Procedural Justice as Fairness*

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Philosopher John Rawls argues in his recent book, *A Theory of Justice,* that trustworthy principles of justice will emerge as the result of an original agreement produced in a properly defined initial situation. The idea of a social contract is not new, but Rawls' ideal initial situation and its implications establish his work as genuinely unique. One distinguished critic has called the book "the most important work in moral and social philosophy published since World War II" and another has called it "the great achievement of a generation in political and moral philosophy." Rawls considers "justice as fairness" a proper name for his theory because "it conveys the idea that the principles of justice are agreed to in an initial situation that is fair." For Rawls, the ideal initial situation would "nullify the effects of specific contingencies which put men at odds and tempt them to exploit social and natural circumstances to their own advantage." The key characteristic of this primary condition is the existence of a "veil of ignorance," the provision that participants do not know their particular physical, psychological, and cultural characteristics—factors that set them apart from and "at odds" with other individuals. Participants, however, are presumed to know general facts about society which might affect their

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4. J. RAWLS, supra note 1, at 12.
5. Id. at 136.
6. Id. at 137. These factors include the participants' social class, their natural assets and abilities, their conception of the good, their special psychological features, the features of their own society, and the generation to which they belong.

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choice of principles of justice, including the nature of politics, the principles of economic theory, the basis of social organization, and the laws of human psychology. Motivation to select among the alternatives despite the participants' lack of any specific aims or interests is supplied by Rawls' provision that persons in the original position "would prefer more primary social goods rather than less." This general desire will cause a rationally self-interested choice of principles of justice in the original position.

According to Rawls, "What these individuals will do is then derived by strictly deductive reasoning from these assumptions about their beliefs and interests, their situation and the options open to them." He argues that of an established set of alternatives, rational participants would choose two principles of justice which may be generally stated as follows: First, "each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others," and, second, that "[s]ocial and economic inequalities are to be arranged so that they are both (a) to the greatest benefit of the least advantaged and (b) attached to offices and positions open to all under conditions of fair equality of opportunity." These principles are regarded as being serially ordered such that equal liberty takes precedence over the others and equal opportunity takes precedence over social and economic inequalities.

Rawls' general theory of the nature of justice as fairness is clearly of the highest importance. Our present purpose, however, is to illuminate a problem of more limited scope by exploiting a methodological hint from Rawls' description of the original position and its key component, the veil of ignorance. In a series of prior studies, we have begun a systematic examination of the comparative characteristics of the adversary and inquisitorial systems of decisionmaking by using psychological laboratory techniques to create conflict-resolution situations. The reactions of participating decisionmakers, attorneys, disputants, and observers were measured with the ultimate objective of determining which of the two ideal systems provides the more just decisionmaking procedure. Rawls' concept of the original

7. Id. at 137.
8. Id. at 142. Primary social goods are "rights and liberties, opportunities and powers, income and wealth." Id. at 92.
9. Id. at 119.
10. Id. at 60.
11. Id. at 83. The "final statement" of the two principles appears in id. at 302. The two versions given here are less detailed but contain the essence of the final version.
12. Id. at 42-45, 61, 153-52, 302-03.
position and its veil of ignorance suggests a rather different method for evaluating the degree of justice incorporated in legal procedure: place actual subjects in a laboratory setting behind a veil of ignorance and ask them to choose under certain conditions between a number of procedural alternatives.

Such an examination of particular procedural models is different in kind from Rawls' interest in determining broad principles to regulate the main institutions of society. In fact, as one commentator has pointed out: "In formulating his principles of justice, [Rawls] assumes that [his principles of justice] will be followed. Hence, he is not primarily concerned with corrective justice—for instance, he does not much discuss the substantive law of crimes or of private and public civil wrongs, or the related law of procedure." Furthermore, it is probably not possible to create in a laboratory or elsewhere all the complex conditions of the original position. Yet, there seems to be no reason why legal procedures cannot be the object of a social contract and even if Rawls' ideal initial position cannot be fully operationalized, a research paradigm incorporating its essential element and a number of other supporting characteristics holds much promise for the development of new insight.

I. Adjudicatory Systems

The differences between adversary and inquisitorial systems are perhaps most evident in the variety of procedures incorporated in the legal processes of the modern Western world. The cleavage is most evident between the procedures of continental European countries (which are influenced predominantly by the inquisitorial model) and those of the United Kingdom and the United States (which are influenced predominantly by the adversary model), but the richest variety of the two basic models can be found and illustrated within each of the two legal cultures.

Within the legal process of the United States it is possible to describe at least five basic procedural variants which compose a simplified spectrum of modes of dispute resolution. The first variant is the pure inquisitorial model, characterized by an activist decisionmaker directly developing the facts in interaction with involved persons and then reaching and announcing a decision. One example is the procedure of the congressional committee that interrogates witnesses in an informal proceeding almost


15. For comparisons of the two systems see Lacy, "Civilizing" Nonjury Trials, 19 Vand. L. Rev. 73 (1966), and Ploscowe, The Development of Present-Day Criminal Procedures in Europe and America, 48 Harv. L. Rev. 433 (1935).

totally controlled by its members. The work of the President's Commission on the Assassination of President John F. Kennedy furnishes a well-known example of inquisitorial process. In a particularly revealing step the Commission temporarily refused to recognize a volunteer representative of Lee Harvey Oswald on the ground that the proceedings were nonadversary in nature.\(^7\)

The second variant, a modification of the inquisitorial system, may be called the “single investigator” model. Here a moderately activist decisionmaker is assisted by an investigator whose rewards are controlled by the decisionmaker and whose role definition is that of an impartial and unbiased truthseeker. The disputants are largely restricted to furnishing requested information, though the opportunity to interact with an investigator may slightly increase the disputants' opportunity to control the procedure. Operating versions of the single investigator model are found in the decisionmaking processes of a number of federal administrative agencies where hearing examiners are commissioned to investigate particular disputes carefully and then make detailed reports to those charged with the ultimate responsibility for judgment.\(^8\) For example, such a procedure is specifically authorized for the National Labor Relations Board.\(^9\)

The third model may be called the “double investigator” system. In this model the decisionmaker is less activist than in the two prior models because he is assisted by two investigators both of whom are employed by the decisionmaker to assist in reaching a just result. Each is assigned to investigate the contentions of one of two (or more) disputing parties and is required to report the facts to the decisionmaker for judgment. The court-martial of the United States illustrates this model. Military judges are relatively passive; they are not charged with planning or developing the case nor with interrogating the witnesses.\(^10\) Considerable responsibility is assigned to the representatives of the Government and the accused, but both representatives are paid by the same authority, which also employs the decisionmaker.\(^11\) Thus a considerable amount of cooperative behavior is facilitated.

The fourth variant is the “adversary system” in which the decision-

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\(^7\) Rosenberg, *The Warren Commission*, THE NATION, Sept. 14, 1964, at 110. The Commission later partially changed its position on this issue and appointed a prominent lawyer to represent Oswald's interests. *Id.* at 111.


maker or judge is relatively passive and in which the proceedings are chiefly controlled by the disputants through advocates who represent them in an openly biased way. An excellent example of this model in operation is the system of civil procedure that is followed in American state and federal courts.\(^{22}\)

The fifth model is bargaining, a procedure somewhat like the adversary system because it is primarily under the control of the disputants. It is different from the adversary system because disputants meet in an attempt to resolve the dispute without the intervention of any third party. Bargaining is implicitly (and sometimes explicitly) encouraged in the American legal process.\(^{23}\) Its most familiar manifestations are settlement in civil cases and plea bargaining in criminal cases, both of which involve negotiation controlled by the parties or their representatives without third party intervention.

These five types of procedure for conflict resolution lie on a continuum characterized by progressively decreasing degrees of control over the procedure by the decisionmakers. At one end of the continuum is the inquisitorial procedure in which nearly all of the control over the hearing process is allocated to the decisionmaker; at the other end is the bargaining procedure from which the decisionmaker has vanished, leaving total control over the process in the hands of the disputants.

II. Experimental Design

Individuals who are already involved in one side of a legal dispute are likely, given the choice, to choose the method of adjudicatory procedure that most favors their position. Taking the methodological approach of Rawls' theory of justice, one can attempt to determine the most just adjudicatory procedure by asking an individual to choose a particular system before he becomes a disputant on either side of a legal dispute.

An experiment was designed to compare the preferences for these five adjudicatory models of individuals in front of and behind a veil of ignorance regarding their position in a legal dispute. Eighty-four male, undergraduate subjects reported to experimental sessions in groups of six. The subjects were told they would participate in a legal-decisionmaking task involving a dispute between two men, Adams—the defendant—and Zemp—the victim. The subjects were informed that Adams had been charged with assault by Zemp, who claimed Adams had used excessive force in repelling an attack by Zemp. "You will be paired off and asked to assume the

\(^{22}\) See F. James, Jr., Civil Procedure § 1.2 (1965).

\(^{23}\) See Fox, Settlement: Helping the Lawyers to Fulfill Their Responsibility, 53 F.R.D. 129 (1971).
role of one of these two men. . . . An actual hearing will be held based upon a case summary and fact cards containing evidence from the two sides, which you will be receiving in a few minutes. After a decision has been made, you will be paid $5.00 if the person whose role you have assumed is awarded the favorable decision.” The subjects were told that in the interest of fairness they would be allowed to choose the type of hearing procedure they wished to be used to settle the dispute.

After the preliminary instructions the participants were given a brief general description of the events that led to the Adams-Zemp dispute.24 They received a written statement which informed them that the parties had been close friends for years but recently had begun to gamble heavily with each other and, as matters became complicated, met in a tavern to discuss their relationship. After conversation, Zemp knocked Adams to the floor and threw an object in his direction. Adams responded by stabbing Zemp in the stomach with a piece of glass. The statement concluded with a rule of law: It is unlawful to use more force in repelling an attack than a person believes necessary or than a reasonable person would believe necessary in the same or similar circumstances.

Cards containing items of evidence which could be used in the hearing were then distributed to the subjects. The facts were selected according to the results of a pretest to favor strongly the victim Zemp over the defendant Adams. Ten of the items indicated that the response was unjustified and thus favored Zemp; only four items indicated the response was lawful and thus favored Adams. After being given an opportunity to study both the statement and the fact cards, the participants were given an opinion questionnaire to determine whether or not they believed the facts favored Zemp.

After the questionnaire was completed, the subjects were either reminded that they did not know which role they would ultimately be asked to assume, thus emphasizing that they remained behind a veil of ignorance, or were told they had been assigned by a coin toss either to the part of Adams or Zemp, thus placing these subjects in front of the veil of ignorance. Thirty-six subjects were left behind the veil and twenty-four were assigned to each of the conditions in front of the veil.

Detailed descriptions of the hearing procedures were then distributed. The five alternative procedures presented were intended to represent the five dispute-resolution models discussed above: inquisitorial, single investigator, double investigator, adversary, and bargaining. The models were described simply in terms of the experimental setting and an effort was made to use totally neutral terms in the presentation of the alternatives. For example, the inquisitorial model was described to the subjects as follows:

24. The case was similar to that used in several of the prior studies cited note 13 supra.
Hearing Procedure A

1. Decisionmaker—Under this procedure the hearing will be conducted by a decisionmaker appointed by the experimenter from a pool of law students. He will learn the facts at the hearing by requesting them from Adams and Zemp. When he has decided that he has all of the facts necessary to reach a decision, he will close the hearing, deliberate, and announce his decision.

2. Investigators or Representatives—There will be no investigators or representatives.

3. Disputants—Adams and Zemp will furnish the facts requested to the decisionmaker.

The other four descriptive statements were similar in tone and format. Only the fifth alternative, bargaining, was probably not an accurate abstraction of the real model because it was necessary to provide that the $5.00 could not be divided in order to maintain the win-lose character of the other four procedures. There nevertheless seemed merit in including

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25. The remaining hearing procedures were described as follows:

Hearing Procedure B

1. Decisionmaker—Under this procedure the hearing will be largely conducted by a decisionmaker appointed by the experimenter from a pool of law students. He will, however, be assisted by an investigator whom he will appoint from a pool of law students. The investigator will find out the facts from both Adams and Zemp before the hearing, and then at the hearing, will repeat the facts for both sides of the case to the decisionmaker. The decisionmaker may ask questions about the investigator’s presentations. Following this the decisionmaker will close the hearing, deliberate and announce his decision.

2. Investigators or Representatives—An investigator appointed by the decisionmaker will obtain the facts from Adams and Zemp before the hearing. He will then prepare a case for each side, presenting both cases to the decisionmaker.

3. Disputants—Prior to the hearing Adams and Zemp will furnish the facts requested by the investigator.

Hearing Procedure C

1. Decisionmaker—Under this procedure a decisionmaker appointed by the experimenter from a pool of law students will in turn appoint two investigators. One investigator will be assigned to present facts favorable to Adams, the other, those facts favorable to Zemp. When the investigators have concluded their presentations, the decisionmaker will close the hearing, deliberate and announce his decision.

2. Investigators or Representatives—Two investigators, appointed by the decisionmaker, are assigned to obtain the facts of the case. One investigator is assigned to each disputant, but the investigators are representatives of the decisionmaker and not of either Adams or Zemp. During the hearing the investigators may ask questions about the facts presented by the other investigator.

3. Disputants—Prior to the hearing Adams and Zemp will furnish the facts requested by the investigator assigned to present their side of the case.

Hearing Procedure D

1. Decisionmaker—Under this procedure a decisionmaker appointed by the experimenter from a pool of law students will learn the facts of the case from representatives of Adams and Zemp. After the representatives have concluded their presentations, he will close the hearing, deliberate, and announce his decision.

2. Investigators or Representatives—Representatives will be chosen by Adams and Zemp from a pool of law students. Each will present facts favorable to the side he represents. They may oppose each other’s presentations through questioning and rebuttal.

3. Disputants—Adams and Zemp will meet with their representatives prior to the hearing to turn over and discuss the facts.

Hearing Procedure E

1. Decisionmaker—There is no decisionmaker.

2. Representatives or Investigators—There are no representatives or investigators.

3. Disputants—Under this procedure Adams and Zemp will meet together to discuss the facts and decide on an outcome. The $5.00 cannot be divided and the negotiation must be completed in 1 hour or no payment will be made.
the alternative as at least the theoretical endpoint on the procedural continuum.\textsuperscript{26}

After their opportunity to consider the procedural alternatives, subjects were asked to complete two additional questionnaires. In the first, they were asked to assign a numerical value between $-8$ and $+8$ to each of the five procedures, according to how much they wanted that procedure used in their hearing. The second questionnaire asked the participants to indicate on a scale of 1 to 9 how much they believed the procedure favored the disadvantaged party, favored the advantaged party, gave an opportunity for the disadvantaged party to present evidence, gave an opportunity for the advantaged party to present evidence, and was fair to both sides. They were also asked to indicate on a scale of 1 to 15 how much control they believed the decisionmaker would have, they themselves would have, and their opponent would have under each of the five procedures.

After completing both questionnaires the subjects were arranged in pairs and each pair was assigned to a small room adjoining the central experimental room. Subjects in front of the veil were arranged so that a disadvantaged and an advantaged party were in each room; those behind the veil were randomly paired. Each pair was asked to complete the same preference rating previously completed by the individual subjects. They were told 20 minutes would be allowed to negotiate an agreement about the score they wished to assign to each of the procedures and that the procedure that received the highest rating would be used for their hearing. Most pairs finished and returned to the central room within 10 minutes; all finished within half an hour.

For subjects in front of the veil of ignorance the experiment ended after the agreement on preferences. Subjects behind the veil were asked to complete one final questionnaire intended to assess their degree of identification with the advantaged or disadvantaged party. Finally, all subjects were told no hearing would be conducted and all were debriefed and paid $5.00 for their participation.

Obviously the "behind-the-veil" condition of the experiment did not create in full the original position as it is described by Rawls, but there are a number of analogous elements. Persons with general knowledge were brought together and asked to contemplate and then to negotiate in pairs an agreement that would control their future relationship. Both persons anticipated that one would be advantaged and the other disadvantaged in

\textsuperscript{26} One-half of the subjects behind and in front of the veil received diagrams along with the hearing procedure descriptions. The diagrams illustrated the relative spatial locations of decision-makers and involved parties under each hearing procedure.

Viewing the diagrams did not cause any major effect. The few effects obtained were small and uninterpretable.
some later competition for a significant reward, but neither knew which position he would ultimately occupy. Under these conditions, the parties expressed preferences from a short list of important alternatives. Yet this modest claim of similarity must be cautiously asserted because among the elements cited there are obvious differences between the experiment and Rawls' concept. Advantage and disadvantage, defined in terms of evidence about a particular incident, are much more specific than the relationships described by Rawls. However, the decision to create the special kind of differential advantage used in the present experiment was based on the common impression that in trial courts this kind of disparity is often produced by differences of the sort Rawls specifies—social class, natural assets and abilities, and so forth. Further, the choices posed in the experiment are more specific than the broad social principles seen by Rawls as the object of his social contract. Also, to facilitate potentially useful comparisons, the experiment measured individual preferences of persons behind a veil of ignorance and individual and mutual preferences of persons not behind a veil of ignorance, two features not incorporated at all in Rawls' description of the original position.

III. Results

A. Perception of the Hearing Procedures

Subjects in all experimental conditions perceived the amount of decisionmaker control under a given procedure to decrease steadily from the inquisitorial to the adversary procedure.\(^\text{27}\) This provides assurance that the hearing procedures were perceived by the subjects as intended. No significant differences in perception of decisionmaker control were found among the three experimental groups. A difference is defined to be significant when statistical analysis yields an index of a size that would occur by chance less than 5 times in 100 instances, written as \(p < .05\). Smaller "p" values provide greater assurance that the difference was not the result of chance.\(^\text{28}\)

\(27\) Ratings by the three role positions of degree of control by decision maker in the various procedures:

<table>
<thead>
<tr>
<th>Procedure</th>
<th>Inquisitorial</th>
<th>Single Investigator</th>
<th>Double Investigator</th>
<th>Adversary</th>
</tr>
</thead>
<tbody>
<tr>
<td>Behind the Veil</td>
<td>12.25</td>
<td>9.92</td>
<td>9.42</td>
<td>8.58</td>
</tr>
<tr>
<td>In front of the Veil</td>
<td>12.04</td>
<td>9.63</td>
<td>9.30</td>
<td>8.42</td>
</tr>
<tr>
<td>Disadvantaged</td>
<td>11.92</td>
<td>9.38</td>
<td>9.08</td>
<td>8.42</td>
</tr>
<tr>
<td>Advantaged</td>
<td>11.92</td>
<td>9.58</td>
<td>9.08</td>
<td>8.42</td>
</tr>
</tbody>
</table>

Ratings were made on a scale of 1 to 15 on which values above 8 indicated "too much control" and values below 8 "too little control." Ratings were, of course, not made of the bargaining procedure.

\(28\) The significance of the results reported in this section was determined by the appropriate multivariate analysis of variance technique using the method of unweighted means. If a multivariate difference exists among the three experimental conditions, individual measures are then tested for
The mean response of all subjects to a measure assessing their perception of the extent to which the evidence favored a particular party was 11.57 on a 15-point scale (with 1 “favors Adams” and 15 “favors Zemp”). This indicates that subjects believed that Zemp, the victim, was in an advantageous position, and that Adams, the defendant, was in a disadvantageous position.

B. Individual Preference Ratings

Individual preference ratings for subjects in the three experimental conditions are shown graphically in Figure 1. Statistical analysis of the ratings of the five dispute-resolution models by the subjects in the various experimental conditions reveals that subjects in all roles expressed greatest preference for the adversary procedure, but that the decreasing preference ordering of the other four procedures differed according to experimental condition. For those behind the veil, the decreasing ordering was double investigator, inquisitorial, single investigator, and bargaining. Subjects in the disadvantaged role also ordered the double investigator procedure second, followed by equal preference for the inquisitorial and bargaining procedures, with the single investigator procedure least preferred. Advantaged subjects expressed equal preference for the double investigator and inquisitorial procedures, followed by a decreased preference for the single investigator procedure, and least preference for the bargaining procedure. For subjects in all three roles, the difference between adjacently ranked procedures is highly significant (\( p < .001 \)), with the exception that the difference in preference between the double investigator and inquisitorial procedures is significant at \( p < .032 \) for both the behind-the-veil and disadvantaged roles.

With these different preference orderings in mind, it may be helpful to examine each of the five hearing procedures separately to determine if subjects in different roles preferred a given procedure more than did those in other roles. It had been predicted that subjects in the advantaged role would...
prefer the inquisitorial and single investigator procedures more than would subjects in the disadvantaged role, since these procedures could be expected to provide for the expeditious transmission of evidence to the decisionmaker with little distortion by partisan legal representatives. This expectation was confirmed, for the difference in preference for the inquisitorial procedure between these two roles is significant at $p < .032$, and the difference in preference for the single investigator procedure is significant at $p < .009$.\textsuperscript{31}

\textsuperscript{31} The two tests of significance reported here are "one tailed" because the planned comparison...
It was also expected that individuals in the disadvantaged role would prefer the adversary procedure more than would those in the advantaged role, because the adversary procedure could be expected to enable the disadvantaged party to bolster his case and dispute his opponent’s contentions through the services of a competent legal representative sympathetic to his position. This hypothesis was also confirmed ($p < .03$). Subjects in the disadvantaged role were also found to prefer the bargaining procedure more than those in the advantaged role ($p < .017$) and more than those behind the veil ($p < .052$). No significant difference in preference for the double investigator procedure was detected among the three roles.

C. Correlates of Preference Ratings

In order to determine what factors subjects took into account in rating the five hearing procedures according to preference, eight “pattern scores” were developed to indicate for each subject the correlation between his preference ratings for the five procedures and his ratings of the procedures’ degrees of fairness, favorability to the disadvantaged party, favorability to the advantaged party, and so forth. Descriptively, a pattern score represents the extent to which a graph of a subject’s preference ratings would coincide, for example, with a graph of his fairness ratings. In general, these pattern scores represent the extent to which preference ratings may be predicted by other ratings. Highly positive scores indicate a close relationship between preference and one of the other eight ratings, while highly negative scores represent a strong inverse relationship. Hence, a highly positive pattern score relating fairness to preference would indicate that in making preference judgments, subjects took into account and were perhaps guided by their estimates of the relative fairness of the various procedures. Mean values of these pattern scores are shown in Table 1.

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between the advantaged and disadvantaged roles involved a directional hypothesis. All other tests reported in this section are two tailed unless otherwise indicated.

32. One tailed test of significance.

33. It should be noted that the correlations were not computed in the traditional manner across subjects, but a correlation was computed for each subject across the five hearing procedures to represent the degree to which his preference ratings correlated with his other ratings of the procedures’ characteristics. Since the eight correlations computed for each subject are simply transformations of his various ratings, they can be considered as correlation scores and subjected to further statistical analysis to determine differences among the three roles with respect to these scores. Because the distribution of correlation coefficients is nonnormal, the correlation scores were transformed into what we have labeled “pattern scores” according to the following formula, where $r$ is a correlation score:

$$\text{pattern score} = \frac{1}{2} \log_e \left( \frac{1+r}{1-r} \right)$$

The following table equates some correlations with these pattern scores:

<table>
<thead>
<tr>
<th>correlation</th>
<th>pattern score</th>
<th>correlation</th>
<th>pattern score</th>
</tr>
</thead>
<tbody>
<tr>
<td>.00</td>
<td>.000</td>
<td>.60</td>
<td>.693</td>
</tr>
<tr>
<td>.10</td>
<td>.100</td>
<td>.70</td>
<td>.867</td>
</tr>
<tr>
<td>.20</td>
<td>.203</td>
<td>.80</td>
<td>1.099</td>
</tr>
<tr>
<td>.30</td>
<td>.310</td>
<td>.90</td>
<td>1.472</td>
</tr>
<tr>
<td>.40</td>
<td>.424</td>
<td>.99</td>
<td>2.647</td>
</tr>
<tr>
<td>.50</td>
<td>.549</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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The best predictor of subjects’ preference ratings, regardless of experimental condition, is their rating of the fairness of the various procedures, with greater preference expressed for those procedures deemed most fair. A graph of mean fairness ratings, shown in Figure 2, reveals that fairness judgments do correspond closely with preference judgments as shown in Figure 1.34

While for all subjects the judged fairness of the procedures was highly correlated with their preference ratings, differences did appear among the different roles with respect to other pattern scores in Table 1. Subjects in the disadvantaged role and those behind the veil indicated greater preference for those procedures that favored the disadvantaged party, while advantaged subjects showed a slight negative relationship between those two ratings. (The differences between the advantaged role and the other two roles were both significant at p < .001.) Subjects behind the veil and disadvantaged subjects in front of the veil also differed from advantaged subjects in the degree of correlation between their preference rating and the extent to which they perceived hearing procedures to favor the advantaged party (p < .001 and p < .001). Similarly, the behind-the-veil and disadvantaged subjects did not prefer procedures favoring the advantaged party, while those in the advantaged role clearly did. With respect to the opportunity for the presentation of evidence for the two parties, subjects

34. The fairness ratings do not appear to account for the lesser amount of preference assigned to the single investigator model relative to the inquisitorial model; however, this does appear to be accounted for by subjects’ belief in front of the veil that they would have less control under this procedure, and by subjects’ belief behind the veil that there is too little opponent control under this procedure.
behind the veil departed from their bias in favor of the disadvantaged party, and like the advantaged subjects indicated a preference for procedures having equality of opportunity for the presentation of evidence. Disadvantaged subjects maintained their egocentricity and were significantly different from those behind the veil in exhibiting greater preference for those procedures that allowed the most opportunity for themselves to present evidence (p < .02).

The opponent control pattern scores reveal a difference between subjects behind and those in front of the veil, with the difference between the disadvantaged role and the behind-the-veil role significant at p < .001, and the difference between the advantaged role and the behind-the-veil role significant at p < .016. All roles preferred procedures minimizing decision-maker control and maximizing self-control.

D. The Meaning of Fairness

Since the best predictor of preference ratings for all roles is the subjects' fairness ratings, seven fairness pattern scores were constructed for each subject to represent the correlation between his fairness ratings and his ratings of the seven other characteristics of the procedures. The fairness pattern scores were constructed in the same manner as the previously discussed pattern scores, except that they indicate what characteristics subjects took

35. See note 28 supra.
into account in making judgments about the fairness of the hearing procedures. The mean values of these fairness pattern scores are contained in Table 2. Inspection of this table reveals that while subjects in all conditions preferred fair procedures, those in different roles interpreted the meaning of fairness differently. Subjects behind the veil viewed procedures as most fair that favor the disadvantaged party, provide opportunity for the disadvantaged party to present evidence, and provide little decisionmaker control. Those in the disadvantaged role were most concerned about their own predicament, and rated procedures as most fair that favor themselves, provide them with greater opportunity for evidence presentation, do not favor the advantaged party, and maximize self-control while minimizing decisionmaker and opponent control. Advantaged parties considered procedures most fair that provide opportunity for both parties to present evidence.

Consideration of differences among subjects in the various conditions with respect to each of the fairness pattern scores further reveals their dissimilar interpretations of fairness. Subjects behind the veil and those in the disadvantaged position show a more positive correlation between their view of a procedure's fairness and the extent to which they believe it favors the disadvantaged party than do subjects in the advantaged position (with differences significant at p < .007 and p < .001, respectively). The same difference among roles occurs with respect to the fairness pattern scores for the extent to which a procedure favors the advantaged party. Subjects in both the behind-the-veil and disadvantaged roles viewed procedures that favor the advantaged party as less fair, while those in the advantaged role

### TABLE 2

**Mean Fairness Pattern Scores**

<table>
<thead>
<tr>
<th>Measure</th>
<th>Behind the Veil</th>
<th>In-Front-of-Veil Disadvantaged</th>
<th>In-Front-of-Veil Advantaged</th>
</tr>
</thead>
<tbody>
<tr>
<td>Favors disadvantaged</td>
<td>.896(^a)</td>
<td>1.215(^a)</td>
<td>.191</td>
</tr>
<tr>
<td>Favors advantaged</td>
<td>-.295(^a)</td>
<td>-.712(^a)</td>
<td>.541</td>
</tr>
<tr>
<td>Evidence opportunity</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>for disadvantaged</td>
<td>.603(^b)</td>
<td>1.219(^b)</td>
<td>.602</td>
</tr>
<tr>
<td>Evidence opportunity</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>for advantaged</td>
<td>-.173(^a)</td>
<td>.280</td>
<td>.727</td>
</tr>
<tr>
<td>Decisionmaker control</td>
<td>-.1088(^a)</td>
<td>-.909</td>
<td>-.426</td>
</tr>
<tr>
<td>Self-control</td>
<td>.527</td>
<td>.867</td>
<td>.575</td>
</tr>
<tr>
<td>Opponent control</td>
<td>-.388(^b)</td>
<td>-.731</td>
<td>-.658</td>
</tr>
</tbody>
</table>

\(^a\) Significant difference between Behind and Advantaged.

\(^b\) Significant difference between Behind and Disadvantaged.

\(^c\) Significant difference between Advantaged and Disadvantaged.
disagreed, believing a procedure that favors themselves to be more fair 
(p < .006 and p < .001). Disadvantaged parties again maintained their 
egocentricity with respect to the fairness pattern score for opportunity for 
evidence presentation by the disadvantaged party: they attributed greater 
fairness to those procedures providing them with greater opportunity than 
did those behind the veil or those in the advantaged role (p < .006 and 
p < .001). The only difference among conditions with respect to the fair-
ness pattern score of evidence opportunity for the advantaged party oc-
curred between the behind and advantaged roles (p < .012). Subjects be-
hind the veil do not exhibit as strong a correlation between fairness and 
 opportunity for evidence presentation for the advantaged as do those in 
the advantaged role. A difference between these two roles also exists for 
the fairness pattern scores for decisionmaker control (p < .006), with those 
behind the veil more concerned in their fairness ratings about excessive deci-
sionmaker control than those in the advantaged condition. No significant 
differences among the various conditions were found for self-control; how-
ever, subjects behind the veil differed from those in the disadvantaged 
condition for the fairness pattern score for opponent control (p < .001): 
disadvantaged subjects perceived hearing procedures as less fair when they 
allowed their opponent a high degree of control.

E. Negotiated Preference Ratings

Preference ratings resulting from negotiations occurring behind and in 
front of the veil of ignorance are shown in Figure 3, along with individual 
preference ratings for those behind the veil. An analysis of these ratings 
reveals that the negotiated preference ordering for both the behind- and 
in-front-of-the-veil pairs was adversary, double investigator, equal rating of 
single investigator and inquisitorial, with bargaining last. (Differences in 
preference were all significant at p < .001.) Comparisons of behind- and in-
front-of-the-veil negotiated preference ratings of each of the hearing pro-
cedures reveal no significant differences between the two groups.36

An analysis of individual preference ratings behind the veil and nego-
tiated preference ratings in front of the veil was performed to determine 
if any differences existed in the ratings produced under these two condi-
tions. The analysis revealed no discernible difference in the preference 
rating curves for these groups. This would indicate that negotiation in 
front of the veil results in the same preference ratings as those made by 
individuals behind the veil of ignorance. Since the original position ap-

36. A marginally significant difference (p < .08) was found between behind- and in-front-of-the-
veil negotiated preference ratings for the adversary procedure, but this is not reliable, especially since 
the multivariate test that takes into account differences among the groups on all five hearing pro-
cedures was nonsignificant.
pears to defy perfect realization, negotiations between interested parties may constitute a useful, if rough, substitute; at least under the present conditions they produce preference hierarchies that are indistinguishable from those behind the veil.

IV. Discussion

One of the clearest findings in our data is that the adversary procedure is judged by all of our subjects—both those in front of and behind the veil.
of ignorance—to be the most preferable and the fairest mode of dispute resolution. But it must be recognized that, in spite of our efforts to describe the various procedures in neutral, nonevaluative language and our use of alphabetic labels, our subjects may have identified the adversary format as representing a procedure that they believed to be the (culturally) prescribed alternative.

While cultural bias may be responsible for the pervasive preference for the adversary system among our subjects, it cannot account for the important parts of our data that reveal differences among the role positions. Tables 1 and 2 show that location behind or in front of the veil gives a different meaning to the judgments of preference and fairness made by subjects in the common culture. Consider the pattern scores for subjects behind the veil in the two tables. These scores reflect a preference for procedures that favor the disadvantaged while at the same time providing the disputants with roughly equal opportunity to present evidence and to exercise control over the proceedings. This is strikingly true for the preference pattern scores and only approximately true for the fairness pattern scores. This configuration of values stands in sharp contrast to the perspectives of the two positions in front of the veil. In particular, Table 1 shows that subjects behind the veil give positive weight to opponent control that is significantly different from the negative weights given by both roles in front of the veil. While subjects behind the veil give weight to the interests of the disadvantaged, they do so moderately and with less total commitment than do subjects who know they are disadvantaged. Subjects behind the veil do not respond as though they had simply identified themselves with the disadvantaged: in fact, we have evidence from the final questionnaire that they did not identify themselves with either side of the dispute. Precisely the same number of subjects reported identifying with the advantaged as with the disadvantaged party. Thus, "risk aversion," through a general fear of subsequently becoming disadvantaged, would not seem to be operative. Nor do subjects behind the veil appear to have adopted a perspective that gives equal weight to the competing sets of values through a simple process of "averaging" the divergent points of view; in Tables 1 and 2, behind-the-veil scores are sometimes higher than both of the in-front-of-the-veil scores and are sometimes lower.

In summary, subjects behind the veil adopted a perspective that led them to prefer (and to judge as fair) systems that they believed to favor the disadvantaged while tending to preserve equal access to channels of infor-

37. A bit of data exists that suggests that even outside the Anglo-American legal culture the adversary system may be preferred. A questionnaire administered in early 1974 to forty subjects at the University of Paris showed that the adversary model, as described in the present experiment, was chosen as preferable more frequently than any one of the inquisitorial variants used in the present research.
mation and to mechanisms of control. Thus, the principles of fairness in legal procedures developed in our simulation of the original position correspond rather well with those postulated by Rawls as the likely objects of agreement in the ideal original position.38

We may ask whether there exists a system that meets these criteria. From one of our earlier studies,39 the answer appears to be that there is and that it is the adversary system. This earlier study by Lind, Thibaut, and Walker examined experimentally the discovery and transmission of evidence by attorneys in adversary, inquisitorial, and mixed systems, which included both adversary and inquisitorial elements. The conclusion of the study was that the adversary system introduces a systematic evidentiary bias in favor of the party disadvantaged by the discovered facts. (The inquisitorial system was found to introduce no systematic distortion; the mixed system was always biased in favor of the party represented by an advocate.) The study suggested that this effect of the adversary system was caused by a more diligent search for evidence by adversary attorneys representing the disadvantaged side. Since in the previous experimental setting the opportunity to present evidence and maintain control over the procedure were equal for the two parties, the further conclusion is suggested that the fundamental adversary model corresponds generally with the conception of fairness held by the subjects behind the veil.

Did the subjects in this condition know of the apparent capabilities of the adversary system to provide both generally equal control and access and a systematic bias in favor of parties disadvantaged by the evidence? It seems especially unlikely that our present subjects behind the veil of ignorance could have intuited that the adversary system contained such processes for redressing imbalances. We can only assert that the perspective adopted behind the veil produced the particular conception of fairness that would in fact be embodied in the system they chose. Hence, though subjects in all role positions preferred the adversary system, the only role occupants who chose the system dictated by their own criteria were those in the original position behind the veil of ignorance. They are the only ones who got what they truly wanted.

V. Conclusion

The positions of interested parties in front of the veil of ignorance create conceptions of a just procedural system that are distinctly different from the conception created in the original position. That conception of procedural justice that uniquely implies the adversary system is created behind the veil of ignorance.

38. See text accompanying notes 8–12 supra.