

AGENTS OF OUR INTERESTS: THE MORAL CLAIM TO LEGAL PROCESS

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"By the law of God, none ought to be imprisoned, but with the cause expressed."¹

Sir Edward Coke

FEW doubt that we are, in some sense, owed due process of law. The grounds of this demand, and hence what counts as an adequate provision of legal procedure in various circumstances, is somewhat less clear. A currently popular view denies that legal procedure inherently serves any important human interest, insisting that procedural rights are mere instruments for the protection of interests of concern to further rights. A right to criminal trials, for instance, is about protecting legal subjects from wrongful infringements of liberty, liberty to which subjects have independent claim. If such protection is otherwise secured, then (the thought goes) the procedural right would lose its rationale, and subjects would cease to be entitled to criminal trials. The theory holds, in sum, that due process is simply about getting the right results in adjudication, and any claim to it is a function of the importance of correctly realizing the demands of other more basic rights (e.g., rights of non-interference, bodily integrity, property, conscience, and the like). As Martha Nussbaum puts it, in illustrating her definition of an 'outcome-oriented conception of justice', in designing criminal trials we "begin with the correct outcome (the guilty, and only the guilty, are convicted), and we design procedures that will generate that outcome as often as possible."² I argue here that if we possess fundamental claim rights, the purely instrumentalist view of procedural

1. Codd v. Turback (1615) 81 Eng. Rep. 94.

2. Martha C. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge, MA: Harvard University Press, 2006), 82. For a more qualified view along these lines, see John Rawls, *A Theory of Justice*, Revised ed. (Cambridge, MA: Harvard University Press, 1999), 74-75. Rawls indicates that the pursuit of the right outcomes in trials must be consistent with the other ends of law, but does not elaborate. Nozick also marks reliability as the central question for the legitimacy of criminal procedure (though acknowledges that the reliability must normally be reasonably manifest to those subject to the procedures). See Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 96-108.

rights is deeply and importantly mistaken. Claim rights afford possessors standing and prerogative to see to it that their rights-protected interests are properly regarded. Hence, where rights are at issue, due process is not merely about producing correct outcomes, but is further about offering attestation to claimants of those rights. Put otherwise, the basic mistake instrumentalists make is seeing rights bearers as mere patients of moral concern, as having only title to certain results. Rights claimants are not mere patients with respect to what they are owed—they are properly agents in the adjudication of their claims, entitled to the social means for capable advocacy.

Before engaging the dialectic directly, I can bring into relief the core idea. Morality affords each of us a capacity to not only pursue our interests within the domain of the permissible, but to officiate moral demands pertaining to those interests. Where a question arises of what one is due, or what one owes, or what would be appropriate to provide or receive, we are not by default bystanders, having standing only to wait for another party to adjudicate. A person slandered need not idly wait for others to discern the wrong, correct the record, and demand an apology. Those slandered *properly can* pursue rectification on their own behalf. More generally, we occupy at baseline a moral office with respect to the normative demands salient to our person. We are *authorized* to assess demands made of us (not merely as an intellectual enterprise, but in a way relevant to compliance), press our own claims, prompt an account concerning an intrusion (such that others are thereby obliged to supply one), defer recognition of a title (when reasonable) until a crucial question can be resolved, and (where appropriate) engage accountability measures. We are agents of our legitimate interests, officers of our rights. Such standing is not to be understood as moral license—as providing a means for shirking morality's requirements—but as a responsibility-laden prerogative born of a

kind of trusteeship.³ Our charge as constables of a domain of morality only empowers us to act in good faith in service of our entitlements. Nonetheless, human dignity requires that such standing be given effective social recognition.

That we are agents of our interests is, in a sense, philosophically familiar⁴ and socially mundane. Yet, we tend to overlook its theoretical importance. To recognize such standing is to acknowledge a certain fundamental moral distribution of responsibility with attendant privileges. Recognizing this in the current context enables us to see what has been elusive to instrumentalists: our basic moral condition requires a specific order of procedure in the administration of justice, and such an order is inherent to a sovereign's proper regard for the dignity of its subjects. I will begin with a more complete statement of the problematic, and then transition to the argument affirming a fundamental moral claim to procedural rights of law.

1. Instrumentalism About Procedural Rights

Instrumentalists understand procedural rights as exclusively concerned with mitigating risks of unwarranted harm or intrusion.⁵ When it comes to familiar process rights, such as the right to discovery, the right to a fair trial, the right to a judicial hearing, the right to testify, and the like, the thought is that they are wholly instruments for se-

3. One might object to "trusteeship" here, since a trust is normally held on behalf of another, and here I refer to the power to act on one's own behalf. This should not distract: the idea concisely indicates that an allocation of responsibility, with accompanying normative powers, is at issue.

4. Indeed, Locke famously affirms the "*doctrine* of a power in the people of providing for their safety a-new, by a new legislative, when their legislators have acted contrary to their trust." See, John Locke, *Second Treatise on Government*, ed. C. B. Macpherson (Indianapolis: Hackett Publishing Company, 1980), 114. His emphasis.

5. See, for instance, Larry Alexander, "Are Procedural Rights Derivative Substantive Rights?," *Law and Philosophy* 17, no. 1 (1998), 19-42; Christopher Heath Wellman, "Procedural Rights," *Legal Theory* 20, no. 4 (2014), 286-306. See also, N.P. Adams, "Grounding Procedural Rights," *ibid.* 25, no. 1 (2019), 3-25. Adams also treats the mitigation of risk as the central rationale for procedural rights.

curing a person's protected interests against wrongful invasion by the state, whether the state is acting in the public interest or on behalf of private parties. As Larry Alexander summarizes, "procedural rights are merely components of substantive rights with no independent status."⁶ The provision of due process is not inherent to serving any interest; due process merely regulates the official adjudication of other matters we care about. Taking Alexander again, procedural rights "would be unnecessary if...official determinations were made by an infallible God and not fallible human beings."⁷

This approach to due process facilitates skepticism about fundamental moral claims to procedural rights. If procedural rights are mere instruments for achieving independent goods, then claim to them will be a function of our claim to those goods and whether they can be otherwise provided. Christopher Heath Wellman has us consider the right against double jeopardy, which helps protect legal subjects from prosecutorial abuse. Absent the right, prosecutors would have less disincentive to engage spurious prosecutions with inadequate evidence, and the discretionary power to harass defendants even upon acquittal. Wellman acknowledges the importance of such protection, but doubts that there is a preinstitutional moral right against double jeopardy. The ultimate justification of the legal prohibition relies on a context-sensitive, reasonably disputable weighing of costs and benefits. The double jeopardy rule inhibits prosecutorial abuse and conviction of the innocent, but increases the number of unconvicted offenders. In some contexts, we might reasonably judge increased offender conviction gained by permitting double jeopardy as offsetting the losses. Further, if comparable protection can be otherwise provided (Wellman suggests increasing the burden of proof for conviction as a possibility), then eliminating the double jeopardy rule appears as no injustice.⁸

The seemingly incontrovertible right to fair trial may seem less vul-

nerable, but Wellman presses the contention here, arguing that the prescription on state punishment absent conviction at a fair trial is justified "*not because each individual retains her right against being punished until she has been proven guilty by a fair, reliable, and public process, but because we should take great care to minimize the number of people wrongly punished.*"⁹ Wellman asks us to imagine the following scenario. A sum of money is stolen from the public treasury of a just society. Eager to punish someone for the theft when the official inquiry turns up no suspects, the society democratically enacts a population-wide, one-time lottery where the 'winner' will receive a punishment proportionate to the crime. By pure happenstance (1/10,000,000 odds), the lottery selects the actual thief, who is then duly punished.¹⁰ Since she made herself liable to state punishment by committing the crime, Wellman contends that the thief has no legitimate grievance at being so punished. And if she has no complaint against such punishment, she has no complaint against the risk of such punishment, i.e., she was not at risk of wrongful conviction for the crime. So, even if her compatriots can rightly protest the risk they endured from the bad procedure, the thief cannot, indicating (Wellman asserts) that she has no preinstitutional moral right to be punished by only good procedures.¹¹ The upshot is that legal procedures should be seen as various implements whose utility depends on purpose and environment, not

9. Ibid., 290. His emphasis.

10. Ibid., 290-91.

11. Ibid., 290-93. It is worth noting that Adams rejects this contention by arguing that we are required to provide 'robust security', which is a matter of shielding subjects (including the guilty) from unwarranted punitive harm in nearby possible worlds where they did not commit a crime. The theoretical purport of the move is to individualize punishment to capture a sense that it must be respectful: a community's provision of robust security partly constitutes a concern to protect members from wrongful harm. Without evaluating the merits of Adams' proposal, which is consistent with my own, I still treat his view as instrumentalist as it understands due process as simply about securing subjects' further protected interests. Should alternatives to providing robust security prove available, the view remains uncritical of adopting them. This *type* of attitude, I argue here, misses something crucial.

6. Alexander, "Are Procedural Rights Derivative Substantive Rights?," 19.

7. Ibid., 23.

8. Wellman, "Procedural Rights," 287-89.

their own goods to which persons could lay fundamental claim. Appropriate adjudicative policy is context-dependent, and a matter of judgment and dispute. Even a policy of non-public trials, or trials where defendants are barred from participating, could be justifiable, Wellman contends, if they improved the accuracy and efficiency of criminal process.¹² Indeed, we should expect determinate, important, pre-institutional moral rights to procedure to render inert, strongly countervail, or noticeably constrain certain policy considerations so as to leave the proper shape of legal procedure clearer, less contestable, and less vulnerable to the vagaries of context.

2. The Right to Attestation

Undoubtedly, legal procedure is in the moral business of securing subjects against institutional threats. Moreover, the appropriate shape of procedural guarantees should reflect practical, context-sensitive consideration of how to achieve adequate protection consistent with legitimate public objectives. However, due process has a further mandate in our moral personality, and this mandate imposes important constraints. Instrumentalism neglects the tight connection between the status of being a rights claimant and the requirement that social conditions facilitate effective claimancy. In the conditions of a sovereign legal order, this preinstitutional moral standing implies a claim to public, transparent, participatory process in the administration of justice.

The argument begins with the premise that adult human persons have fundamental claim rights. The strategy is to show that instrumentalists are committed to denying this, i.e., to denying that adult humans are generically rights claimants. This is costly, and shows instrumentalism to be a much more radical position than is supposed. It is clear to many that human beings are at baseline self-originating sources of moral claims, with claim rights to at least certain familiar basic goods, e.g., life, bodily integrity, security in person, freedom from bondage, access to personal property, liberty in conscience and worship. You can

12. Ibid., 297-99.

populate the list of fundamental rights mostly as you like; the point is that instrumentalists must deny such claim rights generally. The claims are self-originating in the specific sense that the first-order justification of them takes some feature or features of human individuality (e.g., rational agency, an interest in living well or flourishing, etc.) as sufficient for establishing them.

To begin seeing the importance of the premise, consider Feinberg's classic discussion in "The Nature and Value of Rights". In asking us to imagine a world ("Nowheresville") with all the familiar 'moral furniture' of our own (duties, virtue, desert, and the like), and with greater quantity of moral sensibility than our own (more compassion, benevolence, pity, and the like), yet lacking in individual rights, he shows that a core part of the moral value of being a rights bearer is the warrant it affords the social activity of claiming. Absent claim rights, not only is there no directed obligation (and so no sense of personal moral title that could validate indignation in the face of wrongdoing), but no standing for persons to demand their due, publicly complain of a wrong to them, or to give notice of a title to something or on another's conduct. The empowerment to make claims on one's own behalf ought to be prized, Feinberg continues, for underwriting a sense of one's own status as an individual meriting esteem and respect. The status dignifies a claimant, as someone who can properly assert themselves against others, and stand as an equal, entitled to 'look others in the eye'.¹³ "The activity of claiming...as much as any other thing, makes for self-respect and respect for others, gives a sense to the notion of personal dignity, and distinguishes this otherwise morally flawed world from the even worse world of Nowheresville."¹⁴

Moreover, as others have emphasized,¹⁵ the standing to demand

13. Joel Feinberg, "The Nature and Value of Rights," *The Journal of Value Inquiry* 4 (1970), 243-251.

14. Ibid., 257.

15. See John Skorupski, *The Domain of Reasons* (New York: Oxford University Press, 2010), 307-13; Margaret Gilbert, *Rights and Demands: A Foundational Inquiry* (New York: Oxford University Press, 2018).

compliance is a valuable enforcement mechanism with respect to one's rights-based entitlements. What manner of enforcement is warranted will vary by right and context (and will generally be proportionate to what is at stake), but the crucial idea here is that claimancy places the right bearer into the accountability process for seeing to it that their rights are respected. Consider a mundane example. After helping your friend with a task, they promise you a day of assistance at some specified future time. As the day approaches, it becomes clear that they have forgotten their promise, as the friend mentions alternative plans for that day. You *legitimately* remind them of their obligation to you. The moral capacity to simply give notice functions here as enforcement, innocent as your friend's forgetfulness may be. If your friend is unresponsive to the reminder, then a more forceful complaint may be in order—at least, you're entitled to such enjoinder. And, again, more important rights will license more significant accountability measures, e.g., forceful protests against a human rights-violating regime.

Notice that we *can* imagine a moral universe where rights merely afforded titles on others' conduct, but no corresponding standing to see to those titles. In such a world, it might be wrong to remind a friend of a promise, or wrong to protest (even non-violently) a corrupt regime. Defense of one's rights might, in such a world, fall entirely to others (or to no one, failures of compliance merely being occasions for regretful indignation). Compliance with the moral disability involved in this public status may seem like pusillanimity or self-abasement in *our* world, but what is at issue? If rights only generated directed obligation, and did not also supply the moral infrastructure for bearers to officiate those titles, our sense of ourselves as evaluative, self-directed creatures would be compromised. If I do not enjoy a status whereby I am *entrusted* to represent my own interests as they concern others, that not only circumscribes the domain of my legitimate agency, but also impugns my evaluative aptitude. (I cannot even be trusted with adjudicating norms pertaining to myself?) Morality's recognition of my standing to hold others accountable is a recognition of the merit of my practical judgment and the legitimacy of relying upon it in decision-

making. Absent some equally propitious form of recognition, morality's non-recognition of enforcement standing would repudiate that merit, thereby undermining the availability of a dignified bearing as an agent. (No, your judgment cannot be trusted in practical affairs.) A sense of the meritoriousness of one's evaluative judgment is essential to authoritatively comporting oneself in practical decision-making, i.e., to resolving, and carrying through and respecting resolutions. The specific element of human dignity at issue, I am arguing, is the capacity for effective evaluative judgment in one's practical affairs. Morality requires a specific distribution of responsibility in the structure of its requirements to facilitate agential comportment.

To fully render the point, I recommend that we understand claimancy here as a moral office, as this brings into relief a specific nexus of normative powers and concerns. We tend to associate offices with legal and institutional systems, but offices will have a natural place in any normative order where it is important to concentrate responsibility and capacity with respect to some part of the system's norms to better achieve the order's ends. To elaborate, to hold an office is to be recognized by the system's norms as having privileged jurisdiction to see to the proper operation of certain specified normative concerns. Legally, a judge will have a district of law to see in effect; morally, parents will have the interests of their juvenile children to see properly cared for. An officeholder must, then, be recognized as having *standing* to address those concerns, i.e., it is not improper to attend to them (it's their business). More, an officer's standing is normally accompanied by a *concentration of responsibility* to see to it that the relevant requirements are met, standardly with the assistance of *special privileges and powers of enforcement*, though these are privileges and powers *limited by the ends of the office*. Judges and parents endure a density of expectation to see that their jurisdictions are well run, but in view of this enjoy an enhanced normative capacity to act with respect to it. Judges can authorize the procurement of information, adjudicate disputes about the application of laws, enjoin enforcement of the law, etc.; parents can make decisions for their children, hold others account-

able with respect to their children's interests, employ parenting practices per their judgment, etc. However, it would be an abuse of office if these powers were deployed for ulterior purposes. Law and morality, respectively, *entrust* these matters to judges and parents, endorsing their capacity to see to the evaluative tasks. Similarly, as I hope is now clear from above, rights claimants too are entrusted with an evaluative task, a trust that grants standing, concentrates responsibility, and affords special (though limited) privileges and powers related to seeing that one's rights-based titles are observed. Morality's recognition of these prerogatives promotes the fulfillment of rights through the constitution of a moral status supporting a dignified bearing on the part of rights-claimants.¹⁶

My elaboration of rights claimancy as a moral office is agnostic on many philosophical questions about rights. I do not contend that claimancy attaches to rights as a conceptual matter, that the function of rights is to generate standing to claim, or that all rights are *claim* rights with respect to their possessor.¹⁷ I would not deny, for instance, that animals and infants can possess rights, though they have no capacity to claim.¹⁸ I also make no assertion about the waivability of rights-based obligations.¹⁹ On this, I need only say that rights bearers generally have discretion about claiming what is their due. The contention that rights typically bring in tow special standing to hold accountable is a substantive moral claim. It is intuitively well-supported, and can be given explicit justification, as just shown.

16. We might articulate the matter here, as one reviewer suggests, by distinguishing between first- and second-order rights, where the latter are about how first-order rights are adjudicated. This vividly indicates part of the move, but the idea of an office further indicates the specific type of second-order rights at issue and what a successful justification of a package of them looks like.

17. Skorupski appears to endorse this last claim. See Skorupski, *The Domain of Reasons*, 310.

18. Though, I am inclined to say that all rights bearers capable of the relevant practices inherit the prerogative. I cannot think of a counterexample.

19. Thus, I depart from Feinberg, who appears to treat claim rights as generally waivable. See Feinberg, "The Nature and Value of Rights," 250.

To continue the argument, the office of claimant, to be meaningful and serve its justification, must involve a claim to reasonable means for assessing the degree of compliance with one's entitlements, at least where a legitimate question of compliance has arisen. You contract with a money transfer service to deliver funds to a relative. The relative reports that the funds did not arrive. You *call* the company to account; they are obliged to provide documentation verifying the success of the transfer. Further, they must answer reasonable scrutiny of the evidence they provide. If this example seems institutionally parochial, consider some further cases.

Supportive Department Environment: Concerned that a student of yours will receive adequate early-career support at an institution offering a position, you contact a colleague there seeking assurances. The colleague offers assurance, and promises to personally mentor and assist your student. Several years later, the student complains to you about a hostile work environment and lack of professional support. You call the colleague to account. At the very least, the colleague is obligated to verbally attest (in some detail) of their assistance and answer questions, and they should supply easily available evidence to corroborate. ("Here is the program of a conference I organized on your student's research.")

Of course, the institution has independent obligations to your student to offer support and maintain a healthy work environment, but given the assurance and promise, you have a (purely moral) claim to an account with respect to the obligation owed to you. Consider an additional scenario.

Restitution: You and Misanthrope are the sole survivors of a plane crash. Finding yourselves alone on a remote island, you consensually divide it, occasionally engaging in trade. One morning, you start a bonfire irresponsibly close to Misanthrope's abode. Later, Misanthrope approaches you, complaining that

floating embers started a wildfire that destroyed his home. Given that the conflagration is a reasonably foreseeable consequence of your violation of the moral duty of care, he demands compensation. You agree in principle, and are willing to supply restitution, but would like to see the damage for yourself. Misanthrope refuses to permit you onto his property to corroborate, instead insisting that you provide fish equivalent to 38 days of labor. You justifiably withhold compensation until you are able to verify Misanthrope's testimony.

Given the fair division of the material world, both you and Misanthrope have proprietary claims to the fruits of your respective labors. But, given your recklessness, Misanthrope deserves compensation. Yet, you do not have to submit to his taking until he has adequately demonstrated to you the presence and extent of your liability, as there is an available procedure (i.e., showing you the damage) to answer your questions and substantiate his allegations. It is wrong of Misanthrope to expect you to accept his assertions blindly; it is a wrong to you for him to pursue enforcement of his (otherwise legitimate) claim on your labors without availing himself of the means to corroborate his assertions.

The claim to adequate attestation, then, is quite morally significant. As officers of our rights, we are owed reasonable verification measures pertaining to the status of our titles from those we hold the titles against. That is, at least when some reasonable question about the status of a title has been prompted (e.g., where there is evidence of a neglected title, or evidence supporting an asserted liability). Failure to supply appropriate measures and address legitimate queries not only can wrong the rights bearer (as in the transfer service example and Supportive Department Environment), but normally bars enforcement of rights-relevant moral liabilities suffered by the rights bearer (as in Restitution). In such cases, a rights bearer has no obligation to submit to enforcement, and it is wrong for interested parties to enforce against the person's will (i.e., it is an affront to their office). This is as it should

be: to avoid triviality, an element of claimancy must be entitlement to reasonable means for verifying the status of our claims.²⁰

Notice also that Misanthrope could be wrong about the cause of his losses, and still lay claim to compensation at the conclusion of an appropriate procedure. Imagine that the actual cause of the wildfire (unbeknownst to anyone) was a smoldering tree struck by lightning three days earlier. Nonetheless, if Misanthrope permits you to verify the losses and inspect the scene, and thereby you ought (given the evidence) come to the conclusion that the fire is a result of your recklessness, then you should offer, and Misanthrope can claim, restitution. The properly conducted adjudicative procedure morally controls the application of liability.

Here, then, is the core line of thought. As persons, we are moral officers of our rights. Such prerogative, to be meaningful, must involve a claim on those bearing rights-based obligations to offer attestation regarding compliance when a fair question is prompted, and to the extent reasonable given the right at issue and circumstance. Otherwise, we would be ill-equipped officers of our moral titles, having little ca-

20. I use "reasonable" here and elsewhere in the colloquial sense, indicating a resolution of a practical question involving competing, morally legitimate claims and goals that gives proper weight to those claims and goals (or is within a range of solutions that can be said to acceptably approximate giving proper weight to those claims and goals). It would be unreasonable, for instance, for you to demand that Misanthrope demonstrate that the wilderness fire is not the result of a meteor, given that he can show it is far more likely the result of your negligence. A procedural requirement demanding that very unlikely possibilities be conclusively discounted before pursuing liability would overburden Misanthrope's liberty and ability to achieve restitution (and, would have that effect more broadly as a general rule). Or, if Misanthrope's house burns down, and there is no evidence that it is a consequence of your actions, it is unreasonable for him to prompt a question of liability. If people generally had capacity to prompt questions of liability on a whim or on what they ought to recognize as an unlikely infringement, then our freedoms would be heavily burdened by others' discretion and poor judgment. Nonetheless, a claim to attestation can be legitimately quite demanding. If, say, your actions plausibly caused the fire, but there is good evidence for other explanations (say, Misanthrope's own cooking fire), then a quite extensive investigative process might be in order.

capacity to act as agents of our interests. Hence, a polity's forcible adjudication of rights-relevant matters must involve a forum for affected parties to advocate their protected interests and scrutinize its determinations. Mere testimony on the part of the polity is inadequate, as that would require legal subjects to accept state determinations blindly, which would be tantamount to those subjects abandoning their office as claimants. When, on rights-relevant matters, a state fails to engage a transparent adjudicative method subject to scrutiny and contest on the part of those concerned, it wrongs them—even if the adjudicative method is otherwise meritorious. Adjudicative procedures, then, need not only be capable, impartial, and fair, but must be conducted in a way such that those qualities are manifest to interested parties, and such that those parties may (per their discretion) play a role in the governing process. Slightly differently, the right to attestation requires that the state's administration of justice (e.g., in its civil and criminal law) be open and accessible, such that legal institutions are effectively engaged in public, practical reason before and with concerned subjects. From view of claimancy, we justify particular procedural rights by showing that they are constitutive of a process enabling effective advocacy.²¹

Instrumentalists are wrong, then, to treat legal procedures as in general morally insignificant except as safeguards. Rights bearers have a compelling interest in proper process itself, an interest that cannot be independently served. There is, then, a fundamental moral claim to legal process that affords adequate attestation open to contest.

Here is a worry. Perhaps the above line of argument speaks effectively to civil questions involving uncertainty. However, it might be objected, criminal offenders are typically aware of their liability-

21. Hence, the precise shape of particular procedural rights, like the right to testify or right to review evidence at issue, will depend on the adjudicative system at issue, e.g., whether an adversarial or inquisitorial system is used in criminal cases. The proper content of a procedural right will depend on the package of procedural rights in play. What is invariant is that any system need afford sufficient attestation (in the sense indicated here) for the kind of question before it.

generating conduct. In Wellman's case, for instance, the thief knows she committed the crime, and therefore should appreciate that she is liable to proportionate punishment on the part of the state. Hence, she has no need of, and can have no claim to, attestation when she is punished. In the circumstances of hypothetical case, the thief is nowise wronged.

In response, imagine (as seems fair, given that Wellman places virtually no constraint on the process used to administer the 'correct' punishment) that state authorities detain and imprison the thief without indicating the basis for incarceration. They say nothing about the detention being a function of the lottery, about the general purpose of the detention, or even about their status as state officials. The thief simply finds herself, without access to counsel, forced by a group of unidentified persons to endure confinement consistent with the relevant criminal statute. (Or, we might imagine the case of Joseph K. in Kafka's *Trial*—he at least knew he was on trial for something.) Perhaps, at the conclusion of it all, she could tentatively infer what accounted for her treatment, but hardly with any certainty. Imagining ourselves as the thief, I take it we would be distressed and aggrieved. We are now well-positioned to appreciate the legitimacy of this grievance. The thief has basic rights in her freedom and person. Treating her in a way that appears (with epistemic propriety) to violate these rights without supplying a credible account of why such treatment is being applied wholly vitiates her agency as a claimant of those rights. Her moral standing as an officer of her rights would have no social effect—there would be no avenue for her to assess the propriety of her treatment, that is, of enjoying the dignity of her status as a claimant. For the state to supply a credible account, an identifiable official would (at the very least) have to, in a public forum, declare before the prisoner the basis for her incarceration. Any nonpublic procedure of notice should not be trusted, transparency and publicity being essential to the sincerity of human institutions. Hence, we have found at least one procedure of criminal law that can be claimed by all as a moral right: something

approximating the right of habeas corpus.²²

This conclusion is not insignificant, and it rebuts Wellman's general argument. Even the guilty have basic rights to certain procedures of criminal law. What, though, of a fair trial? We should focus here on the significance of a polity's use of arbitrary punishment specifically for our status as claimants. Now that we are positioned to distinguish the aspect of our moral personhood that constitutes an office entrusted with the enforcement of our titles, we can think more directly about the prerogatives of that moral office. Even if it is correct that the thief, qua bearer of titles, has little complaint when her case is not adjudicated by a fair procedure, her office might still suffer affront. And, indeed, arbitrary or capricious treatment of entitlements by a sovereign authority constitutes an affront. As claimants, we have an institutional interest in the manner by which rights-relevant obligations are adjudicated by relevant agencies, and in the case of the state, an institutional interest in how the state adjudicates basic claims. More specifically, the institutional interest at issue here is that obligation-bearers take seriously our rights, such that when they are at issue a reasonable mode of adjudication is employed to ascertain and abide by their practical significance. For an individual obligation-bearer, this might be a matter of proper reflection, fact-finding, and practical reasoning. For an institution, there need be a transparent procedural analogue of these. Unwillingness to engage such a process where reasonably prompted constitutes indifference to comprehend the titles in question. Our moral office as

22. At least, in a minimal sense of having a right to appear before a magistrate to have the basis of one's detention publicly explained. As Paul Halliday argues, habeas corpus was originally (in conception and function) more a device for securing the crown's prerogative against jailers (that they conform with English law) than a tool for protecting individual liberty. See Paul D. Halliday, *Habeas Corpus: From England to Empire* (Cambridge, MA: Harvard University Press, 2010). Yet, its conception and function evolved into a concern for individual liberty, especially as an instrument for protecting legal subjects from official abuse. See, for example, Amanda L. Tyler, "A 'Second Magna Carta': The English Habeas Corpus Act and the Statutory Origins of the Habeas Privilege," *Notre Dame Law Review* 91 (2016).

claimants has an obvious interest that those bearing rights-based obligations not be indifferent.

We do intuitively recognize such claims.²³ Consider an elementary school that neglects, harmlessly, to test its water for contaminants. The risk imposition is certainly a wrong in relation to the children. Yet, we also recognize that the parents were wronged. They, as officers of their childrens' interests, entrusted the school to follow proper protocols pertaining to their childrens' welfare. Or, consider the standing of a state to complain when its citizens are facially mistreated by a foreign government. As a trustee, the state has an institutional interest in how the welfare of its citizens is addressed by other parties. Returning to Wellman's example, when the state administers 'justice' through the lottery, it is an affront to all citizens. Each citizen, including the thief, has a claim that their rights be addressed in a procedurally sound manner, a claim based in their moral status as claimants.

We can see these points from a different angle. An innocent person convicted of a crime by a fair and transparent process has less complaint than an innocent person convicted with bad or little process. Why would this be? I am not asserting the former person has no complaint, or must simply submit should resistance be feasible—we can remain agnostic on such questions. Yet, the fact that one's rights-based claims were manifestly recognized in a procedure adjudicating legitimate questions about their status through sound methods that afforded opportunity for contestatory participation at least partly assuages the indignity of wrongful punishment. The state has addressed you reasonably and as a claimant, affording you an avenue to act as an agent of your rights.

Finally, we should also note that frequently there will be epistemic distance between an offender and the nature of their liability to official punishment. An offender, even if earnest, can underappreciate

23. Enoch offers the example of a culpable colleague being arbitrarily selected for exclusion from social events. See David Enoch, "In Defense of Procedural Rights (or Anyway, Procedural Duties): A Response to Wellman," *Legal Theory* 24 (2018), 44-49.

the degree of undeserved harm or other wrong their crime involved, overestimate their justification in acting, or focus unduly on potential excuses after having committed the offense. Hence, criminal offenses are less unlike the circumstance in Restitution than we might initially suppose. Criminal process is a way of making manifest a justification to an accused claimant—a justification even a guilty offender may not otherwise have been well-positioned to appreciate.

I should address one final objection. Most recognize that we surrender much of our moral capacity for self-enforcement when under the authority of a legitimate state. Powerful reasons normally disbar unilateral self-help on matters of civil and criminal law. So, why not think that we also surrender our claim to attestation? Note that the objection has as a premise that we enjoy a fundamental claim to attestation, so even if it succeeds, pure instrumentalism is unassisted. Nonetheless, it fails. It is irrational for subjects to generally waive a claim to attestation. With respect to prohibited self-help, the gains corresponding to the disability are quite significant and general: impartiality in the administration of justice, peaceable social relations, general security, protection of person and affairs from the private judgment of others, etc. There are no similar benefits had by the wholesale surrender of the right to attestation. Further, the costs are dramatic. It would be morally available to the state to render legal subjects passive recipients of judicial and administrative determinations, without any claim to even bare notice as to the subject matter triggering adjudicative interest. One would not be positioned to appeal on one's behalf, interrogate proceedings, have secure knowledge of one's status vis-a-vis the state, or have reliable access to civil recourse. In addition, there would be no basis for remedial rights, which provide a safeguard against the maladministration of justice. Holding legal institutions accountable supposes such standing, and effective monitoring requires title to access official proceedings. So, per the central argument of this section, we have a fundamental right to attestation, and now we see further that it is irrational, in view of the prudential and dignitarian costs, to surrender it in entering a civil condition.

3. Friends and Family

Others have also perceived a connection between human individuality and due process, so I should indicate what we have gained here by comparing my account with theoretical associates.²⁴ I can, though, state its general distinctiveness. The account does not rely on an undifferentiated appeal to dignity or respect, nor does it simply draw upon intuitions that we possess certain pre-institutional procedural rights.²⁵ Rather, it theoretically articulates the intuitive appeal of fundamental procedural rights as (at least partly) about rights claimancy specifically, which is elaborated as a dignity-affirming and enforcement-enhancing moral office. In rendering explicit the perspective of the office, the elaboration makes available a particular argumentative strategy for rebutting instrumentalism, and indicating principled constraints on legal procedure. In order to avoid defeating the justification for the office, morality must recognize in it certain prerogatives of enforcement that require of others facilitation. The instrumentalist, then, can only deny fundamental procedural rights *on pain of* denying fundamental claim rights *generally*.²⁶ That heretofore unrecognized point demonstrates the moral necessity of certain requirements of legal procedure: that it afford robust attestation, and the means for participating in the litigation of questions pertaining to one's person.

R.A. Duff also recognizes the intrinsic importance of participatory, communicative criminal procedure, and grounds this importance in a "right to be heard" which asserts that "a defendant must in justice be given a fair chance to answer the charges laid against him."²⁷ Duff ad-

24. An anonymous reviewer rightly pressed me on this.

25. The core of Enoch's response to Wellman is to indicate intuitions instrumentalism is ill-equipped to handle. See Enoch, "In Defense of Procedural Rights (or Anyway, Procedural Duties): A Response to Wellman."

26. It may seem odd to accuse instrumentalists of denying these rights generally given that many are motivated by a concern to protect substantive rights. But, in a way, that is the point—instrumentalists have failed to notice that viewing substantive rights as claim rights precludes instrumentalism.

27. R. A. Duff, *Trials and Punishment* (Cambridge: Cambridge University Press, 1986), 100.

vances two interrelated arguments for this right. First, the right to be heard is implicit to the idea of a criminal trial and “provides the best justification for central features of our own system of criminal trials.”²⁸ Indeed, I agree that criminal trials are plausibly partly distinguished from other possible legal doings by affording a participatory role for the defendant as someone positioned to answer charges and be persuaded of the legitimacy of the court’s finding.²⁹ Second, Duff argues that the right to be heard is implied by respect for persons. To respect a person as a rational agent, Duff contends, is to “treat him and respond to him as one who is able, and should be allowed, to conduct his own life and determine his own conduct in the light of his own understanding of the values and goals which command his allegiance.”³⁰ This, Duff urges, implies that trials must facilitate a process of rational exchange between the defendant and the court.

A trial, like moral criticism but unlike [a mere judicial inquiry], is a rational process of proof and argument which seeks to persuade the person whose conduct is under scrutiny of the truth and justice of its conclusions. . . . A criminal trial, as part of a system of law, must also address and respect the defendant as a rational agent; it must seek her participation, and her assent to its verdict.³¹

Respect for autonomy requires the court to render articulate the basis for its verdict in a participatory process.³² Although I agree that an appeal to respect is in order, it’s unclear from Duff’s limited explication if his view is family, originating from the same normative premises, or friend, marking overlapping considerations. Duff is right to prompt a concern with evaluative aptitude in this context, but his formulation of the issue suggests an interest in protecting autonomous pursuit of the

28. *Ibid.*, 102.

29. *Ibid.*, 110-19.

30. *Ibid.*, 6.

31. *Ibid.*, 116.

32. *Ibid.*

good, rather than recognizing an adjudicative office morality affords us in trust. At the very least, he does not explicitly differentiate our standing as claimants, which prevents him from articulating participatory procedural rights as prerogatives required to render the office efficacious.

To see the significance, consider Wellman’s dismissal of Duff’s view “as an exceptionally insightful rational reconstruction of what liberal democratic societies currently do (or at least what we aspire to do) rather than an explanation for why we must continue to act as we currently do.”³³ Explicating the right to be heard as an ideal operative within a practice is insufficient for substantiating that ideal against fundamental challenge. Regarding the further notion that non-participatory criminal procedure involves disrespect, Wellman is unpersuaded. He remarks that if we could achieve gains in efficiency and reliability in adjudicating criminal questions by eliminating defendant participation at trial, then such elimination would not violate anyone’s rights.³⁴ It’s important to respect autonomy, he continues, but this does not require publicly explaining everything we do to a person, especially where they have objectively made themselves liable to some invasion. That criminal trials offer explanations might be desirable, but it is not, he concludes, required by justice.³⁵

Mere appeal to respecting autonomy, then, leaves the dialectic with instrumentalists undesirably at the mercy of competing intuitions about what respect involves. In contrast, the paper indicates a highly determinate cost of endorsing instrumentalism, raising the stakes for the position. If one urges, like Alexander,³⁶ that procedural rights are derivative of substantive rights, serving only to mitigate risks to them, our response is that we cannot recognize basic substantive rights *as claim rights*, without affirming a fundamental right to due process. Moreover, we remain positioned to embrace the importance of a com-

33. Wellman, “Procedural Rights,” 299.

34. *Ibid.*

35. *Ibid.*, 296-303.

36. Alexander, “Are Procedural Rights Derivative Substantive Rights?”

municative trial with its rich procedural requirements. The account provides materials for affirming a right to a hearing (habeas corpus), to discovery, to an attorney, to testify, to enter evidence on one's behalf, to address witness testimony, and the like. Denying these of the accused would be disrespectful in the specific sense of undermining their capacity to serve as an advocate of their protected interests. Without a right to discovery, we cannot address the full range of evidence bearing on the status of our titles. Without access to counsel, we are ill-positioned to navigate the legal system to effectively represent our claims. Without being able to testify or introduce evidence, our capacity to marshal and rebut assertions is compromised.

Similarly, compare the view with Jeremy Waldron's assertion of a strong connection between dignity and robust procedural rights of law. Waldron proceeds with the following understanding of dignity:

Dignity is the status of a person predicated on the fact that she is recognised as having the ability to control and regulate her actions in accordance with her own apprehension of norms and reasons that apply to her; it assumes she is capable of giving and entitled to give an account of herself. . . an account that others are to pay attention to; and it means finally that she has the where-withal to demand that her agency and her presence among us as a human being be taken seriously and accommodated in the lives of others. . . and in social life generally.³⁷

Drawing inspiration from Lon Fuller,³⁸ Waldron continues by noting that courts characteristically accommodate this status by affording those subject to the application of law "an opportunity to make submissions and present evidence (such evidence being presented in an orderly fashion according to strict rules of relevance oriented to the

37. Jeremy Waldron, "How Law Protects Dignity," *Cambridge Law Journal* 71, no. 1 (2012): 202.

38. Lon Fuller, "The Forms and Limits of Adjudication," *Harvard Law Review* 92, no. 2 (1978), 353-409.

norms whose application is in question)."³⁹ It is essential to the idea of the rule of law and a legal system, Waldron contends, that subjects are afforded proceedings that take seriously their point of view and treat them as capable of norm-guided conduct.⁴⁰

[L]aw is a mode of governing people that acknowledges that they have a view or perspective of their own to present on the application of the norm to their conduct and situation. . . As such it embodies the crucial dignitarian idea—respecting the dignity of those to whom the norms are applied as beings capable of explaining themselves.⁴¹

The rule of law is only fully achieved when a system lives up to these procedural ideals.⁴²

Waldron's concern is adjacent to, but different than, ours.⁴³ Even if his argument succeeds, instrumentalists should not yet be moved, for his discussion does not show that *we are entitled to* a legal system so conceived. Our common understanding of the rule of law may involve proceduralist sensibilities. However, why would a human rights-respecting, law-like form of governance (one which provides, for instance, prospectively applied public standards of conduct for legal subjects to independently observe) violate fundamental moral rights if it prescinds from institutionalizing participatory adjudicative process in the administration of justice? The conceptual matter is idle here, and asserting a broad normative proposition that government must give proper regard to subjects' dignity is inadequate. To illustrate, if dig-

39. Waldron, "How Law Protects Dignity," 209-10.

40. Ibid., 208-10. See also, Jeremy Waldron, "The Rule of Law and the Importance of Procedure," in *Nomos*, vol. 50, ed. James E. Fleming (New York: New York University Press, 2011), 3-31.

41. "How Law Protects Dignity," 210.

42. "The Rule of Law and the Importance of Procedure."

43. That we might pursue a connection *between dignity and the rule of law* by focusing on what it is to be a rights bearer and then considering how far law involves rights is briefly contemplated by Waldron, but he explicitly sets the approach aside, opting for a more direct method of indicating the connection he seeks. See "How Law Protects Dignity," 204-05.

nity requires that people be recognized in their capacity to observe norms and reasons, why is it not enough to provide public law that establishes parameters of conduct and facilities for the exercise of legal powers in pursuit of private ends (e.g., in its property and contract law)? Why must individuals *be party to the administration of law* as it pertains to their person? Moreover, the public recognition of the humanity of legal subjects, and the accommodation of their agency, is plausibly accomplished by affording subjects legal rights to various freedoms and a space in which to pursue their good according to their judgment. Again, it's not clear why subjects need be involved in the adjudication of those rights. Finally, that individuals are capable of explaining themselves is different than that they are entitled to participate in the litigation of legal questions concerning them. We might provide forums for individuals to explain themselves on any number of matters, including matters of law, without giving that a role in the adjudication of legal questions. If such an arrangement improved the rights-based outcomes of the adjudicative process, why not engage it? The 'officiant theory'⁴⁴ of procedural rights developed here, by distinguishing between different aspects of our moral personality, is positioned to address precisely these questions.

Consider, finally, Hamish Stewart's recent response to instrumentalist skepticism.⁴⁵ Our approaches differ with respect to the aspect of personhood that supposedly generates the right to legal procedure. I ground the right in our status as claimants; Stewart grounds it in our equal moral freedom to pursue the good. The consequence is that my approach can explain, whereas his cannot (despite his assertion to the contrary), the specifically participatory character of due process.

Stewart urges, in a Kantian spirit, that in an interactive environment where each person can be expected to pursue their own objectives, general freedom is only possible in the context of laws forcibly

imposing a common scheme of norms that ensures the mutual consistency of means. When such a scheme is enacted by a public authority representing all, dependence is avoided since legal subjects are only bound by impartial public standards. Nonetheless, even in these felicitous circumstances, disputes about the application of the law will arise, leaving uncertain who has title to what and raising the specter of private domination. The only way for the state to treat each legal subject as free and equal, then, is to afford fair public procedures for authoritatively resolving disputes about legal entitlements: the availability of authoritative public procedure is a condition of political freedom. To be public, procedures must be both authorized by the sovereign acting on behalf of all and observable, so that subjects can be guided by official decisions.⁴⁶

Since equal freedom requires procedural fairness tribunals must, Stewart contends, be (1) impartial, (2) evenhanded, in the sense that "each party should have the opportunity to present...its own case and to respond to...the opposing party's case"⁴⁷, (3) bound by their own rules, and (4) concerned to offer reasoned decisions in view of the law and facts before it. Elements (3) and (4) follow from the general right of free persons to be governed lawfully and the demand for reasonable accuracy in dispute resolution. Elements (1) and (2) are supposed to follow from the neutrality demanded by equality. The state cannot, consistent with equality, privilege any party to the dispute, so (the thought goes) its procedures must be impartial in adjudicating questions and give full hearing to all disputants.⁴⁸ In civil cases, for instance, "permitting one party to present its case while preventing the other party from doing so would be a kind of unequal treatment inconsistent with the status of each party as a free person independent of the other."⁴⁹

Stewart's approach is intriguing, but it does not establish that adjudicative process must be participatory. What is crucial, on his pro-

44. My thanks to a reviewer for the suggested title.

45. Hamish Stewart, "Procedural Rights and Factual Accuracy," *Legal Theory* 26 (2020), 156-179.

46. *Ibid.*, 156-60.

47. *Ibid.*, 161.

48. *Ibid.*, 163.

49. *Ibid.*, 164.

positional, is that we sustain a public order that renders consistent the free pursuits of moral equals. The central concern, then, is with an environment conducive to independent, purposive agency, i.e., the aspect of our personhood interested in the free pursuit of the good. If we operate solely from this concern, though, it is hard to see why legal process need involve disputants or defendants in any significant way. Certainly, if one party is permitted to press their case in a legal forum then (out of fairness) a similar privilege should be afforded the other. But, what principled reason is there for having a participatory forum in the first place? For instance, private disputants might be given opportunity to briefly indicate a complaint to a designated tribunal, which then publicly indicates its resolution of the question after conducting its own independent inquiry. The impartial investigation might, but need not, involve the disputants. This, apparently, would maintain a free (non-dominating) public order so long as the adjudicative *results* are published. Or (as contemplated by Wellman), criminal defendants might be given little or no role in the trial. Perhaps they are notified when a criminal question is prompted, but then they may have to passively await a verdict. Although a defendant *might* be consulted for evidentiary reasons, why there would be a 'right to be heard' or any comparable right is mysterious from view of maintaining a public order facilitating the free pursuit of the good. Lawful standards embodying a general will can be applied impartially without the defendant's participation. Further, it's unclear why even habeas corpus is required. Naturally, we do not enjoy freedom to independently pursue our good if we can be arbitrarily detained. But that is not what is at issue. Imagine a process that detains suspects of serious crimes per lawful standards, subject to public scrutiny and various mechanisms of institutional accountability, but keeps suspects in the dark until the resolution of the criminal question. The state presumably enjoys the power to impose some mode of detention on suspects facing trial—but why does purposive freedom require that suspects know the basis for their detention *during* the adjudicative process?

Attending specifically to our status as claimants, then, is theoretic-

cally fruitful. By explicitly distinguishing the aspect of our moral personality that operates as an office, we are enabled to see clearly the fundamental demand for participatory legal process. Dignity and respect are at issue, but in a particular way.

4. Correct Outcomes vs. Participatory Process

What should be said when considerations of accuracy in adjudication compete with the demands of what I have called the right to attestation? For instance, if Criminal Justice System 1 involves no trial but deploys a highly reliable AI tool to determine convictions and acquittals, and Criminal Justice System 2 engages significantly less reliable, but fair, public, and participatory criminal procedure, should we be sure that the second is morally preferable?⁵⁰ That's not obviously correct—at least, it seems that there would be a point at which considerations of accuracy in settling adjudicative questions would morally prevail, and this may seem to support the instrumentalist line.

I can say a few things in response. First, although I cannot provide a theory of tradeoffs here (that would be its own elaborate endeavor), that a theory should be thought necessary is a success of the paper's argument. If the above type of question strikes us as involving a dilemma, that must be in view of our recognition of the importance of participatory process apart from realizing correct outcomes. This is what the instrumentalist denies; on the instrumentalist view, there is no dilemma.⁵¹

Second, we should not be surprised if there is a point at which the demand for attestation should give way, as this is normally true of rights-based considerations. Few if any rights are absolute in the sense of being dispositive across all relevant moral questions. Instead,

50. I adapt this example from a reviewer's comments, which rightly pressed this type of issue.

51. As Alexander puts it, "the considerations that should govern the content of...procedural rights are essentially the same as those that should govern private action premised on answering questions of adjudicative fact." Alexander, "Are Procedural Rights Derivative Substantive Rights?," 24.

rights typically serve to countermand some significant body of considerations. Nonetheless, the right to attestation can require measures that have little, no, or negative expected value with respect to ascertaining the correct outcome. A defendant's testimony may often and predictably have a prejudicial impact on jury deliberations, but defendants nonetheless should standardly have legal right to a testify on their own behalf. The selection of evidence for trial might better track the salient if wholly conducted by disinterested parties, but litigants are typically owed a reasonable method for introducing matters that may have some bearing on their case. The evaluation of evidence may be epistemically more meritorious if conducted without a criminal defendant's input, but defendants are owed discovery and the chance to respond to evidence or testimony at issue. These (and other) procedural conclusions, which bear on the proper legal condition for the large majority of adult humans in the sorts of societies with which we are familiar, are provided by the argument above. In cases where we have grounds for thinking the costs to accuracy very high, the above argument requires us to be judicious and careful about compromising participatory attestation. To see the practical significance clearly, notice that the view houses substantial critical potential. Aside from criticizing obvious failures to legally enshrine participatory procedural protections, the approach is sharply critical of prosecutorial techniques, like contemporary plea-bargaining, that render it highly imprudent for criminal defendants to rely upon those protections.⁵² It is critical of such techniques *in advance* of knowing how reliable prosecutors are in targeting individuals with proportionate offers, and how efficient the practice is in processing criminal cases. Threatening a major harm if one pursues a legally guaranteed trial to adjudicate an alleged of-

52. For discussion of this effect of plea bargaining in the American context, see Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (New York: Oxford University Press, 2008), 3-54; John F. Pfaff, *Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform* (New York: Basic Books, 2017), 127-59; Carissa Byrne Hessick, *Punishment without Trial: Why Plea Bargaining Is a Bad Deal* (New York: Abrams Press, 2021).

fense effectively vitiates one's ability to rationally act in defense of one's claims. One can only engage one's office to protect legitimate interests on the condition of prompting graver threats to those interests. On the view defended here, prosecutorial plea bargaining as currently practiced in many jurisdictions faces a high bar to demonstrating its legitimacy.

Third, while it's important to acknowledge that the constraints imposed by claimancy will be burdensome and can come at some cost to adjudicative accuracy, we should not overstate the latter point. As officers of our rights, our legitimate interest is in seeing to it that our rights are properly regarded. Hence, there emerges from the point of view of that office a demand for reliable procedures in the legal administration of justice. Slightly differently, a regime of procedure can only successfully attest if it is, and is seen to be, sufficiently capable of tracking rights-based considerations.

5. Conclusion

Morality affords claim rights as a trust. This allocation of responsibility provides the moral infrastructure for an agential, dignified stance towards one's own person, interests, and titles. Due process of law recognizes in us the prerogatives of that office.