Fair Hearings: Accuracy First

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Abstract. There are two conflicting approaches to fair hearings in English law. One line of cases says that fairness or justice requires a hearing only when it stands to contribute to a more accurate overall decision. The other says that fairness requires a hearing independently of its contribution to an overall decision. Recently, many commentators have championed the second approach, usually based on an appeal to non-instrumental process values, such as respect and autonomy. Here we defend the first, accuracy-centred approach. Others who do so tend to deny that there are process values. Our strategy is different: we show that the existence of process values is consistent with an accuracy-centred approach.

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1. Introduction

PC Cotton, a probationary constable for the Thames Valley Police Force, loved his job. But the police force required constables of Cotton's height to weigh no more than 14 stone, 7 pounds. Cotton weighed 16 stone. After meeting with Cotton, the Assistant Chief Constable (ACC) wrote to the Deputy Chief Constable (DCC) recommending Cotton's discharge. The DCC followed that recommendation. Cotton applied for judicial review, alleging a denial of a fair hearing. He argued he should have had the opportunity to comment on the ACC's report before it was sent to the DCC.

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In *ex p Cotton*, Simon Brown J explained that the only factor relevant to the DCC's decision was Cotton's weight.[1] Cotton was heavier than the required cutoff. Nothing he could say would change that fact. As a result, there was 'no real, no sensible, no substantial chance of any further observation or action on [Cotton's] part altering the final decision in his case'[2]. Because there was no realistic prospect of Cotton having anything decisive to add regarding the dismissal decision, he was not entitled to be heard on the matter. Cotton's application for judicial review was therefore rejected.

Like many other English cases, *Cotton* takes an accuracy-centred approach to fair hearings.[3] This approach says, roughly, that a hearing should be required only if it stands to improve the accuracy of the overall decision. By 'accuracy' we mean how closely a decision corresponds to the outcome that, on balance, the relevant considerations support. A consideration is relevant, in turn, when it favours a decision and is one that the decision maker can permissibly consider. Since the only relevant factor was Cotton's weight, which was not in dispute, a hearing would not have improved the accuracy of the decision. Thus, it was not unfair to deny Cotton a hearing.

Although many cases take an accuracy-centred approach, there is a competing line of authority.[4] An early example is *Spackman*.[5] A divorce court found that a doctor had committed adultery with a patient. Based on that finding, the General Medical Council convened a panel to decide whether to strike the doctor from the medical register. The doctor wanted to be heard on whether the adultery had, in fact, occurred. The panel refused,

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[1] *R v Deputy Chief Constable of Thames Valley Police Force ex p Cotton* [1989] COD 318, [1988] LX 1187; affirmed [1990] IRLR 344.

[2] *Cotton* __.

[3] eg *Malloch v Aberdeen Corporation* [1971] 1 WLR 1578 (HL), 1595 (Lord Wilberforce); *Cinnamond v British Airports Authority* [1980] 1 WLR 582, 593; *R v Secretary of State for the Home Department, ex p Santillo* [1981] QB 778 (CA), 798; *R v Lichfield DC, ex p Lichfield Securities Ltd* [2001] EWCA Civ 304 [23]; *R (Wainwright) v Richmond Upon Thames LBC*, [2001] EWCA Civ 2062 [55]; *R (O'Connell) v Parole Board* [2007] EWHC 2591 (Admin) [24]; *Bank Mellat v Her Majesty's Treasury* [2013] UKSC 38 [179]; cf *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269 (HL) [72] (Lord Hoffmann).

[4] *R v Secretary of State for the Environment, ex p Brent LBC* [1982] QB 593 (DC), 646 (Ackner LJ); *Boddington v British Transport Police* [1999] 2 AC 144 (HL), 174 (Lord Steyn) (procedural unfairness does not require 'substantial prejudice'); *AF (No 3)* [2010] 2 AC 144 [63] (Lord Phillips); *R (McKilligan) v Parole Board* [2024] EWHC 336 (Admin) [36]-[37]; *R (Brockie) v Parole Board* [2025] EWHC 2551 (Admin) [44]. For a useful overview of both lines of cases, see A Mills, 'The "Makes No Difference" Controversy' [2013] JR 124.

[5] *General Medical Council v Spackman* [1943] AC 627.

content to rely only on the divorce court's finding. When the doctor challenged that refusal, the GMC said there had been no prejudice since a hearing would have made no difference. At the House of Lords, Lord Wright emphatically rejected that argument. '[I]t is immaterial', he said, 'whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice.'[6] The decision was declared void.

Scepticism towards the accuracy-centred approach is growing. It is now widely accepted that fairness requires fulfilling non-instrumental values, such as respect for claimants.[7] It is also commonly assumed that these non-instrumental values may demand a hearing even when it could not affect the outcome. The conclusion is that fairness requires a hearing despite it having no chance to improve the decision. As one leading textbook puts it, 'it is debatable whether it is correct to treat prejudice as a necessary ingredient of unlawfulness' given that 'courts have recognized that the requirements of fairness support [non-instrumental] values and interests'.[8] Versions of this objection to the accuracy-centred approach are championed by academic commentators, including TRS Allan and Conor Crummey.[9] They have also been entertained by a number of Supreme Court judges.[10]

The competing lines of cases, and shifting patterns of support, leave the state of English law 'uncertain', as the editors of *De Smith*'s describe it.[11] Here we show how the uncertainty should be resolved. Specifically, we defend a kind of accuracy-centred approach. We are, of course, not the first to emphasise the significance of accuracy to the law of fair hearings. What we offer is a precise interpretation of the approach and a novel argument in its favour. Previous arguments for an accuracy-centred approach denied the existence of non-instrumental reasons for hearings.[12]

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[6] *Spackman* 644-645.
[7] See the references at notes 38-39
[8] J Moffett, J Auburn, A Sharland, *Judicial Review: Principles and Procedures* (2nd edn, OUP 2026) 252.
[9] TRS Allan, 'Procedural Fairness and the Duty of Respect' (1998) 18 OJLS 497; C Crummey, 'Why Fair Procedures Always Make a Difference' (2020) 83 MLR 1221. For a more qualified endorsement, see P Daly, *Understanding Administrative Law in the Common Law World* (OUP 2021) 168.
[10] e.g. *R (Osborn) v Parole Board* [2013] UKSC 61 [68]-[70] (Lord Reed); *R (Pathan) v Secretary of State for the Home Department* [2020] UKSC 41 [72] (Lady Arden), [131] (Lord Kerr and Lady Black).
[11] I Hare, C Donnelly, J Bell (eds), *De Smith's Judicial Review* (9th edn, Sweet & Maxwell) §8-051. See also M Elliott and J Varuhas, *Administrative Law* (5th edn, OUP 2017) 379 ('The leading cases do not adopt an entirely consistent approach').
[12] e.g. R Posner, 'An Economic Approach to Legal Procedure and Judicial Administration' (1973) 2 Journal of Legal Studies 399; R Dworkin, 'Principle, Policy, Procedure' in *A*

Our strategy is different. We grant that there are non-instrumental reasons for hearings and show that their existence is compatible with an accuracy-centred approach.

The discussion in this article is limited in two respects. First, we are concerned with what the law of procedural fairness should require, and thus the lawfulness of administrative decisions. A distinct issue, downstream from this one, is when a court should grant a remedy for unlawful decisions. That issue is partly addressed by the 'makes no difference' principle, which we briefly discuss towards the end of the article.[13] Second, we focus on English administrative law. Fair hearing requirements exist in other jurisdictions. In many of them, such as Canada, New Zealand, and Singapore, it is a live issue whether fairness requires a hearing that would not improve accuracy.[14] Although our arguments may be relevant to these jurisdictions, this line of inquiry must await another occasion.

Here is how we proceed. Section 2 states our proposed principle. Having done so, sections 3 and 4 introduce the key propositions that support the principle. Section 5 shows that these propositions are consistent with the existence of process values. We draw together the argument for the accuracy-centred approach in section 6 and explain how it applies to *Cotton*. Section 7 addresses several objections. Section 8 considers how our argument relates to the makes no difference principle and remedial discretion. Section 9 concludes.

2. Accuracy First

There are different ways to develop the idea that a hearing is properly required only when it stands to improve a decision's accuracy. We defend the following principle:

> *Accuracy First.* Fairness does not demand an administrative hearing (or hearing of a certain form) unless there is a real chance that it will improve the accuracy of an authority's decision.

Matter of Principle (OUP 1986) 102. For a helpful summary of the debate regarding the existence of non-instrumental values for hearings, see D Meyerson and C Mackenzie, 'Procedural Justice and the Law' (2019) 13 Philosophy Compass e12548.

[13] See Senior Courts Act, s31(2A)-(2D); cf *Pathan* [72] (Lady Arden).

[14] Canada: *Cardinal v Director of Kent Institution* [1985] 2 SCR 643 [23]; *Mobil Oil Canada Ltd v Canada Newfoundland Offshore Petroleum Board* [1994] 1 SCR 202, 227-9. New Zealand: *Quake Outcasts v Minister for Canterbury Earthquake Recovery* [2015] NZSC 27 [187] (consultation); Singapore: *Management Corporation Strata Title Plan No 301 v Lee Tat Development Pte Ltd* [2010] SGCA 39 [59]. As in England and Wales, courts in these jurisdictions have not always been careful to distinguish whether lack of substantive prejudice goes to remedial discretion or lawfulness.

This principle sets out a necessary, not sufficient, condition for fairness to require a hearing. Several other points about this principle also need clarification.

First, a hearing improves the decision's accuracy to the extent it increases correspondence with the balance of relevant considerations. These considerations all predate a hearing. A hearing does not, in itself, bring new considerations into existence or make existing ones newly relevant.[15] At most, it reveals to the authority the considerations that were already relevant.[16] A hearing cannot improve a decision's accuracy, then, by altering the considerations that apply to an authority. Instead, it can only do so by altering what decision the authority will make. Put another way, a hearing improves accuracy by leading the authority to decide in accordance with the world as it is, not by changing the world to fit the authority's decision.[17]

Second, Accuracy First refers to administrative 'hearings'. This is meant in a wide sense. Apart from oral hearings, it includes the making of written submissions or written objections.[18] It also includes oral representations to someone other than the decision maker, who is to then transmit what they learned to the decision maker.[19] In *Cotton*, for instance, PC Cotton made representations to the ACC. The ACC then wrote a report to the DCC, who was responsible for making the final decision to dismiss Cotton. The law should not demand an administrative hearing of any form, including written submissions, without a real chance of the decision's accuracy being improved.

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[15] It is true that certain events might occur *during* a hearing that alters the antecedent reasons. This could include, for instance, the giving of an undertaking, the waiver of a claim, or the provision of consent. In each case, a participant in a hearing wields a power to alter the normative situation. But while such performances of a power coincide with a hearing, they are not special to it. That is, nothing about a hearing is essential to the giving of undertakings, the waiver of claims, or the provision of consent. A hearing could, but need not, be the context in which these powers are performed. So while the exercise of these powers leads to a change in the antecedent reasons, the hearing is not itself responsible for the change.

[16] This makes a hearing importantly distinct from, say, a tennis match: cf Crummey, 'Fair Procedures Always Make a Difference' 1242. The point of a tennis match is not only to find out who is the better tennis player. It is also to figure out who won *this* match. This is why an upset, in which the worse tennis player achieves a surprising victory, is not, without more, deviant. By contrast, the point of a hearing is not to 'win' the hearing, in the sense of achieving a victory in a game within the rules, but to reach the correct outcome.

[17] *AF 3* [60] (Lord Phillips).

[18] *Lloyd v McMahon* [1987] 1 AC 625 (HL); *Bushell v Secretary of State for the Environment* [1981] AC 75 (HL).

[19] *Local Government Board v Alridge* [1915] AC 120 (HL).

Relatedly, the principle goes beyond the threshold question of whether a hearing of any form is required. It also concerns what form of hearing must be afforded. The 'form' of a hearing includes various features of a hearing, such as orality, the calling of witnesses, and the opportunity for cross-examination.[20] Suppose an opportunity to make written submissions would lead to a real chance of an accuracy improvement. If so, fairness may demand a hearing with written submissions. But if not, then fairness does not require a hearing of that form.

Third, the chance of a hearing improving a decision's accuracy is 'real' when it is non-trivial. That it will do so must be more than merely conceivable or imaginable. Put in the language of degrees of confidence, fairness does not demand a hearing when a court can be justifiably certain or nearly certain that a hearing will not improve accuracy. We take the term 'real chance' from *Cotton*, but courts in other cases have applied similar epistemic thresholds.[21]

Fourth, Accuracy First is narrowly about what *fairness* demands. The demands of fairness bear on, but need not be decisive to, the question of what a public authority should do all-things-considered. Other factors may also matter. For example, courts have often emphasised the relationship between a hearing and the *impression* of unfairness or 'sense of injustice'[22] that the denial of a hearing might induce. The resentment that such subjective impressions might induce may have 'implications for the prospects of rehabilitation, and ultimately for public safety'.[23] That a hearing would mitigate a personal sense of grievance after an unfavourable decision could favour its provision. But this concerns the public interest in the individual's rehabilitation and good conduct going forward, not what fairness to the individual demands. More generally, hearings may help bolster public confidence in the legal system, which may be yet

[20] The form of a hearing does not include notice of a decision or the right to legal advice. Notice of a decision occurs *after* a hearing; it is not part of a hearing. And legal advice, while it could be provided as part of a hearing, could also be provided before. This is significant because notice and legal advice may serve a different purpose to a hearing, which in turn affects the circumstances in which their provision is futile: cf *Pathan* [121] (Lord Kerr and Lady Black).

[21] e.g. *Sanusi v General Medical Council* [2019] EWCA Civ 1172 [96] ('realistic'). It is plausible that the precise threshold of confidence may be sensitive to the stakes. That is, a factor that could heighten the necessary degree of confidence is how serious it would be if the decision maker were mistaken. It would be extremely serious to criminally punish an innocent defendant. This supports setting a high threshold of confidence, such as the beyond a reasonable doubt standard. Not all administrative decisions raise comparable stakes. In those cases, a lower threshold would be appropriate.

[22] *Osborn* [68]; see also *AF (No 3)* [63] (Lord Phillips), [72] (Lord Hoffmann); *R v Sussex Justices ex p McCarthy* [1924] KB 256 (HC), 259 (Lord Hewart).

[23] *Osborn* [70].

another benefit to providing a hearing. This, too, is distinct from what is owed to individuals as a matter of fairness.

Fifth, Accuracy First sets a limit on when a hearing is required. It does not explain why a hearing is required. To see this, note the difference between two questions:

1. *Scope*: when does fairness require a hearing?
2. *Grounds*: what makes it the case that fairness requires a hearing, when it does require a hearing?

Accuracy First concerns the scope question, not the grounds question. Indeed, the principle is consistent with a range of answers to the grounds question. In particular, it is consistent with the view that fairness requires a hearing (when it does) partly due to non-instrumental values. This is because it is possible for the non-instrumental wrong of failing to afford a hearing to only occur in circumstances when a hearing would have improved the accuracy of the outcome.

Failing to distinguish the scope and grounds questions can lead to confusion. Take the widely accepted claim that the purpose of fair hearings is 'not merely to improve the chances of…reaching the right decision'.[24] It is unsafe to infer from this truth that fairness demands a hearing irrespective of accuracy. It is also a mistake to move directly from the sensible claim that utility is not 'the only yardstick by which to measure the duty to act fairly' to the dubious conclusion that fairness demands a hearing even when it would not be useful.[25] In reality, the yardstick metaphor is ambiguous. The yardstick could, on the one hand, measure the *extension* of the requirement, which goes to the scope question. Or it could, on the other hand, assess the *gravity* of a breach of the requirement, which goes to the grounds question. Even if utility and accuracy were the only yardstick in the first sense, it would not follow that they are the only yardstick in the second.

A careful read of Lord Reed's speech in *Osborn* suggests a recognition of this distinction. As his lordship explained, among the reasons to afford a hearing is 'due respect to persons', where respect 'entails that such persons ought to be able to participate in the procedure by which the decision is made'.[26] At the same time, he set out an important limit on the *scope* of this reason. To deprive someone of a hearing only disrespects their dignity when they would have 'something to say which is relevant to the

[24] *AF 3* [72] (Lord Hoffmann).
[25] *Pathan* [126] (Lord Kerr and Lady Black).
[26] *Osborn* [68].

decision'.[27] Put another way, there is only a 'legitimate interest in being able to participate in a decision' when the person 'has something useful to contribute'.[28]

3. Proper Differences

Our argument for Accuracy First has several steps. We start, in this section, by arguing for a related thesis:

> *Proper Difference*. An administrative hearing (or hearing of a certain form) properly makes a difference to an authority's decision only if it improves the accuracy of the decision.

A decision 'makes a difference to an authority's decision' just when it makes a difference to what the authority decides—that is, to the substance of the decision.

Case types

The case for Proper Difference begins with several distinctions among types of case. In any case that comes before an authority, either the balance of relevant reasons favours deciding for the claimant (and not against them); favours deciding against the claimant (and not for them); or does not favour either option over the other.[29] And in each case, absent a hearing, the authority would either decide for the claimant or against them. That is, the authority would either approve or refuse the claim.

Putting these distinctions together yields six types of case. The first two are:

(1) *Correct approval:* the authority should decide for the claimant (and not against them) and would do so absent a hearing.
(2) *Correct rejection:* the authority should decide against the claimant (and not for them) and would do so absent a hearing.

A hearing does *not* properly make a difference if it leads an authority to do what it should not do. That means a hearing cannot properly make a difference in (1) and (2), since the authority was already going to do the only thing it should do.

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[27] *Osborn* [68].
[28] *Osborn* [82].
[29] To save words, we say 'should' rather than 'the balance of relevant reasons favours'.

In the second two types of case, the authority would fail to do the only thing it should do:

(3) *Incorrect approval:* The authority should decide against the applicant (and not for them) but would not do so absent a hearing.
(4) *Incorrect rejection:* The authority should decide for the applicant (and not against them) but would not do so absent a hearing.

A hearing properly makes a difference in (3) and (4). That is because the hearing leads an authority to do what it should do and to avoid doing what it should not do. Importantly, the hearing makes a difference *and* improves the accuracy of the authority's decision.

In cases of the last two types, reasons underdetermine what an authority should do:

(5) *Underdetermined approval:* The authority should either decide for or against the applicant and would decide for the applicant absent a hearing.
(6) *Underdetermined rejection*: The authority should either decide for or against the applicant and would decide against the applicant.

In these cases, a hearing that makes a difference cannot improve the accuracy of the decision. This is because, whatever it decided, the authority would have decided accurately. So if a hearing properly makes a difference in (5) and (6), then in certain cases a hearing would properly make a difference without improving accuracy. This would mean that Proper Difference is false, which in turn makes Accuracy First difficult to defend. By contrast, if a hearing does not properly make a difference in (5) and (6), then the only types of case in which a hearing properly makes a difference are ones that improve the decision's accuracy, namely (3) and (4). This would mean Proper Difference is true, which puts Accuracy First on the table. It is therefore crucial to know whether a hearing properly makes a difference in underdetermination cases, that is, (5) and (6).

Underdetermination and bad bases

A hearing does not properly make a difference in underdetermination cases. The argument has two steps. First, in such cases, a hearing can only make a difference to an authority's decision by leading the authority to decide on a bad basis. Second, a hearing does not properly make a difference to a decision by giving a decision a bad basis. So a hearing cannot properly make a difference in underdetermination cases. We take the second step to be uncontroversial. The first requires defence, however.

To start, consider the facts of *Cinnamond v British Airports Authority*.[30] The applicant, Cinnamond, was an unlicensed taxi driver. He repeatedly picked up passengers at Heathrow airport, even though this was prohibited. He was fined many times but never paid. Eventually, the British Airports Authority prohibited Cinnamond from entering the airport for any purpose, except as a passenger. This stopped Cinnamond from arriving at the airport to drop off a passenger, only to stay in the arrivals hall to solicit passengers for the return leg.

The authority had broad discretion to make rules to regulate the use and operation of the airport and the conduct of those within its premises.[31] Let us stipulate that the following two options were both rationally available to the authority: (i) forbid the drivers from entering the premises if they are not themselves a legitimate passenger; (ii) allow the drivers to enter the premises with a legitimate passenger, while prohibiting them from soliciting new passengers once within the premises. Since both options were available, the decision was rationally underdetermined.

As it happens, the authority chose (i), namely the adverse yet permissible result. How might a hearing induce a change of mind? One possibility is that, at the hearing, the drivers evoke sympathy by speaking with extraordinary eloquence. But their eloquence is an irrelevant consideration. Another possibility is that, at the hearing, the drivers exercise their rhetorical abilities to underplay their history of blatantly flouting the rules. But this unduly minimises the weight of that history. It follows that, as Brandon LJ said, 'no representations … would have been of the slightest use'.[32]

This pattern generalises. As it turns out, there are only two ways for a hearing to induce a change from one decision it is permitted to make to another decision it is permitted to make. The first is by leading the authority to act based on an irrelevant consideration. The second is by leading it to act based on a false view of the weights of relevant considerations. To do either is to lead an authority to decide on a bad basis. Let us consider these possibilities in turn.

Irrelevant considerations

A hearing could alter the result by leading the authority to consider a reason it should not have considered. Since the authority did not take this consideration into account prior to the hearing, it is a fresh input that bears on the outcome of the hearing. If the authority takes the consideration to

[30] *Cinnamond v British Airports Authority* [1980] 1 WLR 582 (CA).
[31] Airports Authority Act 1975, s9(1).
[32] *Cinnamond* [1980] 1 WLR 582, 593.

be decisive, the hearing will lead to a different result. At the same time, the consideration is irrelevant, which is why it cannot alter the objective correctness of either result.

Such irrelevant considerations may, at first glance, seem innocuous. Indeed, they may naturally feature in our psychology when making decisions. They are still irrelevant. Take the inclination to 'reward' someone who, at a hearing, points out a mistake the authority would otherwise have made. Since we are concerned with underdetermined cases, the mistake cannot have led the authority to an erroneous decision. (If it did, then uncovering the mistake would improve the decision.) Nor could the mistake have led the authority to decide against the applicant when doing so was the correct outcome anyway. So in this scenario, which we previously labelled as a category (2) case, the instinct to 'award' the applicant for raising the error at the hearing would plainly be an irrelevant consideration. For an authority to act on it to decide for the applicant would be unlawful.

The key cases are therefore ones in which the authority should either decide for or against the applicant, and the authority would otherwise have decided against the applicant. Previously we characterised the scenario as a category (6) case. A hearing would make a difference if the authority 'rewards' the applicant by deciding for them. To do so, however, is to act on an irrelevant consideration. The natural inclination to 'reward' those who save us from making an embarrassing mistake is an irrelevant consideration in a category (2) case, and it does not somehow become relevant once we go to a category (6) case.

This is important because authorities should only act on relevant considerations. If a hearing must lead an authority to act on an irrelevant consideration for it to make a difference, then fairness cannot demand that hearing. Otherwise, the authority would have to hold a hearing despite being required to disregard what was said at that hearing.

Undue weight

The second way for a hearing to improperly make a difference to the result is by leading the authority to place more or less weight on a relevant consideration than it objectively possesses. This would explain an authority's change of mind, despite a hearing being unable to make a difference to the objective correctness of the outcome. While hearings do not objectively alter the weight of a relevant consideration, they could erroneously lead an authority to give it undue weight. This error may lead to the decision being different from what it would have been absent a hearing.

Authorities should give relevant considerations the weight they are due. It is implausible that fairness demands a hearing merely because it provides an opportunity to persuade the authority to misweigh the evidence. To be clear, this is consistent with it being *permissible* for an authority to place undue weight on a relevant consideration. As a matter of law, although authorities must take relevant considerations into account, they are not required to give those considerations their correct weight. Rather, the weights afforded to such considerations are assessed under the more forgiving standard of reasonableness, if at all.[33] This, however, goes to when a decision is unlawful in virtue of the weight that a relevant consideration is afforded. Our point relies on a weaker claim: leading an authority to place undue weight on a relevant consideration is an improper way for a hearing to alter the outcome, even if the weight is not so undue as to render the decision impermissible. The question is not whether the decision, given the error, is now unlawful. Rather, it is whether fairness demands a hearing to persuade the authority of a falsehood. That it does so is dubious.

4. Non-Futility

So far, we have said that properly making a difference requires improving accuracy. But we have not yet connected making a difference to fairness. This section bridges the gap. Here we argue for:

> *Non-Futility*. Fairness does not demand an administrative hearing (or hearing of a certain form) unless there is a real chance of it properly making a difference to an authority's decision.

Non-Futility is weaker than Accuracy First. The former is put in terms of the difference that hearings make to an authority's decision. The latter is more specific, since it only concerns those differences that pertain to improvements in accuracy.

The case for Non-Futility is that it yields intuitive results in a range of cases. Consider:

> *Planning*. A local council is considering *A*'s application for permission to convert his loft. *B*, who lives across the country and knows nothing about the matter, asks to be heard by the council. It refuses.

The council's refusal to hear from *B* is plainly not unfair. Why not? Non-Futility provides an easy answer. Not knowing anything about the matter, there is no real chance of *B* properly influencing the council's decision.

[33] *Tesco Stores v Secretary of State for the Environment* [1995] 2 All ER 636 (HL).

However, this is not the only possible explanation of the lack of unfairness. It is possible that fairness does not entitle someone to a hearing on a matter unless they are affected by a decision on that matter. *B* is not affected by the council's decision on *A*'s planning application. So it is possible that *B* would have been treated fairly even were Non-Futility false. This means we need to look elsewhere to find clear support for Non-Futility. Consider a different case:

> *Premises*. *C* wishes to open a pub. She applies for a premises license and is refused. She then appeals to a tribunal. The tribunal informs *C* that it considers the initial decision to be obviously flawed. It grants the appeal without hearing from *C*.

In this case, *C* is affected by a tribunal's decision and is not heard from. Yet she is not treated unfairly.[34] Again, Non-Futility can explain why. All that *C* can do, if a hearing takes place, is to make arguments in her favour. But the decision will be in her favour anyway. So there is no real chance of her making a difference to the tribunal's decision. That, says Non-Futility, is why it is not unfair to refuse to give *C* a hearing.

Someone might point out that, in the premises case, the effect on the applicant is positive. That is, the tribunal's decision to allow the appeal affected *C* in a way that she would have welcomed. Does Non-Futility hold true once we change the decision's valence? Imagine:

> *Bank*. The Bank of England is considering whether to raise interest rates. *D*, an ordinary mortgage holder, will face financial hardship if rates rise. He asks to be heard on the matter. The Bank refuses and then raises interest rates.

In this case, *D* is negatively affected by a decision and is not heard from. Yet *D* has not been treated unfairly. Fairness does not demand that the Bank of England hear from every mortgage holder who will be worse off if interest rates increase. Again, Non-Futility explains why. A court can be justifiably certain, or nearly certain, that an ordinary mortgage holder has nothing to add to a decision that turns on macroeconomic data, inflation targets, and so on. *D* is not in a position to properly influence the decision, in other words. Hence, fairness does not require that he be given a hearing. RG Bone gives a similar example. Before an authority 'sets the legal driving age at sixteen', it is 'not required … to give each person [who would

[34] L Kaplow, 'The Value of Accuracy in Adjudication: An Economic Analysis' (1994) 23 Journal of Legal Studies 307, 390 ('One does not often hear stories of individuals who win complaining that they did not get their day in court').

be disqualified from holding a license based on age] an individualized hearing'.[35] The ordinary fifteen-year old has nothing to contribute to a decision that properly turns on points about mental capacity, accident rates, and so forth. Because they cannot properly make a difference, fairness does not require the authority to hear from them.

In the bank and drivers licensing cases, the relevant decisions negatively affect, not just one individual, but many people. No one is singled out. Someone might wonder whether Non-Futility holds good when a decision negatively affects someone specifically. Now as a general matter, it is doubtful that fairness operates differently depending on the specificity of a decision.[36] Be that as it may, there are examples showing the worry is misplaced. Consider:

> *Procurement*. A council issues an invitation for bids to supply office equipment. The council's policy says that bids will be evaluated based on cost. *E* submits a bid. Following a closed-door meeting, the council rejects *E*'s bid in favour of a lower bid from a different supplier.

There is a negative effect on a specific person, *E*, without a hearing. Yet there is no unfairness here. Cost is the only relevant consideration, and the bid itself details the cost. A hearing would almost certainly add nothing. Of course, it is not *impossible* for a hearing to make a difference. For example, we can imagine a scenario in which the bid materials include a typo (eg the amount written was £2700 instead of £2070), and a hearing would reveal the mistake. But these scenarios are highly speculative. There is no real, non-trivial chance of a hearing making a difference. As a result, Non-Futility says that fairness does not demand a hearing.[37]

5. Non-Futility and Process Values

There is an important potential objection to Non-Futility, running as follows. There may be instrumental reasons for hearings, including the contribution they might make to an accurate decision. However, as we said in section 1, there are also non-instrumental reasons for hearings, or what

[35] RG Bone, 'Rethinking the "Day in Court" Ideal and Nonparty Preclusion' (1992) 67 NYU Law Review 193, 281.

[36] There are pragmatic reasons (cost, time, etc) not to grant a large group of affected people hearings. Such reasons do not apply with the same force when only one person is affected. So, it is more likely that fairness will be *outweighed* when a large group is affected. That does not mean fairness does not apply.

[37] For other examples along similar lines, see L Alexander, 'Are Procedural Rights Derivative Substantive Rights?' (1998) 17 Law and Philosophy 19, 33.

are sometimes termed 'process values'[38]. Process values include autonomy, respect, and participation.[39] Such values (the objection says) count in favour of a hearing whether or not it will make a difference to the result. Fairness may therefore require a hearing even when there is no chance of making a difference, contrary to Non-Futility. Put formally, the objection goes like this:

Premise 1	If process values demand a hearing, then fairness demands a hearing.
Premise 2	Process values may demand a hearing even though a hearing has no chance of making a difference to the result.
Premise 3	If fairness demands a hearing when it has no chance of making a difference to the result, then Non-Futility is false.
Conclusion	So, Non-Futility is false.

The argument is valid; but is it sound? We grant the truth of Premise 1 for the sake of argument. Premise 3 is clearly true. That leaves Premise 2, which we reject.

A potential argument against Premise 2 denies the existence of process values. Were that argument successful, the only fairness-related reasons for procedures would be instrumental. Some theorists, such as Richard Posner, make this argument.[40] Here we pursue a different strategy. We assume there are process values. So we assume the value of a procedure is not limited to its worth as a means to an end. Instead, we reject Premise 2 because process values do not favour a hearing unless it would have a real chance of affecting the outcome.

One might worry our strategy is incoherent. We said that process values are *non-instrumental* reasons. If these values favoured a hearing only when it had a real chance of affecting the outcome, would they not be

[38] R Summers, 'Evaluating and Improving Legal Processes—A Plea for "Process Values"' (1974) 60 Cornell Law Review 1. Jerry Mashaw labels as 'dignitary theories' those theories which reflect the 'perception that the effects of processes on participants, not just the rationality of substantive results, must be considered in judging the legitimacy of public decisionmaking': J Mashaw, 'Administrative Due Process: The Quest for a Dignitary Theory' (1981) 61 Boston University Law Review 885, 886.

[39] There are various lists. See Summers, 'Plea for Process Values' 20-7; Allan, 'Duty of Respect' 498-9; Mashaw, 'Quest for a Dignitary Theory' 899-906; R Saphire, 'Specifying Due Process Values' (1978) 127 University of Pennsylvania Law Review 111, 117-25.

[40] R Posner, 'An Economic Approach to Legal Procedure and Judicial Administration' (1973) 2 Journal of Legal Studies 399; see also L Alexander, 'The Relationship Between Procedural Due Process and Substantive Constitutional Rights' (1987) 39 University of Florida Law Review 323, 325.

instrumental reasons? No. As we said in section 2, a reason's existence can be sensitive to outcomes, despite not solely concerning the bringing about of a valuable outcome. To suppose otherwise conflates the *scope* question (when fairness requires a hearing) with the *grounds* question (why fairness requires a hearing, when it is required). A hearing may be required partly for non-instrumental reasons. But those reasons could only arise when the hearing is instrumentally useful.

An analogy might help. Artistic self-expression is of intrinsic value. That value is not reducible to the value of the outcome of the expression: the painting, the sculpture, etc. But the value is served only if the artist can shape or craft the painting, sculpture, etc. This value therefore depends on the ability to make a difference to an outcome without being reducible to the value of that outcome. Like artistic self-expression, participating in a hearing might be intrinsically valuable. And yet, also like artistic self-expression, the value might be served only when the hearing makes a difference to the outcome.

The distinction between scope and grounds reveals an ambiguity in a popular view. 'We all feel that process matters to us irrespective of result.'[41] On one reading, the claim is that, even if the process would not make a difference to the result, the process still 'matters', that is, is of value. On another reading, the claim is that, while a process is valuable only if it can make a difference to the result, the value of the process is not reducible to the difference it makes. The first reading is assumed by Premise 2; the second is incompatible with it.

With these clarifications out of the way, let us turn to the case against Premise 2. We proceed inductively, showing how various process values only favour a hearing when that hearing can make a difference.

Autonomy

Start with autonomy. A measure enhances a person's autonomy only if it gives them greater control over the course of their own life.[42] No increase in control, no increase in autonomy. As Jason Brennan says:

> There is a surefire way to determine that you do not have autonomous control over situations. No matter what you choose or what you decide, the same thing happens anyway; your decisions make no difference.[43]

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[41] Mashaw, 'Quest for a Dignitary Theory' 887.
[42] J Raz, *The Morality of Freedom* (OUP 1986) 369-74; M Oshana, *Personal Autonomy in Society* (Routledge 2016) 83-4.
[43] J Brennan, *Against Democracy* (PUP 2016) 90.

A hearing that has no real chance of making a difference to a decision does not give a person greater control over what happens to them. The same thing will happen to them anyway. Such a hearing does not enhance autonomy; it does not contribute to 'self-determination'.[44]

To see this point in context, consider the facts of *Mughal*.[45] Mohammed Mughal lived in the UK. But when he sought to return from a visit to Pakistan in 1973, he was refused leave to enter. On his arrival, Mughal was questioned at passport control in Manchester Airport. He told the officer that he came from Pakistan in 1962, having lived in the UK since. At first all appeared to be in order, but a suspicious handwritten indorsement led the immigration officer to change his mind. The officer kept Mughal's passport and proceeded to investigate. The passport entry, which suggested Mughal left Pakistan in 1962, was faked, according to a Pakistani government representative. Then it turned out that Mughal told the Inland Revenue that he first entered the UK in 1968. Faced with these inconsistencies, the officer refused leave, having not been satisfied that Mughal was settled in the UK.

On his application for judicial review, Mughal admits he lied to the officer when he claimed to have arrived in 1962. He also admits he lied when he told the Inland Revenue that he arrived in 1968. But Mughal argued that the officer should have given him a chance to respond to the adverse evidence from the Pakistani representative and the Inland Revenue. The Court of Appeal rejected that argument. As Denning LJ put it, 'how can he expect to satisfy [the officer] when he told so many lies on so many matters?'.[46] In light of this, the officer could reasonably conclude that a hearing on why he told these lies would not improve the accuracy of his decision. Having already afforded Mughal an opportunity to demonstrate his status, the officer was not required to then provide a hearing on his initial misrepresentations.

Imagine, though, that Mughal had been given a hearing. This might allow for an explanation as to why he lied. That, in turn, could bear on an assessment of culpability. But the only question before the officer was whether Mughal had settled status. Whatever he might have said, it could not change his failure to demonstrate his settled status. The outcome would have been the same, whatever Mughal had said. The hearing would not have given Mughal control over what happened to him. It would not,

[44] Summers, 'Plea for Process Values' 21.
[45] *R v Home Secretary, ex p Mughal* [1974] QB 313 (CA).
[46] [1974] QB 313, 325.

therefore, have increased his autonomy. At least on grounds of autonomy, fairness did not require a hearing, consistent with Non-Futility.

Respect

Next, take the value of respect. We follow Stephen Darwall in distinguishing two kinds of respect.[47] Showing a person 'appraisal respect'[48] is to positively appraise them, eg as an athlete or lawyer. We can set aside appraisal respect in what follows. When it comes to hearings, the salient value concerns 'recognition respect'.[49] To respect something, in the recognition sense, is to be inclined to 'weigh appropriately in one's deliberations some feature of the thing in question'.[50] Thus, an 'appropriate object' of recognition respect is something 'that one ought to take into account in deliberation'.[51]

When it comes to the procedural context, there are two potential objects of recognition respect. The first is a claimant's submissions, such as the arguments they make and the evidence they highlight. However, a claimant's submissions are an appropriate object of recognition respect only if the authority ought to take them into account in its deliberations. An authority only ought to take into account information or material relevant to its decision. Information is relevant to the authority's decision when it could properly make a difference to that decision. Thus, a claimant's submissions are an appropriate object of recognition respect only if they could properly make a difference to the decision. This means there is no conflict between Non-Futility and respect for a claimant's submissions.

A second possible object of recognition respect is the claimant themselves. The authority should, so far as the law permits, take into account a decision's impact on the claimant's interests and goals. There are now two scenarios worth considering. First, the authority properly takes into account its decision's impact on the claimant regardless of a hearing. In this scenario, respect does not favour a hearing over no hearing. That is because the claimant will be respected either way.[52] Second, the authority will properly take into account its decision's impact on the claimant only if it hears from the claimant. Here, respect certainly does favour a hearing over no hearing. However—and this is crucial—the hearing has a real

[47] S Darwall, 'Two Kinds of Respect' (1977) 88 *Ethics* 36; see also D Meyerson , 'The Moral Justification for the Right to Make Full Answer and Defence' (2015) 35 OJLS 237, 258ff.
[48] Darwall, 'Two Kinds of Respect' 39.
[49] Darwall, 'Two Kinds of Respect' 38.
[50] Darwall, 'Two Kinds of Respect' 38.
[51] Darwall, 'Two Kinds of Respect' 40.
[52] For a similar point about dignity, see RG Bone, 'Procedure, Participation, Rights' 1028.

chance of making a difference to the decision. After all, it will lead the authority to consider relevant matters it would not have otherwise. Thus, Non-Futility does not rule out a hearing, in this second scenario. In neither scenario does Non-Futility rule out a hearing which respect favours.

Participation

Finally, consider participation. Many people think it is intrinsically valuable for those affected by a decision to participate in the decision-making process.[53] But what is it to 'participate'? On one view, participation requires a measure of control or influence over the decision. As Mashaw says, 'participation provides *control* over the process of decision making'.[54] The problem is that a hearing with no chance of affecting the decision fails to afford the claimant any control. A hearing of this kind is therefore not an opportunity to 'participate' in the decision-making process.[55]

On a second view, all that is necessary to 'participate' in a process is to communicate one's thoughts and opinions to the authority. What matters is being able to speak up, even when doing so has no chance of making a difference.[56] We accept that it is intelligible to speak of 'participation' absent control or influence. We doubt, however, that such participation is intrinsically valuable. A claimant might feel better after saying their piece. But fairness does not demand that an authority make itself available just so a claimant can 'vent'.[57] Further, since the relevant notion of participation is focused on communication from the claimant to the decision maker, a hearing is unnecessary to provide it. Suppose the claimant has an opportunity to lodge a complaint *after* the decision is made.[58] The complaint has no chance of altering the decision, but it guarantees that the decision maker will listen to what the claimant has to say. This, too, affords an opportunity to communicate to the decision maker.

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[53] eg Summers, 'A Plea for Process Values' 1; J Mashaw, 'Administrative Due Process: The Quest for a Dignitary Theory' (1981) 61 Boston University Law Review 885; Conor Crummey, 'Why Fair Procedures Always Make a Difference' (2020) 83 MLR 1221.

[54] Mashaw 178; also assumed by L Solum, 'Procedural Justice' (2004) 78 Southern California Law Review 181, 294-5; L Fuller and K Winston, 'The Forms and Limts of Adjudication' (1978) 92 Harvard Law Review 353, 369.

[55] L Kaplow, 'The Value of Accuracy in Adjudication: An Economic Analysis' (1994) 23 Journal of Legal Studies 307, 391; M Redish and L Marshall, 'Adjudicatory Independence and the Values of Procedural Due Process' (1986) 95 Yale Law Journal 455, 487-8.

[56] F Michelman, 'Formal and Associational Aims in Procedural Due Process' (1977) 18 Nomos 126, 127.

[57] Redish and Marshall, 'Adjudicatory Independence' 388.

[58] cf *R (Martin) v Chancellor of the Exchequer* [2026] EWHC 1123 (Admin) [63] (discussing how, sometimes, consultation is 'pointless because the decision is already made').

To draw the discussion of process values together, return to *Spackman*. A doctor wanted a hearing before the General Medical Council to argue he had not committed adultery with a patient, even though a divorce court found that he had. There are two possibilities. Either the hearing can make a difference or it cannot. If it can make a difference, then there are process reasons for giving Spackman a hearing. He will have a degree of control over what happens to him. His interests are more likely to be taken into account, which means he is more likely to be respected. By contrast, if the divorce court's finding is conclusive, and the hearing cannot make a difference, everything changes. None of the process reasons for a hearing apply. The hearing will not give Spackman control, so it will not enhance his autonomy or allow for meaningful participation. Nor will the hearing help ensure that his interests are taken into account. In short, process values are important, but only when a hearing might make a difference to the decision. For that reason, process values do not threaten Non-Futility.

6. Summary

We have established two theses. First, fairness demands an administrative hearing, or a hearing of a certain form, only if there is a real chance of it properly making a difference to an authority's decision. Second, an administrative decision properly makes a difference to an authority's decision only if it improves the decision's accuracy. It follows that fairness demands a hearing, or a hearing of a certain form, only if there is a real chance that it will improve accuracy. This conclusion is Accuracy First.

As applied to *Cotton*, since there was no real chance of an opportunity to comment on the Assistant Chief Constable's report improving the ultimate decision, fairness did not demand that opportunity. Similarly, in *Spackman*, fairness did not entitle the doctor to the opportunity to challenge the divorce court's findings, provided there was no real chance that he would convince the GMC that the court had erred.

7. Objections

Now we consider several objections to Accuracy First.

Circularity

A possible objection to Accuracy First is that it risks 'circular reasoning'.[59] Suppose a public authority decides against the applicant without a hearing. On our view, the refusal is fair if, on the evidence before the

[59] *Osborn* [88].

decision maker, there is no realistic chance of the hearing taking the decision closer to the outcome that the relevant considerations favour. But hearings are important, in part, because they can unearth fresh evidence that the authority might not previously be aware of. This raises an apparent circularity: a hearing may seem unlikely to help on the evidence currently available, yet one way it might help is by uncovering new evidence.

The objection grants the relevance of accuracy to the fairness of denying a hearing. The suggestion, however, is that it is impossible to assess, in advance, whether a hearing would improve accuracy. This is because the decision maker may be unaware, not only of the evidence, but of the possibility that the evidence exists.

This confuses two issues. First, the strength of the applicant's case, in light of the evidence that is presently available. Second, the likelihood of a hearing *altering* the evidence that is available, in such a way to alter the strength of the applicant's case. It is true that the first issue is relevant to the second. If the applicant has a strong case, then even if the decision maker is initially inclined to decide against the applicant, it is easy to see how things might change after a hearing. It does not follow, however, that if the applicant has a weak case, then a hearing would be futile. For although the applicant's case might be weak on the presently available evidence, a hearing may alter the evidence that is available. This, in turn, may mean that a decision maker could *not* conclude that there was no real chance of a hearing improving the accuracy of a decision. It would then be unfair to make a decision without a hearing, consistent with Accuracy First.

This helps address Lord Reed's concern in *Osborn*, who advances the circularity objection by reference to a prisoner who cannot 'participate effectively in a written procedure due to learning difficulties'.[60] To deny an oral hearing on the basis of his dossier and written representations revealing a 'low prospect of success…would plainly be unfair'.[61] But this is consistent with Accuracy First. When assessing whether there is a real chance of a non-futile hearing, the strength of the applicant's case on the information presently available is not the only relevant issue. In other words, a hearing should not be denied solely because, absent a hearing, the applicant's case appears weak. Rather, the authority must also take into account the second-order considerations that bear on the likelihood of a hearing improving the accuracy of the decision. In short, although the

[60] *Osborn* [89].
[61] *Osborn* [89].

applicant may have yet to demonstrate certain facts on the available evidence, it may not be far-fetched for them have done so after a hearing.[62]

One might object that it is rarely reasonable to conclude that a hearing would not improve the accuracy of the decision. This is false, however. Take a situation in which the decision maker lacks discretion. They must decide against the applicant if circumstance *c* is present, and there is no real doubt that *c* exists on the facts. The existence of *c* may not be certain, of course, given an outside possibility of some freakish scenario in which *c* is absent. But the mere *possibility* of an accuracy improvement is not equivalent to a *realistic* chance. So in this scenario, the weakness of the applicant's case, coupled with the lack of discretion, supports the conclusion that there is no real chance of a hearing improving the accuracy of the eventual decision.

Now consider more complex scenarios, where a potentially wide range of considerations may be relevant to the decision. In these cases, it is more likely that a hearing will have a realistic chance of improving the accuracy of the decision, even if it is hard to see *how* that benefit might arise before the hearing. 'As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of answered charges which, in any event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.'[63] But the likelihood of this occurring, in any given case, is a matter of degree.

This may give rise to a different objection, which is that, since we can never be absolutely certain that a hearing will be futile, it is always unfair to deny a hearing. But if fairness requires decision makers to be certain before acting in a manner that might conceivably infringe a right, then the range of permissible conduct would be vanishingly narrow. Many decisions could conceivably infringe a right. From the authority's perspective, these decisions are always made under some degree of uncertainty. If the law were to insist on certainty, public authorities could not help but act impermissibly. The law does not require this, either in procedural fairness or more generally.[64]

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[62] Moreover, there may be other sources of evidence, outside of a dossier or written representation, which renders this possibility more likely. For instance, in Lord Reed's own example, a crucial piece of context is that the prisoner suffers from learning difficulties. This may mean that a hearing may well have a 'real chance' of improving accuracy even if, absent such difficulties, it would not.

[63] *John v Rees* [1970] Ch 345 at 402.

[64] See RG Bone, 'Procedure, Participation, Rights' 106; R Dworkin, 'Principle, Policy, Procedure' in *A Matter of Principle* (OUP 1986) 72, 82; J Rawls, *A Theory of Justice* (HUP

This is so no matter the importance of the underlying right. Take a criminal trial, where much is at stake.[65] The right of innocents not to be criminally punished is surely, to understate the point, at least as important as a right to be heard in administrative proceedings. Even in this context, the law does not insist on certainty before punishing the defendant. That is, the law does not require the decision maker, before convicting the defendant, to be sure of guilt beyond *all* doubt. Rather, the applicable burden of proof in a criminal trial is guilt beyond a *reasonable* doubt.

Trials

Another worry with our argument proceeds by analogy with criminal trials. The objection builds on two premises. First, fairness always demands the opportunity for a trial in the criminal context. Specifically, this opportunity is required even when a trial would not make any difference to the outcome.[66] Second, there is no relevant difference between criminal trials and administrative hearings. It would then follow that fairness always demands the opportunity to be heard in an administrative context.

The first premise is fairly plausible, although there may be exceptions when it comes to minor offences. The second premise is problematic, however. The differing purpose of criminal punishment and public administration reveals a significant disanalogy between criminal trials and administrative hearings. For instance, it is plausible that criminal punishment involves a kind of communicative element, especially those associated with blame. If so, the defendant may need to be present at a trial for this purpose to be fulfilled. This makes sense of why criminal law requires that the defendant not only satisfy the rules on criminal responsibility when the offence was committed, but additionally satisfy the rules on the fitness to stand trial while the proceedings are underway. That this is disanalogous to administrative hearings is further supported by the fact that, although there is an open call for trials to be held in public, no similar demand extends to administrative hearings.

Even if we were to grant the analogy between criminal trials and fair hearings, the objection is less threatening to our position than it might seem. If the defendant is in fact guilty, a hearing may be unable to improve the accuracy of a decision that reaches the correct conclusion respecting the defendant's guilt. Even so, it is not the case that, on Accuracy First,

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1971) 239; cf *British Transport v Westmorland CC*, per Viscount Simonds (making a similar point in a distict context).

[65] cf Rawls, *Theory of Justice* 85-6.

[66] For discussion, see Meyerson, 'Right to Make Full Answer and Defence' 242-50.

fairness never requires that the guilty be afforded a hearing.[67] For it can still be the case that, when viewed from the perspective of a decision maker, there exists a real chance of a hearing improving the accuracy of its decision. It is one thing to discover that a hearing, as it turns out, could not have made a difference; it is another to conclude, prior to making a decision, that there is no realistic prospect of a hearing having this effect. So our position is consistent with the thought that fairness demands that we not form adverse judgments in the absence of good evidence.[68] It is also consistent with the thought that fairness demands that decision makers guard against the *risk* of reaching an incorrect decision.[69]

Elections

A final objection draws on an analogy with elections in large democracies. Normally, any individual vote is futile, in the sense that it makes no difference to the outcome. So we can usually know, to a degree of confidence, that a particular vote won't improve the accuracy of the outcome. Yet fairness demands that each person be entitled to vote. The implication seems to be that Accuracy First is unsound in the electoral context. And if the principle is unsound in the electoral context, why would it be any more attractive in the administrative hearing context?

Consider two ways to understand the reason for individuals to vote.[70] The first is that the vote contributes to an outcome (eg the election of a Member of Parliament), even if it is not necessary for that outcome to arise.[71] The suggestion is that there is some value in a voter being partly responsible for bringing about a result, even if the vote is not itself pivotal. On this understanding, the reason to vote depends on the outcome having independent value. That is, the winning candidate must be better or be otherwise worth putting in office. So understood, elections do not assist opponents of Accuracy First.

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[67] cf Christopher Heath Wellman, 'Procedural Rights' (2014) 20 Legal Theory 286.
[68] David Enoch, 'In Defense of Procedural Rights (Or Anyway, Procedural Duties)' (2018) 24 Legal Theory 40. Note that, since good evidence goes to whether the judgment is warranted, it concerns accuracy.
[69] NP Adams, 'Grounding Procedural Rights' (2019) 25 Legal Theory 3.
[70] We present the distinction in terms of reasons to vote, because that is how it is normally framed in democratic theory. But it could also be framed in terms of reasons to give people the right or opportunity to vote.
[71] Alvin Goldman, 'Why Citizens Should Vote: A Causal Responsibility Approach' (1999) 16 Social Philosophy and Policy 201.

The second approach is to identify a process value that underpins the intrinsic significance of democracy.[72] For the sake of argument, suppose that the equal political authority of citizens is of non-instrumental value. Suppose also that this value is realised by elections run on a principle of one person one vote, even if no individual vote has a real chance of changing the outcome. The election of an MP, for instance, manifests equal political authority because the outcome—the person elected—just is whoever attracts the most votes. It follows from these assumptions that Accuracy First is not a sound principle in the democratic context.

But democratic elections, so understood, are importantly distinct from administrative hearings. In an administrative hearing, the claimant does not have a vote. They do not have an equal say over what happens. Their role is to raise evidence that bears on a relevant consideration. If the hearing raises relevant points, then the authority must take this into account when making the decision. If it does not, however, then there is nothing for the authority to consider from the hearing when making the decision. That is, administrative hearings do not, and are not designed to, realise the value of equal political authority.

Of course, this response does not address the possibility of democratic elections serving some non-instrumental value other than equal authority. A sceptic could then argue that this value is also served in the administrative context. We do not claim to have canvassed all possible values relevant to elections. But the burden should be on the sceptic to show that this value, whatever it might be, supports a hearing in circumstances that outstrip Accuracy First.

Further, there are general reasons to doubt the analogy between hearings and elections. First, so long as the election is not rigged, voters jointly have the capacity to alter the outcome. So if fairness can apply to groups, then it might demand that the group of eligible voters be afforded an opportunity to vote. By contrast, the applicant who seeks a futile hearing is not part of a larger group for whom the hearing is not futile. Second, elections are meant to be partly constitutive of who should occupy public office. There is a difference between a candidate who wins an election, on the one hand, and a candidate who *would* attract the most votes if an election were to occur. Unlike a hearing, then, elections seek to bring new considerations into existence or make existing ones newly relevant.

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[72] Thomas Christiano, *The Constitution of Equality* (OUP 2008); Emilee Booth Chapman, 'The Distinctive Value of Elections and the Case for Compulsory Voting' (2019) 63 *American Journal of Political Science* 101.

8. Makes No Difference

Even when a public authority acts unlawfully, a remedy is not guaranteed. Most clearly, if the application for judicial review is out of time, then a court must normally refuse it. This puts various remedies that are only available through the judicial review procedure, such as a quashing order, off the table.

Among the factors that could render a remedy unavailable is the 'makes no difference' principle. It is now the case that, 'if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred', then a court cannot normally permit an application for judicial review to proceed or award any relief under that application.[73]

There are several important differences between Accuracy First and the makes no difference principle. The first pertains to scope. Accuracy First concerns the ground of review for failure to afford a hearing, while the makes no difference principle applies across all the grounds of review.

The second is structural. Accuracy First goes to whether fairness demands a hearing, and thus whether an administrative decision is unlawful for the reason that it was made without a hearing. The makes no difference principle, by contrast, goes to whether a court may allow an application for judicial review to proceed, and grant relief under that application, with respect to an *unlawful* decision. The latter is therefore downstream of the former.[74]

The third difference is the epistemic threshold. Accuracy First is framed in terms of a 'real chance' that the hearing will improve the accuracy of a decision. The makes no difference principle is framed in terms of it being 'highly likely' that the flaw in the decision will make no difference to the outcome for the applicant. It may be possible for a hearing to be 'highly likely' to lead to the same outcome, even though there is a realistic, albeit highly unlikely, chance of leading to a more accurate outcome.

The fourth difference is temporal. According to Accuracy First, fairness requires a hearing if, on the evidence before it, there is a real chance of an accuracy improvement. The makes no difference principle, however, tells the courts to deny permission and relief if it is highly likely that the unlawful decision would be substantially similar to a lawful one. The point is that, while the former goes to what fairness demands of an

[73] Senior Courts Act 1981, s31(2A).
[74] see *R (Brockie) v Parole Board* [2025] EWHC 2551 (Admin) [42].

administrative authority at t_1 when it makes the decision, the latter concerns the likelihood of a remedy making a difference at t_2 after a court reviews the decision.[75]

Even with these differences in mind, our analysis of the ground of review for fair hearings has implications for the significance of the makes no difference principle.

Conor Crummey has argued that, since fair hearings are intrinsically valuable, whether a hearing is afforded always makes a difference to the outcome for the applicant.[76] This leads him to conclude that the makes no difference principle is largely irrelevant with respect to fair hearings. Put this way, there is a sense in which this is largely correct, but in a way which has radically different implications for the availability of judicial relief for failure to afford a hearing. It is true that the makes no difference principle is less relevant to the ground of review for fair hearings than one might suppose. But this is because, if there is no real chance of a decision made after a hearing reaching a different outcome as before, then there is no real chance of the hearing having improved the accuracy of the decision. A remedy is therefore unavailable since the decision was not unlawful to begin with, rather than a court being prevented from awarding one to address an unlawful decision.

This analysis, if correct, casts surprising light on the significance of the makes no difference principle. The principle is plainly significant with respect to certain grounds of review. Take, for instance, the ground of review for relevant and irrelevant considerations. It is possible for a decision to be taken, in part, on an irrelevant consideration. If so, the decision is unlawful. But if that irrelevant consideration did not play a major part in the authority's decision, then it may well be 'highly likely' that a fresh decision that properly excludes the irrelevant consideration may well reach the same outcome. Similarly, a decision may be unlawful for failure to consider a relevant consideration, yet it might be highly likely for a lawful decision to reach the same outcome if the consideration is, while relevant, of relatively minor significance. Consider also the ground of review for fettering discretion. If an authority makes a decision by blindly applying a prior policy, without keeping an open mind as to whether to deviate from that policy, then it acts unlawfully. Still, on certain occasions it may be highly likely for the authority to reach the same outcome even after keeping an open mind about deviating from the policy. For there may be no circumstances that justify a deviation.

[75] *Brockie* [2025] EWHC 2551 [45]-[46].
[76] C Crummey, 'Why Fair Procedures Always Make a Difference' (2020) 83 MLR 1221.

By contrast, the makes no difference principle is plainly irrelevant to other grounds of review. If a decision is unlawful because no reasonable authority would have reached the outcome that the authority in fact reached, then it is necessarily the case that a decision that is lawful would reach a different outcome. This is because the decision is unlawful precisely because it reached the wrong result.

At first glance, the ground of review for fair hearings seems like one in which the makes no difference principle might potentially be significant. This is because it is plainly possible for a hearing to lead to a decision with a different outcome for the applicant. But on Accuracy First, fairness only requires a hearing if there is a real chance of the hearing leading to a decision that is more accurate, and therefore a decision that is different from the one that was made without a hearing. The makes no difference principle is therefore far less significant to the fair hearings ground than one might suppose.

9. Conclusion

For some, a hearing is only important because of how it contributes to the accuracy of a decision. For others, it is also important because it satisfies a requirement based on dignity, autonomy, and so on. This disagreement concerns what we call the *grounds* of a requirement to afford a hearing.

Here we show that, whatever one's answer to the grounds question, we should all affirm a particular limit on the *scope* of when a hearing is required. A hearing should only be required if there is a real chance that it would improve the accuracy of the decision. If a hearing is only important in virtue of its contribution to accuracy, this is straightforwardly the case. But even if hearings are required for non-instrumental reasons, those reasons only arise in accordance with Accuracy First.

It follows that English courts should not treat dignity, respect, or participation as reasons to require hearings even when they cannot improve the decision. They are reasons to hold a hearing, but not every hearing.