
A Matter of Principle

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NOTHING is of more immediate practical importance to a lawyer than the rules that govern his own strategies and maneuvers; and nothing is more productive of deep and philosophical puzzles than the question of what those rules should be. One such puzzle is quickly stated. People have a profound right not to be convicted of crimes of which they are innocent. If a prosecutor were to pursue a person he knew to be innocent, it would be no justification or defense that convicting that person would spare the community some expense or in some other way improve the general welfare. But in some cases it is uncertain whether someone is guilty or innocent of some crime. Does it follow, from the fact that each citizen has a right not to be convicted if innocent, that he has a right to the most accurate procedures possible to test his guilt or innocence, no matter how expensive these procedures might be to the community as a whole?

Suppose (to put a crude case) that trials would be marginally more accurate if juries were composed of twenty-five rather than twelve jurors, though trials would then be much longer, retrials more frequent, and the whole process much more expensive. If we continue to use only twelve jurors in order to save the extra expense, that will result in some people being convicted though innocent. Is that decision an act of injustice to all those who are tried by a jury of twelve?

If so, then we must acknowledge that our criminal system—in both the United States and Great Britain as well as everywhere else—is unjust and systematically violates individual rights. For we provide less than the most accurate procedures for testing guilt or innocence that we could. We do this sometimes simply to save the public money and sometimes to secure some particular social benefit directly, like protecting the power of the police to gather information by not requiring the police to disclose the names of informers when the defense requests this information. If this is not systematic injustice, then why not?

If people are not entitled to the most accurate trials possible, hang the

cost, then to what level of accuracy are they entitled? Must we flee to the other extreme, and hold that people accused of crime are entitled to no particular level of accuracy at all? That would be our assumption if we chose trial procedures and rules of evidence entirely on the basis of cost-benefit calculations about the best interests of society as a whole, balancing the interests of the accused against the interests of those who would gain from public savings in a greatest-good-of-the-greatest-number way. Would that cool utilitarian approach be consistent with our fervent declaration that the innocent have a right to go free? If not, is there some middle ground available, between these two extreme claims, that an individual has a right to the most accurate procedures possible and that he has a right to nothing by way of procedures at all?

These are difficult questions. I am not aware of any systematic discussion of them in political philosophy. Instead they have been left to the simple formula that questions of evidence and procedure must be decided by striking "the right balance" between the interests of the individual and the interests of the community as a whole, which merely restates the problem. Indeed, it is worse than a mere restatement, because the interests of each individual are already balanced into the interests of the community as a whole, and the idea of a further balance, between their separate interests and the results of the first balance, is itself therefore mysterious. We must try to find more helpful answers to our questions, including, if possible, an explanation of why this talk of a "right balance" has seemed so appropriate. But it is worth stopping, first, to notice how our questions are connected to a series of apparently different issues, both theoretical and practical, in the law of evidence.

The puzzles about substance and procedure in the criminal law arise in the civil law as well, and though the conflict between issues of individual and public interest is perhaps less dramatic there, it is more complex. When a person goes to law in a civil matter he calls on the court to enforce his rights, and the argument, that the community would be better off if that right were not enforced, is not counted a good argument against him. We must be careful not to fall into a familiar trap here. Very often, when the plaintiff makes out his case by pointing to a statute that gives him the right he now claims, the statute was itself enacted, as a matter of history, because the legislature thought that the public would benefit as a whole, in a utilitarian sort of way, if people like the defendant were given a legal right to what the statute specifies. (The statute was enacted, that is, for reasons not of principle but of policy.) Nevertheless, the plaintiff's claim, based on that statute, is a claim of right.

Suppose, for example, that the plaintiff sues under a statute that awards him treble damages against a defendant whose business practices have reduced competition to the former's disadvantage. Suppose that the legisla-

ture enacted this statute only for economic reasons. It believed the statute would encourage investment, create jobs, reduce inflation, and otherwise contribute to the general good. Nevertheless, even in such a clear-cut case, the plaintiff is himself relying on an argument of principle when he sues in court, not an argument of policy. For he would still be entitled to win, under our legal practice, even if he conceded (and the court agreed) that the statute was unwise from the standpoint of policy and would not have the beneficial consequences supposed, so that the public welfare would gain from turning him away. It is not necessary, to make his claim a claim of principle rather than of policy, that anyone actually think that the statute is unwise as policy. All that is necessary is that his claim be independent of any assumptions about the wisdom of the statute, which it is. Until the statute is repealed he remains entitled to treble damages, whatever one might think of the policy grounds for making him so entitled.

So the same problem we saw in the structure of criminal procedure is raised in civil suits as well. For it is even plainer here than in the criminal case that trials provide less than the optimum possible guarantee of accuracy. And even plainer that the savings so achieved are justified by considerations of the general public welfare. The two questions we posed about the criminal law reappear here. Is the role of social welfare in fixing civil procedure consistent with our understanding that if the plaintiff or defendant has a legal right to win, he or she should win even though the public would then be worse off? If it is consistent, are the parties to a civil suit entitled to any particular level of accuracy? Or is it just a matter of what procedures and rules of evidence work in the overall public interest, all things considered?

These questions, as applied to civil cases, suggest a further puzzle about the law of evidence, a puzzle that belongs more generally to the theory of adjudication. It will take, I am afraid, somewhat longer to state. I just said that the plaintiff in a civil suit asserts a right to win, not merely an argument of policy that his winning would be in the general interest. That would, I think, be generally agreed about what we might call easy cases, that is, when the plaintiff's title to win is established uncontroversially by some doctrinal authority, like a statute or a prior court decision of a sufficiently elevated court. Everyone would agree that the plaintiff's argument—if just pointing at a statute can be considered an argument—is an argument of principle rather than policy.

This is less clear, however, in a hard case, that is, when competent lawyers are divided about which decision is required because the only pertinent statutes or precedents are ambiguous, or there is no doctrinal authority directly in point, or for some other reason the law is not, as lawyers say, settled. In such a case the plaintiff's lawyers will nevertheless present an argument as to why, all things considered, his case is stronger than the

defendant's, and the defendant's counsel will present a different argument to the opposite effect. At the end of the day the judge (perhaps a whole series of judges if the decision is appealed) will decide by preferring one of these two arguments, or perhaps by providing a different one of their own. I believe that even in hard cases like these the arguments that lawyers put forward and that judges accept are arguments of principle rather than arguments of policy, and that this is as it should be. Even in such a case, when the law is (depending on the metaphor you favor) either murky or unsettled or nonexistent, I believe that the plaintiff means to claim that he is entitled to win, all things considered, and not merely that the public would gain if he did win.

But I have not (to understate) persuaded everyone that this is so, and various critics have proposed a large number of counter-examples to my claim. Many of these are drawn from the law of procedure generally and the law of evidence in particular. A series of recent English decisions are thought to supply one such set of counter-examples. In *D v. National Society for the Prevention of Cruelty to Children*, for example, a woman, who had been falsely accused by an anonymous informer of cruelty to her children, sued the defendant agency and asked for the name of the informer.¹ The agency resisted, on the ground that it would receive less anonymous information, and so be in a worse position to protect children generally, if it became known that it might be forced to divulge the names of informers. The House of Lords said that though normally the courts would order the discovery of information of this sort in pretrial proceedings, the agency's argument was sound in this case, because it would be contrary to public policy for the informer's name to be disclosed.

The Court of Appeal reached the opposite result in a similar case, but through an argument that might seem to confirm the importance of policy arguments in cases like these.² An unknown employee of the British Steel Corporation delivered a confidential internal memorandum of that organization to Granada Television, which used the memorandum as the basis for a broadcast critical of the management. The corporation demanded the return of the document, and Granada complied, but only after defacing the document so as to remove all clues as to the identity of the (as the corporation deemed him) disloyal employee. The corporation then sued, relying on the discretionary remedy made available by the House of Lord's decision in *Norwich Pharmacal*, for the name of that employee.³ Lord Justice Denning, in the Court of Appeal, suggested that, but for certain circumstances he thought affected the matter, he would have refused disclosure on the ground that the press can do a better job serving a vital public interest if it is not required to disclose the name of its informers. In fact, joined by his colleagues on the Court, he ordered disclosure, because Granada had, in his view, misbehaved. It had not told the corporation of its possession of the

memorandum soon enough, for example, and the television interview based on the memorandum was not conducted with suitable decorum.

That ground of decision is both silly and malign. Courts have no business reviewing either the editorial judgment or courtesy of the press, and any rule of law that makes the powers of the press turn on what judges think of their manners is a greater threat to their independence than a flat rule requiring them to name their informers. But the background judgment of the court—that the effect on the public's access to information must be taken into account in deciding what material may be discovered in pretrial proceedings in civil litigation—is of great importance.

For even if we say that in *D v. NSPCC* the court made the question of evidence, whether it would require production of the name of the informer, turn on the competing rights of children who would be protected less if such disclosure were ordered, we cannot take that view of *Granada*. No member of the public has a right to the information television companies would lose if they were forced to divulge the names of those who approach them in confidentiality. This obvious fact is sometimes obscured by the phrase, made popular by the press in recent years, that the public has what is called a "right to know." That phrase makes sense only if it is understood merely to claim that in general it is in the public interest to have more rather than less information about, for example, the internal management of state-owned industries. It does not mean that any individual member of the public has a right to this information in the strong sense that his right would provide an argument of principle requiring disclosure. It does not mean, that is, that it would be wrong to deny it to him even if the community would suffer overall by its disclosure. So the background assumption in *Granada*, that in the absence of the television company's indecorum the Steel Corporation's request would have been denied because of the public's interest in information, seems to rely on an argument of policy rather than an argument of principle to justify a judicial decision.⁴

But if that turns out to be so, then doubts must be raised about both the descriptive and normative sides of my claim about hard cases. The normative side argues that it would be wrong for judges to decide civil suits on grounds of policy. That is a claim about the final disposition of a case. It requires (put subjectively) that a judge not award damages to a plaintiff unless he believes that the plaintiff is entitled to that relief. It is not enough that he believe that the public interest would be served by creating a new right in the plaintiff. That says nothing, in itself, about how the judge should go about forming his belief *whether* the plaintiff is entitled to a given remedy. It does not say that he must not take the public interest into account in determining how he (or other triers of fact and law) should proceed to investigate that question. Therefore, the normative argument I makes does not in itself condemn judges who consider the social consequences of one rule of

evidence against another in deciding whether to require the NSPCC or Granada Television to make available particular information that will be used in determining their substantive legal rights.

Yet the normative force of my claim would surely be weakened—some would say extinguished—if judges were permitted to decide procedural issues on what we might call pure arguments of policy. If they were permitted, for example, to decide whether to require the NSPCC to furnish the names of informers simply by balancing the potential loss to plaintiffs against the potential gains to children in a standard cost-benefit calculation. For that would make the boast that society honors claims of right, even at the expense of the general welfare, an idle gesture easily subverted by denying the procedures necessary to enforce these rights for no better reason than that same public interest. So those who take pride in that boast have reason to see whether some middle ground can be found between the impractical idea of maximum accuracy and the submersive denial of all procedural rights.

Parallel threats are raised to the descriptive side of my claims about adjudication. Once again my claim is a claim about the final disposition of lawsuits. I say that judges adjudicate civil claims through arguments of principle rather than policy, even in very hard cases. I mean that they do not grant the relief the plaintiff demands unless satisfied that the plaintiff is entitled to that relief, or deny relief if they are satisfied that the plaintiff is so entitled. Once again that does not include, strictly speaking, any claim about how judges even characteristically decide how to decide whether the plaintiff is entitled or not. I do not argue, certainly, that judges never take considerations of social consequence into account in fixing rules of evidence or other procedural rules. So it is no counter-example to my claim when judges consider the public's interest in deciding whether a child protection agency or a branch of the press must disclose information bearing on adjudication before them.

But once again my descriptive claims would be jeopardized by any concession that these decisions were often purely matters of policy, that is, that they were often decided just by a routine utilitarianlike calculation pitting the damage to some litigant's financial position against the gains to society generally of some exclusionary rule. For since the sharp distinction between substantive and procedure is arbitrary from a normative standpoint, as we have just seen, any descriptive theory that relies so heavily on that distinction, even if factually accurate, cannot be a deep theory about the nature of adjudication but must be only a claim that happens to be true, perhaps for reasons of historical accident, about one part of adjudication and false about another.

So anyone who thinks, as I do, that adjudication of substantive issues at law is a matter of principle, and that this is an important claim both nor-

matively and theoretically, has a special interest in whether some middle ground can be found between the extravagant and the nihilistic claims about the rights people have to procedures in court. Before I turn at last to that issue, however, and to the other issues so far raised, I shall describe yet another legal controversy that raises many of these issues in a still different form.

The Court of Appeal and the House of Lords generated a fascinating discussion about the requirements of what in Britain is called natural justice and in the United States due process of law. In the case of *Bushell v. Secretary of State for the Environment*, for example, the question arose whether the department of the environment, which held hearings to determine whether a highway should be built through a part of the city of Birmingham, could properly exclude from the scope of those hearings an examination of its own "Red Book," a document setting out certain general predictions about traffic flow that the department had developed for the country as a whole.⁵ The department did not allow the groups opposing the highway to contest the Red Book figures, which it proposed to use in connection with its decision, but instead limited the hearing to purely local issues. The department later conceded that the Red Book figures were inaccurate, because they did not take into account predicted reduction in highway use flowing from increased fuel costs, though it nevertheless argued that its decision, which was to build the highway, was the right decision anyway.

The opposing groups took the department to court, and the Court of Appeal, in a decision by Lord Denning, held that the denial of opportunity to contest the Red Book was a denial of natural justice and so rendered the hearings and the decision infirm. The House of Lords, in a divided opinion, reversed. The principal speech argued that the department was within its rights in limiting local hearings to issues that varied from locality to locality, excluding general predictions about traffic flow and other matters that must be decided centrally to govern all local decisions in a uniform manner.

Bushell presents the same problem we have been considering, about the connection between substantive and procedural political decisions, but in the reverse direction. For it is uncontroversial (I suppose) that the decision whether to build a highway in a particular direction is, absent of special circumstances I assume were not present here, a matter of policy. If it was in the public's overall interest to build the highway as the department wished to do, giving full weight, in that determination, to the adverse impact on those particularly inconvenienced by the decision, then the decision to build the highway was the right decision to take. No individual or group has a right in the strong sense against that decision. (It would not be wrong to build the highway over the objection of any particular person, that is, if building the highway were in fact in the general interest.) Of

course, if the highway seriously threatened the life or health of any particular individual, that might well make a difference. That person might well be thought to have a right against the highway in exactly that strong sense. But that is the kind of special circumstance that I am assuming was absent in the case.

If the question whether to build a highway in a particular direction is a question of policy, then is not the further question of what form and dimension of public hearings to hold in order to decide that question also a question of policy? The Court of Appeal, in effect, denied this connection. It held that considerations of "natural justice" apply even to hearings in service of policy decisions. We must therefore ask whether the commitment to procedural rights in the criminal and civil legal process, when we have further identified these rights, indeed do have that consequence.

WE HAVE IDENTIFIED a series of questions that I shall now restate, though in a slightly different order. (1) Is it consistent, with the proposition that people have a right not to be convicted of a crime if innocent, to deny people any rights, in the strong sense, to procedures to test their innocence? (2) If not, does consistency require that people have a right to the most accurate procedures possible? (3) If not, is there some defensible middle ground, according to which people have some procedural rights, but not to the most accurate procedures possible? How might such rights be stated? (4) Do our conclusions hold for the civil as well as the criminal law? (5) Are the decisions that courts make about procedure, in the course of a trial, decisions of policy or principle? Which should they be? (6) Do people have procedural rights with respect to political decisions of policy?

It will prove convenient to begin with the first of these questions. Imagine a society that establishes the right not to be convicted if innocent as absolute but denies, not only the right to the most accurate process conceivable, but any right to any particular process at all. This society (which I shall call the cost-efficient society) designs criminal procedures, including rules of evidence, by measuring the estimated suffering of those who would be mistakenly convicted if a particular rule were chosen, but would be acquitted if a higher standard of accuracy were established, against the benefits to others that will follow from choosing that rule instead of that higher standard.

It is not true that the right not to be convicted if innocent is a mere sham that has no value in the cost-efficient society. For the right protects people against deliberate prosecution by officials who know the accused to be innocent. Surely there is moral value, even in the cost-efficient society, in that prohibition. For there is a special injustice in knowingly and falsely claiming that someone has committed a crime. That is, among other things, a lie.

So there seems no logical inconsistency in a moral scheme that accepts the risk of innocent mistakes about guilt or innocence in order to save public funds for other uses, but will not permit deliberate lies for the same purpose.

But there is another kind of inconsistency, which will take a moment to explain. Political rights, like the right not to be convicted if innocent, have their main function as instructions to government; and we might therefore be tempted to think that nothing has gone wrong when government heeds the instruction and makes a blameless mistake. But this is wrong because the violation of a right constitutes a special kind of harm, and people may suffer that harm even when the violation is accidental. We must distinguish, that is, between what we might call the bare harm a person suffers through punishment, whether that punishment is just or unjust—for example, the suffering or frustration or pain or dissatisfaction of desires that he suffers just because he loses his liberty or is beaten or killed—and the further injury that he might be said to suffer whenever his punishment is unjust, just in virtue of that injustice. I shall call the latter the “injustice factor” in his punishment, or his “moral” harm. The harm someone suffers through punishment may include resentment or outrage or some similar emotion, and is more likely to include some emotion of this sort when the person punished believes his punishment to be unjust, whether it is unjust or not. Any such emotion is part of the bare harm, not the injustice factor. The latter is an objective notion which assumes that someone suffers a special injury when treated unjustly, whether he knows or cares about it, but does not suffer that injury when he is not treated unjustly, even though he believes he is and does care. It is an empirical question whether someone who is punished unjustly suffers more bare harm when he knows that the officials have made a mistake than when he knows that they have deliberately framed him. But it is a moral fact, if the assumption of the last paragraph is right, that the injustice factor in his injury is greater in the second case.

One can be skeptical about the idea of injustice factor, as a component of harm or injury, in the following way. The idea (it might be said) confuses the quantum of harm someone suffers from official decisions with the different issue whether that harm is just or unjust. Someone who suffers a certain degree of pain or frustration or incapacitation from a certain punishment—the “bare” harm—does not suffer *more* harm when he is innocent than when he is guilty. The harm he does suffer is unjust in the former case, whatever the amount of that harm is, but it only confuses that point to say that the injustice in some way adds to that harm. Nevertheless, we do feel more sympathy for someone when we learn that he has been cheated, even though we learn nothing more about his bare loss, and we do believe that someone suffers an injury when he is told a lie, even when he remains ignorant and suffers no bare harm in consequence.

But it is not important, for my present purpose, whether the idea of a distinct moral harm is accepted or rejected, for even if we abandon that idea we must still accept its substance in a different form. For surely we want to be able to say that the situation is worse when an innocent person is convicted, just because of the injustice, even if we balk at saying that that person is worse off; and in order to say even that we need a notion of a moral cost to or a moral loss in the worth of outcomes or situations. This notion will do the same work in my argument as the idea of a moral harm to an individual person, except that it treats the harm as general rather than as assigned. Suppose we discover that some person executed for murder several decades ago was in fact innocent. We shall want to say that the world has gone worse than we thought, though we may add, if we reject the idea of moral harm, that no one suffered any harm of which we were ignorant, or was in any way worse off than we believed. In the remainder of this essay I shall use the idea of moral harm to people, though nothing much in the arguments would be otherwise altered if I used the idea of a moral cost to situations, not assignable to people, instead.

We may now see why the behavior of our imaginary cost-efficient community, which recognizes an absolute right not to be convicted if innocent, but submits questions of evidence and procedure to an ordinary utilitarian cost-benefit analysis, seems so odd. For it makes no sense for our society to establish the right not to be convicted when known to be innocent as absolute, unless that society recognizes moral harm as a distinct kind of harm against which people must be specially protected. But the utilitarian calculus that the cost-efficient society uses to fix criminal procedures is a calculus that can make no place for moral harm. The injustice factor in a mistaken punishment will escape the net of any utilitarian calculation, however sophisticated, that measures harm by some psychological state along the pleasure-pain axis, or by the frustration of desires or preferences or as some function over the cardinal or ordinal preference rankings of particular people, even if the calculus includes the preferences that people have that neither they nor others be punished unjustly. For moral harm is an objective notion, and if someone is morally harmed (or, in the alternative language, if there is a moral loss in the situation) when he is punished though innocent, then this moral harm occurs even when no one knows or suspects it, and even when—perhaps especially when—very few people very much care.

So the practice of the cost-efficient society makes sense only if we accept that there is great distinct moral harm when someone is framed, but none whatsoever when he is mistakenly convicted. That is very implausible, and this explains, I think, why the combination of procedures strikes us as bizarre. We must ask how the procedures of the cost-efficient society must be changed so as to make place for the recognition of moral harm. It is neces-

sary—or possible—to insist on a right to the most accurate procedures imaginable? But first we must consider two possible objections to the argument I have just made, that the procedures of the cost-efficient society, as they stand, do show a kind of moral inconsistency.

I said that its endorsement of an absolute right not to be convicted if innocent shows that it recognizes moral harm as an independent and important sort of harm, while its acceptance of an ordinary utilitarian calculation about procedural issues denies that independence and importance. Someone might challenge each of these claims. He might say, first, that a society that rejected the idea of moral harm over and above bare harm, and aimed only to maximize utility on some ordinary conception (say maximizing the balance of pleasure over pain) would do well to adopt an absolute right not to be convicted of a crime if known to be innocent. He would argue that a society that allows officials even to toy with the idea of deliberately convicting an innocent person will generate more bare harm than a society that does not. This is the now familiar two-level utilitarian defense of ordinary moral sentiments. That defense seems to me, here as elsewhere, to run backward. Those who argue in this way have no direct evidence for their instrumental claims. (How could they know or even have good reason to believe that a society of intelligent act-utilitarian officials, who would consider convicting the innocent only on very special occasions, would do worse for long-term utility than a society that disabled its officials from ever taking that step?) Rather they argue backward from the fact that our moral intuitions condemn convicting the innocent to the conclusion that such a disability must be in the long-term utilitarian interests of any society.

But I do not need to rely on my general suspicions of arguments of this character. For the two-level justification of ordinary moral convictions, however persuasive or unpersuasive it might be in other contexts, is not in point here. The members of the cost-efficient society in my example suppose (as I think most of us do) that it would be wrong deliberately to convict the innocent, even if there were a long-term utilitarian benefit to be gained. They suppose, in other words, that the right not to be convicted if innocent is a genuine right, which trumps even long-term utility, not an instrumental or as-if right that serves it. It is that assumption that, I believe, presupposes the idea of moral harm.

Second, someone might say that the utilitarian test the cost-efficient society uses to fix procedures does not in fact reject that idea, or suppose that there is no moral harm when someone is mistakenly convicted, because even an ordinary utilitarian test will actually be sensitive to moral harm. For suppose we do discover that someone convicted and punished for murder long ago was innocent. We thereby discover that the bare harm done him, just considered in itself, was unnecessary, because the general utilitarian policies of the criminal law would have been advanced just as well—

perhaps even better—without punishing him. We discover, that is, that the bare harm, which is reflected in the utilitarian sum, was unjustified on the simple utilitarian test, and that gives us cause to regret the procedures that produced or allowed it. Of course, we might still conclude that these procedures nevertheless produced more net gain than more accurate procedures would have done, because the unnecessary bare harm was less, in total, than the added expense of the more accurate procedures would have been. But our test is nevertheless sensitive to moral harm, because it identified the bare harm associated with moral harm as unnecessary, and therefore as counting, just considered in itself, against the procedures that allowed it.

But this argument fails because it is not true, in any relevant sense, that the bare harm associated with moral harm was unnecessary. Convicting this particular person, though innocent, might for a vast variety of reasons have contributed especially efficiently to deterrence, or to another consequence of the criminal system of which utility approves. Indeed, if it might sometimes be in the long-term utilitarian interests of the community for officials deliberately to convict someone they thought to be innocent (and that possibility is the occasion for recognizing a right against this), then equally it might sometimes be in those long-term interests of the community that someone innocent be innocently convicted. It therefore does not follow that when we discover a past injustice we also discover an occasion when utility would have gained, even just considering the direct consequences of that injustice, had it been avoided. So the discovery of even a great number of such incidents would not automatically give us a utilitarian cost to set against the costs of having adopted more expensive procedures.

It seems even clearer that even when bare harm that is also moral harm is a mistake from the utilitarian point of view—when utility would have been advanced had that bare harm been avoided—the magnitude of the bare harm may be very different from the magnitude of the moral harm. When someone old, sick, and feeble is executed by a community that wrongly believes him guilty of treason, the bare harm, considered in cold utilitarian terms, might be very little, but the moral harm very great. The difference will be important when the question is raised whether the possibility of that harm justifies adopting expensive procedures that will reduce its chances. If the incident counts, in the grand calculation, only in the measure of the bare harm, then it may hardly advance the argument for more expensive procedures at all. But if it counts in the measure of its moral harm, it might count very heavily.

So these objections actually reinforce my suggestion that a society that submits questions of criminal procedure to an ordinary utilitarian calculus does not recognize the independence or importance of moral harm, or, if it does, does not recognize that even an accidental conviction of an innocent

person is an occasion of moral harm. The cost-efficient society I imagine does therefore act inconsistently. But this is only the end of the beginning. For we must now face the second question in our list. If the cost-efficient society is defective, must we substitute a practice under which all other social needs and benefits are sacrificed to producing the most elaborate and accurate criminal process the world has ever seen?

We might enforce that terrible requirement by ordering the avoidance of moral harm as lexically prior to all other needs. It would not quite follow from this lexical ordering that we would never have an excuse for choosing less than the most accurate criminal process, because there might be forms of moral harm other than innocent conviction of the innocent. Perhaps there is moral wrong, for example, not captured in any ordinary utilitarian calculation, when society neglects the education of the young, so that the provision of funds for public education would be competitive with funds for criminal trial accuracy even under the lexical ordering constraint. But a society governed by that constraint would be obliged to furnish the highest possible level of accuracy for the system (as we might call it) of avoiding moral harm altogether, and could never devote public funds to amenities like improvements to the highway system, for example, so long as any further expense on the criminal process could improve its accuracy. Our own society plainly does not observe that stricture, and most people would think it too severe.

NEVERTHELESS, we could not escape the severe requirement if we were forced to concede that accidentally convicting someone who is innocent is just as bad as framing him deliberately. Would we countenance framing someone for armed robbery if, for some reason, a hundred potential armed robberies would thereby be averted? If the gross national product would thereby be trebled? If a given amount of gain of that sort would not justify a single deliberate violation of the right not to be convicted if innocent, then that amount of gain could not justify adopting procedures that would increase the chance of a mistaken conviction by even one person over the pertinent period.

In the preceding section I denied the premise of this harsh syllogism I said that it is morally worse deliberately to convict the innocent accidentally, because the deliberate act involves a lie and therefore a special insult to the dignity of the person. It is now important to see whether this is right—whether this is an available ground of distinction. Because if it is not, then we must accept lexical ordering of avoiding any risk of mistaken convictions over any amenity we might gain from less expensive procedures, however painful that seems.

I propose the following two principles of fair play in government. First, any political decision must treat all citizens as equals, that is, as equally en-

titled to concern and respect. It is not part of this principle that government may never deliberately impose a greater bare harm on some than others, as it does when, for example, it levies special import taxes on petrol or gasoline. It is part of the principle that no decision may deliberately impose on any citizen a much greater risk of moral harm than it imposes on any other. Moral harm is treated as special by this principle of equality. Second, if a political decision is taken and announced that respects equality as demanded by the first principle, then a later enforcement of that decision is not a fresh political decision that must also be equal in its impact in that way. The second principle appeals to the fairness of abiding by open commitments fair when adopted—the fairness, for example, of abiding by the result of a coin toss when both parties reasonably agreed to the toss.

These two principles each plays a role in fixing rules of criminal procedure. Under certain circumstances (I shall discuss these later) a decision to adopt a particular rule of evidence in criminal trials treats citizens as equals, because each citizen is antecedently equally likely to be drawn into the criminal process though innocent, and equally likely to benefit from the savings gained by choosing that rule of evidence rather than a socially more expensive rule. That decision therefore respects the first principle of fair play. When any particular citizen is accused of crime, the decision to enforce that rule of evidence in his trial, rather than to set it aside or repeal it, is a decision that may well work to that citizen's special disadvantage, because it may offer him a greater risk of moral harm than an alternative rule would, a greater risk not offered to those who have not been accused of a crime. But the second principle stipulates that the application of the rule to him is not a fresh political decision, but rather an unfolding of the earlier decision which was fair to him. So the second principle insists that trial under the established rule is not an instance of treating him other than as an equal.

These two principles of fair play, taken together, explain why deliberate conviction of someone known to be innocent is worse than a mistaken conviction under general though risky procedures fixed in advance. Framing someone is a case of a fresh political decision that does not treat him as an equal as required by the first principle. It is not (nor can it be) only the application to his case of open public commitments fixed in advance. (Framing would lose its point if there were a public commitment to frame people meeting a certain public test.) On the contrary, it is the decision to inflict on a particular person special moral harm, and that is true even when he is selected by lot from a group of candidates for framing. So a deliberate violation of the principle against convicting the innocent involves greater moral harm than an accidental mistaken conviction, because the former violates the equal standing of the victim in the special way condemned by the principles of fair play, as well as sharing in the residual moral harm of the latter.

But we have established only that risking accidental injustice, in the way

this is risked by rules of criminal procedure, is not as bad as inflicting deliberate moral harm. We are not much further along on deciding how bad the former is, and how, if at all, we are to balance the risk of accidental moral harm against the general social gains that are realized by accepting such a risk. We might consider looking for help in a different direction. I mean by capitalizing on the fact that we all, as individuals, in the various decisions we make about leading our own lives, both distinguish moral harm from bare harm, and accept some risk of moral harm in return for gains of different sorts.

Few of us would count it just as bad to be punished for a crime we did commit as for a crime we didn't but the community thought we did. Most of us dread injustice with a special fear. We hate to be cheated more than to be fairly defeated or found out. That is not because the bare harm is greater. On the contrary, if the bare harm is greater, this is because we believe that being cheated is worse, and we therefore feel anger and resentment that multiply the bare harm. Some of us also feel the self-loathing that is for them a paradoxical consequence of being treated with contempt by others.

It is not inevitable that we regard injustice as worse than our deserts. For guilt adds to the bare harm in the latter case, and newfound pride, at least for strong people, may reduce it in the former. But the normal phenomenology of guilt itself includes the idea of moral harm being a special harm to others, over and beyond the bare harm one causes them. For why else should we feel guilt for causing harm deliberately when we feel less guilt or even no guilt for causing the same harm accidentally? And perhaps the special pain of guilt is the recognition of Plato's claim, that when a man is unjust he inflicts moral harm upon himself.

So it is fair to say that we distinguish, in our own moral experience, between moral and bare harm, and at least often count an injury that includes moral harm as worse than one that does not. But we do not lead our lives to achieve the minimum of moral harm at any cost; on the contrary, we accept substantial risks of suffering injustice in order to achieve even quite marginal gains in the general course of our lives. We do this when we accept promises, enter into contracts, trust friends, and vote for procedural features of the criminal law that promise less than the highest levels of accuracy. Indeed under certain circumstances we might regard the design of criminal and civil procedures as a fabric woven from the community's convictions about the relative weight of different forms of moral harms, compared with each other, and against ordinary sacrifices and injuries.

I do not mean that the *correct* weighting of moral harms against bare harms, even for the purpose of a just assignment of risks, is constituted by a social decision. That would be to misunderstand the idea of moral harm and the contrast with bare harm. Bare harm is best understood, perhaps, in sub-

jective terms: someone suffers bare harm to the degree that the deprivation causes him pain or frustrates plans that he deems important to his life. But moral harm is, as I said, an objective matter; and whether someone suffers moral harm in some circumstances and the relative weight or importance of that harm as against what others save through the practices or events that produce it are moral rather than psychological facts. Our common moral experience shows only that we recognize moral harm but do not weigh it as lexically more important than bare harm or loss of various sorts. It does not show that we are right in either respect.

Nevertheless, our common experience does suggest a useful answer to the practical question of how a society should decide how important moral harm is. Under certain circumstances that issue should be left to democratic institutions to decide, not because a legislature or parliament will necessarily be correct, but because that is a fair way, in these circumstances, to decide moral issues about which reasonable and sensitive people disagree. It will be a fair way to decide when the decision meets the first principle of fair play I described, if the decision treats everyone as an equal because, whichever conception of the importance of different moral harms is chosen, that decision is equally in or against the antecedent whole interest of each person, by which I mean the combination of his or her moral and bare interests.

Suppose a society of people, each of whom is antecedently equally as likely to be charged with a crime, and each of whom would suffer the same bare harm from the same punishment if convicted. That society enacts, by majority decision, a criminal code defining crimes, attaching penalties, and stipulating procedures for trials for the different sorts and levels of crimes so defined. Everyone's whole interest is either threatened or advanced by that decision, and in equal degree. People will disagree about the wisdom of the decision. Members of the losing minority will think that the level of accuracy provided by the procedures for trying some crime is too low and so undervalues the moral harm of an unjust conviction for that crime, or that that level is too high and so overvalues that harm compared to the benefits forgone by using the society's funds in this way. But since moral harm is an objective matter and not dependent upon particular people's perception of moral harm, no one will think that the majority's decision is unfair in the sense that it is more in the interests of some than others. Majority rule therefore seems an especially appropriate technique for making this social decision.

It is never true, at any time, that all members of a society are equally likely to be accused of any particular crime. If there is economic inequality, the rich are more likely to be accused of conspiring to monopolize and the poor of sleeping under the bridges. If people differ in temperament the hot-blooded are more likely to be accused of some crimes and the greedy of

others. And so forth. So the constitution of a fair society might well insist that the punishments attached to various crimes must be consistent according to some reasonably objective theory of the importance of crimes, and that the assumed moral harm of an unjust conviction be correlated with the gravity of punishments on some uniform scale.

Even so, the circumstances we imagine for a fair majority decision will be compromised if some minority is more likely to be accused of crimes overall or of crimes carrying relatively serious punishments. That fact will not justify abandoning the majority decision procedure, however, unless the increased risk is great for particular individuals. It will also never be true in any actual society that different people will suffer exactly the same bare harm from any given punishment. But this fact provides even less of a reason to object to majority decision, because differences of that character are much less likely to be correlated with economic or social class and therefore less likely to provide systematic injustice. We should notice a third complexity here. In the actual world different people will gain differently through any alternative use of public funds saved by choosing less rather than more expensive criminal procedures. That will be true even when the saving takes the most abstract form, which is savings added to social funds available for general purposes. But society may save by sacrificing accuracy in the criminal process in much more concrete ways, as it does, for example, when it recognizes a privilege in the police (or in organizations like the National Society for the Prevention of Cruelty to Children or Granada Television mentioned earlier) not to furnish information about informers, or, more conventionally, if it recognizes a doctor-patient privilege so as to improve medical care. The justification for the sacrifice in trial accuracy in these latter cases is just as fully a justification of policy as when the gain is general money saved that might be used for highways or hospitals or a national theater. But the decision about who gains—children, for example, or that part of the public that takes an interest in politics—is part of the decision to reduce accuracy, rather than being, as in the general case, a decision that leaves the distribution of the gain to further political action. But once again the compromise with our imagined conditions is small if, as in these examples, the class that fails to benefit is not a class that is on general social or economic grounds distinct from the majority making the decision.

So even in the real world majoritarian decisions that fix a particular level of accuracy in criminal decisions in advance of particular trials, through the choice of rules of evidence and other procedural decisions, can be faulted for serious unfairness only if these decisions discriminate against some independently distinct group in one or another of the ways just canvassed. It is not enough, to make these decisions unfair, that they put one rather than another value on moral harm of different sorts, so long as this valuation is consistent and unbiased.

Antecedent decisions of this sort may show special concern for moral harm, not only by paying a high price for accuracy, but also, and especially, by paying a price *in* accuracy to guard against a mistake that involves greater moral harm than a mistake in the other direction. This is shown, for example, by the rule that guilt must be shown beyond a reasonable doubt, rather than on the balance of probabilities, and also by rules, like the rule that the accused may not be compelled to testify, whose complex justification includes weighing the scales in favor of the accused, at the cost of accuracy, as well as guarding the accused against certain kinds of mistakes and misimpressions that might compromise accuracy. Examples are rarer in the civil law, because it is generally assumed that a mistake in either direction involves equal moral harm. But when the burden of proving truth is placed on the defendant in a defamation suit, for example, after the plaintiff has proved defamation, this may represent some collective determination that it is a greater moral harm to suffer an uncompensated and false libel than to be held in damages for a libel that is in fact true.

THE IDEA of moral harm, coupled with the fact that a community's law provides a record of its assessment of the relative importance of moral harm, allows us to account for two different sorts of right that people might be said to have with respect to criminal procedure. First, people have a right that criminal procedures attach the correct importance to the risk of moral harm. In some circumstances it would be clear that this first right has been violated, as it would be if, for example, some community decided criminal cases by flipping a coin, or did not permit the accused to be present at this trial or to have a lawyer or to present evidence if he wished, or if it used only ordinary utilitarian calculations to choose criminal procedures as the cost-efficient society did. In other, closer cases it would be debatable whether the correct weight had been given to the risk of moral harm, and reasonable and sensitive people would disagree. The second right, which is the right to a consistent weighting of the importance of moral harm, is of great practical importance in these circumstances. For it enables someone to argue, even in cases in which the correct answer to the problem of moral harm is deeply controversial, that he is entitled to procedures consistent with the community's own evaluation of moral harm embedded in the law as a whole.

Both of these rights are rights in the strong sense of a right we identified earlier, because each of them acts as a trump over the balance of bare gains and losses that forms an ordinary utilitarian calculation. Once the content of the right is determined, then the community must furnish those accused of crime with at least the minimum level of protection against the risk of injustice required by that content, even though the general welfare, now conceived with no reference to moral harm but only as constituted by bare

gains and losses, suffers in consequence. But in each case the right is a right to that minimum of protection, not a right to as much protection as the community could provide were it willing to sacrifice the general welfare altogether. The second right, for example, holds the community to a consistent enforcement of its theory of moral harm, but does not demand that it replace that theory with a different one that values the importance of avoiding unjust punishment higher. So identifying and explaining these rights is a useful reply to the third question listed earlier. The content of these rights provides a middle ground between the denial of all procedural rights and the acceptance of a grand right to supreme accuracy.

The distinction between these two rights is not hard and fast. For the enterprise demanded by the second right—finding the account of moral harm that is embedded in the substantive and procedural criminal law as a whole—does not consist just in establishing a textual and historical record, though that is part of the job. It consists also in interpreting that record, and that means fitting a justification to it, a process that, as I have tried to explain elsewhere, draws upon though it is not identical with citation of principles that are taken to be independently morally correct.⁶

This connection between claims of consistency and claims of independent correctness is exhibited in the various attempts of the Supreme Court to interpret the due process clause of the Fourteenth Amendment, which is the constitutional home of these rights, at least for the criminal process. That clause has been said to protect, for example, “those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions” (*Hurtado v. California* 110 US 516 (1884)), “ultimate decency in a civilized society” (*Adamson v. California* 332 US 45 (1947)), principles that are “basic in our system of jurisprudence” (*Re Oliver* 333 US 257 (1948)), and, in the most famous statement of the clause, “principle[s] of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental” and for that reason “implicit in the concept of ordered liberty” (*Palko v. Connecticut* 302 US 319 (1937)). All these excerpts from constitutional decisions are taken by constitutional lawyers to be, roughly speaking, different statements of the same idea.

Nevertheless, history will play an important role in fixing the content of the second right, the right to consistency in procedure, and in some cases there can be no stronger argument for some particular institutional arrangement than the argument that it has always been so. It is hard to suppose, for example, that the criminal law would necessarily have been very different in other ways had its ancient practice required ten or fourteen jurors instead of twelve, though the former choice would have avoided many retrials and therefore saved a great deal of expense over the centuries, and the latter would have been correspondingly much more expensive. It is hard to resist supposing that the number actually chosen was in large part fortuitous. But the number of jurors is plainly so important a consideration in

guarding an accused against injustice, when a unanimous verdict is required to convict him, that any substantial change in that number for capital cases or cases threatening severe punishments—say reducing the number to six—would count as a violation of the rights of the accused just because it would be a substantial diminution in the level of safety provided at the center of the criminal process for so long. Dozens of Supreme Court decisions applying the due process clause against the states testify to the independent importance of what might be regarded as accidents of history, made into constitutional doctrine by the right to consistency, now conceived independently of the first or background right to a correct account of moral harm.

The second right therefore acts as a distinct conservative force protecting the accused from changes in the evaluation of moral harm. But it also acts as a lever for reform, by picking out even ancient procedures as mistakes—*islands of inconsistency* that cannot be brought within any justification that attaches the level of importance to the injustice factor in the mistaken conviction that is necessary to explain the rest of the law. This second, reforming function must be handled with great care, because it must respect the fact that criminal procedures provide protection as a system, so that the force of one rule of evidence, for example, may be misunderstood unless its effect is studied in combination with other aspects of that system. If the law does not provide a fund out of which indigent defendants might conduct expensive research relevant to the defense, that might show that little weight is put on the moral harm of an unjust conviction, unless the effect of that failure is measured as part of a system that places a great evidentiary burden on the prosecution and protects the defendant in other ways as well.

Nevertheless, it is not a sufficient answer to the objection that some feature of the criminal law puts an inconsistently low value on the importance of avoiding injustice, that other parts of the law of criminal procedure err in the opposite direction. For what must be shown is not that errors on each side of the established line will cancel each other out over the long run of criminal adjudication, but rather that a system of rules, taken together, provide no more than the established risk in each case, given the competing claims displayed in that case. The reforming function must also be sensitive (I should add) to the point we noticed in our discussion of the cost-efficient society. The value society puts on moral harm may be established elsewhere in its law or practices than in its criminal procedure, so that that procedure might be inconsistent with the remainder of legal and political practice beyond any internal inconsistency within the rules of procedure themselves.

With respect to both the checking and reforming functions of the second right, however, there is room for the skeptical claim that a principle that permits reasonable lawyers to differ provides no genuine protection. For (as

almost everywhere in legal analysis) the question of how much the law values avoiding moral harm, and which of two competing procedures comes closest to respecting that valuation, are not questions admitting of demonstration, and reasonable lawyers will disagree. Though the second right will not be so inherently controversial in its application as the first, it may be almost so. But (again here as elsewhere) it would be a mistake to take the skeptical claim as defeating the importance of a moral or legal principle, or as an excuse for refusing to deploy and defend as persuasive an application of that principle, in any particular case, as we can. For the practical importance of a contestable principle is not something that can be established *a priori*, in advance of our best attempts to see how far the principle takes us away from (what we take to be) injustice. This foolish form of skepticism is most often a self-fulfilling prophecy.

Where are we? We have seen that people drawn into the criminal process do not have a right to the most accurate possible procedures for testing the charges against them. But they do have two other genuine rights: the right to procedures that put a proper valuation on moral harm in the calculations that fix the risk of injustice that they will run; and the related and practically more important right to equal treatment with respect to that evaluation. It is that latter right that explains the due process cases in the Supreme Court, some of which I have mentioned, and which I soon shall consider in a slightly different context. I propose first, however, to apply the account of criminal procedure we have developed to the fourth and fifth of the questions I listed. These consist in the problem of civil procedure, and the issue of whether the law of evidence in civil cases shows an important defect or gap in the theory of adjudication that argues that civil cases should be and characteristically are decided on grounds of principle rather than policy.

PLAINLY, no one has a right to the most accurate possible procedures for adjudicating his or her claims in civil law. Nevertheless, someone who is held in tort for damage caused by negligently driving, when in fact he was not behind the wheel, or someone who is unable to pursue a genuine claim for damage to reputation, because she is unable to discover the name of the person who slandered her, or someone who loses a meritorious case in contract, because rules of evidence make the communication that would have established the claim privileged, has suffered an injustice, though the amount of the moral harm may well be different in these different cases. So civil litigants must have in principle the same two rights we found for those accused of crime. They have a right to procedures justified by the correct assignment of importance to the moral harm the procedures risk, and a related right to a consistent evaluation of that harm in the procedures af-

forded them as compared with the procedures afforded others in different civil cases.

The first of these two rights is a background and a legislative right. Everyone has a right that the legislature fix civil procedures that correctly assess the risk and importance of moral harm, and this right holds against the courts when these institutions act in an explicitly legislative manner, as when the Supreme Court enacts and publishes rules of civil procedure, for example, independently of any lawsuit. The second is a legal right. It holds, that is, against courts in their adjudicative capacity. It is a right to the consistent application of that theory of moral harm that figures in the best justification of settled legal practice. In the United States the comparable right in criminal trials is also a constitutional right, through the due process clause of the Fifth and Fourteenth amendments to the Constitution, as I said. That means that the courts have a duty to review procedures established by explicit legislation to see whether the historical theory of moral harm, embedded in traditions of criminal practice, has been sufficiently respected. There does not seem to be any similar general constitutional right on the civil side. The due process clauses have been interpreted to require at least a hearing and the form of adjudication in certain kinds of civil proceedings that might result in the deprivation of property broadly conceived.⁷ But a legislature is not otherwise held, on the civil side, to any historical assessment of the risk worth running when it adopts some new rule of evidence designed to save money or to achieve some concrete benefit for society as a whole. Except through the operation of the equal protection clause and other provisions designed to insure that citizens are treated as equals in each of these decisions. In any case, it is the legal right *tout court*, quite apart from any constitutional right, that concerns us in this section.

I said, when I introduced this issue, that cases like *D v. NSPCC* and *Granada* pose an important problem for theories of adjudication, because in these cases arguments about what conduces to the general welfare seem to play a controlling role in civil litigation. The parties disagree, not only about the ultimate substantive rights in question, but about the legal mechanisms that will be used to decide that ultimate question, and judges take the impact of different mechanisms on the society as a whole as at least pertinent to their decision on that procedural issue. Does that practice call into question—or even provide an ungainly exception to—the general proposition that adjudication is a matter of principle rather than policy?

We should notice, first, that even if the procedural issues were decided as plain issues of policy, that would pose no flat contradiction to the claim that the underlying substantive issue is an issue of principle. This follows from the fact that the practices of the cost-efficient society we discussed, on the criminal side, were not logically contradictory. But there would be a kind of

moral inconsistency, parallel to the moral inconsistency we discovered in that society. For the idea that adjudication is a matter of principle—that someone is entitled to win a lawsuit if the law is on his side, even if the society overall loses thereby, and even if the law on which he relies was justified in the first instance on grounds of policy—presupposes that some distinct importance, at least, is attached to moral harm; and if that is so, then it is morally inconsistent to leave the procedures that protect against this moral harm to a utilitarian calculation that denies that presupposition.

But these reflections also show why the crude description, that procedural issues in cases like *D v. NSPCC* and *Granada* are decided on grounds of policy, is misleading. For the central question raised in such cases is the question whether the party claiming some procedural advantage or benefit is entitled to it as a matter of right, in virtue of his general right to a level of accuracy consistent with the theory of moral harm reflected in the civil law as a whole. The question is the question, that is, of the content of the second right we distinguished. That explains why the judges' calculations are not (as they would be if the crude description were satisfactory) calculations like those we imagined for fixing criminal procedures in the cost-efficient society. Judges deciding hard cases about evidence and procedure do not just balance the bare harm associated with an inaccurate decision against the social gains from procedures or rules that increase the risk of inaccurate decisions. On the contrary, once we have the distinctions we have brought to the surface in hand, we see that the calculations are rather those appropriate to a scheme of justice that recognizes the distinct procedural right that we have identified as a legal right.

This fact is sometimes obscured as much as revealed by judicial rhetoric. Rupert Cross cites, for example, the following statement by Lord Edmund Davies in *D v. NSPCC*:

The disclosure of all evidence relevant to the trial of an issue being at all times a matter of considerable public interest, the question to be determined is whether it is clearly demonstrated that in the particular case the public interest would nevertheless be better served by excluding evidence despite its relevance. If, on balance, the matter is left in doubt, disclosure should be ordered.⁸

This seems like the language of ordinary cost-benefit balancing, topped up with a tie-breaker in favor of the disclosure of relevant information. But on a second look, it makes no sense read in that way.

It cannot sensibly be thought that the public has a “considerable” interest in learning the identity of the particular person who falsely accused D of cruelty to her children, or even in learning the particular identity of all persons who are accused of making such false accusations. It is hard to imagine any political decisions that the public could make more intelli-

gently if in possession of that information, for example. Perhaps there are people of morbid curiosity whose utility would rise if they could read the informer's name in the morning tabloids. But this utility gain could not be thought to outbalance the loss in utility to children if the Society's work stood any chance of suffering by disclosure, and would hardly justify the presumption in favor of disclosure in "doubtful" cases. Surely we must understand the reference to the public's interest in information to refer to its interest in justice being done, not to its interest in the information itself. But even this formulation would be misleading if it were taken to refer to the public's actual concern that justice be done in civil litigation, as this might be disclosed, for example, in a Gallup poll. For neither his Lordship nor anyone else has any accurate sense of how much the public cares about this—surely some care more than others and some not at all—and neither he nor anyone else would think that less material should be disclosed in litigation during those inevitable periods when the public as a whole cares less, perhaps because it is more occupied with seasonal matters of concern, like the World Series.

References to the public's interest in disclosure or in justice make sense only as disguised and misleading references to individual rights, that is, as references to the level of accuracy that litigants are entitled to have *against* the public interest in, for example, the flow of information to useful public agencies or newspapers. For the public does have a straightforward interest, of the sort that might be captured in some utilitarian analysis, in the efficiency of these institutions. What is in question, in these cases, is whether the litigant is entitled to a level of accuracy, measured in terms of the risk of moral harm, that must trump these otherwise important and legitimate social concerns. That is a question of principle, not policy, though it is, as I hope the discussion of this essay makes plain, rather a special question of principle in various ways.

First, it is a question that requires, in the determination of the content of a right, attention to the social consequences of different rules and practices. I have tried, elsewhere, to distinguish questions of policy from questions of principle that involve consequential considerations, in order to guard against the unfortunate conflation of these two kinds of social questions.⁹ Consequences enter into calculations enforcing the right under discussion, however, the right to a consistent assessment of the importance of moral harm, in a particularly intimate way. For our language does not provide us a metric for stating that content in sufficient detail to be helpful except comparatively, that is, by setting out the kinds of social gain that would or would not justify running a particular risk of a particular sort of moral harm. That is the consequence of something I have been at pains to emphasize, which is that the right in question is the right that a particular importance be attached to the risk of moral harm, not a right to a particular,

independently describable, overall level of accuracy in adjudication. If a particular rule of evidence will even marginally improve the accuracy of a trial and will cost society nothing either in general expense or in particular competing policies, then the court's failure to adopt that rule would show that it valued the risk of injustice at almost nothing. But if a rule would improve accuracy by a great deal but cost the community heavily, then a failure to adopt that rule would be consistent with valuing the risk of injustice very high indeed.

The plaintiff in *D v. NSPCC* argued that if the risk of civil injustice was given its normal force, the danger of that risk would be more important than the social loss that might follow disclosure of the informer's name. There was no way that the court could decide whether she was right without considering, not only the value put on the risk of injustice in civil cases generally—the value suggested in Lord Edmund Davies' remarks about doubtful cases—but also the complex value to society of the work of that agency. But it would be a mistake to conclude that because the court considered the latter issue in some detail the problem it faced was a problem of policy rather than principle.

Second, the play of principle in a court's decision about procedural issues may seem to leave room for judicial discretion, and therefore for genuine policy arguments of a sort that are normally out of place in substantive issues. When issues of substance are at stake, the defendant's rights begin where the plaintiff's leave off, so that once it is decided, for example, that the plaintiff has no right to damages for breach of contract, it follows that the defendant has a right that damages not be given. This is the consequence, as I have tried to explain elsewhere, not of any intrinsic logic in the grammar of rights and duties (quite the contrary, since that grammar is three-valued), but rather of the fact that substantive law is set out in what I called "dispositive" concepts, like the concept of liability in contract, whose function is precisely to bridge the gap between the failure of the plaintiff's right and the success of the defendant's.¹⁰ But this connection between the two rights does not hold in the case of procedure, for it plainly does not follow from the fact that the plaintiff is not entitled to the admission of some document, for example, that the defendant is entitled that it be excluded.

We must be careful not to misunderstand this point. The basic procedural right in civil litigation is the right that the risk of the moral harm of an unjust result be assessed consistently so that no less importance is attached to that risk by a court's procedural decisions than is attached in the law as a whole. Both parties have that procedural right, though in most cases only one will rely on that right to demand some procedural benefit. But neither party has any right *against* procedures *more* accurate than the accuracy required by that right. It might therefore *seem* that once it is clear that the

party contending for the admission of some evidence has no right to have it, a genuine policy issue is still presented whether, all things considered, the public would gain or lose more by permitting evidence of this character. For if the public would gain more from its disclosure, then the reason for disclosing it must be the public's interest rather than the procedural rights of either party, and that is just to say that the reason for admitting it must be policy rather than principle.

It should be clear from the preceding discussion, however, that this line of argument has gone wrong. It assumes that the procedural right is a right to a fixed level of accuracy rather than the right to a certain weight attached to the risk of injustice and moral harm. If the right were a right to a given level of accuracy, then the court's decision would be taken, as the argument assumes, in two steps: the first a judgment of principle asking whether the required level of accuracy would be achieved, as a matter of antecedent probability, even if the evidence were excluded; and the second a policy judgment whether, if so, to exclude it. But since the decision is a decision whether the risk of moral harm has been properly weighted, these two steps collapse into one. For if the "policy" calculations indicate that the public would not benefit from the exclusion of this evidence, or from a rule excluding evidence like this, then a decision nevertheless to exclude that evidence would indicate no concern with the risk of moral harm whatsoever, and would plainly violate the procedural right of the party seeking to admit it. So, though the reasons are different, the instrumental and consequential calculations associated with procedural decisions are just as thoroughly embedded in arguments of principle as such calculations are when they appear in substantive decisions. Consequences figure not in deciding whether to admit evidence to which no party is entitled, but in deciding whether one party is entitled to have that evidence.

The Court of Appeal's decision in *Granada*, though baroque, illustrates the principled character of the consequential arguments of procedure sufficiently well, though the case is complicated by the fact that British Steel sued for the information it wanted in an independent action, under the provision in *Norwich Pharmacal*, rather than as part of a larger substantive action against the television company. The Court of Appeal held that British Steel was not "in principle" entitled to the information, because the danger that it would suffer injustice for lack of that information was outweighed by the public interest in the free flow of information, which the Court believed would be to some extent cut off if potential informers knew that their names might be revealed in litigation. That was not a mere cost-benefit analysis, because it weighed the interests of potential plaintiffs in the position of British Steel much higher than these interests would rank in such an analysis. It ranked these interests as interests in avoiding moral harm. Nevertheless, it held that these interests, properly weighted, were

outbalanced by the public interest in news. But it then held that, in the particular circumstances of this case, taking into account the less than exemplary behavior of Granada, the public interest was not well served by protecting the confidentiality of the informer. (It is hard to see how Granada's conduct undercut the value of the news it gathered to the public, but that is nevertheless what the Court, if its decision is to be rational, must have supposed.) But in that case the threat of injustice to British Steel was not outweighed by the public interest on the special facts of the case. So failure to require disclosure would have violated that company's right to a proper concern for the threat of injustice to it.

THE SIXTH and last question I distinguished asks whether citizens can have any procedural rights to participate in what are plainly policy decisions (beyond their right to participate in the election of the government that decides these issues, in the way all citizens do) because these decisions in some way particularly affect them. That question is raised, as I said, by the *Bushell* decision in the House of Lords, which held that even though a hearing is required in connection with the government's decision to build a highway in a particular area as part of a national scheme, that hearing need not include any cross-examination by local residents on the question of whether the pertinent department's general assumptions about traffic flow in the nation are right. Lord Diplock, in the most thoughtful of their Lordships' speeches, said that whether fairness requires opportunity for such cross-examination depends "on all the circumstances," which include as "most important, the inspector's own views as to whether the likelihood that cross-examination will enable him to make a report which will be more useful to the minister in reaching his decision than it otherwise would, is sufficient to justify any expense and inconvenience to other parties to the inquiry which would be caused by any resulting prolongation of it." That language suggests that people particularly affected by a highway planning decision have no rights to any particular procedure in the conduct of any hearing at all, beyond what some statute might explicitly provide, so that the decision what procedures to provide is entirely a matter of cost-benefit policy considerations in the style of the cost-benefit society we imagined.

The argument of the preceding sections of this essay suggests no flaw in Lord Diplock's argument—unless we believe that if the government builds an unwise highway, because it relies on inaccurate predictions about traffic, it commits an act of injustice toward those who will be inconvenienced by that highway. Is an unwise highway an act of injustice? I assume that no one has a right not to have the highway built, in the strong sense that it would be wrong to build it even if it were wise policy to do so. Suppose we say, however, that since a deliberate decision to build a highway that is known

not to be justified on utilitarian grounds is an act of injustice and imposes moral harm on everyone who thereby loses, a mistaken decision to build a highway that is not justified on utilitarian grounds is also an act of injustice, though less serious injustice. That argument might seek to rely on some analogy to the proposition that a mistaken conviction of an innocent man is an act of injustice though not so serious as a deliberate framing. But the comparison is invalid, because it makes no sense to say that people have a right to what an accurate utilitarian calculation provides them, at least in the sense in which we can say that people have a right not to be punished for a crime they did not commit.

But the mistake in the present argument is deeper than that, because it fails even if we do assume that when the government makes a mistake in its policy calculations the government thereby violates each citizen's rights. Lord Diplock supposes that even if the public would lose overall by some highway decision, it may nevertheless gain by procedures that run a greater risk of allowing that mistake to be made than other, more expensive procedures would. Everything depends on whether the increased procedural costs of, for example, allowing local examination of every feature of the national program are worth the gains in the actual design of the program that would be *antecedently* likely to result. If they are not, then the fact, available only by hindsight, that the more expensive procedure would actually have produced a better program does not argue that the failure to follow that procedure deprived citizens of what utility would recommend. On the contrary, the best judgment of antecedent utility would then recommend the cheaper procedure followed by an increased risk of the worse program, rather than the more expensive procedure followed by a heightened chance of the better. In that case the decision not to allow cross-examination gave citizens what they were entitled, by the present hypothesis, to have: the decision that maximized average expected utility. So it did not mistakenly violate their alleged right to what utility would recommend, even if, in the event, it produced a highway that utility would condemn. Of course, the decision whether the more expensive procedures would be worth the cost is itself a policy decision. But the fact that the figures in the Red Book were actually wrong does not show, even in hindsight, that the more expensive procedures would have been better. Lord Diplock's point is precisely that the second-order policy decision should be made by the government, through the administrative agency in question, not by the courts.

It would seriously misunderstand this point, however, to conclude that the judgment about what procedures administrative agencies should follow is always or necessarily a second-order policy decision not to be taken by courts. In the controversial case of *Mathews v. Eldridge* (424 US 319 (1976)), the Supreme Court was asked to decide whether the United States Government could terminate someone's social security benefits without an

evidentiary hearing, consistently with the due process clause. The Court said that the decision whether a hearing was required depended on three factors:

first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

The Court noticed, with respect to this third factor, that any additional expense the agency would be forced to incur, if the due process clause were interpreted to require hearings when benefits were canceled, would come from the funds available to other social security claimants. It decided, on the tests it proposed, that the Constitution does not require an adjudicative hearing before anyone's social security benefits are terminated.

Though it is hard to tell, from the surface of judicial rhetoric, whether a particular test is meant to be an ordinary cost-benefit calculation in the utilitarian style or not (as we saw when we studied, earlier, Lord Edmund Davies' speech in *D v. NSPCC*), the Supreme Court's language here does seem rather like Lord Diplock's in *Bushell*. And it has been interpreted by legal commentators to call for a straightforward utilitarian analysis.¹¹ If that is the correct interpretation, the Court has made a serious mistake in supposing that its test is the test the Constitution requires. For, once Congress has specified who is entitled to social security benefits, the people whom Congress has designated have a right to these benefits. It follows that there is an injustice factor in the harm done to these people when they are mistakenly deprived of their benefits, an injustice factor that cannot be captured in any utilitarian calculation, even a sophisticated one that brings the question of the antecedent value of expensive procedures into play. That is the important distinction between *Bushell* and *Mathews*. No one has a right that a highway not be built where it will spoil the landscape, but people do have a right to benefits that Congress (wisely or not) provides them. There is therefore a risk of moral as well as bare harm in any administrative judgment in the latter case, a risk not present in the former, and utility is out of place in the one though not the other.

I do not mean that the Court's decision in *Mathews* was necessarily wrong. For we are not faced here—any more than in the case of criminal procedure—with a stark choice between no procedural rights at all and a right to some particular procedure hang the cost. Participants in the administrative process have the same general procedural rights that litigants bring to court, because these rights are, in the first instance, political rights. People are entitled that the injustice factor in any decision that deprives

them of what they are entitled to have be taken into account, and properly weighted, in any procedures designed to test their substantive rights. But it does not automatically follow either that they do or do not have a right to a hearing of any particular scope or structure. That depends on a variety of factors, conspicuously including those the Court mentioned in *Mathews*. The Court was wrong, not in thinking those factors relevant, but in supposing that the claimant's side of the scales contained only the bare harm he would suffer if his payments were cut off—if that is the correct interpretation of what the Court said. The claimant's side must reflect the proper weighting of the risk of moral harm, though it might well be that the balance will nevertheless tip in the direction of denying a full adjudicative hearing anyway.

Because the question presented to a court in a case like *Mathews* is a question of principle, requiring a judgment about whether the right to a consistent assessment of the risk of moral harm has been met, it is a fit question for adjudication, and the Court would do wrong simply to defer to the agency's judgment on that question, though it may defer, on grounds of expert knowledge, to the agency's judgment on the consequentialist components of the question. Once again, that makes *Mathews* different from *Bushell*. In the latter case, the issue of procedure was itself integrated with other issues in an ordinary judgment of policy, with no distinct issue of entitlement. The general institutional scheme that assigns issues of policy to the executive rather than to the courts assigns the question of procedure to the agency. In *Mathews* there is a distinct issue of principle, and the courts cannot defer on that issue without cheating on their responsibility to say what people's constitutional rights are.

We must now ask, however, whether there are any other arguments—beyond the risk of substantive injustice which has been our principal concern in this essay—in favor of expensive procedures for administrative agencies or other bodies. In his recent and important treatise on constitutional law, Laurence Tribe suggests a distinction between two different grounds of principle for the due process requirements of the Constitution in cases like *Mathews*. He says that these requirements might be understood instrumentally, as stipulating procedures justified because they increase the accuracy of the underlying substantive judgments, or intrinsically, as something to which people are entitled when government acts in a way that singles them out, independently of any effect the procedure might have on the final outcome. The latter interpretation supposes, as he says, that both

the right to be heard from, and the right to be told why, are analytically distinct from the right to secure a different outcome; these rights to interchange express the elementary idea that to be a *person*, rather than a *thing*, is at least to be *consulted* about what is done with one. . . . For when government acts in a way that singles out identifiable individuals—in a way that is

likely to be premised on suppositions about specific persons—it activates the special concern about being personally *talked to* about the decision rather than simply being *dealt with*.¹²

Tribe notes that the Court's actual decisions seem more consistent with the first of his two interpretations of the due process requirement than the second, perhaps, he suggests, because it has not noticed the distinction.

This analysis is of undeniable interest. But the reference to "special concern" requires some attention. It cannot mean to call attention simply to an aspect of bare harm that might be overlooked. For though it may be a psychological fact that people generally mind an adverse decision more if it is taken facelessly, without their participation, this is the sort of harm that figures in any decent utilitarian calculation, not a reason why the decision whether to hold a hearing should not be based on such a calculation. It is doubtful, in any case, whether that kind of bare harm would outweigh the loss to other social security claimants, or to other recipients of federal welfare programs, who would in the end bear the cost of expensive hearings.

So the "special concern" must be the fact or risk of some moral harm, not just a special kind of bare harm. But this cannot be only the risk of substantive injustice, for that is the harm contemplated by the instrumental interpretation of the procedural requirements. The intrinsic interpretation points to a different form of moral harm. But what? The language about talking to people rather than dealing with them, and about treating them as people rather than things, is of little help here, as it generally is in political theory. For it does not show why the undoubted harm of faceless decisions is not merely bare harm, and statements about what treatment treats a person as a person are at best conclusions of arguments, not premises. Nor is the reference to the fact that the decision is about particular individuals rather than large groups of people much help. We need to know why that makes a difference. The only suggestion in these passages is that a decision about a few people "is likely to be premised on suppositions about specific persons." But this brings us back to accuracy, because it suggests that the moral harm lies in being thought to have or not to have particular disabilities or qualifications, and that can be seen to be moral harm, without further argument, only if it is false.

So more work needs to be done to establish a relevant head of moral harm distinct from inaccuracy. Perhaps Tribe means only to suggest that the constitutional due process requirements are justified because inaccurate administrative decisions produce moral harm as well as bare harm, in which case his point does not require a distinction between instrumental and intrinsic aspects of due process, but rather a distinction within the instrumental aspect that calls attention to the importance of protecting against a kind of moral harm that falls outside cost-benefit, utilitarian calculations.

Yet we do have intuitions, at least, that more is at stake in procedural

issues than even that sort of moral harm. Suppose someone is punished for a crime we are absolutely certain he did commit, but with no trial whatsoever. We feel he has suffered an injustice, but it is artificial, I think, to suppose that this has much to do with the risk that he would be convicted though innocent. For we are certain that the risk was exactly nothing. No doubt our sense of injustice here is connected to the idea that people must be heard before society officially reaches certain sorts of conclusions about them. But these conclusions must be something to their discredit. It is perhaps not too strong to say that it must be something to their moral discredit, using morality here in the broader of the two senses John Mackie has usefully distinguished.¹³ That would explain the idea and the law of bills of attainder, that is, laws that are unconstitutional because they are legislative rather than adjudicative determinations of the guilt of named individuals or groups.

It remains an open question what moral harm, distinct from the risk of substantive injustice, lies in these *ex parte* determinations of guilt that offer no role to the individual condemned. That is too big a question to begin here. But plainly there is no question of any such moral harm in highway hearings of the sort that figured in *Bushell*. There may be more room for argument in the case of a decision to terminate social security benefits, but that must surely depend on the kind of ground relied on or implicitly suggested for the termination.