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Litigation and Legal Practice

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Litigation and Legal Practice

In this series of 12 lectures, you will explore the important roles that litigation and the adversarial system play in American law. The course begins with an examination of the American legal system generally, including the significance of law and lawyers in our history and society. You will then consider what it means to think like a lawyer, learning about matters of precedent, textual analysis, inductive and deductive logic, logical fallacies, and the use of analogy. You will also examine the practical and ethical issues of the attorney-client relationship, learning why a lawyer might want to represent a seemingly guilty person, for example, and what a lawyer should do if a client asks her to break the law. As the course continues, you will learn about pretrial preparation, jury selection, opening statements, direct examination, cross-examination, and closing arguments. You will consider how media coverage and social media can impact what happens in the courtroom. You will learn about evidence—what types of evidence might be introduced at trial, how to handle common objections, and how to address the problems caused by false confessions, mistaken eyewitness identification, and flawed expert testimony. As you approach the end of the course, you will begin to examine the appeals process, including the various procedures, standards of review, and approaches to effective advocacy that distinguish appellate courts from trial courts. Finally, the course concludes with an exploration of the United States Supreme Court—its history, its function, and the unique challenges and opportunities that it presents for lawyers, clients, and the American people as a whole. ▪

Lecture 1

LITIGATION AND THE AMERICAN LEGAL SYSTEM

Litigation holds a special role in the American legal system, and learning about it offers a valuable orientation to the study of law generally. In this lecture, you will explore why we adopted the particular legal system we have in this country, how that system works, and why law is taught in America the way it is.

LAW IN AMERICAN SOCIETY

- America is a nation of laws. From the very beginning, America has grappled with the question of how much power the government should have over the people, and the rules under which people interact with one another. When America broke away from England in 1776, it famously rejected the notion that a king gets to make those rules. Instead, the power of the government and of lawmaking belongs to the people.

- When our country was founded, the Founding Fathers were, in essence, breaking the law. By rebelling against the British monarchy, they were, in the eyes of England, committing treason. To make the case that breaking away from England was the right thing to do, the Founding Fathers wrote the Declaration of Independence in 1776, proclaiming that "governments are instituted among men, deriving their just powers from the consent of the governed."

- The notion that the people are in charge was an extraordinary idea at the time our country was founded. Given the number of authoritarian governments that continue to exist in other parts of the world, it's still remarkable today.

- After gaining independence, the Founding Fathers began replacing the legal system they were rejecting with a new one. In 1787, they drafted the U.S. Constitution, which limited the power of the federal government and established a system in which the people could undo everything if they wanted to.

- America has continued to be a nation where people question the laws, challenge them, change them, and rely on them. Our nation is composed of people who quite often do not agree with one another. Every election cycle, we take some people out of power and put new people in charge. Regular citizens are able to be involved with the law, to influence the shape of the law, simply by voting or raising a claim in court.

- Because of the importance of law to the functioning for our country, lawyers have long played a prominent role in American society. More than half of the 45 U.S. Presidents have been lawyers. So are many members of Congress, most judges, and many prominent leaders in business and banking.

- You will certainly see lawyers at work if you go to a courtroom. But lawyers are also often the people who lead large corporations or help them do business or merge with one another. Lawyers also frequently run our various administrative agencies, which govern things like taxes, the environment, the Internet, elections, and the financial markets.

STRUCTURAL DISTINCTIONS

- ✩ The American legal system is a common law system, and is derived from English legal tradition. Some countries, like France, Italy, and others in continental Europe, have a civil law system. In a civil law system, written-down rules—often called codes—are the primary basis of the law. Judges in these systems interpret the code and make sure it is followed, but their decisions have no lasting authority.

- ✩ In our common law system, by contrast, written-down laws—we call them statutes—and judicial decisions are both important sources of law. What a judge says about the law can be every bit as important as a statute, and sometimes more so. Yet our judges are also bound by statutes and by the decisions of other judges who have come before them.

- ✩ A common law system checks the power of the legislature, which creates a statute, because a judge gets to interpret it. It also limits a judge's power, however, because he has to follow the rulings of previous judges. He can't just make up an outcome according to his own personal desires.

- ✩ America's legal system is also an adversarial system. In an adversarial system, parties make their best arguments before a judge or jury, and from the conflict between them, the judge or jury determines the truth of what happened. This is different from the inquisitorial system used in some civil law countries. In an inquisitorial system, the judge acts as an investigator in a case, questioning witnesses and suspects.

LEVELS OF REVIEW

- ✩ Trial courts are the courts where cases start. At trial, both sides present evidence to demonstrate what happened in the dispute that brought them to court. There is a judge who decides what evidence can be considered and whether the procedural rules are being followed. A trial can be decided either by a judge or a jury, depending on the type of case.

- Many jurisdictions have trial-level courts that hear a wide variety of cases. These courts are sometimes called general district courts. Some jurisdictions also have specialized trial courts. For example, a court system might have a specialized traffic court, a divorce court, or a court for juveniles.

- Legal cases are divided into two broad categories: civil and criminal. Civil cases involve disputes between private parties. The person who brings a civil lawsuit is called the plaintiff, and the person who is sued is called the defendant.

- In a criminal case, a person is accused of breaking a criminal law. In criminal cases, the person against whom the suit is brought is still called the defendant, but the person bringing the suit is a prosecutor representing either the state or federal government.

- ✯ If a party believes that something has been wrongly decided at trial, he or she may be able to appeal that issue to an appellate court. The issue has to be preserved for appeal, however, which usually means that the attorney has to flag the perceived problem during the trial by objecting and indicating the nature of the error. In addition, the appeal typically has to be filed within a certain time period.

- ✯ In an appellate court, there are no witnesses and no jury, and the parties do not present evidence. Instead, lawyers argue legal issues to group of judges, often referred to as a panel. Appellate courts do not rehear all the facts of a case; instead, they focus on the specific question of law being appealed to determine whether that question was decided correctly.

- ✯ If the trial court has made an error, the appellate court may overrule the trial court's decision and issue a written opinion about it. If a party disagrees with an appellate court decision, it may appeal to the ultimate judicial tribunal of a court system, which is often referred to as the jurisdiction's supreme court. That court may overrule or affirm the appellate court's decision and issue a written opinion of its own.

FEDERALISM AND PREEMPTION

- ✯ America has both federal and state laws, and the two are not always consistent with one another. What might be legal in one state might not be legal in another, and state laws and federal laws also clash on occasion. Because we have a dual system of laws, we also have a dual system of courts—federal and state.

- ✯ This system again has its roots in the American Revolution. The framers of our Constitution wanted to limit the power of our federal government. So our Constitution gives certain powers to the federal government, but leaves other powers to the states, and it does not require the states to have laws identical to one another.

- Federal courts are courts of limited jurisdiction, which means they can only hear certain kinds of cases. They can hear cases that raise a federal question, which means the plaintiff or prosecutor has alleged a violation of the U.S. Constitution, a federal law, or a treaty. They can also hear cases involving disputes between parties from different states.

- In addition to state and federal statutes, and the case law written by judges, laws also comes from constitutions (both federal and state), from treaties, and from regulations. Regulations are rules made by an agency at either the state or federal level pursuant to a statute.

- The U.S. Constitution preempts any laws established by other authorities that are inconsistent with the Constitution itself. After the U.S. Constitution come the laws of the United States—federal laws, federal common law, and federal regulations—plus federal treaties. State constitutions, state statutes and court decisions, and state regulations come under that, followed by regional and local ordinances.

Suggested Reading

- Constitution of the United States.
- De Tocqueville, *Democracy in America*.

Questions to Consider

- Does the judicial system occupy the place you think it should in the balance of powers? If not, why not?
- What is your reaction to our adversarial system? Do you think this is the best way to get to the truth of a dispute?

Lecture 2

THINKING LIKE A LAWYER

This lecture addresses a concept that is at the very heart of American legal education: the idea of thinking like a lawyer. Thinking like a lawyer means mastering the ability to think actively and critically about legal doctrine. Once you learn how to do that, you'll not only understand the law better; you will also have a better understanding of how to make an argument, even in a nonlegal context.

THE POWER OF PRECEDENT

- You may have noticed that when you argue with family members—your spouse or your kids, say—they are rarely persuaded that they must do something because "that's the way we've always done it." But when you are a lawyer making an argument to a judge, you will find that if you're advocating a position that no other judge has ever adopted, you are probably going to lose. "That's the way we've always done it" is a pretty powerful legal argument. This is the notion of precedent.

- Precedent means following the decisions that have been handed down in the past. In a common law system like the one we have in America, what judges say about a statute is every bit as important as the statute itself—the opinion a judge writes

about the statute becomes part of the law, too. Because of this, other judges deciding a case have to look at both the statute at issue and what other judges have said about that statute. If the issue has been decided in the past by the court hearing your case or by a higher court in that same jurisdiction, then the matter is settled.

- Law is fundamentally conservative so that people trying to follow the law will know what to expect. If the law could change at the mere whim of a judge, then society would be so unsettled that people would not know how to behave. Law is also conservative to protect people from being treated unfairly by judges who don't like them. Requiring a judge to follow precedent makes it more likely that the law will be applied consistently, not according to the whims and prejudices of individual judges.

- Another reason the law is conservative is purely practical: If judges were asked to decide every legal issue from the beginning in every single case, the workload would be overwhelming. This may sound terribly unfair to the parties, but it would be unfair for everyone if the courts got so bogged down that you couldn't get a hearing for years and years because judges were deciding things anew every time.

- When a lawyer is reading a judicial opinion, he or she will keep an eye out for a discussion of precedent. This will usually involve the judge citing older cases and comparing them to the decision at hand. The judge will try to explain why the two cases are similar—which means that the precedent binds the case at hand and dictates its outcome—or why they aren't.

- Importantly, precedent means that the case has been decided in the past either by a judge in the same court or by a higher court in the same jurisdiction. If a case was decided by a court in a different jurisdiction—in the state next door, for example—that court's opinion might be informative, but it wouldn't be precedential. Lawyers sometimes talk about this as being persuasive authority, but not binding authority.

- Of primary importance in any case is what the court decided in the dispute at hand, and why. This is known as the holding of the case. By contrast, anything the court said that isn't essential to actually resolving the matter at hand is called dicta. The holding of the case is what judges will follow in subsequent cases, and is binding. The dicta, while informative, is not binding.

- If you can find binding authority to support your argument, you are on firmer ground than if you would be if you were relying on dicta, or on a secondary source—an academic article written by a law professor, for example, which no judge is required to follow. If you must rely on persuasive authority, you will need to be able to articulate why the authority is credible. The more credible the authority, the more convincing your argument will be.

TEXTUAL INTERPRETATION

- Legal analysis can seem peculiar in the way it emphasizes the exact words of a statute, constitutional provision, or case. A lawyer must always pay close attention to the text of the legal rule or the precedent governing his case. When you make a legal argument, it is not sufficient to paraphrase the language. Very often, the best legal argument will be the one that parses the words the most carefully.

- Along the same lines, the judicial system is devoted to adhering strictly to the text of rules. You can see this, for example, in the application of a filing deadline at a courthouse. It hardly ever matters what the purpose of the rule was, or if you have a good reason why you didn't meet a particular filing deadline. The filing deadline is generally what's known as a bright-line rule: the requirements are clearly stated and inflexible. A bright-line rule is something you see quite a lot in various laws and legal opinions.

- Sometimes, however, the text of a rule is less clear. There are many examples—most notably those involving interpretation of the U.S. Constitution—in which a text could be interpreted literally, but isn't. Often, one side might rely on the plain meaning of the words in the

text, while the other might look at the purpose of the provision, or how it fits into other parts of the law. As a lawyer, you might argue based on the letter of the law, or you might argue the intention behind the law. Either way, you can't ignore the text.

LOGICAL REASONING

- Lawyers often rely on analogy to make a point. That is, they point out how a case is similar in some way to some other case, and argue that the two cases should therefore be decided in the same way.

- To use analogy well, you start by laying out the facts of your case and the facts of the case you want to compare it to. Then you compare the facts of the cases. Emphasize the similarities that are relevant, and throw away the ones that are not relevant. If the cases are similar in central ways, then they should result in similar outcomes. Of course, you need to be ready for the likelihood that opposing counsel will challenge your analogy, arguing that the facts that you called irrelevant actually make the case that you're citing inapplicable to the one at hand.

- Many legal arguments are based on deductive logic. Reasoning deductively, you can figure out the right outcome if you identify the correct legal proposition and apply it to the facts at hand. Aristotle explained this concept as a syllogism, in which a major premise and a minor premise point the way to a conclusion (if A and B are true, then C must be true).

- When reading a case, you should try to identify the major premise (the rule of law governing the case), the minor premise (the facts particular to your case), and the conclusion (the application of the law to the facts). You must also be sure that the major premise is true. If it isn't, then your conclusion will be flawed.

- Some legal arguments are based on inductive logic. Reasoning inductively means using a number of specific observations to draw a broad generalization. This can be a useful sort of argument when it's difficult to prove something.

- If you make an argument based on inductive reasoning, you probably shouldn't rely only on personal experiences; instead, you would be wiser to draw upon a large number of examples from which to generalize. You would also want to think about how your sample might be criticized. If, for example, your sample is not representative of the population at large, your argument might be considered less credible.

Suggested Reading

- Hart, *The Concept of Law.*
- Schauer, *Thinking Like a Lawyer*
- Sullivan, *Educating Lawyers.*

Questions to Consider

- Law schools emphasize teaching students to "think like a lawyer." Is this different from the way you are accustomed to thinking about things, and if so, how?
- One aspect of "thinking like a lawyer" involves putting aside your own personal reaction to a case, and instead to focus on issues like precedent. What are the pros and cons of that idea?

Lecture 3

REPRESENTING YOUR CLIENT

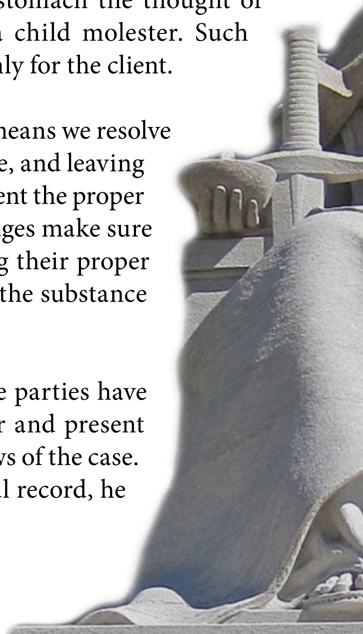
No matter whom they are representing, lawyers have dual responsibilities: to their clients, and to the integrity of justice system. This lecture explores the important relationship between attorney and client, including the ethical rules that guide lawyers when their dual responsibilities come into conflict with one another.

THE IMPORTANCE OF REPRESENTATION

- The structure of the American legal system requires that we have lawyers willing to represent any defendant zealously within the bounds of the law, no matter what that defendant may have done. Many people accept that idea in principle, but still can't stomach the thought of representing a killer, a swindler, a rapist, a child molester. Such representation is critical, however—and not only for the client.

- America's is an adversarial legal system. That means we resolve legal disputes by assigning a lawyer to each side, and leaving it to the lawyers to ask the right questions, present the proper evidence, and raise appropriate objections. Judges make sure that lawyers, jurors, and witnesses are playing their proper roles, but the lawyers are the ones who shape the substance of a trial.

- The advantage of a system like this is that the parties have greater incentive than anybody else to gather and present the evidence that supports their respective views of the case. If it were up to the judge to develop the factual record, he



might not do as thorough a job of it as the parties themselves would do. Also, a judge asked to gather the evidence might develop a bias in favor of or against a party before the trial starts. Our system produces a more complete factual record, and helps the judge remain impartial.

- Our system is governed by complex rules, and litigants have to make many decisions that have long-lasting consequences. A defendant without a lawyer finds himself at a serious disadvantage. He may not even know where to start to gather evidence. And even someone who is not innocent may have had his rights violated—evidence may have been obtained illegally, or a confession may have been coerced.

- To make sure that our system is fair and just, we need good defense lawyers to test prosecutions and make sure that evidence against a defendant was obtained lawfully. We want those lawyers to do the best job possible, because we believe that, through the clash of two effective advocates, juries will best be able to determine the truth. If a defendant doesn't have a lawyer, it's more likely that the system will malfunction.

PROFESSIONAL CONDUCT

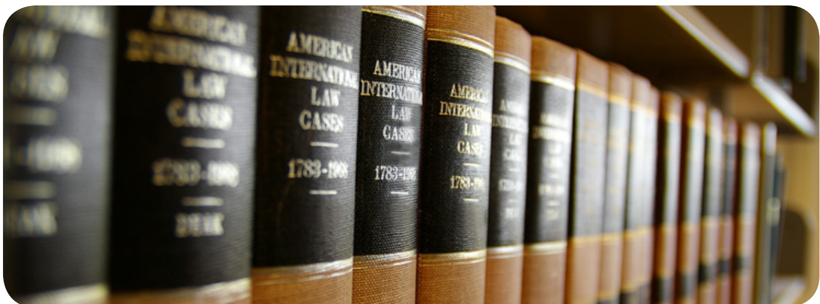
- What if a lawyer thinks that his client is guilty? Should that make a difference in how the lawyer represents him? The answer is a resounding no. It's not up to the lawyer to decide whether the client is guilty or innocent—that determination is left to the jury. Otherwise, the lawyer would be subsuming the role of the jury without giving his client the benefit of a fair trial, which is just the sort of tyranny the Constitution forbids. Moreover, the lawyer would also be violating his ethical obligations to his client.

- Most states have adopted some form of the American Bar Association's Model Rules of Professional Conduct. Rule 1.3 requires a lawyer to "act with reasonable diligence and promptness in representing a client." The comment to this rule explains:

  > A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.

- When is it okay for a lawyer to make a decision—for example, about how to respond to an unexpected question from the press concerning trial strategy—without first consulting with his client? To answer this question, we turn again to the Model Rules of Professional Conduct. Rule 1.2 governs the allocation of authority between client and lawyer. The rule says, in part:

  > [A] lawyer shall abide by a client's decisions concerning the objectives of representation and … shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation … . In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.



- ✯ This means that a criminal defendant gets to decide whether to enter a plea of guilty or not guilty, whether to waive his right to a jury trial, and whether or not to testify. But his lawyer has the authority to take the on-the-ground actions necessary to carry out the representation of his client.

- ✯ Lawyers on TV and in the movies are often depicted as attack dogs, and sometimes that's what a client wants. What should a lawyer do if a client says, "Be as aggressive as possible in every situation when representing me?"

- ✯ Under Model Rule 1.3, the lawyer is required to represent his client "diligently." The lawyer must "act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." But that doesn't mean he has to be unreasonable. It doesn't require him to yell, or to refuse reasonable scheduling requests made by opposing counsel, or to demean other people.

- ✯ In fact, acting as an attack dog all the time is not a smart strategy. Judges detest lawyers who squabble over petty things, or who file motion after motion to make opposing counsel's life miserable. Over time, you will lose your good reputation if you are unreasonable.

- ✯ A lawyer is not just the representative of his client. He is also an officer of the court—that is, a representative of the legal system as a whole. The Preamble to the Model Rules of Professional Responsibility makes this clear:

> A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

CLIENT CONFIDENTIALITY

- ✮ Another important aspect of the attorney-client relationship is the confidentiality of certain communications between the attorney and the client. Under Model Rule of Professional Conduct 1.6, a lawyer is prohibited from revealing "information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation," or the disclosure is otherwise permitted by the rules.

- ✮ It is difficult to imagine how any lawyer could properly advise a client if the client were not free to speak candidly. The attorney-client privilege protects the client, who benefits from the lawyer's advice. It also protects the lawyer, who relies on information from his client to do his job properly. And it protects society, which has an interest in the fair administration of justice that, in our adversarial system, depends on the giving and receiving of competent and informed legal advice.

- ✮ Are there any circumstances in which a lawyer could disclose things his client said, even if his client didn't want him to? Rule 1.6(b) addresses this question. It says that a lawyer can reveal information in circumstances like the following:

  - To prevent reasonably certain death or substantial bodily harm;

  - To keep the client from committing a crime or fraud that is "reasonably certain" to cause substantial injury to someone else's property or financial interests and in furtherance of which the client used the lawyer's services, or to rectify it if the client's already committed the crime or fraud; or

  - To obtain legal advice from another attorney in order to make sure he is properly complying with the rules, or to help him in a dispute with the client about the representation.

- ✯ So what if you were a defense lawyer, and your client confessed that he did it—he committed the crime of which he was accused? Could you reveal that information? Under Rule 1.6, probably not. An attorney has an obligation to keep a client's secrets. If the client said, "I murdered the victim," that's a secret, and it doesn't fall among the things in Rule 1.6(b) that a lawyer can disclose.

- ✯ What if the client tells the attorney, "I murdered the victim," then decides to testify at his own trial, and on the stand says, "I did not murder the victim"? The attorney knows that his client's testimony is false, but also knows that the confession is protected by attorney-client privilege. What should the attorney do? If a lawyer's client, or a witness called by a lawyer, testifies falsely, the Model Rules of Professional Conduct require that the lawyer "take reasonable remedial measures" to correct the perjury—including, if necessary, telling the court about it.

- Ethical dilemmas like these also arise in civil lawsuits, where lawyers are also bound by the same rules governing professional conduct. Attorneys in civil suits might find themselves struggling with similar issues—how to manage interpersonal disputes, which strategic calls are theirs to make, and what to do if they discover that a client is using their services to perpetrate fraud.

Suggested Reading

- Cohen, *The State of Lawyer Knowledge*.
- Harr, *A Civil Action*.
- Model Rules of Professional Conduct Rules 1.3, 1.2, 1.6.

Questions to Consider

- If you were a lawyer, are there certain defendants you simply would not represent? Why or why not?
- Would you always want your lawyer to be as aggressive as possible for you? Are there any downsides to aggression?

TRIAL STRATEGY BEHIND THE SCENES

In some cases, trials are won or lost because of the lawyering that takes place outside the view of the jury. In this lecture, we will talk about the things that lawyers do before trial, how a jury is selected, and the importance of jury instructions.

BEFORE THE TRIAL

- A smart lawyer will use the period before trial to gather evidence and plan for the trial. If you represent the plaintiff in a civil case—the party who brings the lawsuit—you would be wise to gather evidence well before you officially file the case. This informal process of gathering facts might include interviewing your client and other witnesses, reading documents and reports related to the dispute, and perhaps consulting with experts who can advise you about your case or testify in court on particular questions of fact.

- A defense lawyer, however, often doesn't have the opportunity to gather information before a case is filed. After the case is filed, defense lawyers gather information using formal discovery methods. They may also file a number of important pretrial motions.

- Discovery is the process by which parties gather facts once a lawsuit has been filed. The scope of discovery—the breadth of the things you can ask for—is determined by the rules of the particular jurisdiction you're in. Typically, the applicable rule will say that parties may obtain anything relevant to a party's claims or defenses.

- ✯ Discovery results in fairer trials, because it enables lawyers to better defend their clients. Discovery can also encourage settlement. For example, if the state shows during discovery that it has a lot of evidence against a criminal defendant, that defendant might decide to plead guilty—possibly in exchange for a lighter sentence—rather than go through a trial he is most likely going to lose.

- ✯ In civil cases, discovery rules generally permit the filing of interrogatories, which are another important discovery tool. Interrogatories are written questions that lawyers use to learn facts about the case, identify possible witnesses, and learn the location of useful documents or other relevant items. Interrogatories must be answered in writing. Answers are given under oath and subject to the penalty of perjury.

- ✯ Discovery also includes obtaining documents that might be helpful to the case. In a civil case, most jurisdictions permit the filing of a document request, which is a request to a party in the case to produce identified documents and electronically stored information. The documents have to be described with reasonable particularity, however, which means that a document request can't be a fishing expedition.

- ✯ Another important part of discovery is the taking of depositions. A deposition is a question-and-answer session with a potential witness or, in a civil case, with the plaintiff or defendant. A deposition is taken under oath, which means the person being questioned must answer truthfully or be subject to the penalty of perjury. A court reporter transcribes the proceedings, which are sometimes also videotaped.

- ✯ Depositions allow attorneys to gather more information about a case. The scope of what you can ask during a deposition is very broad: you can ask anything that might be useful to the case, including questions you couldn't ask at trial because they might be prohibited by the rules of evidence. Opposing counsel appears at the deposition to voice objections for the record, but can rarely prevent the witness from answering the question.

- A deposition is a useful way to test out potential witnesses—you can see how people are likely to appear on the stand. And deposition testimony can be used at trial to impeach a witness. If a witness says one thing at a deposition, and then says another at trial, you can read or play the deposition for the jury to show that the witness has contradicted himself.

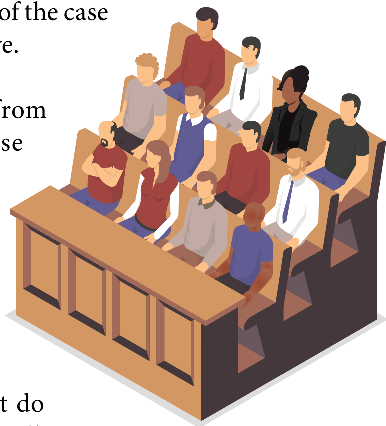
- The pretrial period is also a time for lawyers to file motions about how the case will proceed. These motions may involve discovery disputes, objections to the jurisdiction of the court, objections about evidence or interpretations of the law, and even objections to the judge who will preside over the case.

- It's common for a criminal defendant to get to go home for the period before his trial. He can't do this, however, unless he first pays bail or a posts a bond—a financial sum set by the judge to ensure that the defendant will appear at subsequent trial proceedings. The amount is chosen based on considerations like the type of crime at issue and the financial resources of the defendant.

JURY CONSIDERATIONS

- The right to a trial by jury is guaranteed by the Sixth Amendment of the Constitution. Although it's often described as an individual right, it's also a right of the people: it makes the citizenry, and not their rulers or the police, the deciders of who did what to whom. Parties can waive the right to a jury trial, and often do, but the right remains important.

- The process of jury selection involves lawyers from both sides asking potential jurors questions to ascertain whether they would be appropriate jurors for the case at hand. The questions generally are designed to tease out whether a potential juror has a bias, a connection to the parties or the lawyers, or previous knowledge of the case that would render him unfit to serve.



- Potential jurors may be excused from service if the service would cause undue hardship—for example, if the person has a medical issues, or is the sole caretaker of a disabled family member.

- After questioning the potential jurors, the attorneys can eliminate people from the pool. They might do this by challenging for cause, which allows the attorneys to eliminate potential jurors who are legally unsuitable to serve. Lawyers also get a limited number of peremptory challenges, which allow them to strike a certain number of jurors for any reason. Peremptory challenges cannot be used in a discriminatory way, however.

- The instructions that the jury is given about the law are tremendously important to the outcome of the trial. The lawyers work with the judge to determine what the jury should and should not be instructed to consider. This can be determined before the trial begins, if the trial will be a short one. In a longer trial, these issues are often hashed out later, in a hearing outside of the presence of the jury.

PUBLICITY AND SOCIAL MEDIA

- In highly publicized cases, public opinion, media coverage, and social media commentary can all influence the course of the trial. Finding a jury can be particularly tricky in these circumstances. So many people have heard of the events, and formed opinions about the participants, that it can be difficult to find people who are impartial.

- Highly publicized trials often have a cultural significance that extends beyond the outcome of the case. This larger cultural significance is as much a product of the traditional and social media that surround the trials as it is of the trials themselves. To adequately represent a client in today's media-saturated landscape, an attorney cannot ignore the media's influence.

Suggested Reading

- Mauet, *Pretrial*.

Questions to Consider

- Why do some trials capture the public imagination? Were those disputes resolved in trial, or have they continued to live on?

- How might an attorney consider media coverage or social media when designing the strategy of her case?

Lecture 5

OPENING STATEMENTS: THE MOMENT OF PRIMACY

The opening statement by an attorney in a trial is a crucial opportunity. It represents the attorney's first chance to connect with the jurors and create a lasting impression in their minds of what the case is really about. Preparing an effective opening statement takes careful thought, however, and there are strict limits on what the attorney can say.

THE BASICS

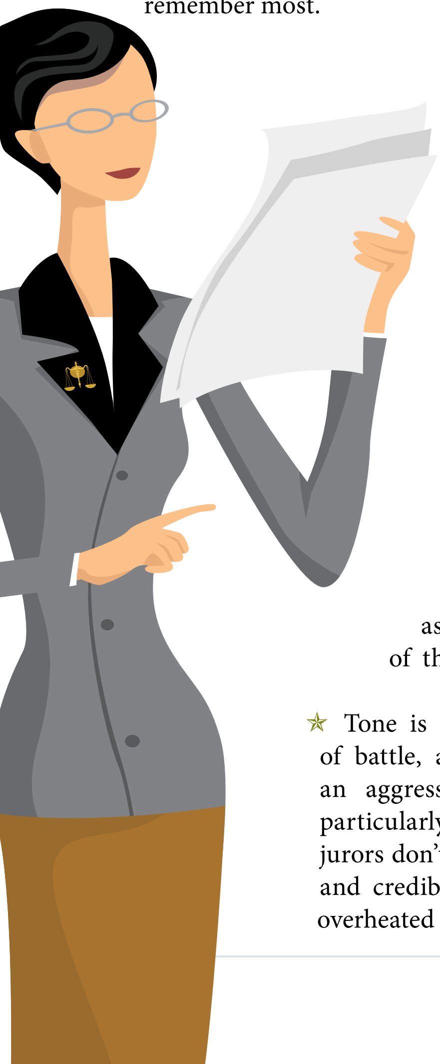
- An attorney's opening statement should be constructed around her theory of the case—that is, what the case is really about, and why her client should prevail.

- The opening statement is a bit like a table of contents: It orients the jurors to the nature of the dispute, who the witnesses are that they're going to see, and what each side is trying to prove. The lawyers then fill in the actual story of the case during the trial, using witness testimony and other pieces of evidence.

- Imagine what a trial would be like if there were no opening statements. A lawyer could begin by calling a witness, who might be able to testify about a fact or two, but the jury would have no idea why the testimony was significant or how it fit into the big picture of the case.

- If the only purpose of an opening statement were orientation, a simple sequence of events and a list of witnesses would be enough. But that's not enough. An opening statement must also grab jurors' attention.

- The first few lines of an opening statement come at an important moment psychologically: the moment of primacy. The moment of primacy is the one time you can be sure that the jury is listening attentively, so you should start with the things that you want them to remember most.



ESTABLISHING ETHOS

- Jurors are usually a little nervous at the outset of a trial, wondering what is going to happen, and feeling the weight of their roles in the process. They're looking for guidance. They're trying to find out whom they can believe—who the "good guys" are. As a lawyer, you want to be one of those good guys. Your first impression must be a good one.

- The opening statement is an exercise in persuasion, and the character of the speaker counts. Aristotle, the father of classical rhetoric, referred to this concept as ethos—persuasion based on the character of the speaker.

- Tone is central to establishing ethos. In the heat of battle, a trial lawyers may be tempted to adopt an aggressive, sarcastic tone. This is a mistake, particularly during the opening statement, when the jurors don't yet know the lawyer. A tone of conviction and credibility is more likely to gain trust than an overheated one.

- At the same time, you don't want to go too far in the other direction—you don't want to be a bully, but you also don't want to seem like a pushover. If you are apologetic, or excessively polite, or if you mumble, hesitate, fumble with visual aids, and use passive body language, the jury will believe you lack confidence in your case and yourself. A wise lawyer will practice his opening statement, including how he will interact with any visual aids he might use, so that he can project self-assurance.

- Another key to establishing ethos is not to exaggerate. It's too easy to disprove an inflated claim, especially one that's offered in an overheated way. You can be sure that opposing counsel will point out the discrepancy. If the jury realizes that you were misleading them about evidence, your credibility will suffer, and so will your client's.

- It is a good practice to identify any facts that are bad for your case. If you know that opposing counsel is aware of them and is likely to mention them, you can lessen their impact by mentioning them first. You should spend most of your time in your opening statement emphasizing the good facts that help you. If you do, mentioning a bad fact as part of the story rather than leaving it out altogether will actually help you stay credible.

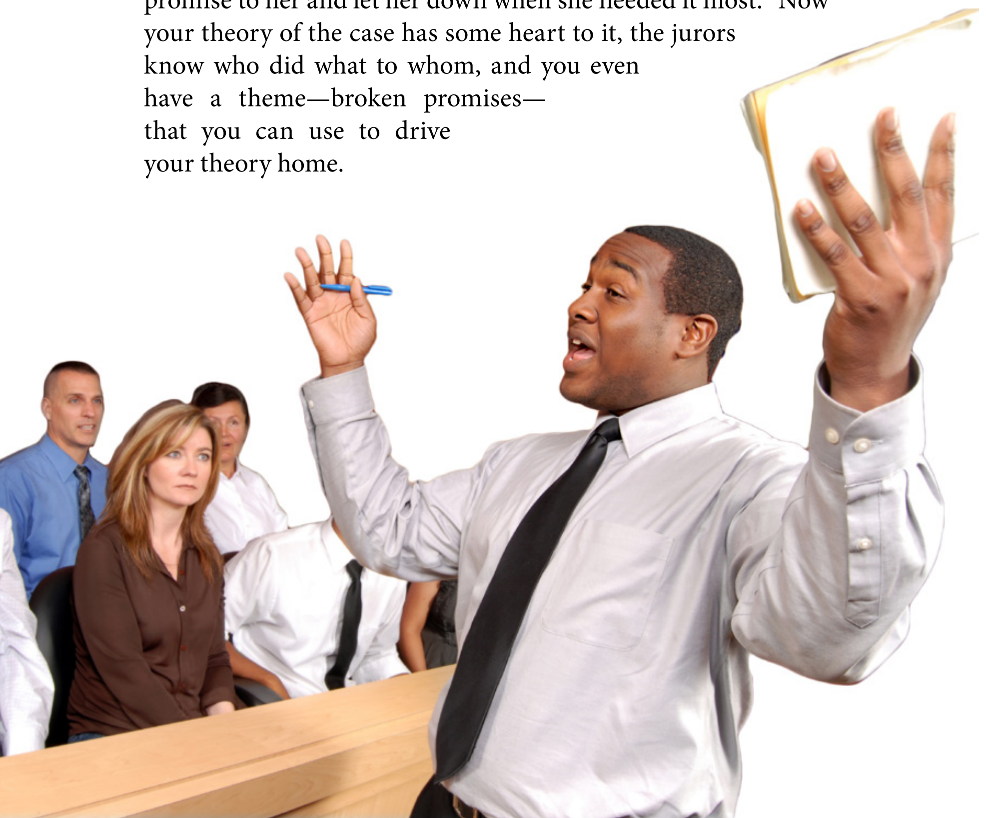
PERSUADING WITH PATHOS

- To be persuasive, you must figure out how to get the jury emotionally invested in your client and your case. This is Aristotle's second element of persuasion, a concept he referred to as pathos—engaging the emotions of your audience effectively.

- As a lawyer, you need to figure out how to explain your client's view of events through a believable and compelling story that jurors can identify with. In other words, it's not enough just to present your theory of the case—you need to get the jurors to relate to your client's point of view.

- Let's say, for example, that you represent a company that is suing another one for violating a contract that the two companies previously signed. Many lawyers might present their theory of the case by saying something like, "This is a case about a breach of contract." That's an accurate statement, and it is pithy, so it's a good first step. But there are no human beings in that version, and you can't tell who did what to whom. It also contains jargon. Some people don't know what "breach of contract" means, nor do they care.

- It's better to look for some people to put into the story. You might instead say something like, "This is a case about Laurie Kind, who owns a small craft store in town, and about the fire insurance company that broke its promise to her and let her down when she needed it most." Now your theory of the case has some heart to it, the jurors know who did what to whom, and you even have a theme—broken promises—that you can use to drive your theory home.



BUILDING WITH LOGOS

- ✯ The impressions that one makes in the first moments of an opening statement are vital, and connecting with the jury emotionally is essential. But of course, an effective opening statement and an effective case depend, at the most basic level, on logic. If a case makes no sense, a jury is unlikely to buy it. Aristotle referred to this concept as logos—persuasion based on sound logic.

- ✯ Logos is especially important in an opening statement, because, strange as it may seem, you aren't allowed to argue in an opening statement. You can offer the jury a preview of the facts you expect to bring out in the course of the trial, and of the witnesses who will testify, but you aren't permitted to tell the jury what you think the facts mean, or to suggest any conclusion or inference from them.

- ✯ It is difficult, but not impossible, to make a persuasive opening statement without arguing. The best lawyers do it by lining up the facts so that their meaning is obvious. The jury can then see the theory of the case for themselves. This takes practice, however. Even experienced lawyers struggle with it.

- ✯ Good logos requires structure. If the structure is clear—if you've thought about what you really want to convey—it's more likely that the audience will absorb what you hope to communicate. In an opening statement, the structure is largely driven by the theory of the case. That might mean that the parties in the case start with completely different parts of the story.

- ✯ Let's say, for example, that you are a prosecuting attorney in a criminal case. Your story might start with events leading up to the crime that show the defendant's motive. Or it might start with the crime itself, to grab the jury's attention. If you are the defense lawyer, your theory of the case may be that the police lab made a mistake in processing the evidence. In that instance, you might start with a description of the police lab and what happens there.

- Good logos also demands that you pay attention to what you want to include in your opening statement and what you want to leave out. One thing you should leave out is any evidence that the jury doesn't really need to consider yet. Likewise, you should omit anything that you can't actually introduce into evidence. The opening statement is supposed to be an overview of the facts that you're going to prove. If you know you won't be able to bring something into evidence—perhaps because you don't have a witness, or because of a pretrial ruling by the judge—you can't talk about it.

- Another tricky logos issue in opening statements is the danger of opening up evidence for the other side. If you've carefully filed a pretrial motion in which you successfully persuaded the judge to prohibit some type of evidence, you could undo all that good work if you end up mentioning that evidence yourself. That will give opposing counsel the right to present it in order to rebut your claim.

Suggested Reading

- Mauet, *Trial Techniques and Trials*.

Questions to Consider

- How is an opening statement similar to any persuasive speech, and how does it differ?

- Aristotle wrote that persuasion requires credibility, emotional engagement, and logic (ethos, pathos, and logos, respectively). Do you agree? Which element do you think is the most important?

Lecture 6

DIRECT EXAMINATION: QUESTIONING YOUR WITNESSES

After opening statements, the prosecution and the defense (or the plaintiff and the defense, in a civil trial) take turns presenting evidence to the jury. One way to present evidence is through direct examination, which involves calling witnesses to the stand to testify about the facts of the case. After each witness testifies, opposing counsel is given the opportunity to question—or cross-examine—the witness, typically to poke holes in the witness's testimony.

TELLING YOUR STORY

- Imagine yourself as a lawyer conducting direct examinations. Your first challenge is to figure out whom you want to put on the witness stand. That means starting with your theory of the case. What do you have to prove? What version of facts must the jury believe in order for your side to prevail, and who can best testify to those facts?

- To address these questions, it can help to create a chart showing your theory of the case, your proof to support that theory, and how each witness will shore up or reinforce that theory. This exercise will help you see what big-picture point you need to make with each witness. It's a good idea to make a list of the testimony you absolutely must elicit from each witness, and bring that list with you to the lectern during questioning so you don't forget anything.

- Keep in mind that you don't have to call every single person who has a connection to the case. A lawyer may spend a significant amount of time before trial taking depositions—questioning witnesses under oath, with the exchange transcribed by a court reporter. Depositions are an opportunity to learn what a witness knows and what really happened. They also show you how the witness will appear to the jury. As common sense would suggest, you want to choose witnesses who are reliable and credible, and avoid people who are disreputable.

- Once you've decided which witnesses you are going to call to prove your case, you need to figure out the order in which to put them on the stand. The order in which witnesses are called is an important part of presenting a credible story to the jury. For example, you might begin with a witness who can provide a broad context for the jury, follow with witnesses who can fill in details in an order that makes sense, and end with a particularly strong witness.

- You're not allowed to tell the jury why you called a witness—that could bias the jurors toward or against what the witness says. But the reasons for the witness's testimony will come out if you ask the witness the right questions. If you start and end with particularly strong witnesses, that can help make your case memorable and convincing.

- ✯ Once you've determined the order in which your witnesses will appear, you need to think about what to ask them. Usually you start the examination with questions that tell the jury why the witness is testifying—his relation to the case, why he's credible. Then you move straight to questions about the main points you need the witness to make.

- ✯ You want each witness to make a few, well-chosen points rather than hundreds of them, because it's easier for the jury to follow if you are selective about what you ask. It can be helpful to think of these points as separate chapters. You need to use clear transition sentences to signal to the jury when you are shifting from one chapter to the next.

- ✯ By organizing your questions into a logical sequence, you can help each witness tell her story and make it memorable. In addition to helping the jury make sense of the testimony, this kind of structure will help the witness feel more comfortable on the stand.

- An effective direct examination must do more than simply plod through the evidence, however. It should relate a vivid story for the jury, one that they're going to care about and believe in. That's why it's important that the witness do most of the talking. If the lawyer is having to prompt the witness too much about what happened, the examination will be dull and tedious, and the jury might tune out. Or even worse, the jury might not believe the witness is telling the truth.

MAKING IT COUNT

- During direct examination, your witness is the star. The lawyer plays a supporting role—gently feeding the witness short, nonleading questions that will help her tell her story.

- A nonleading question is one that's open-ended—one that lets the witness answer in her own words. In contrast, a leading question is one that suggests its own answer, such as, "You went to work, didn't you?" In direct examination you are not permitted to ask leading questions. Until they become experts in direct examination, most lawyers write their questions in advance to make sure they aren't leading.

- A direct examination should sound like a conversation that the jury gets to hear. The lawyer is essentially the voice of the jury, asking the questions that the jurors would want to know answers to. So the lawyer needs to ask questions in an order that makes sense. That doesn't mean you need to stick to the questions you've prepared no matter what, though. If a witness says something interesting, follow up on it. Don't just move on to the next question on your list.

- Be careful not to let the witness stray from the case that you're trying to make. Sometimes witnesses attach significance to things that are simply beside the point. If the witness begins to discuss things that have nothing to do with the case, the wise lawyer will circumvent the topic through careful questioning.

- ✫ Some witnesses are nervous and blurt out their stories so quickly that the jury can't absorb them. You can help slow down the pace by asking the witness about events in increments, or by circling back to ask follow-up questions. By doing so, you will ensure that jury can focus on the details, and you will be able to emphasize the things you want to emphasize.

- ✫ If you have a witness whose testimony you need but who doesn't want to be there in the first place, or who is sympathetic to the other side, the judge will usually allow you to ask leading questions on direct examination. You can also ask leading questions if the witness is a child, or has mental disabilities, or is someone for whom language is an issue.

PREPARING YOUR WITNESSES

- ✫ It's important to be able to think on your feet during direct examination, but a successful direct examination isn't just about what happens in court. You have to prepare the witness. You have to think strategically about what you'll be asking, and you have to give the witness a chance to practice so he or she will feel comfortable and be credible.

- ✫ Witnesses aren't required to meet with you in advance of the trial if they don't want to. A cooperative witness probably will want to, but other witnesses may not. In such cases, the best you can do is to subpoena them and then give a lot of thought to what you will ask them at trial.

- ✫ To prepare a witness for trial, you should first review all the relevant reports, interrogatories, witness statements, and interview notes, and decide what testimony you want from the witness. You should write out your questions and the anticipated answers, but don't give those answers to the witness. You aren't allowed to coach the witness—it would be unethical to tell the witness what to say, and it would also make the witness less credible.

- ✫ Instead, practice with the witness. Ask her your questions, listen to her answers, and adjust what you are asking based on what she says. Make sure you're eliciting clear information. If you're going to use an exhibit

or a visual aid with the witness, show it to her and get her comfortable with it. Work with the witness to help her appear open, positive, clear, and respectful to the court and to opposing counsel. Pay attention to her physical appearance, eye contact, and language to help her be more credible. And emphasize the importance of telling the truth.

- When working with a witness, you must remember that conversations with witnesses who aren't your clients aren't privileged. This means that your conversations with non-client witnesses are fair game on cross-examination. You have to be thoughtful about what you say and don't say.

- Sometimes a witness will become so terrified on the stand that she cannot remember something she used to know. As a lawyer, you want to reassure your witness in advance that it's okay if that happens. In that situation, the rules of court permit you to refresh the witness's recollection. You can use anything that might jog the witness's memory—a transcript of a deposition that she gave about the events in question, for example, or notes she made about the case.

- The preparation session should also include preparing your witness to be cross-examined. Witnesses who are nervous about cross-examination will be less effective during your direct examination. So let witnesses know about the habits of opposing counsel, and remind them that whatever happens, they shouldn't argue or get angry.

- The unexpected can always happen when a witness takes the stand. But if you've lined up credible witnesses who can present your theory of the case clearly, prepared them well, and know exactly what you want to ask them, you have put your client and yourself in the best possible position as you head to trial.

Suggested Reading

- Shadel, *Finding Your Voice in Law School*.

Questions to Consider

- Do you see an application for direct examination techniques in your own life? If so, how might they be helpful?

- How can you use questions to get a witness to tell a story? Consider practicing this by asking direct-examination questions to a friend.

THE ART OF THE OBJECTION

The task of voicing objections at trial is one of a trial lawyer's most important responsibilities. Making objections correctly requires knowledge of both procedural and evidentiary rules. This lecture explores the rules of evidence, focusing especially on the kinds of evidentiary objections you're most likely to hear during a trial.

THE BASICS

- The Federal Rules of Evidence govern the introduction of evidence—a category that includes both witness testimony and exhibits—in all federal courts. State courts have their own evidentiary rules, but many states have adopted rules that are similar to the Federal Rules of Evidence.

- Lawyers objecting to evidence offered by opposing counsel can do so before or during the trial. You can't wait until after the trial to make an objection, however. The whole point is that you're trying to keep the jury from hearing about the evidence at all. If you wait until the trial is over, the damage has already been done.

- Having your objection overruled by a judge can be as valuable as having it sustained. Under Rule 103 of the Federal Rules of Evidence, a party who makes a timely objection has preserved his right to raise the evidentiary issue on appeal. If the judge overrules your objection, you don't have to keep objecting each time the evidence in question

comes up during the trial. As long as you objected properly the first time, your client's right to appeal the judge's ruling on that issue has been preserved.

- If you know that opposing counsel wants to introduce particular testimony and you think there's a good reason it shouldn't be allowed, it can be a smart move to file a motion to preclude the testimony before the trial even starts. This gives the judge more time to think about the correct outcome, and it gives you more time to think about and make your best argument.

- You must always keep your eyes on the evidence introduced during the trial, and be ready to object if necessary. Making objections quickly and properly is a difficult skill to master, because—like so many other courtroom skills—it requires thinking on your feet. It's also important to understand any pretrial rulings the judge has made so that you know when opposing counsel is trying to bring in evidence that would run afoul of those rulings.

RELEVANCE

- ✫ Relevance is one of the most common grounds for objection to a particular piece of evidence. In order to be admissible in court, evidence must be relevant to the dispute at hand. Rule 401 of the Federal Rules of Evidence says that evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action."

- ✫ Evidence can be relevant but still inadmissible if the evidence violates some other exclusionary rule. Under Rule 403, for example, the court may exclude relevant evidence "if its probative value is substantially outweighed" by a danger that it will prejudice, confuse, or mislead the jury, or waste time.

- ✫ A common situation in which this analysis arises is the proposed introduction of evidence about the character of a criminal defendant. Prosecutors may want to introduce evidence that the defendant has done bad things in the past, to show that it's likely that he's behaved badly again this time. When offered for that purpose alone, such evidence is inadmissible under Rule 404(b).

- ✫ Evidence of a defendant's prior bad acts might still be admitted, however, if it is offered for other purposes. Rule 404(b) allows evidence of prior bad acts to prove, for example, that a defendant had a motive or a plan, or to show that the defendant had special knowledge that is relevant to the case at hand.

- ✫ A lawyer can also introduce evidence of prior bad acts when they relate to the truthfulness of a witness testifying on the stand. Rule 608 provides that "a witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness." This rule is limited, however. You can question the witness about the bad act, but unless it's a criminal conviction, you can't bring in outside evidence.

HEARSAY

- ✯ Hearsay refers to a statement made out of court that is being offered into evidence so that the jury will believe the statement is true. The general rule is that hearsay is inadmissible. However, there are many exemptions and exceptions to the general rule.

- ✯ The idea behind the rule against hearsay is that it's better to have a witness come to court to talk to the jury directly, rather than to have someone else say what an absent person said. An in-court witness is testifying under oath, subject to the penalty of perjury, and is therefore considered more likely to tell the truth. In addition, the jury can size up the witness and determine if he seems credible, the lawyer who called the witness can ask questions to flesh out his testimony, and opposing counsel can examine the witness to see if he knows what he's talking about.

- ✯ Certain categories of evidence are exempt from the rule, and are therefore not considered hearsay. For example, Rule 801 provides that statements made by an opposing party aren't hearsay. The logic behind this exemption is that the opposing party will have ample opportunity during the trial to correct any misstatements, and that the jury will have plenty of context to evaluate the evidence.

- ✯ Rule 801 also says that a statement isn't hearsay if it's offered to prove something other than the truth of the statement. For example, testimony by Mark that he heard John say, "The Eagles won the game!" is not hearsay if it's not being introduced to show that the Eagles did, in fact, win the game, but is instead being introduced for some other purpose (perhaps to show that John mistakenly believed that the Eagles had won when, in fact, they hadn't).

- ✯ Another important exemption applies to reports that a witness said something under oath in the past, but has now changed his story and is saying something different on the stand. You can introduce his prior inconsistent statement because the jury should know that he's told two different stories; that makes him less credible.

- Rule 803 lists a number of exceptions to the rule against hearsay. For example, Rule 803 provides that hearsay is admissible if the statement at issue was made to a doctor for purposes of receiving medical treatment. The reasoning behind this exception is that people have a strong incentive to tell the truth in such situations, and their statements are therefore more likely to be credible.

- Another exception to the rule against hearsay applies to present sense impressions. "Gosh, it's hot in here!" is an example of a present sense impression. Because such statements are usually made without thinking, they are more likely to be credible. The same reasoning underlies the exception for excited utterances, like "Watch out for that truck!" There are also exceptions pertaining to public records, marriage certificates, and property documents.

EXHIBITS

- Documents or other pieces of physical evidence can often help prove your case. The judge must admit these items into evidence before the jury can look at them. They are labeled as exhibits and typically assigned a letter or number to make it clear in the record which item you are talking about.

- Exhibits can help drive home a witness's testimony by making a point more vividly than testimony alone can. If you're a trial lawyer, it's important for you to understand how to get something admitted into evidence—not only because you may need to introduce exhibits as you present your case, but also so you know when to object if someone else is introducing evidence incorrectly.

- To enter a document into evidence, you must authenticate it—that is, you must establish that the document is what you are claiming it is. Generally, the witness authenticating the exhibit should be someone with knowledge of it. In the case of a report, for example, the authenticating witness might be the author of a report.

- If opposing counsel is attempting to enter a document into evidence, you may object if the proper foundation hasn't been laid—for example, if opposing counsel hasn't asked the appropriate questions to show that the document is what he claims it to be. In some instances, it might not be worth it to object, particularly if the problem is one that can be easily corrected. But that's not always the case. When introducing a report, for example, attempted authentication by someone who didn't write the report (and can't otherwise establish its authenticity) might very well garner an objection.

- Usually it's okay for a lawyer to offer a copy of a document into evidence. However, if there is a question about whether the document has been forged or altered, the court can require that the original document be produced. This is called the best evidence rule, and is contained in Rules 1001–1004.

- When preparing for trial, a smart lawyer will review her witnesses and exhibits, and consider any objections that might be raised by opposing counsel. Similarly, she will think about the testimony and exhibits that opposing counsel might introduce, and determine if there are reasons she might object.

- The smart lawyer will also pick her battles. That way, the judge will pay attention to the objections she raises. Judges and jurors won't like objections if they think you're simply trying to slow things down.

Suggested Reading

- Federal Rules of Evidence 401, 403, 404, 608, 801, 802.

- Sacks and Spellman, *The Psychological Foundations of Evidence Law.*

Questions to Consider

- What do you think of the prohibition against hearsay evidence? Do you think it is a reasonable rule, or do you see a problem with it?

- We require attorneys to make objections at trial to preserve errors on appeal. If an error has not been preserved, it cannot be appealed. Do you think this is a good system? Why or why not?

Lecture 8

PROBLEMATIC EVIDENCE

Why are innocent people sometimes convicted of crimes they didn't commit? Why is the party at fault in a civil suit not always held liable? In some cases, it's because of problematic evidence. Lawyers must understand the issues associated with problematic evidence so they can take measures to have it excluded. This lecture examines three kinds of problematic evidence: false confessions, mistaken eyewitness identification, and flawed expert testimony.

FALSE CONFESSIONS

- If a jury hears that a defendant has confessed to the crime of which he's been accused, jurors may be entirely convinced that the defendant is guilty. After all, why would anyone confess to something he didn't do? That's one of the questions Brandon Garrett set out to answer in his groundbreaking work *Convicting the Innocent*.

- DNA testing first became possible in the late 1980s. In 1992, attorneys Peter Neufeld and Barry Scheck founded the Innocence Project, which began using DNA testing to exonerate wrongly convicted people. So far, 349 people have been exonerated, including 20 people who were on death row. In many of those cases, DNA evidence also identified the real culprit.

- Garrett studied the first 250 cases in which a convicted defendant was later exonerated by DNA evidence. In the first 40 such cases, the exonerated defendant actually confessed to the crime of which he was later proven innocent. False confessions are particularly problematic in death penalty cases—so much so, in fact, that half of the 20 death penalty cases in which the convicted defendant was later exonerated by DNA evidence involved a false confession.

- In 38 of the 40 cases Garrett studied that involved false confessions, detectives claimed that the defendant provided details about the crime that only the perpetrator could know. But those details may well have come from the detectives themselves, either deliberately or inadvertently. They may have been mentioned during interrogation, for example, by detectives pressing the defendant to confess to the crime.

- In 14 of the 40 cases Garret studied that involved false confessions, the confessing defendant was mentally retarded. Three more defendants were mentally ill, and an additional 13 were juveniles. That's 30 out of 40 cases where false confessions came from particularly vulnerable defendants—defendants who might have confessed simply because police told them to, for example, or because they didn't understand the gravity of the situation.

- ✯ False confessions can also have tragic consequences for people other than those who make them. a false confession might implicate another innocent person, for example, who might then be inclined to provide a false confession of his own to receive leniency in sentencing.

- ✯ To avoid obtaining false confessions, police departments in many states are adopting reforms suggested in *Convicting the Innocent*, including videotaping all police interrogations and educating judges about the research on false confessions.

EYEWITNESS IDENTIFICATION

- ✯ Imagine a rape case in which the victim is able to positively identify the defendant in court. She is able to point to him and say with certainty that he is the person who committed the crime. She got a good look at his face; in fact, his face was quite close to hers throughout the attack. She is therefore 100 percent positive that the defendant is the man who attacked her—except that he isn't.

- ✯ In 190 of the first 250 cases in which a convicted defendant was later exonerated by DNA evidence, eyewitnesses identified the wrong person as the culprit. Sometimes this happens because the police have done something to suggest to the victim who the culprit should be—during a lineup of potential suspects, for example, or while the victim is examining a photo array prepared by police.

- ✯ Sometimes the problem is what police fail to say. For example, social science suggests that police who are showing a victim a lineup need to say in advance, "Now, it's possible that the person who did it isn't included in this group; we may not have found the right guy yet." If they don't, research shows that the victim is likely to pick someone from the lineup, even if that person didn't actually commit the crime.

- ✯ In other situations, the problem is that the witness's memory is malleable. During a rape, for example, the victim is likely to be terrified, and under stress it can be hard to remember things accurately. But if the victim sees a certain suspect's picture in a photo array prepared by

investigators, then sees it over and over again in the newspaper and on television, the suspect's image may become stuck in her mind. This can lead the victim to identify the suspect as her attacker, even when the suspect is innocent.

- False eyewitness identification can happen despite the best intentions of those involved. Police are usually just trying to catch the bad guy. Witnesses are usually just trying to help. Nevertheless, lawyers need to know the problems with eyewitness identification in order to properly defend their clients. Police need to know them, too, to make sure they aren't tainting the process.

- Improving police procedures is essential to reducing false identifications. For example, studies suggest that using a police sketch artist to help a victim make an identification is problematic, because the process of creating the sketch can distort the victim's memory.

- Another problematic procedure is the showup, where the police show the victim a single suspect—rather than a lineup of several possible suspects—in order to quickly identify the perpetrator. a showup is permissible shortly after a crime occurs, when a possible suspect is found near the scene, because it can help police protect the public. Photo arrays and lineups are less suggestive than showups and therefore preferable when performed correctly.

EXPERT TESTIMONY

- ✯ When a trial involves expert testimony, the expert is often the star witness. Expert witnesses are especially influential in court because unlike regular witnesses, they can offer opinions in their areas of expertise. In order to do so, however, a witness must first be qualified as an expert.

- ✯ The Federal Rules of Evidence provide that a witness may be qualified as an expert based on the witness's "specialized knowledge" concerning the matter at hand. This could be scientific or technical knowledge, but it doesn't have to be. In a case involving a defective lawn mower, for example, the owner of a landscaping company with years of experience operating the type of mower used by the plaintiff might be qualified as an expert and therefore permitted to offer an opinion.

- ✩ Most state courts have adopted the same standard for expert testimony as the Federal Rules of Evidence. But there are some states, including California, Illinois, and New York, that follow an older rule known as the Frye standard. The Frye standard requires that experts use methods generally accepted in their field. Under the Frye standard, the owner of the landscaping company in the previous example might not be qualified as an expert witness, because it might be difficult to show that his method of evaluating lawn mowers is generally accepted.

- ✩ In federal courts, the methods used by expert witnesses don't need to be generally accepted. Instead, they must be shown to be reliable. In a 1993 case called *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the U.S. Supreme Court clarified this idea by holding that the judge overseeing a case is responsible for making sure that expert testimony is reliable. If the judge isn't persuaded that an expert is using a reliable method, the expert won't be qualified, and the jury won't be allowed to hear his opinion.

- ✩ When evaluating the reliability of a particular expert's method, federal judges generally apply the nonexclusive checklist established by the Supreme Court in the *Daubert* case. This includes things like whether the expert's technique can be tested for reliability, whether it's been subject to peer review or publication, what the error rate of the technique is, whether there were standards or controls applied, and how the scientific or peer community views the technique.

- ✩ When you're putting an expert on the stand, you usually begin with questions establishing the expert's credentials: the degrees they hold, their experience, and so forth. In some state courts, you must then formally offer the witness as an expert. You would then ask the expert whether he has an opinion about the issue he's there to discuss, ask him what his opinion is, and then ask him to explain the basis for his opinion.

- ✫ When your expert is discussing his area of expertise, his testimony may be very complicated. You'll want to be sure that he explains himself as clearly as possible, using plain language and visual aids if possible. You'll also want to be sure that he doesn't bore, overwhelm, confuse, or patronize the jury.

- ✫ At the request of Congress, the National Academy of Science issued a report about the reliability of forensic methods used in court cases. The report concluded, "In a number of forensic science disciplines, forensic science professionals have yet to establish either the validity of their approach or the accuracy of their conclusions." The one notable exception was DNA evidence, which has proved to be both valid and consistently accurate. Other types of seemingly scientific evidence, such as comparison of bite marks, footprints, fingerprints, voices, and hair, have not.

Suggested Reading

- Garrett, *Convicting the Innocent*.

Questions to Consider

- What safeguards might we enact that could prevent innocent people from confessing to crimes they didn't commit?

- What reforms could be enacted to ensure that expert testimony is reliable?

CONTROLLING CROSS-EXAMINATION

There's nothing quite like the conflict, test of wills, strategy, and quick thinking involved in cross-examination. In a cross-examination, opposing counsel asks questions to poke holes in the testimony of a witness unfriendly to her client's case. It's a tricky exercise, requiring the cross-examining attorney to prove her point without losing control of the witness, eliciting an answer she doesn't expect, or offending the jury.

SCOPE AND FORM

- Rule 611 of the Federal Rules of Evidence lays out two areas of questioning that are permitted on cross-examination in federal courts. It states, "Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility." Some states have rules permitting broader cross-examination, but most states have rules similar to Rule 611.

- On cross-examination, you can ask the witness questions on any topic the witness discussed on direct examination. However, you're not supposed to exceed that scope. You can also cross-examine the witness concerning matters affecting the witness's credibility. For example, if the witness was once convicted of perjury—that is, lying under oath—questions about the perjury conviction would certainly be relevant to the witness's credibility and would therefore be allowed.

- ✯ Rule 611 also provides that a court "may allow inquiry into additional matters as if on direct examination." The court might allow this if the issues you want to raise have some bearing on the case, but you will have to question the witness as if you were performing a direct examination—for example, without asking leading questions.

- ✯ With few exceptions, leading questions are only permitted on cross-examination, where they are a powerful tool for keeping a witness in control. Leading questions are those that suggest their own answer ("You opened the door, didn't you?"). A skillful cross-examining attorney can control the witness by asking a series of simple, single-fact, leading questions. This approach leaves little wriggle room for the witness to argue.

COMMON PITFALLS

- ✯ When cross-examining a witness, it's important not to ask one question too many. This is sometimes called avoiding the ultimate question—the question that really drives home the point that you want to get across to the jury. It can be very tempting, especially if you've spent a lot of time building toward a particular conclusion, but it's a mistake; the witness will never agree with you, and she may say something that makes it harder to prove your case.

- ✯ It's much better to limit your cross-examination strictly to questions with which the witness must agree. Save any conclusions you want the jury to draw for your closing argument, when the witness you cross-examined won't be on the stand to disagree with you.

- ✯ Avoiding the ultimate question is actually an example of a broader, more fundamental rule of cross-examination: Never ask a question unless you already know the answer. The witnesses you cross-examine are usually in court to support the other side's case, and you can't afford to gamble on what they might say. So ask safe questions—ones based on something the witness has said in the past.

- On cross-examination, you should limit yourself to a few, well-chosen points. As with direct examination, the jury is more likely to remember what a witness says if there are only a few points and the points are very clear.

- It's not a great idea to use cross-examination to make a point that you could make through direct examination of a friendly witness, or through your closing argument. Cross-examination should be used strategically—to show why a witness can't be believed, for example, or to elicit helpful testimony that only this particular witness can provide.

- Your cross-examination should be structured in a way that helps tell your story—that promotes your theory of the case. If you spend all your time shooting down the witness's direct examination, the jury probably won't remember your points, and you'll have reemphasized the opposing counsel's structure instead of supporting your own.

- ✫ The tone that a lawyer uses during cross-examination is extremely important. If a witness is hostile, or provides an unexpected answer, some cross-examining attorneys instinctively adopt a more aggressive tone, and may stand too close to the witness. This can backfire, however, if the jury perceives the attorney as a bully.

- ✫ When performing a cross-examination, you should generally stay behind the lectern and maintain a tone of calm confidence. A tone that shows even-tempered professionalism and expertise will appeal to a jury more than one that suggests you enjoy humiliating someone. You may occasionally need to get tough with a witness, but be sure to pick your battles carefully.

IMPEACHMENT AND OBJECTIONS

- ✫ Impeachment is the process of calling into question the credibility of a witness. If you're questioning an important eyewitness to an incident, you might do this by showing that the eyewitness was hiding behind a wall when the events occurred and couldn't actually see anything. If the witness has bias, interest, or motive to lie—for example, if he's a friend of the party calling him to testify or is an expert being paid for his time in court—those are also proper grounds for impeachment.

- ✫ You can impeach a witness by showing that he has been convicted of a felony, or of any crime involving dishonesty or false statements, if the conviction happened in the last 10 years. You can also impeach a witness by asking him about prior bad acts that are probative of his truthfulness, but you won't be able to use extrinsic evidence of the prior bad act.

- ✫ The most complex form of impeachment—but often the most damaging for the witness's credibility—uses a prior inconsistent statement by that witness, typically from a police report or a deposition. Because the witness was talking to the police or was under oath when making the prior statement, it's a major blow to his credibility if he contradicts the statement during his testimony at trial.

- ✯ If you can successfully impeach a witness using a prior inconsistent statement, you will have shown that either the witness is lying now, the witness was lying previously when it was unlawful to do so, or the witness has forgotten a critical part of his testimony. In any case, the jury will be much less likely to believe what that witness has to say.

- ✯ You should only attempt to impeach a witness by prior inconsistent statement if you are certain that he has contradicted something he said previously. You must also have the affidavit or deposition to prove that he has changed his story.

- ✯ Before reading the prior statement for the jury, you must have nailed the witness down to his contradictory statement. If the witness realizes that he is playing fast and loose with his prior testimony, he often will back down and contradict himself in court, in which case an impeachment with the prior statement will be unnecessary. If the witness maintains his position, however, you can proceed with the impeachment.

- ✯ When conducting the impeachment, read the relevant portion of the witness's prior statement to the witness rather than having the witness read it to you, because if given the opportunity, some witnesses will hijack the examination and muddle your impeachment. A wise lawyer will know the impeachment procedure cold so that she can skillfully make clear that the witness has contradicted himself.

- ✯ If the witness admits that his story has changed, then there's nothing else that you need to do. Sometimes, however, the witness might not admit the contradiction, or might claim not to remember.

If the issue you're talking about isn't significant, you might be required to let it drop. But if the matter has important independent significance to the case, then you can prove up the impeachment with extrinsic evidence when it's time for you to call your own witnesses.

- A lawyer can do a lot of damage to opposing counsel's case through cross-examination. But if it's your witness who is being cross-examined, you can defend him by objecting, when appropriate, to the cross-examining attorney's line of questioning. For example, you might object if a question your witness is asked on cross-examination exceeds the scope of the direct examination, misstates evidence, assumes facts not in evidence, or asks the witness to speculate, or if the question is argumentative, which means that it doesn't actually elicit any new information.

Suggested Reading

- Younger, *The Irving Younger Collection*.

Questions to Consider

- One of the lessons of an effective cross-examination is that you must stay in control of your tone. You can ask aggressive questions, but if your tone is also aggressive, that can backfire. Can you think of ways that this lesson could be useful in your own life?

Lecture 10

CLOSING ARGUMENTS: DRIVING YOUR THEORY HOME

After both sides in a trial have had the opportunity to make their cases, it's time for closing arguments. Closing arguments allow each side's lawyers to connect all the dots for the jury. This lecture examines how the elements of persuasion can be used to craft an effective closing argument. It also explains why critical missteps in a closing argument can undermine both an attorney's credibility and his client's case.

WHAT TO DO

- In a closing argument, a lawyer should make full use of Aristotle's three elements of persuasion—ethos, pathos, and logos. First, it's important for a for a lawyer to remain credible. This is Aristotle's concept of ethos—the idea that a speaker persuades partly through his own good character.

- Even though the lawyer is not a party to the dispute, the relationship between the lawyer and the jury is important. The case of a lawyer's client will be stronger if the jury trusts and believes the lawyer, and if it feels a human connection with him.

- It's also important to use the closing argument to connect the jury to your client. This is Aristotle's concept of pathos—if the jury feels sympathy for your client, they're more likely to be persuaded by your arguments on his behalf.

- ✭ To get a jury on your client's side, you'll want to be thoughtful about what you call your client. Sometimes you'll hear lawyers talk about "the plaintiff" or "the defendant," or even "my client," all of which can keep you from thinking of this person as a person.

- ✯ A good technique in a closing argument is to remind the jury of their important role and tell them the action they should take. Another smart move is to organize the evidence to make it easy for the jury to digest and remember.

- ✯ Sometimes in a closing argument, lawyers will attack one another. This is a mistake. It's called an ad hominem attack, and it's a logical fallacy; you can't defeat the logic of an argument by attacking the person who made it. What's more, juries won't like it.

- ✯ The two primary tasks in a closing argument are to flesh out your own theory of the case, and to respond to the other side's strongest points. This is where logos—sound logic—plays a key role. It's time to make explicit the conclusions that you hinted at during your opening statement and to answer the ultimate questions you refrained from asking on cross-examination.

- ✯ A great way to drive home your theory of the case is to make it unforgettable by using a visual aid. This could be a demonstrative aid—a chart, for example, or a series of slides—or perhaps an exhibit that's been entered into evidence at trial.

- ✯ In a closing argument, you want to remind the jury of what they learned from the various witnesses, highlighting testimony that's particularly helpful to you. In doing so, try to explain complicated ideas as simply as possible. Sometimes using an analogy or a metaphor can help make a complex idea more accessible.

- ✯ In addition to explaining your theory of the case, you also need to use your closing argument to respond to the other side's strongest points. You shouldn't avoid the parts of the trial that may damage your side. Confront them head on.

- ✯ One very effective approach is to argue that even if everything the other side says is true, your client should still win, and give reasons why. Rather than jeopardizing your credibility with the jury by misrepresenting what the other side is arguing, address the arguments honestly.

WHAT NOT TO DO

- ✯ We've discussed what you should do in a closing argument. Now let's talk about what not to do. First, you can't misstate the facts. You can argue about what facts mean, and draw reasonable inferences from evidence. But if a witness said one thing, you can't pretend that he said the exact opposite thing. The jury won't buy it, and the rules governing attorney conduct prohibit it.

- ✯ You can't comment on missing evidence if the evidence was excluded by a pretrial ruling, or if a party didn't have the burden of producing the evidence. In general, you can't talk in your closing argument about any evidence that wasn't actually admitted at trial, whether it was excluded by a pretrial ruling or not.

- ✯ It's not acceptable for a lawyer to state a personal opinion. A good rule of thumb for a lawyer is to cut out all references to himself and his thoughts altogether. For example, it wouldn't be appropriate for a lawyer to say things like, "I believe this witness and you should, too," or "I promise you that my client is a good man," or "This is the worst miscarriage of justice I've ever seen." The lawyer is not a witness in the trial and should not be testifying.

- ✰ While you do want to connect with the jury on an emotional level, you can't ask the jury to base its verdict on anything other than the evidence and the law. An argument that appeals to prejudice or fear would be improper.
- ✰ In a civil trial, the jury is typically responsible not only for rendering a verdict, but for awarding damages if they are appropriate. The golden rule for lawyers arguing about damages is not to ask the jury to imagine what it would be like to be the victim and to award damages accordingly.
- ✰ If a civil case doesn't involve punitive damages, it would be improper to argue that the jury should return a verdict that would punish the defendant. The idea is that the law defines the proper amount for damages, and that's what the jury should be using to determine what damages to award. The award shouldn't be based on the jury's gut feelings.
- ✰ It is impermissible to encourage the jury not to follow the law, or to think about the consequences of a particular verdict when determining whether or not to render that verdict. A lawyer also may not misstate the law. It's okay to refer to what that law is so that the jury understands what they're supposed to do, but it must be correct.

WHAT HAPPENS NEXT

- Jury instructions are given by the judge toward the end of a trial. They typically come after the lawyer's closing arguments, though some jurisdictions flip this and have the jury instructions come before closings. Jury instructions tell the jury what the law says and what they need to determine.

- In many jurisdictions, a lot of the language in jury instructions is drawn from pattern jury instructions. These are published by the court system of a particular jurisdiction, and contain approved language for explaining the different pieces of the law. The lawyers in a case submit their requests for particular instructions to the judge, and the judge rules on which instructions to include.

- When the jury deliberates, it is given a verdict form that it uses to report the verdict. That form tracks the judge's instructions. Sometimes, a lawyer will use this form as a visual aid in closing argument, showing the jury which box the lawyer hopes the jury will check.

Suggested Reading

- Sayler and Shadel. *Tongue-Tied America.*

Questions to Consider

- What role do you think emotion should play in a closing argument? How far should a lawyer go to bring emotion into a closing argument?

Lecture 11

UNDERSTANDING THE APPELLATE PROCESS

The right to appeal is the right to question the outcome of the trial process. It's a check on the power of lower courts, and an acknowledgment, based on centuries of experience, that even the smartest minds and the best-run institutions sometimes make mistakes. This lecture examines the appeals process, with particular focus on the standards of review applied by appellate courts and the nuts and bolts of appellate advocacy.

THE APPEALS PROCESS

- ✭ Most jurisdictions have two levels of appellate courts: courts of appeal, which review decisions made by trial courts, and an even higher level judicial tribunal—typically known as a supreme court—which reviews decisions made by the courts of appeal. Decisions of these higher courts, whether in the federal or state court systems, are generally issued in written opinions and have binding authority for the courts below them in the same jurisdiction.

- ✭ Many trials don't generate appeals. Maybe the parties settle, thereby resolving the dispute, which happens a lot in civil cases. Maybe a defendant in a criminal case is found to be not guilty. Maybe there's no legal right to an appeal. You can't appeal simply because you don't like the verdict; you have to be able to point to a particular legal error.

- ✩ Even rarer is the case that makes it all the way to a supreme court—whether a state supreme court or the Supreme Court of the United States. While most jurisdictions give you the right to appeal certain errors to an intermediate appellate court, particularly in criminal cases, most jurisdictions do not guarantee such access to the supreme court.

- ✩ Most supreme courts don't have the time to hear every appeal that's brought to them. The workload would be overwhelming. Instead, they choose their cases, looking for those that have special significance or might clear up a particularly important area of law.

- ✩ Appeals typically take place after a trial is over, but they can be made during the trial. If an appeal is made mid-trial, it's called an interlocutory appeal. For example, a prosecutor might file an interlocutory appeal if the trial judge has suppressed evidence that the government feels should lawfully be admitted.

- ✩ The law typically frowns on interlocutory appeals. It's more efficient to save all issues on appeal for the close of the case, so they can be heard all at once. But if there's an issue that just can't wait—for example, if a party says the court doesn't have jurisdiction even to hear the suit in the first place—then the party may have to file an interlocutory appeal concerning that issue.

- ✩ To bring an interlocutory appeal, you have to show that waiting to appeal the issue until the trial is over would be particularly prejudicial to the rights of one of the parties. In some jurisdictions, an interlocutory appeal will stay the lower court proceeding, halting the trial until the appellate court decides the matter. In other jurisdictions, the lower court proceeding isn't stayed, which could make things complicated.

- ✩ An appeal is not a retrial of a case. Trial courts and appellate courts play very different roles in the judicial process. Everything gets decided at the trial level. The jury gets to resolve all issues of fact—unless the trial isn't a jury trial, in which case the judge becomes the finder of

fact. In either case, the judge is responsible for ruling on all issues of law that are raised during the trial. Together, judge and jury see the whole picture.

- The appellate court, by contrast, doesn't get to start from the beginning to decide if every little thing at issue was decided correctly. Appellate courts don't usually get to evaluate new evidence or hear from witnesses. Instead, the appellate court is only allowed to look at the particular legal issue raised on appeal. Usually, this will be an issue of whether the trial procedure was correct, or whether the trial judge interpreted the law correctly.

STANDARDS OF REVIEW

- Another difference between a trial court and an appellate court is the standard by which the decision is made. In civil cases, the trial court typically will determine liability based on the preponderance of the evidence. That is, findings of fact will be based on whether the evidence shows that it is more likely than not that events were as the plaintiff claims. In a criminal case, the trial court will use the more demanding standard requiring proof beyond a reasonable doubt. An appellate court, however, applies different standards of review, based on the type of ruling the court is being asked to reconsider.

- An appellate court will only overturn a finding of fact if it is clearly erroneous. This means that the appellate court will defer to the factual determinations of the trial court, unless the appellate court has a definite and firm conviction that there's been a mistake.

- Evidentiary hearings usually involve evaluating the credibility of witnesses and other evidence. The trial court judge or jury are in a better position to make that evaluation, because they see the witness testimony and other evidence firsthand. The appellate court usually must rely on the party's legal briefs and a transcript of what happened, and that's not the same thing as actually being present at the trial.

- ✩ If the issue on appeal is a question of whether the trial judge interpreted the law correctly, then the appellate court has more discretion. Legal issues are reviewed de novo. This means that the appellate court is free to substitute its own judgment for that of the trial court. Mixed questions of law and fact typically are also reviewed de novo.

- ✩ Sometimes an appeal involves matters that are left to the discretion of the trial judge—for example, the sentencing of a criminal defendant who is found guilty at trial. Appellate courts use a highly deferential standard in such instances, overturning the lower court only if the trial judge's ruling constituted an abuse of discretion.

APPELLATE BRIEFS

- ✩ The lawyer appealing a case will have to file an appellate brief. Depending on the circumstances, he may also have the opportunity to make an oral argument before the appellate court.

- ✩ In general, appellate courts make their decisions based primarily on written briefs filed by the parties. A brief will start with a statement of the facts of the case, a statement of the question the appellate court is being asked to decide, a summary of the case's procedural history, and a discussion of the applicable standard of review. The brief will then go on to lay out the party's arguments.

- ✩ Writing an effective brief is an art that every appellate lawyer has to master. An effective brief will be well written, and its arguments will be based on sound logic. Logical reasoning is absolutely critical.

- ✩ Basic legal argumentation usually follows the form of an Aristotelian syllogism: a major premise and a minor premise point the way to a conclusion (if A and B are true, then C must be true). In a legal brief, the major premise is the rule of law governing the case, the minor premise is the facts particular to the case, and the conclusion is the application of the law to the facts.

- If your major premise is rooted in text, such as a statute, then you will need to interpret that statute for the court. The court will always want to start with the language of the statute itself, so that should be your starting point. Next, you may want to consider the legislative purpose—the reasons given by legislators for enacting the law in the first place.

- You may also want to look at the statute's legislative history. For example, when Congress passes a statute, it creates reports that can be used to help interpret the language if the meaning is not totally plain, or to help explain the purpose of the statute. State legislatures have their own records that reveal legislative history. Sometimes the history shows that the legislative body considered a different version of the statute and rejected it. You can use that to argue that there are things the statute isn't meant to do.

- A lawyer interpreting a text should always read the entire text, because the court will want to understand the relevant portion of the text in context. The court will try to interpret the statute so that it is internally consistent. A court will also do everything it can to read a statute so that it is constitutional, because undoing the work of the legislature, a body elected by the people, is not something courts undertake lightly.

- Lawyers seeking to bolster their arguments about the proper interpretation of a text often make policy arguments, predicting the likely consequences of the text. Naturally, an interpretation of a statute that promises good public policy outcomes can be very persuasive. Lawyers arguing against a particular interpretation quite often invoke a "parade of horribles," describing all the terrible things that might result from the interpretation they oppose.

ORAL ARGUMENT

- Sometimes, an appellate court will decide a case based solely on the briefs written by the parties. In many cases, however, the court will also permit oral argument, giving the lawyers for each side an opportunity to make oral presentations about their case and answer questions from the appellate judges.

- Writing a brief and participating in oral argument involve very different skills, and an appellate lawyer needs to be able to do both well. In a brief, you can cover all the issues related to your appeal, including those issues that are less important, and you can include lots of footnotes to back up your points. In oral argument, however, you must be selective. You want to pick the one or two main issues that are really important to your case, and focus on those.

- Typically, an appellate court will have a panel of judges who hear the case. Each lawyer will have a limited amount of time to present, and the lawyer isn't the only one doing the talking. The lawyer might start the oral argument off with what she wants to say, but the judges will quickly jump in with questions.

- Good lawyers welcome questions from the appellate panel. If oral argument were simply a time for the lawyer to provide a short oral summary of what's in the brief, it wouldn't really add much. The judges' questions let you know what they really care about. The challenge of oral argument is to present your case confidently and professionally, while at the same time being careful not to sound too aggressive, even in the face of rough questioning.

Suggested Reading

- Davis, *The Argument of an Appeal.*
- Harlan, *What Part Does the Oral Argument Play in the Conduct of an Appeal?*

Questions to Consider

- Do you believe that a person who committed a crime should be able to be released on appeal because of a procedural error? Why is this our system?
- Do you think an appellate court should be able to review everything de novo, without deferring to the trial court's judgement? Why or why not?

Lecture 12

ARGUING BEFORE THE SUPREME COURT

Everything about the United States Supreme Court suggests an institution of great authority: the soaring Corinthian columns of its façade, the lofty height of the courtroom's ceiling, the elevated dais at which the justices sit in their robes. The nature of that authority, however, has changed over the years. In this lecture, you will examine the history of the Supreme Court, the role the Court plays in our government, and the importance of effective advocacy.

HISTORICAL BACKGROUND

- The Supreme Court was established by the U.S. Constitution. However, the details concerning the judicial branch—how the federal courts would be organized, for example—were left to Congress to decide. The modern Supreme Court and its relationship with the lower courts have thus been shaped by various acts of Congress and decisions by the court itself over the years.

- Figuring out how the courts were going to work was a high priority for the founding fathers. After America won the Revolutionary War, the very first bill introduced into the United States Senate became the Judiciary Act of 1789, the law establishing our first court system.

JUSTICE·THE·GUARDIAN·OF·LIBERTY

- The Judiciary Act split the country into three judicial regions, called circuits—the Eastern, the Middle, and the Southern. Each circuit contained judicial districts, but each district contained only trial courts; no intermediate courts of appeals existed. In this beginning, the six justices of the Supreme Court were required to hold court not only in the nation's capital, but also in federal circuits across the country.

- The jurisdiction of the Supreme Court is addressed in the Constitution, which says that federal judicial power extends to cases arising under the Constitution, federal laws, treaties, admiralty and maritime law, cases in which the United States is a party, controversies between states or between citizens of different states, and cases involving foreign countries or foreign subjects. Those are the only kinds of cases the Supreme Court and lower federal courts can hear. All other matters belong in state court.

- In the 1803 case *Marbury v. Madison*, the Supreme Court ruled that Congress can't pass a statute giving the court more power than the Constitution permits the court to have. The Constitution trumps. So *Marbury v. Madison* stands for the proposition that the Constitution is the top of the heap, the paramount law.

- *Marbury v. Madison* also stands for the proposition that it's the Supreme Court's job to say what the Constitution means, and to invalidate an act of Congress if it violates the Constitution. Chief Justice John Marshall wrote, "It is emphatically the province and duty of the judicial department to say what the law is."

- By 1869, the number of Supreme Court justices had grown from six to nine, one for each of the judicial circuits in existence as of 1866. That's also how many justices there are on the Supreme Court today.

- For most of its history, the Supreme Court was peopled by white, Protestant men. Its composition has changed over time, with changes in American society's attitudes and composition. The first Catholic on the court was Roger Taney, who was appointed in 1835. Louis Brandeis was the first Jewish man, appointed in 1916. The first African-American man on the court was Thurgood Marshall, appointed in 1967. But no women served on the court until 1981, when Sandra Day O'Connor was appointed by President Reagan.

- There have been efforts over the years by the other branches of government to influence the Supreme Court through the appointment process. Probably the most famous of these was President Franklin D. Roosevelt's court-packing scheme. During the Great Depression, Roosevelt was at first given a great deal of power to enact legislation to help suffering people. In 1933, during the first 100 days of his presidency, he signed 15 major pieces of legislation, ushering in the New Deal era. But by 1936, the Supreme Court had invalidated some of Roosevelt's plans, holding that some of what he wanted to do exceeded his power.

- Roosevelt responded by proposing judicial reforms. He said that the Supreme Court had an overwhelming caseload, and suggested that he be allowed to add up to five additional Supreme Court justices. The idea was that he would pick five people sympathetic to his reforms, who would back him up. Roosevelt couldn't get public support for the plan, however, and his court-packing scheme failed.

- Ideally, the president who nominates you should not affect how you function as a Supreme Court justice. As the highest authority within a branch of government independent from the executive and legislative branches, the Court has an interest in maintaining its own legitimacy. If Supreme Court justices were mere puppets of the presidents who appointed them, then confidence in the Supreme Court as an institution would erode.

PROCEDURAL MATTERS

- ✯ The Supreme Court gets to decide which cases it wants to hear. This wasn't always the way it worked, however. During the 19th century, the Supreme Court had to hear all cases within its jurisdiction. Congress changed the law when it became clear that the workload was too great.

- ✯ Nowadays, parties file petitions for writs of certiorari, attempting to demonstrate to the Court that their cases are of sufficient general interest to warrant the Court's review. Other interested parties also sometimes weigh in on a petition by filing what are known as amicus briefs.

- ✯ A minimum of four justices must agree that a case merits the Court's time. In almost all cases, the Supreme Court denies the petition for certiorari and lets the lower court's decision stand without endorsing it—either because the case doesn't raise a significant enough issue, or because the court simply doesn't have the time.

- ✯ If the Court accepts the case, it will hear an oral argument about the matter. If the United States is a party to the case, one of those lawyers arguing will be from the office of the Solicitor General—the federal government's lawyer in the Supreme Court. Approximately two-thirds of the cases the Supreme Court hears involve the Solicitor General. People who work in the Solicitor General's office sometimes go on to serve on the Supreme Court itself.

- ✯ In a typical case, after receiving briefs and hearing oral argument, the justices of the Supreme Court will have a private conference to vote on how the case should be decided. The most senior justice in the majority decides who writes the majority opinion. If there is going to be a dissenting opinion, the most senior justice among the dissenters decides who will write it.

- Sometimes a justice might agree with the conclusion of the majority, or with the conclusion of a group of dissenting justices, but might disagree with their reasoning, or want to emphasize some aspect of the case that the other justices have not. In that situation, the justice might write his own concurring or dissenting opinion.

- Once the justices have written their drafts, they circulate them to the other justices. This process is especially noteworthy, because it can actually change minds. As the drafts go through different iterations, justices may change their votes, and a dissent could become the majority opinion.

IMPORTANT FUNCTIONS

- The cases heard by the Supreme Court are a great example of the power that litigation offers the private citizen. We clearly have the power to shape the law based on the representatives that we elect. But we also have the power to influence the law by having our day in court. And while financial resources can make a difference, that power is available to corporations and individuals alike.

- Our system is not fragile. It is robust, and litigation is one way that we keep it strong. In our democracy, rather than having rules handed down by a king, we, the people, make the rules. And we are constantly refining and improving them. The legislature passes laws; the executive branch approves and enforces them; the judiciary interprets them; and we, the people, test them—and sometimes even challenge and change them—through the courts.

- Obviously, the law isn't perfectly responsive to changes in our society. It is a system built on caution, on checking to make sure that things have come out properly. But over time, our system has achieved some amazing things: protections for civil rights, free speech, equal protection, due process, the right of each citizen to vote—innovations of which we can be proud, and which keep our social fabric strong.

Suggested Reading

- McCloskey, *The American Supreme Court.*
- Scalia and Garner, *Making Your Case.*

Questions to Consider

- Why is the Supreme Court so formal? Does the formality of language and dress serve a purpose?
- Do you believe that Supreme Court justices should decide cases according to their own political beliefs?

Criminal Law and Procedure

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Joseph Hoffmann is the Harry Pratter Professor of Law at the Indiana University Maurer School of Law, where he has taught since 1986. He received a B.A. in Mathematics from Harvard College and a J.D. cum laude from the University of Washington School of Law. After law school, Professor Hoffmann clerked for the Honorable Phyllis A. Kravitch of the U.S. Court of Appeals for the Eleventh Circuit and for then–associate justice William H. Rehnquist of the U.S. Supreme Court. He was a Fulbright professor at the University of Tokyo in Japan and at Friedrich-Alexander University of Erlangen and Friedrich Schiller University of Jena in Germany.

Professor Hoffmann is a nationally recognized scholar in the fields of criminal law, criminal procedure, habeas corpus, and the death penalty. He also writes about Japanese law as well as law and psychology. Professor Hoffmann was a co-principal investigator for the Capital Jury Project, the largest empirical project ever to study jury decision making in capital cases. He served as co-reporter for the Massachusetts Governor's Council on Capital Punishment, testified before Congress on habeas corpus and death penalty issues, and has been involved in successful death penalty reform initiatives in Illinois and Indiana. Professor Hoffmann has been a consultant for both prosecutors and defense attorneys in criminal and death penalty cases before the U.S. Supreme Court and numerous federal and state appellate courts.

Professor Hoffmann is an award-winning teacher. At Indiana University, he has been recognized with the Outstanding Junior Faculty Award; the Leon H. Wallace Teaching Award; the Trustees' Teaching Award; the Teaching Excellence Recognition Award; and the Gavel Award, given by the law school's graduating class to the person who made the most significant contribution to their legal education. In addition to his regular law school courses, Professor Hoffmann teaches a popular course about law for honors undergraduates at Indiana University. He has served for more than 30 years on the faculty of The National Judicial College, teaching state, military, and tribal judges about death penalty law. Professor Hoffmann also teaches regularly at University Panthéon-Assas (Paris II) in France; Jagiellonian University in Kraków, Poland; and the University of Tokyo in Japan.

Professor Hoffmann is the coauthor of two of the leading casebooks used by law students across the United States: *Defining Crimes* (with the late William Stuntz) and *Comprehensive Criminal Procedure* (with Ronald Allen, Andrew Leipold, Debra Livingston, Tracey Meares, and William Stuntz). He also cowrote *Federal Criminal Law* (with Peter Low) and *Habeas for the Twenty-First Century: Uses, Abuses, and the Future of the Great Writ* (with Nancy King). In 2007, Professor Hoffmann appeared in the PBS series *The Supreme Court*. ▪

Criminal Law and Procedure

Criminal law and procedure involve the most basic of conflicts between the awesome power of the government and the fundamental rights of the individual. One of the most important responsibilities of any government is to protect its citizens from those who would transgress society's rules and norms, and thereby do harm to others. Criminal law is where we identify those rules and norms, and where we set the punishments for those transgressions.

No two cases are exactly alike, however, so the established rules of criminal law must always be tempered with the discretion to do justice in individual cases. Similarly, the government's power to investigate and prosecute crimes is one that can easily be misused or abused. Criminal procedure must therefore strike a delicate balance, allowing the police and prosecutors to seek justice and protect the public, while simultaneously protecting the right of the accused to a fundamentally fair process.

The first half of this course addresses some of the most important issues in contemporary criminal law. In this part of the course, you'll learn how crimes are defined, and why criminal law has become both more rigid and more punitive. You'll see how judges have managed to retain the discretion to spare defendants who don't deserve to be punished as criminals. You'll study the different kinds of homicide crimes, including murder and manslaughter, and learn all about the doctrine of self-defense. You'll examine the key differences between federal crimes and state crimes. You'll also take a close look at the Eighth Amendment, which regulates and limits the punishments that can be imposed for crimes.

The second half of the course concerns the fundamentals of modern criminal procedure—the rules that govern how criminal cases are handled by the police, prosecutors, and the courts. In this part of the course, you'll learn about the Due Process Clause of the Fourteenth Amendment, and how it became the basis for applying the Bill of Rights to state criminal

cases. You'll study the Fourth Amendment's ban on unreasonable searches and seizures, and its role in preserving individual privacy—a role that's become increasingly important, and increasingly difficult, in the modern age of technology. You'll explore the Fifth Amendment's privilege against self-incrimination, discovering how it led to the famous *Miranda* warnings. You'll also learn about plea bargains and jury trials—two ways in which many criminal cases ultimately get resolved.

The primary goal of this course is to teach you about the key issues that shape modern criminal law and procedure. Along the way, you'll encounter some of the most famous cases in legal history. You'll explore death, taxes, and free will. You'll learn about the Constitution and the Supreme Court. In the end, however, the two questions that frame this course are deceptively simple: How can criminal law best achieve justice? And how can criminal procedure best ensure fairness? ▪

Lecture 1

WHO DEFINES CRIMES, AND HOW?

This lecture examines the development of criminal law in America—in particular, the codification of criminal law by state and federal legislatures. It also considers the definitional roles of various institutional actors outside the legislature, including prosecutors, police, defense attorneys, judges, and juries.

CRIMINAL CODES

- The term "common law" refers to law made by judges through individual decisions rendered in individual cases. America inherited its legal system from England, and many areas of Anglo-American law—including criminal law, contract law, tort law, and property law—evolved over the centuries through the common law process.

- During the early 20th century, a reform initiative to codify criminal law swept America. The basic idea was that people should be able to look up the definition of a crime and learn exactly what kind of conduct is prohibited. As a result of this codification movement, in modern America all crimes are now defined by statutes. We no longer permit judges to create new, common-law crimes.

- In the modern criminal justice system, consideration of cases inevitably begins with the text of the relevant criminal statute. That statute will contain a definition setting forth the specific elements of the crime—the elements that the prosecution must prove beyond a reasonable doubt at trial in order to secure a conviction.

- Almost all crimes in America—more than 90 percent of them—are crimes prohibited by state law, not federal law. This is because our federal government is one of limited powers; it can only exercise those powers that have been granted to it by the Constitution. The Constitution doesn't give Congress the power to enact general crime statutes.

- During the common law era, criminal law was mostly a private matter. For most of English legal history, crimes were not prosecuted by a public official called a prosecutor. In fact, until the late 1700s, there was no such thing as a public prosecutor. That institution originated in the American colonies.

- ✰ In precolonial England, crimes were prosecuted by the victim, or by a member of the victim's family. The victim would hire a private lawyer and press criminal charges, similar to the way civil suits are filed today. In the American colonies, however, legal authority to file criminal charges gradually migrated from victims to a public prosecutor, an official acting on behalf of society as a whole.

INSTITUTIONAL ROLES

- ✰ In modern America, crimes are defined by the complex interaction of several different institutions. Chief among these is the legislature, which enacts the statute that provides the formal definition and that identifies the required elements of the crime.

- ✰ Next comes the prosecutor. Working closely with the police, the prosecutor oversees the criminal investigation process. It is the prosecutor who ultimately makes the decision whether, based on the evidence, a particular individual will be charged with a particular crime.

- ✰ Any person who's been formally charged with a crime has a constitutional right, under the Sixth Amendment, to be represented by an attorney. If the defendant can afford to hire a lawyer, he will usually do so. If he can't, he'll be represented by a lawyer appointed by the government—either a private defense lawyer willing to take the case, or, especially in larger cities, a public defender.

- ✰ Once the defendant has a lawyer, the prosecutor will begin to negotiate with the defense lawyer concerning a possible plea bargain. That's how the vast majority of criminal cases—almost 95 percent—get resolved. As a result, defense lawyers also play an indirect role in defining crimes.

- ✰ If the two sides can't agree on a plea bargain, the case will go to trial. In criminal cases where a defendant could be sentenced to more than six months in prison, the defendant has a constitutional right to a jury trial. Juries play a key role in defining crimes, because they possesses

the absolute and legally unreviewable power to acquit, even in the face of overwhelming evidence of guilt, if the jury believes that the behavior of the police or prosecutor, or even the criminal law itself, is unjust.

- Last, but not least, there's the judiciary. Every criminal trial occurs under the supervision of a trial judge, who has the authority to dismiss the charges if she concludes that the evidence of guilt is legally insufficient to meet the prosecution's burden of proof beyond a reasonable doubt.

- Every guilty plea, including the terms of any plea bargain, must be approved by the judge. In trial courts and appellate courts, judges serve as the official interpreters of the law, including criminal statutes and any defenses or constitutional challenges that might be raised.

SHIFTING INTERPRETATIONS

- ✯ The shift in the institutional balance of power can be observed in many modern criminal law cases. One excellent example is the 1998 case *Brogan v. United States*. James Brogan was a union official suspected by the FBI of taking bribes to sell out the interests of the union. One evening, federal agents knocked on Brogan's door. When he answered, the agents identified themselves and told Brogan they were seeking his cooperation in a criminal investigation. The agents asked Brogan if he had taken bribes. Brogan replied, "No." The agents, already in possession of documents proving that Brogan had taken bribes, arrested him.

- ✯ Brogan was charged with bribery, but he was also charged with violating a federal statute that prohibits making "false statements" to the federal government. The statute, located in Section 1001 of Title 18 of the U.S. Code, provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States, knowingly and willfully falsifies, conceals, or covers up … a material fact, or makes any false, fictitious, or fraudulent statements or representations … shall be fined not more than $10,000 or imprisoned not more than five years, or both.

- Brogan was convicted at trial, and he appealed all the way to the U.S. Supreme Court. Brogan's lawyer argued that the Court should create a special exception to the Section 1001 for someone who, like Brogan, utters a simple "No" in response to a question from a government agent about whether he committed a crime. This proposed exception—described as the "exculpatory no" exception—had previously been recognized by several lower federal courts.

- Brogan's lawyer argued that the "exculpatory no" exception was necessary to avoid putting people like Brogan in the position of being pressured by the government into admitting their own guilt—which would violate the spirit, if not the letter, of the Fifth Amendment privilege against compelled self-incrimination. Brogan's lawyer also pointed out that Brogan didn't actually mislead federal agents, because the agents already knew that Brogan had taken bribes.

- The Supreme Court upheld Brogan's conviction. According to the majority opinion, written by Justice Antonin Scalia:

> By its terms, Section 1001 covers "any" false statement . . . . The word "no," in response to a question, assuredly makes a "statement" . . . . In fact, petitioner [Brogan] concedes that under a "literal reading" of the statute he loses.
>
> Petitioner asks us, however, to depart from the literal text that Congress has enacted, and to approve the doctrine . . . which excludes from the scope of Section 1001 the "exculpatory no."

> [I]t is not, and cannot be, our practice to restrict the unqualified language of a statute … . Courts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so … . Because the plain language of Section 1001 admits of no exception for an "exculpatory no," we affirm the judgment.

- ✭ This is the essence of modern textualist interpretation of criminal statutes. The U.S. Supreme Court—the highest court in the land—felt powerless to consider the argument that Congress wouldn't want Section 1001 to apply to someone who utters merely a simple, "exculpatory no." Instead, the Court found the plain language of the statute completely conclusive.

- ✭ Textualism has had two primary effects on the criminal justice system. First, the system has become more punitive, in terms of both the breadth of the criminal law and the severity of criminal punishments. Politically speaking, legislatures always have a strong incentive to enact broader and tougher criminal statutes; no politician wants to be seen as "soft on crime." As a result, America's prison population has exploded.

- ✭ Second, the power of prosecutors has been greatly increased. For someone like Brogan, the best shot at leniency—perhaps the only shot—is to cut a favorable plea bargain with the prosecutor. Prosecutors have learned how to use effectively the leverage they gained as a result of the shift in power from judges to legislatures. As a result, the rate at which defendants agree to plea bargains continues to climb.

- ✭ Notwithstanding these trends in favor of legislatures and prosecutors, judges do still retain power over one key aspect of criminal law—namely, the requirement that all defendants must be proven to have acted with "evil intent," often referred to as mens rea.

- ✭ Most crime statutes don't specify the mens rea requirement for any particular crime. Legislatures tend to focus their attention instead on defining the criminal act itself. As a result, judges have to fill in the gaps—just like they did in the days of common law.

- Judicial power to define and apply mens rea requirements—which extends to matters relating to self-defense, intoxication, and insanity—means that judges can still pursue the ends of justice in individual criminal cases. Even in a textualist era, judges can still find ways to reverse criminal convictions that seem unfair. And that's a good thing, because in the end, criminal law is all about justice—to the defendant, to the victim, and to society.

Suggested Reading

- Regina v. Dudley & Stephens.
- Brogan v. United States.
- Fuller, "The Case of the Speluncean Explorers.".

Questions to Consider

- What are the pros and cons of relying on judges, legislatures, and prosecutors to define criminal law?
- Do you agree that the necessity defense should never apply to the crime of murder—even in a case where it's clear that the killing actually saved lives?

Lecture 2

CRIME AND THE GUILTY MIND

This lecture explores the contours of mens rea, a fundamental component of criminal law. In this lecture, you will learn how criminal intent is traditionally defined, what happens when a criminal defendant claims to have been mistaken the facts or the law, and when a defendant can be convicted even without proof of criminal intent.

GENERAL INTENT

- The concept of mens rea, the "guilty mind," was developed centuries ago as part of the common law of crimes. By the 18th century, Sir William Blackstone, the famous English judge and legal commentator, was able to declare with certainty that no crime could be committed without a "vicious will." In 1922, the U.S. Supreme Court explained that "the general rule at common law was that the scienter was a necessary element in the indictment and proof of every crime."

- Traditionally, most crimes are defined in a manner that requires only what the criminal law calls general intent. General intent means that you intended to do the act that's defined as the crime. It wasn't done by accident, in other words; you meant to do it.

- ✩ Consider the crime of simple assault. This crime is typically defined as an actual or threatened touching of another person's body in a manner that's unwanted and either painful, harmful, or offensive. If you touch another person in this way, and if it wasn't an accident—if you meant to touch them—then you satisfy the requirement of general intent. It doesn't matter whether you intended to cause the victim any pain, harm, or offense. The law says that the act you committed speaks for itself, and your general intent to commit that act makes you a criminal.

- ✩ Many other crimes are defined in terms of general intent. One such crime is possession of illegal drugs. If illegal drugs somehow appeared your pocket, and you never even knew they were there, then your possession would be accidental, and you wouldn't be guilty. But if you meant to possess the drugs—if it wasn't an accident—then you satisfy the law's requirement of general intent, and you would be guilty.

- General intent is the most common mens rea requirement for crimes. In fact, the criminal law presumes that all crimes are general intent crimes, unless there's a strong reason to conclude otherwise. That reason might be found in the text of the statute that defines the crime, or in the legislative intent behind the statute. In some cases, it can arise because a court decides that the statute—if construed as requiring only general intent—would create too great a risk of unfairly punishing innocent people.

- In modern America, we no longer allow our courts to create or define common law crimes. All crimes must now be defined by statute, which means legislatures are primarily the ones who define crimes. But legislatures tend to focus their attention mostly on criminal acts. Often, they don't say anything at all in a crime statute—or say only vague and indeterminate things—about the mens rea of the crime. As a result, judges often have to fill in the gap and decide what the mens rea should be.

- Whenever there's a significant risk that treating the crime as a general intent crime might end up unfairly punishing innocent behavior—behavior that doesn't speak for itself, in terms of establishing the defendant's criminality—the judge often has at least some discretion to do justice. The judge can use the authority to define or interpret the mens rea requirements of the crime, and can insist on proof of some additional amount of evil, or moral culpability, before convicting the defendant of the crime.

SPECIFIC INTENT

- Consider the crime of intentional homicide, or murder. To be guilty of that particular crime, you have to intend not only the act that caused the victim's death—whatever that act may be—but also the result of the act. Specifically, you have to intend to take a living person and, by your act, turn them into a dead one. This is what the criminal law calls specific intent.

- Specific intent is the criminal law's other big category of mens rea. If a crime is based on specific intent, it means the defendant must be proven to have intended not only to commit the criminal act, but also to cause the specific harmful result, or consequence, of the act. Because general intent is the default rule, specific intent applies only when the crime statute—or the legislative intent behind the statute—specifically requires it.

- A classic example of a specific intent crime is theft. Traditionally, theft is defined as taking the property of another with the intent to permanently deprive them of the property. It's not enough simply to take another person's property. You have to take it with the specific intent to change someone else's property into your property.

- Specific intent can be hard even for courts to understand. In the case of *Commonwealth v. Liebenow*, for example, the defendant was accused of theft for taking some steel pipes and metal plates from an active construction site. The site was marked as private property, and there were construction machines and work trailers parked all around. One morning, Liebenow simply drove up in a pickup truck and started taking stuff. When a worker asked what he was doing, Liebenow said he was picking up some junk.

- ✮ When he was later arrested by the police, Liebenow at first claimed not to know anything about the items in the back of his truck. Later, however, he admitted that he had taken them from the construction site. But Liebenow still denied any wrongdoing; he said he honestly believed that the items had all been abandoned.

- ✮ The Massachusetts Court of Appeals initially held that Liebenow's belief didn't matter one way or the other, and affirmed Liebenow's theft conviction. But the Massachusetts Supreme Court later reversed the conviction, holding that if Liebenow honestly believed that the property was abandoned, and that he was therefore free to take it, he couldn't be found guilty of theft.

- ✯ For a general intent crime, a mistake of fact is no defense, unless the mistake is one that is both honest and reasonable. For specific intent crimes like theft, however, an honest belief—even if patently unreasonable—is a defense, if it negates the specific intent required for the crime. In the *Liebenow* case, an honest belief about whether the property was abandoned could have negated the specific intent required for the crime of theft.

- ✯ In general, criminal law doesn't care at all whether you know that what you're doing is defined as a crime. You can't murder someone, for example, and then complain to the judge that you didn't know it's a crime to murder someone. Ignorance of the law would be no defense.

- ✯ There are some cases, however, where a mistake about the law would be a valid defense. If you're accused of theft, for example, and your defense is that you honestly—but mistakenly—believed that the property in question legally belonged to you, that might be a defense. In that case, an honest mistake about the legal ownership of the property could very well have prevented you from possessing the specific intent required for a theft conviction.

- ✯ A similar point can be made about intoxication. Intoxication is never a defense to a general intent crime. But for specific intent crimes, if you were too drunk to form any specific intent about the harmful consequences of your actions, then it's at least possible that your intoxication might give you a defense to the crime.

STRICT LIABILITY

- ✯ Strict liability typically refers to liability without any mens rea requirement. It's sometimes described as liability without fault. If you commit the criminal act, then you're guilty, regardless of your state of mind.

- ✯ The leading federal cases on strict liability arose during the first half of the 20th century, when the federal government started to become heavily involved in regulating certain risky businesses, like the food and drug

industries, to protect public safety. The consumer protection statutes enacted during this period contained regulations designed to ensure that dangerous products wouldn't be sold or distributed to innocent consumers. To make sure the new rules would be obeyed, Congress often added criminal sanctions for anyone who violated them.

- The Supreme Court upheld strict liability as a basis for criminal conviction in these types of cases. As long as the legislature clearly states that a regulatory crime is based on strict liability, then—according to the Supreme Court—it's okay to dispense with the usual requirement of mens rea, because the goal is to place the duty on the business to avoid the danger to the public.

Suggested Reading

- Morissette v. United States.
- State v. Varszegi.
- Commonwealth v. Liebenow.
- United States v. Dotterweich.

Questions to Consider

- Do you agree that theft should be defined as a specific intent crime?
- In cases where mens rea becomes an issue, how can the law determine what was really going through the defendant's mind at the time of the crime?

Lecture 3

HOMICIDE AND MORAL CULPABILITY

This lecture examines the criminal law governing homicide crimes. In this lecture, you will learn about the different types of homicide, a category of crimes that includes first- and second-degree murder and voluntary and involuntary manslaughter. You will also learn how first-degree murder differs from other types of homicide.

ELEMENTS OF HOMICIDE

- ✯ Homicides are unique among crimes. There is no crime more foul, more heinous, more devastating in its impacts upon the victim and society. And there is no other crime that prompts in the rest of us such a strong desire to delve deeply into the mind—and the soul—of the criminal.

- ✯ Homicides are also unique in the criminal law. Almost all crimes are defined by reference to a particular criminal act, or an act committed under a particular set of circumstances. Take money or property from someone else, and you've committed theft. Take it by force, and you've committed robbery. Punch another person—or, indeed, touch them in any manner that's unwanted and offensive—and you've committed assault. None of these crimes require the defendant to cause any particular result, or any particular amount of harm to the victim.

- ✯ Homicide crimes are defined differently. The essential conduct element in the definition of all homicide crimes is exactly the same: causing the death of another human being. You can commit a homicide by shooting, by stabbing, by strangling, by running the victim over with a car, by or pushing them off a cliff. Any act will do, as long it results in the victim's death.

- ✯ In many cases, homicide doesn't even require an affirmative act. You can commit homicide by failing to do something you're legally required to do—failing to feed your infant child, for example. Homicide simply requires proof that the defendant's act or omission—whatever it may have been—caused the death of another human being.

- ✯ Homicide law is one of the few areas of criminal law where courts debate the meaning of causation. What, exactly, does it mean to say that a defendant's act or omission caused the victim's death? This may seem like a simple question. In some murder cases, however, this issue is anything but simple.

- Causation for legal purposes is not a simple, scientific fact. The simple, scientific fact of causation does exist, of course; in the legal world, it is sometimes referred to as but-for causation. This refers to the concept that but for a certain event, a certain other event would not have happened. That's something we can treat as a scientific fact, something that's either true or false.

- The problem is that but-for causation is woefully insufficient to establish legal causation. This is because there are an infinite number of but-for causes of any particular event. Without consciously thinking about it, however, we instinctively know how to limit the boundless universe of but-for causes of an event to a much smaller set of causes that we treat as relevant to issues of moral responsibility and blame.

- Whenever a tragic event occurs, we make an unconscious choice about which specific cause or causes we want to blame for the loss. It's important recognize that this is a choice—there's nothing true or false about it. To put it another way, the causal judgments we make are normative, not empirical. For moral purposes, we choose the cause that we think should be blamed for the tragic outcome.

- This is the kind of instinctive thought process that psychologists call heuristic thinking. We learn to do it from childhood. And it happens unconsciously—most of the time, at least, until a hard case forces us to bring our thought process out into the open.

- The law has a name for the cause that gets blamed for a particular harmful result: proximate cause. Proximate cause is a legal term without a scientific definition. The term simply refers to whatever cause the law decides to treat as responsible for the particular harm at issue.

- There's no magic formula to proximate causation. Our unconscious minds pay attention to many factors, which combine to produce the final judgment about causation. Some factors are obvious: As the term itself suggests, we tend to attribute proximate causation to causes that are more proximate—closer in time and space—to the result. We also tend to focus on causes that are foreseeably connected to the result, rather than those that almost nobody would have guessed might lead to that result.

- There are two special factors that greatly affect causal judgments. One factor is that, as human beings, we need to believe that we have free will. We don't want to think of ourselves as mere automatons reacting to external stimuli, because this would deprive our lives of all moral significance. The second factor is that we tend to base our causal judgments on morality. Whenever a bad result happens, we tend to blame whomever is seen as the worst actor in the situation.

CATEGORIES OF HOMICIDE

- Distinctions between various homicide crimes depend on what the defendant was thinking at the time of the act or omission that caused the victim's death. It's all about the defendant's moral culpability for the death, or what the criminal law calls mens rea. The law creates a hierarchy of homicide crimes, in which the seriousness of each crime depends on the defendant's level of moral culpability.

- The least serious homicide crime is involuntary manslaughter. The crime of involuntary manslaughter generally consists of causing another person's death with the culpable mens rea of recklessness, or perhaps criminal negligence. The punishment varies from state to state, generally ranging from 1 to 10 years in prison.

- ✯ The next homicide crime in the hierarchy is second-degree murder, which can get you 20 years or more in prison. The legal definition of second-degree murder is a killing committed with malice. In criminal law, however, "malice" does not mean "anger" or "ill will." Rather, "malice" is a catch-all term that signifies a certain kind of evil.

- ✯ There are a number of different ways that a murder defendant can exhibit the kind of evil that qualifies as malice. The paradigmatic case is an intentional killing. If you walk up to somebody, and you suddenly decide to shoot them in the head and kill them, that certainly qualifies as malice.

- ✯ If you intend to cause grievous bodily injury to another person—even if you don't actually intend to kill them—and they die from the injury, that also qualifies as malice. Grievous bodily injury is the kind of injury that could easily turn out to be fatal, such as cutting off an arm or leg, or shooting someone in the chest rather than the foot.

- ✯ If you commit a felony considered by the law to be inherently dangerous to human life, and someone dies as a result of your crime, that qualifies as malice, even if the death was unintended or accidental. This is called the felony murder rule, and it is the subject of much debate. Proponents of the rule say that someone who chooses to commit a dangerous crime deserves to be treated as a murderer when an innocent victim dies. Opponents argue that the rule unreasonably punishes individuals for a death they had no intent to cause.

- ✯ If you do something so extremely reckless that the law considers it a manifestation of an abandoned and malignant heart, and someone dies as a result, that qualifies as malice. The "abandoned and malignant heart" language comes from the traditional legal terminology, which is why the crime is sometimes abbreviated as AMH murder. AMH murder involves a level of recklessness that's closer to depravity.

- The next homicide crime in the hierarchy is first-degree murder. Just like the paradigmatic example of second-degree murder, first-degree murder involves an intentional killing. The difference is that in first-degree murder, the victim's death must be premeditated.

- First-degree murder cases often involve a decision to kill made over an extended period of time. Nevertheless, courts often say that premeditation doesn't require any specific amount of time. The cases also often involve advance planning, but courts say that planning is not required.

- The best way to think about the legal concept of premeditation is that it expresses something about the quality of thought that went into the decision to kill—not the quantity. First-degree murder involves a rational, cold-blooded decision to kill, as opposed to the impulsive kind of decision that's the hallmark of second-degree murder. Rational decision-making can occur in an instant. Of course, the more time spent making the decision, the more likely it is that a court will find premeditation. Similarly, advance planning isn't required, but it can be strong evidence of rational thought.

- The punishment for first-degree murder is severe. A conviction for first-degree murder could mean life in prison, or even—if aggravating circumstances are present and the relevant state law so provides—the death penalty.

- The law also treats some felony murders as first-degree murders, if the felony the defendant was committing is one that the legislature has included on a statutory list. Most states list robbery, burglary, arson, kidnapping, and rape. If you commit any of these felonies, and someone dies as a result of your crime, you can be charged with first-degree murder—even if you never intended for anyone to die.

VOLUNTARY MANSLAUGHTER

- Voluntary manslaughter is a homicide crime that is defined as a special exception to the crime of second-degree murder. If the defendant qualifies, his punishment is typically reduced to half of what it would have been if he had been convicted of second-degree murder. Voluntary manslaughter thus operates as a kind of partial defense to a murder charge; you're still guilty of a homicide crime, but a much less serious one.

- The doctrine of voluntary manslaughter was developed by judges hundreds of years ago. The basic idea was to mitigate the punishment in certain homicide cases where the defendant's act was motivated by extreme anger, due to a provoking event that would make most people at least feel homicidal—even if most people wouldn't actually kill over it.

- ✯ We often describe voluntary manslaughter as taking place in the heat of passion. If the provocation would be adequate to push even a reasonable person into the heat of passion, and if the killing occurs before sufficient time has passed for a reasonable person to cool off, then the crime becomes voluntary manslaughter instead of murder.

- ✯ Two classic situations led to the creation of the voluntary manslaughter doctrine. The first was mutual combat: Two men get into a fight, the fight escalates, and one of them ends up dead. This can't be self-defense, because both men were responsible for the initial violence. But judges decided it shouldn't be murder, either, because the victim was just as responsible as the defendant for creating the situation that led to his death.

- ✯ The second classic situation was spousal adultery: A man finds his wife in bed with another man, and kills his wife, the other man, or both. Once again, judges decided that this shouldn't be murder, because the killing was only partly the fault of the defendant; it was also the fault of the adulterous lovers who created the situation. In both scenarios, the crime was reduced to voluntary manslaughter, and the punishment was reduced by roughly half.

- ✯ Notice how both of these classic situations reflect a testosterone-driven view of the world. The early common law judges who devised the doctrine were all men. And the decision to mitigate the crime and punishment in these cases reflected a male-centric perspective. It's like saying, "boys will be boys"—and sometimes boys will kill, if you get them mad enough.

- ✯ It's proven much harder over the years for female defendants to benefit from the voluntary manslaughter doctrine. A battered wife who kills her abusive husband out of fear for her life, but does so while the husband is sleeping, can't qualify for self-defense because she's not in imminent danger. She also may not qualify for voluntary manslaughter, however, because very few women kill, even under circumstances of extreme emotion.

Suggested Reading

- Robertson v. Commonwealth.
- Commonwealth v. Welansky.
- Mayes v. People.
- Austin v. United States.
- Percy, Hoffmann, and Sherman, "Sticky Metaphors."

Questions to Consider

- Do you agree that a rational intentional killing should be defined by the criminal law as a more heinous crime than an impulsive intentional killing?
- Should the law provide a partial defense to people who kill others out of extreme, provoked anger?

THE LAW OF SELF-DEFENSE

Criminal law tries to strike a balance between the rights of those who feel their lives may be threatened, and the rights of those who are—or who may be mistakenly perceived as—a threat. A key component of this difficult balancing act is the doctrine of self-defense. Related issues include battered spouse syndrome, the duty to retreat, and police use of deadly force.

SELF-DEFENSE BASICS

- Self-defense has a long history in Anglo-American law. As the doctrine is traditionally defined, a person is legally allowed to use force—including deadly force—when he reasonably believes that he, or another person, is in imminent danger of death or serious bodily injury from an assailant. The person claiming the right to self-defense must not be the initial aggressor, and the amount of force used must not be excessive.

- ✯ The doctrine of self-defense is usually based on what a person reasonably believes. This means that it's possible to act legally in self-defense even if you are mistaken about the threat, as long as your mistake is reasonable. If you kill another person because you honestly but unreasonably thought the person was trying to kill you, that's still criminal homicide, but your charge might be reduced from murder to manslaughter.

- ✯ The doctrine of self-defense can be used in defense not only of yourself, but also of others. The law has long taken the position that you're never allowed to take another person's life on the ground of necessity. This means that even if killing one person will save another person's life—or 10 lives, or 100 lives—you can't do it. But if one person is actually trying to kill another person, you can kill the first person to save the second person's life.

- ✯ The traditional definition of self-defense requires that the perceived threat be imminent. This meanss you can't act in self-defense prematurely, killing someone because you believe they're likely to attack you in the future. Nor can you act in self-defense belatedly, killing them after the attack is over and you're no longer in any immediate danger.

BATTERED SPOUSE SYNDROME

- ✯ Self-defense's imminence requirement is sometimes a point of controversy, particularly in cases where the person facing a lethal threat may be unable to defend themselves in the heat of the moment. In such cases, the victim may need to wait until a safer time and place to deal with the attacker. The classic example is someone trapped in a physically abusive relationship with a bigger stronger individual, a pattern known as battered spouse syndrome.

- ✯ Criminal law traditionally holds that a battered spouse can claim self-defense for killing her batterer only if she fights back when she's actually being attacked and when the threat to her life is imminent. In many cases, however, the battered spouse may be much more likely to be killed herself if she tries to fight back when her batterer is enraged.

And if the batterer is hitting her with his fists, the law might not allow her to use a gun to protect herself; that might be seen as an excessive use of force. As a result, the battered spouse may decide to wait until the attack is over before taking action.

- Cases involving battered spouses have led many courts to reconsider the rules of self-defense. Some courts have loosened up the imminence requirement, interpreting it in light of how things would look to a battered spouse who can't plausibly fight back. Others have focused on the requirement that the perception of the threat be reasonable, concluding that reasonableness should be judged from the perspective of a reasonable person who's been battered.

- Still other courts have turned to other legal doctrines, such as diminished mental capacity or acting in the heat of passion, to reduce charges brought against battered spouses from murder to manslaughter. Advocacy groups for battered spouses don't like these alternatives, however, because they still treat the battered woman as a criminal.

THE RETREAT DOCTRINE

- ✯ The legal requirement of imminence and the prohibition against excessive force are both closely related to another important aspect of self-defense law. Some states require that a person must retreat—if it is possible for him to do so in safety—before using force in self-defense. This is known as the retreat doctrine.

- ✯ Judicial decisions in the United States have long been split over the duty to retreat. Currently, less than half of the states require a person to retreat before using force in self-defense. These states tend to be located in the Northeast and Midwest. States that have rejected the retreat doctrine tend to be located in the South and West. Many of these adopted an entirely different standard known as the true man doctrine.

- ✯ The true man doctrine holds that a "true man" doesn't run away in the face of danger; he stands and fights. In states that have adopted the true man doctrine, even if a person who's about to be attacked can easily and safely escape the danger, he doesn't have to do so. He is legally authorized to stand and fight, using deadly force if necessary.

- ✯ The ongoing debate over the retreat doctrine and the true man doctrine seems to be a reflection of something deeply historical and cultural. In the South, there's always been a strong culture of personal honor. In the West, there is a tendency toward rugged individualism. In the Northeast and Midwest, by contrast, there's a greater sense of social interdependence, and thus a greater willingness to leave the use of deadly force to law enforcement.

THE CASTLE DOCTRINE

- ✯ Even in the minority of American states where the retreat doctrine still prevails, there's always been a special exception for attacks that occur inside the home. This is called the castle doctrine. The castle doctrine holds that you have no legal duty to retreat from an assailant if the attack happens inside your own home or place of residence. In such circumstances, if you reasonably fear for your life, you can stand and fight, using deadly force if necessary.

- ✯ There's an increasing tendency in many states to recognize, often by statute, broader versions of the castle doctrine. These broader versions often provide that, inside your own home, you can use deadly force not only in defense of your own life or the life of another, but also to stop an intruder from committing a felony or other serious crime, such as robbery, assault, rape, or kidnapping.

- ✯ Some states have broadened the castle doctrine even further, permitting the use of deadly force to prevent the commission of any crime by a trespasser inside your home. In some states, deadly force can be legally used to stop an unknown person from forcibly entering your home, even if you don't know why they're trying to get in. A few states even extend the castle doctrine to cover illegal entry into your vehicle.

- ✯ These broader versions of the castle alter the traditional rule that you can only use force that's proportionate, and not excessive, relative to the specific threat you perceived. In fact, many of these laws create a legal presumption that the use of deadly force is permitted against any intruder, on the theory that you can reasonably assume anyone trying to break into your home intends to do you or your loved ones lethal harm.

- ✯ The broadening of the castle doctrine in certain states doesn't mean you can accomplish the same thing by setting up a booby trap, a spring gun rigged to fire automatically, or some other such device. Many people have gone to prison for injuring or killing trespassing criminals in that manner—primarily because such devices are incapable of exercising any kind of reasonable judgment based on the facts of the particular situation.

- ✯ Keep in mind that state laws vary widely and sometimes change rapidly. This course is not meant to be source of legal advice. The only person who can give you proper legal advice is a licensed attorney who is well versed in the laws of your particular state.

STAND-YOUR-GROUND LAWS

- ✯ The longstanding debate between the retreat doctrine and the true man doctrine has been pushed aside in many states by the enactment of so-called stand-your-ground laws. The Florida stand-your-ground statute was one of the first to be enacted, and several other states used it as a model. The Florida statute provides:

> A person who is not engaged in an unlawful activity, and who is attacked in any place where he or she has a right to be, has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony.

- ✯ Notice that the statute eliminates any duty to retreat before using force in self-defense, and it allows the use of force—including deadly force—to stop or prevent any forcible felony, such as a robbery. In effect, the statute takes a broad version of the castle doctrine, a doctrine traditionally limited to defense of your home, and applies it to any place in the world you have a right to be.

- ✯ There are two huge, unanswered empirical questions about stand-your-ground laws. The first is whether such laws make the world a safer place by deterring illegal behavior, or a more dangerous place by encouraging people to rely on guns for protection from trouble.

- ✯ The second unanswered question is whether such laws have the unintended effect of making the world a more dangerous place for people who only seem to be threatening because of who they are and what they look like. In a society where young black men are often perceived as especially dangerous, stand-your-ground laws could make it especially dangerous to be a young black man.

POLICE USE OF DEADLY FORCE

- ☆ Police shootings of young black men erupted onto the American political scene in August 2014 with the death of Michael Brown in Ferguson, Missouri. The police officer who shot Brown was cleared of all criminal charges, but not without considerable controversy.

- ☆ The law governing police use of deadly force is surprisingly opaque. The Supreme Court has held that, under the Fourth Amendment, police officers can't use deadly force to stop fleeing criminals unless they present a significant risk of death or serious bodily injury to the officers or to others. Police officers charged with a crime can also avail themselves of the doctrine of self-defense, if applicable.

- ☆ Police officers have a special duty not to retreat from danger, even where others might have to. Given their special training and experience, they might also have a duty to be more prudent in their use of deadly force than civilians might be. So far, the courts haven't said much about how these considerations might affect the legality of police use of deadly force.

- In the end, the use of deadly force by police and by private citizens—whether to apprehend a fleeing criminal, to protect oneself or others from potential danger, or simply to stand up for law and order—is likely to remain highly contentious as we continue to debate how best to build a safe, fair, and just society.

Suggested Reading

- People v. Goetz.
- Mobley v. State.

Questions to Consider

- Do you agree with the verdict reached and the lenient punishment imposed in the *Goetz* case?
- How do you feel about modern stand-your-ground laws, like the one in Florida? Why do you feel that way?

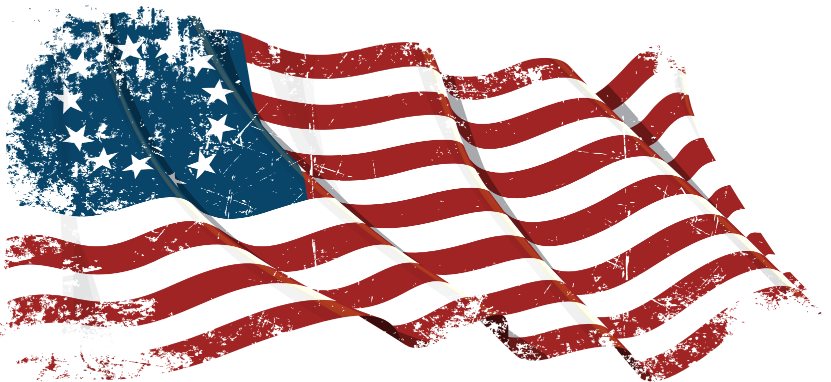
Lecture 5

FEDERAL CRIMES AND FEDERAL POWER

There are important distinctions in scope, meaning, and effect between state criminal law and federal criminal law. In this lecture, you'll learn about the limits placed by the United States Constitution on the federal government's power to enact criminal laws. You'll also examine some of the ways that federal crimes differ from state crimes.

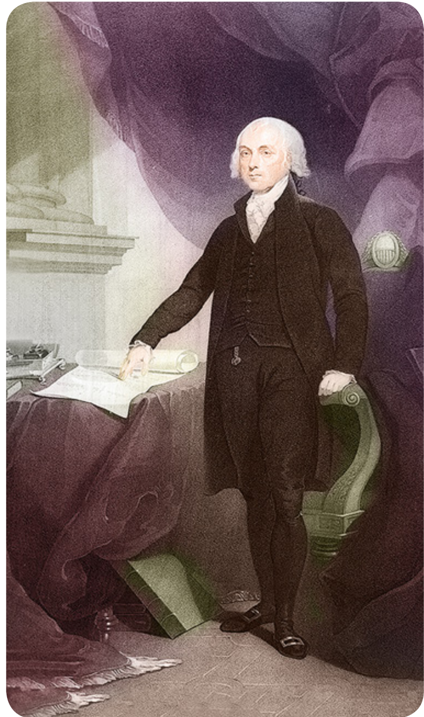
LIMITED AUTHORITY

- The United States federal government may be the most powerful government in the world, but its power to prohibit and punish crimes is relatively constrained. For example, even if Congress were to decide that murder had become a national crisis requiring a concerted response, it would be patently unconstitutional for Congress to pass a federal statute criminalizing all murders.



- Shortly after the Revolutionary War ended, delegates from the 13 former colonies met in Philadelphia to draft a Constitution. The delegates knew they had to forge a strong union, but the last thing they wanted to was create a federal government that might become too strong. After all, they'd just fought a long and bloody war to gain their freedom from an overbearing central government—the British Crown.

- James Madison, a delegate from Virginia, proposed a solution that was simple but brilliant: The newly independent states would agree to give up only a few of their sovereign powers to the new federation. Within those few areas of sovereignty specifically granted to the federal government by the text of the Constitution, the federal government would reign supreme. But all other sovereign powers of government would remain with the states—and in those areas, the federal government would have no authority at all, and the states would retain complete sovereignty.



- This system of dual sovereignty has helped keep America both strong and free for more than 200 years. As Madison and the other framers of the Constitution recognized, individual liberty can be better protected by having two governments, because those two governments will constantly compete with each other for power, which will help keep both of them in check.

- In the Constitution, the framers listed a number of specific powers that would be transferred by the states to the new federal government. Among these enumerated powers were those necessary to raise and maintain a military, to engage in foreign affairs and diplomacy, to control immigration and customs, to create a national currency, to construct a national transportation system of post roads and waterways, to encourage invention and the creative arts through patents and copyrights, and to regulate interstate and foreign commerce.

- One very important power not given to the federal government was the general power to act in the best interests of the American people. This fundamental power of sovereign government—sometimes called the health, safety,

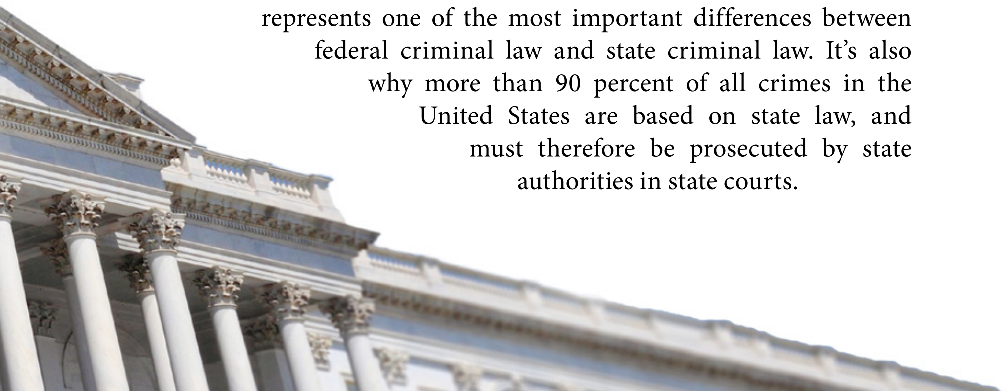
and wellness power, or the police power—remains, to this day, with the states. And it is this power that allows the states to create generally applicable criminal laws. The federal government, by contrast, can create a criminal law only if it is within the scope of federal power under the Constitution.

- Federal crimes fall into one of three broad categories. The first involves criminal statutes that are directly related to a power enumerated in the Constitution. For example, Congress can make counterfeiting a federal crime, based on its authority to create a national currency. Congress can also make it a federal crime to blow up a post office, or to enter the country illegally. According to the Constitution, these are federal matters.

- Second, Congress can enact criminal laws to govern federal places, such as the District of Columbia, military bases, and other federal lands. The same principle applies to areas that lie outside the legal jurisdiction of any state, such as the offshore territorial waters of the United States, or the air and space above.

- Third, Congress can enact federal criminal statutes to protect the federal government itself, its institutions, and its officers and employees. This is akin to the doctrine of self-defense for individuals, and it's an implied power that belongs inherently to all governments. It was this basis upon which Congress, following the Kennedy assassination, passed a law making it a federal crime to assassinate the President.

- The requirement that all federal crimes be based upon a proper assertion of federal power as authorized by the Constitution represents one of the most important differences between federal criminal law and state criminal law. It's also why more than 90 percent of all crimes in the United States are based on state law, and must therefore be prosecuted by state authorities in state courts.



BROAD READINGS

- Despite its limitations, the role of the federal government in defining, prosecuting, and punishing crimes has grown significantly over the years. In the earliest decades of American history, there were very few federal crimes. But over time, the scope of federal constitutional power has increased—and with it, the scope of federal criminal law.

- Much of the expansion of federal criminal law has been based on the federal government's authority to regulate interstate and foreign commerce. When the framers drafted the Constitution, there wasn't much interstate or foreign commerce to speak of; most commerce was entirely local. That gradually changed over the course of the 19th and 20th centuries. Commerce that was originally local became regional, then national, and eventually global. This meant that the scope of Congress's power to regulate had also changed.

- During the Great Depression of the 1930s, Americans turned to a new President—Franklin Delano Roosevelt—who promised to bring about a New Deal and solve the greatest economic crisis in our history. With the help of a willing Congress, Roosevelt immediately began to implement a series of bold new federal laws designed to regulate many aspects of the national economy, in the hopes of increasing employment and reducing poverty.

- The new laws were initially struck down by the U.S. Supreme Court. The Court ruled that, under the Commerce Clause, the federal government could not regulate the economy in general—only economic activity that actually crossed state lines. Around 1937, however, the Court began to change its views about the Commerce Clause.

- The expansion of the Commerce Clause reached its apogee in the 1942 case *Wickard v. Filburn*, in which the Court held that Congress can regulate even purely intrastate commercial activity as long as that activity has some effect on interstate commerce. Given the increasingly interconnected nature of the American economy, this meant that Congress could regulate almost anything.

- In the 1995 case *United States v. Lopez*, the Supreme Court demonstrated that Congress's power to legislate under the Commerce Clause was not truly unlimited. In *Lopez*, the Court held that the Gun Free School Zones Act, a federal statute making it a crime to carry a firearm within a school zone, exceeded Congress's power under the Commerce Clause. According to the Court, the Commerce Clause requires a substantial effect on interstate commerce, not one that is speculative and remote.

COMPLEX CASES

- Many federal crimes involve complicated subjects, from securities transactions to food safety. Sometimes these complex federal laws are aimed primarily at businesses and the people who run them. In such situations, the federal courts typically have little sympathy for claims by corporate defendants that they didn't know what the law required of them. If you're running a business in a heavily regulated industry, you have an obligation to find out what the relevant legal requirements are.

- Sometimes, however, complex federal laws affect average citizens. The Supreme Court has adopted two special rules to protect average citizens from unfair criminal liability due to overly complicated federal statutes. These rules are much more lenient to federal criminal defendants than most state laws would be.

- The first special rule is that a defendant must know the facts that make his conduct illegal. The second rule provides that in some cases—prosecutions based on complex portions of the federal tax code, for example—an honest mistake about what the law requires can be a defense.

- ✯ Perhaps the strangest aspect of the often confusing relationship between federal criminal law and state criminal law is the way that, over the years, federal and state statutes have inconsistently regulated the production, sale, and possession of marijuana. Despite recent changes in state law, marijuana is currently still designated by the U.S. Drug Enforcement Agency as a dangerous drug, and its production, sale, and possession remained strictly prohibited under federal law.

- ✯ This odd discrepancy between state and federal law has led to all sorts of practical problems. It can be very difficult, for example, to get a bank account or a loan for a marijuana business in states where marijuana has been legalized, because the activity in question remains a serious federal crime. Similarly, it can be difficult to find lawyers willing to give legal advice about matters relating to the marijuana industry, because such advice could be construed as telling someone how to commit a federal crime—which could get a lawyer disbarred, if not prosecuted.

- The Constitution provides that, within the proper scope of the federal enumerated powers, federal law reigns supreme. This means that the states that have legalized marijuana are deliberately skating on thin ice, hoping that the federal government decides not to enforce federal law. This dynamic has created what amounts to a new frontier in the never-ending battle of federalism.

Suggested Reading

- Wickard v. Filburn.
- United States v. Lopez.
- Staples v. United States.
- Cheek v. United States.
- Ratzlaf v. United States.

Questions to Consider

- Should the federal government have the power to enact general criminal laws?
- Do you agree with the Supreme Court's decision to let Cheek off the hook for tax evasion, given his (unreasonable) belief that he didn't have to pay taxes?

Lecture 6

CRUEL AND UNUSUAL PUNISHMENTS

The Eighth Amendment, which regulates the punishments that society can inflict upon those who are convicted of crimes, is a constitutional enigma. In this lecture, we'll explore the history and meaning of the Eighth Amendment—specifically, its ban on cruel and unusual punishments—to discover why it's been so problematic for courts to apply to real-world criminal cases.

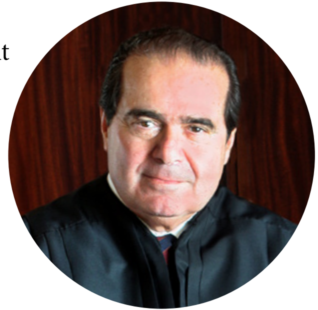
LIFE WITHOUT PAROLE

- Ronald Allen Harmelin was convicted in a Michigan court of simple possession of 672 grams of cocaine. For this crime, he was sentenced to a mandatory term of life imprisonment without possibility of parole—even though he had not been found to be a drug dealer, and even though he had no prior felony convictions. The trial judge had no choice, because the Michigan statute required imposition of the life-without-parole sentence.

- Harmelin appealed to the U.S. Supreme Court, arguing that his life-without-parole sentence violated the Eighth Amendment's ban on cruel and unusual punishments because the sentence was wildly disproportionate to the seriousness of his crime. In *Harmelin v. Michigan*, decided in 1991, the Supreme Court rejected Harmelin's claim and upheld the sentence.

- There was no single majority opinion in Harmelin. Instead, two separate opinions—one by Justice Antonin Scalia and the other by Justice Anthony Kennedy—had to be added together to produce

the result. Justice Scalia's opinion rejected Harmelin's argument on the ground that the Eighth Amendment doesn't require any kind of proportionality between crime and punishment.



- According to Scalia, the Eighth Amendment prohibits only "cruel methods of punishment that are not regularly or customarily employed." In other words, it precludes the legislature from enacting specific kinds of punishment, such as the medieval rack, that would be cruel and unusual as applied to any crime.

- Justice Kennedy's concurring opinion articulated a somewhat broader view of the purpose and effect of the Eighth Amendment. According to Kennedy, the ban on cruel and unusual punishments prohibits both particular kinds of punishment that are always cruel and unusual, as well as punishments disproportionate to the particular crime.

- Kennedy pointed out that the Supreme Court had recognized a proportionality principle within the Eighth Amendment for more than 80 years, and he was unwilling to overturn that precedent. At the same time, Kennedy tried to clarify the scope of this proportionality principle—and in so doing, essentially guaranteed that it would never be used to invalidate a prison sentence.

- Under either Justice Scalia's narrow view of the Eighth Amendment or Justice Kennedy's slightly broader view, it would be nearly impossible to find any prison sentence—even one as severe as mandatory life imprisonment without possibility of parole—unconstitutional under the Eighth Amendment. And that's exactly how things have worked out in the years since *Harmelin* was decided.

THE DEATH PENALTY

- ✩ Christopher Simmons, a 17-year-old resident of Missouri, came up with a plan to murder a woman named Shirley Crook. He convinced two younger friends to help him. Simmons and one of the friends broke into Mrs. Crook's home, bound her hands, covered her eyes, then drove her to a nearby state park and threw her off a bridge. Simmons later confessed. He was convicted of first-degree murder and sentenced to death.

- ✩ Simmons appealed his sentence to the U.S. Supreme Court, claiming that it would violate the Eighth Amendment to execute a defendant whose crime was committed before the defendant turned 18. At the time, of the 38 states with valid death penalty statutes on their books, 18 prohibited imposing the death penalty on anyone under the age of 18. Missouri was not one of them.

- ✩ In *Roper v. Simmons*, a 5-4 majority of the Supreme Court found application of the death penalty to a juvenile under age 18 to be cruel and unusual punishment, and therefore unconstitutional under the Eighth Amendment. In a majority opinion written by Justice Kennedy, the Court held that Missouri was constitutionally barred from imposing the death penalty against a juvenile because most other states wouldn't allow such a punishment.

- ✩ Kennedy's opinion noted that 12 states had no death penalty at all, which—combined with the 18 states that limited the death penalty to defendants over the age of 18—added up to a majority of 30 states rejecting the juvenile death penalty. a few of those states had done so in the preceding few years, making it look like some kind of a trend was developing in the states.

- ✩ Justice Scalia, in dissent, rejected the majority's conclusion that this evidence represented an emerging "national consensus" against the juvenile death penalty, given that 20 states, including Missouri, still authorized such a punishment. Scalia also pointed out the strangeness of counting states that didn't have a death penalty at all, describing

this as comparable to "including old-order Amishmen in a consumer-preference poll on the electric car. Of course they don't like it," Scalia wrote, "but that sheds no light whatever on the point at issue."

- Kennedy's majority opinion also included an extensive discussion of the psychology of juveniles, in an effort to show that juveniles are both less likely to be fully responsible for their actions, and more likely to change and possibly rehabilitate in the future. Kennedy added that abolishing the juvenile death penalty would bring America into alignment with other civilized nations around the world.

- The contrast in approach between *Harmelin v. Michigan* and *Roper v. Simmons* could not be more striking. *Harmelin* is based on almost complete deference to the state legislature's judgment about criminal punishment. *Roper*, by contrast, reveals an interventionist Court looking to overturn the state legislature's decision. The best explanation for this disparity is that the Court has long viewed the death penalty as a special case under the Eighth Amendment.

THE COUNTER-MAJORITARIAN DILEMMA

- The counter-majoritarian dilemma refers to the fact that the Supreme Court and the Constitution often operate by imposing limits on what the majority in society can do. Legislatures generally follow the will of the people, and so, too, does the executive. But every once in a while, the Supreme Court steps in to protect the rights of the minority.

- The majority doesn't need the same kind of protection, because the majority can get what it wants through the political process. The minority can't. That's why the Constitution sets forth fundamental values and norms that are meant to transcend the ever-changing sentiments of the day and limit the potential harm to the minority.

- The dilemma is that the Supreme Court is acutely aware that its own power is severely limited. The Court has no way to enforce its own decisions; it doesn't have a military, and its police force consists of a few officers tasked with protecting the Supreme Court building. So whenever the Court makes a decision, it has to turn to the political branches of government, state and federal, to enforce that decision.

- Whenever the Supreme Court is about to make a decision that's going to be unpopular with a majority of the American people, or even the people within a particular state, the Court always has to think—and swallow—hard. Yes, the Court sometimes has to stand up to the majority. But the Court can't do it too often, or go too far, without risking a loss of respect and public legitimacy. That's the counter-majoritarian dilemma.

- The counter-majoritarian dilemma doesn't mean that the Court does whatever it thinks the majority wants. Rather, it's that the Court always keeps a close eye on what the majority wants, so that the Court can protect its own legitimacy in the eyes of the public. This is a subtle but absolutely crucial aspect of how the Court functions.

☆ The Eighth Amendment, with its plain and simple text, highlights the counter-majoritarian dilemma. When the Court decides to invalidate a democratically approved punishment under the Eighth Amendment, the Court must declare—publicly—that the legislature that authorized the punishment, the jury of citizens that voted to convict the defendant, and the judge who imposed the sentence all behaved in a manner that's "cruel."

- This is why the Court has traditionally viewed the Eighth Amendment in terms of the "evolving standards of decency" of a "maturing society," and has looked for the clearest possible evidence of a national consensus before striking down a punishment as cruel and unusual. It's also why very few punishments—outside the unique context of the death penalty—have ever been struck down by the Court.

Suggested Reading

- Harmelin v. Michigan.
- Roper v. Simmons.
- Furman v. Georgia.
- Gregg v. Georgia.
- Trop v. Dulles.

Questions to Consider

- Does the U.S. Supreme Court—as an unelected branch of the federal government—play too large a role in resolving major social issues and controversies in America?
- How do you feel about the death penalty, and why?

Lecture 7

DUE PROCESS AND THE RIGHT TO COUNSEL

In the modern era of criminal procedure, due process and effective legal assistance are considered fundamental rights, guaranteed by the U.S. Constitution to defendants in all criminal proceedings, state and federal. But this wasn't always the case. This lecture examines the development of the law in this area, including the shift in constitutional interpretation that allowed the U.S. Supreme Court to change the way states handle criminal scases.

INDIVIDUAL RIGHTS

- Adopted in 1791, the first 10 amendments to the U.S. Constitution were the result of a political compromise. Some framers wanted to emphasize that the new federal government should not interfere with the most important rights of individual citizens. Others thought this was obvious, and feared that listing particular rights might suggest that others were not protected. Eventually, the two sides agreed to draft a set of 10 amendments—what became known as the Bill of Rights—to be adopted shortly after ratification.

- The Bill of Rights was designed only to protect individual rights against the new federal government. The various state governments were already in existence, and they had constitutions of their own—including their own provisions concerning individual rights.

- ✭ Many of the guarantees written into the Bill of Rights involved the rights of people accused of crimes. This makes sense, because one of the most important powers of government is the power to lock someone up—or even execute them—as punishment for committing a crime.

- ✭ One of the abiding lessons of the Civil War was that states can't always be trusted to protect the rights of their own citizens. The states that had joined the Confederacy continued to persecute freed slaves, even after the war was over. To address this issue, the Constitution was amended. One of the so-called Civil War Amendments was the Fourteenth Amendment, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

- ✮ The Fourteenth Amendment emphasizes the concept of national citizenship. Prior to the Civil War, most Americans considered themselves citizens only of their particular state. But the Fourteenth Amendment says otherwise: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside."

- ✮ As part of this new concept of national citizenship, the Fourteenth Amendment provides that the states can't take away a person's life, liberty, or property without due process of law. And the federal government will enforce this new constitutional right of due process—as well as the right to equal protection of the laws—against any possible infringement by the states.

- ✮ The Civil War Amendments represented a turning point in American constitutional law. They were the first amendments to the Constitution to directly address, and directly limit, the power of the states to act in ways that might harm their own citizens. This was a huge shift in the balance of American federalism.

DUE PROCESS

- ✮ With the ratification of the Fourteenth Amendment in 1868, the U.S. Supreme Court became responsible for ensuring that state officials wouldn't deprive people of life, liberty, or property, without "due process of law." This was very important for criminal justice, as the vast majority of criminal cases were and are prosecuted by state governments. And in criminal cases, the life, liberty, or property of the defendant is always on the line.

- ✮ The word "process," defined literally, means "procedure." The Due Process Clause of the Fourteenth Amendment thus has something to do with the specific procedures a state must follow if it wants to take away your life, liberty, or property.

- ✯ The Supreme Court had to figure out how to give sensible meaning to this vague constitutional language. In the late 19th century, the Court took a conservative approach. Basically, the Court held that the procedures to which the Due Process Clause entitles you are whatever procedures the state has written into its validly enacted statutes and rules. Once a state enacts a law that guarantees you a particular form of process, the state must follow that law.

- ✯ By the early 20th century, the Court became concerned that this approach wasn't protective enough. At the time, all a state had to do to deny someone a right was enact a new law stating that people no longer have that particular right.

- ✯ In the landmark case *Powell v. Alabama*, the Supreme Court held that the procedures to which the defendants had been subjected violated the Fourteenth Amendment's Due Process Clause. More specifically, the Court held that the defendants were denied a fair trial by virtue of the fact that they were essentially forced to go to trial without the assistance of counsel.

- ✯ The Court in *Powell* adopted a more rigorous analysis for potential Due Process violations, examining whether the state's established criminal procedures—or the application of those procedures in the case at hand—provided the defendant with a "fundamentally fair" trial. If not, the procedures were held to be a violation of the Due Process Clause.

- ✯ In practice, analyzing the fundamental fairness of criminal procedures often required judges to rely purely on their own intuition. In one case, decided in 1952, California forcibly pumped the stomach of a criminal suspect to make him disgorge illegal drugs he'd swallowed. The Supreme Court held that this procedure violated the Due Process Clause because it "shock[ed] the conscience."

- ✯ Much later, in 1993, Justices Blackmun and Scalia got into a spat over the procedures used in a Texas death penalty case. On behalf of several dissenting justices, Blackmun wrote that the state's procedures had indeed shocked the conscience—to which Scalia replied, "perhaps they should doubt the calibration of their consciences, or better still, the usefulness of 'conscience shocking' as a legal test."

- ✯ Fundamental fairness is a vague standard, and was therefore dependent entirely on the subjective views of nine unelected Supreme Court justices. To address this problem, the Court began trying to tie the concept of fundamental fairness to something a little more concrete. Specifically, they began to consider whether the procedures at issue were fundamental in light of the country's Anglo-American history and tradition.

- ✯ This new approach enabled the Court to look to respected historical sources—the Magna Carta, for example, or the Declaration of Independence—to decide whether a particular procedure violated the Due Process Clause. Many sources proved to be too vague, however, so the Court turned to the Bill of Rights.

- The incorporation of the Bill of Rights into the Fourteenth Amendment's Due Process Clause played a central role in the criminal procedure revolution of the 1960s. The Supreme Court, led by Chief Justice Earl Warren, applied the federal constitutional provisions found in the Bill of Rights against the states, forcing states to provide better treatment for all criminal defendants.

- By the end of the 1960s, every criminal procedure guaranteed by the Bill of Rights with respect to federal cases had been incorporated, and was thus applicable to state criminal cases as well—with the singular exception of the Fifth Amendment's right to grand jury review of criminal charges, which was never incorporated.

- Procedures that were incorporated include the prohibition of unreasonable searches and seizures, the requirement that warrants be based on probable cause, the freedom not to testify against yourself, and the right to a jury trial. States must now provide these procedures, along with all others incorporated by the Supreme Court, to each and every criminal defendant.

THE RIGHT TO COUNSEL

- The Supreme Court's most famous incorporation case was *Gideon v. Wainwright*. On March 18, 1963, the Court ruled unanimously that, by refusing to provide an indigent named Clarence Earl Gideon with a defense lawyer for his felony criminal trial, Florida had denied Gideon his constitutional right to the assistance of counsel as guaranteed by the Sixth Amendment—and as applied to Florida by means of the Fourteenth Amendment's Due Process Clause.

- Today, the right to counsel applies not only to felonies, but also to any misdemeanor case where the defendant receives any actual imprisonment. The right to counsel is no panacea, but it's still the most important procedural right that criminal defendants have.

- Unfortunately, the criminal justice system still works unequally. Rich criminal defendants hire the best lawyers money can buy. Poor defendants are assigned public defenders, many of whom are juggling massive caseloads that would crush most lawyers. Public defenders also don't have access to expensive investigators and jury consultants.

- In the 1984 case *Strickland v. Washington*, the Court held that the Sixth Amendment guarantees a criminal defendant not just any lawyer, but a reasonably effective lawyer. The standard used by the Court in *Strickland* to evaluate the defendant's representation is one that still governs claims based on ineffective assistance of counsel.

- In *Strickland*, the Court held that, in order to get a conviction or sentence overturned based on ineffective assistance of counsel, the defendant must show two things: (1) The defense lawyer's performance fell below an objectively reasonable standard, given prevailing professional norms in the area; and (2) The lawyer's subpar performance was prejudicial to the defendant, in the sense that the outcome might reasonably have been different had adequate representation been provided.

- The *Strickland* test is very difficult to satisfy. Most criminal defendants have lots of evidence against them, which means that even the best defense lawyer likely couldn't get them acquitted. As a result, most defendants wouldn't be able to satisfy the prejudice prong of the *Strickland* test.

- In essence, the *Strickland* test allows the courts to overturn convictions or sentences only in the most extreme cases, where the defense lawyer did an especially bad job and the defendant would have had a fighting chance to win with a better lawyer. Otherwise, the defendant has to accept the outcome of the trial.

Suggested Reading

- Powell v. Alabama.
- Gideon v. Wainwright.
- Strickland v. Washington.

Questions to Consider

- Has the Supreme Court gone too far in providing criminal defendants with constitutional rights and procedural protections?
- How can we do a better job of providing equal justice under the law?

Lecture 8

GOVERNMENT SEARCHES AND PRIVACY RIGHTS

In this lecture, you'll explore the fascinating history behind the Fourth Amendment. You'll also look closely at the amendment's scope, examining in particular the terms "search" and "seizure." These terms define the nature and extent of the Fourth Amendment's privacy protections, and greatly influence how the police investigate crimes.

HISTORY AND PURPOSE

- The Fourth Amendment to the U.S. Constitution provides:

  > The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. And no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

- The Fourth Amendment was one of the most important provisions written into the Bill of Rights. Indeed, the American Revolution was motivated in significant measure by the resentment the colonists felt about the fact that British soldiers—armed only with a "general warrant," based on some vague claim that someone was an enemy of the Crown—could barge into that person's home, perhaps even in the middle of the night, and ransack it, looking for seditious papers or other evidence of disloyalty.

- The Fourth Amendment was designed to accomplish two different but related goals. The second half of the amendment, with its list of requirements for a warrant, was designed to eliminate the hated general warrant. In America, warrants would have to describe specifically what the authorities were looking for, as well as where they could go looking for it. Warrants would also have to be based on sworn statements indicating that evidence of a crime would be found, and could be issued only if they were based on probable cause.

- The first half of the amendment, by contrast, is written in more general terms. It was designed to prohibit all searches and seizures that are "unreasonable," whether or not those searches or seizures involved a warrant. But the grand language of the amendment leaves one key question unanswered: What qualifies as a "search" or a "seizure"?

- Defining "search" and "seizure" is important, because these terms let us know when the protections of the Fourth Amendment apply. If a particular activity isn't considered a search or a seizure, the amendment doesn't regulate it. This means that the government can act that way to anyone, for any reason, as often as it wants.

EXPECTATIONS OF PRIVACY

- In the early years of the Fourth Amendment, there was a pretty clear consensus about what was a "search." The framers believed in the sanctity of private property rights almost as much as they believed in privacy. So a "search" basically meant any action that infringes on your private property, for the purpose of a government investigation.

- During the 18th and 19th centuries, Fourth Amendment notions of privacy and property were inextricably linked: Your privacy was protected because your property was protected. For a nation whose very concept of citizenship—including the right to vote—was often based on the ownership of land, this property-based approach to the Fourth Amendment made some sense.

- The Fourth Amendment's protection is no longer limited to cases where property rights are infringed. Over the years, the U.S. Supreme Court has been forced to adopt a more expansive interpretation. These days, a reasonable expectation of privacy is all that's required for the Fourth Amendment to apply.

- The Court's privacy-based approach ran into trouble almost as soon as it was adopted. In *United States v. White*, the defendant, James A. White, was suspected of involvement in illegal narcotics. The government convinced one of White's friends to wear a concealed radio transmitter and talk to him about the crimes. No warrant was obtained. White said incriminating things, and the tapes were used to convict him. The Court held that this was not a "search" within the meaning of the Fourth Amendment, and thus that which no warrant was required.

- In *White*, the Court noted that any time a person shares a secret with another person, it's no longer really a secret. If you choose to confide your crimes to a trusted friend, you must realize that he or she might go to the police and report what you said. In White's case, the recording by police simply ensured the accuracy of his friend's report. Any subjective expectation of privacy White may have had was, at least according to the Court, unreasonable.

- ✯ The legal implications of sharing information with a third party have returned with a vengeance in the modern era of cellular phones, e-mail, and social media. But before we get there, let's look at a few other cases where the Supreme Court applied an empirical view of privacy and reasonable expectations to reach a problematic result.

- ✯ In *Oliver v. United States*, police officers—without a warrant—drove onto Oliver's property and past his house. They exited their car, walked past a gate marked "No Trespassing," and continued walking for over a mile across open fields until they found Oliver's marijuana plants. The Court held that this was not a "search" under the Fourth Amendment, because everybody knows that stuff you do in open fields might not remain private. For one thing, airplanes might fly overhead and see your stuff. Similarly, hikers might come onto your land and see your stuff, despite your "No Trespassing" signs. Oliver lost.

- ✯ In *Florida v. Riley*, the defendant's marijuana plants were in an enclosed greenhouse, right up against the side of his home. The police, without a warrant, hovered 400 feet above Riley's house in a helicopter until they were able to see the marijuana. The Court held that this was not a "search," because everybody knows that airplanes and helicopters fly overhead all the time. The fact that this particular helicopter flew so low didn't matter, because the low-altitude flight was permitted by FAA regulations. Riley lost.

- ✯ In *California v. Greenwood*, the question was whether it's a "search" if the police, without a warrant, look through your garbage once it's left out on the curb—in a closed, opaque plastic bag—for trash pickup. The Court held that this is was not a "search," because everybody knows that sometimes raccoons tear open garbage bags, exposing their contents to public view. Children, scavengers, and snoops might do so, too. Plus, the trash collector can be considered a third party with whom the defendant voluntarily shared his trash. Who knows whether, or when, the trash collector might decide to go through the garbage to find something of value? Greenwood lost.

- Using the Supreme Court's empirical approach, the only relevant issue is how likely the particular privacy intrusion might be. a normative approach, by contrast, might generate a different and perhaps more appropriate inquiry: Instead of assessing how likely it is that raccoons will go through your garbage, you might ask yourself whether you want to live in the kind of society where the police can go through your garbage—without a warrant—every single day, for whatever reason they want, for the rest of your life.

TECHNOLOGY AND PRIVACY

- In today's tech-driven world, almost every aspect of our lives gets shared, one way or another, with third parties. Sometimes we share voluntarily—like posting things for your friends to see on Facebook. Sometimes, it's done in a manner that's technically voluntary, but almost impossible to resist—like swiping your loyalty card at the grocery store, which is necessary to get discounts, but also shares your purchase history with the store and, eventually, other companies too.

- In some cases, we share things about us without even thinking consciously about it—like when you do a search on Google, or when you agree to certain privacy policies as you sign up for a news or entertainment website. Other times, the sharing of information is mandatory—like when the government makes you provide financial information to the IRS, or to your bank or employer.

- Every e-mail you write and text message you send is "shared" with the companies that provides you with that service, if only so they can transmit them to the intended recipient. Of course, you're also sharing those messages with the intended recipient, which looks a lot like the third-party sharing that took place in the *White* case. Does the government have a free pass to read your messages because you willingly shared them with someone else?

- Other types of information about you get collected by the government or by private companies without your knowledge or consent. Think about the now-ubiquitous security and traffic cameras. These cameras

generally record things that happen in public places, or in businesses that are open to the public. They capture information about your life—whom you're with, where you're going, what you're doing—that you share without thinking every time you go out in public.

- One solution might be to ask our legislatures to enact statutes to provide us with greater protection than we'd get from the Fourth Amendment. This has actually been done a few times already. For example, there's a federal statute that provides some extra protection for stored communications, which are copies of messages stored by Internet Service Providers and wireless carriers.

- In 2015, terrorists in San Bernardino, California, killed 14 people and wounded 22 more. The FBI wanted to get into an encrypted iPhone belonging to one of the terrorists. They first tried to force Apple to get around the encryption. When Apple refused, the FBI paid a hacker more than $1 million to do the job. If that hadn't worked, it's very likely that we would have seen legislation requiring cell phone companies to provide backdoor access to the government, at least under certain circumstances.

- In many cases, it falls to the judiciary—the branch of government that's supposed to make sure we stay true to our Constitution and our core values—to regulate the government's access to information in the age of technology. If the Supreme Court continues to apply an empirical standard, the result may be a society where the government—without a warrant—can get inside our cell phones, our computers, and our social media accounts, anytime, anywhere, for any reason, as often as it wants.

Suggested Reading

- Boyd v. United States.
- Katz v. United States.
- United States v. White.
- Florida v. Riley.

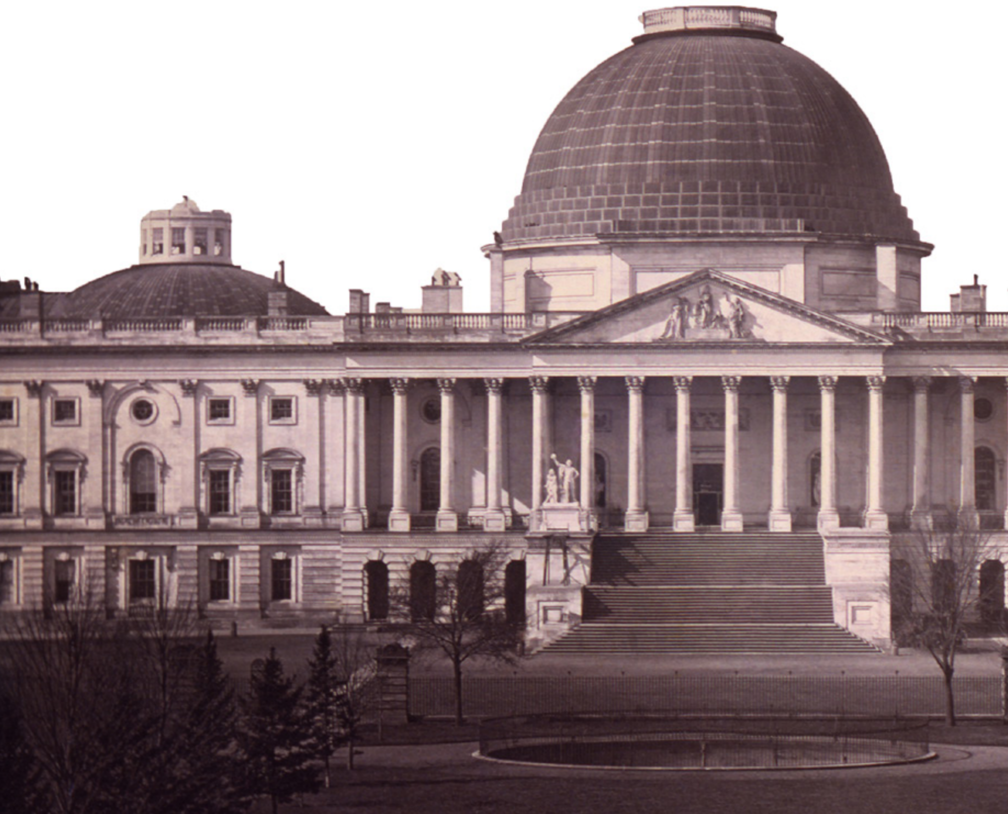
Questions to Consider

- Should the government be granted access to the contents of a cell phone, without a warrant or probable cause, if the owner is suspected of being involved in terrorism or another criminal activity?
- How do you feel about the presence of surveillance cameras in public places? Do they enhance our security, or do they invade our privacy?

Lecture 9

THE SHRINKING WARRANT REQUIREMENT

This lecture considers the circumstances under which the police are permitted to enter and search private property without first obtaining a warrant. It also examines the warrant process, the particulars of probable cause, and judicial enforcement of the Fourth Amendment's protections against unreasonable searches and seizures.



AVAILABLE REMEDIES

- The first half of the Fourth Amendment states that all searches and seizures must be reasonable. The second half of the amendment sets forth the constitutional requirements for a valid warrant. What the amendment doesn't address is whether all searches—or even most—require a warrant. Was this simply an oversight by the framers? Probably not.

- The language of the Fourth Amendment reflects the reality of the period in which it was written. At the time, most government searches were based on warrants. There were no professional police forces in the late 18th century, and the courts hadn't yet developed the doctrine of qualified immunity, which protects police against most civil lawsuits. Law enforcement officers typically obtained a warrant to protect themselves against lawsuits for trespassing on the private property being searched.

- This history helps to explain another oddity of the Fourth Amendment: Nowhere in the text does it say what the remedy should be for a violation of the rights the amendment guarantees. The framers probably figured that the remedy would be a civil lawsuit for damages, because that was the only remedy they knew.

- Over time, however, civil remedies for such violations became more or less obsolete. Today, the likelihood of a person successfully suing a police officer for violating their Fourth Amendment rights is pretty close to zero. The only outliers are lawsuits challenging police use of excessive force, which have grown significantly in both number and dollar amounts in modern times.

- ✯ Today, the primary legal remedy for Fourth Amendment violations is the exclusionary rule, which prohibits improperly obtained evidence from being used to prosecute the person whose rights were violated. The theory behind the exclusionary rule is that suppressing the evidence deprives the police of any benefit from an illegal search or seizure, thus deterring violations in the first place.

- ✯ There are some important exceptions to the exclusionary rule, such as the exception for certain "good faith" violations by the police. Another notable exception concerns evidence that would inevitably have been found in the absence of any Fourth Amendment violation.

- ✯ As a practical matter, the only direct beneficiaries of the exclusionary rule are criminals; if the police don't find evidence of a crime, there's nothing to exclude. And if the police don't actually care about obtaining a criminal conviction—if, for example, they want to seize a supply of drugs and simply move the drug dealers along—the exclusionary rule doesn't act as a deterrent. The rule isn't an ideal remedy, but it's what we've got.

PROBABLE CAUSE

- ✫ Not all searches and seizures require a valid warrant. If a warrant is necessary, however, there are several constitutional requirements that must be met. For example:

  - The officer who presents the warrant application to the judge or magistrate must swear, by oath or affirmation, that the facts stated in the application are true.

  - The facts stated in the application must provide enough information for the judge or magistrate to make an independent decision about the warrant's validity; he can't just rely on the officer's judgment.

  - The magistrate must be neutral and detached. This means, for example, that local governments can't pay magistrates based on how many warrants they issue. Nor can warrants be issued directly by prosecutors.

  - The warrant describe in detail the evidence to be searched for, as well as the location where the search will take place. In practice, this requirement is not particularly stringent. It's fine, for example, for the warrant to contain catchalls such as "any other evidence of the crime under investigation."

- ✫ There are also rules for the proper execution of a warrant—most notably, that police must knock and announce their presence before trying to enter a home or other premises. The Supreme Court has held that entering without knocking and announcing first is allowed only under special circumstances, such as when the police reasonably suspect that it would be dangerous or futile to do so, or that evidence is being destroyed inside.

- ✯ The most important requirement for warrants to be valid under the Fourth Amendment is the requirement of probable cause. The phrase "probable cause" is a term of art, and a fairly vague one at that. In *Illinois v. Gates*, the leading case on probable cause, the Supreme Court described it as follows:

> Probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules … . The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, … there is a fair probability that contraband or evidence of a crime will be found.

> In a footnote, the Court added: "Probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity."

- ✯ Given this low standard, judges and magistrates approve most warrant applications—as many as 95 percent of them. But this doesn't mean that the standard is useless. A police officer must still go through the hassle of writing up the warrant application and appearing in front of the judge or magistrate. This incentivizes the officer to be diligent in preparing his application; if it's rejected, his efforts will have been wasted.

NOTABLE EXCEPTIONS

- ✯ There are several exceptions to the warrant requirement. For example, police don't need to get a warrant when the circumstances are such that it would be crazy to make them stop and go get one. The classic example involves an officer chasing someone who just robbed a bank. If the robber darts into a home, should the police officer have to abandon the chase and get a warrant before entering the home? Of course not. That would be crazy.

- In criminal procedure, the exception illustrated by this example is known as the exception for exigent circumstances. When a situation like this arises, police must still have probable cause to justify their search, but they don't need to wait for a warrant before doing so.

- The other classic example of exigency is when the police knock on someone's door and identify themselves as the police, only to hear excited voices inside saying, "Oh no! It's the cops, flush the drugs!" Perhaps they hear the sound of a toilet flushing. In that kind of situation, it's equally crazy to make the police wait for a warrant. By that time, all evidence of criminal activity would likely be destroyed.

- Another exception to the warrant requirement is when the police see evidence in plain view. When this happens, they can seize the evidence from any place they're legally allowed to be. For example, if you invite a police officer into your home, and the officer sees illegal drugs on your kitchen table, he doesn't need a warrant to seize the drugs.

- In the same example, if the officer is walking down the street and sees your drugs through an open window, he must obtain a warrant before entering the house and seizing the drugs. Of course, if he sees you grab the drugs and start flushing them down the toilet, he won't need a warrant; that's an exigent circumstance.

- ✫ Cars are a big exception to the warrant requirement, for two reasons: First, cars are mobile, so they create their own "exigency." Second, people have a lower expectation of privacy in their cars than they do in their homes. After all, cars have glass windows and people can see inside them easily. Cars can also get into accidents, which means that your privacy might disappear without warning.

- ✫ The only thing the police need to search a car is probable cause to believe there's criminal evidence somewhere inside the car. If they have it, they can search the entire car without a warrant—including the glove compartment, the trunk, and any containers in the car, such as backpacks or suitcases.

- ✫ The only limit to the automobile exception is that police can't search places within the car where probable cause would be lacking. For example, if the police have probable cause to believe that you have a stolen big-screen TV in your car, that doesn't mean that they can rifle through the glove compartment.

- ✫ Even if the police don't have probable cause, they can still search your car in the event that the car gets towed and impounded. In such cases, police can perform what's called an inventory search to make sure that all your stuff is properly accounted for and doesn't get stolen. If the police happen to find evidence of a crime during said inventory search, you're out of luck.

- ✫ Another notable exception to the warrant requirement is for searches incident to arrest. Whenever the police arrest someone, they're allowed to search that person automatically, without a warrant, to make sure that the person doesn't have a weapon. Any evidence of criminal activity they find can then be seized.

If the arrest occurs in a building, the police can also search any area within reach of the person being arrested, to make sure that the person can't grab a weapon. They can also look into nearby rooms and closets to check for others who might attack them.

- If a person happens to be in a car when they're arrested, that provides the police with two new reasons to search the car: First, they can search the car for a weapon—but only while the arrestee is still within reach of the car. Second, even after the arrestee's in custody, the police can search the car if there's reason to think that evidence of the crime might be found there.

- ✯ In an ever-growing number of situations, warrants are no longer presumptively required. Instead, police can search without a warrant—and even without probable cause—as long as they behave "reasonably." In fact, the exceptions to the warrant requirement have become so numerous that it wouldn't be much of a stretch to say that, today, the last bastion of the warrant requirement is the home. Almost everywhere else, the exceptions have swallowed the rule.

- ✯ The biggest change occurred the 1968 Supreme Court case *Terry v. Ohio*. This is the decision that gave police the authority to stop a person on the street and ask them questions, as long as the police have reasonable suspicion that the person is engaged in criminal activity. Police can also frisk the person, if the frisk is based on their reasonable suspicion that the person might be armed and dangerous. No probable cause is required, let alone a warrant.

- ✯ The *Terry* decision changed the rules of the Fourth Amendment in the interest of public safety. But at what cost? Maybe the most significant cost is that *Terry* disproportionately affects certain subsets of the population: racial and ethnic minorities, the poor, the young, and all those who look different and "scary." It authorizes police action based on little more than a hunch that a person might be up to no good. That kind of police discretion almost inevitably leads to snap judgments based on appearances, rather than hard evidence.

- ✯ A search can also be based solely on reasonableness when it serves a special governmental need, one that's different from catching criminals. For example, searches of school lockers can be based on reasonable suspicion, rather than probable cause, because they're done in the interest of school discipline. The same reasoning allows the desks of government employees to be searched (to promote an effective workplace), and pilots and train engineers to be tested for drugs (to protect public safety). Drunk-driving roadblocks and border searches fall into the same category.

- Finally, searches are always legal if the police obtain consent for the search—as long as that consent is voluntary and not coerced. You'd be surprised how many people with illegal drugs in the trunk of their car consent to letting the police search the trunk. Consent searches happen all the time, and police find evidence all the time.

Suggested Reading

- Brigham City v. Stuart.
- Illinois v. Gates.
- Terry v. Ohio.

Questions to Consider

- Do you agree with the Supreme Court that people generally have a much lower expectation of privacy in their cars?
- Should the ability of police to stop and frisk be expanded, or should it be limited?

Lecture 10

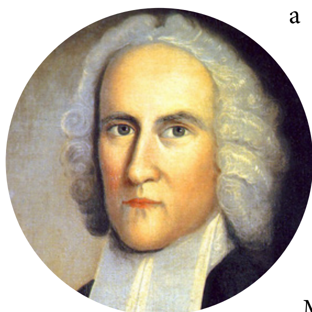
THE FIFTH AMENDMENT PRIVILEGE

The Fifth Amendment provides, in relevant part: "No person … shall be compelled to be a witness against himself." This is known as the privilege against compelled self-incrimination, and it's a core aspect of the Bill of Rights. This lecture explores the history behind the privilege against compelled self-incrimination, the meaning of the constitutional text, and the various kinds of legal protection the privilege provides.

HISTORY AND PURPOSE

- The privilege against compelled self-incrimination was written into the Fifth Amendment in direct response to the history of English criminal prosecutions for sedition and for heresy. In the late 16th and early 17th centuries, suspected heretics were forced to swear an oath to answer truthfully, and then asked about their religious beliefs and the identities of their fellow believers. Later, political dissidents faced the same kind of treatment.

- The Fifth Amendment privilege was designed to end these kinds of abuses at the hands of government officials. As a Puritan leader once put it, forcing a man to testify against himself is like putting "the conscience upon the rack." But exactly how far does the privilege go? What's the scope of the constitutional right to remain silent in the face of a criminal accusation? That's a much harder question to answer.



- In 1807, the Supreme Court presided over a criminal case against Aaron Burr, the former vice president and noted duelist, for conspiracy and treason. Allegedly, Burr was part of a conspiracy to take over part of the American West. During a grand jury hearing, a witness was called to testify about copying a document on Burr's orders. The witness refused to testify, stating that he might incriminate himself. Chief Justice Marshall, who was presiding over the Burr case, ruled in favor of the witness.

- According to Marshall, whenever a witness refuses to answer a question, the presiding judge must decide whether it's possible that the answer might be incriminating. If so, it's up to the witness to decide whether or not to answer. And that right extends even to facts that, on their own, might not be incriminating, but might instead provide a link in a chain of evidence that could become incriminating.

- Congress and many state legislatures soon passed new statutes authorizing government officials to grant immunity from prosecution to witnesses who asserted their Fifth Amendment privilege in response to official questioning. These statutes were designed to eliminate the Fifth Amendment problem, and allow officials to obtain the testimony of the reluctant witness, by making it impossible for the witness to be incriminated by his own testimony.

LEGAL REQUIREMENTS

- There are four requirements that must be satisfied in order for the Fifth Amendment privilege to apply. First, the person must be under compulsion to provide the information to the government. The paradigmatic case of Fifth Amendment compulsion is when a person is called to testify, under oath, as a witness in court. The compulsion comes from the fact that, if the witness refuses, they will be held in contempt of court, and will go to jail.

- Another example of compulsion occurs when a suspect gets arrested for a crime, and the police try to question the suspect. The Supreme Court held, in the famous *Miranda* case, that custodial police interrogation is so inherently coercive that the Fifth Amendment requires police to provide the now-familiar *Miranda* warnings to relieve the pressure.

- The Court has also recognized that compulsion may be present in situations where a person's choice to assert the Fifth Amendment privilege can itself get them in big trouble. The classic example is the 1965 case *Griffin v. California*. The defendant chose not to testify, which led the prosecutor to argue during closing arguments that the defendant's decision not to testify was evidence of his guilt. The Supreme Court held that this was a violation of the Fifth Amendment, because the prosecutor imposed an impermissible penalty against Griffin for exercising his Fifth Amendment privilege.

- ✯ The second requirement for application of the Fifth Amendment privilege is that the information requested by the government be incriminating. Refusal to answer can be punished only if a court can conclude, with certainty, that the information couldn't possibly be incriminating. Otherwise, the person who's being asked gets to decide.

- ✯ Sometimes the refusal to answer is based on fear not of criminal prosecution, but of some other kind of legal trouble. But the Supreme Court has held that there's a constitutional distinction between criminal punishment and civil penalties. For the most part, it's up to the legislature to define whether a particular sanction is criminal or civil. The courts can exercise oversight, however, in situations where a purportedly civil statute looks more like a criminal one.

- ✯ The third requirement for application of the Fifth Amendment privilege is that the person must be giving testimony; that's what it means to be a witness against yourself. In *Schmerber v. California*, the Supreme Court held that a blood sample taken from the defendant was not "testimony" for Fifth Amendment purposes. Rather, it was more like a photograph of the defendant's face, or his fingerprints.

- ✯ The fourth requirement for application of the Fifth Amendment privilege is that it the privilege must be asserted. This requirement can best be illustrated by considering the facts of three Supreme Court cases. Rather than lying, telling the truth, or even remaining silent, a suspect or defendant must affirmatively state that he is electing not to answer the question. He must make it clear that he's asserting his rights under the Fifth Amendment.

A DELICATE BALANCE

- ✯ What happens if the government has a compelling need for information, but the only source for that information is a person who's properly asserted his Fifth Amendment privilege? That's a big problem, and it continues to grow as the role of government in our daily lives keeps expanding—from protecting the safety of our air, water, and food, to protecting us from identity theft and terrorist attacks. The Supreme Court has addressed this problem by attempting to strike a delicate balance between the rights of the individual and the needs of society.

- ✯ Long ago, the Supreme Court has long held that corporations can't assert the Fifth Amendment privilege in order to hide information from the government. Corporations may enjoy the right to freedom of speech under the First Amendment, but they don't have Fifth Amendment protections against compelled self-incrimination. And both companies and individuals must turn over any records the government requires them to keep and maintain on a regular basis—tax and other financial records, for example.

- ✯ When push comes to shove, courts sometimes seem to ignore the Fifth Amendment altogether. In 1988, child welfare officials in Baltimore obtained a court order requiring an abusive mother to either produce, or reveal the location of, her young son. The officials feared that the son, who'd been missing for months, was in danger—and that the mother, who had serious psychological and drug problems, might even have killed him. The mother refused to comply, and she was jailed for contempt of court.

- The sanction against the mother was upheld by the Supreme Court, which ruled that the Fifth Amendment privilege cannot be invoked to avoid compliance with legal obligations that serve an important public purpose unrelated to crime control. Even though the mother would surely be charged with a crime if her son turned up dead, that outcome was secondary to the law's primary goal of protecting the child's welfare.

Suggested Reading

- Salinas v. Texas.
- Griffin v. California.
- Brogan v. United States.
- Minnesota v. Murphy.

Questions to Consider

- Do you agree that a person should forfeit their Fifth Amendment privilege if they don't properly assert the privilege in response to government questioning?
- Should corporations have the same Fifth Amendment rights as individuals to refuse to provide potentially incriminating information to the government?

Lecture 11

MIRANDA AND POLICE INTERROGATIONS

The *Miranda* warnings are perhaps the most famous words in the history of American criminal justice. In this lecture, you'll learn about the historical and legal background of the Supreme Court's decision in the *Miranda* case. You'll also consider what the *Miranda* warnings mean, what purposes they serve, and how we as a society should feel about relying on police interrogations and confessions to solve serious crimes.

EVALUATING VOLUNTARINESS

- To understand the historical and legal significance of *Miranda*, let's look back almost 20 years earlier to another famous case. On the afternoon of November 12, 1947, in Indianapolis, Indiana, police arrested Robert Watts, a 25-year-old black man, for assault. Shortly after the arrest, the police began to suspect that Watts was also responsible for the murder of a white woman whose body had just been discovered nearby.

- For the rest of that day and for the next five days, Watts was held in solitary confinement at the county jail, with no place to sit or sleep except the floor. Each night, Watts was taken to police headquarters, where he was interrogated for hours on end. He was then returned to his barren jail cell, only to await the next round of interrogation. He was never told that he had a right to remain silent. He wasn't allowed to see his family or friends. And he had no lawyer to represent him.

- In the early morning hours of the sixth day in police custody, Watts finally broke down and signed a written confession. In a letter to the local chapter of the NAACP, however, Watts later said that he'd been framed, and that he'd signed the confession only because he "couldn't take it any longer" and the police "forced" him to sign it.

- When Watts's appeal came before the Supreme Court—where Watts was represented by Thurgood Marshall, himself a future Supreme Court justice—the Court agreed that Watt's confession had been "involuntary," and that it therefore should not have been used as evidence against him. The decision was based primarily on the Due Process Clause of the Fourteenth Amendment. Watt's conviction was reversed.

- The voluntariness rule recognized in Watts gave the Supreme Court the legal authority to go after the worst kinds of police abuses during pretrial interrogations. But it was never going to be a perfect solution. The Court simply couldn't keep up with the massive volume of criminal cases coming up from the lower courts, not to mention the more sophisticated psychological techniques developed by police.

A NEW APPROACH

- ✯ The Court had to find a new way to control police interrogation tactics before they got out of hand. Their efforts soon led them to the case of Ernesto Miranda, who had been convicted in Arizona of the brutal kidnapping and rape of an 18-year-old girl. Miranda was poor, had only an eighth-grade education, and had a history of schizophrenia and other psychological issues.

- ✯ After the victim picked Miranda out of a lineup, the police arrested him and subjected him to two hours of strenuous custodial interrogation. During this time, Miranda was never told he had a right to a lawyer, nor was he advised that he had a right to remain silent. He was convicted, and he took his case all the way to the Supreme Court.

- ✯ In *Miranda*, the Court adopted the Fifth Amendment privilege against compelled self-incrimination as the primary basis for regulating police interrogations. The key analytical move was the Court's conclusion that any suspect who is placed under arrest—and thus is in police custody—faces inherent pressure to confess. This meant that custodial police interrogations would always violate the Fifth Amendment—unless, the Court held, the police first give the suspect appropriate legal warnings, and the suspect waives his rights.

- ✯ The *Miranda* warnings are essentially a special form of advance protection—a prophylactic measure—designed to ensure that custodial police interrogations don't reach the point of violating the Fifth Amendment privilege against compelled self-incrimination. The warnings tell the suspect that he always remains in control. By saying the magic words "I'd like to stop now," the suspect can make the questioning stop at any time. Or, if he wishes, he can ask for the help of a lawyer, in which case the questioning also must stop. It's completely up to him.

- Although *Miranda* warnings often state that the suspect the right to an attorney, that doesn't mean that he'll instantly be provided one upon request. Instead, the rule is simply that the police have to stop questioning the suspect as soon as he asks for a lawyer. In most instances, the suspect won't actually receive a lawyer until much later.

VOLUNTARINESS REVISITED

- ✮ If police officers physically assault or beat a man in order to make him confess, almost everyone would agree that that's an involuntary confession. These are the easy cases. Even in the modern context of mass terrorism, where some have argued that torture can be morally justified to save thousands of lives, no good attorneys believe that the resulting confession should be used as evidence in a court of law.

- ✮ One way of looking at voluntariness is that everything we choose to do, or not to do, is the product of a myriad of influences all around us—our genes, our family, our friends, our enemies, our education, the laws of science. From this perspective, nothing we do is ever truly voluntary.

- ✮ Now consider the opposite perspective. Even if someone puts a gun to your head and orders you to do something, you still have a choice. It's a difficult choice, of course; if you disobey the order, you take the bullet. But it's not an impossible choice, and people do make it on occasion. From this perspective, you always have a choice.

- As these examples demonstrate, voluntariness can't be defined simply as the ability to choose, or as an exercise of free will. That's far too simplistic. Every human action involves some aspects of compulsion and some of free will. This contradiction—free will versus determinism—has been the subject of philosophical debate for millennia. It's the fundamental antinomy of the human condition.

- From a legal perspective, we have to think about voluntariness in a different way. In *Miranda*, the Supreme Court didn't try to regulate all the strategies and psychological tricks used by the police—strategies that will surely evolve endlessly into the future. Instead, the Court established a clearer and simpler rule for police to follow.

- If you're a police officer, all you have do is read the *Miranda* warnings and get the suspect's waiver, and then you can pretty much do whatever you want—as long as you don't cross the line into physical force or abuse. You can still lie to the suspect about the evidence against him. You can still tell him that his associates are turning on him, and that he should hurry up and spill the beans first. You can still tell him that you're his friend, and that you'll help him get more lenient treatment if he confesses.

- How does *Miranda* protect the suspect against these kinds of psychological tactics by the police? The answer is that it doesn't—at least not directly. At any time, if the psychological pressure gets to be too much, the suspect can always say the magic words, and the police will have to leave him alone. But it's entirely up to the suspect. After he agrees to talk, and before he actually chooses to invoke his *Miranda* rights, he's fair game for the police.

- The best empirical evidence suggests that roughly 80 percent of all suspects waive their *Miranda* rights and agree to talk to the police. This one of the main reasons why police rarely oppose *Miranda* these days. The case created a safe harbor for them. They know that if they follow the rules, they'll get their chance to persuade the suspect to confess, at least in most instances.

- Coercive interrogation techniques can lead to particularly unfortunate results when suspects are young, mentally ill, or simply naïve and suggestible. False confessions have shaken the criminal justice system to its core. We used to feel confident in the assumption that people who confess their own guilt are actually guilty. Now, we can't be so sure.

Suggested Reading

- Watts v Indiana.
- Miranda v. Arizona.
- Colorado v. Connelly.
- Berghuis v. Thompkins.

Questions to Consider

- Does *Miranda* help arrested suspects, by providing them with knowledge of their rights, or does it hurt them, by providing police with a greater opportunity to use psychological tactics to obtain confessions?
- Should the government be allowed to force arrested suspects—those suspected of terrorism, for example—to answer incriminating questions, if the answers would potentially save lives?

Lecture 12

PLEA BARGAINS, JURY TRIALS, AND JUSTICE

This lecture examines two major features of the American system of criminal justice: plea bargaining and trial by jury. In this lecture, you'll learn how plea bargains came to dominate criminal prosecutions, and what that means for the administration of justice. You'll also learn about the jury system, including the scope of the constitutional right to trial by jury, the requirements for selecting a jury, and the controversial principle of jury nullification.

PLEA BARGAINING

- There is no evidence of plea bargaining in early American history. The practice appears to have begun during the 1800s. Over time, our legal system gradually abandoned the super-efficient summary trials common during the colonial period. Trial procedures were modernized, the rights of defendants came to the forefront, and legal representation of criminal defendants became more common.

- The consequence of this trend toward modernization was that trials became much lengthier and costlier. Today, however, 19 out of every 20 criminal cases are resolved through plea bargaining. Instead of having a jury evaluate guilt or innocence, the defendant enters a plea of guilty at a pretrial hearing, almost always in exchange for a plea bargain that drops some of the charges, reduces the sentence, or both.

- Lawyers and judges truly love plea bargaining. It's incredibly efficient. In addition, most lawyers and judges—including most prosecutors—think that many of the criminal punishments enacted by legislatures are too harsh. Indeed, there's plenty of evidence to suggest that legislatures sometimes deliberately enact overly harsh punishments, knowing full well that prosecutors and judges will exercise their discretion and reach more reasonable outcomes through plea bargaining.

- Public opinion, on the other hand, is strongly against plea bargaining. Many people see the process as a way of "going easy" on the defendant, and they don't like it.

- Negotiating plea bargains and advising defendants when to accept them are central to the role of the modern criminal defense attorney. But these aren't skills that are often taught in law school. Law schools still spends most of their resources teaching lawyers how to litigate. Plea bargaining is quite different—and most lawyers have to learn how to do it through experience.

- An unfortunate side effect of plea bargaining is that almost all criminal defense lawyers eventually come to believe that almost all of their clients are guilty—simply because, in the end, almost all of them plead guilty. Even when a defendant tells his defense lawyer in the most passionate terms that he's innocent of the crime, the defense lawyer probably isn't going to believe it. And the lawyer also isn't likely to rush out and investigate the innocence claim.

- Instead, the lawyer will probably assume that his client's claim of innocence is just an opening gambit, a calculated move to get a better plea bargain. And every time the plea bargain gets offered and the defendant takes it, this perception gets reinforced. This can make life really difficult for the rare defendant who actually is innocent, as he might not be able to get his own lawyer to take his claim seriously.

CONSTITUTIONAL QUESTIONS

- By the mid-1900s, trial judges, prosecutors, defense lawyers, and defendants were all actively engaged in the practice of plea bargaining. They were doing it mostly under the table, however, because there were serious concerns about whether plea bargaining might be unconstitutional. Was plea bargaining consistent with the requirements of the Due Process Clause? Was it permissible for a prosecutor to essentially threaten the defendant with harsher punishment if he didn't agree to waive his right to a jury trial? Or was this too coercive?

- These questions were taken up by the Supreme Court in two cases: *Brady v. United States* and *Bordenkircher v. Hayes*. The defendant in *Brady* was charged with a capital crime, and pled guilty to a lesser charge to avoid the death penalty. Much later, Brady learned that the statute authorizing the death penalty for his crime was unconstitutional—which meant he didn't really have anything to fear in the first place. Brady challenged his guilty plea, arguing that it had been obtained involuntarily by the threat of an unconstitutional death sentence.

- The Supreme Court disagreed. According to the Court, the information upon which Brady based his decision was accurate at the time. As for Brady's claim that fear of the death penalty constituted coercion, thus making his plea involuntary, the Court pointed out that plea bargaining provides a "mutuality of advantage" that benefits both prosecution and defense. The Court did note, however, that guilty pleas must be voluntary, and that pleas induced by improper means might be involuntary in some cases.

- *Bordenkircher v. Hayes* addressed the other side of the coin. The defendant, Hayes, had been charged with forgery, and the prosecutor offered him a tough deal: "Plead guilty, and I'll recommend a sentence of five years in prison. If you don't plead guilty, I'll charge you as a repeat offender, and you'll face life in prison." Hayes refused to plead guilty, and went to trial. He was convicted and sentenced to

life. Hayes challenged the charge and the sentence as a violation of due process, arguing that he had been punished for exercising his constitutional rights.

- The Supreme Court disagreed. According to the Court, "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort. But in the 'give and take' of plea bargaining, there is no such element of punishment or retaliation, so long as the accused is free to accept or reject the prosecution's offer."

JURY TRIALS

- With so many criminal cases resolved via plea bargaining, jury trials have become much less common. Trials still matter, however, because they are the benchmark against which plea bargains are measured. If you don't know what might happen at trial, you can't know what kind of plea bargain you should make.

- The Sixth Amendment sets forth a constitutional right to trial by jury, one that now applies to both state and federal prosecutions. That right does not extend to all criminal prosecutions, however. The Supreme Court has held that the right to a jury trial doesn't apply to petty crimes—that is, misdemeanor cases where the defendant faces a potential sentence of less than six months in jail.

- ✮ A defendant can waive the right to have a jury hear his case, if he so chooses. He can request a bench trial—that is, a trial before a judge, without a jury—and in most cases, the prosecution will agree. About 30 percent of all criminal trials are bench trials. But the jury trial is still the gold standard.

- ✮ There are three important constitutional requirements for selecting a jury. The first is that juries must be impartial. This means that every person who serves on a jury must be able to perform the legal duties of a juror—to consider the evidence fairly, and to reserve final judgment until all the evidence has been introduced and all the arguments concluded. It doesn't mean that a juror must be a tabula rasa, knowing nothing at all about the case. It simply means that the juror must be able to set everything they know aside, and decide the case fairly.

- ✮ The second constitutional requirement for jury selection is that the jurors must be selected from a fair cross-section of the community. Prior to the 1960s, jurors often were limited to the most upstanding members of the community. As the Supreme Court held, however, juries are supposed to represent the entire community. Any jury selection process that substantially excludes distinctive, identifiable groups within the community is a violation of the Sixth Amendment.

- ✮ The third requirement for jury selection comes from the Equal Protection Clause of the Fourteenth Amendment, and concerns the discriminatory use of peremptory challenges. After prospective jurors have been screened for impartiality and other legal barriers to jury service, each side receives a small number of peremptory challenges, which they can use to strike potential jurors for almost any reason. According to the Supreme Court, however, peremptory challenges may not be used to exclude prospective jurors based on race or gender.

- ✮ An important but lesser-known issue concerning jury trials is the concept of jury nullification. This is the implicit power of a jury to nullify an unjust criminal law by acquitting an obviously guilty defendant. There is a long history of jury nullification in America, it's one of the greatest protections we have against government overreach.

- Jury nullification is a power available to every jury. It's a strange power, one that courts don't inform jurors about. But it's very real. Whenever a jury finds a defendant not guilty, the jurors can't be asked, officially, why they did it, and their decision to acquit can't be appealed on any grounds.

Suggested Reading

- Brady v. United States.
- Bordenkircher v. Hayes.
- Alford v. North Carolina.
- Batson v. Kentucky.

Questions to Consider

- How do you feel about plea bargaining, and why?
- Do you agree with the power of juries to nullify criminal laws by acquitting clearly guilty defendants?

Civil Procedure

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Civil Procedure

A law school course in civil procedure is about the procedures that courts follow to resolve disputes about substantive rights. The rules of civil procedure are relevant in every single lawsuit, because the same rules of procedure apply regardless of whether the suit is about torts, contracts, or any other subject. Procedure is incredibly important; it can have a huge effect on the outcome of a case, and on the lives of the litigants while a trial is underway. You can learn everything there is to know about tort law, or contract law, or any other area of substantive law. But if you don't know how to vindicate your interests or those of your client in court, then your knowledge doesn't have much practical value.

The rules of civil procedure are designed to create a fair and efficient system for resolving legal controversies. But these goals are often in tension. Giving the plaintiff a fair opportunity to access the information she needs to prove her case, for example, might make the cost of litigating the suit prohibitive for the defendant. In this course, we will explore these tensions and consider how the rules seek to resolve them.

We'll begin by considering just why exactly procedure is so important. Then we'll turn to the most important questions addressed by the rules of civil procedure, progressing through the topics roughly in the order of an actual lawsuit. We'll begin by considering where a plaintiff can file a lawsuit. When is federal court available, and when must the suit be filed in state court? Then we'll discuss the limits on a plaintiff's ability to sue a defendant far from the defendant's home.

We'll also consider the rules that govern what the plaintiff must allege in order to survive a motion to dismiss the suit. If the plaintiff successfully satisfies that standard, the parties then proceed to discovery, a pretrial process during which the parties seek and obtain information to support their cases. We'll discuss what sorts of information you can seek from your

adversary—and what sorts of information he can seek from you. We'll also consider whether a plaintiff can assert multiple claims, or sue multiple people, in a single lawsuit.

We'll then turn to the mechanisms for proving and resolving a case. We'll consider the standards that govern a judge's power to resolve a lawsuit without a full trial or a decision from a jury, and when the parties are entitled to a jury trial in the first place. We'll also discuss how to decide which body of law applies to lawsuits in federal court; when parties can relitigate matters that have been the subject of prior lawsuits; and the rules that govern appeals.

Most people don't have strong intuitions about what the rules governing these topics should be. But you'll find that the questions we consider are both important and fascinating—and that crafting rules of civil procedure requires us to apply all of the legal reasoning skills that we are learning in *Law School for Everyone*. ▪

Lecture 1

PROCEDURAL RIGHTS AND WHY THEY MATTER

Procedure can have a huge impact on the outcome of a case, as well as on the lives of the litigants while a trial is underway. That's why every first-year law student takes a course in civil procedure. Extensive knowledge of substantive law—tort law, for example, or contract law—has little practical value if you don't know how to vindicate your client's interests in court.

PROCEDURE VS. SUBSTANCE

- Civil procedure is about the procedures that courts follow in civil trials to resolve disputes about substantive rights. It is therefore a relevant topic in every single lawsuit. Regardless of the legal basis for a particular dispute—contract law, for example, or tort law—the same procedural rules will apply.

- Substantive law governs our behavior outside the courtroom. Procedural rules, on the other hand, govern our behavior inside the courtroom. Substantive law defines our rights with respect to other people in our everyday lives. Procedure provides a structure for enforcing those rights.

- Substantive law is a big part of our daily lives. Every time we get behind the wheel of a car, or go outside to shovel snow from the sidewalk in front of our house, or decide whether to look at a text message while we're driving, we're thinking about the obligations we have to avoid causing injuries to others.

- ✯ The same isn't true for civil procedure. We just don't have any real occasion to think about procedural rules—about which court has jurisdiction over a lawsuit, or when a judge can grant a motion for summary judgment—unless we actually get injured, or unless someone actually sues us claiming that we injured him.
- ✯ But that doesn't make civil procedure any less important than other courses in law school. And it doesn't mean that the rules to govern these sorts of things are arbitrary. Quite to the contrary, they're designed to create a fair and efficient system for resolving legal controversies.

WHY PROCEDURE MATTERS

- Two clauses in the U.S. Constitution—the Fifth Amendment, which applies to the federal government, and the Fourteenth Amendment, which applies to the states—explicitly seek to enshrine the principle of procedural fairness. Both guarantee that the government can't deprive us of life, liberty, or property without due process of law. It's not enough to guarantee substantive rights, in other words; the process of adjudicating those rights must also be fair.

- As a matter of constitutional law, procedure matters as much as substantive law. Notice, however, that neither the Fifth Amendment nor the Fourteenth Amendment explains what procedure you're entitled to when someone sues you. They simply restate the conclusion, providing that the process that you're entitled to is whatever process is due.

- The task of deciding whether a particular procedure is consistent with due process is one that often falls to the justices of the U.S. Supreme Court. Some of the most famous cases in the Court's history, in fact, have been about procedure rather than about substantive rights.

- Consider the case of *Goldberg v. Kelly*, decided by the U.S. Supreme Court in 1970. It involved a claim that New York State didn't provide people an adequate hearing before terminating their welfare benefits. At the time, an indigent person would apply for welfare, and the state would decide whether he was entitled to it. If so, he would start receiving welfare checks every month. If the state concluded that a recipient was no longer entitled to welfare, it would just terminate the benefits.

- A group of welfare beneficiaries, and some whose benefits had been terminated, filed suit, claiming that New York's approach to terminating benefits violated the Fourteenth Amendment's Due Process Clause. Shortly after they filed their suit, however, the state changed its procedures. Under the new approach, a caseworker who suspected that a person was no longer entitled to benefits would first discuss it with the beneficiary.

- ✯ But the plaintiffs in the suit claimed that this procedure was also inadequate. They said that they were entitled to a full hearing before the state could terminate benefits. The fight was not about who should be entitled to welfare—a substantive question—but about what procedures were required before the state could terminate a person's benefits.

- ✯ The plaintiffs weren't seeking damages from the government for their injuries. They weren't even seeking the payment of welfare benefits. Instead, they asked for an injunction. They wanted the court to order the government to do something—specifically, to give them a hearing before terminating benefits—that would make it less likely that they'd lose their welfare benefits in the future. The plaintiffs clearly believed in the value of procedure.

- ✯ The Supreme Court agreed with the welfare recipients that they were entitled to a better hearing before the state could terminate their benefits. The Court reasoned that the plaintiffs had previously demonstrated their eligibility for welfare; that's why they started to receive it in the first place. Under New York's welfare statute, they were entitled receive it. This entitlement was essentially a form of property, which was therefore subject to due process.

- ✯ The Court then explained what process was due. It said that welfare recipients were entitled to notice of the state's intention to terminate benefits; a hearing with an impartial fact finder at which they could present evidence both in person and through the submission of documents; representation by a lawyer; and an opportunity to cross-examine witnesses.

- ✯ There's a lot we could say about this conclusion. One on hand, it will ensure that people who are actually entitled to receive welfare don't suddenly lose it because of an error by the state. That's because the error would likely come to light in the hearing, before the state is permitted to stop sending welfare checks.

- On the other hand, the Court's ruling will inevitably make it more expensive for states to provide welfare. If the state believes that a person is no longer entitled to benefits, it can't just terminate the benefits; instead, it has to keep paying him until after the conclusion of a hearing, which could take a year or more to resolve. This might lead states to provide lower benefits to everyone on welfare, or to increase eligibility requirements, to make up the difference.

- For present purposes, it is enough to note that for the welfare recipients in New York, fair procedure was at least as important as a generous definition of who qualifies for welfare in the first place. As is often the case, procedural protections are great if you're the one facing harsh consequences. The more extensive the process, however, the more time consuming and expensive the resolution becomes.

ANALYZING PROCEDURE

- Consider *Mathews v. Eldridge*, a case that the Supreme Court decided in 1976, six years after *Goldberg v. Kelly*. In *Mathews*, the Court considered a challenge to the procedures the government made available before it terminated a person's disability benefits.

- Disability benefits are available, according to a federal statute, when some physical or mental impairment prevents a person from engaging in any substantial gainful activity for a considerable amount of time. Sometimes a serious injury will prevent a person from working and so entitle him to benefits. But two years later, if the injury has healed, the person might cease to be entitled to continued receipt of the benefits.

- Under the rules that were challenged in *Mathews*, if the government believed that the person was no longer entitled to benefits, it would give him a chance to send in evidence about why he was still entitled to receive benefits. If the government still believed that he was no longer entitled to receive them, it would terminate the benefits. A full hearing was available, but only after the benefits had been terminated.

- Unsurprisingly, the plaintiffs in the *Mathews* case relied heavily on *Goldberg*, in which the Court had required a pretty extensive hearing before the state could terminate benefits. But in *Mathews*, the Court concluded that the government was not required to give a full hearing before the termination of benefits; it was enough to give people a hearing to contest the decision after the government had already terminated benefits.

- Why was *Mathews* different from *Goldberg*? The Court said that in *Goldberg*, it had effectively balanced the individual's interest in the uninterrupted receipt of welfare benefits against the state's interest in conserving resources. The loss of welfare benefits can be catastrophic, because the person might not have any other means to pay for food or shelter; as a consequence, the individual interest outweighed the state's interest.

- But the Court said that the individual interest was not as weighty in the case of disability benefits. Those benefits, the Court said, are awarded based on disability status, not based on financial need. That means that their termination won't necessarily be as traumatic. In addition, the Court thought that having a full hearing up front wouldn't be likely to lead to more accurate conclusions.

- There's plenty we could say about this conclusion, too. Even if disability benefits aren't awarded based on financial need, it's still the case that many people on disability rely on the benefits as their main or only source of income. Losing benefits because of the state's mistake, and having to wait for a hearing to prove that it made a mistake, could impose serious hardships.

- On the other hand, almost 10 million Americans receive disability benefits, and the people who are on the rolls are constantly changing. Given the numbers, it can take a year or more to get a hearing. Permitting the government to terminate benefits only after a hearing, even though the government has evidence that the recipient actually has been holding down a job, could cost the taxpayers billions of dollars.

- Even though we're talking about procedural rules, rather than substantive rules, we still have to use all of the tools of legal reasoning that we use when trying to resolve any other legal dispute. To answer the question in the *Mathews* case, it isn't enough to know what the Court's conclusion was in *Goldberg*; you need to know why the Court in *Goldberg* reached the conclusion that it did. The same is true for any other rule of civil procedure.

Suggested Reading

- Brennan, "Reason, Passion, and 'The Progress of the Law.'"
- Clermont, *Civil Procedure Stories*.
- Fiss, "Reason in All Its Splendor."
- Issacharoff, *Civil Procedure*.

Questions to Consider

- What should be the goals of the rules that govern procedure in civil lawsuits?
- Is it possible to craft a system of rules that both guarantees fairness for litigants and minimizes the costs of litigation for the parties and the judicial system?

Lecture 2

SUBJECT MATTER JURISDICTION

The power of a court to hear a case and render a judgment is known as jurisdiction. There are two distinct types of jurisdiction—subject-matter jurisdiction and personal jurisdiction—and it is important to understand the differences between them. In this lecture, you will examine the concept of subject-matter jurisdiction.

SUBJECT-MATTER JURISDICTION

- The United States doesn't have just one court system; it has dozens. Each state has its own system, as does the federal government. And within each of these systems, there are both trial and appellate courts. Trial courts are where plaintiffs file lawsuits, and where the parties' claims are tried. Appellate courts review the decisions of trial courts, usually to ensure that the trial courts properly applied the law.

- Most states have two layers of appellate courts. The first includes intermediate courts of appeals, to which the party who lost in the trial court has an automatic right of appeal. The second includes the state's court of last resort, often (but not always) called the supreme court, which can usually choose which cases to hear.

- The federal court system has a similar structure. There are trial courts, referred to as district courts; intermediate courts of appeals, referred to as circuit courts; and the U.S. Supreme Court. The Supreme Court can hear cases from the federal courts and, if they involve some issue of federal law, from the state courts, too.

- In both state and federal court systems, there are rules about what types of cases can be filed in which courts. These rules govern the courts' subject-matter jurisdiction. As the name suggests, subject-matter jurisdiction usually refers to a court's authority to hear cases concerning a particular subject matter.

- State rules concerning subject-matter jurisdiction usually are designed to ensure that the judicial system functions efficiently. In some states, for example, controversies regarding matters of child custody or divorce are heard in specialized courts devoted exclusively to family law.

- ✭ Federal courts, for the most part, are not specialized. That doesn't mean, however that there's no concept of subject-matter jurisdiction in federal court, or that a federal trial court can hear just any type of case. It's actually quite the opposite; the subject-matter jurisdiction of the federal courts is a sufficiently important matter that it's addressed in the U.S. Constitution itself.

- ✭ Article III of the Constitution places within the subject-matter jurisdiction of the federal courts cases in which the United States or one of the states is a party; cases involving ambassadors; and cases involving admiralty law. Federal courts can also hear cases involving claims that arise under federal law, as well as cases involving controversies between citizens of different states, even if the claims they're asserting are governed by state law.

- ✭ Limits on federal subject-matter jurisdiction exist not to protect the parties, but to preserve the authority of the state courts to decide controversies that matter to their residents. Broad subject-matter jurisdiction in federal court would inevitably deprive the state courts of authority to decide some cases. As a consequence, parties can't consent—either expressly or by failing to object—to litigate a case in federal court if there is no federal subject-matter jurisdiction.

DIVERSITY JURISDICTION

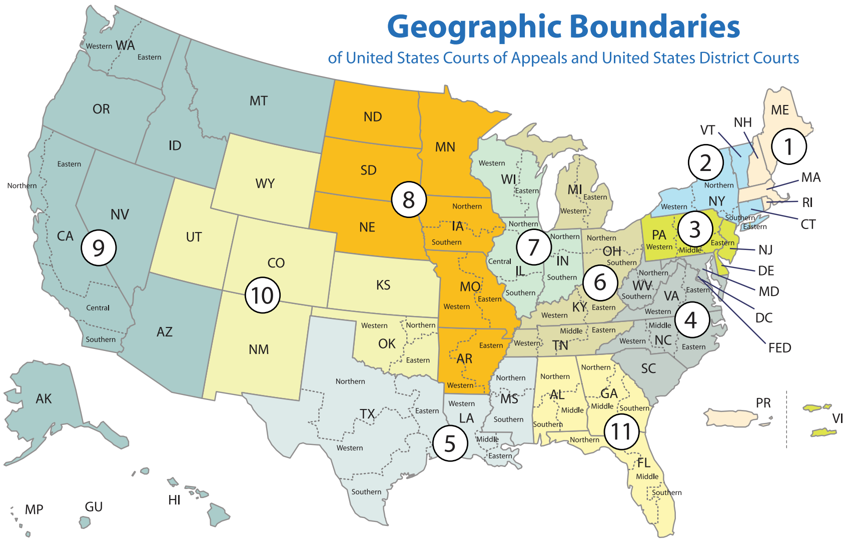
- At the time the Constitution was drafted, most people in the United States thought of themselves as citizens of a particular state. This led the framers to worry that in a dispute between a Rhode Islander and a Virginian, for example, the Rhode Islander would be the victim of bias in a Virginia state court, and vice versa. The framers believed that there would likely be less regional bias in the federal courts.

- It's not clear that this type of local bias is still an issue today. The world is much smaller than it used to be. But we haven't amended the underlying Constitutional provisions, which means that federal courts are still permitted to hear cases involving controversies between parties from different states. This is known as diversity jurisdiction.

- In the United States, there is no formal concept of state citizenship. We do have national citizenship, of course. When we travel, we use U.S. passports; we don't use passports issued by individual states. And if you live in one state temporarily, you don't suddenly become a citizen of that state.

- For purposes of diversity jurisdiction, a person's citizenship is assessed using what courts call the person's domicile. Domicile is our true, fixed, and permanent home, the place to which we plan to return when we are away. Courts have concluded that a person changes his domicile (and thus his citizenship for purposes of diversity jurisdiction) only by both moving to a new place and formulating the intention to remain there indefinitely.

- To establish subject-matter jurisdiction based on diversity, it's not enough merely to demonstrate that the plaintiff and defendant are from different states. Congress has permitted the federal courts to hear suits involving citizens of different states only when the amount in controversy exceeds $75,000. The logic behind this requirement is that the limited resources of the federal judiciary should not be spent hearing cases that don't involve an important question of federal law and where there isn't very much money at stake.



☆ The amount-in-controversy requirement is determined by reference to the amount that the plaintiff seeks in her complaint (the document filed to initiate a lawsuit). It's possible under this test for plaintiffs to inflate unquantifiable damages—like pain and suffering—in order to exceed the $75,000 threshold. Unfortunately, there's no other way to determine the amount in controversy that would be fair and efficient.

☆ When a plaintiff seeks nonmonetary relief—an injunction, for example—it's not immediately obvious how much the relief is worth. To begin with, we need to know from whose perspective the value should be assessed. The typical approach is to look to the value of the relief to the plaintiff. Sometimes, however, the court will apply a more flexible analysis, looking at the value of the injunction from both parties' viewpoints to determine whether in fact the case involves a substantial claim for relief.

FEDERAL-QUESTION JURISDICTION

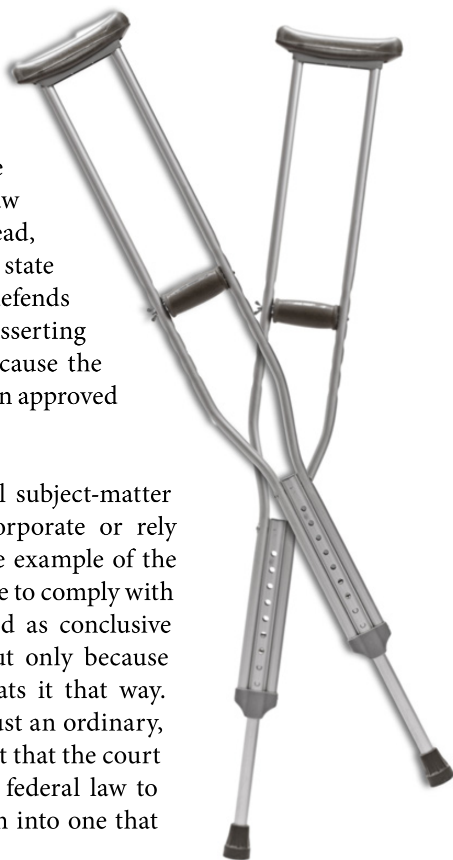
- ✯ The majority of cases litigated in federal court are not based on diversity of citizenship between parties. Instead, they are based on the authority of federal courts to hear cases that present questions of federal law. This is usually referred to as federal-question jurisdiction.

- ✯ Some cases involving federal questions are very complex and require judicial expertise, such as antitrust and patent suits. Others, like a suit seeking a remedy for a government official's violation of the Constitution, enable the courts to play an important role in our system of checks and balances.

- ✯ In most cases involving federal-question jurisdiction, it's not particularly difficult to determine whether a particular claim arises under federal law. The general rule is to examine whether federal law creates the right that the plaintiff seeks to vindicate. For example, if a federal statute says that you have the right not be discriminated against in the workplace because of your gender, a suit to enforce that right against your employer arises under federal law.

- ✯ Suppose that a plaintiff sues a local company that distributes meat to supermarkets. The plaintiff alleges that she got sick from eating the defendant's contaminated meat. The plaintiff's claim is an ordinary tort claim arising under state law. But the plaintiff also alleges that the defendant's negligence is established by the fact that it failed to comply with the U.S. Department of Agriculture's requirements about how to handle meat.

- ✯ Another plaintiff might sue the manufacturer of a medical device, claiming that the device is unreasonably dangerous and injured the plaintiff. There's no federal law authorizing suits of this sort; instead, the plaintiff's claim is governed by state tort law. But the manufacturer defends against the plaintiff's claim by asserting that it's immune from liability because the U.S. Food and Drug Administration approved the device as safe and effective.



- ✯ It's usually not enough for federal subject-matter jurisdiction for state law to incorporate or rely on principles of federal law. In the example of the tainted meat, the defendant's failure to comply with federal standards might be treated as conclusive on the question of negligence, but only because the applicable state's tort law treats it that way. The plaintiff's claim itself is still just an ordinary, state-law negligence claim. The fact that the court will have to resolve a question of federal law to answer it doesn't convert the claim into one that arises under federal law.

- In general, there's also no federal-question jurisdiction if the federal issue enters the case merely because the defendant raises a defense that relies on federal law. It is the plaintiff's claim that must arise under federal law. Accordingly, there would be no federal subject-matter jurisdiction in the case of the device manufacturer who relies on FDA approval as a defense; the plaintiff's claim is still an ordinary state-law tort suit for products liability.

Suggested Reading

- Flango, "Litigant Choice between State and Federal Courts."
- Friendly, "The Historic Basis of the Diversity Jurisdiction."

Questions to Consider

- Should the parties to a lawsuit be permitted to confer subject-matter jurisdiction on a court by agreeing to litigate there?
- Is there still a need for diversity jurisdiction in federal courts?

Lecture 3

JURISDICTION OVER THE DEFENDANT

Even if a court has jurisdiction to hear a particular type of case, the court can't proceed to judgment unless it also has jurisdiction over the parties to the case. This is what is known as personal jurisdiction—the power of a court to compel a person to appear to defend a suit or to face an entry of judgment against him.

BACKGROUND

- The requirement that a court have personal jurisdiction over the defendant reflects our concern over government power. It also arises from our belief in the importance of procedural fairness to the individual litigants, and particularly to the litigant who didn't choose to be involved in the suit in the first place.

- Being forced to defend a lawsuit is an expensive proposition. Losing a lawsuit can be even more expensive. As a consequence, the government—acting through its courts—is subject to limitations regarding when and where it can force us to defend a suit and, if we lose, to pay damages to the plaintiff.

- In the Anglo-American system, courts traditionally had power over persons within their territorial jurisdiction. In the United States, this meant that a state court had power over people or property present within the state in which the court sat. For example, a Pennsylvania court could assert authority over a Pennsylvania resident who lived in the town where the court sat, if a lawsuit was filed against that person.

- This is why we use the term "jurisdiction" to refer both to the court's power in general and to the area over which the court has authority. The word jurisdiction comes from the Latin for "saying the law," which the court can do for anyone within its reach. The traditional corollary of this view of judicial power was that a state court could not assert control over people or property outside the state's borders.

- Traditional notions regarding courts' jurisdiction were generally adequate in the early days of the United States. It wasn't easy to travel far from home in those days, and people tended to get goods and services from local sources. Legal controversies usually involved parties from the same place, which meant that questions of personal jurisdiction weren't very complicated.

- In fact, in the old days, a court's power over a defendant often permitted the court to order a sheriff to literally drag the defendant before the court to answer the plaintiff's claims. This was an exercise of brute power by the courts. This system was soon replaced, however, by service of process, which requires the plaintiff to notify the defendant that he's being sued and initially obtain jurisdiction over the defendant.

- ✯ The term "process" typically refers to the complaint—the plaintiff's statement of his grievance against the defendant—and a summons ordering the defendant to appear in court. The term "service" refers to the act of giving the complaint and the summons to the defendant.

- ✯ A properly served defendant has an obligation to appear in court if he wants to avoid a judgment against him. In other words, the act of serving process on the defendant establishes personal jurisdiction over the defendant, at least as a preliminary matter.

PENNOYER V. NEFF

- ✯ Putting together the idea that a court had power over people only within its jurisdiction, and that service of process is an assertion of a court's jurisdiction over the person who is served, we arrive at the rules for personal jurisdiction in the 19th century. Back then, deciding whether a court had personal jurisdiction over a defendant was a relatively straightforward inquiry.

- In *Pennoyer v. Neff*, a famous case decided in the late 19th century, the Supreme Court held that in order to be subject to personal jurisdiction in a particular court, a defendant who was not a resident of the state in which the court was located (often referred to as the forum state) had to be personally served with process within the borders of that state. Under this approach, a state couldn't assert its power over a nonresident located beyond the state's borders. The court could assert personal jurisdiction over a resident, however, even if he happens to be away from home when process is served.

- The rule established in *Pennoyer* reflected the view that a resident of a state is always constructively present in the state—not actually present, necessarily—and thus within the court's jurisdictional reach. The *Pennoyer* decision further suggested that a court could assert personal jurisdiction over a nonresident defendant who voluntarily appears to defend the suit.

HESS V. PAWLOSKI

- The rule established in *Pennoyer* was simple: In order to decide whether there was personal jurisdiction over a particular defendant, a court simply had to determine whether the defendant had been personally served with process while in the state—or, if not, whether he was a resident or had consented to the court's jurisdiction.

- In the late 19th century, the *Pennoyer* rule rarely created significant injustices. Most controversies were between residents of the same state, and were litigated in that state. By the turn of the 20th century, however, railroads spanned the nation, and automobiles were appearing in increasing numbers on the nation's roads. Conflicts between residents of different states became more common.

- In this age of increasing mobility, state legislatures began to look for ways to ensure that their residents could file lawsuits at home against nonresidents who had caused injury while in the state. They read the

Pennoyer opinion carefully, and noticed a statement by the Court that process could be served either on the defendant directly or on "someone authorized to accept service for him." This second possibility was the subject of another famous case, *Hess v. Pawloski*.

- ✯ The *Hess* case involved a Massachusetts statute providing that any nonresident who drove on the state's roads constructively appointed the state's registrar of motor vehicles as his agent for the receipt of service of process for suits arising out of car accidents in the state. The Supreme Court upheld the statute, observing in its opinion that car accidents were on the rise, and that Massachusetts had an interest in providing a convenient forum for its residents for suits arising out of such accidents.

- ✯ The idea that a nonresident driving through Massachusetts had appointed the state registrar as his agent for service of process was a complete fiction, of course—one that threatened to swallow the entire *Pennoyer* rule. After *Hess*, what would stop a state from saying that setting foot in the state for any purpose, however fleetingly, constructively appointed an agent in the state to accept service of process?

- ✭ Is it more appropriate for the plaintiff or the defendant to bear the extra costs associated with litigating a case far from home? *Hess* didn't require a thorough exploration of this question. Nevertheless, the Court's decision to permit suits against nonresident defendants not served in the forum state suggested that the Court might be moving in that direction. Later cases would make the shift more explicit.

Suggested Reading

- Perdue, "Sin, Scandal, and Substantive Due Process."
- Scalia, "The Rule of Law as a Law of Rules."

Questions to Consider

- Should a state court always be permitted to assert jurisdiction over a person served with process while present in the state where the court sits?
- Should a state court be permitted to assert jurisdiction over any person who has previously engaged in activity in the state where the court sits?

Lecture 4

A MODERN APPROACH TO PERSONAL JURISDICTION

The traditional approach to personal jurisdiction, set forth in *Pennoyer v. Neff*, is very different from the approach taken by the courts of today. As you will see, the modern approach to personal jurisdiction places important limits on the ability of a plaintiff to haul a defendant into court far from the defendant's home.

THE OLD RULE

- Personal jurisdiction is the power of a court to force a defendant to defend a suit or face entry of judgment against him. Under the traditional approach, a state court could establish personal jurisdiction over a nonresident defendant only if the defendant was personally served with process while actually in the state.

- The traditional approach seemed unfair to plaintiffs who had been injured in their home states by defendants who then left those states. If a defendant stayed away from the state were his actions took place, the plaintiff wouldn't be able to sue him at home; instead, the plaintiff would have to bear the expense of traveling to the defendant's home state to sue him.

- Another problem with the traditional approach was that it was not easily applied to corporate defendants. While it's not difficult to tell where a person is present, it's not obvious where a corporation is present at any given time. Corporations are institutions, but they act through people. Is a corporation present in any state where any of its employees happens to be?

- ☆ In the early 20th century, the problems with the traditional approach grew in importance. Because of the growth of the railroads and the development of the automobile, accidents between people from different states became more common. Similarly, the rise of national corporations meant an increase in the number of accidents caused by out-of-state corporations.

THE MODERN STANDARD

- ☆ The Supreme Court announced the modern standard in the case of *International Shoe Co. v. Washington*, decided in 1945. In *International Shoe*, the Court concluded that a state court can assert personal jurisdiction over a defendant not served in the state if the defendant has "certain minimum contacts" with the state such that the maintenance of the suit would not offend "traditional notions of fair play and substantial justice."

- ✯ The Court stated that a defendant who "exercises the privilege of conducting activities within a state," and thereby "enjoys the benefits and protections of the laws of that state," might face a corresponding "obligation" to answer a suit in that state. And it recognized that the limit on a state's jurisdiction over a nonresident should be a function of practical considerations, such as the respective burdens that litigation will impose on the parties and witnesses, rather than any formal and rigid test.

- ✯ The specifics of the *International Shoe* test seem to come from common sense and intuitions about procedural fairness. But the Court made clear that the test is required by the Constitution. Specifically, the Court said that the test derives from the Due Process Clause of the Fourteenth Amendment, which says that no state shall deprive any person of life, liberty, or property without due process of law.

- Standards like the one adopted in *International Shoe* require courts to balance various considerations, on a case-by-case basis, to determine the appropriate outcome. This permits courts to recognize nuanced differences between cases, and allows flexibility in the resolution of those cases. Nuance isn't always helpful, however. Nuanced questions are more difficult to resolve, and outcomes less predictable.

- As standards go, the one set forth in *International Shoe* isn't particularly difficult to apply. It's clear, for example, that driving negligently in the forum state and causing injury there provides the necessary minimum contacts. So does advertising and then selling a defective product to a person in the forum state. If you do something in a state that causes the plaintiff's injuries, you're likely to be subject to personal jurisdiction in that state, even if you're no longer present there.

THE HARD CASES

- No one fights about the basics of personal jurisdiction anymore; all those questions have been decided. These days, personal jurisdiction tends to come up only in outlier cases—more specifically, in cases that concern the outer limits of a court's jurisdictional reach.

- Consider the 1980 case *World-Wide Volkswagen Corp. v. Woodson*. The plaintiffs bought a car from a dealership in New York. Not long after, they drove the car out West and got into an accident in Oklahoma. The car caught fire, and they suffered serious injuries. The plaintiffs filed suit in Oklahoma state court against Audi and Volkswagen, which had manufactured and imported the car; against the dealership where they had bought the car; and against the car's regional distributor.

- The New York dealership and the regional distributor challenged personal jurisdiction. They argued that they didn't do any business in Oklahoma; they didn't sell or distribute any cars there. Their only connection to the state was the fact that someone to whom they sold a car—the plaintiffs—had driven the car there and gotten into an accident. Eventually, the issue came before the U.S. Supreme Court.

- The Court decided that the dealership and the regional distributor weren't subject to personal jurisdiction in Oklahoma because they didn't have the requisite connection to the state; they hadn't taken any purposeful action in Oklahoma from which they derived a benefit. Their only connection to Oklahoma was based on unilateral action by the plaintiffs. Any other conclusion would mean that the seller of a product would be subject to personal jurisdiction in any state where the purchaser decides to bring it.

- But what if the manufacturer of a product, or of a component of a product, deposits it into the stream of commerce, fully aware that it will be sold in the forum state. Would the manufacturer then be subject to personal jurisdiction, assuming it had no other connection to the state? The Supreme Court has twice considered this question, and both times it has been unable to achieve a majority for one view.

- ✯ Some justices have concluded that mere awareness that your product will be sold in the forum state is insufficient to subject you to jurisdiction there; they have reasoned that the defendant needs to take some action specifically directed at the state, such as advertising the product there, to be subject to jurisdiction there. Other justices have concluded that mere awareness that your product will be sold in a particular state should be enough when the plaintiff buys it and suffers injury there.

- ✯ Under the traditional approach of *Pennoyer v. Neff*, not only was personal service of process on the defendant in the forum state sufficient for personal jurisdiction, it was typically the only possible basis for personal jurisdiction. Under the modern approach, however, the defendant is subject to personal jurisdiction in the forum state when he has a sufficient connection with the state such that the maintenance of the suit there would not offend traditional notions of fair play and substantial justice. But what about personal service on a defendant who is present in the forum state? Is that method still valid?

- ✯ The Supreme Court addressed this issue in 1990, in the case *Burnham v. Superior Court*. In *Burnham*, the Court unanimously decided that the defendant was subject to personal jurisdiction in the forum state based solely on the fact that he was served with process there, even though he didn't otherwise have the requisite minimum contacts with the state. But the justices disagreed about why exactly personal jurisdiction was available.

- ✯ Four justices in *Burnham* reasoned that because personal service of process in the state traditionally was sufficient to establish jurisdiction, it by definition is consistent with traditional notions of fair play and substantial justice. Another four justices disagreed, arguing that just because something traditionally was considered fair doesn't mean that it's necessarily fair today. This latter group argued that the Court should consider contemporary notions of fair play and substantial justice, not merely those in place at the time *International Shoe* was decided. As for the ninth justice, he agreed that the court had personal jurisdiction but was reluctant to articulate a broad rule.

- If nothing else, we can be confident that the world will continue to change, putting more pressure on the doctrine of personal jurisdiction. For example, should the creator of a website be subject to personal jurisdiction in any state where a user can access the site—which is to say, in every state? Courts are just beginning to grapple with these types of questions.

Suggested Reading

- Adams, "*World-Wide Volkswagen v. Woodson*."
- Maltz, "Unraveling the Conundrum of the Law of Personal Jurisdiction."

Questions to Consider

- How should the courts reconcile the plaintiff's desire for a convenient forum with the defendant's interest in avoiding costly litigation?
- Should the Constitution's meaning evolve to reflect changes in the world?

Lecture 5

THE ROLE OF PLEADINGS

Pleading is the process by which the parties inform each other and the court of their allegations, claims, and defenses against one another. It's the first step in the pretrial process, and it begins with the complaint—the plaintiff's statement of grievance and demand for relief. The rules of pleading can make or break a suit; as a consequence, they have a powerful impact on every single case litigated in the United States.

THE FUNCTIONS OF PLEADING

- In the old days, the rules of pleading were complicated, technical, and unforgiving. There was often a lengthy back-and-forth between the parties, who filed dueling papers asserting claims, raising defenses, and responding to the other party's assertions. In the modern era, pleading systems are more straightforward. Most cases involve just two filings: the plaintiff's complaint and the defendant's answer.

- The core function of pleading is to notify the defendant about the pendency of the suit and the nature of the plaintiff's claims. But this is not pleading's only possible function. The pleadings may also reveal facts that the parties believe entitle them to relief or, conversely, enable them to defeat the other party's claims.

- Pleadings may also narrow the issues that the court will have to resolve in order to rule on the parties' claims. And both the pleadings themselves and the rules on how specific they must be can be used to weed out frivolous claims at the outset, thus conserving the court's resources and protecting the defending party from harassing litigation.

- The rules of a system of pleading reflect which of the functions of pleading the system is designed to serve. Each function seems like a desirable objective. But it turns out that the more functions we assign to the pleading system, the more problems we create.

THE HISTORY OF PLEADING

- Two hundred years ago, pleading was designed in large part to narrow the issues for trial. But narrowing the issues required the complaint to include lots of details. It also tended to require the parties to go back and forth—making allegations, getting the adversary's response, responding to the adversary's allegations, and so on.

- Because the traditional approach to pleading focused on narrowing the issues for trial, it also required lots of attention to the particular legal requirements for the claims that the plaintiff was asserting. To figure out which issues were in controversy, it was necessary to consider which issues were implicated by the plaintiff's claims.

- To make matters even more complicated, the system tended to require lawyers to use specific, technical, legalistic turns of phrase to describe all of this. When lawyers—or litigants who weren't represented by lawyers—deviated from convention, it could doom otherwise valid claims.

- Many states changed their pleading systems in the 19th century. The revised approach they adopted was to use pleading to reveal the facts on which the parties planned to rely at trial. After all, to win a lawsuit, you have to be able to demonstrate that the things that you allege happened actually happened.

- Under the revised system, it wasn't clear exactly what a plaintiff was obligated to say in the complaint. Pleading rules are supposed to apply to all lawsuits, and it's difficult to create generally applicable rules about how specific factual allegations need to be. Moreover, the evidence to support the facts the plaintiff needs to prove might not be readily available.

- Both the traditional and revised approaches risked bouncing from court plaintiffs who actually had meritorious claims. We certainly don't want a system in which plaintiffs who should win get their suits dismissed because their lawyers didn't use the right turn of phrase in the complaint, or because the defendant kept the necessary evidence locked away in her files. We want to make sure that those plaintiffs make it past the pleading stage.

MODERN DEVELOPMENTS

- ✯ In the 20th century, most jurisdictions in the United States changed their rules again. This time, instead of replacing one set of complicated rules with another, equally complex set, they changed the rules to simplify and deemphasize pleading. The new approach, which is essentially the one still in effect today, doesn't rely on pleading to reveal the facts or to narrow the issues.

- ✯ It's still important for parties to obtain and reveal the facts that they plan to rely on at trial. In the modern system of pleading, the parties do this during a process called discovery, which allows the parties to seek evidence from each other and from third parties. It's also still important to narrow the issues for trial. But that can now be done after discovery, when the parties have figured out what matters are actually in controversy.

- ✯ In federal courts today, the rules say that a complaint needs to contain only "a short and plain statement of the claim demonstrating that the pleader is entitled to relief." If all we're concerned about is making sure the defendant learns that he's being sued and the basic reason why, then that should be enough.

- ✯ This approach does a much better job than the old systems at making sure that potentially meritorious cases get to proceed to discovery. After all, the lower the standard for pleading, the easier it is to satisfy; and if it is easier to satisfy, fewer complaints will be dismissed for failing to satisfy it. If the plaintiff has a genuinely valid claim, it's not likely to be dismissed without seeing the inside of a courtroom.

- ✯ But what about the goal of weeding out frivolous claims? If you get sued, but the claim is entirely meritless, you don't want it to be necessary for you to spend lots of money to win the suit; you want the suit to get dismissed as quickly as possible. A system in which a plaintiff can file a lawsuit that has no hope of winning at trial can nevertheless pressure the defendant to settle the suit to avoid the steep costs of pretrial discovery.

- ✯ During discovery, a party can force his adversary to turn over information relevant to the suit. This can be extremely time-consuming, not to mention expensive—it might involve paying lawyers to search through thousands or even millions of documents to find ones that are relevant, or to fly to another city to participate in the deposition of a witness.

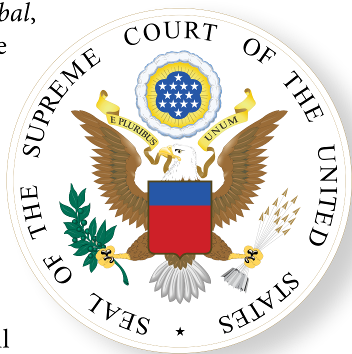
- ✯ These two goals—ensuring that meritorious suits survive, while weeding out frivolous ones—are fundamentally incompatible. The more lenient we make the pleading standards to ensure that potentially meritorious suits see the inside of the courtroom, the more frivolous suits we'll allow to reach discovery. Conversely, the more we toughen the pleading standards to weed out frivolous suits, the more meritorious suits we'll inevitably screen out.

FACTUAL SPECIFICITY

- Courts generally assume that the allegations in a complaint are true when deciding whether to dismiss it. If this weren't the case, we would be "trying" the case based on the complaint, without the procedural protections that we expect from a trial. The court can't determine if the allegations are true until after there's been a trial, or at least an opportunity to engage in some amount of discovery.

- One way to approach this problem is to think about the types of complaints that ought to be dismissed at the beginning of a lawsuit. One such complaint might contain a detailed recital of facts, but assert facts that don't give rise to a cognizable claim. Another might seek to recover for a legally cognizable claim, but fail to provide sufficient detail in the allegations.

- In a case called *Ashcroft v. Iqbal*, the Supreme Court held that the mere "formulaic recitation of the elements" of a claim in a plaintiff's complaint was not enough for it to survive a motion to dismiss. With its decision in the *Iqbal* case, the Supreme Court appears to have established a new standard for evaluating complaints—one that does not automatically assume that all of a plaintiff's factual allegations are true.



- The standard announced in *Iqbal* is one that now applies to all complaints. Consequently, when a judge is deciding whether to dismiss a complaint at the beginning of a lawsuit, she has to decide whether the factual allegations are sufficiently plausible to warrant proceeding with the case.

- Of course, the only way to determine whether factual allegations in a complaint are plausible is to evaluate the merits of the case. The judge needs to ask whether the things that the plaintiff said happened could actually have happened. And at the pleading stage, the judge has to make this determination before the parties have had any opportunity to discover evidence and build their cases.

- It's basically impossible to choose a pleading standard that ensures both that all meritorious cases advance to discovery and that no frivolous claims make it that far. The traditional pleading standard accomplished the latter goal well. It was then replaced by a revised standard that served the former goal well. After *Iqbal*, we seem to be moving back to a standard that is more concerned with screening out frivolous claims.

- ✯ Whether this shift is a good thing or a bad thing depends on whether we view the rules through the eyes of prospective plaintiffs or prospective defendants. Plaintiffs want the opportunity to substantiate and prove their cases, which requires them to get past the pleading stage. Defendants want to avoid the costs of defending suits that they believe they should win. This is a constant tension in formulating rules of civil procedure.

Suggested Reading

- Bone, "Plausibility Pleading Revisited and Revised."
- Reinert, "Measuring the Impact of Plausibility Pleading."

Questions to Consider

- Should a plaintiff be permitted to reach the potentially costly discovery phase of a lawsuit just by making conclusory allegations in a complaint?
- How can we tell whether a plaintiff's claims are plausible at the outset of a suit, before the parties have had an opportunity to discover information to support their claims and defenses?

Lecture 6

UNDERSTANDING COMPLEX LITIGATION

Modern lawsuits sometimes involve multiple plaintiffs suing multiple defendants on multiple claims. In law school, this is known as complex litigation. This lecture examines the rules that apply to complex litigation, including those governing joinder—the mechanism by which multiple parties and claims may be joined together in a single suit—and the special type of multiparty suit known as the class action.

JOINDER OF CLAIMS

- ✯ The majority approach today in the United States is to permit any party asserting a claim against another party to join as many claims as she has against that party. Under that approach, the party doesn't have to join multiple claims together in one suit, but she may. And it doesn't matter if the claims are related to each other; she can assert as many claims as she has against an opposing party in one suit, even if they have nothing to do with one another. The idea is that one lawsuit is more efficient than two, both for the parties and for the court.

- ✯ If the claims are not related, however, it's less clear that it's more efficient to join them together in one suit. To begin with, there may not be any overlap in the evidence. There may even be a chance that jurors will get confused about which evidence is relevant to which claim. Jurors may also allow evidence from one claim to prejudice their views about the proper resolution of the other claim.

- ✯ Nevertheless, it is still more efficient for the plaintiff to join unrelated claims than to bring separate suits. Process must be served only once, for example. The court will have to have only one hearing about personal jurisdiction or other threshold issues, and will have to empanel only one jury.

- ✯ If there were a relatedness requirement, we'd waste energy litigating whether claims are sufficiently related to fit within the rule. If the claims are so different that we're worried about juror confusion or bias, we can always have the judge split the claims up for trial.

- ✯ A party is allowed to join together all claims she has against an opposing party, but she is not required to do so. Under a doctrine called claim preclusion, however, a plaintiff must bring all related claims together, or she loses the right to assert them later. So even though a party isn't required to assert unrelated claims together in one suit, she does have to assert all related claims, or forever hold her peace.

☆ While the rules only require parties to assert related claims together in one suit, in practice parties tend to join together all claims that they have, even if they're not related. There are strong incentives for plaintiffs to do so. First, the cost of maintaining one suit is generally less than maintaining multiple suits. Second, multiple claims against the defendant can make the defendant look bad. Third, statutes of limitations—laws that require suits to be filed within a certain period of time—generally prevent plaintiffs from waiting a long time to assert their claims.

JOINDER OF PARTIES

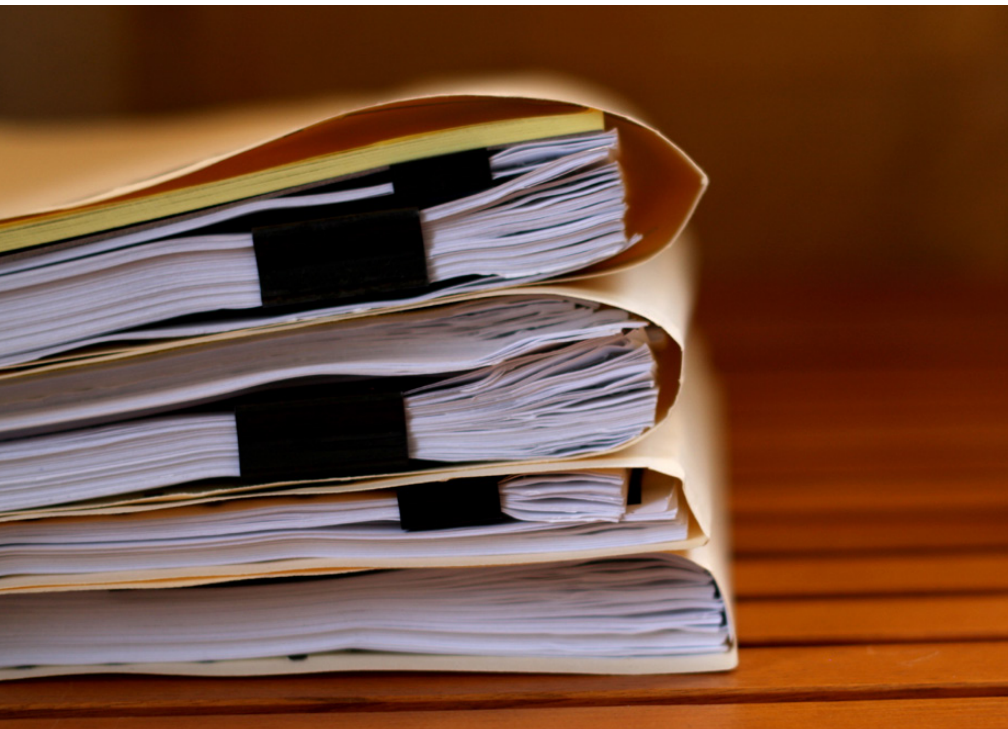
☆ In the old days, the rule was that a lawsuit could involve only one plaintiff suing one defendant. But that's different now. Under the majority approach today, multiple plaintiffs can sue together if the claims that they're asserting are related to each other. Similarly, a plaintiff can sue multiple defendants if the claims that she's asserting against them are related.

☆ But lawsuits can get even more complicated than merely having multiple plaintiffs sue multiple defendants on multiple claims. There are also counterclaims, which can be brought against opposing parties; cross-claims, which can be brought against co-parties; and impleaders, also known as third-party claims, which can be brought against someone not already a party to the suit.

- This doesn't mean, however, that any party can assert any claim against anyone else in a lawsuit. With respect to counterclaims, the usual approach is that a party can always assert a counterclaim against an opposing party. In most jurisdictions, in fact, a party must assert any counterclaims related to the opposing party's original claim, or risk forfeiting the counterclaim altogether.

- With respect to cross-claims, the general rule is that a party may assert a cross-claim if it's related to the original claim or a counterclaim, but is not required to do so. The logic behind this distinction is that in most cases, we don't want to force parties to become adversaries if we don't have to.

- A party may file an impleader, or third-party claim, only if she is asserting that the defendant on that claim will be required to reimburse her if she is found liable on another claim in the suit. She can't simply take the opportunity, now that she's being sued, to resolve any disputes she has against any other random person.



CLASS ACTIONS

- ✯ What if there are so many potential parties that we couldn't fit them all in the courtroom, or easily resolve all their claims in one suit? One possibility is simply to let the various plaintiffs bring separate lawsuits. But there are two potential problems with this solution:

  - If the lawsuits would all involve similar facts and similar claims, it might be costly for the courts—and the defendant—to have to litigate all of them.

  - If the plaintiffs can't join together in a single lawsuit, they might have less incentive to go to court in the first place, thus leaving their injuries unredressed.

- ✯ The law's solution to these problems is the class action, a suit by a representative plaintiff on behalf of a class of similarly situated persons. The plaintiffs in the class typically don't participate in the suit, leaving that to the representative. And we don't have to worry about inconsistent judgments; the result of the suit by the representative will be binding not only on the defendant, but also on all the absent class members.

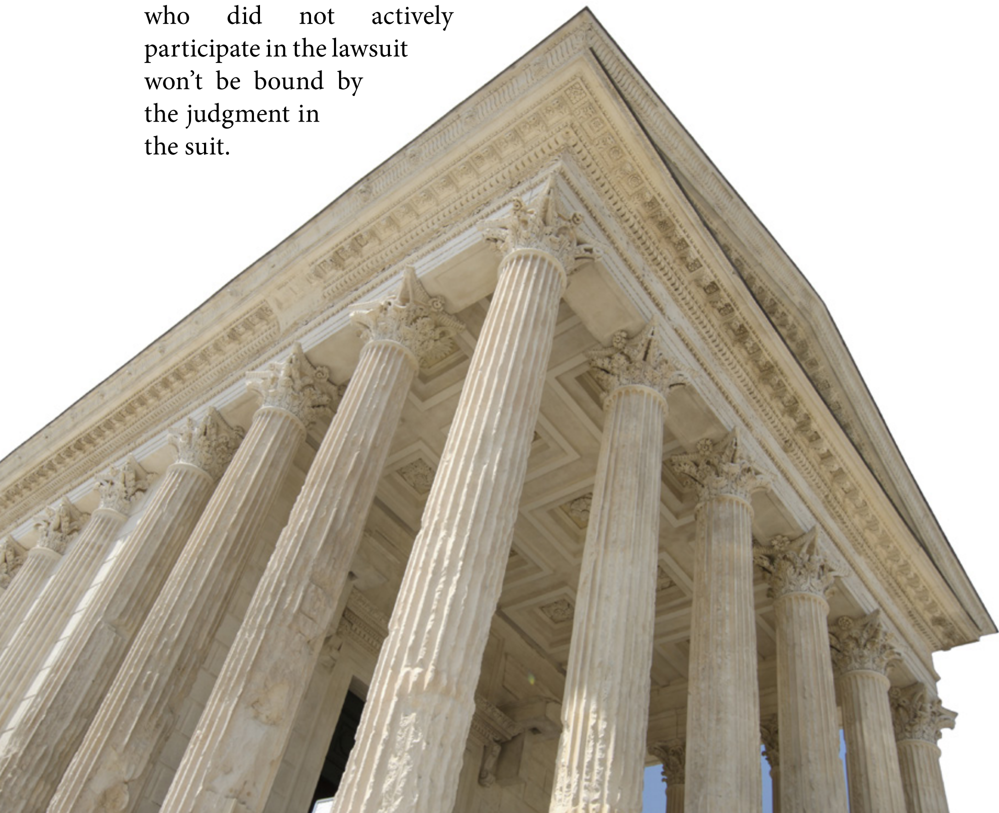
- ✯ Our basic commitment to due process generally means that each litigant should get an opportunity to resolve her claims in court. And so, the general rule is that a person can't be bound by a lawsuit brought by another person, even if that person asserted similar claims. Class actions are an exception to this rule.

- ✯ When a court resolves a class action, all people who were part of the class are bound by the judgment, even if most of them didn't participate in any way in the suit. Courts make this exception for class actions because class actions promote efficiency, and because they ensure that justice is done when individual litigation would not be cost-effective or practical.

- But it can't be the case that any random person can file a suit purporting to be on behalf of other people, and thereby resolve their legal rights. So how do we guarantee that class action litigation serves the interests that it's designed to advance without prejudicing the rights of absent class members?

- In a famous case called *Hansberry v. Lee*, the Supreme Court held that a class action can bind absent class members only if they are adequately represented by the class representatives. To evaluate adequate representation, a court must consider whether the representative's interests and those of the absent class members are aligned.

- If the interests of the class representative and the absent class members diverge, the court will go on to consider whether those differences are enough to make the representation inadequate. If the representation is inadequate, the class members who did not actively participate in the lawsuit won't be bound by the judgment in the suit.



- Critics of class actions have described the practice as a weapon to coerce settlements from large companies, who would rather pay to have the case go away than face years of expensive litigation. But the class action is also an important device for ensuring that there is a meaningful remedy for wrongdoing that harms many people.

Suggested Reading

- Clermont, *Civil Procedure Stories*.
- Freer, "Duplicative Litigation."
- Kane, "Original Sin and the Transaction in Federal Civil Procedure."

Questions to Consider

- Should parties always get to choose how many claims to assert against an opposing party, or how many parties to assert their claims against?
- Is it unfair to absent parties to adjudicate their rights in class action lawsuits?

Lecture 7

THE USE AND ABUSE OF DISCOVERY

Discovery is the process by which parties seek evidence before trial to support their claims and defenses. As many young lawyers quickly learn, the mechanics of discovery are quite dry and technical. Nevertheless, the rules of discovery raise fundamental questions about how we reconcile an adversarial system of litigation with the goal of deciding cases based on the merits.

DISCOVERY BASICS

- In many European jurisdictions, it's the judge who actively investigates the case. The judge is the one who seeks evidence and questions witnesses in an attempt to determine the truth. This type of procedure is referred to broadly as an inquisitorial system of justice.

- In the Anglo-American model, by contrast, it is the opposing parties who gather and present evidence, and who formulate the legal arguments. This is what's called an adversarial system. In an adversarial system, the judge is largely a passive referee, ruling on disputes as they arise between the parties.

- The adversarial system is based on the premise that the parties, who have the most to gain or lose in the outcome of the suit, have the best incentive to discover evidence and formulate arguments that help their cases. In other words, the system depends on competition between self-interested litigants to reveal all the information necessary to resolve the case correctly.

- In an extreme version of an adversarial system, we can imagine that the parties wouldn't share any information at all with each other. To the contrary, they would have every incentive to keep their best evidence hidden until trial. That way that their opponents wouldn't be able to adequately prepare to rebut it.

- Something seems unfair, however, about deciding cases based on who has access to information. We want cases to be decided based on the truth, even if the truth happens to be hidden in the plaintiff's or defendant's files. Left to their own devices, however, parties often have no incentive to disclose information to their adversaries—especially information that might be damaging to their own cases.

- This is where discovery comes in. The discovery process allows access to certain types of information for both parties. Discovery has been a part of the American legal system for many years, but the standards governing the process have evolved over time.

SCOPE OF DISCOVERY

- Defining the types of information that a party may obtain from others in preparing for trial raises a fundamental tension in the law of civil procedure: We want cases to be decided on their merits, not based on who has better access to information. At the same time, we don't want to undermine the incentives at work in our adversarial system. The former goal argues in favor of a broad scope of discovery; the latter argues in favor of a narrow scope.

- Because of evolving views of how to balance these competing goals, the scope of discovery today is much broader than it used to be. In most American jurisdictions today, parties can seek any nonprivileged matter that is relevant to any party's claim or defense. This is true regardless of who has the burden of proving the claim or defense to which the matter is relevant.

- In most cases, it isn't difficult to determine whether the information sought is relevant. Consider, for example, the general rule that a plaintiff can't obtain information during discovery about the defendant's financial resources and ability to pay a future judgment. Such information simply isn't relevant; the defendant's wealth has nothing to do with the plaintiff's entitlement to recover or the amount he should be entitled to recover.

- There are times, however, where the relevance requirement cuts the other way. When a plaintiff in good faith seeks punitive damages—which are designed to punish and deter outrageous conduct—she might be able to seek information about the defendant's financial resources. For punitive damages to have a meaningful deterrent effect, you need to know how much money the defendant has. The information is now relevant to the plaintiff's case.

- A broad scope of discovery helps ensure that cases are resolved based on the merits, not on the parties' comparative access to information. But a broad scope can also be used as a tool for parties to impose costs on their opponents, who might be inclined to settle even those cases they would otherwise win.

- Defendants can also use discovery strategically, as a weapon to wear down an asset-challenged plaintiff. Defense attorneys often try to drag out discovery—sending sweeping document requests, for instance, and arranging for lengthy depositions of as many witnesses as they can find. At some point, the best the plaintiff can hope for will be to settle the suit for some fraction of what he might get after a completed trial.

- When discovery is used to impose costs on an adversary, it's less obvious that it will promote the fair resolution of a suit based solely on the merits. But how do we identify those cases? Any discovery request will impose at least some costs on the responding party, even ones that seek obviously relevant information. Recognizing this problem, the rules governing discovery now require that the information be proportional to the needs of the case.

PRIVILEGES IN DISCOVERY

- ✯ A privilege is a right to refuse to disclose information that the person otherwise would have an obligation to provide. You've probably heard of some privileges, like the doctor-patient privilege and the attorney-client privilege.

- ✯ Courts protect communications subject to privileges to advance goals unrelated to litigation. The doctor-patient privilege, which protects doctors from having to disclose things that their patients tell them, is designed to ensure that doctors have all the information that they need to make wise treatment decisions.

- ✯ The attorney-client privilege, which protects lawyers from having to disclose things that their clients tell them, ensures that the client feels comfortable giving his attorney all the relevant information, which makes it easier for the attorney to represent the client effectively. During discovery, a party can't ask the opposing party to disclose what he told his attorney in the course of seeking legal advice.

- ✯ But what about material that's not protected by the attorney-client privilege—perhaps because it didn't involve a communication between the client and the lawyer—but that the lawyer prepared in anticipation of litigation? This is known as work product, and it typically is shielded from discovery. This helps ensures that lawyers have adequate incentive to prepare their cases for trial.

- ✯ There are some instances, however, when attorney work product will be subject to discovery. This might be the case, for example, when an eyewitness interviewed by an attorney for one party dies before opposing counsel has the opportunity to do the same. Depending on the circumstances, the interest in equal access to information necessary to the resolution of the case might outweigh the interest in preserving incentives in litigation.

- The general rule is that attorney work product is discoverable, notwithstanding the fact that an attorney prepared it in anticipation of litigation, if the party seeking discovery can demonstrate both that it has a substantial need for the materials and that it would face undue hardship if the materials were not discoverable.

- The question raised by discovery of work product is the same fundamental question raised by the scope of discovery in the first place: How do we reconcile the adversarial system with the goal of resolving all cases based on their true merits? There's no perfect answer to this question in the abstract, but the rules we've discussed are designed to find a sensible and workable balance.

Suggested Reading

- Clermont, *Civil Procedure Stories*.
- Easterbrook, "Discovery as Abuse."
- Mullenix, "The Pervasive Myth of Pervasive Discovery Abuse."

Questions to Consider

1. How do we balance a party's need for access to information against the costs that discovery can impose on opposing parties?

2. Is it fair to permit lawyers to shield information from disclosure when they have learned it from their clients or in the course of investigating a case?

Lecture 8

DECIDING A CASE BEFORE THE TRIAL ENDS

Only a tiny percentage of civil lawsuits in the United States involve a complete trial, with all its attendant procedural protections. Some suits are dismissed at the outset of litigation. Others settle before or during trial. But a significant number are resolved by the presiding judge, either before or during the trial. The mechanisms available to judges for this purpose are examined in this lecture.

SUMMARY JUDGMENT

- In most cases, once discovery is complete, at least one of the parties files a motion asking the court to grant judgment in its favor. This is called a motion for summary judgment.

- A motion for summary judgment urges that, in light of the facts discovered and the law that applies to the parties' claims, there's only one legally acceptable resolution of the suit. Summary judgment is a mechanism for resolving a dispute without a trial.

- It's often difficult for a judge to decide whether there's only one legally defensible outcome. Granting summary judgment deprives the losing party of the opportunity to have the fact finder decide the merits of the suit based on the evidence as it would be presented in a full trial. This is potentially problematic, not least of all because it deprives the losing party of the opportunity to have its evidence heard by a jury.

- To grant summary judgment, a court must conclude that there is "no genuine dispute as to any material fact" and that the party who filed the motion "is entitled to judgment as a matter of law." In applying this standard, the court is able to consider only the facts as presented by the parties.

- In a suit arising out of a car accident, for example, if the plaintiff offers eyewitness testimony that the defendant was speeding, the defendant might respond with competing eyewitness testimony suggesting that he wasn't speeding. In such a case, summary judgment would be inappropriate; there is a genuine dispute over a fact that must be resolved in order to resolve the case.

REVIEWING THE EVIDENCE

- ✯ In a complete trial, a jury can base its assessment of the facts on whose witnesses it believed more: those of the defendant or those of the plaintiff. A judge ruling on summary judgment, however, is limited to reading the witnesses' sworn statements. He can't assess the credibility of the witnesses, because he can't see them.

- ✯ Courts reviewing evidence presented at the summary judgment stage view the evidence in the light most favorable to the nonmoving party. This is the party that doesn't want summary judgment to be granted—who instead wants a chance at a trial. For purposes of their decision, judges assume that the testimony that supports that party is true, and that all inferences that are sensibly drawn from it are also true.

- ✯ If a plaintiff moves for summary judgment, there's only one way for her to support the motion if she wants to win: She has to offer enough evidence to show that she'd be certain to win, and the evidence has to be enough even when considered alongside any evidence that the defendant, in opposing the motion, offers to try to show that the facts are actually disputed.

- ✯ A defendant who moves for summary judgment can follow the same approach, offering evidence so overwhelming that victory at trial would be assured. But he can also oppose the motion by offering no evidence at all. Instead, he can simply point out that the plaintiff doesn't have enough evidence to meet her burden of persuasion at trial. As a result, it's generally easier for defendants to win on summary judgment than it is for plaintiffs.

- ✯ Summary judgment is not always granted, of course. In some cases, neither party moves for summary judgment. In others, the facts are clearly in dispute, and both sides have evidence to support their factual assertions. When summary judgment is denied, the case is set for trial.

JUDGMENT AS A MATTER OF LAW

- ✩ The denial of a motion for summary judgment doesn't guarantee that the issues will be decided by a jury. A judge can still dispose of a case during trial—or at the conclusion of the trial—and thereby prevent the jury from deciding the case. Courts do so by granting motions for judgment as a matter of law.

- ✩ In the old days (and still today, in some states) judgment as a matter of law was referred to as a directed verdict. As the name implies, a directed verdict required a conclusion by the judge that there would be only one legally defensible outcome before a jury, and thus that there's no need to have the jury rule on the case.

- ✩ Under the modern standard, a court can grant judgment as a matter of law if "a reasonable jury would not have a legally sufficient evidentiary basis to find for" a party who's had an opportunity to introduce evidence about the relevant issues. This is effectively the same standard that we apply to motions for summary judgment.

- ✯ If the same standard applies to motions for summary judgment and motions for judgment as a matter of law, then how could a court deny the former but then grant the latter? The answer lies mainly in the differing records that a court considers when ruling on the motions.

- ✯ When a court rules on a motion for summary judgment, it bases its decision on more limited evidence: documents obtained during discovery, deposition transcripts, sworn statements, and so forth. In contrast, a court deciding whether to grant a motion for judgment as a matter of law must consider the evidence actually produced at trial.

- ✯ Sometimes the evidence turns out to be more compelling when offered at trial. Sometimes a party, for tactical or other reasons, doesn't offer at trial everything that he offered at the summary judgment stage. The evidence may differ in other meaningful ways, such as when a witness at trial departs from the statement he provided in an affidavit or the testimony he gave in a deposition.

- ✯ In other words, although the standards for summary judgment and judgment as a matter of law are essentially the same, there may be differences in the evidentiary bases for the motions. It makes sense that sometimes a court would deny summary judgment but then grant judgment as a matter of law. Everything can look different after evidence has been introduced in a trial.

- ✯ How can a court decide whether a "reasonable jury" could rule in favor of either party, when granting the motion will prevent a jury from actually deciding the issue? There are certainly cases where the application of the standard is uncontroversial—where evidence is undisputed, for example. But what about when the evidence is in dispute?

- ✯ To answer this question, it's important to note that the concept of the "reasonable jury" is not simply a function of what an ordinary, rational, reasonable person could decide. Rather, it is a normative standard for what a party should have to offer in order to prevail in a trial.

- Under this standard, it's not enough to offer evidence that could lead a reasonable person to conclude that you're more likely right than wrong. Instead, the party with the burden of persuasion has to offer enough tangible, concrete evidence that it seems appropriate and acceptable to change the status quo.

- It's not clear exactly how much evidence is required to meet the standard. There's no mechanical or quantifiable test for what counts as legally sufficient evidence, or for what counts as a permissibly "reasonable" inference from such evidence. It's simply a matter of judgment.

Suggested Reading

- Clermont, *Civil Procedure Stories*.
- Miller, "The Pretrial Rush to Judgment."
- Wald, "Summary Judgment at Sixty."

Questions to Consider

- Do summary judgment and judgment as a matter of law impermissibly interfere with our right to a jury trial in civil cases?
- How can a judge know what a "reasonable jury" would conclude if the judge does not give the jury an opportunity to resolve the suit?

Lecture 9

THE RIGHT TO A CIVIL JURY TRIAL

Juries play an important role in civil procedure. Even in cases that aren't ultimately resolved by juries, the prospect of a jury decision lurks in the background, affecting the parties' and the court's decisions. In this lecture, you'll examine the right to a jury trial in civil cases, the virtues and drawbacks of civil juries, and whether the mechanism of judgment as a matter of law is consistent with the right to a jury trial.

JURIES IN CIVIL SUITS

- Is the civil jury a desirable institution? Or is it an inefficient relic of a bygone era—or worse, likely to resolve cases based on emotion and prejudice rather than reason? Your answer to this question will probably drive your view about all the subsidiary questions about the proper scope of the jury's role.

- The framers of our Constitution thought that the right to a jury trial was so important that the Seventh Amendment states that the right "shall be preserved" in civil suits. According to the Supreme Court, however, the Seventh Amendment is one of only a few provisions in the Bill of Rights that doesn't also apply to actions by state governments.

- The Supreme Court's decision means that there is no federal constitutional right to a civil jury trial in state court. States are free to protect a right to a civil jury in their own constitutions, of course, but they don't have to do so as a matter of federal constitutional law.

And even in federal court, where the Seventh Amendment does apply, there are certain types of civil suits to which the right to a jury trial does not apply.

- Why do we permit juries to resolve civil suits, and sometimes guarantee the parties a right to have a jury do so? In the criminal context, the answer seems straightforward. There's a right to a jury trial in criminal cases because historically, juries served as a bulwark against the power of the state to send a person to jail or worse.

- But we're concerned here with civil suits, not criminal prosecutions. Most civil suits aren't brought by the government against a private individual. Instead, most civil suits involve one private person suing another; no one will go to jail as a consequence of the suit. Why might we want a jury trial in those types of suits?

- There are three principal reasons, although all of them are contestable. First, a dozen minds might be better than one, which is what we'd have if a judge resolved all of the disputed questions in a civil suit. The idea is that collective judgment is superior to individual judgment. One person might miss something, or have idiosyncratic judgment. But if a group of people is making the decision, at least one person is likely to notice the important details, and the group will trend toward the mean, not toward the extreme.

- Second, because juries are supposed to be a representative sample of the community, the party who loses in a jury trial might be more inclined to view the decision as legitimate. Many people tend to view a trial by jury as part of their "day in court," and are therefore more willing to accept even adverse results produced by that process. This might be simply because our legal culture has long used the jury in this capacity; either way, jury decision-making would have taken on a sheen of legitimacy.

- Third, even though the stakes in civil suits are not as high as they are in criminal cases, they are still significant. A court might order a defendant in a civil suit to pay a substantial amount of money, or to surrender property. Just as we think of juries as an important protection against arbitrary deprivations of life, liberty, or property in the criminal context, perhaps we should see them as playing a similar role in the civil context.

ARGUMENTS AGAINST CIVIL JURIES

- The justifications for the use of juries in civil suits are substantial. Together, they suggest that juries can produce better, more legitimate decisions while protecting against an over-reaching state. So why did

the Supreme Court determine that the right to a jury in a civil suit isn't sufficiently important that it must apply in suits in state court? The answer has to do with the costs of juries in civil suits.

- ✭ First, the view that the jury represents the collective wisdom of the community might be naïve and indefensibly romantic. Many cases involve complex questions of science, economics, engineering, and other hard-to-understand topics. A products-liability suit, for example, might require the fact finder to understand how a sophisticated medical device works; an antitrust suit might require the fact finder to decide between competing testimony from academic economists.

- ✭ To make matters worse, the most highly educated people in the jury pool are usually the most likely to be excused by the lawyers for the parties when they're deciding who'll get to serve. In many cases, one of the parties will assume that a well-educated juror won't be as favorably inclined to his position than a less well-educated juror. Even if we think that it is unduly elitist to worry about this, perhaps we should be concerned that the jury will not end up as a genuine cross section of society.

- ✭ Second, it's not obvious that decisions by juries are more legitimate. Studies have consistently found that jurors are more likely than judges to make decisions based on passion and prejudice than on reason and evidence. Indeed, the rules of evidence, which are quite complex, exist mainly to minimize the likelihood that lay juries will make decisions based on impermissible factors.

- ✭ Third, a system of trial by jury is more expensive and inefficient than a system of trial by judge. Many citizens see jury service as an inconvenient burden. It takes considerable time and resources for the government to create and summon a jury pool. It also takes time and resources for the court and the parties to select jurors, to conduct trials according to complicated rules of evidence, and to ensure that the jurors are properly instructed about the law before they reach their decision.

JUDGMENT AS A MATTER OF LAW

- Judgment as a matter of law is a mechanism that permits a judge to resolve a suit before a jury has had an opportunity to resolve the claims. A judge can grant a motion for judgment as a matter of law only if no reasonable jury could find in favor of the nonmoving party.

- Whenever a court grants judgment as a matter of law, it effectively deprives the jury of the opportunity to decide the issues in the case. Nevertheless, the Supreme Court has held that judgment as a matter of law—formerly known as a directed verdict—is consistent with the right to a trial by jury guaranteed by the Seventh Amendment.

- The Supreme Court's decision came in the 1943 case *Galloway v. United States*. In *Galloway*, the Court reasoned that granting a directed verdict is not meaningfully different from procedures that were common in 1791 that also deprived the jury of the opportunity to decide a case.

- The Court noted, for example, that judges in the late 18th century could grant what were called demurrers. A demurrer was a motion to dismiss the plaintiff's claim; it accepted as true the facts asserted by the plaintiff, but asserted that, even if those facts were true, the plaintiff couldn't prevail as a matter of law.

- Another long-established procedure discussed by the Court in *Galloway* was the ability of a court to grant a request for a new trial if the jury's verdict was against the clear weight of the evidence. The Court reasoned that granting judgment as a matter of law isn't meaningfully different, in its effect on the right to a jury trial, from granting a demurrer or a request for a new trial.

- ✯ But is that right? When a party demurred to a complaint, he conceded the facts asserted in the complaint and argued that he nevertheless was entitled to prevail. A demurrer by definition left only a question of law—that is, whether, in light of the undisputed facts, the law provides a remedy for the plaintiff. And questions of law have long been for the court to resolve.

- ✯ New trials are similarly distinguishable from judgment as a matter of law. While granting a motion for a new trial did displace the jury verdict at issue, it still left the case in the hands of a jury—another jury, after another trial. With judgment as a matter of law, however, no jury gets to resolve the suit. The decision is made by the judge alone.

- ✯ The Supreme Court's justification for its decision in *Galloway* is connected to the standard for ruling on a motion for judgment as a matter of law, which requires the presiding judge to consider whether a reasonable jury could rule in favor of the party who wants the trial to continue. The court can grant judgment as a matter of law only if no reasonable jury could reach a different conclusion.

- ✯ Surely there's no constitutional right to an unreasonable jury. If a plaintiff sues in tort and then introduces no evidence at all to satisfy his burden, the jury shouldn't be permitted to rule in his favor—even if the jurors are more sympathetic to the plaintiff and dislike the defendant and his attorney. In such a case, it would seem indefensible to permit the jury to rule against the defendant.

- ✯ At least in theory, a motion for judgment as a matter of law calls upon the court to make only a legal determination: Is there a legally sufficient basis for a reasonable jury to find in favor of either party? Because legal determinations are within the judge's competence, it doesn't deprive a party of the right to a jury trial when the court grants judgment as a matter of law.

- ✯ Unfortunately, there's no clear line between evidence that would be sufficient to support a jury verdict and evidence that wouldn't be. One result is that the Seventh Amendment's guarantee of a right to a trial by jury often leads judges to err on the side of denying motions for judgment as a matter of law in close cases, lest they unfairly deprive parties of their constitutional rights to a jury trial.

Suggested Reading

- Abramson, *We, the Jury*.
- Gergen, "The Jury's Role in Deciding Normative Issues in the American Common Law."

Questions to Consider

- Is the civil jury a heroic institution that does justice by adding common sense to the judicial system, or is it an inefficient and biased institution that undermines justice?
- From what you have learned here about the civil jury, has your level of interest in serving on a jury changed? If so, in which direction?

DETERMINING WHAT LAW APPLIES

The question of which state's law will apply to a particular dispute is an important one; in many cases, the answer will determine who wins and who loses. This topic is known as conflict of laws, and it can be confusing. Not only does every state have its own substantive law, but each also has its own principles about when to apply another state's law. The focus of this lecture will be how federal courts decide which body of law to apply.

FEDERAL COMMON LAW

- There are two principal types of cases that can be litigated in federal court: cases in which the claims arise under federal law, and cases in which the parties are from different states. If a suit is in federal court because the claims arise under federal law, there's no dispute about the proper source of the law that governs the parties' claims: it's federal law.

- ✯ But what if we're in federal court because the parties are from different states? In the Rules of Decision Act, which Congress enacted in 1789, Congress said that "the laws of the several states … shall be regarded as rules of decision in civil actions in the courts of the United States," unless federal law provides otherwise. In other words, the default rule is that state law governs in federal court. But which state's law?

- ✯ In the middle of the 19th century, the Supreme Court held in a case called *Swift v. Tyson* that the phrase "laws of the several states" in the Rules of Decision Act had a very limited meaning. Specifically, the Court held that this language referred only to state statutes and constitutions that governed "strictly local" matters, not to state judicial decisions that applied "general" principles of commercial law.

- ✯ In other words, the Court in *Swift* concluded that it could develop and apply federal common law in diversity suits, as long as there was no state statute or constitutional provision directly on point. That meant that federal judges could consider precedent, policy, and all of the other things that judges consider when making common law, thus creating a body of judge-made federal law that sometimes would be different from any one state's common law.

THE *ERIE* DOCTRINE

- The *Swift* decision encouraged forum shopping. Because the law that applied in federal court in a diversity suit was often different from the law that applied in state court, litigants could choose the forum that was more favorable to them. This happened most often when corporations removed suits from state to federal court, to get the application of the more favorable federal common law.

- But the *Swift* approach didn't endure. The Supreme Court overruled it in its famous 1938 decision in *Erie Railroad Co. v. Tompkins*. What was wrong with the *Swift* doctrine? One possibility the Court addressed was that the *Swift* decision had simply been a misinterpretation of the Rules of Decision Act.

- It certainly would've been plausible, the Court observed, for the language of the Rules of Decision Act to mean that all state substantive law, including state common law, governs in suits in federal court that don't arise under federal law. An earlier draft of the law, in fact, had explicitly referred to "the law of the several States … and their unwritten or common law now in use."

- There are at least two problems with this justification. First, the Court generally won't overrule one of its prior decisions interpreting a statute, even if it interpreted it in a questionable way, because Congress can always overrule the Court just by enacting a new statute that makes clear its intention. Congress never did that in this case, which suggests that Congress was comfortable with the Court's interpretation.

- Second, the evidence regarding the earlier draft showed that Congress had considered a proposal to treat state common law as the rule of decision in suits in federal court. But after considering it, Congress enacted a law that didn't refer to the common law. This could just as easily be read to mean that Congress consciously chose not to require federal courts to rely on state common law in deciding suits filed in their diversity jurisdiction.

- ✭ As a result, the Court offered other reasons to change the rule announced in *Swift*. In particular, the Court's opinion observes that *Swift* had produced "mischievous results." The examples cited by the Court focused on the unusual case of manipulation of citizenship to create diversity, even though most critics of *Swift* recognized that the bigger and more common problem was the ability of corporations to remove suits to federal court.

- ✭ The Court went further, however, suggesting that *Swift* might even be unconstitutional. Under the *Swift* regime, an out-of-state plaintiff could sue an in-state defendant in federal court to get the benefit of federal common law, thereby denying the defendant the opportunity to have his case decided under state law. If both litigants were from the same state, in contrast, the plaintiff wouldn't have such a choice to disadvantage the defendant. This result, the Court said, "rendered impossible equal protection of the law" guaranteed by the Fourteenth Amendment.

- ✭ The Court's equal-protection argument isn't particularly convincing, however, for two reasons: First, it's just not the case that the *Swift* approach operated only to the disadvantage of "citizens"—which is to say residents of the state where the suit was filed. Sometimes federal common law was better for the party suing or being sued at home; sometimes it was better for the party suing or being sued away from home.

- ✭ Second, the Fourteenth Amendment prohibits the states from denying equal protection of the laws by discriminating against persons within their borders. In 1938, when the Court decided the *Erie* case, the Court had not yet concluded that the equal protection principle also applies to actions of the federal government. It eventually did so, but the Court in *Erie* didn't explain how decisions of federal courts could violate a constitutional principle that, at the time, only applied to decisions of the states.

- ✭ Thus the Court suggested, albeit somewhat obliquely, that *Swift* was unconstitutional for still other reasons. The Court said that "Congress has no power to declare substantive rules of common law applicable

in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts." In other words, the Court seemed to say that, as a matter of federalism, *Swift* was wrong because the federal government doesn't have power to create law to govern ordinary tort suits like the one at issue in *Erie*.

☆ Ultimately, the Court rejected the jurisprudential idea that was the basis for the Court's decision in *Swift*. As a result, *Erie* stands for the proposition that state substantive law, and not federal common law, governs in diversity suits in federal court. Of course, we still need to decide which state's substantive law should apply. But a federal court deals with this problem rather straightforwardly, by applying the choice of law rules of the state in which it sits.

SUBSTANCE AND PROCEDURE

- ✯ In 1938, the same year that it decided *Erie*, the Supreme Court issued the Federal Rules of Civil Procedure to govern practice in federal courts. The rules were designed to apply in all suits in federal courts, including diversity suits. Like most procedural rules, they were also designed to be trans-substantive, applying regardless of the particular claim in the case.

- ✯ After the decision in *Erie* and the issuance of the Federal Rules of Civil Procedure, the law essentially was as follows: Substantive law applies in diversity actions, but federal courts can devise and apply their own rules of procedure. But this still leaves an important question, which is how to determine whether a particular rule of state law is procedural or substantive.

- ✯ It's easy to tell the difference between procedural and substantive rules at the extremes. A rule that says to apply the negligence standard to a tort claim, for example, is clearly substantive. By contrast, a rule requiring all motions to be typed with one-inch margins is clearly procedural. But there are many cases where the question is a closer one.

- ✯ Consider the 1945 case of *Guaranty Trust Co. v. York*. The plaintiff filed suit against a bank in federal court in New York, based on diversity of citizenship, claiming that the bank had committed fraud. Under New York's common law, the suit would have been barred by the statute of limitations. But the federal courts' approach was not to apply a statute of limitations in suits of this type.

- ✯ If New York's statute of limitations was determined to be a substantive rule, then under the *Erie* doctrine, it would control. After all, *Erie* said that state substantive common law rules apply in diversity suits. The bank argued that the state statute of limitations was substantive and therefore should govern. The plaintiff argued that the statute of limitations was procedural and therefore shouldn't govern.

- ✯ There's no bright line between the categories of substance and procedure, and a statute of limitations illustrates why. In some ways, a statute of limitations seems procedural. We only care about statutes of limitations once there's a lawsuit. And a statute of limitations simply governs when a person can enforce a right in court, not whether he actually has the right.

- ✯ But in other ways, a statute of limitations seems substantive. If it applies, and if it has run, then the plaintiff is barred from recovery. Once it's run, the plaintiff's "right" becomes, for all practical purposes, meaningless. In this sense, the statute of limitations defines the scope of the plaintiff's right not to be injured by the defendant.

- ✯ In *York*, the Court addressed the issue in light of the concerns identified in *Erie*. The Court reasoned that the point of *Erie*'s rule was to ensure that "the accident of a suit by a non-resident litigant in a federal court instead of State court a block away should not lead to a substantially different result." The Court in *York* said that *Erie* was really about preventing this kind of forum shopping—stopping litigants from choosing between state and federal court simply to get a more favorable rule or outcome.

- ✯ The Court said that the question thus wasn't really whether a statute of limitations is more properly characterized as substantive or procedural. Instead, the Court said, that the relevant question was whether the difference in state and federal rules would essentially determine the outcome of the case. If it would, then the federal court must apply the state rule. Otherwise, parties would decide where to sue based on which court, state or federal, had the better rule for them.

- ✯ If a plaintiff would be barred from suing in one court by a rule, even a rule that seems "procedural," but could recover in the other court, then the plaintiff will sue in the court where he can prevail. A plaintiff obviously would sue in federal court to avoid a state statute of limitations. And so, the Court determined, the federal court had to apply the state statute of limitations, to discourage that kind of forum shopping.

Suggested Reading

- Carrington, "'Substance' and 'Procedure' in the Rules Enabling Act."
- Clermont, *Civil Procedure Stories*.
- Lessig, "An Essay on Context in Interpretive Theory."

Questions to Consider

- If the same law applies in federal courts sitting in diversity and in the state courts that are across the street, then why do we need federal courts to sit in diversity in the first place?
- If state court judges enjoy the power to develop common law rules to govern suits filed before them, then should federal judges enjoy the same power?

Lecture 11

RELITIGATION AND PRECLUSION

Most of the rules of civil procedure are about the mechanisms for preparing and deciding claims. Among other things, they're designed to make sure that claims are likely to be resolved correctly. Some rules, however, are designed simply to get things over with. In this lecture, you'll learn about the rules that prevent parties from relitigating matters that have already been decided.

CLAIM PRECLUSION

- Claim preclusion and issue preclusion are two concepts that determine the impact that prior litigation has on subsequent litigation. The basic rule is that claims and issues tried and resolved in one suit generally can't be litigated again in a subsequent suit.

- The basic rule of claim preclusion is this: If you advance a claim, and it's adjudicated on the merits, you can't reassert that claim in a subsequent suit. But for the rule to actually bar a subsequent suit, you must first conclude that it is based on the same claim asserted in the first suit.

- Some cases seem obvious. You can't sue in one lawsuit for a broken arm you sustained in a car accident, and then file a separate lawsuit for a broken leg that you sustained in the same accident. You should assert those claims in one suit or forever hold your peace.

- In a 1958 case, *Rush v. City of Maple Heights*, a state supreme court went even further, holding that personal injuries and property damage arising out of the same accident also constitute the same claim. This is a clear extension of the previous example. But how far can we stretch this concept?

- The majority approach is that all claims arising out of the same set of circumstances, or that are otherwise logically related, count as the "same claim" for purposes of claim preclusion. This means that a party can be precluded from pressing a demand for relief that it didn't actually assert in prior litigation, as long as it should have asserted it in a prior suit.

- The majority approach to claim preclusion may seem unfair. This is particularly the case when the doctrine is applied to plaintiffs who might simply be less informed about the rules, as opposed to those who are acting strategically by filing additional lawsuits. The occasional unfairness of issue preclusion is justified by other important interests, however.

- ✯ Requiring parties to assert related claims in one suit reduces the total number of suits and saves judicial resources. Moreover, by preventing one litigant from invoking the judicial machinery twice—thereby diverting resources from other litigants' valid claims—claim preclusion ensures a more equitable distribution of judicial resources. Claim preclusion also promotes a sense of repose in prior judgments. It promotes finality. And finally, it prevents plaintiffs from harassing defendants with serial litigation.

- ✯ This doesn't mean that claim preclusion only operates to the detriment of plaintiffs. It also prevents defendants from resisting the binding effect of judgments. Just as a plaintiff must assert all her theories for relief in her initial suit, the defendant must also assert all his defenses in that suit. In fact, this is the quintessential case for claim preclusion, though in this context it's usually known as defense preclusion.

ISSUE PRECLUSION

- ✯ Issue preclusion usually applies when a lawsuit involves a different claim than was asserted previously, but involves an issue that was resolved in a prior suit. Although the two ideas seem similar, issue preclusion has a few requirements that make it different from claim preclusion.

- ✯ The first requirement is that the same issue have been actually litigated—that is, raised and subject to proof—in a prior suit. This makes issue preclusion very different from claim preclusion. Claim preclusion bars relitigating any claim for relief that should have been litigated in a prior suit, even if the party didn't assert it.

- ✯ Issue preclusion, by contrast, doesn't turn on the mere opportunity to litigate an issue; it applies only when the issue was actually litigated by the parties in a prior suit. If there were no such requirement, parties would be tempted to litigate every conceivable issue in the first suit—even those whose resolution seems unnecessary to the case—just in case the issue arises again in subsequent litigation.

- Another requirement for issue preclusion is that the issue must have been necessary to the judgment in the first suit for it to be entitled to preclusive effect. A matter is not necessary to the judgment if the same result would have been produced even if the issue had been decided the other way. By the same token, a matter is necessary to the judgment of the first suit if the case would otherwise have come out the other way.

- There are three reasons why an issue must have been necessary to the judgment for it to have preclusive effect in a subsequent lawsuit. First, the losing party generally has the right to appeal. But you can't appeal if you win, even if in the course of ruling in your favor the jury makes a finding that's bad for you.

- Second, it would be nearly impossible to determine whether the jury in the first lawsuit even considered the issue when making its ruling unless the issue is necessary to the judgment. Third, an issue that wasn't necessary to the outcome of the first lawsuit might not have garnered the full effort of the party against whom issue preclusion is being asserted.

NON-MUTUAL PRECLUSION

- ✯ A claim is a demand by one party that he's entitled to legal relief from another party. The concept of a claim presupposes one plaintiff and one defendant. As a result, claim preclusion can't be asserted against someone who wasn't a party to the initial lawsuit. It's simply not the same claim.

- ✯ The straightforward rule is that a stranger to the first suit can't assert or be bound by claim preclusion. The only real exception to the rule concerns absent members of a class in a class action. Absent class members are bound by a judgment in the suit, on the theory that the named plaintiff provided adequate representation in the suit.

- ✯ Matters are different for issue preclusion. Issue preclusion usually matters only when an issue that came up in the litigation of one claim is relevant in the litigation of a different claim. Accordingly, a stranger to the first suit often has good reason to want to assert issue preclusion against a party who was involved in the first suit.

- ✯ The traditional rule was called mutuality, and it was based on a straightforward notion of symmetry. Because a stranger to the first action couldn't be bound by the findings in the first action, the stranger in turn couldn't bind a person who was a party to the first action to the findings in that suit. But this rule doesn't always make sense. In particular, it can give plaintiffs a second chance to litigate issues they already lost, just by switching adversaries. This seems unfair and abusive.

- ✯ Most jurisdictions have abandoned the traditional rule of mutuality when issue preclusion is asserted by the defendant against a repeat plaintiff. This is called defensive non-mutual issue preclusion. But what if the plaintiff in the second suit wasn't a party to the first suit, and he asserts issue preclusion against the defendant on some issue that the defendant lost in the first suit? In other words, what about offensive non-mutual issue preclusion?

- ✫ There is a potential problem with allowing offensive non-mutual issue preclusion. Imagine that a train crashed, injuring 50 passengers. One passenger files suit for his injuries, alleging that the railroad was negligent. The passenger loses the suit after the jury concludes that the railroad was not negligent.

- ✫ When the second passenger sues, the railroad wouldn't be able to assert issue preclusion, even though it won the first suit, because of the rule that you can't assert preclusion against someone who wasn't a party to the first suit. So the railroad again litigates whether it was negligent. The second passenger loses his suit, too, with the jury finding that the railroad was not negligent.

- ✫ Twenty-three more passengers separately sue the railroad. Each one litigates whether the railroad was negligent, and in each case, the railroad wins. The very next passenger, however, gets a good lawyer and very sympathetic jury. In his case, the jury finds that the railroad's negligence caused the accident.

- ✫ What should happen when the remaining passengers sue the railroad? Is it fair to permit them to assert offensive non-mutual issue preclusion against the railroad to prevent it from denying its negligence? Given that there have been 25 determinations in favor of the railroad, the one determination against seems aberrational. We also wouldn't want to give prospective plaintiffs an incentive to sit on the sidelines and wait to see how other litigants do, taking advantage of others' efforts only when it benefits them.

- ✫ But even if issue preclusion in this case seems unfair to the railroad, there might be other cases when it seems more appropriate. Consider a case called *Parklane Hosiery Co. v. Shore*. In the first suit, the federal government sued Parklane to stop it from violating securities laws. The government won after the court found that Parklane had made a fraudulent misrepresentation. Parklane shareholders then brought a suit against the company for damages caused by the fraud. They asserted issue preclusion on the question whether the company had made a misrepresentation.

- In its decision, handed down in 1979, the Supreme Court permitted the company's shareholders to assert offensive non-mutual issue preclusion. Unlike the example of the train accident, there had been no prior judgments in favor of Parklane. There had been only one other suit, and Parklane had lost. It's entirely possible, of course, that the court got it wrong in the government's suit. But because there were no additional suits, there's no way to know.

- Although the Supreme Court permitted the plaintiffs to assert offensive non-mutual issue preclusion in the case, it made clear that it's not always permitted. Instead, the Court announced a two-part test for determining whether to permit an assertion of offensive non-mutual issue preclusion.

- First, the court asks whether the plaintiff could have intervened in the first suit. If the circumstances suggest that the plaintiff in the second suit intentionally took a wait-and-see attitude toward the first suit, then preclusion might be inappropriate. We don't want plaintiffs to take advantage of the work of others, especially when it will lead to more litigation, rather than less.

- ✯ Second, the court asks whether it would otherwise be unfair to the defendant to apply issue preclusion. It would be unfair if the judgment from the prior action was inconsistent with other judgments in favor of the defendant; if the defendant didn't have adequate incentive to litigate fully in the first suit; or if any procedural opportunities were unavailable in the first action that could readily cause a different result.

- ✯ As with many of the doctrines of civil procedure, formulating the rules for claim and issue preclusion requires us to balance the principle of a fair day in court against the need to conserve judicial resources and the desire to prevent the use of litigation as a form of harassment. Lawyers familiar with the rules know that sometimes you need to speak now or forever hold your peace.

Suggested Reading

- Clermont, *Civil Procedure Stories*.
- Currie, "Mutuality of Collateral Estoppel."
- Shapiro, *Civil Procedure*.

Questions to Consider

- Under the doctrine of stare decisis, courts follow precedent. How do the doctrines of claim and issue preclusion differ from this doctrine?
- Should a person be permitted to assert preclusion if he wasn't a party to the previous lawsuit?

APPEALS AND HOW THEY ARE JUDGED

This lecture examines the appeals process, including key aspects of the relationship between trial courts and appellate courts. Topics addressed include when and on what grounds a party is allowed to appeal a trial court's decision, as well as the various standards an appellate court might apply as part of its review.

TRIALS AND APPEALS

- Trial courts are where plaintiffs file lawsuits. As the name suggests, they're also where the parties' claims are tried. Appellate courts review trial court decisions. Most U.S. jurisdictions, including the federal court system, have two layers of appellate courts.

- The first layer of appellate courts is made up of intermediate courts of appeals, to which a party who lost in the trial court will often have an automatic right of appeal. The second layer is typically the jurisdiction's court of last resort—often, but not always, known as a supreme court—which can usually choose which cases it will hear.

- Let's say you've been sued far from home, but the trial court denied your motion to dismiss the case for lack of personal jurisdiction. Can you appeal that decision immediately, or do you have to wait until the court resolves all of the plaintiff's claims? The short answer is that it depends. Some court systems in the United States let you file an immediate appeal, but most require you to wait.

- In thinking about which approach makes more sense, we need to distinguish between two types of trial court decisions. First, in the course of any lawsuit, the trial court makes many interlocutory rulings. These are decisions that do not ultimately resolve the claims raised by the parties, but that happen along the way to a final decision.

- Second, a court resolves a suit by entering a final judgment. As the name implies, a final judgment is the court's final disposition of the case. A final judgment might say, for example, that the defendant is liable to the plaintiff and is ordered to pay $100,000 in damages.

- In the example of the suit far from home, if the court had granted the motion and dismissed the plaintiff's claims, it presumably would have entered a final judgment. But because the court denied your motion, the suit will continue. That means that the decision you'd like to challenge was an interlocutory order.

- The general rule in most of the court systems in the United States is that you can't appeal such an interlocutory decision. In the federal courts, for example, generally a party can appeal only from a final judgment. If you're upset by an interlocutory order, you will almost always have to wait until the trial court resolves the case and enters a final order before you can appeal. Some state courts do allow interlocutory appeals.

TIME AND MONEY

- In the suit you're facing far from home, it's not hard to see the attraction of a rule that lets you take an immediate appeal. If the court of appeals agrees with you that there's no personal jurisdiction over you, the court will reverse the trial court and order the suit dismissed. An interlocutory appeal on an issue like this one can terminate the suit and avoid the expense of a trial.

- Just think how wasteful and unfair it would be if you couldn't appeal immediately—if instead you had to go to the time and expense of defending against the plaintiff's claims at trial only to learn on appeal that in fact the trial court lacked personal jurisdiction. In that case, everything that happened after the trial court's decision denying your motion to dismiss will have been a waste. That seems unfair.

- Now imagine that the decision you want to appeal wasn't the denial of your motion to dismiss, but instead a discovery order requiring you to disclose any information you have showing that you sought estimates for the cost of repairs to your front steps, which the plaintiff fell on. Does it make sense to permit you to take an immediate appeal of that order?

- ✮ Unlike a successful appeal of the court's denial of your motion to dismiss, a successful appeal of this decision won't end the suit. It would just mean that the plaintiff has to find other evidence to support his claim of negligence. In fact, the resolution of most interlocutory orders doesn't terminate the suit. And there's no reason to think that the discovery order will be the only decision the judge makes that you disagree with and that might have an impact on the ultimate outcome of the suit.

- ✮ Because there are likely to be multiple contested interlocutory orders in any given suit, a rule requiring final judgment to be entered before parties can appeal saves resources by consolidating all of the parties' objections into a single appeal. The final judgment rule might also promote efficiency even when what's at issue is the trial court's denial of your motion to dismiss for lack of personal jurisdiction.

- ✯ The final judgment rule might save resources in another way, even if you turn out to have been right about personal jurisdiction, or about your right to shield information during discovery, or about the admissibility of evidence at trial. If you can't appeal those decisions immediately but then end up winning at trial on the merits, there'll be no reason to appeal the trial court's resolution of those interlocutory issues. You'll take your win in court and go home. In that case, the appeals will have been mooted, and we won't need to burden the court of appeals with them at all.

- ✯ And just as we said that prohibiting interlocutory appeals might be unfair to the party denied an immediate appeal, permitting such appeals might be unfair to the other party. There are arguments based on fairness and efficiency both for and against the competing approaches.

- ✯ At bottom, whether to permit interlocutory appeals turns on an empirical question: are trial court rulings more often correct than they are incorrect? If they're more often correct, appeals are more likely to be wasteful. If they're incorrect more often, immediate appeals are more likely to promote fairness and possibly avoid costly litigation.

QUESTIONS OF FACT

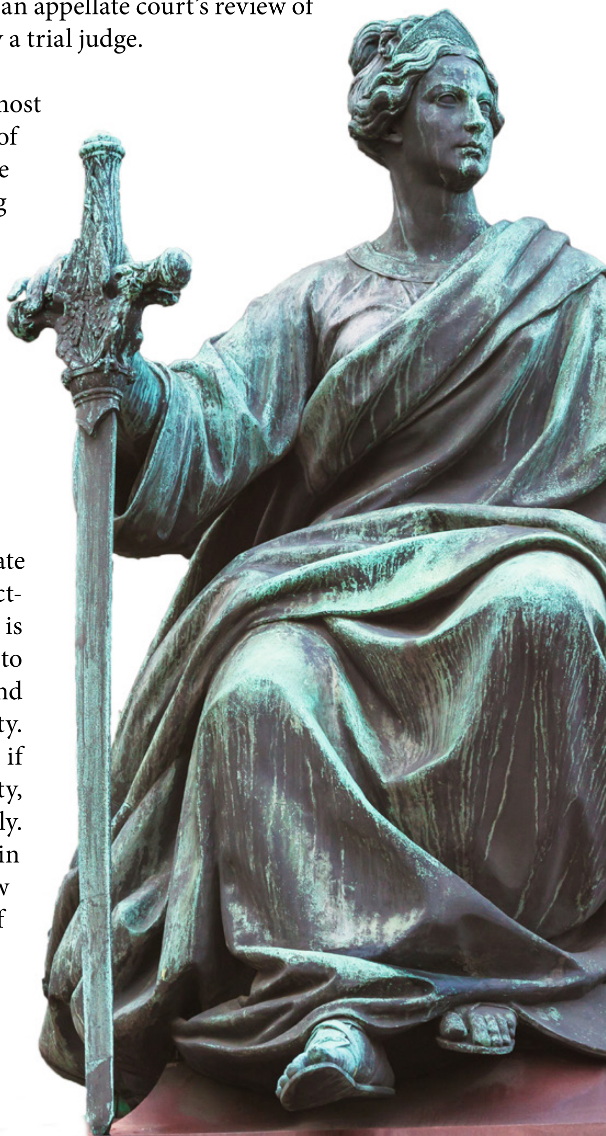
- ✯ Whether a court of appeals will reverse a trial court decision turns in large part on the standard that the appellate court uses to review the order. For example, if the court of appeals will reverse a trial court order only if it was clearly wrong, then it won't be enough to show that, on balance, the trial court was wrong.

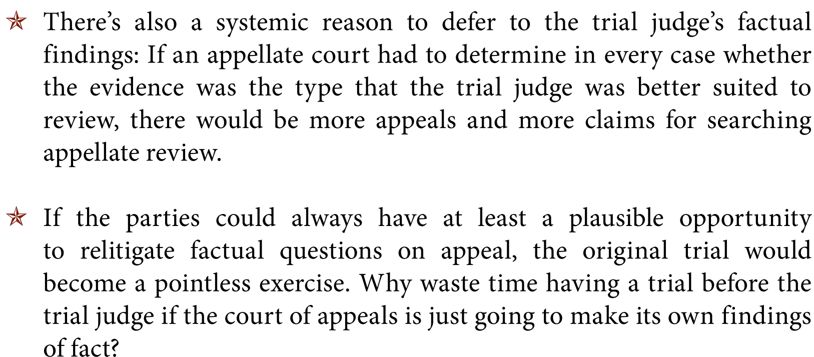
- ✯ The various standards of review require appellate courts to exercise different degrees of independent judgment as they review the decisions made by lower courts. We'll now consider the standards of review that appellate courts apply, focusing in particular on when and why appellate courts defer to trial court decisions.

- When an appellate court defers to a decision, it doesn't try to answer the question independently. Instead, it treats the trial court's answer as presumptively correct and asks whether there's some particularly good reason to reverse it. A common situation involving deference of this type is an appellate court's review of findings of fact made by a trial judge.

- In federal court and in most state systems, a court of appeals won't reverse a trial judge's finding of fact simply because it would have reached a different conclusion based on the evidence. Instead, it will reverse a trial judge's factual finding only if it was clearly erroneous.

- One reason appellate courts defer to fact-finding by trial courts is that a trial court gets to observe the witnesses and gauge their credibility. The trial judge can see if the witnesses look shifty, or are sweating profusely. The appellate judges, in contrast, can only review the written transcript of the testimony.





- ✯ There's also a systemic reason to defer to the trial judge's factual findings: If an appellate court had to determine in every case whether the evidence was the type that the trial judge was better suited to review, there would be more appeals and more claims for searching appellate review.

- ✯ If the parties could always have at least a plausible opportunity to relitigate factual questions on appeal, the original trial would become a pointless exercise. Why waste time having a trial before the trial judge if the court of appeals is just going to make its own findings of fact?

QUESTIONS OF LAW

- ✯ There's also no reason to think that trial judges are better than appellate judges at discerning the law. In fact, the opposite might be true. A trial judge might never have encountered a particular type of case before; the court of appeals, which hears appeals from all of the trial courts in the jurisdiction, will likely have some familiarity with it.

- ✯ In addition, in our system, trial courts are bound by the decisions of appellate courts in their jurisdiction, but not vice versa. This means that the court of appeals is the most sensible actor to interpret the law and to ensure that it's consistently applied. This makes trial court conclusions of law very different from their findings of fact.

- ✯ For these reasons, appellate courts generally review a trial court's conclusions of law de novo, or anew. In other words, appellate courts don't defer to trial court conclusions of law. Instead, they resolve legal questions according to their best judgment, regardless of what the trial judge thought about the issue.

- ✯ Any time appellate courts review something de novo, there's an increased incentive for the party who loses in the trial court to appeal. You can imagine that there might be some concern that parties who lose on legal questions in the trial court will get two bites at the apple. But this typically isn't the case.

- ✯ Once the court of appeals announces a legal standard, the court of appeals and the trial courts below it will be bound by the standard in future cases. This is the doctrine of stare decisis, from the Latin for "to stand by things decided." So there's little incentive for litigants to appeal trial court conclusions of law when they follow precedent.

JURY DETERMINATIONS

- ✯ Appellate courts are particularly deferential to decisions made by juries. In part, this is because juries never decide purely legal questions. They decide questions of fact, and they apply the law to the facts based on instructions from the judge. Jurors also have the opportunity to see the witnesses and asses their demeanor.

- ✯ The Seventh Amendment to the U.S. Constitution provides not only that the right to a jury trial shall be "preserved," but also that "no fact tried by a jury" shall be "otherwise re-examined in any Court of the United States, than according to the rules of the common law."

- At a minimum, this language means that appellate courts must be sensitive to the importance we assign to fact-finding by the jury. But it also indicates that appellate courts can review jury decisions if the review is of something other than fact-finding, or if the review is consistent with traditional, common law approaches to reviewing jury decision-making.

- Although courts of appeals probably can't directly review jury determinations, they can review decisions by trial judges granting or denying motions for judgment as a matter of law. And because those decisions raise questions of law, courts of appeals review them de novo.

Suggested Reading

- Estreicher and Sexton, "A Managerial Theory of the Supreme Court's Responsibilities."
- Najam, "Caught in the Middle."

Questions to Consider

- Should a defendant always be permitted immediately to appeal a trial court's denial of a motion to dismiss for lack of personal jurisdiction?
- Should Congress require the Supreme Court to hear certain types of cases—or prevent it from hearing others?

Torts

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Torts

Torts are part of everyday life. Car accidents, slip-and-falls, medical malpractice, dangerous products, and harmful pharmaceuticals can all result in what the law calls a tort, or private wrong. In a tort case, the defendant is accused of behaving badly and causing some kind of injury to the plaintiff, and is potentially liable for damages.

In this course, we cover the fundamental concepts and controversies that underlie the American tort system. We begin with the core of torts—the negligence claim—and break it down into its constituent parts. To recover for negligence, a plaintiff must prove that the defendant had a duty to exercise reasonable care but breached that duty, and that the breach caused damage to the plaintiff. Probing each of these elements, we encounter all kinds of complexity. For example, while we all have a duty not to harm others, do we have a duty to affirmatively help someone in need? How do we determine what constitutes reasonable care? Is the care expected of the average person the same as that expected of the young, the aged, or the disabled? What does it mean for a defendant to "cause" an injury? Can we infer causation? What happens if the damage caused is bizarre and wholly unexpected?

After fleshing out the basic negligence claim, the course explores other legal complications. For example, what happens when there are multiple defendants, or when the tort is committed by the defendant's employee? What happens when the plaintiff is also negligent, or was aware of the risks associated with the defendant's activity? How does such contributory negligence or assumption of risk affect the plaintiff's claim?

Negligence forms the baseline rule in torts, and in negligence claims, there is no liability without fault. But there are exceptions where tort law imposes strict liability, holding the defendant liable for simply causing the damage, regardless of fault. We first examine two pockets of strict liability—one involving the ownership of wild animals, and the other involving so-called ultrahazardous activities, like blasting. We then turn to the largest category

of strict liability, modern products-liability law. The course looks at the historical rise of strict products liability, the reasons for imposing strict liability in the product context, and the current state of the law. Finally, we discuss punitive damages, a hot-button topic with eye-catching dollar values and plenty of critics.

All along the way, the course will challenge you with the philosophical and policy questions that underlie tort law. Should the baseline rule be negligence, or should it be strict liability? In other words, should the defendant only have to pay if he is at fault? What is the proper role of the jury in our judicial system, and how much judicial supervision of jury verdicts is desirable? In developing tort law, should we prefer bright-line rules, which are easy to apply but rigid, or should we prefer standards, which are flexible and fact-specific, but require considerable discretion?

Finally, throughout the course, we will cover some of the most famous cases from law school, the old chestnuts that all lawyers share as part of their common vocabulary. And because fact is often stranger than fiction, you will hear some remarkable and memorable tales. From amusement park rides to unruly fires, hunting accidents to drunken sailors, exploding Coke bottles to pet tigers, the study of torts is chock-full of crazy stories.

In everyday life, the world of torts is practically unavoidable. Whether it's late-night television commercials or billboards promising a cash settlement, class action notices or product recalls you receive in the mail, or an unfortunate fender bender on Fifth and Main, torts are everywhere. When you are finished with this course, you'll have a better understanding of what tort law is really all about, and why, warts and all, torts remain a critical part of our judicial system. ▪

Lecture 1

THE CALAMITOUS WORLD OF TORT LAW

Tort law is the law of everyday life, involved in everything from routine car accidents to multimillion-dollar products-liability cases. This lecture provides an overview of this important area of the law, with particular emphasis on the mechanisms by which tort law changes over time to account for developments in politics and society.

HISTORICAL PERSPECTIVE

- Change typically happens very slowly. The tort law of today is most likely going to be the tort law of tomorrow, as well as the tort law 10 years from now. But change does happen. It's important to keep in mind that the law doesn't represent some kind of universal or unchanging truth.

- One great example of the evolution of tort law is found in the tension between negligence and strict liability. The idea of negligence is that the defendant must be at fault before the defendant is liable for damages. In contrast, under strict liability, as long as the defendant caused the plaintiff's harm, the defendant is liable. No fault is necessary.

- Prior to the 19th century, the dominant rule in torts was strict liability, not negligence. If you caused harm, you had to pay for it, regardless of whether you were at fault. Only in the mid-19th century did tort law experience the revolution that replaced strict liability with negligence.

- Scholars have proposed many theories for why negligence replaced strict liability as the guiding principle of modern torts. Two of the more interesting ones point to the key societal change in mid-19th century America: industrialization.

- One theory is that as the United States shifted from a more sparsely populated agrarian society to a more crowded industrial one, the likelihood of joint accidents increased considerably. As such cases became more common, negligence wove its way in legal discourse and consciousness.

- The second theory is a more controversial one, with political and ideological overtones. Professor Morton Horwitz famously proposed that negligence arose as a subsidy to industrial interests. In the 19th century, incidents involving trains were frighteningly common. If you are a railroad company operating under a strict liability regime, you pay for all of these harms.

- Under a negligence regime, railroad operation becomes considerably cheaper. As long as you take reasonable precautions, the liability disappears. Under a negligence regime, you only pay if you behaved unreasonably. That difference in liability payouts becomes the subsidy.

- Regardless of the reason, negligence soon replaced strict liability as the dominant rule. Tort law changes with the times, however, and the pendulum would eventually swing back. In the 1960s, a series of products-liability cases in the California Supreme Court would usher in the return of strict liability—arguably a response to the modern consumer economy.

COMMON LAW

- Unlike many other areas of modern American law, including criminal law, torts remains a common law field. That means that most of tort law is judge-made law, and it evolves and develops through cases. Judges decide individual cases using reason, experience, and precedent—previously decided cases.

- ☆ From time to time, attempts are made to organize and systematize this patchwork of cases. For example, a torts scholar may try to give coherence to an area of torts in a law review article or a treatise. Sometimes, organizations like the American Law Institute assemble groups of judges, lawyers, and scholars to restate the law of torts in a single document.

- ☆ None of these systemization efforts are legally binding. The article, treatise, or restatement is merely persuasive authority, resting only on the strength of its reasoning. Future courts must adopt them before they have the full weight of law. And even if a court adopts a particular provision, that precedent is only binding authority with regard to the one specific matter at issue in the case.

- ☆ Courts do things one case at a time. A common law area like torts therefore differs significantly from a statutory field such as criminal law, where Congress or a state legislature may pass the entire body of governing law all at once, or periodically make broad sweeping amendments to the field.

- ☆ This structure means that tort law typically evolves through an extremely gradual and accretive process. Cases tend to follow previous cases, but sometimes will create exceptions or strike off in subtly different directions. Tensions within doctrines or between doctrines build over time, until they are resolved in notable cases, which then anchor the next stage of development.

- ☆ While notable cases in tort law are incredibly important, they are the exception, not the rule. They are famous because they are aberrational. The typical tort case is far more mundane. Often, the law is so well established and stable that the parties settle, or at most go to a jury verdict. Appeals and fancy new legal arguments aren't even really on the table.

REFORM EFFORTS

- ✯ The fact that most of tort law is judge-made does not mean that it has to be that way. For the most part, legislatures have the authority to displace the common law of torts with a comprehensive statutory scheme. Legislatures have not done so thus far, but they certainly could.

- ✯ There are a few areas over the last few decades in which legislatures have made forays into tort law, often in the service of tort reform. Although the phrase "tort reform" suggests a somewhat neutral stance, tort reform almost always refers to a distinct policy agenda founded on the belief that plaintiffs are abusing the tort system and recovering excessive amounts from defendants.

- ✯ Tort reform is a pretty vague category, and it can expand to encompass many things. For example, over the last few decades, courts have heightened the scrutiny given to expert witnesses used in tort cases. In a sense, this change advanced the tort reform agenda, because it created obstacles for plaintiffs. In its traditional sense, however, "tort reform" is a phrase applied to legislative efforts.

- ✯ One well-known tort reform effort involves damages. The concern is juries can make arbitrarily large awards when dealing with vague or ambiguous injuries, such as pain and suffering. Many legislatures have therefore imposed damage caps, at least in certain areas like medical malpractice. The precise limits vary by state, but they're often in the range of $250,000 to $750,000.

- Another ongoing legislative tort reform effort focuses on class actions, which enable tort plaintiffs to join forces and aggregate their claims into a single lawsuit. Because of their large size, class actions pressure defendants to settle, which means that they are subject to abuse. For this and other reasons, federal legislators have tried to make class actions more difficult to bring. Such efforts have generally been unsuccessful thus far.

Suggested Reading

- George and Sherry, *What Every Law Student Really Needs to Know.*
- Horwitz, *The Transformation of American Law.*
- Huber, *Liability.*

Questions to Consider

- Negligence and strict liability both hold intuitive appeal as the baseline rule for torts. Today, however, negligence—no liability without fault—is the governing principle of modern American tort law. Is negligence the right default rule for torts? Why or why not?
- The common law that traditionally governs tort claims represents a case-by-case, bottom-up process of legal development—a stark contrast from the holistic, top-down process that is a hallmark of statutory frameworks. What are the advantages and disadvantages of each approach? Do you agree that tort law is best developed via the common law?

LEGAL DUTY TO OTHERS

The concept of duty is a significant one in tort law. All people have a duty not to actively harm another person. As a general rule, however—and regardless of what religious and ethical authorities may advise—there is no legal duty to affirmatively prevent harm. In this lecture, you'll learn about the common law basis for this rule, efforts by state legislatures to change it, and some well-established exceptions to the rule.

MISFEASANCE AND NONFEASANCE

- Negligence is a critical concept in many tort suits. A negligence claim is the basic claim made by a plaintiff who has been injured by someone accidentally. To prevail on a negligence claim, the plaintiff needs to demonstrate several things; the first of these is that the defendant had a duty toward the plaintiff. To establish duty, the plaintiff needs to show that the defendant had an obligation to exercise some kind of reasonable care in his behavior.

- In talking about duty, it's useful to separate two types of wrongful conduct: misfeasance and nonfeasance. Misfeasance is an act that is done improperly and thus results in harm. If you run a red light and hit a pedestrian, that is a misfeasance, because you have driven improperly and caused harm to the pedestrian.

- Nonfeasance, by contrast, is the failure to do something that would have prevented harm. Stepping over a baby that's lying in a puddle without helping is a nonfeasance. It wasn't a direct act that caused the harm; rather, it was your failure to act. The reason for distinguishing misfeasance from nonfeasance is that the law requires different levels of duty with respect to each.

- For misfeasance, the rule is straightforward: You always (or nearly always) have a duty to refrain from misfeasance. In other words, you have a duty to refrain from acting improperly or else. The more difficult area is nonfeasance. Under the common law, there is no liability for nonfeasance. This is often referred to as the no-duty-to-a-stranger rule.

- Over the years, scholars have offered a number of justifications for the no-duty-to-a-stranger rule. One of the most powerful rationales draws on the American preference for liberty, embodied in the idea of rugged individualism. We are simply responsible for ourselves. Your right to swing your fist ends at another person's nose.

the more practical problem of slippery slopes. If there were a duty to aid others, where would it end? Where would charity end, for instance? A strong affirmative duty to help would mean that, as a legal obligation, you would have to forgo your next fancy dinner—or perhaps any food at all beyond your basic needs—so that money could help feed the hungry.

- Consider the famous Kitty Genovese case. As *The New York Times* reported it back in 1964, "for more than half an hour, 38 respectable, law-abiding citizens in Queens watched a killer stalk and stab [Genovese]." After an initial attack, neighbors heard her cries for help, but no one contacted the police. The killer later came back to finish the job.

- Now consider the case through the lens of affirmative duties. If the law created an affirmative duty to help, who would be legally responsible to Kitty Genovese? All 38 neighbors reported by *The New York Times*? What about other folks in the neighborhood? It's hard to pin blame on any one specific person.

- For all the problems of affirmative duties, the no-duty-to-a-stranger rule also just seems wrong. Part of it may be moral—in certain situations, failing to help just seems reprehensible. But from a public policy perspective, it's also plain inefficient. It costs you nothing, or very little, to throw someone a life preserver, or to call the police. Yet the benefits of saving someone's life are profound.

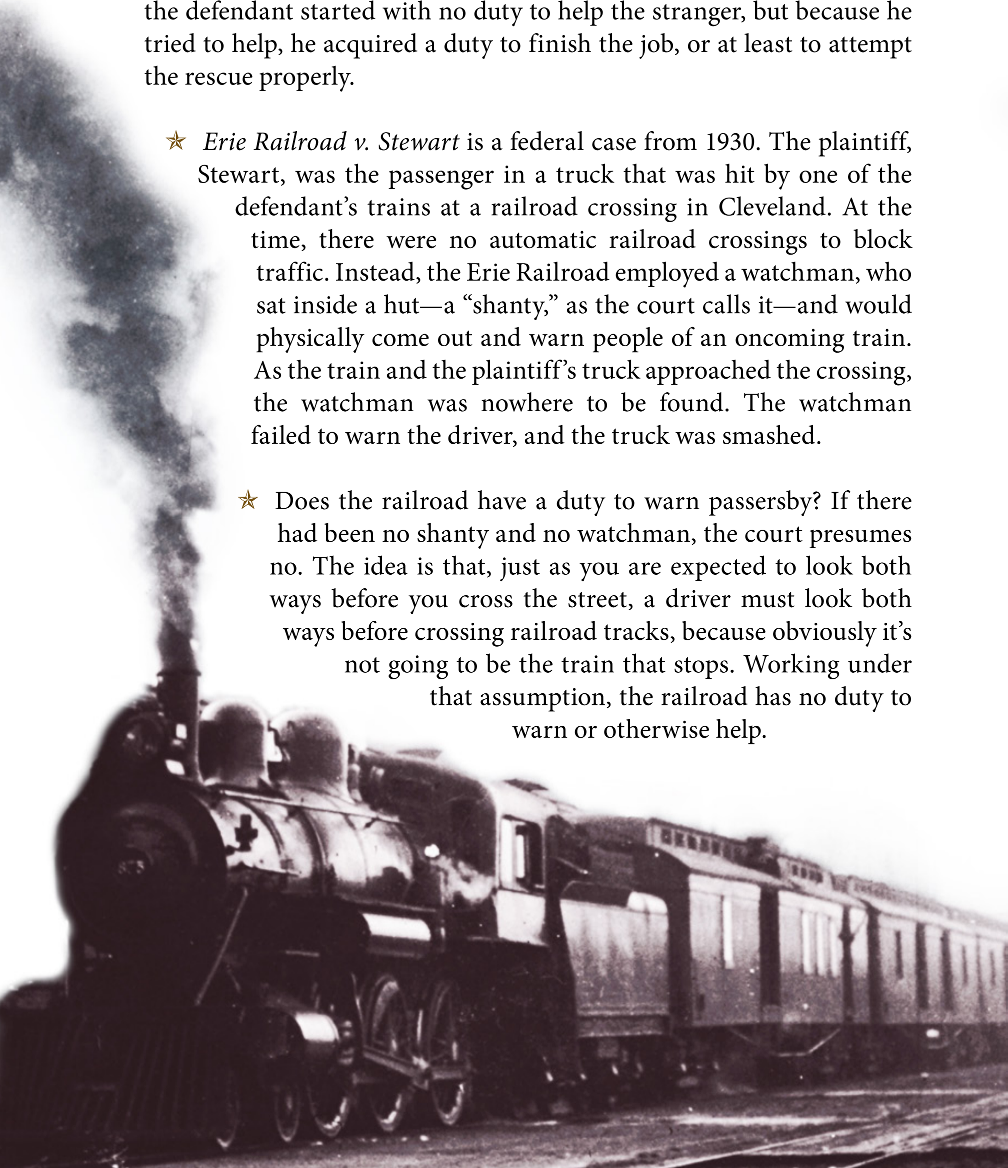
- Some states have passed what are known as Good Samaritan laws, which modestly try to encourage Good Samaritan–type behavior. For example, some states protect Good Samaritans from liability if they make an earnest effort but mess up. Others, like Vermont, impose modest fines for failing to help. Generally, however, the victim still can't sue the so-called Bad Samaritan in tort for full damages. The no-duty-to-a-stranger rule has had remarkable staying power.

GRATUITOUS UNDERTAKINGS

- There are, however, exceptions to the basic rule governing nonfeasance. The first set involves what can best be described as rescues gone bad—sometimes called gratuitous undertakings. These are cases in which the defendant started with no duty to help the stranger, but because he tried to help, he acquired a duty to finish the job, or at least to attempt the rescue properly.

    - *Erie Railroad v. Stewart* is a federal case from 1930. The plaintiff, Stewart, was the passenger in a truck that was hit by one of the defendant's trains at a railroad crossing in Cleveland. At the time, there were no automatic railroad crossings to block traffic. Instead, the Erie Railroad employed a watchman, who sat inside a hut—a "shanty," as the court calls it—and would physically come out and warn people of an oncoming train. As the train and the plaintiff's truck approached the crossing, the watchman was nowhere to be found. The watchman failed to warn the driver, and the truck was smashed.

        - Does the railroad have a duty to warn passersby? If there had been no shanty and no watchman, the court presumes no. The idea is that, just as you are expected to look both ways before you cross the street, a driver must look both ways before crossing railroad tracks, because obviously it's not going to be the train that stops. Working under that assumption, the railroad has no duty to warn or otherwise help.



- In the *Erie* case, however, the railroad suckered the driver into the accident with the train. If there's a shanty and the watchman is standing outside waving, there's a train coming. If there's no watchman, then it's safe. The railroad can't then say that because they weren't obligated to provide the watchman to start, it's fine if they provide an inadequate one and trick drivers into relying on them.

SPECIAL RELATIONSHIPS

- The other large set of exceptions to the no-duty-to-a-stranger rule are cases in which the defendant has a special relationship with the plaintiff. In some instances, your job might give you an affirmative duty to help a stranger, based on your contract or your position of authority. A lifeguard, for example, can't just watch someone drown; he has an affirmative duty to save a swimmer in distress.

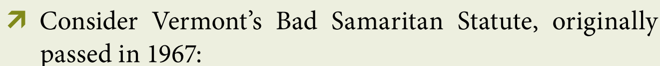
- Another special relationship involves common carriers—boats, buses, trains, and other forms of transportation available to all comers. A ship captain, for example, has a duty to the ship's passengers. If the ship is sinking, the captain can't just jump ship and let the passengers fend for themselves. Sadly, there have been several high-profile cases of ship captains doing precisely that.

- Lifeguards and ship captains are pretty obvious and relatively uncontroversial cases involving special relationships. The affirmative duty is intuitively part of their positions of authority. Somewhat more complex and controversial, however, are more modern cases that push the envelope on special relationships, often by creating affirmative duties to protect victims from criminals and other third parties.

Suggested Reading

- Erie Railroad v. Stewart.
- Kline v. 1500 Mass. Ave. Apartment Corp.
- Latane and Darley, *The Unresponsive Bystander.*
- Yania v. Bigan.
- Zelenko v. Gimbel Bros.

Questions to Consider



- Consider Vermont's Bad Samaritan Statute, originally passed in 1967:

  > § 519. Emergency medical care
  >
  > (a) A person who knows that another is exposed to grave physical harm shall, to the extent that the same can be rendered without danger or peril to himself or without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others.
  >
  > * * *
  >
  > (c) A person who willfully violates subsection (a) of this section shall be fined not more than $100.00.

  Should such a statute be on the books? Is there any value to such a law given that the fines are no more than $100?

- The affirmative-duty cases, and the duty-to-rescue cases in particular, illustrate the sharp contrast between moral obligation and legal obligation. Is such a gap between legal acts and moral acts desirable? Why or why not?

- Consider a famous hypothetical first proposed by Lord Macaulay in discussing the Indian Penal Code in the 19th century: Suppose a surgeon is the only person who can perform a life-saving operation, but the operation requires extensive travel across the continent. If the surgeon refuses and the patient dies, is the surgeon responsible for the death? Why or why not? What if the surgeon would be fully compensated? What if the proposed operation is at the hospital down the street?

Lecture 3

REASONABLE CARE AND THE REASONABLE PERSON

Tort law generally requires that defendants take reasonable care. In this lecture, you'll learn how the concept of reasonable care is defined. You'll also examine the complications associated with the standard of reasonable care. Finally, you'll compare the standard to a more modern formulation based on cost-benefit analysis.

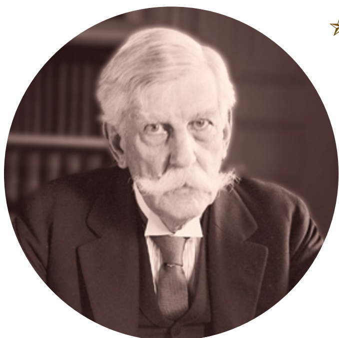
THE REASONABLE PERSON

- To determine reasonable care, the legal system often invokes the concept of the reasonable person. Who this reasonable person is, however, is a bit mysterious. First of all, the reasonable person is not the average person. In fact, it's probably not anyone you know. Rather, the reasonable person is a kind of mythical being that we all aspire to be—or at least that tort law would like us to be.

- The reasonable person never leaves a lit stove unattended, for example. He never fails to lock the door. He shovels his driveway when it snows, and salts it when it's icy. The reasonable person never talks on the phone while he's driving, never daydreams while riding a bicycle, and certainly never plays Pokémon Go while walking down the street. The reasonable person takes medication at the correct interval and dose, and only when directed by a doctor.

- If we were all reasonable people all of the time, there would be fewer accidents and injuries in this world. Perhaps there would still be some, but they would be far, far fewer in number. And tort law would be far less interesting.

- One anomalous thing about the reasonable-person concept is that, by and large, it is what is known as an objective standard. By objective, what we mean is that the expected amount of care is set from the outside, without regard to the individual characteristics of a particular defendant in a particular case. This is in contrast to a subjective standard, where we would care about what the defendant was thinking, or whether he was trying his best.



☆ Justice Oliver Wendell Holmes offered a good explanation for the objective standard: "If … a man is born hasty and awkward, is always having accidents and hurting himself or his neighbors, no doubt his congenital defects will be allowed for in the courts of heaven but his slips are no less troublesome to his neighbors then if they sprang from guilty neglect." In other words, well-meaning but careless defendants still cause damage.

☆ Another reason to prefer objective over subjective standards has to do with proof or administrability. Reasonable care is a pretty clear target. It is some average level of care that we expect out of everyone, and jurors can assess this kind of standard without getting inside the defendant's mind. Subjective standards, by contrast, are far more difficult to apply. For example, the defendant may claim that he was trying his hardest, but he has plenty of reasons to lie. Only he knows what was going on inside his head.

ABILITY AND DISABILITY

☆ Another complication with the traditional approach is whether the objective standard courts apply is universal. Is the reasonable-person standard a single standard that applies to everyone, or does the standard change to account for a defendant's individual characteristics? This turns out to be a somewhat complicated area, and the choices made are not always consistent or easily explained.

☆ As a general rule, the law will account for physical disabilities. As one leading treatise notes, "A shorter person or an unsighted person is not expected to see and avoid dangers that could be perceived by a taller or sighted person." Similarly, a driver who suddenly becomes incapacitated by a heart attack or a seizure is not expected to behave as a person not suffering from those conditions.

- Note, however, that such individualization does not mean that a person suffering from a disability can do whatever he or she wants. A reasonable blind person will take special precautions when crossing an intersection. If a blind defendant fails to do so, she will be found negligent. A person with a history of sudden seizures might reasonably choose not to drive a car. So while a defendant who suffered a seizure for the first time might have no liability, one with a continuing medical issue might be held responsible.

- Tort law tends to be far more skeptical about mental or psychological impairments. In fact, this skepticism against nonphysical impairments extends all the way to insanity. Although there are some limited exceptions, the general rule is that the insane are still liable for their torts.

- Some people accuse the legal system of holding an antiquated view that physical impairments are somehow more legitimate than mental ones. There is a more charitable interpretation, however: At its core, negligence is about the defendant's judgment, and it can be difficult to determine whether the defendant's dangerous actions are caused by a moral failing or a mental disability. This isn't a problem when individualizing for a person's height, for example.

defendant has enhanced abilities, or a certain expertise? Just from the standpoint of common sense, you would expect that the law would require an expert to demonstrate greater care than the average person. If you are an orthopedist treating someone's broken ankle, surely society would expect you to apply your full expertise. It'd be downright silly to hold you to the standard of a layperson.

☆ Consistent with this common-sense approach, a defendant's specialized skills and knowledge are indeed taken into account to determine whether he behaved as a reasonable person. A lay defendant helping a friend with a broken ankle is expected to exercise only the understanding of a reasonable layperson; an orthopedist, however, is expected to use the skills and knowledge earned through years of experience.

INFANCY AND AGEDNESS

- With respect to age, the law does adjust the reasonable-person standard—at least for infancy. But why? Is it that the law cherishes the young more than the elderly? One could argue that recognizing infancy but not agedness in adjusting the reasonable-person standard is precisely backward from the law's position on disability. The reduced judgment of an infant seems similar to a mental disability. Agedness, by contrast, gives rise to physical disabilities.

- Perhaps it appears a bit backward in the abstract, but the rule may make a bit more sense when put into practice. Infancy does arguably impair judgment, and is thus more like a mental disability. But infancy is also easily categorized. Seven-year-olds are quite different from 12-year-olds, for example. And while there is always a spectrum, 12-year-olds are more like each other than like seven-year-olds. So infancy is easy to administer.

- Additionally, torts involving a child's negligence often involve some advanced warning. Children at play are seen—as when you drive through a residential neighborhood or near a playground. The expectation is that adult drivers will adjust their level of care to account for wayward children.

- ✯ The effects of advanced age are far less uniform. The reasonable 77-year-old is not very well defined. Besides, rather than using age as a poor proxy, we can directly individualize for an elderly defendant based on his specific physical disabilities.

- ✯ Approximately half of U.S. jurisdictions have developed an exception for children who are engaged in adult activities—driving a car, for example. In these jurisdictions, if the child participates in an adult activity, the normal adult standard will apply. What constitutes an adult activity? That's where things get a little complicated.

- ✯ There are some obvious childlike activities, like running, throwing balls, and riding bicycles (although adults sometimes do those things too). There are also obvious adult activities, like driving a car, or operating heavy machinery. But then there are the tricky activities in the middle. What about operating a Jet Ski, for example? It's certainly a motorized vehicle, but it's still primarily recreational.

- ✯ Some courts have tried to construct principles for defining an adult activity. Often these principles involve the dangerousness of the activity, whether it is motorized, or whether it requires a license. But these principles do not necessarily explain all the funny distinctions made. Case law indicates that driving a golf cart is not an adult activity, for example, but driving a speedboat is. Whether something seems like an appropriate activity for children would appear to depend a lot on a person's geographic region, socioeconomic class, and upbringing.

COST-BENEFIT ANALYSIS

- If you think the reasonable-person standard is too vague, or too dependent on intuition, a hypothetical cost-benefit formulation may be instructive and more appealing. This model comes from the law-and-economics movement, an attempt by some scholars to explain legal rules using economic principles. From an economic perspective, the reasonable person will take safety precautions as long as the cost of those precautions justify the benefits.

- This is all well and good as a theoretical matter. In practice, however, the average person quickly becomes uncomfortable with this kind of analysis. Putting a dollar figure on injuries is not only difficult, but may also seem disturbing or even downright offensive.

- Thus we're left between a rock and a hard place. To give the reasonable-person standard some rigor and predictability, we can tie it to cost-benefit analysis. And in practice, people do this kind of calculation all the time, whether formally or informally. If you make the tradeoff explicit, however, in some cases people may balk.

Suggested Reading

- Abraham, *The Forms and Functions of Tort Law.*
- American Law Institute, *Restatement (Third) of Torts.*
- Bolton v. Stone.
- Dobbs, *The Law of Torts.*
- Grimshaw v. Ford Motor Co.
- Roberts v. Ring.
- Robinson, *Criminal Law.*
- U.S. v. Carroll Towing Co.
- Vaughan v. Menlove.

Questions to Consider

- In October 2010, *The New York Times* wrote about two four-year-olds who collided with an 87-year-old woman while racing their bikes down a Manhattan sidewalk. The victim broke her hip and subsequently died. Should the children be held liable, and if so, under what standard? What are the best arguments on both sides?

- Should cost-benefit analysis inform (or indeed, replace) a jury's application of the reasonable-person standard? Do you agree with those that find Ford's behavior with the Pinto despicable? If you reject cost-benefit analysis, what sort of analysis is more appropriate?

Lecture 4

RULES VERSUS STANDARDS OF CARE

The alternative to a flexible, case-specific standard is what lawyers call a rule. Rules come from a variety of sources, including judges, legislatures, and industry practices. Substituting a rule for a standard—tort law's reasonable-person standard, for example—comes with both advantages and disadvantages. In all cases, however, rules serve to take power and discretion away from the jury.

LEGISLATIVE ACTION

- Rules offer an alternative to flexible, case-by-case legal standards. But where do we find the content for the rules themselves? One source is the legislature. To being with, the legislature has the authority simply to supplant—that is, replace entirely—traditional tort law, including the reasonable-person standard applicable in many tort cases.

- Recall that tort law traditionally evolves through the common law process. Under the common law, judges develop the law through the cases they decide. If the legislature doesn't like the common law rules, however, it can replace them by passing statutes and regulations to that effect.

- One familiar context for legislatively created tort claims is employment discrimination. Under the common law of torts, there is no claim based on employment discrimination. The passage of the federal Civil Rights Act, however, created just that—an entirely new tort claim for employment discrimination. This means that when plaintiffs file employment discrimination suits, it is the Civil Rights Act—and not the common law—that they're invoking.

NEGLIGENCE PER SE

- Another way that legislatures influence tort law is through something known as negligence per se. Negligence per se is a legal doctrine that directly affects the reasonable-person standard, while still operating within the confines of the common law.

- Consider *Martin v. Herzog*, a case decided in 1920 by New York Court of Appeals judge—and future U.S. Supreme Court justice—Benjamin Cardozo. As in many tort cases, the facts of *Martin v. Herzog* begin with an automobile accident. The plaintiff and her husband had been driving at night when their car, which had no lights, was struck by a car driven by the defendant. The plaintiff was injured; her husband was killed.

- The plaintiff sued for damages, alleging negligence on the part of the defendant. The defendant asserted that the absence of lights on the plaintiff's car was evidence of contributory negligence—i.e., that the plaintiff was partly to blame for the accident, and should therefore be barred from recovering damages.

- Cardozo agreed, but took things one step further: He wrote that because there was a statute requiring the use of headlights, the plaintiff's failure to have headlights was not merely evidence of negligence, but rather negligence in itself. And that's precisely the meaning of the term "negligence per se." In Cardozo's view, the statute passed by the legislature obviated the need for an individualized decision by the jury.

- Note that *Martin v. Herzog* still involves common law negligence. The legislature didn't create a new, separate tort claim for driving without headlights. It didn't say that someone violating the statute could be sued for damages. It just required that people use headlights.

- But if no new tort claim has been created, how has the legislature influenced tort law? The main question is still what a reasonable person would do. And according to Cardozo, a reasonable person obeys the law. Because it is unreasonable to defy the legislature, the regulation has now displaced the jury's judgment.

- Negligence per se effectively replaces a standard with a rule. Under the reasonable-person standard, the jury decides on a case-by-case basis whether particular actions are reasonable. Under negligence per se, by contrast, a regulation defines what is reasonable. This regulation provides the notice, uniformity, and predictability that rules provide.

INDUSTRY CUSTOM

- Another way tort law can create greater predictability and uniformity is for courts to focus on custom—specifically, the regular or typical practices of an industry or field—to determine the standard of care.

- Assuming that an industry custom exists, it's going to be much more rule-like than the reasonable-person standard. Customs are consistently observed, so defendants have ample notice. Customs are also stable, and don't fluctuate with the whim of a jury. So if you think about it, focusing on custom takes discretionary power away from the jury and gives it to the relevant industry or profession.

- Industry custom plays a very limited role in torts, however. To understand why, let's consider a classic case from the 1930s. Commonly known to as *The T.J. Hooper*, the case was decided by a judge named Learned Hand, a brilliant and influential jurist with a prominent place in the history of American law.

- The facts of *The T.J. Hooper* begin with a tugboat towing a coal-laden barge up the coast of the Atlantic Ocean. In the age before satellites and modern communications, ships were always at risk of unexpected storms and hurricanes. And as you might imagine, an ungainly barge filled with coal does not do well in rough seas.

- Just emerging on the market at the time were radios. These radios allowed tugboat pilots to hear twice-daily weather reports, obviously an important source of information and warning. Radios, however, were not yet in widespread use. They were curiosities that were, as Judge Hand described them, "partly a toy," and they were typically owned personally by the tugboat pilots.

- The tugboat *T.J. Hooper* did not have a working radio. During a storm off the coast of New Jersey, the shipment of coal was lost. The owner of the coal barge sued, arguing that the loss was the result of negligence on the part of the tugboat company. If the boat had been equipped with a working radio, the plaintiff argued, the shipment of coal would surely have been saved.

- The question facing Learned Hand and the court was what to make of the industry custom—or in this case, the lack of custom—regarding the provision of radios. Judge Hand famously reasoned: "In most cases, reasonable prudence is in fact common prudence; but strictly it is never its measure." In other words, the reasonable-person standard and custom often coincide, but custom is not dispositive of what the reasonable person will do.

- The judge continued, writing that "a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages." In other words, it doesn't matter that most ships hadn't yet adopted radio technology; given the obvious benefits of the technology, the tugboat company should still have adopted it regardless of the custom in the industry.

- ✰ Learned Hand's opinion in *The T.J. Hooper* pretty much gutted the power of custom arguments in negligence cases. Yes, custom can be evidence of negligence or nonnegligence, but it is never the standard itself. Instead, juries are left to apply the reasonable-person standard independently.

- ✰ The primary justification for the decision in *The T.J. Hooper* is the rather obvious one given by Learned Hand: It's foolish to trust industry to self-regulate. Just because tugboat operators don't provide radios to their pilots doesn't mean that's the optimal rule. After all, radios are expensive, and if the tugboat companies are not liable for storms, they have no incentive to improve safety.

- ✰ Professor Richard Epstein challenges the wisdom of *The T.J. Hooper*, drawing a distinction between consensual activities and strangers. Epstein argues that when the parties agree to an activity, they have an implicit understanding about the expected level of care. Whatever the custom is, it is effectively subsumed into the contract.

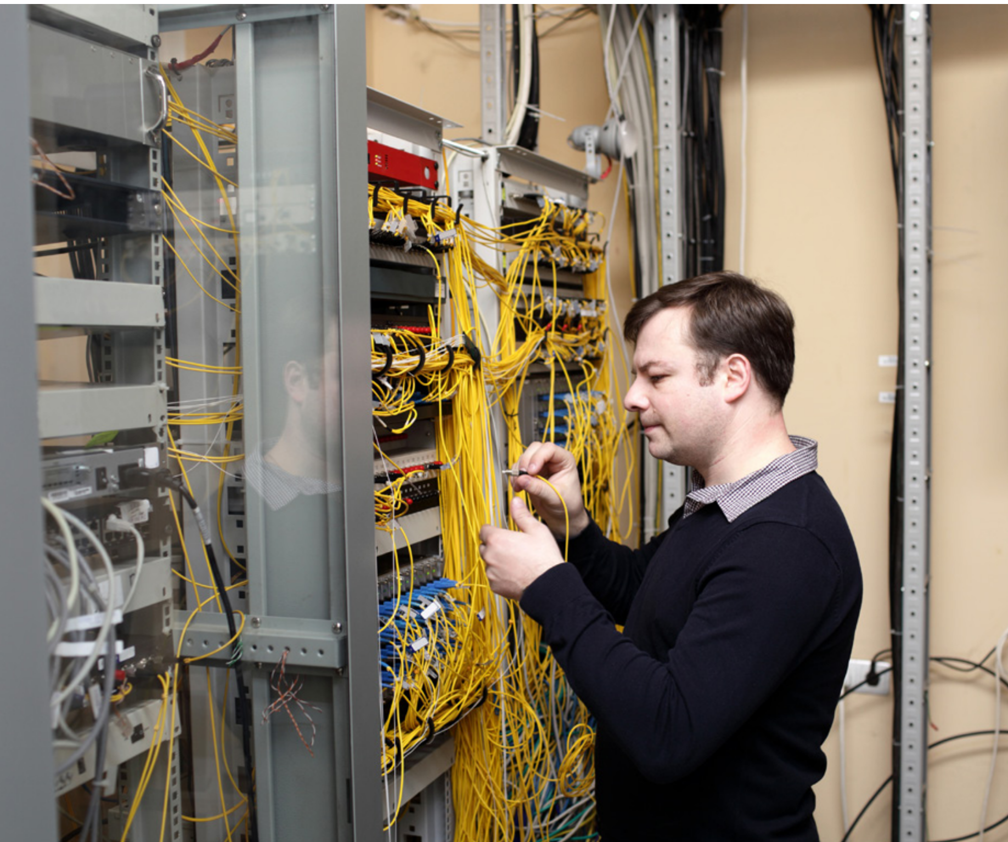
- ✰ In *The T.J. Hooper*, the owner of the coal barge knew the situation with the radios, but went forward with the deal anyway. If the *T.J. Hooper*'s lack of a radio had bothered him, he could have gone with a different tugboat operator—and in fact, there was a company at the time that provided radios to all its pilots.

- ✰ Where custom does not work, however, is in interactions between strangers. If a pedestrian is hit by a delivery truck backing up, he won't care that the industry custom is not to have backup cameras. He hasn't agreed to anything, and he certainly never agreed to let the delivery company decide what constitutes reasonable care. He will want a jury to decide whether it's reasonable not to have backup cameras.

- ✰ The major exception to the rule in *The T.J. Hooper* is medical malpractice. In medical malpractice cases, custom rules. Depending on the jurisdiction, malpractice cases involving other types of professionals—attorneys, for example, or accountants—may also treat custom as dispositive.

- ✯ The best explanation for why doctors are treated differently has to do with professional expertise. Because medicine is highly specialized and technical, it's very difficult for a lay jury to determine what a reasonable person would do during heart surgery or a kidney transplant. Deferring to the medical profession takes advantage of its overall expertise, while also providing uniformity and predictability.

- ✯ This explanation is not without its flaws, however. There are other fields—computer programming, for example, or complex engineering design—where the jury also lacks expertise, and those fields don't get the benefit of a custom rule. And there are some types of medical care for which juries are perfectly capable of understanding the tradeoffs involved. Collusion is also a concern, as doctors may be inclined to protect their colleagues from scrutiny.



Suggested Reading

- Helling v. Carey.
- Kaufman, *Cardozo*.
- Martin v. Herzog.
- Polenburg, *The World of Benjamin Cardozo*.
- State v. Stanko.
- The T.J. Hooper v. N. Barge Corp.
- Vaughan v. Menlove.

Questions to Consider

- Should we abandon industry custom in medical malpractice cases in favor of the reasonable-person standard, and if so, why?
- In the case *Tedla v. Ellman*, the plaintiffs were hit by a car while walking along a highway. At the time, a statute required that pedestrians walk facing (against) traffic. The plaintiffs, however, had been walking with traffic, because there were far fewer cars on that side of the road. The jury found that the defendant driver was negligent. Should negligence per se have applied in deciding the issue of the plaintiffs' contributory negligence? How does this fact pattern fit into the debate over rules versus standards?

THE COMPLEXITIES OF FACTUAL CAUSATION

This lecture examines causation, focusing in particular on the concept of factual or scientific causation. While more empirically based and perhaps more susceptible to analytical scrutiny than other areas of tort law, factual causation still requires value judgments to be made in difficult cases. When that happens, reasonable people often disagree.

CAUSATION BASICS

- In order to recover on a tort claim, a plaintiff must show that the defendant owed the plaintiff a duty of reasonable care, that the defendant breached this duty, and that this breach of duty caused the plaintiff's harms or damages. With respect to causation, there are two distinct parts of the inquiry. The first of these is factual causation, also known as but-for causation.

- Factual causation is essentially a scientific inquiry. It asks whether the defendant contributed in some empirical way to the plaintiff's injury. The question usually asked to determine factual causation is whether the plaintiff's injury would have occurred in the absence of the defendant's allegedly negligent conduct.

- The second part of the inquiry into causation is legal causation, traditionally referred to as proximate cause. This is not a scientific inquiry, but rather a moral one: When are the defendant's actions sufficiently close to the plaintiff's injury that it is fair to hold the defendant accountable? Causal chains can be extremely long; legal causation asks where we should cut them.

- As described in a famous torts case, causal chains are like ripples in a pond. When you drop a rock in a pond, ripples emanate in all directions, changing the character of the pond in all directions forever. But it would be absurd to say that everything that happens in that pond forever after was caused by the rock. Similarly, a person is not responsible for every event that occurs after he takes a particular action, no matter how unreasonable that action may be.

DAUBERT V. MERRELL DOW PHARMACEUTICALS

- In ordinary tort cases, factual causation is fairly straightforward. The defendant leaves ice on his sidewalk; the plaintiff slips on the ice and breaks her leg. The defendant texts while driving and crashes his car into the plaintiff. But there are certain types of cases where factual causation is not so straightforward. Big-money toxic tort claims, often involving drug manufacturers and a host of plaintiffs, fall into this category.

- In 1993, the U.S. Supreme Court decided *Daubert v. Merrell Dow Pharmaceuticals*, arguably the most important case in modern tort law. *Daubert* was a case about a drug called Bendectin, a seemingly innocuous combination of B vitamins and an antihistamine that was used to treat severe morning sickness—also known as hyperemesis—in pregnant women.

- ✯ At issue in *Daubert* was whether Bendectin caused birth defects. Women who had taken Bendectin had babies born with birth defects, and the question that bedeviled courts was whether the women and their children were simply unlucky, or whether Bendectin was actually a teratogen, meaning a substance that increases the risk of birth defects.

- ✯ The importance of *Daubert* rests not in the rather specialized dispute about Bendectin and birth defects, but in what that dispute represented. For one thing, it represented modern, big-time, bet-the-company tort litigation involving hundreds of millions and sometimes billions of dollars. Many cases of this type are massive products-liability cases involving pharmaceuticals or chemicals, like Bendectin, and an enormous number of potential plaintiffs.

- ✯ Like many products-liability cases, *Daubert* involved tricky questions of causation, which meant that expert testimony was required. How can we know whether Bendectin causes birth defects? We have to rely on testimony from doctors and other medical experts. Whether those experts—who are paid by the parties—can reliably establish causal connections thus becomes the linchpin of the entire litigation.

- ✯ The defendant in the case, Merrell Dow, offered compelling evidence suggesting that Bendectin was not associated with an increased risk of birth defects: epidemiological studies that compared women who had taken Bendectin with women who had not. Merrell Dow ultimately won the case; today, the scientific consensus—based on those same epidemiological studies—is that Bendectin does not cause birth defects.

INDETERMINATE CAUSES

- ✮ Toxic torts are not the only area of tort law in which complex questions about factual causation lurk. Another difficult category involves what are referred to as indeterminate causes. In indeterminate-cause cases, the question of factual causation is often more philosophical than scientific.

- ✮ The classic case of indeterminate cause is *Kingston v. Chicago & Northwest Railway*, decided by the Wisconsin Supreme Court back in 1927. In *Kingston*, there were two fires. One started to the northwest of the plaintiff's property and was of unknown origin. The other started to the northeast of the plaintiff's property and was caused by the defendant's train. The two fires combined as they approached the plaintiff's property, and the combined fire reduced the property to cinders.

- ✮ The puzzling aspect of factual causation in *Kingston* is that both fires were sufficient causes. Either fire, acting alone, was fully capable of spreading south and burning down the plaintiff's property. But here's the kicker: Because both fires are sufficient causes, neither fire is a but-for cause. Under the traditional definition, then, neither fire would be considered a factual cause of the plaintiff's loss.

- ✮ Under the conventional but-for causation requirement, the plaintiff loses. But that result clearly violates our sense of justice. At least one defendant, and perhaps two, started a fire that could have independently burned down the plaintiff's property. The plaintiff's house was destroyed by fire. It doesn't seem right that he wouldn't be able to recover his losses in court.

- ✮ The Wisconsin Supreme Court must have felt a similar sense of injustice. In deciding *Kingston*, the court drew an important distinction between two possible scenarios. The first is when two fires both have human origins. In those cases, even though the conventional but-for causation requirement suggests that the plaintiff should lose, the court held that both defendants were jointly and severally liable.

- ☆ The idea of joint and several liability has a number of variations, but basically it means that the two defendants split the damages awarded to the plaintiff. If one of the defendants is bankrupt or cannot be found, the other defendant has to pay the whole amount. The idea here is that between the available defendant and the plaintiff, the available defendant is the more blameworthy and should eat the cost of the missing defendant.

- ☆ Whether you like the idea of joint and several liability or not, the result in *Kingston*, at least with respect to the first scenario, is pretty sensible; tort law doesn't hew slavishly to the but-for causation requirement, and instead does the practical thing. Two equally culpable defendants? Can't figure out which one analytically caused the damage? Let them share the liability.

- ☆ The curious result in *Kingston* is what the Wisconsin Supreme Court said about the second scenario. The second scenario is when one fire has human origins, and the other was the result of natural causes, like lightning. There, the legal rule is no liability.

- Viewed in isolation, this result also makes some sense. If the plaintiff's property would have burned down as a result of the natural fire anyway, then there is no reason for the plaintiff to be able to sue the defendant. Viewed in context, however, the result is quite odd. It means that whether the defendant railroad in *Kingston* is liable depends entirely on chance. If the second fire was caused by a human actor, the railroad is liable. If the second fire was caused by lightning, the railroad pays nothing. In other words, the defendant's liability is completely unrelated to its behavior.

- If you think a bit more about this, it may seem less strange that so much rests on the element of luck. People do negligent things all the time—they text while driving, they speed, they defer maintenance and repairs. If no accident occurs, the negligent parties have gotten lucky, and there is no liability. As in *Kingston*, serendipity plays a major role.

Suggested Reading

- Berger, *Eliminating General Causation*.
- Byrne v. Boadle.
- Daubert v. Merrell Dow Pharms., Inc.
- Kingston v. Chi. & N.W. Ry.
- Martin v. Herzog.
- Palsgraf v. Long Island R.R. Co.
- Summers v. Tice.
- Wood, *Bird Hunting Etiquette*.
- Zuchowicz v. U.S.

Questions to Consider

- General causation is a formidable hurdle for plaintiffs in toxic tort litigation, particularly with regard to relatively rare reactions or side effects. The large-scale epidemiological studies needed to establish causation are time-consuming and expensive, and thus typically unavailable. Professor Margaret Berger has proposed doing away with the general-causation requirement and focusing instead on a manufacturer's failure to test. Her proposal parallels the *Zuchowicz* decision, in the sense that it emphasizes breach and minimizes causation. What are the advantages and disadvantages of such a proposal? What situations might justify taking the approach suggested by Professor Berger?

- In *Byrne v. Boadle*, a classic case decided by an English court in 1863, the plaintiff was hit from above by a falling barrel of flour. But he was unable to provide any evidence of negligence—i.e., evidence of a breach. Under the traditional requirements for a negligence claim, the plaintiff should have lost. Instead, the court invoked the doctrine of res ipsa loquitur ("the thing speaks for itself") to allow the jury to infer negligence from the mere fact that the accident occurred at all. Does this seem like the correct result? How is res ipsa loquitur similar to the doctrines courts use to resolve questions of factual causation? How is it different?

Lecture 6

LEGAL CAUSATION AND FORESEEABILITY

This lecture examines legal causation, also known as proximate cause. Unlike factual causation, legal causation has very little to do with causation in a scientific or physical sense. Legal causation is about policy, justice, and moral responsibility; in difficult cases, factfinders often have to rely on their own instincts about what is and isn't fair.

BREAKING THE CHAIN

- Factual causes, also known as but-for causes, form chains that are infinitely long and that extend in all directions. At some point, we have to decide where to break these chains; otherwise, we would never be able to assign liability to a particular party. Mrs. O'Leary and her cow may have started the Great Chicago Fire of 1871, but it seems intuitively wrong to hold her liable to the entire city of Chicago.

- Over the years, courts have developed a number of principles and approaches to help rationalize what is arguably a gut reaction regarding what the defendant should be responsible for. In the end, despite the courts' best efforts—and perhaps because legal causation is ultimately about gut reactions—these questions are often left to juries.

- As with factual causation, legal causation is typically fairly straightforward. If the defendant negligently runs a red light and hits the plaintiff, the defendant is clearly both the factual and legal cause of the accident. When causation questions get complicated, however, they tend to do so in bizarre, seemingly fantastical ways. Legal causation is at issue in many of the most memorable tort cases, and these cases have become favorites of many law professors.

- A natural place to break the chain of causation is wherever some person, someone exercising autonomy and free will, inserts himself into the chain. This person is often described as an intervening or superseding cause. This approach is not without its weaknesses, however.

- Some intervening causes involve people acting maliciously, but many others do not. For example, a person otherwise identified as the intervening cause of the plaintiff's injury might have been acting reflexively, based entirely on instinct. Would it be fair to hold this person responsible for actions he can't control?

FORESEEABILITY

- One helpful modification to this intervening-case inquiry is to consider whether the injury to the plaintiff was a foreseeable result of the defendant's actions. Under this approach, if the intervening cause is not foreseeable, the causal chain is broken and the defendant is not liable. If the intervening cause is foreseeable, however, the chain remains intact and the defendant is on the hook.

- The foreseeability test also works well in defining legal causation outside the realm of intervening causes. One such area involves what are called harms not within the risk. The basic problem in this group of cases is this: Normally, a defendant's actions are negligent because they impose some kind of unreasonable risk. But what happens if some other kind of harm materializes? Should the defendant still be liable?

- In a 1961 case typically referred to as *Wagon Mound*, an English court answered this question in the negative. It held that a defendant is only liable for foreseeable harms of his negligence. In *Wagon Mound*, the defendant negligently discharged oil from a ship into Sydney Harbor, causing an oil slick that spread to the plaintiff's wharf.

- ✯ Ordinarily, the expected harm from an oil spill is pollution. And that is what happened, at least at first. A few days after the spill, however, one of the plaintiff's employees was welding when sparks that ordinarily would have fallen harmlessly into the water instead lit some rag or cotton waste that was floating on the surface. The rag ignited, the heat was sufficient to light the oil slick on fire, and the resulting inferno destroyed the entire wharf.

- ✯ Now, the discharge of the oil was indeed negligent, but the fire was not foreseen. Following the foreseeability rule, the court held that the defendant was not the legal cause of the fire. The defendant was therefore not liable.

- Another memorable harm-not-within-the-risk case is *Madsen v. East Jordan Irrigation*, decided by the Utah Supreme Court in 1942. In *Madsen*, the plaintiff owned a mink farm. The defendant was using dynamite to blast an irrigation ditch nearby.

- In tort law, blasting is considered an ultrahazardous activity. As a result, a defendant who is blasting typically is not governed by a negligence standard. Instead, he is subject to strict liability—that is, he is liable for all harms caused by his blasting whether or not he behaved in a negligent manner.

- So what happened in *Madsen*? Did the defendant blast rocks onto the plaintiff's mink farm, crushing the minks? Of course not. What happened was that the noise from the blasting caused the mother minks to freak out and eat their young. The loss of these baby minks constituted a significant economic harm to the business.

- The court in *Madsen* held that the defendant was not liable, even though blasting is ordinarily an activity subject to strict liability. The risks that make the defendant's actions ultrahazardous are the usual risks of blasting—vibration, concussion, flying objects—not minks eating their young. Since the harm was not foreseeable, the plaintiff was not able to recover damages.

THE LIMITS OF FORESEEABILITY

- ✯ In modern cases, foreseeability is the dominant factor in determining legal causation. The factual chain of causation may be infinitely long, but we are judged—and held liable for—only those harms that are a foreseeable consequence of our actions. It is important to note, however, that not all types of unforeseeability are created equal.

- ✯ So far, we have dealt largely with cases in which the harm, or the mechanism causing the harm, is of a wholly different kind. In these weird cases, the rule is of course that the defendant is not liable. But tort law imposes a different rule when the unforeseen harm is not different in kind, but rather different in degree. Just because the level of harm was unforeseen does not mean that the defendant will not be liable.

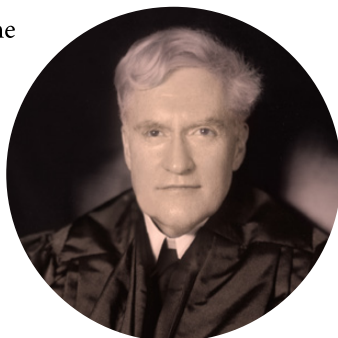
- ✯ Suppose the defendant negligently sets fire to the plaintiff's home and it burns down. Under the conventional rules on damages, the defendant must make the plaintiff whole. If it's a shack, the defendant must pay for a shack. If it's a mansion, the defendant must pay for a mansion. If the plaintiff's ordinary home unexpectedly happens to have a $100 million Rembrandt in the living room, then the defendant must pay for both the house and the Rembrandt. The painting is surely unforeseen, but that sort of unforeseeability has no effect on liability.

- ✯ In torts, this rule is often referred to as the thin-skull rule, or the eggshell-skull rule, for reasons that you might surmise. You negligently cause a minor accident. An ordinary victim would bump her head, get up, and walk away. Unluckily for you, however, your victim has an eggshell skull; the accident causes massive head trauma and death. Under the eggshell-skull rule, you are liable for all the damages caused.

- ✯ The eggshell skull might seem a fantastical hypothetical dreamed up by law professors, but reality sometimes imitates fiction. In the celebrated case of *Vosburg v. Putney*, decided by the Wisconsin Supreme Court in 1891, the defendant, who was 11 years old, gently kicked the plaintiff, who was 14 years old, in the leg. The expected reaction might be a slight wince, with or without a retaliatory kick or punch, perhaps.

- Unfortunately, and unbeknownst to anyone at the time, the plaintiff's leg was catastrophically compromised. The defendant's tap somehow caused the plaintiff to experience a sudden and violent pain. The leg became infected, and the plaintiff soon lost the use of his leg entirely. The medical testimony in the case suggested some nonsense about the touch activating microbes. Regardless, the defendant was found liable for battery—committing an unlawful touching—and had to pay the entire amount of damages.

PALSGRAF V. LONG ISLAND RAILROAD



- The most famous case—not just in the area of causation, but in all of torts—is a case called *Palsgraf v. Long Island Railroad*. Decided by future Supreme Court justice Benjamin Cardozo in 1928, *Palsgraf* is easily the most complicated case in the torts canon.

- The case begins with the plaintiff, Helen Palsgraf, standing on a New York train platform. Elsewhere in the station, two men are running to catch another train departing the station. This was in 1924, a time when passengers could still literally run to catch a train as it departed. And this is precisely what the two men tried to do.

- One of the two men jumps onto the train easily. The other jumps somewhat unsteadily, and is about to fall. A guard on the train holds the door open and extends his hand. From the platform, another guard tries to help by pushing the teetering man onto the train. This is certainly dangerous and negligent behavior, both from the passenger and from the guards.

- But the story of *Palsgraf* isn't that the teetering passenger fell and got hit by the train. That would be a little too straightforward. What happens instead is that the jostling and pushing causes the man to drop a small package he was carrying—a package that just happens to be filled with fireworks. The fireworks fall onto the tracks, where they do what fireworks do. They explode.

- So far, the events on the train have nothing to do with Mrs. Palsgraf. She's standing far away, on the other side of the platform. Soon, however, the exploding fireworks send a shock wave in her direction. The shock wave shakes loose a set of scales, which then fall over onto Mrs. Palsgraf, injuring her.

- ✩ Should Mrs. Palsgraf be able to sue the Long Island Railroad for negligence? For Cardozo, writing for the majority, the answer was no. Foreshadowing the importance of foreseeability, Cardozo wrote that negligence is a relational concept. The question is not whether the defendant was negligent writ large, but rather whether the defendant was negligent with respect to the plaintiff. Because Mrs. Palsgraf was not a foreseeable plaintiff with respect to the guards' actions, the railroad owed her no duty of care.

Suggested Reading

- American Law Institute, *Restatement (Third) of Torts*.
- City of Lincoln.
- Gorris v. Scott.
- In re Polemis & Furness, Withy & Co. Ltd.
- Kline v. 1500 Mass. Ave. Apartment Corp.
- Madsen v. E. Jordan Irr. Co.
- Noonan, *The Passengers of Palsgraf*.
- Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng'g. Co. Ltd.
- Palsgraf v. Long Island R.R. Co.
- Ryan v. N.Y. Ctr. R.R.
- Vosburg v. Putney.
- Wagner v. Int'l. Ry. Co.

Questions to Consider

- Consider the famous nitroglycerin hypothetical originally posed by Professor Warren Seavey: A man negligently leaves a 10-pound container of nitroglycerin on a table. A child knocks the container off the table, but miraculously, it does not explode. The container does land on the child's foot, however, injuring him. Can the child sue the man for damages? What are the best arguments for both sides?

- Which test of legal causation do you find more compelling: the directness test in *Polemis*, or the foreseeability test in the *Wagon Mound* case? In answering this question, you may find it useful to think about the debate between strict liability and negligence. Which rule would advocates of strict liability prefer? What about those who argue that the traditional negligence standard should apply?

Lecture 7

LIABILITY FOR THE ACTS OF OTHERS

This lecture examines two related theories of liability in tort law. The first, known as vicarious liability, concerns the circumstances under which someone can be held liable for another person's wrongdoing. The second, called joint and several liability, divides or shifts liability when several parties are sued for a tort they committed together.

VICARIOUS LIABILITY

- Vicarious liability is sometimes referred to as respondeat superior, which is Latin for "let the master answer." It is a tort doctrine that states that an employer is strictly liable for torts committed by its employees during the scope of their employment. The employer itself does not need to be negligent or at fault; as long as the employee commits a tort, the employer will be liable.

- Many areas of tort law are controversial. Different courts in different jurisdictions have different rules, and there are debates about which rules are better. But this notion of vicarious liability—of an employer being strictly liable for the torts of its employees—is almost universal.

- Consider how vicarious liability fits into our cultural mindset about responsibility. If there's a foreign object in your pizza, clearly someone should be liable. But who? The specific person who packed the ingredients at the processing plant? The worker who made the pizza in the kitchen? The most likely defendant in a lawsuit would not be one of these individuals, but rather the pizza company itself.

- This is a very natural way of thinking, and it explains why vicarious liability is almost universally recognized. The doctrine remains good law in legal systems around the world with roots in the English common law, including England, Australia, Canada, all 50 U.S. states, and the District of Columbia. Similar doctrines are on the books in France and Germany.

- As you might suspect, vicarious liability as an idea is also not modern. Although its precise historical roots are more controversial, some scholars have suggested that it is derived from Roman law or ideas about masters and servants from the medieval period.

- Most everyone agrees that the modern vicarious liability doctrine originated in a set of English decisions during the late 17th and early 18th century. By the end of the 18th century—in other words, the time of the founding of the United States—vicarious liability was well established and fully in force.

- One reason to have vicarious liability is an evidentiary one. Vicarious liability protects victims from the actions of companies where the corporate source of the harm is clear, but the specific employee perpetrator is not. In the modern world, we place a lot of our trust in the processes and procedures of companies and their brands, not their individual employees, and so it seems fair to hold the companies accountable.

- Another reason is cost internalization. During the course of a company's operations, the company will inevitably cause losses and damages to some parties. Cost internalization says that the company should internalize—that is, absorb—those costs. The company will thus have incentives to make the proper tradeoffs about quality control, inspections, and the like.

- Similarly, a company is able to spread these freakish or chance losses around. It can, for example, charge more for its products or services to cover the cost of potential liability, either directly or through insurance. From a purely compensatory angle, the company has deep pockets, and is thus better positioned to help those who suffer as a result of employee misconduct.

SCOPE OF EMPLOYMENT

- The real difficulty over vicarious liability is not whether it should exist in some form. What is controversial are the conditions under which it should apply—in other words, its scope. To explore this, let's think about the different vicarious liability rules we might impose on employers.

- The most restrictive rule would be to make employers liable only if they expressly authorized or encouraged the employee's tort—if, for example, the CEO of a pizza-delivery company tells an employee to overcharge credit cards, or to sabotage a competitor's delivery vans. This behavior looks a lot like an intentional tort.

- Requiring intent, however, seems a bit limited, because you can imagine other bad behavior that is not intentional but still blameworthy. For example, say our pizza delivery company tells its employees to obey traffic laws, but imposes unrealistic delivery times and penalizes drivers for arriving late. Their drivers, trying to stay on schedule, end up driving like maniacs. At some point, one of them will get into a bad accident.

- In the situation just described, the employer hasn't authorized or encouraged the tort, but it is still arguably at fault. The pizza company has created unreasonable expectations that promote speeding and reckless driving. One could therefore say that the company has behaved negligently. The same conclusion could be drawn if the company hires delivery drivers without checking their driving history, and one of them mows down a pedestrian on the sidewalk.

- ☆ Vicarious liability is strict liability for the employer, not a negligence rule, and thus requires some additional nuance. The conventional rule is that the employer will only be held vicariously liable if the actions of its employee are within the scope of employment. For example, the pizza company might argue that speeding is outside the scope of employment, because company policy prohibits it.

- ☆ You can easily imagine, however, why the scope of liability can't be based merely on company policy. That would basically transform vicarious liability into a form of intentional tort—liability would follow only when the company wanted the employee to commit torts.

- At the same time, there must be some limit beyond which the employer will not be held liable. Should the pizza company be held liable if one of its drivers goes 65 miles an hour down a residential street? What if the accident takes place while the driver is running a personal errand, or during an incident of road rage?

- One way courts have handled these issues is to ask whether the employee's actions—however misguided—were done to further the employer's interests. If so, the employer would be vicariously liable. If, however, the employee was acting only for himself, the employer would be off the hook. Under this interpretation of scope of employment, it's no longer the employer's perspective that controls, but the employee's.

- Other courts have focused on the foreseeability of the employee's conduct, recognizing that foibles and misdeeds by employees come with the territory of conducting business operations. This approach would hold an employer liable as long as the employee's misbehavior is not so unforeseeable that it would be unfair to attribute it to the employer.

- A related doctrine addressing these issues is that of frolic and detour. Traditionally, the distinction between a frolic and a detour was the mechanism used to define scope of employment. There are some subtle differences to the approaches just mentioned, but the driving principle is the same. The basic rule is that an employer is liable for an employee's actions when the employee makes a mere detour, but not when the employee is on a frolic of his own.

JOINT AND SEVERAL LIABILITY

- Joint and several liability deals with cases involving joint tortfeasors—multiple defendants who commit a single tort together. For example, the defendants might be part of a business partnership where one of the partners commits a tort. The law of partnership treats all of the partners jointly and severally liable for the action of that one partner, as if each partner is simultaneously the employer and employee of all the other partners.

- ✯ Another situation in which joint and several liability will be imposed is where two defendants who are strangers unwittingly combine to cause a single tort. For example, one defendant might be texting on her phone while driving, while at the same time another defendant is running a red light. If the two collide and then run into a bystander, both defendants will be jointly and severally liable.

- ✯ The key concept in joint and several liability is that any one of the defendants can be sued for the entire amount of the claim. The law has increasingly relaxed this rule over time, however, forcing defendants to share the liability in even amounts. In more recent cases, juries have divided the liability by comparative fault, assigning a percentage of the plaintiff's recovery to each defendant.

- ✯ Where things get hairy is when some of the defendants don't have the money to pay their assigned share. Under joint and several liability, when some defendants are insolvent, the other defendants must make up the shortfall. For example, if three defendants combine to commit a tort and two of them are effectively bankrupt, the one remaining defendant pays in full.

- Some critics claim that joint and several liability is one of the places where tort law runs amok. They argue that it is emblematic of how the legal system goes after deep pockets, and how rich defendants are unfairly targeted. But whether joint and several liability is fair is really a matter of perspective.

- Critics of joint and several liability have suggested that payouts from joint defendants should be treated independently of one another. This approach is known as plain several liability. If one of the defendants is bankrupt, that's just the plaintiff's tough luck. After all, that's exactly what happens in situations where a plaintiff is hit by a single insolvent driver, with no other potential defendants.

- In response, we might ask why the risk of insolvency should be borne by the plaintiff if there are other defendants involved. The plaintiff is an entirely blameless victim. Each defendant, on the other hand, was in some way negligent or otherwise worthy of blame. If someone is going to bear the risk of insolvency, shouldn't it be the other defendants? That is exactly the perspective taken by joint and several liability.

Suggested Reading

- Baty, *Vicarious Liability*.
- Giliker, *Vicarious Liability in Tort*.
- Holmes, "Agency."
- Ira S. Bushey & Sons, Inc. v. U.S.
- Laski, "The Basis of Vicarious Liability."
- Nelson v. American-West African Line.
- White, *Tort Law in America*.

Questions to Consider

- Which of the three perspectives on scope of employment for vicarious liability do you find the most compelling? Should liability be limited to acts authorized by the employer, acts done to further the employer's interests, or acts that are foreseeable? What kind of incentives is each rule likely to create?

- There have been reform efforts recently to limit joint and several liability. Consider the following statute, which the state of Tennessee enacted in 2013:

  > If multiple defendants are found liable in a civil action governed by comparative fault, a defendant shall only be severally liable for the percentage of damages for which fault is attributed to such defendant by the trier of fact, and no defendant shall be held jointly liable for any damages.

  Do you agree with this approach? What advantages and disadvantages are there to a regime of several liability, as opposed to joint and several liability?

Lecture 8

WHEN TORT PLAINTIFFS SHARE THE BLAME

This lecture examines what happens when a tort plaintiff himself is at least partly to blame for the injuries on which his lawsuit is based. You will learn when, and to what extent, a plaintiff's contributory negligence will bar him from recovering damages. You will also learn about assumption of risk, a separate but related doctrine that may also limit a plaintiff's recovery as a result of his own conduct.

CONTRIBUTORY NEGLIGENCE

- Under the traditional common law, the rule governing contributory negligence was simple and harsh. If the plaintiff was contributorily negligent—in other words, if the plaintiff breached his duty of care to behave like a reasonable person—then the plaintiff lost, end of story. Contributory negligence was a complete defense to a negligence claim.

- A few reasons justify this rather hard-nosed rule. The first is what you might call an unclean hands issue. Normally when a plaintiff sues a defendant, the plaintiff is in the position of an innocent asking the court for justice against a blameworthy party. But when there's contributory negligence, both parties are effectively in the wrong. In this kind of situation, courts were inclined to leave the damages where they fell.

- Another reason for the complete bar to recovery relates to causation and causal chains. Consider exactly what it means for the plaintiff to be contributorily negligent. It means that the plaintiff was a factual cause of the accident. But for the plaintiff's contributory negligence, the accident would not have happened. The plaintiff thus bears the ultimate blame, and should not recover.

- Finally, there is the basic issue of incentives. If the legal system didn't punish plaintiffs for their negligent behavior, then perhaps they would not take adequate care. Nevertheless, traditional contributory negligence doctrine can seem unduly rigid. Why not simply split the difference, with the plaintiff receiving half the damages from the defendant?

- There are some cases in which even an even split of the damages might seem unfair to the plaintiff—if, for example, a defendant runs a red light and hits a plaintiff walking inattentively, but legally, across the street. Yes, perhaps the plaintiff should have been crossing more carefully, and perhaps he was not acting reasonably. But the defendant is the one who broke the rules, and is clearly the one at greater fault.

- Today, almost every jurisdiction in the United States has rejected traditional contributory negligence in favor of comparative negligence. Under a comparative-negligence regime, the jury decides the level of comparative fault between the plaintiff and the defendant, and the two parties split the damages accordingly. In these jurisdictions, the plaintiff's fault is no longer a complete bar to recovery; it merely discounts it.

AVOIDABLE CONSEQUENCES

- A legal concept related to contributory negligence is called the doctrine of avoidable consequences. To illustrate, consider a situation in which the defendant drives negligently, hits the plaintiff, and breaks her leg. For purposes of this example, assume that with proper medical treatment the leg would have healed. What happens if the plaintiff unreasonably does not seek medical treatment, and the leg becomes gangrenous and ultimately has to be amputated?

- Under the doctrine of avoidable consequences, the plaintiff's recovery would be reduced due to her negligence in failing to seek treatment after the accident. The damage caused by the defendant was a broken leg, not an amputated one; the additional injury was the plaintiff's fault.

- ✫ The avoidable-consequences doctrine exists in tension with the traditional eggshell-skull rule, which suggests that the plaintiff's fault should be irrelevant. The eggshell-skull rule holds that the defendant takes the plaintiff as-is, and must pay for the full extent of any damages.

- ✫ Unlike the eggshell-skull rule, the avoidable-consequences doctrine—and comparative negligence as a whole—holds that the defendant's liability should be reduced according to the degree of the plaintiff's fault. This tension makes the razor-thin line between the plaintiff's behavior before the accident, on one hand, and her behavior at the time of or after the accident, on the other, an extremely important one.

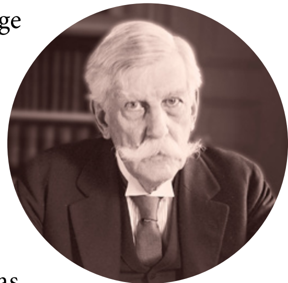
ASSUMPTION OF RISK

- ✫ Under traditional tort law, a plaintiff's assumption of the risk of injury was, like contributory negligence, a complete defense to liability. In some cases, this doctrine has a deep visceral appeal. When a plaintiff engages in a dangerous activity, he does so of his own volition, and is thus perfectly capable of deciding whether or not to proceed.

- ✩ Despite its inherent appeal, assumption of risk was traditionally used to deny recovery in cases where plaintiffs' freedom of choice was far more dubious. Consider, for example, the case *Lamson v. American Axe & Tool Co.*, which was decided by the Massachusetts Supreme Judicial Court in 1900.

- ✩ In *Lamson*, the plaintiff's job was to paint hatchets. After painting each hatchet, the plaintiff placed it on a rack to dry—a rack that happened to be located directly in front of his workspace. With the way the racks were designed, the hatchets would fall if jarred by some nearby machinery. The plaintiff complained to the management, who basically told him to take it or leave it. The plaintiff stayed at the job, and was later injured by one of the falling hatchets.

- ✩ *Lamson* was decided by another great judge in the American pantheon, U.S. Supreme Court justice Oliver Wendell Holmes, Jr., at a time when he was still chief judge of the Massachusetts Supreme Judicial Court. Holmes held that the plaintiff Lamson had assumed the risk, stating that "the plaintiff … appreciated the danger more than anyone else. He perfectly understood what was likely to happen. … He stayed and took the risk."



- ✩ It's important to note, however, that this was not a case where the plaintiff's assumption of risk was entirely gratuitous. Jobs can be hard to find, and the costs of switching jobs can sometimes be considerable. In many instances, the need to earn a living places additional pressure on employees to remain at their jobs and assume some level of risk.

- ✩ The fundamental question is whether the difference in the degree to which the plaintiff is free to choose is legally relevant. As time went on, the harshness of the doctrine—especially when applied to employee injuries—became increasingly untenable. Having large numbers of injured workers who were both destitute and unable to work became a serious social problem.

- The modern system of workers' compensation was in many ways a direct response to assumption of risk. It is essentially an insurance-based system that pays for work-related injuries. It thus represents a preference for an insurance-based solution over a tort-based solution. Despite the difference in approach, workers' compensation demonstrates our society's judgment that workplace injuries should be compensated.

- Assumption of risk is increasingly a disfavored and disappearing doctrine. Some jurisdictions continue to abide by it, particularly in cases involving athletic and recreational settings. In all other areas, however, it has largely been supplanted by the doctrine of comparative negligence.

- Comparative negligence enables a jury to compromise in order to attain something approximating justice. The cost is an inevitable degree of arbitrariness, but surely the benefits are well worth that cost. Indeed, the flexibility of comparative negligence may be one reason that it has become so popular in cases involving plaintiff conduct.

Suggested Reading

- Applbaum ex rel. Applbaum v. Golden Acres Farm and Ranch.
- Lamson v. American Axe & Tool Co.
- McDermott v. Carie, LLC.
- Murphy v. Steeplechase Amusement Co.
- Sanson, "Avoiding Effect of Recreational Activity Liability Release."
- Simons, *Murphy v. Steeplechase Amusement Co.*

Suggested Reading (continue)

- Standen, “Assumption of Risk in NFL Concussion Litigation.”
- Strassfeld, “Taking Another Ride on the Flopper.”
- Yaconi v. Brady & Gioe, Inc.

Questions to Consider

- Lambert’s Café is a restaurant in Ozark, Missouri, that is well known for being the “Home of Throwed Rolls.” Rather than serving diners with dinner rolls in a traditional basket, servers at Lambert’s Café throw rolls across the room to guests. During a meal in 2014, a customer was struck in the eye with a dinner roll, resulting in serious vision loss. The plaintiff sued the restaurant. How should the case come out under modern, comparative-fault rules? How would it come out under the assumption-of-risk doctrine?
- How should courts and legislatures handle the seat-belt defense? If we surveyed the general population about the desirability of the seat-belt defense, what do you think the results would look like? Would responses correlate with certain political or philosophical views?

Lecture 9

ANIMALS, BLASTING, AND STRICT LIABILITY

This lecture explores the concept of strict liability. In particular, you will learn about two types of cases in which strict liability, rather than negligence, is the rule: cases involving damage caused by animals, and cases involving damage from blasting and other types of explosions. The lecture also examines the rationale behind the departure from the traditional negligence standard, and whether strict liability really is all that different.

GETTING WILD

- Historically, strict liability applied only to certain types of narrowly defined situations. As Professor Morton Horwitz used to say, tort law is a sea of negligence with islands of strict liability. One such island is made up of cases where the plaintiff's injury has been caused by one or more animals.

- Tort law divides the world of animal ownership into what is really three groups. First, you have your ordinary, nondangerous domestic animal. In other words, your typical dog or cat or fish, or even the less common gerbil, parakeet, or rabbit. Owners of nondangerous domestic animals are governed by the usual negligence standard.

- Owners of dangerous domestic animals are typically subject to strict liability. For example, the owner of a vicious dog would be liable to anyone bitten by the dog, regardless of what measures the owner took to control the animal. But how do we determine which animals are dangerous and which are not?

- The traditional common law approach had what was known as the one-bite rule. The one-bite rule was that an animal operated under a negligence regime until it bit someone, at which point things switched to strict liability. Modern courts have abolished the one-bite rule in favor of a more capacious standard. Now, any indication that an animal has an abnormally dangerous propensity—lunging or baring its teeth, for example—is enough to activate strict liability.

- Finally, there is the category of wild animals. Like dangerous domestic animals, wild animals are governed by a strict-liability rule. If you own a tiger or a king cobra and it escapes and hurts someone, you are liable, regardless of the level of precaution you took to prevent its escape.

- The rule for wild animals seems straightforward enough, but there are two interesting wrinkles. First, as you might imagine, deciding which animals are "wild animals" is often a significant flashpoint for litigation. A determination that a particular type of animal is a wild animal requires not only lack of domestication—which would be relatively easy to apply as rule—but it also a high likelihood of causing injury.

- The line separating wild animals from domestic animals has varied at times in surprising and odd ways. The category of course include things like lions and tigers. Courts have also applied the wild-animal label to elephants, snakes, and monkeys. However, wild animals do not include iguanas, pigeons, or manatees.

- ✭ One leading treatise addressing wild animals and strict liability raises the problem of a zebra. To a layperson, a zebra certainly seems like a wild animal, and is certainly exotic. In light of the requirement that a wild animal have a high likelihood of causing injury, however, zebras might not be sufficiently dangerous to warrant strict liability.

- ✭ The second wrinkle to the rule for wild animals is the existence of potential exceptions, including one for zoos. When wild animals are kept in controlled environments for the benefit of the public, as is the case with zoo animals, some courts have been reluctant to impose strict liability. This is a controversial rule, but there is a longstanding body of case law suggesting that zoos are subject to different standards.

GETTING RISKY

- ✭ There are several, often complimentary reasons that certain activities are singled out for strict liability. The first, proposed many decades ago by Professor George Fletcher, is that we impose strict liability when the activity involves what is known as a nonreciprocal or unilateral imposition of risk. To understand this idea, we need to step back and ask why we might prefer negligence over strict liability as a baseline rule.

- We all impose risks on one another. Every now and then, even if we behave as reasonable people, accidents happen and people get injured. Roughly speaking, however, we all impose mutual risks on one another. The chance of any one of us being a victim, or a defendant, is roughly the same. As long as everyone behaves reasonably, it's arguably inefficient to require one person to pay for the injuries of another.

- But when one of us is negligent, that symmetry is broken. The negligent defendant has imposed more risk on society. Consequently, it's fair to ask the negligent defendant to pay for the injuries he causes. Doing so also creates useful incentives not to be negligent.

- An example of these incentives can be seen in the zoo exception to the wild-animal rule. Though they may impose a nonreciprocal risk on their communities, zoos are nevertheless socially beneficial, offering both entertainment and educational opportunities to the public. Holding zoos to the negligence standard, instead of the strict-liability standard imposed on private owners of wild animals, avoids creating a potential disincentive to zoo operation.

GETTING BLASTED

- ✯ In modern tort law, blasting and explosions fall into the category of ultrahazardous or abnormally dangerous activities, and are therefore subject to strict liability. Other activities that courts have found to be ultrahazardous include fumigation, gasoline storage, and plutonium processing.

- ✯ Deciding whether a particular activity is ultrahazardous involves, in part, determining whether the activity is not in common usage. As a result, whether or not something is ultrahazardous often depends on context. Gasoline storage may be ultrahazardous in a residential neighborhood, but not amongst oil refineries.

- ✯ Fireworks are an especially interesting area of controversy. In some older cases, courts found that fireworks were not subject to strict liability, because they were a publicly beneficial form of entertainment. On its face, this explanation sounds similar to the reasoning behind the zoo exception to the wild-animal rule. Drawing a direct analogy between fireworks and zoos is problematic, however.

- In the wild-animal context, we can distinguish private ownership of wild animals from zoo ownership based on public utility. Individuals owning wild animals arguably provide little public utility; private ownership is deemed unreasonable and subject to strict liability in part for that reason. Zoos, on the other hand, offer the public education and entertainment, and are thus held to the lesser standard of negligence.

- Most ultrahazardous activities, like blasting, are also publicly useful. In some cases, like road construction, blasting directly benefits the public. Even blasting for private development is a socially beneficial activity. The mere fact that fireworks provide public value doesn't distinguish them from other ultrahazardous activities that are subject to strict liability.

Suggested Reading

- Abraham, "Rylands v. Fletcher."
- Allen and Harris, "Officers Tell Harrowing Tale of Catching Elvis the Cobra."
- City of Dallas v. Heard.
- Dobbs, *The Law of Torts*.
- Hammontree v. Jenner.
- Heeg v. Licht.
- Rylands v. Fletcher.
- Simpson, "Legal Liability for Bursting Reservoirs."
- Tavernese, "Man Who Kept Tiger in Apartment Gets 5-Month Jail Term.".

Questions to Consider

- Consider this modification of the facts in the San Francisco Zoo case: Suppose that a visitor had provoked the tiger and provided it with some means of escape (by lowering an object into the enclosure, perhaps). The tiger escapes, and attacks a different visitor, an entirely uninvolved and innocent victim. If the victim sues the zoo, will the zoo be subject to strict liability? Consider that there may also be issues surrounding whether or not the zoo is the proximate cause of the plaintiff's injury.

- The distinction between strict liability and negligence can often be distilled into a difference of time frame. Ownership of a tiger is a strict-liability trigger when viewed at the time of the accident, but may only be a negligent decision when viewed at the time of purchase (the argument being that it is unreasonable to own the tiger in the first place). Consider how time frames might interact with the reasonable-person standard if, for example, a defendant with a history of seizures crashes his car into a business owner's storefront. If the defendant's behavior is assessed at the time of the accident, is he liable? How might the answer change if the defendant's behavior is instead assessed at the time he starts his car?

THE RISE OF PRODUCTS LIABILITY

Massive tort cases have become almost mundane in modern America. For the last few decades, mass torts have been all over the media, including late-night television commercials. Some involve pharmaceutical drugs, medical devices, or defective consumer products. Others involve well-known harmful substances, like tobacco, lead paint, or asbestos. Not all claims are successful, of course, but some result in awards of millions if not billions of dollars.

DISTINGUISHING CHARACTERISTICS

- Massive products-liability cases share a few key characteristics that distinguish them from traditional negligence cases. First, products-liability cases are rarely about negligence; most are governed by a specialized form of strict liability. Consequently, the critical issues in products-liability cases often center around the issue of causation—whether the product at issue actually caused the harm.

- Second, while products-liability lawsuits are typically filed against the manufacturers of the products at issue, it's almost never the case that the plaintiffs bought the products directly from the manufacturers. Instead, products are sold to consumers by retailers. Pharmaceuticals, for example, are sold to consumers by pharmacies, not by the manufacturers themselves.

- Third, the sheer scale of products-liability cases makes them almost an entirely different animal from the traditional tort case. There are often thousands—and in some cases, millions—of potential plaintiffs. Numbers like these, along with the imposition of strict liability and the ability of consumers to sue manufacturers directly, have had the effect of promoting litigation on a massive scale.

MACPHERSON V. BUICK MOTOR CO.

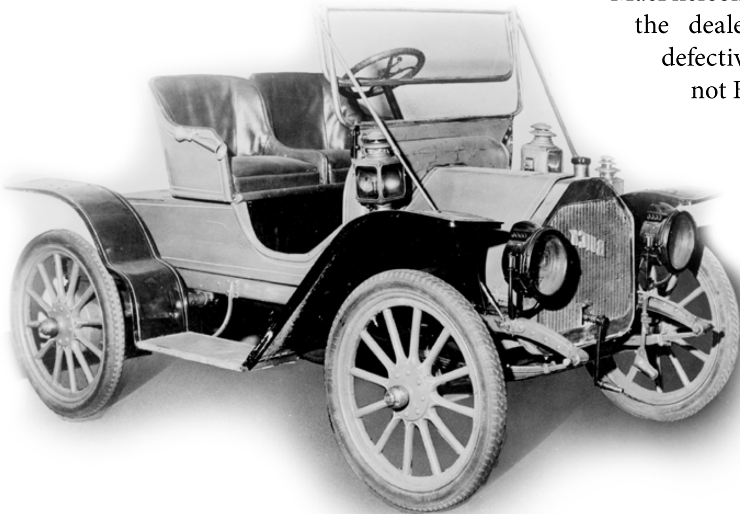
- The history of products-liability law gives us an opportunity to see the law develop over time as courts struggle to solve problems of the modern economy. It also allows us to examine some of the most famous torts cases of all time. First up is *MacPherson v. Buick Motor Co.*, a 1916 case decided by New York Court of Appeals judge Benjamin Cardozo—the same Benjamin Cardozo who later became an associate justice of the U.S. Supreme Court.

- The plaintiff, Donald MacPherson, was driving his 1910 Model 10 Buick Runabout when one of its wheels suddenly collapsed due to a defect, causing him to crash. Because this was a 1910 Buick, built when society was transitioning from the horse and buggy to the automobile, the car's wheels were made out of wood. MacPherson claimed that Buick was negligent in inspecting the wooden wheels, which had been made by another manufacturer.

- To modern eyes, this appears to be a simple case: MacPherson should recover from Buick for its negligence in inspecting the wheel. At the time, however, the path to victory was not so simple. For one thing, MacPherson didn't buy his car from Buick. As is still the case today, cars were first sold to many different distributors and independent dealerships, who then turned around and sold them directly to customers.

- The presence of the intermediary—the dealer—creates big conceptual problems for the usual torts requirement that the defendant owes the plaintiff a duty of care. And that's the key question in *MacPherson*: Does Buick have a duty of care to downstream customers? Or is Buick's duty limited to just the immediate purchaser?

- The latter conclusion was consistent with tort law's traditional limitation, which depended on a concept known as privity. Buick had a contract with, and was thus in privity with, the dealer or the distributor. Thus, under the traditional rules, the only party that could sue Buick for a defect was the dealer. Similarly, MacPherson was in privity with the dealer, not Buick. So MacPherson could sue the dealer for the defective car, but not Buick.



- ✮ Some have argued that the privity rule existed to protect manufacturers from liability, an effect that it no doubt had. Others have suggested that it guarded against a flood of consumer litigation, and if you think about today's mass tort litigation, that's partly right too. But there is also a conceptual reason for the privity rule, which is that it allows defendants to order their affairs. It allows makers of products to know whom they are dealing with, and to know when they have satisfied their obligations.

- ✮ In an age of limited production—one involving largely handmade or custom products—a privity rule made sense. A furniture maker built a chair for a customer. If the customer was satisfied with the chair, then any liability would arguably end there. The furniture maker chose to deal with that customer; the customer chose to deal with that specific furniture manufacturer. The fact that the customer sold the chair to someone else, or had a dinner guest sit on it, was really the customer's problem, not the furniture maker's.

- ✮ That logic makes little sense in a modern economy of mass-produced goods, corporate branding, and marketing. The key relationship that the modern manufacturer wants to build is with the ultimate consumer. Its advertising is directed at the consumer, and it jealously protects its trademarks and brand recognition. This is true for cars, like Buicks, and even more true when it comes to smaller purchases, like TVs or bottles of soda. The retailer is just a conduit that connects the manufacturer with you, the consumer.

- ✮ In *MacPherson*, Cardozo began the process of dismantling the privity rule by focusing on a chink in the rule's armor, an 1852 case called *Thomas v. Winchester*. In *Winchester*, a supplier had negligently mislabeled a poison, which a pharmacy then gave to a consumer. The privity rule, of course, would have prevented the consumer from suing the supplier, because the consumer contracts only with the pharmacy. The *Winchester* court, however, held that the privity rule was inapplicable when the product was inherently or imminently dangerous, like poison.

- ✮ Keeping *Winchester* in mind, Cardozo then distinguished two cases that were otherwise problems for him. And by distinguishing them, he was basically able to discard them. First, there was *Loop v. Litchfield*, decided in 1870. Second was *Losee v. Clute*, decided in 1873. Cardozo cleverly narrowed *Loop* and *Losee*, distinguishing them from the facts in MacPherson.

- ✮ According to Cardozo, the plaintiff had lost in those earlier cases not because of the privity rule, but for other reasons—in particular, the fact that the original purchaser was to blame for the harm caused, in effect breaking the chain of causation back to the manufacturer. With the problematic cases distinguished, Cardozo then turned to several cases that pushed the limits of *Winchester* and the dangerous product exception. Ultimately, he used these favorable cases to completely eliminate the privity rule.

- ✮ Two favorable cases addressed by Cardozo were *Devlin v. Smith* and *Statler v. Ray Manufacturing*, which involved collapsing scaffolding and an exploding coffee urn, respectively. In both cases, the plaintiff had been allowed to recover from the manufacturer of the product. Cardozo observed that in these cases, neither product was inherently dangerous; they were only dangerous because they had been improperly made. As such, the exception for dangerous products had already undergone a subtle but important expansion.

- ✯ Defined in this way, of course, the dangerous-product exception swallows the rule. Nearly every product is dangerous if negligently made. Following the reasoning in *MacPherson*, almost any product that causes injury—that is, any product that generates a tort suit—will be defined as "dangerous." With this deft bit of sleight of hand, Cardozo swept away the privity rule. He did limit his new principle, however, stating that it would apply only if the product would not be tested or inspected by consumers.

ESCOLA V. COCA-COLA BOTTLING CO.

- ✯ In 1941, Gladys Escola, a waitress at Tiny's Waffle Shop, was restocking the waffle shop's refrigerator with Coca-Cola, which at the time came in reusable glass bottles. One of the bottles exploded in her hand, injuring her. Escola sued the bottling company, which was the distributor responsible for refilling the bottles.

- This was after *MacPherson*, so Escola was perfectly allowed to sue the bottling company, even though the contract—that is to say, the privity—was only between the bottling company and the restaurant. Escola had a problem, however. Strict liability for products wouldn't be the law for another two decades. The rule was still negligence, which would have been all-but-impossible for her to prove.

- Had the bottler negligently overpressurized the bottle? That was a common problem at the time. Had the distributor negligently inspected the bottle, such that a defective one had come through the production line? Did the bottle get whacked—whether by the driver, or one of Escola's coworkers, or Escola herself? The fact is, we just don't know. Escola certainly didn't. And any evidence concerning the bottle itself was gone when the bottle exploded.

- In an attempt to show wrongdoing on the part of the bottler, Escola employed the common law doctrine of res ipsa loquitur, which allows the plaintiff to use circumstantial evidence to infer the existence of negligence. Escola argued that glass bottles do not normally explode without negligence. That's not exactly right, however; glass bottles might not explode in the absence of negligence, but that doesn't necessarily mean the bottler was at fault. Escola herself, for example, could easily have knocked the bottle into something, damaging it to the point of explosion.

- At this point in the development of products liability, courts had already started to interpret res ipsa loquitur in expansive ways. And an expansive or loose application of res ipsa loquitur transformed what was a negligence standard into one strikingly close to strict liability. In court, a defendant would be extremely hard-pressed to defend against claims like Escola's. The plaintiff is clearly injured, and the defendant can do nothing except perhaps feebly protest that it has quality controls. The manufacturer is almost always going to lose in that scenario.

- ✭ That is precisely what happened in *Escola*. The majority of the California Supreme Court held that res ipsa loquitur applied to the case, and because the jury had found for the plaintiff, the damages award was affirmed. In a notable opinion concurring in the judgment, the court's Justice Traynor argued that products liability should be simply strict liability. Traynor argued implicitly that broad application of res ipsa loquitur was already operating like strict liability, so the court might as well make it official.

- ✭ It would be another two decades—from 1944 to 1963, to be precise—before Traynor was able to convince the rest of his colleagues to fully embrace strict products liability. But embedded in his 1944 concurrence in *Escola* were all of the arguments and reasons for the revolution in strict liability that was to come.

- ✭ The first of Traynor's arguments is often characterized as a cost-avoidance argument. Traynor observed that the manufacturer is in the best position to improve product safety, and that making a manufacturer responsible for all of the harms caused by its products would thus optimize the manufacturer's incentives to choose the correct level of safety.

- ✭ Traynor's second argument is a loss-spreading argument, and it views the manufacturer as an efficient insurer. The problem with product defects, the argument goes, is that they strike like lightning. For example, out of millions of soft drink bottles, a few will explode, causing serious damage to a few unlucky victims. By imposing strict liability, manufacturers effectively becomes the insurers for these lightning strikes. A bottler, for example, can charge a penny or two more per bottle—the premium, as it were—and pay out when sued for product defects.

Suggested Reading

- Berenson, "Merck Agrees to Settle Vioxx Suits for $4.85 Billion."
- Escola v. Coca-Cola Bottling Co.
- Geistfeld, "Escola v. Coca Cola Bottling Co."
- Henderson, "MacPherson v. Buick Motor Co."
- Hull and Fisk, "Tesla Cranks Up Pressure to End Ban on Direct Auto Sales."
- MacPherson v. Buick Motor Co.

Questions to Consider

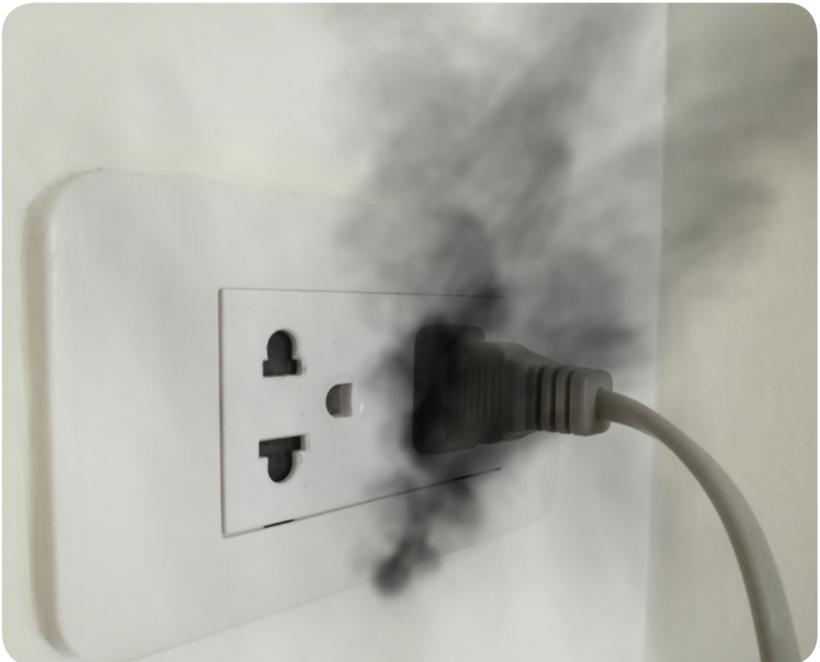
- Imposing strict liability on manufacturers for their products is often thought to be unfair because they are not at "fault" per se. Is the argument for loss-spreading—in other words, turning the manufacturer into an insurer—a legitimate basis for liability? Would it be preferable to simply allow a separate insurance market to form? Would such an insurance market form in the absence of strict products liability?

- *MacPherson* broadly abolished the privity rule, but should its holding be interpreted so broadly? For example, while *MacPherson* may make sense for mass-market consumer products, it makes less sense for custom products, or ones created by individual artisans. Should there be limitations?

Lecture 11

PRODUCTS LIABILITY TODAY

This lecture is about the current state of products-liability law. In this lecture, you will learn about the types of products and manufacturers that are subject to strict products liability. You will also explore the types of harm suffered by plaintiffs in products-liability cases. Finally, you will learn about the legal distinctions among three categories of product defects: manufacturing defects, design defects, and failures to warn.



THE BUSINESS OF SELLING

- The Third Restatement of Torts, in its discussion of products liability, begins with a simple statement of the position adopted by its drafters: "One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect."

- You can see that the rule involves strict liability. The focus is on products, and the liability is for harm, unqualified by negligence or fault. But there's more to this provision than meets the eye. Unpacking this language will give you a sense of how a lawyer unpacks a statute. The three words to focus on here are "selling," "harm," and "defect."

- Those engaged in the business of selling include manufacturers, of course, but also wholesalers and retailers—the entire supply chain, in other words. Note, however, that because the language is about the business of selling, strict liability is limited only to commercial sellers. This means that casual sellers are excluded. For these casual sales, the usual negligence standard will apply.

- This exclusion for casual sellers makes sense in light of the rationales behind strict liability. A casual seller doesn't have enough sales to become an insurer under the loss-spreading theory of strict liability. It also isn't the best cost-avoider, having neither the volume nor the money to do research into manufacturing processes and quality control.

- We also need to be precise about selling itself. One important distinction is the difference between a product seller and a service provider. For example, say a pipe bursts in your house. If you install a pipe yourself, and that pipe turns out to be defective and injures you, you can sue the manufacturer in strict liability. If the pipe is installed by a plumber instead, you would still be able sue the manufacturer in strict liability. The plumber himself, however, is subject only to a negligence claim; he's a service provider, not a product seller.

TYPES OF HARM

- ✮ The next issue to parse is the matter of harm. Most of the harm you hear about would be covered by the language used in the Restatement: disease from pharmaceuticals, personal injuries from the lack of an airbag or an accident caused by a defective tire, property damage from an exploding lithium battery, etc. All would be subject to strict liability.

- ✮ But there is one kind of harm that is not recognized under strict products liability—or tort law in general, for that matter—and it is what is sometimes called economic loss. Strict liability applies to harms caused by the product to other things—people, for example, or the surrounding property. It does not apply to harm to the product itself.

- ✮ Consider a defect in a faucet that causes it to crack and slice into your hand. That's products liability, and strict liability applies. But if a defect in the faucet causes it to no longer work, that's an economic loss, and not a tort at all. Similarly, if a defect in the faucet's finish causes it to tarnish and become ugly, that's not a tort; it's a purely economic loss.

- ✮ The rationale behind the economic-loss rule is the rather basic idea that tort law will not come to the rescue in the case of bad economic decisions. If you buy a cheap toaster and it explodes—a situation that should never happen—products liability applies. If you buy a cheap toaster and it burns your toast, that's your problem. Disappointed economic expectations are the realm of contract, not tort.

TYPES OF DEFECTS

- ✮ The defect requirement for strict liability is where the rubber really meets the road, because defects are at the core of products-liability cases. There are three different types of defects in products liability: manufacturing defects, design defects, and failures to warn. Each of these three types of defect is subject to a particular set of standards that must be met if the plaintiff is to succeed.

- ✭ The first category is manufacturing defects. The Restatement defines a manufacturing defect as when a "product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product." For manufacturing defects, the rule is strict liability. As the Restatement says, a deviation from the intended design is a defect, regardless of how careful the manufacturer is, and regardless of whose fault it is. If there's a manufacturing defect, the manufacturer will be held liable.

- ✭ The second category is design defects. Compared to the definition of a manufacturing defect, the definition of a design defect is far more controversial. The Restatement defines a design defect as occurring when the "foreseeable risks of harm … could have been reduced or avoided by the adoption of a reasonable alternative design." One controversy surrounding this definition concerns the use of the word "reasonable," a word more commonly used in negligence cases, rather than strict liability.

- ✩ Critics of the Restatement accused its drafters of trying to secretly transform what was supposed to be a doctrine of strict liability back to an old-school negligence standard. But how else can you explain what a design defect is? In many ways, the very nature of a design defect is that it involves some kind of negligence or unreasonableness. Alternative definitions that were proposed occasionally focused on the issue of consumer expectations, but even in those instances, there was still some idea of fault or blame involved.

- ✩ Another controversy about design-defect doctrine focuses on consumer choice. Why shouldn't you, as a consumer, have the ability to choose between a table saw with safety technology and one without safety technology? The added technology is expensive, and perhaps you would prefer the more dangerous saw with a reduced price. Perhaps you're a careful person, or you simply don't use your table saw very much. Should there be a baseline level of safety despite market preferences? Tort law is about that baseline, but it's a controversial one to draw.

- The third and final category of defects consists of what are known as failures to warn. These are cases in which the risks of harm could have been reduced through the use of better instructions or warnings. Although failures to warn are traditionally a separate category of defect under products-liability law, they are conceptually similar to design defects. After all, warnings are part of the design of a product.

- Among the types of defects, failure to warn is the one that tends to prompt the most puzzling behavior by manufacturers, perhaps because warnings are cheap. Ridiculous warnings now appear on everyday items—coffee cups warning that their contents are hot, irons warning you not to iron your clothes while wearing them. These are the results of manufacturer attempts to avoid product-liability suits for failure to warn.

Suggested Reading

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- Geier v. Am. Honda Motor Co.
- Henderson, and Twerski, "A Proposed Revision of Section 402A."
- Maloney, "Florida District Court."
- Osorio v. One World Technologies, Inc.
- Restatement (Second) of Torts.
- Restatement (Third) of Torts.

Questions to Consider

- Consider the following scenario, which involves the modern form of transportation known as the hoverboard: A plaintiff buys a defective hoverboard from an independent retailer through an Internet marketplace—Amazon Marketplace, for example, or eBay. The hoverboard's battery catches fire, and the fire spreads, destroying the plaintiff's home. The manufacturer is a foreign counterfeiter. The retailer, according to the plaintiff, is a sham company with no assets. Can the plaintiff sue the marketplace in strict products liability? Does it matter that the marketplace merely facilitated the transaction and never actually sold the product?

- A conventional table saw without flesh-detection technology cost less than $150. A modern saw with the technology costs at least $1,000. If a plaintiff purchases a conventional table saw and accidentally—but nonnegligently—severs his finger in an accident, will he be able to recover from the manufacturer of the saw on a theory of defective design? What type of cost-benefit analysis is appropriate in this context? Should consumer choice matter?

PUNITIVE DAMAGES AND THEIR LIMITS

This lecture examines the matter of punitive damages, providing a closer look at the facts that lie underneath the sensational headlines and massive jury awards. In this lecture, you will learn what punitive damages are, why we have them, and how the legal system can rein in out-of-control juries. Punitive damages play a unique and quite limited role in our legal system, and are not necessarily as lawless as they are commonly thought to be.

TYPES OF DAMAGES

- ✫ There are three types of damages that a plaintiff can ask for in a torts or personal-injury case. The first two are forms of compensatory damages. As the name implies, these damages compensate the plaintiff for the harm done. In other words, the defendant behaved badly and caused damage to the plaintiff, so the defendant has to pay the plaintiff to make the plaintiff whole again.

- Compensatory damages come in two flavors. The first are economic damages, sometimes called pecuniary damages. These are compensatory damages to which it is relatively easy to assign a dollar figure. For example, the plaintiff in the well-known McDonald's coffee lawsuit had extensive medical bills as a result of the burns she suffered. These are easily quantified. If McDonald's behaved wrongfully, McDonald's would have to pay for them. If the plaintiff missed work as a result of her injury, McDonald's would have to compensate her for her lost wages—again, easily quantified.

- More nebulous is the second category of damages, which is made up of noneconomic damages. Noneconomic damages are still compensatory, but they are far less easily quantified. Pain-and-suffering damages, for example, are noneconomic damages. The defendant is still compensating the plaintiff for the damage caused—in the McDonald's case, for example, the pain caused by the burns or the pain from the plaintiff's subsequent skin-graft procedures. But there is no clear way to put a dollar amount on pain or injuries.

- In addition to the two kinds of compensatory damages, there are also punitive damages. The primary purpose of punitive damages is, as the name implies, to punish the defendant for wrongdoing. The plaintiff has already been made whole; now the question becomes how much more we should extract from the defendant as a pure penalty.

- As we will see, we can use this extra penalty, these punitive damages, to deter the defendant from doing similar things in the future. Or we might use it to simply express our outrage. In either instance, however, the focus is entirely on the defendant and his bad act, not on what the plaintiff has suffered. In other words, compensatory damages focus on the plaintiff, while punitive damages focus on the defendant.

PUNITIVE DAMAGES

- Punitive damages are a rare and special form of damages. Plaintiffs seldom ask for them, and juries even more rarely award them. According to the U.S. Department of Justice's Bureau of Justice Statistics, in 2005 plaintiffs only asked for punitive damages in 12 percent of torts and contract cases. Out of more than 14,000 of these cases in which the plaintiffs won, punitive damages were awarded in a miniscule five percent of them. That's only 700 punitive-damages awards for the entire country over a one-year period.

- Despite being seldom used, punitive damages are often a flashpoint for controversy because they can generate very large, eye-catching numbers. The McDonald's coffee case, for example, resulted in an award of $2.7 million for punitive damages. In the 700 cases from 2005 in which punitive damages were awarded, 13 percent involved awards of more than $1 million. That's more than 90 cases in one year with punitive damages upward of $1 million.

- An even greater source of controversy is that huge punitive-damages awards often seem arbitrary. Like damages for pain and suffering, punitive damages aren't easily quantified. Just as it's difficult to value someone's pain or suffering, it's hard to put a dollar figure on how badly the defendant behaved. Critics of punitive damages complain that a jury can basically award whatever it wants. They might feel bad for the plaintiff, and go after the deep pockets of the defendant as a result.

MULTIPLE PURPOSES

- Punitive damages serve several purposes. One major goal of lawsuits in general, and of punitive damages in particular, is deterrence—discouraging defendants from engaging in blameworthy behavior. If plaintiffs were only permitted to seek compensatory damages, their ability to recover in tort wouldn't deter corporations or other deep-pocketed defendants from continuing the behavior that led to the plaintiffs' injuries.

- Even in cases with more substantial compensatory damages at stake, we would still need punitive damages. Compensatory damages might be seen by defendants as merely the cost of doing business. To put an end to this mentality, we need a bigger stick than compensatory damages can provide. Punitive damages are that stick.

- Another purpose that punitive damages serve is enforcement. Lawsuits take a lot of time, money, and energy to pursue. As a result, many potential plaintiffs elect not to pursue legal action, viewing the high costs of litigation as more trouble than they are worth.

- To set incentives properly, the legal system needs to somehow account for these cases of nonenforcement. And once again, it's punitive damages to the rescue. Punitive damages, when they are awarded, indirectly hold defendants accountable for the damages they cause over the long term, thus setting defendants' incentives correctly.

- The other major reason to have punitive damages is, quite simply, to be punitive. Punitive-damages awards punish the defendant for bad conduct. This can be an end in itself, particularly when viewed from the perspective of society at large.

- ✮ Cases involving punitive damages are different from those involving simple negligence, in which harm occurs unintentionally. If you get into a car accident with another driver, the other driver may be at fault or negligent, but it's unlikely that he was purposely trying to hit your car. Similarly, if you slip on ice on someone's sidewalk, the homeowners may have been careless in not shoveling the snow, but they weren't trying to make you fall.

- ✮ In punitive damages cases, the harm is often intentional. Defendants may know that what they are doing is wrong or illegal, and then do it anyway. Another common scenario involves recklessness: Perhaps the defendant didn't want the harm to occur, but he ignored substantial risk of harm that his conduct created. In some cases, courts refer to recklessness as willful and wanton conduct. In these kinds of cases, punitive damages let us, though the jury, express our outrage against the defendants.

LIMITING FACTORS

- ✮ The legal system controls or puts limits on punitive damages in several ways. One major source for limitations is the state legislature. Another is the court itself.

- ✮ In response to the seeming arbitrariness of punitive-damages awards, some state legislatures have imposed caps on punitive damages. These caps come in a variety of forms: They can be numerical limits—for example, no punitive damages greater than $500,000. The problem with this approach comes in cases involving very large compensatory awards. In such cases, a low cap makes little sense.

- ✮ Others have proposed multiplier limits, where any punitive damages awarded can't be greater than twice or three times the amount of compensatory damages. These limits work well at the high end, but can cause trouble at the lower end of the spectrum. To address this issue, some state legislatures have adopted hybrids of multiplier and numerical limits.

- Still other punitive damages reform efforts have tried to limit the windfall that plaintiffs get. The purpose of punitive damages is to deter or punish the defendant; the plaintiff has already been made whole by the compensatory damages. We might want to give plaintiffs some incentive to file suit, but perhaps not multimillion-dollar incentives.

- Some states allow the plaintiff to keep only a percentage of the punitive damages as a reward. The remainder goes to the state, sometimes to a fund that compensates crime victims. These limitations reduce the appearance that plaintiffs are winning a punitive-damages lottery at the defendant's expense.

- On a case-by-case basis, individual courts also have the power to moderate large awards. The most common tool in a judge's toolbox is called remittitur. Let's say the jury awards a staggering amount of punitive damages. If the judge thinks that the amount is excessive, he can grant a new trial on the issue of damages—a do-over, in a sense—based on his conclusion that no rational jury could have found the facts as the jury did in the case.

- The problem with remittitur when used this way is that it is a fairly blunt instrument. The court has to conduct an entirely new trial, at substantial cost of time and money. And at the end of the day, there's no guarantee that the next jury will assign a punitive-damages amount lower than the one assigned by the first jury.

- A more nuanced approach judges sometimes take is to threaten remittitur, giving plaintiff a choice: either accept a more reasonable amount of punitive damages, or take your chances with a new trial and all the associated expenses. Used this way, remittitur might seem like a form of judicial blackmail. Nevertheless, it is a well-accepted legal practice. Unsurprisingly, plaintiffs usually take the lower amount.

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- Cain, "And Now, the Rest of the Story about the McDonald's Coffee Lawsuit."
- Cheng, "When 10 Trials Are Better Than 1000."
- Cohen and Harbacek, "Punitive Damage Awards in State Courts."
- Jacque v. Steenberg Homes.
- Kirkland, *The Vaccine Court*.
- Liebeck v. McDonald's Restaurants.
- Mathias v. Accor Economy Lodging, Inc.
- Schwab v. Philip Morris USA.

Questions to Consider

- Should the tort system feature punitive damages at all? Should punishment instead be left to prosecutors or other state actors who can better account for and balance the public interest involved not only in punishing defendants, but in incentivizing business and manufacturing?

- The combination of punitive-damages caps, remittitur, and constitutional limitations arguably creates three intrusions on jury discretion. Are these sensible safeguards against potentially wayward juries? Or are these illegitimate usurpations of the jury's power in our judicial system?

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