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Deciding, 'What Happened?' When We Don't Really Know:
Finding Theoretical Grounding for Legitimate Judicial Fact-Finding

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Introduction

My aim in this paper is to discuss the basis on which we can accept the authority of judicial fact-finding. Judicial fact-finding is an uncertain endeavor: evidentiary gaps and complexities cause uncertainty when it comes to determining 'what happened,' but judges must authoritatively decide that question to resolve the dispute. Since those factual determinations underpin nearly every judicial decision, it is incumbent on us to know the basis on which we accept them.

I start from the uncontroversial premise that since factual uncertainty cannot be eradicated altogether, the risk of inaccurate fact-finding cannot completely disappear. If this is accepted, then it must also be accepted that from time to time, that risk may manifest, resulting in factually inaccurate outcomes, whether we know they are inaccurate or not. For instance, suppose a plaintiff could prove a 60% chance that a defendant doctor's negligence caused her injury. In accordance with the balance of probabilities standard of proof, causation is established, but there remains a 40% chance that the doctor's negligence did not cause the injury. Neither the judge nor the litigants know whether the factual finding of causation was truly accurate, yet the decision to proceed as though causation is a 'fact' is acceptable and is considered legitimate. The acceptability of the outcome is not, then, dependent on its accuracy. Rather, it is rooted in procedural integrity: if the factual finding is made in accordance with the procedures of fact-finding, including weighing relevant and admissible evidence against the standard of proof, then the finding is legitimate, and its authority is considered acceptable.[1] But on what basis?

I opt to answer that question using a jurisprudential methodology. I start by adopting the jurisprudential perceptions of procedural theorist Jürgen Habermas,

I am grateful to professors Richard Devlin, Sheila Wildeman, and Vaughan Black for reading through these ideas with utmost care, and for inviting and helping me to respond to countless thoughtful critiques. I also thank Professor Ronalda Murphy for helping me initiate this project and for introducing me to Jürgen Habermas and showing me how to make sense of his dense contributions.

1. I note at the outset that I use "authoritative" here in the descriptive sense that the factual conclusions a judge makes will form the basis of the ultimate decision, and that decision will be considered final and binding (that is, it would be broadly acquiesced as authoritative) on the involved parties. A theoretical discussion of the relationship between authority and moral obligation to obey law is outside of my scope here, but for an elucidating discussion, see, e.g., Richard Dagger, "Authority, Legitimacy, and the Obligation to Obey the Law" (2018) 24:2 Legal Theory 77.

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because he has provided a substantiated process-based theory for legal validity. He argues, in my interpretation, that where the law-making process embodies a genuine respect for citizens as autonomous agents, then the law is capable of eliciting the rational assent of its subjects. On that basis, the law's authoritative nature is grounded, even if the law appears substantively disagreeable. These insights can be applied by analogy to the question of legitimate judicial fact-finding. Litigants can rationally accept adjudicative fact-finding based on the application of a process that genuinely respects them as free-acting agents. Just as the substance of a law is not itself determinative of the law's legitimacy, the substantive accuracy of adjudicative fact-finding is not determinative of the legitimacy of that factual finding.

In Part One, I set out Habermas's concepts of legal legitimacy in the adjudicative sphere. Using his ideas as a springboard, in Part Two, I delineate the necessary features of legitimate adjudicative fact-finding by showing how maintaining respect for litigants as autonomous agents can be reflected in judicial fact-finding. I conclude that respect for human agency in fact-finding procedures has two categories of necessary features: factual reliability and participation rights. I define a 'factually reliable' process as one that embodies a genuine effort towards achieving accurate factual determinations. Below, I expand further on what that entails, and discuss how the risk of inaccuracy should be managed while maintaining a genuine commitment to getting the outcomes right. Along with maintaining factual reliability, in order to give full expression to respecting human agency, fact-finding procedures must include meaningful participation rights for affected parties, and I outline what those participation rights must entail.

My project of articulating a framework of legitimate fact-finding is a justificatory enterprise. I do not seek to criticize the unavoidable imperfections of judicial fact-finding, nor to ignore them. Rather, my aim is to say what makes a civil fact-finding system good despite the inevitable frailty that attaches to any human endeavor. My hope is that this will, at least in some small way, contribute to ensuring that what is good in civil justice is not compromised through all of our laudable efforts to improve it.

Part One: Habermas on Adjudication

Habermas's conception of adjudication develops in a parallel course to his jurisprudential presentation of law, its purpose, and its necessary features in light of that purpose. For Habermas, law plays an integrative and stabilizing role in society and, in order to play this role, law must have two elements: certainty or facticity, and legitimacy.[2] Law must be certain in the sense that subjects should know (or be able to know) what the enforceable rules in the society are, and to

2. Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press, 1996) at 197-203 [Habermas, *Between Facts and Norms*].

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know that those rules will indeed be enforced. Second, laws must also have a normative quality that grounds the legal subject's rational acceptance of them.[3] Without that normative quality, law may be coercive, but would not function as a socially integrative agent.[4]

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

A parallel line of reasoning gives rise to Habermas's application of discourse theory to adjudication.[5] First, adjudicative law plays a socially integrative function, just like legislative law.[6] Legislative law establishes a system of rights and adjudication interprets and gives content to that system of rights.[7] Consequently, just as the two aspects of facticity/certainty and legitimacy must be manifest in legislative law, they must also be present in adjudicative law:

> Both guarantees, certainty and legitimacy, must be simultaneously redeemed at the level of judicial decision making.… In order to fulfill the socially integrative function of the legal order and the legitimacy claim of law, court rulings must satisfy simultaneously the conditions of *consistent decision making* and *rational acceptability*.…[8]

As the excerpt above indicates, Habermas maintains that consistent decision-making ensures the certainty of law, at least in part, by maintaining a predictable and equally applicable application of law. But that basic value of formal justice through treating like cases alike is not itself sufficient to establish adjudicative

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

4. *Ibid*.

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

6. Habermas, *Between Facts and Norms*, *supra* note 2 at 198.

7. This is consistent with Klaus Günther's explanation of Habermas's theory: "Rational discourse is the internal procedural structure of legislation as interpreting and shaping the system of rights as it is laid down in the constitution. According to Habermas, legal adjudication also 'interprets and shapes' the system of rights within another form of communication, the legal discourse of application." Klaus Günther, "Legal Adjudication and Democracy: Some Remarks on Dworkin and Habermas," (1995) 3:1 Eur J Philosophy 36 at 47.

8. Habermas, *Between Facts and Norms*, *supra* note 2 at 198 [emphasis in original]. For Habermas, certainty is a derivative of the facticity of law, and legitimacy is a derivative of rational acceptability: "On the one hand, established law guarantees the enforcement of legally expected behavior and therewith the certainty of law. On the other hand, rational procedures for making and applying law promise to legitimate the expectations that are stabilized in this way; the norms *deserve* legal obedience."

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legitimacy. Along with maintaining the minimal respect for equal treatment through bare formalism, judicial decisions must also be 'right' in the sense of being rationally acceptable. If not, the socially integrative function that is as relevant to adjudicative law as it is to legislative law could not be discharged.

The task of his theory of adjudication, Habermas explains, is to harmonize the two elements of certainty and legitimacy, but as he notes, harmonization is not always easy.[9] The difficulty is clear where legal principles are developed through common law. In tort law, for instance, courts have introduced new tests for causation into Canadian law to complement the 'but for' test,[10] and tort liability has been extended to include psychiatric injury when it was once limited to physical injury.[11] The implication is that such new principles are "right," yet where there are shifts in what constitutes "right" law in Canada, legal certainty becomes compromised.

Habermas explains the tension between certainty and rightness as a problem of legal indeterminacy. Legislated law is necessarily general in character, so its application in specific situations is not always clearly ascertainable. In that sense, the content of a legislated law is not fully defined, and judges are tasked with providing it with further definition through application.[12] For Habermas, given that law and its application can be indeterminate, it is not possible to guarantee a consistent and predictable 'right' interpretation of exactly the nature of the rights protected by general laws, especially in novel situations. This is because the rights guaranteed by laws are not empirical facts and are not discernable through some type of determinative empirical test.[13] Rather, the correct expression of a particular right is subject to argument and competing reasons in favour of one interpretation over another. As Habermas explains, "there is no 'natural' end to the chain of possible reasons; one cannot exclude the possibility that new information and better reasons will be brought forward."[14] Accordingly, a single right answer does not necessarily exist.[15] This gives rise to what Habermas calls "the rationality problem:" "how can the application of a contingently emergent law be carried out with both internal consistency and rational external justification, so as to guarantee simultaneously *the certainty of law* and its *rightness*?"[16]

This question that Habermas poses in light of legal indeterminacy parallels my purpose of resolving the analogous tension that arises in adjudication due to *factual* indeterminacy. Just as judges are tasked with making authoritative conclusions with respect to the sometimes uncertain question, 'what is the law?,' they

9. *Ibid*.
10. See, e.g., *Athey v Leonati*, [1996] 3 SCR 458; *Resurfice Corp. v Hanke*, 2007 SCC 7; *Clements v Clements*, 2012 SCC 32; and *Henry v British Columbia (Attorney General)*, 2015 SCC 24.
11. *Mustapha v Culligan of Canada Ltd*., 2008 SCC 27.
12. Habermas, *Between Facts and Norms*, *supra* note 2 at 198-99.
13. *Ibid* at 226.
14. *Ibid* at 226-27.
15. Habermas's notion of no right answer can be contrasted with Ronald Dworkin's position, which maintains the necessity and possibility of a right, or at least, best answer. For Habermas's discussion of Dworkin's theory, see *ibid* at 203-22.
16. *Ibid* at 199 [emphasis in original].

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are also (and more often) tasked with authoritatively resolving the often uncertain question, 'what happened?' Even in cases where the applicable legal principles are generally agreed upon, answering the relevant factual questions is often arduous. For instance, while the general framework of tort law may not be at issue, determining the cause of an injury can involve consideration of contradicting medical expert opinions; determining financial losses can similarly involve making sense of challenging and potentially conflicting actuarial evidence. Given the inevitability of factual uncertainty and indeterminacy, accurate resolution to these factual questions cannot be guaranteed. How, then, can the adjudicative system reconcile the need for a final and certain legal outcome and the need for a 'correct' resolution of the dispute? Habermas reconciles the certainty and legitimacy issue by turning to the discursive principle that he applies to law generally. My goal is to use those insights as the starting point for understanding how to reconcile the comparable tension that arises in adjudication due to indeterminate or uncertain factual questions.

Habermas's move is to transfer both elements, certainty and rightness (i.e. legitimacy), from outcome to process. Rather than insisting on the existence of a particular substantively right answer, Habermas's theory makes the rightness of the outcome depend on the process of arriving at that outcome: "Procedural rights," he explains, "guarantee each legal person the claim to a fair procedure that in turn guarantees not certainty of outcome but a discursive clarification of the pertinent facts and legal questions."[17] In other words, the certainty component does not guarantee any certain outcome, but it does guarantee that the outcome will be the product of a certain *procedure*.[18]

Of course, satisfaction of the certainty element in this way is essentially an expression of formal justice and does not account fully for the 'rightness' guarantee, which requires a stronger normative commitment. That normative commitment is also located in the realm of process—legitimacy is imported into the judicial outcome via the virtues of the process of arriving at the outcome. As Habermas puts it, "procedural principles that secure the validity of the outcome of a procedurally fair decision-making practice require internal justification."[19]

17. *Ibid* at 220.

18. Given my focus here on adopting Habermas's theoretical commitments and applying them to judicial fact-finding, I cannot engage deeply in the related debates around the very existence of procedural rights to accompany substantive rights. But this has recently been expertly debated in Christopher H Wellman, "Procedural Rights" (2014) 20:4 Legal Theory 286 (arguing against the existence of procedural rights) and David Enoch's response, "In Defense of Procedural Rights (Or Anyway, Procedural Duties): A Response to Wellman" (2018) 24:1 Legal Theory 40. The analysis here lends support to Enoch's claim that a wrong is indeed committed when a procedural error occurs, even absent any substantive error. For instance, suppose a factual finding is made that a doctor's negligence caused a patient's injury. If that factual finding was made in a process where the patient was arbitrarily not permitted to present an expert witness on the issue of causation, according to the analysis presented here, the patient must be understood to have suffered a rights violation, even if it is true that the doctor's negligence did cause the injury, as will be explained further below.

19. Habermas, *Between Facts and Norms*, *supra* note 2 at 225.

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That internal justification, Habermas explains, comes from the principles of discourse theory. Just as the approximation of the discourse principles within democratic process gives rise to the rational acceptability of law in general, adjudicative procedures that approximate discourse principles give rise to the rational acceptability of judicial outcomes.[20] Accordingly, Habermas's theory postulates that "'rightness' means rational acceptability supported by good reasons,"[21] which is attainable through an approximation of discourse principles. And certainty is achieved through a guaranteed, consistent adherence to these procedures in the resolution of legal disputes.

How, then, can the discourse principles be reflected in the adjudicative process? In its ideal manifestation, a rational discourse will contain a number of presumptive preconditions. The process will:[22]

1. Prevent a rationally unmotivated termination of argumentation;[23]
2. Secure both freedom in the choice of topics and inclusion of the best information and reasons through universal and equal access to, as well as equal and symmetrical participation in argumentation; and
3. Exclude every kind of coercion—whether originating outside the process of reaching understanding or within it—other than that of the better argument, so that all motives except that of the cooperative search for truth are neutralized.

Naturally these principles cannot be reflected in adjudication absolutely given the practical restrictions of timely and economically feasible dispute resolution.[24] Rather, those ideal conditions provide guidance to the effect that justifiable procedural conditions should "ensure that all the relevant reasons and information available for a given issue at a particular time are in no way suppressed, that is, that they can develop their inherent force for rational motivation."[25] Just as the ideal discourse conditions protect against unequal ability to participate, the requisite features of adjudicative decision-making call for free and equal ability for affected members to put forth arguments and reasons, bearing in mind the practical realities involved in maintaining adjudicative efficacy. As Habermas puts it:

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

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

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

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

24. Habermas, *Between Facts and Norms*, *supra* note 2 at 235. "Practical realities" may also involve indiscretions including adversarial attempts at thwarting fact-finding.

25. *Ibid* at 227.

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> Procedural law does not regulate normative-legal discourse as such but secures, in the temporal, social, and substantive dimensions, the institutional framework that *clears the way for* processes of communication governed by the logic of application discourses.[26]

Put in another way, adjudicative procedural rules are a mechanism for ensuring a place where the essence of rational discourse can be maintained, limited by the pragmatics of legal adjudication. They "institutionally carve out an internal space for the free exchange of arguments in an application discourse."[27] In doing so, they maintain that the judicial outcome will be rationally motivated by the evidence and argument presented by affected parties, and the outcomes, therefore, have a basis for acceptance. Accordingly, the adjudicative procedures are internally justified when they treat parties as equal and free autonomous agents who are entitled to present their cases, and who are entitled to rational decisions respecting their legal entitlements and obligations.

Habermas's commentary on adjudication provides the grounding for my ultimate question of locating the source of legitimacy of judicial resolution of factual indeterminacy. Although Habermas's account, like most jurisprudential discussions of adjudication, focuses on legal indeterminacy, and does not consider factual indeterminacy directly, his insights are applicable by analogy. Just as legal indeterminacy causes uncertainty in adjudication, so does factual indeterminacy, and litigants are entitled to legitimate resolution of factual questions, considering that the resolution of those questions underpins the subsequent application of legal principles leading to the resolution of disputes. Just as legal subjects have a reason to respect judicial resolution of legal indeterminacy by virtue of a rational decision-making process, they can similarly respect judicial resolution of factual indeterminacy so long as the fact-finding processes embody a genuine commitment to a rational determination of the relevant facts. As Habermas suggests, this requires that parties be enabled to present evidence and argument in favour of a particular factual determination, and that they be assured that the ultimate outcome will be sincerely rationally motivated. In this way, the process of fact-finding maintains a discernable respect for litigants as equal, autonomous agents, which provides the normative justification for an authoritative determination of the uncertain question, "what happened?" The remainder of this paper is dedicated to a more specific delineation of how these virtues can be reflected in the basic features of adjudicative fact-finding in the civil litigation context.

Part Two: Delineating Legitimate Adjudicative Fact-Finding

In this Part, I consider the necessary features of an adjudicative fact-finding process that demonstrably respects legal subjects as autonomous agents deserving of rational decision-making. I conclude that a legitimate adjudicative

26. *Ibid* at 235 [emphasis in original].
27. *Ibid*.

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process of fact-finding has two independent, yet related features. First, as Habermas set out, the adjudicative process should assure meaningful participation rights that enable affected parties to present relevant evidence in support of their positions. An adjudicative process that does not enable decision-making on the basis of parties' evidence and reasons (within the confines of legal principles that justifiably restrict admissible evidence or arguments) cannot be considered either committed to rational outcomes or respectful of the agency of legal subjects.

Second, while fact-finding procedures cannot guarantee accuracy, the process must assure factual reliability. That is achieved, I suggest below, when the adjudication process is genuinely oriented towards achieving factually accurate outcomes. A fact-finding process that is not committed to making an authentic effort to finding true facts is inherently irrational and disrespectful of legal subjects. The inevitable compromises to accuracy should be justifiable in light of the principles of legitimate fact-finding, which I outline below.

I note that the framework for legitimate fact-finding I offer below does not solely rest on the value of striving for outcome accuracy. Rather, what is paramount in the framework provided is the expression of the two values noted above—equality and autonomy. Ensuring a reliable fact-finding process is part of manifesting those values, but, as I hope is made clear below, it is not enough on its own. Afterall, a process may be factually reliable, but may compromise the values of autonomy or equality. Consider, for instance, a process that allows men to present their own evidence but demands that all women's evidence is presented by an able representative. This may have no necessary impact on the factual reliability of the process, but the values of equality and autonomy are nonetheless compromised. Such a process is clearly repugnant, and cannot yield legitimate legal outcomes, even if those outcomes are factually reliable.

A. Factual Reliability

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

An argument for procedural legitimacy can be critiqued on the basis that it is improperly forgiving of the injustice caused by factual inaccuracy.[28] That criticism does not hold, however, in the context of the case for procedural legitimacy that I endorse here. Although the procedural legitimacy notion refrains from the

28. See, e.g., Hock Lai Ho, *A Philosophy of Evidence Law: Justice in the Search for Truth* (Oxford University Press, 2008) [Ho, *A Philosophy of Evidence Law*] at 65, where he rejects the notion of pure procedural justice on the basis that: "A party is unjustly treated if and when the court withholds from her substantive entitlements under the law, however unintentional the error." Similarly, in the criminal context, David Paciocco, "Balancing the Rights of the Individual and Society in Matters of Truth and Proof: Part II—Evidence About Innocence" (2002) 81:1 Can Bar Rev 39 at 44: "When we recognize a wrongful conviction we, quite rightly, consider it to be an inexcusable tragedy. It is no answer to the factually innocent to say, 'Well. Even though you are factually innocent it is fair to leave you convicted because the law was applied with perfection during your trial.'"

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impractical ideal of pinning legitimacy to factual accuracy of each outcome, it does not follow that a process that is altogether unconcerned with outcome-accuracy is acceptable under a procedural legitimacy framework.[29] The goal of outcome-accuracy is, however, expressed as a genuine effort towards factual accuracy, demonstrable through a fact-finding procedure that is authentically oriented towards accuracy.

The general requirement for genuine truth-seeking is paralleled in Habermas's approach to adjudication. For him, the rationality of a discourse aimed at assessing the truth of a claim breaks down if participants are insincere in their search for truth.[30] Since legitimate adjudicative processes should provide a structure for decisions to be made on the basis of the logic of rational discourse, it follows that adjudicative procedures of fact-finding must enable and manifest a genuine inquiry into the truth. David Dyzenhaus's comments on the relationship between the procedures of rational discourse and a search for truth set out the point clearly. He recognizes that truth may not be attained in every instance, but the pragmatic reality is that a decision must be rendered in spite of uncertainty as to the truth of it:[31]

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

Like Habermas and Dyzenhaus, I maintain that an authentic attempt at ascertaining facts is not only laudable, but necessary within a legitimate adjudicative

29. David Estlund is well-known for advancing a theory known as "epistemic proceduralism" in the context of democratic legitimacy. He argues that democratic procedures produce legitimate results because they emerge from a process that *tends to* arrive at correct outcomes; importantly, the legitimacy of the outcome does not depend on its correctness—incorrect outcomes can also be legitimate on the basis of the democratic process from which they emerged. See David M Estlund, *Democratic Authority: A Philosophical Framework* (Princeton University Press, 2008) particularly at ch 7. This idea clearly aligns with the notion of procedural legitimacy that I have been suggesting. However, I do not hold that the epistemic value of adjudicative fact-finding procedures can, itself, fully support a framework for legitimate adjudicative fact-finding. Though his ideas are developed in a different arena, Estlund's insights regarding the importance of epistemic value, and his steadfast insistence that legitimacy is located in the realm of process and not outcome, support my position that the legitimacy of fact-finding is to be found in procedural virtues.

30. For rationally motivated discourse to ensure equal communication rights for participants, it requires sincerity and any force other than the force of the better argument must be diffused. Jürgen Habermas, "Between Facts and Norms: An Author's Reflections" (1999) 76:4 Denv UL Rev 937 at 940.

31. David Dyzenhaus, "The Legitimacy of Legality" (1996) 46:1 UTLJ 129 at 180 [Dyzenhaus, "The Legitimacy of Legality"].

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fact-finding process. In so holding, I distance myself from those writers who suggest that the adjudicative system cannot be considered a search for truth at all.[32]

I aim to demonstrate that the tension between the importance of factual accuracy and the impossibility of guaranteeing it can be best reconciled by replacing the notion of outcome-accuracy as a necessary element of legitimacy with accuracy's procedural counterpart: a factually reliable process. Being products of a reliable procedure means that the outcomes are factually reliable, even though there is a risk that the outcome is not factually accurate, and irrespective of whether it is ever known if the outcome is factual or not.[33]

An acceptable process of fact-finding is necessarily a system that claims to ascertain the relevant facts accurately. Even though adjudicative fact-finding cannot promise to invariably achieve that claim, it can maintain legitimacy, in part, on the basis of the *authenticity* of that claim. That authenticity can be evaluated objectively by considering whether the fact-finding procedures enable a sincere search for truth, subject only to justifiable limitations.

An authentic understanding of judicial fact-finding is contingent on accepting that imperfection is part of adjudication.[34] With that in mind, I endorse Jerome Frank's view that we do not, because we cannot, demand perfection from the adjudicative process, but that we must demand a genuine effort.[35]

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32. See, e.g., Keith D Kilback & Michael D Tochor, "Searching for Truth but Missing the Point" (2002) 40:2 Alta L Rev 333. They argue that considering a trial as a "search for truth" is flawed for two reasons: first, because it is impossible for the trier of fact to know the truth, and second, since the concept of the "search for truth" has not been judicially defined, judges can pursue desired outcomes under its auspices. Note: Harvard Law Review, "The Theoretical Foundation of the Hearsay Rules" (1980) 93:8 Harv L Rev 1786 at 1787: "Since no evidence can provide more than a basis for inferences, which are by definition uncertain (by contrast to deductions, where conclusions follow with certainty from the premises), trials cannot discover absolute truth." In addition, while extraneous to my analysis, some epistemologist viewpoints hold that knowledge is fallibilist, so establishing truth is impossible whether in the context of a trial or otherwise. See, e.g., Michael Williams, *Problems of Knowledge: A Critical Introduction to Epistemology* (Oxford University Press, 2001). For a discussion of the pros and cons of the debate around the nature of knowledge, see Simon Blackburn, *Truth: A Guide for the Perplexed* (Allen Lane, 2005), and for critical reactions to skepticism over the ascertainability of truth or 'veriphobia,' see Susan Haack, *Manifesto of a Passionate Moderate: Unfashionable Essays* (University of Chicago Press, 1998), and Alvin I Goldman, *Knowledge in a Social World* (Oxford University Press, 1999).

33. Ho's explanation of the relation and significant difference between accuracy and reliability is helpful: "The reference to 'accuracy' when speaking of a finding of fact must be to the likelihood of its truth, and not how close it is to the truth. If this is right, we would arguably do better to speak of 'reliability' instead…. Reliability implies functional efficacy…. A verdict is more or less reliable depending on the reliability of the trial system which produced it." Ho, *A Philosophy of Evidence Law*, *supra* note 28 at 66-67.

34. *Ibid*.

35. Jerome Frank, *Courts on Trial—Myth and Reality in American Justice* (Princeton University Press, 1973) at 35-36: "Perfect justice lies beyond human reach. But the unattainability of the ideal is no excuse for shirking the effort to obtain the best available." Also see Thomas Weigend, "Is the Criminal Process about Truth?: A German Perspective" (2003) 26:1 Harv JL & Pub Pol'y 157 at 173 [Weigend, "Is the Criminal Process about Truth?"]: "The public will accept whatever is presented as 'justice' only if justice is perceived to be based on an honest effort to find the 'truth.' There are no great expectations beyond that…. What, then, are the necessary ingredients of procedural truth?… the essential element is a visible, honest effort to collect and introduce facts on which the decision-maker can base a rationally defensible verdict."

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And it is that 'genuine effort' towards factual accuracy, as represented in its fact-finding procedures, which I use to assess the procedural concept of 'factual reliability.'[36]

ii. How Should Reliability be Reflected in the Adjudicative Process?

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

First, the basic principle of enabling generous access to relevant evidence is key to maintaining a genuine fact-finding process. The Supreme Court of Canada has maintained that it is a "principle of fundamental justice … that relevant evidence should be available … in a search for truth."[37] This principle is provided for within the basic rule of admissibility of evidence that stipulates that a trier of fact can consider any evidence that would tend to prove or disprove a fact in issue. In *R v Collins*, the Ontario Court of Appeal set out this principle as follows:[38]

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

The concept of maintaining access to relevant evidence is in keeping with Habermas's ideal discourse condition of a full and free exchange of information.

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36. I note here that it is not my purpose to adopt a statistically grounded concept of assessing or quantifying reliability. Statistical reliability can only be assessed empirically by examining the percentage of errors that occur in a given fact-finding system. That approach to assessing reliability is impractical and potentially impossible, because confirming the truth of an outcome is often elusive. See, e.g., Shari Seidman Diamond, "Truth, Justice, and the Jury" (2003) 26:1 Harv JL & Pub Pol'y 143 at 150: "we cannot compare the… verdict with some gold standard of truth because no such dependable standard exists." I assess reliability by considering whether the fact-finding process is genuinely orientated towards factual accuracy. This does not depend on empirical precision, but on an authentic consideration of whether the features of a fact-finding process can be considered as committed to seeking truth within only justifiable limits.

37. *R v Jarvis*, 2002 SCC 73. See also David M Paciocco & Lee Stuesser, *The Law of Evidence*, 7th ed (Irwin Law, 2015) at 2 [Paciocco & Stuesser, *The Law of Evidence*]: "Given its role in serving the application of the substantive law, the law of evidence should ideally enable triers of fact to have orderly access to any information that could help them make an accurate determination about whether the substantive law applies."

38. *R v Collins* (2001), 150 OAC 220 (Ont CA) at para 18. See also Doherty JA's discussion of relevance in *R v Watson* (1996), 30 OR (3d) 161 (Ont CA). At para 33, Doherty JA states: 'Relevance … requires a determination of whether as a matter of human experience and logic the existence of "Fact A" makes the existence or non-existence of "Fact B" more probable than it would be without the existence of "Fact A." If it does then "Fact A" is relevant to "Fact B." As long as "Fact B" is itself a material fact in issue or is relevant to a material fact in issue in the litigation then "Fact A" is relevant and prima facie admissible.'

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Any system that unjustifiably excludes relevant evidence can have the legitimacy of its claim of fact-finding questioned on the basis that its commitment to truthful fact-finding lacks sincerity. Yet there are several justifiable exclusions of relevant evidence, and many evidentiary doctrines in the Canadian legal system have that effect. Some such exclusionary rules further the goal of accurate fact-finding, like rules that purport to reduce unreliable evidence from the court process. For instance, preventing hearsay evidence for the purpose of proving the truth of a statement, or rules prohibiting prior consistent/self-serving statements, and rules requiring voluntariness for admissibility of confessions, are examples of evidentiary doctrines that are designed to prevent unreliable evidence from entering into the decision-making process. These rules can be understood as promoting (perhaps among other things) the commitment to accurate decision-making by preventing reliance on evidence that has a high risk of unreliability.[39]

Other exclusionary doctrines, however, may compromise the goal of factual accuracy in pursuit of other values.[40] Examples include privilege rules that prevent solicitor and client communications or spousal communications from being admitted at trial;[41] Canadian *Charter* principles that render improperly obtained evidence inadmissible;[42] or the principle of *res judicata* which prevents re-consideration of issues that have already been adjudicated, even if there is an indication of a factual discrepancy in a previous decision.[43]

Inevitably, some doctrines that exclude probative evidence are necessary and justifiable despite their potential compromise to outcome accuracy. The existence and acceptance of these doctrines should not lead to the conclusion that the adjudicative process is not in the business of seeking truth at all.[44] So long as

39. Sidney N Lederman et al, *The Law of Evidence in Canada*, 4th ed (LexisNexis Canada, 2014) at 12-13.

40. See Weigend, "Is the Criminal Process about Truth?", *supra* note 35 at 168: "[exclusionary rules] limit the pool of (relevant) information available to the decision-maker and thus reduce the chances that the verdict will be based upon a completely "true" finding of facts."

41. For a discussion of the evidentiary principles of privilege, see Paciocco & Stuesser, *The Law of Evidence*, *supra* note 37 at 236-305; and for a discussion focusing on procedural aspects of privilege principles, see Janet Walker & Lorne Sossin, *Civil Litigation* (Irwin Law, 2010) at 193-204.

42. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 24(2) [*Charter of Rights and Freedoms*]: "Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this *Charter*, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute." Also see Richard C Fraser & Jennifer AI Addison, "What's Truth Got to Do with It? The Supreme Court of Canada and Section 24(2)" (2004) 29:2 Queen's LJ 823 for an argument urging caution in excluding evidence under s 24(2) of the *Charter of Rights and Freedoms*.

43. Donald J Lange, *The Doctrine of Res Judicata in Canada*, 2nd ed (LexisNexis Butterworths, 2004) [Lange, *Res Judicata in Canada*].

44. Weigend, "Is the Criminal Process about Truth?", *supra* note 35 at 160, for example, gestures towards this when he says of the adversarial system that, "because the system excludes from the court's view everything that cannot be introduced as evidence on the day set for trial, the 'truth' is based only on the relatively small array of material then available, and valuable information will be ignored because one or both parties cannot present it at the right time in the legally prescribed manner. The adversarial system, at least in the form practiced in the Anglo-American world, therefore does not lead to the discovery of 'true' truth but of an artificially generated set of facts euphemistically called 'procedural truth.'"

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

I maintain that assessing the justifiability of exclusionary doctrines on that basis has two dimensions. First, where ensuring respect for the agency of legal subjects requires exclusion of evidence, such exclusion can be considered justifiable. Exclusions of evidence on the basis of *Charter* violations, or exclusions for the purpose of protecting fundamental human liberties, are examples of evidence-exclusion principles that are justifiable on this basis.[45] Second, an exclusionary doctrine that is necessary to enable adjudicative efficacy can be justifiable as long as any associated affront to respecting human agency is minimized.[46] Below I demonstrate how the respect for agency justification scheme would apply to the doctrines of solicitor and client privilege, which illustrates the first dimension, and *res judicata*, which illustrates the second.

Solicitor and client privilege constitutes an assurance that communications between a lawyer and his or her client remain confidential, including preventing disclosure of such communications over the course of the litigation.[47] Surely,

45. It is outside my scope to engage in a more searching analysis of the underpinnings of *Charter* protections here, but I note that Lawrence Solum has made the point that compromises to accuracy on the basis of "ensur[ing] that the process of adjudication does not unfairly infringe on the substantive rights guaranteed by the basic liberties, such as rights of privacy and freedom of speech," must be considered acceptable. Lawrence B Solum, "Procedural Justice" (2004) 78 S Cal L Rev 181 at 306 [Solum, "Procedural Justice"].

46. The idea that rules of fact-finding and evidentiary exclusions are underpinned by the value of respect for human agency is present in arguments from a number of scholars. For example, Richard CC Peck has argued in "The Adversarial System: A Qualified Search for the Truth" (2001) 80:1-2 Can Bar Rev 456 at 468, in the criminal trial context that: "evidence ought be excluded where it has been obtained through state actions which violate human rights. This engages the central debate as to whether the value of the search for the truth, which must, of necessity, involve trustworthiness, is of a higher ordinate than the worth and dignity of the individual." Alex Stein has similarly explained a justification on the basis of respect for agency regarding the rule against drawing incriminating inferences based on past crimes: "By treating personality and action as causally interrelated, such inferences undermine the anti-deterministic postulate of free agency, epitomized by the famous precept, 'Judge the act, not the actor.' Free agency indeed serves as a pillar of the liberal theory of criminal liability. From this perspective, using the defendant's personality as incriminating evidence undermines his or her autonomy and degrades her individuality." Alex Stein, *Foundations of Evidence Law* (Oxford University Press, 2005) at 32 [Stein, *Foundations of Evidence Law*]. Also see Alex Stein, "The Refoundation of Evidence Law" (1996) 9:2 Can JL & Jur 279 at 293. In addition, David T Wasserman, "The Morality of Statistical Proof and the Risk of Mistaken Liability" (1991) 13:2-3 Cardozo L Rev 935, argues for respect for individual autonomy as an underpinning moral value in fact-finding. On that basis, he argues, some statistical evidence is inadequate in establishing the requisite standard of proof because of its affront on treating people as part of a class rather than as individual agents. As Dworkin has held, "it is unjust to put someone in jail on the basis of a judgment about a class, however accurate, because that denies his claim to equal respect as an individual." Ronald Dworkin, *Taking Rights Seriously* (Duckworth, 1977) at 27.

47. See David H Kaye et al, *The New Wigmore: A Treatise on Evidence* (Wolters Kluwer Law & Business, Aspen Publishers, 2011) at 2292: "Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by

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

First, parties need legal representation because understanding the law and navigating through legal processes is difficult. These complexities can render individuals unable to make fully informed, independent decisions in pursuit of their legal claims without the help of a third party. Needing an intermediary may require individuals to compromise their personal privacy in order to access legal knowledge and make decisions about their lives. This can be considered a barrier to a full expression of human agency.

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

> The privilege is an expression of our commitment to both personal autonomy and access to justice. Personal autonomy depends in part on an individual's ability to control the dissemination of personal information and to maintain confidences.… The surrender of the former should not be the cost of obtaining the latter. By maintaining client-solicitor privilege, we promote both personal autonomy and access to justice.[48]

The commitment to respecting the personal autonomy of individuals, which grounds solicitor-client privilege, helps to justify the increased risk of factual inaccuracy that comes with that evidentiary rule.

Now consider the doctrine of *res judicata*. *Res judicata* is a rule against re-litigation of previously decided matters. As a rule of evidence, *res judicata* is an exclusionary principle.[49] It prevents proffering of evidence, as well as a new theory of the case, on an issue that has already been decided, even if a party

himself or by the legal adviser, except the protection be waived." The Supreme Court of Canada stated in *Ontario (Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23 at para 53: "the only exceptions recognized to the privilege are the narrowly guarded public safety and right to make full answer and defence exceptions." But for a discussion of the solicitor-client privilege doctrine in Canada, including comments on the changing state of recognized exclusions, see Adam M Dodek, "Solicitor-Client Privilege in Canada: Challenges for the 21st Century" (2011) Canadian Bar Association Discussion Paper.

48. *General Accident Assurance Company v Chrusz* (1999), 180 DLR (4th) 241 (Ont CA) at para 92.

49. Lange, *Res Judicata in Canada*, *supra* note 43 at 10.

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has new evidence or argument that might negate the finding in the previous adjudication.[50] According to Lange, the Supreme Court of Canada gave its "best pronouncement" on the doctrine in its 1894 decision in *Farwell v The Queen*:

> Where the parties (themselves or privies) are the same, and the cause of action is the same, the estoppel extends to all matters which were, or might properly have been, brought into litigation. Where the parties (themselves or privies) are the same, but the cause of action is different, the estoppel is as to matters which, having been brought in issue, the finding upon them was material to the former decision.[51]

The rule disallowing re-litigation of issues already adjudicated is generally justified on the grounds that it protects the finality of adjudicative outcomes. That is a worthwhile cause. For one, recognizing the finality of judicial disputes protects individuals from the expense of being "twice vexed by the same cause."[52] And more fundamentally, if adjudicative outcomes were not to be considered final, and previously decided issues could be re-litigated, then judicial decision-making could not be considered authoritative at all. Absent their authoritative quality, adjudicative dispute resolution would lose relevance. But can this commitment to finality be justified in light of its compromise to outcome accuracy along with the impairment on allowing litigants to present evidence and argument of their choice?

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

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

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50. *Ostapchuk v Ostapchuk* (1959), 19 DLR (2d) 746 (SKQB).
51. *Farwell v The Queen* (1894), 22 SCR 553, at 558. See also Lange, *Res Judicata in Canada*, *supra* note 43 at 2.
52. Lange, *Res Judicata in Canada*, *ibid* at 4.

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iii. Maintaining Reliability Alongside Fair Management of Risk of Error

Fact-finding procedures must manage the risk of inaccuracy fairly in order to maintain the legitimacy of outcomes.[53] Ronald Dworkin has provided what I view to be one of the most valuable proposals for what principled risk management would entail, in his under-discussed piece, *Principle, Policy, and Procedure*.[54] There, Dworkin explains that litigants have certain substantive rights, like the right not to be criminally convicted if not guilty, or the right to compensation if negligently injured, but since the adjudicative procedures cannot promise accurate outcomes every time, the vindication of those rights cannot be guaranteed. For Dworkin, the integrity of a legal system is nonetheless maintained through two procedural rights. Taken together, those procedural rights ensure appropriate recognition of the harm associated with factual errors, and a fair and consistent exposure to the inevitable risk of their occurrence.[55] As Dworkin puts it, community members should have[56]

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

Dworkin's procedural rights proposal calls for two types of consistency, one substantive and one formal. Substantively, adjudicative procedures must tolerate a similar risk of error for similar types of error. That is what Dworkin means when he says the procedures must put a "proper valuation" on the risk of factual error.[57] Suppose, for example, that a community decides to criminalize tobacco consumption. In that society, there is a minimum sentence of a $1000.00 fine for consumption of illegal drugs, and the same goes for tobacco consumption. Suppose, though, that prosecuting for contravening all other illegal drug consumption requires proof beyond a reasonable doubt, but prosecuting for consumption of tobacco only requires proof on a balance of probabilities. That rule would violate Dworkin's first procedural right, because the harm associated with a factual error (i.e. being fined $1000.00 and bearing a conviction for a crime not committed) is similar to other drugs, yet the risk of that harm manifesting is rendered higher for tobacco consumption.

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53. In Alex Stein's words: "There is no escape from deciding how to allocate the risk of error in adjudicative fact-finding." Stein, *Foundations of Evidence Law*, *supra* note 46 at 3.

54. As Dworkin notes, the conundrums caused by the inevitability of inaccuracy in adjudicating claims has largely "been left to the simple formula that questions of evidence and procedure must be decided by striking 'the right balance' between the interests of the individual and the interests of the community as a whole, which merely restates the problem." Ronald Dworkin, "Principle, Policy, and Procedure" in *A Matter of Principle* (Harvard University Press, 1985) 72 at 73 [Dworkin, "Principle, Policy, and Procedure"].

55. For me, fair risk distribution is one among other necessary characteristics of procedural legitimacy. But Dworkin's approach to credible risk distribution is a wholly endorsable starting point.

56. Dworkin, "Principle, Policy, and Procedure", *supra* note 54 at 92.

57. *Ibid*.

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

Dworkin's rights require internal coherence and consistency in application, but notably, they do not dictate the substance of the risk-allocating procedures. This suggests that in Dworkin's view, a society can legitimately allocate and tolerate risk of error in any way it deems appropriate, so long as its risk tolerance is internally coherent (i.e. it 'fits' within the general scheme of risk tolerance in each community) and is applied consistently to litigants. I generally agree. As Stein notes, "Moral considerations that inform risk-allocating decisions belong to the domain of politics,"[58] and there can be different reasons that lead to different levels of risk tolerance. For instance, in the Canadian legal system, we accept a greater risk of inaccurately imposing civil liability compared with criminal conviction. And we tolerate a greater risk of false acquittal compared with false conviction.[59]

How risk is allocated is substantively justified at the level of legislative lawmaking.[60] Within my narrower purpose of describing how adjudicative legitimacy can be assessed, it is coherence and consistency in risk allocation that are paramount in an adjudicative system where error must be tolerated while maintaining respect for legal subjects who will be subject to potential error. Arbitrary and inconsistent risk allocating procedures would constitute irrational

58. Stein, *Foundations of Evidence Law*, *supra* note 46 at 13.

59. As David Paciocco has pointed out, "there is not the same virtue in a single-minded pursuit of the truth about guilt as there is in a single-minded pursuit of the truth about innocence." David M Paciocco, "Evidence About Guilt: Balancing the Rights of the Individual and Society in Matters of Truth and Proof" (2001) 80:1-2 Can Bar Rev 433 at 435.

60. Relevant questions in that sphere could include questions of appropriate balancing between the different social costs of potential error, as presented in Erik Lillquist, "Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability" (2002) 36:1 UC Davis L Rev 85; or Thomas J Miceli, "Optimal Prosecution of Defendants Whose Guilt Is Uncertain" (1990) 6:1 JL Econ & Org 189. Appropriate risk allocation could also be based on questions of optimal deterrence: As Mike Redmayne explains in "Standards of Proof in Civil Litigation" (1999) 62:2 Mod L Rev 167 at 172, a common argument about setting the standard of proof is that it "should be set at a level which will ensure optimal deterrence of tortious conduct (i.e. it should not under-deter, increasing the number of accidents, but nor should it over-deter, increasing the cost of safety measures and encouraging potential victims to be careless." Similarly, Dominique Demougin & Claude Fluet, "Preponderance of Evidence" (2006) 50 European Economic Rev 963 at 963, argue "that a 'more-likely-than-not' decision rule provides maximal incentives for potential tort-feasors to exert care." For a similar analysis in the criminal context, see, e.g., Tone Ognedal, "Should the Standard of Proof be Lowered to Reduce Crime?" (2005) 25 Int'l Rev L & Econ 45. For one of the most comprehensive discussions of the burden of proof and factors to consider in setting it, see Louis Kaplow, "Burden of Proof" (2012) 121:4 Yale LJ 738.

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

I maintain, though, that internal and systemic consistency in risk allocation must be accompanied by two additional conditions if it is to maintain an authentic commitment to factual accuracy. The first is a necessary restriction on the adjudicative standard of proof. The standard of proof is the clearest place where the state can control the extent of risk of error that will be tolerated and the distribution of that risk.[61] Conceivably, a society may have reason to adopt different standards of proof in some class of cases. For instance, perhaps a society seeks to dissuade litigation and adopts a 60 or 70% standard of proof instead of 50%. So long as the consistency requirements are met, this does not seem to *necessarily* compromise adjudicative legitimacy.[62] But can a 30% or a 20% standard of proof be tolerated, even if that standard of proof satisfies coherence and consistency requirements?

If a legitimate fact-finding system must display a genuine orientation towards factual accuracy, a standard of proof that falls below the 50% threshold cannot be accepted. That is because if the standard of proof falls below 50% then even facts that are not more likely to be true than false are accepted as true. Such a system would accept facts that are probably not true as true, resulting in a lack of reliability: it cannot be said that the commitment to factual accuracy in that system is genuine.

The second proviso is a stipulation of *how* the fact-finder should determine whether the standard of proof has been met. Picking up from Habermas's notion, rational decision-making is foundational to adjudication, and the same goes for the fact finder's determination about whether the standard of proof has been met. A fact-finding system is acceptable only if the standard of proof is applied *rationally*. The requirement for rationality in the application of the standard of proof finds well-stated support in Hock Lai Ho's account of acceptable fact-finding, as explained below.

iv. The Rationality Requirement

In *A Philosophy of Evidence Law*, Ho has argued that justifiable fact-finding depends not only on epistemic success, but also on ethical values. This is in keeping with my notion that an orientation to factual accuracy cannot be the sole source of legitimacy of fact-finding procedures. Those ethical values are, at least in part, represented in the process of arriving at factual conclusions. As he puts it, "it is not only the case that truth is needed to do justice; the court must do justice in finding the truth."[63] Whether justice is done in the process of finding the truth

61. As Louis Kaplow, *ibid* states at 741: "The stringency of the proof burden determines how error is allocated between mistakes of commission—improper assignment of liability—and mistakes of omission—improper exoneration."

62. This approach may not be acceptable to those who might justify the civil standard of proof on the basis that it treats litigants equally through a roughly equal distribution of the risk of error. In my view, the risk distribution is a substantive aspect of the proof of facts principles, and is within the legislator's jurisdiction to determine, subject to the qualification noted above.

63. Ho, *A Philosophy of Evidence Law*, *supra* note 28 at 51.

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depends, Ho suggests, on the rationality of the fact-finding deliberation. If the deliberation process was irrational, then even if the ultimate outcome was accurate, one should conclude that an unjustifiable error occurred:

> A particular verdict may be correct even though it was produced by irrational reasoning. In such a case, one might say that no harm was done after all. But one should insist that something has gone wrong: the fact-finder has failed to discharge her duty properly in not deliberating as she ought to. It is wrong to find the defendant guilty by consulting an Ouija board or by the toss of a coin. It is wrong even if the verdict happens to be correct and even where rational support for belief in his fault exists on the evidence admitted in court.… Rationality is a demand in fact-finding that cannot be completely identified with the demand of reliability or accuracy.[64]

Ho's insistence on recognizing the value of rational fact-finding is grounded in the central value of being respectful of legal subjects' human agency. Picking up from Raimond Gaita's poetic conception of justice as humanity,[65] and Markus Dubber's[66] and Michael Slote's[67] accounts of justice as empathetic engagement, Ho notes that "the fact-finder ought to care to find the truth because she ought morally to respect and care for the person standing before the court. In this sense, the trial is not only about accuracy; it is, more importantly, about affirming a common humanity."[68] That common humanity can be expressed when "through reflection and the conceptualization of another person as a fellow moral being, someone with equal capacity for autonomy as oneself… one comes to have respect for her and want to treat her in accordance with that respect."[69] Rational decision-making is foundational to maintaining that respect.[70]

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64. *Ibid* at 73. Highlighting the significance of rational discharge of the standard of proof in the criminal context, Larry Laudan has posed the question, "If a juror feels doubtful about guilt but cannot even identify or formulate the reason for that doubt, then how can she possibly decide *whether* the doubt in question is rational or irrational?" Larry Laudan, *Truth, Error, and Criminal Law: An Essay in Legal Epistemology* (Cambridge University Press, 2006) at 42.

65. Raimond Gaita, *A Common Humanity: Thinking about Love and Truth and Justice* (Routledge, 2002).

66. Markus Dirk Dubber, *The Sense of Justice: Empathy in Law and Punishment* (New York University Press, 2006).

67. Michael Slote, *The Ethics of Care and Empathy* (Routledge, 2007); and Michael Slote, "Autonomy and Empathy" (2004) 21:1 Social Philosophy and Policy 293.

68. Ho, *A Philosophy of Evidence Law*, *supra* note 28 at 84. And also at 83: "In short, the trier of fact must appreciate, from the position of that person, the value of respect and concern. A verdict should be given against her only when it can be justified on grounds that she ought reasonably to accept. The standard of proof and evidential reasoning used in reaching the verdict must express adequate respect and concern."

69. *Ibid* at 82.

70. A commitment to rational decision-making on the basis of the evidence presented suggests that judges must approach their fact-finding task with neutrality and impartiality. On its face, that is an uncontroversial requirement, and has been expressly endorsed by the Supreme Court of Canada. See *R v S (RD)*, [1997] 3 SCR 484 [*R v SRD*], and most recently in *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25 [*Yukon Francophone School Board v Yukon*]. For example, at para 22 of *Yukon Francophone School Board v Yukon*, Abella J notes: "Impartiality and the absence of bias have developed as both legal and ethical requirements. Judges are required—and expected—to approach every case with impartiality and an open mind." However, while I cannot offer a more

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Much of Ho's proposition resonates with my understanding of legitimate fact-finding. The requisite respect for the litigants that underpins the legitimacy of fact-finding is contingent on rational deliberation when arriving at factual conclusions.[71] But before closing the discussion of the rationality proviso, there are two related considerations left to discuss: First, whether legitimacy of fact-finding demands express reasons for factual findings. I explain below why I think it does. And second, the question of whether judicial deliberation is the only place where rationality is expressed in the adjudicative process. Adopting Habermas as my starting point leads to my conclusion that this is a too narrow approach to adjudicative rationality. That is a point of divergence between Ho's position and mine, as I explain below.

The requirement for having rational reasons for factual conclusions to maintain adjudicative legitimacy is suggestive of a requirement for *giving* those reasons as well. Such a requirement for express reasons is supported within my theme of maintaining respect for human agency in that public justification demonstrates an acknowledgment that community members can, and have a right to, scrutinize the rationality of judicial decisions.[72] As William Richman and William Reynolds hold:

> When a judge makes no attempt to provide a satisfactory explanation of the result, neither the actual litigants nor subsequent readers of an opinion can know whether the judge paid careful attention to the case and decided the appeal according to the law or whether the judge relied on impermissible factors such as race, sex, political influence, or merely the flip of a coin.[73]

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thorough discussion here, the Supreme Court's application of the reasonable apprehension of bias test may suggest some dilution of the demand for judicial neutrality through commentary such as: "It is apparent, and a reasonable person would expect, that triers of fact will be properly influenced in their deliberations by their individual perspectives on the world in which the events in dispute in the courtroom took place. Indeed, judges must rely on their background knowledge in fulfilling their adjudicative function" (*R v SRD* at para 39). If such a statement can be taken to suggest a compromise to the rationality requirement of judicial fact-finding, it is contrary to the procedural legitimacy perspective that I am presenting here.

71. Micah Schwartzman has argued that adjudicative legitimacy requires judicial sincerity and public justification in order to provide those affected a reason to accept the decision. Micah Schwartzman, "Judicial Sincerity" (2008) 94:4 Va L Rev 987 [Schwartzman, "Judicial Sincerity"]. For me, a judge's sincerity, while laudable, cannot handle the same normative load as Ho's principle of rationality. Suppose that some judges believe in a magic coin and toss it in order to make factual findings. They may be sincere in their subjective belief, but I, as a litigant, would not care about their sincerity; I do care, however, about their irrationality, particularly when it results in an outcome that is authoritative for me. As Martin Golding puts it, "It would be unfortunate if a judge's argument was a mere rationalization and if the judge did not sincerely hold the reasons he explicitly gives. But in an important respect this fact, whenever it is a fact, is irrelevant to the justifiability of the decision. The justifiability of the decision depends on how well the decision is reasoned." Martin P Golding, *Legal Reasoning* (AA Knopf, 1984) at 8. My own references to "sincerity" or "authenticity" should not be confused with requiring a sincere judge. Rather, they should be understood as denoting objective procedural qualities. The rationality of a judge's deliberation can be considered a part of assessing how sincere (in an objective sense) a fact-finding process is.

72. Schwartzman, "Judicial Sincerity", *ibid* at 1008.

73. William M Richman & William L Reynolds, "Elitism, Expediency and the New Certiorari: Requiem for the Learned Hand Tradition" (1996) 81 Cornell L Rev 273 at 282-83.

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Providing express reasons for arriving at factual conclusions is an avenue for assessing the rationality of the deliberation process, and committing to providing those reasons contains an implicit respect for the litigants as rational, active players rather than mere passive receivers of authoritative decrees.[74] It sends a message that the community member's assessment of its decisions *matters*. That is a message of respect. Jules Coleman has explained that the practice of giving reasons "presupposes the values of autonomy and equality" as follows:

> The commitment to equality flows from the fact that a practice of offering reasons and inviting criticism can arise only among people who believe that they owe it to others to justify their actions to others.… The commitment to autonomy is exemplified in the very idea that individuals can respond to reasons and arguments, that others' judgments are formed as a result of reflecting on the reasons offered. Anyone who offers reasons designed to convince or persuade others makes it clear that he treats others as autonomous and equal in the same way that one regards oneself, worthy of the respect a practice of offering reasons presupposes and as capable of being moved by reasons as only autonomous agents can be.[75]

On this basis, I maintain that giving full expression to respect for human agency within an adjudicative process requires that reasons for factual conclusions be expressed. This way, legal subjects are given a chance to discern the rationality of the deliberation that took place in the judge's mind, so far as that is reflected in the express reasons.[76]

My second question is whether adjudicative rationality is expressed only in the mind of a judge, as Ho's discussion suggests. In arriving at his argument for why rational deliberation matters, Ho starts by advocating for and adopting the "internal" point of view of the fact-finder. This is in contrast to the more common "external" point of view which, if adopted, leads to the conclusion that the relevant criterion for acceptable adjudication is factual accuracy of the outcome, because if an outcome is correct, then justice is done.[77] Taking up the point of

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74. David Dyzenhaus has also offered a compelling proposed addition to Habermas's theory by calling for a recognition of the importance of publicizing intelligible legal outcomes so that those outcomes can be subjected to further deliberation by the public. This, as I understand, is akin to calling for public reasons to be given in the fact-finding context as well, so that judicial outcomes can be reviewed publicly. See Dyzenhaus, "The Legitimacy of Legality", *supra* note 31.

75. Jules L Coleman, "Authority and Reason" in Robert P George, ed, *The Autonomy of Law: Essays on Legal Positivism* (Clarendon Press, 1996) at 312-13.

76. Note that the Supreme Court of Canada has commented that defects in the reasons provided by judges can amount to procedural impropriety: *Cojocaru v British Columbia Women's Hospital and Health Centre*, 2013 SCC 30 at paras 73-75. In that case, the appellants questioned the propriety of the trial judge's reasons due to extensive copying from the plaintiff's submissions. The Supreme Court of Canada held that the copying in the judge's reasons did not rebut the presumption of judicial impartiality, but noted that better practice is to refrain from extensive copying. A more extensive discussion of the adequacy of judicial reasons is outside of my scope, but see, e.g., HL Ho, "The Judicial Duty to Give Reasons" (2000) 20:1 LS 42; and Richard Murphy, "Chenery Unmasked: Reasonable Limits on the Duty to Give Reasons" (2012) 80:3 U Cin L Rev 817.

77. Ho, *A Philosophy of Evidence Law*, *supra* note 28 at 51-84.

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view of the trier of fact, Ho explains, this conclusion does not hold.[78] The judge, along with being concerned with what to believe, "must also be concerned about the morality of the process by which she reaches her verdict."[79] Given that Ho's operative perspective is that of the trier of fact, rationality or irrationality in arriving at a verdict is expressed entirely in her thought process. In other words, whether an outcome is rational depends exclusively on the fact-finder committing to being rational: she will rely on the evidence presented and weigh it fairly against the standard of proof.

Doubtless, the fact-finder's commitment to rationality is critical, but the judge's deliberations only tell part of the rationality story. Suppose that a litigant was coerced in a way that prevented her from freely presenting her evidence and arguments. Even if a judge makes a reasoned decision based on the evidence presented, the rationality of the outcome is questionable, at least in a sense that would be relevant to the coerced litigant.[80] Even if rationality motivates an adjudicator's conclusion, the outcome she arrives at may still be considered irrational. Encompassing rationality exclusively in the mind of the adjudicator misses this problem.

Adopting Habermas's approach to adjudication provides an avenue to rectify this problem. He perceives the adjudicative process itself as an expression of rational decision-making, resulting in a more comprehensive understanding of rationality as a requisite feature of adjudicative legitimacy. Through the lens of Habermas's jurisprudence, it becomes clear that the adjudicative process itself must maintain a commitment to rational fact-finding, not just the fact-finder. The fact-finder's ultimate decision-making is part of that system. She must make a rational decision by considering the evidence and the argument presented by parties and applying the relevant standard of proof on the basis of that evidence and argument. But her mind is not the only place where adjudicative rationality is expressed. Rather, the entirety of the process should be conducive to rational decision-making.

Ensuring rational adjudication involves ensuring that litigants have meaningful ability to participate. If a fact-finder makes an irrational decision in the sense that she improperly fails to consider evidence presented by one party (for instance, by accepting only the evidence of blue-eyed witnesses) she erodes the party's right to meaningful participation, because the right to participate through presentation of evidence is a façade if the evidence is not rationally relied on in deciding whether the standard of proof was satisfied.[81]

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78. *Ibid* at 51: "From an external standpoint, the relevant criterion is the correctness of the verdict. There is a contingent connection, to which terms like 'accuracy' and 'reliability' refer, between the outcome of fact-finding and truth. Truth is needed so that justice (in the sense associated with 'rectitude of decision') can be done."

79. *Ibid*.

80. On the question of whose perspective is important, see Solum, "Procedural Justice", *supra* note 45 at 280: "When we seek to identify the conditions for the legitimacy of adjudication, we should assume the point of view of a citizen who is to be bound by a judgment that he or she has good reason to believe is in error and is adverse to the citizen's interests or wishes."

81. Given the significance that I am giving to the rationality of the decision-making process, it is worth noting important social science evidence that suggests that judges, like all decision-

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This leads to the final question on the nature of participation rights and the underlying value they protect. So far, participation rights have been discussed in relation to their role in maintaining rational outcomes. This elicits the question whether participation rights are *only* significant in relation to rationality, or if ensuring litigant participation protects other values as well. Answering this question is important because it influences the nature of the participation rights that should be maintained. I turn to this question below.

B. The Value of Participation Rights

Whether and to what extent participation rights are valued in an adjudicative theory depends on the theorist's viewpoint as to the nature and purpose of adjudication. Theorists who place the ultimate value of the adjudicative system in its ability to produce accurate outcomes would conclude that a best effort towards accurate outcomes should wholly satisfy the requirements of legitimate adjudication.[82] It follows that for them, participation only matters so far as it affects outcome accuracy, and does not add any independent value of its own. Louis Kaplow, for instance, suggests in "The Value of Accuracy in Adjudication: An Economic Analysis," that:

> One suspects that claimants who object to not being heard are those who are, for example, denied benefits. If only losers complain, however, one should be suspicious that the complaint is motivated by a concern for the result, and thus an objection to a lack of process may implicitly be an instrumental argument. An entirely plausible reason to object to not being heard is that one may believe (perhaps feel certain) that the decision was adverse precisely because the

makers, adopt certain heuristics that may unconsciously bias their decisions. See Daniel Kahneman, Paul Slovic & Amos Tversky, eds, "Judgment Under Uncertainty: Heuristics and Biases" (1974) 185:4157 Science 1124; Daniel Kahneman, *Thinking, Fast and Slow* (Farrar, Straus & Giroux, 2011); Stephen Porter & Leanne ten Brinke, "Dangerous Decisions: A Theoretical Framework for Understanding How Judges Assess Credibility in the Courtroom" (2009) 14 Leg & Criminal Psychology 119; Eyal Peer & Eyal Gamliel, "Heuristics and Biases in Judicial Decisions" (2013) 49 Court Rev 114; Jeffrey J Rachlinski, "Heuristics and Biases in the Courts: Ignorance or Adaptation?" (2000) 79:1 Or L Rev 61; Donald C Langevoort, "Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review" (1998) 51:6 Vand L Rev 1499; Emma Cunliffe, "Judging, Fast and Slow: Using Decision-Making Theory to Explore Judicial Fact Determination" (2014) 18:2 Int'l J Evidence and Proof 139. The best answer to this literature is, in my view, to recognize its significance and encourage further study on biases and cognitive difficulties in complex decision-making like trials, and continually make efforts through judicial education to maintain judges' awareness of decision-making pitfalls and provide tools to overcome them to the best extent possible.

82. I have already discussed that Dworkin is a proponent of an outcome-accuracy model of adjudication, and participation rights are notably missing from his procedural proposal. Similarly, even Ho, despite his commitment that outcome-accuracy must be accompanied by rationality, still maintains that outcome-accuracy is the paramount goal of adjudication, and as I have noted, participation rights do not find expression in his proposal.

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> decision-maker was deprived of information one had to offer. Thus, the decision may have been inaccurate.[83]

Elsewhere, I have explained why, for me, the starting point adopted by instrumental or outcome-accuracy focused authors is problematic.[84] In summary, there are two issues that cannot be responded to if an instrumental approach to adjudicative fact-finding is adopted. First, it does not offer a response to the problem associated with achieving an accurate outcome *improperly*. If only accuracy mattered in adjudication, then problems associated with irrational, arbitrary, or otherwise improper decision-making would dissolve if the outcome turned out to be factually accurate. Second, and even more fundamentally, an effective adjudicative system cannot guarantee outcome accuracy, yet it also requires that its outcomes be authoritative. That means that inevitably, some outcomes will be inaccurate yet authoritative, whether anyone is aware of the inaccuracy or not. A theory that centralizes outcome accuracy cannot provide sufficient grounding for that authority. As such, as I have noted above, making a 'genuine effort to achieve accuracy' does not provide the full answer to a litigant who may accept that the adjudicative system rendered such a best effort, but ultimately failed in its task. Given the failure, why should one accept the authority of the outcome?

It is legitimacy that grounds the authority of adjudicative outcomes *despite* its potential failure to achieve factual accuracy. Legitimacy does not, and cannot, depend on outcome accuracy. Rather, drawing on Habermas's insights, legitimacy is achieved when legal procedures demonstrably respect human agency. In the adjudicative context, as I have elaborated above, that requires a demonstrable procedural commitment to genuine and rational effort towards achieving factual accuracy. Whether factual accuracy is ultimately achieved does not affect the legitimacy of the factual determination.

Given the normative foundations of legitimacy in my proposal, the relevant question for me is whether a genuine effort at accurate, rational fact-finding gives the fullest expression to respect for human agency in fact-finding procedures.[85] In terms of participation rights, my question is whether they are necessary only in relation to their impact on achieving a rational outcome as discussed above, or if they have a role in preserving respect for human agency independent of rationality as well.

I have already noted that rational decision-making presumes participation rights, because if some affected party's position is not permitted or sincerely

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83. Louis Kaplow, "The Value of Accuracy in Adjudication: An Economic Analysis" (1994) 23:1 J Leg Stud 307 at 390-91. And for Solum's treatment of Kaplow's argument, see Solum, "Procedural Justice", *supra* note 45 at 291-95.

84. Nayha Acharya, "Adjudicating Uncertain Facts—The Case for Procedural Legitimacy" (2018) 49:1 Adv Q 105.

85. Robert G Bone states in "Procedure, Participation, Rights" (2010) 90:2 BUL Rev 1011 at 1028: "Anyone arguing for dignity or legitimacy as a basis for participation rights must be prepared to explain why dignity is not fully respected and legitimacy fully secured by an adjudication system that does its best to produce an outcome for each individual that conforms to the substantive law".

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considered, then the rationality of the outcome is imperiled. If enabling a rational outcome is the only value of participation rights, then the right to participate can be justifiably defined as a right to have one's interests represented in an adjudicative system. Owen Fiss has made the claim that representation of interests is key to grounding an authoritative outcome; a right of individual participation is not:

> What the Constitution guarantees is not a right of participation, but rather what I will call a 'right of representation': not a day in court but the right to have one's interests adequately represented. The right of representation provides that no individual can be bound by an adjudication unless his or her interest is adequately represented in the proceeding.[86]

On the surface, Fiss' argument seems agreeable. If litigants' interests were adequately represented in the decision-making process, then on what basis would they complain that one was not allowed to participate in the decision? One could not, for instance, complain that the rationality of the decision was compromised due to the inability to represent one's interests. Solum's answer to Fiss' argument is persuasive and demonstrates why individual rights of participation are necessary in terms of respect for human agency. He explains that it is not "interests" in their own right that are the primary concern in the adjudication of a claim. Rather, the primary concern is the individuals who hold those interests. Solum provides:

> We are concerned about individual interests because we are concerned about individuals. Interests themselves have no moral standing. Individuals represent themselves, not because they are the best or most efficient representatives of their own interests; individuals represent themselves because they are human persons, who act on their own behalves, define their own interests, and speak for themselves.[87]

Given this response to Fiss's point, it is surprising that Solum does not clearly acknowledge that respect for human agency is at the heart of individual participation rights. According to Solum, "Dignity, equality, and autonomy are fundamental political values. The idea that they connect in some way to the value of participation is sound."[88] He goes on to note, however, that "the error is to believe that any one of these values directly provides the value of participation—legitimacy plays that role."[89]

In Solum's account, however, the conception of legitimacy is unsubstantiated. He defines legitimacy in terms of its role and its significance, but not in terms of

86. Owen M Fiss, "The Allure of Individualism" (1993) 78:5 Iowa L Rev 965 970-71.
87. Solum, "Procedural Justice", *supra* note 45 at 302-03.
88. *Ibid* at 289.
89. *Ibid*. And elsewhere [286-87] he notes: "The value of participation derives from the idea of legitimacy. Our focus on legitimacy contrasts with much of the prior literature, which has suggested three rival explanations—based on dignity, equality, and autonomy—for the irreducible value of legitimacy. Each of these three rival explanations has a contribution to make, especially when considered in relationship to legitimacy. Considered in isolation, however, dignity, equality, and autonomy do not provide an adequate explanation of the value of participation."

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its requisite features. His account of legitimacy can be summarized as that which provides the grounding to adjudicative authority.[90] But he does not delineate any underlying normative commitments that could answer *on what basis* legitimacy provides that grounding. Without identifying the key normative features of legitimacy, Solum's statement that participation rights are underpinned by legitimacy remains hollow. Since it is an unsubstantiated notion of legitimacy that grounds the requirement for participation rights, the question of *why* participation rights are necessary within a legitimate adjudicative process cannot be answered beyond, 'because participation rights are necessary for legitimacy,' which simply begs the question.

The better approach, in my view, is to recognize that respect for the human agent is at the heart of legitimacy, and to preserve that fully, individuals must have a right to participate in their own adjudication. That right cannot be subsumed into the rationality requirement. That is because a system where representation of litigant interests is guaranteed, but individual participation rights are not protected, could preserve the rationality of the outcome while also failing to fully respect litigant agency.

Despite the difficulty in Solum's approach, parts of his analysis support this notion. For one, he explains that participation rights are essential to legitimacy because denial would inflict a certain "moral harm" on citizens.[91] The very reason that this moral harm exists is because denying participation rights constitutes a denial of "a concern and respect for individual dignity."[92] He also relates a helpful hypothetical situation that elicits the intuition that representation of interests is not enough to ensure respect for human agency.[93] In his hypothetical, a fully competent adult is sued in a civil law suit, but is denied the ability to participate in the adjudication. Instead, the judge appoints a guardian *ad litem* to represent the person's interests. The guardian represents their interests well. But it still seems that the legitimacy of the proceeding can be denied. If I were that person, in the event of an unfavourable outcome, my intuition (shared by Solum) is that I have good reason to deny the authority assumed over me, because I was improperly denied the right to participate.[94]

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90. *Ibid* at 277-79. There, Solum explains the importance and role of legitimacy, but does not expound on its necessary features. For example, at 277: "Why is legitimacy important? Citizens are not obligated to regard illegitimate laws as authoritative." And at 278: "The goodness of legitimacy flows from an intuitively appealing principle of political morality: each citizen who is to be bound by an official proceeding for the resolution of a civil dispute should be able to regard the procedure as a legitimate source of binding authority creating a content independent obligation of political morality for the parties to the dispute."

91. *Ibid* at 298.

92. *Ibid* at 305.

93. *Ibid* at 283-84.

94. *Ibid*. One may wonder here how different the hypothetical situation is from what really happens, given that people are normally represented in court by counsel and probably largely rely on their advice in terms of evidence and argumentation. But people normally choose their counsel and *can* give them instructions (unlike the guardian in Solum's hypothetical) which I think is a material difference.

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A number of authors have picked up on this intuition to argue that participation rights in the litigation process are necessary and are underpinned by respect for human dignity and autonomy of legal subjects.[95] For instance, Laurence Tribe provides that:

> Both the right to be heard from, and the right to be told why, are analytically distinct from the right to secure a different outcome; these rights to interchange express the elementary idea that to be a person, rather than a thing, is at least to be consulted about what is done with one.[96]

In a similar vein, Robert Bone has noted that:

> I assume that the parties to mass tort cases have process-oriented participation rights that can trump utility and that those rights guarantee a robust form of individual control, including control over litigation of *all* significant issues relating to the determination of individual damages. I also assume that the intrinsic value of participation is historically tied to respect for individual autonomy: allowing a person to participate before subjecting him to the coercive power of the state respects his dignity as an autonomous moral agent.[97]

These contributions lend credence to the position that participation rights are necessary features in my conception of legitimacy.[98] On this basis, I endorse the conclusion that parties who will be substantially affected by the adjudication should have a right to participate in the sense of being allowed an equal and meaningful opportunity to present relevant evidence and arguments.[99] This is, of course, subject to justifiable admissibility rules discussed above.

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95. See, e.g., Jerry L Marshaw, *Due Process in the Administrative State* (Yale University Press, 1985); Richard B Saphire, "Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection" (1978) 127:1 U Pa L Rev 111, adopting a dignity-based approach to due process and arguing in favour of recognizing participation rights on that basis. Compare the contrary position of Stein, *Foundations of Evidence Law*, *supra* note 46 at 33: "The right to be heard, and, indeed, the entire package of trial participation rights, are rights that ultimately derive from epistemic fallibility, not from moral virtuousness."

96. Laurence H Tribe, *American Constitutional Law*, 2nd ed (Foundation Press, 1988) at 666-67.

97. Robert G Bone, "Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity" (1993) 46:3 Vand L Rev 561 at 619-20. He also states at 625: "A strong participation right can be justified only by a normative theory of process value that grounds the value of participation in the conditions of adjudicative legitimacy, such as respect for a party's dignity or autonomy."

98. Some accounts hold that adjudicative legitimacy is tied exclusively to participation rights. That view over-extends the normative value of participation rights at the cost of failing to recognize that factual reliability is also necessary to legitimate adjudication. Solum alludes to this problem in "Procedural Justice", *supra* note 45 at 272: "At this point, we can take stock of the participation model… [the interpretation which] emphasizes the dignity interest of litigants, at least gets off the ground, but the dignity-enhancing process is not sufficient for fairness in the face of skewed outcomes." Of course, my own approach to legitimacy does not suggest an exclusivity of participation rights, and includes a requirement for a genuine orientation to factual accuracy, as I have delineated above.

99. See *ibid* at 305 for Solum's statement of the "Participation Principle." I note that the requirement for participation rights is suggestive of a possible defect in the inquisitorial model of dispute resolution from the procedural legitimacy perspective, but a full discussion of the merits and pitfalls of inquisitorial dispute resolution is beyond my scope here. In addition, I

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Summing Up: The Fact-Finding Framework

My purpose in this paper has been to uncover the general principles for how respecting legal subjects as autonomous agents can be reflected in the adjudicative fact-finding process. That leads to a substantiated procedural legitimacy proposal, and constitutes my suggestion for why, and on what basis judicial fact-finding can be acceptable despite its unavoidable potential for factual inaccuracy. The fundamental idea is that respect for litigant autonomy must be reflected in fact-finding processes. That occurs when the fact-finding processes are reliable (or, demonstrate a genuine effort to ascertain the true facts), and when there are fulsome participation rights.

Whether fact-finding procedures manifest and facilitate a sincere effort at achieving accuracy is the relevant question to assessing factual reliability. The authenticity of that effort can be presumed when:

1. In general, all relevant evidence is admissible.
2. Exclusions to relevant evidence are justified on the basis of respecting human autonomy.
3. The system ensures internally coherent and consistent error-risk management.
4. The standard of proof is, at minimum, a balance of probabilities.
5. The evidence presented is weighed rationally against the standard of proof, and the factual findings are accompanied by reasons.

The two elements of factual reliability and participation together provide the fullest expression of respect for human autonomy in adjudicative fact-finding procedures. When fact-finding procedures reflect those qualities, consistent application of those rules gives rise to legitimate factual determinations.

The implicit message of committing to consistent application of a procedural system that manifests these principles is that while we cannot guarantee factually accurate adjudicative outcomes, we can promise judicial outcomes that are right in a different sense: they are right in that they are a product of a valuable procedure that ensures respect for the human agent while simultaneously acknowledging the reality that factual findings occur in a context of uncertainty.

Conclusion

My starting point for this paper was the modest observation that we do not always know 'what happened' to give rise to a legal dispute. Since knowing things *for*

acknowledge that a call for participation rights would require further consideration and delineation, particularly in contexts beyond civil litigation. The question of who is substantially affected or directly affected can depend on the type of administrative decision at stake. Addressing the question of who could be affected in various instances goes beyond my purpose here, which is to provide guiding principles that may be used to assess fact-finding processes in the civil litigation context.

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sure is not usually (if ever) possible, there is always a chance of arriving at an inaccurate conclusion. My effort has been to discover the legitimacy of the adjudicative fact-finding system without rejecting, ignoring, or minimizing that frailty, while simultaneously committing to the fundamental goodness of civil justice systems. Adopting the jurisprudential insights of procedural theorist Jürgen Habermas, supplemented by the incisive insights of others, I have offered an account of the bases on which we can (and do) accept the legitimacy of a judicial decision that rests on factual conclusions that are made in a context of uncertainty. In doing so, I have offered a justificatory project that fundamentally claims that while civil justice processes are susceptible to critique from many angles, there are necessary and attainable conditions that would make them good. So, my hope is that in addition to being useful for assessing the operations of civil justice systems and reform initiatives, this framework may serve as a multi-faceted reminder: that not knowing never excuses not making a genuine, authentic effort to know, that imperfection is inevitable and therefore cannot be synonymous with illegitimacy, and that imperfect civil justice systems are considered good for good reason, and those reasons must never be compromised.

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