Litigation as Accommodation

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As persistent threats to the integrity of some of our most important public institutions remind us, every public institution faces the challenge of combating the abuse of its powers for ends inconsistent with the public values it aims to serve. Public law employs a distinctive set of strategies for addressing that challenge: vesting institutional powers with public officials, imposing public-regarding duties on those officials, and ensuring compliance with the duties by subjecting officials' decisions to various forms of oversight and accountability.

This Article argues that the public institution of civil litigation pursues a very different strategy for countering abuse from public law's, one that belies predominant scholarly understandings of civil procedure and reveals an inherent, ineliminable tension within any liberal civil justice system between the impartial public values such a system espouses and the significant degree of partiality it must permit parties to display for their own personal interests, relationships, and moral beliefs. Parties can end up exercising their partiality by engaging in litigation conduct that contravenes important public values. And yet, it turns out that civil procedure doesn't always suppress such conduct, but often tolerates, and sometimes even facilitates, it. The result is that civil procedure frequently declines to compel parties to internalize all the moral costs of their litigation conduct, thus affording them a series of moral subsidies*. Those moral subsidies, this Article contends, are best understood as a kind of* accommodation*, which in other contexts has been theorized as the tolerated externalization of some of the costs—including the moral costs—of individual conduct for the sake of autonomy and other personal values.*

By better comprehending civil procedure's accommodations and their normative logic, we can more readily appreciate conflicts between parties' personal interests and moral beliefs, on the one hand, and, on the other, the public values we expect the civil justice system to reflect or promote, as well as more candidly debate the resulting value tradeoffs. And while those tradeoffs are inevitable, this Article identifies current practices in civil procedure that appear either to confer significant moral subsidies even in the absence of substantial personal interests or to fail to adequately accommodate such interests. The most fundamental lesson of civil procedure's accommodations, however, is that, in contrast both to public law's strategies for addressing abuse

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and to prevailing accounts of civil procedure, litigation's adversarial architecture constrains—and often compromises—the pursuit of public values through the civil justice system in order to respect parties' competing pursuit of their own personal interests and moral beliefs.

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INTRODUCTION

As persistent threats to the integrity of some of our most important public institutions remind us, every public institution faces the challenge of combating the abuse of its powers for ends inconsistent with the public values it aims to serve. Public law employs a distinctive set of strategies for addressing that challenge. In general, those strategies involve vesting institutional powers with public officials, imposing public-regarding duties on those officials, and ensuring compliance with the duties by subjecting officials' decisions to various forms of oversight and accountability.[1] This approach is, of course, prone to its own well-known pathologies, including the "ossification" of regulatory policymaking[2] and the "capture" of the oversight and accountability mechanisms themselves by private interests.[3] But it nevertheless remains a defining feature of public law's repertoire of techniques for safeguarding public institutions from abuse.

In this Article, I argue that the public institution of civil litigation pursues a very different strategy for countering abuse from public law's, one that belies predominant scholarly understandings of civil procedure and reveals an inherent, ineliminable tension within any liberal civil justice system between the impartial public values such a system espouses and the significant degree of partiality it must permit parties to display for their own personal interests, relationships, and moral beliefs. Parties can end up exercising their partiality by engaging in litigation conduct that contravenes important public values. And yet, it turns out that civil procedure doesn't always suppress such conduct, but often tolerates, and sometimes even facilitates, it. The result is that civil procedure frequently declines to compel parties to internalize all the moral costs their litigation conduct has for public values, thus affording them a series of *moral subsidies*. Those moral subsidies, I contend, are best understood as a kind of *accommodation*, which in other contexts has been theorized as the tolerated externalization of some of the costs—including the moral costs—of individual conduct for the sake of autonomy and other personal values.

By better comprehending civil procedure's accommodations and their normative logic, we can more readily appreciate conflicts between parties' personal interests and moral beliefs, on the one hand, and, on the other, the public values we expect the civil justice system to reflect or promote, as well as more candidly debate the resulting value tradeoffs. And while those tradeoffs are inevitable, it may be possible to identify current accommodations in civil procedure either that confer significant moral subsidies even in the absence of

1. That is the approach embodied in the Administrative Procedure Act (APA), Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified at 5 U.S.C. §§ 551–59).

2. *See, e.g.*, Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 357–59 (2019).

3. *See, e.g.*, David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1117 (2017); David E. Pozen, *Transparency's Ideological Drift*, 128 YALE L.J. 100, 102 (2018).

substantial personal interests or that fail to adequately protect such interests. The most fundamental lesson of civil procedure's accommodations, however, is that, in contrast both to public law's strategies for addressing abuse and to prevailing accounts of civil procedure, litigation's adversarial architecture constrains—and often compromises—the pursuit of public values through the civil justice system in order to respect parties' competing pursuit of their own personal interests and moral beliefs.

It's well recognized that governmental services generally afford *financial* subsidies to their beneficiaries, inasmuch as the government expends public funds to cover at least some of the services' costs.[4] Civil litigation is no different from any other governmental service in this respect, and scholars have identified various financial subsidies entailed by the state's provision of public courts for resolving private disputes.[5] Less appreciated is the fact that litigation also provides parties with significant *moral* subsidies: although parties often engage in litigation conduct that conflicts with important public values—values the political community is collectively committed to enforcing through the state's coercive power[6]—civil procedure doesn't always seek to prevent such conduct or to punish it after the fact; rather, it often tolerates or even facilitates the conduct, thus allowing parties to externalize some of the moral costs of their litigation behavior. These moral subsidies can be found in every corner of contemporary civil practice, whether parties are abusing the broad access civil procedure grants to its institutions or the powers it confers, entering into objectionable agreements that it nonetheless enforces, or exploiting the various principal-agent relationships it authorizes. In all these contexts, the civil justice

4. *See, e.g.*, Matal v. Tam, 582 U.S. 218, 241 (2017) ("[J]ust about every government service requires the expenditure of government funds. This is true of services that benefit everyone, like police and fire protection, as well as services that are utilized by only some, *e.g.*, the adjudication of private lawsuits and the use of public parks and highways."). *But see id.* at 240 (holding that only "cash subsidies or their equivalent" constitute a government "subsidy" for First Amendment purposes).

5. *See, e.g.*, STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES 45, 219 (1999); Brendan S. Maher, *The Civil Judicial Subsidy*, 85 IND. L.J. 1527, 1530–31 (2010); Judith Resnik, *Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism: The Childress Lecture*, 56 ST. LOUIS U. L.J. 917, 942–47, 961–72 (2012) [hereinafter Resnik, *Constitutional Entitlements*]; Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2131–37 (2000) [hereinafter Resnik, *Money Matters*]; Stephen J. Ware, *Is Adjudication a Public Good? "Overcrowded Courts" and the Private Sector Alternative of Arbitration*, 14 CARDOZO J. CONFLICT RESOL. 899, 900 (2013); *cf.* JOHN GARDNER, *Public Interest and Public Policy in Private Law*, *in* TORTS AND OTHER WRONGS 304, 305 (2019) ("The support of the law in dealing with personal injustices that one faces is a kind of social assistance—a public sponsorship of one's cause . . . .").

6. *Cf.* Thomas W. Merrill, *Private and Public Law*, *in* THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW 575, 578 (Andrew S. Gold, John C.P. Goldberg, Daniel B. Kelly, Emily Sherwin & Henry E. Smith eds., 2021) ("Public law . . . [is a] mechanism of collective governance and the use of coercion to promote compliance with collectively determined norms.").

system often relieves parties of some of the moral costs of their litigation behavior, rather than requiring them to internalize all those costs.[7]

Civil procedure's various moral subsidies can be conceptualized as a kind of *accommodation*, and by thus conceiving of them, we can better assess the value tradeoffs they entail. As the extensive literature on accommodations in other legal contexts reveals, the defining feature of an accommodation is the state's toleration of individual behavior that violates important public values for the sake of the autonomy and other personal interests realized by such behavior.[8] The state might value autonomy either intrinsically or instrumentally, but either way, exercises of individual autonomy will often contravene important public values. The state will sometimes be able to regulate such problematic exercises of autonomy so as to prevent their worst effects or at least to compel the internalization of their costs. When the state can't readily do so, however, it will face a choice between either completely proscribing the more general category of behavior to which the objectionable exercise of autonomy belongs or tolerating the offending conduct. To take the latter course is to grant the individual exercising her autonomy a moral subsidy—an accommodation.[9]

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7. This Article can thus be understood as exploring the mirror image of Ronen Avraham and William Hubbard's idea that a primary purpose of civil procedure is to regulate the externalities of parties' litigation conduct. *See* Ronen Avraham & William H.J. Hubbard, *Civil Procedure as the Regulation of Externalities: Toward a New Theory of Civil Litigation*, 89 U. CHI. L. REV. 1, 13 (2022). Indeed, the sweeping ambition of their proposed reforms suggests that a focus on inducing parties to *internalize* (negative) externalities would radically alter the nature of our civil justice system. *See id.* at 16–19.

Let me make a few further clarifications about some of the terminology I'll be using throughout this Article. First, by "moral costs," I mean to refer to the ways in which parties' litigation conduct can undermine or violate public values. The term "costs" is, admittedly, more commonly used in legal scholarship to denote specifically *economic* costs, but that narrower usage is tendentious, unduly restricting normative analysis to only a particular subset of values ("efficiency," "welfare," and so on). *Cf.* GARDNER, *supra* note 5, at 327 (employing a more capacious understanding of "costs"). Second, just as individuals can be compelled to "internalize" the economic costs of their conduct (say, through a Pigouvian tax or some kind of penalty) or can be permitted to "externalize" those costs onto other individuals or society as a whole, the same is true of moral costs. And third, when the law systematically lets parties externalize the moral costs of their litigation conduct, that would seem to constitute a "moral subsidy," in the same way that the state provides de facto financial subsidies whenever it confers benefits but declines to charge beneficiaries for all the associated financial costs. The term "subsidy" does, to be sure, imply a normative baseline of generally requiring private parties to internalize the moral costs of their conduct. But it seems to me that such a baseline characterizes nearly all public institutions, which typically seek to conform the conduct of the private parties participating in them to various public values. In departing from that baseline, the institution of civil litigation affords private parties a set of moral benefits they don't enjoy in other public institutions. The idea of a "moral subsidy" captures that fact.

8. *See infra* Part.II.

9. In scholarship on antidiscrimination law, accommodation requirements are often conceptualized as a means of inducing employers to *internalize* the costs their hiring practices would otherwise impose on disabled and other disadvantaged employees. *See, e.g.*, Christine Jolls, Commentary, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 650 (2001). But from the converse perspective, accommodation requirements equally permit disabled and other disadvantaged employees to *externalize* certain costs associated with employing them onto their employers. I likewise focus in this Article on the ways in which civil procedure allows parties to externalize the moral costs of their litigation conduct onto their opponents or the civil justice system as a whole—even if it's also possible to conceptualize civil procedure's accommodations as the internalization by the civil justice system of some of the costs the conduct would otherwise impose on parties.

Civil procedure's moral subsidies exhibit this more general accommodationist structure, though with important variations that reflect the unique institutional context of civil litigation. For both intrinsic and instrumental reasons, civil procedure affords parties significant autonomy in how they use the civil justice system and the various powers it confers. But the civil justice system is also tasked with the pursuit of important public values, including interpersonal accountability, rights enforcement, the rule of law, and equality. Parties' litigation conduct can frustrate the full realization of those values. Rather than pursuing public values without regard for personal autonomy, however, civil procedure tolerates all but the most egregious exercises of autonomy during litigation, even at great moral cost—hence its many moral subsidies.[10] It thus strikes a balance between the partiality parties display for their own personal interests and moral beliefs, on the one hand, and, on the other, the more impartial public values we expect the civil justice system to answer to. Assessing the reasonableness of that balance requires a full accounting of the considerations on each side of the scale. While the relative importance of parties' personal interests and public values will likely vary between different procedural contexts, any distinctively *liberal* civil justice system will attach significant weight to the former and therefore inevitably must at least somewhat curb its pursuit of the latter when the two conflict.[11]

Although no liberal civil justice system, then, can avoid the tradeoffs that civil procedure's accommodations seek to mediate between parties' partiality for their personal interests and beliefs and impartial public values, it nevertheless seems possible to distinguish between more and less reasonable responses to those tradeoffs, with potential implications for several prominent doctrinal and policy debates in civil procedure. On the one hand, civil procedure increasingly extends accommodations even in the absence of substantial personal interests, unjustifiably undermining important public values in the process. That appears to be the case with private-enforcement regimes such as Texas's Senate Bill 8,[12] which empower citizen enforcers even when they lack a personal stake in the outcome of their lawsuits. A similar problem plagues large companies' use of the bankruptcy system to resolve mass-tort claims, practices that tend to subvert

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The comparison with antidiscrimination law might seem to render my use of the concept of accommodation inapposite in another respect, for in the antidiscrimination context, an accommodation is always granted to an individual (e.g., a disabled employee) with respect to a generally applicable policy that binds other individuals (e.g., nondisabled employees), whereas what I'm calling civil procedure's accommodations seem to lack such a comparator class because all parties to litigation potentially enjoy them. On closer consideration, however, it seems possible to identify a comparator class in the civil justice context as well—namely, the private parties who must conform their conduct to public values whenever they participate in public institutions other than litigation. Parties to litigation are accommodated vis-à-vis participants in other public institutions, even if not vis-à-vis one another.

10. *See infra* Part.I.

11. *See infra* Part.III.

12. TEX. HEALTH & SAFETY CODE ANN. §§ 171.204–08 (West 2021); *see* Whole Woman's Health v. Jackson, 595 U.S. 30, 35–36 (2021).

important public values (most notably, the rule of law) without the kinds of autonomy interests that might warrant such moral costs. The main problem with these novel accommodations is that they bestow *wholesale* moral subsidies to general categories of parties across broad categories of legal claims, in contrast to civil procedure's more traditional accommodations, which confer moral subsidies on a *retail* basis within the interstices of the rules governing party conduct; they thereby eschew a more careful calibration of parties' personal interests and public values.[13] At the same time, some areas of contemporary civil practice appear to pursue certain public values almost single-mindedly, without due regard for parties' personal interests. Civil procedure requires parties, for example, to disclose significant amounts of personal information in the name of transparency and information production, even when the prospect of doing so might deter many victims of wrongdoing from pursuing their legal claims and vindicating their rights.[14] Understanding civil procedure's moral subsidies as a kind of accommodation thus furnishes the conceptual and normative resources to appreciate both the value and the limits of respecting parties' partiality for their personal interests and moral beliefs in the civil justice context.

More fundamentally, civil procedure's accommodations confound the predominant scholarly accounts of civil litigation, which tend to share public law's conception of institutional abuse. Rather than conceive of lawsuits simply as the procedural form in which courts do justice between the parties according to the applicable law, most civil procedure scholars tend to view litigation instrumentally, as a means to further ends.[15] Different scholars emphasize different ends, but perhaps the most commonly touted one is the "private enforcement" of public policies embodied in regulatory statutes.[16] According to this conception of litigation, plaintiffs serve as "private attorneys general," fortuitously helping to vindicate the public interest by seeking redress for the wrongs allegedly committed against them.[17] The private-enforcement model of litigation encapsulates the main elements of civil procedure scholars' instrumental outlook, including a focus on (1) litigation's broader social and political effects rather than the resolution of individual disputes, (2) on classes of claims rather than individual claimants, and (3) on values external to the litigation process rather than those internal to it. To be sure, the instrumental consensus in civil procedure scholarship isn't unanimous, with several prominent scholars stressing the non-instrumental nature of individual

13. *See infra* Subpart.IV.A.

14. *See infra* Subpart.IV.A.

15. *See infra* Subpart.IV.B.

16. *See generally, e.g.*, SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. (2010) (analyzing how Congress uses private enforcement regimes to augment "state capacity").

17. *See, e.g.*, Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 195. For a taxonomy of the various ideas associated with the concept of the "private attorney general," see generally William B. Rubenstein, *On What a "Private Attorney General" Is—and Why It Matters*, 57 VAND. L. REV. 2129 (2004).

procedural rights.[18] But litigation is, for most other scholars, just another institutional venue for pursuing generic policy objectives, rather than a distinctive institution with its own normative logic. That instrumental vision, moreover, implies an approach to institutional abuse similar to public law's, whereby the propriety of parties' litigation conduct depends on the conduct's implications for important public values.

Civil litigation's various accommodations of parties' personal interests defy such instrumental accounts of litigation and their concomitant conceptions of institutional abuse. Although litigation does indeed have many of the systemic social and political consequences that civil procedure scholars ascribe to it, the accommodations highlight the considerable gap between public values and the individualistic structure of the civil justice system. Public values aren't pursued directly through litigation, but rather are layered upon that structure, which includes a significant degree of tolerance for litigation conduct that subverts public values. Given civil procedure's accommodations, pursuing public values through litigation can transmute the values themselves, lending them a different cast than they'd have in other institutional contexts. Any attempt to use civil litigation to promote public values must therefore grapple with the institution's own normative logic, including its accommodations of problematic litigation conduct. And against scholars' tendency to assimilate civil procedure to public law, the accommodations exemplify litigation's unique approach to institutional abuse, an approach that tempers the pursuit of public values for the sake of personal interests.

The rest of the Article proceeds as follows. Part I identifies and develops a typology of civil procedure's various moral subsidies, while Part II conceptualizes the subsidies as a kind of accommodation. Part III seeks to justify civil procedure's accommodations in terms of the basic commitments of liberal political theory. Finally, Part IV assesses several prominent aspects of contemporary civil practice against the account developed in the previous Parts and suggests that understanding the nature of civil procedure's accommodations should lead us to reconsider the fundamental purposes of civil litigation.

I. CIVIL PROCEDURE'S MORAL SUBSIDIES

Like any other public institution, civil litigation aims to realize certain public values. But, unlike most other public institutions, civil litigation simultaneously allows private parties to wield significant public power and to exercise significant discretion in doing so.[19] Such private control creates a risk that parties will deploy public power in ways that undermine public values. One can envision a civil justice system that emulates public law's approach to combating such abuse, treating private parties as pro tempore officials bound by

18. The most prominent dissenter is Martin Redish. *See infra* note 172 and accompanying text.

19. *See* Matthew A. Shapiro, *Delegating Procedure*, 118 COLUM. L. REV. 983, 993–1014 (2018).

duties to affirmatively pursue public values through their litigation conduct and subjecting their decisions to judicial oversight in order to ensure their compliance with those duties.[20] The United States federal civil justice system, however, takes a different tack.[21] Although it incorporates elements of public law's approach to institutional abuse, it tailors each of those elements to the distinctive institutional context of an adversarial form of civil litigation. Civil procedure, for one thing, does require parties to attend to some public values in their litigation decisionmaking, but only to a specific subset of particularly important values—and even then, only so as to avoid deliberately subverting the values rather than to affirmatively promote them.[22] For another, even as civil procedure subjects parties' litigation decisions to a degree of oversight, it permits parties to exercise considerable power unmediated by any governmental decisionmaker in the first instance and tends to step in to address only especially serious forms of abuse.[23] These two variations on the public law model mean that civil procedure ends up tolerating significantly more conduct that contravenes public values than does public law.[24]

This Part seeks to elucidate the normative structure of that tolerance. Given the wide latitude that civil procedure affords parties to neglect and even violate public values as they exercise their procedural powers, parties needn't internalize all the moral costs of their litigation conduct and consequently enjoy considerable *moral subsidies*—the assumption of some of the moral costs of their conduct by other individuals or institutions. I identify many such subsidies across the full expanse of contemporary civil procedure and distinguish them along three main dimensions. One dimension is the nature of the public values civil procedure permits parties to contravene, and thus the nature of the moral costs it permits parties to externalize—whether those costs involve violations of norms of interpersonal conduct governing relations between parties or with third parties, more systemic values unique to legal institutions such as the civil justice system, or generic values applicable to all political institutions. Civil procedure's moral subsidies also differ in terms of how they redirect the moral costs they don't require parties to internalize, sometimes *shifting* those costs to other parties, and other times *socializing* the costs so as to be borne by the political community as a whole. Finally, the subsidies display varying degrees of generosity, with some merely *relieving* parties of certain moral costs of their litigation conduct and others positively *facilitating* that conduct. Civil procedure's moral subsidies thus assume several different forms, and, as we'll

20. *See infra* notes 165–170 and accompanying text.

21. State civil justice systems, by contrast, often fail to conform to the federal system's adversarial model. *See* Pamela K. Bookman & Colleen F. Shanahan, *A Tale of Two Civil Procedures*, 122 COLUM. L. REV. 1183, 1237–38 (2022).

22. *See* Matthew A. Shapiro, *Procedural Wrongdoing*, 48 BYU L. REV. 197, 238–51 (2022).

23. *See* Shapiro, *supra* note 19, at 1014–32.

24. *But cf.* Adrian Vermeule, *Optimal Abuse of Power*, 109 NW. U. L. REV. 673, 679 (2015) (arguing that public law sometimes seeks to deter abuse of power even when such abuse may be "optimal").

see in subsequent Parts, those differences determine the precise balance the subsidies strike between public values and private interests and beliefs, which, in turn, affects their normative appeal.

A. PUBLIC VALUES: INTERPERSONAL, LEGAL, AND POLITICAL

A fundamental principle of public law is that officials may exercise their institutional powers only for a legitimate public purpose.[25] Not so in civil litigation. Rather than being obligated to affirmatively pursue some collectively defined public-regarding goal, the parties to a lawsuit may seek to advance their own personal interests or moral beliefs so long as they don't commit especially egregious violations of particularly important public values along the way.[26] The upshot is that civil procedure permits parties to engage with impunity in a significant amount of litigation conduct that contravenes public values.[27]

There are at least three kinds of public values parties' litigation conduct might transgress, and accordingly three kinds of moral costs the conduct might impose. First, parties can exercise their litigation powers in ways that breach publicly defined interpersonal obligations they owe their opponents or third parties. Second, parties' litigation conduct can subvert more systemic, but still distinctly legal, values governing the structure and operation of the civil justice system as a whole. And third, by taking certain actions during litigation, parties can end up compromising more generic political values that apply to all public institutions. Civil procedure tolerates violations of each of these types of values, forbearance that constitutes a moral subsidy of the offending litigation conduct.

Start with the *interpersonal* values pertinent to parties' relationships with each other and with third parties. Those values, though interpersonal, are still "public" in the sense that the political community collectively defines them through the law and enforces them through the state's coercive power.[28] Notwithstanding that collective commitment, however, civil procedure often enables parties to violate such values and declines to address the violations. That's so, first, with respect to the primary norms of conduct whose alleged violation gives rise to lawsuits in the first place. Parties can undermine those norms by engaging in litigation conduct that frustrates the accurate adjudication of their legal rights and obligations in the immediate case—whether they're advancing misleading legal and factual contentions in their pleadings and other written submissions, withholding relevant information or inundating their

25. Seth Davis, *Standing Doctrine's State Action Problem*, 91 NOTRE DAME L. REV. 585, 607, 615 (2015); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1692 (1984); Cass R. Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127, 134.

26. For the doctrinal details, see Shapiro, *supra* note 19, at 1014–17, and Shapiro, *supra* note 22, at 238–45.

27. *See* Daniel Markovits, *Arbitration's Arbitrage: Social Solidarity at the Nexus of Adjudication and Contract*, 59 DEPAUL L. REV. 431, 445–48 (2010).

28. *See supra* note 6 and accompanying text.

opponents with impertinent information during discovery, or skewing the presentation of their case to the judge or jury at summary judgment or trial. Recognizing this risk, various procedural rules require parties to disclose relevant information and to refrain from making legally or factually unsupported arguments, while authorizing the court to impose sanctions for violations.[29] But, for one thing, evidentiary privileges significantly attenuate the disclosure obligations.[30] For another, even when parties engage in technically impermissible litigation behavior, the rules tend to reserve the most significant sanctions for deliberate deception, as opposed to zealous, though not necessarily malicious, conduct that nevertheless distorts the application of the pertinent legal norms to the parties' case.[31] And the constraints on deliberate and reckless litigation conduct alike are, in any event, systematically underenforced in practice.[32] Civil procedure thus endeavors to counteract only a relatively narrow subset of litigation conduct that thwarts the accurate adjudication of the parties' legal rights and obligations, declining to compel parties to internalize many of the moral costs stemming from such conduct.

Parties' litigation behavior can also subvert various interpersonal values governing their relationships *during* litigation. The idea that there are such values—that parties can wrong one another and third parties not only through their social interactions, but also through the litigation process itself—is reflected in the torts of wrongful institution of civil proceedings (the civil analogue of malicious prosecution) and abuse of process, both of which purport to remedy the "private harm" resulting from others' wrongful litigation

29. *See, e.g.*, FED. R. CIV. P. 11(b)(2)–(4) (requiring adequate legal and factual support for contentions made in non-discovery-related "papers" submitted to the court); *id.* 37(b) (authorizing sanctions for failure to comply with the court's discovery orders); *id.* 37(e) (authorizing sanctions for spoliation of electronically stored information); *id.* 37(c)(1) (authorizing sanctions for failure to make the mandatory disclosures required by Rule 26(a)).

30. *See id.* 26(b)(1) (providing that only "nonprivileged" information is discoverable); *id.* 26(b)(3) (recognizing a work-product doctrine for materials "prepared in anticipation of litigation").

31. *See, e.g.*, *id.* 11(b) advisory committee's note to 1993 amendment (suggesting that more severe sanctions are appropriate for "willful" violations); *id.* 37(e)(2) (imposing heightened sanctions for spoliating electronically stored information with "specific intent"); *id.* 60(b)(3), (d)(3) (authorizing a court to set aside a final judgment in cases of "fraud" and "fraud on the court").

32. *See, e.g.*, Antolini v. McCloskey, 335 F.R.D. 361, 364 n.1 (S.D.N.Y. 2020) ("Courts maintain a high bar for establishing a Rule 11 violation given judicial concern for encouraging zealous advocacy." (quoting Int'l Techs. Mktg. v. Verint Sys., Ltd., No. 15-cv-2457, 2019 WL 1244493, at *7 (S.D.N.Y. Mar. 13, 2019))); *cf.* M. Todd Henderson & William H.J. Hubbard, *Judicial Noncompliance with Mandatory Procedural Rules Under the Private Securities Litigation Reform Act*, 44 J. LEGAL STUD. S87, S88 (2015) (finding that judges rarely fulfill a statutory requirement that they certify plaintiffs' compliance with Rule 11 in certain securities cases). There are other constraints, beyond the formal rules, on parties' litigation conduct. In discovery, for example, parties conduct themselves in the shadow of informal cultural "norms" as well as an uncodified body of common law developed by the magistrate judges who adjudicate most discovery disputes. *See, e.g.*, Edith Beerdsen, *Discovery Culture*, 57 GA. L. REV. 981, 1031–32 (2023); Seth Endo, *Discovery Dark Matter*, 101 TEX. L. REV. 1021, 1032–33 (2023). But even accounting for these less formal restrictions, much of parties' illicit litigation conduct goes unpunished. *See generally* Diego A. Zambrano, *The Unwritten Norms of Civil Procedure*, 118 NW. U. L. REV. 853 (2024) ("[T]o the extent that legal actors like to be good sports with one another, they may refuse to punish acquaintances for rule violations.").

conduct.[33] Federal Rule of Civil Procedure 11 likewise recognizes that parties sometimes engage in litigation conduct motivated by an "improper purpose" to "harass" or otherwise harm their opponents.[34] And although Rule 11 sanctions must seek solely to deter the offending party and other potential wrongdoers,[35] courts may use their inherent power to award attorney's fees as a sanction for "bad faith" litigation conduct in order to compensate the other party for the fees she incurred because of the misconduct.[36] Other rules seek to prevent parties from inflicting various tangible and intangible harms on their opponents and third parties through discovery requests[37] and from unduly augmenting their opponents' litigation costs.[38] Despite these repeated acknowledgments of the harms wrongful litigation conduct can perpetrate, however, civil procedure stops well short of comprehensively addressing them. The wrongful-institution-of-civil-proceedings and abuse-of-process torts, for instance, are hard to prove, leaving unremedied many harms that, while perhaps not rising to the level of an actionable wrong, nonetheless compromise the norms of interpersonal conduct those torts seek to enforce.[39] And as with the rules governing litigation conduct generally, courts systematically underenforce the rules governing parties' conduct toward one another during a lawsuit, which, in turn, allows parties frequently to externalize their conduct's moral costs.[40]

In addition to interpersonal values governing parties' relationships, parties' litigation conduct can imperil distinctively *legal* values that help to constitute the civil justice system as an institution for resolving disputes according to law.

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33. DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, DOBBS' LAW OF TORTS § 585 (2d ed. 2011). More specifically, the tort of wrongful institution of civil proceedings requires the plaintiff to show that she was subjected to a prior lawsuit that lacked "probable cause" and was filed for an "improper purpose," that she suffered an injury as a result, and that the prior lawsuit was terminated in her favor. *See id.* § 592. The abuse of process tort is similar, but with the wrong consisting in the misuse of any legal process, not just the filing of a lawsuit, and the potentially tortious conduct extending beyond prior litigation that lacked probable cause and was terminated in the plaintiff's favor. *See id.* § 594.

34. FED. R. CIV. P. 11(b)(1).

35. *See id.* 11(c)(4) and advisory committee's note to 1993 amendment; 5A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE & A. BENJAMIN SPENCER, FEDERAL PRACTICE AND PROCEDURE § 1336.3 (4th ed. 2008).

36. *See* Goodyear Tire & Rubber Co. v. Haeger, 581 U.S. 101, 107–11 (2017).

37. *See, e.g.*, FED. R. CIV. P. 26(c)(1) (authorizing the court to issue protective orders to avoid or mitigate various harms to the producing party).

38. *See, e.g.*, *id.* 4(d) (requiring defendants to avoid increasing the costs associated with service of process); *id.* 8(b)(2), (d)(1) (requiring parties to avoid increasing the costs of construing their pleadings and discovery papers); *id.* 26(b)(1) (partly predicating the "proportional[ity]" of a discovery request on the producing party's costs); *id.* 26(b)(2)(B) (similarly considering the costs of producing electronically stored information); *id.* 26(g)(1)(B) (requiring adequate factual and legal support for discovery requests); *id.* 37(a)(4) (requiring requesters to pay the costs of production for discovery requests that aren't "substantially justified"); *id.* 68(d) (penalizing plaintiffs who prolong the proceedings in the face of certain settlement offers).

39. With regard to wrongful institution of civil proceedings, for example, the prior lawsuit must have been clearly frivolous to have lacked "probable cause," mere negligence doesn't count as an "improper purpose," and many states require the plaintiff to have suffered not just generic harm but some kind of "special injury." *See* DOBBS ET AL., *supra* note 33, §§ 592–93.

40. *See supra* note 32 and accompanying text.

That function, which has traditionally been considered an aspect of legality or the rule of law,[41] depends on courts' ability to effectively allocate their attention and other inevitably scarce resources across their entire dockets;[42] as such, it can be compromised by litigation conduct that induces courts to dissipate those resources on less deserving cases at the expense of more deserving ones.[43] Without mechanisms to maintain the overall integrity of the civil justice system, courts can't realize the public value of doing justice between the parties according to law across the full range of cases that come before them.[44]

A maldistribution of judicial resources can also stunt or distort the development of the law by preventing courts from formulating rules suitable to guiding individuals in a wide variety of situations, thus further hindering the civil justice system from complying with the rule of law at a systemic level.[45] Some procedural rules explicitly attend to the deleterious systemic consequences of parties' litigation conduct,[46] while other rules can be understood as seeking to forestall such consequences. For example, various rules require parties to minimize the costs their litigation conduct imposes not just on their opponents, but also on the civil justice system as a whole.[47] Aspects of Rule 11 reflect a similarly systemic perspective: sanctions awarded under the rule may generally be no more severe than necessary to achieve specific and general deterrence of future litigation misconduct, and the preferred form of sanctions are fines payable to the court rather than payments to cover the opposing party's attorney's fees, which may be ordered only in rare circumstances.[48] The litigation conduct proscribed by such rules, however, is defined in vague terms that leave significant room for judicial discretion, which courts tend to exercise so as to countenance all but the most egregious misconduct.[49] And more fundamentally, an adversarial system such as the federal civil justice system

41. *See, e.g.*, John Gardner, *The Twilight of Legality*, 43 AUSTRALASIAN J. LEGAL PHIL. 1, 13 (2018); Liam Murphy, *The Normative Force of Law: Individuals and States*, *in* 3 OXFORD STUDIES IN PHILOSOPHY OF LAW 87, 116 (John Gardner, Leslie Green & Brian Leiter eds., 2018).

42. *See* Matthew A. Shapiro, *Distributing Civil Justice*, 109 GEO. L.J. 1473, 1490–94 (2021) (discussing the distribution of "judicial resources" across cases). For some reasons that judicial resources are inevitably scarce, see GARDNER, *supra* note 5, at 306–08.

43. *Cf.* John Gardner, *What Is Tort Law for? Part 1: The Place of Corrective Justice*, 30 LAW & PHIL. 1, 48 (2011) ("[T]he pursuit of justice can be self-defeating[, inasmuch as] . . . attempting to do justice can increase injustice [even if nobody is mistaken about what would count as a relevant justice or injustice]. Corrective justice too can be counterproductively pursued, and increasing access to it, at least beyond a certain point, might add to the counterproductivity. In which case what we are giving is access to injustice.").

44. *See* GARDNER, *supra* note 5, at 305.

45. *See id.* at 310–15.

46. *See, e.g.*, 8B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2284 nn.36–38 (3d ed. 2002) (enumerating various factors courts consider in selecting sanctions for violations of the discovery rules).

47. *See, e.g.*, FED. R. CIV. P. 6(b)(1) (requiring "good cause" for extensions of time); *id.* 26(a)(3)(B) (requiring "good cause" for extension of time to make mandatory pretrial disclosures); *id.* 26(b)(1) (enumerating various factors bearing on the "proportional[ity]" of discovery requests).

48. *See id.* 11(c)(4) and advisory committee's note to 1993 amendment; WRIGHT ET AL., *supra* note 35.

49. *See supra* note 32 and accompanying text.

necessarily gives parties significant control over the allocation of judicial resources, control that the foregoing rules don't come anywhere close to rescinding. So long as parties can more or less automatically trigger the deployment of judicial resources through their litigation conduct, they can distort the distribution of those resources in ways that compromise the civil justice system's overall ability to uphold the rule of law, and they enjoy moral subsidies insofar as they aren't compelled to internalize those moral costs.

Finally, parties' litigation conduct can impair more generic *political* values that apply to all political institutions, not just the civil justice system. The most prominent such values are equality and distributive justice, which civil procedure implicates in two main ways.[50] For one, civil procedure is itself an *object* of distributive justice—a set of resources, opportunities, and other goods that can be distributed more or less equally among the potential users of the civil justice system. The egalitarian concern with the distribution of procedure, which scholars tend to discuss under the heading of "access to justice,"[51] is closely connected to the kinds of systemic rule-of-law considerations discussed above, inasmuch as a grossly inegalitarian distribution of legal resources can systematically undermine courts' ability to fairly and accurately adjudicate the legal rights and obligations of the parties who come before them.[52] But in addition to being an object of distributive justice, civil procedure can also act as that value's *agent*, affecting the overall distribution of benefits and burdens in society at large.[53] An adversarial civil justice system such as the federal civil justice system tends to have regressive, rather than progressive, distributive effects, and thus tends to entail significant moral costs with regard to the value of distributive justice. As Marc Galanter famously explained, because such a system places a premium on party initiative, it tends to advantage the "haves" over the "have-nots," allowing better-resourced parties to exploit procedural opportunities so as not only to secure (perhaps unmerited) victories in their own individual cases, but also to shape procedural and substantive law to promote their material interests over the long run.[54] This inherent regressive bias is exacerbated by recent procedural developments—from heightened pleading requirements to limits on discovery to restrictions on class actions—that

50. *See* Shapiro, *supra* note 42, at 1475–76 (distinguishing these two kinds of connections between civil procedure and distributive justice).

51. *See, e.g.*, Gary Blasi, *Framing Access to Justice: Beyond Perceived Justice for Individuals*, 42 LOY. L.A. L. REV. 913, 930 (2009); Judith Resnik, *A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitrations*, 96 N.C. L. REV. 605, 617 (2018); William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865, 1881–84 (2002).

52. *See, e.g.*, FREDERICK WILMOT-SMITH, EQUAL JUSTICE: FAIR LEGAL SYSTEMS IN AN UNFAIR WORLD 26–27, 59–65, 74–75, 82–86 (2019); Alan Wertheimer, *The Equalization of Legal Resources*, 17 PHIL. & PUB. AFFS. 303, 305 (1988).

53. *See, e.g.*, Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1076–78 (1984); Kenneth W. Graham, Jr., *The Persistence of Progressive Proceduralism*, 61 TEX. L. REV. 929, 948 (1983).

54. *See generally* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

disproportionately prevent disadvantaged parties from vindicating their interests through the legal system.[55] The very structure of civil litigation thus favors already-advantaged parties, and parties realize these latent costs for distributive justice whenever they engage in litigation conduct that ultimately contributes to inequality.

Civil procedure makes little effort to compel parties to internalize those costs. Regarding the distribution of benefits and burdens between the immediate parties to a lawsuit,[56] civil procedure does try to mitigate some of the *formal* obstacles confronting disadvantaged parties by, for example, waiving filing fees for the indigent,[57] but it leaves most of the *substantive* obstacles intact, allowing better-resourced parties to press their advantages during litigation and to reap the resulting benefits for their material interests.[58] As for litigation's more systemic effects on the distribution of benefits and burdens in society at large, civil procedure simply prescinds from the broader distributive consequences of parties' litigation conduct. That's so with respect to the ramifications of parties' individual litigation decisions for the development of procedural and substantive law as well as the distributive implications of practices adjacent to the formal litigation process, such as settlement and arbitration.[59] The upshot is that, across the litigation landscape, parties need not attend to the distributive consequences of their litigation conduct, and rather than requiring parties to internalize those costs, civil procedure largely lets them lie where they fall—a significant moral subsidy.

B. COSTS: SHIFTING AND SOCIALIZING

Whatever kinds of public values they might compromise, civil procedure's moral subsidies permit parties to externalize some of the moral costs of their litigation conduct. The externalized costs can then be redistributed in one of two main ways: either they can be *shifted* onto the other parties who are the victims

55. *See, e.g.*, Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005, 1041 (2016); Theodore Eisenberg & Kevin M. Clermont, *Plaintiphobia in the Supreme Court*, 100 CORNELL L. REV. 193, 200–03 (2014); Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531, 1539–50 (2016); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 314–22 (2013); Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion*,* Wal-Mart v. Dukes*, and* Turner v. Rogers, 125 HARV. L. REV. 78, 164 (2011); A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 368–69 (2010); Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1847–51 (2014).

56. For an argument for the existence of such "localized" issues of distributive justice, see John Gardner, *What Is Tort Law For? Part 2. The Place of Distributive Justice*, *in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS 335, 346–50 (John Oberdiek ed., 2014).

57. *See generally, e.g.*, Andrew Hammond, *Pleading Poverty in Federal Court*, 128 YALE L.J. 1478 (2019) (analyzing the requirements for proceeding in forma pauperis in federal court).

58. *See* Shapiro, *supra* note 42, at 1485–90.

59. *See, e.g.*, Fiss, *supra* note 53, at 1075; Deepak Gupta & Lina Khan, *Arbitration as Wealth Transfer*, 35 YALE L. & POL'Y REV. 499, 499–502 (2017).

of the perpetrating party's conduct, or they can be *socialized* by the civil justice system itself. Civil procedure's moral subsidies exhibit both redistributive strategies.

The cost-shifting strategy tends to be employed, naturally, when the moral costs at issue stem from violations of interpersonal values governing the relationships between parties.[60] Consider discovery. Because the party producing information during discovery generally bears the costs associated with production, an illegitimate discovery request can inflict significant unjustified harm on the producing party.[61] When courts fail to countermand such a request or to require the requesting party to internalize its costs by imposing sanctions,[62] they allow those costs to rest with the producing party, thereby effectively shifting the costs from the wrongdoer to the victim. So, too, when a party presses spurious legal and factual arguments that nonetheless fall short of sanctionable misconduct, forcing the opposing party to expend additional resources to rebut them.[63] In such cases, the externalized moral costs of parties' litigation conduct are left to lie with the conduct's targets, rather than being either redirected back onto the perpetrating party or assumed by the political community through the civil justice system.

Civil procedure's moral subsidies tend to employ the socialization strategy, by contrast, when the moral costs at issue stem from violations of more systemic and political values (though even violations of such values will often involve an element of harm to the opposing party as well, and thus, absent full internalization, entail a degree of cost-shifting). When, for instance, parties engage in litigation conduct that induces courts to misallocate their judicial resources,[64] that can increase the risk of distorted decisions across the entire civil docket as well as in the immediate case in which the misconduct is perpetrated.[65] Dilatory litigation conduct similarly protracts the proceedings—and thus proliferates the costs—both in the instant case and in other cases from which the court's attention is diverted. Insofar as courts fail to compel the offending parties to internalize such costs through sanctions or other mechanisms, the costs end up being borne not (primarily) by the immediate victims, but by the civil justice system as a whole and thus, ultimately, the entire political community.

60. *See supra* Subpart.I.A.

61. *See* A. Benjamin Spencer, *Rationalizing Cost Allocation in Civil Discovery*, 34 REV. LITIG. 769, 804 (2015).

62. *See, e.g.*, FED. R. CIV. P. 37(a)(4) (requiring requesters to pay the costs of production for discovery requests that aren't "substantially justified").

63. *See, e.g.*, *id.* at 11(b).

64. *See supra* notes 41–45 and accompanying text.

65. *Cf.* Robert G. Bone, *Improving Rule 1: A Master Rule for the Federal Rules*, 87 DENV. U. L. REV. 282, 302–05 (2010) (arguing that the central purpose of procedure is to "distribute the risk of outcome error fairly and efficiently" at a systemic level).

C. SUBSIDIES: RELIEVING AND FACILITATING

Civil procedure's moral subsidies make it easier for parties to engage in certain kinds of litigation conduct by declining to compel parties to internalize all the moral costs of that conduct. But litigation conduct can entail a wide variety of moral costs, and civil procedure can permit parties to externalize a broader or narrower range of them. More specifically, some of civil procedure's moral subsidies merely *relieve* parties of inconvenient but not necessarily prohibitive moral costs they would otherwise have to bear, while others more affirmatively *facilitate* litigation conduct by allowing parties to externalize certain costs that would prevent them from engaging in the conduct in the first place. It's true, of course, that *any* aspect of civil procedure facilitates party misconduct inasmuch as it enables parties to take actions they would otherwise be powerless to take. For example, focusing particularly on plaintiffs' power to initiate and prosecute lawsuits at their own behest, John Gardner observes how that power affords plaintiffs "[t]he latitude . . . to err in exercises of authority over others—over the court and, through the court, over the defendant"—and, indeed, to err to such an extent that "[i]t is not as if the plaintiff's errors are merely tolerated by the law," but rather his or "her errors are positively supported and sponsored by the law."[66] The point holds for the entire system of powers and privileges that civil procedure bestows on parties: but for the discovery rules, for instance, parties would never be in a position to demand information from each other and thus to make overburdensome discovery requests. But some features of the civil justice system go even further, simultaneously enabling a form of litigation conduct and immunizing parties who engage in that conduct from the most substantial moral costs potentially inhibiting it—a type of moral subsidy that differs from civil procedure's more typical ones in degree, if not in kind.

Many of civil procedure's moral subsidies *relieve* parties of only a subset of the moral costs of their litigation conduct, costs that wouldn't necessarily prevent parties from engaging in the conduct altogether. When, for example, the rules authorize sanctions for frivolous arguments or overbroad discovery requests but courts reserve their opprobrium for only the most egregious misconduct,[67] parties who engage in less serious misconduct and elude sanctions need not bear all the costs their actions impose on their opponents and the civil justice system, even though the prospect of having to internalize those costs might not deter them from perpetrating the misconduct (because, say, they're simply seeking to "harass" an opponent[68] and indulging their spite is worth the price). Allowing parties to externalize such costs may, to be sure, affect parties' litigation decisions at the margins, but these more modest subsidies are largely inherent in any civil justice system that gives parties significant control over the

66. JOHN GARDNER, FROM PERSONAL LIFE TO PRIVATE LAW 202 (2018).
67. *See supra* note 32 and accompanying text.
68. FED. R. CIV. P. 11(b)(1).

litigation process and thus don't radically change the nature of the federal civil justice system beyond its baseline adversarialism.

Some of civil procedure's other moral subsidies, by contrast, permit parties to externalize certain moral costs whose full internalization would make it all but impossible to engage in the relevant litigation conduct; such subsidies can therefore be said to go beyond relieving parties of some of the moral costs of conduct they would engage in anyway and to more affirmatively *facilitate* the conduct. Examples of these more generous subsidies include courts' highly deferential treatment of parties' stipulations and settlement agreements and the enablement of otherwise-unviable claims through aggregate litigation. With regard to stipulations, myriad rules allow parties to stipulate, either individually or jointly, to modifications of various procedures or even to certain facts bearing on the resolution of their disputes, and courts enforce the stipulations more or less automatically, without any meaningful scrutiny.[69] Courts are similarly deferential to parties' settlement agreements, through which parties can definitively resolve their disputes free from any judicial oversight that would ensure conformity with important public values.[70] Each practice constitutes a moral subsidy insofar as stipulations and settlements entail significant moral costs for interpersonal and systemic public values yet parties aren't forced to internalize those costs. The subsidies, moreover, facilitate the practices, for the ability to externalize the moral costs of their stipulations and settlement agreements is what enables parties to authoritatively resolve (aspects of) their disputes irrespective of the applicable procedural and substantive law; were parties compelled to internalize those costs, their authoritative dispute-resolution powers would be severely curtailed, if not obviated. When it comes to stipulations and settlement agreements, then, moral subsidies are, in an important sense, partly constitutive of the litigation conduct being subsidized.

Moral subsidies play a similarly fundamental role in the construction of aggregate litigation—both class actions and multidistrict litigation (MDL). Notwithstanding their significant benefits, class actions have long been recognized as also entailing significant moral costs insofar as they create principal-agent problems between the class representatives and class counsel, on the one hand, and absent class members, on the other,[71] and allow spurious and

69. *See, e.g.*, Robin J. Effron, *Ousted: The New Dynamics of Privatized Procedure and Judicial Discretion*, 98 B.U. L. REV. 127, 138–48 (2018) (describing stipulations and other agreements in planning and conducting discovery). Joint stipulations can be understood functionally as a partial settlement of the parties' claims. *See* J.J. Prescott & Kathryn E. Spier, *A Comprehensive Theory of Civil Settlement*, 91 N.Y.U. L. REV. 59, 62–64 (2016).

70. *See, e.g.*, Seana Valentine Shiffrin, *Remedial Clauses: The Overprivatization of Private Law*, 67 HASTINGS L.J. 407, 429–31 (2016); David A. Sklansky & Stephen C. Yeazell, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 GEO. L.J. 683, 697 (2006).

71. *See, e.g.*, JOHN C. COFFEE, JR., ENTREPRENEURIAL LITIGATION: ITS RISE, FALL, AND FUTURE 136 (2015); John R. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative*

even "fraudulent" claims to tag along with meritorious ones.[72] Similar problems have been shown to afflict mass-tort MDLs.[73] Such problems threaten both the interpersonal and systemic public values noted above[74]—the interpersonal values because the principal-agent costs and spurious claims unfairly benefit some plaintiffs and class or lead counsel at the expense of other plaintiffs and defendants, and the systemic values because they distort the allocation of judicial resources and thus compromise courts' ability to comply with the rule of law. While the civil justice system makes some attempts to compel the offending parties to internalize these costs,[75] it falls well short of achieving full cost internalization, consequently conferring considerable moral subsidies on the beneficiaries of aggregate litigation's pathologies. And those subsidies, like the subsidies stemming from courts' treatment of parties' stipulations and settlement agreements, affirmatively facilitate the litigation conduct they subsidize, for at least with respect to negative-value claims, class actions provide the only viable means of redress,[76] while as a practical matter, the pretrial consolidation of mass-tort cases via MDL lets plaintiffs obtain some measure of compensation despite often-intractable questions of causation in exchange for some form of "global peace" for the defendants.[77] Without civil procedure's tolerance of aggregate litigation's moral costs—without, that is, its moral subsidies—many of the claims aggregated through class actions and MDLs wouldn't get off the ground in the first place, threatening the entire aggregation enterprise.

Litigation, 100 COLUM. L. REV. 370, 418 (2000); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 7–8 (1991). *But see* Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 104–05 (2006).

72. *See, e.g.*, Nora Freeman Engstrom, *Retaliatory RICO and the Puzzle of Fraudulent Claiming*, 115 MICH. L. REV. 639, 640 (2017); Biana Lynn Rosenbaum, *The RICO Trend in Class Action Warfare*, 102 IOWA L. REV. 165, 167 (2016).

73. *See generally* ELIZABETH CHAMBLEE BURCH, MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION (2019) (arguing that contemporary multidistrict litigation benefits defendants and lawyers at the expense of plaintiffs).

74. *See supra* Subpart.I.A.

75. *See, e.g.*, FED. R. CIV. P. 23 (enumerating certification requirements for class actions). As for MDL, proposed amendments to the Federal Rules of Civil Procedure seek to address perceived abuses of the device. *See* Memorandum from Hon. Robin L. Rosenberg, Advisory Comm. on Civil Rules Chair, to Hon. John D. Bates, Comm. on Rules of Practice & Procedure Chair, on Report of the Advisory Committee on Civil Rules 110–19, 123–36 (May 11, 2023), https://www.uscourts.gov/sites/default/files/2023_preliminary_draft_final_0.pdf.

76. *See, e.g.*, COFFEE, *supra* note 71, at 53; Sergio Campos, *Mass Torts and Due Process*, 65 VAND. L. REV. 1059, 1074–87 (2012); Gilles, *supra* note 55, at 1535–36; Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057, 1059–60 (2002); Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686 (1941); Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 EMORY L.J. 293, 294–95 (2014); David Rosenberg, Response, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 832 (2002).

77. *See* Andrew D. Bradt & D. Theodore Rave, *It's Good to Have the "Haves" on Your Side: A Defense of Repeat Players in Multidistrict Litigation*, 108 GEO. L.J. 73, 90–91 (2019).

II. MORAL SUBSIDY AS ACCOMMODATION

What I've described as civil procedure's moral subsidies can be understood in several different ways. On a deflationary account, civil procedure's failure to compel parties to internalize all the moral costs of their litigation conduct doesn't reflect a systematic strategy so much as the civil justice system's inability to detect or remedy every act by a party during litigation that compromises public values. Civil procedure can't counteract each instance of abuse, the argument goes, so it ends up tolerating the less egregious ones—and thus affording parties de facto moral subsidies—only as a pragmatic concession to reality, not from some principled respect for parties' personal interests and beliefs. After all, *no* area of the law can fully enforce its norms, yet we wouldn't say that criminal law, for instance, grants legal subjects a "moral subsidy" whenever it fails to punish their crimes. Far from a theoretically significant phenomenon, the tolerated externalization of certain moral costs in civil procedure appears to be just an inevitable, unremarkable feature of all legal institutions.

I think something like the foregoing account plausibly explains the origins of civil procedure's moral subsidies, which can't be traced to any kind of deliberate decision by procedural policymakers. And yet, as the previous Part demonstrated, the subsidies are ubiquitous, touching nearly every aspect of civil practice. They are, moreover, normatively distinct from the mere underenforcement of legal norms in other areas of the law, for they allow private parties to externalize the moral costs of their conduct in the course of wielding public powers and deploying public resources. Civil procedure's moral subsidies are consequently systematic in effect even if not in conception, and such a prominent feature of the civil justice system calls for a coherent conceptual account, if one can be supplied.[78]

This Part develops such an account. I argue that we should conceptualize civil procedure's moral subsidies as a kind of *accommodation*—a way of mediating conflicts between the public values of the political community and individuals' personal interests and moral beliefs that involves tolerating the pursuit of the latter even at some cost to the former. Drawing particularly on the work of the political philosopher Seana Shiffrin,[79] I show how civil procedure's moral subsidies exhibit each of the defining characteristics of an accommodation, including: (1) an institutional commitment to coercively enforcing certain collectively defined norms, (2) a simultaneous institutional

78. *Cf.* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 415 (1996) (arguing that various First Amendment doctrines effectively "smoke out" illicit governmental purposes, even if they weren't deliberately devised to perform that function).

79. Seana Valentine Shiffrin, *Egalitarianism, Choice-Sensitivity, and Accommodation*, *in* REASON AND VALUE: THEMES FROM THE MORAL PHILOSOPHY OF JOSEPH RAZ 270 (R. Jay Wallace, Philip Pettit, Samuel Scheffler & Michael Smith eds., 2004) [hereinafter Shiffrin, *Egalitarianism*]; Seana Valentine Shiffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 PHIL. & PUB. AFFS. 205, 205 (2000) [hereinafter Shiffrin, *Paternalism*].

commitment to affording individuals wide leeway to pursue their personal interests and moral beliefs, (3) a tendency for those two commitments to conflict in practice, (4) an inability to regulate individuals' pursuit of their interests and beliefs so as to always proscribe conduct that contravenes the collectively defined norms or at least compel the internalization of the conduct's costs for those norms, and (5) a collective decision to nevertheless tolerate some of the offending conduct. But whereas Shiffrin and other scholars tend to articulate their accounts of accommodation largely in the abstract,[80] I seek to situate the concept in the specific institutional context of civil litigation, demonstrating how each element of the general idea of an accommodation is inflected by that context. First, the public values at stake in litigation aren't only generic values that govern all political institutions, but also distinctively legal values that partly constitute litigation as a unique institution, which arguably compounds the institutional costs of civil procedure's moral subsidies. Second, civil procedure affords private parties especially broad decisionmaking authority for a public institution. Third, as a result of these two institutional features, conflicts between public values and parties' personal interests and moral beliefs are pervasive and acute in the civil justice context. Fourth, such conflicts can't be avoided without fundamentally altering civil procedure's adversarial structure and thereby compromising the values that structure serves. And finally, civil procedure systematically (if not deliberately) responds to the conflicts by tolerating a significant amount of party conduct that undermines important public values—that is, by granting parties accommodations. Civil procedure's accommodations thus test the limits of the accommodationist model, striking a particularly generous balance in favor of parties' partiality for their own personal interests and moral beliefs, relative to the impartial public values at stake in the civil justice context.

The circumstances of accommodation include a set of collectively defined and enforced public values, a countervailing public commitment to respecting individual autonomy, and potential conflict between the latter and the former—all of which characterize civil litigation. As we saw in the previous Part, civil litigation implicates a wide variety of public values.[81] But whereas many other public institutions instrumentally *serve* externally defined values, litigation stands in a mutually *constitutive* relationship with certain distinctively legal values, with the institution shaping the values and vice versa. Recall, for example, the rule-of-law value of doing justice between the parties according to law.[82] Even as that value structures the litigation process, the process likewise alters the nature of the value, partly proceduralizing the form of interpersonal

80. *See generally* Shiffrin, *Egalitarianism*, *supra* note 79 (considering the concept of accommodation as a matter of abstract moral and political philosophy); Shiffrin, *Paternalism*, *supra* note 79 (developing an account of accommodation in the specific context of contract law but extending the account, more or less unmodified, to other contexts).

81. *See supra* Subpart.I.A.

82. *See supra* note 41 and accompanying text.

justice rendered to the parties.[83] Individual conduct that undermines public values consequently poses a particularly acute threat in the civil justice context—not just creating normative slack that other institutions might have to pick up, but potentially stymying the political community's ability to realize certain values altogether.

And indeed, civil litigation presents numerous opportunities for litigation conduct to jeopardize public values, given the significant autonomy it affords parties. While civil procedure scholars have, of course, recognized the broad scope of party autonomy in litigation, they tend not to treat it as a normatively central feature of the institution, as anything more than yet another manifestation of the traditional American skepticism of centralized government.[84] Many theorists of private law, by contrast, identify party autonomy as one of litigation's most normatively significant features, if not its defining characteristic. Most notably, John Goldberg and Benjamin Zipursky ground their influential "civil recourse theory" of tort law in the set of legal powers and privileges that tort plaintiffs are granted so as to enable them to seek redress for the wrongs committed against them.[85] In a similar vein, Shyamkrishna Balganesh contends that the "*sine qua non*" of private law is its commitment to "redressive autonomy"—the way in which it grants to "individual right-holder[s]" a "private mechanism of redress . . . with minimal constraints on the invocation, exercise, and use of that mechanism."[86] These strands of private law theory rightly emphasize the normative significance of plaintiffs' autonomy in private law litigation. But if anything, they *understate* the role that the idea of party autonomy must play in a general normative account of civil litigation. For one thing, defendants enjoy nearly as much autonomy as plaintiffs in the litigation process.[87] For another, party autonomy is a feature not only of private law litigation, but of civil litigation writ large, including public law cases seeking

83. *Cf.* Avihay Dorfman & Alon Harel, *The Necessity of Institutional Pluralism*, 43 OXFORD J. LEGAL STUD. 753, 754 (2023) (examining how specific institutions partly constitute or "fix" certain values).

84. *See, e.g.*, Sklansky & Yeazell, *supra* note 70, at 684 ("Civil litigation[] . . . has been essentially privatized[] . . . ."). The significance of party autonomy in United States civil litigation is a particular focus of comparative proceduralists. *See, e.g.*, MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS 104–06 (1986); ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 3 (2001); John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 823–24 (1985).

85. *See* JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS 30 (2020). For another theory of private law that similarly emphasizes party autonomy, see ANDREW S. GOLD, THE RIGHT OF REDRESS 4 (2020).

86. Shyamkrishna Balganesh, *Intellectual Property Law and Redressive Autonomy*, *in* 1 OXFORD STUDIES IN PRIVATE LAW THEORY 161, 184 (Paul B. Miller & John Oberdiek eds., 2020). Although Balganesh focuses on intellectual property, he makes clear that he sees "redressive autonomy" as characterizing private law generally. *See id.* at 161 ("[A] form of autonomy that is characteristic of much (if not all) of private law [is] best termed 'redressive autonomy'"); *id.* at 183 ("Underlying much—if not all—of private law is . . . a core commitment to redressive autonomy."); *id.* at 186 ("Redressive autonomy is an integral part of private law.").

87. More specifically, defendants enjoy a mirror-image power for almost every one of the procedural powers enjoyed by plaintiffs that I proceed to identify. *See infra* notes 92–94 and accompanying text.

to vindicate individual rights against the government and its officials.[88] And most fundamentally, whereas private law theorists present party autonomy as a *substantive* feature of private law, it is, in fact, as much a *procedural* principle institutionalized through procedural rules.[89] The concept of "party autonomy," more specifically, comprises the bundle of Hohfeldian powers that the Federal Rules of Civil Procedure grant parties[90]—from the power of plaintiffs to initiate litigation and thereby hale whomever they name as defendants into court,[91] to both parties' powers to raise certain legal and factual contentions and abjure others[92] as well as to compel each other to disclose certain information,[93] to plaintiffs' power to accept a settlement offer and terminate their lawsuits.[94] And, with respect to each of those powers, parties enjoy a Hohfeldian privilege to decide for themselves how best to wield it, a privilege that, as we saw in the previous Part, is subject to relatively few constraints. Alongside the various public values that civil procedure aspires to realize, then, is a thoroughgoing commitment to party control of key aspects of the litigation process.

That commitment to party autonomy will continually conflict with the public values espoused by the civil justice system.[95] As Shiffrin explains, conflicts between individuals' pursuit of their own interests and public values generally stem from any liberal society's "support [for] the formation of cooperative endeavors that make members of the society intertwined and interdependent," for as "we become interdependent, . . . [individual] choices that once would have been purely self-regarding take on other-regarding components."[96] It seems a stretch to describe an adversarial lawsuit as a "cooperative" endeavor, but there's a sense in which the parties to litigation aim

88. That's because the Federal Rules of Civil Procedure are largely trans-substantive, governing private law and public law cases alike. *See* Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 718 (1975).

89. *Cf.* Matthew A. Shapiro, *Civil Wrongs and Civil Procedure*, *in* CIVIL WRONGS AND JUSTICE IN PRIVATE LAW 87, 88–89 (Paul B. Miller & John Oberdiek eds., 2020) (analyzing the procedural assumptions of prominent theories of private law, particularly civil recourse theory).

90. *Cf.* Ori J. Herstein, *How Tort Law Empowers*, 67 U. TORONTO L.J. 99, 107 (2015) (analyzing the concept of "legal power" in tort law); Benjamin C. Zipursky, *Civil Recourse Not Corrective Justice*, 91 GEO. L.J. 695, 741 (2003) (presenting civil recourse as a "power" enjoyed by tort plaintiffs).

91. FED. R. CIV. P. 3, 4, 55.

92. *Id.* 8, 12.

93. *Id.* 26–37.

94. *Id.* 41(a); *see supra* notes 59, 70 and accompanying text.

95. To be clear, the commitment to party autonomy is itself a "public value," as I've been using that term, insofar as the political community collectively recognizes it and supports it through the state's coercive power. *Cf.* GARDNER, *supra* note 5, at 305–06, 326–27 (explaining how a principle of "seeing to it that justice is done according to law" in individual cases can become a "freestanding policy goal"). But it nevertheless remains distinct—both conceptually and practically—from the other public values with which it can conflict: Conceptually, party autonomy has a more individualistic focus than the other values at stake in litigation, including systemic values such as the rule of law and equality and even more local ones such as interpersonal morality. *See supra* Subpart.I.A. And given that individualistic focus, party autonomy ends up engendering qualitatively different kinds of conflicts with other values—not just tradeoffs among competing political priorities, but fundamental clashes between the individual and the political community.

96. Shiffrin, *Paternalism*, *supra* note 79, at 237.

at a joint goal—a just resolution of their dispute according to the applicable law—to which the entire structure of the litigation process is oriented.[97] That structure links parties both with each other and with the institution in which they participate and, through it, the political community; these interconnections, in turn, tend to amplify the other-regarding effects of parties' individual litigation decisions, for both their opponents and the civil justice system as a whole. A decision to raise a particular claim or defense, to request a particular piece of information during discovery, to persist with a lawsuit rather than settle—every one of a party's litigation choices affects not only her immediate opponent, but also the court and other actual and potential users of the civil justice system. And because various interpersonal and systemic values govern the legitimacy of those effects as well as their proper distribution,[98] parties' litigation conduct will necessarily implicate, and often violate, important public values.

Of course, the conflict between party autonomy and public values would dissolve if civil procedure could regulate parties' litigation conduct so as to align it with public values, whether by proscribing problematic conduct ex ante or penalizing it ex post. But we've seen that civil procedure largely eschews that approach—hence its many moral subsidies.[99] Nor could it achieve perfect harmony between parties' litigation conduct and public values without incurring prohibitive practical and moral costs that would fundamentally alter the adversarial nature of the civil justice system. Practically, civil procedure can't craft rules that anticipate and prohibit every instance of litigation conduct that undermines public values.[100] That is especially so given the "polycentric" nature of the problems that generate much modern civil litigation—their tendency to implicate a wide range of parties and to turn on highly context-specific factors.[101]

In addition to such practical limitations, Shiffrin identifies a set of deeper, more principled reasons that political institutions generally can't fully align individual conduct with public values, and those reasons seem to have special force in the civil justice context. The most straightforward way of inducing individuals to conform their conduct to public values, given the practical impediments to proscribing problematic exercises of individual autonomy ex

97. *Cf.* Larissa Katz & Matthew A. Shapiro, *The Role of Plaintiffs in Private Law Institutions*, *in* PRIVATE LAW AND PRACTICAL REASON: ESSAYS ON JOHN GARDNER'S PRIVATE LAW THEORY 239, 253–54 (Haris Psarras & Sandy Steel eds., 2023) (outlining a "power-sharing model" of private law litigation).

98. *See supra* Subpart.I.A.

99. *See supra* Part.I.

100. This is a reason for the "open-textured" nature of many equitable doctrines. *See, e.g.*, Andrew S. Gold, *Equity and the Right to Do Wrong*, *in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF EQUITY 72, 80, 85 (Dennis Klimchuk, Irit Samet & Henry E. Smith eds., 2020); Henry E. Smith, *Equity as Meta-Law*, 130 YALE L.J. 1050, 1089 (2021). Many of the Federal Rules of Civil Procedure share that quality. *See generally* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987) ("[A] historical examination of the evolution of the Federal Rules reveals that rules of equity prevailed over common law procedure.").

101. *Cf.* Gold, *supra* note 100, at 84 (suggesting that cases of "rights sticklerism" often present polycentric problems). On the concept of polycentric problems in litigation, see Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 395 (1978).

ante, is to "tax" them ex post so as to compel individuals to internalize their conduct's costs for public values. Shiffrin notes, however, that there are two general "ways in which thorough cost-internalization measures may affect individual freedom" adversely.[102] First, such measures can have "certain phenomenological effects on individuals' experiences of freedom—they may feel intimidated, surveilled, chilled, etc. from making authentic choices."[103] And second, "a choice-sensitive system may impose obstacles to individuals' rationally responding to certain sorts of reasons and values more or less directly and discretely."[104] Efforts to compel parties to internalize the costs of their litigation conduct are likely to have analogous effects on party autonomy in civil procedure. Faced with the prospect of strict cost-internalization, parties may come to feel as though their litigation choices are being dictated by the civil justice system rather than embodying an "authentic" expression of their own interests. They might also come to attend increasingly to the public-regarding reasons bearing on the choices, to the exclusion of their own personal interests. Whether such changes in parties' litigation decisionmaking would be normatively desirable depends on the importance of the public values their conduct threatens to compromise, on the one hand, and the importance of giving parties the latitude to pursue their personal interests through the civil justice system, on the other. But wherever that normative balance is struck,[105] a strict regime of cost-internalization would radically change the experience of party autonomy in civil procedure.

All this leaves the civil justice system facing a dilemma: either it can proscribe the whole category of potentially problematic litigation conduct (for example, party-initiated lawsuits or discovery requests) outright and thereby severely restrict the scope of party autonomy, or it can permit the general class of conduct, try to compel parties to internalize some of the conduct's most significant costs for public values, and tolerate other instances of the conduct notwithstanding such costs. In taking the latter course, civil procedure affords parties what Shiffrin calls an "accommodation."[106] An accommodation, for

102. Shiffrin, *Egalitarianism*, *supra* note 79, at 288.

103. *Id.*; *see also* Shiffrin, *Paternalism*, *supra* note 79, at 238 ("[C]ost-extraction at every opportunity and in every context can be wearing. It may also detract significantly from the feelings of community that are generated by such cooperation and part of their impetus. Pricing every action feels picayune, like bean-counting. Often it involves a great deal of observation and accounting that may itself chill or distort autonomous expression.").

104. Shiffrin, *Egalitarianism*, *supra* note 79, at 288; *see also* Shiffrin, *Paternalism*, *supra* note 79, at 243 ("Complete cost-internalization may threaten the meaningfulness of the freedom that it is the aim of these theories [i.e., luck egalitarian theories] to provide fair access to. In some spheres, some relaxation of the norms of choice-sensitivity may be necessary to ensure that autonomy is available in a fully meaningful way.").

105. I consider the normative question below. *See infra* Part.III.

106. *See* Shiffrin, *Paternalism*, *supra* note 79, at 239. Civil procedure's moral subsidies might also seem to resemble what Joseph Raz calls an "exclusionary permission," a kind of second-order reason that allows an agent to ignore some of the first-order reasons for or against a particular action in her deliberations. *See* Joseph Raz, *Permissions and Supererogation*, 12 AM. PHIL. Q. 161, 163 (1975). But parties *are* formally required to attend

Shiffrin, is the political community's assumption of some of the "costs" of individual conduct for the sake of the autonomy of those who engage in the conduct,[107] who, in turn, end up receiving a "subsidy" from the political community.[108] Shiffrin's idea of an accommodation echoes uses of the concept in certain areas of the law. Religion-based exemptions from generally applicable laws, for example, are understood as autonomy-promoting accommodations, though in that context, the "costs" that tend to concern scholars most are harms to particular third parties rather than the political community as a whole.[109] And while accommodations for individuals with disabilities likewise seek to enhance those individuals' autonomy, scholars tend to focus on the economic costs incurred by the businesses that must employ or serve such individuals.[110] In contrast both to Shiffrin's generic notion of "costs" and to the narrower notions in the religion and disability contexts, the kinds of subsidies I've been analyzing in this Article involve the assumption of some of the *moral* costs that individual conduct can have for important public values—whether such costs fall on discrete third parties in the first instance or directly on the entire political community, and whether they ultimately reduce to economic harms or to less tangible injuries. But neither are civil procedure's moral subsidies concerned with parties' ordinary moral "foibles."[111] Rather, they seek to facilitate parties' autonomous exercise of civil procedure's various institutional powers by insulating much of parties' litigation conduct from its implications for important interpersonal and systemic public values. Civil procedure's moral subsidies thus

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to many, if not all, of the public-regarding reasons bearing on their litigation conduct. *See* Shapiro, *supra* note 22, at 238–51. Rather than relieving parties of that rational obligation, civil procedure's moral subsidies effectively foreclose certain accountability mechanisms when parties privilege their personal interests and moral beliefs over public values in their litigation conduct. The subsidies are thus better understood as a kind of accommodation, as I proceed to argue.

107. *See* Shiffrin, *Paternalism*, *supra* note 79, at 239 ("To respect others' autonomy and to create the conditions for its meaningful exercise, citizens should bear some costs and refrain from some otherwise permissible interferences, even if this behavior is not strictly required by the set of autonomy rights, and even if citizens significantly disagree with how and toward what ends others exercise their autonomy. That is, citizens should tolerate some level of burdensome other-regarding behavior.").

108. *See id.* ("Even further, [citizens] should go beyond mere tolerance and they should subsidize some such behavior. . . . [S]ubsidizing others' activities, in some domains, may be necessary to retain spheres of activity in which agents can act autonomously and reap the goods associated both with acting freely and with the feeling that one acts freely." (footnote omitted)).

109. *See, e.g.*, Nelson Tebbe, Micah Schwartzman & Richard Schragger, *Home Much May Religious Accommodations Burden Others?*, *in* LAW, RELIGION, AND HEALTH IN THE UNITED STATES 215, 215 (Elizabeth Sepper, Holly Fernandez Lynch & I. Glenn Cohen eds., 2017); Nelson Tebbe, Micah Schwartzman & Richard Schragger, *When Do Religious Accommodations Burden Others?*, *in* THE CONSCIENCE WARS: RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY, AND EQUALITY 328, 329 (Susanna Mancini & Michael Rosenfeld eds., 2018).

110. *See, e.g.*, Jolls, *supra* note 9, at 645–46. *But see, e.g.*, Elizabeth F. Emens, *The Sympathetic Discriminator: Mental Illness, Hedonic Costs, and the ADA*, 94 GEO. L.J. 399, 401 (2006) (considering a set of noneconomic "hedonic costs" associated with some disability accommodations).

111. *Cf.* Gold, *supra* note 100, at 82 ("[T]he state's conduct in enforcing certain legal rights [even when the rights bearer is being a 'stickler'] is a means to accommodate the foibles of its citizens, giving these citizens a greater sphere of unfettered choices.").

take the form of an accommodation in Shiffrin's sense, albeit with a normative focus inflected by the unique institutional context of civil litigation.

Understood as a kind of accommodation, civil procedure's moral subsidies can be distinguished from other, neighboring concepts in political theory. An accommodation, for one thing, doesn't reduce to a "right to do wrong" or a license to abuse one's legal rights. According to Andrew Gold, various equitable doctrines effectively grant a limited right to do wrong to "rights sticklers"—those who "insist[] on their rights in a harsh, stubborn, or otherwise unappealing fashion"—inasmuch as equity sometimes permits plaintiffs to recover for legally valid claims even when asserting those claims is morally objectionable in the circumstances.[112] Civil procedure's accommodations, by contrast, differ from a right to do wrong in several significant ways. First, accommodated litigation conduct need not be morally "wrong." A party might, to be sure, be acting from a purely self-interested motive to aggrandize herself at the expense of her opponent, but she might just as well be pursuing an other-regarding purpose to advance a noble cause or to protect a third party (by, say, withholding certain relevant information during discovery so as to avoid embarrassing a friend), and civil procedure's accommodations will permit the party to externalize the costs of her litigation conduct for public values either way. While the accommodations don't transmute immoral litigation conduct into morally permissible conduct, neither do they tacitly condemn all conduct that happens to undermine public values. Second, it follows that civil procedure's accommodations, in contrast to a right to do wrong, aren't concerned with rendering an all-things-considered judgment about the morality of litigation conduct, but rather with mediating the interactions between such conduct, whatever its motivation, and the public values embraced by the civil justice system. And third, whereas a right to do wrong provides a kind of categorical protection underwritten by a correlative duty on the part of the state not to interfere with certain individual conduct, the accommodations entail no such duty, but rather are largely a matter of the state's discretion as it seeks to balance individuals' private interests and public values.

Nor do civil procedure's accommodations effect the kind of "institutional division of labor" characteristic of liberal-egalitarian political theories. According to the most prominent version, developed by John Rawls, liberal principles of justice govern only the "basic structure" of society—"the way in which the major social institutions fit together into one system, and how they assign fundamental rights and duties and shape the division of advantages that arises through social cooperation"—whereas "the rules applying directly to individuals and associations and to be followed by them in particular transactions" are instead "framed to leave individuals and associations free to

112. *Id.* at 73. On the general idea of a right to do wrong, see David Enoch, *A Right to Violate One's Duty*, 21 LAW & PHIL. 355, 356–57 (2002); Ori Herstein, *Defending the Right to Do Wrong*, 31 LAW & PHIL. 343, 344 (2011); and Jeremy Waldron, *A Right to Do Wrong*, 92 ETHICS 21, 22 (1981).

act effectively in pursuit of their ends and without excessive constraints."[113] Civil procedure's accommodations are, in one respect, less generous than the Rawlsian institutional division of labor, since they reside within the interstices of procedural rules that require parties to attend at least somewhat to the implications of their litigation conduct for public values,[114] even if those rules are vague and systematically underenforced.[115] But in another, more significant respect, civil procedure's accommodations are *more* generous than the division of labor, which aims to leave individuals "secure in the knowledge that elsewhere in the social system the necessary corrections to preserve background justice are being made."[116] The division of labor, in other words, is designed so as to compensate for the adverse systemic consequences that individual conduct has for distributive justice and other public values,[117] whereas civil procedure's accommodations by definition *tolerate* such consequences, leaving a kind of moral deficit that's never eliminated.

If civil procedure's accommodations have any normative analogue, it would seem to be the style of reasoning characteristic of the institution of equity, which likewise seeks to mediate the interaction between private interests and public values, though with significantly more solicitude for the latter than the accommodations display. "Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs."[118] That "flexibility," however, doesn't take the form of unbounded judicial discretion to promote some generic notion of "fairness" in individual cases, but rather is institutionalized through a "second-order" system of principles and doctrines that enable judges to protect public values from private parties' exploitation of various deficiencies in the law.[119] Civil procedure's accommodations can be understood as emanating from this kind of second-order structure: just as equitable doctrines seek to address self-interested behavior that threatens public values, so procedural rules attempt to at least partially align parties' litigation conduct with those values, with the

113. JOHN RAWLS, POLITICAL LIBERALISM 268–69 (rev. ed. 1996).

114. *See* Shapiro, *supra* note 22, at 256–59.

115. *See supra* note 32 and accompanying text.

116. RAWLS, *supra* note 113, at 269.

117. Though scholars debate the extent to which the division of labor realizes the systemic goals of the principles of justice in practice. *Compare, e.g.*, Samuel Scheffler, *Distributive Justice, the Basic Structure, and the Place of Private Law*, 35 OXFORD J. LEGAL STUD. 213, 222–25 (2015) (arguing that more individualistic and bilateral considerations end up being overshadowed by distributive concerns in Rawls's theory), *and* Samuel Scheffler, *Egalitarian Liberalism as Moral Pluralism*, 79 PROC. ARISTOTELIAN SOC'Y 229, 250 (2005) (arguing that the division of labor affords individuals relatively little leeway to engage in self-interested conduct), *with* G.A. Cohen, *Where the Action Is: On the Site of Distributive Justice*, 26 PHIL. & PUB. AFFS. 3, 10, 16 (1997) (arguing that, given the division of labor, Rawls's principles of justice end up not significantly constraining self-interested behavior), *and* Liam Murphy, *Institutions and the Demands of Justice*, 27 PHIL. & PUB. AFFS. 251, 280–81 (1998) (arguing that the division of labor permits significant inequality and injustice).

118. Brown v. Bd. of Educ. of Topeka (*Brown II*), 349 U.S. 294, 300 (1955).

119. Smith, *supra* note 100, at 1054.

accommodations inhabiting the space where civil procedure declines to fully safeguard those values. But equity is a variegated institution, spanning substantive rights, procedure, and remedies. In the procedural context, equity's primary concern is not so much with parties' manipulation of legal forms[120] as it is with their discretionary exercise of procedural powers in ways that undermine public values. While various procedural rules allow courts to counteract parties' abuse of those powers, courts tend not to do so unless the abuse is particularly egregious,[121] effectively accommodating parties' personal interests and moral beliefs even at significant cost to public values. And even when courts do intervene, civil procedure follows equity in "leav[ing] intact most of the legal relationships on which it acts" in its "second-order" mode[122]—in civil procedure's case, the assignment of procedural powers to private parties rather than public officials. Civil procedure's accommodations, then, represent an especially generous concession to individuals' personal interests and moral beliefs for a public institution.

III. THE VALUE—AND LIMITS—OF CIVIL PROCEDURE'S ACCOMMODATIONS

To identify civil procedure's moral subsidies and to conceptualize them as a kind of accommodation is, of course, by no means to justify them as a matter of political morality. And yet, by rendering them intelligible and situating them in a coherent conceptual framework, the previous Parts have begun to gesture at a normative defense.[123] This Part elaborates that defense, explaining why civil procedure's moral subsidies, understood as accommodations, are valuable in a specifically *liberal* civil justice system—one that, like all liberal institutions, preserves significant space for the exercise of individual autonomy amid its pursuit of public values. The accommodations serve this liberal imperative by allowing parties to display partiality for their own personal interests and moral beliefs even as they bring their disputes to a public institution for authoritative resolution according to impartial public values. Because of the accommodations, parties need not abjure their partiality for a primarily public-regarding perspective during litigation. But precisely for that reason, the accommodations can entail significant costs for the public values the civil justice system answers to, and so they must also be subject to certain limiting principles, lest they completely subvert those values. The appropriate limits will be highly context-dependent, but, in general, retail accommodations for individual parties in individual cases will pose less of a systemic threat than wholesale

120. *See id.* at 1080.

121. *See supra* Part.I.

122. Andrew S. Gold & Henry E. Smith, *Sizing up Private Law*, 70 U. TORONTO L.J. 489, 504 (2020).

123. *Cf.* JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY 4 n.4 (2001) ("[T]o understand what corrective justice is entails understanding at least in part why it could make sense for individuals to want corrective justice to be realized in public practices and institutions.").

accommodations for broad classes of parties across broad categories of cases. With a better appreciation of both the value and the limits of civil procedure's accommodations, we'll be able to turn in the next Part not only to assessing bolder variations on the accommodationist model, but also to revisiting civil procedure's overarching purposes in light of its fundamental commitment to individual autonomy.

The general strategy of accommodation seeks to mediate an inevitable tension in liberal political theory between individual autonomy and more systemic public values, and civil procedure's accommodations can be understood as performing that function within the specific institutional context of civil litigation. Nearly every liberal political theory will include a foundational commitment to individual autonomy—the value of self-determination, of being the author of one's own life.[124] But at least once we move beyond the "classical liberal" tradition into the contemporary "high liberal" tradition, liberalism will also embrace values that can be realized only at a more systemic level, particularly distributive equality and the rule of law.[125] The two sets of commitments will often conflict with each other. "On the one hand," Shiffrin explains, "some may object that their autonomy is compromised when they have to bear the costs of and lend assistance to [collective] projects and endeavors that they have not chosen and morally disapprove of" but that are essential to the realization of important public values; and yet, "[o]n the other hand, some level of mutual subsidization (what [Shiffrin] call[s] accommodation) seems necessary to preserve a climate of both meaningful autonomy and community," lest the demand for individuals to contribute to the pursuit of public values eclipse their personal projects and beliefs.[126]

The conflict, in fact, runs even deeper, reflecting a clash not just between competing values, but between two radically opposed human perspectives. More specifically, the value of autonomy gives expression to individuals' *partiality* for their own personal interests, projects, relationships, and beliefs, whereas public values such as equality embody the universal, *impartial* perspective of our common humanity.[127] Partiality, to be clear, may involve self-interested behavior, but it need not; one also displays partiality when one pursues one's own "personal morality" or sense of justice at the expense of collectively defined public values that purport to impartially account for the interests of all

124. For particularly prominent liberal theories premised on such a commitment, see JOHN RAWLS, A THEORY OF JUSTICE 456 (rev. ed. 1999), and JOSEPH RAZ, THE MORALITY OF FREEDOM 165 (1986).

125. *See generally* Samuel Freeman, *Illiberal Libertarians: Why Libertarianism Is Not a Liberal View*, 30 PHIL. & PUB. AFFS. 105 (2001) ("The fuller conceptions of equality of opportunity are characteristic of the high liberal tradition, and mark one major difference with classical liberalism.").

126. Shiffrin, *Paternalism*, *supra* note 79, at 245–46.

127. *See generally* THOMAS NAGEL, EQUALITY AND PARTIALITY (1991) ("The impersonal standpoint in each of us produces . . . a powerful demand for universal impartiality and equality, while the personal standpoint gives rise to individualistic motives and requirements which present obstacles to the pursuit and realization of such ideals.").

individuals, considered as free and equal persons.[128] Liberalism endeavors simultaneously to respect individuals' autonomy as a way of affording them significant scope for their partiality and to insist on a significant degree of impartiality in the societal pursuit of its universalistic ambitions, thus sowing a fundamental tension within any liberal political community. As Thomas Nagel has explained specifically with respect to liberalism's egalitarian aspirations, the challenge for liberalism is "[t]o design institutions which serve an ideal of egalitarian impartiality without demanding a too extensive impartiality of the individuals who occupy instrumental roles in those institutions," so that individuals still enjoy significant room to display partiality for their own interests, projects, relationships, and beliefs.[129]

If the tension between individuals' partiality for their own personal interests and the impartial pursuit of public values pervades individuals' general social interactions, then that tension is especially acute in civil litigation, given the considerable control the institution assigns parties over the litigation process. That control promotes autonomy by allowing individuals to display significant partiality for their own interests and beliefs as they structure and litigate their lawsuits. Several private law scholars, most notably Hanoch Dagan, have identified autonomy as a foundational interest of substantive private law doctrine as well as litigation to enforce private law rights.[130] But what's true of private law litigation seems true of most civil litigation, including statutory torts such as claims under Title VII of the Civil Rights Act of 1964[131] and even some

128. *See* Hugh Collins, *Interpersonal Justice as Partial Justice*, 1 EUR. L. OPEN 413, 420 (2022). The distinction I'm borrowing from Nagel between partiality and impartiality is thus more complex than, and somewhat orthogonal to, Duncan Kennedy's distinction between "individualism" and "altruism" in private law adjudication. *See* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 88 HARV. L. REV. 1685, 1713–22 (1976).

129. NAGEL, *supra* note 127, at 61. Does the fact that partiality sometimes involves self-interested behavior render the attempt to accommodate partiality a matter of "nonideal" theory? Wouldn't the members of an ideal society be motivated by their sense of justice to curtail the pursuit of their own interests (and maybe even their own moral beliefs) so as to ensure the primacy of impartial public values? *Cf.* Cohen, *supra* note 117, at 113–14 (arguing that the members of an ideally just society would be motivated by an "egalitarian ethos" to limit their self-seeking conduct); Rebecca Stone, *The Circumstances of Civil Recourse*, 41 LAW & PHIL. 39, 39 (2022) (analyzing theories of private law in terms of the ideal/nonideal distinction). At the risk of wading into difficult debates about the distinction between ideal and nonideal theory, I'll just say that I doubt that the phenomenon I've analyzed in the previous Parts as a form of accommodation can be relegated to nonideal theory. For even as civil procedure ends up tolerating a significant amount of self-interested litigation conduct, it usually manages to censure the worst bad-faith behavior, and much of the remaining, less egregious self-interested conduct that ends up being accommodated would persist even in "ideal" circumstances—at least insofar as ideal theory allows for a legitimate "personal prerogative" to sometimes pursue one's own interests. *See* SAMUEL SCHEFFLER, THE REJECTION OF CONSEQUENTIALISM: A PHILOSOPHICAL INVESTIGATION OF THE CONSIDERATIONS UNDERLYING RIVAL MORAL CONCEPTIONS 41–79 (rev. ed. 1994). Civil procedure's accommodations thus strike me less as a grudging concession to nonideal circumstances and more as a reasonable response to an inevitable feature of the human condition.

130. *See, e.g.*, Hanoch Dagan, *Autonomy and Pluralism in Private Law*, *in* THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW, *supra* note 6, at 177; Hanoch Dagan, *Pluralism and Perfectionism in Private Law*, 112 COLUM. L. REV. 1409, 1410 (2012).

131. 42 U.S.C. §§ 2000e–2000e-17.

public law litigation involving at least one private party: decisions about the shape and progress of litigation will implicate the parties' autonomy.

More specifically, Arie Rosen has identified two general categories of personal interests that private law litigation in particular can potentially affect—but again, that seem pertinent to most, if not all, kinds of civil litigation. First, litigation can have profound effects on the parties' personal relationships.[132] Such relationships are often the subject of the litigation itself in private law cases, but even when they're not, they're likely to be significantly shaped by litigation decisions such as which claims to raise, what evidence to seek and use to substantiate or refute those claims, and how far and how vigorously to pursue the litigation. And while personal relationships are partly governed by impartial considerations of interpersonal or bilateral morality, how those considerations apply to a given relationship and the relative importance they have vis-à-vis nonmoral considerations will be inflected by reasons particular to the parties as well.[133] Second, litigation implicates what Rosen calls the "individual practical identit[ies]" of the parties, the sets of reasons that apply to parties as unique individuals rather than as generic members of the political community, and that consequently bear the imprint of their personal histories, relationships, and projects.[134] And finally, to Rosen's two categories of personal interests, we can add a third, which is most pertinent to plaintiffs but has significance on both sides of the "v.": one's dignitarian interest as a rights-bearer in vindicating one's rights, rather than letting violations of those rights go unanswered, but without becoming a "stickler" who stands on one's rights even at disproportionate cost to others.[135]

Civil procedure, by affording parties meaningful control over the litigation process, allows them to respond to all three sets of personal interests, thereby giving significant expression to their autonomy during litigation. Some private law theorists seek to tie party control (and particularly the plaintiff's power to sue) closely, if not analytically, to individual autonomy via the underlying substantive rights that are the subject of the litigation. According to Kantian corrective justice theorists such as Arthur Ripstein and Ernest Weinrib, for instance, torts are violations of the victim's rights, which safeguard individual

132. Arie Rosen, *The Role of Democracy in Private Law*, *in* 2 OXFORD STUDIES IN PRIVATE LAW THEORY 211, 224–28 (Paul B. Miller & John Oberdiek eds., 2023).

133. *See* Arie Rosen, *Political Reasons and the Limits of Political Authority*, 29 LEGAL THEORY 63, 81–82 (2023).

134. Rosen, *supra* note 132, at 228–29.

135. *See* Katz & Shapiro, *supra* note 97, at 254–55. For an analogous dignitarian account of the enforcement of moral rights, see Stephen Darwall, *Relational Wrongs vs. Wrongs Period: Personal Accountability vs. Accountability to the Moral Community*, 27 JERUSALEM REV. LEGAL STUD. 15, 16–20 (2023). For the general moral theory in which that account is grounded, see STEPEHEN DARWALL, THE SECOND-PERSON STANDPOINT: MORALITY, RESPECT, AND ACCOUNTABILITY (2006); and STEPHEN DARWALL, *Bipolar Obligation*, *in* MORALITY, AUTHORITY, AND LAW: ESSAYS IN SECOND-PERSONAL ETHICS I 20 (2013). Darwall's theory of moral rights draws particularly on JOEL FEINBERG, *The Nature and Value of Rights*, *in* RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY 143 (1980).

autonomy (or "independence"), and an essential part of what it means to have a right is to have the discretionary power to decide whether to "stand on" it by, among other things, filing a lawsuit when it has been violated.[136] One need not accept this analytical claim about the relationship between procedural powers and individual autonomy, however, to appreciate the ways in which party control can promote parties' autonomy by enabling them to display partiality for their personal interests and beliefs during litigation. Balganesh's idea of "redressive autonomy" suggests a more functional account of the connection between party control over the litigation process and parties' ability to display partiality for the three kinds of personal interests considered above.[137] With regard to parties' interests stemming from their personal relationships,[138] Balganesh contends that, "[i]n privileging the right-holder's choices about when, whether, and how to enforce violations of the primary [substantive] right . . . , the law is recognizing and prioritizing the right-holder's power to enter into and shape a relationship through the avenue of enforcement."[139] Plaintiffs can use their power to sue to profoundly alter a relationship that preexists their lawsuit, or they can use it to establish a new relationship altogether, but either way, the decision whether to use that power in such ways is up to them, to be based on the considerations they deem most important.[140] As for a party's interests in her "individual practical identity" and dignity as a rights-bearer,[141] a plaintiff's power to sue, for Balganesh, reflects "a fundamental belief that when and how the coercive power of the state ought to be invoked (even if not actually obtained) in aid of an individual is a matter of judgment that is personal to that individual, and which implicates a variety of subjective considerations not all of which are capable of objective rationalization."[142] Litigation presents the parties with "a series of important self-defining decisions,"[143] implicating "potentially competing (and incommensurable) normative values."[144] By granting private individuals the discretionary power to sue, civil procedure allows the plaintiff herself "to make [those] important normative decisions about deploying the mechanism [for invoking the state's coercive power]," decisions "that are entirely personal and originate from the individual motivations and desires of the right-holder, subjective and of questionable rationality as they may be."[145]

136. *See* ARTHUR RIPSTEIN, PRIVATE WRONGS, 271–75 (2016); ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 8 (2d ed. 2012).

137. *See supra* note 86 and accompanying text.

138. *See supra* notes 132–133 and accompanying text.

139. Balganesh, *supra* note 86, at 170.

140. *See id.* at 186 ("In delegating to individuals the decision of *whether*, *when*, *how*, and *against whom* to invoke the state's coercive power in recognizing and enforcing a primary right, private law recognizes the connection between this power and the ability to shape one's interpersonal relationships, in turn a critical part of individual self-identity. The decision is in turn a deeply normative one[] . . . .").

141. *See supra* notes 134–135 and accompanying text.

142. Balganesh, *supra* note 86, at 172–73.

143. *Id.* at 178.

144. *Id.* at 182.

145. *Id.* at 183.

The ability to act on those subjective, personal motivations constitutes a kind of "authority of the right-holder in initiating the claim of redress and invoking the state's power to that end," which "is morally significant in that it shapes the individual's (i.e., right-holder's) self-identity, or put another way, it recognizes the autonomy of the right-holder."[146]

Although Balganesh focuses specifically on intellectual property plaintiffs' power to sue, that power is the product not of substantive private law, but of the trans-substantive rules of civil procedure;[147] Balganesh's arguments thus have force in most forms of civil litigation, as well as with respect to other procedural powers enjoyed by both plaintiffs and defendants. In deciding whether to make or comply with a particular discovery request, for example, a party will have to consider the implications of obtaining or disclosing the requested information for her relationships with the opposing party and third parties, her other personal interests and projects, and her moral beliefs. The broad discretion that civil procedure affords parties allows them to make such decisions based on reasons personal to them, rather than more impartial considerations dictated by the political community. Or consider the parties' joint power to settle their lawsuit. Rebecca Stone has argued that, at least in conditions of "normative uncertainty about justice,"[148] "the legal system ought to make room for plaintiffs and defendants to negotiate about the appropriate response to a defendant's legal wrongdoing in light of their own, perhaps superior, conception of what justice between them requires."[149] According to Stone, the structure of civil litigation facilitates this negotiation

> [B]y giving potential plaintiffs the authority to decide whether to enforce their rights, thus enabling each to decide whether to seek the remedy that she might be legally entitled to or instead reach some other resolution of her dispute with the defendant that, at least in her and the defendant's eyes, better realizes justice between them.[150]

This, in turn, promotes the parties' autonomy, for the state effectively defers to the parties' decision about whose "rational standpoint" should take precedence in their dispute,[151] a decision that turns as much on personal and interpersonal considerations unique to the parties as it does on impartial considerations of social justice or legality common to the entire political community. As with

146. *Id.* at 183–84. For empirical evidence that many copyright plaintiffs act on a variety of such subjective motivations, even when they haven't suffered an economic loss, see Kristelia García, *Selective Enforcement*, 113 GEO. L.J. (forthcoming 2025) (manuscript at 4), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4930160).

147. *See supra* note 89 and accompanying text.

148. Stone, *supra* note 129, at 59.

149. *Id.* at 60.

150. *Id.*; *cf.* Balganesh, *supra* note 86, at 170–71 (describing the power to sue as a power "to initiate a mediated bilateral negotiation with the other party, during which the other party *qua* defendant will introduce arguments to challenge the existence and scope of the primary right, its putative violation, and the form of remediation sought").

151. *See* Rebecca Stone, *Who Has the Power to Enforce Private Rights?*, *in* 2 OXFORD STUDIES IN PRIVATE LAW THEORY, *supra* note 132, at 25, 28.

decisions about whether to sue in the first place and how to structure the litigation, civil procedure's deferential approach toward settlement allows parties to display partiality for their own personal interests and beliefs in resolving their disputes, thus promoting their autonomy.

None of this is to deny the considerable instrumental benefits that can also flow from giving parties significant control over the litigation process. For most civil procedure scholars, the most important such benefit is the "private enforcement" of governmental regulatory policy, which results through an invisible-hand-like mechanism when individual plaintiffs sue to vindicate their rights under various statutes.[152] Civil procedure scholars also emphasize the increased transparency about policymaking that stems from parties' exchange of information during discovery.[153] John Gardner identifies still further instrumental benefits of granting private parties significant powers in the litigation process (and particularly plaintiffs the power to sue), including freeing victims of private wrongs from the whims of governmental officials who may disregard violations of their rights and dispersing power so as to prevent the formation of an "oligarchy of officials."[154] Indeed, Gardner insists that plaintiffs' power to sue can be justified *only* in instrumental terms, and not by appealing to plaintiffs' autonomy or other personal interests, for that power is so "radically discretionary" that it permits plaintiffs to act in "illiberal" ways that can't be said to promote their autonomy in any meaningful respect.[155] But for one thing, even assuming that autonomy is intrinsically valuable only when exercised in morally valuable ways, excessively interfering with individuals' choices in order to address "bad" exercises of autonomy can end up chilling "good" ones.[156] Party control can thus still be justified in terms of autonomy even if some exercises of that control don't promote autonomy, so long as a sufficient number do; civil procedure's tolerance of parties' harmful exercises of power during litigation can be understood as an institutional choice to avoid over-deterring the valuable ones. More fundamentally, the various instrumental benefits of party control in litigation seem to supervene on the intrinsic, autonomy-based benefits. The private-enforcement and information-production functions of litigation, for instance, both depend on parties' being motivated to vigorously exercise their procedural powers in light of their personal interests. Unless the government is going to propagate some kind of "noble lie" that alienates parties and their agency from the moral underpinnings of the powers

152. *See supra* notes 16–17 and accompanying text.

153. *See, e.g.*, ALEXANDRA D. LAHAV, IN PRAISE OF LITIGATION 8–9, 57–58, 82 (2017); Diego A. Zambrano, *Discovery as Regulation*, 119 MICH. L. REV. 71, 120 (2020).

154. *See* GARDNER, *supra* note 66, at 209–10. On the drawbacks of the public enforcement of private rights, see GOLDBERG & ZIPURSKY, *supra* note 85, at 139.

155. GARDNER, *supra* note 66, at 200–02, 212–13.

156. Gardner himself recognizes this in other contexts. *See* John Gardner, *Private Activities and Personal Autonomy: At the Margins of Anti-Discrimination Law*, *in* DISCRIMINATION: THE LIMITS OF LAW 148, 155 (Bob Hepple & Erica M. Szyszczak eds., 1992).

they exercise and the institution in which they participate,[157] those powers should be grounded in the considerations parties themselves take to justify their holding the powers in the first place—namely, enabling parties to seek a public resolution of their dispute largely in line with their personal interests, relationships, and projects and their moral beliefs. Even the instrumental benefits of party control, then, appear to ultimately depend on parties' ability to display partiality for their personal interests and beliefs and thereby exercise their autonomy.

Notwithstanding the significant benefits of party control in civil litigation for personal autonomy, such control also obviously entails significant costs for public values—for the straightforward reason that parties' pursuit of their own personal interests and beliefs in litigation will often diverge from the collectively defined public values the civil justice system seeks to promote. Part I explored some of the general ways in which parties' litigation conduct and public values can conflict, but we're now in a position to appreciate the deeper mechanism generating those conflicts, as well as their normative stakes. For as we've seen in this Part, parties tend to undermine public values through their litigation conduct precisely because, in exercising their procedural powers, they're responding to and acting upon not (primarily) impartial reasons derived from public values, but rather partial reasons derived from their relationships, projects, and interests, as well as, perhaps, from their personal morality and sense of justice. Parties, in their litigation conduct, assume a predominantly private rational perspective rather than a public-regarding one. It should thus come as no surprise that they end up neglecting or even directly subverting public values as they exercise their procedural powers. Indeed, parties' private rational perspective can similarly distort the substantive law itself, for as "citizens and their lawyers decide whether and to what extent their rights will be protected, extended, or modified[]"; "how much energy to spend searching for the smoking gun that will prove their case, how to proceed without it, or, if they are defendants, whether to turn it over"; and "whether to settle or press for public resolution" of their dispute—as they make these myriad decisions, they exercise indirect "agency" over "the production of law," agency that contributes to "the indeterminacy and instability of the law's intersection with public values."[158] That indeterminacy and instability owes directly to the fact that civil procedure vests parties with significant procedural powers and significant discretion in exercising those powers, which, as we've seen, creates considerable room in the civil justice system for parties' partiality for their own interests and beliefs and thus their autonomy.

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157. *Cf.* Katz & Shapiro, *supra* note 97, at 250–51 ("The institutional role of the plaintiff—to wield a radically private power over the use of public authority and thereby to bring about the institutional goods Gardner describes—can be seen to rest on a kind of 'noble lie': we are in a position that is *designed* to be exercised freely and without regard to the institutions it serves.").

158. Norman W. Spaulding, *The Rule of Law in Action: A Defense of Adversary System Values*, 93 CORNELL L. REV. 1377, 1391–92 (2008).

The dominant perspective in civil procedure scholarship would seem to *condemn* that solicitude for parties' autonomy and to require the civil justice system to be restructured so as to strictly prioritize public values over parties' personal interests and beliefs. Owen Fiss famously lauded "[a]djudication" as "the social process by which judges give meaning to our public values"[159] and decried practices such as settlement that, as he saw it, allowed parties to thwart courts in that endeavor.[160] Most civil procedure scholars share this public conception of the civil justice system. For example, engaging in the debate over the legitimacy of "party rulemaking,"[161] Scott Dodson argues that civil litigation is structured according to a "party subordinance" principle, whereby "parties' attempts to alter otherwise applicable procedures . . . are wholly unenforceable absent some legal authorization for judicial enforcement. And even when the law allows parties to exercise litigation choices, courts retain largely unfettered discretion—cabined only by law—to disregard or override those choices."[162] This formal principle strikes me as an inapt description of the *functional* realities of modern litigation under the Federal Rules of Civil Procedure. But be that as it may, I want to focus on the normative view it reflects—namely, the idea that courts *should* maintain ultimate control over parties' conduct during litigation so as to preserve the priority of public values over parties' personal interests.[163]

There are several possible ways of institutionalizing such a priority, all of which draw on aspects of public law's approach to countering abuse of public institutions.[164] For one, the civil justice system could treat parties as temporary or acting public officials, bound by public-regarding duties in the exercise of their procedural powers and subject to accountability for their litigation decisions through judicial review.[165] Such an approach would resolve any conflicts between parties' personal interests and public values decisively in favor of the latter. For it would treat the status of being a party to a lawsuit as what Nico Kolodny calls an "impersonally justified office," where an "office" refers to the "capacity to make, by certain processes, certain decisions that have certain implications" for others and "impersonally justified" means that the office "serves impersonal reasons," that is, reasons "not grounded in the agent's

159. Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979).

160. *See* Fiss, *supra* note 53, at 1077.

161. *See generally, e.g.*, Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, 90 TEX. L. REV. 1329 (2012); Jaime Dodge, *The Limits of Procedural Private Ordering*, 97 VA. L. REV. 723 (2011).

162. Scott Dodson, *Party Subordinance in Federal Litigation*, 83 GEO. WASH. L. REV. 1, 6–7 (2014).

163. For another forceful articulation of that normative view, see Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507, 541 (2011); *cf.* DAVID DYZENHAUS, THE LONG ARC OF LEGALITY: HOBBES, KELSEN, HART 189 n.120 (2022) (elaborating a theory of legality that seeks "to give public law priority over private law in understanding legal order").

164. *See supra* notes 1–3 and accompanying text.

165. For an intimation of such an approach, see RIPSTEIN, *supra* note 136, at 182, 182 n.42. Gardner also occasionally gestures at a conception of plaintiffs as acting public officials, though this doesn't seem to be his considered view. *See* Katz & Shapiro, *supra* note 97, at 244.

interests, projects, or relationships as such."[166] As the occupant of such an office, a party to a lawsuit would be "permitted only to act for the purposes defined by his mandate," not for his own "private purposes."[167] Nor could a party exercise a procedural power even "with indifference as to whether it will serve the purposes which alone can justify use of that power," much less with a "belief that it will not serve them";[168] she would be permitted to act only "with the manifest intention to serve the interests of the governed."[169] In the context of civil litigation, that requirement means parties would always have to act with an intention to facilitate the just resolution of their dispute according to the applicable law, as determined by the political community's collective values rather than the parties' own sense of what justice might require in the circumstances. Treating parties as temporary officers would thus impose on them a duty of impartiality with regard to the promotion of public values through their litigation conduct, which would, in turn, reconstitute civil litigation on a public law model, inasmuch as public "actions have to be more impartial than private ones, since they usually employ a monopoly of certain kinds of power and since there is no reason in their case to leave room for the personal attachments and inclinations that shape individual lives."[170] Short of this full-blown impartial, public-regarding duty, civil procedure could more closely manage parties' litigation conduct so as to ensure that it comports in practice with public values. David Engstrom has argued that, in fact, civil procedure already adopts this strategy with respect to certain kinds of legal claims for which administrative agencies serve as "gatekeepers," screening claims before permitting plaintiffs to file them in court and monitoring the litigation in various ways thereafter.[171] Both strategies, however, follow public law in seeking to curb institutional abuse by conforming exercises of governmental power to public values as closely as possible, and both would accordingly result in public considerations largely eclipsing personal ones in parties' litigation conduct.

At the other extreme, one might seek to *augment* civil procedure's current solicitude for parties' personal interests by insulating parties' litigation decisions even further from interference in the name of public values. This is one way of understanding Martin Redish's longstanding critique of class actions and other forms of aggregate litigation as inconsistent with a classical liberal commitment

166. NICO KOLODNY, THE PECKING ORDER: SOCIAL HIERARCHY AS A PHILOSOPHICAL PROBLEM 131 (2023).

167. ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY 192 (2009).

168. JOSEPH RAZ, *The Rule of Law and Its Virtue*, *in* THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 210, 219–20 (1979).

169. Joseph Raz, *The Law's Own Virtue*, 39 OXFORD J. LEGAL STUD. 1, 8 (2019).

170. THOMAS NAGEL, *Ruthlessness in Public Life*, *in* MORTAL QUESTIONS 75, 84 (1979). *But see* IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 97 (1990) (criticizing the "distinction between public, impersonal institutional roles in which the ideal of impartiality and formal reason applies, on the one hand, and private, personal relations which have a different moral structure," on the other, partly on the ground that such a distinction "helps to justify hierarchical decisionmaking structures").

171. *See* David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 644–55 (2013).

to individual autonomy; by curbing those practices, the argument goes, individual parties would enjoy more control over important litigation decisions and thus freer rein to promote their autonomy.[172] In a similar vein, Ernest Weinrib has argued that private law adjudication should attend only to considerations particular to the parties' relationship with each other and prescind from considerations derived from more systemic values such as distributive justice.[173] To be sure, Weinrib also insists that courts, as public institutions, must render decisions that comply with the requirements of "publicness," ensuring that the norms they promulgate can be understood by all, and "systematicity," the demand for a significant degree of coherence across decisions.[174] But these more public requirements end up not disturbing the priority of interpersonal considerations in Weinrib's theory of private law adjudication, given his insistence that the bipolar "internal logic of private law is left intact" even after accounting for them.[175] Weinrib's view, then, like Redish's, would effectively double down on civil procedure's already-generous treatment of parties' personal interests in the litigation process, even at great cost to public values.

In contrast to both the predominantly public and predominantly private models of civil litigation, the accommodationist strategy that I've identified and defended in this Article represents more of a hybrid public-private model that attempts to balance public and private considerations, charging the civil justice system with the pursuit of public values but tolerating a significant amount of litigation conduct that offends those values for the sake of parties' personal autonomy. Against more privately oriented models such as Redish's and Weinrib's, civil procedure's accommodationist strategy still makes meaningful attempts to align parties' litigation conduct with public values. Balganesh, for one, suggests that private law litigation involves no scrutiny of the reasons for which plaintiffs decide to sue,[176] but this overstates civil procedure's permissiveness, ignoring rules that require parties to attend to at least some public values in their litigation decisionmaking, even though courts tend not to

172. *See* MARTIN H. REDISH, DUE PROCESS AS AMERICAN DEMOCRACY 21 (2024); MARTIN H. REDISH, WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT 21 (2009).

173. *See, e.g.*, ERNEST J. WEINRIB, RECIPROCAL FREEDOM: PRIVATE LAW AND PUBLIC RIGHT 21 (2022) (insisting that considerations of formal "juridical" equality of the parties must be "*decisive* for the elaboration of legal doctrine and for the disposition of disputes" (emphasis added)); *see also* RIPSTEIN, *supra* note 136, at 23 ("I will unashamedly maintain that the point of tort litigation is to resolve the specific dispute between the parties currently before the court, based *entirely* on what transpired between them." (emphasis added)).

174. WEINRIB, *supra* note 173, at 67, 75.

175. Gold & Smith, *supra* note 122, at 518. To get a sense of the very limited role Kantian theories permit public values to play in private law adjudication, consider Arthur Ripstein's suggestion that private law should take account of distributive justice only in cases of extreme poverty. *See* RIPSTEIN, *supra* note 136, at 289–91; *cf.* Hanoch Dagan & Michael Heller, *Choice Theory: A Restatement*, *in* RESEARCH HANDBOOK ON PRIVATE LAW THEORY 112, 130–31 (Hanoch Dagan & Benjamin Zipursky eds., 2020) ("Only the most urgent distributive concerns may legitimately override the demands of relational justice within private law.")

176. *See* Balganesh, *supra* note 86, at 167 ("[I]ntellectual property law does nothing to scrutinize the primary right-holder's reasons behind these decisions, however idiosyncratic or irrational they may be.").

enforce those rules to their limits.[177] Against more publicly oriented models, on the other hand, civil procedure routinely declines to compel parties to internalize the moral costs of their litigation conduct for public values; hence civil procedure's many moral subsidies.[178] These subsidies, understood as accommodations, allow parties to attend primarily to their personal interests and beliefs when deciding how to exercise the procedural powers granted them during civil litigation, rather than having to always consider the implications of their litigation conduct for collectively defined public values.[179] The accommodationist model thus frees parties from a potentially overwhelming "choice-sensitivity" and the looming prospect of "strict cost-internalization."[180] That rational freedom is valuable for parties' autonomy and is accordingly worth bearing at least some cost to public values, I've argued, because it allows parties to focus on the personal relationships and projects that make autonomy meaningful, rather than always having to subordinate their personal interests and beliefs while participating in the public institution of civil litigation. Civil procedure's accommodations thus introduce a strongly particularistic element into the otherwise-universalistic enterprise of resolving disputes according to the law,[181] an important concession to individuals' personal interests in a liberal political system that seeks to balance respect for human partiality with the demands of impartiality.

Civil litigation nevertheless remains a *public* institution, and civil procedure's accommodations can avoid completely subverting litigation's public mission only if they are subject to certain limits. Although civil procedure can't proscribe all litigation behavior that contravenes public values without forgoing the accommodations' benefits for personal autonomy, it may be able to police the accommodations and counteract the most serious threats that parties' litigation conduct poses to public values. Courts do, after all, use their

177. *See* Shapiro, *supra* note 22, at 245.

178. *See supra* Part.I.

179. *Cf.* Shiffrin, *Paternalism*, *supra* note 79, at 247 ("Accommodation restricts the sorts of reasons the agent and those who interact with her must consider. To varying degrees, creating insulated areas allows an agent to focus on some of the distinctive reasons associated with the activity. It protects her from worrying about certain goods and reasons only contingently or indirectly associated with the activity. . . . [Accommodation] allows an agent to respond to a certain range of reasons that might otherwise be dominated by considerations relating to others, by morality, or by physical and financial need; in so doing, it permits her the chance to exercise a particular aspect of her capacity for choice. This permits her to exercise a certain range of capacities for choice without having to exercise others."); Shiffrin, *Egalitarianism*, *supra* note 79, at 291 ("If responding to reasons is roughly connected to responding to values[] . . . it is important and desirable to have the opportunity to respond to and to engage with particular values or goods in purer, more direct ways. It is valuable to have the opportunity to engage with a particular value, in some degree of isolation, to determine its significance to oneself and to respond appropriately to the reasons it presents."); *id.* at 294 ("[T]here is an important value to sometimes relaxing norms of choice-sensitivity to facilitate this one important sort of freedom—the freedom to engage with and react directly to discrete reasons and values.").

180. Shiffrin, *Egalitarianism*, *supra* note 79, at 271.

181. *Cf.* Galanter, *supra* note 54, at 148 n.136 (defining "dualism" as a "distinctive style of accommodating social diversity and normative pluralism by combining universalistic law with variable application, local initiative and tolerated evasion").

discretionary authority to sanction parties for the most egregiously abusive litigation conduct.[182] Such ex post policing mechanisms constitute a kind of "safety valve" that allows courts to effectively rescind some of civil procedure's accommodations when the costs of parties' litigation conduct for public values prove too great.[183] Even supplemented with these kinds of "safety valves," however, particular accommodations may, in some circumstances, entail such significant public costs that they can't be justified. That is likely to be the case when, on the one hand, a particular lawsuit doesn't directly implicate or interfere with the parties' personal relationships and projects[184] and, on the other hand, tolerating the parties' litigation conduct requires the political community to directly facilitate the conduct or to violate its most fundamental moral commitments.[185] Because it will be difficult to predict exactly when an accommodation will become unjustifiable, civil procedure should prefer *retail* accommodations that grant parties ad hoc moral subsidies in individual cases rather than *wholesale* accommodations that allow entire classes of litigants in broad categories of cases to externalize the moral costs of their litigation conduct.[186] A regime of retail accommodations will better enable courts to identify those accommodations that go too far in compromising important public values.

182. *See supra* note 32 and accompanying text.

183. Following Henry Smith's theory of equity, see Smith, *supra* note 100, at 1080, Andrew Gold ascribes a similar function to various equitable doctrines. *See* Gold, *supra* note 100, at 73 ("As a safety valve, equity . . . enable[s] courts to better align their own conduct with the state's moral obligations."); *id.* at 90 ("A safety valve approach to equity may then be justifiable as a method for allowing courts to avoid assisting rights sticklers where equity's justice is better, while leaving a wide scope for contexts in which legal justice is still preferable. That is, a safety valve can respect those settings in which sticklers should legitimately be able to stand on their rights—and even call on the state for its assistance—while still permitting equity to step in when the right holder goes too far.").

184. *Cf.* Shiffrin, *Paternalism*, *supra* note 79, at 248 (arguing that the legitimacy of an accommodation depends on "whether the decisions being supported are highly personal and critical to one's sense of self . . . whether the denial of accommodation will make the agent's projects infeasible; and whether the decisions being supported are ones that are difficult to make and involve hard cases, difficult judgments, or areas in which agents are highly vulnerable or susceptible to overvaluing the opinions [of] or effects on others"); Shiffrin, *Egalitarianism*, *supra* note 79 at 296 ("[T]he areas of decision around which there should be some accommodation should include decisions relating to personal relationships and their place within one's life.").

185. *Cf.* Shiffrin, *Paternalism*, *supra* note 79, at 248 (arguing that the legitimacy of an accommodation depends on "what sort of support or involvement by others is required: whether it involves mere financial support or other sorts of involvement, whether the support is direct or indirect, whether the support suggests agreement or affiliation, and so on—whether the degree of support or involvement by the bystanders seriously implicates their integrity or interferes with their capacities to pursue their own autonomous aims, and whether a practice of accommodation in this domain would be especially subject to free-riding"); Shiffrin, *Egalitarianism*, *supra* note 79, at 296 ("[W]e should also consider whether[] . . . a practice of accommodation in this domain would itself provide perverse incentives to choose particular goods just to benefit from accommodation. . . . [W]e should bear in mind whether some practices would not serve the aim of facilitating more direct response to particular values, but would instead be especially subject to free-riding or perverse adaptation.").

186. *Cf.* Matthew A. Shapiro, *Labor Goals and Antidiscrimination Norms: Employer Discretion, Reasonable Accommodation, and the Costs of Individualized Treatment*, 32 YALE L. & POL'Y REV. 1, 5 (2013) (distinguishing between wholesale and retail accommodations in the disability context).

In the end, though, accommodating parties' personal interests and beliefs during civil litigation necessarily entails costs for public values; the accommodations' *raison d'être* is precisely to insulate parties from some of those costs. How significant the costs will be will partly depend on how likely parties are to exploit the accommodations to directly attack public values, as opposed to incidentally undermining those values as they pursue their personal interests.[187] The prospect of such abuse, however, isn't a sufficient reason to refuse to accommodate all litigation conduct that happens to undermine public values, much of which promotes the autonomy of the parties who engage in it.[188] At the same time, the costs of the accommodations for public values should be distributed fairly, which generally means that "we should attempt to share [the costs] together, roughly, within a larger system exhibiting reciprocity" and not just let them fall exclusively on particular individuals.[189] That's a reason to prefer the accommodations that socialize the moral costs of parties' litigation behavior over those that shift the costs to the opposing party.[190]

IV. CIVIL PROCEDURE'S ACCOMMODATIONS AND LITIGATION'S PURPOSES

Civil procedure's accommodations constitute an important set of mechanisms by which the institution of civil litigation seeks to mediate conflicts between important public values and parties' personal interests and beliefs. Without the accommodations, parties would have to restrain their partiality and assume a public-regarding perspective in order to utilize the public system of dispute resolution—a significant cost for a liberal civil justice system to impose. That's not to say that public values should always yield to personal autonomy in the civil justice context. On the contrary, contemporary liberalism is defined as much by its embrace of more systemic values such as equality and distributive justice as it is by its commitment to personal autonomy,[191] and even those liberal institutions that emphasize the latter must still heed the former. Civil procedure, however, has increasingly employed new variations on the accommodationist model whose costs for important public values threaten to outstrip any benefits for parties' autonomy. From the conferral of private rights of action even to unaffected parties, to the single-minded pursuit of "global peace" in mass-tort bankruptcy litigation, civil procedure increasingly bestows moral subsidies to broad categories of parties in broad categories of cases without adequately considering the significance either of the personal interests the subsidies purport

187. *Cf.* MARK OSIEL, THE RIGHT TO DO WRONG: MORALITY AND THE LIMITS OF LAW 3 (2019) (showing how conventional morality constrains the abuse of legal rights, such that individuals will often voluntarily refrain from exercising legal rights in ways that cause serious moral harm).

188. *Cf.* Shiffrin, *Paternalism*, *supra* note 79, at 249 n.52 ("[A]ccomodation practices may be susceptible to exploitation but, in appropriate circumstances and with constraints, this seems more like a cost to pay for facilitating autonomy rather than a reason to reject accommodation entirely.").

189. Shiffrin, *Egalitarianism*, *supra* note 79, at 301.

190. *See supra* Subpart.I.B.

191. *See supra* notes 124–125 and accompanying text.

to serve or of the public values they end up undermining. On the other hand, civil procedure is equally indiscriminate in its *denial* of moral subsidies in certain areas of civil practice—most notably, concerning the exchange of information during discovery, which threatens parties' personal dignitarian interests. But we're likely to overlook both the excesses of accommodation and its squandered potential if we continue to adhere to the predominant scholarly conception of litigation as a mere means of achieving generic policy goals, a conception that occludes the kinds of tradeoffs between parties' personal interests and public values that civil procedure's accommodations attempt to navigate.

A. REVISITING CIVIL PROCEDURE'S ACCOMMODATIONS

Some of civil procedure's more novel accommodations permit parties to externalize the moral costs of their litigation conduct even in the absence of substantial autonomy interests and even when the moral costs seriously jeopardize the political community's most important public values. Consider state "bounty-hunter" laws such as Texas's Senate Bill 8, which prohibits most abortions after a fetal heartbeat has been detected and authorizes enforcement of that prohibition exclusively through lawsuits by private parties—even private parties with no personal connection to the case—rather than public officials.[192] The law departs from traditional understandings of private rights of action by relieving plaintiffs of having to make any showing that they suffered their own personal legal injury.[193] In doing so, it puts the full panoply of litigation's procedural powers at the disposal of unaffected third parties. Such individuals are especially likely to exercise the powers in ways that compromise public values, making decisions about the allocation of legal resources and the use of legal institutions that thwart the impartial administration of justice and thus undermine the rule of law.[194] But precisely because those individuals lack any personal stake in the proceedings, their problematic exercises of procedural powers have few, if any, compensating benefits for their personal autonomy, beyond the satisfaction of any political or moral interest they might have in the subject matter of the lawsuit. That strikes me as too tenuous a personal connection to warrant the conferral of the broad procedural powers that parties to litigation enjoy. Laws such as Texas's Senate Bill 8 can thus be understood as an accommodation bestowed upon an entire class of individuals who may have a passing curiosity in a particular lawsuit but whose personal projects and

192. TEX. HEALTH & SAFETY CODE ANN. §§ 171.204–.208 (West 2021); *see* Whole Woman's Health v. Jackson, 595 U.S. 30, 35–36 (2021).

193. *See, e.g.*, John C.P. Goldberg & Benjamin C. Zipursky, *Tort Theory, Private Attorneys General, and State Action: From Mass Torts to Texas S.B. 8*, 14 J. TORT L. 469, 481–91 (2021); Jon D. Michaels & David L. Noll, *Vigilante Federalism*, 108 CORNELL L. REV. 1187, 1228–29 (2023).

194. *See, e.g.*, Randy Beck, *Popular Enforcement of Controversial Legislation*, 57 WAKE FOREST L. REV. 553, 553 (2022); Aziz Z. Huq, *The Private Suppression of Constitutional Rights*, 101 TEX. L. REV. 1259, 1321–26 (2023).

relationships aren't necessarily implicated by it. Given the lack of significant autonomy interests, the significant costs to public values, and the absence of safeguards against the most egregious abuse, it's hard to see how such an accommodation could be justified.

Another contemporary litigation practice that can be understood as an unjustified accommodation is solvent companies' use of the bankruptcy process to avoid potential mass-tort liability. In an increasingly common maneuver, solvent companies will spin off their potential mass-tort liability into a subsidiary, which will then declare bankruptcy, and the litigation stay entered by the bankruptcy court will bar pending litigation against not only the insolvent subsidiary, but also the solvent parent.[195] The Supreme Court severely limited that practice last Term,[196] but the point for purposes of this Article is that it seems to constitute an unwarranted accommodation. With regard to parties' autonomy, solvent companies (and the individuals who manage and invest in them) lack the personal interest traditionally underlying the bankruptcy process: the interest in unwinding one's financial obligations and obtaining a financial "fresh start." Solvent companies are instead using bankruptcy simply to minimize their mass-tort liabilities, which can, in some sense, serve the companies' and other actors' interests, but not the kinds of personal interests that justify civil procedure's accommodations. As for the moral costs imposed by the solvent companies' conduct, those costs include significant harm to important public values, particularly the rule-of-law values of public accountability for wrongdoers and the development of the law, as well as more instrumental values such as information production.[197] The bankruptcy system thus appears to be permitting certain parties to externalize the considerable moral costs of their litigation decisions even though that subsidy doesn't meaningfully promote anyone's autonomy.

Whereas the preceding examples involve accommodations that should perhaps be eliminated or curtailed, other aspects of contemporary civil practice tend to neglect parties' personal interests and thus may warrant more generous moral subsidies. Take discovery. Parties can be required under the discovery rules to disclose a significant amount of personal information to each other and the court.[198] Especially in the digital age, much of that information is likely to

195. *See generally* Lindsey D. Simon, *Bankruptcy Grifters*, 131 YALE L.J. 1154 (2022) (analyzing recent examples of this use of the bankruptcy system in mass-tort cases).

196. *See* Harrington v. Purdue Pharma L.P., 603 U.S. 204, 227 (2024).

197. *See, e.g.*, Pamela Foohey & Christopher K. Odinet, *Silencing Litigation Through Bankruptcy*, 109 VA. L. REV. 1261, 1323 (2023); Abbe R. Gluck, Elizabeth Chamblee Burch & Adam S. Zimmerman, *Against Bankruptcy: Public Litigation Values Versus the Endless Quest for Global Peace in Mass Litigation*, 133 YALE L.J.F. 525, 552 (2024), https://www.yalelawjournal.org/pdf/GluckBurchZimmermanYLJForumEssay_ipkubzep.pdf. For an argument that the bankruptcy process actually realizes many of the public values associated with litigation, see Anthony Casey & Joshua Macey, *In Defense of Chapter 11 for Mass Torts*, 90 U. CHI. L. REV. 973, 980 (2023).

198. *See* FED. R. CIV. P. 26–37.

become public.[199] Such publicity can severely harm individuals' dignitarian interest in maintaining control over their public self-presentation and thereby undermine their autonomy.[200] At the same time, many civil procedure scholars emphasize the important role that information disclosure during civil discovery plays in promoting public transparency about wrongdoing.[201] Indeed, some scholars go so far as to contend that victims of certain kinds of wrongdoing have a *duty* to publicly disclose information about the wrongs they've suffered in order to protect others from becoming victims of the same misconduct.[202] An approach more consistent with civil procedure's other accommodations, by contrast, would allow parties to withhold personally sensitive information from the public record (if not from their opponents or the court) so that they could preserve their public self-presentation during the litigation and thus be in a position to resume their personal relationships and projects afterward more or less unscathed.

None of this is to suggest any categorial rules for distinguishing between legitimate and illegitimate accommodations in civil litigation. On the contrary, the legitimacy of any particular accommodation will turn on a complex balance of private and public considerations, which will inevitability vary from one context to another. Public law cases challenging governmental policies, for example, will, almost by definition, have significant implications for public values, as will private law cases seeking redress for more systemic harms; in both kinds of cases, the moral costs of parties' litigation conduct for public values will tend to outweigh any benefits for the parties' autonomy, making any accommodation of the parties' interests and beliefs more difficult to justify. Conversely, the systemic implications of more quotidian private law cases—or even public law cases challenging one-off legal violations—will often be more cabined, such that the parties' personal interests and beliefs can be accommodated without unduly threatening public values. This kind of context-specificity, of course, offends civil procedure's general preference for the "trans-substantive" application of its rules to every kind of dispute, irrespective of

199. *See, e.g.*, David S. Ardia, *Privacy and Court Records: Online Access and the Loss of Practical Obscurity*, 2017 U. ILL. L. REV. 1385, 1387.

200. *See* Matthew A. Shapiro, *The Indignities of Civil Litigation*, 100 B.U. L. REV. 501, 527–28 (2020).

201. *See, e.g.*, LAHAV, *supra* note 153, at 57–63; Resnik, *supra* note 51, at 611.

202. *See generally, e.g.*, Scott Altman, *Selling Silence: The Morality of Sexual Harassment NDAs* (Univ. of S. Cal. Legal Stud. Rsch. Paper Series, Paper No. 19-29, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3444638 ("NDAs that hide serious torts or crimes help repeat perpetrators avoid detection and punishment (both official and social), thereby increasing the risk of harm to future victims. When early victims speak openly, they warn potential future victims of risk."); Gilat J. Bachar, *A Duty to Disclose Social Injustice Torts*, 54 ARIZ. ST. L.J. 41 (2023) ("[D]espite the private nature of torts, failing to disclose wrongs arising from social injustice will allow wrongdoing to persist throughout society."); Ashwini Vasanthakumar, *Epistemic Privilege and Victims' Duties to Resist Their Oppression*, 3 J. APPLIED PHIL. 465 (2018) ("In many cases, only perpetrators and victims are aware that grave injustices are occurring, so absent a change of heart from perpetrators, it is only with the escape of some victims that any capable bystanders are created.").

subject matter.[203] But civil procedure can't completely prescind from substance so long as it wishes both to honor the public values most directly implicated by the resolution of disputes through civil litigation and to respect the personal interests and moral beliefs of the individuals who participate in the institution.

B. RETHINKING CIVIL LITIGATION'S PURPOSES

Whatever reforms this Article's account of civil procedure's extant accommodations might suggest, the account's most fundamental implication is to unsettle the predominant scholarly understanding of the institution of civil litigation. Most civil procedure scholars understand litigation instrumentally, as a means of realizing various public goals—whether the deterrence of violations of the law,[204] the private enforcement of governmental regulatory policy,[205] the catalyzation of public law enforcement efforts,[206] transparency about the activities of governmental institutions and private businesses,[207] or the development of legal norms.[208] Consistent with this instrumental outlook, scholars tend to conceive of plaintiffs as "private attorneys general,"[209] adopt a systemic perspective that focuses on classes of claims and categories of cases rather than individual litigants,[210] and analyze the consequences of parties' litigation conduct rather than the reasons for which parties engage in it.[211] Most civil procedure scholars, in short, view civil procedure as fundamentally a form of public law and civil litigation as a fundamentally public institution.[212]

Civil procedure's accommodations resist each of the elements of a public law conception of civil litigation.[213] Rather than single-mindedly promoting public goals, the accommodations permit parties to engage in litigation conduct that compromises public values as they pursue their own private interests. Nor do the accommodations presume that parties, by engaging in such conduct, will fortuitously realize public objectives, in the manner of a "private attorney general." And the accommodations draw our attention to individual parties and

203. *See* Cover, *supra* note 88, at 718.

204. *See, e.g.*, FARHANG, *supra* note 16, at 8–9.

205. *See, e.g.*, Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 646–47 (2013); *see supra* notes 16–17 and accompanying text.

206. *See, e.g.*, Nora Engstrom & Robert L. Rabin, *Pursuing Public Health Through Litigation: Lessons from Tobacco and Opioids*, 73 STAN. L. REV. 285, 328 (2021).

207. *See, e.g.*, LAHAV, *supra* note 153, at 58–63.

208. *See, e.g.*, Colleen F. Shanahan, Jessica K. Steinberg, Alyx Mark & Anna E. Carpenter, *Lawyerless Law Development*, 75 STAN. L. REV. ONLINE 64, 65 (2023), https://review.law.stanford.edu/wp-content/uploads/sites/3/2023/05/Shanahan-et-al.75-Stan.-L.-Rev.-Online-64.pdf.

209. *See supra* note 17 and accompanying text.

210. *See, e.g.*, Brooke D. Coleman, *Endangered Claims*, 63 WM. & MARY L. REV. 345, 349–50 (2021); Gilles, *supra* note 55, at 1538.

211. *See, e.g.*, Avraham & Hubbard, *supra* note 7, at 4–5; Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575, 577 (1997).

212. *Cf.* Leon Green, *Tort Law Public Law in Disguise*, 38 TEX. L. REV. 1, 1–3 (1959) (expounding an analogous public law conception of tort law).

213. *Cf.* Balganesh, *supra* note 86, at 185 ("Redressive autonomy is the conceptual anti-thesis of the private attorney general idea.").

the particular reasons for which they act during litigation. A public law conception of litigation, in short, fails to account for the institutional structure created by civil procedure's accommodations.[214] As Balganesh puts a similar point regarding plaintiffs' power to sue:

> The private attorney general model readily presumes that the statutory origin of an area of law infuses it with collectivist goals, which renders it a body of public law regardless of the substance of the rights and duties created. Yet, creating a mechanism of private redress and delegating normatively salient decisions to a right-holder introduce important private-regarding considerations into the regime, all of which emanate from the autonomous nature of the individual making decisions. The decision whether to treat an action as [wrongful] *and* do so publicly through a mechanism of private redress is a deeply interpersonal one, inevitably driven by subjective considerations that the law is perfectly fine with countenancing. The idea of a private attorney general eliminates this nuance.[215]

So, too, a public law account of civil litigation tends to exaggerate the significance of "collectivist goals" and to diminish, if not obscure, the prominent role that "private-regarding considerations" play in the institution, a role underwritten largely by civil procedure's accommodations. We need a more nuanced account that captures the complex interaction between parties' personal interests and public values in civil litigation.

Such an account would begin by recognizing that civil procedure pursues public values not directly, but through a particular institutional structure with its own normative logic.[216] That structure, which includes the accommodations, can subtly alter the public values that civil procedure espouses, lending them a different cast than they have in other institutional contexts. The rule of law looks different in litigation than it does in an administrative agency, and that's largely because the former institution provides much more room for the expression of individuals' personal autonomy than the latter does. Just as we must "recognize[] th[e] normative role that a mechanism of private redress plays in the structuring of a [legal] regime, and the unique interpersonal values and goals that it

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214. And indeed, proponents of a public law conception of civil litigation seem to effectively concede the conception's poor fit with the extant institution when they advocate throughgoing reforms that seek to better align litigation with public policy goals. *See, e.g.*, David L. Noll & Luke P. Norris, *Federal Rules of Private Enforcement*, 108 CORNELL L. REV. 1639, 1642 (2023); *cf.* Anthony Sangiuliano, *Against Moralism in Antidiscrimination Law*, 73 U. TORONTO L.J. 467, 470 (2023) (advocating an "instrumentalist," rather than "moralist," account of antidiscrimination law but conceding that such an account requires jettisoning civil recourse—a core feature of current antidiscrimination law—in favor of administrative enforcement).

215. Balganesh, *supra* note 86, at 185.

216. The account would, in other words, be an "internal" or "legal" one, seeking to capture the internal point of view or self-understanding of the institutions' participants. *See, e.g.*, STEPHEN A. SMITH, CONTRACT THEORY 29 (2004); WEINRIB, *supra* note 136, at 8. Though given the prominent role of public values in civil litigation, the account must also incorporate "external," functionalist considerations. *Cf.* Gold & Smith, *supra* note 122, at 506 n.70 (advocating "inclusive internalism" as an approach to private law theory). *But see* Charles L. Barzun, *Inside-Out: Beyond the Internal/External Distinction in Legal Scholarship*, 101 VA. L. REV. 1203, 1208–09 (2015).

introduces into the law,"[217] so we should appreciate the ways in which the introduction of such personal considerations can reshape the public values an institution such as civil litigation must also answer to.[218]

Any compelling theory of civil procedure must therefore take account of how civil litigation functions as what Andrew Gold and Henry Smith call a "complex" system.[219] According to Gold and Smith, when a system is "complex," "it is hard to infer the properties of the whole from the properties of its parts"; in private law, for instance, the powers parties exercise and the rights and duties governing their relations with each other don't "relate to" the system's broader "societal effects" for values such as efficiency and justice in straightforward ways.[220] The same is true of litigation generally, and that's largely because of civil procedure's accommodations, which complicate the connections between parties' conduct in individual cases and the public values we expect the civil justice system as a whole to instantiate. Gold and Smith nonetheless seem relatively sanguine about the prospect of harmonizing the individualistic structure of private law litigation with systemic values. By adopting a degree of "modularity" that allows individual cases to be processed through relatively simple doctrinal categories, they contend, private law can ensure that systemic values remain "emergent" in the system as a whole even if they're not "infused directly" into any particular case.[221] Civil procedure's accommodations, however, appear to preclude such a strategy when it comes to the public values most directly implicated by civil litigation, for not only do the accommodations frustrate the full realization of those values, but their discretionary, ad hoc nature defies the kinds of simplifying doctrinal structures that might stabilize courts' procedural decisionmaking so as to permit the values to "emerge" from the litigation of myriad cases in predictable ways. The specific type of complexity introduced by the accommodations thus ends up fundamentally altering the public values at play in civil litigation rather than merely deferring them to a higher level of the system. And insofar as we think the accommodations respond to important values of their own—as I've argued they do—that transfiguration can't be avoided. For civil procedure scholars, then, the task becomes less to explain how litigation realizes public values, defined in the abstract, and more to develop accounts of those values grounded in the particular institutional context that forms them.

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217. Balganesh, *supra* note 86, at 185.

218. Of course, the converse is also true: the institutional structure of litigation, including the public values it seeks to promote, can affect parties' conceptions of their own interests. *Cf.* William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631, 642–43 (1980) ("[T]he relationship between objectives [of disputants] and mechanisms [of dispute resolution] is reciprocal; not only do objectives influence the choice of mechanisms, but mechanisms chosen may alter objectives.").

219. Gold & Smith, *supra* note 122, at 490–91.

220. *Id.* at 490–91, 494–97 (explaining the features of complex systems).

221. *Id.* at 500–04.

CONCLUSION

Perhaps uniquely among liberal political institutions, civil litigation authorizes private parties to use public power to pursue their own personal interests. It does so by declining to consistently compel parties to internalize all the moral costs of their litigation conduct—by granting them accommodations. While the accommodations can compromise the pursuit of important liberal values, such as distributive justice and the rule of law, they help to honor another basic liberal commitment: allowing individuals to display partiality for their own relationships, projects, interests, and beliefs as they exercise their autonomy. It is particularly important to accommodate individual autonomy in civil litigation. For even as the institution seeks to resolve private disputes according to public values, it relies on private parties to bring their disputes to court and to impel their lawsuits through the various stages of the litigation process. This party control means that individuals' personal interests are implicated in litigation to a greater extent than in almost any other political institution; at nearly every turn, litigation presents parties with fundamental choices that test their deepest personal commitments. In a political system that generally equates public institutions with the impartial pursuit of public values, civil procedure's accommodations allow the institution of civil litigation to provide a valuable forum in which individuals can come as they are, showing partiality for their own personal interests and beliefs even as they participate in an essential public enterprise.