Part I

THE COMMON LAW

Chapter 1

CASES

A. THE COMMON LAW

Should we ask, what is "law"? (Did you ask yourself that when you decided to "study law"?) Richard Posner, noted teacher and scholar, and since 1981 also a judge on the United States Court of Appeals for the 7th Circuit, has said that "what is law?" is a "question that has little practical significance if, indeed, it is a meaningful question at all." He said this in an article entitled *The Decline of Law as an Autonomous Discipline*.[1] What do you suppose it means to speak of law as "autonomous"? Surely one cannot think about "law's" autonomy without thinking about what "law" is. Hence, how can it possibly not be meaningful to ask precisely that question? And how can it not be of the greatest practical significance: how can you learn to "do law" if you do not know what it is you are learning to do? Or will you learn what it is by doing it?

Assuming that at least for the time being we cannot or should not ask what law is, let's start with a narrower question: what are the components of American law? The usual, formal answer is that they are three. *Constitutional law*, which is outside the scope of this book, consists of the federal and state constitutions and the judicial decisions interpreting and applying them. In general, constitutional law concerns the structure and powers of government, particularly vis-à-vis the individual. *Statutory law* consists of laws enacted by a legislature. Statutes have become an increasingly central part of our legal system, both at the federal and the state level. Statutory interpretation is a complex and controversial matter, which we address in Part II. (Tied to statutes are *regulations*; these are rules promulgated by administrative agencies pursuant to statutory authority that flesh out, clarify, or implement statutes.) The third distinct body of law is the *common law*. It is that part of the legal system of the United States that consists in its entirety of a body of past judicial decisions, as those decisions were rendered in particular "cases." Part I of this book is devoted to the methods of the common law.

Unlike statutory and constitutional law, the common law rests on no authoritative text external to the judiciary. The law is knowable only by reading past "cases"; it is not to be found anywhere other than in those very cases (and in *non* authoritative summaries of them). What marks common law as distinct, then, is its self-generating aspect. That is, "appropriate references for justifying legal decisions are prior legal decisions of the same order, and . . . every decision serves as

[1] Richard A. Posner, *The Decline of Law As an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 765 (1987).

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a reference for future decisions."[2] (You will learn more about this when we discuss precedent in Chapter 5). The motor of this "common law self-generativity . . . [is] the role of individuals — ordinary legal persons — in generating legal norms, and the need of individuals to keep transforming them,"[3] in other words, the role of ordinary legal persons in bringing about the "cases" you will study. Or, in still other words, *you as lawyers will make "the law"*: in the cases you will bring, the advice you will give, the arguments you will make, you will generate the precedents that will guide the next generation of lawyers. Thus, one possible answer to our initial question ("what is law?") is that, at least in "common law," *law is application* — application of legal norms by individuals in ordinary interactions.[4]

You should note that "common law" is unique to Anglo-American law. Other countries, even those that have similar democratic aspirations, do not produce a "common law." They (Western Europe, all of Central and South America, many parts of Asia and Africa, and even a few enclaves in the common law world, namely, Louisiana, Quebec, and Puerto Rico) have instead a "civil law" system.[5] Such a system relies primarily on comprehensive, though highly generalized, written codes, rather than on the accumulated body of judicial decisions. It has its origins in Roman Law (which has influenced Anglo-American law as well).[6] The broad acceptance of the civil law is worth remembering, because, as the great Karl Llewellyn[7] admonishes us:

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[2] Arthur J. Jacobson, *Autopoietic Law: The New Science of Niklas Luhmann*, 87 MICH. L. REV. 1647, 1677 (1989).

[3] *Id.* at 1681.

[4] *Id.* at 1681.

[5] *See* JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION 3 (1969). The recent emergence of market economies in Eastern Europe has involved the restoration of certain civil law traditions. Note that "civil" has several different legal meanings, each most easily understand in opposition to something else. First, as indicated, there are "civil law" systems as opposed to common law ones. Second, civil can mean "non-criminal." For example, the course in "civil procedure" covers the rules for litigating civil cases as opposed to criminal cases, the latter being prosecutions brought by the government against those charged with violating the criminal law in which the state seeks a criminal punishment such as imprisonment. Litigation between private parties is always "civil," in this sense (though often not "civil" in the etiquette sense). Third, "civil" (more often, "civilian") can mean non-military. "Civil officers" are government employees outside the military; the civil courts (the ones you study in law school) handle litigation involving civilians, as opposed to the military courts, or courts martial, which apply military law and hear cases involving members of the armed forces.

[6] The influence of Roman law derives almost entirely from a single collection, the *Corpus Juris Civilis*, in which the sixth-century Emperor Justinian assembled the works of earlier jurists and emperors. Medieval legal scholars rediscovered and were preoccupied by a particular text from the *Corpus* known as *The Digest*. From the eleventh to the eighteenth century, the central aspect of legal development in Western Europe was the reception of Roman law. This culminated with the idea, borrowed from the *Corpus*, that law should be systematically codified and that Roman law offered the analytic tools for successful codification. The influence of Roman law on the common law is more uncertain; historians agree, however, that Roman and civil law did supply particular doctrines, terms, and perspectives to the common law, especially in such areas as mercantile and family law.

[7] Karl Nickerson Llewellyn (1893-1962), whom you will meet repeatedly in these materials, is generally considered one of the foremost legal scholars of the 20th century. A professor at the Columbia and University of Chicago Law Schools, he was among the most prominent and influential of the "legal realists." He is best-known today as the principal drafter and driving force behind the Uniform Commercial Code and as the author of *The Bramble Bush* (1930), a useful introductory guide for

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> Nowhere more than in law do you need armor against that type of ethnocentric and chronocentric snobbery — the smugness of your own tribe and your own time: We are the Greeks; all others are barbarians.[8]

Although American jurists have always been ambivalent toward the English inheritance, American common law has been importantly shaped by its "reception" of the English common law. You have perhaps already noticed that all of your casebooks contain English cases, many of them decided after independence but nevertheless treated as groundbreakers for their particular patch of the law.[9] Indeed, the term "common law" is itself borrowed from England, where it referred to that body of customary law that was shared, or common to, the entire Kingdom (as opposed to idiosyncratic local customs or rules). About reception, you should know at least this:[10]

> How did the common law of England get over here, and to stay? In an opinion written a little more than fifty years after the Declaration of Independence, Justice Story said of the common law that "our ancestors brought with them its general principles and claimed it as their birthright." This is at best a figure of speech, and I greatly doubt that Story meant it as more than that. If there had been lawyers among those who sailed to Virginia in 1607 and to Plymouth in 1620, they would undoubtedly have brought the principles of the common law along with them as their most precious baggage, but the time for lawyers in America had not yet come. The historian-jurist Daniel J. Boorstin gives us a better picture of colonial law as it was in the beginning:
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> > Legal proceedings of the early years give us the impression of a people without much legal training and with few lawbooks who were trying to reproduce substantially what they knew 'back home.' Far from being a crude and novel system of popular law, or an attempt to create institutions from pure Scripture, what they produced was instead a layman's version of English legal institutions. * * *
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> Colonial law and judicial administration became increasingly professionalized in the first half of the eighteenth century. The evolution towards regularity and formal rationality in the operation of legal institutions was not as rapid in some colonies as in others, but it is discernible to a substantial degree everywhere. This is always true in developing countries,

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first-year law students. His two other most important works are *The Common Law Tradition* (1960), which examines appellate decisionmaking, and *The Cheyenne Way*, an interdisciplinary study, well ahead of its time, of dispute resolution among the Cheyenne. The standard biography is WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1973).

[8] KARL N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 44 (Oceana Pubs. 1960; 1st published 1930). The snobbery seems evenly and equally distributed. Merryman notes that "many people believe the civil law to be culturally superior to the common law, which seems to them to be relatively crude and unorganized." MERRYMAN, *supra* note 5, at 3.

[9] *See*, for just one example, a case most likely at least noted in your Torts casebook: *Rylands v. Fletcher*, In the House of Lords, 3 L.R.-E. & I. App. 330 (1868). It shaped the law dealing with abnormally dangerous activities conducted by an owner on his land.

[10] Harry W. Jones, *The Reception of the Common Law in the United States*, *in* POLITICAL SEPARATION AND LEGAL CONTINUITY 93–94, 96–99, 105 (Harry W. Jones ed., 1976).

> as America then was. Every colony had its substantial property holders who looked to law for the security of their expectations. Commerce was on the rise, not only local business but also intercolonial bargains and overseas trade with England, and commercial undertakings, then as now, required reasonably certain law — and competent lawyers to structure transactions in sensible and effective form. The stage is now set in the colonies for the historically demonstrable cycle: (1) the security of interests and transactions requires some regularization of the law; (2) but the regularization of law creates an urgent need for lawyers; and (3) lawyers, when they come, bring about law's further regularization. * * *
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> The common law thus came to the colonies of British North America not in the ideological baggage of the first settlers but a century or so later, with the emergence of an accredited and active legal profession, the development of reasonable competence in the judiciary and the regularization of adversary procedures and precedent-based methods of legal reasoning. The principles of the English common law are now to be drawn on as sources of guidance for colonial decision-making. * * *
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> [I]ndependence made it necessary to formulate a theory of reception. English case-law was presumably applicable, within limits, so long as what were now American states had been colonies of the British Crown. But why and by what mandate should English law be any more authoritative in the now independent states than the law of any other foreign country? In state after state, efforts were made to state the theory and the limits of the reception in explicit terms. This proved to be a difficult drafting assignment, largely because the enacting state conventions and legislatures were by no means sure how much of the English law they wanted to receive and how much to reject. * * *
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> As a matter of pure theory, American reception may have been limited to the English law as it existed on some set date — 1775, 1776 or whatever — but as a matter of demonstrable fact, English judicial decisions handed down long after 1776 exerted a profound influence on nineteenth century American adjudication. The reception of the common law in the United States remained unfinished business long after American independence was established. Whatever cut-off date may have been recited in this or that state reception statute, American courts did not regard the spring of English common law doctrine as one that went dry for them on the day American independence was proclaimed. Throughout the formative period of American law and well into the later years of the nineteenth century, what was received here was not the closed book of English law as of 1776 but the open book of developing English common law doctrine.

The most important "reception" from England was perhaps not any particular body of doctrine but a way of thinking about law which made it easier for our great jurists (such as Story) to create an indigenous American jurisprudence.[11]

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[11] A quite wonderful (and very readable) book that tells you more about our legal traditions is Grant Gilmore, The Ages of American Law (1977) (see especially Chapter Two, "The Age of Discovery"). *See*

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B. "CASES"

When a lawyer talks of a "case," she most often means a past judicial decision that once and for all settled a dispute (a lawsuit) between two contending parties — a plaintiff and a defendant, as they most often are called. So one refers to the "case of" *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), in which the Supreme Court held that segregated public schools were unconstitutional. The reference tells us that the case was a lawsuit between Brown on the one hand and the Board of Education on the other, that the written opinion announcing and explaining the ruling can be found in volume 347 of the United States Reports (the set of books in which the United States Supreme Court reports its decisions) at page 483, and that the decision occurred in 1954.

But in talking of a "case," a lawyer might also be referring to a particular legal claim, the strength of which, in the common law system, can be evaluated only in light of prior "cases" — that is prior decisions made by courts when faced with situations with similar facts. Thus, suppose you consulted your lawyer about a dispute between you and X, whom you wish to sue. If she were to say, "I don't think you have much of a case," she would mean something like this: I have listened to your story, your tale of the events that transpired as you perceived them. I have done so with a measure of skepticism — because I know only too well that what you have told me is affected by whatever limits your perception and is undoubtedly shaped, consciously or not, by your aims, goals and desires. I have, nevertheless, converted your story into a chapter of the emerging law-story that we lawyers call "facts" and I have then put these facts into legally relevant categories drawing on my understanding of past cases that involved similar factual categories. Next I ascertained that the appropriate court or courts in those cases refused relief to the plaintiff and that they did so recently, firmly, unequivocally, and perhaps even unanimously. Or she means: there are prior, factually similar cases in which the plaintiff prevailed, but they all contained an important factual element that, in my judgment, was crucial to why they were decided the way they were and that element is missing in your case. Or: your story contains a factual element never present in those factually similar cases in which the plaintiff prevailed, and its presence here throws off all bets, because, frankly, I judge it to be quite detrimental to your cause, and I think the court will also think it to be detrimental to your cause.

In short, concludes your lawyer, I am predicting that you would lose this suit against X at this time with your specific facts. If you ask her, why should prior decisions determine the fate of my current dispute with X, she will answer: our legal system says that prior, *factually* similar cases constitute "precedent" for subsequent cases, and a doctrine called stare decisis dictates that courts must follow precedent. Of that, more later; for now, simply accept it (and note only the careful hedging in your lawyer's statement) because we must learn many other things about cases before dealing with stare decisis.

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also Morton J. Horwitz, The Transformation of American Law, 1780-1860 (1977) (especially Chapter One, "The Emergence of an Instrumental Conception of Law").

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Cases as a Method of Instruction

Perhaps you now think that the reason you are carrying several pounds of cases into each of your courses is that they contain "The Law of" Contracts or Property or Torts or Civil Procedure or Whatever — and you attend those classes to learn The Law.

Wrong — as you know from the Foreword which warned you that there is no such thing as "The Law of" in the sense in which you probably still think of it: something stored in little black boxes to which your instructors refuse to give you the keys, probably because they want to keep their jobs! And even if such a body of law did exist, your casebooks would be an exceedingly poor tool for teaching it. As Karl Llewellyn observed long ago, "it is obvious that man could hardly devise a more wasteful method of imparting *information about subject matter* than the case-class. Certainly man never has."[12] Worse, the case method is misleading, because the cases you study are virtually all cases which the parties have carried, at great expense in time and money, to the highest tribunal that could or would hear them. By focusing almost exclusively on appellate opinions, you are studying only the very small tip of the very large iceberg of "law" or "the legal system."

Why study only the tip? Perhaps it is because

> many law professors experience vertigo when they open the doors and look outside appellate courtrooms. There is too much to look at, and it becomes difficult to produce elegant theories of law. * * * Those whose personalities need order slam the door quickly and turn back to rules and great cases decided by elite appellate courts.
>
> If we mustered our courage and lifted our eyes from the pages of appellate reports and books written by famous dead Europeans, what might we see? Jerome Frank, with little success, long ago tried to provoke the academy to pay attention to trial judges.[13]

Nevertheless, "the academy" largely persists in making appellate opinions the virtually exclusive vehicle of law studies, at least in the first year. Is the reason really no more than vertigo?

The "case class" approach to legal education was largely the creation of Christopher Columbus Langdell (yes, that really was his name), the first dean of the Harvard Law School. You owe your present enrollment in law school to Dean Langdell:

> Langdell was hired by Charles Eliot, Harvard's new president, because twenty years earlier, when he was a student at Harvard, Eliot had been extraordinarily impressed by Langdell's approach to legal study. When Eliot later recruited Langdell, Harvard's Law School was in serious trouble with declining enrollments and widespread dissatisfaction with its quality.

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[12] Karl N. Llewellyn, *The Current Crisis in Legal Education*, 1 J. Legal Ed. 211, 215 (1948).

[13] Stewart Macaulay, *Popular Legal Culture: An Introduction*, 98 Yale L. J. 1545, 1546–1547 (1989). The reference is to Jerome Frank, a noted, some would say "extreme," Legal Realist, and his book, *Courts on Trial* (1949).

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> If Eliot had not met Langdell two decades earlier, he might have succumbed to the view that education of lawyers did not belong in the university. Eliot might have closed Harvard's Law School, just as it had been shut down in 1829 when enrollment fell to one student. In closing Harvard Law School, Eliot might logically then have instructed the departments of philosophy and political economy to deal with whatever they considered important and legitimate about law. If this hypothetical set of events had occurred, there could have been a decoupling of the universities and the legal education of people eager to become practicing lawyers. If so, both legal education and university scholarship about law would have evolved in very different patterns.[14]

One way of legitimizing law as an academic field worthy of university instruction as an autonomous discipline was to align or associate it with the natural sciences. Langdell's central innovation growing out of this conception was the case method. In the preface to his original contracts casebook, Langdell explained:

> Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law. Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries. This growth is to be traced in the main through a series of cases; and much the shortest and best, if not the only way of mastering the doctrine effectually is by studying the cases in which it is embodied. But the cases which are useful and necessary for this purpose at the present day bear an exceedingly small proportion to all that have been reported. The vast majority are useless and worse than useless for any purpose of systematic study. Moreover, the number of fundamental legal doctrines is much less than is commonly supposed * * *. It seemed to me, therefore, to be possible to take such a branch of the law as Contracts, for example, and, without exceeding comparatively moderate limits, to select, classify, and arrange all the cases which had contributed in any important degree to the growth, development, or establishment of any of its essential doctrines; and that such a work could not fail to be of material service to all who desire to study that branch of law systematically and in its original sources.[15]

Langdell's novel approach to legal education initially drove virtually every student at the school out of his classroom. But Langdell had the last laugh, and the case method has certainly carried the day. The question is whether it makes sense.

Edwin W. Patterson, the late Cardozo Professor of Jurisprudence at Columbia University Law School, enumerated four benefits claimed by advocates of the case method: (1) *historical*, because it best enables students to grasp the development of the law; (2) *pedagogical*, because it forces students to participate actively in their

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[14] David Barnhizer, *The Revolution in American Law Schools*, 37 Clev. St. L. Rev. 227, 261 (1989).

[15] Christopher Columbus Langdell, Selection of Cases on the Law of Contracts vi–vii (1870).

education; (3) *pragmatic*, because it gives early training in what lawyers do; and (4) most importantly, *scientific*, in that it focuses on the raw materials of "the science of law."[16]

The first of these justifications is a makeweight; historical understanding is neither a necessary part of, nor unique to, the case method. The second is in our view correct, although slightly overstated. Unfortunately, the case method does not in fact "force" you to participate intellectually; it only creates an incentive to do so. In some cases the incentive backfires; the case method can actively discourage students. In any event, this is a question of pedagogy more than one about the nature of law.

The most interesting defenses of the case method are the third and fourth. In our view, the third is the central justification for the continuing use of the method; the fourth in large measure an anachronistic and wrongheaded misconception. We will consider them in reverse order.

The Law as Science

Consider the following debunking:

> Christopher Columbus Langdell, who in 1870 became the first dean of the Harvard Law School, has long been taken as a symbol of the new age [— an age of faith and blind self-confidence among lawyers and legal academics]. A better symbol could hardly be found; if Langdell had not existed we would have had to invent him. Langdell seems to have been an essentially stupid man who, early in his life, hit on one great idea to which, thereafter, he clung with all the tenacity of genius. Langdell's idea evidently corresponded to the felt necessities of the time. However absurd, however mischievous, however deeply rooted in error it may have been, Langdell's idea shaped our legal thinking for fifty years.
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> Langdell's idea was that law is a science. He once explained how literally he took that doubtful proposition:
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> > [A]ll the available materials of that science [that is, law] are contained in printed books. . . . [T]he library is . . . to us all that the laboratories of the university are to the chemists and physicists, all that the museum of natural history is to the zoologists, all that the botanical garden is to the botanists.[17]

Regarding the idea of a "science of law" Judge Posner has said:

> The idea that law is an autonomous discipline, by which I mean a subject properly entrusted to persons trained in law and in nothing else, was originally a political idea. The judges of England used it to fend off royal interference with their decisions, and lawyers from time immemorial have

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[16] Edwin W. Patterson, *The Case Method in American Legal Education: Its Origins and Objectives*, 4 J. Leg. Educ. 1, 2–10 (1951).

[17] Grant Gilmore, The Ages of American Law 42 (1977) (quoting A. Sutherland, The Law at Harvard 175 (1967)).

used it to protect their monopoly of representing people in legal matters.[18]

As an example, Judge Posner offers a well-known statement by Sir Edward Coke, at the time Chief Justice of the English Court of Common Pleas:

> [T]hen the King said, that he thought the law was founded upon reason, and that he and others had reason, as well as the Judges: to which it was answered by me, that true it was, that God had endowed his Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it: and that the law was the golden met-wand and measure to try the causes of the subjects; and which protected his Majesty in safety and peace.[19]

Judge Posner continues:

> Langdell in the 1870s made [the conception of law as an autonomous discipline] an academic idea. He said that the principles of law could be inferred from judicial opinions, so that the relevant training for students of the law was in reading and comparing opinions and the relevant knowledge was the knowledge of what those opinions contained. He thought that this procedure was scientific, but it was not, not in the modern sense at any rate. It was a form of Platonism; just as Plato had regarded particular chairs as manifestations of or approximations to the concept of a chair, Langdell regarded particular decisions on contract law as manifestations of or approximations to the legal concept of contract.[20]

Judge Posner goes on to call this a "perverse or at best incomplete way of thinking about law."[21] In what lies the perversity? Or, less damning, the incompleteness?

At this point we ought to ask the logical corollary: is it equally perverse or incomplete to view *science* as science?[22]

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[18] Posner, *supra* note 1, at 762.

[19] *Id.* at 762, n.1 (quoting Prohibitions Del Roy, 6 Coke Rep. 280, 282 (1608)). Lord Coke (1552-1634) was an early collector of precedents; through his own reports, he was largely responsible for the now standard practice of reporting opinions fully. He is best-known for his assertions of the primacy of the common law, both over the King (in the quoted excerpt) and over Parliament (in the celebrated, but long since abandoned, 1610 decision in *Dr. Bonhman's Case*).

Coke's independent stance was successful only up to a point; in 1616 King James I removed him from office, essentially for insufficient malleability. Should judges be removable from office? By the President or Governor? The legislature? The public? Other judges?

[20] *Id.* at 762.

[21] *Id.*

[22] Alan Wolf, Professor of Physics at Cooper Union and, at the time, our student, presented the authors with what follows.

You may have come to law school with the idea that law is "scientific" in the following sense. The applier of law (judge, scientist) looks up the existing rules (precedents, equations) and applies them to particular situations (appellate cases, laboratory experiments). Often a "blind" application of the rules succeeds (justice is done, correct predictions are made), but sometimes a more creative effort is required. When old rules fail to meet our needs (society changes, new experimental realms are explored), we create new rules or modify old ones. We hope that the rules generally improve with changes, but we suspect that our work will never be finished (society is always evolving, there are ever more subtle physical phenomena to understand).

Langdell's method of case law study is said to be a scientific one, so you might expect legal study to resemble your study of, say chemistry. In chemistry you were told that PV = NRT was the relationship between gas pressure, volume, and temperature. Class discussion focused primarily on how to apply the rule, and interesting consequences of the rule. Legal case analysis couldn't be more different. You are given no lists of rules, instead you are asked to deduce the rules from an analysis and comparison of cases. Such a "discovery" method of teaching is rare, but not unheard of in science. In a discovery course, students perform classic scientific experiments, unaware of the results they should obtain.

The far more common method of teaching science is to *present* the fundamental rules (these cannot be derived from more elementary principles, we must appeal to experimental confirmation), and to *derive* the applied rules (these are essentially combinations of the fundamental rules). So the law/science analogy seems to break down. The rules of law are confusing and uncertain, and you are asked to play games to find them. The rules of science are simple (in the sense that they can be expressed concisely and unambiguously) and they are universally True. The most important equation of physics is Newton's Second Law of motion, F=ma. It says that the harder I kick an object, the faster it will fly away. Simple and True.

A month or two into the frustrating process of case analysis, you will suspect that cases are decided, not according to rules, but according to judicial whim, lawyer ineptitude, political pressures, and likely the phase of the moon. At this point science and law stand in sharp contrast. Science is Truth (logic, rigor, consistency), and law is a mess (human foibles, politics, economics). If it made any sense quantitatively to compare the truth of science to the truth of law, most everyone would agree that science has a dramatic lead, but it may interest (and dismay? comfort?) you to know that science is not as perfect as you may have thought.

The fundamental physical laws are based on neither logic nor mathematics, they are simply "thought up" and found to be consistent with a set of experiments. Newton's Second Law was "the law" for centuries, but the more precise experiments of modern physics (circa 1900) disproved the law, so Truth was replaced by "approximately true under certain circum

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stances." More accurate versions of Newton's Second Law are far more complex mathematically, but no more logically provable than F=ma.

The applied rules of science rest on the shaky foundation of the fundamental laws, but the applied rules are more than a simple combination of these laws. Approximations of many types are required, each of which limits the accuracy and applicability of the results. Often it is necessary to make assumptions that are not testable or even plausible, simply to be able to proceed with a computation.[23] Bertrand Russell said "All exact science is dominated by the idea of approximation." Students of science, but also scientists and science teachers have a largely unconscious tendency to forget about the approximations and limitations, and to think of and present their results as more True than they really are.

Understanding the imperfections of science should make you feel more forgiving toward law, which, after all, has to solve problems far more complex than science.

Professor Patterson raised a different objection to the idea of "law as science":

> [I]n none of these discussions [of law as science] was it recognized that a rule or principle of law is primarily normative or prescriptive in meaning, whereas scientific propositions are either true or false upon the basis of empirical observations.[24]

The normative quality of law is an essential concept to understand — both because such an understanding will help you to decipher cases, and because it will lead you to think more clearly about what "law" is.

Suppose you enter a classroom and see a sign on the wall that reads "No Smoking." Is it appropriate for you to say about the words, "No Smoking," "That is not true" (or, "That is true")? If it is not appropriate, what does that imply about the nature of the words, "No Smoking"? If you cannot say the legend is true or false, what observations can you make about it? Can you say about the *sign*, "That is not true," and what would you mean by that? Do you understand the difference between commenting on the *legend* and on the *sign*?

Presumably, no one will be smoking in the room. What observations can you make about that? If someone is smoking, does that act now make the words "No Smoking" "not true," "false" or what?

If you sue the cement factory next door because it emits dust that settles on your house, and the court says: "We find that the cement factory has (does not have) a right to do that," is that like saying "No Smoking" or is it like saying, "In the United

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[23] Here are *some* of the approximations used in PV = NRT, the "ideal gas *law*":

1) that the gas molecules occupy no space (wrong);

2) that the huge number of molecules bouncing off the container walls define a constant value for the pressure (wrong); and

3) that there are an infinite number of gas molecules — hence a statistical approach is correct (wrong).

[24] Patterson, *supra* note 16, at 4.

States the 4th of July is a national holiday"?

When, prior to bringing suit, the plaintiff in our cement factory case tells the factory owner, "As a matter of fact, you have no right to do that!" what is he doing? Is his statement any more than "whistling in the dark"? Is it whistling in the dark when he orders his 10 year-old son, "Clean your room" or tells his secretary, "This letter must go out tonight"?

Is to say "as a matter of fact, I have the right to do that" a nonsensical sentence? Always? Sometimes? Never? In the factory example, is "as a matter of fact you have no right to do that" a meaningful utterance before the court has spoken? After the court has spoken?

What does all this have to do with Professor Patterson's observation? With your understanding of cases? Your understanding of what "law" is about?

Suppose you understand that an opinion in a given case is a mixture of descriptive language, verifiable as true or not, and normative language, verifiable, if that is the right word ("legitimated"?) by standards other than empirical ones.[25] What do you gain from that understanding?

Practical Benefits of the Case Method of Instruction

Although decided cases are obviously essential (if incomplete) data for understanding what judges do and what the law requires, it is rare that anyone now defends the case method on the basis that it is the most scientific approach to a scientific discipline. Rather, the central modern justification relies on a vision of law school as professional training.

> [The case method] has survived because it has been widely esteemed as an efficient and effective means of inculcating intellectual skills, or habits of thinking, which are deemed valuable in the practice of law. People who have studied cases are changed by the experience; the change is often substantial, and may be more profound than that usually wrought by any other experience provided in higher education.
>
> Case method instruction develops several types of important legal intellectual skills. Such instruction gives a practical bent to the student's thinking; cases are problems, and students reading cases are also trying to solve problems. The activity hones the student's sense of relevance as he acquires the habit of distinguishing between ideas that are useful and those that are not. . . . Additionally, such study helps develop greater balance in thinking. Discussion and analysis of cases require the student to consider both sides of issues. A student who has considered both sides of several thousand cases is less likely to engage in self-deception about the strength and righteousness of his position. * * * Tolerance for ambiguity also improves; professional instinct is heightened.

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[25] R.M. Hare, The Language of Morals (1952), deals with the distinction between descriptive and prescriptive language. It is a wonderful and accessible book that you might want to look at.

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> Case study is also important as a means of elevating such basic skills as reading, speaking, and listening. This results from the extensive dialogue between teacher and students, and among students, which is greatly facilitated by the framework for discussion provided by the cases being read together by the group. * * *
>
> Students who acquire these intellective traits and habits in adequate supply have also acquired the capacity to become their own professional teachers. To the extent that a person has achieved competence in case method instruction, he is capable of mastering large amounts of new legal material with little or no help. * * * While bare doctrine can be simplified and confined in study outlines and thus assimilated more efficiently than by the case method, understanding of doctrine and underlying policy is enhanced and deepened if the understanding is acquired as a result of the student's own synthesis in the course of problem solving. A student who has read and discussed a hundred antitrust cases, for example, will generally have a much firmer grip on that field, and its difficulties and ambiguities, than one who has invested equal time in passive submission to lecture, outline, and text.[26]

Because at least one of the schools' missions is to train students for the "business of law," that is, for *practice*, it is safe to predict that cases will indeed remain a foundational part of your legal education and, for that matter, will accompany you through your professional life as a lawyer.

C. COURTS

Cases are decided, and decisions issued, of course, by courts. The United States contains a vast number and variety of courts, many operating in distinct but overlapping systems. There is no such thing as "the American judicial system" as such. As Daniel Meador has explained:

> The great divide in the American legal landscape is the state-federal line. It derives from the United States constitution, pursuant to which the federal government was created in 1789 to "form a more perfect Union" of the existing states. The federal government and the state governments coexist, with a broad range of powers delegated to the former and all others reserved to the latter, although there are certain powers that can be exercised concurrently. Each of these governments has its own court system, autonomous and self-contained. * * *
>
> The federal judiciary and the fifty state judicial systems are each constructed like a pyramid. In broad outline these systems are similar, but they vary in the details of their organization and business. Across the base are the trial courts, and the courts of first instance. At the apex is the court of last resort, usually called the Supreme Court [though in New York State, oddly, the Supreme Court is the trial-level court and the highest court is

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[26] Paul D. Carrington, *Book Review*, 72 CAL. L. REV. 477, 490–491 (1984) (reviewing Robert Stevens, Law School: Legal Education in America from the 1850s to the 1980s (1983)).

called the Court of Appeals]. In most states and in the federal system there is a middle tier, the intermediate appellate courts. * * *

When opinions of American courts are published, they are collected in various sets of bound volumes know as reports. Most states have their own official reports, and decisions from all states are included in regional reports provided by private publishers for the convenience of users. There are other reports for federal decisions. * * * In addition to being published in bound volumes, court decisions, statutes, and regulations are now available nationwide through electronic data retrieval systems * * *.

American courts adhere to the adversary process, as distinguished from the inquisitorial process that prevails on the continent of Europe and in numerous countries elsewhere. In both civil and criminal cases, the parties through their lawyers are solely responsible for presenting the facts to the court * * * [though most cases are settled and] only some 5 to 10% of cases actually go to trial. At trial, the lawyers call and question the witnesses. The testimony elicited in court, along with all other items admitted into evidence by the judge (e.g. documents), forms the trial record. Based on this adversarial "party presentation," the trial court makes determinations of fact, applies the pertinent law, and enters judgment accordingly. . . .

In civil cases, any party dissatisfied with the outcome of the case may appeal, but in practice only a small percentage of judgments are taken beyond the trial court. In criminal cases, a high percentage of all convictions is appealed by defendants (normally the prosecution cannot appeal an acquittal). Appeals are based solely on the record made in the trial court. No witnesses appear and no new evidence can be offered at the appellate level; normally no questions can be raised there for the first time. Unlike trial courts, over which a single judge presides, appellate courts are multi-judge forums acting collegially. Appellate courts generally confine themselves to reviewing questions of law raised in the trial court proceedings; factual determinations made by the trial court are not normally disturbed. The appellate court's sole function is to determine whether, as a matter of law, the trial court's judgment should be affirmed, reversed, or modified in some way. If the appellate court concludes that the lower court erred in its application of the law, the appellate court may reverse the lower court's decision. It will do so unless the reviewing judges conclude that the error was relatively minor and probably did not affect the outcome in the trial court [i.e., was "harmless error"]. . . .

The state courts are the front-line adjudicators in the United States. They overshadow the federal courts both in the number of cases they handle and in the number of persons involved as litigants, lawyers, and judges. In the trial courts of the fifty states, more than 30,000,000 cases, civil and criminal, are filed annually, compared with fewer than 314,000 in the principal federal trial courts (the district courts) and 1,300,000 in the federal bankruptcy courts. In numbers of judges the state courts likewise eclipse the federal. There are over 29,800 judges in the state trial courts,

> while there are fewer than 1,500 federal trial judges (district, bankruptcy, and magistrate judges).[27]

Within a single jurisdiction (e.g. the State of New York, or the federal system) courts are organized hierarchically, as the foregoing excerpt indicates. This arrangement is illustrated in Appendices A (federal courts), B (New York state courts), and C (California courts). In addition, judicial jurisdiction is subdivided geographically. So a trial court will have jurisdiction of cases arising within the geographic area in which it sits. Appellate courts cover a larger area than trial courts; the Supreme Court covers the entire jurisdiction. This arrangement for the federal courts is illustrated in Appendix D.

D. JUDGES

Courts have fairly large staffs, but, of course, their key members are the judges themselves. Unlike many countries, the United States has no professional track for judges; future judges receive no special education or training and follow no special career path. Judges are lawyers who at some point were appointed or elected to the bench. We offer only three quick observations about the American judiciary here.

First, with regard to *independence*. As part of the general concept of "separation of powers," government authority in the states and at the federal level is divided into three separate branches: legislative, executive, and judicial. Professor Meador again:

> Each part must be in the hands of different officials of official bodies. Put in its simplest form, the doctrine requires that the legislative branch make the law through the passage of statutes, the executive branch enforce the law, and the judicial branch interpret and enunciate the meaning of the law through the adjudication of disputes. By this dividing power, the doctrine aims to protect citizens from abuse of official authority stemming from its concentration in the hands of too few persons or in a single body. In the mystique of American politics, this arrangement is viewed as fundamental to liberty and to government under law. It is embodied in all American government structures; hence, the federal and state courts function as separate branches of government, independent of the legislative and executive branches.[28]

Essential to this arrangement is protection of the courts from oversight or retribution from the other branches — that is, the existence of an independent judiciary. The legislative and executive branches cannot alter a judicial ruling; there is no appeal from the courts to the other branches; and judges cannot be penalized for ruling in a way disfavored by the other branches. (The legislature can, of course, modify the legal rule applied or articulated by the court in its ruling; that is its function as the lawmaking institution of government. But it cannot adjudicate or review judicial adjudications.) At the *federal* level, this independence is constitutionally protected by "life tenure" (judges hold their positions for life; they can be

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[27] Daniel John Meador, American Courts 1–8 (2d ed. 2000). Reprinted with permission.

[28] *Id.* at 2.

removed from office only through impeachment) and a guarantee that their salaries will not be diminished.[29] *State* judges generally hold office for a specific term of years, after which they must be reappointed or re-elected.

Second, with regard to *selection*. How should judges be selected? The basic methods are three. First, all federal judges, and the judges of some states, are appointed by the head of the executive branch (the President or the Governor). Federal judges are, to be precise, *nominated* by the President and *confirmed* by the Senate. See U.S. Const., art. II, sec. 2. Second, many states use what is commonly referred to as "merit selection," which is a variation on gubernatorial appointment in which a bipartisan commission draws up a short list of names from which the Governor must select. Third, most states hold elections for at least some of their judges. In most instances, these are partisan (i.e., the candidates identify what political party they belong to and run as the nominees of their parties); some states require that judicial elections be nonpartisan.

The choice between appointing and electing judges has been a matter of longstanding, and continuing, debate. In part, this disagreement reflects a contest over what it is judges actually do (or should do). The standard justification for *electing* judges is that "judges make policy [and] * * * like other policymakers, they should be accountable to the people in a representative political system."[30] The standard justifications for *appointing* judges are that judges ought to be independent from politics and the popular will, pursuing the law where it leads rather than yielding to popular pressure, and that the general public is not well-equipped to evaluate judicial ability. During debate over ratification of the Federal Constitution James Madison noted that, while in general high-ranking governmental officers ought to be selected by the people,

> [s]ome deviations . . . from the principle must be admitted. In the constitution of the judiciary department in particular, it might be inexpedient to insist rigorously on the principle: first, because peculiar qualifications being essential in the members, the primary consideration ought to be to select that mode of choice which best secures these qualifications; second, because the permanent tenure by which the appointments are held in that department must soon destroy all sense of dependence on the authority conferring them.[31]

Both the election and the appointment of judges are, at this point in American history, quite politicized and polarizing.

Third, with regard to *composition*. Historically, both the federal and state judiciaries were composed of successful, white, male lawyers. In the last generation or two, there has been a significant increase in the diversity of the bench, with an increasing number of women and minority judges drawn from a variety of practice

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[29] "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. Const., art. III, § 1.

[30] David Adamany & Philip Dubois, *Electing State Judges*, 1976 Wis. L. Rev. 731, 772.

[31] The Federalist No. 51, at 321 (James Madison) (Clinton Rossiter ed., 1961).

backgrounds. To most, this seems a salutary change. But why, exactly? Consider the following:

> [It is a common] complaint that the judiciary is not adequately "representative" of society as a whole. Advocates of a more representative bench often fail to identify precisely the value of such diversity. Three overlapping justifications are implicit. First, the bench, like any profession, should be open to all regardless of race or gender. * * * Second, a "representative" judiciary (or Congress or school board) has symbolic value. Those subject to the commands of a governing body will have more confidence in and respect for that body if it includes a member or members who are "like" them. Third, representativeness will affect substantive outcomes; that is the basic realist critique and the assumption, or hope, underlying much reluctant support for the [Clarence] Thomas nomination. These latter two justifications are linked. It is because decisions are affected by the decisionmaker's background and group membership that "representativeness" has symbolic value. Public confidence in governing bodies hinges much more on their representativeness than does public confidence in, say, the space program. Thus, the reason "representativeness" matters with regard to judges is that they *do* act on behalf of the public and they do so through the elaboration of norms that are not wholly objective.[32]

As was keenly illustrated during the 2009 confirmation hearings for Justice Sotomayor, most people are more comfortable with the first two justifications, than with the third. The nominee spent a large portion of her testimony backtracking from, spinning, and contradicting this statement from a 2002 speech:

> [O]ur experiences as women and people of color affect our decisions. The aspiration to impartiality is just that — it's an aspiration because it denies the fact that we are by our experiences making different choices than others.
>
> Whether born from experience or inherent physiological or cultural differences * * * our gender and national origins may and will make a difference in our judging. Justice O'Connor has often been cited as saying that a wise old man and wise old woman will reach the same conclusion in deciding cases. * * * I am * * * not so sure that I agree with the statement. First, * * * there can never be a universal definition of wise. Second, I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life.[33]

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[32] Michael Herz, *Choosing Between Normative and Descriptive Versions of the Judicial Role*, 75 Marquette L. Rev. 726, 746–747 (1992).

[33] Sonia Sotomayor, *A Latina Judge's Voice*, 13 Berkeley La Raza L.J. 87, 91–92 (2002).

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E. LITIGATION: HOW A DISPUTE BECOMES A "CASE"[34]

As said earlier, the cases you will read in law school (and as a practicing lawyer) are, for the most part, appellate decisions. That is, the case has been brought to trial, a verdict rendered by the factfinder (either a judge or jury), one party (or both) has appealed the decision to the next higher court in that jurisdiction. What question is before the court on appeal? Who has brought the appeal, and what happened in the court below? The answer to these questions will tell you the *procedural posture* of the case you are reading and, ultimately, shed light on exactly what issue(s) the case does — *and does not* — address.[35]

Your ability to read and understand a case thoroughly will depend in no small measure on your understanding of how cases are brought, tried, and appealed — in short, Civil Procedure. The following discussion is provided to assist you in your general understanding of how a lawsuit is brought in court.[36] We will trace the steps involved in bringing a civil action in the context of a simple hypothetical.[37]

Victim v. Driver

You are a lawyer in the State of Euphoria. Victim comes to you with a problem. She was getting onto her motorcycle in front of the local DVD store, having just rented an instructional DVD on tree house renovation, when Driver rounded the corner in his '57 Edsel, lost control of the wheel, and slammed into Victim and her bike. Victim lists for you all of the troubles she has suffered as a result of the accident: her back and neck were sprained, her motorcycle was totaled, she missed three weeks of work as an aerobics instructor, and she never got to see the DVD she had rented. You take notes during the interview and tell Victim you will get back to her. Now, alone in your office, what do you do?

Is there a cause of action?

Your first job as a lawyer is to determine if Victim has a legally cognizable claim, or *cause of action* — that is, has she suffered something at the hands of Driver for which the courts will grant her relief? As a practical matter, you must also assess her chances of winning even if her claim is legally sufficient. Remember, in our system of justice, a plaintiff must prove that the defendant has done what is

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[34] (c) 1992 Victoria A. Kummer. Ms. Kummer was a student in our Legal Process Workshop. She undertook the task of preparing the following pages. Her goal was to render a complex process understandable to raw novices without distorting it. We obviously believe that she succeeded splendidly. We would only add this caveat: the goal here is to give you a "palm-of-the-hand" view of matters procedural. Inescapably, some finer points and distinctions have been ignored. You will learn about all of them in due course in Civil Procedure.

[35] Remember, a court can only make a binding ruling on a question that is squarely before it. Musings by a court on an issue outside the specific question it faces are called *dicta* and, while persuasive, do not carry the authority of an actual holding.

[36] As you undoubtedly know by now, Civil Procedure is a fascinating and complex area of study to which law schools typically devote an entire semester, or even a year. This rudimentary outline is merely an introduction to the basic concepts of Civil Procedure.

[37] Our concern at this juncture is only civil cases. The somewhat different procedures of a criminal action, in which the State brings a case against a defendant for criminal wrongdoing, will not be treated here.

claimed, while the defendant is not required to prove anything. Before Victim can recover a judgment against Driver, for example, she must prove her case against him by a "preponderance" of the evidence — the factfinder (either judge or jury) must find it "more likely than not" that Driver "caused" Victim's injuries and did so in a manner giving rise to legal liability.

You have looked through the law books and your old Torts class notes, and you have finally determined that Victim's injuries may be redressed — that is, the law does provide relief for the injuries Victim claims to have suffered at Driver's hands. You have also learned that a nearby motorcycle gang saw the whole thing, so you have a flock of witnesses to help you prove your case. You describe your ordinary fee scale to Victim, who says it sounds reasonable. In your infinite wisdom, you take Victim's case.

What forum?

Now that you have a case to bring, the next logical question is, *where* do you bring it? The court you choose is called the *forum*, and there are many different *fora* from which to choose — municipal, county, district, federal, etc. Where do you go? A court can only hear a case if it is empowered to do so — i.e., if it has "jurisdiction" over the subject matter of the case and over the parties involved. When we say "jurisdiction," we are really talking about two distinct kinds of power: *subject matter jurisdiction* and *personal jurisdiction*. Whether or not a court is empowered to hear a case — whether it has "jurisdiction" — turns on issues such as the nature of the claim, how much money is at stake, where the claim arose, and the state citizenship of the parties.

The competence of a court to hear certain kinds of cases depending on the nature of the claims asserted and the amount in controversy is called the *subject matter jurisdiction* of a court. *Common law* claims are almost always based on *state* common law (federal common law exists, but it is quite rare), and therefore come within the subject matter jurisdiction of the state court. The typical Tort or Contract lawsuit will usually be a *state* claim, arising under state law, and is properly brought in a state court of general jurisdiction.[38]

The subject matter jurisdiction of federal courts is generally limited to cases that arise under federal law. For example, if Victim were claiming that Driver was involved in monopolistic trade practices, then *Victim v. Driver* would be a case arising under federal law (the Sherman Antitrust Act), and would properly belong in federal court. There is one major exception to this limitation of federal jurisdiction: federal courts also have subject matter jurisdiction in cases involving state law claims if the parties are from different states, or if one of the parties is from a foreign country, *and* the amount in dispute exceeds $75,000. In such "diversity cases" (i.e. cases involving parties of "diverse" citizenship), which account for roughly a quarter of the federal docket, the court will apply the law of the state in which it sits.

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[38] "General jurisdiction" as opposed to "limited jurisdiction." "Courts of limited jurisdiction" — Surrogate's Court, Family Court, Criminal Court, etc. — are usually courts which are empowered to hear only certain kinds of claims such as administration of estates, child custody, and murder, to name a few.

In our case, suppose Victim and Driver are from different states. We know that Victim is a citizen of the State of Euphoria. If Driver was a citizen of the State of Grace, and Victim's claim was for $1,000,000, Victim would have her choice of fora: she may bring suit against Driver in either state or federal court. Choosing the forum for your client's case is a strategic decision which you will make based on a variety of factors, such as which forum's procedural rules could be best used to your client's benefit,[39] which forum can get Victim a trial most quickly, or which forum would provide Victim with the most generous jury. Whichever forum Victim chooses, Driver may be entitled to contest Victim's choice and may try to move the case to the other forum.

Still supposing that Victim and Driver are from different states, what happens if you decide that it is best for Victim to sue in state court? Would it do Victim any good to simply go into the Euphoria state court and bring a claim against Driver? The historical answer would have been no. Since Driver is not from the State of Euphoria, the State of Euphoria may not subject Driver to its judicial process — it lacks *personal jurisdiction* over Driver. Driver may only be hauled into court in his own state, the State of Grace. For this reason, Victim must go to the State of Grace, and sue in Grace's state court if Victim wants to bring her case against Driver in state court. However, at present state statutes almost always provide for jurisdiction over out-of-state drivers who have accidents within the state. Under "long arm statutes," this has been expanded to include all tortious conduct within the state. The out of state driver statutes rely on a concept of "implied consent" that makes all drivers subject to personal jurisdiction.[40]

Bringing the Suit

As it turns out, both Victim and Driver live in Euphoria, so your options for a forum are limited to the Euphoria state court. How do you commence the suit? There are formal procedures, the details of which will vary from state to state, but which will in most respects follow one of two general patterns.

In many jurisdictions (including the federal trial courts), the lawsuit is commenced by *filing a complaint* with the court. If Euphoria were such a "file and serve" state, you would commence your case by first filing the complaint with the Euphoria state court. Afterwards, you would *serve* upon Driver a *summons* which directs Driver to come to court to defend himself. Included with the summons would be a copy of the complaint.

If, on the other hand, Euphoria were a "serve and file" state, you would commence your case by first serving Driver (by mail or by a professional process-server) with the summons and a copy of the complaint. You would not file copies with the court until later, at such time as either you or Driver needed a judge

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[39] The body of substantive law that applies to any given case is not necessarily the law of the forum. Determining which jurisdiction's substantive law will apply is the subject of a fascinating course entitled Conflict of Laws. However, a case in a particular forum will be subject to the *procedural* law of that forum regardless of what substantive law applies.

[40] You will learn about other exceptions to the "rule" regarding personal jurisdiction in Civil Procedure.

to take action of some kind (for example, to decide something or to order the other party to do something).

The Complaint

The complaint informs the court and Driver of Victim's claims — e.g., "Driver negligently failed to keep control of his automobile and drove it into me, causing the following injuries." The complaint will also outline the relief Victim is seeking from Driver — in this case, an amount of money. If Driver ignores the summons and complaint, the court will render a *default judgment* against him, and the case is over — Victim wins.

The Answer

If Driver is wise, he will avoid a default by responding to the complaint with an *answer*. The answer is a formal document responding to, and often denying outright, each of the specific allegations made in the complaint. It may include one or more *affirmative defenses*, stating in essence "yes, but" (that is, the events occurred as Victim says, but other facts negate Driver's liability), or it may even raise a *counterclaim*, seeking to impose a liability on Victim.

Before or after answering, Driver could also move to dismiss *for failure to state a claim upon which relief can be granted* (also called a *demurrer*, stating in essence "so what?" — even if the events occurred exactly as Victim says, the actions by Driver or injuries to Victim are not anything for which the law grants relief) or *for lack of jurisdiction* (stating in essence, "you can't touch me" or "you can't hear this kind of case").

In general, if the facts are undisputed, and the case hinges solely on a question of law, the judge can decide the case alone and prior to trial on a *motion to dismiss*, or on a *motion for summary judgment*. These pre-trial motions, as well as the *motion for judgment as a matter of law* (formerly called a directed verdict motion) *during* the trial, and the *renewal of motion for judgment after trial* (formerly called a judgment notwithstanding the verdict or a J.N.O.V.[41]) share the same basic argument: they ask the court to enter judgment for the moving party *as a matter of law* — because the facts alleged by plaintiff do not amount to a cognizable claim, or because the law does not recognize the defense advanced by the defendant, or because no facts are in dispute and the judge can determine the winner as a matter of law.

Where a question of fact exists, however, the parties must be given the opportunity to prove the facts they have asserted in their complaint and answer. The proving ground is, of course, the trial itself, and the outcome of the case is placed in the hands of the factfinder — either the judge sitting as a trier of fact (the parties having waived their rights to a jury trial) or the jury.

In our case, Driver raises several defenses in his answer. He claims that Victim was wrong in her recital of the facts, asserting that he was driving carefully at the

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[41] J.N.O.V. stands for "judgment *non obstante veredicto*." The Federal Rules of Civil Procedure were amended in 1991 to eliminate some of the more archaic terminology found within our federal system. Some state courts still use these older terms, however, and you will still find them mentioned in the cases pre-dating the 1991 amendment.

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time of the accident, and denying all fault. In addition, he alleges that Victim herself caused the accident by slamming into Driver's Edsel, and that Driver is therefore not liable for Victim's injuries.[42] Driver also moves to dismiss Victim's claim for injuries stemming from the fact that she never got to view her instructional DVD, arguing that "deprivation of DVD watching" is not a legal claim recognized by the State of Euphoria.

The judge agrees with Driver and dismisses ("throws out" is how laypersons and newspaper reporters tend to put it) Victim's "deprivation of DVD watching" claim. The other claims, however, are legally cognizable and involve disputed facts, thus requiring a trial before a factfinder.

Discovery

Despite what you may think as a result of seeing the "surprise witness" or the metaphorical "smoking gun" evidence on television, the opposing sides in a lawsuit not only share information with each other, they are actually under an obligation to do so. The pre-trial exchange of information is called *discovery*, and in both the federal and state courts a significant portion of the procedural rules is devoted to governing this process. The rules provide a variety of methods to assist the lawyers in their search. *Interrogatories* are written questions served on the opposing party, to which a written response is required to be produced by the party with the aid of her lawyer. *Depositions* are oral examinations of witnesses and parties conducted by the opposing party before a court reporter — a stenographer who (for a fee) produces a transcript of the deposition for each side. Parties may also request the *production of documents* relating to the opposing party, witnesses, the event itself, insurance coverage, and related information.

In this case, you call in Driver for an oral deposition, in which he again insists on his version of the story. You request the production of documents from his car mechanic relating to the service history of the Edsel as well as a copy of Driver's insurance policy.[43] Driver, for his part, deposes Victim as well as every member of the motorcycle gang that will be testifying on her behalf. He also requests the production of documents from her employer (the aerobics fitness center), relating to her health evaluations and her job performance. You refuse this request as totally irrelevant to the dispute, and Driver files a motion asking the court to compel you to comply with the request for document production. The judge agrees with you that Victim's job performance history is irrelevant to the proceedings and denies that portion of the motion, but orders you to comply with the request for documents relating to her health evaluation, since Victim has put her health "in issue" by claiming personal injury and damages from loss of work.

Summary Judgment

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[42] Driver's claim that Victim is responsible could form the basis for a *counterclaim* by Driver against Victim — a new lawsuit, tried at the same time, in which Driver is the plaintiff suing Victim for damage to his Edsel and any personal injuries he sustained. Let's keep things simple, however, and assume that Driver suffered no personal or property injury in the accident, and therefore has no interest in counterclaiming against Victim.

[43] Why do you think these documents would be helpful to your case?

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All during Discovery, at any point until the trial starts, either party may move for *summary judgment*. The question before the court on summary judgment is: for each and every claim in the complaint, is there any genuine issue of material fact for which a trial is required and, if not, is the moving party entitled to judgment as a matter of law? Each claim resolution of which turns on a disputed material fact must be resolved by a factfinder after a trial. In essence then, the question raised by a motion for summary judgment is whether there is anything for a jury (or a judge as fact-finder) to do.

The Jury

Your case against Driver is going to be tried before a jury of six people.[44] When Discovery is completed and the parties are ready for trial, the court will empanel a jury. Many lawyers insist that they have won (or lost) certain cases at this stage of the proceedings. Choosing a jury provides you as the lawyer with strategic opportunities to begin trying your case. You are presented with the opportunity to hear the potential jurors answer questions addressed to them by the judge or by the lawyers. This allows you, first, to select only those jurors who you are confident will see the evidence in the light most favorable to Victim. Second, it allows you, in a setting somewhat less formal than the trial, to begin subtly to lay out your vision of the case for them. The question and answer session between the judge, attorneys, and potential jurors is known as *voir dire*.[45]

The Trial

Your jury is empanelled, and you are ready for trial. You make your opening statement, and Driver's attorney makes his. As the attorney for the plaintiff, you present your case first. You call your first witness, Victim, and ask her questions on *direct examination*. The attorney for Driver questions Victim on *cross examination*. When Driver's attorney asks a question or introduces evidence in a manner which you believe violates the rules of evidence, you *object* in very specific terms so that the record reflects your objection and the reasons for it. In this way, you have ensured that the trial record preserves your objection so that, if necessary, you may raise this point on appeal.

After you have presented all of your witnesses, and Driver's attorney has cross examined each of your witnesses, plaintiff will *rest*. This marks the close of the plaintiff's case. Driver may now move for a *judgment as a matter of law* (formerly: move for a directed verdict), arguing essentially the same thing that he argued at the (pre-trial) summary judgment stage of the proceedings: that, even if the court accepts all of the evidence which the Plaintiff has just presented, the court must still direct a verdict for the defendant Driver as a matter of law because, in light of the proof presented up to this point, no reasonable jury could render a verdict for the plaintiff Victim. If you have not presented any evidence which tends to prove the

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[44] The size of a civil jury will vary from jurisdiction to jurisdiction.

[45] "Voir dire" translates literally, from modern French, as "to see speak," which is indeed what happens during voir dire. That is not actually what it means, however. The "voir" is a corruption of "vrai," which means "true." So what is really happening in voir dire, at least from an etymological perspective, is not that the lawyers are seeing prospective jurors speak, but rather that the prospective jurors are speaking the truth — or so it is hoped.

facts as alleged in Victim's complaint, then you have not established a *prima facie* case — a case which, on the face of it, is legally sufficient to form the basis of Driver's liability. If you have not "made out" your prima facie case, Driver may very well win his motion, and the case will be over before Driver even presents his defense. The case is "taken away from the jury," a permissible outcome because the jury could only have either (a) reached the same outcome or (b) acted unreasonably.

In this case, the court finds that you have made out your prima facie case on the claim regarding Victim's totaled motorcycle, but the court is not certain you have made out your case regarding the personal injury suffered by Victim. Driver's motion for judgment as a matter of law is therefore denied as to the motorcycle claim, but the court *reserves* judgment regarding the personal injury claim. This claim will still go to the jury along with the rest of the case at the close of Driver's case, but by "reserving" judgment, the court has essentially reserved the right to change its mind after the jury deliberates.

After the plaintiff rests, it is Driver's turn to present his case. He calls and examines his witnesses who are in turn subjected to your searing cross examination. At the close of Driver's case, *both* parties are permitted to move for a directed verdict. Driver renews his motion for directed verdict, arguing that on the proof presented no reasonable trier of fact could find for the Victim. You argue simply that even if the court were to accept Driver's version of the facts as true, that is no defense so Victim must win. Let's assume the judge denies the motions (except for the claim on which the court previously reserved judgment, which is really just a conditional denial), and both sides present their closing arguments to the jury.

Your final opportunity to influence the jury takes place in the form of the judge's instructions, or "charge" to the jury. The jury's determination is limited to questions of fact. The judge's charge states the law, which the jury will apply in reaching its ultimate conclusion as to liability. Before your closing arguments, both you and Driver's attorney will have submitted to the court proposed jury instructions which present the law in a manner most favorable to your respective clients and which, you hope, the judge will adopt in charging the jury. After the jury is charged, they deliberate, and you bite your nails.

The jury comes back, and they have found in favor of Victim on all of her claims — including the claim for personal injury. Driver, however, is permitted to renew his motion for judgment after trial. He does so, and the court grants the motion. Therefore, even though the jury found in favor of Victim on her claim for personal injury, the judge "takes the claim away from the jury" and directs the entry of judgment for Driver on that claim, concluding that Driver is not legally liable for Victim's sprained back and neck.

Appeal

You are not satisfied with the outcome of this case, because you believe that the claim for personal injury and the claim for loss of "DVD watching" should have been left for the jury to decide. You and Victim therefore decide to file an *appeal*. Driver is happy with the dismissal of those two claims, and does not believe that he will get anywhere if he tries to appeal the other claims (on which he lost), so Driver does not file a cross-appeal. He merely "responds" to the appeal as the *Appellee*, or

Respondent, while Victim is in the position of the *Appellant*, or *Petitioner*.

The appeal is a direct attack on the final judgment of the trial court. You claim that the trial court committed an error of law in the proceedings below. For our appeal, you file your papers with the Euphoria Supreme Court arguing that the trial court's dismissal of the "DVD watching" claim, and the grant of Driver's renewed motion for judgment after trial on Victim's personal injury claim, constituted "reversible error,"[46] and therefore the jury's original verdict on the personal injury claim should be reinstated and the plaintiff should be granted a new trial on the "DVD watching" claim.[47]

In Euphoria, there are three levels of courts, as is standard. Thus, appeals go initially to the "intermediate" appellate court; after a decision is rendered there the parties may seek review by the state's highest court (or "court of last resort"). In general, the loser on appeal does not have a right to this further appeal; the highest court chooses which cases to hear (it has a "discretionary docket") and will agree to hear only those of sufficient importance to merit its attention. Similarly, in the federal system, for example, the losing party in the District (trial) Court can appeal as of right to the Court of Appeals, or Circuit Courts. If the losing party wishes to pursue its claims further, in almost all cases it must petition the U.S. Supreme Court for a *writ of certiorari*, the mechanism by which the Court brings the case to it from a lower court. Issuing the writ is completely discretionary, and the Court grants only a tiny portion of "cert" petitions.

You now write a *brief* for the appellate court, a long document (despite its name) outlining the errors of the court below. Driver's attorney files a brief arguing that the court made no errors or that any it made did not affect the outcome. You both submit your briefs, and on the day for oral argument you come to court, stand before the panel of judges (appellate courts typically consist of a panel of three judges), and argue your position.

In this case, you argue that a claim based on "deprivation of DVD watching" is or should be a cognizable claim in the State of Euphoria, and you detail for the court your reasons, pointing to cases that allow such a claim or analogous claims and to policy reasons why doing so would be a good idea. Relying on the trial record, you also argue that Victim's claim for personal injury to her neck and back was fully substantiated by the evidence at trial so that the jury verdict in that claim should not have been set aside by the trial court. Driver's attorney then argues the opposing side, pointing out all of the reasons that "deprivation of DVD watching" should not be considered a legally compensable injury in this state and all the reasons that your evidence in the personal injury claim was legally insufficient.

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[46] Error that is merely "harmless" is insufficient to cause the appellate court to reverse a lower court's ruling. The moving party must have suffered some *prejudice* as a result of the error for the court to impose a remedy so drastic as reversal.

[47] Courts are always interested in time-saving measures. The appeal of a *judgment after trial* presents a wonderful opportunity to appeal a judgment without asking the appellate court to order a time-consuming new trial. If a judgment after trial is reversed, the original jury verdict can simply be reinstated. On the other hand, the DVD-watching claim has never been litigated, so there is no *judgment* to reinstate if Victim wins her appeal on that claim. If Victim wants to collect on this issue, she must go to trial and win again.

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The disposition in an appeal is delivered in the form of a written opinion — the very appellate opinions to which most of your law school reading will be devoted. The court will explain its decision to affirm or reverse, often placing its decision in the context of a wealth of common law authority for its conclusion.

Assume that in the case of *Victim v. Driver*, the court finds that the trial court committed errors of law in setting aside the jury's verdict on the personal injury claim. It will then *reverse* the lower court's ruling. It will not itself enter a new judgment. Instead, it will "remand" the case to the trial court, with instructions to enter judgment for the plaintiff. On the other hand, assume also that the appellate court agrees with the trial court with regard to the "DVD watching" claim, concluding that under Euphoria state law "deprivation of DVD watching" does not present the kind of loss that is legally redressable. Accordingly, it will *affirm* the lower court in this respect, and there the matter ends (unless, of course, Victim seeks review by the state supreme court).

Res Judicata

The case of *Victim v. Driver* is complete, and the judgments are final. Victim's claims against Driver arising out of this accident have been exhausted by this lawsuit, and Victim is *barred* from bringing a new lawsuit in the future based on any claim (either a new one, or one of the claims on which she previously sued) arising from the same accident. We say that the decision of the court in *Victim v. Driver* has "*res judicata*" effect, meaning that the judgment is final and cannot be challenged in a later proceeding. Victim cannot later sue Driver, and Driver cannot later sue Victim, on any *claim or defense* that was raised in this case. The parties are also barred from later raising claims or defenses that were not raised here but could have been. We say that such claims and defenses are *merged* in the judgment. Nor may the parties relitigate any issue in any later disputes between them, if that issue was actually litigated, and was essential to the judgment, in *Victim v. Driver*.

F. JUDGMENTS AND THEIR EFFECTS — HEREIN OF RES JUDICATA, AND SOME OTHER IMPORTANT WORDS[48]

We need to talk about four words, or rather about two sets of two words each, about which we must be clear. They are:

reversing and overruling

res judicata and stare decisis

1. *Reversing and overruling*

Let us follow the fate of a *single* lawsuit between plaintiff X and defendant Y. As we saw in *Victim v. Driver*, it will begin in a "lower court," typically a trial court of the appropriate jurisdiction. If one or the other or both of the parties are

[48] We are indebted to Jones, Kernochan, and Murphy's *Legal Method* for the thought of attempting to clear up this particular bit of endemic beginning law student confusion. *See* HARRY W. JONES ET AL., LEGAL METHOD 7–8 (1980).

dissatisfied with the decision of the lower court, they will take their dispute to a "higher court"; that is, they will appeal, claiming that the lower court was wrong on certain matters, it "erred." Often, the "higher court" is not the highest court of the jurisdiction, in which case the plaintiff or the defendant, or both, if they are still not satisfied after the ruling of the intermediate court, may seek to have the highest court in the jurisdiction — e.g., the "Supreme Court of California," "The New York Court of Appeals" (do you know what it is called in your state?) — hear the case.[49]

The language alone — higher, lower — tells you that the structure is hierarchical. The highest court issues orders to the "lower court" (e.g., hold a new trial, enter judgment for the plaintiff, conduct further proceedings consistent with this opinion, etc.) and the lower court must obey. If the higher court concludes that the lower court reached the correct result, it will *affirm*. On the other hand, we use the magic word "reverse" (as in "We hereby reverse" or "Judgment reversed") when a higher court decides that the court one step below on the hierarchical ladder in the suit between X and Y erred in a non-harmless way.

What, then, is "overruling"?

Suppose that the controversy between our friends X and Y takes place in the State of New Jersey, and that the New Jersey Supreme Court has agreed to review the case, one or both of the parties being unhappy with the decision below. Suppose further that at a time past the New Jersey Supreme Court heard a different case, a dispute between A and B, and "ruled" in favor of B. If the X-Y dispute is factually similar to the A-B dispute, then the decision in the case of *A v. B* is a "precedent" for the case of *X v. Y*. Under the doctrine of stare decisis, the Supreme Court of New Jersey "is bound" to follow the rule of *A v. B* and it must render judgment for defendant Y — *unless*. Unless, that is, it decides to "overrule" *its own prior* decision, in the case of *A v. B*. Should it not overrule, we say it "followed," "stood by," or "adhered to" *A v. B*. Note that the lower court in *X v. Y* was also "bound" by the case of *A v. B*; indeed, more meaningfully than was the state Supreme Court. Because *A v. B* was decided by a higher court, overruling was simply not an option for the lower court.[50]

To put it as succinctly as possible: a court *reverses* the decision of a (lower) court *in the same controversy*; it *overrules* itself, that is, it disavows in a *later*, *different* case, what *it itself* had ruled in a *prior*, *different*, *but factually similar case*.

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[49] The United States Supreme Court building contains a rather primitive gymnasium, including a basketball court. The gym is on the building's top floor, and is accordingly often referred to as "the highest court in the land."

[50] Or so "the law." But note:

> Some time ago, a handful of judges on the local superior court bench began deciding summary judgment motions without according the parties the benefit of oral argument. * * * In *Mediterranean Construction Co. v. State Farm Fire & Casualty Co*., this court took a long, hard look at the language of Code of Civil Procedure section 437c, and came to the inescapable conclusion that, as now drafted, it requires oral argument on summary judgment motions * * *.
>
> We thought — incorrectly, as it turned out — that the trial courts would simply follow our opinion even if they disagreed with it. Stare decisis and all that stuff. But sometimes it seems as though we have to remind the lower court there is a judicial pecking order.

Gwartz v. Superior Court, 71 Cal. App.4th 480, 83 Cal Rptr.2d 865 (1999) (Sills, J.).

The case of *X v. Y*, we said, takes place in New Jersey. Suppose *A v. B* was a New York decision and it was the New York Court of Appeals that gave judgment for B. Must New Jersey now, in *X v. Y*, follow New York? The answer is *no* — stare decisis has territorial limitations. The New York Court of Appeals can only *bind* itself and New York's lower courts. It cannot *bind* the New Jersey Supreme Court or any other tribunal in any other state. Decisions of courts in other jurisdictions are considered "persuasive authority," but *not* binding precedent.

2. *Res judicata* and *stare decisis*

Let us assume that our hypothetical dispute resulted in a final judgment in the New Jersey Supreme Court for defendant Y. The case is now "res judicata." What that means is that X may not ever again sue Y *over this particular dispute*. This is true even if the rule which is the reason for the outcome of the *X v. Y* dispute is later abandoned; indeed, it is true even if *X v. Y* is itself overruled.

Suppose X is a tenant and Y his landlord. X is suing Y to recover for personal injuries suffered when an intruder entered the apartment building where X lives and injured X in the hallway of the building in the course of a robbery. The Supreme Court of New Jersey ultimately decides in the case that landlords owe no duty to protect tenants against the criminal actions of third parties. Therefore, judgment is for defendant Y.

Some time after the *X v. Y* litigation has concluded, X is again injured in the same apartment building, perhaps even by the same robber. X again sues Landlord Y. The lower courts rule in favor of the landlord — stare decisis requires that they follow "the law," the rule laid down by the Supreme Court of New Jersey in *X v. Y I*. Plaintiff X again asks the New Jersey Supreme Court to review the case. (Why would the plaintiff persist? For that matter, what made him bring the suit in the first place?) The Supreme Court agrees to hear it: it believes its decision in *X v. Y I* may have been wrong and intends to use *X v. Y II* to re-examine the problem. As we have seen, the principle of stare decisis is not absolute with regard to the Court's own prior decisions. Indeed, in this case it declares that landlords *do* have a duty to protect tenants against criminal intruders.

May X now, on the basis of *X v. Y II*, sue Y again to recover for the *first* assault? The answer is a categorical no. Why? *Res judicata*. Think about it. To permit X to sue again after the law has changed would mean that no lawsuit is *ever* truly over. The law is constantly changing, constantly favoring one point of view and then another. It would be manifestly unfair to the litigants on *either* side of a lawsuit to keep them in suspense, forever anticipating the next change in the law which would permit an old adversary to crop up and reinstate a lawsuit that everyone thought had been put to rest.

In sum, in *X v. Y II* the Court *reverses* the lower courts' decisions and *overrules* its own decision in *X v. Y I*. It can do so because *stare decisis* is not absolute; but X cannot sue again to recover for the first assault, notwithstanding the change in the law, because that claim is *res judicata*.

Chapter 2

READING AND BRIEFING CASES

INTRODUCTION

In this chapter we show you, step by step, how to *read* a case, how to *brief* it, how to *analyze* it, how to *think* about it. That is what you will be doing for the next three years — and for the rest of your professional life. The case on which we will focus is edited very lightly in contrast to most of the cases in your casebooks. The reason: in the so-called real world, you have to do your own editing. More immediately, you'll have to cope with unedited cases in Legal Writing and Moot Court.

Our first step is to *read* the case. Of the *reading* of cases, Llewellyn had this to say:

> Now the first thing you are to do with an opinion is to read it. Does this sound commonplace? Does this amuse you? There is no reason why it should amuse you. You have already read past seventeen expressions of whose meaning you have no conception. So hopeless is your ignorance of their meaning that you have no hard-edged memory of having seen unmeaning symbols on the page. You have applied to the court's opinion the reading technique that you use upon the Satevepost. Is a word unfamiliar? Read on that much more quickly! Onward and upward — we must not hold up the story.
>
> That will not do. It is a pity, but you must learn to read. To read each word. To understand each word. You are outlanders in this country of the law. You do not know the speech. It must be learned. Like any other foreign tongue, it must be learned: by seeing words, by using them until they are familiar; meantime, by constant reference to the dictionary. What, dictionary? Tort, trespass, trover, plea, assumpsit, nisi prius, venire de novo, demurrer, joinder, traverse, abatement, general issue, tender, mandamus, certiorari, adverse possession, dependent relative revocation, and the rest. Law Latin, law French, aye, or law English — what do these strange terms mean to you? Can you rely upon the crumbs of language that remain from school? Does *cattle levant and couchant* mean *cows getting up and lying down*? Does *nisi prius* mean *unless before*? Or *traverse* mean an upper gallery in a church? I fear a dictionary is your only hope — a law dictionary — the one-volume kind you can keep ready on your desk. Can you trust the dictionary, is it accurate, does it give you what you want? Of course not. No dictionary does. The life of words is in the using of them, in the wide network of their long associations, in the intangible something we denominate their feel. But the bare bones to work with, the dictionary offers; and

without those bare bones you may be sure the feel will never come.[1]

A. THE CASE

MARIE E. KELLY, PLAINTIFF-APPELLANT v. DONALD C. GWINNELL AND PARAGON CORP., DEFENDANTS-APPELLANTS, AND JOSEPH J. ZAK AND CATHERINE ZAK, DEFENDANTS-RESPONDENTS

96 N.J. 538, 476 A.2d 1219 (1984)

WILENTZ, C.J.

This case raises the issue of whether a social host who enables an adult guest at his home to become drunk is liable to the victim of an automobile accident caused by the drunken driving of the guest. Here the host served liquor to the guest beyond the point at which the guest was visibly intoxicated. We hold the host may be liable under the circumstances of this case.

At the trial level, the case was disposed of, insofar as the issue before us is concerned, by summary judgment in favor of the social host. The record on which the summary judgment was based (pleadings, depositions, and certifications) discloses that defendant Donald Gwinnell, after driving defendant Joseph Zak home, spent an hour or two at Zak's home before leaving to return to his own home. During that time, according to Gwinnell, Zak, and Zak's wife, Gwinnell consumed two or three drinks of scotch on the rocks. Zak accompanied Gwinnell outside to his car, chatted with him, and watched as Gwinnell then drove off to go home. About twenty-five minutes later Zak telephoned Gwinnell's home to make sure Gwinnell had arrived there safely. The phone was answered by Mrs. Gwinnell, who advised Zak that Gwinnell had been involved in a head-on collision. The collision was with an automobile operated by plaintiff, Marie Kelly, who was seriously injured as a result.

After the accident Gwinnell was subjected to a blood test, which indicated a blood alcohol concentration of 0.286 percent.[2] Kelly's expert concluded from that reading that Gwinnell had consumed not two or three scotches but the equivalent of thirteen drinks; that while at Zak's home Gwinnell must have been showing unmistakable signs of intoxication; and that in fact he was severely intoxicated while at Zak's residence and at the time of the accident.

Kelly sued Gwinnell and his employer; those defendants sued the Zaks in a third party action; and thereafter plaintiff amended her complaint to include Mr. and Mrs. Zak as direct defendants. The Zaks moved for summary judgment,

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[1] KARL N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 39–40 (Oceana Pubs. 1960; 1st published 1930). What is "Satevepost"? We add this, just in case: reading cases the Llewellyn way includes each and every footnote!

[2] Under present law, a person who drives with a blood alcohol concentration of 0.10 percent or more violates N.J.S.A. 39:4-50 as amended by L. 1983, c. 129, the statute concerning driving while under the influence of intoxicating liquor.

contending that as a matter of law a host is not liable for the negligence of an adult social guest who has become intoxicated while at the host's home. The trial court granted the motion on that basis. While this disposition was interlocutory (plaintiff's claim against Gwinnell and his employer still remaining to be disposed of), the trial court entered final judgment in favor of Zak pursuant to Rule 4:42-2 apparently in order to allow an immediate appeal. Pressler, *Current N.J. Court Rules*, Comment R.4:42-2. The Appellate Division affirmed, *Kelly v. Gwinnell*, 190 N.J. Super. 320 (1983). It noted, correctly, that New Jersey has no Dram Shop Act imposing liability on the provider of alcoholic beverages, and that while our decisional law had imposed such liability on licensees, common-law liability had been extended to a social host only where the guest was a minor. *Id.* at 322–23. (But *see Figuly v. Knoll*, 185 N.J. Super. 477 (Law Div.1982).) It explicitly declined to expand that liability where, as here, the social guest was an adult. *Id.* at 325–26.

The Appellate Division's determination was based on the apparent absence of decisions in this country imposing such liability (except for those that were promptly overruled by the Legislature).[3] *Id.* at 324–25. The absence of such determinations is said to reflect a broad consensus that the imposition of liability arising from these social relations is unwise. Certainly this immunization of hosts is not the inevitable result of the law of negligence, for conventional negligence analysis points strongly in exactly the opposite direction. "Negligence is tested by whether the reasonably prudent person at the time and place should recognize and foresee an unreasonable risk or likelihood of harm or danger to others." *Rappaport v. Nichols*, 31 N.J. 188, 201 (1959); *see also Butler v. Acme Mkts., Inc.*, 89 N.J. 270 (1982) (supermarket operator liable for failure to provide shoppers with parking lot security). When negligent conduct creates such a risk, setting off foreseeable consequences that lead to plaintiff's injury, the conduct is deemed the proximate cause of the injury. "[A] tortfeasor is generally held answerable for the injuries which result in the ordinary course of events from his negligence and it is generally sufficient if his negligent conduct was a substantial factor in bringing about the injuries." *Rappaport, supra*, 31 N.J. at 203; *see Ettin v. Ava Truck Leasing Inc.*, 53 N.J. 463, 483 (1969) (parking tractor-trailer across street is substantial factor in cause of accident when truck with failed brakes collides into trailer).

Under the facts here defendant provided his guest with liquor, knowing that thereafter the guest would have to drive in order to get home. Viewing the facts

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[3] The Appellate Division noted that several state court decisions imposing liability against social hosts under circumstances similar to those in this case were abrogated by later legislative action. We note that legislation enacted in Oregon did not abrogate the state court's holding in Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity, 258 Or. 632, 485 P.2d 18 (1971). The court found that a host directly serving liquor to a guest has a duty to refuse to serve the guest when it would be unreasonable under the circumstances to permit the guest to drink. Eight years later the legislature enacted Or. Rev. Stat. § 30.955, limiting a cause of action against a private host for damages incurred or caused by an intoxicated social guest to when the host "has served or provided alcoholic beverages to a social guest when such guest was visibly intoxicated." The legislature did not, therefore, preclude liability of private hosts under a negligence theory but instead decided that the social guest must be visibly intoxicated before the host will be held accountable for injuries caused by the guest's intoxicated conduct.

Nevertheless, we acknowledge that many jurisdictions have declined to extend liability to social hosts in circumstances similar to those present in this case. *See, e.g.*, Klein v. Raysinger, 504 Pa. 141, 470 A.2d 507, 510 (1983), and collected cases cited therein.

most favorably to plaintiff (as we must, since the complaint was dismissed on a motion for summary judgment), one could reasonably conclude that the Zaks must have known that their provision of liquor was causing Gwinnell to become drunk, yet they continued to serve him even after he was visibly intoxicated. By the time he left, Gwinnell was in fact severely intoxicated. A reasonable person in Zak's position could foresee quite clearly that this continued provision of alcohol to Gwinnell was making it more and more likely that Gwinnell would not be able to operate his car carefully. Zak could foresee that unless he stopped providing drinks to Gwinnell, Gwinnell was likely to injure someone as a result of the negligent operation of his car. The usual elements of a cause of action for negligence are clearly present: an action by defendant creating an unreasonable risk of harm to plaintiff, a risk that was clearly foreseeable, and a risk that resulted in an injury equally foreseeable. Under those circumstances the only question remaining is whether a duty exists to prevent such risk or, realistically, whether this Court should impose such a duty.

In most cases the justice of imposing such a duty is so clear that the cause of action in negligence is assumed to exist simply on the basis of the actor's creation of an unreasonable risk of foreseeable harm resulting in injury. In fact, however, more is needed, "more" being the value judgment, based on an analysis of public policy, that the actor owed the injured party a duty of reasonable care. *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928). In *Goldberg v. Housing Auth. of Newark*, 38 N.J. 578, 583 (1962), this Court explained that "whether a *duty* exists is ultimately a question of fairness. The inquiry involves a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution."

When the court determines that a duty exists and liability will be extended, it draws judicial lines based on fairness and policy. In a society where thousands of deaths are caused each year by drunken drivers,[4] where the damage caused by such deaths is regarded increasingly as intolerable, where liquor licensees are prohibited from serving intoxicated adults, and where long-standing criminal sanctions against drunken driving have recently been significantly strengthened to the point where the Governor notes that they are regarded as the toughest in the nation, see Governor's Annual Message to the N.J. State Legislature, Jan. 10, 1984, the imposition of such a duty by the judiciary seems both fair and fully in accord with the State's policy. Unlike those cases in which the definition of desirable policy is the subject of intense controversy, here the imposition of a duty is both consistent with and supportive of a social goal — the reduction of drunken driving — that is practically unanimously accepted by society.

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[4] From 1978 to 1982 there were 5,755 highway fatalities in New Jersey. Alcohol was involved in 2,746 or 47.5% of these deaths. Of the 629,118 automobile accident injuries for the same period, 131,160, or 20.5% were alcohol related. The societal cost for New Jersey alcohol-related highway deaths for this period has been estimated as $1,149,516,000.00, based on statistics and documents obtained from the New Jersey Division of Motor Vehicles. The total societal cost figure for all alcohol-related accidents in New Jersey in 1981 alone, including deaths, personal injuries and property damage was $ 1,594,497,898.00. New Jersey Division of Motor Vehicles, *Safety, Service, Integrity, A Report on the Accomplishments of the New Jersey Division of Motor Vehicles* 45 (April 1, 1982 through March 31, 1983). These New Jersey statistics are consistent with nationwide figures. Presidential Commission on Drunk Driving, *Final Report* 1 (1983).

While the imposition of a duty here would go beyond our prior decisions, those decisions not only point clearly in that direction but do so despite the presence of social considerations similar to those involved in this case — considerations that are claimed to invest the host with immunity. In our first case on the subject, *Rappaport, supra*, 31 N.J. 188, we held a licensee liable for the consequences of a customer's negligent operation of his automobile. The customer was a minor who had become intoxicated as a result of the consumption of liquor at various premises including the licensee's. While observing that a standard of conduct was contained in the statute prohibiting licensees from serving liquor to minors and in the regulation further prohibiting service to any person actually or apparently intoxicated, our decision that the licensee owed a duty to members of the general public was based on principles of common-law negligence.[5]

We later made it clear that the licensee's duty is owed to the customer as well, by holding in *Soronen v. Olde Milford Inn, Inc.*, 46 N.J. 582 (1966), that the licensee who served liquor to an intoxicated customer was liable to that customer for the death that resulted when the customer fell in the licensed premises while leaving the bar. While the situation of a licensee differs in some respects from that of a social host, some of the same underlying considerations relied on here in disputing liability are present in both: the notion that the real fault is that of the drunk, not the licensee, especially where the drinker is an adult (as he was in *Soronen*); and the belief — not as strong when applied to licensed premises as when applied to one's home — that when people get together for a friendly drink or more, the social relationships should not be intruded upon by possibilities of litigation.

The Appellate Division moved our decisional law one step further, a significant step, when it ruled in *Linn v. Rand*, 140 N.J. Super. 212 (1976), that a social host who serves liquor to a visibly intoxicated minor, knowing the minor will thereafter drive, may be held liable for the injuries inflicted on a third party as a result of the subsequent drunken driving of the minor. There, practically all of the considerations urged here against liability were present: it was a social setting at someone's home, not at a tavern; the one who provided the liquor to the intoxicated minor was a host, not a licensee; and all of the notions of fault and causation pinning sole responsibility on the drinker were present. The only difference was that the guest was a minor — but whether obviously so or whether known to the host is not disclosed in the opinion.[6]

In *Rappaport*, we explicitly noted that the matter did not involve any claim against "persons not engaged in the liquor business." 31 N.J. at 205. We now approve *Linn* with its extension of this liability to social hosts. In expanding liability, *Linn* followed the rationale of *Rappaport* that the duty involved is a common law duty, not one arising from the statute and regulation prohibiting sales

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[5] We noted that the statutory and regulatory violations could properly be considered by a jury as evidence of the licensee's negligence. *Rappaport*, 31 N.J. at 202–203.

[6] The case was decided on a motion for summary judgment. The court noted that the record did not indicate the minor's age. The opinion does not rely at all on the host's ability easily to determine the fact that the guest was a minor, a factor relied on to some extent in the arguments seeking to distinguish the present case from *Linn*.

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of liquor to a minor, neither of which applies to a social host.[7] *Cf. Congini v. Portersville Valve Co.*, 504 Pa. 157, 470 A.2d 515, 517–18 (1983) (in which the Pennsylvania Supreme Court relied exclusively on statutes criminalizing the provision of alcohol to minors as the basis for extending liability to a social host). The fair implication of *Rappaport* and *Soronen*, that the duty exists independent of the statutory prohibition, was thus made explicit in *Linn*. As the court there noted: "It makes little sense to say that the licensee in *Rappaport* is under a duty to exercise care, but give immunity to a social host who may be guilty of the same wrongful conduct merely because he is unlicensed." 140 N.J. Super. at 217.[8]

The argument is made that the rule imposing liability on licensees is justified because licensees, unlike social hosts, derive a profit from serving liquor. We reject this analysis of the liability's foundation and emphasize that the liability proceeds from the duty of care that accompanies control of the liquor supply. Whatever the motive behind making alcohol available to those who will subsequently drive, the provider has a duty to the public not to create foreseeable, unreasonable risks by this activity.

We therefore hold that a host who serves liquor to an adult social guest, knowing both that the guest is intoxicated and will thereafter be operating a motor vehicle, is liable for injuries inflicted on a third party as a result of the negligent operation of a motor vehicle by the adult guest when such negligence is caused by the intoxication. We impose this duty on the host to the third party because we believe that the policy considerations served by its imposition far outweigh those asserted in opposition. While we recognize the concern that our ruling will interfere with accepted standards of social behavior; will intrude on and somewhat diminish the enjoyment, relaxation, and camaraderie that accompany social gatherings at which alcohol is served; and that such gatherings and social relationships are not simply tangential benefits of a civilized society but are regarded by many as important, we believe that the added assurance of just compensation to the victims of drunken driving as well as the added deterrent effect of the rule on such driving outweigh the importance of those other values. Indeed, we believe that given society's extreme concern about drunken driving, any change in social behavior resulting from the rule will be regarded ultimately as neutral at the very least and not as a change for the worse; but that in any event if there be a loss, it is well worth the gain.[9]

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[7] We note that the Senate and Assembly have recently passed a bill that, if signed into law, would make it a disorderly persons offense knowingly to offer or serve an alcoholic beverage to a person under the legal drinking age. Senate Bill No. S. 1054.

[8] While *Linn*'s statement of the legal rule does not explicitly go beyond the situation in which the social guest was a minor (140 N.J. Super. at 217, 219, 220), its reasoning would apply equally to an adult guest.

[9] We note that our holding and the reasoning on which it is based may be regarded as inconsistent with Anslinger v. Martinsville Inn, Inc., 121 N.J. Super. 525 (App. Div. 1972), certif. den., 62 N.J. 334 (1973). There, the court refused to impose liability on business associates for the injuries a drunken guest suffered after leaving their social affair. The guest died when the car he was driving rammed into a truck on a highway. That court also ruled that decedent's drunkenness constituted contributory negligence, available to the business (or social) host as a defense (as distinguished from its unavailability where defendant is a licensee; *see Soronen, supra*, 46 N.J. 582). We express no opinion on that question, which

The liability we impose here is analogous to that traditionally imposed on owners of vehicles who lend their cars to persons they know to be intoxicated. [Citations omitted.] If, by lending a car to a drunk, a host becomes liable to third parties injured by the drunken driver's negligence, the same liability should extend to a host who furnishes liquor to a visibly drunken guest who he knows will thereafter drive away.

Some fear has been expressed that the extent of the potential liability may be disproportionate to the fault of the host. A social judgment is therein implied to the effect that society does not regard as particularly serious the host's actions in causing his guests to become drunk, even though he knows they will thereafter be driving their cars. We seriously question that value judgment; indeed, we do not believe that the liability is disproportionate when the host's actions, so relatively easily corrected, may result in serious injury or death. The other aspect of this argument is that the host's insurance protection will be insufficient. While acknowledging that homeowners' insurance will cover such liability,[10] this argument notes the risk that both the host and spouse will be jointly liable. The point made is not that the level of insurance will be lower in relation to the injuries than in the case of other torts, but rather that the joint liability of the spouses may result in the loss of their home and other property to the extent that the policy limits are inadequate.[11] * * * It may be that some special form of insurance could be designed to protect the spouses' equity in their homes in cases such as this one. In any event, it is not clear that the loss of a home by spouses who, by definition, have negligently caused the injury, is disproportionate to the loss of life of one who is totally innocent of any wrongdoing.

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is not before us since Gwinnell's only claim against Zak is for contribution or indemnification and not for personal injuries. While, as noted *infra*, Zak and Gwinnell may be liable as joint tortfeasors as to Kelly, any right of contribution or indemnification between the two will have to be determined by the trial court on remand. That determination presumably will require consideration of the effect, if any, of *Soronen, Anslinger*, and the Comparative Negligence Act, N.J.S.A. 2A:15-5.1-5.3 (which was not in effect at the time of those decisions).

The *Anslinger* court also discussed, in dictum, the policy against imposing liability on hosts in social or quasi-business settings. Today, the facts of the case before us persuade us that policy considerations warrant imposing such a duty on a social host. We note also the case of Figuly v. Knoll, 185 N.J. Super. 477 (Law. Div. 1982), which, on facts substantially similar to those before us, held the social host liable.

[10] The dissent challenges our assumption that present homeowners' policies cover the liability imposed by this decision. At oral argument, counsel for both sides indicated that they believe typical homeowners' policies would cover such liability. Even if that is so, however, says the dissent, the homeowner/social host is unable "to spread the cost of liability." *Post* at 568. The contrast is then made with the commercial licensee who "spreads the cost of insurance against liability among its or her customers." *Id.* But the critical issue here is not whether the homeowner can pass the cost on or must bear it himself, but whether tort law should be used to spread the risk over a large segment of society through the device of insurance rather than imposing the entire risk on the innocent victim of drunken driving. Obviously there will be some additional insurance premium at some point that homeowners and renters will have to bear. Their inability to pass that cost on to others, however, is no more persuasive than that same argument would be as to the "average citizen's" automobile liability insurance or, for that matter, for homeowners' insurance as it now exists.

[11] We need not, and do not, reach the question of which spouse is liable, or whether both are liable, and under what circumstances.

Given the lack of precedent anywhere else in the country, however, we believe it would be unfair to impose this liability retroactively. *Merenoff v. Merenoff*, 76 N.J. 535 (1978); *Darrow v. Hanover Twp.*, 58 N.J. 410 (1971); *Willis v. Department of Conservation & Economic Dev.*, 55 N.J. 534 (1970). Homeowners who are social hosts may desire to increase their policy limits; apartment dwellers may want to obtain liability insurance of this kind where perhaps they now have none. The imposition of retroactive liability could be considered unexpected and its imposition unfair. We therefore have determined that the liability imposed by this case on social hosts shall be prospective, applicable only to events that occur after the date of this decision. We will, however, apply the doctrine to the parties before us on the usual theory that to do otherwise would not only deprive the plaintiff of any benefit resulting from her own efforts but would also make it less likely that, in the future, individuals will be willing to claim rights, not yet established, that they believe are just.

The goal we seek to achieve here is the fair compensation of victims who are injured as a result of drunken driving. The imposition of the duty certainly will make such fair compensation more likely. While the rule in this case will tend also to deter drunken driving, there is no assurance that it will have any significant effect. The lack of such assurance has not prevented us in the past from imposing liability on licensees. Indeed, it has been only recently that the sanction of the *criminal* law was credited with having some significant impact on drunken driving.[12] We need not, however, condition the imposition of a duty on scientific proof that it will result in the behavior that is one of its goals. No one has suggested that the common-law duty to drive carefully should be abolished because it has apparently not diminished the mayhem that occurs regularly on our highways. We believe the rule will make it more likely that hosts will take greater care in serving alcoholic beverages at social gatherings so as to avoid not only the moral responsibility but the economic liability that would occur if the guest were to injure someone as a result of his drunken driving.

We do not agree that the issue addressed in this case is appropriate only for legislative resolution. Determinations of the scope of duty in negligence cases has traditionally been a function of the judiciary. The history of the cases cited above evidences a continuing judicial involvement in these matters. Without the benefit of any Dram Shop Act imposing liability on licensees, legislation that is quite common

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[12] Within the last year those laws have been strengthened and officials have stepped up enforcement efforts. Since 1980, the number of drunk driving arrests in New Jersey has increased by approximately 40%. The number of drunk driving deaths has decreased in this State from a high of 376 deaths in 1981 to a reported preliminary total of 270 deaths in 1983. Since the State minimum drinking age was returned to 21 years in 1983, the number of fatal accidents involving people under the age of 21 has dropped significantly. In 1982, drunken drivers between the ages of 18 and 20 were responsible for 67 highway fatalities. Preliminary figures for 1983 show that this age group was responsible for 38 drunk driving deaths that year. There has been a corresponding drop in the number of injuries sustained in accidents involving drunk drivers. New Jersey Division of Motor Vehicles, *Safety, Service, Integrity, A Report on the Accomplishments of the New Jersey Division of Motor Vehicles, supra*, at 44. Law enforcement officials believe that the decrease in accidents and injuries is attributable to the recent changes in these laws. See Comments of Attorney General, *quoted in* "Highway Carnage," *Herald News*, Mar. 13, 1984, p. A-10; Comments of Director, Division of Motor Vehicles, *quoted in* "Teen Road Carnage Drops Sharply in First Year of Higher Drinking Age," *The Star-Ledger*, Mar. 8, 1984, p. 1.

in other states, this Court determined that such liability nevertheless existed.[13] We did so in 1959 and have continued to expand that concept since then. We know of no legislative activity during that entire period from 1959 to date suggesting that our involvement in these matters was deemed inappropriate; even after the judiciary expanded this liability to include social hosts in its decision in *Linn*, there was no adverse reaction on the part of the Legislature. In fact, the Legislature's passage of S. 1054, imposing criminal liability on anyone who purposely or knowingly serves alcoholic beverages to underage persons, indicates that body's approval of the position taken eight years earlier in *Linn*. The subject matter is not abstruse, and it can safely be assumed that the Legislature is in fact aware of our decisions in this area. Absent such adverse reaction, we assume that our decisions are found to be consonant with the strong legislative policy against drunken driving.

The dissent relies on two related grounds in concluding this matter should be resolved by legislation: the superior knowledge of the legislature obtained through hearings and other means enabling it better to balance the interests involved and to devise an appropriate remedy, and the ruling's potential "extraordinary effects on the average citizen." Many of the cases cited in support of this view, however, are from jurisdictions in which a Dram Shop Act was in effect and are therefore clearly distinguishable. [Citations omitted.]

Whether mentioned or not in these opinions, the very existence of a Dram Shop Act constitutes a substantial argument against expansion of the legislatively-mandated liability. Very simply, when the Legislature has spoken so specifically on the subject and has chosen to make only licensees liable, arguably the Legislature did not intend to impose the same liability on hosts * * *.[14]

In only four of the jurisdictions cited in the dissent did the courts rule, despite the absence of a Dram Shop Act, that a host should not be liable. [Citations omitted.]

Whether our ruling will have such an "extraordinary" impact on "the average citizen" in his or her social and business relations (presumably the premise for the conclusion that judicial action is inappropriate) depends to some extent on an initial evaluation of the matter. We suspect some of the extraordinary change is already taking place, that it is not unusual today for hosts to monitor their guests' drinking to some extent. Furthermore, the characterization of the change as one demanding prior legislative study and warranting action only after such, implies that its effects on balance may be seriously adverse. Given our firm belief that insurance is available, that compensation of innocent victims is desirable, and that the added deterrence against drunken driving is salutary, we do not perceive the potential

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[13] Justice Jacobs adverted to this fact in his opinion in *Soronen, supra:* "Many states have dram shop acts in which the legislature has specifically fixed the scope and extent of the tavern keeper's civil responsibility for injuries which result from his service of alcoholic beverages to an intoxicated person. We have no such act and must therefore deal with the common law principles of negligence and proximate causation." 46 N.J. at 592.

[14] The dissent's reference to Oregon statutes as abrogating or restricting a prior judicial determination in favor of the cause of action is incorrect. The Oregon statute accepted the judicial determination similar to that made in this case; its effect, as noted *supra* at n. [3], was only to prevent further expansions of liability beyond that allowed by this Court today.

revision of cocktail-party customs as constituting a sufficient threat to social well-being to warrant staying our hand. Obviously the Legislature may disagree.

This Court has decided many significant issues without any prior legislative study. In any event, if the Legislature differs with us on issues of this kind, it has a clear remedy. See, *e.g., Van Horn v. Blanchard Co.*, 88 N.J. 91 (1981) (holding that under Comparative Negligence Act, a plaintiff could recover only from those defendants that were more negligent than was the plaintiff); N.J.S.A. 2A:15-5.1 as amended by L. 1982, c. 191 § 1 eff. Dec. 6, 1982 (under which a plaintiff may recover from all defendants if plaintiff's negligence is less than or equal to the *combined* negligence of all defendants); *Willis v. Department of Conservation and Economic Dev.*, 55 N.J. 534 (1970) (abolishing the State's sovereign immunity from tort claims), N.J.S.A. 59:1-1 *et seq.*, L. 1972, c. 45 (reestablishing and defining immunity for all New Jersey governmental bodies); *Dalton v. St. Luke's Catholic Church*, 27 N.J. 22 (1958), *Collopy v. Newark Eye & Ear Infirmary*, 27 N.J. 29 (1958), *Benton v. Y.M.C.A.*, 27 *N.J.* 67 (1958) (abolishing charitable immunity), N.J.S.A. 2A:53A-7, L. 1959, c. 90 (reestablishing charitable immunity); *cf. Immer v. Risko*, 56 N.J. 482 (1970) (abolishing interspousal immunity in automobile negligence cases); *France v. A.P.A. Transport Corp.*, 56 N.J. 500 (1970) (abolishing parent-child immunity in automobile negligence cases) (no subsequent legislative action on issue of familial immunity).

We are satisfied that our decision today is well within the competence of the judiciary. Defining the scope of tort liability has traditionally been accepted as the responsibility of the courts. Indeed, given the courts' prior involvement in these matters, our decision today is hardly the radical change implied by the dissent but, while significant, is rather a fairly predictable expansion of liability in this area.[15]

It should be noted that the difficulties posited by the dissent as to the likely consequence of this decision are purely hypothetical. Given the facts before us, we decide only that where the social host directly serves the guest and continues to do so even after the guest is visibly intoxicated, knowing that the guest will soon be driving home, the social host may be liable for the consequences of the resulting drunken driving. We are not faced with a party where many guests congregate, nor with guests serving each other, nor with a host busily occupied with other responsibilities and therefore unable to attend to the matter of serving liquor, nor with a drunken host. We will face those situations when and if they come before us,

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[15] In view of the arguments set forth, the dissent's approval of the decision in *Linn* is difficult to understand. The difference between that case and the instant case is simply one of degree. There a social host was held liable for the consequences of drunken driving by a minor who had been served by the host in a social setting. The legislative indicator of liability was not significantly stronger (in *Linn* a statutory and regulatory prohibition was involved, applicable, however, only to licensees; here only a regulatory prohibition); in both cases social habits may be affected, substantial economic consequences may result, and in both the court acts without the advantage of a legislative inquiry. The dissent's notion that *Linn* can be distinguished because "minors occupy a special place in our society and traditionally have been protected by state regulation from the consequences of their own immaturity" fails to acknowledge that the thrust of the case was to provide compensation for an innocent victim of a drunken driver where the driver happened to be a minor and not even a party to the action. The entire rationale of the opinion is that there is no sound reason to impose liability on a licensee and not on a social host. There is not a word nor the slightest implication in the opinion suggesting that the underlying purpose of the decision was to protect minors.

we hope with sufficient reason and perception so as to balance, if necessary and if legitimate, the societal interests alleged to be inconsistent with the public policy considerations that are at the heart of today's decision. The fears expressed by the dissent concerning the vast impact of the decision on the "average citizen's" life are reminiscent of those asserted in opposition to our decisions abolishing husband-wife, parent-child, and generally family immunity in *France v. A.P.A. Transport Corp.*, 56 N.J. at 500, and *Immer v. Risko*, 56 N.J. at 482. In *Immer*, proponents of interspousal immunity claimed that abandoning it would disrupt domestic harmony and encourage possible fraud and collusion against insurance companies. 56 N.J. at 488. In *France*, it was predicted that refusal to apply the parent-child immunity would lead to depletion of the family exchequer and interfere with parental care, discipline and control. 56 N.J. at 504. As we noted there, "[w]e cannot decide today any more than what is before us, and the question of what other claims should be entertained by our courts must be left to future decisions." *Immer*, 56 *N.J.* at 495. Some fifteen years have gone by and, as far as we can tell, nothing but good has come as a result of those decisions.

We recognize, however, that the point of view expressed by the dissent conforms, at least insofar as the result is concerned, with the view, whether legislatively or judicially expressed, of practically every other jurisdiction that has been faced with this question. It seems to us that by now it ought to be clear to all that the concerns on which that point of view is based are minor compared to the devastating consequences of drunken driving. This is a problem that society is just beginning to face squarely, and perhaps we in New Jersey are doing so sooner than others.

For instance, the dissent's emphasis on the financial impact of an insurance premium increase on the homeowner or the tenant should be measured against the monumental financial losses suffered by society as a result of drunken driving. By our decision we not only spread some of that loss so that it need not be borne completely by the victims of this widespread affliction, but, to some extent, reduce the likelihood that the loss will occur in the first place. Even if the dissent's view of the scope of our decision were correct, the adjustments in social behavior at parties, the burden put on the host to reasonably oversee the serving of liquor, the burden on the guests to make sure if one is drinking that another is driving, and the burden on all to take those reasonable steps even if, on some occasion, some guest may become belligerent: those social dislocations, their importance, must be measured against the misery, death, and destruction caused by the drunken driver. Does our society morally approve of the decision to continue to allow the charm of unrestrained social drinking when the cost is the lives of others, sometimes of the guests themselves?

If we but step back and observe ourselves objectively, we will see a phenomenon not of merriment but of cruelty, causing misery to innocent people, tolerated for years despite our knowledge that without fail, out of our extraordinarily high number of deaths caused by automobiles, nearly half have regularly been attributable to drunken driving. *See supra*, at n.3. Should we be so concerned about disturbing the customs of those who knowingly supply that which causes the offense, so worried about their costs, so worried about their inconvenience, as if they were the victims rather than the cause of the carnage? And while the dissent

is certainly correct that we could learn more through an investigation, to characterize our knowledge as "scant" or insufficient is to ignore what is obvious, and that is that drunken drivers are causing substantial personal and financial destruction in this state and that a goodly number of them have been drinking in homes as well as taverns. Does a court really need to know more? Is our rule vulnerable because we do not know — nor will the Legislature — how much injury will be avoided or how many lives saved by this rule? Or because we do not know how many times the victim will require compensation from the host in order to be made whole?

This Court senses that there may be a substantial change occurring in social attitudes and customs concerning drinking, whether at home or in taverns. We believe that this change may be taking place right now in New Jersey and perhaps elsewhere. It is the upheaval of prior norms by a society that has finally recognized that it must change its habits and do whatever is required, whether it means but a small change or a significant one, in order to stop the senseless loss inflicted by drunken drivers. We did not cause that movement, but we believe this decision is in step with it.

We are well aware of the many possible implications and contentions that may arise from our decision. We express no opinion whatsoever on any of these matters but confine ourselves strictly to the facts before us. We hold only that where a host provides liquor directly to a social guest and continues to do so even beyond the point at which the host knows the guest is intoxicated, and does this knowing that the guest will shortly thereafter be operating a motor vehicle, that host is liable for the foreseeable consequences to third parties that result from the guest's drunken driving. We hold further that the host and guest are liable to the third party as joint tortfeasors, *Malone v. Jersey Central Power & Light Co.*, 18 N.J. 163, 171 (1955); *Ristan v. Frantzen*, 14 N.J. 455, 460 (1954); *Matthews v. Delaware, L. & W. R.R.*, 56 N.J.L. 34 (Sup. Ct. 1893), without implying anything about the rights of the one to contribution or indemnification from the other. *See supra* at n. 8.

Our ruling today will not cause a deluge of lawsuits or spawn an abundance of fraudulent and frivolous claims. Not only do we limit our holding to the situation in which a host directly serves a guest, but we impose liability solely for injuries resulting from the guest's drunken driving. Automobile accidents are thoroughly investigated by law enforcement officers; careful inquiries are routinely made as to whether the drivers and occupants are intoxicated. The availability of clear objective evidence establishing intoxication will act to weed out baseless claims and to prevent this cause of action from being used as a tool for harassment.

We therefore reverse the judgment in favor of the defendants Zak and remand the case to the Law Division for proceedings consistent with this opinion.

GARIBALDI, J., dissenting.

Today, this Court holds that a social host who knowingly enables an adult guest to become intoxicated knowing that the guest will operate a motor vehicle is liable for damages to a third party caused by the intoxicated guest. The imposition of this liability on a social host places upon every citizen of New Jersey who pours a drink for a friend a heavy burden to monitor and regulate guests. It subjects the host to

substantial potential financial liability that may be far beyond the host's resources.

My position as a strong advocate of legal measures to combat drunk driving is established. *See In re Kallen*, 92 N.J. 14 (1983). The majority need not parade the horrors that have been caused by drunk drivers to convince me that there is always room for stricter measurers [*sic*] against intoxicated drivers. I too am concerned for the injured victim of a drunken driver. However, the almost limitless implications of the majority's decision lead me to conclude that the Legislature is better equipped to effectuate the goals of reducing injuries from drunken driving and protecting the interests of the injured party, without placing such a grave burden on the average citizen of this state.

I

Prior to today's decision, this Court had imposed liability only on those providers of alcoholic beverages who were licensed by the State. *See Rappaport v. Nichols*, 31 N.J. 188 (1959). The Appellate Division also had expanded the liability to a social host who served liquor to a minor. *Linn v. Rand*, 140 N.J. Super. 212 (App.Div.1976).[16] Although both of these cases were based on common-law negligence, the courts deemed the regulations restricting the service of alcohol to minors significant enough evidence of legislative policy to impart knowledge of foreseeable risk on the provider of the alcohol and to fashion a civil remedy for negligently creating that risk.

Many other states have considered the problem before us today but no judicial decision establishing a cause of action against a social host for serving liquor to an adult social guest is currently in force. Any prior judicial attempts to establish such a cause of action have been abrogated or restricted by subsequent legislative action. *See, e.g.*, Cal. Civ. Code § 1714 (as amended Stats.1978, ch. 929, § 2, p. 2904); Or. Rev. Stat. § 30.955 (1979).

State courts have found that imposition of this new form of liability on social hosts is such a radical departure from prior law, with such extraordinary effects on the average citizen, that the issue is best left to a legislative determination. [Citations omitted.

I agree with the holdings of our sister states and with their misgivings about the judicial imposition of the duty that the majority today places on social hosts. * * *

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[16] If this case involved service of alcohol by a social host to a minor guest, I would vote with the majority in approving *Linn v. Rand, supra*, 140 N.J. Super. 212, to the extent it has been interpreted as applying only to social hosts who serve liquor to minors. The distinction I draw is based on the clearly and frequently expressed legislative policy that minors should not drink alcoholic beverages, *see, e.g.*, N.J.S.A. 33:1-77, and on the fact that minors occupy a special place in our society and traditionally have been protected by state regulation from the consequences of their own immaturity. Although the majority sees no basis for this distinction, I am not alone in making it. *Compare* Klein v. Raysinger, 504 Pa. 141, 470 A.2d 507 (1983) (in which the Supreme Court of Pennsylvania refused to extend liability to a social host who serves an adult guest) *with* Congini v. Porterville Valve Co., 504 Pa. 157, 470 A.2d 515 (1983) (decided on the same day as *Klein* by the same court but extending liability to a social host who served liquor to a minor guest); *see also* Senate Bill S-1054 (recently passed by the Senate and Assembly imposing criminal liability on social hosts who serve liquor to minors but not mentioning hosts who serve liquor to adults).

II

My reluctance to join the majority is not based on any exaggerated notion of judicial deference to the Legislature. Rather, it is based on my belief that before this Court plunges into this broad area of liability and imposes high duties of care on social hosts, it should carefully consider the ramifications of its actions. The Court acts today with seemingly scant knowledge and little care for the possible negative consequences of its decision.

The magnitude of the problem with which we are dealing is entirely unknown. As the Illinois Appellate Court noted in *Miller v. Moran*, *supra*, 96 Ill. App.3d at 600, 421 N.E.2d at 1049, the injured party normally has a remedy against the direct perpetrator of the injury, the intoxicated driver. The majority's portrayal of the specter of many innocent victims with no chance of recovery against drunk drivers is specious. * * *

As stated earlier in this dissent, this Court has, in the past, imposed civil liability on commercial licensees who serve alcoholic beverages to intoxicated patrons. Commercial licensees are subject to regulation by both the Alcoholic Beverage Commission (ABC) and the Legislature. It is reasonable to impose tort liability on licensees based on their violation of explicit statutes and regulations.

I have no quarrel with the imposition of such liability because of the peculiar position occupied by the licensee. A social host, however, is in a different position. A brief discussion of the dissimilarities between the licensee and the private social host will illustrate the many problems this Court is creating by refusing to distinguish between the two in imposing liability upon them.

A significant difference between an average citizen and a commercial licensee is the average citizen's lack of knowledge and expertise in determining levels and degrees of intoxication. Licensed commercial providers, unlike the average citizen, deal with the alcohol-consuming public every day. This experience gives them some expertise with respect to intoxication that social hosts lack. A social host will find it more difficult to determine levels and degrees of intoxication.

The majority holds that a host will be liable only if he serves alcohol to a guest knowing both that the guest is intoxicated and that the guest will drive. Although this standard calls for a subjective determination of the extent of the host's knowledge, a close reading of the opinion makes clear that the majority actually is relying on objective evidence. The majority takes the results of Gwinnell's blood alcohol concentration test and concludes from that test that "the Zaks must have known that their provision of liquor was causing Gwinnell to become drunk * * *."

Whether a guest is or is not intoxicated is not a simple issue. Alcohol affects everyone differently. "[T]he precise effects of a particular concentration of alcohol in the blood varies from person to person depending upon a host of other factors. See generally Perr, 'Blood Alcohol Levels and "Diminished Capacity",' 3 (No. 4) J. Legal Med. 28–30 (April 1975)." *State v. Stasio*, 78 N.J. 467, 478 n. 5 (1979). One individual can consume many drinks without exhibiting any signs of intoxication. Alcohol also takes some time to get into the bloodstream and show its outward effects. Experts estimate that it takes alcohol twenty to thirty minutes to reach its highest level in the bloodstream. See American Medical Association, *Alcohol and*

the Impaired Driver (1968). Thus, a blood alcohol concentration test demonstrating an elevated blood alcohol level after an accident may not mean that the subject was obviously intoxicated when he left the party some time earlier. "Moreover, a state of obvious intoxication is a condition that is very susceptible to after the fact interpretations, *i.e.*, objective review of a subjective decision. These factors combine to make the determination that an individual is obviously intoxicated not so obvious after all." Comment, "Social Host Liability for Furnishing Alcohol: A Legal Hangover?" 1978 Pac. L.J. 95, 103. Accordingly, to impose on average citizens a duty to comprehend a person's level of intoxication and the effect another drink would ultimately have on such person is to place a very heavy burden on them.

The nature of home entertaining compounds the social host's difficulty in determining whether a guest is obviously intoxicated before serving the next drink. In a commercial establishment, there is greater control over the liquor; a bartender or waitress must serve the patron a drink. Not so in a home when entertaining a guest. At a social gathering, for example, guests frequently serve themselves or guests may serve other guests. Normally, the host is so busy entertaining he does not have time to analyze the state of intoxication of the guests. Without constant face-to-face contact it is difficult for a social host to avoid serving alcohol to a person on the brink of intoxication. Furthermore, the commercial bartender usually does not drink on the job. The social host often drinks with the guest, as the Zaks did here. The more the host drinks, the less able he will be to determine when a guest is intoxicated. It would be anomalous to create a rule of liability that social hosts can deliberately avoid by becoming drunk themselves.

The majority suggests that my fears about imposition of liability on social hosts who are not in a position to monitor the alcohol consumption of their guests are "purely hypothetical" in that the present case involves a host and guest in a one-to-one situation. It is unrealistic to assume that the standards set down by the Court today will not be applied to hosts in other social situations. Today's holding leaves the door open for all of the speculative and subjective impositions of liability that I fear.

A more pressing distinction between the social host and commercial licensees is the host's inability to fulfill the duty the majority has imposed even if the host knows that a particular guest is intoxicated. It is easy to say that a social host can just refuse to serve the intoxicated person. However, due to a desire to avoid confrontation in a social environment, this may become a very difficult task. It is much easier in a detached business relationship for a bartender to flag a patron and either refuse to serve him or ask him to leave. We should not ignore the social pressures of requiring a social host to tell a boss, client, friend, neighbor, or family member that he is not going to serve him another drink. Moreover, a social host does not have a bouncer or other enforcer to prevent difficulties that may arise when requesting a drunk to stop drinking or not to drive home. We have all heard of belligerent drunks.

Further, it is not clear from the Court's opinion to what lengths a social host must go to avoid liability. Is the host obligated to use physical force to restrain an intoxicated guest from drinking and then from driving? Or is the host limited to

delay and subterfuge tactics short of physical force? What is the result when the host tries to restrain the guest but fails? Is the host still liable? The majority opinion is silent on the extent to which we must police our guests.

III

The most significant difference between a social host and a commercial licensee, however, is the social host's inability to spread the cost of liability. The commercial establishment spreads the cost of insurance against liability among its customers. The social host must bear the entire cost alone. While the majority briefly discusses this issue, noting that it may result in a catastrophic loss of a home to a husband and wife, it apparently does not consider this much of a problem to the average New Jersey citizen. It assumes that such liability is now covered or will be covered under the homeowner's insurance policy.

The majority cites no authority for its belief that actions against social hosts will be covered under homeowner's insurance. This new cause of action will be common and may result in large awards to third parties. Even if it is assumed that homeowner's insurance will cover this cause of action, it is unrealistic to believe that insurance companies will not raise their premiums in response to it.

Furthermore, many homeowners and apartment renters may not even have homeowner's insurance and probably cannot afford it. Other homeowners may not have sufficient insurance to cover the limitless liability that the Court seeks to impose. These people may lose everything they own if they are found liable as negligent social hosts under the Court's scheme. The individual economic cost to every New Jersey citizen should be weighed before today's result is reached. * * *

Recently, our Legislature has enacted laws making New Jersey the unchallenged leader in the national crackdown on drunken driving. Evidence that the Legislature is still vitally interested in the area of drunken driving is Senate Bill S-1054, recently passed by the Senate and Assembly. It provides a criminal penalty for a social host who serves alcohol to a minor. The absence of any similar imposition of criminal liability on social hosts who serve adult guests should be instructive as to the Legislature's intent on the matter before the Court.

IV

In conclusion, in trivializing these objections as "cocktail party customs" and "inconvenience" the majority misses the point. I believe that an in depth review of this problem by the Legislature will result in a solution that will further the goals of reducing injuries related to drunk driving and adequately compensating the injured party, while imposing a more limited liability on the social host. Imaginative legislative drafting could include: funding a remedy for the injured party by contributions from the parties most responsible for the harm caused, the intoxicated motorists; making the social host secondarily liable by requiring a judgment against the drunken driver as a prerequisite to suit against the host; limiting the amount that could be recovered from a social host; and requiring a finding of wanton and reckless conduct before holding the social host liable.

I do not propose to fashion a legislative solution. That is for the Legislature. I merely wish to point out that the Legislature has a variety of alternatives to this Court's imposition of unlimited liability on every New Jersey adult. Perhaps, after investigating all the options, the Legislature will determine that the most effective course is to impose the same civil liability on social hosts that the majority has imposed today. I would have no qualms about that legislative decision so long as it was reached after a thorough investigation of its impact on average citizens of New Jersey.

B. THE BRIEF

What, then, is a brief?[17]

Suppose you were to tell us that you saw a movie last night and we asked, what was it about? Only in the most unusual circumstances would you retell it frame by frame. Instead, you would begin by assigning the movie to a *genre*, a "category * * * characterized by a particular style, form or content,"[18] for instance, adventure story, love story, or murder mystery. The purpose this categorizing serves is to locate us in the world of possible stories. It presupposes, of course, that we have common cultural referents. A Martian might find your answer, "it was a murder mystery," incomprehensible.

Beyond locating the story in its proper genre, you may offer a *précis* of your movie, a "concise summary of essential points, statements, or facts."[19]

But now note: how concise, or, in other words, how "précis" your *précis* is, will depend upon many variables. Who we are, who you are, why we asked, why you answered, whether you or we have an agenda in the asking or the answering, and so forth; and you will exercise your judgment accordingly. But however abbreviated your *précis*, *it must be a linear narrative with a beginning, a middle, and an end or it will be incomprehensible*!

A brief is nothing more mysterious than a précis of a case, more or less extensive and detailed as the context requires, and following certain conventions as to form.

Why do law students and lawyers "brief" cases? Most obviously, first-year law students do it so as not to be embarrassed in class. Your teachers will question you about the "relevant" and "material" facts; the procedural history of the case; the "holding"; the reasoning; etc. They will expect you to have the answers ready — *from your brief*. More than that, the *process* of briefing forces you to come to grips with, to master, the case you are briefing. *Having* a brief (your classmate's, one from a book) is helpful, but much less so than *preparing* a brief.

Finally, briefing enables you to talk about past cases. In a system of stare decisis, "prior cases," that is, cases that have been finally decided, do not go away but

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[17] This kind of "brief" — one made when reading a case for the purpose of recalling and understanding what you have read — is different from another kind of "brief," which is a lawyer's written argument presented to a court.

[18] Webster's Ninth New Collegiate Dictionary (9th ed. 1989).

[19] *Id.*

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remain, or at least are capable of remaining, a part of the living organism of the law. Not only do old cases, like old soldiers, never die — they exert a *normative* force because the system says they are binding on the later court in a factually similar case.

Hence we always need to talk about past cases — but surely not frame by frame, although, just as a frame in a movie can be very powerful, so a single fact in a case can go a long way to explaining the result.

So let's brief *Kelly v. Gwinnell*.

We will assume that you have read the entire case (majority, dissent, footnotes) the Llewellyn way, much or all of it more than once. Take notes and organize the tale chronologically if the court has not done so. (In some cases it may be helpful to draw a picture or a diagram).

The person who brings the appeal is the appellant; she may have been either the plaintiff or the defendant below, but by definition she lost (at least in part). The one responding to the appeal is the appellee or, rarely, the respondent, and again she may have been either the plaintiff or the defendant below. Courts may call a party either by the proper designation at the trial level (plaintiff, defendant) or by the designation on appeal (appellant, appellee or respondent), and they sometimes switch back and forth between the two designations in the same narrative, making it easy to grow confused.

A court may also, having initially identified the cast of characters, use the names of the parties, as the *Kelly* court does. At an absolute minimum, you will be expected to know who is who and who is suing whom. Frequently that will be easy to do: there is one plaintiff suing one defendant. Then again it may get more complicated. Let's take *Kelly*.

In *Kelly*, the plaintiff is Marie Kelly, seriously injured by a drunken driver named Gwinnell. Marie sued Gwinnell and his employer (under certain circumstances employers *may* be "vicariously" liable for torts committed by their employees). Incidentally, why would she sue the employer? If you suspect it is because employers tend to have more money, including insurance, than do their employees, you are on target.

Gwinnell and his employer (aside from answering Marie's complaint) turned around and filed what is called a "third party action," bringing the Zaks into this suit or, to use the technical term, "impleading" them. (You will learn about this in Civil Procedure. For now just accept that such a procedure exists). And who are the Zaks? They are the folks said to have provided Gwinnell all that alcohol. The court calls them "social hosts," to distinguish them from "commercial hosts," that is those, like bar and tavern owners, who are in the business of selling alcohol by the drink to their paying customers.

Why are Gwinnell and his employer doing this?

Well, if, in addition to Gwinnell and maybe his employer, the Zaks, too, are found liable, then perhaps Gwinnell and employer can demand that the Zaks and, possibly,

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their insurance company, contribute to paying any damages that Marie recovers.[20]

Apparently Marie — or rather, Marie's lawyer — had not initially thought to make the Zaks co-defendants with Gwinnell and his employer. Why not? Perhaps she had a dumb lawyer; the thought never occurred. Or the thought did occur but was dismissed because the lawyer thought (correctly) that no New Jersey case — or any other case for that matter — had allowed a suit against a social host, at least not where the guest was an adult. To put it differently, there was no precedent, no authority, for holding the Zaks liable.

But then why did the lawyers for Gwinnell and his employer "implead" the Zaks? Short answer: they were better lawyers; they were better at reading the cases and better at "reading" their own Supreme Court; they had more imagination; they were more creative.

In any event, Marie now amends her complaint and adds the Zaks as defendants. *This opinion is only about Marie and the Zaks.*

We are now ready to prepare our "official" brief. Its format looks like this:

1) **Heading**
2) **Statement of the Case**
3) **Facts**
4) **Procedural History and Outcome Here**
5) **Issue or Issues [or: Question or Questions Presented]**
6) **Holding**
7) **Reasoning**
8) **Separate Opinions and Dissents**
9) **Other Items of Note**

There is no "law" prescribing the precise format of a brief. There are individual variations on the basic theme of: facts, procedure, issue, ruling, reasons. For present purposes, follow our format, until you develop your own style. But remember that you should be able to answer specific questions asked in class about the case directly from your brief; if you must alter the format to serve that purpose, by all means do so.

1. *Heading*

The Heading is simply the name of the case, "cited" in a rigorously prescribed format (which you will learn about in your legal writing course). Use the last name of the first-listed party on each side of the "v." to indicate the name of the case.

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[20] You will learn about the relations among "joint tortfeasors" (defendants "jointly and severally liable") in your Torts course. You need not know anything more about it for our purposes than what we say in the text.

There is no artistic license for you to rearrange the heading, except you may wish to indicate the author of the court's opinion (as well as any separate opinions) and/or the vote.

Thus, here the heading is: Kelly v. Gwinnell, 96 N.J. 538, 478 A.2d 1219 (1984) (6-1) (opinion for the Court by Wilentz, C.J.; dissent by Garibaldi, J.)

2. *Statement of the Case*

The Statement of the Case is typically a one-sentence capsule version of what the case is "about."

Experience teaches that to formulate that capsule version gives you trouble — as much trouble as articulating the "issue" and the "holding" of the case. The reason? All three demand that you truly grasp the core, the essence of just what it was the court decided and what it did not decide, the latter being *at least* as important as the former! And grasping the core of a decision is very hard to do. Yet you must master this skill among other reasons for a very simple and practical one: when lawyers discuss cases they do not read their briefs to one another, or to the court for that matter. Rather, they put the case, that is, what it was "about," into the proverbial nutshell. And that nutshell looks very much like the Statement of the Case.

Suppose you were to say: *Kelly* is about the potential tort liability of social hosts for their drunken guests.

Is that accurate? Is it acceptable? Yes and No.

Why yes? Well, *Kelly is* about social hosts (the Zaks) and about their drunken guest (Gwinnell) and your description does locate the case on that large map we call "law" and gives it an address: it is a torts case; it is a torts case about social hosts, alcohol, and drunken guests of social hosts. We have now eliminated all the cases in our legal universe that are not torts cases and we have eliminated all cases in our torts universe that are not about social hosts and alcohol and drunken guests. But what we said ("*Kelly* is about the potential tort liability of social hosts for their drunken guests") will not do. Why not?

Our statement has three serious shortcomings:

First, it says nothing about what connection if any, there must exist between the social host and the drunken state of the guest. Yet isn't it crucial to the case that the Zaks "provided liquor directly" (the court's words) to Mr. Gwinnell, serving him "beyond the point at which the guest was visibly intoxicated" (again the court's words)?

Suppose you were to imagine that the day after *Kelly* is decided by the New Jersey Supreme Court, a visibly drunken Mr. Gwinnell shows up at the Zaks' home, perhaps to commiserate with them. This time the Zaks give him a mug of black coffee to drink; however, it fails to sober him up. A short while later, still drunk, Gwinnell gets into his car. The Zaks make no attempt to stop him and then Gwinnell drives into — lo and behold — Marie Kelly, out in her new S.U.V. The car is totaled and Marie is again seriously injured.

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As Marie's lawyer, perhaps you take the position that Marie can sue the Zaks again. You might argue that the Supreme Court of New Jersey "clearly" (a word courts and lawyers tend to use when the matter at hand is anything but clear!) is "bound" to permit her to do so on the basis of *Kelly v. Gwinnell I*.

You would be right IF *Kelly v. Gwinell I* said: a social host of a drunken guest is responsible for injuries that drunken guest inflicts on third parties (when driving an automobile) — *regardless of whether the social host enabled the guest to become drunk* — which is what we implied with our first, too sweeping Statement of the Case.

But is there not a difference between actively doing something and passively standing by and letting something happen? Might we have an easier time — morally, ethically, legally — saying to someone: You may not do that and if you do it anyway we will subject you to legal processes, than saying to someone: You must act and if you fail to act your omission will subject you to legal processes?

If this distinction rings true (*you* kicked the football through the neighbor's window; you didn't stop the class bully from doing so) then you know that the result in *Kelly v. Gwinnell II* is not dictated by *Kelly v. Gwinnell I*; that *Kelly II* is not *Kelly I* and that we must amend our Statement of the Case to read: "*Kelly* is about the potential tort liability of a social host who serves his guest alcohol beyond the point of visible intoxication."

One added note of caution: might the Supreme Court of New Jersey in *Kelly II* hold the Zaks liable "on the authority of our decision in *Kelly I*"? Of course it might! And, of course, it might not! Either is within the court's power. But the court, not we, decrees the future fate of *Kelly I*, decrees how broadly or how narrowly it will sweep. Our job when we read *Kelly I* is to give it as accurate, as objective, as honest a reading as we are capable of — even while we know its uncertainty and ponder at the same time its implications and the arguments we as lawyers could make about it in future cases. Or to put the same thing differently, how we could argue to make future cases "like" *Kelly I*.

Let us turn to the second shortcoming of our original Statement, namely: we never say what it was that Gwinnell did, namely, that while drunk *he drove an automobile*.

Suppose we again imagine ourselves the day after *Kelly* has been decided. Again the Zaks serve alcohol to Gwinnell beyond the point of visible intoxication (some folks are incorrigible). But this time Gwinnell decides to walk home. On the way he passes a house that happens to belong to Marie Kelly and, "for the fun of it" he heaves rocks through her lighted windows. He causes about $10,000 worth of property damages and in addition, one of the rocks hits Marie in the head, causing a severe concussion.[21]

As Marie's lawyer, would you make the Zaks co-defendants with Gwinnell?

You, again, study *Kelly I*. You, again, ponder all the footnotes. Do you think the majority saw the core of the case as being *drinking* and was on some sort of

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[21] If this strikes you as an unlikely hypothetical, it is because you haven't read enough torts cases.

temperance campaign? Or did it see the social problem as one of *drunken driving*? For that matter, note that the court explicitly says, "We impose liability solely for injuries resulting from the guest's *drunken driving*." And note further that Justice Garibaldi agreed with the court about the nature of the problem; she disagrees only as to who the appropriate agency is to address it.

Perhaps you think it should not matter whether Gwinnell drove or walked, in either case he was intoxicated and caused harm. Yet consider: holding social hosts liable for tortious acts of their drunken guests imposes a substantial burden on them and the *Kelly* court was well aware of that. We think we can justify the imposition of that burden because the benefit we hope to get — fewer drunken drivers killing or maiming people with their now deadly weapons — outweighs the burden, at least in the majority's judgment and, if you agree with the outcome of *Kelly*, in yours. But if the benefit (avoided harms) was less or the burden greater, that calculus might come out differently.

Would you give the same overriding weight to the benefit side if the mischief came about as we just hypothesized? Should it matter that, as the footnotes testify, we have a great deal of solid evidence on the consequences of drunken driving, but probably very little on the consequences to third parties of drunken walking? Would you be increasing the burden on the social host by too much? (What is "too much"?) Can the host prevent drunken walking as effectively, with the same amount of effort, as drunken driving?

The two cases (driving and walking) are alike and not alike; they have similarities and dissimilarities. They are similar, but not congruent. Which should prevail and how do we decide the question?

The third shortcoming of our Statement of the Case is that it is silent about the nature of the injury — that is, was the injury one to the plaintiff's person or to her property (or, of course, to both)? In our "walking" hypothetical Gwinnell caused both sorts of damages. Or suppose everything again happened as it did in *Kelly I* except that Marie miraculously walked away from the collision without a scratch — only her car is totaled.

What would you argue for and against the proposition that we should make a distinction between the two kinds of injury? How would your respective positions affect our cost-benefit analysis?

Whatever you conclude, unless you believe that drawing a distinction between personal injuries and property damage is totally irrational and without merit (in which case you must say why), must you not amend your Statement of the Case one more time to read:

> *Kelly* is about the potential tort liability of a social host who serves his (adult?) guest alcohol beyond the point of visible intoxication, knowing that his guest will shortly thereafter drive and who in so doing inflicts personal injuries on third parties.

Did you notice that we just "snuck" something past you? We said, injuries inflicted "on third parties." How about liability of the social host for personal

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injuries suffered by his drunken guest as a consequence of having served him alcohol beyond the point of intoxication knowing that his guest would shortly be driving his automobile?

You are thinking this is a great deal of energy to spend on getting one sentence right. But of course you are not getting one sentence right — you are getting a case right! Besides, the time and effort we just expended will be amply returned to us when we come to the Issue and the Holding. And meticulous care, bordering on nit-picking, throughout your First Year will make all the rest of your professional life easier.

A final observation regarding our Statement of the Case: do not start your sentence with: "This is an action by Marie Kelly. . . ." It is pointless to do this: (a) we haven't a clue who Marie Kelly is and (b) it tells us nothing of what is normatively significant — legally relevant, if you prefer — about Marie Kelly. She did not bring suit because of an injury to her name. Rather, she wishes to be put into a category of persons which the legal system is willing to protect — here "persons injured because a social host has plied a guest with alcohol beyond intoxication knowing the guest will then drive." It is that categorical trait that you must, in a system of stare decisis, isolate and present when you introduce the story of this case.

Only in the event that the dispute centers around the very words, "Marie Kelly" would you have to say, "Marie Kelly" or, better, "a Marie Kelly" or "one Marie Kelly." Better because most likely you don't mean to imply this is about "*the* Marie Kelly."

Remember: courts fashion general rules while resolving particular controversies.

We can think of two exceptions or modifications:

a) It is Oprah Winfrey — *the* Oprah Winfrey — who is suing for the alleged unauthorized use of her name, for example. You may then say "This is an action by Oprah Winfrey. . . ." But note that the rule of the case would still be a general rule, namely, a rule for people who have become "legends" on the order of Oprah Winfrey.

b) If the plaintiff is a large corporation "everyone" has heard of, it is a great deal more efficient to say "Microsoft," for instance, than it would be to give an identifying description of Microsoft.

What we have said about a plaintiff applies equally to a defendant.

It should be clear to you that it is not the least bit helpful to say: "The plaintiff is bringing suit . . ." as you are, unfortunately, wont to do. There is no known case in which a defendant initiated a lawsuit. The same, needless to say, applies the other way around ("This is a suit against a [the] defendant . . .").

On occasion, plaintiffs and defendants are known by different names — e.g., as libellant and libellee in admiralty proceedings. Apply the proper designation. All else follows as above.

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3. *The Facts*

What, we might ask first, is the relationship between "the brute raw events" that happened perhaps years ago and "the facts" as they appear in your casebook?

Here is Llewellyn:

> What is left in men's minds as to those raw events has been canvassed, more or less thoroughly, more or less skillfully, by two lawyers. But canvassed through the screen of what they considered *legally* relevant, and of what each considered legally relevant to win his case. It has then been screened again in the trial court through the rules about what evidence can be admitted. The jury has then reached its conclusion, which — for purposes of the dispute — determines contested matters for one side. The two lawyers [who may or may not be the same lawyers that tried the case] have again sifted — this time solely from the record of the trial — what seemed to bear on points upon appeal. Finally, with the decision already made, the judge [really, of course, the judges of the final tribunal in the case] has sifted through these "facts" again, and picked a few which he puts forward as essential — and whose legal bearing he then proceeds to expound. It should be obvious that we may now be miles away from life. Again, we may not. By some miracle it may be there is no distortion. Or by some other each successive distortion may have neatly canceled out the last. But it is current doctrine that the age of miracles is past.[22]

Those then are what we call "the facts of the case" — the final version of the "real" events.

Yet *you* must now "sift" once more: you must put only those facts into your brief that were "material" and "relevant" to the court's decision, the facts on which the decision "turned," without which the court could not, would not, have decided as it did. And again you must do so because you live in a system of stare decisis.

Llewellyn again:

> The plaintiff's name is Atkinson and the defendant's Walpole. The defendant, despite his name, is an Italian by extraction, but the plaintiff's ancestors came over with the Pilgrims. The defendant has a schnauzer-dog named Walter, red hair, and $30,000 worth of life insurance. All these are facts. The case, however, does not deal with life insurance. It is about an auto accident. The defendant's auto was a Buick painted pale magenta. He is married. His wife was in the back seat, an irritable, somewhat faded blonde.[23] She was attempting back-seat driving when the accident occurred. He had turned around to make objection. In the process the car

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[22] LLEWELLYN, *supra* note 1, at 38.

[23] [Ed. Fn.] In later years, Professor Llewellyn was married, by all accounts happily, to the near legendary Soia Mentschikoff, one of the first women law professors in the country (at the University of Chicago Law School), Dean of Miami University Law School, an important scholar, and a truly formidable woman. She was (she died in 1984) often referred to as "The Russian Bear," with a mixture of affection, admiration, and, last but not least, awe. The point of this footnote obviously is to prevent the delegitimization of Karl Llewellyn.

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> swerved and hit the plaintiff. The sun was shining; there was a rather lovely dappled sky low to the West. The time was late October on a Tuesday. The road was smooth, concrete. It had been put in by the McCarthy Road Work Company. How many of these facts are important to the decision? * * *
>
> Is it not obvious that as soon as you pick up this statement of the facts to find its legal bearings you must discard some as of no interest whatsoever, discard others as dramatic but as legal nothings?[24]

Which of Llewellyn's hypothetical facts would you discard "as of no interest whatsoever" to this controversy, or as "dramatic but as legal nothings"? Articulate the reasons for your choices. Have you, in the midst of that articulation, also begun to articulate the "rule," the "norm" you are about to fashion?

As for the remaining facts, which you must regard as relevant because we only have two classes, relevant and irrelevant, "you suddenly cease to deal with them in the concrete and deal with them instead in categories which you, for one reason or another, deem significant."[25]

And again, will your "one reason or another" reflect the rule, the norm, you are in the process of fashioning or believe the court has fashioned?

> A normative proposition is general or law-like — is a standard — insofar as it *abstracts* from the wealth of detail found in live social contexts, picking out a few features of a case or situation *normatively significant*.[26]

The more orderly among you will object to this discussion because we were supposed to speak of "The Facts." Yet to what extent can we identify the "relevant facts" of a case without an inkling of what the applicable norm *is* or *should be*? By the same token, can we put down the norm, "the holding," of our case before we grasp the facts?

Your goal, in any event, is clear: to try and determine which facts (or "facts," if you prefer) in the court's narrative you believe to have been "normatively significant."

But take heed:

> I warn you, I warn you strongly, against cutting the facts down too far. If you cherish any hope of insight into *what difference the rules make* to people, you will have to keep an eye out to some of the more striking details of the facts, as the court gives them. * * * *You will be impatient with the facts to the precise extent to which you need them.*[27]

You should understand this warning, so strongly delivered, from our Statement of the Case. *When in doubt, put it in!* It is better to err by overly narrowing the

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[24] LLEWELLYN, *supra* note 1, at 48.

[25] *Id.*

[26] Frank I. Michelman, *The Supreme Court, 1985 Term — Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 29 (1986) (emphasis added).

[27] LLEWELLYN, *supra* note 1, at 55.

sweep of a case (by putting in too many facts) than to err by overly broadening the sweep of a case (by omitting facts that prove to have been important).

Now how about *Kelly*? If you think about our discussion of the Statement of the Case then you know we must say something like this: The plaintiff in this suit is one Marie Kelly who was seriously injured in a head-on collision with one Gwinnell. Immediately prior to the accident Gwinnell had spent an hour or two at the home of Mr. and Mrs. Zak. During that time and according to Gwinnell and the Zaks, Gwinnell had consumed 2 or 3 drinks of scotch on the rocks (query: do we have to be that specific? Would it be OK to say 2 or 3 drinks? 2 or 3 alcoholic drinks?) A blood test administered after the accident showed a blood alcohol concentration of 0.286 percent. A blood alcohol concentration of 0.10 or more violates New Jersey's DWUI statute. Plaintiff's expert concluded that Gwinnell had consumed the equivalent of 13 drinks and that he must have shown unmistakable signs of intoxication while at the Zaks' home. The suit seeks to charge the Zaks with liability for Marie Kelly's injuries as joint tortfeasors with Gwinnell and his employer.

Do you think we said all we needed to say? (More than we needed to say?) Here is one thing we omitted: Mr. Zak accompanied Gwinnell outside to his car, chatted with him and watched Gwinnell drive off. Is that "relevant" and "material"? How do you think about that question? You ask yourself whether you believe — on the basis of the court's opinion and your common sense and your membership in this society at this time — that had Mr. Zak *not* accompanied Gwinnell outside and *not* chatted with him and *not* watched him drive off, the court would *not* have found the Zaks liable. Preposterous? Irrational? Without rhyme or reason? Then why does the court tell us this fact? This is again a question of identifying the core, or essence, of a decision.

We also omitted that Mr. Zak telephoned Gwinnell's home 25 minutes after Gwinnell drove off to make sure he had arrived safely. Relevant and material? In or out? Why does the court tell us? Does it want us to draw this sort of inference: Zak called because he knew that Gwinnell was drunk and he worried about him getting into an accident?

Assuming the answer is yes — on what aspect of the case could it have a bearing? To show that Zak knew that Gwinnell was drunk? According to the court, we have better evidence than that. That Zak "foresaw" or "should have foreseen" that there might be an accident? True, foreseeability is an element of a negligence cause of action — but it is measured by whether the reasonable prudent person in Mr. Zak's circumstances (and not Mr. Zak himself) should have foreseen that what happened might happen. It is an objective standard, not a subjective one, as you will learn in Torts.

So whether the court meant to signal something or not, we don't need it for our "Facts," right? But harking back to Llewellyn's warning, we repeat: when in doubt put it in. No great harm is done by doing so — but great harm would be done if you omitted to mention, for example, that it was the Zaks who furnished all that liquor to Gwinnell.

4. *Procedural History and Outcome Here*

You cannot ever properly comprehend a common law case unless you understand its procedural history and its precise procedural posture before the appellate tribunal.

To begin, no one ever "appeals a case." The plaintiff, or the defendant, or both, appeal one or more "reversible errors of law" that they claim the lower court made.

Assume that eventually the "court of last resort," in *Kelly* the Supreme Court of New Jersey, agrees to hear the case. What it can and cannot do by way of "appellate review" is governed by what kind of reversible error is being claimed.

To illustrate: every law suit involves "the facts" and "the law" applicable to these facts. Sometimes the parties "stipulate" to the facts (that is, they agree on what happened) but more often than not, the facts are contested. (You say I had 13 drinks, I say I had two or three). In that event, the "trier of fact" must "find" the facts on the basis of the evidence brought forth by the parties (and there are rules which determine who, plaintiff or defendant, must prove what). The United States, unlike any other country of which we are aware, assigns this task to the jury even in civil cases. Sometimes the parties agree to have the trial judge fulfill this function and she will then wear two hats: as the trier of facts she will make "findings of fact"; as the dispenser of law, she will state "conclusions of law."[28]

Suppose on appeal the defendant claims that the judge wrongfully denied his motion for judgment after trial (formerly called a judgment n.o.v.) because there was insufficient evidence to support a jury verdict for the plaintiff. How much room should we allow the appellate court in reviewing this alleged error? Would it be all right if the appellate court reviewed the case as though the jury had never spoken, never, in effect, been a player? Start "de novo," in legal jargon?

If we were to say yes, then what is the point of having a jury in the first place? Yet clearly we consider it important that the larger community, as represented by the jury, participates meaningfully not just in criminal but also in civil proceedings.

There is in addition this: we need someone to judge the credibility of the witnesses. The jury sees them and hears them and observes them. (The same, of course, holds for the trial judge sitting as trier of fact.) The appellate tribunal only has the record. Who is better capable of evaluating credibility? And is it necessary that one have a law degree and be a judge to determine whether someone is telling the truth or is lying or is, perhaps, mistaken?

Finally, we cannot relitigate every case completely — the burden would overwhelm our appellate tribunals. So the division of labor makes sense from an efficiency point of view as well.

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[28] Note that in general when a jury finds facts it does not tell us its findings; it simply states its ultimate conclusion as to liability. In unusual circumstances, the judge may ask the jury to render a "special verdict," which includes determinations as to specific facts. In addition, when a case is tried to a judge rather than a jury, the judge does generally set out factual findings; indeed, she is often required to do so. *See* Fed. R. Civ. Pro. 52(a)(1).

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It won't surprise you then to learn that *in this context* we confine the role of the appellate tribunal; we demand that it show "deference" to the trier of fact. How? By telling it: you must limit your review to the question, was there sufficient evidence for the *jury* (or the judge sitting as trier of fact) to find as it did. *You may not ask, would I (we) have found the way the jury did?* That is not your job. We do not care what you, appellate tribunal, would have done — we care about the integrity of the process and that the vital division of power between the judge (law) and the jury (fact) be respected.

By contrast: suppose the defendant appeals because there is no cause of action against a social host for injuries inflicted by their drunken guests on third persons. However many drinks the defendant served and whether he knew or should have known his guest was intoxicated and about to drive, he owned no duty to Marie Kelly. Therefore the trial court erred when it denied his motion to dismiss for failure to state a claim upon which relief can be granted.[29]

The question, is there or is there not (really, *should* there or should there *not* be) a cognizable claim, is there (should there be) a "cause of action" is a *question of law* and thus falls uniquely within the province of lawgiving courts. The appellate tribunal has the final, authoritative word. The jury has no say in it and what the trial court or, for that matter, the intermediate appellate court thought has no binding or limiting effect on the Supreme Court of New Jersey. It alone decides whether there should be such a cause of action.

In the case proper, of course, the trial court had granted the motion for summary judgment in favor of the social host-defendant and it was the plaintiff who appealed.

Now note: the *Kelly* court says: "*Viewing the facts most favorably to plaintiff* (as we must, since the complaint was dismissed on a motion for summary judgment [by the defendant]), one could reasonably conclude . . ." (emphasis added). It then goes on to enumerate that "one could reasonably conclude"

> 1) "that the Zaks must have known that their provision of liquor was causing Gwinnell to become drunk, yet they continued to serve him after he was visibly intoxicated";
>
> 2) that "[b]y the time he left, Gwinnell was in fact severely intoxicated";
>
> 3) that "[a] reasonable person in Zak's position could foresee quite clearly that this continued provision of alcohol to Gwinnell was making it more and more likely that Gwinnell would not be able to operate his car carefully"; and
>
> 4) that "Zak could foresee that unless he stopped providing drinks to Gwinnell, Gwinnell was likely to injure someone as a result of the negligent operation of his car."

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[29] You might here reread the discussion of "The Answer" at *supra* p. _____. These things are difficult to keep straight.

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These "facts"[30] suffice, says the court, to sustain a cause of action for negligence: "The usual elements of a cause of action for negligence are clearly present: an action by defendant creating an unreasonable risk of harm to plaintiff, a risk that was clearly foreseeable, and a risk that resulted in an injury equally foreseeable."

You understand clearly, do you not, that these facts have never been "found" to be so by a jury — there never was a jury; *Kelly* was decided on a pre-trial motion.

Did then the judges of the Supreme Court of New Jersey "find the facts"? No, no, and no. Appellate tribunals are not in that business. So what did they do? In their chambers, they sat down and looked at all they knew about the case from the record (which, the court tells us, included "pleadings, depositions, and certifications") and constructed the best case that could be made for the (non-moving) plaintiff (see the italicized part of the quote from the opinion above) and having done so decided whether a plaintiff so situated has, or *should* have, a cause of action against defendants situated like the Zaks: "Under those circumstances the only question remaining is whether a duty exists to prevent such risk or, *realistically, whether this court should impose such a duty*." (Emphasis added).

Suppose that instead of the Zaks it is Marie Kelly who moves for summary judgment, asserting that the facts necessary for her to win are undisputed and that *as a matter of law* the defendants are liable. Now the facts on the basis of which the court will rule change kaleidoscopically. Why? Because (1) Summary judgment may not take from the non-moving party (now the Zaks) something to which they are entitled; (2) the Zaks are entitled to a trial in open court and a jury verdict; (3) therefore the judge must give Zaks everything they could conceivably have gotten from a jury trial. She must construct, on the basis of the available record, the best version of the facts for the Zaks that a jury *reasonably* could find. That story will often differ significantly from the best version of the facts for the plaintiff.

Returning to the case as it was, on the Zaks' motion for summary judgment, is the lawsuit over once the court says, Marie Kelly, you have a cause of action against the Zaks? In theory, no. To "have [or state] a cause of action" does not mean the plaintiff wins the case; it only means that she can go to trial to present evidence in support of the allegations of the complaint. In short, the appellate court has not "found" any facts, it has only concluded that *if* Marie Kelly establishes the facts she alleges a reasonable jury could find the Zaks liable.

What happens now? The court says: "We . . . remand the case to the Law Division [i.e., the trial court] for proceedings consistent with this opinion." Thus, Marie Kelly can proceed with a trial against the Zaks (and the other defendants); the trial that was precluded when the trial court (incorrectly) granted the Zaks' motion to dismiss. Such a trial will probably not take place, however. In practice,

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[30] Note that we put the word "facts" in quotation marks. Why? Well, item (2) looks like a "fact" to us — but does item (3)? Does not (3) look more like a standard than a fact? Or at least a "mixed" question of standard and fact? If so and if we let the jury determine it, then we apparently invite the community, by way of the jury and by way of calling (3) a fact, to function as the arbiter of standards of appropriate behavior, at least in this case! You will pursue these matters in your Torts and Civil Procedure courses. We merely want to alert you to the complexities lurking behind the simple "factfinders do facts, judges do law" formula.

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especially once the court has ruled on pre-trial motions, the parties have a lot of incentive to settle so as to avoid the time, expense, and risk of going to trial.[31]

The moral of the story: under the heading of, Procedural History and Outcome Here, you must specify what rulings the court or courts below made, the precise error or errors alleged to have been committed, what the reviewing court did regarding those rulings, and what disposition ("affirmed," or "reversed" or "reversed and remanded") it made of the case.

In *Kelly* we would say:

> The trial court granted defendant social hosts' motion for summary judgment. The Appellate Division affirmed. The Supreme Court of New Jersey reverses the judgment in favor of defendants and remands for proceedings consistent with its opinion.

A final word: the procedural history of *Kelly v. Gwinnell* tells us that we have a new precedent, a new rule of law. Future plaintiffs situated as Marie Kelly was can rely on the case as having established that social hosts under "like" circumstances owe a duty to injured third parties.[32]

Suppose, on the other hand, the Supreme Court of New Jersey rules on the disposition of a motion challenging the sufficiency of the evidence in a given case. In other words, whether this jury on the basis of this evidence could have reached the verdict it did. What is the precedential value of such a decision?

So heed Llewellyn's warning:

> I say procedural regulations are the door, and the only door, to make real what is laid down by substantive law. Procedural regulations enter into and condition all substantive law's becoming actual when there is a dispute. . . . Everything that you know of procedure you must carry into every substantive course. You must read each substantive course, so to speak, through the spectacles of that procedure. For what substantive law says should be means nothing except in terms of what procedure says that

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[31] Indeed, less than a year after the New Jersey Supreme Court's ruling in *Kelly*, the parties settled. Marie Kelly received $100,000 from Gwinnell's insurance company and $72,500 from the Zaks' insurance company. "If the whole thing can save one life, it's worth it," *Time* magazine quoted her as saying. *See Expensive Pour: Beware of Drunken Guests*, TIME 73 (Mar. 4, 1985).

[32] Unless, of course, the legislature gets into the act. In New Jersey, the legislature modified *Kelly* in several ways: liability does not extend to the drunken guest; anyone who tests at less than 0.10% is irrebutably presumed not to be visibly intoxicated; anyone who tests between 0.10% and 0.15% is rebuttably presumed not to be visibly intoxicated; the social host is not jointly and severally liable. A brief explanation of the last point: suppose Marie Kelly gets a judgment for 3 million dollars. If defendants are "jointly and severally liable," then each one is responsible for the entire 3 million dollars (even though Marie cannot, of course, collect more than 3 million dollars altogether). If the Zaks are only severally liable, then they are responsible only for their share in the damages, so to speak. Assume that is l.3 million. If Marie cannot collect 1.7 million from Gwinnell (who is broke) or perhaps his employer (who has filed for bankruptcy) then that is bad luck for her — the most she is entitled to collect from the Zaks is 1.3 million dollars.

Is the legislative response to *Kelly* a refutation of the court? Or is it an endorsement?

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you can make real.[33]

5. *Issue or Issues (and Holding)*

Simply put, the "issues" (or "questions presented") are the questions the appellate tribunal is asked to decide. Clearly, they must flow from what the case is about, from its facts and from its procedural posture. So one (somewhat ungainly) way of stating the question before the court, the issue, in *Kelly* is:

> Did the court below err in granting summary judgment to defendant social host who, knowing his adult guest would shortly be driving his automobile, provided liquor to said guest beyond the point of visible intoxication, in a suit by a third party for injuries sustained as the consequence of the guest's drunken driving, or should the conduct of the social host instead have been subjected to the jury's judgment guided in its deliberations by the trial court's instruction as to the law?

This formulation heeds our warning not to lose sight of the procedural posture of the case by stating explicitly the error charged (and reminds you that the ultimate question is *whether this case should have gone to the jury!*). But it would be permissible to say it differently:

> Can a plaintiff who suffers personal injuries inflicted by a drunken driver maintain suit against the driver's social host who, knowing his guest would shortly be driving, provided liquor to his guest beyond the point of visible intoxication?

Or we could say:

> Is a social host who serves his adult guest liquor beyond the point of visible intoxication, knowing that the guest will shortly be driving his automobile, under a duty to third parties suffering injuries due to the drunken driving of said guest?

In addition, we must now also grasp two different ways of thinking and speaking about issues and holdings. The words we use to express what we mean are "broad" (or "maximum") and "narrow" (or "minimum"); that is, we speak of a "broad" (or maximum) statement of the issue, the holding; and of a "narrow" (or minimum) statement of the issue, the holding.

It would help if you visualized an inverted pyramid. Or:

> Imagine standing in the middle of the field in a stadium and looking at the seats. If you focus on one seat on the lower level, the angle between you and the seat is rather slight; if you look at a seat in the upper level, it's a larger angle.[34]

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[33] LLEWELLYN, *supra* note 1, at 17–18.

[34] Ruggero J. Aldisert, *Precedent: What It Is and What It Isn't; When Do We Kiss It and When Do We Kill It?*, 17 PEPPERDINE L. REV. 605, 616 (1990). Judge Aldisert was Senior United States Circuit Judge of the U.S. Court of Appeals for the Third Circuit. The stadium metaphor is from a classic piece on stare decisis: Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A.J. 71 (1928).

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It is the point at the bottom of the inverted pyramid, the focus on the one seat on the lower level, the minimum, the narrowest point that we want to talk about first.

The court, at the absolute *minimum* must decide "*the dispute that is before it*. It cannot refuse because the job is hard, or dubious, or dangerous."[35]

The narrowest possible question to ask the court, the narrowest formulation of the issue in *Kelly* is:

> Can Marie Kelly, who was seriously injured in a head-on collision with one Gwinnell, maintain an action against Mr. and Mrs. Joseph Zak where a jury could find that Gwinnell after driving Joseph Zak home, stayed at the Zaks and where his hosts served him enough liquor for his blood alcohol to register at 0.286% etc. etc. etc.

You get the point: the "etceteras" stand in for all the further details, including, for instance, the phone-call Zak made to Gwinnell's home. If we included all of these in our (very long) statement of the issue we would then have the narrowest possible articulation of that issue. We would be at the very bottom of our inverted pyramid. (The same is true if we were talking about the Holding).

But we know already — from our Statement of the Case — that some of these details are irrelevant, are immaterial, are of no precedential significance. That we could not think of a single good moral, ethical, policy or justice reason for limiting recovery in future cases to those in which, to take the most extreme example to make the point, the social host's first is name Joseph or the plaintiff's Marie.

To see the true core of the case, and so to be useful for future cases we need to move up from the very bottom of our inverted pyramid, we must "broaden" our Statement of the Issue.

It is crucial for you to see that we accomplish this by omitting facts from the case — for example, that Mr. Zak's first name is Joseph; the plaintiff's Marie, etc. Doing so expands the reach, or scope, of the case as a precedent. The question becomes whether there are limits to this shedding process. Is there a "maximum" question that can, *on these facts*, legitimately be said to have been before the court? A "maximum" rule legitimately issued, on these facts, by a court adhering to the rules of the game of our system?

In *Kelly* the court says or, better perhaps, warns:

> We are well aware of the many possible implications and contentions that may arise from our decision.[36] We express no opinion whatsoever on any of these matters but confine ourselves strictly to the facts before us. We hold only that where a host provides liquor directly to a social guest and continues to do so even beyond the point at which the host knows the guest is intoxicated, and does this knowing that the guest will shortly thereafter

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[35] LLEWELLYN, *supra* note 1, at 42.

[36] [Ed. Fn.] We played with some of these — for example, Gwinnell walks home and heaves rocks through Marie Kelly's windows; Gwinnell arrives drunk, is served black coffee, fails to sober up, and the Zaks let him drive home.

be operating a motor vehicle, that host is liable for the foreseeable consequences to third parties that result from the guest's drunken driving.

Try your hand on this simple example: an eight-year old boy asks permission of his parents to stay up until 10:00 p.m. on a school night; his usual bedtime is 8:00 p.m. The reason he gives is that he wants to watch an educational program on television that his teacher mentioned favorably in class. They allow him to watch the show.

1. What is this "case" about?

2. Are any of even these few facts not relevant?

3. What, precisely, is the issue put to the parents? (And by implication, therefore, the breadth of the ruling?)

If there is a continuum that flows from narrow to broad, from minimum to maximum, and back, then where on that continuum do you locate yourself in your brief?

The answer must be that you will locate yourself at the point most appropriate for your purposes, and those purposes will depend on who you are: the plaintiff's lawyer in this case, a plaintiff's lawyer in the next case, the defendant's lawyer in this case, a defendant's lawyer in the next case, the court now or in the next case, a scholar examining the case — a law student preparing for class. Within the boundaries of legitimacy and reasonableness, all are right, none are wrong.

6. *Holding (and Issue or Issues)*

If you correctly identified what the case "was about," if, in other words, you got your Statement of the Case right, and if you correctly identified the error charged on appeal, then you have your issue — and your holding. Everything we said just above about "broad" and "narrow" applies with equal force here. Who are you: tinker, tailor, soldier, spy — a plaintiff's lawyer in a subsequent non-driving case ("*Kelly* established a duty of care for all social hosts for the drunken behavior of their guests"); defendant's lawyer in that case ("*Kelly* is limited to cases in which the guest's alcohol level exceeds 0.286% and is further limited to drunken driving"); a court; a scholar; a lawyer being consulted by a client champagne and fine wines wholesaler whose business requires frequent and lavish entertaining of potential customers; a legislator besieged by both MADD and the liquor lobby who wants to know the precise "state of the law"; or last but not least a law student preparing for class — in which latter case it is obvious, is it not, that you should prepare appropriate statements for everyone in this cast of characters! Do it before class and do it in writing to get the maximum benefit out of this exercise, which is to see, by doing it yourself, the multiple legitimate holdings for which a case may stand.

Beyond that, some special, important things need to be said about the holding.

First, we need two more words. The fancy Latin phrase for "holding" is *ratio decidendi*, which translates roughly to "the ground, or reason, of decision." It is a common misunderstanding to think of "decidendi" as being the same word as "descend" (one sometimes hears reference to a case's "ratio descendi" — a term

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that just does not exist). This is incorrect; "decidendi" is etymologically related to "decision," not "descend." But you can see how in a system based on stare decisis that misconception would arise. The holding, the ratio decidendi, of a prior case is its central feature from the point of view of those who come later and are trying to determine "the law"; it is what descends from one case to the next. But to say that the holding descends does not tell us what a holding *is*. The true meaning of "decidendi" provides a better clue: it suggests that the holding is the basis for the decision, the thing(s) on which the result turned.

The ratio decidendi is to be distinguished from *obiter dicta* — generally referred to simply as "dicta" ("dictum" in the singular). These are the words in the opinion on which the result *did not* turn; passing observations, generalizations, analogies, illustrations, or asides not necessary to the resolution of the case. Judicial opinions are often larded with dicta; however fascinating or learned they may be, strictly speaking they are not binding in any subsequent case.

We also need two of Llewellyn's "canons":

> *The court can decide only the particular dispute which is before it.*
>
> Everything, everything, everything, big or small, a judge may say in an opinion, is to be read with primary reference to the particular dispute, the particular question before him.[37]

Llewellyn goes on:

> [A]s a practiced campaigner in the art of exposition, [the judge] has learned that one must prepare the way for argument. You set the mood, the tone, you lay the intellectual foundation — all with the case in mind, with the conclusion — all, because those who hear you also have the case in mind, without the niggling criticism which may later follow. You wind up, as a pitcher will wind up — and as in the pitcher's case, the wind-up often is superfluous. As in the pitcher's case, it has been known to be intentionally misleading.
>
> With this it should be clear, then, why our canons thunder. Why we create a class of dicta, of unnecessary words, which later readers, their minds now on quite other cases, can mark off as not quite essential to the argument. Why we create a class of *obiter dicta*, the wilder flailings of the pitcher's arms, the wilder motions of his gum-ruminant jaws.[38] Why we set about, as our job, to crack the kernel from the nut, to find the true rule the case in fact decides: the *rule of the case.*[39]

But ponder this anecdote, told by Judge Weinstein:

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[37] LLEWELLYN, *supra* note 1, at 42–43.

[38] [Ed. Fn.] For example, suppose in Llewellyn's "Magenta Buick" case, the court found Mr. Walpole liable for negligently causing the plaintiff's injury and added: "Of course, if the defendant's steering wheel had been defective, he would not be liable." Or suppose in *Kelly* the court had said, "The defendant would not be liable if the guest had helped himself to the liquor at an open bar the defendant had set up."

[39] LLEWELLYN, *supra* note 1, at 45.

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> Judge Fuld also taught me that some first year knowledge needs to be handled carefully. "Why did you strike out this citation in the draft of this opinion?" he sternly asked one day.
>
> "It's only a dictum, judge, not a holding. You can't cite it as you have."
>
> "Who wrote it?"
>
> "You did."
>
> "If I said it, it's the law. Put it back in."

Before you rejoice, however, take note that Judge Weinstein went on to tell his listeners (an entering class of Columbia Law School students): "Since you are not judges yet, I suggest that it might be wise to know the difference between holding and dictum."[40]

Let us return to Llewellyn:

> Now for a while I am going to risk confusion for the sake of talking simply. I am going to treat as the rule of the case, the *ratio decidendi*, the rule *the court tells you* is the rule of the case, the ground, as the phrase goes, upon which the court itself has rested its decision. For there is where you must begin, and such refinements as are needed may come after.[41]

Llewellyn implies that what the court *says* is the rule, may not *be* the rule. From where, then, is the "authoritative," the canonical statement of the rule to come? Surely not from you? From the next decision in a factually similar dispute in which the court tells us what it "really" decided in the first case — and which might or might not involve some creative "moving around" of some "dictum" and "holding" (or at least you thought it was "dictum" and "holding," respectively) in the first case?[42] If, as Llewellyn suggests, we can't trust it in the first case, how can we trust it in the second? The answer is, of course, that you cannot; but the better you learn to read cases as judges read them, the closer you will come to trusty readings.

You should now understand why we said at the very beginning of Chapter 1, "unlike statutes and constitutions the common law rests on no authoritative text external to the judiciary." The point is not just that the common law is "judge-made"; in addition, it is perpetually evolving (*see, e.g., Kelly*) and therefore never knowable. One can no more "know" the common law than one can know every single eating establishment in Manhattan.

As for the holding in *Kelly*, the rule of *Kelly*, might we be able to use the court's own statement:

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[40] Taken from *The Mansion of the Law*, Address to First Year Law Students, Columbia Law School (Sept. 9, 1992). Judge Fuld was a distinguished member (and Chief Judge) of the New York Court of Appeals, for whom Judge Weinstein had clerked. We thank Judge Weinstein for making his speech available to us.

[41] Llewellyn, *supra* note 1, at 45.

[42] You could profitably look at Karl N. Llewellyn, The Common Law Tradition: Deciding Appeals (1960).

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> We hold . . . that where a host provides liquor directly to a social guest and continues to do so even beyond the point at which the host knows [query: should we add, "or should know"?] the guest is intoxicated, and does this knowing that the guest will shortly thereafter be operating a motor vehicle, that host is liable for the foreseeable consequences to third parties that result from the guest's drunken driving.

Yet even this statement requires "refinements," in Llewellyn's phrase. The court here speaks of "foreseeable consequences"; earlier it had said, "Zak could foresee that unless he stopped providing drinks . . . Gwinnell was likely to *injure* someone. . . ." And in its recital of the facts the court says: "The collision was with an automobile operated by plaintiff, Marie Kelly, who was *seriously injured* as a result."

What is the difference between saying, "foreseeable consequences" and saying, "injured"? The word "injured" primarily connotes personal injuries, not damages to property. On the other hand, the "foreseeable consequences" of drunken driving surely encompass both injuring or even killing another driver (or a pedestrian, for that matter) and damaging or totally destroying that driver's car with all that is in it.[43] We don't know whether the court meant that a social host is liable for (serious?) personal injuries only, or that the social host is liable also for property damage accompanying personal injuries, or that a social host is liable even if there is only property damage.[44]

So what do we do? The case, it seems, was about a plaintiff "seriously injured." Hence we, in our statement of the rule of *Kelly*, will move down a notch on our inverted pyramid and will say that social hosts are liable to third parties "suffering serious personal injuries" due to the guest's drunken driving, and will let the question of liability for example for property damage *only* await another day or, rather, another case.

7. *Reasoning*

The most important point about this part of your brief is that you *must* forbid yourself simply to *quote* the court's opinion, as you almost inevitably do at this juncture. Discipline yourself to state *in your own words* what you believe to be the gist of the court's argument, its premises, its reasons for why it decided the case the way it did. And practice doing so as *concisely* as possible. To quote Justice Ginsburg (during her confirmation hearings): "Get it right and keep it tight."

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[43] Even extremely unlikely events are arguably "foreseeable" in some sense. For example, you hit a world-famous violinist and he had his two Stradivarius's in the limousine.

[44] We are not told what relief the plaintiff sought; i.e., whether in her complaint she asked for compensation for her personal injuries only or for personal injuries and property damage. If the latter, the question would seem to be answered.

8. *Separate Opinions and Dissents*

Judges who disagree with the majority's reasoning or result may write their own opinions. A judge might simply "concur," meaning that she essentially agrees with, and may well join, the majority opinion, but feels moved to explain or emphasize or qualify a particular aspect of the case or point in the majority opinion. Or a judge might "concur in the result," meaning that she agrees with, and votes for, the *outcome* the majority reaches (e.g., "affirmed") but not with its *reasoning*. Or a judge might dissent, meaning that she disagrees with the outcome and, by definition, at least some aspect of the reasoning, of the majority. It is tempting to ignore these opinions; after all, "the law" is what the majority says it is. Don't! Separate opinions generally do not merit as much attention in your brief as the opinion for the court. But you should read them carefully and describe them in your brief, paying particular attention to how and why they diverge from the majority opinion.

This is for two reasons. First, separate opinions will help to illuminate what it is the court did. It is much easier to understand an opinion when another judge is objecting to it and pointing out its flaws. And the concurring or dissenting judges' explanations or objections may say something about the scope and precedential value of the case.

Second, dissenting opinions, as you will see in at least one instance in the case sequence in Chapter 4, can be every bit as important, or even more important, than the court's opinion to the development of the law. They may foreshadow a new approach, a new or at least different perception of justice, an imminent shift in a legal rule. In law, then, history is sometimes written by the losers.

Over time you will learn to assess dissents critically and to distinguish the impending revolution, which merits close attention, from the more or less graceful rear guard action, which justifies no more than a note in your brief that the court's opinion was accompanied by a dissent or dissents. For now, you must pay close attention and *in your own words* articulate the nub of the disagreement between the dissenter or dissenters and the court.

In *Kelly*, you learn from the dissent all the counter-arguments one can make against the majority's taking the initiative on what both majority and dissent agree is an evil that must be addressed: drunken driving. The quarrel is over who is best qualified to do that. The disagreement thus serves as a fine vehicle to get you started on thinking about the respective roles of courts and legislatures as lawgivers in a system that both boasts of being a representative democracy and has an entrenched common-law tradition.

9. *Other Items of Note*

Here you can account for anything else in the case that strikes you as interesting or important and that does not properly belong in any of the other parts of your brief. More often than not you will omit item 9. *Kelly* raises at least one issue that might appropriately be included here: the court's decision to apply its ruling prospectively only.

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Common law decisions have a retroactive effect: when Zak poured those scotches for Gwinnell, indeed, until the day *Kelly* was decided, no social host had reason to think he would be held liable for injuries inflicted on third parties by his drunken adult guests with their automobiles. Now Zak learns that he *is* liable for something that happened years ago. His insurance policy may or may not cover him and the insured amount may or may not be adequate.

Is that entirely fair?[45] If not, what could the court do about it? Well, it could say: we hereby announce a new rule but it will apply only to injuries occurring after today's date. Thank you, Ms. Kelly, for having called our attention to a rule (social hosts owe no duty) we no longer think is appropriate. As a civic-minded person you surely do not begrudge future plaintiffs the thousands of dollars you have spent pursuing this case all the way to us, the Supreme Court of New Jersey.

How many people would there be, do you suppose, willing to play the Good Samaritan? If you think virtually none — isn't that rather a problem? We want a "living law" that reflects our present reality; we don't want to be tethered by rules reflecting values we have come to reject. Yet we said early on that common law is *application*; that it is self-generating.[46] In short, we depend on plaintiffs to bring cases that will challenge old rules (e.g., separate but equal is constitutional) and will claim new rights. And given the scarcity of Saints among us, at least *this* plaintiff should (must?) get her just desserts — i.e., the new rule should apply to her.

But *must* we extend it to all the other victims of negligent social hosts who did not come forth and bring suit? Must we let them free-ride, as it were, on the efforts of the one who did?

Note the answer the court gives in *Kelly*:

> The imposition of retroactive liability could be considered unexpected and its imposition unfair. We therefore have determined that the liability imposed by this case on social hosts shall be prospective, applicable only to events that occur after the date of this decision. We will, however, apply the doctrine to the parties before us on the usual theory that to do otherwise would not only deprive the plaintiff of any benefit resulting from her own efforts but would also make it less likely that, in the future, individuals will be willing to claim rights, not yet established, that they believe are just.

This aspect of *Kelly* is a very important one — so important that one might consider including it in the Holding. But if not there then it should be noted here.

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[45] For a memorable argument that it is not, see the excerpt from Jeremy Bentham at *infra* page _____.

[46] *See supra* page _____.

C. A SAMPLE BRIEF[47]

Heading: Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219 (1984) (6-1) (opinion for the court: Wilentz, C.J.; dissenting opinion: Garibaldi)

Statement of the Case: This is a case about the potential tort liability of a social host who serves his adult guest alcohol beyond the point of visible intoxication, knowing that his guest will shortly thereafter drive, where the guest inflicts serious personal injuries on third parties.

Facts: The plaintiff is one Marie Kelly, who was seriously injured in a head-on collision with one Gwinnell. Immediately prior to the accident Gwinnell had been at the home of Mr. and Mrs. Zak for an hour or two. The Zaks knew that Gwinnell planned to drive home from their house.

According to Gwinnell and the Zaks, the Zaks had served and Gwinnell had consumed 2 or 3 alcoholic drinks. However, a blood test administered after the accident showed a blood alcohol concentration of 0.286 percent. (A blood alcohol concentration of 0.10 or more violates New Jersey's driving while under the influence statute). Plaintiff's expert concluded that Gwinnell had consumed the equivalent of 13 drinks and that he must have shown unmistakable signs of drunkenness while at the Zaks' house.

The suit seeks to charge the Zaks with liability for the plaintiff's injuries, as joint tortfeasors with Gwinnell and his employer.

Procedural History and Outcome Here: The trial court granted defendants Zaks' motion for summary judgment. The Appellate Division affirmed. The Supreme Court of New Jersey reverses and remands.

Issue or Issues (3 versions):

(a) Did the courts below err in granting defendants' motion for summary judgment where a plaintiff who suffers personal injuries inflicted by a drunken driver, seeks to maintain an action against the driver's social host who, knowing his guest would shortly thereafter drive, serves liquor to his guest beyond the point of visible intoxication?

(b) Can a plaintiff who suffers personal injuries inflicted by a drunken driver maintain a negligence suit against the driver's social host who, knowing his guest would shortly thereafter drive, serves liquor to his guest beyond the point of visible intoxication?

(c) Is a social host who serves his guest liquor beyond the point of visible intoxication, knowing that the guest will shortly drive home, under a duty of care to third parties suffering personal injuries due to the drunken driving of said guest?

Holding (3 versions):

(a) Where a social host provides liquor directly to a guest and continues to do so beyond the point at which the host knows the guest is intoxicated, and does so

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[47] *Sample*, not model. "Model" would imply this is the only way to do it; "sample" makes clear that this is *one* way to do it.

knowing that the guest will shortly thereafter be operating a motor vehicle, the lower courts erred in granting summary judgment for defendant-host in a suit by a third party who suffered serious personal injuries as a consequence of the guest's drunken driving.

(b) Where a social host provides liquor directly to a guest and continues to do so beyond the point at which the host knows the guest is intoxicated, and does this knowing that the guest will shortly thereafter be operating a motor vehicle, that host is liable for foreseeable consequences to third parties in suffering injuries due to the guest's drunken driving.

(c) A social host who serves his guest liquor beyond the point of visible intoxication, knowing that the guest is planning shortly thereafter to drive, is under a duty to third parties suffering personal injuries due to the guest's drunken driving.

Reasoning: Many jurisdictions have refused to extend liability to social hosts in similar circumstances and state court decisions which did impose such liability were subsequently abrogated or at least modified legislatively. However, conventional negligence law, far from immunizing social hosts, points to the very opposite. We test negligence by asking whether a reasonable and prudent person under like circumstances should recognize and foresee an unreasonable risk or likelihood of harm. Under the circumstances here there can be no doubt that the risk of harm was foreseeable. That being so, the crucial question to decide is whether the court *should* say that a social host *should* owe the injured party a duty of reasonable care. The imposition of such a duty seems both fair and "fully in accord with the State's policy" — as witnessed by recently strengthened criminal sanctions which make New Jersey the "toughest" state in regard to drunk driving. Furthermore the social goal at stake, the reduction of drunk driving, is one that is "practically unanimously" accepted by society.

Prior decisions, as well as an important Appellate Division case which, despite the absence of a Dram Shop Act in New Jersey (a) held licensees liable for the consequences of a minor customer's negligent operation of his automobile; (b) extended that duty to the licensee's customer and (c) held a social host liable for injuries inflicted on a third party as a result of subsequent drunk driving by his — minor — guest support the decision.

The issue is not appropriate only for legislative resolution — after all, there had been *no* legislative activity during the entire period from 1959 (when the first case on the subject of the liability of a licensee was decided) to date. "Obviously the Legislature may disagree" — that is, it can abrogate the ruling.

Going beyond legal principles: "Does our society morally approve of the decision to continue to allow the charm of unrestrained social drinking when the cost is the lives of others, sometimes the guests themselves?" Further: "This court *senses* that there may be a substantial change occurring in social attitudes and customs concerning drinking, whether at home or in taverns." (Emphasis added).

Separate Opinions: There are no concurrences. Justice Garibaldi dissented.

Justice Garibaldi's essential argument is that the legislature and not the court should address the "horrors" of drunken driving, for a number of reasons: the "limitless implications" of the majority's decision; the heavy burden imposed on social hosts to monitor and regulate their guests; the fact that the injured party has a remedy against the drunken driver; the significant dissimilarities between a commercial licensee and a social host, most importantly the social host's inability to spread the cost of insurance; and the possible loss of the family home. Finally, unlike the court, the legislature can hold hearings, debate the policy considerations and then draft legislation which would "adequately meet the needs of the public in general."

Other Items of Note: The Supreme Court applies the new rule prospectively only but allows Marie Kelly the benefit of her suit.

Chapter 3

JUDGING

We here offer you a highly unsystematic — if you like, arbitrary — selection of statements about what judges do, or ought to do. You have so far read only a handful of cases and you may feel ill equipped to answer the questions we raise. But we do not expect you to "answer" them; they are not in any event "answerable." We only expect that you give them serious thought. We have a fairly modest aim: to introduce you to some of the questions asked and some of the observations made, to acquaint you with the issues that face a judge and surround the judicial process, and perhaps to stimulate a desire for more concentrated study at a later time.

We also wish to inspire you to empathy with the task of judging. Too often, students impatiently dismiss judges' efforts because they do not "like" the opinions — sometimes out of disappointed idealism, sometimes out of a "gut reaction," a direct pipeline from stomach to mouth bypassing both the heart (which has its reasons, after all) and the head, and sometimes out of the opposite, a purely intellectual conviction that may indicate narrow-mindedness more than learning.

Several of the quotations that follow appear in Cardozo's *The Nature of the Judicial Process*,[1] a set of lectures setting out his philosophy of adjudication. They were, in other words, of concern to Cardozo. Try to think of why that was so.

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[1] Benjamin N. Cardozo, The Nature of the Judicial Process (Yale University Press 1921) [hereafter cited as *NJP*]. Benjamin N. Cardozo (1870-1938) was and is one of the most revered American jurists. The literature on Cardozo is extensive. The definitive biography is Andrew L. Kaufman, Cardozo (1998). You might enjoy an essay including personal reminiscences of the Justice by Milton Handler & Michael Ruby, *Justice Cardozo, One-Ninth of the Supreme Court*, 10 Cardozo L. Rev. 235 (1988). Richard Posner, Cardozo: A Study in Reputation (1990) is just what its subtitle says it is; Posner offers many cites to the literature, including some to the inevitable "debunkers." Cardozo had his greatest impact as Chief Judge of the New York Court of Appeals (the state's highest court), which, under his leadership, became the preeminent common law court in the country. His tenure on the United States Supreme Court was too brief for him to leave as large a mark there, although no less an authority than Justice Frankfurter wrote: "What is unparalleled in the history of the Supreme Court, is the impress he made on his judicial brethren during the less than six full terms that he served on the Court and the influence that he has left behind him." Felix Frankfurter, *Benjamin Nathan Cardozo*, *in* Felix Frankfurter, Of Life and Law and Other Things that Matter 185, 187 (Philip P. Kurland, ed., 1965). Even allowing for the exaggeration that attends assessments of Cardozo, *see* Posner, *supra*, it might fairly be said that Cardozo's Supreme Court stint was unusually significant given its brevity. For such an argument, *see* Richard D. Friedman, *On Cardozo and Reputation: Legendary Judge, Underrated Justice?*, 12 Cardozo L. Rev. 1923 (1991).

Cardozo was "the first modern judge to tell us how he decided cases, how he made law, and, by implication, how others should do so." Kaufman, *supra*, at 199. Many students who, at our urging, read *The Nature of the Judicial Process* (it is a slim volume) have told us how helpful they found it and how much it illuminated their law school experience in all their courses but especially in the first year.

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A. THE BASES OF JUDICIAL DECISIONS

Holmes[2]

> The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong.[3]

Gray[4]

> We all agree * * * that many cases should be decided by the courts on notions of right and wrong, and, of course, everyone will agree that a judge is likely to share the notions of right and wrong prevalent in the community in which he lives; but suppose in a case where there is nothing to guide him but notions of right and wrong, that his notions of right and wrong differ from those of the community — which ought he to follow — his own notions, or the notions of the community? * * * I believe that he should follow his own notions.[5]

Are Holmes and Gray saying the same thing? If not, how do they differ?

What was the basis of the court's decision in *Kelly v. Gwinnell*? The "feelings and demands of the community" or the Justices' "notions of right and wrong"? Could it be both? Is there a problem when the two conflict?

Suppose that your community is empathetic and deeply compassionate toward people dying of AIDS. A landlord has evicted such a person. The law is "open" as to whether he may or may not do so. You are the judge. Will you follow *your* notions, *your community's* notions, or those of the *larger community* in which, let us stipulate, it is universally felt that the landlord should have the right to do what he did. What should you do if that were also "the law"?

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[2] Justice Oliver Wendell Holmes, Jr. (1841-1935) is an American legal figure of mythic but controversial proportions. Holmes was a thrice-wounded Civil War veteran, and his experiences in the war were to color his view of the world ever after. (When asked, years later, for the facts of his life he is said to have commented: "Since 1865 there hasn't been any biographical detail.") Holmes was a Judge on the Supreme Judicial Court of Massachusetts prior to his appointment to the U.S. Supreme Court, on which he sat from 1902-1932. The best-known American jurist of his day, if not in the nation's history, he has been both deified and reviled. The fluctuations in Holmes's reputation are described in G. Edward White, *The Rise and Fall of Justice Holmes*, 39 U. Chi. L. Rev. 51 (1971). For an interesting discussion and rich cites to the literature, *see* G. Edward White, *Holmes' "Life Plan": Confronting Ambition, Passion, and Powerlessness*, 65 N.Y.U. L. Rev. 1409 (1990). The many biographies of Holmes (not to mention a movie and a Broadway play) include Sheldon M. Novick, Honorable Justice (1989), and Liva Baker, The Justice from Beacon Hill (1991). A useful collection of Holmes's writings is The Essential Holmes: Selections from the Letters, Speeches, Judicial Opinions, and Other Writings of Oliver Wendell Holmes, Jr. (Richard Posner ed. 1997).

[3] Oliver Wendell Holmes, Jr., The Common Law 41 (1881).

[4] John Chipman Gray (1839-1915) served with Holmes in the Union Army and they were fellow students at Harvard Law School. After practicing in Boston, Gray became a law professor at Harvard, where he was a leading advocate of the "case method." He wrote two treatises in the field of property law, *Restraints on Alienation* (1883) and *The Rule Against Perpetuities* (1886), but is today best remembered for his jurisprudential work, *The Nature and Sources of the Law*.

[5] John Chipman Gray, The Nature and Sources of the Law § 610 (1909), *quoted in* NJP at 107–108.

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Is Holmes saying that the law should simply adopt and legitimize majoritarian prejudices, however unreasoned or immoral? Does this sentence "reduce[] all of jurisprudence to a single, frightening statement" that legitimizes any and all persecution of minorities?[6] Does congruence between the law and "the actual feelings and demands of the community" frighten you? Writing in 1945, one observer suggested: "If totalitarianism comes to America it will not come with saluting, 'heiling,' marching uniformed men * * * [but] through dominance in the judiciary of men who have accepted a philosophy of law that has its roots in Hobbes[7] and its fruition in implications from the philosophy of Holmes."[8]

If the linkage of Hitler and Holmes (or for that matter Hitler and Hobbes) shocks you (it does us) what follows sheds some light. In her biography of Holmes, Liva Baker writes:

> His patrician genealogy, his influence on American legal thought and jurisprudence, his sharply worded opinions read from the United States Supreme Court bench, particularly the dissents, even his more or less regular trips to a Washington burlesque house, had acquired a larger-than-life quality. It was said at the time that if you asked your neighbor to name the justices of the Supreme Court, he might name the chief justice, he might think of Louis Brandeis, but surely he would name Oliver Wendell Holmes. Holmes's birthdays were celebrated on the front pages of the *New York Times*. There was an Oliver Wendell Holmes Parent-Teacher Association in Cleveland, Ohio. And in 1946, Emmet Lavery wrote the popular Broadway play *The Magnificent Yankee*; Holmes was the first Supreme Court justice to be so portrayed.
>
> It is unusual for a judge to capture the imagination and affection of the American people, to translate into a genuine folk hero. * * *
>
> Then in the 1940s, as Hitler's hordes threatened to destroy what men who had been constructing it for at least five thousand years called civilization, a cult of detractors, led by a group of Jesuit professors scandalized by Holmes's lack of religious faith, formed to demythologize him. When they were through, his democratic sensitivities, his scholarship, and his standards were all found wanting, his work the mechanistic mischief of a materialist. In their zeal to create a modern Antichrist, these critics, like Holmes's admirers, also had distorted the picture.

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[6] Grant Gilmore, The Ages of American Law 49 (1977).

[7] [Ed. Fn.] Thomas Hobbes (1588-1679). Hobbes's best-known work, *Leviathan*, is an effort to articulate and justify a vision of strong sovereignty. Hobbes begins with two premises: (1) the state of nature, in which life was "solitary, poor, nasty, brutish, and short" (I *Leviathan* ch. 13), was intolerably anarchic, and (2) motivated by appetite and self-interest, mankind has as its primary goal self-preservation and the avoidance of violent death. To obtain peace and order, people give up certain natural rights, make a social contract, and create a sovereign. Readers of Hobbes vary in their assessment of just how all-powerful his sovereign is; detractors view Hobbes's vision as absolutist and totalitarian, supporters stress that Hobbes believed that the sovereign was limited by its own self-interest and deemed resistance permissible if the subject's life were in danger (for then the sovereign would not be performing the function for which it existed). [Ed. Fn.].

[8] Ben W. Palmer, *Hobbes, Holmes, and Hitler*, 31 A.B.A. J. 569, 573 (1945).

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> In an easy effort of transference, Holmes's capacity for deferring to legislative enactment as an expression of majority will became an expression of authoritarianism, might makes right. Supported by an occasional secular scholar, this group created out of Holmes's writings a judicial monster whose jurisprudence came closer to the philosophy of the German dictator than to that of America's Founding Fathers.[9]

Consider the following story, told by Judge Learned Hand, for half a century a federal district and court of appeals judge and sometimes referred to as the single individual most nominated for the Supreme Court by others than the President of the United States:

> I remember once I was with [Justice Holmes]: it was a Saturday when the Court was to confer. It was before we had a motor car, and we jogged along in an old coupe. When we got down to the Capitol, I wanted to provoke a response, so as he walked off, I said to him: "Well, sir, goodbye. Do justice!" He turned quite sharply and he said: "Come here. Come here." I answered: "Oh, I know, I know." He replied: "That is not my job. My job is to play the game according to the rules."[10]

Does this anecdote confirm or refute the picture of Holmes, totalitarian? In its light, could the quote from Montesquieu immediately following be just as readily attributed to Holmes? The quote from Blackstone?

Montesquieu

> In certain cases the law, which is both clairvoyant and blind, may be too harsh. But the judges of the nation * * * are only the mouths that pronounce the words of the law; inanimate beings who can moderate neither its force nor its rigor.[11]

Blackstone[12]

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[9] Baker, *supra* note 2, at 8, 10. For a more recent treatment that shares some of the doubts about Holmes voiced by his 1940s detractors, *see* Albert Alschuler, Law Without Values: The Life, Work, and Legacy of Justice Holmes (2000) (a portrait stressing Holmes's tendencies toward social Darwinism, eugenics, and the belief that might makes right).

[10] Learned Hand, The Spirit of Liberty 306–307 (Irving Dilliard ed., 3d ed. 1960). This story has been told, and modified, by many people for many purposes. For an overview and analysis of the different versions, *see* Michael Herz, *Do Justice! Variations on a Thrice-Told Tale*, 82 Virginia L. Rev. 11 (1996).

[11] Charles de Secondat de Montesquieu, De L'Esprit des Lois, bk. 11, ch. 6 (1748) (translated from the French), *quoted in part in* NJP at 169.

[12] You will come across Sir William Blackstone (1723-1780), an English lawyer, professor, and judge, with surprising frequency.

> Blackstone's *Commentaries on the Laws of England* (1765-1769) is the most important legal treatise ever written in the English language. It was the dominant lawbook in England and America in the century after its publication and played a unique role in the development of the fledgling American legal system. The book went through eight editions during Blackstone's lifetime; innumerable editions, revisions, abridgments, and translations appeared thereafter. Astonishingly, it can still be read with pleasure in the late twentieth century.

Stanley N. Katz, *Introduction* to 1 William Blackstone, Commentaries on the Laws of England at iii (1979).

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> [A] very natural, and very material, question arises: how are these customs or maxims [that form the common law] to be known, and by whom is their validity to be determined? The answer is, by the judges in the several courts of justice. They are the depositary of the laws; the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land. * * * [J]udicial decisions are the principal and most authoritative evidence, that can be given, of the existence of such a custom as shall form a part of the common law. * * * [I]t is not in the breast of any subsequent judge to alter or vary from [these prior decisions], according to his private sentiments: he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be contrary to the divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*; that is, that it is not the established custom of the realm, as has been erroneously determined.[13]

Were the majority of the judges on the New Jersey Supreme Court "only the mouths" that pronounced "the words of the law" in *Kelly v. Gwinnell*? If so, where did that law come from? Is there preexisting law, perhaps a just, "natural" law separate from, and external to, the law of the State of New Jersey and its judges? How would we go about discovering such a body of law?

Suppose there is an eternal body of law; must such a body necessarily contain a specific *rule* for the *Kelly* case — a rule, for example, which says: Where a social host provides liquor directly to a guest and continues to do so beyond the point at which the host knows the guest is drunk and does this knowing that the guest will shortly thereafter be operating a motor vehicle, the trial court should not grant summary judgment for defendant-host in a suit by a third party who suffered serious personal injuries as a consequence of the guest's drunken driving?

If that seems asking a bit much, then how about a background *principle* or *standard* — for instance, society has an interest in deterring behavior that is of little social utility but that endangers life and limb of innocent third parties? Or, principles of justice and fairness require that innocent third parties be compensated for injuries they sustain at the hands of actors whose behavior is of little social utility?

Perhaps some external and eternal body of law does contain such standards or principles. But stated at this level of generality, how do they help us to decide the case of Marie Kelly v. Mr. and Mrs. Joseph Zak?

And what explains the inability of dissenters to discover these rules (if they exist) or principles, and their insistence on disagreeing even when these rules and principles are pointed out?

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[13] 1 William Blackstone, Commentaries on the Laws of England *69–*70.

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A Detour into Rules and Standards

We suggest above that "rules" are something different from "standards" and "principles," from which it would follow that one cannot use these terms interchangeably. However, courts sometimes do so — see the first case in the Chapter 4 case sequence, *Barrett v. Southern Pacific Co.*, and especially Question (2) following the case.[14] It seems appropriate to try and get it straight now. The following may be helpful:[15]

> *I. Definitions.* — Here is the rules and standards debate in a nutshell. Law translates background social policies or political principles such as truth, fairness, efficiency, autonomy, and democracy into a grid of legal directives that decisionmakers in turn apply to particular cases and facts. In a non-legal society, one might apply these background policies or principles directly to a fact situation. But, in a society with laws, using the intermediary of legal directives is thought to make decisionmakers' lives easier, improve the quality of their decisions, or constrain their naked exercises of choice.
>
> These mediating legal directives take different forms that vary in the relative discretion they afford the decisionmaker. These forms can be classified as either "rules" or "standards" to signify where they fall on the continuum of discretion. Rules, once formulated, afford decisionmakers less discretion than do standards. Although the terms "rules" and "standards" are not everyone's favorites,[16] I hope we can stipulate to their definition as follows:
>
> *(a) Rules.* — A legal directive is "rule"-like when it binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts. Rules aim to confine the decisionmaker to facts, leaving irreducibly arbitrary and subjective value choices to be worked out elsewhere. A rule captures the background principle or policy in a form that from then on operates independently. A rule necessarily captures the background principle or policy incompletely and so produces errors of over- or under-inclusiveness. But the rule's force as a rule is that decisionmakers follow it, even when direct application of the background principle or policy to the facts would produce a different result.
>
> *(b) Standards.* — A legal directive is "standard" — like when it tends to collapse decisionmaking back into the direct application of the background

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[14] *Infra* page _____.

[15] Kathleen M. Sullivan, *The Supreme Court, 1991 Term — Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 57–59 (1992). Professor Sullivan is a distinguished constitutional law scholar and appellate litigator and the former dean of the Stanford Law School.

[16] First, the ambiguity of the terms breeds confusion. Some people call both rules and standards "principles"; some (notably Ronald Dworkin) call rules "rules" and standards "principles"; some (again, notably Dworkin) use the term "standard" as a broad genus subsuming the species of rules, standards, principles, and policies; and some use rules and standards as synonyms rather than antonyms.

Second, the rule/standard distinction deceptively appears to be a dichotomy. In fact, there is only a continuum of greater or lesser "ruleness."

> principle or policy to a fact situation. Standards allow for the decrease of errors of under- and over-inclusiveness by giving the decisionmaker more discretion than do rules. Standards allow the decisionmaker to take into account all relevant factors or the totality of the circumstances. Thus, the application of a standard in one case ties the decisionmaker's hand in the next case less than does a rule — the more facts one may take into account, the more likely that some of them will be different the next time.

Let us give you an easy example: the point of imposing a speed limit presumably is to make highway travel safer and to reduce accidents and their attendant social costs. The usual way of trying to achieve these social ends is to fix on a number, let's say 65 miles per hour, and to post signs along the route to which that number applies. If you get caught traveling faster than 65 miles per hour, you will get a ticket. The law enforcement officers may have some enforcement discretion in deciding whether to ticket you or not. But there is no judgment call, no discretion, involved in determining whether you broke the law: you either observed the numerical speed limit or you didn't.

Let us look again at how Dean Sullivan describes a rule-like legal directive, of which this is a classic example: "it binds a decisionmaker [here the police officers] to respond in a determinate way to the presence of delimited triggering facts" — you went 70 mph, you get a ticket. "Rules aim to confine the decisionmaker to facts" — did you or did you not travel 70 mph? "A rule captures the background principle or policy . . ." — we (i.e., the legislature in this instance) believe that a speed limit of 65 mph strikes the appropriate balance of safety and convenience. "A rule necessarily . . . produces errors of over- or under-inclusiveness." Suppose you are in the middle of Montana on an empty stretch of a well-maintained Interstate; there isn't another car around as far as the eye can see; you are driving a late model Lincoln Town car; you have been a professional chauffeur for 20 years and you have never even gotten a parking ticket; it is a clear, dry, crisp day, early in the morning and you are traveling west. Under these circumstances the rule (65 mph) is surely overinclusive; that is, it prohibits conduct that should be permitted in light of "the background principle or policy" in that our societal goal would not be endangered by letting you drive 70 mph or maybe even 75 (80? 100? 120?)

Suppose instead you are in New Jersey on a crowded two-lane highway, none too well maintained; you are driving a 1987 Rattletrap; you just got your first driver's license; it is evening and it is raining heavily. Under these circumstances the rule is surely underinclusive, permitting conduct that should be prohibited, because our societal goal is endangered by your driving more than 40 mph (35? 30?).

If all rules share the characteristics of producing "errors of over- or under-inclusiveness," and if we know that and yet still choose a rule as our "mediating legal directive," then it must be because we want to "afford decisionmakers less discretion"; because we want to "constrain their naked exercises of choice."

Suppose we post a sign saying not "Speed Limit 65 MPH," but this:

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"Reasonable and prudent" is a standard, not a rule. It is a legal directive that "collapse[s] decisionmaking back into the direct application of the background principle or policy" — that is, we want people to drive safely and prudently because we want to prevent accidents (within limits) but instead of translating that policy into a number, we state it directly.[17]

Assume now that the police stop you. They say you were speeding. You, of course, protest that you were driving in a "reasonable and prudent" manner. You point to the condition of the road, the time of day, the weather, the condition of your car, your prior driving record, and other traffic. All of these factors are presumably relevant and have a bearing on whether you drove reasonably and prudently.

"Standards allow the decisionmaker [here in the first instance the Highway Patrol and eventually, if you contest your ticket, perhaps the Montana Supreme Court] to take into account all relevant factors or the totality of the circumstances," to quote Dean Sullivan again. We now also decrease "errors of under- and over-inclusiveness by giving the decisionmaker more discretion than do rules." But do we want to do that? Granting such discretion has costs. Our answer might well depend on the context, and on our feelings about the particular decisionmaker. Note that this particular level of discretion is that given to juries in civil cases.

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[17] In 1995, Montana adopted precisely this approach, becoming the first and only state to eliminate a numerical speed limit. In Montana v. Stanko, 974 P.2d 1132, 55 Mont. St. Rep. 1302 (1998), the Supreme Court of Montana held the speed law to be unconstitutionally vague under the Montana constitution; the Montana legislature then re-established numerical speed limits. *See* Robert E. King & Cass R. Sunstein, *Doing Without Speed Limits*, 79 B.U.L. Rev. 155 (1999). Montana and its highway culture made it repeatedly into *The New York Times* and, under the title *Postcard from Montana*, into the June 7, 1999 issue of *The New Yorker*.

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Note one other consequence of using a standard rather than a rule: "the more facts one may take into account, the more likely that some of them will be different the next time" and the consequence of *that* is that "the application of a standard in one case ties the decisionmaker's hand in the next case less than does a rule." To put it differently: cases that are decided on the basis of standards yield less precedential value than cases decided by the application of rules.

Let us return to our main subject.

Saleilles

> One wills at the beginning the result; one finds the principle afterwards; such is the genesis of all juridical construction. Once accepted, the construction presents itself, doubtless, in the ensemble of legal doctrine, under the opposite aspect. The factors are inverted. The principle appears as an initial cause, from which one has drawn the result which is found deduced from it.[18]

Was the result in *Kelly* deduced from principle or did the majority "will at the beginning the result"?

Is not Saleilles' account a perversion of the very ideal of judging, a corruption? How would you defend such a process? Do you believe many judges go about their task in precisely the manner described by Saleilles? Consider:

> Any lawyer or judge who is honest with himself knows that he often intuits a conclusion and then goes to work to see if legal reasoning supports it. But the original intuition arises out of long familiarity with the structure and processes of law. A judge will have such intuitions in cases where he has not the remotest personal preference about the outcome. A process like that must occur in all intellectual disciplines. But the honest practitioner, including the lawyer or the judge, also changes his mind when the materials with which he works press him away from his first tentative conclusion. I have had, as many other judges have, the experience of reaching one result after reading the briefs and reversing my position at oral argument, or of voting one way at the judges' conference after argument and then changing my mind in the process of reading, discussion, and writing. I have had the even less pleasurable experience of publishing my opinion and then concluding I was wrong upon reading the petition for rehearing and having to change the result of the case. Many judges can testify to similar experiences. If that is true, and it is, then it is not true that all judges choose their results and reason backward.
>
> But it is true for some judges.[19]

And, Judge Bork charges, *that* view of the judicial process is "profoundly cynical."[20] Do you agree?

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[18] Raymond Saleilles, De la Personnalité Juridique 45–46 (1922) (translated from the French), *quoted in* NJP at 170.

[19] Robert M. Bork, The Tempting of America: The Political Seduction of the Law 71 (1990).

[20] *Id.*

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Hutcheson[21]

Perceiving the law as a thing fullgrown, I believed that all of its processes were embraced in established categories, and I rejected most vigorously the suggestion that it still had life and growth, and if anyone had suggested that the judge had a right to feel, or hunch out a new category into which to place relations under his investigation, I should have repudiated the suggestion as unscientific and unsound, while as to the judge who dared to do it, I should have cried "Away with him! Away with him!"

I was too much influenced by the codifiers, by John Austin and Bentham, and by their passion for exactitude. I knew that in times past the law had grown through judicial action; that rights and processes had been invented by the judges, and that under their creative hand new remedies and new rights had flowered.

* * * [B]ut I believed that creation and evolution were at an end, that in modern law only deduction had place, and that the judges must decide "through being long personally accustomed to and acquainted with the judicial decisions of their predecessors." * * *

I knew, of course, that some judges did follow "hunches" – "guesses" I indignantly called them. I knew my Rabelais,[22] and had laughed over without catching the true philosophy of old Judge Bridlegoose's trial, and roughly, in my youthful, scornful way, I recognized four kinds of judgments; first the cogitative, of and by reflection and logomachy; second, aleatory, of and by the dice; third, intuitive, of and by feeling or "hunching;" and fourth, asinine, of and by an ass; and in that same youthful, scornful way I regarded the last three as only variants of each other, the results of processes all alien to good judges. * * *

I came to see that instinct in the very nature of law itself is change, adaptation, conformity, and that the instrument for all of this change, this adaptation, this conformity, for the making and the nurturing of the law as a thing of life, *is the power of the brooding mind*, which in its very brooding makes, creates and changes jural relations, establishes philosophy, and drawing away from the outworn past, here a little, there a little, line upon line, precept upon precept, safely and firmly, bridges for the judicial mind to pass the abysses between that past and the new future. * * *

And so, after eleven years on the Bench following eighteen at the Bar, I, being well advised by observation and experience of what I am about to set down, have thought it both wise and decorous to now boldly affirm that

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[21] Joseph C. Hutcheson (1879-1973) was Mayor of Houston when, in 1918, he was appointed to the United States District Court for the Southern District of Texas. He was elevated to the U.S. Court of Appeals for the Fifth Circuit in 1930. He was Chief Judge from 1948 until 1959, when he took senior status.

[22] [Ed. Fn.] Rabelais was probably the most famous French writer of his generation (around 1494-1553) and the creator of a number of fantastic fictional characters — in addition to Judge Bridlegoose — such as Gargantua and Pantaguel.

> "having well and exactly seen, surveyed, overlooked, reviewed, recognized, read and read over again, turned and tossed about, seriously perused and examined the preparitories, productions, evidences, proofs, allegations, depositions, cross speeches, contradictions * * * and other such like confects and spiceries, both at the one and the other side, as a good judge ought to do, I posit on the end of the table in my closet all the pokes and bags of the defendants — that being done I thereafter lay down upon the other end of the same table the bags and satchels of the plaintiff."
>
> Thereafter I proceeded "to understand and resolve the obscurities of these various and seeming contrary passages in the law, which are laid claim to by the suitors and pleading parties," even just as Judge Bridlegoose did, with one difference only. "That when the matter is more plain, clear and liquid, that is to say, when there are fewer bags," and he would have used his "other large, great dice, fair and goodly ones," I decide the case more or less offhand and by rule of thumb. While when the case is difficult or involved, and turns upon a hairsbreadth of law or of fact, that is to say, "when there are many bags on the one side and on the other" and Judge Bridlegoose would have used his "little small dice," I, after canvassing all the available material at my command, and duly cogitating upon it, give my imagination play, and brooding over the cause, wait for the feeling, the hunch — that intuitive flash of understanding which makes the jump-spark connection between question and decision, and at the point where the path is darkest for the judicial feet, sheds its light along the way.
>
> And more, "lest I be stoned in the street" for this admission, let me hasten to say to my brothers of the Bench and of the Bar, "my practice is therein the same with that of your other worships." * * *
>
> Further, at the outset, I must premise that I speak now of the judgment or decision, the solution itself, as opposed to the apologia for that decision; the decree as opposed to the logomachy, the effusion of the judge by which that decree is explained or excused. I speak of the judgment pronounced, as opposed to the rationalization by the judge on that pronouncement.[23]

Was the result in *Kelly* arrived at by cogitation; by dice; by hunch? Why should it matter that you understand how the decision was arrived at so long as you know the result?

Judge Bridlegoose has two sets of dice — "large, great dice, fair and goodly ones" and "little small" ones. The large he uses for matters "plain, clear and liquid," the "little small dice" when "there are many bags on the one side and on the other," or, in Judge Hutcheson's words, "when the case is difficult or involved, and turns upon a hairsbreadth of law or of fact." As for Judge Hutcheson, instead of using dice, large or little, he decides the one case "more or less offhand and by rule of thumb," and the other by imagination, brooding, hunch — "that intuitive flash of understanding."

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[23] Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 Cornell L.Q. 274, 275–279 (1928) (emphasis added).

There are, apparently, "easy cases" and "hard cases."

Suppose a plaintiff brings suit for injury to a fetus in a jurisdiction in which case law has held in the past that unborn children are not persons and have, therefore, no cause of action. Is this an easy case or a hard case? How would we know this? Who would decide it?[24]

Are the abortion cases "easy" or "hard?" The surrogate mother cases? The "right to die" cases?

Do we mean by "hard" that the case falls into lacunae in the legal system? If so, then must we draw on extra-legal sources, e.g., our system of ethics, morals, ideology, what have you? (Or, of course, toss dice — but that, too, reflects a value system, does it not?)

Why should judicial behavior differ, as Judge Hutcheson tells us it does, depending on whether the case is easy or hard, assuming "we" can decide the threshold question?

Was *Kelly* an "easy" or a "hard" case? If you have difficulty deciding whether it was one or the other — does the difficulty lie with you or with the task of sorting cases into "easy" and "hard" ones?

Is reliance on intuition, on that "flash of understanding," as Hutcheson calls it, merely avoidance (out of arrogance, laziness, concern for convenience, or possibly wisdom) of the task of finding not the "rule" governing the case, since there does not seem to be one, but the "principle" or "standard"?

What did the *Kelly* court mean by the following: "This Court *senses* that there may be a substantial change in social attitudes and customs concerning drinking, whether at home or in taverns. We *believe* that this change may be taking place right now in New Jersey and perhaps elsewhere."[25]

If Hutcheson is correct and the law is not deductive, does that leave any basis for decision other than the hunch? Consider what is perhaps Justice Holmes's most famous nonjudicial statement:

> The life of the law has not been logic: it has been experience.[26]

Could Holmes mean that logic has *no* place in the law? As a lawyer, wouldn't you hope that logical argument might carry some weight?

Holmes's writings were in large measure a reaction to a view of the law we have already considered: that of Dean Langdell, in which law is self-contained and governed by strictly logical considerations. You will recall Langdell's conception of law as a science. On this account, the judge's task is to reason from prior decisions, the dominant mode of legal reasoning being the syllogism. Holmes insisted that judicial decisionmaking was not so rarified or abstract; he saw the common law as

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[24] The example is taken from Richard Taylor, *Law and Morality*, 43 N.Y.U. L. Rev. 611, 624–625 (1968), and is discussed in Anthony D'Amato, *The Limits of Legal Realism*, 87 Yale L.J. 468, 478–491 (1978).

[25] *See supra* page _____ (emphases added).

[26] Holmes, *supra* note 3, at 1.

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the pursuit (sometimes unconscious) of sound public policy.

Holmes develops his theme elsewhere in *The Common Law*:

> The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than syllogism in determining the rules by which men should be governed. * * *
>
> [There exists a] paradox of form and substance in the development of law. In form its growth is logical. The official theory is that each new decision follows syllogistically from existing precedents. But just as the clavicle in the cat only tells of the existence of some earlier creature to which a collar-bone was useful, precedents survive in the law long after the use they once served is at an end and the reason for them has been forgotten. The result of following them must often be failure and confusion from the merely logical point of view.
>
> On the other hand, in substance the growth of the law is legislative. And this in a deeper sense than that what the courts declare to have always been the law is in fact new. It is legislative in its grounds. The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis.[27]

If Holmes is correct, why do we have judges making law? In trying to "legislate" effectively, they are surely handicapped by inadequate training, resources, expertise, and opportunities. Moreover, doesn't Holmes's view fly in the face of basic democratic principles, under which the electorate controls policymakers?

Re-examine *Kelly* (both the majority and the dissent) in light of Holmes and in light of our questions. What would you now add to your thoughts about the case?

Cardozo

We shall next listen at some length to Cardozo. First of all, we should treasure all judges' explications of what they do; they are, after all, the ones doing it! More often, academics are the ones who debate what judges do and should do. But more importantly, Cardozo, in the words of Justice Brennan, "was able, in a slim volume of near lyric prose [*The Nature of the Judicial Process*] to alter the course of American legal thought":

> [T]o an extent almost unimaginable today, the legal and popular culture of Cardozo's day denied the relevance of the human dimension of the judicial process. * * * [T]he judge was thought to be no more than a legal

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[27] Holmes, *supra* note 3, at 1, 35–36.

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pharmacist, dispensing the correct rule prescribed for the legal problem presented. It was supposed that judges decided cases in mechanical, "scientific" fashion. * * *

Into this formalistic conception of law Cardozo breathed the wisdom of human experience.[28]

Here then is Cardozo:

Repeatedly, when one is hard beset, there are principles and precedents and analogies which may be pressed into the service of justice if one has the perceiving eye to use them. It is not unlike the divinations of the scientist. His experiments must be made significant by the flash of a luminous hypothesis. For the creative process in law, and indeed in science generally, has a kinship to the creative process in art. Imagination, whether you call it scientific or artistic, is for each the faculty that creates. * * * Learning is indeed necessary, but learning * * * is the springboard by which imagination leaps to truth. The law has its piercing intuitions, its tense, apocalyptic moments. We gather together our principles and precedents and analogies, even at times our fictions, and summon them to yield the energy that will best attain the jural end. * * * "When, again, I asked an American judge, who is widely admired both for his skill and for his impartiality, how he and his fellows formed their conclusions, he also laughed, and said that he would be stoned in the street if it were known that, after listening with full consciousness to all the evidence, and following as carefully as he could all the arguments, he waited until he 'felt' one way or the other." * * * "When the conclusion is there," says William James, "we have already forgotten most of the steps preceding its attainment."[29]

One of the most fundamental social interests is that law shall be uniform and impartial. * * * Uniformity ceases to be a good when it becomes uniformity of oppression. The social interest served by symmetry or certainty must then be balanced against the social interest served by equity and fairness or other elements of social welfare.[30]

If you ask how [the judge] is to know when one interest outweighs another, I can only answer that he must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself. Here, indeed, is the point of contact between the legislator's work and his. * * * Each indeed is legislating within the limits of his competence. No doubt the limits for the judge are narrower. He legislates only between gaps. He fills the open spaces in the law. How far he may go without traveling beyond the walls of the interstices cannot be staked out for him

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[28] William J. Brennan, Jr., *Reason, Passion and "The Progress of Law"*, 10 Cardozo L. Rev. 3, 4 (1988). Professor Gilmore put the point this way: "Cardozo's hesitant confession that judges were, on rare occasions, more than simple automata, that they made law instead of merely declaring it, was widely regarded as a legal version of hardcore pornography." Gilmore, *supra* note 6, at 77.

[29] Benjamin N. Cardozo, The Paradoxes of Legal Science 59–61 (1928).

[30] Benjamin N. Cardozo, The Nature of the Judicial Process 112–113 (Yale University Press 1921). This and later excerpts reprinted with permission.

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upon a chart. He must learn it for himself as he gains the sense of fitness and proportion that comes with years of habitude in the practice of an art. * * * None the less, within the confines of these open spaces and those of precedent and tradition, choice moves with a freedom which stamps its action as creative. The law which is the resulting product is not found, but made. The process, being legislative, demands the legislator's wisdom.[31]

Or, as Holmes said:

[J]udges do and must legislate, but they can do so only interstitially; they are confined from Molar to molecular motions. * * * The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified.[32]

We return to Cardozo:

I was much troubled in spirit, in my first years upon the bench, to find how trackless was the ocean on which I had embarked. I sought for certainty. I was oppressed and disheartened when I found that the quest for it was futile. * * * As the years have gone by, and as I have reflected more and more upon the nature of the judicial process, I have become reconciled to the uncertainty, because I have grown to see it as inevitable. I have grown to see that the process in its highest reaches is not discovery, but creation.[33]

Again, compare Holmes:

The training of lawyers is a training in logic. The processes of analogy, discrimination, and deduction are those in which they are most at home. The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty is generally an illusion, and repose not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding.[34]

Adrift on the trackless ocean the judge may be, but, wrote Cardozo,

[h]e is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness.[35]

Perhaps not usual for the time and place, Cardozo spoke of the unconscious:

Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or

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[31] NJP at 113–115.

[32] Southern Pac. Co. v. Jensen, 244 U.S. 205, 221–222 (1917) (Holmes, J., dissenting).

[33] NJP at 166.

[34] Oliver Wendell Holmes, Jr., *The Path of the Law*, *in* Collected Legal Papers 167, 177 (1920).

[35] NJP at 141.

> judge. * * * There has been a certain lack of candor in much of the discussion of the theme, or rather perhaps in the refusal to discuss it, as if judges must lose respect and confidence by the reminder that they are subject to human limitations. I do not doubt the grandeur of the conception which lifts them into the realm of pure reason, above and beyond the sweep of perturbing and deflecting forces. None the less, if there is anything of reality in my analysis of the judicial process, they do not stand aloof on these chill and distant heights; and we shall not help the cause of truth by acting and speaking as if they do. The great tides and currents which engulf the rest of men, do not run aside in their course and pass the judges by.[36]

Cardozo speaks of the need for candor in contemplating the judicial role. What role should candor play in the writing of opinions? Is it good or bad to erect a rationalizing screen, to quote Judge Hutcheson, between "the decree" and the "logomachy, the effusion * * * by which that decree is explained or excused"?

To put the question more sharply:

> If the [Legal] Realists were right, if the legal rules applicable to most cases are indeed indeterminate, and such decisions therefore almost always the result of factors other than the mere application of doctrinal categories, then aren't judges lying when they seek to present their decisions as the determinate result of the application of preexisting rules?[37]
>
> * * * [W]hat are judges doing when they write about law in their opinions? They are not describing the state of the law, nor are they describing their own internal thought processes. Rather, they are making arguments * * * [to the judges of the appellate court] to persuade them that the * * * decision should be affirmed [and to t]he lawyers, litigants and public at large * * * to *explain* and *justify* the judge's decision.
>
> * * * [T]he whole question of "truth" and "belief" in connection with legal argument is rather complex and vexing. When I think about myself as a lawyer making arguments to a court, I find that I can easily make statements like "The law requires a judgment in favor of my client" or "The precedent on which my opponent relies is clearly distinguishable from the case at bar." In short, I find myself phrasing my arguments in the same language of determinacy and clear meaning that seems so problematic when expressed in judicial opinions.
>
> Do I believe it? Do I really believe that the law requires a judgment in favor of my client? Well, yes, but not in quite the same way I believe that

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[36] NJP at 167–168.

[37] [Ed. Fn.] "Legal realism" was a large and complicated "school" of jurisprudential thought which had its heyday in the 1930s. Rejecting the view of legal reasoning as purely deductive, the legal realists "denied that the actions of legal decisionmakers were the determinate results of applying general legal rules. * * * [They] asserted that in virtually every case the legal decisionmaker * * * was free to decide the case in directly contradictory ways * * * and then find adequate grounds for justifying either result." Charles M. Yablon, *Justifying the Judge's Hunch: An Essay on Discretion*, 41 HASTINGS L.J. 231, 236 (1990). *See also* Charles M. Yablon, *The Indeterminacy of the Law: Critical Legal Studies and the Problem of Legal Explanation*, 6 CARDOZO L. REV. 917 (1985).

> the train will arrive at 3:30. I believe that I have made a good argument, that a ruling for my client would be sensible and just and supportable on the basis of prior precedent, but I am perfectly aware that nothing actually *requires* the judge to rule my way, that other arguments have been made by my opponent, and that it is possible that the judge will rule against my client.
>
> Then why do I speak in the language of requirement, compulsion and determinacy? In part, because those are simply the conventions of my language game. No one expects me to say, indeed they would be somewhat surprised if I said, "Truthfully, the precedents could support a ruling either way in this case, but I believe it would be desirable and appropriate to rule for my client." The judge knows very well that when I say the law "requires" or "compels" a given result, I am not denying that she has a choice in the matter. The judge, and everyone else in the process, knows that those words are part of the conventions of making a forceful argument. This in turn makes it impossible for me to express my argument in more ordinary language, closer to my actual belief, that a ruling for my client would be "desirable" or "appropriate," because the conventions of legal argument make those terms seem exceedingly weak. * * *
>
> It is possible to view judicial language as expressing something quite different from the reasons which floated to the top of the judge's mind as she rendered her decision. Rather, the conventions of legal argument may well lead judges to express their decisions in terms of determinate results of legal rules, although the participants in the process understand these statements as explanations and justifications of the judge's choice in ruling for one side or the other, not as a description of the way in which the judge discovered the "right answer" to the legal problem presented by the case before her.[38]

Cardozo spoke of the "grandeur of the conception" that lifts judges into "the realm of pure reason" but dismissed it as unattainable, accepting the presence of the "human" as inevitable. In our own time, Justice William Brennan, invoking Cardozo, has called for the judge to combine passion and reason not because doing so is unavoidable, but rather because "this interplay of forces, this internal dialogue of reason and passion, does not taint the judicial process, but is in fact central to its vitality."[39] By the beginning of this century, he writes, the greatest threat to judicial legitimacy

> lay in the legal community's failure to recognize the important role that qualities other than reason must play in the judicial process. In ignoring these qualities, the judiciary had deprived itself of the nourishment essential to a healthy and vital rationality. I shall refer to these qualities

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[38] Charles M. Yablon, *Are Judges Liars? A Wittgensteinian Critique of* Law's Empire, 3 CAN. J. JUR. 123, 124–125, 135–138 (1990).

[39] Brennan, *supra* note 28, at 3. For a glowing tribute to Justice Brennan, *see* Frank I. Michelman, *Mr. Justice Brennan: A Property Teacher's Appreciation*, 15 HARV. C.R.-C.L. L. REV. 296 (1980). For a typical less sanguine view of "activist" judges as undermining self-government, *see* LOUIS LUSKY, OUR NINE TRIBUNES: THE SUPREME COURT IN MODERN AMERICA (1993).

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> under the rubric of "passion," a word I choose because it is general and conveys much of what seems at first blush to be the very enemy of reason. By "passion" I mean the range of emotional and intuitive responses to a given set of facts or arguments, responses which often speed into our consciousness far ahead of the lumbering syllogisms of reason. Two hundred years ago, these responses would have been called the responses of the heart rather than the head. Indeed, to individuals such as Thomas Jefferson, the faculty of reason was suited to address only questions of fact or science, while questions of moral judgment were best resolved by a special moral sense, different from reason, and often referred to as the "heart." In his well-known *Dialogue Between My Head & My Heart*, Jefferson stated that "[m]orals were too essential to the happiness of man to be risked on the incertain combinations of the head. [Nature] laid their foundation therefore in sentiment, not in science."
>
> An appreciation for the dialogue between head and heart is precisely what was missing from the formalist conception of judging. Indeed, Cardozo's own appreciation for it was slow in developing. In *The Nature of the Judicial Process* he appeared to accept with resignation the inevitability of such a dialogue, and did not value or encourage it. He adhered to pure reason as the goal toward which judges, flawed humans though they were, should continue to aspire. Some years later, however, he would come to champion the role of intuition. "The law has its piercing intuitions," he wrote, "its tense, apocalyptic moments." "Imagination, whether you call it scientific or artistic, is for [both law and science] the faculty that creates." The well-springs of imagination, of course, lie less in logic than in the realm of human experience — the realm in which law ultimately operates and has meaning. Sensitivity to one's intuitive and passionate responses, and awareness of the range of human experience, is therefore not only an inevitable but a desirable part of the judicial process, an aspect more to be nurtured than feared.[40]

Passion, however, is not to be confused with "impassioned judgment." Brennan continues:

> It is of course one thing for a judge to recognize the value that awareness of passion may bring to reason, and quite another to give way altogether to impassioned judgment. Cardozo, as usual, said it best:
>
> > [The judge] is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence.
>
> It is often the highest calling of a judge to resist the tug of such sentiments. There is no better example than the criminal law, where the awareness of the brutality of the underlying crime often threatens to overwhelm the mind and discretion of even the most seasoned judge. Yet the judge's job is not to yield to the visceral temptation to help prosecute the criminal, but

[40] Brennan, *supra* note 28, at 9–10.

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> to preserve the values and guarantees of our system of criminal justice, whatever the implications in an individual case. Indeed, the judge who is aware of the inevitable interaction of reason and passion, and who is accustomed to conscious deliberation and evaluation of the two, is the judge least likely in such situations to sacrifice principle to spasmodic sentiment.[41]

Holmes, Cardozo, and Brennan each reject the view that the judge's task is purely logical or syllogistic. How do their views of the inadequacies of reason differ? How do their prescriptions of what judges ought to bring to their task besides pure reason differ?

B. EMPATHY, PASSION, REASON: TWO EXAMPLES

Here are two Cardozo opinions through which to digest and evaluate the foregoing.

HYNES v. NEW YORK CENTRAL RAILROAD
231 N.Y. 229, 131 N.E. 898 (1921)

On July 8, 1916, Harvey Hynes, a lad of sixteen, swam with two companions from the Manhattan to the Bronx side of the Harlem River, or United States Ship Canal, a navigable stream. Along the Bronx side of the river was the right of way of the defendant, the New York Central Railroad, which operated its trains at that point by high tension wires, strung on poles and crossarms. Projecting from the defendant's bulkhead above the waters of the river was a plank or springboard, from which boys of the neighborhood used to dive. One end of the board had been placed under a rock on the defendant's land, and nails had been driven at its point of contact with the bulkhead. Measured from this point of contact the length behind was 5 feet; the length in front 11. The bulkhead itself was about 3½ feet back of the pier line as located by the government. From this it follows that for 7½ feet the springboard was beyond the line of the defendant's property and above the public waterway. Its height measured from the stream was 3 feet at the bulkhead, and 5 feet at its outermost extremity. For more than five years swimmers had used it as a diving board without protest or obstruction.

On this day Hynes and his companions climbed on top of the bulkhead intending to leap into the water. One of them made the plunge in safety. Hynes followed to the front of the springboard, and stood poised for his dive. At that moment a crossarm with electric wires fell from the defendant's pole. The wires struck the diver, flung him from the shattered board, and plunged him to his death below. His mother, suing as administratrix, brings this action for her damages. Thus far the courts have held that Hynes at the end of the springboard above the public waters was a trespasser on the defendant's land. They have thought it immaterial that the board itself was a trespass, an encroachment on the public ways. They have

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[41] *Id.* at 11–12. If questions of reason and passion and their relationship to judging and judges interest you, you may want to peruse other contributions to Symposium, *Reason, Passion, and Justice Brennan*, 10 Cardozo L. Rev. 1 (1988).

thought it of no significance that Hynes would have met the same fate if he had been below the board and not above it. The board, they have said, was annexed to the defendant's bulkhead. By force of such annexation, it was to be reckoned as a fixture, and thus constructively, if not actually, an extension of the land. The defendant was under a duty to use reasonable care that bathers swimming or standing in the water should not be electrocuted by wires falling from its right of way. But to bathers diving from the springboard, there was no duty, we are told, unless the injury was the product of mere willfulness or wantonness — no duty of active vigilance to safeguard the impending structure. Without wrong to them, cross-arms might be left to rot; wires highly charged with electricity might sweep them from their stand and bury them in the subjacent waters. In climbing on the board, they became trespassers and outlaws. The conclusion is defended with much subtlety of reasoning, with much insistence upon its inevitableness as a merely logical deduction. A majority of the court are unable to accept it as the conclusion of the law. * * *

Rights and duties in systems of living law are not built upon such quicksands.

Bathers in the Harlem River on the day of this disaster were in the enjoyment of a public highway, entitled to reasonable protection against destruction by the defendant's wires. They did not cease to be bathers entitled to the same protection while they were diving from encroaching objects or engaging in the sports that are common among swimmers. Such acts were not equivalent to an abandonment of the highway, a departure from its proper uses, a withdrawal from the waters, and an entry upon land. A plane of private right had been interposed between the river and the air, but public ownership was unchanged in the space below it and above. The defendant does not deny that it would have owed a duty to this boy if he had been leaning against the springboard with his feet upon the ground. He is said to have forfeited protection as he put his feet upon the plank. Presumably the same result would follow if the plank had been a few inches above the surface of the water instead of a few feet. Duties are thus supposed to arise and to be extinguished in alternate zones or strata. * * *

The truth is that every act of Hynes from his first plunge into the river until the moment of his death was in the enjoyment of the public waters, and under cover of the protection which his presence in those waters gave him. The use of the springboard was not an abandonment of his rights as bather. It was a mere by-play, an incident, subordinate and ancillary to the execution of his primary purpose, the enjoyment of the highway. * * * We think there was no moment when he was beyond the pale of the defendant's duty — the duty of care and vigilance in the storage of destructive forces.

This case is a striking instance of the dangers of "a jurisprudence of conceptions" (Pound, Mechanical Jurisprudence, 8 Columbia Law Review, 605, 608, 610), the extension of a maxim or a definition with relentless disregard of consequences to "a dryly logical extreme." The approximate and relative become the definite and absolute. * * * In one sense, and that a highly technical and artificial one, the diver at the end of the springboard is an intruder on the adjoining lands. In another sense, and one that realists will accept more readily, he is still on public waters in the exercise of public rights. The law must say whether it will

subject him to the rule of the one field or of the other, of this sphere or of that. We think that considerations of analogy, of convenience, of policy, and of justice, exclude him from the field of the defendant's immunity and exemption, and place him in the field of liability and duty.

PALSGRAF v. LONG ISLAND RAILROAD

248 N.Y. 339 (1928)

Plaintiff was standing on a platform of defendant's railroad after buying a ticket to go to Rockaway Beach. A train stopped at the station, bound for another place. Two men ran forward to catch it. One of the men reached the platform of the car without mishap, though the train was already moving. The other man, carrying a package, jumped aboard the car, but seemed unsteady as if about to fall. A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In this act, the package was dislodged, and fell upon the rails. It was a package of small size, about fifteen inches long, and was covered by a newspaper. In fact it contained fireworks, but there was nothing in its appearance to give notice of its contents. The fireworks when they fell exploded. The shock of the explosion threw down some scales at the other end of the platform, many feet away. The scales struck the plaintiff, causing injuries for which she sues.

The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relatively to her it was not negligence at all. Nothing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed. Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right. * * * The plaintiff as she stood upon the platform of the station might claim to be protected against intentional invasion of her bodily security. Such invasion is not charged. She might claim to be protected against unintentional invasion by conduct involving in the thought of reasonable men an unreasonable hazard that such invasion would ensue. These, from the point of view of the law, were the bounds of her immunity * * *.

A different conclusion will involve us, and swiftly too, in a maze of contradictions. A guard stumbles over a package which has been left upon a platform. It seems to be a bundle of newspapers. It turns out to be a can of dynamite. To the eye of ordinary vigilance, the bundle is abandoned waste, which may be kicked or trod on with impunity. Is a passenger at the other end of the platform protected by the law against the unsuspected hazard concealed beneath the waste? If not, is the result to be any different, so far as the distant passenger is concerned, when the guard stumbles over a valise which a truckman or a porter has left upon the walk? The passenger far away, if the victim of a wrong at all, has a cause of action, not derivative, but original and primary. His claim to be protected against invasion of his bodily security is neither greater nor less because the act resulting in the invasion is a wrong to another far removed. * * * [T]he orbit of the danger as disclosed to the eye of reasonable vigilance would be the orbit of the duty. One who jostles one's neighbor in a crowd does not invade the rights of others standing at the outer fringe when the unintended contact casts a bomb upon the ground. The wrongdoer as to them is the man who carries the bomb, not the

one who explodes it without suspicion of the danger. Life will have to be made over, and human nature transformed, before provision so extravagant can be accepted as the norm of conduct, the customary standard to which behavior must conform.

The argument for the plaintiff is built upon the shifting meanings of such words as "wrong" and "wrongful," and shares their instability. What the plaintiff must show is "a wrong" to herself, *i.e.*, a violation of her own right, and not merely a wrong to someone else, nor conduct "wrongful" because unsocial, but not "a wrong" to anyone. We are told that one who drives at reckless speed through a crowded city street is guilty of a negligent act and, therefore, of a wrongful one irrespective of the consequences. Negligent the act is, and wrongful in the sense that it is unsocial, but wrongful and unsocial in relation to other travelers, only because the eye of vigilance perceives the risk of damage. If the same act were to be committed on a speedway or a race course, it would lose its wrongful quality. The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension. * * * This does not mean, of course, that one who launches a destructive force is always relieved of liability if the force, though known to be destructive, pursues an unexpected path. * * * Here, by concession, there was nothing in the situation to suggest to the most cautious mind that the parcel wrapped in newspaper would spread wreckage through the station. If the guard had thrown it down knowingly and willfully, he would not have threatened the plaintiff's safety, so far as appearances could warn him. His conduct would not have involved, even then, an unreasonable probability of invasion of her bodily security. Liability can be no greater where the act is inadvertent.

Negligence, like risk, is thus a term of relation. Negligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all.

The judgment of the Appellate Division and that of the Trial Term should be reversed, and the complaint dismissed, with costs in all courts.

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1. *(Com)passionate judging*. What are we to make of these two contrasting opinions, so different at least in tone, and perhaps in substance? *Hynes* is often seen as a case of (com)passionate judging; *Palsgraf* as a case of dispassionate distancing. It has been described as an example of "the judge cleaning and polishing principles with his back turned to the parties."[42] The comment was intended as a criticism, but is this not precisely what we want judges to do? To decide, *impartially*, on the basis of general principles, regardless of the wealth, race, or identity of the parties. Why, after all, does Justitia wear a blindfold?

For that matter, make an argument that if *Hynes* is a passionate case, so too is *Palsgraf*.

2. *Is judicial passion dangerous*? Justice Brennan seems to propose that passion is an essential ingredient of justice. But might not passion produce *in* justice? We have all seen people act unreasonably (unjustly?) when overwhelmed by passion.

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[42] Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299, 1350 (1988).

Would legitimizing judicial passion give a valid passport to judicial tyranny?

Consider the response to Justice Brennan by Judge Richard Cudahy of the U.S. Court of Appeals for the Seventh Circuit:

> During the last fifty or so years, the growing acceptance of passion or intuition in the law seems generally to have favored "liberal" outcomes and been approved by liberal theoreticians. I do not think there are any iron laws of history, however, that dictate the immutability of these relations. * * *
>
> My own instincts tell me, nonetheless, that in the long run the judges who invoke a measure of intuition and passion are somehow more likely to benefit the powerless than the powerful. This may be Justice Brennan's underlying hunch although he does not articulate it. And perhaps this is merely an illustration of flawed induction from my own life experiences. But I expect there will always be groups too small, diffuse, or reviled to obtain redress for their real grievances through majoritarian processes. These groups will continue to prefer judges whose logic is informed by their sensitivity to the plight of the dispossessed and underrepresented, as opposed to judges who confine themselves to passive roles guided by principles thought to be congenial to the status quo. This is all speculation, of course; nevertheless, it is a surmise deserving of consideration. * * *
>
> In summary, I find myself in general agreement with Justice Brennan's thesis. I must note in candor, however, that the passions and intuitions that he perceives as legitimate and constructive are those that correspond to his own point of view. A passion for capital punishment is not something that he would easily see as legitimate or constructive within the reason-passion paradigm.[43]

Reviewing Ingo Müller's *Hitler's Justice, The Courts of the Third Reich*,[44] Professor Berghahn writes:

> On Dec. 22, 1943, the executioner at the county prison of Wolfenbüttel, some 50 miles east of Hanover in Germany, had to work particularly hard. As the prison chaplain recorded in his death register, the guillotine fell in swift succession that evening at 6:35, 6:38, 6:40, 6:42 and 6:44.
>
> Unlike the thousands of other men, women and children who also died on that day in all parts of Nazi-occupied Europe in the concentration camps, as hostages or as innocent bystanders in military operations, the victims at Wolfenbüttel had been sentenced to death by ordinary courts — courts that had never ceased to operate throughout the Nazi period. These courts were manned by judges who had gone through the traditional law schools, often with excellent examination results, and who, according to conservative estimates, handed down 40,000 to 50,000 death sentences in the 12 years of Hitler's rule of terror. Around 80 percent of these sentences were carried

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[43] Richard D. Cudahy, *Justice Brennan: The Heart Has Its Reasons*, 10 CARDOZO L. REV. 93, 102–103 (1988).

[44] (Deborah Lucan Schneider trans. 1991).

> out, often within hours of the verdict being rendered. University-trained lawyers also imposed over 12,000 death sentences as members of military courts-martial, of which a mere 10 percent were ultimately commuted. If one adds also the reprisal executions of so-called "Night and Fog" prisoners, mainly in occupied Western Europe, and the sentences of special courts set up in Nazi-occupied Eastern territories, at least 80,000 people can be assumed to have died at the hands of Hitler's hanging judges.[45]

How many of these death sentences were handed out by judges full of passion for the Neue Reich?[46] If you do not consider this a fair comment, why not? "The best lack all conviction, while the worst/Are full of passionate intensity."[47]

If you are, by now, thoroughly disquieted, perhaps there is some comfort at least in this:

> The ultimate check, however, upon the passions, intuitions and emotions of one judge is the same faculties of another judge. That is why there is appellate review. It also explains why those reviewing courts always contain more than one member.[48]

Then again, if passions can "sweep" whole countries, why can they not sweep whole courts, or at least five lonely figures?

3. *Empathy.* If "passion" is not unproblematic, will "empathy" serve us better?

Barack Obama, both as Senator and as President, has stressed the importance of empathy in judging. Explaining his vote against the confirmation of John Roberts as Chief Justice of the United States, he stated:

> The problem I face * * * is that while adherence to legal precedent and rules of statutory or constitutional construction will dispose of 95 percent of the cases that come before a court, * * * what matters on the Supreme Court is those 5 percent of cases that are truly difficult. In those cases, adherence to precedent and rules of construction and interpretation will only get you through the 25th mile of the marathon. That last mile can only be determined on the basis of one's deepest values, one's core concerns, one's broader perspectives on how the world works, and the depth and breadth of one's empathy.
>
> In those 5 percent of hard cases, the constitutional text will not be directly on point. The language of the statute will not be perfectly clear. Legal process alone will not lead you to a rule of decision. In those * * * difficult cases, the critical ingredient is supplied by what is in the judge's

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[45] Berghahn, *The Judges Made Good Nazis*, N.Y. Times Book Rev., Apr. 28, 1991, at 3.

[46] Regarding law and legal rhetoric in Vichy France see *Avoiding Central Realities: Narrative Terror and the Failure of French Culture Under the Occupation* and *Legal Rhetoric Under Stress: The Example of Vichy*, both in Richard Weisberg, Poethics and Other Strategies of Law and Literature (1992). *See generally* Richard H. Weisberg, Vichy law and the Holocaust in France (1996).

[47] William Butler Yeats, *The Second Coming*, lines 7–8 (1920).

[48] Cudahy, *supra* note 43, at 103–104.

heart.[49]

As a candidate, he returned to this theme: "[W]e need somebody who's got the heart, the empathy, to recognize what it's like to be a young teenage mom. The empathy to understand what it's like to be poor, or African-American, or gay, or disabled, or old. And that's the criteria by which I'm going to be selecting my judges."[50] And when Justice Souter announced his resignation, giving President Obama his first Supreme Court vacancy, the President said this with regard to what sort of person he would nominate:

> I will seek somebody with a sharp and independent mind and a record of excellence and integrity. I will seek someone who understands that justice isn't about some abstract legal theory or footnote in a case book. It is also about how our laws affect the daily realities of people's lives — whether they can make a living and care for their families; whether they feel safe in their homes and welcome in their own nation.
>
> I view that quality of empathy, of understanding and identifying with people's hopes and struggles as an essential ingredient for arriving at just decisions and outcomes.[51]

The President's emphasis on empathy provoked a powerful reaction, pro and con, in the media, the public, and the Senate. The negative reaction was strong enough that during the Sotomayor confirmation process the White House came to avoid the word "empathy" as too charged and politically problematic.[52] The nominee herself did not use it a single time during her testimony and expressly disavowed the President's account of what a judge is supposed to do.

Why the flight from empathy? The anti-empathy flank derided it as a code-word for activism, bias, feelings, emotions, and favoritism — in short, decisionmaking based on grounds other than law. Consider this summary of the standard account of the disconnect between empathy and even-handed judging.

> The Rule of Law is the reification of rules governing rights and duties to which we pay homage: thus, this is a "government of laws, not men";[53] the Rule of Law transcends humans and is superior to them. The virtue of the Rule of Law is that it is ostensibly "neutral" and prevents abuse of persons. The neutrality and generality of the Rule of Law seek to serve the goals of protecting individuals from arbitrary treatment and of respecting people as autonomous and equal. As such it is not in direct opposition to empathy. Yet

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[49] 151 Cong. Rec. S10,366 (daily ed. Sept. 22, 2005) (statement of Sen. Obama).

[50] *See* Edward Whelan, *Obama's Constitution: The Rhetoric and the Realit* y, Wkly. Standard, Mar. 17, 2008, at 12.

[51] The President's Remarks on Justice Souter, available at http://www.whitehouse.gov/blog/09/05/01/The-Presidents-Remarks-on-Justice-Souter/.

[52] *See* Sheryl Gay Stolberg, *Say It With Feeling? Not This Time Around*, N.Y. Times, May 29, 2009, at A15 ("Empathy was all the rage in Washington only a few weeks ago, . . . [b]ut now that conservatives have cast empathy as an epithet when it comes to the judiciary . . . Mr. Obama seems to have dropped it from his confirmation lexicon.").

[53] [Ed. Fn.] This much invoked aspiration originated in the Massachusetts Constitution of 1780, in a provision guaranteeing the separation of governmental powers.

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> to the extent the concern is with perpetuating the Rule of Law for its own sake, the importance of empathic understanding can disappear.
>
> Essential to legality is the premise that fidelity to the law is necessary for predictability and control over outcomes and for social ordering. The Rule of Law provides us with an anchor, a grounding, that otherwise would not exist in modern postindustrial society; it keeps chaos and anarchy away from our door. Rules — whether explicit or open-textured — provide the illusion, if not the reality, of certainty; that certainty is reason enough to obey or acquiesce to the Rule of Law without question. For this reason the narrative of the suffering caused by the law to the Other can be ignored or suppressed.[54]

Is *Hynes* a case of "empathic understanding"? If so, is it (therefore) a case cut loose from the anchorage of the rule of law? Is it, not to put too fine a point on matters, essentially a lawless, albeit just decision? But is to speak of "lawless but just" decisions not an oxymoron?[55] It seems to come more naturally to speak of "lawful but unjust" decisions. Why?

How do the answers you just gave apply to *Palsgraf*? Where does *Kelly* fit in?

4. *Empathy and Impartiality*. In part, the 2009 empathy debate turned on a disagreement over whether empathy is a neutral characteristic, a turn of mind, or whether it is simply a substantive preference for particular individuals or groups. One empathy skeptic wrote:

> President Obama says he wants judges who have the "empathy to understand what it's like to be poor, or African American, or gay, or disabled, or old." But if judges who feel empathy for these groups can legitimately base decisions on it, the same goes for the considerably larger number of jurists who most easily empathize with what it's like to be rich, or white, or straight, or able-bodied. If we weaken the norm of judicial impartiality in favor of greater emphasis on empathy, minorities and the poor are unlikely to benefit.[56]

Do you agree? If not, how would you respond?

Which way does empathy cut in a case about affirmative action? When a judge must decide whether to suppress illegally seized evidence in a murder trial?

"Empathy" can be variously defined.

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[54] Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1587–1588 (1987).

[55] Before you say yes too quickly, think of that great icon of American (and world) popular culture: the gun that brings justice to the lawless town. Think of the American Western! *See generally* André Bazin, *The Western, or the American Film* par excellence, in II WHAT IS CINEMA? (1971).

[56] Ilya Somin, *How empathy can distort judges' thinking and lead to bad decisions*, L.A. Times (on-line edition), May 28, 2009, at http://www.latimes.com/news/opinion/opinionla/la-oew-chemerinsky-somin28-2009may28,0,4921073.story. Professor Somin was writing as part of a "Point/Counterpoint" exchange with Dean Erwin Chemerinsky; the whole exchange is worth reading. For an endorsement of empathic judging written against the background of the Sotomayor hearings, *see* Susan A. Bandes, *Empathetic Judging and the Rule of Law*, 2009 CARDOZO L. REV. DE NOVO 133.

> While the word ["empathy"] often appears to be used interchangeably with "love," "altruism," and "sympathy," it actually encompasses specific psychological phenomena. Although the literature of empathy manifests disagreement about what is or is not "empathy," rather than projection, sympathy, or what have you, there are three basic phenomena captured by the word: (1) feeling the emotion of another; (2) understanding the experience or situation of another, both affectively and cognitively, often achieved by imagining oneself to be in the position of the other; and (3) action brought about by experiencing the distress of another (hence the confusion of empathy with sympathy and compassion). The first two forms are ways of knowing, the third form a catalyst for action.[57]

Which, if any, of these three phenomena (none of which equates to bias, sympathy, or preference) are relevant to deciding cases? Note the stress on understanding both "affectively" *and* "cognitively." (Is this the difference between passion and empathy?)

Lawsuits by definition involve two sides. Can a judge be empathetic toward both? If empathy is a thumb on the scale, a preference for one set of interests over another, the answer is no. But if empathy is "a way of knowing," a more complete understanding of the relevant, and competing, interests, the answer might be yes.

5. "*Real people.*" It is sometimes said, almost always as a compliment, of a particular judge that he or she does not lose sight of "the people behind the cases," or of how the court's decisions "will affect real people." Consider the following information about the real person behind *Palsgraf.* Does it change your view of the decision? If so, should Cardozo have included some or all of it in the opinion?

> "Mrs. Palsgraf" bore the Christian name of Helen. She was forty-three and the mother of three children, of whom the younger two, then fifteen and twelve, were with her at the time of the accident. She was married, but neither side judged it desirable to ask who her husband was or where he was. It may be inferred that they had separated. She testified that she paid the rent, that she had always worked, and that she was "all alone."
>
> At the time of the accident Helen Palsgraf lived in a basement flat at 238 Irving Avenue in Ridgewood [Brooklyn], performing janitorial work in the apartment building, for which she was allowed ten dollars a month on her rent. She did day work outside the apartment, earning two dollars a day or about eight dollars a week. She spoke English intelligibly but not with complete grammatical correctness.
>
> The day of the accident was a hot Sunday in August. She was taking Elizabeth and Lilian to the beach. It was ten o'clock. She carried a valise. She bought their tickets and walked onto the station platform, which was crowded. Lilian went for the Sunday paper. As a train started to pull out, there was the noise of an explosion. Then, "Flying glass — a ball of fire came, and we were choked in smoke, and I says 'Elizabeth turn your back,' and with that the scale blew and hit me on the side." * * *

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[57] Henderson, *supra* note 54, at 1579.

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> In 1924 the Long Island's total assets were valued at $114 million of which $98 million was the valuation set on track and equipment. Net income from railroad operations was just over $4 million, reflecting a return just over the 4 percent that was usual for railroads of the period to show. Over 60 percent of the operating income was from passenger traffic. The parent Pennsylvania [Railroad] had a net income of $48 million and assets of $1.7 billion, of which almost one half billion represented capital stock and surplus.[58]

Does *Palsgraf* reflect an appropriate, indeed necessary, judicial detachment? After all, aren't such factors as the relative wealth of the parties legally irrelevant? Or, given the above, might one conclude that Cardozo was not merely not empathetic toward Mrs. Palsgraf, but that the decision *does* reflect "passion" as well as reason, though passion directed *against* the plaintiff? Alternatively, perhaps Cardozo was entirely empathetic, but his empathy was for the Long Island Railroad and its employees.

In *Hynes*, Cardozo says that Harvey Hynes was in "the enjoyment of the public waters," painting a nearly bucolic picture of a boy swimming in the river. In *Palsgraf*, he does not mention that Helen Palsgraf and her children were on their way to the beach on a hot August day. The fact that it was hot is

> a detail of consummate irrelevance in terms of any legal principles but suggestive of the circumstances in which urban users of public transportation need to travel, a reminder of the innocence of Helen Palsgraf's seaside excursion. How such a fact should affect the outcome is nondemonstrable, yet it will play a part in the process by which judgment is reached.[59]

Should Cardozo have mentioned the August heat? If you were Palsgraf's attorney, would you have, even though it is legally irrelevant? Perhaps the ability to identify such factors distinguishes effective litigators from ineffective ones even more than skill at "legal reasoning" (which might, after all, lead an advocate to ignore such factors as the temperature). Does this mean that the most effective advocate is the one with the least sophisticated legal understanding? Or does it overstate the importance of such factors "in the process by which judgment is reached"?

Consider one last aspect of *Palsgraf*:

> Severe impartiality led in *Palsgraf* to the aspect of the decision which seemed least humane: the imposition by Cardozo of "costs in all courts" upon Helen Palsgraf. Under the New York rules of practice, [awards of court] costs [which does *not* include attorney's fees,] were, in general, discretionary with the court. An old rule, laid down in 1828, was that when the question was "a doubtful one and fairly raised, no costs will be allowed." In practice, the Court of Appeals tended to award costs mechanically to the party successful on the appeal. Costs here amounted to $142.45 in the trial

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[58] John T. Noonan, Jr., Persons and Masks of the Law 126–128 (1976).

[59] *Id.* at 141–142.

> court and $100.28 in the appellate division. When the bill of the Court of Appeals was added, it is probable that costs in all courts amounted to $350, not quite a year's income for Helen Palsgraf. She had had a case which a majority of the judges who heard it [counting those on the lower courts] thought to constitute a cause of action. By a margin of one, her case had been pronounced unreasonable. . . . The effect of the judgment was to leave the plaintiff, four years after her case had begun, the debtor of her doctor, who was still unpaid; her lawyer, who must have advanced her the trial court fees at least; and her adversary, who was now owed reimbursement for expenditures in the courts on appeal. Under the New York statute the Long Island could make execution of the judgment by seizing her personalty. Only a judge who did not see who was before him could have decreed such a result.[60]

6. *Judging.* Finally: if *you* were a judge, how would you go about judging and, particularly, how would you go about judging when the case before you is not "controlled" by a prior, "precedential," case or statute? Do you know your predilections and prejudices, your "complex of instincts," your "subconscious loyalties" to the groups "in which the accident of birth or education or occupation or fellowship" have placed you? Do you know your passions? Do you trust your *reason*? (What do you mean by reason?) Do you trust your *intuition*? (What do you mean by intuition?) Do you simply rely on your *judgment*? (What do you mean by judgment?[61])

Is the injunction, "Judge, Know Thyself" sufficient?

Can you ask only "What should *I* do in this case? What do *I* think is 'best' in this case?" If you answer yes, are you then not assuming a legislative mantle? And if so, then we can no longer evaluate your decision in terms of its correctness or incorrectness vis-à-vis any preexisting "law" but only in terms of its foolishness or wisdom — is that not so?

Or should you ask, "What can and should I, *a judge*, do in this case?" If you deem that the correct question, are you then not asserting that there is always "something else" for which a judge can reach to help her decide the case? That is, that "there is some aspect of judicial decisionmaking which renders it *qualitatively* different from legislative decisions,"[62] even in a case of "first impression," that is, a case not controlled by precedent. Ought you, in other words, seek to experience "the legal rule structure * * * simultaneously as an 'internal' source of obligation and an 'external' institutional constraint"?[63] And if so, then we could evaluate your decision not only as "wise or foolish, but in terms of some notion of 'correctness' or

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[60] *Id.* at 144.

[61] Judge Posner calls "good judgment" a "cousin of intuition and another major factor in judicial decisions" where legal materials leave significant judicial discretion. He describes it as "an elusive faculty best understood as a compound of empathy, modesty, maturity, a sense of proportion, balance, a recognition of human limitations, sanity, prudence, a sense of reality, and common sense." RICHARD A. POSNER, HOW JUDGES THINK 117 (2008.

[62] *See generally* Charles M. Yablon, *Judicial Process As an Empirical Study: A Comment on Justice Brennan's Essay*, 10 CARDOZO L. REV. 149, 56 (1988) (emphasis added).

[63] *Id.*

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'appropriateness' within the prevailing rule system"[64] — is that not so?

C. A FINAL NOTE

"On July 8, 1916, *Harvey Hines*, a *lad* of sixteen, swam with two companions"; they "intend[ed] *to leap* into the water"; the wires "*flung him* from the *shattered* board, and *plunged* him to his death below."

You knew by the time you reached "plunged" that Harvey Hines would win, right? Probably you guessed it at "lad."

In contrast: "Plaintiff was standing on a platform of defendant's railroad after buying a ticket to go to Rockaway Beach."

Things do not look as promising for "plaintiff," do they?

Is this a difference of form (or style) or one of substance? Cardozo himself doubted the distinction: "The strength that is born of form and the feebleness that is born of the lack of form are in truth qualities of the substance."[65]

Assignment 1

Identify the "strength that is born of form" in *Hynes* and contrast it with the "feebleness that is born of the lack of form" in *Palsgraf*.

Assignment 2

Take an imaginative leap: you are no longer a first-semester law student. You have just become an appellate judge. You look for guidance, for a model, to help you be the kind of judge you feel you want to be and should be.

Reread the excerpts in Section A. Identify those that most nearly embody *your* ideal of what a great judge should be like and that you therefore want to take as a lodestar.[66] Explain your choice. Do the same with those excerpts that you consider at the farthest remove from your vision of the great judge you would like to be. Explain your choice.

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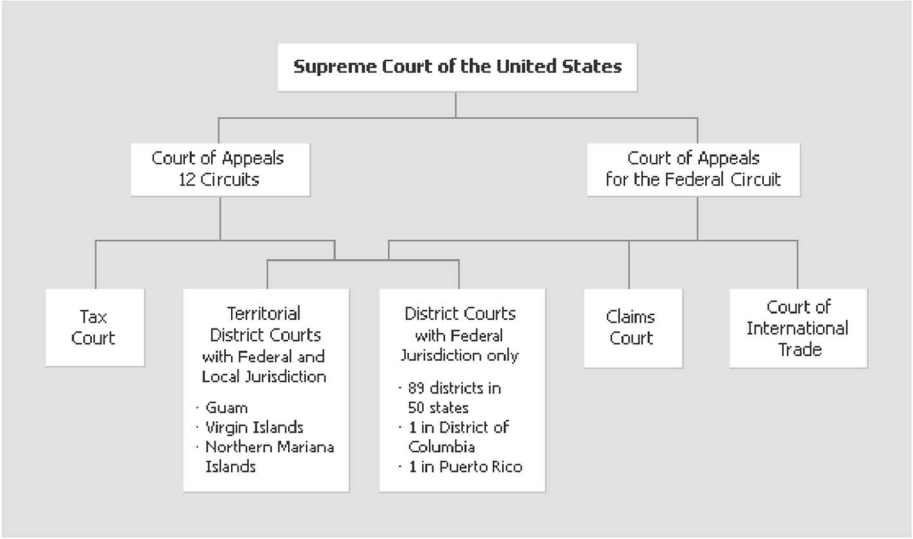
[64] *Id.*

[65] Benjamin N. Cardozo, Law and Literature 6 (1931).

[66] A lodestar is a star that leads or guides, especially the North Star.

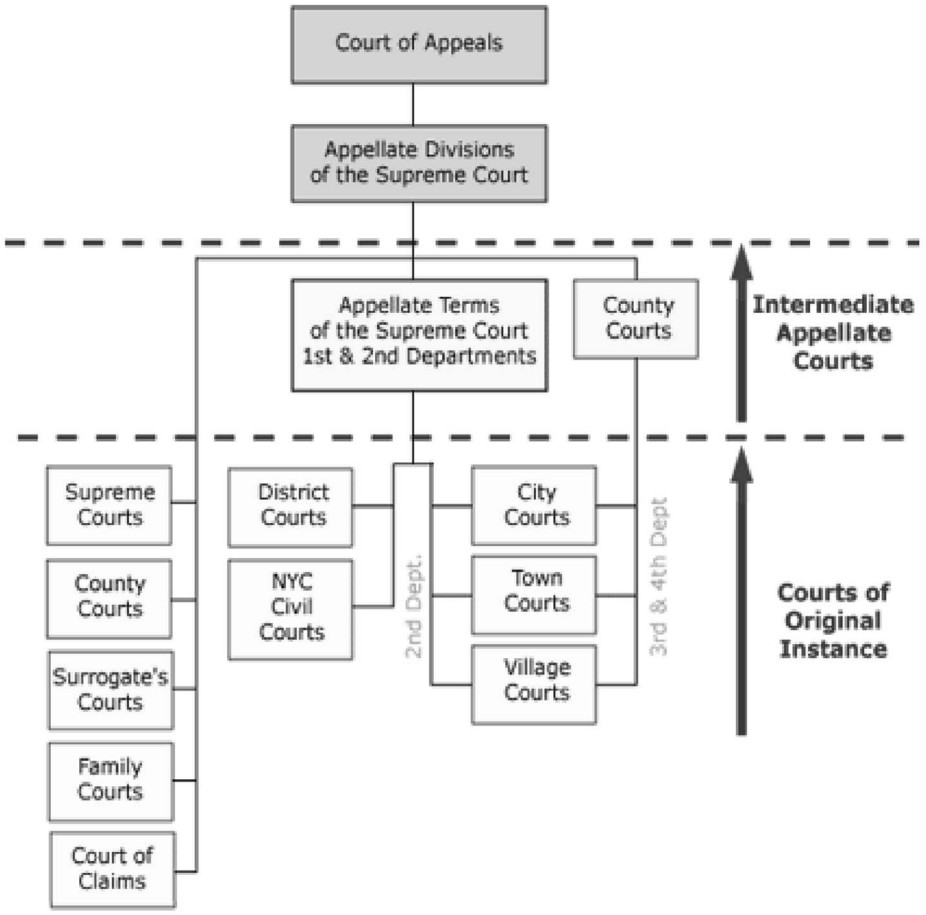
Appendix A

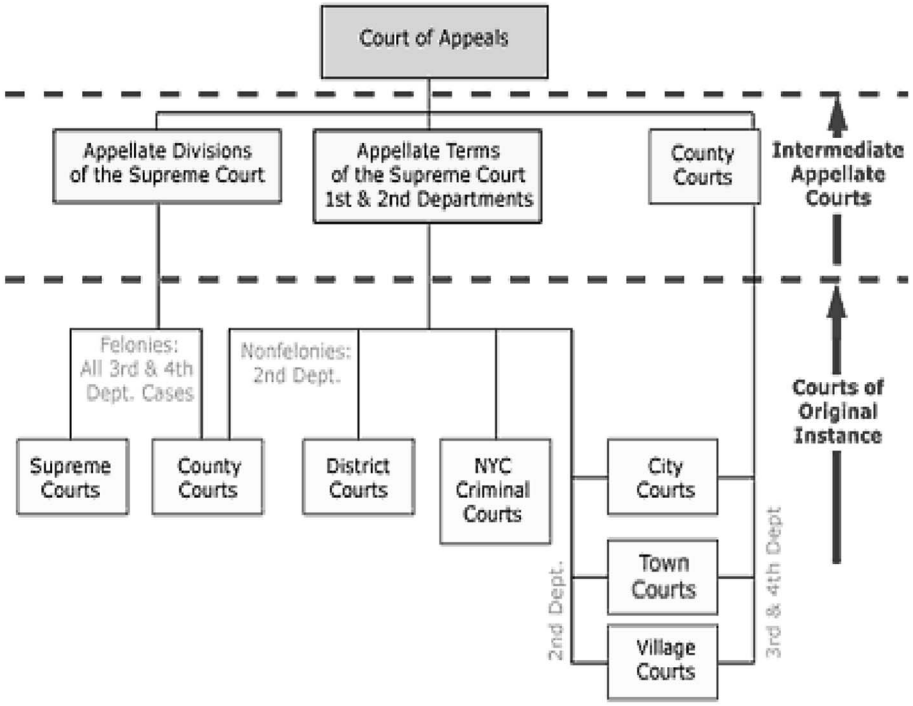
THE FEDERAL COURTS



Appendix B

NEW YORK STATE COURTS

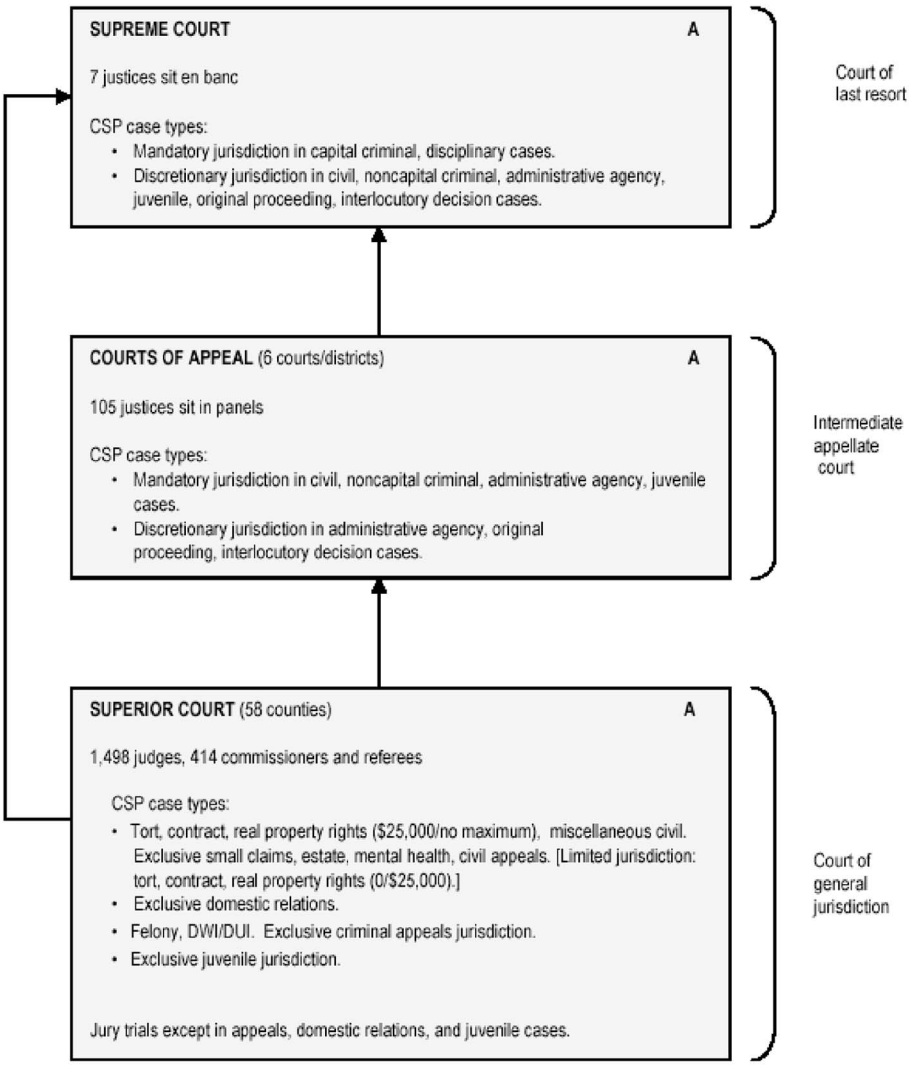




Appendix C

CALIFORNIA STATE COURTS

CALIFORNIA COURT STRUCTURE



Appendix D

GEOGRAPHIC BOUNDARIES OF THE FEDERAL COURTS