

# *Which Came First, the Procedure or the Substance? Justificational Priority and the Substance–Procedure Distinction*

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**Abstract**—Sometimes, we are justified in adopting a certain procedure because it leads to a just outcome. A paradigmatic example is dividing a cake using the ‘you-cut-I-choose’ method: the one who cuts the cake is the last to get her share. This procedure is justified because it tends to lead to the just outcome—an equal division of the cake. However, at times the direction of justification is reversed. Think, for example, of a tennis match in which a coin toss is utilized to determine which player will serve first. In this case, the outcome is justified in virtue of its being a product of that (fair) procedure. We can call these two phenomena ‘justificational priority’ of the outcome and of the procedure, respectively. This article suggests that the concept of justificational priority can be applied to the legal classification of norms as ‘substantive’ or ‘procedural’. Such classification is required, for instance, in cases of conflict of laws. It is argued that if a certain substantive outcome has justificational priority over a certain norm, which is conceptually (or philosophically) procedural, then this norm should be legally classified as ‘substantive’. In contrast, if a certain (conceptually) procedural norm has justificational priority over the substantive outcome, then, in general, it should be legally classified as ‘procedural’.

**Keywords:** legal philosophy, conflict of laws, evidence law, criminal procedure, civil procedure

## *1. Introduction: The Substance–Procedure Distinction*

The substance–procedure dichotomy has been prevalent in legal thinking for more than two centuries.<sup>1</sup> However, despite the longevity of the substance and

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<sup>1</sup> Some attribute the distinction between the categories of substance and procedure to Jeremy Bentham, HLA Hart (ed), *Collected Works of Jeremy Bentham: Of Laws in General* (The Athlone Press 1970) 142; see DM Risinger, “Substance” and “Procedure” Revisited with some Afterthoughts on the Constitutional Problems of “Irrebuttable Presumptions” (1982) 30 UCLA L Rev 189, 191. Others credit Sir William Blackstone for

procedure categories, defining the boundaries between them continues to attract judicial and scholarly attention.<sup>2</sup> When we address the question of how to determine whether a specific norm is procedural or substantive, we must first distinguish between the *philosophical* distinction and the *legal* distinction between substance and procedure. In some cases the two may overlap, but generally, while the philosophical (or *conceptual*) distinction concerns the appropriate application of the *ordinary* language concepts of ‘procedure’ and ‘substance’ and seems to be context-independent, the legal distinction is context-dependent and sensitive to further (moral or legal) normative considerations.<sup>3</sup>

Jurists are required to distinguish between substance and procedure whenever such a distinction has legal implications. For example, it may be required to classify a rule as procedural or substantive to resolve a conflict of laws where the legal dispute involves a foreign element. In such cases, matters of procedure are governed by the law of the forum (*lex fori*), while matters of substance are governed by the law to which the court is directed by its choice of law rule (*lex causae*).<sup>4</sup> We refer here to this issue as *jurisdictional conflict of laws*.<sup>5</sup> Legal classification may also be required to determine whether the valid rules are the ones in force at the time of the trial (as if they are procedural), or rather the rules in force at another point in time, eg, at the time when the offence was committed (as if they are substantive). We refer here to this issue as *temporal conflict of laws*.

The context-dependent character of the legal classification of norms, as substantive or procedural, stems from the fact that normative considerations are sensitive to the specific legal context. For example, the normative considerations that apply in cases of jurisdictional conflict of laws might differ from the normative considerations that apply in cases of temporal conflict of laws. In contrast to the legal distinction, the philosophical distinction between substance and procedure, at least in the classical view, is based solely on conceptual analysis of these notions and seems to be

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introducing this categorization, see TO Main, ‘Traditional Equity and Contemporary Procedure’ (2003) 78 Wash UL Rev 429, 459; TO Main, ‘The Procedural Foundation of Substantive Law’ (2010) 87 Wash UL Rev 801, 804–05, citing 3 BL Comm 115. There are also those who point to 13th century scholar Jacobus Balduinus as the origin of the distinction, R Garnett, *Substance and Procedure in Private International Law* (OUP 2012) 6.

<sup>2</sup> cf *Harding v Wealands* [2006] UKHL 32, [2007] 2 AC 1; Garnett (n 1); *Shady Grove Orthopedic Associates v Allstate Insurance Co* 130 SCt 1431 (2010).

<sup>3</sup> See WW Cook, ‘“Substance” and “Procedure” in the Conflict of Laws’ (1933) 42 Yale LJ 333, 337; EH Ailes, ‘Substance and Procedure in the Conflict of Laws’ (1941) 39 Mich L Rev 392, 406–08; CW Joiner and OJ Miller, ‘Rules of Practice and Procedure: A Study of Judicial Rule Making’ (1957) 55 Mich L Rev 623, 635; *Hanna v Palmer* 380 US 460, 471 (1965); PD Carrington, ‘“Substance” and “Procedure” in the Rules Enabling Act’ (1989) Duke LJ 281, 287; A Briggs (ed), *Dicey, Morris and Collins on the Conflict of Laws* (14th edn, Sweet & Maxwell 2006) § 7–004 (hereinafter Dicey and Morris).

<sup>4</sup> *ibid* § 7–003; G Biehler, *Procedures in International Law* (Springer-Verlag 2008) 7; *Restatement (Second) of Conflict of Laws* (1971) § 122.

<sup>5</sup> By this term, we refer collectively to inter-state conflict of laws, and conflict between federal and state law in the context of diversity cases. Clearly, there are normative and legal differences between these cases. However, these differences are immaterial for the purposes of the present article, since it focuses on an analysis of the fundamental relationship between substance and procedure.

context-free.<sup>6</sup> The difference between the philosophical and the legal categorizations can thus be understood as a difference in the type of normative guidance which is available when drawing the distinction: conforming to our intuitions as to what counts as ‘procedure’ (or as ‘substance’), when the philosophical distinction is at stake, or (also) conforming to moral or legal reasons, when the legal distinction is at stake.<sup>7</sup> Consequently, there may be cases in which a normative (legal or moral) consideration could lead to classifying a norm that is philosophically (or conceptually) procedural as legally ‘substantive’ or *vice versa*.<sup>8</sup>

Traditionally, British courts have extended the meaning of the term ‘procedure’ and granted it a very broad definition<sup>9</sup> that embraces ‘all aspects of relief and enforcement in a suit (“the remedy”)’.<sup>10</sup> This approach is now being subjected to some criticism. In the context of jurisdictional conflict of laws, for example, it has been argued that ‘it tends to frustrate the purpose of choice of law rules’.<sup>11</sup> Recognizing these difficulties, some Commonwealth courts have adopted a different principle for classifying rules as procedural or substantive.<sup>12</sup> In particular, the High Court of Australia stated that ‘matters that affect the existence, extent or enforceability of the rights or duties of the parties to an action are matters that, on their face, appear to be concerned with issues of substance, not with issues of procedure’.<sup>13</sup>

<sup>6</sup> According to the classical view, philosophical enquiry is grounded in the *a priori* analysis of concepts—namely, specifying the necessary and sufficient conditions for the application of concepts. However, in recent decades this view has become a matter of controversy. For a further discussion, see E Margolis and L Stephen, ‘Concepts’ in *The Stanford Encyclopedia of Philosophy* (EN Zalta, ed, Fall edn, 2012) <<http://plato.stanford.edu/archives/fall2012/entries/concepts/>> accessed 22 April 2013.

<sup>7</sup> See in this context KM Sullivan, ‘Post-Liberal Judging: The Roles of Categorization and Balancing’ (1992) 63 U Col L Rev 293, 294.

<sup>8</sup> We use the terms ‘conceptual’ and ‘philosophical’ interchangeably and contrast them to the ‘legal’ (distinction between substance and procedure). This use of terminology may appear confusing, since arguably the legal distinction is also conceptual; it is merely that the concepts it invokes are legal ones, whereas the philosophical distinction refers to the ordinary language concepts which prevail outside the law. We thank an anonymous referee for raising this point. It should be emphasized, then, that by the term ‘conceptual distinction’, we mean a distinction between the *ordinary language concepts* of substance and procedure. The contrast we make between the ‘conceptual’ and the ‘legal’ is nevertheless important, because it points out that when courts classify norms as procedural or substantive they are not merely engaging in conceptual analysis (in the philosophical sense of the term). Rather, they are combining conceptual analysis with the application of additional normative (moral or legal) considerations. Since these normative considerations are sensitive to the circumstances, the content of the *legal* concepts of substance and procedure may vary between different contexts.

<sup>9</sup> Dicey and Morris (n 3) § 7–003.

<sup>10</sup> Garnett (n 1) 8.

<sup>11</sup> Dicey and Morris (n 3) § 7–003; Garnett (n 1) 15–16.

<sup>12</sup> *ibid* 18.

<sup>13</sup> *Pfeiffer v Rogerson* (2000) 203 CLR 503. This principle was cited with approval by the Court of Appeal, Civil Division in *Harding v Wealands* [2004] EWCA Civ 1735, [2005] 1 WLR 1539 [90] (Aldous LJ). However, the decision was reversed by the House of Lords: *Harding v Wealands* [2006] UKHL 32, [2007] 2 AC 1. In a similar fashion, the Court of Appeal of Ontario stated that: ‘Substantive law creates rights and obligations and is concerned with the ends which the administration of justice seeks to attain whereas procedural law is the vehicle providing the means and instruments by which those ends are attained’. *Somers v Fournier* (2002) 60 OR (3d) 225 para 14. Similarly, in the USA, the Second Restatement states that a relevant factor for the distinction is ‘whether the issue is one whose resolution would be likely to affect the ultimate result of the case. If so, the otherwise applicable law should be applied unless application of the local law of the forum is required by the dominant interest of the forum state in the decision of the particular issue’. *Restatement (Second) of Conflict of Laws* (1971) § 122 cmt a.

In American courts, the distinction between substance and procedure has gained much attention in the context of diversity cases, where matters of procedure are governed by federal law while matters of substance are governed by state law.<sup>14</sup> One can identify three leading legal tests for distinguishing between substantive and procedural norms. The first test may be termed the *formal-functional* test, and it examines what the rule itself regulates.<sup>15</sup> If the rule governs only the manner and means by which the litigants' rights are enforced, then it is procedural; if it alters the rules of decision by which the court will adjudicate those rights, then it is substantive.<sup>16</sup>

From a normative perspective, applying the *formal-functional* test might be problematic since procedural norms can exercise a determinative effect on substantive rights.<sup>17</sup> Another test, which may be referred to as an *outcome-determinative* test, was therefore suggested. According to this test, the degree to which a norm affects the legal outcome and the litigants' substantive rights is a key factor in determining whether it is procedural or substantive (if it significantly affects the result of the litigation, then it is substantive).<sup>18</sup> This test also presents some difficulties, since almost any procedural norm affects the legal outcome.<sup>19</sup> It is necessary therefore to either determine the degree to which the outcome is affected, or to specify the types of effects that justify a rule's classification as 'substantive'.

The third test that has been proposed examines the *purpose* of the rule. According to this *purposive* test, the determinative question is whether the purpose of the norm is 'procedural' (for example, a purpose that touches on adjudication efficiency or fact-finding accuracy), or 'substantive' (one that touches on policy considerations that lie beyond the administration of the legal process).<sup>20</sup>

<sup>14</sup> See *Erie Railroad Co v Tompkins* 304 US 64 (1938); Rules of Decision Act, 28 USC § 1652; Rules Enabling Act, 28 USC § 2072; JP Bauer, 'The Erie Doctrine Revisited: How a Conflicts Perspective can Aid the Analysis' (1999) 74 Notre Dame L Rev 1235, 1266–70; JP Bauer, 'Shedding Light on *Shady Grove*: Further Reflections on the Erie Doctrine from a Conflicts Perspective' (2011) 86 Notre Dame L Rev 939.

<sup>15</sup> *Sibbach v Wilson & Co* 312 US 1, 14 (1941): 'The test must be whether a rule really regulates procedure, the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them'.

<sup>16</sup> J Tidmarsh, 'Procedure, Substance, and Erie' (2011) 64 Vand L Rev 877, 896–97.

<sup>17</sup> See, for instance, *Semtek International Inc v Lockheed Martin Corp* 531 US 497 (2001); KM Clermont, 'The Repressible Myth of *Shady Grove*' (2011) 86 Notre Dame L Rev 987, 1012; JS Hendricks, 'In Defense of the Substance-Procedure Dichotomy' (2011) 89 Wash UL Rev 103.

<sup>18</sup> *Guaranty Trust Co of New York v York* 326 US 99 (1945); *Cohen v Beneficial Industrial Loan Corp* 337 US 541 (1949); *Woods v Interstate Realty Co* 337 US 535 (1949); *Ragan v Merchants Transfer & Warehouse Co* 337 US 530 (1949); K Petroski, 'Statutory Genres: Substance, Procedure, Jurisdiction' (2012) 44 Loy U Chi LJ 189.

<sup>19</sup> *Shady Grove* (n 2) 1442 (plurality opinion): 'The test is not whether the rule affects a litigant's substantive rights; most procedural rules do'. See also M Keyes, 'Substance and Procedure in Multistate Tort Litigation' (2010) 18 Torts LJ 201, 215; Garnett (n 1) 21.

<sup>20</sup> See JH Ely, 'The Irrepressible Myth of *Erie*' (1974) 87 Harv L Rev 693: 'It is relevant whether the state irrepressible provision embodies substantive policy or represents only a procedural disagreement with the federal rulemakers respecting the fairest and most efficient way of conducting litigation' (722); 'The most helpful way, it seems to me, of defining a substantive rule – or more particularly a substantive right, which is what the Act refers to – is as a right granted for one or more nonprocedural reasons, for some purpose or purposes not having to do with the fairness or efficiency of the litigation process' (725). See Carrington (n 3) 290–91. Tidmarsh (n 16) 897 n 85, identifies a somewhat similar test of *balance of interests*: 'a rule is "procedural" when a federal court's policy interest in applying a federal rule outweighs the relevant state's policy interest in having its rule applied'. See also Petroski (n 18).

In this article, we explore the justificational relations between legal procedures and substantive legal outcomes. More precisely, we examine the question of *justificational priority* between the two. That is, whether a certain procedure justifies the substantive outcome, or perhaps the other way round: if the substantive outcome is justified because it is the product of a certain procedure. We will show that the question of justificational priority is relevant to the legal classification of norms as procedural or substantive.

Before approaching the question of the justificational relations between procedural norms and substantive outcomes, let us explain our use of the ordinary language term ‘procedural norm’. A clear and complete definition of ‘procedural norm’ is unnecessary for this article’s purposes; instead we can give an ostensive characterization or rely on a pre-theoretical (ordinary) understanding of this term. We adopt here a broad understanding of ‘procedural norm’, which includes not only adjudication and evidentiary rules but also rules of interpretation and rules governing the democratic process. It should be emphasized, however, that the discussion below does not depend on accepting this broad understanding.

Nor shall we be disturbed by the fact that the ordinary concepts of ‘procedural norm’ and ‘substantive norm’ are probably vague; presuming that, although there are some borderline cases, it is not difficult to distinguish paradigmatic examples of procedural and substantive norms.<sup>21</sup> Exploring these paradigmatic cases will suffice. The point we wish to make here is that the distinction between the (ordinary concepts of) procedural and substantive norms, though vague, is not meaningless. Hence, a discussion of the justificational relations between these different types of norms is not utter nonsense.

The rest of the discussion proceeds as follows: in Section 2, we present the concept of *justificational priority* of procedural norms over substantive outcomes (and *vice versa*). We then suggest, in Section 3, that the concept of justificational priority may be applied as a standard for legally classifying specific rules as procedural or substantive, where this classification is required. We conclude with some thoughts on further possible applications of the concept of justificational priority.

## 2. *The Concept of Justificational Priority*

### A. *The Direction of Justification—the General Idea*

The idea that lies behind the concept we termed ‘justificational priority’ is that of the *direction of justification*.<sup>22</sup> Sometimes, we are justified in adopting a

<sup>21</sup> Many terms in natural language are vague. For example, the term ‘tall’ is vague, but still there is no difficulty in saying that Shaquille O’Neal is tall while Danny DeVito is not. For a similar observation in the context of the substance–procedure distinction, see Cook (n 3) 336–37; Carrington (n 3) 284.

<sup>22</sup> Generally speaking, the term ‘justification’ may refer to different normative systems: epistemic, moral, legal, religious and so forth. Here we will focus mainly on moral or legal justification, though we will consider epistemic justification as well (in which case we will note this explicitly).

certain procedure because it leads (or tends to lead) to a just or right outcome. A paradigmatic example of such priority of the outcome over the procedure is the following. Suppose that we would like to divide a cake among several people. An adequate procedure for dividing the cake is the ‘you-cut-I-choose’ method. That is ‘to have one man divide the cake and get the last piece, the others being allowed their pick before him’.<sup>23</sup> The assumption is that the just outcome is that everyone gets an equal share of the cake. This outcome is justified independently of the chosen procedure, while the procedure is justified because it is likely to lead to that right substantive outcome (equal division).<sup>24</sup>

However, sometimes the direction of justification is the other way round. A certain outcome may be justified by the fact that this outcome is a product of an appropriate procedure. Namely, the procedure is justified independently of the outcome and the outcome is justified in virtue of its being a result of a justified procedure. A paradigmatic example for such priority of procedure over substantive outcome is a coin toss. Consider a case in which one must decide which of two claimants will receive an indivisible benefit. For example, a tennis match in which the umpire must decide who should serve first: Serena Williams or Maria Sharapova. Granting the right to serve first to the player who won the toss is not justified in a way that is independent of the procedure. Rather it is justified in virtue of its being an outcome of a fair procedure.<sup>25</sup> In other words, there is no *a priori* correct substantive outcome (for instance that Serena Williams should be the one to serve first) that the procedure reveals or leads to; rather, the outcome is justified in virtue of its being a product of the coin toss procedure (because it grants equal chances to all parties).

### B. *Justificational Priority in the Legal Context—Some Examples*

In the legal context, the question of justificational priority consists of whether the procedure is justified in virtue of its likelihood to lead to a certain legal outcome or whether the legal outcome is justified in virtue of its being a result of a certain procedure. Unlike the paradigmatic examples of the cake division and the coin toss, the legal examples are not clear-cut and involve several difficulties as we attempt to analyse the direction of justification. *First*, the justification of a legal procedure is often complex, relying upon both procedural and substantive considerations. Therefore, we shall distinguish between cases of ‘pure’

<sup>23</sup> J Rawls, *A Theory of Justice* (rev edn, Harvard University Press 1999) 74.

<sup>24</sup> Rawls (*ibid* 74) presents this procedure as an example of what he refers to as ‘perfect procedural justice’. This concept of justice has two characteristics: ‘[f]irst, there is an independent criterion for what a fair division is, a criterion defined separately from and prior to the procedure which is to be followed. And second, it is possible to devise a procedure that is sure to give the desired outcome’. For an application of Rawls’ concepts of procedural justice in the context of criminal adjudication, see J Edwards, ‘Justice Denied: The Criminal Law and the Ouster of the Courts’ (2010) 30 OJLS 725.

<sup>25</sup> Rawls uses gambling as an example of what he refers to as ‘pure procedural justice’, *ibid* 74. In such cases, ‘there is no independent criterion for the right result: instead there is a correct or fair procedure such that the outcome is likewise correct or fair’. See also J Rawls, ‘Kantian Constructivism in Moral Theory’ (1980) 77 J Phil 515, 523; J Rawls, *Political Liberalism* (Columbia University Press 1993) 72.

justificational priority of the outcome, in which the substantive outcome is the *only* thing that justifies the procedure (like in the cake division example) and cases of ‘impure’ justificational priority of the outcome, in which the outcome is just *one* of the things that justify the procedure.

*Second*, unlike the above-mentioned examples, where it is clear what the relevant outcomes are, the consequences of legal procedures manifest in a variety of realms. Specifically, a distinction must be made between the *concrete* outcome of a specific legal process (in the realm of the *actual* parties) and more *general* outcomes of legal procedures that reach far beyond the specific case. Such general consequences might be the effect of procedural rules on the efficiency of the overall legal system or consequences in an even broader sense, such as the effect of procedural rules in terms of general efficiency or distributive justice. The direction of justification should be examined *vis-à-vis* a certain outcome. Thus, before evaluating justificational priority one must define the relevant outcome.

If the ‘outcome’ of a legal process is assumed to include *all* of its consequences, then it follows that according to a *consequentialist* moral theory, justificational priority of procedure would be impossible. That is, if we were to define the outcome of a legal process as including all the consequences thereof, then justificational priority of procedure could only hold according to a *deontological* moral theory.<sup>26</sup> Similarly, if the *ultimate* justification of a certain outcome is its being a product of a certain procedure (like in the coin toss example), and not any expected consequence of that procedure, then a deontological consideration must be involved. We will refer to such cases, in which the procedure has justificational priority over *all* its consequences or the ultimate justification of the legal outcome is its being a product of certain procedure, as cases of *pure* justificational priority of the procedure.<sup>27</sup>

*Third*, in the legal context it is rare that the *concrete* right outcome of the adjudication is fully known before the legal process begins.<sup>28</sup> This is contrary to paradigmatic examples of justificational priority of the outcome (such as the cake division example), where the right outcome (equal division of the cake), is known in advance. The right outcome might be known in advance in non-judicial contexts, such as procedures geared towards establishing efficient or

<sup>26</sup> The deontological character of *pure* justificational priority of procedure is related to the idea that procedures are grounded in intrinsic, non-instrumental values. For a distinction between consequentialist and deontological standards of evaluation, see T Nagel, ‘Justice and Nature’ (1997) 17 OJLS 303, 304 (deontological standards ‘evaluate each system on the basis of the intrinsic character of the procedures themselves... the aim being to describe conditions of *pure* procedural justice’); TRS Allan, ‘Procedural Fairness and the Duty of Respect’ (1998) 18 OJLS 497. For a related discussion in the context of judicial review, see J Waldron, ‘The Core of the Case against Judicial Review’ (2006) 115 Yale LJ 1346, 1374–75.

<sup>27</sup> For example, suppose that the purpose of a certain exclusionary rule is to deter future unlawful police conduct. Assuming that in a certain case an acquittal is justified because of that exclusionary rule we can say that the rule in question has justificational priority over the legal outcome. However, unlike the coin toss example, the *ultimate* justification of the (acquittal) outcome is not that it resulted from this procedural rule, but rather the consequences of applying that rule, namely, minimizing future violations of constitutional rights.

<sup>28</sup> The question of whether the correct outcome of a legal process is known in advance depends on the degree of concreteness. For example, in a criminal trial the court knows that the right outcome is to find the defendant guilty only if he is guilty beyond a reasonable doubt. However, the court does not know, when the trial begins, whether the defendant *is* in fact guilty beyond a reasonable doubt.

equal allocation of resources. In the judicial process, however, while certain aspects of the right outcome may be known in advance, there are nearly always open questions, factual and normative, which can only be answered during the course of the legal process itself.

Despite these difficulties and complexities, we still believe that there is a substantial set of circumstances in which the dominant direction can be identified.<sup>29</sup> We will attempt to demonstrate this proposition through the following examples. Consider, for instance, regulation that aims to gain the most valuable offer through public auction (or competitive public bidding). Such procedural regulation is justified because it leads to a certain outcome. The presumption is that the rules of the auction should lead to a certain desired outcome.<sup>30</sup> Applying game-theory methods of mechanism design,<sup>31</sup> that aim to draft rules which tend to lead to the desired outcome, indicates that the outcome has justificational priority over the procedure.

Another case in which substantive outcome has justificational priority over procedural norm is as follows. A rule in Tennessee as well as in some other US states limits the admissibility of expert evidence regarding physicians' standard of care solely to testimony by local experts.<sup>32</sup> The justification of this evidentiary rule lies in the substantive law of medical malpractice according to which the standards of due medical treatment are the standards accepted by Tennessee physicians.<sup>33</sup>

Justificational priority of the substantive outcome may also be found in a New York State statute that prohibits class actions in suits seeking to recover a penalty, or a minimum measure of recovery created or imposed by a statute.<sup>34</sup> It was suggested that this statute aims to limit 'a defendant's liability in a single lawsuit in order to prevent the exorbitant inflation of penalties – remedies the New York legislature created with individual suits in mind'.<sup>35</sup> Assuming that this is indeed what justifies this norm, then the direction of justification is from the substantive outcome to the procedure. That is, the outcome has justificational priority over the procedural norm.

<sup>29</sup> It should be emphasized that the determination of whether procedure (or substance) has justificational priority in a specific case involves normative judgment since it requires a decision regarding normative questions of the form: 'whether procedure X is what justifies outcome Y'.

<sup>30</sup> This is not to say that the auction rules are not subject to non-consequentialist constraints such as procedural fairness, but that given these constraints, the auction rules are justified in virtue of their leading to a certain outcome.

<sup>31</sup> D Fudenberg and J Tirole, *Game Theory* (MIT Press 1991) ch 7.

<sup>32</sup> Doctors from Tennessee or from a contiguous bordering state. Tenn Code Ann § 29–26–115(a) (2006); MCL § 600.2169 (2011); TA Bishop, 'Evidence Rulemaking: Balancing the Separation of Powers' (2010) 43 Conn L. Rev 265, 289.

<sup>33</sup> Tenn Code Ann § 29–26–115(b) (2006); *Legg v Chopra* 296 F3d 286, 291 (6th Cir 2002). See also A Stein, 'Toward a Theory of Medical Malpractice' (2012) 97 Iowa L Rev 1201, 1209 n 24.

<sup>34</sup> NY Civ Prac Law Ann § 901(b) (West 2006).

<sup>35</sup> *Shady Grove* (n 2) Ginsburg (dissenting) 1465 (see also the Opinion of the Court position with regard to the New York Legislator's purpose, *ibid* 1440). For other discussions of the *Shady Grove* case, cf 'Leading Cases, Preemption of State Procedural Rules' (2009) 124 Harv L Rev 320; SB Burbank and TB Wolff, 'Redeeming the Missed Opportunities of *Shady Grove*' (2010) 159 U Pa L Rev 17; Tidmarsh (n 16); Hendricks (n 17); Clermont (n 17); Petroski (n 18).



Let us now turn to the reverse direction of justification, where the procedure has justificational priority over the substance. Take for example equitable estoppel, which stems from the voluntary conduct of a party, whereby she is precluded from asserting substantive rights that perhaps otherwise might have existed, against another person who has reasonably relied upon the conduct and has been led thereby to change her legal position for the worse.<sup>36</sup> Rules of estoppel are not justified because they lead to the right substantive outcomes or tend to reveal the existing substantive rights. On the contrary, if a rule of estoppel can be justifiably applied, the concrete legal outcome is justified in virtue of the fairness considerations behind that rule.

Another example of justificational priority of the procedure is seen in the rules governing democratic processes, such as parliamentary elections. In these cases, the assumption is that there is *no fact of the matter* which is independent of the procedure,<sup>37</sup> with regard to the right *legal* outcome of the process. The legal outcome is justified in virtue of its being established according to a due decision-making procedure.<sup>38</sup> It may be suggested that there is a *moral* truth (which is independent of the voters' preferences) regarding the question of which party should win the election. Nonetheless, even if this were true, there still might be an epistemic difficulty in knowing that truth.

Some have argued that a democratic election process which aggregates the knowledge and moral judgments of many people is the optimal procedure for tracking the normative truth (or making correct decisions). This claim would have been persuasive if the conditions of the *Condorcet Jury Theorem* were met. According to the classic version of this theorem, if each voter has an independent probability that is greater than 0.5 of voting for the right decision, the probability that the majority vote will be correct increases with the number of voters.<sup>39</sup> However, since it is difficult to believe that these conditions are in fact met,<sup>40</sup> the basis for the claim that democratic procedure is likely to track normative truth is unclear.<sup>41</sup>

<sup>36</sup> 28 Am Jur 2d Estoppel and Waiver § 1.

<sup>37</sup> If so, the criterion for the *truth* or *validity* of the legal proposition 'X won the election' (and not only for its *justification*) is procedural.

<sup>38</sup> For the claim that Rawls' concept of 'pure procedural justice' is not available in the context of democratic procedure, see W Sadurski, 'Law's Legitimacy and "Democracy-Plus"' (2006) 26 OJLS 377.

<sup>39</sup> According to the Condorcet Jury Theorem, in a decision procedure by majority vote of  $n$  voters, if every one of those voters' independent chance of getting the right answer is better than 0.5, the probability of this leading to the right answer increases monotonically with  $n$  (and converges to 1 as  $n$  goes to infinity).

<sup>40</sup> For example, a decision procedure that denies people who tend to make morally wrong judgments or to ignore moral considerations (criminals, for instance) the right to vote, might track the moral truth better. For a critical discussion of the aggregation argument which is based on the Condorcet Jury Theorem, see eg, A Vermeule, *Law and the Limits of Reason* (OUP 2009); J Brennan, *The Ethics of Voting* (Princeton University Press 2011).

<sup>41</sup> But see DM Estlund, *Democratic Authority: A Philosophical Framework* (Princeton University Press 2008) for an epistemic justification of democracy that does not depend on the Condorcet Jury Theorem. According to Estlund's theory, democracy is justified because it leads to good decisions. However, the 'goodness' of the decisions is not to be understood in terms of tracking normative truth, but rather in terms of meeting the principle of 'qualified acceptability requirement' (justifiability in terms of acceptability to 'all qualified points of view') (41). Thus, Estlund's argument for epistemic proceduralism is not that democracy is the most accurate decision procedure but that it is epistemically best among the options that are generally acceptable.

One may object to the assertion that the election example reflects justificational priority of procedure over substance and argue that ‘following the majority’s preferences’ is the outcome that justifies the democratic procedure. However, such identification of the ‘outcome’ leaves some degree of freedom with regard to the substantive content of the legal rule. The dependency on the majority’s will lends a formal quality to the rule and turns it into a somewhat ‘open formula’ that must be filled in on a case by case basis according to the relevant preferences. Moreover, from an epistemic perspective, it seems that the direction of the justification is from the procedure to the outcome. That is, the belief that the obtained outcome is the right one (as it reflects the majority’s preferences) is epistemically justified by the election process. The procedure enjoys (epistemic) justificational priority because the right outcome cannot be known without employing the election process or a similar procedure.

*Pure* justificational priority of the procedure exists in cases characterized by independent normative reasons, which are not outcome-dependent, to prefer one procedure over another. For example, it seems that a prominent reason that justifies the procedure of democratic election is fairness. If it is true that the idea of ‘one person one vote’ is grounded in procedural fairness and it is not, for instance, a means to achieve good outcomes (eg, in terms of efficiency or distributional justice)<sup>42</sup> then the outcome of a democratic election is justified in virtue of its being the result of a fair procedure.

### 3. *Justificational Priority and the Legal Classification of Norms as Procedural or Substantive*

#### A. *The Justificational Priority Standard*

We mentioned earlier that in some instances there may be a normative reason to classify a rule that is *conceptually* procedural as *legally* substantive. Such classification is needed, for example, in a case of jurisdictional conflict of laws, where the procedure is governed by the *lex fori* while the substance is governed by the *lex causae*. In this section, we will demonstrate how the concept of justificational priority presented above can assist in resolving the normative question of whether we ought to (legally) classify a certain rule as ‘procedural’ or as ‘substantive’. The idea is that if a certain (conceptually) procedural rule is

<sup>42</sup> R Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press 2000) 185–90, proposes distinguishing between two conceptions of democracy: the ‘detached conception’ according to which, ‘we judge the fairness or democratic character of a political process by looking to features of that process alone, asking only whether it distributes political power in an equal way, not what results it promises to produce’ (186); and the ‘dependent conception’, according to which ‘the best form of democracy is whatever form is most likely to produce the substantive decisions and results that treat all members of the community with equal concern...[and] is more likely to distribute material resources and other opportunities and values in an egalitarian way’ (ibid). See also Sadurski (n 38) 395.

justified solely because it leads to a certain substantive outcome then it does not seem justified to classify that rule as ‘procedural’. Legally, we should treat such a rule as if it was substantive.

In a more formal way, the argument is as follows:

- If (1) it is justified to apply a substantive norm S (in a certain legal context)  
 and (2) the desired outcome according to S has (pure) justificational priority  
 over certain procedural norm P (that is, P is justified solely by virtue  
 of the fact that it leads to a right outcome according to S)  
 then (3) it is also justified to apply the procedural norm P.

Since the classification is needed in legal contexts in which there are two competing norms (for example, in cases of jurisdictional conflict of laws, where norms of the *lex fori* vie against those of the *lex causae*), it may be helpful to present the argument in the following comparative manner:

- If (1) it is justified to prefer a certain substantive (foreign) norm S over  
 another substantive norm S’ (of the forum)  
 and (2) the desired outcomes according to S and S’ have *pure* justificational  
 priority over procedural norms P and P’ respectively<sup>43</sup>  
 then (3) it is also justified to prefer the procedural (foreign) norm P over the  
 procedural norm P’ (of the forum).

Let us first demonstrate the argument using the simple example of the cake division. Suppose that it is justified to apply the substantive norm S of a foreign country, according to which a disputed cake should be divided equally. Suppose further that the foreign procedural norm P is that one of the claimants divides the cake and gets the last piece, with the other participants being allowed to choose their share before him; and the forum’s procedural norm is a different rule, P’ (for example, allocation of the cake by auction). If the *only* (normatively relevant) difference between P and P’ is that applying each of them leads (or tends to lead) to different substantive outcomes (that would be the assumption in a case of pure justificational priority of the outcome) then the same justification for applying the substantial foreign norm S would also apply with regard to applying the procedural foreign norm P. In other words, assuming that the foreign substantive standard (equal division) ought to be applied, and assuming that the only difference between the procedural norms P and P’ is that P’ leads to a different outcome, then there is no reason not to apply the foreign procedural norm P as well.

Unfortunately, in legal reality the examples are less ‘clean’ and cases of pure justificational priority of the substantive outcomes over both of the conflicting procedural norms are not so common. However, we believe that our argument also holds, *mutatis mutandis*, in cases of impure justificational priority where the

<sup>43</sup> A more complicated case (which we will discuss below) is one in which one of the competing procedural norms is justificational inferior to the substantive outcome but the other norm is not.

substantive outcome plays a central, though not exclusive, role in justifying one of the conflicting procedural norms. This may be demonstrated using the following example.

Consider the malpractice evidence rule of Tennessee. As already mentioned, in a malpractice trial, only local doctors may testify regarding the due standard of care. Consider, for example, if proceedings were conducted in England against a doctor from Tennessee regarding negligent performance of a surgical procedure that took place in a clinic in Tennessee. In such a case, matters of procedure are governed by the law of the forum (England),<sup>44</sup> while the applicable law in substantive matters is the *lex loci delicti*, the law of the place of the wrong (Tennessee).<sup>45</sup> Thus, the court should adopt the substantive standard of care in Tennessee. It seems, then, that if the court wishes to respect the substantive law of Tennessee, it should classify the evidentiary rule that limits the admissibility of expert evidence to local doctors as legally 'substantive'. This classification is implied by the justificational priority standard, since the evidentiary rule is justified in virtue of the fact that it leads to a desired substantive outcome, namely a certain standard of care. Dismissing this evidentiary limitation is in fact a deviation from Tennessee's substantive malpractice law and it undermines one of the purposes thereof.<sup>46</sup>

The standard of justificational priority works well when the procedure is justified by the concrete outcome in the realm of the parties to the proceeding. But as mentioned above, in some cases a procedural rule is justified because it leads to consequences that lie beyond the realm of the parties and are not related to the substantive law that governs the dispute. If we consider these consequences to be the 'outcome', then a procedural rule that is justified because it leads to that specified outcome should not necessarily be legally classified as 'substantive'. For example, certain procedural rules are (partially) justified because they minimize litigation costs. It seems clear that the fact that the justification of such a procedural rule rests upon its leading to a socially efficient outcome does not imply that we should classify the rule as 'substantive'.<sup>47</sup>

The justificational priority standard is not conclusive where the justification of a procedural rule is based on an 'external' outcome, which is not in the realm of the parties to the proceeding. However, we can identify cases in which it is appropriate to legally classify a procedural rule as 'substantive' even under those circumstances. Take for example cases in which the reason to adopt a

<sup>44</sup> Pat III of the Private International Law (Miscellaneous Provisions) Act 1995, s 11(1).

<sup>45</sup> *ibid* s 14(3)(b).

<sup>46</sup> A Stein, 'The Trial-Time/Forum Principle and the Nature of Evidence Rules' (2008) *Cardozo Legal Studies Research Paper No 220* <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1103254](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1103254)> accessed 28 November 2013; *Legg* (n 33).

<sup>47</sup> For example, suppose that the forum state A is a developing country and its procedural rules are less costly (and less accurate) than those of a foreign developed state B. The assumption that the court in A should apply the foreign law (of B) in substantive matters does not mean that it should also apply its expensive procedural rules.

certain procedural rule is ‘external’, such as guiding the behaviour of third parties that are not part of the concrete legal process. In these instances, there might be no reason to distinguish between the procedural rules and the substantive rules in the context of temporal conflict of laws. Consider an evidentiary rule that excludes relevant evidence on grounds of ‘the fruits of the poisonous tree’ doctrine which was enacted *after* the evidence was obtained (but before the trial). Applying that rule (which is valid at the time of the trial) seems like a misfire if the purpose of the rule is to deter future unlawful police conduct. A similar conclusion is reached with regard to the classification of evidentiary privileges for self-critical analysis, such as the confidentiality of medical review committees’ reports.<sup>48</sup> In this case, the rationale for applying the trial-time law in evidentiary matters does not apply. Assuming that the reason for adopting the evidentiary privilege is that disclosure might create a chilling effect on the self-evaluative process, then here again we are dealing with an ‘external’ reason—guiding the behaviour of future people in such self-critical processes. Applying the privilege retroactively to evaluation processes that were already completed when the rule was adopted cannot lead to this desired outcome.<sup>49</sup>

We conclude that in cases in which the substantive concrete outcome in the realm of the parties to the proceeding has justificational priority over procedure, as well as in some cases in which the reason for adopting the procedural rule is to guide the behaviour of third parties, it is justified to classify the procedural rule as legally ‘substantive’.

Now, what about the opposite direction? Where a procedural norm has *pure* justificational priority over substance, should we legally classify it as ‘procedural’? We think that in general the answer is positive. We have seen that there is a link between pure justificational priority of the procedure (ie, where the procedure has justificational priority over *all* its consequences or the ultimate justification of the legal outcome is its being a product of that procedure) and the existence of a deontological constraint. Since many deontological moral theories are characterized by agent relativity,<sup>50</sup> we may presume that a procedural rule that has pure justificational priority would impose a deontological constraint on the relevant agent who is authorized to make the legal decision (the judge, for example). Consider, for instance, the procedural standard of proof beyond a reasonable doubt. If this standard reflects the deontological constraint on convicting innocent people then it is highly

<sup>48</sup> Stein 2008 (n 46); DP Leonard, ‘Codifying a Privilege for Self-Critical Analysis’ (1998) 25 Harv J Legis 117.

<sup>49</sup> Notwithstanding that if the public (and potential subjects of self-evaluative processes) is unaware of the legal change, then a retroactive application of the rule might have some expressive or informative impact on reducing chilling effects.

<sup>50</sup> These are agent-centred deontological theories, according to which moral duties are agent-relative, ie, they are obligations for a particular agent to take some action. See L Alexander and M Moore, ‘Deontological Ethics’, *The Stanford Encyclopedia of Philosophy* (EN Zalta, ed, Winter edn, 2012) <<http://plato.stanford.edu/archives/win2012/entries/ethics-deontological/>> accessed 22 April 2013.

implausible that this deontological constraint is limited only to offences that occurred in the court's jurisdiction and does not apply if the offence occurred in a (hypothetical) state where the standard of proof is lower. Therefore, if a procedural rule of the forum has pure justificational priority over substance then it seems implausible that the court should be required to apply a procedural rule other than its own.

Furthermore, if a certain legal procedure has justificational priority over *all* the consequences thereof, then it is not justified by any outcome. In particular, it is not justified by any consequences in the foreign state. Therefore, the consideration of respecting foreign state interests, which is a central rationale for applying foreign law in case of jurisdictional conflict of laws, is weakened. In addition, if a procedural norm has *pure* justificational priority over the legal outcome then the outcome is not justified by any of the consequences of that procedure. In particular, it is not justified by the outcome of guiding people's behaviour. Thus, a central consideration against applying the *lex fori* does not apply. Indeed, in reality, in the absence of acoustic separation,<sup>51</sup> procedural norms may affect the behaviour of the parties outside the court.<sup>52</sup> However, if the purpose of the procedural norm is not to guide people's behaviour, it seems that from a fairness perspective the mere reliance on that norm does not provide a reason to apply it in another jurisdiction (contrary to the reliance on substantive law). Thus, there is no reliance-based reason to classify that norm as 'substantive' in the context of *jurisdictional* conflict of law. If this is true, then there is also no reliance-based reason to classify it as 'substantive' in the context of *temporal* conflict of laws, and applying it retroactively is not problematic.

Our hypothesis is, then, that generally, where a procedural norm has *pure* justificational priority over substance, it should be legally classified as 'procedural'. However, we cannot exclude the possibility of counter-examples. For instance, in some cases, if it is justified to respect a foreign jurisdiction's substantive law, it may also be justified to respect that foreign jurisdiction's normative positions *vis-à-vis* procedure. In addition, we cannot exclude the possibility that in some instances the law should respect parties' reliance on procedures that were valid at the time or in the place of the relevant activity.<sup>53</sup>

<sup>51</sup> Acoustic separation is a hypothetical state of affairs in which the general public only knows the content of the 'conduct rules' (rules that are addressed thereto and are designed to guide its behaviour) and only officials know the content of the 'decision rules' (rules that are directed to the officials who apply conduct rules). M Dan-Cohen, 'Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law' (1984) 97 Harv L Rev 625.

<sup>52</sup> See A Stein and G Parchomovsky, 'The Distortionary Effect of Evidence on Primary Behavior' (2010) 124 Harv L Rev 518.

<sup>53</sup> For example, in the context of contracts, it seems that respecting the parties' expectations regarding the applicable rule of evidence is at least a consideration that should be taken into account (although other considerations, such as efficiency considerations, may prevail). This is compatible with Article 18(1) of the Rome I Regulation (Regulation (EC) 593/2008 of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I): [2008] OJ L 177/6). This law is given effect in England in its former formalization in Article 14(1) of the 1980 Rome Convention on the Law Applicable to Contractual Obligations, as adopted by the Contracts (Applicable Law) Act 1990, s 2. See Dicey and Morris (n 3) § 7-028.

We shall now examine more closely whether the general hypothesis presented above can be applied to the particular case of standards of proof and related evidentiary rules.

### *B. Classifying the Standard of Proof beyond a Reasonable Doubt and Related Evidentiary Rules*

Seemingly, the standard of proof beyond a reasonable doubt and related evidentiary rules in criminal law are justified because they are likely to lead to a desirable outcome of low frequency of erroneous convictions.<sup>54</sup> These rules reflect the normative asymmetry according to which the moral wrong caused by the conviction of an innocent defendant is greater than the moral wrong caused by the release of a defendant who is guilty. The proposition that the standard of proof beyond all reasonable doubt and related evidentiary rules reflect justificational priority of this outcome calls for an explanation. *First*, the term ‘justification’ here refers to a moral justification.<sup>55</sup> It is assumed that the *moral* truth (ie, the normative asymmetry mentioned above) is known and that this moral truth serves as the general justification of these evidentiary rules. However, the *factual* truth, whether a specific defendant is guilty or not is unknown and the belief that a particular defendant committed a criminal offence is epistemically justified by the criminal procedure.<sup>56</sup>

*Second*, the classification of these rules as a case of justificational priority of outcome over procedure refers to the *general* outcome of reducing the frequency of erroneous convictions. This classification is compatible with consequentialist moral theories according to which moral justification depends solely on consequences. However, it seems that the standard of proof beyond a reasonable doubt is more consistent with deontological moral theories. At least in cases of serious-but-hard-to-prove crimes, the consequences of applying this standard might be worse than the consequences of applying a lower standard of proof.<sup>57</sup> If this is true, applying the standard of proof beyond a reasonable doubt in a concrete criminal case is not justified merely in virtue of its likelihood to lead to the desirable outcome of low frequency of erroneous

<sup>54</sup> Rawls, *A Theory of Justice* (n 23) 75, refers to criminal trials as a particular instance of what he terms ‘imperfect procedural justice’. The key characteristic of this concept of justice is that ‘while there is an independent criterion for the correct outcome, there is no feasible procedure which is sure to lead to it’.

<sup>55</sup> See n 22.

<sup>56</sup> The considerations behind the criminal procedure are not only epistemic (but also other considerations such as fairness and efficiency) and of course there are procedures that are epistemically superior to the criminal procedure. Nevertheless, a key purpose of the criminal procedure is to guarantee that defendants are convicted only if the court justifiably believes that they are guilty. For a further discussion of the gap between the actual truth and the legal truth, see RS Summers, ‘Formal Legal Truth and Substantive Truth in Judicial Fact-Finding – Their Justified Divergence in Some Particular Cases’ (1999) 18 L & Phil 497.

<sup>57</sup> It is difficult to view the standard of proof beyond a reasonable doubt as reflecting a classical utilitarian moral theory, since it seems that from a utilitarian perspective it is not *always* better that 100 guilty persons would be released than that 1 innocent person would be convicted. Perhaps, it is possible to justify this standard of proof within rule-consequentialism or by modifying utilitarianism and adapting a conception of the good that bring it in line with it. We cannot engage in this discussion here, and we hope to do it elsewhere.

convictions. On the contrary, with regard to the *concrete* outcome of a specific case, the conviction or acquittal of a specific defendant, it seems that the direction of the justification is reversed: the resultant conviction in a concrete case is justified by the fact that the defendant's guilt was proven beyond all reasonable doubt.<sup>58</sup> In other words, with regard the concrete legal outcome of a criminal trial, the standard of proof beyond a reasonable doubt seems to have pure justificational priority.<sup>59</sup>

How, then, should we classify norms regarding the standard of proof in criminal cases? In order to identify the direction of justification, we first must define the relevant outcome: the *general* outcome—a certain frequency of erroneous convictions—or the *concrete* outcome of the case (for which the classification is required). We believe that, at least in the context of temporal conflict of laws (where a question of retroactivity arises because a change in the standard of proof was enacted after the offence occurred), the relevant outcome is the *concrete* outcome of the case. In regard to the general outcome, we can assume (for the sake of discussion) that the change in the required standard of proof is justified. The point in time at which the legal change was made is not relevant with regard to this outcome. The question arises, then, only with respect to the concrete outcome: whether 'retroactive' application of a new standard of proof, which is justified in itself, to a criminal offence that occurred before it was enacted, renders the concrete outcome (morally) unjustified.

As stated before, with regard to the *concrete* outcome of a criminal trial, evidentiary norms regarding the standard of proof have justificational priority. That is, the outcome is justified in virtue of the fact that the trial was conducted under fair rules that ensure a low probability of wrongful conviction. If this is true, and if indeed the relevant outcome for determining the justificational priority is the concrete outcome, then the standard of proof beyond a reasonable doubt and the related evidentiary rules should be legally classified as 'procedural' in the context of temporal conflict of laws.

Nonetheless, the US Supreme Court has reached the opposite conclusion. Dating back to the 18th century, the Court held that the provision against the retroactive application of laws that is safeguarded in the Constitution (Ex Post Facto Clause),<sup>60</sup> which is generally perceived as protecting substantive rights,

<sup>58</sup> One can argue that if the defendant did not commit the crime there is no moral justification for her conviction, even if it resulted from a fair and reliable process and the evidence led unquestionably to the conclusion that she is guilty. There may be such an objective sense of 'moral justification' however we adopt a different sense of justification here, one that is more subjective and sensitive to the factual information that was reasonably available to the court. For a discussion of whether a moral obligation is subjective or objective, see MJ Zimmerman, 'Is Moral Obligation Objective of Subjective?' (2006) 18 *Utilitas* 329.

<sup>59</sup> One may object to this claim by arguing that if the outcome of convicting a specific defendant is justified in virtue of the fact that he was convicted following a fair and reliable criminal procedure then there is no justification for new trial or post-conviction exoneration even if new evidence (eg, DNA evidence) of innocence has been discovered. Our response is that in these cases the justification of the concrete (new) outcome is still in virtue of its being an outcome of an appropriate procedure: an appropriate criminal procedure should permit new trials and post-conviction exonerations in certain circumstances.

<sup>60</sup> US Constitution art I § 10, § 9 cl 3.



also applies to the right not to be convicted unless proven guilty beyond a reasonable doubt.<sup>61</sup> Later on, the Court extended this doctrine to other evidentiary rules, such as the corroboration rule, according to which evidence of the crime that is of probative value beyond the complainant's testimony is required to support a guilty verdict. The Court held that the corroboration requirement is related to the prosecution's burden to prove the defendant's guilt beyond a reasonable doubt. Accordingly, the corroboration rule was classified as a substantive rule that is protected against retroactive change.<sup>62</sup>

Indeed, normatively, it is difficult to distinguish between the standard of proof beyond a reasonable doubt and other rules of evidence geared towards the application thereof.<sup>63</sup> However, following this logic would lead us to classify a major portion of evidentiary rules as 'substantive'. This outcome seems counter-intuitive, since we are accustomed to thinking of evidentiary rules as procedural in nature.<sup>64</sup>

A coherent solution to this problem would be to reject the claim that the standard of proof beyond a reasonable doubt is itself a substantive norm. It seems to us, that at least in the context of temporal conflict of laws (retroactivity), this conclusion is correct and in line with the rationale of the legal distinction between substance and procedure. Let us assume that the morally right standard of proof is  $p$ . If so, and all else being equal, then this is also the morally right standard of proof regarding crimes that were committed in the past. If the defendant chose to commit the crime knowing that the standard of proof at that time was greater than  $p$ , it is hard to see why these expectations should be taken into account.<sup>65</sup> Thus, we should classify the standard of proof as 'procedural' and apply the standard that is valid at the time of the trial. This conclusion is in line with the claim that the standard of proof has justificational priority over the substantive outcome of a concrete case and therefore should be classified as 'procedural'.

#### 4. Conclusion

For many years, the substance–procedure distinction has been a source of confusion for jurists and scholars. In part, the confusion stems from the

<sup>61</sup> *Calder v Bull* 3 US 386 (1798).

<sup>62</sup> *Carmell v Texas* 529 US 513 (2000).

<sup>63</sup> But see Stein 2008 (n 46) for a different view.

<sup>64</sup> For a similar point, see *ibid* 14–15.

<sup>65</sup> Intuitively, it seems that there is a normative difference between reliance on substantive law and reliance on procedural law. However, it should be noted that an economic approach may lead to a different conclusion, whereby there is in principle no normative difference between expectations regarding the standard of proof and expectations regarding criminal sanctions. What a potential criminal faces *ex-ante* is the expected sanction (ie, the punishment multiplied by the probability of its imposition). Therefore, from an optimal deterrence perspective, there might be no reason to distinguish between a change in the (substantive) criminal sanction and a change in the (procedural) standard of proof which reflects the probability that the sanction would be imposed (see GS Becker, 'Crime and Punishment: An Economic Approach' (1968) 76 J Pol Econ 169, 176–79). The difference between the moral intuition described in the text and the normative conclusion of the economic analysis recalls to the general claim that pure justificational priority of procedure is incompatible with consequentialist moral theories.

difference between the philosophical distinction between substance and procedure, and the legal distinction between them. While the philosophical distinction is reflected in the appropriate use of the (ordinary language) concepts of 'procedure' and 'substance' and appears to be context-free, the legal distinction is context-dependent, since it is sensitive to additional (moral or legal) normative considerations.

In this article, we introduced the concept of justificational priority of legal procedures over substantive outcomes and *vice versa*, and suggested that the concept of justificational priority could be applied to the legal classification of norms as 'substantive' or 'procedural'. Such classification is required, for instance, in cases of conflict of laws. A procedure (or procedural norm) has justificational priority over a certain substantive outcome if this outcome is justified in virtue of its being a product of that procedure; a substantive outcome has justificational priority over a certain procedural norm if this norm is justified in virtue of the fact that it leads (or tends to lead) to that outcome. We argued that if a certain substantive outcome has pure justificational priority over a certain procedural norm, then this (conceptually) procedural norm should be legally classified as 'substantive'. In contrast, if a certain (conceptually) procedural norm has pure justificational priority over the substantive outcome, then, in general, it should be legally classified as 'procedural'.

In the complex legal reality, it is not always easy to apply the justificational priority standard, since in many actual cases there is no pure justificational priority of the outcome over the procedure (or *vice versa*), and the latter is only partially justified by the former. However, the examples we examined showed that there are indeed cases in which the dominant direction of justification is relatively clear, and in these cases the results of applying the justificational priority standard are consistent with the pre-theoretical intuitions about the appropriate classification.

Although the main focus of this article was on the relevance of the concept of justificational priority to the substance–procedure legal dichotomy, we believe that this concept may also be relevant to other normative questions, such as whether the court should have discretion to deviate from a certain procedural norm. The answer to such questions may depend on whether the substantive outcome has justificational priority over that procedural norm or not. If the outcome has justificational priority (the procedure is justified because it leads to that outcome), then if one could guarantee that the right outcome would be obtained, the existence of a procedural defect would not make a normative difference and therefore in such an instance the court may be allowed to deviate from the procedural norm. In contrast, if a procedural norm has pure justificational priority, it seems that the court should not have discretion to deviate from it, because the legal outcome is justified in virtue of its being a product of that procedure.

This last point is related to the aforementioned observation that *pure* justificational priority of a certain procedural norm is incompatible with consequentialist moral theories and is only compatible with deontological moral theories. It seems that there are procedural norms (perhaps, for instance, the requirement for a fair criminal process) that have pure justificational priority over substantive outcomes. This raises some doubts, in this respect, about the plausibility of consequentialist approaches to the law (eg, law and economics). Hence, we believe that further discussion of the justificational relations between substance and procedure may contribute to the clarification of what is at stake in concrete normative questions regarding the relations between substance and procedure, as well as to the more general discussion of the consequentialism-deontology moral debate.