



# Connecting Civil Rights and Civil Procedure

SIR HENRY MAINE FAMOUSLY OBSERVED THAT SUBSTANTIVE law is “secreted in the interstices of procedure.” George Rutherglen, the John Barbee Minor Distinguished Professor of Law, is among the many Civil Procedure professors who invoke this saying, if only to persuade skeptical students not immediately impressed with the inherent importance of procedure. (He has, however, seen no need to inform his students that this observation was offered in a book entitled *Ancient Laws*.) Wholly apart from the pedagogical value of this maxim, it highlights the inevitable connection between procedural rules and substantive rights. In much of his teaching and in articles on an astonishing array of subjects, Rutherglen has explored this connection.

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In particular, he has focused on what might be considered a variant of Maine’s observation, the idea that the protection of *liberty* also lies within the interstices of procedure. Rutherglen’s teaching and writing

thus emphasizes the link between civil rights and civil procedure. In his scholarship on employment discrimination, for example, Rutherglen has analyzed how procedural rules and devices such as class actions, joinder of parties, and the burden of proof have shaped the substantive law. In civil procedure itself, he has written on such issues as mass torts, personal jurisdiction, and the *Erie* doctrine. He has also written in the field of professional responsibility, which seeks to define and limit the role of lawyers within our adversary system of justice. Last but not least, he has written and taught in Admiralty, a subject where procedure and substance also are deeply intertwined. In all these fields, his overriding concern has been to ask what happens to a legal rule once it becomes the subject of litigation—how it operates, with what consequences, and at what costs.

Rutherglen came to the Law School in 1976 and has taught an unusually wide variety of courses, including Civil Procedure, Federal Courts, Conflict of Laws, Employment Discrimination, Philosophy of Law, Professional Responsibility, and Admiralty. Rutherglen joined the faculty after clerking for Justices William O. Douglas and John Paul Stevens on the Supreme Court. Both justices are known for their protection of civil rights and civil liberties. Rutherglen had previously served as a law clerk to Judge J. Clifford Wallace on the United States Court of Appeals for the Ninth Circuit, after receiving both his law degree and his bachelor's degree from the University of California at Berkeley.

Rutherglen's undergraduate degree, in philosophy, informed both his legal education and his subsequent scholarship. His studies also provided a welcome contrast to the many extracurricular activities at Berkeley during the late 1960s and early 1970s when he was a student there. Even at a distance (preferably up-wind, he says, from any clouds of tear gas), these events offered their own unique political education, revealing all too vividly the uneasy balance between dissent, disorder, and the rule of law.

These events also revealed what Holmes identified as the failure of general propositions to decide concrete cases. Many political pro-

grams expounded at Berkeley in those days made little practical sense. Those that did had to be tested against what could actually be achieved, whether it was ending a distant and costly war, achieving racial and gender justice, or promoting economic equality. Law seemed to Rutherglen at the time, and still does today, a way to bring political ideals down to earth, to see what difference they make and what consequences they have. This reformist agenda might seem far removed from the technicalities of Civil Procedure, but in fact, the conflict of opposing values, interests, evidence, and argument in our judicial system constitutes one way to give expression to and make meaningful our deepest societal commitments.

Civil rights litigation provides the clearest example of how procedural rules create the framework for arguments on fundamental social issues. One such issue arose in the early years after passage of the Civil Rights Act of 1964. Title VII of that act prohibits discrimination in employment. Plaintiffs bringing Title VII claims frequently argued for certification of class actions on the ground that “racial discrimination is by definition class discrimination.” In two articles, “Title VII Class Actions,” 47 *U. Chi. L. Rev.* 688 (1980), and “Notice, Scope, and Preclusion in Title VII Class Actions,” 69 *Va. L. Rev.* 11 (1983), Rutherglen analyzed the justification for special treatment of Title VII class actions and the particular circumstances in which class actions were certified. This analysis took account of both the procedural rule governing class actions and the substance of the plaintiff’s claim. Rutherglen explained how neither the procedural rule nor the substantive law could be applied without considering the other, and he argued that both together, on the facts of each case, determined the suitability of class litigation.

Another area in which procedural rules framed the debate over Title VII was affirmative action, where third parties often sought to intervene to support or oppose such plans. In “Procedures and Preferences: Remedies for Employment Discrimination,” 5 *Rev. Litigation* 73 (1986), Rutherglen analyzed the rights of third parties to intervene in this fashion and the consequences of allowing them to do so. Whatever

one concludes about the legality and wisdom of affirmative action, particular affirmative action plans cannot be assessed without considering the interests of all parties affected by them. Procedural rules on intervention and necessary parties assure that all these parties have a right to be heard.

From these procedural issues that affect the enforcement of Title VII, Rutherglen took the short step of considering how the substantive law under Title VII should be framed so that it can be effectively enforced. He took up this theme in a series of articles on sex discrimination in fringe benefits, burdens of proof under Title VII, the relationship between statutory and constitutional standards for affirmative action (with Daniel R. Ortiz), and more generally, the concept of discrimination itself. These articles led to others on statutes related to Title VII, such as the Age Discrimination in Employment Act, the Americans with Disabilities Act, Title IX of the Education Amendments of 1972 (concerned with sex discrimination in education), and most recently, the Reconstruction-era civil rights acts.

These last statutes provided an occasion to survey the entire history of civil rights law and its intimate connection with constitutional law. Rutherglen's article on this topic, "Custom and Usage as Action Under Color of State Law: An Essay on the Forgotten Terms of Section 1983," 89 *Va. L. Rev.* 925 (2003), is also a fine example of his extraordinary strength as a scholar. As the title suggests, this article concerns the meaning of the statutory phrase in Section 1983, which provides for damages against persons acting "under color of any statute, ordinance, regulation, custom, or usage of any State." By historical and jurisprudential analysis, Rutherglen showed that custom and usage were not, as is assumed today, summary terms for the enforcement decisions of government officials, but referred to patterns of private activity from which law might be derived.

On that view, custom and usage are not merely examples of action "under color of law," as the statute is always paraphrased, but also encompass pervasive private practices in which government officials

acquiesce, especially with regard to the institution of slavery. This insight is original and important, but Rutherglen's essay does not stop there. Rutherglen goes on to explain how understanding the original meaning of custom and usage sheds light on the scope of Congress' power under Section 5 of the 14th Amendment, a topic of considerable contemporary importance. In contrast to the Court's cramped reading of Section 5, Rutherglen explains how the original understanding of Section 1983 supports granting Congress the power to address specific customs when they are tolerated by the administration of state law, regardless of whether state law is in itself defective. As Dean John Jeffries remarked, when recently awarding Rutherglen the Traynor Prize in recognition of outstanding scholarship, this is a "wonderful essay—fine grained, nuanced, subtle" and contains the "first really new" insights about Section 1983 in a "generation of scholarship."

Along with this series of separate articles, Rutherglen has published several books that provide a more systematic treatment of the subject, in particular, *Employment Discrimination Law: Visions of Equality in Theory and Doctrine* (2001), and *Employment Discrimination: Law and Theory* (with John J. Donohue III) (2005). He has also co-authored a leading casebook on civil rights, *Civil Rights Actions: Enforcing the Constitution* (with John C. Jeffries, Jr., Peter W. Low, and Pamela S. Karlan) (2001). Perhaps the subtitle to this casebook best captures the common theme among his writings, as well as the perspective that he shares with his co-authors: in order to determine the real meaning of values, principles, and rights—whether they are found in the Constitution, statutes, or the common law—it is necessary to focus on how they are enforced.

Rutherglen's work does not stop there, however. His intellectual curiosity has led him recently to study the many complexities surrounding notice and compensation to class members, in contexts as varied as ordinary class actions and as extraordinary as the September 11th Victim Compensation Fund. In "Distributing Justice: The September 11th Victim Compensation Fund and the Legacy of the Dalkon

Shield Claimants Trust,” 12 *Va. J. Soc. Pol’y & L.* 673 (2005), he found a powerful precedent for the September 11th Fund in the Dalkon Shield Claimants Trust, a trust established to compensate victims of a defective contraceptive device. This article, demonstrates the fusion of substantive and procedural rights which Rutherglen believes to be essential for truly successful legal innovations. Taking his cue from the late Judge Robert R. Merhige, who presided over the Dalkon Shield litigation, Rutherglen believes that the challenges confronting our legal system today require a sense both of the tensions between substantive rights and procedural values and of how to make them work together. Indeed, this has been the overarching theme of Rutherglen’s scholarship and teaching.

As the description of his work suggests, Rutherglen is a rare combination of a true intellectual and careful lawyer. He is widely read but has an eye for detail shared by other outstanding attorneys. To quote Dean Jeffries once more, Rutherglen “understands everything from Fibonacci numbers to moral philosophy, including literature, a good deal of science, and even law school administration. At the same time, he is a superb lawyer who understands and demonstrates the careful, purposive, disciplined reasoning that are the hallmarks of quality lawyering.” Rutherglen’s scholarship and teaching nicely combine these two elements, and a generation of students and colleagues have benefited enormously from his learning and insights. ❁

## EXCERPTS

***International Shoe* and the Legacy of Legal Realism**

2001 *Sup. Ct. Rev.* 347

THE MODERN LAW OF PERSONAL JURISDICTION OWES ITS existence, and most of its structure and detail, to Chief Justice Stone's magisterial opinion in *International Shoe v. Washington* (1945). It does not, however, owe its legal rules to this opinion, because Chief Justice Stone set out systematically to discredit most of the rules that had previously restricted the exercise of personal jurisdiction. In this effort, he succeeded beyond his wildest dreams—or, perhaps more accurately, his worst nightmares. The law of personal jurisdiction, and of such related fields as venue and choice of law, has been swept clear of nearly all rules, at least those that can be applied in a more or less determinate fashion, yielding all-or-nothing results. Rules in this sense have been in a steady retreat since the decision in *International Shoe*, and not just with respect to the constitutional issues addressed in that case. State statutes on the exercise of personal jurisdiction have generally been interpreted to reach to the constitutional limits, or at least to approach them. Venue rules often are so generous in identifying a proper forum that they provide only a preliminary to the case-by-case application of transfer statutes and the judge-made doctrine of forum non conveniens. And choice of law, at least at the constitutional level and in states that have abandoned the first Restatement of Conflict of Laws, has abandoned all but the most lenient restrictions on a state's ability to choose its own law to govern a case.

Not all of these developments followed *International Shoe*. Some preceded it, such as the decisions on conflict of laws. But none are so well known and or so clearly changed our understanding of the limits on state



power over civil litigation. Before *International Shoe*, the law of personal jurisdiction was governed by the venerable decision in *Pennoyer v. Neff* (1878), which established as constitutional doctrine the theory of territorial sovereignty articulated by Justice Story in his treatise on the *Conflict of Laws*. The decision takes as its premise the principle “that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory.” Accordingly, the location of the defendant or the defendant’s property within the forum state at the time of service of process became crucial to the exercise of personal jurisdiction. This principle was subject to several exceptions, whose scope and importance increased over the decades of the late nineteenth and early twentieth century. Yet these exceptions remain confined within the strict territorial theory of *Pennoyer v. Neff*, until *International Shoe* replaced this network of detailed exceptions with a single overriding principle: that a state court can exercise personal jurisdiction over a defendant if he has “certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” This principle eventually displaced the entire conceptual structure of the strict territorial theory, and with it, most of the legal rules derived from that theory.

Some may deplore these consequences of *International Shoe*, while others may applaud them. Few deny that they have occurred. The only dispute, as a descriptive matter, is over how many remnants are left of the old formal territorial theory, such as the rule that service on an individual inside the forum state is always sufficient to confer personal jurisdiction. These exceptions stand like isolated ruins, revealing how completely the old rules have been devastated and how little reconstruction has occurred. This consequence should come as no surprise. The opinion in *International Shoe* is one of the enduring monuments of Legal Realism and this is, we are told, “a negative philosophy fit to do negative work.” Only the Uniform Commercial Code has a comparable pedigree as a product of Legal Realism and a comparable influence on existing law. Its provisions in Article 2 are derived directly from the realist teachings of Karl Llewellyn and these, too, have had a destructive influence on legal

rules, but not nearly so apparent and so complete as *International Shoe*.

What is surprising is that both of these contributions of Legal Realism have been attributed to the constructive rather than the skeptical branch of this movement in legal thought. The constructive phase of Legal Realism inclined towards empirical studies of law and reformist projects, like the Uniform Commercial Code, designed to bring the “law on the books” into closer harmony with the “law in action.” In its skeptical aspects, Legal Realism has been identified as the predecessor of Critical Legal Studies: as a thoroughgoing conceptual critique of the foundations of all legal rules. Yet it is difficult, in all the controversy that Legal Realism generated when it came on the scene, to find a more effective and more thorough job of “trashing” legal rules than has been accomplished by *International Shoe*. What’s more, this triumph of deconstruction was initiated by a pillar of the establishment, Harlan Fiske Stone, a former dean of the Columbia University School of Law, former Attorney General, Justice and then Chief Justice of the Supreme Court. Moreover, the scholars who recognized the critical implications of the opinion, to be sure some decades later, were hardly precursors of CLS: Philip Kurland and Geoffrey Hazard, both at the University of Chicago Law School at the time of publication of their articles, and Arthur T. von Mehren and Donald T. Trautman, both of the Harvard Law School. None of these authors sought to deconstruct the law of personal jurisdiction. On the contrary, they sought to build a general theory on the foundations of *International Shoe*. But what they built was not a theory of rules. At most, it was a call for particularized rules to be developed either through legislation or through case law. Neither of these developments has come to fruition.

This article offers one reason why not: Legal Realism made the criticism of legal rules far easier than the task of formulating and defending them, resulting in a systematic bias of modern jurisdictional analysis towards open-ended standards applied on the facts of each case. This conceptual bias has then been exploited by in-state interest groups—not the least of which has been the plaintiff’s bar—to expand the reach of state long-arm statutes so that virtually no restraints remain on the exercise of

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personal jurisdiction. Experience has now shown the need for some such restraints, and although the nature of these restraints remains a matter of dispute, the form that they take should not be slanted against legal rules. The roots of this bias lie in the realist origins of *International Shoe*. ❄

## Distributing Justice: The September 11th Victim Compensation Fund and the Legacy of the Dalkon Shield Claimants Trust

12 *Va. J. Soc. Pol'y & L.* 673 (2005)

THE SCALE OF MASS TORT CLAIMS SEEMS TO INCREASE inexorably and exponentially, as does the magnitude of the misfortunes giving rise to these claims. The terrorist attacks of September 11th furnish the latest and most tragic example of events giving rise to claims measured in the billions of dollars. The September 11th Victim Compensation Fund, established by Congress to compensate the victims of these attacks and their next-of-kin, paid out over \$7 billion in awards, with over \$4 billion more to be paid these recipients by insurance companies, charities, and other government programs. And these payments represent only a fraction of the compensation paid to businesses and others harmed by the terrorist attacks, which themselves bring the estimated total compensation to \$35 billion.

Figures this large defy comparison with any antecedents. Yet one model for the September 11th Fund stands out among the institutions created to remedy previous mass torts. It is the Dalkon Shield Claimants Trust, in which the Special Master of the September 11th Fund, Kenneth Feinberg, himself served as a trustee. He did, to be sure, bring extensive experience with mass torts to his position as special master, among them serving in the same position in the Agent Orange litigation. But it is the scale, the structure, and the accomplishments of the Dalkon Trust that provide a compelling precedent for the September 11th Fund. This article documents those similarities and the remarkable innovations that both of these funds brought to the resolution of mass torts.

The Dalkon Trust was created to resolve over 400,000 claims arising from the use of the Dalkon Shield, a contraceptive device manufactured by the A.H. Robins Company in the 1970's. Of these claims, 200,000 were

eventually resolved on the merits, resulting in payments of over \$2.8 billion from the trust. By way of comparison, many fewer individuals suffered direct injury from the September 11th attacks, but because so many of the victims died in the attacks, the resulting losses were far more severe. Almost 4,000 people were killed and almost 2,680 suffered physical injuries. The September 11th Fund handled many fewer claims than the Dalkon Trust—only a few percent of those considered by the trust—but paid out over twice as much in compensation.

If the size of the payments made by each of these funds is roughly comparable, so too, is the centralized control exercised over their administration. The Dalkon Trust resulted largely from the efforts of a single district judge, Judge Robert R. Merhige, to control the many claims arising from the use of the Dalkon Shield. Together with a bankruptcy judge, he presided over the reorganization of the A.H. Robins Co., the corporation that had manufactured the Dalkon Shield and that went bankrupt because of it. The reorganization plan eventually approved in these proceedings resulted in the sale of the company, the creation of the Dalkon Trust, and the funding of the trust from the proceeds of the sale. Judge Merhige also presided over a related class action involving claims against the company's insurers, which resulted in a settlement and the establishment of related trusts, and after all these trusts were established, he presided over their administration. Throughout these proceedings, many of the parties involved, and especially their attorneys, complained bitterly about Judge Merhige's control over the proceedings. These complaints echoed similar objections to the role assumed by Judge Weinstein earlier in the Agent Orange case.

These complaints, whatever merit they might have, carried no weight with Congress when it considered the legislation establishing the September 11th Fund. This statute and its implementing regulations give the Special Master virtually unrestricted discretion to determine the amount of compensation paid to claimants. By the very different methods of bankruptcy proceedings and congressional legislation, both compensation funds settled on a very similar administrative structure. Judge Merhige closely supervised the administration of the Dalkon Trust, even though it was formally

under the control of a board of trustees, and Kenneth Feinberg exercised still more power as the Special Master of the September 11th Fund.

The reason for concentrating control over these funds has less to do with how they were created than with the benefits resulting from foregoing the potentially ruinous cost of litigation on the scale necessary to resolve all the claims arising from a mass disaster. Procedures designed for deciding one claim at a time, or even hundreds of claims consolidated into a single case, cannot be used to decide cases involving a thousand times as many claims. These cases inevitably depart from the model of separate litigation of individual claims controlled by individual plaintiffs and their attorneys. Yet even as the inadequacies of this model of litigation are acknowledged, departures from it are recognized only as a matter of necessity: to avoid the cost and delay of adjudicating a seemingly unending series of similar claims. But the goals of mass tort reform must be broader: to exploit the gains from avoiding individualized litigation in order to secure more adequate compensation for individual claimants. And the proposals for reform must be correspondingly broader, embracing changes in the substantive rules of liability in addition to the procedures by which these rules are applied. Rights to recovery and exposure to liability must be modified in practice—even if they somehow remained unchanged as a matter of legal doctrine—to meet the needs of mass tort claimants.

If approximations are necessary, accurate approximations are also essential. This is the single most important lesson from the creation and operation of the Dalkon Trust and the one that was followed most faithfully in setting up and administering the September 11th Fund. [A] process of approximation achieves gains in efficiency by avoiding the costs, and in particular, the strategic behavior, associated with individualized adjudication. Those gains can be achieved, however, only if the resulting approximations approach or exceed the amounts that claimants could realistically have expected to recover through litigation. Otherwise, so many claimants will be dissatisfied with the relief offered to them that they will seek, by one means or another, to retain or revive their right to sue individually. Procedural and substantive rules should be shaped to achieve these two goals:

to save the cost of individualized litigation by offering only approximate recoveries, but by assuring that the approximation leaves claimants no worse off than they would be through litigation.

In seeking to achieve these goals, a compensation fund cannot neglect purely procedural values, such as individual participation in litigation, but it must recognize limits on their scope and force. Parties do not engage in litigation for its own sake, but only to serve some further purpose, such as obtaining compensation or avoiding liability for past injuries. Even the Due Process Clause conditions the existence of procedural rights on substantive interests in liberty or property that are threatened by government action. Procedure should follow substance, and not the other way around, inverting Maine's famous observation that "substantive law has at first the look of being gradually secreted in the interstices of procedures." In mass tort cases, the priority of substantive law requires procedural rights to be defined and allocated so as to encourage the acceptance of approximate remedies as a substitute for individual litigation.

Both the September 11th Fund and the Dalkon Trust sought to achieve this objective by a variety of different means, which nevertheless exhibit a surprising similarity in the overall approach taken by each fund and in the results that it achieved. [This article] examines the similar circumstances confronted by both compensation funds, and particularly the need to achieve a global resolution of many thousands of claims against multiple defendants. [It then] analyzes the way in which each fund effectively or formally altered the substantive rules that normally govern recovery of tort claims [and] the related changes in the procedural rules necessary to resolve these claims. ❧

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