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PROCEDURAL WRONGDOING

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ABSTRACT

Both the practice and the study of civil justice are rife with accusations of litigation "abuse"—as evidenced by the widespread calls to sanction the lawyers who filed lawsuits challenging the results of the 2020 presidential election, which one federal district court recently pronounced "a historic and profound abuse of the judicial process." Although it's tempting to dismiss all this abuse talk as merely rhetorical, the concept of abuse in fact has deep roots in the normative structure of civil procedure's doctrinal apparatus for regulating parties' wrongful litigation conduct—their *procedural wrongdoing*. Prior accounts of procedural wrongdoing have maintained that parties abuse the civil justice system whenever they violate a procedural rule that's calibrated to maximize the benefits and minimize the costs of litigation. Such accounts, however, ignore the many rules that define procedural wrongdoing not in terms of the *effects* of litigation conduct, but rather in terms of parties' *motivations*, forbidding parties to act with certain motives or for certain purposes. According to these rules, which this Article labels *motivation-sensitive restrictions*, the very same litigation conduct can either constitute procedural wrongdoing or not, depending on a party's motivations for engaging in it.

This Article provides a comprehensive analytical account of civil procedure's motivation-sensitive restrictions. In doing so, it contends that the restrictions have ambiguous normative consequences for civil justice. On the one hand, the restrictions can foster a thin but nevertheless valuable form of *procedural civic virtue*, prodding parties to attend to important public values even as they pursue their own private ends through the civil justice system. On the other hand, precisely because they focus on litigants' subjective purposes, the motivation-sensitive restrictions risk inflaming public discourse about civil justice by inviting participants in policy debates to transmute their disagreements into moralized accusations of abuse or bad faith. We can try to mitigate these latter, discursive effects by emphasizing the relatively modest demands imposed by the motivation-sensitive restrictions—the fact that such rules require parties to abjure only certain illicit purposes rather than to become purely public-regarding in their litigation behavior.

This Article's account of civil procedure's motivation-sensitive restrictions also sheds new light on leading theories of civil justice, which have largely glossed over the doctrinal infrastructure for addressing procedural wrongdoing. In contrast to the "private enforcement" model espoused by most civil procedure scholars, the motivation-sensitive restrictions (modestly) limit the purposes plaintiffs may pursue through civil litigation but make no further attempt to ensure that plaintiffs promote rather than subvert governmental policy, belying common portrayals of plaintiffs as stand-ins for the state—"private attorneys general." But the restrictions also expose an underappreciated public dimension of prominent theories of private law, insofar as they curb

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litigant autonomy by requiring parties to attend directly to public values when taking certain actions during civil litigation. Civil procedure's motivation-sensitive restrictions, in short, demonstrate the civil justice system to be both more private and more public than how it's generally understood.

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INTRODUCTION

Both the practice and the study of civil justice are rife with accusations of litigation "abuse." Most recently, there have been widespread calls to sanction the lawyers who filed lawsuits challenging the results of the 2020 presidential election,[1] and at least two federal district courts so far have obliged, with one pronouncing the lawsuit before it "a historic and profound

[1] *See, e.g.*, Brent Kendall & Alexa Corse, *Trump 2020 Election Lawsuits Lead to Requests to Discipline Lawyers*, WALL ST. J. (May 9, 2021, 10:00 AM EDT), https://www.wsj.com/articles/trump-2020-election-lawsuits-lead-to-requests-to-discipline-lawyers-11620568801; Andrew Strickler, *Mich. Election Fraud Attys Can't Skip Sanctions Hearing*, LAW360 (Jul. 8, 2021, 4:21 PM EDT), https://www.law360.com/legalindustry/articles/1401155/mich-election-fraud-attys-can-t-skip-sanctions-hearing.

abuse of the judicial process" and the lawyers' litigation tactics "abusive."[2] Such denunciations tap into a deep vein of rhetoric about the civil justice system. Defense-side interests and other proponents of civil justice "reform" routinely charge plaintiffs with filing "frivolous" or "abusive" lawsuits and seeking unduly burdensome discovery.[3] Invoking common law prohibitions against champerty and maintenance, they decry third-party litigation funding—in which financial institutions pay plaintiffs' litigation expenses in exchange for a share of any recovery—for stoking "inauthentic" claims.[4] Some have even gone so far as to sue plaintiffs and their lawyers under the Racketeer Influenced and Corrupt Organizations Act (RICO)[5] for including allegedly "fraudulent" claims in class actions.[6] Lest such accusations seem to run in only one direction, advocates and scholars have increasingly condemned as oppressive the use of the civil justice system by creditors to collect consumer debts and by landlords to evict tenants.[7] And many have criticized would-be defendants for enlisting the courts to compel individuals into private arbitration, thereby thwarting their access to the public civil justice system altogether.[8] All sides in contemporary debates about civil justice thus appear to take it for granted that private parties can *abuse* the public civil justice

[2] King v. Whitmer, No. 20-13134, 2021 WL 3771875, at *1 (E.D. Mich. Aug. 25, 2021); *see also* O'Rourke v. Dominion Voting Sys. Inc., No. 20-cv-03747-NRN, 2021 WL 3400671, at *31 (D. Colo. Aug. 3, 2021) (finding that the lawsuit "was filed in bad faith").

[3] *See, e.g.*, WALTER K. OLSON, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT (1992) (decrying a supposed onslaught of "frivolous" lawsuits); THE SEDONA CONFERENCE COOPERATION PROCLAMATION 1 (July 2008), http://www.ncjfcj.org/sites/default/files/Opening_Grossman_Maura.pdf (proposing reforms to curb perceived discovery abuse); *About*, AM. TORT FOUND., https://www.judicialhellholes.org/about/ (last visited Dec. 21, 2021) (cataloging alleged "abuses within the civil justice system"); *Legal Reform*, U.S. CHAMBER OF COMMERCE, https://www.uschamber.com/legal-reform (last visited Dec. 21, 2021) (asserting that "many lawsuits in this country lack merit or are downright abusive"); *Mission*, AM. TORT REFORM ASS'N, https://www.atra.org/about/mission/ (last visited Dec. 21, 2021) (condemning "the cycle of lawsuit abuse"); *see also infra* note 235 and accompanying text.

[4] *See generally, e.g.*, Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61 (2011) (identifying, but ultimately rejecting, such criticisms).

[5] 18 U.S.C. § 1964 (2018).

[6] *See generally* Nora Freeman Engstrom, *Retaliatory RICO and the Puzzle of Fraudulent Claiming*, 115 MICH. L. REV. 639 (2017); Briana Lynn Rosenbaum, *The RICO Trend in Class Action Warfare*, 102 IOWA L. REV. 165 (2016).

[7] *See, e.g.*, Suzette M. Malveaux, *Getting Real About Procedure: Changing How We Think, Write, and Teach About American Civil Procedure*, JOTWELL (June 9, 2021), https://courtslaw.jotwell.com/getting-real-about-procedure-changing-how-we-think-write-and-teach-about-american-civil-procedure/ (noting "[a]busive debt-collection practices" in state and local courts); *see also* NAT'L CTR. FOR STATE COURTS, THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS (2015), https://www.ncsc.org/__data/assets/pdf_file/0020/13376/civiljusticereport-2015.pdf (documenting the large number of debt-collection and eviction cases on state court dockets).

[8] For a small sampling of the vast literature criticizing arbitration in these terms, see MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 19-32 (2013); Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2808, 2839-40, 2863-74 (2015); David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247 (2009); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631 (2005); and Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROBS. 75 (2004). *See also* Martin H. Malin, *Focusing on an Often-Neglected Player in the Mandatory Arbitration Game*, JOTWELL (Nov. 5, 2020), https://worklaw.jotwell.com/focusing-on-an-often-neglected-player-in-the-mandatory-arbitration-game/ (describing corporate parties' "abusive" arbitration tactics).

system. Some actions in the context of civil litigation, everyone seems to agree, amount to *procedural wrongdoing*.[9]

It's tempting to dismiss all this abuse talk as merely epiphenomenal—a kind of proxy battle in the ongoing ideological wars over the legitimacy of certain types of lawsuits and of the American civil justice system itself. On this deflationary view, accusations of litigation abuse simply signal the accuser's intense political disagreement with the underlying rights being asserted or the specific procedural actions being taken. I think it's hard to deny that allegations of procedural wrongdoing perform this rhetorical function in much contemporary discourse about civil justice. And yet, the concept of litigation abuse, I aim to show, still has independent content.

In this Article, I argue that the concept of abuse in fact has deep roots in the normative structure of civil procedure's doctrinal apparatus for regulating parties' litigation conduct. By uncovering that structure, we can better understand how civil procedure doctrine shapes evaluations of party behavior both within civil litigation and in the broader legal and political culture. And that more nuanced understanding, in turn, might help us to begin to reframe debates about civil justice in less charged and more productive ways.

Notwithstanding the ubiquity of allegations of abusive litigation practices in civil justice debates, prominent theories of civil justice have had relatively little to say about what, exactly, it might mean to abuse the civil justice system. The civil procedure scholars who have directly considered the question have tended to eschew precise definitions of "abuse," instead evaluating procedural rules that regulate parties' litigation conduct in terms of how well they achieve some kind of optimal "balance" between the goals of incentivizing desirable lawsuits and litigation tactics and deterring undesirable ones (with different scholars, of course, having very different notions of which lawsuits and tactics are in fact desirable).[10] According to this approach, to abuse the civil justice system is simply to violate a procedural rule—whether by filing a lawsuit or by employing some litigation procedure—that's calibrated to maximize the benefits and minimize the costs of litigation. Abuse is thus reduced to sub-optimal litigation conduct.[11] Such a conception of procedural wrongdoing resonates with an older scholarly literature that employed economic cost-benefit analysis and probability theory to distinguish "frivolous" lawsuits from merely unmeritorious ones.[12] It also accords with the prevailing understanding of civil litigation more

[9] As these examples suggest, litigation abuse is not seen solely as a feature of "big," complex cases. To be sure, studies show that certain practices regarded as abusive, such as expensive and burdensome discovery, are largely limited to such cases. *See* Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393 (1994); Linda S. Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 B.C. L. REV. 683, 684 (1998); Judith A. McKenna & Elizabeth C. Wiggins, *Empirical Research on Civil Discovery*, 39 B.C. L. REV. 785 (1998); Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525 (1998). But other kinds of abuse are alleged to occur even in "small," ordinary cases.

[10] Engstrom, *supra* note 6, at 646, 690; *see also, e.g.*, Charles M. Yablon, *The Virtues of Complexity: Judge Marrero's Systemic Account of Litigation Abuse*, 40 CARDOZO L. REV. 233, 265 (2018) (urging judges to adopt "techniques for altering the cost-benefit analysis under which lawyers too frequently choose strategies that add cost and delay").

[11] *See, e.g.*, Victor Marrero, *The Cost of Rules, the Rule of Costs*, 37 CARDOZO L. REV. 1599, 1645-70 (2016) (equating litigation abuse with any practice that undermines Federal Rule of Civil Procedure 1's ambition "to secure the just, speedy, and inexpensive determination of every action and proceeding").

[12] *See, e.g.*, Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519 (1997); Charles M. Yablon, *The Good, the Bad, and the Frivolous Case: An Essay on Probability and Rule 11*, 44 UCLA L. REV. 65, 68 (1996). In a similar vein, scholars employed game theory to analyze the problem of "discovery abuse," understood as a subset of the general problem of litigation abuse. *See* Robert D. Cooter & Daniel L. Rubinfeld, *An Economic Model of Legal Discovery*, 23 J. LEGAL STUD. 435, 452–54 (1994); Robert D. Cooter & Daniel L. Rubinfeld, *Reforming the New*

generally among civil procedure scholars, according to which the primary function of civil litigation is the "private enforcement" of governmental "policy."[13] If a lawsuit is an act of private enforcement, with the plaintiff serving as a "private attorney general," then it seems natural to define "abuse" as any litigation conduct that frustrates, or fails to sufficiently advance, regulatory goals, yielding more costs than benefits from the perspective of the particular policy at issue. Such instrumental accounts of procedural wrongdoing only feed the widespread impression that abuse talk does no independent work in civil procedure, but rather merely recapitulates policy judgments in more morally laden terms.

But the concept of abuse, this Article reveals, turns out to play a much more fundamental—and much more complex—role in civil procedure's approach to regulating litigant behavior. Concerns about abuse, if not the exact term, permeate the Federal Rules of Civil Procedure and other procedural doctrines. And while some of those rules and doctrines do indeed require parties to minimize the costs of their litigation conduct, that's not how civil procedure always, or even primarily, conceptualizes abuse of the civil justice system. Many other rules, I show, define procedural wrongdoing not (solely) in terms of the *effects* of litigation conduct, but rather in terms of litigants' *motivations*, forbidding parties to act with certain motives or for certain reasons. According to these rules, which I call *motivation-sensitive restrictions*, the very same litigation conduct can either constitute procedural wrongdoing or not, depending on a party's motivations for engaging in it. My main analytical aims in this Article are to call attention to the motivation-sensitive restrictions as a distinct category of procedural rule, to elucidate their formal structure and substantive content, and to compare them with motivation-based rules in other areas of the law.

Normatively, this Article suggests that the motivation-sensitive restrictions have ambiguous consequences for civil justice. On the one hand, the restrictions can foster a thin but nevertheless valuable form of *procedural civic virtue*, prodding parties to attend to important public values even as they pursue their own private ends through the civil justice system. On the other hand, precisely because they focus on litigants' subjective purposes, the motivation-sensitive restrictions risk inflaming public discourse about civil justice by inviting participants in policy debates to transmute their disagreements into moralized accusations of abuse or bad faith. I doubt that we can reap the benefits of civil procedure's motivation-sensitive restrictions for civil practice without incurring the costs to our politics of civil justice. The best we can probably do is to try to mitigate the latter by emphasizing the relatively modest demands imposed by the motivation-sensitive restrictions—the fact that such rules require parties to abjure only certain illicit purposes rather than to become purely public-regarding in their litigation behavior, and therefore express only a partial condemnation of violators' conduct rather than a more comprehensive condemnation of their character. Given this limited ambition, policy advocates overreach when they attempt to parlay civil procedure's professed concern with litigation abuse into sweeping aspersions against whole groups of litigants or whole categories of legal claims. A more fine-grained account of civil procedure's approach to regulating litigant conduct thus might provide the necessary conceptual resources to help to confine abuse talk to its duly circumscribed, but still potentially salutary, role in debates about civil justice.

Discovery Rules, 84 GEO. L.J. 61, 63–65 (1995); Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 641 (1989); John K. Setear, *The Barrister and the Bomb: The Dynamics of Cooperation, Nuclear Deterrence, and Discovery Abuse*, 69 B.U. L. REV. 569 (1989).

[13] *See generally, e.g.*, SEAN FARHANG, THE LITIGATION STATE (2010); Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637 (2013).

This Article's analysis of civil procedure's motivation-sensitive restrictions also sheds new light on leading theories of civil justice, which have largely glossed over the doctrinal infrastructure for addressing procedural wrongdoing. In contrast to the "private enforcement" model espoused by most civil procedure scholars, the motivation-sensitive restrictions (modestly) limit the purposes plaintiffs may pursue through civil litigation but make no further attempt to ensure that plaintiffs promote rather than subvert governmental policy, belying common portrayals of plaintiffs as stand-ins for the state—"private attorneys general."[14] But the restrictions also expose an underappreciated public dimension of prominent theories of private law, which tend to emphasize plaintiffs' individual agency and autonomy in seeking redress for the wrongs allegedly committed against them, irrespective of their reasons for doing so.[15] The motivation-sensitive restrictions curb that autonomy precisely by regulating parties' reasons for taking certain actions during civil litigation, limitations that are hard to justify without adverting to the kinds of "public" considerations that many private law theorists downplay. In short, civil procedure's motivation-sensitive restrictions demonstrate the civil justice system to be both more private and more public than how it's generally understood.

I elaborate these arguments in three Parts, which seek to bridge the technicalities of civil procedure doctrine and the abstractions of private law theory and political theory. Part I constructs an extensive, if not exhaustive, typology of the various restrictions that civil procedure and adjacent doctrinal areas impose on parties' conduct during civil litigation. While I distinguish these restrictions along several different axes, the main contrast I draw is between (1) those restrictions that define procedural wrongdoing objectively as any unreasonable, inefficient, or unduly burdensome litigation conduct and (2) those that define procedural wrongdoing subjectively as any act taken during litigation for an improper purpose or with an improper motive—the motivation-sensitive restrictions. Despite their importance for civil practice, the motivation-sensitive restrictions have gone underexplored in civil procedure scholarship, which has focused on the former, efficiency-based restrictions, as exemplified by the prominent debate over the recently reemphasized "proportionality" requirement for discovery.[16] Examples of the motivation-sensitive restrictions include Federal Rule of Civil Procedure 11's "improper purpose" prong and analogous provisions of the discovery rules, federal courts' "inherent" authority to sanction parties for "bad faith" litigation conduct, the abuse-of-process tort, and jurisdictional doctrines forbidding "fraudulent" joinder and removal.[17] As this illustrative list suggests, the motivation-sensitive restrictions are themselves hardly homogenous, differing in terms of the litigation procedures they regulate and the motivations they preclude (or, in a few cases, mandate). But what they all have in common is that they prohibit litigation conduct that would otherwise be perfectly permissible, simply because of the reasons for which a party engages in it.

In Part II, I draw on several different theoretical frameworks to analyze this distinctive feature of the motivation-sensitive restrictions, as well as to begin to identify some of the purposes or motives such restrictions condemn. Insofar as they predicate the permissibility of litigation conduct on parties' motivations, the motivation-sensitive restrictions can helpfully be compared with prohibitions against disparate-treatment discrimination, which similarly proscribe otherwise-

[14] *See supra* note 13 and accompanying text.

[15] *See infra* Section III.C.

[16] FED. R. CIV. P. 26(b)(1); *see, e.g.*, Patricia Hatamyar Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees*, 83 U. CIN. L. REV. 1083, 1085-86 (2015).

[17] *See infra* Section I.B.

permissible actions based on the reasons for which they're performed (with the important difference that bans on disparate-treatment discrimination focus on decisionmakers' *intentions*, or more immediate reasons for action, whereas civil procedure's motivation-sensitive restrictions focus on litigants' *motives*, or more ulterior reasons). The motivation-sensitive restrictions also parallel prohibitions against disparate-treatment discrimination in largely *excluding* objectionable purposes, rather than *compelling* laudable ones. As such, the motivation-sensitive restrictions leave parties significant room to pursue their own, potentially self-interested ends through the civil justice system: Rather than demand that parties become public-regarding stewards of governmental policy, they require parties merely to refrain from invoking litigation for purposes that violate public values that are integral to the proper functioning of the civil justice system. The public values that the motivation-sensitive restrictions safeguard are multifarious, and I don't attempt a comprehensive catalog here, but we can begin to trace the normative content of the motivation-sensitive restrictions to traditional principles of equity and various substantive doctrines in both private and public law. The motivation-sensitive restrictions thus represent an important avenue through which public values penetrate civil litigation even in disputes between private parties. By insisting that parties abstain from acting on motivations that would require the state to deploy its coercive apparatus on grounds it can't condone, the restrictions indirectly prod parties to honor important public values when exercising the significant power and discretion they enjoy in civil litigation—irrespective of the resulting "balance" between meritorious and meritless claims.[18]

Part III considers some of the normative consequences of the motivation-sensitive restrictions for civil practice and public discourse about civil justice issues more generally. Within civil litigation, the motivation-sensitive restrictions can have the beneficial effect of cultivating a kind of procedural civic virtue in litigants. If civic virtue traditionally consists in a disposition to promote the common good of the political community, procedural civic virtue is thinner, manifesting as an acceptance of the necessity to sometimes subordinate one's self-interest to important public values. The motivation-sensitive restrictions can foster such acquiescence by requiring not just outward conformity with the conditions imposed on the various powers that civil litigation confers on parties, but a (partially) clear conscience when exercising those powers—that is, a conscience untainted by motives inimical to important public values. Civil procedure thus takes a different approach from the "division of labor" posited by contemporary liberal political philosophy, whereby individuals remain free to pursue their personal projects as they see fit within the boundaries set by institutions designed to ensure that individuals' actions do not significantly undermine "background justice."[19] Rather than leave the promotion of public values entirely to institutional structure, civil procedure, through its motivation-sensitive restrictions, insists that individual parties attend to at least some of those values and take at least partial responsibility for their maintenance, even as they employ the civil justice system to private ends.

The intense focus of the motivation-sensitive restrictions on parties' subjective purposes, however, has a potentially detrimental flip side when it comes to the *politics* of civil justice. While any strong causal claim would be speculative at best, it seems plausible that the motivation-sensitive restrictions can contribute to a political culture in which charges of illicit purposes and bad faith pervade public discourse about civil justice issues. Nor are any such discursive effects likely to be politically neutral: Given the current political economy of civil justice debates, powerful interests can distort civil procedure's concern with litigants' motivations in an effort to

[18] *See supra* note 10 and accompanying text.

[19] *See infra* notes 209-213 and accompanying text.

delegitimize individuals' attempts to seek recourse for the wrongs allegedly committed against them. At the same time, an exclusive focus on political economy risks occluding the normative structure of the motivation-sensitive restrictions, which bespeaks a more measured anxiety about litigation abuse than much of the rhetoric of contemporary civil justice debates implies. We may well be in a better position to resist the most exaggerated claims of litigation abuse if we follow civil procedure's motivation-sensitive restrictions in conceptualizing the civil justice system as a hybrid public-private institution, as opposed to either the substitute for public regulation depicted by many civil procedure scholars or the forum for private dispute resolution depicted by many private law scholars.

But wherever one prefers to strike the balance between public and private in the civil justice context, any theory of civil justice will remain incomplete unless it explains not only the animating principles of the civil justice system, but also the limits the system imposes on litigant conduct. By accusing certain groups of litigants of *mis*using the civil justice system, those levelling the accusations necessarily, if implicitly, presuppose some account of what it means to properly *use* that system, to employ it for its intended purposes. Procedural wrongdoing, together with the rules that civil procedure uses to curb it, thus constitutes a kind of mirror image of a properly functioning civil justice system—and, as such, a window into the nature and purposes of civil justice.

I. DEFINING PROCEDURAL WRONGDOING

Before analyzing and evaluating the motivation-sensitive restrictions in subsequent Parts, I seek in this Part to situate the restrictions in the broader constellation of civil procedure's regulations of litigation conduct. The pervasive rhetoric of abuse in contemporary debates about civil justice can often seem untethered from any doctrinal foundation. In fact, civil procedure—by which I mean to include not only the Federal Rules of Civil Procedure, but all bodies of law that constitute and govern the litigation process—has developed an extensive regime for regulating parties' conduct during civil litigation and combatting abuse of the civil justice system. That regime employs a range of definitions of procedural wrongdoing and a range of strategies for policing it. In its more hortatory mode, civil procedure enumerates lofty aspirations for the system to pursue and exhorts parties to heed them in their litigation conduct. That is the strategy embodied, most prominently, in Federal Rule of Civil Procedure 1, which admonishes parties and lawyers as well as courts to "construe[], administer[], and employ[]" all the Rules so as "to secure the just, speedy, and inexpensive determination of every action and proceeding."[20] But most of civil procedure's other restrictions on litigant conduct have bite, forbidding or requiring specific behavior and authorizing the imposition of (potentially severe) sanctions for violations.

Focusing on these latter restrictions, Section I.A classifies them along several different dimensions. While a few directly constrain the conduct of lawyers, most apply in the first instance to the parties themselves. Some purport to protect the interests of the opposing party, though most aim to preserve the integrity of the civil justice system as a whole. Some regulate procedures employed primarily by plaintiffs, others procedures used primarily by defendants, and still others procedures invoked more or less symmetrically by both sides. Most significantly, the restrictions proscribe a broad spectrum of wrongdoing, spanning objective wrongs such as unreasonable or unduly burdensome litigation practices, deliberate disobedience of court orders, and subjective wrongs defined in terms of parties' motives or reasons for engaging in particular litigation conduct.

[20] The Rule provides only that all the other Rules "*should* be" so construed, administered, and employed, rather than imposing any kind of enforceable obligation. FED. R. CIV. P. 1 (emphasis added).

Section I.B then homes in on this last category—the motivation-sensitive restrictions. Examples of such restrictions abound in the Federal Rules themselves, as well as in various doctrines in adjacent bodies of law such as federal jurisdiction and torts. Most of the motivation-sensitive restrictions forbid parties to take certain actions with bad motives or for bad reasons, though a few purport to compel *good* motives or reasons, in the form of "good faith." But notwithstanding such subtleties, in contrast to more objective forms of procedural wrongdoing, all the forms of procedural wrongdoing prohibited by the motivation-sensitive restrictions are defined in terms of parties' subjective mental states.

A. Dimensions of Procedural Wrongdoing

Scholars tend to speak of litigation "abuse" as a single, monolithic category, but civil procedure actually recognizes several distinct forms of procedural wrongdoing and contains a corresponding variety of restrictions on litigation conduct. This Section develops a taxonomy of those restrictions, distinguishing them along four different dimensions: (1) the identity of the wrongdoer; (2) the identity of the wronged; (3) the procedural mode of wrongdoing; and (4) the substantive definition of the wrongdoing.

1. Parties vs. Lawyers

Civil procedure's restrictions on litigation conduct differ in terms of whose actions they regulate, with the potential perpetrators of procedural wrongdoing being either the parties themselves or their lawyers. Many recent accounts of litigation abuse have focused on the conduct of lawyers,[21] and understandably so. When a party is represented in litigation, she must act through her lawyer, who is thus the one most directly positioned to either follow or violate various procedural rules. Lawyers are also subject to special duties to uphold certain public values underlying the legal system in virtue of their role as "officers of the court"[22] as well as professional-ethics rules[23]—an additional set of obligations constraining their litigation behavior.

Civil procedure likewise contains several restrictions that apply directly and exclusively to lawyers, such as the federal statute authorizing courts to sanction any lawyer—but not a party—"who so multiplies the proceedings in any case unreasonably and vexatiously."[24] Other rules, while regulating parties and lawyers alike, single out lawyers for special obligations, and special liability to sanctions when they violate them. For example, Federal Rule of Civil Procedure 11 requires either a lawyer or, if unrepresented, a party to sign any (non-discovery-related) "paper" submitted to the court,[25] and in signing the paper or otherwise "presenting" it to the court, one makes certain representations that can elicit sanctions if they prove false.[26] Although represented parties as well

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[21] *See, e.g.*, Yablon, *Virtues*, *supra* note 10, at 233-34 (purporting to offer a general account of "litigation abuse" but quickly reducing the issue to one of "*lawyers'* litigation tactics" (emphasis added)).

[22] *See* MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS 143 (1986) ("The invocation of counsel as officer of the court is designed to constrain the excessive amalgamation of the lawyer's interest with that of his client and to forestall the transformation of privately managed litigation into a melee of self-seeking.").

[23] *See, e.g.*, John Gardner, *The Twilight of Legality*, 43 AUSTRALASIAN J. LEGAL PHIL. 1 (2019); W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 363 (2004).

[24] 28 U.S.C. § 1927 (2018).

[25] FED. R. CIV. P. 11(a).

[26] FED. R. CIV. P. 11(b).

as their lawyers can be sanctioned for violations of Rule 11,[27] only lawyers (and unrepresented parties) can face monetary sanctions for violating the specific representation that "the claims, defenses, and other legal contentions [made in the paper] are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law."[28] Represented parties, the idea seems to be, shouldn't incur sanctions for the frivolous *legal* arguments advanced by their lawyers.

Most of civil procedure's regulations of litigation conduct, however, apply equally to parties and lawyers. Consider again Rule 11. With the exception of violations of the representation regarding a paper's legal arguments, "the court may impose an appropriate sanction on any attorney, law firm, *or party* that violated the rule or is responsible for the violation."[29] If, for instance, a party was acting for an "improper purpose" in instructing her lawyer to make a particular filing,[30] the lawyer may be sanctioned, but so may the party, as the one ultimately "responsible for the violation."[31] The rule functions in such cases as a direct regulation of parties' litigation conduct. But even when a court exercises its discretion to sanction only the lawyer for a violation, Rule 11 still incentivizes lawyers to assess their clients' "purposes" and thus functions as an *indirect* regulation of parties' conduct. Only when a lawyer takes some step without her party's knowledge or approval do sanctions regimes such as Rule 11's regulate the conduct of lawyers alone.[32]

Within civil procedure's framework for regulating litigation conduct, then, we find a shadow regime of *party ethics*, with rules that restrict parties' conduct directly or, by constraining their lawyers, vicariously.[33]

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[27] *See infra* notes 30-32 and accompanying text.

[28] FED. R. CIV. P. 11(b)(2); *see* FED. R. CIV. P. 11(c)(5)(A). Other rules restrict lawyers' conduct more indirectly. For example, Rule 23 enumerates various factors courts should consider in deciding whether to approve a class action settlement, including whether class counsel adequately represented the class members and whether the settlement was negotiated at arm's length—considerations that derivatively impose obligations on both class and defense counsel. FED. R. CIV. P. 23(e)(2)(A)-(B); *see* 7B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1797.1 (3d ed. 2002) (explaining that the factors seek to determine whether there was collusion between class and defense counsel); 4 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 13:48 (5th ed. 2011) (similar).

[29] FED. R. CIV. P. 11(c)(1) (emphasis added).

[30] FED. R. CIV. P. 11(b)(1).

[31] *See* 5A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE & A. BENJAMIN SPENCER, FEDERAL PRACTICE AND PROCEDURE § 1336.2 (4th ed. 2008) ("As the text of the rule and cases applying it make clear, the district court's discretion under Federal Rule of Civil Procedure 11 includes the power to impose sanctions on the client alone, solely on the counsel for one of the parties, a law firm, or on any combination of the three . . . ." (footnotes omitted)). Some courts, however, are loath to sanction represented parties, notwithstanding Rule 11's clear authorization to do so. *See id.*

[32] *See, e.g.*, St. Charles Health Sys., Inc. v. Or. Fed'n of Nurses & Health Prof'ls, Local 5017, No. 6:21-cr-304-MC, slip op. at 6 n.4 (D. Or. Dec. 16, 2021) (sanctioning the lawyer rather than the party for "bad faith" litigation conduct on the ground that the party "was entitled to rely on experienced, high-priced counsel for advice"); Avery v. E&M Servs., LLC, No. 1:18-cv-258, 2020 WL 7364974, at *3 (D.N.D. Dec. 15, 2020) (declining to sanction a party under the discovery rules for his lawyer's misconduct during a deposition because the party hadn't "endorsed or condoned" the lawyer's actions).

[33] *Cf.* Norman W. Spaulding, *The Rule of Law in Action: A Defense of Adversary System Values*, 93 CORNELL L. REV. 1377, 1397 (2008) ("I . . . fail to see why the moral accountability of the citizen-client is not sufficient for those concerned with the moral consequences of lawyers' vicarious action for the clients they represent.").

2. Party Opponents vs. the System

Just as a restriction on litigation conduct can have two different addressees, so it can seek to protect from procedural wrongdoing two different beneficiaries: the perpetrator's opponent or the civil justice system as a whole. There are a few vestiges of the view that it's the opposing party who is wronged by litigation misconduct—most notably, the torts of wrongful institution of civil proceedings (the civil analogue of malicious prosecution) and abuse of process, both of which purport to remedy the "private harm" resulting from certain forms of procedural wrongdoing.[34]

Most of the restrictions found within civil procedure doctrine itself, by contrast, conceive of procedural wrongdoing as a *public* wrong to the civil justice system rather than a private wrong to the opposing party. For one thing, many restrictions don't require any finding of harm or prejudice whatsoever as a prerequisite for sanctions, or if they do, they focus on the wrongdoing's harmful consequences for the proper functioning of the civil justice system.[35] For another, even when procedural wrongdoing does happen to harm or prejudice the other party, the imposed sanctions often purport not to compensate that injury, but only to deter future wrongdoing. Rule 11 sanctions, for instance, may be no greater than necessary to achieve specific and general deterrence, and the rule's preferred sanctions are fines payable to the court rather than payments to cover the opposing party's attorney's fees, which may be ordered only in rare circumstances.[36] While sanctions imposed for the sake of deterrence may, of course, also incidentally compensate the other party, the fact that the sanctions' official purpose remains deterrence reflects a conception of procedural wrongdoing as a public wrong to the civil justice system.

3. Plaintiffs vs. Defendants

There are myriad ways to perpetrate procedural wrongdoing, and civil procedure's restrictions on litigation conduct accordingly govern the full range of litigation procedures. A few restrictions apply to procedures typically invoked either only by plaintiffs, such as the requirements for pleading allegations in a complaint,[37] or only by defendants, such as the conditions for waiving service of process[38] and the requirements for responding to the allegations in the complaint.[39] But most of the restrictions are symmetric, in that they apply to procedures that are equally available to plaintiffs and defendants—at least as a formal mater, even if certain procedures have different practical significance on different sides of the "v." Some of the symmetric restrictions regulate the manner in which parties and their lawyers must participate in the litigation process, such as the rule authorizing sanctions for failing to appear at, prepare for, or participate in the pretrial conference.[40] Most of the other symmetric restrictions limit the use of

[34] DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK., DOBBS' LAW OF TORTS § 585 (2d ed. 2011). I discuss these torts in more detail in the next Section. *See infra* Section I.B.

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

[36] *See* FED. R. CIV. P. 11(c)(4) and advisory committee's note to 1993 amendment; WRIGHT ET AL., *supra* note 31, § 1336.3. By contrast, while courts may use their inherent power to award attorney's fees as a sanction for "bad faith" litigation conduct, such a fee award must be purely compensatory, limited to the fees the other party incurred because of the misconduct. *See* Goodyear Tire & Rubber Co. v. Haeger, 137 S. Ct. 1178, 1184-86 (2017).

[37] *See* FED. R. CIV. P. 8(d)(1); *see also* FED. R. CIV. P.23.1(b) (pleading requirements for derivative actions).

[38] *See* FED. R. CIV. P. 4(d).

[39] *See* FED. R. CIV. P. 8(b).

[40] *See* FED. R. CIV. P. 16(f)(1)(A)-(B).

discretionary powers invoked by plaintiffs and defendants alike. Rule 11 thus applies to the submission of any (non-discovery related) "pleading, written motion, or other paper," while either side faces sanctions for misconduct committed during discovery.[41] To be sure, Rule 11 has morphed over the decades largely in response to the perceived abuses of plaintiffs,[42] and plaintiffs typically have greater need for discovery given information asymmetries.[43] But whether plaintiff or defendant, a party exercises the various powers conferred on her during civil litigation subject to certain limits—and under the threat of sanctions for exceeding those limits.

4. Objective vs. Subjective

Finally, and most significantly, civil procedures' restrictions on litigation conduct differ in terms of how they define procedural wrongdoing—and, in particular, whether they define the proscribed conduct objectively or subjectively. I first focus on the objective restrictions and then turn to the subjective restrictions in the next Section.

The objective restrictions prohibit litigation conduct that's inefficient in the sense of being "unduly burdensome," excessively costly, or otherwise unjustified—with respect to either the opposing party or the civil justice system (though again, even when the opposing party bears most of the costs associated with inefficient litigation conduct, the wrong is often regarded as one to the civil justice system as a whole).[44] The rules thus require defendants to avoid increasing the costs associated with service of process[45] and both parties to reduce the costs of construing their pleadings.[46] Parties must also have "good cause" to seek any extension of time from the court,[47]

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[41] *See* FED. R. CIV. P. 26, 37.

[42] Most notably, Rule 11 was amended in 1983 to combat a purported profusion of "frivolous" lawsuits. *See* FED. R. CIV. P. 11 advisory committee's note to 1983 amendment. Many scholars, however, criticized courts for imposing sanctions under the revised rule inconsistently across different categories of plaintiffs and worried that the risk of sanctions deterred potential plaintiffs from bringing meritorious lawsuits. *See* Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1937 (1989); Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11: Some "Chilling" Problems in the Struggle Between Compensation and Punishmen*t, 74 GEO. L.J. 1313, 1339-43 (1986); William W. Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1015-17 (1988). Rule 11 was significantly revised in 1993 largely to address these kinds of concerns, *see* Carl Tobias, *The 1993 Revision of Federal Rule 11*, 70 IND. L.J. 171, 171 (1995), though it continues to be associated primarily with the litigation conduct of plaintiffs, as when scholars invoke sanctions as a preferable alternative to other plaintiff-focused measures aimed at curbing abusive litigation practices, such as heightened pleading standards, *see, e.g.*, A. Benjamin Spencer, *Pleading and Access to Civil Justice: A Response to* Twiqbal *Apologists*, 60 UCLA L. REV. 1710, 1722, 1732-33 (2013).

[43] *See* Yablon, *Virtues*, *supra* note 10, at 238 n.14 ("In big case litigation with information asymmetries, complaints that focus on 'overdiscovery' or 'fishing expeditions' usually view plaintiffs' counsel as the source of such problems. When the concerns allege delay and document destruction, it is usually defense counsel who are identified as the culprits.").

[44] *See supra* subsection I.A.2.

[45] *See* FED. R. CIV. P. 4(d)(1) (imposing on defendants "a duty to avoid unnecessary expenses of serving the summons"); FED. R. CIV. P. 4(d)(2) (requiring a defendant who, "without good cause," refuses a plaintiff's proper request to waive service to pay expenses associated with service).

[46] FED. R. CIV. P. 8(b)(2) ("A denial must fairly respond to the substance of the allegation."); FED. R. CIV. P. 8(d)(1) ("Each allegation must be simple, concise, and direct."); *see also* FED. R. CIV. P. 12(e) (motion for a more definite statement). The rules impose a similar requirement for answering requests for admission during discovery. *See* FED. R. CIV. P. 36(a)(4) ("A denial must fairly respond to the substance of the matter . . . .").

[47] FED. R. CIV. P. 6(b)(1).

and they must have adequate legal[48] and factual[49] support for all the contentions made in their filings, as well as comparable support for their discovery requests.[50] The discovery rules are replete with similar requirements: Parties must have "good cause" for seeking an extension of time in which to make the mandatory pretrial disclosures to their opponent[51] and face sanctions for any failure to make those disclosures that isn't "substantially justified";[52] they may request during discovery only information that's "proportional to the needs of the case," with proportionality being defined in terms of several objective factors;[53] they must show "good cause" to obtain electronically stored information that's not "reasonably accessible because of undue burden or cost"[54] and take "reasonable" steps to preserve such information in anticipation of litigation;[55] they must pay their opponent's expenses if they lose on a motion to compel discovery unless their position was "substantially justified";[56] and they must avoid proliferating the costs associated with deposing their opponent and third-party witnesses.[57] Finally, under Rule's 68 offer-of-judgment procedure, if a plaintiff rejects a defendant's pretrial settlement offer and ends up securing a judgment no more favorable than the spurned offer, she must pay the defendant's post-offer litigation costs.[58]

All of these rules require parties to modify their litigation conduct so as to avoid imposing excessive costs on their opponent and the civil justice system, with courts determining which costs count as excessive according to various objective standards. And because the rules all define procedural wrongdoing objectively, they are all amenable to economic cost-benefit analysis, and thus accord with the prevailing conception of procedural wrongdoing among civil procedure scholars.[59]

Other rules, though still employing objective definitions of procedural wrongdoing, don't seek to minimize the costs of parties' litigation practices so much as to preserve courts' control over the proceedings. In particular, various rules allow a court to sanction parties and lawyers for

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[48] FED. R. CIV. P. 11(b)(2).

[49] FED. R. CIV. P. 11(b)(3)-(4). These provisions can be understood as imposing purely objective requirements at least in cases in which any violation is merely "negligent" rather than "willful." *See* FED. R. CIV. P. 11(b) advisory committee's note to 1993 amendment. Further confirming the requirements' objective nature, courts recognize no "good faith" defense for these provisions. *See* WRIGHT ET AL., *supra* note 31, § 1335 & n.6.

[50] FED. R. CIV. P. 26(g)(1)(B)(i) (requiring discovery requests to have legal support); 26(g)(1)(B)(iii) (prohibiting discovery that's unreasonable or unduly burdensome or expensive); 26(g)(3) (authorizing sanctions for violations of the foregoing provisions).

[51] FED. R. CIV. P. 26(a)(3)(B).

[52] FED. R. CIV. P. 37(c)(1).

[53] FED. R. CIV. P. 26(b)(1); *see also* FED. R. CIV. P. 26(b)(2)(C) (requiring the court to limit discovery if it's "unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive," or if "the party seeking discovery has had ample opportunity to obtain the information by discovery in the action").

[54] FED. R. CIV. P. 26(b)(2)(B).

[55] FED. R. CIV. P. 37(e).

[56] FED. R. CIV. P. 37(a)(5)(A)(ii), 37(a)(5)(B). A position is "substantially justified" so long as "reasonable people could debate" it. WRIGHT ET AL., *supra* note 35, § 2288 & n.31.

[57] *See, e.g.*, FED. R. CIV. P. 30(d)(2) (authorizing sanctions for "a person who impedes, delays, or frustrates the fair examination of the deponent" during an oral deposition); FED. R. CIV. P. 30(g) (authorizing sanctions for a party who fails to show up to a deposition or to get a nonparty deponent to appear); FED. R. CIV. P. 37(d)(3) (requiring a party to pay the expenses associated with a failure to attend a deposition or answer interrogatories unless the failure was "substantially justified"); FED. R. CIV. P. 45(d)(1) (requiring parties to "take reasonable steps to avoid imposing undue burden or expense on a person subject to [a] subpoena").

[58] FED. R. CIV. P. 68.

[59] *See supra* notes 10-12 and accompanying text.

disobedience of its orders, including its scheduling and other pretrial orders[60] and its discovery orders.[61] Courts, of course, also possess inherent power to punish contempt.[62] These restrictions on litigation conduct remain objective because they make liability to sanctions turn on the fact of disobedience of a court order rather than any of the subjective mental states of the person who disobeyed; disobedience of a court order, for example, need not have been "willful" to constitute (civil) contempt.[63] At the same time, they generally make no attempt to account for the costs and benefits of disobedience,[64] in contrast to many of civil procedure's other objective restrictions on litigation conduct.

B. Party Motivations and Procedural Wrongdoing

Less prominent in extant accounts of procedural wrongdoing is another set of rules and doctrines that define the litigation conduct they prohibit subjectively, in terms of the motivations of the individuals who engage in it. I thus label these rules "motivation-sensitive restrictions." By "motivations," I mean the *reasons* for which an individual performs a particular action.[65] Motivations, so understood, differ from incentives, which are the focus of other accounts of procedural wrongdoing[66]: If incentives are (some of) the reasons for which an individual might be inclined to act, motivations are the reasons for which she does in fact act; incentives become motivations only when an individual "responds" to them. All the rules considered in this Section make the permissibility of litigation conduct turn at least partly on the motivations with which individuals engage in it—and often exclusively, without regard to the conduct's consequences.

Many of the motivation-sensitive restrictions forbid parties and their lawyers to engage in litigation conduct for certain illegitimate reasons. Perhaps the most familiar example (and one to which I'll return frequently in the remainder of this Article) is Rule 11's "improper purpose" prong, which prohibits parties and their lawyers from presenting a "paper" for "any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation."[67] The provision's references to "unnecessary delay" and "needlessly increase[d] . . . cost[s]" might evoke the objective restrictions considered in the previous Section. In contrast to those other restrictions, however, Rule 11's "improper purpose" prong imposes no freestanding duty to avoid delay or otherwise minimize litigation costs; one violates the provision not whenever one happens to unnecessarily delay the proceedings or needlessly increase litigation costs, but only when one makes such delay or waste one's *purpose* in presenting a paper to the court. Most courts have accordingly emphasized that the "improper purpose" prong, unlike Rule 11's other provisions, imposes a *subjective* requirement, akin to a prohibition on bad faith litigation conduct.[68] To be sure, some courts occasionally describe the provision as an objective requirement, but usually in

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[60] FED. R. CIV. P. 16(f)(1)(C).

[61] FED. R. CIV. P. 37(b)(2)(C).

[62] *See* FED. R. CIV. P. 70(e); Ex parte Robinson, 19 Wall. (86 U.S.) 505 (1874); 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2960 (3d ed. 2002).

[63] *See* WRIGHT ET AL., *supra* note 62, § 2960 & n.60.

[64] *But see* FED. R. CIV. P. 37(b)(2)(C) (excusing disobedience of discovery orders if "substantially justified").

[65] I provide a more detailed account of the kinds of reasons the motivation-sensitive restrictions proscribe in the next Part. *See infra* Section II.A.

[66] *See, e.g.*, Marrero, *supra* note 11 (developing an account of abusive litigation practices based on the various financial and professional incentives faced by lawyers); Yablon, *Virtues*, *supra* note 10, at 241-51 (following Judge Marrero's lead).

[67] FED. R. CIV. P. 11(b)(1).

[68] *See* WRIGHT ET AL., *supra* note 31, § 1335 & n.7.

the course of demanding objective *evidence* of a violation, which is perfectly consistent with a subjective standard of conduct.[69] What's more, most courts treat the "improper purpose" prong as a distinct requirement from Rule 11's other, objective requirements, in that one can be sanctioned for acting with an "improper purpose" even if one's legal and factual contentions are nonfrivolous.[70] The provision thus predicates the permissibility of certain litigation actions exclusively on the reasons for which they're performed.

In this respect, Rule 11's "improper purpose" prong is hardly an aberration. Many other procedural rules, both within the Federal Rules of Civil Procedure themselves and in adjacent bodies of doctrine, prohibit parties and their lawyers from engaging in litigation conduct for certain illegitimate reasons. Under the Rules, parties and their lawyers are subject to an "improper purpose" provision for discovery requests that's analogous to Rule 11's;[71] they may seek protective orders against discovery that constitutes "annoyance" or "oppression," terms that bespeak an implicit mental state on the part of the party seeking the discovery;[72] they may move to terminate or limit an oral deposition "on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party";[73] they face heightened sanctions for spoliating electronically stored information "with intent to deprive another party of the information's use in the litigation";[74] and they can be sanctioned for submitting an affidavit or declaration on summary judgment "in bad faith or solely for delay."[75]

Beyond the Rules, various statutes and judicially created doctrines likewise limit the reasons for which parties and their lawyers may act during civil litigation. Courts, for example, possess "inherent authority" to sanction "bad faith" litigation conduct, where a party is deemed to have acted in bad faith when she acted for the kinds of purposes deemed "improper" under Rule 11.[76] Under the federal jurisdictional statutes, a defendant has only one year to remove a state lawsuit to federal court based on diversity jurisdiction, unless the plaintiff acted in "bad faith" to

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[69] *See id.* nn.26-27.

[70] *See, e.g.*, FDIC v. Maxxam, Inc., 523 F.3d 566 (5th Cir. 2008) (explaining that a plaintiff "would violate Rule 11 if it filed a case that it reasonably thought had merit, but pursued it in a manner calculated to increase the costs of defense," thus rejecting the view that "the filing of a paper for an improper purpose is immunized from Rule 11 sanctions simply because it is well grounded in fact and law"); Whitehead v. Food Max of Miss., Inc., 332 F.3d 796, 803-07 (5th Cir. 2003) (en banc) (upholding sanctions against a lawyer who executed a judgment in a manner deliberately designed to embarrass the other party, irrespective of whether the lawyer's application for a writ of execution had been nonfrivolous); Szabo Food Serv. Inc. v. Canteen Corp., 823 F.2d 1073, 1083 (7th Cir. 1987) (approving Rule 11 sanctions for "filing a colorable suit for the purpose of imposing expense on the defendant rather than for the purpose of winning"). Those courts that have dissented from this view have tended to do so only when the "paper" at issue was a plaintiff's complaint. *See, e.g.* Sussman v. Bank of Isr., 56 F.3d 450 (2d Cir. 1995) (holding that sanctions would be inappropriate where the plaintiff's complaint was nonfrivolous, even if she had filed it partly for an improper purpose); Townsend v. Holman Consulting Corp., 929 F.2d 1358, 1362 (9th Cir. 1990) (holding that a "determination of improper purpose must be supported by a determination of frivolousness when a complaint is at issue").

[71] FED. R. CIV. P. 26(g)(1)(B)(ii) (providing that a discovery request, response, or objection must "not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation").

[72] FED. R. CIV. P. 26(c)(1).

[73] FED. R. CIV. P. 30(d)(3)(A).

[74] FED. R. CIV. P. 37(e)(2). Even "gross negligence" isn't enough to warrant sanctions under this provision. *See* FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment. And unlike the other provisions of Rule 37(e), section (e)(2) doesn't require a finding of prejudice to the other party. *See* WRIGHT ET AL., *supra* note 35, § 2284.2 & n.23.

[75] FED. R. CIV. P. 56(h).

[76] *See* Chambers v. NASCO, Inc., 501 U.S. 32 (1991).

prevent removal.[77] And several substance-specific doctrines forbid parties to act for illegitimate reasons in the context of particular kinds of lawsuits, from prison litigation[78] to securities[79] and antitrust actions.[80]

Most of the foregoing rules attempt to police parties' illicit motivations while the litigation is ongoing, but other rules address ill-motivated litigation conduct through collateral proceedings after the fact. That is the role of the torts of wrongful institution of civil proceedings and abuse of process. To recover under the former tort, the plaintiff must show that she was subjected to a prior lawsuit that lacked "probable cause" and that was filed for an "improper purpose," that she suffered an injury as a result, and that the prior lawsuit was terminated in her favor.[81] The elements of the abuse-of-process tort are similar, except that the wrong consists in the misuse of any legal process, not just the filing of a lawsuit, and the prior litigation need not have lacked probable cause or been terminated in the plaintiff's favor.[82] Although these torts differ from many of the other motivation-sensitive restrictions in that they require the opposing party to have suffered some kind of harm from the abusive litigation conduct,[83] I nevertheless include them here because "in most cases motive or purpose is the centerpiece" of both torts.[84] The torts also recognize even more explicitly

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[77] 28 U.S.C. § 1446(c)(1) (2018).

[78] Under the so-called "three strikes" provision of the Prison Litigation Reform Act (PLRA), a prisoner may not proceed *in forma pauperis* in federal court if three or more of his previous lawsuits were dismissed as, among other things, "malicious." 28 U.S.C. § 1915(g) (2018); *see* Lomax v. Ortiz-Marquez, 140 S. Ct. 1721, 1726 (2020) (distinguishing "abusive" from "simply meritless prisoner suits," though noting that the PLRA seeks to combat both).

[79] The Private Securities Litigation Reform Act (PSLRA) imposes heightened versions of Rule 11's requirements on certain securities lawsuits. *See* 15 U.S.C. § 78u-4(c) (2018).

[80] Under the so-called "sham litigation" doctrine, a business lawsuit will be regarded as an attempt to violate the antitrust laws, as opposed to a bona fide attempt to vindicate the plaintiff's rights, if and only if that lawsuit is both (1) "objectively baseless," in that "no reasonable litigant could realistically expect success on the merits," and (2) motivated by an improper purpose "'to interfere directly with the business relationships of a competitor' . . . through the 'use [of] the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon.'" Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60-61 (1993); *see, e.g.*, FTC v. AbbVie Inc., Findings of Fact and Conclusions of Law, No. 2:14-cv-05151-HB, slip op., at 32, 36-37, 39 (E.D. Pa. June 29, 2018) (elaborating the doctrine's "subjective intent" element).

[81] *See* DOBBS ET AL., *supra* note 34, § 592. It's difficult to recover under this tort for several reasons. First, "probable cause" requires "only that the original suitor must believe in the facts he asserts and that a civil claim is plausible, or he has a good chance at establishing the case to the satisfaction of judge and jury, or that he 'may' have a claim." *Id.* (footnote omitted). Second, a party doesn't act with an "improper purpose" if she's merely negligent, and neither does spite alone count as malicious, though spite plus intent to harass is sufficient. *See id.*Third, many states require a showing of some kind of "special injury." *See id.* § 593.

[82] *See* RESTATEMENT (SECOND) OF TORTS § 682 (AM. LAW. INST. 1977) (explaining that the tort prohibits using any legal process "against another primarily to accomplish a purpose for which it is not designed"); DOBBS ET AL., *supra* note 34, § 594 (explaining that a showing of lack of probable cause isn't required).

[83] *See supra* note 34 and accompanying text.

[84] DOBBS ET AL., *supra* note 34, § 594; *see, e.g.*, Gen. Refractories Co. v. Fireman's Fund Ins. Co., 337 F.3d 297 (3d Cir. 2003). I thus disagree with Alan Calnan's understanding of the wrongful-litigation tort, according to which it imposes a de facto "probable cause" requirement on (tort) plaintiffs, subjecting them to liability whenever they file unsupported claims. *See generally* ALAN CALNAN, THE RIGHT TO CIVIL DEFENSE IN TORTS (2013). But of course, lack of probable cause isn't a *sufficient* condition for liability under the tort, only a *necessary* one. Calnan pays particularly little heed to the improper-purpose element.

The torts also seem to constitute a counterexample to Arthur Ripstein's claim that tort law prescinds from the ends for which individuals act and considers only the means they use. *See* ARTHUR RIPSTEIN, PRIVATE WRONGS 159-84 (2016). *But see infra* note 203 (observing Ripstein's passing attempt to account for the torts); *infra* notes 263-268 and accompanying text (considering the compatibility of the motivation-sensitive restrictions with Ripstein's theory of tort law).

than some of the other motivation-sensitive restrictions that parties can act with mixed motives, and they accordingly look to parties' "predominant" or "primary" purpose in taking particular actions, rather than their sole one.[85]

Among the illegitimate reasons that might motivate a party's litigation conduct is an intent to deceive the court (beyond the deceit implicit in any attempt to accomplish an improper purpose). Rule 11 thus authorizes courts to impose heightened sanctions for "willful" violations.[86] A party may also seek relief from a final judgment on the ground that it resulted from "fraud . . . , misrepresentation, or misconduct by an opposing party,"[87] and courts enjoy inherent power to "set aside a judgment for fraud on the court."[88] Short of outright fraud, several rules prohibit parties from engaging in duplicitous conduct designed to achieve ends the law otherwise forecloses, such as the requirement that a lawsuit "be prosecuted in the name of the real party in interest" rather than some surrogate,[89] as well as assorted rules prohibiting "collusive" practices designed to manufacture jurisdiction in derivative actions[90] or to manufacture[91] or defeat diversity jurisdiction.[92] In these various contexts, when a party performs an otherwise-permissible action with an intent to deceive or mislead the court, the rules frequently deem her to be acting for an illegitimate purpose and prohibit her conduct.

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[85] Thus, for a party to have acted with "malice" or for an "improper purpose," "the proceedings must have been initiated or continued *primarily* for a purpose other than that of securing the proper adjudication of the claim on which they are based." RESTATEMENT (SECOND) OF TORTS § 676 (AM. LAW INST. 1977) (emphasis added). I consider more extensively how to address the problem of mixed motives in the context of civil litigation in the next Part. *See infra* notes 133-136 and accompanying text.

[86] *See* FED. R. CIV. P. 11(b) advisory committee's note to 1993 amendment.

[87] FED. R. CIV. P. 60(b)(3).

[88] FED. R. CIV. P. 60(d)(3) (acknowledging the existence of such inherent power).

[89] FED. R. CIV. P. 17(a)(1); *see* 6A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1541 (3d ed. 2002) ("Arguably, . . . Rule 17(a) performs the useful function of protecting individuals from harassment and multiple suits by persons who would not be bound by the principles of claim preclusion if they were not prevented from bringing subsequent actions by a real-party-in-interest rule.").

[90] *See* FED. R. CIV. P. 23.1(b)(2). Though defendants rarely contest this requirement, and courts tend to police only the most egregious attempts to manufacture federal jurisdiction. *See* 7C CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1830 (3d ed. 2002).

[91] *See* 28 U.S.C. § 1359 (2018) ("A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."); 13F CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3637 (3d ed. 2002) (observing that the provision "seeks to prevent agreements or transactions that are designed primarily to manufacture federal diversity jurisdiction"). In applying this provision, most courts employ a subjective "motivation" or purpose test, though some courts criticize that approach on the ground that determining parties' motives is too difficult. *See* WRIGHT ET AL., *supra* note 89, § 1557.

[92] Traditionally, there was little check on the collusive destruction of diversity, but courts increasingly look for an intent to defeat diversity jurisdiction by "fraudulently" joining a nondiverse party. *See* WRIGHT & MILLER, *supra* note 91, §§ 3639, 3641, 3641.1; *cf., e.g.*, Hensgens v. Deere & Co., 833 F.2d 1179, 1182 (5th Cir. 1987) (listing as the first factor for courts to consider in deciding whether, under 28 U.S.C. § 1447(e) (2018), to deny a plaintiff's request to amend her complaint to join a defendant who would destroy diversity jurisdiction "whether the amendment's *purpose* is to defeat diversity jurisdiction"). The case law on so-called "fraudulent joinder" is particularly confused, with some courts declaring subjective intent "immaterial" and others purporting to determine whether a nondiverse defendant was joined in "bad faith." *See* 14C CHARLES ALAN WRIGHT, ARTHUR R. MILLER, JOAN E. STEINMAN, MARY KAY KANE & A. BENJAMIN SPENCER, FEDERAL PRACTICE AND PROCEDURE § 3723.1 & nn.2-3 (rev. 4th ed. 2008). It seems that the best way to reconcile these conflicting cases is to treat fraudulent joinder as a subjective wrong while allowing that wrong to be proved through objective evidence, a common approach throughout the law. For a recent treatment of the related phenomenon of "fraudulent removal," see generally Zachary D. Clopton & Alexandra D. Lahav, *Fraudulent Removal*, 135 HARV. L. REV. F. 87 (2021).

Finally, while most of the motivation-sensitive restrictions *forbid* parties to act with certain bad motivations, a few affirmatively *require* parties to act with certain good ones. The latter rules impose that requirement by demanding that parties take certain actions in "good faith," understood as a sincere belief in the reasonableness of one's conduct. A defendant must, for instance, have a "good faith" basis to make a general denial of the allegations in the plaintiff's complaint,[93] and a similar requirement applies to a party's answers to requests for admission during discovery.[94] Other rules require parties to negotiate in good faith with their opponents, whether during scheduling and other pretrial conferences,[95] before seeking a protective order during discovery,[96] when attempting to develop a joint discovery plan,[97] before seeking to depose a representative of an organization,[98] or before moving for an order compelling discovery.[99] The security requirement for preliminary injunctions and temporary restraining orders can similarly be understood as an assurance of a party's good faith in requesting such provisional relief.[100] Like the other motivation-sensitive restrictions, civil procedure's good-faith requirements define procedural wrongdoing in terms of parties' subjective mental states,[101] but they're more rationally demanding than the former and thus appear less frequently in the Federal Rules and related doctrines.

* * *

Time and again, procedural rules and doctrines define the litigation conduct they prohibit subjectively, in terms of the reasons for which parties act, rather than objectively, in terms of the reasonableness of parties' actions. These motivation-sensitive restrictions treat the very same procedural act—filing a lawsuit, making a discovery request, and so on—as either wrongful or not, depending on a party's reasons for performing it. To be sure, because individuals' subjective mental states can be difficult to discern, courts frequently rely on objective, circumstantial evidence of illicit motives. But that evidentiary practice, common throughout the law,[102] hardly converts a subjective standard of conduct into an objective one. Nor is the motivation-sensitive restrictions' concern with parties' subjective reasons for action merely didactic; violations of the restrictions carry significant sanctions, and often more severe ones than those imposed for

[93] FED. R. CIV. P. 8(b)(3)-(4).

[94] FED. R. CIV. P. 36(a)(4).

[95] FED. R. CIV. P. 16(f)(1)(B).

[96] FED. R. CIV. P. 26(c)(1).

[97] FED. R. CIV. P. 26(f)(2); *see also* FED. R. CIV. P. 37(f) (authorizing sanctions for violations of the good-faith negotiation requirement).

[98] FED. R. CIV. P. 30(b)(6).

[99] FED. R. CIV. P. 37(a)(1). More specifically, conferring in good faith is a precondition for recovering one's expenses in connection with a motion to compel discovery. *See* FED. R. CIV. P. 37(a)(5)(A)(i); *see also* FED. R. CIV. P. 37(d)(1)(B) (imposing a similar requirement to confer in good faith before moving to compel responses to depositions and interrogatories).

[100] *See* FED. R. CIV. P. 65(c).

[101] *See, e.g.*, Naviant Mktg. Sols., Inc. v. Larry Tucker, Inc., 339 F.3d 180, 186 (3d Cir. 2003) (holding that Rule 37(a)(1)'s good-faith-conferral requirement demands a "sincere effort," not just a "token effort," "to secure [requested discovery] without court action"). In this respect, civil procedure's various good faith requirements may differ from good faith requirements in other areas of the law, which often understand good faith to be at least partly objective. *See, e.g.*, U.C.C. § 1-201(b)(20) (AM. LAW INST. & UNIF. LAW COMM'N 2011) (construing good faith to contain both objective and subjective elements).

[102] *See, e.g.*, Lawrence Ponoroff, *The Limits of Good Faith Analyses: Unraveling and Redefining Bad Faith in Involuntary Bankruptcy Proceedings*, 71 NEB. L. REV. 209, 222 n.44 (1992) (bankruptcy); Michael P. Van Alstine, *Of Textualism, Party Autonomy, and Good Faith*, 40 WM. & MARY L. REV. 1223, 1247 (1999) (contract).

violations of other procedural rules.[103] Indeed, the motivation-sensitive restrictions are regarded as so essential to the proper functioning of the civil justice system that a court may entertain a motion to impose sanctions for bad faith litigation conduct even in a case over which it turns out to lack subject matter jurisdiction, lest "parties who abuse the judicial procedures . . . get off scot-free" because of jurisdictional technicalities.[104]

And yet, despite their practical importance, the motivation-sensitive restrictions are largely absent from prevailing accounts of procedural wrongdoing. That's likely because the restrictions, in contrast to their objective counterparts, can't be readily explained in terms of efficiency or cost-benefit analysis, the dominant scholarly frameworks for assessing litigation conduct.[105] While one can, of course, tell a rather circuitous story in which the motivation-sensitive restrictions indirectly promote efficiency, the more straightforward efficiency-based approach would seem to be to jettison the motivation-sensitive restrictions and evaluate all litigation conduct objectively for its reasonableness, as many other procedural rules do.[106] If we take civil procedure's professed concern with parties' subjective motivations seriously, then we need a different account of how those motivations can determine the permissibility of litigation conduct and why they should. The next Part develops such an account.

II. THE FORM AND SUBSTANCE OF CIVIL PROCEDURE'S MOTIVATION-SENSITIVE RESTRICTIONS

The motivation-sensitive restrictions are distinguished from civil procedure's other limits on parties' litigation conduct by a focus on parties' subjective mental states—their purposes and reasons. But this feature, of course, hardly renders the restrictions unique in the broader scheme of legal rules; many crimes and torts contain subjective elements, for instance. To better apprehend the normative structure of the motivation-sensitive restrictions, Section II.A compares them with one of the most studied sets of rules that purport to regulate individuals' subjective motivations: prohibitions against disparate-treatment discrimination. This comparison helps to illuminate the ways in which civil procedure's motivation-sensitive restrictions both resemble and depart from other subjective legal rules. On the one hand, the motivation-sensitive restrictions and bans on disparate-treatment discrimination both make the permissibility of particular actions—whether to, say, fire an employee or file a discovery request—turn on the motivations behind them. On the other hand, notwithstanding that notable affinity, the motivation-sensitive restrictions also differ from prohibitions against disparate-treatment discrimination in at least two important respects. For one, the motivation-sensitive restrictions target parties' *motives* or more ulterior reasons for action, not only their *intentions* or more immediate reasons, and thus probe more deeply into parties' practical reasoning. For another, the restrictions proscribe a broader swath of motivations, not just the grounds traditionally prohibited by antidiscrimination law. The impermissible motivations nevertheless represent only a relatively small subset of all the possible motivations behind parties' litigation conduct, leaving parties significant latitude to pursue their own objectives through the civil justice system.

If the motivation-sensitive restrictions exclude only some motivations, then the crucial question becomes precisely *which* motivations are off limits. There turns out to be no neat formula

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[103] Contrast, in this regard, constitutional law, in which "soft" sanctions such as public censure predominate over "hard" sanctions for bad-faith conduct. David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 951 (2016).

[104] Hyde v. Irish, 962 F.3d 1306, 1310 (11th Cir. 2020).

[105] *See supra* notes 10-12 and accompanying text.

[106] *See supra* subsection I.A.4.

for distinguishing illegitimate from legitimate reasons for engaging in various litigation conduct, but as I show in Section II.B, we can begin to glean some of the hallmarks of abusive motivations from the illustrative lists of "improper purposes" in the Federal Rules of Civil Procedure and doctrines in adjacent areas of law. Though variegated, many of the illicit motivations are incompatible with important public values—values not only that the political community endeavors to uphold, but the violation of which must not be allowed to corrupt the state's coercive apparatus, including the civil justice system. Such values are grounded in traditional principles of equity and various substantive bodies of law and are continually up for debate in the political process. Through these myriad sources, the motivation-sensitive restrictions infuse important public values even into disputes between private parties.

A. Motivations, Permissibility, and Personal Prerogative

Civil procedure's motivation-sensitive restrictions all forbid parties not simply to engage in certain kinds of litigation conduct, but to engage in certain kinds of litigation conduct for certain reasons or purposes. When Rule 11 prohibits presenting any "paper" for an "improper purpose,"[107] when federal courts sanction litigants for acting in "bad faith,"[108] or when they dismiss a case with "fraudulently" joined parties for lack of subject-matter jurisdiction,[109] civil procedure makes the permissibility of parties' procedural actions turn on the subjective mental states with which they're performed; litigation conduct that would be perfectly permissible when engaged in for a legitimate reason becomes impermissible when engaged in for an illegitimate reason. But what, exactly, is the relationship between parties' subjective motivations and the forms of procedural wrongdoing proscribed by the motivation-sensitive restrictions? And just how intrusively do the restrictions regulate parties' reasoning, as opposed to their outward behavior?

We can better comprehend the formal structure of civil procedure's motivation-sensitive restrictions by comparing them with similar restrictions in other areas of the law. Many other legal rules define wrongdoing in terms of individuals' subjective mental states, such that the very same act can be either permissible or not, depending on the reasons for which it's performed.[110] Perhaps the most familiar examples of such rules are found in antidiscrimination law. Consider Title VII of the Civil Rights Act of 1964, which bans employment discrimination based on race, sex, and certain other protected characteristics.[111] More specifically, Title VII has been construed to prohibit two distinct forms of discrimination: (1) "disparate treatment," where "[t]he employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin," and (2) "disparate impact," where employers adopt "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity."[112] Disparate treatment is distinguished from disparate impact by the employer's intent: Whereas disparate impact includes any unjustified employment practice that disproportionately harms members of a particular social group—irrespective of the employer's intent in adopting the practice—disparate treatment

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[107] FED. R. CIV. P. 11(b)(1); *see supra* notes 67-70 and accompanying text.

[108] Chambers v. NASCO, Inc., 501 U.S. 32 (1991); *see supra* note 76 and accompanying text.

[109] *See supra* note 77 and accompanying text.

[110] *See, e.g.* Stephen Daly, *The Aberrant Tort of Lawful Means Conspiracy?*, 31 KING'S L.J. 145 (2020) (analyzing the civil conspiracy tort, which creates liability for otherwise-permissible competitive business tactics when performed with the motive to suppress competition).

[111] *See* 42 U.S.C. § 2000e-2(a) (2018).

[112] Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

includes only those adverse employment actions motivated by an intent to discriminate against an employee based on her race, sex, or other protected characteristic.[113] Prohibitions against disparate-treatment discrimination thus define the particular wrong they proscribe in terms of the wrongdoer's subjective mental state; in contrast to the wrong of disparate impact, the employer's mental state partly constitutes the wrong of disparate treatment. And in this regard, prohibitions against disparate-treatment discrimination resemble civil procedure's motivation-sensitive restrictions.

Also like civil procedure's motivation-sensitive restrictions, prohibitions against disparate-treatment discrimination forbid individuals to act with certain objectionable subjective mental states, rather than requiring them to act with certain laudable ones. Both sets of rules, that is, purport to *exclude* particular illegitimate reasons from individuals' decisionmaking rather than to *mandate* the consideration of particular legitimate reasons. With regard to bans on disparate-treatment discrimination, Title VII doesn't require employers to have some justification before, say, firing their employees, but rather prohibits them from firing their employees only for specific reasons (race, sex, and so on); employers remain free to fire their employees for any *other* reason or even for no reason at all (subject to other legal restrictions on employment practices). As for civil procedure's motivation-sensitive restrictions, they likewise generally forbid parties to engage in litigation conduct for specified reasons (harassment, causing undue delay, and so on), leaving parties free to engage in the same conduct for any other reasons, even bad ones. A few of the motivation-sensitive restrictions do go further, requiring parties to perform certain actions in "good faith."[114] Such requirements demand the *presence* of certain legitimate reasons in parties' decisionmaking (to wit, whatever reasons collectively constitute "good faith"), not just the *absence* of certain illegitimate reasons.[115] But for the most part, the motivation-sensitive restrictions, like Title VII's ban on disparate-treatment discrimination, define the wrongful actions they prohibit in terms of specific illicit motivations with which the actions might be performed.

In forbidding individuals to act with certain subjective mental states, both the motivation-sensitive restrictions and prohibitions against disparate-treatment discrimination furnish their subjects with what Joseph Raz has called "exclusionary reasons." If a "first-order reason" is a reason to perform or not to perform a particular action, then an exclusionary reason is a kind of "second-order reason"—namely, a "reason to refrain from acting for some [first-order] reason."[116] When an employer would take her employee's race or sex as a reason to fire or demote the employee, Title VII's ban on disparate-treatment discrimination directs her to refrain from acting on that (putative) reason, but without preempting her from taking the very same action for some other reason. Civil procedure's motivation-sensitive restrictions likewise require parties to abstain from, say, filing a lawsuit or making a discovery request when motivated by a desire to harass their opponents or another "improper purpose," though not when motivated by any other consideration.

While the two sets of rules thus function in much the same way, they differ in terms of the kinds of subjective mental states they direct their subjects to refrain from acting on—the kinds of first-order reasons they exclude. More specifically, prohibitions against disparate-treatment

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[113] *Id.*

[114] *See supra* notes 93-101 and accompanying text.

[115] *But cf.* Robert S. Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 196 (1968) (arguing that "good faith" in contract law "is best understood as an 'excluder'—it is a phrase which has no general meaning or meanings of its own, but which serves to exclude many heterogeneous forms of bad faith" (footnote omitted)).

[116] JOSEPH RAZ, PRACTICAL REASONS AND NORMS 39 (2d ed. 1990); *see also* JOSEPH RAZ, THE AUTHORITY OF LAW 22-23 (1979).

discrimination exclude only certain *intentions*, whereas civil procedure's motivation-sensitive restrictions also exclude certain *motives*. Both intentions and motives refer to the reasons for which an individual acts[117]—the answers a person could sincerely give when asked, "Why did you do that?"—but the two kinds of mental states occupy different positions along the chain of means-ends relationships linking the agent's action and her ultimate objective in taking it. Intentions can be understood as an agent's more immediate reasons for taking a particular action,[118] culminating in "the initiation of [the] action" itself.[119] "In forming . . . an intention," this conception holds, "the agent ratifies or endorses a desire in a distinctively practical way by *deciding* to bring about what she wants to do."[120] An agent's motive, by contrast, is her "ultimate desire for performing" an action, or her "end in acting."[121] Both intentions and motives are subjective mental states rather than objective ones, as they both reflect what "the agent took to be desirable—and hence, presumably, reasonable—about acting" rather than what she should have found desirable about acting or what it was in fact reasonable for her to do.[122] At the same time, motives stand at somewhat further remove than intentions from the actions they motivate, and thus lie at a deeper level of individuals' practical reasoning.

Prohibitions against disparate-treatment discrimination focus only on intentions so understood, defining the wrongs they proscribe in terms of the most immediate reasons for which individuals act. When Title VII forbids employers to discriminate "because of" race, sex, or other protected characteristics, it directs them not to take any of those characteristics as a reason to treat an employee less favorably, regardless of the *further* reasons they might have for engaging in such conduct. The statute thus prescinds not only from "the emotional or attitudinal force behind what was done," but also from "the further and ultimate intention with which it was done"[123]—that is, the employer's motive. Whether an employer refuses to hire a minority job applicant in order to promote white supremacy, to conform to a race-based stereotype, or to grudgingly appease a racist clientele, she equally violates Title VII's ban on disparate-treatment discrimination, making clear that the prohibited wrong consists in acting on certain intentions, not with certain motives.

Civil procedure's motivation-sensitive restrictions, by contrast, generally do attend to parties' motives, rather than just to their intentions. Consider again Rule 11's "improper purpose" prong, which forbids parties to present any "paper" for an "improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation."[124] Unlike Title VII's list of prohibited grounds, Rule 11's list of illustrative improper purposes doesn't identify parties' most immediate reasons for action; when a party acts for one of the improper purposes, she always has some other, more immediate reason for her action, and conversely, she need not have any improper purpose when she's acting for one of those more immediate reasons. All plaintiffs, for instance, file a complaint for the immediate reason of initiating a lawsuit and compelling the defendant to

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[117] *See* JOSEPH RAZ, ENGAGING REASON 39 (2002) ("[T]o identify people's intentions one needs to identify their reasons. They fix the intentions.").

[118] Contrast a different notion of intention as an agent's awareness of the action she's taking and its likely consequences. *See, e.g.*, T.M. SCANLON, MORAL DIMENSIONS: PERMISSIBILITY, MEANING, BLAME 19 (2008).

[119] STEVEN SVERDLIK, MOTIVE AND RIGHTNESS 33-34 (2011).

[120] *Id.* (emphasis added); *cf.* John Finnis, *Intention in Tort Law*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 229 (David G. Owen ed., 1995) (defining an intention as "the linking of means and ends in a plan or *proposal*-for-action *adopted* by *choice* in preference to alternative proposals (including to do nothing)").

[121] SVERDLIK, *supra* note 119, at 19.

[122] *Id.* at 24.

[123] John Gardner, *On the Ground of Her Sex(uality)*, 18 OXFORD J. LEGAL STUD. 167, 181 n.34 (1998).

[124] FED. R. CIV. P. 11(b)(1).

respond, on pain of default.[125] Acting on that reason is compatible with a wide range of various *further* reasons, including eliciting answers, garnering publicity, and extracting a settlement, as well as all the "improper purposes" enumerated in Rule 11. Yet whereas Title VII prohibits acting on some of the immediate reasons an employer might have to, say, fire an employee (the employee's race, sex, and so on), Rule 11 and civil procedure's other motivation-sensitive restrictions prohibit acting on certain further reasons parties might have to present a "paper" or engage in other litigation conduct. Those further reasons may, of course, be instrumental to other, still more ulterior reasons.[126] For example, a party might seek to "harass" her opponent in order to exact revenge, extort a monetary payment, or dissipate the opponent's resources. But the reasons proscribed by the motivation-sensitive restrictions—the "improper purposes"—nonetheless remain more remote than the prohibited grounds in Title VII, and thus merit the label "motives" to distinguish them from the latter.

Although civil procedure's motivation-sensitive restrictions thus define wrongful litigation conduct in terms of different kinds of subjective mental states from those targeted by bans on disparate-treatment discrimination, the restrictions might seem to suffer from some of the same difficulties that many scholars have attributed to other purpose-based rules such as those found in antidiscrimination law. Indeed, one might think that the motivation-sensitive restrictions are especially vulnerable to those difficulties precisely because they attend to parties' motives rather than intentions. And that vulnerability, in turn, might render the restrictions much more peripheral to civil procedure's doctrinal apparatus for regulating procedural wrongdoing than I've portrayed them to be.

The difficulties supposedly confronting purpose-based rules are both conceptual and moral, on the one hand, and practical and evidentiary, on the other. At the conceptual and moral level, some scholars flatly deny that the moral permissibility of an action can ever turn directly on the subjective motivations with which it's performed; whether an action is permissible, these critics contend, depends on the balance of objective reasons for and against the action, not the particular reasons for which an agent subjectively performs it.[127] Such objections, of course, must confront the fact that purpose-based prohibitions are ubiquitous in the law, with myriad legal rules purporting to predicate the permissibility of various actions on the reasons for which they're *actually* performed, as opposed to the reasons for which they could *conceivably* be performed.[128] There are also cases in which an act intuitively seems to be rendered impermissible solely in virtue of the subjective motivations with which it's performed, including most cases of employment discrimination—where, after all, the employer takes an action (firing, demoting, and so on) that would usually be perfectly unobjectionable but for the fact that it's motivated by race- or sex-based reasons.[129] But be that as it may, the thoroughgoing conceptual objections to purposed-based prohibitions don't tell against civil procedure's motivation-sensitive restrictions. For even scholars

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[125] *See* FED. R. CIV. P. 3, 4, 55.

[126] The motivation-sensitive restrictions thus address attempts to use harm as "leverage"—"as a means of achieving something else"—as well as instances of "animus," or a bare desire "to gratify spite." Larissa Katz, *Spite and Extortion: A Jurisdictional Principle of Abuse of Property Right*, 122 YALE L.J. 1444, 1448 (2013).

[127] *See, e.g.*, SCANLON, *supra* note 118, at 8-88 (making this criticism as a matter of moral theory); DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG? 138-68 (2008) (applying the criticism to antidiscrimination law and norms); Richard H. Fallon, *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523, 564 (2016) (applying the criticism to constitutional restrictions on legislative action).

[128] *See, e.g.*, Michael C. Dorf, *Even a Dog: A Response to Professor Fallon*, 130 HARV. L. REV. F. 86 (2016).

[129] *See* Micah Schwartzman, *Official Intentions and Political Legitimacy: The Case of the Travel Ban*, *in* POLITICAL LEGITIMACY: NOMOS LXI 201, 216-19 (Jack Knight & Melissa Schwartzberg eds., 2019).

who level such objections concede that subjective motivations can *indirectly* affect the permissibility of an action, as when a power or privilege is conferred on the condition that it not be exercised for any illegitimate purpose.[130] While many of the procedural powers that civil litigation confers on private parties might on their face appear to be unqualified,[131] we can understand the motivation-sensitive restrictions to impose further conditions on the exercise of those powers, conditions that are defined in terms of parties' subjective motivations.[132]

But even accepting that subjective motivations can determine (directly or indirectly) the permissibility of some kinds of conduct, one might nonetheless insist that matters are more complicated in civil procedure. The problem, one might think, lies in the fact that civil procedure's motivation-sensitive restrictions define impermissible litigation conduct in terms of parties' motives rather than intentions. While individuals' most immediate reasons for taking a particular action may well be relatively discrete and definite, their further reasons for taking the action are often multifarious and inchoate. This problem of "mixed motives" seems to be especially acute in civil litigation, where a party might act for a complex combination of ulterior reasons, blending a genuine desire for vindication with baser motives.[133] A party's legitimate motivations for engaging in litigation conduct may thus be inextricably intertwined with certain "improper purposes"—even in her own mind. And if that's so, the argument goes, it becomes conceptually difficult to proscribe the party's conduct based on her motives, as the motivation-sensitive restrictions purport to do.

This difficulty, though hardly unique to civil procedure, is compounded by the fact that the motivation-sensitive restrictions tend to employ one of the more indeterminate standards for assessing mixed motives. In particular, rather than prohibit every instance of conduct tainted by an impermissible motivation, many of the restrictions purport to condemn only conduct for which an impermissible motivation *predominates* over other, permissible ones. One commits the wrongful civil litigation tort, for example, only when one brings the offending lawsuit "primarily" for an improper purpose.[134] But such a standard invites a seemingly indefinite inquiry, requiring judges to ascertain all the reasons for which a party acted and to assign primary significance to just one. That enterprise seems much less sound conceptually than either sanctioning only conduct motivated solely by an improper purpose (a so-called "sole motive" standard) or sanctioning all conduct motivated even partly by an improper purpose, whatever other purposes may also be motivating it (an "any motive" standard).[135] And yet, the motivation-sensitive restrictions may nevertheless end up resembling a "sole motive" standard in practice, inasmuch as courts tend to sanction only the most egregious litigation misconduct and some rules afford parties the opportunity to withdraw dubious filings before sanctions may be imposed.[136] Whatever the conceptual coherence of a "primary" or "predominant" motive standard, it seems perfectly intelligible to single out litigation misconduct that is so flagrant as to be tantamount to misconduct motivated solely by an improper purpose, even if other, permissible purposes may also be lurking in the background.

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[130] *See, e.g.* SCANLON, *supra* note 118, at 12-13, 62-73.

[131] *See, e.g.*, FED. R. CIV. P. 34 (authorizing parties to request documents and other evidence from each other).

[132] I am grateful to Kim Ferzan for pressing me to consider this possibility. *See also infra* notes 256-257 and accompanying text (developing a similar account in terms of the civil recourse theory of tort law).

[133] *Cf.* DEBORAH L. RHODE, ACCESS TO JUSTICE 51 (2004) ("[T]he line between vindictiveness and vindication is often difficult to draw.").

[134] *See* DOBBS ET AL., *supra* note 34, § 592; *see also supra* note 85 and accompanying text.

[135] *See* Andrew Verstein, *The Jurisprudence of Mixed Motives*, 127 YALE L.J. 1106, 1161-62 (2018).

[136] *See, e.g.*, FED. R. CIV. P. 11(c)(2) (creating a twenty-one-day "safe harbor" during which a party may withdraw an offending paper and thereby prevent the opposing party from moving for sanctions).

Even when so limited, the motivation-sensitive restrictions might prompt a normative concern about the state's evaluating parties' subjective motivations for taking certain actions during civil litigation. The state, one might think, shouldn't be in the business of predicating the permissibility of litigation conduct on the kinds of reasons for which parties engage in it. Such concerns sound in the First Amendment. Indeed, the First Amendment's Petition Clause has generally been assumed to protect a right to seek redress in the courts, and some courts have suggested in other contexts that the petition right may not be conditioned solely on the motivations with which a petition is made, irrespective of the petition's objective validity, lest the government engage in a form of impermissible viewpoint discrimination.[137] Such an understanding of the First Amendment, however, threatens to sweep very broadly, potentially condemning myriad other purpose-based rules, including much of antidiscrimination law. More fundamentally, given the extensive (and often coercive) powers that civil litigation affords private parties,[138] prescinding from the motivations with which parties exercise those powers would require the state to not merely tolerate but actively facilitate many forms of wrongdoing, which, as we'll see when we examine more closely the kinds of purposes the motivation-sensitive restrictions proscribe,[139] include wrongdoing that directly compromises the integrity of the civil justice system. The state should have some leeway to prevent private parties from bending the civil justice system toward particularly unjust ends.

In addition to the foregoing conceptual and moral objections, scholars have raised epistemic or evidentiary doubts about purpose-based rules such as bans on disparate-treatment discrimination, doubts that may appear to impugn civil procedure's motivation-sensitive restrictions as well. I've been assuming that individuals' motivations are relatively transparent, such that they can be more or less readily perceived by courts. Yet that contradicts the widely held view that individuals' "motivations are inescapably opaque: We can never know for certain what motivates actions, and people have strategic incentives to misrepresent their motives, even to themselves."[140] If that's so, then "reliably discerning motivational types . . . is likely impossible."[141] Such skepticism seems to be borne out by how courts tend to apply the motivation-sensitive restrictions in practice, often employing objective proxies for parties' motivations in lieu of direct inquiries into their subjective mental states.[142] In resorting to objective indicia of an ostensibly subjective form of wrongdoing, courts might appear to be tacitly conceding the impracticability of determining the true motivations with which parties engage in litigation conduct, and thus the futility of applying the motivation-sensitive restrictions on their own, subjective terms.

We should be careful, though, to distinguish two different ways in which objective considerations might relate to an avowedly subjective legal standard. On the one hand, objective

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[137] *See, e.g.*, Bd. of Tr. v. Pirro, 58 N.Y.S.3d 614 (App. Div. 2017); *cf.* Carl Rice Andrews, Jones v. Clinton*: A Study in Politically Motivated Suits, Rule 11, and the First Amendment*, 2001 BYU L. REV. 1 (positing a "tension" between Rule 11 and the Petition Clause in "politically motivated suits"). Consistent with these concerns, the *Noerr-Pennington* doctrine, "a rule of statutory construction that requires courts to construe statutes to avoid burdening conduct that implicates the protections of the Petition Clause of the First Amendment," excludes from protection only litigation conduct that is *both* "objectively baseless" *and* motivated by an improper purpose. United States v. Koziol, 993 F.3d 1160, 1171 (9th Cir. 2021).

[138] *See generally* Matthew A. Shapiro, *Delegating Procedure*, 118 COLUM. L. REV. 983, 993-1014 (2018).

[139] *See infra* Section II.B.

[140] Jack Knight & Melissa Schwartzberg, *Institutional Bargaining for Democratic Theorists (or How We Learned to Stop Worrying and Love Haggling)*, 23 ANN. REV. POL. SCI. 259, 272 (2020).

[141] *Id.*

[142] *See supra* notes 69-70 and accompanying text.

criteria might perform a merely evidentiary function, providing indirect indications of an individual's motivations when we lack more direct, conclusive proof—as will usually be the case, given that individuals obviously have strong incentives to conceal their illicit motives. And indeed, the law routinely employs such indirect proxies,[143] from burden-shifting frameworks[144] to scrutiny tests designed to "smoke out" improper motivations.[145] Courts' reliance on these various evidentiary frameworks doesn't belie the subjective nature of purpose-based rules: Just because we can't see into other individuals' minds and definitively discern the reasons for which they act, it doesn't follow that there aren't better and worse approximations of such insight, that we can't have reasonable, if not complete, confidence in our assessments of others' motives. On the other hand, there may well come a point at which the objective proxies supplant the subjective standard they purport to implement. To categorically deem objective indicia to be sufficient evidence of an illicit motivation is to effectively transmute a nominally subjective standard into an objective one.[146] While it can be difficult to determine precisely when that line has been crossed, it nevertheless seems possible to distinguish legal rules that continue to genuinely aim at subjective features such as individuals' mental states, even if via objective evidentiary proxies, from those that have given up the game as not worth the candle and simply redefined the wrongdoing they proscribe objectively.

We can see objective criteria playing both roles in courts' applications of civil procedure's motivation-sensitive restrictions. When, for instance, some courts infer an illicit motivation under Rule 11's "improper purpose" prong from the mere fact that a plaintiff filed a baseless claim,[147] they conflate that provision's subjective element with Rule 11's other prongs, which define procedural wrongdoing objectively, as the submission of any "paper" lacking adequate legal or evidentiary support.[148] Many courts, however, treat such objective factors as probative, but not dispositive, evidence of illicit motivations.[149] On this approach, there remains a gap between the wrongdoing and the evidence used to prove it; while the weakness of a plaintiff's claim may raise the suspicion that she acted for an illegitimate reason, it doesn't definitively establish her motivations without further corroborating evidence. It's precisely that gap—the possibility that a party might act unreasonably yet without an illicit motive—that preserves the independence of the subjective element in Rule 11's "improper purpose" prong and civil procedure's other motivation-sensitive restrictions. At the same time, considering objective criteria allows courts to get some

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[143] *See* Fallon, *supra* note 127, at 580.

[144] *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (articulating a burden-shifting framework for employment discrimination claims under Title VII).

[145] *See, e.g.*, Pozen, *supra* note 103, at 902-05 (describing how inquiry into illicit "purpose" in constitutional antidiscrimination law can be understood as a way of "smoking out" bad faith conduct, though noting that such norms are "underenforced").

[146] *Cf.* William D. Araiza, *Animus and Its Discontents*, 71 FLA. L. REV. 155, 184-92 (2019) (attempting to redefine the concept of "animus" in constitutional law as an objective quality rather than "subjective ill will" by proposing that courts infer animus from various objective indicia).

[147] *See* cases cited *supra* note 70.

[148] FED. R. CIV. P. 11(b)(2)-(4).

[149] *See supra* note 69 and accompanying text; *see also, e.g.*, United States v. Koziol, 993 F.3d 1160, 1171-72 (9th Cir. 2021) (holding in a criminal extortion case that a reasonable jury could infer that the defendant had acted with an improper motive from the facts that he never actually filed the threatened lawsuit and that he knew that his claims were baseless and had even fabricated evidence); Fed. Trade Comm'n v. AbbVie Inc., 976 F.3d 327, 369-70 (3d Cir. 2020) (holding that "[e]vidence that a [a party] knew its claims were meritless may" constitute circumstantial evidence of an improper subjective motivation for purposes of the "sham litigation" exception to the *Noerr-Pennington* doctrine).

purchase on parties' subjective motivations, if not the elusive "certain[ty]"[150] that many critics of purpose-based rules seem to demand.

The upshot is that civil procedure's motivation-sensitive restrictions are no less conceptually coherent or evidentiarily tractable than other purpose-based rules such as bans on disparate-treatment discrimination simply because they predicate the permissibility of litigation conduct on parties' motives rather than intentions.

The motivation-sensitive restrictions differ from many other purpose-based rules not only in terms of the *kinds*, but also in terms of the *number*, of motivations they proscribe. Prohibitions against disparate-treatment discrimination single out only a few select prohibited grounds—in the case of Title VII, "race, color, religion, sex, [and] national origin."[151] The motivation-sensitive restrictions, by contrast, forbid parties to act during civil litigation for a fairly wide range of reasons. Although some of the restrictions enumerate certain "improper purposes" for engaging in litigation conduct, the lists are merely illustrative, leaving courts to specify additional illicit motives.[152] It's consequently easier, in this respect, to violate the motivation-sensitive restrictions than prohibitions against disparate-treatment discrimination, for unlike the employer deciding whether to fire her employee, the party deciding whether to make a discovery request can never be certain that some of her reasons for taking that action won't subsequently be deemed "improper."

And yet, civil procedure's motivation-sensitive restrictions by no means fully dictate parties' purposes during litigation. Because they generally emulate bans on disparate-treatment discrimination in excluding particular illegitimate reasons for action rather than compelling particular legitimate ones, the rules still leave parties free to engage in litigation conduct with myriad motivations, albeit fewer than remain permissible under bans on disparate-treatment discrimination. And as we'll see in the next Section, the remaining, permissible motivations include not only noble reasons, but also many baser ones that nevertheless fall short of being deemed "improper." The motivation-sensitive restrictions can, in this regard, be understood as trying to carve out a liminal space between the traditional private law categories of good faith and bad faith: Whereas private law tends to posit a strict dichotomy between the categories, such that one necessarily acts either in good faith or in bad faith,[153] civil procedure's motivation-sensitive restrictions seem to contemplate an intermediate category of "not bad faith," whereby a party can act permissibly even if her motives don't quite amount to "good faith."[154] Even the few rules in

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[150] Knight & Schwartzberg, *supra* note 140, at 272.

[151] 42 U.S.C. § 2000e-2(a) (2018).

[152] *See, e.g.*, FED. R. CIV. P. 11(b)(1) (prohibiting the presentation of a "paper" for "any improper purpose, *such as* to harass, cause unnecessary delay, or needlessly increase the cost of litigation" (emphasis added)).

[153] *See* Pozen, *supra* note 103, at 890 n.10 (noting that most areas of law posit a strict good faith/bad faith binary, with the possible exception of Delaware corporate law, which may have once recognized an intermediate "not good faith" category).

[154] Civil procedure scholars tend to elide this intermediate category in their analyses of procedural wrongdoing. According to Alexandra Lahav, for instance, "[g]ood lawsuits are brought with the intention of redressing a wrong, forcing defendants to answer for their conduct, enforcing existing law, or improving existing law," while "[b]ad lawsuits are brought to harass, annoy, or obtain payment wrongfully, and are without a basis in law." ALEXANDRA LAHAV, IN PRAISE OF LITIGATION 17 (2017); *see also id.* at 123 ("Most people agree that increasing the legitimate enforcement of rights is good for society, and most people agree that litigation can be bad for society when it is not brought to enforce rights and obligations, but rather to harass or intimidate the other side."). But this dichotomy overlooks the fact that a lawsuit can be perfectly permissible even if it's not affirmatively motivated by any of the "good" purposes Lahav enumerates, so long as it isn't motivated by any of the "bad" ones. Note as well that, like some courts, Lahav conflates the two basic categories of procedural wrongdoing distinguished in Part I, ignoring

civil procedure that impose genuine "good faith" requirements[155] constrain parties' motivations only slightly more strictly, as the conception of good faith they codify more closely reflects contract law's conception of good faith, which still permits individuals to pursue their own interests, rather than fiduciary law's conception, which doesn't.[156] In eschewing more comprehensive motivational requirements, all of civil procedure's motivation-sensitive restrictions afford parties significant leeway to act for reasons of self-interest during civil litigation.

B. Private Motivations and Public Values

If the motivation-sensitive restrictions proscribe only certain subjective mental states while leaving parties free to act with all others, then how, exactly, does civil procedure delimit the set of forbidden motivations? We can begin to answer that question by examining the kinds of purposes the restrictions themselves and courts applying them identify as improper. That review reveals that all the impermissible motivations are inconsistent with public values that are integral to the proper functioning of the civil justice system. There are, to be sure, various ways in which parties' motivations can contravene public values, and there's no simple formula for distinguishing those public values that are sufficiently important to warrant forbidding parties to act with contrary motivations from those values whose violation during civil litigation can be tolerated. But on closer inspection, the public values safeguarded by the motivation-sensitive restrictions all turn out to share roots in traditional principles of equity, even as they remain amenable to ongoing contestation and development through dynamic legal and political processes. If "private law is the law that persons use to structure their lives in relation to others," while public law involves a "mechanism of collective governance and the use of coercion to promote compliance with collectively determined norms,"[157] then the motivation-sensitive restrictions imbue civil litigation with some of the values of public law, even in private law cases.

1. The Public Implications of Prohibited Private Purposes

Some of the motivation-sensitive restrictions, as well as the case law applying them, identify core examples of the purposes or motives parties are forbidden to act with, and those illustrative illicit motivations, in turn, represent distinct modes of violating public values that are peculiarly, if not uniquely, implicated by the resolution of disputes through the civil justice system. The prohibited motivations and the respective public values they contravene fall into at least four categories.

First, some motivations flatly contradict civil litigation's core function of accurately resolving the dispute before the court "on the merits," according to the underlying facts and applicable law. The Second Restatement of Torts thus provides that a party satisfies the "improper

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motivation-sensitive restrictions, such as Rule 11's improper-purpose prong, that condemn ill-motivated litigation even when it has "a basis in law." *See supra* notes 69-70, 148 and accompanying text. Conversely, Lahav at other times seems to gloss over the many other restrictions that condemn unreasonable litigation conduct irrespective of the motivations underlying it. *See, e.g.*, LAHAV, *supra*, at 18 (appearing to endorse "the idea that . . . we . . . should only sanction [litigants] when they act in bad faith").

[155] *See supra* notes 93-101 and accompanying text.

[156] *See* John C. Coffee, Jr., *The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, 89 COLUM. L. REV. 1618, 1658 (1989).

[157] Thomas W. Merrill, *Private and Public Law*, *in* THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW 575, 578 (Andrew S. Gold et al. eds., 2020).

purpose" element of the wrongful civil litigation tort when he files a lawsuit even though he "is aware that his claim is not meritorious."[158] The wrong, to be clear, doesn't consist in merely filing an unmeritorious claim; a plaintiff commits the tort only if he is *subjectively* "aware" of the claim's lack of merit, however unmeritorious or even frivolous it *objectively* might be.[159] The Restatement seems to assume that such awareness bespeaks an improper purpose on the part of the plaintiff to dupe the court into granting him relief to which he knows he isn't legally entitled. After all, the Restatement suggests, most plaintiffs wouldn't knowingly file an unmeritorious lawsuit unless they planned to submit "manufactured or perjured testimony" or to otherwise see to it that "the court or jury is misled in some way."[160] And when a plaintiff acts with such an aim, "[h]e is then abusing the general purpose of bringing civil proceedings and is not seeking a proper adjudication of the claim on which the civil proceeding is based."[161]

Parties act with equal disregard for courts' dispute-resolution function when they treat civil litigation as a mere means to nonadjudicatory ends. Courts have accordingly sanctioned parties whom they deemed to be using litigation solely to garner publicity, mount a political "protest," or propagate a political "narrative" for broader public consumption.[162] It's perfectly legitimate, of course, to invite the publicity that attends certain lawsuits. But when parties act for the sake of such publicity alone, without regard for the ultimate disposition of their claims, they reduce the court to a mere forum for their public posturing, completely divorcing their litigation conduct from the court's adjudicatory role.

Second, some motivations, when acted upon, threaten to compromise the proper functioning of the civil justice system more indirectly—not by misleading or coopting the court, but by protracting the proceedings so as to dissipate the court's and opposing party's resources and to thereby impede an accurate resolution of the dispute. This appears to be one of the concerns underlying Rule 11's "improper purpose" prong, which mentions as one of three illustrative improper purposes a motive "to . . . cause unnecessary delay."[163] The Second Restatement similarly explains that a defendant acts with an improper purpose when she "files a counterclaim, not for the purpose of obtaining proper adjudication of the merits of that claim, but solely for the purpose of delaying expeditious treatment of the [plaintiff's] original cause of action."[164] Once again, it bears emphasis that a party doesn't expose herself either to sanctions under Rule 11 or to tort liability merely by taking some action that happens to end up delaying the proceedings, even unnecessarily; she must instead affirmatively make the unnecessary delay her purpose. By acting with such a dilatory motive, the party seeks to divert the civil justice system from its core public functions, compromising the court's ability to accurately dispose of her own case as well as others on its docket.

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[158] RESTATEMENT (SECOND) OF TORTS § 676 cmt. c (AM. LAW INST. 1977).

[159] Once again, I thus disagree with Alan Calnan's gloss on the wrongful civil litigation tort. *See supra* note 84. *Pace* Calnan, the tort does *not* effectively impose an obligation on plaintiffs to file only claims supported by "probable cause." While filing an objectively unsupported claim is a *necessary* condition for tort liability, it isn't *sufficient*; as the Restatement indicates, the plaintiff must also be subjectively aware of the lack of support, awareness the Restatement takes to evince an "improper purpose" motivating the plaintiff's decision to file her lawsuit anyway.

[160] RESTATEMENT (SECOND) OF TORTS § 676 cmt. c (AM. LAW INST. 1977).

[161] *Id.*

[162] *See, e.g.*, Saltany v. Reagan, 886 F.2d 438, 440 (D.C. Cir. 1989). Such "political" motives were among the "improper purposes" ascribed to some of the lawyers who brought lawsuits challenging the results of the 2020 presidential election. *See* King v. Whitmer, No. 20-13134, 2021 WL 3771875, at *33-35 (E.D. Mich. Aug. 25, 2021).

[163] FED. R. CIV. P. 11(b)(1).

[164] RESTATEMENT (SECOND) OF TORTS § 676 cmt. c (AM. LAW INST. 1977).

Third, some motivations reflect a party's bare desire to use the civil justice system to harm the opposing party. Such motivations don't necessarily threaten to compromise the accuracy of adjudication, as a party can attempt to harm her opponent through civil litigation without obfuscating the strength of her legal claims, in the way that outright fraud does. Rather, the worry is that, in employing the procedures of civil litigation to harm her opponent, a party corrupts the civil justice system, conscripting the state's coercive apparatus in her unjust projects and thereby implicating the state in her wrongdoing.[165] Rule 11 accordingly deems it an "improper purpose" to file any paper in order "to harass" one's opponent,[166] while the Second Restatement likewise considers a plaintiff to have acted with an improper purpose "when the proceedings are begun primarily because of hostility or ill will" toward, or "solely to harass," the defendant.[167] Now, nearly all parties bear their opponents "hostility or ill will," as lawsuits are typically filed after a relationship has ruptured (or where there was no preexisting relationship to begin with), not while a relationship remains intact. So, we shouldn't understand civil procedure's motivation-sensitive restrictions to banish ordinary human emotions from the litigation process. But when a party acts *primarily*, let alone *solely*, to "harass" or otherwise harm her opponent, she exploits the powers civil litigation affords her for ends the state can't tolerate.[168]

A party commits similar abuse when she seeks to use civil litigation to inflict financial or other property-based injuries on her opponent. A plaintiff thus risks incurring tort liability "when the proceedings are initiated solely for the purpose of depriving the person against whom they are brought of a beneficial use of his property," as in a lawsuit brought to thwart the legitimate sale of land.[169] And any party subjects herself to sanctions if she files a paper in order "to . . . needlessly increase the cost of litigation" and thereby deplete her opponent's resources.[170] In both cases, the offending party aims to deprive the opposing party of her legitimate property rights—a motive to cause harm that, like a motive to "harass," taints the exercise of the various powers conferred on parties during civil litigation.

While the motivation-sensitive restrictions tend to focus on material harms such as harassment and financial losses, a party would also seem to act with an improper purpose when she seeks to use civil litigation to harm others in less tangible ways. The restrictions themselves are capacious enough to bear that interpretation, and purpose-based doctrines in neighboring bodies of law explicitly contemplate that some parties will act with a motive to inflict intangible harms. Many states, for example, have enacted so-called anti-SLAPP statutes, which impose heightened procedural requirements on lawsuits that implicate the defendant's First Amendment rights, with the express aim of detecting and forestalling those "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of

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[165] On the idea that a party, by abusing the civil justice system, can render the state *complicit* in her wrongdoing, see Shapiro, *supra* note 138, at 1032-49.

[166] FED. R. CIV. P. 11(b)(1); *see, e.g.*, DNA Sports Performance Lab, Inc. v. Major League Baseball, No. C 20-00546 WHA, 2020 WL 6290374, at *7 (N.D. Cal. Oct. 27, 2020) (imposing sanctions after finding that the plaintiff had "filed its complaint to harass" the defendant, in the sense that the suit had been "brought in bad faith to vex").

[167] RESTATEMENT (SECOND) OF TORTS § 676 cmt. c (AM. LAW INST. 1977).

[168] Lest the prospect of "harass[ment]" through civil litigation seem too abstract, consider how domestic abusers are increasingly suing their victims in order to circumvent restraining orders and maintain control by hauling the victims into court. *See* Jessica Klein, *How Domestic Abusers Weaponize the Courts*, ATLANTIC (Jul. 18, 2019), https://www.theatlantic.com/family/archive/2019/07/how-abusers-use-courts-against-their-victims/593086/.

[169] RESTATEMENT (SECOND) OF TORTS § 676 cmt. c (AM. LAW INST. 1977).

[170] FED. R. CIV. P. 11(b)(1).

grievances."[171] And the Supreme Court has extended the constitutional ban on race-based peremptory challenges against prospective jurors to civil parties, largely on the ground that allowing parties to exclude jurors based on race would implicate the state in private discrimination.[172] In both cases, the law recognizes that parties sometimes employ civil litigation and its various procedures for the purpose of subjecting others to intangible harms, such as censorship and discrimination, and it attempts to prevent or at least mitigate such harms by forbidding litigants to act with such motivations.

Fourth, just as a party can endeavor to use civil litigation to inflict illegitimate financial injuries on others, so, too, she can endeavor to use it to realize illegitimate financial gains for herself. Most plaintiffs, of course, are motivated at least in part by financial considerations, insofar as they seek to recover money damages,[173] while many others pursue litigation in anticipation of more incidental monetary benefits, such as those flowing from judicial approval of (or rejection of challenges to) a lucrative commercial project. Civil procedure does not prohibit parties from acting on such movies, making clear that a mere desire for financial gain does not in itself constitute an improper purpose for filing a lawsuit or invoking a litigation procedure. But when a party seeks to use civil litigation to extract from her opponent money to which she's not entitled, civil procedure's motivation-sensitive restrictions deem her pecuniary motives improper. Under the wrongful civil litigation tort, then, a party acts with an improper purpose "when the proceedings are initiated for the purpose of forcing a settlement that has no relation to the merits of the claim"—a so-called "nuisance suit"—or "when the proceedings are based upon alleged facts so discreditable as to induce the defendant to pay a sum of money to avoid the notoriety of a public trial."[174] A party likewise risks committing the abuse of process tort when she utilizes a litigation procedure for purposes of "extortion."[175] To permit parties to act on such motives would be to allow the civil justice system to be coopted for a kind of theft, a role the state must not be thrust into.

Even short of extortion, civil procedure looks skeptically on parties who engage in litigation conduct for financial motives. Courts, for instance, sometimes deem parties to have acted in "bad faith" or for an "improper purpose" when they file a lawsuit simply to gain unfair leverage in ongoing negotiations.[176] For similar reasons, members of class actions may not accept payment in exchange for withholding or withdrawing their objections to a proposed class action settlement without first obtaining the court's approval.[177] Such judicial scrutiny is necessary to ensure that

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[171] CAL. CIV. PROC. CODE § 425.16(a) (West 2021).

[172] *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 624-28 (1991).

[173] *But see* Tamara Relis, *"It's Not About the Money!": A Theory on Misconceptions of Plaintiffs' Litigation Aims*, 68 U. PITT. L. REV. 701, 701-02 (2007).

[174] RESTATEMENT (SECOND) OF TORTS § 676 cmt. c (AM. LAW INST. 1977).

[175] DOBBS ET AL., *supra* note 34, § 594 & nn.14-15. Indeed, such extortion can also incur criminal liability under the federal Hobbs Act, 18 U.S.C. § 1951 (2018). *See, e.g.*, United States v. Koziol, 993 F.3d 1160, 1168-76 (9th Cir. 2021).

[176] *See, e.g.*, St. Charles Health Sys., Inc. v. Or. Fed'n of Nurses & Health Prof'ls, Local 5017, No. 6:21-cr-304-MC, slip op. at 4-5 (D. Or. Dec. 16, 2021) (finding that the lawsuit had been filed "in bad faith for an improper purpose" because "the goal of th[e] action was not to advance a valid legal argument or claim, but rather to gain a valuable negotiating chip . . . during longstanding discussions" between the parties).

[177] FED. R. CIV. P. 23(e)(5)(B); *see, e.g.*, *In re* Wells Fargo & Co. S'holder Derivative Litig., No. 16-cv-05541-JST, slip op. at 9-12 (N.D. Cal. Mar. 4, 2021) (finding that an objector had "likely" acted in "bad faith" by seeking "side payments" in exchange for withdrawing his objections to a federal class action, but declining to order as a sanction "disgorgement" of payments he had received in exchange for withdrawing his objections to a related state court action); *In re* Foreign Exch. Benchmark Rates Antitrust Litig., 334 F.R.D. 62 (S.D.N.Y. 2019) (denying approval under Rule 23(e)(5)(B)).

class members aren't "seeking only personal gain, and using objections to obtain benefits for themselves rather than assisting in the settlement-review process," which would be an "improper purpose[]."[178] More radically, some courts have recently held that class representatives may not be given "incentive payments" as part of class settlements, on the ground that such awards "create[] a conflict of interest between [the representatives] and the other class members."[179] One can also understand the traditional common law prohibitions against "champerty" and "maintenance," which prevent nonparties from assuming a financial stake in others' litigation in order to turn a profit, to reflect similar misgivings about monetary motivations (though many states have relaxed the restrictions to accommodate the burgeoning practice of third-party litigation funding, or litigation finance).[180] While parties may legitimately seek money damages for the injuries they believe they've suffered or even pursue litigation with the aim of reaping monetary benefits as a byproduct of the litigation's outcome, they act with an "improper purpose" when they attempt to turn the litigation process itself into a profit-generating enterprise.

2. The Equitable Functions of Civil Procedure's Motivation-Sensitive Restrictions

Civil procedure's motivation-sensitive restrictions, in sum, forbid parties to act during civil litigation with a range of different motivations that are inconsistent with public values that are integral to the proper functioning of the civil justice system. While the public values safeguarded by the restrictions are variegated, a more general account begins to emerge from the preceding typology of impermissible motivations. Such an account might start by noting that, when a party acts with any of the impermissible motivations, she abuses one or more of the public powers that civil litigation confers on her. Civil litigation vests parties with various powers (including coercive powers)—whether to hale others into court or to demand information during discovery[181]—and a party would seem to abuse those powers when she exercises them for reasons inconsistent with the reasons civil litigation confers them in the first place.[182] This observation, however, doesn't get us very far, as it simply passes the buck from the question what purposes are impermissible to the question what purposes, when acted upon, constitute an abuse of power. More to the point, it risks giving the misleading impression that a party abuses a procedural power whenever she exercises the power for any purposes other than those the power exists to serve. Civil procedure, as we've seen, is not so strict: With the exception of a few "good faith" requirements, the motivation-sensitive restrictions generally require parties to act not *with* certain good motivations, but rather *without* certain bad ones. And the prohibited motivations—the "improper purposes"—represent not a mere unwillingness to promote the public values underlying the civil justice system, but a deliberate effort to pervert them, to turn the civil justice system to ends that are inimical to

[178] FED. R. CIV. P. 23(e)(5) advisory committee's note to 2018 amendment. On the phenomenon of "objector blackmail," see generally Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 VAND. L. REV. 1623 (2009).

[179] Johnson v. NPAS Sols., LLC, 975 F.3d 1244, 1255 (11th Cir. 2020).

[180] *See* J. Maria Glover, *A Regulatory Theory of Legal Claims*, 70 VAND. L. REV. 221, 246-51 (2017) (discussing litigation finance's relationship to the traditional common law prohibitions against champerty and maintenance). Even as some states have relaxed their restrictions on champerty and maintenance, they have continued to prohibit "antisocial forms of maintenance"—that is, maintenance motivated by "malice" or an "improper purpose"—which still "are treated as a species of abuse of process, malicious prosecution, tortious interference with economic advantage, or prima facie tort." Sebok, *supra* note 4, at 122.

[181] *See generally* Shapiro, *supra* note 138, at 993-1014 (examining some of the ways in which civil litigation delegates coercive state power to private parties).

[182] *See, e.g.*, John Murphy, *Malice as an Ingredient of Tort Liability*, 78 CAMBRIDGE L.J. 355, 377-78 (2019) (casting the abuse of process and malicious prosecution torts in such terms).

its proper functioning. The prohibited motivations, in other words, evince an attitude that is incompatible with important public values, not just insufficiently committed to them.[183] So even as the motivation-sensitive restrictions effectively require parties to heed certain public values in their litigation decisionmaking, they don't enjoin parties to become purely public-regarding; parties remain free to pursue their private ends through the civil justice system so long as they don't flout important public values in the process. A substantive account of the motivation-sensitive restrictions should therefore explain why parties must subordinate their private ends only to some public values during civil litigation—and even then, only when pursuing their private ends threatens to violate, rather than merely fail to promote, those values.

One possible explanation for the relatively bounded nature of the cognitive duties imposed by civil procedure's motivation-sensitive restrictions is pragmatic: It's hard enough to determine whether a party has acted for an improper purpose; as it is, courts must rely on indirect proxies to ferret out impermissible motivations. Were civil procedure to go further and require parties to act *for* certain reasons—that is, were it to exclude *all* motivations except certain permissible ones—it would saddle courts with an even more onerous, and well-nigh impossible, evidentiary undertaking, and threaten to mire courts in protracted "satellite litigation" about parties' mental states. Focusing on a relatively limited set of impermissible motivations helps to keep the task of policing parties' litigation conduct manageable.

This explanation has some force, but it also proves too much. For *any* inquiry into parties' motivations will necessitate a degree of satellite litigation. Were that concern decisive, civil procedure would never make the permissibility of litigation conduct turn on parties' subjective purposes. And yet, that is precisely what civil procedure does time and time again with the motivation-sensitive restrictions. We should thus consider more principled reasons for civil procedure to target the specific impermissible motivations identified in this Section's typology. Those motivations fall into two broader categories: (1) motivations to frustrate the civil justice system in performing its main function of accurately resolving the parties' dispute based on the relevant facts and applicable law and (2) motivations to commandeer the civil justice system to perpetrate *in*justice beyond the litigation. And it turns out that both of those purposes have traditionally been core concerns of equity.

While equity is itself hardly a monolithic institution, some of the functions that scholars have ascribed to it reflect concerns similar to those animating civil procedure's motivation-sensitive restrictions. One prominent account maintains that equity serves as a "safety valve" in cases of "opportunism," where a party exploits a legal form for purposes it wasn't intended to serve but the lawmaker either failed to foresee or couldn't readily forestall.[184] On another account, equity protects the legal system from "sticklers" who "insist[] on their rights in a harsh, stubborn,

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[183] *Cf.* Stephen R. Galoob & Ethan Leib, *Motives and Fiduciary Loyalty*, 65 AM. J. JURIS. 41 (2020) (developing a "compatibility account" of the fiduciary duty of loyalty, according to which the duty requires fiduciaries to refrain from acting with motives that are incompatible with certain attitudes toward the persons to whom the duties are owed).

[184] Henry E. Smith, *Equity as Meta-Law*, 130 YALE L.J. 1050, 1080 (2021) (explaining that opportunism "often consists of behavior that is technically legal but is done to secure unintended benefits that are usually smaller than the costs they impose on others"). Note that, as with most civil procedure scholars when defining litigation "abuse," Smith adopts a law-and-economics definition of "opportunism" as inefficient behavior—that is, self-interested economic behavior that can't be contracted away ex ante because of information and transaction costs. *See id.* at 1079-80.

or otherwise unappealing fashion," even at great harm to those against whom the rights are held.[185] Neither account quite fits civil procedure's motivation-sensitive restrictions, for unlike both the opportunist and the stickler, the party who acts for an "improper purpose" during civil litigation doesn't seek to take advantage of legal technicalities—whether the inflexible nature of legal rules or the preemptive force of legal rights—so much as to invoke broad, otherwise-unconditional powers for objectionable ends.

Civil procedure's motivation-sensitive restrictions instead seem to perform something akin to a third equitable function. According to Larissa Katz, equity also seeks to "ensur[e] the integrity of the legal order as a whole" by, among other things, counteracting "the potential injustice thrown up by the legal order itself."[186] The state institutes a legal system in the first place to secure justice, but in doing so, it also creates yet another avenue for the perpetration of *in*justice, and many equitable doctrines can be understood as responses to that problem. Although Katz focuses on one particular form of injustice involved in the "acquisition" of substantive legal rights,[187] parties can equally commit injustice through the procedures the state establishes to enforce those rights. In particular, they can use the procedures to thwart the accurate adjudication of rights claims and to harm or oppress their opponents. Civil procedure's motivation-sensitive restrictions aim to stem both kinds of procedural injustice by forbidding parties to employ the various litigation powers for those purposes.[188] The restrictions' structure, as a set of constraints on the various powers that civil litigation confers on parties, thus mirrors the second-order structure of equity more generally[189]—except with the first normative layer comprising procedural powers rather than substantive legal entitlements.[190]

Civil procedure's motivation-sensitive restrictions also employ equity's distinctive mode of regulation: appealing to individuals' conscience. Equity has traditionally been concerned with the rectitude of individuals' conduct, and in assessing the quality of parties' motives, the motivation-sensitive restrictions likewise speak in a moral register. But whereas on at least some accounts equity employs a thick conception of conscience as potentially comprehending all of

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[185] Andrew S. Gold, *Equity and the Right to Do Wrong*, *in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF EQUITY 72, 73 (Dennis Klimchuk, Irit Samet & Henry E. Smith eds., 2020).

[186] Larissa Katz, *Pathways to Legal Rights: The Function of Equity*, *in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF EQUITY, *supra* note 185, at 168, 174; *see id.* at 170-71 ("The integrity of a system of law as a blueprint for our lives together, requires that the state attend to the potential for oppression and injustice that is produced by the very nature of acquired rights."); *see also* United States v. Bethlehem Steel Corp., 315 U.S. 289, 326 (1942) (Frankfurter, J., dissenting) ("[I]s there any principle which is more familiar or more firmly embedded in the history of Anglo-American law than the basic doctrine that the courts will not permit themselves to be used as instruments of inequity and injustice?").

[187] Although Katz repeatedly refers to "procedure," she means "a procedure for *acquiring* rights," not a procedure for *enforcing* those rights once acquired. Katz, *supra* note 186, at 173 (emphasis added). She is thus concerned with a different kind of injustice from the one I'm focused on—namely, "the forfeiture of one's position on the way to [substantive] legal rights," *id.* at 175, rather than the abuse of procedural powers associated with the enforcement of those rights.

[188] For an argument that the equitable defense of unclean hands performs a similar function, see T. Leigh Anenson, *Beyond Chafee: A Process-Based Theory of Unclean Hands*, 47 AM. BUS. L.J. 509, 543-46 (2010).

[189] *See* Smith, *supra* note 184, at 1054 (providing a "functional" account of equity as a second-order system that responds to some of law's deficiencies—in other words, "law about law, or meta law").

[190] And indeed, those powers themselves have deep roots in the historical institution of equity. *See generally* Stephen N. Subrin, *How Equity Conquered the Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

morality,[191] the motivation-sensitive restrictions presuppose a thinner conception.[192] In particular, they don't authorize courts to ensure that parties conform their litigation conduct to all the requirements of justice,[193] let alone morality writ large. The restrictions instead respond to two distinct forms of injustice enabled by the civil justice system: the perversion of procedure either to prevent the court from determining the parties' true legal rights and obligations or to achieve unjust ends beyond the litigation that the law would otherwise foreclose. Because those forms of injustice are partly constituted by the motives with which parties act, the motivation-sensitive restrictions follow equity in attending to individuals' conscience, albeit a narrower slice than equity is characteristically concerned with. The restrictions thereby safeguard public values uniquely imperiled by civil procedure's conferral of broad powers on private parties.

One might resist my characterization of the values safeguarded by the motivation-sensitive restrictions as in some sense "public." In fact, one might think that, by grounding those values in equity, I've unwittingly revealed them to be *private*, inasmuch as many consider equity to be a private law institution.[194] Some of the values I've identified do indeed lie near the heart of private law—particularly the first set, concerning the just determination of parties' legal rights and obligations. But even there, we can distinguish the value of doing justice between the parties in any individual case, which may well be a value internal to private law, from the value of preserving the integrity of the courts as an institution capable of doing justice across the gamut of cases, which is a collective goal for the political community to pursue at a systemic level and so is, in an important sense, public.[195] And in any event, we've seen that many of the motivations prohibited by the motivation-sensitive restrictions involve using the civil justice system to achieve unjust ends beyond the litigation itself, thereby threatening values external to private law. It thus makes sense to speak of the motivation-sensitive restrictions as protecting "public values," even if some of those values overlap with core private law concerns.

Nor should my invocation of equity be taken to suggest that the set of public values protected by the motivation-sensitive restrictions is immutable. On the contrary, while the restrictions have remained relatively stable over time, they have evolved at the margins to account for changing conceptions of the core purposes of the civil justice system and of the kinds of injustice that most threaten those purposes. Courts have, for instance, developed additional restrictions, such as the ban on racially discriminatory peremptory challenges in civil jury selection, to proscribe purposes that weren't traditionally deemed "improper" in the context of civil litigation but are now recognized to taint the civil justice system.[196] Meanwhile, courts and legislatures have relaxed other restrictions to condone previously prohibited motivations in response to changing norms regarding the appropriate use of the civil justice system. That seems

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[191] *See generally* IRIT SAMET, EQUITY: CONSCIENCE GOES TO MARKET (2019).

[192] *Cf.* Katz, *supra* note 186, at 171 (suggesting that equity appeals only to individuals' "political or civil conscience," rather than their moral conscience); Larissa Katz, *Conscience with a Filter*, 21 JERUSALEM REV. LEGAL STUD. 22, 30 (2020) (similar).

[193] In contrast, for example, to John Gardner's account of equity. *See* JOHN GARDNER, LAW AS A LEAP OF FAITH 254-56 (2012).

[194] *See, e.g.*, Andrew S. Gold & Henry E. Smith, *Sizing up Private Law*, 70 U. TORONTO L.J. 489, 519 (2020) (conceptualizing equity as a "private law institution," insofar as "[e]quitable reasoning is sometimes incorporated into private law reasoning"); *cf.* ANDREW S. GOLD, THE RIGHT OF REDRESS 201-02 (2020) (suggesting that equity sometimes aims at a kind of justice between the parties and, in that respect, constitutes a part of private law).

[195] *Cf.* JOHN GARDNER, *Public Interest and Public Policy in Private Law*, *in* TORTS AND OTHER WRONGS 304, 304-06 (2019) (arguing that seeing that justice is done in individual cases is itself a collective policy goal).

[196] *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 628 (1991) (arguing that court-facilitated private discrimination in juror selection "mars the integrity of the judicial system"); *supra* note 172 and accompanying text.

to be the case with many states' increasingly permissive approach to litigation finance, a practice some advocates have begun to tout as a way of promoting access to justice rather than condemning it as the abuse it was traditionally portrayed to be.[197] These examples show how legal and political processes beyond civil litigation can alter the public values that constrain parties' conduct within civil litigation: As other bodies of law, particularly public law, espouse new public values and repudiate old ones, courts adapt civil procedure's motivation-sensitive restrictions to reflect the values most directly implicated in civil litigation and to condemn those motives most inimical to those values.[198] The motivation-sensitive restrictions, in this way, help to align civil litigation with at least some important public values, even in cases between private parties.[199]

III. PARTY MOTIVATIONS IN AND BEYOND CIVIL LITIGATION

Civil procedure's motivation-sensitive restrictions define abuse of the litigation process in terms of parties' subjective motives and purposes, and the proscribed motives and purposes, in turn, all threaten important public values that are distinctively, if not uniquely, implicated by the resolution of disputes through the civil justice system. Given this normative structure, the motivation-sensitive restrictions effectively require parties to attend to certain public values in their litigation decisionmaking—not for the sake of affirmatively promoting those values, but for the narrower purpose of avoiding deliberately subverting them.

Even such limited regard for public values, I suggest in this Part, can have the desirable effect of cultivating a kind of *procedural civic virtue* in parties: In forcing private parties to partially, yet deliberately, subordinate their private interests to important public values, the restrictions prod them to heed the civic role they assume by participating in the public institution of civil litigation. That role, to be clear, isn't the role of a public official; the motivation-sensitive restrictions don't convert parties into purely public-regarding agents of the state. Nor is it even the role of a citizen, as parties typically participate in civil litigation in their private capacities. But the restrictions nonetheless require parties to shoulder at least some of the moral responsibility for ensuring civil litigation's integrity, its capacity to promote justice rather than injustice.

Even as the motivation-sensitive restrictions can realize these significant political-moral benefits within civil litigation, this Part also shows how they may well help to distort public discourse on civil justice issues beyond civil litigation. In particular, I raise the possibility (though cannot definitively prove) that the restrictions might contribute to the coarsening of civil justice debates by making it easier for participants to moralize what are essentially policy disagreements about the desirability of certain kinds of lawsuits and litigation practices. That risk seems to be especially acute given the current political economy of civil justice, in which powerful interests attempt to delegitimize efforts by certain groups of litigants to seek redress by disparaging their legal claims and litigation tactics as "abusive." The motivation-sensitive restrictions potentially fuel such rhetoric, providing a doctrinal basis for the notion that a party can *abuse* the civil justice system, as opposed to merely squandering private and public resources, by filing certain claims or deploying certain procedures.

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[197] *See supra* note 180 and accompanying text.

[198] *Cf.* Merrill, *supra* note 157, at 579 (tracing an historical "expansion of the sphere of the 'public' and a corresponding shrinkage of the 'private,'" even as "the intuition that there remains a domain of private law that must be preserved refuses to go away"). Equity thus constitutes "a dynamic and discursive process" not only "outside the courts," Maggie Blackhawk, *Equity Outside the Courts*, 120 COLUM. L. REV. 2037, 2043 (2020), but also within them.

[199] *Cf.* Evan Fox-Decent, *The Constitution of Equity*, *in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF EQUITY, *supra* note 185, at 117 (portraying equity as a way of injecting public law values into private law).

But this Article's analysis of civil procedure's motivation-sensitive restrictions also offers a rejoinder to attempts to enlist the restrictions in the broader cause of "civil justice reform"—to wit, that such attempts conflate the two distinct types of procedural wrongdoing identified in Part I. While many restrictions on litigation conduct do require parties to avoid inefficiency, only a subset—the motivation-sensitive restrictions—go further and attach any kind of moral valence to procedural wrongdoing, and even then, only when a party can be shown to have subjectively acted for an "improper purpose" or in "bad faith." Civil procedure thus reserves its moral condemnation for parties who deliberately endeavor to perpetrate injustice through civil litigation, reflecting a vision of the civil justice system at once more private and more public than the alternative visions articulated by many leading theories of civil justice.

A. Procedural Civic Virtue

To see how civil procedure's motivation-sensitive restrictions might foster a kind of civic virtue in parties, recall how the restrictions work: They forbid parties to take otherwise-permissible procedural actions with certain motives or for certain purposes, and they implement that prohibition by giving parties second-order "exclusionary" reasons to refrain from acting on certain illicit first-order reasons they might initially find compelling.[200] To comply with the restrictions, then, a party must have a sense of the first-order reasons for which she's inclined to perform a particular action; determine whether any of those reasons are illicit and thus preempted by the second-order exclusionary reasons furnished by the motivation-sensitive restrictions; and, if they are, abstain from acting on the prohibited first-order reasons. A party can't perform this rational calculus without attending to both what she regards as her reasons for action and civil procedure's authoritative assessment of those reasons, as embodied in the motivation-sensitive restrictions.

As a result of this cognitive awareness, a party deliberately subordinates at least some of her private interests to important public values when she chooses to comply with the motivation-sensitive restrictions. Each of the motives prohibited by the motivation-sensitive restrictions amounts to a desire to contravene important public values, whether as an end in itself or as a means to further ends;[201] so, by refraining from acting on those motives, a party privileges the corresponding public values in her procedural decisionmaking. And a party will presumably consider acting with the prohibited motives only if she thinks that doing so will advance her own interests; so, by privileging the public values, she is also necessarily subordinating some of her private interests. All of these deliberations, moreover, are a matter of the party's conscience, her assessment of the propriety of her contemplated actions. The upshot is that, in allowing the motivation-sensitive restrictions to preempt first-order reasons she would otherwise act on, a party deliberately, even if grudgingly, acquiesces to public values she would otherwise seek to subvert.

Such acquiescence can contribute to the formation of a thin kind of civic virtue. Generally speaking, to possess civic virtue is to have a settled disposition to promote the common good of the political community when acting in one's role as citizen.[202] When participating in public institutions, the virtuous citizen is inclined to take the common good as an especially weighty, if not decisive, reason for action. Civic virtue thus consists of a particular character trait (the

[200] *See supra* Section II.A.

[201] *See supra* Section II.B.

[202] *See, e.g.*, JASON BRENNAN, THE ETHICS OF VOTING 46 (2012); RICHARD DAGGER, CIVIC VIRTUES: RIGHTS, CITIZENSHIP, AND REPUBLICAN LIBERALISM 14 (1997); ISEULT HONOHAN, CIVIC REPUBLICANISM 160 (2002); William Galston, *Pluralism and Civic Virtue*, 33 SOC. THEORY & PRAC. 625, 630 (2007).

disposition to promote the common good) expressed within a particular domain (public institutions).

Civil procedure's motivation-sensitive restrictions can help to cultivate a weaker version of this disposition, one more suited to the specific public institution of civil litigation. Though a public institution, civil litigation isn't one in which individuals typically participate *as citizens*, much less as public officials—at least in private law cases, where no party is a state actor.[203] Most civil cases instead involve individuals seeking the state's assistance in their private capacities. The state therefore shouldn't expect parties to exhibit full-blown civic virtue during a lawsuit: While the virtuous citizen displays her wholehearted commitment to the common good by avidly participating in public institutions,[204] individuals who come to civil litigation with that aim are generally looking in the wrong place; civil litigation rarely presents the opportunity to directly promote public values, and it doesn't attempt to induce parties to do so. But as the motivation-sensitive restrictions contemplate, parties can still *subvert* public values in the course of pursuing their private ends through the civil justice system. The form of civic virtue appropriate to civil litigation thus consists not in a disposition to promote the common good, but in a disposition to subordinate one's private interests when they conflict with important public values in the course of exercising the procedural powers afforded by civil litigation. The motivation-sensitive restrictions can help to foster that disposition by requiring parties to attend to their motives and to abstain from acting on them when doing so would mean employing the procedures of civil litigation to contravene important public values and perpetrate injustice.

This distinctively procedural form of civic virtue is less demanding than the kind of civic virtue that parties might be expected to exhibit in public law cases, in which a private individual or association challenges governmental action as unlawful. Farrah Ahmed and Adam Perry have argued that the various factors British courts consider in determining whether private parties should be granted "public interest standing" in public law cases function as proxies for civic virtue, in the classic sense of a public-spirited disposition to pursue the common good.[205] Assuming they're right,[206] requiring such a disposition may well be appropriate in public law cases, where the plaintiff stands in for the members of the general public and represents their collective interests in the case.[207] When parties participate in private law cases, by contrast, they are typically representing only their own interests, and so need only refrain from directly assaulting the common good rather than affirmatively pursue it.

Procedural civic virtue also differs from the kinds of public-regarding duties that Larissa Katz has suggested equity imposes on private parties. According to Katz, equity sometimes

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[203] *But see* RIPSTEIN, *supra* note 84, at 182 & n.42 (seemingly analogizing private plaintiffs to public officials insofar as bringing a lawsuit involves the exercise of certain "public powers").

[204] *See* Richard Dagger, *Republican Citizenship*, *in* HANDBOOK OF CITIZENSHIP STUDIES 150 (E.F. Isin & B.S. Turner eds., 2002).

[205] *See* Farrah Ahmed & Adam Perry, *Standing and Civic Virtue*, 134 LAW Q. REV. 239, 247-50 (2018).

[206] There is reason to question Ahmed and Perry's account on its own terms. Among the cases they cite for the proposition that courts use standing doctrine in public interest cases to identify civically virtuous plaintiffs are those in which courts refuse to grant public interest standing to plaintiffs who are deemed to be acting with an "ill motive" or for an "improper purpose." *Id.* at 248 & nn.63-67. But of course, given civil procedure's motivation-sensitive restrictions, *no* plaintiff—whether in a public interest case or in an ordinary private law case—may act with such motives or for such purposes, and merely refraining from doing so by no means evidences a general disposition to pursue the common good.

[207] *Cf.* Seth Davis, *Standing Doctrine's State Action Problem*, 91 NOTRE DAME L. REV. 585, 607 (2015) (arguing that when standing doctrine delegates the state's power to enforce the law to a private party, the party must completely subordinate her private interests and affirmatively pursue some public value).

"conscripts" private parties "to assist the state in the dispensation of justice."[208] The kind of civic virtue fostered by civil procedure's motivation-sensitive restrictions appears to be both more and less demanding than Katz's notion of "conscription." It's more demanding because the restrictions require parties not merely to passively allow themselves to be used as instruments to promote public values, but rather to deliberately refrain from seeking to undermine those values. But procedural civic virtue is also less demanding than equitable conscription because parties can comply with the motivation-sensitive restrictions simply by avoiding certain forms of injustice, without necessarily having to help to bring about any kind of just result. The restrictions, in other words, do not convert parties into agents of justice, even unwilling ones, but rather require them only to keep out of justice's way.

On the other hand, procedural civic virtue seems to make greater demands of individual parties compared with those they face under the "division of labor" posited by at least some versions of contemporary liberalism. According to the most prominent version, developed by John Rawls, the principles of justice, including the requirements of distributive justice, apply only to the "basic structure" of society, "the way in which the major social institutions fit together into one system, and how they assign fundamental rights and duties and shape of division of advantages that arises through social cooperation."[209] Justice, Rawls contends, requires that the basic structure be arranged so as to secure and maintain "background justice," ensuring that individual transactions, however just each might seem on its own terms, don't collectively undermine justice over time.[210] But Rawls doesn't extend that requirement to the individual transactions themselves, instead proposing an "institutional division of labor": While the institutions of the basic structure must conform to the principles of justice, "the rules applying directly to individuals and associations and to be followed by them in particular transactions" should instead be "framed to leave individuals and associations free to act effectively in pursuit of their ends and without excessive constraints[,] . . . secure in the knowledge that elsewhere in the social system the necessary corrections to preserve background justice are being made."[211]

Given that only the basic structure is governed by the principles of justice, much turns on delineating its scope. Private law scholars have accordingly debated whether the basic structure comprises the substantive rules of private law, noting Rawls's own ambiguous statements on the question.[212] It seems more straightforward that the basic structure includes the legal system and its *procedural* rules.[213] But be that as it may, the principles of justice regulate the overall operation of

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[208] Katz, *supra* note 186, at 189.

[209] JOHN RAWLS, POLITICAL LIBERALISM 258 (rev. ed. 1996) [hereinafter RAWLS, POLITICAL LIBERALISM].

[210] *See id.* at 266-67.

[211] *Id.* at 268-69.

[212] *Compare, e.g.*, Arthur Ripstein, *The Division of Responsibility and the Law of Tort*, 72 FORDHAM L. REV. 1811, 1830 (2004); and Arthur Ripstein, *Private Order and Public Justice: Kant and Rawls*, 92 VA. L. REV. 1391, 1393 (2006), *with* SAMUEL FREEMAN, LIBERALISM AND DISTRIBUTIVE JUSTICE 167-94 (2018); Aditi Bagchi, *Distributive Justice and Contracts*, *in* PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 193, 193-94 (Gregory Klass et al. eds., 2014); Gregory C. Keating, *Is Tort Law "Private"?*, *in* CIVIL WRONGS AND JUSTICE IN PRIVATE LAW 351, 352-53, 359-60, 364-65 (Paul B. Miller & John Oberdiek eds., 2020); Kevin Kordana & David H. Blankfein-Tabachnick, *Rawls and Contract Law*, 73 GEO. WASH. L. REV. 598 (2005); and Samuel Scheffler, *Distributive Justice, the Basic Structure, and the Place of Private Law*, 35 OXFORD J. LEGAL STUD. 213 (2015).

[213] *See* JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 10 (Erin Kelly ed., 2001) (including "the political constitution with an independent judiciary" in the basic structure, though not further specifying the nature of the "judiciary"); RAWLS, POLITICAL LIBERALISM, *supra* note 209, at 301 (including "the legal order" within the basic structure); *see also* SAMUEL FREEMAN, RAWLS 464 (2007) (stating that the basic structure includes, among other institutions, "the legal system of trials").

the basic structure, not the individual actions occurring within it.[214] Civil procedure's motivation-sensitive restrictions—with their singular focus on individual actions and, indeed, the individual motivations with which those actions are performed—would thus seem to fall on the individual, rather than the institutional, side of the division of labor, and so not to be directly answerable to the principles of justice.

And yet, the motivation-sensitive restrictions seem to go further than the kinds of rules for individual conduct contemplated under the Rawlsian division of labor. Egalitarian political philosophers have criticized Rawls's restriction of the principles of justice to the institutions of the basic structure for letting individuals off the hook when they fail to do their part to secure justice. According to G.A. Cohen, for instance, the division of labor licenses "unlimited self-seekingness in the economic choices" of individuals, who in a truly just society would be motivated in their individual choices by an egalitarian "*ethos* of justice."[215] And Liam Murphy, while noting that Rawls holds individuals to be under a "natural duty" to comply with and support just institutions and presumes a "strong and normally effective" sense of justice motivating them to do so,[216] argues that the division of labor undercuts these individualistic features of Rawls's theory insofar as the principles of justice that apply to institutions impose no corresponding obligations on individuals to directly promote the just aims underlying the basic structure.[217] Both criticisms suggest that the division of labor leaves individuals with extensive discretion to pursue their own, potentially self-interested ends within the bounds set by the basic structure.

If these criticisms correctly apprehend the division of labor,[218] then the motivation-sensitive restrictions expect more of individuals than the Rawlsian framework. The restrictions require individual parties not simply to conform their external conduct to certain standards, but to refrain from acting for purposes that are antithetical to the public values underlying those standards. That cognitive requirement, I've suggested, can potentially cultivate a disposition to deliberately subordinate aspects of one's self-interest to important public values. While such a disposition isn't nearly so robust as an "egalitarian ethos," neither does it seem fully compatible with the broad "free[dom] to act effectively in pursuit of their ends" that individuals enjoy under the institutional division of labor. To be sure, Rawls himself has an account of civic virtue, according to which the state may endeavor "to strengthen the forms of thought and feeling that sustain fair social cooperation between its citizens regarded as free and equal," including "civility and tolerance, . . . reasonableness[,] and [a] sense of fairness."[219] Such qualities may well overlap with the kind of disposition I've been describing, and Rawls's principles of justice may accordingly permit the institutions of the basic structure to be arranged so as to foster that disposition. At the level of the coercive rules that govern individual conduct, however, the motivation-sensitive restrictions appear to *require* individuals to attend to public values in their decisionmaking—and to expect them to be solicitous of those values—to a greater degree than envisioned by the Rawlsian institutional division of labor.

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[214] *See* Scheffler, *supra* note 212, at 217-22.

[215] G.A. Cohen, *Where the Action Is: On the Site of Distributive Justice*, 26 PHIL. & PUB. AFF. 3, 10, 16 (1997).

[216] JOHN RAWLS, A THEORY OF JUSTICE 293-94, 398 (rev. ed. 1999).

[217] Liam Murphy, *Institutions and the Demands of Justice*, 27 PHIL. & PUB. AFF. 251, 280-81 (1998).

[218] For an argument that Cohen and Murphy exaggerate the leeway individuals enjoy under the division of labor, see Samuel Scheffler, *The Division of Moral Labor: Egalitarian Liberalism as Moral Pluralism*, 79 PROC. ARISTOTELIAN SOC'Y 229 (2005).

[219] RAWLS, POLITICAL LIBERALISM, *supra* note 209, at 194-95.

The motivation-sensitive restrictions, then, compel parties to subordinate their private interests to certain public values during civil litigation but stop short of demanding that parties become purely, or even primarily, public-regarding in their litigation conduct. By imposing only the former, more modest obligation, the restrictions seem to strike a reasonable balance between the personal prerogatives of individual litigants and the collective imperatives that all political institutions must heed. In contrast to traditional accounts of civic virtue, the motivation-sensitive restrictions recognize that individuals may legitimately participate in at least some public institutions, including civil litigation, for their own purposes, without having to pursue the common good. But in contrast to the Rawlsian division of labor, the restrictions also recognize that parties bear individual responsibility for upholding at least some of the important public values on which the integrity of those institutions depends. We can thus begin to uncover within the normative structure of civil procedure's motivation-sensitive restrictions a vision of parties in civil litigation as neither public-spirited citizens nor moral free-riders, but rather semi-publicly-conscious private actors—a moderately demanding vision that enlists parties in maintaining the integrity of the public civil justice system while granting them latitude to pursue their myriad private projects through it.

B. Procedural Rules and Public Discourse

Civil procedure's motivation-sensitive restrictions can potentially foster a thin form of civic virtue because they focus on parties' subjective motives and purposes, requiring parties to contemplate the reasons for which they're planning to act and to refrain from acting on those reasons when doing so would contravene important public values. But that same motivational focus, I want to suggest, potentially has a significant downside once we look beyond the immediate confines of civil litigation itself and consider the broader culture of civil justice.[220] In particular, civil procedure's overt concern with parties' motives may facilitate rhetorical accusations of bad faith between opponents in debates about civil justice issues, which, in turn, may help to moralize and inflame those debates, making them less tractable. Although I can't definitively prove any causal relationship between the motivation-sensitive restrictions and the current state of civil justice discourse, scholars have identified similar dynamics in other legal contexts, and civil justice, with its increasingly polarized camps and politicized controversies, would seem to be no less vulnerable to the kind of moralistic impugning of opponents' motives that the motivation-sensitive restrictions evidently invite.

Scholars have outlined the various mechanisms by which a focus on individuals' subjective motives can affect public discourse and have traced those mechanisms in several different legal contexts. As David Pozen has explained, questioning the motives of one's political opponents can moralize policy debates by implying that conflicting viewpoints are not just mistaken or misguided, but illegitimate and the product of moral defects in those who espouse them.[221] Such moralization can, in turn, personalize public discourse, emphasizing *who* is making various arguments rather than *what* arguments they're making;[222] "pathologize[] disagreement," portraying it as a contingent consequence of corruption rather than an ineluctable fact of political

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[220] *Cf.* Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003) (expounding the concept of "constitutional culture"—how various actors regard and discuss the Constitution outside the courts).

[221] *See* Pozen, *supra* note 103, at 941 (noting how "constitutional faith infuses constitutional practice with moral, if not cosmic, significance").

[222] *Id.* at 948 (noting how "bad faith talk" risks "*personalizing* constitutional contestation").

life;[223] and, consequently, hinder compromise, equating it with a capitulation to nefarious interests.[224] Nor can one escape this cycle by touting the purity of one's motives, for "[a] focus on motivational changes may make actors who are properly motivated prey to those who would seek to misrepresent their motivations."[225] While these various dynamics figure most prominently in debates about constitutional law,[226] particularly constitutional antidiscrimination law,[227] they also have been shown to affect discourse on criminal law[228] and the judicial role more generally.[229] In all of these areas, the practice of impugning others' motives alters the tenor of public discussion, recasting disagreements of policy and principle as competitive assertions of moral superiority.

Contemporary civil justice debates exhibit many of these same features, and there's reason to think that civil procedure's motivation-sensitive restrictions are partly to blame. In recent decades, those debates have centered on calls for "civil justice reform,"[230] with corporations and other defense-side interests increasingly advocating (and in many cases securing) greater restrictions on the procedures by which putative victims of wrongdoing seek to vindicate their rights.[231] Consistent with that procedural focus, defense-side interests have propagated a "cost-and-delay" narrative according to which plaintiffs and their lawyers file weak or even specious claims and employ unwarranted litigation tactics that end up increasing the defendant's litigation costs, protracting the proceedings, and, in many cases, inducing the defendant to settle.[232] The gravamen of such criticisms is that civil litigation is often *inefficient*—not necessarily in any rigorous economic sense, but rather in the more colloquial sense of unduly expensive.[233] If civil litigation were reformed to curb its costs, the argument goes, defendants would no longer face pressure to settle unmeritorious claims.

Defense-side interests, however, aren't content to portray plaintiffs' litigation tactics as merely wasteful or unreasonable; they also couch their criticisms in the rhetoric of *abuse*, accusing plaintiffs and their lawyers—without any kind of systematic empirical evidence[234]—of

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[223] *Id.* at 950.

[224] *Id.* (noting how "charges of bad faith" in constitutional discourse "may undermine prospects for welfare-enhancing cooperation and compromise").

[225] Knight & Schwartzberg, *supra* note 140, at 272.

[226] *See generally* Dan M. Kahan, *The Supreme Court, 2010 Term—Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1 (2011); Pozen, *supra* note 103.

[227] *See, e.g.*, Steven D. Smith, *The Jurisprudence of Denigration*, 48 U.C. DAVIS L. REV. 675, 686-94 (2014) (criticizing accusations of "animus" in constitutional antidiscrimination law doctrine for sustaining a "jurisprudence of denigration" that exacerbates "cultural polarization").

[228] *See, e.g.*, Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413 (1999).

[229] *See* Duncan Kennedy, *The Hermeneutic of Suspicion in Contemporary American Legal Thought*, 25 LAW & CRITIQUE 91 (2014) (analyzing a "hermeneutic of suspicion" whereby judges impugn the ideological motives of their opponents while denying similar motives in themselves).

[230] *See generally* THOMAS F. BURKE, LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY (2002).

[231] *See* SEAN FARHANG & STEPHEN B. BURBANK, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION (2017); SARAH L. STASZAK, NO DAY IN COURT: ACCESS TO JUSTICE AND THE POLITICS OF JUDICIAL RETRENCHMENT (2015).

[232] *See generally* Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085 (2012). For a more recent treatment, see generally Arthur R. Miller, *Widening the Lens: Refocusing the Litigation Cost-and-Delay Narrative*, 40 CARDOZO L. REV. 57 (2018).

[233] *See generally* Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 1777 (2015).

[234] *See* HERBERT M. KRITZER, LET'S MAKE A DEAL: UNDERSTANDING THE NEGOTIATION PROCESS IN ORDINARY LITIGATION 75 (1991); Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1887 (2014). Indeed, if anything, the available empirical evidence suggests that tort victims *under*claim. *See* DAVID M. ENGEL, THE MYTH OF THE LITIGIOUS SOCIETY: WHY WE DON'T SUE (2016);

deliberately filing frivolous claims, discovery requests, and the like in order to "extort" undeserved settlements.[235] The inefficiency, on this view, is precisely the point. While plaintiff-side interests have recently used similar rhetoric to criticize certain litigation practices of defendants,[236] the charges of abuse generally go in the other direction. And that's not surprising: Accusing plaintiffs of abuse is a way of delegitimizing their attempts to seek redress for their legal injuries—a moralizing strategy that has the same kinds of discursive consequences observed in other legal contexts: First, accusations of abuse attribute any shortcomings of modern civil practice to the personal moral failings of plaintiffs and their lawyers. Second, if many plaintiffs are not just unreasonable but unscrupulous, then it becomes easier to dismiss their objections to civil justice reform as made in bad faith. And third, compromise becomes more elusive when one side in the debate is maligned as illegitimate.

Whether or not they're explicitly invoked in public discussions of civil justice issues, civil procedure's motivation-sensitive restrictions appear to lend an air of doctrinal plausibility to all these rhetorical moves. When myriad rules and doctrines express concern about parties who act for "improper purposes" or in "bad faith," accusations of abuse in public discourse can seem like a natural extension of the restrictions on parties' conduct within civil litigation. That is so even though such accusations may gloss over technical distinctions between different forms of procedural wrongdoing. And indeed, proponents of civil justice reform seem to be trading on just such ambiguities, levelling largely unsubstantiated charges of willful "abuse" to decry what are, at worst, wasteful or unduly burdensome litigation practices. Their rhetoric thereby elides civil procedure's fundamental distinction, analyzed in Part I, between litigation conduct that is objectively unreasonable and litigation conduct that is genuinely abusive because of the subjective motivations of the parties who engage in it. While the substance of the complaints about current civil practice sounds more in the objective, efficiency-based restrictions on parties' litigation conduct, the rhetoric of civil justice reform is pitched in the moralistic key of the motivation-sensitive restrictions. Proponents of civil justice reform can thus be understood to be leveraging the moral valence of the motivation-sensitive restrictions to condemn practices that wouldn't necessarily violate those restrictions. Despite their relatively limited ambit, the motivation-sensitive restrictions may end up helping to underwrite allegations of abuse even when civil procedure itself wouldn't regard the deprecated litigation conduct as truly abusive.

This kind of rhetorical slippage, moreover, is unlikely to remain confined to public discourse; rather, it threatens to seep back into legal practice, where it can distort the interpretation and application of the motivation-sensitive restrictions themselves. Recall that the content of the motivation-sensitive restrictions can adapt in response to dynamic political processes, with various litigation purposes being deemed either proper or improper as different public values either wax

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Richard Abel, *The Real Tort Crisis—Too Few Claims*, 48 OHIO ST. L.J. 443 (1987); Sanchin S Pandya & Peter Siegelman, *Underclaiming and Overclaiming*, 38 LAW & SOC. INQUIRY 836 (2013).

[235] *See generally* WILLIAM HALTOM & MICHAEL MCCANN, DISTORTING THE LAW: TORT REFORM, MASS MEDIA, AND THE SOCIAL PRODUCTION OF LEGAL KNOWLEDGE (2004).

[236] *See supra* notes 7-8 (collecting sources criticizing debt-collection litigation and arbitration as "abusive"). For examples of abusive litigation conduct involving arbitration, see Serv. Emps. Int'l Union Local 32BJ v. Preeminent Protective Servs., Inc., 415 F. Supp. 3d 29, 31-33 (D.D.C. 2019), *appeal dismissed in part*, 2021 WL 1972247, at *1-2 (D.C. Cir. May 18, 2021), in which the district court sanctioned the defendant for engaging in "bad faith" conduct intended to protract arbitration proceedings; and Max Kutner, *Home Care Co. Says Sanctions Unwarranted in Forgery Fight*, LAW360 (Apr. 27, 2021, 4:44 PM EDT), https://www.law360.com/articles/1378974, which describes a case where the plaintiff moved to sanction the defendant for having sought to dismiss the lawsuit in light of a forged arbitration agreement.

or wane in importance.[237] Among those processes are the public fora in which debates about civil justice issues occur. So, as public discourse around civil justice issues becomes increasingly moralized, with litigation "abuse" being defined ever more capaciously to invest merely inefficient litigation conduct with the moral valence associated with maliciously motivated conduct, we can expect the motivation-sensitive restrictions to subtly expand in similar ways to encompass ever broader swaths of the litigation landscape. And that's arguably what's happening when some courts take an increasingly objective approach to the restrictions, treating objectively baseless litigation conduct, for instance, as dispositive evidence of an "improper purpose" under Rule 11.[238] Just as the motivation-sensitive restrictions can shape public discourse on civil justice issues, so, too, can that discourse, in turn, alter judicial understandings of the restrictions' scope—a feedback loop that illustrates the deep connections between the politics and practice of civil justice.

C. Private Motivations in a Public Civil Justice System

Appreciating the place of the motivation-sensitive restrictions in civil procedure's framework for regulating parties' litigation conduct reveals a neglected dimension of debates about civil justice "reform." Those debates, it turns out, aren't just about finding some optimal "balance" between the goals of incentivizing meritorious claims and deterring unmeritorious ones;[239] civil procedure also seeks to ensure that all parties—defendants as well as plaintiffs—heed important public values in their litigation decisionmaking. We should therefore evaluate any proposed reforms for their tendency to promote or frustrate the latter goal as well. But partly because civil procedure pursues that goal by attending to parties' subjective motivations, it's all too easy for debates about civil justice reform to follow suit and devolve into accusations of "abuse" and "bad faith." It will be difficult to eliminate that moralistic element of civil justice discourse so long as civil procedure itself continues to define litigation abuse in terms of parties' subjective purposes, an approach that has significant normative benefits for parties and for the integrity of the civil justice system. Unless civil procedure wants to relieve parties of individual responsibility for respecting important public values, the best we can do, it seems, is to emphasize the relatively narrow purview of the motivation-sensitive restrictions—the fact that they deem a party to have acted with bad motives or for "improper purposes" only when she deliberately flouts a limited number of public values, not, as the rhetoric of the civil justice reform movement implies, whenever she engages in litigation conduct a court considers inefficient or unreasonable.

And yet, even that modest understanding of civil procedure's motivation-sensitive restrictions complicates leading theories of civil justice, as developed both in private law theory and in civil procedure scholarship. In private law theory, many scholars have emphasized the discretion of parties (and particularly plaintiffs) to use the various powers of civil litigation to pursue their own private ends without deliberate regard for public values, whereas the motivation-sensitive restrictions curb that discretion by requiring parties to attend directly to public values and to refrain from acting with certain motives that threaten to subvert them. Consider, for example, John Goldberg and Benjamin Zipursky's "civil recourse theory" of tort law, arguably the most procedurally inflected private law theory.[240] That theory is founded on the principle that "a person

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[237] *See supra* notes 196-199 and accompanying text.

[238] *See supra* notes 69-70.

[239] *Contra* sources cited *supra* note 10.

[240] *See* Matthew A. Shapiro, *Civil Wrongs and Civil Procedure*, *in* CIVIL WRONGS AND JUSTICE IN PRIVATE LAW, *supra* note 212, at 87, 89-96 (arguing that civil recourse theory presupposes various procedural features associated more with the general structure of the civil justice system than with substantive private law).

who is the victim of a legal wrong is entitled to an avenue of civil recourse against one who wrongs her."[241] Crucially for civil recourse theorists, "[i]t is the putative victim, not a government official, who decides whether to" exercise the power of civil recourse by "assert[ing] a claim and demand[ing] a remedy."[242] Tort law thus involves "a legal process initiated and substantially controlled by complainants."[243] Affording victims of legal wrongs such control, civil recourse theorists contend, promotes the values of "equality, fairness, and individual sovereignty."[244]

To be sure, civil recourse theorists acknowledge that the power of civil recourse, while very broad, is rightly subject to certain limits in order to protect defendants from abuse. Given the breadth of plaintiffs' power to seek redress, "a defendant is correspondingly vulnerable to the decisions of the plaintiff about what, when, and where to make a claim, and how to pursue it,"[245] which "creates new hazards and quandaries."[246] Civil recourse theorists accordingly insist that "the power provided by tort law comes with serious strings attached"[247] and accept the legitimacy of "various conditions and limitations on the ability of individuals to pursue and obtain recourse," specifically mentioning rules designed to "ensure that those who are alleged to have committed wrongs have a fair opportunity to defend against such allegations"[248] as well as courts' remedial preference for damages over more intrusive injunctive relief.[249]

Civil procedure's motivation-sensitive restrictions, however, go further than the qualifications contemplated in these caveats, limiting the kinds of reasons for which plaintiffs may seek redress. And civil recourse theorists seem loath to accept significant motivational limits on plaintiffs' discretion in exercising the power of civil recourse. At the doctrinal level, for instance, Goldberg and Zipursky assert that "the only check on the filing of a complaint—a minimal one—is the duty to refrain from filing frivolous claims,"[250] even though civil procedure also forbids plaintiffs to file even non-frivolous claims for "any improper purpose."[251] They come closer to countenancing the kinds of limits imposed by the motivation-sensitive restrictions in discussing the "problem of the overreaching plaintiff":

> Part of what it means for a plaintiff to have a right of action is for her to have near-complete discretion to choose to bring a claim: it is the plaintiff's power, the plaintiff's right, the

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[241] JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS 3 (2020); *see also id.* at 31, 112-13.

[242] *Id.* at 29. Victims' discretionary power thus includes the power to settle their claims before obtaining a judgment. *See id.* at 277-78.

[243] *Id.* at 73.

[244] *See id.* at 119, 130-45. Civil-recourse-style theories, of course, recognize exceptions to the general principle of plaintiff control, as when a guardian sues on behalf of an incompetent ward, who nevertheless obtains a kind of recourse even if she doesn't get to control the litigation herself. *See, e.g.*, GOLD, *supra* note 194, at 225-26. But such exceptions merely prove the rule.

[245] GOLDBERG & ZIPURSKY, *supra* note 241, at 205.

[246] *Id.* at 127 n.20.

[247] *Id.* at 8; *see also id.* at 98 ("Needless to say, the power to pursue and obtain a court-ordered remedy is subject to various conditions . . . .").

[248] *Id.* at 124; *see also id.* at 207-08 (noting "procedural" protections "such as the guarantee of an opportunity to defend oneself against a claim, the (usual) placement of the burden of proof and persuasion on the plaintiff, and the rule requiring plaintiffs to cover their own legal costs and attorneys' fees").

[249] *See id.* at 165-66.

[250] *Id.* at 166.

[251] FED. R. CIV. P. 11(b)(1); *see supra* notes 67-70 and accompanying text.

> plaintiff's choice. Thus, to have a right of action is to be able to press it even when doing so is selfish, heartless, or unjust (though not when it is abusive in certain senses).[252]

The final parenthetical qualification would seem to be capacious enough to comprehend the motivation-sensitive restrictions, which, of course, proscribe conduct that's "abusive in certain senses." But even here, Goldberg and Zipursky appear to suggest that plaintiffs may act with certain motives that civil procedure actually proscribes. A plaintiff may not, in particular, enlist the civil justice system to pursue certain "unjust" ends, such as to "harass" her opponent,[253] even if she admittedly need not always refrain from seeking redress when doing so would be "unjust" in other ways. The motivation-sensitive restrictions likewise belie Goldberg and Zipursky's attempt to distinguish criminal law from tort law on the ground that "[p]rosecutors not only have the liberty to decide which charges to press, in part by reference to considerations of justice, [but] they have a duty to do so," whereas "[t]ort law and other bodies of private law recognize no counterpart to this prosecutorial obligation."[254] In fact, the distinction between the state prosecutor and the private plaintiff isn't so sharp. For although victims of wrongdoing have no obligation to file a claim, and although they need not act justly in all respects when they do choose to proceed, they must nevertheless take account of at least some "considerations of justice" when seeking redress through the civil justice system—namely, whether they would be acting for any of the purposes deemed "improper" by the motivation-sensitive restrictions. The civil recourse power, in short, is more circumscribed than civil recourse theorists officially acknowledge, and is specifically subject to more limits, in the form of the motivation-sensitive restrictions, on the reasons for which it may be exercised.[255]

This isn't to say that civil recourse theory lacks the conceptual resources to accommodate civil procedure's motivation-sensitive restrictions. In particular, nothing in the theory seems to preclude the possibility of conceptualizing the civil recourse power as a *conditional* power, one that plaintiffs may exercise for a wide range of reasons but that becomes illegitimate when exercised for certain forbidden ones. The civil recourse power, in other words, might be conditioned on plaintiffs' not abusing it by invoking it for illicit purposes. On such a view, the civil recourse power would resemble qualified privileges in substantive tort law, which immunize otherwise-tortious conduct so long as the defendant didn't engage in it with an impermissible mental state, such as "malice." Just as civil recourse theory countenances such motivational limits

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[252] GOLDBERG & ZIPURSKY, *supra* note 241, at 356. In a similar vein, they deny, against critics, s*ee, e.g.*, John Finnis, *Natural Law: The Classical Tradition*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 1, 56-58 (Jules Coleman & Scott Shapiro eds., 2002); Emily Sherwin, *Interpreting Tort Law*, 39 FLA. ST. U. L. REV. 227, 231-36 (2011), that tort law is a substitute for a natural right "to inflict harm intentionally upon another whenever the other invades one's moral rights against being wrongfully injured," GOLDBERG & ZIPURSKY, *supra* note 241, at 121; *see also id.* at 143-44.

[253] FED. R. CIV. P. 11(b)(1).

[254] GOLDBERG & ZIPURSKY, *supra* note 241, at 356.

[255] Some scholars who seek to apply the insights of civil recourse theory to other areas of private law beyond torts likewise neglect the motivational limits on parties' exercise of their procedural powers. *See, e.g.*, Shyamkrishna Balganesh, *Intellectual Property Law and Redressive Autonomy*, *in* 1 OXFORD STUDIES IN PRIVATE LAW THEORY 161, 183 (Paul B. Miller & John Oberdiek eds., 2020) (arguing that all branches of private law, including intellectual property, embody "a core commitment to redressive autonomy," inasmuch as "they allow the right-holder to make important normative decisions about deploying the mechanism [for coercively enforcing his or her right] that are entirely personal and originate from the individual motivations and desires of the right-holder, subjective and of questionable rationality as they may be"); *id.* at 184 (characterizing the "constraints on the invocation, exercise, and use of [private law's] mechanism [of redress]" as "minimal").

on substantive privileges,[256] so it might accept similar limits on invocations of the civil recourse power itself, including civil procedure's motivation-sensitive restrictions.[257]

But while this account of the motivation-sensitive restrictions is certainly available to civil recourse theorists, it would constitute a significant, and underappreciated, public facet of their theory. For the conditions imposed on the civil recourse power by the motivation-sensitive restrictions reflect at least some public values rather than only values internal to private law, and thus incorporate public values into private law litigation more directly than civil recourse theory purports to allow. As we saw in Part II, the motivation-sensitive restrictions require parties to attend directly to certain important public values in their litigation decisionmaking by forbidding them to act for reasons that contravene those values. Civil recourse theorists, by contrast, generally insist that putative victims of wrongdoing should be able to seek redress for their own reasons, without regard for public values.[258] That accords with civil recourse theory's more general account of the role of public values in private law adjudication, according to which the resolution of individual private law disputes may well have incidental benefits for public values but shouldn't deliberately aim at promoting them.[259] Rather than approach private law cases "derivatively" in terms of their implications for public values, civil recourse theorists insist, courts should decide individual cases based on the legal rights and obligations of the parties and, when it comes to public values, let the chips fall where they may.[260] The motivation-sensitive restrictions qualify this picture insofar as they represent one (relatively modest) way in which public values figure directly in the participants' decisionmaking. Some of those public values, admittedly, are closely connected to the values of private law, as they bear directly on the accurate resolution of private law disputes (or, as Goldberg and Zipursky put it, the "authentication" of the plaintiff's demand for redress). A plaintiff clearly shouldn't, for example, be able to file a lawsuit for the sole purpose of extorting a settlement to which she's not entitled. But some of the other public values enshrined in the motivation-sensitive restrictions represent a more significant intrusion on plaintiffs' autonomy. If, for instance, it were truly up to the putative victim of wrongdoing to decide whether to file a claim, then it wouldn't seem to matter whether she's predominantly motivated by a desire to "harass" the alleged wrongdoer rather than a genuine desire to seek redress for its own sake. Nor, given a putative victim's absolute discretion to settle her case, would members of a class action need court approval to withdraw their objections to a proposed class settlement in exchange

[256] *See* John C.P. Goldberg & Benjamin C. Zipursky, *Triangular Torts and Fiduciary Duties*, *in* CONTRACT, STATUS, AND FIDUCIARY LAW 239, 249-50 (Paul B. Miller & Andrew S. Gold eds., 2016) (discussing qualified privileges in defamation law).

[257] I am grateful to John Goldberg for suggesting the line of response developed in this paragraph.

[258] *See* GOLDBERG & ZIPURSKY, *supra* note 241, at 69-70; *see also* Davis, *supra* note 207, at 601-04 (arguing that, under the principle of civil recourse, parties should have wide latitude to pursue their own interests without regard to public values).

[259] *See* GOLDBERG & ZIPURSKY, *supra* note 241, at 267 ("[I]n defining a certain type of wrong and providing victims with an opportunity for redress, tort law *indirectly* advances other values." (emphasis added)); *cf.* Hanoch Dagan & Benjamin C. Zipursky, *The Distinction Between Private Law and Public Law*, *in* RESEARCH HANDBOOK ON PRIVATE LAW THEORIES (Hanoch Dagan & Benjamin C. Zipursky eds., forthcoming 2021) (manuscript at 17-21), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3641950 (elaborating Zipursky's account of the relationship between private law and the values of public law). For example, although Catharine MacKinnon worried that creating a statutory tort for sexual harassment would fail to disrupt the social norms that sustained such conduct, Goldberg and Zipursky contend that the tort ended up having precisely that broader social impact, notwithstanding the "individualistic" form of private law adjudication. *See* GOLDBERG & ZIPURSKY, *supra* note 241, at 40-42.

[260] GOLDBERG & ZIPURSKY, *supra* note 241, at 250-51.

for payment from the defendant.[261] In these ways and others, the motivation-sensitive restrictions seem to compel private parties to defer to public values to a greater degree than civil recourse theory has acknowledged.

There seems to be a starker incongruity between the motivation-sensitive restrictions and the version of corrective justice theory developed by Arthur Ripstein.[262] Ripstein maintains that a tort is a wrong because it is a violation of the victim's rights, and as with civil recourse theory, he insists that an essential part of enjoying a right is having the discretionary power to decide whether to "stand on" it—to enforce it through a lawsuit—when it has been violated.[263] Also like civil recourse theory, moreover, Ripstein's version of corrective justice theory appears to preclude any inquiry into the victim's motives for deciding to stand on her rights. In particular, after noting some of the various reasons tort victims might choose either to sue or to forgo litigation, Ripstein asserts that "[t]he law does not make a global moral assessment of whether you should stand on your rights; it leaves that question to you."[264] This principle dovetails with Ripstein's view that tort law, like private law generally, considers only how individuals use their own "means" or interfere with others', not what "ends" they choose to pursue, and accordingly prescinds from individuals' motives, deeming such subjective mental states irrelevant to liability.[265] He further grounds that motivational indifference in a particularly strict version of the Rawlsian division of labor.[266] Given these features of Ripstein's theory, the motivation-sensitive restrictions would seem to unduly cabin putative victims' discretion to decide whether to seek redress. To be sure, Ripstein, like Goldberg and Zipursky, acknowledges courts' role in resolving private law disputes according to the prescribed procedures, procedures that limit the parties' autonomy in order to ensure a legitimate outcome.[267] But again, while some of the motivation-sensitive restrictions might be justified on such grounds, others go further and purport to prohibit parties' conduct even when it doesn't threaten to distort the case's outcome, simply because it's motivated by purposes inimical to important public values.[268] That kind of limitation seems hard to square with a portrayal of plaintiffs as the sole arbiters of whether to "stand on" their rights.[269]

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[261] *See supra* note 177-178 and accompanying text.

[262] Other versions of corrective justice theory might more readily accommodate civil procedure's motivation-sensitive restrictions. For example, even as John Gardner (over-)emphasizes the broad discretion enjoyed by plaintiffs, *see, e.g.*, JOHN GARDNER, FROM PERSONAL LIFE TO PRIVATE LAW 200 (2018) ("[T]he plaintiff has no legal duty to exercise her legal powers at all, or to exercise them in particular way if she does exercise them, including to exercise them reasonably."), he grounds that discretion not in personal autonomy, but rather in various "institutional" considerations, which reflect important public values, *see id.* at 205-16. There would seem to be no principled objection, on such a view, to curbing plaintiffs' discretion in the name of those values. For a critical analysis of Gardner's account of plaintiffs' power to sue, see Larrisa Katz & Matthew A. Shapiro, *The Role of Plaintiffs in Private Law Institutions*, *in* PRIVATE LAW AND PRACTICAL REASON: ESSAYS ON JOHN GARDNER'S PRIVATE LAW THEORY (Haris Psarras & Sandy Steel eds., forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3956085.

[263] *See* RIPSTEIN, *supra* note 84, at 12, 271-75.

[264] *Id.* at 15.

[265] *See id.* at 159-84; *see also supra* note 84.

[266] *See* RIPSTEIN, *supra* note 84, at 291; *see also id.* at 288-95; *supra* note 212.

[267] *See* RIPSTEIN, *supra* note 84, at 272-75.

[268] *See supra* Section II.B.

[269] It's unclear whether Hanoch Dagan and Avihay Dorfman's "relational justice" theory of private law makes more room for the kinds of motivational assessments required by civil procedure's motivation-sensitive restrictions. *See* Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 COLUM. L. REV. 1395 (2016) [hereinafter Dagan & Dorfman, *Just Relationships*]. On the one hand, their theory purports to admit more values commonly associated with public law—particularly a thick conception of autonomy and substantive, rather than purely formal, equality—directly into private law than does either civil recourse theory or Ripstein's brand of corrective justice theory. To that end,

Where at least some theories of private law seem to regard the motivation-sensitive restrictions as significant (if not undue) limitations on plaintiffs' autonomy, the "private enforcement" model of civil litigation espoused by many civil procedure scholars suggests that the restrictions don't go nearly far enough in curbing parties' discretion. By "private enforcement," scholars mean the enforcement of governmental regulatory policy through lawsuits brought by private parties rather than public officials—where the concept of "enforcement" is understood capaciously to encompass not only lawsuits in which private parties genuinely stand in for the state, as with actions under the False Claims Act,[270] but also those in which parties seek to recover for statutory torts such as violations of Title VII's ban on employment discrimination.[271] Private enforcement is touted as a way of harnessing the profit motive to bring the private sector's additional resources and information to bear on public law enforcement efforts.[272] Through the pursuit of their private self-interest, the argument goes, plaintiffs and their lawyers will indirectly promote governmental regulatory objectives along with the underlying public values those objectives aim to serve.[273]

The motivation-sensitive restrictions might initially seem to fit comfortably within the private enforcement model, but they actually prove alien to it. For although they may incidentally prevent private parties from acting on motives that undermine the government's regulatory goals, the restrictions are orthogonal to the core concerns of proponents of private enforcement. Those concerns include the facts that private parties might be either "overzealous" or too reticent in deciding whether to sue,[274] that their individual litigation decisions might hinder the formation of a "coherent regulatory strategy" in conjunction with administrative agencies,[275] and that they might press rights claims in ways that are "inconsistent with the original legislative design."[276] If the fundamental purpose of civil litigation is the private enforcement of governmental policy, then civil justice reforms should target private litigation practices that "impair the system's ability to fully vindicate the public interest."[277]

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they reject the Rawlsian division of labor, *see* Hanoch Dagan & Avihay Dorfman, *Justice in Private: Beyond the Rawlsian Framework*, 37 LAW & PHIL. 171 (2018), and countenance "affirmative duties of accommodation" such as duties of nondiscrimination, which they regard not as a public law graft onto private law, but rather as a set of relational duties internal to private law itself, *see* Dagan & Dorfman, *Just Relationships*, *supra*, at 1438-45. Even more to the point, they specifically advocate curbing plaintiffs' discretion to sue and control their lawsuits in the name of public values. *See* Hanoch Dagan & Avihay Dorfman, *The Value of Rights of Action: From Civil Recourse to Class Action*, JERUSALEM REV. LEGAL STUD. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3566438. The motivation-sensitive restrictions would seem to fit comfortably within this framework. On the other hand, Dagan and Dorfman also insist that "relational justice's interpretation of the distinction between the private and the public resists treating private persons as agents of collective goals." Hanoch Dagan & Avihay Dorfman, Poverty and Private Law: Beyond Distributive Justice 8 (Sept. 14, 2021) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3637034. Yet the motivation-sensitive restrictions make parties partially responsible for maintaining the integrity of the civil justice system, insofar as they require parties to attend directly to certain public values, *see supra* Section II.B, and so would seem to contravene Dagan and Dorfman's injunction against "treating private persons as agents of collective goals."

[270] 31 U.S.C. §§ 3729-3733 (2018).

[271] *See, e.g.*, FARHANG, *supra* note 13 (presenting Title VII as a paradigmatic private enforcement regime).

[272] *See, e.g.*, Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 107-13 (2005).

[273] *Cf.* LAHAV, *supra* note 154, at 38 (describing law enforcement as a "collateral benefit" of private litigation motivated by self-interest).

[274] David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 630-34 (2013).

[275] *Id.*at 635.

[276] *Id.* at 638.

[277] *Id.* at 636.

From this perspective, the motivation-sensitive restrictions aren't just inadequate; they're largely beside the point. Whether individual private lawsuits are sufficiently advancing governmental regulatory objectives is fundamentally a matter not of parties' motives, but of the consequences of their litigation decisions. On the one hand, private parties can undermine governmental policy even if they're acting with pure motives, as when a party sincerely presses a legitimate, but aggressive, claim that risks provoking broader public backlash against the regulatory regime under which she's suing.[278] On the other hand, even if a party is acting for an "improper purpose," she can fortuitously promote regulatory goals, as when a party files a lawsuit solely to "harass" an opponent who did in fact happen to engage in conduct that undermines governmental policy. Private enforcement views individual claims for relief instrumentally—for their effects on governmental policy—and that instrumental outlook would seem to extend to the evaluation of parties' litigation conduct as well, in contrast to the categorical nature of the limitations imposed by the motivation-sensitive restrictions.

The thoroughgoing instrumentalism of the private enforcement model complicates efforts to defend civil litigation against charges of "abuse" and demands for "reform." Recall that critics of contemporary civil practice, whether consciously or not, draw on the moral valence of civil procedure's motivation-sensitive restrictions to condemn litigation conduct that is merely inefficient or unreasonable rather than deliberately abusive.[279] The rejoinder, we've seen, is to emphasize that, even as civil procedure does indeed require parties to refrain from engaging in various forms of inefficient litigation conduct, only a subset of procedural wrongdoing—that prohibited by the motivation-sensitive restrictions—involves the kind of deliberate misconduct that merits the moralistic epithet "abuse."[280] And yet, the private enforcement model's instrumentalism stymies, if not forecloses, that response. Just as proponents of "civil justice reform" evaluate litigation conduct for its impact on economic efficiency, so proponents of private enforcement evaluate it for its implications for regulatory policy. Both factions seem committed to treating as procedural wrongdoing any litigation conduct that undermines more ultimate goals. That approach provides little ground on which to resist the conflation of different categories of procedural wrongdoing, as all sub-optimal litigation conduct comes to be portrayed as a personal failing on the part of private parties to promote public values (whether efficiency or regulatory objectives).[281]

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The motivation-sensitive restrictions, in sum, reflect a vision of civil litigation that is at once more public and more private than alternative visions found in leading theories of civil justice. Neither a commitment to party autonomy nor the concept of private enforcement quite captures

[278] For examples of such backlash, see generally Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782 (2011).

[279] *See supra* Section III.B.

[280] *See supra* Section I.B.

[281] In this regard, proponents of private enforcement may find themselves in a position analogous to that of political liberals in their efforts to defend the welfare state against conservative attacks. The political philosopher Samuel Scheffler has suggested that one of the reasons political liberalism encounters so much popular resistance might be that contemporary *philosophical* liberalism, in defending the welfare state, rejects traditional, pre-institutional notions of desert and individual responsibility that are widely shared in society. *See* Samuel Scheffler, *Responsibility, Reactive Attitudes, and Liberalism in Philosophy and Politics*, 21 PHIL. & PUB. AFF. 299 (1992). Likewise, proponents of private enforcement, in taking a purely instrumental approach to procedural wrongdoing, implicitly reject categorical limits on litigation conduct that have deep roots in civil procedure doctrine.

the boundary that the motivation-sensitive restrictions attempt to demarcate between public and private in our civil justice system. In contrast to prominent theories of private law, the restrictions require parties to attend directly to certain public values in deciding how to deploy the various powers bestowed on them during civil litigation. But in contrast to the private enforcement model, the restrictions generally permit parties to engage even in litigation conduct that threatens to undermine governmental regulatory objectives. The motivation-sensitive restrictions thus reveal civil litigation to be an institution that seeks primarily to facilitate the resolution of private disputes, but that also employs various second-order mechanisms to ensure that private parties heed important public values along the way.

Although a full defense of this hybrid public-private vision of civil litigation is beyond the scope of this Article,[282] I hope this Article's account of the motivation-sensitive restrictions has begun to illustrate the normative appeal of such a vision. There are compelling reasons to vest parties with significant discretion in how they exercise their procedural powers—whether because of a principled respect for their autonomy or independence[283] or because of more instrumental considerations, such as the idea that private parties will often be more effective at identifying and responding to injustices than governmental officials.[284] That is the lesson of many prominent theories of private law, with their emphasis on party autonomy. At the same time, there are compelling reasons to attend to the implications of parties' litigation conduct for important public values. That is the lesson of the private enforcement model, with its instrumental approach to evaluating litigation conduct. These two competing imperatives create a need for rules that insulate civil litigation from parties' worst abuses without overburdening parties with public-regarding obligations as they seek to pursue their own private purposes. Civil procedure's motivation-sensitive restrictions constitute one prominent feature of our civil justice system that seeks to strike such a balance.

CONCLUSION

Civil litigation confers significant powers on parties, but it also imposes significant limits on the exercise of those powers. Among the most ubiquitous, yet overlooked, limits are civil procedure's motivation-sensitive restrictions, which forbid parties to abuse the civil justice system by invoking procedural powers with illicit motives or for improper purposes. The motivation-sensitive restrictions seek not to minimize the economic costs of parties' litigation conduct, but rather to induce parties to attend to important public values in their litigation decisionmaking. In doing so, the restrictions can help parties to cultivate a form of procedural civic virtue, a disposition to subordinate one's own interests to the most pressing public imperatives. The price of this increased regard for public values within civil litigation may be a coarser public discourse about civil justice issues beyond civil litigation, as policy advocates emulate the motivation-sensitive restrictions and accuse their opponents of proceeding in bad faith. While we may be able to temper this moralism somewhat by emphasizing the relatively limited demands made by the motivation-sensitive restrictions, we shouldn't jettison the restrictions' focus on parties' subjective motivations altogether, lest we either give parties free rein to subvert important public values during civil litigation or, at the other extreme, require parties to become purely public-regarding

[282] I plan to develop such a defense in future work.

[283] As emphasized, for instance, by Goldberg and Zipursky's civil recourse theory and Ripstein's brand of corrective justice theory.

[284] *Cf.* GARDNER, *supra* note 262, at 209-10 (enumerating several considerations along these lines).

agents of the state. The motivation-sensitive restrictions, with their subjective approach to regulating procedural wrongdoing, represent an important restraint on parties as they pursue their private ends through the public civil justice system.