AMERICAN CASEBOOK SERIES

CIVIL PROCEDURE
A MODERN APPROACH

Sixth Edition

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Richard L. Marcus, Martin H. Redish,
Edward F. Sherman, James E. Pfander

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By

Richard L. Marcus
Horace O. Coil ('57) Chair in Litigation,
University of California,
Hastings College of the Law

Martin H. Redish
Louis and Harriet Ancel Professor of Law and Public Policy,
Northwestern University School of Law

Edward F. Sherman
W.R. Irby Chair and Moise S. Steeg, Jr., Professor of Law,
Tulane Law School

James E. Pfander
Owen L. Coon Professor of Law,
Northwestern University School of Law

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PREFACE TO SIXTH EDITION

It's been nearly a quarter century since the first edition of this casebook was published. Although the basic structure has stood the test of time well, the materials relevant to the various topics have evolved. With each edition, therefore, we find different parts of the book changing significantly. In this edition, for example, the tumult about pleading has produced considerable revisions in Chapter 3 to take account of a new aggressiveness of the Supreme Court in that field. Somewhat similarly, more attention to electronic discovery has been added to the Chapter 5, and expanded attention to class-action issues has also been provided in Chapter 4. In addition, substantial textual material on the impact of the Federal Arbitration Act on class-action litigation has been added to Chapter 2. All in all, we believe that the new edition provides an entirely up-to-date treatment of civil procedure. And we intend to continue providing annual Teachers' Updates to ensure that users of the book remain up-to-date on developments after publication.

An enduring reality for civil procedure teachers is the fact that many students perceive this to be the most difficult and least comprehensible course in their first-year curriculum. To a considerable extent, students' difficulty stems from the fact they have not encountered these issues before even though some civil procedure topics (e.g., class actions and large damage awards) have begun to surface in more general political discourse. By way of contrast, students often have personal experience dealing with the subject matter covered in torts, contracts, and even property courses, and most have some attitudes about criminal law and constitutional law. Few, however, have been personally involved with the intricacies of court rules and procedures. Although issues in substantive law courses relate to "real life" situations, issues of procedure may seem to involve only technical matters that students just beginning the study of law may find difficult to appreciate. For many, developing a taste for procedure is a gradual process; the reality that it will become second nature to many when they are in practice is likely to provide cold comfort at the outset.

This book is premised on the belief that a taste for civil procedure is worth cultivating and that students will find the study of civil procedure more challenging and rewarding than they might have expected. The procedure governing a trial or other dispute resolution process provides the ultimate context for enforcing substantive rights in our society, and it is a common-place that bears repeating that procedure is often critical to the outcome of a case. The initial impression of some law students that civil procedure is a rote-like study of precise rules should give way to an appreci-

ation that procedure, no less than substantive law, is a complex subject that defies a simplistic approach. The perpetual tension between certainty and flexibility in the law is no less important in matters of procedure, and problems of generality and ambiguity are as insistent in procedure as they are in substantive law. Similarly, the impression that procedure does not go the "heart" of the law needs to be tempered with the realization that procedural rules reflect fundamental value judgments and social policies. The manner in which society chooses to resolve its disputes, and its notion of what constitutes procedural fairness, bear directly on social choices about the conduct we want to encourage or discourage and on the allocation and distribution of resources.

We have chosen the subtitle "A Modern Approach" in the belief that this casebook has a focus that puts a distinctive cast on the subject of civil procedure. Recent and ongoing developments have had a significant impact on the way we resolve disputes in this country. It is not so much that the basic procedural rules and mechanisms have been materially altered as that the way they are applied in dispute resolution processes has been affected. To mention only a few of the developments and their impacts on procedure:

- New and often more complex causes of action created by courts and legislatures demand more satisfactory ways to reach a resolution of the dispute;
- New causes of action and our strong societal impulse towards resolving disputes through litigation have resulted in serious court crowding and delay;
- For a generation, the high cost of legal services has prompted experiments with ways to cut costs and time in lawsuits through resort to alternative dispute resolution methods;
- Broader standards of legal responsibility and liability have enlarged the number of parties in suits and, to some extent, have also complicated the procedural posture and prompted counterpressures favoring early disposition of claims;
- The class action, in particular, has emerged as a prominent vehicle for "wholesale" redress and as the object of concerns about a variety of perceived abuses;
- The influence of such disciplines as economics, sociology, and psychology has resulted in a more sophisticated approach to such procedural issues as resource allocation, fundamental fairness, and analysis of competing considerations in dispute resolution;
- Technological developments such as electronic discovery increasingly challenge traditional methods of gathering and presenting evidence at trials, and could alter the form of dispute resolution in

ways that depart markedly from the traditional Anglo-American trial format.

- Comparative material has become increasingly prominent; as the 21st century ushers in a globalized economy, American litigation increasingly will be measured by international as well as domestic standards.

This book attempts to reflect the impact of these kinds of contemporary developments without losing sight of the fact that much of civil procedure still concerns traditional rules and mechanisms and time-honored policies. The Seventh Amendment, for example, still relies largely on the "historical" test to determine when parties have a right to jury trial. Modern civil procedure has fortunately not been called upon to reinvent the wheel. In order to understand the contemporary "system" of civil procedure, students must still acquire a sense of its historical development, the traditional interrelationship of procedural devices, and the proper interaction of doctrine and policy. Thus history, doctrine, and key precedents remain an important part of this casebook.

The book roughly follows the chronological order of a lawsuit—proceeding from the initial complaint and pleadings to appeal and the binding effect of a judgment. The first two chapters, however, deviate from the generally-chronological order of presentation, providing an overview of the policies and features of our adversary system (Chapter 1) and of the remedies available in civil litigation (Chapter 2). The chapters on jurisdiction and the choice between state and federal law (the *Erie* problem) follow the chapters on trial preparation and trial in the belief that students are better able to handle the conceptual complexities of these matters once they have an appreciation of the adjudication process.

We think this book offers some distinctive approaches that are not as comprehensively treated in other civil procedure casebooks. These include:

- A continuing reexamination of the policies and mechanisms of our American adversary system, including criticisms of the system and of the procedural innovations (such as sanctions and early-decision devices) that attempt to remedy its shortcomings;
- A reflection, through choice of cases and descriptive material, of the impact that the development of public law and complex litigation has had on procedure;
- Treatment, both in an introductory chapter on remedies (Chapter 2) and in a separate chapter on judicial supervision of pretrial and promotion of settlement (Chapter 7) of the developing processes and techniques of alternative dispute resolution;
- Examination of the new management techniques of trial courts, including the devices (such as docket and trial-preparation trial con-

trol, discovery, and use of surrogate judicial personnel) and the strengths and weaknesses of such responses;

- Use of interdisciplinary and comparative materials reflecting practices in other countries and various states to introduce the student to alternative ways of dealing with various procedural issues.

We hope that a student will come away from this course with a sense of the process called civil procedure, and with an appreciation of both its strengths and weaknesses and the range of other solutions that are possible in particular situations. We have put some emphasis on practice materials in the belief that one must be able to work effectively with the Federal Rules of Civil Procedure and the various doctrines to claim a mastery of civil procedure. But we also try to ensure that the practice materials force the student to think about the policies underlying the practice and to relate it to the general process themes of the book.

Finally, some comments on format: We have tried to make this text accessible to students by editing out unimportant materials and by minimizing the use of asterisks to indicate those omissions. Whenever we have deleted material from a case or other source, we have indicated that omission either by a bracketed summary of the omitted material or by asterisks. Where quoted material includes deletions by the court or other primary source, there is a conventional ellipse rather than asterisks. We have not indicated the deletion of case and source citations, and have made some effort to remove unimportant citations. We have omitted footnotes from cases and source materials unless they seemed to add something of use, but have retained their original numbering for footnotes we have not deleted.

Throughout the book, we have included substantial notes and questions because we believe they shed light on the principal cases and provide important backup information and citations for those who wish to pursue a matter further. Indeed, even where the primary case remains unchanged we have often modified and updated the notes and questions to ensure that the discussion is up-to-date. The questions we have asked fall basically into three categories: (1) questions that ask the student to ascertain the answer either from what the case says or from the applicable rule or statute; (2) questions, often leading questions, that challenge or provide new perspectives on the assertions made in the principal cases; and (3) questions that invite reflection on the underlying process issues we have tried to raise throughout the book. We hope students will quickly learn to identify the different types of questions and to appreciate the different mental activity called for by them.

We are indebted to many people for their help and guidance during the years we have been working on this book and the previous editions. Most of all, we want to thank our families for their understanding of the demands of the project, and particularly our spouses, Laurie Mikva, Caren Redish, Andrea Saltzman, and Alice Sherman, for their advice, help, and (most of all)

their patience. We also want to thank the research assistants who have helped out on this edition: Michael LaFond of Hastings and Julie Karaba of Northwestern.

Professor Laurens Walker of the University of Virginia Law School collaborated with Professor Sherman on an early version of portions of these materials. His contributions are gratefully acknowledged.

We are also indebted to the copyright holders for permission to reprint excerpts from copyrighted materials listed in the footnote.[1]

RICHARD MARCUS

MARTIN REDISH

EDWARD SHERMAN

JAMES PFANDER

April 2013

[1]The following materials are listed in the order in which they appear in the book:

L. Fuller, The Problems of Jurisprudence (1949), ©1949, by Lon Fuller, reprinted by permission of Marjorie D. Fuller.

Zeidler, Evaluation of the Adversary System: As Comparison, Some Remarks on the Investigatory System of Procedure, 55 Australian L.J. 390 (1981), ©1981, by The Law Book Company Ltd.

Frankel, The Search for Truth: An Umpireal View, 123 U.Pa.L.Rev. 1031 (1975), ©1975, Marvin E. Frankel.

Ely, The Irrepressible Myth of Erie, 87 Harv.L.Rev. 693 (1974), ©1974, by the Harvard Law Review Association.

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CHAPTER 1

CHOOSING A SYSTEM OF PROCEDURE

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Law can be conveniently divided into two categories, substance and procedure. Substantive law defines legal rights and duties in everyday conduct. Thus, it is a rule of substantive law that an individual will be liable in damages for injuring another person through negligence. Procedural law sets out the rules for enforcing substantive rights in the courts. It is a rule of procedure that a complaint filed in a federal court must contain "a short and plain statement of the claim showing that the pleader is entitled to relief" (Federal Rule of Civil Procedure 8(a)(2)). The line between substance and procedure is sometimes difficult to draw, but the basic distinction is central to the theory of procedure.

A procedural system provides the mechanism for applying substantive law rules to concrete disputes. Without rules of procedure there would be no guidelines as to what information is received by the decision-maker (that is, the judge or jury in the American system), how the information is to be presented, or what standards of proof or scope of review apply. In short, without procedure there would be no standardized method of litigation, all cases would be decided *ad hoc,* and there would be no assurance that the same kinds of information and same standards of examination would be applied in similar cases.

The kind of procedural system with which we will be principally concerned in this course operates through formal courts. It contemplates ultimate resort to a trial, even though most suits filed in the United States end short of trial through negotiated settlements or other dispositions. In recent decades, alternate methods of dispute resolution (such as arbitration or summary presentation of the case to neutral observers) have sometimes been appended to the litigation model as nonbinding prerequisites to the right to a full trial. Thus in a very real sense litigation today is a wide-ranging process of dispute resolution rather than simply the preparation and trial of law suits.

The American legal system falls within the family of the "common law," that process, originating in England, by which many rules of law are derived from court cases arising out of disputes between adverse parties. In terms of procedure, the "common law" is often referred to as an "adversary system," with the courts providing an impartial forum for resolution

of private disputes in civil cases (and of prosecutions by the state in criminal cases). The moving party (called the plaintiff) is expected to take the initiative in filing a civil suit in the proper manner, and the parties (both plaintiff and defendant) are expected to prepare their cases and present them at trial with a minimum of judicial interference.

Of course, this is not the only plausible way for a court system to operate. In the European "civil law" system, for instance, the judge plays a much more active role in litigation. The "Continental" model, as we shall refer to it, actually is not uniform and has evolved over time. During the 19th century the influential French code, for example, reflected a laissez faire attitude giving the parties much control over the presentation of the case, but late 19th century developments reemphasized the active role of the judge.[2] In the mid 20th century, a Soviet model emerged emphasizing more control by judicial officials in what might be called an "inquisitorial" process in which the officials had the main responsibility for ensuring a correct outcome.[3] But the American model remained distinctive.[4] "The concept that the judiciary properly controls the quest for evidence in civil litigation is * * * fundamental in the civil law,"[5] with the result that the American idea that the parties themselves can use discovery and investigation to obtain evidence (to be covered in Chapter 5) offends against a fundamental precept of that system. In the U.S., the parties' latitude to litigate is often relied upon as a desirable method to enforce the substantive law.[6]

This chapter is entitled "Choosing a System of Procedure" to emphasize that rules of procedure reflect important policy values and that one must approach procedure with some appreciation of the objectives sought to be achieved through litigation. In it, we focus on the roles of the parties and the judge because "[t]he problem of the reciprocal roles of the judge and the parties [is] the central problem of any system of civil procedure."[7]

Most people would list "truth" and "justice" as primary objectives of a good system of dispute resolution. If the only question were one of determining objective facts (as is usually the case in scientific inquiry), then "truth" would be the appropriate standard for decision-making. But the legal process is concerned, for the most part, with the resolution of conflicts of interests between competing parties. Although scientific inquiry

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[2] See C.H. van Rhee, European Traditions in Civil Procedure 3–14 (2005).

[3] See M. Damaska, The Faces of Justice and State Authority 154–73 (1986).

[4] See Marcus, Putting American Procedural Exceptionalism in Globalized Context, 53 Am. J. Comp. L. 709, 723–24 (2005).

[5] Hazard, Jr., Discovery and the Role of the Judge in Civil Law Jurisdictions, 73 Notre Dame L. Rev. 1017, 1025 (1998).

[6] See S. Farhang, The Litigation State (2010) (explaining reliance of Title VII employment anti-discrimination statute and many other statutes on enforcement by private plaintiffs rather than public authorities).

[7] M. Capelletti, The Judicial Process in Comparative Perspective 252 (1989).

may also involve disputes—as when there is disagreement over opposing theories—this is a purely "cognitive conflict," and once the true facts are determined, it is in the interest of all concerned to adopt the solution supported by the facts. Determining the facts, however, is often insufficient to resolve a law suit. A law suit is ordinarily a zero-sum game because it presents competing claims to rights or assets, and a decision that favors one party necessarily disfavors the other. It thus requires a determination of how rights, assets, or losses will be apportioned, and necessitates resort to policy values which we loosely attempt to describe by the term "justice." Inquiry into the "truth," of course, is a necessary aspect of the legal process, but much of what a court does is to go beyond the facts to decide which party has a "just" claim.

Apart from assuring that the outcome is consistent with the rules of substantive law, procedure has a function in making even an unsatisfactory outcome palatable to the parties by making them feel they have had their "day in court." We must recognize that the outcome of every case will not always be consistent with abstract substantive law rules, or with the outcomes in similar cases, and that at least one party is often unhappy with the outcome. There is reason to believe that litigants tend to judge the justness of dispute proceedings without reference to the outcome if they deem the process itself to have been fair.[8] Thus, procedure serves to validate the integrity of the legal system as a whole by providing a remedial process that replaces much more destructive motivations like self-help and personal retribution.

If truth, justice, and fair process are all valid objectives of a legal system, what system of procedure is best suited to accomplishing them? It has been suggested that the manner of distributing control over the process and the decision between the decision-maker and the parties is the most significant factor in characterizing a procedural system.[9] Since procedure largely governs what information will be provided to the decision-maker, the degree of control over the selection and presentation of information given to litigants is a critical feature of any procedural system. The role of attorneys is to exercise the control that is given to the parties. Although procedural systems exist which do not involve lawyers, attorneys play a vital role in our procedural system in ensuring that each party is able to take advantage of the degree of control accorded it. These themes will resurface later as we consider whether particular procedural rules should limit or enhance the control of various participants in particular situations.

It may now be useful to consider a concrete case in an attempt to discern the policies underlying our procedural system.

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[8] Walker, Lind & Thibaut, The Relation Between Procedural and Distributive Justice, 65 Va.L.Rev. 1401, 1412–1414 (1979).

[9] Thibaut & Walker, A Theory of Procedure, 66 Calif.L.Rev. 541, 548–552 (1978).

BAND'S REFUSE REMOVAL, INC. V. BOROUGH OF FAIR LAWN

Superior Court of New Jersey, Appellate Division, 1960
163 A.2d 465

GOLDMANN, S.J.A.D.

Defendants Capasso appeal from a Law Division judgment declaring void *ab initio* and setting aside their garbage removal contract with the Borough of Fair Lawn; declaring illegal and void *ab initio* all payments made to them under the contract; setting aside as illegal and void *ab initio* Fair Lawn ordinance No. 688, a supplement to the borough sanitary code; and awarding $303,052.62 in favor of the borough against them.

[In February 1957, the Borough of Fair Lawn advertised for bids for collection of garbage in town. After considering bids, the borough council unanimously voted to award the contract to the Capassos, the lowest qualifying bidder, at a base price of $18,260 per month. The contract was signed in May, the Capassos promptly began garbage collection, and they continued to do so in a satisfactory manner through the trial and ensuing appeal.

In August 1957, the borough adopted ordinance 688, which required a permit to collect garbage and provided that only a person who held a contract with the town could be granted a permit. In effect, this meant that only the Capassos could collect garbage in Fair Lawn. Plaintiff Band's Refuse then had a contract to collect garbage from the Western Electric plant in town, so it applied for a permit. The borough denied the application pursuant to the ordinance.

On November 25, 1957, Band's Refuse filed a complaint alleging that ordinance 688 was arbitrary, discriminatory, unconstitutional, and ultra vires. It asked the court to declare the ordinance void and order the borough to renew its previous permit or issue a new one. Plaintiff sued the borough and a number of its officials, and all these defendants filed an answer alleging their action was proper since the contract had been awarded to the Capassos under proper competitive bidding as required by state statute. On motion, the Capassos themselves were allowed to intervene in the suit as defendants and filed an answer that was identical with the borough's. They also filed a counterclaim asking that the borough be restrained from issuing a permit to plaintiff during the term of their contract, restraining plaintiff from collecting garbage in the town and adjudging ordinance 688 and the contract valid.

Meanwhile, a grand jury investigation into scavenger (garbage collection) contracts in the county disclosed allegations of improprieties in the bidding for the Fair Lawn contract and led to indictments of numerous Fair Lawn officials. On May 15, 1958, plaintiff was allowed (over defendants' objections) to file an amended complaint which added a third count

alleging that the Fair Lawn-Capasso contract was not the result of open competitive bidding but of "secret agreements and understandings * * * which tainted the bidding with fraud." Both the municipal defendants and the Capassos filed answers denying fraud and claiming compliance with the bidding statutes.

At the same time the complaint was amended, the case was pretried by the trial judge who later presided at trial. Although the amendment expanded the issues involved, the pretrial order limited the fraud contentions to two discrete concerns. The trial was projected to take one day. In fact, it took 21 days.

Before turning to the Capassos' objections to the conduct of the trial, the appellate court held that ordinance 688 was valid and that Band's Refuse could not challenge the legality of the bidding procedure because it lacked "standing" to sue, because it had not bid and was not a resident of Fair Lawn.][a]

The Capassos next contend that the judgment must be reversed because of the manner in which the trial judge conducted the proceedings. On the very first day of the trial, June 19, 1958, counsel for these defendants moved that the judge disqualify himself because his activities before trial demonstrated that he had prejudged the issues and exhibited a plan to use the litigation as a vehicle for a broad municipal investigation. Additionally, counsel during the trial objected repeatedly to the participation in the prosecution of the action by both the trial judge and the *amicus curiae* whom he had appointed. There were also several motions for mistrial because of the allegedly prejudicial actions of the court. All of these were overruled or denied.

The Capassos charge—and it is conceded by the trial judge and plaintiff's attorney, Mr. Zimel—that the judge communicated with Mr. Zimel before the trial began and discussed with him the production of various witnesses. It is also an admitted fact that when, during the course of a telephone conversation, Mr. Zimel informed the judge of the possibility of discontinuing the third count of the complaint, the judge said that if that were done he would immediately declare the contract void.[b] When this was subsequently revealed in the course of a colloquy shortly to be mentioned, the trial judge sought to justify what he said on the ground that this was his sole means of controlling the case, since a very important issue involving the public welfare would be eliminated. We find the justification without merit. What the trial court said suggests a possible prejudging of the issues before a single word of testimony had been adduced. Indeed, it foreshadows what later became manifest—an attitude on the

[a] Bracketed material was inserted by the editors to summarize portions of the opinion that were deleted. Asterisks indicate deletions of material by the editors.—Eds.

[b] Presumably this refers to the contract between plaintiff and Western Electric.—Eds.

part of the court that a complete exploration into everything that might possibly touch upon the contract was his personal responsibility.

In discharge of his duty, as he conceived it, the trial judge addressed letters to various counsel demanding the production of certain witnesses and records, thus reflecting a prior partisan analysis and preparation of the case normally considered the exclusive function and legitimate interest of counsel representing the respective parties.

* * *

Six days before the opening of the trial—on June 13, 1958—the trial judge requested counsel to appear before him. The attorney for the Capassos could not attend because he was engaged in another trial. Nevertheless, the court proceeded to question counsel for plaintiff and the borough, requesting that they produce and subpoena certain named witnesses. As to some of these, plaintiff's attorney said that he had had no intention of calling them. It was during this court appearance that mention was made of the telephone conversation between the trial judge and Mr. Zimel, in the course of which the possibility of discontinuing the third count of the amended complaint was discussed. Mr. Zimel told the court on June 13 that he had amended the complaint because the grand jury had indicted Health Officer Begyn and made a presentment. He frankly admitted, "I have no information other than was contained in the indictment and in the newspapers . . . I have no further proof on that than is contained in the presentment." He went on to explain that the reason he had mentioned dropping the third count when he spoke to the judge on the phone was that "In the recent trial of Mr. Begyn, that part of the indictment which involves him with Capasso Brothers was dismissed by the Court. Since that was dismissed by the Court and there was no ruling on it by any jury or otherwise, I felt that perhaps under those circumstances I might drop the third count and proceed on the illegality of the ordinance itself, feeling now very confident, in my mind anyway, that I would be successful on that point."

After further colloquy, the trial judge proceeded to read a statement obviously prepared in advance for public presentation at the June 13 court session. He reviewed the contents of the pleadings, their filing dates, and the similarity of the positions taken by the borough and the Capassos. He observed that "the fact that the Borough appears unwilling to inquire into the validity of the contract under the present circumstances is most unusual," and then went on to refer to such obviously extrajudicial and legally inadmissible materials as the grand jury investigation, its presentment, and the indictment of two Fair Lawn officials for an offense unrelated to the litigation. "These facts," he said, "together with the newspaper accounts of fraud connected with the collection of garbage under the contract involved in this suit, makes it imperative in the public

interest that the matter be investigated. . . ." He concluded this part of his statement with the remark that the apparent neglect of the borough to undertake and adequately protect the public interest and welfare involved in the suit "borders on criminal nonfeasance."

The trial judge then proceeded to appoint an *amicus curiae,* whose duty it would be "to present evidence, subpoena witnesses, examine all witnesses, and submit to the court briefs on the law and facts."

* * *

Even a casual reading of the record, covering some 2,000 pages of printed appendix, reveals an extraordinary participation by the judge in the trial of the cause. He obviously had devoted much time in preparing for the questioning of witnesses and the offering of exhibits. This preparation on the part of the court extended to the issuance of subpoenas by the court itself and by its *amicus curiae,* and the contacting of witnesses for their appearance. The trial judge secured files and documents from the prosecutor's office and sifted them in advance, in preparation of having such of them as he deemed relevant offered as exhibits.

At the hearings the judge called witnesses on his own motion or had the *amicus* do so, and examined and cross-examined them at length. He offered exhibits he had called for. He ruled upon the propriety of his own questions and upon the admissibility of his own exhibits. On occasion he attacked the credibility of witnesses called by him.

In all, there were 32 witnesses who took the stand during the 21 trial days. Of these, the parties produced five; the trial judge, by his own subpoena, direction or arrangement, called 27. Of the latter, 24 were permitted to testify upon questioning by the court or *amicus curiae,* and this over the objection of counsel for the Capassos that their names had not been supplied in answer to interrogatories.

* * *

Defendants Capasso do not question the right of a judge to interrogate a witness in order to qualify testimony or elicit additional information, or his right under special circumstances to summon a witness on his own initiative. Generally, a court's interrogation of witnesses, where not excessive, has been sustained. As was pointed out by our Supreme Court, the power to take an active part in the trial of a case must be exercised by the judge with the greatest restraint. "There is a point at which the judge may cross that fine line that separates advocacy from impartiality. When that occurs there may be substantial prejudice to the rights of one of the litigants."

The motivation of the trial judge may be found in what he said in his opinion in justification of his appointment of *amicus curiae*; he felt that

the court was "faced with a grave situation testing its ability and will to use its powers, if necessary, to prevent fraud, preserve justice, and protect the public interest." He also observed that he had the power to investigate as auxiliary to his power to decide, and "the power to investigate implies necessarily the power to summon and to question witnesses."

What is called for here is a balancing of judicial power against the interests of a litigant. On the one hand, there is the recognized power of a trial judge to call witnesses. Balanced against this power of a trial judge must be the necessity of judicial self-restraint and the maintenance of an atmosphere of impartiality. Courts must not only be impartial; they must give the appearance of impartiality.

The power of a trial judge to call and examine witnesses is not unlimited. His conduct of a trial contrary to traditional rules and concepts which have been established for the protection of private rights constitutes a denial of due process. The limitations upon the activities and remarks of a trial judge have usually been considered within the frame of reference of a jury trial. However, the necessity of judicial self-restraint is no less important where the judge sits alone; if he participates to an unreasonable degree in the conduct of the trial, even to the point of assuming the role of an advocate, what he does may be just as prejudicial to a defendant's rights as if the case were tried to a jury. * * *

It is our conclusion that the trial judge overstepped the permissible bounds of judicial inquiry in this case. In effect, he took on the role of advocate, his activities extending from investigation and preparation to the actual presentation of testimony and exhibits at the trial. He converted the action into what amounted to a municipal investigation. Cf. Canons of Judicial Ethics, Canon 15, dealing with a judge's interference in the conduct of a trial.

We agree with defendants Capasso that the trial court committed prejudicial error by producing a large number of witnesses and admitting their testimony in evidence.

Defendants Capasso served supplemental interrogatories upon plaintiff on May 20, 1958 requesting the names and addresses of all witnesses to the facts alleged in the third count of the amended complaint. The answer [contained the names of only seven witnesses]. This answer was not supplemented or amended before trial.

The court, as noted, produced 27 witnesses on its own motion; 24 had not been named in the answer to interrogatories. Counsel for the Capassos had no advance notice of the identity of these witnesses and no opportunity to conduct adequate pretrial investigation. He made proper objection as each witness was called, but to no avail. The testimony they gave, as a reading of the trial judge's lengthy opinion and supplemental

opinion will demonstrate, played an important part in the factual conclusions he reached.

Under R.R. 4:23–12 of our interrogatory rules, the penalty for failure to name a witness in answer to interrogatories is the exclusion of the testimony of that witness at the trial. * * *

It would seem anomalous to give a party protection from surprise witnesses when they are called by the opposition, but not when called by the court itself. The potential for harm is identical in either case. In addition, the testimony of the witnesses here called by the court brought entirely new issues into the case which were in no wise comprehended by the pretrial order. These issues found their way into the court's opinions and will be mentioned hereinafter.

* * *

Prejudicial error also resulted from the creation of new issues by the court—issues never mentioned or suggested in the pretrial order.

On September 10, 1958, the eleventh day of the trial and four months after the pretrial conference was held, the trial judge on his own motion, and without prior notice, stated that he was adding new issues, and this over the most strenuous objection of counsel for the Capassos. [The new issues alleged noncompliance with the bidding process required by various state statutes.]

The five added issues provided a substantial foundation for the court's conclusion that the Capasso contract was invalid. Although the trial judge in his original opinion made the bare statement that "There was no justifiable reason to allege surprise on any new issue raised during the trial," we cannot agree. The issues were injected into the case without notice or warning. There was no reason for the Capassos or their counsel to anticipate that these questions were issues to be tried until the judge, against a background of testimony he was largely responsible for adducing, brought them into the trial picture.

As in the case of the judge's other activities before and during trial, so here—he apparently considered it his duty to introduce new issues because of the public character of the case, in disregard of those which had been defined by the parties, and in disregard of the rules and precedents applicable in civil cases.

The function of a trial judge is to serve litigants by determining their disputes and the issues implicated therein in accordance with applicable rules and law. Established procedures lie at the heart of due process and are as important to the attainment of ultimate justice as the factual merits of a cause. A judge may not initiate or inspire litigation and, by the same token, he may not expand a case before him by adding new issues

which come to mind during the trial, without giving the parties affected a full and fair opportunity to meet those issues.

* * *

On September 11, 1958, the twelfth day of the trial, the recently substituted counsel for the borough and its officials applied for permission to change the position theretofore taken by them, as set forth in their original answer and amended answer and as repeated on a number of occasions during the preceding trial days. Up to that moment the borough and its officials had insisted that the ordinance and the contract were valid. These defendants were now allowed to file a second amended answer alleging fraud and the invalidity of the contract, and a cross-claim seeking recovery against the Capassos of all monies paid them under the contract. This change of position was permitted over the vigorous and extended objection of the Capassos' attorney. Counsel's request for adequate time to protect the interests of his client by investigation and discovery proceedings was promptly denied.

The Capassos insist that this sudden shift came as a shock and a surprise and amounted to a substantial deprivation of their fundamental rights. They quote from Grobart v. Society for Establishing Useful Manufactures, 2 N.J. 136, 149, 65 A.2d 833 (1949), where former Chief Justice Vanderbilt said:

> ". . . It is not a mere matter of formal logic that leads the courts to insist that litigants shall not shift their position in *successive* pleadings.
>
> . . . [S]hifting causes of action in successive pleading will completely block the purpose of all pleading, i.e., getting to an issue or issues where one party asserts the affirmative and the other the negative on a question or questions of law or of fact."

It seems inappropriate to extend the *Grobart* rule in the present case. When the original answer was filed by the borough and borough officials—and so with the amended answer to plaintiff's amended complaint—the officials apparently had the honest belief that the Capasso contract was in all respects valid. What came out in the course of the trial, mostly through witnesses and exhibits brought into the case by the court and its *amicus curiae*, must have changed their minds. It is also possible that they had a second thought in the light of the impact of the grand jury's action upon the public and the newspapers, and the impending legislative investigation into the scavenger business.

If the Capasso contract was not in fact the result of *bona fide* competitive bidding, it was important and proper from the point of view of the paramount public right and interest to allow the amended answer. However, fairness to defendants dictated that they be allowed a reasonable

time for discovery and investigation, in order that the facts in support of their claim that the contract was valid might be developed and presented. They had up to that moment been dealing with a situation where the borough and its officials had stoutly affirmed the validity of the contract. The municipality had taken no steps to rescind the agreement, but had accepted scavenger service and made monthly payments thereunder even during the period of the hearings. Its position had been affirmed and reaffirmed, in its pleadings, in the pretrial order, and during the trial. Fundamental fairness required that the court allow the Capassos sufficient time to meet the radically new situation facing them. The denial of that opportunity was the denial of due process.

* * *

The judgment is reversed and the matter remanded for a full trial to determine the validity of the scavenger contract. Substituted pleadings should be filed, reasonable discovery allowed and a new pretrial conference held, in order that the exact position of the several parties will be manifest, their respective contentions clearly defined, and the issues sharply drawn. In view of the fact that the borough, mayor and council, and borough manager now challenge the validity of the Capasso contract, there would appear to be no need for the services of an *amicus curiae*. The parties can be relied upon to develop fully what are patently the issues of the case, including such questions as compliance with the bidding, appropriation and prequalification statutes, and the charges of collusion and connivance among the bidders and between the Capassos and the borough officials.

NOTES AND QUESTIONS

1. This suit, filed in a New Jersey trial court, was subject to the New Jersey rules of civil procedure, rather than the Federal Rules of Civil Procedure that apply in federal courts. Today many states' rules of civil procedure are directly modelled on the Federal Rules. The New Jersey rules applicable at the time of this case had a number of significant variations from the Federal Rules, but many of the basic steps in the litigation chronology are the same. Note the various pretrial procedural steps followed in this case (with the analogous Federal Rule shown in parentheses):

—complaint filed by plaintiff Band's Refuse Removal, Inc. (Fed.R.Civ.P. 8(a));

—answer filed by defendant Borough of Fair Lawn, containing five separate defenses (Fed.R.Civ.P. 8(b)–(c));

—motion of the Capassos to intervene as defendants granted (Fed. R.Civ.P. 24);

—answer and counterclaims filed by defendants Capasso (Fed.R.Civ.P. 8, 13);

—plaintiff permitted to file an amended complaint after Grand Jury issued indictments (Fed.R.Civ.P. 15);

—discovery conducted by the parties, including interrogatories requesting identity of witnesses (cf. Fed.R.Civ.P. 26, 33);

—judge held pre-trial hearing (cf. Fed.R.Civ.P. 16);

—judge appointed *amicus curiae* to present evidence, subpoena and examine witnesses, and submit briefs (cf. Fed.R.Civ.P. 53);

—trial held (cf. Fed.R.Civ.P. 38–52);

—judgment entered (cf. Fed.R.Civ.P. 54(a); 58);

—appeal taken (cf. Fed.R.App.P. 3; 4).

2. If the trial judge had reason to believe that the Capassos had influence over the borough, was he powerless to do anything about it? Cf. Haitian Refugee Ctr. v. Civiletti, 503 F.Supp. 442, 461 (S.D.Fla.1980) ("Federal Courts are not roving engines of justice careening about the land in search of wrongs to right.") Does his claim that the public welfare was at stake justify a more activist role? If so, how did he err in carrying out that role? Does the fact that the borough eventually switched sides show that the trial judge was right to do as he did? If it had not switched sides, what would the appellate court have done with the case?

In *Band's Refuse* the judge justified his activism by saying that his investigation was integral to his responsibility to decide the case correctly. Should the judge's responsibility extend this far? Consider the following description of the role of judges in 19th century Japan in C. Goodman, Justice and Civil Procedure in Japan (2004) at 68:

> Since the responsibility for clarifying issues was a responsibility of the judge and since the judge was also responsible for reaching a correct decision in the matter, the process was judge centered. Judges could on their own call witnesses and could question witnesses before the parties were permitted to examine. The parties did not have ultimate responsibility for either fact gathering and fact production or for legal contention presentation. As the judge was responsible for arriving at a "correct" decision, these matters were part of the court's responsibility. If the judge failed to properly clarify the case (i.e., if the judge failed to address legal issues that might change the decision or failed to investigate into factual matters that might change the result—even if such legal or factual matters had not been raised by the parties) the court's decision could be reversed on appeal.

It bears emphasis that this "self-starter" role is not the norm for judges in other systems. Instead, the judge in the Continental system usually investigates according to "suggestions" from the parties, not as a self-starter. Should judges be self-starters? In France, there have since Napoleonic times been officials called "investigating magistrates" who wield great authority. Balzac, for example, said in the 19th century that "No human authority can

encroach upon the power of an investigating judge; nothing can stop him; no one can control him." Even today, such a judge "is not bound by the prosecutor's opinion when deciding whether to send people to trial, though it is unusual for the two to arrive at radically different conclusions." Saltmarsh & Pfanner, French Court Convicts Executives in Vivendi Case, N.Y. Times, Jan. 22, 2011, at B2. But that sort of judicial behavior is not countenanced in the rest of Western Europe. In the U.K., for example, the Court of Appeal denounced intervention by trial judges in pending cases, saying it involved "a quasi-inquisitorial role" that is "entirely at odds with the adversarial system." Southwark LBC v. Maamefowaa Kofiadu [2006] EWCA Civ. 281 at [148].

3. *Band's Refuse* says an American trial judge can call witnesses in civil cases "under limited circumstances." What are those circumstances? Consider the following views regarding the judge's questioning of witnesses: "A trial judge may not advocate on behalf of a plaintiff or a defendant, nor may he betray even a hint of favoritism toward either side. This scrupulous impartiality is not inconsistent with asking a question of a witness in an effort to make the testimony crystal clear for the jury. The trial judge need not sit on the bench like a mummy when his intervention would serve to clarify an issue for the jurors." Ross v. Black & Decker, Inc., 977 F.2d 1178, 1187 (7th Cir.1992). How could the trial judge in *Band's Refuse* have exercised that power properly?

4. In a case involving alleged pollution of Lake Superior by Reserve Mining Co., a federal appellate court assigned a new judge upon a mandamus petition alleging improper conduct and bias by District Judge Miles Lord, who had exercised jurisdiction over the case over a lengthy period. Reserve Mining Co. v. Lord, 529 F.2d 181 (8th Cir.1976). After the appellate court's affirmance of his determination that Reserve Mining Co.'s discharges posed a public health hazard and must be abated, Judge Lord called a series of hearings on the question of remedy at which he expressed the view that, in 9 1/2 months of trial, "in every instance Reserve Mining Company hid the evidence, misrepresented, delayed and frustrated the ultimate conclusions" and called witnesses in whom he did not have "any faith." The Eighth Circuit found, *inter alia:*

> Judge Lord seems to have shed the robe of the judge and to have assumed the mantle of the advocate. The court thus becomes lawyer, witness and judge in the same proceeding, and abandons the greatest virtue of a fair and conscientious judge—impartiality.
>
> A judge best serves the administration of justice by remaining detached from the conflict between the parties.

Should Judge Lord have held his tongue even though he believed there had been a studied course of misrepresentation and bad faith by Reserve Mining Co.? Was it proper for him to raise Reserve's past misdeeds if he believed them relevant to its on-going conduct in relation to the remedial phase of the suit that was before him? If so, how could these matters have been

properly raised without demonstrating partiality on the judge's part? For a lively account of the controversial career of Judge Lord, see S. Engelmayer & R. Wagman, Lord's Justice (1985).

In *Band's Refuse*, should it matter whether the judge concluded that further information was needed based on presentations by the parties in court? In general, judges are disqualified on grounds of bias only where that attitude results from an "extrajudicial source," rather than from the evidence and other proceedings in the case. Liteky v. United States, 510 U.S. 540 (1994). Should the reaction of the judge to the evidence presented in the case ever require disqualification?

5. With these issues in mind, let us reflect on whether the American adversary model is inevitable, or even desirable.

LON FULLER, THE PROBLEMS OF JURISPRUDENCE

706–07 (1949)

Adjudication involves a complex of factors that may appear in various combinations and that may be present in varying degrees. We may, however, say that the moral force of a judgment or decision will be at a maximum when the following conditions are satisfied: 1) The judge does not act on his own initiative, but on the application of one or both of the disputants. 2) The judge has no direct or indirect interest (even emotional) in the outcome of the case. 3) The judge confines his decision to the controversy before him and attempts no regulation of the parties' relations going beyond that controversy. 4) The case presented to the judge involves an existing controversy, and not merely the prospect of some future disagreement. 5) The judge decides the case solely on the basis of the evidence and arguments presented to him by the parties. 6) Each disputant is given ample opportunity to present his case.

It is seldom that all of these conditions can be realized in practice, and it is not here asserted that it is always wise to observe all of them. What is asserted is merely that adjudication as a principle of order achieves its maximum force when all of these conditions are satisfied. Some of this moral or persuasive force may wisely be sacrificed when other considerations dictate a departure from the conditions enumerated above, and where the tribunal, as an agent of legitimated power, has the capacity to compel respect for its decision.

The connection between the conditions enumerated above and the moral force of the judgment rendered is not something irrational and fortuitous. The key to it is found in the fact that men instinctively seek to surround the process of adjudication with those conditions that will tend to insure that the decision rendered is the closest possible approximation of the common need. This obviously explains the conditions of disinterestedness on the part of the judge and the opportunity for a full hearing of both sides, that is, conditions 2 and 6 in the enumeration above. Underly-

ing the other four conditions is a single insight, namely, that men's interests and desires form a complex network, and that to discover the most effective and least disruptive pattern of order within this network requires an intimate acquaintance with the network itself and the interests and desires of which it is composed. In other words, these conditions are designed to obviate an evil that may be broadly called "absentee management." The judge must stick to the case before him (condition 3), because if he ventures beyond it he may attempt to regulate affairs on which he is inadequately informed. The judge must work within the framework of the parties' arguments and proof (condition 5), because if he goes beyond these he will lack the guidance given him by the parties and may not understand the interests that are affected by a decision rendered outside that framework. The case must involve a present controversy (condition 4), because neither the parties nor the judge can be sure that they fully understand the implications of a possible, future controversy or the precise interests that may be affected by it when it arises. The first condition (that the judge should act on the application of the parties) is perhaps the most difficult to justify. It arises from the fact that the judge who calls the parties in and himself sets the framework of the hearing lays himself open to the suspicion of planning a general regulation in which the controversy on which he hears evidence and arguments appears as a mere detail. Thus a violation of condition 1 tends to carry with it a strong suspicion that condition 3 is being violated.

W. ZEIDLER, EVALUATION OF THE ADVERSARY SYSTEM: AS COMPARISON, SOME REMARKS ON THE INVESTIGATORY SYSTEM OF PROCEDURE

55 Australian L.J. 390, 394–97 (1981)

While the English judge is an umpire sitting at the sidelines watching the lawyers fight it out and afterwards declaring one of them the winner, the German judge is the director of an improvised play, the outcome of which is not known to him at first but depends heavily on his mode of directing.

Thus to our English colleague the German judge will seem highly vocal and dominant whereas counsel will appear to act with somewhat subdued adversary zeal. * * *

It is the task of the Continental lawyers to determine through the facts which they introduce and by the applications which they make what the specific question in issue in the litigation is. The parties, therefore, do draw the perimeters of the dispute and within these the court must determine the issues raised by the parties. But most of the rest is, it is true, then up to the judge. It is he who advances the course of the proceedings and conducts the hearings at the trial. He has the duty of find-

ing out the law including the foreign law and to some extent even the facts of the case. To allow the examination of the witnesses and experts to be placed in the hands of the attorneys has always been thought to be incompatible with the most important rule, namely that it is the chief function of a court of law to find out the truth and not merely to decide which party has adduced better evidence. * * *

As a result, the judge interrogates the witnesses and experts, while the attorneys only put supplementary questions. * * *

The German judge is not * * * limited only to consideration of the probative value of the material put forward by the parties. The judge can, for example, appoint ex officio an independent expert even if neither of the parties requested this to be done. The judge may of his own motion make an order that a view be taken of a locus quo such as the scene of a traffic accident, and he may also request public authorities to transmit documents or to furnish official information. He may also order a litigant to produce any documents to which he has referred as a means of proof and which are in his possession. In the words of Kaplan, von Mehren and Schaefer: "Always examining the case as it progresses with understanding of the probably applicable norms, the court puts questions intended to mark out areas of agreement and disagreement, to elucidate allegations and proof offers and the meaning of matters elicited in proof-takings. In this way the court enlightens itself about the issues, and at the same time broadens the understanding of counsel and the parties. The court leads the parties by suggestion to strengthen their respective positions, to improve upon, change, and amplify their allegations and proof offers and to take other steps." [See Kaplan, von Mehren and Schaefer, Phases of German Civil Procedure, 71 Harv.L.Rev. 1193, 1225 (1958)].

The leading part played by the court both in deciding on the nature of the evidence to be examined and in taking it explains why the lawyers are generally not allowed to examine the witnesses privately before this is done by the court. It is feared that this could unduly influence their testimony. * * * It is the court who asks for the witness' name, age, occupation and residence and who warns him that he must tell the truth. The witness is then invited by the judge to tell in narrative form and without undue interruption what he knows about the matter. After he has told his story it is the court which asks questions designed to test, clarify and amplify it. When the lawyers' and the parties' turn comes to formulate pertinent questions, very little use is normally made of this opportunity, at least by English standards, perhaps because extensive questioning by them might appear to be critical of the court itself.

MARVIN FRANKEL,* THE SEARCH FOR TRUTH: AN UMPIREAL VIEW

123 U.Pa.L.Rev. 1031, 1042–43 (1975)

The fact is that our system does not allow much room for effective or just intervention by the trial judge in the adversary fight about the facts. The judge views the case from a peak of Olympian ignorance. His intrusions will in too many cases result from partial or skewed insights. He may expose the secrets one side chooses to keep while never becoming aware of the other's. He runs a good chance of pursuing inspirations that better informed counsel have considered, explored, and abandoned after fuller study. He risks at a minimum the supplying of more confusion than guidance by his sporadic intrusions.

The ignorance and unpreparedness of the judge are intended axioms of the system. The "facts" are to be found and asserted by the contestants. The judge is not to have investigated or explored the evidence before trial. No one is to have done it for him. The judicial counterpart in civil law countries, with the file of the investigating magistrate before him, is a deeply "alien" conception. * * * Without an investigative file, the American trial judge is a blind and blundering intruder, acting in spasms as sudden flashes of seeming light may lead or mislead him at odd times.

The ignorant and unprepared judge is, ideally, the properly bland figurehead in the adversary scheme of things. Because the parties and counsel control the gathering and presentation of evidence, we have made no fixed, routine, expected place for the judge's contributions. It is not a regular thing for the trial judge to present or meaningfully to "comment upon" the evidence. As a result, his interruptions are just that—interruptions; occasional, unexpected, sporadic, unprogrammed, and unduly dramatic because they are dissonant and out of character. The result—to focus upon the jury trial, the model for our system including, of course, its rules of evidence—is that the judge's participation, whether in the form of questions or of comments, is likely to have a disproportionate and distorting impact. The jury is likely to discern hints, a point of view, a suggested direction, even if none is intended and quite without regard to the judge's efforts to modulate and minimize his role. Whether the jury follows the seeming lead or recoils from it is not critical. The point is that there has been a deviant influence, justified neither in adversary principles nor in the rational competence of the trial judge to exert it.

We should be candid, moreover, in recognizing that juries are probably correct most of the time if they glean a point of view from the judge's interpolations. Introspecting, I think I have usually put my penetrating questions to witnesses I thought were lying, exaggerating, or obscuring

* At the time he wrote this article, Marvin Frankel was a federal district judge.—Eds.

the facts. Less frequently, I have intruded to rescue a witness from questions that seemed unfairly to put the testimony in a bad light or to confuse its import. Similar things appear in the reported decisions. The trial judge who takes over cross-examination seems to be hot on the scent after truth. Even the cold page conveys notes not wholly austere or detached. This would all be agreeable for a rational system of justice if there were grounds to suppose that the judge was always, or nearly always, on the right track. But there are not such grounds. The apparatus is organized to equip the judge poorly for the position of attempted leadership. Within the confines of the adversary framework, the trial judge probably serves best as relatively passive moderator.

NOTES AND QUESTIONS

1. Professor Fuller speaks in rather general terms of the attributes of adjudication. Do both the American and the Continental models embody the characteristics he endorses? Has he emphasized the wrong things?

2. There are aspects of the American system that resemble the Continental approach. Zeidler points to the judge's power to appoint an independent expert as though this is thoroughly alien to the Anglo-American approach. But Rule 706 of the Federal Rules of Evidence authorizes an American federal judge to do exactly that. See also Fed.R.Civ.P. 53 (authorizing the appointment of Special Masters to conduct hearings or investigate issues).

3. Some have argued that the American approach should be revised more radically to resemble the Continental model. Professor Langbein, for example, contends that it would be possible to preserve the adversary nature of adjudication while leaving fact development to the judge. See Langbein, The German Advantage in Civil Procedure, 52 U.Chi.L.Rev. 823 (1985). Does this argument disregard important differences between the two systems? For example, in the American system much of the law is derived from previous cases, while the Continental approach, influenced by the Napoleonic Code, relies more heavily on statutes. More significantly, the American commitment to the jury trial seems incompatible with the Continental emphasis on fact development by the judiciary.

Sherman, Transnational Perspectives Regarding the Federal Rules of Civil Procedure, 57 J. Legal Ed. 510 (2006), notes that American practice under the Federal Rules differs from traditional civil law procedure as to such features as notice pleading, single-event trials with live testimony, broad discovery, a central role for counsel and correspondingly reduced role for the judge, liberal joinder and aggregation devices, and promotion of settlement. But in recent decades, "the two systems have increasingly influenced each other" and have moved closer in their methods. The American Law Institute, in conjunction with the International Institute for the Unification of Private Law (UNIDROIT), has published Principles of Transnational Civil Procedure (Cambridge U. Press, 2006), which attempts to identify "fundamental principles for transnational commercial litigation" that sometimes deviate from

those used in American courts. As to the role of the judge in calling and examining witnesses in civil law countries versus examination by counsel in common law countries, they comment (Principles at 145):

> The chief deficiency in the common-law procedure is excessive partisanship in cross-examination, with the danger of abuses and distorting the truth. In the civil law the chief deficiency is passivity and lack of interest of the court while conducting an examination, with the danger of not reaching relevant information. Both procedures require efficient technique, on the part of the judge in civil-law systems and the lawyers in common-law systems.

4. What impact would emphasizing judicial control have on the parties' willingness to accept the outcome? Would litigants be reluctant to turn over factual investigation to judges? How would plaintiffs suing the government be likely to view such a process?

5. By the 1970s, the emergence of what has been termed "public law litigation"—such as school desegregation, employment discrimination, antitrust, securities fraud, corporate reorganizations, union governance, consumer fraud, and environmental management—prompted some rethinking about the traditional passive view of a judge's role. These cases usually involve multiple parties, a sprawling and amorphous structure, the need for discovery of large amounts of information, lengthy pre-trial preparation, and complex forms of relief. In this context, Professor Abram Chayes argued, the judge becomes "the dominant figure in organizing and guiding" the case, drawing "for support not only on the parties and their counsel, but on a wide range of outsiders—masters, experts, and oversight personnel." The judge must act as "the creator and manager of complex forms of ongoing relief, which have widespread effects on persons not before the court and require the judge's continuing involvement in administration and implementation." Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L.Rev. 1281, 1284 (1976). Would the suit in *Band's Refuse* be considered a public law case, given the municipality's and public's interest in it? Was the judge's conduct there nevertheless inappropriate? Compare Brown, The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication, 93 Calif. L. Rev. 1585 (2005) (urging that "inquisitorial" judicial management be introduced into American criminal adjudication to offset the recent increase in prosecutors' power).

6. The American judge's role has also been expanded pursuant to amendments to the Federal Rules. Fed.R.Civ.P. 16 now provides for two kinds of pretrial conferences—"scheduling and planning" and "final." A judge must enter a "scheduling order" limiting the parties' time to complete various pretrial tasks within 120 days after the complaint is served. A "final" conference should be held "as close to the time of trial as is reasonable" and result in a pretrial order that "control[s] the course of the action." Some see a shift in the role of judges: "Judges began to see themselves less as neutral adjudicators—deciding what the parties brought to them for decision and proceeding at a pace to be determined by the parties—and more as managers of a

costly and complicated process." Shapiro, Federal Rule 16: A Look at the Theory and Practice of Rulemaking, 137 U.Pa.L.Rev. 1969, 1983 (1989); see also Marcus, Reining in the American Lawyer: The New Role of American Judges, 27 Hast. Int'l & Compar. L. Rev. 3 (2003).

Judicial management has been criticized as making judges meddling, bureaucratic administrators who lose their basic sense of judging. See Resnik, Managerial Judges, 96 Harv.L.Rev. 374, 445 (1982) ("Seduced by controlled calendars, disposition statistics, and other trappings of the efficiency era and the high-tech age, managerial judges are changing the nature of their work.") But the case management movement has nevertheless spread to other common law countries, and England adopted similar techniques in 1999. "Certainly, the new [English procedural] code has reshaped the relationship between the parties, their lawyers, and the courts. Already, it is clear that there has been an important shift of procedural control from the parties to the court." N. Andrews, English Civil Procedure 29–30 (2003).

KOTHE V. SMITH

United States Court of Appeals, Second Circuit, 1985
771 F.2d 667

Before LUMBARD, VAN GRAAFEILAND and PIERCE, CIRCUIT JUDGES.

VAN GRAAFEILAND, CIRCUIT JUDGE:

Dr. James Smith appeals from a judgment of the United States District Court for the Southern District of New York (Sweet, J.), which directed him to pay $1,000 to plaintiff-appellee's attorney, $1,000 to plaintiff-appellee's medical witness, and $480 to the Clerk of the Court. For the reasons hereinafter discussed, we direct the judgment be vacated.

Patricia Kothe brought this suit for medical malpractice against four defendants, Dr. Smith, Dr. Andrew Kerr, Dr. Kerr's professional corporation, and Doctors Hospital, seeking $2 million in damages. She discontinued her action against the hospital four months prior to trial. She discontinued against Dr. Kerr and his corporation on the opening day of the trial.

Three weeks prior thereto, Judge Sweet held a pretrial conference, during which he directed counsel for the parties to conduct settlement negotiations. Although it is not clear from the record, it appears that Judge Sweet recommended that the case be settled for between $20,000 and $30,000. He also warned the parties that, if they settled for a comparable figure after trial had begun, he would impose sanctions against the dilatory party. Smith, whose defense has been conducted throughout this litigation by his malpractice insurer, offered $5,000 on the day before trial, but it was rejected.

Although Kothe's attorney had indicated to Judge Sweet that his client would settle for $20,000, he had requested that the figure not be

disclosed to Smith. Kothe's counsel conceded at oral argument that the lowest pretrial settlement demand communicated to Smith was $50,000. Nevertheless, when the case was settled for $20,000 after one day of trial, the district court proceeded to penalize Smith alone. In imposing the penalty, the court stated that it was "determined to get the attention of the carrier" and that "the carriers are going to have to wake up when a judge tells them that they want to settle a case and they don't want to settle it." Under the circumstances of this case, we believe that the district court's imposition of a penalty against Smith was an abuse of the sanction power given it by Fed.R.Civ.P. 16(f).

Although the law favors the voluntary settlement of civil suits, it does not sanction efforts by trial judges to effect settlements through coercion. Del Rio v. Northern Blower Co., 574 F.2d 23, 26 (1st Cir.1978) (citing Wolff v. Laverne, Inc., 17 A.D.2d 213, 233 N.Y.S.2d 555 (1962)). In the *Wolff* case, cited with approval in *Del Rio,* supra, the Court said:

> We view with disfavor all pressure tactics whether directly or obliquely, to coerce settlement by litigants and their counsel. Failure to concur in what the Justice presiding may consider an adequate settlement should not result in an imposition upon a litigant or his counsel, who reject it, of any retributive sanction not specifically authorized by law.

In short, pressure tactics to coerce settlement simply are not permissible. "The judge must not compel agreement by arbitrary use of his power and the attorney must not meekly submit to a judge's suggestion, though it be strongly urged." Brooks v. Great Atlantic & Pacific Tea Co., 92 F.2d 794, 796 (9th Cir.1937).

Rule 16 of the Fed.R.Civ.P. was not designed as a means for clubbing the parties—or one of them—into an involuntary compromise. Although subsection (c)[(2)(I)] of Rule 16, added in the 1983 amendments of the Rule, was designed to encourage pretrial settlement discussion, it was not its purpose to "impose settlement negotiations on unwilling litigants." See Advisory Committee Note, 1983, 97 F.R.D. 205, 210.

We find the coercion in the instant case especially troublesome because the district court imposed sanctions on Smith alone. Offers to settle a claim are not made in a vacuum. They are part of a more complex process which includes "conferences, informal discussions, offers, counterdemands, more discussions, more haggling, and finally, in the great majority of cases, a compromise." J. & D. Sindell, Let's Talk Settlement 300 (1963). In other words, the process of settlement is a two-way street and a defendant should not be expected to bid against himself. In the instant case, Smith never received a demand of less than $50,000. Having received no indication from Kothe that an offer somewhere in the vicinity of $20,000 would at least be given careful consideration, Smith

should not have been required to make an offer in this amount simply because the court wanted him to.

Smith's attorney should not be condemned for changing his evaluation of the case after listening to Kothe's testimony during the first day of the trial. As every experienced trial lawyer knows, the personalities of the parties and their witnesses play an important role in litigation. It is one thing to have a valid claim; it is quite another to convince a jury of this fact. It is not at all unusual, therefore, for a defendant to change his perception of a case based on the plaintiff's performance on the witness stand. We see nothing about that occurrence in the instant case that warranted the imposition of sanctions against the defendant alone.

Although we commend Judge Sweet for his efforts to encourage settlement negotiations, his excessive zeal leaves us no recourse but to remand the matter with instructions to vacate the judgment.

NOTES AND QUESTIONS

1. If the plaintiff's offer to settle for $20,000 had been communicated to the defendant, would sanctions still not have been appropriate? Given the court's comment that an attorney should not be condemned for changing her evaluation of the case after hearing the evidence, would it ever be fair to impose sanctions on one who thought that the case was stronger than it actually appeared at trial? Does the court's comment that the law does not support efforts "to effect settlements through coercion" mean that a judge can never sanction a party for refusal to settle? A district judge with a large number of asbestos personal injury cases set a time limit for settling cases set for trial, and the appellate court held that this was permissible under Rule 16: "[I]mposing sanctions for unjustified failure to comply with the court's schedule for settlement is entirely consistent with the spirit of Rule 16. The purpose of Rule 16 is to maximize the efficiency of the court system by insisting that attorneys and clients cooperate with the court and abandon practices which unreasonably interfere with the expeditious management of cases." Newton v. A.C. & S., 918 F.2d 1121 (3d Cir.1990).

2. Note that the judge in *Kothe* ordered the parties to conduct settlement negotiations, and that Rule 16 authorizes settlement conferences with the judge. For some time, there was a debate about whether Rule 16 permitted judges to require parties represented by counsel to attend settlement conferences. (This is discussed fully in G. Heileman Brewing Co. v. Joseph Oat Corp., infra p. 522.) In 1993 this rule was amended to permit the judge to "require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute." How should judges use this authority? Consider In re Stone, 986 F.2d 898 (5th Cir.1993), which held that a district judge should not have required the federal government to send a representative with "full settlement authority" since some cases could only be settled by action of officials in Washington. Noting the "unique position" of the government, the appellate court insisted

that the judge consider "less drastic steps" such as requiring availability by telephone. See also U.S. v. U.S. District Court for the Northern Mariana Islands, 694 F.3d 1051 (9th Cir. 2012) (endorsing Fifth Circuit's "practical approach" in *Stone* to ordering high federal officials to attend settlement conferences, and holding that the district court abused its discretion by ordering that the Assistant Attorney General attend the initial settlement conference in a tax refund suit filed in the Northern Mariana Islands).

In Nueces County v. De Penn, 953 S.W.2d 835 (Tex.App.1997), the appellate court found that the county executive did not have to attend under an order requiring the attendance of the person with settlement authority because he could only settle with the concurrence of the commissioner's court. Should all the members of the commissioner's court be required to attend? Is there any alternative to this unmanageable situation? Compare United States v. City of Garland, 124 F.Supp.2d 442 (N.D.Tex.2000) (mayor and city council member could be required to attend mediation session).

An additional complicating factor is the role of insurance companies in settlement. In *Kothe* the judge said he wanted to "get the attention" of insurance companies. Should the judge be allowed to compel their attendance? The reality is that insurers may play a critical role in controlling settlements. See Syverud, The Duty to Settle, 76 Va.L.Rev. 1113, 1115–17 (1990). Nevertheless, there is doubt about whether courts can require their participation in settlement conferences. Compare In re Novak, 932 F.2d 1397 (11th Cir.1991) (court may not compel attendance by representative of insurer) with Lockhart v. Patel, 115 F.R.D. 44 (E.D.Ky.1987) (court sanctioned defendant because his insurer did not send representative with authority to settle rather than "some flunky who has no authority to negotiate").

3. If a judge can require parties and counsel to attend a settlement conference, what can they be required to do there? In G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648 (7th Cir.1989) (reproduced in full, infra p. 522), the court upheld the power of a district court to order a corporate party represented by counsel to send a "corporate representative with authority to settle" to a settlement conference. The court found that this did not require attendance by a person "willing to settle on someone else's terms," but only a person with authority to speak definitively and to commit the corporation in the litigation. What does "authority to settle" mean? If the defendant's representative only has authority to settle the case for $100 "nuisance value," does that satisfy the court's requirement of coming with authority to settle? Does it suffice if the representative has been instructed "not to pay one cent" because the company believes the suit is without merit? Court orders to mediate sometimes require that the parties "participate in good faith." Is it possible to have a "good faith participation" standard that does not improperly interfere with the parties' right not to yield or settle? For discussion, see Sherman, Court-Mandated Alternative Dispute Resolution, 46 S.M.U.L.Rev. 2079, 2089–94 (1993).

In Shedden v. Wal-Mart Stores, Inc., 196 F.R.D. 484 (E.D. Mich. 2000), Wal-Mart sent one of its store managers to the final pretrial settlement con-

ference, but the store manager reiterated Wal-Mart's policy that it would not settle suits brought by customers. According to Wal-Mart, there was accordingly nothing more to say. The judge reacted as follows (id. at 486):

> Because Wal-Mart's asserted "no settlement" litigation policy will require the Court to expend substantial judicial time and resources in a trial which might have been avoided if Wal-Mart had been willing to engage in meaningful settlement negotiations, the Court finds that it would be just to require the attendance at trial of Wal-Mart's general counsel or some other Wal-Mart corporate officer with litigation policy authority.
>
> The Court recognizes that a party has the right to refuse to offer any money for settlement in a given case and the court cannot require a party to make a monetary settlement offer in any given case. (Indeed, one might find it refreshing for a party to take a "principled stand" against settlement in a given case.) However, in the Court's view, an across-the-board policy of refusing to negotiate frustrates both the letter and spirit of both the Federal Rules of Civil Procedure and this Court's Local Rules, which encourage good faith settlement efforts in order to preserve scarce judicial resources. Here, the Court is, in fact, not even requiring Wal-Mart to engage in settlement negotiations. It is simply requiring Wal-Mart's General Counsel, or other responsible corporate officer, to be present for trial, as the Court believes that requiring the attendance of such a Wal-Mart official during trial could have a salutary effect in that the responsible officer would have an opportunity to observe first-hand the effect of the company's policy both on the Court in general and in a particular case. Certainly, if this policy is important enough for Wal-Mart to persist in, then it is not asking too much for a responsible corporate officer to be present for trial.

4. Whatever the judicial role, the reality is that far more lawsuits are settled than tried. In different jurisdictions, the rate of trial varies, but it is everywhere a small and declining percentage of civil filings. See Galanter, The Vanishing Trial: An Examination of Trials and Related Matters in State and Federal Courts, 1 J. Empir. Legal Stud. 439 (2004) (finding a large decline in trials between 1962 and 2002); compare Hadfield, Where Have All the Trials Gone?, 1 J. Empir. Legal Stud. 705 (2004) (suggesting that the decline has not been so large). Indeed, most grievances in our society never enter the litigation system at all. A survey of 5,000 households showed that in only 71.8% of grievances was there an informal complaint to the allegedly offending party, that a dispute arose in only 45% of these situations, and that only 5% of these disputes resulted in the filing of a lawsuit. Trubek, Sarat, Felstiner, Kritzer & Grossman, The Costs of Ordinary Litigation, 31 U.C.L.A.L. Rev. 72, 87 (1983). Do these figures argue in favor of promoting settlement of suits that would not settle without such pressure? See Kiser, Asher & McShane, Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations, 3 J. Empir. Legal Stud.

551 (2008) (analyzing frequency of parties' "mistaken" rejection of settlements followed by less favorable outcome from adjudication).

5. How should an American judge approach the question of settlement amount? One possibility is to try to find an amount both parties will accept. In *Kothe,* for example, the judge seems to have selected a figure this way. Should the judge instead try to identify a figure that is "right"? What would make a figure "right"? Would a judge who is more familiar with the evidence be in a better position to identify such a figure? Alternatively, should a judge avoid giving any indication of the amount of settlement she considers fair?

At least in some cases, American judges do become deeply involved. For example, consider the much-celebrated settlement achieved by District Judge Weinstein in the Agent Orange class action brought against several chemical companies on behalf of Vietnam veterans who were exposed to the herbicide in Southeast Asia and claimed that it caused a variety of illnesses, including cancer. See P. Schuck, Agent Orange on Trial: Mass Toxic Disasters in the Courts (1986). Throughout the pretrial preparation of the case after he took it over from Judge Pratt, Judge Weinstein involved himself intensely in the details of the dispute about whether Agent Orange actually caused the types of harms plaintiffs claimed. Throughout, he also pressed for a settlement.

Over the weekend before trial was to begin, the lawyers for both sides were directed to report to the courthouse for around-the-clock settlement negotiations supervised by David Shapiro, an experienced lawyer whom the judge had appointed as a special settlement master (see Rule 53). Shapiro concluded at one point that the defendants would be willing to agree to plaintiffs' pending demand of $200 million. Believing he had a deal, he reported to the judge and received a rude shock: The judge refused to allow a settlement that high because he felt the veterans' case was extremely shaky and that he had an obligation to the legal system not to encourage groundless mass toxic tort litigation by allowing a settlement that would signal that the case was stronger than it actually was. When later informed of this, one of the lawyers for defendant Dow Chemical Co. said that the judge was "too much of an idealist." In any event, eventually a settlement at the judge's preferred figure of $180 million was reached at three o'clock on the morning that trial was to begin.

How does Judge Weinstein's role in Agent Orange compare with the behavior of the judges in *Band's Refuse* and *Kothe*? Consider Marcus, Apocalypse Now? (Book Review), 85 Mich.L.Rev. 1267, 1293–94 (1987):

> Is this judging? It is far from the classical view of the judge as an inactive figure who decides according to announced rules of law. Yet that vision has long since given way to a more flexible view of the judicial function, and promoting settlement is now an accepted part of the picture. It is surely troubling to picture judges as unprincipled settlement promoters who only care about achieving settlement, and not about the terms, particularly when they are armed with the variety of persuasive tools Judge Weinstein employed in the Agent Orange litigation.

Better, perhaps, that they should be idealists whose settlement posture is informed by a vision of what is right. Indeed, that may make them superior in the settlement arena as well.

The Agent Orange case illustrates this point. A primary impediment to settlement, from defendants' perspective, was allocation of any global settlement figure among defendants. Despite long efforts to resolve the problem among themselves, defendants failed. The defendants' solution? "Let's let the judge do it; he's fair." And so Judge Weinstein devised a formula that "brought squeals of pain and shrieks of delight from the [defendants'] lawyers," but which even the unhappy accepted. Similarly, when the ability of one of the small defendants to pay threatened to derail the settlement later, the judge was again recruited to decide the issue. In each instance, "the settlement hinged on the lawyers' perception that Weinstein was scrupulously fair and their willingness to be guided by his decision when internal negotiations reached an impasse." An unscrupulous pursuer of a deal, any deal, would probably not be able to perform this function.

But is this judging? What standards did Judge Weinstein use in fashioning the critical allocation formula? Were they "legal"? In a sense, these episodes suggest a model of judging that depends more on the personality of the judge than on his position in the institutional hierarchy. Judge Weinstein could do it but Judge Pratt [who had presided over the case earlier in the litigation], perhaps, could not. It is nice to have charismatic judges, but this is hardly a trend to be embraced; as Max Weber observed long ago, in a complex society it is necessary to shift authority from a charismatic to an institutionalized leadership. Of all governmental officials, this should be most true of judges, and our system therefore resolutely opposes judge shopping while permitting forum shopping. Although *Agent Orange* thus affords an intriguing glimpse into the Brave New World of judging, the judge's resolution of defendants' internal disputes is institutionally troubling.

The judge's settlement figure, however, is more problematical. At least the defense lawyers submitted their internal disputes to the judge for his disposition with their eyes open. The [plaintiffs' lawyers] did not, so far as we are told. To the contrary, after he failed to persuade the judge to press for a $200 million settlement Special Master Shapiro told the [plaintiffs' lawyers] that "they would never get the *defendants* to go above $180 million" even though he had by then concluded that defendants could easily be convinced to pay more. No doubt the [plaintiffs'] lawyers did not, like Dow's lawyer, call the judge an "idealist" when they found out what really happened.

6. Is the kind of intervention performed by Judge Weinstein an appropriate role for a judge in the American system? In any system? In Against Settlement, 93 Yale L.J. 1073 (1984), Professor Owen Fiss argues that "[t]o be against settlement is only to suggest that when the parties settle, society

gets less than what appears, and for a price it does not know it is paying. Parties might settle while leaving justice undone." He explains:

> I do not believe that settlement as a generic practice is preferable to judgment or should be institutionalized on a wholesale and indiscriminate basis. It should be treated instead as a highly problematic technique for streamlining dockets. Settlement is for me the civil analogue of plea bargaining. * * * Like plea bargaining, settlement is a capitulation to the conditions of a mass society and should be neither encouraged nor praised.

How persuasive are these arguments? So long as settlements accurately reflect forecasts about likely outcomes at trial, why should they not be favored and promoted by judges? Cf. McCoy & Mirra, Plea Bargaining as Due Process in Determining Guilt, 32 Stan.L.Rev. 887, 921–22 (1980) (arguing that the only due process concern with plea bargaining is that the innocent will plead guilty). Is justice advanced by judicial promotion of settlements?

7. We will return to issues raised by increasing enthusiasm for settlement at the end of Chapter 2 and in Chapter 7. Since settlement is the outcome of more litigated cases than judicial resolution, you should have the question of the relation between formal litigation and settlement in the back of your mind throughout the course.

PROCEDURAL CHALLENGES OF OUR FEDERAL SYSTEM

In the chapters that follow, we will focus on adjudication in the federal courts, deferring until later detailed consideration of the complications that can arise because this is a large country with many state court systems and a somewhat parallel federal court system. For background purposes, however, it is helpful to describe in a general fashion the rules that govern these problems.

Subject matter jurisdiction: One of the cases we have read in this chapter was decided in state court and the other was decided in federal court. Federal courts are courts of "limited jurisdiction" because they can decide only certain types of claims. In civil cases, there are basically two situations in which federal courts have such jurisdiction. First, there are cases in which there is a *federal question* (see 28 U.S.C.A. § 1331), which usually means that the plaintiff is asserting a claim created by federal law. Examples include claims for violation of civil rights, the federal antitrust laws, or federal rules against securities fraud. Second, federal courts have jurisdiction of cases in which all plaintiffs come from different states than the defendants, and *diversity of citizenship* therefore exists (see 28 U.S.C.A. § 1332). In Kothe v. Smith, for example, the ground for jurisdiction in federal court was diversity of citizenship because the malpractice action did not involve any federal question. Where a case cannot be brought in federal court, there will be a state court of "general jurisdiction" in which it can be brought, as was done in Band's Refuse v.

Borough of Fair Lawn. We examine the rules governing these problems in Chapter 10.

Personal jurisdiction: Defending a lawsuit is a burdensome undertaking. It can become much more burdensome if the suit is filed in a court a great distance from the defendant's residence. Accordingly, entirely separate from the question of subject matter jurisdiction is the question whether the defendant can be compelled to travel to the geographical location chosen by the plaintiff for the suit. The limitations on plaintiff's power to make defendant travel a great distance to defend the suit usually apply whether the case is in federal court or state court. The Supreme Court has held that the due process clause of the Constitution forbids assertion of personal jurisdiction unless the defendant has voluntarily established a contact with the state in which the court sits so that it is fair to require a defense there. We explore these problems in Chapter 9.

Federal v. state law: When cases like Kothe v. Smith are in federal court on grounds of diversity of citizenship, the judge must usually look to state law to decide them because they do not involve federal claims. Thus, you will find that in many of the cases that are covered in the coming chapters federal judges will be applying state substantive law to determine whether plaintiff has a valid claim against defendant. In general terms, federal judges in such cases are to apply state substantive law, but they should also apply federal procedural law. Thus, you will find that in such cases the federal judges apply the Federal Rules of Civil Procedure. We will examine the complexities of this subject (often called the *Erie* problem, after a famous case) in Chapter 11.

C. COST OF LITIGATION

VENEGAS v. MITCHELL

Supreme Court of the United States, 1990
495 U.S. 82

JUSTICE WHITE delivered the opinion of the Court.

Under 42 U.S.C. § 1988, a court may award a reasonable attorney's fee to the prevailing party in civil rights cases. We granted certiorari to resolve a conflict among the Courts of Appeals as to whether § 1988 invalidates contingent-fee contracts that would require a prevailing civil rights plaintiff to pay his attorney more than the statutory award against the defendant.

I

This dispute arises out of an action brought by petitioner Venegas under 42 U.S.C. § 1983 in the United States District Court for the Central District of California, alleging that police officers of the city of Long Beach, California, falsely arrested Venegas and conspired to deny him a fair trial through the knowing presentation of perjured testimony. After an order of the District Court dismissing Venegas' complaint as barred by the statute of limitations was reversed by the Court of Appeals, Venegas

retained respondent Mitchell as his attorney. Venegas and Mitchell signed a contingent-fee contract providing that Mitchell would represent Venegas at trial for a fee of 40% of the gross amount of any recovery. The contract gave Mitchell "the right to apply for and collect any attorney fee award made by a court," prohibited Venegas from waiving Mitchell's right to court-awarded attorney's fees, and allowed Mitchell's intervention to protect his interest in the fee award. The contract also provided that any fee awarded by the court would be applied, dollar for dollar, to offset the contingent fee. The contract obligated Mitchell to provide his services for one trial only and stated that "[i]n the event there is a mistrial or an appeal, the parties may mutually agree upon terms and conditions of [Mitchell's] employment, but are not obligated to do so." Venegas subsequently consented to the association of co-counsel with the understanding that co-counsel would share any contingent fee equally with Mitchell.

Venegas obtained a judgment in his favor of $2.08 million. Mitchell then moved for attorney's fees under § 1988, and on August 15, 1986, the District Court entered an order awarding Venegas $117,000 in attorney's fees, of which $75,000 was attributable to work done by Mitchell. The District Court calculated the award for Mitchell's work by multiplying a reasonable hourly rate by the number of hours Mitchell expended on the case, and then doubling this lodestar figure to reflect Mitchell's competent performance. Negotiations between attorney and client about the possibility of Mitchell's representing Venegas on appeal broke down, and on September 14, 1986, Mitchell signed a stipulation withdrawing as counsel of record. Venegas obtained different counsel for the appeal.

[Mitchell then asserted a $406,000 attorney's lien against the judgment proceeds, representing his half of the 40% fee. Venegas objected that the fee was excessive, arguing that Mitchell should be limited to the $75,000 found to be reasonable on the motion for attorney's fees. The district court refused to disallow or reduce the fee, finding it reasonable and not a windfall for Mitchell. The court of appeals affirmed the district court with regard to the fee dispute. Venegas v. Mitchell, 867 F.2d 527 (9th Cir.1989).]

II

Section 1988 states in pertinent part that "[i]n any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." The section by its terms authorized the trial court in this case to order the defendants to pay to Venegas, the prevailing party, a reasonable attorney's fee. The aim of the section, as our cases have explained, is to enable civil rights plaintiffs to employ reasonably competent lawyers without cost to themselves if they prevail. It is likely that in many, if not

most, cases a lawyer will undertake a civil rights case on the express or implied promise of the plaintiff to pay the lawyer the statutory award, i.e., a reasonable fee, if the case is won. But there is nothing in the section to regulate what plaintiffs may or may not promise to pay their attorneys if they lose or if they win. Certainly § 1988 does not on its face prevent the plaintiff from promising an attorney a percentage of any money judgment that may be recovered. Nor has Venegas pointed to anything in the legislative history that persuades us that Congress intended § 1988 to limit civil rights plaintiffs' freedom to contract with their attorneys.

It is true that in construing § 1988, we have generally turned away from the contingent-fee model to the lodestar model of hours reasonably expended compensated at reasonable rates. See Blanchard v. Bergeron, 489 U.S. 87, 94 (1989); Riverside v. Rivera, 477 U.S. 561, 574 (1986) (plurality opinion); Blum v. Stenson, 465 U.S. 886, 897 (1984). We may also assume for the purposes of deciding this case that § 1988 would not have authorized the District Court to enhance the statutory award upward from the lodestar figure based on the contingency of nonrecovery in this particular litigation. But it is a mighty leap from these propositions to the conclusion that § 1988 also requires the District Court to invalidate a contingent-fee agreement arrived at privately between attorney and client. We have never held that § 1988 constrains the freedom of the civil rights plaintiff to become contractually and personally bound to pay an attorney a percentage of the recovery, if any, even though such a fee is larger than the statutory fee that the defendant must pay to the plaintiff.

Indeed, our cases look the other way. Section 1988 makes the prevailing party eligible for a discretionary award of attorney's fees. Evans v. Jeff D., 475 U.S. 717, 730 (1986). Because it is the party, rather than the lawyer, who is so eligible, we have consistently maintained that fees may be awarded under § 1988 even to those plaintiffs who did not need them to maintain their litigation, either because they were fortunate enough to be able to retain counsel on a fee-paying basis, Blanchard v. Bergeron, supra, at 94–95, or because they were represented free of charge by nonprofit legal aid organizations, Blum v. Stenson, supra, 465 U.S., at 894–95. We have therefore accepted, at least implicitly, that statutory awards of fees can coexist with private fee arrangements. And just as we have recognized that it is the party's entitlement to receive the fees in the appropriate case, so have we recognized that as far as § 1988 is concerned, it is the party's right to waive, settle, or negotiate that eligibility. See Evans v. Jeff D., supra, 475 U.S., at 730–731.

Much the same is true of the substance of a money judgment recovered under § 1983 (exclusive of fees awarded under § 1988), of which the contingent fee in this case is a part. A cause of action under § 1983 belongs "to the injured individua[l]," Newton v. Rumery, 480 U.S. 386,

395 (1987) (plurality opinion), and in at least some circumstances that individual's voluntary waiver of a § 1983 cause of action may be valid. If § 1983 plaintiffs may waive their causes of action entirely, there is little reason to believe that they may not assign part of their recovery to an attorney if they believe that the contingency arrangement will increase their likelihood of recovery. A contrary decision would place § 1983 plaintiffs in the peculiar position of being freer to negotiate with their adversaries than with their own attorneys.

Relying heavily on Blanchard v. Bergeron, supra, Venegas argues that if a contingent-fee agreement does not impose a ceiling on the amount of a "court awarded fee which would go to the attorney" (as he understands the holding of *Blanchard*), such a fee agreement should also be ignored for the benefit of the client so that he need pay only the statutory award. There are two difficulties with this argument. First, *Blanchard* did not address contractual obligations of plaintiffs to their attorneys; it dealt only with what the losing defendant must pay the plaintiff, whatever might be the substance of the contract between the plaintiff and the attorney. Second, we have already rejected the argument that the entitlement to a § 1988 award belongs to the attorney rather than the plaintiff. See Evans v. Jeff D., supra, 475 U.S., at 731–732.

Venegas also argues that because Congress provided for a reasonable fee to be paid by the defendant so that "a plaintiff's recovery will not be reduced by what he must pay his counsel," *Blanchard*, supra, 489 U.S., at 94, the plaintiff should be protected from paying the attorney any more than the reasonable fee awarded by the trial court. Otherwise, Venegas contends, paying the contingent fee in full would greatly reduce his recovery and would impose a cost on him for enforcing the civil rights laws, a cost that the defendant should pay. This argument, too, is wide of the mark. *Blanchard* also noted that "[p]laintiffs who can afford to hire their own lawyers, as well as impecunious litigants, may take advantage" of § 1988. Civil rights plaintiffs, if they prevail, will be entitled to an attorney's fee that Congress anticipated would enable them to secure reasonably competent counsel. If they take advantage of the system as Congress established it, they will avoid having their recovery reduced by contingent-fee agreements. But neither *Blanchard* nor any other of our cases has indicated that § 1988, by its own force, protects plaintiffs from having to pay what they have contracted to pay, even though their contractual liability is greater than the statutory award that they may collect from losing opponents. Indeed, depriving plaintiffs of the option of promising to pay more than the statutory fee if that is necessary to secure counsel of their choice would not further § 1988's general purpose of enabling such plaintiffs in civil rights cases to secure competent counsel.

* * *

Venegas also argues that even if contingent fees exceeding statutory awards are not prohibited per se by § 1988, nonetheless the contingent fee in this case is unreasonable under federal and state law. Venegas made this contention to both lower courts, and both courts rejected it. We find no reason in the record or briefs to disturb their conclusion on this issue. We therefore have no occasion to address the extent of the federal courts' authority to supervise contingent fees.

NOTES AND QUESTIONS

1. As almost everyone seems to recognize, litigation is expensive. Fed. R. Civ. P. 54(d)(1) provides that the prevailing party usually can recover its costs of suit. But these costs are ordinarily limited to the items listed in 28 U.S.C. § 1920—filing fees and certain out-of-pocket expenditures. See Taniguchi v. Kan Pacific Saipan, Ltd., 132 S.Ct. 1997 (2012) (§ 1920 does not cover costs for document translation); Race Tires America v. Hoosier Racing Tire Corp., 674 F.3d 158 (3d Cir. 2012) ($365,000 in electronic discovery costs not recoverable under statute).

In most cases the recoverable costs are much smaller than attorneys' fees, but they can be considerable. See Depasquale v. International Business Mach. Corp., 40 Fed.R.Serv.3d 425 (E.D.Pa.1998) (in product liability action, defendant sought to recover over $50,000 in costs from plaintiff). In Cherry v. Champion Int'l Corp., 186 F.3d 442 (4th Cir.1999), the appellate court held that the district court in an employment discrimination action abused its discretion when it refused to impose the prevailing defendant's costs on the plaintiff because plaintiff was unemployed and defendant was a large corporation. See also Quan v. Computer Sciences Corp., 623 F.3d 870 (9th Cir. 2010) (Rule 54(d)(1) creates a "presumption for awarding costs").

From an early date, however, American courts refused to make the loser pay the winner's attorneys' fees. The requirement that each party bear its own attorneys' fees has become known as the "American rule." But a damage recovery that is depleted by attorneys' fees would seem incomplete. A defendant who is exonerated arguably should not be impoverished by the cost of the successful defense. That seems to be the idea behind routine shifting of ordinary costs. Beyond the compensation rationale, routine fee-shifting might have desirable effects on behavior of litigants by deterring the assertion of groundless claims and defenses because those would increase the cost of litigation without improving the chance of winning. For reasons like these, almost all other countries allow the winning party to recover attorneys' fees, and some urge that this country should do the same. Would plaintiffs with good claims but moderate means be willing to sue large organizations and risk liability for the defendant's attorneys' fees? How sure would plaintiff have to feel about success before filing suit? Would the risk of liability for plaintiff's added fees really deter defendants from asserting groundless defenses?

In terms of incentives, shifting away from the American rule might prompt higher expenditure on litigation. If the parties must pay their own lawyers, win or lose, it makes sense for them to be frugal. If they can collect from their opponents if they win, they may be willing to spend more lavishly. Consider the following description of the consequences of the English full indemnity rule:

> [O]nce it is clear that a dispute is destined to go all the way to trial, the indemnity principle tends to erode resistance to costs. * * * Indeed, a point may come where the parties would have reason to persist with investment in litigation, not so much for the sake of a favorable judgment on the merits as for the purpose of recovering the money already expended in the dispute, which may well outstrip the value of the subject matter in issue.

Zuckerman, Lord Woolf's Access to Justice: Plus Ca Change . . ., 59 Mod. L.Rev. 773, 778 (1996). Similarly, the American rule may prompt even parties confident of victory in court to settle because settlement relieves them of paying attorneys' fees.

2. Whatever your reaction to the policy debate about the American rule, the reality in this country is that fees are recoverable only if there is an exception to that rule. In Alyeska Pipeline Serv. Co. v. Wilderness Society, 421 U.S. 240 (1975), the Court held that Congress had not "extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted." In response, Congress amended 42 U.S.C.A. § 1988 the following year to add the fee-shifting provisions involved in Venegas v. Mitchell, providing that the court "may allow the prevailing party * * * a reasonable attorney's fee as part of the costs."

Although it appears bilateral, like Rule 54(d)(1), this provision has been interpreted in the same way as Title VII of the 1964 Civil Rights Act, which has been held to authorize recovery of fees by defendants only when plaintiff's suit is "frivolous, unreasonable, or without foundation." Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978). But when civil rights plaintiffs prevail, defendants must usually pay their fees whether or not the defenses were groundless. Newman v. Piggie Park Enter., Inc., 390 U.S. 400 (1968). Compare Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994) (refusing to read a similar pro-plaintiff intention into the fee-shifting provisions of the Copyright Act, 17 U.S.C.A. § 505 even though it is "virtually identical" to § 1988 because "in the civil rights context, impecunious 'private attorney general' plaintiffs can ill afford to litigate their claims against defendants with more resources. Congress sought to redress this balance in part, and to provide incentives for the bringing of meritorious lawsuits, by treating successful plaintiffs more favorably than successful defendants.").

Besides § 1988 and the copyright act, there are more than 100 other federal statutes that provide for fee shifting. See Marek v. Chesny, 473 U.S. 1, 44–51 (1985) (Brennan, J., dissenting, listing statutes). See further discussion in Chapter 7.

3. Ordinarily, as in § 1988, fee-shifting statutes authorize the award of a "reasonable" fee. In Venegas v. Mitchell, this fee award is calculated by what is called the "lodestar" method—multiplying the hours worked by the lawyer times the lawyer's hourly rate. In deciding whether the fee award is reasonable, the court may disallow hours that were spent on unsuccessful claims or inefficiently used. Regarding billing rate, ordinarily the court will use the attorney's customary rate for paying clients. In *Venegas*, the court doubled the lodestar fee award because Mitchell performed "competently." But the Supreme Court has frowned on such enhancements of the lodestar amount. Thus, it is likely that under current law Mitchell's work would result in a fee award half the size approved by the district court—$37,500.

4. In Blanchard v. Bergeron, 489 U.S. 87 (1989), plaintiff had a contract with his attorney providing that the lawyer would accept 40% of the award as payment, but the district court awarded more using the lodestar method. Defendant argued that the contract should set a ceiling for the fee award, but the Court disagreed, holding that the lodestar approach is "the centerpiece of attorney's fee awards" and that fees so calculated "by definition will represent the reasonable worth of the services rendered in vindication of a plaintiff's civil rights claim." It found this result consistent with the purpose of Congress that "a plaintiff's recovery will not be reduced by what he must pay his counsel."

If under the lodestar Mitchell's fee of $37,500 was by definition reasonable in *Venegas*, how could a fee of 20% of the recovery, over ten times that large, also be reasonable? See Model Rules of Professional Conduct 1.5(a) ("A lawyer's fee shall be reasonable."). Note that there is an inherent tension between the lawyer and the client in the negotiation of a fee. At some point a court may disallow a fee as too high. Do you think that it should have been trimmed in this case?

Some additional facts revealed in the lower courts' decisions and the oral arguments may shed light on this question. Mitchell was hired three months before the trial of Venegas' suit, after the bulk of discovery had been done. A state court suit by Venegas had already resulted in a $1,000,000 verdict that was overturned on grounds not applicable to the federal claim. Mitchell insisted on a $10,000 nonrefundable retainer and took the case to trial. After trial, defendants moved to have the judgment set aside and, when those motions were denied, appealed. Mitchell then offered to handle the appeal for an additional 10% of the recovery ($200,000 more, as things turned out). The appellate court affirmed in all respects. See Venegas v. Wagner, 831 F.2d 1514 (9th Cir.1987); Venegas v. Mitchell, 867 F.2d 527 (9th Cir.1989). Should Mitchell have offered Venegas the alternative of paying by the hour? Can you think of a reason why Venegas might not have taken this option?

In many personal injury cases, American lawyers have long worked for a share of the recovery, an arrangement with little parallel in the rest of the world. For civil rights suits, that model may not work because ordinarily "the risks plaintiffs face in § 1983 litigation are greater and the rewards are

smaller" than in typical personal injury suits. Kirchoff v. Flynn, 786 F.2d 320, 323–34 (7th Cir. 1986). But in personal injury cases it may be objected that lawyers screen cases to "cherry pick" strong ones promising large recoveries. See Kritzer, Seven Dogged Myths Concerning Contingency Fees, 80 Wash. U. L. Rev. 739 (2002) (reporting that contingency fee lawyers actively screen cases and, as a result, run only a small risk of nonrecovery). Some criticize the percentage measurement of attorney fees for overcompensating lawyers, see Brickman, Contingent Fees Without Contingencies: *Hamlet* Without the Prince of Denmark, 37 U.C.L.A. L. Rev. 29 (1989) (arguing that percentage fee arrangements overcompensate lawyers who actually are taking no risk). Do these concerns affect the propriety of Mitchell's insistence on being paid another 10% to take the appeal in *Venegas*?

5. If percentage fees can overcompensate counsel in some large-recovery cases, lodestar computations can present that risk when the recovery is small. In Riverside v. Rivera, 477 U.S. 561 (1986), plaintiffs sued a variety of police officers for illegal arrest and ultimately obtained judgments against some of them totalling $33,000. The district court awarded $245,000 in fees, noting that the police misconduct "had to be stopped and * * * nothing short of having a lawsuit like this would have stopped it." Justice Rehnquist argued that "billing judgment" should have prevented the lawyers from seeking such a large fee, but the Court affirmed the award because Justice Powell decided the findings regarding the larger public importance of the suit were not clearly erroneous. Justice Brennan, writing for a plurality, asserted that "[w]e reject the notion that a civil rights action for damages constitutes nothing more than a private tort suit benefitting only the individual plaintiffs whose rights were violated. Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms." Should this mean that in civil rights cases the size of the claim is no constraint on the amount of lawyer time invested in the case?

6. Note that Mitchell's contract with Venegas forbade Venegas from waiving court-awarded attorneys' fees. In Evans v. Jeff D., 475 U.S. 717 (1986), defendants in a class action brought on behalf of handicapped children regarding health-care treatment offered plaintiffs "virtually all the injunctive relief" they had sought provided that plaintiffs would waive attorneys' fees. The Court rejected the argument that this was improper:

> Although respondents contend that Johnson, as counsel for the class, was faced with an "ethical dilemma" when petitioners offered him relief greater than that which he could reasonably have expected to obtain for his clients at trial (if only he would stipulate to a waiver of the statutory fee award), * * * we do not believe that the "dilemma" was an "ethical" one in the sense that Johnson had to choose between conflicting duties under the prevailing norms of professional conduct. Plainly Johnson had no *ethical* obligation to seek a statutory fee award. His ethical duty was to serve his clients loyally and competently. Since the proposal to settle the merits was more favorable than the probable outcome of the trial,

Johnson's decision to recommend acceptance was consistent with the highest standards of our profession.

Given that defendants in *Jeff D.* seem almost to have conceded that they violated plaintiffs' rights, does this decision unduly erode the value of the fee-shifting statute? Will the risk that defendants may insist on a fee waiver in return for favorable relief on the merits affect the willingness of attorneys to accept such cases? Does a provision like the one used by Mitchell solve that problem? Does it raise an ethical problem?

7. *Publicly subsidized attorneys*: Some countries have tried to assure legal representation for all by subsidizing lawyers for the poor, but many such programs have been cut back. See A. Zuckerman, Civil Procedure 949–51 (2003) (describing "radical reform" to cut the costs of English scheme for government to pay for privately-retained lawyers). In the 1960s, the federal government in this country created a network of legal services offices that provided lawyers on the government payroll for eligible poor people. In the 1980s, however, funding for this program was cut.

8. *Third-party funding*: Although government funding has receded, for some lawsuits private, profit-seeking entities offer a source of litigation funding. "Large banks, hedge funds and private investors hungry for new and lucrative opportunities are bankrolling other people's lawsuits, pumping hundreds of millions of dollars into medical malpractice claims, divorce battles and class actions against corporations—all in the hope of sharing the potential winnings." Appelbaum, Putting Money on Lawsuits, Investors Share in the Payouts, N.Y. Times, Nov. 15, 2010; see also Comment, Revolution in Progress: Third-Party Funding of American Litigation, 58 UCLA L. Rev. 571 (2010).

9. *Filing fees*: Besides paying lawyers, litigants must initially pay filing fees and the like even if they are ultimately able to recoup them. Federal courts will excuse payment of those fees by people eligible to file in forma pauperis, 28 U.S.C.A. § 1915, but that option is not always available. The Supreme Court has sometimes found the imposition of these fees to violate due process when a "fundamental right" is involved and a litigant cannot afford the fees. See Boddie v. Connecticut, 401 U.S. 371 (1971) (holding that state could not impose a filing fee for obtaining a divorce); compare United States v. Kras, 409 U.S. 434 (1973) ($50 filing fee for bankruptcy petition could be imposed because bankruptcy discharge is not a fundamental right like dissolving a marriage); Ortwein v. Schwab, 410 U.S. 656 (1973) (upholding $25 fee for court review of reduction of welfare allowance for the aged on ground that no fundamental right was involved). See also M.L.B. v. S.L.J., 519 U.S. 102 (1996) (due process violated by state requirement that party seeking to appeal termination of parental rights post over $2,300 to cover the cost of preparing a transcript of the proceedings from which the appeal was taken).