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EVALUATING AND IMPROVING LEGAL PROCESSES—A PLEA FOR “PROCESS VALUES”*

Robert S. Summers†

I

INTRODUCTION

Neglected topics sometimes call for lengthy introduction. So it is here. Legal systems operate through various legal processes, including processes for designating officials, for creating law, for applying it, for enforcing remedies, and for imposing sanctions. It is possible to evaluate not only the *results* of a process, but the *process*, too. Consider this example:

Example (1): Bodea was a small society with a democratic legislature. An organized crime syndicate assumed control of the

* My work in this area has gone slowly. For the record, I wish to recount the following: I treated part of the topic in a lecture at the University of Aberdeen, Scotland in April, 1965. I later published a much-revised version of the lecture as *Law, Adjudicative Processes, and Civil Justice*, in *LAW, REASON AND JUSTICE* 169, (G. Hughes ed. 1969). During 1968-1969, I taught Civil Procedure at Cornell Law School, an experience which gave more concrete focus to my thinking about process values. During 1970-1971, I revised my teaching materials for undergraduate courses about law and included five sections on “Process Values”. See R. SUMMERS & C. HOWARD, *LAW, ITS NATURE, FUNCTIONS AND LIMITS* 98-102, 168-85, 265-68, 351-57, 426-32 (2d ed. 1972). During 1973-1974, I co-authored a booklet of public school teaching materials entitled: *PROCESS VALUES—HOW OUR LAW DOES ITS JOBS ALSO COUNTS*, in R. SUMMERS, A. CAMPBELL & J. BOZZONE, *JUSTICE AND ORDER THROUGH LAW* (1974).

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legislature and secured enactment of a law that for a time abolished police forces. This disrupted the peace of Bodea and left its people insecure.¹

It will be apparent that in Example (1) both the lawmaking process and its results were bad. Its *results* were bad partly because they disrupted peace and security, high values in any legal system. The process itself was bad, *as a process*, at least because lawmaking processes controlled by self-serving minorities are unlikely to yield results good for all. Such processes lack efficacy as means to good results—"good result efficacy." Democratic legislatures, on the other hand, have significant "good result efficacy," for they are far more likely to yield results good for all. (This is not to say, however, that they *guarantee* such results.)

Example (2): Bodea had a constitution with a bill of rights similar to that of the United States. However, the Bodean police lost confidence both in prosecutors and in the courts. As a result, the police became vigilantes and undertook not merely to identify and apprehend suspects, but also to "convict" and "punish" them. Police invaded the homes of suspects and even tortured them. By mistake, the police frequently "convicted and punished" persons who were not guilty.²

It should be apparent that in Example (2) both the law-applying process and its results were bad. Its *results* were bad partly because they were unjust: punishment of the innocent is a form of injustice. The process itself was bad, *as a process*, at least because law-applying processes that fail to provide for impartial and deliberative fact-finding run a high risk of error. Again, such processes lack efficacy as means to good results—"good result efficacy."

My remarks on Examples (1) and (2) indicate how we can evaluate process results, *as results*, in light of such standards as peace, security, and justice. The evaluation of results is an important social practice. However, it is not my objective to explore it in this Essay.

My remarks on Examples (1) and (2) also reveal how the process itself, *as a process*, can be evaluated in terms of what I call good result efficacy. If a process is a significant means of achieving good results, it is in that respect good *as a process*. The evaluation of

¹ The example is not wholly fanciful. Some societies have even sought to dispense with criminal law. See, e.g., I. LAPENNA, SOVIET PENAL POLICY 28-39 (1968) (recounting post-revolution efforts in Russia to dispense with traditional criminal law).

² Again, the example is far from fanciful. See R. SUMMERS & C. HOWARD, LAW, ITS NATURE, FUNCTIONS AND LIMITS 184-85 (2d ed. 1972) (describing São Paulo, Brazil, Death Squads—off duty police who formed vigilante groups to administer criminal law).

a process in terms of "good result efficacy" is also an important social practice. Although it is not my main objective here to explore this variety of evaluation in depth, I will offer some account of it.

Is good result efficacy the only kind of value that a process can have *as a process*? Return to Example (1) and assume that the syndicate-controlled legislature happened to make laws good for all.

In my view, this legislative process would still be bad *as a process* because it displaces democratic rule. Put in affirmative terms, a legislative process that is democratic is good in that respect *as a process*, quite apart from whether it is also an efficacious means to good results in the form of beneficial laws. For a process of this kind serves participatory governance, a "process value." Similarly, in regard to Example (2), it is my view that a vigilante law-applying process would be bad *as a process* even if its "good result efficacy" were high, because it is procedurally irrational (*e.g.*, it is partial rather than impartial), inhumane (people are tortured), and is undignified and invades privacy. Put in affirmative terms, a law-applying process that is procedurally rational, humane, and respectful of individual dignity and personal privacy is good in those respects *as a process*, quite apart from whether it is also an efficacious means to good results (just convictions, just acquittals, etc.). For procedural rationality, humanity, and regard for dignity and privacy are "process values."

I use the phrase "process values" to refer to standards of value by which we may judge a legal process to be good *as a process*, apart from any "good result efficacy" it may have. I use "process value efficacy" to refer to the capacity of a process to implement or serve process values, as distinguished from its capacity to yield good results ("good result efficacy").³ From the examples I have cited, it should already be evident that, of those values that can qualify as process values in my scheme of analysis, some are generically familiar (and uncontroversial). But how these values qualify as process values is not so familiar. And not all process values are generically familiar in the first place.

³ Some philosophers might here prefer that I use their own terminology of "intrinsic value" and "extrinsic" or "consequential value" to mark the distinction I am drawing between "process value efficacy" and "good result efficacy." See generally, W. FRANKENA, *ETHICS* 79-94 (2d ed. 1973). However, I have chosen not to do so. Philosophers themselves do not always use their terminology to mark the same distinction. In addition, the terminology itself has some implications that I do not intend. For example, I do not intend "process value efficacy" to exclude "good result efficacy." That is, a feature of a process that has the former may also have the latter, yet to designate the former in terms of "intrinsic value" implies the contrary for some philosophers.

My principal thesis in this Essay is that a legal process can be good, *as a process*, in two possible ways, not just one: It can be good not only as a means to good results, but also as a means of implementing or serving process values such as participatory governance, procedural rationality, and humaneness. Although the first kind of goodness is "result-oriented," it is nonetheless a form of process-related goodness, for one process is generally preferable to another, *as a process*, to the extent that it is a more efficacious means to good results. The second variety of goodness—the extent to which a process implements or serves process values—is *exclusively* "process oriented," and in this Essay I will concentrate on it.⁴ Why do I choose to concentrate on evaluating and improving legal processes rather than process results, and on process value efficacy rather than good result efficacy?

First, modern societies give far less evaluative emphasis to processes than to results. Both in the world of thought and in the world of action, process values fail to get their due. Thus our own scholarly literature on process values is in a primitive state.⁵ Although we have many books and articles on such important social values as participatory governance, fairness, and rationality, there is not yet a single systematic essay on how these familiar and uncontroversial values can qualify as process values in a legal order. In the world of action, too, process values are not only neglected but often ignored altogether. We are ready to assume that unless the results of our legal processes turn out bad, then "no harm done." But if my thesis is valid, "harm" can be done merely by disregarding process values.⁶ Surely it is bad to neglect or

⁴ Of course, from what has been said so far in the text, a legal process may not only be good—have value—in the two ways I have indicated, but may also be bad—have disvalue—in two corresponding ways. It may both lack good result efficacy *and* ignore or infringe a process value. I will usually refrain from stating these negative possibilities in the text. They can be inferred when appropriate. Occasionally I will call them "disvalues."

⁵ In 1970, after an extensive search, I found only one article that even seemed to recognize the topic as a unitary subject for study. See the brilliant article by Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 346-63 (1957). As its title implies, however, its orientation is different from that of the present Essay. As an incidental part of his article, Professor Kadish does identify and split off one process value: "respect for the dignity of the individual." *Id.* at 346-47. It is some indication of the primitive state of the literature on process values that another distinguished law professor immediately hailed Professor Kadish's feat as a "major contribution." Newman, *The Process of Prescribing Due Process*, 49 CALIF. L. REV. 215, 219 (1961). All this was over a decade ago. As far as I can determine, there has been little since. See note 75 *infra*. Of course, I do not contend that the legal literature is devoid of concern for all aspects of legal processes as such. There are many essays on legal processes *as means to desired outcomes*.

⁶ Even Shakespeare sometimes seemed to think that only that is bad which ends bad, or

ignore such values as participation, fairness and rationality when embodied in legal processes. Even when these values are recognized and consciously weighed, they are typically overridden. But it can hardly be true that it is always justified to override them. Process values are not weightless. And it is especially important to give process values their due in those circumstances, often frequent, in which the standards for evaluating process results are not clear or are not agreed upon, or the facts required for applying agreed-upon standards are not ascertainable. In these circumstances, the entire "process-result" aggregate can be judged only in terms of the quality of the process itself, and thus largely in terms of the process values it implements or serves.⁷

Second, an analysis of process values and their role in the evaluation of legal processes should help clarify some distinctive forms of social criticism. Thus it should enable us to understand more fully what social critics frequently mean—but often fail to articulate—when they invoke the maxim, "The end does not justify the means," or when they condemn action as too "result-oriented." For what such critics frequently seem to mean is that the course of action being judged unjustifiably sacrifices process values, or worse yet, ignores them altogether.⁸ This analysis should also render explicit much of what lawyers, jurists, and elected officials intend to convey when they stress the "morality of process"⁹ or otherwise emphasize "legal process."¹⁰ Similarly, it should further our under-

well that ends well. Shakespeare, *All's Well That Ends Well*, in *THE COMPLETE WORKS OF SHAKESPEARE* 861 (Cambridge ed. 1936). This, of course, is the only respect in which he ever erred.

⁷ Cf. J. RAWLS, *A THEORY OF JUSTICE*, 83-90 (1971).

⁸ For example, see the perceptive piece by William F. Baxter, addressed to the then Assistant Attorney General William H. Rehnquist, *Faculty and Government Roles in Campus Unrest*, in 50 *EDUCATION RECORD* 411 (1969), in which the "ends-means" maxim is frequently invoked. See generally, Gomperz, *When Does the End Justify the Means?*, 53 *ETHICS*, 173 (1942-43). Admittedly, criticism that behavior is too "result oriented" may mean something other than that the behavior sacrifices or ignores process values. For example, it may be a criticism of those who espouse a given rationale only when it happens to serve the result they want at the moment. See, e.g., Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *HARV. L. REV.* 1, 10-35 (1959).

⁹ See, e.g., Bickel, *Watergate and the Legal Order*, 57 *COMMENTARY* 19, 25 (1974) (using phrase "morality of process" attributed to Professor Freund).

¹⁰ See, e.g., *United States v. UMW*, 330 U.S. 258, 307 (1947) (Frankfurter, J., concurring) ("Legal process is an essential part of the democratic process.") And, for a statement by an elected official, consider this recent example: "[T]he values of democracy are in large part the processes of democracy, the way in which we administer justice, the way in which Government deals with individuals." Address by Senator William Fulbright, University of Arkansas at Fayetteville, April 13, 1974, in *N.Y. Times*, May 25, 1974 § 6 (Magazine), at 35.

standing of the broad phrase "the rule of law," as invoked in criticism of social action.¹¹

Third, this Essay might contribute to our understanding of the nature of law, at least in Western democracies. Some jurisprudential theorists have sought to characterize law in terms of "salient" elements including a "value" element. Yet they have neglected the "process value" element in legal systems. Instead, they have stressed the values typically embodied in the non-procedural law of a society, such as security of person and property, freedom of contract and movement, and substantive justice.¹²

Fourth, the ideas presented here might qualify as a modest contribution to contemporary moral theory, for most moral theorists are preoccupied with utilitarian or result-oriented evaluation.¹³ Similarly, this Essay can serve as a reminder to those many social scientists who focus their studies on processes merely as means to good results, to the neglect of process values as such.¹⁴

Finally, this analysis might even contribute to the improvement of actual legal processes. It might arouse conscious interest in designing legal processes to implement or serve process values or even make some officials more conscious of process values and less disposed to "short-circuit" prescribed processes to secure desired results (when this is unjustified). And it might help citizens more effectively to discharge their democratic "watchdog" functions, for to perform these functions at all well, citizens must be conscious of the relevant values and capable of articulate criticism in their name.¹⁵

One thing is certain: The topic is timely, at least in the United States. The status of process values is now at low ebb here. The excesses of the civil rights movement testify to this. The works of the "Watergaters" are also illustrative. So, too, are student take-overs of campus buildings. The "law-administering" and "law-

¹¹ See, e.g., Cox, *Civil Rights, The Constitution and the Courts*, 40 N.Y.S.B. BULL. 161 (1968).

¹² See, e.g., H.L.A. HART, *THE CONCEPT OF LAW* 189-95 (1961).

¹³ On this dominant form of evaluation, see Smart, *Utilitarianism*, in 8 *ENCYCLOPEDIA OF PHILOSOPHY* 206-11 (P. Edwards, ed. 1967).

¹⁴ See, e.g., Arrow, *The Organization of Economic Activity: Issues Pertinent to the Choice of Market Versus Non-Market Allocation*, in STAFF OF JOINT ECONOMIC COMM., 91ST CONG., 1ST SESS., *THE ANALYSIS AND EVALUATION OF PUBLIC EXPENDITURES: THE PPB SYSTEM*, pt. 1, at 47-67 (Comm. Print 1969); Stigler, *The Law and Economics of Public Policy: A Plea to the Scholars*, 1 J. LEGAL STUDIES 1 (1972).

¹⁵ When President Nixon refused to hand over the Watergate tapes sought by then special prosecutor, Archibald Cox, the public rose up in articulate anger, and the President capitulated. If citizens are to be good watchdogs, this kind of articulateness is vital.

creating" activities involved in such forms of behavior sacrifice or ignore process values of high importance, including participatory governance and procedural rationality.¹⁶

Now for some disclaimers and caveats: My purpose in this Essay is not to undertake an analysis of the positive law of any society. In particular, it is not my intent to survey our own constitutional doctrines of due process, to treat such phenomena as the Warren Court's exaltation of process over outcome in criminal cases.¹⁷ My aims are jurisprudential and therefore more general. Furthermore, I am not claiming in this Essay to have discovered a whole new class of values called "process values." Indeed, I have acknowledged that many of the values I call process values are already generically familiar to us in some form or another—*e.g.*, participatory governance, fairness, rationality, etc. Once we recognize how such values can qualify as process values, we can readily see some evidence of their espousal, *as process values*, all about us—in legal precepts, in official pronouncements, in books and journals on law, and even in newspapers and popular periodicals.¹⁸ Of course, some of the ideas presented here are not yet fully worked out. I nevertheless offer them now, for I believe they may stimulate useful reaction.

II

LEGAL PROCESSES AS SEPARATE OBJECTS OF EVALUATION DISTINCT FROM RELATED PHENOMENA

In complex societies, many occasions arise to evaluate legal processes, for those processes are both important and numerous. In the United States, there are many varieties of processes for designating officials, for creating various forms of law, for dis-

¹⁶ See Part V *infra*.

¹⁷ See generally, Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 TEXAS L. REV. 736 (1972); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

¹⁸ "Once we identify legal principles as separate sorts of standards, different from legal rules, we are suddenly aware of them all around us. Law teachers teach them, lawbooks cite them, legal historians celebrate them." Dworkin, *Is Law a System of Rules?*, in *ESSAYS IN LEGAL PHILOSOPHY* 41 (R. Summers ed. 1968). But the independent status of most process values is not nearly so evident in our legal practices as that of legal principles to which Professor Dworkin refers. One would think that judges, above all, would be sensitive to process values as such. But one can find only scattered instances of *explicit* judicial recognition of process values as such. See, *e.g.*, *Benton v. Maryland*, 395 U.S. 784, 796 (1969); *Baker v. Carr*, 369 U.S. 186, 208-09 (1962); *Rochin v. California*, 342 U.S. 165, 172-73 (1952); *Lisenba v. California*, 314 U.S. 219, 236 (1941).

seminating, enforcing, or otherwise implementing the law, and even for creating and modifying these processes themselves.

The overall goodness or badness of a process is a function of specific evaluations of the various features of that process. Those features can be found in the rules and other prescriptive legal norms that constitute and regulate the process.¹⁹ Thus, for example, important process features are specified in rules which provide:

1. How the process is to be commenced and who is entitled to commence it;
2. What stages the process is to go through;²⁰
3. The various activities that are to occur at each stage;²¹
4. Who is to participate at each stage and what activities the participants are to perform;
5. Whether there is to be any "review" of the workings of the process, or any "veto" on its outcomes or the like;
6. By what means the process is to be made efficacious or "sanctioned";
7. How the process is to be terminated, and by whom;
8. How process personnel are to be designated.

To illustrate the notion of "process features," we may briefly consider a process for revoking a driver's license. The rules that constitute and regulate such a process might specify features as follows: commencement via service of notice on the driver of a proposed revocation; provision for an impartial hearing in which the driver may have the aid of a lawyer; a requirement that any revocation decision be made only by a three member board; an opportunity for review; and final order.

When a legal process is evaluated, the focus may be: (1) on a specific feature which, in turn, may be either (a) regular or (b) irregular in the particular case; or (2) on the process as a whole. The distinction between regular and irregular features can be readily illustrated: In our judicial processes, usually only litigants present evidence and argument. Accordingly, this activity is what I

¹⁹ Those interested in a philosophical account of how processes are constituted should consult J. SEARLE, *SPEECH ACTS* 3-54 (1969); MacCormick, *Law as Institutional Fact*, 90 *LAW Q. REV.* 102 (1974).

²⁰ *E.g.*, a judicial process may have a pleading stage, a preparation stage, a trial stage, and so on.

²¹ *E.g.*, the activities in the "preparation" stage of a judicial process include discovery, stipulation, preparation of witnesses, etc.

call a "regular" feature of a judicial process. But if a judge should cross-examine witnesses or otherwise engage in fact-finding in a particular case, this would be what I call an "irregular" feature. A legal process may be evaluated not only for its "positive" features (regular and irregular) but also for what it is not—its "negative" features. For instance, an evaluator might criticize a process for *failure* to afford a right to a hearing in a certain type of case.

Before evaluating a legal process it is often necessary to do some preliminary study. It might be necessary to determine what the regular features of a process are and how they work. Or it might be necessary to determine what causal impacts the process has in terms of results. And to assess the workings of a process in a particular case, facts concerning those workings must be ascertained. Sometimes it will be difficult to determine relevant facts about a legal process. For example, confidentiality, as in the case of juries, may be an obstacle to effective fact-finding. Inadequacies of social science methods may create difficulties in, for example, determining cause and effect in penal processes.²²

Legal processes should be distinguished from other closely related phenomena that are often objects of evaluation as well. Thus, for evaluative purposes, a legal process must be differentiated from process results. These results include immediate outcomes, side effects, and collateral consequences. Of these, immediate outcomes are most important and include designations of officials, specific laws, applications of laws, court judgments, and administrative orders.²³ Such results can be evaluated on their own

²² But some important empirical work on the operations of certain types of legal processes is now under way. See, e.g., Thibaut, Walker & Lind, *Adversary Presentation and Bias in Legal Decision Making*, 86 HARV. L. REV. 386 (1972).

²³ I offer the following more or less comprehensive table of types of processes from which their corresponding "immediate" outcomes must be distinguished for evaluative purposes:

Legal Processes	General Types of Immediate Outcomes
A. Processes for selection of officials elective and appointive	A. Designation of officials
B. Processes for creating law	B. "Creation" outcomes
1. Legislative	1. Statutes
2. Judicial	2. Precedents
3. Administrative (regulatory and executive)	3. Regulations, rulings, etc., formal and informal treaties; international agreements, etc.
4. Referenda	4. Popular enactments
5. Contracts, wills, trusts, etc.	5. Particular contracts, wills, trusts, etc.
C. Processes for publicizing and disseminating law	C. "Publication" and "dissemination" of law

(Cont. on p. 10)

terms apart from the legal processes from which they emanate. (An evaluator may not only wish to evaluate a particular outcome, but a series of outcomes as well.)

Side effects and collateral consequences of a process are separable objects of evaluation, too. They include the extent to which the process generates public confidence and respect for law and authority, the extent to which its results are acceptable to the parties involved, and so on.²⁴

For evaluative purposes it is also important to differentiate a legal process from the non-procedural law applicable within the process. Even in law-creating processes there might be applicable non-procedural law. For instance, a constitutional provision may impose a duty on participants in a legislative process to enact a certain kind of law, or to refrain from enacting a certain kind of law.²⁵ Of course, in a law-applying process, the very substantive law to be applied can usually be distinguished from the process itself. Imagine, for example, a binding substantive statute providing that Puerto Ricans, but not blacks, can recover damages in court for employment discrimination. If a court should apply this law to

Legal Processes	General Types of Immediate Outcomes
D. Processes for applying law	D. "Application" outcomes
1. Negotiation	1. Settlements; plea bargains; etc.
2. Judicial—civil	2. Judgments; orders
3. Judicial—criminal	3. Convictions; acquittals
4. Administrative (executive and regulatory)	4. Rulings, orders, etc.
5. Self-application by private citizens and organizations	5. Decisions consistent with law (or not)
E. Processes for enforcing law	E. "Enforcement" outcomes
1. Civil—"common law"	1. Payment of proceeds from sheriff's sales to judgment creditor (and the like)
2. Civil—"equity"	2. Fines or imprisonment for contempt, etc.
3. Criminal	3. Fines or imprisonment, etc.
4. Administrative	4. License revocation and the like
5. Use of militia	5. Military detention and related enforcement mechanisms
6. Enforcement by private citizens and organizations	6. Various "self-help" outcomes
F. Processes for creating and modifying processes	F. Creation and modification of processes

²⁴ On acceptability and associated values in adjudicative processes, see L. FULLER, *THE PROBLEMS OF JURISPRUDENCE* 706-7 (1949); *Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic and Social Issues*, 71 MICH. L. REV. 111, 146 (1972).

²⁵ An example of the former is the New York constitutional provision that requires the legislature to maintain a system of public schools. N.Y. CONST. art. IX, § 1. An example of a constitutional provision that proscribes certain kinds of unwise laws is, of course, the first amendment to United States Constitution.

deny relief to a black claimant, the outcome would be bad, but this would be traceable to the non-procedural statute, not to the judicial process. Further, in many legal systems there is another body of non-procedural law called the law of "evidence." This law might obstruct the discovery of truth and therefore contribute to injustice, but, again, the process would not necessarily be to blame. In sum, there are several varieties of non-procedural law that can be evaluated on their own terms, distinct from the processes within which and to which these laws apply.

Finally, to the extent that officials have broad discretion to perform process activities in diverse ways or to exercise ultimate discretionary judgments in the process, it is often wise to single out those discretionary activities and judgments as distinct objects of evaluation, even though they are not wholly separable from the process. For example, in adjudicative processes there arise "hard" cases and "close" cases that call for the exercise of the art of judging, an art which some judges perform well, others not so well. This art of judging can be evaluated by its own distinctive standards.²⁶ Votes of legislators in legislative processes are analogously illustrative. These votes are often "judgment calls," and deserve evaluation on their own terms distinct from (though in conjunction with) the legislative process involved.²⁷

I am not, however, claiming that the features of legal processes have no bearing whatsoever on the quality of discretionary exercises of judgment. On the contrary, some kinds of abuse of discretion can be traced directly or indirectly to deficiencies in process design. For example, a judge might abuse his discretion because he lacks impartiality, and this, in turn, might be attributable to a deficiency in the process which fails to secure impartial judges.²⁸

III

STANDARDS FOR EVALUATING LEGAL PROCESSES *as Processes*: "GOOD RESULT EFFICACY"

Once the features of a legal process are laid bare, and once other related objects of evaluation are identified and put aside, the

²⁶ Many judges have written on various aspects of the "art of judging." See, e.g., B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921); C. WYZANSKI, *A TRIAL JUDGE'S FREEDOM AND RESPONSIBILITY* (1952).

²⁷ Legislators have sometimes written perceptively about the art of legislative judgment. See, e.g., T. SMITH, *THE LEGISLATIVE WAY OF LIFE* (1940). On the art of judgment in policy making generally, see the interesting essay by G. VICKERS, *THE ART OF JUDGMENT* (1965). See L. WADE & R. CURRY, *A LOGIC OF PUBLIC POLICY* (1970).

²⁸ See Fuller, *The Adversary System*, in *TALKS ON AMERICAN LAW* 30 (H. Berman ed. 1961).

standards for evaluating the process, *as a process*, can be considered. These standards are: (1) the efficacy of the process as a means to good results—its “good result efficacy”; and (2) the process values that the process serves, including the degree of efficacy of the process in serving those values. Although my primary focus will be on the latter, it is necessary to offer some account of the former, if only to clarify my views.

In the phrase, “good result efficacy,” I use “result” to include the immediate outcomes of the process, *e.g.*, designations of officials, laws made, court judgments, and the like, and also the side effects and collateral consequences of the process. As mentioned previously, outcomes can usually be assessed on their own terms without reference to the processes from which they emanate.²⁹ Consider, for example, the election of a public official. His election can be judged good or bad in light of his intelligence, his capacity for work, and the quality of his judgment. Or consider newly enacted statutes. They can ordinarily be judged on the basis of their contribution to public peace, to liberty, to welfare, or to justice. Particular court decisions, too, can be judged by such standards quite apart from the nature of the process from which they emanate. The same is true of side effects and collateral consequences of legal processes.

If process results, as judged on their own terms by appropriate standards, are good, this will often be traceable *partly* to the process from which they emanate. When this is so, the process is good in that respect, as a process, for it demonstrates good result efficacy.³⁰ Of course, the good result efficacy of a process will usually not be the only factor contributing to the results. The quality of non-procedural law, and of any discretionary judgment, will usually contribute to the results, also. Indeed, these other factors will often be equally, if not more, important than the process itself in accounting for such results.³¹

When the causal issues are resolved and it is determined that the process did contribute to the results, then the process may be said to have some measure of good result efficacy. It is one thing for a process to have this quality in a particular case, and another for it to have it in the usual case. Obviously, it is more desirable for a process to have general good result efficacy than for it to be only an occasional and therefore unreliable contributor to good results.

²⁹ See notes 23-24 and accompanying text *supra*.

³⁰ See notes 2-3 and accompanying text *supra*.

³¹ Sometimes it will not be possible to tell whether the process contributed at all, or it will only be possible to speculate that it did.

It is important to note that a process might generally contribute to given results, but those results might be bad. In that event, the process would not be good as a process insofar as its result efficacy is concerned. The good result efficacy of a process is therefore an inherently derivative kind of value. It derives from the goodness of process results, as results, and is in that respect "result-oriented."³²

A legal process, then, may be good as a process insofar as it contributes to good process results. And a process that generally contributes to good results is preferred, as a process, to one that so contributes only irregularly and unreliably. Processes are commonly judged exclusively by such criteria. That is, insofar as a process is considered good as a process, this is commonly by virtue of its good result efficacy, or its efficacy in bringing about such side effects or collateral consequences as public confidence, acceptability of process outcome, and the like.

IV

STANDARDS FOR EVALUATING LEGAL PROCESSES *as Processes*: "PROCESS VALUES" AND "PROCESS VALUE EFFICACY"

Good result efficacy is not the only kind of value a process can have *as a process*. I have already indicated that a process may also be good insofar as it implements or serves³³ "process values" such as participatory governance and humaneness.³⁴ These forms of goodness are attributable to what occurs, or does not occur, in the

³² The illustrative table below shows various process features in the left hand column and the corresponding good result efficacy of the feature in the right hand column:

Process Feature	Good Result Efficacy
1. Participation by party to a law-applying process	Better informed decision, factually and legally
2. Prohibition of torture in a criminal process	More reliable verdicts
3. Use of committees in a legislature to study proposed laws	Better laws
4. Requirement that an official grant (or deny) a welfare application within 30 days after receipt	Early provision of benefit where need shown

³³ When a process feature is intentionally designed to further a process value, it is appropriate to say that it "implements" that value. Many process features, however, have evolved over time so that it is not appropriate to say they were intentionally designed to further a process value, even though they do. Here it is not appropriate to use the word "implement," with its "intentional" overtones. Instead, the word "serve" is used.

³⁴ See Part I *supra*.

course of a process. They are thus process-oriented, rather than result-oriented. For example, a feature of a process allowing for participation by interested parties is generally good for that reason, apart from whether in the end it also contributes to good results. Similarly, a feature of a process that prohibits torture is generally good for that reason, apart from results. These process features implement or serve, respectively, the process values of participatory governance and humaneness. Features of processes that implement or serve what I call process values are prizable whether or not they contribute to good results, though they may, of course, be justifiably overridden.

A skeptic may quarrel with various aspects of my "process values" thesis, or even deny the reality of process values altogether. But I invite him to suspend judgment until the end of this section. I will stop at that juncture and confront several skeptical attacks.

A. *A Procedure for Compiling a Catalogue of Process Values*

Since, in my view, features of legal processes are good insofar as they implement or serve what I call process values, it is important to compile a catalogue of such values for use as evaluative standards. I have already cited several examples of process values.³⁵ I will now outline a general procedure for identifying them, and will follow with the beginnings of such a catalogue.

My relatively simple procedure for identifying process values calls for a "case by case" approach at this primitive stage of the art, at least. Under this approach, legal processes are to be singled out one by one and examined to determine whether their features implement or serve values that qualify as process values. Of course, even with this kind of "common law" approach,³⁶ it is necessary to know in advance what one is seeking to identify. In my analysis, a value qualifies as a process value if (1) it is a value that can be implemented through, or served by, features of a legal process, (2) it is a value that can be "realized" in the course of the workings of a legal process rather than merely in its end results, and (3) it is a value that can render a feature of a legal process prizable regardless of its effect, if any, on results. These are closely related requirements for process value status. However, I do not assert that there are two totally independent classes of values—process

³⁵ *See id.*

³⁶ I call it a "common law" approach because it resorts to "cases" of legal processes as sources of standards for evaluation in a fashion somewhat comparable to that by which courts extract law from cases.

values and, for example, “substantive” values—with the former inherently applicable only to processes and the latter only to results. Thus, I do not claim that every value that qualifies as a process value is *inherently* process-oriented in its scope and therefore can never properly apply to evaluate process results, as well.³⁷

My “common law” procedure for identifying process values consists of ten principal steps. Briefly, they may be summarized as follows:

STEP ONE—*Single out a legal process.*

Usually, it will be relatively easy to single out a legal process as a separate object of evaluation.³⁸ Of course, it is not necessary that the process singled out be an actual one. It may be purely hypothetical, yet still serve as a “source” of process values. But to guarantee realism it seems best, at this primitive stage of the subject, to single out actual processes and focus on selected instances of their operation.

STEP TWO—*Determine the operational features of the process.*

The operational features of a legal process can be found in the constitutive and regulative rules (and other norms) that define the process. These may be written or unwritten. Of course, the law in books is not necessarily the same as the law in action. A sophisticated observer should, however, be able to compile a list of the rules and other norms that define the process at hand, and from these the operational features can be readily gleaned.³⁹

STEP THREE—*Identify results of the process.*

The relevant results to which a process contributes in a selected instance or instances can usually be identified without undue difficulty. As discussed previously, these results consist of immediate outcomes, side effects, and collateral consequences.⁴⁰

Before specific process results can be evaluated, however, they must be specified in sufficient detail. To characterize them by type, such as “elected official,” or “law,” will not be enough. Such entities would be too insubstantial to be satisfactorily evaluated.

³⁷ Fortunately, it is not necessary to address some of the hoarier questions in value theory. Thus, for example, I need not explore the *general* criteria for deciding whether a value is truly a value. Nor do I need to offer a theory of what values are “supreme” or “ultimate.” And, of course, it is not necessary for me to show “where the values come from” or that they are in some sense “universal.”

³⁸ Although difficult problems of “individuating” legal processes can arise, it is not necessary to go into them for present purposes.

³⁹ For several illustrative examples of process features see note 32 *supra*.

⁴⁰ See notes 23-24 *supra*.

STEP FOUR—*Evaluate the process results.*

Once selected process results are specified in sufficient detail, the standards appropriate to their evaluation will usually be apparent. Thus, legislation abolishing police would, under ordinary circumstances, be bad, for it would disturb peace and security. But legislation creating a police force would be good. Similarly, enforcement of criminal law by vigilantes would be bad, for its results, we may assume, would regularly include punishing the innocent. But prohibition of vigilantism would be good, for it would ensure against such injustice. Peace, security, and justice are among the values appropriate to evaluating process results. Of course, the evaluation of results as such is naturally and appropriately result-oriented rather than process-oriented.

STEP FIVE—*Determine which process features, if any, contributed to good results.*

Bear in mind that various factors other than the process itself may contribute to good results. Indeed, these other factors may be exclusive causes. Sometimes it will be difficult to tell if a process feature contributes at all. But if a process feature contributes in significant measure to good results, it will have good result efficacy. The good result efficacy of a process feature makes the process good in that respect as a process. But this variety of process goodness must not be confused with process values. The goodness of good result efficacy derives from the goodness of process results. But process values are not result-oriented at all.

STEP SIX—*Determine whether any process features that have good result efficacy are also good for other non-result-oriented reasons.*

With this step, it becomes possible to identify process *values*. Consider this example: Assume that an adjudicative process for trying criminal defendants has the feature that indigents shall be entitled to free counsel.⁴¹ Assume this feature is good because counsel will inform the adjudicators better and thus the relevant outcomes—*i.e.*, convictions or acquittals—will be more accurate and just. This feature would have good result efficacy. But might this feature also be good for other non-result-oriented reasons?⁴² In

⁴¹ Cf. *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁴² There are at least two relevant non-result-oriented reasons. First, a process feature may be valuable for its own sake as a form of some process value. A feature securing participatory governance is an example. Second, a process feature may be valuable as a means to some other process value. For example, orderliness serves the process value of procedural rationality.

my view, the answer is "yes." It is good also because it furthers a form of participatory governance. It makes the accused's participation all the more meaningful (although it will be more vicarious). Such participatory governance is therefore good for what it is, apart from results, and qualifies as a process value. Thus, putting good result efficacy to one side, a "process-result aggregate" can be good on at least two distinct counts, both traceable in part to the same process feature: the result can be good in light of standards for judging results (here, justice), and the process can be good in light of relevant process values (here, participatory governance). Note well that the goodness of the process feature (here, provision of free counsel) does not, however, depend only on the goodness of particular process results (here, just conviction or acquittal). The result might happen to go awry in particular cases, and yet the relevant process feature remain valuable for what it is, namely a form of participatory governance.

A process feature that implements or serves a process value may be said to have "process value efficacy." Often the same feature will have both kinds of efficacy and imaginative and careful analysis will be required to disentangle the two.⁴³

STEP SEVEN—*Determine whether any process features that have bad result efficacy are nevertheless good in other ways.*

This step, too, can enable us to identify process values. Some process features may actually have *bad* result efficacy. For example, processes for apprehending, convicting, and punishing criminals may have the feature of prohibiting involuntary stomach pumping of persons suspected of drug offenses.⁴⁴ In some cases, guilt or

⁴³ This is a possibility often overlooked. Even those who go so far as to denominate certain procedural rules as "rules of natural justice" tend to view these rules solely as means to good outcomes. See, e.g., H. MARSHALL, *NATURAL JUSTICE* (1959). One might add a third column to the table in note 32 *supra* to further illustrate this phenomenon:

Process Feature	Good Result Efficacy	Process Value Efficacy
1. Participation by party to a law-applying process	Better informed decision, factually and legally	Realization of participatory governance
2. Prohibition of torture in a criminal process	More reliable verdicts	Humaneness
3. Use of committees in a legislature to study proposed laws	Better laws	Procedural rationality
4. Requirement that an official grant (or deny) a welfare application within 30 days after receipt	Early provision of benefit where need shown	Timeliness

⁴⁴ Cf. *Rochin v. California*, 342 U.S. 165 (1952).

innocence might depend *exclusively* on the fruits of such stomach pumping. Yet a flat prohibition of stomach pumping precludes access to this evidence and thus has *bad* result efficacy. Does it have any redeeming virtues? In particular, does it serve any process values? I believe it does, for a prohibition against involuntary stomach pumping respects individual dignity. A process feature that respects individual dignity is good for that reason alone, regardless of results, and thus qualifies as a process value.

Consider a second example: Many law creating bodies are popularly elected and operate by majority rule. But it is arguable that these features have almost as much bad result efficacy as they have good. It is at least true that democratic legislatures create their share of bad laws. Yet the participatory features of democratic legislatures are nevertheless good for what they are, apart from results. They comprise a form of participatory governance which is good for its own sake and therefore qualifies as a process value.

STEP EIGHT—*Where it is not possible to say whether process features affect results or to tell whether affected results are good or bad, determine whether any such features are good for non-result-oriented reasons.*

Sometimes it will not be possible to say whether process features affect results for good or for ill. And sometimes it will not be possible to tell whether results partly traceable to process features are good or bad, either for lack of facts or for lack of agreed standards. Thus, we may imagine certain designations of officials the goodness or badness of which cannot be determined. The officials may be politically unknown, for example. Yet the features of the electoral process that designated the officials may provide for a form of participatory governance—a process value.

Or, to cite another common case, a legislature may hold hearings, deliberate, and finally enact a statute, yet it may be quite unclear whether this law is good or bad. But the features of the process that call for reasoned reflection and deliberation remain good as forms of procedural rationality. Although these features are good as a means to good results, they are also good apart from results. Unlike random or arbitrary, or nakedly coercive process features, procedurally rational ones are intelligible to us as applications of human reason.

STEP NINE—*Compare any process value identified by the foregoing*

procedure with others already catalogued, and enter it either as a variety of some process value already entered or as a distinct value.

As part of this step, it will be desirable to elaborate on the value significance or "content" of at least the less familiar entries. Also, when different features of a single process or of different processes implement or serve the same value, it will be useful to note this with illustrations.

STEP TEN—*Move on to another legal process (or to other operations of the process at hand) and repeat the foregoing procedure.*

By repeating this relatively simple procedure with respect to a variety of processes, it should be possible to compile an extended catalogue of "process values" for use in evaluating legal processes. I have said that these values are values that (1) can be implemented through, or served by, features of legal processes, (2) have a kind of value significance that is realizable in the course of the workings of legal processes rather than merely in their end results, and (3) can render the features of those processes valuable whether or not they contribute to good process results. I concede that the foregoing procedure for identifying such values is not foolproof, nor is it without other limitations. A process singled out pursuant to this procedure might not be one that implements or serves process values. In that event, the procedure would bear no fruit. Also, some persons who use the procedure may simply miss process values that the process does implement or serve. And two different persons will not always identify the same values by applying the procedure to a given process. This should not be surprising, for fruitful use of the procedure calls for fact-finding about processes, for value sensitivity, for imaginative reflection, and for articulate-ness. But it is not just that these capacities are unequally distributed in our "natural lottery." Sometimes there is room for reasonable disagreement over whether a process does serve a process value. And until we understand ourselves better, some process values may elude even the most sensitive, imaginative, and articulate among us.

But for now, the foregoing procedure and the beginnings of a catalogue (about to be presented) are all I have to offer. I hope that others can improve on the procedure, or perhaps even fashion an altogether different and less circuitous strategy for identifying process values.

B. *The Beginnings of a Catalogue of Process Values*

If I am right about process values, then it follows that it would be valuable to have a catalogue of these values for use in evaluating legal processes. My own efforts to apply the procedure for identifying process values outlined in the preceding section have borne some fruit (although of varying degrees of ripeness). Accordingly, I now offer sketches of several possible catalogue entries to indicate how the beginnings of the catalogue might look. The names I have given to some of the values listed are inevitably somewhat arbitrary, but I hope they are not misleading. They are names for *values*, not names for general process *features* that implement or serve these values. However, I will include within each entry illustrative examples of process features that do implement or serve the relevant process value. It should be clear that some very familiar values can readily qualify for entry as process values. Participation and fairness are examples. But for some values, it is not easy to articulate "value content." On this score, some of what I say will seem sketchy and question-begging—at least initially. But I hope that on reflection, it will seem intuitively plausible if still not wholly convincing.⁴⁵ It should be kept in mind that the "catalogue entries" listed below are but beginnings. I do not claim that the values listed are universally valid, although I do want to leave open the possibility that some may be. I concede that some are widely espoused only in Western democracies. And even in those societies, it would not be sound to design *every* legal process to implement or serve every one of the values listed. Nor are these values "absolutes." In some cases they may be justifiably overridden.

1. Participatory Governance. One of the most common features of legal processes in democracies is that they assign various participatory roles to citizens, and to citizens elected by citizens (or appointed by those elected). Voting is such a role, and so is electoral office holding. But citizens also have roles in non-electoral processes too. In legislatures they may testify, lobby, advise, etc. And in law-applying processes, they are often the "prime movers." Usually, participatory roles are assigned at least to secure good result efficacy. If people elect the legislators, they are more likely to

⁴⁵ The number of possible strategies here is limited. But I can identify at least the following: (1) using suggestive examples of values, (2) contrasting values with their "opposites," (3) analogizing to other closely related and indisputable values, (4) imagining unfavorable responses to hypothetical situations in which the values are not present, and (5) pointing out conflicts in which we would still prize the value even if this meant giving up something else.

make laws for the good of all; if litigants present evidence and argument in a law-applying process, it is more likely that the truth will "out" and the right law be applied, thereby yielding good results (assuming the law itself is good), and so on.

But whether or not participatory governance helps secure good results, it is also good for another reason and thus qualifies as a process value: it is an approximation to autonomous self-determination of varying degrees of directness. It is likely that most citizens in democracies would prefer to manage themselves and do somewhat less well, in terms of results, than have others manage them and do somewhat better. Among the "opposites" of participatory governance are slavery, political subjugation, and martial law. In Western history, at least, there is evidence that slaves and the politically or militarily oppressed have objected not only to the results of such a rule (when bad) but to its nature as well, even when results were good. They have wanted a voice in governing themselves, too. It is not merely that they wanted freedom; they wanted a measure of self-determination. In varying degrees, the participatory roles provided for in legal processes have afforded this.⁴⁶

2. Process Legitimacy. A process may (1) lack legal legitimacy because it is legally unauthorized, or (2) lack political legitimacy because it does not have the assent or acquiescence of citizens in a democracy, or (3) lack moral legitimacy, that is, not be worthy of moral respect because its decisions are morally bad. A process can have features designed to secure all three forms of legitimacy: rules of jurisdiction can help ensure that a process is legally authorized; rules requiring public accountability can help secure assent and acquiescence; rules providing for vetoes, for bicameralism, and for review by another body, can, in very general but often effective ways, help secure morally acceptable decisions. But for now, I will not contend that the first or the third forms of legitimacy qualify as process values.

The second form of legitimacy, public assent to, or acquiescence in, a mode of governance in democracies, also helps secure good results. It at least signals that the immediate outcomes of the process are more likely to be acceptable to the public at large, and

⁴⁶ Cf. COHEN, *DEMOCRACY* 268-74 (1971) (discussing "intrinsic values" of democracy). Professor David Lyons has suggested to me that participation in official processes may be good as such, apart from whatever goodness it may have as an approximation to self-rule. However plausible this may be, I do not explore it further here, for my analysis does not require it.

this, in turn, signals that these outcomes are more likely to achieve their purposes. But in my view, this form of legitimacy is also prizable, at least in a democracy, whether or not its implementation improves results. People prefer being ruled through a process they assent to, or acquiesce in, rather than by one imposed on them. The first kind regards them as human beings, the second as objects or common pawns. Like participatory governance, assent or acquiescence is a democratic value. It is not itself a form of actual participatory governance, but rather a kind of "condition" upon which a share of the ruling task is turned over to others.

That legitimacy as such is conceptually distinct from participatory governance can be readily seen by reflecting on the nature of legitimacy in many non-democratic societies. There, legitimacy derives not from anything that smacks of participatory governance, but rather from such sources as divine right, blood succession, superior force, or the like. In non-democratic societies there would be little temptation to confuse legitimacy with participatory governance.⁴⁷ Similarly, legitimacy in those societies cannot have the same value significance as democratic legitimacy.

3. Process Peacefulness. Most people in Western societies take this process value for granted. The general criminal law and special "rules of order" applicable to specific legal processes help secure this value. For example, duelling is forbidden as a process for settling disputes. Vigilantism and lynching are outlawed as processes for enforcing criminal law. Revolution is proscribed as a process for deciding whether there is to be private property. War as a process for conducting foreign policy is usually considered a drastic alternative and special procedures may be required before war can be officially declared.

Generally, well-ordered societies have elections, legislatures, courts, and the like. One rationale for this is that results are likely to be better. Justice is not identical with the interests of the stronger, the more violent, or the "peaceless." But even if unpeaceful methods should regularly secure good results, we ought to object to those methods. Indeed, a peaceful process is generally preferable even when its results are somewhat less good than those realizable through less peaceful methods. This is true not only because in violent or disorderly processes people frequently suffer physical harm; people understandably dislike strife and tension

⁴⁷ See generally, Sternberger, *Legitimacy*, in 9 INT'L ENCYCLOPEDIA OF THE SOC. SCIENCES 244 (D. Sills ed. 1968). For an interesting analysis in relation to the United States, see Hurst, *Problems of Legitimacy in the Contemporary Legal Order*, 24 OKLA. L. REV. 224 (1971).

even when no one is physically harmed and the risk of harm is not high. Other things being more or less equal, peace and repose are simply preferable to strife and tension. Of course, as with all process values, people may choose to sacrifice peace and repose for some desired result even in well-ordered societies. The point is that this would be a sacrifice, not that it would always be unjustified.

4. Humaneness and Respect for Individual Dignity. The constitutive and regulative rules of a legal process may safeguard persons against inhumane actions. For example, rules for investigating crime may prohibit torture. Such rules might be defended solely on the ground that "tortured evidence" is not reliable.⁴⁸ In other words, torture is bad because it impairs the good result efficacy of a process. But again, there is more to it. The use of torture in a fact-finding process is bad in itself. It is inhumane, brutal, and barbarous, although it may in particular cases actually yield reliable evidence. Even when it would yield reliable evidence, however, we ought not to approve torturing procedures, unless the circumstances are most extraordinary.

Even though a process is not inhumane, it may fail to respect individual dignity. The use of a stomach pump (even if painless) to extract evidence of drug use against the will of a suspect is an example. The practice degrades, and except in the most extraordinary circumstances, is unjustified. But again, this is not because the evidentiary fruits of the practice are necessarily unreliable, but because respect for human dignity qualifies as a process value.

The dictates of respect for individual dignity are not exhausted in proscriptions against undignified fact-finding processes. Lynching, vigilantism and other similar processes also offend human dignity. Moreover, denial of fair access to legal processes on grounds of race, color, or creed offend human dignity. *Official* discrimination of this kind invidiously brands or degrades individuals. The victims are not treated as equally worthy of respect before the law. They are treated as inferior beings or at best second class citizens deprived of important grounds for self respect.

Denial of participatory governance, as in the cases of slavery and political subjugation, is also degrading. The dictates of respect for individual dignity range far and wide.⁴⁹

⁴⁸ Bentham would not have defended them in this way. See Twining & Twining, *Bentham on Torture*, 24 N. IR. L.Q. 305 (1973).

⁴⁹ See generally Pritchard, *Human Dignity and Justice*, 82 ETHICS 299 (1972); Spiegelberg, *Human Dignity: A Challenge to Contemporary Philosophy*, 9 PHILOSOPHY FORUM 39-64 (1971).

5. Personal Privacy. The investigative function of law-making processes and the fact-finding function of law-applying processes may infringe upon personal privacy. Officials may force individuals to reveal their personal beliefs or personal history. Officials may invade homes and places of work. Various features of our own legal processes serve as safeguards against such infringements. Again, features of this nature are not to be rationalized solely on the basis that they help secure good process results. On the contrary, these features can be obstacles to truthful fact-finding. Yet in those very instances we should value these safeguards as protecting personal privacy, for privacy is valuable in itself whether or not its protection yields good process results. Safeguards of privacy bar unjustified intrusions and thus implement a right to be "let alone." Of course, this right serves many other ends, too.⁵⁰

6. Consensualism. Features of legal processes, at least in many Western democracies, permit prospective participants to *decline* to participate. Thus, it is generally not a crime to refrain from voting in an election. And administrative law-making via regulations and rulings generally does not require affected parties to participate. Even a criminal suspect can refuse to participate in his trial, and a civil litigant can decline to respond to a claim. Moreover, the laws generally do not require that citizens exercise their legal rights to invoke a legal process. These and other examples illustrate a bias against coercion and in favor of voluntarist values.⁵¹ It is difficult to explain this state of affairs solely on the basis that process results might be better this way. On the contrary, compelled voting, for example, might yield better results, usually in the form of better officials. Coerced public participation in administrative lawmaking might yield better rulings and regulations, and so on. I contend that consensualism is a process value—a value we should espouse apart from any good result efficacy it may have. In the absence of special circumstances, and other things being equal, consensual participation is preferable to coerced participation simply because choice is left to the individual.⁵²

7. Procedural Fairness. The features of legal processes that secure fairness differ from process to process. Often what is fair

The growing literature in moral philosophy on "respect for persons" is relevant here, too. See, e.g., R. DOWNIE & E. TELFER, *RESPECT FOR PERSONS* (1969).

⁵⁰ Cf. C. FRIED, *AN ANATOMY OF VALUES* 125-32, 137-55 (1970).

⁵¹ For a very brief account that accords with the spirit of the text, see Wolff, *Is Coercion Ethically Neutral?*, in *NOMOS XIV—COERCION* 144-48 (J. Pennock & J. Chapman eds. 1972).

⁵² Of course, this is not to say that a legal system can dispense with coercion entirely.

can be understood only in contrast to what is unfair.⁵³ Consider briefly two examples: unfair allocation of procedural advantages within a process and unfair access to a process. In an adjudicative process, the adjudicator might grant advantages to one side and thereby deny the other a "fair shake." For example, an adjudicator might choose to hear only one side of the case, or to hear one side via both oral and written briefs, but the other via only written briefs. This would be unfair. But would it be unfair only because it is likely to bias the results in favor of the advantaged party? I think not. Whether the advantaged party wins or loses, the procedure itself is unfair, for the adjudicator does not accord equal procedural rights to parties similarly situated in relevant respects.

Many legal systems have process features designed to secure fair process access. For example, a rule may provide that indigent suspects shall be given free counsel in criminal proceedings. Or a statute may limit campaign expenditures in electoral processes and thus make offices more accessible to the poor. Or a constitutional provision may specify that access to a process must not depend on race, color, or creed. In some processes, fair equality of access may only irregularly improve process results. In others, it may regularly improve them—as in criminal cases where indigents are given free counsel (rather than no counsel at all).

However, regardless of whether fair equality of access improves process results, the features that secure this equality are valuable. To deny access for irrelevant "reasons" of wealth, race, color, or creed is arbitrary and therefore unfair. Except in very special circumstances, "reasons" of this nature cannot justify differences in access.⁵⁴

8. The Procedural Rule of Law: "Procedural Legality." A legal process may lack procedural legality in either of two basic ways: (1) it may simply lack rules and thus leave officials with too much discretion, or (2) it may fail to provide mechanisms for keeping officials within the rules. Procedural legality is valuable whether or not it improves process results. It provides for procedural governance "by law instead of men." Other things being equal, rule by law is generally preferable to rule by officials acting in a legal vacuum, even in procedural matters. We may imagine two processes that yield similar results with only one being law-

⁵³ This is true of many expressions. Cf. Summers, "Good Faith" in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968).

⁵⁴ Those denied fair equality of access are also denied the opportunity for participatory governance. Equality of access is also a dictate of procedural fairness.

governed. We should generally prefer the law-governed one, for its operations would be more certain and predictable. Of course, these qualities can serve good results, too, for they enable process participants to make intelligent procedural choices that may lead to good results. But certainty and predictability are valuable in their own right, as well, for they simply enable people to know where they stand before official authority.⁵⁵

9. Procedural Rationality. As Aristotle and others have observed, man is a rational animal.⁵⁶ Accordingly, humans generally prefer to order their affairs through reason rather than through random or arbitrary action, or through naked force. This value I call *procedural* rationality. For many legal processes, its dictates (expressed as maxims) include the following: (1) "carefully ascertain relevant evidence and carefully canvas relevant argument," (2) "carefully weigh that evidence and argument," (3) "deliberate calmly and carefully," (4) "resolve issues impartially and therefore solely on the basis of their merits," (5) "be prepared to give reasons for what is decided." Legal rules that constitute and regulate legal processes typically incorporate these dictates.⁵⁷

Obviously, these dictates may serve good result efficacy. For example, their pursuit in electoral processes is more likely to yield better officials. And their pursuit in law-applying processes is a necessity if law is to be "applied." Further, in lawmaking the results are more likely to be better if the process is rational. But procedural rationality is valuable as such, apart from any good result efficacy it has. Absent extraordinary circumstances, it is preferable to random or arbitrary or exclusively coercive methods. Thus, of two legal processes yielding more or less the same results, only one of which is a rational process, we should generally prefer the rational one. This is because it involves scrutinizable effort to use human reason and is therefore *intelligible* to us in a way that the other kinds of processes are not. Those who participate in, or are affected by, rational processes generally have a better chance of

⁵⁵ Cf. Beinart, *The Rule of Law*, 1962 ACTA JURIDICA 99; Burin, *The Theory of the Rule of Law and the Structure of the Constitutional State*, 15 AM. U.L. REV. 313 (1966). The procedural rule of law can serve other process values, too, including rationality.

⁵⁶ Woman, too. See ARISTOTLE, *ETHICS* 38 (Penguin Classics ed. 1953).

⁵⁷ Professor Fuller has emphasized that various features of legal processes secure "guarantees of deliberateness" which express "more profoundly than does the principle of majority rule itself the role Western culture has historically assigned to reason." Fuller, *Jurisprudence*, in XIII ENCYCLOPEDIA BRITANNICA 152 (1965). On impartiality see especially Eckoff, *Impartiality, Separation of Powers, and Judicial Independence*, 9 SCANDINAVIAN STUDIES IN LAW 9 (1965).

knowing “what is going on”—of knowing what is happening to them and why. This knowledge, in itself, is worth having.

10. Timeliness and Finality. When it is said that a process operates with dispatch, or that it is dilatory, it is the “timeliness” of the process that is being evaluated.⁵⁸ In our own system, for instance, electoral processes typically operate in a timely fashion, but our legislative and law-applying processes often do not, and are often condemned for this. Their failure to operate in a timely fashion can significantly affect results. For example, when a legislature delays, the problems may worsen to such an extent that it can no longer deal with them. If a judicial proceeding is delayed, witnesses may die, move out of the area, or become forgetful, thus making a fact determination difficult.

Regardless of whether or not processes improve results by disposing of issues in a timely fashion, timeliness is itself valuable and thus qualifies as a process value. Timeliness is, on the one hand, the “opposite” of dilatoriness, and on the other hand the “opposite” of haste. Dilatoriness is objectionable even if it does not affect results. Persons to be affected by a process ought not be kept “up in the air” for no reason. And haste is objectionable if only because it disserves procedural rationality.

Lack of process finality and dilatoriness are related. That is, lack of a *final* result may unduly draw out the proceedings. In adjudicative processes where finality is of prime importance it secures repose and freedom from harassment. A dispute-settling process that is always subject to “reruns” of the same issues is deficient as a process.⁵⁹

The preceding ten items are but sketches for entries in a projected catalogue of process values. Doubtless these entries can be expanded and otherwise improved upon. Indeed, whole books have been written on some of the listed values. Still other entries are needed if the catalogue is to be at all complete.⁶⁰

C. “Process Value Efficacy”—Notes for a Special Catalogue Entry

The catalogue of values for evaluating processes should include a special entry on process value efficacy just as it should

⁵⁸ For an insightful discussion of the value of time that has bearing in legal contexts, see Brown, *The Value of Time*, 80 ETHICS 173 (1970).

⁵⁹ Of course, this deficiency may impair the quality of ultimate process results and be objectionable on that ground too.

⁶⁰ Among the many other possible candidates for process value status are: truth telling, tolerance for dissent, official integrity, and public openness.

include a special entry on good result efficacy.⁶¹ It is important to distinguish between *particular* process value efficacy and what I will call *general* process value efficacy. A process may or may not regularly or generally implement or serve a process value. General "reliability" in implementing or serving a process value is preferable. Consider, for example, the process value of participatory governance in criminal processes. A criminal process that merely permits an indigent-accused to participate without also providing him with a lawyer cannot reliably serve participatory governance. The participatory role of an indigent in his defense cannot be as meaningful as if he were represented by a lawyer (in what is, after all, a technical process). Accordingly, to secure *general* efficacy in implementing the relevant participatory value, the government must provide free counsel to indigents.

The general efficacy of a process in implementing a process value depends on two factors: (1) the efficacy of the legal rules that prescribe the features of the process which implement or serve the process value (*e.g.*, rules providing for assigned counsel in the above example), and (2) the efficacy of "implementive mechanisms"—any corrective procedures, sanctions, or the like—to be utilized or imposed if the foregoing rules are not followed in the particular case (*e.g.*, if assigned counsel is not provided).

The first of these factors embodies a means-end hypothesis—*e.g.*, that meaningful participation (the "end") by an indigent accused requires competent counsel (the "means"). The means-end hypothesis may not be soundly conceived. If unsound, implementive effort will fail for that reason. But even if sound, it may fail for want of corrective or sanctioning mechanisms to be resorted to, if the legal rules embodying the hypothesis are not followed.

"General process value efficacy" should be distinguished from "general good result efficacy" discussed previously.⁶² Recall that the goodness of general good result efficacy ultimately depends on the goodness of the results as judged by appropriate standards. But the goodness of general process value efficacy does not depend on the goodness of results. Instead, it depends merely on the relevant process value being *truly* a process value.

Of course, the efficacy of a process to implement or serve a process value may conflict with the efficacy of that process to yield a good result. For example, police investigations may pose this

⁶¹ See part III *supra*.

⁶² See *id.*

conflict. To solve a crime (good result efficacy) it may be necessary to detain and interrogate a person against his will in circumstances in which the suspect is put in fear and feels helpless, thereby infringing the process value of respect for individual dignity. Or, an administrative-regulatory process, for example, may pose a "process vs. result" conflict. Thus, to reduce drunken driving (good result efficacy), drivers may be required to submit to blood tests against their will, thereby infringing respect for individual dignity and personal privacy (both process values). Numerous other examples could be cited.

D. *An Addendum on the Relations Between Process Values and the Values for Evaluating Process Results*

Of the various kinds of process results, what I have called "immediate outcomes" are most commonly evaluated. These outcomes include laws, applications of law, court orders, and the like. Among the familiar values often used to evaluate such outcomes, the following may be listed:

1. Liberty. This value includes both "daily life" liberties such as freedom of worship and movement, and political liberties such as freedom of expression.

2. Substantive justice. This value encompasses the justice of deserved reparations and compensation, the justice of punishments, the justice of inter-personal transactions, and the justice of state distributions of benefits and burdens.

3. Income and wealth.

4. Formal and substantial equality of opportunity. Included here are equality of access to education and the absence of restrictions on access to significant social roles.

5. Security of person and property.

6. Community peace.

7. Human dignity.

Although the foregoing list overlaps the list of process values discussed previously,⁶³ I believe that some values are *generally* appropriate only to evaluating processes as processes while others are appropriate only to evaluating process results. I will not, however, try to establish this, for my principal thesis does not depend on it. My principal thesis is that there are values which, when implemented in an appropriate process, are prizable whether or not their implementation improves process results. To sustain this thesis, it is not necessary to show that values for judging

⁶³ See text accompanying notes 45-60 *supra*.

processes and values for judging results are different. These values could all be the same and the thesis still hold. Consider this example: Assume that a lawmaking process is peaceful. Assume also that it yields laws that help secure community peace. This "process and result aggregate" is valuable on two counts, not one: the process itself is peaceful, and its results contribute to community peace. Now, assume that although the lawmaking process is itself peaceful, it fails to yield laws that help secure community peace. The process is still good *as a process* in that it is peaceful. Process peacefulness, then, qualifies as a process value, for it is prized whether or not its implementation also improves results. Yet the standards of value for judging both process and result in this example are the same.

In any event, this much is undeniably true: *In a particular case*, the values appropriate to evaluating a given process will *not necessarily be the same* as the values for evaluating its results. Indeed, the values will often be different. For example, a lawmaking process may be judged good *as a process* because it provides for participatory governance, is peaceful, and operates in a fashion that is procedurally rational and fair. But its results—statutes—might be judged good because, for example, they contribute to the general safety by requiring that cars not be capable of going faster than fifty miles an hour. How the values relevant to judging processes and to judging results may vary can be indicated schematically as follows:

1. A process might be judged good because it has V1, V2, and V3, but its outcomes good because they have V4 and V5.
2. A process might be judged good because it has V1, V2, and V3, but some of its outcomes bad because they lack V4 and V5.
3. A process might be judged bad because it lacks V1, V2, and V3, yet some of its outcomes good because they have V4 and V5.
4. A process might be judged bad because it lacks V1, V2, and V3, and its outcomes bad because they lack V4 and V5.
5. A process might be judged bad because it lacks V1 and V2, and it might be unclear whether its outcomes are good or bad. (A common kind of case.)
6. A process might be judged good because it has V1 and V2, and it might be unclear whether its outcomes are good or bad. (A common kind of case.)

Many other permutations are, of course, possible.

In summary, then, at least some values *generally* appropriate to judging results are also *generally* appropriate to judging processes. But *in particular cases*, the values appropriate to judging the one and the other will not necessarily be the same, and, in fact, will often be very different. Process values, then, at least have this kind of independent significance.

E. *Process Values Reconsidered—Five Skeptical Attacks*

A skeptic may quarrel with various aspects of my process values thesis, or even deny the reality of process values altogether. Therefore, I shall address various skeptical attacks.⁶⁴ My responses are not absolutely decisive, but they are all I can now offer.

1. "Ideal Results" Skepticism

I have contended that features of processes that implement or serve process values are good regardless of any good results to which these features may contribute. Imagine an "ideal results" skeptic who counters as follows:

Suppose an ideal world ruled by a philosopher queen (P.Q.) who by her own *direct action* always makes ideal laws, always applies them correctly, and always achieves the correct result. In such a society there would be no legal processes. Consequently, there could be no process values. And if we lived in this society, we would not object to P.Q.'s governance, for the results would be ideal. This shows that process features are valuable only because in our own world legal processes are necessary to provide good results with regularity. Accordingly, there are no "process values."

In response to the "ideal results" skeptic, I offer three points. First, I deny that even in such an ideal world, people would not object to P.Q.'s rule. I believe that if those people were like us, they would prefer at least some measure of participatory governance.

Second, P.Q.'s world is simply not our world. *We* need legal processes to maximize good results.

Third, in any event, the conclusion of the "ideal results" skeptic does not follow from his premise. Even if in his ideal world

⁶⁴ For my purposes it is fortunately not necessary to go into every source of value skepticism here. For instance, I do not undertake to treat the sophisticated arguments of those philosophers who stress the disanalogies between facts and values and deny that value judgments can be rationally defended. See, e.g., A. AYER, *LANGUAGE, TRUTH AND LOGIC* (2d ed. 1946). Nor do I treat commonplace sources of value skepticism more characteristic of the laity—e.g., the view that any phenomenon (whether a value or not) which is abstract, general, nebulous, and somewhat imprecisely articulable is more or less unreal.

legal processes are not needed, and therefore citizens have no occasion to espouse process values, it would not follow that in a society where legal processes are needed, their features are prized only for their good result efficacy. Why should not these processes be good as processes, too? Although process values are "parasitic" on processes, it does not follow that process features that serve those values are valuable only because they further good results desired by those who set up the process.

2. "Future Results" Skepticism

In arguing for process values, I have sometimes cited examples in which a process is bad because it ignores or infringes a process value, but its result in the particular instance nonetheless is good.⁶⁵ I have then concluded that the badness of the process cannot derive from badness of result, because the results are good. Imagine a "future results" skeptic who responds as follows:

Where the process is bad but the results good, the badness of the process is still result-dependent, for while badness of process has no adverse effect on results in the case or cases at hand, its regular reoccurrence would necessarily affect results adversely. Hence, *any* criticism of process badness is really result-oriented, even if those results are hypothetical future ones.

I offer these responses: First, any force the skeptic's argument may have diminishes insofar as the causal relation between badness of process and badness of result is tenuous. The causal relation between some process features that in my view implement or serve process values, and the corresponding process results, is tenuous indeed. Participatory governance, for example, finds expression as a process value in majority vote of an elective legislative body. Yet failure to abide by majority rule, for example, is far from any *guarantee* that the result will be bad in future cases, let alone the case at hand. But we nonetheless espouse majority rule as a prizable feature of lawmaking processes. It therefore seems highly unlikely that our espousal is solely attributable to whatever good result efficacy majority rule may have in future cases.

Second, even if people should come to think like the "future results" skeptic, I contend that they ought not to do so. Instead they *ought* to recognize process values for what they are—values that make process features prizable in their own right, independent of result. These values are realizable *in the course* of the workings of a process rather than merely in its *end* results. Why

⁶⁵ See text accompanying notes 2-3 *supra*.

should not the inner workings of processes be recognized as a possible "realm of value realization," too, independently of end results? The future results skeptic seems blind to this possibility.

3. "Skeptical Behindism"

I have contended that process features can be good solely for the sake of the process values they implement or serve. The skeptic who insists on what I will call "behindism" might argue as follows:

It won't do just to give a name to, describe, or elaborate on what an alleged process value is, and then *assert* that a process feature is good for the sake of this process value. Moreover, to say that an alleged process value, such as participatory governance, is good for its own sake is to stop the analysis at an arbitrary point. If we will only *go behind* alleged process values, we will always discover relevant "outcome" values. Thus, it will always turn out that the goodness of a process, "as a process," depends on its contribution to the goodness of process results as judged by "outcome" values.

First, I do not deny that many process features, *in addition* to being good for the sake of the process values they implement or serve, are also good for the sake of any good results that they contribute to. Second, "behindism" carried to extremes would land us in an infinite regress. There must be a stopping point somewhere.⁶⁶ The "behindism" skeptic might concede as much but assert that this point is reached only when, in going behind a so-called process value, we identify a higher value appropriate to judging process results. In my view, it is dogmatic to insist on this. Third, it is simply not arbitrary to halt the regress with a process value. Admittedly, in my listing and analysis of process values I sometimes rested merely with suggestive or intuitively plausible sketches of how it is that they render process features valuable. But some process values are so taken for granted in our own society—even though they are not necessarily implemented—that it ought to be sufficient merely to call attention to them. I invite the skeptic to review in this light such examples as participatory governance, humaneness, process peacefulness, procedural fairness, and legitimacy. Fourth, I readily admit to less than perfect understanding of some process values. Their value significance is difficult to articulate. I believe, however, that I have done more than merely give names to possible values. In regard to each value I have said at

⁶⁶ Or so many believe. This issue is discussed in C. WELLMAN, CHALLENGE AND RESPONSE—JUSTIFICATION IN ETHICS ch. 6 (1971) ("Infinite Regresses").

least enough to rebut any charge that I am merely labeling phenomena as valuable. It therefore seems fair to shift the burden of proof to the "behindism" skeptic.

4. "*Ultimate Values*" Skepticism

It might be possible to formulate a satisfactory theory about the "ultimate value grounding" of process values. For instance, one might try to "ground" these values in generalities about human nature, or in some all-encompassing theory of rationality, or in an ideal conception of society. Since I have not attempted this, a skeptic might contend:

In order for the process values thesis to be convincing, proponents of the thesis must show in ultimate terms *why* claimed process values are *valuable*, and this would require that they be grounded in some comprehensive and justified axiological theory.

I concede that, if I could show some such "ultimate value grounding" for each process value, this might strengthen the justificatory force of my thesis. But the very possibility of executing such a project is itself the subject of philosophical debate.⁶⁷ And the project is beyond the purposes and scope of this Essay. To sustain my principal thesis, it is only necessary to cite some process values which, *as values*, are familiar and uncontroversial, and which render process features prizable regardless of results. I believe that most of my catalogue entries fall in this category.

5. "*Experiential Effects*" Skepticism

I have claimed that process features that implement or serve process values are valuable for the sake of those process values. Imagine an "experiential effects" skeptic who argues as follows:

Process features that implement or serve process values are not valuable for the sake of those process values. They are valuable only if those involved in or affected by the process actually experience certain psychological reactions or sensations. These experiences are one type of process result. Hence process values are result-dependent values.

Before responding to this argument, I will state it more fully. Consider the following two tables:

⁶⁷ See generally P. TAYLOR, *NORMATIVE DISCOURSE* 68-188 (1961); Feigl, *Validation and Vindication—An Analysis of the Nature and Limits of Ethical Arguments*, in *READINGS IN ETHICAL THEORY* 667 (W. Sellars & J. Hospers eds. 1952).

TABLE A

Process Feature Implementing a Process Value	Experiential Effects
1. Accused's unimpaired participation in his own defense (Process value: Participatory Governance)	Feeling of accused that he has had his full "day in court"
2. Accused's freedom from torture to get a confession (Process value: Humaneness)	Avoidance of fear and physical harm to accused
3. Plaintiff's equal opportunity to present his side of his case (Process value: Procedural Fairness)	Feeling of plaintiff that he has been treated fairly
4. Administrator's statement of findings of fact and reasons for denying an application for welfare benefits (Process value: Procedural Rationality)	Feeling of applicant that he has been treated in a rational, non-arbitrary way

TABLE B

Process Feature Infringing a Process Value	Experiential Effects
1. Denial to accused of any participation in his defense	Accused's anger, bitterness
2. Torture of accused	Fear, physical harm, anger, bitterness
3. Denial to plaintiff of right to present his case to civil court	Plaintiff's anger, bitterness
4. Arbitrary denial of application without reviewing facts	Anger and bitter feelings of applicant

The "experiential effects" skeptic argues that values such as participatory governance, humaneness, procedural fairness, and procedural rationality are valuable only for the experiential effects that accompany their implementation through features of processes. Thus, they derive their value from other "things" (right column, Table A), and also their disvalue (right column, Table B), and these other things are classifiable in my own scheme as process results—side effects or consequences collateral to immediate outcomes.⁶⁸ Accordingly, the skeptic concludes that the very concept of process values is logically incoherent. There simply cannot be any values which make process features valuable without regard to whether these features contribute to good process results. The experiential effects required for process values to render process features valuable are themselves one variety of process "result," as that term is used in this Essay.

In my view, however, the process value served by a process feature is not *dependent* for its value on occurrences of feelings and other experiences, at least not in particular cases. Suppose, for

⁶⁸ See notes 23-24 and accompanying text *supra*.

example, that a litigant is actually given a full and fair opportunity in court. That very litigant may still go away dissatisfied and embittered. The experiential effects skeptic would say that the process therefore did not accord the litigant either an opportunity for participatory governance, or procedural fairness. But if this is so, we will be plunged into subjectivism. The same feature of a process would or would not be regarded as having process value, depending on the subjective experiences of those involved or affected. Yet various factors may explain why the persons involved or affected may not be satisfied when, on objective analysis, the process features do serve relevant process values. These persons might have been mistaken about facts. They might have misunderstood an official. They might have been unreasonable. Their expectations might have been unrealistic in the first place. Or they may be so dissatisfied with the immediate outcome that they are unable to perceive anything good in the process. Similarly, process disvalue is not dependent on the occurrence of feelings of anger or bitterness.⁶⁹

An "experiential effects" skeptic might espouse a less radical view, namely, that although process features that serve process values are not dependent for their value on the occurrence of "value experiences" *in particular cases*, they do *generally* depend for their value on the more or less regular occurrence of such experiences. It is not possible for me to respond satisfactorily to this view here. But even if the view is correct, at the very least it would remain open to me to revise my theory as follows: A process value is a value which makes features of a process good, whether or not those features also contribute to good *outcomes* (as opposed to such outcomes *plus* side effects and collateral consequences). Thus, process values would still constitute standards for evaluating a process *as a process*. And these standards would be distinct from "good outcome efficacy." They would not necessarily be the same as the standards appropriate to judging process outcomes, *as outcomes*, in particular cases. Thus, my principal thesis would remain largely intact.

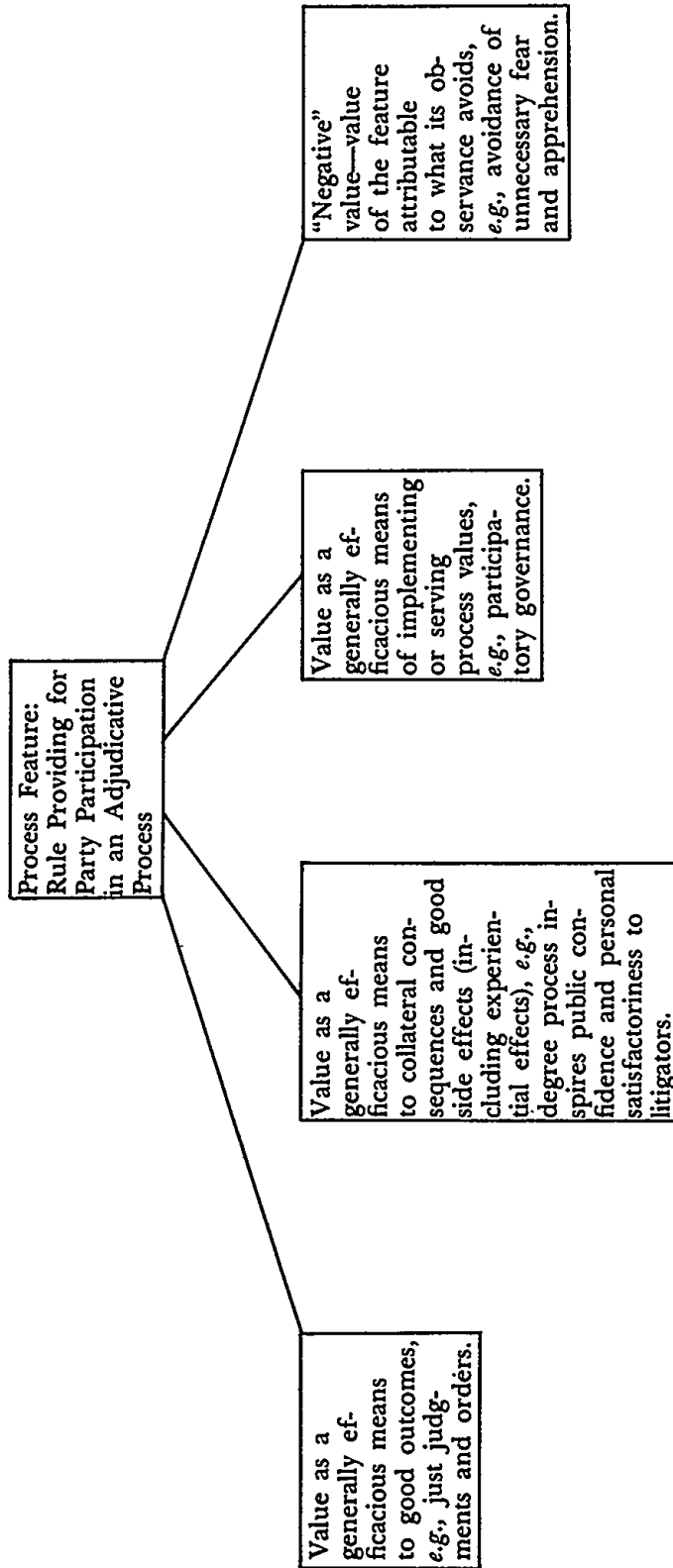
F. *A Summary Diagram*

It may now be useful to summarize the specific ways in which an illustrative process feature might contribute to the total goodness of a process *as a process*. In the diagram below, I have used the process feature of "party participation" in an adjudicative process as an illustration.

⁶⁹ Cf. Baylis, GRADING, VALUES, AND CHOICE, LXVII MIND 485, 495-96 (1958).

DIAGRAM

WAYS AN ILLUSTRATIVE PROCESS FEATURE MAY HAVE VALUE THAT CONTRIBUTES TO THE OVERALL GOODNESS OF A PROCESS AS A PROCESS



V

THE NONUSE AND MISUSE OF PROCESS VALUES IN ACTUAL PRACTICE—AN INVENTORY

Process values are relevant in evaluating and in choosing between legal processes, actual or proposed. I will identify several different ways in which these values may be ignored or misused. My examples will be drawn from our own society. In this way, the reader may judge whether a "plea for process values" is appropriate.

A. *Evaluations and Choices That Ignore Process Values—
"Result Orientation" Par Excellence*

A review of the scholarly literature will dismay believers in process values. Many "policy scientists," moral philosophers, and students of decisional strategies in government ignore process values.⁷⁰ Thus, when economists and others theorize about government benefits and "public goods," only rarely do they count process values as benefits or goods.⁷¹ Some political scientists, especially behaviorists, seem to ignore evaluative questions altogether.⁷² "Systems analysts" commonly leave process values out of account.⁷³ Many moral philosophers—particularly those of utilitarian persuasion—stress quality of result (consequences)⁷⁴ and ignore process values. Even law professors regularly neglect process values,⁷⁵ although they insist on "due process" as a means to good outcomes.

Do the myopias of social theorists ever afflict social actors? It would be strange if they did not. Presidents in our time have ignored the most elemental process values. So, too, legislators. Indeed, even judges as sophisticated as Holmes,⁷⁶ and more re-

⁷⁰ Proving "negatives" is almost always impossible, strictly speaking. Here I will rest with references to what I take to be representative figures.

⁷¹ Even the most important thinkers say little or nothing of process values. *See, e.g.,* Arrow, *supra* note 14; Stigler, *supra* note 14.

⁷² This is an oft-noted and oft-discussed fact. *See, e.g.,* Berns, *Law and Behavioral Science*, 28 *LAW AND CONTEMP. PROB.* 185, 203 (1964). But there are signs of change.

⁷³ *See, e.g.,* SYSTEMS THINKING (F. Emery ed. 1969).

⁷⁴ *See generally,* J. SMART & B. WILLIAMS, *UTILITARIANISM FOR AND AGAINST* (1973); Brock, *Recent Work in Utilitarianism*, 10 *AM. PHIL. Q.* 241, 249-65 (1973).

⁷⁵ But there are rare exceptions. Two notable ones are Professors Laurence Tribe and Charles Fried of Harvard. *See* C. FRIED, *AN ANATOMY OF VALUES* 105-15 (1970); Tribe, *Policy Science: Analysis or Ideology?*, 2 *PHIL. & PUB. AFFAIRS* 66 (1972).

⁷⁶ For example, see Holmes's opinion in *McDonald v. Mabee*, 243 U.S. 90, 92 (1917), in which he justified giving the defendant an opportunity to be heard solely as a means of doing "substantial justice" in terms of outcome.

cently, Fortas,⁷⁷ sometimes have failed to perceive process values under their very noses. Then, too, lay ignorance of process values is widespread. Consider how often laymen seem ready to dismiss procedural rules as "mere technicalities" even though these are the very rules which must secure most process values.

B. *Evaluations and Choices in Which Process Values Are Only Dimly Appreciated*

It is one thing to ignore process values altogether. It is another to fail to grasp the significance of relevant process values. Doubtless one reason some process values are ignored is because they are inherently elusive and vague. They would be less often ignored if they were more easily perceived. The value significance, for instance, of legitimacy, procedural legality, and procedural rationality lack instant intelligibility. Moreover, even when such values are readily understood, their practical dictates in the context at hand may not be perceived. Of course, not all process values are elusive to the understanding. For example, participatory governance and procedural fairness can be grasped more or less readily.

Evaluations and choices, then, may sometimes be made with only a *dim appreciation* of relevant process values. And although this will not necessarily lead, in particular cases, to determinations that undesirably sacrifice process values, it presumably inclines decision makers to accord less weight to process values than they otherwise would.

C. *Evaluations and Choices that Unjustifiably Sacrifice Process Values: A Further Form of "Result Orientation"*

Values inevitably conflict. And in order to achieve desired results, it will sometimes even be necessary to sacrifice process values. But particular sacrifices may be quite unjustified. For example, some "men of action" might prefer the election of one presidential candidate over another. Consequently, they might clandestinely sabotage electoral processes in order to secure the outcome they desire. In so doing, they would be sacrificing at least the process values of participatory governance, of legitimacy, and of fairness of process. Many observers believe this is exactly what occurred during the Nixon reelection campaign for the Presidency in 1972. Certainly some of Nixon's supporters interfered with

⁷⁷ An example is provided by his opinion in *In re Gault*, 387 U.S. 1, 19-20 (1967), where, after only an oblique reference to fairness, he proceeds to justify according "due process" to juveniles on the ground that it yields better outcomes.

Democratic primaries and with the Democratic general election campaign. Part of their strategy was to facilitate the nomination of an arguably "weak" opponent. Some of former President Nixon's supporters presumably felt that he must be reelected at any cost,⁷⁸ process values be damned.

Similarly, when President Nixon offered a federal district judge the directorship of the FBI during the course of a criminal trial over which the judge was presiding, and in which the President's own appointees were prosecuting a celebrated anti-Nixonite (Daniel Ellsberg), the President apparently evinced a willingness to sacrifice impartiality for the sake of influencing the trial's outcome.⁷⁹ Impartiality is a dictate of procedural rationality: It helps to assure that only factors relevant to the merits influence the outcome. President Nixon similarly sacrificed impartiality and legitimacy when he refused to permit the first Watergate special prosecutor to function independently, and dismissed him for refusing to limit a prosecutorial investigation to which the President himself was subject.⁸⁰

Activists of the left have also sacrificed process values in circumstances in which the sacrifice was dubious. It is now almost trite to cite in this context the excesses of the civil rights movement in the late 1950's and early 1960's.⁸¹ But consider the "building takeovers" on university campuses in the late 1960's and early 1970's, too. Frequently these were not mere "protests," but efforts to "negotiate" campus lawmaking and other decisions, in which the building occupants frequently refused to vacate until their demands were met (or until they had sufficient assurances that their demands would be met).⁸² These activists sacrificed, for the sake of

⁷⁸ See *Hearings on Presidential Campaign Activities of 1972 Before the Senate Select Committee on Presidential Campaign Activities*, 93d Cong., 1st Sess., bk. 2, at 814 (1973) (testimony of Jeb Stuart Magruder).

⁷⁹ At the President's direction, John Ehrlichman met twice with Judge Matthew Byrne, and the Judge met once with the President. See generally *id.*, bk. 6, at 2617-22 (testimony of John Ehrlichman).

⁸⁰ For relevant reflections of the former special prosecutor, see Cox, *Ends*, N.Y. Times, May 19, 1974, § 6 (Magazine), at 27. Professor Cox observed that the Watergate affair illustrates the erosion of process values in public life, though he did not use this terminology. *Id.* at 66, 68, 72.

What many of those involved in Watergate did also constituted violations of personal moral standards recognized in our society. But process values must not be confused with such standards, although there is some overlap.

⁸¹ But for an exceptional account, see Bickel, *Watergate and the Legal Order*, 57 COMMENTARY 19 (1974).

⁸² See generally R. SUMMERS & C. HOWARD, *supra* note 2, at 533-95 (1972). As might be expected, the literature on "political direct action" of this period is generally devoid of

outcomes, such process values as legitimacy (the campus building takeover is not a legitimate decisional process), participatory self-rule (only the self-appointed occupants participate "for the students"), and procedural rationality (seldom do such permit rational deliberation, fact-finding, and the like).⁸³

Of all branches of our positive law, it is in the criminal field that process values and desired outcomes regularly conflict most dramatically. Since conviction of the guilty is a desired outcome of high priority, it should not be surprising that officials have occasionally subordinated process values to this outcome. For example, until recently police not uncommonly infringed the process values of humaneness, of respect for individual dignity, and of personal privacy, all in the name of convicting the guilty via warrantless intrusions and "third degree" methods.⁸⁴ The courts have now interpreted the Constitution to prohibit most such infringements and have extended the "exclusionary rule" to put teeth in these prohibitions.⁸⁵ But it has not always been so, and it is not always so in practice even now. Indeed, in many places plea bargaining accounts for a high proportion of our criminal convictions, yet it offends many process values, including some of the very ones protected by these recent constitutional interpretations. Thus, when police and prosecutor induce an accused to "bargain away" rights guaranteeing him protection from a lawless police intrusion or coerced confession, in exchange for a guilty plea to a charge carrying a lighter sentence, the so-called "exclusionary rule" loses a measure of its efficacy as a means of protecting process values.

I do not contend that sacrifices of process values are never justified. It is always possible to postulate overriding considerations. In some circumstantial patterns, sacrifices of process values may even be regularly justified. In internal security employee

concern for process values, even as authored by sophisticated college professors. *See, e.g.,* M. WALZER, *POLITICAL ACTION—A PRACTICAL GUIDE TO MOVEMENT POLITICS* (1971).

⁸³ Of course, this is not necessarily to say that what the campus activists did was as objectionable as what the "Watergaters" did. *Official* misbehavior is especially objectionable and dangerous. *See* J. LIEBERMAN, *HOW THE GOVERNMENT BREAKS THE LAW* (1972).

I want to stress that in this Essay I have striven for an analysis that is politically neutral as between liberals and conservatives. Whether I have succeeded is for the reader to judge. But I do plead guilty to advocating a thesis that conserves process values, many of which are liberal in character. Is a thesis which conserves liberal values conservative? If so, so be it.

⁸⁴ *See, e.g.,* Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 *STAN. L. REV.* 411 (1954).

⁸⁵ The main developments are recounted in admirably concise fashion by two scholars of the subject in J. ISRAEL & W. LAFAVE, *CRIMINAL PROCEDURE IN A NUTSHELL* 85-179, 210-56, 280-335 (1971).

dismissals, for example, it may be justifiable to accord an employee less than a full public hearing for the sake of safeguarding state secrets. Here the process value of participatory governance, among others, is sacrificed to some degree. Or, in order to remove risks from the roadways more efficiently, allegedly drunken drivers might be denied a right to cross-examine those who perform blood tests. Here, too, there may be justifiable sacrifice of a participatory value.

I believe, however, that many officials are inclined, as a matter of course, to sacrifice process values in return for desired outcomes, whether or not the sacrifice is justified. And I believe that unjustified sacrifices would occur less often if more officials were alert to process values and if a workable calculus could be devised for weighing process values against other values. The late Learned Hand and others have noted that such a calculus would be extraordinarily difficult to devise.⁸⁶

It may be useful to try to explain why process values tend to be sacrificed to outcomes when the two come into conflict. First, of course, the value of the outcome served may simply outweigh, or be thought to outweigh, process values. Second, insofar as process values are difficult to articulate and hard to measure, decision makers probably accord less weight to them. Third, the legal precepts that purport to secure process values seldom wear their rationales on their faces;⁸⁷ accordingly, the protected values are somewhat hidden from view and have to be "unearthed" for consideration. Fourth, there is a widespread tendency merely to view procedures as technicalities or rules of thumb. Any values they protect are therefore assumed to be inconsequential.

D. *Evaluations and Choices Which Unjustifiably Sacrifice One Process Value to Another*

There are many examples of the phenomenon whereby one process value is sacrificed to another. For instance, speed of decision (timeliness) is a process value (as contrasted with dilatoriness). Yet unhurried deliberation and careful fact-finding are dictates of quite another process value too: procedural rationality. Sometimes these values conflict. The majority of the Supreme Court in the "Pentagon Papers" case hurried to an early decision

⁸⁶ L. HAND, *THE SPIRIT OF LIBERTY* 261 (1952). See also B. CARDOZO, *PARADOXES OF LEGAL SCIENCE* 56-57 (1928).

⁸⁷ See Part VI (C) *infra*.

even though this involved, according to Justice Harlan, an unjustified sacrifice of procedural rationality.⁸⁸

Thus, officials may sacrifice a process value not merely for the sake of an outcome they desire, but also to achieve that outcome quickly. To cite a further clash of process values: Full participation by both sides in an adjudicative process may conflict with the process value of finality. This can occur when one party later learns of new evidence and seeks to have a case reopened.

E. *Evaluations and Choices Which "Overvalue" Process Values*

Although in my opinion, the overwhelming tendency in our society is to undervalue most process values, they may sometimes be overvalued too. Participatory governance, for instance, is commonly overvalued. It is simply not possible in a society like ours for persons to participate in every significant stage of every significant decisional process that might significantly affect them. And even where possible, it would not necessarily be appropriate, given such other desiderata as expertise and confidentiality. Where participation is both possible and appropriate, the specific form of proposed participation might be inappropriate. For example, it would hardly be appropriate to decide on the tenure of a teacher solely by majority vote of students, or on the content of a public school curriculum solely by majority vote of parents. Yet our law carries some participatory roles to excess. For example, in many states, laws give teachers' *unions*—as distinguished from teachers—a large say in formulating basic educational policy in our public schools.⁸⁹ And it is notorious that our laws generally permit vested economic interests a large say in legislative processes through lobbying, campaign contributions, and the like.

F. *Evaluations and Choices Which Neglect General Process Value Efficacy*

The evaluator (or "chooser") neglects still another important evaluative dimension when he fails to consider how a process might be *better* designed in order to implement the process values it is supposed to implement. This is not a rare occurrence. For example, it took American courts over a hundred years to see that our criminal processes were poorly designed to secure meaningful

⁸⁸ *New York Times Co. v. United States*, 403 U.S. 713 (1971) (Harlan, J., dissenting). Of course, this is not to say that the only values at stake were process values.

⁸⁹ See e.g., N.Y. CIV. SERV. LAW §§ 200-214 (McKinney Supp. 1973) ("Taylor Act").

participation by indigent defendants. In the end, the courts required free counsel.⁹⁰

VI

IMPLEMENTING PROCESS VALUES THROUGH LAW— GENERAL REQUIREMENTS

A people that seeks to implement values through law as *process values* will (1) stand ready to criticize infringements upon or departures from these values for *special* reasons—reasons that are not exclusively result oriented; and (2) see to the legal implementation of these values, even though this does not necessarily enhance the quality of process results. Thus, *even when results are good*, the people will be concerned about departures from and infringements upon process values.

In order to implement process values through law, a legal system must provide:

1. Means of designing process features to “embody” process values in the first place.
2. Corrective mechanisms, sanctioning devices, and the like which may come into play when “built-in” process values are infringed, regardless of outcome.
3. Means by which process administrators and persons affected by processes can tell whether specific processes are in fact intended to secure process values (or ought to be so regarded).
4. Means by which process administrators (official and other) can tell whether a process value that a process has been designed to implement has been infringed in a particular case.

I will now discuss each of these requirements.⁹¹

A. *Means of Designing Process Features to “Embody” Process Values in the First Place*

This is a relatively unproblematic requirement. Through the use of procedural norms—rules, principles, maxims, rulings, and

⁹⁰ See *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁹¹ It should be recalled that more effective implementation of process values is but one way of improving legal processes. See generally Rosenberg, *Devising Procedures That Are Civil To Promote Justice That Is Civilized*, 69 MICH. L. REV. 797 (1971).

the like—the features of a process can be designed to “embody” a value. For example, rules and other norms can provide for a hearing to implement the process value of participatory governance. As already indicated, whether one value rather than another is secured can affect the shape of a process in terms of the stages of the process, who is assigned what participatory roles in the process, what steps are specified in these roles, and so on.⁹²

In some legal systems, specific constitutional provisions require that certain processes have specified features.⁹³ And in some systems there may be a generalized “due process” requirement applicable to all legal processes.⁹⁴ Requirements of this nature may operate to implement process values, too.

B. *Corrective Mechanisms and Sanctioning Devices*

Even though the law prescribes a process feature (*e.g.*, right to a hearing), in order to implement a process value (*e.g.*, participation), that feature might be unlawfully ignored or bypassed in particular cases. Corrective mechanisms and sanctioning devices are therefore needed as well.

Corrective mechanisms include provisions for vetoes, for review by another body, for invalidation of an outcome as unauthorized, for optional or required “reruns” of the process (including reruns without use of the same facts as used in the first “run”), and so on. Sanctioning devices include ordinary penalties like those imposed under the criminal law, administrative sanctions, private remedies against officials, and whatever sanctions there may be in internal codes of ethics applicable to officials.

The main types of occasions for invoking corrective mechanisms and sanctioning devices when process values embodied in a process are ignored or bypassed (contrary to law) are three-fold:

- (A) The “bad process,” “bad outcome”⁹⁵ cases.
- (B) The “bad process” cases in which it is unclear whether the outcome itself is good or bad (a large class of cases), and
- (C) The “bad process,” “good outcome” cases.

A legal system may choose to use different mechanisms or devices in these cases. If the case is of type (C), the system might choose

⁹² See Part II *supra*.

⁹³ See, *e.g.*, U.S. CONST. amend. V. See generally M. MOSKOWITZ, HUMAN RIGHTS AND WORLD ORDER (1958).

⁹⁴ *Id.*

⁹⁵ “Outcome” is used here to refer to “immediate outcomes” of the types listed in note 23 *supra*.

not to "rerun" the process, for the outcome was good by the relevant *outcome* standards of value. Instead, in cases of type (C), the system might only provide for sanctions against anyone *culpably* responsible for the "bad process." But even in some kinds of type (C) cases, the social desirability of emphatically vindicating the desired process value might call for a rerun of the process as prescribed in the first place. For example, we might require that a legislative process yielding a good law (good outcome) without a majority vote (bad process) nevertheless be repeated. Or a criminal conviction based partly on conclusive evidence (good outcome) secured through involuntary stomach pumping (bad process) might be overturned with the proviso that the case be retried without the use of any "pumped out" evidence.⁹⁶

In cases of type (A) it will often not be possible to tell whether the process deficiency contributed to the outcome. Yet there will be cases where it plainly did contribute. In both of these situations, a rerun will often be appropriate for two purposes: to secure the desired outcome and to vindicate the relevant process value. But what if the case is one in which the process deficiency plainly did not contribute to the bad outcome? Here, it may be enough to impose some sanction on the infringing party without any kind of rerun. But again, the value involved might be of such significance that a rerun would be called for either alone or in addition to the sanction.

All cases of type (B) can be treated analogously to those of type (A).

C. *Means of Determining Whether a Process Value is to be Implemented*

It would do little good to design processes to implement process values, and to provide for corrective mechanisms and sanctioning devices, if it would be impossible for anyone reliably to tell when a process feature had been designed to implement a value *as a process value* rather than designed *merely* as a means to certain outcomes or types of outcomes.

Identification is an acute problem because most process features capable of implementing process values are at the same time capable of serving as means to certain outcomes. A right to participate in a hearing is an apt example. As I have noted, this right might be built into a process *merely* to facilitate fact-finding re-

⁹⁶ *Rochin v. California*, 342 U.S. 165 (1952).

quired for certain outcomes and not because participatory governance is in itself considered desirable. Or this right might be built into the process *both* to secure the participatory process value *and* to serve the outcome value of truthful fact-finding. At least when such a right is intended to secure a process value, officials should generally take appropriate corrective or sanctioning steps to implement that value whenever (1) both process and outcome are bad, and (2) process is bad but quality of outcome unclear. But how can officials tell when a process feature is designed to implement a process value (at least in part)? Of course, simple cases can be imagined in which those responsible for a process are quite explicit about why its features are as they are, and an official record of these reasons might even be kept.

However, the designers and others responsible for legal processes in particular societies are rarely so explicit. Consequently, those who wish to bring corrective mechanisms and sanctioning devices into play will often be called upon to argue for the proposition that a given feature is intended to implement a process value and that its infringement calls for repetition of the process or some other form of corrective or sanctioning action.

I know of no formula for the required arguments. I offer only an illustrative case to show the general character of such argumentation. Much of this argumentation is essentially evidentiary but some of it is more speculative and rationalistic.⁹⁷

We may imagine a society, Bodea, that has the following somewhat extreme legal principle (A): "Whenever the administrators of a legal process infringe a prescribed process value, the process itself shall be repeated without the infringement, even though the outcome is good." We may imagine further that the Bodeans have adopted another legal principle (B): "Statute laws are to be enacted by a majority vote of the democratically constituted Bodean legislature." Assume the Bodeans do not leave any evidence as to their reasons for adopting (B).

Assume also that forty percent of the legislature assembles and "passes" a law against religious discrimination in employment, formerly a problem in Bodea. All Bodeans applaud this law as a good outcome. But some Bodeans—let us call them the PV Bodeans—claim that the actions of the legislators violate principle (B), and that a majority vote is a process feature designed to secure the process value of participatory governance *within the meaning of*

⁹⁷ Cf. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 328-34, 339 n.125 (1957).

principle (A), and that the process must therefore be repeated to "vindicate majority vote," and to validate the law.

Did the people of Bodea, in adopting (B), intend it, among other things, to be a means of implementing a participatory process value as such, or did they intend it only as a way of securing good outcomes or as a safeguard against bad outcomes? How might the PV Bodeans, assuming Bodea is very much like America, argue for the former? At the outset, they would need to establish that majority vote is indeed susceptible of being espoused for reasons in addition to, or wholly apart from, desired outcomes. This the PV Bodeans could readily do. For example, they could urge persuasively that majority vote not merely guarantees better outcomes, but also that it is *possible* for Bodeans to believe in majority vote for reasons apart from outcomes, such as the desire for participatory governance. Once having shown that a given process feature is susceptible of having process value (and not merely instrumental value as a means to outcomes), the PV Bodeans would then have to argue that the relevant Bodeans did *in fact* incorporate majority vote in their legislative process at least partly because of its approximation to self-governance. Assuming that there is no indisputable or substantially convincing direct evidence of this espousal, we might expect the PV Bodeans to try to make arguments of the following types.

First, it would be helpful for the PV Bodeans to try to establish a presumption that any process features susceptible of having process value shall, in the absence of contrary evidence, be viewed as intended to secure the relevant process value. This would be a presumption as to the likely intent of those responsible for the process (assuming, as we are, that there is no convincing direct evidence of this intent). The strength of any such presumption would vary from society to society. For example, such a presumption would be exceedingly weak in any society in which process designers rarely sought to implement process values through law. But the contrary would be true in societies in which process designers frequently designed process features not merely as means to certain process outcomes, but also as means to secure process values.

The presumption would be strengthened all the more if it could be shown that the society is one *generally* infused with regard for process values. Indications of this might take a variety of forms. For example, explicit signs might be found throughout the general law and relevant forms of legislative and other lawmaking history

of the society. But one should also look at the standards of criticism that social critics invoke to judge the behavior of process designers. Such standards would be found in the various media, journals, books, and so forth. Further, one should look to oft-repeated slogans from everyday life, provided they reflect more than lip service. Two examples readily come to mind: "The end does not justify the means" and "It is not whether you win or lose, but how you play the game that counts."

Second, it may be possible to show that the value in question is one that the society generally espouses in a variety of other contexts, apart from the one at hand, *for reasons that are relevant to its characterization as a process value*. In the case of majority rule, one would try to show that the society generally espouses majority rule. Obviously, if one can show that the society not only generally espouses process values, but also generally espouses the particular process value at hand, the case for concluding that the process is intended to secure this value is greatly strengthened.

Third, it may be possible to cite evidence that members of the society regularly criticize departures from or infringements upon the value in question, even when the process outcome is good. Various explanations of such critical behavior are possible. It could be that the process is prized as securing a process value and not merely as a means to desired outcomes. An alternative explanation might be that the critics prize the process merely as a means to desired outcomes and object to the infringement simply because of a fear that the general quality of outcomes in the future will decline. At least in the case of some process values, the force of this alternative explanation will be inherently weak. Thus, where the process features securing the value are ones which fall far short of constituting any kind of guarantee of good outcome, it is not very plausible to say that the criticism is merely outcome oriented. Criticism of departure from majority rule happens to be a good example, since majority rule is not itself much of a guarantor of good outcomes.⁹⁸

As a corollary to this third type of argument, it may be possible to cite evidence that relevant members of society regularly criticize *twice, not once*, when officials depart from or ignore a process value and bad outcomes occur at the same time. The fact that two criticisms—and not one—are typically heard, may indicate that the

⁹⁸ Consider the discussion of "future results" skepticism at text accompanying note 65 *supra*.

critics espouse the process not merely as a means to desired outcomes but as securing a process value, too.

Fourth, it may be possible to construct strong analogical arguments to show that the process in question is intended to serve a process value. If, for example, majority rule is intended to secure a process value in a legal process closely analogous to the one in question, it can be argued with some force that process designers probably intended the same in the instant situation.

Fifth, it is always possible to convert the issue from an "is" question to an "ought to be" question. That is, the process designers *ought to be* viewed as intending that the process implement relevant process values, even though the evidence is at best ambiguous. A great many legal arguments purportedly of the form, "A is B" are, realistically viewed, arguments that "A ought to be considered a B and therefore is a B." And on one view of the nature of law itself, this is as it ought to be.⁹⁹

D. *Means of Determining Whether a Process Value Has Been Infringed in a Particular Instance*

Assuming that given features are designed to secure a process value, it generally should not be difficult to tell whether or not the value has been infringed in particular cases. Usually this factual issue will simply call for an inquiry into whether a particular legal rule or other legal precept securing the value has been broken.

It is important to recognize, however, that process values may be disregarded even though no legal rule or precept is infringed. Process designers may simply ignore a relevant process value in designing the features of the process. For example, a driver's license revocation process might be set up without providing the licensee any right to a hearing. It would be appropriate to condemn such a process as one that disregards an important process value.

There should be no need to set up a separate body called the "Board for Determining Particular Process Value Infringements." Rather, the very processes involved can provide their own "adjunct" procedures for determining (1) whether features of a process are designed to secure a process value, and (2) whether that value has been infringed in the particular case. For example, the parties to an adjudicative proceeding could also raise "process

⁹⁹ See L. FULLER, *THE LAW IN QUEST OF ITSELF* (1940); Hart, *Holmes' Positivism—An Addendum*, 64 HARV. L. REV. 929, 930 (1951).

value" issues (in both their factual and legal aspects) for adjudication in the ordinary way.

Are process values, at least in theory, easier to secure through law than good results? It would appear so since their implementation only calls for rules and other norms prescribing that they shall be implemented, and for corrective mechanisms, sanctioning devices, and the like. Generally it should not be as difficult to design these as it is to design ways of securing good results as such. We often do not know how to secure good results. Indeed, we often cannot even agree on what results are good.

By way of summary, it may be useful to list the possible respects in which we may be critical of a process from the "process value point of view":

1. The process fails to prescribe the implementation of appropriate process values.
2. The process prescribes inappropriate (or inappropriate forms of) process values.
3. The process values prescribed by the process are left highly ambiguous.
4. The process only imperfectly (*e.g.*, sketchily) prescribes process values.
5. The process does not embody the right means-end hypothesis for prescribing appropriate process values (*e.g.*, participation of the accused is prescribed, but no provision is made for free counsel to indigents, or an impartial tribunal is specified, but no institutional provision is made to secure suspension of judgment until both sides are heard).
6. The process fails to provide corrective mechanisms, sanctioning devices, or the like.
7. The process fails to provide for recruitment of administrative personnel sensitive to process values.

CONCLUSION

In this Essay, I have sought to identify process values for what they are. In legal ordering, man does not live by results alone. Yet we often fail to recognize process values, and even when we do, we tend to neglect or override them almost as if they were weightless. Accordingly, I have entered a *plea* for process values. But in closing, I am mindful that there is much more to be said than I

have been able to say. In particular, I have no fear that there will be wanting thinkers who can improve upon my articulations of the "value content" of process values, or formulate better responses to the various forms of process value skepticism, or perhaps even develop ways of assigning weights to process values. Indeed, it may be that my basic approach to the entire topic can be shown to be misconceived. Whatever the course of any future developments, it will, for me, be gratifying if this Essay at least serves to sharpen our awareness of process values.