For our first class be prepared to discuss the preliminary questions raised by the syllabus (See below). Specifically, when Holocaust survivors residing in the United States sue Swiss banks for the return of alleged bank deposits made between 1933-1939, where should the litigation take place? What law should govern? How should the case be financed?

Procedure  (L09.2001.002)

Professor Neuborne             Fall 2005

Syllabus

Every society must have a mechanism for resolving disputes. In the beginning, there was force, often fueled by revenge. The *Iliad* can be read as a cautionary tale about the limits of using raw force to resolve disputes. Then came resort to the supernatural. It's just amazing how often God is on the side of winners. The *Oresteia* can be read as a celebration of human responsibility for dispute resolution, using the rule of law as a substitute for force and superstition. When Athena releases Orestes from the Furies for judgment by the people of Athens, law begins. Be aware, though, how much residue of force and superstition remains in our modern dispute resolution system.

Using law to resolve disputes often involves a Triad - two adversary parties, each claiming the power of law, and a third-person who decides what the law requires. The practice raises a number of questions. How is the system financed? Who gets to be the arbiter? How is the arbiter chosen? How does the arbiter learn about the dispute? Where does the law come from? What counts as law? How does the arbiter figure out what the law is? Does the arbiter find pre-existing law, or make up new law? Where does the dispute get resolved? What law 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?

Most modern legal systems use a syllogistic model to explain the operation of the dispute resolution system. The arbiter is expected to listen to the parties and, then, to announce a major premise consisting of the governing rule of law. The arbiter then listens to the parties and announces a minor premise consisting of the facts. 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. Legal systems differ in the
degree of independent research and investigation expected from the arbiter. The Anglo-American system
generally assumes a passive arbiter, informed by the parties. The Civil Law systems rely less on
the parties, and more on the energy and independent initiative of the arbiter. In both systems,
however, convention assumes that the arbiter is discovering pre-existing governing law and
operative facts that are simply being announced by the arbiter, whose expertise has allowed the
arbiter to search out the correct laws and facts.

The extent to which the conventional account describes the actual operation of the system
is a matter of intense disagreement and importance. Does the conventional model 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? When, if ever, should we use less formal means of resolving disputes premised more on
discretion than on law? Why not just flip coins?

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
philosophy of law, lawyers, and judges and their respective roles in a democracy.

We will start by asking the prosaic question: Where is the courthouse? Where can a given
dispute be resolved?

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