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Professor Nagan's central thesis — that the rules of civil procedure have a power-affinity — is obvious in the way that gravity is, once your attention is drawn to it. The power lawyers wield because they are trained in the rules of civil procedure — "a science which is necessary, but which is not very generally known"[1] — likewise is obvious. The power aspect of procedure is so obvious that it often escapes the attention of law students, legal educators, lawyers and judges. Laypeople, however, seem acutely aware of the special power reserved to legal practitioners. Their power disadvantage makes some nonlawyers resentful and suspicious of the jargon — the "game" lawyers play — "all at the expense of the Defendant."[2]

Professor Nagan underscores the sharp contrast between the outsider's mistrust of lawyers' procedure and lawyers' near reverence for it. He believes that we must reconsider procedure from an outsider's perspective. His purpose is reform, but not reform in the limited, traditional sense of amendments that, for example, restrict the number of interrogatories a party can file. Rather, he advocates broad reform inspired by a standard other than what he refers to as "immediate practitioner relevancy."

Taking a wider, "observer's" view, Professor Nagan points out the gaps between the Supreme Court's statements about procedural fairness[3] and its actual practice in ensuring fairness.[4] A commentator who adopts the "immediate practitioner relevancy" perspective does not

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1. A. TOCQUEVILLE, DEMOCRACY IN AMERICA 124 (Mentor Ed. 1956).

2. DuMaurier describes a lawyer at work:

> The Attorney-General spooned his witness bait, fed her with frivolous sop . . . . The Court applauded. The Lord Chief Justice could not interrupt them. The pair were playing a game that defied intervention, they were matched like reel and rod and there was no unwinding. They juggled in jargon, dabbled in *double entendres*, wallowed in each other's witticisms, and all at the expense of the Defendant.

D. DUMAURIER, MARY ANNE 309 (1954).

3. For example, Rule 1 of the Federal Rules of Civil Procedure defines the purpose of the Rules as "to secure the just, speedy, and inexpensive determination of every action." FED. R. CIV. P. 1.

4. *See* Nagan, *Civil Process and Power: Thoughts from a Policy-Oriented Perspective*, 39 U. FLA. L. REV. 453 (1987).

notice or care about these gaps in the way Professor Nagan encourages us to care.

The "immediate practitioner relevancy" standard, therefore, is quite different from the "policy-perspective relevancy" standard Professor Nagan advocates. Under the practitioner relevancy standard, a valid question is whether, for example, judicial enforcement of a confession of judgment clause has a tendency to promote internal, practice-dominated needs. It is *not* relevant whether the judicial practice can be squared with courts' statements about procedural fairness in other contexts. Neither is it relevant whether these statements, taken together, express desirable higher procedural values that actually are observed in practice. In other words, the "power" component of procedural practice, as Professor Nagan describes it, is irrelevant under much of the conventional way of critiquing procedure.

If we ask different questions about common procedural problems, we of course find different answers. This is what Professor Nagan encourages us to do. He wants us not only to notice that our procedure choices are power/value choices but also to make those choices in a way that better promotes wider policy ends. That is, we should take seriously our own rhetoric about securing the just, speedy, and inexpensive determination of every action, by defining these terms not from our parochial insiders' view, or even from an individual client perspective, but from the broader, social policy perspective he promotes.

Professor Nagan's thesis may have wide-ranging practical implications. If we adopt his view, we not only must re-think "procedure" in a jurisprudential sense, but we must also re-evaluate our methods of teaching "procedure." Even if we do re-think our methods and alter them to promote the ends Professor Nagan describes, we may effect little change. A brief discussion of the work-product doctrine of civil discovery illustrates this point.

Hickman v. Taylor[5] and Rule 26 of the Federal Rules of Civil Procedure[6] prevent an opponent from discovering documents and tangible things prepared in anticipation of litigation or for trial without a showing of "substantial need," "hardship" and "no substantial equivalent." If we adopt the "immediate practitioner relevancy" perspective, the work-product doctrine seems inevitable, sensible, and neces-

5. 329 U.S. 495 (1947).

6. FED. R. CIV. P. 26(b)(3). Rule 26 provides that a party cannot discover an opponent's work-product absent a showing that he or she "has substantial need of the materials in the preparation of his [or her] case and that he [or she] is unable without undue hardship to obtain the substantial equivalent of the materials by other means." *Id.*

sary. First, we can and do label the doctrine "procedural." That is, we claim that this rule is value neutral, and not one that changes litigation results or affects what Justice Harlan in *Hanna v. Plumer*[7] called "primary decisions respecting human conduct."[8]

We can intone the conventional lore that, without the work-product rule, lawyers would be "inefficient," "demoralized," and inclined to engage in "sharp practices." We also can describe as a "parasite" the plaintiff's lawyer who, in order to prepare for interviewing witnesses, asks for oral and written statements from witnesses who already have been interviewed by the defendant's lawyer; such a lawyer is either "without wits" or seeks to borrow wits from the adversary.[9] And, we can view discovery — the information-gathering stage during which most lawsuits are resolved — as inescapably adversarial. If law educators adopt this practitioner perspective, they need only instruct the students in the "how-to" aspects of work-product, and explain its parochial, practice-based justifications.

The work-product doctrine, however, is not preordained, not strictly procedural and not value-neutral.[10] The work-product doctrine is justified, it is said, by the adversary process. But, adversarial discovery, versus adversarial trial, is not the only rational or necessarily the most effective information-gathering technique.

Although we label the work-product doctrine procedural, the doctrine, like privilege rules, can affect non-courtroom behavior — at least for behavior of well-advised, "repeat performers" in civil litigation.[11] Corporate counsel may advise clients to gather information in ways that will improve their chances of successfully resisting future motions to compel production of the information. Indeed, both the attorney-client privilege and the work-product qualified immunity in effect encourage clients to involve lawyers in daily operations, and make clients dependent upon legal counsel not only for advice, but also as a shield from intrusive discovery. It is sound business practice

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7. 380 U.S. 460 (1965).

8. *Id.* at 475 (Harlan, J., concurring).

9. Hickman v. Taylor, 329 U.S. at 516 (Jackson, J., concurring).

10. *See* Waits, *Work Product Protection for Witness Statements: Time for Abolition*, 1985 WIS. L. REV. 305. Professor Waits makes the case against work-product qualified immunity for witness statements in terms that are highly relevant to Professor Nagan's thesis that procedural rules are power rules. Waits points out the cost of immunity for witness statements, *id.* at 319-24, and concludes that the benefits of the rule are conferred primarily upon institutional litigants who are "repeat" performers in litigation. *Id.* at 325.

11. *See id.* at 325.

to have a separate legal department, with its own letterhead. It is sound business practice to "run things by the lawyers," to allow attorneys to spearhead investigations into accidents and to allow attorneys to direct experts or agents involved in the investigation.[12]

Access to information during discovery affects the quality and nature of the evidence presented at trial, as well as decisions about whether to settle a lawsuit and for what amount. Thus, discovery rules can affect the outcome of litigation in very palpable ways. Moreover, the primary arbiters of the limits of the work-product doctrine are not judges, but lawyers. Discovery disputes under the federal rules are not resolved by judges unless lawyers are unable to settle an issue among themselves. Most discovery requests are served and heeded with no judicial approval or oversight. Indeed, the discovery sanction rules[13] make it potentially costly for lawyers to request judicial intervention in discovery disputes: the prevailing lawyer can request that the loser pay the costs associated with the request.

The work-product rule is described as neutral because both parties theoretically have equal access to the underlying facts and because "[d]iscovery is a two-edged sword";[14] that is, neither party can uncover the other's work-product. The benefits of the rule, however, may not be distributed equally. For example, a consumer who sues a corporation for physical injuries caused by the corporation's product cannot discover the work-product of the company's lawyers, agents, or nontestifying experts. The consumer's lawyer operates at an information disadvantage. Unlike the company's lawyer, the consumer's lawyer, experts and researchers may not know where to begin the search for information about the injury-producing product. The consumer, therefore, does not have "equal" access to the facts, given this greater time and expense in finding those facts. Indeed, a guiding principle of discovery is that if you do not ask the right question, you will not get the right answer. Asking the right question, however, is a matter of knowledge and experience. A dearth of either may disable even the brightest attorney, at the consumer client's expense. Even if the consumer's lawyer could uncover the same facts as the corporation's lawyer, the work-product rule requires that both parties pay the expense of uncovering this data. This double expense is borne by the

12. *Id.* at 340-42.

13. *See* FED. R. CIV. P. 11, 26, 30, & 37.

14. Hickman v. Taylor, 329 U.S. at 515 (Jackson, J., concurring). Justice Jackson observed that plaintiffs' lawyers formed the chief opposition to broader discovery "because defendants have made liberal use of it to force plaintiffs to disclose their cases in advance." *Id.*

clients, to the obvious benefit of no one except, perhaps, the clients' lawyers and agents.

How, then, do we justify the costs of the work-product rule? We simply accept the assumption that without the rule, lawyers would be demoralized, would engage in sharp practices, and would not write anything down, thereby ultimately defeating the truth-seeking goal of discovery. If we reject this assumption, then we may find it difficult to square the rule with our stated desire to secure the just, speedy, and inexpensive determination of every action. In fact, however, very little is known about how lawyers would act, if the work-product rule were abandoned. Why, one might wonder, is there no significant call to explore the rule's untested rationale?

One explanation may be that the rule is working reasonably well, and consequently no great need dictates that we test the rationale. Another explanation, suggested by much of what Professor Nagan has said, is that the work-product rule works reasonably well to serve *lawyer* ends, even though the individual client may be ill-served by the doctrine. Moreover, no one besides lawyers knows if the rule defeats larger policy goals: only lawyers have meaningful access to this extra-judicial discovery process.

In medicine, the consumer may not know whether medical tests are warranted. Only the medical professional can make that judgment. Similarly, only a legal professional can make an informed judgment about whether a deposition of a particular witness is needed. In medicine, however, health insurers, medical review panels, or other supervisory bodies may review a medical practitioner's decision to order a series of blood tests. In contrast, no one oversees the legal practitioner's discovery decisions. Despite their power-affinity, procedure rules are seen as the insider lawyer's exclusive province.

If, however, no outside force requires procedural rules to promote the public ends Professor Nagan extols, then the changes he desires are unlikely to occur. We must have incentive to change the rules or at least to reexamine them. If practitioners are the only people who see and use the rules, then it is no surprise that the rules reflect an "immediate practitioner relevancy" perspective.

One "outside" force that might encourage practioners to consider broader policy goals when using and construing the procedural rules is legal education. A civil procedure teacher's choice of how to teach a case like *Hickman v. Taylor* may play a role in how students later behave as lawyers in the discovery stage of litigation. The professional behavior rewarded in *Hickman* — "give nothing up willingly" — is learned behavior. If this behavior is taught in law school without a discussion of whether it promotes interests beyond the profession, then it is doubtful that most graduates later will seriously consider

the rule's value. On the contrary, they will likely regard as heresy any argument against the conventional wisdom of *Hickman*. Yet, if students view procedure as the "key to the business of lawyering," as Professor Nagan suggests, then legal educators must consider what message is conveyed about that business when the plaintiff's lawyer in *Hickman* is called a "parasite." What assumptions underlie a procedure system in which "borrowing wits" is regarded as a deeply serious, even fatal, breach of the rules? How does that definition of skill and triumph promote the stated objective of securing the just, speedy, and inexpensive determination of every action?

Two problems — both practical in nature — suggest that change may not occur even if legal educators do accept the view that procedural rules, like work-product, have a power affinity, and also accept theoretical responsibility for training lawyers in a broader policy perspective. The first problem lies in the fact that most civil procedure courses are five hour courses. This may translate to only eight hours of class time spent on the discovery principles and methods. The pedagogical dilemma — obviously not unique to civil procedure — is how to cover the basic concepts and expose the students to the mechanics of discovery, yet also engage in serious, effective critique of discovery concepts, all within these eight hours. Professors can choose among several alternatives:

1. Teach only the techniques, or "operational code."
2. Teach the techniques and the underlying assumption or "myth."
3. Teach the techniques and the assumption, but challenge the assumption.
4. Refuse to teach the techniques and focus solely on the assumptions.
5. Teach new, less adversarial techniques and develop new assumptions.
6. Teach the techniques but refuse to lend force to them — not unlike placing the lying client on the stand to testify, but refusing to participate in the lie.

If professors choose not to expand the perspectives of their students — soon to become "insiders" — then the students may have little incentive, or tools with which to challenge the legal rules that are most foreign to lay people, most impervious to "outsider" input and critique: procedural rules. Yet, procedure teachers have an obligation to train students to juggle effectively in jargon and to use the prevailing "operational code" to their clients' advantage.

The second, more significant problem lies beyond legal education. Even professors who ignore the obligation to train students in the prevailing code and who focus solely on policies behind the rules may effect little change. Once students leave law school, their discovery

ethics likely conform less to professorial exhortations than to whatever discovery practices their future law associates and partners follow.

Professor Nagan's thesis, therefore, is a disturbing one. The power-affinity of the rules may be obvious, like gravity. But, it is difficult to know what a legal educator can "do about it" if — as gravity proves — the apple will fall anyway.