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Civil Process and Power: Thoughts from a Policy-Oriented Perspective

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I. INTRODUCTION: BACKGROUND TO THE PROBLEM

The purpose of this article is to set out the salience of a theory *about* civil procedure and to suggest a policy-oriented jurisprudential framework to secure that end. A policy-oriented jurisprudential framework should give a realistic theoretical framework that is needed

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to improve the way the subject is taught, thought about, and applied in the real world. First, there is no theory that has explanatory power that will eliminate the "strangeness" of procedure, not only for lawyers and students but also for others with diverse disciplinary backgrounds. This means a conceptual basis is needed for civil procedure that has explanatory power so that descriptions of procedural systems will inform us about what we know and do not know about civil procedure as an operational system.

Second, a theory about civil procedure must have descriptive utility that will improve the knowledge base about procedure. This should facilitate policy and value clarification with reference to real problems and issues, which will in turn generate explicit standards of normative guidance. Such standards should enable us to reach down from abstract normative principles, and up from problem-specific detail, to reach solutions to decisional problems that are realistic as well as normatively satisfying in their congruence with the perceived and clarified common interest.

It is a simple matter for a student or lay person to conceptualize a negligent or malicious act, envision a theft, or ponder the breach of a contract for sale. Yet it is quite another thing to visualize, much less experience, the thrill of an action for replevin, the aesthetics of a perfectly executed *quasi in rem* procedure, or the intellectual satisfaction of the successful use of the offensive collateral estoppel aspect of res judicata.[1]

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1. Even the most casual perusal of the literature of civil procedure will quickly disclose that it has generated no coherent, unified, comprehensive conceptual framework. According to Professor Rosenberg, civil procedure is "riddled with archaic rigidities and indefensible paradoxes. It is often sluggish and irrational. As an instrument for resolving disputes, its greatest redeeming feature is that it stands alongside our system of criminal justice, where its warts seem beauty marks by contrast. It will improve; it must." Rosenberg, *Devising Procedures That Are Civil to Promote Justice That Is Civilized*, 69 MICH. L. REV. 797, 819 (1971).

If the casebooks are a good indicator of the state of procedure theory, they in effect represent a nuanced hodge-podge of topics, frequently leaving their conceptual or pedagogical integration to the instructor's fancy, or lack thereof. For a representative illustration, see J. COUND, A. MILLER, & J. FREIDENTHAL, CIVIL PROCEDURE (1980). The orientation of the book suffers from the fact that the different authors bring diverse "implicit" jurisprudential assumptions that are frequently incompatible. Thus, the promise of the book seems to be a complex admixture of functionalism and realism, but this quickly dissolves into a fine-tuned analytical mode, in keeping with the best of the analytical, positivist tradition. As this mode preempts others, procedure becomes increasingly divorced from the contextual background that generates the procedural problems in the first place.

First year students begin civil procedure with high expectations that the course holds the key to the business of lawyering. Those same students frequently experience a measure of cognitive dissonance as they confront not the concrete circumstances of tortious or criminal conduct, but the variability and ambiguity of a complex and technical legal language game — a game whose opaque values and archaic and abstract nomenclature provide a treacherous landscape to the naive and intellectually inert. Yet as practitioners wade through the procedural swamp, they often recognize, as many students do not, that the rules have a power-affinity, that they are central to the business of choice in law, and that they exert extraordinary influence over the larger process of decisionmaking we call "law." The lawyer who is a virtuoso with the rules, whether his case is strong or weak, can exercise a great measure of influence over who wins and who loses in the final determination of a law suit.

From the perspective of the practical lawyer, the adversary process is sometimes seen as a symbolic version of trial by battle. It combines the mastery of weapons (procedural tools) with craft-skills of theatrical presence in an often ritualized contest, sometimes seen as an intrinsic "good." From the observer's perspective, however, the lawyer's tactical and strategic skill and mastery over the weapons of litigation (procedural rules) result inevitably in someone winning and someone losing.

This article focuses broadly on what I believe to be a vacuum. This vacuum exists between the lawyers' perceptions of procedure, perceptions that elevate procedure to almost sacrosanct levels, and the perceptions of scientific observers who, like clients and potential clients, have no idea what civil procedure is, but whose attitudes to legal procedure are often characterized by high degrees of alienation[2] toward arcane and esoteric legal procedures collectively (not to mention pejoratively) labeled "technicalities." These technicalities often provide access to the more favored things in our social and political lives. More pertinently, I will try to underscore the importance of efforts to theorize *about* civil procedure from the vantage point of the observer,[3] rather than efforts to theorize *of* procedure from the vantage

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2. *See generally* Simon, *The Ideology of Advocacy in the Structure of Procedure*, in THE STRUCTURE OF PROCEDURE, 48 R. COVER & O. FISS (1979) (critique of lawyering and loss of client autonomy).

3. On the importance of theories about law and the standpoint of the observer, see generally Lasswell & McDougal, *Trends in Theories About Law: Maintaining Observational Standpoint and Delimiting the Focus of Inquiry*, 8 U. TOL. L. REV. 1 (1976).

point of the practitioner. Despite many other modes of important procedural study, I chose the rules of *civil* procedure because their evolution forms the almost quintessential metaphor of what an Anglo-American lawyer is.

II. Civil Procedure: The Problem of Adequate Theorizing

Civil procedure is part of a larger process called the constitutive process.[4] Civil procedure is not the most visible part of the constitutive process, and is rarely considered an integral part according to conventional theories of constitutional law. Moreover, civil procedure literature frequently views procedure as a subject quite distinct from the constitutive processes. Practice, however, frequently requires acknowledgment that some rules of civil procedure are indeed of constitutional significance, or that they are at least indirectly conditioned by constitutional law prescriptions.

A theory about constitutive process that has explanatory or descriptive power must start with an appreciation of the social process or the contextual background of that process. One of the key background or contextual features of constitutive process is the community process of effective power. We contend that civil procedure is a part of "constitutional law" (constitutive process) and for a theory about civil pro-

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4. *See* M. McDougal, H. Lasswell, & L. Chen, Human Rights and World Public Order (1980). Professors McDougal, Lasswell, and Chen describe constitutive process as those

> [d]ecisions which identify and characterize authoritative decision makers, postulate and specify basic community policies, establish appropriate structures of authority, allocate bases of power for sanctioning purposes, *authorize procedures* for the making of different kinds of decisions, and secure performance of all the different decision functions (intelligence, promotion, prescription, etc.) necessary to the maintenance and administration of general community policy.

Id. at 162 (emphasis added).

We differentiate the decisions that characterize constitutive process from those of the public order. "By the 'public order' decisions we refer, more specifically, to those decisions, emerging as outcomes of the established constitutive process, which shape and maintain the protected features of the community's various value processes, including the value processes embodied within human rights." *Id.*

This distinction is crucial to unravelling, inter alia, the perennial mysteries of what is substance and what is procedure. For a general overview of the policy-oriented conception of law, see Lasswell & McDougal, *Criteria for a Theory About Law*, 44 S. Cal. L. Rev. 362 (1971); *see also* Lasswell & McDougal, *Trends in Theories About Law: Comprehensiveness in Conceptions of Constitutive Process*, 41 Geo. Wash. L. Rev. 1 (1972); McDougal, Lasswell, & Reisman, *The World Constitutive Process of Authoritative Decision*, in The Future of International Legal Order 73-154 (R. Falk & C. Black eds. 1969).

cedure to have explanatory power, it must account for, among other things, the social process background. More particularly, it must account for the background of power relationships and interactions that substantially condition constitutional law and civil procedure. Such a theory alone, however, would be incomplete because decisionmaking is a dynamic process with ongoing impacts on social and political arrangements. The theory requires a normative component of overriding community goals to appraise, evaluate, and improve the performance of an actual civil procedural decision process.[5] Clarification of the larger goals of constitutive process,[6] therefore, is vital to a theory about civil

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5. The silly idea that one can meaningfully identify the values and policies of civil procedure without a descriptive or explanatory theory, or even more simplistically, that one can articulate all the central policies or norms of procedure without an explanatory theory, is illustrated in Bayles, *Principles For Legal Procedure*, 5 LAW & PHILOSOPHY 33, 50-57 (1986) (describing the process values served by legal procedure).

Even more astounding is the idea that rational policy-making or decisionmaking is purely an exercise in "logic." Justice Holmes was careful to remind us that the life of the law has not been logic but experience, a strong caution that rationality cannot be a matter independent of experience and process so far as law is concerned. *See* Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

Professor Bayles, however, believes that "rationality" is essentially a formal exercise of logic. The policy-oriented perspective views "logic" alone as inadequate for making rational decisions. Bayles suggests what he loosely calls process benefits but these benefits are set out without even a hint at what procedure is, the complex phases of procedural decisional practices, the relationship of procedure to decisionmaking, or an appreciation of the larger goals of both constitutive process and public order. Bayles, *supra*, at 50-57.

6. The preferred goals of constitutive process are set out in M. MCDOUGAL, H. LASSWELL, & L. CHEN, *supra* note 4, at 400-22. Preferred goals are set out for each phase of the constitutive process. These are briefly set out as follows:

(1) Participation In Decision Making:
  (a) Wide representation;
  (b) Responsible participation.
(2) Perspectives (preference for common interests rather than special interests):
  (a) Demands (values of human dignity maximizing in context, power, wealth, affection, respect, rectitude, skill, well-being, enlightment);
  (b) Identifications (inclusive);
  (c) Expectations (maximize realistic orientation to context).
(3) Arenas (policy on establishment to create and maintain authority structures appropriate to all aspects of constitutive process):
  (a) Policy on access (openness and compulsoriness);
  (b) Policy on bases of power (maximize authority component of effective control: the Rule of Law).
(4) Policy on Strategies:
  (a) Initiation of process (prompt, non-provocative, fair);
  (b) Exploration of potential facts and policies (procedures that are dependable, contextual, selective, creative);

procedure.[7] In addition, an equally compelling challenge is whether we can supplement the "rules" of civil procedure with a system of normative guidance for the process of prescription and application to particular instances requiring decisional responses in civil courts. In other words, can we invent principles of content and procedure that will guide the interpretation and application of the "rules" of civil procedure to secure the larger community concerns?[8]

(c) Communication (responsivess to actual shared subjectivities of participants);
(d) Implementaton (stress on effectiveness and, where possible, coerciveness).
(5) Outcomes:
(a) Aggregate consequences;
(b) Rationality;
(c) Efficiency;
(d) Inclusivity;
(e) Comprehensiveness and integration as necessary to achieve goals of the public order.
(6) Goals of Decision Functions:
(a) Intelligence (dependable, comprehensive, selective, timely, creative, open);
(b) Promotion (rationality, integrativeness, comprehensiveness, effectiveness);
(c) Prescription (effectiveness, rationality, inclusiveness);
(d) Invoking (timeliness, dependability, rationality, non-provocativeness, effectiveness);
(e) Application (rationality, realism, uniformity, effectiveness, constructiveness);
(f) Termination (timeliness, comprehensiveness and dependability, balance, ameliorativeness);
(g) Appraisal (dependability, contextuality, independence, continuity).

Id.

These preferences are policies for constitutive process whose realization provides the best means to achieve the broader policy of the common interest: that the key values in social process are abundantly produced and optimally shared.

7. The preferred policies of the applicative decision function cover essentially the same phases as that of constitutive processes, although the preferred strategies are broader. The preferred policies for the strategies of the application function are: (1) minimum use of coercion; (2) net economy in the use of base values; (3) fair procedures perceived as fair; (4) diminishing conflict in fact; (5) creating enlightenment about objectives of public policy; (6) developing skills appropriate to protecting the public order; and (7) generalized preference for common interests.

8. Professor Bayles is totally confused about the function of principles of content and procedure. These principles are normative in the sense that they are guides to an optimal or desirable discharge of a specific decision function: application. Application is itself an aspect of the decision process; it is a process itself, with identifiable phases of process that interlock with all other decision functions (prescription, intelligence, invocation, promotion, termination and appraisal). The function of the principles of procedure and content here recommended is to assure that all procedure decisions maximize the realization of the more general goals of the constitutive process, of which civil procedure is a part. And the most general goal policy scientists recommend for all of the processes of authoritative decision (law) is the goal value of human dignity. The reduction of policy-oriented thinking — the configurative mode — to a crude

Constitutive process is, in itself, an outcome of a relatively discrete aspect of social process — the power process. Human interactions are impossible to imagine without regard to some power dimension. Similarly, considering the idea of social process is difficult without accounting for the processes of effective power that are an outcome of it. The problem of the political foundations of constitutional law is even more significant for constitutional theory. Constitutional law is an outcome of the community's processes of effective power. This does not mean that constitutional law is purely a matter of effective power. It does mean, however, that the expectations about control and authority concerning the basic institutions of decision that we call the constitutive process, reflect an understanding that institutionalizes expectations about the distribution of basic or fundamental power relations over time.

The term "constitutive process" is preferable to the term "constitutional law" because the stability of understandings or expectations about the key institutions of power in a community or state are, within limits, fluid and continuing. The constitutive process does not terminate its decisional, prescriptive or applicative roles simply because the founding fathers have promulgated a document called "The Constitution." However important a document may be as codification of expectations about the distribution of power among the key power-brokers of the time, it cannot reify the conditions of constitutive process, especially the power aspect of constitutive process. Viewed in this light, a constitution stabilizes expectations about the processes of effective power, and generates understanding about the allocation of a kind of decisionmaking competence largely conditioned by expectations about a fundamental law, that is, Constitutional Law.[9] From this perspective, we see that the constitutive process of the United States allocates competence about governance at multiple levels of the social

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Benthamite utilitarianism betrays a complete lack of familiarity with the literature of the policy sciences, or a complete misunderstanding of its social science, jurisprudential and normative basis, as well as its methodological underpinnings.

9. There is a danger in suggesting that constitutional law should be subject to rethinking to accommodate civil procedure, because of the concerns some scholars feel that pervade the "one scholar — at least one theory" syndrome, and the attendant fear that we are being drowned in egotistical theory-construction. The fields most affected by this are conflict of laws, and perhaps more visibly, certainly more spectacularly, constitutional law. *See* Van Alstyne, *Interpreting This Constitution: The Unhelpful Contribution of Special Theories of Judicial Review*, 35 U. FLA. L. REV. 209 (1983). For a trenchant response to the Van Alstyne thesis, see Saphire, *Constitutional Theory in Perspective: A Response to Professor Van Alstyne*, 78 NW. U.L. REV. 1435 (1984).

and power process. Competence is allocated to the executive branch, the legislative branch, the courts, the states, individuals, etc. Refining the precise allocation of competence is a continuing affair, integral to the idea of a constitutive process.

Civil procedure is an aspect of the constitutive process concerned primarily with what policy-oriented lawyers call the "applicative" function.[10] The applicative function deals with the allocation of competences in ways both complex and confusing to the observer and others untrained in law. In the United States, the "rules" of civil procedure allocate competence to parties who present and prosecute claims before

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10. On the applying function, specifically, see M. MCDOUGAL, H. LASSWELL, & L. CHEN, *supra* note 4, at 289-99, as it relates to the international procedure for processing human rights claims. The application function that includes civil procedure is "[t]he application of prescriptions in particular instances." *Id.* at 290. Professors McDougal, Lasswell, and Chen point out that in

> [i]ts most comprehensive form, application may be characterized as including the following sequential features: the exploration of potential facts, including the precipitating events and their larger factual context; the exploration of potentially relevant policies; the identification of the facts to be regarded as significant; the determination of the authoritative policies applicable; the making of the decision, including the projection of future relations between the parties; enforcement; and review.

Id. at 289-90.

In addition to the application of prescriptions to particular instances, all other decision functions "are in a measure fashioned to assist in securing rational, uniform, effective and constructive applications." *Id.* at 290. In addition, it is vitally important that the application function, in conjunction with allied decision functions, secure those applications that in fact "put basic community policies into controlling practice and mobilize a continuing consensus, in support of prescription" that augments the delivery of justice and freedom, in short, human dignity. *Id.*

The demand implicit in the civil procedure background is, in effect, a demand for "performance of an entire sequence of activities constituting an application . . . ." *Id.* at 291. These activities include the

> [e]xploration and characterizaton of facts and the exploration and choice of policies. The exploration of policies characteristically includes three interlocking subgoals: the interpretation of prescriptions (seeking the closest possible approximation to the communications made); supplementation (filling gaps and removing ambiguities), and integration (the policing and accommodation of prescriptions in terms of priorities in community demands).

Id. The *bases of power* in the system of procedure include the management of authority symbols, as well as the bases of effective power that attend the process of civil litigation. The *strategies* available to lawyers in civil litigation are complex and varied, but include both those that are coercive as well as persuasive. The *outcomes* of final applications affect patterns of value distribution and future behaviors. The enforcement of judgments may "build upon inducement as well as coercion," and most significantly, no decision or application is "really final." *Id.* at 292. Every application is "an experiment in goal realization which is tested through time and changing context by the responses of those affected, directly and indirectly." Review is itself a continuing process. *Id.*

the courts. The rules allocate exclusive, sequential, and concurrent competence to diverse courts within and without the state. In addition, they allocate competence between judge and jury, trial judge and appellate judge, and complex burdens of pleading and proof. Civil procedure is, therefore, more accurately described as civil process, and is an aspect of constitutive process because the "rules" allocate decisionmaking competence about basic power arrangements. Although the allocations take place at a low visibility level, these allocations of authoritative decisional competence reflect complex assumptions about the appropriate exercise of control and authority that are fundamental. They provoke deeper concerns about congruence with the broader goals of constitutive process, and the extent to which principles of content and procedure might be used to design a better guidance mechanism for civil procedure and its power dimensions, to better approximate the goals of the constitutive process itself, and the larger goals of the system of public order.

While conventionally descriptive, civil procedure literature does not adequately disclose a coherent or comprehensive theory *about* procedure. The literature is designed to meet the practitioner's needs and adheres, therefore, to normative standards of law intended to make the procedural rules work more economically, fairly, and quickly. While Yale professors Cover and Fiss have managed, along with several others, to stimulate a more informed normative and conceptual dialogue about the nature of civil procedure, they have failed, on the whole, to stimulate any radical reassessment of the subject.[11] Although their published work stresses the relevance of the normative element of procedure, the subject's ostensible disjunction from constitutive process makes it difficult to clarify the relevance of the goals of constitutive process to the process of civil procedure.

Two vital considerations exist that the Yale project failed to explicate in clear terms. Although the collaborators implicitly recognized distinct and discreet procedural values and the influence of these values over the design and content of other values, they failed to exhaust the concept of power and its interrelationships with the various aspects of the procedural process. The second flaw rests in their failure to bring a manifestly clear jurisprudential focus to the system of civil procedure. While their book does contain an important article by Professor Simon,[12] which analyzes the adversary process and the nature

11. R. COVER & O. FISS, THE STRUCTURE OF PROCEDURE (1979).
12. *See* Simon, *supra* note 2, at 48.

of the lawyer's role in terms of contending paradigms of law, it gives scant guidance about the nature of civil procedure. The book falls short of providing any deeper appreciation of the role of civil procedure in the normative scheme of legal process.

III. Civil Process and Power: The Conventional Myth System and the Operational Code

To underscore the paucity of realistic theorizing about civil procedure, consider the extent to which operational theories of procedure obscure the relationship of procedure to the processes of effective power, and consequently to the constitutive process, of which it is a part. An adequate appreciation of this problem should help one appreciate the role and potentials of civil procedure as part of the larger process of authoritative decision we label "law." We should then be able to provide a better normative basis for appreciating the purpose of civil procedure and for realizing how those goals might better be accomplished.

As part of the common law, the system of "civil procedure" predates the adoption of the United States Constitution. Indeed, it may be that the common law owes its longevity as a coherent system of law to civil procedure. Professor Maitland has maintained that the substantive aspect of common law was actually secreted through the interstices of procedure. Maitland also reminds us that although the classic forms of action have been long buried, they still rule us from their graves.[13] The legacy of common law modes of procedure has been substantially revised by subsequent generations of lawyers. Pleading the specific pigeon-hole of liability, the appropriate "form of action" has given way to the code system of pleadings, in which the requirement is that a party plead the relevant "cause of action." The Federal Rules of Civil Procedure have gone even further and, under the influence of functionalist theories of law, given us the procedural institution of "claims" upon which relief can be granted. The tying of "claims" to the institutional capability of the court as a dispute-resolving, justice-dispensing institution of government underscores the flexibility and function of the civil litigation process, rather than form and formulary conditions associated with earlier procedural systems.

But the influence of procedural "form," or more accurately procedural thinking, has imprinted itself deeply on the jurisprudence of common law thinking as a whole. By civil law standards, common law

13. *See* F. Maitland, The Forms of Action at Common Law (1932).

thinking is still particularistic, skeptical of philosophic abstractions and casuistic in character. Thus Maitland's insight may still be relevant: although we have buried the formulary system, we have not buried the casuistic modes of thinking that it represents. Enlarging upon Maitland in contemporary terms suggests that the procedural myth is a dominant condition upon the actual behavior of judicial decisionmakers and lawyers, or a dominant ideological instrument that rationalizes what lawyers and judges do. But this myth communicates virtually nothing to those who receive the benefits and burdens of civil processes; i.e., the clients and outsiders to litigation whose rights and duties are shaped by this system.

As indicated earlier, one of the outcomes of a community's power process is the process of decisionmaking, or more precisely for the purposes of law, the process of authoritative decisionmaking. From an observer's perspective, what we label civil procedure is simply an aspect of this larger, more inclusive process. Procedural scholarship is, however, dominated by its immediate practitioner relevancy. Scholarly work, therefore, is characterized by theories of procedure, theories that frequently stress the *use* of the rules in the strategic roles of lawyers in practice. Literature *about* procedure, on the other hand, is notably sparse. Yet I suggest that theories *about* procedure from the scientific observer's perspective will give important insights into some of the thornier problems of civil procedure, such as the substance-procedure distinction, the relationship of procedure to decisionmaking, and the constitutive process.

To illustrate the value of a theory about civil procedure, a theory that links civil procedure to the relevant processes of effective power and constitutional law, a selected range of procedural problems should be examined. Thus one may better appreciate how unedifying the law is about the power aspect of civil process, and how much realism might be brought to civil process, by a simple appreciation of the power operations of role players operating under the "rules" themselves.

The characterization of the "rules" of civil procedure as power-conditioned may be too obvious a datum even to verbalize. For the scientific observer, the characteristic of procedure most striking, apart from its social ubiquity, is the power aspect of the rules and institutions of procedure. For example, whether procedures sanctioning trial by battle or trial by ordeal were meant to be conditioned by the "invisible hand" of God or the steel mace of the champion is not as important to the observer as the coercive dimension of power it represents.

The principle that all actions at law were "local" actions exemplifies the relationship of procedure to the concepts of status and land, the twin pillars of feudal power. The emergence of the transitory cause

of action, a procedural fiction neatly following the interests of expanding mercantilism, is still another example of the interplay of procedural innovation in the locus of power from status to contract. More recently, the Supreme Court adverted to the power aspects of *in personam* jurisdiction and noted that the summons, the symbolic exercise of state power by state officials, had replaced the *capias ad respondendum*, the physical apprehension of the defendant, as the means of making a defendant answerable in a civil proceeding. The myriad of procedural instances of the power aspect of procedure might extend indefinitely.

To illustrate the problem of the relevance of power to theorizing about civil procedure we examine four general procedural problems: first, the problems of due process and state court jurisdiction; second, the problems of massive class actions; third, the problems of substance and procedure; and fourth, the problem of lawyer roles in the context of the adversary aspect of civil procedure. Additionally, we attempt to provide a jurisprudential context for civil procedure, and suggest the utility of a policy-oriented framework for a better appreciation of what civil procedure is, and what its normative basis should be.

IV. State Court Jurisdiction: The Due Process Myth and the Operations of Effective Power

Since the Supreme Court decided *Pennoyer v. Neff*[14] in 1878, the exercise and reach of state court jurisdictional competence has been subject to the limitations imposed by constitutional standards of due process. Theorists have urged that *Pennoyer* actually imposed a power theory about the appropriate reach of a state court's jurisdictional competence, and that one might fruitfully view the law of state court jurisdiction not as an elaboration of traditional jurisdictional ideas reified by the due process clause, but rather as a reaction to *Pennoyer*'s reification of due process concepts.

A review of major decisions does not indicate when the Court began chipping away at the reified edifice created by *Pennoyer*. Corporate defendant cases may have caused the change, since the presence of a corporation in a jurisdiction is manifested by corporate functions, and the collapsing of corporate functions into the archaic notion of presence is not easily accomplished without artifice.[15] The change may

14. 95 U.S. 714 (1878).

15. For a review of this trend that culminated in International Shoe Co. v. Washington, 326 U.S. 310 (1945), see Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts: From* Pennoyer *to* Dencla: *A Review*, 25 U. Chi. L. Rev. 569, 577-86, (1958).

have begun with the non-resident automobile cases where the court recognized that a fictional service of process substitution could bring a non-resident motorist-defendant within the power of the state courts on the theory that automobiles are "dangerous machines."[16]

The major shift from the *Pennoyer* doctrine, however, is invariably identified with the Supreme Court decision *International Shoe Co. v. Washington.*[17] In *International Shoe*, the Court sought to allocate greater flexibility to state courts in the exercise of extra-territorial jurisdictional competence. The Court used the due process clause not to reify jurisdictional concepts along rigid territorial lines, but to define the reach of state court process in terms of a "reasonableness" standard. The famous test of reasonable extra-territorial jurisdictional competence was the "minimum contacts" test. The test was further conditioned by "traditional notions of fair play and substantial justice."[18]

Some theorists suggest that the law of state court jurisdiction from *Pennoyer* to *International Shoe* and beyond represents an evolutionary progress from power to authority. According to this view, the core authority signals mandate a minimum standard of fairness, reasonableness, and convenience. The authority myth indicates a process for the assertion of state court jurisdictional competence conditioned by standards of rationality and justice rather than coercion and power.[19]

Students of procedure studying state court jurisdiction early in their law school years are impressed by the salience of the due process idea as a means of constraining the arbitrariness that might repose in assertions of state jurisdictional competence across state and national lines. The overwhelming impression, frequently given by academicians, suggests that assertions of power over parties and issues are predominantly influenced by the great edifice of fairness and substantial justice mandated by *International Shoe* and its progeny. The first year student is often impressed with the great and agonizing battles to satisfy "fair play and substantial justice" without ever approaching the merits of a case. In addition, the intellectual and material capital that defines and refines a "minimum contact" may also be impressive. Perhaps the message conveyed is that no matter how small the problem, it is never too small for principles of "fair play and substantial justice."

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16. Hess v. Pawloski, 274 U.S. 352, 356 (1927).

17. 326 U.S. 310 (1945).

18. *Id.* at 316.

19. Hazard, *General Theory of State Court Jurisdiction*, 1965 SUP. CT. REV. 241. The traditional distinction between power and authority is indeed fictitious. There is both control and authority in every lawful exercise of power.

The above scenario masks important and substantial allocations of power in the civil process system quite far from the high ideals of constitutional due process. Perhaps one of the most statistically relevant areas of civil process that tracks the law of *Pennoyer* and *International Shoe* is the nature and quantum of due process delivered by the bill collector.[20] Countrymen described the system of debt collection as a system of "grab law," a system governed by the principle that he who grabs last grabs least. The procedural remedies available to the bill collector have historically included the writ of attachment, the writ of garnishment, the writ of replevin, the use of cognovit notes, and the self-help and self-sale provisions of sections 9-503 and 9-504 of the Uniform Commercial Code.[21] Historically, the Supreme Court has only recently been willing to apply concepts of procedural due process to some of these procedural devices.

In *Sniadach v. Family Finance Corp.*,[22] the Supreme Court struck down a Wisconsin wage-garnishment law because the garnished wages, which the Court recognized as "a specialized type of property presenting distinct problems in our economic system," required a special measure of due process protection.[23] The *Sniadach* Court held that freezing of wages "absent notice and a prior hearing . . . violates fundamental principles of due process."[24] Summary procedure flies in the face of the great jurisdictional principles limiting the exercise of state jurisdictional power over defendants. The key test of summary procedures that occurred in the context of wage garnishment rather than some lesser kind of interest may have resulted from an accident of litigation. Indeed, Justice Douglas suggested that beyond the context of wage garnishment, summary process might still be licit in the cause of creditor needs.[25]

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20. *See* Countryman, *The Bill of Rights and the Bill Collector*, 15 ARIZ. L. REV. 521 (1973); *cf. also* Swygert, *Consumer Protection*, 23 DE PAUL L. REV. 98 (1973) (survey of legal developments affecting rights and obligations of consumers).

21. U.C.C. § 9-503. Unless otherwise agreed, a secured party has on default the right to take possession of collateral. In taking possession a secured party may proceed without judicial process if this can be done without a breach of the peace or may proceed by action." *Id.* Section 9-504 permits the secured party to sell the collateral and apply the proceeds to the debtor's outstanding indebtedness provided the sale or foreclosure is done in a commercially reasonable manner. *See id.* § 9-504.

22. 395 U.S. 337 (1969).

23. *Id.* at 340.

24. *Id.* at 342.

25. *Id.* at 339. Justice Douglas says, for example, that such "summary procedure may well meet the requirements of due process in extraordinary situations." *Id.* But in *Sniadach*, no

Sniadach affected other creditors' remedies as well. First, lower courts declared several garnishment statutes unconstitutional. Second, the replevin statutes of Florida and Pennsylvania were held inconsistent with constitutional due process standards. Third, attachment statutes were successfully challenged for constitutional sufficiency. Two remedies did, however, escape the expanding reach of *Sniadach*. The confession of judgment procedures and the self-help provisions of U.C.C. sections 9-503 and 9-504 may be seen as the vanishing point of due process concepts in the context of civil litigation.

In *Swarb v. Lennox*,[26] the United States Supreme Court held that a confession of judgment provision in a contract, consistent with a Pennsylvania rule permitting the confession of judgments, was facially valid. The Court, however, affirmed a lower court judgment declaring the statute invalid as applied to natural persons who earn less than $10,000.[27]

A confession of judgment proceeding creates the fiction of judicial supervision and control. Since judgment is "confessed," nothing is left to argue about before the court. Since the merits have been decided by contract, nothing specifically requires meaningful notice and an opportunity to be heard. Even more pertinent are provisions that totally exclude courts from confessing judgments in standard form contracts. Sections 9-503 and 9-504 of the U.C.C. permit the creditor to attach the secured good by a process of self-help without breach of the peace, and authorize the sale of the secured good in a "commercially reasonable manner." These provisions have withstood constitutional challenges on the fictional basis that statutes empowering creditors to practice self-help techniques represent only passive rather than active state action, and thus represent no state action subject to the limitations of the due process clause of the fourteenth amendment.[28] The *amicus curiae* brief filed on behalf of creditor special interest groups contended that self-help was quick and cheap, and thus signifi-

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situation requiring special protection to a state or creditor interest was presented by the facts; nor was the Wisconsin statute narrowly drawn to any such unusual condition. Petitioner was a resident of the Wisconsin community and *in personam* jurisdiction was readily obtainable. *Id.*

26. 405 U.S. 191 (1972).

27. *Id.*

28. A lower court decision, Adams v. Egley, 338 F. Supp. 614 (S.D. Cal. 1972), did find state action in the sense that the state "encouraged" self-help. *Id.* at 617. In Kirksey v. Theilig, 351 F. Supp. 727 (D. Colo. 1972), the court found no state action since forms of self-help were recognized at common law. Greene v. First Nat'l Exch. Bank, 348 F. Supp. 672 (W.D. Va. 1972), found only passive state action. This latter rationale seems to have won the day.

cantly reduced the cost of consumer credit.[29] In short, self-help aids the consumer in the long haul. Under this analysis, consumer needs are presumably collapsed into the creditor needs adverted to by Justice Douglas.

The great myth system of due process of law in civil litigation, anchored around *Pennoyer*, *International Shoe*, *Mullane*, *Worldwide Volkswagen*, *Shaeffer* and other significant cases is cognizable. Yet the operational dynamics of one of the most significant aspects of civil litigation conflict is an operational code informed by the principle of "grab law" — a principle sustained by the dynamics of state-sanctioned, private power. In defense of the jurisdictional myth-system, however, the grand "authority" edifice has a significant effect on the battle against unemployment — at least for lawyers!

V. Class Justice and Individual Rights: Class Actions

Situation two involves another example of the interplay between the myth system of procedural standards and the operational code. The perennial problem of clogged court dockets and trial delays is one of the great and persistent concerns of those with an interest in the administration of justice. Indeed, Chief Justice Rehnquist has been an ardent spokesman for the proposition that the solution to the problems of judicial administration is to have fewer cases, and that at least in the federal context, this can be achieved by rules limiting access to federal courts.[30] The Federal Rules of Civil Procedure evidence a modest effort to accomplish the goals of efficiency and accessibility to justice through the evolution and development of class action suits. Until recently at least, Rule 23(b)(3) could be viewed as a procedural instrument for delivering class justice on a class scale.

The Supreme Court has had ample opportunity to develop Rule 23(b)(3) in a manner enabling it to be a major instrument of consumer protection as well as an instrument responsive to mass justice on a large scale. The idea of courts dispensing mass justice on a mass scale would not take favorable root in a predominantly agrarian and ruralized body politic. This idea responds to the challenges occasioned by the mass production of goods and services covering huge aggregates of affected people. The question, of course, is whether a court system shaped fundamentally along individuated lines can be molded and

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29. *See* Swygert, *Consumer Protection*, 23 De Paul L. Rev. 98 (1973).

30. Address by Justice William H. Rehnquist at University of Florida College of Law (Sept. 15, 1984) (available on videocassette in University of Florida Law Library).

shaped to meet the problems of mass society and mass culture. Rule 23(b)(3) seemed to be a mild experiment in this direction, and for a time it generated the myth that the class action suit was an instrument for redressing the balance of power among capital, industry, big labor and the consumer. The capacity to resolve untold numbers of legal claims in a single proceeding suggests potential for expedition and efficiency in the administration of justice.

In *Eisen v. Carlisle & Jacquelin*,[31] the Supreme Court was confronted with a colossal class action suit. A major New York brokerage firm had overcharged the transaction costs of odd lots sold on the stock exchange. The manageability of the class action required judicial supplementation of Rule 23(b)(3). The central question before the Court was whether the supplemental remedy, invented by the lower courts to give practical effect to the rule, was an appropriate interpretation and application of the rule. The Supreme Court focused instead on what the Second Circuit Court of Appeals and the litigants considered a secondary issue: Had the plaintiff class members been given the appropriate measure of due process notification under the jurisdictional rules announced in *Mullane*? Since threshold notice had not been given, the Court dismissed the action.

Perhaps the *Mullane* rule is an essential foundation of a legal system that sees as a major purpose the allocation of rights and duties on the basis of personal and individuated identity. And perhaps an essential element of the adversary process is that lawyers represent clients who are "autonomous egos." The idea of autonomy may be a reasonable assumption upon which to allocate legal rights and duties, but the myth of nineteenth century individualism may symbolize a golden age that never really was and that is incompatible with urban culture, standardization, and mass society that appear to overwhelm the individual ego. The concept of autonomous man — then and now — may, however, be a desirable legal myth. Perhaps then, *Eisen* stands like Don Quixote — something admirable, part of a mythical age of chivalry — indeed a reification of the nineteenth century myth of individualism in its insistence that class justice process meet standards of individualism, whatever the cost to the delivery of class justice on a class scale. When Justice Rehnquist was asked to explain *Eisen* in light of his commitment to less litigation and faster court procedures, he simply stated that it was "evident that you disagree with the *Eisen* holding. Well, a majority of the Court agrees with it . . . ."[32]

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31. 417 U.S. 156 (1974).

32. J. Rehnquist, Remarks at Faculty Seminar, University of Florida, Gainesville, Florida (Sept. 15, 1984).

I suggest that here too we see the emergence of a myth system about the responsiveness of the courts within the civil procedure system. Pursuant to the principles of fair play and substantial justice, plaintiffs in a representative suit had to receive a level of notification that effectively aborted the case itself. Perhaps the idea that control over massive amounts of capital generated by such litigation in the hands of consumer advocates was seen as incompatible with a responsible process for that control. The influence of institutional capital on the processes of authoritative decisionmaking, therefore, is seemingly more decisive when we deal with class justice and consumer protection, although the justification the *Eisen* Court gave elevated individualism and the due process myth to great heights.

VI. The Perennial Problems of Substance and Procedure

The conventional myth about the relationship between substance and procedure is that the latter is adjectival, since it exists for something else. The relationship has been more colorfully expressed as procedure being the "handmaiden" of substantive law, Maitland notwithstanding. The ultimate example of using the procedural myth system to trump a substantive claim lies in the judgment of Justice Marshall in the celebrated case, *Marbury v. Madison*.[33] In that case, Justice Marshall asked whether the petitioner had a "right to the commission" and further "whether the laws of his country afforded him a remedy." As it turned out, the mandamus remedy existed, but could not issue from the Supreme Court. The spirit of *Marbury* is clearly illustrated in the Supreme Court's recent rebuff to Congress in the litigation involving the Gramm-Rudman bill. In a phrase that captures the power of the procedural myth as it "proceduralizes" our political life, the Court said the purpose of separating and dividing powers of government was to diffuse power so as to better serve liberty.[34]

Procedural rules are described as representative of the techniques used by parties and decisionmakers to arrive at judicial decisions. Emphasis is not on *substantive* law and its content, but on the *means* by which substantive *ends* are attained. To distinguish procedural means from the substantive ends does not mean that we can divorce the interdependence of means and ends. Each concept is shaped by

33. 5 U.S. (1 Cranch) 137 (1803).
34. Bowsher v. Syner, 106 S. Ct. 3181, 3186 (1986).

the demands of justice or, indeed, the lack thereof. The recurrent tension in the practice of law lying within the substance/procedure distinction is posed simply in the following manner: Why should an otherwise meritorious claim be dismissed because of a procedural infraction, often termed a "mere technicality"? Obviously the term "mere" is loaded, for it suggests that fidelity to procedural standards is less important than securing substantive results. But even substantive results might be "infected" and therefore lead to a miscarriage of justice. Some persons would like to de-elevate procedural norms and focus on the "goodness" or "badness" of the result. Others see within the interstices of procedure the principle of legality, without which we have no principled, impartial, and otherwise fair rule of law. Some suggest that social institutions for dispute management can provide at best, *not* somebody's subjective idea of substantive justice, but rather the fairest and most equitable mode of proceeding. In other words, so long as we have assured a party his "procedural due process," no more can be expected. Sometimes these ideas are discussed in constitutional adjudication as representing "neutral principles" and those who subscribe to these neutral principles oppose those who are more result-oriented.

The myth that ideal procedural rules are neutral as to substantive ends is an appealing instance of what Shklar calls the ideology of "legalism." The isolation of procedure from substantive expectations is simply an instance of a value system that serves to "isolate law completely from the social context within which it exists."[35]

While the relationship of substance to procedure is in practice a pervasive and difficult problem in many fields of law, courts and theorists have recognized that in particular situations a core interdependence exists between substantive and procedural law. From an observer's perspective, there seems to be the added recognition that procedure and substance are empirically grounded instances of more inclusive decisional functions of application and prescription. The substance-procedure problem is not only one of practical importance to practitioners and judges, but an important aspect of the nature of law itself, of continuing importance to those who subscribe to theorizing "of" as well as "about" law. The myth that procedure is the servant of substantive justice is an excellent mask for the operative code that makes power a central ingredient in law. Extending the myth into the domain of "neutral" principles presents a grander myth that power

35. J. SHKLAR, LEGALISM 2 (1964).

is a neutral dimension of law, and that winning and losing is immaterial, from an observer's perspective, to how the game is played.

From an observer's perspective, the relationship between substance and procedure exemplifies the relationship between the constitutive process and the public order. In this view, whether one classifies a prescripton as procedural or substantive depends on the purpose for which the question is asked, and the predicted consequences of a decision actually characterizing the prescription. If characterizing a prescription as substantive is more congruent with the common interest, then the policy-oriented jurist will advocate classification as substantive. If, however, characterization as procedural advances the common interest, then characterize prescriptions as procedural. Thus, the test is made with reference to both policy and context.

Justice Frankfurter was partially correct in this advocacy of an outcome determinative test for *Erie* problems.[36] A policy-oriented jurist would differ, however, about what the appropriate "outcome" should be as a condition of decision. Frankfurter's test was formulated in a context where his test served to close access to the federal courts without regard to whether in the instant case the test was congruent with the common interest. This test was mechanical, it proved too much, and was soon replaced by a balancing test. The test balanced complex procedural and constitutive goals against the substantive claims of the parties, and assumed a decision that preserved decisional integrity and concern for the substantive values at stake. In effect, the procedural and constitutive preferred policies were interpreted in accord with public order goals to secure the common interest in providing a federal forum for some state claims.[37]

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36. Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958).

37. In Guaranty Trust Co. v. York, 326 U.S. 99 (1945), Justice Frankfurter noted that the terms "substance" and "procedure" were key-words to "very different problems." To give these terms meaning in *Erie* contexts, he formulated a result-oriented policy-informed test: As applied to a given federal state jurisdictional problem, was the application of the word outcome determinative? This focus became too mechanical in practice since the focus was too result-oriented and less context-conditioned. The pendulum was rectified in Byrd v. Blue Ridge Elec. Coop., 356 U.S. 525 (1958), where a contextual balancing test was inserted, a test that found favor with Justice Harlan in Hanna v. Plumer, 380 U.S. 460, 475 (1965) (Harlan, J., concurring).

Perhaps the most illuminating discussions of the distinction emerged in the context of conflict of laws. Reacting to the idea that all licit applications of the distinction could be formulated as hard and fast rules, Realist-scholars gave thought and effort to a rethinking of the problem.

Walter Wheeler Cook was among the earliest of Realist theorists to recognize part of the problem of giving a rational, legal meaning to the substance-procedure distinction. According to Cook, the meaning of the words themselves, in legal communication, is a purely verbal affair containing an assumption that legal words have a linear quality whose meaning is intrinsic to

VII. CHAMPIONING CLIENT AUTONOMY (THE MYTH) V. SUBVERTING CLIENT AUTONOMY (THE OPERATIVE CODE)

The nature of the adversary process is one of the pillars of our civil procedure system. The lawyer in an adversary procedural context, rather than being a "champion," a "parabureaucrat," or an "acolyte," as some charge, is really a "special purpose friend"[38] to the client. A legacy of our age of anxiety[39] may be that if we are honest, we are not sure who the lawyers are because we are not all that certain there is a consensus about what they do. Although a rich literature attempts either to describe or justify what people think lawyers do, still a powerful myth exists that rationalizes the lawyer role in terms of client autonomy, and further rationalizes client autonomy and the role

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the words themselves. Cook challenged the idea that the elucidation of meaning is a matter to be garnered purely from logical derivation, rather than from the variable conditions of context. Cook hinted strongly that the meaning of these particular words — substance and procedure — in judicially defined discourse was in effect drawn from circumstances of practical convenience as informed by salient policy considerations. Practical convenience in Cook's lexicon was effectually a synonym for underlying the relevance of context. *See* W. COOK, THE LOGICAL AND LEGAL BASIS OF THE CONFLICT OF LAW 154, 166 (1942). Professor Morgan, writing shortly after Cook, emerged with conclusions close to those of Cook. Morgan concluded that the meaning of substance-procedure in decisional contexts was in reality informed by considerations of public policy and "weighty" practical considerations. *See* Morgan, *Choice of Law Governing Proof*, 58 HARV. L. REV. 153, 195 (1944). Since neither Cook nor Morgan nor any of the Realists were systematic about the general characteristics of decision or decision functions, the precise relationship of substance and procedure to the general processes of decision, and particularly to legal decisionmaking, remained elusive. The relevance of context and policy, however, seems apparent in Cook and Morgan.

In this article I urge that substance and procedure really underscore the relationship between the constitutive process and the public order. As mapped onto a functional analysis of decisionmaking, substance and procedure would influence all decision functions, especially the functions of prescription and application. The processes of prescription and application themselves have an inner anatomy of relatively discrete processes. *See* W. Reisman, *International Lawmaking: A Process of Communication*, in PROCEEDINGS OF AMERICAN SOCIETY OF INTERNATIONAL LAW 101 (1981). Even more significant is the possibility that a careful, functional integration of these decision processes may suggest clearer policy lines for the core perennial problem of all law: the grounding of value judgments to instances of particular application. Here the invention of principles of context and procedure add a distinctive dimension to the relationship of substance and procedure to policy considerations; i.e., to an enhanced framework of practical rationality in actual decisional arenas.

38. *See* Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976); *see also* Simon, *supra* note 2, at 72-74 (Simon's discussion of Fried).

39. On the "age of anxiety" see Gilmore, *The Storrs Lectures: The Age of Anxiety*, 84 YALE L.J. 1022 (1975).

of lawyers as champions in the assertion of client interests in a democratic society. The following description sets out the nature of the adversary process in those terms. But the reader should be aware that trenchant critiques of this model suggest that the nature of the lawyer as champion operationally subverts the client's autonomy.

VIII. The Adversarial Aspect of Civil Procedure

Our civil procedure system is adversarial. We describe it as adversarial because the claimants carry the main burden of claim presentation and prosecution and because we assume that the judge plays something of a passive role. Other judicial models exist, of course, for the management of legal decision; one of these is the "inquisitorial" model. Such a model assumes the judge is the inquisitor, with the parties playing an essentially passive role in presentation and prosecution.

The adversary model requires focus on the role and character of the claim presentors and the claim prosecutors, namely the lawyers themselves. The lawyer in our system is charged with the role of making the strongest and most efficient representation of the client's interests. The client relies on the lawyer; his trust reposes in his "champion." The lawyer must, however, ultimately rely on himself to make a strong and efficient showing on behalf of the client.

The adversary process, as it is supposed to work in the United States today, is consistent with prevailing and widely accepted beliefs about autonomy, liberty, self-interest, and equality in a democratic, republican, social, and political process. This is so because the individual and/or his lawyer make the critical decisions about the law suit. The client and attorney initially decide whether to bring a law suit, and thereafter how to (1) prosecute the law suit; (2) conduct investigation and research about the relevant facts and law; (3) determine the strategies relating to trial advocacy; (4) determine the reliance to be placed on trial and judgment; and (5) determine the strategies for securing appellate court supervision over the trial court's determinations. As can be seen, the individual attorney determines the nature and timing of the coercive or persuasive strategies crucial to the presentation of the law suit. In the role of advocate, an attorney will make many decisions as to whether to proceed, and if so, upon what power base and employing which strategies.

What about the judge? What is his role? The terms "judge" and "court" are sometimes interchangeable. Writers say the "court ruled . . ." when they mean "the judge has ruled . . . ." The idea of a court is almost as complex as the idea of a judge. When we refer to the court, however, we may be referring to a judge or a number of judges

presiding in the institution of the court; we may be referring to trial or appellate tribunals and personnel; we may be referring to a judge and jury; or we may be referring to all the relevant parties, including the attorneys and claimants.

The key party in the adjudicatory role, as distinct from the advocate's role, is the judge. The question we are now concerned with is this: What generally in our adversary process does the role of the judge amount to? Is his role merely that of an umpire between competing wills, or is the role a more active one? And, because we often have an authority of lay persons (jurors) active in the decisionmaking process of the courts, a further question is suggested: What effect does the institution of the jury have in defining the role of a judge? Decisionmaking roles and the critical indices that define them in law are crucial in predicting and understanding judicial behavior. Additionally, principles of procedure are often an important index of the character and scope of such role allocation.

In our adversary process, the "essential" as well as the "ascribed" identities of all the involved parties, and the *indices* or "conditions" that define them, are central to any comprehensive and realistic understanding of the legal process and the role of procedural justice.

The twin pillars of the adversary process, as we have already suggested, are grounded in the role of the advocate. That role encompasses two fundamental expectations about representing a client. First, the attorney is charged with *presenting* the parties' claim. Second, the attorney is charged with *prosecuting* that claim through the phases of a law suit. These ideas complement each other. By "party presentation" we refer to a claim through the phases of a law suit. We mean that a claim is clarified through the phases of a law suit, with reference to principles of content necessary to support the substantiality of the claim. Thus, relevant principles of content will provide an institutional framework whereby an attorney might investigate the factual basis of a claim, have an opportunity to prove the existence of relevant facts, and have an opportunity to argue disputed points of fact or law.

The conceptual basis of party presentation is rooted principally in our ideas about individual liberty and autonomy. We assume that the individual is, in the last analysis, the most effective asserter of his own self-interest. Hence, a party should have, or be allocated, the power and competence to assert what that party perceives to be his self-interest. A party, therefore, should determine whether to press or waive those interests. Additionally, the common interest of the larger aggregate body politic is enhanced by the expectation that an individual's rights will be pursued to the extent of that person's perceived self-interest. This principle operates for the government as well

as the private citizen or private association in the process of party presentation in the courts. This form of "interest articulation," however, would only be possible where a strongly instituted system of party presentors exists, namely, an organized Bar historically specialized to the representation and articulation of this "form" of interest assertion.

Party "prosecution" refers to the initiatives that the parties may use to move the case toward ultimate resolution on the merits. This involves all the complex phases of a lawsuit including pre-trial, trial, post-trial, and appeal. The expedition and efficiency with which a case may proceed has historically been a function of what the parties do to each other along the path to final judgment and appeal.

Presentation and prosecution are, of course, complementary concepts. Their complex interplay ideally should reflect a balance between the parties and principles of procedure that are designed to secure the integrity of substantive ends. Principles of content and procedure represent complex but crucial guides to decision. What is important at this point, however, is that the presentation and prosecution of a party's claim is done by the party, not by the court. The court is some sort of institutional umpire or arbiter between the competing wills of the parties. The outcome of this process of bilateral interest assertion assumedly will be more accurate, fair, and acceptable and, therefore, will ensure a greater production and distribution of substantive justice to the parties and community by securing the liberties of persons and their interests.

Our adversary process is essentially a model whereby particular interests, or claims, are asserted. Interests are structurally articulated in a bilateral mode of claim-answer, claim-counterclaim, claim-cross-claim, etc. The authority component of the decisionmaking outcome of such a process is enhanced when the impartiality of judge and/or juror is not only a datum, but is perceived to be so. Not only is the reality of impartiality crucial to the authority of any particular decisional result, but the perception of impartiality is often thought to be of key *symbolic* importance. Indeed, a venerable maxim of western legal culture holds that no judge should adjudicate matters in which the judge is an interested party.

The above description is perhaps an idealized version of the adversary process and its assumptions. In reality, the role of the advocates and the judge is much more complex and varied. For example, judges in the Anglo-American tradition jealously guard their independence from executive or legislative interference over matters deemed to be essentially judicial. An independent judiciary is often thought to be an essential precondition of a political culture that honors individual freedom. Anglo-American judges often pride themselves in the fact

that the Supreme Court follows the court of public opinion — that they are a different breed of judicial decisionmaker from those judges whose social and political process accords only minimal deference, if any, to the independence of the courts. From the vantage point of independent judges, it is seemingly incongruous to find that our ideal model of the adversary process would ascribe to high-status independent officials a passive role-structure. In fact, common-law judges tend to be more involved in the administration of a law suit than the ideal model would have us believe. Moreover, the growth and acceptance of modern administrative technologies have given judges a further justification for playing a more active role in the management of contemporary judicial process. In short, the judicial role today has a distinctively administrative side.

This idealized version of the adversary process, the true handmaiden of civil procedure, greatly oversimplifies the business of client representation, client autonomy, and client interests. Placing these relationships into a more realistic context of social dynamics in which the respective power relations of the parties are more clearly perceived might produce a less flattering picture of the adversary process and of lawyer roles within it. Indeed, among the most trenchant criticisms made of the role of lawyer as champion in the "war against all" is the psychological vulnerability upon which the model has been erected.[40] In short, the institutional context of lawyer and client frequently underscores the lack of autonomy or choice in the client. Moreover, the institutional context itself establishes structures that assure, in a very large number of situations, that the lawyer subverts the client's autonomy. Here again, the relationship between the myth system and the operational code that defines more realistically the power dynamics of lawyer, client, judge and perhaps jury, underscores the importance of the observers perspective *about* procedure and the saliency of power in the application process.

IX. Jurisprudence, Power and Rationality

These examples illustrate the role the myth system plays in obscuring the operations of procedure in the process of decisionmaking. This recognition has led to diverse jurisprudential theorists viewing procedural prescriptions in terms that make clear their affinity to the processes of effective power. Let us consider two jurisprudential per-

40. *See* Simon, *supra* note 2, at 57-60.

spectives by reference to schools of legal thought representing views that are fundamentally polarized.

The first view is that of Professor H.L.A. Hart.[41] Within Professor Hart's paradigm, law is a union of primary and secondary rules, and rules are conceptual devices very largely insulated from the world of cause and effect. Under Hart's scheme, the primary rules, encumbered by the defects of inefficiency, uncertainty, and static quality, are supplemented by another species of rules, secondary rules, which perform power functions in what Hart would view as a formal sense. These secondary rules prescribe the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied or violated. In a broad sense, the secondary rules to which Hart avers are rules concerned with some dimension of power. Without such rules the rights, duties, and claims of the disputing parties are commingled into diluted and amorphous pleas and relegated towards ineffective channels of self-help or simple contemplations of what might have been.

Hart's secondary rules of adjudication, in effect, tell us what judges are, what lawyers are, what courts are, what jurisdiction is, what judgments are, and so on. Yet under Hart's scheme, rules that empower private lawmaking are not necessarily procedural, although from the observer's perspective, one could conceivably maintain that substantive law rules that define the modes of private lawmaking are best classified as procedural. I do not propose to get into a complex critique of the interplay and classifications Hart uses within his scheme. For our purposes, I will focus on a single procedural aspect of Professor Hart's work: his secondary rules, which are fundamentally rules of power. Since Hart ignores fact, he views the concept of power as a concept of formal power, which in the sense employed by Wesley Newcombe Hohfeld, is one element included in the concept of a legal right. Whether we define the nature of procedure in broad or in narrow terms, therefore, the concept of power under the most formalistic of jurisprudential schemes is what makes law certain, flexible and efficient.

The second jurisprudential law view is that of Professors McDougal, Lasswell and Reisman. They are, of course, the architects of the jurisprudence of the policy sciences. In the McDougal scheme, law is a process of decision, or more precisely, authoritative decision. Since authoritative and controlling decision is a fact, we may rightly view the McDougal system as the antithesis of the Hartian scheme. Under

41. H.L.A. HART, THE CONCEPT OF LAW (1961).

McDougal's policy orientation, law is a process of decisionmaking that is both authoritative and controlling, where members of the community clarify and implement their common interests.[42] Furthermore, McDougal and Lasswell insist that the perspective of the authoritative decisionmaker is quite distinct from the perspective of the observer or claimant. They also point out that jurisprudential ideas are often present in the daily decisionmaking of judges, advocates, administrators, and legislators.

McDougal, Lasswell and Reisman insist, as strongly as Hart denies, that jurisprudence is most usefully conceived as a theory *about* law and not a theory *of* law. As a theory about law, they have insisted that one of the central intellectual tasks of jurisprudence involves the capacity to view the phenomenon of law through the lens of an observer. Such an undertaking is guided by the use of several intellectual tasks designed to provide a comprehensive, particular, and relevant jurisprudential orientation. One of the major contributions of the jurisprudence of the policy sciences is its focus on law as authoritative decision, and its efforts to locate decisionmaking in the contextual framework of the larger community process. The focal points of my article, therefore, are two: first, what is the anatomy of decisionmaking; and second, how does procedure fit into this anatomy?

According to McDougal, decisionmaking that aspires to even the most minimal measure of rationality necessarily encompasses seven decision functions: intelligence, promotion, prescription, invocation, application, termination, and appraisal. Although defined in general categories, these functions can be found in all but the most unreasonable of procedural systems. In addition, McDougal's model requires that from a jurisprudential point of view, the decisionmaking process itself and the values to which it subscribes be assessed against principles of content and principles of procedure to enable the decisionmaking process to integrate procedural values with substantive ones. Moreover, McDougal requires that the entire decisionmaking process also be assessed for its contribution to knowledge, its conformity with its own stated goals, and its congruence with the broader goals to which the observer is committed.

As can be easily inferred, decisionmaking is an outcome of the power process, and all decision functions have both a procedural and

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42. For a general orientation to the jurisprudence of the policy sciences, see M. MCDOUGAL, H. LASSWELL, & L. CHEN, *supra* note 4, at 289; Lasswell & McDougal, *Jurisprudence in Policy-Oriented Perspective*, 19 U. FLA. L. REV. 486 (1966-1967).

a substantive dimension in policy oriented terms, a constitutive (which includes procedure) and a public order (substantive human rights values) dimension. Within a jurisprudential framework that views law as fact, therefore, the relationship between procedural and substantive law is one that can only be appreciated in terms of the power background, in terms of the functions of decisionmaking, and in terms of the approximation of those forms of decisionmaking to the principles of content and procedure that guide the grounding of value judgments.

These jurisprudential views represent the idea of law in conceptual terms and in empirical terms. Yet in the positivist lexicon, procedural rules are a species of secondary or power-conferring rules. In the policy-oriented perspective, procedure interfaces with all decision-functions and might better be seen in terms of a general taxonomy of the entire process of application, which is, of course, only one aspect of decisionmaking.

X. Procedure and the Policy-Oriented Perspective

The examples used to illustrate the interplay between the myth-system and the operational code suggest that the law of procedure or civil procedure is a complex, but crucial variable in the processes we label, for convenience, "judge-made law." Like law generally, civil procedure is characterized by a myth system that implies stability, and an operational code that stimulates new applicative competences, terminates old ones and confirms or expands the reach of existing ones. The operational code may be seen as the dynamic side of law — the living law. The application function of decision may decisively influence or condition how other decision functions are executed. The major purpose for which the community provides an application function within its constitutive process is to clarify and put its fundamental policies into controlling practice. This requires a very careful exploration of the potentially relevant facts and the determination of what facts will be regarded as relevant. It also requires an exploration of potentially relevant policies and a choice of what policies are appropriate for the particular instance of application. Finally, it requires the relation of the chosen policies to the facts regarded as relevant. The traditional assumptions that procedure and substance are autonomous decision functions seems untenable if we appreciate how prescription and application interstimulate and interdetermine the outcomes of decision. These conclusions may then be fruitfully contrasted with the well received idea that civil procedure is adjectival, that it exists for something else; namely, to vindicate substantive justice. Upon reflection, however, this seems like putting the proverbial cart before the horse. Under Hart's system we apparently have no efficacy, certainty

or flexibility without those secondary rules of power. For a decision to qualify as law under McDougal's policy-oriented system, it must be both authoritative and controlling. In other words, power must be the crucial ingredient in the process of decisionmaking and thus an integral part of procedure. Anglo-American lawyers have long indulged the colorful myth that somehow or other, if content and process are different, content trumps process or, in a very real sense, procedure is only supposed to "facilitate" decisions of substance.

The procedural expectations codified by the rules of procedure promote discrete decision functions within the institutions of civil process. The critical question to an observer is whether the procedure promotes anything to do with "rationality,"[43] and what might be done to enable the procedural aspect of decision to improve the rationality of the decision process we call law. If by rationality we mean an optimal decision process (the means) that consciously and efficaciously promotes articulated goals and values (the ends), then the larger values of the public order require clarification.

The problem of whether law has anything to do with values is a major jurisprudential controversy in conventional theoretical literature. Policy-oriented jurisprudence views as absurd the idea of law as autonomous from human values. From the policy perspective, however, questions as to how we get these values and how we clarify them for the purposes of decision in law have been discussed elsewhere. Suffice it to say that the observer cannot escape the value issue if he is concerned about making rational decisions. The general value the policy-oriented jurisprudence attributes to an observer is that, conveniently styled, the public order of human dignity.[44] In this view, discrete procedural values do not stand apart, for the purpose of appraisal, from the larger value commitments that the observer recommends. If this perspective is accepted, the critical question becomes how to shape law to more consciously approximate the principles and policies associated with human rights, and how decisional principles of procedure and content might be constructed to meet this goal.[45]

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43. Rationality in the perspective of the policy-oriented jurisprudence is best approximated by the use of the five intellectual tasks: Goal, Trend and Condition, Appraisal, Projection, and Alternatives. The form of thinking required to maximally utilize these intellectual tools is called configurative thinking. *See* Nagan, *Human Rights and World Public Order*, (Book Review), 2 N.Y.L. SCH. J. INT'L & COMP. LAW 106, n.26 (1980).

44. *See* Reisman, *Law from the Policy Perspective*, in M. MCDOUGAL & W. REISMAN, INTERNATIONAL LAW ESSAYS 1 (1981).

45. Philosopher David Little has understood the importance of identifying the grounds of value clarification, and has provided an insightful critique of the principles of content and

The second major component of the notion of rationality is the concern with "means" in the broadest sense of the term. The term "means" encapsulates a large range of jurisprudential ideas, the most important being the processes of effective power.

Within the framework of at least two major schools of jurisprudence is acceptance of the idea that procedure is an important instrument of power. Power is an outcome of social process. Rules or prescriptions that define power competences are, in reality, codified expectations that guide decisionmakers in making choices about the competency and reach of fundamental institutions of decisionmaking. Procedure has an affinity, then, to the social process context of which it is an outcome, more specifically, of the power aspect of social process. Thus if we ever attempted to provide a conceptual framework for civil procedure from the perspective of an observer, rather than the practitioner, it would be that the rules of civil procedure are codified but incomplete, ambiguous, and sometimes logically circular expectations about the allocation of public power to both public and private actors who function primarily through the institution of the courts. The definition of a court would have to be broad enough to include what lawyers do in and out of their offices and chambers. By strategic manipulation of these general guidelines, however, diverse actors such as claimants, lawyers, judges, and a whole range of others, can wield state-sanctioned power within the court system to produce good or bad results. This vantage point suggests that quite possibly we need to refocus our inquiry into the nature of civil procedure. Such a refocusing might be along the following lines, which we regard as more vigorously empirical in the process-oriented sense of the term.

— For whom are the rules of procedure prescribed?
— How are procedural rules made and applied?
— What procedural values and larger legal and societal values are meant to be advanced by the procedural regime?
— Who prescribes the rules of procedure?
— What is the content of the rules so prescribed and what do they do?

If the rules are basically power rules, then much of the nature of civil procedure is linked to constitutional law prescriptions. The funda-

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procedure here recommended to promote a civil procedure that maximizes the potentials for "rational" applications in the common interest. *See* Little, *Toward Clarifying the Grounds of Value — Clarification: A Reaction to the Policy-Oriented Jurisprudence of Lasswell and McDougal*, 14 VA. J. INT'L LAW 451 (1974).

mental characteristic of constitutional prescriptions is that they codify expectations about the allocation of power at many important levels of decisionmaking. Civil procedure shares with constitutional law the idea that the rules allocate power, although the allocation in civil procedure is more institution specific. Not all rules of civil procedure carry a kind of constitutional imprimatur. Although the due process clause has been widely interpreted in civil litigation, not every procedural rule has been elevated to constitutional status under either due process or some other constitutional standard.

Some of the procedural rules do carry a direct constitutional imprimatur, and others that have not been so interpreted certainly may be appraised to the extent they vindicate the values of constitutional reasonableness and fairness. Perhaps an accurate description of our civil procedure system is that it maintains a low visibility aspect of constitutional law in the broad sense that the values of fairness, equality, and reasonableness are at least assumed to undergird the diverse and complex rules. The function of these rules is the establishment and maintenance of a process where functionally legal and judicial decisions are made and applied. The rules hone out the allocation of power to private parties — lay persons, judges, lawyers, professional associations, legislatures, and executive authorities. Optimally then, the rules of civil procedure aspire to "rationality," allocating competences in the effective use of state power to resolve disputes and advance public policy through the court process. An entire set of further questions arises that again focuses on the empirical character of civil process.

— Who makes the effective recommendation about the content and structure of the procedural rules and upon what information? How is the data amassed and by what procedures?
— Who may procedurally be authorized to invoke the application of substantive law, to which other parties, and in what contexts?
— What policies are promoted by the application of substantive law, and what is its promotional impact on long run efficacy of the process?
— What policies are promoted by the use of procedural norms in the application of both procedural and substantive prescription to particular cases, and what is the promotional impact upon the institutional process of dispute management and claim presentation or prosecution?

Procedural rules in the United States, for example, allocate a great deal of power to private parties invoking state power in order to

compel other parties to settle their differences with them. The discovery rules permit a process of private investigation unheard of in most other parts of the world. The rules prescribe power dispensations between state and federal courts, trial and appellate courts, judges and jurors. They allocate burdens and responsibilities, costs and options, and establish the grounds for jurisdiction over parties and over subject matter. And perhaps most telling of all is that frequently private parties may, through the civil court system, indulge in a form of public law enforcement, as is the case with antitrust treble damages. A vast amount of the interaction between various actors in a civil litigation, especially within the fact-finding proceeding, is done with only residual judicial supervision. A very large segment of what a court is, is found in the offices and chambers of lawyers.

I now return briefly to the normative component of civil procedure. This problem, I believe, is tied intimately from an operational perspective with the traditional problem of distinguishing substance from procedure.[46] A large number of civil procedure scholars sometimes create the impression that the key problem with the distinction is that of defining procedure. In *Sibbach v. Wilson & Co.*,[47] the Supreme Court appraised Rule 35 and promulgated a strangely circular test for determining whether the rule was or was not procedural. The test given was this: "Does the rule really regulate procedure?" The great stickler for procedure, Felix Frankfurter, gave his imprimatur to the idea that we only need to define what procedure is in order to integrate substance and procedure. In *Guaranty Trust Co. v. York*,[48] Justice Frankfurter pronounced the so-called "outcome determinative test" for the *Erie* cases.

In order to distinguish substance from procedure, one must know how they interrelate in the first place, and even more importantly, what they are from the perspective of decision functions. To distinguish between substance and procedure, for whatever purpose, is to have made a jurisprudential assumption, albeit an implicit one, that must be reluctantly extracted from the intellectual "fog" of those who presume to know the distinction.

H.L.A. Hart defined law as a complex set of rules that loosely integrates primary and secondary rules. His model celebrates the union

46. The relationship between substance and procedure, as I have earlier indicated, is one of the thorny problems of law. The mysteries about the distinction fade when we recognize that procedure decisions are effectually constitutive process decisions, that substantive decisions are public order decisions, and that principles of content and procedure are the only assured non-arbitrary way of integrating the goals of constitutive process with that of the public order to realize the traditional objective of law: the realization of the common interest.

47. 312 U.S. 1 (1941).

48. 326 U.S. 99 (1945).

of substance and procedure. Hart's theory of rules views rules from an internal vantage point. Policy-oriented jurisprudence maintains the opposite point of view. Theorizing remains an impoverished, not to say irrelevant, exercise if one cannot observe law-conditioned behaviors that practitioners for convenience label substance or procedure. The observational viewpoint about law lends law-related insights that must invariably escape the internal perspective of law espoused by Hart and his followers.

In the jurisprudence of the policy sciences, law is a process of authoritative decision through which members of the community clarify and implement their common interests. One of the central understandings of decisionmaking is that prescriptions we call law are often normatively ambiguous, travel in pairs of complementariness, or come in increasingly abstract levels of precision. Trying to know what the law is is no mean feat regardless of the theory one embraces. According to this view, since law is an instrument of policy, the function of decision with which we are concerned is not what substantive law is, in terms of some litmus test or other, but rather what is the design of the entire process of law-making: how is law made or prescribed? Lawyers and courts are, of course, predominant instruments in the processes of prescription, but from an observer's vantage point they are not the only ones. The problem of application is intimately tied to the questions how law is made, and how law is applied, Professor McDougal, writing in the context of international law and human rights, suggests what he views as the core challenge of prescription and application. In his view the basic challenge is, namely, "to make *continual reference of the part to the whole* in a contextual consideration of every particular question in the light of the overriding goals and characteristics of the larger community."[49] Professor McDougal continues:

> Experience suggests that this necessary contextual examination of every particular problem, though perhaps occasionally achievable by flashes of insight, may best be facilitated and assured by the systematic employment of a comprehensive set of principles of inquiry, both of content and procedure: principles of content for spotlighting the relevant features of the particular interaction and its community context; principles of procedure for the rational and economic identification exploration, and appraisal of possible solutions.[50]

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49. M. McDOUGAL, H. LASSWELL, & L. CHEN, *supra* note 4, at 415 (emphasis added).
50. *Id.*

This statement highlights several important aspects about law and procedure. First, that procedural law gains most systematic benefits when the perspective of observation is maintained. Second, that procedure in the broad sense provides a means of resolving specific problems that are outcomes of social process. Third, that problems provoke decisional responses that frequently employ decisional procedures of which the expectations codified in the rules of procedure are vital to making real choices. Fourth, that the decisional responses may or may not approximate the goals and expectations of the parties and the larger community. Fifth, that inquiry into the nature of this process, including recommendations for normative guidance, may be of enormous help not only in improving the processes of decisionmaking, but also in providing deeper insights into the normative basis of procedure and its relationship to substantive law in a normatively ideal system. The practical task of decisionmaking is the recurrent problem of prescribing and applying law for particular cases and problems. Decisional responses to problems, at least in law, represent policy outcomes. Since policy outcomes reflect interests, the special normative challenge of decisional technique is whether it enables the accommodation of interests in particular instances. This is no mean feat, and efforts to create a rational legal order flounder on the issues of whether decision is responsive to problems, and if so how complete is the response. To appraise this process we must know what application and prescription entail. We must be able to interpret or appraise particular decisional practices to determine whether we intellectually approximate a responsible discharge of what Professor McDougal calls the application function. That function is explained as follows:

> The responsible performance of the application function in such instances may require a whole sequence of activities or choices, including the exploration of the potential facts and their larger context; the exploration of the potential policies apparently relevant to the provisional focus upon the facts; the characterization of the facts and determination of their varying degrees of relevance; the selection from among the potential policies of those to be applied and the detailed relation of these policies to the facts regarded as relevant; and finally, the formulation and projection of the decision, with indication of measures appropriate to securing conformity. For an applier genuinely dedicated to the clarification and implementation of the common interest, the necessities of an informed and rational, yet still personal, choice must stalk every act in this sequence.[51]

51. *Id.* at 416.

In this perspective, civil procedure has the task of exploring and clarifying potentially relevant policies that need to be harmonized in the common interest as part of the decisional outcome. Civil procedure fits largely, but not entirely, into the more inclusive decision function of application. More accurately, the whole process of application is a systematic link with the law-making, or prescribing process, itself. The key functions of application cannot, therefore, be seen in isolation of prescription and the core tasks of prescription itself, namely, the systematic effort at ascertaining community expectations expressed in particular prescriptions. Ambiguous or incomplete communications might be supplemented by recourse to more inclusive values identified, clarified, and evaluated for relevance in terms of their approximation to the common interest, and the integration of "particular expectations with basic community policies."[52] The critical question an observer interested in application would ask is whether the intellectual strategies used to apply law are best suited to maximize the rationality and minimize the arbitrariness of the process of decisionmaking, of which prescription and application are crucial functions. Policy-oriented lawyers believe that the invention of a systematic set of principles of content and procedure might provide useful guidelines for the examination and evaluation of both the processes of prescription and application. These principles include perennial principles of substance and procedure whose problems permeate the teaching and practice of procedural courses and the dynamics of litigation process. Principles of content and procedure in the policy-oriented sense provide an anatomy of an open-ended intellectual frame, which has both explanatory or mapping possibilities, as well as dynamic possibilities about the relationship between procedure and substance. They provide more precise keys to a functional integration of what is at least conventionally called procedure and substance. This essay provides only a suggestive outline of principles that are more comprehensive and that require more detailed explanation. This outline should, however, be sufficient to serve as a normative standard to appraise the extent to which any of the particular rules of civil procedure approximate that standard.

XI. Principles of Content and Principles of Procedure

The principles of content recommended are those that provide guidance in "the choice of subject matter relevant to evaluating alternatives in policy open to a decisionmaker."

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52. *Id.* at 417.

Principles of procedure suggest "agendas and techniques for bringing pertinent content to the focus of a decisionmaker's attention."

The framework that an observer might provide for a rational integration of the process of lawmaking and law application would, in the policy-oriented framework, focus primarily on the process of prescription, the process of claim and decision and the process of application. The intellectual strategies relating to the prescribing process may be stated in the form of principles of content, and may be schematically illustrated as follows:

Principles of Content

I. Principles relating to prescription or law-making are:
   (1) ascertaining prescription;
   (2) supplementing prescription; and
   (3) interpreting expectations.
II. Principles relating to the process of claim, viewing "legal" problems through lens of observer, relating problems to context.
III. Principles relating to entire decision process invent principles that enable all decision functions to be tested for salience in shaping results or outcomes.

Principles of Procedure

I. The Contextual Principle
II. Principle of Economy
III. Principle of Provisional Focus
IV. The Principle of Clarified Focus
V. Principle of Observing Past Experience
VI. Principle of Orientation to Conditions of Decision
VII. Principle of Prediction of Probabilities
VIII. Principle of Appraisal and Invention of Options

These intellectual strategies are, of course, abstracted from a more complex formulation of what law is and how it might be improved in the case of a value-conditioned universe. The principles of content and procedure are a device, or intellectual technique, that enables us to appraise and evaluate the civil procedure process, or any other discrete procedure process against some rational measure of performance. The principles not only provide normative guidance to the process of decision itself, but also throw light on how we might appraise the nature of procedure in terms of standards of explicit rationality. Debate about those standards, however, is not foreclosed. What we debate is explicit and subject to reformulation, change, or whatever, in terms of conscious, intellectual discussion. Debate is explicit about the relevance of values. If we accept that the system of civil procedure is an outcome

of the community's power process, and the rules, however aptly or ineptly, justly or unjustly, allocate competences in ways that are of bewildering complexity even to lawyers, and if we accept the principle that responsible scholarship might promote the progress of law toward improved rationality, then the interplay of power and values is a crucial focus for a better understanding of civil procedure, and how it might be made an even more important instrument in the delivery of freedom and justice, now and in the future.