THE MODERN LAW REVIEW
Modern Law Review
DOI: 10.1111/1468-2230.12556

Why Fair Procedures Always Make a Difference

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Section 31(2A) of the Senior Courts Act 1981 (as inserted by the Criminal Justice and Courts Act 2015) requires judges to refuse relief in judicial review of administrative decisions if it is 'highly likely' that the conduct complained of did not make a significant difference to the outcome of the decision. The strongest justification for this 'Makes No Difference' principle is provided by a 'narrow instrumental view' of fair procedures, according to which their value lies only in their producing the correct outcome. This conception of procedural fairness, however, is impoverished and flawed as a matter of political morality. Fair procedures reflect a conception of citizens as participants in their own governance and play an important communicative role in democratic legal orders. Inasmuch as it leaves no room for these aspects of the value of fair procedures, the Makes No Difference principle embodied in section 31(2A) is *pro tanto* unjust.

INTRODUCTION

The last decade has seen a host of governmental attempts to reduce the capacity of citizens to access judicial review of administrative decisions. Legal aid funding has been consistently cut,[1] adverse costs orders bar in practice the majority of potential claims from reaching a courtroom,[2] and prohibitive costs are attached to various lower court and tribunal proceedings.[3] Among these efforts to clamp down on judicial review we can count section 84 of the Criminal Justice and Courts Act 2015. The provision introduced the requirement that High Court judges refuse relief in applications for judicial review (or refuse permission, as the case may be) in cases where an administrative decision-maker has acted unlawfully, where it is thought that the conduct complained of made no significant difference to the outcome of the decision.[4] Suppose, for example, that a local authority grants planning permission for a new shopping mall in

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1 Amnesty International, *Cuts That Hurt: The Impact of Legal Aid Costs in England on Access to Justice* (2016) at https://www.amnesty.org.uk/files/aiuk_legal_aid_report.pdf. Unless otherwise stated, all URLs were last accessed 22 July 2019.
2 T. Hickman, 'Public Law's Disgrace' *UK Constitutional Law Association Blog* 9 February 2017 at https://ukconstitutionallaw.org/2017/02/09/tom-hickman-public-laws-disgrace/; T. Hickman, 'Public Law's Disgrace Part 2' *UK Constitutional Law Association Blog* 26 October 2017 at https://ukconstitutionallaw.org/2017/10/26/tom-hickman-public-laws-disgrace-part-2/.
3 *R (UNISON)* v *Lord Chancellor* [2017] UKSC 51.
4 Criminal Justice and Courts Act 2015, s 84.

a residential area, without consulting local residents. The residents then seek judicial review of this decision, on the grounds that the failure to consult them made the decision unlawful. If it seems to the judge 'highly likely' that planning permission would have been granted even if the residents had been consulted, then the judge must refuse relief, notwithstanding the illegality of the decision. Call this requirement the 'Makes No Difference' principle.

In this paper I analyse whether any compelling justification can be offered for the Makes No Difference principle. I argue that even read in its most philosophically coherent light, the principle rests on a conception of the value of fair procedures that is deeply problematic as a matter of political morality. The strongest justification for the principle is based on a 'narrow instrumental view' of fair procedures. According to this view, fair procedures are not valuable in and of themselves. Rather, they are valuable because they further the specific instrumental aim of producing the right outcome in individual cases.[5]

I argue that this theoretical underpinning is flawed. The narrow instrumental view elides two other important ways in which fair procedures are valuable. First, properly understood, fair procedures express a conception of citizens as responsible agents with a right to participate in the creation and enforcement of law. This aspect of procedural justice is well understood in the relevant literature. Secondly, I argue that democratic legal systems play an important *communicative* role in expressing an ideal of equal citizenship, and that fair procedures are essential to law playing this role.

Taken together, these two grounds of objection demonstrate that the Makes No Difference principle is *pro tanto* unjust, because the narrow instrumental view that underpins it is wrong. It may be that further arguments can be given as to why the Makes No Difference principle is *all things considered* just. Absent this further justification, however, the on-going development of procedural fairness as a head of judicial review should place these further aspects of the value of fair procedures at its heart.

Before proceeding, it might be useful to set out upfront what kinds of 'unfair' procedure I am interested in. My analysis of the Makes No Difference principle turns on arguments about why fair procedures are valuable. It would beg the question to say that a procedure counts as 'unfair' if it fails to embody the value that I identify. I will stipulate from the outset, then, that I take an 'unfair procedure' to mean unfair in any sense currently recognised in public and administrative law. A procedure might be unfair if, for example, the decision makers failed to consult affected parties, if the decision maker did not give reasons for their decisions, if a decision maker was biased, or if the sort of procedure used is deemed to have been inadequate to reach the sort of decision that had to be made, such as when a parole board reaches a decision without granting a prisoner an oral parole hearing. The account that I set out in this article seeks

5 Throughout this paper, I am agnostic about what is meant by the 'right outcome' or 'correct outcome'. I use these terms rather than the narrower 'fair outcome' since, presumably, values other than fairness, such as justice, will play a role in determining the all things considered rightness of an outcome.

to explain why guarding against these sorts of procedural shortcomings is to be valued.

This is a fairly thin definition of fairness. It does not seek to extend the concept to anything beyond what currently exists as a matter of law.[6] I use it here for three reasons. First, it is thin enough to avoid begging the question in favour of the value of fair procedures that I identify later. My goal is to explain why an aspect of our public law practice is valuable, rather than to construct an *a priori* conception of the value of fair procedures. If the Makes No Difference principle cuts against this aspect of public law practice without adequate justification, then we have reason to reconsider it.

Secondly, by adopting a minimalist definition of fairness I hope to avoid the accusation that I am setting too high a moral standard for the legislation in question to reach. I believe that the Makes No Difference principle is *pro tanto* unjust by the lights of even this bare conception of fair procedures.

Finally, limiting the definition of fair procedures to those already recognised at law is appropriate, because the Makes No Difference principle does not purport to make decisions that are procedurally flawed in these ways *lawful*. Rather, it simply shields unlawful decisions from judicial review.[7] There is no need, then, to offer an expansive definition of unfair procedures. The Makes No Difference principle protects decisions that have already been defined as unfair as a matter of law.

THE 'MAKES NO DIFFERENCE' PRINCIPLE AND THE NARROW INSTRUMENTAL VIEW OF FAIR PROCEDURES

The 'Makes No Difference' principle

Section 31(2A) of the Senior Courts Act 1981 (as inserted by section 84 of the Criminal Justice and Courts Act 2015) provides that, save for reasons of exceptional public interest, the High Court must refuse to grant an application for judicial review 'if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred'. Section 31(3A)-(3D) permits the Court to consider this at the permission stage of a judicial review application.

This requirement applies to any ground on which it is claimed that an administrative decision was legally flawed. The effect that this will have on judicial

6 How would this definition deal with a morally iniquitous or arbitrary procedure being recognised as 'fair' by law? ie if Parliament removed one of the examples I have given as a ground of judicial review, or if judges stopped considering one of these as an example of procedural unfairness, would that procedure be considered 'fair', according to my definition? The answer is that this would not necessarily follow. I take the existing grounds of review to provide paradigmatic examples of procedural unfairness. This does not mean that a morally iniquitous procedure that was not deemed 'unfair' as a matter of law would necessarily be considered 'fair'. I remain agnostic on that point, as it does not have a bearing on the arguments that follow.

7 M. Elliott, 'The Duty to Give Reasons and the New Statutory "Makes No Difference" Principle' *Public Law for Everyone* 18 April 2016 at https://publiclawforeveryone.com/2016/04/18/the-duty-to-give-reasons-and-the-new-statutory-makes-no-difference-principle/.

review applications will vary depending on the head of review. In cases where a decision-maker acted unreasonably in the *Wednesbury* sense, for example, it is doubtful that a Court would decide that it was 'highly likely' that this unreasonableness made no substantial difference to the outcome.[8] Claims made under other heads of review, however, are more likely to fall foul of the test. In particular, cases involving some claim of procedural unfairness seem the most likely to be stung. Mark Elliott argues that cases involving the requirement to give reasons, for example, are much more likely than other sorts of cases to fall under the provision.[9] I think that this is convincing, but I wish to make a broader argument than Elliott. In what follows, I argue that the Makes No Difference Principle is *pro tanto* unjust as a matter of political morality when applied to judicial review on the basis of any aspect of procedural unfairness.[10]

Prior to the introduction of this statute, the courts had already developed a doctrine for dealing with cases in which it was thought that a procedural flaw would not have affected the outcome of a decision. Judges were permitted to refuse an application on the basis of procedural fairness at common law where they were satisfied that the decisions would 'inevitably' have been the same had there been no procedural impropriety.[11] The new statutory requirement, then, seems designed to curtail successful judicial review applications in two ways. First, it lowers the standard for refusing review from the requirement that it be 'inevitable' that a fair procedure would have led to the same outcome, to the lower threshold of it having been 'highly likely' that a procedure would have led to the same outcome. Secondly, it *requires* the High Court to refuse an application absent an exceptional public interest, rather than granting them discretion to do so.[12] Courts approached the old inevitability standard with caution; it was not enough that it was merely probable that a decision-maker would have reached the same decision with a proper procedure.[13]

The reason for this statutory intervention was ostensibly that judicial review was being used too often 'to delay perfectly reasonable decisions or actions'.[14] This supposedly frivolous use of judicial review, according to Chris Grayling, Lord Chancellor and Secretary of State for Justice at the time, 'is bad for the economy and the taxpayer, and also bad for public confidence in the justice system'.[15] The 2015 Act thus requires judges to withhold access to judicial review

8 *ibid*.
9 *ibid*. For an analysis of the courts' recent approach to the requirement of reason giving specifically, see J. Bell, 'Reason-Giving in Administrative Law: Where are We and Why have the Courts not Embraced the 'General Common Law Duty to Give Reasons'? (2019) 82 MLR 983.
10 This includes, for example, cases involving the right to an oral parole hearing (*R (Osborn)* v *Parole Board* [2013] UKSC 61), the right to legal representation (*Bourgass* v *Secretary of State for Justice* [2015] UKSC 54), or the right to view and contest the evidence used to obtain a conviction (*Secretary of State for the Home Department* v *AF (No 3)* [2009] UKHL 28).
11 *R* v *Chief Constable of Thames Valley, ex p Cotton* [1990] IRLR 344; *R (on the application of Smith)* v *North Eastern Derbyshire Primary Care Trust* [2006] EWCA Civ 1291. This test is still used in cases in which the claim was brought before the 2015 Act came into force.
12 *R (Wet Finishing Works Ltd)* v *Taunton Deane BC* [2017] EWHC 1837 (Admin) at [74].
13 *R (Smith)* v *North East Derbyshire PCT* [2006] 1 WLR 3315 at [10].
14 *Judicial Review: Proposals for Further Reform* Cm 8703 (2013) at [99].
15 'Ministerial Foreword' in *Judicial Review – Proposals for Further Reform: The Government Response* Cm 8811 (2014) 3.

in certain circumstances in order to cut down on such facetious claims.[16] We might formulate this justification with the following premises and conclusion:

(P1) Government has a legitimate interest in reducing frivolous judicial review claims.
(P2) Restricting access to judicial review by implementing the Makes No Difference principle will achieve the legitimate interest expressed in P1.
(C) The Makes No Difference Principle is justified.

Before proceeding to the main argument of this paper, we might note that premise P2 is extremely dubious. In advance of the introduction of these changes, the government launched a consultation to canvas opinion on the changes. Of the 170 who responded, 132 did not agree with the introduction of a revised test, 21 expressed mixed views, and only 17 agreed.[17] The senior judiciary, who were canvassed, were among those who disagreed with the introduction of the new test, pointing out that it would ensure that unlawful processes which might have had an impact on a decision will not be considered.[18] The final summary point in this section of the consultation responses is pithy: 'Many respondents argued that this proposal reflected a Government misunderstanding of the importance of following a lawful process (particularly those set out in statute), which was as important as any type of substantive illegality'.[19]

Even if we grant premises P1 and P2, however, it should be evident that we cannot proceed to the conclusion that the Makes No Difference principle is justified without further argument. It is generally accepted that fair legal procedures are an essential requirement of justice. There must be a strong presumption against removing the right of redress in the event of procedural unfairness. Proponents of the Makes No Difference principle must show that it is does not violate the demands of procedural fairness. The best strategy for doing so, I believe, is by appealing to a narrow instrumental conception of fair procedures.

16 A wealth of evidence has been provided to show that these fears were imagined or exaggerated. See for example V. Bondy and M. Sunkin, 'Judicial Review Reform: Who is Afraid of Judicial Review? Debunking the Myths of Growth and Abuse' *UK Constitutional Law Association Blog* 10 January 2013 at https://ukconstitutionallaw.org/2013/01/10/varda-bondy-and-maurice-sunkin-judicial-review-reform-who-is-afraid-of-judicial-review-debunking-the-myths-of-growth-and-abuse/; V. Bondy and M. Sunkin, 'How Many JRs are Too Many? An Evidence Based Response to "Judicial Review: Proposals for Further Reform"' *UK Constitutional Law Association Blog* 26 October 2013 at https://ukconstitutionallaw.org/2013/10/25/varda-bondy-and-maurice-sunkin-how-many-jrs-are-too-many-an-evidence-based-response-to-judicial-review-proposals-for-further-reform/; M. Elliott, 'Judicial Review – Why the Ministry of Justice Doesn't Get It' *UK Constitutional Law Association Blog* 16 December 2012 at https://ukconstitutionallaw.org/2012/12/16/mark-elliott-judicial-review-why-the-ministry-of-justice-doesnt-get-it/.

17 *Judicial Review – Proposals for Further Reform: The Government Response* Cm 8811 (2014) at [99].

18 *ibid* at [110].

19 *ibid*.

The narrow instrumental view of fair procedures

On a narrow instrumental view, fair procedures are valuable to the extent that they lead to the right outcome. An unfair procedure that results in the right outcome, following this reasoning, poses no problems from the perspective of justice. At the very least, it does not pose a big enough problem to merit taking up precious court time. This is a *narrow* instrumental conception, as we shall see, because there are various other possible instrumental reasons for valuing procedures beyond their leading to the right outcome. On the narrow instrumental view, producing the right outcome is the only, or at least the most, relevant instrumental aim of fair procedures. On this view, fair procedures have no intrinsic value.

We might think of the narrow instrumental view as adding the following premises to P1 and P2 in support of the Makes No Difference principle:

(P3) Restricting access to judicial review by implementing the Makes No Difference principle is justifiable if the restriction does not undermine the reason for having fair procedures.
(P4) The only reason for having fair procedures is that they lead to the right outcomes.
(P5) Refusing review in cases where a procedural flaw did not affect the outcome of the decision does not undermine the value of fair procedures, as long as the outcome was the correct one.
(C) The Makes No Difference principle is justified.

This conception of fair procedures offers a normative argument on behalf of the Makes No Difference principle, by aiming to show that the principle is consistent with the value of fair procedures, properly understood.

Before exploring the view in greater depth, it merits noting that there are various other instrumental aims, beyond producing the right outcome, that fair procedures might achieve, none of which are captured by the narrow instrumental view. To give one example, compelling research has been presented to show that faith in the justice system and the perception of the legitimacy of the system among citizens turned to a much greater degree on the fairness of the procedure than on the favourability of the outcome.[20] This makes intuitive sense. Most adults are capable of accepting sub-optimal results if they can be provided with reasons. If we care about the perception of legitimacy of a legal system, then it matters that our procedures and not just outcomes are fair.

This particular instrumental aspect of procedural fairness was given expression in a famous judgment on the issue of apparent bias in judicial proceedings. In *R* v *Sussex Justices, ex p McCarthy*, the claimant sought to have a conviction for dangerous driving quashed.[21] One of the judicial clerks who was present when magistrates were considering the defendant's case was also a partner in

20 T. Tyler, J. Casper and B. Fisher, 'Maintaining Allegiance toward Political Authorities: The Role of Prior Attitudes and the Use of Fair Procedures' (1989) 33 *American Journal of Political Science* 629.

21 *R* v *Sussex Justices, ex p McCarthy* [1924] 1 KB 256.

the law firm acting against the defendant in an unrelated civil case. This clerk was not consulted at any point about the case, nor was he in the room when the decision was made. In other words, his presence made no difference to the decision. Nevertheless, the conviction was quashed, because, according to Lord Hewart, it is 'of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done'.[22]

The narrow instrumental view leaves no room for this particular aspect of the instrumental value of fair procedures. Again, this is not to say that producing the right outcome is not a legitimate reason for valuing fair procedures. It is only to say that the narrow instrumental view's *exclusive* concern with producing the right outcome makes it inadequate as an account of the value of fair procedures. There are other instrumental aims that fair procedures help to further. More importantly, I argue below, there are important senses in which fair procedures are *intrinsically* valuable. If the narrow instrumental view underpins the Makes No Difference principle, then we can conclude that the latter is *pro tanto* unjust.

This narrow instrumental view of fair procedures is not entirely without pedigree. In an influential account, D.J. Galligan argued that fair procedures are 'simply those procedures which lead to fair treatment according to authoritative standards'.[23] Procedural fairness, on this view, is an essentially instrumental good, concerned with producing the right outcome. In order to achieve the end of fair treatment, we need certain procedural safeguards:

> Fair treatment requires an accurate finding of fact and the proper application of the statutory criteria to it. In order to ensure that outcome, procedures are needed to provide the necessary information and evidence, and to facilitate a sound and impartial judgment applying the statutory criteria to the facts.[24]

Fair procedures are important, in other words, because they lead to better informed, more carefully taken decisions. This conception also finds support in the judgment of Lord Phillips in *Secretary of State for the Home Department* v *AF (No 3)* (*AF*).[25] In this case, which predates the introduction of the Makes No Difference principle, the accused was denied access to evidence used against them on the grounds of national security. Part of the Court's reasoning turned on a particular understanding of the purpose of procedural fairness as a ground of judicial review. Lord Phillips wrote:

> I do not believe that it is possible to draw a clear distinction between a fair procedure and a procedure that produces a fair result. The object of the procedure is to ensure, in so far as this is possible, that the outcome of the process is a result that accords with the law. Why then should disclosure to the controlee of the case against him be essential if, on the particular facts, this cannot affect the result?[26]

22 *ibid*, 259.
23 D.J. Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Oxford: Clarendon Press, 1996) 95.
24 *ibid*, 53.
25 *Secretary of State for the Home Department* v *AF (No 3)* [2009] UKHL 28.
26 *ibid* at [60].

Few would deny that the goal of producing correct outcomes is *a* reason for thinking that fair procedures are valuable. In law we are concerned with the justice of outcomes and consequences. The presumption of innocence carries the weight it does at least partly because the prospect of innocent persons being wrongfully convicted is so unpalatable. But this is not the only reason that we value the presumption of innocence. It would be difficult to argue that a trial in which an accused person was not afforded the presumption of innocence was unproblematic because he would have been convicted anyway. Intuitively, there is value to the presumption of innocence beyond its instrumental aims. It seems plausible that this should extend to other procedural safeguards as well.[27]

In the remainder of this paper, I argue that the narrow instrumental view is myopic in its focus on outcomes and provides inadequate justification for the Makes No Difference principle. A state's moral authority to make and enforce decisions that affect its citizens is negatively impacted when these decisions are made on foot of unfair procedures, regardless of the whether the outcomes of those procedures are the right ones. My specific targets are premises P4 and P5 above. It is incorrect to say that the value in fair procedures lies in their ability to produce the right outcome. This in turn debunks the claim that refusing review in cases where a procedural flaw did not affect the outcome of the decision does not undermine the value of fair procedures. Therefore, the narrow instrumental view fails to justify the Makes No Difference principle, and the latter principle is *pro tanto* unjust.

The argument proceeds in two parts. First, I argue that the Makes No Difference principle is blind to an important sense in which fair procedures are intrinsically valuable. This thicker conception of fair procedures is implicit in traditional conceptions of the rule of law, which express a particular view of citizens as rational agents entitled to equal respect from the state. Fair procedures are a necessary condition of this demand for respect being fulfilled. Secondly, the narrow instrumental view elides an important connection between fair procedures and a *communicative* aspect of democracy. The facilitation of this communicative function is an important aspect of the value of procedural fairness, but one that is separate from the outcome of the procedure. Taken together, I believe that these arguments show that an unfair procedure is *pro tanto* unjust, regardless of whether a fair procedure would have reached the same outcome. The Makes No Difference principle, in the absence of some other justification unconnected with the fairness of the outcome, is *pro tanto* unjust as a matter of political morality.

27 It is of course possible that there is something morally special about the presumption of innocence that distinguishes it from other procedures. Dworkin for instance argues that the conviction of an innocent person is a special sort of moral wrong, and that this justifies the popular maxim that 'it is better that a thousand guilty people go free than one innocent person is convicted'. This provides an instrumental view of the presumption of innocence in particular, because of the special nature of the moral harm that the presumption seeks to protect against: '… a community that is careless of proof or niggardly in protecting against error … violates the first principle of human dignity'. R. Dworkin, *Justice for Hedgehogs* (Cambridge, MA: Belknap Press of Harvard University Press, 2011) 372; R. Dworkin, *A Matter of Principle* (Cambridge, MA, Harvard University Press, 1985) ch 3. Nevertheless, I think the analogy that I provide here gives us license to ask whether procedures generally are intrinsically valuable.

INITIAL OBJECTIONS AND CLARIFICATIONS

Before considering in more depth the understanding of fair procedures that should underpin procedural unfairness as a head of judicial review, there are three initial objections that might render such an exploration a non-starter. The first considers that the Makes No Difference is so beyond justification that there is little point in analysing it, the second that the Makes No Difference principle is in fact easily justified, and the third that the Makes No Difference principle will itself make no difference. I try to show that each of these objections is misguided.

Searching for principle in politics

One objector might ask why we should bother searching for a principle underpinning what is at heart a strategically motivated effort to clamp down on judicial review. What can political or moral philosophy tell us about the values underlying the law in this area, beyond explaining the motivation of those who drafted it?

It is true that every piece of legislation is conceived in a nexus of political negotiations and compromises, where political actors hold various motivations. Once this process is complete, however, the legal rights and obligations that result from it exist separately from the strategies and compromises that gave rise to them. The principle of legality requires judges to interpret legislation, where possible, consistently with the rule of law.[28] Plainly, legislation restricting standing for judicial review could be read in a way that is problematic from a rule of law perspective. In deciding on the scope of the Makes No Difference principle, then, judges will be entitled to interpret the statute consistently with the rule of law, if possible. In determining whether the statute violates the rule of law, judges will need to ask whether a coherent conception of the value of fair procedures underpins the statute. Suppose that the Makes No Difference principle can be interpreted in two ways: the first expresses a coherent conception of the value of fair procedures, and the second plainly misunderstands the value of fair procedures. The second reading would evidently impact the right to procedural justice that is inherent in the rule of law. Judges would then have to ask whether the statute carries a 'clear and express' meaning in order to see if they are entitled to interpret it in the first, rule of law compliant sense. Determining the conception of fair procedures underpinning the statute, then, is crucial. These debates have a real impact on the shape of public law.

My aim is not to argue that judges should interpret the statute in one way or another. I do not engage with whether the statute carries a 'clear and express' meaning, or whether it is sufficiently ambiguous to allow for the wiggle room that legality supplies. My focus is on the prior issue of the conception of fairness underpinning the statute.

28 *R* v *Secretary of State for the Home Department, ex p Simms* [1999] UKHL 33.

Balancing fair procedures with other values

A second possible objection is that even if it can be shown that an *a priori* understanding of fair procedures is wider than the narrow instrumental view, a narrow instrumental view is enough to justify the Makes No Difference principle in the specific context of administrative decision making. This is because, the objection runs, various values need to be balanced against procedural fairness. This includes concerns about courts becoming over-burdened, avoiding frivolous claims, putting an applicant through the expense and inconvenience of re-running an administrative decision that has no hope of success etc.

This objection is not trivial. It is true that what we consider a justifiable level of fairness in a given circumstance may depend on facts about what is at stake. For example, procedural fairness might make greater demands in a criminal trial than in a planning application.[29] Thus, even if the narrow instrumental view is inadequate as a conception of fair procedures *a priori*, the Makes No Difference principle might be all things considered justifiable, at least when it comes to judicial review of certain administrative decisions, even if it could not justifiably be extended beyond that context.

I do not deny that it may be permissible to relax our conception of what fairness demands depending on the context. What a certain value demands or *means* in a given context will depend on all of the other values in play. In the previous section I specified that I argue that the Makes No Difference principle is *pro tanto* unjust, because it may be that mitigating factors can be introduced. An *a priori* conception of the value of fair procedures is much richer than is expressed in the Makes No Difference principle, but this may not mean that we must pursue fair procedures at all costs. My aim in this paper is more modest. It is simply to show that the narrow instrumental view of procedural fairness fails to justify the Makes No Difference principle *by itself*. Further argument would be required to show that the Makes No Difference principle is all things considered unjust.[30]

The Makes No Difference principle will make no difference

A final possible objection is that any philosophical inquiry into this conception of fair procedures is moot from the outset, because judges will be able to avoid applying the Makes No Difference principle in practice. Perhaps it may not be difficult for a judge to argue that it cannot be said that it is 'highly likely' that an unlawful procedure did not make a 'substantial difference' in a given

29 Though the level of fairness we strive for in criminal trials has a limit too. Dworkin, for instance, points out that criminal trials would be marginally more accurate were we to compose juries of twenty-five rather than twelve jurors, yet this might also make the process unacceptably expensive. Dworkin, *A Matter of Principle*, n 27 above, 72.

30 The arguments that I make here apply in principle to the old 'inevitability' standard as well. That test, however, is less problematic from the perspective of my argument, so I will limit my discussion to the new Makes No Difference principle.

case.[31] Is this an instance where we should be happy to ignore an embarrassingly unprincipled part of the law? A look at the cases in which the provision has been considered should help us answer this question.

It may be helpful to set out a standard for the objection's success in this test from the outset. It should hopefully be uncontroversial to say that in order to conclude that the Makes No Difference principle has made no difference in practice, judges should have established a clear and consistent pattern of rejecting claims that the standard in section 31 has been met. Even this would only be a necessary but not sufficient condition for meeting the hypothesis, since it could simply be the case that judges have only had to grapple with straightforward cases in which the standard has not been met. But it is enough to go on for now, since, as it happens, no such clear and consistent pattern has been established.

The Supreme Court has not yet ruled on the scope of the Makes No Difference principle.[32] In the lower courts, not much in the way of a consistent pattern has emerged. There have been several cases in which the courts have held that it could *not* be said to be highly likely that a procedural flaw would not have led to a substantially different outcome. Many of these have involved challenges to planning decisions. Failure to properly consult affected parties,[33] failure to allow an affected party to make proper representations,[34] failure to consider relevant matters,[35] and decisions made on the basis of incorrect information or misinterpretations of policy frameworks,[36] have all been taken to be the sorts of procedural flaws that could have made a difference to the outcome of a decision. Outside of the planning context, the High Court has also held that the failure of a Police Medical Appeal Board to treat the recommendation of a selected medical practitioner as binding in deciding whether to award a retiring officer an injury pension did not satisfy section 31(2)(A).[37]

In one rather outlandish case, the Court quashed a claimant's previous conviction, on the grounds that the person who attended the trial using the claimant's name was in fact not the claimant but his trusted agent.[38] The correct procedure was followed, but the wrong person was involved. In considering

31 M. Elliott and R. Thomas, *Public Law* (Oxford: OUP, 3rd ed, 2017). A paper jointly published by the Bingham Centre for the Rule of Law, JUSTICE, and the Public Law Project recommended that judges take an extremely restrictive approach to the new provisions. *Judicial Review and the Rule of Law: An Introduction to the Criminal Justice and Courts Act 2015, Part 4* (2015) at https://www.biicl.org/documents/767_judicial_review_and_the_rule_of_law_-_final_for_web_19_oct_2015.pdf?showdocument=1.

32 They considered the provision indirectly in *R (on the application of Haralambous)* v *St Albans Crown Court* [2018] UKSC 1 in a different context. Here the Court held that the Makes No Difference principle in section 31 lent support to the argument that parliament had intended to permit the High Court to use closed material procedures in judicial review in certain instances.

33 *R (Bokrosova)* v *Lambeth LBC* [2015] EWHC 3386; *R (Wet Finishing Works Ltd)* v *Taunton Deane BC* [2017] EWHC 1837 (Admin) at [76].

34 *R (Holborn Studios Ltd)* v *Hackney LBC* [2017] EWHC 2823 (Admin).

35 *R (The Midcounties Co-operative Ltd)* v *Forest of Dean DC* [2017] EWHC 2056 (Admin); *R (Cooper)* v *Ashford BC* [2016] EWHC 1525 (Admin).

36 *R (Crematoria Management Ltd)* v *Welwyn Hatfield BC* [2018] EWHC 382 (Admin); *R (Irving)* v *Mid-Sussex DC* [2016] EWHC 1529.

37 *R (Evans)* v *Chief Constable of Cheshire* [2018] EWHC 952 (Admin).

38 *R (Bahbahani)* v *Ealing Magistrates' Court* [2019] EWHC 1385.

section 31(2A), the Court held that it could not be said that it was highly likely that the outcome for the claimant would not have been substantially different had such an error not occurred.[39] The Court also accepted the argument that the 'outcome' of a criminal case is not limited only to the eventual verdict, but includes the trial process itself.[40] If this reasoning is picked up in subsequent cases, it may limit the scope of the Makes No Difference principle in criminal trials.

Other cases provide cause for optimism for those who believe the Makes No Difference principle will make no difference. Recently, the Court of Appeal expressed some doubt as to whether the new standard would prove very different from the old 'inevitability' standard, though the Court did not state this in certain terms.[41] Here, the Home Secretary's decision to refuse indefinite leave to remain to four Tier 1 migrants was declared unlawful. The Home Secretary had relied on discrepancies in the applicants' tax returns in refusing their applications.[42] Overturning the decision of the Upper Tribunal, the Court held that the appellants were given inadequate opportunity to show that these discrepancies were due to error rather than dishonesty. It could not be said to be highly likely that the Home Secretary's decision would not have been substantially different had the appellants been permitted the opportunity to proffer an innocent explanation for the discrepancies.[43]

In at least one case, the High Court has indicated that decision-makers will need to actively demonstrate that a procedural flaw did not substantially affect their decision. In *R (Public and Commercial Services Union)* v *Minister for the Cabinet Office* (*Public and Commercial Services Union*), the High Court stated that although the threshold had been lowered since the days of the inevitability standard, it 'remains a high one', which 'involves an evaluation of the counter-factual world in which the identified unlawful conduct by the public authority is assumed not to have occurred'.[44] Further:

> [S]elf-interested speculations of this kind [offered by the minister] by an official of the public authority which has been found to have acted unlawfully should be approached with a degree of scepticism by a court. This is especially so where the public authority has not provided a full evidential picture of all matters which bear upon such parameters.[45]

He also added that since the decision making process in this case was a particularly complicated one, it would be very difficult to say that it was highly

39 *ibid* at [77].
40 *ibid* at [63], [77].
41 *Balajigari* v *Secretary of State for the Home Department* [2019] EWCA Civ 673 (*Balajigari*) at [141].
42 The Immigration Rules state, at paragraph 322(5), that leave will normally be refused on the ground of 'the undesirability of permitting the person concerned to remain in the United Kingdom in light of his conduct … character or associations'.
43 n 41 above at [139].
44 *R (Public and Commercial Services Union)* v *Minister for the Cabinet Office* [2017] EWHC 1787 (Admin) at [89]. Here the exclusion of a trade union from a consultation process on changes to the Civil Service Compensation Scheme was held to constitute a breach of the minister's duty to consult the affected parties.
45 *ibid* at [91].

likely that a decision would not have been substantially different in the absence of procedural impropriety.[46]

In *R (Logan)* v *Havering LBC* (*Logan*), the Court advocated a similarly cautious approach.[47] Here the case was decided on other grounds, so statements on section 31 may be read as *obiter*, but Justice Blake cautioned that an analysis of whether a procedural flaw made a difference to the outcome 'should normally be based on material in existence at the time of the decision and not simply post-decision speculation by an individual decision maker'.[48] Any other approach:

> [W]ould undermine the efficacy of judicial review as an instrument to ensure that the rule of law applies to decision making by public authorities, by deterring claimants from bringing a case or the court from granting permission by a declaration by a decision maker who has failed to obey the law to the effect that obedience would have made no difference. Whatever else Parliament may have intended to achieve by this legislation, I cannot infer that it included so draconian a modification of constitutional principles.[49]

If the approach in *Balajigari, Logan* and *Public and Commercial Services Union* is adopted in future cases, perhaps decision makers will have a high evidentiary burden to meet. Further, the complexity of the process may count against a claim that it is highly likely that a decision would not have been substantially different.

Some cases, however, have seen judges accept that it was highly likely that procedural flaws would not have affected the outcome of a decision. In one of the most recent cases to consider the application of the Makes No Difference principle, a parish council sought to argue that the principle applied only to procedural flaws, and not to decisions made on the basis of substantive errors of law.[50] The lower court had issued a declaration to the effect that the decision maker had erred in law in making their decision, but thought it highly likely that the correct procedure would not have produced a different outcome, and so granted only declaratory relief. This was upheld in the High Court, and the Court of Appeal, in dismissing the appeal stressed that 'the concept of "conduct" in section 31(2A) is a broad one, and apt to include both the making

46 *ibid* at [98].
47 *R (Logan)* v *Havering LBC* [2015] EWHC 3193.
48 *ibid* at [55].
49 *ibid*.
50 *R (on the application of Goring-on-Thames Parish Council)* v *South Oxfordshire DC* [2018] EWCA Civ 860. The argument made on behalf of the claimant was, as the Court of Appeal noted at [46], somewhat confusing. At times they seemed to argue section 31 simply did not apply to decisions involving errors of law, while at other times they seemed to claim that the lower court judge had erred in finding that it was highly likely that the decision would not have been substantially different if the conduct complained of had not occurred. The second of these arguments seems to contradict the first, since it relies on the principle being applicable to this decision. Still, it was perhaps uncharitable of the Court of Appeal not to read the argument as 'section 31 does not apply to these cases, *but if it does*, the trial judge erred in his decision', particularly since they went to some lengths to reconstruct the reasoning of the lower court and High Court judges on this point, at [51]-[52].

of substantive decisions and the procedural steps taken in the course of decision-making'.[51] In another case in which a local council had erred in thinking that proposed changes to a neighbourhood development plan did not conflict with a strategic policy developed for the area, the Court held that it was highly likely that the council would have approved the changes even if they had been aware of the conflict.[52]

In one of the most recent cases in which section 31(2A) was engaged, three fire and rescue authorities challenged the Home Secretary's decision to approve a proposal to transfer the governance of the three fire and rescue authorities to the police and crime commissioners in the respective areas.[53] The Home Secretary had identified and applied the wrong statutory test in reaching this decision. Nevertheless, the Court held that it was highly likely that the Home Secretary would have reached the same decision had she applied the correct test, and the claim failed.[54]

In other cases, the Court has rejected applications for review on other grounds, but has stressed that even if the claimants had been right that the conduct complained was unlawful, their claims would have failed under section 31.[55]

While there have then been several occasions so far on which the argument that some procedural unfairness made no difference was unsuccessful, it would be a mistake to conclude from the cases above that section 31 is a meaningless obligation. Judges in several cases have rejected arguments to the effect that the relevant conduct would not have affected the outcome, but the argument has succeeded in some cases, including two of the occasions on which it has reached the Court of Appeal.[56] No very strong guidance has been given thus far on the scope or application of the provision. Perhaps the Makes No Difference principle will prove to make no difference. We shall have to wait longer for a more concrete pattern to emerge to see whether this prediction proves true.[57] Regardless, we should be concerned that courts are now required to couch their arguments in terms of the narrow instrumental conception of fairness envisioned in the 2015 Act. They can decide to grant judicial review, but only by couching their reasoning in terms of the fairness of the outcome. If we take issue with this conception of fair procedures, then we should care about the law

51 *ibid* at [47].

52 *Hoare* v *Vale of White Horse DC* [2017] EWHC 1711 (Admin) at [180].

53 *R (Shropshire and Wrekin Fire Authority)* v *Secretary of State for the Home Department* [2019] EWHC 1967 (Admin).

54 *ibid* at [82]-[86].

55 *R (on the application of Williams)* v *Powys CC* [2016] EWHC 480 (Admin); *R (on the application of Glencore Energy UK Ltd)* v *Revenue and Customs Commissioners* [2017] EWCA Civ 1716; *R (on the application of Friends of Finsbury Park)* v *Haringey LBC* [2016] EWHC 1454 (Admin).

56 n 50 above; *R (on the application of Glencore Energy UK Ltd)* v *Revenue and Customs Commissioners ibid*.

57 It merits noting that in a recent case in which the old 'inevitability' standard was used (because the claim was brought before the 2015 Act came into force), the Court of Appeal found that the decision-maker would *inevitably* have come to the same decision had he not erred in failing to consider whether to exercise certain discretionary powers. If there are cases in which the older, harder to satisfy standard can be met, it seems foreseeable that the new standard will at least on some occasions be met. *Asiweh* v *Secretary of State for the Home Department* [2019] EWCA Civ 13.

containing such a standard, regardless of how lithe judges prove in their evasion of it. Perhaps more importantly, as Elliott notes, the Makes No Difference principle does not purport to render lawful the decisions that fall under it.[58] It merely shields those unlawful decisions from judicial review. An applicant will be refused judicial review even if an administrative decision concerning them was unlawful because of a procedural flaw. This legislation thus joins a historic list of constitutionally problematic legislative measures that deserve deep and probing scrutiny. With this in mind, let us proceed to assess the merits of the conception of fair procedures underpinning the Makes No Difference principle.

FAIR PROCEDURES AND PARTICIPATORY CITIZENSHIP

The narrow instrumental view at the heart of the Makes No Difference principle, recall, posits that fair procedures are important to the extent that they produce the right outcome. This conception would be unduly narrow if it could be shown that fair procedures are intrinsically as well as instrumentally valuable. If this is the case, then the narrow instrumental view is wrong as an account of fair procedures.

A simple way of testing our intuition on this question is to ask whether we would we say that a person had been wronged if an unfair procedure resulted in the right outcome. Consider a prisoner – John – who is denied the opportunity to make representations at an oral parole hearing.[59] The parole board decides that written submissions will suffice, but John is illiterate, and struggles to effectively make the case for his release in writing.[60] Despite being denied an oral hearing, however, he is successful, and is granted parole.

I do not think it uncontroversial to say that the state has acted wrongly in this instance. Many theorists who have considered fair procedures would, I think, agree with this intuition, because they have identified an intrinsic aspect to the value of fair procedures. Imagine that as well as failing to grant John a fair hearing, the parole board decides his case by flipping a coin. Even if the coin flip goes in his favour and he is released, John still has a right to feel aggrieved with the parole board. The parole board has wronged John in some way *by choosing the procedure it did*. A parole board that acts in this way has less legitimate authority to administer parole decisions (if it can be said to have any such authority) than a board that makes its decisions through proper procedures.

How might we make sense of the intuition above? The notion that social order should be arranged on the basis of procedural justice, and not ad hoc decision-making, is a central concern for many traditional visions of political justice.[61] In a celebrated treatise on US constitutional law, Lawrence Tribe sets

58 Elliott, n 7 above.

59 This occurred in *Osborn* v *Parole Board* [2013] UKSC 61. My subsequent elaborations in this example did not occur in that case.

60 This is the sort of contextual fact the Court would likely take into account in deciding whether an oral hearing is necessary for a prisoner to put their case effectively. *ibid* at [2].

61 J. Waldron, 'The Rule of Law in Contemporary Liberal Theory' (1989) 2 *Ratio Juris* 79, 88.

out two ways of understanding the principles underpinning the due process clause of the Fifth Amendment.[62] The due process clause might be defended as instrumentally valuable because it led to fairer outcomes, or as an intrinsically valuable 'right to interchange' with public officials.[63] This latter interpretation, according to Tribe, expresses a certain conception of the individual as a being worthy of respect; it expresses 'the elementary idea that to be a *person*, rather than a *thing*, is at least to be *consulted* about what is done with one'.[64] Trevor Allan, in a review of Galligan's book (discussed in the previous section), builds on this intrinsic aspect of fair procedures.[65] According to Allan, the fairness of procedures is inextricably tied up with a person's dignity and status as an autonomous agent.

The connection between the procedural virtues of a legal system and a corresponding conception of citizens as moral agents is also at the heart of Lon Fuller's conception of legality.[66] As is well known, Fuller posited eight procedural desiderata for a legal system.[67] Underpinning Fuller's account is a particular conception of the citizen (or legal subject) as a moral agent. Certain procedural qualities (of which his desiderata is a non-exhaustive list) express a certain respect for citizens as autonomous agents. Kristen Rundle articulates this aspect of Fuller's work with great clarity: 'Fuller's legal subject', she says, 'is not just an individual possessed of choices, or a planner with regard only to her own interests, but, akin to the Greek conception of the citizen, is envisaged as an active participant in the legal order'.[68] In this way, the state fulfils its duty to '*collaborate* with the legal subject in the creation and maintenance of law'.[69]

This collaborative relationship between the state and citizen is important here. Fox-Decent suggests that we understand this as a *fiduciary* relationship.[70] Citizens permit states the authority to govern through law, on the condition that it obeys the demands of the rule of law. This fiduciary relationship involves more than simple consent.[71] The legal subject does not say 'I consent to ø', but

62 L. Tribe, *American Constitutional Law* (New York, NY: Foundation Press, 3rd ed, 2000) 666.
63 *ibid*.
64 *ibid*. Dworkin offers a critique of Tribe's account. While he agrees with the sentiment that there is some moral harm in cases of procedural injustice that is separate from the outcome of those cases, he seems to view Tribe's attempts to articulate that harm as too vague to be of use. Dworkin, *A Matter of Principle,* n 27 above, 101-103. Whether this is true, the notion of some value in the *participatory* nature of legal procedures which Tribe seems to be pointing to is one that is picked up by other theorists, as we shall see, and so serves as a useful starting point.
65 T.R.S. Allan, 'Procedural Fairness and the Duty of Respect' (1998) 18 OJLS 497. Allan expands on this view at length in T.R.S. Allan, *Constitutional Justice* (Oxford: OUP, 2001) 77-87.
66 L.J. Fuller, *The Morality of Law* (New Haven, CT: Yale University Press, revised ed, 1969).
67 *ibid*, ch 2.
68 K. Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (Oxford: Hart Publishing, 2012) 100.
69 *ibid*.
70 E. Fox-Decent, 'Is the Rule of Law Really Indifferent to Human Rights?' (2008) 27 *Law and Philosophy* 533, 542. This relationship of mutual responsibility is also at the heart of Gerald Postema's account of the rule of law. See G. Postema, 'Law's Rule: Reflexivity, Mutual Accountability, and the Rule of Law' in X. Zhai and M. Quinn (eds), *Bentham's Theory of Law and Public Opinion* (Cambridge: CUP, 2014).
71 For a sophisticated consent-based account of state authority, see L. Green, *The Authority of the State* (Oxford: Clarendon Press, 1990).

rather, 'I consent to ø on the condition that …'.[72] The internal morality of law represents a package of conditions that the state must satisfy to hold up its side of this bargain. These conditions, Fox-Decent claims, centre on the concepts of *freedom* and *dignity*.[73] Roughly, the argument is that to say that an agent has freedom is to imply that she is capable of purposive action. This capacity in turn implies that an agent can choose to obey or disobey the law. The law must then reflect this capacity in order to treat agents as free. Thus, for example, laws must be properly promulgated, because if we do not know what the law is, then we cannot *choose* whether to follow it. And our choosing freely to follow it is at the heart of our fiduciary relationship with the state.

A complete assessment of the concepts of freedom and dignity as being at the heart of the rule of law is beyond the scope of this paper. Needless to say, some might fear that such notions are overly broad, and risk collapsing the rule of law into a 'complete social philosophy'.[74] Whether or not we accept Fox-Decent's final step of connecting the fiduciary relationship between citizen and state to the concepts of dignity or freedom, I think we can at least say that respecting this relationship is necessary for the enforcement of legal standards to be considered fair. If the state fails to respect its commitments in this fiduciary relationship, including enforcing legal standards only in line with fair procedures, then its legitimacy in carrying out this enforcement is undermined. In this sense, the broader notion of a relationship between individual citizens and the state acts as a good starting point for articulating an intrinsic conception of fair procedures. Failure to respect this relationship through fair procedures, we might say, undermines the authority states have to enforce binding standards of conduct.[75] In the narrower context with which we are concerned here, administrative decision makers who fail to uphold fair procedures lack the authority to make and enforce the decisions they do.

The notion of a fiduciary relationship with the state, of which procedural fairness is an important part, is often expressed in terms of the position of citizens as *participants* in the legal order. It is well established that political systems in which we can sensibly claim authorship, systems whose laws we can say are *our* laws, have greater claims to our allegiance than systems in which rules are vertically imposed.[76] This is reflected in the idea of a reciprocal relationship between citizen and state present in Fuller's work. Similarly, in analysing Tribe's discussion of fair procedures, Allan states: 'A principal purpose of the rules of natural justice, more generally, is to enable a person to *identify* with the decision-making process: by observing them we make it easier for him to accept the result'.[77] In

72 As noted by Waldron, n 61 above, 94, something like this argument is also to be found in the jurisprudence of John Finnis. See J. Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1979) 273.

73 Fox-Decent, n 70 above, 550.

74 J. Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979) 211.

75 Of course, efficient administration may also be relevant in determining a state's authority to govern. If the Makes No Difference principle led to more efficient governance, then this might feature in a case for its being all things considered justified.

76 In a trivial sense all legal systems have some vertical authoritative aspect, but there are certainly systems that can claim to afford greater participatory possibility to citizens.

77 Allan, 'Procedural Fairness and the Duty of Respect' n 65 above, 500.

other words, even an unfavourable outcome becomes *her* outcome; an outcome that was reached by a political community of which she is a genuine member with equal standing. In order to sensibly claim to be participants in our political order, a legal system must guarantee certain specific rights and obligations. It seems to me uncontroversial to say that this must include certain guarantees of procedural justice, in the form of fair legal procedures.[78] Any society that eschews a fair procedure for deciding legal disputes lacks the operative structures and institutional arrangements that constitute a political arrangement in which citizens share in the enforcement of the laws that apply to them.

Crucially, if this is the case, then the state commits a *pro tanto* wrong when its standards of procedural fairness slip, even if this brings about no harm.[79] We can now see why John is still wronged when the parole board releases him without granting him a proper hearing. In failing to afford a citizen proper procedures, the state has failed in the endeavour of submitting 'human conduct to the governance of rules'.[80] John's result, though favourable, has come as a result of something closer to what Fuller called 'managerial direction' than law properly understood. Managerial direction is a 'one-way projection of authority' that undermines an individual's dignity by failing to include them as part of the process of governance.[81] When adjudicative processes comply with the demands of legality, they can be said to embody a certain respect for persons as free individuals.[82]

If we take seriously the idea that the law should be *our* law, then it is essential that our legal procedures reflect the ideal of a system in which citizens participate in the administration of law. The question posed by Lord Phillips in *AF* – 'Why then should disclosure to the controlee of the case against him be essential if, on the particular facts, this cannot affect the result?' – has a straightforward answer. It may be essential to disclose to the controlee the case against him because to do so is to treat him as a citizen with a genuine say in the administration and enforcement of the law. Jeremy Waldron articulates this deep requirement of a legal system. Speaking of procedural requirements in law, he says:

> They capture a deep and important sense associated foundationally with the idea of a legal system – that law is a mode of governing people that treats them with respect, as though they had a view of their own to present on the application of a given norm to their conduct or situation. Applying a norm to a human individual is not like deciding what to do about a rabid animal or a dilapidated house. It involves paying attention to a point of view and respecting the personality of the entity one is dealing with.[83]

78 P. Railton, '"We'll See You In Court!" in D. Plunkett, S. Shapiro and K. Toh (eds), *Dimensions of Normativity: New Essays on Metaethics and Jurisprudence* (Oxford: OUP, 2019) 17-19.
79 Fox-Decent, n 70 above, 569.
80 Fuller, n 66 above, 74.
81 *ibid*, 204.
82 Allan, 'Procedural Fairness and the Duty of Respect' n 65 above, 504.
83 J. Waldron, 'The Concept and the Rule of Law' (2008) 43 *Georgia Law Review* 1, 23-24.

Both *AF* and its spiritual descendent in the Makes No Difference principle ignore this aspect of the value of fair procedures. The Makes No Difference principle asks something like the following: 'if conduct C did not occur, would D or D★ have occurred (where D★ is an outcome not substantially different to D)?'[84] The only thing that should concern applicants, on this view, is whether D or D★ should happen, as opposed to whether C should happen. As we have seen above, however, C matters intrinsically from the perspective of fair procedures, and so applicants should be able to challenge it regardless of the difference it makes to D or D★. Decision makers who reach decisions via unfair procedures undermine their own authority to reach those very decisions.

If I am correct to argue that there is an important sense in which fair procedures are intrinsically valuable, then the narrow instrumental view is wrong. As such, it offers no justification for the Makes No Difference principle. Indeed, that the Makes No Difference principle relies on such normative underpinnings provides a compelling moral case *against* that provision. The Makes No Difference principle rests on unsound moral foundations because it expresses a view of applicants before the court as subjects to whom legal rulings are administered from on high, rather than participants in an on-going process of self-government. Pending different arguments in its favour, we can conclude that the Makes No Difference principle is *pro tanto* unjust.

THE COMMUNICATIVE VALUE OF FAIR PROCEDURES

There is another important aspect of the value of fair procedures that is missing from the narrow instrumental view. In the previous section, I argued that procedural fairness is intrinsically valuable because it expresses a conception of participatory citizenship. Procedural fairness also has an important corresponding *communicative* value in facilitating the state in *demonstrating* to citizens that it views them with such respect. This is a related but distinct point.

In recent work, Seana Shiffrin has argued that democratic states have a communicative responsibility to citizens that can only be satisfied through law.[85] Shiffrin's argument is intricate, and merits close consideration. First, she points out that certain attitudes and obligations must not only be adopted or fulfilled, but must be *shown* to be adopted or fulfilled. If I wrong you, I may not be able to dispense with any moral obligations that I owe you simply by *feeling* regret. It is constitutive of regret that one responds to the feeling in certain ways, such as by communicating and expressing that feeling, and perhaps offering to make amends. Just as certain interpersonal duties have a demonstrative component, so can obligations that we owe one another as members of a political community. It is part of treating each other as individual persons deserving of equal respect that we actively communicate and reaffirm this respect. However, this will not always be possible to do effectively at the political level. Because of partiality

84 I am grateful to Simon Palmer for suggesting this formulation.

85 S.V. Shiffrin, 'Lecture I: Democratic Law' (2018) *The Tanner Lectures on Human Values at UC Berkeley*.

towards those closest to us, issues of context, and difficulties of interpretation, we cannot always reliably communicate to others that we consider them our equals. Given this fact, it matters that we belong to a political collective that actively reaffirms the equal standing of all its members.

Mere discursive affirmation of this equal standing, however, would not be enough. Just as merely saying 'thank you' might not always effectively convey gratitude, so state leaders merely declaring their belief in the equality of all citizens may not be enough to effectively convey the message that this is an ideal that we all genuinely hold. What is required is that discursive affirmation and a corresponding conforming pattern of action be 'rendered together as a legibly interconnected pair for either component to realize fully its role in the communicative expression of the moral proposition's endorsement'.[86] Law is the tool with which democratic societies can signal a commitment to justice, and to the equal standing of all members of the political community. As Shiffrin says: 'Were we just to perform what justice (otherwise) requires of us without declaring our commitment through law, in a sense, we would perform the right actions and we might act from respect but we would fail to do so clearly, under the banner of a self-assumed, joint public commitment'.[87] It is not enough, in other words, that we simply happen to act in the right way. We must make clear that our organising society in this way is part of a plan, that we take seriously one another's equal standing within a political community.

If law is supposed to communicate a commitment to the equal citizenship of all, then it is not difficult to see that this role cannot be fulfilled without fair procedures. These procedures are essential to law's *demonstrating* the equal standing of all. In the case of the prisoner whose parole is granted by coin flip, the outcome, even if the correct one, has not come about 'under the banner of a self-assumed, joint public commitment' to justice.

Fair procedures are analogous here to communicative expressions in the interpersonal examples of blame and regret. When we feel it morally appropriate to assign blame to another for wronging us, one factor in determining our reactive attitude towards the agent deemed morally at fault is the attitude that they themselves demonstrate. As Angela Smith notes, 'If someone has an objectionable attitude toward me, for example, but is already reproaching herself for it and making efforts to change, then I may judge that I have no reason to adopt or express any blaming attitudes toward her at all'.[88] Crucially, however, the responsible agent in this case may need to *demonstrate* her mitigating response. Commonly, this might take the form of explaining *why* she is sorry for her actions. In this way, the agent demonstrates an appropriate level of self-reflection.

Suppose another person, ignoring a red light, drives their car into yours, endangering both you and your child in the back seat. Your appropriate anger at this event may not be mitigated by a cheque in the post that covers the cost

86 *ibid*, 16.
87 *ibid*, 23.
88 A. Smith, 'On Being Responsible and Holding Responsible' (2007) 11 *The Journal of Ethics* 465, 482. On appropriate reactive attitudes generally, see P. Strawson, 'Freedom and Resentment' in G. Watson (ed), *Proceedings of the British Academy, Volume 48: 1962* (Oxford: OUP, 1962).

of the damages. After all, the person at fault may simply be trying to avoid legal difficulties or avoid raising their insurance premium. Even if they do intend the gesture to be an act of reparation, they are mistaken if they think that is enough. Monetary reparation may be a necessary constituent element of an appropriate reaction, but it is unlikely to be sufficient.[89] If, however, the cheque is accompanied by a letter explaining why they were particularly unfocussed that day, an apology for their carelessness and a commitment to change, then our anger may appropriately dim. This is because often it does not just matter that the person makes it up to you; it matters that they know why they should make it up to you, and that they communicate this to you in some fashion.

If law is to fulfill its communicative functions, it requires specific content. As Shiffrin puts it: 'If mutual, ongoing communication and affirmation of our values and commitments is a foundational organizing end of democratic law, then we must generate coherent, morally legible law as an articulate representation of our values'.[90] In law, fair procedures are a crucial mechanism for the fulfilment of this communicative function. In establishing that legal rights and obligations will only be enforced as a result of fair and impartial procedures, we signal a commitment to justice that applies to all equally.[91] This is an instrumentally valuable aspect of procedural fairness, but one unconnected with achieving the right outcome in a given case. A person whose parole application would have been granted had they been given an oral parole hearing and a person whose parole still would have been denied had they been granted an oral hearing are both wronged. This is because both have been denied the communicative endorsement of their equal standing as citizens that law provides.

In fact, the wrong here is a more troubling one than a simple a failure to affirm such a commitment to justice. If our legal rules are supposed to represent a joint public commitment to justice, then a legal provision that denies judicial review of decisions made illegally is an affirmation that we do not really honour those commitments after all. To emphasise again: the administrative decisions shielded from review by section 31 were made unlawfully. Section 31 does not render them lawful; merely unreviewable. This particular legal provision communicates the precise opposite of what law is supposed to communicate. It sends the message that citizens are not held in equal regard, as members of a scheme of justice.

When we understand this aspect of fair procedures, we see that we have a right to such procedures that obtains regardless of the contribution that the

89 For an interesting recent critique of some popular accounts of the moral foundations of obligations to make amends, see J. Gardner, *From Personal Life to Private Law* (Oxford: OUP, 2018) ch 3.

90 S. V. Shiffrin, 'Lecture II: Common and Constitutional Law: A Democratic Perspective' (2018) *The Tanner Lectures of Human Values at UC Berkeley*, 177.

91 We can think of this in two ways. Either the state owes certain communicative duties to citizens, or citizens owe communicative duties *to one another*. If we take the latter approach, proper procedures are valuable because they allow us as citizens to communicate to each other that we believe that legal rights and obligations should only be enforced in the right way. In this way, we declare a belief in one another's equal standing. For the purposes of the present argument it does not matter which version we subscribe to. On the importance of *impartiality* specifically in this regard see A. A. S. Zuckerman, 'Interlocutory Remedies in Quest of Procedural Fairness (1993) 56 MLR 325.

procedural flaw made to the outcome of the decision. This is as true of administrative decision making procedures as it is of the procedures of higher courts. The stakes may sometimes be higher in the legal proceedings of higher courts (though as the parole example shows, not always), but this aspect of the value of fair procedures obtains in administrative decision making as well. Administrative decisions are *legal* decisions. They play a role in communicating a belief in the equal status of all, and they can play a role in communicatively denying this status. The Makes No Difference principle sends the message that the joint commitment to justice communicated in our administrative rules is a hollow one.

Finally, we might also note that when we understand this aspect of fair procedures, we can see that an administrative agency wrongs persons who are the subject of unfair procedures even if those procedures work in their favour. An analogy with sport may be illustrative here. When playing a game or sport, we generally want not just to win, but to win 'in the right way'. Suppose that in a game of tennis, you are delighted to narrowly beat me, only to discover afterwards that the umpire was deliberately aiding you by declaring shots that were out as in and vice versa. You will likely feel that your victory was a hollow one. This is because what matters is not just that we obtain a favourable outcome. It matters that the process that led to that outcome was fair, regardless of the outcome itself.

Would it make any moral difference here if the unfair procedure in the game did not make a difference to the overall result? Suppose that instead of playing you, I play three sets of tennis against Roger Federer, who has accepted my challenge on Twitter. After soundly defeating me, I learn that Federer's coaches (Ivan Ljubicic and Severin Lüthi, at the time of writing) bribed the umpire to give Federer the edge. I appeal my loss to relevant tennis authorities, and they reply by pointing out that Roger Federer is considerably better than me at tennis, and would have won even if the umpire had not been bribed. Therefore, I have nothing to complain about. I don't think that it is uncontroversial to say that I have a right to feel aggrieved here. Perhaps as importantly, Federer has a right to feel aggrieved too. The tennis authorities here have failed both of us in some way. They have not treated either of us with the respect that we are entitled to as participants in the sport. Their authority to administer and enforce the rules of the sport rests on their doing so in accordance with fair procedures. When they fail to do so, their authority over both loser and winner is undermined.

In law too, it matters that legal institutions take seriously the communicative function of law, by making decisions in accordance with fair procedures. Imagine that my application for planning permission is granted, and I later receive a letter from an anonymous benefactor, informing me that they bribed the local council to act in my favour. My victory here will stick in my throat, because I know that favourable administrative decisions are supposed to result from the right procedures having been followed. I will not feel much comfort if the letter adds 'in all likelihood they would have given us planning permission anyway; I was just making sure'. As with the tennis authority, the local council here has undermined its own authority to make these sorts of decisions. My queasiness,

it is possible, results from my anonymous benefactor having undermined the joint public commitment to justice that is given expression in legal procedures.

Some might object that there is an important difference between law and sport in this context: this is that in law, we generally think that we have a *right* to win. When an administrative agent decides against us, we think (if we have brought our claim in good faith) that they have got the decision *wrong*. In a sporting contest, we have a strong preference for winning (perhaps even an 'interest' in winning), and a corresponding determination to work hard enough and play well enough to win. This is why it matters that the procedures in sport are fair: because we want our efforts to produce the outcome that they deserve, win or lose. But it would not make sense to say that we have any 'right' that our efforts result in a win. The Makes No Difference principle might thus be unacceptable in sport, where the point is to see where the procedure takes us, but acceptable in law, where the point is to reach the correct outcome. Ignoring a procedural unfairness might not then disrupt the whole enterprise of law the way it would the whole enterprise of sport.

It would be easy to overstate the distinction between the two realms here. The example of planning permission granted as a result of my anonymous benefactor's bribe shows that we can feel uneasy about having legal rights enforced if that enforcement does not come about in the right way. John, the prisoner whose parole is decided by coin flip, has reason to be aggrieved even if the coin flip leads to his 'right' to release being enforced. It seems then that there is something important about our rights being enforced in the right way.

We can conceive of this importance in a number of ways. We might say that litigants have a right to win, and a strong preference that this right is enforced under just or fair conditions. John might be relieved to have his right enforced, but still feel justifiable resentment about how that decision was reached. In the planning example, I could feel that the local council made a correct legal judgment in granting me planning permission, but feel appropriate guilt at the mysterious stranger's interference in this decision.

On a much stronger version, we might say that it is *constitutive* of the rights that litigants claim that these rights are only properly enforced when they are enforced under just or fair conditions. A right enforced for the wrong reasons is not enforced at all. In John's case, the parole board has not really enforced his right in a meaningful sense, because the relevant right was a right *to the correct outcome on the basis of a fair procedure.* In the planning case, the local council's decision was in an important sense *wrong*, even if the outcome would have been the same without the bribe.

A middle position might say simply that enforcement for the wrong reasons diminishes my right in some way. There is a spectrum of positions that we could take between these poles, and I do not think that it is necessary for present purposes to choose one. The important point is that the correctness of the outcome of a legal proceeding and the procedure used to reach it do not come apart cleanly. There is a moral shortfall when a procedure is unfair. This is enough to defang the initial objection.

CONCLUSION

In this paper, I set out what I believe to be the strongest and most coherent normative underpinning that it is possible to give for the Makes No Difference principle. On this view, which I called the 'narrow instrumental view' of fair procedures, procedures are only valuable to the extent that they produce just outcomes and have no intrinsic value. If this view of fair procedures is correct, then the Makes No Difference principle, which denies review of decisions taken subject to unfair procedures, can be morally justified.

I have argued, however, that the narrow instrumental view is wrong. Fair procedures, from the perspective of political morality, always matter. That they may make just outcomes more likely is undoubtedly a reason for valuing fair procedures, but it is not the whole story. A system of fair procedures is intrinsically valuable, insofar as it expresses a conception of the citizen as an active participant in the legal order.

There is also a communicative dimension to the value of fair procedures. A system of fair procedures can act as a signalling device for democratic states to fulfil their communicative obligations to citizens. They demonstrate that individuals are viewed as equals under a system that operates the same way for one as it does for all. Conversely, a system in which decisions made on foot of unfair procedures are shielded from judicial review communicates to the citizenry that a joint commitment to justice is not taken seriously (at least in this particular realm of administrative law), even where such a procedure did not materially affect the outcome. This is precisely what section 31 communicates.

The narrow instrumental view of procedural fairness underpinning the Makes No Difference principle leaves no room for either of these aspects of procedural fairness. It is an inadequate account of the value of fair procedures and fails to offer a justification for the Makes No Difference principle. When we have a proper understanding of fair procedures, we see that refusing review in cases where a procedural flaw did not affect the outcome of the decision does in fact undermine the value of fair procedures.

The Makes No Difference principle, then, is offensive to the two aspects of fair procedures that I have identified: participatory citizenship and the communicative aspect. The value of participatory citizenship emerges in a political order whose public institutions abide by the demands of legality. In shielding decisions made on foot of unfair procedures from judicial review, the Makes No Difference principle licenses the undermining of the litigant's status as autonomous participant in the legal order.

Similarly, the Makes No Difference principle sends a perverse communicative signal to the members of the legal community. Rather than affirm a joint public commitment to justice, which is the communicative role law is supposed to play, it conveys the message that no such commitment is taken seriously when it comes to administrative decision-making. This is because the Makes No Difference principle denies redress for violations of decisions made in breach of these commitments to justice.

One might still argue that the policy concerns that motivate the wider crackdown on access to judicial review justify the restrictive conception of

procedural fairness at the heart of the Makes No Difference principle. Perhaps one might argue that there is something special about *administrative* decision making, such that the intrinsic aspect and communicative aspect of fair procedures do not apply. In that case, the narrow instrumental view might offer an acceptable account of the value of administrative procedures, even if it is incorrect as an account of the normative value of other sorts of procedures. I will not explore such an argument fully here, but I believe that it should be met with heavy scepticism. Administrative procedures are legal procedures, and they affect the lives of litigants every day.

One might also argue that the moral shortfall caused by the Makes No Difference principle is acceptable in the face of other considerations, such as relieving the burden on courts, avoiding frivolous claims, or sparing a litigant a legal proceeding that has no hope of success. As I indicated earlier, such a claims are beyond the scope of this paper, though given the important ways in which fair procedures are of value, such claims should also be met with heavy scepticism and a demand for a high threshold of proof.

My aim in this article, however, has been a more modest one. I have argued only that the Makes No Difference principle is *pro tanto* unjust as a matter of political morality. The narrow instrumental view of fair procedures provides no justification for it, and the two aspects of the value of fair procedures that I have explored each provide reasons against the Makes No Difference principle. A legal system that fails to uphold procedural standards is *pro tanto* unjust, even if these procedures still produce correct outcomes, and administrative decision makers lack the authority to reach and enforce decisions if those decisions do not result from fair procedures.

I make no claims about what next steps should follow this conclusion. The legislature revisiting the provision would certainly be the optimal outcome. Some might argue that in the absence of such action, judges should take as restrictive an interpretive approach as they can to the content and application of the principle. Such arguments I must leave to others. Here I have tried only to highlight the problem from a philosophical perspective. I hope that the effort here to articulate just how out of step the Makes No Difference principle is with a proper philosophical treatment of the value of fair procedures will contribute to the discussion of those next steps.