

HANDOUT OF PROBLEMS, COURSE INFORMATION, SONGSHEETS, AND CARTOONS

Contents

Course Objectives: Procedure I	3
Complaint No. 1 [On Undefined Claim]	4
Complaint No. 2 [On Promissory Note Not Yet Payable]	4
Complaint No. 3 [On Promissory Note That Is Unpaid But Is Payable]	4
Litigation Problem No. 1:.....	5
Dixon v. Golden Age Insurance Co.	5
Yania v. Bigan	7
Litigation Problem No. 2:.....	8
Litigation Problem No. 3:.....	8
Litigation Problem No. 4:.....	9
On Teaching Civil Procedure	10
International Shoe (The Long-Arm Song)	12
Worksheet for Analyzing Chapter Summary Problem (The Due Process Issue).....	13
Some Concepts in Logic.....	14
Barry Brainspring Comix.....	15
It's Got to Be Part of the Claim.....	17
Review Problem: Jurisdiction and Venue	18
The Who Shocked the Cows Rap.....	19
Optional Class Meeting With Beer, Soft Drinks, and Pretzels	20
Litigation Problem No. 4: <i>Smith v. Anton</i>	21
Documents Produced By the State's Prosecution of John S. Anton	21
State's File Cover	22
Information Filed by State.....	23
Offense Report	24
Supplementary Offense Report.....	25

Texas Peace Officers Accident Casualty Supplement	26
Investigating Officer’s Diagram of the Scene	28
THE <i>ERIE</i> DOCTRINE	29
PROCEDURE OR SUBSTANCE?.....	29
NOTE ON CASES THAT CREATED THE FIVE SUBSTANCE-PROCEDURE APPROACHES	29
BRISTOL-MYERS SQUIBB CO. v. SUPERIOR COURT	31
[D] Removal: Defendant’s Key to the Federal Courthouse	31
TEXAS BRINE COMPANY, L.L.C. v. AMERICAN ARBITRATION ASSOCIATION	32

Course Objectives: Procedure I
Professor David Crump

I. PRIMARY OBJECTIVE

- A. To make students familiar with our system of litigation as it functions today.

II. OTHER MAJOR OBJECTIVES

- A. To explore alternatives or possible improvements to our litigation system.
- B. To begin establishing an understanding of the daily tasks of a litigation lawyer so that students may begin the difficult business of making career choices.
- C. To introduce the practical skills needed to conduct a litigation practice (such as drafting, document preparation, interrogation, discovery skills, fact-gathering, negotiation, witness examination, argument, counseling, financial decisionmaking, business management, and the skills associated with ethical and professional practice, among others).
- D. To teach the skills of statutory analysis and analysis of appellate opinions (to the extent not already emphasized in other courses).

III. SECONDARY OBJECTIVES

- A. To introduce jurisprudential concepts (or in other words, the differing philosophies that judges may exhibit in their approaches to cases).
- B. To provide a basis for appreciating the content of upper-level litigation courses (such as Procedure II, Procedure III, Evidence, Federal Courts, Conflicts, Clinical Litigation courses, and Trial Practice).
- C. To facilitate understanding of substantive-law courses (including the first-year courses in Contracts, Torts, Property and Constitutional Law), which primarily are taught in a litigation context and whose content is affected by the prospect of litigation.
- D. To confront the question, “How can an ethical, professional litigator live a complete and balanced professional life?”
- E. To preserve to the student decisions about political and social philosophy in the choice of career and ultimate values (except those values inherent in professionalism).

Complaint No. 1 [On Undefined Claim]

1. Because of circumstances that have occurred in the past, Defendant has become legally required to pay Plaintiff damages in the amount of \$ 100,000.
2. Defendant refuses to pay anything to Plaintiff, representing only that he does not understand why Plaintiff claims to be owed anything.

Wherefore, Plaintiff prays that Defendant be ordered to pay \$100,000 to Plaintiff now.

[Signature]

Complaint No. 2 [On Promissory Note Not Yet Payable]

1. Defendant executed and delivered to Plaintiff a promissory note, attached as Exhibit 1, by which Defendant agreed to pay \$100,000 on January 1 of the year 2020.
2. Although the promissory note is not yet payable, Plaintiff wants the money now and asks that the Court order Defendant to pay \$100,000 now, even though there is no legal, equitable or moral obligation of Defendant to do so.

Wherefore, Plaintiff prays that Defendant be ordered to pay \$100,000 to Plaintiff now.

[Signature]

Complaint No. 3 [On Promissory Note That Is Unpaid But Is Payable]

1. Defendant executed and delivered to Plaintiff a promissory note, attached as Exhibit 1, by which Defendant agreed to pay \$100,000 on January 1, 1994.
2. By its terms, the promissory note is due and payable, but Defendant has refused to pay upon demand. Defendant owes Plaintiff the amount of the note.

Wherefore, Plaintiff prays that Defendant be ordered to pay \$100,000 to Plaintiff now.

[Signature]

Litigation Problem No. 1:

Dixon v. Golden Age Insurance Co.

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

Deanna Dixon)
V.) CIVIL ACTION NO. H-95-12345
Golden Age Insurance Co.)

PLAINTIFF DIXON’S COMPLAINT

Deanna Dixon, Plaintiff, complains of Golden Age Insurance Company, as follows:

1. Plaintiff is a citizen of the State of Texas. Defendant is a corporation incorporated under the laws of the State of Delaware having its principal place of business in the State of New York. The matter in controversy exceeds, exclusive of interest and costs, the sum of fifty thousand dollars. Defendant does business in Texas by numerous agents and insurance contracts and can be served by serving its registered agent, B.T. Corporation Services, Inc., at 1234 Smith Street, Dallas, Texas 75201. A substantial part of the events or omissions giving rise to the claim occurred in the Southern District of Texas.
2. Plaintiff is the widow of Donald Dixon, deceased. She is the sole heir at law and is executor of the estate of Donald Dixon.
3. Deceased applied to Defendant for a contract of life insurance. In the course of evaluating his application, Defendant employed physicians to examine deceased. Defendant refused to insure deceased, citing “confidential medical information.” Plaintiff and deceased both made numerous requests and entreaties to Defendant to inform them of the life-threatening condition that deceased implicitly suffered from, but Defendant absolutely, adamantly refused to do so.
4. Deceased died on January 1, 1995, approximately 18 months after the examination by the physicians engaged by Defendant. The cause of death was a coronary infarction due to complications from a defective mitral valve. Had deceased known about this condition at or near the time of the examination, his death could have been avoided. Plaintiff believes that discovery will provide evidentiary support for the allegation that decedent’s defective mitral valve was contained in the “confidential medical information” that Defendant inexcusably refused to disclose.
5. Defendant willfully, intentionally and negligently caused decedent’s death.

For these reasons, Plaintiff prays that she have judgment against Defendant for her and decedent’s past and future physical and mental pain and suffering, lost wages, medical and health care expenses, and funeral expenses, as well as exemplary damages.

Respectfully submitted,
Lauren Norder, Attorney for Plaintiff

[Style omitted here; same as above]

DEFENDANT GOLDEN AGE’S MOTION TO DISMISS

1. Defendant Golden Age moves the Court to dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.
2. Defendant admits the allegations of paragraphs 1, 2, 3, and 4, except that Defendant denies that it acted adamantly and it is without information sufficient to form a belief as to the truth of the allegations that the cause of death was a coronary infarction due to complications from a defective mitral valve or that decedent’s death could have been avoided.

Defendant denies the allegations of paragraph 5 and of the prayer.

Respectfully submitted,
A. Tomey, Counsel for Defendant

Counsel for Defendant:

Using (and stating) the standard for dismissal of a complaint, argue to the Court that Plaintiffs claim is not supportable either in contract or in tort and should be dismissed.

Counsel for Plaintiff:

Also rely on and state the standard for dismissal, and argue against dismissal. Use common sense rather than legalistic arguments, except in one respect—be legalistic about the standard for dismissal of a complaint.

The problem is adapted from John Schwartz, “Insurer Goes to Court to Defend Refusal to Tell Man He Had AIDS,” *Hous. Chronicle*, Aug. 5, 1996, §A, at 10, col. 1 (reporting on judgment for defendant, appeal pending in the Fifth Circuit).

[Assume that the following case is the only relevant authority for Litigation Simulation No. 1.]

Yania v. Bigan
155 A.2D 343 (Pa. 1959)

BENJAMIN R. JONES, Justice.

A bizarre and most unusual circumstance provides the background of this appeal. On September 25, 1957 John E. Bigan was engaged in a coal strip-mining operation ... On the property being stripped were large cuts or trenches [full of water] created by Bigan when he removed the earthen overburden for the purpose of removing the coal underneath.... Joseph F. Yania, the operator of another coal strip-mining operation, ... went upon Bigan's property for the purpose of discussing a business matter with Bigan, and, while there, [was] asked by Bigan to aid him in starting the pump. ... Yania stood at the top of one of the cut's side walls and then jumped from the side wall—a height of 16 to 18 feet—into the water and was drowned.

Yania's widow [sued] Bigan, contending Bigan was responsible for Yania's death. Preliminary objections, in the nature of [motions to dismiss], to the complaint were filed on behalf of Bigan. The court below [dismissed.] ... [I]n the nature of [motions to dismiss], every material and relevant fact well pleaded in the complaint and every inference fairly deducible therefrom are to be taken as true.

The complaint avers negligence in the following manner: ... "After [Yania] was in the water, a highly dangerous position, ... [Bigan] failed and neglected to take reasonable steps and action to protect or assist [Yania], or [to extract] [Yania] from [his] dangerous position" Summarized, Bigan stands charged with ... negligence ... by failing to go to Yania's rescue after he had jumped into the water....

... The mere fact that Bigan saw Yania in a position of peril in the water imposed upon him no legal, although a moral, obligation or duty to go to his rescue unless Bigan was legally responsible, in whole or in part, for placing Yania in the perilous position. Restatement, Torts, § 314. Cf. Restatement, Torts, § 322. The language of this Court in *Brown v. French*, 104 Pa. 604, 607, 608, is apt: ... "[The deceased] may have been, and probably was, ignorant of the risk ... But ... the result ... must rest with himself-and cannot be charged to the defendants." The complaint does not aver any facts which impose upon Bigan legal responsibility for placing Yania in the dangerous position in the water and, absent such legal responsibility, the law imposes on Bigan no duty of rescue. [Dismissal Affirmed.]

Note on How to Use This Case In Litigation Simulation No.1

Yania v. Bigan is consistent with the laws of most American jurisdictions. There is no duty to aid another person who is in a position of peril, even if the actor could provide aid with no danger to himself or herself, *unless* the actor has somehow created the peril, or *unless* there is some sort of "special relationship" that creates a duty of rescue. In Litigation Problem No. 1, there is no allegation that the defendant created the peril. Therefore, the plaintiff will need to argue that the parties stand in a "special relationship" such that a duty to provide assistance should be imposed upon the defendant. A hotel operator has a relationship with a guest that creates duties, for example. So does a parent with respect to a child, or a lawyer with respect to a client.

Defendant will argue first (because Defendant is the Movant). Start by stating the **standard for dismissal of a complaint**. Then, the defendant will argue that the motion to dismiss should be granted by arguing that the case fits the rule that there is no duty to aid a person who is in peril, is analogous to *Yania v. Bigan*, and does not involve either creation of peril or a relationship that creates a duty. Defendant also will explain why common sense and public policy should lead to this rule. Plaintiff will also begin by **stating the standard for dismissal** and will argue that *Yania v. Bigan* is distinguishable, that the no-duty rule should not apply, and that common sense and public policy require recognizing a relationship between the parties that would give rise to a duty. Defendant will provide a brief rebuttal. Do not do any other research, beyond reading this litigation problem, the *Yania* case, and these notes.

Litigation Problem No. 2:

You are a member of a law firm that represents the Acme Bank. The Bank holds a promissory note which is due and unpaid. The loan officer, Donald Stone, tells you that the note originated when Joe Blow applied for a loan of \$85,000. Donald Stone concluded that a promissory note from Joe Blow would be inadequate to protect the Bank because Joe Blow was a notorious deadbeat. Joe Blow suggested that his brother, John Blow, co-sign the note. Donald Stone says he called John Blow and relayed this suggestion to him. John Blow then came to the offices of the Bank, according to Donald Stone, and co-signed the note. Stone says he was relaxed and pleasant.

Now, Joe Blow is deceased and his estate is insolvent. The Bank has been unsuccessful in getting John Blow to pay and wishes to file suit. Donald Stone has possession and control of the payment records, which are kept on the cover of an envelope in which the loan is retained, and they show no payment entries, indicating that no payments have been made. Stone has learned that in his answer, John Blow will admit to most allegations of the complaint, except that John Blow will take the position that he can neither admit or deny what is unpaid on the note because he has no way of knowing what payments may have been made; and, in addition, John Blow will take the position that he co-signed as a result of duress initiated by the Bank.

Incidentally, Acme is a corporation chartered under the laws of, and having its principal place of business in, Texas. John Blow is a citizen of New York, residing at 1234 Jones Street, New York City, N.Y. 00001.

1. Draft a complaint suitable for filing in the United States District Court for the Southern District of Texas, Houston Division (where the Bank's principal office is) on behalf of the Bank. Use Federal Forms 7 and 10 for the allegations and imitate the *Weitinger v. 2 Officers* (Chapter 1) complaint as to format. This assignment should be easy because most of the complaint can be copied verbatim. **Write or type compactly and do not skip any lines in drafting (not even at the title or signature).**
2. Draft five or six interrogatories on behalf of the Bank designed to learn from John Blow what facts he bases his duress assertion upon. You need not write a heading or formal language, just the questions. You may assume that the instructor will draft an answer for Blow conforming to the above description. Do not skip any lines (**see the instructions for the complaint, above**).
3. Draft an affidavit to be signed by Donald Stone in support of a motion for summary judgment against Blow. At the top put "COUNTY OF HARRIS/STATE OF TEXAS: My name is Donald Stone. I have personal knowledge of the following facts and am competent to testify to them" and end with a jurat ("Subscribed and sworn to before me, the undersigned authority, this ___ day of ___, 20__"). Again, do not skip any lines (**see instructions for complaint**). The motion will be drafted by instructor.

Litigation Problem No. 3:

Consider the fact situation in *Bivens v. Six Unknown Agents*, which is noted in the casebook at pp. 186-87, and the contentions outlined in the opinion, and do the following tasks. **As in litigation problem No. 1, draft compactly and do not skip any lines, even after the heading or before signature.**

1. Draft a complaint on behalf of Bivens, suitable for filing in the United States District court for the Southern District of Texas, Houston Division. Join as defendants both the six agents and the Federal Bureau of Narcotics. With respect to service, deal only with the Bureau, pleading completely how it should be served; and omit service instructions for the agents. Assume that all events in question happened in the Southern District of Texas. Show jurisdiction first, and then state your first claim, under the Constitution. Then, assert a *second* claim arising under the state law of assault and battery (be sure, in your assertion of jurisdiction, to state that you invoke the doctrine of supplemental jurisdiction). Strive for brevity, but comply with the federal rules.

2. Draft a Rule 12 motion on behalf of the Federal Bureau of Narcotics, requesting **(a)** dismissal for failure to state a claim, **(b)** in the alternative, a more definite statement, and **(c)** exercise of the court's discretionary authority to dismiss the supplemental jurisdictional claim.
3. Draft an answer on the merits for the officers, who say they acted on probable cause, without time to procure a warrant, because Bivens was said to be about to move a large quantity of narcotics, with no more force than was reasonable and necessary. Be sure to preserve defenses based upon **(a)** the officers' authority under federal law as officers of the FBN and **(b)** the defense of "good faith" (which is a defense to many kinds of civil rights actions), and any other defenses you think applicable.
4. Draft a set of interrogatories to the officers (you represent Bivens). As one of your questions, ask the identity of any persons furnishing information upon which probable cause was based.
5. Draft a request for production, directed to the FBN by Bivens.
6. Take the deposition of one of the officers, in class (limited to roughly 5 to 10 minutes). A former law enforcement official will be present to play the part of the officer (you represent Bivens).
7. Take Bivens's deposition (you represent the officers).

Litigation Problem No. 4:

Smith v. Anton. Certain materials will be handed out to you later, constituting the State's file in a criminally negligent homicide case. We will undertake in class to prepare and try a civil case arising from the same incident, with different student teams doing all steps from pleadings through post-trial. Assignments will follow. This problem will culminate in a jury trial in one class meeting.



LAW SCHOOL REPORT

Serving The Legal Profession Since 1887

SEPTEMBER, 1988

[The following articles, written by Mr. Lipson and Professors Catz and Crump, illustrate approaches to teaching students civil procedure. We hope you find these articles stimulating. — Editors.]

ON TEACHING CIVIL PROCEDURE

Michael H. Lipson, Esquire
Robert S. Catz
Professor of Law
Cleveland State University

David Crump
Professor of Law
University of Houston

Of all first-year courses faced by beginning law students, procedure is the most alien. Neither common sense nor social conscience suffices, in the first analysis, as a means for students to grasp the system. In our view, several essential elements contribute to the effective presentation of the subject: A focus on the litigation context; an emphasis on the frequently responsive nature of the lawyer's analysis of procedural issues; problem-solving versus case abstraction; and attention to the reality of the process. Combined, these approaches reduce common impediments to the acquisition and use of knowledge concerning the rules governing the procedural system in which civil litigation takes place.

The suggested approach by no means ignores the important conceptual areas traditionally emphasized in a civil procedure course. On the contrary, it should give considerable attention to these. However, conceptual topics like jurisdiction, venue and notice never arise in the abstract, but rather when a litigant makes some sort of "misstep"—at least in the view of his opponent. Showing students where, within the litigation process, these questions arise, and when and how they do, is as important to the study of procedure as teaching the analysis of such problems.

Much of what occurs in civil litigation occurs in response to action by the "other side". The lawyer's cultural role is to evaluate what he or she has received, and to make a response to it. Consider the receipt of an "ill-founded" motion, discovery inquiring into protected areas, or an answer raising affirmative defenses that one must inquire about in a deposition. The development of students as procedural advocates occurs most readily when they are asked to deal with problems which require them to develop, argue and evaluate one or both sides of a procedural issue by reference to the Rules and cases interpreting them. Trying out "approaches" to problems, and evaluating their pros and cons, is measurably more effective in engendering an understanding of civil procedure than the "hide-the-peanut" approach of discussing briefed cases. Our practice in teaching, almost exclusively, was to use cases only as sources of analysis helpful in the solution of problems. This is not to denigrate the cases at all, but rather to train students to employ them as a lawyer would employ them.

Many students enter law school with minimal knowledge of the courts, their personnel, their practices, or how law-

(Continued on P.2)

Civil Procedure is the hardest course in the first-year curriculum to teach well.

All of the other subjects seem more familiar. In Torts class, for instance, students already understand that a punch in the nose is an assault. They also have experience that prepares them for the contracts course, because every one of them has been a party to some kind of transaction involving a detailed agreement. But in Civil Procedure, they suddenly have to deal with unfamiliar, abstract concepts like ancillary jurisdiction or persons necessary for just adjudication.

And there are other difficulties that conspire against the Civil Procedure professor. Many schools have gone to four-hour courses, and often they cram this difficult subject matter into that vulnerable first semester of the first year. What is more, Civil Procedure is the principal rule-oriented course for the first year; however, there is no subject matter in which the practice deviates so much from the theory.

That is why, when I teach Civil Procedure, my main objective is simple: to teach how our litigation system works. I concentrate on making students familiar with our system for resolving civil disputes. This seemingly modest (but in fact difficult) objective has very practical implications for the way that I conduct the class.

Choosing the Teaching Materials. I want a book with a no-nonsense organization—one that describes our litigation system as it is. There are some books that seem, instead, to be designed to show how creative the authors are, and others in which the author has superimposed his own idiosyncratic organization on the system—an organization that students will be required to un-learn when they struggle to begin practice. For my class, I want the book to be "user-friendly"—I want students to come to class as knowledgeable and unconfused as they possibly can be, so that I can get across the basics and move on to more interesting issues.

Course Coverage. I think it's important to provide students with a basic understanding of every stage of the litigation system, not just a few chosen issues. I've been acquainted with professors who taught jurisdiction and pleadings, and not much more. "You can't cover in depth all of the subjects that are in the book", these professors explain. "I'd rather cover a few chapters well." I understand the motivation for this approach, but I disagree—because I

(Continued on P.2)

Lipson & Catz (Continued from P1)

yers communicate with them. Often they lack even a rudimentary knowledge of procedural terminology. An important part of the task for a procedure teacher is to give students a strong sense of the reality of litigation practice.

Knowing the Rule becomes a much less demanding process if the student understands in what format he or she is likely to have to consider it. Knowing how one would communicate a procedural argument about the Rule to the court facilitates an understanding of its importance. Show students, and let them study, the arguments made by "real" lawyers on procedural issues in "real" cases. Show them mostly the "good" ones, but also some "bad" ones, and by doing so accustom them to the range of quality they will see later.

A tremendous benefit also can be gained from assigning students the preparation of pleadings, motions and accompanying memoranda. These assignments are especially worthwhile if commenced "serving" the students with a pleading or motion, and a simply structured set of facts, and requiring a response based upon factual analysis and some legal research. Some students will complain bitterly that they are being singled out for this "extra work" (if you are not the only civil procedure teacher); but all of these will

return to you in later years expressing appreciation for the experience.

Procedure should be a lineal course of study. The sensible way to approach it is by tracking the course of a civil action—as much as possible—from beginning to end, emphasizing the commonly-encountered issues along the way, as they commonly will be raised by contesting litigants. In doing so, one ought to try to emphasize the fundamentals.

We tend to believe that the practitioner who possesses a sophisticated knowledge of procedure has based that knowledge on a solid understanding of the basic process, the rules which govern it, and the policies which drive the construction of those rules. We tend also to think that far more serious procedural blunders occur with respect to the basic building blocks of procedure, those things one would expect everyone to know—than with respect to issues on the cutting edge. Ensuring comprehension of the building blocks will produce the capacity to deal with the arcane, on those rare occasions it arises.

Mr. Lipson and Professor Catz are the co-authors of the casebook *Materials on the Process of Federal Civil Litigation*, available now from Matthew Bender.

Prof. Crump (Continued from P1)

think that a student who doesn't learn at least something about each of the major stages that a complete law suit may go through—e.g., discovery, jury charge, judgment—won't understand the process as a whole.

Teaching Methods: Careful Case Selection, Periodic Reviews, and Hard Work for the Students. To cover the course the way I want to in my allotted time, I carefully pick and choose cases, notes, and questions to assign for reading. I provide students with a syllabus of all of the course readings on the first day of class, showing what to read and what to omit. I also set aside three hours for periodic reviews during the semester. The Civil Procedure course throws difficult concepts at my students, and these reviews help them to consolidate and retain what they have learned. Furthermore, I tell my students in the very first week that they will work harder in this course per credit hour than in virtually any other course in law school. This announcement scares them, but I find that they would rather know in the beginning.

Teaching the Federal Rules. Obviously, I want my students to have a good working knowledge of the Federal Rules of Civil Procedure. My syllabus has all of the Rules set out adjacent to the case to which they pertain. This helps to get the students to read the Rules. I also expend a fair amount of effort early in the course encouraging students to break down Rules into their component parts. At several points during the semester, I write excerpts from the Rules on the board and have students identify the conditions that must be demonstrated to trigger application of the Rule, writing "1", "2", "3", etc. beside the various clauses. It's worth the effort—because it never ceases to amaze me how much difficulty some students have in reading the Rules.

Understanding Change and Growth: "Improving the System." Although my main goal is to make my students understand our procedural system as it is, a good lawyer has to be responsive to change, and so I spend a concentrated period at the end of every chapter analyzing with my students how the Rules could be improved. A comprehensive discussion of possible improvements at the end of a chapter tends to inspire more general solutions and more crea-

tive thought than *ad hoc* references during case discussions.

Insights into the Practice. Exposure to litigation practices reinforces students' understanding of the theory. And so when I teach Civil Procedure, I expose my students to complaints, answers, motions to dismiss, discovery materials, summary judgment documents, excerpts from trial transcripts, charges, and post trial motions. There are casebooks available that integrate these materials into the course coverage, and there are several good "Story of a Civil Suit" paperback supplements on the market. If it's done right, this kind of teaching can be the high point of the course.

Alternative Dispute Resolution. Today, a Procedure professor gives her students an incomplete picture if she does not expose them to alternate methods of dispute resolution as counterparts to traditional litigation. Again, there are excellent teaching materials available that provide the vehicle. I always have a hard time reaching the Alternative Dispute Resolution chapter, but I try to make myself do it, even in my four-hour format, because ADR's provide a comparative view that makes for better understanding of litigation.

• • •

The biggest enemy of the Civil Procedure professor is not the difficulty of the material, but time—and poor planning about how to use it. To paraphrase Andrew Marvell (who spoke in a very different context): At my back, I always hear/ Time's winged chariot: hurrying near, whenever I teach Civil Procedure.

But every Fall, the Civil Procedure course is where I want to be working. Teaching this extraordinary subject is one of the biggest challenges of my life. I have the satisfaction of knowing that my students have won a door prize: They take away with them a sound understanding of one of the most difficult and important subjects in all of the law.

Professor Crump is co-author with William V. Dorsaneo, III (Southern Methodist University), Oscar G. Chase (New York University), and Rex R. Perschbacher (University of California - Davis) of *Cases and Materials on Civil Procedure*, available now from Matthew Bender.

International Shoe (The Long-Arm Song)

copyright 1987 by David Crump

International Shoe, they had some hot merchandise;
Shipped it all off to Seattle.
Sold lots of boots, sandals, sneakers and shoes,
But they got into a legal battle.
In Washington State they had-a-several salespersons,
Occasionally rented a showroom;
Supreme Court said that that was enough
To subject them to suit in that forum.
Court reasoned thusly--they said:

CHORUS: DIDDY-WAH DOO-DUM, DIDDY-WAH DING-DONG,
 DIDDY-WAH SHOO-BOP-BOP;
 TRADITIONAL NOTIONS OF FAIR PLAY AND SUBSTANTIAL JUSTICE.

Mr. Justice Black he was-a-dissatisfied,
So he weighed in with a blistering dissent--
The essence and gravamen of which, was that
He didn't know what the majority meant.
He said to the Court, "In that Positivist tradition,
That's the vaguest legal test I ever saw.
"We ought to reach decisions in these Bill of Rights cases
"Under neutral principles of law.
"Instead of just saying—

CHORUS

Mrs. McGee's decedent was solicited and he bought
A single insurance contract;
That was held to be sufficient although the company
Had no other California contacts.
Then came a case with a completely foreign cause of action,
But due process still saved the day--
'Cause officing in the neighborhood was held to be enough
In Perkins against Benguet.
The Court kept on saying—

CHORUS

add: WELL, WE DON'T KNOW WHAT THE LEGAL TEST MEANS EITHER, AND YOU'LL JUST HAVE TO
 TRUST US.

Then Heitner sued Shaffer in a Delaware court,
Tried to claim the court had in rem jurisdiction;
What he wanted was a judgment *in personam*, and in rem
Was nothing but a legal fiction.
Court had to overrule Pennoyer and Neff
And other precedent stretching back to a lost age.
They said, you can't make a person submit to being sued
Just by holding his property hostage.
Then Hanson against Denckla brings to an end
This long line of cases so carefully erected
All the trustee did was to mail letters to
The State the settlor had selected.
Court said they got to take purposeful advantage;
Don't you know the plaintiff was surprised to lose.
And I guess that mailing letters is just different from selling shoes.

... REPEAT CHORUS

Worksheet for Analyzing Chapter Summary Problem
(The Due Process Issue)

This worksheet is designed to help you work through the first issue you will encounter in the problem, by providing a format for notes (which needn't be elaborate, just sufficient to enable you to respond in class).

[The first issue concerning jurisdiction has to do with the federal due process clause.] **1. The legal principles governing this issue are as follows** (*you should be able to give all applicable legal principles, in complete sentences*):

2. The problem facts relevant to these legal principles, and their applicability to the principles, are as follows (*you should be able to be exhaustive in enumerating the relevant facts, and you should tell how each fits with the legal principles*):

3. Therefore, my conclusion with respect to this issue is (*if you've done it right, this is the easiest part*):

Next, go on to the second jurisdictional issue (*suggestion: It's a state law issue*). After you've dealt with all the jurisdictional issues, draw an overall conclusion; then, go on to the next question in the problem and use the same three steps.

Some Concepts in Logic

1. Syllogism:	Major premise, minor premise, conclusion Example: <ul style="list-style-type: none">• All tomatoes are green.• This object is a tomato.• Therefore, this object is green. <i>(Valid only if syllogistic in form and if premises true.)</i>
2. Analogy	Controlling aspect same; result same. Example: <ul style="list-style-type: none">• Newspapers are protected by the first amendment.• Radio is like newspapers in the relevant aspects.• Therefore, radio is also protected by the first amendment. <i>(Valid only if we pick out the correct aspects as analogous.)</i>
3. Legal Reasoning:	Heavy use of syllogism, analogy. The “IRAC” method is basically syllogistic: <ul style="list-style-type: none">• The rule is major premise; analysis of facts produces minor premise.• Analogy often is the basis of the analysis of facts as well as of novel questions of law.
4. False Reasoning – ARC Method	The “ARC” method: assertion, repetition, conclusion. Example: <ul style="list-style-type: none">• “Minimum contacts are present.• Defendant derived revenue from the state.• Therefore, due process is satisfied.” <i>(Where is the rule? The facts?)</i>
5. False Reasoning – Conclusion First	“Yes, there is jurisdiction, because”
6. Induction: Generalization from Experience	“The sun has risen every day we know of; therefore, it will rise tomorrow.”

Barry Brainspring Comix

**BARRY
BRAINSRING
COMIX**

ADVENTURE NO. 1:
PAYNE V. BRASH

OUR HERO IS CONTEM-
PLATING HIS LAWSUIT
IN PAYNE V. BRASH...



HA! I FILED IT
IN STATE COURT.
THE JUDGE HATES
THE DEFENSE
LAWYER, HARRY
AIREDALE, OF
AIREDALE,
TERRIER + PUG.

BUT
LATER...



OH, NO! THAT
SORRY, NO-GOOD
X@!Z#!@!!@#
AIREDALE
REMOVED
THE CASE! *

* TO FEDERAL COURT.



BUT I'VE GOT
THE SOLUTION!
I'LL FILE A MOTION
TO REMAND!
THAT OUGHT
TO DO THE TRICK,
BECAUSE I DON'T
WANT IT TO BE
REMOVABLE!!

FLASH!! NOW WE ARE
IN JUDGE GUMMER'S
CHAMBERS AT A PRETRIAL
HEARING. THE JUDGE ASKS
BARRY ABOUT HIS MOTION
TO REMAND!!!!

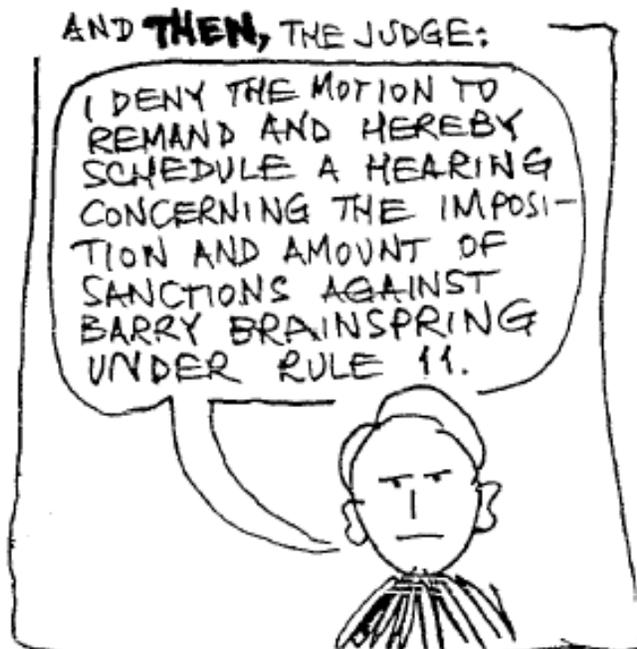
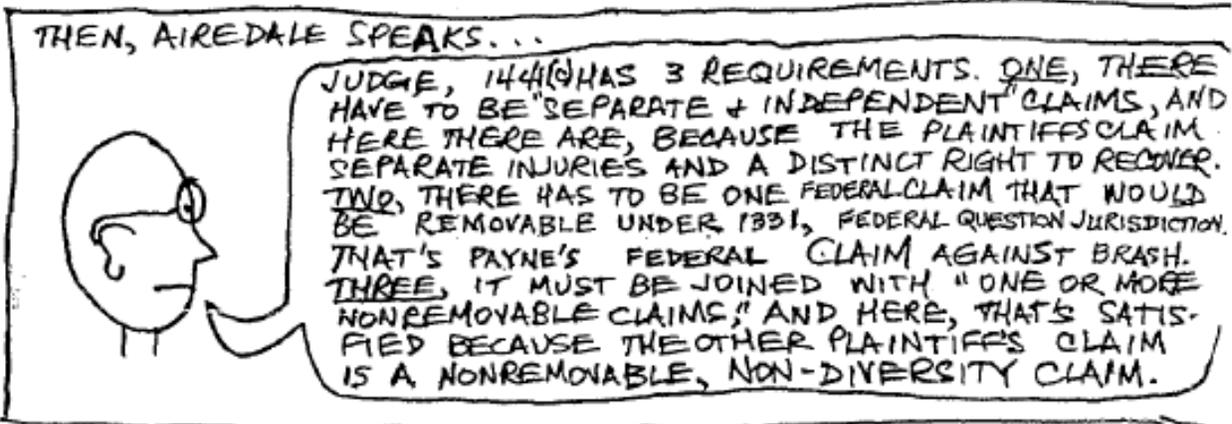
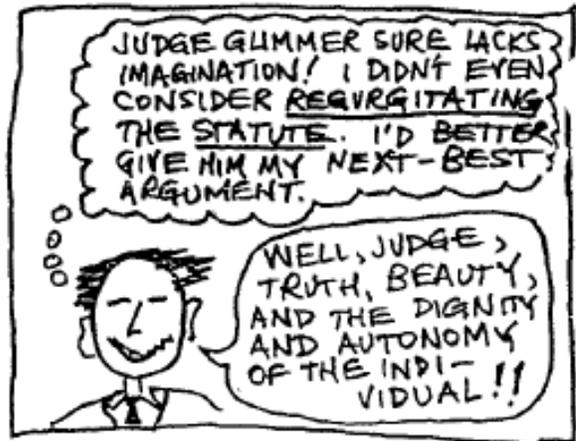
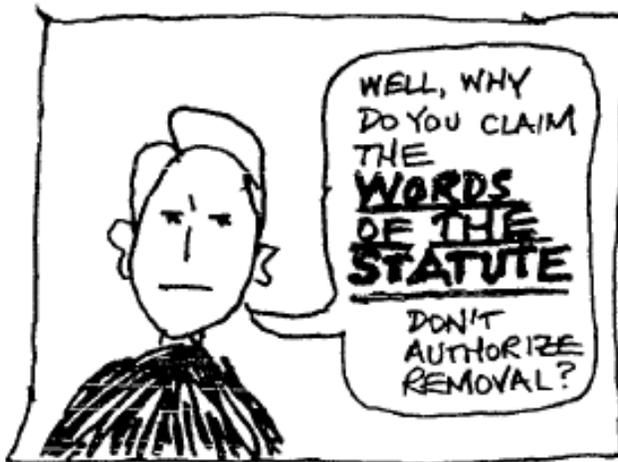


SO, MR. BRAINSRING,
WHY DO YOU THINK
REMOVAL ISN'T AUTHO-
RIZED BY THE CON-
TROLLING ACT OF CON-
GRESS, § 1441?
SEEMS TO ME IT IS.



I'M GLAD YOU
ASKED THAT
QUESTION!
THE ANSWER IS,
JUSTICE
AND THE
AMERICAN WAY
CRY OUT
FOR THE
REMAND OF
THIS CASE.

© 1987 BY DAVID CRUMP



It's Got to Be Part of the Claim

(c) 1990 by David Crump

The Mottleys had a deal with the railroad
For the rest of their lives they'd ride for free
Congress passed a law, said the Mottleys had to pay
The same fare that applies to you and me.
The Mottleys were mad as a hornet
Thought that was illegal ... and rude.

The Mottleys pled the Act of Congress
Don't you know they pled the fifth amendment too
It seems as far as the pleading federal law would go
They'd done about the best that they could do.
But some law clerk, who had no sense of humor
Told the judges they had to dismiss the complaint.
He said, "I've seen many complaints that were well pleaded
"But I'm afraid that this is one that ain't."

CHORUS: Federal question is a misleading name
 A federal DEE-fense just isn't the same
 And that's why the Mottleys can't sue the train
 It's got to be part of the claim.

The Mottleys were very disappointed
When the Supreme Court handed down that landmark case
Said the federal question's got to be an ingredient of the claim
Can't be just stuck in there, any old place.
The Mottleys ... had a state law contract claim
And it seems they just didn't realize
It won't do to anticipate a federal defense
Federal law's gotta be where the claims arise.

REPEAT CHORUS

Review Problem: Jurisdiction and Venue

VIC TUMM has been injured while riding on a carnival ride called a “Shake-a-Snake” in his home town, which is Omaha, Nebraska. He has decided to sue the manufacturer, SNAKE INC. He also knows that he has a potential claim against the local operator of the carnival ride, called LOCAL YOKELS INC.

Claimant TUMM thinks he has two claims against SNAKE INC., one that is an ordinary negligence claim, and one that is a negligence per se claim based upon a statutory/regulatory violation, in that he thinks the Shake-a-Snake and its operation violated the federal Occupational Safety and Health Act (OSHA) and regulations promulgated under that Act.

SNAKE INC. is a corporation incorporated under the laws of Delaware and having its principal place of business in Texas. LOCAL YOKELS is a corporation incorporated under the laws of and having its principal place of business in Nebraska, residing in Omaha.

SNAKE INC. manufactured the Shake-a-Snake 20 years ago in Texas and sold it to a Texas company as a unique piece of machinery. That company sold it to another company, which ultimately sold it to LOCAL YOKELS.

During that 20 years, the Shake-a-Snake travelled around the country, appearing at fairs, rodeos, political rallies, etc., so that it has been used in about 25 different States, including Nebraska, before being sold to LOCAL YOKELS, which has operated it in only one location, in Nebraska.

SNAKE INC. maintained a technical service branch that fielded calls for fixed charges from all of those states, including Nebraska, from time to time, and it shipped and sold parts to service the Shake-a-Snake to various states including Nebraska. But SNAKE INC. has had no connection with LOCAL YOKELS at all, and it appears it has never had any other contacts with Nebraska. Today, SNAKE INC. has no business or contacts outside Texas, where it operates a chain of lucrative hazardous waste dumps, except that it still is the corporation that manufactured, did technical service for, and shipped parts for the Shake-a-Snake.

TUMM’S lawyer plans to file suit against both SNAKE INC and LOCAL YOKELS in a state district court in Omaha. Actually, TUMM’S lawyer has come to an agreement with LOCAL YOKELS that it will pay a grand total of \$100 and then its personnel will testify that everything was SNAKE INC’s fault, but this settlement has not yet been implemented.

SNAKE INC. does not want to be sued in a state district court and also does not want to be sued in Nebraska or in Omaha. SNAKE INC would much rather find a way to have the case heard in federal court and outside Nebraska.

The question, to you, is to analyze all potentially applicable legal doctrines that might affect the location of the forum. Therefore, this problem requires you to analyze all applicable issues of **(1)** subject matter jurisdiction, **(2)** personal jurisdiction, and **(3)** venue, as well as **(4)** all possible means of changing, attacking or altering them in this situation, to determine whether SNAKE INC. can avoid TUMM’S intended forum or whether TUMM can hold the jurisdiction and venue where they are.

The Who Shocked the Cows Rap

Who shocked the cows?

Who shocked the cows?

If you don't know the whys and you don't know the hows,

You can join them all together

And find out whether

It's the maker, distributor, or even the installer,

Or maybe all three, ... who ...

... Who shocked the cows?

Who shocked the cows?

There are just three factors, Rule 20 allows!

(1) Jointly, severally, or in the alter-nation,

(2) A com-mon question within the combination,

And (3) just one series trans-act-sinations;

(That last one's the key) ... to ...

... Who shocked the cows?

Who shocked the cows?

If you don't know the whys and you don't know the hows,

You can join together plenty

Of folks, with Rule 20.

It's fun! And it's easy to do!

So try it, and maybe, then, even you—Can find out ... who shocked the cows.

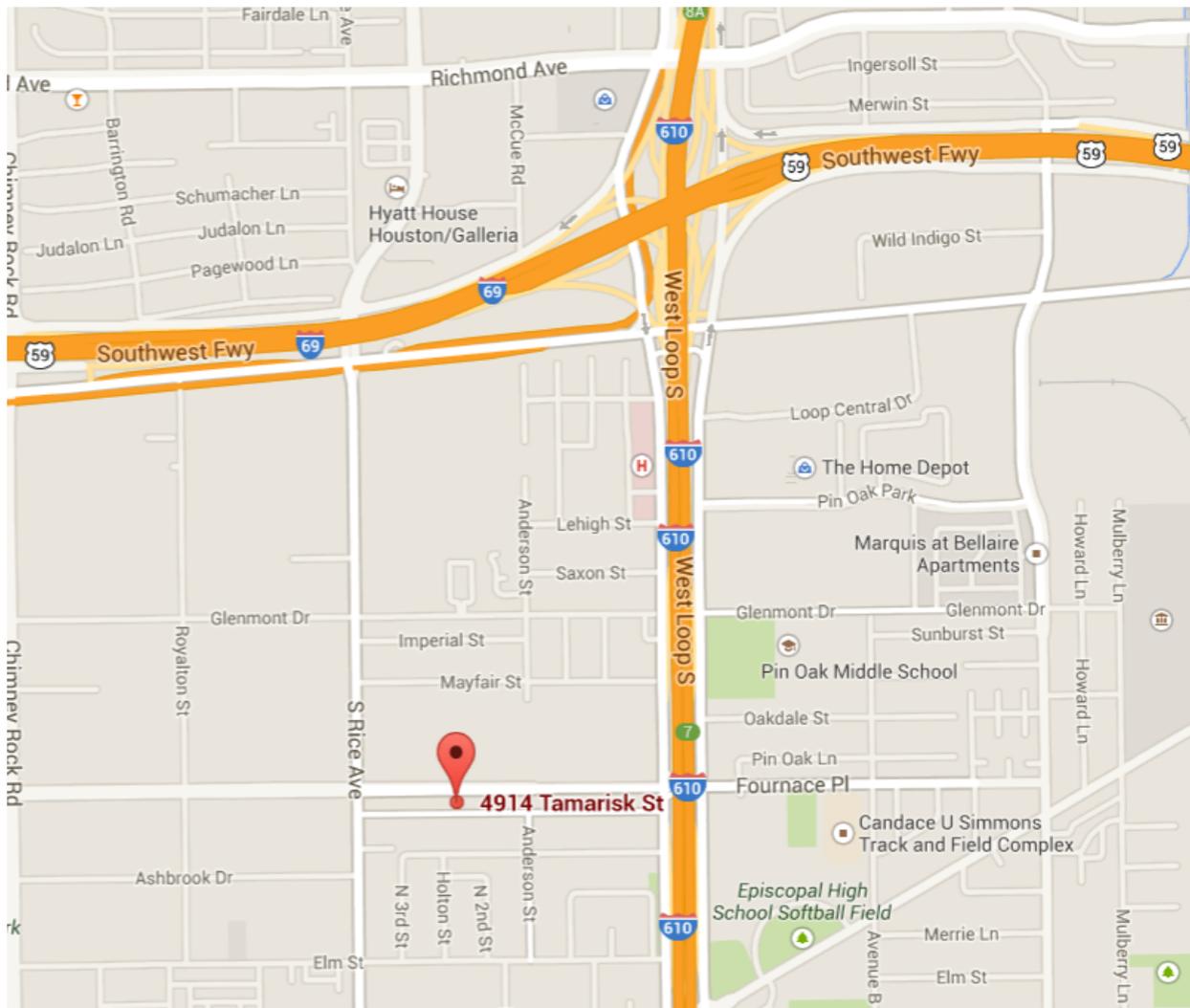
Optional Class Meeting With Beer, Soft Drinks, and Pretzels

The class party will be at my (your professor's) home, 4914 Tamarisk Street, Bellaire. I will furnish beer, soft drinks, and potato chips, etc. You may bring your spouse or significant other. If you have to in order to come, you may bring your kids. Experience shows that if you do, you won't have as good a time, so bring them only if you have to, but we want you to be able to come. The dress is casual (jeans, etc.), although no one will be turned away on account of overdressing.

The date and time: 8 p.m. to 11:30 or so, on

Please drive safely. I have done pro bono work for Mothers Against Drunk Driving (MADD). Important!

Here is a map.



Litigation Problem No. 4: *Smith v. Anton*

State v. Anton (Criminal)

Smith v. Anton (Civil)

On September 18, 1972, Andrea Marie Smith was returning from school to her home three blocks away. At approximately 3:15 or 3:20 p.m., while she was crossing Sabo Road to her home, she was struck by a motorcycle driven by John S. Anton. The speed of the motorcycle was a contested issue in the Case. The conduct of the deceased, Andrea Marie Smith, was also a contested issue. She was six years old at the time of her death.

Ms. Smith, the mother of Andrea Marie Smith, testified to having seen the incident, though testimony was offered by the defendant to rebut or impeach this testimony.

The incident occurred near a school zone sign posting a 20 m.p.h. speed, and it was within the area encompassed by the zone. Because of the facts in the police officer's report upon investigation, the State charged John S. Anton with negligent homicide. (The present penal code was not then in effect, but there was former law defining the offense slightly differently than today). Additionally, Mr. and Ms. Smith, the child's parents, filed a civil suit against John S. Anton. Throughout these materials, the names of all parties and witnesses have been changed.

Documents Produced By the State's Prosecution of John S. Anton

State's File Cover

Information Filed by State

Offense Report

Supplementary Offense Report

Texas Peace Officers Accident Casualty Supplement

Investigating Officer's Diagram of Scene

State's File Cover

This cover sheet would be stapled to a copy of the information, offense report, and "rap sheet," if any, of the defendant. For misdemeanor cases in Harris County, this material is the extent of the file. The cover sheet is used for certain notes, plea recommendations, setting date records, and listing of witnesses and their locations.

Case Set:	No. 332981 #4
4/22/72	THE STATE OF TEXAS
R/S 2/21 ISSUE	vs.
5/15/73 Issue	John S. Anton
5/29/73 Issue	10,333 Sabo # 814

INFORMATION

Trial Date: _____	Negligent Homicide – 1st
<input type="checkbox"/> Plea of Guilty	
<input type="checkbox"/> Plea of Not Guilty—Court	Bail \$ _____
<input type="checkbox"/> Plea of Not Guilty—Jury	_____, Judge
<input type="checkbox"/> Nolo Contendere	
Penalty	<u>WITNESSES: Milton Hausehorn, S.O.; Quentin Donald, J.H.R. Funeral Home, League City, Dr. Streetwater, Med Examr's Office: Bart Toney, 1610 Wellerton, 661-0000; Jerry Aylor, 1116 Rose, 666-1100; Tommy Aylor, same</u>
Fine _____	_____
Jail Time: _____	_____
Credit: _____	_____
Motion for New Trial Filed _____	_____
Set: _____	_____
Probation: _____	_____
Overruled: _____	_____
Notice of Appeal _____	
Bond Set \$ _____	
Sureties: _____	

Commitment Issued _____	

Information Filed by State

Since the offense of negligent homicide is a misdemeanor, an information is all that is necessary, rather than an indictment. The information is based upon a previously or simultaneously filed complaint, which is simply an affidavit of a credible person having reason to believe that the charge is true. As a matter of practice, the information and complaint are usually in the same instrument, are usually offset printed with blanks to be filled in, and the complaint and information are identical in language. The information is signed by a district attorney or assistant; in Harris County, the drafter of the information and the trial attorney are usually different.

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS:

Bradley Nehemeier, Assistant..District Attorney of Harris County, Texas, comes in behalf of the State of Texas, and presents in and to the County Criminal Court at Law No. 4 of Harris County, Texas, at the October Term, A.D. 1972, of said Court, that theretofore, on or about the 18th day of September, 1972, in said County of Harris and State of Texas, JOHN S. ANTON, hereinafter styled the Defendant, did then and there unlawfully

cause the death of an individual, ANDREA MARIE SMITH, hereinafter styled the Complainant, by causing a motorcycle to collide with the Complainant, by criminal negligence, in that he

- (1) failed to keep the motorcycle under proper control by reason of its operation at a greater rate of speed than was reasonable or prudent under the conditions then existing;
- (2) failed to guide the motorcycle away from the Complainant; and
- (3) failed to keep a proper lookout for the Complainant, whom he could have seen had he been looking in the direction in which he was going;

Against the peace and dignity of the State.

/s/Bradley Nehemeier
Assistant District Attorney of Harris County, Texas

This instrument is drafted in conformance with current law defining the offense of negligent homicide. At the time of the incident, a different statute was in effect, and the wording of the instrument was different. This draft preserves the wording of the original to the maximum degree while fitting it to the current statute.

Offense Report

The OFFENSE REPORT consists of an initial sheet in narrative form and several supplements, which follow.

OFFENSE REPORT

Serial No. A 87538

SHERIFF'S OFFICE

576T

HARRIS COUNTY

0809

HOUSTON, TEXAS

Offense	Negligent Homicide				
Complainant	Andrea Marie Smith	Address: 10703 Rambling Trail			
Bus. Phone:	Res. Phone	941 6734	Age	6	Sex F Color W
Reported by	Sagewood Fire Dept.	Address		Phone	
Place of Occurrence	10300 Sabo			Beat	
Date of Occurrence	Approx 3:30PM 9-18-72			Time	AM/PM
Received by	Milton Hausehorn	Date: 9-18-72, 3:29 PM; 9-18-72, 8:10 PM		How: Phone/Person	

This officer HAUSESHORN, while on routine patrol received call to above location 3:32 PM arrived on scene 3:55 PM 9-18-72 reference "Auto - pedestrian."

Upon arrival at scene found this to be a motorcycle pedestrian collision with the comp and driver of motorcycle still on the scene. Upon investigation was determined that the motorcycle "Vehicle #1" had been northbound on Sabo apparently at a high rate of speed, "20 mp h school zone was in effect."

Found that the pedestrian had darted from the East side of Sabo into the North bound lane in an attempt to pick up a bicycle lock that was laying in the street. Found the pedestrian attempted to return to the East side of the road, to get away from the motorcycle, driver of the motorcycle seeing the pedestrian in the roadway swerved to his right (same being the East side of the road) in an attempt to avoid the pedestrian. Motorcycle struck the pedestrian approximately one fourth of the width of the North bound lane from the East edge of the roadway.

Upon further investigation it was determined that the motorcycle dragged the comp for a considerable distance along the roadway, and as the motorcycle veered off the roadway in a Northeasterly direction the comp continued to slide on the roadway in a northerly direction. The motorcycle traveled across a grassy area, an apartment parking lot driveway striking the southwest corner of the apartment building, same being 10330 Sabo. Motorcycle coming to rest approximately parallel to the final resting point of the motorcycle. Comp still in North bound lane of the street at this time. Unknown bystander removed the comp from the street to the grassy area next to the motorcycle.

Preliminary investigation by M. Hausehorn, Badge 1322

Supplementary Offense Report

**SUPPLEMENTARY
OFFENSE REPORT**
Sheriff's Office - Harris Co.
Houston, Texas

SERIAL No. A 87530

Offense **NEGLIGENT HOMICIDE**
Location 10300 Sabo

Name of Complainant **Andrea Marie Smith**
Address 10703 Rambling Trail

**DETAILS OF OFFENSE, PROGRESS
OF INVESTIGATION, ETC.**

Investigating Officer Should Sign

Date: 9-18-72

Further investigation revealed the driver of the motorcycle to be JOHN S. ANTON (WM) (DOB 7-16-53) 10333 Sabo #814. Further investigation revealed comp to be ANDREA MARIE SMITH (WF) (10703 Rambling Trail). Found comp DOA on the scene, Deputy Medical Examiner JONES contacted came to the scene and pronounced "Comp DOA" and order the body removed to the morgue for medical legal. Same removed by J.H.R. Funeral Home, League City, Texas, driver being Q. DONALSON (WM) (31) side rider PARKER ONTA (WM) (34). No personal effects on the comp.

This officer HAUSESHORN took eight black-and-white photographs on the scene #639-21-1-4. Also four photographs taken by City PD.

Driver JOHN S. ANTON (WM) (DOB 7-16-53) placed under arrest 4:50PM 9-18-72. Given oral warning by Deputy HAUSESHORN at 4:55PM 9-18-72, no witness. I then took the def to Judge Dave Thompson's Court where he was given magistrate warning at 5:40PM by Judge Dave Thompson, and filed on in above offense on below warrant.

DEF: VEH: 1970 Honda 350 Motorcycle, Tennessee 72 Lic ZN 7520
Loaded by Bailey Bros Wrecker to 2604 Galveston Highway

DEF: JOHN S. ANTON (WM) (DOB 7-16-53) 10333 Sabo #814
Filed on in above offense Judge Dave Thompson Court Warrant #174343
Placed in 225 NEGLIGENT HOMICIDE

D told officer that he was doing 30-35 speed
D stated he tried to stop after hitting girl.

Witnesses

- (1) Bart Toney
- (2) Jerry Aylor
- (3) Tommy Aylor

Texas Peace Officers Accident Casualty Supplement

ACCIDENT IDENTIFICATION (Copy information in this section exactly as shown on Basic Report)			
County:	<u>Hamis</u>	City or Town	
Road on Which Accident Occurred	<u>10300 Sabo Rd.</u>	Date of Accident	<u>Sept. 18, 1972</u> Hour <u>3:20PM</u>
Unit No. 1 Operator	<u>ANTON, JOHN S.</u>	License Plate	<u>72 Tenn ZN 7520</u>

SECTION III – PEDESTRIAN CASUALTIES (DEATHS OR INJURIES)		
Name of Casualty: <u>SMITH, ANDREA MARIE</u>	Date of Death	<u>9/18/72</u>
WHAT PEDESTRIAN WAS DOING	If not in roadway, explain:	
Pedestrian was going <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/> Along <input type="checkbox"/> N S E W Across <input checked="" type="checkbox"/> <u>Sabo Rd. From E to W Side</u>	<u>Picking up article in road</u>	
<input type="checkbox"/> Crossing or entering at intersection <input type="checkbox"/> Crossing or entering not at intersection <input type="checkbox"/> Getting on or off vehicle <input type="checkbox"/> Walking in roadway with traffic	<input type="checkbox"/> Walking in roadway against traffic <input type="checkbox"/> Hitch hiking in roadway <input type="checkbox"/> Standing in roadway <input type="checkbox"/> Pushing or working on vehicle <input type="checkbox"/> Other working in roadway	<input type="checkbox"/> Playing in roadway <input type="checkbox"/> Other (explain) <input type="checkbox"/> Not in roadway
Describe injuries	<u>Head & Internal</u>	
Color shirt	Color Trousers or skirt	<u>Pink dress</u>
Pedestrian condition <u>Normal</u>	Pedestrian drinking?	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
Blood sample taken?	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
Blood sample sent to:		

Place where Accident Occurred: County	<u>Hamis</u>	City or Town	
1/2 mile	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/> of	<u>Houston</u>	
	N S E W		
Road on Which Accident Occurred	<u>10300 Sabo Rd.</u>	Under Const.	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
		Speed Limit.	<u>20</u>
At its intersection with:			
If not at intersection	<u>95 ft</u> <input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> of	<u>Rambling Trail</u>	Under Const. <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
	N S E W		Speed Limit. <u>20</u>
Date of Accident	<u>9/18 72</u>	Day of Week	<u>Mon</u>
		Hour	<u>3:20 PM</u>
Unit No. 1 – <u>Motorcycle</u>		Veh. Int. No.	<u>CB350EN07497</u>
Operator Name: <u>Anton, John S. 10333 Sabo #814 Houston Tex</u>	Occupation: <u>Student</u>	License No.	<u>72 Tenn ZN 7520</u>
Operator's License <u>Tenn 4717947</u>	DOB <u>7/16/53</u>	Sex <u>M</u>	Race <u>W</u>
Owner's Name	<u>Same</u>		

Describe What Happened Veh #1 N/B on Sabo, ped ran from E. side of rd to center of N/B lane, ped attempted to return to E. side of rd, M.C. (Veh #1) swerved to E. side of rd attempting to miss pedestrian. Veh #1 struck ped. w/ front of m.c. Dragged ped along rd, Veh #1 then left rd on east side of rd traveled northeasterly direction across grass crossing apt parking lot & striking S.W. corner of apt. bldg.. Ped skidded down rd in N/B lane & came to rest in center of N/B lane parallel to final point of Veh. #1	Conditions:	<u>Clear</u>
	Describe Road Condition:	<u>Asphalt</u>
	Light condition:	<u>Daylight</u>
	Type of Traffic Control:	<u>None</u>

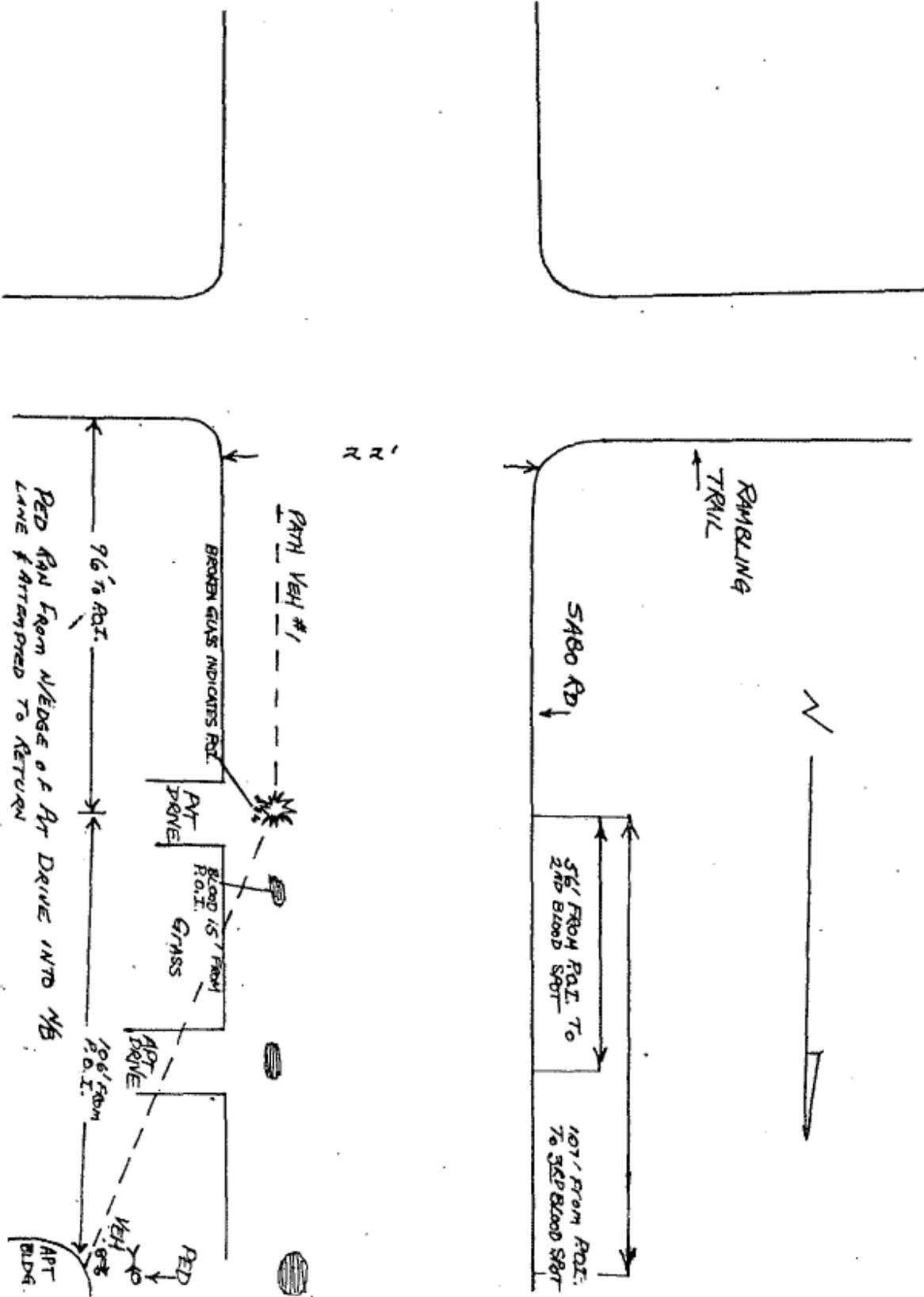
Factors Contributing to Accident (Officer's Opinion) Exceeding speed limit	DIAGRAM 	

POLICE ACTIVITY					
Name:	<u>ANTON, JOHNS</u>	Charge:	<u>Negligent Homicide</u>	Warrant	<u>174343</u>
		Type Alcohol Test	<u>N/A</u>		
Time Notification of Accident	<u>9/18/72 3:35 PM</u>	<u>KKC381</u>	Time at Scene of Accident	<u>9/18/72</u>	<u>4:05 PM</u>
Unit No. 1 Operator	<u>ANTON, JOHNS.</u>		License Plate	<u>72 Tenn ZN 7520</u>	
Signature /s/ <u>Milton Hausehom</u>	<u>S.D. Houston</u>	Date Report Made	<u>9/18/72</u>	Is report complete?	<input checked="" type="checkbox"/> Y <input type="checkbox"/> N

Pedestrian/Bicyclist	Casualty Name	Casualty Address	Age	Sex	Code
Pedestrian	SMITH, ANDREAMARIE	10903 Rambling Trail	6	F	K

Disposition of Killed and injured		
Item Number	Taken To	By
13	Harris County Morgue	Jack H. Rowe Funeral Home

Investigating Officer's Diagram of the Scene



22'

THE *ERIE* DOCTRINE

PROCEDURE OR SUBSTANCE?

NOTE ON CASES THAT CREATED THE FIVE SUBSTANCE-PROCEDURE APPROACHES

The five approaches described above did not arise all at once, or easily. They grew. They evolved. They overlapped and sometimes contradicted each other. To understand them fully, a student needs to consider the cases that created them. The cases are all in the book, but we won't read them all. This Note will substitute for most of them.

But first, remember this: The issue in each one of these cases depends upon whether the law in question is characterized as “substance” or “procedure.” According to the *Erie* doctrine, a federal court in a diversity case follows state substantive law. But it follows **federal procedural law**. Thus, it becomes important sometimes to determine whether a given law is “substantive” or “procedural.” The questions, answers, and principles often are elusive. And then, the characterization of the law as substantive means that state law applies, or as procedural means that federal law applies.

Guaranty Trust Co. v. York. This case used Approach **No. 1, the “Outcome determination”** test. The law in question was the statute of limitations, which might “sound” procedural, but which the Court determined was substantive, and therefore controlled by state law, not federal. Plaintiff brought a diversity case based on New York state law. But she filed suit long after the claim had arisen. If the state law applied, the plaintiff probably was going to lose, because of the New York statute of limitations. If federal equity law applied, she was likely to prevail on that issue and be able to present her suit. The Court said, “The outcome of the litigation in the federal court should be substantially the same” as in the state court. “[T]he accident of a suit ... in a federal court instead of a State court a block away should not lead to a substantially different result.” Therefore, the statute of limitations was “outcome determinative,” which meant that it was substantive, and the state law applied.

[**Question: Can you spot the flaw in this test?** Think about it: Any rule can theoretically become outcome-determinative, even procedural rules! The outcome determination test, taken literally, meant that anytime a procedural rule made any difference, it automatically became “substantive,” and the state rule had to be applied, no matter how “procedural” the rule seemed. Ultimately, wouldn't this mean that there could be no Federal Rules of Civil Procedure?]

Byrd v. Blue Ridge Rural Electric Coop, Inc. This case used Approaches **No. 2, the “Absolute Outcome Determination”** test, and **No. 3, the “Interest Balancing”** test. The issue was whether plaintiff had a right to a jury trial. Plaintiff had sued his employer for on-the-job injuries. The defendant defended by asserting that it was plaintiff's statutory employer under the governing worker's compensation statute, and that it had immunity from suit, because plaintiff's sole remedy was worker's compensation. If the suit had been in the state courts, the law of South Carolina was that this issue would have been resolved by the judge alone, without a jury. Nevertheless, plaintiff filed suit in federal court and demanded a jury. The defendant argued that instead, the statutory employer question should be decided by the judge alone, without a jury. The defendant supported this position by arguing that since plaintiff wanted a jury, plaintiff must think that the outcome would be different than with a judge; but the outcome determination test meant that any difference in outcome required use of the state law; and therefore, the federal judge must decide the statutory employer issue alone, without a jury, just as a state judge would.

The Court rejected this argument. It introduced a refinement of the outcome determination test: the “absolute” outcome determination test. It reasoned that the substitution of a jury for a judge did not create “the

certainty that a different result would follow.” Thus, the Court implied that anything short of a rule that could have an absolute effect on the outcome was not necessarily substantive (the “absolute” outcome determination test). In short, the substitution of a jury for a judge was not “absolutely” outcome determinative, and so the federal court did not have to follow the state rule.

In addition, the Court introduced the interest-balancing approach. The state rule allowing the judge alone to decide the question was a rule of administrative convenience, and therefore not a strong policy interest, whereas the federal law included the Seventh Amendment, which created a constitutional right to jury trial in a federal court. The interest-balancing approach involved the conclusion that the federal interest in applying federal law was much stronger than the state interest in having the federal courts apply state law, and so again, the right to jury trial was procedural, and therefore, the federal courts should apply federal law to this question.

Hanna v. Plumer. This case used Approaches **No.4, the “Deference to a Controlling Federal Rule”** test, and **No. 5, the “Policies of Erie”** test. It was a suit for personal injuries in Massachusetts against a decedent’s estate. Massachusetts state law required in hand service on the executor of an estate. It also created a special statute of limitations for the service on an executor to be completed. The federal rule, of course, was Rule 4, which authorized leave-with service (leaving the papers with a “person of suitable age and discretion then residing therein” at the defendant’s “dwelling house or usual place of abode”). After the time for in-hand service authorized by the Massachusetts statute had expired, defendant moved to dismiss because, it argued, the Massachusetts statute would make a difference in the outcome (plaintiff would lose immediately) and therefore, the state law must apply.

The Court rejected the defendant’s argument. It introduced two additional approaches, the deference to a controlling federal rule approach and the policies of *Erie* approach. It held that the federal law applied because there was a “controlling federal rule,” and because the policies of *Erie* called for federal law to control. [Read this case in the casebook.]

II. Jurisdiction over Persons and Property

[B] The Modern View of Personal Jurisdiction

[3] “General” and “Specific” Jurisdiction

[At the end of section [3], add:]

BRISTOL-MYERS SQUIBB CO. v. SUPERIOR COURT, 137 S. Ct. 1773 (2017). To invoke specific jurisdiction, how closely must the controversy connect with the defendant’s contacts in the state? The California state supreme court had extended specific jurisdiction broadly, to encompass claims of nonresidents against defendant BSM that did not arise in California, on the stated ground that BSM had many other contacts in California and that California residents had similar claims. The Court concluded that this reasoning really amounted to a spurious kind of general jurisdiction, and it held that specific jurisdiction required more:

In order for a state court to exercise specific jurisdiction, “the *suit*” must “aris[e] out of or relat[e] to the defendant's contacts with the *forum*.” In other words, there must be “an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation.” . . . “[S]pecific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction.”

III. Federal Subject Matter Jurisdiction

[D] Removal: Defendant’s Key to the Federal Courthouse

[After the Notes and Questions on Removal Procedure, add:]

Note on the Persistence of Issues about Removal

(1) *How Much Do Defendants Want to Remove? Sometimes, Very Much.* Defendants often prefer federal court, and plaintiffs to stay in state court. See the footnote in the *Caterpillar* case.

(2) *Can Third-Party Defendants Remove? They’ve Tried.* A third party defendant is a party brought into the suit by a defendant (covered in a later chapter). Can a third-party defendant remove? No. See below.

(3) *An Example of Defendants Really Wanting to Remove: “Snap” Removal.* Imagine that you represent a defendant who is diverse from the plaintiff. There is another named defendant—named but

not yet served—who is a local citizen. Can you remove? Well, the removal statute prohibits removal if there is a local citizen “joined and served”—and here, that defendant has been joined *but not yet served!* So, is removal authorized? The courts have gone both ways on this issue, which is informally called “snap” removal. (You’d better be quick.)

TEXAS BRINE COMPANY, L.L.C. v. AMERICAN ARBITRATION ASSOCIATION, INC., ___ F.2d ___, 2020 WL 1682777 (5th Cir.). The court of appeals here joined others in upholding “snap” removal (see the note above). The plaintiff had joined other defendants that were local citizens, so if those defendants had been served, removal on diversity grounds would have been prohibited. But this court, relying on the statutory language, decided that the prohibition applied only with respect to local citizens “joined and served,” not just joined:

“[W]hen the plain language of a statute is unambiguous and does not lead to an absurd result, our inquiry begins and ends with the plain meaning of that language.” By [Section 1441\(b\)\(2\)](#)’s terms, this case would not have been removable had the forum defendants been “properly joined and served” at the time of removal. [The local defendants] had not been served, though. The forum-defendant rule’s procedural barrier to removal was irrelevant because the only defendant “properly joined and served” . . . was not a citizen of . . . the forum state. {Thus, snap removal allowed.]