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Commentary on Nagan

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Professor Nagan takes us on a grand tour through Supreme Court decisions on extraterritorial jurisdiction, summary process, and class action notice requirements; past the morass of the substance-procedure distinction; quickly through the elements of adversary adjudication; to a grand overview of Hart's and McDougal's conceptions of law and the importance of power in them; and finally to the summit of policy science as applied to procedure. I will summarize where I think we went, but given the length and tortuous nature of this little-used path, I may stray from it in various places.

Professor Nagan begins by drawing attention to the difference between the myths of civil procedure and its actual operation. *International Shoe*[1] ostensibly makes jurisdiction subject to minimum contacts, providing for fair play and substantial justice; summary process, however, still largely lacks those characteristics. Rule 23(b)(3)[2] promises class justice on a mass scale, but *Eisen*[3] undercuts this promise with a requirement of individual notice to millions of class members. The myth is that substance trumps procedure, but the reality is otherwise.[4]

Procedure concerns power — both legal and social. The best way to understand and harness civil procedure is to analyze it in terms applicable to all decision processes.[5] To do so, one must choose between the perspective of a scientific external observer and that of a practitioner. Professor Nagan opts for the former. From an observer's perspective, the critical question is whether civil procedure promotes rationality, that is, an "optimal decision process (the means) that consciously and efficaciously promotes articulated goals and values (the ends)."[6] The policy science observer assumes the values of a "public

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1. International Shoe Co. v. Washington, 326 U.S. 310 (1945).
2. FED. R. CIV. P. 23(b)(3).
3. Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).
4. Nagan, *Civil Process and Power: Thoughts from a Policy-Oriented Perspective*, 39 U. FLA. L. REV. 453, 468-70 (1987).
5. *Id.* at 453.
6. *Id.* at 481.

order of human dignity" or human rights.[7] The policies and values of society that are compatible with human dignity are accepted.

Professor Nagan's entire enterprise contains ambiguity, or less charitably, confusion, in developing a theory *about* civil procedure. The ambiguity is between a descriptive and explanatory theory, on the one hand, and an evaluative and justificatory theory on the other. Professor Nagan thinks it is "silly" to try to develop a normative theory without a descriptive-explanatory one.[8] It is indeed silly to apply such a theory to evaluate a particular system without knowledge of how it works and what effects it has. A normative theory, however, is independent of, neither justified nor falsified by, an explanatory one. One's confidence in condemning the Nazi system would not be shaken by a belief that one's previous explanation of it, say, as a result of legal positivism, was incorrect. Although both normative and explanatory theories can be about civil procedure, it is silly to think that one theory will describe and explain a system and also provide principles for its evaluation. Professor Nagan wants one theory to do both, but he recognizes that the theory must have a "normative component."[9] The point is that this normative component amounts to a separate theory independent of the descriptive and explanatory component. Professor Nagan would probably not, and surely need not, drop his commitment to human dignity and rights even if he rejected his policy-science explanatory view. The rest of my comments primarily focus on this normative theory or component.

The theory is an instrumentalist analysis and evaluation of procedure. Rationality involves choosing the proper means to ends. The ends are society's values and policies compatible with human dignity. This instrumentalism is clearly evidenced in Professor Nagan's response to the charge of instrumentalism. He contends that reducing policy-oriented thinking to Benthamite utilitarianism betrays a lack of familiarity with policy sciences.[10] Just prior to this comment, however,

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7. *Id.*

8. *Id.* at 457 n.5. Although Professor Nagan singles me out for criticism, I construe it to apply to a broad range of jurisprudential writing, since my article merely developed discussions by Posner, Dworkin, Summers, and Mashaw. *See* R. DWORKIN, A MATTER OF PRINCIPLES ch. 3 (1985); Bayles, *Principles for Legal Procedure*, 5 LAW AND PHILOSOPHY 33 (1986); Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U.L. REV. 885 (1981); Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973); Summers, *Evaluating and Improving Legal Processes — A Plea for "Process Values,"* 60 CORNELL L. REV. 1 (1974).

9. *See Nagan, supra* note 4, at 457.

10. *Id.* at 458-59 n.8.

Professor Nagan states that the function of his principles is to "maximize the realization of the more general goals of the constitutive process."[11] Professor Nagan's mistake is in thinking that if one is not a utilitarian, one is not an instrumentalist.[12] Instrumentalism, however, consists in viewing procedure as a means to an external end, and Professor Nagan's approach clearly includes this feature.

I briefly suggest that (1) a third possible perspective is that of a potential litigant; (2) instrumental rationality either omits an important factor or obscures the relationship among factors better captured from the perspective of a potential party; (3) adversary adjudication has an uncertain place in instrumental rationality and is better accounted for from the third perspective; and (4) the perspective of a potential litigant better handles the problems of summary process, class action, and the relationship between procedure and substance.

First, for viewing civil procedure, Professor Nagan offers only the perspectives of a scientific external observer and a legal practitioner. That is a false choice. A third possible perspective is that of a potential litigant. A potential party is not a mere external observer with no personal concern but has a different view than a practitioner. Most procedural rules, such as those of discovery, can be used as either a shield or a sword. A potential litigant may be either plaintiff or defendant. Thus, procedure must be acceptable from either position; that is, one must trade off the advantages and disadvantages of sword and shield. To make such trades, one must understand how procedures operate so that one knows the actual advantages and disadvantages.[13]

Second, instrumental rationality denies any value to process except as a means to ends. It can, of course, reject efficient means to one

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11. *Id.* In an appendix to a previous draft, Professor Nagan also specified that the Principle of Economy required one to adjust the amount of resources used to resolve a dispute to the amount involved in it. The Principles of Prediction of Probabilities and of Appraisal and Invention of Options as there formulated prescribe calculating the net costs and benefits of each option and choosing the one with the greatest net benefit.

12. Had Professor Nagan read my earlier article more closely, he would have realized that one need not be a utilitarian to be an instrumentalist. I there characterized Professor Dworkin's view as a multi-value instrumentalism but clearly indicated that Dworkin is not a utilitarian. *See* Bayles, *supra* note 8, at 45-50.

13. Professor Nagan claims that I consider rationality to be essentially an exercise in formal logic, *see Nagan*, *supra* note 4, at n.5. In my article, I characterized a rational person as one who "uses logical reasoning and all relevant available information in . . . accepting legal principles." *See Bayles*, *supra* note 8, at 33. All relevant information includes available descriptive-explanatory theory. It is, however, a formal logical fallacy and irrational to conclude, as Professor Nagan does, from the premise "A = B + C" that "A = B."

end because they conflict with or hinder another end. For example, trial by combat as a means of dispute resolution can be rejected because it is contrary to the end of preserving human life. Yet, one may value certain types of means for their own sake, because of the value inherent in them. One may prefer procedures in which one can participate and that are intelligible even if they are less efficient than others in producing proper outcomes. Instrumental rationality seems to omit these considerations.

Professor Nagan might reply that his analysis can incorporate such considerations. Procedure is for the rational implementation of policies and human rights. Those policies and rights might include values inherent in certain procedures. Indeed, human rights codes often specify certain procedures for criminal cases such as public hearings, counsel, and so on, which constitute an opportunity to be heard.

While this approach is theoretically possible, it obscures the relationships of policies and values to procedures. It is one thing for a procedural feature, such as opportunity to submit evidence, to be a rational means to a goal such as accurate decision; it is another for it to be valued as an opportunity to have one's say, to be recognized as a person worthy of consideration. In short, Professor Nagan's concept of rationality confuses procedures as means to ends and as instantiations of values. It is like confusing playing tennis to lose weight, and playing tennis simply because it is enjoyable. The latter is simply not a means-ends relationship.

Third, the status of adversary adjudication in Professor Nagan's view is unclear. He straightforwardly condemns its usual claims as a myth, and he notes that they have been subjected to "trenchant critiques."[14] Yet, he does not provide or even hint at any rationale for adversary procedure.

A deep reason exists for the ambiguous status of adversary adjudication in a policy science orientation. Policy science is concerned with the formulation of policies to promote values or goals, and the implementation of those policies. At each step, it has an instrumental approach. Policies are means to values or goals; application is a means of making policies effective. Thus, it is most compatible with an administrative or bureaucratic approach to application.

From the perspective of a potential party, one can perhaps better determine when adversary procedures are appropriate and when they are not. Much depends on the nature of the issue involved.[15] If the

14. *See Nagan, supra* note 4, at 474.

15. Professor Nagan does consider the type of controversy in principles of content relating

issue does not involve a conflict with another party, if one cannot lose (but only fail to gain), and if the decision is based on fairly clear-cut empirical grounds, then an investigatory process seems preferable. Applications for driver's licenses, passports, and social security retirement benefits generally fit this model. If the issue involves a conflict with another party, if one might lose significantly, and if decisions involve difficult fact determinations and values, then adversary adjudication might be preferable. Such situations arise in civil law cases, termination of welfare and social security disability benefits, and so on. The significance of these factors is better grasped from the perspective of a potential party than an external observer. The former is thus more useful in determining what process is due.

Finally, the potential party perspective can illuminate some of the problems of myth and reality that Professor Nagan mentions.[16] Although Professor Nagan seems to disapprove of summary processes, his policy science perspective does not necessarily support that disapproval. The Principle of Economy prescribes that one adjust the time and facilities devoted to application according to the importance of the controversy.[17] As most summary processes concern matters of relatively little importance, a quick and simple procedure should be appropriate.

From the perspective of a potential party, one might arrive at the same conclusion, but not as easily. First, some noninstrumental values might be at stake in the process, such as an opportunity to have one's say. Second, one has to consider the process from both the perspective of creditor and consumer. Third, as a consumer, one must consider the possible impact on the cost of credit.

The problems of *Eisen*[18] notice under rule 23(b)(3)[19] are even easier. The purpose of notice is to permit a potential class member to opt out of an action and not be bound by the decision. If the amount in question is so small that one would not independently bring an action,

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to the process of claim, but not in those of procedure. In an earlier draft I mistakenly said "but not in those of application." This mistake may be what prompted Professor Nagan's charge that I am "totally confused about the function of principles of content and procedure." *Nagan, supra*, note 4, at n.8. Clearly, principles of content do pertain to procedure in the broad sense. The perspective of a potential litigant, however, better enables one to determine what type of procedure is preferable.

16. For more detail, see M. BAYLES, PRINCIPLES OF LAW (1987).

17. This is, at least, how Professor Nagan described the principle in an appendix to an earlier draft.

18. 417 U.S. 156 (1974).

19. FED. R. CIV. P. 23(b)(3).

then one stands only to gain by permitting the suit without requiring individual notice. If, however, the amount in question would justify an independent action, then one would want the opportunity to opt out. Of course, from the perspective of a potential defendant, the ability to block suits by the cost of notice would be preferable. However, as there are many more members of plaintiff class than defendant class, the probability of being a plaintiff is much greater than the probability of being a defendant. Thus, the weighted advantages of allowing the action outweigh the advantages of blocking it. To require individual notice in such situations is to allow a lot of people to be cheated a little, but prevent a few people from being cheated a lot.

As the discussions of adversary adjudication and class action illustrate, substance and procedure are intimately connected. One must consider the values affected by the whole set of procedures for each type of problem. Some values relate to outcomes (substance) and some to processes (procedure). From the perspective of a potential party, one must consider both types of values and determine a set of rules acceptable to any party to such a case. Sometimes considerations of substance and procedure are relatively distinct; some procedures, such as using impartial decisionmakers, might be appropriate for almost any subject. Other procedures might be best only for a limited subject, for example, a prohibition of self-incrimination for criminal cases. Distinguishing procedure and substance becomes unimportant, for the question is always: What set of rules can one accept as any potentially affected party?

Nothing in the foregoing involves a rejection of Professor Nagan's call to examine how the system actually works. A potential party is concerned with the operative rules, the living law, and not paper rules. To choose rules rationally, to apply a normative theory, one needs the empirical information. What I have challenged is Professor Nagan's policy science theory of normative evaluation.