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11 Administrative discretion and governing relationships

Situating procedural fairness

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11.1 Introduction¹

When ‘procedural fairness’, ‘procedural justice’, or ‘procedural due process’ have been singled out as sites of theoretical inquiry, efforts have primarily been directed to identifying the value of observing this cardinal demand of fair treatment within decision-making processes.² Among administrative law scholars, responses to this question have especially emphasised the intrinsic value of rules of procedural fairness to honouring human dignity, as well as the consequential value of such observance to the efficiency of government decision-making.³ These responses have largely tracked the more general effort of philosophers to illuminate the contribution of procedural fairness to ‘dignitarian’, ‘utilitarian’, or other ‘outcome-based’ values across different legal contexts, with particular emphasis on the instrumental value of fair procedures to the realisation of substantive legal rights.⁴

The recent turn towards ‘relational’ approaches to procedural justice signals a new philosophical perspective among these established accounts of the value of procedurally fair treatment within decision-making processes. Drawing upon research in social psychology, relational theories seek to explain and justify the intrinsic value of procedures in terms of how they enhance the quality of interpersonal interactions with individuals, groups and institutions (Meyerson & Mackenzie 2018, p. 6). Yet while the perspective might be new, relational theories share with established accounts a common background assumption: namely, that the legal form within which procedural justice carries its relevant value is an order of rules. This default to rules and the adjudicative processes that enliven them is hardly misguided. Adjudication based on the application of rules is ‘the characteristically legal mode’ across criminal, civil and administrative decision-making processes (Galligan 1996, p. 24). Still, the virtually exclusive focus on rule-based orders within inquiry into the value of procedural fairness represents a significant limitation on the scope of analysis, and joins a wider tendency to assume the presence of rule-based orders as the focus of legal theoretical inquiry generally.

My aim in this chapter is to turn attention to a different legal form—administrative discretion—with a view to addressing its relative neglect by scholars of procedural justice. Though my approach is distinctly relational in orientation,

my goal is not to offer a relational theory *of* procedural fairness with justificatory or explanatory aims. Rather, my aim is to illuminate the significance of the relational dynamics carried by procedural fairness to the possibility of situating administrative discretion within a condition of the rule of law. Building on other work in which I have illuminated the centrality of procedure to an understanding of the rule of law as a practice of framing governing relationships by the authority of law, the argument I develop can be summarised as follows.

An administrative discretion is a distinctive legal form in which its repository is ‘free to make a choice between possible courses of action or inaction’ (Davis 1969, p. 4). This core feature of administrative discretion carries important implications for the relationship between repository and subject that is convened and sustained through it. Above all, it causes the relational dynamics between repository and subject to be highly unpredictable. This unpredictability is in turn likely to be amplified in relation to those aspects of administrative discretion that address larger political or policy goals—such as considerations of the ‘public interest’—as contrasted with those aspects which attend solely to the subject’s individual circumstances.

Acknowledging these features of administrative discretion invites consideration of the special contribution that observance of procedural fairness might make to correcting this relational unpredictability, and by extension, to situating administrative discretion within the relational conditions necessary for the rule of law. Examined from this wider perspective, the relational dynamics sustained by procedural fairness carry a significance beyond their contribution to treating that person fairly or with dignity within a decision-making process, important though that might be. On the account I develop here, these relational dynamics bear directly upon the fundamental question of whether what is constituted by an exercise of administrative discretion is recognisable as a governing relationship framed by the authority of law.

I begin in Section 11.2 by setting out the resources of legal theory from which I have developed my account of the importance of procedure within an understanding of the rule of law as a practice of framing governing relationships by the authority of law. These are drawn from insights of Lon Fuller’s jurisprudence of the ‘internal morality of law’ (Fuller 1969), and in particular from my interpretation of that jurisprudence as yielding a conception of the rule of law in which the quality of governing relationships between those who possess authority and those who are subject to it is central. Relevantly for present purposes, I argue that the demands Fuller places on these governing relationships hold irrespective of the characteristics of the legal form through which they are carried. It is this feature of my account that opens up consideration of governing relationships that are *not* framed by the model of an order of rules to which thinking about the rule of law typically attaches, and which therefore makes it ripe for application to the phenomenon of administrative discretion.

My task in Sections 11.3 and 11.4 is to lay the groundwork for extending these relational demands and the procedural conditions necessary to support them to

administrative discretion. This requires consideration of how procedural fairness (Section 11.3) and administrative discretion (Section 11.4) need to be theorised if the relational significance of their interplay is to be brought to the fore. As I emphasise in Section 11.4, of special importance to my analysis is that aspect of administrative discretion in which the governing relationship between repository and subject is shaped by political or policy considerations beyond the individual circumstances of the subject, and which invites its exercise to orient towards more unilateral than relational dynamics.

In Section 11.5 I make the case for why the interplay between procedural fairness and administrative discretion is so significant: namely, because of the relational correction that procedural fairness supplies to the stark asymmetry between repository and subject that is a defining feature of administrative discretion. In materially altering the experience of the subject within the particular governing relationship that is convened through the possession and exercise of administrative discretion, I argue that this correction goes some way towards locating that relationship within the relational conditions necessary for the rule of law. I then turn in Section 11.6 to situate my analysis within other efforts to illuminate the promise of relational approaches to administrative law, before offering some thoughts on its significance to practice by way of conclusion in Section 11.7.

11.2 The demands of governing relationships framed by the authority of law: situating the importance of procedure

Elsewhere (Rundle 2019a), I have developed an account of the demands of the rule of law in terms of prescriptions to be imposed on governing relationships framed by the authority of law. The place of procedure within this account is central. As the primary vehicle for relational contact between legal officials and legal subjects, procedures, processes, and institutional forms provide the channels through which the authority of law directly touches upon those subject to it. Accordingly, *how* a repository of legally constituted authority engages with the subject of his or her authority within those procedures, processes, and institutional forms is of foundational significance to what is required to convene and sustain a condition of lawful authority rather than one of mere power.

I have developed this argument from elements of Lon Fuller's jurisprudence of the 'internal morality of law' (1969, pp. 33–38). Fuller's point in introducing the idea that a condition of law implicates an 'internal morality' was to direct attention to how governing through law requires practices, conditions, and commitments conducive to that end. Fuller conveyed these lessons through his famous tale of a king, Rex, who failed in eight ways to make law. By exemplifying how *not* to create and administer a legal system, Fuller's account of Rex's eight failures was designed to invite reflection on the constitutive demands of the enterprise that he had undertaken but failed to achieve. The eight principles of Fuller's 'internal morality of law' are thus understood in terms of the need for law to be (1) general, (2) publicly promulgated, (3) non-retroactive, (4) sufficiently

clear, (5) non-contradictory, (6) possible to comply with, (7) relatively constant through time, and (8) that there be congruence between official action and declared rule.

In my reading of Fuller I have emphasised the irretrievably relational commitments that he sought to convey through these eight principles. This is clear from his analysis of the ‘reciprocity’ between ‘government and citizen’ that is built into the structure of governing through enacted rules, and how this causes his principles of the ‘internal morality of law’ to entail ‘a relationship with persons generally’ (Fuller 1969, pp. 39–40). But I have equally emphasised the importance of grasping the context of these relational demands in Fuller’s jurisprudence: namely, his concern to articulate the conditions necessary for the *authority* of law. Fuller speaks of these conditions in terms of the mutual ‘fidelity to law’ in the part of both legal officials and legal subjects that must be sustained if legal order is to be achieved. The subject’s acceptance of the authority of the lawgiver or other legal official has a special place within this picture, for the reason that legal officials ultimately take their authority to govern from that acceptance. Thus, the lawgiver must enter into a relationship of ‘reciprocity’ with the subject to secure her fidelity to law, otherwise ‘nothing will be left on which to ground the citizen’s duty to observe the lawgiver’s rules’ (1969, p. 40). Fidelity to law on the part of (putative) legal subjects is to be earned through, and only through, relational conditions between legal officials and legal subjects that are capable of generating and sustaining that fidelity.

The burden that Fuller’s jurisprudence places on legal officials if they are to be regarded as participating in a condition of lawful authority as opposed to one of mere power is clearly a demanding one. He described these burdens as belonging to the ‘role morality’ that attaches to being a legal official.⁵ Central to the fulfilment of this role morality is appropriate regard for and respect towards those with whom the legal official seeks to be in a relationship of authority.⁶ This is why Fuller also provided an account of what it means to be a subject of law as opposed to mere power in his reflections on ‘the view of man implicit in the internal morality of law’ (1969, p. 162). To embark on the enterprise of subjecting human conduct to the governance of rules, Fuller argued, involves of necessity ‘a commitment to the view that man is, or can become, a responsible agent, capable of following rules and answerable for his defaults’ (1969, p. 162).

On their face, these reflections on ‘responsible agency’ are directed to the capacities required of the legal subject in order to participate in an order of rules. The emphasis is on the kind of agency that is *presupposed* by legal rules. But Fuller also went on to explain the important difference between engaging with the subject through the medium of rules and merely acting upon him. To do the latter, he argued, was not just to convey indifference to the subject’s ‘powers of self-determination’, but to negate the reciprocal dynamics upon which the achievement of legal order itself depends (see Rundle 2019a, pp. 24–25; 2014, pp. 220–225). The point of interest for present purposes is what this suggests about the kind of agency that is *constituted* by participation in a condition of law as opposed to one in which the putative subject is merely acted upon. I have

called this species of agency ‘legal agency’:⁷ that which materialises and is made visible when a subject participates within a condition of law.

The significance of procedure to Fuller’s jurisprudence enters here, and, I have argued, is much deeper and more profound than what has typically been indicated in the description (initially articulated, if cautiously, by Fuller himself) of the eight principles of the ‘internal morality of law’ as a kind of ‘procedural natural law’ (Fuller 1969, pp. 96–97).⁸ When Fuller’s reflections on the conception of the person to which the demands of the internal morality of law attach are situated within his overarching concern for what is required to sustain a condition of lawful authority as opposed to one in which subjects are merely acted upon, the significance of procedures and institutional channels capable of supporting the possibility of legal agency becomes apparent. The dynamics between legal official and legal subject through which a relationship of lawful authority is given concrete expression must be not just respectful, but productive, of the kind of agency that supports participation in a governing relationship framed by the authority of law (see also Rundle 2012, p. 42). In Fuller’s jurisprudence it cannot be otherwise. What it takes to *bring* a condition of lawful authority into existence is equally what it must take to *keep* that condition in existence.

This last point is critical to the analysis of the significance of procedural fairness in circumstances of administrative discretion that I develop in the pages to follow. Most crucially, the requirement that the relational conditions that attach to an instance of authority in its concrete expression must be continuous with the relational conditions that generate the authority of legal order in the first place is a *general* demand. As such, it need not and should not be limited to the rule-based orders with which Fuller’s jurisprudence has been explicitly if not exclusively associated so far (see Rundle 2019a, pp. 32–36), and which occupy the primary focus of legal theory generally. Rather, on my reading the demands of Fuller’s ‘internal morality of law’ attach to *all* governing relationships framed by the authority of law. Indeed, observance of these relational demands might ultimately be more critical in the context of modalities of contemporary government that are *not* modelled on an order of rules, as is the case for administrative discretion.⁹ I therefore turn now to consider how we might need to think about procedural fairness and administrative discretion, respectively, to develop this analysis.

11.3 Procedural fairness: mapping the territory

At their essence, the terms ‘procedural fairness’, ‘procedural justice’, and ‘procedural due process’ each speak to the idea that a person subject to the decision of another should be provided with a fair opportunity to advance their case before that decision-maker. While particular emphasis might historically have been given to the significance of this demand of fair treatment in the face of adverse allegations, in contemporary administrative law the obligation to afford procedural fairness is thought to apply to any exercise of power apt to affect an individual’s interests, broadly understood. To establish a denial of procedural fairness as a matter of law, therefore, the issue for determination will be whether the

aggrieved person has suffered some material encroachment on a fair opportunity to advance his or her case before the decision-maker.¹⁰

I explained in Section 11.1 that until the recent emergence of ‘relational’ approaches to procedural fairness, philosophers have gravitated towards two broad sites of analysis when seeking to identify the ‘value’ of the provision of procedural fairness in decision-making contexts: ‘dignitarian’ and ‘utilitarian’ or other ‘instrumental’ or outcome-based accounts. A wide range of arguments falls within these broad categories.¹¹ The efforts of administrative law scholars to explain the value of procedural fairness have borrowed directly from these philosophical debates, giving primary emphasis to ‘dignitarian’ and ‘utilitarian’ justifications.

Those who favour the dignitarian view emphasise the enduring appeal of its evident concern for persons.¹² For example, Jerry Mashaw, the leading American administrative law scholar and proponent of the dignitarian view, has argued that procedural ‘due process’ is important precisely because it respects ‘values inherent in or intrinsic to our common humanity-values such as autonomy, self-respect, or equality’ (1985, p. 171).¹³ By contrast, those who promote ‘utilitarian’ perspectives see the observance of the rules of procedural fairness as consequentially valuable for their contribution to more efficient decision-making processes and better decisional outcomes. The appeal of such perspectives thus lies in their apparently more concrete and measurable orientation to results.¹⁴ Though often pitted against each other, these two standard justifications for procedural fairness in administrative law need not always be in opposition. For instance, if the opportunity to advance one’s case is led by utilitarian considerations, that opportunity might still secure the ‘side-effect’ of respecting the dignity of the subject, with all the benefits that proponents of the dignitarian view have emphasised so far. Be that as it may, in my own work I have insisted that something important is overlooked in these analyses.

This missing element is attention to the particular setting in which the demands of procedural fairness arise in administrative law: namely, in the context of one person possessing authority to exercise administrative power over another. When this context is brought into view, we can see that at stake in different ways of explaining the value, rationale, or justification for the rules of procedural fairness; are different ways of prioritising the perspective and experience of the repository and subject of that exercise of authority respectively and, crucially, the *relationship* between them (see Rundle 2016, pp. 164–167). Although there might be nothing intrinsic to the utilitarian view that necessarily *excludes* orientation to the perspective or experience of the subject within this relationship, there is equally nothing intrinsic to the utilitarian view that *orients towards* that perspective or experience. Fundamentally, utilitarian perspectives are directed to the position of the repository of authority and the wider institutional frame within which that repository operates. They are not, or not primarily, directed to the position and experience of the subject who ultimately has no power to direct the outcome of the repository’s exercise of authority beyond the influence afforded to her in the processes leading to it. Only dignitarian accounts can support an understanding

of the exercise of administrative authority as a relationship between those who possess government power and those who are subject to it. Dignitarian justifications for the demands of procedural fairness must therefore take priority over utilitarian justifications not merely for their own sake, but for how they lend support to the empowerment of the subject necessary for the relational conditions of authority itself.¹⁵

11.4 Administrative discretion: mapping the territory

Echoes of the wider legal theory commitments outlined in Section 11.2 will be discernible in the argument just outlined. In the work in which it was developed, my interest lay with the place of procedural fairness within circumstances of administrative power generally. I did not single out administrative discretion as potentially demanding separate treatment, as I propose to do here.

The reason why administrative discretion may demand such separate or additional treatment is because the form of legal relation constituted by its possession and exercise is materially different from that which is constituted under the model of an order of rules that ordinarily lies in the background of discussions of procedural fairness. Under an order of rules, the role of the lawgiver is to articulate the relevant rule(s), the role of the law-applier is to apply those rules to the circumstances of the legal subject, and the role of the legal subject is to ‘obey’ or otherwise to cooperate with their normative demands. Contestation around processes of rule-application typically concerns conflicting interpretations of the rules, or complaints about the fairness of their application in the individual case. But the important point for present purposes is that the legal relation itself is framed by an order of rules to which rule-applier and rule-subject alike are *mutually* subordinate. Asymmetries will undoubtedly still be present within this rule-governed relationship. These will moreover stand to be amplified by the fact that some discretion will typically be vested in the rule-applier to determine precisely how the rules will be applied. Still, even accounting for such asymmetries, it remains the case that the legal relationship itself will be framed by the rules, that these rules will be known in advance, and that any discretion as to their application will be subject to some degree of contestation.

The form of legal relation constituted by the possession and exercise of administrative discretion is different. As earlier noted, when a discretion is reposed in an administrative official, it leaves that official ‘free to make a choice between possible courses of action or inaction’ (Davis 1969, p. 4). This defining feature of freedom of choice on the part of the repository, whatever its degree, produces a different form of legal relation to that which arises when an exercise of power is framed by rules. This legal relation still has boundaries, in the sense that it is framed and therefore confined by the boundaries of the statutory provision through which a discretion is reposed. The discretion might also be structured through the statutory imposition of certain requirements for its exercise, such as mandating consideration of particular facts about the individual, or reference to specified public policy priorities or simply the ‘public interest’.

These ways in which administrative discretions are confined and structured are undoubtedly important to the character and quality of the governing relationships between repository and subject that come to be convened through them. Nonetheless, the point to highlight for the purpose of the present analysis is that neither of these ultimately contingent features of an administrative discretion alters the relational implications that necessarily follow from the feature of choice between possible courses of action that belongs to the repository of the discretion and the repository alone. In short, the element of mutual subordination characteristic of an order of rules is starkly absent in the case of administrative discretion.

This key difference in the form of legal relation constituted by rule-based and discretionary administrative orders, respectively, has received an—at most—implicit treatment in the literature on procedural justice so far. Two key studies, however, have yielded arguments and insights that provide important support for those that I wish to develop and defend here. The first is the seminal effort of the mid-twentieth century American administrative law scholar Kenneth Culp Davis to situate administrative discretion at the centre of administrative law inquiry. The second is the socio-legal study of due process in the context of administrative procedures undertaken by Dennis Galligan (1996).

In *Discretionary Justice: A Preliminary Inquiry* (1969) Davis sought to address the problem of individual injustice that can result from either too much or insufficiently limited discretionary power. In pursuing this inquiry Davis highlighted some key theoretical commitments that had led to the marginalisation of administrative discretion as a site of legal inquiry to that point. In particular, Davis emphasised the extent to which this marginalisation had been encouraged by what he described as ‘extravagant’ versions of the rule of law according to which enacted rules are presented as the only legal form, and the courts the only supervisory institutions, through which a condition of the rule of law can be maintained (pp. 28–41).¹⁶ On this understanding administrative discretion essentially embodies and gives legal form to arbitrary power: the very antithesis of the rule of law. To Davis’s eyes, this ‘extravagant’ version of the rule of law not only presented a descriptively inaccurate account of modern government and the centrality of the administrative state within it, but also operated to limit wider theoretical inquiry into conditions necessary for the rule of law (pp. 29–30).

It is important to emphasise that Davis was not a defender of discretion *per se*. Indeed, he thought that ‘a good deal of discretion is illegal or of questionable legality’ (p. 4). His point was simply that not *all* administrative discretion is necessarily at odds with a condition of the rule of law. Thus, while arbitrary power ‘should be eliminated to whatever extent it can be eliminated without undue sacrifice of other values that may be deemed more important’ (p. 30), so long as administrative discretions are appropriately confined and structured ‘discretionary justice’ in the individual case and compliance with the rule of law could both be achieved. For Davis, then, the key question is how administrators can ‘regularise’, ‘organise’, and ‘produce order’ in their exercise of discretionary power in order to avoid unjust arbitrariness (p. 98) or other miscarriages of justice in the

individual case (p. 119).¹⁷ Among the ‘instruments’ he identified as potentially contributing to that aim was the provision of ‘fair informal procedure’, which he described in terms of the ‘opportunity for the affected party to know what is considered and to respond to it before a decision is made’ (p. 98).

A more extended treatment of the demands of procedure in the context of administrative discretion can be found in Galligan’s study of due process in the context of administrative processes (1996). The taxonomical aim of Galligan’s project was to differentiate common families of processes on the basis of their legal purpose (the particular mode of resolution each offers within the legal system itself) so as to consider the implications for procedural fairness reflected in each. Within this taxonomy he identified discretion as belonging to a family of processes characterised by the capacity of the official in whom it is reposed to decide as he or she ‘thinks best’, which was to be distinguished from the characteristic legal mode of the application of authoritative standards (pp. 26–27). Galligan recognised that a discretion will still generally be situated within a system of standards, even if only those to be implicitly taken from the wider purposes of the statute within which the discretion is reposed. But he argued that it would be a ‘distortion’ to overstate the role of authoritative standards within discretion given the substantial degree to which the exercise of discretion depends on the judgement of the official as to what standards should apply (p. 26).

Galligan’s observations on ‘policy-based discretion’ are of particular interest to present concerns (pp. 264–267). ‘Policy-based discretion’ arises in circumstances where, in deciding how a person is to be treated, the authority is obligated to act as appears best in the public interest (p. 264). Examples include the discretion to decide whether to release a prisoner on parole, deport an alien, or grant a planning permission. What distinguishes this kind of administrative discretion is how it involves ‘an uneasy combination of an individualised process on the one hand and a policy-based process on the other hand’ (p. 264), inviting attention to the individual’s circumstances at the same time as leaving space for considerations of politics.

Relevantly for present purposes, the tension between these two elements carries important implications for the demands of procedural fairness in relation to such discretions (p. 266). As Galligan explains it, the individualised aspect of a ‘policy-based’ discretion points towards the standard ‘adjudicative’ model of procedural fairness and its prescriptions for how facts are to be determined and issues of merit considered. Yet the absence of authoritative standards of the kind typical in rule-based orders complicates even these individualised aspects of ‘policy-based’ discretions, with the consequence

that the relationship between the official and the party ... is better characterised as one in which the official may decide as seems best while at the same time being *responsive* to the claims of the party.

(p. 265, emphasis added)

As for the policy-based component, here Galligan suggests that the notion of ‘consultation’ might better capture the procedural demands of the relationship

between the official and the subject that is in play. This is because even if the subject might use her procedural rights to attempt to influence the application of the policy-based aspects of the discretion, the official ultimately ‘may decide for reasons which go beyond those submissions’ (p. 265). The dual features of a ‘policy-based’ discretion thus make it impossible to prescribe precisely what is needed to meet the demands of procedural fairness in such contexts, beyond well-settled general standards of fair treatment (p. 375).¹⁸ But in Galligan’s view these demands of fair treatment should include an opportunity for the affected party to make a case specifically directed at influencing the policy aspects of the discretion, at least in relation to their application to the individual case. Galligan acknowledges that this controversial suggestion might be thought to invite into the administrative space a kind of participation in assessing the merits of policy that belongs foremost to the legislative domain (p. 378).¹⁹ But, as he puts it, ‘in this shadowland between adjudication and policy, the very understandings governing the citizen-state relationship are unsettled’ (p. 266).

The present analysis benefits from Davis’s and Galligan’s in several respects. The affinity with Davis lies above all in the latter’s effort to bring administrative discretion to the fore, and to illuminate the rules-based assumptions and commitments of legal theory that have operated to marginalise its study as a distinctive form of legal relation or to associate it with arbitrariness for its non-alignment to that archetypal legal mode. Davis was also entirely alive to the asymmetries generated by discretion and the dangers this produces for those subject to its exercise. The affinity between Galligan’s project and the present lies on another plane. Galligan’s careful differentiation of the ‘individualised’ versus ‘policy-based’ components typical of many administrative discretions helps us to see that the very same person whose particular circumstances might be brought into focus within the ‘individualised’ aspect of this kind of discretion might in turn be at best tenuously situated within its ‘policy-based’ aspects. Thus, even if implicitly, he points to the relational problems that accompany the phenomenon of administrative discretion.

I turn now to make the case for *why* the interplay between procedural fairness and administrative discretion is so significant to managing and potentially correcting these tensions, and how this might in turn contribute to the possibility of situating administrative discretion within conditions necessary for the rule of law as Fuller understood them.

11.5 The interplay of procedural fairness and administrative discretion: promoting the relational conditions for authority

The feature of choice as to possible courses of action that is the hallmark of the possession and exercise of administrative discretion complicates its character as a form of legal relation into which practices of procedural fairness might enter. What we can take from Galligan is that this complexity is amplified in the face of the dual character of ‘policy-based’ discretions. Saliently, it is precisely this

kind of administrative discretion that tends to be in view when the location of discretion within a condition of the rule of law is disputed. What, then, is the significance of procedural fairness when a governing relationship is framed by administrative discretion?

Following Galligan's division, this question must be considered separately for the individualised versus policy-based aspects of administrative discretion. With respect to the former, it is not difficult to discern how procedural fairness in the context of the individualised aspect of an administrative discretion facilitates a recognisable relationship between its repository and subject. The obligation to observe procedural fairness is clearly most at home in the individualised aspect of administrative discretion, where the concern has been to ensure that the person subject to the discretion is given a fair opportunity to put a case for its exercise in her favour. This demand has been strenuously protected by courts in their supervisory jurisdiction over administrative action, in no small measure because courts have long recognised the alignment between their own procedural fairness obligations within judicial processes and what the law ought to demand within this aspect of administrative decision-making.

But what of the relational significance of procedural fairness in the context of those policy or political aspects of a 'policy-based' administrative discretion where, as just noted, the very same person whose particular circumstances might be brought into focus within the 'individualised' aspect of this kind of discretion might be at best tenuously within the repository's gaze? This tendency, inherent in the very form of administrative discretion, gains further traction from the trappings of unilateral power inherent in the idea of being 'authorised' to exercise such discretion. This invitation to unilateralism is even more extreme when the exercise of an administrative discretion is conditioned on the 'public interest', for the reason that such considerations necessarily operate to divert the perspective of the repository away from the subject. It is therefore precisely here, I want to suggest, that affording procedural fairness contributes a crucial *relational correction* to what could otherwise operate as mere power over the individual affected by it.

It is important to understand *why* the relational correction needed in this context can only be supplied by affording procedural fairness to the subject positioned within it. Other structural features of administrative discretions, such as their answerability to certain stated mandatory, relevant, or irrelevant considerations may well operate to direct attention to some or other aspect of the circumstances of the subject. But beyond the fact of how the presence of these features is contingent on how the boundaries of the discretion are formulated, these structural features ultimately go to the conditions of authorisation imposed by the vesting authority on the official in whom the discretion is reposed. Though they might provide important standards against which that repository can be called to account, it does not follow that these structural features of an administrative discretion are concerned with the agency of the person subject to that discretion, or the obligation of the repository to engage with it.

Procedural fairness, by contrast, makes precisely this agency-investing contribution. In doing so, it operates to render concrete a governing relationship

between repository and subject that otherwise stands to be absent or radically attenuated as a consequence of the relational vulnerability that characterises administrative discretion generally. The statutory boundaries of an administrative discretion might provide the frame for a governing relationship, but it is the agency-investing character of procedural fairness that secures the relational quality of that relationship. It is therefore essential to grasp the relational contingency that characterises administrative discretion, and which is most acute in the case of 'policy-based' discretion, if we are to achieve a more sophisticated account of its place within overarching commitments to the rule of law. The extent to which observance of procedural fairness operates to provide a relational correction to that contingency will determine whether administrative discretion can be so situated.

In developing this view, it is important to consider what this relational correction serves in terms of situating administrative discretion within conditions of the rule of law. Here we meet a number of complications that attend the effort to theorise administrative law generally.²⁰ In the context of the exercise of administrative power it might be difficult to argue that the relational dynamics at play in the provision of procedural fairness serve the *acceptance* of authority in the manner signalled in Fuller's arguments about the relational conditions that constitute the authority of legal order in the first instance. Administrative law belongs to a domain of practice concerned with the application or administration of legally authorised power, rather than the conditions for the constitution of that power. The descriptive or normative theoretical commitments we might associate with those constitutive conditions might therefore strain to be extended, without modification, into the administrative space: specifically, the notion that procedural fairness serves the subject's acceptance of the repository's power might be misplaced as either a description or a normative demand. Further, though procedural fairness might play an important role in supporting acceptance of the repository's *decisions*, it is unlikely that such acceptance will be carried by procedural fairness alone. The justificatory practice of reason-giving is arguably more likely to contribute to the acceptance of administrative decisions in this sense.

The claim I want to advance about what the relational correction supplied by procedural fairness serves, in terms of situating administrative discretion within conditions of the rule of law, addresses something beyond the conditions necessary for accepting the authority of administrative decisions. My argument is instead that the relationality supplied by procedural fairness is fundamental to the intelligibility and recognisability of the *experience* of authority itself within an order of law. To be experienced as an instance of lawful authority rather than mere power, the relational conditions that structure administrative action must be continuous with those which support conditions for the acceptance of authority in its constitutive aspect. This position can accept that the structure of authorisation underscoring administrative action will hardly collapse if a subject does not actively 'accept' an administrative decision: the person authorised to make that decision will still be authorised to make it regardless. But, and crucially, the legal status of being 'authorised' still comes with relational demands.

These demands necessarily follow from the theoretical commitments outlined earlier, in which the central idea was that what it takes to bring a condition of lawful authority into existence is equally what it must take to keep that condition in existence. Once we defend a normative conception of the rule of law in these terms, we must reject the idea that the concrete expression of authority, in its administrative aspect, can be characterised by unilateralism or other conditions in which relational dynamics are radically attenuated. This is precisely why procedural fairness is so important. The particular species of agency there generated—what I earlier termed legal agency—stands to effectively convert an instance of authorisation into a condition continuous with the foundational conditions of authority from which that authorisation is derived.

11.6 Promoting relational approaches to administrative law

In addition to marking out a new contribution to relational approaches to procedural justice, the arguments just offered might be situated among other recent works that have sought to promote ‘relational’ approaches to questions of administrative law, including with respect to procedural fairness and administrative discretion specifically. Jennifer Nedelsky’s treatment of ideas of bureaucratic autonomy within American approaches to procedural ‘due process’ is a leading contribution to the former (Nedelsky 2011), while Genevieve Cartier’s conception of ‘discretion as dialogue’ within Canadian administrative law offers an innovative account of the latter (Cartier 2005).

As part of her study in *Law’s Relations: A Relational Theory of Self, Autonomy, and Law*, Nedelsky considers what kinds of practices and values might be needed ‘to make autonomy viable in a bureaucratic state’ (2011, p. 139). Questions of autonomy in this context are of special interest to Nedelsky, as a theorist of ‘relational autonomy’ more generally (1989), as those who are ‘in the most dependent relation to the government’ will invariably find themselves in bureaucratic relationships (2011, p. 140). In such settings, Nedelsky argues, affording procedural fairness is potentially status-transforming in regard to the components of autonomy with which she is concerned: dignity, competence, comprehension, and defence against arbitrariness. As she expresses the point, ‘a hearing designates recipients as part of the process of collective decision-making rather than as passive, external objects of judgment’, and may accordingly prevent the subjects of administrative decisions ‘from becoming passive objects’ of bureaucratic intervention (2011, p. 140).

Nedelsky takes her cue for the autonomy-promoting promise of procedural fairness from an (albeit limited) era of 1970s American ‘due process’ jurisprudence that indicated how autonomy can be fostered through bureaucratic relations between the individual and the state (2011, p. 140). Although Nedelsky describes this ‘due process explosion’ as growing out of ‘the best of the American liberal tradition’ in its emphasis on the protection of individuals from the power of the state (2011, p. 143), she observes many problems associated with it. Some are specific to the American constitutional context: for example, Nedelsky notes

that the conceptual framework underlying the ‘due process explosion’—conceiving of welfare payments as a form of ‘new property’ that required constitutional ‘due process’ protections before being taken away—does not of itself provide an adequate basis for articulating affirmative responsibilities of the state (2011, p. 143). Other problems are more general: for instance, she identifies how the objective of fostering autonomy will be rendered vulnerable if procedural fairness protections are tied to the specificities of a particular agency’s powers or particular substantive rights (2011, pp. 140, 144). The objective must instead be ‘to protect the autonomy of all in their interactions with government’, in all circumstances (2011, p. 144).

Resonating with Nedelsky, the normative aim of Cartier’s project (2005) is to promote a relational view of what is demanded in the exercise of administrative discretion specifically. Cartier’s conception of ‘discretion as dialogue’ as opposed to ‘discretion as power’²¹ accordingly seeks to foster ‘a reciprocal relationship between the decision-maker and the individual affected by the decision’ (p. 644). According to this conception, the process of communication triggered within the idea of ‘discretion as dialogue’ prevents a repository from imposing its decision ‘unilaterally’ on the subject, and supplies an opportunity for the subject to participate in the creation of the norms that will govern the exercise of the discretion (p. 644). At an interpretive level, Cartier claims that her conception best accounts for the progressive trend reflected in a line of key Canadian cases commencing in the late 1970s that saw the courts impose procedural obligations on repositories of discretionary powers, and which departed from a previous reluctance to supervise the exercise of discretionary powers so as to avoid overstepping into questions of policy (pp. 640, 642).²² But most relevantly for present purposes, Cartier insists that her conception of ‘discretion as dialogue’ brings discretion ‘down to the individual, instead of maintaining it in the high spheres of the government machinery’ (pp. 630–631), and gives concrete expression to the principle ‘that the administrative state is there first and foremost to serve the individuals submitted to the authority of the state’ (p. 648).

Situating my account alongside Nedelsky and Cartier’s reveals some key points of common emphasis. First, and foundationally, we are each preoccupied with questions of agency in the face of administrative power, and specifically with ameliorating or removing the possibility that the repository of such power will unilaterally ‘act upon’ the person subject to it. We are each equally concerned to highlight the importance of procedural fairness in providing a channel not just for participation in administrative decision-making, including in processes of norm-creation, but for situating the relational contact between repository and subject within the larger project of government. The agentic and relational demands of the bureaucratic space are thus, in each analysis, viewed as continuous with the agentic and relational demands of democratic constitutionalism and the institutions through which it is given concrete expression. Moreover, in each analysis the normative prescriptions advanced in association with these shared preoccupations are inseparable from a relational conception of administrative authority itself, whether implicitly or explicitly.

In the present instance, however, the foundation for insisting on a relational conception of administrative authority, and for drawing out the unique relationship between administrative discretion and procedural fairness that it yields, is an extension of a particular set of theoretical commitments: namely, my concern to develop and defend an understanding of the rule of law itself as a practice of framing *all* governing relationships by the authority of law. In ‘Fuller’s Relationships’ I suggested that such a conception offered a more fitting contemporary tribute to Fuller’s contribution to theorising conditions necessary for the rule of law than the kind of ‘checklist-style’ applications of his eight principles of the ‘internal morality of law’ that are so often associated with that endeavour (Rundle 2019a). In support of the foregoing analysis, I want equally to suggest that this explicitly relational reading of Fuller offers the most generative ‘application’ of the insights of his jurisprudence to questions of administrative law.

In so urging, I am distinguishing my approach from the efforts of other scholars who have sought to bring Fuller’s thought to such questions. An important recent contribution to that end is the effort of the leading American public law scholars, Cass Sunstein and Adrian Vermeule (2018), to articulate ‘the morality of administrative law’ (p. 1927). Though Sunstein and Vermeule do not attempt to apply each of Fuller’s eight principles to specific issues in American administrative law in developing this idea, they do seek to ‘examine Fuller-compatible approaches’ to a number of pressing issues, including vagueness and retroactivity in the practice of administrative agencies (p. 1929). There is not space here to recount the details of this contribution that has done much to direct the attention of administrative law scholars to the promise of Fuller’s thought. What requires emphasis in the present context is how, even if there is some acknowledgement of present concerns,²³ Sunstein and Vermeule’s project reflects a qualitatively different engagement with the idea of the ‘internal morality of law’ than that which I have pursued here.

The key point of difference is that Sunstein and Vermeule accept, and adopt, the ‘checklist’ reading of Fuller’s principles that my own work has been at pains to resist. As I read them, Fuller’s principles speak to an idea that is broader, and more fundamental, than the sum of eight parts. They speak to the distinctive quality of relationship that is brought into being, regulated and served, but not exhausted by, those principles (Rundle 2012, pp. 10, 92). Treating the eight principles as a ‘checklist’, I have therefore argued, distracts from Fuller’s central concern to illuminate the relational conditions constitutive of a condition of the rule of law (Rundle 2019a, pp. 35–36). The importance of this point bears repeating in the present context. In my view, emphasising Fuller’s enduring concern to illuminate the quality of governing relationships required by an order of law offers the most generative connections between his avowedly normative, authority-centred, form-sensitive, role-emphasising and subject-oriented jurisprudential commitments and the kinds of questions raised by the design and exercise of contemporary administrative power.

11.7 Conclusion: the promise for practice

My aim in the foregoing has been to expand the theoretical treatment given to ‘procedural fairness’, ‘procedural justice’, or ‘procedural due process’ in two new directions. First, I have directed inquiry towards a different form of legal relation—administrative discretion—to that to which inquiry into the value or other significance of procedural fair treatment in decision-making settings most commonly refers. Second, I have aimed to situate this move within a jurisprudence of the rule of law understood as a practice in which governing relationships are framed by the authority of law, and in which the distinctive kind of agency supported by procedures occupies a central place.

Among the motivations for developing this analysis has been an awareness of the vulnerability of these procedural supports in practice. As Nedelsky and Cartier emphasise with respect to the American and Canadian contexts, trends in the articulation of the legal demands of procedural fairness show, starkly, the contingency of the relational promise of its conceptualisation and realisation (Nedelsky 2011, pp. 144–145, 147). The scope and content of procedural fairness in Australian administrative law have followed a similar trajectory. As with the American and Canadian experience, there have been some important moments, indeed eras, of relational promise in the conceptualisation of what procedural fairness demands as a matter of law. For example, for a period the Australian common law held that if a subject of administrative power had a ‘legitimate expectation’ that a particular course of action would be taken in association with its exercise, then a duty to afford procedural fairness would arise in the event that the repository proposed to depart from that course of action. Though the era of ‘legitimate expectations’ has now all but passed, what was striking about this idea being included among the possible triggers for a duty to afford procedural fairness was the concern it indicated for the quality of administrative relationships. That is, to insist that procedural fairness might be owed to a person whose legitimate expectation of a particular course of administrative action has been defeated, is to acknowledge that being a subject of administrative power involves a relationship with the repository of that power, and that this relationship carries demands that will be enforced by the law.²⁴ The same might be said about the recent emphasis in the Australian case law on why the provision of an oral hearing may be necessary in certain contexts (such as when questions of credibility are at stake) if the demands of procedural fairness are to be met.²⁵

These and other features of the Australian common law of procedural fairness—past and present—might be thought to suggest that observing this cardinal legal demand ensures ‘that those governing are answerable to and should be responsive to those affected by that exercise of power’ (Robertson 2016, p. 162; see also Rundle 2016, p. 168). But this, too, might be historically and institutionally contingent. In the present era, responsibility for determining the ambit of procedural fairness to be afforded to subjects of administrative power is increasingly appropriated by parliaments for their exclusive determination through the

statute that establishes the authorising scheme. Moreover, contemporary practice demonstrates that administrative discretions that push furthest into the policy or political space are precisely those to which few or no procedural fairness obligations will attach. The widespread statutory exclusion of procedural fairness in the context of parole hearings, and in connection with administrative powers associated with national security measures, provide just two examples.

The framing of administrative discretion itself has also begun to take new and innovative forms. A leading Australian example is the device of the ‘non-compellable’ administrative discretion that can be exercised at the option of its repository. Conditioned by unspecified considerations of the ‘public interest’, and departing from the longstanding assumption of administrative law that a discretion reposed must be exercised upon an application to do so, procedural fairness protections will only be available in association with such powers in the event that the repository chooses to consider exercising them.²⁶ This squarely reflects the ‘authorisation’ mindset analysed above, in which the very design of the scheme of power orients toward the repository and away from the subject. One can only question where these developments leave conditions for the governing relationship itself.

In administrative law these governing relationships are inherently and invariably unequal. This fact that attends the work of government in its practical expression is a perennial one. Still, there are ways of thinking about the administrative state, and about administrative law, which can promote the idea that the project of both is to *mediate* the governing relationships that arise between a state and its subjects. In this enterprise, ideas matter. A relational theoretical perspective on what is at stake when power is exercised by the administrative state, irrespective of the legal form through which that power might ultimately manifest, is a necessary foundation for a relational practice.

Notes

- 1 I am grateful to the editors, and participants in the Julius Stone Institute of Jurisprudence seminar in September 2019 at which an earlier version of this chapter was presented, especially Denise Meyerson and Jeffrey Gordon, for their helpful comments. Sincere thanks also to Emily Peck for her superb research assistance.
- 2 Following Denise Meyerson and Catriona Mackenzie (2018), I will treat these three terms as essentially interchangeable. For the purpose of my analysis, however, I will primarily adopt ‘procedural fairness’ given the prevalence of this term in the administrative law context with which my analysis is concerned.
- 3 I return to the administrative law treatment in Part III.
- 4 For an excellent review of the philosophical literature, see Meyerson and Mackenzie (2018).
- 5 Fuller’s private correspondence explicitly affirms that ‘role morality’ is the primary meaning he intended for the ‘morality’ element of his idea of the ‘internal morality of law’. For one example, see Letter from Fuller to Rolf Sartorius, 29 January 1974 in The Papers of Lon L Fuller, Harvard Law School Library, Box 7, Folder 15 (Correspondence).

- 6 This was also fundamental to Fuller's objections to the concept of law presented by legal positivism. To Fuller's eyes, the picture of a unidirectional 'manifested fact of authority or social power' reflected in legal positivism might better be described in terms of 'managerial direction' than 'law' (1969, p. 147). For a full treatment of Fuller's objections to legal positivism, especially those of HLA Hart, see Rundle (2012, pp. 86–140).
- 7 For a use of this term with compatible aims by scholars interested in questions of legal capacity in the context of disability law, for example, see Anna Arstein-Kerslake and Eilíonóir Flynn (2017).
- 8 It follows that I depart from Jeremy Waldron's assessment (2011) that 'Fuller's "procedural" theory was concerned almost entirely with the formal properties of legal rules, such as their clarity and consistency', and that the features of Fuller's internal morality of law 'all relate to the form that legal norms take, not to either the procedure of their enactment or (more important) the procedural mode of their administration' (pp. 7–8).
- 9 Though administrative discretion did not take a central place in the development of Fuller's claims about the principles of the 'internal morality of law' *per se*, those familiar with the discussion of Nazi law in the famous debate between Fuller and HLA Hart in the 1958 *Harvard Law Review* will recall that Fuller paid special attention to the ostensibly unbounded administrative discretions characteristic of certain Nazi statutes. Relevantly for present purposes, it was in the context of discussing Nazi law that Fuller distinguished between a 'tinsel of legal form' and the kind of conditions actually capable of supporting the relational demands of legal order, as he understood them (1958, p. 660).
- 10 For my own treatment of the rules of procedural fairness in the context of Australian administrative law, see Rundle (2016, p. 164).
- 11 See Meyerson and Mackenzie's (2018) review of the key philosophical arguments.
- 12 Philosophers have extended upon the connections between procedure and dignity in different ways. For example, Jeremy Waldron (2011) has argued that procedures embody 'a crucial dignitarian idea—respecting the dignity of those to whom the norms are applied as being capable of explaining themselves' (p. 16). Lawrence Solum (2004) has developed a position that recognises both the intrinsic dignitarian value of procedure alongside the 'irreducible' instrumental value of procedural participation to conferring legitimate authority on adjudicative decisions, irrespective of their substantive correctness (pp. 275, 278).
- 13 For a helpful explanation of the constitutional lineage and preoccupations of American 'procedural due process' thinking, see Jennifer Nedelsky (2011, pp. 139–141).
- 14 For an overview, see the helpful discussion of different justifications for the rules of procedural fairness in terms of 'instrumental' versus 'intrinsic' or 'non-instrumental' accounts offered by Peter Cane and Leighton McDonald (2012, p. 118).
- 15 My position here resonates strongly with Jennifer Nedelsky's observation, also addressing questions concerning state-subject relations in the administrative state, that '[d]ignity is not necessarily about perception, competence, judgment and capacity to act', and that '[n]ot all the relations that express dignity will foster these abilities' (2011, p. 141). Though with different theoretical questions in view—in my case, theorising conditions for authority, in Nedelsky's, theorising conditions of autonomy—the common point is that more than dignitarian arguments are needed to illuminate the value of procedural fairness in administrative settings. See my discussion of Nedelsky's 'relational' approach to questions of autonomy in the administrative state in section 11.6.

- 16 Ed Rubin's important analysis of law and legislation in the administrative state echoes and develops Davis's polemic in key ways. Also rejecting abstract theories of 'law' and seeking to promote the theorisation of legislation in a manner that more closely reflects its modern attributes, Rubin pointed out that the legislative form implicated in administrative authorisation rarely produces the classic rule-governed relationship between lawgiver and citizen but is instead directed primarily to empowering officials to apply rules to or exercise discretion over subjects (see Rubin 1989).
- 17 Davis ultimately suggested seven 'instruments' through which this exercise of structuring discretionary power might be achieved, with different applications in different contexts: 'open plans, open policy statements, open rules, open findings, open reasons, open precedents, and fair informal procedures' (1969, p. 98).
- 18 For example, established procedural demands such as that the facts of the case be enquired into and properly assessed, and that the official properly consider the circumstances of the case and its consequences for the subject (Galligan 1996, pp. 375–378).
- 19 Galligan highlights how this prescription runs against the position articulated by the majority of the High Court of Australia in *South Australia v O'Shea* (1987) 73 ALR 1, that the merits of a minister's policy on parole are matters for determination by government and should not be subject to attack in an individualised case (1996, p. 379).
- 20 As the French administrative law scholar Denis Baranger has astutely put the point, engaging with Martin Loughlin's *Foundations of Public Law* (OUP 2010), administrative law is readily assumed by public law theorists to be 'not foundational' in character (2016, p. 112).
- 21 It is notable for present purposes that in setting up this distinction Cartier analogises her point to Fuller's complaints about the conception of law advanced by legal positivist philosophy as 'one-way projection of authority' or a 'unidirectional assertion of control over human behaviour' (see Cartier 2005, p. 636).
- 22 Engaging with Cartier's account, Nedelsky suggests less optimistically that 'discretion as dialogue' might be better understood as accounting for the best of Canadian administrative law (2011 p. 147).
- 23 For example, in their suggestion that claims about law's internal morality 'help to underscore the serious problems ... that arise, for example, if public officials have the discretion to do whatever they want' (p. 1966).
- 24 For my treatment of legitimate expectations, and the corresponding loss represented in its demise, see Rundle (2016, p. 170), and (2019b, pp. 10–11).
- 25 See *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326.
See also my discussion of developments in the English case law in Rundle (2016, p. 172).
- 26 For my analysis of non-compellable powers, see Rundle (2019b).

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