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TITLE: The Moral Justification for the Right to Make Full Answer and Defence

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TEXT:

Abstract-Why is it unjust to condemn an accused unheard? This article argues that the opportunity to be heard in one's own defence is an intrinsic element of a just trial. Defenders of this view typically argue that respect for dignity, in the Kantian sense of rational agency, is the source of the inherent value of participation. My argument is different. I emphasise the relational and symbolic dimensions of participation. I draw on research in social psychology that shows, first, that people care as much about processes as about outcomes, and secondly, that when they are asked what leads them to view procedures as fair, they emphasise the way in which certain procedures enhance the quality of their interpersonal interactions with group authorities, something that they value for its own sake. It seems that this is because certain kinds of treatment at the hands of authorities, which include the opportunity to be heard, function as a symbolic marker of group status, which in turn supports a sense of self-respect. The article concludes by explaining why it is a requirement of justice that procedural arrangements should be designed to support self-respect.

Keywords: procedural justice, hearing principle, participation, self-respect

CONSTITUTIONAL LAW

1. Introduction

The idea that accused persons should be offered the opportunity to be heard in their own defence is accepted as a fundamental legal principle in both common law and civil law systems and under a range of national constitutions and human rights instruments. It extends not only to the opportunity to adduce and challenge evidence, either in person or through a legal representative, but also to the prerequisites of meaningful participation in trials, such as notice of

the charge and adequate disclosure of prosecutorial information, and to the opportunity to make submissions as to sentence. Yet the moral justification for this principle is rarely articulated. Instead, courts and lawyers typically treat the opportunity to be heard as self-evidently just or fair. (This article will follow the standard practice of using the concepts of 'justice' and 'fairness' interchangeably.) Common law courts, for instance, frequently make reference to Justice Fortescue's famous statement of intuitive justice in *Dr Bentley's Case* that 'God himself would not condemn Adam for his transgression until he had called him to know what he could say in his defence ... Such proceeding is agreeable to justice.' n2 In the recent Privy Council case of *Dominique Moss v The Queen*, in which the opportunity to make

submissions as to the length of sentence was considered, Lord Hughes said that it is 'elementary' that a criminal court is under a duty to provide such an opportunity, 'however little there may appear to be available to be said on [a defendant's] behalf ', at least where the sentence is not fixed by law. n3 Lord Hughes went on to remark that '[a]n omission to hear a defendant before passing sentence is a serious breach of procedural fairness. That simple proposition does not need the citation of authority.' n4

This article takes a deeper look at these 'simple' propositions. It investigates whether it is possible to provide a satisfactory theoretical defence of the intuitive conviction that allowing defendants to put their case is 'agreeable to justice' and an essential aspect of a fair trial. It is offered as a philosophical contribution, and more specifically as a contribution to normative procedural theory. The article will not be concerned with the nuances of legal doctrine, either within a particular jurisdiction or as a comparative matter. It operates at a more abstract level, being concerned to explore the soundness of the widespread assumption that it is unjust to condemn an accused unheard, or, putting it the other way around, that accused persons have a moral right to participate in their trials. No doubt, there are many interesting questions that arise in relation to spelling out the concrete implications of such a right once it has been accepted. For instance, to give just one example, is it an interference with the right if the Crown is given the right to address the jury last? n5 This article is not, however, concerned with questions of detail of this kind, the answers to which may also to some extent be dependent on local jurisdictional differences such as the existence of jury trials. It is concerned with the prior and more fundamental question as to what, if anything, justifies the assumption that accused persons are morally entitled to participate in their trials.

In Sections 2 and 3, I consider two competing theoretical accounts of the justice of allowing defendants to be heard in their own defence. I call these the

'error reduction account' and the 'process values account'. The error reduction account views the morality of participation in instrumental terms, directing attention, in particular, to the contingent contribution a hearing makes to an accurate verdict of guilt or innocence, and arguing that this is an outcome to which defendants have a moral right. By contrast, on the process values account, denying a defendant the opportunity to be heard is intrinsically unjust, whether or not a hearing would assist in reaching the right decision or, indeed, lead to any other good consequences, such as enhancing the legitimacy of the criminal justice system or preserving public confidence in the courts. As I explain in Section 3, the process values account is typically defended by reference to 'dignitarian' values: it is argued that a hearing demonstrates respect for the dignity of the accused as a rational agent. In Section 4, I argue that it is not possible to carve out a mid way position between the error reduction and the process values accounts. In Section 5, I describe empirical research on people's judgements about procedural justice which shows that people do not perceive the justice of procedures solely in terms of means-ends rationality but also view procedures in relational or interpersonal terms. This leads them to regard procedures that enhance the quality of their interpersonal interactions with authorities as intrinsically valuable. The opportunity to be heard is prominent among such procedures. In Section 6, I explain why a normative theory of procedural justice should take these subjective perspectives seriously. I rely on empirical research that shows that when authorities make decisions in ways that speak to relational concerns, this sends a message of equal status, which in turn contributes to a sense of self-respect, and I explain why legal institutions and arrangements should be designed to support self-respect, drawing on some comments Rawls makes about why self-respect matters from the perspective of justice. Taken together, these arguments-the elucidation of the connections between satisfactory relations with authorities, self-respect and justice, and the enlistment of empirical research on the psychology of procedural justice to flesh out our understanding of satisfactory relations in the context of criminal trials-support the conclusion, which I draw in Section 7, that the process values account is correct, although not for the reason that it speaks to dignity-based concerns.

2. Safeguarding against Error

I should begin by making clear that this article is concerned only with the role played by procedures in a just legal system, it being no part of my argument that there is any virtue in following procedures when the laws are significantly unjust. On the assumption, then, that the substantive criminal law rules and standards are substantially just, we need to

consider whether there is a satisfactory normative justification of the legal practice of allowing defendants to be heard in their own defence.

One approach to this question, which I call the 'error reduction account', is based on epistemic considerations. As will shortly become apparent, there are different possible versions of the error reduction account, but the rough idea is as follows. It is said that defendants have a moral right to legal procedures that vindicate their substantive rights under the criminal law and that hearings reduce the likelihood that the substantive criminal law rules and standards will be incorrectly applied. This explains why defendants are morally entitled to participate in their trials. This instrumental account of the moral right to participate in criminal trials owes a debt to John Rawls's account of procedural justice in *A Theory of Justice*, in which he discusses three ways in which just procedures are connected to the achievement of substantively just outcomes.

First, Rawls argues that a procedure can be a fool-proof way of arriving at an outcome that is independently just. The obvious example is a cake that needs to be divided among two people. If justice demands that they should receive equal portions, the rule that the person who divides the cake should pick last is an effective method for yielding the result we antecedently know to be just. Rawls calls this 'perfect procedural justice'. n6

Secondly, a procedure can be a generally reliable although not a guaranteed way of arriving at an outcome that is independently just. Rawls calls this 'imperfect procedural justice'. Imperfect procedural justice increases the likelihood of a just outcome. n7 Rawls seems to think that we settle for imperfect procedural justice when it is impossible to design procedures in such a way that they always lead to the correct result. n8 However, another reason for settling for imperfect procedures may be that perfection costs too much.

Thirdly, sometimes we adopt certain procedures when there is no independent criterion of a just outcome. For instance, we may toss a coin to decide which of two equally entitled people should get a certain benefit. Rawls says that in such cases the intrinsic fairness of the procedure 'translates its fairness to the outcome'. n9 Likewise, when players bet money in a game of roulette, there is no independent criterion of who should win or lose. Provided the wheel is not rigged, the spinning of the wheel will determine the just distribution of the money wagered. Rawls calls procedures such as fair gambles instances of 'pure procedural justice'. n10

It will be clear that a hearing is neither an example of perfect procedural nor pure procedural justice. It is not a guaranteed way of arriving at independently just outcomes (the conviction and appropriate punishment of the guilty and the acquittal of the innocent). And a hearing cannot make the outcome just, since the justice of the outcome depends on its conformity to pre-existing legal

standards. It is, though, plausible to think that in the majority of cases the participation of accused persons in their trials will reduce the risk of erroneous convictions and the imposition of unjust sentences, and that it is therefore typically a form of imperfect procedural justice. As DJ Galligan observes, there are a number of ways in which a hearing is likely to contribute to the achievement of a sound legal outcome, given the role played by inquiry, argument and deliberation in legal decision-making. First, the accused person will often be the only available source of relevant information. Secondly, the accused may be able to raise considerations apart from purely factual matters that would not otherwise be known to the court, such as mitigating factors relevant to sentencing. Thirdly, arguments that are able to withstand the critical attack of the accused are more likely to be sound than arguments that have not been tested. n11

When courts make accurate determinations of the facts, apply just legal rules properly, and make appropriate sentencing decisions, this is obviously in the social interest, but it is also a matter of fairness and individual rights, because mistaken decisions infringe the moral rights protected by just laws. n12 The error reduction account is therefore correct in saying that to the extent that the participation of defendants in their trials makes the correct application of just legal rules more likely, they have a moral right to participate: it is impossible to be fair to accused persons unless procedures are used that minimise the chances of wrongfully convicting the innocent or imposing excessive punishment on the guilty. As Galligan remarks, '[a] right is taken seriously, only if there are procedures for its protection'. n13

However, since the error reduction account is offered as the sole justification for the hearing principle, it would seem to imply that defendants have a moral right to participate only if the opportunity to be heard will reduce the likelihood of error in their particular case. Presumably, then, a hearing could be dispensed with in 'open and shut' cases, easy enough to imagine, in which the facts are known and the rules are clear, and an accurate verdict or appropriate sentence can be reached without the accused's participation. In such cases, the error reduction account appears to imply that there is no reason to provide a hearing, and providing a hearing might even be wrong, unless, perhaps, spending society's resources in this way has social benefits, such as enhancing the legitimacy of the criminal justice system. On the face of it, then, the error reduction account does not appear to provide a moral basis for the standard legal approach, which treats the opportunity to be heard as a virtually exceptionless aspect of fair treatment, subject only to very unusual

circumstances-for instance, those in which trials in absentia of absconding war criminals are permitted.

One response might be to argue that the scope of the traditional legal rule is too wide, in which case it lacks a sound moral basis in its current form and needs reform. Galligan's treatment of the subject hints at this possibility, because he argues that the practical justification for the hearing principle has been forgotten. According to him, certain basic procedures such as the hearing principle have taken on a life of their own. Originally 'working rules' or 'rules of thumb', they have solidified into 'fixed rules of law, considered fair in themselves', and have come to be incorrectly thought of as flowing directly 'from the fountains of justice'. n14 Galligan goes on to say that '[p]rocedural reform is a continuing concern of any legal system, and settled rules need to be re-examined from time to time'. n15

On the other hand, there is no doubt that the importance that the law places on giving accused persons the opportunity to be heard reflects widely shared intuitive understandings of fairness, and that changing the law with a view to restricting the circumstances in which a hearing is guaranteed to circumstances in which the accused's participation will increase the chances of arriving at a sound outcome would come at a significant price. This might seem to suggest that it is the error reduction account that should be rejected, not the strict rule we find in the law-unless, perhaps, it is possible to formulate a version of the error reduction account that is not as intuitively 'disagreeable to justice' as the version I have described (on which defendants should be heard only if a hearing would reduce the likelihood of error in their particular case).

I will consider two possible strategies for attempting to reconcile the error reduction account with the intuitive understandings of fairness that are reflected in the law's inflexible approach. I have based these on two different forms of utilitarianism-rule utilitarianism and indirect utilitarianism. The first strategy is to argue that defendants have a moral right to procedures that are generally reliable methods of decision-making, even if the procedure is not needed in their particular case to arrive at an accurate verdict. On this view, even when an accused's guilt is not in doubt, it is unjust to deny them a hearing, because arriving at a verdict without hearing the other side of the case is *as a rule* an unreliable method for discovering the truth. This version of the error reduction account is modelled on rule utilitarianism.

It is not possible to do justice to the large literature on rule utilitarianism here. For my purposes, the discussion can be confined to the core idea of rule utilitarianism-the idea that the moral rightness of an act depends on whether it would be required or permitted by a rule whose adoption by the majority of

members of society would maximise utility. By contrast, act utilitarianism holds that the moral rightness of an act depends on whether it maximises utility.

One reason given in support of the superiority of rule utilitarianism over act utilitarianism is that it fits with and justifies the intuitively attractive rules of ordinary morality. n16 Two examples are the rule that it is unjust to impose grave sacrifices on some people in order to achieve benefits for others and the rule that we ought to keep our promises, except in very unusual circumstances in which the countervailing considerations are exceptionally strong. n17 On the face of it, act utilitarianism struggles to accommodate these intuitive convictions, at least if it is understood as prescribing the direct assessment of acts in terms of the utility to which they will lead. Such direct assessment could

permit, for instance, scapegoating an innocent person to avert a riot and promise-breaking when that would marginally increase utility. Rule utilitarians argue that they avoid this problem. They claim that the rules of ordinary morality are the rules that would maximise utility if they were generally adopted and hence that rule utilitarianism is not only consistent with but also justifies these rules.

The plausibility of this claim depends on how we understand the concept of 'adoption'. If 'adoption' is understood as 'compliance', in which case rule utilitarianism prescribes acting on rules which, if complied with by most people, would maximise utility, it can be argued that rule utilitarianism is practically equivalent to act utilitarianism, and faces the same problem of counter-intuitiveness. The argument is that if rule utilitarianism selects its rules on the basis of their expected utility, and if, in a particular set of circumstances, compliance with a particular rule would not maximise utility, then rule utilitarianism would have to modify the rule to create an exception for these circumstances. After all, compliance with the amended rule would result in more utility than compliance with the original rule. The making of such exceptions would lead to a highly complex code, consisting in masses of exquisitely detailed rules prescribing performance of whatever action would maximise utility in specific circumstances. The use of such rules of unlimited specificity would lead to the same results as the direct assessment of the utility of acts. n18

Whatever the merits of this criticism insofar as the 'compliance' version of rule utilitarianism is concerned, another version of rule utilitarianism is immune to it. On this version, rules are to be evaluated by reference to the

utility of accepting or internalising them, not the utility of complying with them. n19 Since it is not possible to internalise a moral code containing a vast number of rules, or a small number of rules with a vast number of exceptions, the 'acceptance' version of rule utilitarianism favours fewer and more general rules and consequently does not collapse into act utilitarianism. n20

The acceptance version of rule utilitarianism nevertheless confronts another problem. If the moral rightness of acts is defined solely by reference to their conformity with the correct moral rules, and if the relevant rules are not subject to an ever-expanding array of exceptions directed to ensuring achievement of maximum utility in all conceivable circumstances, it follows that an act that maximises utility could be morally wrong and an act that fails to maximise utility could be morally right. The acceptance version of rule utilitarianism can consequently be accused of incoherence-at any rate, if one's reason for being a rule utilitarian is that one takes maximising utility to be the ultimate moral objective. n21 It is difficult to see how someone whose only moral motivation is to maximise utility can hold that it is morally right to obey a rule even if, in a particular situation, it would maximise utility to disobey the rule. JJC Smart famously called attention to this problem, arguing that it is irrational for a utilitarian-who is presumably someone ultimately concerned with human happiness-to hold that it is morally right to perform an act that will reduce utility just because actions of that kind *generally* maximise utility. n22 This involves 'superstitious reverence' for rules. n23 Smart added: '[y]ou might as well say that a person ought to be picked to play for Australia just because all his brothers have been'. n24

The same objection applies to the rule-based version of the error reduction account, which holds that because a hearing generally decreases the risk of mistaken outcomes, defendants always have a moral right to participate in their trials, even when participation is not necessary to reduce the likelihood of error. This is an irrational position to adopt if one takes the instrumental view that the only point of hearing from the accused is to make an accurate outcome more likely. If that really is the only purpose of a hearing, and if, in a particular exceptional case, a hearing is in fact unnecessary for that purpose, it is superstitious to say that it would be unjust to deny the accused a hearing. This amounts to making a fetish of a hearing.

A second way of attempting to reconcile the error reduction account with the intuitive convictions reflected in legal practice is to use the model of indirect utilitarianism. Although rule utilitarianism is sometimes described as an 'indirect' form of utilitarianism, the phrase is also used to describe a sophisticated kind of act utilitarianism, and that is the sense in which I will use it here. n25 Indirect utilitarianism accepts the core idea of act utilitarianism, which is that an act is right if and only if it maximises utility, but it shares with rule utilitarianism the belief that a utilitarian theory should be

able to accommodate and explain our moral intuitions. The upshot is that indirect utilitarians prescribe the internalisation of the same intuitively appealing rules whose internalisation is prescribed by rule utilitarians. They do not, however, make the problematic, 'superstitious' claim-superstitious in the sense that it is inconsistent with the belief that maximising utility is the ultimate moral goal-that conformity with these rules is what makes acts right. On the contrary, they concede that conformity with these rules will sometimes lead to acts that are wrong.

Their route to this 'best of both worlds' solution is to make a distinction between the correct criterion of rightness and the correct way to make decisions. n26 Act utilitarianism is, according to them, the correct criterion of rightness: what makes an act morally right is the fact that it results in at least as much utility as any other available alternative act. Indirect utilitarians argue, however, that agents should not employ this standard as a method for deciding how they should behave. Instead, they should, for instance, be disposed to give promise-keeping and the need to treat people justly whatever weight they have in our intuitive understandings, because intuitive reasoning of this kind will result in more utility than directly attempting to assess which acts will lead to most utility on a case-by-case basis. n27

This is obviously an empirical claim. One common reason offered in support of it is that real world decision-makers are imperfect. For a variety of reasons, such as lack of information, incompetence and bias, agents' assessments of utility can be flawed, and if they were to act on these assessments, they would frequently make decisions that would be suboptimal from the perspective of the act-utilitarian criterion of rightness. Of course, deliberating in a way that reflects intuitive judgements will also sometimes be suboptimal from this perspective, since there is no doubt that there are situations in which following the rules of ordinary morality will lead agents to perform acts that fail to maximise utility and are therefore morally wrong. Incorrect decisions are therefore inevitable, regardless of whether a utilitarian or non-utilitarian

decision-procedure is employed. Indirect utilitarians claim, nevertheless, that in the long run fewer incorrect decisions will be taken by agents who are in the habit of ignoring utility (except, perhaps, in dramatically unusual circumstances) than by agents who attend to it as a matter of course. Indirect utilitarianism is therefore an application of what Frederick Schauer describes as 'the theory of the second-best'. n28 A second-best perspective on decision-making is sensitive to the fact that '[w]hen we design real decision-making institutions for real decision-makers, the optimal decision-procedure for an aggregate of decisions is sometimes one that abjures the search for the optimal in the individual case.' n29

It is worth emphasising that indirect utilitarians are in favour of agents' treating intuitive moral views as 'proper' rules, not merely as 'rules of thumb' or rough guides for identifying utility-maximising actions. Since rules of thumb are used as short-cuts to save time and reflection in routine cases, they have no force when agents are certain that it would be best to violate them. This is not to say that rules of thumb make no difference. As Schauer observes, they usually 'elevate the level of confidence necessary for taking action inconsistent with them'. n30 It is nevertheless true that even the strongest rule of thumb must fall by the wayside when an agent is convinced that following it on a particular occasion will not serve the purposes for which it was devised. Rules, by contrast, are what Schauer calls 'mandatory'. Although they are not necessarily absolute, they provide reasons for action in their own right simply by virtue of their existence as rules. This means that their weight will normally be sufficient to prevail over the conviction that it would be best, all things considered, to violate the rule on a particular occasion. n31

Although Schauer is not specifically concerned with debates within utilitarianism, or even within the broader class of consequentialist theories, and although his notion of all-things-considered reasoning is agnostic as to the relevant considerations, which might or might not be (or include) considerations of a utilitarian kind, Schauer's analysis of rules is helpful in understanding indirect utilitarianism. In particular, it is clear that indirect utilitarians believe that agents ought to think of the rules of ordinary morality as mandatory rules that should normally be followed even when utilitarian reasoning seems to indicate otherwise. n32 This is not because indirect utilitarians believe that acting on these rules is intrinsically good-that would be incompatible with the act-utilitarian criterion of rightness. Instead, it is because they believe that agents who see intrinsic value in acting on the rules

of ordinary morality will make fewer incorrect decisions by the act-utilitarian standard itself.

It is now possible to construct an indirect version of the error-reduction account modelled on these ideas, in an effort to reconcile the view that the only point of a hearing is to increase the chances of arriving at an accurate outcome with the intuitively attractive conviction that defendants should be provided with a hearing as a matter of course. On the indirect version of the error reduction account, the instrumentalist nettle would be grasped, because there would be no deviation from the view that defendants do not have a moral right to participate in their trials when an accurate verdict can be reached without their participation. Making a contribution to accuracy would be what makes a hearing a requirement of justice, analogous to the act-utilitarian criterion of rightness. At the same time, defenders of this view would argue that assessing the need for a hearing on a case-by-case basis-which would in theory be the ideal or first-best decision-procedure-would not yield the best results in practice. This is because it is too difficult to pursue the goal of error reduction directly: judges are not infallible and if they try to assess whether a hearing is necessary to reduce the chances of error, they will frequently make mistakes. It would be conceded that allowing a hearing as a matter of course will also sometimes be a mistake from the error-reduction perspective, since there are cases in which a hearing will make no difference and is not a requirement of justice. However, it would be argued that fewer suboptimal decisions will be made by judges who view the opportunity to be heard as a virtually exceptionless requirement of fairness than by judges who directly attempt to assess whether a hearing is necessary on a case-by-case basis. n33 In a nutshell, on the indirect version of the error-reduction account, judges should treat the hearing principle as mandatory, not because it is intrinsically wrong to deny a defendant a hearing-an idea that is incompatible with the error reduction account-but because being disposed to allow a hearing as a routine matter is the decision-procedure most likely in the aggregate to deliver hearings in circumstances in which they are necessary to achieve the goal of accurate verdicts.

This second-best defence of an inflexible hearing principle is not incoherent, since, unlike the rule-based version of the error reduction account, it does not resile from the instrumental premiss that what makes a hearing just is the contingent contribution it makes to safeguarding against error. It would nevertheless appear greatly to exaggerate the likelihood of judges making mistaken decisions if they were to be given the discretion to decide whether a hearing is necessary to arrive at the right decision. As Lord Hoffmann observed in *Secretary of State for the Home Department v AF*, '[u]sually if evidence appears

to an experienced tribunal to be irrefutable, it is not refuted'. n34 There is also a deeper reason to reject the indirect version of the error reduction account. Even if its empirical assumptions about the fallibility of judges are correct, and it is successful in eliminating the apparent conflict between an unswervingly instrumental conception of the purpose of a hearing and the intuitive understandings of fairness that are reflected in the law, it is not necessary to resort to baroque reasoning of this kind in order to vindicate the law's strict approach. This is because there is a more convincing and normatively more attractive account of the legal rule-or so I will argue.

3. Process Values

I turn now to theorists who reject the idea that the moral right of defendants to participate in their trials derives solely from the contingent contribution a hearing makes to safeguarding against error. According to these theorists, the denial of a hearing is intrinsically unjust. This is the view I will ultimately defend. I will call it the 'process values' account of participation, borrowing the phrase from an influential article by Robert Summers.

Summers distinguishes between two ways in which a legal process can be good as a process. First, we can judge a process by the results it produces. If a process is a means to good results, it has 'good result efficacy'. n35 Secondly, a process can be good because it implements or serves process values, quite apart from whether it is also an efficacious means to good results (or even has 'bad result efficacy'). The first kind of process-related goodness is result-oriented. The second kind of process-related goodness is process-oriented. n36 It is focussed on the moral quality of a process-what occurs or does not occur in the course of the process. n37 Examples of process values offered by Summers are participation, humaneness, privacy and intelligibility. n38

Summers mentions, for instance, rules that prevent the police from torturing suspects so as to obtain a confession. Although a confession obtained by torture is unlikely to be reliable, Summers argues that this cannot be the only reason for prohibiting the torture of suspects, since there is no reason to believe that torture can never yield reliable information. Hence we need to find the rationale for the rule against torture at least partly in non-instrumental considerations. Although torture might in unusual circumstances be an effective means of arriving at accurate determinations of guilt, means-end rationality is trumped by the intrinsic wrongness of torture. n39 Insofar as the

provision of a hearing is concerned, Summers argues that participation is good for two reasons: it generally makes a contribution to good results but it is also good in itself, 'apart from whether in the end it also contributes to good results'. n40

The intrinsic wrongness of torture is easy to understand, but what is the intrinsic positive value of participation in one's trial? The standard answer to this question given by those who accept the idea of process values relies on the notion of human dignity or worth, which is in turn understood along Kantian lines as residing in the human capacity for rational agency. I will call this the 'dignitarian' answer. Although I agree with the dignitarians that participation has intrinsic value, my account of its intrinsic value is different, being based in social and emotional concerns, rather than the need to respect the rational agency of accused persons (see Section 6). It is nevertheless worth explaining the dignitarian approach for purposes of later comparison.

The essential claim of the dignitarians is that courts should treat defendants as active subjects, not passive objects-ends not means-which involves respecting them as people who can reason, explain themselves and enter into a dialogue with the state. Jeremy Waldron, for instance, argues that the procedures that regulate the conduct of trials, and especially the opportunity they provide for argumentation and contestation, respect human dignity by treating people as 'bearers of reason and intelligence', n41 who have their own view or perspective on the application of legal norms to their situation. Waldron writes:

[a]pplying a norm to a human individual is not like deciding what to do about a rabid animal or a dilapidated house. It involves paying attention to a point of view and respecting the personality of the entity one is dealing with. As such it embodies a crucial dignitarian idea-respecting the dignity of those to whom the norms are applied as *beings capable of explaining themselves*. n42

Waldron goes on to observe that courts, hearings and arguments are 'indispensable to the package of law's respect for human agency'. n43

There are other variants on the same theme. For instance, in *The Trial on Trial*, Antony Duff and three co-authors argue that the trial is best understood as a moral enterprise that serves an end that goes beyond simply accurately identifying those who should be punished. According to Duff and his co-authors, a trial is a communicative forum in which the defendant is 'not to be treated as a mere object of investigation', n44 but rather as a citizen who is called

to answer allegations of wrongdoing and to account for his or her wrongdoing if it is proved. n45 From this it follows that the right to participate is an intrinsic element of a just trial, since inviting the defendant to participate is 'integral to the process as one of calling the defendant to answer to the charge'. n46 In other words, since a trial is a moral process addressed to the defendant, defendants must be treated as responsible agents who can answer to the charge, inter alia by being given the opportunity to be heard in their own defence. This leads Duff and his co-authors to resist a distinction between outcomes and processes. They argue that if an accurate verdict has been reached improperly it is not correct to say that while the outcome was just, the process was unjust. Instead, the injustice of the process compromises the justice of the outcome. For instance, if a guilty person is convicted without being given an opportunity to be heard in their defence, they have been wronged and have legitimate grounds for complaint. n47

A less moralised example of a dignitarian approach to participation can be found in Hock Lai Ho's account of the trial. Ho argues that the purpose of the criminal trial is not confined to 'bringing criminals to justice' but is also 'a

process of doing justice to accused persons, a political obligation owed by the state to the citizens it seeks to censure and punish'. n48 Ho focusses on the constitutional role of the judiciary in overseeing the executive branch of government in the exercise of its coercive powers, and on the corresponding need for the criminal court to function as a liberal institution by conducting trials in certain ways if it is to discharge its constitutional role. n49 Insofar as participation specifically is concerned, Ho argues that the court cannot function as a liberal institution if the accused is denied the opportunity to participate and that the court's verdict would lack rightful authority in such a case. According to Ho, this is because of 'the intrinsic value of self-direction (the positive "freedom which consists in being one's own master")... Citizens are not objects to be acted upon and kept away by the state for the sake of public safety and order.' n50 Ho also writes: '[a] liberal trial is one that adequately respects the accused as a rational and autonomous moral being... It attempts to engage the accused in a dialogue because he or she is intrinsically worthy of dialogue.' n51 These dignitarian concerns lead Ho to conclude that lack of due process is 'more than an epistemic shortcoming'. n52 It is in itself a wrong and a form of injustice, whether or not it undermines the accuracy of the verdict. n53

4. A Midway Position?

I have described two competing accounts of the justice of allowing accused persons to be heard in their own defence. The first makes the moral right to participate contingent on the role it plays in increasing the likelihood of an accurate verdict. The second takes the view that participation has inherent moral value, asserting that the denial of a hearing is intrinsically unjust. I will shortly give reasons for accepting the latter view but before doing so it is worth discussing Galligan's attempt to occupy what seems to be an intermediate position between the two accounts.

On the one hand, Galligan rejects the idea that the value of procedures lies only in the contribution they make to accuracy. He says that 'the idea of accuracy of outcome is much too crude', n54 and that 'non-outcome values' also have a place in legal processes. n55 These are values that originate from sources other than the concern for accurate outcomes and may even compromise the accuracy of outcomes, such as the need to protect privacy and confidentiality, and the need to protect criminal suspects against mistreatment. n56 Insofar as participation specifically is concerned, although Galligan believes that its primary justification consists in the contribution it makes to accuracy, n57 he also thinks it is partially justified by what he calls the 'self-protection principle'. This is the principle that we have the right to defend our own interests. Galligan elaborates on the self-protection principle by saying that in a society that values autonomy and responsibility, we are responsible for taking charge of our lives, which means that we should actively develop, defend and advance our interests in our relationships with the state. Participation can therefore be seen as a way of expressing this active involvement. n58

Although this might seem to place Galligan in the process values camp, he strenuously rejects this suggestion. Although he agrees with the dignitarians that all members of society should be treated with equal dignity and respect and is in that sense a 'dignitarian', n59 he rejects the process values version of dignitarianism, on which the duty to show respect requires the following of certain procedures just because they are fair in themselves. According to Galligan, this involves taking the 'outlandish' n60 view that procedures can be judged fair without reference to any values. n61 Process value dignitarians, in Galligan's view, defend 'procedures in the air, procedures good in themselves, and procedures edged with mystery'. n62 He, by contrast, thinks that the duty to

treat people with equal dignity and respect requires the following of procedures only to the extent that they achieve other valuable ends and purposes, such as treating people in accordance with the legal rules. n63 Even when procedures give effect to 'non-outcome values', Galligan claims that his account of them remains instrumentalist, because he sees all procedures as instrumental to values. n64 In particular, all procedures are 'instrumental to fair treatment', n65 and are fair only to the extent that they achieve that end. The moral justification for them therefore remains contingent. n66 Galligan argues that the only alternative to the 'insupportable claim' that procedures can be good in themselves is his instrumental account of their value. n67

It would therefore seem that Galligan believes that there is a half-way house between the 'crude' purely accuracy-based view and the 'outlandish' dignitarian insistence that processes can be 'simply good and fair'. n68 This

middle position is supposedly like the dignitarian position in recognising that epistemic considerations are not the full picture but unlike the dignitarian position in insisting that even when procedures give effect to 'non-outcome values', they are instrumentally justified and the moral justification for them therefore remains contingent. It is not clear, though, that this is a stable position.

Galligan is right to reject the idea that legal procedures are 'good or fair, independently of values'. n69 As he says, if no values are at stake, it is mysterious as to why particular procedures should be followed. However, it is a non sequitur to conclude that procedures must therefore be instrumentally justified. Galligan assumes that either procedures must be good independently of values or they must be instrumentally valuable, and since the former view is outlandish, the latter view must be true. However, theorists who defend the view that procedures are intrinsically valuable do not think that they are good *independently* of values. The very phrase 'intrinsic *value*' suggests otherwise. Instead, these theorists are relying on the standard philosophical distinction between something's being valuable for its own sake or non-derivatively valuable (a matter of intrinsic value) and something's being valuable because it is a means to something else of value or is derivatively valuable (a matter of instrumental value). Consider the difference between walking for health and walking because one just likes walking. If someone walks purely for pleasure, the walking has intrinsic value for them. No doubt the pleasure that walking brings is a benefit but, unlike the benefit of health, the pleasure of walking is

part and parcel of the experience, not a consequence of the experience. n70 Walking is not an 'instrument' for deriving pleasure.

Indeed, Galligan himself appears to rely on the concept of intrinsic value in respect of the fair treatment to which fair procedures are (according to him) a means. He does not argue that fair treatment has value because it is causally related to something else that is of value. On the contrary, Galligan says that fair treatment is important because it recognises that each person 'is a moral agent who is entitled to be treated with dignity and respect'. n71 If we were to ask Galligan why we should treat people with dignity and respect, it seems he would have to answer: because to do so is valuable in itself. This answer would pose no philosophical conundrums, and the idea underlying the process values account, namely, that procedures can be valuable in their own right, is equally unmysterious.

Furthermore, the non-outcome values to which Galligan refers, such as privacy, confidentiality, respecting the rights of suspects and self-protection, cannot be conceptualised in instrumental terms, as a contingent 'means' to fair treatment. n72 When conduct has instrumental value by virtue of being a means to a certain end, it is not necessary to perform the conduct in circumstances where it does not lead to the end in question. But the values Galligan mentions cannot be conceptualised along these lines. Consider the requirement to refrain from abusing suspects. This is a categorical requirement, not one that is fair only to the extent to which it achieves the end of fair treatment. In what conceivable circumstances might it be said that the obligation to respect a suspect's right not to be abused does not serve the objective of fair treatment and can consequently be dispensed with? The idea is incoherent and it is incoherent because fair treatment is not identifiable independently of the right not to be abused: respecting the rights of suspects is constitutive of fair treatment, not something that makes a contingent contribution to fair treatment. For these reasons, I conclude that Galligan's attack on the process values account fails: there is nothing mysterious in the notion of intrinsic value and non-outcome values cannot be conceptualised as a contingent means to fair treatment.

5. Subjective Perspectives on Fair Processes

I have given reasons for rejecting the most sophisticated attack on the idea that processes can have intrinsic value, in the form of Galligan's attempt to incorporate 'non-outcome values' in an instrumental framework, and I turn

now to my own positive defence of the process values account, with specific reference to the opportunity to be heard in one's own defence. As foreshadowed in Section 3, my defence of the intrinsic value of participation is not based on dignitarian arguments. Instead, it is based on a large body of social psychological research into people's subjective judgements about procedural justice ('subjective procedural justice' for short). I will explain these empirical

findings in this section and demonstrate their relevance to a normative theory of procedural justice in the next section. I will draw mainly on the work of Tom Tyler, since he is widely acknowledged as having made the largest contribution to our understanding of the psychology of procedural justice. Although his evidence is largely US-based, it seems that people react similarly to procedures in many other countries. n73

The first point to note about the psychological findings is that they contradict some frequently made assumptions about human motivation. For this reason, they have been described as 'counter-intuitive'. n74 It will be helpful in explaining this to consider an article by Louis Kaplow, in which he makes the assumptions about human motivation that are contradicted by the research. Kaplow defends an instrumental account of the value of processes but not for conceptual reasons à la Galligan. Instead, he relies on a priori psychologising, arguing that the process values account exaggerates the extent to which people care about processes, and, furthermore, that to the extent that processes do matter, the process values account distorts the reasons why they matter. Kaplow begins by arguing that if someone is not afforded a hearing but the decision benefits them, they are unlikely to complain that they were unjustly treated. He writes:

[o]ne does not often hear stories of individuals who win complaining that they did not get their day in court. If there is an independent process value, they would have a claim for reconsideration under proper procedures despite their victory, and if they valued the process significantly, they would choose such a reconsideration, even at some risk of losing. n75

Kaplow concludes that the only people who object to not being heard are those who are unhappy with the outcome. Kaplow then goes on to argue that their

unhappiness must be a function of the belief that if they had been heard, they might have secured a more favourable outcome. In other words, their motive is really outcome-oriented, not process-oriented. They complain because they think a hearing would have increased their chances of success. Kaplow argues that this is proved by the fact that individuals would not value participation if they were certain that their views would be ignored and have no effect whatsoever on the decision. n76

It will be clear that Kaplow makes two empirical assumptions. First, he assumes that people are motivated only to maximise personal gain in their interactions with legal authorities and hence that the only influence on personal satisfaction with decisions is whether one wins or loses: if the outcome is unfavourable, people will be dissatisfied with the decision; if favourable, they will be satisfied. Secondly, he assumes that when 'losers' complain of procedural unfairness, the reason must be because they believe that a fair process would have increased their chances of a favourable outcome.

These assumptions might appear to be a matter of common sense but they are, in fact, disconfirmed by the empirical literature on subjective evaluations of procedural fairness. First, Kaplow's account implies that when the courts cannot give people what they want, or believe they deserve, they will not accept the outcome and will have negative attitudes towards the courts. In fact, studies in many settings, including criminal trials, have shown that outcome favourability (personal gain) and outcome fairness or substantive fairness (the deserved nature of the outcome) are not the only influences on people's willingness to accept decisions or their positive evaluations of decision-makers. Outcomes do matter, of course. However, people are also very sensitive to processes. Perceptions of procedural fairness or unfairness make an independent contribution to evaluations of experiences with legal authorities and when decisions are made in ways that people regard as fair this cushions the impact of negative outcomes. n77

In fact, even people who receive favourable outcomes can be dissatisfied if the outcome is reached using a procedure they regard as unfair. For instance, researchers investigated the reactions of defendants in a traffic court to the dismissal of their cases without a hearing-a common occurrence, the judges being of the view that coming to court and losing a day's pay is sufficient

punishment for a traffic offence. Dismissal means that the person is subjected to no penalties and does not have a violation record, which is obviously a good outcome. Yet defendants whose cases were dismissed often left the court dissatisfied. To give just one example, one woman wanted to show the judge a photograph that demonstrated that a traffic sign was not clearly visible and she was very dissatisfied when she was not given the opportunity to do so. n78

Secondly, and again contrary to Kaplow's claims, studies have found that when people are asked which methods for decision-making they regard as fair, and why they value these particular methods, they do not focus on self-interested considerations, that is, the way in which certain procedures may help them to influence decisions and increase their chances of getting the material outcome they want. Instead, non-instrumental concerns play a large role in their fairness judgements, 'relational' concerns or concerns about interpersonal treatment being especially prominent. People see procedures as settings within which people are involved in social interactions with others, and their procedural concerns extend to a concern with the quality of the treatment experienced in these interactions-factors such as polite treatment, respect for rights and treatment that evidences trustworthiness on the part of the authorities (in the sense that authorities seem to care about the people who appear before them and to be motivated to decide fairly). n79

Most relevantly for present purposes, the opportunity to participate, which people consistently single out as a key element of procedural fairness, is valued not only because the opportunity to present arguments may persuade the decision-maker to make a decision in one's favour or at least a fair decision. Participation is also valued because the opportunity for 'voice', or the opportunity to tell one's own side of the story, enhances the quality of a person's interpersonal interaction with authorities, and is consequently valued for its own sake. n80 This is proved by the fact that voice is viewed as important even when it is known that participation will have little influence on the ultimate decision, as long as people believe that the authorities are paying attention to them. n81 Researchers have even found that 'postdecision voice' enhances perceptions of procedural fairness to some extent, demonstrating that there are circumstances in which the value attached to participation is

exclusively symbolic. n82 Contrary to Kaplow's claim, then, when people complain about procedural unfairness this is not always because they believe that they would have been more likely to receive a favourable outcome if they had been offered an opportunity to participate. Participation is valued not only for the information it allows one to convey but also for its intrinsic value.

How, it might be asked, does the social psychology research help to adjudicate between the error reduction account and the process values account? The empirical research tells us that even if a hearing would not affect the outcome, defendants will feel a sense of injustice if they are not allowed to participate in their trials. But this, it might be said, is just a brute fact about people's psychological reactions and is consequently irrelevant to the normative question with which this article is concerned. The question of interest concerns the moral entitlement to participate in trials, which is a matter of objective fairness or justice. Information about people's subjective procedural preferences cannot assist in resolving this question. The answer to this challenge turns on the reason why people experience the denial of a hearing as intrinsically unfair. I discuss the underlying psychological dynamic next and its implications for the normative debate.

6. From Subjective to Objective Justice

We need to take a step back and ask why people are more concerned about the relational aspects of procedures than their instrumental value. Why do they feel that they were unfairly treated if, for instance, a judge treated them rudely or appeared not to care about them, even when the outcome was correct and the decision-making process was not instrumentally flawed in the sense of being an unreliable method for arriving at the legally correct result? In explaining why people emphasise non-instrumental issues in evaluating the fairness of processes, and why they focus especially on the interpersonal quality of their interactions with authorities, Tom Tyler and Steven Blader use the theoretical framework of social identity theory, originally used in the context of intergroup relations, n83 and extended by them to intragroup relations. n84

Social identity is one aspect of individuals' views of themselves, being defined as 'that part of an individual's self-concept which derives from his knowledge of his membership of a social group (or groups) together with the value and emotional significance attached to that membership.' n85 People form

their social identities through interacting with other individuals in their group. n86 Tyler and Blader refer to empirical findings which show that a key factor in developing and maintaining a favourable social identity is the perception that one has status within one's group and, furthermore, that when authorities treat people in ways that are interpersonally satisfactory, this sends the message that they have status within their group. This helps to explain why people are more concerned about the quality of their treatment at the hands of authorities than the instrumental virtues of procedures: this aspect of their experience functions as a 'status cue' n87 or a form of 'status recognition'. n88

These findings develop the 'group-value model' of the psychology of procedural justice initially proposed by Tyler and E Allan Lind. The premiss of this model is that people value membership in social groups and hence that the aspects of procedures that dominate people's evaluations of their experiences (and also explain why they care so much about processes) are those that have symbolic and psychological implications for feelings of belonging in the group. In the words of Tyler and Lind, '[fair] procedures communicate positive standing whereas unfair procedures raise questions about one's status as a group member.' n89

A further relevant aspect of the empirical research relates to the discovery of a causal connection between the experience of fair treatment and the enjoyment of self-respect. When authorities treat individuals in ways they regard as fair, thereby conveying the message that they have standing as full members of society, this promotes feelings of self-worth, which Tyler and other psychologists generally call 'self-esteem', but is more usually called 'self-respect'. n90 It is noteworthy that the hard evidence confirms what many social theorists have intuitively recognised-that there is a connection between social messages about status and positive attitudes towards the self. Axel Honneth's recognition theory, for instance, which is concerned with our 'recognitional needs' n91 and the conditions of meeting them, postulates that appropriate social or intersubjective relations of recognition not only show respect for others but also generate corresponding positive attitudes to the self, including self-respect, on the part of those who are shown respect. n92 A related point is made by Avishai Margalit, in a discussion of the connection between what he calls 'institutional humiliation'-discriminatory laws and systematically

subordinating practices that send a message of low social status-and feelings of degradation and personal worthlessness. n93

Summing this up, we are now in a position to explain why defendants regard the opportunity to be heard as worthwhile in itself, quite apart from the favourable or fair outcomes to which a hearing usually leads. The opportunity to present one's own perspective is perceived as a symbolic marker of inclusion within the larger community, conveying the information that one is a valued member of the group, whose views are worthy of being heard. Conversely, not to be allowed to present one's own side would be experienced as an expression of contempt, which in turn would detrimentally affect one's sense of self-worth or self-respect.

It may be wondered why these conclusions do not generalise to other decision-making institutions. After all, there are many settings in which participation is not regarded as crucial, even though decisions may be taken in these settings that have important consequences for people's lives. The activities of corporations are an example. Why, it might be asked, does the status recognition effect arise in trials but not in these other settings? The answer to this question is that it is especially procedures used by group authorities that symbolically communicate the information about our standing in society that is so important to us and ultimately explains why procedures matter to us. Tyler and Lind make this point, saying that '[p]eople tend to view their treatment by authorities as especially diagnostic of how they are seen by society, because they view authorities as a personification of society'. n94 The authorities in question may not be legal authorities. They may, for instance, be political, familial or educational authorities. Still, they all have the status of authorities, and it is because they are authorities that their views about our value, as conveyed by the way in which they relate to us, influence our own self-evaluations, encouraging or discouraging the construction and maintenance of a

favourable social identity and the attendant sense of self-worth. This helps to explain why the opportunity to participate is regarded as more important in trials, over which group authorities preside, than in settings in which relationships with authorities are not involved and concerns about group status and social identity are consequently not as prominent. To quote Tyler again: 'justice [ie subjective procedural justice] is linked to identity and, therefore, justice matters more when identity is more relevant'. n95

I will shortly explain why these empirical findings are relevant to a normative theory of procedural justice but in order to do that I first need to pin down in more detail the kind of self-respect with which the psychologists are concerned, since there are different kinds of self-respect. In an influential article, Stephen

Darwall examines the concept of respect for others, an analysis which he then extends to the concept of self-respect. Darwall argues that there are two kinds of respect for others: recognition respect and appraisal respect. Someone who says that persons as such are entitled to respect is talking about recognition respect. To have recognition respect for persons is to give proper weight to the fact that they are persons in deciding how we should behave towards them. Duties of recognition respect for persons, grounded in their capacity for rationality and autonomy, are at the heart of Kant's moral philosophy, and it would likewise seem to be Kantian recognition respect that dignitarians have in mind when they claim that respect for persons as rational agents requires courts to listen to and engage with the perspective of defendants-that defendants should be treated as subjects, not objects. Appraisal respect, by contrast, is a matter of thinking highly of someone. It involves a positive assessment of their character traits, as, for instance, when we say that we have respect for someone's integrity, or we have respect for their character overall. Whereas recognition respect is due to everyone, appraisal respect is earned or merited by particular people. n96

Darwall then goes on to observe that these two ways of respecting others are matched by two kinds of self-respect or ways of respecting oneself, namely, appraisal self-respect and recognition self-respect. When people have a high opinion of their characters and what they have made of their lives then they have appraisal self-respect. n97 Conversely, someone who feels self-loathing would lack appraisal self-respect. Insofar as recognition self-respect is concerned, this is, according to Darwall, a matter of recognising that our special moral status as persons gives rise to duties to ourselves. It was recognition self-respect that Kant had in mind when he claimed that we are under a moral duty to show respect for ourselves as rational beings by behaving in certain ways. n98 For instance, Kant thought that we should not submit to indignities, or behave in servile or degrading ways, arguing that people who behave in such ways lack respect for themselves as persons. The concept of recognition self-respect can be described as a moral concept of self-respect. On such a concept, as Stephen Massey explains, a self-respecting person must 'properly value his capacity to act morally and act in ways characteristic of the virtuous person.' n99 Appraisal self-respect, by contrast, is a matter of the favourable attitudes a person has to their character, which makes it a psychological matter, not a moral duty.

Darwall's picture of self-respect is insightful but the psychological research suggests that it is incomplete. Both kinds of self-respect described by Darwall are asocial, in the sense that relations with other people make no contribution

to them. The psychological research suggests, however, that there is a third kind of self-respect, which consists neither in a person's feeling that they are of value because they believe they have personally meritorious qualities, nor in the fact that they appropriately value themselves in virtue of their capacities as rational agents. The third kind of self-respect is bound up with our need to have value in the eyes of others and it is dependent on positive messages sent by others in our social interactions with them. People who enjoy this kind of self-respect have been made to feel the equal of other members of society, not inferiors or second-class citizens. I will call this kind of self-respect 'relational self-respect', because it is tied to social relations that create and sustain a sense of self-worth. n100 The empirical research shows that perceptions of fair treatment at the hands of decision-making authorities contribute to this kind of self-respect.

However, this is not yet an answer to the question posed at the end of Section 5: how does empirical information about people's subjective procedural preferences help us to determine the procedural rights to which they are entitled as a matter of objective justice? Allowing accused persons to participate in their trials may contribute to their relational

self-respect but it still needs to be shown that people are morally entitled to be treated by society in a way that supports relational self-respect. I turn to this issue next, drawing on Rawls's illuminating account of why a just society would concern itself with the need for self-respect, which Rawls clearly understands in relational or intersubjective terms, since he stresses 'the great significance of how we think others value us' for our self-respect. n101 Rawls's account of why (relational) self-respect matters from the point of view of justice is rich and in what follows I will highlight only those aspects of his thought that are relevant to my concerns.

First, justice is concerned, according to Rawls, with principles for regulating the basic social institutions that constitute the basic structure of society. Basic social institutions, for Rawls, are the major political and social institutions that are necessary for the maintenance of society and social cooperation-institutions such as the constitution, the legal system, the economy and the family. These institutions have a profound influence on citizens' life prospects. Secondly, Rawls does not see the enjoyment of self-respect as something that one aspires to achieve or for which one can be held responsible, n102 but believes

instead that self-respect 'depends upon and is encouraged by certain public features of basic social institutions'. n103 Rawls calls the features of basic social institutions on which self-respect depends the 'social bases of self-respect'. These are features of institutions that lead people to feel that their status in society is secure. Thirdly, Rawls emphasises the central contribution that self-respect makes to human wellbeing. He says that 'a sense of [our] own worth is necessary if [we] are to pursue [our] conception of the good with satisfaction and to take pleasure in its fulfillment'. n104 For Rawls, indeed, self-respect is a 'primary good' (one necessary to all life-plans), since without self-respect 'nothing may seem worth doing'. n105

Taken together, these points lead Rawls to argue that free and equal persons asked to choose principles of justice for the purpose of regulating the basic social institutions would choose principles that, inter alia, provide the best support for their sense of self-respect. In particular, according to Rawls, such persons would choose principles guaranteeing equal basic rights and liberties and fair equality of opportunity, with the fair value of the political liberties also playing some role. n106 (Basic rights and liberties are the familiar rights and liberties guaranteed by a constitutional regime and the principle of fair equality of opportunity is the principle that offices and positions should be open to everyone in a system in which the effects of class differences have been mitigated by the provision of equal educational opportunities for everyone.) n107 In explaining why these particular institutional arrangements support self-respect, Rawls says that when the distribution of fundamental rights and liberties is equal, 'everyone has a similar and secure status when they meet to conduct common affairs of the wider society'. n108 By contrast, an unequal distribution of fundamental rights and liberties 'would have the effect of publicly establishing [people's] inferiority as defined by the basic structure of society', which would be 'humiliating and destructive of self-esteem'. n109 In short, according to Rawls, the just state 'avoid[s] at almost any cost the social conditions that undermine self-respect', n110 and does so by guaranteeing equal rights and liberties and fair equality of opportunity, since in a society in which equality is 'publicly affirmed' n111 in this way, the 'need for status' n112 is satisfied and no-one has 'cause to consider themselves inferior'. n113

A controversial feature of Rawls's theory is his claim that it is more important to protect equal basic liberties and fair equal opportunities than to secure improvements in material welfare: liberty and equality of opportunity should never be sacrificed for more wealth, even if everyone's liberty is sacrificed to the same extent. This strong claim may become easier to understand against the background of Rawls's belief, explained above, that protecting basic liberties and equal opportunities underwrites people's belief in their own worth by securing the same political status for everyone. When combined with the great importance Rawls attaches to self-respect, this helps to explain why he believes that the guarantees on which self-respect depends should not only be equal but also unconditional or non-negotiable, that is, not capable of being balanced or traded off against economic gains. n114 Rawls claims that no other approach would secure a sense of self-respect as effectively. n115 He argues, for instance, that in a utilitarian society, in which some people are required to sacrifice their fundamental interests in order to secure advantages for others, the former 'will find it difficult to be confident of their own worth'. n116

I should make clear that I am not arguing for the adequacy or completeness of Rawls's views about the social institutions and arrangements that are necessary and sufficient for self-respect. For instance, some critics regard Rawls's single-minded focus on equal basic rights and liberties and fair equality of opportunity as a rather narrow, if not 'archaic', view of the social determinants of self-respect. In their view, a sense of self-worth is also affected by inequalities in income and power. n117 Feminists are likely to find Rawls's picture too narrow for different reasons, inasmuch as it focusses exclusively on the way in which legal forms of discrimination undermine self-respect, overlooking the fact that social expectations and cultural practices can also play a role in feelings of inferiority and a diminished sense of worth, even in a society in which everyone enjoys equal rights. n118

However, these matters of detail are of less interest for present purposes than Rawls's plausible claims that self-respect is a fundamental human need and that its enjoyment depends in part on the design of basic social institutions, including the legal system. Both of these claims are empirically supported. Furthermore, principles for regulating the basic institutions are appropriately regarded as the subject of justice, in light of the role these institutions play

in making social cooperation possible, as well as the profound effect they have on the lives of citizens.

If we now draw together the arguments of this section and apply them to the matter of participation in criminal trials, the following can be said. The moral justification for allowing defendants to participate in their trials is not exhausted by the practical contribution a hearing makes to safeguarding against error, whether in the majority of cases or because allowing across the board participation is the best strategy for counteracting judicial fallibility. A trial is a social institution in which people interact with group authorities and the way in which trials are conducted has symbolic meaning for defendants. Defendants experience the opportunity to present their side of the case as an acknowledgement of their status in the community. This is part and parcel of the experience of being heard, not a consequence of it. Conversely, to condemn an accused unheard would send a powerful message of inferiority and social exclusion and be experienced as an expression of contempt. Furthermore, these messages matter because a feeling of belonging to social groups is crucial to the enjoyment of self-respect, which in turn plays a central role in human wellbeing. Finally, since it is plausible to think, following Rawls, that institutional arrangements that foster self-respect are a constitutive element of a just society, it follows that a hearing should be regarded as an intrinsic element of a just trial.

7. Conclusion

Like the dignitarians, I have defended the process values view: some of the values served by participation are intrinsic to the process, not consequences of it, and denying defendants the opportunity to be heard is an injustice in and of itself. However, my arguments have a different focus. Although a hearing is a way of expressing respect for defendants, the respect in question is not respect for them as persons in the technical Kantian sense of rational agents. It is respect for them as equal members of the larger community and the reason why this kind of respect is important is because failure to accord it leads to diminished self-respect.

In arriving at this conclusion, I have emphasised the relational and symbolic dimensions of the opportunity to be heard, and the way in which it sustains certain inherently valuable social relations, not the way in which it speaks to the defendant's special moral status as a rational and autonomous being. I have described the role participation plays in sustaining identity-based and affective bonds to a group, not its role as a vehicle for expressing intelligence and the capacity for self-direction. Instead of working in an a priori way from abstract premises about human dignity, and what is owed to persons by virtue of respect for their rational agency, I have relied on empirical findings about the human need for a positive social identity and the way in which certain kinds

of social interactions between legal authorities and criminal defendants meet this need by affirming defendants' equal social status.

This is not to reject the dignitarian explanation of the non-instrumental value of legal processes. Clearly, my

arguments can coexist alongside dignitarian ideas. However, I believe that our understanding of the intrinsic value of participation is greatly strengthened by an appreciation of the fact that we are social beings, embedded in a social context, and that being listened to by a group authority is a potent symbol of social inclusion and an important contributor to feelings of self-worth. I conclude that an appreciation of the intrinsic value of satisfactory interpersonal interactions with legal authorities provides the best theoretical foundation for the intuitive legal conviction that the opportunity to be heard in one's own defence is 'agreeable to justice' and an essential aspect of a fair trial.

FOOTNOTES

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n2 *The King v Chancellor of Cambridge* (1723) 1 Str 557, 2 Ld Raym 1334, 8 Mod 148, 164.

n3 *Dominique Moss v The Queen* [2013] UKPC 32, [2013] 1 WLR 3884 [5].

n4 ibid.

n5 *R v Rose* [1998] 3 SCR 262 (Can).

n6 J Rawls, *A Theory of Justice* (rev edn, Belknap Press 1999) 74.

n7 ibid 75.

n8 ibid.

n9 ibid.

n10 ibid.

n11 DJ Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Clarendon Press 1996) 350-51.

n12 ibid 32, 78. See also G Edmond and A Roberts, 'Procedural Fairness, the Criminal Trial and Forensic Science and Medicine' (2011) 33 Sydney L Rev 359, 363.

n13 Galligan (n 10) 102.

n14 ibid 63-65.

n15 ibid 64.

n16 JC Harsanyi, 'Some Epistemological Advantages of a Rule Utilitarian Position in Ethics' (1982) 7 Midwest Studies in Philosophy 389, 390-91.

n17 B Eggleston, 'Act Utilitarianism' in B Eggleston and DE Miller (eds), *The Cambridge Companion to Utilitarianism* (CUP 2014) 138-39.

n18 RB Brandt, 'Toward A Credible Form of Utilitarianism' in HN Casta[#241]eda and G Nakhnikian (eds), *Morality and the Language of Conduct* (Wayne State University Press 1965) 122-23; DE Miller, 'Rule Utilitarianism' in B Eggleston and DE Miller (eds), *The Cambridge Companion to Utilitarianism* (CUP 2014) 149-50.

n19 This formulation of rule utilitarianism is based on Brad Hooker's formulation of rule-consequentialism in B Hooker, *Ideal Code, Real World: A Rule-consequentialist Theory of Morality* (OUP 2000) 75-80.

n20 Miller (n 17) 151.

n21 Hooker (n 18) 101. Hooker denies that a rule-consequentialist must have an overarching commitment to maximise the good. For a different attempt to address the incoherence objection, see DE Miller, 'Mill, Rule Utilitarianism, and the Incoherence Objection' in B Eggleston, D Miller and D Weinstein (eds), *John Stuart Mill and the Art of Life* (OUP 2010) 107-11.

n22 JJC Smart, 'An Outline of a System of Utilitarian Ethics' in JJC Smart and B Williams, *Utilitarianism: For and Against* (CUP 1973) 10.

n23 JJC Smart, 'Extreme and Restricted Utilitarianism' in P Foot (ed), *Theories of Ethics* (OUP 1967) 178.

n24 ibid 181-82.

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n33 cf L Alexander, 'Are Procedural Rights Derivative Substantive Rights' (1998) 17 L Phil 19, 23: 'Procedural rights ... are rights about official determinations of the facts governing the application of substantive rights. They would be unnecessary if those official determinations were made by an infallible God and not fallible human beings.'

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n41 J Waldron, 'The Rule of Law and the Importance of Procedure' in JE Fleming (ed), *Getting to the Rule of Law* (New York University Press 2011) 19.

n42 ibid 16 (emphasis in original). This passage was quoted approvingly in *Osborn and Booth v The Parole Board; In the application of James Clyde Reilly for Judicial Review (Northern Ireland)* [2013] UKSC 61, [2013] 3 WLR 1020 [68].

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