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TEACHING PROCEDURE: PAST AND PROLOGUE

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I. INTRODUCTION

Most courses in Civil Procedure are built on the foundations of four major developments in the subject, all of which date from the middle of the twentieth century: the Federal Rules of Civil Procedure and three landmark decisions of the Supreme Court, *Erie Railroad Co. v. Tompkins*,[1] *International Shoe Co. v. Washington*[2] and *Mullane v. Central Hanover Bank & Trust Co*.[3] The Federal Rules provide the framework in which law is applied and facts are found in civil actions by their own force in federal court and as a model for most state courts. *Erie*, *International Shoe*, and *Mullane* provide the constitutional structure in which this process of case development takes place. Most teachers take these classic sources of law to be fundamental to the modern course on Civil Procedure, as do virtually all casebooks.

Yet, in the decades since these foundations of Civil Procedure were first established, they necessarily have become dated and, to our students, remote from the pressing issues that they will soon confront as lawyers. Lines of cases that once were clear and simple now have become complex and difficult, diminishing both their value as teaching tools and their interest as subjects of scholarship. The recent decisions of the Supreme Court under the *Erie* doctrine hardly elicit the same level of interest in the classroom or in the law reviews as did earlier decisions. And as law students have found such decisions less helpful, practicing lawyers have found them less revolutionary. They can, instead, be assimilated or circumvented as the immediate interests of current clients dictate. One generation's solution to the procedural problems that it faced becomes the next generation's method of creating new problems by trying to reach the same goals by other means. So, for instance, at common

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1. 304 U.S. 64 (1938).
2. 326 U.S. 310 (1945).
3. 339 U.S. 306 (1950).

law, defendants sought to avoid or postpone liability by filing motions attacking formal defects in the plaintiff's declaration or bill of complaint. When the Federal Rules replaced formal pleading with discovery as the principal vehicle for pretrial proceedings, defendants could use prolonged discovery to achieve the same objective.

The classic elements of the course in Civil Procedure have, as all classics do, aged in reality while retaining their youthful elegance and attraction only in memory. The lesson to be drawn is twofold: first, that these classic elements of the course no longer serve as well in teaching the basic structure of a lawsuit, and with it, the basic legal vocabulary necessary to learn "how to read a case"; and, second, that an emphasis upon the classics in Civil Procedure neglects the principal reason why our procedural system has evolved in a different direction and why our students have reason to become interested in this course. This reason involves the strategic decisions of parties and their attorneys. If every trial represents a failure to reach a settlement, every case represents a situation that must be understood, not with the Olympian detachment of the academy, but from the desires and needs of the parties and their attorneys.

This second lesson is perhaps the more sensitive of the two, since everyone who teaches Civil Procedure—or, for that matter, any course in law school or elsewhere—has his or her own techniques for eliciting a lively discussion from an otherwise deadening silence. On this general subject, I do not mean to contradict the only sound piece of advice that can be offered: if it works for you, use it. My suggestion only concerns what is likely to work. The transparent elegance of our system of Civil Procedure is no longer likely to inspire students (if it ever could) for the simple reason that it is no longer transparent (if it ever was).

For reasons to be elaborated in this comment, the strategic behavior of participants in the process should instead be the focus of the course on Civil Procedure. As another disclaimer, I do not mean to suggest that the classic elements of the course should be jettisoned. Such a step is possible (and, I am told, has sometimes been attempted at the Yale Law School), but it makes the error of going from one extreme to another: from giving too much weight to these sources of law to giving none at all. The orientation of the course is what needs to be changed, not materials that have long been accepted as the common ground for understanding the subject. We can continue to accept the same materials as foundational, but change what we build upon them. And, in fact, a change in emphasis and degree may be all that is feasible. In order to get beyond the classic sources, it is necessary first to understand them.

II. PROBLEMS WITH THE CURRENT APPROACH

Most courses in Civil Procedure take the Federal Rules and the decisions in *Erie*, *International Shoe* and *Mullane* to announce basic principles that are

developed at greater or lesser length. Some substitutions perhaps could be made in this list, especially for *Mullane*, using *Mathews v. Eldridge*[4] or *Hansberry v. Lee*[5] to illustrate the basic principles of due process. All of these materials promise to give an account of the development of the basic principles of Civil Procedure in the twentieth century. What they fail to do, in ways that become more obvious with each passing year, is to deliver on this promise. This failure is not to be found in the content or ambition of these sources of law, at least as originally formulated, but in subsequent events that disappointed the progressive hopes that, rightly or wrongly, were initially fostered by them.

To take one of only several examples that can be found in the Federal Rules of Civil Procedure, the rise and fall of Rule 11 followed a curious course from radical expansion to doctrinal elaboration to near insignificance. As originally framed in 1938, Rule 11 prohibited only pleadings and other papers filed for an improper purpose. In 1983, the rule was amended to require a reasonable basis in law and fact. But, in 1993, it was again amended greatly to restrict the remedies available for violations of the rule, especially in the form of attorney's fees.[6] This history of amendment of a single rule differs dramatically from the usual narrative characterizing the adoption of the Federal Rules as a long overdue rejection of the technicalities of common law pleading. What began as a vehicle of promising legal reform has now become itself the repository of ever more complex provisions. This is true not just of Rule 11, but of the rules on service of process and discovery, and through judicial interpretation, the rules on class actions and summary judgment.

The same ever-increasing complexity also holds for leading decisions. The seemingly simple command of *Erie*—"There is no general federal common law"[7]—now has become an intricate combination of state and federal procedures, as in *Gasperini v. Center for Humanities, Inc.*[8] The minimum contacts test for personal jurisdiction in *International Shoe* has become the multi-factor test articulated in the multi-part opinions in *Asahi Metal Industry Co. v. Superior Court of California*.[9] And the requirement of individual notice in *Mullane* has foundered for many years on the strategic use and abuse of notice in class actions, beginning with *Eisen v. Carlisle & Jacquelin*.[10]

In recounting these familiar, if disappointing, developments, I do not mean to lay them at the feet of the course on Civil Procedure. If we have held a mirror up to existing law and found it wanting, we cannot blame the mirror.

4. 424 U.S. 319 (1976).
5. 311 U.S. 32 (1940).
6. For all of these developments, see FED. R. CIV. P. 11 advisory committee's notes (1993).
7. Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938).
8. 518 U.S. 415 (1996).
9. 480 U.S. 102 (1987).
10. 417 U.S. 156 (1974).

And, for that matter, we cannot blame the reformers who have tried to bring a degree of coherence to the law in this field. They do not have the power of the Emperor Justinian who, after compiling his digest of Roman law, had all previously available sources of law burned. Modern law reformers cannot aspire to such thoroughness in limiting legal complexity, nor can they be assured that even Justinian's draconian measures proved to be entirely successful. Regardless of the cause, we cannot take the recent trends in Civil Procedure as an inspiring narrative of continuous progress that sustains interest in our course. At best, the classic sources of law in this field have posed the right questions. Subsequent developments have yet to offer coherent answers.

III. STRATEGIC BEHAVIOR AND MOTIVATION

We can take arms against this sea of troubles by trying to diagnose their source. It lies, I think, almost entirely in the strategic behavior of parties and their attorneys. As a systemic matter, participants in litigation adjust to each round of reform, such as those represented by the classic sources of Civil Procedure, by modifying the means that they use to seek objectives that they have always had. Procedural reform does not change the goals that most litigants bring to the process of asserting a claim or offering a defense. It changes only the means—denying some while offering others. As a pedagogical matter, the all-too-human motivations of parties and attorneys in litigation provide the drama that otherwise can be lost in procedural technicalities. Few outside the small guild of Civil Procedure teachers (and perhaps even fewer within it) value procedural maneuvers for their own sake. These all take place against the background of the opposed interests of adversaries in litigation which, if not always supplying drama worthy of the current generation of talk shows, do so with enough regularity to inspire general reflections upon the human condition. An imaginative reconstruction of that condition, as it is subjected to the stress of litigation, should give students an insight into a process that many of them will soon participate in.

The consequences of strategic behavior emerge over the long term from many different areas of Civil Procedure. Forum-shopping constitutes one of the clearest examples. Any lawyer with the option of filing or defending a case in more than one court will choose the court that best serves the interests of his or her side in litigation. As we all know, *Erie* descried forum shopping between federal and state courts when it was used to affect the choice between federal and state law. This kind of forum-shopping was particularly pernicious because it could be accomplished so easily, in many cases simply by going across the street from the federal to the state courthouse or vice versa. Sometimes, as in the egregious case of *Black & White Taxicab & Transfer Co.*

v. Brown & Yellow Taxicab and Transfer Co.,[11] the plaintiff made strenuous efforts to manufacture diversity jurisdiction in order to take advantage of federal law. Yet, if the evils of federal-state forum shopping are all too familiar, so is the continued prevalence of every other kind of forum shopping: between state courts, between federal courts in different states, and at the limit, between courts in different nations. As Lord Denning, the Master of the Rolls of the English Court of Appeals, famously remarked, "As a moth is drawn to the light, so is a litigant drawn to the United States."[12] This kind of forum shopping remains unaffected by *Erie*.

It is promoted, however, by one of the other classic sources of Civil Procedure: *International Shoe*. As this decision has increased the reach of the long-arm jurisdiction of state courts, it has necessarily decreased the impediments to forum shopping for favorable state law. Thus, in *Keeton v. Hustler Magazine, Inc.*,[13] the Supreme Court upheld the plaintiff's choice of a forum in New Hampshire, motivated entirely by the application of that state's statute of limitations, which was the only one in the country that did not bar the plaintiff's claim by the time it was actually filed. As federal-state forum shopping has faded, state-state forum shopping has prospered, and all because attorneys have recognized the strategic possibilities open to them after the seminal decisions in *Erie* and *International Shoe*.

Similar examples could be multiplied from the Federal Rules, where the history of discovery and sanctions has already been mentioned. These rules closed off the avenues for strategic behavior available in common law pleading, but they opened new ones to shift the cost of litigation onto the opposing party. Rule 23 on class actions, especially in combination with the right to notice and opportunity to be heard in *Mullane*, added to the strategic possibilities open to both sides in class action litigation. Plaintiffs and their attorneys have taken advantage of the expanded scope of class actions under the current version of Rule 23 to assemble nationwide class actions with claims reaching into the billions of dollars. Aggregation of liability on this scale has deterred defendants from continued litigation that "bets the company" on the outcome of a trial and puts enormous pressure on defendants to settle. The resulting settlements have generated multiple conflicts of interests among the named plaintiffs, their attorneys, and unnamed class members.

Paradoxically, defendants often point to these conflicts as a reason to deny class certification, in a litigation strategy that recalls all the morals to be drawn from the tale of the fox guarding the henhouse. Defendants use the same strategy to limit or defeat class certification when they invoke class members'

11. 276 U.S. 518 (1928).

12. Smith Kline & French Labs. Ltd. v. Bloch, 1983 2 All E.R. 72 (C.A. 1982) (Lord Denning, J.).

13. 465 U.S. 770 (1984).

right to notice under *Mullane*, as was successfully accomplished in the leading case of *Eisen v. Carlisle & Jacquelin.* Or, eschewing any high-minded consistency, defendants can side with plaintiffs after a settlement has been worked out, and insist that all class members are bound by the class action regardless of whether they have been given notice or even whether they knew they had a claim. These are the tactics on the defense side that led to the recent decisions limiting certification of "settlement only" class actions in *Ortiz v. Fibreboard Corp.*[14] and *Amchem Products, Inc. v. Windsor*.[15]

Again, these recent developments are all very familiar. They may be praised, or lamented, or simply accepted as inevitable. What they cannot be is assimilated to the progressive expectations that still surround the classic sources of the current course on Civil Procedure. All of these developments are complex enough, with so many shifting shades of black, white and gray, that they disprove any confident belief that our procedural system, insofar as it adopted the reforms of the middle of the twentieth century, put itself on the path of inevitable progress. By taking these sources of law as foundational, we need not accept them as messianic—nor, at the opposite extreme, as apocalyptic. The narrative, not just its message, is what has been lost.

Instead of laboring to invent a new one—which must be a long-term project of understanding long-term trends—I suggest that we take the strategic motivation of the parties as the chief feature of the course in Civil Procedure, both structurally and pedagogically. The structural role of strategic behavior provides a workable rationale for developments of the last several decades, as I have just recounted. It can also provide a focus for the students' interest in the course. Beneath the layers of even the most technical issues of procedure lies the usually all-too-human dispute that caused a case to make its way to court.

Just to take one example from a well-known casebook, *Layman v. Southwestern Bell Telephone Co.*[16] concerns the burden of pleading—surely among the driest of procedural issues. Yet the very presence of this issue in a reported decision prompts the question of why the lawyers involved saw fit to stake the case on such an arcane issue. Perhaps the author of this casebook was extremely diligent in searching for an interesting vehicle for an otherwise tedious message, but even so, I doubt that he is alone among casebook authors in trying to elicit interest in the cases that he selects. The plaintiff, Eileen Layman, appeared to have been the sole owner of property that the defendant telephone company—the usual archetype of the big, bad utility—dug up in order to install underground cables. The utility introduced evidence of a recorded easement assigned to it under a "Joint Use Agreement" and prevailed for this reason at trial. On appeal, Ms. Layman argued that the judgment for

14. 527 U.S. 815 (1999).
15. 521 U.S. 591 (1997).
16. 554 S.W.2d 477 (Mo. Ct. App. 1977).

the utility had to be reversed because the trial "court erred when it permitted the defendant to introduce evidence of an easement when it had pleaded only a general denial and not an affirmative defense [based on the] easement."[17]

The Missouri Court of Appeals, following state rules modeled on the Federal Rules of Civil Procedure, reversed and remanded for a new trial.[18] Perhaps the court was technically correct in accepting Ms. Layman's argument that the utility had the burden of pleading on this issue. But it is difficult to believe that Ms. Layman suffered any prejudice from the utility's failure to raise this issue in the technically correct form. What did Ms. Layman's lawyer think: that the utility just randomly dug up the yards of unsuspecting landowners without any color of right? In fact, representatives of the utility seemed to have contacted Ms. Layman before the digging began.[19] There seems to be no surprise at all, and hence no prejudice to Ms. Layman, from the utility's reliance on the easement as a defense. Under Rule 15(b), amendments are liberally allowed to conform to the evidence at trial. Still, there appears to be no reason why such an amendment would be allowed—or technically, even necessary in this case. So, how could the court of appeals rule against the utility?

This is the real interest of this case and contains a number of morals for the would-be lawyer. First, the utility apparently notified Ms. Layman before it went digging up her land, but it did not obtain her explicit agreement that its actions were allowed by the easement. Second, the utility's lawyers, probably brought into the case only after Layman was angry enough to sue, should have realized that their unsympathetic client, in an unsympathetic case, would have every technical mistake held against it. And last, but hardly least, perhaps there was something more to this story that led a technical procedural issue to stand for the injustice of letting the utility company prevail. In fact, the easement literally applied only to wires strung above the ground, not those buried under it.[20] This defect in the documents supporting the easement should have led the utility company to convince Ms. Layman that wires concealed below the surface presented less of a problem than wires strung above it. No doubt these issues take the case far from the technicalities of pleading, but that is the point. The merits of the case exercise a pervasive influence even on procedural issues seemingly well isolated from them. If this moral can be drawn from a case on how to plead an easement as a defense, I am sure that most of the cases we cover in Civil Procedure are open to similar treatment. Certainly, I invite my colleagues in the field to try to find them. Otherwise, we

17. *Id.* at 480.
18. *Id.* at 482.
19. *Id.* at 481.
20. *Id.* at 482.

leave unanswered—and often unasked—the question of why the parties and their lawyers even raised procedural objections in the first place.

IV. CONCLUSION

As teachers of Civil Procedure, we might aspire to a vision of our subject in which even the least significant detail finds its place within an integrated whole. Nothing is wrong with the aspiration to see our procedural world in a grain of sand, however small a part it might be of a concrete case. Yet, the recent history of our subject suggests another view: that despite this aspiration, the basic elements of procedure do not often combine into a harmonious whole, but instead assemble themselves into the discordant shapes of human conflict. Tracing the effects of these conflicts, on the overall structure of our procedural system and on particular cases within it, is a no less worthy goal than discerning the abstract symmetries of the system as it stands revealed by legal doctrine. Regardless of the other aims of the course, we would do well to make these conflicts, and the motivation that leads to them, one focus of our teaching.