Excavating Subtexts and Integrating Humanity in Civil Procedure

Bret Asbury
Excavating Subtexts and Integrating Humanity in Civil Procedure

Bret Asbury*

INTRODUCTION

I am currently in my fifth year as a law professor at Drexel University, where I teach Civil Procedure, Jurisprudence, and a Literature & the Law seminar. While Jurisprudence and Literature & the Law are fields arising directly out of the humanities, Civil Procedure—what with its heavy reliance on the Federal Rules and frequently unambiguous statutes—appears at first blush to exist in a separate realm, one of cold calculation and indifference to the human condition. It is perhaps for this reason that I had dispirited memories of Civil Procedure when I first set out to teach it five years ago. But as I have grappled with the material and evolved as a teacher over time, I have come to believe that the humanities can offer Civil Procedure a great deal, not only in terms of making this notoriously dry subject more engaging for my students, but in helping them to master the material as well.
Though I teach all three of my courses through a humanistic lens, I would like to highlight two humanities-inspired techniques that I have found to be particularly useful in teaching Civil Procedure. The first pedagogical technique is “close reading,” the method of pausing over and examining selected words, phrases, sentences, and syntax in order to reveal subtextual meanings that might not initially be apparent. I have found this technique particularly useful in teaching personal jurisdiction, perhaps the most vexing of the topics customarily covered in an introductory Civil Procedure course. The second pedagogical technique I would like to highlight relates to my broader framing of Civil Procedure. Instead of teaching the course piecemeal, as a series of discrete topics, I endeavor to frame the whole of Civil Procedure as a clash of two competing grand narratives—the quest for justice versus the desire for courts to adjudicate disputes as quickly and inexpensively as possible. These two objectives are often at odds, and as we read cases, Rules, and statutes, I go to great lengths to underscore the struggle judges, drafters, and legislators necessarily face in resolving tensions between the two.

In this Essay, I will elaborate on how I employ these humanities-based techniques—one derived from literary criticism and the other aimed at establishing the humanistic struggle that I believe lies at the core of Civil Procedure—and the positive effects they have had on my students’ understanding of this challenging subject.

I.

EXCAVATING SUBTEXTS THROUGH CLOSE READING

I have most frequently employed close reading in attempting to help my students understand personal jurisdiction, a topic that, absent some contextual framework, tends to confound first-year law students. For years my chosen contextual framework has arisen out of “close reading,” a literary technique that, as noted above, focuses on deliberate, often narrow, textual analysis. The line of cases from *Pennoyer v. Neff* through *International Shoe* through *Shaffer,*

---

1. I use the term “close reading” not in the sense of merely reading closely, which is essential to success in any law school class, but rather as a term of art arising out of literary criticism. “Close reading” as used here refers to “the detailed analysis of the complex interrelationships and ambiguities (multiple meanings) of the verbal and figurative components within a work.” M.H. ABRAMS & GIOFFREY GALT HARPAN, A GLOSSARY OF LITERARY TERMS 242 (10th ed. 2012). As Abrams and Harpham note, “‘Explication de texte’ (stressing all kinds of information, whether internal or external, relevant to the full understanding of a word or passage) had long been a formal procedure for teaching literature in French schools, but the explicative analyses of internal verbal interactions characteristic of New Criticism derives from such books as I.A. Richards’ Practical Criticism (1929) and William Empson’s Seven Types of Ambiguity (1930).” Id. See also DAVID MIKICS, A NEW HANDBOOK OF LITERARY TERMS 61 (2007) (describing close reading as the “discipline of careful, intricate study of a text, championed in the mid-twentieth century by the New Critics” and noting that “[t]o read closely is to investigate the specific strength of a literary work in as many details as possible” and “understanding how a text works, how it creates its effects on the most minute level”). As discussed infra, I frequently utilize this literary technique in analyzing legal texts, most notably judicial opinions.
2. 95 U.S. 714 (1878).
ebbs and flows, reflecting changing judicial attitudes with respect to sovereignty and the importance of state lines, ease of travel, foreseeability, and the distinction between individuals and entities. Anticipating my students’ inevitable confusion were I to address each case in isolation, I employ close reading of the cases as a whole in an effort to reveal certain currents and subtextual tropes that are essential to truly understanding the reasoning and principles that serve as personal jurisdiction’s foundation. During discussions of *International Shoe*, for example, we closely examine the following passage:

> Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact, it is clear that unlike an individual its “presence” without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it. To say that the corporation is so far “present” there as to satisfy due process requirements . . . is to beg the question to be decided. For the terms “present” or “presence” are used merely to symbolize those activities of the corporation’s agent within the state which courts will deem to be sufficient to satisfy the demands of due process. Those demands may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there.  

We spend a great deal of time reading and unpacking these four sentences because I believe they form the heart of the Supreme Court’s personal jurisdiction jurisprudence over the past seventy years. The conception of “presence” explored here has for decades shaped interpretations of the meaning of “traditional notions of fair play and substantial justice” courts must apply in deciding any personal jurisdiction case. That this notion of “presence” often must rely on a “fiction” is a second observation I explore with my students at length, one that can be destabilizing for the many who are accustomed to thinking of presence or absence in literal terms, but is crucial to all in understanding personal jurisdiction as we move forward. Finally, in unpacking this passage I note a peculiar circularity that repeats itself.

---

10. 326 U.S. at 316–17 (citations omitted).
12. A close reading of the above paragraph also makes clear the fact that corporate presence and individual presence, though sharing similarities, are not to be treated in the same way. As the Court observes, “unlike an individual [a corporation’s] ‘presence’ without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it,” whereas an individual can literally be present within a given state. *International Shoe*, 326 U.S. at 316.
throughout the personal jurisdiction canon. The *International Shoe* Court tells us that a defendant shall be deemed to be “present” for personal jurisdiction purposes only to the extent that its activities in a forum state make it reasonable to require it “to defend the particular suit which is brought there”—due process requires a defendant’s presence, but presence itself is determined by reference to due process. Recognizing this paradoxical circularity is essential to understanding how courts have, and will in the future, address the simple question of whether a court may exercise personal jurisdiction over a given party. Close reading helps to bring about this recognition.

To be sure, performing a close reading of this passage is time-consuming, and excavating the numerous meanings and potential ambiguities of these words proves challenging for many students. But I have judged the time and effort to be worthwhile in enhancing student understanding of this challenging topic, and this observation has been supported by numerous student evaluations and personal conversations, the general tenor of which has been that conceptualizing personal jurisdiction through close reading and extensive explication has made this frequently beguiling concept and its corresponding, often seemingly contradictory, cases far more coherent and understandable.

More broadly, I have also found close reading to be helpful in exploring the human element of judicial decision making. In deciding personal jurisdiction cases, courts must interpret subjective terms such as “traditional,” “fair,” “justice,” and “reasonable” in order to sustain or overrule a state’s power to assert its authority over an out-of-state defendant. The Supreme Court, vested with the ultimate authority to determine state power in this realm, has often displayed a certain uneasiness in personal jurisdiction cases. Though one can observe this uneasiness on a number of fronts, close reading reveals a telling syntactical tic that is surprisingly common in personal jurisdiction cases, one that is particularly useful for first-year students to recognize as they begin to understand that even a primarily Rules-based field such as Civil Procedure can be highly subjective.

In personal jurisdiction opinions, Supreme Court Justices often rely on a rhetorical device called litotes. The Oxford English Dictionary defines litotes as “[a] figure of speech, in which an affirmative is expressed by the negative of the contrary; an instance of this.” For example, there is a marked distinction between observing that a colleague’s draft is “good” versus saying it is “not

---

13. *Id.*; cf. *id.* at 318 (“True, some of the decisions holding the corporation amenable to suit have been supported by resort to the legal fiction that it has given its consent to service and suit, consent being implied from its presence in the state through the acts of its authorized agents. . . . But more realistically it may be said that those authorized acts were of such a nature as to justify the fiction.”). This passage underscores the circularity noted in the accompanying text.

14. For example, the fractured opinions in *Asahi* (relating to stream of commerce analysis) and *Burnham* (relating to precisely why an assertion of personal jurisdiction over an individual defendant who is served within the forum state accords with due process) suggest this uneasiness.

Litotes is often used as a form of understatement, as a way of expressing a sentiment mildly rather than with full force. Through close reading, I show my students how the Supreme Court employs litotes in just this way and that this syntactical choice can be read as an indicator of the uneasiness many Justices experience when tasked with deciding such weighty cases based on subjective, individual notions of “traditional,” “fair,” “justice,” and “reasonable.”

*International Shoe* again provides a useful example. There, Justice Stone observes that where an out-of-state corporation incurs obligations that are connected to its in-state activity, “a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, *hardly be said to be undue.*”17 “Hence,” Justice Stone adds, “we cannot say that the maintenance of the present suit in the State of Washington involves an unreasonable or undue procedure.”18 Along similar lines, Justice White declares in *World-Wide Volkswagen* that “it is not unreasonable to subject [a defendant] to suit in [a State] if its allegedly defective merchandise has there been the source of injury to its owner or to others.”19 Justice Brennan employs litotes as well, both in his majority opinion in *Burger King* (“[W]e conclude that the District Court’s exercise of jurisdiction . . . did not offend due process”20) and his dissents in *World-Wide Volkswagen* (“The petitioners are not unconnected with the forum”21) and *Asahi* (“I cannot join the plurality’s determination that Asahi’s regular and extensive sales . . . in California is insufficient to establish minimum contacts with California”22). So too do Justices Marshall (in *Shaffer*23) and Scalia (in *Burnham*24) employ this form of

---

16. The *International Shoe* Court observed in 1945 that “due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” *International Shoe*, 326 U.S. at 316 (quoting *Milliken*, 311 U.S. at 463) (emphasis added). Subsequent Supreme Court personal jurisdiction cases have consistently relied upon this articulation of the relationship between due process and personal jurisdiction in settling disputes. In both *International Shoe* and its progeny, reasonableness has been at the heart of the inquiry as to whether a given assertion of personal jurisdiction over a foreign party is consistent with traditional notions of fair play and substantial justice. See, e.g., *id.* at 317 (noting that the demands of due process “may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there”) (emphasis added); *World-Wide Volkswagen*, 444 U.S. at 292 (“The protection against inconvenient litigation is typically described in terms of ‘reasonableness’ or ‘fairness.’”); and *Burger King Corp.*, 471 U.S. at 480 (“Rudzewicz’ refusal to make the contractually required payments in Miami, and his continued use of Burger King’s trademarks and confidential business information after his termination, caused foreseeable injuries to the corporation in Florida. For these reasons it was, at the very least, presumptively reasonable for Rudzewicz to be called to account there for such injuries.”) (emphasis added).

18. *Id.* at 320 (emphasis added).
20. 471 U.S. at 487 (emphasis added).
21. 444 U.S. at 506 (emphasis added).
22. 480 U.S. at 121 (emphasis added).
23. “There have, however, been intimations that the collapse of the in personam wing of
understatement in personal jurisdiction cases. I do not mean to overstate the point, but rather to show that the Justices often employ litotes as a means of separating themselves from direct assertion in personal jurisdiction cases and that this separation can be read as a reflection of the anxiety they feel in deciding such weighty cases on such subjective grounds. Close reading brings this observation to the forefront and helps my students begin to recognize that judges, even Supreme Court Justices, struggle with some of the same anxieties and discomforts that they do in determining what the law is and should be.

II.

CIVIL PROCEDURE’S GRAND NARRATIVE

For the reasons discussed above, I have found close reading to be particularly useful in teaching personal jurisdiction. Though I employ the technique throughout my course, as the semester moves forward into an examination of the Federal Rules, the preclusion doctrines, and joinder, a second technique steeped in the humanities takes on greater prominence in my pedagogy. Hoping to address what I perceived to be Civil Procedure’s narrative void, I have in recent years begun to emphasize that much of its law and doctrine—particularly the Rules and contemporary perceptions of preclusion and joinder—can be understood as existing on a battleground between two competing narrative aspirations: finality and justice. Teaching the balance of Civil Procedure against the backdrop of these grand narratives allows students to understand our shared texts as part of a wary coexistence between the two and to further appreciate the humanity of the judges who must decide these cases.

Federal Rule 1 provides that the Federal Rules “should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.” As I point out in my first lecture, these objectives are often in tension, and determining when to privilege any one over the other two is frequently challenging and always context-specific. Ultimately, the judges deciding these cases, I often remind my students, are human beings, cloaked in rectitude, but human nonetheless. And in deciding a given case, judges must frequently choose among co-equal priorities to which they are duty-bound to adhere.

At times, finality is deemed most important. For example, the doctrines of claim preclusion (res judicata) and issue preclusion (collateral estoppel) prevent relitigation of certain claims and the reopening of certain issues that have

---

24. “Because the Due Process Clause does not prohibit the California courts from exercising jurisdiction over petitioner based on the fact of in-state service of process, the judgment is Affirmed.”

25. FED. R. CIV. P. 1.

26. See 18 MOORE’S FED. PRACT. § 131.01 (3d ed.) (“The classic formulation of the claim preclusion doctrine, also known as res judicata, . . . was set forth by the United States Supreme Court more than one hundred years ago in the case of Cromwell v. County of Sac: ‘[T]he judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a
been resolved in a prior litigation. Similarly, it is axiomatic that a losing party may not attack a judgment collaterally on jurisdictional grounds where jurisdiction was challenged in the original action, regardless of how plainly correct the jurisdictional challenge might be.\(^{28}\) In each of these instances, the desire to reach a final result precludes further inquiry with respect to the underlying merits of a given case; it does not matter which party is correct on the merits—the earlier judgment will stand. As the Supreme Court stated over eighty years ago, “Public policy dictates that there be an end to litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered settled as between the parties.”\(^{29}\)

But at other times, the quest for justice assumes prominence. The desire for courts to reach the correct or just result is embodied not only in a robust appeals process incorporating in the federal courts and most states two levels of appellate jurisdiction, but also in Rules 50(b)\(^{30}\) (permitting a court to reject a jury’s verdict as a matter of law), 59(a)(1)\(^{31}\) (providing grounds for when a court may grant a new trial), and 60(b)\(^{32}\) (providing grounds for relief from a prior judgment for five enumerated reasons or for “any other reason that justifies relief”). Judges are thus given the discretion to invalidate judgments in the name of justice through a number of procedural devices, and where they take advantage of the opportunity to do so, it is often at the cost of forestalling finality.

Current joinder rules further illustrate this tension, as they both require the joinder of certain parties (per Rule 19) and permit the joinder of certain others (per Rule 20). Permissive joinder is by definition discretionary, and all three of Rule 1’s objectives—just, speedy, and inexpensive—come into play for a judge deciding whether to join an additional party under Rule 20. Adding parties usually further complicates and lengthens a trial, and it adds to the expense the individuals or entities already party to the litigation must incur. But there are also frequent scenarios in which a court cannot reach an optimal result without the participation of certain non-required absentees. It follows that in weighing whether to add a permissive party, a judge must assess the importance of

---

\(^{27}\) See 18 MOORE’S FED. PRACT. § 131.01 (3d ed.) (“Under the doctrine of issue preclusion, or collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party (or privy) to the prior litigation. Issue preclusion therefore applies to prevent, or estop, relitigation of the same issues in a subsequent case.”) (footnote omitted).

\(^{28}\) See 16 MOORE’S FED. PRACT. § 108.03 (3d ed.) (“A mistake in jurisdiction may be challenged either in the court in which the action is originally brought (i.e., first forum or F-1) or, if no such challenge is made in F-1 and the mistake in jurisdiction is not waived, in a later proceeding in a different court (i.e., F-2).”) (footnote omitted).

\(^{29}\) Baldwin v. Iowa State Traveling Men’s Ass’n, 283 U.S. 522, 525 (1931).

\(^{30}\) See FED. R. CIV. P. 50.

\(^{31}\) See FED. R. CIV. P. 59.

\(^{32}\) See FED. R. CIV. P. 60.
reaching a final result as quickly and inexpensively as possible relative to the importance of reaching the most just result.

As these examples illustrate, finality and justice—two core objectives of Civil Procedure—are at times in tension, and courts are often tasked with determining when to privilege one over the other. In teaching Civil Procedure, I endeavor to show my students the folly of adhering too closely to either policy preference—both the finality and justice narratives should be taken seriously and at times permitted to assume prominence. Key to my pedagogical approach is showing my students that this tension arises repeatedly and that skilled advocates (as I hope they will soon be) can make an argument in favor of privileging either under almost any set of facts. In order to do so, they must recognize the importance of both objectives—accepting them as co-equals in the orderly administration of the courts—prior to determining that one should trump the other under a given set of facts. I consider this to be a humanistic approach because it strips away much of the objectivity of legal decision making and boils it down to a human choice between two competing, meaningful objectives. I encourage my students to think of the judge’s predicament from this human perspective and to understand that he or she is often torn between two divergent grand narratives relating to core principles he or she is sworn to promote. Understanding cases in this way—with a recognition of the inherent contradictions in how courts and legislatures have decided to craft and interpret the Rules and doctrines of preclusion and joinder—fosters a more meaningful understanding of why judges acted as they have in the past and how they might act in the future. This in turn helps my students to become better advocates, both in the classroom and, hopefully, as practicing lawyers after graduation.

CONCLUSION

This has been a brief discussion of how I employ humanities perspectives in teaching Civil Procedure. I have found close reading to be helpful in illuminating the subtext of many personal jurisdiction opinions and the use of grand narratives to explain other areas of Civil Procedure to be beneficial for my students. That judges are at times uneasy, often contradictory, and always human is at the heart of my endeavor. The sooner law students recognize that the constraints of prior cases, Rules, and statutes can only get us so far—that humanistic concerns are often at the heart of legal decision making, even in Civil Procedure—the better off they will be as students and lawyers. Teaching Civil Procedure in this way is my attempt to share this revelation with my students from the first day of law school.