Class of 2022

ORIENTATION | AUGUST 2019

The following materials will be covered during the Orientation Program. Please review all materials and attempt to brief the case beginning on page 16 in preparation for the program.

Passion *into* Practice.

GONZAGA UNIVERSITY | School of Law

TABLE OF CONTENTS

SECTION I. PROFESSOR SEPUNICK'S CLASS

THE LAW SCHOOL CASE METHOD

Many of your law school courses, particularly in the first year, will be taught at least in part through the use of cases – particularly the written decisions of courts in appellate cases. This teaching method was developed in 1870 by a Harvard law professor named Christopher Columbus Langdell. Langdell was impressed with the results of the scientific method in the natural sciences, by which scientists formulated theories to explain specific phenomena. In a similar vein, Langdell suggested that individual cases could be studied to determine what general rules could be derived from specific results. For example, if judges routinely refused to award damages in accident cases where the defendant was not at fault, the conclusion could be drawn that fault is a necessary element to the recovery of damages in an accident case.

This scientific method affected not only the study of law, but also prevailing notions about what law was. At the time Langdell developed the case method, few lawyers would have characterized the common law as judge-made. Instead, they considered the common law to be an offshoot of natural law, which judges could discover or discern through the use of reason. Such views are rare today. Most lawyers and scholars now consider the common law to be the creation of judges, just as statutes are the creation of legislatures.

Nevertheless, the case method of study endures. Indeed, if the changing perceptions about law have had any effect at all, they have made the case method more relevant. The case method focuses on judicial opinions not merely to discern legal rules and predict how future cases are likely to be resolved. In short, its goal is not limited to the dissemination of legal doctrine. The case method is also – perhaps primarily – a technique to help students develop the legal reasoning skills essential to the practice of law. In other words, by reading and analyzing cases, students can learn what types of legal arguments work best (*i.e.*, are most likely to persuade judges). From there, they can begin to construct effective legal arguments on their own.

Thus, for our purposes (and, indeed, for the purposes of lawyers too) the outcome of any particular case is often far less important than the reasoning upon which it rests. For that reason, you must quickly learn to focus on the court's analysis of the problem before it. One way to focus your study is to brief each case.

READING AND BRIEFING CASES

A "brief" of a case is a short, written summary of the important facts, issues, reasoning, and points of law discussed in an appellate decision.[1] Mastery of brief-writing skills is imperative for success in law school.

The key to writing a functional brief lies in first determining its purpose. There are several different reasons for briefing cases, each calling for a different type of brief. Students often prepare written briefs solely for use in class recitation. Rather than resort to memory when called upon to discuss the case in class, a student may rely upon the brief – sometimes to the point of reading it aloud. Briefs written for this purpose are not usually very helpful, largely because most students, particularly during their first year, will fail to anticipate most of the questions that the professor will ask. On a more practical level, the chances of being called upon in class to discuss any particular case are slim, the probabilities obviously varying with class size, the professor's teaching method, and other considerations. Briefing cases for classroom recitation may avoid a momentarily embarrassing classroom experience, but the effort and time consumed in preparing a brief solely for this purpose generally outweigh its benefits.

Preparation for final examinations is another standard justification for briefing. After all, in all your courses combined there will simply be too many cases and they will be too complex for you to remember without some form of written organization. Yet early in your law studies it is difficult to write briefs that will accomplish this purpose. You may find, once your ability to analyze legal opinions has developed, that briefs prepared during the first few months of law school are of minimal assistance. Accordingly, when you are preparing for final examinations and grades are at stake, do not rely too heavily on briefs you prepared in the early days of law school.

Thus we reach the real objective of brief writing: to aid in the comprehension of cases. Brief writing requires precise analysis. The process of distilling information into the brief forces the reader to think about what is being decided and to follow the court's reasoning. Committing your impression of a case to paper also forces you to learn legal terminology and to begin thinking critically. Briefing cases thus refines legal analysis and writing skills, and, like a dress rehearsal, prepares you for writing exams and practicing law. Preparing briefs should also reveal those areas in which your comprehension is less than adequate. Appreciating what you do not know is a necessary stage in the learning process.

Because brief writing is best thought of as part of the learning process, and all of us learn a bit differently, there is no single right way to brief cases. You must develop the style and format that suit your purpose. That said, one thing about briefs is universal: the benefit is not from *having* a brief; it is from *writing* it. You can acquire briefs from someone else, but that act will not help you develop the skills you need. Indeed, it may actually interfere with the development of those skills.

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[1] Distinguish this from a lawyer's brief to the court, which is a persuasive memorandum of law addressing legal issues involved in a case.

Until such time as you acquire a reasoned basis for using some other format, you are well advised to prepare briefs that: (1) have wide margins or occupy just one side of a page, so that you may take your class notes next to your brief of the case under discussion; and (2) contain separate sections for Facts, Procedural History, Issue(s), Holding, Reasoning, Judgment, and Evaluation. A short description of each of these sections and a sample case brief follow.

ELEMENTS OF A CASE BRIEF

Identification of the Case

At a minimum, in each brief you should include the case name, the deciding court, and the year of the decision. Knowing the case name allows you to refer to the case easily; the deciding court provides insight into the precedential value of the decision; the year tells you the historical context of the case and the opportunity of subsequent courts to limit, expand, or overrule the decision. You also may want to include the page of your casebook on which the case appears, so that you may refer back to it easily when you review, or the volume number of the reporter and the page on which the case begins (its citation), so that you may refer others to the case should the need arise.

Facts

Your brief should include all the legally significant facts on which the court relied in deciding the case. The factual circumstances of a dispute are essential to understanding a court's opinion and to predicting the outcomes of future disputes. You must read the entire opinion and understand the issue and the court's rationale before you can select which facts were necessary for its result. For this reason, some students find it easier to write the facts section of a brief after they have written the issue and rationale sections.

Appellate courts typically do not decide what the facts are; rather, they determine the legal significance of the facts found by the trial court. Moreover, in writing their opinions, appellate courts often cull the facts they deem significant from all the other facts asserted in the pleadings or proven at trial. Nevertheless, you should not simply adopt verbatim the appellate court's statement of the facts. Courts often mention facts that are not necessary to its result. For example, specific amounts, dates, and similar details rarely are essential to a court's rationale or to the outcome of a case. The court may include other facts because they add drama or narrative continuity to an opinion. So, go through the opinion carefully and extract those facts that are necessary to explain and evaluate the decision. That said, bear in mind that the court may have neglected to mention facts that, in the Evaluation section of your brief, you decide are or should be important. Be sure to include those too.

At a minimum, your facts section of a brief should identify the parties, their relationship to each other or "status," and the nature of their dispute. Your briefs may be easier to understand if you use the trial court designations for the parties (plaintiff, defendant), rather than the appellate court designations. At first glance, you cannot know whether the appellant was the plaintiff or

defendant below. Using appellate labels can also be confusing because appellate labels may differ from jurisdiction to jurisdiction. Some jurisdictions call the party bringing the appeal the "appellant"; others use the terms "plaintiff-in-error" or "petitioner." Correspondingly, some jurisdictions call the party that prevailed at trial the "appellee," while others use the terms "defendant-in-error" or "respondent." Eliminate confusion by consistently using the trial court labels.

Alternatively, you also may find it helpful to refer to parties by their role in the drama, for example "seller" or "buyer," "landlord" or "tenant." This role may reveal something about the nature of the dispute, especially if you also include information about the status of the parties, for example "plaintiff/buyer." Employees usually bring certain kinds of suits against employers; tenants bring certain kinds of suits against landlords.

Include the nature of the dispute in your brief, for example, whether it is a contract, tort, or criminal proceeding, and the facts on which the claim is based – that is, who did what to whom, with what result.

First-year law students frequently underestimate the importance of the facts section of the brief because it seems less "legal" than other sections of the brief and closer to the kind of literary narrative they encountered as undergraduates. For this reason, they sometimes skim over the facts when reading cases and recount them in a cursory manner in briefs. Because the first-year courses emphasize the common law, however, the facts of cases are extremely important. They may be the only factor upon which to distinguish later cases. Moreover, the facts, or "story," personalize a dispute and can provide a good mnemonic device for remembering other elements of the case.

Procedural History

The procedural history section of your brief should explain what happened in the trial court and in any intermediate appellate court. It contains the legal history of the case. You should include who sued whom, the legal theory or kind of action, the relief sought, and the outcome in the trial court. Pay particular attention to the procedural device through which the trial court decided the case. Was it decided on a motion to dismiss? A motion for summary judgment? After a trial before a jury? The answers to these questions affect how much deference the appellate court will give to the judgment rendered by the trial court.

In the procedure section, you should also include the result of any intermediate appeals. For example, if one of the parties appealed to an intermediate appellate court and that court reversed the judgment of the trial court, the court of last resort will review the intermediate appellate court's decision, not the trial court's. You therefore should summarize the bases on which the trial and intermediate appellate courts rendered their judgments. The bases on which the court of last resort renders its opinion may differ from those of both lower courts.

This section will be more important in some contexts than in others. In any event, however, the procedural posture of a case often can explain what otherwise appears to be an anomalous result and thus the importance of the procedural context in comprehending the ruling of an appellate court cannot be overstated.

Issue

The issue is the question that the appellate court must answer to resolve the dispute before it. Many opinions address multiple issues; casebook authors, however, usually edit opinions so that they contain only one or two issues on which students should focus. If the case addresses more than one issue, you should have a separate statement of each issue and holding, and separate paragraphs for each issue with the Reasoning and Evaluation sections.

Write the issue in question form, tailoring it to the case by including the legally significant facts of the case. Frame your issue in two different ways. In one phrasing, state it as narrowly as possible because courts usually attempt to resolve the disputes before them on the narrowest possible grounds. If your issue statement can apply to other cases, your statement may be too general. Check to see whether you have missed any legally significant facts that make this case differ from others. Then phrase your issue more broadly. This may help identify the possible significance of the case and the types of other disputes to which the court's decision may be applied in the future.

The interplay between the facts and the applicable law creates the issue in a case. Legal principles regulate the relationships among parties, their respective rights and responsibilities, and their remedies if a dispute develops. The facts of a case thus determine whether a particular legal principle will apply. For example, the plaintiff in a civil case must establish all the elements of a cause of action; the absence of a single element may bar the plaintiff from obtaining relief. If, on appeal, the defendant disputes whether the plaintiff demonstrated a particular element of the action, the appellate court will focus its analysis on the proof surrounding that element. In other cases, the court may focus on a procedural defect (for example, lack of personal or subject matter jurisdiction or an improper jury instruction) or an affirmative defense (such as statute of limitations or payment). Liability, guilt, or innocence are less important in issue questions than the legal theory and facts on which the outcome is premised.

Courts often state issues in broad terms that do not describe the case before them very well. For example, a statement that "we must decide whether the trial court erred in entering summary judgment for the defendant" tells little about the case before the court. You must glean the precise issue from the facts and the court's evaluation of their significance. Remember that the law does not exist in a vacuum: without the specific facts of the dispute, the court cannot determine the appropriate application of law. Thus, the issue asks what law appropriately applies to the facts of the case.

Holding

The holding is the court's response to the issue question. The holding may be stated as a single word ("yes" or "no") if it immediately follows a statement of the issue, or as an affirmative or negative restatement of the issue question. If you restate the issue as a declarative sentence incorporating the holding, you state the "rule" of the case. For example, suppose that the issue in the case you are reading is, "should a 16-year old driver of a motor vehicle be held to an adult standard of care – rather than a child's standard of care – because driving is in an adult activity?"[2] If the holding is "yes," you can form the "rule" from the case by combining the issue and the holding into an affirmative statement: a 16-year old operator of a motor vehicle must comply with an adult's standard of care rather than a child's standard because driving is an adult activity.

Often courts call the specific result of a case its holding, for example, "We hold that defendant is liable to plaintiff." Because the purpose of a case brief is to understand the court's decision and to predict the outcome of future cases, such a statement divorced of factual context is of little concern to anyone except the immediate parties. A well-crafted holding will always include sufficient facts to indicate what the issue is.

Reasoning

This section, along with the Evaluation section, should be the heart of your brief. Use it to explain why the appellate court decided the controversy as it did. The court's reasoning provides the grounds on which future litigants or courts will predict or defend similar results. Courts usually rely – sometimes expressly, sometimes not – upon precedent, principle, or policy to justify their decisions. To the extent you are able to identify these rationales, you should note them in this section of your brief.

Sometimes more than one reason justifies the result in a particular case. These reasons usually are not equally important to the result, however, and you should attempt to discern on which the court relied most heavily. This can be a difficult task. Sometimes the relative importance of the court's justifications will become clear only in later opinions. Moreover, sometimes courts make remarks that do not directly support their result. Such remarks are called "dicta" or, when singular, "dictum." The court may use dicta to address hypothetical facts or issues that are not before it. Because the dicta was expressed in passing and therefore was not necessary to the court's decision, it will not bind lower courts in future cases, although it may have strong persuasive value. Thus, dicta may be more important in resolving future disputes than in explaining the decision in which they occur. Nevertheless, dicta may be useful in distinguishing which rationales a court did find compelling.

Do not ignore dissenting and concurring opinions. A dissent is an opinion by one or more judges on the court who do not agree with the outcome reached by the majority. A concurring opinion is one in which the author agrees with the outcome reached by the majority but for slightly

[2] *See* Baxter v. Fugett, *infra*.

different or additional reasons. Although dissenting and concurring opinions do not have the force of law, they can nevertheless be very important. They often critique all or part of the majority opinion, and thus can help you understand it. They sometimes identify important additional facts and they usually raise additional analytical points. Beyond all this, dissents can become law. On occasion, a court will reconsider its earlier decisions and conclude that a dissent was better reasoned.

Indeed, that is one of the main reasons that judges write dissents: they hope to influence the law in the future.[3] Most of the cases in casebooks have been edited, some quite substantially. If the casebook authors have included a dissenting or concurring opinion, it is because they thought you should read and pay attention to it.

Judgment

The judgment is the result or outcome of the case. This section tells who won and what relief the court ordered, for example, "Judgment for defendant is reversed." It probably is of more interest to the immediate parties, however, than it is to future litigants or law students. Many people incorporate this section into the Holding. Alternatively, you may wish to maintain this as a separate section for class recitation purposes or as a mnemonic device – remembering who won may trigger the more important consideration of why that party won.

Evaluation

Courts do not always reach the correct result; indeed, the fact that a case appears in your casebook may be *because* the court reached an unwise or unsupported decision, rather than as a model of judicial wisdom. There is no single formula for evaluating a decision. The one constant, though, is to be critical.[4] This is your opportunity to question the court's decision and to go beyond

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[3] Justice Oliver Wendell Holmes, Jr. became known as "The Great Dissenter" for his consistent, principled stand on free expression issues, positions which the Court ultimately adopted after some change in its membership.

[4] Many beginning law students are reluctant to evaluate courts' decisions because criticism seems presumptuous and disrespectful. Usually, however, this reluctance quickly evaporates after exposure to professors' criticism of opinions. Remember that most of the cases you will be reading probably presented close questions or introduced novel legal theories, which is why they were included in the casebook. Moreover, some of these theories later were abandoned or ignored. Ask yourself how you would have reacted to the court's decision if you were the losing party. Also ask yourself how the decision will affect future litigants. Will they be better able to vindicate their legal rights? Is society better off because of the court's decision? Remember too that law, unlike some other disciplines, contains few absolute rules or "right" answers. The skill you acquire in evaluating courts' decisions is essentially the same skill you will use in making persuasive arguments, an ability that will serve you well in law school and in practice.

what is on the page. The questions to ask often vary with context and issue. For example, you may:

- Consider whether the court's reasoning is logical, internally consistent, and whether what the court did corresponds to what the court said.

- Identify facts (things which occurred) or nonfacts (things which did not occur) that are or should be critical to the outcome, but which the court did not discuss.

- If the decision is one of several in your materials on a particular issue, determine whether it follows the rules other cases established. Or, does it extend them? Limit them? Reverse them? Disregard them?

- Ask yourself if there are useful analogies to other legal issues or doctrines you have studied, and if so, whether this decision is consistent or inconsistent with them.

- Identify analytical points – policy, principle, or precedent – that the court overlooked and which might support a contrary result.

- Ask whether the decision is fair, whether it is practical, and whether some alternative approach might not have been better. Are there issues that the decision implicitly raises but does not answer? Have social or economic circumstances significantly changed since the court issued its decision, such that the decision should no longer be followed? If I were appealing this decision to a higher a court, what arguments would I make?

SAMPLE CASE

Baxter v. Fugett

425 P.2d 462 (Okla.1967)

McINERNEY, Justice.

This is an appeal by plaintiff from verdict and judgment for defendant in a negligence action arising out of a collision, at an Oklahoma City street intersection, between a bicycle ridden by a 12 year old plaintiff and an automobile driven by a 16 year old defendant. The mothers of the two boys were made parties plaintiff and defendant respectively, but in view of the single proposition argued on appeal, it will not be necessary to notice their respective interests in the case.

In the petition, the 16 year old defendant was charged with specific acts of negligence; in the answer, defendant pleaded contributory negligence, unavoidable accident, and the defense of sudden emergency.

No detailed summary of the evidence is necessary to an understanding of the single question raised on appeal. Plaintiff was riding his bicycle north on a through street. He could not recall any facts pertaining to the cause of the accident. Defendant testified, as a witness for plaintiff, that he was driving his automobile west toward an intersection where the through street was protected by a stop sign. After stopping and observing plaintiff about fifty feet away, defendant proceeded into the intersection and his automobile was struck at a point just behind the driver's seat on the left side by plaintiff's bicycle.

In his "statement of the case and pleadings" the trial judge informed the jury that plaintiff alleged that the defendant automobile driver was negligent in two particulars: (1) failure to keep a proper lookout, and (2) failure to yield the right of way. From the language in the petition, and from uncontradicted circumstances shown in evidence, it is clear that the allegation of failure to yield the right of way was based upon the requirement of Okla. Stat. tit. 47, § 11-403(b) that "every driver" approaching an intersection protected by a stop sign shall stop, and "after having stopped shall yield the right of way to any vehicle which . . . is approaching so closely on said highway as to constitute an immediate hazard." The trial judge also told the jury, among other things, that the defendant alleged that the 12 year old plaintiff was guilty of contributory negligence. No objection to the court's statement of the issues and pleadings was made by either party.

From verdict and judgment for defendant, plaintiff appeals.

The precise argument made on appeal, and the only one, is that the court erred in giving the following instruction:

> You are instructed that the plaintiff Robert Baxter at the time of this accident was 12 years of age and the defendant William M. Fugett was 16 years of age. In determining whether or not the defendant William M. Fugett was guilty of negligence and whether or not the plaintiff Robert Baxter was guilty of contributory

> negligence as heretofore defined in these instructions, you are instructed that by the term "ordinary care" as applied to children is meant that degree of care and caution which would usually and ordinarily be exercised by children of the age of 12 and 16 years under the same or similar circumstances. The conduct of children 12 years of age and 16 years of age is not necessarily to be judged by the same rules which would apply to an adult. The degree of care and caution required of a child is according to and commensurate with his age and mental capacity and his power to exercise such degree of care as a child of his age may be fairly presumed capable of exercising. Insofar as Robert Baxter and William M. Fugett may be presumed to do so it was their duty to take into consideration the fact that each was attempting to cross a public street upon which vehicular traffic could ordinarily be expected and in crossing the street to exercise ordinary care for his own safety and to watch out for traffic proceeding along the street.
>
> It was the duty of each to take into consideration all the circumstances and conditions surrounding the place of the accident and the possibility of injury which might result in crossing or attempting to cross the street at the time and place in question.

This instruction follows the general rule that when a minor is charged with common law negligence, his conduct is to be measured by a "child's standard of care" under which consideration is given to his age, mental capacity, judgment, etc. *Davis v. Bailey*, 162 Okla. 86, 19 P.2d 147; *Witt v. Houston*, 207 Okla. 25, 246 P.2d 753; *Morris v. White*, 177 Okla. 489, 60 P.2d 1031; *Bready v. Tipton*, 407 P.2d 194 (Okla.). These cases, however, involve the standard of care required of a child while engaged in activities commensurate with his age.

We are asked to approve the above standard of care for a 16 year old minor engaged in an adult activity. We decline to do so. The better reasoning is expressed in *Dellwo v. Pearson*, 259 Minn. 452, 107 N.W.2d 859. The Minnesota Supreme Court, in disapproving a similar instruction, and distinguishing between the contributory negligence and primary negligence of minors, said as follows:

> However, this court has previously recognized that there may be a difference between the standard of care that is required of a child *in protecting himself against hazards and the standard that may be applicable when these activities expose others to hazards*. (Emphasis supplied)

The instruction complained of permits a minor to engage in adult activities which expose others to hazards, while imposing only a child's standard of care on the minor so engaged. This legal sanction is impractical and contrary to the circumstances of modern life. We hold that a minor, when operating an automobile, must exercise the same standard of care as an adult. Jurisdictions surrounding Oklahoma generally follow the rule announced in this case. *See Harrelson v. Whitehead*, 236 Ark. 325, 365 S.W.2d 868; *Allen v. Ellis*, 191 Kan. 311, 380 P.2d 408; Wilson v. Shumate, 296 S.W.2d 72 (Mo.); *Renegar v. Cramer*, 354 S.W.2d 663 (Tex. Civ. App).

The Highway Safety Code, Title 47, Motor Vehicles, makes no distinction between minors and adults in defining "person," § 1-144, "driver," § 1-114, and "operator," § 1-140. No statute or rule of the road prescribing the operation of a motor vehicle makes any such distinction, but refers to "every person," when reference is made to the person, operating a vehicle and the duties required in the operation of a vehicle. It is the announced legislative policy of this state to prescribe only one standard of care upon a person operating a motor vehicle, regardless of the age of the person, and that is an adult standard of care. There is no reason to apply a different standard of care to negligent acts committed by a minor while driving an automobile, even though the negligent act is not a specific violation of a statute, since the activity of operating a motor vehicle on a public highway is the basis for imposing the standard of care, rather than the age of the person, and that is an adult standard.

Having determined that the giving of the instruction was error, and being of the opinion that this error was prejudicial to the plaintiff, the judgment of the trial court is reversed and the cause is remanded with directions to grant a new trial.

SUGGESTED BRIEF

Facts

Action for damages – negligence. Plaintiff, a 12-year old, was riding a bicycle on a through street. Defendant, a 16-year old driver, approached from a side street in his car. Defendant came to a full stop at the stop sign, then pulled out. Plaintiff ran into the driver's side of Defendant's car, injuring himself. Plaintiff claims that Defendant negligently failed to keep proper lookout and failed to yield the right of way. Defendant claims contributory negligence.

The court instructed the jurors that in considering whether both Plaintiff and Defendant used ordinary care, they should apply the standard of "care ordinarily exercised by children" 12 and 16 years old, respectively, and that the parties should not necessarily be judged by standard of care of an adult.

Procedure

Verdict and judgment for Defendant. Plaintiff appeals, urging error in the jury instructions.

Issue

Narrow: Should a 16-year-old automobile driver be judged by the standard of ordinary care applicable to a 16 year-old child, rather than that applicable to an adult?

Broad: What standard of care should courts use to judge children?

Holding

Narrow: No. A 16-year-old automobile driver is to be judged by the standard of ordinary care applicable to an adult because driving is an adult activity.

Broad: Courts should judge children by the same standard applicable to adults when children are engaged in an adult activity.

Judgment

Judgment for Defendant is reversed and the case is remanded for a new trial.

Reasoning

The general rule is to hold children to the standard of care of others their age, but this rule applies if they are engaged in activity commensurate with their age. The child's standard is appropriate to require of a child in protecting himself, but a different standard may apply to protect others from harm. In dealing with driving automobiles, an adult activity, society must hold minors to the adult standard of care to protect the public.

Highway safety codes and other rules of the road do not distinguish between minors and adults. The code refers only to "every person," indicating a legislative policy to apply one standard of care to all drivers.

In the new trial the jury will be instructed that the minor driver should be held to the standards of an adult, whereas the contributory negligence of the bicyclist may be judged by standards relating to children.

Evaluation

1. Can a jury truly understand such an instruction? What if the bicyclist were 17 years of age? Should age be a factor in resolving other issues as well?
2. To the extent that this ruling discourages minors from engaging in certain activities (or adults from letting their children engage in them), is that desirable? In rural and farming areas, children need to be able to drive. On the other hand, for their own protection and the protection of others traveling on or by public roads, children driving motor vehicles need to drive skillfully. A tort rule requiring this may prevent accidents, to the extent that negligence can ever be deterred.
3. How are we to distinguish "adult activities" from "children's activities"? Does the answer depend on whether adults often engage in the activity, on whether the activity is primarily the province of adults, on the seriousness of the potential consequences, or on something else entirely? What other activities in which minors engage are likely to qualify as adult activities?
4. Is this case relevant in states with no-fault auto insurance?
5. Why did I read this case? – One answer may be to further explore the tensions in tort law between evaluating conduct according to an objective standard while appropriately accounting for the characteristics of the parties and the circumstances in which they found themselves.

ASSIGNED CASE

Read the case that follows and prepare a brief for it.

Riggs v. Palmer

22 N.E. 188 (N.Y. 1889)

EARL, J.

On the 13th day of August, 1880, Francis B. Palmer made his last will and testament, in which he gave small legacies to his two daughters, Mrs. Riggs and Mrs. Preston, the plaintiffs in this action, and the remainder of his estate to his grandson, the defendant Elmer E. Palmer, subject to the support of Susan Palmer, his mother, with a gift over to the two daughters, subject to the support of Mrs. Palmer, in case Elmer should survive him and die under age, unmarried, and without any issue. The testator, at the date of his will, owned a farm, and considerable personal property. He was a widower, and thereafter, in March, 1882, he was married to Mrs. Bresee, with whom, before his marriage, he entered into an antenuptial contract, in which it was agreed that in lieu of dower and all other claims upon his estate in case she survived him she should have her support upon his farm during her life, and such support was expressly charged upon the farm. At the date of the will, and subsequently to the death of the testator, Elmer lived with him as a member of his family, and at his death was 16 years old. He knew of the provisions made in his favor in the will, and, that he might prevent his grandfather from revoking such provisions, which he had manifested some intention to do, and to obtain the speedy enjoyment and immediate possession of his property, he willfully murdered him by poisoning him. He now claims the property, and the sole question for our determination is, can he have it?

The defendants say that the testator is dead; that his will was made in due form, and has been admitted to probate; and that therefore it must have effect according to the letter of the law. [However], all [wills], as well as all contracts, may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes. They were applied in the decision of the case of Insurance Co. v. Armstrong, 117 U.S. 599. There it was held that the person who procured a policy upon the life of another, payable at his death, and then murdered the assured to make the policy payable, could not recover thereon. Mr. Justice Field, writing the opinion, said:

> Independently of any proof of the motives of Hunter in obtaining the policy, and even assuming that they were just and proper, he forfeited all rights under it when, to secure its immediate payment, he murdered the assured. It would be a reproach to the jurisprudence of the country if one could recover insurance money payable

> on the death of a party whose life he had feloniously taken. As well might he recover insurance money upon a building that he had willfully fired.

These maxims, without any statute giving them force or operation, frequently control the effect and nullify the language of wills. A will procured by fraud and deception, like any other instrument, may be decreed void, and set aside; and so a particular portion of a will may be excluded from probate, or held inoperative, if induced by the fraud or undue influence of the person in whose favor it is. So a will may contain provisions which are immoral, irreligious, or against public policy, and they will be held void.

Here there was no certainty that this murderer would survive the testator, or that the testator would not change his will, and there was no certainty that he would get this property if nature was allowed to take its course. He therefore murdered the testator expressly to vest himself with an estate. Under such circumstances, what law, human or divine, will allow him to take the estate and enjoy the fruits of his crime? The will spoke and became operative at the death of the testator. He caused that death, and thus by his crime made it speak and have operation. Shall it speak and operate in his favor? If he had met the testator, and taken his property by force, he would have had no title to it. Shall he acquire title by murdering him? If he had gone to the testator's house, and by force compelled him, or by fraud or undue influence had induced him, to will him his property, the law would not allow him to hold it. But can he give effect and operation to a will by murder, and yet take the property? To answer these questions in the affirmative it seems to me would be a reproach to the jurisprudence of our state, and an offense against public policy. Under the civil law,[5] evolved from the general principles of natural law and justice by many generations of jurisconsults, philosophers, and statesmen, one cannot take property by inheritance or will from an ancestor or benefactor whom he has murdered. Dom. Civil Law, pt. 2, bk. 1, tit. 1, § 3; Code Nap. § 727; Mack. Rom. Law, 530, 550. In the Civil Code of Lower Canada the provisions on the subject in the Code Napoleon have been substantially copied. But, so far as I can find, in no country where the common law prevails has it been deemed important to enact a law to provide for such a case. Our revisers and law-makers were familiar with the civil law, and they did not deem it important to incorporate into our statutes its provisions upon this subject. This is not a *casus omissus*. It was evidently supposed that the maxims of the common law were sufficient to regulate such a case, and that a specific enactment for that purpose was not needed. For the same reasons the defendant Palmer cannot take any of this property as heir. Just before the murder he was not an heir, and it was not certain that he ever would be. He might have died before his grandfather, or might have been disinherited by him. He made himself an heir by the murder, and he seeks to take property as the fruit of his crime. What has before been said as to him as legatee applies to him with equal force as an heir. He cannot vest himself with title by crime. My view of this case does not inflict upon Elmer any greater or other punishment for his crime than the law specifies. It takes from him no property, but simply holds that he shall not acquire property by his crime, and thus be rewarded for its commission.

The facts found entitled the plaintiffs to the relief they seek. The error of the referee was in his conclusion of law. Instead of granting a new trial, therefore, I think the proper judgment

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[5] [Recall the brief discussion of the civil law tradition on p. 4 – ed.]

upon the facts found should be ordered here. The judgment of the general term and that entered upon the report of the referee should therefore be reversed, and judgment should be entered as follows: That Elmer E. Palmer and the administrator be enjoined from using any of the personality or real estate left by the testator for Elmer's benefit; that the devise and bequest in the will to Elmer be declared ineffective to pass the title to him; that by reason of the crime of murder committed upon the grandfather he is deprived of any interest in the estate left by him; that the plaintiffs are the true owners of the real and personal estate left by the testator, subject to the charge in favor of Elmer's mother and the widow of the testator, under the antenuptial agreement, and that the plaintiffs have costs in all the courts against Elmer.

GRAY, J., dissenting.

This appeal presents an extraordinary state of facts, and the case, in respect of them, I believe, is without precedent in this state. The respondent, a lad of 16 years of age, being aware of the provisions in his grandfather's will, which constituted him the residuary legatee of the testator's estate, caused his death by poison, in 1882. For this crime he was tried, and was convicted of murder in the second degree, and at the time of the commencement of this action he was serving out his sentence in the state reformatory. This action was brought by two of the children of the testator for the purpose of having those provisions of the will in the respondent's favor canceled and annulled. The appellants' argument for a reversal of the judgment, which dismissed their complaint, is that the respondent unlawfully prevented a revocation of the existing will, or a new will from being made, by his crime; and that he terminated the enjoyment by the testator of his property, and effected his own succession to it, by the same crime. They say that to permit the respondent to take the property willed to him would be to permit him to take advantage of his own wrong. To sustain their position the appellants' counsel has submitted an able and elaborate brief, and, if I believed that the decision of the question could be effected by considerations of an equitable nature, I should not hesitate to assent to views which commend themselves to the conscience. But the matter does not lie within the domain of conscience. We are bound by the rigid rules of law, and within the limits of which the determination of this question is confined.

I cannot find any support for the argument that the respondent's succession to the property should be avoided because of his criminal act, when the laws are silent. Public policy does not demand it; for the demands of public policy are satisfied by the proper execution of the laws and the punishment of the crime. There has been no convention between the testator and his legatee nor is there any such contractual element, in such a disposition of property by a testator, as to impose or imply conditions in the legatee. The appellants' argument practically amounts to this: that, as the legatee has been guilty of a crime, by the commission of which he is placed in a position to sooner receive the benefits of the testamentary provision, his rights to the property should be forfeited, and he should be divested of his estate. To allow their argument to prevail, would involve the diversion by the court of the testator's estate into the hands of persons whom, possibly enough, for all we know, the testator might not have chosen or desired as its recipients. Practically the court is asked to make another will for the testator. The laws do not warrant this judicial action, and mere presumption would not be strong enough to sustain it. But, more than this, to concede

the appellants' views would involve the imposition of an additional punishment or penalty upon the respondent. What power or warrant have the courts to add to the respondent's penalties by depriving him of property? The law has punished him for his crime, and we may not say that it was an insufficient punishment. In the trial and punishment of the respondent the law has vindicated itself for the outrage which he committed, and further judicial utterance upon the subject of punishment or deprivation of rights is barred. We may not, in the language of the court in People v. Thornton, 25 Hun, 456, "enhance the pains, penalties, and forfeitures provided by law for the punishment of crime." The judgment should be affirmed, with costs.

SECTION II.
READING FOR PROFESSOR KORN'S CIVIL PROCEDURE CLASS

Chapter 1
An Introduction to the Civil Action and Procedure

A. The Study of Procedure

The course in civil procedure focuses on the litigation process, by which parties seek to resolve civil disputes in the courts. While it involves a significant amount of technical material, the course requires more than mastering discrete rules and doctrines. It should foster critical thinking about the principles underlying the rules and doctrines, and about the role of litigation as a method of resolving civil disputes. The stated goal of modern procedure is contained in Federal Rule 1: "to secure the just, speedy, and inexpensive determination of every action and proceeding." Throughout this course, we should consider whether that goal is achieved.

The focus of this course is on the *litigation* process through which parties seek to resolve their dispute by "g9ing to court." Contrary to depiction in popular media, however, this process consists of far more than a trial. In addition, we should keep in mind that litigation is not the only method for resolving disputes.

In Chapter 15, we will discuss alternatives to litigation. Indeed, most disputes in this country are not resolved through litigation; they are privately settled without the need for filing suit. And of all those disputes that do get filed in court, only a very small percentage (generally two to four percent) will actually go to trial; they are resolved during the litigation process, perhaps by court order or, more likely, by settlement.

Although only a small percentage of all disputes will actually end in trial, use of alternatives, including voluntary settlement, are always made "in the shadow of the law." Any negotiated settlement will be influenced by the parties' assessment of what they could obtain through formal litigation. Thus, a full understanding of the litigation option is essential even for lawyers who ultimately pursue alternatives to it.

In this course, we are concerned with civil, as opposed to criminal, cases. The major goal of criminal law is to *punish* defendants for breaches of the general order rather than to *compensate* the victim of the crime. Civil cases, on the other hand,

usually involve disputes between private parties,* in which the plaintiff seeks to recover a remedy from the defendant.

For example, suppose defendant drives her car while under the influence of alcohol and runs into a car driven by plaintiff. Plaintiff is injured, and her car is destroyed.

Defendant's act constituted a violation of the criminal (or penal) law, for which the government may prosecute. If the prosecution is successful, the state can punish defendant, perhaps by imprisonment, or by payment of a fine, or by an order to perform community service. Generally, however, any fine goes to the government and not to the injured person.

Defendant's act also constituted a tort for which the plaintiff can maintain a civil action against the defendant. The goal of that action will be to force defendant to compensate plaintiff for harm caused by her breach of a duty owed to plaintiff. The remedy may include reimbursement for the plaintiff's medical expenses and lost wages while recuperating, as well as compensation for pain and suffering and for the loss of her car.

Of course, not all civil cases involve criminal behavior. Breach of contract cases, for example, rarely involve misconduct that could constitute a crime. Similarly, the tort of negligence may be based on mere inadvertence which could not support a criminal prosecution. Civil cases play an important role in the administration of justice. They permit one party to sue another for breaching rules our society establishes governing relationships, even when those breaches fall short of criminal.

Throughout the law school curriculum, you will see procedural differences between criminal and civil cases. The prosecution must prove the criminal defendant guilty "beyond a reasonable doubt." The civil plaintiff generally must show that the defendant is liable "by a preponderance of the evidence." When charged, the criminal defendant is given warnings that the civil defendant is not. The court cannot compel the criminal defendant to testify at trial; the state must warn the criminal defendant that her statements may be used against her; the state must provide the criminal defendant with legal counsel if she cannot afford it. In short, more process is due the criminal defendant than the civil defendant.

The line between criminal and civil is not always bright. For example, in civil actions in which defendant has acted egregiously, our system may permit plaintiff to recover "punitive," or "exemplary," damages. Their purpose is expressly to punish- to "send a message" to defendant that her behavior is intolerable. To the extent that punitive damages serve a function similar to the criminal law, some observers have argued that the state should afford the defendant various heightened procedural protections given criminal defendants.

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* The government can be a party to a civil action. For example, it might sue a contractor who breached an agreement to build some public work. In that instance, it is not enforcing a penal law but is vindicating its private right. In addition, the government often enforces laws through civil actions, for example, by bringing an action to enjoin violations of antitrust laws.

A civil litigant determines whether she has a claim and, if so, against whom, through the *substantive* law. In contrast, civil procedure provides the vehicle for attempting to vindicate rights created by substantive law. As we will see, however, the line between substance and procedure is sometimes ephemeral.

In many respects, procedure is the unique province of lawyers. Lawyers understand that *how* rights are vindicated can affect dramatically the scope of those rights. A claim or defense that one cannot prove is not worth much. Procedure is relatively invisible to most of the world, but seemingly technical procedural changes may bring about significant alteration in the scope of substantive rights. Changes in the allocation of which party has the burden of proof on an issue, or how notice is given, or who is bound by a judgment can alter the underlying rights. As one scholar has summarized:

[N]eglecting the terrain of procedure is, as it always has been, a mistake. Fundamentally, that is because procedure is power, whether in the hands of lawyers or judges. Smart lawyers and judges recognize the power of procedure.* * * Substantive rights, including constitutional rights, are worth no more than the procedural mechanisms available for their realization and protection.

Stephen Burbank, *The Bitter With the Sweet: Tradition, History, and Limitations on Federal Judicial Power-A Case Study,* 75 NOTRE DAME L. REV. 1291, 1292-93 (2000). Throughout this course, you should consider whether seemingly neutral rules of procedure might have a distinctly substantive impact. For instance, Professor Madison has demonstrated the substantive impact of procedural provisions on human bias and the promotion of impartial justice. Benjamin V. Madison, III, *Color-Blind: Procedure's Quiet But Crucial Role in Achieving Racial Justice,* 78 U.M.K.C. L. REV. 617 (2010).

B. Federalism

Before there was a national government, the thirteen original states were separate sovereigns, governed by their individual constitutions and laws. Citizens concluded, however, that their interests might be better served by institution of a centralized government, at least for some purposes. After experimentation under the Articles of Confederation, the citizens undertook to create a national entity. Importantly, however, this national government did not replace or eliminate the separate state governments. The Constitution creates the United States government and cedes to it limited and enumerated powers.

In the first case in this book, Justice Stephen Field summarized these points succinctly:

The several States of the Union are not, it is true, in every respect independent, many of the rights and powers which originally belonged to them being now vested in the government created by the Constitution. But, except as re-

strained and limited by that instrument, they possess and exercise the authority of independent States * * *.

Pennoyer v. Neff, 95 U.S. 714, 722 (1878).

While federal power is limited to those areas enumerated in the Constitution, the Supremacy Clause of that document provides that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. * * *" U.S. CONST., art. VI. Thus, where federal law exists and conflicts with state law, the federal law controls, so long as it concerns an issue properly within the purview of the federal government. Although most of the Constitution addresses the scope of federal power, it also imposes direct restrictions on the power of the states. For example, the Fourteenth Amendment provides that "No State shall * * * deprive any person of life, liberty, or property, without due process of law; * * *." Any state law violating this precept is unconstitutional and invalid.

The limited nature of the national government's power is reflected in the federal judiciary. Article III, section 2, of the Constitution sets the outer boundary of federal judicial power. Thus, as we will see in Chapter 4, litigants cannot file suit in a federal district court simply because they would like to be there. The case must be one as to which the Constitution and a congressional statute permit access to the federal courts. The two major types of cases which plaintiff can file in federal court are "diversity of citizenship" cases (in which the plaintiff and defendant are citizens of different states and in which the amount involved exceeds $75,000) and "federal question" cases (in which plaintiffs claim arises under a federal law).

What if the plaintiff has a dispute that cannot invoke one of these bases of federal subject matter jurisdiction? She can file in state court. Indeed, even the vast majority of those cases that can be filed in federal district court- all diversity of citizenship and most federal question cases- may also be filed in state court.* Thus, the existence of separate state and federal court systems will usually give the plaintiff a choice of fora. In fact, plaintiff may have a choice of filing in federal or in state court in several different states.

Although federal law can trump state law, it is important to note that the federal courts do not have general power to review actions of state courts. In most instances, a civil litigant in a state trial court can appeal an adverse judgment *only* to an appellate court of that state. Once the case is filed in one system - state or federal- it is subject to appellate review only in that system. There is one significant exception to this rule. The United States Supreme Court can review a decision of the highest court of a state. However, it can review that decision *only as to matters of federal law.*

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* The only exception is with those federal question cases as to which federal district court jurisdiction is exclusive of the states. Such cases are rare. Examples include federal antitrust actions and patent cases.

Suppose, for example, that the supreme court of State A holds that unmarried people living together are not entitled to the same property law benefits as married people. The United States Supreme Court cannot review this holding, because it raises only a question of state law, as to which state courts are supreme. If, however, a party challenged this state law on the basis that it denied equal protection of the law as guaranteed by the United States Constitution, the Supreme Court would have the power to review the case. The reach of the Equal Protection Clause is a federal question, as to which the Supreme Court is the ultimate arbiter.

The American system of justice faces often thorny questions of federalism because American citizens are subject to regulation by both state and national governments. Few other countries have such dual governments. Interestingly, for example, England, from which we inherit so much of our law and legal tradition, is not a federal republic.*

C. Overview of the Structure of a Court System

As we have noted, the federal government has a system of courts. Each state is free to establish its own judicial system as it sees fit. The federal courts and the courts of many (but not all) states are established in a tripartite model, consisting of (1) trial courts reviewed by (2) intermediate appellate courts reviewed by (3) a supreme court.

1. Trial Courts

These are the courts in which the plaintiff initiates civil litigation, usually by filing a complaint and having it and a court order (called a summons) delivered to defendant. Trial courts have *original* (as opposed to *appellate)* jurisdiction. Some states assign jurisdiction to different trial courts based upon subject matter. For example, they may have separate trial courts for probate matters, family law cases, and general civil disputes. Other states divide jurisdiction based upon the amount in dispute. For example, one court may take cases involving $15,000 or less while another takes cases of greater amounts. States may use different names for their trial courts. Common names include superior, municipal, district, and circuit courts. The trial court in the

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* Though this course will focus primarily on procedure in the federal courts, we will also note divergences in state practice. The vast majority of litigation in this country takes place in state courts.
Scholarship increasingly has begun to reflect an emerging appreciation for the study of state-court practice.
In particular, Professor Koppel urges consideration of uniform rules. See Glenn Koppel, *Reflections on the "Chimera" of a Uniform Code of State Civil Procedure: The Virtue of Vision in Procedural Reform,* 58 DEPAUL L. REV. 971 (2009); Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process,* 58 VAND. L. REV. 1167 (2005). See also *Symposium on State Civil Procedure,* 35 W. ST. L. REV.1-304 (2007). See generally Benjamin V. Madison, C1v1L PROCEDURE FOR ALL ST ATES (2010).

federal judicial system is the federal district court. This book focuses almost entirely on the jurisdiction and procedure in trial courts, where the bulk of litigation is carried out.

2. Intermediate Appellate Courts

Despite a popular notion that a losing litigant can "fight to the highest court in the land," there is no federal constitutional right to appeal a judgment in a civil case. Nonetheless, most American jurisdictions do provide one. For example, in a three level court structure, states may permit an appeal of right to the intermediate appellate court.

In the federal judicial system, a litigant has a right to appeal an adverse district court judgment to the intermediate appellate court, which is known as the United States Court of Appeals. It consists of thirteen "circuits," eleven of which are grouped by geography into courts bearing a number. For example, the Fourth Circuit sits in Richmond, and hears appeals from federal district courts in Maryland, Virginia, West Virginia, North Carolina, and South Carolina. The twelfth is known as the Court of Appeals for the District of Columbia Circuit, which sits in Washington, D.C. and hears appeals from the federal district court in Washington.* The thirteenth United States Court of Appeals is for the "Federal Circuit," the jurisdiction of which is determined not by geography but by subject matter. It sits in Washington and considers appeals in specialized cases such as import transactions and patents.

Not all states have an intermediate court of appeals. In such states, a civil litigant who loses at the trial court may seek review at the state supreme court. Further, the existence of an intermediate appellate court does not guarantee a right of appeal in civil cases. In Virginia, for example, the intermediate appellate court reviews criminal and administrative matters, but not general civil cases. Here, too, then, a civil litigant losing at the trial court may seek review by the supreme court.

3. Supreme Courts

Supreme courts are appellate courts.** Most states refer to their court of last resort as the supreme court. (In New York, however, it is called the Court of Appeals.) In the federal judicial system, the highest court is the United States Supreme Court. It consists of nine justices.*** and sits only at Washington, D.C. In most states, as in the federal system, the highest court is not required to hear all cases in which its

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* Each of these courts of appeals reviews decisions by administrative agencies. Because it is in Washington, the District of Columbia Circuit hears more of these than any other Circuit.

** Interestingly, the United States Constitution gives the United States Supreme Court original (trial) jurisdiction over certain types of cases, including those in which a state is a party. U.S.CONST., art. III, § 2.

*** The Constitution is silent on how many justices shall sit on the Supreme Court. The number is set by statute. See 28 U.S.C. § 1. The original Judiciary Act of 1789 provided the Court with only six justices.

review is sought. Indeed, in civil cases, supreme court review is almost always discretionary.* In a typical year, for instance, the United States Supreme Court agrees to hear fewer than four percent of the cases (of any sort, criminal or civil) in which a party seeks its review.

4. Appellate Practice and the Doctrine of Precedent

Appellate courts review dispositions of the case by the lower court(s). Appellate practice, however, is very different from trial practice. Appellate courts do not try cases, so they do not receive evidence or hear witnesses. Instead, they rely on the record below, briefs filed by counsel and, usually, oral argument on legal points. In intermediate courts of appeals, it is common to have a panel of three judges review each case. At the supreme court level, usually the entire panel of justices (commonly consisting of seven or nine) considers each case.

It is important to appreciate the role of appellate courts. The intermediate court (or the supreme court if it is reviewing the trial court directly) is not interested in whether it would have decided the case differently from the trial court; it does not retry the case and for the most part does not reexamine the facts. Instead its review is generally limited to errors of law. Even where there were errors, the doctrine of "harmless error" allows an appellate court to affirm a judgment even when the lower court made a mistake, if the result would have been the same anyway.

When reading any opinion, note what court is deciding it. If it is an appellate court, note the issues as to which it is particularly deferential to the trial court. Note also the disposition of the appellate court. Does it affirm or reverse outright? Does it remand with instructions? How clear are the instructions?

Most supreme courts have a limited, though critical, role. Rather than simply correcting mistakes made by lower courts, most supreme courts act principally as final arbiter of the content of the jurisdiction's law. This role is reflected in the fact that most are not required to hear all cases in which parties seek their review. Thus, a supreme court may accept cases for review in particular substantive areas because it needs to clarify the law there.

Appellate pronouncements on questions of law are binding on all lower courts in the jurisdiction through the doctrine of *precedent,* or *stare decisis.* This doctrine lends consistency and stability to the law. In addition, under the same principle, an appellate decision on a point of law binds the same court in later cases. Thus, once a state supreme court has held that a plaintiffs contributory negligence bars her recovery that court will apply the same rule in deciding subsequent cases. Stare decisis does not, however, freeze the law forever. Responding to relevant changes, the court that rendered an opinion (or a higher one) can overrule the precedent. Although overruling

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* In some states, a defendant in certain criminal cases, such as those involving capital punishment, has a right to review by the supreme court.

precedent is unusual, courts regularly elaborate on or modify rules announced in prior cases. This process of elaboration and gradual modification is at the heart of our common law system.

D. The Adversary System

One fundamental characteristic of American litigation is its adversarial nature. In our adversary system, each side to a dispute presents its case vigorously, in the best light possible. The parties take the initiative to bring suit, raise issues, present evidence, and persuade the factfinder. One obvious assumption of the system is that parties motivated by self-interest will only pursue worthwhile litigation and will invest the time and resources necessary to present their positions well. Another is that this clash of self-interested combatants hones the issues in such a way as to enhance the possibility of finding the truth and reaching a just result. Throughout the course, consider whether the adversary system relies too much on the notions that all lawyers are of equal ability and that all parties are of equal financial means.

The Constitution grants to federal courts jurisdiction only over "cases" or "controversies." Thus, courts may not render opinions on questions not presented in the context of an actual case. For example, assume that a legislature (federal or state) passes a statute that plainly violates the Constitution. No matter how egregious the violation, no federal court can declare the statute unconstitutional until the question is proffered in an actual case. The Founders expressly rejected a proposal that the Chief Justice sit with Congress to advise it on the constitutionality of its bills. Many (but not all) state court systems impose a similar limitation.

No plaintiff can sue unless she has "standing," which generally means that she must have suffered some injury before she can bring suit. Our system does not permit litigation simply because someone is upset over something or wants the courts to issue an advisory opinion; she has to be injured, to have a personal stake in the litigation, before the court is presented with the appropriate adversarial vehicle for resolution. Standing and similar doctrines governing "justiciability" of issues often present vexing questions; you will deal with them in detail in courses on constitutional law and federal courts.

Litigation is not unrestricted combat. Much like rules of a sporting contest, rules of procedure curb pure adversariness. For example, Federal Rule 11 imposes sanctions on litigants or counsel for various misdeeds, including documents filed "for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Rule 16 imposes sanctions for failure to cooperate in pretrial efforts to settle the case or to frame issues for trial. Rule 37 does the same for abuses in the area of discovery, through which litigants are permitted to find out contentions and evidence of opponents. In addition, rules of professional responsibility impose several important duties on counsel. Thus, a lawyer may not raise frivolous issues, conceal or destroy evidence, misrepresent

facts, or offer false evidence. Counsel also must reveal controlling authority contrary to her position.

Under the traditional adversary model, the judge is usually passive and reactive. The parties, not the court, are responsible for initiating and developing the case, framing the issues, discovering the evidence and presenting it at trial. Under this model, the judge rarely intervenes unless asked by the parties. For example, one might make a *motion,** that is, a request for an order, on any of dozens of grounds, such as a motion to dismiss the case, or to transfer the case to another venue, or to strike a pleading. In addition, at trial, the judge monitors the admissibility of evidence.

Here, although her need to rule is usually dictated by objections made by the parties, she can and will intervene to protect witnesses from harassment and to shield the jury from irrelevant or prejudicial evidence. Although the court is entitled to ask questions of witnesses at trial, historically courts have been reluctant to do so. In general, then, the decision makers (judge and jury) consider issues and evidence proffered by partisan advocates.

Not all judicial systems envision such a passive judge. In most of continental Europe, for example, the courts follow an "inquisitorial" model, in which the judge is expected to make an independent investigation into the merits of the case. She routinely questions witnesses and generally takes charge of the case in a way American lawyers would find intrusive.

Increasingly, American judges, particularly in federal courts, are borrowing some aspects of the inquisitorial system. In response to a perception that there is too much litigation (particularly too much expensive pretrial litigation), judges have assumed an activist role in managing cases, rather than simply reacting to the parties' requests. Recent amendments to the Federal Rules of Civil Procedure foster this new activism, which is changing (at least to a degree) the traditional view of the judge in the adversary system. Indeed, it is not uncommon now to hear some federal district judges complain that their job has become more "bureaucratic" or "managerial" than umpireal.

The primary responsibility is often "keeping the parties' feet to the fire" and facilitating settlement.

Among many questions, the adversary system raises the issue of who should bear the cost of litigation. Litigation is expensive. Although the public provides the courthouse and the judges and jurors, the adversary system puts the primary burden for expense on the parties. They pay the filing and other court fees, they pay to uncover evidence, they pay expert witnesses, and, most importantly, they pay attorney's fees. Attorneys are usually paid by the hour. Outside of small claims matters, cases do not get to trial without months, even years, of pretrial activity involving pleadings, motions, discovery, and settlement negotiations. Throughout these activities, the "meter is running."

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* “Motion" is the noun. "Move" is the verb. Parties never "motion" the court. They "move" or "make a motion" for the desired order.

Under the "American Rule," each side pays her own attorney's fees.* The fact that it is called the American Rule implies that it is not followed in most other nations. Indeed, England now provides basically that the prevailing party recovers her costs *and* attorney's fees. In this country, there are exceptions to this rule (some created by courts, others by legislatures), and comentators and legislators increasingly advocate rejection of the American Rule. Still, it remains. Can you articulate policy support for the rule? Can you articulate policy reasons for rejecting the rule?

The expense of litigation -principally of attorney's fees - is an important factor in plaintiff's assessment of whether to attempt to enforce her substantive right. Suppose, for example, that D has swindled you out of $25,000; there is no question that D is liable to you for that sum. Suppose that you retain a lawyer who charges $150 per hour. If she spends only 50 hours litigating the case through trial, her fee will be $7,500. Thus, even if you go to trial and win a judgment for $25,000, you will actually recover a net of $17,500. Moreover, you will have spent several months (perhaps years) in the litigation process.

Under these circumstances, you may instruct the lawyer to invest as little time as possible and to settle the case. Suppose the lawyer invests five hours and receives an offer from the other side to settle the case for $10,000. Will you agree to the settlement? It would give you $10,000, out of which you pay your lawyer (based on the hourly rate) $750. You end up with $9,250. On the other hand, you obviate the need to go to trial, and receive the money now rather than months or years from now.

Sometimes, plaintiff's lawyer bears the risk of attorney's fees by agreeing to take a case on a contingent fee arrangement. By this, the client agrees to pay the lawyer a percentage (typically one-third) of any recovery she gains. Some observers hail this arrangement, saying that it helps plaintiff bring some actions that would never be brought if plaintiff had to pay an hourly rate. Others criticize contingent fees for this very reason, saying the arrangement tends to foment litigation.

Other critics worry that the contingent fee arrangement gives the lawyer too great an incentive to settle a case quickly, rather than to go through trials. Suppose, for example, lawyer could settle a case for $60,000 (and take a $20,000 contingent fee) after investing 30 hours. Suppose also that if the case goes to trial, plaintiff might win as much as $600,000; or, of course, plaintiff could win nothing. To go through trial will require several hundred attorney hours. It might be in the lawyer's economic interest to settle rather than litigate; critics worry that this economic incentive may color the advice the lawyer gives to her client.

Many lawyers, clients, judges, and commentators are addressing these and similar issues more seriously today than ever. Many are convinced that there is a "litigation

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* It is important to distinguish between "costs" and attorney's fees. When lawyers speak of "costs" they mean "taxable" or "recoverable" costs. Generally, the prevailing party in litigation recovers her costs from the other side. These costs include such things as docket fees, court reporter fees, and clerk's costs, and usually amount to relatively little money. See 28 U.S.C. § 1920. They do not include attorney's fees, which will almost always be the most substantial cost of litigation.

crisis." Others disagree. But many observers seem to agree that litigation is too expensive and takes too long to resolve many disputes. Not surprisingly, people are looking to alternatives.

E. Alternatives to Litigation

This course focuses almost exclusively on litigation - the adversary system – to resolve disputes. That model has drawbacks. As noted, it is expensive. It relies in part on the fictive notions that all lawyers have equal ability and that all litigants have equal financial resources. Litigation, when pursued to adjudication (as opposed to settlement), is a zero-sum game; someone wins, and someone loses. It is also retrospective, forcing litigants to look back to what happened in the past rather than focus on the future. All of this suggests that litigation may be better suited to some kinds of disputes than to others. We will address these issues in more detail in Chapter 15.

Alternative dispute resolution (ADR) has become an important topic for an upper division law school course. In our course, we hope to raise awareness of the possibility that litigation may not be tl1e most appropriate method for resolution of your client's dispute. Our goal here is to survey the major methods of ADR. None is a panacea. None will ever totally supplant litigation. But throughout your law school career, consider whether the disputes you consider in your cases might have been handled better through ADR.

For example, consider a dispute between two persons who envision an ongoing relationship. This could be a dispute between family members over something personal, such as inheritance of a family heirloom. Or it could be the continuing relationship between a wholesale distributor and a retailer who, except for this disruption, have gotten along fine for years. Or perhaps it is an employer-employee relationship. In such situations, the best resolution may focus on the future, on continuing the relationship, on working out an arrangement to keep the relationship intact. Traditional, retrospective, zero-sum litigation may not be optimal. But what other choices are there?

Negotiation is the most widely used ADR tool. In fact, the vast majority of cases filed in court end up in a negotiated settlement. When negotiation works, and results in a settlement, it avoids the zero-sum-game aspects of litigation. The parties are free to structure the settlement in any way they see fit. They may take into account future relations and can be more creative than courts in fashioning remedies. An early settlement avoids the expense and trauma of trial and appeal, and it can substantially lessen overall litigation costs. Although parties can enter settlement negotiations at any time, often they do so only after the litigation dance has progressed for awhile, perhaps to the discovery stage. At that point, the lawyers begin to understand the facts of the dispute better, and tl1ey may have a clearer idea of what the case is "worth."

At about that point as well, clients begin to realize not only the expense of protracted litigation, but that they are required to devote great time to the cause as well.