FORUM BY COIN FLIP: A RANDOM ALLOCATION MODEL FOR JURISDICTIONAL OVERLAP

Ori Aronson*

Abstract:

This Article offers a novel solution to forum shopping. Instead of the established regime, which accords the one of the parties to the litigation substantial power over the choice of forum, the Article suggests a new model for allocating cases among courts with overlapping jurisdiction—the Random Allocation Model. It argues that randomized case allocation would constrain strategic behavior at the initial stage of the proceedings, thereby saving wasteful costs and promoting greater distributive fairness among parties. Furthermore, randomization of case allocation would ensure a consistent pluralist quality to judicial output, by guaranteeing that multiple, diverse courts receive comparable cases and produce, over time, different responses to similar questions. Such structural pluralism would also enhance the epistemic value of judicial output, as instructive comparisons between the institutional behaviors of different forums become available. Although randomness is often thought to undermine the rational ideal of rule of law systems, the legal system in fact already resorts to random decision mechanisms in important circumstances. Randomized case allocation can thus be accommodated within an existing institutional framework, while facilitating the realization of the redeeming potential of diffuse court systems.

---

* Assistant Professor, Bar-Ilan University Faculty of Law; S.J.D., Harvard Law School. I thank Nora Engstrom, Lawrence Friedman, Gillian Hadfield, Deborah Hensler, Shahar Lifshitz, Martha Minow, Kjell Modeer, Gideon Parchomovsky, Oren Perez, and Eric Talley for valuable comments on earlier drafts. The Article was selected to be presented at the 2012 Harvard-Stanford International Junior Faculty Forum, held at Stanford Law School; thanks are due to workshop participants for a helpful discussion. Gal Meshulam provided research assistance.

TABLE OF CONTENTS

INTRODUCTION

Forum shopping – the exercise of strategic choice between multiple jurisdictions in the pursuit of legal action – endures as a vexing institutional feature of the American court system, as well as a conceptual and normative challenge to judges and commentators alike. While courts and scholars have been lamenting for generations the inefficiencies and inequities of forum shopping,[1] the

1. *See*, *e.g.*, Hanna v. Plumer, 380 U.S. 460, 468 (1965) (noting the aim of "discouragement of forum-shopping" in choice of law doctrine); Rumsfeld v. Padilla, 542 U.S. 426, 447 (2004) (stressing the need to curb "rampant forum

problem remains as germane as ever. *Shady Grove v. Allstate*,[2] in which the Supreme Court recently applied the *Erie* doctrine[3] to the effect of allowing in federal court diversity-based class actions that cannot proceed in New York state courts, invoked concerns of vertical forum shopping between state and federal forums. A plurality of the Court's justices acknowledged that forum shopping would be an objectionable but inevitable result of the Court's decision;[4] and initial empirical evidence seems to corroborate this prediction.[5] Concerns over horizontal forum shopping (between the courts of different states or federal districts) also remain a recurring challenge for the legal system, with the most recent example being *Walden v. Fiore*, a personal jurisdiction case pending Supreme Court disposition after being argued in its October, 2013 term.[6]

---

shopping" in *habeas* petitions and the "inconvenience, expense, and embarrassment" it begets); Robinson v. McNeil Consumer Healthcare, 615 F.3d 861, 866 (7th Cir. 2010) (Posner J) (an incentive to forum shop in personal injury suits should be avoided); Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507 (1995) (finding empirically that plaintiffs do forum shop and reap substantial benefits as a result); LYNN M. LOPUCKI, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS 137-81 (2005) (arguing that bankruptcy venue rules lead to a corruptive competition between forums); Michelle J. White, *Asbestos Litigation: Procedural Innovations and Forum Shopping*, 35 J. LEGAL STUD. 365, 396-97 (2006) (showing how forum shopping in asbestos litigation enables plaintiffs to push up damages and settlement awards, and suggesting this likely leads to over-deterrence); Megan Woodhouse, *Shop 'til You Drop: Implementing Federal Rules of Patent Litigation Procedure To Wear Out Forum Shopping Patent Plaintiffs*, 99 GEO. L.J. 227 (2010) (describing convenience and fairness costs brought about by excessive forum shopping in patent litigation); See also *infra* Parts I(B),(C).

2. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 130 S.Ct. 1431 (2010).

3. Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).

4. *Shady Grove*, 130 S.Ct. at 1447-48 ("We must acknowledge the reality that keeping the federal-court door open to class actions that cannot proceed in state court will produce forum shopping. That is unacceptable when it comes as the consequence of judge-made rules … But divergence from state law, with the attendant consequence of forum shopping, is the inevitable (indeed, one might say the intended) result of a uniform system of federal procedure").

5. *See* William H.J. Hubbard, *An Empirical Study of the Effect of* Shady Grove v. Allstate *on Forum Shopping in the New York Courts* (April 29, 2013), University of Chicago, Public Law Working Paper No. 428, available at SSRN: http://ssrn.com/abstract=2263481 (reporting empirical results showing rise in federal court filings and decline in removals of putative class actions seeking statutory damages under New York law).

6. *Walden* concerns the fate of a *Bivens* action filed in Nevada federal court by two professional gamblers whose gambling proceeds were allegedly

This Article suggests a novel solution to the problem of forum shopping, which many have come to see as an inescapable characteristic of the American court system with its considerable share of overlapping jurisdictions.[7] Rather than attempting to come up with rules or doctrines that would mitigate the social costs of forum shopping or that seek to align strategic litigation practices with public interests, the Article explores the possibility of altering the institutional foundations of forum shopping. It suggests replacing the initiator's choice model, which normally lets the party instigating the litigation to choose – shop – the forum of her preference,[8] with a system of random case allocation among forums with overlapping jurisdictions.

Instead of forum shopping the Article thus proposes a shift to a *Random Allocation Model*: holding an ad hoc lottery at the point of filing that would determine which court of the jurisdictionally available forums will hear the case. In the *Shady Grove* context this would mean, for example, that rather than incentivizing class-action diversity plaintiffs seeking statutory damages under New York law to file in federal court, all such suits would be randomly allocated to

---

unlawfully seized by a DEA agent during a flight stopover in Atlanta. Reversing the Las Vegas district court's dismissal of the suit, the Ninth Circuit found Nevada had personal jurisdiction over the case. The court of appeals held that the Atlanta-located actions of the Atlanta-based agent providing for the seizure and supporting a subsequent forfeiture of the Nevada-heading plaintiffs' cash money had qualified as the minimum contacts necessary to establish jurisdiction (and venue) in Nevada. The Supreme Court in review will now have to decide whether the plaintiffs were entitled to this kind of horizontal forum shopping, again weighing the consequences of the system's jurisdictional concurrence. Walden v. Fiore, No. 12-574 (U.S. argued Nov. 4, 2013); Fiore v. Walden, 688 F.3d 558 (9th Cir. 2012), *cert. granted*, 133 S.Ct. 1493 (U.S. Mar. 4, 2013).

7. *See*, *e.g.*, Robert Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 640-42 (1981) (considering competing narratives as to the structure of the American Jurisdictional system as either "the persistence of… a dysfunctional relic" or "a product of institutional evolution").

8. Removal from state to federal court is formally an exception to the initiator's choice model since it grants the defendant, rather than the plaintiff, the right to determine the ultimate forum of litigation in applicable cases. See 28 U.S.C. § 1441. Substantively, however, most of the familiar critiques of forum shopping hold here too, but with respect to the uneven power of defendants. *See*, *e.g.*, Neal Miller, *An Empirical Study of Forum Choices in Removal Cases under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369 (1992). For purposes of this Article, removal is hereon included in the "initiator's choice" category.

either state or federal forum,[9] with obviously divergent consequences due to the divergence in applicable class action laws. Similarly in cases of horizontal overlap like *Walden*, a lottery would determine which state (or federal district) gets to apply its personal jurisdiction to the case; and here too the costs of litigating away from home, as well as localist divergences, might affect case outcomes.

The Random Allocation Model may seem at first blush as an affront to deeply ingrained principles of fairness and equality: it appears to elevate luck over reason as a determinant of the nature of litigation and sometimes of case outcome as well. The Article seeks however to show that while randomizing choice of forum might have some drawbacks, under specified conditions it is a superior institutional design strategy to the initiator's choice model, which currently dominates the American system of overlapping jurisdictions.

Randomizing choice of forum makes it more difficult for sophisticated parties to plan, prepare, and strategize in order to reach sympathetic courts. It also makes it more difficult for courts that compete with other forums, to strategize in order to ensure they attract more valued litigants. Random allocation can therefore save socially wasteful costs invested in shopping for forums or for parties. At the same time it supports the ideal of equal access to justice, insofar as better-off, more sophisticated parties lose an opportunity to invest in advantageous forum shopping strategies. Random allocation can thus be normatively defended by both efficiency-based and distributive-justice accounts.

Beyond mitigating the familiar efficiency and distribution concerns of forum shopping, the Random Allocation Model also ensures that the socially redeeming potential of jurisdictional concurrence gets tapped. Randomizing forum selection means that, over time and given a sequence of random allocations, similar questions and similar fact patterns will reach divergent forums and be treated *differently*, thus producing a pluralism of judicial output, as well as an information-generating dynamic reminiscent of randomized-experiment methods. These ends are supported by a political-pluralist normative account of a legal order that reflects and respects the varied beliefs and expectations of members and communities in a diverse democracy. At the same time they enable comparison, experimentation, and learning between forums dealing with similar questions – in the tradition of the "jurisdictional laboratory" familiar from federalism discourse.[10]

---

9. This does not necessarily mean an equal distribution of cases to each forum, as lotteries can be weighted in favor of one alternative or another while maintaining their random qualities. *See infra* text following note 46.

10. *See*, *e.g.*, Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 397-400 (1997); Roberta Ramano, *The States as a Laboratory: Legal Innovation and State Competition for Corporate Charters*, 23 YALE J. ON REG. 209 (2006).

Persistent randomization thus ensures that over time no alternative from among the concurrent jurisdictions will "defeat" the others: it replaces the "natural-selection" dynamics of forum shopping with an insistence on the preservation of multiple institutional and normative options, embodied in the diverse forums available under jurisdictional overlap. The determination of the optimal degrees of jurisdictional diversity and concurrence is thus handed back to the deliberative processes of democratic policymaking, rather than to sophisticated, self-interested forum shoppers.

Granted, the commitment to the rule of law – with its insistence on a rational and reasoned legal decisionmaking process – makes us inclined to regard randomization in judicial practices as an improper (normative) aberration (descriptive). Yet randomization is in fact prevalent in certain legal contexts, most notably in the assigning of cases to judges and judges to panels – a procedure that essentially leaves a significant determinant of judicial outcome to sheer luck. The Article builds on this existing accommodation of case-dispositive randomization in the management of single courts, in order to support its broader claim for the virtues of randomized case allocation throughout the system in conditions of jurisdictional concurrence.

The Article proceeds as follows: Part I briefly presents the forum shopping structure of jurisdictional concurrence and identifies several socially undesirable effects that result from letting the initiator of the litigation determine the forum and thereby affect the outcome. The following two Parts set the conceptual and institutional frameworks for the Random Allocation Model: Part II unpacks the complex notion of randomness. The discussion concentrates on the idea of equal procedural randomness, which entails the use of an ad hoc random choice mechanism (i.e., a lottery) to break distributive ties. Part III examines the central occurrences of randomness in the American legal system. The prevalent use of randomness in allocating cases among judges and assigning judges to panels is shown to reflect an acceptance of the integral role of random choice mechanisms in the process of producing judicial decisions.

Part IV presents the positive normative argument for employing the Random Allocation Model in cases of jurisdictional overlap. I argue that distributive justice, value pluralism, and better knowledge, as well as certain efficiency-related concerns, will all be better served by replacing forum shopping with randomized allocation. This Part also considers the central challenges to the Model and offers responses. The Article's Conclusion ties the argument to the ongoing discussion on the viability and usefulness of the substance vs. procedure distinction in legal discourse.

I. THE FORUM SHOPPING CHALLENGE

A. The Normative Pluralism of Diverse Jurisdictions

The American court system – like any other common law system – is a complex network of institutional entities with diverse jurisdictional purviews and interaction arrangements.[11] As such, it can be understood as an extrapolation of a single court with multiple judges – with the system as a whole constituting the court and the various jurisdictional units the individual judges. And just as it is customary to evaluate individual judges in terms of diversity (of identity group (gender, race, religion), political affiliation (conservative, liberal), and professional background (prosecutor, defender, academic, tax expert, intellectual property specialist)),[12] so it is common to assess the work of a court system — that is characterized by institutional diffusion — according to the different outcomes its multiple forums produce. Indeed, regardless of whether the diffuse structure is an intentional design, a constructive exploration of the institutional foundations of adjudication must take into account the diversity of judicial forums as well as, importantly, the diversity of judicial results.[13]

For example, the establishment of family courts or locally-based community or neighborhood courts is often intended to create a distinctive institutional atmosphere for the disposition of certain

---

11. For detailed surveys of the jurisdictional diffusion of state court systems in the U.S., see COURT STATISTICS PROJECT, STATE COURT STRUCTURE CHARTS (Jan. 31, 2013), http://tinyurl.com/84ljxka. *See also* Ori Aronson, *Out of Many: Military Commissions, Religious Tribunals, and the Democratic Virtues of Court Specialization*, 51 VA. J. INT'L L. 231, 247-52 (2011) (detailing instances of court proliferation in common law systems along several axes: subject-matter specialization, administrative adjudication, ADR, and international tribunals).

12. *See*, *e.g.*, Orley Ashenfelter, Theodore Eisenberg & Stewart J. Schwab, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 273-81 (1995) (assessing the impact of judge characteristics – political affiliation, age, gender, religion, experience, background – on case outcomes); CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? (2006) (examining panel results according to the appointing president's party affiliation); Mark S. Hurwitz & Drew Noble Lanier, *Diversity in State and Federal Appellate Courts: Change and Continuity Across 20 Years*, 29 JUST. SYS. J. 47 (2008) (examining judicial diversity in state and federal courts according to race, ethnicity, and gender).

13. *See* LAWRENCE BAUM, SPECIALIZING THE COURTS 205-10, 220-26 (2011) (specialized courts are usually created with the purpose of impacting judicial policy in a given field, which is certainly the typical result of such institutional innovations).

legal matters, for instance through unique litigation structures or a relaxation of procedural or evidentiary norms.[14] Military forums, which adhere to an institutional culture that combines the legal and the martial, similarly reflect a separate vision of adjudication, designed to render the process more sensitive to the unique context of military normativity (e.g., by appointing commissioned officers as judge and jury).[15] Courts that deal intensively with administrative law issues might develop a government-oriented bias even in non-related cases.[16] And, of course, entrusting federal courts with diversity jurisdiction based on the expectation of lesser local bias[17] reflects an assumption of an inherent divergence in judicial output between state and federal forums.

Even the spatial diffusion of courts among towns, counties, districts, and states can be and often is explained as a mechanism for generating *difference* among distinct loci of adjudication. Location-based diffusion does not only make access to courts more feasible in large countries; it also allows for the enhancement of localizing qualities of adjudication, ensuring the sensitivity of judges and juries (and parole officers, attorneys, and court personnel) to the idiosyncrasies of their communities as well as the reflection of their varying sensibilities in procedural dynamics and judicial outcomes.[18]

The diffuse judicial system is designed, then, as the producer of consequential normative pluralism: even if most legal norms are

---

14. *See*, *e.g.*, Melissa L. Breger, *Making Waves or Keeping the Calm?: Analyzing the Institutional Culture of Family Courts Through the Lens of Social Psychology Groupthink Theory*, 34 L. & PSYCHOL. REV. 55, 65-66 (2010) (discussing "the therapeutic nature and relaxed procedures of family courts"); Jeffrey Fagan & Victoria Malkin, *Theorizing Community Justice Through Community Courts*, 30 FORDHAM URB. L.J. 897, 908 (2003) (community courts are designed to be "legal forums that are uniquely configured towards [the community's] particular crimes and social problems").

15. *See, e.g.*, Timothy C. MacDonnell, *Military Commissions and Courts-Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinctions Between the Two Courts*, 2002 ARMY LAW. 19 (reviewing unique institutional characteristics of military forums); Ori Aronson, *In/Visible Courts: Military Tribunals as Other Spaces*, *in* SECRECY, NATIONAL SECURITY AND THE VINDICATION OF CONSTITUTIONAL LAW 229-46 (David Cole et al. eds., 2013) (discussing the deliberately distinct nature of military adjudication).

16. *See*, *e.g.*, Paul R. Gugliuzza, *Rethinking Federal Circuit Jurisdiction*, 100 GEO. L.J. 1437, 1489-91 (2012) (reviewing claims that the U.S. Court of Appeals for the Federal Circuit has developed a pro-government bias).

17. *See* RICHARD A. POSNER, THE FEDERAL COURTS 212-13 (1996).

18. *See* Richard T. Ford, *Law's Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843, 906-22 (1999) (presenting the view of the benefits of localized adjudication and criticizing it); Heather K. Gerken, Foreword: Federalism All the Way Down, 124 Harv. L. Rev. 4 (2010) (calling for the breaking up of notions of sovereignty in order to incorporate localist voice in a federalist mode of governance).

produced in fairly centralized processes (legislation and precedent-setting), their interpretation and application are entrusted to multiple judicial units that are diverse across personal, institutional, and cultural dimensions. This is a significant point, especially given that all these units are regularly required to come up with answers to very similar questions, such as the meaning of constitutional norms (due process, equal treatment), of general statutory or common-law standards (reasonableness, good faith), and of procedural norms (preclusion, venue). Of course, at the apex of the judicial system is a single centralizing entity, the Supreme Court, which has the power to unify judicial output by way of appellate review that is backed by a regime of binding precedent. But the reality is that the vast majority of judicial decisions a system produces do not reach its highest courts,[19] and for most litigants and for most issues, the diverse outcomes of these multiple (inferior) forums are the final expressions of judicial action.

The institutionalization of normative pluralism in judicial output mandates creating a mechanism for allocating disputes among the system's units in a way that complies with its ideals of fairness and rationality. This is the role of the rules of jurisdiction: these rules usually follow some objective criterion that is supposed to rationally attach types of cases to measures of expertise, geographic proximity, forum interest, or other institutional markers of relevant courts.[20] Thus, subject-matter jurisdiction relates to the legal or factual foundations of a case or its subject, whereas personal jurisdiction has to do with the geographical elements of a case and the affiliations of the parties. But under the current regime, the allocation process is not exhausted by the rules of jurisdiction. In some circumstances, significant power rests with the parties themselves.

B. Forum Shopping and Initiator's Choice

"[S]trategic manipulation of procedural rules is an inherent and permanent feature of our system."[21] The rules of jurisdiction enable sophisticated parties – those capable of planning for the contingency of litigation and of allocating the resources to prepare

---

19. For example, during the twelve months ending in September 2012, 57,501 appeals were filed with the twelve federal courts of appeals (http://tinyurl.com/a8zm97y). During the same period, the 94 federal district courts terminated as many as 382,837 cases (http://tinyurl.com/buuhyyh).

20. *See*, *e.g.*, Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1236-46 (2004) (surveying the typical justifications for state-federal jurisdictional distinctions).

21. Alexandra D. Lahav, *Recovering the Social Value of Jurisdictional Redundancy*, 82 TUL. L. REV. 2369, 2373 (2008)

for that possibility – to plan their behavior in order to direct potential litigation to a preferred forum, with varying degrees of probability. Such strategic behavior becomes relevant at two distinct periods in time: prior to dispute (during the creation and conduct of legal relations) and upon the initiation of litigation (after dispute has already occurred).[22]

Thus, at the preliminary stage, a sophisticated player can either situate her behavior in a certain location (country, state, district) in order to secure an advantage regarding the litigation forum[23] or else, as is currently customary, contractually set a certain forum for future litigation. Similarly, she can plan her activities to affect the application of subject-matter jurisdiction rules and bring future litigation to a favorable forum (e.g., cap the value of her transactions at the statutory minimum amount for keeping diversity litigation in state rather than federal court, or arrange her economic activities so that any disputes are channeled to a particular specialized forum).

Yet not only are the jurisdiction rules susceptible to manipulation by sophisticated parties ex ante (prior to litigation), the very activation of the jurisdictional mechanism once litigation has been initiated is also susceptible, at least partially, to strategic behavior. Thus, although the rules of jurisdiction were ostensibly designed to ensure an efficient and rational process of matching cases with forums, the system has, interestingly, not opted for a centralized allocation mechanism for filed cases. One could easily imagine an administrative unit that receives all filed cases and distributes them to the appropriate forum – which is, in effect, what happens with the allocation of cases to judges within a single court. Instead, the typical adversarial system incorporates the *agency of the case's initiator* into the initial choice of forum.[24] The effective subjects of jurisdictional rules are the claimants, plaintiffs, and prosecutors, who choose where to initiate proceedings from amongst the alternatives they believe to be available under law. Only after this initial action can the system intervene and redirect the litigation if jurisdiction is lacking; and moreover, even that power is sometimes contingent on (timely) action by the opposing party.[25]

Giving the initial choice of forum to the initiator of the litigation can be justified in efficiency-based terms by the premise

---

22. On the ex-ante/ex-post distinction in civil procedure design, see generally Bruce L. Hay, *Procedural Justice – Ex Ante vs. Ex Post*, 44 UCLA L. REV. 1803 (1997).

23. *See*, *e.g.*, Daniel Klerman, *Personal Jurisdiction and Product Liability*, 85 S. CAL. L. REV. 1551 (2012) (given high transaction costs, personal jurisdiction rules enable producers to design their transactions to benefit from lenient forums).

24. *See*, *e.g.*, Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947) ("the plaintiff's choice of forum should rarely be disturbed").

25. *See* Fed. R. Civ. P. 12(h)(1).

that she has the best information (at this stage, at least) as to the most appropriate forum. It can also reflect an appeal to moral notions of autonomy and choice within a system that is deeply rigid in structure.[26] Regardless, it is noteworthy that whenever the system or opposing party fails to act to correct a jurisdictional flaw (or, in civil actions in the state-federal context, to use the right of removal),[27] the initiator of the case in essence holds the exclusive power to determine the forum of litigation.

The case in which the initiator's advantage is most conspicuous is when the jurisdiction rules allow for the litigation of a given case in more than one forum. This is the not uncommon state of jurisdictional overlap or, in Robert Cover's terms jurisdictional "redundancy."[28] In such instances, the initiator's agency is clear and obvious: the law has deferred to her on choice of forum from among the jurisdictionally available alternatives. There are several familiar examples in U.S. law: when personal jurisdiction laws permit a case to be litigated in more than one state; when venue laws allow for a case to be litigated in more than one federal district in a given state; and when subject-matter jurisdiction laws allow for a case to be litigated in either state or federal court. In countries in which terrorism suspects can be indicted in military forums, such as the U.S. (military commissions) or Israel (military courts), it is essentially left to the prosecutor to decide whether to indict in a military or civilian forum.[29]

In such conditions of concurrent jurisdiction, the initiator legitimately exercises her power to determine the institutional setting of the litigation and, hence, also to affect its outcome, without investing any preparatory resources at the pre-litigation stage or risking a jurisdictional challenge in the post-filing stage (state-federal removal notwithstanding). The centrality of parties' agency in forum choice is particularly striking when we consider the suggested analogy between multiple judges within a single court

---

26. *See* Lahav, *supra* note 21, at 2376.

27. The behavioral status quo bias – the tendency to regard an existing state of affairs as the baseline from which divergence is costly – likely inhibits such corrections at least in some of the cases. *See* William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7 (1988); Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608, 625-30 (1998).

28. Cover, *supra* note 7.

29. In the U.S., the most familiar case of late was that of Khalid Sheikh Mohammed, alleged mastermind of the 9/11 attacks, who was initially supposed to be tried in federal court in New York, but was eventually arraigned before a military commission in Guantánamo Bay, thanks to congressional intervention. *See* Jane Mayer, *The Trial: Eric Holder and the Battle over Khalid Sheikh Mohammed*, NEW YORKER, Feb. 15, 2010, at 52; National Defense Authorization Act for Fiscal Year 2011, § 1032 (prohibiting the transfer of Mohammed into the United States).

and a diffuse network of forums within a court system: On the one hand, within a given court, litigants have nearly no control over the identity of the judge or panel that will hear their case (though they do have limited control over the identity of jurors), and as demonstrated below, even the system itself gave up much of its control over this when it opted for random assignment of cases to judges. On the other hand, when it comes to choice among several forums, the law has developed a set of jurisdictional norms that inform parties in advance of the alternative forums for litigation and encourage them to make post strategic choices, which typically work to the advantage of litigation initiators and sophisticated players and, sometimes, to the detriment of the general public interest.

C. The Undesirable Effects of the Forum Shopping Model

The social ramifications of strategic forum shopping have long been the topic of research and critique, yielding varying normative positions.[30] Without rehashing familiar arguments, I will point out three significant costs associated with the initiator's choice model. Note that these costs relate specifically to the choice accorded to the initiator of the proceedings and not to the underlying condition of jurisdictional concurrence. As others have argued and as I elaborate below, jurisdictional concurrence can be socially beneficial for various reasons. It is the mechanism used for its activation – party choice – that should raise concern and warrants rethinking.[31]

Wasteful investment. Parties that enjoy the ability to choose among alternative forums – either by strategically designing their transactions pre-dispute or by making the legally sanctioned choice of forum upon instigating litigation – have a rational incentive to invest resources in steering their case to the best forum available.

---

30. *See*, *e.g.*, Cover, *supra* note 7; Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677 (1990) (noting the use of forum shopping can lead to the enforcement of certain rights, while questioning the extent of its possible abuse); Mary Garvey Algero, *In Defense of Forum Shopping: A Realistic Look at Selecting a Venue*, 78 NEB. L. REV. 79 (1999) (questioning the ethical stigma often attaching to strategic forum shopping); Nita Ghei & Francesco Parisi, *Adverse Selection and Moral Hazard in Forum Shopping: Conflicts Law as Spontaneous Order*, 25 CARDOZO L. REV. 1367 (2004) (reviewing the costs of forum shopping and finding their alleviation in choice of law doctrines); Scott E. Atkinson at al., *The Economics of a Centralized Judiciary: Uniformity, Forum Shopping, and the Federal Circuit*, 52 J.L. & ECON. 411 (2009) (exhibiting empirically the use of forum shopping in patent litigation); Kermit Roosevelt III, *Choice of Law in Federal Courts: From* Erie *and* Klaxon *to CAFA and* Shady Grove, 106 NW. U.L. REV. 1, 32-33 (2012) (discussing the normative ambivalence of forum shopping).

31. *See* Clermont & Eisenberg, *supra* note 1.

Again, under the pluralist premise of a diffuse court system, regardless of how strongly the different forums strive for uniformity of legal output, they will necessarily diverge to some extent on similar questions. Thus, a rational party is bound to try and predict the possible outcomes of her litigation in the various available forums and work to direct her case to the forum expected to be most favorable to her interests. Factors making a forum favorable can, for example, be greater judicial expertise, lower expected litigation costs, known ideological biases of the bench or jury pool, and a party's political clout in a certain jurisdictional community or professional circle.

Yet, normally investing resources in this kind of strategic planning – gathering information on beneficial forums followed by strategic forum shopping – is socially wasteful. The different forums, and the jurisdictional rules that allocate cases among them, are usually designed to attach to objective characteristics of genuine human activity, not to influence that activity.[32] And to the extent that jurisdictional concurrence is regarded as of deliberate design, a system's choice of concurrence can only express indifference regarding the forum in which the odd case lands from among the available alternatives. Each forum is as socially desirable as the other; otherwise concurrence would not be the rule. Investing resources in directing a case to one forum rather than another is, therefore, wasteful: it entails costs but affects only distribution (often detrimentally, as I note momentarily) and not welfare.

In some circumstances, the initiator's choice model also incentivizes the forums themselves – the "supply side" – to invest resources to draw more cases to their jurisdiction. This competitive dynamic is not necessarily wasteful, as forums might be driven to improve the quality of justice they provide.[33] But in certain market conditions, it can also lead to monopolistic results (the Delaware chancery court is often viewed in such terms[34]) or to a self-defeating "race to the bottom."[35] Supply-side competition can also be wasteful when forums attempt to attract "valued" litigants or cases, such as those that are more interesting, more famous, more income-generating, or cheaper to resolve (thanks to better evidence, for example). Here, too, the original rationales for the jurisdictional delimitations are subverted for irrelevant purposes.[36]

---

32. *See*, *e.g.*, Note, *supra* note 30, at 1691-92; Klerman, *supra* note 23.

33. *See*, *e.g.*, Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225 (1985).

34. *See* Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679 (2002).

35. *See*, *e.g.*, William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663 (1974); Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435 (1992).

36. *See*, *e.g.*, LOPUCKI, *supra* note 1.

Distributive Outcomes. The capacity of certain parties to influence ex ante the future choice of forum and of initiating parties to choose the forum can often empower strong, well-off, and sophisticated parties – Marc Galanter's "haves."[37] Those parties with better information (or the means to invest in information-gathering), with a greater capability for strategic planning and behavior, and with an ability to act quickly upon the initiation of litigation are more likely to make beneficial use of jurisdictional concurrence.[38]

It is true that in some classes of cases, the initiator's choice model seems to benefit the paradigmatically worse-off party. Consider civil rights cases, consumer protection actions, and certain employment-related suits: the initiator of the litigation is normally the weaker party in the dispute in all three classes of cases. It would seem, then, that at least in these contexts, the initiator's choice model in fact helps to empower the worse-off parties. But there are two qualifications to this point: First, there are significant areas of the law in which the initiator's choice model inevitably benefits the stronger party, most notably criminal cases and administrative enforcement proceedings. Second, the advantage enjoyed by certain weakened parties under the initiator's choice model usually materializes only once the litigation is instigated. Prior to that, sophisticated parties can affect the choice of available forums even as putative defendants (through choice-of-forum clauses or deliberate business practices) and thereby limit the redistributive potential of forum shopping.

Public-Private Divergence. Although a system of concurrent jurisdictions is assumed to be indifferent as to the eventual placement of any given case among the available alternatives, it may still have a preference regarding the overall distribution of cases among the relevant forums. To the extent that the forum-shopping model is not concerned solely with maximizing party agency, it should be expected to promote other social interests, unrelated to individual autonomy. These may be administrative concerns of caseload mitigation, or more substantive institutional purposes, such as attaching a degree of specialization to specific forums, preventing the over-insularity of forums by diversifying dockets, producing a diverse judicial output by assigning similar cases to different forums, or countering distributive unfairness by constraining the use of forum shopping in "suspect" circumstances.

Interestingly, the forum shopping model offers no assurances of serving any such public-regarding considerations. Parties using

---

37. Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC. REV. 95 (1974).

38. *See*, *e.g.*, Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481, 489 & n.36 (2011) (discussing the incentive for gathering information on relevant court generated by a forum shopping system, and noting its specific relevance to repeat litigants).

their prerogative of choosing a forum of their liking among the overlapping alternatives are expected to make that choice normally according to their own, self-regarding interests. These may coincidentally converge with the public interest in case distribution, but can also often diverge, leading to overall results that contradict the public reasons for jurisdictional concurrence.

Consider, for example, the market justifications for forum shopping. These often rest on party choice as a mechanism for comparing forums, which gradually coalesces around a preferred alternative in a natural-selection-like process. While such a dynamic can promote a certain notion of institutional efficiency, it could also conflict with other social goals, such as maintaining the normative diversity of judicial output over time. Under the initiator's choice model, only public goals that overlap with private interests can be pursued: the system essentially forgoes public interests that are not reliant upon, or that wholly deviate from, the preferences of individual litigants.[39]

* * *

There is, therefore, ample reason to call for a reconsideration of the initiator's choice model given the detrimental effects of forum shopping: the wasteful strategic investment; the potential distributive advantage sophisticated parties tend to derive from the practice; and the likely divergence between private- and public-regarding considerations. Below, I suggest that a random allocation mechanism might allay some of these costs and effects, while also supporting pluralism and knowledge-seeking in the legal system. To set the conceptual stage for my normative argument, I will first unpack the idea of randomness and survey its existing, if somewhat latent, presence in the legal system.

II. THE TURN TO RANDOMNESS

A. What Randomness Means

There are several meanings attributed to the idea of randomness, each with a distinct reference and use. Most notably, randomness can define the process of reaching a decision. But it can also relate to the result of that process: when we describe Jackson Pollock's paint drippings or John Cage's tone variations as "random," we usually do not mean that their works were created

---

39. *See* Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575 (1997) (presenting a general theory – focused on efficiency-related costs – of the divergence between the private and the public interests in managing the litigation system).

without planning or intention, but rather that they were designed to make it difficult to identify an organizing pattern within them. This kind of randomness can be described as *consequential*. It exists wherever it is impossible to derive an organizing principle from a given set of data or decisions and, therefore, also impossible to predict the next piece of data or decision from those that preceded it.[40] Consequential randomness can be an end in itself, such as when it is intended to make acclimation, reliance, or planning more difficult for those tracking a series of events (as in an agent subject to surprise reviews by a principal). Consequential randomness can also serve as a proxy for randomness in the process leading up to the result, where the process itself is not visible. However, mathematically valid consequential randomness is very difficult to attain,[41] and it is a problematic indicator of randomness in the process, in being subject to diverse manipulations.[42]

In this Article, the use of "randomness" will refer to a second central type: that which appears in the process of reaching a decision. *Procedural randomness* occurs when the decider suspends her own discretion and employs instead a decision mechanism whose outcome she (or anyone else) cannot control. This kind of randomness involves, therefore, two related elements: uncontrollability and unpredictability.[43] A random decisionmaking process ensures that the outcome of the process cannot be influenced, nor predicted, in advance. Procedural randomness takes two main forms: arbitrary randomness, which is weak randomness**,** and equal randomness, which is strong randomness.

Arbitrary procedural randomness characterizes decision mechanisms in which the choice is made based on a criterion that is irrelevant to the issue being decided and cannot be controlled by the decider at the time of the decision.[44] Thus, for example, a rule that divides students into two classes according to date of birth (e.g., January-June into group A, July-December into group B) is an arbitrary random rule. It is arbitrary because date of birth is irrelevant to any rational student placement policy. It is random

---

40. Oren Perez, *The Institutionalisation of Inconsistency: From Fluid Concepts to Random Talk*, *in* PARADOXES AND INCONSISTENCIES IN THE LAW 119, 137-38 (Oren Perez & Gunther Teubner eds., 2006).

41. DEBORAH J. BENNETT, RANDOMNESS 132-51 (1998). The most familiar metaphoric example of this challenge is mathematician Émile Borel's prediction of the typing monkey who would eventually reproduce the works of Shakespeare.

42. *See* JON ELSTER, SOLOMONIC JUDGEMENTS 40-43 (1989) (the producer of a series can design it in a way that will make it seem random, relying on people's tendency to assume randomness based on an insufficient sample).

43. *See* BENNETT, *supra* note 41, at 152-73.

44. *See* Adam Samaha, *Randomization in Adjudication*, 51 WM. & MARY L. REV. 1, 16-17 (2009); Lewis A. Kornhauser & Lawrence G. Sager, *Just Lotteries*, 24 SOC. SCI. INFO. 483, 488-91 (1988).

because students' dates of birth are determined before the time of allocation and irrespective of it. The decider therefore cannot control which student will be assigned to which class, and the rule-maker cannot know in advance which students will have which dates of birth. What we get is a combination of arbitrariness, reflected in the lack of rational connection between the criterion and the purpose, and randomness, deriving from the predetermination of membership in the group defined by the criterion.

Such arbitrary random decision mechanisms raise complex issues of fairness. They decide a person's fate based on an immutable characteristic that she cannot control (her date of birth, in our example) and thus recall practices of gender or racial discrimination. Indeed, over time, such decision mechanisms may lead to discrimination if they preserve differential treatment of members of different groups (even if the preliminary distinction between the groups appeared to be arbitrary, such as a person's date of birth). Moreover, arbitrary decision rules may be susceptible to manipulation (which removes their arbitrariness), and as such, they may benefit those who can plan ahead and act strategically (e.g., a rule for the inspection of every fifth person going through airport security seems arbitrary, but can in fact be used by strategic actors planning ahead to enable them to avoid inspection). The more manipulable the mechanism, the less uncertain its outcomes, and it thus loses its random qualities.

Equal procedural randomness adds another requirement, beyond the arbitrariness of the result. In order to be equal, the randomness has to renew in each and every decision, so it cannot rely on a fixed choice criterion. Equal procedural randomness therefore requires an *ad-hoc lottery* in the choice from among given alternatives in each and every instance. In our example, an equal random decision mechanism would entail a lottery among all cohort members to assign them to the two available classes. Such a rule is equal because at any given time – until the point of decision – each member of the relevant group has a genuinely equal chance of ending up with any of the results (regardless of her date of birth, last name, or place in a line). *Pure* equal procedural randomness requires equal probabilities of arriving at any of the possible results. Such a lottery ensures equal treatment of those subject to it, in both its disregard for any immutable characteristics as well as its lack of bias toward any one outcome over another for each of the group members.[45] The coin flip is the paradigmatic example of pure equal procedural randomness; the roll of a die is another (the difference between the mechanisms is the number of alternatives from which they can choose – two compared with six). Equal randomness that is based on an ad-hoc lottery fully complies with the uncertainty criterion, and as such, it allows those subject to it to prepare, at the

45. Also known as a "fair" lottery (*see* Kornhauser & Sager, *supra* note 44, at 485) or "statistical" one (*see* Samaha, *supra* note 44, at 9-10).

very most, for the relevant probabilities of ending up with each result.[46]

As we will see below, there may be conditions in which it is justified to intentionally bias the lottery, so that certain outcomes are more likely than others. It is important to note, however, that a biased lottery retains all of the procedural elements of equal randomness, both in that the fates of those subject to the lottery are determined ad-hoc (regardless of preexisting characteristics) and in that the biased probability applies equally to all participants (thus, in a 90/10 bias, every participant has a 90% chance of ending up with option A and a 10% chance of ending up with option B).

B. Some Features of Procedural Randomness

There are several remarkable features to decisionmaking mechanisms that employ procedural randomness. Significantly, they are relatively cheap to operate, they "sterilize" the decision-making process by eliminating human discretion, and they ensure a plurality of outcomes over a sequence of decisions. I consider each of these features in a little more detail below. Note, however, that these are not (yet) presented as necessary advantages of randomness, but rather as features that might prove useful to further certain normative visions – as will be argued in following sections.[47]

Cost. Perhaps the most prominent feature of a random decision mechanism is its relatively low cost. A random rule will normally be cheaper than its alternatives, since it requires devising only a single mechanism that is used repeatedly, thus averting the costs related to case-specific discretion.[48] Accordingly, when cost effectiveness dominates all other considerations, randomness is often the reasonable decisionmaking method, at least from the perspective of the institution with the decisionmaking authority.[49] A classic example is the line at the post office or bus stop: in these contexts, it is usually accepted that, assuming all customers will

---

46. Samaha, *supra* note 44, at 17.

47. See primarily *infra* Part IV.A.

48. Of course, creating a mechanism that would ensure a truly random ("50/50") series of coin flips is a considerable scientific challenge: one would need to control, e.g., for type of coin, erosion of metal, angle of spin, stability of flipping mechanism, degree of air resistance, and landing surface. *See* Persi Diaconis et al., *Dynamical Bias in the Coin Toss*, 49 SOC. INDUS. APPLIED MATH. REV. 211 (2007); Joseph B. Keller, *The Probability of Heads*, 93 AM. MATH. MONTHLY 191 (1986).

49. This may not be the case from the perspective of those subject to the lottery: they might in fact incur new costs due to the shift from reason to randomness, especially if they are risk averse. I return to these concerns further on in *infra* Part IV.B.2.

eventually be served, investing resources in weighing the comparative urgency of each person's needs (a question that some moral principle can certainly apply to) is a waste that is best saved by relying on random sorting based on a "first come first served" heuristic.[50]

But its low cost is not the only appealing feature of a random decisionmaking process. Such a process – especially in its equal form – has additional unique qualities that may be relevant in selecting a choice mechanism and may justify the choice of randomness regardless of procedural efficiency. Two such noteworthy qualities are sterility and multiplicity.

Sterility. A significant characteristic of randomness is the "sterile" nature of the process.[51] A truly random mechanism eliminates the resort to any and all reasons – both good and bad, relevant and irrelevant – in the decisionmaking process. This means that a decisionmaker using a random choice mechanism is exempt from considering reasons and, therefore, also from the responsibility entailed by reason-based decisions: if you take account of reasons, you might go wrong; if you flip a coin, you're free of the burden of error.

In addition, randomizing also renders the decider "untouchable": it is very difficult to corrupt a random choice mechanism, especially one that is publicly visible. In this respect, randomness can operate as a defense mechanism against undue pressures in the decisionmaking process: at the price of giving up relevant reasons, we secure the absence of irrelevant ones, and thus the decider is completely neutral.[52] Finally, the sterility of the process is the foundation of its formal equality: because no other factors are involved in the decisionmaking process beyond the random mechanism, it necessarily treats all those subject to it as complete and formal equals and eliminates all personal or systemic preferences or biases, conscious or otherwise.

Plurality. Another noteworthy, though often overlooked, quality of the random process is the multiplicity of results it ensures over a sequence of decisions. As with any heuristic, random choice

---

50. *See* Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U.L.Q. 667, 670 (1986) ("Time offers a unique measuring rod, sufficient in principle to resolve two or two thousand competing claims for priority. Whoever got there first, wins... [A]n enormous decisionmaking capability is contained in a single variable."). Still, not every line is random: in conditions that allow for planning, a person may invest (socially wasteful) resources in getting to line early in the morning, for example. A genuinely random line is a group of patients in the ER, who usually do not time their accidents to align with the hospital's slow hours. *See* ELSTER, *supra* note 42, at 70-72.

51. *See* Kornhauser & Sager, *supra* note 44, at 489 (discussing the "sanitary" quality of procedural randomness).

52. *See* Perez, *supra* note 40, at 138.

mechanisms come into play when a decider has to choose among multiple alternatives. In this context, randomness is normally understood to serve as a tie-breaker when the decider has exhausted all rational reasons to choose one alternative over the others. Randomness thus emerges from conditions of multiplicity. But what makes it a unique kind of heuristic is that it also ensures multiplicity *as a consequence*, given a series of decisions over time. One of the qualities of reason-based decision rules is that they produce uniform decisions over time, so that in repeated instances of choice between similar alternatives, the same choice is likely to be made each time around. A random decision mechanism, in contrast, guarantees that over a series of decisions, all of the available alternatives will eventually be chosen and represented in the choice sequence. Randomness thus begins from multiplicity, but also ends (over time) in multiplicity. A random decision rule means indifference (ex ante) with respect to different alternatives; but equally as important, it reflects (ex-post) willingness – indeed, interest – that all of the alternatives will remain available as a result of the rule's use.

III. RANDOMNESS IN LAW

The rule of law, which guides contemporary liberal democracies, mandates a measure of stability and coherence in a legal system's norms, so that its subjects can predict the legal results of their actions to a reasonable degree of certainty.[53] At the same time, the rule of law also requires equal treatment: the law should apply uniformly to all its subjects, in the absence of a rational differentiating factor that justifies disparate treatment. Under the rule of law paradigm, any change to the normative field must be accompanied by a reasoned justification expressed through a legitimate decisionmaking procedure.[54] This is the case, for example, with parliamentary debate on a draft bill, judicial reasoning, and the administrative consultation process: these are all institutional procedures aimed at making decisionmakers rely on rational arguments.

Under this paradigm, then, a random decision rule – that is, a rule that subjects the application of a norm, or the discretion of its interpreter, to an uncontrollable and unpredictable process like a

---

53. *See*, *e.g.*, LON L. FULLER, THE MORALITY OF LAW 46-91 (rev. ed. 1969); BRIAN Z. TAMANAHA, ON THE RULE OF LAW 91-101 (2004).

54. *See, e.g.*, Jeremy Waldron, *The Rule of Law and the Importance of Procedure* 4 (N.Y.U. Sch. of Law, Pub. L. & Legal Theory Research Working Paper No. 10-73, 2010), *available at* http://ssrn.com/abstract=1688491 (necessary conditions for legitimate use of public force include a hearing before a tribunal that provides rational justifications for its decisions).

coin flip or dice roll – contradicts both the certainty and equality principles at the base of the rule of law. Randomness undermines certainty because the person subject to the norm does not know whether the norm will actually apply to her and, therefore, has difficulty planning her behavior.[55] Randomness undermines equality because without control over the application of the norm, two people who are similar in all relevant respects might still have different outcomes. In addition, randomness entails arbitrariness in that the application of a norm is not contingent on intelligible reasons, but on fate. At least some of the liberal notions of human dignity will deem this an affront to a person's right not to be subject to treatment that is grounded on irrational decisionmaking processes.[56]

Yet, in certain circumstances, common law legal systems do employ random decision rules. In many countries, like the U.S., legal randomness arises primarily in two typical situations: (1) at the substantive rights level, with respect to the ultimate allocation of indivisible resources, and (2) in the procedural context, with respect to the allocation of cases among judges and assignment of judges to judicial panels. Systematic thought on randomness in law has therefore been devoted mostly to explaining and critiquing these two contexts – the first as a rare anomaly in the rational field of substantive legal norms and the second as a prevalent phenomenon in judicial administration.[57] I discuss each of these contexts separately, followed by an assessment of what these instances teach us about the limits and possibilities of irrationality in a judicial system committed to the ideal of the rule of law.

A. Allocation of Indivisible Resources

The most common lottery context in rational legal systems is when there are multiple justified claims of equal legal weight to an indivisible good or resource.[58] Consider, for example, the allocation

---

55. Randomness does not eliminate all certainty. In fact, it introduces an element of risk, which we can take into account given our degree of risk aversion and the availability of means for protecting against it (i.e., insurance). Of course, in order to properly deal with risk, we need information – primarily, the probability of risk embodied in the random norm.

56. *See, e.g.*, Jeremy Waldron, *Lucky in Your Judge*, 9 THEORETICAL INQ. L. 185, 191 (2007); Yuval Eylon & Alon Harel, *The Right to Judicial Review*, 92 VA. L. REV. 991, 1002-06 (2006).

57. *See*, most notably, Samaha, *supra* note 44, a seminal survey of the use of randomness in law in general and in intra-court case assignment procedures in particular. Our contributions however diverge: unlike Samaha's, this Article asserts an overtly normative claim, which leads to distinct emphases in the conceptual groundwork as well.

58. *See* Samaha, *supra* note 44, at 33-34.

of a chattel inheritance, an organ for transplant, or a public housing apartment among equally entitled claimants or the allocation of the use of a classroom after school hours among similarly situated theater groups. Another set of cases in this category is when the good is divisible but the divided parts will be necessarily different, and so the dispute among the claimants will transform into a competition over the better part. Division of real property is the classic example here.

In such disputes, it is possible that the available heuristics of substantive law will be exhausted, without pointing to a rational preference of one claimant over the others. Moreover, the market mechanisms of allocation might also be unavailable, due to a lack of bargaining resources or information, prohibitive transaction costs, difficulties in translating distinct preferences into exchangeable terms, or a deontological aversion to certain kinds of barters. One of two results is then possible: either the allocation is canceled so that no one receives the good, and consequential equality is maintained; or else the good is allocated only to some members of the claimant group, based on a criterion that is irrelevant to the moral foundation of the claimants' initial eligibility.

In its general reluctance to refrain from allocations – an option that is viewed as both wasteful (and, thus, inefficient) and status-quo-preserving (and, thus, potentially distributively unjust) — the legal system sometimes resorts to a decision rule that is arbitrary but still fair. Such a rule must determine who will receive the indivisible good, but without taking into account differentiating factors that were excluded in the initial allocation process. As we have seen, an ad-hoc lottery satisfies these conditions, while guaranteeing all justified claimants equal chances of receiving the good or resource.[59] And, indeed, many legal systems sanction the use of a lottery as a tie-breaking means among parties with an equal claim to a finite, indivisible resource.[60]

Legal scholars have suggested extending the use of random allocation mechanisms to even more complex contexts. Thus, for example, Akil Amar famously explored the idea of an election mechanism whereby the ballot count is followed by a lottery among candidates that is biased relative to the share of votes each earned in the vote (e.g., a candidate who won 60% of the vote will have a 60% chance of winning the contested seat, rather than a 100% chance as is the case today). Such an arrangement treats the power of government like an indivisible resource, to which potential access

---

59. For a detailed development of this justification, see Peter Stone, *Why Lotteries Are Just*, 15 J. POL. PHIL. 276, 287-88 (2007).

60. *See*, *e.g.*, Samaha, *supra* note 44, at 33 (land partitions); Carol Necole Brown, *Casting Lots: The Illusion of Justice and Accountability in Property Allocation*, 53 BUFF. L. REV. 65, 114-24 (2005) (education rights).

ought be guaranteed for all groups, including minorities.[61] Considering the Solomonic dilemma, several authors have invoked the possibility of a lottery to allocate child custody between separated parents (at least where joint custody is unavailable). Such a rule represents a practicable solution for a judge who lacks a rational reason for preferring one parent over the other; but it also has an expressive quality with respect to the child, who is spared the experience of a judge assessing the parenting skills of her mother and father.[62] In a different context, a random distribution of small-claims class action proceeds was recently suggested, proposing that a few plaintiffs be randomly selected from the plaintiffs' class and paid sums larger than their individual claims. In this case, the resource up for allocation (the proceeds fund) is in fact divisible, but the costs of distribution among all class members would be prohibitively high.[63]

It is noteworthy, however, that random distribution mechanisms are not, in fact, usually used in socially crucial contexts. We usually do not decide child custody by coin flip;[64] we do not elect our leaders by a roll of the dice. This reality reflects a deeply entrenched aversion, documented in behavioral research,[65] as well as in moral argument,[66] to random determination of

---

61. Akil Reed Amar, Note, *Choosing Representatives by Lottery Voting*, 93 YALE L.J. 1283 (1984). On the frequent use of lotteries in election procedures from ancient Greece to the Renaissance, see NEIL DUXBURY, RANDOM JUSTICE 26-32 (1999).

62. *See* Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 L. & CONTEMP. PROBS. 226, 289-91 (1975); ELSTER, *supra* note 42, at 171-72.

63. Shay Lavie, *Reverse Sampling: Holding Lotteries to Allocate the Proceeds of Small-Claims Class Actions*, 79 GEO. WASH. L. REV. 1065 (2011).

64. *Compare In re Brown*, 662 N.W.2d 733 (Mich. 2003), where a judge was reprimanded for flipping a coin to decide whether a divorced couple's children would spend Christmas Eve with the father or the mother's parents. As part of the disciplinary proceedings, the judge promised "[to r]efrain from resolving any disputed issue by the flip of a coin." *Id.* at 737. *See also* Judicial Inquiry & Review Comm'n of Va. v. Shull, 651 S.E.2d 648 (Va. 2007) (disciplining a judge who flipped a coin in order to decide where the children would spend the better part of a holiday vacation, after the parents had failed to reach an agreement).

65. *See*, *e.g.*, Gideon Keren & Karl H. Teigen, *Decisions by Coin Toss: Inappropriate But Fair*, 5 JUDGMENT & DECISION MAKING 83, 98-100 (2010).

66. *See* RONALD DWORKIN, LAW'S EMPIRE 178-84 (1986) (random application of a legal norm violates the integrity requirement of a just legal system); *see also* Brown, *supra* note 60, at 114 ("Lotteries, by their nature, are fundamentally unreasoned and unexplained because of their randomness. Therefore, their use in making decisions with legal consequences offends generally recognized notions of distributive justice.").

"substantive" distributive questions—ethical, legal, or political.[67] This aversion is particularly striking given the conspicuous willingness to employ such mechanisms in central aspects of judicial administration. To that I now turn.

B. Case Allocation and Panel Assignment

The second instance of procedural randomness in law is ostensibly unrelated to the determination of contests of rights, but rather concerns the management of the judicial process itself: common law court systems often resort to random mechanisms in allocating cases among judges, as well as in assigning judges to panels, within a single court.[68] Although this institutional phenomenon is significantly more widespread and entrenched than the unique cases of indivisible resource allocation, it is fairly obscured and does not normally draw much concern.[69] This is a fact of great interest.

Why do legal systems employ random mechanisms to allocate cases and assign judicial panels? This could reflect a systemic presumption that all judges are similar enough in all relevant respects, and so random distribution is merely the cheapest mechanism for assigning cases when the court is indifferent to the allocation results. But this is an unconvincing explanation. It seems reasonable that if pure institutional efficiency were the objective, then allocation policies would be pulled toward specialization rather than randomness: sending similar kinds of cases to the same judge (and joining groups of judges in fixed panels) would ensure, over time, greater specialization and, thus, cheaper disposition.

A more persuasive explanation seems to be that the random allocation of cases among judges is in fact intended to deal with the reality of judicial heterogeneity: the resort to randomness is not the result of judicial sameness, but rather of judicial *divergence*. Indeed, the common understanding in the legal-realist world is that reasonable judges may and often do arrive at different answers to similar questions. This understanding might be based on a theory of

---

67. Contrary examples do, however, exist: for years, the U.S. drafted its soldiers into wartime service by lottery, when life and death were literally on the line. *See* GEORGE Q. FLYNN, CONSCRIPTION AND DEMOCRACY: THE DRAFT IN FRANCE, GREAT BRITAIN AND THE UNITED STATES 38 (2002).

68. *See*, *e.g.*, Samaha, *supra* note 44; Ashenfelter et al., *supra* note 12, at 266-70 (concluding empirically that three surveyed federal district courts assign cases mostly randomly); Matthew Hall, *Randomness Reconsidered: Modeling Random Judicial Assignment in the U.S. Courts of Appeals*, 7 J. EMP. LEGAL. STUD. 574 (2010).

69. The notable exception is Adam Samaha's detailed treatment of this topic in Samaha, *supra* note 44.

the indeterminacy of the legal norm,[70] on a conception of the strong discretion allowed in hard cases,[71] on the limits of human reason in its search for a single correct answer,[72] or on the recognition that judges' doctrinal commitments are sometimes trumped by their ideological ones.[73] Whatever the underlying theory, if we accept that the fate of a case depends on, among other factors, the identity of the judge or panel to which it has been allocated, and if these links of dependency can be identified, then the person in charge of case distribution turns out to have a great deal of influence over the contents of judicial outcomes. A random allocation mechanism removes this influence by preventing the system from allocating cases according to expected results. At the same time, an equal random allocation mechanism ensures every litigant ex-ante equal chances of reaching each and every judge, and it eliminates the capacity of sophisticated parties to steer their cases to a specific judge within a given court.

Random case distribution therefore sanitizes the process by ridding it of two kinds of external influences: the ability of allocating agents to abuse the system, on the one hand, and the strategic advantages of sophisticated parties, on the other. It eliminates intentional (or negligent) discrimination in a corrupted assignment process, as well as distributive discrimination between haves and have-nots. In addition, a random allocation mechanism expresses a systemic indifference to the differences among judges and thereby serves to legitimate courts' image as forums of impartial adjudication.

But this, of course, is not the full story. As many commentators have already noted, the solution developed to eliminate discrimination (or the appearance thereof) in the case allocation process raises important concerns of discrimination *ex post facto*. For random allocation of cases among judges within a court means embedding in the judicial process a significant irrational element: luck. The severity of a sentence in a criminal case or the probability of winning a (non-jury) civil case is determined by, among other factors, the sheer luck of the case's allocation to one judge rather than another.[74] From a consequentialist point of view, similar matters regularly receive disparate treatment, in random fashion and without any rational reason for the distinction (not even a bad reason, as lotteries are

---

70. *See* Menachem Mautner, *Luck in the Courts*, 9 THEORETICAL INQ. L. 217, 219-23 (2007).

71. *See* H.L.A. HART, THE CONCEPT OF LAW 132-39 (2d ed. 1994).

72. *See* DWORKIN, *supra* note 66, at 263-66.

73. *See* DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION 152-55 (1997); SUNSTEIN ET AL., *supra* note 12.

74. *See*, *e.g.*, Waldron, *supra* note 56, at 209; Mautner, *supra* note 70, at 222; Samaha, *supra* note 44, at 5.

"sterile"), except for the original interest in preventing manipulation of the allocation process and lowering its cost.[75]

Considering the judicial system's typical aversion to deciding judicial proceedings by lottery,[76] the commonplace use of randomness in case allocation, as well as the matter-of-factness with which it is accepted, raises questions and, accordingly, attempts at justification[77] and rectification.[78] At the same time, this apparent tolerance could also offer important hints as to the limits of acceptable randomization in the legal system: randomness in the judicial decision is shunned, whereas randomness in judicial administration is allowed. The judge may not flip a coin, but the court registrar may certainly do so.

C. The Legitimate Lottery Paradox: Between Adjudication and Administration

What is the source of the divide between the legal system's deep aversion to random judicial decisionmaking, on the one hand, and the presence of randomness in the case-allocation stage, on the other? A plausible explanation is that this divide, which we might term the legitimate lottery paradox,[79] reflects the public image of

---

75. *But see* Perez, *supra* note 40, at 141-42 (opting for a random choice process necessitates a substantive position in favor of randomness and, as such, cannot be neutral).

76. *See* Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 840, 840-41 (1984) ("Whether a judge's internal mental process, when pronouncing a sentence of twenty or thirty days, actually amounts to anything more than a coin flip, the community wishes judicial rulings at least to appear to be the product of contemplative, deliberative, cognitive processes."). Prominent Israeli Chief Justice Aharon Barak has stated that in choosing among several reasonable interpretive alternatives, "the judge may not flip a coin." H.C.J. 547/84, Of Ha'Emek v. Local Council Ramat-Yishai, 40(1) P.D. 113, 141 (1986) (Heb.).

77. *See* Samaha, *supra* note 44, at 70-81. Randomized case assignment can be explained as a means of "sensible allocation of indivisible resources [of judicial excellence] across apparently equal claims, and reliable experimentation on judicial behavior." *Id.* at 75.

78. *See* Mautner, *supra* note 70, at 224-34 (in order to diminish the role of luck in adjudication, the system should be designed such that each individual outcome approximates the average position all of the system's judges would have taken on a similar question). For a critique of the normative and practical viability of the suggested model, see Daphna Hacker, *Lack of Luck in the Courts: A Comment on Menachem Mautner*, 9 THEORETICAL INQ. L. FORUM 38 (2007).

79. Samaha discusses a close but distinct feature of this odd reality, which he calls "the case assignment puzzle": How come courts condone randomization in various governmental decisionmaking contexts (including court management), but exclude merits adjudication? Samaha, *supra* note 44, at

the court and, more specifically, the way legal systems have constructed the judge as the focal core of judicial action. The elusive notion of "public confidence" in the courts, to which judicial systems resort more often with the gradual erosion of their traditional legitimation mechanisms,[80] focuses mainly on the role of the judge: how she conducts the proceedings and reasons her decisions. Court administration tends to be perceived as a support system for the core judicial function, and as such, it is not measured by the moral standards that the judge and her decisionmaking process must meet.

It may be, therefore, that our belief in the rationality of judicial discretion, in the firmness of the procedures aimed to ensure it, and in a sufficient level of professional fitness of all our judges all affect our willingness to give up rationality – that is, reason-based decisionmaking – at the case allocation stage. The distance separating the initial random process of case allocation and panel assignment from the eventual moment of "substantive" judicial decisionmaking seems to be great enough – and, moreover, interrupted by the force of rational adjudication – to blur the impact of the former on the latter. Judicial discretion appears so exceptional in its reasoned rationality, that randomness seems its antithesis. Administrative discretion, in contrast, raises suspicion: it is seen as potentially tainted by the biases of bureaucratic culture, skewed incentive regimes, the agency of interest groups, and the pressures of the political ranks. So incorporating random elements in administrative decisionmaking processes may actually free the allocating agent from the corrupting potential of her job. The lottery is enabled at the administrative stage of adjudication thanks to – and in order to uphold – the ideal of the rationality of judicial discretion,[81] which, in turn, quells the demand for consequential equality in similar cases.

---

47. The paradox I discuss here concerns the fact that randomizing case assignment in fact randomizes much of the merits results as well.

80. *See generally* Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635 (1992); Sara C. Benesh, *Understanding Public Confidence in American Courts*, 68 J. POL., 697 (2006). *See also* Bush v. Gore, 531 U.S. 98, 157 (2000) (Breyer, J., dissenting) ("[I]n this highly politicized matter, the appearance of a split decision runs the risk of undermining the public's confidence in the Court itself.").

81. *See*, *e.g.*, BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 11 (1921) ("*Some* principle, however unavowed and inarticulate and subconscious, has regulated the infusion. … [] [A] choice there has been, not a submission to the decree of Fate."); TAMANAHA, *supra* note 53, at 123 (describing the rule of law ideal: "as the judge becomes indoctrinated in the ways of the law and the judicial role, the judge *becomes* the law personified. In the ideal, the judge is to be unbiased, free of passion, prejudice, and arbitrariness, loyal to the law alone."); PIERRE SCHLAG, THE ENCHANTMENT OF REASON 19-29 (1998).

The paradox remains unresolved, therefore. But it does nonetheless reveal an important piece of information: that we seem to be willing to conduct ourselves as a fairly stable political community – or are at least capable of doing so – even under conditions of institutionalized uncertainty and structural heterogeneity in adjudication results. It is true that the system sometimes employs mechanisms intended to limit the variance of judicial outcomes on certain issues. Appeals are meant to serve this purpose (among others); sentencing guidelines are another familiar example, as is institutional reform of court specialization. But despite such mechanisms, adjudication remains mostly diffuse: most cases are handled by generalist judges (or juries) and are not subject to effective appellate review.

In the next Part, I build on this insight about the equilibrium reached by the judicial system in merging diffuse and random elements at the institutional level with rational discretion elements at the consequential level. On its basis, I suggest the usefulness of the random allocation mechanism for the network of jurisdictions comprising the court system as a whole.

IV. THE CASE FOR RANDOM ALLOCATION

A. The Random Allocation Model: Description and Justifications

As we saw in Part I, in conditions of jurisdictional overlap, the choice of forum is effectively in the hands of the initiator of the litigation. Although this may lead to optimal use of the information she holds, and although it may enhance her sense of autonomy and agency, her strategic advantage could lead to socially undesirable, sometimes even harmful, results. This risk could be moderated by an ad-hoc lottery to determine the forum. Under the Random Allocation Model, cases would be filed with an administrative unit within the court system, which would then randomly assign them to one of the forums with jurisdiction over the case. The allocation mechanism could apply equal randomness, which would assure an equal chance of the case reaching any of the relevant forums; or it could be based on a biased lottery, assigning different probabilities of reaching different forums. As will be demonstrated below, the choice of lottery type will derive from the substantive purposes of the allocation process. The important thing to understand, though, is that this kind of purposive analysis is applicable only absent the premise of the initiator's control over choice of forum.

A random allocation mechanism would incorporate the typical advantages of procedural randomness into the choice of forum process: it would enhance social utility, because the process

would become shorter and simpler and would also save the wasteful investment in strategic planning; and it would ensure fairness ex ante among the parties, because they would have equal chances of receiving each of the alternatives. Access to a beneficial forum can be thought of as an indivisible resource; it therefore makes sense to allocate it by lottery, as the system is supposed to be neutral among the parties in the initial stage of the litigation.[82] Beyond these familiar justifications, however, there are also other social interests that might benefit from the adoption of randomness: it will guarantee greater equality among parties (distributive purpose); sustain over time a multiplicity of normative visions in the institutional field (pluralist purpose); and add information in the process of improving adjudication (epistemic purpose). I will now reflect on each of these three justifications in detail. I will then address several important challenges and counter-arguments to the ideas set out below.

(1) Distributive Justice

As previously discussed, creating an opportunity for the initiator to behave strategically at the choice of forum stage gives sophisticated parties an advantage. Such parties have the resources and, hence, the capacity to assess with relative accuracy their chances to succeed in each of the relevant forums (for example, if they are repeat players who are familiar with the system or if they can consult with a seasoned lawyer). Using their superior information, sophisticated initiators can locate the forum that they expect will yield the best possible results in their litigation. Although a system with concurrent jurisdiction can be assumed to be indifferent regarding which forum is chosen, the parties themselves are clearly not. Thus, there is no reason for one party to be given a distributive advantage over another at this initial stage.

In addition, sophisticated parties can typically better prepare for the possibility of litigation and, accordingly, act faster upon dispute and bring it to the forum of their choice before the other party manages to act. The greater the distributive gap between the parties, the lower the chances of counteraction by the adversary (such as raising a *forum non conveniens* claim, employing the right of removal, or seeking change of venue) once the process has been put into motion. Moreover, repeat players – usually, large corporations and governmental entities – can exploit their initial ability to choose the forum to aggregate achievements over multiple litigations (for example by strategically directing cases of special importance to one forum or another so as to establish (or avoid) a

82. Samaha thinks in similar terms of "the tragically scarce and indivisible resource of judicial excellence," which justifies random assignment of cases among judges. Samaha, *supra* note 44, at 66.

precedent or by maintaining long-term relationships with agents in specific courts).

There are two central types of cases where the potential for strategic manipulation of choice of forum can raise distributive concerns. The first is disputes in which the initiator of the proceeding typically possesses greater strategic resources than her adversary. The criminal process is the most obvious context of this category of cases. Other examples would be civil processes of debt collection by a bank or a national or local administrative entity. A large, well-funded class action against a relatively small defendant would also be included in this category. In such proceedings, the choice of forum can affect their nature and outcome, in a single case or over a series of cases. With the second category of cases, it is the nature of the dispute or available forum that creates the distributive risk of the potential for strategic manipulation. An example would be family disputes, which often implicate gendered biases and distinctions and might, therefore, raise the distributive concern that strategic choice of forum will reproduce existing power structures rather than challenge them. The Israeli context is a good case in point, where the religious courts and civil courts, which have concurrent jurisdiction and distinct cultural commitments, vie for litigants in family disputes under a first-come-first-serve system.[83]

Cases falling into these two categories – i.e., when there are significant distributive ramifications to the initiator's strategic power – require a procedural alternative that will remove her choice of forum advantage. In eliminating the initiator's ability to secure a familiar court setting and thereby impeding her ability to prepare in advance for the litigation, this will put parties on more equal footing at the start of the proceedings, at least with regard to the litigation forum.[84] A random allocation rule – instituting an ad-hoc equal lottery – would support this end. It would save the costs of strategic preparation, allowing the parties to prepare, at best, for the given probabilities of reaching each of the possible forums (assuming these probabilities are publicly known). At the same time, such a rule would also eliminate the capacity of the system itself – that is, of its allocating agents – to prefer one forum over others and thereby bias case outcomes. A random allocation rule is, accordingly, equal ex ante both among the parties to a given case and among parties across different proceedings, because each case has the same probabilities-matrix of reaching each of the jurisdictionally relevant forums. The rule is neutral in the sense that it does not allow for the preference of one forum over others.

---

83. *See* Ariel Rosen-Zvi, *Forum Shopping between Religious and Secular Courts (and its Impact on the Legal System)*, 9 TEL AVIV U. STUD. L. 347 (1989).

84. *See also* Yuval Feldman & Shahar Lifshitz, *Behind the Veil of Legal Uncertainty*, 74 L. & CONTEMP. PROBS. 133 (2011) (suggesting enhancing uncertainty with regard to the legal consequences of certain practices in order to eliminate the operation of undue reasons).

Because the distributive justification applies the random allocation rule to only certain categories of cases, we run into the classification problem: how to determine – and more importantly, who will determine – that a certain case belongs to one of the categories of cases in which a distributive concern tends to arise and, therefore, should be randomly assigned. In some contexts, the classification is fairly simple, since they exhibit clearly-identifiable instances of distributive concern, such as criminal prosecutions or immigration proceedings; these could be set out en masse in procedural legislation. In less obvious cases, refined categorization tools are necessary to identify instances that fall in the categories of cases warranting random allocation for distributive reasons. These could be based on types of parties or the subject-matter of the dispute, as previous work on this topic has proposed.[85]

As noted, the distributive justification for random allocation in cases of concurrent jurisdiction assumes the system's moral indifference to the competing forums. This is not a necessary premise. Various ideological viewpoints might prefer that certain kinds of cases reach certain kinds of forums, even though the rules of concurrent jurisdiction allow equal access to multiple forums. Thus, for example, in the U.S., civil rights activists have long preferred federal courts over state courts in litigating constitutional claims, while a federalism-centered point of view might support a greater role for state courts in interpreting the Constitution. The random allocation model, which assumes equal chances to reach either forum, reflects, in contrast, respect for the fact of institutional multiplicity in the judicial system. Whether this diversity is a planned reality or the result of unintended processes,[86] the random model promotes a synchronic understanding of the judicial system. It takes account of existing institutional conditions and gives them their utmost effect. If the legal system has generated multiple, concurrent forums to determine certain kinds of cases, then it should embrace an allocation mechanism that will effectuate this choice, without allowing an undue advantage to quick or sophisticated parties. Still, in the discussion of pluralism below, I will seek to show that there are also independent reasons, beyond the effectuation of an existing state of jurisdictional affairs, for an arbitrary equalization of access to overlapping jurisdictions.

At the same time, random allocation could also be used to attain a sort of distributive "affirmative action." This could be done through a lottery biased in favor of a certain forum or through more complex methods of randomization. Thus, for example, assume we prefer that most prosecutions of terrorism suspects are brought

---

85. *See, e.g.,* Issachar Rosen Zvi & Talia Fisher, *Overcoming Procedural Boundaries*, 94 VA. L. REV. 79 (2008) (suggesting a novel typology of legal cases according to wealth and power disparities among parties).

86. *See* BAUM, *supra* note 13, at 5 (characterizing the process leading to the reality of court specialization as mostly "inadvertence rather than design").

before military tribunals, but also want to keep civilian courts in the picture, perhaps in order to monitor interrogation practices by sample. We could create a lottery in which 80% (for the sake of the example) of the relevant cases are brought before military commissions and 20% are referred to federal district courts. Under such a scheme, all cases have the same probability distributions of reaching each forum, so that in that respect, ex-ante equality among all defendants is maintained. At the same time, the power of the prosecuting authorities to strategically choose their forum of preference for each and every case is eliminated. Consider another example, in the context of family disputes subject to concurrent jurisdiction: To the extent a legal bias exists favoring men over women in property distribution decisions,[87] we may want to grant female litigants an initial advantage in choice of forum. This can be done by subjecting only male initiators to an allocating lottery. Under such a system, women are still rewarded for acting quickly, whereas men lose the incentive to do so, but without granting complete veto power to women. Of course, these suggestions raise complex problems and issues. It is important to note, however, that we can begin debating them only once we abandon the assumption of initial choice by the litigation initiator and consider, instead, mechanisms that are not dependent on pure party agency.

(2) Pluralism

By eliminating the strategic element in choice of forum and replacing it with random allocation, we would be relinquishing a market system of forum competition. The latter system often implies processes of specialization and "natural selection," which lead to the eventual precedence of certain forums over others.[88] A lottery at the choice of forum stage would prevent parties from directing their cases to the most efficient or competent forum in a given case. The ramification is a certain added cost in terms of the social utility of the judicial system: some cases would necessarily arrive at a sub-optimal forum, while some forums that should have (according to some evaluation criterion) diminished and withered over time are likely to remain in operation and continue to get cases.

This cost notwithstanding, however, this result can at the same time benefit the promotion of the political ideal of value pluralism in adjudication. In ideologically, culturally, religiously, and ethnically diverse political communities – all contemporary democracies, in effect – mainstream liberal theory currently

---

87. *See*, *e.g.*, Marsha Garrison, *How Do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making*, 74 N.C.L. REV. 401, 495, 512-13 (1996) (reporting findings from an empirical study of New York divorce cases in which "Judicial decisions often reflected traditional gender stereotypes," if not outright bias).

88. *See supra* notes 33-36 and accompanying text.

demands equal concern and respect for all competing value systems, or at least the reasonable ones.[89] This pluralistic approach requires, at a minimum, making room for competing cultural visions in the public sphere, in resource allocation, and in public processes of decisionmaking. Under more ambitious versions of this view, a pluralistic community should also institutionalize modes of communication, discourse, and education among the groups comprising it, with the purpose of enriching the community's aggregate cultural resources and creating conditions for available exit from and entry into different groups.

A diffuse judicial system can support these pluralist ideals. Because courts are central social institutions in the development and dissemination of public values,[90] institutional heterogeneity in their design can express the cultural and geographic diversity of the political community (a symbolic/educational function); give effective normative presence to the conceptions and demands of different groups (a legal-pluralist function); and facilitate an ongoing exchange among the various groups through judicial discourse on shared normative issues, like the interpretation of constitutional or procedural norms (a deliberative-learning function). Because the institutional idiosyncrasies of each kind of court produce distinct forms of legal experience, and because very few of the decisions of these forums are subject to homogenizing appellate review, a multiplicity of court forums sustains a diverse character to the legal order. As such, the court system constitutes a field of state power that recognizes, expresses, and facilitates the value-pluralist character of the political community.[91] Of course, this is a limited sort of diversity, since the various forums apply a shared system of rules (or at least a shared constitutional regime), albeit through diverse institutional vehicles. This ensures that pluralism does not turn into complete normative balkanization, and a shared framework of power and discourse – a legal culture, grounded in an overall constitutional structure[92] – is maintained.

The random allocation of cases to diverse forums with concurrent jurisdiction will assist in upholding the consequential

---

89. *See*, *e.g.*, ISAIAH BERLIN, *The Pursuit of the Ideal*, in THE CROOKED TIMBER OF HUMANITY 1-19 (1998); JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS 302-14 (1998); JOHN RAWLS, POLITICAL LIBERALISM 231-40 (2005); AMARTYA SEN, THE IDEA OF JUSTICE 239-47 (2009); Martha Minow & Joseph William Singer, *In Favor of Foxes: Pluralism as Fact and Aid to the Pursuit of Justice*, 90 B.U. L. REV. 903 (2010).

90. *See*, *e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1962); OWEN FISS, *The Social and Political Foundations of Adjudication*, *in* THE LAW AS IT COULD BE 48 (2003).

91. *See* Aronson, *supra* note 11, at 266-67.

92. *See* Menachem Mautner, *Three Approaches to Law and Culture*, 96 CORNELL L. REV. 839, 856-67 (2011) (surveying theories of judicial behavior and discourse as a "distinct cultural system").

pluralism of the legal system, even if individual litigants have no interest in such pluralism. Implementing an equal lottery in a competition between two forums ensures that 50% of all relevant cases will reach each of the forums, and so the political community will enjoy the comparable input of each of the institutional alternatives (state A and state B, state and federal, military and civilian, religious and secular). Such a mechanism sacrifices the individual autonomy of the proceeding's initiator, as well as that of a separatist community or a monopolistic forum-competitor, for the benefit of a consequential institutional ideal of normative diversity and of continuous interaction among members of different knowledge and culture groups.

Significantly, this kind of pluralism does not reflect the communitarian stream in multicultural thought, which calls for the state to use its power to enable groups to maintain separate and exclusive normative frameworks. Rather, this is a model that seeks ongoing interaction (through legal-normative discourse) among groups and group members and, therefore, demands that groups relax their exit and entry barriers, at least as long as they make use of state-sanctioned judicial power.[93] Such "social engineering" is not a rare feat. Incorporation of arbitrary elements into a rule – or, at any rate, elements that do not take into full account the preferences of those subject to the rule – is a familiar (if constitutionally contested) strategy for promoting social and class diversity in various policy contexts, such as university admission[94] or soldier placement in military units.[95]

Of course, a necessary condition for the legitimacy of pluralism-based random allocation is that all of the relevant forums meet minimum standards of procedural fairness. It is justified to force parties to litigate in a forum they have not chosen (given a preferred alternative) only if each of the alternatives is morally tolerable. The degree of tolerability derives from the prevailing legal-procedural ideal in a given society at a given time and so cannot be set out in general terms. It does make sense, however, that a reasonably liberal community would require all available forums to adhere to basic due process tenets and treat all litigants in an equal and respectful manner, even if a particular litigant does not share the normative commitments or cultural biases that characterize the forum to which she was sent. Ostensibly, this should not be too much of a challenge, as all institutional alternatives are the products of the democratic system to begin with.

---

93. *See*, *e.g.*, Leslie Green, *Rights of Exit*, 4 LEG. THEORY 165 (1998).

94. *See*, *e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003) (allowing the inclusion of some considerations of racial diversity in law school admission policies, although a lottery was deemed too arbitrary).

95. *See* MORRIS J. MACGREGOR, JR., INTEGRATION OF THE ARMED FORCES 1940-1965, ch. 7 (1985) (the U.S. military resorted to quotas in order to ensure inclusion of black soldiers in "white'" units).

Even within democracies, however, not all forums maintain similar levels of procedural fairness. Military forums raise constant concerns, as do religious courts where such exist, but so might seemingly innocuous forums of the problem-solving variety, which are often criticized for relaxing due process guarantees in the furtherance of other institutional purposes.[96] For such forums to be included in an essentially coercive system of pluralist allocation, they would have to satisfy general conditions of fairness.

(3) Knowledge

Institutional heterogeneity does not only promote the pluralist goal of respecting competing normative worlds. It can also serve another purpose: infusing information into political discourse and institutional design processes. There are several aspects to this latter objective. On one level, which is closely related to the pluralist argument rationale, we can construe deep cultural disagreements as complex questions to which we have yet to find conclusive answers. Consider, for example, the profound controversies on gun rights or gay marriage, on which state and federal judiciaries, or the courts of different regions, might genuinely and reasonably disagree. While resolution to the underlying moral dilemmas is possibly out there, it may be that we are simply in need of more time to fully fathom their implications or come up with new data or arguments or theories that would help in reaching resolution. If this is the case, then it is justified to keep multiple alternatives available, side by side, so that we can continue experimenting with them and learning from them and perhaps even agree on the dominance of one or the other at some point in the future. A random allocation mechanism would ensure that strategic litigants will not undermine this social interest in maintaining concurrent alternatives that reflect genuine and as-of-yet irresolvable differences among members of the political community.

On a slightly more practical level, heterogeneous alternatives are a familiar and often necessary means in any experimental process testing the utility of a novel policy idea. Institutional moves towards specialization in adjudication are typical such situations. Decisions to establish new court forums devoted to a unique subject-matter are a commonplace phenomenon, usually based on the predictions of experts and politicians as to the social gains that will result.[97] A responsible decisionmaking process, however, should be wary of granting such new forums complete and exclusive jurisdiction without first testing the assumptions that led to their creation. One way of conducting such an assessment is to attempt (perhaps during a predetermined trial period) concurrent

---

96. *See*, *e.g.*, Phylis Skloot Bamberger, *Specialized Courts: Not a Cure-All*, 30 FORDHAM URB. L.J. 1091 (2003).

97. *See* BAUM, *supra* note 13, at 49-55.

jurisdiction between the new forum and old forum and randomly distribute cases to both. This would reveal the relative benefits of each alternative.

This idea of course draws from the familiar and normal practice of scientists from various disciplines, who regularly divide tested communities into trial and control groups to conduct informed comparisons. Just recently, several prominent legal scholars proposed that legal designers adopt this model, so that new regulatory programs would include an initial stage testing the effectiveness of proposed policy relative to an alternative (the status quo or any other suggested innovation), with trial and control groups to be selected randomly from the relevant population.[98] The random element here is crucial: it is intended to limit the capacity of the experimenter to skew the composition of the trial and control groups (intentionally or unconsciously) and, even more, the possibility of the subjects themselves altering the experiment's results by joining either of the groups for exogenous reasons. The experimenter's main objective is to examine the functioning of the relevant alternatives in similar conditions; in our context, this would be the ways in which different court forums treat similar cases. It would require sending similarly-situated parties, who would normally pick the same forum, to different courts. Randomness is the customary way to carry out such an analysis.

Granted, a comparative experiment in the operation of competing court forums with a random allocation of litigants does not qualify as a controlled "lab" experiment. It is an experiment in actual social life, and all the participants are affected by it in real and direct terms (there's no placebo option), without even consenting to participate (at least not in the regular sense of informed consent, as opposed, perhaps, to the presumed consent of social-contract based democratic legitimation theories). This means that – as with the pluralist justification – all of the alternatives must conform to minimal conditions of procedural tolerability in order to justify their experimental worthiness. Moreover, the compared alternatives are cognizant of one another and thus might behave in a strategic or competitive fashion to gain more acceptance, power, and income. The race among forums for corporate chartering – in the U.S., currently being won hands-down by Delaware – exemplifies this. These dynamics could clearly skew the comparative analysis and should, therefore, be accounted for as well.

Still, assuming minimum assurances of procedural fairness, the parallel treatment of similar cases in different forums can teach us a lot – both on how these forums behave and on the various ways available for treating similar problems. It is therefore customary to relate to diffuse court systems as "laboratories" in which the legal system weighs institutional and doctrinal alternatives, compares

98. Michael Abramowicz, Ian Ayres & Yair Listokin, *Randomizing Law*, 159 U. PA. L. REV. 929 (2011) .

them, and challenges itself to devise possible innovations; this is one of the traditional justifications for the federal system in the U.S., in which various states experiment in diverse legal arrangements while other states learn from their neighbors' cumulative experience.[99] Indeed, the multiplicity of circumstances in which the federal system allows for concurrence of jurisdiction has been famously explained by Robert Cover as an attempt to promote innovation and critical exchange.[100]

Relying on the agency of parties in generating such experimental dynamics is problematic, however. Litigants' incentives do not tend to overlap with the social interest in producing knowledge and promoting innovation and experimentalism in institutional design. Being strategic actors, parties go to the forums of their own preference. Over time, a "free market" of court forums may lead strategic litigants to prefer a certain forum and abandon another, although from a social perspective, the latter may be an important resource of knowledge, innovation, and critique (and aside from the related distributive concerns). Indeed, the near-monopoly of Delaware courts over corporate litigation in the U.S. has been decried by some for its effective elimination of available normative/institutional alternatives for U.S. companies.[101] Random allocation solves this problem by setting egoistic interests aside and giving precedence to the societal interest in a diverse output of the judicial system.

B. Counter-Arguments and Replies

(1) Man as Means

One of the central challenges to the argument presented in this Article for randomized case allocation might echo the Kantian categorical imperative against treating human beings as a means alone. At the individual level, incorporating random elements into the management of the judicial system for the purpose of furthering general social interests does prevent some litigants from fulfilling their own will, and it may even forgo the possibility of attaching the most suitable process to a given case. The experience of individual

---

99. The most familiar statement of this kind appeared in Justice Brandeis's dissent in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932): "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." For a recent discussion of this argument and an assessment of its critiques, see Friedman, *supra* note 10.

100. Cover, *supra* note 7, at 672-80.

101. *See* Michael Abramowicz, *Speeding up the Crawl to the Top*, 20 YALE J. ON REG. 139, 157-59, 189-90 (2003).

parties thus turns into a means of sustaining institutional pluralism, with all of its accompanying distributive, political, and epistemic advantages, according to the argument I set out above.

This may sound like a strong rejoinder, but I do not think the Kantian point to be compelling in the current context. Court systems are created and developed through complex political and bureaucratic processes, which reflect diverse reasons and purposes; some relate to the rights of individual litigants, while others to various public or parochial interests. Respect for the person that comes "before the law" does not necessarily entail establishing some particular forum or a forum that is necessarily to the person's liking. Rather, it is achieved by ensuring that *any* forum at which she arrives will provide basic procedures and an impartial arbiter, so that the proceedings will be fair and intelligible. Given these conditions, design of the judicial forums and the mechanisms of choice and allocation among them is essentially a social matter of general concern: we are concerned with the design of the institutions for the development and inculcation of the political community's public norms, which are also the means for controlling the state's use of its violent power against its citizens. Making the use of these institutions susceptible to the strategic choices of certain litigants seems, in this light, unfair (vis-à-vis their adversaries) and undemocratic (vis-à-vis the general public). Given sufficient fairness standards in all of the alternative forums, it is difficult to object to society's making use of the diffuse system it has generated in order to realize its values to the fullest extent.[102]

In addition, recall that the notions of respect, autonomy, and agency cited in the current critique of the random model in fact apply only to one of the parties in typical court proceedings – the party that gets to choose the forum. As it is, the other party is dragged into the process and, as such, becomes a "means" for furthering the interests of the former, without having a say in the initial choice of forum. This is the result of a specific structure of the legal process that is neither necessary nor easily justified. It is a state of affairs that, in some circumstances, empowers sophisticated parties while denying society valuable sources of normative input that a re-imagined diffuse court system might yet produce.

(2) Efficiency

The random allocation model could be criticized on efficiency grounds for three related reasons: (1) it fails to utilize the

---

102. In fact, as Dorf and Sabel aptly argued, "we do not face a choice between experimentation or no experimentation. The status quo is an ongoing, albeit haphazard, experiment. Between that kind of experiment and a more democratically and systematically organized one, we think the choice is easy." Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 469 (1998).

information held by the parties regarding the suitable forum; (2) it introduces a new element of uncertainty into the litigation matrix, which can mean new insurance costs for risk-averse parties (this is also a matter of distributive concern, since risk aversion increases for low-income individuals[103]); (3) and in some contexts, it undermines the expertise and specialization rationales that led to the creation of separate forums in the first place. Therefore, in certain circumstances, the random allocation mechanism will entail litigating a case at a higher cost than otherwise necessary. The random model does away with rational input in the market for forums, and it does not replace it with the rational input of any other agent. It simply lets fate decide, and there is no reason to assume that luck has a tendency towards efficiency. The control of the central planner is limited to the establishment of the various court units (creating the field of alternatives), and the role of the proceedings' initiator is exhausted with the decision to bring her case to court (entering the field). The allocation itself is taken away from both of these agents, and in this respect, we could argue that the Random Allocation Model is less efficient than reason-based alternatives.

A partial response to this point turns on the fact that random mechanisms are typically very cheap in and of themselves. This is an important point to keep in mind, given the considerable costs invested in litigating initial disputes over jurisdiction, venue, and *forum conveniens*. At least some of these disputes and their accompanying costs will be saved by a default random mechanism for resolving questions of concurrent jurisdiction.[104] A random allocation mechanism also will reduce the ex-ante incentive of strategic actors to invest resources to prepare for future litigation – an investment that is, as discussed, pure waste from a social point of view.

But a more comprehensive reply to the efficiency critique requires a shift from assessing the efficiency of a single instance of litigation to considering the aggregate social outcomes over time. Even forgoing the distributive justification for the random model (assuming, though we shouldn't, that equality does not promote efficiency), the pluralist and epistemic aspects of the model suffice as evidence of its concern with improving the quality of law and

---

103. *See* William B. Riley Jr. & K. Victor Chow, *Asset Allocation and Individual Risk Aversion*, 48 FINANCIAL ANALYSTS J. 32 (1992); Charles A. Holt & Susan K. Laury, *Risk Aversion and Incentive Effects*, 92 AM. ECON. REV. 1644, 1651 (2002) ("income has a mildly negative effect on risk aversion").

104. The knowledge that the case will be allocated by lottery can also incentivize parties to settle before the forum is decided: eliminating the strategic element reduces the incentive to withhold information and, thereby, makes settlement more attainable. *See* Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade*, 104 YALE L.J. 1027 (1995).

adjudication over time. Specialization is doubtless an important utilitarian principle for institutional designers, but over-specialization, which dissects legal knowledge into separate and enclosed forums, can also lead to a detachment from generalist legal discourse and to the vulnerability of such forums to the biases of interest groups and self-sustaining informational cascades. The very demand for efficiency may, therefore, justify relaxing the rigid boundaries of specialization, to some extent, so as to maintain contact and cross-pollination among the system's various units.[105]

Indeed, no experiment is short-term "efficient," since it inevitably wastes resources on examining alternatives that are due to be proven inferior and eventually abandoned. But we keep on conducting experiments, and we try to converse across institutional and cultural borders, because accumulation of knowledge is a project of obvious utilitarian benefit from a social perspective. In this regard, the ideal of pluralism not only derives from deontological conceptions of dignity and equality, but also emerges as a means for maximizing social welfare over time.

(3) Legitimacy

How would a lottery affect the experience of the litigant in the judicial process? The behavioral literature on procedural justice has shown that people ascribe considerable importance to the nature of the process that led to a decision on their matter, regardless of the contents of that decision. This means that a fair process can reinforce the legitimacy of its outcome, even if its subject landed on the losing side. Familiar versions of the procedural justice claim are characterized by the expectation that the subject of the decision be able to affect its making – to present evidence and arguments and witness the process by which the evidence and arguments lead to the eventual outcome.[106] This conception of fairness requires a rational decisionmaking process, and flipping a coin is perceived as its very antithesis.[107]

This potential argument against the involvement of procedural randomness in the process leading to a judicial decision certainly has some merit. Yet it is important to remember that the decision to resort to such a mechanism in the first place is reasoned and rational, as well as justified by the understanding that it is superior to other allocative options.[108] Indeed, it is not easy to say

---

105. *See* Aronson, *supra* note 91, at 287-96.

106. *See*, *e.g.*, E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 93-118 (1988).

107. For a detailed description of the argument in the context of lotteries, see DUXBURY, *supra* note 61, at 132-35. *See also* ELSTER, *supra* note 42, at 118-20.

108. *See* ELSTER, *supra* note 42, at 116. *Cf.* Perez, *supra* note 40, at 141-42.

what is preferable from a procedural justice point of view – a decider unable to choose among given alternatives who disguises a random choice with rational arguments that fail to persuade her, or a decider who exposes the dead end she has reached and openly resorts to a process that, albeit arbitrary, at least ensures equality, like a lottery.[109] Nonetheless, given the obvious modernist preference for rationality and consistency in decisionmaking,[110] it would be reasonable to assume that a random allocation mechanism would yield some cost in terms of legitimacy and public confidence in the courts. The knowledge that a decision was reached in conditions of ex-ante equality is not always sufficient to soften the sense of injustice that results from a consequential defeat.[111]

A partial response to this concern is tied to the distinction suggested earlier in the Article, between substantive judicial decisions and administrative decisions made in the pre-trial case allocation process. As demonstrated, the reality is that most litigants are already subject to a random allocating process when it comes to the judge assigned to their cases or the pool from which their jury is selected. And as discussed earlier, we may be willing to tolerate this treatment because we assume that all judges satisfy some minimal standard of rational professionalism, so we do not expect to face unbearable injustice, whoever the judge may be. This notion is in fact similar to the condition stated above for the legitimacy of forced pluralism in court forums: that all available forums satisfy basic tenets of procedural tolerability, such that even by arbitrary allocation, we will achieve a reasonably fair court.

In addition, as stressed throughout the discussion, the existing arrangement for choice of forum from among concurrent jurisdictions does not rest on a fair decisionmaking process either. Rather, it is based on the strategic agency of the forum chooser, who, surely, pays no heed to the preferences of her adversaries. Adopting a random allocation mechanism in place of the prevailing principle of initiator's agency would raise procedural justice concerns for those who have become accustomed to making the initial choice of forum; it would offer a new element of fairness to the other side.

(4) Opt Out

It could be argued that sophisticated litigants, knowing they face a barrier to strategic preparation due to randomization, will act in advance to counteract the uncertainty. They could do this, in

---

109. *See* DUXBURY, *supra* note 61, at 120-21, 132-33.

110. *See* ELSTER, *supra* note 42, at 116; John E. Coons, *Consistency*, 79 CAL. L. REV. 59 (1987).

111. *See*, *e.g.*, ELSTER, *supra* note 42, at 170 ("Equality ex post has a much more robust appeal than equality ex ante. Once the coin is tossed, the winner takes all and the loser's knowledge that he or she had an equal chance of being the winner is meager consolation.").

principle, in one of two ways: either by resorting to mechanisms of alternative dispute resolution (ADR), where the parties have greater control over the character of the forum and nature of the proceedings, or by contractually ensuring choice of forum or rules of procedure.[112] Although these possibilities are already available and might not breed unique concerns, they do seem to undermine the fundamental purposes of the random model: they diminish the redistributive qualities of randomness, because strong parties could use superior bargaining power to avoid it; and they erode the redeeming potential of jurisdictional multiplicity, because parties might abandon the court system for more certain alternatives and thereby fail to provide it with the cases it needs to reap the benefits of diffusion.

This is a serious challenge to randomness in some respects, but its limits should be noted. First, with regard to the possibility of opting out of the judicial system in favor of alternative forums: this option is not available in matters in which the law requires judicial involvement and does not allow for non-state alternatives. The criminal process is an obvious example, but so are child custody determinations, for instance. Second, as to the possibility of contracting around the random allocation process: this can be controlled by fairly straightforward contract law doctrines, such as unconscionability, and made subject to judicial review.

Naturally, the risk of contracting around the random process also touches on parties' interest to negotiate the choice of forum question *ex post facto* — that is, to make a deal *after* the lottery has already handed one of the parties, in random fashion, access to an advantageous forum. Given an equal lottery, the ability to contract ex post would sometimes benefit an already-better-off party (although at other times, it would give a weaker party an additional bargaining chip), as well as undermine the systemic interest in preserving a plurality of active forums. The random model therefore requires a "protection mechanism." Such a mechanism could determine that the result of the lottery is final and unchangeable, although this would not contend with the option of withdrawing the case altogether from the judicial system. Accordingly, a means of regulating contractual evasions would be needed here too.

CONCLUSION: FORUM SHUFFLING AND THE SUBSTANCE/PROCEDURE DISTINCTION

112. *See* Jaime Dodge, *The Limits Of Procedural Private Ordering*, 97 VA. L. REV. 723 (2011) (surveying the doctrinal landscape regarding procedural private ordering, and suggesting a "symmetrical theory" of enforcement which relies on the rules governing procedural agreements during trial); Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 Wm. & Mary L. Rev. 507 (2011) (describing the practice and evaluating the social spillovers that result from the "outsourcing" of procedural norms).

A consistent, nagging issue for civil procedure scholars is the boundaries of their kingdom — the distinguishing feature that draws the line between procedural law and substantive law: Does such a feature exist, and how should it be conceptualized? Various tests and doctrinal developments have sought to contend with this puzzle, which has both theoretical and practical implications.[113] At the end of the day, however, a single common question has taken shape: Is the norm at hand intended to direct the behavior of people in their social activities (substantive), or is it only meant to determine how rights and duties are to be enforced in court if the internal enforcement power of the norm fails (procedural).

This distinction is open to two familiar challenges: First, people do not experience this distinction in the real world. In reality, we are Holmesian "bad men" – we use (within the boundaries of our rationality) every piece of normative information regarding the consequences of our actions when choosing social behavior, including the risks and probabilities of an eventual judicial process. Second, the judicial process itself is infused with political, ideological, and distributive missions and implications, which means that it is also a field of "substantive" social life and not only a means for its regulation.

One plausible response to these two points is to abandon any principled distinction between the substantive and the procedural and to accept the fact that all state institutions are part of a normative regime that shapes, with varying degrees of efficacy, the incentives and choices of its subjects. Yet to the extent that there are useful reasons to maintain the distinction between the two kinds of norms – rules of first order and second order – we face a serious institutional predicament: how to design a judicial process that, on the one hand, does not affect social behavior as long as it is not brought into play but, on the other hand, ensures worthy social consequences if and when it is invoked. In Meir Dan-Cohen's terms, how do we ensure an effective "acoustic separation" between human behavior and the norm to which it is subject?[114]

---

113. *See*, *e.g.*, Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 38 DUKE L.J. 281 (1989); Martin H. Redish & Dennis Murashko, *The Rules Enabling Act and the Procedural-Substantive Tension: A Lesson in Statutory Interpretation*, 93 MINN. L. REV. 26 (2008); Jay Tidmarsh, *Procedure, Substance, and* Erie, 64 VAND. L. REV. 877 (2011) (suggesting a differentiating criterion based on the effect of the norm on the value of the claim at filing); Jennifer S. Hendricks, *In Defense of the Substance-Procedure Dichotomy*, 89 WASH. U. L. REV. 103 (2011) (arguing that a bright-line distinction in the context of the *Erie* doctrine would enhance states' lawmaking political accountability).

114. Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

The idea of incorporating random decision rules into the legal process is not a panacea, and it certainly has its costs. But it also hints at new directions for solving the puzzle of procedural law. Such a mechanism will diminish harmful incentives and distributive disparities ex ante. At the same time, it will facilitate the realization of the pluralist potential of a diffuse court system as well as benefit from the treasure-trove of knowledge it generates.

On our way to these goals, we must consider the procedural norm in its systemic, not individualized, context: the former relates to the aggregate product of the judicial system over time and across cases and courts and not the personal achievement of one or another party. The procedural norm is, of course, subject to foundational conditions of fairness, because all litigants are persons worthy of respectful treatment. But being exempt from the need to instruct behavior beyond the courthouse, this norm may also be released from the requirement of rigid consistency in the management of adjudication, if other purposes may be better served otherwise. Randomness offers an inconsistency that is not corrupt; it is a resource worth utilizing.