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## Procedural Triage

Matthew J.B. Lawrence  
*Harvard Law School*

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## ARTICLES

### PROCEDURAL TRIAGE

*Matthew J.B. Lawrence\**

*Prior scholarship has assumed that the inherent value of a “day in court” is the same for all claimants, so that when procedural resources (like a jury trial or a hearing) are scarce, they should be rationed the same way for all claimants. That is incorrect. This Article shows that the inherent value of a “day in court” can be far greater for some claimants, such as first-time filers, than for others, such as corporate entities and that it can be both desirable and feasible to take this variation into account in doling out scarce procedural protections. In other words, it introduces and demonstrates the usefulness of procedural triage.*

*This Article demonstrates the real world potential of procedural triage by showing how Medicare should use this new tool to address its looming administrative crisis. In the methodological tradition of Jerry Mashaw’s seminal studies of the Social Security Administration, this Article uses its in-depth study of Medicare to develop a theoretical framework that can be used to think through where and how other adjudicatory processes should engage in procedural triage. This Article concludes by applying this framework to survey other potential applications for procedural triage, from the Department of Veterans’ Affairs to the Federal Rules of Civil Procedure.*

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\* Academic Fellow and Lecturer on Law, Harvard Law School. Thanks to Nicholas Bagley, Oren Bar-Gill, I. Glenn Cohen, Seth Davis, Einer Elhauge, Dan Epps, Barry Friedman, Mark Geistfeld, James Greiner, Mark Hall, Helen Hershkoff, William Hubbard, David Hyman, David Kamin, Lewis Kornhauser, Florencia Marotta-Wurgler, Nicholson Price, Theodore Rave, Christopher Robertson, Ben Roin, Rachel Sachs, Jeff Skopek, Rebecca Stone, and Cass Sunstein for helpful comments on earlier drafts, and to A. Lawrence for encouragement and support. Thanks also to conference participants at Harvard Law School and Hastings College of Law and to Elizabeth Guo and Laura Hogikyan for excellent research assistance. This research was made possible by funding from the Petrie-Flom Center for Health Law Policy, Bioethics, and Biotechnology at Harvard Law School.

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#### INTRODUCTION

Hearings are a scarce resource in many administrative and judicial processes. Budgets are too tight, claim volumes are too high, and hearings are too costly to afford to give every claimant the full measure of procedural justice. So we have to ration the procedural protections that we provide to claimants.

We usually treat all claimants alike in rationing process. We might compromise the procedures we give to every claimant across the board, providing everyone the sort of second-best opportunity for participation that Judge Friendly called "some kind of hearing"<sup>1</sup> and Jerry Mashaw called

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1. Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1275 (1975).

“bureaucratic justice.”<sup>2</sup> Or we might screen out frivolous or low-stakes claims regardless of who brings them or why,<sup>3</sup> rationing process based only on a claim’s likelihood of success and magnitude as provided by the often-criticized *Mathews v. Eldridge*<sup>4</sup> test.<sup>5</sup>

Our reliance on a one-size-fits-all approach to distributing scarce procedural protections among claimants makes sense only if either (1) the value of process in a particular case depends only on the claim at issue—its magnitude or merit or stakes—not the claimant who brings it; or (2) there is no normatively permissible and cost-effective way to direct heightened procedural protections to those claimants for whom such protections have most value. Scholars have assumed one premise or the other,<sup>6</sup> with limited exception.<sup>7</sup>

2. JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 1 (1983).

3. *See, e.g.*, 28 U.S.C. § 1332 (2012) (federal amount in controversy requirement); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (holding that federal courts should dismiss civil actions that do not present “plausible” allegations of fact). We do, occasionally, use claimant identity as a proxy for case merit. For example, prisoner petitions are subject to a special exhaustion requirement. 42 U.S.C. § 1997(e)(a) (2012).

4. 424 U.S. 319 (1976).

5. *Id.* at 335 (setting out a three-part test for determining whether administrative procedures satisfy the Due Process Clause). This test has come under attack for being focused exclusively on accuracy to the exclusion of other values, most prominently, the inherent value of participation. *See, e.g.*, Tung Yin, *Procedural Due Process to Determine “Enemy Combatant” Status in the War on Terrorism*, 73 TENN. L. REV. 351, 393 n.348, 414 (2006) (criticism of *Mathews* attacks “its single-minded focus” on cost-effective promotion of accuracy to exclusion of other values).

6. Most analyses do not recognize the possibility that the inherent value of participation could vary from claimant to claimant. *See generally* JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE (1985) (proposing a method for including inherent value of participation in distributing procedural protections that does not address variations among claimants); Richard B. Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111, 160–77 (1978) (same); *see also* Glen O. Robinson & Kenneth S. Abraham, *Collective Justice in Tort Law*, 78 VA. L. REV. 1481, 1503 (1992) (“If there is a due process right to individualized adjudication, it must be in recognition of an equal right enjoyed by other, similarly situated claimants.”); *cf.* Brendan S. Maher, *The Civil Judicial Subsidy*, 85 IND. L.J. 1527, 1547–49 (2010) (proposing a method for including inherent value of participation in distributing procedural protections that addresses only variations in claimants’ liquidity). Some scholars have noted the possibility of variation but nonetheless assumed that the inherent value of participation is the same for all claimants due to the difficulties of tailoring. *Compare* I. Glenn Cohen, *Rationing Legal Services*, 5 J. LEGAL ANALYSIS 221, 289 (2013) (recognizing that the inherent value of participation might be greater “for the downtrodden”), *with* Maher, *supra*, at 1647–49 (stating in light of the complexity of tailoring, modeling inherent value of participation with a “fixed ‘dignitary participation bonus’” assigned equally to each potential claim). *See also* Robert G. Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity*, 46 VAND. L. REV. 561, 630 (1993) [hereinafter Bone, *Statistical Adjudication*] (noting the possibility of variation but assuming uniformity); Robert G. Bone, *Rethinking the “Day in Court Ideal” and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 288 (1992).

7. In a footnote, David Rosenberg notes the possibility of variation and proposes to address it by charging claimants a fee for the full cost of procedural protections. David Rosenberg, *Individual Justice and Collectivizing Risk-Based Claims in Mass-Exposure Cases*, 71 N.Y.U. L. REV. 210, 256 n.110 (1996). Problems with this solution are presented *infra* Part IV.C.1. Gillian Hadfield laments scholars’ failure to differentiate among

This Article demonstrates that both premises are flawed. Through a study of Medicare’s adjudicatory process for resolving disputes about coverage of particular treatments and services, which is currently facing a multi-year backlog of claims,<sup>8</sup> this Article demonstrates that the *inherent* value of process—the value that comes from giving a claimant her “day in court,” win or lose<sup>9</sup>—can vary from claimant to claimant and that we can take advantage of that variation in distributing scarce procedural protections. In so doing, this Article builds a framework for identifying whether and how other administrative and judicial processes should ration process among claimants according to need.

This Article’s primary contribution can be understood at two levels of generality. For Medicare in particular, this Article offers a timely and novel way of responding to a growing administrative crisis that has sparked two congressional hearings and two federal lawsuits, left many providers struggling to stay in business, and threatened patient access.<sup>10</sup> For the

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claimants in designing adjudicatory processes, Gillian K. Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57 STAN. L. REV. 1275, 1280 (2004), but does not address the differing value of process to different claimants or how procedures might be designed to take advantage of that variation. Finally, some have followed Marc Galanter’s distinction between “haves” and “have nots” to suggest that procedures be varied depending on the identity of claimants. See generally Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 144 (1974). But Galanter’s call, and those that have followed it, do not explore variation in claimants’ capacities to benefit from participation as a reason for procedural specification. Instead, such efforts focus on claimants’ varying abilities to use particular procedures to maximize their chances of success, which can raise accuracy and inequality concerns. See *id.* at 98 (noting advantages of repeat players over one-shot players); Issachar Rosen-Zvi & Talia Fisher, *Overcoming Procedural Boundaries*, 94 VA. L. REV. 79, 103 (2008) (explaining that there are different rules for institutional players differently able to game the system); Marc Galanter, *Planet of the APs: Reflections on the Scale of Law and Its Users*, 53 BUFF. L. REV. 1369, 1397 (2005) [hereinafter Galanter, *Planet of the APs*] (citing the same proposition); Eleanor D. Kinney, *Medicare Coverage Decision-Making and Appeal Procedures: Can Process Meet the Challenge of New Medical Technology?*, 60 WASH. & LEE L. REV. 1461, 1510–11 (2003) (supporting separate rules for providers because they are better able to use adversarial process); Judith Resnik, *Precluding Appeals*, 70 CORNELL L. REV. 603, 622 (1985). Such efforts do not amount to procedural triage, because any differential treatment of claimants is not based on differences in the *inherent value* of process to those claimants.

8. See Office of Medicare Hearings and Appeals (OMHA), Medicare Appellant Forum (Feb. 12, 2014) (PowerPoint presentation on file with author) [hereinafter OMHA PowerPoint].

9. “Inherent value of participation” here means the benefit (or cost) of process qua process, “standards of value by which we may judge a [participatory] legal process to be good as a process, apart from [results].” Robert S. Summers, *Evaluating and Improving Legal Processes—A Plea for “Process Values”*, 60 CORNELL L. REV. 1, 3 (1974); see *infra* Part II (discussing three theories of process value).

10. See *Lessler v. Burwell*, No. 3:14-CV-1230 (D. Conn. Oct. 9, 2014); Complaint, *Am. Hosp. Ass’n v. Sebelius*, No. 14-cv-00851, 2014 WL 2532049 (D.D.C. May 22, 2014); *Office of Medicare Hearings and Appeals Workloads: Hearing Before the U.S. H. Comm. on Oversight & Gov’t Reform, Subcomm. on Energy Policy, Health Care & Entitlements*, 113th Cong. (2014); STAFF OF S. COMM ON AGING, 113TH CONG., IMPROVING AUDITS: HOW WE CAN STRENGTHEN THE MEDICARE PROGRAM FOR FUTURE GENERATIONS (Comm. Print 2014) [hereinafter IMPROVING AUDITS].

design of adjudicatory processes in general, this Article's study of Medicare introduces the possibility of rationing process among claimants based on the inherent value of participation to particular claimants—"procedural triage" for short<sup>11</sup>—demonstrates the usefulness of this new tool, and provides the basis for an exploration of its potential.

Procedural triage is this Article's primary contribution, but this Article also makes three additional, secondary contributions. First, it argues for the first time that the dignitary interest in procedural justice differs for natural persons and corporate entities.<sup>12</sup> Second, it incorporates the inherent value of participation in the costs and benefits it considers;<sup>13</sup> for the most part systemic analyses of adjudicatory design have excluded this value.<sup>14</sup> Third, it advances the longstanding argument about when to sacrifice participation for efficiency in the adjudicatory process,<sup>15</sup> by showing that when process is scarce and its value varies among claimants, procedural triage can be used to build an adjudicatory process that is less participatory for some, but more efficient *and* more participatory overall.<sup>16</sup>

Part I offers background on the administrative process for making Medicare coverage determinations, the use of hearings as a cog in that process, and the malfunction in that cog evidenced by Medicare's lengthy backlog of appeals. The multi-year backlog is expected to grow to more than one million claims. In addition to hurting claimants, the backlog now threatens healthcare access, quality, and cost for Medicare beneficiaries. Providers allege they are scrambling to stay in business while they wait on unpaid claims, threatening patient access, and the Department of Health and

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11. In medicine, "triage" has come to mean "the sorting of and allocation of treatment to patients . . . according to a system of priorities designed to maximize the number of survivors." *Triage*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2014). This Article uses the term "procedural triage" to describe its proposal to sift among claimants in distributing procedural protections based on their capacity to derive inherent benefit from those protections.

12. *Infra* Part II.B; cf. Robert G. Bone, *Procedure, Participation, Rights*, 90 B.U. L. REV. 1011, 1013, 1027 (2010) ("calling for more scholarship on procedural rights" and pointing to the question of whether corporations have dignitary interest in procedural justice).

13. *Infra* Part IV.

14. See, e.g., Louis Kaplow, *Multistage Adjudication*, 126 HARV. L. REV. 1179, 1187 n.33 (2013) (presuming the "only welfare-relevant" outputs of adjudicatory process are transaction cost and accuracy); see also Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307, 382 (1994) ("[I]n most instances, the nature of the [inherent value of participation] is not very well defined, and its grounding is uncertain. This makes application in concrete contexts and evaluation of trade-offs quite difficult." (footnote omitted)). *But see* Bone, *Statistical Adjudication*, *supra* note 6 (including inherent value of participation in analysis).

15. See, e.g., Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 48–49 (2010); Alexandra D. Lahav, *The Law and Large Numbers: Preserving Adjudication in Complex Litigation*, 59 FLA. L. REV. 383, 400 (2007).

16. *Infra* Parts III, IV.C.4.

Human Services held important quality control efforts in abeyance pending a solution.<sup>17</sup>

Part II surveys the three prevailing theories of the inherent value of participation—the psychological theory, Jerry Mashaw’s dignitary theory, and Lawrence Solum’s legitimacy theory<sup>18</sup>—to establish that the inherent value of process can vary from claimant to claimant. For example, in Medicare, an individualized hearing to reconsider a denial of coverage for a motorized wheelchair has significant inherent value when it gives the satisfaction of having been heard to a frustrated beneficiary, win or lose. But it has much less inherent value, if any, when provided to a wheelchair manufacturer that routinely appeals hundreds of denied claims each year simply in order to maximize revenue. Yet provider appeals make up 85 percent of Medicare’s appeals workload.<sup>19</sup>

Part III begins by explaining that the variation identified in Part II is insufficient, without more, to make the case for procedural triage in Medicare or any other process. The simple fact that the value of participation varies does not mean that participation is not worthwhile for every claimant. And the background commitment to procedural justice reflected in most debates about adjudication (and in Medicare’s administrative process itself) makes it normatively problematic to sacrifice potentially worthwhile participatory protections for no other reason than to create efficiency.

So, Part III identifies process scarcity as an additional boundary condition to procedural triage. Where process is scarce, the question is not whether to sacrifice participation for efficiency, but instead how best to sacrifice participation, opening the door to claimant-based rationing. Part III concludes by explaining that procedural protections are indeed scarce in Medicare and evaluates and rejects potential alternative solutions to the backlog.

Part IV then uses a behavioral economic analysis to show that procedural triage is not just theoretically desirable as a response to Medicare’s backlog—as demonstrated in Parts II and III—but actually feasible. It begins by identifying five considerations that affect the feasibility of any means of rationing process among claimants—effect on the accuracy of the administrative process, participation value, effect on claimants’ primary behavior, transaction cost of the administrative process, and legality. It

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17. See Complaint, *Am. Hosp. Ass’n v. Sebelius*, No. 14-cv-00851, 2014 WL 2532049 (D.D.C. May 22, 2014) (alleging that providers’ viability is threatened by backlog); IMPROVING AUDITS, *supra* note 10 (describing how recovery audit contractor audits are held up due to backlog).

18. See generally LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE (2002) (psychological theory of inherent value of participation); MASHAW, *supra* note 6, at 177–80 (dignitary theory of inherent value of participation); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 277 (2004) (legitimacy theory of inherent value of participation).

19. DEP’T OF HEALTH AND HUMAN SERVS., OFFICE OF INSPECTOR GEN., IMPROVEMENTS ARE NEEDED AT THE ADMINISTRATIVE LAW JUDGE LEVEL OF MEDICARE APPEALS 8 (2012) [hereinafter 2012 OIG REPORT].

then shows how Medicare could ration process without interfering with the accuracy of its administrative process by splitting its adjudicatory process into two tracks: one optimized for efficiency and the other optimized for participation. Specifically, it shows how Medicare could reduce costs on the “efficiency” track by sacrificing participation, not accuracy, and that by selectively sifting claimants into this track, Medicare could generate a savings to put toward improved procedural protections for claimants in the “participation” track.

Part IV concludes by proposing and evaluating libertarian, paternalistic, and behavioral approaches to procedural triage.<sup>20</sup> The potential value-added of libertarian approaches is limited by market failures that distort the demand for process,<sup>21</sup> and the potential value-added of paternalistic approaches is limited in ways Part IV discusses by our lack of precise information about the inherent value of participation to particular claimants.

So, Part IV concludes that the safest way to ration process among claimants, in Medicare at least, would be to use a hybrid, “asymmetrically paternalistic” behavioral approach.<sup>22</sup> Because the Medicare claimants who tend to benefit most from a hearing also are the most likely to be susceptible to behavioral biases, the behavioral approach could leverage status quo bias (the behavioral tendency to follow the default) and other softly-paternalistic measures to sort claimants based on their capacity to benefit from procedural protections.

Finally, Part V synthesizes and generalizes the framework for deciding when and how to engage in procedural triage developed through this Article’s study of Medicare in Parts II, III, and IV. It then employs this framework to identify other adjudicatory systems where procedural triage could be worthwhile, from the Department of Veterans’ Affairs to federal court. It points out that administrative processes that feature a wide and lumpy (multi-modal) assortment of claimants (like Medicare) are the best candidates for procedural triage. And it presents the novel possibility of using claimant-based procedural triage rather than claim-based summary judgment as a way to ration access to a jury trial in federal civil proceedings. Finally, a brief conclusion is offered.

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20. The terms “libertarian” (or “choice-based”) and “paternalistic” (or “mandatory”) here are intended to invoke the evolving debate in the normative behavioral economics literature on utilizing and evaluating regulatory tools based on their capacity to respect choice. See generally Ryan Bubba & Richard H. Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 HARV. L. REV. 1286 (2014); Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for “Asymmetric Paternalism”*, 151 U. PA. L. REV. 1211, 1211 (2003); Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1159 (2003).

21. Matthew J.B. Lawrence, *Mandatory Process*, 90 IND. L. J. 1429 (2015).

22. The default rule that this Article proposes would be “asymmetrically paternalistic” because it would act like a mandate for those who are subject to status quo bias, but as a choice for those who are not. See Camerer et al., *supra* note 20, at 1211; George Loewenstein et al., *Asymmetric Paternalism to Improve Health Behaviors*, 298 J. AM. MED. ASSOC. 2415, 2416 (2007).



## I. MEDICARE'S ADMINISTRATIVE CRISIS

Like any entitlement program, Medicare's administrative task is ultimately to determine eligibility for and distribute taxpayer dollars. The administrative task for Medicare is complicated, however, by the fact that each recipient's entitlement is tied not to a precise statutory formula, but instead to a standard that implicates professional judgment. Beneficiaries are entitled to coverage for all medical care they receive that is medically "reasonable and necessary."<sup>23</sup> That decision is initially made by doctors, not bureaucrats, which creates an administrative challenge for the Medicare program.<sup>24</sup>

Medicare attempts in various ways to control the decisions of these doctors, who ultimately dole out a larger fraction of our gross domestic product than do the consumer markets for electronics, apparel, and furniture combined.<sup>25</sup> Many of these efforts, which are in an important sense healthcare rationing efforts,<sup>26</sup> are implicit. For example, Medicare incentivizes hospitals to cut costs by compensating them on a per-patient basis.<sup>27</sup> And the accountable care organizations created by the Affordable Care Act are intended to encourage doctors to cut costs by giving them a share of the resulting profits.<sup>28</sup>

There are ethical<sup>29</sup> and instrumental<sup>30</sup> limitations to Medicare's ability to ration care implicitly, however. As a result, Medicare also attempts to limit

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23. 42 U.S.C. 1395y(a)(1)(A) (2012).

24. Nicholas Bagley, *Bedside Bureaucrats: Why Medicare Reform Hasn't Worked*, 101 GEO. L.J. 519, 522 (2013).

25. In 2012, Medicare accounted for \$572.5 billion in spending. CENTERS FOR MEDICARE AND MEDICAID SERVICES, NATIONAL HEALTH EXPENDITURES FACT SHEET 2012 (2013) [hereinafter EXPENDITURES FACT SHEET 2012], <http://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/NHE-Fact-Sheet.html> [<http://perma.cc/H9EL-DEU9>]. In the same year, Americans spent \$216 billion on apparel (including clothing and shoes), \$197 billion on furniture, and \$103 billion on consumer electronics. See U.S. BUREAU OF LABOR STATISTICS, CONSUMER EXPENDITURES IN 2012 2 (2014), <http://www.bls.gov/cex/csxann12.pdf> [<http://perma.cc/B2N8-HRTC>].

26. In light of the political sensitivity of the word "rationing," Mark Hall self-consciously uses the term "medical spending decisions" rather than "rationing decisions" in his book-length treatment of the subject. MARK A. HALL, MAKING MEDICAL SPENDING DECISIONS: THE LAW, ETHICS, AND ECONOMICS OF RATIONING MECHANISMS 3-4 (1997). Persuaded by Maxwell Gregg Bloche that transparency here will improve discourse in the long run, MAXWELL GREGG BLOCHE, THE HIPPOCRATIC MYTH: WHY DOCTORS ARE UNDER PRESSURE TO RATION CARE, PRACTICE POLITICS, AND COMPROMISE THEIR PROMISE TO HEAL 59 (2011), this Article uses the term "rationing" above to describe efforts to forego healthcare that someone thinks could possibly benefit the patient. So understood, rationing is already commonplace in our healthcare system. See *id.*; HALL, *supra*, at 5 ("[W]e have always rationed health care resources on a massive scale."). Note, on this point, that even "wasted" care may be somewhat beneficial—or be thought to have been before it was delivered. See Bagley, *supra* note 24, at 536.

27. Ching-to Albert Ma, *Health Care Payment Systems: Cost and Quality Incentives*, 3 J. ECON. MGMT. STRATEGY 93, 94 (1994) (describing prospective payment system).

28. Russell Korobkin, *Comparative Effectiveness Research As Choice Architecture: The Behavioral Law and Economics Solution to the Health Care Cost Crisis*, 112 MICH. L. REV. 523, 543 (2014).

29. Gregg Bloche argues that implicit rationing violates the doctor's Hippocratic oath. BLOCHE, *supra* note 26; see also DAVID ORENTLICHER, MATTERS OF LIFE AND DEATH:

spending explicitly, especially on nonemergency big-ticket items like hospital admissions, long-term care, and motorized wheelchairs.<sup>31</sup> The process by which Medicare does so—by refusing coverage even for doctor-recommended care—is known as “utilization review.”

Medicare hires private contractors to perform utilization review on the more than one billion claims for coverage that it receives each year.<sup>32</sup> These contractors are empowered to deny payment for treatments and services that are excluded by Medicare payment rules or that they themselves deem not to be medically “reasonable and necessary.”<sup>33</sup>

In some cases, utilization review in Medicare is prospective—that is, it happens before care is delivered.<sup>34</sup> Usually, though, Medicare utilization review is retrospective, happening after delivery. Either the beneficiary submits a claim for reimbursement or the provider does so, having taken “assignment” of the claim as a condition of service (a provider that takes assignment of a claim cannot charge the beneficiary if the claim is denied). In practice, the vast majority of claims are submitted by providers.<sup>35</sup>

Whether performed prospectively or retrospectively, utilization review significantly affects Medicare claimants. Its direct effect is usually to make a claimant pay for healthcare herself. Its indirect effect is to influence the ex ante healthcare choices of beneficiaries and especially providers who make treatment decisions in the shadow of utilization review.<sup>36</sup> These

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MAKING MORAL THEORY WORK IN MEDICAL ETHICS AND THE LAW 145 (2001) (arguing that physicians should make rationing decisions explicitly); KEITH SYRETT, LAW, LEGITIMACY AND THE RATIONING OF HEALTH CARE: A CONTEXTUAL AND COMPARATIVE PERSPECTIVE 58–63 (2007) (discussing reasons we should ration explicitly, including informed consent and individual autonomy). *But see id.* at 55–58 (discussing arguments in favor of implicit rationing, including social stability and minimization of “denial disutility”).

30. Implicit efforts to encourage rationing can cause significant distress to patients and the public when they come to light, as the managed care experience in the 1990s made very clear. *See generally* Thomas H. Gallagher et al., *Patients’ Attitudes Toward Cost Control Bonuses for Managed Care Physicians*, 20 HEALTH AFF. (MILLWOOD) 186 (2001).

31. *See, e.g.*, Medicare Program; Prior Authorization for Power Mobility Device (PMD) Demonstration, 77 Fed. Reg. 46,439, 46,439 (Aug. 3, 2012) [hereinafter Medicare Program] (expanding prior authorization requirement).

32. 42 U.S.C. § 1395ff(a)(2)(A) (2012).

33. *Id.* § 1395y(1)(A)(1); *id.* § 1395kk-1(a)(3).

34. *E.g.*, Medicare Program, *supra* note 31, at 46,439; Peter J. Neumann et al., *Medicare and Cost-Effectiveness Analysis*, 353 NEW ENG. J. MED. 1516, 1517 (2005) (prior authorization in Medicare Part C).

35. *See infra* Figure 1.

36. For example, when Medicare recently began retrospectively reviewing hospital admissions more closely, hospitals responded immediately by denying new patients inpatient admission on the margins. Zhanlian Feng et al., *Sharp Rise in Medicare Enrollees Being Held in Hospitals for Observation Raises Concerns About Causes and Consequences*, 31 HEALTH AFF. 1251, 1251 (2012). According to allegations from some consumer and provider advocates, Medicare went too far, so hospitals did as well, leading hospitals to deny thousands of beneficiaries hospital admission that would have helped them, for fear of a subsequent denial of coverage. *See Bagnall v. Sebelius*, No. 3:11cv1703 (MPS), 2013 WL 5346659 (D. Conn. Sept. 23, 2013), *aff’d in part, vacated in part, remanded sub nom.*, *Barrows v. Burwell*, 77 F.3d 106 (2d Cir. 2015); Mary D. Naylor et al., *Unintended Consequences of Steps to Cut Readmissions and Reform Payment May Threaten Care of Vulnerable Older Adults*, 31 HEALTH AFF. 1623, 1627 (2012).

effects have increased since the Patient Protection and Affordable Care Act, which instructed Medicare to limit spending by stepping up its efforts to scrutinize claims, both through fraud and abuse enforcement,<sup>37</sup> and through utilization review.<sup>38</sup>

By statute and constitutional mandate,<sup>39</sup> Medicare offers an adjudicatory process everywhere that it subjects doctors' treatment recommendations to utilization review and a way to appeal decisions denying coverage to a de novo hearing before an independent Administrative Law Judge (ALJ). This ALJ appeal is the first and last "litigant persuasion opportunity" in the Medicare coverage appeals process, in Judith Resnik's terms.<sup>40</sup>

The composition of Medicare's appeal workload, like that of its claimants, is dominated by provider-filed appeals. As shown in Figure 1 below, as of the Office of Inspector General's 2012 Report, 11 percent of appeals were filed directly by beneficiaries challenging an adverse coverage determination, with the remaining 89 percent filed by either providers (86 percent) or state Medicaid organizations (3 percent) (state Medicaid agencies often appeal a denial of Medicare coverage for a dual-eligible beneficiary because if Medicare refuses coverage, the Medicaid agency must pay). Providers include hospitals, nursing homes, durable medical equipment manufacturers (such as the now-defunct "Scooter Store" famous for its ubiquitous mid-day television commercials), and practitioners.<sup>41</sup> The subject matter of appeals varies widely; disputes reflect disagreements about a patient's need for a motorized wheelchair, inpatient hospital admission, off-formulary drugs, home health or rehabilitation services, particular treatment (such as bariatric surgery or sex change surgery), and so on.

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37. See generally Julie E. Kass & John S. Linehan, *Fostering Healthcare Reform Through a Bifurcated Model of Fraud and Abuse Regulation*, 5 J. HEALTH LIFE SCI. L. 75 (2012).

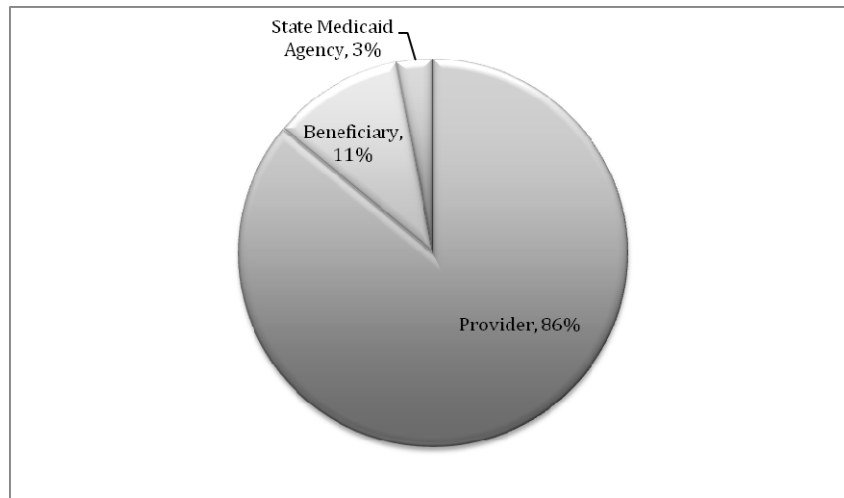
38. Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, § 6411, 124 Stat. 119, 773 (2010).

39. See 42 U.S.C. § 1395y(a)(1)(A) (2012); *Schweiker v. McClure*, 456 U.S. 188, 195 (1982); *Grijalva v. Shalala*, 946 F. Supp. 747, 755 (D. Ariz. 1996).

40. Resnik, *supra* note 7, at 607–09. The appeals process features three steps prior to an ALJ hearing but the ALJ hearing is de novo and the first opportunity for a live hearing before an adjudicator who is functionally independent from the Centers for Medicare and Medicaid Services. See Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, § 931(b)(2), 117 Stat. 2066, 2398 (2003). Furthermore, while the ALJ's decision may be appealed to federal district court, the district court sits in an appellate capacity, giving the ALJ substantial deference. *Arruejo v. Thompson*, No. CV-00-2402(JG)(SMG), 2001 WL 1563699, at \*10 (E.D.N.Y. July 3, 2001); *Bosko v. Shalala*, 995 F. Supp. 580, 582 (W.D. Pa. 1996).

41. 2012 OIG REPORT, *supra* note 19, at 24.

Figure 1: Percentage of Appeals Filed by Type of Appellant<sup>42</sup>



At a hearing, a claimant offers testimony to the ALJ about the medical condition at issue, the symptoms and history of the patient whose coverage is in question, and the usefulness of the treatment or service provided in support of written submissions.<sup>43</sup> Opposing views may usually be offered by the Centers for Medicare and Medicaid Services (CMS) or the contractor who denied the claim, at their discretion.<sup>44</sup> Like other administrative processes, the procedures are designed so that claimants can proceed with or without representation.<sup>45</sup>

Pursuant to regulation and policies adopted to reduce costs, hearings are held by telephone with only rare and “extraordinary” exception.<sup>46</sup> Claimant representatives have argued that this practice violates the Medicare statute, which they read to guarantee an in-person hearing.<sup>47</sup>

As a check on utilization review, itself a primary means by which Medicare ultimately makes decisions about what to cover, Medicare’s coverage appeals process plays a major role in the formation of Medicare policy through the piecemeal adjudication of claims. “Medicare coverage decision-making and appeals processes are the venues in which the battle

42. This data reflects the composition of Medicare’s appeal workload as reflected in the 2012 OIG Report. Insofar as increasing appeal rates result predominantly from increases in provider appeals, the fraction of provider appeals has likely increased since.

43. 42 C.F.R. § 405.1030 (2014).

44. *Id.* §§ 405.1010, 1012. Opposing views may not be presented in a hearing requested by an unrepresented beneficiary. *Id.* § 405.1012(a).

45. 2012 OIG REPORT, *supra* note 19, at 3.

46. Under “extraordinary circumstances” a hearing can be held in one of the four cities hosting Medicare ALJs. 42 C.F.R. § 405.1020(b).

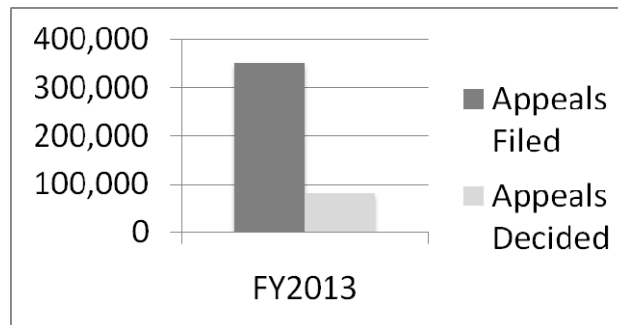
47. 42 U.S.C. § 1395ff (2012); CTR. FOR MEDICARE ADVOCACY, WHEN IS A HEARING NOT A HEARING? (2013), [http://www.medicareadvocacy.org/old-site/News/Archives/Reform\\_InPersonHearings.htm#\\_edn2](http://www.medicareadvocacy.org/old-site/News/Archives/Reform_InPersonHearings.htm#_edn2) [<http://perma.cc/6EBN-86N8>].

over program costs, and ultimately the future design and content of the Medicare program, will play out.”<sup>48</sup>

Unfortunately, Medicare’s coverage appeal process is broken. As mentioned above, in the Affordable Care Act and other enactments, Congress instructed the CMS to step up its scrutiny of wasteful Medicare claims.<sup>49</sup> It has done so, saving the taxpayers billions in the process.<sup>50</sup> But that savings comes out of the pockets of providers and patients, who are having their claims denied increasingly often. At the same time, more beneficiaries are entering the Medicare program as the baby boom generation enters retirement.<sup>51</sup> Combined, these factors have led to a dramatic and steady uptick of appeals, totaling 545 percent in recent years.<sup>52</sup>

Under this new state of affairs, Medicare’s Office of Hearings and Appeals is not capable of providing a hearing to every claimant who wants one. In 2013, for example, as shown in Figure 2, Medicare claimants filed appeals of decisions denying coverage four times faster than Medicare’s ALJs could hear them.

Figure 2: Medicare Appeals Filed and Appeals Decided<sup>53</sup>



48. Kinney, *supra* note 7, at 1511.

49. Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, § 6411, 124 Stat. 119, 773 (Mar. 23, 2010); Improper Payments Elimination and Recovery Act of 2010, Pub. L. 111-204, 124 Stat. 2224 (July 22, 2010); *see also* Exec. Order No. 13,520, 74 Fed. Reg. 62,201 (2009) (entitled “Reducing Improper Payments”).

50. DEP’T OF HEALTH AND HUMAN SERVS., OFFICE OF THE INSPECTOR GEN., MEDICARE RECOVERY AUDIT CONTRACTORS AND CMS’S ACTIONS TO ADDRESS IMPROPER PAYMENTS, REFERRALS OF POTENTIAL FRAUD, AND PERFORMANCE 1 (2013) (reporting \$1.3 billion savings in FY 2010 and 2011 from one audit program).

51. *Office of Medicare Hearings and Appeals Workloads: Hearing Before the United States H. Comm. on Oversight & Gov’t Reform, Subcomm. on Energy Policy, Health Care & Entitlements*, 113<sup>th</sup> Cong. 3 (2014) (statement of Chief Judge Nancy J. Griswold) [hereinafter *Griswold Statement*], <http://oversight.house.gov/wp-content/uploads/2014/07/CMS-Griswold-OMHA-Final.pdf> (discussing “increases in the number of beneficiaries utilizing services covered by Medicare”) [<http://perma.cc/B48Z-PBVG>].

52. *Id.*

53. OMHA PowerPoint, *supra* note 8.

As a result, at the beginning of 2014, half a million appeals and counting were waiting for a hearing (the federal courts process fewer civil cases in a year), and that number grew throughout the year, with no end in sight.<sup>54</sup> In July 2014, the Office of Medicare Hearings and Appeals began to implement measures that it hoped would alleviate some of the backlog, such as a pilot project to try statistical sampling in limited cases and efforts to prioritize beneficiary appeals in line. Such efforts, though, “are insufficient to close the gap between workload and resources” in the hearing process.<sup>55</sup> Related efforts by the CMS to settle a significant block of cases in the backlog that resulted from a particular change in hospital billing rules also will be insufficient either to bring capacity in line with demand or clear the backlog.<sup>56</sup> Meanwhile, appellants have filed suit seeking to compel swifter resolution of claims,<sup>57</sup> pointing to the statutory mandate of a decision in ninety days.<sup>58</sup> Something has to give.

## II. THE INHERENT VALUE OF PROCESS VARIES FROM CLAIMANT TO CLAIMANT

The significant differences between Medicare claimants, who range from represented providers to pro se beneficiaries, presents a question: In light of the ongoing backlog, should Medicare treat claimants differently in deciding how to distribute its procedural resources?

If the inherent value of process is the same for all claimants, as prior scholarship has assumed, then the answer is no.<sup>59</sup> If process is equally valuable for every claimant, then there is no reason to consider the inherent value of participation for particular claimants in distributing procedural protections and no value to be gained by doing so.

This part argues that the inherent value of process does vary from claimant to claimant. The parts that follow build on this insight to show that it is both desirable and feasible for Medicare to take this variation into account in distributing scarce procedural protections.

A preliminary note: one of the challenges in assessing the inherent value of participation to particular claimants is that proceduralists have not come to a consensus about *why* being heard at a hearing or through another participatory process has value beyond its affect on the possibility of a

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54. *Id.* The backlog was expected to reach a million claims by the end of 2014. *Id.* On January 8, 2015, the author submitted a request through the Freedom of Information Act (FOIA) for precise 2014 year-end data. FOIA Request 15-0320 (Jan. 8, 2015) (on file with author). The agency has indicated that it is processing that request. E-mail from OMHA to author (Jan. 13, 2015) (on file with author).

55. *Griswold Statement*, *supra* note 51, at 6.

56. See Reed Abelson, *Medicare Will Settle Short-Term Care Bills*, N.Y. TIMES, Aug. 30, 2014, at B1; *Inpatient Hospital Reviews*, CMS.GOV (Sept. 17, 2014), <http://www.cms.gov/Research-Statistics-Data-and-Systems/Monitoring-Programs/Medicare-FFS-Compliance-Programs/Medical-Review/InpatientHospitalReviews.html> [<http://perma.cc/HL9Q-579S>].

57. Complaint at 1–2, *Am. Hospital Ass’n v. Sebelius*, No. 14-cv-00851, 2014 WL 2532049 (D.D.C. May 22, 2014).

58. 42 U.S.C. § 1395ff (2012); 42 C.F.R. 405.1016 (2014).

59. Rosenberg, *supra* note 7, at 237.

winning outcome. Instead, there are multiple normative theories of the inherent value of participation that take different routes to that conclusion. Because these views are not mutually exclusive, this section applies each of the three leading sorts of theories in identifying reasons a hearing may tend to be more inherently valuable for some Medicare claimants than others. These are: (1) psychological theories, which see participatory process as a way to generate acceptance (or, in economic terms, satisfy a “preference for fairness”); (2) dignitary theories, which see participation in a decision affecting an individual as required to maintain the dignity of that individual; and (3) legitimacy theories, which see participatory process as uniquely able to confer normative legitimacy on an adverse decision. The subsections that follow address these theories in turn.

#### A. Psychological Theories

The psychological theory of the inherent value of participation has a long pedigree. Justice Frankfurter joined Frank Michelman and Richard Saphire in seeing in participatory process the power to “generat[e] the feeling, so important to a popular government, that justice has been done,”<sup>60</sup> and long before that one of the earliest legal scholars wrote that “[a] good hearing soothes the heart.”<sup>61</sup>

The specific nature of the inherent value of participation on the psychological theory has been modeled by economists, most prominently Louis Kaplow and Steven Shavell in their book, *Fairness Versus Welfare*, as its capacity to satisfy a “taste for a notion of fairness.”<sup>62</sup> Some people, the story goes, have a preference for fair treatment, just as one might have a preference for bread or beauty.<sup>63</sup> A process that such a person perceives to be fair creates value by satisfying that preference for fairness.<sup>64</sup> A supplement to this approach models the value of participation not as satisfying a preference for fairness, but instead as soothing a person’s negative emotional reaction to an adverse event, which may entail altering a preference.<sup>65</sup>

On a psychological theory, the inherent value of procedural protections varies fairly obviously based on a claimant’s emotional investment in his or

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60. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring); see also Frank I. Michelman, *Formal and Associational Aims in Procedural Due Process*, in *DUE PROCESS: NOMOS XVIII* 126, 127 (J. Roland Pennock & John W. Chapman eds., 1977) (“[A] participatory opportunity may also be psychologically important to the individual.”); Saphire, *supra* note 6, at 124–25 n.59 (“[T]enants, consumers, and welfare recipients often regard the way in which they are treated by governmental institutions at least as importantly as the extent to which they achieve their substantive goals.”).

61. Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U.L. REV. 885, 885 (1981) (quoting “The Instruction of Ptahhotep”).

62. KAPLOW & SHAVELL, *supra* note 18, at 21 (“[I]ndividuals have a taste for a notion of fairness, just as they may have a taste for art, nature, or fine wine.”); see Rosenberg, *supra* note 7.

63. See KAPLOW & SHAVELL, *supra* note 18, at 21.

64. See *id.*

65. Lawrence, *supra* note 21.

her appeal (and sensitivity to soothing or aggravating interventions). A claimant's emotional stake in his or her appeal is difficult to measure directly, but there are qualities in the Medicare claimant population that tend, all else being equal, to indicate greater or lesser emotional investment.

First, the nature of the claimant matters because certain claimants are intuitively less likely to be emotionally invested in their appeals. It is much easier to tell a story of why an elderly beneficiary could be emotionally invested in her appeal than it is to tell the same story about a provider appealing on assignment. Similarly, it is easier to tell a story of why a solo practitioner or doctor in a small practice group could be invested in her appeal (her professional judgment is in question) than it is to tell the same story about a case manager working for a major hospital or wheelchair manufacturer who, at year's end, selects and pursues appeals on behalf of the business. A corporate entity itself has "no independent psychological experience."<sup>66</sup> Employees, partners, or owners (in a closely held corporation) might have a psychological stake in a corporation's appeal, so the fact that an appeal is brought by such an entity does not entirely vitiate the possibility of inherent psychological value.<sup>67</sup> But corporate status is nonetheless an indication that the inherent psychological value of participation is attenuated, all else being equal.

Second, a claimant's motivation for appealing may provide a window into her emotional stake, in this sense: a claimant motivated purely by money is less likely to have an emotional stake than a claimant motivated also (or only) by principle, because such a claimant is less likely to perceive an unfairness (either in the first instance or in the decision on appeal). While a claimant's motivation also is hard to know, it stands to reason that any factor tending to indicate that an appeal is positive value (worth filing in a monetary sense) or that an appellant has a lower cost of identifying and pursuing such positive-value appeals will tend to indicate diminished emotional stakes. So, again, providers are better equipped to learn about and understand the appeals process than beneficiaries. This makes them better equipped to identify and select appeals that are likely to succeed and therefore to be able to appeal in the ordinary course of business.

For the same reason, we can expect repeat filers, on average, to derive less inherent psychological benefit from process qua process because it is more likely they are motivated by money. This is so because repeat players necessarily have a greater familiarity with the appeals process—how to appeal, how the process operates, and so on. It stands to reason that it is therefore less likely they will take a denial in a particular case as an affront. And it also lowers the marginal cost of appealing (because no upfront investment in learning how to do so is required), making it logically more likely that a repeat player files appeals in the ordinary course of business.

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66. Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS LAW J. 127, 148 (2011) ("[A]n entity represented by an agent simply cannot, as a definitional matter, have any perceptions of procedural justice; it is an entity, with no independent psychological experience.").

67. *Id.*



In fact, while it is easy to assume that beneficiary appeals are automatically brought at least in part for principled reasons,<sup>68</sup> some beneficiaries may themselves be repeat players who appeal as a matter of course for whom the stakes of an appeal are purely monetary.<sup>69</sup>

Comparing these factors to the Medicare claimant pool shows that participation value in the Medicare appeals process varies markedly. For example, as shown in Figure 2 above, the provider/beneficiary split is very pronounced in Medicare, where most claimants are sophisticated providers and beneficiary appeals represent only a small percentage. Furthermore, claimants' repetition in bringing appeals also varies a great deal. In fiscal year (FY) 2010, one-third of appeals were filed by ninety-six providers, who filed between fifty and 1050 appeals each.<sup>70</sup> Some of these providers appealed every denial they received.<sup>71</sup>

### B. Mashaw's Dignitary Theory

Many scholars believe that participation has inherent value because it affirms the dignity of an individual by giving her a say in a decision affecting her life. Jerry Mashaw's articulation of this dignitary theory, expressed most directly in "Due Process and the Administrative State,"<sup>72</sup> is "perhaps the most influential and well-developed."<sup>73</sup> Notwithstanding this prominence, the question whether this dignitary value varies from claim to claim, including whether corporations have "dignity" of the sort that makes procedural rights inherently valuable, has not been explored.<sup>74</sup>

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68. Individual litigants outside of Medicare report in surveys that their reasons for suing were principled—that "it is not about the money!" See, e.g., Tamara Relis, "It's Not about the Money!": A Theory on Misconceptions of Plaintiffs' Litigation Aims, 68 U. PITT. L. REV. 701, 702 (2006). Those self-descriptions are consistent with empirical observations of claiming behavior. Fredrick Dunbar & Faten Sabry, *The Propensity to Sue: Why Do People Seek Legal Actions?*, 42 BUS. ECON. 31, 36–41 (2007); Herbert M. Kritzer, *Propensity to Sue in England and the United States of America: Blaming and Claiming in Tort Cases*, 18 J.L. & SOC'Y 400, 417–19 (1991); David M. Studdert et al., *Negligent Care and Malpractice Claiming Behavior in Utah and Colorado*, 38 MED. CARE 250, 253–55 (2000).

69. See, e.g., Posting of Traci to *Insurance Has Denied Coverage for Growth Hormone*, CHILDREN WITH DIABETES (Aug. 8, 2012, 5:55 PM) [hereinafter Children with Diabetes Forum], <http://forums.childrenwithdiabetes.com/showthread.php?70915-Insurance-has-denied-coverage-for-growth-hormone> ("Appeal, appeal, appeal. Let me tell you, they killed a whole forest of trees with their denial letters when I had premature triplets in the NICU . . . they denied routine things for all kinds of crazy reasons. I learned to appeal . . . early and often.") [<http://perma.cc/7MAA-ESCW>]. That a beneficiary seeks appeal strategically does not mean that he or she does not have a deeply emotional interest in the treatment being paid for.

70. 2012 OIG REPORT, *supra* note 19, at 8.

71. *Id.* at 9.

72. MASHAW, *supra* note 6, at 45. Mashaw had developed the view expressed in that book in a series of earlier articles. See *id.* (listing articles).

73. Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 436 n.115 (2008).

74. The moral status of corporate entities has been explored in other contexts, however. See generally Galanter, *Planet of the APs*, *supra* note 7 (providing overview of discussion of legal and moral status of corporate entities). And, as discussed above, Rebecca Hollander-Blumoff has addressed the psychological benefit of procedural justice to corporate entities. See Hollander-Blumoff, *supra* note 66, at 147–49.

Although Mashaw's theory is sometimes described as deontological, it is ultimately instrumental. To Mashaw, process has value qua process by virtue of the capacity of participation to "nurture[]" deontological dignitary values "such as autonomy, self-respect, or equality."<sup>75</sup> So, on Mashaw's theory, the degree to which process has inherent value in a case is a function of the degree to which it furthers a person's "autonomy, self-respect, or equality."<sup>76</sup>

Mashaw sees variation from case to case on this theory based on the degree to which the questions presented implicate a person's dignity. The ultimate issue is the extent to which a decision is being made about a person's life, in which he or she therefore deserves partial authorship. For example, Mashaw sees a much greater dignitary stake in a custody determination based on a person's fitness to be a parent than in a food stamp entitlement determination based on formulaic application of an income threshold. The former case is truly "about" the person's life and directly implicates the appellant's dignity, whereas the latter is more a routine application of law to objective facts and implicates a diminished dignitary stake notwithstanding the importance of the outcome to the claimant.<sup>77</sup>

Although Mashaw does not recognize it, this same reasoning points to variation from claimant to claimant, not just claim to claim. First, the dignitary interest in participation in an appeal brought by a corporate entity is diminished as compared to an appeal brought by an individual. While corporate entities may be treated as persons for purposes of the First Amendment's Free Speech and Free Exercise Clauses,<sup>78</sup> they do not possess a dignitary interest of the sort that gives procedural protections inherent value.<sup>79</sup> Mashaw, and others who have written about the dignitary theory of procedural justice, repeatedly connect it to humanity and to personhood.<sup>80</sup> As Justice Marshall put it, borrowing the words of Lawrence

75. MASHAW, *supra* note 6, at 162.

76. *Id.* Consistent with this characterization, Mashaw cites with approval the following statement from Edmund Pincoffs' analysis of *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972): "Participation may be instrumentally valuable, but instrumental to the achievement of a moral purpose that is itself impossible to describe in instrumental terms, the purpose of treating a man not as a mere means but as an end in himself." Edmund Lloyd Pincoffs, *Due Process, Fraternity, and a Kantian Injunction*, in *DUE PROCESS: NOMOS XVIII* 172 (J. Roland Pennock & John W. Chapman eds., 1977), *quoted in* MASHAW, *supra* note 6, at 191.

77. *See generally* MASHAW, *supra* note 6.

78. *See generally* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (free exercise rights of corporate entities); *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 885 (2010) (free speech rights of corporate entities).

79. The analysis here is addressed to whether corporate entities have a dignitary interest in procedural justice, not whether corporations are persons in the abstract or for other purposes. As such, it follows the largely functional, piecemeal approach to analyzing the status of corporations reflected in American law. *See* Saru M. Matambanadzo, *The Body, Incorporated*, 87 TUL. L. REV. 457, 469–73 (2013) (contrasting legal decisions conferring particular rights on corporate entities with broader debate about corporate personhood *vel non*).

80. MASHAW, *supra* note 2, at 162 (referring to "values inherent in or intrinsic to our common humanity"); *id.* at 163 ("[I]t is commonplace for us to describe process affronts as

Tribe, the right to participation comes from the “elementary idea that to be a *person*, rather than a *thing*, is at least to be *consulted* about what is done with one.”<sup>81</sup> A corporation is a “thing” rather than a person in this limited sense; unlike a person it has no right to vote,<sup>82</sup> can be lawfully owned, and may be destroyed, created, or cut to pieces with the stroke of a pen.

Therefore, an appeal brought by a corporation can further dignitary values only insofar as the process offered in the case furthers the individual dignity of the corporate employees involved in the appeal. The extent to which this is so will depend on the extent to which such persons may (or may not) come to have their identity bound up with that of the corporation. As a result, the dignity implicated by an appeal on behalf of a two-person partnership, or small closed corporation long owned by the same family, may tend to be greater than the dignity implicated by an appeal on behalf of a publicly-traded corporate entity, which may be more attenuated. In any case, corporate status—and the nature of the corporations’ connection to its constituents—is a source of variation on a dignitary understanding of the inherent value of participation.

Similarly, a claim brought by a provider on assignment from a beneficiary raises a diminished dignitary stake, because the person whose deservedness for healthcare we are deciding is not actually present in (and has no interest in) the appeal. Thus, the fact of assignment means that the issue at stake in a provider appeal is not whether the claimant is entitled to healthcare, but rather who should pay for healthcare that the provider already decided to provide to the beneficiary. So a provider appeal is more analogous to a subrogation action about who will bear liability than it is to an ordinary benefit decision about an individual’s entitlement to a benefit in the first instance. The provider may have a dignitary stake by virtue of its financial interest—or the fact that the provider’s medical judgment is being questioned—but such an appeal does not implicate the claimant’s dignity as directly as a beneficiary-appeal.

Indeed, the more routine a claimant’s appeal, the less it is a decision about his or her life and the more it is a routine business transaction. For a claimant who appeals numerous claims as part of its business, the appeals process performs a primarily administrative function; in Mashaw’s terms, it is “implementation of previously determined values.”<sup>83</sup> For such a process,

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somehow related to . . . our not being taken seriously as persons.”); *id.* at 164 (“The issue is . . . whether the challenged process sustains or diminishes an appropriate conception of human dignity.”); Stephen N. Subrin & A. Richard Dykstra, *Notice and the Right to Be Heard: The Significance of Old Friends*, 9 HARV. C.R.-C.L. L. REV. 449, 457 (1974) (“By asking to hear from litigants and listening to them, the ‘system’ is treating them with a dignity consonant with their self-image as human beings.”).

81. See Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 103 n.15 (1978) (Marshall, J., concurring in part and dissenting in part) (quoting L. TRIBE, AMERICAN CONSTITUTIONAL LAW 503, § 10-7 (1978)).

82. Mashaw analogizes the right to procedural justice to the right to vote. MASHAW, *supra* note 2, at 163.

83. Jerry L. Mashaw, *Conflict and Compromise Among Models of Administrative Justice*, 1981 DUKE L.J. 181, 188 (1981).

a focus on administrative efficiency rather than fairness is appropriate.<sup>84</sup> But for a claimant motivated by principle—who views her own appeal as unique—the process is better understood as performing a “value defining” function that does trigger a dignity interest, and with it a need for participation.<sup>85</sup> As a result, the factors that tended to indicate greater inherent value on psychological theories do so under a dignitary theory as well.<sup>86</sup>

### C. Solum’s Legitimacy Theory

Several scholars have articulated a vision of the inherent value of process based on the legitimizing effect that participation has on a disappointing decision.<sup>87</sup> Lawrence Solum offered an understanding of this view in *Procedural Justice*<sup>88</sup> that has, in a short time, earned the attention of a number of proceduralists.<sup>89</sup>

In Solum’s view, the inherent value of process comes not only from its psychological effect but also from its capacity to give decisions normative legitimacy. “[A] core right of participation is essential for the [normative] legitimacy of adjudication.”<sup>90</sup> By “normative legitimacy,” Solum means something more objective than “the legitimacy that is required for the important social goods of voluntary compliance and social stability.”<sup>91</sup> And it is not based solely on the dignitary value of participation for the individual. Rather, to Solum, normative legitimacy is desirable because it creates “content-independent obligations.”<sup>92</sup> Or, to be more precise, a procedurally “just” decision-making process transfers the obligatory power of a “just” (but necessarily general and therefore ambiguous) substantive

84. *Id.*

85. *Id.* at 206–07 (“The question of appropriateness of the mode of proceeding must be addressed from a perspective that considers . . . the dominant and subsidiary substantive goals of a program.”); *see also id.* at 208 (“[T]he Court would have done better to rest its distinction between the overpayment and fault determinations on grounds relating to appropriate models of justice.”); *id.* at 211 (“[T]he basic question is not which technique is more accurate, but which is more appropriate to the question to be resolved.”).

86. To be sure, Mashaw sees the inherent value of participation as a “political” value rather than a “psychological” value—he cares about a person’s dignity whether they do or do not. MASHAW, *supra* note 6, at 171 (“We are not exploring what processes make people *feel* dignified or have self respect.”). But he nonetheless sees dignity as connected to a person’s experience and state of mind. *Id.* In this way, dignitary value can be “a question about individual psychology,” even if the value is by nature political rather than psychological. *Id.*

87. *E.g.*, Resnik, *supra* note 7, at 609 (participation as way of “providing the dialogue prerequisite to compulsion”).

88. Solum, *supra* note 18, at 275.

89. *E.g.*, Elizabeth Chamblee Burch, *Procedural Justices in Nonclass Aggregation*, 44 WAKE FOR. L. REV. 1, 8 (2009) (citing Solum); Jaime Dodge, *The Limits of Procedural Private Ordering*, 97 VA. L. REV. 723, 765 (2011) (same); A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 23, 1, 23 (2009) (same).

90. Solum, *supra* note 18, at 274.

91. *Id.*

92. *Id.* at 278.

law into a particularized judgment that binds the parties to it, notwithstanding the inevitability of error.<sup>93</sup>

Solum's theory of procedural justice is of little independent use in assessing the value of participatory process in Medicare (and whether it varies from claimant to claimant). First, Solum's theory does not apply to the procedures that govern the administration of benefit determinations. With an eye to the Federal Rules of Civil Procedure,<sup>94</sup> Solum offers a theory of the qualities a procedure must possess in order to render a judgment that is normatively binding on the parties, that is, that gives them an obligation to comply (even if they disagree).<sup>95</sup> But in the world of Medicare appeals—or indeed any sort of entitlement appeal—compliance with the ultimate “judgment” is a given. When an appeal is granted, the government has not “lost,” it has merely changed its position about the claimant's entitlement, and we can expect government agents to act in accordance with that position by virtue of their duty to follow the law. And while a claimant can “lose” an entitlement appeal, there is no need to ensure the claimant's compliance in such a case. The claimant need do—and can do—nothing at that point to ensure compliance. Of course, the claimant may be dissatisfied, angry, or take action against the government, but Solum's is a theory of the procedures that produce *normative* obligation, not the procedures that produce compliance in the real world.<sup>96</sup>

Second, Solum views his normative legitimacy theory as a supplement to, not a replacement for, psychological accounts of the inherent value of process.<sup>97</sup> Therefore, even in Solum's view, the inherent value of process in a case can vary from appeal to appeal as discussed above, but all the variation happens on the psychological dimension, not on the “normative legitimacy” dimension.

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In sum, the inherent value of participation varies from claimant to claimant in ways that are marked among Medicare claimants. Specifically, the following factors are relevant for predicting the inherent value of participation: (1) whether a claim is brought directly by a provider (such as a hospital or a durable medical equipment manufacturer) on assignment or

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93. *See id.* at 238 (“A conception of procedural justice specifies the conditions under which the application of the norms of corrective justice to particular cases is fair.”).

94. *Id.* at 241 (“Our investigation will focus on the civil action at the trial level.”).

95. *Id.* at 274 (“How can we regard ourselves as obligated by legitimate authority to comply with a judgment that we believe (or even know) to be in error with respect to the substantive merits?”).

96. *Id.* (“Satisfaction that is merely subjective cannot confer normative legitimacy—although it may provide the legitimacy that is required for the important social goods of voluntary compliance and social stability.”).

97. *Id.* at 273–74 (“[S]atisfaction with the process is not *the whole story* about procedural fairness.” (emphasis added)). “[L]itigants may feel more satisfied by adjudication that affords them the opportunity to tell their story in a meaningful way.” *Id.* “But the focus of this part of the Article is not on accuracy or satisfaction.” *Id.*

by a beneficiary (eighty-five percent of appeals are provider-initiated);<sup>98</sup> (2) whether the claimant is a corporate entity; and (3) whether the claimant is a serial filer in the appeals process or a first-time filer.

### III. PROCESS SCARCITY

Where the inherent value of process varies among claimants, as in Medicare, it is not theoretically desirable to ration process among claimants unless an additional boundary condition is met: participatory protections must be scarce, meaning that there are insufficient resources to provide every claimant with the full measure of procedural justice.<sup>99</sup> Scarcity is a pragmatic, normative boundary condition to procedural triage, as explained in Part III.A, and this condition is satisfied in Medicare, as explained in Part III.B.

#### A. *Process Scarcity As a Boundary Condition for Procedural Triage*

Without scarcity, rationing process among claimants would run afoul of our background commitment to procedural justice. This is because absent perfect information, any means of tailoring the distribution of procedural protections among claimants would inevitably mean denying a hearing to some claimants who might have derived enough inherent value from the hearing to be worthwhile. Even if we know enough to say that a hearing has no inherent value for some claimants, we are unlikely to find an error-proof way to deny procedural protections only to those claimants.<sup>100</sup>

In the absence of scarcity, the fact that any method of rationing process will mean denying a hearing to some for whom it would be worthwhile would serve as the basis for a potentially fatal normative objection. Those who are passionate about procedure could object to any such rationing mechanism on the grounds that it violates our background commitment to procedural justice. Supporters of rationing could point only to any monetary savings generated, triggering the long running debate about whether and when adjudicatory processes should sacrifice procedural justice for efficiency.

Process scarcity changes this debate. In the presence of scarcity, rationing process is inevitable. The question becomes not whether to sacrifice participation, but how best to do so, making procedural triage a potentially desirable option. When process is scarce and its value varies, we can sacrifice the participation of some not for efficiency, but rather for enhanced overall participation.

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98. 2012 OIG REPORT, *supra* note 19, at 8 (reporting that in FY 2010, beneficiary appeals were 11 percent of total volume and 3 percent were state Medicaid agency appeals).

99. “Full measure of procedural justice” here means all those procedures that are worth the cost, incorporating the inherent value of participation.

100. *See infra* Part IV.C.1–2 (informational problems and market failures make error inevitable).

To be sure, there are those who are skeptical that participation has inherent value that should be given heightened importance in designing adjudicatory procedures.<sup>101</sup> Such skeptics may object to treating process scarcity as a boundary condition for rationing process. Furthermore, there may be circumstances in which the efficiency gains that come from treating claimants differently are so extreme as to make procedural triage obviously permissible even in the absence of scarcity.

Whatever one thinks of the inherent value of process, however, any triage-based solution to Medicare's backlog problem would be unlikely to get very far in the absence of process scarcity. There is a consensus among scholars of healthcare rationing that an individual appeal is a necessary component of any rationing program.<sup>102</sup> Similarly, among scholars of adjudicatory design, there may not be a consensus, but there is at least a chorus of believers in the paramount value of participation.<sup>103</sup> And finally, belief in the inherent value of participation is reflected in the political dialogue about Medicare's procedures.<sup>104</sup>

This emphasis on the inherent value of participation in designing Medicare's coverage appeals process is appropriate. The inherent value of participation can be difficult to measure precisely, though scholars in psychology have tried with some success to measure the psychological

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101. KAPLOW & SHAVELL, *supra* note 18, at 228 n.6; Solum, *supra* note 18, at 265 n.213 (collecting sources).

102. See generally NORMAN DANIELS & JAMES E. SABIN, SETTING LIMITS FAIRLY: CAN WE LEARN TO SHARE MEDICAL RESOURCES? (2002) (stating that insurers, whether public or private, should offer a right to appeal adverse coverage decisions); TIMOTHY JOST, HEALTH CARE COVERAGE DETERMINATIONS: AN INTERNATIONAL COMPARATIVE STUDY (2004); Mark A. Hall & Gerard F. Anderson, *Health Insurers' Assessment of Medical Necessity*, 140 U. PA. L. REV. 1637, 1680–81 (1992) (making the case that independent reviewers should be empowered to reconsider coverage decisions on a case-by-case basis, but arguing against relying on courts to perform this function).

103. See, e.g., MASHAW, *supra* note 6, at 259–60; Miller, *supra* note 15, at 60–61; Martin H. Redish & William J. Katt, Taylor v. Sturgell, *Procedural Due Process and the Day-in-Court Ideal: Resolving the Virtual Representation Dilemmas*, 84 NOTRE DAME L. REV. 1877, 1880 (2000) (value of participation is “extremely high but not absolute”); Saphire, *supra* note 6, at 122–23; Solum, *supra* note 18, at 320–21; Robert S. Summers, *Evaluating and Improving Legal Processes—A Plea for “Process Values”*, 60 CORNELL L. REV. 1, 4–5 (1974); Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 279–80 (1978) (process values have become “consensus values” acknowledged by “the scholarly community and acknowledged by Congress”).

104. When in the 1980s the procedures were made to deny an ALJ hearing for fee-for-service appeals arising in Medicare Part B (governing outpatient care), the resulting outcry led to the right to a hearing now embedded in the statutory text. H.R. REP. NO. 99-727, at 95 (1986) (discussing fairness as reason for change); Eleanor D. Kinney, *Medicare Beneficiary Appeals Process*, in GUIDE TO MEDICARE COVERAGE DECISION-MAKING AND APPEALS 70 (2002) (discussing change). The Centers for Medicare and Medicaid Services—the agency responsible for administering Medicare—itsself has listed generation of acceptance of adverse coverage decisions as a primary purpose of adjudicatory procedures to review healthcare coverage decisions. See Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Internal Claims and Appeals and External Review Processes Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 43,330, 43,341 (July 23, 2010) (“[A] full[] and fair[] system of claims and appeals processing [can] facilitate enrollee acceptance of cost management efforts.”).

benefit of “fair” process.<sup>105</sup> But the difficulty of measuring the inherent value of participation should not be taken as a reflection of its importance.<sup>106</sup>

The potential of participating in an adjudicatory process to promote acceptance is especially important when it comes to decisions about healthcare coverage.<sup>107</sup> Beneficiaries’ willingness to make use of a public entitlement program like Medicare may depend in part on the trust that they put in the operation of the program.<sup>108</sup> Furthermore, managed care failed in part because its efforts to cut back on healthcare expenses, which sounded promising in theory, were subject to public outcries by disappointed claimants. Cases of this basic type persist to this day; it has become a familiar tune.<sup>109</sup>

If we hope not only to get coverage decisions right but also to get them accepted by the people that matter—disappointed claimants—we must use every tool at our disposal, and participatory process is an especially promising one. Indeed, the need for such tools to make healthcare rationing decisions more palatable will only increase as healthcare costs rise as compared to gross domestic product.<sup>110</sup> So our hesitation to curb procedural protections solely in the name of efficiency should be especially pronounced in healthcare.

Finally, an independent objection to procedural triage—inequality—also is vitiated in the presence of process scarcity. A surging view in scholarship on procedural design sometimes sees equality as an underappreciated administrative consideration that should be considered on par with procedural justice and efficiency.<sup>111</sup> This view finds support in

105. See generally Hollander-Blumoff, *supra* note 66 (providing a overview of empirical work); Solum, *supra* note 18, at 213 (collecting several dozen sources from “procedural justice” literature). But see Paul G. Chevigny, *Fairness and Participation*, 64 N.Y.U. L. REV. 1211, 1212 (1988); KAPLOW & SHAVELL, *supra* note 18, at 212 n.613 (offering alternative explanations for observed results).

106. It is difficult enough to measure the effect of legal rules on more easily measurable outputs, like mortality or gun violence. To measure the effect of a legal process (not just a rule) on a psychological or normative output, like acceptance or dignity, is even more difficult.

107. See generally Rand E. Rosenblatt, *Health Care Reform and Administrative Law: A Structural Approach*, 88 YALE L.J. 243 (1978) (advocating greater use of participatory structures in healthcare decision making).

108. See Marianne Bertrand et al., *A Behavioral-Economics View of Poverty*, 94 AM. ECON. REV. 419, 422 (2004).

109. Leada Gore, *Morbidly Obese Girl with Rare Condition Will Receive Gastric Bypass Surgery After Tricare Reverses Earlier Denial*, AL.COM (Mar. 20, 2014, 8:58 AM), [http://blog.al.com/wire/2014/03/morbidly\\_obese\\_girl\\_with\\_rare.html](http://blog.al.com/wire/2014/03/morbidly_obese_girl_with_rare.html) [<http://perma.cc/YZJ3-QRKC>].

110. See MARK A. HALL, MAKING MEDICAL SPENDING DECISIONS: THE LAW, ETHICS, AND ECONOMICS OF RATIONING MECHANISMS 3–5 (1997) (stating that “medical advances” will not “eventually reduce medical spending by making people fundamentally healthier” because “[m]edical needs are inherently limitless”).

111. E.g., Lahav, *supra* note 15, at 435 (discussing possibility of justifying sampling by “favoring equality over liberty”); see also Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 484 (1986) (discussing equality as process value); Robinson & Abraham, *supra* note 6, at



Mashaw's and Solum's theories of procedural justice, which also list equality as an important procedural value.<sup>112</sup>

Procedural triage in the face of claimant variation and process scarcity would not violate this equality concern, because any differential treatment would be neither arbitrary nor based in animus. It would be a deliberate response to differences among claimants, designed to improve the welfare of claimants overall. As such, even a mandatory approach to procedural triage would not raise constitutional equality concerns and also would be permissible under Solum's view of procedural justice.<sup>113</sup> Any approach to procedural triage that incorporated claimant consent, as does this Article's ultimate proposal, would avoid equality concerns for that reason, as well.

### B. Process Scarcity in Medicare

Procedural triage is theoretically desirable in Medicare because process is indeed scarce. To be sure, the backlog of Medicare claims does not alone show that there are not enough resources to give every claimant a prompt hearing, because the process might be designed poorly. If alternative design changes could remove Medicare's hearing backlog without sacrificing procedural protections, then rationing process could not be defended as unavoidable. However, no such alternative fix is on the horizon.

First, an obvious way to alleviate the backlog would be to increase the budget for hearings enough to meet current demand. But Congress is unlikely to appropriate the funds necessary to "fix" the budgetary problem.<sup>114</sup> This is due not only to the difficult budgetary environment, but also to the fact that ALJs have life tenure, making it very difficult and especially costly to ramp up ALJ capacity quickly or on a temporary basis.<sup>115</sup>

Second, the problem in Medicare's coverage appeals process also could be understood as one of the volume of would-be claimants; if there were

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1503 ("A system designed so that all claimants cannot enjoy the same due process 'right' . . . arguably denies the latter the equal protection of the laws.").

112. Solum, *supra* note 18, at 277–78.

113. *See id.* at 287–88 ("If others are afforded a right of participation, but I am *arbitrarily* denied this right, I have been treated unequally and have a right to complain . . . ." (emphasis added)).

114. In 2013, more than four appeals were filed for every one appeal resolved. *See* OMHA PowerPoint, *supra* note 8, at 16. A four-fold increase in the budget to resolve appeals would require an appropriation of \$348,044,000. DEP'T OF HEALTH AND HUMAN SERVS., FY 2016 BUDGET IN BRIEF, <http://www.hhs.gov/about/budget/budget-in-brief/omha/> (reporting that OMHA budget in FY 2015 was \$87,011,000) [<http://perma.cc/4RB3-5S6D>]. Congress is aware of the backlog, but its latest effort is a draft bill that would require the agency to produce a report within 180 days, proposing steps to alleviate the backlog. *See* COUNCIL FOR MEDICARE INTEGRITY, INSIDE CMS: SENATORS USE HHS APPROPS BILL TO PUSH MEDICARE APPEALS SYSTEM FIX (2014), <http://medicareintegrity.org/inside-cms-senators-use-hhs-approps-bill-to-push-medicare-appeals-system-fix/> [<http://perma.cc/483V-48NQ>].

115. By statute and regulation, ALJ examination and hiring is managed by the Office of Personnel Management. 5 C.F.R. § 930.201 (2015).

fewer appeals, there would be no backlog. But a volume-based solution is also unlikely to work. We could reduce the volume of claimants by reducing the scrutiny Medicare applies to coverage claims—and so the number of denials—as the American Hospital Association has urged.<sup>116</sup> But such a solution would trade a volume problem for an overtreatment (and overpayment) problem.<sup>117</sup> Similarly, while some contractors have argued that the volume of appeals could be reduced by increasing the predictability of ALJ decisions,<sup>118</sup> Medicare already seeks to make coverage predictable insofar as it is able to through its “National Coverage Determination” process.<sup>119</sup> Like the social security disability cases that Mashaw studied,<sup>120</sup> the disputes that populate the backlog surround irreducibly uncertain questions of professional judgment<sup>121</sup> as to which “medicine is more art than science.”<sup>122</sup> Therefore, a volume-based solution is unlikely, as well.<sup>123</sup>

Neither a budget- nor volume-based solution is likely to work, so the scarcity condition is met. Medicare must confront, for the time being, the

116. See Letter from Am. Hospital Ass’n to Marilyn Tavenner, Adm’r of the Ctrs. for Medicare & Medicaid Servs. (Jan. 14, 2014), <http://www.aha.org/advocacy-issues/letter/2014/140114-let-aljdelays.pdf> [<http://perma.cc/6UE2-36XC>].

117. Medicare needs to scrutinize claims for coverage if it is to control costs and ensure that beneficiaries are not needlessly subjected to unnecessary or frivolous treatments. That is why the Affordable Care Act instructed Medicare to continue to scrutinize claims closely and ordered this scrutiny be expanded to Medicaid. Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, § 6411, 124 Stat. 119, 773–75 (2010).

118. See Press Release, Health Data Mgm’t, Medicare Recovery Audit Contractors Ask Congress for Changes (Jan 15, 2014), <http://properpayments.org/medicare-recovery-audit-contractors-ask-congress-for-changes/> [<http://perma.cc/H724-G2HM>].

119. See generally JOST, *supra* note 102 (discussing National Coverage Determination process); KINNEY, *supra* note 104, at 5, 18–20; ELEANOR D. KINNEY, *GUIDE TO MEDICARE COVERAGE DECISION-MAKING AND APPEALS* (2002); RICHARD A. RETTIG, *HEALTH CARE IN TRANSITION* (1997).

120. See JERRY L. MASHAW ET AL., *ADMINISTRATIVE LAW* 457 (4th ed. 1998) (“[T]he fact-based, highly contextual decision making involved in the [social security] disability program simply cannot be structured through precedent. Variation among ALJs is something like the variance that one would expect from one-person juries applying the ‘reasonable person’ standard.”).

121. These might be “legal” questions about medical science where rulemaking is not possible, or “factual” questions entailing application of established coverage standards to the facts of a particular patient’s case in light of judgments about the severity of symptoms, characterization of past history, and so on. See David M. Eddy, *Variations in Physician Practice: The Role of Uncertainty*, 3 *HEALTH AFF.* 74, 75 (1984) (“Uncertainty creeps into medical practice through every pore. Whether a physician is defining a disease, making a diagnosis, selecting a procedure, observing outcomes, assessing probabilities, assigning preferences, or putting it all together, he is walking on very slippery terrain. It is difficult for nonphysicians, and for many physicians, to appreciate how complex these tasks are, how poorly we understand them, and how easy it is for honest people to come to differen[t] conclusions.”).

122. See HALL, *supra* note 26, at 84; see also ALAIN C. ENTHOVEN, *HEALTH PLAN: THE PRACTICAL SOLUTION TO THE SOARING COST OF MEDICAL CARE* 4 (2002).

123. A third volume-based solution is Phyllis Bernard’s proposal to have doctor and patient work together on a mediated treatment plan prior to service. See generally Phyllis E. Bernard, *Mediating with an 800-Pound Gorilla: Medicare and ADR*, 60 *WASH. & LEE L. REV.* 1417, 1449 (2003). Absent a significant upfront investment and alteration to the Medicare program of the sort Bernard recommends, that solution is not feasible.

condition of “process scarcity”<sup>124</sup> which has afflicted many other administrative processes at various times, from Veterans’ Benefits to the Environmental Protection Agency (EPA). Because the inherent value of procedural protections also varies from claimant to claimant, Medicare could theoretically make the most of its present condition of process scarcity by engaging in procedural triage, rationing procedural protections among claimants based on need.

#### IV. OPERATIONALIZING PROCEDURAL TRIAGE: A BEHAVIORAL APPROACH

Procedural protections are scarce in Medicare, and their inherent value varies from claimant to claimant. So Medicare could theoretically improve welfare by rationing process among claimants, providing the claimants who benefit most from participation with more and those who benefit least with less, *if* a way can be found to do so that creates more net benefits than costs.

That is a big “if.” Distributing procedural protections on the basis of the inherent value of participation for particular claimants is easier said than done, which has caused the few scholars who have recognized the theoretical possibility of variation to nonetheless assume claimant homogeneity.<sup>125</sup> That choice is understandable.

As elaborated in this part, a number of special features of the product that is participatory process make it especially difficult to ration among claimants in practice. These include: the relationship between accuracy and participation; the difficulty of measuring the inherent value of participation to a particular claimant; the abstract nature of the inherent value of participation; and the information asymmetry between claimants and adjudicatory designers.

This part works through these obstacles—with the help of behavioral economics—to identify how Medicare could nonetheless harness the variation in its claimant population to add value by engaging in procedural triage. It begins by identifying, in Part IV.A, five considerations that affect the costs and benefits of any rationing mechanism: effect on accuracy, participation value, effect on primary behavior, transaction cost, and legality.

Because the first of these considerations (effect on accuracy) is a primary consideration in adjudicatory design, Part IV.B suggests a way for Medicare to engage in procedural triage without undermining accuracy by splitting its administrative process into two tracks: one optimized for accuracy and the other for participation. Part IV.C then applies the remaining considerations to evaluate libertarian, paternalistic, and behavioral approaches to sifting claimants between these two tracks. It concludes by recommending that Medicare should ration process among claimants using a behavioral approach.

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124. The term “process scarcity” was brought into legal scholarship by Robert Bone. *See generally* Bone, *Statistical Adjudication*, *supra* note 6.

125. *See generally supra* note 7.

### A. Considerations

*Effect on accuracy:* A primary consideration for any method of rationing process is the associated effect, if any, on the accuracy of the adjudicatory system.<sup>126</sup> Indeed, in the view of some, the entire purpose of the adjudicatory process is to encourage accurate administration.<sup>127</sup>

Accuracy is threatened by many methods of rationing process because accuracy and participation are often tied together.<sup>128</sup> Participatory procedural protections promote not just participation, but also accuracy, even where they do not do so as cost effectively or as well as alternative administrative tools. So a system that gives some claimants less procedural protection than others risks rationing not just process but also accuracy as to those claimants' claims, and this possibility must be accounted for in weighing the desirability of particular approaches to rationing process.

*Participation value:* The goal of procedural triage is to increase a second output of the administrative process, namely, the inherent value of participation derived from a particular distribution of procedural entitlements to claimants. This Article calls this "participation value," but it also can be thought of as "procedural utility,"<sup>129</sup> "process value,"<sup>130</sup> "process significance,"<sup>131</sup> or even as a version of Michelman's "demoralization cost."<sup>132</sup> Indeed, as will be shown in Part IV.B, the participation value of Medicare hearings is what makes them worthwhile despite the existence of other more streamlined alternatives. The reason that triage may be worthwhile is that this value varies from Medicare claimant to Medicare claimant as discussed above in Part II. This combination creates room to generate greater overall participation value

126. See Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307, 307–08 (1994) ("One might go so far as to say that a large portion of the rules of civil, criminal, and administrative procedure and rules of evidence involve an effort to strike a balance between accuracy and legal costs."); Robert S. Summers, *Evaluating and Improving Legal Processes—A Plea for "Process Values"*, 60 CORNELL L. REV. 1, 17–18 (1974) (proposing that accuracy come first in designing legal process that takes into account inherent value of participation).

127. See Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319, 323 (2008) (discussing this vision of procedure); Roscoe Pound, *Some Principles of Procedural Reform*, 4 U. ILL. L. REV. 491, 508 (1909) ("[T]he court should have full power to make whatever order the whole case and complete justice in accord with substantive law may require.").

128. To be specific, "accuracy" here means "the correspondence of the substantive outcome of an adjudication with the true facts of the claimant's situation and with an appropriate application of the relevant legal rules to those facts." CHARLES H. KOCH ET AL., *ADMINISTRATIVE LAW: CASES & MATERIALS* (quoting Jerry Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772, 774 (1974)).

129. Bruno S. Frey et al., *Introducing Procedural Utility: Not Only What, but Also How Matters*, 160 J. INSTITUTIONAL & THEORETICAL ECON. 377, 377 (2004).

130. Summers, *supra* note 126, at 4.

131. Amartya Sen, *Maximization and the Act of Choice*, 65 ECONOMETRICA 745, 745 (1997).

132. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214 (1967).

through a more careful distribution of the system's scarce procedural resources.

*Effect on primary behavior:* Third, certain mechanisms for rationing process could affect the primary behavior of claimants, who may behave in the shadow of the rules of procedure.<sup>133</sup> For example, Part II noted that first-time filers tend to derive greater inherent value from participation than repeat players. A rule simply denying hearings to serial filers, however, could distort some providers' decisions of whether to accept assignment, a result that could pose its own benefits or costs.

*Transaction cost:* Fourth, we must take into account the added administrative cost, if any, associated with a given method of rationing process.

*Legality:* In addition to these costs and benefits, Medicare faces both constitutional and legal constraints on the design of its administrative processes. The Due Process Clause applies to Medicare coverage decisions, and the Medicare statute specifies particular procedures that the Secretary of Health and Human Services ("the Secretary") should follow.<sup>134</sup> While these legal considerations do not affect the cost or benefit of any particular rationing proposal, they act as constraints that must be kept in mind in weighing the feasibility of potential means of rationing process.

#### *B. A Two-Track Process Would Avoid Accuracy Costs*

Because promoting accurate administration is a primary value in designing any adjudicatory process, any method of procedural triage that leads to suboptimal accuracy may well be cost prohibitive. Specifically, simply denying some claimants the ability to appeal adverse coverage decisions altogether would deny those claimants both participation *and* a means of quality control in Medicare. While a wheelchair manufacturer denied a right to a hearing altogether might be no worse off from a procedural justice perspective, unless there is some alternative means for ensuring the quality of decision making on the manufacturer's claims, the manufacturer (and its customers) may then be subjected to a higher net denial rate as a result. Such an adverse effect on the accuracy of the administrative process could well outweigh whatever benefits otherwise result from procedural triage.

Medicare could ration participatory protections among claimants without creating this problem by splitting its adjudicatory process into two tracks: one focused on cost-effective but accurate resolution of claims by any means necessary and the other constrained to provide participatory procedural protections. The result would be a split adjudicatory process analogous to the federal courts prior to the merger of law and equity.<sup>135</sup>

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133. See generally Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

134. See *supra* note 47 and accompanying text.

135. The two-track process proposed here would be analogous to the law-equity divide insofar as it would offer two distinct adjudicatory processes for resolution of the same sorts of substantive claims; insofar as one such process would be tailored toward fairness, the

Here, however, one track would be optimized for efficiency (rather than tailored to remedies at law) and the other for participation (rather than tailored to equitable remedies). In Mashaw's terms, the efficiency track would reflect the "bureaucratic rationality" model of administrative process, and the participation track would reflect the "moral judgment" model.<sup>136</sup>

Such a two-track approach could lower administrative costs in the efficiency track without creating accuracy costs because participation is not the most cost-effective way to ensure accuracy in Medicare's administrative process. Procedure scholars will not be surprised at this conclusion, because participation and accuracy are often in tension.<sup>137</sup> More streamlined methods have been used to promote accuracy more cost-effectively in resolving claims in many areas of the law. For example, Medicare's approach to monitoring its administrative contractors' reopening decisions does not include adjudication at all.<sup>138</sup> Similarly, mass disaster relief programs such as the Gulf Coast Claims Fund have used their own streamlined processes to distribute funds without providing a participatory hearing to every claimant.<sup>139</sup> Inquisitorial systems can be used to achieve accuracy more cost effectively while affording claimants diminished opportunities for participation.<sup>140</sup>

Just so in Medicare, where more streamlined administrative technologies could resolve claims as accurately, or nearly as accurately, as live hearings and would come at a fraction of the cost. For one, statistical sampling techniques (what Robert Bone calls "actuarial litigation")<sup>141</sup> could be used

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other would be toward efficiency. There are ways, however, in which the analogy breaks down. Most importantly, while "law" procedures and "equity" procedures governed the same sorts of substantive claims, different remedies were available through each set of procedures. *See* FED. R. CIV. P. 2 (abolishing division between equity procedure and law procedure, except for certain limited exceptions); Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 430 (2003) ("Equity moderates the rigid and uniform application of law by incorporating standards of fairness and morality into the judicial process."); Jacqueline M. Nolan-Haley, *The Merger of Law and Mediation: Lessons from Equity Jurisprudence and Roscoe Pound*, 6 CARDOZO J. CONFLICT RESOL. 57, 58 (2004) ("[E]quity . . . offer[ed] a form of 'individualized justice' unavailable in the official legal system.").

136. *See* Mashaw, *supra* note 83, at 184–90.

137. *See infra* Part V.B.

138. *See* Palomar Med. Ctr. v. Sebelius, 693 F.3d 1151, 1165 (9th Cir. 2012).

139. *E.g.*, BDO CONSULTING, INDEPENDENT EVALUATION OF THE GULF COAST CLAIMS FACILITY: EXECUTIVE SUMMARY (2012), [http://media.nola.com/2010\\_gulf\\_oil\\_spill/other/BDO%20Executive%20Summary.pdf](http://media.nola.com/2010_gulf_oil_spill/other/BDO%20Executive%20Summary.pdf) [<http://perma.cc/RNE8-NQCN>].

140. *See* OMHA, Statements of C.F. Moore, Deputy Chief Admin. Law Judge, and Robert Fisher, Admin. Law Judge (Feb. 12, 2014) (notes on file with author); *see also* Mark Spottswood, *Live Hearings and Paper Trials*, 38 FLA. ST. U. L. REV. 827, 837 (2011) ("[V]isually observing witnesses at best contributes nothing to a credibility determination and at worst increases the likelihood that a fact-finder will get it wrong."); Allan A. Toubman et al., *Due Process Implications of Telephone Hearings: The Case for an Individualized Approach to Scheduling Telephone Hearings*, 29 U. MICH. J.L. REFORM 407, 416 n.31 (1995) (listing sources doubting usefulness of in-person credibility determinations).

141. On statistical sampling generally, *see* Michael D. Sant'Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 COLUM. L. REV. 1992, 2061 (2012) ("Sampling uses a subset of individuals from within a population to yield some knowledge about the whole population. Sampling lowers costs, speeds data collection, and, because the sample

in order to determine the error rate for groups of appealed claims—say, knee brace claims in a given geographic region—with reimbursement in the run of claims based on the rate of success for analogous claims in the sample. Just as sampling and bellwether trials are used to resolve thousands of claims in federal court and alternative dispute resolution,<sup>142</sup> such a method has the potential to create substantially the same aggregate accuracy, and accompanying incentive effects on utilization reviewers, as individual treatment for a fraction of the cost. Indeed, Medicare has recently begun a pilot project to experiment with limited statistical sampling on a subset of coverage appeals.<sup>143</sup>

Even for those cases not amenable to “actuarial litigation,” individual adjudication could be streamlined significantly. In lieu of live hearings, the efficiency track could employ the paper hearing process that the Affordable Care Act sets up to resolve analogous healthcare coverage disputes in the private sector.<sup>144</sup> Rather than presenting evidence and testimony in a live hearing before an ALJ, claimants would have their appeals decided solely on the basis of written filings by board-certified clinicians.<sup>145</sup> This process costs the private insurance companies required to use it about half as much as the live hearings currently used in Medicare,<sup>146</sup> but does not appreciably diminish accuracy.<sup>147</sup>

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surveyed is smaller, ensures higher quality and more consistency in the information gathered.”); Robert G. Bone, *A Normative Evaluation of Actuarial Litigation*, 18 CONN. INS. L.J. 227 (2011); Bone, *Statistical Adjudication*, *supra* note 6; Alexandra D. Lahav, *The Law and Large Numbers: Preserving Adjudication in Complex Litigation*, 59 FLA. L. REV. 383, 435 (2007); Laurens Walker & John Monahan, *Sampling Damages*, 83 IOWA L. REV. 545, 567 (1998).

142. *E.g.*, *Cimino v. Raymark Indus., Inc.*, 751 F. Supp. 649, 651 (E.D. Tex. 1990), *vacated in part*, 151 F.3d 297 (5th Cir. 1998); *see also* Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 582–85 (2008).

143. *See Griswold Statement*, *supra* note 51.

144. For a description of the private-sector coverage appeals process, see Roy F. Harmon, *An Assessment of New Appeals and External Review Process—ERISA Claimants Get “Some Kind of a Hearing”*, 56 S.D. L. REV. 408, 433 (2011). *See generally* Katherine T. Vukadin, *Hope or Hype: Why the Affordable Care Act’s New External Review Rules for Denied ERISA Healthcare Claims Need More Reform*, 60 BUFF. REV. 1201 (2012).

145. *See* Vukadin, *supra* note 144, at 1211.

146. A paper hearing costs on average \$470–\$690 to conduct. NORTH CAROLINA DEP’T OF INS., HEALTHCARE REVIEW PROGRAM: 2008 ANNUAL REPORT 19, <http://www.ncdoi.com/smart/Documents/ExternalReviewReport11.pdf> [<http://perma.cc/QQ28-V324>]. The average live hearing costs Medicare \$1170. *Compare* DEP’T OF HEALTH AND HUMAN SERVS., JUSTIFICATION OF ESTIMATES FOR APPROPRIATIONS COMMITTEES 4, <https://www.cms.gov/About-CMS/Agency-Information/PerformanceBudget/Downloads/FY2014-CJ-Final.pdf> (reporting that OMHA budget in FY 2012 was \$72,011,000) [<http://perma.cc/D6XA-BPUS>], *with* OMHA PowerPoint, *supra* note 8 (noting that 61,517 were resolved in FY 2012).

147. ALJs in the Medicare process have expressed skepticism about the accuracy benefit of a live hearing. That skepticism is consistent with the fact that decisions are based on the record of doctors’ notes and medical literature. Furthermore, the paper hearings used in the private sector rely on independent clinical experts with subject-matter expertise rather than ALJs. So it is not obvious which is better positioned to come to the “right” answer about the question of professional judgment at issue in most Medicare coverage disputes, i.e., the “medical necessity” of the underlying treatment or service. Once Medicare began operating the efficiency track, it could assess specifically the accuracy benefit, if any, by assigning a group of efficiency track appeals at random to the participation track.

That said, there would be opportunities to streamline the efficiency track above and beyond the reforms mentioned above. Indeed, the efficiency “track” might actually be multiple tracks. This is because when free to focus only on efficiency, it may be possible to particularize procedures within this track to the unique demands of particular claims.<sup>148</sup> Indeed, policymakers need not craft this plethora of process products;<sup>149</sup> they could engage claimants in crafting procedural settlements that propose novel means of resolving groups of claims, as is sometimes done in mass tort litigation.<sup>150</sup>

An efficiency track could use such reforms to provide the same level of aggregate accuracy as the “participation” track, or at least to provide a diminished level of aggregate accuracy that comes at sufficient savings to be worth the tradeoff. In either case, claims on the efficiency track could be resolved at a fraction of the cost of claims on the participation track without creating an accuracy cost.

### C. A Behavioral Approach Would Maximize Participation Benefits

As participation is not the most cost-effective way to promote accuracy in Medicare—because hearings are in this sense inefficient—a two-track process would allow Medicare to triage claimants without sacrificing the accurate administration of claims. But is there a workable means to sort claimants between the “efficiency” track and the “participation” track?

The developing literature on normative behavioral economics provides a starting point for evaluating this question, distinguishing between three sorts of regulatory approaches: (1) choice-based, libertarian regulatory approaches; (2) mandatory, paternalistic regulatory approaches; and (3) hybrid, behavioral regulatory approaches. This section proposes mechanisms for rationing process among Medicare claimants using each sort of approach, evaluates these proposals using the considerations listed in

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148. For example, one set of rules might apply to inpatient hospital admission appeals and another to wheelchair appeals to the extent that the two present different sorts of evidentiary issues. Cf. Frank Sander, Address Before the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice: Varieties of Dispute Processing (Apr. 7–9, 1976), *in* 70 F.R.D. 79 (1976) (conceptualizing civil courts as dispute resolution processes and arguing that alternative processes could better resolve disputes). This sort of tailoring is impossible in a process designed to be accommodating to pro se or unsophisticated claimants, who may not be able to correctly identify the nature of their substantive claim at the outset of a proceeding and thereby shift it onto the right track. That was the reason for the abandonment of particular forms of action in the adoption of the Federal Rules of Civil Procedure. See 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1041 (3d ed. 2004).

149. Policymakers should, however, offer a default set of procedures. This would carry several benefits, including (1) lower transaction costs, resulting from saving claimants the transaction cost of devising their own procedures, (2) lower adjudication costs, resulting from the fact that claimants (and counsel) need become familiar with only one (or a few) sets of procedures, and (3) network effects, resulting from the fact that through repetition and experience, bugs in a particular process can be worked out.

150. Lahav, *supra* note 15, at 416–17 (discussing settlement in Diet Drugs litigation, *In re* Diet Drugs III, 226 F.R.D. 498, 514 (E.D. Pa. 2005), that created “two-tiered appeal system” for resolving claims).



Part IV.A, and ultimately compares all three to a one-size-fits-all approach to rationing process.

As we will see, the operational difficulty of sorting claimants between tracks presents a final obstacle to procedural triage. But it is nonetheless possible to conclude that Medicare should indeed ration process among claimants based on need and that a behavioral approach is the safest way for it to do so.<sup>151</sup>

### 1. Libertarian Approach

The presumptively superior way to sort Medicare claimants would be to allow them to make their own choices about whether the benefit of participation is worth its costs. For example, we might charge claimants wishing to utilize the participation track rather than the efficiency track a heightened filing fee, equal to the cost of a hearing less any subsidy.<sup>152</sup> To mitigate inertia we could use active choosing, forcing claimants to decide whether to pursue the participation track (at some cost) or the efficiency track at the time of filing.<sup>153</sup> And we could even tailor the subsidy to the claimant, based on our assessment of their likely capacity to benefit from procedural protections—beneficiaries might be subject to a lower filing fee than providers, individuals a lower fee than corporate entities, and so on. The presumptive superiority of such an approach comes in part from claimants' specialized information about themselves and their claims, and in part from the normative preference for choice.<sup>154</sup>

*Effect on accuracy:* The only added concern for accuracy posed by a choice-based approach to triage is the possibility of adverse selection. The desire to obtain reversal would lead claimants to make use of whichever procedural track they perceived to give them the best odds in a particular case, perhaps directing cases more likely to bias the adjudicator into the participation track. This threat could be avoided by requiring claimants to

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151. This section concludes that the behavioral approach is the “safest” rather than the “best” way to ration process in Medicare. That is because the goal of this section is to demonstrate that there is a means by which Medicare could improve on the status quo (long delayed live hearings for all claimants) by triaging claimants. As a result, the analysis treats three conditions as constraints: (1) the intervention must not more-than-marginally diminish accuracy, *see supra* Part IV.B; (2) the intervention must not decrease the overall participation value produced by the adjudicatory process, *see infra* Part IV.C.4; and (3) the intervention must not more-than-marginally alter primary behavior, specifically, providers' and suppliers' decisions whether to take assignment of claims from beneficiaries, *see infra* Part IV.C.3. However, note that this conservative approach is not inevitable; a procedural justice skeptic might be comfortable putting a price on participation and so support a system that diminished participation overall while capturing substantial savings. So too, a more aggressive analysis could assign values to accuracy and primary behavior effects in identifying an optimal sorting regime.

152. Rosenberg proposes an approach like this for resolution of mass torts. Rosenberg, *supra* note 7, at 256 n.110.

153. *See* Cass R. Sunstein, *Deciding by Default*, 162 U. PA. L. REV. 1, 39–43 (2013) (discussing arguments in favor of active choosing).

154. Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507, 527 (2011) (discussing presumptive superiority of market-based allocation of procedural entitlements).

choose between the participation route and the efficiency route as to all their claims in a given year.

*Participation value:* Unfortunately, the product that is process to dispute Medicare coverage decisions is subject to two market failures that would tend to distort the demand for participatory process downward, leading claimants to “purchase” too little, even if we subsidize the cost.<sup>155</sup> These possibilities undermine the presumptive efficiency of a market-based approach.<sup>156</sup>

First, on the classical side, it can be difficult to inform claimants about the nature and value of procedural protections.<sup>157</sup> Uninformed claimants may tend to focus on one or two salient characteristics—such as time to decision or cost of appealing—as beneficiaries do when shopping for insurance. Second, on the behavioral side, the inherent value of participation depends to some extent on the potential for being heard, which could soothe a negative emotional reaction to a decision denying coverage. But claimants may fail to anticipate that being heard could have this grievance-soothing effect, due to the tendency to assume static preferences known in behavioral economics as “projection bias.”<sup>158</sup> This possibility is especially pronounced when dealing with patients.<sup>159</sup>

That said, the simple possibility of error does not mean that triage using a market approach would decrease the participation value created by the system rather than increase it. Part IV.C.4 discusses those possibilities and offers an approach to calculating the participation value of Medicare’s process.

*Effect on primary behavior:* A libertarian approach with a flat filing fee and subsidy would have no effect on primary behavior (outside of its accuracy effects). Because a claimant’s entitlement to a hearing would not depend on her status or actions, she would have no incentive under such a regime to take particular actions or obtain any particular status in order to become eligible for a hearing.

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155. Two market failures could be corrected by a subsidy and so are not discussed as distortions above: First, decisions about procedural protections present positive externalities because of the societal value of participation. *See supra* Part II.B–C; Lawrence, *supra* note 21. And second, as Medicare is an entitlement program, many claimants may not be able to afford to pay the cost of a hearing. A special subsidy might be offered for such claimants on the basis of wealth, along the lines of *in forma pauperis* status in federal court.

156. Davis & Hershkoff, *supra* note 154, at 513 (“[P]rivate transactions presumptively are efficient only if there are no negative externalities.”).

157. It can be difficult even to inform a claimant that she has the right to appeal; ensuring she is well informed about the potential benefits of particular procedures is even more difficult. *See* Bone, *Statistical Adjudication*, *supra* note 6, at 624 (offering reasons to doubt that tort plaintiffs could ever fully be informed in making such a choice). *See generally* Lauren E. Willis, *The Financial Education Fallacy*, 101 AM. ECON. REV. 429 (2011) (pointing to shortcomings of disclosure rules).

158. *See generally* Lawrence, *supra* note 21.

159. *See* Jodi Halpern & Robert M. Arnold, *Affective Forecasting: An Unrecognized Challenge in Making Serious Health Decisions*, 23 J. GEN. INTERN. MED. 1708, 1710 (2008); George Loewenstein, *Projection Bias in Medical Decision Making*, 25 MED. DECIS. MAKING 96, 97–98 (2005).

A libertarian approach that varied the filing fee from claimant to claimant could, however, disrupt primary behavior. For example, a heightened filing fee for corporate entities could give hospitals an incentive to change their practices by, say, rearranging their billing practices so that appeals technically would be filed by a doctor rather than the hospital.

*Transaction cost:* Some investment would be required to harmonize claimants' ex ante likelihood of success on each track. Otherwise, if claimants' odds of success would be better on the participation track, then some would avoid it for that reason (and vice versa). To avoid this problem, Medicare could compare samples of appeals from the efficiency track and the participation track in order to make sure that the participation track was not producing a higher reversal rate. This might entail randomly selecting some efficiency track appeals for processing through the participation track, or even processing a sample of claims in both tracks. If the participation track appeals were reversed more often relative to case mix, adjudicators could be encouraged to alter their scrutiny of claims (in either track) to align success rates. For example, compensation of adjudicators in the efficiency track might be tied to the alignment of their decisions with outcomes on the participation track—the decisions of ALJs. Regardless, the results of the study could be published, to provide reassurance to claimants (and their counsel).<sup>160</sup>

*Legality:* A libertarian approach would not run contrary to the statutory mandate for hearings, because the efficiency track would be an optional supplement to the statutory route, not a replacement. The Medicare statute gives the Secretary broad powers to “prescribe such regulations as may be necessary to carry out the administration” of Medicare, pursuant to which she could create the efficiency track for handling coverage appeals.<sup>161</sup> Indeed, she could start by temporarily creating the “efficiency” track as a pilot project, without notice-and-comment rulemaking.<sup>162</sup> Furthermore, the Due Process Clause would not stand in the way because the Supreme Court has been sanguine about consensual agreements to forego procedural rights made in the course of adjudicating a claim, after a dispute has arisen.<sup>163</sup>

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160. The fact that a particular appeal is a bellwether—one of the sample cases upon which a large group of cases would turn—could be kept secret from the ALJ hearing the case to ensure bias does not creep in. See Christopher Tarver Robertson, *Blind Expertise*, 85 N.Y.U. L. REV. 174, 211 (2010) (discussing unconscious bias in adjudicator decision making).

161. 42 U.S.C. § 1395hh(a)(1) (2012).

162. See generally Kristin Madison, *Building a Better Laboratory: The Federal Role in Promoting Health System Experimentation*, 41 PEPP. L. REV. 765, 767–68 (2014) (discussing pilot project authority). See also Eleanor D. Kinney & William M. Sage, *Resolving Medical Malpractice Claims in the Medicare Program: Can It Be Done?*, 12 CONN. INS. L. J. 77, 97 (2005) (discussing pilot project authenticity).

163. See *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 184–86 (1972). See generally Lawrence, *supra* note 21. Pre-dispute agreements can be more problematic. Lawrence, *supra* note 21.

## 2. Paternalistic Approach

Instead of relying on claimants' choices, Medicare could distribute procedural entitlements paternalistically, by mandate. Medicare could pick and choose which claimants deserve a live hearing one-by-one, much as judges evaluate whether plaintiffs are constitutionally deserving of access to federal court by applying standing criteria case-by-case.<sup>164</sup> Or, a blanket rule could be used to sort claimants somewhat less accurately without the transaction cost of individualized determinations. For example, hearings could be given to beneficiaries but not to providers, or to individuals but not corporate entities.<sup>165</sup> Mandatory rationing, however, also has limitations.

*Legality:* A first, practical problem is that a mandatory approach to rationing process would require a change in the law. The Medicare statute's promise of healthcare coverage creates a constitutional entitlement, so the Due Process Clause of the Fifth Amendment dictates coverage cannot be denied without affording, at least, the right to an individualized hearing.<sup>166</sup> As a result, an administrative process that did not offer everyone who has a constitutionally cognizable claim, providers or beneficiaries, with at least a paper hearing would be at risk of constitutional attack.<sup>167</sup> Furthermore, the Medicare statute separately grants providers as well as beneficiaries a right to a live hearing, so a statutory change would be required to triage claimants paternalistically.<sup>168</sup>

*Effect on accuracy:* A paternalistic approach to triaging claimants would not have an adverse effect on the accuracy of Medicare's administrative process so long as a two-track system is used to unbundle participation and accuracy as described in Part IV.B.

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164. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 (1992).

165. The possibility of treating providers and beneficiaries differently by *fiat* has as its inspiration OMHA. Recent practice allows those claimants who self-identify as beneficiaries to forward their appeals to a specific address first in line, ahead of provider appeals in the backlog. See *Griswold Statement*, *supra* note 51, at 4. While this practice does not save resources and therefore does not alleviate the backlog as does the proposal offered in this Article, it does involve a form of mandatory sorting. As discussed above, such an approach creates legal and normative issues but may nonetheless be warranted.

166. Eleanor D. Kinney, *Medicare Coverage Decision-Making and Appeal Procedures: Can Process Meet the Challenge of New Medical Technology?*, 60 WASH. & LEE L. REV. 1461, 1485 (2003) (discussing *Schweiker v. McClure*, 456 U.S. 188 (1982)).

167. While prior to 2002, constitutional procedures were offered early in the Medicare administrative process at the carrier (first) level, see *Schweiker*, 456 U.S. at 195, changes enacted in that year left the ALJ hearing the only individualized hearing available through the Medicare appeals process. The constitutional status of providers' right to a hearing when they take assignment of a claim is not as straightforward as that of a beneficiary, but a provider would, at first blush, appear to have a plausible argument that due process entitles it to a hearing. *E.g.*, *Am. Soc'y of Cataract & Refractive Surgery v. Thompson*, 279 F.3d 447, 455 (7th Cir. 2002) (holding that physicians have property interest in being reimbursed at the rate set out in the fee schedule); *Furlong v. Shalala*, 156 F.3d 384, 393 (2d Cir. 1998) (holding that denial of appeal right violated providers' due process right); see also *Coral Gables Convalescent Home, Inc. v. Richardson*, 340 F. Supp. 646, 650 (S.D. Fla. 1972) (holding that Medicare denied nursing home due process when it withheld payment without granting a hearing).

168. 42 U.S.C. § 1395y(a)(1)(A) (2012).

*Participation value:* The most fundamental problem with a mandatory approach to rationing process is that it would be difficult to maximize participation value because of incomplete information. Part II identified factors that, when present, tend to indicate that participation would be more or less valuable for a particular claim. But these are only tendencies.

There are surely exceptions to the tendencies among Medicare claimants that Part II identified. Some beneficiaries may genuinely (and correctly) believe that participation would hold no inherent value for them. Furthermore, some providers may genuinely benefit from a hearing—a chance to say their peace. Imagine a solo practitioner, who has only a few claims a year denied, decides to appeal one such denial because she takes it as a professional affront.

As a result of these variations, any mandatory approach to rationing procedural protections would inevitably get it wrong some of the time. This would create participation costs that would limit the added participation value of rationing, as discussed at greater length in Part IV.C.4.

*Primary behavior:* Finally, a mandatory approach to procedural triage could also change claimants' primary behavior in undesirable ways. A mandatory approach would hinge entitlement to a hearing purely on a claimant's status or actions. So a provider or beneficiary who thought hearings to be advantageous could position itself *ex ante* so that its claims would come packaged in whatever form would lead to a hearing. Specifically, some providers might refuse to accept assignment of claims from beneficiaries in order to ensure that denied claims would formally be appealed by the beneficiary rather than the provider. Assignment serves multiple beneficial purposes—it insulates beneficiaries from the financial cost and distress associated with a denial and puts the responsibility for deciding whether to appeal in the hands of the entity best positioned to do so—that this result would undermine.

*Transaction cost:* The transaction cost of a mandatory approach would depend on the nature of the approach. A rule-based approach, such as treating providers differently *per se*, would come without any transaction cost. Such an approach, however, would come with a higher error rate. A more standard-based approach to sorting could be used to minimize these errors, but that could come with potentially prohibitive transaction costs.

### 3. Behavioral Approach

A hybrid approach could employ behavioral economics tools to capture the major advantage of a market-based approach (the ability of choice to avoid legal and normative objections to paternalistic rationing) while counteracting its main weakness (market distortions that would cause claimants to contract for too little process). This section discusses the behavioral approach in two steps, first proposing how Medicare might use a bundle of behavioral economics tools to sort claimants between tracks and then evaluating this behavioral approach.

*a. Behavioral Approach Explained*

Claimants could be given a choice whether to pursue a live hearing or instead pursue faster resolution through the efficiency track, thereby avoiding the primary objections to a purely paternalistic mandatory approach. But because market failures make claimant choice an imperfect indicator of the inherent value of process, measures could be used to push or pull claimants into the appropriate track.

i. Status Quo Bias As a Sifting Mechanism

First, and most importantly, all claimants could be placed into the “participation” track by default, but given incentives to opt into the “efficiency” track, such as the promise of a faster and cheaper appeals process. Claimants do not receive payment until the conclusion of a hearing in their favor, so a faster, cheaper track would offer claimants not only the certainty of an earlier decision and ability to lower expenses, but also the added time value of the funds at issue. This would incentivize rational wealth-maximizing claimants who perceive little inherent benefit in a live hearing to opt into the efficiency track. Placing claimants into the participation track by default, however, would counteract claimants’ tendency to “purchase” too little process by leveraging “status quo bias.”

“Status quo bias” is the behavioral economic term<sup>169</sup> for the tendency of a person to follow the default path of least resistance even if “opting in” to a different path would be in that person’s financial best interest.<sup>170</sup> For those subject to status quo bias, default rules act functionally as mandates.<sup>171</sup> But for some actors, the default is just that—a default—and for these actors the default is not paternalistic at all.<sup>172</sup> Because a default rule functions as a mandate only for those who are subject to status quo bias, it is “asymmetrically paternalistic.”<sup>173</sup>

Status quo bias actually reflects several phenomena that tend to cause people to follow the default—in behavioral parlance, to make the default

169. Because all of the identified reasons for following the status quo are perfectly rational (even the endowment effect presumably creates a genuine preference), *see supra* notes 158–63 and accompanying text, the appellation “bias” is misleading. The common term is nonetheless used here for clarity.

170. Russell Korobkin, *Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608, 625 (1997). Status quo bias has been shown to have a major effect on decision making in diverse contexts, from class action participation to organ donation to savings. Eric J. Johnson & Daniel Goldstein, *Do Defaults Save Lives?*, 302 SCIENCE 1338, 1338 (2003) (reporting that organ donation rates increase close to 100 percent under opt-out regime). *See generally* John Beshears et al., *The Importance of Default Options for Retirement Saving Outcomes: Evidence from the United States*, in SOCIAL SECURITY POLICY IN A CHANGING ENVIRONMENT 167 (Jeffery R. Brown et al. eds., 2009) (participation in savings plan jumped from 60 percent to 95 percent under opt-out regime; savings rates across board were aligned with default rate); *cf.* Gretchen B. Chapman et al., *Opting In Vs. Opting Out of Influenza Vaccination*, 304 J. AM. MED. ASS’N. 43, 43 (2010) (noting that opt out flu vaccine achieved 45 percent participation compared to 33 percent for opt in, a 36 percent relative increase).

171. Bubb & Pildes, *supra* note 20, at 1599.

172. Camerer et al., *supra* note 20, at 1224.

173. *See id.* at 1219.

“stick”: (1) the endowment effect, which causes a person to value what she possesses more than what she does not possess, all else being equal;<sup>174</sup> (2) a signaling effect, because those with limited information take the default to reflect the policymaker’s (or public’s) opinion about the best option;<sup>175</sup> (3) a reputational effect, where a person worries about how others will perceive her if she opts out; and (4) inertia resulting from bounded rationality, where a person with finite attention chooses not to waste mental resources considering a departure from a status quo that she perceives to be adequate.<sup>176</sup>

The status quo will be least sticky for those Medicare claimants who stand to benefit least from procedural protections for two reasons. First, assuming that behavioral biases correlate, the other market failures that would tend to distort the demand for process downward—limited information and projection bias—are likely to be most present for those claimants who are also subject to status quo bias.

Second, several of the factors that make a default stick overlap with the factors that indicate enhanced inherent process value (on either a psychological or deontological theory) among Medicare claimants noted in Part II. A corporate entity is both less likely to be susceptible to status quo bias (because it is less susceptible to the endowment effect)<sup>177</sup> and less likely to derive inherent benefit from participation. Similarly, a repeat player is both less likely to be susceptible to status quo bias (because it has a heightened incentive to become and remain informed, counteracting the default’s signaling and inertia effects) and less likely to derive inherent benefit from participation. So, too, providers are both less likely to be susceptible to status quo bias (because they are in a better position to be informed about the process)<sup>178</sup> and less likely to derive inherent benefit from participation.

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174. Korobkin, *supra* note 170, at 625 (modeling status quo bias as resulting from endowment effect).

175. See Beshears et al., *supra* note 170, at 2; David Tannenbaum & Peter H. Ditto, Default Behavior As Social Inference (unpublished manuscript) (on file with author).

176. Brigitte C. Madrian & Dennis F. Shea, *The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior*, 116 Q. J. ECON. 1149, 1149 (2000) (“[D]efault’ behavior appears to result both from participant inertia and from many employees taking the default as investment advice on the part of the company.”).

177. See Jennifer Arlen & Stephan Tontrup, *Does the Endowment Effect Justify Legal Intervention? The Debiasing Effect of Institutions* 3 (N.Y.U. Pub. Law & Legal Theory Res. Paper Series, Working Paper No. 14-36, 2014), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2473758&download=yes](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2473758&download=yes) (stating that “institutions that divide responsibility debias”) [<http://perma.cc/E3KC-MVYA>].

178. That is not to say that providers or their attorneys are immune to behavioral phenomena. Physicians, for example, have been shown to suffer from optimism bias. See Thomas L. Greaney, *Economic Regulation of Physicians: A Behavioral Economics Perspective*, 53 ST. LOUIS U. L.J. 1189, 1197 (2008) (discussing physician tendency toward optimism bias and other behavioral phenomena). But on net, economically motivated and sophisticated providers are less likely to be susceptible to behavioral bias than patients. And, in any event, physician appeals represent only 13 percent of provider appeals; most are brought by hospitals, nursing homes, and durable medical equipment manufacturers. See 2012 OIG REPORT, *supra* note 19, at 23.

As for magnitude, various studies show evidence of behavioral bias among patients,<sup>179</sup> and status quo bias appears to persist even among those who have already made the decision to “opt in” to an appeal.<sup>180</sup> But to minimize the risk that claimants who would benefit from procedural protections opt out, the choice could be presented in a way designed to enhance its stickiness, that is, its tendency to be followed. This could be done both by making opt out difficult (we could require a separate letter, rather than a check box)<sup>181</sup> and by framing the choice to discourage opt out.<sup>182</sup>

Indeed, if necessary to maximize the stickiness of the participation track, the option of pursuing a claim through the efficiency track could be left out of the notice that claimants receive describing their appeal rights. Like the “secret menu” at In-N-Out Burger, which is not posted on the restaurant’s menu but rather known only by word-of-mouth, the efficiency track could be an option only for those claimants who affirmatively seek it out or have access to Medicare regulations and payment policies. This highly conservative approach to rationing should be employed only if early experience indicates a high rate of erroneous opt-ins to the efficiency track.

#### ii. Targeted Incentives As a Sifting Mechanism

While status quo bias could be leveraged as a primary means of sorting claimants, additional means could be employed as well. A second sorting mechanism could be the use of incentives designed disproportionately to encourage repeat players, or those appealing multiple claims, to opt in to the efficiency track. Such entities are capable of benefiting from economies of scale in a way that one-off claimants are not. So the efficiency route

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179. See Keith Marzilli Ericson & Amanda Starc, *Heuristics and Heterogeneity in Health Insurance Exchanges: Evidence from the Massachusetts Connector*, 102 AM. ECON. REV. 493, 494 (2012) (explaining how heuristics affect purchasing behavior); Halpern & Arnold, *supra* note 159, at 1709–10; Loewenstein, *supra* note 159, at 98; George F. Loewenstein, *Costs and Benefits of Health- and Retirement-Related Choice*, in SOCIAL SECURITY AND MEDICARE: INDIVIDUAL VERSUS COLLECTIVE RISK AND RESPONSIBILITY 87 (Shelia Burke et al. eds., 2000); Jane C. Weeks et al., *Relationship Between Cancer Patients’ Predictions of Prognosis and Their Treatment Preferences*, 279 J. AM. MED. ASS’N 1709, 1712 (1998).

180. Low appeal rates persist through multi-tiered healthcare coverage appeal processes despite high win rates at each tier and low barriers to appeal. See generally Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Internal Claims and Appeals and External Review Processes Under the Patient Protection & Affordable Care Act, 75 Fed. Reg. 43,330 (July 23, 2010) (describing low appeal rate at each stage despite high success rate at subsequent stages).

181. See generally Ian Ayres, *Regulating Opt Out: An Economic Theory of Altering Rules*, 121 YALE L.J. 2032 (2012).

182. For example, the choice might be framed as a decision to forego a benefit rather than a decision among two equal routes, perhaps as a choice to “forfeit procedural rights.” Cf. Lauren E. Willis, *Why Not Privacy by Default*, 29 BERKELEY. TECH. L.J. 61, 110 (2013) (discussing situations under which profit-interested parties with power to do so trigger slippery defaults by framing). Also, a hearing date could be identified immediately upon appeal, so as to make the foregone hearing appear even more as a concrete loss to an appellant. Cf. Bertrand et al., *supra* note 108, at 419 (finding that students were more likely to follow through on a medical appointment if given a meeting date in advance).



should offer enhanced opportunities to take advantage of these, like exclusive aggregation mechanisms for consolidation and class treatment. This would give many financially motivated entities a targeted reason to opt for the efficiency route.

*b. Behavioral Approach Evaluated*

The behavioral approach carries the benefit of not relying on claimants to correctly choose the right amount of process, but poses equivalent costs.

*Accuracy:* Like the market-based and mandatory approaches, a behavioral approach would have no effect on accuracy so long as participation and accuracy are unbundled as described in Part IV.B and adverse selection is avoided with a once-a-year opt-in rule as described in Part IV.C.1.

*Participation value:* Because it counteracts the tendency of claimants to opt for insufficient procedural protections, the behavioral approach would come with lower potential participation costs than a libertarian approach. At the same time, it would have diminished potential benefits because it would sift fewer claimants into the efficiency track than the libertarian and paternalistic approaches. These potential participation benefits and costs are discussed at greater length below in Part IV.C.4.

*Effect on primary behavior:* Like a purely libertarian approach, a behavioral approach would have no effect on claimants' primary behavior.

*Transaction cost:* As with a purely libertarian approach, the behavioral approach would require a modest investment to give claimants a credible guarantee that the participation track did not offer a greater likelihood of success.

*Legality:* Like a purely libertarian approach, a behavioral approach is legal and could be implemented without a statutory change.

4. Participation Value of Rationing Approaches Compared

Which approach to rationing process, if any, should Medicare use in lieu of a one-size-fits-all approach? All of the approaches discussed above would create substantial monetary savings by directing the significant subset of Medicare claimants for whom participation creates no value into the efficiency track. One in three Medicare coverage appeals is filed by a repeat player who files dozens of times each year, and many others are filed by large, corporate provider entities that file appeals as a routine part of their business. To the extent that hearings provided to such claimants are wasted, all of the methods of rationing process discussed above would create value by eliminating that waste. This value, in turn, could be used to enhance the participation value produced by the system overall either by reducing the current delay for claimants who seek a hearing, reintroducing to the participation track participatory protections that have been cut in the

interest of efficiency, like live (as opposed to telephone) hearings,<sup>183</sup> or by making it possible for consumer advocates and representatives to bring more claims.<sup>184</sup>

That benefit would come at the cost of the foregone benefit of a live hearing to those claimants sifted into the efficiency track.<sup>185</sup> For those who derive zero inherent benefit from participation, this will be zero. But that will not be the case for everyone. Some claimants directed to the efficiency track will derive diminished participation value as a result and, in the case of egregious sifting errors, they will derive quite a lot of diminished participation. This participation cost must be weighed against the participation benefits created by rationing in order to determine whether triage is worthwhile.

In order to decide whether the participation benefits of any triage approach outweigh the participation costs, and by how much, we must first determine the benefit to those in the participation track of the added protections made possible by the cost savings of triage. Then, we must weigh this benefit against the cost to those in the efficiency track of receiving efficiency-track procedures rather than the procedural protections they would have received under a one-size-fits-all regime. The tilt of this balance will ultimately be the function of two differentials: the differential between the participatory protections provided on each track, on the one

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183. For example, Medicare offers telephonic hearings by default, allowing a claimant to obtain a videoconference only upon a showing of need and allowing in-person appearance at one of the four ALJ offices nationwide (in Ohio, California, Florida, and Virginia) only upon a showing of extraordinary need. CTR. FOR MEDICARE ADVOCACY, WHEN IS A HEARING NOT A HEARING? (2013), [http://www.medicareadvocacy.org/old-site/News/Archives/Reform\\_InPersonHearings.htm#\\_edn2](http://www.medicareadvocacy.org/old-site/News/Archives/Reform_InPersonHearings.htm#_edn2) [<http://perma.cc/DBW4-TPXP>]. This is in contrast to the social security appeals system, which features 168 hearing offices spread throughout the country and offers an in-person hearing as of right. *Information About SSA's Office of Disability Adjudication and Review*, SOC. SEC. ADMIN., [http://ssa.gov/appeals/about\\_odar.html](http://ssa.gov/appeals/about_odar.html) [<http://perma.cc/Y34R-R7A5>]. Research in procedural justice suggests that interaction with an adjudicator is a component of a claimant's perception of the fairness of an adjudication. See, e.g., E. Allan Lind et al., *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERS. & SOC. PSYCHOL. 952, 957–58 (1990) (describing that perception of procedural fairness depended in part on body language and tone of adjudicator).

184. By making it possible to bring an appeal without paying costs associated with a live hearing, the availability of the efficiency track would increase the number of appeals that consumer advocates, providers, or for-profit attorneys could bring. Because of the complexity of medical decision making and stress of sickness, such intermediaries are even more likely to be a necessary prerequisite to access when it comes to Medicare appeals than they are in other adjudicatory contexts. Cf. Samuel Issacharoff, *Disclosure, Agents, and Consumer Protection*, 167 J. INSTITUTIONAL THEORETICAL ECON. 56, 68–69 (2011).

185. This analysis assumes that a prompt live hearing produces more participation value than a delayed live hearing and that any live hearing produces more participation value than a paper hearing. Compare Nourit Zimmerman & Tom R. Tyler, *Between Access to Counsel and Access to Justice: A Psychological Perspective*, 37 FORDHAM URB. L.J. 473, 482 n.21 (2010) (finding that moderate delay did not significantly impact claimants' perceptions of procedural fairness), with Lind et al., *supra* note 183, at 957–58 (perception of fairness depended in part on interaction with adjudicator). If that assumption is flawed—if paper hearings in fact produce more inherent participation value, say, because claimants find live hearings to be humiliating—then Medicare should simply eliminate live hearings for all claimants.

hand, and the differential between the capacity to benefit from participation of the claimants sifted onto each track, on the other.

The participation differential between the tracks will depend on (1) the cost savings associated with processing a claim through the efficiency track, (2) the improvements to the participation track that can be made using those cost savings, (3) the diminished participation value potentially created by the efficiency-track procedures, and (4) the enhanced participation value potentially created by the participation-track procedures. For example, if the experience on the efficiency track is much worse than what would otherwise have been provided under a one-size-fits-all approach but generates only enough savings to make a modest improvement to the participation track, then it is unlikely (but not impossible) that triage will produce a net benefit. The diminished participation value for those claimants who are sifted into the efficiency track may simply be too great.

Note that the participation differential between the tracks will tend to be greater than one, that is, the decreased potential to generate participation value associated with efficiency-track procedures will tend to be *greater* than the associated increase in potential to generate participation value associated with the participation track. This is true so long as the marginal benefits of additional investment in participation are diminishing, because under this assumption, the drop-off from the status quo to the efficiency-track process will be greater than the associated step up from the status quo to the participation track. Therefore, for rationing among claimants (rather than treating all claimants the same) to be worthwhile, the participation differential between the claimants on each track must also be greater than one. For the same reason, the sorting rule must be better than random, so much so that the participation differential of the tracks is offset.

As a result, the difference between the capacity to benefit from procedural protections of the claimants sifted into the efficiency track, on the one hand, and the capacity to benefit from procedural protections of the claimants sifted into the participation track, on the other—the participation differential between the claimants on each track—will also control the analysis. It will depend on: (1) the percentage of claimants for whom participation has substantially diminished value, and (2) the quality of our sorting mechanism to sift only those claimants into the efficiency track. If the participation differential between the efficiency-track procedures and a one-size-fits-all approach is much greater than the differential between the one-size-fits-all approach and the participation track, triage may nonetheless be worthwhile if the difference between the claimants on each track is even greater. To take an extreme example, imagine that only claimants who derive zero value from procedural protections are directed into the efficiency track, and those left on the participation track have a strong capacity to benefit from procedural protections. In such a case, triage will improve participation even if the efficiency track makes extreme procedural sacrifices in order to generate only a tiny improvement to the experience of those on the participation track.

In Medicare, it is possible to break down the cost side of the participation differential between the tracks. If the efficiency track offers paper hearings rather than long-delayed live hearings (the status quo), then for every two claimants sifted into the efficiency track, the process can provide one prompt hearing to a claimant on the participation track.<sup>186</sup> That is because a paper hearing costs about half as much as a live hearing before an ALJ.<sup>187</sup>

The participation value side of this differential is harder to pinpoint. How much worse is a paper hearing than a long-delayed live hearing? And how much better is a prompt live hearing than a long-delayed one? The cliché that “justice delayed is justice denied” suggests that a prompt live hearing is much better than a multi-year wait. But how does that benefit match up against the lost opportunity for a “day in court” associated with a paper hearing? It is hard to say. That does not mean, however, that it is not possible to conclude that procedural triage would improve Medicare’s administrative process.

The participation differential between the claimants in the efficiency track and participation track that would result from triage is not as elusive. The libertarian, paternalistic, and behavioral approaches to rationing process can be thought of along a spectrum, from more conservative to more aggressive. The behavioral approach is the most conservative, tailored to sift only those claimants for whom a hearing has little or no value into the efficiency track. It would weed out low-value claimants from the participation track, directing a moderate number of claimants to that track, while ensuring that such claimants were those for whom participation is wasted or at least low value. Next comes the libertarian, forced-choice approach, which would sift many more claimants into the efficiency track, potentially netting a greater benefit but posing an increased potential for diminished overall participation value as a result. This approach would “cherry pick” high-value claimants onto the participation track. And last comes the most aggressive, mandatory approach, which would sift all providers—the vast majority of claimants—into the efficiency track, cherry picking even more directly.

Therefore, it is safest to conclude that the behavioral approach to sorting claimants would produce a substantial net increase to the overall participation value produced by Medicare’s process.<sup>188</sup> By defaulting all

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186. This two-to-one ratio, based on the cost difference between an ALJ hearing and a private sector hearing, reflects the conservative assumption that the constraint on additional process—what makes hearings scarce—is the monetary cost of hearings. To the extent that the constraint on additional hearings is actually the practical feasibility of hiring additional ALJs, rather than the cost of doing so, every paper hearing allows us to provide one additional ALJ hearing, so the ratio would be one-to-one.

187. See *supra* note 147 and accompanying text.

188. The behavioral approach would add overall participation value so long as the sum of the participation value of an efficiency-track appeal *multiplied* by the capacity to benefit from participation of claimants directed to the efficiency track *and* the participation value of a participation-track appeal *multiplied* by the capacity to benefit from participation of claimants directed to the participation track *was greater than* the participation value produced by the status quo (a long-delayed hearing) *multiplied* by the capacity to benefit from participation of the average claimant. In Medicare, given current costs, every two

claimants onto the participation track, the behavioral approach would avoid the biases that undermine the effectiveness of a libertarian approach. But by incentivizing all claimants—and especially repeat players—to opt in to the efficiency track, it would sift onto the efficiency track the core group of claimants for whom procedural protections are wasted. Furthermore, because status quo bias and propensity to benefit from procedural protections are correlated, the number of claimants for whom a hearing would have significant inherent value, but who would nonetheless mistakenly opt out, should be small.

That said, those who are dubious about the inherent value of participation in the first place will tend to support an even more aggressive approach to rationing that comes with the potential for greater net overall benefit, such as the forced choice or mandatory approaches, even while risking diminished participation overall. Similarly, those who doubt that providers ever derive inherent value from being heard will support the legal changes necessary for a paternalistic approach, and those who are confident that a paper hearing is likely just as good or almost as good as a live hearing, will also support a more aggressive approach.

In sum, Medicare should respond to the ongoing backlog by implementing a behavioral approach to procedural triage as described above. This would allow the claimants who really need it to receive something closer to an uncompromised hearing, without adversely affecting the overall accuracy of the administrative process or seriously threatening to deny hearings erroneously. The result would be a more just—or more modestly, a less unjust—administrative process.

## V. PROCEDURAL TRIAGE BEYOND MEDICARE

The study of Medicare in Parts II through IV showed that Medicare could make the most of its scarce procedural resources by rationing process among claimants based on need, that is, by engaging in procedural triage. But the framework developed through that study for determining whether and how to engage in procedural triage in Medicare can also tell us whether and how procedural triage would improve other adjudicatory systems. This part synthesizes and generalizes that framework, then shows how it can be used to identify other potential candidates for procedural triage.

### A. Framework

First, the inherent value of participation must vary from claimant to claimant because there is no reason to ration procedural protections among claimants based on need in an adjudicatory process for which this is not the case. This consideration will eliminate only those adjudicatory processes

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efficiency-track appeals would enable one prompt (rather than delayed) hearing. This would be true, for example, if (1) the drop-off in participation from a delayed hearing to a paper hearing is smaller than the increased participation of a prompt hearing instead of a delayed one, and (2) efficiency-track claimants have less than half the capacity to benefit from participation of participation-track claimants.

that are made up of very similar claimants. For example, highly particularized adjudicatory processes featuring universally substantial process value considerations, such as the one for resolution of habeas corpus petitions for enemy non-combatants imprisoned at Guantanamo Bay,<sup>189</sup> are poor candidates for procedural triage. So too are adjudicatory processes that resolve claims among highly sophisticated, corporate actors that may generate no inherent process value in the first place.

Second, absent perfect information, procedural protections must be scarce. Otherwise, triage will be subject to the objection that it is merely a new way to sacrifice participation for efficiency. As with the requirement of variation, this condition does not eliminate many adjudicatory processes. Medicare is hardly the first administrative process to struggle with a claims backlog,<sup>190</sup> or the procedural scarcity that causes it. Indeed, making the most of limited procedural resources is the defining challenge of many adjudicatory systems: social security,<sup>191</sup> veterans' benefits,<sup>192</sup> workers' compensation,<sup>193</sup> private health insurance coverage disputes,<sup>194</sup> and, increasingly, even civil justice in the federal courts.<sup>195</sup>

Wherever these two boundary conditions—variation and scarcity—are present, procedural triage could *potentially* add value. However, in order to realize that potential, a normatively and legally permissible means of triage must be found that creates more value than it costs. The five considerations identified in Part IV.A—effect on accuracy, participation value, effect on primary behavior, transaction cost, and legality—are a starting place for any such cost-benefit analysis, and the libertarian, behavioral, and paternalistic

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189. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006).

190. See, e.g., Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 HASTINGS L.J. 363, 369 n.28 (2014) (describing backlog of asylum appeals before Board of Immigration Appeals); Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1288–89 (2014) (detailing backlog of veterans' disability claims before Department of Veterans' Affairs); Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 904 (1999) (explaining that Civil Justice Reform Act of 1990 made changes to rulemaking for Federal Rules of Civil Procedure designed to "address problems of case backlog"); Marjorie A. Silver, *The Uses and Abuses of Informal Procedures in Federal Civil Rights Enforcement*, 55 GEO. WASH. L. REV. 482, 501–06 (1987) (noting backlog of civil rights claims before Equal Employment Opportunity Commission and Department of Justice's Office of Civil Rights); Daniel F. Solomon, *Fundamental Fairness, Judicial Efficiency, and Uniformity: Revisiting the Administrative Procedure Act*, 33 J. NAT'L ASS'N ADMIN. L. JUDICIARY 52, 95 (2013) (noting backlog of social security disability claims); David B. Torrey, *Master or Chancellor? The Workers' Compensation Judge and Adjudicatory Power*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 21, 85–104 (2012) (reviewing various state agencies' responses to backlog of workers' compensation claims); Paul R. Verkuil & Jeffrey S. Lubbers, *Alternative Approaches to Judicial Review of Social Security Disability Cases*, 55 ADMIN. L. REV. 731, 752–53 (2003) (explicating backlogs in social security and veterans' disability determination processes).

191. MASHAW, *supra* note 2, at 134–35.

192. Michael Serota & Michelle Singer, *Veterans' Benefits and Due Process*, 90 NEB. L. REV. 388, 418–19 (2011).

193. See, e.g., Torrey, *supra* note 190, at 85–104.

194. See *infra* note 199.

195. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558–59 (2007). See generally Lahav, *supra* note 15, at 592–93; Miller, *supra* note 15, at 42–44.

approaches discussed in Part IV.C are a starting place for thinking about possible sorting mechanisms. In determining the effect of a triage regime on participation value, which may be a driving consideration, the approach to maximizing participation value offered in Part IV.C—comparing the participation differential of the procedural tracks to the participation differential of the claimants on each track—could also serve as a starting point. Adjudicatory systems beyond Medicare, however, may present additional considerations or possibilities not identified in this Article’s analysis of Medicare.<sup>196</sup>

### *B. Triage of Claimants in Spite of Imperfect Information*

If we had perfect information and cared only about social welfare, then we could say with precision whether and how to engage in procedural triage anywhere that the value of participation varies among claimants. Clear signals, however, are likely to be rare. Imperfect information is a defining challenge of the administrative state, so it will likely be the usual case that our information about the value of participation to claimants will be imperfect at best.

Administrators are often tasked with making the most of scarce resources—from safety to healthcare to food stamps to vaccines—withstanding a deficit of information about how those resources actually benefit the people to whom they might be distributed. In doling out entitlements, including procedural entitlements, administrators must make do anyway, or settle for a one-size-fits-all approach that is worse than second best.

This Article has shown that with careful attention to context, we can do just that, i.e., we can make procedural triage a component of a better, if still imperfect, administrative process. Specifically, it has shown that we can identify traits that tend to correlate with heightened participation value and use behavioral economic tools to direct procedural protections to claimants with those traits.

In many cases, identification of a factor that tends to correlate with process value alone is unlikely to be enough. Any sorting mechanism that relies on mere tendencies will come with a high rate of error costs, diluting the benefit of sorting and limiting the number of contexts in which doing so is worth the candle.

Two additional features of the Medicare coverage appeals process made it a particularly apt context for sorting based on limited information about tendencies alone. First, participatory protections are not the most cost-

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196. For example, for Medicare claimants, the determinants of variation on a psychological theory of participation value corresponded with the determinants of variation on a deontological theory, so it was not necessary to collapse the two in order to say that the default (or another) approach would increase participation value overall. Where this is not the case, any attempt at procedural triage would need to take on this problematic task. See generally Lewis A. Kornhauser, *Preference, Well-Being, and Morality in Social Decisions*, 32 J. LEGAL STUD. 303, 304 (2003) (offering objections to efforts to incorporate deontological “fairness” considerations with more mundane tastes).

effective way to promote accuracy in Medicare.<sup>197</sup> That fact—the inefficiency of participatory hearings in Medicare—is why Medicare can ration process without creating accuracy costs.

Second, the distribution of claimants in the Medicare coverage appeals process, in terms of their capacity to benefit from procedural protections, was both wide and lumpy—in economic terms, multi-modal—with process tending to be more valuable for one group and less valuable for another. Specifically, a significant minority of claimants in the Medicare coverage appeals process are highly sophisticated providers who appeal a significant number of claims as part of the day-to-day operation of their business. Such claimants derive significantly less, if any, inherent benefit from participation. On the other hand, a small minority of claimants are unsophisticated beneficiaries who tend to derive significant benefit from process.

Such a wide and lumpy distribution of claimants (in terms of their capacity to benefit from participation) lessens the error cost of sorting while increasing the benefits. A sorting rule that separates somewhat inaccurately between groups will produce fewer errors on both sides than an equally accurate sorting rule used to sort claimants in a uniform distribution. So, all else being equal, the error costs of separating claims for which procedural protections are worthwhile from those for which procedural protections are not worthwhile, is much lower when the distribution of claims is lumpy. Similarly, the wider the variation among claimants, the larger the potential gains from rationing. As a result, with all else being equal, procedural triage is more likely to be worthwhile in an adjudicatory process that features a wide and lumpy (multi-modal) distribution of claimants (in terms of their capacity to benefit from participation).

Therefore, in looking for other administrative processes that are good candidates for procedural triage, future research should pay special attention to processes in which (1) participation is inefficient, and (2) the distribution of claimants is wide and lumpy. The former factor will apply in most adjudicatory processes because, as procedure scholars know well, the most efficient process is rarely the most participatory, and vice versa.<sup>198</sup>

As for the second factor, it also will apply in a significant subset of adjudicatory processes because the wide and lumpy distribution is common.<sup>199</sup> For example, veterans' benefits appeals,<sup>200</sup> private sector

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197. See *supra* Part IV.B.

198. See Sant'Ambrogio & Zimmerman, *supra* note 141, at 2039 (“[A]ggregate litigation threatens *legitimacy* by replacing formal court hearings with impersonal, top-down bureaucracies that stray from democratic ideals.”); see also Lahav, *supra* note 15, at 415 (discussing tension between efficiency and accuracy); Mashaw, *supra* note 83, at 197 (stating that accuracy and participation “indeed[] compete” and that “[t]he logic of one cannot be played out without destroying the other; blending them necessarily produces stress[] and perhaps incoherence”); Solum, *supra* note 18, at 313 (“Individual participation is costly.”).

199. Marc Galanter noted decades ago that many adjudicatory processes feature a bimodal distribution of very different claimants, which he called the “haves” and “have nots.” See Galanter, *supra* note 7, at 103–04; *supra* text accompanying note 7.



healthcare coverage determinations,<sup>201</sup> and U.S. Department of Agriculture loan and crop insurance determinations all fit this pattern.<sup>202</sup>

C. *Procedural Triage in the Federal Rules of Civil Procedure*

Perhaps the most well studied adjudicatory system where participatory protections are not the most cost-effective way to promote accuracy and the cast of claimants varies widely<sup>203</sup>—and therefore the most well-known candidate for procedural triage—is the Federal Rules of Civil Procedure.

This section, therefore, briefly surveys the potential for procedural triage in federal court. Procedural triage offers a new way of rationing process in federal court, as elaborated upon in Part V.C.1 below, and a new way of assessing the value of existing rules of civil procedure, as elaborated upon

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200. Many veterans' pension appeals are brought pro se, but many others are brought by appeal mills that bring claims en masse on behalf of absentee claimants. See U.S. GOV'T ACCOUNTABILITY OFFICE, VETERANS' PENSION BENEFITS: IMPROVEMENTS NEEDED TO ENSURE ONLY QUALIFIED VETERANS AND SURVIVORS RECEIVE BENEFITS 29–32 (2012) (reporting transcript of conversation with company representative). To the extent that procedural protections have less inherent value for such cases—a question beyond the scope of this Article—the Veterans' Benefits Administration could consider rationing process among claimants. A danger in doing so is that a sorting rule that treats represented claimants differently as a matter of course could affect primary behavior—that is, it could discourage claimants from becoming represented in the first place. For that reason, any approach to rationing process in veterans' benefits appeals would likely need to rely on a default rule.

201. Private sector coverage decisions follow a similar pattern to those in Medicare, except that utilization review is more common and more often takes place before treatment is administered. But appellants in this process are never entitled to a live hearing, in person or otherwise. This makes it doubtful that appeals in the private sector do much to facilitate acceptance of rationing decisions. See William M. Sage, *Managed Care's Crimea: Medical Necessity, Therapeutic Benefit, and the Goals of Administrative Process in Health Insurance*, 53 DUKE L.J. 597, 626 (2003) (“No feature of current programs seems designed to further therapeutic trust or patient participation . . . . [P]aper review of submitted materials is the norm.”). This Article's study of Medicare offers a suggestive blueprint for a more effective coverage appeals process and thus better rationing of healthcare and process in private health insurance. Providers should be incentivized to act as intermediaries for patients, a role they are well positioned to play, see Charity Scott, *Doctors As Advocates, Lawyers As Healers*, 29 HAMLINE J. PUB. L. & POL'Y 331, 376 (2007), or to take assignment of appeal rights, in order to increase the volume of claims and insulate beneficiaries from denials. This would provide a needed boost to the accuracy benefit of the appeals process. See Vukadin, *supra* note 144, at 1237. Simultaneously, appeal rights should be expanded to include a hearing, at least by telephone, to improve the capacity of appeals to generate acceptance. Zimerman & Tyler, *supra* note 185, at 482–83. Both changes could be made without creating an intractable administrative burden by adopting a two-track process and rationing mechanism along the lines of the behavioral approach this Article has suggested be adopted by Medicare.

202. The agriculture industry is largely split between big business and small farmers. When it comes to USDA determinations affecting market participants in this industry, however, we currently provide a one-size-fits-all adjudicatory process. See Gary Condra & Merinda Condra, *The Basics of the USDA National Appeals Division*, 73 TEX. B.J. 396, 396 (2010).

203. Gillian Hadfield has noted the disparity in federal courts between organizational and individual claimants. Gillian K. Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57 STAN. L. REV. 1275, 1280–84 (2005) (presenting “preliminary data on the differences between individual and organizational litigants in the disposition of federal civil cases”).

in Part V.C.2 below. The potential to improve the administration of civil justice in federal court through procedural triage is somewhat limited, however, by the requirement that federal rules be transsubstantive, as discussed in Part V.C.3.

### 1. An Alternative to Claim-Based Rationing

Procedural reforms in federal court over the past several decades—“from *Conley* to *Twombly* to *Iqbal*”—have tended overwhelmingly to sacrifice participation for the sake of efficiency.<sup>204</sup> The most significant of such reforms may be the growth of summary judgment, thanks to *Celotex Corp. v. Catrett*'s<sup>205</sup> teaching that the mechanism is not disfavored.<sup>206</sup> Cases susceptible to summary judgment are decided by a judge, often purely on the papers, rather than by a jury after a literal day, or perhaps days, in court.

A more recent reform that may also prove momentous is the plausibility pleading requirement announced in *Bell Atlantic Corp. v. Twombly*.<sup>207</sup> The pleading standard creates a new route by which a case may be decided by a judge rather than a jury and differs from summary judgment in that the decision comes prior to discovery rather than after.

These reforms respond to the perception of scarcity and inefficiency in federal court by rationing process among *claims* based on the perceived accuracy benefit of additional process. Because we think there are not enough resources to provide every civil litigant a jury trial, summary judgment saves the jury trial for the claims—not claimants—in which the jury trial's fact-finding function appears to be needed most. Similarly, because we think there are not enough resources to provide every civil litigant with discovery, *Twombly*'s plausibility pleading requirement saves discovery for those claims—again, not claimants—for which discovery is most likely to yield proof.

Procedural triage offers an alternative approach to rationing process in federal court. Rather than direct procedural protections to the claims for which they are most valuable, we might direct them to the claimants for whom they are most valuable.

For example, assume that a claimant who sues soon after an event is more likely to be pursuing an emotionally-loaded grievance than a claimant who sleeps on her rights for years and that research discovers this tendency to be pronounced.<sup>208</sup> If so, we might forbid summary judgment in civil actions filed within two months of the plaintiff's discovery of her injury, thereby providing especially motivated claimants direct access to the participation track in federal court. Such a staggered limitations period would ration access to a jury trial not (or not only) based on the perceived

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204. See Miller, *supra* note 15, at 9–10.

205. 477 U.S. 317 (1986).

206. *Id.* at 327.

207. 550 U.S. 544 (2007).

208. Due to hedonic adaptation—the tendency for an adverse emotional reaction to fade over time—this assumption is a plausible one. See John Bronsteen et al., *Hedonic Adaptation and the Settlement of Civil Lawsuits*, 108 COLUM. L. REV. 1516, 1517 (2008).

accuracy benefit of a jury trial in a particular case, but instead (or also) on the perceived meaning of a “day in court” to a particular claimant (or claimants).

Of course, the desirability and feasibility of rationing procedural protections in federal court using a staggered limitations period, or any other method of triaging claimants, are complicated questions that call for additional scholarly inquiry. This Article has explored only variation in the inherent value of process to claimants, not defendants. In private lawsuits in federal court, the inherent value of process for both sides of the “v” must be taken into account.

Ultimately, the superiority *vel non* of procedural triage as an alternative to summary judgment or pleading requirements will depend not only on our ability to identify permissible means to ration process among claimants using the framework discussed above, but also on our assessment of the ability of judges to ration process correctly using claim-based approaches. Those who take a sanguine view of summary judgment and pleading may tend to favor claim-based approaches to rationing process in federal court, while those who take a dim view of judges’ ability to sort wheat from chaff through summary judgment may tend to see procedural triage as a potentially less-bad response to process scarcity in federal court.

## 2. Possible Triaging Effect of Existing Rules

Furthermore, even rules of procedure that are not consciously intended to ration process among claimants may nonetheless have the effect of doing so. Future research should be attentive to the possibility of such effects, which may or may not be salutary. For example, at the pleading stage, federal courts show special solicitude for pro se claimants, applying a lower pleading threshold to their claims.<sup>209</sup> This preference could be justified as a way of rationing process among claimants if it turns out that lack of representation or direct claimant involvement correlates with heightened participation value. Indeed, even constitutional standing doctrine may come with the benefit of rationing process among claimants, notwithstanding its constitutional origins, to the extent that those with an injury fairly traceable to a challenged action derive more participation value from a lawsuit than those without such an injury.<sup>210</sup>

On the other hand, some rules may have the previously unrecognized cost of denying procedural protections to the very claimants who stand to benefit most from such protections. For example, many courts provide in-person oral argument only to those claimants who affirmatively opt in by indicating “oral argument requested” at the top of a motion.<sup>211</sup> To the

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209. *Erikson v. Pardus*, 551 U.S. 89, 94 (2007) (pleading by pro se litigants “must be held to less stringent standards”).

210. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (constitutional test for standing).

211. *See, e.g.*, D. ARIZ. L. R. CIV. 7.2(f) (“[A] party desiring oral argument must request it by placing ‘Oral Argument Requested’ immediately below the title of a motion or the response to a motion.”).

extent that status quo bias—and ignorance of local rules—is most common among federal civil claimants who would tend to derive most inherent benefit from airing their grievance before a judge—as they are among Medicare claimants—such rules ration process in precisely the wrong way.

### 3. Procedural Triage and Transubstantivity

Any intentional effort to ration process among claimants in federal court will need to confront a special requirement applicable there that limits the potential feasibility of procedural triage: transubstantivity. Unlike Medicare's administrative process for resolving coverage appeals, or the administrative process for resolving veterans' benefits appeals, federal courts endeavor to apply the same set of rules to a broad range of substantive claims. Pursuant to the "transubstantivity" requirement embedded in the rules, federal courts are supposed to apply the same procedures to an employment action, a routine motor vehicle tort claim, a constitutional claim, a corporate contract dispute, and so on.

The transubstantivity requirement makes procedural triage more difficult by significantly complicating the inquiry into whether particular claimant traits tend to indicate enhanced or diminished participation value. Scholars have noted that the inherent value of participation may vary based on the type of substantive claim at issue (as opposed to who brings it and why).<sup>212</sup> This variation may be more pronounced for some claimants than others, such that a trait that indicates enhanced participation value for claimants bringing one sort of substantive claim may not do so when the underlying substantive claim is different, or might even tend to indicate diminished inherent value. For example, the fact that a claimant has filed four prior suits may tend to indicate diminished participation value when the suits are brought under the Federal Tort Claims Act. But, the fact of repeat filings may tend to do just the opposite when the suits all allege violation of constitutional rights under *Bivens v. Six Unknown Named Agents*.<sup>213</sup> Similarly, the chance to tell her story in court may be cathartic to an employee who feels her termination reflected racial prejudice, but have the

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212. See Roger H. Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 820–22 (1985) (arguing that participation has greater inherent value in personal injury cases than in property damage cases); Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69, 76–78 (1989) (same); see also Ronald Dworkin, *Principle, Policy, Procedure*, in CRIME, PROOF, AND PUNISHMENT 72, 102–03 (1985) (arguing for a stronger participation interest in morally charged cases); MASHAW, *supra* note 6, at 205–15 (suggesting special participation right for constitutional cases). Carol Steiker also has argued that the divide between criminal and civil procedure is justified because of the heightened dignitary implications of criminal sanctions. Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 806–08 (1997) (personal moral opprobrium associated with criminal sanctions "reach[es] inside the self," creating a heightened threat to autonomy, and so demand for procedure).

213. 403 U.S. 388 (1971).

opposite effect for a sexual harassment victim, or vice versa.<sup>214</sup> In order to evaluate whether treating claimants of one type differently would produce participation benefits, it would be necessary to know more about the magnitude of such tendencies and the frequency of such claims. Learning that information, and incorporating it into the distribution of procedural protections, may be too difficult to be worthwhile.

Finally, a robust literature has articulated various pros and cons of transsubstantivity in procedure and has questioned the extent to which this supposed requirement should be (or is) merely aspirational.<sup>215</sup> The fact that transsubstantivity limits the feasibility of rationing process in federal court in the way just discussed stands as an additional “cost” that weighs against continued adherence to the transsubstantivity requirement. Whether this added weight tips the balance is beyond the scope of this Article.

#### CONCLUSION

In “mass justice” adjudication, as in healthcare, a dollar spent on a person unnecessarily is a dollar taken from someone who could have used it, perhaps desperately. Yet, in Medicare we are wasting so much of our adjudication budget providing procedural justice for all, even though it only benefits some, that we cannot afford to give anyone a prompt hearing.

As this Article has shown, we can construct better adjudicatory processes by tailoring the provision of scarce procedural protections to particular claimants, using streamlined processes to resolve the claims of those who benefit least simply from being heard and using those savings to enhance the opportunity for participation we give to the claimants a “day in court” benefits most. And while limited information, market failures, and our background commitments to procedural justice make such rationing easier said than done in practice, we can use an asymmetrically paternalistic approach to separate the claimants who benefit least from a hearing from those who benefit most, making it possible to secure some of the benefits of procedural triage while avoiding the pitfalls.

The result is an improved regulatory tool, better able to help us work through the hard choices that scarcity forces us to make. In healthcare and far beyond, we could sure use it.

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214. Cf. Jeannie Suk, *The Trajectory of Trauma: Bodies and Minds of Abortion Discourse*, 110 COLUM. L. REV. 1193, 1205 (2010) (discussing laws intended to protect claimants from “a second brutalization in court” by preventing cross examination).

215. See generally Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the “One Size Fits All” Assumption*, 87 DENV. U. L. REV. 377 (2010). See also Judith Resnik, *Procedure As Contract*, 80 NOTRE DAME L. REV. 593, 597, 607 (2005) (stating that “[t]he aspiration for a trans-substantive procedural regime embedded in the Federal Rules has been supplanted by an array of contextualized processes” and discussing erosion of transsubstantivity).