PROCEDURAL JUSTICE AND INFORMATION IN CONFLICT-RESOLVING INSTITUTIONS

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A logical analysis of the idea of justice would seem to be a very hazardous business. Indeed, among all evocative ideas, that of justice appears to be one of the most eminent and the most hopelessly confused.
–Chaïm Perelman[1]

I. INTRODUCTION

One difficult question that political and moral thinkers have grappled with is how to limit justice.[2] We have a tendency to see justice as potentially applicable to almost any circumstance in which values are somehow involved with interpersonal behavior.[3] Yet in our contemporary parlance it does not seem appropriate to use the language of justice in all such situations. While there may be significant disagreement over which situations are appropriate for the use of the concept, there does appear to be some agreement

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[1] CHAÏM PERELMAN, JUSTICE, LAW, AND ARGUMENT: ESSAYS ON MORAL AND LEGAL REASONING 1 (1980).

[2] *See, e.g.*, ARISTOTLE, THE NICOMACHEAN ETHICS 107–11 (David Ross trans., Oxford Univ. Press 1980) (1925) (dividing justice into two senses: the universal sense of law abiding—the "complete virtue"—and the particular sense of fair and equal). Aristotle's latter sense of justice has limited scope and application and is concerned with particular kinds of acts, while the former is concerned with every act that might have an impact on one's virtue. *See id.* at 108, 110–11; Joel Feinberg, *Noncomparative Justice*, 83 PHIL. REV. 297, 298 (1974) (dividing justice into "comparative" justice, which focuses on eliminating arbitrary inequalities, and "noncomparative" justice, which responds to basic rights).

[3] *See, e.g.*, PERELMAN, *supra* note 1, at 1–2.

that the concept is limited by its subject matter.[4]

My goal in this paper is to examine one way in which the subject matter of justice has an impact on its content.[5] I will examine how a conflict-resolving institution presupposes certain standards of procedural justice and how those standards speak to the amount and kind of information that the conflict-resolving institution may justly consider.

Each of these concepts will be developed in greater detail below. However, here I offer some preliminary remarks to clarify the subject. Justice is commonly divided into at least two categories: procedural justice and substantive justice.[6] Since both procedural and substantive justice have both form and substance, the term "substantive" is ambiguous.[7] Therefore, for the purposes of this article, I will employ the phrase "outcome justice" for what is commonly called substantive justice.[8]

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[4] *See id.* at 7–10 (theorizing that the subject of justice contains an unknown variable that, when specifically applied to a particular situation, will produce different forms of justice); *see also* Evan Simpson, *The Subjects of Justice*, 90 ETHICS 490 (1980) (comparing Rawls's viewpoint that the primary subject of justice is the basic social structures with Nozick's definition, which takes the subject of justice to be individual rights).

[5] For the purposes of this article, I employ the phrase "subject matter" with respect to justice to refer to conflicting values. By employing the term "content" when referring to justice, I mean those general principles of justice articulated by individuals within a society as well as the judgments individuals make based on those principles. These distinctions will get more treatment below.

[6] *See* Richard Brook, *Justice and the Golden Rule: A Commentary on Some Recent Work of Lawrence Kohlberg*, 97 ETHICS 363 (1987) (calling the distinction between procedural and substantive justice "[a] rough but helpful distinction"); *see also* Matthew H. Kramer, *Justice as Constancy*, 16 LAW & PHIL. 561 (1997) (emphasizing the importance of separating procedural justice from substantive justice). *But see* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 155 (1974) (articulating a more general division between "historical principles" and "end-result principles" or "end-state principles").

[7] *See* Michael Walzer, *Philosophy and Democracy*, 9 POL. THEORY 379, 386 (1981) (noting the distinction between procedural and substantive justice while recognizing that each depend on the other because "[n]o procedural arrangement can be defended except by some substantive argument, and every substantive argument . . . issues also in some procedural arrangement").

[8] *See* DAVID MILLER, PRINCIPLES OF SOCIAL JUSTICE 93 (1999) (stating that the justice of outcomes "refers to the state of affairs whereby at any time different individuals enjoy various resources, goods, opportunities, or entitlements"); *see also* Kramer, *supra* note 6, at 562 (exemplifying the confusion that arises from conflating outcome with substantive justice). To support this distinction, consider the following example: the presumption of innocence in a criminal trial appears to be highly substantive, yet is clearly in the realm of procedural justice as a norm that governs the procedure by which the trial takes place. On the other hand, the principle that the trial takes place in the proper order—opening statements followed by the presentation of each side's case, followed by closing statements—seems to be a purely formal notion within the realm of procedural justice. Since it appears that both formal and substantive principles might arise within the realm of procedural justice, I will refer to matters of justice unconcerned with procedure as matters of "outcome justice" or "the justice of outcomes."

Justice is about situations of actual or potential conflict and the outcomes to these conflicts or the distributions made based on the resolution of these conflicts.[9] As Hume famously noted, justice is not an appropriate standard in situations of abundance or enlarged affections.[10] Rather, it is a concept that serves as a criterion by which we resolve conflicts over property distribution, over showing each other the proper amount of respect, and over the appropriate response to situations where others have been wronged. These and other conflicts define the scope of justice. As social constructions or organizations of people that seek to resolve interpersonal conflicts, conflict-resolving institutions obviously deal extensively with the concept of justice.

Much of the first part of the paper will be occupied with an attempt to gain a better understanding of these concepts. First, I define conflict-resolving institutions and illustrate how both procedural and outcome justice act as important criteria by which such institutions are to be judged. Next, I examine the division between procedural and outcome justice as it applies to these institutions and the formal aspects of the norm of justice as they constrain these conflict-resolving institutions. Putting these two pieces together, we will then see more specifically how a conflict-resolving institution and the formal aspects of the division between procedural and outcome justice demand certain informational requirements that provide the substance of the procedural justice norms. Finally, we will examine some implications of these considerations for the authority of the conflict-resolving institutions.

Ultimately, the purpose of this paper is to consider the particular conditions under which conflict-resolving institutions operate and to articulate how those conditions create requirements that restrict the content of procedural justice as applied to such institutions. These requirements limit both the general principles we articulate and the individual judgments we make. A particular focus will be upon notions of procedural justice as intimately linked to the

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[9] *See* Simpson, *supra* note 4, at 490–93 (discussing how communal, private, institutional, and class conflicts can be distinguished based upon their subject matter); NOZICK, *supra* note 6, at 207 (claiming that any principles that emerge from a particular situation and process constitute principles of justice, regardless of the nature of the process). *But see* MILLER, *supra* note 8, at 93–95 (raising the notion that historically, society has been concerned with outcomes and it would instead be beneficial to examine the procedures that create just outcomes).

[10] DAVID HUME, AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALS 83–85 (Tom L. Beauchamp ed., Oxford Univ. Press 1998) (1751).

conditions of conflict resolution.[11] We will see that the project of institutional conflict resolution and the need for that resolution to be authoritative presumes limitations on the kinds of information that should be considered in the resolution: too much or the wrong kind of information can contaminate a resolution process and render it unjust.[12]

I will not offer anything approaching a complete theory of justice. Rather, my goal is to offer some general analyses of certain characteristics that any notion of procedural justice must possess by using examples arising in conflict-resolving institutions. In a way, my examination of justice will be formal rather than substantive. There may be some substantive conclusions that flow from it, but they will be limited to the minimal standards of procedural justice.[13] Put another way, I will examine the manner in which conflict resolution impacts or determines the criterion by which the institutions' performance is to be judged.

II. INSTITUTIONS AND CONFLICTS

A. The Notion of an Institution

Institutions are artificial social structures or organizations

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[11] Some have claimed that the justice of situations is to be found exclusively in the procedure by which that state of affairs was reached. *See, e.g.,* NOZICK, *supra* note 6, at 207. While this is an extremely important theory and one I have neither the power nor the space to undermine, I do not believe that it respects common understanding—however flawed that understanding might be. Even though we are in the business of limiting the concept of justice so that it does not swamp other norms, limiting it to mere compliance with an established procedure strikes me as rendering the concept too circumscribed. I therefore maintain the common distinction between conceptions of justice for procedures and for outcomes. *See* MILLER, *supra* note 8, at 93–110. Our focus on subjective valuations of process and outcome further justifies the use of this distinction. Even if one participant or viewer of a conflict resolution is in the grip of a Nozickian theory of justice, that person will simply collapse the standards by which he or she judges the outcome onto the process. As long as there are other individuals who will view the two as subject to distinctive standards—and still think of both those standards as aspects of justice—it is appropriate to accord with their distinction.

[12] *See infra* note 77. This is true notwithstanding individual judgments about the outcome of the process. Although a tension exists between the degree to which conflict-resolving institutions and processes should be open to allow the free flow of all relevant information and our sense that it is only fair that certain information be limited, I want to go beyond questions of relevancy and claim that procedural justice requires the limitation of even relevant information.

[13] As a result, I will remain neutral with respect to the popular theories of justice. Many of these theories of justice are replete with content sufficient to indicate what justice demands in any given situation, at least insofar as justice is capable of guiding our judgment in any situation to which it applies. However, to the extent that some of these theories discuss the formal characteristics of justice, I will appeal to those analyses.

framed to deal with certain kinds of problems or to accomplish or pursue certain goals.[14] Different institutions will, therefore, deal with different kinds of problems and goals. For example, a library is an institution that addresses the research problems of its patrons. Researchers have a variety of needs with regard to their research projects.[15] Some or all of these needs can conflict with the needs of other researchers. Given the limited resources of space and money at the library's disposal, not every possible research need can be met. Therefore, the institution must examine the actual and potential conflicting needs of researchers in order to decide which books to buy and to which publications the library should subscribe. The output or determination of the process is a solution to the problem at hand. That solution, however, may or may not have been arrived at through a just process. Furthermore, notwithstanding the process used to arrive at the solution, it may or may not be a solution that fairly accounts for the interests of all actual or potential researchers.

The conflict-resolving institutions that I describe are meant to be as general as possible, but must share some characteristics to be relevant. While one might sometimes speak of justice in noninstitutional settings, I do not believe that much can be learned from these uses for the present purposes.[16]

B. Conflict-Resolving Institutions

The kinds of institutions I have in mind are ones that resolve conflicts among people.[17] These resolutions are not always to the

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[14] *See* JOHN RAWLS, A THEORY OF JUSTICE 55 (1971) [hereinafter RAWLS, JUSTICE] (defining institutions as abstract goals that are actualized by rules and social interactions); *see also* Charles Fried, *Natural Law and the Concept of Justice*, 74 ETHICS 237, 245 (1964) (characterizing institutions as patterns of actions, thereby emphasizing more strongly the essential connection between institutions and procedural justice).

[15] I understand that libraries are not only used by researchers. For the sake of simplicity, however, I will call anyone who uses a library a researcher and what they do in the library is research their projects.

[16] This is mainly because I believe such uses tend to be even more metaphorical than in the cases of institutions that do not take conflict-resolving as their purpose. *See infra* notes 19–20 and accompanying text.

[17] Social scientists have well documented the fact that "people recognize that the maintenance of social relationships and the resolution of disputes sometimes require that control over decisions be relinquished to a third party." E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 13 (1988). *See also* STUART HAMPSHIRE, JUSTICE IS CONFLICT 7 (2000) ("Almost any organized society requires an institution and also a procedure for adjudicating between conflicting moral claims advanced by individuals and by groups within a society."). I disagree with Hampshire on two points: First, it is difficult for me to imagine any organized society without at least one such institution and, in a less formal

satisfaction of the parties involved in the conflict, but the nature of the institution as the mechanism for solving the kind of conflict at issue gives the resolution some authoritative status.[18] The parties must, therefore, respect this authority if they are to continue with whatever enterprise represents the context in which the conflict arose. This might be a very general social enterprise, such as a nation or municipality; the decisions of its legislatures, executive bodies and courts must be respected for a party to continue participating within that social entity in good standing. It might also be a very limited and specific enterprise, such as an orchestra; the decision of its dispute resolution mechanism must be respected for the party to continue to participate in the orchestra.

An institution that is concerned with justice and yet fails to resolve either actual or potential conflicts among people reduces justice to an ancillary or metaphorical role.[19] In such institutions, a robust role played by justice could be analyzed as stemming from a sub-institution, which shares more in common with the kinds of conflict-resolving institutions that are at issue here.

Revisiting the example of an orchestra, it is an institution the primary function of which is to practice and perform music. In that role, questions of justice will rarely, if ever, arise. To the extent they do arise, the use of the word "justice" will tend to be metaphorical or derivative, such as a claim that it would be unjust to play yet another work by Beethoven when the orchestra has not yet played any Tchaikovsky.[20] However, to the extent that the

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way, many such institutions will likely flourish within the confines of any organized society (and in most disorganized societies as well). Second, I disagree with Hampshire in that I believe that it is a mistake to limit the kinds of claims the institution adjudicates to "moral" claims only. In fact, I assert that conflict-resolving institutions would be needed even if there were no moral claims. While it may be the case—as this article attempts to illustrate—that there are moral norms that would govern the settling of any set of conflicting claims, it is not the case that all such claims must themselves be moral. One could interpret—as I suspect Hampshire does—all claims one is willing to press against another to have a moral aspect. Frequently, however, one might be in a position of pressing a claim simply because one values something highly in a material way—it is worth a lot—and not necessarily because one believes that one has a greater entitlement to it. *See infra* note 73 and accompanying text.

[18] *See* RAWLS, JUSTICE, *supra* note 14, at 58 (discussing how popular consent to the judgment of an institution necessitates obedience to the institution regardless of the justice of an individual ruling).

[19] *See, e.g.*, D. Clayton Hubin, *The Scope of Justice*, 9 PHIL. & PUB. AFF. 3 (1979) (providing a non-institutional example of "the conflict between white blood cells and an invading virus" as a situation that "would be perverse, semantically and morally, to view . . . as raising problems of justice").

[20] It is metaphorical if we interpret this claim as one where the orchestra is being unjust to Tchaikovsky or to his music; the former because he is no longer a person with whom conflicts can arise and the latter because it is not a person. It is derivative if we interpret the claim as

orchestra has mechanisms in place for dealing with disputes that arise among musicians or between them and the directors or administration, that mechanism is a sub-institution. When functioning primarily as a dispute-resolver, such a sub-institution can itself be analyzed as a conflict-resolving institution. Hence that aspect of the institution is subject to the analysis of this paper.

C. Conflicts, Goods, and Values

The conflicts with which justice is concerned arise as a result of the importance people place on "goods" such as ideas, objects, events, other people, actions, behavior, status, and states of affairs.[21] One type of conflict might arise out of mutually exclusive claims, such as when two individuals or groups value the same good, the nature of which prevents simultaneous use of the good. In a dispute over non-divisible property, two or more parties might both claim entitlement to the property. In a dispute over divisible property, one or more parties may claim an amount that is inconsistent with the claims of other parties. Conflicts may also develop where the opposing parties value a good inconsistently. It may be of high value to one person to bring about a state of affairs, while for another it may represent a disvalue—something to be avoided. For example, consider the availability of firearms to the general public: for some it is of great value, while for others it is of great disvalue.

There is an important distinction between the value placed upon

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one where the orchestra is being unjust to its audience or to its musicians. This is because we can imagine each of these groups as having an interest that would conflict with the decision of the program director to play more Beethoven. However, since these interests are unlikely to be tested by any dispute resolution mechanism, the claim that the choice is unjust seems a bit strained. *Cf. id.* at 3 (describing the model situation in which parties require conflict resolution as "[w]hen two normal adults put forth conflicting claims to goods or services in a society such as our own").

[21] *See* Herbert Spiegelberg, *What Makes Good Things Good? An Inquiry into the Grounds of Value,* 7 PHIL. & PHENOMENOLOGICAL RES. 578, 579 (1947) (defining things to which one assigns value as "concrete objects as well as qualities, states, relations, events etc."); Roy Wood Sellars, *In What Sense do Value Judgments and Moral Judgments Have Objective Import?*, 28 PHIL. & PHENOMENOLOGICAL RES. 1, 2 (1967) (pointing out that one can make value judgments "about referents of all sorts such as projects, states of affairs, things, the self, other selves, institutions, etc"); *see also* John Rawls, *Outline of a Decision Procedure for Ethics*, 60 PHIL. REV. 177 (1951), *reprinted in* TWENTIETH CENTURY ETHICAL THEORY 212, 220–21 (Steven M. Cahn & Joram G. Haber eds., 1995) [hereinafter Rawls, *Outline*] (defining "goods" in three subclasses as: (1) things satisfying needs, wants, and likes; (2) activities that have the capacity to satisfy needs, wants, and likes; and (3) objects or activities that foster the conditions under which the other kinds of goods may be "produced, appropriated, or exercised").

a thing and the thing being valued, i.e., the good.[22] Sometimes we fail to maintain this distinction by using the word "value" to stand for both together.[23] When dealing with abstract entities such as rights, this distinction is easily blurred. For example, for me to say that my right to bodily integrity is a value means simply that I place a high degree of importance on that abstract thing known as the right to bodily integrity. Whether such an abstraction is understood as a power, a claim or entitlement against others or a propositional attitude, the value itself is to be distinguished from that abstract thing being valued.

This distinction is important for our understanding of justice in that the two may come apart when attempting to adjudicate among competing values. In our attempt to reach the most just outcome—literally, to discover or evaluate the justice of the situation[24]—we may have to consider the thing being valued and the value that an appraiser places upon it separately.[25] While each constitutes a part of the subject matter of justice, and while they may come apart in the process of adjudication, they invariably present themselves together. Therefore, a question of justice will never arise unless there is both an important thing and an importance placed upon that thing at issue.[26] For the sake of simplicity, when dealing only with the subject matter of justice—in which the two present themselves together—rather than the process of adjudication, I

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[22] *See* Spiegelberg, *supra* note 21, at 579–80 (using the term "value" to represent "certain characteristics of things").

[23] *See id.* at 582; Sellars, *supra* note 21, at 4.

[24] *See infra* Part IV.A. (discussing degrees of justice).

[25] I use the term "appraiser" to include individuals, groups and possibly institutions, although this last only insofar as there is a person or group as a part of the institution that has an institutional role to make judgments. The appraiser decides among goods and how much importance to place in them. *See* Sellars, *supra* note 21, at 3 (discussing the human thought process by which one determines "the role an object plays in relation to desires and needs," and subsequently appraises the object by assigning it a value). I am indebted to Sophia Wong for the term "appraiser". An appraiser should be distinguished from an adjudicator, who decides upon the outcome of conflicting claims. The adjudication of conflicts requires the application of procedural norms to the specific conflict at hand in order to reach an outcome. *See* THE OXFORD ENGLISH DICTIONARY 158 (2nd ed. 1987) (defining "adjudicator" as "[o]ne who adjudicates; who settles a controverted question, or awards the prize in a competition). Using the scale analogy that will get greater explanation below, the appraiser decides what and how much of the subject matter is placed on the scale, while the adjudicator reads the scale.

[26] *See* John Kane, *Justice, Impartiality, and Equality: Why the Concept of Justice Does Not Presume Equality*, 24 POL. THEORY 375, 379 (1996) ("[J]ustice is concerned with people's relations to certain tangible and intangible 'things'—namely, goods, means, honours, positions, powers, rewards, privileges, burdens, punishments, penalties, and so on—in respect of which they may have various moral rights, entitlements, obligations, and liabilities.").

follow the conflation and use the word "value" to refer to this pair of import and important thing.[27] But when discussing the way justice operates on the process of adjudication, I will attempt to maintain the distinction.[28]

All formats in which subjects of justice arise share a competition among the parties involved in the conflict over some aspect of perceived value.[29] Where there is no care, there is no conflict.

D. Kinds of Conflict-Resolving Institutions

People generally turn to institutions to solve these kinds of conflicts. Sometimes the institutions are formal, as in the cases of the legal regime and orchestra mentioned above. Other times the institutions are informal as in the case of noncodified, but explicit, norms by which a farming neighborhood might solve cattle-grazing disputes.[30] Formal or informal, however, the explicitness with which the institution is implemented for the purpose of settling the kind of dispute arising within the particular institution's context is what distinguishes these institutions from other frameworks in that wider context or enterprise. While there may be many other facets of the context that form the basis for the institution,[31] at issue here

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[27] *See supra* notes 22–23 and accompanying text; *see also* Sellars, *supra* note 21, at 2 (discussing "value judgments" as thought processes that associate goods with their relative role in the human economy). It is important to note here that we are only talking about subjective valuations. Decisions of objectivity or universality in ranking these values or deciding among competing claims will have to be made later, in determining what justice demands of the institution in resolving the conflict. That is, in analyzing the way in which conflicts give rise to considerations of justice in the institutional context, it is the subjective claims of the parties to the conflict that are initially important. Considerations of objectivity become important (if at all) only once some institutional actor attempts to reach a just solution to the conflict.

[28] There is an obvious sense in which this distinction tracks the distinction drawn above between the subject matter and content of justice itself. This can help explain the second-order character of the value of justice—telling us the value of other things—and how appraisers might sometimes serve as adjudicators, examining the justice of their own values. *See infra* notes 70–73 and accompanying text.

[29] The language of competition here is not meant to exclude cooperative enterprises in settling conflicts. So long as the conflict is analyzed as a dispute over valuations of goods, there is of necessity some mutual exclusivity among the parties' positions that defines the conflict. The conflict-resolving institution may very well operate to bring the parties together to hammer out a compromise or employ some other cooperative framework for settling the conflict. No doubt this would, if successful, greatly increase the chance that each party will be satisfied with the outcome. Such satisfaction, however, is tangential.

[30] *See* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991) 1–4; *see also* John R. Searle, *How to Derive "Ought" from "Is"*, 73 PHIL. REV. 43, 55–56 (1964) (listing examples of both formal and informal institutions and associated obligations).

[31] For example, cattle grazing a commons, mutual security in the face of natural or artificial threats, or the desire to perform music for others.

are only those institutions that resolve conflicts and hence have recourse to concepts of justice as a guiding principle or criterion for that end. Justice is then both a principle to which the institution turns in making its determinations and by which others—including the parties in the dispute—may judge the process and outcome.[32]

It might be claimed that this understanding of the role of the conflict-resolving institution already introduces one substantive element of a conception of procedural justice: jurisdiction. However, the distinction between the institution and its context or wider enterprise does not set the institution apart from other conflict-resolving institutions but from other institutions and entities within a given wider enterprise that do not resolve conflicts. That is, an institution's jurisdiction provides an understanding of what is appropriately within the purview of a given institution's mandate for conflict resolution. It indicates which conflicts it may resolve authoritatively and which it may not. The orchestra's dispute-resolution institution may not, for example, resolve a custody dispute between two of its divorcing members. The distinction drawn in the previous paragraph distinguishes the conflict-resolving institution from other aspects of its context or what we might call other elements of the wider enterprise. It would distinguish the conflict-resolving institution from, for example, the budgetary apparatus of the orchestra or the music director's decision of what to play at a given concert. To the extent that conflicts arise with or within those other parts of the institution, they will be settled by the conflict-resolution mechanism.[33]

E. Institutional Design as Conflict Resolution

The form and purpose of the conflict-resolution procedures can themselves be seen as resolutions of higher-order conflicts. There is, therefore, a second-order conflict inherent in any conflict-resolving institution: the potential conflict over different designs for the institution. This is resolved by the enterprise that designed the first-order institution. That would be the constitutional convention,

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[32] The institution and the parties or other individuals may not share the same conceptions of justice, resulting in different judgments about the outcome of the conflict resolution.

[33] The wider enterprise or context may have many conflict-resolution mechanisms, the purview for each of which would be a matter of jurisdiction. So there may be one mechanism for resolving disputes among musicians and another for settling differences of opinion about budgetary allocations. As of now, however, we are only concerned with what distinguishes the conflict-resolving mechanisms from other aspects of the overall context or enterprise. Of course not all conflicts will be subjected to the conflict-resolution procedure.

the legislatures, the drafters of organizational by-laws, the founders, or others who worked out initial procedures for settling disputes within the context of the shared enterprise at issue.[34] To the extent that the conflict-resolution procedure is open to amendment and change, there will be processes within or alongside it that can be analyzed as akin to these foundational institutions.

The obvious next question is: "What about those second-order institutions? Were they, in turn, the result of higher-order institutional designers?" There is no need to deny the possibility of multiple higher-order institutions since there is no fear of an infinite regress. At the basis of any conflict-resolving institution is some commonality of purpose.[35] In any drive to institutionalize a conflict-resolution procedure, there is some agreement among those involved in the enterprise who see the need for such a procedure in order to enable the enterprise to fulfill its purpose.[36] That purpose cuts off the possibility of an infinite regress as it also binds the parties to the enterprise.

A group of music enthusiasts get together and decide to form an orchestra. As the project grows and becomes more formal, those in charge of furthering the development of the project realize that they will need a conflict-resolution procedure to resolve conflicts among members. But that procedure itself may need to change with time and they may also have to design an interim procedure for governing the process of designing and reviewing proposals for conflict-resolution institutions. Since there had to be an initial agreement of purpose to get the project off the ground, there cannot be a regress of possible conflicts, the resolution of which requires higher and higher order procedures. If there was too much conflict over the initial conceptions of the enterprise itself there would have been no commencement of the enterprise and the parties would have gone their separate ways.

There might be some doubt about all this—especially with regard to its explicitness—when using this analysis for the formation of governments or constitutions and their initial conflict-resolution bodies. While a theoretical recourse to social contract theory would

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[34] *Cf.* HAMPSHIRE, *supra* note 17, at 8 (discussing the need for all conflict-resolving institutions to be backed by a smaller group of organizers who determine the policies that will underlie the institution).

[35] *See* RAWLS, JUSTICE, *supra* note 14, at 54–56.

[36] *See id.* at 55–56.

solve this problem by positing society itself as a shared enterprise,[37] we might be justifiably uncomfortable with using such a theoretical construction in this context. Rather, we should admit the possibility of some institutions arising organically—such as those that gained their processes periodically as solutions to practical difficulties, without a self-conscious institutional designer—and other institutions being imposed by those who had recourse to force them upon other conflicting parties. The problem of infinite regress of higher-orders of governing procedural norms is still cut off in these cases by some historical analog to a process of reflective equilibrium in the case of organic institutions, and by the sovereign will to minimize strife among subjects in the case of despotically imposed institutions.

III. ASPECTS OF JUSTICE

In these contexts, justice is a norm that governs the way the institutions resolve conflicts and how they implement those resolutions. Any limitations on implementation, including practical considerations, may be factored into the solutions that are arrived at. These limitations may also be a subject for justice if the conflict requires determining the just distribution of practical limits and burdens among interested parties in fashioning solutions to conflicts.[38]

A. The Scale Metaphor

Analyzing justice in this context, we can distinguish among its subject matter or scope and its process and result, which together create its content.[39] If we use the common metaphor of the scale, the subject matter is what is placed on the scale, the process is the weighing procedure[40] and the result is what the scale reports.

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[37] *See* THOMAS HOBBES, LEVIATHAN 101–02 (Oxford Univ. Press 1929) (1651) (implying that contracts, by definition, require a mutual transferring of social rights, such that both or all parties to the contract have relinquished something in return for something else).

[38] *See* RAWLS, JUSTICE, *supra* note 14, at 56 (arguing that the transparency of the rules of institutions can ensure that those engaged in it know the institution's limitations and know what to expect).

[39] *See* ARISTOTLE, *supra* note 2, at 106 ("With regard to justice and injustice we must consider (1) what kind of actions they are concerned with, (2) what sort of mean justice is, and (3) between what extremes the just act is intermediate."). The first is analogous to subject matter, although we tend not to limit it to actions, while the second two would both be found in the content.

[40] I ignore for the moment the important consideration that adjudicators can misread the

Focusing on what is initially placed on the scale, we have what topics justice treats; what things can be evaluated as just or unjust; what inputs justice takes. On the other side of the process, the scale ultimately reads what justice demands of those topics; what it means for something to be just or unjust. Adjudication is the process of coming to an evaluation of the best resolution of a given conflict.[41] As we will see, these different aspects of justice are brought to bear on corresponding aspects of the resolution. The adjudicatory process is judged and guided by notions of procedural justice, while the outcome may additionally be judged by somewhat independent substantive notions of justice, such as preconceived notions about which party, in all fairness, should be favored in the result.[42]

When dealing with output, a further possible distinction arises between generalized rules demanded by the principles of justice and the application of those rules to particular situations. That application will then yield judgments regarding states of affairs, behaviors and policies relevant to those situations.[43] The term "content" encompasses both the general and specific notions of what justice requires. For the purposes of this paper, I will gloss over this distinction since it tends to obfuscate the way in which these two notions are mutually dependent. In many analyses, this distinction plays a greater role than I afford it here.

B. Conflicts as Subject Matter

The subject matter of justice can be described as values that are either in conflict or need to be ordered in some fashion, with equality being one potential outcome of such ordering. That is, justice deals with situations in which an evaluation—literally, the setting of an importance; a judgment of something's worth—must be made of two or more conflicting sides. A need to order the importance placed upon two or more things can itself be understood

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scale, i.e., that human understandings of justice are fallible.

[41] *See* THE OXFORD ENGLISH DICTIONARY, *supra* note 25, at 158 (defining adjudication as "the act of adjudicating or adjudging; an awarding or settling by judicial decree").

[42] *See* HAMPSHIRE, *supra* note 17, at 4–5 (noting that procedural justice in the sense of fairness in conflict-resolution processes is practically invariant and universal—though the processes themselves may vary, the idea of fairness in their operation does not—while "[j]ustice and fairness in substantial matters, as in the distribution of goods or in the payment of penalties for a crime, will always vary with varying moral outlooks and with varying conceptions of the good").

[43] *See* Rawls, *Outline, supra* note 21, at 216, 218, 221–22.

as a kind of conflict. This is true in the sense that each of the goods can be seen—albeit somewhat artificially—as vying to be more important than the other goods. The situation can be seen as a case of counter-factual conditional conflict: if I *had* to choose among them, I would keep the good that I now judge to be more important. Therefore, for the sake of simplicity, I say that the subject matter of justice is conflicts of value, understanding this to include cases in which only a mere ordering is at stake. Although not all cases concerning a conflict of values constitute the subject matter of justice, all cases of justice have value conflicts as their subject matter.

For the purpose of this paper, this idea can be made more precise. While questions of justice might sometimes arise in cases of wholly intrapersonal value conflicts—as in the individual decision of whether I should value my independence or my pet more highly—I am presently concerned with how justice operates in and upon institutions. Institutions deal with *interpersonal* value conflicts.[44] Interpersonal value conflicts are situations in which two or more parties have values that are incompatible or for some reason must be ranked against each other—with equality still being a possibility.[45] This can be understood literally, as in the case where two divorcing parents are both seeking full-time custody of a child or, more abstractly, as in the case of deciding whether to spend a given sum of money to combat air pollution while recognizing that the money may be needed later for a more pressing value.

C. Classifying Justice

Many justice theorists concentrate most heavily on attempting to derive the principles of justice or to apply those principles to a particular context.[46] They do this in a variety of ways, including the

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[44] *See* HAMPSHIRE, *supra* note 17, at 7–8. A possible exception here is organized religion, an institution that also deals with intrapersonal value conflicts in purporting to instruct us how to settle these with respect to our beliefs about the relative values of a variety of goods.

[45] The inevitability of conflict, even among perfectly rational individuals was perhaps most famously characterized by Hobbes. *See* Michael Ridge, *Hobbesian Public Reason*, 108 ETHICS 538, 543–45 (1998) (citing THOMAS HOBBES, LEVIATHAN *passim* (Michael Oakeshott ed., Collier Books 1962) (1651) and David Gauthier, *Public Reason*, 12 SOC. PHIL. & POL'Y 19 (1995)).

[46] *See, e.g.*, MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY *passim* (1983) (concentrating on distributive justice to make conclusions about the need for pluralism and equality in a variety of contexts including group membership, the provision of basic needs within a community setting, markets, remuneration and succession, political office, the division of labor, leisure time and activities, education and family, and

examination of particular judgments made in our society or the intuitive application of certain principles and the subsequent attempt to define said principles in terms of their relation to justice.[47] Since my goal is to examine how both the principles and the subject matter of justice impact its content—both the principles and the particularized judgments—I will treat both the abstract principles of justice and any possible application of them as content unless the subject matter has a different impact on each part of the content.

The distinction between subject matter and content exists regardless of what kind of justice one examines. When focusing on distributive or social justice,[48] the subject matter concerns the goods to be distributed and the varying demands for those goods, while the distribution scheme that justice yields, requires, or recommends after reconciling these elements constitutes its content. Corrective or retributive justice—as distinguished from distributive justice—takes as its subject matter those actions or states of affairs judged *ex ante* as wrong according to some value scheme and the defenses to these actions or states of affairs. The particular punishment or response that justice would lead people to call appropriate constitutes the content of corrective or retributive justice. Procedural justice similarly takes as its subject matter processes that are considered important based on their ability or tendency to reach settled outcomes in cases where values conflict. Its content is the characteristics of a procedure or class of procedures that respect the conflicting values according to a previously evaluated scheme.[49]

Barry points out a further division between the contemporary theories of justice and those theories influenced by more classical

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personal relationships).

[47] *See, e.g., id.* at xiv–xv (noting that although one may examine society from an "objective and universal standpoint"—by viewing the world from afar—the contours of justice can be scrutinized from within, because "[w]e make the social world as much in our minds as with our hands, and the particular world that we have made lends itself to egalitarian interpretations").

[48] *See* BRIAN BARRY, THEORIES OF JUSTICE 355 (1989) [hereinafter BARRY, THEORIES] (stating that distributive justice "is in the first instance an attribute of institutions"). I do not believe—nor does Barry claim—that distributive justice is the only form of justice applicable to institutions. Therefore, while my analysis will primarily focus on procedural justice, I will sometimes widen the scope and also consider outcome justice based on the belief that focusing exclusively on distributive justice tends to mask certain kinds of assumptions about the content of justice.

[49] Of course, justice can appear in multiple ways and in multiple forms. For example, one may consider those characteristics of a procedure that settle interpersonal value conflicts according to a scheme that was itself previously determined by distributive justice as the content of procedural justice.

conceptions of justice.[50] On the one hand is the classical tradition begun by Plato and Aristotle and culminating with Hume, in which justice is a property of individuals, the king of virtues in general and/or one among them in particular.[51] On the other hand is a more modern conception, in which "[j]ustice is the first virtue of social institutions."[52] This difference represents not only a distinction between the kinds of justice being discussed, but the kinds of subject matter involved. Where justice is a property of individuals, it takes as its subject the behaviors, projects and perhaps characters of individual actors.[53] Where justice is a property of institutions, it takes as its subject the policies, laws and decisions of those institutions and perhaps the unintended consequences of those policies, laws and decisions.[54]

Justice, therefore, constitutes a rather large class that can be further subdivided into sub-classifications based upon the variety of types of subject matter and operations upon that subject matter. Nonetheless, there are similarities among all these different forms or kinds of justice. One key similarity among the subject matters that different forms of justice take is that each deals with values. Values here are to be understood as the importance—both the amount and kind—placed upon anything that is deemed by an appraiser to be more or less important. This would, therefore, include everything from one's right to free speech to the content of one's wallet and would also include other people, groups, and institutions. Not necessarily all values can be subject matters of justice, but all subject matters of justice must be values.

D. Procedural Justice

Focusing now on procedural justice, Rawls makes a three-fold distinction among pure procedural justice, perfect procedural justice, and imperfect procedural justice.[55] Pure procedural justice

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[50] *See* BARRY, THEORIES, *supra* note 48, at 152.

[51] *See id.*; *see also* PLATO, THE REPUBLIC 40 (Raymond Larson trans., AHM Publ'g Corp. 1979) (attempting to define the justice of individuals by first examining the justice of the state); RAWLS, JUSTICE, *supra* note 14, at 10 (indicating that Aristotle's notions of justice are based on the actions of persons and the belief that persons are deemed to be just insofar as they desire to act justly).

[52] RAWLS, JUSTICE, *supra* note 14, at 3. One could argue, however, that Plato presaged the modern tradition by examining the justice of the *polis* in analogy to the justice of individuals, understanding the latter in terms of the former. *See* PLATO, *supra* note 51, at 40.

[53] *See* RAWLS, JUSTICE, *supra* note 14, at 10.

[54] *See id.* at 7.

[55] RAWLS, JUSTICE, *supra* note 14, at 84–86 (citing BRIAN BARRY, POLITICAL ARGUMENT ch.

refers to situations where the process for determining an outcome completely exhausts all considerations of the justice of the situation—and hence of the outcome.[56] There is, therefore, no independent way of determining the justice of the outcome other than to discover whether or not the procedure was correctly followed. Rawls's example here is of a fair bet freely entered into by the parties.[57] As long as the process of determining the winner is fair—every entry has the expected chance of winning and is accorded that announced chance in the process of determining the

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VI (1965)). Barry also makes a three-fold distinction in what we might call generally procedural justice. *See* BRIAN BARRY, POLITICAL ARGUMENT 97–100 (1965) [hereinafter BARRY, POLITICAL ARGUMENT]. "Procedural fairness" is when a procedure is operating according to the formalities that define it. *See id.* at 97. This leaves aside consideration of any criteria upon which those procedures were developed. Rather, procedural fairness is akin to getting what you expect in the working of a procedure. A random method for settling a dispute accords with procedural fairness insofar as the method is actually random. *See id.* at 97. The notion makes no comment about whether such a random method is the best means for settling the dispute. "Background fairness" goes a bit further into the issue of which process would be most just for settling an issue or contest. *See id.* at 98. Barry defines this notion in terms of examples, e.g., "background fairness would rule out sailing boats or cars of different sizes being raced against one another unless suitably handicapped." *Id.* at 99. It is important to note that more substantive notions seem to be creeping in here, though it is difficult to discern them; it would appear that background fairness goes to giving all parties good reason to participate in the procedure by suggesting that each side gets some kind of equal footing from the onset. This is one aspect in which substantive notions of justice would inform one aspect of procedural justice. This norm of equal footing or a rational basis for participation in the process is substantive in the sense that it is a part of the content of the procedural justice norm as opposed to being purely formal. It is not substantive conceived as opposed to procedural since it is a norm that governs the procedure of conflict-resolution and not a way to judge the outcome. This recalls the important distinction that I try to maintain by referring to the content of justice, which can apply to norms of process or outcome. *See supra* notes 7–8 and accompanying text. Finally, Barry notes that "legal" or "rule-based justice" is where there is an "authoritative determination procedure" that takes place according to articulated rules. BARRY, POLITICAL ARGUMENT, at 99–100. Barry adopts Sidgwick's understanding of it as "a correct application of the relevant rule." *Id.* at 99. At first blush, it is difficult to see the distinction between this last notion and a combination of the previous two. Where there is background fairness, a procedure will be developed to apply rules to stand in for the norms that govern the process. An extremely useful example here, and one that shows the prescience of Barry's use of boat races for background fairness, is the conflict over the America's Cup races of 1989–90. *See* Mercury Bay Boating Club, Inc. v. San Diego Yacht Club, 557 N.E.2d 87, 88–90, 91 (N.Y. 1990), *aff'g* 545 N.Y.S.2d 693 (App. Div. 1989). The race took place according to the announced procedure—fastest boat through the course won, demonstrating the concept of procedural fairness—but there was serious controversy over the fairness of racing a double-hulled vessel against one with only one hull, raising a question of background fairness. The lack of background fairness led the parties to a dispute over legal justice in their varying interpretations of the rules by which the race was supposed to take place, i.e., whether or not the correct interpretation of the rules under which the Cup races were endowed allowed the use of multiple-hulled vessels. *See Mercury Bay*, 557 N.E.2d at 92 (explaining that issues surrounding fairness and sportsmanship must be resolved through the rules of yachting and not through judicial intervention).

[56] RAWLS, JUSTICE, *supra* note 14, at 86.

[57] *Id.*

winner—the outcome is just. There is no independent outcome justice in this situation; it is all in the procedure.[58] Pure procedural justice is distinguished from perfect procedural justice—where there is an independent criterion by which to identify the most just result and there is a process for perfectly achieving that outcome—and from imperfect procedural justice—where there is an independent criterion for determining the most just result but there is no perfect process for reliably arriving at it.[59] In such cases as the latter, the process may be followed exactly but the "correct" result may still not be reached.

It is important to note that these criteria for determining the justice of outcomes, since they respond to the interests directly at stake in the conflict, are likely to be highly contentious and dependent upon perspective. This is exactly what lends procedural justice its value: even with situations involving imperfect procedural justice, we can set aside differences of opinion as to the most just outcome and put our faith in the process. The fact that the most common aspects of procedural justice—both perfect and imperfect—are accompanied by independent substantive norms for judging the outcome does not lend greater weight to those independent norms. In fact, it has quite the opposite effect. The lack of an unbiased test for determining the correct criteria by which to judge outcomes in the institutional setting leads us to deemphasize those process-independent criteria, at least from the perspective of the institution itself.[60]

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[58] *Id.*; *see also*, BRIAN BARRY, JUSTICE AS IMPARTIALITY 214–15 (1995) (noting that "it is the procedure itself that determines what a just outcome is").

[59] RAWLS, JUSTICE, *supra* note 14, at 85–86.

[60] To speak of the institution having a perspective is somewhat misleading. It might be more correct to call this the perspective of a possibly hypothetical institutional participant who has no personal stake in the outcome of the conflict resolution. As a participant in the institution, although not necessarily in the conflict-resolution procedure itself, she still has an interest in there being *some* outcome—i.e., that the conflict not be allowed to continue unabated, as unresolved conflicts will tend to interfere with the wider institution achieving its purpose—but not in any *particular* outcome. To say that the person has no personal stake must be understood very strictly here. For example, a criminal trial can be seen as a method for resolving a dispute between society as a whole and the accused. Every member of society can be construed to have a personal interest in the trial's outcome, and, hence, all actual institutional participants have a stake in the outcome. The interest may be as vague as, "let the guilty be punished and the innocent remain unharmed." Nevertheless, to the extent that anyone forms a belief about the guilt or innocence of a particular defendant, that person will have an interest in the outcome of the trial. If the outcome is not in accordance with one's beliefs about the guilt or innocence of the defendant, one will believe that the outcome was unjust even if one believes that the process was perfectly just. To the extent that one does not form a belief about the guilt or innocence of a particular defendant, one will rely upon the process to find that essential fact and will then still have an interest in the outcome—i.e., if

We are primarily concerned with instances of imperfect procedural justice as the normal considerations of conflict-resolving institutions. There may be certain kinds of institutions that are able to settle conflicts with perfect procedural justice; however, these institutions are less problematic because little doubt arises as to whether the result is just.

E. Procedural Justice, Justice of Outcomes, and Perspective

Rawls's notions of procedural justice are heavily shaped by the distinction between that form of justice and the justice of outcomes.[61] Where there are methods for determining the justice of outcomes, they may differ greatly depending upon the perspective from which someone makes the determination. When pure procedural justice operates correctly, the process sets the just outcome.[62] In cases of both perfect and imperfect procedural justice, there may be differences of opinion as to the most just outcome.[63] This is especially relevant in situations of conflict resolution. Indeed, it may be that the process produces a result with which no one is satisfied. If we nonetheless say that justice was done, we are implying that the process itself is responsible for producing a just outcome. In such cases, we recognize the lack of any objective standpoint from which to measure the justice of the outcome and instead allow the justice of the procedure to stand in for it.[64]

In conflicts over goods that have an all-or-nothing character or in conflicts settled in a manner such that one party's claim is given full

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this defendant is guilty he should be punished accordingly; if innocent he should be let free. These kinds of interests give rise to independent criteria for judging the justice of the outcome. Imagine a situation where the process worked perfectly, but still led to a "miscarriage of justice." It might be easier to imagine a perfectly working criminal system convicting an innocent person as an example of this, since many might believe that setting a guilty person free is not a "miscarriage of justice" without other injustices leading up to that false acquittal. However, we are still tempted to say that any mistaken outcome evidences a flawed process. I believe that latter claim comes from the faith we place in the perfectibility of the system to reach the "correct" result. It is that faith, and the recognition of the inherent bias in any independent assessment of the outcome—especially in criminal trials, where some personal interest is unavoidable—that leads to those independent assessments being deemphasized in the framework of the conflict resolution.

[61] *See, e.g.*, MILLER, *supra* note 8, at 96–97 (contrasting between the two extreme sides of the spectrum: "Outcomes alone seem to matter when some discrete and finite good is being allocated, the good is essential, and the criteria for allocating it are uncontroversial. . . . At the other extreme stand the cases in which the outcome raises no questions of justice aside from that of the procedure employed to reach it.").

[62] *See id.* at 97.

[63] *See id.* at 95–96.

[64] *See id.* at 102.

force and the other's is given no force, the losing party is unlikely ever to feel that justice was done, even if the process worked perfectly. In processes that lead to compromises or settlements it is possible that both sides are satisfied with the outcome.[65] This, however, is less likely—though not impossible—if the procedure was somehow tainted or lacked robust standards of procedural justice.[66] Here there is likely to be lingering doubt in the fairness of the resolution if there was some aspect of the procedure that was substantially unfair.

IV. JUSTICE IN CONFLICT-RESOLVING INSTITUTIONS

The division of justice into subject matter, procedure, and outcome parallels facets within the conflict-resolving institutions themselves. This should come as no surprise since, as a set of norms governing that very institution, justice will necessarily track all aspects of the practical process it regulates. Restated, the formal components of justice within conflict-resolving institutions will reflect the parts of the institutions about which normative judgments can be made. Institutions deal with a scope of conflicts and have established systems for settling these disputes, which give rise to the institutions' decisions, solutions, and settlements.[67]

Given this parallel, it will be useful in our discussion to distinguish between aspects or considerations of justice itself and formal aspects of the institutions regulated by justice. I will, therefore, use different terms to refer to each in order to maintain

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[65] Although parties involved in arbitration can choose to agree on various procedural details that would affect the outcome of the proceeding, they rarely come to such an agreement. NORMAN BRAND, COMMITTEE ON ADR IN LAB. & EMP. L., A.B.A., HOW ADR WORKS 6 (2002). This is certainly not always the case, and there may be many situations where both sides are sufficiently satisfied with the outcome to overlook improprieties in the process. *See, e.g., id.* at 5 (explaining that in directive or result-oriented mediation the mediator's goal is to bring the parties to a point where both are satisfied with the results). *Cf.* HAMPSHIRE, *supra* note 17, at 95 (arguing that the judicial procedures for rendering a decision are perceived as just where both sides in a conflict have the opportunity to be heard).

[66] *See* MILLER, *supra* note 8, at 99–101 (discussing four qualities—equality, accuracy, publicity, and dignity—that must be incorporated into the conflict-resolving process to achieve procedural fairness); Brand, *supra* note 65, at 9 (claiming a "red flag immediately goes up" if one party possesses more bargaining power than the other, which could unfairly tip the scales of justice).

[67] The aspects of justice can be brought to bear on different aspects of the institutional process. For example, an adjudicator, determining only the justice of something, can take an institutional process as a subject matter and reach a substantive conclusion about its justice as an outcome. This would be to treat procedural justice norms as if they were outcome norms. An adjudicator can also make a determination about an outcome of a dispute resolution independently of norms that govern the process of dispute resolution.

this distinction. The subject matter or scope will be essentially the same for both.[68] The institutional actor who fashions—and perhaps implements—a resolution to the conflict at hand I will call the "judge," while any person making a determination of the justice of the outcome or the operation of a given procedure will be called an "adjudicator."[69]

Recall the definition that an appraiser is a party who evaluates a claim or goods in the conflict.[70] Paradigmatically, an appraiser is a party in the conflict in the capacity of evaluating her own claims. The appraiser and adjudicator are merely conceptual roles that anyone can play at any time.[71] This means that anyone can potentially adjudicate the justice of a given conflict situation, including the appraisers themselves. However, when the appraiser is also adjudicating, he or she is determining the justice of his or her own claims. Again, this should not be confused with the institutional setting: if a party were to judge her own claims in an institutional setting, it would be manifestly unjust.[72] Nevertheless, it is expected that parties decide upon the relative weight of their own claims when bringing them into any conflict situation. If an appraiser perceives that her claim is not as weighty as that of the conflicting party, then we would expect that she not press her claim in an institutional setting. Of course, this is not always the case. There are circumstances in which a party might press a claim even if she would acknowledge that the claim is less weighty according to justice: strategic considerations; to test the institution's capacity to

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[68] Since justice as a norm requires tracking the institutional process by which the conflict is resolved, the claims in the conflict to be resolved by the institution are the same claims that are subject to the justice determinations made by the adjudicator.

[69] In one sense, then, an adjudicator is like an ideal judge in that he or she considers only justice. These terms are given somewhat artificially restricted meanings only for the sake of keeping clear the distinction between the operation of the institution and evaluations of the justice of that operation.

[70] *See supra* note 25 and accompanying text.

[71] The titles of the roles are meant to stand in for the actions, decisions or functions being performed at each step in the conflict resolution process. An adjudicator is then anyone conceptually adjudicating among the competing claims. An appraiser is anyone conceptually determining the value of a claim independent of its relation to the opposing claim(s). It is to be expected that parties will appraise their claims before submitting them to any conflict-resolving institution and also do their own adjudication of their claim's worth in comparison to the opposing claim(s).

[72] This is not always the case. Take the example of a teacher allowing her students to determine their own grades. Since the teacher is still there as an ultimate arbiter, there is a check on otherwise wildly unjustified outcomes. The general grade deflation—students grading themselves more harshly than the teacher would have—that is often experienced in such situations is empirical evidence of what I will call the "justice discount." *See infra* Part IV.E.

render just results; or simply because the party desires to have her claim heard in the institution.[73]

Examining again the notion of a conflict-resolving procedure, there is a difference between an institution arriving at a solution to an interpersonal conflict and a just outcome to that conflict. The institution arrives at resolutions to conflicts: the hypothetical adjudicator, considering only justice, decides just outcomes to conflicts. Although they accept the same subject matter, the two can easily come apart. In fact, as alluded to above, justice can be thought of as shadowing the institutional resolving process. They both take the same inputs, the values or interests that are in conflict. The institution arrives at a solution that is an attempt to account for a host of criteria and considerations—both theoretical and practical—brought up by that particular conflict in the context of its institutional mission. These criteria include justice, but might also include other considerations such as practicality and some sense of the commitments of the parties to the values or interests in conflict. The result is an operative resolution to the conflict at hand. It might be a compromise, an attempt to account for some of each of the competing values, or it may be a simple decision as to which value will win or trump the other. On the other hand, an ideal adjudication of only the justice of a given value-conflict yields a result (an outcome) that can then be compared to the result of the institutional solution: if there is too great a discrepancy between the result that justice demands and that at which the institution arrives, then the institutional solution will be deemed unjust.[74]

A. Degrees of Justice

This implies that outcome justice admits of degrees. Possible solutions to problems can be more or less just. However, there may

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[73] *See generally* LIND & TYLER, *supra* note 17, at 222 (explaining that in the self-interest model, people attempt to "seek indirect control over decisions through process control"). Certainly, it might be difficult or impossible for some parties to perceive the greater weight that might otherwise be placed upon the opposing claims.

[74] At this point, such a judgment—that a solution is unjust—is wholly subjective. However, what is involved in coming to such a judgment is that the person who makes the judgment places him or herself in the role of the adjudicator and makes a determination of the justice of the outcome. Since the subject matter or inputs to the conflict are subjective evaluations, there is a great likelihood that individuals will judge the justice of situations differently, depending on how they appreciate the subjective values that are at stake. It should also be noted that we are now assuming situations of imperfect procedural justice, but are ignoring aspects of the procedure and only concentrating on the outcomes. In cases of pure procedural justice this distinction would make no sense.

also be some threshold below which we would call given possible outcomes unjust or over which possible solutions will be deemed just. Furthermore, one's judgment of the justice of the situation may or may not be modified by some of the other considerations that the institution would have to take into account. One might initially judge an outcome as unjust because of incomplete information of the practical limitations on any given outcome. If one were supplied with more information about the practical limitations involved in the circumstances, then one might then reassess the earlier judgment. This might include a readjustment of the threshold below which the solution is deemed unjust. For example, if we were to look at a given distribution of resources and learn that some people were starving while others were not, we might initially say that the distribution—along with the institution that produced it—was unjust. However, if we were then told that those who were not starving were just barely getting by, and that if the resources were distributed absolutely equally everyone would starve, we might reassess our earlier judgment and decide that the distribution was not manifestly unjust.[75]

B. Institutional Failure

It would seem that there are at least three ways in which a conflict-resolving institution can fail, thus leading to three sources of injustice. First, it can fail in its scope, either by ignoring cases within the scope or by reaching beyond the scope to settle cases outside its purview. This would be a failure to accord with principles of jurisdiction. Second, it can fail in its procedure, by failing to use the correct means to settle the dispute. Finally, it can fail in the outcome, by reaching a result that is somehow manifestly unjust notwithstanding having used the correct procedure and having tackled the correct questions.

But what is the difference between these last two? If the process is completely just, do we have reason to question the justice of the outcome? Certainly in cases of imperfect procedural justice, we should not be surprised that the outcome might be questionable notwithstanding the procedure operating correctly. Take the

[75] This example assumes an isolated community, which is unable to appeal to other sources to supplement their resources. It also requires at least a certain availability of resources so that we are not in a situation of such scarcity that the question of justice cannot even arise. *See* HUME, *supra* note 10, at 85–86 (arguing that notions of justice cannot arise or be applied to situations of severe scarcity).

example of a famous African-American football star accused of murdering his ex-wife. Assuming he actually did possess the requisite *mens rea* and performed the *actus reus* necessary to constitute the crime of murder, we might want to say that the acquittal was unjust, but that the procedure was just. For example, procedural justice required excluding certain evidence from the jury or including other evidence that would introduce doubts not directly related to the circumstances of the crime—such as racism on the part of the investigating officer. In order to have ensured the just outcome we would have had to forgo or modify some element of procedural justice.[76]

It is important to carve out of this discussion what we are not talking about: it is not as if the key element of the procedural consideration is the uniformity or universality of the rules by which information is included and excluded. The point is not that it would have been procedurally just, so long as the trial of the football player was subject to the same rules as all other trials. Rather, there is some notion that the evidentiary rules themselves are supposed to represent an application of procedural justice.[77] It would have been equally—if not more—unjust to try the football player according to a set of rules that would not allow the jury to consider evidence indicating racism on the part of the investigating officer.

But why is this? Is it simply that we believe the result will be more just in the long run? If so, then there would be an empirical test—assuming perfect information on the part of the

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[76] I am not claiming that the procedure actually was just, but simply that it could easily have been just while still leading to what we might want to think of as an unjust outcome.

[77] Interestingly, there are a variety of reasons or ways in which evidentiary rules implicate procedural justice. Some are meant to exclude information that cannot help but be logically relevant to the determination of the jury, but which would nonetheless risk, if admitted, introducing emotional elements that would distract the jury from other relevant considerations in their deliberations. *See, e.g.,* FED. R. EVID. 404–06 (utilizing evidence to prove character of the accused through testimony of reputation, opinion, habit, and specific instances of conduct). Rule 403 of the Federal Rules of Evidence proscribes the usage of past crimes to prove the present character and/or culpability of the accused. Other rules appear to suggest the importance of process in other aspects of the institution outside the conflict-resolution process. For example, even relevant and reliable evidence that was obtained in violation of rules may not be used in the conflict-resolution procedure because the rules stem from the application of notions of procedural justice to the process of evidence collection. *See, e.g.,* FED. R. EVID. 402 (noting the inadmissibility of relevant evidence that violates statutes or the Constitution, such as evidence obtained from an improper Fourth Amendment search and seizure). The notions of procedural justice currently in use in this culture seem to suggest strongly that the ends cannot alone justify the means and that impermissible means of evidence collection will operate to exclude the evidence from trial, even if the evidence is otherwise reliable and relevant.

experimenter—for telling whether it is better overall to stick to the procedural rules or to adjust them according to better knowledge of the best possible outcome. This latter option is not to assume that a particular outcome is most just and then to modify the rules of that case to result in that outcome. Rather it would be to modify the rules systematically in response to cumulative information about what tends to yield the correct outcome as it is arrived at by the independent criteria of the substantive justice of outcomes.[78] This would not be as vulnerable to problems of bias as would an adjustment for a particular outcome, although bias can factor into the assessment of each data point. After all, we might be mistaken about whether the football star willingly performed the acts constituting the crime—vitiating the *mens rea*. Hence, adjusting the rules to accommodate this information in this one case would probably not stand up to the notions of procedural justice and the reasons for its independence from substantive and subjective assessments of outcomes. But, if an empirical study illustrated that admitting evidence about the racism of an investigating officer leads to more "false acquittals"—assuming it was possible to measure that number against "true acquittals"—then we might wish to claim that justice demands the evidence be excluded. This would be a clear case of outcome justice informing the justice of the procedure, and it relies on the perhaps overly strong assumption that the justice of certain outcomes is objectively verifiable.

On the other hand, it seems that an accused *deserves* to have the racism of the investigating officer known, notwithstanding the impact upon the outcome of the trial. It demonstrates a bias in the process itself.[79] What is important to note is that considerations of

[78] The determination of the justice of each outcome is a subjective conclusion. But this hypothetical experiment would assume agreed-upon explicit standards of such outcome justice so that the experimenter's only judgment is whether the outcome met with those standards. That judgment itself is somewhat subjective and calls for interpretation of both the outcome and the standards by which they are to be judged. The point here, however, is that there is an empirical test available in principle, even if such a test requires some idealizations about issues of subjectivity.

[79] One might wonder initially if the accused deserves to have the racism of the officer known by the jury—as opposed to having it reported in the press, from which the jury is shielded. The answer to this question requires an investigation of the source and nature of that desert. If the fact about the officer is seen as an aspect of the process that introduces bias, we might think that the nature of the desert is such that the accused is entitled to have the information heard by an entity empowered to compensate for that bias, such as the jury. On the other hand the relevance of this piece of information to that which the jury is charged to decide is questionable. While in this particular example we might wish to say that the information is relevant to the jury's basic charge—raising the reasonability of a contention that the accused is being framed—we can imagine situations where the relevance might

process can overpower concern with outcome. We are frequently more concerned to see that justice is done in terms of process than we are in terms of outcome and are willing to sacrifice a just outcome for safeguarding the justice of process. In other words, it might be more plausible and pragmatic to tolerate a greater number of false acquittals—and perhaps even false convictions—for the sake of respecting some procedural right of the accused. This notion can be applied to all conflict-resolving procedures in which we are willing to tolerate a higher incidence of admittedly less just outcomes for the sake of a procedural principle or a right of the parties. But then we are admitting that the justice of outcomes is not the only way to judge processes; we may be countenancing standards of imperfect procedural justice that are independent of any outcome, even an outcome the justice of which is transparent and uncontroversial.

On the other hand, we may then compare that result to some independent sense of justice that is not dependent upon the procedural situation. We may realize that any process that is designed to do justice will misfire and decide that we should still respect the decision of such a process when it misfires, since the result, though unjust, was produced by ostensibly just means. Yet we still have an independent sense that it has misfired, so our notion of the content of outcome justice must be independent of the notion of the most just procedure to render such decisions.

In certain cases, we might think that the misfire is so egregious that it warrants disrespecting the decision of the institution. We may go even further and consider the misfire to warrant reforming the institution; anything that can fall that wide of the mark must not be the best possible way to resolve conflicts. Yet in other cases, our notion of the most just outcome may simply be defined by the outcome of the process. So long as the process worked perfectly then justice was done. This is not necessarily simply a case of pure procedural justice. Rather, we admit the theoretical possibility of an independent standard by which to judge outcomes, but are so hamstrung by its complexity or the impossibility of enunciating an unbiased explanation of it that we simply treat the situation as if it were a case of pure procedural justice.

It does seem that this latter sense gives up on an independent sense of outcome justice, putting all our faith in procedural justice.

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become more questionable.

I am not claiming that we should not respect the decision of a procedurally just institution even when we think that the outcome was somehow the wrong one. However, in that case our outrage is allowed to continue, and we may work to refine the way in which the conflict-resolution process balances the competing interests. Perhaps we will argue that more or less information should be considered, or that some information should be given a greater or lesser weight. This is not to redesign the conflict-resolution procedure itself, but rather to recalibrate its operation. Is that recalibration itself tinkering with procedural justice for the sake of substantive concerns about that procedure? Or is it rather allowing for knowledge of what makes a more just outcome to seep back into the process, a process rather akin to peeking behind the veil?

C. Informational Criteria

Consider again the components of an institution that resolves conflicts: The institution must have certain characteristics and—in making use of the institution—the parties make certain presumptions. The institution must have the power to hear some kind of information about the nature and circumstances of the conflict. The institution must be empowered not only to settle the dispute but to go beyond what the parties themselves would have agreed to. Otherwise the parties would have settled it themselves or they would not have bothered to use the institution.

While no complete argument is presented, Hampshire's basic idea is that citizens of a state commonly believe in the fairness of institutional proceedings,[80] and that "[t]hese fair procedures, political and legal, constitute the cement that holds the state together."[81] Among all virtues, fairness and justice alone set procedural norms that can reasonably be said to be entitled to universal respect.[82] Human behavior mirrors these norms by adhering to a rational process of reasoning between opposing arguments when confronted with a conflict situation.[83]

If we start from the assumption that conflict is inevitable and

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[80] HAMPSHIRE, *supra* note 17, at 79 (stating that "[t]here is one overriding moral principle that every citizen has good reasons to accept and to honor in practice: that is the principle of institutionalized fairness in procedures for the resolution of these conflicts").

[81] *Id.*

[82] *Id.* at 53; *see also id.* at 87 ("Only the principle of fairness in settling conflicts can claim a universal ground as being a principle of shared rationality, indispensable in all decision making and in all intentional action.").

[83] *Id.* at 53.

widespread, and that institutions are created for the purpose of settling these conflicts in ways that allow their wider contexts or parent enterprises to avoid substantial disruption as a result of the conflicts, then certain norms must be posited as preconditions to these institutions performing their functions. The inevitability of conflict requires institutions for resolution; the need for conflict-resolving institutions in turn requires procedural norms captured within notions of procedural justice. Some subset of those norms will be essential to any notion of a conflict-resolving institution. Those norms will then partially govern the correct operation of such conflict-resolving institutions, yielding certain commonalities. Since these norms do impose requirements upon the way in which the institution is to operate, and not just on the form it is to take, they are not simply formal norms. This is the substantive part of procedural justice: The outcome of conflicts can not be judged according to these norms; they are purely norms of the process of conflict resolution and the operation of the adjudicatory process. They do not confer any advantage on one side or the other in the conflict—as norms of outcome justice inevitably will unless the outcome turns out to be some form of equivalency between the opposing positions.[84]

D. Hear All Sides

By submitting our conflicts to the conflict resolution institutions, we are assuming certain commitments. Certainly, nothing forces us to respect an institution's resolution once fashioned and implemented except the desire to continue participating in the enterprise. However, by engaging and entering the institution for the purposes of settling a conflict, we are expressing a certain

[84] There is a possible exception, where the substance of the procedural norm *will* confer an advantage to one side in the conflict. This is where the conflict is over the need for, or value of, the conflict-resolving institution itself. Implicitly, if one side in the conflict contends that the process of conflict resolution—involving the substantive procedural norms—is flawed, this amounts to a denial of the procedural norms themselves, and the procedural norms cannot treat this position fairly. It must be understood here that the position that one side is disadvantaged is not a contention that the procedure needs to be changed or modified. I see no reason that a conflict resolution procedure cannot reach as a conclusion the need for its own modification; this seems to happen fairly often in the legal context, especially when considering the rules of court or certain kinds of legislation regarding the legislative process. What is bound to be treated "unfairly"—in the sense that the institution cannot consider it rationally—is the contention that the conflict should continue. However, I do not feel that this should pose a particular worry since it would be incoherent for any party in a conflict to submit this claim to an institution designed to settle the conflict.

commitment we would have to betray in order to ignore the settlement or resolution. The content of that commitment is the substantive principles by which the process is to be judged. For example, in order to get such an institution off the ground, to give it any use or purpose whatsoever, it will have to hear all sides of the conflict and have some authority to render a decision.[85] It is in the nature of the institution to fashion and perhaps implement a resolution to the conflict. So by submitting the conflict to the institution, we must assume that a resolution will be forthcoming.[86] For any such institution to reach a resolution in a systematic way, it must take into consideration all sides of the conflict.

The absurdity of the alternatives makes this point clear. Any institution that must resolve more than one conflict will be bound to hear all sides in order to be capable of rendering a resolution; it must get some information about the circumstances of the conflict itself in order to fashion some resolution that applies to the conflict at hand. Certainly, if there is an institution solely created to settle one particular conflict, after which that institution will cease to exist, we might think that it would not necessarily be bound by the dictum to hear all sides. Perhaps this institution was designed for the sole purpose of enabling one side to triumph in a specific conflict. There might not, therefore, be any reason to hear the other side. In such a case, however, there can not be any reasonable expectation that the losing side will respect the resolution at all, unless it is backed by the threat of force. But if overwhelming force is at the disposal of the party that is bound to win, then there is really no reason to submit the conflict to a resolving institution.

By entering into the institutional setting to settle our conflict, we are expressing a pre-commitment to these principles for the purpose of arriving at that resolution. Any conflict resolution procedure must, therefore, be guided by those principles and have those characteristics in order for it to have been implemented as an example of an institution for solving that kind of conflict in those kinds of circumstances.

It might seem that there is one alternative to the principle to hear all sides: hear no side. Let us consider whether a conflict resolution

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[85] HAMPSHIRE, *supra* note 17, at 8–9.

[86] Sometimes parties may not have any choice about whether to submit the conflict to the institution. This is especially true in situations like criminal trials. We can nonetheless posit an initial conflict for which the institution was designed and implemented to bring about its resolution. This is sufficient to generate the assumed preconditions that flow from the decision to use that institution to resolve the conflict.

procedure that operates according to this principle is still a robust institution. We must imagine that disputants bring their conflict to a court of arbitrary or random decision.[87] The first problem with such an institution that does not even pretend to provide a reasoned resolution is that there is no possible reason the parties could have for bringing their conflict to the so-called institution. If they know that the institution operates randomly or arbitrarily, and were prepared to abide by its decision, they could just as easily settle the matter themselves by some random procedure. It may be objected that the institution might still have some official imprimatur that the parties want accompanying their random outcome, but it is difficult to imagine of what value that imprimatur would be unless it involves a pretense to some kind of insight. Imagine the parties bring their dispute before the judge in such an institution. They do not tell the judge what the dispute is; they just say, "we have a conflict." The judge flips a coin and says, "you win," to one party.[88] Of what possible value is the official character of the institution? There are two possibilities: one is that the official character claims some mystical insight—as if the gods determined the outcome of the coin toss based upon their knowledge of the strength of each claim. However, that would be to re-introduce the dictum to hear both sides. The parties believe that the gods have looked into their souls and have heard both sides. The other possibility is that there is no mystical investigation, but that the parties are perhaps unsure of the compliance of each other with the outcome of a coin-toss done without the force of the institution behind it. One need not imagine this to be a case of the state backing up the coin toss; it might be sufficient for the parties to seek out a mutual friend or acquaintance—the esteem of whom each party wishes to maintain—to perform or witness the coin-toss with the expectation that the friend's potential disapproval will bind the other party to the result. But if compliance is the issue, then it would still be impossible for the judge to ensure compliance without hearing at least something of the dispute.[89] Since there is not even a pretense of hearing both

[87] Since the court cannot get any information about the dispute its decision must be arbitrary or random.

[88] Of course, this would only even potentially work for disputes that only have all-or-nothing outcomes. Once measurements and apportionments are required, there will need to be more information in the resolution process lest another dispute immediately arise over what "you win" entails.

[89] In order for the judge to ensure compliance, she must first have a working definition of compliance in order to recognize non-compliance. But to know what counts as compliance and non-compliance, the judge needs to know what is at issue in the conflict. It is possible that

sides, there would be no way for the parties to gain any use from such an institution, because the judge would have no way to ensure compliance with the outcome unless she knew what was at issue in the dispute.

One reply to this line of reasoning is that it does not involve a very robust notion of the norm to hear all sides. After all, there is a big difference between allowing the judge to know the issue over which the conflict has arisen and allowing a presentation of the actual claims of each side. To take our minimal judge, who is only allowed to hear what the dispute is about, it would seem sufficient to ensure compliance with the resolution if this minimal judge hears only, for example, that each side claims a piece of property. As long as the judge knows what the property is, she can ensure that the winner of the coin toss keeps the property. This is certainly the least amount of information possible to give to a conflict-resolving institution, and it certainly does not seem like a very strong application of a norm to hear both sides. However, it is still an application of that norm. Even though the judge does not hear the basis of each side's claim on the property, she still is informed that each side makes such a claim. In essence, she hears each side say, "I want it." We certainly do not think much of this institution as a conflict-resolver since we have other norms that demand the judge consider which side has the greater claim—based, perhaps, on substantive principles—thereby requiring more information. But this shows that the dictum to hear all sides in some, perhaps incredibly weak, form is a presumption behind a conflict-resolving institution.

We would be understandably reluctant to call such a stripped down process an institution. However, since it appears to have all of the characteristics of a conflict-resolving institution—an explicit and standardized decision process, some minimal authority to enforce the resolution, etc.—we might be best off calling it a primitive institution. Part of what makes it primitive is its inadequacy with respect to received norms of procedural justice. However, this merely shows that the extent to which institutions meet those norms is a matter of degree.

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this information is to be given after the dispute has been resolved (i.e., after the coin toss), but then the principle of hearing both sides is still operative for the later disputes over compliance.

E. The Justice Discount

Recall that values, as related to situations of conflict that are treated by justice, are pairs consisting of desired objects or goods—which may be abstract—and the desire directed at those objects. When an appraiser enters a conflict situation and comes to believe that the opposing value is of more import to the opposing party than the appraiser's value placed upon her good, that appraiser may devalue her claim as against the opposing claim.[90] I call this the "justice discount." That is, the appraiser discounts the justice of her claim as against the opposing value. Described this way, this is a completely subjective feature of the evaluation that is being done when entering any potential conflict of value. The appraiser may or may not readjust the subjective evaluation based on the perception of the importance placed upon the good by the opposing party.[91]

The important thing about the justice discount is that this completely subjective determination by an appraiser can have a large impact upon what we might wish to call the objective description of the justice of the outcome in some kinds of conflicts. Since justice takes as its subject matter a value/object pair that is in conflict with another value/object pair, the strength and kind of the subjective values at stake come into play. The weight each value/object pair gets in the adjudication process may depend somewhat on the value given the object by each of the appraisers. In certain situations, this means that believing the other person to have a more just claim than you can actually give them a more just claim than you.[92]

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[90] This is likely to be the exceptional case but still, I hope, illuminating.

[91] While it would appear to be possible that an appraiser would adjust the value upward when examining the claim of the opposing party, it is difficult to see how this would impact the content of an eventual adjudication. On the other hand, the fact that an evaluation is more tenuous does seem appropriately accounted for in the adjudication of some kinds of value conflicts, though certainly not all.

[92] This is far from always the case. We would probably say that, where someone's freedom of assembly is in conflict with another's appreciation of a certain flower, the fact that the first person does not place much value at all on his freedom of assembly (and therefore holds the right of the other to appreciate the flower in higher esteem) does not thereby render it just to sacrifice it for the sake of the other's enjoyment of the flower. This gets more treatment immediately below.

The Humean circumstance that justice is not an appropriate norm for a situation of "enlarged affection" does not preclude a notion such as the justice discount. The circumstance that would preclude considerations of justice is when affections are so enlarged that we consider the interests of others as on par with those of ourselves:

> [S]uppose . . . the mind is so enlarged, and so replete with friendship and generosity, that every man has the utmost tenderness for every man, and feels no more concern for his

Some further methodological considerations are important: it would appear that in some instances the justice discount would have an impact upon the content of the judgment made and in others it would not. It seems possible to reach this conclusion without regard to any specific theory about the nature of that judgment or a complete description of the content of that judgment. However, whether or not the discount has an impact upon the content of the judgment does seem to depend upon the particular subject matter that is being considered. Some values that might be at stake in a conflict are of the kind that subjective valuations are very important to the most just outcome, whatever that may be. Some values that might be at stake in these conflicts are not of the kind that the subjective valuations should matter. Whether a given value falls into one group or another may depend heavily upon the theory of the content of justice that is in play, and it also seems possible that there will be conflicts where one value is of the kind that subjective valuations do matter, while the other is of the kind that they do not.

The following example will aid here: The appropriate punishment for a heinous crime like murder is an issue that brings in a host of complicated considerations of justice. Putting aside questions of assessment of guilt, and the distribution and imposition of the punishment, it would seem at first blush that whether the death penalty is a just response to murder should not depend upon the subjective valuations of the claims of the victim's family or the culprit.[93] That is, it would seem that whether the culprit wants to go on living with the guilt of her action is irrelevant to the question of whether it would be just to impose the death penalty. Similarly, in most cases, it would appear that whether the victim's family[94]

> own interest than for that of his fellows: It seems evident, that the use of justice would, in this case, be suspended by such an extensive benevolence. . . .

HUME, *supra* note 10, at 84.

The concept of the justice discount does not imply such a condition of enlarged affections. It is not an example of enlarged affections for someone to insist upon pressing her claim even though she acknowledges that her opponent has more at stake in his claim. The very context in which the justice discount becomes problematic—its presence in the midst of a conflict that an institution is working to resolve—assumes that Hume's circumstances of justice are present. If the discount operates on one party to make her feel that her claim is less worthy and she decides as a result not to press her claim within the conflict-resolving institution, then the discount presents no problem of procedural justice to the institution.

[93] I leave aside the possible claims of the victim as unduly complicated by the need for a "representative" to press for them, as well as the admittedly important question of what the claims of society as a whole might be.

[94] Imagine they are considered spokespersons for the interest of the community since, as I noted above, the criminal trial is more properly understood as community versus accused

wants the culprit to be put to death is irrelevant to the question of whether it would be just to do so. Upon closer examination, however, it seems that these conclusions may stem from a preconceived notion about the content of justice and that there is nothing inherently wrong with a conception of justice that requires an examination of those issues. From one perspective, these subjective issues might be very important to a determination of whether the imposition of the death penalty was just. We might have a conception according to which it would be unjust not to impose the death penalty when the culprit devalues her claims to go on living in the face of the demands for retribution. On the other hand, we might want to be more reluctant to impose death on a culprit if the victim's family decides that the culprit's life is worth more than their claims. It seems possible that we should ignore one subjective valuation while accounting for the other, ignore both, or account for both. But at least some kinds of values seem to require an examination of the subjective valuation of the party in order to reach the most just outcome (even if this is not always the case in the death penalty situation under our normal way of addressing this issue in this culture). That these conclusions seem at least colorable indicates a very imprecise and insecure notion of what justice demands in these kinds of cases.[95]

Additionally, these considerations highlight how tenuous the role is of any specific "thicker" notions of procedural justice. In a system that treated the subjective valuations of the convicted murderer and victim's family as relevant to the issue of whether the murderer receives the death penalty, a higher premium may be placed on the relevance of that information than upon the need for consistency in the application of punishment for given criminal acts.

F. Information and the Requirements of Justice

This suggests that we cannot divorce the issue of the content of justice from the issue of what kind of information gets considered in the question of the just outcome. One conception of procedural justice will require the inclusion of certain kinds of information that another conception will exclude. So the only conclusion possible without delving into the content of these conceptions of justice is

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rather than victim versus accused. *See supra* note 60.

[95] The vehemence with which one might argue for a given conclusion in these situations may indicate a very precise and secure concept of the content of justice, or it might indicate the opposite.

that procedural justice does offer guidance as to what information ought to be included in the process of adjudication. Different conceptions of procedural justice, fleshed out as they may be in different institutions and for the purposes of resolving different kinds of conflicts, will require different inclusion and exclusion principles in the marshalling of information as the basis for adjudication.

Nonetheless, it is clear that relevance cannot serve as a fundamental criterion for decisions about what kinds of information are admitted into the conflict resolution process. While relevance may be useful as a threshold criterion for initial determinations about whether a given piece of information is appropriate for use in the process, other—perhaps more substantive—criteria relating to the conception of procedural justice in use will quickly begin excluding even relevant information.[96] The justice discount is a good example of information that appears to be relevant yet will likely be appropriately excluded—depending on the circumstances of the conflict—by institutions operating within many conceptions of procedural justice.

G. Ideal Institutions and Dealing with the Justice Discount

For the institutional setting, the justice discount can complicate matters greatly. Imagine an institution that uses justice itself as the only criterion for solving problems; that is, it is not beholden to considerations of efficiency, practicality, etc. How does such an "ideal institution" deal with the justice discount? Here, it is important to separate the two situations described above: the situation in which the justice discount does have an impact on the most just outcome and the one in which it does not. In the latter case, an ideal institution successfully tracking what justice demands of the situation will ignore the justice discount of either or both parties. That is, if the justice discount would not change the most just outcome, then the ideal institution can—and should—ignore it.

But what of the cases in which the justice discount does have an impact on the most just outcome? In these cases, justice demands

[96] *See* Alvin I. Goldman, *Epistemic Paternalism: Communication Control in Law and Society*, 88 J. OF PHIL. 113, 114 (1991) (discussing the exclusion of wrongfully obtained evidence in the legal setting in order to maintain procedural fairness despite the fact that the evidence would be relevant to uncovering the truth). These would count as nonepistemic reasons for excluding relevant evidence.

that the result take into account the fact that the parties themselves have discounted their appraisals depending on whether they considered their claim to be less just. In this case, there are two ways the ideal institution can take it into account: one is that since the parties themselves can easily get their estimations of what justice requires wrong—assuming that there is an objectively right or best evaluation—the ideal institution only needs to take into account what an ideal party would appraise of its values when in conflict.[97] This would mean that the ideal parties recognize exactly the justice of each other's claims. In that case, the problem seems to fall away and the ideal institution can simply attempt the adjudication without accounting for any justice discount. Since ideal parties always predict the adjudication process correctly, figuring out what they predict and what justice "actually" demands amount to the same thing.[98]

The other possibility creates more of an issue. It would seem at first that parties' actual value judgments about their value claims can have some real impact on the justice of the outcome. It would then appear that an ideal institution, concerned only with doing justice, might have to take into account what the parties believe about the justice of their claims. Imagine the following: Matisse and Trista are in a situation of value conflict. Matisse places a high value on her enjoyment of the sunny day while lying on the grass in the park. Trista places a high value on proselytizing the heathen sun worshippers by preaching from a stump in the same park. For Trista to proselytize means that Matisse cannot enjoy the park. However, Trista recognizes that her proselytizing disturbs people lying on the grass and believes that they do have a right to do so without her disturbing them.[99] Matisse has no such consideration of

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[97] The ideal party here being only someone who always gets the appraisal right after adjusting for what justice actually demands.

[98] If an ideal institution were dealing with actual ideal parties, no adjudication would be required at all, since both parties would agree on the appropriate outcome and would have done the institution's adjudication work for it. An analogous observation is made by Brian Barry. BARRY, THEORIES, *supra* note 48, at 196 (discussing the fact that all parties in Rawls's original position have identical interests and information, which amounts to understanding them all as one person). Here the parties clearly have different interests, but since they are in the position of being ideal appraisers of their own and each other's claims, they do not give any greater weight to their own claim. Hence they all reach the same conclusion about what justice demands as an outcome to their conflict.

[99] This does not have to depend upon Trista considering her own right to lie on the grass as of greater worth. She may understand that, for her, lying on the grass is vastly less important than proselytizing, while at the same time understand that, for others such as Matisse, lying on the grass is vastly more important than hearing sermons. She need only consider the possibility that the value others place on not being disturbed is higher than her

Trista's claim to proselytize. Even though she has a belief that she would be disturbing others, Trista nevertheless decides to test the justice of the situation in the crucible of the ideal institution. Should the ideal institution ignore Trista's estimation of her own claims and figure which is the more important right independently of her estimations? Or should the ideal institution recognize that, even if Trista would, *ceteris paribus,* have a more just claim to proselytize, since she does not believe her claim to be as pressing as against the claim of Matisse to lie peacefully on the grass, to allow Trista the justice of the situation would be to reach a less just result? What about Matisse? Should the justice of her claim be augmented simply because she was too insensitive to recognize the possibly greater right of Trista? Or perhaps Matisse's claim should be judged less weighty because of her insensitivity to Trista's claim.

My sense is that the answer lies back in the nature of the ideal institution and that other, non-justice-related considerations may be creeping in here. The ideal institution is supposed to track justice and no other consideration. It may be the case that in such situations of non-ideal justice discount, to take account of the parties' own adjudications would be to take account of an additional criterion, such as political practicability. It would seem politically unfeasible to reach an outcome that both parties believe is less just than the alternative, but that still might be the most just thing to do.

Take another example from the *Iliad*:[100] Achilles holds a chariot race to celebrate the funeral of Patroclus. He announces the prizes for the race and that the second prize will be a mare. Diomedes finishes first, Antilochus finishes in second place, but everyone agrees that Eumelos is the best charioteer in the race. Eumelos finished last because, as usual, the gods were meddling and broke his yoke. Achilles gives the first prize to Diomedes but proposes to give the second prize to Eumelos:

> The best man is driving his single-foot horses in last.
> Come then, we must give some kind of prize, and well he
> deserves it;
> second prize . . . .[101]

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own interest in preaching to them.

[100] HOMER, THE ILIAD (Richmond A. Lattimore, trans., 1951); *see also* LLOYD L. WEINREB, NATURAL LAW AND JUSTICE 186 (1987) (employing the same chariot race analogy to highlight notions of justice).

[101] HOMER, *supra* note 100, at 464. Weinreb quotes the Fitzgerald translation, which

Of course, Antilochus claims that particular mare is justly his as the second place finisher. But what if Antilochus had remained silent or had even agreed that Eumelos *should* get the mare (not to be confused with agreeing to *give* Eumelos what was rightly now Antilochus' mare)? It would appear that the justice of this situation does not depend on whether Antilochus presses his claim or not: it is unjust for Eumelos to be awarded the mare when he finished last. In Rawlsian terms, Achilles has mistaken a situation of pure procedural justice—whoever finishes second in the race gets the second prize; that is what defines who deserves second prize—for one of imperfect procedural justice—seeing the race as a test of who are the best charioteers and the outcome of the test may not report the truth perfectly. However, even if this were a case of imperfect procedural justice, it does not appear that the correct understanding of the justice of the outcome depends at all upon Antilochus' estimation of his claim as against that of Eumelos. While this might only show that justice does not always account for any discount of the parties, I cannot help the nagging impression that it sometimes does. Perhaps ideal institutions would be well advised to avoid such quandaries.

V. AUTHORITY

Having discussed the values as inputs to justice, and somewhat the role of the adjudicator, we come finally to the output of justice. Returning to our analytical framework: If procedural justice shadows the institutional conflict resolving process, then its output serves as a norm against which we can measure any proposed institutional solution. This does not mean that it is only a reaction to such solutions once proposed. It can also be prospective in helping to guide and frame possible institutional solutions insofar as the processes are permitted to make direct considerations of outcome, as when courts bend their own rules to prevent "miscarriages of justice."

What that norm demands of the institutional solutions is the subject of most of the literature on justice. Whatever the actual content of outcome justice may be, we can examine the formal characteristics of that content insofar as it restricts institutional resolutions that take the justice of outcomes into consideration.

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states "in fairness" instead of "he deserves it," thereby highlighting Achilles' mistake of justice. *See* WEINREB, *supra* note 100, at 186.

A. Ideal Institutions and the Threat of Justice to Authority

It would seem first of all that the normative content of outcome justice gives people a practical tool for deciding whether to respect or follow certain kinds of institutional solutions. It is practical in that it can serve as the basis of or a reason for certain kinds of behaviors and beliefs. If an institution claims to be an ideal institution—in that it seeks resolutions with justice as its sole criterion—then an independent judgment that a resolution falls below some threshold established by direct adjudication of the outcome against standards of outcome justice will be an absolute ground for rejecting the institutional resolution. In other words, if the institution sets itself up as ideal in situations of imperfect procedural justice, then any judgment that failed to achieve the most just outcome would be sufficient reason for rejecting the outcome. Here I am bracketing any claims on the part of the institution to some kind of authority in making adjudications of justice of outcomes.[102] However, I do acknowledge that this model sets every person up as a potential adjudicator. If we have an institution that claims only to find justice, then everyone's own judgment about the justice of the situation at hand will be an independent reason for that person to confirm or reject the resolution proposed by the institution. This is not to say that people will not share the same conclusion or the same process: most of the time, they likely will. But when an institution claims to do only justice, then everyone's ability to adjudicate serves as grounds for that person to accept or reject the outcome.[103]

In cases of imperfect procedural justice, independent judgments concerning the failure of the institution will inevitably lead to a call for its reform, or at least a reform of its decision procedures. It should be noted that ideal institutions can still be understood in cases of imperfect procedural justice. What makes it ideal is simply

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[102] I recognize that such claims may be a necessary feature of legal institutions. *See* JOSEPH RAZ, *Authority, Law, and Morality, in* ETHICS IN THE PUBLIC DOMAIN 194, 199 (1994) (arguing that the law must claim legitimate authority). Note, however, that an institution's claim to do justice is not identical to a claim that the institution's authority is legitimate—i.e., morally justified.

[103] The law may of course be asking them to ignore those grounds. *See id.* at 198, 214 (discussing the "pre-emption" thesis that the reasons the law gives for action are intended to replace the individuals' own reasons for action).

its claim to consider nothing but the justice of outcomes in its institutional process. Hence an ideal institution will hear only information relevant to a determination of the most just outcome. Recall that in situations of perfect or imperfect procedural justice, the justice of the outcome is measurable according to a standard that makes no reference to the process by which the determination is made. Thus, an ideal institution is one that seeks only to arrive at that most just outcome by the most just means.

The information to be considered in the process of arriving at the most just outcome—by whatever standard that may be viewed—will necessarily involve hearing relevant information that would be germane to the most just outcome.[104] If the subject matter is such that the subjective valuations of the parties have an impact upon the most just outcome, then this ideal institution will have to consider those subjective valuations, even if they include subjective off-sets such as the justice discount. Without a consideration of these matters, it will be impossible to maintain the claim that the institution is seeking only the most just outcome. Of course, it is the subject matter itself that sets the limits of information that such an ideal institution can consider. For some kinds of subjects, the parties' subjective valuations may not have anything to do with the most just outcome to the conflict.

B. Grounds for Institutional Authority

We do not usually see ideal institutions. Every institution has to take into account criteria other than simply justice. With some of those criteria, the institution can credibly claim to have some special knowledge or ability that entitles its resolution to respect on the basis of its greater authority in the area of that additional criterion. But institutions should then be wary of making claims of justice as the sole grounds for respect of their solutions. That is, since all institutions are arriving at solutions where justice is one criterion among many,[105] then those other criteria can serve as the grounds for respecting their solutions with the claim that the institution has a greater capacity to judge solutions based upon those other criteria. In our orchestra example, the conflict-resolving

[104] The institution may, of course, reject consideration of relevant information if doing so would lead it away from the most just outcome.

[105] Even though justice may be the most important criterion, it is rarely the predominant one in the sense of lexical priority. If it were then the institution would behave as if justice were the only criterion unless and until more than one solution is equally just.

mechanism will likely attempt to arrive at the most just solutions that are compatible with the continued functioning and flourishing of the orchestra. That second criterion is one for which the institution can claim special knowledge and interest, and it serves as the primary reason that parties should respect the decision of that institution. If they care about the continued functioning of the orchestra and wish to remain a part of it, they will respect the resolution arrived at by its dispute resolution process.

Institutions should be wary of unqualified claims of the justice of their solutions as the grounds for those solutions for fear that doing so gives others an independent justification for ignoring or disrespecting those solutions. Rather, qualified claims of the justice of resolutions interpose additional criteria that undermine such possible independent justifications. If an institution claims that their solution should be respected since it is the most just solution, then every individual can decide for herself whether justice favors that solution. If, rather, the institution claims that the solution should be respected since it is the most just solution practicable, or is the most just solution compatible with our needs, then individuals are not necessarily in as good a position as the institution to decide issues of practicability or compatibility with the other announced needs.

This is a conclusion about authority based upon a pragmatic consideration. Since everyone is in a potentially equal position to adjudicate the justice of any value conflict situation, institutions that seek to have their solutions respected should modify their claims to the justice of their solutions with other criteria on which they can credibly claim to have more ability or authority.

C. Justice and the Equality of Moral Judges

What is it about justice that allows everyone to claim equal authority? Why can't institutions claim greater authority with regard to justice? These questions do seem to have an answer that depends upon the scope and form of justice rather than any particular content. The answer lies in the fact that justice is a moral concept and not purely a political one. Most everyone understands what it would entail to adjudicate the justice of a conflict given a certain amount of information about it. Institutions can claim greater information or understanding of the information relevant to the conflict, and that would be a ground for respecting their determinations. However, we have independent reasons for

wanting transparency in our conflict-resolving institutions.[106] We want to know how they work and the kind of information that they consider. If there is a good reason for closed doors in a given conflict, then people do not pretend to know enough about the situation to make their own determinations about the most just outcomes. However, where the tendency is to allow access to the process—thus providing spectators with the same information that the judge has in the conflict—then any institution that claims only to be arriving at the most just outcome must contend with our belief that everyone is equally qualified to judge the justice of a situation. This might just be a facet of our particular culture or society and its individualistic emphasis on the moral equivalency of every person: everyone is considered to be an equal moral agent ab initio.[107] But, it should be noted that concepts like justice will only become of great importance in such cultures where individuals are considered morally equivalent.[108] Hence, the very primacy of justice in our minds in situations of conflict resolution leads us to question the authority of any institution that claims justice is its only consideration.

VI. CONCLUSION

This was not meant to be a complete picture of the subject. Rather, it was intended to be a road map for further analysis. We have seen that procedural justice has some particular characteristics within conflict-resolving institutions. Among those characteristics are implications for the way in which institutional decision-makers admit and consider different kinds of information in their decision processes. These implications prevent a simplistic analysis of procedural justice in terms purely related to the justice of outcomes. We have seen that the substance of the norms by which the decision process is judged—or guided—are somewhat fixed and determined by the purpose of the wider institution of which the conflict-resolving body is a part and additionally fixed by

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[106] These may be democratic—and therefore political—reasons or they may be moral reasons. These reasons may be based on conceptions of justice, but they need not be. It may be as simple as the recognition that any one of us might need to utilize the institution to settle a conflict and we want to know what to expect.

[107] If everyone is an equivalent moral agent, then the expertise of a judge or adjudicator cannot be based on greater familiarity or expertise in matters of justice. In support of this it is significant that philosophers of justice—who we might be tempted to think have the most familiarity with matters of justice—are not automatically considered to be the most qualified conflict resolvers.

[108] *See* HUME, *supra* note 10, at 88.

the very nature of a conflict-resolving institution. We have also seen that, as moral norms, principles of justice—both procedural and outcome—are not of the kind that institutions can claim special expertise with respect to their application. Hence the authority of institutions that claim to be guided purely by considerations of justice is called into question by those with divergent views on the content or application of those norms.