,” (2014) 12 UNH L Rev 1 at 26: “Consistency provides some assurance that particular outcomes of judicial lawmaking will be predicable and not arbitrary,” [Friedman, “Value of Consistency”]. For further discourse on the value of consistency, see for example: John E Coons, “Consistency” (1987) 75 Cal L Rev 59; Christopher Peters, “Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis” (1996) 105(8) The Yale L J 2031.

attempts to introduce a principle or interpretation that would justify its applicability there. I then explain, in more general terms, how unprincipled inconsistency results in unacceptable incoherence.

Consider plaintiff A who can establish a 70% likelihood that a doctor's negligence caused her injury. The doctor would be found liable to the plaintiff, and the plaintiff would receive 100% compensation for the injury. Plaintiff B, however, can only establish a 30% likelihood that the doctor's negligence caused her injury. In her case, the doctor could not be found liable. If the loss of chance doctrine were applicable, however, Plaintiff B may still receive some partial compensation if she can establish that the doctor's negligence caused a diminished chance of a medically better outcome. This is an appealing outcome because although Plaintiff B may not receive full compensation for the injury she suffers, she at least gets some compensation to account for her lost chance of a medically better outcome.

But such an outcome is harder to justify when the inherent inconsistencies that result from it are made clear by comparing a 'loss of chance' plaintiff to plaintiffs who are also injured, and who also face causal indeterminacy hurdles, but for whom loss of chance would not be available. First, compare Plaintiff A to Plaintiff B above. If chances of medically better outcomes are to be compensable, then how can it be justified to award Plaintiff A full compensation for the injury? After all, even Plaintiff A could only establish that the doctor's negligence increased the chance of a medically worse outcome - just like Plaintiff B.⁹⁵

⁹⁵ Weinrib refers to this as the problem of 'reciprocity' throughout "Causal Indeterminacy," *supra* note 57.

One response could be to simply appreciate this possibility, and agree that if loss of chance is accepted for Plaintiff B, then it must also be accepted for Plaintiff A. In other words, both the plaintiffs and defendants should have the benefit of the loss of chance doctrine.⁹⁶ If this proposal were accepted, there would be no incongruity as between Plaintiff A and B. It would also mean, though, that tortious injury claims that arise out of medical negligence would be risk-compensation based, rather than injury-compensation based, without any clear justification for why medical negligence should be treated differently from other types of negligence leading to injury.⁹⁷ This leads to the next comparison.

Compare Plaintiff B to Plaintiff C who is injured by a product that was negligently manufactured. Just like Plaintiff B, Plaintiff C can establish a 30% likelihood that the negligent manufacturing caused her injury. If loss of chance were accepted in the medical negligence context, then Plaintiff B could characterize her claim as a lost chance of avoiding an adverse medical outcome, and could receive some compensation for that lost chance. But Plaintiff C could not, even though she may be able to establish some chance that her injury would have been avoided absent the manufacturer's defect. This inconsistency is difficult to justify, because again, if the legal principle is that increasing a chance of an injury is compensable, then Plaintiff C should be able to seek compensation despite being unable to establish that the manufacturer caused her injury on a balance of probabilities. And if

⁹⁶ For example, the Saskatchewan Court of Appeal relied on this reasoning in *Hagblom v Henderson*, *supra* note 55, in an action against a lawyer for malpractice.

⁹⁷ See Part 2(c)(ii).

loss of chance were available broadly, then the general tort law framework of full compensation for negligently inflicted injuries would break down.⁹⁸

Agreeing that a right of a chance of avoiding adverse outcomes “sits uncomfortably within the framework of negligence law taken as a whole,” Ernest Weinrib has recently proposed a new conceptualization that he suggests would give coherence to the loss of chance doctrine within the tort law scheme.⁹⁹ First, Weinrib explains that the law recognizes a plaintiff’s right to be treated in a particular manner, when she has relied on a defendant’s undertaking to act in that way. If the defendant fails to act in that way, the plaintiff’s right has been breached.¹⁰⁰ Any damage arising out of that breach, Weinrib suggests, should be compensable.¹⁰¹ A lost chance of a better outcome, while not an independent right, may be a compensable damage if it arises out of the defendant’s breach.¹⁰²

⁹⁸ See Part 2(c)(i): *Understanding the Large-Scale Impact of Loss of Chance*.

⁹⁹ Weinrib, “Causal Uncertainty,” *supra* note 57 at 26.

¹⁰⁰ Weinrib explains in “Causal Uncertainty,” *supra* note 57 at 27 that this falls into a category of rights “that arise in and through persons’ interactions. Such rights are *in personam*: they generally hold only as between the parties whose interaction created them. Paradigmatic of this kind of right is the right to contractual performance, which exists only through the interaction between promisor and promisee.” Another example of a reliance-based right is encompassed in the tort of negligent misrepresentation. Under that doctrine, a special relationship exists when a person relies on representations made by a specialist. If the specialist’s statement turns out to be negligent, then any losses resulting from reliance on that statement are recoverable.

¹⁰¹ *Ibid* at 28: “the right arises through the defendant’s express or implied invitation to rely for a particular purpose, and the plaintiff’s accepting this invitation as reliable and acting on it for the purpose for which it was made....[A] defendant can be held liable for loss caused when this performance is inadequate. The loss caused by the detrimental reliance constitutes the injury to the plaintiff’s right to have the defendant act in a particular way.”

¹⁰² *Ibid* at 26-30.

The medical misdiagnosis situation that invokes the loss of chance argument can then be considered a subset of this right by characterizing the doctor and patient relationship as follows: a patient relies on a doctor's undertaking to provide an increased chance of survival or recovery (whatever that chance may be, even if it is less than 50%). She has a right to be treated in accordance with that undertaking. If the doctor acts negligently, the plaintiff's right is breached.¹⁰³ Weinrib summarizes his proposal as follows:¹⁰⁴

To sum up: the loss of the chance is compensable not because the plaintiff has an independent right to the chance, as they have to their physical integrity. Instead, the right is to the defendant's non-negligent conduct in the execution of an undertaking on which the plaintiff, at the defendant's invitation, is relying. The purpose of the undertaking is to allow the plaintiff to have a chance, whatever it is, to survive or recover from the illness. The plaintiff has a right to conduct consistent with that purpose. The loss of the chance is the specification of the injury to this right of the plaintiff. The probability of the chance's materialising is the measure of the defendant's compensation for its loss.

Weinrib suggests that his proposal allows for a principled reason to compensate a lost chance in the misdiagnosis situation, without causing tension with the general tort law framework because, as I explain further below, it relieves the loss of chance from the type of

¹⁰³ *Ibid.* For example, at 26: "in the misdiagnosis situation the plaintiff has a right to a course of conduct consisting in the defendant's provision of competent medical care. The chance of recovering from the medical condition is an incident of this right. The loss of the chance is then a specification of how this right was injured when the defendant's conduct did not conform to it; the loss of chance thereby also becomes a possible measure of the compensation to which this injury entitles the plaintiff."

¹⁰⁴ *Ibid* at 29, emphasis added.

incongruences that are noted in the above examples. But in my understanding, adopting Weinrib's presentation of the loss of chance doctrine is problematic, and brings incongruences of its own.

First, under Weinrib's proposal, the right to compensation crystallizes at the moment that a plaintiff is treated contrary to the defendant's undertaking to treat her in a particular way. That constitutes a shift from the tort law right to compensation for a negligently inflicted injury to a right to be treated in accordance with a duty of care, because the right crystallizes at the moment that the duty of care is breached – the losses that result are only *incidents* of that breach. This may be a defensible approach to injury compensation, but it is very different from the existing tort law scheme in which liability does not crystallize until it can be shown that the negligence caused some loss.¹⁰⁵ Moreover, it is not obvious how to manage the scope of the right that Weinrib points to without causing a widespread change in tort liability, because it is not clear which relationships could be characterized as involving the requisite undertaking to act in a particular way, and which would not. For instance, could the requisite implied undertaking exist between a manufacturer and a purchaser? A client and a plumber? A driver and fellow drivers? If so, then should liability crystallize upon negligence, giving rise to potential loss of chance damages?

Weinrib's proposal could be read as having an in-built limitation on the scope of its availability, if it is understood that loss of chance damages are only available when the defendant specifically undertakes to improve a plaintiff's chances of some desirable

¹⁰⁵ See Part 2(c)(i).

outcome. Even if that were an appropriate limit, it does not properly characterize the nature of the service that doctors may provide to patients. A relationship that centers on an undertaking to improve chances of a better medical outcome may exist when a doctor is treating a patient for some condition, but it may not exist when a doctor is providing diagnostic or investigative procedures. At the diagnostic stage, there is no undertaking to provide treatment. Suppose, for instance, that a patient is sent to a specialist for a chest x-ray. That specialist negligently misreads the x-ray, and assures the patient's physician that she has a benign condition that requires no treatment. As a result of the misdiagnosis, the specialist has in fact *not* undertaken to improve the chances of survival at all. A right that is contingent on an undertaking to improve chances of survival would not crystallize in this situation.

Accordingly, if one patient was treated negligently while receiving treatment (so the requisite undertaking of improving chances of recovery are cognizable), and suffers a lost chance, she may be compensated for that lost chance, but a patient who suffers a lost chance of survival due to a negligent misdiagnosis may not. The result is significantly different legal outcomes for patients who were both treated negligently by medical professionals, who suffered comparable losses, but are subject to very different legal outcomes.

The next issue with Weinrib's proposal is his suggestion that plaintiffs who are able to show, on a balance of probabilities, that a detrimental outcome resulted from the doctor's

negligence would be able to receive full compensation for that outcome.¹⁰⁶ This gives rise to the discrepancy described between Plaintiff A and Plaintiff B, above. Weinrib suggests that his proposal can reconcile Plaintiff A receiving compensation only for the lost chance, while Plaintiff B receives compensation for the adverse outcome itself, because under his proposal liability is not contingent on the lost chance itself, but on the breach of the duty of care owed to the plaintiff. Since Plaintiff B can prove, on the balance of probabilities, that the loss resulting from her detrimental reliance on the doctor's undertaking indeed was her ultimate demise, she is entitled to compensation for that outcome. Plaintiff A, on the other hand, can only show that the lost chance resulted from her detrimental reliance on the doctor's undertaking, so she is only entitled to compensation for that lost chance.

These two outcomes remain irreconcilable, even in Weinrib's characterization. If liability is crystalized on the basis of the right to be treated in a manner that accords with an undertaking to improve chances of survival, then both Plaintiffs have suffered in exactly the same way: both detrimentally relied on the doctor's treatment, both were treated negligently, and both suffered the same reduction in chance as a result of that reliance. It seems unjustifiable to tolerate such significantly different outcomes for both plaintiffs.

¹⁰⁶ *Ibid* at 29: "loss of chance is not general to all causal uncertainties, but is solely the consequence of the detrimental reliance induced by the defendant. Accordingly, there is no basis for giving the defendant the reciprocal benefit of reducing full liability to proportional liability when the plaintiff can prove factual causation on the balance of probabilities. Moreover, even in the circumstances of detrimental reliance, the plaintiff is not restricted to a recovery for the lost chance; if an injury to their physical integrity is the provable consequence of the reliance, the plaintiff can recover fully for that injury."

Next, Weinrib suggests that his re-characterization does not imply that compensation for lost chances would be available even absent a manifest injury. In his proposal, he explains, “liability is the result not merely of the loss of the chance, but also of the plaintiff’s detrimental reliance on the defendant’s undertaking. In the absence of the adverse outcome, the plaintiff has not suffered the detriment that a proper diagnosis might have obviated.”¹⁰⁷ The first problem with this is visible through the following example: A doctor treats Plaintiff D negligently and reduces her chance of survival from 30% to 10%. Suppose that Plaintiff D beats the odds and survives, despite the reduction in the chance of survival. Under Weinrib’s proposal, Plaintiff D should not be compensated, because she cannot point to any detriment resulting from her reliance on the doctor’s undertaking to treat her non-negligently.

This may seem promising on the surface, but it gives rise to an internal tension in Weinrib’s proposal: he suggests that the plaintiff’s rights rest on the doctor’s undertaking to provide a better chance of outcome.¹⁰⁸ If so, then Plaintiff D *does* suffer a detriment – she suffers the loss of a chance of a better outcome. Holding that she cannot recover against a negligent doctor would mean, under Weinrib’s proposal, that she has had a legal right breached, she has suffered the detriment that corresponds with the breached right, but has no legal recourse until she dies. The result is a necessary incongruence between the right that is protected and its administration: the right that Weinrib articulates is independent of any final outcome – it is a right to treatment consistent with improving chances; at the same

¹⁰⁷ *Ibid* at 29.

¹⁰⁸ *Ibid*.

time, administering that right depends on the manifestation of the final outcome of that chance.

Moreover, Weinrib's proposal does not address the fact that any claim where the causal link between the ultimate adverse outcome and the negligence cannot be established can simply be reframed as a claim for the loss of chance. Accordingly, compensability of lost chances can be characterized as an alternative mechanism for handling causal uncertainty. This leads back to the question of why this mechanism of accommodating causal uncertainty should not be available in all situations of negligently inflicted injuries? Suppose, for instance, that a plaintiff suffers a heart attack. She has a 30% chance of survival. Upon negligent treatment by her doctor, her chances of survival are reduced to 10% and she ultimately dies. Her right to non-negligent treatment is breached. She cannot establish that the ultimate death resulted from the doctor's negligence, but she can recover for the reduction in her chances of survival. But suppose her doctor treated her appropriately, and a negligent driver delayed her arrival at a hospital, resulting in the same reduction in her chance of survival. Under Weinrib's proposal, no compensation would be available to her in the second situation because she cannot establish a casual link between the driver's negligence and her death. Both situations involve negligence, reduction in chance, injury and casual uncertainty, so the difference in outcomes seems difficult to justify.

Each of the scenarios of Plaintiffs A, B, C, and D contain issues of factual uncertainty around causation of a physical injury. The loss of chance doctrine effectively enables that factual uncertainty to be accommodated in different ways for each plaintiff, resulting in outcomes

that are incoherent with one another. They are incoherent in the sense that one outcome cannot be justified compared with the others.

The formal requirement of principled consistency that is inherent in the procedural legitimacy proposal ensures that the outcomes that are achieved through the adjudicative system can be *coherently justified*. Incoherent justification ultimately amounts to arbitrary treatment. Below, I explain this further by demonstrating the interplay between consistency and coherent justification of adjudicative outcomes. Here, I draw on Ernest Weinrib's *Idea of Private Law*, which contains, for me, the most helpful exposition and defense of formal values in Canadian tort law scholarship.¹⁰⁹ His commitment to coherence in tort law provides a springboard for my claim that legitimate adjudication requires consistency and coherence in its accommodation of factual uncertainty.

The first thing to keep in mind is that legal principles have in-built justifications. The standards of proof in Canadian adjudication, for instance, are justified on the basis of what our society considers a fair allocation of the risk of error. As noted in Chapter Four, in criminal law the 'beyond a reasonable doubt' standard applies, because the risk of error should favour the accused; in the civil context, the balance of probabilities applies, because the risk of error should be fairly balanced, with a slight favour towards the defendant.¹¹⁰

¹⁰⁹ Ernest Weinrib, *Idea of Private Law* (Oxford: Oxford University Press, 2012) [Weinrib, *Idea of Private Law*].

¹¹⁰ Stein, *Foundations of Evidence Law* (Oxford, New York: Oxford University Press, 2005) at 2 [Stein, *Foundations of Evidence Law*]; and see also Larry Laudan, *Truth, Error and Criminal Law – An Essay in Legal Epistemology* (Cambridge: Cambridge University Press, 2006) at 129.

Importantly, this is not a normative claim. Other societies may come to different (and still justifiable) conclusions on what constitutes a fair error distribution.¹¹¹ The point is that there may be a variety of justifiable legal principles, and the justification is embedded in the legal principles that exist.¹¹²

When the legal principles are applied consistently, the justifications that exist within those principles are applied dependably as well. Through that consistency, the adjudicative system produces outcomes that are coherently justified.¹¹³ That coherence would be lost if judges applied laws differently in order to procure outcomes that appear desirable based on extraneous justifications.¹¹⁴ Habermas makes this point as follows:¹¹⁵

¹¹¹ My normative claims in respect of what substantive elements are necessary for justifiable fact-finding procedures are presented in Chapter Four. My point here is that justifiable fact-finding procedures may differ from society to society, or even between areas of law, as noted above.

¹¹² As Stein notes in *Foundations to Evidence Law*, *supra* note 110 at 12, “Moral considerations that inform risk-allocating decisions belong to the domain of politics.”

¹¹³ Weinrib makes this point in *Idea of Private Law*, *supra* note 109 at 32: “In the law’s self-understanding, private law is a justificatory enterprise. The relationship between the parties is not merely an inert datum of positive law, but an expression of – or at least an attempt to express – justified terms of interaction. Coherence must be understood in the light of this justificatory dimension. For a private law relationship to be coherent, the consideration that justifies any feature of that relationship must adhere with the considerations that justify every other feature of it. Coherence is the interlocking into a single integrated justification of all the justificatory considerations that pertain to a juridical relationship.” An analogous concept of coherent justification of fact-finding rules was presented in my discussion of Dworkin’s procedural right of coherence in Chapter 3, Part 2(a)(iii).]

¹¹⁴ Weinrib expresses this point precisely as follows: “The necessity for coherence arises from the nature of justification. A justification justifies: it has normative authority with respect o the material to which it applies. The point of adducing a justification is to allow that authority to govern whatever falls within its scope. Thus if a justification is to function as a justification, it must be permitted, as it were, to expand into the space that it naturally

The judiciary cannot make whatever use it likes of the reasons bundled up in legal norms; rather, these same reasons play a different role when, with a view of the coherence of the legal system as a whole, one employs them in a legal discourse of application aimed at consistent decision-making.

Applying the loss of chance doctrine could seem justified on the basis that it gives some compensation to a person who has been treated negligently. But that outcome and its justification does not cohere with the other outcomes, which are governed by tort law principles requiring that the causal link between negligence and the injury is required for tort liability. Applying legal principles inconsistently in order to achieve outcomes that seem more desirable opens a gate for arbitrary, illegitimate exercise of legal authority. Disabling that is the contribution of the formalist aspect of the procedural legitimacy proposal: it demands consistency and, in so demanding, it furnishes the adjudicative system with the fairness that inheres in coherence.

The value of coherence through consistency may be further elucidated in an analogous context. Suppose a university is endowed with some funds and must decide how to distribute them through scholarships. The awards can be justified on a number of different

fills. Consequently, a justification sets its own limit. *For an extrinsic factor to cut the justification short is normatively arbitrary.* [Weinrib, *Idea of Private Law*, *supra* note 109 at 39, emphasis added.]

¹¹⁵ Jurgen Habermas, *Between Facts and Norms: Contributions to Discourse Theory of Law and Democracy* (Cambridge, Massachusetts: MIT Press, 1996) at 236. In relation to Habermas's idea in the quotation above, Klaus Gunther explains that, "The judge's range of interpretive reasons is limited because she is bound by those reasons which are chosen by legislation." Klaus Gunther, "Legal Adjudication and Democracy: Some Remarks on Dworkin and Habermas" (1995) 3(1) *Eur J Phil* 36 at 47.

bases, such as academic merit, financial need, or in furtherance of some societal welfare goal. The university will have to choose the basis on which to justify an award. The chosen justification will then be embedded into the policy that the university settles on in order to select recipients of the award. Suppose the university decides that this particular scholarship will be awarded solely on the basis of academic achievement. Once the award policy is decided, the justification (i.e. academic merit) is embedded into that policy. That policy must be applied consistently. Even though other justifications may exist to award the scholarship to different individuals (like social welfare concerns, or financial need) awarding this particular scholarship in furtherance of those justifications would be improper (even if it may be laudable) once the policy is decided. It would be improper to give an individual that scholarship justified on the basis of financial need, because financial need is not the justification that underpins that scholarship. Therefore, even though it may seem to be a good and even justified outcome, the decision to make that award would be incoherent and arbitrary, and therefore illegitimate.

In the same way, accommodating factual uncertainty by resorting to the loss of chance doctrine may appear desirable because it would afford an injured individual some compensation, but when viewed from a procedural legitimacy perspective, such piecemeal justification is inappropriate. It results from incoherent treatment of litigants in tortious injury actions and causes outcomes that cannot be coherently justified compared with one another. The concept that a substantively desirable outcome is not necessarily synonymous with legitimate outcome is one of the foundational ideas in the procedural legitimacy proposal, and is its most important cautionary cue.

Part 3. Outstanding Questions

Three final questions arise from my discussion of loss of chance: First, how does the requirement for consistent application of legal principles account for incremental changes in the common law? Second, does my analysis here over-commit to the traditional tort law principles only on the basis that they are the existing principles? And third, my discussion so far has rested on the justifiability of current fact-finding procedures – since they are justified, their consistent application is necessary. But is there an alternative mechanism of fact-finding that can also be justified and that may resolve the tension of uncertainty that the loss of chance discourse highlights? I address these questions in sequence below.

First, the demand for consistent application of existing legal principles should not be taken to mean that legal principles cannot evolve. On the contrary, the common law system has in-built opportunity for re-evaluation, but adopting a procedural legitimacy based jurisprudential orientation makes clear that the changes that are offered should be coherently justifiable. As Weinrib explains:

to understand private law from the inside does not entail the acceptance of the entire corpus of holdings as if they were facts of nature. Internal to the process of law is the incremental transformation or reinterpretation or even the repudiation of specific decisions so as to make them conform to a wider pattern of coherence.¹¹⁶

¹¹⁶ Weinrib, *Idea of Private Law*, *supra* note 109 at 13. Later, at 15, Weinrib notes: “as a self understanding, private law embodies a dynamic process. The law’s aggregate of specific determinations does not permanently freeze the intelligibility of law to their contours. Being an exhibition of human intelligence rather than of divine omniscience, private law includes a self-critical dimension that manifests itself in overrulings, dissents, juristic commentary, and other indicia of controversy. Moreover, because private law develops

The Supreme Court of Canada's discussion of the material contribution test for causation in *Clements* can be understood as an example of an incremental change to the causation analysis that displays the flexibility of the common law, while maintaining coherence with tort law principles. As explained earlier, in *Clements*, the Supreme Court of Canada was tasked with identifying when the material contribution test for causation should be available. First, the Court clarified that situations of factual indeterminacy, including medical or scientific uncertainty, are not justifiable reasons to depart from the usual 'but for' test, to be proven on a balance of probabilities standard. The Court then advised that the material contribution test is triggered in situations of logistical proof problems, which arise when multiple tortfeasors all act negligently, and the negligence of one or more has caused the plaintiff's injury, but it is impossible to show whose negligence in particular caused the injury. The classic example of this arose in *Cook v Lewis* decision, where two hunters fired negligently, one of the shots injured the plaintiff, but the plaintiff had no way of showing, on a balance of probabilities, which hunter's shot ultimately caused the damage.¹¹⁷

It may be suggested that the Supreme Court in *Clements* effectively endorsed a relaxation of standard of proof required to establish causation for individual tortfeasors who acted negligently along with others. This interpretation might imply that the Court has allowed

over time and in the context of contingent situations, subsequent occurrences or the thinking of subsequent jurists may lead to fresh nuances in doctrine or to a reevaluation of the coherence or plausibility of previously settled law."

¹¹⁷ *Cook v Lewis* 1951 SCR 830.

an alteration to the procedures of legal fact-finding and tort law principles because it admits of the possibility of holding someone liable when but-for causation has not, on a balance of probabilities, been proven against that person. Why, then, should the multiple tortfeasor analysis be acceptable despite its novelty, while the loss of chance doctrine should be rejected on the basis of its novelty?

In my interpretation, the multiple tortfeasor situation that invokes the material contribution test for causation coheres with tort law principles while accounting for a novel situation in a way that loss of chance does not. First, in the multiple tortfeasors context, the requirement to prove, on a balance of probabilities, that but for a tortious activity, the plaintiff's injury would not have occurred, remains present.¹¹⁸ Only if the causal connection between negligence and injury can be established does the material contribution test apply in order to find the individual defendants liable.¹¹⁹ This approach accounts for the problem that a plaintiff would have no legal recourse in a multiple tortfeasor situation, given that each negligent defendant can point a finger at the other to avoid liability.¹²⁰ In the loss of chance situation, as explained above, the causal connection between any negligence and the injury sustained cannot be established due to evidentiary uncertainty. As a result of that

¹¹⁸ *Clements, supra* note 24 at para 39.

¹¹⁹ *Ibid* at para 40.

¹²⁰ See Weinrib, "Causal Uncertainty," *supra* note 57 at 2-14 for a thoughtful discussion endorsing the majority reasoning in *Cook v Lewis, supra* note 117. At 8 Weinrib offers the argument that introducing the material contribution test in this context is justified because a plaintiff has "not only a substantive right to bodily integrity but also a remedial right to establish liability for wrongful injury." That remedial right would be eroded if the but-for causation analysis were strictly adhered to in the multiple tortfeasor context. Notably, Weinrib also holds that "if one of the possible causes of the injury is non-tortious, invocation of the remedial right is out of place."

uncertainty, the fact that a tortious injury occurred at all cannot be established.¹²¹ Introduction of the loss of chance doctrine would erode the need for a tortious injury. As explained above, that cannot cohere in the tort law scheme.

The availability of the material contribution test constitutes a novel expression of tort law principles arising out of rare factual circumstances. So long as the availability of the material contribution test is applied consistently in situations of multiple tortfeasors, the procedural legitimacy perspective would not necessarily require its rejection. The procedural legitimacy proposal does not demand rigidity, nor does it prevent response to novel situations; it demands that those responses occur coherently. As Lawrence Friedman notes, echoing the above comments on the value of consistency in a common law context:

The hope is that, when faced with the opportunity to create or reject precedent, the court will show due respect for the value of consistency – for the value that inheres in a predicable and logical approach to the interpretation, application, articulation, and extrapolation of legal rules. Consistency suggests that judicial decision-making is based on principle rather than passion, and its presence or absence accordingly contributes

¹²¹ Weinrib's expression in "Causal Uncertainty," *supra* note 57 at 5 of the difference between these situations is helpful: "...there is a crucial difference between uncertainty as between negligent actors [i.e. the multiple tortfeasor situation] and uncertainty as between negligent and innocent causation [i.e. the loss of chance situation]. In the first situation the defendants have all acted wrongfully toward the plaintiff under circumstances where the separate effects of their negligence cannot be disentangled. The problem here centres on the consequence of their wrongful conduct and on the kind of injury that each has thereby caused the plaintiff. [In the latter situation], the possibility exists that the injured plaintiff was not the victim of a tort at all. The problem in these situations centres on the connection, if any, between the defendant's wrongful action and the supposedly innocent causal factors that are in play."

to the public's view of the legitimacy of particular instances of judicial lawmaking.¹²²

This leads to the second (and related) point of clarification: holding that legal principles emerge embedded with some substantive justification does not imply that alternative legal principles are necessarily unjustifiable, or that the substantive justification that is chosen is invariably the right one. Again, Weinrib has captured this general point:

Legal formalism is not a political position. In opposing ideas like loss-spreading through tort law, the formalist is not a libertarian who stands against the use of state machinery to transfer wealth from those whose need for it is more pressing. Nor is the formalist's insistence on the possibility of a coherent tort law an argument that tort law should be preferred to a general social insurance scheme that embodies loss-spreading or some other compensatory principle. What is paramount to the formalist is not the substantive desirability of any legal arrangement, but the coherence of the justificatory considerations that support its component features.¹²³

These ideas transfer into the misdiagnosis and loss of chance context. First, liability for medical negligence is governed in common law Canada through tort law principles, and in Quebec through the Civil Code. The viability of tort law as the means of regulating medical negligence liability can be, and has been critiqued on a number of grounds, including the existence of financial and practical barriers that favour defendant doctors and limit access for maltreated patients to adjudicative outcomes. These are, of course, very significant

¹²² Friedman, "Value of Consistency" *supra* note 94 at 2.

¹²³ Weinrib, *Idea of Private Law*, *supra* note 109 at 46.

concerns.¹²⁴ But the fact that the existing system of tort adjudication may not be ideal in a medical context is not relevant to my rejection of the loss of chance doctrine on the basis of its incoherence with tort law principles. Nor does it necessarily imply that those tort principles are the only justifiable method of administering medical injury claims. The argument presented here has no bearing on suggestions that medical negligence would be better regulated through, for instance, a no-fault scheme.¹²⁵

The argument that I present in this chapter is that the loss of chance doctrine is incoherent *within* tort law where injuries occurring as a result of medical negligence are currently regulated. In parallel to Weinrib's comments above, my concerns are independent from any claim that the tort law system and tort law principles are the paramount forum and method for regulating medical negligence.

So far, I have endorsed the rejection of the loss of chance doctrine on the basis that it compromises the consistent application of our methods of accommodating factual uncertainty, yielding incoherent results. I have already addressed the substantive justifiability of our fact-finding processes in Chapter Four, but it is fitting here to address the question of whether the traditional approach to proof of causation yields fair results when a negligently treated plaintiff whose pre-existing risk of an adverse outcome is more than 50% cannot recover anything because liability is not established, while another

¹²⁴ See Robert S. Prichard, *Liability and Compensation in Health Care* (Toronto: University of Toronto Press, 1990); See also Gerald Robertson "A View of The Future: Emerging Developments in Health Care Liability" (2008) Health Law Journal Special Edition..

¹²⁵ Elaine Gibson, "Is It Time to Adopt a No-Fault Scheme To Compensate Injured Patients?" (2016) Working Paper Series No. 5, Ottawa L Rev.

negligently treated plaintiff, whose pre-existing risk of adverse outcome is less than 50%, recovers fully, because liability can be established.¹²⁶ This scenario arises out of the balance of probabilities and all or nothing approach to legal fact-finding. The first plaintiff cannot establish causation so recovery must be denied, while the second recovers fully because she can prove causation.¹²⁷

Some proponents of loss of chance have interpreted this circumstance as arbitrary and unfair with reference to the House of Lords decision in *Hotson* noted above.¹²⁸ In that case, the injured plaintiff had a 75% chance of adverse outcome prior to any negligence. Consequently, he was denied recovery, because he was unable to establish on a balance of probabilities that 'but for' the doctor's negligence, he would have been injury-free. Rather, he was 'doomed' to be injured, as far as the law was concerned, with or without negligence. Stapleton argues that ignoring the 25% chance that the plaintiff was *not* doomed amounts to unfairness to the plaintiff.¹²⁹

¹²⁶ Jansen poses this question as: "can it be right that a victim with a less than 50 per cent chance of regaining health is always denied a legal remedy despite being treated negligently?" at 278 in Jansen, "The Idea of a Lost Chance," *supra* note 57. See also King, "Causation and Valuation" *supra* note 57 at 1372.

¹²⁷ Alice Ferot's discussion entitled, "The Arbitrary Distinction Between More than Even Chances and Less than Even Chances of a Favorable Outcome" in Ferot, "Theory of Loss of Chance" *supra* note 65 at 619-621.

¹²⁸ *Hotson*, *supra* note 45. And for example, Stapleton, "Gist II", *supra* note 57; Chris Miller, "Loss of Chance in Personal Injury: A Review of Recent Developments" (2006) 5 *Law, Probability and Risk* 63 at 64-68; Marc Stauch, "Causation, Risk, and Loss of Chance in Medical Negligence" (1997) 17 *Oxford J Legal Studies* 205 generally and at 218-222 for specific comments related to *Hotson*; Walter Scott, "Causation in Medico-Legal Practice: A Doctor's Approach to the 'Lost Opportunity' Cases" (1992) 55 *Modern Law Review* 521.

¹²⁹ Stapleton "Gist II," *supra* note 57 at 393.

This critique, I suggest, must be interpreted as a critique of the balance of probabilities and all or nothing process of fact-finding: if it is unfair to treat the 75% chance that the inherent condition caused the injury as a legal certainty, and thereby ignore the 25% chance that the injury was contingent on the negligence, then balance of probabilities proof must be considered unfair altogether, because that method of fact-finding *always* requires courts to ignore possibilities (of less than 50% likelihood) that the facts that are found for legal determinations may not correspond to factual reality.¹³⁰ If the probabilities in *Hotson* were inverted, for instance, if there was a 75% chance that injury would not have occurred but for the doctor's negligence, then liability would have been established despite the 25% chance that the injury would have occurred irrespective of the doctor's negligence. That is, the courts would 'ignore' the 25% chance that the doctor should not be liable to the plaintiff. All legally relevant facts, including causation, are decided on the 51% standard of proof, which allows courts to ignore, in a sense, possibilities of up to 49% that the fact that was found for legal purposes was not a fact in reality. As argued in Chapter Four, this is a necessary method of translating factual uncertainty into legal certainty in order to maintain a manageable and efficient adjudicative system despite conditions of factual uncertainty.

¹³⁰ I acknowledge that it is most often causal indeterminacy that provokes perceptions of unfairness, as opposed to factual uncertainty over any other element of a cause of action. The tendency that causal indeterminacy, in particular, has to invoke such sentiments could suggest that there is a substantive uniqueness about causation as a legal fact compared with the other factual elements. Yet my comments above can be seen to imply that there is no significant difference between causation and any other factual element. Whether or not there is any substantive difference between causation and the other factual elements, however, the method of proving causation as a legal fact is no different than the method of establishing any other factual element as a legal fact. In my interpretation, the critique of the causal analysis that leads to the loss of chance argument is situated within the *process* of proving causation, which is the same process of proof as all the other factual elements. Within this procedural context, I maintain that there is no significant difference between causation and the other facts that must be established for a finding of liability.

Applying the balance of probabilities standard of proof enabled the House of Lords in *Hotson* to find that the plaintiff's accident caused the injury for the purpose of the legal determination, *even though* there was a 25% possibility that the injury in fact would not have manifested absent the doctor's negligence. This constitutes a correct application of the balance of probabilities process of fact-finding in order to resolve a legal dispute in conditions of factual uncertainty. The balance of probabilities allows the legal determination to be made *despite* uncertainty and *despite* chances of inaccuracy, and distributes the inevitable risk of erroneous fact-finding. Suggesting that this constitutes improper treatment in the medical negligence context is, I suggest, misplaced.

Still, the usual approach to legal fact-finding where a fact is proven to a standardized likelihood and then treated as if it were certainly true, can seem like an attempt to create an illusion of certainty in adjudication.¹³¹ As an alternative, one could suggest chance-based fact-finding where, rather than translating uncertain facts into legal certainties, the chance or likelihood of a fact could remain legally relevant, leading to proportionality instead of all or nothing outcomes throughout the adjudicative process.¹³²

¹³¹ Consider Coons's comment in John Coons, "Approaches to Court Imposed Compromise – The Uses of Doubt and Reason," (1963-1964) 58 Nw UL Rev 750 [Coons, "Court Imposed Compromise"] at 755. : "As with other men, uncertainty goes down hard with lawyers. Unable wholly to eradicate it, they are under an abiding temptation to disguise it. Where it persists, they have learned to sweep it under the rug with a grand gesture...Most splendid of the rules-and sheltered by a whole panoply of major premises-is winner-take-all." Coons argues for a proportional liability approach where there is one determinative fact at issue, and its chance is evenly balanced. In this context, he suggests that the 'winner-take-all' approach should 'trouble the conscience.' Coons does not advocate an abandonment of the winner-take-all approach altogether, but his comments echo the sentiment of unfairness that can accompany the all or nothing approach.

¹³² Note: This type of proportion-based reasoning is sometimes referred to as 'simple

The foundational problem with chance-based fact-finding is that it constitutes much more than a procedural change. Rather, this approach embodies a manipulation of the substantive principles that liability for negligent infliction of injury are based on. As I noted earlier, the principles of liability dictate that if a defendant owes a duty of care to the plaintiff and breaches his standard of care causing an injury to the plaintiff, then the defendant is liable to compensate the plaintiff. The principles of liability for negligence are also the facts that must be proven at trial in order for liability to attach. Although the factual elements must be proven to be more than 50% likely, the actual likelihood of the fact is not *substantively* relevant. Depending on whether the 50% threshold likelihood is established, the fact is taken as proven or not proven, and the liability determination reflects only whether the fact is proven or not, not the extent to which it was proven or not proven. A dramatic change would occur if chance-based fact-finding were introduced for finding facts in the liability context. Under that approach, the likelihood of the fact *must* bear impact on the substantive determination at stake. The actual proportionality of the fact must remain relevant to, and be reflected in the ultimate legal outcome.

Paralleling my earlier comments regarding chances as injuries, if the chance of a factual element is substantively relevant, it follows that the substantive questions for a liability determination would become: was there a *chance* of a duty, a *chance* of a breach, and a *chance* that the defendant caused the injury? If these are the substantive questions at stake in a liability determination, then by implication, individuals would have an enforceable right to be free from *possible* breaches of *possible* duties of care that have *some likelihood of*

probability,' and its use has been endorsed in the context of quantifying damages. This is the subject of my discussion in Chapter 6.

causing *some potential* injury. Not only is this contrary to established principles of what can be actionable in law. Such an approach would obviously lead to a state of uncertainty over whether a cause of action exists. If the balance of probabilities and all or nothing outcome were replaced with probability-based fact-finding, this difficult state of affairs would result.

There is a second fatal problem with exchanging the balance of probabilities and all or nothing approach with a probability-based and proportional outcome approach. Using a probabilistic fact-finding model, a court could potentially come to a conclusion as follows: the evidence indicates a 100% chance that a duty of care exists, a 60% chance that the standard of care was breached, 10% chance of causation, and 70% chance of injury. Given these findings, what basis would a court have to find the defendant liable to the plaintiff?¹³³

Perhaps one could argue that if some threshold level of likelihood were crossed, then the chance of the factual element can be considered legally relevant. If each of the requisite elements of liability passes the threshold level of likelihood, one might argue that there is then a basis to find the defendant liable. This approach, however, amounts to nothing more than changing the standard of proof for the factual elements of a liability determination to

¹³³ Vaughan Black has pointed out in "Not a Chance," *supra* note 57 at 96-97 that the logical extension of the loss of chance argument as a response to causal uncertainty could be the situation of probabilistic factual findings as set out in this paragraph, given that factual indeterminacy is an issue in many legal questions besides causation.

whatever the threshold level of likelihood is.¹³⁴ The actual likelihood itself loses legal relevance, because it is not reflected in the liability determination at all.

Unless the proportionality of the factual elements can be reflected in the ultimate legal determination, the likelihood of the event beyond the threshold level is substantively meaningless, just like the likelihood of a fact becomes meaningless if it passes the 51% standard of proof. But the proportionality of facts cannot be reflected in a liability determination. A liability determination is an “all or nothing” determination, in the sense that there are only two options: a defendant is either liable, or not liable. It is irreconcilable for a determination that has only two possible outcomes to reflect the unique proportionality of all its necessary factual elements. A concoction of chances cannot be echoed in a liability determination. When this attribute of a liability determination is kept in mind, it becomes clear that only the standard of proof and all or nothing method of fact-finding can be applied.¹³⁵

¹³⁴ In Chapter Four, I argued that in order to maintain procedural legitimacy, there has to be at least a 50% threshold likelihood. Likelihoods above that might be acceptable, but below 50% is contrary to the requirement for a genuine commitment to ascertaining the truth.

¹³⁵ One may point out the concept of contributory negligence leading to proportional liability as a contradiction to my contention that liability is a categorical ‘yes’ or ‘no’ question, and cannot reflect proportionality. In my view, proportional liability is a misnomer. When the contributory negligence principle applies, the *extent* of liability is proportioned, not the *fact* of liability. Even when contributory negligence applies, a plaintiff must establish that a defendant is legally liable to the plaintiff by demonstrating a duty of care, a breach of the standard of care, and injury and causation. Only if these elements are established can the defendant be held responsible to the plaintiff at all. How much the defendant owes is a subsequent inquiry. Proportionality based on contributory negligence bears its impact at the latter inquiry. When applicable, the ‘how much’ question will be proportional to the defendant’s contribution, but this is a distinct inquiry from whether there is liability at all.

My comments endorsing the rejection of the loss of chance doctrine on the basis of consistency, even if recognized as analytically sound, may seem cold. Indeed, the factual circumstances that give rise to the loss of chance scenario are moving. The psychological suffering that would result from a negligent medical treatment would, in many cases, be unimaginable. In my view, a solution that should be further explored is to facilitate judges to recognize that mental anguish is a real and compensable loss.¹³⁶

Conclusion

Causal uncertainty poses analytical difficulties in legal claims, and at times, applying the usual fact-finding process in the case of causal uncertainty can give rise to troubling outcomes. This is nowhere more evident than in the misdiagnosis cases where plaintiffs are treated negligently, but denied recovery for the ultimate adverse outcome because of proof difficulties around causation. Unsurprisingly, therefore, many attempts have been made to demonstrate that the law produces faulty adjudicative outcomes in the context of causal uncertainty, and that some change is in order to correct those outcomes.

¹³⁶ This was the approach adopted by Gonthier J in *Lafferriere v Lawson*, *supra* note 51 discussed above (see paras 42, 169). I cannot undertake to more fully assess such an approach here, but mental anguish is recognized as a compensable damage in tort litigation (See for example, *Mustapha v Culligan of Canada Ltd* (2008) SCC 27 at para 8: “Generally, a plaintiff who suffers personal injury will be found to have suffered damage. Damage for the purpose of this inquiry includes psychological injury. The distinction between physical and mental injury is elusive and arguably artificial in the context of tort.”) Accordingly, awarding compensation for mental suffering where it can be causally linked to an act of negligence is unlikely to result in the incoherence that would stem from interpreting lost chance as a compensable injury. Therefore, the feasibility of recognizing and compensating psychological damage in personal injury cases generally, and in medical negligence cases in particular should be explored further.

My attempt in this chapter was to infuse the procedural legitimacy framework into the causal indeterminacy debates. In doing so, my underlying aim was to display and reiterate the normative work of procedural legitimacy in a concrete context. Causal uncertainty is an ideal arena for this purpose, because foundationally, the concern around proof of causation, including the specific concerns in the loss of chance context, can be interpreted as a manifestation of the central question of my thesis: how, and on what basis, are adjudicative outcomes legitimate, despite factual uncertainty and the associated risk of error?

Addressing this question in general terms has led me to the conclusion that the legitimacy of adjudicative outcomes is sourced in maintaining procedural integrity, given the inevitability of a fallible judicial system that must tolerate a gap between the ideal of perfect substantive justice and the realistic need for legitimate judicial outcomes. On that basis, I have assessed proposed solutions to issues posed by causal uncertainty through the procedural legitimacy lens. This analysis has resulted in endorsing the judicial adherence to the traditional balance of probabilities process of proof in the realm of causation, in order to maintain the demands of a legitimate adjudicative system.

The driving influence from the procedural legitimacy framework in this chapter has been the demand for systemic consistency in terms of application of acceptable procedures as well as of substantive legal principles, which ensures the coherent and, therefore, non-arbitrary treatment of litigants. When adjudication operates through legitimate procedures, it is systemically legitimate. This systemic legitimacy is also the source of legitimacy of the specific outcomes, because they are infused with the legitimacy of the procedures that gave rise to them. Being products of a consistently applied legitimate process provides

adjudicative outcomes with legitimacy. This is true even when particular outcomes are substantively uncomfortable and seem not to achieve justice. The outcome of a negligently misdiagnosed patient left without compensation is among the most stirring examples of this. And as such, it is an exemplary indicator of the heavy normative load that procedural legitimacy bears.

CHAPTER 7. FIXING SIMPLE PROBABILITY THROUGH PROCEDURAL LEGITIMACY*

Introduction

In Chapters Five and Six, where I applied the procedural legitimacy framework to doctrinal issues in the context of scientific evidence and proof of causation, I criticized certain proposed reforms to long-standing principles of civil litigation on the basis that the reforms would not uphold the demands of procedural legitimacy. In this chapter, I offer an analysis of a doctrinal situation where the procedural legitimacy framework mandates reform. The conventional interpretation of the doctrine of simple probability reasoning must be changed, I argue here, in order to meet the coherence and consistency demands of procedural legitimacy.

The problem of simple probability reasoning and its application by Canadian courts that I address in this chapter arises in the damages assessment stage of a personal injury action. It is a principle of damages awards that a successful plaintiff must be returned to the position she would have been in absent the defendant's negligence. This principle demands answers to difficult factual questions. A court would have to determine, for example, how a plaintiff's business would have fared had she not been injured, or how she would have performed at her job, or even how happy she would have been, absent the injury.¹ The answers to these questions are clearly indeterminate at the time of the trial.

* Much of this Chapter was originally published in my paper, Nayha Acharya, "Complicating the Simple Probability Principle: Developing a New Approach to Probabilistic Reasoning In Personal Injury Litigation" (2014) 23 Dal J Legal Stud 191.

Of course, the usual method of accommodating such factual difficulty in the civil litigation context is through the balance of probabilities standard of proof. Arguably, another way that uncertainty can be accommodated in the legal process is through the use of simple probability, or probabilistic reasoning. Simple probability reasoning allows for compensation for an injury or loss proportional to the chance that the injury or loss will occur. For instance, if a plaintiff can show that because of his tortious injuries, there is a 30% likelihood of requiring a surgery in the future, then he will be compensated for 30% of the total losses associated with the future surgery; if there is a 70% chance of surgery, then he will be compensated for 70% of the total assessed value, and so on.² The availability of these two approaches, the balance of probabilities/all or nothing approach as well as the simple probability approach, gives rise to the question of when one should be used over the other.

Canadian courts apply the prevailing approach, which I call the ‘type of fact’ approach, inconsistently and incoherently. Presently, courts categorize facts as: (1) past facts, which refers to events that would have occurred prior to the trial, like a breach of the standard of care, or entry into a valid contract; (2) hypothetical facts, referring to inquiries like ‘if the

¹ It may seem conceptually odd to refer to such inquiries as factual questions, because they are better described as *counterfactual* situations. But these questions are conventionally referred to as factual issues that a court must determine in awarding damages, and are rightly defined as factual questions in terms of the dichotomy between questions of law and questions of fact. I refer to counterfactual inquiries relevant to damages assessments as factual questions throughout.

² Throughout this paper, I use the term ‘simple probability’ to refer to this principle. ‘Probabilistic reasoning’ is also sometimes used to describe the same principle.

plaintiff did not have her pre-existing condition, what damages would she have suffered?'; or (3) future facts, like whether a plaintiff will continue to lose income or require some additional medical care, for instance, after the trial. The availability of simple probability depends on which of these types of facts is thought to trigger its use. But when it comes to assessing damages entitlements, courts are inconsistent in applying this categorization and in their consequent use of simple probability, as I demonstrate below. As I explain further throughout, using an improper standard of proof and failing to use the simple probability principle appropriately brings a susceptibility to plaintiffs being improperly compensated for their injuries, and defendants being held incorrectly accountable. In other words, the erroneous interpretation and application of the simply probability principle opens a door to illegitimate adjudication due to inconsistency and incoherence, contrary to two key aspects of procedural legitimacy.

This reiterates my claims in Chapter Six, where I discussed how and why the procedural legitimacy framework demands both consistency and coherence in legal principles and their application, and how the two concepts are related to each other. First, judges must apply the relevant rules consistently in order to maintain the formal aspect of rule of law - all litigants should be subject to the existing law that applies to them. This relates to coherence in the legal system, as I noted in Chapter Six, because when legal principles are applied consistently, the justifications that underpin those legal principles are applied consistently as well, resulting in outcomes that are coherently justified. Suppose, for instance, that Judge A only applies simple probability to future facts, but Judge B applies it to future facts and hypothetical facts. This clearly causes a consistency problem, because litigants who appear before Judge A will get a different outcome than they would if they appeared before Judge B.

But Judge A and B may both have good reasons that would justify their own interpretation of when simple probability should be used, so it is not the case that either approach is devoid of justification; the problem is that the justifications do not cohere with one another, resulting in arbitrary treatment of litigants. This is how consistency and coherence relate, and both are necessary from the procedural legitimacy perspective. Accordingly, I approach the problem of inconsistent application of the simple probability principle from the perspective of how to establish a framework for when to use simple probability reasoning that enables coherence in the doctrine and its application.

Problematically, however, none of the frameworks that arise out of the 'type of fact' approach can be applied consistently without unjustifiably compromising a fundamental principle of either liability determination or damages assessment. This impossibility suggests that the inconsistency in the current approach is not merely the product of superficial confusion over where to apply simple probability reasoning, but is grounded in something more fundamental.

Below, I diagnose the root of the problem: the conventional type of fact approach is based on a mischaracterization of simple probability reasoning. The characterization of simple probability as an alternative method of proving facts is, I argue, inaccurate, and has led to the incoherence surrounding its application. Simple probability is better described as a method of placing a value on a chance, when that chance is first established as a legal fact. For instance, when considering whether a plaintiff will require a knee-replacement surgery, rather than understanding simple probability as a way to prove the need for that surgery, it should be understood as a way to quantify the chance that the surgery would be required.

This re-characterization reframes the approach to where simple probability should be available. Its availability should not depend on whether the fact is past, future or hypothetical. When simple probability is understood as a quantification mechanism for chances, the question of its availability shifts from which ‘type of facts’ it should be used to prove (because simple probability is not a mechanism for proving facts at all), to whether the demands of liability determinations and of damages assessments *require* that chances be established as relevant legal facts.

I begin by discussing the origins of simple probability reasoning and explaining the conventional framework that is used to determine when to use it in the personal injury context. Second, I canvas a number of Canadian appellate decisions that exemplify the irregular use of simple probability reasoning in personal injury litigation, demonstrating the need for reform.

I then explain why and how the conceptualization of simple probability reasoning as a proof mechanism is contrary to the demands of a procedurally legitimate fact-finding process, and how that mischaracterization leads to faulty frameworks for its availability, ultimately leaving litigants in personal injury actions susceptible to improper adjudicative outcomes. This culminates in my claim that the ‘type of fact’ model that is invariably used (albeit inconsistently) by Canadian courts today is incapable of providing either the consistency or coherence that legitimate adjudication requires. A better approach is to use a framework grounded on the characterization of simple probability as a method of placing value on a chance. Under that approach, the analysis of when it should be used depends on whether and when chances should be relevant for liability determinations and for damages assessments. I have argued in Chapter Six that probabilistic reasoning and recognizing lost

chances as tortious injuries is inappropriate at the liability stage of a civil action. Here, I argue that chances are, and must be, relevant facts for damages assessment purposes. Consequently, simple probability reasoning, when properly understood, has a significant role in determining an injured plaintiff's compensatory entitlements, so its coherent application is compulsory.

The procedural legitimacy-inspired reconstruction of simple probability has the benefit of ensuring coherent treatment of litigants in personal injury actions in terms of the principles that are applicable in the damages context as well as maintaining consistency in terms of how factual uncertainty is accommodated in civil litigation. As such, this Chapter adopts the analysis in the first four chapters where the procedural legitimacy frame was developed, as well as the analysis in Chapter Six as to the value of coherence achieved through consistency, and demonstrates how the demand for adherence to those principles can ground a call for reform.

Part 1. The Affront of Simple Probability Reasoning to Procedural Legitimacy

A. Simple Probability Reasoning and its Associated Confusions

One of the earliest articulations of the simple probability principle appears in a House of Lords decision, *Mallett v McMonagle*. This case has been cited by a significant number of

Canadian trial and appellate decisions,³ and was quoted with approval and applied by the Supreme Court of Canada in *Janiak v Ippolito*⁴ and in *Athey v Leonati*.⁵

In assessing damages which depend on [the court's] view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards.⁶

Lord Reid's comments contain the principle behind simple probability and how it is put into practice: the court must consider the chance of a future event whether or not the value of the chance is less than 50%. Once assessed, it is reflected in the damages awarded. For instance, if a plaintiff is able to establish a 30% chance of requiring a compensable future medical treatment, then 30% of the total assessed cost of that medical treatment will be awarded.

³ An unrefined Quicklaw search suggests that at least 168 Canadian cases of all levels of court have referred to *Mallett v McMonagle* [1969] 2 All ER 178.

⁴ *Janiak v Ippolito* [1985] 1 SCR 146, SCJ No 5 (QL) at 42.

⁵ *Athey v Leonati* [1996] 3 SCR 458, [1996] SCJ No 102 (QL) at 28, 29 [*Athey*].

⁶ *Mallett v McMonagle*, *supra* note 3 at 191. This House of Lords decision involved a future dependency claim of a young widow whose husband died in an accident. The Court's task in assessing the dependency claim was to estimate "how long the dependents would have continued to benefit from the dependency had the deceased not been killed and what the amount of the dependency would have been in each year of that period" (at 190).

Simple probability has been applied in a number of Canadian appellate personal injury decisions. For instance, in *Conklin v Smith*,⁷ the Supreme Court awarded the plaintiff lost earnings based on a chance that he would have succeeded in securing a more lucrative pilot's career. In *Kovats v Ogilvie*,⁸ the British Columbia Court of Appeal compensated for the chance of developing post-degenerative arthritis as a future consequence of the injury, rather than requiring proof on a balance of probabilities that the arthritic condition would occur in the future. In *Schrump v Koot*,⁹ the Ontario Court of Appeal opined that the *chance* of the future surgery is compensable, even if its future occurrence cannot be established on the balance of probabilities. In *Graham v Rourke*,¹⁰ the Ontario Court of Appeal clarified that simple probability is not only available for the plaintiff's benefit. The loss of income award was reduced by 25% based on a 25% chance that she would have been unable to earn as much as anticipated even had she not suffered the accident. Similarly, the cost of care award was reduced by 15% because of a 15% chance that the medical services would have been required even absent the accident.¹¹

In *Athey v Leonati*, the Supreme Court of Canada confirmed that simple probability reasoning is available for hypothetical and future events in the following terms:

Hypothetical events (such as how the plaintiff's life would have proceeded

⁷ *Conklin v Smith* [1978] 2 SCR 1107, [1978] SCJ No 54 (QL).

⁸ *Kovats v Ogilvie* [1971] 1 WWR 561, [1970] BCJ No 653 (QL) (BCCA) at 15.

⁹ *Schrump v Koot* (1978) 18 OR (2d) 337 (QL) (O.C.A.).

¹⁰ *Graham v Rourke* (1990) 74 DLR (4th), [1990] OJ no 2314 (QL) (ONCA).

¹¹ *Ibid* at 64.

without the tortious injury) or future events need not be proven on a balance of probabilities. Instead, they are simply given weight according to their relative likelihood. For example, if there is a 30 percent chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30 percent of the anticipated extra damages to reflect that risk. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation...By contrast, past events must be proven, and once proven they are treated as certainties.¹²

Although judicial authorities endorse simple probability reasoning, Canadian courts have faced challenges in applying it. Evident from the above excerpt to determine when simple probability should be used, courts have resorted to a three-part classification of facts as past, future, and hypothetical. Problematically, courts have not always agreed on which of these types of facts simple probability should apply to. First, while many courts have referred to the past/future divide, some courts have held that the balance of probabilities standard is applicable to past as well as future facts.¹³ For instance, a brief decision of the Alberta Court of Appeal held the balance of probabilities applicable to prove both past and future earnings:

With respect to past and future earnings, much the same comments apply. The cross-appellant plaintiff advances questions of weight, and guessing about what would have occurred without an accident. He had no proven steady employment track record before the accident. There is no way to

¹² *Athey, supra* note 6 at paras 26-28 (references removed).

¹³ I do not intend to overstate this inconsistency, because Canadian courts are fairly stable in refusing to apply the balance of probabilities standard to future injuries, usually citing the authorities noted in Section 2(a) above. For a sampling of such decisions, see *Steenblok v Funk* (1990) 46 BCLR (2d) 133 (BCCA), (often cited for this principle in British Columbia), *Nelson v Nelson* [1992] BCJ No 1576 (QL), *Basque v Saint John (City)* [2002] NBJ No 134 (QL).

assess these heads of damages with certainty. In a civil case, a balance of probabilities suffices.¹⁴

The Ontario Court of Appeal endorsed a similar view in *Lurtz v Duchesne*.¹⁵ At trial, the plaintiff's medical providers were found to have misdiagnosed her, and were liable for her resulting injury. The quantification of the damages award was at issue on appeal, where the Court of Appeal approved the trial judge's comments that:

I find that [the plaintiff] is entitled to future loss of income. On the balance of probabilities, I find that Donna is unlikely to return to remunerative employment at any time in the future.¹⁶

And later:

I find that considering the expert evidence of Dr. Benoit and Dr. Singer on the presence and the lasting stay and effect of the disease, Donna Lurtz is a disabled person and will not, on a balance of probabilities, return to work in the future.¹⁷

¹⁴ *Dubitski v Barbieri* 2006 ABCA 304, [2006] AJ No 1293 (QL) at para 14, emphasis added.

¹⁵ *Lurtz v Duchesne* 194 OAC 119, [2005] OJ No 354 (QL) (Ont CA). The relevant question on appeal was whether "trial judge should have drawn an adverse inference against the respondent in her claim for future loss of income because she did not call any of her treating physicians to give viva voce evidence." According to the Court of Appeal, the trial judge committed no error when he found that based on the evidence presented, he was satisfied that the plaintiff has met the burden of proof for the claim for past and future losses.

¹⁶ *Lurtz v Duchesne* [2003] OTC 319, [2003] OJ No 1540 (QL) at para 442.

¹⁷ *Ibid* at para 455.

Along with this evident confusion over the applicability of simple probability to future facts, the comment in *Athey* that simple probability can apply to hypothetical facts has also been interpreted inconsistently. Some appellate cases, like *Courtney v Cleary*¹⁸ and *Gill v Probert*,¹⁹ have concluded that past hypothetical facts warrant the use of simple probability reasoning. *Courtney v Cleary* centered on a misdiagnosis of mouth cancer, leading to extensive medical intervention and injurious disfigurement to the plaintiff's face. The defendant physician accepted liability but appealed the quantification of damages regarding lost earning capacity. In answer, the Newfoundland Court of Appeal was²⁰

satisfied that the trial judge stated and applied the wrong test (the balance of probabilities) in dealing with loss of earning capacity from September 2001 to trial. Given that the claim centers on a hypothetical situation she should have applied the simple probabilities test and applied the appropriate percentage to the per annum loss.

In *Gill v Probert*, the plaintiff suffered a herniated disc in a car accident. The defendant appealed the trial judge's award for past lost earnings. Relying on the Supreme Court's comments in *Athey*, the Court of Appeal held:

In assessing hypothetical events there is no reason to distinguish between those before trial and those after trial. In making allowances for contingencies the trial judge was assessing the hypothetical events that

¹⁸ *Courtney v Cleary* 2010 NLCA 46, [2010] NJ No 231 (QL).

¹⁹ *Gill v Probert* 2001 BCCA 331, [2001] BCJ No 1056 (QL).

²⁰ *Courtney v Cleary*, *supra* note 18 at para 62.

could have affected the plaintiff's employment earnings, according to the assessment to their relative likelihood.²¹

The *Smith v Knudsen*²² decision from British Columbia provides another example of the confusion about simple probability's applicability to hypothetical facts. There, the plaintiff commenced an action for damages for injuries suffered in a car accident. He alleged that his injuries rendered him unable to prepare a tender offer to bid for the contract with the provincial government to build ambulances. He claimed compensation for this lost opportunity. The trial judge cited a number of cases as he directed himself to the question of what standard of proof would be required to recover for losses related to the lost opportunity to submit the offer. The cases, the trial judge commented, were inconsistent with one another: while some cases seemed to suggest a simple probability approach, others suggested that he should apply a balance of probabilities standard.²³

The trial judge found that cases with the most precedential value, including *Athey*, held that a balance of probabilities standards is applicable to past losses. Since plaintiff's claimed lost income would have been earned prior to the trial, the trial judge classified his claim as a "past" loss, and imposed the balance of probabilities standard. Accordingly, the plaintiff was required to prove that absent his injuries, he would more likely than not have won the contract and, therefore, would have procured the earnings he claimed. If the plaintiff could prove that, then he would have recovered all of the lost profits associated with the contract.

²¹ *Gill v Probert*, *supra* note 19 at para 9.

²² *Smith v Knudsen* (2004) BCCA 613, [2004] BCJ No 2509 (QL).

²³ *Ibid* at paras 7-9 and 11-15, reproducing para 22 of the trial decision.

The plaintiff was not able to satisfy the balance of probabilities standard with respect to winning the contract.

The plaintiff appealed, arguing that the trial judge “misdirected the jury on the burden of proof required to establish a loss of opportunity to be the successful bidder on a contract to build ambulances for the provincial government.”²⁴ The Court of Appeal agreed. Applying *Athey* differently, it held that “the trial judge’s instructions do not accord with the case authorities regarding proof of hypothetical events.”²⁵

The Court of Appeal held that authorities have drawn a distinction between proof of actual events and proof of future or hypothetical events.²⁶ “What would have happened but for the injury,” the Court opined, “is no more ‘knowable’ than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events.”²⁷ The Court of Appeal classified the plaintiff’s claim as a hypothetical event, which warranted the use of simple probability. The trial judge was overturned on his decision to instruct the jury to apply the balance of probabilities standard to the loss of profits. Instead, the Court of Appeal held that the jury should have been instructed to determine the

²⁴ *Ibid* at para 5.

²⁵ *Ibid* at para 23.

²⁶ *Ibid* at para 28.

²⁷ *Ibid* at para 29.

likelihood that the plaintiff would have won the contract, and to award proportional compensation (i.e. to apply simple probability reasoning).

The discord between the trial and appellate decisions in *Smith v Knudsen* despite referring to many of the same authorities, indicates that the question of where to use simple probability reasoning is neither easy nor resolved. The BC Court of Appeal itself has expressed two different views on the matter. In *Sales v Clark*, interpreting the Supreme Court's comments in *Athey*, it held that "read in context, it is clear to me that the discussion of "hypothetical events" is limited to what will happen in the future or what would have happened in the future if something had not happened in the past."²⁸ Like the trial judge in *Smith v Knudsen*, the BC Court of Appeal in *Sales v Clarke* maintained the past versus future divide for the availability of simple probability reasoning. In contrast, the appeal court's conclusion in *Smith v Knudsen* suggests that the past/future divide does not account for the availability of simple probability reasoning, because simple probability reasoning should be available for hypothetical past facts as well as future facts.

Evidently then, some courts have adhered to the past *versus* future divide, where past facts are subject to the balance of probabilities standard, while future facts are subject to simple probability. Others attest to a past versus hypothetical and future divide, where future facts as well as hypothetical past facts are subject to simple probability. And still others have

²⁸ *Sales v Clarke* 165 DLR (4th) 241, [1998] BCJ No 2334 (QL) at para 11. The Court of Appeal in *Smith v Knudsen*, *supra* note 22 sought to distinguish *Sales v Clarke* on the basis that it concerned a causal relationship, as opposed to proof of loss. Whether or not that is a legitimate distinction, the quotation provided above is undoubtedly contrastable with the conclusion reached by the Court of Appeal in *Smith v Knudsen*, *supra* note 22.

applied the balance of probabilities standard, even in respect of future losses. Depending on which approach is preferred, a plaintiff can receive significantly higher or lower compensation.

The inconsistencies described so far are situated within the damages context. In liability determinations, however, courts have consistently held that simple probability is unavailable, and proof of facts must be to the balance of probabilities standard. The outcomes resulting from this commitment to the balance of probabilities standard in the liability context have met with some academic criticism. In Part 2, I provide reasons for endorsing this judicial commitment.

The confusion and resultant inconsistencies over where simple probability reasoning should apply suggest that a new and more comprehensive framework for its use is required. The current situation of multiple frameworks harbours the susceptibility for subjecting two similarly situated plaintiffs to different legal principles leading to significantly different outcomes. Suppose that one plaintiff had a 40% prospect of getting a better job if her injury had not occurred. A judge could decide that simple probability applies to past hypothetical facts, so the 40% chance of a better job should be reflected in the damages award. Another plaintiff with a similar prospect could have her case decided by a judge that decides that simple probability does not apply to past facts, and since the chance of a better job cannot be proven on a balance of probabilities, the plaintiff will not be compensated for that lost prospect. Despite the similarity of their circumstances, the two plaintiffs would be subject to different principles of fact-finding and different allocations of risk, leading to very

different damages awards. Such differences in outcome would arise out of unjustifiably inconsistent applications of legal principles.

The inconsistency itself is an affront to procedural legitimacy. It is contrary to Habermas's notion that law must have certainty in order for it to maintain stability in a community.²⁹ It is contrary also to Fuller's principles that law must be knowable³⁰, and that there must be congruence between the law and its application by the judiciary.³¹ As I have explained in Chapter Three, these elements are necessary features of a legal system that respects litigants as rationally acting, autonomous agents who are capable of planning their affairs within an authoritative legal framework, and that is the keystone of procedural legitimacy. When it comes to the doctrine of simple probability and its applicability in particular instances of factual indeterminacy, Canadian courts have clearly fallen short. The current uncertainty over when simple probability reasoning will be used creates a situation that implicitly fails to respect community members as autonomous agents who use law to rationally guide their conduct, because the doctrine is applied unpredictably. As such, the demands of procedural legitimacy are compromised.

Nevertheless, if inconsistency and uncertainty were the only concerns, then the analysis would be aimed at deciding which type(s) of facts (past, hypothetical, future) are justifiably

²⁹ Jurgen Habermas, *Between Facts and Norms: Contributions to Discourse Theory of Law and Democracy* (Cambridge, Massachusetts: MIT Press, 1996) [Habermas, *Between Facts and Norms*], at 198, and see Chapter 2, Part 2 (B).

³⁰ Lon Fuller, *Morality of Law* (New Haven and London: Yale University Press, 1964) at 63-64 [Fuller, *Morality of Law*], and see Chapter 2, Part 2 (A).

³¹ *Ibid* at 81, and see Chapter 2, Part 2 (A).

subject to simple probability reasoning, and to argue that these types of facts must, on the basis of that justification, be consistently accommodated through simple probability. But the problem is not so simple. As I explain further below, it is not possible to coherently justify the use of simple probability reasoning in respect of one particular type of factual uncertainty.

The root of the problem is that the 'type of fact' approach is grounded in a misunderstanding of simple probability reasoning. When simple probability is understood as a way of proving facts, its availability would naturally depend on which types of facts warrant proof by simple probability as opposed to the balance of probabilities. But the very characterization of simple probability as a method of proving facts is flawed, leading to incoherence in terms of accommodating factual uncertainty as well as maintaining coherence among basic tort doctrines. In order to explain this further, I turn first to explaining that simple probability reasoning is not a standard of proof. Its availability, therefore, cannot depend on which facts should be proven by simple probability as opposed to balance of probabilities, because the simple probability principle is not aimed at proving facts at all. I then explain that the mischaracterization results in inevitable incoherence, which the procedural legitimacy framework highlights as a fundamental problem. The solution, I suggest, is to understand simple probability as a method of quantifying chances, not proving outcomes. Approaching the applicability of simple probability from that understanding enables the requisite coherence among doctrines in the damages assessment context, thereby ensuring non-arbitrary treatment of litigants, a foundational value of the procedural legitimacy proposal.

B. Re-Characterizing Simple Probability

Simple probability reasoning is often understood to encompass a different standard of proof contrastable to the balance of probabilities.³² Cooper-Stephenson and Saunders, in *Personal Injury Damages in Canada*, have ascribed to this description. For instance, discussing proof of claims for cost of future care, they comment that, “[b]asic principles apply, and it must be emphasized that the standard of proof is “simple probability” – a different standard than the normal balance of probabilities test.”³³ Similarly, discussing damages assessment generally, Cooper-Stephenson and Saunders suggest that:

At the root of damage assessment is a different standard or method of proof.... The different standard of proof which governs most of a damage assessment may be termed “simple probability.” It involves the valuation of possibilities, chances and risks according to the degree of likelihood that events would have occurred, or will occur. This contrasts with the

³² The judicial authorities noted in Part 2 lend themselves to this description, and Canadian Courts virtually always refer to simple probability as a standard of proof when they discuss it expressly. A few examples include: *Grimard v Berry* [1992] SJ No 275 (QL) and *Parent v Andrews* [2001] SJ No 336 (QL) at para 9, both citing Cooper-Stephenson and Saunders state, “For the most part, in assessing damages, a court proceeds on a different standard of proof than it does when determining civil liability: simple probability as opposed to a balance of probabilities” (emphasis added). The Alberta Court of Queen’s Bench stated in *Ganderton v Brown* [2004] AJ No 528 (QL) at 261 that: “The applicable standard of proof for the assessment of damages in a personal injury action is simple probability *Tat v. Ellis* (1999), 228 A.R. 263 (C.A.); *Stevens v Okrainec* (1997), 210 A.R. 161 (Q.B.)” The British Columbia Court of Appeal in *Reilly v. Lynn*, 2003 BCCA 49 stated at para 101: “The standard of proof in relation to future events is simple probability, not the balance of probabilities, and hypothetical events are to be given weight according to their relative likelihood: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para 27.”

³³ Ken Cooper-Stephenson and Iwan Saunders, *Personal Injury Damages in Canada*, 2d ed (Scarborough, Ontario: Carswell, 1996) at 414 [Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada*].

“balance of probabilities” standard, more familiar in civil actions, which involves an “all or nothing” approach.³⁴

Presumably, the description of simple probability as a standard of proof arises because the impact of simple probability reasoning on future facts is often contrasted with the impact of balance of probability reasoning on past facts, as evident in the above quotation. As discussed throughout the thesis, the balance of probabilities standard is accompanied by an “all or nothing” impact because if a proposed fact is proven on the balance of probabilities, it is thereafter treated as a legal certainty. The subsequent determination will be based on that fact as if it were certainly true, because it has become a legal fact. Conversely, if a fact is not proven on the balance of probabilities, it is taken to be untrue for the purpose of the legal determination. This allows uncertain fact to be translated into legal certainty, so the legal determination can be made on the basis of established facts.

When simple probability reasoning applies, however, the future or hypothetical events themselves are not translated into legal certainties. Instead, the *possibility* of the future or hypothetical event is relevant. If the occurrence of some future event (“future fact”) is 30% likely, for instance, this 30% likelihood has legal significance. And if the future fact is 60% likely, then this 60% likelihood has legal significance. In contrast, when the balance of probabilities applied, the likelihood itself has no substantive legal relevance.

³⁴ *Ibid* at 67.

The proportional impact of simple probability versus the all or nothing impact of the balance of probabilities causes an inclination to contrast the two approaches, as if they were both in the business of establishing legal facts. This inclination is evident in the excerpt below. After recounting the use of simple probability reasoning in *Schrump v Koot*, where the Court endorsed probabilistic damages founded on the likelihood of a future surgery, Cassels and Adjin-Tetty suggest that:

it is important to note that the court rejected an all or nothing approach under which the plaintiff receives 100 percent compensation if it can be shown that the loss is 'likely' to occur and nothing if it is 'unlikely' to occur. Instead, uncertainty about the future is reflected in the amount of the award, 'with the higher degree or the greater chance or risk of a future development attracting a higher award' [quoting *Schrump v Koot*].³⁵

I agree that where a court compensates for a risk of a future event, it prevents the future fact *itself* from being subjected to the balance of probabilities and all or nothing approach. As Cooper has suggested, the use of simple probability reasoning indicates that the creation of a risk is really what is being compensated, not the future event.³⁶ This idea has been well and succinctly stated: "Where a defendant deprives a plaintiff not of an expected future benefit, but of his chance to

³⁵ Jamie Cassels and Elizabeth Adjin-Tetty, *Remedies: The Law of Damages*, 2d ed (Toronto: Irwin Law Inc, 2008) [Cassels and Adjin-Tetty, *Remedies*] at 331.

³⁶ Ken Cooper, "Assessing Possibilities in Damages Awards – The Loss of a Chance or the Chance of a Loss" (1972-73) 37 Sask L Rev 193 [Cooper, "Loss of a Chance"]. See especially at 222 and 231-235.

gain that benefit, then surely the loss suffered is plaintiff's chance, not the benefit itself."³⁷

What needs clarification is what must follow from the recognition that simple probability enables compensation for a risk, in its own right. If simple probability is a way to compensate for a risk, it follows that this risk itself is the legally relevant fact, not the potential future or hypothetical outcome. If the risk itself is legally relevant, then proving the outcome of that risk is not. Whether or not the outcome will occur is irrelevant to the question of whether there is a *risk* that the outcome will occur, and the value of that risk. Simple probability is a way to value a risk or chance, once its existence is established.

Where simple probability applies, future or hypothetical events avoid being subject to the balance of probabilities and all or nothing approach, *not* because simple probability reasoning is a different standard of proof for future or hypothetical facts, but because these facts are not subject to proof at all. Rather, simple probability allows us to understand chances as valuable and potentially relevant to legal determinations. If the chance is the fact that is relevant to the legal determination, then its existence must be established as a legal fact. Like all legal facts, the existence of the chance must be established on a balance of probabilities – the civil

³⁷ "Damages Contingent Upon Chance" (1964) 18 Rutgers L Rev 875 at 875.

standard of proof that is applicable to all relevant legal facts. Then, simple probability applies as a method valuing the chance.

Leading cases are consistent with this description. For example, in *Schrump v Koot*, the Ontario Court of Appeal confirmed that the plaintiff is not obligated to prove that a future loss or damage *will* occur.³⁸ Rather, the obligation is to establish, on a balance of probabilities, a non-speculative *possibility* of such a future loss. Similarly, in *Kovats v Ogilvie*, simple probability reasoning was employed to account for the possibility of developing “post traumatic arthritis resulting from the injury” in a serious motor vehicle collision.³⁹ The British Columbia Court of Appeal explained that the balance of probabilities standard is applicable to establish the existence of a risk:

It is a fundamental rule that in civil cases questions of fact are to be decided on a balance of probabilities; this is a matter of proof...one can decide on a balance of probabilities that there is a risk of something happening in the future. In an appropriate case such a risk can be taken into account in assessing damages for the wrongful act or default that caused it.⁴⁰

In short, situations employing simple probability reasoning can be understood as follows: suppose a plaintiff claims that due to his injuries there is a chance that he will require a future surgery. For this chance to be relevant to his damages entitlement, he has to establish, on a balance of probabilities, that the tortious injuries gave rise to a risk that he will require a future surgery. If established, then the existence of this chance will bear some

³⁸ *Schrump v Koot*, *supra* note 9 at 4 (cited to QL page numbers).

³⁹ *Kovats v Ogilvie*, *supra* note 8 at 5.

⁴⁰ *Ibid* at 6.

impact on his damages entitlement. The *extent* of this impact is determined through simple probability reasoning.

The notion that simple probability is itself a standard of proof indicates a lack of conceptual clarity regarding what its use actually implicates. And not only is understanding simple probability as a standard of proof descriptively inaccurate, it is also normatively improper when perceived through the procedural legitimacy frame for legitimate fact-finding procedures. In Chapter Four, I argued that one of the requirements of legitimate fact-finding is that the procedures must demonstrate a genuine orientation towards achieving factually accurate outcomes.⁴¹ Simple probability, if understood as a fact-finding mechanism, falls short of this requirement. Suppose a plaintiff makes a claim for a future surgery that has a 40% likelihood of being needed. Simple probability reasoning will provide 40% of the entire assessed value of the surgery to the plaintiff. Some time later, the surgery will either occur or not. In respect of the future event itself, the plaintiff will have been either over or under compensated – over compensated if the surgery does not occur, under compensated if the surgery does occur. Whatever the ultimate outcome, the compensation awarded is inevitably inaccurate. A doctrine that gives rise to inevitable inaccuracy cannot be considered a legitimate fact-finding mechanism. Re-characterizing simple probability as a mechanism of quantifying chances avoids this problem.

The mischaracterization of simple probability is not limited to semantic impropriety. It has substantive implications. Most significantly, misunderstanding simple probability

⁴¹ See Chapter Four, Part 2.

reasoning has led to the 'type of fact' approach which yields implausible frameworks for its application, as I will now explain.

C. The Incoherence Caused by Mischaracterizing Simple Probability Reasoning

Canadian courts invariably apply the 'type of fact' approach, which is based on a mischaracterization of simple probability as a method of proof, and which results in conceptual and practical trouble. The 'type of fact' approach yields four different potential frameworks that would justify simple probability reasoning operating in particular instances, but which Courts have inconsistently adopted.

1. Simple probability should apply to future facts and not to past facts, hypothetical or otherwise.
2. Simple probability should apply to future and hypothetical facts, but not to past facts.
3. Simple probability reasoning should be abandoned altogether - apply balance of probabilities to all facts.
4. Balance of probabilities standard should be abandoned altogether - apply simple probability to all relevant facts.

Problematically, consistent application of each one of these frameworks would compromise either a principle of liability determination or of damages assessments. Each one would prevent the relevance of chances where they should be relevant, or, implicate the relevance of a chance where chances should not be relevant. As such, adopting any one of the frameworks consistently leads to inevitable incoherence.

Framework 1 cannot satisfy the demands of damages assessments, because it would prevent courts from taking into account pre-existing conditions when assessing damages. In order to account for pre-existing conditions, a court must consider the hypothetical past fact of whether, even absent the tort, the pre-existing condition could have resulted in the plaintiff's harm. Framework 1 requires that all past facts must be proven on a balance of probabilities, so pre-existing conditions and the potential harm they could have caused would have to be subjected to the balance of probabilities standard. This would effectively prevent pre-existing conditions from being taken into account at all.

It is inevitable that a pre-existing condition will have a less than 50% chance of having caused the plaintiff's claimed harm. Otherwise, the requisite causal link between the defendant's negligence and the plaintiff's harm would be negated. In order to establish causation (and therefore liability), the plaintiff must show, on a balance of probabilities, that but for the defendant's negligence, the plaintiff's harm would not have occurred. This would be impossible if a pre-existing condition gave rise to a greater than 50% likelihood of harm, because it would be more likely that the pre-existing condition caused the harm, not the defendant's negligence. Under framework 1, a pre-existing condition could never co-exist with a finding of liability, which is contrary to the demands of damages assessment. If pre-existing conditions are to have legal significance (as the compensation principle demands), they must be relevant in terms of the chance of harm they create. Simple probability, properly understood, must be used when assessing the value of the chance of harm owing to the pre-existing conditions.

Framework 2 allows any hypothetical and future facts to be subject to simple probability reasoning. This is incompatible with the usual analysis for establishing causation under the 'but for' test, where the plaintiff must show that but for the defendant's negligence, her injury would not have occurred.⁴² This test requires that the court determine what would have occurred if, hypothetically, the defendant's negligence had not occurred.⁴³ Since the 'but for' analysis necessitates a hypothetical inquiry, Framework 2 would require all causal inquiries to be subjected to simple probability rather than the balance of probabilities. Accordingly, Framework 2 cannot be comprehensive, because it cannot be applied consistently.⁴⁴

This leaves the more drastic options, Frameworks 3 and 4. Framework 3 requires exclusive use of the balance of probabilities. Framework 3 is agreeable to the extent that it requires the balance of probabilities to apply to all facts. However, being based on the notion that simple probability is a method of proof, Framework 3 contains the erroneous idea that if the

⁴² See Chapter 5. Note also that discussion about the merits of the 'but for' test for establishing causation is outside the scope of this paper, but see for example Vaughan Black, "Decision Causation: Pandora's Tool-Box" and Richard Wright, "Acts and Omissions as Positive and Negative Causes" in J Neyers et al, eds, *Emerging Issues in Tort Law*, (Oxford: Hart Publishing, 2007); Jane Stapleton, "Unnecessary Causes" 129 *Law Q Rev* 39 (2013); Richard Goldberg ed, *Perspectives on Causation*, (Oxford and Portland, Oregon: Hart Publishing, 2011) [Goldberg, *Perspectives on Causation*].

⁴³ As Vaughan Black notes in "Not a Chance: Comments on Waddams, The Valuation of Chances" (1998) 30 *Can Bus L J* 96 at 99 that: "It is uncontroversial that, regardless of the nature of the cause of action, future uncertainties should be assessed on a probabilistic basis. But to say that this is true of past hypotheticals seems to overlook that every application of the but-for test of factual causation necessarily involves a hypothetical." [References removed].

⁴⁴ This conclusion could provoke the argument that the causal analysis should be subject to simple probability, and if so, then Framework 2 could not be painted as incapable of consistent application. I have evaluated this suggestion at length in Chapter 5.

balance of probabilities is the exclusive standard of proof, then simple probability must be abandoned altogether. When simple probability is properly understood as a way to value chances, abandoning it means that chances would never count as legal facts. I already suggested that pre-existing chances of harm must be relevant to damages assessments; below, I argue that chances (even besides pre-existing chances of harm) must be relevant for determining compensatory entitlements. Therefore, abandoning simple probability altogether is incompatible with the demands of damages assessments.

Finally, under Framework 4, all facts would be subject to simple probability reasoning rather than the balance of probabilities. Although this option is wholly implausible, it is a conceivable option that can arise from the erroneous conception of simple probability as a method of proof. Entertaining the idea, exclusive reliance on simple probability would mean that all pertinent facts would be relevant only to the extent of their likelihood. Under this approach, no fact could be considered 'established.' Instead, the chance that some fact occurred would be relevant. I have argued in Chapter 5 that this approach would be wholly incompatible with legitimate fact-finding in the liability context.

Given that none of the frameworks arising from the type of fact approach is acceptable, it is hardly surprising that Canadian courts do not apply any one of them consistently. There is currently no framework that coherently justifies the availability of the simple probability principle. Depending on which legal principle is argued or emphasized, courts can conceivably reach different conclusions in similar circumstances. The result is a condition of overall incoherence and considerable potential for arbitrary adjudication, contrary to the procedural legitimacy proposal for fact-finding.

The significance of coherence and its relationship to procedural legitimacy is more fully canvassed in Chapter Six, but I briefly repeat it here.⁴⁵ The basic concept is that legal principles have justifications embedded within them, and as such, existing legal principles must be applied consistently in order to ensure that the justifications that exist within those principles are applied dependably as well. This can be understood as one of the fundamental messages of the rule of law, as introduced in Chapter Two: the law must apply to everyone in the same way, so that everyone is subject to the same *principle* that underpins the law.⁴⁶ Through that consistency, the adjudicative system produces outcomes that are coherently justified.⁴⁷ In the case of simple probability reasoning, judges are inconsistent with one another in their understanding of what the underlying justification for simple probability really is. Some judges justify it one way, while other judges justify it in another way.

Applying legal principles inconsistently on the basis of different justifications opens a door to illegitimate exercise of legal authority. Guarding against that possibility is the

⁴⁵ See Chapter Six, Part 2(c)(iii).

⁴⁶ See Chapter Two, Part 2.

⁴⁷ As noted in Chapter Six, Weinrib makes this point in Ernest Weinrib, *The Idea of Private Law* (Cambridge, Mass: Harvard University Press, 1995) at 32: “In the law’s self-understanding, private law is a justificatory enterprise.... Coherence must be understood in the light of this justificatory dimension. For a private law relationship to be coherent, the consideration that justifies any feature of that relationship must adhere with the considerations that justify every other feature of it. Coherence is the interlocking into a single integrated justification of all the justificatory considerations that pertain to a juridical relationship.” An analogous concept of coherent justification of fact-finding rules was presented in my discussion of Dworkin’s procedural right of coherence in Chapter 3, Part 2(a)(iii).]

contribution of the formalist element of the procedural legitimacy proposal: it demands consistency so as to ensure an adjudicative system that manifests the fairness that inheres in coherence. This is currently compromised in the context of simple probability reasoning in the damages assessment arena. The solution is to find a justification for the use (or non-use) of simple probability reasoning that can maintain adjudicative coherence.

A comprehensive framework for the use of simple probability is impossible while harboring a mischaracterization of what simple probability actually accomplishes. The idea that simple probability reasoning is a standard of proof is not only factually erroneous, it also makes it impossible to coherently justify its use. When properly understood, the use of simple probability should be justified on the basis of when chances should and should not have legal significance. This way, the question to ask in order to determine whether simple probability is available is whether recognizing the relevant chance is justifiable, and that depends on whether the chance is relevant to the legal inquiry at stake. In other words, determining whether simple probability reasoning should be available depends on when and whether chances are relevant to the operating legal determination – i.e. liability or damages assessments. I have argued at length in Chapter Six that chances cannot be considered relevant facts at the liability stage. But a question still remains as to whether and when chances can be relevant in the damages assessment stage. Below, I offer comments on when simple probability reasoning should be available, and re-iterate some of the incoherence that currently permeates its application, particularly in the damages stage of a personal injury action.

Part 2: The Proper Application of Simple Probability Reasoning

Part of my argument against the relevance of chances in the liability analysis was that if chances were relevant in liability determinations, a court could potentially come to the following conclusion: the evidence indicates a 100% chance that a duty of care exists, a 60% chance that the standard of care was breached, 10% chance of causation, and 90% chance of injury. Given these findings, what basis would a court have to find the defendant liable to the plaintiff?

Unless the proportionality of the factual elements can be reflected in the ultimate outcome, the likelihood of the event beyond the threshold level is substantively meaningless, just like the likelihood of a fact becomes meaningless if it passes the 51% standard of proof. But the proportionality of facts cannot be reflected in a liability determination. A liability determination is itself an “all or nothing” determination, because there are only two possible outcomes: a defendant is either liable, or she is not. It is not possible for a determination that has only two possible outcomes to reflect the unique proportionality of all its necessary factual elements. A concoction of chances cannot be echoed in a liability determination, and so it becomes clear that only the all or nothing method of fact-finding can be applied.

The binary nature of liability determination may become masked by failing to conceptually separate the question of whether a defendant is liable from the question of the *extent* of her liability. Whether a plaintiff is liable at all is the primary inquiry that must be satisfied

before any question of *how* liable he is can even be entertained. What proportion of the plaintiff's injury is compensable can only be considered after it is determined that the defendant owes anything at all. Whether a defendant owes anything to the plaintiff is contingent on the presence of each of the factual principles of liability. If any one of the requisite factual elements is not established, liability is a 'no'; if every factual element is established, liability is a 'yes.' There is no room for proportionality in such an inquiry. Conversely, the *extent* injury, where a plaintiff's damages entitlement is determined, is not binary in nature. It is driven by distinct principles, and can reflect proportions. Accordingly, while simple probability must not and cannot be used at the liability stage, the driving principles of the damages assessment stage demand that chances are, can, and must be substantively relevant to determine a plaintiff's compensatory entitlements, as I explain next.

Once liability is established, the adjudicative inquiry shifts to determining damages. Unlike the liability analysis, which is driven by the defendant's responsibility, the damages stage focuses on rectifying the plaintiff's deprivation.⁴⁸ Below, I argue that the compensatory principle and its associated doctrines dictate that a plaintiff's damages entitlement will depend on the existence of chances. Relevant chances must bear an impact on the quantification of the plaintiff's damages entitlements. The valuation of those chances occurs through simple probability reasoning: the value of the chance is equal to the total value of the outcome associated with the chance, multiplied by the likelihood of the outcome occurring.

⁴⁸ Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada*, *supra* note 33 at 4-5.

The impact of the confused characterization of simple probability permeates the upcoming discussion. As I have noted in Chapter Three with reference to the jurisprudence of Lon Fuller and Jurgen Habermas, a state of confusion with respect to applicable legal principles cannot be tolerated – such a state diminishes predictability and stability in law, resulting in potential compromise to the necessary promise of non-arbitrary treatment of litigants.⁴⁹ That results in a failure to respect litigants as autonomous agents who can accept the authority of adjudicative outcomes because they are justifiable on the basis of procedural legitimacy.⁵⁰ I point to the Supreme Court decision in *Athey v Leonati*⁵¹ and the Ontario Court of Appeal decision in *Beldycki Estate v Jaipargas*⁵² to illustrate the affront to procedural legitimacy when the method of accommodating factual uncertainty in civil litigation is in a confused state.

As I have argued throughout the thesis and this chapter, coherent management of factual uncertainty in the adjudicative process is key to upholding the demands of procedural legitimacy. Maintaining coherence in the context of determining damages entitlements requires conceptual clarity around the principles driving the fact-finding and valuation stages of damages assessments. Below, I set out these principles, and offer an approach to

⁴⁹ See Chapter Three Parts 2(A) and 2(B), and Jurgen Habermas, *Between Facts and Norms*, *supra* note 29 at 198 and Fuller, *Morality of Law*, *supra* note 30 at 63-64.

⁵⁰ See Chapter Three, Part 2.

⁵¹ *Athey*, *supra* note 6.

⁵² *Beldycki Estate v Jaipargas* 2012 ONCA 537 [*Beldycki*].

the availability of simple probability that ensures coherence among them, and thereby upholds the demands of procedural legitimacy.

B. Simple Probability and the Relevance of Chances in Damages Determinations

i. The Damages Assessment Stage: General

The following quotation contains the foundational principles that have driven damages assessment since the time of its 1880 pronouncement by the House of Lords decision in *Livingstone v Rawyards Coal Co.*

I do not think that there is any difference of opinion as to its being the general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting compensation or reparation.⁵³

This statement provides the backdrop for determining damages entitlements: once liability is established, the plaintiff is entitled to be fully compensated, or to be restored to her injury-free condition, known as the *restitutio in integrum* principle.⁵⁴

⁵³ *Livingstone v Rawyards Coal Co.* (1880), 5 App. Cas. 25 at 39 (HL). Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada*, *supra* note 33 cite this quotation as containing the foundational principle of damages assessment at 109.

⁵⁴ Jamie Cassells and Elizabeth Adjin-Tettey, *Remedies*, *supra* note 35 at 11: the “normal measure of recovery in tort law is *restitutio in integrum*: the plaintiff is entitled to be restored to the position she would have been in had the tort never been committed.” For a judicial example, see *Milina v Bartsch* (1985), 49 BCLR (2d) 33 at 78, affirmed (1987), 49

The compensable loss can be thought of as ‘what has happened and will happen in the plaintiff’s life now that the tortious injury has occurred’ *minus* ‘what would have happened in the plaintiff’s life, even if the injury had not occurred.’ Stated in a different way, to evaluate the plaintiff’s compensable loss the court must consider the difference between the plaintiff’s “original position” and “injured position.”⁵⁵ In that effort, the Court must make findings of fact to establish what events *have* and *will* occur as a result of the injury (relevant to determining “injured position”), and what *would have* occurred if the injury had not occurred (relevant to “original position”).⁵⁶ Of course, to define the compensable loss, the plaintiff must establish that the difference between her original and injured positions is owing to the negligence. For instance, if a defendant’s tortious conduct causes a discrete neck injury, and the plaintiff subsequently breaks her leg, the leg injury is part of her post-injury condition, but it is clearly not part of ‘injured position’ relevant to defining her compensable loss.⁵⁷

BCLR (2d) 99 (BCCA): “The fundamental governing precept is *restitutio in integrum*. The injured person is to be restored to the position he would have been in had the accident not occurred, insofar as this can be done with money.”

⁵⁵ *Athey*, *supra* note 4 at para 32.

⁵⁶ This is explained in Cooper, “Loss of a Chance,” *supra* note 36.

⁵⁷ Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada*, *supra* note 33 at 7: “The concepts of ‘compensation’ or ‘loss’ for the purpose of a civil action for damages are not synonymous with their general usage, where the term ‘loss’ may describe a ‘detriment’ unconnected with any wrongful conduct...However, for the purposes of civil actions for damages, the term ‘loss’ and therefore the concept of compensation, is causally tied to the wrongful event which produced the detrimental effects...”

Once the plaintiff has established that the harms she claims are properly compensable, she bears the additional onus of proving the monetary losses she suffered arising from those harms. These losses include non-pecuniary and pecuniary damages. Non-pecuniary damages are dollar amounts awarded to compensate the plaintiff's pain and suffering. Pecuniary losses can be divided into pre-trial losses (sometimes called 'special damages') and future losses. Pre-trial pecuniary losses can be placed into two broad categories: cost of care and loss of working capacity. Pre-trial cost of care includes medical expenses related to the injury and any compensable harms arising from it. The loss of working capacity includes lost earnings, lost profits and loss of home making capacity. A plaintiff may additionally claim for future cost of care and prospective loss of earnings.⁵⁸

Based on the above, the damages stage can be conceptualized as a two-phased project: Phase One establishes legal facts to help determine what is compensable by defining the original position versus the injured position. Phase Two concerns the valuation, or quantification of these losses. Suppose that a plaintiff establishes liability for the knee injury suffered in a car accident. At the damages stage, the plaintiff alleges that she developed arthritis in her knee and that she might need a knee surgery in the future. She seeks compensation for both. The court must determine whether the plaintiff is suffering from arthritis, whether the arthritis is attributable to the injury, and whether there is a chance of a future knee surgery owing to the injury. These factual findings occur in Phase One of the damages stage. Then, in Phase Two, the court considers the valuation of these losses.

⁵⁸ *Ibid*, see generally Chapter Five, Cassels and Adjin-Tettey, *Remedies, supra* note 35 at 119-159 for more detailed account of special damages. See also Christopher Bruce, *Assessment of Personal Injury Damages*, 4th Ed (Markham, Ontario: LexisNexis Canada Inc, 2004) for a useful practical guide for demonstrating pecuniary losses.

There, questions to be asked include: what medical expenses did the plaintiff have in relation to the arthritis? What were her lost earnings due to the arthritis? What costs will she incur in case of future surgery? How will her earning capacity be affected in case of the future surgery?

Based on established doctrines routinely applied in the damages stage, I argue that maintaining the relevance of chances for the factual inquiry of Phase One of the damages assessment promotes coherence. These doctrines are justified on the basis that they enable proper application of the compensation principle. The relevance of chances, however, is sometimes hidden in the language of these various doctrines that may suppress an understanding that chances are being taken into account.

ii. Future Harms, Contingencies, Pre-existing Conditions/Crumbling Skulls

i. Future Harms

The routine compensation of future harms is the first indication that chances are relevant to damages assessments, and that their relevance ensures proper compensation. When a plaintiff claims for a possible future harm, she is *not* required to prove, on a balance of probabilities, that the future harm *will* occur, on a balance of probabilities. Rather, the plaintiff's compensation will reflect the chance of the future harm occurring.⁵⁹

⁵⁹ See for example Peter Cane, *Atiyah's Accidents, Compensation and the Law* 5th ed (Toronto and Vancouver: Butterworth Canada Ltd., 1993) at 109-110: "With certain types of injury there is always a risk of complications in the future, e.g. epilepsy is almost always a risk in brain damage cases, and arthritis is a common risk wherever bones are severely fractured...this means that the judge must calculate what sum would be appropriate if the risk materialized, and then award a fraction of this sum proportional to the risk occurring."

Probabilistic compensation of future harms is often mis-described as engaging a different standard of proof for future facts, as explained in Part 1. The better description is that when future harms are compensated, the plaintiff must show that there is a *chance* of a future harm. The existence of this chance, proven in Phase One, is relevant to the plaintiff's 'injured position.' In Phase Two, the chance is quantified, and the damages award will reflect the likelihood of occurrence of the future harm, in accordance with simple probability valuation.

In practice, the evidence relevant to the *quantification* of the chance (Phase Two) will also establish the *existence* of a chance (Phase One). Therefore, in many cases, the inquiry into the existence of a chance may be silent, because it is pre-supposed. Nonetheless, this silent analysis underlies the quantification of the chance, because without establishing a relevant fact, there is nothing to quantify. Despite the potential silence, proof of the existence of a chance on a balance of probabilities must be kept in mind, because it is impossible to determine when simple probability should apply without understanding what is happening when it is being used. And what is happening is that a chance has become a relevant legal fact.

ii. Accounting for Contingencies

The second instance of chances being relevant to damages awards is in the form of contingency deductions for future cost of care and loss of income. McLachlin J. endorsed contingency deductions in *Milina v Bartsh* as follows:

In recognition of the fact that the future cannot be foretold, allowance must be made for the contingency that the assumptions on which the award for

pecuniary loss is predicated may prove inaccurate. In most cases this will result in a deduction, since the earnings and cost of care figures are based on an uninterrupted stream which does not reflect contingencies such as loss of employment, early death, or the necessity of institutional care.⁶⁰

These deductions, as McLachlin J implies, are intended to account for the chance that ordinary life events may diminish the cost of care required or cause income reductions even if the injury had not occurred. For instance, a plaintiff may have a better-than-expected recovery, and therefore require less cost of care. Courts may account for this possibility by reducing the cost of care award by the percentage figure that represents the probability of a speedier recovery. Similarly, courts may reduce loss of earnings awards to account for the chance that a plaintiff would have experienced a reduction in income for reasons other than the negligent act, like other illness, business failures, layoffs, etc.⁶¹

Although somewhat controversial, contingency deductions are endorsed by the courts.⁶² In *Lewis v Todd*, for instance, Dickson J states that, “in principle, there is no reason why a court

⁶⁰ *Milina v Bartsch* (1985) 49 BCLR (2d) 33 at 79.

⁶¹ Cassels and Adjin-Tettey, *Remedies*, *supra* note 35 at 125-126 and 143. See also S M Waddams, *The Law of Damages* (Toronto: Canada Law Book, 2012) at 3.94. For a more detailed discussion of contingency reductions for future loss of working capacity, see Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada*, *supra* note 33 at 375-394, and contingency reductions for future cost of care at 449-455.

⁶² Part of the controversy is that courts make deductions almost as a matter of course, without appropriate reliance on evidence. Indicating the impropriety of this, the Supreme Court of Canada in *Thornton v School District No. 57 (Prince George) et al.*, [1978] 2 S.C.R. 267 at 284, commented that “the imposition of a contingency deduction is not mandatory, although it is sometimes treated almost as if it were to be imposed in every case as a matter of law. The deductions, if any, will depend upon the facts of the case...” As Cassels and Adjin-Tettey suggest in *Remedies*, *supra* note 35 at 143, despite these comments, courts

should not recognize, and give effect to those contingencies, good or bad, which may be reasonably foreseen...the court must attempt to evaluate the probability of the occurrence of the stated contingency.”⁶³ Along with endorsing the use of contingency deductions generally, Dickson J’s comments suggest that accounting for contingencies is a manifestation of the principle that chances (i.e. contingencies) are relevant to determining a damages award. And simple probability is used to quantify the value of that contingency.⁶⁴

Translated into the language of ‘original position’ vs ‘injured position,’ making a contingency deduction can be thought of as a court accepting that inherent in the plaintiff’s original position is a chance that she will endure some loss of income, or will require less or more medical expense. In order to ensure proper compensation, the defendant must return the plaintiff back to the original position, which includes the chance of detriment or windfall.

seem to make contingency deductions almost automatically. The legitimacy of such deductions is questionable, because adjudicative decisions should occur on the basis of evidence, as opposed to judicial inklings.

⁶³ *Lewis v Todd* (1980) 115 D.L.R. (3d) 257 at 271.

⁶⁴ At 380, Cooper-Stephenson and Saunders, in *Personal Injury Damages in Canada*, *supra* note 33, state that, “the inclusion of contingencies is a manifestation of simple probability reasoning, since contingencies have regard to cumulated possibilities rather than probabilities, and are assessed on the degree of likelihood of their occurrence.” On its face, I agree. But I adopt a different characterization of what “simple probability reasoning” means and implies compared to Cooper-Stephenson and Saunders. This difference is reflected in the slightly different phrasing that I have used in the text above.

iii. Pre-Existing Injuries/Crumbling Skulls

Accounting for pre-existing injuries is another indication of the relevance of chances in assessing damages. Sometimes referred to as an application of the 'crumbling skull,' accounting for pre-existing injuries ensures that the plaintiff is to be returned to the position he was in prior to the negligence, "with all of its attendant risks and shortcomings, and not a better position."⁶⁵ In light of this principle, the Court provides that, "if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award."⁶⁶

The way that pre-existing conditions are accounted for is similar to contingency deductions. In the same way as ordinary life events create a chance of harm inherent to a plaintiff's original position, so too do pre-existing conditions. When determining damages entitlements, courts must consider the *chance* that owing to a pre-existing injury or conditions, the plaintiff would have experienced the same losses that she now claims. Such pre-existing *chances* may cause a plaintiff's award to be reduced through simple probability reasoning, by the value of the chance of the harm created by the pre-existing injury.

Suppose, for example, that a plaintiff claims for losses arising out of depression suffered after a tortious head injury. The trial judge finds the depression is related to the head

⁶⁵ *Ibid* at 35.

⁶⁶ *Ibid* at 35.

injury, so it is part of the plaintiff's 'injured position.' Suppose there is also evidence that the plaintiff suffered from psychological illness prior to the injury. The defendant can argue that the pre-existing psychological illness created a chance that the plaintiff would have become depressed, irrespective of the negligence. If the defendant can prove that the inherent psychological illness gave rise to a chance of depression, then that chance is a legitimate part of the plaintiff's 'injured position.' If so, the award for the losses related to the depression can be offset by the value of the pre-existing chance of depression owing to the pre-existing psychological illness. Accounting for pre-existing conditions is another manifestation of the principle that chances must be considered when determining the compensation entitlement.

Accounting for pre-existing conditions, however, can easily become confused with proving two different causal connections:⁶⁷ First, when assessing damages, if a court finds that a particular harm is causally connected to the injury (for instance, the court found a causal relation between the negligently inflicted head injury and the depression in the example above) then it may seem self-contradictory to also account for a pre-existing condition that may have caused the same harm (e.g. the depression).

⁶⁷ See for instance, *Hosak v Hirst* [2003] BCJ No 107(QL), where the BC Court of Appeal expressly noted that the trial judge made the error of conflating the legal analysis for causation and pre-existing injuries. At para 10, the BC Court of Appeal noted: "...I am of the view that the learned trial judge...erred in law by conflating the issue of causation (whether the accident caused the pre-existing condition to be 'activated or aggravated') with an issue relevant to the assessment of damages (whether there was a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the respondent's negligence). In other words, it is my respectful view that...the trial judge erred in law by not distinguishing between the principles of law that had to be applied in determining the issue of causation and those that apply to the assessment of damages."

Second, if liability is established, that means that a causal link between the defendant's negligence and the plaintiff's injury has been established in law. To then take into account a pre-existing condition that may have resulted in the same injury can also seem self-contradictory. That perception would allow for the mis-compensation of a plaintiff on the presumption that the chance of harm arising from a pre-existing condition cannot be relevant, because the causal link between the defendant's negligence and the harm suffered has become a legal certainty.

The first problem arose in *Athey*. The second problem is demonstrable in *Beldycki*. I argue that an erroneous conception of simple probability reasoning and its application to pre-existing injuries is a critical reason for the errors in compensation that occurred in both decisions.

iv. *Athey*

Athey brought a suit for recovery of damages for injuries sustained after two accidents. At trial, the accidents were treated as one and the defendants each admitted liability. Six months later, during an exercise warm up, *Athey* suffered a disc herniation that required surgery. At trial, Boyd J found that the injuries from the accident were a 25% causal factor of the herniation. She awarded 25% of the total assessed award for the disc herniation.⁶⁸ *Athey* appealed, arguing that he should have been awarded 100% of the damages arising

⁶⁸ *Athey v Leonati* [1993] BCJ.No 2777 (QL) [*Athey* Trial Decision]

from the disc herniation. Southin J.A. of the British Columbia Court of Appeal declined to consider the argument, and dismissed the appeal.⁶⁹ The case was appealed further, and the Supreme Court considered whether the trial judge's approach provided Athey with proper compensation.

The Supreme Court overturned the trial judge's 75% reduction. According to Justice Major, "[t]he only issue was whether the disc herniation was caused by the injuries sustained in the accidents or whether it was attributable to the appellant's pre-existing back problems."⁷⁰ The Court held that since it was established that the herniation was caused by the injuries arising from the accidents, causation was a legal certainty. Therefore, there could be no legal finding that suggested that a pre-existing condition, as opposed to the tortious conduct, could have been behind Athey's disc herniation. On that basis, Athey was compensated for all the losses that arose out of the herniation without accounting for his pre-existing condition.⁷¹

The Supreme Court considered a number of arguments for reducing Athey's damages award, given his predisposition to back injury. The two that are relevant for my purposes are the 'crumbling skull' and 'adjustments for contingencies' arguments. Despite commenting that the crumbling skull argument was the defendants' "strongest submission," and that the crumbling skull principle "recognizes that the pre-existing condition was

⁶⁹ *Athey*, *supra* note 5 at 10.

⁷⁰ *Ibid* at 7.

⁷¹ *Ibid* at 41.

inherent in the plaintiff's original position," and "the defendant need not put the plaintiff in a better position than his or her original position," the Court concluded that the findings of fact made by the trial judge did not imply an obligation to reduce Athey's award to account for the pre-existing susceptibility to disc herniation.⁷²

Responding to the defendants' argument that the trial judge's approach could be considered a routine contingency reduction, the Supreme Court pointed to the distinction between, on the one hand, past facts, and on the other hand, future and hypothetical facts. While future and hypothetical facts can be accommodated through simple probability reasoning, the Court agreed that past facts must be proven on a balance of probabilities. Past facts would therefore be subject to 'all or nothing' treatment. The court characterized the causal link between the injuries and the disc herniation as a past fact. Therefore, the contingency principle, which implies probabilistic reasoning, was held inapplicable. Instead, the causal link was to be proven on a balance of probabilities, and thereafter, treated as a legal certainty.⁷³ Since the trial judge had found that this causal link was established on a balance of probabilities, no pre-existing condition that rendered Athey susceptible to disc herniation was taken into account.

⁷² *Ibid* at 35. As Dennis Klimchuk and Vaughan Black maintain in "A Comment on *Athey v Leonati*: Causation, Damages and Thin Skills," (1997) 31 U Brit Colum L Rev 163, a better approach may have been to send the matter back to the trial judge to make appropriate findings with respect to Athey's pre-existing susceptibility to disc herniation, which may have led to a deduction of the damages award.

⁷³ *Athey, supra* note 5 at paras 26-30.

The Supreme Court's reasoning suggests that taking into account the pre-existing chance that Athey would have suffered the disc herniation somehow negates or compromises the usual process of proving a causal connection in law. However, if the question at stake is understood clearly, then the proof of the causal link between the tortious injuries and herniation is not at issue at all. The question at issue in the *Athey* decision is better understood as "whether it was proper to take into consideration the pre-existing chance that Athey may have suffered the herniation absent any negligence." The fact that the causal relation between the tortious injury and the disc herniation is established provides that Athey's disc herniation will form a legitimate part of his 'injured position.' This does not preclude the relevance of the pre-existing chance of disc herniation in Athey's 'original position.' The causal question that was relevant to defining Athey's 'injured position' is not re-opened when defining his 'original position.'

Undoubtedly, harms claimed as part of the 'injured position' must be causally connected to the tortious injury. For instance, a coincidental broken leg between the time of the accident and his trial would not be relevant to a plaintiff's 'injured position' because it would not have been caused by the tortious injuries. Accordingly, when Major J states that the issue at stake is whether the disc herniation was caused by the tortious injuries, and that this causal connection must be proven on a balance of probabilities, he is only partially correct, and the implication that he draws from the causal connection being established is not correct.

Athey is correct to the extent that the causal connection between the tortious injury and the herniation must be established, on a balance of probabilities, for the disc herniation to be relevant to Athey's 'injured position.' However, once the causal connection was established, holding that the pre-existing chance of disc herniation was rendered irrelevant

circumvented half of the requisite inquiry for the damages determination. Deeming the pre-existing chance of disc herniation irrelevant meant that the plaintiff's 'original position' was defined as significantly more valuable than it actually was, because it ignored Athey's pre-negligence back condition.

The source of this error can be traced to the misconception that surrounds simple probability reasoning. By contrasting past facts versus future/hypothetical facts, and suggesting that a different standard of proof applies to different types of facts,⁷⁴ the Court displayed its reliance on the erroneous interpretation of simple probability. Misunderstanding simple probability as a method of proof, the Court thought that the requirement to prove causation on a balance of probabilities would be compromised if simple probability was applied to account for Athey's pre-existing chance of back problems. The failure to recognize that the pre-existing chance of harm can itself be a legal fact caused a misapplication of the compensation principle and erroneous damages award. The Court subsumed the question of determining Athey's compensable loss within the question of defining Athey's injured position (which required establishing a causal link between the tortious injury and the disc herniation). However, it is the difference between the original position and the injured position that truly constitutes the plaintiff's compensable loss. The Supreme Court, however, did not define the plaintiff's original position at all, at least not in reference to the disc herniation.

⁷⁴ *Ibid* at 27: "Hypothetical events (such as how the plaintiff's life would have proceeded without the tortious injury) or future events need not be proven on a balance of probabilities. Instead, they are simply given weight according to their relative likelihood...by contrast, past events must be proven, and once proven they are treated as certainties."

After explaining how similar (though distinct) errors occurred in *Beldycki*, I will return to the comment on the approach that ought to have been taken to ensure proper application of the full compensation principle.

v. *Beldycki Estate v Jaipargas*

The Ontario Court of Appeal decision in *Beldycki Estate v Jaipargas*⁷⁵ shows how easily proof of causation principles in liability determination can improperly creep into the question of whether pre-existing chances are relevant for damages assessments. There, the plaintiff underwent surgery to remove a malignant tumor from his colon. After the surgery, a radiologist failed to notice a liver lesion on his CT scan. No post-operative treatment was scheduled. Two years later, a medical examination revealed stage 4 colon cancer, resulting in just 4-6 months to live without treatment and about 20 months to live with treatment. The plaintiff died 4 months after the jury returned its verdict.

The jury found that the radiologist was negligent in misreading the CT scan, and that caused the plaintiff to be “not disease free” when the case was tried. Liability was therefore established, and damages were awarded.⁷⁶ The radiologist did not contest his negligence. But he appealed the jury’s decision on two relevant grounds:

⁷⁵ *Beldycki*, *supra* note 53.

⁷⁶ *Ibid* at para 3.

1. The jury's finding of causation was erroneous because the evidence could not establish on a balance of probabilities that 'but for' his negligence, the plaintiff would have been disease free at the time of trial.
2. The jury improperly failed to reduce the loss of future income award on the basis of the chance that the loss could have occurred anyway even if the negligence had not occurred.

The defendant's appeal was dismissed. Answering the first ground of appeal, Justice Watt stated that "in an action for delayed medical diagnosis and treatment, a plaintiff must establish on a balance of probabilities that the delay caused or contributed to the unfavourable outcome."⁷⁷ Given the evidence that the plaintiff's chance of cure was greater than 50% before the misdiagnosis, it was open to the jury to conclude that the balance of probabilities test for causation was satisfied, and the radiologist could be found liable. This seems accurate.

Watt J's subsequent comments about the award for future income loss, however, mixed causation-for-liability principles and damages principles. Appealing for a reduction in the future loss of income award, the radiologist argued that the jury failed to account for adverse contingencies.⁷⁸ He argued that the jury should have reduced the award by 30% to account for the hypothetical chance that even with proper treatment, it was possible that the same losses would have occurred anyway. The plaintiff responded that since the jury

⁷⁷ *Ibid* at para 44.

⁷⁸ *Ibid* at para 63.

had found the doctor's negligence to be the legal cause of the injury, he was liable for the full extent of the losses.

Like the Supreme Court in *Athey*, Watt J referred to the principle that past facts are to be proven on a balance of probabilities, and are thereafter treated as legal certainties.⁷⁹ On this basis, he found the defendant doctor's argument flawed, because once it is established that the doctor's negligence caused the plaintiff's injury, that fact is taken as legal certainty, and full compensatory damages are awarded. According to Justice Watt, no principle allows the defendant to discount the full measure of the damages to reflect the chance that the same losses would have occurred even absent the negligence.⁸⁰ This ignores the compensation principle, which requires that the plaintiff be returned to his original position, but not beyond.

In *Beldycki*, the plaintiff's original position included a quantifiable likelihood that he may not have been cured even if the doctor's negligence had not occurred. Justice Watt's finding that "at law, [the plaintiff] would have been cured was therefore a certainty; that his cancer might still have metastasized was a legal impossibility,"⁸¹ and on that account, his refusal to consider chance in the damages assessment constitutes an error in the application of the compensation principle. True, causation was determined for the purpose of establishing liability, and when liability is established, (and assuming no contributory negligence) a

⁷⁹ *Ibid* at para 73.

⁸⁰ *Ibid* at para 84.

⁸¹ *Ibid* at para 84.

defendant is 100% liable *to return the plaintiff to his pre-accident condition*. This pre-accident condition must be determined, and this is part of the task of the damages stage. A finding of causation for liability does not exclude, nor should it exclude the pre-existence of a chance that the plaintiff would have suffered some harm that overlaps with the harm now being claimed as part of his 'injured position.' That conclusion of mutual exclusivity results in improper compensation.

As in *Athey*, the *Beldycki* error can be traced back, at least in part, to a problematic understanding of simple probability reasoning. Both courts point to the past/future divide as determining when simple probability reasoning is available. This divide reflects the misinterpretation of simple probability reasoning and prevents chances from being relevant legal facts. Suggesting that simple probability is not available for past facts, but is only available for future (and sometimes for hypothetical) facts results in a confusion between the principles that must be applied to establish liability and those applicable to assessing damages.

At the liability stage, if causation was established on a balance of probabilities, any chance that an injury was caused by some other factor is no longer relevant. Once a legal fact is proven on the requisite standard, it is thereafter treated as established in law in accordance with the 'all or nothing' method of fact-finding. But misinterpreting simple probability as a standard of proof can mask the fact that this method of fact-finding holds true in the damages stage as well. The valuation of harms is dependent on an underlying fact-finding process whereby the plaintiff's original and injured positions are defined. These facts are subject to proof on a balance of probabilities, just like facts at the liability stage.

The difference, however, is that at the liability stage, there is an 'all or nothing' approach – either there is liability, or there is not.⁸² In that way, liability inquiry parallels fact-finding – if there is only one legal fact at issue (i.e. did the negligence cause the injury) then the answer to this legal question, which is to be proven on the balance of probabilities, will be determinative of the liability question as well. Accordingly, any chance that the injury was caused by some other factor becomes wholly irrelevant to the liability determination – once the causal link between the negligence and the injury is established, the defendant is liable.

In contrast, the damages stage does not culminate in an all or nothing outcome. It determines a dollar figure that represents the extent of the defendant's liability. Legal facts, including the causal connection between the injury and harm, are found on the basis of the balance of probabilities and all or nothing approach in the damages assessment stage. For example, the causal link between Athey's disc herniation and the tortious injury had to be proven on a balance of probabilities. If the balance of probabilities is met, the disc herniation becomes part of Athey's injured position. If the balance of probabilities is not met, the disc herniation cannot be part of the injured position at all. However, at the damages stage, there is no reason for this to preclude the relevance of a pre-existing chance of suffering the same harm. Rather, the compensation principle requires the pre-existing chance to be accounted for within the plaintiff's original position.

⁸² This argument was presented in Chapter 5.

Joseph King has explained this in his discussion of the relationship between pre-existing injuries and the “thin skull” principle. The thin skull rule provides that a plaintiff should not be prevented from establishing liability because his pre-existing susceptibilities (his ‘thin skill’) caused the tortious harm suffered to be extreme.⁸³ However, this does not mean that the pre-existing condition that caused the extreme consequences must be ignored when assessing a plaintiff’s damages.⁸⁴ As King explains it, “[T]hat a terminally ill victim would have died on Tuesday, the next day, does not prevent the defendant’s conduct from being a cause of his death on Monday, but would obviously be quite relevant to the question of damages.”⁸⁵ This relevance, as I explain below, is the chance of harm that the pre-existing condition creates.

If pre-existing conditions are to be taken into account for damages assessment, then the only logical approach is that they are relevant through the chance of harm that they engender. If the contrasting approach were employed, then for a pre-existing condition to be relevant, the causal connection between the pre-existing condition and the harm that it is alleged to have caused would have to be established on a balance of probabilities. That is,

⁸³ For example, see John Munkman, *Damages for Personal Injury and Death*, 9th ed (London: Butterworths, 1993) at 39: “Where a plaintiff has some pre-existing weakness which renders him more liable to injury than other persons - such as a thin skull or a tendency to bleed - the defendant is liable for such injuries (assuming he is liable at all) although their extent could not be foreseen.”

⁸⁴ Joseph King Jr., “Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences” (1980-1981) 90(6) *Yale LJ* 1353 at 1361. See also Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada*, *supra* note 33 at 851: “The defendant may be able to show that the plaintiff’s condition, although it became worse than might normally be expected, would have deteriorated anyway: that is a “crumbling skull” case. Thus, a plaintiff’s unusual susceptibility will not go unnoticed when the issue of quantum is reached.”

⁸⁵ *Ibid* at 1361.

the pre-existing condition would have to be shown to be the cause of the harm itself (not just the chance of harm) in order to gain any relevance. If this were the approach to accounting for pre-existing conditions, then the courts' misgivings about negation of the causal analysis either at the liability stage or when defining a plaintiff's 'injured position' would have merit. This approach would render it impossible for pre-existing conditions to bear any relevance to damages assessment without negating a causal relationship between either negligence and injury (*Beldycki*) or injury and harm (*Athey*). This leaves only two options: abandon the requirement to consider pre-existing injuries when considering a plaintiff's damages entitlements, or make them relevant in terms of the *chances* of harm they create. The first option is undesirable. Pre-existing conditions must be relevant to damages assessments in order to ensure that defendants are not held accountable and then end up improving the plaintiff's original position.

A pre-existing condition is relevant to the plaintiff's original position to the extent that it disposed the plaintiff to a chance of harm, prior to his being subjected to any tortious conduct. That chance is the relevant legal fact. The existence of the chance must be proven on the balance of probabilities, just like any other legal fact. Once a pre-existing chance of harm is established, this chance becomes part of the plaintiff's original position. This chance gains relevance in the quantification of the plaintiff's damages through simple probability reasoning. The total award for the relevant harm will be reduced by the percentage value of the chance.

vi. Summary

The application of any of the damages principles noted (future harms, contingencies, and pre-existing injuries/crumbling skull) all aim to ensure proper compensation, and all

necessitate the use of simple probability reasoning. Conceiving of simple probability as a method of making a chance a relevant fact in its own right best coheres with the principle that a plaintiff's damages should be full and accurate. If, in contrast, simple probability were taken to be a method of proving future facts, then the compensation that would result would invariably result in either over or under compensation, as indicated above. The 'chance as a legal fact' interpretation avoids this inevitability of inaccuracy, because that approach does not purport to 'prove' the uncertain outcome, but to quantify its chance or risk.

Applying the new characterization, when a plaintiff claims that, for instance, a risk of future harm is part of her injured position, she must establish the existence of this chance and its causal connection to her tortious injuries on a balance of probabilities. Similarly, if a defendant alleges that a plaintiff's award should be reduced to account for a chance of harm created by a pre-existing injury, he must prove, on a balance of probabilities, that such a chance of harm existed in the plaintiff's original position. The existence of these chances is proven in Phase One of the damages stage, where the facts that define the plaintiff's original position and injured position are established. If a plaintiff proves, on a balance of probabilities, that the tortious injuries created a chance for future surgery, this chance will be relevant to the plaintiff's injured position. If a defendant proves, on a balance of probabilities, that a pre-existing condition also caused a chance of future surgery then this chance will be part of the original position.

If a chance of surgery is relevant to the injured position, or to both the original position and the injured position, then the value of these chances is quantified through the simple

probability metric. If, for instance, the tortious injury caused a 60% chance of future surgery, and the plaintiff's pre-existing condition caused a 20% chance of the same surgery, then comparing the injured position with the original position, there is a 40% chance of surgery. In accordance with simple probability reasoning, therefore, he should be awarded 40% of the total value of the surgery. Now suppose that a causal connection could not be established between the pre-existing condition and the chance of surgery. That means that the chance of a surgery is not part of the plaintiff's original position. In that case, the plaintiff is entitled to 60% of the cost of the future surgery.

Conclusion: The Benefits of a New Approach to Simple Probability

The procedural legitimacy framework prioritizes both consistency and coherence in order to assure an adjudicative fact-finding system that treats litigants non-arbitrarily. The situation of uncertainty and inconsistency in terms of the use of simple probability reasoning as an alternative mechanism for accommodating some types of factual uncertainty requires reform. In an effort to bring coherence to the simple probability doctrine and, therefore, bring the doctrine within the demands of procedural legitimacy, I started by suggesting that simple probability is mischaracterized as an alternative standard of proof. It is better understood as a method of recognizing the value of a chance in its own right. This interpretation implies that when simple probability is used, a two-stage analysis takes place. First, the existence of a chance is proven on the balance of probabilities standard, so the chance itself becomes a legally relevant fact. Then, simple probability is

used to quantify that chance. This is the 'chance as a legal fact' interpretation of simple probability. Not only is this a more accurate description, this interpretation brings a number of constructive benefits which are prioritized in the procedural legitimacy perspective.

First, the 'chance as a legal fact' interpretation preserves the consistency with which the adjudicative system accommodates its inevitable condition of factual uncertainty. I opened this thesis commenting that the balance of probabilities and all or nothing approach to fact-finding is the legal system's technique of converting factual uncertainty into legal certainty. Because it allows for legal facts to be proven to a standard that is less than certainty, the balance of probabilities and 'all or nothing' approach contains the inherent risk that legal facts are factually inaccurate. Still, adjudicative decisions are made on the basis of those legal facts. The legitimacy of adjudicative outcomes is nonetheless maintained because the factual uncertainty is managed fairly and consistently: all litigants are equally subjected to the balance of probabilities and all or nothing method, along with the other procedural rules of fact-finding. As such, the risk of error caused by uncertainties is fairly distributed.

The consistent application of the balance of proof and all or nothing approach is compromised when simple probability reasoning is interpreted as an alternative mechanism of proving legal facts that can replace the usual balance of probabilities and all or nothing approach. Under the 'chance as a legal fact' interpretation, simple probability does not constitute an abandonment of conventional procedure for translating factual uncertainties into certain legal facts, but rather maintains the established procedure. As I have explained, simple probability allows for the legal relevance of a chance. Just like any

other legally relevant fact, the existence of a chance must be proven on a balance of probabilities standard, upon which the chance is treated as a legal certainty.

Second, the 'valuation of a chance' interpretation preserves the consistency with which the adjudicative system accommodates its inevitable condition of factual uncertainty. This is important because it maintains equal and consistent distribution of risk of error.

Some confusion over accommodating uncertainty when it comes to chances is understandable. Where a chance is a relevant legal fact, there are actually *two* layers of uncertainty. First, the very existence of a chance and its connection to the tortious injury are uncertain facts; and second, the chance itself embodies an uncertainty. The new characterization maintains consistency in respect of the distribution of both uncertainties. Simple probability reasoning as a valuation tool distributes the *second* uncertainty by providing proportional quantification on the basis of the likelihood of the uncertain outcome. Thereby, it accounts for the concern that the inherent uncertainty associated with some facts should not be visited entirely on any one party. This second uncertainty is relevant to valuation of the chance, but not to the establishment of the legal fact (the legal fact is the chance, not the associated outcome). The uncertainty around establishing the chance as a legal fact at all and its causal relation to the injury is accommodated through the familiar standard of proof/all or nothing approach, as it is for all legal facts.

In practice, the evidence that relates to the *quantification* of the chance will also clearly establish the *existence* of a chance. Therefore, the inquiry into the existence of a chance may

be silent (because it is pre-supposed) in many cases. Nonetheless, this silent analysis underlies the inquiry into the quantification of the chance, because without establishing a legal fact, there is nothing to quantify. Despite the potential silence or obviousness of the inquiry into the existence of a chance on a balance of probabilities, it is important to keep in mind in principle, because it is not possible to determine when simple probability reasoning should or should not be applicable without an understanding of what is actually happening (in principle) when it is being used.

The 'chance as a legal fact' interpretation provides a coherent remedy for the current state of inconsistency in terms of judicial use of simple probability reasoning by forcing an approach to its use that is grounded on the substantive demands of liability determinations and damages assessments. Understood as a way to give legal relevance to a chance, simple probability reasoning must only be applicable where chances themselves are relevant to the legal determination at stake. And determining when chances are and are not relevant facts depends on the unique requirements of both the liability and damages determinations. Accordingly, the availability of simple probability could not clash with the demands of either liability or damages determinations, as inevitably occurs under the 'type of fact' approach, because its applicability is grounded on those very demands.

As such, the 'chance as a legal fact' interpretation remedies the incoherence with which judges currently attempt to resolve factual indeterminacies when faced with the question of whether simple probability applies or not. I have concluded that the use of simple probability should not depend on the type of uncertainty (i.e. the 'type of fact') that the court faces, but on the question of whether chances are substantively relevant. Applying

that approach, I conclude that simple probability has no utility in liability determinations (argued in Chapter 5), because chances are not relevant there, but it is applicable in the damages context to ensure that all the relevant chances, past or future, are taken into account when assessing damages entitlements.

On the basis of the procedural legitimacy framework developed in Chapters Two, Three and Four, I would call on the Canadian judiciary to adopt the reform outlined in this chapter in respect of the interpretation, availability and use of simple probability reasoning in personal injury damages assessments

CHAPTER 8. CONCLUSION

A. Introduction

Determining ‘what happened?’ is foundational to resolving any dispute. Judges are called on to resolve that question in most substantive disputes that reach them. It is a difficult question because of evidentiary gaps and complexities. No matter how difficult, however, the factual questions must be resolved in order for a legal claim to be decided. Through this thesis, I have inquired into why and, on what bases, we can accept the authority of a judicial decision that rests on factual conclusions that are made in a context of uncertainty.

Though I offer critiques of various judicial outcomes and scholarly approaches throughout the thesis, my inquiry did not arise out of a criticism of the legal system for its susceptibility to factual inaccuracy. My starting point, which remains central to my analysis, was the modest observation that we do not always know what happened, and we do not always know what the right answer is. That fallibility naturally manifests in the adjudicative system. Since knowing things *for sure* is not usually (if ever) possible, there is always a chance of arriving at an inaccurate conclusion. My effort has been to discover the legitimacy of the adjudicative system without rejecting, ignoring, or minimizing that frailty.

Acknowledging the unavoidable imperfection of the adjudicative system was soon coupled with the realization that an effective dispute resolution system requires outcomes that are authoritative by nature, and as such, the outcomes have to be legitimate. Accordingly, my project was oriented towards finding the right balance between the judicial system’s

forgivable limitations and the uncompromisable demands that define legitimacy. That balance, I have suggested, is ascertainable through a concept of legitimacy that keeps procedural integrity at its heart. My first four chapters were designed to uncover the concept of procedural legitimacy and its essential features; the last three chapters were designed to show why recognizing procedural legitimacy matters. I demonstrated this by applying it to three doctrinal debates that revolve around factual uncertainty.

B. Summary

I explain in Chapter Two that my inquiry into legitimate fact-finding has led me to a notion of procedural legitimacy. My understanding that procedure is integral to legitimacy first arose by observing how the adjudicative system resolves the above noted tension between the inevitability of factual uncertainty and the need for an authoritative resolution to the legal dispute. It is resolved by enabling facts to be found on a standard of proof that is less than certainty. In the civil litigation context, where I focus, a fact is proven if it can be shown to be more likely true than not. The implication contained within that method of fact-finding is that we accept the validity of outcomes that may be inaccurate – we accept up to a 49% risk of that. This means that the validity of an outcome does not depend on its substantive accuracy. The legal validity must, therefore, depend on the propriety of the process that gave rise to that outcome.

When an outcome has legal validity, it is authoritative and can be enforced. That authority requires justification, which I have called legitimacy. I reasoned that if procedural integrity is a necessary element of legal validity, and legal validity brings simultaneous implications

of authority, then procedural integrity must underpin legitimacy as well. This led to my conclusion in Chapter Two: consistent and appropriate adherence to legal processes is necessary for the legitimacy of an outcome.

That conclusion leads to the question of whether any process, applied consistently, would legitimize an outcome. For instance, can we have a process where fact-finding is based on a flip of a coin? Would outcomes that arise out of this process have justifiable authority so long as the process was applied properly? My answer is no, and substantiating that response led to the jurisprudential inquiry that I undertook in Chapter Three.

There, I began by unraveling some of the major themes in H.L.A Hart's and Joseph Raz's positivism. I noted that there are aspects of the separation thesis that must be accepted. The legal validity of a law, for instance, cannot depend on individual assessments of its moral acceptability. At the same time, I found the positivist commitment to an absolute separation of law and the justification of law to be limiting. Since legal validity brings with it authoritative implications, I suggest that legal validity must have in-built legitimacy. For me, that does not mean that an outcome that has legal validity must be correct in its outcome, but it must be justified in some way. That, again, prompted and reinforced my turn to process. Accordingly, in the second half of Chapter Three, I turned to theorists who have offered proceduralist paradigms for law's validity *and* its legitimacy: Lon Fuller and Jurgen Habermas.

I noted stark similarities in Fuller's and Habermas's thinking. Both have offered unique accounts of legality and legitimacy, and the points at which their theories converge were the

most significant for me. For both, legal processes must demonstrably embody respect for human autonomy. Consistent adherence to those procedures results in valid legal outcomes that are also legitimate. Fuller develops this concept by outlining eight rules that a monarch (King Rex), must follow when creating laws. These eight rules, which are called the internal morality of law, all demonstrate that the lawmaker must respect the autonomy of her subjects.

Habermas offers a similar commitment to recognizing citizens as autonomous agents within lawmaking procedures, but in more familiar terrain: the democratic process. That process, for Habermas, is an expression of a rational discourse, and it is the rational discursive process that gives rise to the legitimacy of an outcome or claim. The fundamental feature of the rational discursive process is that everyone who is affected by the outcome of that process will have had an autonomous, non-coercive, and meaningful ability to participate. For both Fuller and Habermas, those who are under the authority of law deserve to be treated as free acting agents who cannot be treated arbitrarily.

In Chapter Four, following Fuller's and Habermas's lead of centralizing respect for the autonomy of those affected by authoritative laws, I set out some general principles of fact-finding procedures that would ensure a demonstrable respect for litigants as free acting agents. The first part of Chapter Four required the most direct engagement with the role of factual accuracy in maintaining adjudicative legitimacy. My premise, as noted above, is that factual accuracy cannot be guaranteed, so adjudicative legitimacy cannot depend on it. This does not mean that factual accuracy is irrelevant. An adjudicative procedure that disregards factual accuracy cannot be said to respect litigants as free-acting agents who

should not be subject to arbitrary treatment. In Chapter Four, I explained that factual accuracy is relevant in my proposal through a procedural conception of factual *reliability*. Fact-finding procedures are factually reliable, I suggested, when they demonstrate a genuine orientation towards achieving factual accuracy. As I noted in Chapter Four, the authenticity of the fact-finding procedures can be presumed when:

1. In general, all relevant evidence is admissible.
2. Exclusions to relevant evidence are justified on the basis of respecting human autonomy.
3. The system ensures internally coherent and consistent error-risk management.
4. The standard of proof is, at minimum, a balance of probabilities.
5. The evidence presented is weighed rationally against the standard of proof, and the factual findings are accompanied by reasons.

Along with factual reliability, a legitimate fact-finding procedure will ensure full participation rights to those affected by the outcome. No affected party should be excluded from participating in the decision-making by presenting evidence and argument. Factual reliability and participation rights together provide the fullest expression of respect for human autonomy in adjudicative fact-finding procedures. When fact-finding procedures embody those qualities, consistent application of those rules results in legitimate factual determinations. This is the substantiated procedural legitimacy proposal that constitutes my suggestion for why, and on what bases judicial fact-finding can be acceptable despite the unavoidable potential for factual inaccuracy.

In Chapters Five, Six, and Seven I applied the procedural legitimacy framework to three doctrinal discourses situated in the negligent injury civil litigation context. My primary purpose was to use these discussions as an arena to showcase the procedural legitimacy proposal. The science and law discourse has highlighted crucial problems associated with over-dependence on unreliable expert evidence resulting in erroneous outcomes. Often, procedural changes (like changing the admissibility criteria, or more use of joint experts) are suggested as responses to the dangers associated with expert scientific evidence. Approaching this scientific evidence concern from the perspective of procedural legitimacy, I evaluated various suggestions for change as well as the existing procedures around the use of scientific evidence for judicial fact-finding.

Through my analysis in Chapter Five, I found that the Canadian procedures for admitting and relying on expert evidence satisfy the substantive requirements of procedural legitimacy: the admissibility criteria require the requisite level of factual reliability, and enabling presentation of expert evidence of a litigant's choice ensures meaningful participation rights. I discuss in that Chapter why a number of the proposed changes would not maintain those substantive elements of the procedural legitimacy proposal. Accordingly, the discussion was redirected from how best to change adjudicative procedures to better accommodate science towards how best to ensure that lawyers and judges use and apply the procedures appropriately when scientific experts are required to assist in fact-finding.

While my analysis in Chapter Five centered on the substantive elements of procedural legitimacy, Chapters Six and Seven relied more on its formal component of requiring consistent and, thereby, coherent application of acceptable adjudicative procedures. In Chapter Six, I used the procedural legitimacy frame to evaluate responses to concerns posed by difficulties in proving causation in injury claims. I especially focused on whether the loss of chance doctrine should be incorporated into Canadian injury law, or in the narrower context of medical negligence. My analysis culminated in endorsing the judicial adherence to the traditional balance of probabilities process of proof in the realm of causation, in order to maintain the demands of a legitimate adjudicative system. Adopting the loss of chance doctrine would result in irreconcilable inconsistency and incoherence and, therefore, arbitrary treatment of litigants. As such, it must be rejected.

In Chapter Seven, I again demonstrate the importance of coherence by addressing an area of incoherence in the management of factual uncertainty in the damages assessment context. I noted that judicial application of the simple probability principle is currently in a state of inconsistency, resulting in an affront to procedural legitimacy. I argued that simple probability reasoning has been misinterpreted as an alternative standard of proof, and it is more accurately characterized as a method of quantifying chances. Applying this interpretation would enable the Canadian judiciary to use the simple probability principle in accordance with the demands of procedural legitimacy, in particular, maintaining adjudicative consistency as well as coherence among the principles of injury litigation.

A message implicit in Chapters Five, Six and Seven is that the jurisprudential orientation that one assumes will impact his or her doctrinal analyses. Adopting a theoretical frame that responds to the need for adjudicative legitimacy despite conditions of factual

indeterminacy has enabled me to insert the fundamental question of legitimacy into the doctrinal debates that I have engaged with. That is, the value of developing a model of procedural legitimacy is not confined to theoretical arenas. I have hoped to show, through Chapters Five, Six, and Seven, that its impact is practical.

C. Limitations

The limitations on the research presented here have been set by the nature of my research question and the methodology adopted to answer it. First, focusing on adjudicative legitimacy from the perspective of fact-finding means that I have not considered the legitimacy of judicial pronouncements on ambiguous laws. The propriety of these interpretations is clearly necessary for the legitimacy of judicial outcomes. Although the considerations around resolving both legal and factual indeterminacy in an adjudicative context can helpfully inform each other, I have presented my inquiry on adjudicative resolution of factual indeterminacy as one that is complementary to, and distinct from, questions about the how and when we can accept the authority of judicial resolution of legal indeterminacy. These questions, though I do not address them in this work, are no less valuable to the broader goal of maintaining a legitimate adjudicative system and outcomes. As such, I hope to address them in my future research endeavours.

Second, I have opted to illustrate procedural legitimacy in the tortious injury context. Its applicability extends, in my view, far beyond that limited scope. All of the conclusions presented regarding acceptable fact-finding here are applicable throughout civil litigation. I believe there is also significant transferability to the criminal context, because even there, factual uncertainty cannot be eradicated. Naturally, however, there are different concerns

and values at stake in the criminal sphere compared with the civil sphere. I have not addressed those, nor have I addressed critiques of the ideas presented here that may especially arise in the criminal context. Wrongful conviction, for instance, is one of the most stirring examples of the impropriety of factual inaccuracy that surely cannot be made to seem “legitimate” no matter how laudable the procedure. I agree, and this project should not be taken as providing any justification for such an outcome.

Third, through this project I have contemplated adjudicative legitimacy through a jurisprudential lens, but there are practical and systemic realities that confront legal institutions and understandably impact perceptions on whether the adjudicative system really is legitimate, even if it may be in theory. These would not, I believe, detract from the thesis that procedural integrity is necessary for acceptable judicial decisions, but they are significant concerns for anyone interested in adjudicative legitimacy. I have not been able, in this work, to engage with the undoubtedly important contributions that will have arisen from critical scholarship shedding light on the practical realities of being a woman, or a racial minority, or a member of the LGBTQ community, or a disabled person, for instance, trying to navigate within adjudicative procedures.

Somewhat related, my conclusion that the legitimacy of an adjudicative outcome depends, at least in part, on procedural propriety may give rise to questions around accessibility of those very processes in practical terms. Again, I have not engaged deeply in this element of the access to justice discourse here, but a concept of the necessary components of adjudicative legitimacy can surely contribute to that discourse, and is part of my future research initiatives.

D. Final Reflections

This project has enabled me to explore some of the most deeply held intuitions about what makes the adjudicative system acceptable and good. It has required me to come to terms with (and defend) the idea that fallibility does not equate to illegitimacy. At times that recognition has proven challenging, both intuitively and analytically. It is difficult, I have found, not to expect the legal system to be perfect, given the authority that it exerts, its role in maintaining societal stability, and its symbolic significance as a representation of the unity of a community. But I have learned that it is analytically unsound to impose a standard of perfection to assess anything.

That lesson applies to my project. The analysis contained here is, of course, not perfect. As noted, there are certain discussions and perspectives that I have had to leave unaddressed, and there will be places where my analysis will not have gone far enough or will have fallen short of covering every possible counter-position. But this project represents my best attempt to understand and make use of the often brilliant insights of others, to try to reconcile and explain the disagreements among some of the most influential thinkers in contemporary legal philosophy, and to start my journey into finding my voice among those who believe in the goodness of law despite its (and our) fallibility.

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Appendix A

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