Civil Procedure
Professor Neuborne

Syllabus

The casebook is Friedenthal, Miller, Sexton and Hershkoff, *Civil Procedure*, 9th ed., (West 2005), and the 2006 Supplement.

Introductory Material for First Day of Class

Disputes exist in every society. In deciding how to resolve them, two questions must be answered: (1) How do you decide who wins? (2) How do you organize the contest? Most modern legal systems call the first question the development of substantive rules; and the second question the development of “procedural” rules.

Substantive rules instruct both citizens and the government about how to behave. Procedural rules instruct disputants and decision-makers about how to decide whether a substantive rule has been broken. The ban on certain kinds of killings called murder, the protection of certain legal relationships called property, the enforcement of certain promises called contracts, the ban on certain types of differential treatment called discrimination, and the protection of certain forms of communication called free speech are all examples of substantive rules. How to serve a summons, the content of a complaint, or the time when an appeal can be taken are examples of procedural rules. As we shall see, it is sometimes difficult to know whether a given rule is substantive or procedural – for example, is a right to trial by jury procedural or substantive? How about the time period in which a claim must be brought?

Ideally, procedural rules merely provide the stage on which substantive rules operate, without distorting the meaning or effect of the substantive rules. Actually, the image is closer to a prism, with substantive rules being refracted as they pass through the procedural process. Lawyers expend immense energy on seeking procedural advantages designed to affect the likely substantive outcome. For example, the real world effect of a substantive rule may depend on procedural rules determining who gets to interpret and apply it.

A substantive rule can be critiqued in at least two ways: (1) the desirability of the rule itself, measured against values derived from reason, faith, efficiency and/or expediency; and (2) how the rule was generated. The two types of critiques are often called “first-order,” and “second order” criticism. For example, a Supreme Court decision upholding or invalidating free speech, affirmative action, or trying suspected terrorists before military commissions can be criticized or defended as matter of first-order analysis by testing it against values; or, as a matter of second-order criticism, by assessing the manner in which the decision was reached. It helps to keep the two types of critiques separate in your mind.
Civil Procedure concentrates on second-order rules needed to organize a form of dispute resolution particularly prized in this culture – litigation in a court of law. Of course, even in a litigious culture like this one, most disputes never enter the realm of law. They are resolved through informal processes better studied as sociology. Think about your most recent argument with your parents, or how you deal with someone who doesn’t show up for a dinner date. A recurring question in the first year of law school is how we decide which disputes to subject to law, and which to leave to sociology.

Even within the realm of the law, in this legal culture, disputes involving the imposition of punishment by the state are set aside for special second-order organization as Criminal Procedure. Why? In recent years, we have experimented with less formal methods of resolving non-criminal disputes under the rubric of mediation and arbitration – often called Alternative Dispute resolution (ADR). Once you have mastered the formal second order rules used to organize litigation, you will be in a position to judge when and whether ADR is a useful alternative. Finally, especially since the New Deal, many disputes that once were the subject of judicial resolution are now diverted to alternative administrative tribunals with their own second order rules and an increasingly complex relationship with reviewing courts. One recurring issue in today’s legal culture is how to allocate dispute resolution between judicial and administrative fora.

Although it helps to distinguish first-order rules from second-order rules, the two are closely intertwined. In fact, you can’t design second-order rules until you know what kind of first-order rules will be used to declare the winner. The obvious candidates for first-order rules include force, chance, the supernatural, nepotism, group solidarity, bias, reason, fairness, redistribution, restoration and the rule of law. If a culture chooses first-order rules based on force, the second order rules will seek to organize a joust, ranging from individual combat to nuclear holocaust. If a culture chooses first order rules based on an appeal to the supernatural, second order rules will be designed to catch the attention of the divinity.

This legal culture claims to have chosen the rule of law as the exclusive way of creating first-order rules. Don’t be fooled. At various points in the evolution of this legal culture, we have used most of the available first-order options, and the traces remain. In the beginning, there was force, often fueled by revenge. The Iliad should be read by lawyers as a cautionary tale about the limits of using force and vengeance to resolve disputes, especially domestic ones. When Helen ran away with Paris, it took the Trojan War to resolve that marital dispute. How successful have we been in eliminating force and coercion as the means of resolving domestic arguments? How about international disputes? What about significant resource imbalance in ordinary litigation? Was Marx right in scornfully dismissing law as just another species of force, permitting the have to wield it like a club to control the have-nots? Can Marx’s view explain democracy, or the existence of effective laws protecting the weak?

After force came resort to the supernatural. Disputes were resolved as a matter of divine will. Magnificent edifices of human thought based on divine revelation continue to provide norms for resolving virtually every form of human dispute. What role should faith play today in setting first-order rules? Every sitting of the Supreme Court opens with “God save this Honorable Court.” Every session of Congress opens with a prayer. Every public official swears
an oath of office. Every witness swears an oath to tell the truth “So help me God.” At this stage of human development, is it possible to separate secular values from values derived from faith? How hard should we try?

The Oresteia can be read by lawyers as a rejection of force, revenge and the supernatural as sources of first-order rules. In the trilogy, Agamemnon sacrifices his daughter, Iphigenia, to the gods at Aeolis to assure fair winds for Troy. His wife, Clytemnestra, murders him on his return from Troy to avenge Iphigenia. Orestes then promptly murders his mother, Clytemnestra, to avenge his father. Since matricide was the most heinous crime known to the Greeks, Orestes is sentenced by the gods to divine punishment at the hands of the Furies. When Athena releases Orestes from the Furies and remits him for judgment by the people of Athens, the rule of law begins in Western culture. Be aware, though, how much residue of force and faith remains in our modern dispute resolution system.

Using a rule of law instead of force or the supernatural to resolve disputes requires acceptance of the notion (fiction?) that we live embedded in a comprehensive web of rules that pre-exist any dispute, enabling a neutral arbiter to seek out the most applicable pre-existing rule and apply it to the dispute, thus declaring a winner in accordance with the rule of law. Most modern legal systems use a syllogistic model to organize the operation of a rule of law dispute resolution system. The arbiter is expected to listen to the parties, exercise her expertise and announce a major premise for the syllogism consisting of the governing rule of law. In this legal culture, the arbiter searches for the major premise in four hierarchically organized sources of law: the text of a written constitution; legislation; administrative regulation; and earlier common law precedents.

Since three of the four potential sources of law are textual – the written constitution; a statute, or an administrative regulation, in order to conduct the search for the major premise, an arbiter must develop an approach to reading text. Some contemporary candidates are literalism, originalism, constructive originalism, or pragmatism. Literalism uses a dictionary to give an objective meaning to words used in a text. Originalism asks what the drafters intended the text to mean. Constructive originalism asks what the original drafters would probably want the text to mean today. Pragmatism breaks ties about a text’s meaning by worrying about the consequences of different readings. Different categories of pragmatists worry about different kinds of consequences, ranging from economic efficiency to ethical values. Some critics argue that most legal text is so elusive that its real meaning in many cases is provided by the arbiter, not the drafter. What does “due process of law” really mean? One of the issues that you will explore throughout law school – indeed, throughout your legal careers - is how lawyers and judges should confront various categories of ambiguous text.

The fourth potential source of the major premise is judge-made. In settings where no text has displaced it, judge-made common law provides the pre-existing major premise. Reading past precedents is more complex than reading text, requiring an arbiter to distill the rule of law that emerges from past relevant cases. Perhaps the most important skill to be learned in your first year of law is how to take a case apart so that it yields its holding. Holdings in earlier cases are presumptively binding on later judges as a matter of stare decisis. One important skill is distinguishing between dictum and holding. Holdings are entitled to stare decisis respect; dictum
is not. A second crucial is skill is to hone your ability to reason by analogy in order to decide whether a past case is analogous to the present one. Finally, the concept of *stare decisis* is very helpful in reading text, since earlier decisions may have given a hopelessly ambiguous phrase much more precise meaning. That’s how we decide what “due process of law” means.

Once the major premise has been determined, the arbiter then listens to the parties, applies a series of second-order rules that govern proof of facts and announces a minor premise consisting of the facts. Given the uncertainty that surrounds any contested fact-finding, who finds the facts is crucially important. Judge? Jury? Expert? So are the burden of proof rules that tell the arbiter how sure she is supposed to be before announcing a minor premise. The arbiter then links the major and minor premises in a classic syllogism to reach a logically compelled conclusion - which is then imposed upon the parties in the form of an opinion or judgment. You must decide for yourselves the extent to which the major and minor premises in a given case are external phenomena that have been discovered by the arbiter, or are subjective constructs of the arbiter.

Legal systems differ in the degree of independent research and investigation expected from the arbiter. The Anglo-American adversary system generally assumes a relatively passive arbiter, informed by the adversarial efforts of the parties. But what if only one party can afford a lawyer? European Civil Law systems rely less on the parties and more on the energy and independent initiative of the arbiter. But what if the arbiter is biased, or lazy?

In both systems, however, convention assumes that the arbiter is merely discovering pre-existing governing law and unearthing objectively pre-existing facts. The extent to which the conventional account describes the actual operation of the rule of law dispute resolution system is a matter of intense disagreement. Does the conventional model of a syllogism machine fully explain and justify the judge's role? Does it matter whether the source of law “found” by the judge is a common law precedent, an administrative regulation, a legislative enactment, or a Constitutional right? What role does *stare decisis*, or precedent, play in the process? As a matter of philosophy, are the “facts” in a litigation really objective phenomena, or are they subjective constructs plucked from the maelstrom of potential realities? Even if we ignore the philosophical issues, do we have the tools to discover the truth about contested facts?

The practice raises a number of second-order questions. Who gets to be an arbiter? How is the arbiter chosen? For how long? How does the arbiter learn about the dispute? Where does the pre-existing rule of law come from? What counts as a pre-existing rule? How does the arbiter figure out what the rule is? Does the arbiter find the pre-existing rule, or invent a new one? How much creative power - does – should – must - an arbiter have? On a more prosaic level, where does the dispute get resolved? What rule governs when more than one source is available? What remedies may the arbiter provide? What is the effect of the arbiter's decision on third-persons? Can there be do-overs? How does the arbiter find out what the facts are? Who decides what the facts are when the parties can't agree? How is the system financed?

A course in Civil Procedure seeks to answer many of these questions. The issues raised by this course are, therefore, intensely practical, since virtually every lawsuit requires an answer to most of them; and also intensely theoretical, since the answers require us to think about the
We will start by asking a prosaic question of geography: Where is the courthouse? Where can a given dispute be resolved? Who gets to pick the place? Let’s assume it is 1996, and that that you have been approached by a client who tells you that his parents, both of whom perished during the Holocaust, had opened a very large bank account in Switzerland in 1937. Your client does not know the name of the bank, or the number of the account. Let’s also assume that mergers and acquisitions since WW II have resulted in two large Swiss Banks, UBS and Credit Suisse, that account for about 75% of all Swiss banks in existence during WW II. You send letters to both banks. They give you the polite run-around. You do some research and find that, as of 1996, neither bank has branches in the United States. On the other hand, both banks do business with every large bank in the United States, including the Wall Street banks. Can you sue the Swiss banks? Where? Brooklyn is your preferred location. In researching your answer, confine yourself to the three four cases in the syllabus:

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You should also consult 28 U.S.C 1332(a) and 1391, as well as FRCP Rules 4 and 18.

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9. Pleading and Discovery: An Overview

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