NOTE[†]

THEIR BROTHERS' KEEPERS: PROCEDURAL JUSTICE IN THE INTERMEDIATE APPELLATE COURTS

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I
INTRODUCTION

What procedure must a legal system establish to be considered legitimate by the parties before it? How much information must a court collect, and in what way, before rendering a decision? When rendering a decision, to what extent must the court explain its reasoning and the facts that impacted its decision? Scholars, politicians, and the courts themselves have long debated these questions of procedural justice.[1] Historically, this debate was largely normative and theoretical.[2] But in the 1970s, psychologists began to empirically study whether individuals perceived court decisions as legitimate and whether certain procedures might impact that perceived legitimacy.[3]

Procedural Justice Theory has grown out of this empirical research. It argues that the level of procedure—comprised of the various procedural safeguards and participation rights—provided in litigation impacts how parties perceive the fairness of a court's decision.[4] This perception consequently impacts how likely parties are to follow the court's decision and the law more generally.[5]

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1. Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127, 138–40 (2011).

2. *Id.* at 140 ("The philosophical and legal theory perspectives . . . rely on philosophical conceptions about the nature of procedural justice . . . .").

3. *See id.* at 132–38 (discussing the empirical research developments on these issues since the 1970s).

4. *See generally* Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT'L J. PSYCHOL. 117 (2000) (explaining that criteria of procedural justice, like participation, neutrality and trustworthiness of decision-makers, and dignity and respect, influence whether a party views the procedures and outcomes as fair).

5. *See id.* at 119 (discussing research, for example, on how people who believe fair procedures leading to a particular outcome are more likely to follow those outcomes over time).

This field has primarily focused on studying and critiquing trial-level litigation.[6] But recent work has begun to explore how Procedural Justice Theory might apply to the intermediate appellate courts (IAC),[7] and initial results support the notion that procedural justice principles apply on appeal.[8]

This Note considers the role of the IACs to propose a new theoretical framework for applying Procedural Justice Theory to appellate procedure. The unique position of the IACs within our broader legal system likely impacts how their decisions and procedures affect parties. Parties may well bring their perceptions of the trial court's procedure to the appellate courts tasked with reviewing the conclusions of the court below. If an IAC ignores a trial court's procedural failings—or, worse, reinforces them through its own failing—then it risks compounding a party's perception that the court system is illegitimate.

Applying this framework, this Note identifies two distinct categories of procedural justice concerns that potentially arise in appellate litigation: discrete concerns that arise on appeal in much the same way as at trial, and aggregate concerns that incorporate potential procedural failings below.[9] These concerns might apply differently in various appeals and may cause parties bringing facially similar appeals to perceive certain procedure in vastly different ways. Further, these categories likely suggest the need for different types of reforms by the IACs. Thus, both researchers and the courts may benefit from considering how both discrete and aggregate procedural justice concerns might impact the parties on appeal.

This Note proceeds in four parts. Part II provides more background on procedural justice, both generally and in the IACs. Part III outlines the debate over error correction in the IACs and, drawing on the error correction debate, posits that the IACs' position in the American legal system gives rise to both discrete and aggregate procedural justice concerns. This Part further describes how the two categories might differ in both application and remedy. Part IV discusses asylum appeals in the Second Circuit to provide a real-world example of aggregate procedural justice in action. Part V concludes.

II

THE PROCEDURAL JUSTICE DEBATE IN U.S. COURTS

Although decisions by the IACs have public value because of their precedential effect on future litigation,[10] they may only be issued on an actual

6. *See* Merritt E. McAlister, *"Downright Indifference:" Examining Unpublished Decisions in the Federal Courts of Appeals*, 118 MICH. L. REV. 533, 565 (2020) ("There has been little work exploring the experience of procedural justice in the specific context of appellate litigation.").

7. *See, e.g.*, *id.* (providing an overview of unpublished opinions at the federal appellate level and discussing how unpublished opinions relate to procedural justice values).

8. *Id.* at 566 (citing Scott Barclay, *A New Aspect of Lawyer-Client Interactions: Lawyers Teaching Process-Focused Clients to Think About Outcomes*, 11 CLINICAL L. REV. 1, 1 (2004)).

9. *See infra* Part III.

10. *See* McAlister, *supra* note 6, at 561 (discussing how unpublished opinions, despite having only persuasive rather than precedential value, retain public value).

dispute between two parties and have the greatest impact on the rights and responsibilities of the parties to the appeal.[11] Recognizing this effect on the parties, scholars have begun to critique appellate procedure through the lens of Procedural Justice Theory. This Part discusses the procedural justice debate, both generally and in the IACs.

A. Procedural Justice: The Philosophical and Empirical Debate

Philosophers and legal scholars have long debated the question of what constitutes "due" or "fair" process in adjudication.[12] Participants in this debate have largely fallen into two camps: one camp focused on the outcome of the adjudication and the so-called dignitary camp focused on the process itself.[13]

The outcome camp argues that any legal system should, as its central goal, seek to maximize "substantively accurate outcomes."[14] From this central goal, courts should establish a procedure for adjudication that most likely leads to correct decisions.[15] Some procedures—including the opportunity for parties to brief the issues and arguments—help the adjudicator arrive at a correct result, while others—such as the ability to physically stand before the judge for argument—may not further that goal in every case. Thus, according to the outcome focused camp, courts should add or remove procedure to efficiently minimize the chance of substantive error.[16]

Conversely, the dignitary camp argues that procedure has intrinsic value independent from the ultimate decision. For example, Lawrence Tribe describes a party's procedural right to be heard as "analytically distinct from the right to secure a different outcome."[17] According to the dignitary camp, the societal benefits flowing from participation in the adjudication of one's legal rights are themselves fundamental to a legal system. Thus, on this theory, courts should establish a level of procedure that maximizes those benefits.[18]

Historically, this debate was largely theoretical and conceptual, focusing on the theoretical demands and the potential impact of specific procedures on

11. The impact on the parties is most direct in the case of unpublished opinions, which have only limited precedential value and constitute the majority of decisions rendered by the IACs. *See id.* at 561, 551 fig.2 (citing ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS tbl.B-12 (2018)).

12. *See* Hollander-Blumoff, *supra* note 1, at 130 (discussing the varied debate over the term as used within and between fields).

13. *Id.* at 138.

14. *Id.*

15. *Id.*

16. *Id.* at 138–39.

17. *Id.* at 139 (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 667 (2d ed. 1988)).

18. *See id.* ("As Tribe explained, 'At stake here is not just the much-acclaimed *appearance* of justice but, from a perspective that treats process as intrinsically significant, the very *essence* of justice.'").

hypothetical litigation.[19] In the mid-1970s, however, psychologists brought a subjective and empirical lens to the debate. Specifically, researchers began studying why people followed the law, focusing on whether certain procedures in an adjudication improved the likelihood that individuals would accept the results of a negative decision.[20]

The results of these studies suggest that the procedure afforded to parties impacts the likelihood that they will accept and adhere to an adverse decision.[21] When faced with a negative outcome, parties who feel that they were treated fairly during the dispute are more likely to view the decisionmaker as legitimate.[22] This legitimacy leads to greater respect for the negative decision and a greater likelihood that the parties will follow it.[23] Conversely, parties who feel that an authority treated them unfairly are more likely to view the authority as less legitimate. Consequently, those parties are less likely to obey both the specific decision and other laws imposed by that authority.[24] The research further suggests that, while litigants care most about the outcomes of litigation, they also *independently* care about how they perceive the system's fairness.[25]

This perception—the fairness of the authority—can be impacted by different procedures implemented in the adjudication.[26] Specifically, Tom R. Tyler has identified four principles of procedural justice that contribute to a party's perception of the fairness of an adjudication: (1) the extent to which the party believes she had an opportunity to be heard, (2) the neutrality of the forum, (3) the trustworthiness of the decisionmaker, and (4) the degree of dignity and respect afforded to the party.[27] These operate in tandem, and certain procedural rules may impact multiple considerations.[28]

First, parties place significant weight on "the opportunity to express their views to decision-makers."[29] Specifically, parties value participation even when they know that it "will not meaningfully affect the decision."[30] Thus, courts can

19. *See id.* at 149 (describing legal procedural due process as "explicitly normative" and "rely[ing] on philosophical conceptions about the nature of procedural justice rather than on any empirical research").

20. *See, e.g.*, JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975).

21. *See, e.g.*, McAlister, *supra* note 6 at 566 & nn.175–76 (citing TOM R. TYLER, WHY PEOPLE OBEY THE LAW 107–08 (1990)).

22. *Id.*

23. *Id.*

24. *Id.*

25. *See id.* at 563 ("That is not to say that outcomes are irrelevant to litigants, but it is to say that the treatment litigants receive matters *independently*." (citing Hollander-Blumoff, *supra* note 1, at 137)).

26. *See* Tyler, *supra* note 5, at 121 ("[A]uthorities that use fair decision-making procedures are viewed as more legitimate, and people more willingly defer to their decisions.").

27. *Id.* at 121–23.

28. *See* McAlister, *supra* note 6, at 564–65 (discussing how reasoned explanations improve a party's belief in the trustworthiness and neutrality of the tribunal, as well as the dignity and respect shown to the party).

29. Tyler, *supra* note 5, at 121.

30. Hollander-Blumoff, *supra* note 1, at 136.

support procedural justice (and improve their own legitimacy) by providing the opportunity for argument even when it will not affect the outcome of litigation. This consideration may be further enhanced by the way decisionmakers present their decisions. For example, Tyler suggests that litigants are more likely to accept a decision when the judge tells them that "[their] views were considered but (unfortunately) could not influence the decision . . . ."[31]

Similarly, the neutrality of the forum and trustworthiness of the decisionmaker are two related but distinct factors impacting a party's assessment of the "quality of decision making" and consequently the fairness of the process.[32] Parties view the forum as neutral if decisionmakers are impartial and objective, and do not allow personal bias to impact their decisions.[33] Decisionmakers are trustworthy when they show that they care about the parties and try to make a fair decision.[34]

Finally, parties respect decisions reached by adjudicators who treat them with dignity and respect throughout the process. Dignity and respect can be shown by listening to the parties, taking their arguments seriously, and providing a rational decision that explains what motivated each conclusion.[35]

Rebecca Hollander-Blumoff further theorizes that the identity of the parties may impact their experiences and ultimate conclusions regarding the fairness of adjudication.[36] For example, natural persons—especially the most vulnerable members of society—may experience all procedural justice failures more acutely than corporations or other "repeat players."[37]

Critical race theory scholars condemn this focus on procedure, arguing that it obscures the law's substantive impact on systemic inequality and racism and undermines substantive change.[38] Their claims are valid: No amount of procedural window dressing can fix substantive law that harms people. But procedural justice exists outside substantive law; it can undermine just laws and compound the negative effects of harmful ones. For this reason, it is worth

31. *See* McAlister, *supra* note 6, at 564 (quoting TOM R. TYLER, WHY PEOPLE OBEY THE LAW 149 (1990)).

32. Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 298 (2003); *see also* Hollander-Blumoff, *supra* note 1, at 136 ("Neutrality and trust are distinct but related factors.").

33. Tyler, *supra* note 5, at 122.

34. *Id.*

35. McAlister, *supra* note 6, at 564–65.

36. *See* Hollander-Blumoff, *supra* note 1, at 147–49 (describing how procedural justice compares between corporate entities and individuals).

37. *Id.*; *see also* McAlister, *supra* note 6, at 566–67 ("Natural persons, as opposed to the corporate appellants who dominate the first tier, may be more affected by these experiences. And society's most vulnerable members—including the poor and the prisoners who often proceed pro se on appeal—may experience procedural justice failures more acutely, as they injure self-esteem and threaten group inclusion.").

38. For example, Monica C. Bell argues that a focus on procedural justice implies that the problem of policing is rooted at some level in African Americans' refusal to follow the law, rather than "race- and class-subjugation." Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2061 (2017).

considering how procedure and procedural justice interact with substantive law.[39]

B. Appellate Procedural Justice

Much of the procedural justice debate has focused on adjudications of first instance—that is, trial litigation.[40] In the last thirty years, however, scholars have begun expanding the debate to consider the procedure given to parties on appeal.[41]

The relative recency of this debate is largely explained by the historical procedure afforded by the Circuit Courts. Prior to the 1970s nearly every federal appeal received the "Learned Hand Model" of appellate procedure, the sufficiency of which was never in doubt.[42] Under this model, every party to the appeal had the opportunity to brief their argument.[43] A three-judge panel heard oral argument, followed by a panel conference where the judges met to discuss their decisions.[44] One judge prepared a draft opinion, which was reviewed by the rest of the panel.[45] The authoring judge incorporated any notes before issuing a final opinion, which stated the facts and issue, the relevant law, the court's analysis, and the holding.[46] Finally, the remaining judges could dissent or concur to present their own decision on the issue.

The time and effort demanded by this lengthy review, and a growing federal docket crisis, put increasing strain on the Circuit Courts throughout the second half of the 20th Century.[47] In response to this crisis, the Circuit Courts implemented "modern case management"—relaxing the level of procedure afforded to certain cases in pursuit of judicial efficiency.[48] The number of cases receiving oral argument decreased, and the rate of summary disposition through unpublished opinions—shorter, party-oriented opinions often without a formal author—increased.[49] Judges also began relying more heavily on clerks to screen cases and in some instances draft opinions.[50]

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39. In this note, I do not propose enhanced procedure as a panacea. Rather, I hope to suggest that a lack of procedure may obscure substantive harms and compound their impact on affected parties.

40. *See* McAlister, *supra* note 6, at 565 & n.167 ("There has been little work exploring the experience of procedural justice in the specific context of appellate litigation.").

41. *See id.* at 565–66 (citing Scott Barclay, *A New Aspect of Lawyer-Client Interactions: Lawyers Teaching Process-Focused Clients to Think About Outcomes*, 11 CLINICAL L. REV. 1 (2004)).

42. Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 DUKE L.J. 315, 374 (2011); *see also*, William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 278 (1996).

43. Richman & Reynolds, *supra* note 42, at 278.

44. The Evarts Act of 1891, which established the modern structure of the United States Courts of Appeals, originally allotted three circuit judges to each circuit, all of whom heard every appeal. *See* Judiciary (Evarts) Act of 1891, ch. 517, 26 Stat. 826 (1891).

45. Richman & Reynolds, *supra* note 42, at 278.

46. *Id.*

47. Levy, *supra* note 42, at 321.

48. *Id.* at 321–22.

49. *Id.* at 322–23.

50. *Id.* at 323.

In response to this modern case management, the procedural justice debate turned to appellate procedure. In the 1990s, William Richman and William Reynolds authored *Elitism, Expediency, and the New Certiorari*,[51] highlighting and criticizing the relaxations of the Learned Hand Model.[52] These "shortcuts to decision making," they argue, lead to lower quality decisions that increase error rates and leave the law underdeveloped.[53]

More importantly, they identify a trend in these shortcuts: the Circuit Courts focus all the procedural shortcuts onto specific categories of cases, functionally creating two tiers of appellate procedure.[54] Tier-one cases—those continuing to receive the Learned Hand Model—involve wealthy and connected parties or disputed issues of law.[55] Tier-two cases—the targets of every single procedure limiting change—involve claims of error arising from prisoners, pro se litigants, and other marginalized members of the community.[56] The collective effect of all these shortcuts, they argue, is to turn the IACs into functional certiorari courts for the most vulnerable members of society. This change threatens "the basic guarantee of justice to all in equal measure" and undermines the "perceived legitimacy" of the IACs.[57] Following this seminal work, other scholars have used procedural justice theory to analyze appellate procedure.[58]

While scholars have expanded the theoretical debate to appellate procedure, empirical procedural justice theory has largely remained rooted in trial litigation. Indeed, Tyler's research and subsequent replication studied adjudications of first instance.[59] In recent history, however, some limited empirical studies on appellate litigation have supported the notion that the four elements of procedural justice identified by Tyler's findings also apply on appeal. In one notable study of appellate procedural justice, Scott Barclay interviewed 125 civil litigants and found that they often considered goals other than outcome when deciding to appeal their case.[60] Most notably, litigants may take an appeal "in order to have [their] story taken seriously" by the IAC even when the odds of success are very low.[61] These recent theoretical and empirical expansions suggest that procedural justice research in the IACs is a burgeoning field that will likely see increased study in the near future.

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51. Richman & Reynolds, *supra* note 42.

52. *Id.* at 278.

53. *Id.* at 294–95.

54. *Id.* at 293–94.

55. *Id.* at 296.

56. *Id.* at 295–96.

57. *Id.* at 297.

58. *See generally*, McAlister, *supra* note 6 (theorizing that the elements of procedural justice might apply in the appellate courts much as they do at trial).

59. *Id.* at 565.

60. Scott Barclay, *A New Aspect of Lawyer-Client Interactions: Lawyers Teaching Process-Focused Clients to Think About Outcomes*, 11 CLINICAL L. REV. 1, 5 (2004).

61. *Id.* at 8.

III
DISCRETE AND AGGREGATE PROCEDURAL JUSTICE IN THE IACS

As the empirical analysis of procedural justice in the IACs grows more robust, it will be helpful to consider how the position of the IACs within the broader legal system may impact how parties experience appellate procedure. Specifically, the decision and procedure afforded to the parties below likely impacts how they experience the procedure on appeal. This impact leads to two distinct conceptualizations of procedural justice in the IACs: a discrete conceptualization that requires a certain level of procedure to adjudicate the appeal, and an aggregate conceptualization that tasks the IACs with addressing potential procedural deficiencies experienced in the trial below.

To explicate this dichotomy more fully, it is helpful to first consider a different debate in the IACs: the debate over the proper conception of error correction in the Circuit Courts.

A. The Error Correction Debate in the IACs

Most contemporary discussions identify two primary functions of the United States Circuit Courts: error correction and law development.[62] The error correction role—reviewing the trial below to "ensure that an appropriate and just outcome has been reached"[63]—is often considered the core historical justification for the appeal as of right.[64] Indeed, because "[e]very appeal necessarily involves at least one claim that the trial court erred," the Circuit Courts' law development function—deciding how an open question of law should apply to the facts—formally operates as a collateral consequence of error correction.[65] The overlap between these roles has led some to conceptualize the dichotomy as merely a difference in the difficulty of the question before the IACs: error correction applies to "easy cases" where settled law clearly controls the issue, and law development applies to "hard questions" where the IAC must fill gaps in the law.[66]

Even after removing hard questions from consideration, "[t]here are countless possible variations of error."[67] The Federal Rules of Appellate Procedure direct the Circuit Courts to identify errors below and set aside verdicts for "harmful error," but never define "error."[68] Under this doctrinal ambiguity, individual circuit judges must craft personal conceptualizations of error and, by

62. *See, e.g.*, Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 BROOK. L. REV. 685, 712 (2000).

63. *Id.*

64. *See* Paul D. Carrington, *The Function of the Civil Appeal: A Late-Century View*, 38 S.C. L. REV. 411, 412–14 (1987) (describing the historical approach to appeals in the United States, where district court judges and supreme court justices would form temporary panels to review decisions for error).

65. Chad M. Oldfather, *Error Correction*, 85 IND. L.J. 49, 64 (2010).

66. *See, e.g.*, *id.* at 65.

67. *Id.* at 56 (quoting ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 16 (1970)).

68. *Id.* at 55–56.

extension, the court's error correction role. Chad Oldfather surveyed the Circuit Courts, and identifies two broad conceptualizations of error correction, which he argues are rooted in prevailing legal theories.[69]

First, he identifies a case-based conceptualization of error that finds support in legal realism.[70] Under this approach, the court primarily asks whether the "right" party prevailed below.[71] This approach, he argues, collapses into a "relatively broad and unconstrained focus on the justness of the trial court's overall resolution."[72] Though the parties may identify actual conduct below that constitutes legal error, that conduct takes a back seat to the ultimate disposition. Following this lodestar, courts may ignore "technicalities" if they conclude that the correct party prevailed below, or they may conversely reverse the decision below "regardless of what the parties had put before it" where it seems the wrong party prevailed.[73]

Second, Oldfather argues for reconceptualizing the error correction role through the lens of legal process theory. In this conceptualization, he casts the appeal as a derivative dispute—a discrete claim that the other party was unjustly enriched by an erroneous judgment.[74] This conceptualization prioritizes the specific issue raised, rather than the ultimate disposition of the case below.[75] A court approaching error correction in this way considers first and foremost whether the party's discrete appeal—that is, the claim of error—has legal merit, regardless of who prevailed below.[76] This approach, he argues, better emphasizes the parties, and maintains the legitimacy of the appeals process.[77]

This debate reveals a broader dichotomy in how the IACs and litigants might conceptualize the role of the IACs within the legal system. On the aggregate, or case-based conceptualization, the IACs exist as one link in the chain that is a multi-tiered legal system constructed to resolve a core dispute. The appeals they hear are intrinsically connected to the ultimate dispute, and parties experience the appeal with an eye towards their entire case.

On the discrete, or issue-based conceptualization, the IACs exist as independent adjudicatory bodies resolving a specific issue that may incidentally impact some other dispute. The appeals they hear are self-contained disputes and parties might experience the appeal much like they would a subsequent trial against someone they have sued in the past.

69. *Id.* at 77, 81.
70. *Id.* at 68–69.
71. *Id.* at 59–60.
72. *Id.* at 52.
73. *Id.* at 59.
74. *Id.* at 81.
75. *Id.*
76. *Id.*
77. *Id.* at 81–82.

B. Discrete and Aggregate Procedural Justice Concerns

These two theories of error correction map relatively cleanly onto the discussion of procedural justice in the IACs. Applying this dichotomy reveals the two distinct categories of procedural justice concerns that may arise in appellate procedure: discrete concerns and aggregate concerns.

1. Discrete Procedural Justice Concerns

Reflecting the issue-based conceptualization of the IACs, all appeals likely raise procedural justice concerns as a new, discrete adjudication. When a party appeals, the IAC becomes the court of first instance as it relates to the claim of error. Oriented in this way, the four procedural justice considerations identified by Tyler and others apply against an IAC in much the same way they would against another trial court in a different litigation.[78]

In this light, appellate procedure matters to the parties independently when the appeal commences. If appellants feel that they do not have the opportunity to be heard on appeal, or that the IAC has not seriously considered their arguments or sufficiently explained its reasoning in ruling against them, then they may lose trust in the ability of the IACs to legitimately review cases.[79]

Further, because the appellate loser cares about the procedure on appeal whether a loss is affirmed or win reversed, discrete procedural justice likely applies categorically. This further reflects (at least theoretical) conceptualizations of procedural justice in the trial courts.[80] Because every party to an appeal might lose the appeal, discrete procedural justice "can *always* be discussed with respect to *all* parties."[81]

2. Aggregate Procedural Justice Concerns

Aggregate procedural justice reflects a case-based approach that recognizes the role of the IACs within the broader justice system. Every stage of litigation is one in a series of connected interactions between parties and authority that inform a party's perception of the system's fairness. At every link in this chain, procedural deficiencies can undermine the party's faith in that system. Parties do not forget procedural failings when they proceed to the appeal. In fact, these failings are often the reason for the appeal.[82] Allowing such failings to continue through the appellate system without redress reinforces and often compounds

78. *See* discussion *supra* Part II.A.

79. These legitimacy concerns may manifest in ways showing dissatisfaction with the IACs, but not the entire system. For example, the filing of more petitions for certiorari at the Supreme Court, litigation campaigns to change the law through repeated appeals, or attempts to narrow precedent from below or calls to change the structure and balance of the IACs.

80. *See* Hollander-Blumoff, *supra* note 1, at 144.

81. *Id.*

82. *See generally* Barclay, *supra* note 60; Oldfather, *supra* note 65.

their negative effects.[83]

If an "unfair" proceeding undermines the legitimacy of the authority making that decision, those effects are magnified when the party calls attention to that unfairness. This initial unfairness is compounded when a second authority, tasked with identifying and remedying unfairness below, blesses the failing as perfectly acceptable within the system. When IACs affirm and reinforce procedural deficiencies, the deficiency infects the appeal and undermines the legitimacy of the entire system. This degradation of faith in the system is multiplied when the process for review raises the exact same procedural justice concerns as the action being reviewed. When parties appeal their case to address a lack of voice or dignity in the process but receive only a summary affirmance without the opportunity to tell their story, they may hear that their exclusion from the system is a feature, not a bug.

These concerns are especially weighty for the last authority to review the case. The body with whom the buck stops is both the last line of defense to rectify any mistakes, and the source for any actual or perceived tone at the top. An actual or de facto court of last resort that summarily affirms deficient procedure sends a clear message to both the lower bodies and the parties.

Thus, aggregate procedural justice concerns incorporate the entire adjudicatory system, asking all bodies tasked with review—but especially the final review—to consider the procedure experienced below. If the body identifies any procedural justice issues below, it should alter its procedure to remedy that deficiency.

Aggregate procedural justice concerns are theoretically boundless; an appellate body would need to respond to any of a near infinite number of ways in which the lower body may have failed the parties. The United States has limited the potential concerns, however, by incorporating lower procedure into substantive review.[84] Because litigants still care most about outcomes, an authority likely need not account for past process deficiencies where the affected party wins on appeal, especially when the party wins because of the deficiency.[85]

In light of this substantive review, aggregate procedural justice concerns likely only arise when the lower procedure undermines a party's faith in the system without offending substantive law—that is, when the IAC will affirm the lower court despite the problematic procedure. In these cases, the reviewing body should take care to ensure that the parties have a voice and that the body fully

83. McAlister has also made a similar suggestion—in passing—about the aggregate effects of procedural justice concerns. *See* McAlister, *supra* note 6, at 566 ("[T]he appellants expectations as to reason-giving may vary depending on the extent of process received at the trial level.").

84. *See* Hollander-Blumoff, *supra* note 1, at 140–46 (discussing the similarities and differences of procedural justice and procedural due process).

85. Consider, for example, Cage v. Louisiana, 498 U.S. 39 (1990), where the Supreme Court issued a three paragraph per curiam opinion without oral argument. Given the procedural deficiencies below, such a summary disposition would arguably have raised aggregate procedural justice concerns, except that the Court held that the procedure below violated the Due Process Clause and reversed the decision.

explains why it must affirm the lower decision.[86]

Finally, because aggregate procedural justice concerns arise when the reviewing court affirms deficient procedure below, the process arguably deviates from the traditional conceptualization of procedural justice as always applying to every party.[87] Rather, aggregate concerns may arise unilaterally, only impacting the appellant—that is, the trial court loser. For this reason, aggregate procedural justice concerns may (depending on the appellant's identity) arise differently in appeals that, at first blush, appear very similar. Aggregate procedure may thus cause ostensibly similar parties to experience an IAC's procedure in vastly different ways. Considering how aggregate procedural justice may impact these parties might help researchers craft their studies and analyze results to ensure the most accurate view of appellate procedure's effects on litigants.

C. Comparing the Demands of Discrete and Aggregate Procedural Justice

Having described discrete and aggregate procedural justice concerns, it may be helpful to further theorize when the categories might arise and what might be required to remedy them. At the threshold, aggregate and procedural justice concerns likely arise to different degrees depending on the specific facts of the appeal and the parties. As discussed, discrete concerns apply categorically and likely arise in much the same way that they do in the trial court. Conversely, aggregate issues arise most acutely when: (1) the IAC is likely to affirm the lower court, and (2) the lower court's procedure was problematic, but nonetheless permissible.

Though discrete and aggregate procedural justice concerns may arise to different degrees in different appeals, they need not impose different demands on the IACs. Because discrete procedural justice conceives of the appeal as essentially a new trial, the demands are likely similar to those of a new trial. Relatedly, any aggregate procedural justice concerns may well be remedied by a new trial with sufficient process. In its purest form then, de novo review of the trial or relevant issue arguably cures all aggregate concerns provided the procedure on review is discretely sufficient.

To be sure, IACs lack the judicial resources to provide de novo review of every appeal. But even where the IAC does not completely replicate the initial review, discrete procedural justice concerns—combined with substantive considerations of procedure—may still respond to potential aggregate concerns. This phenomenon can be seen in the historical Learned Hand model of appellate review. The participation, trustworthiness, and dignity of a complete opinion following full oral argument likely remedied much of the harm from deficient

86. Because the outcome of the case cannot be definitively known at the time procedure is set, appellate bodies should focus on those cases or types of cases with a high potential for an affirmance that would further undermine a party's faith in the system. This still will likely be less than all of a certain type of appeal. *See infra* Part IV.C.2.

87. Hollander-Blumoff, *supra* note 1, at 145.

procedure below, especially where the appeal resulted in reversal.[88]

Thus, aggregate and discrete procedural justice demands only diverge when (1) the IAC reviews an appeal under deferential standards, shifting the derivative suit away from a de facto new trial; (2) the IAC finds problematic procedure below nonetheless substantively permissible; and (3) the procedure required to satisfy discrete concerns is insufficient to also satisfy aggregate concerns. In other words, tier-two cases.

From the first instances of relaxing appellate process, decisions on procedure were explicitly predicated on the complexity of the case and the marginal improvement in decisional accuracy.[89] Under the two-tier regime, tier one cases—often brought by corporate parties or repeat players—receive the Learned Hand treatment because they raise complex issues with difficult answers.[90] Meanwhile, tier-two procedure is predicated on the theory that a decision is easy and that increased participation would not aid deliberation.[91] Consideration of the procedure afforded to the parties below, or of the intrinsic benefits flowing from appellate procedure, are absent from this system.

Many of these changes were made in pursuit of judicial efficiency, which remains a central concern for the federal courts. But his Note's critique has a silver lining: When aggregate and discrete concerns diverge in a given case, the procedures required to remedy them also diverge. Specifically, because aggregate procedural justice issues only arise based on the specific procedure below, remedies can be much more focused. Only those cases where an appealing party received deficient procedure below need require increased procedures. Thus, rather than apply new procedure to entire classes of cases, the IAC can likely remedy aggregate concerns with flexible approaches that seek to identify and remedy individual cases.

IV

AGGREGATE PROCEDURAL JUSTICE IN ACTION: THE SURGE IN ASYLUM CASES

The case of United States asylum appeals in the early twenty-first century provides a helpful real-world example of how aggregate procedural justice

88. Indeed, Richman and Reynolds suggest that the Learned Hand Model upheld the "guarantee of justice to all in equal measure." Richman & Reynolds, *supra* note 42, at 297.

89. *See, e.g.*, *id.* at 296 (The standard explanation for the existence of different tracks of justice is that some cases are more 'important' than others."); Fed. R. App. P. 34(a)(2) (requiring oral argument unless, *inter alia*, "the dispositive issue . . . [has] been authoritatively decided" or "the decisional process would not be significantly aided by oral argument").

90. *See* Levy, *supra* note 42, at 334 (noting that circuit screening bodies recommend oral argument based on "several factors, including the novelty of the issues . . . , the number of issues raised, the number of parties, . . . the size of the record, . . . [and] . . . whether the appellant is represented by counsel.").

91. *See* Jon O. Newman, *The Second Circuit's Expedited Adjudication of Asylum Cases: A Case Study of a Judicial Response to an Unprecedented Problem of Caseload Management*, 74 BROOK. L. REV. 429, 436 (2008) (defending a lack of oral argument in asylum appeals because the benefits "would not have been significant" and because internal screeners "invariably provide more insightful and comprehensive analysis").

concerns may deviate from discrete justice concerns, how the current two-tier system of appellate process potentially ignores such aggregate concerns, and how the IACs could address these aggregate concerns without being crushed under an exploding docket.

A. Factual Background: Asylum Review

The Immigration and Nationality Act (INA) and subsequent amendments control modern U.S. immigration policy.[92] These laws govern the process by which foreign nationals apply for asylum in the United States.[93] The Departments of Justice (DOJ) and Homeland Security (DHS) share joint responsibility for implementing the INA, including the asylum process.[94] The DOJ and DHS have promulgated joint regulations defining the procedure for reviewing requests for asylum and refugee status, as well as the system for appealing such decisions.[95]

1. The Asylum Application Process

The administrative framework requires individuals first apply for asylum and have their case adjudicated by either (or both) an Asylum Officer in the United States Customs and Immigration Services (USCIS) or an Immigration Judge (IJ). An IJ is an Administrative Law Judge in the DOJ's Executive Office for Immigration Review (Immigration Court).[96] Both the Asylum Officer and IJ constitute legal adjudicators, but the IJ's role is quasi-judicial, and proceedings before the IJ resemble litigation.[97]

In all cases, the asylum applicant has the burden of proving that she is eligible for asylum as a refugee under the statutory definition before any decision to stay deportation can be made.[98] The exact process changes, however, depending on whether the application is: (1) an affirmative application, (2) a defensive application, or (3) a credible fear application.[99]

An affirmative application occurs when an individual in the United States,

92. Immigration and Nationality Act, Pub. L. No. 89-236, 79 Stat. 911 (1965); *see* Erika Lee, *Immigrants and Immigration Law: A State of the Field Assessment*, J. AM. ETHNIC HIST., Summer 1999, at 85, 94. Immigration laws are collected in Title 8 of the United States Code.

93. 8 U.S.C. § 1103.

94. *Id.*

95. 8 C.F.R.

96. *See infra* notes 107–116 and accompanying text.

97. U.S. Dep't of Just., Org. & Functions Manual §17(D).

98. 8 C.F.R. § 1208.13(a). The applicant's testimony alone may satisfy this burden, provided it is "credible." AM. IMMIGR. COUNCIL, ASYLUM IN THE UNITED STATES 2 (2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/asylum_in_the_united_states.pdf [https://perma.cc/QM9U-VGEJ].

99. *See* ANDORRA BRUNO, CONG. RES. SERV., R45549, IMMIGRATION: U.S. ASYLUM POLICY 2 (2019), https://fas.org/sgp/crs/homesec/R45539.pdf [https://perma.cc/HT2D-RGB2]. (describing the affirmative application as a voluntary application for asylum that is filed while the applicant is not in removal proceedings, defensive applications as occurring after removal proceedings have been initiated, and a credible fear application as occurring when an individual raises credible fears of harm in their home country only once stopped at the border).

and not in removal proceedings, voluntarily applies for asylum.[100] In these cases, an Asylum Officer interviews the applicant; reviews the application; and either grants, denies, or refers the application to an IJ for further proceeding.[101] If an application is denied and the applicant does not have a valid visa, the Asylum Officer will initiate removal proceedings and refer the case to an IJ for further proceedings (including a defensive application).[102]

A defensive asylum application occurs when an applicant requests asylum after removal proceedings have been initiated against her, thus as a defense to deportation.[103] Removal proceedings may occur after a failed affirmative application or after independent immigration enforcement.[104] In reviewing defensive applications, the IJ takes the place of an Asylum Officer, holding a hearing to receive the applicant's testimony and review any additional evidence, and ultimately deciding whether the applicant has carried her burden.[105] The IJ's ultimate decision may be written or oral, but an adverse finding must include the reasons for denial.[106]

The third application—a credible fear application—occurs when individuals raise asylum claims after being stopped at the border. Individuals who meet certain statutory requirements may affirmatively apply for asylum at a port-of-entry.[107] But most applicants stopped at the border fail to meet these requirement and are placed in expedited removal proceedings.[108] When these individuals raise their asylum claims, they technically make a defensive application.[109] Instead of receiving the traditional defensive review though, these individuals are diverted to an interview with an Asylum Officer to determine "whether the [applicant]

100. *Id.* at 3.

101. *Id.* at 3–4.

102. 8 C.F.R. § 208.14(c).

103. EXEC. OFFICE FOR IMMIGR. REV. (EOIR), U.S. DEP'T OF JUST., FY 2018 STATS. YB 24 (2019), https://www.justice.gov/eoir/file/1198896/download [https://perma.cc/8HUW-NA9F].

104. BRUNO, *supra* note 100, at 5.

105. 8 C.F.R. § 1240.11(e).

106. *Id.* § 1240.11(c)(4); *see also id.* §1240.12.

107. *Id.* § 208.2(a).

108. CONCHITA CRUZ, AMIT JAIN, JOANNE LEE, ERIKA NYBORG-BURCH, SWAPNA REDDY, CLAIRE SIMONICH, DOROTHY TEGELER, & LIZ WILLIS, ASYLUM SEEKER ADVOC. PROJECT, VINDICATING THE RIGHTS OF ASYLUM SEEKERS AT THE BORDER AND BEYOND 8 (2018) [hereinafter ASYLUM SEEKER ADVOC. PROJECT] (citing INA §§ 235, 240 and Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877, 48,880 (Aug. 11, 2004)), https://asylumadvocacy.org/wp-content/uploads/2018/06/ASAP-Expedited-Removal-Guide.pdf [https://perma.cc/6BMG-AN2M]; *see also* 8 U.S.C. § 1182(a)(7) (codifying the documentation requirements for the admissibility of immigrants and nonimmigrants). In 2017, Customs and Border Patrol apprehended 181,440 foreign nationals; and 103,704 individuals were removed through expedited removal. OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., Annual Report: Immigration Enforcement Actions: 2017, at 12 tbl.6 (2019), https://www.dhs.gov/sites/default/files/publications/enforcement_actions_2017.pdf [https://perma.cc/GB8K-U5EW].

109. *See* BRUNO, *supra* note 100, at 6 (explaining that when DHS determines an individual is inadmissible, that individual can rebut that by deciding to apply for asylum, which requires a showing of credible fear to "defend" against removal).

has a credible fear of returning to their home country."[110] This credible fear interview, often performed in an immigration detention center, tasks the applicant with convincing an Asylum Officer that there is a "significant possibility" that the applicant qualifies as a refugee.[111]

If the applicant satisfies this burden, the application proceeds to Immigration Court as a defensive application.[112] If the applicant cannot convince the Asylum Officer, she will be deported unless she requests review by an IJ.[113] The IJ reviews the record from the interview and makes a de novo credible fear determination.[114] If the IJ finds a significant possibility that the applicant qualifies for asylum, the removal order is vacated and the case proceeds as a defensive application.[115] If the IJ finds no significant possibility, DHS will deport the applicant.[116]

2. The Classic Model of Reviewing Asylum Applications

Decisions by an IJ are usually appealable to either (or both) the federal courts or the Board of Immigration Appeals (BIA)—another body within the Immigration Court. The availability of, and specific process for, appeals to these bodies has varied over time. For our purposes, it is worth first considering the classic model of asylum appeals that existed until the early twenty-first century.

Except when an IJ rejects an applicant's credible fear claim, applicants may appeal an IJ's rejection of their asylum applications to the BIA.[117] This quasi-judicial body functions like an intermediate court of appeals.[118] In the 1990s, the BIA consisted of twenty-three members, who reviewed IJ decisions in three-member panels.[119] Panels reviewed the IJ decision de novo and had the power to engage in new factfinding or to alter an IJ's discretionary decision.[120] The BIA reversed in approximately twenty-five percent of appeals.[121]

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110. ASYLUM SEEKER ADVOC. PROJECT, *supra* note 108, at 13.

111. *Id.* at 13, 26–27 (describing the "significant possibility" standard and the interview process by which an individual would attempt to meet that standard); *see also* BRUNO, *supra* note 100, at 6 (same).

112. *Id.* at 6 (noting that establishing credible fear leads to a referral for a full hearing in front of an immigration judge).

113. 8 C.F.R. § 208.30(g).

114. *Id.* § 1208.30(g)(1) & (2)(ii).

115. *Id.* § 1208.30(g)(2)(iv)(B).

116. *Id.* § 1208.30(g)(2)(iv)(A).

117. *Id.* § 1003.1(b); *see also id.* § 1208.30(g)(2)(iv)(A) ("The immigration judge's decision [concurring that no credible fear exists] is final and may not be appealed.").

118. *See* DORSEY & WHITNEY LLP, BOARD OF IMMIGRATION APPEALS: PROCEDURAL REFORMS TO IMPROVE CASE MANAGEMENT 9 (2003), *available at* https://www.ilw.com/articles/2003,1126-dorsey.pdf [https://perma.cc/S3XA-L679] ("The BIA is a quasi-judicial body with exclusively appellate functions. It historically has served two purposes: deciding appeals of individual cases and issuing precedential decisions for guidance to the Service and the Immigration Judges.").

119. *Id.* at 20–21.

120. *Id.* at 10 (quoting Charles Gordon et. al. Immigration Law and Procedure § 3.5[5](b) (2003)) ("[T]he Board may make a de novo review of the record and make its own conclusions and findings irrespective of those made by the Special Inquiry Officer.").

121. Comm. on Fed. Courts, Ass'n of B. of City of N.Y., *The Surge of Immigration Appeals and Its Impact on the Second Circuit Court of Appeals*, 60 REC. ASS'N B. CITY N.Y. 243, 245 [hereinafter *The Surge*] (citing DORSEY & WHITNEY LLP, *supra* note 118, at app. 24).

Further, until the early 2000s, both the district and circuit courts exercised jurisdiction to review asylum decisions by the Immigration Court. First, the District Courts exercised jurisdiction over petitions on writ of habeas corpus from individuals challenging their deportation orders while in custody.[122]

Second, the Circuit Courts exercise jurisdiction to review most final orders of removal, including those following rejection of an asylum application.[123] Final removal orders are appealable to the circuit in which IJ making the decision resides.[124] Most asylum decisions are rendered in either the Second or Ninth Circuits.[125]

Historically, the Second Circuit included almost all immigration appeals in its Civil Appeals Management Plan (CAMP).[126] CAMP seeks to expedite and clarify the appeal while encouraging resolutions with minimal participation by judges.[127] The program revolves around Staff Counsel, full-time attorneys within the court system.[128] Staff Counsel conducts pre-argument conferences, attended by counsel for both parties (and sometimes the parties themselves), where the parties can state their view of the facts and issues.[129] The goal of these conferences is to limit the issues on appeal or if possible negotiate a resolution before oral argument.[130] Staff Counsel also responds to the parties' arguments, pointing out weakness and suggesting withdrawal when a case seems hopeless.[131]

Under this system, as high as sixty-four percent of immigration appeals were disposed of after pre-argument conferences.[132] And this success was bilateral: Cases were disposed because the applicants withdrew their appeal and because the government agreed to rehear a case in Immigration Court or to grant an application.[133]

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122. 8 U.S.C. § 1105a(a)(10) (1995) (repealed 1996); Elizabeth Cronin, *When the Deluge Hits and You Never Saw the Storm: Asylum Overload and the Second Circuit*, 59 ADMIN. L. REV. 547, 549 (2007).

123. Cronin, *supra* note 122, at 548. *See also* Erick Rivero, Note, *Asylum and Oral Argument: The Judiciary in Immigration and the Second Circuit Non-Argument Calendar*, 34 HOFSTRA L. REV. 1497, 1499 (2006) (citing Anti-Terrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, § 440(a), 110 Stat. 1214, 1276–77, (1996)) ("While the AEDPA amended [INA] section 106 subject matter jurisdiction, abrogating judicial review of removal orders issued pursuant to a conviction for an aggravated felony, it did not affect judicial review of denied asylum applications."). Orders of removal become final once the deadline for appeal to the BIA passes, or once the BIA affirms the order. Cronin, *supra* note 122, at 548. This includes petitions from a negative credible fear determination. *See id.* at 550 (listing denials of asylum as one of the final orders over which circuit courts have jurisdiction).

124. *Id.* at 548.

125. *See, e.g.*, EOIR, *supra* note 103, at 25 tbl.13 (showing the New York City heard 11,029 asylum claims—the most of any city—and that Los Angeles and San Francisco each heard approximately 4,000).

126. Cronin, *supra* note 123, at 553.

127. Irving R. Kaufman *Must Every Appeal Run the Gamut?—The Civil Appeals Management Plan*, 95 YALE L. J. 755, 756 (1986).

128. *Id.* at 757 n.8.

129. *Id.* at 757–58.

130. *Id.* at 758.

131. *Id.*

132. Cronin, *supra* note 123, at 553.

133. *Id.*

B. The Asylum Appeal Surge

In the 1990s, the United States made a number of changes regarding its approach to immigration, especially its enforcement of undocumented immigration.[134] These changes drove an increase in removal proceedings and a corresponding increase in both asylum claims and asylum appeals.[135]

By 1999, the BIA faced a docket backlog numbering in the tens of thousands.[136] In response, the BIA Chairman instituted a pilot program that designated categories of cases as suitable for a streamlined procedure.[137] These cases were reviewed by one permanent BIA member rather than the traditional three-member panel.[138] If the IJ's decision below met certain conditions, this one-member panel could summarily affirm the decisions without any oral argument or opinion and dismiss the case.[139] The chairman initially limited this Affirmance Without Opinion (AWO) system in the asylum context to decisions below rendered on procedural grounds or under specific settled precedent,[140] or to appeals that were procedurally barred (for example, untimely appeals or appeals in cases that became moot).[141]

The backlog continued to grow, however, and in early 2002—reeling from September 11th and staring down a backlog now 57,000 cases deep—Attorney General Ashcroft allowed the BIA to massively expand its pilot program.[142] These reforms included substantive and procedural changes intended to increase the rate at which the BIA affirmed IJs in three ways.[143]

Most notably, the regulations removed de novo review of factual issues—establishing a clear error standard for reviewing factual determinations—and stripped the BIA of its fact-finding powers.[144] Further, the reforms expanded AWO cases, "mak[ing] single-member adjudication the default procedure."[145] A

134. Newman, *supra* note 91, at 430.

135. *Id.*

136. John R.B. Palmer, Stephen W. Yale-Loehr & Elizabeth Cronin, *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 22–23 (2005).

137. DORSEY & WHITNEY LLP, *supra* note 118, at 15–17.

138. *Id.* at 17.

139. *Id.*

140. *Id.* app. 3 at 3–5 (allowing AWO in asylum claims regarding conviction of an aggravated felony "unless there is a substantial legal question" whether the applicant was convicted of such a felony).

141. *Id.* app.3 at 5–6; *see also* Palmer et. al., *supra* note 136, at 24–25 (listing the initial categories of cases "appropriate for single-member affirmance without an opinion" and listing two categories the BIA Chairman added later).

142. *See* DORSEY & WHITNEY LLP, *supra* note 118, at 16–17, 19 (noting, for example, that the BIA Chairman in 2002 expanded the "certain categories of cases" that could be subject to AWO to "all cases"). *See generally* John D. Ashcroft & Kris W. Kobach, *A More Perfect System: The 2002 Reforms of the Board of Immigration Appeals*, 58 DUKE L.J. 1991 (2009).

143. *See* DORSEY & WHITNEY LLP, *supra* note 118, at 20 (listing the DOJ's changes to the BIA appeal process, including changes to the standards of review, and the structure and composition of the BIA itself).

144. *Id.* at 22.

145. *See* Palmer et. al., *supra* note 136, at 28.

screening panel of employees within the BIA now assigns all appeals for single-member adjudication unless the appeal meets one of six conditions signaling sufficient importance to go before a full panel.[146] The single board member must affirm without opinion whenever the IJ's decision is correct, errors are harmless or non-material, and the case raises no substantial issues and is "squarely controlled" by existing BIA precedent.[147] Finally, the rules also impose hard time limits for ultimate decisions and briefing schedules and remove any oral argument from non-panel cases.[148]

This streamlined procedure for BIA review substantially increased the rate of dispositions. In 1999, the BIA completed just over 23,000 cases.[149] By 2004, the yearly disposition rate peaked at nearly 49,000 decisions.[150] Further, most of these decisions were affirmances, especially AWOs.[151] The rate at which the BIA granted relief to an appellant fell from twenty-five percent to just ten percent.[152]

In the wake of the BIA's increased affirmances of IJ decisions, immigration attorneys turned to the habeas petition to challenge Immigration Court decisions in the District Courts.[153] Congress responded to this in 2005 by passing the REAL ID Act, which stripped the District Courts of any authority to review the Immigration Court's determination that an asylum applicant lacked a credible fear of persecution.[154]

This changing immigration procedure, BIA streamlining, and District Court jurisdiction stripping precipitated a "surge" of appeals to the circuit courts in the early 2000s, especially the Second Circuit.[155] Most notably, both the number *and rate* of appeals from the BIA increased. The reasons for the rate increase are

146. DORSEY & WHITNEY LLP, *supra* note 118, at 21.

147. *Id.* at 23–24.

148. *Id.* at 24–25. For good measure, the Attorney General also reduced the Board's membership from twenty-three to eleven permanent members—fewer than sat just before Congress' reforms in 1995. *Id*. at 24. The stated rationale was that the increase had not "appreciably reduced the backlogs" and had undermined "cohesiveness and collegiality." *Id.* Some observers have noted however, that the first members cut were also the most likely to reverse an adverse IJ decision. John R.B. Palmer, *The Nature and Causes of the Immigration Surge in the Federal Courts of Appeal: A Preliminary Analysis*, 51 N.Y.L. SCH. L. REV. 13, 24 (2006).

149. EOIR, 2003 STAT. YB S2 fig.27 (2004), https://www.justice.gov/sites/default/files/eoir/legacy/2008/04/18/fy03syb.pdf [https://perma.cc/3FHJ-BR9Q].

150. EOIR, 2006 STAT. YB S2 fig.25 (2007), https://www.justice.gov/sites/default/files/eoir/legacy/2008/04/18/fy04syb.pdf [https://perma.cc/L9EQ-BCAZ].

151. AWOs also increased—from less than ten percent of all cases during the pilot program, to sixty percent by the end of 2002. *The Surge*, *supra* note 121.

152. *Id.* (citing DORSEY & WHITNEY LLP, *supra* note 118, at app. 25).

153. *See* Cronin, *supra* note 122, at 549.

154. Pub. L. No. 109-13, Div. B § 106, 119 Stat. 231, 310 (2005) (codified as amended at 8 U.S.C. § 1252(a)(2)(A)); *see also* Dept. of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1968–69 (holding that the Suspension Clause does not protect writs of habeas corpus that "permit a petitioner to claim that right to enter or remain in a country, or to obtain administrative review potentially leading to that result").

155. *See, e.g.*, Newman, *supra* note 91; *The Surge*, *supra* note 121.

hotly debated.[156] John Palmer, Stephen Yale-Loehr, and Elizabeth Cronin set out to empirically test a number of potential reasons, including increased error, denied applicants with higher expulsion costs, and more non-detained aliens wishing to stay in the Country.[157] The data could not exclude any of the proposed causes, but supported the theory that dissatisfaction with the BIA procedure, coupled with a spike in removal orders, compelled applicants and immigration lawyers to shift their focus to the Circuit Courts.[158]

Regardless of the cause, by March 2004, applicants were appealing a quarter of all BIA decisions, up from less than five percent before the reforms.[159] More than two-thirds of these appeals were brought in either the Second or Ninth Circuits.[160] In three years, the number of agency cases before the Second Circuit—the overwhelming majority of which were BIA appeals—rose from under 700 per year to almost 5,300 (over fifty percent of its entire docket) in 2005.[161]

Faced with this deluge, the Second Circuit implemented a non-argument calendar system to screen all appeals from the BIA.[162] Under this system, the Staff Attorney's Office at the Second Circuit receives all briefs and records for BIA appeals.[163] A law clerk in the office reviews these documents and prepares a memorandum and draft summary order recommending a specific disposition.[164] Each week, the office sends the completed summary orders (along with the supporting documents) to a panel of three judges who vote sequentially on the case.[165] The judges vote on a sheet that provides five options: refer to the regular argument calendar, deny, grant, remand, or other.[166] Additionally, the Second Circuit has removed all BIA appeals from CAMP participation.[167] The non-argument calendar is now the only system for adjudicating asylum appeals.[168]

The non-argument calendar succeeded in decreasing the Second Circuit's administrative backlog from 5,000 cases in 2005 to under 1,000 by 2015, where it

156. For example, Judge Newman, posits that the shorter wait at the BIA has left applicants searching for a new way to extend their time in the United States. *See* Newman, *supra* note 91, at 431. The New York City Bar, however, concluded that increase came from a sense of aggrievement and concern that the BIA's summary procedure increased the risk of error. *See The Surge*, *supra* note 121, at 245.

157. *See generally* supra note 136, at 22–23.

158. *Id.* at 94.

159. Newman, *supra* note 91, at 431 (citing Palmer et. al., *supra* note 136, at 53 fig.5).

160. *Id.* at 431 n.19.

161. The Second Circuit had 696 administrative appeals pending on September 30, 2002. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, 2003 ANN. REP. 72 tbl.B-1 (2004). By September 30, 2005, the administrative appeals docket had increased to 5,299 cases. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, 2005 ANN. REP. 102 tbl.B-1 (2006).

162. *See* Newman, *supra* note 91, at 432–34.

163. *Id.* at 434.

164. *Id.*

165. *Id.*

166. *Id.*

167. Cronin, *supra* note 122, at 554.

168. *Id.*

has remained since.[169] The majority of cases on the non-argument calendar are disposed of by affirming the BIA in an unpublished decision.[170]

C. Appellate Procedural Justice in the Asylum Surge

The story of the Surge provides insight into discrete and aggregate procedural justice in three important ways. The Surge shows: (1) how IACs implicate aggregate procedural justice by their decisions regarding appellate procedure, (2) how discrete and aggregate procedural justice concerns may arise differently in facially similar cases, and (3) how programs like CAMP enable IACs to remedy aggregate concerns with targeted procedural changes rather than sweeping reforms.

1. Aggregate Procedural Justice and Asylum Appeals

Whether the BIA or Second Circuit's procedure for asylum appeals violate the Due Process Clause, the INA, or notions of discrete procedural justice are outside the scope of this Note.[171] But the story of the Surge and judicial response shows how aggregate procedural justice concerns may arise in the appellate courts.

At the threshold, asylum applications are the type of American adjudication likely to raise procedural justice concerns in the first instance. First, applications are made by individuals who the government seeks to remove from the United States. Given the potential consequences of removal proceedings, individuals in removal proceedings are analogous to criminal defendants,[172] and thus uniquely affected by procedural justice concerns.[173] Further, the initial proceedings are overseen within the agency tasked with removing the applicants. Asylum Officers are agents of the agency tasked with removing foreign nationals, and, even with the statutory independence provided to them,[174] ALJs like the IJs likely raise more independence concerns than judges. Finally, many circuits, including the Second, have recognized that Immigration Court often fails to provide asylum applicants with adequate dignity or a reasoned decision.[175]

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169. The data discussed in this sentence derive from a review of the JUDICIAL BUSINESS OF THE UNITED STATES, ANNUAL REPORTS for the years 2005-2018, tbls.B-1 *available at* https://www.uscourts.gov/statistics-reports/analysis-reports/judicial-business-united-states-courts [https://perma.cc/M2YD-JXNX].

170. Cronin, *supra* note 122, at 555.

171. For an example of such arguments, *see generally* Eric Rivero, Note, *Asylum and Oral Argument: The Judiciary in Immigration and the Second Circuit Non-Argument Calendar*, 34 HOFSTRA L. REV. 1497 (2006).

172. For a discussion of the overlapping characteristics of the criminal law and civil removal proceedings, *see generally* Jennifer M. Cachón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Right*, 59 DUKE L.J. 1563 (2010).

173. *See supra* notes 36–37 and accompanying text.

174. *See* 5 U.S.C. § 554(d).

175. *See, e.g.*, Niam v. Ashcroft, 354 F.3d 652, 654 (7th Cir. 2005) ("[T]he elementary principles of administrative law, the rules of logic, and common sense seem to have eluded the Board in this as in other sentences."); Seceida-Rosales v. I.N.S., 331 F.3d 297, 312 (2d Cir. 2003) (holding that the IJ "relied on a number of inappropriate standards . . . and erroneously resorted to speculation and conjecture").

Additionally, the standard of review suggests that these cases raise aggregate procedural justice concerns. Most asylum appeals challenge an IJ's adverse credibility finding.[176] The Circuits review this credibility finding under the highly deferential substantial evidence standard: affirming the decision unless "the record demonstrates that any reasonable adjudicator would be compelled to conclude to the contrary."[177] This deferential standard drives a high affirmance rate. As such, these immigration cases—long-shot error cases, brought by members of a marginalized group who may feel aggrieved by the procedure below—raise serious aggregate procedural justice concerns.

The BIA review process provides a case study in aggregate procedural concerns. As discussed, decreasing appellate procedure at the BIA led to an increase in the rate of appeals to the circuit courts.[178] Something then, beyond just the number of dispositions, motivated applicants to appeal when statistically they otherwise would have accepted the BIA's disposition. Palmer and others hypothesized that the BIA changes triggered "a fundamental shift in behavior among lawyers and [applicants], causing them to focus their litigation in the federal courts."[179] Further, the New York Bar Association's Committee on Federal Courts argued that the decreased procedure left applicants "aggrieved" and feeling that they might be "deported without being accorded meaningful administrative review."[180] Finally, Palmer, in another paper, suggested that the BIA procedures may have driven applicants to push forward with appeals to the circuit courts "regardless of whether or not they [had] a realistic chance of success."[181]

Thus, the literature reveals, applicants were at least partially motivated by a feeling that the BIA changes left them without any real process to tell their story, and that they appealed to the circuits to vindicate their claims regardless of success. That is, they were motivated by aggregate procedural justice concerns.

2. The Differential Approach

In light of the aggregate procedural justice concerns motivating the surge in appeals, the Second Circuit's focus on accuracy and discrete concerns in crafting its procedural response may compound those problems. But this story also shows how those problems may not affect all asylum appeals the same way. The type of case known as asylum appeals can actually be thought of as seven types of cases through the aggregate procedural justice lens.[182]

176. Newman, *supra* note 91, at 433 ("[M]ost asylum cases present a single issue—whether an adverse credibility finding by the BIA is supported by substantial evidence.").

177. *See* Andrew Tae-Hyun Kim, *Rethinking Review Standards in Asylum*, 55 WM. & MARY L. REV. 581, 587–88 (2013).

178. *See supra* notes 155–158 and accompanying text.

179. Palmer et al., *supra* note 136, at 94.

180. *The Surge*, *supra* note 121.

181. Palmer, *supra* note 148, at 29.

182. A case called an "asylum appeal" and automatically scheduled for non-argument may actually be: (1) an affirmative application with full BIA review, (2) an affirmative application and AWO, (3) a

First, a case will raise different procedural justice questions depending on whether it begins as an affirmative, defensive, or credible fear application. Thus, each type of case implicates different aggregate procedural justice concerns on appeal. Applicants may spend substantial time and effort constructing an affirmative application, and an affirmative application only reaches an IJ if an Asylum Officer first denies it. Thus, an affirmative applicant will have had two full opportunities for argument and decision making before reaching the circuit.

Conversely, a defensive application is prepared while in custody and directly reviewed by the IJ. Moreover, an application in defense of removal proceedings has a strong odor of illegitimacy and thus may not receive as much respect as a completely voluntary application.[183] In this sense then, appeals from defensive applications raise substantially more potential aggregate concerns than affirmative applications. Credible fear interviews present a more complex situation: they have some aspects of an affirmative application (like multiple reviews) and aspects of defensive applications (like the conditions and timing for preparation, and indicia of incredibility).

Further, as discussed above, the BIA adds an additional wrinkle to the aggregate procedural justice analysis. First, an appeal from an adverse credible fear interview receives no BIA review and so comes to the circuit court on a path all its own. Further, appeals from the BIA might have received procedure rivaling the Learned Hand Model or might have received an AWO, with the AWO appeals raising far more aggregate concerns.

3. CAMP as a Targeted Remedy for Aggregate Concerns

Finally, from this recognition that facially similar appeals may raise very different aggregate procedural justice concerns, the story of the Surge shows how courts may use targeted reforms to efficiently remedy aggregate procedural justice. CAMP provided valuable benefits in asylum appeals before the Surge, but docket increases made it impossible to maintain the program for all appeals.[184] As just shown, however, reforms need not apply to every asylum appeal, at least not if it is only aimed at aggregate procedural justice concerns. The Second Circuit could partially reintegrate CAMP for those sub-types of asylum appeals raising the most aggregate procedural justice concerns to avoid being again crushed by the weight of every asylum appeal.

Some might argue that this change would incentivize applicants to target a

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defensive application with full BIA review, (4) a defensive application and AWO, (5) a negative credible fear determination, (6) a positive credible fear determination-turned-defensive application with full BIA review, or (7) a positive credible fear determination-turned-defensive application and AWO. The paradigmatic case for all of these pose different potential aggregate procedural justice concerns.

183. Many Americans share the view that foreign nationals are exploiting "asylum loopholes" to gain entry to United States. *See* Laurel Wamsley, *Trump Calls for Asylum-Seekers to Pay Fees, Proposing New Restrictions*, NPR (Apr. 30, 2019), https://www.npr.org/2019/04/30/718627010/trump-calls-for-asylum-seekers-to-pay-fees-proposing-new-restrictions [https://perma.cc/ZF52-TFS9]. Moreover, some have argued that foreign nationals may raise (or appeal) defensive asylum applications to delay removal. *See* Newman, *supra* note 91, at 431–32.

184. Cronin, *supra* note 122, at 554–55.

specific method of application, but the substantive law constrains those perverse incentives. Aggregate procedural justice concerns are most weighty in the types of cases with the least likelihood of substantive success. Thus, since parties care most about outcomes, they would likely opt for application methods not subject to CAMP, if given the chance.

V
CONCLUSION

The arguments presented in the Note are highly theoretical. Empirical research has barely begun to address appellate procedural justice in general, and without understanding what procedure individuals expect on appeal, we cannot know whether they expect more in light of a procedural failing experience below.

But procedural justice theory has always preceded empirical study. Considering the impact of the position of the IACs within the greater legal system may help researchers better analyze data on procedural justice concerns in appellate procedure. Further, when IACs and scholars consider what level of procedure is due on appeal, considering the impact of the procedure below may open up unique reform alternatives that balance justice concerns and finite judicial resources.

If the IACs do not consider the experiences that the parties bring to filling an appeal, their procedures may risk affirming not just the judgment of the trial court, but its treatment of the parties as well.