

COLOR-BLIND: PROCEDURE'S QUIET BUT CRUCIAL ROLE IN ACHIEVING RACIAL JUSTICE

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*“Our local [i.e., state-court] judges, it seems, succumb to whims and caprices of local custom in deciding cases like ours,” he said. “In the federal courts, a judge is appointed and doesn’t have to worry about being reelected. God grant them the moral courage and integrity to interpret the Constitution in its true meaning.”*¹

Dr. Martin Luther King, Jr.
*Newspaper interview prior to the
Montgomery Bus Boycott Trial*

I. INTRODUCTION

The Desegregation Era, the Civil Rights Movement, and federal criminal trials involving racially charged events provide perhaps the best modern examples supporting this Article’s thesis. This Article offers an in-depth discussion of the often overlooked ways in which procedure plays a key role in overcoming racial prejudice.² A relatively recent trial will help to introduce the themes that are developed more fully throughout the rest of this Article.

In 1992, Rodney King, an African-American, suffered a lengthy and severe beating from several Los Angeles police officers, all of whom were Caucasian.³

* © 2010. Associate Professor, Regent University School of Law. B.A., 1981, Randolph-Macon College; M.A., 1982, J.D., 1985, College of William and Mary. The author acknowledges his deep gratitude, first and foremost, to the late Judge Walter E. Hoffman, a jurist who truly was color blind. As explained in Part III.1.A., (the section of the Article dealing with desegregation of the South), Judge Hoffman played a pivotal role not only in desegregating the most populous area of Virginia, but in ordering then Virginia Governor Lindsay Almond to cease the campaign of massive resistance that the Governor and his supporters had undertaken. As a judicial clerk for Judge Hoffman, the author learned firsthand the value of impartial justice not only by hearing Judge Hoffman’s views on the need for impartial justice, but through watching him dispense it. The author also thanks the following professors for reading drafts of this Article and providing valuable comments, insights, and suggestions: Beth Burch, James Duane, Steve Friedland, Natt Gantt, Mike Hernandez, Mike Schwartz, Craig Stern, and John Tuskey. Because the author has been working on this Article for an extended period of time, a Research Assistant from past academic years, Jess Monette, needs to be recognized for his research assistance. Also, Courtney Fogarty, Nathan McGrath, and Andrew Porter—offered not only their considerable editing talent but also persisted in pursuing and finding support whenever the author asked. I am indebted to them. However, the Research Assistant who has provided invaluable help in not only researching this Article, but also discussing with the author the Article’s organization and themes, is Autumn Leva. Her dedication and patience in working on this Article were remarkable.

¹ JACK BASS, UNLIKELY HEROES 66 (1981) (citing King’s interview with African-American newspapers prior to the Montgomery Bus Trial).

² See *infra* Part III.B.1.

³ See Kenneth B. Cole, *The Endless Rodney King Case*, N.Y. TIMES, Feb. 4, 1996, available at <http://www.nytimes.com/1996/02/04/weekinreview/the-nation-the-endless-rodney-king-case.html>.

A videotape of the attack aired on television nationwide.⁴ The officers were indicted in state court.⁵ The trial judge granted a change of venue to Simi Valley, California—a predominantly Caucasian, conservative area.⁶ Not surprisingly, the jury that rendered the verdict was predominantly Caucasian and lacked any African-Americans. Indeed, the pool of 260 people from which the jury was chosen included only six African-Americans, “five of [whom] had no interest in serving on a jury in what they considered hostile territory.”⁷ When the jury returned verdicts that acquitted each officer, the city of Los Angeles experienced severe rioting that led to over fifty deaths, 7000 arrests, and billions of dollars in property damage.⁸ The cause of the rioting was clear. The videotape of Rodney King’s violent arrest had received at least as much television air time (if not more) than any piece of news footage had to date. In a public statement, the Los Angeles Police Chief declared that the force used “was very, very extreme.”⁹ African-Americans perceived the jury’s verdict as an example of extreme racial injustice.¹⁰ In response to nationwide expressions of outrage, President George H.W. Bush issued a statement that the verdict “left us all with a deep sense of personal frustration and anguish.”¹¹ In a televised address to the nation, Bush signaled that a federal prosecution of the police officers would soon follow.¹² Less than a week after the President’s address, federal prosecutors began presenting evidence to a federal grand jury.¹³ After hearing three months of testimony, the grand jury returned indictments for violations of federal civil rights criminal statutes.¹⁴ The Department of Justice went on to pursue federal criminal charges against the officers.¹⁵ Federal juries are chosen from a much

⁴ The video is available on a “Famous Trials” website developed by Professor Douglas Linder of the University of Missouri-Kansas City School of Law. The site features the King case among many others. Douglas O. Linder, *The Trials of Los Angeles Police Officers in Connection with the Beating of Rodney King*, <http://www.law.umkc.edu/faculty/projects/ftrials/lapd/lapdaccount.html> (last visited Jan. 10, 2010) [hereinafter Linder, Trial Account].

⁵ *Id.*

⁶ *Id.*; see also Douglas O. Linder, *Juror Empathy and Race*, 63 TENN. L. REV. 887 (1996) (explaining the interplay between race and empathy and the impact it has upon jurors).

Empathy with a defendant can move a jury toward leniency; empathy with a victim or a victim’s family can move a jury toward harshness. . . . So long as race remains an important part of individual identity, empathetic reactions will be more common and more intense between members of the same racial group than between members of different racial groups. It is not surprising, given the relevance of race to empathy, that the race of a defendant or a victim may influence trial outcomes.

Id. at 900.

⁷ Linder, Trial Account, *supra* note 4.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See *id.*

broader geographical area than state jurisdictions, such as Simi Valley. They involve a random selection process which collects qualified persons to serve on the jury who are located across the applicable judicial district.¹⁶ At the time of the federal trial, the United States District Court for the Central District of California drew jurors from the seven counties that comprised that federal district—Los Angeles, Orange, Riverside, San Bernardino, San Luis Obispo, Santa Barbara, and Ventura.¹⁷ Not surprisingly, the jury in the federal trial was racially mixed and included African-Americans.¹⁸ During the federal trial, the defense sought to remove one of the African-American jurors on the basis that “she was overheard strongly criticizing the defense’s treatment of other black potential jurors.”¹⁹ Federal District Judge John G. Davies denied the defense’s motion to dismiss the juror.²⁰ The federal jury trial began in March and ended in April, with a verdict that convicted two of the officers and acquitted the others.²¹ Justice Department Attorney Barry Kowalski declared: “This verdict provides justice.”²²

Like federal judges in the Desegregation and Civil Rights Eras who enforced unpopular decisions, and in light of the constitutional guarantee of a lifetime appointment and protection against salary reduction, did Judge Davies feel less inhibited in his decision to leave the African-American juror on the jury?²³ In Part II, this Article discusses at length the manner in which these twin constitutional protections guarantee federal judges necessary independence from certain pressures and the fact that these protections probably have had more impact than many people realize. One ought to recognize that another procedural mechanism that contributed to the fairness of the second King trial—the federal system’s method of selecting jurors from a much larger pool than state courts—allowed for a jury that was more diverse than the state court jury located in Simi Valley. This procedural difference may often go unnoticed. Nevertheless, it is a stark reality that the federal jury selection process better serves the judicial system as a whole, especially in cases where bias and prejudice are more likely to play a role in the outcome. The contrasting jury-selection process in the state and federal trials of the officers involved in the King case provides just one example of procedural rules making a difference. The following sections of this Article show that there are many other procedures that serve the ends of justice, (often

¹⁶ See 28 U.S.C. §§ 1861–1877 (2006) (providing detailed requirements ensuring fair and impartial selection of jurors from throughout a federal judicial district and seeking as broad and diverse a jury pool as possible).

¹⁷ See *United States v. Cannady*, 54 F.3d 544 (9th Cir. 1995) (noting that it was not until August 1993, after the trial of the officers in the King beating, that a new jury selection plan was adopted that narrowed the selection to fewer than all seven counties in the district).

¹⁸ See Linder, Trial Account, *supra* note 4.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ See *infra* notes 215-22 and accompanying text (describing the value of the Constitutional protections to federal judges in ensuring their independence to enforce unpopular rulings).

silently) as they did in the second King trial. Most importantly, this Article demonstrates the principles underlying each of these seemingly disparate procedures. It is only through appreciating these principles that someone can confidently say, “yes, procedure does have substance.”

This Article unfolds in three parts. Part II explores the two fundamental principles upon which every system of procedure that seeks to produce justice inevitably must rest. The first principle is this: human beings are fallible and thus, procedural checks are necessary to safeguard the consequences of human vulnerability to bias, prejudice, etc.²⁴ The second principle is that every human being is equal in dignity and thus has the right to the equal treatment that the procedures in our justice system provide.²⁵ Philosophers and theologians alike have articulated these principles from antiquity through the present.²⁶ The Founding Fathers certainly recognized them. The Constitution itself reflects a keen understanding of the need to provide institutional checks on the fallibilities of mankind.²⁷ The American dedication to full equality of all persons before the law evolved more slowly.²⁸ As history demonstrates, however, both of these principles should serve as the touchstones of any system for the just resolution of disputes.

Part III demonstrates the manner in which procedure incorporates the principles discussed in Part II. Institutional protections are really what procedural doctrines and rules are all about. Regardless of whether the institutional protections are rooted in our Constitution or a rule book, they affect the impartiality of case results. Thus, Part III explores the reason that the American justice system needs institutional checks. Part III shows the manner in which procedural doctrines and rules address two related principles: the fallibility of all persons and the equality of all persons before the law. In short, Part III demonstrates that anyone who seeks an impartial system for resolving disputes (between the state and an accused, or between civil litigants) has implicitly, if not explicitly, recognized that we cannot count on human beings to execute justice when left “unchecked.” Procedural protections shield us from ourselves, or at least from that part of human nature that can too easily undermine a result that is consistently fair.

II. THE TWIN PRINCIPLES UNDERLYING THE NEED FOR PROCEDURAL PROTECTIONS

This Part explores two interrelated principles. The first principle is that human beings are inherently vulnerable to various obstacles to dispensing justice, such as bias and prejudice. As illustrated concretely in the above discussion of the Rodney King trials, this principle certainly comes into play when justice is to

²⁴ See *infra* Part II.A.

²⁵ See *infra* Part II.B.

²⁶ See *infra* Part II.

²⁷ See discussion *infra* Part III.B.1.a.

²⁸ See discussion *infra* Part III.B.1.

be administered through a jury verdict.²⁹ The evolution of the Rule of Law rested in large part upon this principle.³⁰ The second principle underlying the need for procedure is that each person has equal value, and thus deserves equal justice. By appreciating these underlying principles, those in the legal profession are more likely to value the significance of procedure.³¹

A. Human Imperfection

Both philosophers and theologians agree that human beings are innately flawed, and that we all make mistakes. First, this section outlines the

²⁹ See discussion *supra* Part I.

³⁰ See *infra* Part III and accompanying notes (demonstrating how the Rule of Law has developed into modern procedure, which, though often unnoticed, effectively promotes justice in spite of human fallibility).

³¹ Studying the framework and principles undergirding American civil procedure not only cures the legal profession's and lay public's misunderstanding of the system, but also enhances a student's grasp of the material. Recent legal scholarship has begun to recognize the educational value of exploring the context of a topic. See Deborah Maranville, *Infusing Passion and Context into the Traditional Law Curriculum Through Experiential Learning*, 51 J. LEGAL EDUC. 51 (2001) (saying law schools should encourage students' passions and values in order to better engage them). "Context helps students understand what they are learning, provides anchor points so they can recall what they learn, and shows them how to transfer what they learn in the classroom to lawyers' tasks in practice." *Id.* at 52. Context is important for three reasons: (1) it increases students' interest in learning, (2) it increases the likelihood that students will understand the information, and (3) it increases the ability to organize and store information in the memory for retrieval during legal practice. *Id.* at 56-57; see also ROY STUCKEY ET AL., BEST LEARNING PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 141 (2007), available at http://cleaweb.org/documents/Best_Practices_For_Legal_Education_7_x_10_pg_10_pt.pdf ("Legal education would be more effective if law teachers used context-based education throughout the curriculum."); Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 386-87 (1995). Context helps in at least two ways. First, drawing a connection between a particular subject and the broader framework of the discipline of which it is a part helps persons to better learn the subject because research shows that students learn better when they know why a topic is important. The closest that these scholars get to that kind of broad context, or underlying principles, that I discuss below is to address understanding of: the real-life facts behind cases assigned, the legal practices and institutions preceding litigation, the legal processes and institutions in which legal doctrine is applied, the legal tasks of a lawyer and the knowledge necessary to perform them, and the necessary means for reaching a desired end. See STUCKEY ET AL., *supra*, at 63-64 (stating that teachers need to explain to students the purpose of learning domain knowledge is to learn the "concepts and procedures that enable the expert to use knowledge to solve problems" (quoting WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS 8 (Draft July, 2006))); Maranville, *supra*, at 58-59. Also, "a key part of problem-solving skill is . . . 'ends-means thinking.' . . . Knowing the end is an essential step toward figuring out the best means for getting to it." WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS 116 (2007). "[L]aw teachers should use context-based education to teach theory, doctrine, and analytical skills; how to produce law-related documents; and how to resolve human problems and cultivate practical wisdom." STUCKEY ET AL., *supra*, at 141.

philosophical perspective on this truth. The section then turns to theological expressions of the fallibility of men.

1. Philosophical Perspectives

The truth is that there are no perfectly “just” human beings. The last century or more of study into the human psyche has demonstrated that every human being has unconscious sources of motivation, preferences, biases, etc.³² Classical philosophers such as Socrates, Plato, and Aristotle believed that humans are prone to err but could overcome that hurdle—though relatively few would do so, and then only with considerable effort.³³ These classical philosophers concurred in the belief that humans, in their natural state, require boundaries and checks such as education. Plato specifically compares the natural man to a tame animal that can only approach becoming truly civilized through education.

Man, as we say, is a tame or civilized animal; nevertheless, he requires proper instruction and a fortunate nature, and then of all animals he becomes the most divine and most civilized; but if he be insufficiently or ill educated he is the most savage of earthly creatures. Wherefore the legislator ought not to allow the education of children to become a secondary or accidental matter.³⁴

The great scholastic philosophers in the medieval period built upon the foundation of the Greek philosophers. John Scotus Erigena and Thomas Aquinas continued to recognize human fallibility.³⁵ In his *Summa Theologica*, Aquinas developed proofs—i.e., arguments leading to conclusions vetted by the threshing ground of Aristotelian logic—that reason was a divine gift that helped one to find truth.³⁶ However, Aquinas maintained that the vast majority of individuals required more than reason to find truth due to humans’ vulnerability to err in using reason.³⁷ According to Aquinas, divine law revealed in Scriptures allowed

³² Emily Pronin, *Perception and Misperception of Bias in Human Judgment*, 11 TRENDS IN COGNITIVE SCI. 37, 37–38, 41 (2007) (stating that biases distort judgment and decision making, and biases are often unconscious).

³³ ARISTOTLE, THE NICOMACHEAN ETHICS BOOK V § 7 (David Ross trans., Oxford Univ. Press 1998); PLATO, DIALOGUES OF PLATO 439 (Benjamin Jowett trans., Oxford Univ. Press 1875) (Plato discusses the evil of the body as distinct from the soul. Men *can* through the operation of philosophical thought raise themselves up from the evils of the body, but they have to do that through hard work.); THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR 137 (Richard Crawley trans., 2004) (“All, states and individuals, are alike prone to err, and there is no law that will prevent them; or why should men have exhausted the list of punishments in search of enactments to protect them from evildoers?”).

³⁴ PLATO, LAWS 145 (Benjamin Jowett trans., Forgotten Books 2008).

³⁵ THOMAS AQUINAS, *Treatise on Law*, in SUMMA THEOLOGICA, question 95, art. 1, p. 77 (Regnery Publishing, Inc. ed., 1956).

³⁶ *Id.*

³⁷ At the beginning of his *Summa Theologica*, Aquinas states:

humans a basis against which to test reason; ultimately, then, Scriptures would lead to truth.³⁸ In his book *Leviathan*, Thomas Hobbes provides a more recent treatment of human nature that perhaps goes to the extreme, by likening people to beasts.³⁹ With regard to the American legal system, however, John Locke is the premier philosopher due to the influence of his writings upon the Founding Fathers.⁴⁰ Locke recognized the inherent proclivity of humans to err. Indeed, his *Treatise on Government* presumes that government must account for this reality of the human condition.⁴¹

Political philosophers are not the only individuals who understand the reality of the fallibility of man. Immanuel Kant was cited by his students during a lecture as declaring that discipline is necessary because man in his untamed state is wild.

But correction does not teach a child anything new; it merely restricts its unlimited freedom. Man must be disciplined, because he is by nature raw and wild. He can be brought to proper behavior only by training. Animal nature develops of its own accord; human nature must be trained. If we allow nature unfettered sway, the result is savagery.⁴²

2. Theological Perspectives

The world's major religions agree on the fallibility of human beings. For instance, the Judeo-Christian tradition teaches that humans are by nature vulnerable to self-interest, ambition, and other failures.⁴³ Laws—both divine law revealed in Scriptures (the Torah for Judaism; the Torah and New Testament for Christians), and human laws (to the extent they are consistent with divine laws), provide the path to true human fulfillment. A departure from these laws represents “sin” in both traditions. The term used in original Biblical texts is the Greek “hamartia” (ἁμαρτία), which basically means, “missing the mark,”⁴⁴ (as in, shooting an arrow and missing the mark). Maimonides, the great Jewish scholar, explains that the law exists as a guide that allows conscious choice—if one knows the law and is conscious of his actions—he may reach the fulfillment

Even as regards those truths about God which human reason could have discovered, it was necessary that man should be taught by a divine revelation; because the truth about God such as reason could discover *would only be known by a few, and that after a long time, and with the admixture of many errors.*

Id. at question 1, art. 1, p. 1 (emphasis added).

³⁸ *Id.*

³⁹ THOMAS HOBBS, *LEVIATHAN* 189 (Penguin Books 1985).

⁴⁰ Cindy G. Buys, *Burying Our Constitution in the Sand? Evaluating the Ostrich Response to the Use of International and Foreign Law in U.S. Constitutional Interpretation*, 21 *BYU J. PUB. L.* 1, 18, 21, 24–25 (2007).

⁴¹ See JOHN LOCKE, CONCERNING CIVIL GOVERNMENT, SECOND ESSAY, *reprinted in* 35 *GREAT BOOKS OF THE WESTERN WORLD* 25, 53–54 (Robert Maynard Hutchins ed., Encyclopedia Britannica 1952).

⁴² RUTH LINK-SALINGER HYMAN, IMMANUEL KANT, *INFELD, LECTURES ON ETHICS* 249 (1977).

⁴³ See, e.g., *Romans* 3:10–18, 7:7–25 (NIV); *Colossians* 3:5 (NIV); *Galatians* 5:19–21 (NIV).

⁴⁴ LIDDELL AND SCOTT, *GREEK-ENGLISH LEXICON* (9th ed. Clarendon, Oxford 1996).

that will inevitably come from following the law.⁴⁵ The Christian tradition approaches human sinfulness, and the tendency to stray from the right path, along the same lines. Of course, Judaism and Christianity differ markedly concerning the sinful person's avenue that will lead him to reconciliation with God and His laws.⁴⁶

One of the first and perhaps the most influential Christian thinkers on the subject of the fallen nature of humans is St. Augustine. A doctrine called "Pelagianism" had already developed by the time Augustine became Bishop of Hippo.⁴⁷ Pelagianism held that original sin had not tainted a human's ability to choose good over evil, and that divine aid was unnecessary to a person's choice.⁴⁸ Augustine countered that humans were prone to err, but by divine grace, could choose good over evil.⁴⁹ Following Augustine's lead, the Catechism of the Catholic Church makes clear that human's proclivity to err, or original sin, is not a matter of personal fault for those living today.

By his sin, Adam, as the first man, lost the original holiness and justice he had received from God, not only for himself but for all human beings. Adam and Eve transmitted to their descendants human nature wounded by their own first sin and hence deprived of original holiness and justice; this deprivation is called "original sin." As a result of original sin, human nature is weakened

⁴⁵ See MOSES MAIMONIDES, *THE GUIDE FOR THE PERPLEXED*, chs. XXXII-XXXV (M. Friedländer trans., Dover Publ'ns 1956) (1190).

⁴⁶ To the Christian, one can do so only through Jesus Christ, whose sacrifice made possible through the grace of God, reconciliation with God. *Romans* 5:6-21; see also CATECHISM OF THE CATHOLIC CHURCH 615 (1994). True repentance in the Jewish tradition centers around one's choosing to confess one's sin to God and refraining "from repeating the transgression." Rabbi Louis Jacobs, *Repentance*, http://www.myjewishlearning.com/holidays/Yom_Kippur/Overview_Yom_Kippur_Theology/Repentance.htm (last visited Jan. 10, 2010) (excerpt from LOUIS JACOBS, *THE JEWISH RELIGION: A COMPANION* (1995)). Further, sins committed against not only God, but also one's neighbor, require restitution to be considered true repentance. *Id.* However, both Judaism and Christianity see a person's recognition of his having "missed the mark" by acting inconsistently with divine law—and taking responsibility for his actions by asking for forgiveness—as crucial to the person's, and society's, well-being. See 1 JOHN CALVIN, *INSTITUTES OF THE CHRISTIAN RELIGION*, reprinted in *THE LIBRARY OF CHRISTIAN CLASSICS* 43-47 (John T. McNeill ed., Ford Lewis Battles trans., Westminster Press 1960) (1536) [hereinafter CALVIN, *INSTITUTES*, reprinted in *THE LIBRARY OF CHRISTIAN CLASSICS*]; A. COHEN, *THE TEACHINGS OF MAIMONIDES* 211-14 (1927) (regarding the centrality of recognition of straying from divine law and seeking forgiveness and change through repentance); PETER J. KREEFT, *CATHOLIC CHRISTIANITY* 336-47 (2001) (discussing the central role in Catholicism, to both the individual and to society, of the recognition of and taking responsibility for actions that are contrary to divine law); PHILLIP MELANCTHON, *AUGSBURG CONFESSIONS*, art. XIII (1530) (discussing the centrality of recognizing one's deviation from divine law and seeking forgiveness, in the Lutheran Tradition).

⁴⁷ See JUSTO L. GONZALEZ, *2 A HISTORY OF CHRISTIAN THOUGHT* 27-32 (1971).

⁴⁸ See *id.* at 28-31.

⁴⁹ See SAINT AUGUSTINE, *ANSWER TO THE PELAGIANS*, reprinted in pt. 1, vol. 23 *THE WORKS OF SAINT AUGUSTINE*, bk. 1, pp. 50-53 (Roland J. Teske trans., 1997).

in its powers, subject to ignorance, suffering, and the domination of death, and inclined to sin (this inclination is called “concupiscence.”)⁵⁰

The Protestant Reformation reaffirmed the overarching belief of the fallen nature of man. Martin Luther certainly accepted the doctrine.⁵¹ Because of his great impact on the Founding Fathers,⁵² John Calvin’s view also bears close examination. A sample of his comments on the nature of man follows:

Let this then be agreed: that men are as they are here described not merely by the defect of depraved custom, but also by depravity of nature. The reasoning of the apostle cannot otherwise stand: Except out of the Lord’s mercy there is no salvation for man, for in himself he is lost and forsaken.⁵³

The doctrine that humans are flawed and vulnerable to error is by no means exclusive to the Judeo-Christian tradition. Indeed, it recurs throughout other major world religions. For instance, Islam teaches that “[t]he mind of man is ever ready to incite to evil” and “[h]e who purifies his soul of earthly passions shall be saved and shall not suffer ruin, but he who is overcome by his earthly passions should despair of life.”⁵⁴ Hinduism emphasizes that man’s “self will” is one of the greatest obstacles to truth.⁵⁵ Buddhism’s teachings warn emphatically against “him who makes his desire his god.”⁵⁶

When a teaching is applied so universally, tradition would consider it a “natural law.” What does that mean? Essentially, the recurrence of the same principle in different cultures and eras demonstrates the universal, unchanging nature of the truth. As with many subjects that are difficult to grasp, C.S. Lewis helps explain the concept better than most authors who have written on the subject.⁵⁷ To illustrate the concept, Lewis chose a Chinese philosophical and religious phrase, “The Tao” (The Way), typically associated with the *Tao Te Ching*, and thought to be written by Lao Tsu.⁵⁸ Lewis, however, was not promoting Taoism. He was avoiding the explicit use of the phrase “natural law” while seeking to demonstrate the fact that certain universal principles recur throughout civilizations and throughout history.⁵⁹ He offers several examples of these principles, such as the admonition against killing without justification or

⁵⁰ CATECHISM OF THE CATHOLIC CHURCH, *supra* note 46, at 416–18.

⁵¹ MARTIN LUTHER, *Disputation of Scholastic Theology*, in 4 AMERICAN EDITION OF LUTHER’S WORKS 4 (Jaroslav Pelikan & Helmut T. Lehman eds., 1955–79) (1517).

⁵² See *infra* notes 103–107 and accompanying text.

⁵³ CALVIN, INSTITUTES, *reprinted in* THE LIBRARY OF CHRISTIAN CLASSICS, *supra* note 46, at 291.

⁵⁴ *The Quran* 12:54, 91:10–11 (Islam), available at <http://www.alislam.org/library/links/1-13.html>.

⁵⁵ *Mundaka Upanishad* 3.1.6 (Hinduism), available at http://www.sacred-texts.com/hin/sbe15/#section_002.

⁵⁶ *Pali Canon, Samyutta Nikaya*, lvi.11 (Buddhism).

⁵⁷ See C.S. LEWIS, *The Tao*, in THE ABOLITION OF MAN (1947).

⁵⁸ *Id.*

⁵⁹ *Id.*

stealing another's property, of teaching and caring for one's children, and of providing justice to those wronged by another.⁶⁰

Another author has expressed these common principles as things "we can't not know,"⁶¹ and a recent book persuasively reaches the same conclusion.⁶² Based on the widespread philosophical and theological support for the capacity of humans to err, the principle qualifies as one of those indisputable items within the realm of natural law.

B. The Equality of All Persons Before the Law

1. Philosophical Support for Equality of Each Person Before the Law

This section will explore the principle that all persons are equal in dignity and in their right to justice. This discussion begins with the philosophical notion of human equality before the law. Then, complementary theological doctrines will be explored in detail. In terms of each individual's right to justice, the equality of all persons is a concept that, as noted below, the Judeo-Christian tradition maintains to be an undeniable truth.⁶³ From antiquity, philosophers have embraced notions of equal justice. Although Aristotle certainly did not believe that all persons are equal in social status or virtue, he did maintain that "natural justice" requires the legal system, at least in fundamental matters, to treat persons equally.⁶⁴ Each person's right to natural justice grew out of the very dignity that stems from being human.⁶⁵ As with his work on the ability of humans to "reason" their way to truth,⁶⁶ Aquinas also built upon the foundation left by Aristotle for understanding the role of societal justice. Like Aristotle, Thomas Aquinas recognized that a person's particular societal status could lead him to be legitimately under another's governance.⁶⁷ However, as John Finnis has noted, the Thomistic tradition holds that each person has a right to justice due to the dignity that arises from her humanity:

Every member of the human species is entitled to justice. So, since the object of justice is always someone's right {ius}, there are rights which every member of our species is entitled to: human rights. But it would be equivocal and misleading to say, without clarification, that we have rights *because* we are human. Rather, we each have them because every individual member of the species has the dignity of being a person. And this is not a 'status' to be conferred or withdrawn, but a reality to be acknowledged. It is a truth

⁶⁰ See *id.*; see also *id.* at Appendix (classifying the principles mentioned in the text and providing citations to different religions or civilizations).

⁶¹ See J. BUDZISZEWSKI, WHAT WE CAN'T NOT KNOW (2003).

⁶² See generally ALAN JACOBS, ORIGINAL SIN: A CULTURAL HISTORY (2008).

⁶³ See discussion *infra* Part II.B.2.

⁶⁴ ARISTOTLE, *supra* note 33, at bk. V, § 7.

⁶⁵ See *id.* at bk. I, § 5.

⁶⁶ See *supra* notes 36-38 and accompanying text.

⁶⁷ JOHN FINNIS, AQUINAS 171 (1998).

already grasped in one's understanding of basic reasons for actions: good for me and anyone like me—anyone who shares my nature, any human being.⁶⁸

2. Theological Perspectives on Equality of All Persons Before the Law

Like the fallibility of human beings, the dignity of all persons is a principle deeply rooted in all of the major world religions. In the Judeo-Christian tradition, this tenet derives from the teaching that human beings are created in God's image.⁶⁹ Judaism traces equality back to the first human being: "But a single man [Adam] was created for the sake of peace among mankind, that none should say to his fellow, 'My father was greater than your father.'" ⁷⁰ A particularly intriguing passage follows from the Book of Deuteronomy that reinforces the principle of the human dignity of every person.

When men have a dispute, they are to take it to court and the judges will decide the case, acquitting the innocent and condemning the guilty. If the guilty man deserves to be beaten, the judge shall make him lie down and have him flogged in his presence with the number of lashes his crime deserves, but he must not give him more than forty lashes. *If he is flogged more than that, your brother will be degraded in your eyes.*⁷¹

This passage appears to contrast with the eye-for-an-eye (often called "Lex Talionis") approach suggested in the Book of Exodus.⁷² However, when the passage from Deuteronomy is read in consideration of the overall teachings contained in the Scriptures, context reveals that proportionality in punishment is also a biblical principle, with the ultimate goal being respect for human dignity.⁷³ Even more clearly than these passages, the New Testament reveals the dignity of all persons. Jesus Christ respected everyone—rich or poor, sexually promiscuous or not, Jew or Gentile—as equal in dignity.⁷⁴ Jesus' teachings reinforce the

⁶⁸ *Id.* at 176–77 (footnote omitted); *see also id.* at 178 (discussing similarity between Aristotle's view and Aquinas' view on human dignity as the basis for human dignity and equality).

⁶⁹ *Genesis* 1:27 (NIV).

⁷⁰ *Mishnah, Sanhedrin* 4.5 (Judaism), available at http://www.newworldencyclopedia.org/entry/Adam_and_Eve.

⁷¹ *Deuteronomy* 25:1–3 (NIV) (emphasis added).

⁷² *Exodus* 21:23–27; *see also Deuteronomy* 19:21; *Leviticus* 24:17–20.

⁷³ Jeffrey Brauch & Robert Woods, *Faith, Learning and Justice in Alan Dershowitz's The Genesis of Justice: Toward a Proper Understanding of the Relationship Between the Bible and Modern Justice*, 36 VAL. U. L. REV. 1, 50–51 (2001); *see also Talmud, Mishnah Sanhedrin* 79a (Rabbi Dr. Isidore Epstein ed., Jacob Shachter & H. Freedman trans., 1952), available at http://www.come-and-hear.com/sanhedrin/sanhedrin_79.html.

⁷⁴ *See, e.g., John* 4:4–42 (NIV) (Jesus speaks to the Samaritan woman at the well); *Luke* 7:36–50 (NIV) (Jesus sat down to eat with Pharisees and sinners); *Luke* 8:2 (NIV) (Mary Magdalene, who formerly had seven demons, followed Christ in his entourage); *Matthew* 9:9–13 (NIV) (Christ as physician came to heal the sick and downtrodden); *Matthew* 21:31–32 (NIV) (Christ says tax collectors and prostitutes believed in John's way of the righteous).

principle in many ways—by his encouragement to treat the poor and crippled as brothers and sisters, by his insistence on humility, and perhaps best shown by his washing of his disciples' feet.⁷⁵ Of course, as St. Paul in the Book of Philippians underscores, the very coming of God to earth as Jesus and the emptying of Himself is an example of humility that we humans can only seek to comprehend.⁷⁶

The biblical mandate of impartial application of the law supports the concept of human equality. Following is one passage: “And I charged your judges at that time: Hear the disputes between your brothers and judge fairly, whether the case is between brother Israelites or between one of them and an alien. Do not show partiality in judging; hear both small and great alike.”⁷⁷ Jesus' charge to the Pharisees that they had worshipped the letter of the law while ignoring what was important in the law—*justice*, mercy, and faithfulness⁷⁸—certainly reaffirms the biblical principle of providing justice to all, impartially, and regardless of rank, social status, etc.⁷⁹

Indeed, the concept of human equality spans religions formed in all parts of the world, and from different eras. The tenets of Buddhism,⁸⁰ Islam,⁸¹ Jainism,⁸² and Hinduism⁸³ all suggest that manifestations of impartiality, detracting from

⁷⁵ *John* 13:1–12 (NIV).

⁷⁶ *Philippians* 2:1–11 (NIV).

⁷⁷ *Deuteronomy* 1:16–17; see also *2 Chronicles* 19:6–7 (NIV); Brauch & Woods, *supra* note 73.

⁷⁸ See *Matthew* 23:23 (NIV) (emphasis added).

⁷⁹ E.g., *Deuteronomy* 1:16–17 (NIV) (“And I charged your judges at that time: Hear the disputes between your brothers and judge fairly, whether the case is between brother Israelites or between one of them and an alien. Do not show partiality in judging; hear both small and great alike. Do not be afraid of any man, for judgment belongs to God. Bring me any case too hard for you, and I will hear it.”); *2 Chronicles* 19:6–7 (NIV) (“He told them, ‘Consider carefully what you do, because you are not judging for man but for the LORD, who is with you whenever you give a verdict. Now let the fear of the LORD be upon you. Judge carefully, for with the LORD our God there is no injustice or partiality or bribery.’”).

⁸⁰ Buddhism dismisses “titles, names, and races” as “mere worldly conventions.” *Pali Canon, Sutta Nipata* 648, available at <http://www.religionstolerance.org/humequal.htm>.

⁸¹ Islam demonstrates impartiality to justice more specifically: “For the white to lord it over the black, the Arab over the non-Arab, the rich over the poor, the strong over the weak or men over women is out of place and wrong.” *Hadith of Ibn Majah*, available at <http://www.religioustolerance.org/humequal.htm>.

⁸² Jainism holds: “The Law is that which leads to welfare and salvation. It forms conduct and character distinguished by the sense of equality among all beings.” *Somadeva, Nitivakyamrita* 1.1, available at <http://www.religioustolerance.org/humequal.htm>. See generally Allen N. Sultan, *Judicial Autonomy Under International Law*, 21 U. DAYTON L. REV. 585 (1996) (describing the influence of various religions in different cultures in attaining judicial autonomy so as to promote impartial justice).

⁸³ Impartial treatment of all persons, flowing from their equality, is a fundamental tenet of Hinduism: “I am equally disposed to all living entities; there is neither friend nor foe to Me; but those who with loving sentiments render devotional service unto Me; such persons are in Me and I am in them.” *Srimad Bhagavad-Gita* 9.29, available at <http://www.bhagavad-gita.org/Gita/verse-09-29.html>.

human dignity, stray far from the ideal of these respective religious traditions and derive from mere human invention, rather than from any divine principle. This principle of human equality rivals the concept of human fallibility in the breadth of religions and eras in which the principle appears. As noted above, the recurrence of such a principle universally qualifies it as a natural law principle.⁸⁴ Different cultures and societies, in diverse eras, have recognized the equality of all persons before the law. Not every system has done so, but the reality that the great world religions espouse such treatment suggests the universality of the principle.

Part III, which follows shortly, addresses the way in which procedure reconciles the universal truths shown in Part II—the fallibility of human beings, the threats to equal justice that result, and the need for impartial justice to vindicate the human dignity of all persons. Part III begins with a discussion of the evolution of the Rule of Law in the Anglo-American tradition as one means of achieving a reconciliation of these principles. However, one should bear in mind that the various procedures contained in different systems have successfully achieved reconciliation of these principles in different ways.⁸⁵ Many will debate the superiority of one legal system over the other. However, the effort to limit the effect of human fallibility and bias in the quest for equal justice demonstrates (regardless of the system adopted) the crucial role in any legal system of integrating these two principles.

III. PROCEDURE AS A MEANS OF ACCOUNTING FOR HUMAN FALLIBILITY IN DEVELOPING A SYSTEM DESIGNED TO PROVIDE EQUALITY BEFORE THE LAW

Without examining the development of the Rule of Law in the Anglo-American judicial system, one cannot fully appreciate the manner in which procedure balances the two principles discussed in Part II. The concept of the Rule of Law is certainly broader than the concept of procedure. However, the notion of the Rule of Law grew out of the same bases for which procedures have been, and still are, enacted to protect us from human bias and allow for equal justice before the law.

The Rule of Law remains one of the best ways to reinforce the notion that procedure has substance. As discussed in Part II above, the principle that everyone deserves equal treatment under the law rests on the dual concepts of human fallibility and equal human dignity.⁸⁶ These dual concepts embody the essence of the Rule of Law—that no one, however powerful, is above the law. Under the Rule of Law, the monarchial king in medieval England had to respect the law. Centuries later, American presidents must still do the same. At times,

⁸⁴ See *supra* notes 57-62 and accompanying text.

⁸⁵ See Benjamin V. Madison, III, *Trial by Jury or by Military Tribunal for Accused Terrorist Detainees Facing the Death Penalty? An Examination of Principles that Transcend the Constitution*, 17 U. FLA. J.L. & PUB. POL'Y 347, 398-400 (2006).

⁸⁶ See *supra* Part II and accompanying notes.

the king or president must accept a decision from a court, a decision on a substantive point of dispute. Nevertheless, the manner in which the powerful are kept “in check” is often accomplished through procedural mechanisms such as a jury verdict. The Rule of Law remains perhaps the greatest contribution of the Anglo-American heritage to our justice system.⁸⁷ The degree to which other countries implement the Rule of Law as the crux of their legal systems is a testimony to this fact.⁸⁸ Among the many contributions America makes to the world, this is one of our greatest exports.

As Section A below will demonstrate, many of the original components of the Rule of Law, as it evolved, were procedural. The Final section in Part III will demonstrate how procedural mechanisms continue to accommodate the principle that human vulnerability requires institutional checks and everyone deserves equal treatment.

A. The Evolution of the Rule of Law

Most trace the Rule of Law in the Anglo-American tradition to the Magna Carta.⁸⁹ In the reign of King John (1199–1216), we find the events leading to the drafting of the Magna Carta. King John was reportedly a personally repulsive man and known for his arbitrary acts.⁹⁰ He waged expensive wars and claimed the lands and assets of barons to support his often futile war efforts.⁹¹ Archbishop Stephen Langton led a group of barons who challenged King John.⁹² In return for continuing to support the King’s war efforts, the group of dissenters secured his consent to the substance of the Magna Carta at Runnymede in 1215.⁹³ These events are a historical milestone because the King, in the Magna Carta, acknowledged limitations on his sovereign powers.⁹⁴ Many of the most infamous limitations on the King’s powers in the Magna Carta were procedural ones, of which trial by jury stands as perhaps the greatest achievement.

Although the following passage originally protected only free men, the right to a jury trial and to habeas corpus ultimately extended to all persons:

No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other

⁸⁷ See generally Maxwell O. Chibundu, *Law in Development: On Tapping, Gourding, and Serving Palm-Wine*, 29 CASE W. RES. J. INT’L L. 167 (1997). One should also view the work of the Rule of Law Institute in Sofia, Bulgaria as that institute seeks to promote the Rule of Law and protection of human rights, available at http://www.ruleoflawinstitute.bg/about_us.html#our_purposes.

⁸⁸ See generally Chibundu, *supra* note 87.

⁸⁹ RUSSELL KIRK, *THE ROOTS OF AMERICAN ORDER* 194-95 (Open Court 1st ed. 1974).

⁹⁰ *Id.* at 194.

⁹¹ See *id.*

⁹² See generally J.C. Holt, *The Making of Magna Carta*, 72 ENG. HIST. REV. 401, 405 (1957).

⁹³ KIRK, *supra* note 89, at 194.

⁹⁴ *Id.* at 195.

way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals. . . .⁹⁵

Henrici de Bracton, an influential jurist and scholar, built upon the Magna Carta in *De Legibus et Consuetudinibus Angliae* (*The Laws and Customs of England*), which was written between 1220 and 1260 and first appeared posthumously in 1268.⁹⁶ There, Bracton acknowledged explicitly the Rule of Law:

The king himself ought not to be under man but under God, and under the Law, because the Law makes the king. Therefore let the king render back to the Law what the Law gives him, namely, dominion and power; for there is no king where will, and not Law, wields dominion.⁹⁷

During the Tudor period, the doctrine of the Rule of Law underwent a test as Protestant Kings executed Catholics, and Catholic Kings executed Protestants.⁹⁸ Following civil war and the Glorious Revolution, William and Mary assumed the throne upon agreeing to share their power with Parliament, and to the rights included in the Bill of Rights.⁹⁹ Most notably, the English Bill of Rights consisted of procedural rights, such as the right to jury trial and to due process of law.

The Rule of Law was an intrinsic part of the American inheritance from Britain. Indeed, a significant impetus for the American Revolution was the colonists' view that Britain failed to honor the Rule of Law.¹⁰⁰ The Framers were students of British history, of political science, and of theology. As students of British history, they knew the dangers of unchecked authority. Indeed, they personally experienced rule by a king and parliament who exercised authority, at least over the colonists, as if they were not subject to the law themselves.¹⁰¹ As political theorists, the Framers knew Montesquieu's theories espoused in *Spirit of Laws*, where Montesquieu argued that any government must have institutional checks to ensure the Rule of Law is followed.¹⁰² As theistic thinkers, the

⁹⁵ Magna Carta § 39, available at http://www.bl.uk/treasures/magnacarta/translation/mc_trans.html.

⁹⁶ G. Steven Neeley, *The Right to Self-Directed Death: Reconsidering an Ancient Proscription*, 36 CATH. LAW. 111, 129 (1995).

⁹⁷ See James C. McClellan, *Liberty, Order, and Justice: An Introduction to the Constitutional Principles of American Government* (3d ed. Liberty Fund 2000) (1989), available at http://oll.libertyfund.org/index.php?option=com_content&task=view&id=327&Itemid=284 (quoting Henrici de Bracton).

⁹⁸ See Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU L. REV. 1099, 1142–43 (2004).

⁹⁹ See KIRK, *supra* note 89, at 296–97.

¹⁰⁰ THE DECLARATION OF INDEPENDENCE paras. 3, 7, 10, 20, 22 (U.S. 1776).

¹⁰¹ See JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 615 (1891).

¹⁰² See KIRK, *supra* note 89, at 356–58; see also MONTESQUIEU, THE SPIRIT OF LAWS, reprinted in 38 GREAT BOOKS OF THE WESTERN WORLD 70 (Robert Maynard Hutchins ed., Thomas Nugent trans., Encyclopedia Britannica 1952) (1748) (“When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions

Framers, while interdenominational, were most influenced by John Calvin.¹⁰³ In his *Institutes of the Christian Religion*, Calvin espoused a form of government with limited powers.¹⁰⁴ Although Calvin certainly considered human fallibility a truth,¹⁰⁵ he was not as pessimistic about the ability of humans to govern in a reasonably fair way—provided they saw God as the ultimate authority,¹⁰⁶ and they used institutional means to set limits on the ability of any group to exercise power in an excessive manner.¹⁰⁷

The United States Constitution is among the best illustrations of a governing document predicated on the need for the Rule of Law and hence, limited government. The separation of powers between the branches of government provides the most obvious illustration.¹⁰⁸ Moreover, the procedural

may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.”).

¹⁰³ Marci A. Hamilton, *The Calvinist Paradox of Distrust and Hope at the Constitutional Convention*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 293 (Michael W. McConnell et al. eds., 2001).

¹⁰⁴ JOHN CALVIN, INSTITUTES OF THE CHRISTIAN RELIGION 657 (Eerdmans 1989) [hereinafter CALVIN, INSTITUTES (Eerdmans)] (“Owing, therefore, to the vices or defects of men, it is safer and more tolerable when several bear rule, that they may thus mutually assist, instruct, and admonish each other, and should any one be disposed to go too far, the others are censors and masters to curb his excess.”).

¹⁰⁵ JOHN CALVIN, COMMENTARIES ON THE EPISTLE OF PAUL THE APOSTLE TO THE ROMANS 141 (John Owen trans., 2003) (“But he takes as granted that every one, conscious of his sin, when he comes before the tribunal of God, is confounded and lost under a sense of his own shame; so that no *sinner* can bear the presence of God, as we see an example in the case of Adam.”).

¹⁰⁶ CALVIN, INSTITUTES (Eerdmans), *supra* note 104 (“Thus all have confessed that no polity can be successfully established unless piety be its first care, and that those laws are absurd which disregard the rights of God, and consult only for men.”).

¹⁰⁷ *Id.* at 657. Calvin states that governmental systems exist because the Lord has established them—

[W]hen he [the Lord] established an aristocracy bordering on popular government among the Israelites, keeping them under that as the best form, until he exhibited an image of the Messiah in David. And as I willingly admit that there is no kind of government happier than where liberty is framed with becoming moderation, and duly constituted so as to be durable, so I deem those very happy who are permitted to enjoy that form and I admit that they do nothing at variance with their duty when they strenuously and constantly labour to preserve and maintain it. Nay, even magistrates ought to do their utmost to prevent the liberty, of which they have been appointed guardians, from being impaired, far less violated.

Id.

¹⁰⁸ U.S. CONST. art. I, § 1 (power vested in Congress); U.S. CONST. art. II, § 1, cl. 1 (Power vested in the President); U.S. CONST. art. III, § 1 (power vested in the Supreme Court); *see also* KIRK, *supra* note 89, at 356 (“Even separation of powers and effective checks and balances, Montesquieu feared, might not suffice to ensure continuity of law and evenhanded justice. Somewhere there ought to exist a ‘depository’ or guardian of laws, protecting the fundamental laws, the constitution of a country.”) (According to Kirk, this “depository” of fundamental laws was ultimately created in the Supreme Court of the United States. The separation of ruler (executive branch) from fundamental laws and rights (judiciary branch) is the establishment of the Rule of Law being over and untouchable by the executive branch.)

rights tracing from the Magna Carta through the English Bill of Rights are preserved not only in the Constitution's text,¹⁰⁹ but in the American Bill of Rights that was adopted less than two years after the ratification of the Constitution.¹¹⁰ Therefore, procedural rights have formed a key part of the Rule of Law throughout the history of English and American law and government.

Checks and balances are a well-known part of our constitutional heritage. But the reason for them is not necessarily well known. *Federalist No. 51* of *The Federalist Papers*, in fact, offers that reality as a basis for the form of government adopted by the Framers:

But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place, oblige it to control itself.¹¹¹

In this respect, the Framers echoed the philosophy of Baron de Montesquieu, whose *Spirit of Laws* was just as influential on the Framers as were Locke's writings.¹¹² Montesquieu states:

Man, as a physical being . . . incessantly transgresses the laws established by God, and changes those of his own instituting. He is left to his private direction, though a limited being, and subject, like all finite intelligences, to ignorance and error: even his imperfect knowledge he loses; and a sensible creature, he is hurried away by a thousand impetuous passions.¹¹³

Thus, it was well recognized by the Framers that people needed institutional protections to avoid the undesirable effects of human bias and prejudice. Article III, Section 1 of the United States Constitution outlines the twin protections, assuring that judges would: (1) "hold their Offices during good Behavior" and (2)

¹⁰⁹ See U.S. CONST. art. I, § 9, cl. 2 (Privilege of the Writ of Habeas Corpus shall not be suspended unless public safety warrants it in cases of rebellion or invasion.); U.S. CONST. art. 3 § 2, cl. 3 (Trial of all crime, except Impeachment, shall be by jury.).

¹¹⁰ U.S. CONST. amend. VI (right to a jury trial in criminal cases); U.S. CONST. amend. VII (right to a jury trial in suits at common law).

¹¹¹ THE FEDERALIST NO. 51, at 269 (James Madison) (George W. Carey & James McClellan eds., 2001).

¹¹² See JOHN EIDSMOE, CHRISTIANITY AND THE CONSTITUTION 52 (1987) (citing Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 AM. POL. SCI. REV. 189 (1984)) (documenting citations to Montesquieu by the Framers).

¹¹³ 1 BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 20 (Thomas Nugent trans., Batoche Books 2001).

avoid reduction of their salaries.¹¹⁴ In placing these procedural protections within the Constitution, the Founding Fathers clearly acknowledged as truth the fallibility of human beings. Likewise, the Framers viewed procedural protections as necessary insurance to help limit certain types of pressures on judges.

Dealing directly with the judiciary, in *Federalist No. 79*, Alexander Hamilton explicated the reason why the twin protections of appointment for life and protection from salary reduction are essential. As human beings, Hamilton explained, judges are subject to the same vulnerabilities as everyone else.¹¹⁵ Protecting federal judges from pressure on an often vulnerable point, one's subsistence, made judicial independence a reality rather than an aspiration.¹¹⁶

Among legal minds, Sir Thomas More, chancellor under Henry VIII (1529–1532),¹¹⁷ appreciated the significance of procedure as the embodiment of the Rule of Law as well as, or better than, anyone before or since. As dramatized by Sir Robert Bolt's play, *A Man for All Seasons*, More demonstrates his keen understanding of the connection between procedural protections and the Rule of Law. Before reviewing a scene from the play addressing this connection, one should recall the crisis facing More when he offers his defense of procedure. Arthur, Henry's older brother, married the Spanish Princess Catherine.¹¹⁸ When Arthur died unexpectedly and Henry became King, England and Spain wished to cement an alliance through a marriage between Henry and Catherine.¹¹⁹ Christian law, however, forbade a man from marrying his brother's widow.¹²⁰ The Pope granted a dispensation that allowed Henry and Catherine to marry.¹²¹ Years later Catherine had not borne Henry a son, and Henry had fallen in love with Anne Boleyn.¹²² Henry sought to have his marriage to Catherine annulled on the ground that he had married his brother's widow.¹²³ The Pope refused Henry's request.¹²⁴

Henry's response to the refusal led to More's crisis. Henry declared himself the supreme authority over the Church of England, appointed his own Archbishop, divorced Catherine, and married Anne.¹²⁵ In the process, Henry

¹¹⁴ U.S. CONST. art. III, § 1. These protections were instituted under the belief that judges threatened with loss of job or income would be less likely to dispense justice properly. *See infra* Part III.B.1 and accompanying notes.

¹¹⁵ *See* THE FEDERALIST NO. 79, at 408-10 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

¹¹⁶ *Id.*; *see also supra* Part III.B. and accompanying notes for a fuller discussion of the Framers' emphasis on the need for judicial independence, emphasizing that the twin protections played a larger role than most realize during an era of extreme pressure and prejudice.

¹¹⁷ History Learning Site, Sir Thomas More, http://www.historylearningsite.co.uk/thomas_more.htm (last visited Jan. 10, 2010).

¹¹⁸ ROBERT BOLT, *Preface to A MAN FOR ALL SEASONS*, at vii (1962).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at viii.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at ix-x.

sought More's support, but More would not give it and resigned as Lord Chancellor.¹²⁶ Afterward, Thomas Cromwell and others, including Richard Rich, conspired to have More convicted of treason.¹²⁷ Still Lord Chancellor at this point, More could easily have brought the weight of the legal system upon Rich. Yet he refrained, and it is his reason for doing so to which we should pay attention.

In one of the most famous scenes in the play, Rich, for whom More had previously served as a mentor, visited More's home and sought to entrap him.¹²⁸ After Rich left, the fiancé of More's daughter urged More to use the power of the Chancellor to undercut Rich's plotting.¹²⁹ More's response—that he would not arrest citizens until they had broken the law (not even the Devil himself), embodies the essence of the importance of the Rule of Law:

Roper: So now you'd give the Devil benefit of law!

More: Yes. What would you do? Cut a great road through the law to get after the Devil?

Roper: I'd cut down every law in England to do that!

More: (*roused and excited*) Oh? (*Advances on Roper*) And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? (*[More] leaves [Roper]*) This country's planted thick with laws from coast to coast—man's laws, not God's—and if you cut them down—and you're just the man to do it—d'you really think you could stand upright in the winds that would blow then? (*Quietly*) Yes, I'd give the Devil benefit of law, for my own safety's sake.¹³⁰

Although using his position as Chancellor to bend the law might prove expedient, More saw the broader picture. More was concerned about having the benefit of the Rule of Law—especially procedure—because he was aware of the vulnerability of men, in the absence of procedure, to rationalize unjust acts. One probably needs to read more of the play to fully appreciate More's humility. He was in fact as well respected as any legal official of his day, but he candidly recognized his own limits. Second, More would give the benefit of law to everyone—the conniving Rich included—because everyone deserves equal treatment. More's concluding speech is an eloquent defense of the Rule of Law.¹³¹

¹²⁶ See *id.* at xiii.

¹²⁷ See *id.*

¹²⁸ See ROBERT BOLT, A MAN FOR ALL SEASONS 62-64 (1962).

¹²⁹ See *id.* at 65-66.

¹³⁰ See *id.* at 66.

¹³¹ No one claims that the dialogue of Sir Robert Bolt's play represents actual events; rather, Bolt dramatized the events surrounding the conflict between More and Henry VIII—and betrayal by Rich and others—in a manner consistent with everything we know of More's respect for the law and for principle. One may benefit from comparing the play to the following excellent biographies:

B. Contemporary Examples in Which Procedure Continues to Protect Against Human Vulnerability and to Promote Equal Justice

Part I focused on the jury selection procedures in the state and federal trials of the officers involved in the beating of Rodney King, captured on videotape and aired nationwide. As explained, the federal procedure of drawing a jury pool from a much broader area than that of the state court produced a jury with African-Americans in the federal trial, while the state jury had none. Although we cannot know for sure just how often it has occurred, the more diverse jury composition produced by the federal system's broader geographic area for selecting prospective jurors has likely played a substantial role in the resulting fairness of those trials. Certainly, the perception that justice is better served through a jury with persons of diverse races is undeniable.¹³² Because racial injustice represents a legacy with which America has struggled, we would do well to contemplate the period in which the greatest change occurred—the period of desegregation of schools beginning in the 1950s, and the Civil Rights Movement that was launched in the 1960s. Before dealing with the manner in which procedure yet again helped to serve both of these just causes, we will consider another racially charged criminal case.

Like the trial of the officers who beat Rodney King, the first trial in this case occurred in state court and ultimately resulted in an acquittal of the accused.¹³³ As with the second federal trial in the King incident, a later federal jury trial resulted in a conviction.¹³⁴ Here, however, the accused was an African-American and the victim was a Hasidic Jew.¹³⁵ Lemrick Nelson, Jr. stabbed and killed Yankel Rosenbaum in 1991, but a state jury that consisted of quite a few African-Americans and no persons of Jewish descent acquitted Nelson.¹³⁶ A federal jury, that was more racially diverse, later convicted Nelson of a federal crime.¹³⁷ Again, the federal trial results suggest that the federal system's

PETER ACKROYD, *THE LIFE OF THOMAS MORE* (1999); RICHARD MARIUS, *THOMAS MORE: A BIOGRAPHY* (1984).

¹³² See, e.g., *Powers v. Ohio*, 499 U.S. 400, 411 (1991) (“[R]acial discrimination in the selection of jurors ‘casts doubt on the integrity of the judicial process,’ and places the fairness of a criminal proceeding in doubt.” (citation omitted)); *id.* (“The intrusion of racial discrimination into the jury selection process damages both the fact and the perception of [the] guarantee [provided to criminal defendants as a check against the power of the State and the prosecutor].”).

¹³³ See Alan Vinegrad, *Prosecutions of Lemrick Nelson Jr.*, N.Y.L.J., May 23, 2003, available at <http://www.cov.com/files/Publication/6bc9ea1d-1c9b-4849-91d6-55f36727c97d/Presentation/PublicationAttachment/0985177c-a701-4e4b-82be-6307fa8fc250/oid6617.pdf>.

¹³⁴ See *id.*

¹³⁵ *United States v. Nelson*, 68 F.3d 583, 585-86 (2d Cir. 1995).

¹³⁶ See JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 103 (1994) (referring to the state court acquittal of Lemrick Nelson as a “verdict of racial loyalty,” due to the jury having a substantial African-American representation but no one of Jewish descent).

¹³⁷ See Andy Newman, *Penalty in Crown Heights Case Means a Little More Jail Time*, N.Y. TIMES, Aug. 21, 2003, at B2 (also noting that Nelson, who had denied guilt in the state trial, admitted his guilt at the sentencing phase of the federal trial).

procedural mechanism of drawing jurors from a broader geographic area than state courts do definitely serves to produce more diverse juries.¹³⁸

If one had to pick a single evil that procedural mechanisms have helped redress, racial prejudice would rank high on the list. Look back in time a mere fifty to sixty years and we can see some of the most dramatic examples in which procedure has played a major role in both protecting against human vulnerability and promoting equal justice. This section will begin with a discussion of the Desegregation and Civil Rights Eras. It will then provide other examples in which procedural mechanisms limit human error and promote equality, but which do so in a more general fashion, in a variety of contexts not limited to racial prejudice.

1. The Silent Helper: Procedures that Aided in Desegregation and Civil Rights Cases

a. The Crucial Role of Judicial Independence in Desegregation and Civil Rights

One need only revisit the Desegregation and Civil Rights Eras to see the need for the federal courts' jurisdiction over laws that, in a given locality, could have—and, in many cases, surely would have—been ignored. The legal segregation of races was a reality in America for much of the twentieth century. The Supreme Court's decision in *Brown v. Board of Education* held unconstitutional the previously sanctioned practice of segregating students in public schools.¹³⁹ Almost a decade later, the Civil Rights Act of 1964 made segregation in schools, public places, and employment illegal.¹⁴⁰ Federal courts were left with the job of enforcing these laws.

The difficulty of enforcing these laws proved to be most troublesome in the “deep” South. “The response throughout the South to the Supreme Court's ruling in *Brown* ran the spectrum from defiant denunciation through reluctant acquiescence . . .”¹⁴¹ United States District Judge Skelly Wright, then sitting in New Orleans (before years later ascending to the United States Court of Appeals for the District of Columbia Circuit), took on the difficult job of desegregating the public school system in Louisiana.¹⁴² The task was harder than one could imagine. Before it was over, Judge Wright had repeatedly struck down state legislative acts designed to forestall desegregation, personally enjoined each member of the Louisiana legislature, and used the court's contempt powers as the ultimate tool with which to accomplish the Supreme Court's direction in *Brown*.¹⁴³

¹³⁸ See *supra* notes 1-19 and accompanying text.

¹³⁹ 349 U.S. 294 (1955).

¹⁴⁰ Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as 42 U.S.C. § 2000 (2006)).

¹⁴¹ Joel W. Friedman, *Desegregating the South: John Minor Wisdom's Role in Enforcing Brown's Mandate*, 78 TUL. L. REV. 2207, 2214 (2004).

¹⁴² *Id.* at 2214-30.

¹⁴³ See *id.*

After the *Brown* decision, Wright issued a decree requiring desegregation of the New Orleans public schools.¹⁴⁴ The Louisiana Legislature continued to concoct segregation laws, defying Wright's decision.¹⁴⁵ Thus, Wright issued another order to compel the school board to present a desegregation plan.¹⁴⁶ Louisiana's state executive branch, legislative branch, and judicial branch then entered the picture by collaborating in an "unrelenting campaign of massive resistance to the ruling in *Brown I.*"¹⁴⁷ The Louisiana Legislature's fourth packet of anti-integration measures included: reserving to the Legislature the exclusive right to integrate public schools, commanding the governor to assume exclusive control over the public school system in the event of judicially ordered desegregation, and attempts to reenact statutes that had been declared unconstitutional by Wright and the Fifth Circuit.¹⁴⁸ The Louisiana Attorney General asked state civil district court Judge Oliver P. Carriere "to enforce these laws by issuing an injunction prohibiting the Orleans Parish School Board from complying with Judge Wright's desegregation order."¹⁴⁹ Judge Carriere granted the motion before the end of the week.¹⁵⁰ However, the ruling was appealed, and Judge Carriere was enjoined from enforcing his injunction by Judges Rives, Christenberry, and Wright of the Fifth Circuit.¹⁵¹ Further, all state officials were ordered to refrain from interfering with the school board's obligation to comply with Judge Wright's original desegregation order.¹⁵²

Undeterred, the Louisiana governor signed a twenty-nine-bill package saying that the state would not recognize the authority of the Court's decision in *Brown* or of any federal court order pursuant to it.¹⁵³ The bill included criminal penalties for any federal judge or marshal for attempting to render or carry out any such order or decision.¹⁵⁴ Nevertheless, the New Orleans Parish School Board moved forward with its plan to comply with Judge Wright's order.¹⁵⁵ The Legislature sent state troopers to prevent integration at the elementary schools, so Judge Wright responded with an "extraordinary order."¹⁵⁶ He enjoined the Legislature, each of its 140 members, and every other public official from taking any action designed to interfere with his previous desegregation orders.¹⁵⁷

¹⁴⁴ *Id.* at 2218.

¹⁴⁵ *Id.* at 2219–20.

¹⁴⁶ *Id.* at 2220.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 2221.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 2221–22.

¹⁵³ *Id.* at 2222.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 2222–23.

¹⁵⁶ *Id.* at 2223.

¹⁵⁷ *Id.*

The resistance to desegregation was massive, and many wished to see Judge Wright dead.¹⁵⁸ Federal courts continued to issue injunctions, while Louisiana courts responded with still more injunctions in the fight for power.¹⁵⁹ Then the Legislature changed its tactics once again, by making it a crime for any parent to interact in any way with an integrated school.¹⁶⁰ The Fifth Circuit panel comprised of Judges Rives, Christenberry, and Wright, of course, declared these statutes unconstitutional.¹⁶¹

In return for simply doing his job, the pressures brought to bear upon Judge Wright were profound.

Frequently denounced as “Judas Scalawag Wright” and “Judge Smelly Wright,” he was hung in effigy on more than a single occasion, victimized by obscene telephone calls and cross burnings at home, and reviled by most members of his local community. More than anyone else associated with this tragic epos, Wright was demonized and transformed into a virtual pariah in his home state, compelled to rely upon armed federal marshals to and from his office and to guard his home.¹⁶²

Judge Wright was not alone. Federal judges throughout the country bore the brunt of enforcing unpopular laws that many did not wish to follow. We ought not to diminish the courage of these judges in carrying out their duty. However, we should also recognize the brilliance of the Framers in putting *procedural* mechanisms in place that insulated these judges.

During the Civil Rights Era, federal and state judges alike suffered heavily under the political, social, and cultural pressure of the Old South. Many judges grew up in deep southern society and culture and had a great deal to lose for what was often perceived as ruling in favor of civil rights and against the Old South society. Judge Rives of the United States Court of Appeals for the Fifth Circuit is a good example of a man who had much to lose for standing up for what he thought was right. A fellow Fifth Circuit judge Frank Johnson had this to say about the pain and sacrifice that Judge Rives bore during this period.

Judge Rives had lived here and grown up here and he was a lifetime member of Trinity Presbyterian Church. His son had been buried from that church. His daughter had been married in that church. He’s always sat in the same pew. He belonged to a lawyers’ club that met once a week. He loved people and it was important to him for people to love him and it really hurt when he’d walk down the street and his friends wouldn’t speak to him, his lifetime friends. It hurt him when he had to leave his church. It hurt him when his

¹⁵⁸ *Id.* at 2225–26.

¹⁵⁹ *Id.* at 2227–28.

¹⁶⁰ *Id.* at 2228–30.

¹⁶¹ *Id.*

¹⁶² *Id.* at 2230.

lawyers' weekly luncheon club moved their meeting place without notifying him as to where they were going to start meeting. . . .¹⁶³

Judge Johnson characterized Judge Rives' experience as being especially difficult because his connection with southern Alabama society was severely shattered. One of the most taxing times for Judges Rives and Johnson was after their decision in *Browder v. Gayle*.¹⁶⁴ *Browder* was a class action civil rights case that challenged the constitutionality of the Montgomery bus segregation.¹⁶⁵ Judge Rives wrote the opinion in which Johnson joined. In November 1956, the Supreme Court upheld Judge Rives' decision.¹⁶⁶

In the weeks and months and years of the decade and a half after their decision in *Browder*, Rives and Johnson received an avalanche of hate mail, abusive telephone calls, and threats. Because of incessant telephone calls, Johnson finally got an unlisted number in order to sleep at night. Rives never did, rising at all hours to answer abusive and obscene callers. "You better enjoy your husband while you can," his wife would be told when she answered, "you won't have him long."¹⁶⁷

Although overt violence was generally reserved for civil rights activists, the home of Judge Johnson's mother was partially destroyed by a bomb.¹⁶⁸ Unfortunately, her telephone number was listed as Mrs. Frank M. Johnson, Sr.¹⁶⁹ As a respected author observes, "For Rives, the final indignity—worse even than an indirect attack on him from his pastor's pulpit—came one morning when he and his wife visited their son's grave and found it strewn with garbage and the tombstone painted red."¹⁷⁰

On occasion a judge was forced to rule against personal friends or professional colleagues. Judge Johnson, for instance, threatened sanctions against his college friend and state Circuit Judge George Wallace. Evidently, Judge Wallace had refused to allow federal civil rights commissioners to examine voter records.¹⁷¹ "Wallace paid a late-night visit to the judge's home and tried to wheedle a short prison term that would make him a martyr for defying federal authorities. Unless the records were turned over, Johnson promised, Wallace would get a sentence that would 'put [him] away for a long time."¹⁷²

¹⁶³ BASS, *supra* note 1, at 80.

¹⁶⁴ 142 F. Supp. 707 (M.D. Ala. 1956).

¹⁶⁵ *See generally id.*

¹⁶⁶ BASS, *supra* note 1, at 76.

¹⁶⁷ *Id.* at 79.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 81.

¹⁷² *See id.*; *see also infra* notes 200–04 and accompanying text (discussing more fully the confrontation between federal Judge Johnson and state circuit Judge Wallace).

Federal judges in the deep South were not the only ones who displayed courage, and suffered undesirable consequences, due to ordering desegregation and related decisions. In Virginia, Judge Walter E. Hoffman was the lone federal judge in one of the most populous parts of the state—the area ranging from Williamsburg, Virginia, to the Atlantic Ocean.¹⁷³ Virginia was as recalcitrant as any state in desegregating.¹⁷⁴ It enacted a Pupil Placement Act that effectively permitted school administrators to perpetuate segregated schools.¹⁷⁵ In January of 1957, Judge Hoffman declared the Act unconstitutional.¹⁷⁶ In a continuing lawsuit on behalf of African-American students, Judge Hoffman witnessed stalling and evasive tactics in an effort to avoid the effect of the Supreme Court's decision in *Brown*.¹⁷⁷ Fed up with the School Board's tactics, Judge Hoffman issued an order that Norfolk Schools be desegregated by the fall of 1958.¹⁷⁸ Later, when the Governor of Virginia, Lindsay Almond, openly sanctioned "massive resistance" by closing public schools in Virginia rather than segregating them, Judge Hoffman was on a three-judge panel that ordered the Governor to reopen public schools and abide by desegregation rulings.¹⁷⁹ Ultimately, the Governor, the City of Norfolk, and other school systems relented and began to comply with the court's orders.¹⁸⁰

Judge Hoffman received death threats repeatedly throughout this period.¹⁸¹ He also lost many friends.¹⁸² Judge Hoffman certainly was shunned by many, even to the extreme that a cross was burned on his front lawn.¹⁸³ Considered by some to be a "traitor," he made it clear that he would, as he liked to put it, "do his duty."¹⁸⁴ Decades later, Judge Hoffman was the first recipient of the Edward Devitt Award, an annual award designed to honor a judge whose judicial career reflects integrity, dedication, and courage.¹⁸⁵ There is little doubt that Judge Hoffman's performance in the Desegregation Era played more than a small part

¹⁷³ See Federal Judicial Center, Hoffman, Walter Edward, <http://www.fjc.gov/servlet/tGetInfo?jid=1066> (last visited Jan. 10, 2010); Interview with Carol Hoffman, daughter of Judge Hoffman (Mar. 2, 2009).

¹⁷⁴ See generally Denise Watson Batts, *The Summer of '58*, pts. I-VI, VIRGINIAN PILOT, Sept. 28 – Oct. 3, 2008.

¹⁷⁵ Pupil Placement Act of 1956, ch. 70, 1956 Va. Acts Ex. Sess. 1109.

¹⁷⁶ *Adkins v. Sch. Bd. of Newport News*, 148 F. Supp. 430 (E.D. Va. 1957).

¹⁷⁷ Batts, *supra* note 174, pt. I, at 10–11.

¹⁷⁸ *Id.* at 11.

¹⁷⁹ *James v. Almond*, 170 F. Supp. 331 (E.D. Va. 1959).

¹⁸⁰ See generally Batts, *supra* note 174.

¹⁸¹ Interview with Carol Hoffman, *supra* note 173.

¹⁸² *Id.*

¹⁸³ *Id.*; Wolfgang Saxon, *Walter E. Hoffman, 89, Dies; Judge in Agnew Proceeding*, N.Y. TIMES, Nov. 24, 1996, available at <http://www.nytimes.com/1996/11/24/us/walter-e-hoffman-89-dies-judge-in-agnew-proceeding.html?pagewanted=1>.

¹⁸⁴ Interview with Carol Hoffman, *supra* note 173.

¹⁸⁵ American Judicature Society, Devitt Award, http://www.ajs.org/ajs/awards/Devitt%20Award/ajs_awards-recipients.asp (last visited Jan. 10, 2010).

in the minds of those who chose him as the first recipient of this prestigious award.

i. Contrasting Attorneys (Who Lacked Procedural Protections Ensuring Independence) with Federal Judges

Contrasting federal judges with lawyers helps one to see more clearly the value of procedural protections assuring job and income security to federal judges. Although there were courageous judges who suffered greatly for upholding basic freedoms, attorneys frequently suffered just as much and had more to risk. A judge who spoke out for black freedoms risked only public disgrace, ostracism, and occasional violence. The attorneys who attempted to litigate these civil rights cases suffered similar consequences, as well as the loss of income.¹⁸⁶ Hence, few lawyers in the South willingly took up the cause of enforcing desegregation laws. As one commentator observed: “[T]he organized bar in the deep South [often refused] to represent those involved in civil rights cases. The number of white lawyers from Louisiana who would touch a civil rights case could be counted on the fingers of one hand, and Louisiana had more than most deep South states.”¹⁸⁷

Indeed, many plaintiffs in southern states had difficulty acquiring local counsel. For example, in Louisiana, an attorney from the North was unable to procure a Louisiana lawyer to serve as local counsel for his clients.¹⁸⁸ He refused to allow such recalcitrance to prevent him from representing his clients and was subsequently arrested for the illegal practice of law because he was not a member of the Louisiana bar.¹⁸⁹ This example illustrates the epitome of the movement, which attempted to drive out “Yankee lawyers” who sought to help defend the Civil Rights Movement.¹⁹⁰

Of the few white lawyers from the South who took civil rights cases, some were driven out by harassment, intimidation, and social and economic pressure. A few survived and even won belated professional recognition for their efforts. For those who came South to participate, the experience often changed their lives.¹⁹¹

Zelma Wyche, the president of the Madison Voters League in northeast Louisiana, was advised by a local judge to seek local counsel after appearing in court with out-of-state attorneys.¹⁹² Wyche spoke with two attorneys that the local judge recommended. The first attorney informed him that “the townspeople

¹⁸⁶ See generally BASS, *supra* note 1, at 6–96.

¹⁸⁷ *Id.* at 289.

¹⁸⁸ *Id.* at 286–89.

¹⁸⁹ *Id.*

¹⁹⁰ See generally *id.* at 286–96.

¹⁹¹ *Id.* at 295.

¹⁹² *Id.* at 290.

would kill him if he drew up papers for the Madison Voters League.”¹⁹³ The second attorney said that “his practice in Tallulah (seat of government in Madison Parish) would be killed if he defended Wyche in a criminal case arising out of a public accommodations test.”¹⁹⁴

The relatively few conscientious lawyers with established practices who were willing to take on racial cases also had other professional considerations. Judge John Godbold recalled that although his firm had represented clients in racial matters, he felt constrained to turn down a request from a church organization’s national headquarters for his services in a highly volatile racial case in a rural Alabama county. Godbold explained his firm had several lawsuits pending in the county at that time involving death and injury, representing “people—widows and children, and they depend on us to protect their interests. We would have adversely affected their interests in these cases that had to be tried before juries in that county if we become involved in that case.”¹⁹⁵

Although Judge Johnson sympathized with the plight of individual attorneys, he criticized bar groups for failing to speak out.

“I am acutely aware of the pressures that those few individual lawyers who did speak out were subjected to,” said Johnson. “And I can accept that as an explanation and as a reason for individual lawyers not speaking out It doesn’t stand as an acceptable explanation for the bar groups from having failed to speak out. I think they completely abdicated their legal role and they completely ignored the canons of ethics that require them to take some action defending judges that are under unwarranted criticism for court decisions that they have been required to make.”¹⁹⁶

Judge John Brown lamented in a speech made to the Arkansas Bar Association that newspaper editors, not attorneys, had taken the leadership role in denouncing those who defied the law.¹⁹⁷

ii. Comparing State Judges’ Response to that of Federal Judges

If the lack of resolve by attorneys was disappointing, the response from certain state judges was doubly disturbing. One might be inclined to think that the difference between the ability to dispense justice and the inclination to bow to natural human bias lies in the distinction between a judge and a lawyer. However, the crucial factor here was that state judges, like lawyers, lacked constitutional procedural protections. As shown above in Judge Wright’s battle with the State of Louisiana, it was not only the state legislative and executive

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 295.

¹⁹⁷ *Id.* at 294.

branches that worked against federal law, but the state judicial system that promoted massive resistance as well.¹⁹⁸ The bias of state judges was apparent in other instances.

As chief judge in the 1960's, [U.S. Appellate Judge] Tuttle recognized that state officials were using delay as a tactical weapon in a strategy based on wearing down the outside forces of change, and he and like-minded judges realized that state judges often acted as part of a repressive political system. Led by Tuttle, the Fifth Circuit pioneered procedures to remove civil rights cases from state courts and ordered recalcitrant and reluctant federal district judges to act and, if necessary, wrote orders for them to issue.¹⁹⁹

A state circuit judge, George Wallace, refused to allow federal civil rights commissioners to examine voting records in two "Black Belt" counties, and Fifth Circuit Judge Johnson ordered Judge Wallace to comply.²⁰⁰ Instead, Wallace tried in vain to convince Judge Johnson to give him a short prison sentence, seeking martyrdom for his defiance of federal authorities.²⁰¹ The next day, Johnson staged a dramatic federal versus state confrontation in his courtroom.²⁰² Wallace acted as if he had won in court, but secretly produced the records while continuously denying that he had done so and publicly attacking Johnson.²⁰³ Ultimately, Judge Johnson placed various Alabama systems under the federal court's jurisdiction as a direct result of the upheaval, and the upshot was that he essentially influenced public policy in Alabama more than Wallace did.²⁰⁴ "If the state abdicates its responsibilities," Johnson would say later, "the federal courts are not powerless to act." But he emphasized his belief that "the courts have intruded only so far as the states have retreated."²⁰⁵

Judge Johnson's veiled criticism of the states having "retreated" could be leveled at the state judiciaries as well. Once again, we must keep in mind the fact that state court judges do not have the procedural protections of lifetime appointments and protection against salary reduction that Judge Johnson and other federal judges enjoy. In state judicial systems, the degree of judicial independence varies based upon the tenure of office and political elections.²⁰⁶ State judicial systems thus provide far less judicial independence than the federal system. The stark fact is that state judges hold office for limited terms and must stand for reelection.²⁰⁷ Judges with shorter terms are more likely to be influenced by political concerns. "A judge knowing that he can be challenged by any

¹⁹⁸ See *supra* notes 143–64 and accompanying text.

¹⁹⁹ BASS, *supra* note 1, at 20.

²⁰⁰ *Id.* at 81.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* at 81–82.

²⁰⁴ *Id.* at 82.

²⁰⁵ *Id.*

²⁰⁶ DANIEL JOHN MEADOR, *AMERICAN COURTS* 60 (1991).

²⁰⁷ *Id.*

lawyer who cares to pay the filing fee to become a candidate is likely to be more attentive to political currents and popular sentiment than a judge running only for retention on the record made.²⁰⁸

Ideally, judges are persons beyond bias, prejudice, and the pressures of society. Yet in reality, judges possess the same vulnerabilities as any human being. One might hope that they would overcome these tendencies and do justice simply because they are key figures in a system that seeks to effect impartiality. The accounts of state judges in the South conveyed above, demonstrate the wisdom of the Framers in recognizing that all persons are subject to similar pressures and that providing them with procedural protections that afford a certain amount of freedom and security offers judges a better chance to effectively do their jobs. Indeed, one should seriously question whether, absent the procedural protections assuring them lifetime positions with steady salaries, federal judges in the southern states might have found segregation unconstitutional or enforced the decrees in the 1950s and afterward.²⁰⁹ The value of judicial independence as an institutional protection, therefore, should not be underestimated. Judges must be free from intimidation and control by the executive, by the legislature, and by the electorate.²¹⁰

Those who believe that independence is the more important quality base their position principally upon the argument that judges cannot make the hard decisions—particularly those in cases of great public interest—unless they are truly independent. According to this group, a judge who is dependent upon the continued approval of another, whether it be one of the other branches of government or the electorate, cannot reasonably be expected to decide cases in a way likely to provoke the disfavor of those who will decide whether that judge will remain on the bench. They also argue that it is important not only that judges be independent in fact, but also that they be perceived as independent by society.²¹¹

One may view the judges' role, therefore, as counter-majoritarian: to protect individuals and minorities from encroachments upon their rights, either by one of the other branches of government or by the majority of the electorate.²¹² "Judges are expected . . . to make decisions which effectively change the law, even though the changes might prove to be unpopular with one of the other branches of government or with the majority of the electorate, in order to protect individual or minority rights."²¹³ As one scholar observes, "state judges do not require the same degree of independence as federal judges, because state judges are called upon less frequently to protect individual and minority rights—the

²⁰⁸ *Id.* at 61.

²⁰⁹ Erwin Chemerinsky, *Decision-Makers: In Defense of Courts*, 71 AM. BANKR. L.J. 109 (1997).

²¹⁰ Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, 23 FLA. ST. U. L. REV. 1, 4 (1995).

²¹¹ *Id.* at 9.

²¹² *Id.* at 7.

²¹³ *Id.*

federal judiciary already exists for that purpose.”²¹⁴ Of course, without the independence of federal judges assumed by the constitutional protections, the need for independence in the state judiciary would be greater.

The Constitution’s guarantees of lifetime appointments and protection against salary reductions represent meaningful procedural safeguards that ensure judicial independence. The Framers knew there would be federal laws that, at some point, would be unpopular to one or more states.²¹⁵ As noted in *Federalist No. 81*: “State judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws.”²¹⁶ The Framers were not maligning the integrity of state judges. A given judge (state or federal) who takes the oath to decide cases impartially, *and really means it*, may nevertheless be influenced in ways of which he is not even fully conscious. Certainly, questions about one’s career and ability to provide for oneself and one’s family represent the kinds of concerns that have potential to creep into decision-making. The twin constitutional guarantees of lifetime appointments and protection from salary reductions allow federal judges to make decisions independent of these concerns.

The Framers believed that “[i]n the general course of human nature, a power over a man’s subsistence amounts to a power over his will.”²¹⁷ As human beings who are vulnerable to pressure, federal judges needed assurance of their subsistence to withstand pressures that could quite possibly have undermined their impartiality. Such insulation, according to Hamilton, would permit federal judges to uphold the Constitution and federal rights even when the decision that would be needed to accomplish this would not be “popular” in the geographic area in which a particular judge sits.²¹⁸ Judge John Minor Wisdom, one of the most famous of the judges who carried out the Supreme Court’s mandate in *Brown*, offers a unique perspective on the institutional protections that allowed federal courts to implement locally unpopular laws. Judge Wisdom refers to the “friction-making, exacerbating political role of federal courts.”²¹⁹ He recognized that “[n]o matter how unpopular federal requirements may be, federal courts must expect to bear the primary responsibility for protecting the individual.”²²⁰ “[T]he reason Congress was given such power [to establish inferior courts] and presumably the basic reason for the existence of the federal courts which

²¹⁴ *Id.* at 8.

²¹⁵ THE FEDERALIST NO. 78 (Alexander Hamilton).

²¹⁶ THE FEDERALIST NO. 81, at 421 (Alexander Hamilton) (George W. Carey & James McClellan, eds., 2001).

²¹⁷ THE FEDERALIST NO. 79, at 408 (Alexander Hamilton) (George W. Carey & James McClellan, eds., 2001).

²¹⁸ *See id.* at 409.

²¹⁹ John Minor Wisdom, *The Frictionmaking, Exacerbating Political Role of Federal Courts*, 21 Sw. L.J. 411 (1967).

²²⁰ *Id.* at 421.

Congress did establish forthwith, was the need for national tribunals to enforce the national law in the teeth of local resistance.”²²¹

While state judges and attorneys were forced to consider their own livelihood and obligations to support their own families, federal judges did not have the same economic concerns. These federal protections allowed federal judges the freedom to execute their office free from outside economic and job security influence. Many of us would like to believe that the federal judges in the South who enforced desegregation and later civil rights laws would have done so without the constitutional protections described above. More likely than not, however, these protections were essential to enforcement of desegregation and, later, the Civil Rights Act.²²² The Civil Rights Era is proof positive that the federal protections envisioned by the Framers are both necessary and effective to achieve their objectives.

b. Procedural Remedies as Another Aid to Accomplishing Desegregation and Civil Rights

The previous section describes the ways in which constitutional procedures most likely played a key role in assisting federal judges to accomplish desegregation and civil rights goals. This section addresses two other procedural mechanisms that served desegregation and civil rights. The first mechanism deals with appellate judges’ ability under Federal Rule of Civil Procedure 62 to issue injunctions during appeals. The second addresses the expanded injunctive powers that federal courts employed to enforce the Constitution and, later, the Civil Rights Act. Much has been written on the so-called “structural injunction,” and this section does not aim to be an elaborate treatment of the subject. Instead, the purpose here continues to be to provide an illustration of the manner in which procedure has served goals such that one might recognize the procedure itself as having substance. In other words, these procedures vindicated underlying purposes of providing impartial justice in the face of human fallibility.

i. Federal Rule of Civil Procedure 62

In comparison to structural injunctions, the ability of appellate judges to issue injunctions under Federal Rule of Civil Procedure 62 may not seem significant. Yet it is part of an integrated system of procedures where each procedure serves a role. For example, in a 1961 University of Georgia integration case, a district judge “stayed his own integration order two days before the first black students were scheduled to enroll.”²²³ The black students’

²²¹ *Id.* at 422 (quoting Louis Lusky, *Racial Discrimination and the Federal Law: A Problem in Nullification*, 63 COLUM. L. REV. 1163 (1963)).

²²² See Stephen Shapiro, *The Judiciary in the United States: A Search for Fairness, Independence, and Competence*, 14 GEO. J. LEGAL ETHICS 667, 669 (2001) (recognizing that the constitutional protections to federal judges allowed their independence in making unpopular decisions such as desegregation rulings).

²²³ BASS, *supra* note 1, at 217.

attorneys called Elbert Tuttle, Chief Judge of the United States Circuit Court of Appeals for the Fifth Circuit, to see whether the stay could be vacated.²²⁴ Judge Tuttle directed them to file an appeal.²²⁵ Judge Tuttle turned to Federal Rule of Civil Procedure 62(g).²²⁶ That rule not only “gives specific authority to the District Court to grant relief pending an appeal,” but also “states that the granting of such authority to the District Court ‘does not limit any power of an appellate court or of a judge or justice thereof . . . to suspend, modify, restore, or grant an injunction during the pendency of an appeal.’”²²⁷ Judge Tuttle held that the district court had issued its stay for no good reason.²²⁸ Although the University immediately appealed, the Supreme Court denied its motion, clearly in support of “Tuttle’s use of extraordinary procedures to avoid unnecessary delay in the enforcement of civil rights.”²²⁹

*United States v. Lynd*²³⁰ is another example in which the Fifth Circuit used procedure to control district court judges and effect civil rights. The Justice Department filed a lawsuit against a voter registrar, and the suit dragged on for years in the district court.²³¹ When it finally went to trial, District Judge Cox granted the registrar another thirty-day postponement.²³² At that point “John Doar sought a temporary restraining order to stop discrimination against Negroes who sought to register.”²³³ When Judge Cox refused to rule on the motion, Doar appealed.²³⁴ The Fifth Circuit again turned to Rule 62(g) and the “All-Writs Statute.”²³⁵ The Fifth Circuit held that Judge Cox’s refusal to rule on the motion was an attempt to retain jurisdiction because “traditional procedure would not allow an appeal till there was a final order.”²³⁶ The court then “acted under the authority granted . . . by the All-Writs Statute to issue [the appellate court’s] own injunction against the registrar.”²³⁷

The examples given above were not the only cases that involved recalcitrance by federal district judges. Thus, some federal district judges, reminiscent of the state judges described above,²³⁸ unfortunately played a role in impeding desegregation. The Fifth Circuit’s injunctions under Rule 62 and the All Writs Act sent a clear message to these and other district judges that these tactics of insubordination simply would not work. As one author has observed,

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.* at 217–18.

²³⁰ 301 F.2d 818 (5th Cir. 1962).

²³¹ *See id.* at 819–20.

²³² BASS, *supra* note 1, at 218.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.* at 218–19.

²³⁶ *Id.* at 219.

²³⁷ *Id.*

²³⁸ *See supra* notes 200–25 and accompanying text.

Not only did the action put all district judges on notice that attempts to delay by postponement and inaction would not be tolerated, but it radically altered the existing concept of an injunction pending appeal. For the first time, a circuit court issued an injunction, pending appeal, that did more than just freeze the status quo. Even though no full hearing had yet been held, they enjoined the registrar from continuing discriminatory practices, thus changing the status quo to prevent abuse of legal rights—in this case the right of Negroes to register to vote. Also, by issuing their own injunction against the registrar, they made him subject to contempt of the Fifth Circuit Court of Appeals.

The “injunction pending appeal” became a mainstay of civil rights lawyers thwarted by recalcitrant district judges and came into wide use in later school desegregation cases.

. . . .

The Supreme Court’s denial of cert to challenges of the new use of the All-Writs Statute represented implicit approval of the Fifth Circuit’s extensions of power in protecting constitutional rights. . . .

For some district judges in the Fifth Circuit, inaction on civil rights matters and disregard of clear and recent legal authority bordered defiance of the law. The procedural innovations provided a means of discipline to control trial judges who defied the law by using delay as a form of evasion.²³⁹

Even with the constitutional protections of appointment for life and protection against salary reduction, some federal district judges did not act in a manner consistent with impartial justice. These are but some examples of that. The procedural mechanism offered by Rule 62, therefore, became a significant tool that was used by the appellate court to avoid an unjust result.

ii. The Structural Injunction

The beginning of a new era in the use of injunctions under Federal Rule of Civil Procedure 65 began with *Brown v. Board of Education*.²⁴⁰ As never before, the federal courts were called on to carry out a constitutional decision—that racial segregation in public school violated the equal protection clause—in vast regions of the country. The injunction, with the power of contempt to give it punch, served as the remedy of choice in achieving desegregation. As shown above, the United States Court of Appeals for the Fifth Circuit itself issued injunctions.²⁴¹ The combination of those, and the reversal of decisions by district judges who failed to enforce the *Brown* decision by meaningful injunctions, ultimately created a type of injunctive remedy that had never been seen before.

²³⁹ BASS, *supra* note 1, at 219–20.

²⁴⁰ 349 U.S. 294 (1955); 347 U.S. 483 (1954).

²⁴¹ See *supra* notes 156, 239 and accompanying text.

Sometimes called the “structural injunction,” district courts issued orders covering broad areas, and monitored compliance with such orders. As a leading scholar has observed:

The structural injunction achieved its greatest prominence in the civil rights era. Federal courts used the structural injunction to desegregate the schools of the nation. . . . [The structural injunction] seeks to safeguard constitutional values from the threats posed by bureaucratic organizations. It is premised on the view that these threats will not be eliminated by some specific command or prohibition, but only through restructuring of the bureaucratic organization.²⁴²

A good example of an early decision in which one can observe the expanded use of injunctive remedies is *Brewer v. Hoxie School District No. 46 of Lawrence County, Arkansas*.²⁴³ In *Brewer*, the school district wanted to desegregate, but had to bring suit in the face of attempts by the community to obstruct this goal.²⁴⁴ The school board and school superintendent sought to obtain a restraining order and injunction to overcome the obstruction.²⁴⁵ The district court enjoined the defendants from interfering with the desegregation.²⁴⁶ Affirming, the United States Court of Appeals for the Eighth Circuit ruled that “[a]n injunction will issue wherever necessary to afford adequate protection of constitutional rights.”²⁴⁷ It further held that “no question” existed regarding the school board’s protection by federal injunction in its efforts to comply with the Constitution.²⁴⁸

Whereas federal injunctions had primarily been case-specific and aimed at preventing conduct the court deemed unlawful, structural injunctions such as the one in *Brewer* exemplify transformative injunctions. The structural injunction “is designed to bring the structure [e.g., school system, prison system] within constitutional bounds—not to minimize the chance of some other, discrete wrong occurring.”²⁴⁹ Further, structural injunctions require a past wrong, a finding that “the existing institutional arrangement is illegal, is now a wrong, and will continue to be wrongful unless corrected.”²⁵⁰

As time passed and courts continued to face resistance, the structural injunction grew to be more specific in nature. In the first *Brown* decade, 1954–64, the structural injunction “had two parts—one a broad prohibition (do not discriminate on the basis of race; do not maintain a ‘dual school system’), and the other—a requirement for the school board to submit a plan for transforming the

²⁴² DOUG RENDLEMAN, REMEDIES: CASES AND MATERIALS 528 (6th ed. 1999) [hereinafter RENDLEMAN, REMEDIES].

²⁴³ 238 F.2d 91 (8th Cir. 1956).

²⁴⁴ *Id.* at 93.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 94.

²⁴⁷ *Id.* at 98.

²⁴⁸ *Id.* at 101.

²⁴⁹ OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 11 (1978) [hereinafter FISS, INJUNCTION].

²⁵⁰ *Id.*

‘dual school system’ into a ‘unitary, nonracial school system’” to allow defendants to “specify their own remedial steps.”²⁵¹ Over time, courts realized that “generalized decrees would not effectively change the status quo.”²⁵² So, in the “second *Brown* decade, 1964–74, the courts began to write their own plans and thus to be increasingly specific in describing the steps for structural reformation.”²⁵³ However, the Supreme Court viewed these specific steps as only temporary, “necessary to cope with the absence of good faith.”²⁵⁴

It is fair to wonder whether the goal of desegregation, and later enforcement of the Civil Rights Act of 1964,²⁵⁵ could have been accomplished without the unique procedural advantages of the injunction. Once a broad goal such as desegregation has been announced (by the Court, as in *Brown*, or in public facilities, as in the Civil Rights Act), the law needs force to make these goals a reality. As one author notes,

The injunctive process concentrates power in judges because they can decide without a jury whether to grant relief, and they possess contempt powers to enforce their orders. This allows them to act by whatever legal means are necessary. School integration orders, for example, often provide for continuing supervision over long periods of time of a detailed plan that may direct pupil and faculty assignments, transportation policy, school site selection, programs for compensatory educations, the creation and use of a citizens’ advisory committee, and other details. Because an injunction can be easily modified if conditions or circumstances change, it allows a judge to retain control with whatever degree of firmness is desired. The civil rights cases also demonstrated uses of the injunction that were new to the legal process, such as eliminating the effects of a past wrong.²⁵⁶

The topic of structural injunctions and their role in effecting desegregation and enforcement of civil rights is beyond the scope of this Article.²⁵⁷ The point the author seeks to make is that procedure served the ultimate goals of serving impartial justice and overcoming human bias and great recalcitrance by enforcing decisions grounded in the Constitution’s Equal Protection Clause. The flexibility of the injunction itself, and its ability to adapt to changing circumstances, provided an essential ingredient in the difficult task of effecting wide-ranging change in institutions. That these institutions were, at best, rigid in adhering to past behavior and at worst, defiant, made the value of the injunction even greater. One can argue that federal judges may have ultimately exercised power that led to the eventual creation of a perception of activism that went beyond a healthy

²⁵¹ *Id.* at 13–14

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ 42 U.S.C. § 2000(a)–(h)(6) (2006).

²⁵⁶ BASS, *supra* note 1, at 21.

²⁵⁷ For excellent discussions of these topics, see generally FISS, INJUNCTION, *supra*, note 249, OWEN M. FISS & DOUG RENDLEMAN, INJUNCTIONS (2d ed. 1984), and RENDLEMAN, REMEDIES, *supra* note 242.

separation-of-powers. Any fair-minded person, however, would find it difficult to question the indispensable role that the federal injunction played in accomplishing important goals of the three branches—desegregation of schools and enforcement of civil rights.

c. General Federal Question Cases as a Procedural Aid to Serving Impartial Justice in a Variety of Contexts

Moreover, the independence of federal courts serves equally as well in less dramatic confrontations. One can argue that the safeguards mentioned above embolden some federal judges to overstep their bounds and become activists.²⁵⁸ On the other hand, the activism of some judges (always reviewable by the appellate process) may be a price worth paying in order to ensure that federal trial judges have a certain measure of independence. Even when dealing with a run-of-the-mill case in federal court that is properly within the court's jurisdiction solely because federal law underlies the suit,²⁵⁹ the detachment from political pressures afforded by constitutional procedures is important. The procedures allow federal judges to ensure that national interests are protected and not compromised for parochial reasons. *Federalist No. 78* states this concept well:

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. . . . The independence of the judges is . . . requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppression of the minor party in the community.

But it is not with a view to infractions of the Constitution only, that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. . . . The benefits of the integrity and moderation of the judiciary have already been felt in more states than one; and though they may have displeased those whose sinister expectations they may have disappointed, they must have commanded the esteem and applause of all the virtuous and disinterested. . . .

²⁵⁸ See generally ANTONIN SCALIA, *FEDERAL COURTS AND THE LAW: A MATTER OF INTERPRETATION* (1997).

²⁵⁹ Both Article III, Section 2 of the Constitution and 28 U.S.C. § 1331—the general federal question statute—provide jurisdiction in federal courts for cases “arising under the Constitution, laws of the United States, or treaties of the United States. . . .” Most federal suits under this category involve “laws of the United States,” i.e., federal statutes.

That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. If the power of making them [i.e., periodic, not permanent appointments] was committed either to the executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; . . . if to the people, or to persons chosen by them for the special purpose, there would be too great disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws.²⁶⁰

Contrasting the independence permitted by the procedural safeguards given to federal judges with the system of most states may be the best proof that the Framers knew what they were doing. As one commentator observes, “[m]ost of the judges in America are elected. Yet, the institution of the elected judiciary is in trouble, perhaps in crisis. The pressures of campaigning, particularly raising money, have produced an intensity of electioneering that many observers see as damaging to the institution itself.”²⁶¹ The “politicization” of the judicial election process threatens the independence of state judges.²⁶²

By recognizing the need for independent federal judges who “guard[] the Constitution and the rights of individuals,” *Federalist No. 78* was not speaking solely of issues such as desegregation and civil rights. Protection of a litigant’s rights under a commonly litigated federal statute may seem “less dramatic,” but is no less important than enforcement of Civil Rights statutes. For instance, imagine a lawsuit grounded upon the Federal Age Discrimination Act or some other federal right. Although most lawsuits based upon federal rights are within the concurrent jurisdiction of state and federal courts, the Framers realized that a number of state judges would place less value on federal rights than they would on state rights, as parochial as that view may be. Thus, the guarantee that an independent federal judge will hear a case that involves federal rights of any kind will help avoid human bias and promote impartial treatment of that litigant’s lawsuit.

²⁶⁰ THE FEDERALIST NO. 78, at 403-07 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

²⁶¹ George D. Brown, *Political Judges and Popular Justice: A Conservative Victory or a Conservative Dilemma?*, 49 WM. & MARY L. REV. 1543, 1546 (2008).

²⁶² See *id.* at 1543. Brown expresses concern over the effect of judicial fundraising and campaigning on judge neutrality: “The existence of political ‘debts,’ especially campaign contributions, ‘owed’ to parties who then litigate before the debtor raises the same concerns [over neutrality].” *Id.* at 1592. Further, politicization leads to a general mistrust of “state courts as fair and competent forums for the adjudication of federal constitutional rights.” *Id.* at 1567.

d. Diversity and Alienage Jurisdiction

Diversity and alienage jurisdiction of federal courts are specifically designed to protect out-of-state defendants (or in the case of aliens, persons from other countries) from local bias. As *Federalist No. 80* observed:

The reasonableness of the agency of the national courts in cases in which the state tribunals cannot suppose to be impartial, speaks for itself. No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias. This principle has no inconsiderable weight in designating the federal courts as proper tribunals for the determination of controversies between different States and their citizens.²⁶³

In other words, the reason for including these categories as ones within federal courts' jurisdiction is the recognition that the natural bias of the state judiciary for in-state citizens can undermine impartiality. Those who question whether human nature has evolved beyond the need for such jurisdiction may reconsider upon reading the following quote from Justice Neely of the West Virginia Supreme Court:

As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because the in-state plaintiffs, their families and their friends will reelect me.²⁶⁴

In Justice Neely's statement, he was being remarkably honest about what many state judges would not admit openly: they often favor the litigant from their home state. Clearly, Judge Neely admits here to the weaker part of human nature on which procedure is a check. By providing the procedural means for a nonresident to obtain a neutral forum (i.e., one dedicated to providing a fair shake to nonresidents in disputes with residents of the state where the federal court sits), diversity jurisdiction unmistakably serves the goal of maintaining equality of everyone before the law.

The policies that alienage jurisdiction serves are no different from those of diversity jurisdiction. These, too, recognize that in some cases state courts would favor a state resident in lawsuits that involve citizens of other countries. If "home cooking" exists when two Americans litigate in state court and one is from another state, the same bias certainly exists against persons from other countries—perhaps countries perceived as unfriendly to United States policies. Without alienage jurisdiction, the foreign citizen would be subject to the vulnerabilities of human nature and would be less likely to receive equal justice

²⁶³ THE FEDERALIST NO. 80, at 414 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

²⁶⁴ RICHARD NEELY, THE PRODUCTS LIABILITY MESS: HOW BUSINESS CAN BE RESCUED FROM THE POLITICS OF STATE COURTS 4 (1988).

under the law. Although the foreign citizen may not ultimately be as well received in federal court as he would be in his home country, at the very least he has the assurance that he is in a court that is designed to provide him a forum that removes him from state prejudices.

2. The Integrated System of Rules and Procedures Promoting Fair Resolution of Claims that Serves the Broader Principles Underlying Procedure

Having noted particular jurisdictional doctrines and procedural features that promote justice, we would do well to stand back and observe the manner in which the structure of the federal system also meets the twin goals of procedure outlined in Part II. The federal system rests on the philosophy of allowing parties an ample opportunity to assert claims or defenses, to join as many claims or parties that are properly within the jurisdiction of the federal court, to pursue evidence that will assist in proving claims or defenses, and—if parties have sufficient evidence in support of their claims or defenses—to have their day in court. Cases under the writ system, or even under the Field Code, were not so generous to the resolution of claims.²⁶⁵ A much greater percentage of cases failed to get past the initial stage of asserting claims under the older systems. After the 1983 amendments to Federal Rule of Civil Procedure 11, one might argue that the federal system was regressing toward the older systems. Even then, the regression was only a matter of degree.²⁶⁶ In any event, later amendments to Rule 11 have returned balance to the federal system.²⁶⁷

It is easy to take for granted the benefits of America's modern federal system that is balanced in favor of allowing parties an opportunity to pursue their rights. In so doing, the system itself serves the twin principles underlying procedure: (1) accounting for the parts of human nature that can frustrate justice, and (2) seeking equal justice for all. As human beings, judges with increasingly heavy dockets have the natural inclination not to consistently pursue the fair

²⁶⁵ See RICHARD D. FREER & WENDY COLLINS PERDUE, *CIVIL PROCEDURE: CASES, MATERIALS, AND QUESTIONS* 284–310 (5th ed. 2008).

²⁶⁶ See FED. R. CIV. P. 11 (1993 Amendments & Advisory Committee Notes).

²⁶⁷ See *id.* Many now consider two recent Supreme Court decisions to present a greater threat to the opportunity of litigants to have an opportunity to litigate their disputes. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). In these decisions, the Court stated a test for pleading under Federal Rule of Civil Procedure 8(b) that appeared to depart from the long-standing test of *Conley v. Gibson*, 355 U.S. 41 (1957). *Conley* had held “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Id.* at 45–46. Conversely, *Bell Atlantic* and *Iqbal* suggested a shift in the test for sufficiency of complaints in which the district court could assess the plausibility of the claim pled. See *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 556–57, 570). In both the House and Senate, congressmen have introduced proposed legislation to overrule these cases. See Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. § 2 (2009) (pending); Open Access to the Courts Act of 2009, H.R. 4115, 111th Cong. § 2 (2009) (pending).

resolution of claims in each case, but instead to seek docket reduction. Although it does not ignore efficiency, the federal system limits a judge's ability to short-circuit litigation (as judges under the Writ system or even under the Field Code were able to do). Overall, the system promotes the dignity of persons by giving them an opportunity to have their claims heard and resolved—to have their day in court.

As with the procedural doctrines of claim and issue preclusion, the Federal Rules of Civil Procedure, which govern most issues related to the litigation of a suit, are neutral. They apply equally to everyone and they do not “play favorites.” Rule 26, the rule governing discovery, is an exception to the general treat-all-parties-the-same principle. If a party demonstrates that it has inadequate resources with which to litigate a case, or even that the party's resources are significantly disparate from its adversary, Rule 26 allows the court to intervene.²⁶⁸ The district court may issue orders to permit the party with limited resources to pursue the litigation while minimizing the resultant burden on the party.²⁶⁹ On the other hand, Rule 26 encourages the district court to ensure that the opposing litigant is not overly prejudiced by the court's order providing relief to a party.²⁷⁰ One could argue that this particular part of Rule 26 provides for “special” treatment of a litigant. However, the Rule is clearly predicated on fairness to all parties. It is designed to avoid instances where a litigant with greater resources can overcome an adversary not by litigating on the merits of its claim, but by using its resources to “wear down” an opponent. The discretion of a district court to treat a party by a different standard than its opponent may run contrary to the overarching theme of procedure limiting the opportunity for human vulnerability. However, the Rule and the discretion it affords are a necessary requirement whenever there is a situation where litigants have unequal resources that could prevent a case from reaching the merits. The principle of seeking equality, and protecting the dignity of each party, is clearly supported here.

3. The Right to a Jury Trial as an Ongoing Procedure Emblematic of the Anglo-American Commitment to Procedures that Avoid Bias and Promote Equal Justice

The jury trial is, of course, another contemporary procedure that serves the twin principles of limiting the effects of human biases and prejudices, and of seeking equal treatment for parties to lawsuits. The right to a jury trial, in the Anglo-American tradition, has its roots in the effort to provide a mechanism to promote impartial decision-making by providing a buffer between judges and parties.²⁷¹ From its heritage as one of the key provisions in Magna Carta to the

²⁶⁸ See FED. R. CIV. P. 26(b)(2)(c).

²⁶⁹ See *id.*

²⁷⁰ See *id.*

²⁷¹ See JEFFREY BRAUCH, A HIGHER LAW: READINGS ON THE INFLUENCE OF CHRISTIAN THOUGHT IN ANGLO-AMERICAN LAW 310–15 (2d ed. 2008) (quoting Madison, III, *supra* note 85, at 391-97).

founding of the American Republic, the jury has been a primary tool for offsetting the fallibility of human nature in decision-making—protecting persons against bias, prejudice, and other of the less noble qualities of human nature.²⁷² It has likewise served as a primary means of assuring equal justice.²⁷³ Indeed, the customary phrase “a jury of one’s peers” epitomizes the role of the procedural buffer that a jury provides.

The constitutional guarantees of trial by jury—both civil and criminal—thus offer another example of procedural checks against the vulnerabilities of human nature.²⁷⁴ No right is mentioned as often in the Constitution and Bill of Rights as the right to a trial by jury.²⁷⁵ The author has elsewhere explored both the history and purpose of the jury in the Anglo-American system.²⁷⁶ As shown in that article, both *The Federalist Papers* and the Anti-Federalist writings in *The Federal Farmer* agreed on one point if they agreed on nothing else: the jury was a crucial part of the justice system.²⁷⁷ The concern that is woven throughout these writings is a fear of individual judges, with the temptations of power, overstepping their bounds.²⁷⁸ Again, the Framers were keenly aware of the need to rely on institutional procedures to protect us from ourselves.

The various motions that may terminate a case before trial (summary judgment), during trial (judgment as a matter of law), or post-trial (renewed judgment as a matter of law) are limited. Indeed, the criteria for whether these motions should be granted is not whether the judge would decide the case one way or the other, but whether reasonable jurors could decide it for the nonmoving party.²⁷⁹ With this in mind, anyone first learning about the functions of these motions should understand clearly the reasons why trial judges cannot grant one of these dispositive motions on the ground that they believe the plaintiff has simply failed to prove his case. If a jury could reasonably render a verdict on the evidence, the judge may not remove the jury’s prerogative in deciding the case regardless of whether the judge believes the case should be decided for the defendant.

²⁷² *See id.*

²⁷³ *See id.*

²⁷⁴ U.S. CONST. amend. VII (civil); *id.* at art. III, § 2 & amend. VI (criminal).

²⁷⁵ Article IV of the Constitution guarantees the right to trial by jury in criminal cases. The Sixth Amendment recognizes the same. The Seventh Amendment guarantees the right to a civil jury.

²⁷⁶ *See* Madison, III, *supra* note 85, at 398-400, 400-13.

²⁷⁷ *Compare* THE FEDERALIST NO. 83 (Alexander Hamilton), *with* LETTERS FROM THE FEDERAL FARMER XIV & XVI, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 320-21, 326-27 (Herbert J. Storing ed., 1981).

²⁷⁸ THE FEDERALIST NO. 83 (Alexander Hamilton); THE FEDERALIST NO. 78 (James Madison); LETTERS FROM THE FEDERAL FARMER XV, *supra* note 277, at 483.

²⁷⁹ *See* FREER & PERDUE, *supra* note 265, at 483 (“Summary judgment is also used when the parties disagree about the facts, but there is no ‘genuine’ dispute, that is, one side has so little evidence that no reasonable jury could find for that side.”); *id.* at 508 (“The standard for [judgment as a matter of law] and [renewed judgment as a matter of law] is the same as the standard for summary judgment—‘whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented.’”).

Above, the author highlights the specific procedures employed in federal courts to draw potential jurors from a broader pool.²⁸⁰ This may suggest that, in ideal circumstances, juries in every system should be from a large pool as is the case in the federal system. In reality, state juries are drawn from a broad enough pool in most cases to provide a fair trial. The size of the jury pool becomes a much more significant issue in cases in which a subdivision within an area is largely of one race and race is an issue in the case. As America becomes increasingly diverse,²⁸¹ the problem of unrepresentative jurors such as occurred in Simi Valley, California, in the first Rodney King trial discussed at the beginning of this article,²⁸² may become less problematic. However, we should not underestimate the time it will take to achieve true integration in the demographics of every American community.

IV. CONCLUSION

“We have met the enemy and he is us.”²⁸³ Human beings have the capacity for great acts of courage, self-sacrifice, and charity. They also have the capacity for great cowardice, selfishness, and prejudice. Anyone who honestly examines human nature recognizes the truth that humans are imperfect. That imperfection has perhaps most predominantly manifested itself in America in the form of racial prejudice. Fortunately, the Constitution’s Framers were prescient enough to put systems in place that ultimately would offset human bias, prejudice, and imperfection—though not perfectly, at least enough to allow for progress in dispensing justice. Indeed, one of their central themes in the constitutional debates, and in the structure of the Constitution, was to deal with the inevitability that checks were essential to offset the effects of human nature.²⁸⁴

This Article maintains that the modern judicial system still rests, to a great extent, on the two principles that: (1) humans are imperfect and need institutional checks, and (2) every person is equal in dignity and, thus, deserves equal treatment before the law. When we review periods in which judges faced great pressures, such as the Desegregation and Civil Rights Eras, we appreciate the foresight of the Framers in providing procedural guarantees that maintained federal judges’ independence. Without these procedural safeguards, one must doubt whether district judges could have withstood the kind of forces brought to bear on them by the recalcitrant legislatures and populace of many states. Even in less explosive cases we see the value of judicial independence for cases involving federal rights that could receive short shrift in state courts. And the

²⁸⁰ See *supra* notes 1-19 and accompanying text (trial of officers in King beating); *supra* notes 136-38 and accompanying text (trial of African-American who killed Hasidic Jew).

²⁸¹ See David Minckler, *U.S. Minority Population Continues to Grow: Minorities Make Up 34 Percent of U.S. Population in 2007*, AM.GOV, May 14, 2008, <http://www.america.gov/st/diversity-english/2008/May/20080513175840zjsredna0.1815607.html>.

²⁸² See *supra* notes 3-7 and accompanying text.

²⁸³ Walt Kelly, “Pogo” cartoon, available at http://www.igopogo.com/we_have_met.htm.

²⁸⁴ See MICHAEL NOVAK, *FREE PERSONS AND THE COMMON GOOD* 184 (1989).

value of diversity and alienage jurisdiction, in avoiding prejudice to out-of-state litigants, is clearly one that should continue.

These “silent” protectors of rights—procedural doctrines, principles, and rules—show themselves in other ways. The entire philosophy of the federal system, designed to allow litigants their day in court, is one that relies on a highly integrated system of rules and doctrines that keep judges from sacrificing this American value to the pressures of docket control. Although we may laugh at the propensity of Americans to say “I’ll sue,” most disputes do not actually result in litigation. Thus, is not the perceived availability of courts for resolution of disputes a valuable means for people to “blow off steam”? As for those cases that actually reach the litigation phase, statistics show that most settle.²⁸⁵ Again, might we not ask whether this result is preferable to others, such as parties taking justice into their own hands? As the author likes to tell his Civil Procedure students, “Our system has its warts, but it beats dueling!”

As evidenced by the proper use of procedure in the Desegregation Era, the power of procedure to effect change derives from recognizing and applying its foundational principles. A system that is based upon truths that are rooted in both philosophy and theology, and designed to justly resolve disputes and treat people as equals, should command more respect than it currently does. The author’s hope is that this Article has the effect of playing a role in that process.

²⁸⁵ See, e.g., *The Vanishing Trial: Implications for the Bench and Bar*, CIV. ACTION, Spring 2005, at 1-5, available at http://www.ncsconline.org/projects_Initiatives/Images/CivilActionSpr05.pdf.