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## Two Conceptions of Procedural Fairness

Cass R. Sunstein

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## Two Conceptions of Procedural Fairness

### I. INTRODUCTION

THERE ARE TWO CONCEPTIONS OF PROCEDURAL FAIRNESS. THE FIRST places a high premium on the creation and application of general rules. On this view, public authorities should avoid “balancing tests” or close attention to individual circumstances. They should attempt instead to give guidance to citizens through clear, specific, abstract rules laid down in advance of actual applications (see Fuller, 1964). This approach sees procedural fairness in the similar treatment of the similarly situated, which is ensured by rule-bound judgments.

The second conception emphasizes the value of individualized treatment, highly attentive to the facts of the particular circumstances. On this view, public authorities should stay close to the details of the controversy before them and avoid rigid rules altogether. The problem with rigid rules is that they are likely to overreach. They tend to produce arbitrariness or unfairness when applied to new or unanticipated problems.

The conflict between the two conceptions of procedural fairness arises in every area of politics and law.<sup>1</sup> Often it involves the most fundamental liberties. Of course, familiar understandings of the rule of law prize, as a safeguard of freedom, clear rules laid down in advance; but the American legal system, and the common law in particular, also value particularized decisions and close attention to the details of each case. A central reason is that public authorities often cannot design sensible general rules, because they lack relevant information. Often

general rules will be poorly suited to the new circumstances that will be turned up by unanticipated developments. Often rulemakers cannot foresee the circumstances under which their rules will be applied.

My goal here is to make some progress in understanding the choice between the two conceptions of procedural fairness. The discussion proceeds in three parts. The first emphasizes a key difference between the two conceptions: rules require legal institutions to do a great deal of work before actual applications arise, while the individuated approach requires such institutions to do a great deal of work in the process of settling controversies.<sup>2</sup> This difference helps to explain controversies over the death penalty, affirmative action, and more. The second part explores the reasons that both conceptions have such appeal, emphasizing a range of qualitatively diverse considerations that tend to lead people to favor one or the other. The third part explores the choice between the two by stressing the importance of three simple factors: the costs of legal decisions, the costs of legal error, and the costs of private planning.

An emphasis on these factors has an admittedly reductionist character, and I do not contend that it explains everything. But it does help to explain the choices that sensible legal systems make, and also to show when a charge of procedural unfairness is most likely and most justified. Reflective claims about unfairness, I suggest, are at least implicitly attuned to consequentialist considerations of this kind.

## **II. CONCEPTS AND ILLUSTRATIONS**

### **A. Rules and Individuation**

Those who favor rule-bound judgments focus on the arbitrariness and error that come from the exercise of unbounded discretion; those who favor individualized judgments focus on the arbitrariness and error that come from rigid applications of rules. If this is a large part of the division, then we can readily identify the primary difference between rule-bound judgments and particularized ones. Rule-bound judgments require that lawmakers give all or most of the content to the law in advance of particular applications. Individualized judgments require

all or most of the content of the law to be provided at the point of application.

Consider a few examples. A law that requires people to go no more than 65 miles per hour is a rule; a law that requires people to drive “in a safe and prudent manner” calls for a high degree of individualized judgment. If a judicial decision allows women to choose abortion in the first two trimesters of their pregnancy, a rule is involved. If a judicial decision allows women to be free from “undue burdens” on that choice, then individualized judgment is required. If the Constitution is read to forbid segregation of the sexes, then the Constitution imposes a rule; if the Constitution is read to forbid sex segregation when it denies equal opportunity to women, then the Constitution requires individualized judgments.

It should be clear in this light that the line between the two conceptions is not always sharp. There is a continuum here, not a dichotomy. A procedure may be relatively rule-like; it may call for only a limited exercise of discretion. Consider, for example, a rule that allows deduction of “ordinary and necessary business expenses.” Or a procedure may appear open-ended, but everyone might know that at the point of application, authorities cannot do whatever they wish. When the criminal law punishes “disorderly conduct,” it does not allow the police to arrest anyone at all. To be sure, we can identify the extreme cases for both conceptions. With respect to rules, imagine a thoroughly fixed, exception-free speed limit; with respect to individuation, imagine a system that allows officials of the Communist Party to arrest people whenever they like. But in most legal systems worthy of the name, the extreme cases are rare; discretion is never unbounded and rules almost always admit exceptions.<sup>3</sup> It is nonetheless useful to speak of two conceptions of procedural fairness, because many people are attracted to one or another extreme, and an understanding of their appeal and limitations much illuminates controversies about procedural fairness in law.

Because of the perceived demands of fairness, procedures may and often do migrate from one end of the continuum to another. What

was once a system of individualized consideration may well become a more rule-bound system over time, certainly if precedents are taken as authoritative or even merely helpful. As individualized judgments are made, they turn into small rules, applicable and binding in particular contexts. As those little rules accumulate, they often develop into a system of rules. Much of American law in the domain of sex equality has developed in this way. The opposite process occurs as well. A legal system might begin with a rigid rule and celebrate it because it seems mostly to make sense. But as new and unanticipated problems arise, the rule is taken to admit exceptions, precisely because of the perceived unfairness of its rigidity in particular contexts. As the unanticipated problems accumulate, the rule might ultimately break down into a highly individualized system.

From all this, we should be able to see that it is tempting but too simple to criticize rules for their crudeness. There are simple rules, of the one-size-fits-all variety, and these are indeed crude. But there are complex rules as well, and such rules ensure diverse, before-the-fact resolution of many different situations. A rule with a set of varying provisions, or with carefully specified and previously established exceptions, nonetheless remains a rule. Consider, for example, the tax code, which contains many specific provisions—not conferring discretion, but certainly reducing the crudeness that would come from greater simplicity. The problem is that complex rules are hard to design in advance; because of that difficulty, a system of individualized judgments might seem a pragmatically compulsory second-best.

## **B. Capital Punishment, Affirmative Action, and Beyond**

The discussion thus far has been quite abstract. To anchor the analysis, let us start with a brief glance at the American constitutional law of capital punishment. In this area, both conceptions of procedural fairness have been tested, and both have been found wanting.

In *Furman v. Georgia* (408 U.S. 238, 1972), the Supreme Court held that a rule-free death penalty violated the due process clause not because it was excessively barbaric for states to take life, but because

the states had allowed undue discretion in the infliction of the ultimate penalty of death. In other words, the problem with the pre-1970 death penalty was emphatically procedural, in the sense that states did not limit the discretion of juries in deciding who deserved to die. This was a recipe for unfairness. In a key opinion, Justice Potter Stewart said that the relevant “death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual,” and the Constitution “cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed” (*Furman*, 309).

Justice Byron White similarly emphasized the existence of jury discretion. He objected to “the recurring practice of delegating sentencing authority to the jury and the fact that a jury, in its own discretion and without violating its trust or any statutory policy, may refuse to impose the death penalty no matter the circumstances of the crime” (*Furman*, 314). Thus the central problem, for the Supreme Court, was the absence of procedural discipline to ensure against random or arbitrary death sentences. The court’s decision is best understood as an insistence on the rule of law—and as an explicit endorsement of the rule-bound conception of procedural fairness.

North Carolina responded to the court’s decision in *Furman* by enacting a mandatory death penalty, entirely eliminating judge and jury discretion. Under North Carolina law, a mandatory death penalty was to be imposed for a specified category of homicide offenses. No judge and no jury would have discretion to substitute life imprisonment in cases falling within that category. No judge and no jury would have discretion to decide who would live and who would die. In this way, North Carolina attempted to apply sharp rule-of-law constraints to the area of death sentencing.

In *Woodson v. North Carolina* (428 U.S. 280, 1976), the Supreme Court held that a mandatory death sentence was unconstitutional precisely *because it was a rule*. Invoking the need for individuation, the court said that “the belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the

past life and habits of a particular offender.” According to the Supreme Court, a serious constitutional shortcoming of the mandatory death sentence is that it:

fails to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death. . . . A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

Here, then, is the second conception of procedural fairness in action. Note that the court’s objection might have been met at least in part through a complex rule. Such a rule would specify, in advance, the range of “compassionate or mitigating factors stemming from the diverse frailties of humankind.” Such a rule would also set out the identifiable features “of the character and record of the individual offender or the circumstances of the particular offense.” No state has attempted a full specification of this kind. But what has ultimately emerged from *Woodson* is not so different from that. The court now permits a system in which juries and judges decide on the death penalty through consideration of a set of specified factors in the form of aggravating and mitigating circumstances. It is this system of capital sentencing that, in the current court’s view, walks the constitutionally tolerable line between unacceptably mandatory rules and unacceptably broad discretion. Here, then, is a context in which rule-free decisions are forbidden, but in which rule-bound decisions are banned as well.

*Woodson* arose in an especially dramatic setting. But the Court's preferred method—individuation rather than rule-bound justice—can be found in many areas. In recent years, the most prominent involves affirmative action. What kinds of affirmative action programs are permitted, and which are forbidden? The court's answer builds heavily on the view that procedural fairness required a large degree of individuation. The court has long made clear that rigid quota systems are unacceptable. Educational institutions, for example, cannot insulate "each category of applicants with certain desired qualifications from competition with all other applicants" (*Grutter v. Bollinger*, 539 U.S. 306, 2003). The court has also invalidated a "point system" for undergraduate admissions at the University of Michigan. In that system, students receive a specified set of points for various attributes, including academic performance (up to 110 points), in-state residence (10 points), having alumni parents (4 points), athletic recruitment (20 points), and being a member of an underrepresented minority group (20 points).

In striking down this system, the court did not rule that the 20 points were too high; it ruled instead that a point system is procedurally invalid as such. The court stressed "the importance of considering each particular applicant as an individual, assessing all of the qualities that the individual possesses, and in turn, evaluating that individual's ability to contribute to the unique setting of higher education" (*Gratz v. Bollinger*, 539 U.S. 244, 2003). The point system fails to "provide such individualized consideration" simply because of its automatic nature. And "the fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system."

By contrast, the court has permitted educational institutions to create affirmative action programs if they do not assign points or impose quotas or follow any kind of racial rule but merely include race as a "plus" within a system of individualized judgment (*Grutter*). At least such programs are acceptable if they remain "flexible enough to ensure



that each applicant is evaluated as an individual.” Hence, the court permits race-conscious admissions if there is “a highly individuated, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment.” When no policy gives “automatic acceptance or rejection based on any single ‘soft’ variable,” and when there are “no mechanical, predetermined diversity ‘bonuses’ based on race or ethnicity,” affirmative action is permissible. In its requirement of individuation, the constitutional law of affirmative action is close to the constitutional law of capital punishment as reflected in *Woodson*.<sup>4</sup>

In fact, the Supreme Court’s own practices often reflect a preference for individualized judgment. The court’s own decisions are often narrowly tailored to the facts of particular cases, and reflect an antipathy to clear rules laid down in advance. As Justice Scalia has noticed and deplored (see Scalia, 1989), balancing tests are a large part of American constitutional law. As a leading example, consider the court’s approach to the very question of how much procedural protection is “due,” or fair, when liberty or property has been taken. Here the court has offered no clear rules. Any “rules,” the court suggests, would be too inaccurate and too insensitive to individual circumstance. Instead, the court requires an assessment of three factors: the nature and weight of the individual interest at stake; the likelihood of an erroneous determination and the probable value of additional safeguards; and the nature and strength of the government’s interest (see *Mathews v. Eldridge*, 424 U.S. 319, 1976). This somewhat open-ended and highly individuated test is quite different from what is anticipated by some conceptions of the rule of law. It sacrifices predictability for the sake of accuracy in individual cases.

This is a pervasive choice in the American legal system. But is that choice sensible? To approach that question, we need to investigate the strong appeal of the two competing conceptions.

### III. RULES AND THE RULE OF LAW

A system of rules is often thought to be the signal virtue of a system of law. Indeed, the rule of law might seem to require a system of rules

(see Scalia, 1989). The idea has a constitutional source, as we shall now see.

### **A. Void for Vagueness**

The due process clause of the American Constitution is sometimes interpreted to require rules, or rule-like provisions, and to forbid a system based on analogies, standards, or factors. This is particularly important in the areas of criminal justice and freedom of speech, where the “void for vagueness” doctrine requires the state to set forth clear guidance before it may punish private conduct.

Consider, for example, the great case of *Papachristou v. City of Jacksonville* (405 U.S. 156, 1972), in which the court struck down a vagrancy ordinance that did not clearly say what it prohibited. The relevant ordinance made it a crime for people to be “vagrants.” It defined “vagrants” to include “rogues and vagabonds, or dissolute persons who go about begging, common gamblers . . . persons wandering or strolling around from place to place without any lawful person or object, habitual loafers,” and more. The court emphasized that terms of this sort “fail to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.” Hence the void for vagueness doctrine is designed to promote fairness by ensuring that citizens know what they cannot do. The court added that the vague terms of the ordinance “encourage arbitrary and erratic arrests and convictions.” This is a second form of unfairness. Prohibitions that are ill-defined place too much discretion in the hands of the local police, and thus encourage behavior that is arbitrary both in the sense of being unpredictable and in the sense of being invidious.

More recently, the requirement of specificity resulted in the invalidation of Chicago’s highly publicized “gang loitering” ordinance (*City of Chicago v. Morales*, 527 U.S. 41, 1999). That ordinance authorized a police officer to issue a dispersal order whenever he “observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more persons.” Loitering was defined to include “remain[ing] in any one place with no apparent purpose.” A

criminal street gang was defined to mean “any ongoing organization, association in fact or group of three or more persons . . . having as one of its substantial activities one of more of” a set of enumerated criminal acts. Three members of the Supreme Court concluded that this ordinance failed to give fair notice simply because of the imprecision of its terms. “It is difficult to imagine how any citizen of the city of Chicago standing in a public place with a group of people would know if he or she had an ‘apparent purpose.’ If she were talking to another person, would she have an apparent purpose?”

The majority of the court refused to accept this argument. But the majority nonetheless voted to strike the ordinance down, not by reference to fair notice, but on the ground that the legislature had failed to establish minimal guidelines to govern law enforcement. The procedural defect, then, was that police officers had not been adequately disciplined by the legal requirements, and hence there was an undue risk of arbitrary or invidious action. Lawmaking was essentially entrusted to “the moment-to-moment judgment of the policeman on his beat” in a way that ensured the exercise of excessive discretion. Such discretion was impermissible in the context of enforcement of the criminal law.

## **B. Fairness and the Rule of Law**

Vagueness exemplifies a failure of the rule of law. But what specifically does the concept of the rule of law entail? It is possible to identify several characteristics (see Fuller, 1964). A system committed to the rule of law seems to require 1) clear, general, publicly accessible rules laid down in advance; 2) prospectivity and a ban on retroactivity; 3) a measure of conformity between law in the books and law in the world; 4) hearing rights and availability of review by independent adjudicative officials; 5) separation between law-making and law-implementation; 6) no rapid changes in the content of law; and 7) no contradictions or inconsistency in the law. These are the customary characteristics of a system committed to the rule of law. Of course, no legal system is likely to comply with these seven goals; failures of the rule of law, understood in such terms, are commonplace.

A particular advantage of a system of rules is that people who disagree on much else may nonetheless agree about the meaning of a rule. A rule that forbids people from going over 55 miles per hour has the same meaning to Republicans and Democrats, libertarians and socialists, anarchists and members of the Ku Klux Klan. When a clear rule is in place, people can know what the rules are without adverting to basic principles. Indeed, adverting to basic principles is generally illegitimate, short of civil disobedience. Rules can therefore represent and produce *incompletely theorized agreements* (see Sunstein, 1996)—agreements on the part of people who disagree on, or are unsure about, the foundational questions. Let us understand this point as a foundation for an exploration of the various virtues of rule-bound judgment.

### **C. The Advantages of Rule-Bound Judgment**

#### *1. Rules Minimize the Informational and Political Costs of Reaching Decisions in Particular Cases*

If we understand rules to be complete or nearly complete ex ante specifications of outcomes in particular cases, we can readily see that rules have extraordinary virtues (see Sunstein and Ullmann-Margalit, 1999). Because of their simplifying effects, rules produce enormous gains in generating outcomes in cases that would otherwise be extremely expensive to resolve. Every day, people operate as they do because of rules, legal and nonlegal. Often the rules are so internalized that they become second-nature, greatly reducing the costs of decisions and making it possible for people to devote their attention to other matters.

These ideas justify the general idea that rules should be entrenched in the sense that they apply even if their rationale does not (see Schauer, 1991). A rule is not really a rule if decisionmakers feel free to disregard it when its application is not supported by its justification; if decisionmakers investigate the purpose for a rule before applying it, they convert the rule into something very close to a standard or set of factors.

The high costs—informational and political—of ruleless decisions are often not invisible to those who are deciding whether to lay down rules in the first instance. The Supreme Court, for example, can see that rules will bind its members in subsequent cases, and therefore might avoid rule-making in the interest of maintaining flexibility for the future. The court might so decide without easily seeing that the absence of rules will force litigants and lower courts to guess, possibly for a generation or more, about what will turn out to be the real content of the law. In this way the court can internalize the benefits of flexibility while “exporting” to others the costs of rulelessness (see Scalia, 1989). So, too, legislatures can see that rules may contain major mistakes, or that they cannot be compiled without large informational and political costs—without, perhaps, fully understanding that the absence of rules will force others to devote enormous effort to giving the law some concrete content. While many of the various costs of rulelessness must be borne by public officials, high costs can be borne by citizens as well. People will have to invest large amounts of resources in trying to predict outcomes.

*2. Rules Are Impersonal and Blind; They Promote Equal Treatment and Reduce the Likelihood of Bias and Arbitrariness*

Often rules operate to counteract bias, favoritism, or discrimination in the minds of people who decide particular cases. In this way, rules are associated with impartiality, an ideal captured in the idea that Justice, the goddess, is “blindfolded.” Rules are blind to many features of a case that might otherwise be relevant, and that are relevant in some social contexts, and to many things on whose relevance people have great difficulty in agreeing—religion, social class, good or bad looks, height, and so forth. The prohibition on vague laws must be understood in this light.

*3. Rules Serve Both to Embolden and to Constrain Decisionmakers in Particular Cases*

A special advantage of rules is that judges (and others) can be emboldened to enforce them even when the particular stakes and the particu-

lar political costs are high (see Scalia, 1989). Because rules resolve all cases before the fact, rules can make it easier for officials to stick with certain unpopular judgments when they should do so, but might be tempted to back down.

Suppose, for example, that the Supreme Court has set out the *Miranda* rules, offering warnings to suspects in custody, and that everyone knows that those rules will be applied mechanically to every criminal defendant. If so, judges can refer to those rules, and in a sense hide behind them, in cases in which the defendant is especially despised, and in which it is tempting to say that the *Miranda* rules should yield before a multifactor test to be resolved against the defendant. Similarly, the implementing doctrines for free speech can provide judges with an acceptable way to make correct but unpopular decisions. If a speech-protective rule is in place, judges can defer to that rule in protecting flag burning, even in the face of severe and otherwise irresistible public pressure. In one sense rules reduce the responsibility of officials for particular cases by allowing them to claim that it is not their choice, but the choice of others who have laid down the rule. But in a system in which rules are binding, and are seen to be binding, the law can usefully stiffen the judicial spine, and this may be necessary to safeguard individual liberty against public attack.

#### *4. Rules Promote Predictability and Planning for Private Actors and for the Government*

For people who are subject to public force, it is especially important to know what the law is before the actual case arises. Indeed, it may be more important to know what the law is than to have a law of any particular kind. Return, for instance, to the *Miranda* rules. A special virtue of those rules is that they tell the police specifically what must be done, eliminating the guessing games that can be so destructive to planning. So, too, in the environmental area, where prospectively clear rules, even if strict, are often far better than the “reasonableness” inquiry characteristic of the common law. Under a test that calls for

individuation, neither government officials nor affected citizens may reliably know their obligations in advance.

#### *5. Rules Increase Visibility and Accountability*

When rules are at work, it is clear who is responsible and who is to be blamed if things go wrong. Without rules, the exercise of discretion can be invisible, or at least less visible to the public and affected parties. At the same time, rules allow the public to monitor compliance much more easily than a system of individualized discretion does. For instance, the public can easily ascertain if the police are following a correct procedure or if officers are failing to give *Miranda* warnings to all arrestees. Compliance with a ban on “involuntary” confessions is harder to supervise.

#### *6. Rules Avoid the Humiliation of Subjecting People to Exercises of Official Discretion in Their Particular Case*

A special advantage of rules is that because of their fixity and generality, they make it unnecessary for citizens to ask an official for permission to engage in certain conduct. Rules turn citizens into right-holders, able to expect certain treatment as a matter of right. Individualized procedures are more likely to make citizens into supplicants, requesting official help. Importantly, such procedures allow mercy, in the form of relief from the consequences of rigid rules. But rules have the comparative advantage of forbidding officials from being unmoved by, or punitive toward, a particular applicant's request.

### **D. Against Rules**

A large number of considerations also argue against rule-bound judgments, and they help explain why individuation has such appeal.

#### *1. Rules Are Both Overinclusive and Underinclusive if Assessed by Reference to the Reasons that Justify Them*

An obvious problem with rules is that it can be very hard to design good ones. In many areas, people lack enough information to produce

rules that will yield sufficiently accurate results. If strictly followed, the rule will often produce arbitrariness and unfairness in particular cases. This was the central concern that animated the Supreme Court in its invalidation of mandatory death sentences in *Woodson*. In fact, rules are typically under-inclusive and over-inclusive if measured by reference to their background justifications. Consider a 65-mile-per-hour speed limit. If safety is the goal, that rule will ban some conduct that is perfectly safe (70-mph speeds on a clear day with little traffic) and will permit some conduct that is hazardous (64 mph in a snowstorm with a lot of traffic). By their very nature, rules suffer from under-inclusiveness and over-inclusiveness.

## *2. Rules Can Be Outrun by Changing Circumstances*

Rules are often shown to be perverse through new developments that make them anachronistic. Those who issue a rule cannot know the full range of situations to which the rule will be applied. In the new circumstances, the rule may be hopelessly crude. For this reason it may be best to avoid rules altogether.

## *3. Abstraction and Generality Sometimes Mask Bias*

When people are differently situated, it may be unfair or otherwise wrong to treat them the same—that is, to apply the identical rule to them. Speaking of Paris in 1894, Anatole France wrote that it is “the majestic equality of the laws, which forbid rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread” (France, 1930: 95). If a rule is that everyone must use stairs, people in wheelchairs will face special disadvantages. If a rule says that every employee must lack the capacity to become pregnant, many women will be frozen out of the workforce. A familiar understanding of equality requires the similarly situated to be treated the same; a less familiar but also important understanding requires the differently situated to be treated differently, also in the interest of equality. General rules might produce inequality to the extent that they do not allow people to speak of relevant differences.



#### *4. Rules Drive Discretion Underground*

When rules yield a good deal of inaccuracy in particular cases, people in a position of authority may simply ignore them. Discretion is exercised through a mild form of civil disobedience, and this is hard to police or even to see. Thus in *Woodson*, the court invalidated the mandatory death penalty not only on the ground that it was excessively rule-bound, but also on the ground that it would prove too discretionary, since the mandatory rule could not possibly be mandatory in practice. In the court's view, under a mandatory rule, juries would refuse to sentence people to death, but for reasons that would not be visible and accessible. "Jury nullification" of broad and rigid rules is a familiar and often celebrated phenomenon. Similarly, administrative agencies can simply refuse to enforce statutes when they are too rule-like in nature.

#### *5. Rules Allow Evasion by Wrongdoers*

Conduct that is harmful, and that would be banned in an optimal system, will be allowed under most imaginable rules, because it is hard to design rules that ban all conduct that ought to be prohibited. Because rules have clear edges, they allow people to "evade" them by engaging in conduct that is technically exempted but that creates the same or analogous harms.

#### *6. Rules Can Be Dehumanizing and Procedurally Unfair; Sometimes It Is Necessary or Appropriate to Seek Individualized Tailoring*

A familiar conception of procedural justice grants people a hearing to show that a statute or regulation has been accurately applied. But it is possible to understand procedural justice to allow people to urge that their case is different from those that have gone before, and that someone in a position of authority ought to be required to pay heed to the particulars of their situation. This conception has conspicuous democratic features insofar as it embodies norms of participation and responsiveness. Affected citizens might be permitted to offer the partic-

ulars of their case and to demand a particularized response. As we have seen, the Supreme Court was responsive to this point in the context of capital punishment and affirmative action.

## **II. WHEN RULES? WHEN PARTICULARITY?**

All this should be enough to show that a number of factors can be invoked on behalf of both conceptions of procedural justice. But to make progress on the choice between them, it would be necessary to discipline the analysis, to see when one or another approach is most appealing. A tempting approach would be to proceed context by context, to explore when the arguments for one of the conceptions is particularly strong. We might believe, for example, that taken as a whole, the relevant points support a rule-bound speed limit law, partly to reduce the risk of arbitrary judgments by police officers, and partly to promote predictability and planning. We might also believe that the argument for rule-bound college admissions decisions is extremely weak in light of the crudeness of any rules and the advantages of allowing particularized judgments by people whose competence and good faith can be trusted.

To say the least, however, investigations of two unruly sets of factors would not be easy to administer. I suggest that the best way to organize the inquiry into procedural fairness is unabashedly reductionist. It emphasizes just three factors: the costs of decision, the costs of error, and the costs of private planning. Of course there are qualitative distinctions among these kinds of costs. But as a first approximation, we might say that the optimal degree of specification depends on identifying the approach that would minimize what might be seen, for analytic purposes, as the sum of the three sets of costs. Rules are unambiguously best if they clearly reduce that sum; individuation is unambiguously best if it does the same. The hard cases are those in which experience offers no clear guidance on the central question.

My largest suggestion is that the most reflective objections to procedural unfairness are rooted in an intuitive understanding that the

relevant costs argue against the particular procedure that is in place. And when objections are not based on any understanding of those costs, they are most unlikely to be plausible. Let us specify how decision costs, error costs, and planning costs are relevant to procedural choices.

### **A. Decision Costs**

The idea of decision costs is straightforward. To produce a decent rule, a person or institution must be in a position to sort out the relevant facts and values and to generate some kind of sensible specification. Suppose, for example, that the Supreme Court is asked to say when and whether sex discrimination in education is permissible. The court may lack the information that would permit it to set out a clear rule on that question. It might believe that the number of imaginable situations is too multifarious to justify a rule in advance. The same might be true if the court is asked to say whether the appearance of the Ten Commandments on a public building is constitutionally permissible; much might depend on the particular context. From the standpoint of the rule maker, it is always tempting to refuse to produce a rule and thereby to economize on decision costs—and to grant discretion to those who are to follow.

But this step, calling for individuation, imposes decision costs of its own—ex post rather than ex ante. Suppose that the lawmaker refuses to set out rules and allows the real content of the law to be given at the point of application. If so, the costs of decision will grow rapidly, especially if many decisions must be made. Suppose, for example, that administrators must decide, without the benefit of advance specification, who counts as “disabled” for purposes of Social Security disability benefits. Every year, tens of thousands of people apply for such benefits. If administrators must rule on their applications without the benefit of rules, the costs of those rulings will be astronomical. If, on the other hand, administrators can use simple rules, and apply them fairly mechanically to the relevant cases, then the costs of decisions will be relatively low.

Compare a 65-mile-per-hour speed limit. A great advantage of a simple rule is that it is susceptible to easy application. A central issue, in the choice of the right amount of specificity, is that magnitude of the decision costs that would come from one or another approach. If decisions are rare, and if specification is exceptionally difficult in advance, the argument for individuation is greatly strengthened.

### **B. Error Costs**

If there were no need to worry about errors, decision costs would always be low. We could simply pick any particular rule (see Ullmann-Margalit and Morgenbesser, 1977) and let the chips fall where they may; or we could proceed on an individuated basis and allow ex post authorities to decide as they wish. Decisions are sometimes made by lot when people do not agree on what counts as an “error”; hence they leave dispositions to chance, and reduce decision costs in the process. Such costs end up being high only because institutions usually want to produce an accurate rule rather than any rule at all. They want to reduce the number and magnitude of mistakes. Indeed, the reduction of error costs is often a central goal of procedural design.<sup>5</sup>

This simple point helps to explain why appellate courts are often drawn to particularity and why administrative agencies are often drawn to rules. When deciding cases, judges are usually given a great deal of information about the particular problem at hand, without learning a great deal about adjacent or analogous problems. The intense judicial focus on particulars leads to a preference for narrow rather than wide rulings, simply because narrow rulings fit well with their limited information. At least this is so for novel or difficult problems, where judges do not want to overreach by using a wide rule that will predictably misfire. Errors might well be best avoided through a series of individualized judgments. Indeed, a rule might well appear to be exceedingly unfair, simply because it has been produced without allowing any kind of participation by those affected by it. And for that very reason, it might produce significant blunders.

Compare administrative agencies, which often have a choice between rule making and adjudication, and which have increasingly expressed a preference for the former over the latter. When the Federal Trade Commission or the Federal Communications Commission is deciding what to do, it might well prefer to issue a wide rule. That approach will reduce its decisional burdens down the line; it will create the appearance and even the reality of equal treatment; and it may also reduce the aggregate costs of errors.

Many procedural judgments can be appreciated in this light. For Social Security disability benefits, individualized decisions would impose enormous burdens; they would also be a recipe for unjustified inequality and a high level of inaccuracy. A rule-bound system, now in place for over two decades, creates arbitrariness of its own; but by any reasonable judgment it is superior to the system that preceded it (see Mashaw, 1983). The intensity of the current debate over the Federal Sentencing Guidelines, which attempt to discipline sentencing decisions, is centrally about errors. Supporters of the guidelines believe that they are better than any alternative simply because they promote equality, reduce decisional burdens, and ensure a lower level of mistakes (in the form of irrational or unfair sentences) than individualized judgments. Critics of the guidelines believe that they are a recipe for unfairness and error, precisely because of their rigidity. In their view, more individualized sentencing decisions, in which judges are authorized to exercise their informed discretion, will ensure more fairness, more equality, and fewer errors than a system of rule-bound judgments.

The choice between the two views would have to depend on a careful empirical investigation. My only suggestion is that with an understanding of the importance of reducing errors and their costs, we can appreciate what the debate is about.

### **C. Planning Costs**

For legal institutions, an inquiry into decision costs and error costs provides much of the picture. But the law has an audience, and law's

audience needs to be able to hear what the law says. If the law is vague or open-ended, planning becomes impossible. And when this is so, numerous problems arise, including a serious risk of unfairness. If people do not know what the law forbids, they cannot conform their conduct to it. In this light, it should be no surprise that laws are void for vagueness if they impose criminal punishment, or regulate speech, without a great deal of specificity. We must therefore add planning costs to the costs of decision and the costs of error.

Most simply, the idea of planning costs refers to the costs of learning the actual content of the law. Suppose that the law forbids “loitering” and that it is unclear what this term means. To know what to do, many people might try to learn its likely meaning—perhaps by consulting specialists, including those who have had experience with the law. But suppose that this step is extremely costly, because no specialists are readily available or because even specialists can only guess about the law’s meaning. An evaluation of this state of affairs depends on assumptions about how private actors will act in the face of a risk of legal sanctions. There are three major possibilities here:

1. People are risk-neutral and they are able to assign probabilities to a range of possible understandings of the law. If so, planning costs are reducible to error costs *except* insofar as people have to make an inquiry in order to generate estimates of the probability of various interpretations.
2. People are risk-averse and they will steer clear of any course of action that gives rise to a nontrivial danger of legal sanction. In the face of a vague law that might be interpreted to ban certain speech, a risk-averse speaker will silence himself, not because the expected value of the speech is lower than its expected cost, but because he wants to build a “margin of safety” into his behavior. Here planning costs include not simply the need to estimate probabilities, but also the foregone benefits of activity that is avoided as a result of risk aversion.

3. People are unable to assign probabilities to various interpretations; in other words, suppose that they are acting under circumstances of uncertainty rather than risk. If people cannot assign probabilities to various outcomes, they might do best to follow the maximin strategy and to avoid the worst-case scenario—which will, much of the time, consist of criminal punishment. Hence, they will not engage in conduct that might possibly trigger criminal sanction. Here planning costs include both an inquiry into the legal situation and also the foregone benefits, individual and social, that come from following maximin. In many situations, these foregone benefits will be substantial.

In light of these possibilities, it should be clear that planning costs will often argue strongly in favor of rule-bound judgments. Because people like to be able to plan, the private costs of inquiring into the legal situation can be extremely high; because of risk aversion and maximin, the error costs of vague rules might be much more serious than anticipated. Those who distrust rules and prefer individualized judgment ignore these points at their peril.

#### **D. A Note on Procedural Fairness and Free Speech**

I have said that when free speech is at risk, the Supreme Court is especially insistent on clarity rather than vagueness. In fact, a large body of constitutional doctrine invokes a rule-bound conception of procedural fairness to strike down open-ended controls on speech. Thus the court will not permit a statute to regulate speech if people “of common intelligence must necessarily guess at its meaning and differ as to its application” (*Connally v. General Construction Co.*, 269 U.S. 385, 1926).

In the first amendment context, the court has stressed that the state should not “trap the innocent by not providing fair warning” and that vague laws delegate “basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applica-

tion” (*Grayned v. City of Rockford*, 408 U.S. 104, 1972). The court objects to vague restrictions on free speech because such restrictions lead citizens to “steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked” (*Grayned*, 109). This is a shorthand description of the planning problem just described. Risk-neutral citizens may, and risk-averse citizens will, silence themselves rather than speak; and under circumstances of uncertainty, many citizens will take the precautionary step of refusing to contribute their view to public discussion.

The void for vagueness doctrine, with its particular “bite” in the context of free speech, reflects the appeal of the rule-bound conception of procedural justice. But first amendment law has a quite different testimonial as well. The prohibition on vagueness is accompanied by the first amendment’s “overbreadth” doctrine (see *Gooding v. Wilson*, 405 U.S. 518, 1972). According to that exceedingly unusual doctrine, speakers, having engaged in speech that is admittedly unprotected by the first amendment, can nonetheless attack laws and escape conviction if those laws are “overbroad.” Overbroad laws are those that reach well beyond constitutionally punishable speech. Consider, for example, a law that banned any person “to engage in First Amendment activities within the Central Terminal Area at Los Angeles International Airport” (*Board of Airport Commissioners vs. Jews for Jesus, Inc.*, 482 US 569, 1987). The court acknowledged that governments could impose significant restrictions on speech at airports, but it struck down this law on the ground that it prohibited protected speech as well. Or consider an ordinance forbidding any person to “assault, strike or in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty” (*City of Houston v. Hill*, 482 U.S. 451, 1987). The court acknowledged that some speech directed against police officers might be criminalized, but it concluded that the prohibition was overbroad because the Constitution “protects a significant amount of verbal criticism and challenge directed against police officers.”



The void for vagueness and overbreadth doctrines are often confused, and as the cases just discussed reveal, they often overlap. But the doctrines have fundamentally different goals. A law can be vague but not overbroad; consider an imaginable prohibition on “any speech that is not protected by the United States Constitution.” By definition, this law is not overbroad, because it is limited to constitutionally unprotected speech. But it is unacceptably vague, because first amendment principles are not clear enough to provide the basis for criminal liability. A law can also be overbroad but not vague. Consider a prohibition on any speech that includes that word “fuck.” There is nothing vague about this prohibition; the problem is that it sweeps up constitutionally protected speech.

What is noteworthy is that it is only under the first amendment that people engaging in admittedly unprotected activity can challenge a law as overbroad “on its face,” in the sense that it also applies to protected activity. Why does the court permit this? The answer is that it is concerned with the over-inclusiveness of the relevant rules, simply because they are rules. While the vagueness doctrine is concerned with the unfairness of individuation, the overbreadth doctrine is concerned with the unfairness of rule-bound judgment. And it should perhaps be unsurprising that it is in the context of free speech, above all, that the Constitution stands against both forms of procedural unfairness.

### **E. On Intuitions, Fairness, and Consequences**

Often people who object to certain legal procedures are simply claiming that the use of those procedures has produced unfairness in their particular case. Those who object to rules argue, plausibly, that the most accurate outcomes would be produced if (wise and all-knowing) authorities took account of the full set of relevant considerations. When justice is blind, or blindfolded, real unfairness will inevitably result. By itself, however, this is a weak objection to rule-bound law, because authorities are not wise and all-knowing, and hence individuated procedures

might be still less fair. The most plausible objections to unfair procedures, I suggest, are rooted in an intuitive judgment that the relevant procedure imposes indefensibly high costs in terms of decisions, errors, and planning.

When the Supreme Court strikes statutes down as unacceptably vague, this intuitive judgment is sometimes on the surface. In the *Morales* case, for example, Justice Sandra Day O'Connor stressed that Chicago could promote its law enforcement purpose through a "gang loitering" law that imposed more serious limitations on police discretion (*City of Chicago v. Morales*, Justice O'Connor, concurring). And when the Supreme Court strikes down statutes as unacceptably rigid, it emphasizes the high costs of error—as, for example, in the context of executions of people who probably ought not, in the considered conscience of the community, to be subject to the penalty of death. Many regimes that embody a high degree of discretion often present less insistent contexts for advanced planning. Consider college admissions. A fair system need not inform students of the precise likelihood of admission to their preferred institutions. Or consider criminal sentencing. Within a certain range, those who have committed crimes really do not need to know, in advance, about the precise penalty to which they are subject. And when individualized treatment is provided, it is often because the relevant institutions are believed to be trustworthy, and hence the risk of large-scale errors is reduced. Of course, college admissions officers and sentencing judges err. But their judgments typically do not show such randomness or bias as to suggest that rigidly rule-bound procedures would be better. If they did, the argument for such procedures would be far more convincing than it now is.

The larger point is that the strongest objections to procedural unfairness tend to be based on an intuitive belief that the relevant procedures do not take proper account of the costs of decision, the costs of error, and the costs of planning. Of course an account of this kind is reductionist, and it does not account for qualitative differences or even all relevant variables. But judgments about unfairness, I suggest, are

often rooted in consequentialist considerations of the kind that I am identifying here. An effort to spell out those considerations often helps to discipline and to sharpen debates about what is fair.

## **CONCLUSION**

The most familiar conception of procedural fairness stems from ideal of the rule of law. It requires clear rules laid down in advance, accompanied by procedural safeguards designed to ensure that the rules are respected in the real world. An alternative conception calls for a high degree of particularity, ensuring that authorities attend closely to the individual characteristics of the situation. Of course, the distinction reflects a continuum rather than a dichotomy, but the appeal of the two poles helps to explain many debates about fair and unfair procedures. And in different areas, the due process clause of the Constitution requires institutions to respect one or another conception.

If accurate decisions could be produced at no cost, particularity would have strong advantages. By definition, rules are cruder than the purposes they animate. If we could costlessly achieve those purposes without rules, we would have good reason to do exactly that. A central argument for rule-bound judgment is that it imposes lower decision costs—and does so, much of the time, while reducing the risk of mistake, bias, and even corruption that often accompany discretionary decisions. In addition, rule-bound judgments make planning a great deal easier. In the context of criminal liability, good legal systems require clear rules notwithstanding their crudeness, so as to ensure against guessing games by citizens and so as to discipline those who exercise the power of the state. But in other contexts, good legal systems require individuation in the belief that on-the-spot decisions will produce greater accuracy without causing significant burdens in terms of planning. Sensible legal systems appreciate both conceptions of procedural fairness; they choose between the two largely on the basis of an inquiry into the costs of decisions, the costs of errors, and the costs of planning.

## NOTES

1. On rule-bound decisions and interpretation, see Vermeule (2000).
2. See Kaplow (1992), which similarly emphasizes this point, and from which I have learned a great deal.
3. On why entirely rule-bound judgment is rare, see Sunstein (1996); I borrow from that discussion here.
4. It would be possible to challenge the court's approach on the ground that an individualized system actually operates, in practice, as a delegation to individual admissions officers to produce their own "points" system, and to do so secretly and without any effort to ensure consistency across admissions officers. If race is permitted to act as a plus, the question is: How much of a plus? Under an individualized system, the answer will not be known, and it will vary within the same admissions office. Why is that better than a point system? I believe that the court was confused on this question. But for present purposes, the importance of the court's decisions lies in their refusal to permit a rule-bound affirmative action program.
5. For relevant discussion, see Sunstein and Margalit (1999).

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