Procedure § 2, Fall 2003. Professor Neil Franklin.

I. Civil Procedure

A. Jurisdiction

1. N.b., jurisdiction is "the power to declare the law."
2. **Constitutional limitations**
   - **a)** Article III, §2: limits of federal judicial authority.
     - **(1)** Federal courts cannot exceed jurisdictional boundaries set out in Art. III, §2.
     - **(2)** Congress can restrict federal jurisdictional authority more narrowly than Art. III does.
   - **b)** Article IV, §1: Full Faith and Credit to other state's judgments.
     - **(1)** No full faith and credit required when the court that made the judgment did not have jurisdiction to make it.
   - **c)** Amendment XIV, §1: Due Process in the states (see also Amendment V, federal Due Process).
   - **d) Choice of law limitations**
     - **(1)** Article VI, ¶ 2: Supremacy Clause.
       - **(a)** Both state and federal courts must enforce a relevant federal statute, even if there is a contrary state statute.
3. **Personal jurisdiction, generally**
   - **a) Objection mechanics**
     - **(1) Collateral attack**
       - **(a)** Take a default judgment, then defend when the plaintiff attempts to enforce it, on the basis of lack of jurisdiction.
         - **i)** All defenses on the merits are waived.
         - **ii)** This technique is justified since defendants should not have to travel to a distant forum to contest jurisdiction, esp. when they have no connections with the forum state.
     - **(2) Direct attack**
       - **(a)** Direct attack is waiver of the right to attack collaterally (*Baldwin v. Iowa Traveling Men's Association* (1931)).
       - **(b)** Raise the jurisdiction defense before or at the same time as answering the complaint (FRCP 12(b)(2), (g)).
         - **i)** Personal jurisdiction must be raised in the first response, before or at the same time as any Rule 12 motions, or it is waived (FRCP 12(h)(1)). But if you lose on the jurisdiction defense, you can then defend on the merits and later appeal the jurisdiction decision.
           - **a.** 12(h)(1): you can waive some objections; and you will waive them if you omit them from a 12(g) motion or don't include them in a responsive pleading.
             - **1)** Lack of personal jurisdiction.
             - **2)** Improper venue.
             - **3)** Insufficiency of process.
             - **4)** Insufficiency of service.
         - **ii)** N.b., in Idaho, you must move to dismiss for lack of personal jurisdiction in a pre-answer motion to dismiss. You waive your objection if you include it in your answer. IRCP 4(i).

iii) N.b., special appearance: in some jurisdictions, you can make a special appearance to contest jurisdiction. The appearance is limited to the jurisdiction issue. If you make a general appearance you have waived your jurisdiction objection. Again, if you lose at the special appearance, you can defend on the merits and appeal the jurisdiction decision.

b) Development

(1) N.b., *in personam*: proceedings against a person.

(2) N.b., *in rem*: proceedings against property; limited to the value of the property in question.

(a) *Quasi in rem*: proceedings against property for recovery unrelated to the property itself (as in *Pennoyer*).

(3) *Pennoyer v. Neff* (1877, sheriff sale land): a state court has *in personam* jurisdiction only over individuals actually served within the state's borders (and probably over all residents anywhere); a state court may gain *in rem* jurisdiction through only constructive notice.

(a) Process on Neff fell "between two stools" (i.e., between *in personam* and *in rem*, which are mutually exclusive and exhaust all possibilities).

(b) State power

i) Every state has the power to determine for itself the civil status and capacities of its inhabitants; to determine the contract and property law there.

ii) No state can exercise direct jurisdiction over people or property outside of its territory; exertion of authority beyond the limit is "a mere nullity."

iii) State has jurisdiction, without personal notice to non-resident, to determine status of a citizen towards a non-resident (e.g. marriage and divorce).

(c) Notice requirements

i) No constructive notice (e.g., by publication) for purely *in personam* proceedings.

ii) Constructive notice can be okay, though, for *in rem* proceedings. But the property must be attached prior to the lawsuit (n.b., Neff's property was not attached prior to this suit).

a. Law assumes landowners are always in possession of their property, and so are assumed notified if it is seized.

(d) Consent requirements

i) State may require non-resident partners, contractors, etc., to appoint an agent or place for receiving process.

ii) State may serve corporations without personal service of their officers.

(e) N.b., Neff collaterally attacked Pennoyer's judgment, with an ejectment action.

(4) After *Pennoyer*

(a) The courts have to adapt the *Pennoyer* doctrine to a nation whose mobility was rapidly increasing, and so stretched the "consent" and presence" ideas as far as they could go (to where "consent did not, and presence could not, exist).

(b) *Harris v. Balk* (1905, debtor caught in Md.): A, who owes B who owes C, served by C in Maryland for collection. A and B are not Maryland residents. Valid jurisdiction. Creditors are liable for their owed debts in any state where their debtors set foot.

(c) Consent and Presence

i) Corporations

a. All along, corporations were subject to service in their incorporation state (based on *Bank of Augusta v. Earle* (1839)).

b. Consent: foreign "host" states, where corporations operated, could require consent to jurisdiction; n.b., consent might be express or implied -- but implied consent only extended to suits arising from transactions in that state. Based on the "mere fiction" that states could exclude foreign corporations altogether (*Flexner v. Farson* (1919)).

c. Presence: a certain level of activity constituted "presence" and was sufficient for personal jurisdiction.

ii) Individuals

a. Consent: unlike corporations, there was no "mere fiction" that states could exclude foreign individuals. Still, implied consent extended to individuals in *Hess v. Pawloski* (1927), for non-resident motorists (then later to non-resident securities sellers).

b. Presence: from *Pennoyer*, presence inside a state's borders was sufficient for personal jurisdiction over individuals.

c. Jurisdiction over domicilers outside of state borders, not discussed in *Pennoyer*, was assumed, and eventually declared valid in *Milliken v. Meyer* (1940).

c) ***International Shoe v. Washington*** (1945, unemployment payments): for *in personam* jurisdiction of corporations, due process requires only "minimum contacts" and that "traditional notions of fair play and substantial justice" are not offended.

(1) Minimum contacts; fair play and substantial justice

(a) N.b., at the time of *Int'l Shoe*, "fair play and substantial justice" is simply a synonym for "minimum contacts."

(b) Basis: corporations with contacts and relations with a state enjoy the "benefits and protections" of that state's laws.

(c) Not strictly a quantitative test: depends on the "quality and the nature" of the contacts. No jurisdiction may be had where there are no contacts, ties, or relations (the state line still means something).

(d) *McGee v. International Life Insurance* (1957, policy sent to Calif.): jurisdiction where only contact was a reinsurance policy sent to policyholder in California. The ceiling of *Int'l Shoe*.

i) Purposeful availment: Df. reached into Calif. and availed itself of Calif. benefits and protections.

ii) Due Process is satisfied: insurance contract had a "substantial connection" with California.

a. Contract was delivered to Calif.

b. Premiums were mailed from Calif.

c. Insured was a Calif. resident when he died.

d. Calif. has a "manifest interest" in having a means for its residents to sue their insurers, and not have to chase them down out-of-state.

iii) Df. did not dispute that it had sufficient notice and sufficient time to prepare its case.

(e) *Hanson v. Denckla* (1968, Florida trust beneficiary): no jurisdiction where only contact was Df's. status as trustee of Florida woman's assets. The floor of *Int'l Shoe*. Purposeful availment is essential, unilateral act alone is not enough.

i) Unilateral activity of someone else (Pf.): Df. did not purposely avail itself of Florida benefits and protections. It was the unilateral act of the Pf. that made

Florida come into play.

(f) Key considerations

i) Defendant - Forum relationship: the casual to continuous contacts spectrum.

ii) Forum - Litigation relationship: the unrelated to related spectrum.

(g) Recasts the fictions of "consent" and "presence" considerations: "more realistically it may be said that [the] authorized acts were of such a nature as to justify the fiction." I.e., it was "fair" to give jurisdiction -- the process was sufficiently due.

(2) General and specific jurisdiction

(a) General jurisdiction: substantial and continuous contacts. E.g., Int'l Shoe Co. sued in Missouri (its principal place of business).

(b) Specific jurisdiction: minimum contacts. Could be a single, isolated event -- consider the forum - litigation relationship; e.g., Int'l Shoe Co.'s truck hits a car in Wyoming, where it does not do business.

(3) DISSENT (Black): "minimum contacts" and "fair play and substantial justice" standards are too elastic. States should be able to sue corporations that do business there, no matter how minimally.

d) ***Shaffer v. Heitner*** (1977, shareholder derivative action): extends *Int'l Shoe* both to *quasi in rem* proceedings and to individuals.

(1) Adopts *Int'l Shoe* standards -- minimum contacts, and fair play and substantial justice -- for jurisdiction over individuals and for *quasi in rem* actions. Adopts the standards in dicta for true *in rem* actions.

(2) *Quasi in rem* jurisdiction

(a) *Quasi in rem* is not abolished as an idea, but mere presence of property in a state (e.g. *Harris v. Balk*) is no longer enough. N.b., otherwise, in *Shaffer*, all shareholders in Delaware corporations would be subject to personal jurisdiction in Delaware. *In rem* jurisdiction is no longer automatic.

(b) But, *quasi in rem* is still nearly automatic where the property in question is the source of the underlying dispute (e.g., many actions involving land).

(c) Retaining *quasi in rem*, which might make the law more certain (*Pennoyer* is more certain than *Int'l Shoe*), might simplify the law at the cost of fair play and justice.

(d) *Carolina Power v. Uranex* (1977, garnish French company): *Shaffer* does not forbid property seizure to gain security against a judgments on the merits (but maybe it does forbid seizure strictly in order to proceed on the merits).

(3) CONCUR (Powell): sometimes, property in a state might should subject its owner to personal jurisdiction by ownership alone, without more; i.e., general jurisdiction over some kinds of property.

(4) CONCUR (Stevens): this decision may be too broad.

(5) DISSENT (Brennan): states should have jurisdiction over shareholder derivative actions concerning organizations it has incorporated. Generally, the state's interests should be considered.

e) Specific jurisdiction

(1) The ~~five~~ multi factor test

(a) Litigation - forum connection (related to unrelated).

(b) Defendant - forum connection (casual to continuous).

(c) Burden on the defendant.
(d) Plaintiff's interests in litigating in the forum.
(e) Forum's interests in litigating in the forum.
(f) Judicial system's interest in efficiency.
(g) States' interests in substantive social policies.
(h) Everybody's interests in international relations and international law.
(i) Others ad hoc and yet to be determined . . .

(2) *World-Wide Volkswagen v. Woodson* (1980, Oklahoma car wreck): no jurisdiction where Df's. only contact to the forum was that its car was in a wreck there. For personal jurisdiction over a Df., that Df. should have been able to reasonably foresee being subject to suit in the forum.

(a) Df's. burden considered in light of other factors
i) Forum state's interests in adjudicating the dispute.
ii) Pf's. interests in convenient and effective relief (when not covered by Pf's. choice of forum).
iii) Judicial system's interests in efficiency.
iv) States' interests in social policies.

(b) Foreseeability (that the car could end up in a wreck in Oklahoma) is not enough; but it is not irrelevant, either. Dfs. should generally be subject to a state's jurisdiction is they should "reasonably anticipate being haled into court there."
i) This means you have some control over where you can be sued. E.g., a Moscow, Idaho, business marketing locally only does not expect to be sued in Florida, and probably can not be. Walmart, on the other hand, does expect to and can be sued in Florida (even if it is incorporated in Delaware and headquartered in Arkansas).
ii) N.b., courts' personal jurisdiction opinions, including this one, actually themselves affect whether its reasonable to anticipate being haled into court somewhere; so, to some extent, this rule is vacant.

(c) Purposeful availment is clear notice to a corporation that it will be subject to suit in that forum. Unilateral act is not enough.

(d) Financial benefits to the Df. because of the forum's existence are not enough alone (e.g., it is not enough that Df. might not have sold as many cars if the cars could not drive to Oklahoma). There must be a "cognizable contact."

(e) DISSENT (Brennan): majority does not give enough consideration to the forum's interest in the litigation. Stream of commerce consequences can mean purposeful availment.
i) Although Df. may have hoped and intended to have no commercial impact beyond its region, but it did, and what it hoped for should not automatically preclude jurisdiction.
ii) Df. could and did purchase insurance for this type of scenario.

(f) N.b., multiplicity of suits: this result itc. could cause some disputes to be litigated in separate fora (e.g., the distributors and manufacturers in one forum, the retailer in another). This is not a good thing.
i) Multiple suits could lead to contrary results.
ii) It costs more to try the dispute separately than it does to try all parties at once.

(3) *Burger King v. Rudzewicz* (1985, failed franchise): jurisdiction where Df. purposefully availed himself of the forum via K with Pf.

(a) N.b., this is a case brought in federal court. The personal jurisdiction analysis does not change, though, since the federal court must apply the state's jurisdiction law unless there is a contrary federal statute (see FRCP 4(k)(1)(A)).

(b) N.b., fairness and minimum contacts are almost separate tests itc., but not quite; the court says they are interrelated.

(c) **Minimum contacts**: a K alone is not enough for jurisdiction. But here Df. "reached out beyond" to the Pf's. forum by entering into a "carefully structured" and long-term agreement -- the relationship was not "random"; Df., in fact, purposefully availed himself of the Pf's. forum's benefits and protections.

- **i)** Consider multiple factors to determine whether a Df. has purposefully availed itself of a forum by entering a K.
  - **a.** Prior negotiations.
  - **b.** Contemplated future consequences.
  - **c.** Contract terms.
  - **d.** The parties' actual course of dealing.

(d) **Fairness**: there may be a slight disparity in bargaining power, but not enough to diminish the sufficiency of Df's. contacts to the forum.

- **i)** The lower court's concern over consumers and small businessmen being haled into faraway courts based on contracts is not a big worry: the fairness consideration should prevent that from happening. Also, contracts formed by duress or undue influence can't be the basis for jurisdiction.

(e) DISSENT (Stevens, et al.): asserting jurisdiction over Df. here would be unfair. Df. was really a local business, and plus there was a disparity in bargaining power during formation of the K involved here.

(4) *Asahi Metal v. Superior Court* (1987, Japan v. Taiwan): "minimum contacts" and "fair play and substantial justice" become two separate tests -- they are no longer synonyms.

(a) **Fairness**: it is not fair to assert jurisdiction over Asahi here. (8 of 9 justices agree.)

- **i)** Burden on the defendant: severe. Asahi must travel from Japan to defend itself in a foreign legal system.
- **ii)** Interests of the forum state: slight. Pf. is not a Calif. resident.
- **iii)** Plaintiff's interest in obtaining relief in the forum: slight. Transaction took place in Taiwan, where Pf. is located. Pf. did not demonstrate why it would be more convenient to sue in Calif. than in Taiwan.
- **iv)** Judicial system's interest in efficiency, and the several states' interest in furthering social policies: "great care . . . should be exercised when extending our notions of personal jurisdiction into the international field."

(b) Minimum contacts: for jurisdiction, there must be something more than Df's. awareness that the stream of commerce will carry its product to the forum in question. (4 of 9 justices agree).

- **i)** There must be a "substantial connection" between the defendant and the forum that arose from an action by the Df. "purposefully directed toward the forum state." Examples:
  - **a.** Designing the product for the market in the forum state.
  - **b.** Advertising in the forum state.
  - **c.** Establishing channels for providing regular advice to customers in the forum state.
  - **d.** Marketing the product through a distributor who has agreed to serve as

the sales agent in the forum state.

ii) N.b., the other interpretation, not overruled here, is that personal jurisdiction can be based on no more than the Df. placing its product in the stream of commerce.

(c) DISSENT (Brennan, et al.): injecting goods into the stream of commerce ought to suffice for jurisdiction. (4 of 9 justices agree.)

(d) DISSENT (Stevens, et al.): the minimum contacts analysis is not always necessary. (3 of 9 justices agree.)

i) No unwavering line can be drawn between "purposeful availment" of a forum state and "mere awareness" that a product will reach that state.

(5) Meta-jurisdiction

(a) *Insurance Corp. of Ireland v. Compagnie des Bauxites* (1982): A party's appearance to contest personal jurisdiction operates as a waiver of their right to object to the court's jurisdiction over the personal jurisdiction issue. Courts may presume that failure to comply with discovery requests on that issue is an admission of a meritless argument against personal jurisdiction.

i) Waiver: Df. who submits to a court's jurisdiction for the limited purpose of challenging jurisdiction agrees by doing so to abide by that court's determination on that issue.

ii) Presumption: a party's failure to produce requested evidence creates a presumption that the party doesn't have a meritorious argument (*Hammond Packing v. Arkansas* (1909)).

iii) CONCUR (Powell): this holding is too broad, and seems to do away with the "minimum contacts" requirement. Furthermore, FRCP 37 (compel discovery) does not grant any jurisdictional power, as per FRCP 82. Still, the result is good, because Pf. proved minimum contacts anyway.

iv) N.b., international litigation.

a. Foreign defendants may be sued in U.S. courts, either federal or state. The defendants may remove to federal court, however. U.S. defendants may be sued in foreign courts that have jurisdiction. The jurisdiction's law may not apply, though -- there must be a choice of law analysis.

b. Victors in U.S. courts over foreign parties can enforce by either attaching the parties' U.S. assets, or attempting to enforce in the foreign jurisdiction. Where there is no treaty re: enforcement (and the U.S. has none), the foreign courts may enforce or not (they will usually enforce what they see as fair judgments).

f) General jurisdiction

Comment: "Under what circumstances will defendant be subject to jurisdiction for all claims -- even those without any connection to the forum state?"

(1) N.b., general jurisdiction is rarely an issue: usu. there is either specific jurisdiction or general jurisdiction is obvious.

(2) Corporations

(a) Corporations can always be sued, on all claims, in both their state of incorporation and in the state that is their principal place of business (see *Int'l Shoe*).

(b) *Helicopteros v. Hall* (1984, helicopter crash): no general jurisdiction where Df. simply made a K in the state and trained its pilots there -- contacts should be of a "continuous and systematic nature."

i) Purchases, checks drawn on the state's banks, trips to the state are not enough for general jurisdiction -- even if they occur at regular intervals.

ii) DISSENT (Brennan): there could be specific jurisdiction here -- the purchases and trips were related to pilot training, and so were related to the cause of action.

(c) *Washington Equipment v. Concrete Placing Co.* (1997, Idaho corp. K): Idaho corporation that obtained a business certificate and appointed and agent in Washington is not subject to general jurisdiction there because Washington statutes do not say that would be consent, and the Idaho corp. had to do those things anyway to do business in Washington.

i) Statutory consent: "consent, including consent to general jurisdiction, requires some knowing and voluntary act. A foreign corporation should not be deemed to have knowingly consented to general jurisdiction by doing an act required by the state."

ii) Waiver of objection: Idaho corp. did not waive jurisdictional objections by asserting forum non conveniens: waiver only happens when there is a claim for affirmative relief, and forum non conveniens is not a claim for affirmative relief.

iii) N.b., if the Idaho corp. had made the K in Washington, it would be subject to specific jurisdiction -- the Washington corp. must have solicited the Idaho corp's. business in Idaho (or elsewhere).

iv) N.b., distinguish from *Shaffer* on the forum - litigation connection: there is not forum - litigation connection in this case.

(3) Persons

(a) Individuals can always be sued, on all claims, in the state of their domicile (see *Milliken v. Meyers*).

(b) *Burnham v. Superior Court* (1990, child custody): personal service of an individual in the state is good enough for personal jurisdiction; but we don't know exactly why.

i) **Physical presence**: it is fair to subject an individual to personal jurisdiction based on his physical presence in a state. But the court does not agree whether personal service in the state is good enough alone, or if the *Int'l Shoe* / *Shaffer* test must be applied.

a. PLURALITY (Scalia and 3 others): individuals are always subject to jurisdiction when personally served; *Int'l Shoe* minimum contacts analysis is not required in all cases -- it is required only in cases with absent, nonresident Dfs. "Jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of 'traditional notions of fair play and substantial justice.'"

b. CONCUR (Brennan and 3 others): *Int'l Shoe* minimum contacts analysis always applies, but usu. personal service will satisfy it -- the individual has purposefully availed himself of the state's benefits and protections, and can expect to be haled into court there. N.b., Df's. defense would be substantial unfairness.

1) Df., by coming to a state, enjoys protection by the state's emergency services, is free to travel on the state's roads, and enjoys the state's economy also.

c. CONCUR (Stevens alone): again, *Shaffer* was too broad. There is jurisdiction here because it is historically justified and fair.

ii) Induced or seduced into the state: this usu. won't mean personal jurisdiction -- this means courts do not seem to have followed Scalia's "personal service is always good" argument.

iii) In state for court proceedings: courts usu. give immunity from personal jurisdiction to individuals in state for proceedings.

iv) N.b., Df. wife can get personal jurisdiction for a divorce without any trouble (see *Pennoyer*: a state always has an interest in the status of its citizens). Here, she is trying to get her husband's property -- that requires something more in order to get personal jurisdiction.

v) N.b., Pf. husband could probably get personal jurisdiction over his wife in N.J., where they lived during their marriage -- this is provided for in statute usu., and seems to satisfy the *Int'l Shoe* tests.

vi) N.b., federal appeals courts have said *Burnham* does not apply to corporate defendants (or their registered agents (*Washington Equip.*)).

(4) Real consent

(a) *National Equipment Rental v. Szukhent* (1964, designated agent clause): clause in lease agreement designating an agent to accept service did not violate due process.

(b) *Carnival Cruise Lines v. Shute* (1991, forum selection clause): forum selection clause that was reasonable, and part of an enforceable contract, did not violate due process.

i) Forum selection clauses -- and any clause that seeks to limit jurisdiction -- should be scrutinized by the courts, but this one is okay, because it's reasonable and not in bad faith.

a. Pf. concedes notice of the clause.

b. Clause selects the Df's. principal place of business as the forum, which is also where many of its cruises begin.

c. There is no evidence of fraud or overreaching.

ii) DISSENT (Stevens and Marshall): forum selection clauses should not be enforced where they are the not freely bargained for, create additional expense for one party, or deny one party a remedy (see *The Bremen v. Zapata Off-Shore* (1972)).

iii) N.b., the jurisdiction sought in this case is general, in personam. Since the accident happened on the high seas, the litigation - forum connection is weak, and so the defendant - forum connection has to be strong (as it is, and as the court points out).

g) Notice

(1) *Mullane v. Central Hanover Bank* (1950, publication notice to trust beneficiaries): notice by publication is not good enough where you can do a better job. "Process which is a mere gesture is not due process."

(a) Personal jurisdiction (aside from notice): whether this trust accounting is *in rem*, *in personam*, *quasi in rem*, or whatever, New York has enough interest in trusts established under its laws so that it has jurisdiction as long as the beneficiaries are given a chance at their day in court.

(b) Adequate notice: Notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them of an opportunity to present their objections."

i) Personal service is always good enough; but it is not always required. Itc. adopts a reasonability standard: is it reasonably certain to give notice? Is it as reasonable as any other method would be?

ii) Notice has to convey the required info, and give an reasonable time for interested people to make an appearance. "The fundamental requisite of due process of law is the opportunity to be heard." This means you have to have been informed.

iii) Publication as notice may or may not be good enough, depending on the circumstances. Here it isn't -- but not because it was notice by publication, but because it was "not reasonably calculated to reach those who could

easily be informed by other means at hand."

a. Itc. is not good enough.

1) Pf. has addresses for most of the beneficiaries: at least for them it needs to send something.

2) It's in a newspaper, in the back, in small type.

3) The names of the beneficiaries aren't printed, so none of them or their acquaintances would notice.

b. It can be good enough; e.g., persons missing or unknown, persons whose interests are conjectural or future, persons whose whereabouts would require extraordinary diligence to determine, persons who are trying to evade notice.

iv) When there are a large number of interests, not everyone needs to be well-notified. Each interest does not stand alone, but is identical with the class -- so notice "reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all, since any objection sustained would inure to the benefit of all."

v) N.b., the decision sets up a conflict between the interest in practicality and the importance of personal notice.

vi) N.b., notice may or may not still be assumed where a Df's. property is in question (e.g. *Pennoyer*). However, cases since *Mullane* have held that personal notice is needed when the Pf. knows the Df's. address.

(2) Service of Process

(a) FRCP 4

i) Service waiver: send a copy of the complaint to the Df. and include Form 1B (service waiver). If Df. waives formal service, he gets extra time to answer (the carrot). If Df. doesn't return it in time, you have to serve him properly, but he has to pay for the service (the stick).

a. N.b., Df. who waives formal service also gives up any objections to the sufficiency or method of service.

4. Long-arm statutes

a) Maximum reach: explicitly co-extensive with due process; e.g., California: "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of the United States."

(1) Statutory and due process analysis collapse: you automatically do both at the same time.

b) Limited-to-maximum reach: not explicitly co-extensive, but maybe so nevertheless, depending on the courts' interpretations; e.g., Idaho (see below).

(1) Statutory analysis is distinct from due process analysis: you must do both.

(2) Steps to take in an exam response.

(a) Long-arm statute analysis.

(b) Due process: purposeful availment (*Hanson v. Denckla*) and minimum contacts.

(c) Due process: fairness and substantial justice.

(3) N.b., just because a long-arm statute permits jurisdiction does not mean that due process does. And vice versa.

c) N.b., the U.S. Supreme Court has no part in the interpretation of state long-arm statutes, except to correct a federal court's interpretation.

d) Idaho long-arm statutes

(1) IC § 5-514: Acts subjecting persons to jurisdiction (the long-arm statute).

(a) You submit to the jurisdiction of the Idaho courts if you, your agent (if

you're a corporation), or you personal representative do any of these things:

- **i)** Do business in the state. I.e., if you do anything here meaning to make money or further your business objectives.
- **ii)** Commit a tort in the state.
- **iii)** Own, use, or possess any real property in the state.
- **iv)** Contract to insure any person, property, or risk that was in the state when you were making the contract.
- **v)** Have a house with your spouse when you do anything that would be grounds for divorce or separation.
- **vi)** Have sex that could mean a cause of action for paternity against you.

(2) **IC § 5-517**: Other service unaffected.

- **(a)** Nothing in §§ 5-514 - 5-517 limits or affects the right to any other kind of service of process.

(3) IC § 5-515: Service of process on people described in § 5-514.

- **(a)** Anybody subject to the jurisdiction of the Idaho courts because of what § 5-514 says can be personally served outside of the state with the same effect as personal service in the state would have.

(4) IC § 5-516: Limitation of causes of actions.

- **(a)** If you have jurisdiction over somebody because of what § 5-514 says, you can't sue them for something that's not spelled out in that section.

(5) IC § 5-508: Service by publication.

Comment: N.b., Prof. Franklin thinks IC 5-508 could, under a plain-meaning interpretation, be read to grant jurisdiction as far as due process allows; i.e., it (arguably) grants at least as much jurisdiction as Mullane and Burnham do.

- **(a)** Service by publication is okay when the court is satisfied that there is a cause of action against the person and that the person is a proper party to the action, and is satisfied with an affidavit that says:
  - **i)** The person lives outside of the state.
  - **ii)** The person has left the state.
  - **iii)** The person can't be found in the state after due diligence.
  - **iv)** The person has hidden himself in the state to avoid service.
  - **v)** The person is a foreign corporation without an agent, cashier, or secretary in the state.
  - **vi)** The defendants are unknown to the complainant.
- **(b)** If the person is out of state but his address is known, the court can say it's okay to serve him outside of the state.
- **(c)** The affidavits for this stuff do not have to say what efforts have been made in trying to serve the person otherwise.

(6) *Akichika v. Kelleher* (1975, Ford truck sold in OR): IC § 5-514 doesn't allow jurisdiction where Df. advertised a truck in Oregon only, contracted to sell and sold it in Oregon, and lied about it in Oregon.

- **(a) Interpreting IC § 5-514**
  - **i)** Cases should be considered in light of their particular jurisdictional facts, because commercial transactions are complex these days (*Intermountain Bus. Forms v. Shepard Bus. Forms* (1975)).
  - **ii)** § 5-514 should be liberally construed -- it is remedial legislation designed to provide a forum for Idaho residents (*Intermountain Bus. Forms*).
  - **iii)** § 5-514 was enacted to provide all the jurisdiction available under the Due Process clause (*Intermountain Bus. Forms*). Also, it was modeled after

Illinois's long-arm statute.

(b) Applying it itc.: Df's. acts must fit either under the "doing business" clause or the "tort" clause.

i) Doing business: no. Df. advertised the truck in a newspaper circulated primarily in Portland, Oregon; the ad didn't even give a phone number -- Pf. had to go to Df's. house, basically, to do business with him; the K was made in Oregon, and the truck was exchanged in Oregon. Df's. only contacts with Idaho were a phone call from Pf., use of an Idaho bank for title transfer, and attempts to repossess on Pf's. farm -- these were only incidental, not integral to the transaction.

ii) Committing a tort (fraud -- lying about the truck): no. There might have been fraud, but it didn't happen in Idaho.

(c) But then!!!: the court says because the statute gives no jurisdiction, they don't have to talk about due process. Wait. I thought they said the statute gave as much power as the Due Process clause gave.

(d) DISSENT: the statute is co-extensive with the due process, and we use *Int'l Shoe*, and it doesn't matter that Df's. acts were only incidental and not integral to the transaction. There are minimum contacts itc., and it's fair to assert jurisdiction: Pf. knew the truck was going to Idaho, Pf. availed himself of an Idaho bank, Pf. entered Idaho to try to repossess, and when he couldn't, Pf. tried to use Idaho's legal system to get the truck back.

(e) N.b., personal jurisdiction is necessary here because Pf. is seeking damages. An Idaho court would have jurisdiction to quiet title in the truck, in an *in rem* action (*Shaffer* and *Pennoyer*).

(7) *Duignan v. A.H. Robins Co.* (1977, faulty IUD): it is both allowed by the statute and fair under due process to subject the Virginia mfr. of a faulty product to jurisdiction in Idaho, where the the product's faults manifested.

Comment: "If dangerously defective goods are placed in the interstate flow of commerce, those whose negligence created the defect should be prepared to defend themselves wherever injury should occur." Doggett v. Electronics Corp. of America (1969).

(a) N.b., this is a decision prior to *World Wide Volkswagen*. After *WWVW*, you would have to ask: what are the Df's. contacts with Idaho? Did Df. purposefully avail itself with Idaho? &c. I.e., a tort committed in Idaho gets you under § 5-514, but may not satisfy due process.

(b) Applying IC § 5-514(b), the tort clause.

i) Where did the tort happen? For determining the state for jurisdiction, the most logical is the state where the injury occurred (and so, where the cause of action accrued) (*Doggett v. Electronics Corp. of America* (1969)).

ii) Itc., there are enough facts to suggest the IUD failed in Idaho, and so it's fair to assert jurisdiction over the Df. under the statute.

(c) Considering due process, is it fair to use the long-arm statute on a Df.?

i) Consider several factors (*Phillips v. Anchor Hocking Glass* (1966)). Such as:

a. Nature and size of Df's. business. Greater chance of product entering interstate commerce, greater the size and volume of the business ⇒ greater the fairness of asserting jurisdiction over Df.

b. Economic independence of the Pf. Poor Pfs. may not be able to travel to another jurisdiction to sue.

c. Nature of the cause of action. Such as the applicable law and practical matters at trial. More local witnesses, less ability of witnesses to travel ⇒ greater the fairness of asserting jurisdiction over Df.

ii) Because of the great mobility nowadays, it is hair-splitting to wonder about the territorial reach of a tort -- the real questions on the issue should be about justice and convenience.

iii) Itc., California's only connection is that the IUD was inserted there; but Idaho is where the Pf. and her doctor, surgeon and medical records are. Df. is based in Virginia: what's the difference to them between Idaho and California, as far as travel?

(8) *Schwilling v. Horne* (1983, Alaska airplane fiasco): where Df. accepted a default in Alaska, determining whether to give full faith and credit to the Alaska judgment, Alaska's long-arm statute and due process must be considered.

(a) Full faith and credit: Idaho doesn't have to enforce a judgment entered by a sister state that did not really have *in personam* jurisdiction over one of the parties.

i) Did the sister state (Alaska itc.) have jurisdiction?

a. Df's. conduct must have fallen under the appropriate long-arm statute.

1) It seems to, itc., but Alaska wants its long-arm statute to be co-extensive with due process, anyhow, so we really just need to do the *Int'l Shoe* analysis.

b. Df. must have had minimum contacts with the forum.

1) This is not a mechanical test: was there purposeful availment, considering the transaction that gave rise to the suit? Is it reasonable to have the Df. conduct his defense in the forum in question? Interests or the forum state? Plaintiff's interests in convenient and effective relief? Interstate judicial system's interest in efficiency? States' interests in furthering substantive social policies? (*World Wide Volkswagen* (1980)).

2) Itc., Df. sought the help of Alaska state police, flew to Alaska, hired somebody in Alaska to repossess the plane, and purchased maintenance work in Alaska. But if all Df. did was self-help repossession (under the UCC), then that's not enough. So, the case is remanded for consideration of the extent of Df's. contacts with Alaska.

(b) DISSENT: the jurisdiction issue was litigated, it just wasn't contested -- it was Df's. choice not to appear to contest, and so now he is limited to collateral attack. Also, his repossession was a concerted effort, not self-help. Further, jurisdictional issues are subject to *res judicata*, and should be here -- *Duthie v. Lewiston Gun Club* notwithstanding.

5. Venue

Comment: "Venue locates litigation not just in a state [like personal jurisdiction does] but in a particular federal judicial district within that state."

a) N.b., venue is strictly a statutory question.

(1) In federal cases, you are determining which judicial district the case is to be heard in. But, n.b., state cases removed to federal court, the case is heard in district that encompasses the venue from which the case was removed.

(2) In state cases, you are determining which county the case is to be heard in.

(3) Because venue does not turn on any constitutional issues, sometimes other concerns supersede it.

(a) In federal cases, Pf. can choose venue by his place of filing.

(b) Df. can remove to federal court, and the case will be heard there, regardless of whether there is venue or not.

(c) In cross-claims, 3d party claims, and counterclaims, venue doesn't apply -- it is more important to consolidate claims than to get venue right.

b) Objection mechanics

(1) Make an FRCP 12(b)(1) motion (improper venue).

(2) Venue challenges must be in your first response.

(a) 12(h)(1): you can waive some objections; and you will waive them if you omit them from a 12(g) motion or don't include them in a responsive pleading.

i) Lack of personal jurisdiction.

ii) Improper venue.

iii) Insufficiency of process.

iv) Insufficiency of service.

(3) No collateral attack.

c) 28 U.S.C. § 1391: if you can, you must bring your claim where the Df. resides or where the claim arose.

(1) § 1391(a): actions founded only on diversity.

(a) If all Dfs. reside in the same state, you can bring the action in a judicial district where any Df. resides.

(b) You can always bring the action in a judicial district where a substantial part of either the events/omissions that gave rise to action or the property that is basis of the action.

(c) If there is no other district where the action can be brought, then you can bring the action in a judicial district where any Df. is subject to personal jurisdiction at the time the action is commenced.

(2) § 1391(b): actions not founded only on diversity.

(a) If all Dfs. reside in the same state, you can bring the action in a judicial district where any Df. resides.

(b) You can always bring the action in a judicial district where a substantial part of either the events/omissions that gave rise to action or the property that is basis of the action.

(c) If there is no other district where the action can be brought, then you can bring the action in a judicial district where any Df. can be found.

(3) § 1391(c): residency of corporations. (N.b., this residency definition is for venue purposes only -- it is designed so that it is not harder to get corporations in court than it is to get individuals in court.)

(a) Df. corporations are deemed to reside in any judicial district where it is subject to personal jurisdiction at the time the action is commenced.

(b) If a state where a Df. corporation resides has more than one judicial district, then the corporation is deemed to reside in any of those districts where the corporation's contacts would subject it to personal jurisdiction if that district was another state. But, if there is no district where Df. has sufficient contacts, it is deemed to reside in the district where it has the most significant contacts.

(4) § 1391(d): aliens can be sued in any district.

(5) §§ 1391(e),(f): (N.b., these sections will not be covered on the exam).

(6) § 1391(g): mutliparty, multiforum jurisdiction situations.

(a) In actions where the jurisdiction is based on § 1369 (multiparty, multiforum jurisdiction), the action can be brought in any district where any Df. resides, or where a substantial part of the accident took place.

6. Declining jurisdiction

Comment: "There will be circumstances in which a court has the power to hear a case [under both due process, venue rules, and, if applicable, state long-arm rules] but, for reasons of justice or efficiency, should not do so."

"For example, the judge may conclude that although jurisdiction is clear, a strong local prejudice against one of the parties will make a fair trial difficult to achieve. Or the preponderance of the witnesses, perhaps some of them severely disabled, will have to travel long distances to testify."

a) Transfer of venue

(1) 28 U.S.C. § 1404: change of proper venue.

(a) § 1404(a): for the convenience of the parties and the witnesses, and in the interest of justice, a district court can transfer an action to any other district (or division) where the action could have been brought. N.b., the court can't do this *sua sponte* -- a party has to move for the transfer.

(b) § 1404(b): what, when, and where you can transfer between divisions of the same district.

i) What: any civil action, and any motion or hearing of a civil action. But, if the action is *in rem* and brought by or on behalf of the U.S., then the U.S. does not have to consent to the transfer.

ii) When: upon the motion of all parties, the consent of all parties, or the stipulation of all parties.

iii) Where: from the division where the case is pending to any other division in the same district.

(c) § 1404(c): a district court can order that a case be tried in anywhere in the division where the case is pending.

(d) § 1404(d): (says what district courts are for the purposes of this section.)

(e) N.b., usu., Df. is going to seek transfer under this section, but Pf. can use it, too (*Ferens v. John Deere Co.* (1990)).

(2) 28 U.S.C. § 1406: correcting improper venue.

(a) § 1406(a): if a case is filed in the wrong venue, then the district/division where it is filed can either dismiss it or -- if it's in the interest of justice -- transfer it to a proper venue. N.b., the court can't do this *sua sponte* -- a party has to move for the transfer.

(b) § 1406(b): this section doesn't limit a court's jurisdiction over a party who does not object to venue in a timely or sufficient manner.

(c) § 1406(c): (says what district courts are for the purposes of this section.)

(3) 28 U.S.C. § 1631: curing lack of jurisdiction.

(a) If an action is brought and the court finds that it has not jurisdiction, the court can -- in the interest of justice -- transfer the action to any court where the action could have been brought when it was filed. If it does transfer, the action proceeds as if it was filed in the proper court on the same date it was originally filed (in the first court).

b) Forum non conveniens

Comment: Forum non conveniens is applicable when you can't transfer. Under FNC, you move for dismissal.

(1) *Piper Aircraft v. Reyno* (1981, Scottish plane crash): *FNC* motions are not defeated simply because the law of the alternative forum would be less favorable to the Pf. or more favorable to the Df. Also, Pf's. choice of forum is given less deference when the Pf. is foreign.

(a) N.b., Dfs. first removed from state to federal court in California, then transferred (§ 1404(a) -- Pennsylvania, the Pfs. headquarters, is a much more logical venue) to Pennsylvania district court, the sought dismissal on *forum non conveniens*. Note that Df. could have moved for *forum non conveniens* in state court, too.

(b) Disturbing the Pf's. choice of forum: usu., you don't; except when private and public interest factors clearly suggest an alternative forum (*Gulf Oil Corp. v. Gilbert* (1947) and *Koster v. Lumbermens Mut. Cas. Co.* (1947)).

i) **The factors to consider in an *FNC* analysis** (*Gulf Oil Corp. v. Gilbert* (1947)).

a. **Private interests of the litigants**

1) Relative ease of access to proof.

2) Ability to compel unwilling witnesses to testify.

3) Possibility to view the premises related to the case.

4) Any other practical things that make the case easy, expeditious, and inexpensive.

b. **Public interests**

1) Administrative difficulties cause by court congestion.

2) Local interest in deciding local disputes locally.

3) Interest in trying a diversity case in a forum of the law the governs the case.

4) Avoidance of conflict of laws problems.

5) Avoidance of foreign law application problems.

6) Unfairness of making citizens in an unrelated forum serve as jurors.

ii) When an alternative forum has jurisdiction, and the Pf's. chosen forum would oppress and vex the Df. "out of all proportion to Pf's. convenience," then you might dismiss for *FNC*.

iii) When the Pf's. chosen forum is inappropriate because of that court's own administrative and legal problems, then you might dismiss for *FNC*.

(c) Just because the substantive law of the alternative forum is less favorable to the Pf. does not defeat a *FNC* motion.

i) It is important to have flexibility here, and if you give a lot of weight to the possible changes in law, *FNC* could become useless. Pf. will usu. choose the forum with most favorable law, so alternative fora will almost always have less favorable law. N.b., it doesn't matter much, either, if the alternative forum's law is more favorable to the Df., for basically the same reasons.

ii) Also, if you can't dismiss for *FNC* when the law is less favorable, then you're going to have tons of foreign Pfs. filing suit in the U.S., and congest our courts.

iii) N.b., changes in law still can be given substantial weight in the *FNC* analysis, i.e., when the result would be unjust, inadequate, or otherwise unsatisfactory. E.g., when the cause of action at the heart of the case would not be available in the alternative forum, or when the procedural law of the alternative forum is so different that it would be inadequate.

(d) When the Pf. is foreign, its forum choice is given less deference.

i) Itc., there are strong ties to Scotland (even though there are good arguments on both sides). There would be less evidentiary problems if the case were tried in Scotland, probably. Also, it could be confusing to try the case in the U.S. and have to use Scottish law. Further, the Pf. doesn't have a strong connection to the U.S. forum.

(2) N.b., Dfs. moving for *FNC* usu. must waive any statutes of limitations

defenses it might have in the alternative forum, and sometimes must waive personal jurisdiction and venue objections to the alternative forum as well.

7. Subject matter jurisdiction

Comment: Unlike personal jurisdiction, which flows from the Due Process clauses, and is a personal right that can be waived, subject matter jurisdiction is an aspect of the structure of the federal government. As such, it is not a personal right and can not be waived -- the courts must not hear cases over which they have no subject matter jurisdiction. See FRCP 12(h).

a) N.b., for exam responses re: subject matter jurisdiction, begin the analysis at Art. III.

b) N.b., subject matter issues arise from the structure of the judiciary as spelled out in Article III.

(1) Art. III, § 1: establishes the Supreme Court, but leaves lower federal courts to be created and destroyed by congress. N.b., that this is a compromise re: federalism -- balances fears of a too-powerful federal government with the importance of having an adequate federal court system.

(2) Art. III, § 2: sets out the limits on federal courts' jurisdiction -- it is implied that no case not listed may be heard by a federal court, and that congress may grant or deny the federal courts the power to hear the listed cases. N.b., this means there must be statute granting jurisdiction for a listed case to actually be within the power of the federal judiciary (e.g., 28 U.S.C. §§ 1331, 1332, and 1367).

(a) All cases arising under the Constitution or federal law and treaties (federal question).

(b) Cases re: ambassadors, public ministers, public consuls.

(c) Admiralty and maritime cases.

(d) Cases where the U.S. is a party.

(e) Cases between two or more states.

(f) Cases between a state and citizens of another state.

(g) Cases between citizens of different states (diversity).

(h) Cases between citizens of the same state when they are claiming land grants made by other states.

(i) Cases between a state or citizens and foreign states or citizens.

c) N.b., federal complaints must include a "short and plain statement of the grounds upon which the court's jurisdiction depends" (FRCP 8(a)).

d) **12(h)(3)**: whenever it appears that the court lacks subject matter jurisdiction, the action must be dismissed. This means a party can move for it or the court can do it *sua sponte*.

e) Objection mechanics

(1) Diversity or amount: make an FRCP 12(b)(1) motion (lack of SMJ).

(2) Federal question: attack either the jurisdiction (FRCP 12(b)(1)) or the claim itself (FRCP 12(b)(6)).

(3) N.b., you usu. only get one chance to argue SMJ; also, you usu. can not attack SMJ collaterally if you have already had the opportunity to raise an objection. However, you may raise an objection for the first time on appeal. Also, of course, any court may consider it *sua sponte*.

f) Federal questions

(1) **28 U.S.C. § 1331**: (general federal question statute) federal district courts

have original jurisdictions over all actions arising under the Constitution, federal laws, and federal treaties.

(a) N.b., such cases can be brought either in state or federal court -- there is concurrent jurisdiction.

(b) Art. VI: (Supremacy clauses) these clauses permit Congress to grant federal courts exclusive jurisdiction to any of the cases listed in Art. III, § 2 (e.g., bankruptcy, admiralty). Likewise, these clauses mean the states cannot limit the Congress's grants of SMJ to federal courts.

(2) *Louisville & Nashville R.R. v. Mottley* (1908, lifetime free RR pass): a federal question in an anticipated defense does not give federal question jurisdiction. The federal issue must give rise to Pf's. claim, and must appear so in the pleadings -- the well-pleaded complaint rule.

(a) For federal question jurisdiction under § 1331, a suit arises under only when the Pf's. statement of his own cause of action shows that it is based on the federal laws or Constitution -- it is not enough that Pf. alleges an anticipated defense that is based on them. N.b., this implies that "arising under" in § 1331 is more narrow than "arising under" in Art. III, § 2.

i) It is not consistent with our systems of pleading for the Pf. to go into possible defenses to prove his complaint

ii) Itc., the complaint is for breach of contract (failure to honor Pf's. free lifetime passes).

iii) N.b., this method of sorting claims on their SMJ is strict, but it allows the claims to be sorted at the beginning of the suit. But, under notice pleading, it can sometimes be difficult to decide the SMJ issue just from the pleadings.

(b) *Smith v. Kansas City Title* (1921, federal bond issues): Pf's. complaint that state law prohibited a bank from investing in illegal securities had a federal question because the securities in question were federal bonds.

(c) *T.B. Harms Co. v. Eliscu* (1964, copyright case): federal grants of patent, copyright, land, &c. do not infuse a federal question in disputes of their ownership.

(3) Declaratory judgments: no federal question where a party asks for declaratory judgment using a federal claim that would arise only as a defense in the "actual" action that would be brought; e.g. if Louisville RR sought declaratory judgment in *Mottley*. See *Franchise Tax Board v. Cosntruction Laborers Vacation Trust* (1983).

(4) Appellate jurisdiction: the "arising under" concerning federal appeals courts' jurisdiction is broader -- possibly co-extensive with the "arising under" in Art. III.

(5) SCOTUS certs.: on appeals from a state's highest court, SCOTUS may hear any case where the validity of a federal law is questioned or where a right, privilege or immunity from federal law has been invoked.

g) Diversity

Comment: Originally, diversity jurisdiction was probably granted to protect citizens from prejudice in the courts of states other than their own. Some argue that this is not a problem anymore, and so that diversity jurisdiction should be eliminated. Note that the number of diversity cases allowed in to federal courts is limited by the amount in controversy requirement, which is adjusted from time to time.

(1) 28 U.S.C. § 1332

Comment: 1332 covers most diversity issues, and it is the generic diversity statute, but there are other statutes that address diversity in special situations (e.g. federal interpleader).

(a) § 1332(a): district courts have original jurisdiction when the amount in controversy is more than $75,000 and when there is diversity. Also, aliens admitted for residence are deemed a citizen of the state where they're domiciled.

- **i)** Between citizens of different states.
- **ii)** Between citizens of a state and citizens of a foreign state.
- **iii)** Between citizens of different states when foreign states and citizens are additional parties.
- **iv)** Between a foreign state plaintiff and citizens (of a single state or different states).
- **v)** Aliens admitted for residence: *Saadeh v. Farouki* (1997, Df. becomes citizen during trial): because the "aliens admitted for residence" clause was added to § 1332(a) to contract diversity jurisdiction (so as to lessen federal caseloads), diversity will not be permitted where resident alien Pf. and alien Df. live in the same state.
  - **a.** Itc. is "one of those rare cases where the most literal interpretation of a statute is at odds with the evidence of Congressional intent and a contrary construction is necessary." Note also that allowing diversity jurisdiction here would probably conflict with even the broader Art. III diversity grant.

(b) § 1332(b): if the Pf. actually recovers less than $75,000, the court can deny costs to the Pf. or even impose costs on the Pf.

(c) § 1332(c): citizenship for the purposes of § 1332.

- **i)** § 1332(c)(1): corporations are citizens of any state it has been incorporated in and its principal place of business. Insurers (corporate or not) are also citizens of the state where the insured is a citizen.
  - **a.** Principal place of business: this is a question of fact. Courts have focused either on the corporate "nerve center" or on the "muscle" of the corporation, and often the courts consider both.
  - **b.** N.b., these "citizenship" requirements for corporations are much narrower than the "residency" requirements for venue: otherwise you could almost never get diversity on a national corporation. So, like the venue residency requirements, these diversity citizenship requirements are designed to make it no less difficult to get corporations into federal court than to get individuals in federal court.
  - **c.** N.b., this subsection does not apply to partnerships. Each partner in a partnership is considered individually in determining domicile.
- **ii)** § 1332(c)(2): estate representatives are citizens of the same state as the decedent. Same with representatives of infants and incompetents.

(d) § 1332(d): for the purposes of this sections, U.S. territories, D.C., and Puerto Rico are "states."

(e) N.b., aliens.

- **i)** No diversity jurisdiction in suits between aliens of different countries -- § 1332 simply does not cover this situation.
- **ii)** There is diversity jurisdiction is suits between a U.S. citizen and aliens of different countries (§ 1332(a)(2)). Likewise, there is diversity in suits between a U.S. citizen with an alien and a U.S. citizen with an alien from another country (e.g. CA and Mexico vs. NY and Japan).

(2) *Strawbridge v. Curtis* (1806): complete diversity is required under § 1332. The diversity required by Art. III, however, is only minimal diversity (at least one claimant must be diverse from another).

(3) *Mas v. Perry* (1974, two-way mirrors): wife of an alien does not share her husband's domicile where that would lead to absurd results. Also, judicial efficiency can be a factor in determining diversity issues.

- **(a)** "Citizenship": to be a citizen of a state under § 1332, you have to be both a citizen of the U.S. and a domiciliary of the state -- mere residence is not enough.
  - **i)** Domicile: a person's "true, fixed, and permanent home," where he intends to return if he is absent.
  - **ii)** N.b., domicile is determined by the domiciles of the parties at the time of filing -- later moves are not determinative of the diversity issue, but can be evidence of a party's intent w/r/t domicile.
  - **iii)** Wife of an alien should not be assigned the domicile of her husband, because that would be absurd. Her husband would be a domiciliary of France, so she would neither be a citizen of any state nor be able to sue as an alien -- she would have no way to sue. Even if her husband could be considered a domiciliary of Louisiana, the wife would still not be able to sue on diversity since Df. is a Louisiana citizen.
- **(b)** It is important at times to consolidate interdependent claims.
  - **i)** Itc., since the court clearly had jurisdiction over the husband's claim, and the wife's claim is completely interdependent with her husband's, it is in the interest of sound judicial administration to allowing both claims to come together.
- **(c)** N.b., domicile.
  - **i)** You keep your last domicile until you get a new one (*Mas v. Perry* (1974)).
  - **ii)** Intent is the test for domicile. E.g., being a student is not determinative one way or the other.
  - **iii)** Domicile is determined at the time of filing (but later acts can be evidence of intent).

(4) N.b., the party invoking diversity has the burden of proving it.

(5) N.b., a court can dismiss non-diverse parties who are not indispensable to the action (*Newman-Green, Inc. v. Alfonzo-Larrain* (1989)).

(6) N.b., federal courts have no jurisdiction where parties have been improperly or collusively joined to get diversity (28 U.S.C. § 1359).

(7) Amount in controversy

- **(a)** N.b., the courts take the amount in the pleading at face value, unless it's clear to a legal certainty that the party could not recover over $75,000.
  - **i)** The party does not even plead over $75,000 (obviously).
  - **ii)** The party asks for damages that are calculated per a statute, and so the court can calculate the maximum recoverable amount under the statute.
- **(b)** N.b., assigning value to injunctions.
  - **i)** Determine the value to the Pf.
  - **ii)** Determine the cost to the Df.
  - **iii)** Determine the value or cost to the party invoking diversity.
- **(c)** Aggregation.
  - **i)** A single Pf. can aggregate all of his separate claims to get over $75,000.
  - **ii)** Multiple Pfs. can not aggregate their separate claims.
  - **iii)** Compulsory counterclaims need not claim damages over $75,000.

Permissive counterclaims, though, must claim damages over $75,000.

h) Supplemental jurisdiction

(1) Pendent jurisdiction: jurisdiction to hear a a claim -- which it wouldn't otherwise have jurisdiction over -- because the claim arises from the same transaction as another claim that the court does have jurisdiction over.

(2) Ancillary jurisdiction: jurisdiction to hear claims that arise out of claims already before the court (e.g., counterclaims).

(3) *United Mine Workers v. Gibbs* (1966, union conflict): courts have the power to hear state claims that are factually related to federal claims in federal question cases. "Cases and controversies" is interpreted broadly.

(a) Pendent jurisdiction

i) Minimum requirements for jurisdiction

a. The federal claim must have substance sufficient to confer SMJ (see *Mottley*).

b. Both state and federal claims must derive from a common nucleus of operative fact.

c. If, considered without regard to their federal or state character, all claims must be ordinarily expected to be tried in one judicial proceeding.

ii) But, pendent jurisdiction does have to be exercised if there is power for the jurisdiction.

a. Consider judicial economy.

b. Consider convenience to the litigants.

c. Consider fairness to the litigants.

d. Needless decisions of state law should be avoided.

e. If federal claims are dismissed before trial, the state claims should be dismissed also.

f. If state issues predominate, the state claims may be dismissed.

g. If the claims would be separated for trial (FRCP 42(b), then the claims should be dismissed (e.g., possible jury confusion over divergent theories).

iii) Pendent jurisdiction issues remain open throughout the litigation.

a. Usu., the issues will be resolved from the pleadings.

b. But, if pretrial or trial procedures reveal that the state claims predominate, the state claims may still be dismissed. The circumstances should be taken into account, however.

(b) *Owen Equipment v. Kroger* (1978): Iowa Pf. sues Nebraska Df, who impleads an Iowa 3d party Df. Iowa Pf. then adds a claim against the Iowa 3d party Df. No jurisdiction to support the Iowa Pf's. claim against the Iowa Df. -- ancillary jurisdiction does not give Pf. power to add a Df. that it could not have named in the original suit (although it does give jurisdiction over counterclaims, cross-claims, and 3d-party claims).

(c) *Finley v. United States* (1989): Pf. suing Df. U.S. under federal law can not add state claim against another Df., even though the claims involved substantially overlapping facts. This is the result that 28 U.S.C. § 1367 cures.

(4) 28 U.S.C. § 1367 (1990): supplemental jurisdiction.
Comment: Keep in mind that if you've got 1331 (federal question) or 1332 (diversity) jurisdiction, you don't need 1367 supplemental jurisdiction. 1367 allows you to get jurisdiction where Strawbridge (complete diversity interpretation of 1332) never would.

(a) § 1367(a): when district courts have original jurisdiction over an action,

they have supplemental jurisdiction over all other claims that form part of the same case or controversy under Art. III, including claims involving joinder and intervention of other parties -- unless § 1367(b) takes this jurisdiction away (overrules *Finley*).

(b) § 1367(b): but, there is no supplemental jurisdiction over claims by Pfs. against parties added through FRCP 14 (3d party), 19 (joinder for just adjudication), 20 (permissive joinder), or 24 (intervention), or proposed joinders or interventions if there is no diversity between them (§ 1332).

i) N.b., § 1367(b) keeps Pfs. from using § 1367(a) to get non-diverse parties into court.

(c) § 1367(c): district courts may sometimes decline supplemental jurisdiction.

i) When the claim raises a novel or complex state law issue.

ii) When the claim predominates over the claims where there is original jurisdiction.

iii) When the court has dismissed all the claims it had original jurisdiction over.

iv) When there are exceptional circumstances, or other compelling reasons to decline jurisdiction.

(d) § 1367(d): Statutes of limitations are tolled while the claim is pending and for 30 days after it's dismissed (unless state law provides a longer tolling period).

(e) § 1367(e): for the purposes of this section, U.S. territories, D.C. and Puerto Rico are "states."

i) Removal

Comment: Gives Dfs. the power to second-guess the Pf's. forum choice.

(1) 28 U.S.C. § 1441: removal, generally.

(a) § 1441(a): Df. can remove any action from state court to the federal district and division of where the state action is pending. I.e., if it could have been in federal court, it can be removed there.

i) Caselaw says that all Dfs. must join in a removal motion.

ii) N.b., this is "except as otherwise provided" -- there are other relevant statutes that could apply.

(b) § 1441(b): federal question actions can be removed regardless of parties' citizenship or residence. But diversity actions can only be removed if none of the Dfs. is a citizen of the state where the action is brought.

i) N.b., this protects out-of-state Dfs. (whereas § 1332 is more broad and allows an in-state Pf. to bring suit against an out-of-state Df., § 1441(b) does not allow this).

ii) E.g., California Pf. sues Washington Df. and Idaho Df. in Idaho -- the Dfs. can not remove, even under § 1441(b), since the suit is in Idaho and of the Dfs. is from Idaho.

(c) § 1441(c): if a federal question claim (§ 1331) is joined to a non-removable case, the whole case can be removed.

i) N.b., the federal judge decides removal -- the state court judge has nothing to do with it (Art. VI, Supremacy Clause).

(d) § 1441(d): actions against foreign states (§ 1603) can be removed, and § 1446(b) time limits can be expanded if necessary.

(e) § 1441(f): if a case is removed and the state court had no jurisdiction in the first place, the district court can still hear it (e.g., a patent infringement

case filed in state court).

(2) 28 U.S.C. § 1446: removal procedures.

(a) § 1446(a): Df. who wants to remove files a motion with the local district court; the motion has to include a short and plain statement of the grounds for removal and a copy of all the process and pleadings served on the Df.

(b) § 1446(b): Df. has 30 days to remove after receiving the initial pleading or a summons (whichever time is shorter). But, if the original case wasn't removable, the Df. has 30 days to remove after receiving something that indicates the case has been amended to be removable. But still, a diversity action can not be removed more than one year after the action was initially filed.

i) N.b., Pfs. can manipulate removal in diversity actions because of the one year limit: they can join non-diverse parties and then drop them after a year, or wait to raise their damage prayer after a year.

(c) § 1446(d): Df. has to notify all adverse parties if the case is removed.

(3) 28 U.S.C. § 1447: post-removal procedures.

(a) § 1446(c): a motion to remand to state court for any reason besides lack of SMJ has to be made within 30 days after notice of the removal was filed. If there's no SMJ, though, the case is remanded whenever that's discovered, no matter when it is. Remand orders may charge a party for costs incurred from removal.

(b) § 1446(e): after removal, if a party wants a joinder that would destroy SMJ, the court can either deny the joinder, or permit it and remand to state court.

(4) *Caterpillar, Inc. v. Lewis* (1996): removal is okay as long as federal jurisdictional requirements are met at the time the judgment is entered.

(a) KY Pf. sues DE-IL Df. corp. and KY-KY Df. corp. MA-MA insurer intervenes as Pf. KY Pf. settles with KY Df. DE-IL Df. gets removal, even though the MA Pf. has not settled with the KY Df. So, there was not complete diversity at the time of removal -- the district court erred.

(b) Even though Pf. objected to the removal, and rightly so, the fact that SMJ was cleared up before trial makes the removal okay.

i) Consider finality, efficiency, and economy here -- wiping out removals like these would impose high costs on the federal and state court systems and hinder justice by making some cases go on for a long time.

ii) Dfs. will probably not gamble on removals, despite this decision, says the court: district courts will usu. insist on the removal rules, and Dfs. risk remand, along with the district court's disfavor.

B. Respect for judgments

1. *Rush v. City of Maple Heights* (1958, motorcycle wreck): only a single cause of action arises from an accident causing both property damage and personal injuries to a Pf.

a) First suit was for property damage, the second for personal injury.

(1) Issue preclusion: duty, breach, and cause elements were established in the first suit, and are precluded in the second suit.

(2) Claim preclusion: the old rule was that personal injuries and property damage gave rise to separate claims; but most jurisdictions say that only a single cause of action arises from an accident with multiple types of

damages. Itc., the court decides to go with the majority rule.

2. **FRCP 56**: summary judgment -- the method for invoking claim or issue preclusion (when it is strictly a legal question whether the doctrines apply; i.e., there is no issue of material fact. If there is an issue of material fact, you use FRCP 50(a) (judgment as a matter of law (directed verdict in IRCP)).

3. **Claim preclusion**

Comment: The basic goals of claim preclusion are efficiency, finality, and the avoidance of inconsistency.

a) Elements of claim preclusion

(1) The first action must have had a valid, final judgment either "on the merits" or "with prejudice."

(a) FRCP 41(b): all dismissals are "on the merits" except in certain situations.

i) Lack of jurisdiciton.

ii) Improper venue.

iii) Failure to join (FRCP 19).

(b) FRCP 12(b)(6) dismissals are given preclusive effect (*Federated Dep't Stores*).

i) *Federated Dep't Stores v. Moitie* (1981): Supreme Court says 12(b)(6) dismissals are judgments on the merits (but they don't explain why).

ii) Complaints usu. may be amended.

iii) N.b., in code pleading states, failure to state a claim dismissals might not be given preclusive effect (e.g., Illinois).

(c) *Gargallo v. Merrill, Lynch* (1990, federal securities claims): federal courts must apply claim preclusion law of the state where prior judgments were made. Where the prior judgment was made without jurisdiction, a court should apply that state's preclusion law w/r/t judgments made without jurisdiction.

i) In the first suit, party's federal securities counterclaim was dismissed with prejudice for discovery abuse in state court (n.b., that the state court should have dismissed for lack of SMJ) . Then the party brings the same claims in federal court.

ii) Full faith and credit: federal court must apply the state court's claim preclusion law (§ 1738), which says a dismissal with prejudice is to have preclusive effect (it is constructively "on the merits"). So, party's claims have preclusive effect based on this.

iii) Jurisdictional defect: the state's claim preclusion law does not give preclusive effect to judgments made without SMJ, so the federal court can not give preclusive effect here, since federal courts have exclusive jurisdiction over federal securities claims (and so the state court had no jurisdiction in the first suit over those claims) (again, § 1738).

a. N.b., at least four SCOTUS justices have indicated that federal courts would not have to give preclusive effect to a judgment made without SMJ, regardless of the relevant state's law.

(2) Claim preclusion can only be asserted by and against parties in the first action or parties in privity to the first action.

(a) Factors for determining privity

i) Sufficient relationship between the parties.

ii) Agreement to be bound.

iii) Substantive representation of parties in the first action (e.g., an executor on behalf of heirs).

iv) Procedural representation of parties in the first action (e.g., guardians at litem and class actions).

v) Virtual representation of parties in the first action (see *Mullane*, *Jefferson County v. Richards*).

vi) Nonparty guides and control the first action (see *Rynsburger v. Dairymen's Fertilizer*, where a homeowners group gathers evidence and requests their city bring a nuisance action).

vii) (&c.)

(b) *Searle Bros. v. Searle* (1978, partnership loses house in divorce): partnership not precluded from litigating on the ownership of a house previously litigated in the divorce proceeding of one of the partners.

i) Privity: a party is in privity with another if the party is so identified in interest with the other party that they represent the same legal right. For property interests, privity relationships include successive and mutual relationships to property rights.

ii) Neither claim nor issue preclusion apply itc.

a. Partnership has its own interests in the property, not identical to the husband's interests that were assigned in the divorce proceeding -- i.e., the partnership was not in privity with the husband (even though the husband is a partner).

b. The partnership was not represented in the divorce proceedings -- the husband was acting in individual capacity, not as a partner.

c. The right to intervene as a party does not bind a party that does not intervene.

iii) DISSENT: issue preclusion applies itc.: prior judgment was on the same issue (the ownership of the house), prior judgment on the issue was necessary to that result (had to decide ownership of the house to assign it), and the partnership was in privity with the husband (it was actively involved in the suit, it was aware of the claims, two partners testified). The purpose of issue preclusion is to prevent a party from being harassed in having to litigate the same dispute twice -- that is exactly what we have here.

(c) There is a Due Process dimension to the privity exception (this means barred parties may appeal to the Supreme Court on Due Process issues).

i) *Jefferson County v. Richards* (1995): claim preclusion can not apply where parties were not adequately notified (see *Mullane*) and were not adequately represented.

a. There is a balance to be struck here between judicial economy, prompt litigation of important legislation, and fairness and convenience.

(d) N.b., witnesses are not usu. barred from bringing claims similar to the ones in the case where they testified (e.g., car passenger who testifies in the suit between the drivers).

(e) N.b., biologically distinct individuals possess separate claims -- even married couples need not prosecute their claims together.

(3) The claims in the second action must arise from the same transaction (Restatement of Judgments, Federal courts, Idaho courts), or from the same cause of action (in some jurisdictions, usu. code pleading states).

(4) The claims in the second action must have been bringable in the first action.

(a) Ripeness: claims couldn't have been brought in the first action because they were not ripe at that time.

i) E.g., installments not yet due need not be brought with claims for installments past due.

(b) SMJ: claims couldn't have been brought in the first action because there

was no SMJ for them. But, n.b., there is a split in the courts here -- some preclude and some don't. The problem is that the all of the claims could have been brought together somewhere. Should Pfs. be allowed to split their claims in order to assign them to the most appropriate court?

b) 28 U.S.C. § 1738: full faith and credit. Judgments and acts of one state have the same effect in every court in the U.S. as they have in the courts of the state they come from.

(1) F1 and F2 are state courts: claim preclusion choice of law is based on § 1738 (combined with the Supremacy Clause in Art. VI) and Art. IV, § 1, Full Faith and Credit Cl.

(2) F1 is a state court and F2 is a federal court: choice of law is based on § 1738 only (Art. IV only talks about full faith and credit between states).

(3) F1 is a federal court and F2 is a state court: it can not be based on either Art. IV or § 1738, because neither text covers this situation. Note, though, that the caselaw, without interpreting either text, has said the state courts must give preclusive effect to federal judgments.

(a) Argument: Art. III says federal courts have the power to "decide cases and controversies," which implies some binding effect to the decisions -- then add Art. VI Supremacy Clause and you've can say state courts must give preclusive effect. But note that this does not solve the problem of which preclusion law to apply.

(4) *Durfee v. Duke* (1963, Nebraska-Missouri boundary dispute): the court that hears a collateral attack must inquire whether the jurisdictional issues were full and fairly litigated in the prior suit, and if they were, it must give that judgment full faith and credit.

(a) This issue was already decided w/r/t personal jurisdiction in *Baldwin v. Iowa State Traveling Men's Ass'n* (1931). Here the issue is SMJ.

(b) Exceptions to full faith and credit

i) Federal preemption (Art. VI, Supremacy Clause).

ii) Sovereign immunity.

c) Claim preclusion approaches

(1) Cause of action: a new claim is precluded by a prior judgment where the cause of action (and the parties) are identical. This is the traditional view.

(2) Transactional: a new claim is precluded by a prior judgment where it arises from the same transaction or series of transactions (Restatement 2d of Judgments § 24).

(a) A transaction is determined pragmatically (Restatement 2d of Judgments § 24).

i) Relation of facts in time.

ii) Relation of facts in space.

iii) Origin of the facts.

iv) Motivations apparent in the facts.

v) Whether the facts form a convenient trial unit.

vi) Conformance with parties' expectations.

vii) Conformance with parties' business understanding and common usage.

(3) *Aldape v. Akins* (1983, quiet title/accretion): claim preclusion has evolved, and it is time for Idaho to apply the transactional approach. Also, property title disputes esp. need repose.

(a) First suit was to quiet title on adverse possession theory. Second suit

was to quiet title on accretion theory.

(b) Court adopts the transactional approach, from Restatement 2d of Judgments § 24, over the strict cause of action approach.

i) Note that there are exceptions: esp. for writs and mandamus and ripeness.

ii) Since the purpose of quiet title actions is to establish the security of title, "judgments establishing property rights fall within the clear need for repose."

(4) *Diamond v. Farmers Group* (1990, private investigator defamation):

(a) Timeline

i) Idaho action filed in state court.

ii) Oregon action filed in federal court.

iii) Oregon action decided, for Diamond against Farmers because of discovery abuse.

(b) Claim preclusion against Diamond's claims applies in the Idaho case -- the sanction dismissal in the Oregon case must be "on the merits" and given preclusive effect, because otherwise the sanction would have no effect.

i) Diamond argues against claim preclusion by noting that the statute of limitations had run in Oregon at this point -- so he had no ability to file in Oregon. Of course, that's Diamond's own fault.

(c) The court adopts *Aldape* and the transactional approach in Restatement § 24 (with exceptions for mandamus, ripeness, and divorce).

d) *Frier v. City of Vandalia* (1985, car blocking the street): replevin claim and constitutional claims could have been brought together, so the second (constitutional) claim is precluded -- this is in the interest of **efficiency**.

(1) Full faith and credit: federal court considering a prior judgment from state court must use that state's preclusion law (§ 1738). I.e., if Pf's. new claims would be precluded in the state's court, he will be precluded in federal court.

(2) Illinois claim preclusion: preclusion where the "parties and the cause of action are identical"; causes of action are identical when the evidence necessary to sustain a second verdict would sustain the first. So, to suits may be grounded in different theories but still be based on the same evidence -- and so are the same cause of action and the second will be precluded.

(a) Itc., first suit was for replevin, second suit was for money damages in equity and argued on unconstitutionality -- since Pf. could have joined a constitutional claim to his first suit, his claims in the second suit use the same evidence and are precluded. Furthermore, they involve the same "common core of operative facts" and so would also be precluded under a transactional analysis of claim preclusion. It doesn't matter that Pf's. second suit was over only two of four cars in dispute -- Illinois law invokes claim preclusion when Pf. litigated a subset of all available disputes in his first suit.

(3) Purposes of claim preclusion: designed to make parties consolidate closely related matters into one suit, so as to prevent oppression of Dfs. Plus, it avoids inconsistency.

(4) CONCUR: Illinois has not adopted a transactional approach -- and Pf's. new claims are not precluded under a cause of action approach. But, no matter, because his new claims fail anyway, because Pf. received sufficient due process.

e) *Martino v. McDonald's, Inc.* (1979, consent decree settlement): although FRCP

13(a) did not compel a counterclaim, claim preclusion still applies because the new claims were available as a defense/counterclaim in the first suit and go to the validity of the original claims. This is in the interest of **consistency**.

(1) FRCP 13(a): compulsory counterclaims required when there are pleadings. N.b., here, there were no pleadings -- the first suit was settled by consent decree -- so Pf. did not have to file his counterclaim.

(a) Judicial economy -- the general purpose of FRCP 13(a) -- is sacrificed for Df's. convenience by marking the "line" of compulsion at the point where pleadings are made.

(2) Still, a consent decree is a judgment on the merits -- the court is not simply recording a contract between the parties. The consent decree itc. was accompanied by judicial fact-finding and legal decisions.

(3) Common law compulsory counterclaims: even though FRCP 13(a) doesn't require counterclaims to be filed where there were no pleadings, common law may operate to require Df. to assert a defense that could have been a counterclaim in the original suit -- esp. when the defense goes to the validity of the Pf's. claims.

(a) Generally, a defense that could have been a counterclaim need not be raised in a prior proceeding -- interests in judicial economy are outweighed because the burden on the courts in small and the interests in fairness are greater (Restatement 2d of Judgments § 56.1(1)).

(b) But, that's not an absolute rule: a counterclaim is barred where it would nullify the rights established by the prior action -- there is an interest in the consistency of results.

(4) *Chicot County Drainage District v. Baxter State Bank* (1940): first suit canceled certain bonds under the Readjustment Act. Second suit sought to challenge the constitutionality of the Readjustment Act. Claim preclusion applied, because there was full opportunity to present the constitutional claims in the first suit -- the bondholders were "not less bound by the decree because they failed to raise [the defense]."

(5) *Virginia-Carolina Chemical v. Kirven* (1909): first suit recovered purchase price on fertilizer. Second suit for crop damages caused by the fertilizer. No claim preclusion because the crop damage claim did not go to the validity of the K claims in the first suit.

(6) N.b., if the Pf. wins in *Martino* or *Chicot County*, then the original judgment will be undone, whereas it will not if the Pf. wins in *Virginina-Carolina*.

f) N.b., claim preclusion is an affirmative defense: you must raise it in your answer, or your could lose it. See FRCP 8(c) (court can correct misplaced defenses/counterclaims), 12 (b) (defenses must be made in the response, with exceptions), 12(c) (motion for judgment on the pleadings), and 56 (summary judgment).

g) N.b., just because a Pf. has to bring all its claims at the same time does not mean they have to be tried at the same time -- the court can split a case into parts for separate trials (FRCP 42(b)).

h) N.b., Pf. strategies for splitting.

(1) Different theories of recovery. E.g., K in one action and quasi K in another action.

(2) Arithmetical splitting -- recovery for separate damages. E.g., *Rush v. City of Maple Heights*.

(3) Different relief. E.g., *Frier v. City of Vandalia*.

i) **Declining claim preclusion**: Restatement 2d of Judgments § 26.

(1) Parties have expressly or implicitly agreed to allow splitting of claims.

(2) Court in the prior action reserved the Pf's. right to bring another action.

(3) Pf. could not have sought the relief he does now because of jurisdictional limitations.

(4) The prior judgment is inconsistent with a statutory or constitutional scheme.

(5) The Pf. has a right to sue for damages from time to time.

(6) There is some other extraordinary reason to decline claim preclusion (e.g., restraint of a vital personal liberty, incoherent resolution in the prior case).

4. Issue preclusion

Comment: "The black letter of issue preclusion is simple: when an issue of fact or law is actually litigated and determined by a final judgments, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." Restatement 2d of Judgments @ 27.

a) Elements of issue preclusion

(1) The issue must be identical.

(2) The issue must have been fully (i.e., to judgment) and fairly litigated.

(3) The issue must have been actually decided.

Comment: Applies where the prior decision is "opaque" in some way.

(a) *Illinois Central Gulf R.R. v. Parks* (1979, train wreck l/o/c): no issue preclusion where it could have been either contrib. or l/o/c that was decided in the first judgment.

i) In the first suit, wife sued for injuries and won, husband sued for l/o/c and lost. In the second suit, husband sues for his own injuries.

ii) The decision may have been reach for either or two reasons: either the husband was contributorily negligent (and would be precluded in this suit), or the husband's l/o/c had no value (and there would be no preclusion in this suit, because the l/o/c issue has nothing to do with this action).

(b) N.b., default judgments: usu., no issue preclusion is applied to them, since no issues were actually decided. But some jurisdictions preclude issues that would have been necessary to decide in order to reach a default. See *Martino*, where no preclusion would lead to inconsistency.

(4) The issue must have been essential to the original judgment.

Comment: Sort of the opposite of the "actually litigated" requirement: applies when there are too many issues decided in the prior case to determine what issues bore on the judgment.

(a) Restatement 2d of Judgments § 27, Comment i: when there are alternative grounds for a judgment, neither determination should be binding in later litigation.

i) Determination of either ground may not have been as carefully or rigorously determined as it otherwise would have been.

ii) The losing party may be discouraged from appealing because one determination might be upheld and the other not even considered -- this is good, since otherwise the losing party is encouraged to appeal, which increases the burden on the parties and the courts, and that's the opposite of what issue preclusion is trying to do.

iii) Special appeals situations (Comment o).

a. App. ct. upholds both determinations: both have preclusive effect.

b. App. ct. upholds one as sufficient, the other as insufficient: the sufficient one has preclusive effect.

c. App. ct. upholds one as sufficient, doesn't consider the other: the sufficient one has preclusive effect.

(5) Preclusion must be asserted against a party or privy from the first suit.

(a) Mutuality: originally, there had to be mutuality between the parties (i.e., the same parties involved) in order to invoke issue preclusion. Now, nonmutual parties may sometimes invoke issue preclusion against a party who had a full and fair chance to litigate the issue in an earlier action.

(b) *Parklane Hosiery v. Shore* (1979, SEC false proxy claims): fairness to the Df. should be considered when issue preclusion is used offensively. The Amendment VII right to a jury trial does not mean offensive issue preclusion can not be asserted.

- **i)** In the first suit, the SEC sues Parklane and wins on false proxy. In the second suit, Shore sues Parklane claiming false proxy. Shore seeks summary judgment (FRCP 56) on issue preclusion against Parklane -- this is nonmutual, offensive issue preclusion.
  - **a.** Problems with nonmutual offensive issue preclusion.
  - **b.** It encourages multiple litigation, and so cuts against efficiency.
  - **c.** If Df. is sued for a small amount in the first action, it may not defend vigorously if future suits are not foreseeable.
  - **d.** It may lead to inconsistent results. E.g., 50 person train wreck, RR wins the first 25, Pf. wins the 26th -- the Prof. Currie example.
  - **e.** The Df. might have procedural opportunities in the second action that it did not have in the first. E.g., first action was in a forum inconvenient for the Df. (a likely situation).
- **ii)** **Offensive issue preclusion**: trial courts have broad discretion
  - **a.** Could Pf. have easily joined in the earlier action?
  - **b.** Could Df. have foreseen later issue preclusion or did Df. vigorously defend itself?
  - **c.** Is the relied-on judgment inconsistent with previous judgments?
  - **d.** Does the 2d action give Df. procedural opportunities it didn't have in the first action?
  - **e.** "Jury compromise": is there a big difference between the prayer and the award?
    - **1)** This may be evidence that the jury couldn't really make up its mind and compromised by adjusting the award.
    - **2)** The Df. may consider the low award a "victory" and not appeal, even if they have a strong case.
  - **f.** Other reasons making offensive issue preclusion unfair to the defendant.
- **iii)** **Right to jury trial** (Amendment VII): the courts are not today bound to the original details of jury trial, and issue preclusion is not repugnant to the right to a jury trial, so it is no matter.
- **iv)** N.b., the mutuality requirement was abandoned for defensive issue preclusion in *Blonder-Tongue Labs. v. University of Illinois Foundation*.

(c) *State Farm v. Century Home* (1976, fire damages lots of Pfs.): if there is good reason to question the integrity of prior results, it is unfair to invoke issue preclusion against the defendant.

- **i)** Timeline
  - **a.** Df. wins at trial, but is reversed on appeal.
  - **b.** Df. wins, no appeal.
  - **c.** Pf. wins, affirmed on appeal.
  - **d.** Remand of the first suit, Pf. wins.
  - **e.** Itc., Pf. has amended its complaint to be identical to the last two suits, where the Pfs. won.
- **ii)** **Reasons to deny issue preclusion**

a. There is evidence of jury compromise.

b. Prior determinations are likely erroneous (see Restatement 2d of Judgments § 88).

c. There is newly discovered evidence that could have had a significant impact on the prior result.

(6) Preclusion must not be unfair.

(7) Preclusion must not cut against efficiency.

b) *Safeco Insurance v. Yon* (1990, prior trial was criminal): a verdict in a criminal case can be the basis for issue preclusion since the issue was determined against a higher burden of proof. Also, the heirs, who seek to use issue preclusion here, are sufficiently in privity with the murderer against his insurer since their rights are only as good as his w/r/t the policy.

c) Declining issue preclusion: Restatement 2d of Judgments § 28.

(1) The party to be precluded couldn't have obtained review of the first judgment, as a matter of law (e.g., party won in a prior trial, despite losing an important motion, and now is a Pf. suing on the issue that he lost in the prior action).

(2) The first and second actions are substantially unrelated.

(3) There has ben an intervening change in the law.

(4) There are differences in the quality of procedures between the two courts.

(5) There are differences in jurisdictional power between the two courts (e.g., small-claims court; n.b., this is not a reason to decline preclusion in Idaho (*Hindmarsh v. Mock*).

(6) The party to be precluded had a heavier burden of proof in the first action, or the burden is now on the adversary, or the adversary has a heavier burden of proof.

(7) Issue preclusion would have an impact on either the public interest or the interests of parties not involved in the suit.

(8) It was not foreseeable during the first suit that the issue would come up again (see *Parklane Hosiery* and *Century Home*).

(9) The party to be precluded did not have an adequate opportunity or incentive to obtain a full and fair adjudication (see *Parklane Hosiery* and *Century Home*).

5. Other means of preclusion

a) The law of the case: precludes a party from questioning, later in the case, a legal ruling made earlier in that case.

b) Judicial estoppel: precludes a party from arguing out of both sides of its mouth.
Comment: "Judicial estoppel prevents a party from contradicting previous declarations made during the same or a later proceeding if the change in position would adversely affect the proceeding or constitute a fraud on the court." Black's.

(1) *New Hampshire v. Maine* (2001, boundary dispute): New Hampshire is judicially estopped from arguing a different position than it maintained in a consent decree agreed 25 years prior.

(a) Factors in judicial estoppel: the purpose of judicial estoppel is to "protect the integrity of the judicial process."

i) The party's later position is clearly inconsistent with its earlier position.

ii) The party succeeded on its position in a prior proceeding.

iii) The party would gain an unfair advantage or impose a detriment on the opposing party by asserting its inconsistent position.

iv) &c.

(2) *Loomis v. Church* (1954): Where litigant, by means of sworn statements, obtains a judgment, advantage or consideration from one party, he will not thereafter, by repudiating such allegations and by means of inconsistent and contrary allegations or testimony, be permitted to obtain a recovery or a right against another party, arising out of the same transaction or subject matter.

(a) Even though judicial estoppel wasn't pleaded, the court can invoke it anyway when the evidence it's based on is entered without objection.

6. Reopened judgments

a) FRCP 60

(1) **FRCP 60(b)**: mistakes, inadvertence, &c.

Comment: FRCP 60(b) is usu. used to reopen default judgments (but not that the rule does not distinguish between defaults and other judgments).

(a) On motion, and upon just terms, the court can reopen a judgment (or relieve a party from an order or proceeding) in certain situations.

i) There was a mistake, inadvertence, surprise, or excusable neglect (**within one year**).

a. N.b., this covers excusable neglect -- inexcusable neglect would be covered, probably, under FRCP 60(b)(6) (reopen for any other reason justifying relief).

ii) There is newly discovered evidence that couldn't have been discovered through due diligence in time to move for a new trial (FRCP 59(b)) (**within one year**).

iii) There was fraud, misrepresentation, or misconduct by an adverse party (**within one year**).

iv) The judgment is void (within a reasonable time).

v) The judgment has been satisfied, released or discharged (within a reasonable time).

vi) A prior judgment that this judgment was based on has been reversed or vacated (within a reasonable time).

vii) It is no longer equitable to give the judgment prospective application (within a reasonable time).

viii) There is any other reason justifying relief from the judgment (within a reasonable time).

a. N.b., this rule, FRCP 60(b)(6), is mutually exclusive with the mistake rule (FRCP 60(b)(1)).

(b) A motion to reopen a judgment does not affect the judgments finality or suspend the judgment.

(2) FRCP 60(a): clerical mistakes in judgments and case documents can be corrected at any time either *sua sponte* or on motion.

(3) N.b., the one year limit on mistake, new evidence, and fraud is strictly enforced -- so you have to use one of the other reasons after a year has gone by.

(4) N.b., to reopen you must show a meritorious case (and opposing motions are allowed).

(5) N.b., a party can still prosecute and independent action for relief from judgment.

(6) *United States v. Beggerly* (1998, new evidence in quiet title action): independent actions for relief from judgment are limited to "grave miscarriages of justice," and this wasn't one of those.

(a) Dfs. settled with U.S. on quiet title action, then they discovered new

evidence that the U.S. probably did not own the land. Dfs. argue that the U.S. should have provided this information during the original trial (even though it took Dfs. 12 years to find it on their own).

(b) Dfs. had to use an independent action to get relief from the judgment -- their only other recourse was FRCP 60(b)(3), but it had been much more than one year from the first suit at this point.

C. Choice of law

1. Constitutional limitations

a) Article VI: supremacy clause -- if congress enacts a statute, both fed'l AND state cts. must enforce it, even if there is a contrary state statute or state common L. rule

b) When there is no relevant federal statute, federal courts must respect the relevant state statute or common law.

II. Litigation timeline

A. Pretrial

1. Something happens

2. Gather facts and research law

a) Subject to FRCP 11(b)

3. Π Complaint

a) Summary

b) FRCP detail

(1) 7(a) kinds of pleadings

(a) must be a complaint and an answer

(b) must be a reply to any counterclaim

(c) must be an answer to any cross-claim in an answer

(d) must be a 3d pty complaint if a 3d pty is summoned (see FRCP 14)

(e) must be a 3d pty answer to any 3d pty complaint

(f) No other pleadings are allowed EXCEPT

i) ct. may order a reply to an answer, or to a 3d pty answer

(2) 8(a) what claims look like

(a) all claims must have: (all claims: original, counter, cross, 3d pty)

i) 1 grounds for jurisdiction

a. EXCEPT if ct. already has jur'n and no new jur'n grounds needed

ii) 2 some reason that pleader is entitled to relief

iii) 3 demand for judgment (for relief sought)

a. alternative relief allowed here

b. different types of relief allowed here

(3) 8(e) what pleadings look like: overall

(a) all pleadings should be "simple, concise, and direct."

i) no technical forms req'd for pleadings or motions

(b) you can propose two or more claims/defenses, as alternatives or hypos

i) just one of your claims/defenses needs to be sufficient (insuff. alternatives don't make the claim insuff.)

ii) consistency not req'd across claims/defenses (can come from law, equity, maritime grounds)

- **(4)** 8(f) pleadings read so to have justice
  - **(a)** pleadings will be construed so that substantial justice can be done (e.g., not dismissed because of technical faults)
- **(5)** 9 pleading special matters
  - **(a)** (a) in a pleading, you don't have to show a party's capacity to sue/be sued, or its legal existence
  - **(b)** (b) fraud and mistake averments must be partiular
  - **(c)** (b) malice, intent, cond'n of mind can be averred generally
  - **(d)** (c) you can aver a previous act or cond'n generally, but a denial of it has to be averred particularly
  - **(e)** (d) you can plead official docs or acts by simply saying doc was issued or act was done in compliance with law
  - **(f)** (e) you can plead any kind of judgment without showing that there was jur'n for it
  - **(g)** (f) time and place averments are material (and are considered likewise)
  - **(h)** (g) if you claim an item of special damage, you have to specifically state it
  - **(i)** (h) you can state that your claim falls under admiralty/maritime law, but if your claim falls there, it will be there whether you state it or not
- **(6)** 10 what pleadings look like: form
  - **(a)** (a) all pleadings have to have a caption with:
    - **i)** name of the court
    - **ii)** title of the action
      - **a.** complaint has to have the names of ALL the parties
      - **b.** other pleadings only have to have the name of the first party on each side
    - **iii)** file number
    - **iv)** FRCP 7(a) designation
  - **(b)** (b) all claims and defenses must be made in numbered grafs, and each graf should treat just a single set of circumstances
  - **(c)** (c) you can adopt a statement from any pleading/motion in your claim by referring to it
- **(7)** 11 sign all papers and be professional, or get sanctioned
  - **(a)** (a) at least one attorney of record (or in pro se, the party) has to sign any paper submitted to the court, and put his phone number on it
  - **(b)** (a) unsigned papers will be stricken unless they are promptly corrected
  - **(c)** (b) by signing a paper, you're saying:
    - **i)** you aren't presenting it for improper purposes (like to harrass, cause delay, needlessly increase litigation costs)
    - **ii)** all your contentions are warranted by existing law, or by a nonfrivolous arg to change existing law or to create new law
    - **iii)** all the allegations either have evidence to support them already, or probably will after discovery
    - **iv)** all denials of facts are warrented by evidence or by a reasonable belief based on lack of info
  - **(d)** (c) if you violate 11(b), you can be sanctioned
    - **i)** how sanctions happen:
      - **a.** by motion
      - **b.** by ct's own initiative

ii) what sanctions are:

a. they're limited to what's necessary to deter the violation in the future

b. can be:

1) nonmonetary directives

2) penalty payment to ct.

3) penalty payment to the movant (of movant's attorney's fees, or other expenses)

iii) when sanctioning, ct. has to describe the violation and explain the basis for the particular sanction

(e) (d) FRCP 11 does not apply to discovery

4. Π Service of process

a) Summary

b) FRCP detail

(1) 4 "Summons"

(a) (c) summons must be served with a copy of the complaint

(b) (e) serve individuals in a U.S. judicial dist as if serving defendant for action in gen'l jur'n ct. of the state:

i) where dist. ct. is located; or

ii) where service is effected

(c) (m) ct. can dismiss your action if you don't serve defendant within 120 days from filing of complaint

5. Δ Pre-answer motions

a) Summary

b) FRCP detail

(1) 12 "Defenses and Objections..."

(a) (a) you have to answer:

i) if you don't waive service: within 20 days after being served

ii) if you do waive service: within 60 days after being served (or 90 days if served outiside U.S.)

iii) cross-claim: answer within 20 days after being served

iv) counterclaim: answer within 20 days after being served

v) ct.-ordered reply: answer witin 20 days after order (unless specified o/w)

(b) (b) all defenses have to be asserted in answer, EXCEPT

i) lack or subj. matt. jur'n

ii) lack or pers. jur'n

iii) improper venue

iv) insuff. process

v) insuff. service

vi) FAILURE TO STATE A CLAIM (12(b)(6))

a. challenges whether the opposing parties claim actually exists

b. in code pleading, this is called DEMURRER

vii) failure to join party under FRCP 19

6. Δ Responsive pleading

a) Summary

b) FRCP detail

(1) 7(b) motions and other papers (besides pleadings):

- **(a)** must be in writing (or be a written notice of a hearing on the motion)
- **(b)** must state the grounds for the motion
- **(c)** must state the relief sought
- **(d)** captions and other form stuff for pleadings req'd (see FRCP 7(a))
- **(e)** must be signed (see FRCP 11)

(2) 7(c) no demurrer, no pleas, no exceptions for insuff'y

(3) 8(b) what defenses look like:
- **(a)** must state defenses to each claim, and do it concisely
- **(b)** must admit or deny each one of the claimant's averments EXCEPT
  - **i)** if you don't have the info to admit or deny, just say so -- it's treated as a denial (o/w is treated as an admission (see FRCP 8(d)))
  - **ii)** you can generally deny ALL averments

(4) 8(c) must state all affirmative defenses
- **(a)** if affirmative defense is mistakenly designated as a counterclaim, the ct. can treat it as an affirmative defense anyway, justice demands (see FRCP 8(f))

(5) 8(d) if you don't deny an averment, you've admitted it EXCEPT
- **(a)** if an averment is in a pleading that does not require a response, lack of denial is NOT admission

(6) 10 what pleadings look like: form
- **(a)** (a) all pleadings have to have a caption with:
  - **i)** name of the court
  - **ii)** title of the action
    - **a.** complaint has to have the names of ALL the parties
    - **b.** other pleadings only have to have the name of the first party on each side
  - **iii)** file number
  - **iv)** FRCP 7(a) designation
- **(b)** (b) all claims and defenses must be made in numbered grafs, and each graf should treat just a single set of circumstances
- **(c)** (c) you can adopt a statement from any pleading/motion in your claim by referring to it

(7) 11 sign all papers and be professional, or get sanctioned
- **(a)** (a) at least one attorney of record (or in pro se, the party) has to sign any paper submitted to the court, and put his phone number on it
- **(b)** (a) unsigned papers will be stricken unless they are promptly corrected
- **(c)** (b) by signing a paper, you're saying:
  - **i)** you aren't presenting it for improper purposes (like to harrass, cause delay, needlessly increase litigation costs)
  - **ii)** all your contentions are warranted by existing law, or by a nonfrivolous arg to change existing law or to create new law
  - **iii)** all the allegations either have evidence to support them already, or probably will after discovery
  - **iv)** all denials of facts are warrented by evidence or by a reasonable belief based on lack of info
- **(d)** (c) if you violate 11(b), you can be sanctioned
  - **i)** how sanctions happen:

a. by motion
b. by ct's own initiative

ii) what sanctions are:
a. they're limited to what's necessary to deter the violation in the future
b. can be:
1) nonmonetary directives
2) penalty payment to ct.
3) penalty payment to the movant (of movant's attorney's fees, or other expenses)

iii) when sanctioning, ct. has to describe the violation and explain the basis for the particular sanction

(e) (d) FRCP 11 does not apply to discovery

7. Δ Other claims

a) Summary
(1) Counter claim
(2) Cross claim
(3) 3d party claim

b) FRCP detail
(1) 13 counterclaim and cross-claim
(a) (a) counterclaim "compulsory" (related to the facts) EXCEPT when "permissive"
i) the claim did not arise out of the same transaction/occurrence in the orig. claim
ii) the counterclaim would require 3d ptys over which ct. has no jur'n
iii) the counterclaim is one that's subject to another pending action at that time
iv) the orig. claim brought suit from attachment and doesn't have pers. jur'n over the orig. claim

(b) (b) counterclaim CAN arise out of some transaction/occurence that's NOT in the orig. claim

(c) (g) cross-claim:
i) can arise out of any transaction/occurrence in the orig. claim or in counterclaims
ii) but must arise from the same events of the orig. claim

(2) ?? 3d party claim ("impleader")

8. Π Reply to Defendant's claims

a) Summary
b) FRCP detail
(1) 7 types and form of pleadings
(a) 7(a) kinds of pleadings
i) must be a complaint and an answer
ii) must be a reply to any counterclaim
iii) must be an answer to any cross-claim in an answer
iv) must be a 3d pty complaint if a 3d pty is summoned (see FRCP 14)
v) must be a 3d pty answer to any 3d pty complaint
vi) No other pleadings are allowed EXCEPT
a. ct. may order a reply to an answer, or to an 3d pty answer

(b) 7(b) motions and other papers (besides pleadings):

- **i)** must be in writing (or be a written notice of a hearing on the motion)
- **ii)** must state the grounds for the motion
- **iii)** must state the relief sought
- **iv)** captions and other form stuff for pleadings req'd (see FRCP 7(a))
- **v)** must be signed (see FRCP 11)

(c) 7(c) no demurrer, no pleas, no exceptions for insuff'y

(2) 10 what pleadings look like: form

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- **ii)** title of the action
  - **a.** complaint has to have the names of ALL the parties
  - **b.** other pleadings only have to have the name of the first party on each side
- **iii)** file number
- **iv)** FRCP 7(a) designation

(b) (b) all claims and defenses must be made in numbered grafs, and each graf should treat just a single set of circumstances

(c) (c) you can adopt a statement from any pleading/motion in your claim by referring to it

(3) 11 sign all papers and be professional, or get sanctioned

(a) (a) at least one attorney of record (or in pro se, the party) has to sign any paper submitted to the court, and put his phone number on it

(b) (a) unsigned papers will be stricken unless they are promptly corrected

(c) (b) by signing a paper, you're saying:

- **i)** you aren't presenting it for improper purposes (like to harrass, cause delay, needlessly increase litigation costs)
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- **iii)** all the allegations either have evidence to support them already, or probably will after discovery
- **iv)** all denials of facts are warrented by evidence or by a reasonable belief based on lack of info

(d) (c) if you violate 11(b), you can be sanctioned

- **i)** how sanctions happen:
  - **a.** by motion
  - **b.** by ct's own initiative
- **ii)** what sanctions are:
  - **a.** they're limited to what's necessary to deter the violation in the future
  - **b.** can be:
    - **1)** nonmonetary directives
    - **2)** penalty payment to ct.
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(4) 12 "Defenses and Objections..."

(a) (a) you have to answer:

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ii) if you do waive service: within 60 days after being served (or 90 days if served outiside U.S.)
iii) cross-claim: answer within 20 days after being served
iv) counterclaim: answer within 20 days after being served
v) ct.-ordered reply: answer witin 20 days after order (unless specified o/w)

(b) (b) all defenses have to be asserted in answer, EXCEPT
i) lack or subj. matt. jur'n
ii) lack or pers. jur'n
iii) improper venue
iv) insuff. process
v) insuff. service
vi) FAILURE TO STATE A CLAIM (12(b)(6))
a. in code pleading, this is called DEMURRER
vii) failure to join party under FRCP 19

9. Π Δ Discovery

a) Summary
b) FRCP detail
(1) 26 scope of discovery
(a) 26(b)(1) parties can discovery anything that' relevant to any claim or defense (and isn't privileged)
(2) 37 you can be sanctioned if you don't cooperate in discovery

10. Π Δ Summary Judgment

a) Summary
b) FRCP detail
(1) 56 summary judgment
(a) can be moved for only when there are only issues of law:
i) there are no facts in dispute, OR
ii) opposing party can't win on the (known) facts
(b) (a) claimants can move for summ. judg.:
i) any time after 20 days from commencement of action
ii) or any time after motion for summ. judg. a/g them, if that comes first
(c) (b) defendants can move for summ. judg. at any time
(d) (c) summ. judg. can be issued on liability even if there is a genuine issue about dmgs.
(e) (d) partial SJ allowable
(f) (g) if affidavits for summ. judg. made in bad faith, ct. can order party using them to pay other party's expenses, and/or find the party in contempt

B. Trial

1. In complex litigation (many parties), judge can determine order of arguments.

2. Right to jury trial

a) FRCP detail
(1) 38 & 39

3. Π Plaintiff's case in chief

4. Δ **Judgment as a matter of law (FRCP) / Directed verdict (IRCP)**
   - **a)** Summary: JaMoL motion claims "only one verdict can arise from these facts"
   - **b)** Why don't you always make a JaMoL motion? Sanctions under FRCP 11
   - **c)** FRCP detail
     - **(1)** 50(a) Judgement as a Matter of Law
       - **(a)** (1) If, after opposing party has been fully heard on an issue, there is not legally suff. evidentiary basis for jury to find for that party, court can:
         - **i)** determine the issue a/g that party
         - **ii)** and grant JaMoL motion w/r/t that issue
       - **(b)** (2) JaMoL motions can be made any time before submission to jury -- JaMoL motion must specify the judgment sought along w/ the relevant law and facts
   - **d)** IRCP detail
     - **(1)** 50(a) Directed Verdict
       - **(a)** If DV motion isn't granted, moving party can still offer evidence as if motion wasn't made
       - **(b)** Ungranted DV motion isn't a waiver of jury trial, even if both parties make DV motions.
       - **(c)** Granted DV motion doesn't require assent of the jury
5. Δ **Defendant's case in chief**
6. Π **Plaintiff's rebuttal**
7. Π Δ **Judgment as a matter of law (FRCP) / Directed verdict (IRCP)**
   - **a)** Summary
   - **b)** FRCP detail
     - **(1)** 50(a) Judgement as a Matter of Law
       - **(a)** (1) If, after opposing party has been fully heard on an issue, there is not legally suff. evidentiary basis for jury to find for that party, court can:
         - **i)** determine the issue a/g that party
         - **ii)** and grant JaMoL motion w/r/t that issue
       - **(b)** (2) JaMoL motions can be made any time before submission to jury -- JaMoL motion must specify the judgment sought along w/ the relevant law and facts
   - **c)** IRCP detail
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       - **(b)** Ungranted DV motion isn't a waiver of jury trial, even if both parties make DV motions.
       - **(c)** Granted DV motion doesn't require assent of the jury
8. **Jury instructions**
   - **a)** Usu., jury instrs. presented by both Pf. and Df. at the beginning of trial
   - **b)** FRCP detail
     - **(1)** 51 Instructions to Jury: Objection
       - **(a)** Parties can file written requests for specific jury instructions at close of

evidence (or during trial if ct. directs)

(b) Ct. must inform counsel about its plans w/r/t jury instrs.

(c) Ct. can instruct jury before or after argument or both, whenever it prefers.

(d) A party can't assign error to jury instrs. unless it objected before jury retires to consider

(e) Ct. must allow instr. objections to be heard away from jury

9. Jury verdict

C. Post-trial

1. Π Δ New Trial

a) FRCP detail

(1) 50(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial

(a) If JaMoL motion wasn't granted before jury retired, any party can:

i) move to renew its JaMoL motion w/in 10 days after judgment entered

ii) move for new trial (FRCP 59) or join new trial motion to JaMoL renewal motion

(b) Renewed JaMoL motions -- verdict returned, ct. can:

i) allow judgment to stand

ii) order new trial

iii) direct entry of JaMoL

(c) Renewed JaMoL motions -- no verdict, ct. can:

i) order new trial

ii) direct entry of JaMoL

(2) 59 New Trials; Amendment of Judgments

(a) (a) What the ct. can do when:

i) jury trial: new trial can be granted as per common L. w/r/t actions AT LAW

ii) no jury trial: new trial can be granted as per common L. w/r/t actions AT EQUITY

iii) no jury trial: ct. can open the judgment and:

a. take add'l testimony

b. amend findings of fact and conclusions of law

c. make new findings of fact and conclusions of law

d. direct entry of a new judgment

(b) (b) New trial motion must be made w/in 10 days after entry of judgment

(c) (c) if affidavits, they must be filed w/ the new trial motion. Opposing party has 10 days to file opposing affidavits, or up to 20 days if ct. grants extension or parties stipulate extension in writing. Ct. can permit reply affidavits to opposing affidavits.

(d) (d) ct. can order new trial sua sponte (it must specify grounds and notify parties). Or ct. can grant new trial on grounds other than those specified in a party's motion.

(e) (e) party can move to alter or amend judgment -- must be filed w/in 10 days after entry of judgment

2. Π Δ Post-verdict judgment as a matter of law (FRCP) / JNOV (IRCP)

a) Accepted BEFORE verdict and case is rem'd: new trial

b) Accepted AFTER verdict and case is rev'd: jury verdict stands

c) JNOV usu. joined w/ New Trial motion: a course btwn. doing nothing and moving for JNOV only

(1) allows the judge to correct a wrong (w/ new trial) that's not wrong enough to enter judgment

d) FRCP detail

(1) 50(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial

(a) If JaMoL motion wasn't granted before jury retired, any party can:

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ii) move for new trial (FRCP 59) or join new trial motion to JaMoL renewal motion

(b) Renewed JaMoL motions -- verdict returned, ct. can:

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a. take add'l testimony

b. amend findings of fact and conclusions of law

c. make new findings of fact and conclusions of law

d. direct entry of a new judgment

(b) (b) New trial motion must be made w/in 10 days after entry of judgment

(c) (c) if affidavits, they must be filed w/ the new trial motion. Opposing party has 10 days to file opposing affidavits, or up to 20 days if ct. grants extension or parties stipulate extension in writing. Ct. can permit reply affidavits to opposing affidavits.

(d) (d) ct. can order new trial sua sponte (it must specify grounds and notify parties). Or ct. can grant new trial on grounds other than those specified in a party's motion.

(e) (e) party can move to alter or amend judgment -- must be filed w/in 10 days after entry of judgment

e) IRCP detail

(1) 50(b)-(d) Motion for JNOV

(a) JNOV motion must be filed w/in 14 days after:

i) entry of judgment

ii) if no verdict, w/in 14 days after jury was discharged

(b) party can move for JNOV whether or not it filed for directed verdict

(c) party can join new trial motion to JNOV motion.

(d) new trial motion or motion to nullfiy judgment is considered to include JNOV as an alternative

(e) if no verdict, ct. can enter a judgment or order a new trial.

(f) appeal isn't precluded if party doesn't file JNOV, new trial, or DV motion

3. Π Δ Relief from judgment

a) Made when something comes up after trial that could reopen judgment; usu.:

(1) serious misconduct (e.g. fraud)

(2) compelling new evidence

b) FRCP detail

(1) 60 Relief from Judgment or Order

(a) (a) Clerical Mistakes: ct. can correct clerical mistakes sua sponte, or by any party's motion, at any time prior to appellate docketing.

(b) (b) Mistakes; Indvertance; Excusable neglect; Newly Discovered Evidence; Fraud, etc.

i) On motion, ct. can relieve a party from final judgment if there's:

a. mistake, inadvertance, surprise, excusable neglect

b. newly discovered evidence that couldn't have been discovered in time for a new trial motion (FRCP 59)

c. fraud, misrepresentation, or misconduct by an adverse party

d. a void judgment

e. judgment that has been:

1) satisfied, released, or discharged

2) based on prior judgment that has been reversed or vacated, or that's no longer equitable

f. any other reason that justifies relief from judgment.

ii) Motion for relief from judgment must be made w/in a reasonable time (for mistake, new evidence, or fraud, it has to be made w/in a year from judgment

4. Π Δ Enforce judgment

5. Π Δ Appeal

III. Legal methods

A. Legal Classifications

1. Separation of powers

a) Articles I (leg.), II (exec.), III (jud.)

b) *Plaut v. Spendthrift Farm*: Congress cannot direct cts. to reinstate claims after final judgment has been entered on those claims

(1) SCOTUS: const. violation is that leg. would deprive judicial judgments of their conclusive effect (it is NOT that the leg. acted in an unusual way)

(2) SCOTUS: sep. of powers is a "structural safeguard" -- not a remedy to be applied to specific harms. It estabs. "high walls" b/c low or vague walls would not be defnsible "in the heat of interbranch conflict."

(3) CONCUR (Breyer): sep. of powers may not always be violated whenever leg. disturbs a final judgment. Consider cases of sep. of pwrs. violations case-by case, based on the "basic 'sep. of pwrs.' principle."

(4) DISSENT (Stevens & Ginsburg): sep. of pwrs. is not absolute -- there has always been some sharing of pwrs. -- maj. view too rigid in light of gov't of a complex society

(5) DIST. CT.: once final judgment is entered:

(a) parties should consider the matter closed

(b) legislature cannot disturb the judgment

(6) DIST. CT.: legislation CAN

(a) act on subsequent proceedings

(b) abate pending actions

c) *Miller v. French* (prisoner rgts. under 8th amend.): case of an underlying change in the law while the case is still open

(1) distinguished from Plaut b/c this is an ongoing case: prisoners sought and got injunction -- injunction is an equitable remedy and, as such, the case remains open as long as the injunction continues.

(a) specifically, "prospective relief under a continuing, executory decree [e.g. injunction] reamins subject to aletration due to changes in the underlying law."

(b) the remedial injunction IS a "final judgment" for the purposes of APPEAL, but it is not the "last word of the judicial dept."

(2) q'n raised about constitutionality of time limit on judicial decisionmaking is not a sep. of pwrs. q'n -- it is a due process q'n

(3) CONCUR (Souter & Ginsburg): q'n of time limit on judicial decisionmaking COULD BE a sep. of pwrs. problem.

2. International Law / Municipal Law

a) Int'l Law: external (i.e. foreign) affairs btwn. nations

(1) gen'ly, regulation of relations btwn. nations

(2) but, some int'l agreements establish rights and responsibilities for INDIVIDUALS

(3) consent btwn. nations in

(a) customs and usages

(b) contracts and treaties

(4) conflict btwn. sovereignty of nations and univeral consent

b) Municipal Law: internal (i.e. domestic) regulation w/in a nation

(1) gen'ly, regulation of relations btwn. individuals

3. Common Law / Civil Law

a) Common Law

(1) grew out of Medieval English law

(2) adversarial

(3) mix of statutes, rules, and caselaw

(a) caselaw "creates law in the interstices of the statutes and rules"

(b) statutes are usu. "prospective"

(c) cases are usu. "retroactive"

b) Civil Law

(1) grew out of Roman law

(2) in effect in continental europe

(3) inquisitorial

(4) mainly statutory

4. Substantive Law / Adjective Law

a) Substantive: what rights you have

b) Adjective: how you enforce those rights (i.e. procedural law)

5. Public Law / Private Law

a) Private law

(1) gen'ly, regulates relations btwn. private citizens / organizations

(2) i.e. torts, contracts, property

b) Public law

(1) gen'ly, regulates relations btwn. private citizens / orgs. and the gov't

(2) protection of civil liberties, validity of law

(3) i.e. constitutional law, civil proc., crim. law

6. Legislation / Caselaw / Customary law

a) *Baldwin v. State*: Ct. refuses to extend common law loss of consortium action to wife.

(1) Married Women's Act gave wives right to bring alienation of affections actions. A "historical accident" that it didn't eliminate husbands' right to bring l/o/c actions.

(2) Ct. sees no reason to give wife a right that is denied to the couple's children.

(3) Boundaries of common law recovery should not be extended just for the sake of consistency.

b) *Whitney v. Fisher*: Ct. extends common law l/o/c action to wife

(1) Two new relevant statutes since *Baldwin* are not retroactive and so don't apply

(a) l/o/c action can be brought by both spouses

(b) common law alienation of affections action abolished

(2) Responses to *Baldwin*

(a) Children's l/o/c interest not as broad as spouses'

(b) Possibly illegal gender classification under equal protection clause (14th amend.)

(c) Distinction btwn. husband and wife w/r/t l/o/c seems arbitrary

(3) DISSENT 1: no reason to overrule *Baldwin*; statutes, since not retroactive, should have no bearing at all

(4) DISSENT 2: no reason to create a cause of action "out of thin air"

c) *Harris v. Sherman*: l/o/c action does not allow recovery when marriage occurred after the injuries

(1) Legislative intent

(a) Ct. applies a purposive reading of the statute: legislature intended to give wives l/o/c action, only.

(b) Under a plain meaning reading, Pf. wins.

(2) *Bulloch* (federal case allowing l/o/c recovery for premarital injury) has not been followed, even overruled

7. Equal protection (limits classification)

a) Amendment IX

b) Limits legal classification

B. Historical development of the common law

1. Writ system at common law (obsolete)

a) writ system limited relief to those actions that fell under the writ categories

b) abolished in the U.S. and in England during the 19th century (see FRCP 2)

(1) FRCP 2: "One Form of Action. There shall be one form of action to be known as 'civil action.'"

c) however, the writ system lives on (to haunt us) in the elements of substantive claims and defenses

2. Equitable jurisdiction

a) Today, and historically, you can invoke a ct's. powers at equity if you show you have no recourse at law

b) Arose historically from petitions to the mercy of the king -- king estab'd. chancery ct. to handle these petitions

c) equitable remedies

(1) reform

(2) rescind

(3) specific perf.

(4) estab. trusts

(5) remove title claims

d) no right to jury on equitable claims

e) laches: equitable version of the statute of limitations

(1) Black's: "the equitable doctrine by which a court denies relief to a claimant who has unreasonably delayed or been negl. in asserting the claim, when that delay or negl. has prejudiced the party a/g whom relief is sought."

f) law and equity merge (partially) during the 19th century

(1) still distinguished, though: no right to jury on equitable claims

(2) cts. have to determine whether new statutory remedy is legal or equitable

3. Common law comes to America

a) law was mostly statutory before the revolution

(1) you need lawyers to use common L., since it is so vast and difficult to research -- and there weren't many lawyers in the colonies

b) after the revolution, English common L. was adopted by statute, mostly, in the several states.

C. U.S. Ct. system

1. Horizontal structure: separation of powers between branches of government.

2. Vertical structure (federalism): separation of powers between federal and state governments (including courts).

3. Federal Ct. system

a) Trial level

(1) District cts.

(2) Special trial cts.

(a) e.g. Tax, Claims, Int'l Trade

b) Appellate level

(1) Circuit Cts. of Appeals (13 of them)

(2) Special Cts. of Appeals

(a) e.g. Military, Temp. Emergency

c) SCOTUS

4. Idaho Ct. system

a) Magistrate cts.: lowest; sometimes have orig. jur'n.

b) District cts.: usu. have orig. jur'n.

c) Ct. of Appeals: hears appeals sent to it by the Supreme ct.

d) Supreme ct.: receives all appeals from dist. cts. -- decides which it will hear and which it will send to the Ct. of Appeals. Hears appeals from the Ct. of Appeals when it wants to.

5. Jurisdiction classifications

a) Personal jur'n: power to issue judgments a/g specific individual or organization

b) Subj. matter jur'n: power to issue judgments re: a specific q'n

(1) General subj. matter jur'n: ct. can hear ANY case unless a statute or rule specifically takes that kind of case away from that ct.

(2) Limited subj. matter jur'n: ct. can hear ONLY cases specifically assigned to it by a statute or rule

(a) ALL fed'l cts. are cts. of limited jur'n -- 10th amend: "pwrs not delegated to the U.S. by the const., nor prohibited by it to the states, ARE RESERVED TO THE STATES REPECTIVELY, OR TO THE PEOPLE."

c) Concurrent jur'n: can be heard by either state or fed'l ct.

d) Exclusive jur'n: can be heard by on one ct. or set of cts.

D. Legal reasoning

1. Stare decisis

a) Policy

(1) Strengths

(a) Provides certainty

i) Everyday world: provides basis for predictions w/r/t rights, duties, obligations

ii) Legal world: provides basis for legal reasoning and legal advice

(b) Curbs judicial arbitrariness

i) A prop for weak, unstable, prejudiced, or partial judges

(c) Promotes efficiency

i) Reduces litigation costs

ii) Conserves judges' energy and time

(d) Allows for justice

i) A method for treating like cases in like ways

(2) Weaknesses

(a) Stale precedent

i) Notions of justice can change: stare decisis provides for equality in <u>time</u> (between past and present), but not for equality in <u>space</u> (between two like cases under contemporary value judgments)

b) Adherence

(1) Higher courts can overrule precedent

(2) Same court is not absolutely bound by its own precedent

(3) All courts can distinguish precedent

(4) Exceptions

(a) Constitutional questions: stare decisis has more limited application, since legislative correction would be difficult or impossible

(b) Changing values: sometimes it is proper to overrule precedent in order to set aside pernicious error or react to changing values. But, generally, it is more important that disputes be settled than be settled right (J. Brandeis). See retroactivity, below.

(5) L/O/C case line

(a) *Nicholson v. Hugh Chatham Mem. Hospital*: overrules and tidies up precedent by allowing either spouse to bring l/o/c action

i) History of l/o/c precedent in North Carolina before *Nicholson*

a. *Hipp* extends l/o/c action to wives, on basis of married women's acts, logic, and fairness

b. *Hinnant* overrules *Hipp* and abolishes l/o/c action for wives on basis of:

1) historical precent a/g wives' right to l/o/c action

2) l/o/c implied recovery for services rendered

3) wives' l/o/c dmgs. too remote from husband's injury

4) may allow double recovery

c. *Hemstetler* adheres to *Hipp*, but abolishes husbands' l/o/c action, too, on basis of fairness

d. *Nicholson* overrules *Hinnant* and *Hemstetler*, restores l/o/c action to both spouses

(b) *Cox v. Haworth*: applies *Nicholson* retroactively

i) Old rule: effect of overruling isn't that prior decision was bad law -- it never was the law (see retroactivity, below).

ii) Nowadays: retroactivity is a matter of judicial policy.

iii) Overruling decision should have retroactive effect unless there are compelling reasons otherwise. Considerations:

a. Extent of reliance on the prior decision

b. Whether prospective application of the new rule will satisfy its purpose

c. Effect of retroactive application on the administration of justice

c) Retroactivity

(1) N.b., statutes are usually applied prospectively; judicial opinions are usually applied retroactively.

(2) Civil law

(a) N.b., retroactivity is not applicable to closed civil cases, due to *res judicata* (see below).

i) So, full retroactive effect must be given to changes in federal law in any non-final civil case.

(b) Complete retroactivity: overruled precedent was never the law -- it was mistaken.

i) N.b., complete retroactivity "solves" the retroactivity problem: damned if you do overrule retroactively (individual conduct that was proper before is legally penalized), damned if you don't (bad precedent would work injustice).

ii) *People ex rel. Rice v. Graves* (1934, dramatist owes back taxes): complete retroactivity, i.e., overruled law never was the law.

a. Two schools: (a) decisions are conclusive evidence of the law (overruled precedent is bad law), (b) decisions are evidence, but not

conclusive evidence, or the law (overruled precedent never was the law, *ab initio*. N.b., victim of overruling suffers a hardship, but remember that the other party suffered under the prior law).

(c) Complete prospectivity: "overruled" precedent was the law, even for the instant litigants. The new law applies only in the future, after the instant case.

i) *Sunburst Oil v. Great Northern Ry.* (1932, shipper paid too high rates): complete prospectivity, i.e., overruled law does not even apply to the instant parties. Really, a federalism case.

a. Constitution "has no voice" on the retroactivity/prospectivity issue; states can choose as they please, and can choose differently in different cases.

b. Completely prospective application is a "prophecy" that transactions in the future will be governed by a new rule, and an affirmance of the old rule -- the precedent has not been overruled at all.

ii) Problems

a. Complete prospectivity does not settle disputes. And courts are supposed to settle disputes!

b. Court acts like a legislature when they apply new law completely prospectively.

(d) Limited retroactivity: new law is applied to instant case (and usu. concurrent cases), old law stands in prior cases.

i) *Linkletter v. Walker* (1965, *Mapp* evidence): retroactive application of *Mapp* is not necessary, b/c it will not affect future behavior.

a. Effect of a change in law:

1) Applies to cases currently under direct review.

2) Can apply to collaterally attacked prior final judgments (in criminal cases). Considerations: prior history of the rule; purpose and effect of the rule; whether retroactive application will advance the rule's operation, or not.

b. N.b., contrast *Gideon*.

(3) Criminal law

(a) Statutes and judicial opinions can not be applied retroactively, per "ex post facto" clauses in the Constitution (Article I).

(b) *Linkletter v. Walker* (1965, *Mapp* evidence): retroactive application of *Mapp* is not necessary, b/c it will not affect future behavior.

i) Effect of a change in law:

a. Applies to cases currently under direct review.

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1) Prior history of the rule.

2) Purpose and effect of the rule.

3) Whether retroactive application will advance the rule's operation, or not.

c. N.b., contrast *Gideon*.

2. Ratio decidendi

a) Ratio decidendi: (Black's)

(1) The principle or rule of law on which a court's decision is founded.

(2) The rule of law on which a later court thinks that a previous court founded its decision.

(3) A general rule without which a case must have been decided otherwise

b) Obiter dictum: (Blacks's)

(1) A judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (though it may be considered persuasive.

c) Products liability case line

(1) *Winterbottom v. Wright* (1842, mail coach wreck): Pf. driver cannot recover b/c there is no privity between himself and Df. manufacturer.

(a) Privity is required. The coach manufacturer's obligations arise from its contract, which was with the postmaster. If Pf. driver can sue the manufacturer, then any injured passerby could sue the manufacturer -- unlimited liability.

(b) *Levy v. Langridge* (father gives gun to son): Pf. son can recover from Df. gun manufacturer, even though not in privity, because manufacturer committed intentional fraud. (Also distinguish on father-son relationship -- like privity).

(c) N.b., *damnum absque* [*sine*] *injuria*: loss or harm for which there is no legal remedy.

(2) *Thomas and wife v. Winchester* (1852, mislabeled medicine): Pf. can recover from Df. wholesaler who inadvertently mislabeled her medicine, b/c of imminent danger to the public.

(a) Distinguished from *Winterbottom*.

i) Mislabeling medicine created an imminent threat to the public; manufacturing a poor coach usu. does not.

ii) The contract itc. was part of the means by which the wrong was effected.

iii) Consider also the greater remoteness of Pf. and Df. in *Winterbottom*.

(3) *Loop v. Litchfield* (1870, machine kills neighbor): Pf. cannot recover from manufacturer b/c machine is not an imminent danger, plus not privity.

(a) Just because a product can fail, or even that it did fail, does not mean it is an imminent threat to the public. Injury itc. was no the "natural result or the expected consequence of the manufacture and sale." Every use of mislabeled poison would harm, whereas this machine was used safely for five years.

(4) *MacPherson v. Buick Motor Co.* (1916, defective wheel): the exception swallows the rule: Df. manufacturer liable to Pf. when the product by its nature creates risk to life and limb, and when the manufacturer knows it will be used by people besides the purchaser.

(a) Df. not merely a dealer -- a manufacturer, too, and so must inspect its products to ensure their safety.

3. Logic and policy

a) Logical approaches

(1) Deductive: reasoning by syllogism.

(2) Inductive: reasoning by induction, i.e. from sequences of like approaches or results.

(3) Analogical: reasoning by analogy, i.e. from like to like situations.

(4) Dialectical: non-analytic reasoning by pro and con.

(a) Novel problems where no existing rule is suitable for application.

(b) Applicable precedent is unsound.

(c) Two or more rules are applicable and a choice must be made.

b) Jurisprudence

(1) Sources of law's legitimacy ???? WHERE ????

(a) Legitimacy of the sovereign

(b) Legitimacy of the law's purpose

(c) Legitimacy of the legal process (of enactment)

i) N.b., a legal structure does not entail legitimacy of law or rule of law.

(2) Stances

(a) On the sources of law

i) Natural law: legal rules are valid because they are grounded in moral or otherwise eternal truths.

ii) Positivism: legal rules are valid because they are either enacted by a legitimate authority or accepted by a society, not b/c they have moral or natural grounds.

iii) Historical jurisprudence: e.g., law in custom, the "living law": legal rules are valid because they are embedded in the customs of society.

(b) On the analysis of law

i) Formalism: law is coherent and complete, and can be effected by deductive application of existing rules. Judges do not make the law, they discover it.

a. Formalists, such as civil law judges, are like mathematicians.

ii) Realism: law is reactive and entwined with public policy, and cannot be effected by pure deduction. Law is "the prophecies of what the courts will do in fact."

a. Holmes: "the life of the law has not been logic: it has been experience." To know the law, you must know both what it has been and what it tends to become.

(3) Conflicts

(a) Natural law vs. Positivism

(b) Courts as "partners" of the legislature vs. Courts as "agents" of the legislature

(c) Formalism vs. Realism

i) Purposive statutory interpretation vs. Plain-meaning statutory interpretation

(4) *Hynes v. New York Central R.R.* (1919, boy dives into a canal): Pf. was enjoying public waters, and did not lose those rights by stepping onto Df's. plank. Landowners do not have a duty to protect trespassers, but do have a duty to protect users of adjacent public ways.

(a) Df's. argument: overhanging prop. belongs to the owner of the prop. to which it is attached → Pf. was a trespasser. Supported by the caselaw.

(b) Pf.'s argument: Pf. should be treated as a passerby, for he would have just as likely been injured had he been in the water.

(c) Maj. (Cardozo): "rights and duties in systems of living law are not built upon such quicksands." Df's. argument, however supported by law, does not give the proper result; it drives the law to a "dryly logical extreme."

(d) N.b., Cardozo's reasoning:

i) Analogy: was Pf. more like a swimmer or more like a trespasser?

ii) Policy: who can best bear the loss?

iii) Realism: jurisprudence of conceptions.

c) Statutory interpretation

(1) N.b., think of the paradigmatic (i.e., "easy") case, and measure your case

against it.

(2) N.b., to get out of a statute, you must find an ambiguity. An ambiguity in the language is best, since it might catch formalists. Otherwise, your ambiguity may only catch realists.

(3) Limitations

(a) Inherent limits of language: open texture problem, where the meaning of words and clauses become uncertain at the borders of their descriptive ability.

(b) Necessity of uncomprehensiveness: "we are men, not gods." Rules must be cast in general terms because we cannot anticipate every possible situation.

(c) Indeterminacy of aim: legislators sometimes do not include in the statutory language an answer to certain problems because they have not decided how to handle that situation. N.b., when confronting a touchy subject, legislators may wish to foist on to the judiciary the policy-making task, in order to stay in favor with their constituents.

(4) Basic approaches

(a) Plain-meaning (literal): legislature means what it has plainly expressed, and its clear terms should be enforced even if they lead to "absurd or mischievous" results.

i) Problems: obviously, can result in absurdities and injustice.

ii) *Caminetti v. United States* (1917, affair in Reno): court applies a literal interpretation to the White Slave Traffic Act, saying that a statute's meaning must be sought first in its language. If that meaning is constitutional, the courts must enforce it.

(b) Golden rule: a statute should be taken as a whole and construed all together; words should be assigned their ordinary meaning unless that causes absurdities or inconsistencies. Then, the trouble words should be given slightly different meanings that clear up the problems.

(c) Purposive: courts should give effect to the legislature's true purpose, and should consider whatever materials outside of the statutory language that help determine what the purpose is.

i) Problems: the legislature may, and, in fact, often does, have many intents. Every legislator may have had a different intent in passing the statute.

ii) *United States v. Kirby* (1868, arrested mailman): "all laws should receive a sensible construction." Court takes a purposive approach, but could have taken a more formalist one (e.g., was sheriff who arrested mailman "willfully" retarding the passage of the mail?; was he even "retarding" it?).

iii) *Holy Trinity Church v. United States* (1892, alien employee): the court must take a purposive approach, to the point of ignoring the statute's words, to reach its result -- the statute is ironclad. Court says that the statute itc. was meant to prevent immigration of poor laborers and the consequent effect on the domestic labor market. The immigration of a "brain toiler" minister carries no risk of causing these effects.

(5) Intrinsic aids (canons of statutory construction)

(a) N.b., there are hundreds of construction canons: they include every coherent thing the courts have said about statutory construction.

(b) N.b., because there is a counter-canon for nearly every canon, dialectical reasoning must often be used to decide which canon to use.

(c) Expressio unius est exclusio alterius: **"**the expression of one thing is the

exclusion of the other." Where something is clearly specified in the language, the legislature meant to exclude other related things.

(d) Noscitur a sociis: "a thing is known by its associates." The meaning of a word can be determined by considering the words that surround it.

(e) Ejusdem generis: "of the same kind." When a general term follows a list of specific terms, the legislature meant for the general term to be limited to the class of the specific terms.

i) E.g., "horses, cattle, sheep, pigs, goats, and any other barnyard animal." "Barnyard animal" ought to be limited to animals like those mentioned, i.e., four-legged, hoofed mammals.

(6) Extrinsic aids

(a) Extrinsic aids include everything besides the words of the statute.