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CONCEPTUAL OVERBURDEN IN THE SYSTEM'S OPERATION?: OF JUDGES AND SCHOLARS, JURISDICTION AND ALL THAT

*James Dickson Phillips, Jr. **

FEDERAL PRACTICE AND PROCEDURE, VOLUMES 13-19: JURISDICTION AND RELATED MATTERS. By *Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper*. St. Paul, Minn.: West Publishing Co. 1975-1982. \$26 per volume.

With the publication in 1982 of Volumes 19 and 20, Professors Wright, Miller and Cooper closed the ring on this superb multi-volume treatise on federal practice and procedure.¹ The publication of Volume 19 also completed the particular unit with which this review is concerned, that on Jurisdiction and Related Matters.

Given the dual significance of the unit's completion, it may be appropriate to indulge a preliminary thought about the coincidental completion of the entire work. Begun in 1969 with Charles Alan Wright's publication under his own name of the first three volumes of the successor work to the *Barron & Holtzoff* treatise,² which, starting in 1951, he had expanded and supplemented in "Wright Editions," the completed treatise runs now, thirteen years later and with the collaboration of several distinguished coauthors, to 25 bound volumes, including indexes, appendices, and tables. These volumes, in turn, are subdivided into four discrete, titled units that reflect the classic categories of adjective law: criminal procedure, civil procedure, jurisdiction and related matters, and evidence — essentially the gamut of practice and procedure as the term has been most widely perceived.

The completed treatise is a magnificent achievement of scholarship and plain hard work. Its completion entitles its principal author³ to the respect, admiration and gratitude of all who labor in the legal vineyard and, though they know it not, of all who have a stake in the effective administration of justice. As one who has directly benefited from this and the predecessor Wright-edited work as practitioner, teacher, and judge, I take this opportu-

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1. "Ring-closing" is used because these are not the last volumes in numerical order. The ring, of course, will continue to be opened from time to time by the addition of new bound volumes to accommodate expanded materials, as just recently with a new volume 10A.

2. W. BARRON & A. HOLTZOFF, *FEDERAL PRACTICE AND PROCEDURE WITH FORMS* (1960).

3. This is not to denigrate the contributions of the distinguished coauthors, Professors Miller, Cooper, Gressman, Graham, and Kane. Wright's ability to enlist the collaboration of such colleagues is but another measure of his achievement.

nity to express these sentiments for myself and, I feel sure, for countless others. While his financial rewards from the endeavor are — I hope and trust — adequate when measured by the world's standards, I have a notion, knowing something of his fierce pride of scholarship, that the achievement is itself no inconsiderable reward by more inward standards. May he long enjoy both.

The seven main volumes making up the Jurisdiction and Related Matters unit did not emerge full-blown as a unit but came volume by volume over a seven-year period, from 1975 to 1982. The first five, 13-17, published between 1975 and 1978, deal with fundamentals of the organization and judicial power of the federal courts, the basic grounds of district court jurisdiction — federal question, diversity, etc. — venue and removal in the district courts, jurisdiction of the courts of appeals and the Supreme Court, appellate procedure in both courts,⁴ problems of appealability under the appellate jurisdictional grants, and other matters intimately related to the exercise of those grants. The sixth volume, 18, published in 1981, deals with *res judicata*;⁵ and the last, 19, published in 1982, with the *Erie* doctrine.

This is of course a vast body of material, and major portions of it have been in the public domain and in heavy use by bench, bar and legal academe for a considerable period of time. Under the circumstances, an exegetic review of the whole is neither possible nor wanted, nor would it be bearable if attempted. As a general assessment, it suffices simply to observe that the high quality of the materials in this unit — as in the entire treatise — is immediately and persistently manifest, in terms of accuracy, organization, coverage, lucidity, depth of insight, and general style, to any user who puts it to regular test. It seems unnecessary to temper this general judgment with the customary examples which undoubtedly exist but which this reviewer has neither chanced upon nor bothered to ferret out — of significant flat inaccuracies, arguable errors of analysis, failures of coverage, and organizational oddities that inevitably occur in any endeavor of this magnitude. I turn instead to a few general ruminations stirred by contemplation of the unit as a whole.

The first has simply to do with the unit's coverage and is prompted by its title — Jurisdiction and Related Matters — specifically by the last part. The "jurisdiction" referred to is, of course, subject matter jurisdiction. The other dimension of judicial power — including personal, in rem, and quasi in rem (or, now generically, "territorial")⁶ jurisdiction — is systematically treated elsewhere⁷ in the treatise.

The "relatedness" in the title is therefore to subject matter jurisdiction.

4. The treatment of Supreme Court procedure is only interstitial to discussion of its jurisdiction. Court of appeals procedure is addressed directly in Volume 16, in connection with the Federal Rules of Appellate Procedure.

5. The *Res Judicata* volume has previously been reviewed in the *Michigan Law Review*. Casad, Book Review, 80 MICH. L. REV. 664 (1982).

6. See RESTATEMENT (SECOND) OF JUDGMENTS § 1(2) (1982).

7. See generally 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1064-1075 (1969) (discussed in conjunction with rule 4 governing service of process) [hereinafter cited as WRIGHT].

Despite the potentially unlimited reach of the term "related" when applied to any part of the law's seamless web, there may not be a more serviceable or informative one to embrace the topics here embraced. They comprise a body of concepts that have always lain uneasily, along with jurisdiction itself, within the general law of "practice and procedure." Of chief importance among these "related matters" may be noted: the concept of "justiciability" as primarily derived from constitutional case or controversy constraints on exercises of judicial power; subsumed concepts of standing, mootness, ripeness, feigned issues, etc.; other purely prudential limitations on exercises of jurisdiction — abstention principles and rules and principles restricting the scope of appellate review; timing limitations on exercises of appellate jurisdiction — the vexed problems of appealability and writ review; the choice of law problems forced by federalism, including federal common law and *Erie*; and, probably least "related," *res judicata*.

The "related matters" of the unit's title are essentially, therefore, all those concepts, doctrines, principles and rules whose emergence has been forced by the inevitable problems of operating the federal system within the constraints of the fundamental jurisdictional grants and of constitutional federalism. In rough sum, therefore, the "Jurisdiction and Related Matters" unit can be said to deal comprehensively with the structure (jurisdiction) and the dynamics of operation ("related matters") of the federal judicial system. This is, of course, a conceptually heavy body of law that, as I will show, is getting heavier.

Indeed, it is difficult to think of another substantial body of federal law on the "procedural" side of things — unless it be the whole of criminal procedure — that in recent years has undergone such an expansion and refinement of doctrine as has this one. Primarily, of course, this development has been in the realm of the system's dynamics — in matters "related" to jurisdiction. The basic structure of courts and jurisdiction has undergone little change despite all the talk of abolishing or reducing diversity jurisdiction, cutting back on selected elements of federal question jurisdiction, and constituting a new intermediate court of appeals. But in the "related matters" with which this unit deals, there is not only a flood of new cases but signs of a developing conceptual overburden whose causes and effects are an interesting subject for speculation and, possibly, concern.

The burgeoning space accorded these matters in the treatise reflects — though not in any exact measure — the underlying phenomenon. Of the numerous examples, two suffice as illustration.

Take first "standing." In Volume 13, published in 1975, a total of 61 pages of text and footnotes were devoted to this one facet of the more general concept of justiciability. When, in 1980, it had already become necessary to publish a bound cumulative supplement to this volume, a total of 54 pages of new annotated text along with another 60 pages of supplementary case annotations were added to deal with the standing decisions of the intervening five years. And, in the 1982 pocket supplement, there appeared yet another 37 pages, ten of which were devoted to new annotated text.

The explosion of abstention doctrine is similarly reflected in the treatise's allocation of page coverage. To this body of doctrine — which only first emerged in 1941 in quite limited form — the final Wright edition of the

predecessor work, as supplemented through 1975, devoted only around 30 pages of annotated text. When Volume 17 of the treatise under review was published in 1978, it gave to this topic a complete subchapter of 8 sections and around 103 pages of annotated text. And this has now been expanded in the 1982 pocket part by 42 pages of text and new and supplementary case annotations.

Generally comparable examples of doctrinal expansion in both case-volume and conceptual terms exist in other "related matters": e.g., *Erie* doctrine;⁸ government appeals in criminal cases;⁹ federal-state res judicata problems;¹⁰ political question doctrine;¹¹ mootness.¹² The case-volume expansion in these areas is undoubtedly explainable in major part simply as a consequence of the general explosion of litigation in recent years. The conceptual complication that has accompanied the volume surge is the more interesting, and bothersome, phenomenon. Here, again, it suffices to illustrate with three examples.

Take standing, again. Here the conceptual problem — analytically and definitionally — remains essentially at the level of its beginnings. We still grapple to capture and state the principle's essence at a serviceable level of generality. A flood of particularized decisions has not yet yielded the expected fruit of the common law decisional process — a workable general theory. Witness the Supreme Court's latter-day effort in *Davis v. Passman*,¹³ simply to lay better hold upon the core concept by differentiating it from the related concepts of jurisdiction, cause of action and remedy that have been around as fundamental elements of procedure from its earliest days. Perhaps an analytical and definitional problem this resistant to general resolution over so long a period may be logically intractable. But the case flood endures — with or without clear conceptual guidance for resolution of standing problems.

As a second example, take government appeals in criminal cases. While the ultimate source of new doctrinal complexity here is a relatively rare congressional alteration of a fundamental jurisdictional grant, the conceptual miseries arise from importing the dispositive matter of double jeopardy into the new statutory grant. The Criminal Appeals Act of 1970¹⁴ was interpreted early by the Supreme Court as being intended to remove all non-constitutional barriers to government appeals, leaving only those found in double jeopardy.¹⁵ Though the perceived congressional purpose was to remove the uncertainties inherent in the extant statutory grant dating from 1907, these uncertainties have proved to be nothing as compared to the imported conceptual problems of double jeopardy. Indeed, in the course of defining the new contours of permissible government appeals under double jeopardy constraints, the Supreme Court has encountered some of the most

8. 19 WRIGHT, *supra* note 6, at §§ 4501-4515.

9. 15 WRIGHT, *supra* note 6, at § 3919.

10. 18 WRIGHT, *supra* note 6, at §§ 4466-4473.

11. 13 WRIGHT, *supra* note 6, at § 3534.

12. 13 WRIGHT, *supra* note 6, at § 3533.

13. 442 U.S. 228, 236-44 & n.18 (1979).

14. 18 U.S.C. § 3731 (1976).

15. *United States v. Wilson*, 420 U.S. 332, 339 (1975).

difficult and inconclusive aspects of double jeopardy analysis in its history.¹⁶

Finally, take that old conceptual dragon, the *Erie* doctrine. Considering, in retrospect, the tortured conceptual maze through which so fundamental a matter as choosing the proper rule of decision for federal courts has been wrung evokes equal measures of wonder and grief. One by one the hoped-for general solutions — procedure or substance, outcome-determinative, overriding federal interest in procedural uniformity — have been revealed as merely inconclusive lurches along the path. Each of the periodic special insights into controlling principles — anti-forum shopping, inequitable administration of the laws, “primary obligations” — has lacked sufficient breadth or conceptual precision to provide a general solution. And while one might have hoped that over a period of forty-odd years the potential range of cases raising close *Erie* questions would have been substantially exhausted and decided, albeit on particularized bases without benefit of a controlling general theory, that simply has not happened. New variations continue to arise — the supply seems inexhaustible¹⁷ — and the conceptual tangle remains, despite the flood of intervening particularized decisions and the massive judicial and scholarly efforts to synthesize them.

The general picture suggested by these limited examples is one of vast expenditures of effort and time in wrestling with fundamental questions respecting basic operations of the federal judicial system — questions which, though heavily policy laden, are still essentially “procedural.” After all, they concern, in the final analysis, only “threshold” matters: May this government appeal be considered on the merits? May this action be prosecuted at all by this party? Which sovereign’s rule is to be applied to decide this case? Each of these examples is characterized by great conceptual difficulty which seems to be increasing in complexity rather than yielding to general solution by the normal synthesizing process. Consequently, substantial resources are being spent in coping with conceptual difficulties whose resolution in the particular case frequently leads only to the result that the merits are or are not addressed at the time and in the forum chosen by the instigating party. The system’s basic “procedure” seems to be afflicted with an increasing conceptual overburden in many of its most vital elements.

From a perception that the phenomenon exists in significant degree, rumination turns inevitably to causes. And the first wonderment is whether in

16. See the Supreme Court decisions starting with *United States v. Wilson*, 420 U.S. 332 (1975), and running, in order of decision, though by no means in a straight line, through *United States v. Jenkins*, 420 U.S. 358 (1975); *Serfass v. United States*, 420 U.S. 337 (1975); *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977); *Lee v. United States*, 432 U.S. 23 (1977); *Sanabria v. United States*, 437 U.S. 54 (1978); *United States v. Scott*, 437 U.S. 82 (1978).

The suggestion in text that these decisions involve inconclusive analysis is, of course, made with all respect. If the appraisal is valid, it simply reflects the conceptual difficulties that are the theme of this review. The line of decisions is indeed replete with recognitions by members of the Court of the tortured path of analysis. See, e.g., *Sanabria v. United States*, 437 U.S. at 80 (Blackmun, J., concurring).

17. As illustrations, this reviewer can cite with some wryness two recent examples in which he was unable to induce full panel concurrence in two *Erie* problem cases presenting new variations on the ancient theme. See *Yarber v. Allstate Ins. Co.*, 674 F.2d 232 (4th Cir. 1982); *Davis v. Piper Aircraft Corp.*, 615 F.2d 606 (4th Cir. 1980).

this field — as Professor Grant Gilmore has convincingly suggested did happen in the law of contract¹⁸ — the scholars may not be large contributors to the growing conceptual burden.

Certainly the intellectual power, the influence, and the sheer numbers of contemporary proceduralist scholars is adequate for the purpose. Indeed, one of the most interesting thoughts prompted by the completion of this second major multi-volume treatise on federal procedure is of the extraordinary number of truly first-rate legal scholars who have labored in recent years in the various fields of adjective law including, in particular, the federal courts and the federal system.¹⁹

But, for this reviewer at least, that possibility is quickly dispelled. Though the efforts of the great proceduralist scholars in matters of federal jurisdiction and related matters have been solid and influential, their primary thrust has been toward synthesis and critical commentary rather than the independent development of general theory. Of course, whenever fundamental re-thinkings of the basic structure and its procedure have been undertaken — as in the process leading to adoption of the federal rules of procedure and the more recent ALI jurisdictional study — the proceduralist scholars have participated by invitation, and with great influence. But aside from these occasional opportunities to redesign, their efforts have focused mainly on the matters of which I speak — expository, critical, and synthesizing endeavors directed at judicially developed doctrine. To the extent that standing, *Erie* and double jeopardy as a measure of appealability are examples of a general conceptual overburden in the federal system, the fault cannot be laid at these scholars' doors.

Indeed, it may be improper to suggest that fault can be laid at the door of anyone — unless it be Congress and the framers of the Constitution. And even as to these it is probably more accurate and fair to speak in terms of simple cause rather than fault. For the basis of the conceptual overburden is probably best attributed simply to fate and the adversarial system. Given the built-in tendency of the adversarial system, featuring party-shaping of issues, to run out every legal concept to and beyond its logical end, the move toward increasing conceptual complexity in these matters was predictable and essentially inexorable.

This can readily be seen by looking again, briefly, at one of the three examples of conceptual complexity chosen to illustrate the phenomenon.

The increasing conceptual difficulty and logical intractability of the "standing" problem simply reflect the underlying difficulty of continually adapting to increasingly more sophisticated procedural forms and substantive doctrine the premises of an adversarial litigation system that in its origins was a quite primitive one designed to resolve only an artificially

18. See G. GILMORE, *THE DEATH OF CONTRACT* 17-18 (1974).

19. To attempt an exhaustive listing of all those who should be included in the front ranks of the proceduralist scholars suggested in text would be far too risky. For starters and simply to illustrate, the following names gleaned solely from the spines of books currently on the shelves of a federal judge's chambers library would surely be included in any fair listing: Bator, Carrington, Clark, Cleary, Cooper, Cound, Currie, Dobbs, Ehrenzweig, Field, Fiss, Friedenthal, Graham, Gressman, Hazard, Israel, James, Kamisar, Kaplan, LaFave, Louisell, McCoid, Miller, Mishkin, Moore, Rosenberg, Shapiro, Vestal, Ward, Wechsler, Weinstein, and Wright.

constricted range of issues arising from an equally primitive body of private substantive law. The typical litigation pattern in which standing problems now arise is likely to involve multiple parties (public and private, class and individual, natural, and other) asserting substantive claims and defenses based in constitutional or statutory sources of public law. This pattern bears little resemblance to the paradigmatic litigation pattern of the system's origins in which two natural person parties litigated only a single issue of private common law, seeking narrowly circumscribed and standardized relief. It is no wonder that the originally primitive, related concepts of cause of action and remedy, along with party standing, have simply been wrenched from their conceptual moorings. What is going on here is of course something more profound than a "merely" procedural adaptation, but it has to be accomplished within the traditional procedural forms.

That there would be great conceptual difficulties and the necessity for a long period of working through this and other jurisdictionally related conceptual problems with a multitude of particularized decisions was preordained. Recrimination is not in order for either the courts or the scholars. We must simply stay at it for awhile.

In helping to work through these conceptual problems, the procedural scholars of our time must be given high marks. As indicated, their influence has been mainly felt with respect to synthesis and constructive criticism of the products of the belabored judicial process. Among the many examples are such single volume treatises as the highly influential Hart & Wechsler's *The Federal Courts and the Federal System*, now in its second edition,²⁰ and Charles Alan Wright's own amazingly compact and valuable *Law of Federal Courts*.²¹ In addition, many influential pieces appear in the law reviews, including, as a particularly interesting example, the series of articles constituting an unfolding colloquy on *Erie* among Professors Ely, Chayes and Mishkin in the aftermath of *Hanna v. Plumer*.²²

There is simply no way to reckon the influence on the courts and judicial doctrine of these and comparable scholarly endeavors. Certainly, this influence is even more pervasive than the actual citations in opinions would indicate. My estimate is that it is so pervasive that many judges might be made somewhat uncomfortable if its full extent were revealed. But I think the bench should not be troubled by the scope of scholarly influence. The interplay of judicial and scholarly efforts at clarifying and applying legal doctrine is an ancient and honorable one in our tradition, and should be freely recognized.

Which brings me, finally, full circle to the treatise unit under review. Surely one of the most difficult problems for authors of such a treatise is fixing upon the basic editorial purpose of the work and then maintaining it with reasonable consistency. Particularly for authors of a procedure treatise

20. P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (2d ed. 1973).

21. C. WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS* (4th ed. 1983).

22. Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974); Chayes, *The Bead Game*, 87 HARV. L. REV. 741 (1974); Ely, *The Necklace*, 87 HARV. L. REV. 753 (1974); Mishkin, *The Thread*, 87 HARV. L. REV. 1682 (1974).

tise, the problem of "for just whom are we writing" is acute. Every lawyer — at least every litigator — is a potential user. The subject matter is not sufficiently esoteric in all its elements that a generally sophisticated level is automatically dictated, as it may be in such areas as antitrust, patent or admiralty. The workaday lawyer may well need it for edification in the most mundane matters.

But for such a treatise there is also a wider potential range of readers whose quite different needs must also be taken into account: judges, law teachers, other scholars, and lawyers with difficult conceptual problems out of the ordinary course. The problem of balance and basic editorial purpose is exceedingly difficult, particularly with respect to subject matter that abounds in the kind of extremely difficult conceptual problems dealt with in the unit under review.

At several points in volume prefaces, the authors state editorial purposes that recognize the difficulties of striking a proper balance. An early one is "to provide extremely complete coverage of the cases" and to "emphasize the practical needs of the lawyer."²³ But in a preface to one of the later volumes, a more sophisticated assessment of the difficulties appears.²⁴ It may well reflect an accumulation of experience in attempting properly to treat open conceptual problems of the type that dominate the Jurisdiction and Related Matters unit while at the same time keeping in mind the "lawyer with a modest library and [a] problem that deserves more than just a glance at the rules."

My final judgment on the unit under review is that the authors have done an unusually fine job of maintaining a properly balanced approach. There are exceedingly good, straightforward expositions of what to the experienced federal practitioner may be "obvious" aspects of such mundane topics as amount in controversy, but to the young lawyer with his first such problem may appear to be a startling revelation of something never touched in law school.

But there is also a great deal of superb, sophisticated analysis of the more difficult conceptual problems that do abound in this unit. At their best, these are excellent free-standing essays synthesizing both the mainlines of judicial decision and the best of the scholarly commentaries upon the subject. Of the numerous examples, I would mention in particular the general discussion of standing doctrine in section 3531, the beautifully-crafted summary of the whole course of *Erie* doctrinal development in sections 4501-05, the exhaustive synthesis of the double jeopardy/government appeals decisions in section 3919 and the fine, tightly drawn analysis of political question abstention in section 3534.

Such carefully and lucidly written mini-essays are a particularly valuable resource for anyone, judge, lawyer, or teacher, who needs an accurate but manageable general overview in order to come to grips with a specific problem. It is the knowledge that these exist that causes me frequently to send a puzzled law clerk to this unit with the confident suggestion that it is likely to provide just such aid.

23. 4 WRIGHT, *supra* note 6, at x.

24. 21 WRIGHT, *supra* note 6, at vi.