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A Course in Legal English and U.S. Law for Undergraduate Japanese Law Students

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A COURSE IN LEGAL ENGLISH AND U.S. LAW FOR UNDERGRADUATE JAPANESE LAW STUDENTS

by

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ABSTRACT

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Under the Supervision of Dr. Glenn Starr

In this paper, I discuss the design of a Legal English and U.S. Law course for undergraduate Japanese law students visiting for a semester at the University of Wisconsin-Milwaukee's English Language Academy. I review how I went about analyzing the students' needs and wants and the factors affecting their motivation. I explain my philosophy of second language teaching, in particular, that second language teaching should contain an element of play. I describe how I sought to introduce a play element in the course through such techniques as watching law-related movies, role play activities, Kahoot quizzes, and pronunciation drills. Course design included, as well, vocabulary study, readings of authentic legal texts as well as teacher-prepared writings, guest speakers, and field trips. I report the students' reactions to the course, as indicated in a mid-semester survey.

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ACKNOWLEDGMENTS

I teach my students that in bankruptcy, the debtor must list the debts he or she owes in something called "schedules." So let this be my schedule of debts of gratitude ("Schedule GR") that I owe. I am sure that, like many debtors' schedules, it will be inadvertently incomplete.

I owe a very large debt of thanks to Brooke Haley and Lindsey Hill, my colleagues at UWM's English Language Academy. Without Brooke's invitation to me to write the curriculum for and teach a Legal English class, and Lindsey's mentoring me as my cooperating teacher when I student taught, I would not be teaching at the ELA, and this thesis would not have come to be. Thanks to both for their feedback on drafts of my curriculum chapters.

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1. Introduction and Background

This paper will discuss the design and implementation of a course in Legal English and U.S. Law at the University of Wisconsin-Milwaukee's English Language Academy in the fall of 2022. Legal English is considered a form of English for Specific Purposes, or ESP, a subspecialty within English as a Second Language pedagogy. As English has increasingly become the lingua franca of international commerce and international dispute resolution, Legal English has become a topic of study in many law faculties in non-English speaking countries and in or in connection with many United States law schools that offer master of law (or LL. M.) degrees and S.J.D. (Doctor of Juridical Science) degrees. LL.M. and S.J.D. programs attract foreign students who already have a first degree in law from a foreign university and often some law practice, legal academic, or judicial experience, as well.

In consequence, the Legal English programs at U.S. law schools are typically tailored to students who have at least an advanced intermediate or B2 knowledge of English. Most such students will also have a thorough knowledge of their home countries' legal systems and some knowledge of the common law tradition of English-speaking countries.

I came to learn that I faced a somewhat different challenge. The students I was to teach were Japanese undergraduate law majors, 19 ,20, or 21 years old, at the beginning of their second or third year of law study. Most tested at (or in one case below) a beginning intermediate – B1, on the CEFR scale – level of English. Legal English textbooks and syllabi that I found online or elsewhere were too advanced, both in language level and assumed legal knowledge, to be apt for this group. And most also appeared to suffer a fatal flaw: they were boring.

1.1 Host institution: the Intensive English Program of the University of Wisconsin-Milwaukee's English Language Academy

More than 5% -- over 1,000 – of the University of Wisconsin-Milwaukee's 25,000-plus student body are international students. Many admitted international students arrive needing some additional instruction in English in order to do well in regular classes. Other students come to UWM to take English language courses in the hope of getting admitted to UWM, or simply to improve their English proficiency before returning to their home countries or attending university elsewhere. The UWM English Language Academy, the ELA, serves both groups of students. The Intensive English Program, or IEP, is the branch of the ELA that offers instruction at all CEFR levels to students who have not been admitted as regular UWM undergraduates. It currently has partnerships with two Japanese universities – International Christian University and Meiji Gakuin University – pursuant to which undergraduates from the Japanese universities spend either part of a summer (ICU) or a fall semester (MGU) in an intensive English program at the IEP.

1.2 Partner institution: Meiji Gakuin University

Meiji Gakuin University, with campuses in Tokyo and Yokohama, traces its roots to the Hepburn School, an English school founded in 1863 by Dr. James C. Hepburn, an American Presbyterian missionary, physician, and educator and the inventor of the Hepburn romanization system for transcribing Japanese, still widely used today. Throughout its history, MGU has emphasized the importance of international relations, the English language, and the Christian faith. MGU has offered undergraduate instruction in law since the 1960's and has recently partnered with several other Japanese universities to open a graduate law faculty.

That law is an undergraduate major at MGU is the historical norm in Japanese universities, as it is in many European, Latin American, African, and other Asian countries. Historically, until 2006, undergraduate Japanese law majors who wanted to enter the legal profession took an examination at the end of their undergraduate studies in order to be admitted to a mandatory internship program offered by the Legal Research and Training Institute of the Japan Supreme Court. The pass rate was often in the range of 2% to 3%. Many law graduates took cram courses or studied independently in order to take the bar exam a second, third, fourth, or fifth time. Despite quite a large number of students who majored in law in Japanese universities, in the early 2000's, there was, unsurprisingly, a shortage of lawyers in Japan. (Weiss 2011) To remedy this, the Japan Supreme Court encouraged the opening of new graduate law schools offering a three-year program similar to those of U.S. law schools. Students with an undergraduate law degree can get a graduate law degree in two years. As noted, MGU has participated in this process.

Despite the opening of new Japanese graduate law faculties on the U.S. model, law remains an undergraduate major at MGU as at many other Japanese universities. The students MGU sends to UWM's IEP – in most cases reflecting the students' preference to come to UWM rather than studying at another university in a common-law country – are undergraduates in MGU's Department of Global Legal Studies, one of its three undergraduate law study departments. All Global Legal Studies majors are required to attend the fall semester of their second year in a university in an English language, common-law jurisdiction.

1.3 History of the IEP-MGU Legal English program

The IEP and MGU partnered for a number of years to offer MGU Global Legal Studies majors a semester in Milwaukee at the IEP. MGU students took the regular IEP Intensive English

curriculum – which includes classes in reading, writing, speaking and listening, and combined skills, daily except Fridays – together with other IEP students, with one modification. Instead of a reading class, the MGU students took Legal English, separately from other IEP students. The Legal English teacher was an ESL teacher then at the IEP who had some experience working as a paralegal in a law firm.

Then the COVID pandemic hit. Much international travel was put on hold, and the IEP-MGU program took a hiatus. Meanwhile the teacher who had taught the Legal English class at the IEP took an opportunity elsewhere – and took with her the institutional memory of what the curriculum had been.

1.4 The new teacher, and the teacher's charge

As the pandemic wound down, the IEP and MGU began plans to resume their partnership. Second-year Global MGU Legal Studies majors would again be travelling abroad in the fall of 2022, as would third-year students who had not been able to do so during the pandemic. Brooke Haley, the director of the ELA, learned that there was a student in UWM's M.A. in TESOL and Applied Linguistics program – a program from which the IEP likes to recruit teachers – who was a lawyer – namely, me. By coincidence I had taken two years of Japanese immediately before and during law school, and had been an East Asian Studies major as an undergraduate. The ELA extended me the opportunity to write a curriculum for the Legal English class for the MGU students and then to teach the class.

Here is what I learned about what MGU wanted the course to cover, at a minimum. It should explain the principal differences between the common law system in place in English-speaking countries and the civil law system of countries such as Japan. It should discuss U.S.

constitutional law. And, the MGU contacts had requested, with typically Japanese politeness and indirection, please, it shouldn't be boring.

2. Needs analysis

Curriculum design for English for Specific Purposes classes begins with needs analysis. This is a concept that has an important role in all English as a Second Language (ESL) pedagogy. In English for General Purposes (EGP) or English for Academic Purposes (EAP) classes, however, the role may be less prominent, because the need may be more obvious. What does the learner need, in those classes? He or she needs to know how to speak, understand, read, and write English, or academic English. There are still needs to be assessed: What is the learner's current reading or writing level? What are the learner's interests, and preferred learning styles? What intercultural and cross-linguistic knowledge does the learner have, and what attitudes and motivations? (Ferris and Hedgcock 2014: 155) But, in general, the goal is clear: teach the learner how to be able to communicate in English in a broad range of contexts.

In developing curriculum for an ESP class, ESL scholars point to the importance of establishing communicative needs in the "target situation." (Basturkmen 2010: 17-19) In other words, what are the tasks and activities learners will be using English for? What is the target professional or vocational workplace? ESP classes can be extremely practical and narrowly targeted to particular groups of workers in specific vocations. Basturkmen describes, for example, ESP classes for helicopter pilots, home care workers, office managers, and police officers. (Basturkmen 2010:5, 24-25, 71-87). Needs analysis for ESP classes can be particularly important where, as is often the case, the instructor lacks personal knowledge of the specialized discourse of the "target situation," and must master it before teaching it.

For a Legal English class in which the "target situation" is law practice, a needs analysis might include, for example, surveys of recent graduates who are currently practicing law, as well as surveys of the law firms that hire those graduates. Chovoncová (2013) conducted such surveys in a needs analysis for a Czech university's Legal English program. She also surveyed current students, since, in her view (and Basturkmen's), needs analysis includes not only an analysis of the target situation, but analyses of the learners' present situation, "learner factor" (primarily, learners' motivation, discussed below), and teaching content – what can realistically be taught in the course. (Chovoncová 2013: 55; Basturkmen 2010: 19)

2.1 My pre-course needs analysis research

Before teaching the class, I was aware of the extraordinarily low pass rate for the Japanese bar exam (Weiss 2011), and that many Japanese law graduates who did not pass the bar (or did not take the bar) ended up working in corporate legal departments or in government. But I was unclear which substantive areas of the law I should teach. Are my students going to go into corporate legal departments and work on drafting contracts? Should contract drafting be a major focus of the class?

A conversation I had this past summer with one of the IEP's visiting Japanese students from International Christian University proved enlightening. The IEP's summer program with ICU is an intensive English program, only, without any focus on law. But this student happened to be a law major. I asked him what his interests were and what he planned to do as a career. He said he was interested in environmental law and wanted to go into government. It should not have come as any great surprise, but I had a realization: Japanese law students have the same broad range of interests as U.S. law students.

To assist my curriculum planning, especially with topic selection, I read a number of Legal English syllabi I found online and some scholarly literature about Legal English instruction. Based primarily on that review, I selected topics for the first nine "chapters" of a curriculum I wrote: the differences between the civil law and the common law; the legal profession in the U.S.; pretrial procedure in civil cases; criminal law; trials; appeals; U.S. constitutional law; contracts; and debtor-creditor law. See Appendices B -J. These are foundational subjects, often covered in Legal English classes and (except for civil law) taught in required or highly recommended courses in U.S. law schools.

And, since Japanese law students might be interested in anything of interest to current U.S. law students, I checked out Harvard Law School's current course offerings, available online. That listing served as a checklist of subject topics I might want to include in an interests survey distributed to the students.

2.2 Needs analysis after the course began: getting to know the participants

Scholars of curriculum design in ESP classes stress that needs analysis should be a continual process, throughout a course. (Basturkmen 2010: 26; Hedgcock and Ferris 2018: 255-256) Teachers must have some idea of students' needs before the course begins, to have some curriculum and materials ready to teach. But refining one's understanding of the learners' needs is a critical task. One common method at the beginning of a course is the distribution of a needs analysis questionnaire, asking about such things as students' interests and goals. I prepared and distributed a questionnaire on the first day of class. (Appendix A) In it I asked about particular subjects that were of interest to the student, what their career goals were, and what they hoped to learn in the class.

That first day of class, after we had introduced ourselves to each other, I asked the group – four young women, all beginning their third year of law school, and three young men, all beginning their second year of law school, how many of them wanted to become lawyers. Knowing of the low bar exam pass rate, I knew that some might have other plans.

No one – not one person – raised a hand.

The thought later crossed my mind that perhaps modesty may have kept some from doing so. Given the low pass rate on the Japanese bar exam, asking "Who wants to become a lawyer?" to a group of Japanese law students might be the equivalent of asking a group of first-year U.S. law students, "Who here plans to make law review?" or "Who plans to clerk for a U.S. Supreme Court Justice?". An affirmative answer to such a question would reveal the speaker to be what U.S. law school students call a "gunner" – an immodest striver.

Having read their answers on the needs analysis survey, and, more importantly, having gotten to know them better since then, I am now convinced: not one of them wants to become a lawyer. They have a variety of career goals – among them Web designer, C.E.O., working for Google or Facebook or the like, working in advertising or publishing, working for a Japanese company overseas, and going into politics. All of them want to improve their English. Most or all of them are interested in such things as law and politics, U.S. constitutional law, legal history, human rights, "having a lot of values and thinking" as one put it on her survey, LGBTQ rights.

MGU's Web site offers some insight into its law students. Under the heading "Why Meiji Gakuin University?", it has a video of one of its law students, the captain of the university's baseball team. He explains why he is studying law: "I believe understanding the universal values of law allows me to make better choices on a number of socio-economic matters. I also think that it will help me develop my values and perspectives over the years." His goal, he says, "is to be

someone with many talents as well as the ability to think broadly and openly." His career plan is to work in the sales department of a manufacturer of daily necessities. (Meiji Gakuin University 2022)

MGU's Web site notes that for its graduating law students, students in the Department of Juridical Studies, "[i]t is also possible to obtain teaching certification (elementary type-2, junior high, and senior high schools)." (*Id*.) It is difficult to imagine any United States law school touting on its Web site that its graduates could go on to be certified to teach elementary, junior high, or high school.

Undergraduate education in law in Japan, it is apparent, is very different from a U.S. law school education. It is not primarily a preprofessional education. It is, rather, a liberal arts major, much as history, classics, political science, or philosophy – or linguistics – is in the United States. The students in my Legal English course did not come here to be able to perform the tasks and activities of a "target professional or vocational workplace," narrowly defined. They came here to continue their journeys to becoming educated men and women.

This is not to say that the MGU students do not have specific linguistic and subject matter needs to be addressed in the course. Because English is the language of international commerce, and several anticipated going to work for a foreign company or a Japanese company abroad, it is important for them to improve their English, and to be familiar with legal terminology such as that found in contracts. And upon their return to MGU, they will have continued coursework in law, in which knowledge of the U.S. legal system and concepts may help with their academic success.

Nonetheless, the needs of this group of students differ in important ways from those of the most typical type of students found in U.S. Legal English classes, that is, already graduated foreign lawyers preparing to study for a second degree in law at a U.S. law school. My students' English

language skills are not as advanced as those of most foreign lawyers entering U.S. law schools, and they lack the same "target situation" or target professional or vocational workplace.

3. Motivation

One major factor in the success of any class – whether involving language learning or any other subject – is how motivated the students are to learn. As I noted above, some suggest that the learners' motivation does not belong under a separate heading, as I have placed it here, but is a subcategory of needs analysis, under the subheading "learner factor analysis." (Basturkmen 2010: 19) Certainly in devising a course it is helpful to know levels of preexisting motivation to learn the subject, for reasons such as determining the workload level the learners will tolerate, how likely it is they will actually do homework assignments, and the like.

But motivation is not static. To a very large extent, it is subject to the teacher's influence. Good teachers motivate their students to learn. Dörnyel – who was perhaps the leading scholar of motivation in language learning – noted of one survey he had participated in conducting: "of all the factors that were hypothesized to contribute to the students' positive or negative appraisal of L2 learning, the teacher came out on top for all the age groups surveyed." (Dörnyel 2001: 32) Indeed, "almost everything a teacher does in the classroom has a motivational influence on students." (*Id.*) The question to which all teachers want to know the answer – which I will explore in the next section – is, *how* do you motivate your students?

First let's look at some factors effecting motivation that are unique to this particular course and this group of learners. The class is a Legal English class, a form of ESP class. Basturkmen has posited that ESP classes, in theory at least, are more likely to be effective than general ESL classes, because the learners have a particularized need to learn the discourse of their "target

situation," and in consequence are more motivated. Pointing out the obvious, she notes that "[i]f students are more motivated, the learning is more likely to occur." (Basturkmen 2010: 11) The typical Legal English course offered by a law school, or university having a law school, to incoming LL. M. and S.J.D. students can be viewed as a form of Survival English. These high-performing foreign lawyers, judges, and legal academics are about to be thrown into an all-English-language academic milieu. Their success in that environment and their professional advancement depend on learning the language of the law. They are, presumably, highly motivated to do so. As noted above, however, the students in my Legal English class do not have the same "target situation" and immediate professional or vocational need to learn legal discourse.

Linguistic, cultural, and educational backgrounds also affect motivation. Japanese and English are linguistically very different, and each is difficult for native speakers of the other to master. In a very thorough study of adult Japanese learners' motivation to learn English, Aguilo Ramos notes that, despite having had six years of English language classes, most Japanese high school graduates lack basic English communicative skills; once in university, tend to lose motivation to study English after one year of college-level study; and fear making mistakes speaking English in public. (Aguilo Ramos 2021: 16-23). One thing that did improve Japanese university students' motivation to learn English was being part of a classroom environment that encouraged collaboration and interaction in class and thereby created a sense of community. (*Id.* at 23 *citing* Falout *et al*. 2013).

It's important to look at personality and more granular, individual factors, too, affecting this particular group of learners – my Legal English class. All of the students in the class are Global Legal Studies majors, required to study abroad for one semester in an English-speaking country. Their study abroad options included universities in the United Kingdom, Ireland, Canada,

Australia, and the United States. UWM is one of two options available for the students in the United States – the other one being San Jose (California) State University. Some students in the class said they had selected UWM as their first choice because they wanted to study in the United States. Others said they had chosen UWM because it guaranteed dormitory accommodations. At many other partner universities, the accommodations are homestays. Some students in my class preferred the less supervised and, shall we say, more traditionally collegiate experience of living in a dorm. In general, they are a fun-loving group. For a few of them, the class's 8:30 a.m. start time occasionally poses a challenge – sometimes because of prior late nights working on homework, but, on occasion, for other reasons.

I hasten to point out that, as in most university courses, the class has a range of personality types and motivation levels. There is a scholarly, quiet introvert, and there is a student who joined the UWM water polo team, has DJ'ed at off-campus parties, and has traveled to UW-Madison for weekend trips with his roommate on several occasions.

So . . . how does one motivate a group like this, all of them interested generally in law and politics, but none intending to become a lawyer, to want to be in class at 8:30 a.m. four days a week to learn things like the English words "arraignment" and "preliminary hearing" and the different meanings they have in a criminal case in the U.S.?

Dörnyel, the scholar of motivation, provides an extremely extensive list of motivational strategies for language teaching, many of which are common sense suggestions for any teacher or, for that matter, any person in authority. Get to know your students as individuals. Build up their senses of self-confidence and self-esteem. Have a good relationship with them. Show passion for the subject you are teaching; students will respect and admire you for it. Create a supportive classroom environment in which there are shared norms and expectations. (Dörnyel 2001, *passim*)

All of these are of course critical to success in teaching. But, although Dörnyel mentions the benefits of the use of humor and how role play can be a rewarding form of group experience (*id*. 41, 47), to me it seems he does not adequately emphasize the importance of a critical element in language learning: play.

4. My teaching philosophy: The importance of a play element in language learning

Students learn best, and are motivated to learn, when learning is fun, and when classroom play creates a sense of a community of learners. Krashen captured this simple and perhaps self-evident truth in fancier words when he wrote of the importance of "lowering the affective filter." (Krashen 1982) And, although my own experiences studying a number of languages over the last fifty years are not a double-blind study, to me they bear witness to that truth.

The scholar who has most cogently argued for the importance of a play element in language learning is the British applied linguist Guy Cook. In his 1997 article "Language Play, Language Learning" and his 2000 book of the same name, Cook has pushed back against the trend in the "communicative" school of second language learning to view task-based "negotiation of meaning" as the best or exclusive way to acquire a second language. (Cook 1997, 2000) Nonsense, Cook says – and nonsense, he says, and fantasy and language play are important parts of how children acquire their first languages. (Cook 2000) And, he argues, play – even in the course of currently unfashionable repetitive language drills – should be an element of L2 language instruction.

4.1 Theories of play

Cook devotes the middle section of his book to a discussion of theoretical explanations of play, beginning with explanations of the socialization and other benefits of play in the animal

world and its important role in learning, both in the animal world and for humans. "Young animals and children alike are seen to play out the activities which will be important to them as adults: antelopes leap and dodge; cats pounce and worry; and children create play worlds in which they are mummies and daddies and various kinds of worker." (Cook 2000: 107) (citations omitted)

He goes on to discuss the theories of two of the leading theorists of play among humans, the Dutch linguist and historian Johan Huizinga and the French scholar Roger Caillois. For Huizinga, the most serious human activities – including law, warfare, courtship, religion, art, education, and philosophy – arise out of adult human play. Indeed, Huizinga titled his study *Homo Ludens* – man the player, in contrast to *homo sapiens*, man the knower – because he believed play to be more fundamental to human civilization than knowledge. (Huizinga [1944] 1949) Cook, summarizing Huizinga's definition of play, says that in his definition it has these fourteen characteristics: it is a free activity, conscious, outside ordinary life, 'not serious,' absorbing the player, bounded in time and space, governed by rules, orderly, serving no material purpose, profitless, promoting social grouping, having a faculty of repetition, and tending to secrecy, and to disguise. (Cook 2000: 112-113, *citing* Huizinga [1944] 1949 10, 13)

The second theorist of play that Cook discusses in detail is Roger Caillois. Caillois' article, "The Structure and Classification of Games" (Caillois [1955] 1969), took Huizinga's theory of play as a starting point, but faulted it for focusing almost exclusively on what he called agonistic, or competitive, play. Caillois came up with four categories of play: *agôn*, or competition; *alea*, or chance; *mimicry*; and *ilinx*, or vertigo, the category of play that includes such things as children's merry-go-rounds and swings, skiing, and mountain-climbing. (Cook 2000: 114-115, *citing* Caillois [1955] 1969)

4.2 Incorporating play into language teaching

In the third part of his book Cook takes aim at several current orthodoxies in L2 pedagogical theory and argues for the inclusion of a play "element" in language teaching. He does not argue that language learning should become play, "any more than the classroom has to become the playground; but neither does it need to be exactly like work or 'the real world', in the core senses of these terms." (Cook 2000: 150) He pokes a bit at "needs analysis": "What sort of needs – or perhaps more pertinently *whose* needs – are we talking about? Those of students, institutions, employers, or governments? And if the first of these, do we mean simply their economic job-related needs, or some deeper spiritual need for knowledge, self-development, and enjoyment?" (*Id.* 152) And, he notes, the identification of a desired outcome, such as the ability to use the discourse of a particular job, doesn't tell us "the best route to that outcome . . . Contrary to the work ethic, fulfillment of needs may be furthered by doing what we want." (*Id.*)

Cook is particularly not fond of the kind of "task-based" pedagogy that recommends teaching doing such "target tasks" as "filling out a form, buying a pair of shoes, making an airline reservation, borrowing a library book, taking a driving test, typing a letter weighing a patient, [etc.]." (*Id*. at 155, *quoting* Long and Crookes (1992)). "Any of the listed activities *could* be part of paid employment, or not; but none of them seems remotely connected to play. They are all rather drab instrumental subsidiary activities . . . ." (Cook 2000: 155)

Summarizing, Cook says that, of the dichotomies between needs and wants, meaning and form, and reality and artifice, "[c]urrent orthodoxy makes a clear judgement in favour of the first term in each pair. Needs, meaning, and reality are lined up as the criteria to be revealed by good teaching and good materials." (*Id.* 173) Against this orthodoxy, he quotes none other than Chomsky: "The truth of the matter is that about 99 percent of teaching is making the students feel

interested in the material. Then the other 1 percent has to do with your methods." (Chomsky 1988: 182, *quoted in* Cook 2000: 176)

While Cook makes a persuasive case for the importance of a play element in the L2 classroom, he doesn't offer specific advice for the forms it should take. His discussion of theories of play, though, helps us identify things we may properly classify as play that can potentially contribute to L2 learning. I come up with at least the following list: contests and competitions of all kinds; games; video games; storytelling; drama; role play; reading literature; watching TV and film; poetry; creative writing; music, both music listening and singing or the creation of music; humor; standup; dance; puns, riddles, jokes, and other word play; mimicry and choral repetition.

Many of these forms of play have been subjects of SLA research, including through studies that involved both experimental groups of students and control groups. Role play, in particular, has been found to improve speaking skills and vocabulary significantly more than control group instruction that did not include role play. (*See, e.g.*, Alabsi 2016; Krebt 2017; Samsibar, *et al*. 2018; Asriyani, *et al*. 2019) Music in L2 instruction can increase learners' motivation, improve memory of words and phrases, and teach pronunciation. (Engh 2013: 117-119; Werner 2018; Laghos and Laghos 2018) Video games – off-the-shelf commercial games, commercial games modified to serve a teaching function, and games specifically designed to teach – can improve L2 vocabulary and listening, reading, and writing skills. (Lewis 2020; Li 2019)

Ultimately, much of what can make learning in the language classroom a playful or joyous experience cannot be reduced to a formula or recipe book for sequences of classroom events. In his doctoral dissertation at the University of Wisconsin-Madison, Jacques Arceneaux (2011) closely documented playful activity over the course of a first-semester UW French class. Arceneaux observed and recorded language play by the teacher and by the students in the class,

and his thesis is a finely grained analysis of it. The teacher was an enthusiastic, sometimes over-the-top performer, and much language play occurred in drills:

> A noteworthy finding of my study with broad implications for teaching practice is just how much language play occurred in the whole-class pedagogical context, particularly during choral repetition of lexical items. Some teachers shy away from choral repetition because of its association with the now-outmoded audiolingual method. My findings indicate, however, that choral repetition provides ample opportunity for students to engage with language learning through play. Some students are, in fact, highly attentive and engaged during choral repetition, and a number of my participants expressed in their interviews that they not only needed the correct modeling such choral repetition provided, but even enjoyed a good bit of it.

(Arceneaux 2011: 216)

These, then, were the beliefs I brought to curriculum design to make the class interesting, and motivate the students – make the class fun; introduce a play element.

5. Course design

From an early stage in the planning of the class I knew that I would be writing my own "text" for the students to read and gathering the materials for the class. I researched several possible Legal English textbooks online and read one recent one. (Ross 2019) Everything I read was at too advanced a level, both linguistically and in substantive legal knowledge, for the students I was to have in the class – and, in my opinion, frequently boring. So I ended up writing a curriculum as a series of topical chapters. (Appendices B -K) The chapters also serve as unit plans, with descriptions of activities by day.

5.1 Essential vocabulary words and phrases and chapter texts

It would be difficult to teach Japanese law students substantive U.S. law unless they first learned the English vocabulary of the law. And teaching vocabulary words can be a good way to

introduce legal concepts and procedures. To explain how a civil lawsuit works, one needs to know the difference between a plaintiff and a defendant, a complaint and an answer. So I started each ”chapter” of the course – typically covering a week’s work of instruction, though in some instances more – with a list of vocabulary words and phrases, usually about twenty, relevant to that chapter’s topic, and my definitions of those words and phrases. I tried to make the definitions as simple as possible while still being accurate.

There was no science or method to my choice of vocabulary words, no consultation of a corpus of most commonly used words in a particular area of the law. I just chose words and phrases that occurred to me as important in relation to a particular legal topic, based on my three years of legal education and four decades of law practice. I cannot imagine how a nonlawyer would go about such a task without first-hand knowledge of legal discourse – perhaps through corpora research, I suppose. Teaching an ESP class is undoubtedly a challenge for ESL teachers who are not themselves familiar with the discourse of the “target environment.” Presumably, most would find it easiest to rely on a textbook written by someone who was.

Every “chapter” of my text then proceeds to provide, in text form, information about the chapter’s topic and a description of the various exercises to be done in class during the week. I assigned sections of the chapters as homework reading assignments. I also assigned as homework various additional readings – mostly authentic materials such as excerpts from judicial opinions – that I made available to students by posting them on Canvas, the online learning management software program used by UWM.

I begin each week of instruction with a cloze (fill-in-the-blank) activity designed to review the prior week’s vocabulary words, with the vocabulary review sentences shown on a screen. Then I have students take turns reading aloud the new chapter’s vocabulary words and phrases and their

definitions. At times I interrupt to explain a word in greater detail or ask questions to confirm understanding or provide schema activation, exploring differences or similarities with the Japanese legal system.

5.2 Pronunciation drills

It became apparent early on in the class from students' reading aloud that, like many native speakers of Japanese, the students had difficulty distinguishing [r] and [l] sounds. [R] and [l] are allophones in Japanese, and distinguishing those two sounds is one of the hardest things for Japanese English language learners to master. Pronunciation drills tend to be unfashionable these days in the communicative school of language learning, with its focus on the negotiation of meaning and avoidance of repetition drills. And yet Japanese native speakers' confusion of [r] and [l] can give rise to stereotyping and mockery, as well as genuine difficulties in communicating. Although each of my students is also enrolled at UWM in a Listening and Speaking course (appropriate to each individual's level) as well as a Writing course and a Combined Skills course, those courses include students of various L1 backgrounds. Mine is the only class the MGU students take in which all the students are Japanese. I suspected they might not be having any drills in their other courses particularly focusing on the [r]/[l] difference.

And so I made it a goal of mine that the students in my class would learn the difference between [r] and [l]. Teaching pronunciation wasn't a specific part of my charter, but I wanted my students to be able to say "rights," not "lights," "law," not "raw," and "election," not "erection," as meaning required. When a student mispronounces an [r] or [l] word, I pause for a pronunciation drill – often using minimal pairs -- and get each student in the class, in sequence, to say the words. These drills often are an occasion for play. For example, in one minimal pairs drill, I pointed out

that sashimi is raw, but we are studying law. I told the class that there is a long, narrow fish (burbot or *Lota lota)* somewhat eel-like in appearance, that is called a "lawyer" in Door County, Wisconsin, and eaten there (cooked). Then I had them practice the sentence "Jude Law ate a raw lawyer."

5.3 Role-plays

In addition to reading parts of the chapter aloud and related discussions, the curriculum includes various role-play activities. I have had students role-play lawyers and witnesses at a bail hearing, a hearing on a motion to suppress evidence, and a trial. We have also role-played appellate oral arguments, both in an actual historical U.S. Supreme Court case (*Loving v. Virginia,* the case that struck down bans on interracial marriage), and in several hypothetical cases. In one instance, my curriculum called for the students to role-play the oral argument that took place in *Obergefell v. Hodges*, the U.S. Supreme Court case that invalidated bans on same-sex marriage. I asked them if they would prefer to role-play a hypothetical argument before the Japan Supreme Court on the same issue -- there are conflicting lower court opinions in Japan on same-sex marriage, each relying on different provisions of the Japanese Constitution – and the students opted to role-play that argument instead. In these role-plays, I have the students who are not role-playing the advocates role-play judges. I found some black and navy blue choir robes in my attic to attire the "judges" appropriately. In the chapter on contracts, I had the students role-play representatives of a Japanese company – a mochi ice cream ball manufacturer – and representatives of a prospective U.S. distributor, and had them negotiate a distributorship contract.

5.4 Guest speakers and field trips

To spice things up and offer a variety of perspectives, I invited a number of guest speakers to give presentations. The guest speakers have had practice experience relevant to the topic under discussion that particular week. Thus I invited a husband-and-wife team of lawyers, partners in practice as well as life, to speak during the chapter on the legal profession. Both had practiced in larger firms as well as a smaller firm, and the husband had moved to Wisconsin, and gained bar admission here, after having first practiced in large firms in New York City. Similarly I invited a friend who is a criminal defense lawyer to speak during our chapter on Criminal Law; a friend with substantial trial experience to speak during our Trials chapter; a friend who has substantial experience litigating constitutional law cases to be one of the judges for a mock Supreme Court argument and speak during our chapter on Constitutional Law; and a friend who routinely litigates franchise contract cases to speak during our chapter on Contract Law.

The class, like other courses in the IEP, meets every weekday except Friday, which facilitates the planning of field trips. On one Friday, we visited the federal courthouse in Milwaukee, where we met with Chief U.S. District Judge Pamela Pepper. While there we toured the ceremonial courtroom, which was described by one of our guest speakers, perhaps without any exaggeration, as "the most beautiful courtroom in the United States." We will also visit the University of Wisconsin Law School, in Madison, meet with members of its East Asian Legal Studies program, and visit the Wisconsin State Capitol and meet with former Wisconsin Chief Justice Patience Roggensack.

5.5 Movie Night

Film can be a valuable tool in language learning and in particular in Legal English classes. (Vyushkina 2016; Alexandrovna 2018; Dabrowski 2016; Faedo 2010:31 (recommending such films as "The Social Network," "Wall Street 2," "Money Never Sleeps," "Erin Brockovich," "A Civil Action," and "Wall Street")). In designing the course, I set out to have students watch at least one law-related movie every week as part of their homework. (I subsequently eased up somewhat on the frequency of films, and skipped Movie Night some weeks.) I chose each movie based on some relationship to the subject of the chapter we were reading that week. Thus, in our chapter on Constitutional Law, in which we studied *Loving v. Virginia* and *Obergefell v. Hodges*, I had the students watch "Loving," about the factual background leading up to the *Loving* case, and "Freedom to Marry," a documentary about the legal battle for recognition of same-sex marriage that led up to *Obergefell*.

Our class period – an hour and fifteen minutes, if everyone showed up promptly at 8:30 a.m. – was not long enough to show the entirety of a film. And I thought an evening showing, on a Thursday or Sunday night, would be a fun and social activity for the students, with the benefit, on Thursday nights, of not having class the next day. I have attended the showings, to point out germane vocabulary words and concepts. Golda Meir Library at UWM has a Media Showing Room in its basement, with very helpful staff on hand at any time the library is open. This came in very handy during a showing of "Erin Brockovich," when the CD had some sort of scratch on it, creating a stall. The staff was able to buff the scratch out, and we resumed watching the movie.

To accommodate students who might have conflicts with either a Thursday or Sunday night showing, the requirement was to watch one of the two movies – either the Thursday night film or the Sunday night film. Two students were assigned the roles of Siskel and Ebert at the Movies,

and tasked with reporting to the class, during a regular class period, the answers to these questions: 1.) Did you like the movie? Why or why not? 2.) Keeping in mind that movies are not always entirely accurate in their depictions of the legal system, what did you learn about the U.S. legal system? 3.) What vocabulary words did you notice? What were the contexts?

I had seen most, but not all, of the films I scheduled to be shown. To try to make sure that the movies I chose would generally be well-received, I checked ratings on ImdB and Rotten Tomatoes, and tried to choose only well-rated movies. The films I chose and have played thus far in the course are "Legally Blonde," "My Cousin Vinny," "Erin Brockovich," "A Civil Action," "Reversal of Fortune," "The Verdict," "A Few Good Men," "On the Basis of Sex," "Amistad," "Loving," "Freedom to Marry" and "The Paper Chase."

5.6 Kahoot quizzes

Another type of audio-visual learning is quizzes on the Kahoot platform, www.kahoot.com. This is a new technology since I went to high school (back in the early 1970's), but apparently, I learned from an undergraduate friend, quite popular in high schools and universities today. Although Kahoot offers a number of different ways to play, the options I chose were individual play and multiple-choice quizzes. The instructor first writes a multiple-choice quiz, which Kahoot saves in its memory. When it is time to play, the quiz can be displayed on a screen. As music plays, students first log into the game on their smart phones, and then have to select the correct answer from the three or four options given. Kahoot awards winners points based both on getting the correct answer and how fast they choose it. After the correct answers to each question are displayed, Kahoot displays an updated scoresheet showing each participant's score and their relative rankings. Very frequently, in our class at least, players would move up and down in

rankings from one question to the next. In our class, there is generally a fair amount of cheering, and I cheer on the new winner (who sometimes, at least initially, has been the weakest student in the class).

Kahoot is what Huizinga and Vaillois would categorize as an agonistic type of game. It is competitive play. I find it a lot of fun, and I think the class does as well. It has been particularly useful at the end of a chapter, as a form of review. I have not had Kahoot quizzes for every chapter; there is a benefit to keeping things from becoming routine.

5.7 Student presentations

Around mid-semester, I gave students an assignment to do a presentation on any law-related topic of their choice. I did not require that the presentation be related to any topic we were currently studied or had studied to date, although several students did end up choosing to present on something we had studied. I did not require a PowerPoint presentation – and told the students that – but they all chose to do one anyhow. The topics the students selected included the Second Amendment right to bear arms, free speech in Japan and the United States, the McLean case (a case in Japan about the free speech rights and political activities of non-Japanese people in Japan), the Jeffrey Dahmer case, same-sex marriage in Japan and the United States, and Ruth Bader Ginsberg (the subject of a movie we had watched, "On the Basis of Sex"). They were all very well done. Giving the students the agency to pick a topic of their choice ensured that each student was enthusiastic about their own presentation.

5.8 Materials

Materials selection for the class was something of a challenge. Some of the reading materials for the course were the chapter texts that I wrote having in mind the likely reading level of the students. (And, having now taught the course for part of one semester, I plan to revise my chapter texts to make them even more comprehensible to learners at a B1 reading level, for future iterations of the course.) I wanted to expose students at much as possible to authentic materials – real legal texts. But large portions of authentic legal texts are difficult for even native English speakers to understand if they are not also trained in the technical vocabulary of the law.

Where authentic materials are simply at too advanced a level for an ESP learner to understand, the teacher has several options. One is to rewrite – dumb the materials down, if you will, with simpler vocabulary. That was not an attractive option to me. Another option is to excerpt – to select only portions of authentic materials. This works best if discussion can be focused around one particular issue in the text. I used excerpts of authentic materials on several occasions. Another option is to look for different authentic materials: search for something in the genre that is just shorter and has simpler vocabulary.

In planning one of the role-plays in the class, I used the last two strategies. We role-played a trial – typically a complex matter, with multiple issues. The role-play was based on a bankruptcy case of mine. There was just one issue that went to trial in the case: were the debtors, who had not lived in Wisconsin for some years, still residents of Wisconsin? For the materials the students read, I excerpted the post-trial briefs, of both sides, summarizing the facts of the case. The students' jobs were to prepare questions for the lawyers to ask and answers for the witnesses to give, based on the excerpts from the briefs. The mock trial went well. I have to say, the student claiming Wisconsin residency in the mock trial made a more credible witness than the real-life

debtor did. In the mock trial, echoing the actual trial, he testified, "I'm a Wisconsin boy," but also lifted up his sweatshirt to display a Wisconsin Badger T-shirt. It was fun!

Not all of the authentic materials I selected were as well-matched to the students' levels as the post-trial brief excerpts in that role-play. In future iterations of the course I will be tweaking materials selection. On some occasions it may be best to use something other than an authentic legal text. Although I originally contemplated having the students read excerpts from *Marbury v. Madison* – the great case that established the Supreme Court's power to declare law unconstitutional – in the end I showed the students two short videos about the case. It would have been just too hard to understand even excerpts from the opinion.

5.9 Assessment

I have not graded students' homework (most of which is reading or watching a movie) or in-class assignments, many of which were role-plays that would be very subjective to assess. I gave the students a midterm assessment, on paper, which they completed without benefit of smart phones or computers. (Appendix L) It was designed to test knowledge of vocabulary words and the various rights protected by the Bill of Rights. In the several days before the test, we spent parts of class time reviewing vocabulary words and repeating several Kahoot quizzes. (I did not record Kahoot quiz scores as part of student assessment in the class.)

Although the midterm gave the students a few options for extra credit, all of the students said that it was hard – and it appears to have been. I was charitable in my grading, which resulted in a fairly broad range of scores, with a high score of 98 out of 100.

I intend to give a final assessment at the end of the course, which will also be preceded by review in the several days prior. I intend for part of that assessment (a take-home part) to be

writing a specified number of haiku in which the students will be required to use vocabulary words from various "chapters" of our text (one vocabulary word or expression per haiku), in a manner that demonstrates understanding – with bonus points for creativity.

6. Midsemester survey: the students' assessment of the course

Turnabout is fair play, so it's only appropriate that the students be asked, as well, to assess the course. I distributed a survey asking the students some specific questions and also to rank class activities as "educational" or "fun" on a scale of 0 to 4, with 0 being least educational or least fun, and 4 being most educational or most fun. As Basturkmen notes, a course developer needs to consider "*did the students like the course* and *did the students learn anything from it*?". (Basturkmen 2010: 65)

Although the survey was anonymous, a few students gave their names. Their comments may reflect the power imbalance between student and teacher, or a desire to please. In any event they were overwhelmingly positive, which is of course gratifying to me, even if at times – homework reading assignments getting a score of 4 for fun? – one feels like this was like Iraqis voting on whether Saddam Hussein should be reelected, back when he was in power. Here are the average scores students gave to the various classroom activities in the two metrics:

	Educational	Fun
Homework reading assignments	4	3.714
In-class readings	4	3.714
In-class discussions	4	3.857
Role-plays	4	3.833
Movie Night	3.857	3.428
Student presentations	4	3.857
Pronunciation drills	4	3.857
Kahoot quizzes	4	3.857
Guest speakers	4	3.857
Field trip	4	3.857

All seven students in the class completed the survey. Every student rated every activity, except one student who did not rate role-plays.

I asked the students for their favorite activity in the class, and for their least favorite, and why. One student's favorite activity was Kahoot quizzes, because "I like quizzes." Another's favorite parts of class were the field trip and role-plays, because "I can learn a lot of things." A third's favorite activity was pronunciation drills, because "I want to practice and improve my English skill." Another said that his or her favorite part of class "is that we can discuss actively." Yet other favorites were the case of same-sex marriage and the presentations, in the latter case because the student "got a new knowledge . . . by searching by myself."

As for least favorite activities, three students replied "Nothing" (in one case with a smiley face and two hearts drawn). There were a few least favorite activities. One student voted for "vocabulary" and another for "reading assignment," because they were difficult.

"Movie Night" got two least favorite activity votes, but one of them was qualified: "Movie Night (when the movies are not interesting)." That same student voted for Movie Night as his or her favorite activity "(when the movies are interesting)."

I asked the students what they thought they learned the most from, and, finally, for any advice they had for me to improve the class. Kahoot, trial practice, role-plays, the field trip, the U.S. Constitution, listening, and the movie "On the Basis of Sex" each got one mention as the thing from which they had learned the most. And no one had any advice for me to improve the class – though the comments "Nothing. You're the most!", "You're perfect!!", and "To be honest, this class is my best favorite class at UWM" are extremely gratifying to a teacher – even if one is painfully aware of the dubiousness of at least the first two comments.

7. Discussion

I have greatly enjoyed teaching this class, and the students' responses to the survey confirm my impression that, for the most part, they have found it educational and fun as well. The one thing that is most salient from the survey is the need to tweak or retool Movie Night. I asked too much of the students to set aside two hours of their out-of-class time, week after week, to watch a movie as part of their homework. It was too much even if they had the option of doing so either on a Thursday night or on a Sunday night. Part of the problem is that some of the films were, well, boring, or at least not maximally entertaining. Movie Night can be, as it apparently was, both a favorite thing and a least favorite thing, depending on the movie. And part of the problem is that too much of a good thing makes it not a good thing. I did not have a guest speaker every week, nor did I have a Kahoot quiz every week. As Dörnyel notes, "[a]ny learning activity can become satiating." (Dörnyel 2001: 71) It is important to vary the tasks in a course – and to do the unexpected. (*Id*. 74)

A revised approach to Movie Night could show a smaller number of films – the most popular ones -- to the entire class selected weeks, and perhaps assign a few films to individual students, to be the subject of a presentation. Faedo, who uses movies in her Legal English class in a Spanish university, has students view a film of her choice on their own and later, in groups, write a follow-up and stage the film in English in a moot courtroom. (Faedo 2010: 33 .n 14) This could be interesting – although I know from a prior teaching experience of mine, also at the IEP, that having students write and perform an original law-related play can require several weeks' time to accomplish. That might be excessive time for a single task in a class designed to provide an overview of U.S. law.

Certain films, in particular "My Cousin Vinny," help to establish a common base of knowledge about U.S. law that I found helpful as I taught the class. Time after time I found myself explaining a concept such as voir dire of a prospective juror or voir dire of an expert by reference to a scene in "My Cousin Vinny." And films like "Loving" and "Freedom to Marry," though not entertaining in the way "My Cousin Vinny" is, were closely linked to the curriculum content in the chapter on Constitutional Law. So it may be valuable to keep them as part of the class.

Other challenges of teaching the course prospectively include making sure that reading assignments, both my "chapters" and assigned readings from authentic materials, are not overly difficult for students who, for the most part, are at a B1 level. The in-class role-play activities almost always went well. Indeed, two students came up to me after our hearing on whether "Ephry Jeppstein" should be released on bail and commented on how much they had enjoyed that class. And the role-play of the U.S. Supreme Court Justices in conference deciding the cases in which they would grant certiorari took on an aspect of agonistic, competitive play. Each student was assigned to speak either in favor or against granting "cert." in a particular case, and then the "Justices" voted on which cases they would take. So some "Justices" persuaded their peers to take a case. In retrospect, though, the materials I had the students read in preparation for their individual arguments for or against a case – the certiorari petitions or briefs in opposition to them -- were too challenging.

Kahoot quizzes and student presentations were fun and held the students' attention. I tried in drafting the multiple choice options for the Kahoot quizzes occasionally to include a humorous pun or joke (wrong) answer. The competitive scoring system – with one student frequently overtaking another in the scores, posted after the answer to each question is given – appeals to students' love of games, and gives the teacher the chance to cheer on the winner, which is

especially gratifying when you can give kudos to an underdog. Students seemed particularly invested in their presentations because they had essentially unlimited agency in choosing their topics.

As Arceneaux observed in his study of a college French class, I thought pronunciation drills were both helpful and engaging – an occasion for fun. These were not a routinized part of the class but an as-needed interruption in whatever else was going on in the class, when words like "law," "rights," or "collateral" were mispronounced. I sometimes used props, as for example by pointing to the overhead lights, in minimal pairs drills. I was pleased and a little surprised when one student, in the midsemester survey, described pronunciation drills as his or her favorite part of the class.

8. Conclusion

At my law school graduation, the president of our university – himself a lawyer by training – issued this time-honored pronouncement to those who were receiving law degrees: "You are ready to aid in the shaping and application of those wise restraints that make us free." The students of my Legal English class probably are not headed to a "target situation" in which their daily vocation will be the application of the "wise restraints" of the law – though, to be sure, the one who wants to go into politics may have occasion to shape those restraints. But each has set for himself or herself a goal of learning the discourse of the law – whether there is a "need" to know it for possible future employment, or just a "want" to understand how ideas like equal protection of the law (a concept found in the Japanese Constitution as well as in ours) have led courts here to protect, for example, same-sex marriage. It is my job to teach them how to talk about the law, in English – and talking about the law in English is not easy for students whose English language

competency is at a low intermediate or B1 level. The acquisition of technical vocabulary in a foreign language can be a difficult and at times frustrating undertaking – perhaps especially so where there is not a clear or direct prospect of a "target situation" in which the learner will need to know that vocabulary to survive at work.

In learning English for a Specific Purpose, as in language learning generally, it helps greatly if there is an element of play in the learning environment – if learning is fun. Classroom play can help create a community of motivated learners. In my Legal English class, I have tried to use movies, role play activities, Kahoot quizzes, and even pronunciation drills to incorporate play. These are but a few of the types of play that a teacher can incorporate in the classroom. I believe it is critical to use tools such as these even where a course such as ESP might be viewed as narrowly pre-vocational – all about preparing for work. Play is how *homo ludens* rehearses for work, but, more than that, it is intrinsically rewarding.

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Appendices

Appendix A

UWM English Language Academy
Fall Term, 2022-23
Legal English
Goals and Interests Survey

1. Your name: _____

2. What is your career goal? What kind of job would you like to have after you graduate from university? _____

3. Do you have a particular interest in a legal field? If so, what is it? _____

4. Among the following legal subjects, are there any that are particularly interesting to you? Please make a check mark next to any that are particularly interesting:

   - Business organizations __
   - Administrative law __
   - Antitrust law __
   - Employment discrimination __
   - Torts __
   - Immigration law __
   - International business law __
   - U.S. legal history __
   - Freedom of speech __
   - Intellectual property law __
   - Law and economics theory __
   - Environmental law __
   - Evidence __
   - Family law __
   - Taxation __
   - Property __
   - Statutory interpretation __
   - Mergers and acquisitions __
   - Trusts and estates __
   - Famous decisions of the U.S. Supreme Court __
   - Law and literature __

What do you hope to learn in this class? _____

_____

Appendix B

Chapter I:

The Importance of the Case in the Common-Law System:

Common Law vs. Civil Law; Legal Research and Legal Education in the U.S.

Week of September 5-9

Chapter Objectives:

Students should be able to:

- Identify the major differences between common law jurisdictions and civil law jurisdictions.
- Recognize and use about twenty essential words and phrases relating to common law and civil law systems and legal education and legal research in common law systems.
- Do legal research using the West key number system.
- Do legal research using word searches on Google Scholar.
- Brief a case: describe its facts, issue, holding, and rationale.
- Identify the main types of judicial opinions.

Homework Assignments:

For Wednesday's class: Read Chapter I B., C., and D., and read *Pierson v. Post* (edited), posted on Canvas.

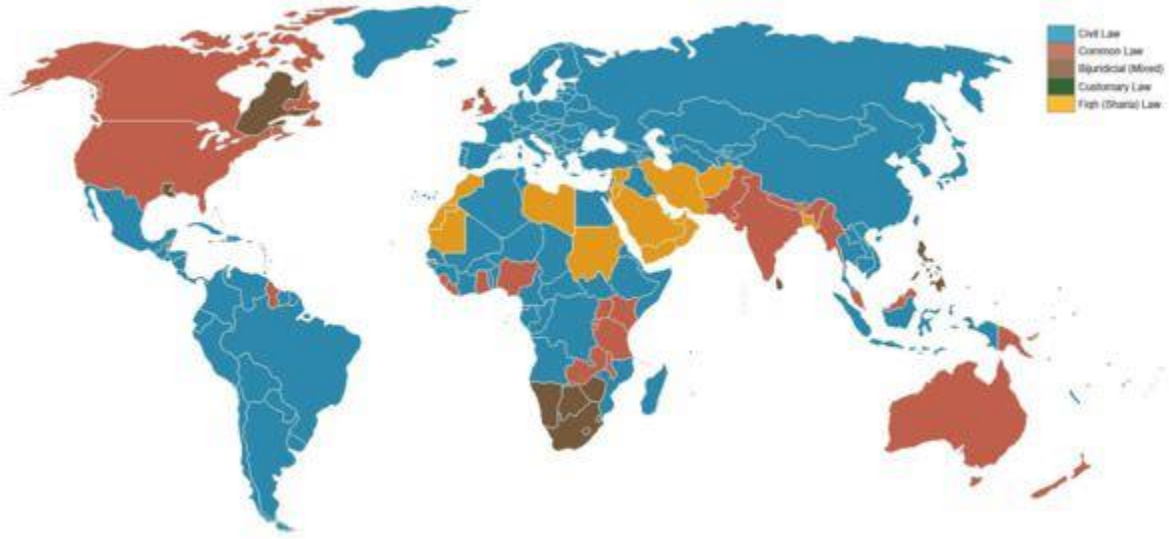
For Thursday's class: Watch either "The Paper Chase" or "Legally Blonde" (two students will be appointed to give brief presentations about one or the other movie); scan

the *Dobbs v. Jackson Women's Health Organization* opinions (link set forth below) and read the excerpts from three of the *Dobbs* opinions posted on Canvas.

Tuesday

A. Introductions; overview of syllabus and course; distribution of goals and interests survey.

B. **Introduction to unit**. There are two principal categories of legal systems in the world: "common law" systems and "civil law" systems. Another category, "sharia law," describes those legal systems that are based on Islamic law. Here is a map of the world showing the general distribution of common law, civil law, mixed or bijuridical, sharia law, and customary law jurisdictions:



The common law tradition is based, originally, on English law. You will note that the jurisdictions that appear in red on the above map – the common law jurisdictions -- are all either the United Kingdom itself or former colonies of the United Kingdom: (most of) Canada, (most of) the United States, India, Pakistan, Sri Lanka, Australia, New Zealand,

Malaysia, Myanmar (Burma), Guyana (in South America), Kenya, Nigeria, other former African colonies of the United Kingdom, and so on.

Civil law jurisdictions trace their legal traditions, at least in substantial part, to European law codes and in particular two bodies of law set forth in famous legal codes: Roman law, codified in the Code of Justinian, and French law, codified in the Napoleonic Code. Most of Europe, China, Russia, Central Asia, Thailand, and the former African, Asian, and Latin American colonies of France, Spain, Portugal, and the Netherlands – shown in blue on the above map -- are civil law jurisdictions. Japan is a civil law jurisdiction.

You will note that a part of Canada is shown in brown – for "bijuridical" -- on the above map, as is a part of the United States and several South African countries. The Canadian province of Quebec was ruled by the French before it was ruled by the British, so its legal tradition combines elements of civil law and common law – as does the law of the U.S. state of Louisiana, which was also a French colony before it became part of the United States. South Africa was a Dutch colony before it became a British colony.

So, what's the difference between the common law tradition and the civil law tradition? Or, I should say, what are the differences? We'll get to those in a moment. First, let's see what you already know about the differences between the Japanese legal system and the U.S. legal systems, and learn some essential vocabulary.

Exercise I. A. 1: Discussion. What are your impressions – based on what you have read previously, seen on TV or in movies, or studied -- of the differences between the Japanese legal system and the legal systems of the U.S. and its states? In what ways are the court systems similar and in what ways different? How are the roles of lawyers similar, and how

are they different? Do you think Americans are more likely to go to court to resolve disputes than Japanese people? Is there a difference in the status or prestige of lawyers or judges between the two countries? Is the role of judges different or the same in the two countries – or partly different and partly the same? If it is different, how is it different, do you think?

C. Essential **vocabulary**.

Adversarial: A legal system in which the judge does not engage in independent fact-finding but relies on evidence presented by the lawyers for the parties to the case, who are the adversaries. Distinguished from "inquisitorial."

Briefing a case: Writing a short summary of a judicial decision. Briefing a case usually includes 1.) the facts of the case; 2.) the issue in the case; 3.) the holding in the case; and 4.) the court's rationale. Sometimes a case brief also describes the procedural setting of the case. "Briefing a case" in this sense should not be confused with "briefing an appeal" or "briefing a motion," which describe writing the briefs (written legal arguments) that are filed in court.

Case law: Judicial decisions (on a particular topic).

Case method: Method of instruction in law schools that relies mainly on talking about judicial decisions in class

Digest: Summaries of judicial decisions organized by topics.

Concurrence or concurring opinion: A written opinion of a judge who agrees with the outcome of a case decided by a multijudge court, but wants to say something additional.

Dicta: (From the Latin for "words"): Statements in a judicial decision that are not necessary to the holding in the case and are not binding on later courts. Distinguished from "holding."

Dissent: The written opinion of a judge who does not agree with how a majority of the judges in the case decided it.

Google Scholar: A relatively new free legal research tool that allows word searches in a broad range of case law materials.

Holding: The exact principle of law decided by a case. Distinguished from "dicta."

Inquisitorial: A legal system in which the judge acts as a fact-finder in pretrial proceedings or in the trial itself by asking questions of witnesses. Distinguished from "adversarial."

Jury: A group of citizens, traditionally 12 in number, chosen at random to decide civil and criminal cases in common law jurisdictions. Juries of a smaller number, often six, are now common in civil jury trials. England has abolished jury trial in most civil trials, but it remains in the United States both in civil and criminal cases.

LEXIS: A computerized legal research system that relies on word searches and other tools to help in legal research.

Majority opinion: The written decision of a majority of the judges deciding a case. It is the controlling opinion. Distinguished from "concurrence" and "dissent."

Overrule: The action of a court in saying that a prior decision is no longer controlling.

Precedent: A judicial decision that has binding effect unless it is overruled.

Reports or reporter: A book of judicial decisions from a particular court or regional or state group of courts. Distinguished from "court reporter," the person who records proceedings in a court. Socratic method: A method of teaching law students in which the professor doesn't lecture, but asks questions of students. The name is based on the Greek philosopher Socrates, who used a similar style of asking questions in his teaching.

Stare decisis: A Latin term meaning to stand by or adhere to what has previously been decided in a judicial decision.

West key number: An indexing system for legal topics in judicial decisions invented by the West Publishing Company of St. Paul, Minnesota, to help in legal research.

WESTLAW: A computerized legal research system sold by the West Publishing Company that uses West key numbers as well as word searches in its search functions.

D. Differences between the common law tradition and the civil law tradition. There are a number of procedural differences between common law jurisdictions and civil law jurisdictions. The common law system is often called an "adversarial" system, where the lawyers for the opposing parties present legal arguments to a judge and evidence either to the judge or a jury, and the judge and jury (if any) are supposed to be neutral and rely on the evidence presented in court. In the civil law system, judges often act as investigators in collecting evidence, in addition to their role in deciding the case. This is sometimes called an "inquisitorial" system. Another main difference between the two systems is a greater role for the jury in common law jurisdictions. The U.S. Constitution guarantees a right to trial by jury in most criminal cases, and it guarantees a right to trial by jury in federal courts in most civil cases, as well. Although some civil law systems also have a form of layperson (nonlawyer) participation in deciding cases, this is uncommon.

The biggest difference between the two systems is the relative importance of case law as opposed to statutes. In the English common law tradition, the law developed on a case-by-case basis as judges decided individual cases. To learn the law, or to research the law on a particular point, lawyers read cases. Although the British Parliament sometimes enacted statutes, it, historically, never attempted to enact a comprehensive code setting forth all of the kingdom's law.

This contrasts with the tradition in civil law jurisdictions. The Roman emperor Justinian ordered a group of scholars to create the Code of Justinian from various sources that existed in Roman law. And Napoleon did much the same thing in France. Civil law jurisdictions have continued to create codes of law – statutes – that are the primary source of law in those jurisdictions.

To an extent, common law jurisdictions and civil law jurisdictions have moved toward a middle ground. There is now a United States Code that compiles in one multivolume set all of the principal laws of the federal government of the United States. And individual states have similar statute books. Most civil law jurisdictions now have court systems that issue reasoned judicial decisions, and those decisions are entitled to respect.

But the mindset and traditions of the two systems remain different. In common law systems, case law is precedent, entitled to controlling force under the doctrine of *stare decisis* unless and until it is overruled by a court (or in effect overruled by the enactment of a statute that changes the law). In theory in the U.S., the state and federal constitutions and state and federal statutes are entitled to greater respect than case law – but it is how those provisions get interpreted by courts that is most important. Also, there are many areas of the law – depending on the state – where large bodies of law are not subject to any statutes, but are entirely governed by common law – that is, by judicial decisions, only. In civil law systems, on the other hand, constitutions and statutes are the most important, and judicial decisions tend to occupy a less important role. And typically in civil law jurisdictions all aspects of the law – for example, contracts, torts, property, and criminal law – are subject to rules set forth in statutes.

As we will see next, in common law jurisdictions, much of both legal education and legal research involves reading ***cases.***

Wednesday

Exercise I.D.1.: briefing a case and Socratic dialogue. *Pierson v. Post* is one of the very first cases U.S. law students typically study in property law classes, and it stands for a basic

principle. I will call on students to state the facts in *Pierson v. Post*; the issue; the holding by the majority; the majority's rationale; and how the dissenting justice would have ruled.

Exercise I.D.2.: using the West key number system to do legal research. Before computers made legal research much easier, lawyers and law students had to use indexes in digests of cases to find cases that might help their arguments. Imagine you are a lawyer representing a debtor in bankruptcy who gave his bank financial statements with inflated values of assets in order to get a loan. Generally, giving a bank a false financial statement is considered fraud, and the debtor will not be able to discharge (wipe out) liability on the loan. In your client's case, though, the bank officer knew that the values were inflated or at least had lots of reasons to know that the values were too high. The loan officer just wanted the loan approved because the more loans he made, the more he got paid. Does this make a difference in whether the debtor will be able to discharge the loan debt in bankruptcy? Using the West's Bankruptcy Reporters distributed in class, research Bankruptcy key numbers 3353(14.10) and 3353(14.25) to see if you can find any helpful cases.

Exercise I.D.3: using Google Scholar to do legal research. A client comes to see you at your law office in Wisconsin. She gave a bank a second mortgage on her house a long time ago and stopped making payments on the second mortgage in 2008. The bank has done nothing to try to collect from her or foreclose the mortgage since 2008. You know that in Wisconsin, the statute of limitations (time you have to sue) for a breach of contract is six years from time of the last payment. If you don't sue within six years, you can't sue for

breach of contract. Does this apply to mortgages, too? Research the answer under Wisconsin law using Google Scholar.

Thursday

Siskel and Ebert at the movies. This week will be our first week of "Siskel and Ebert at the movies," in which we will talk about, typically, two American movies and what they show (whether accurately or inaccurately) about some topic related to U.S. law and the legal system. It is important to keep in mind that the movies we will be watching may not always be accurate in every detail in how they show the U.S. legal system. But in most cases they will show some important aspects, and at least be a basis to discuss the system and how it differs or does not differ from the Japanese legal system. This week's movies are "The Paper Chase" and "Legally Blonde." Both show legal education – in fact, at the same law school, Harvard, although the two films were produced some years apart and "Legally Blonde" is more of a comedy. Everyone in the class was assigned to watch at least one of the movies, and two students will be assigned to be the "film critics." Film critics, please give your review and report to the class, and address these questions: 1.) Did you like the movie? Why or why not? 2.) Keeping in mind that films are not always 100% accurate in their depictions of the U.S. legal system – what did you learn about legal education in the U.S.? How does it differ from legal education in Japan? 3.) Were some of this week's essential vocabulary words used in the film? What were the contexts?

Exercise I.D.4. Review of the opinions in *Dobbs v. Jackson Women's Health Organization.* This year the U.S. Supreme Court issued a highly controversial decision in *Dobbs v. Jackson Women's Health Organization.* The Court overruled a famous precedent, *Roe v. Wade*, decided in 1973, that had guaranteed a woman's right to an abortion. Please

scan – skim, look through quickly without reading every word – the various opinions, which you can find at this link: https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf . I do not expect you to read the decisions. That would take too long and be too hard. But please identify these parts of the case: the syllabus; the majority opinion; the two concurring opinions; the one opinion concurring only in the judgment (the outcome); and the dissent. Who wrote the majority opinion? Who wrote the two concurrences? Who wrote the concurrence in the judgment? Which justices wrote the dissent? Next, please read the excerpts from several opinions that I have uploaded to Canvas. In these excerpts, the justices talk about *stare decisis* and how it affects their decisionmaking. What did Chief Justice Roberts have to say about *stare decisis* in this case? What did Justice Kavanaugh have to say about it? And what did Justices Breyer, Sotomayor, and Kagan have to say? Which do you find most persuasive?

Both *Roe v. Wade* and *Dobbs v. Jackson Women's Health Organization* were constitutional law decisions. They interpret the U.S. Constitution and not an area of law that is traditionally thought of as "common law," such as contracts or torts (where, historically at least, the legal rules were found only in judicial decisions and not in statutes). However, many parts of the U.S. Constitution are so broad and vague that they amount to giving courts the power to make up more specific rules. For example, the Constitution prohibits both the federal and state governments from denying any person the "equal protection of the laws." What does that mean, in particular cases? The courts have to decide.

Roe v. Wade and *Dobbs v. Jackson Women's Health Organization* decided an issue – whether or not there is a right to an abortion – that in a civil law system, would far more likely be

decided by statutes. (And this is one of the complaints the majority opinion in *Dobbs* has about *Roe v. Wade*: per the majority, the abortion issue should have been decided by state legislators in state statutes.) Because *Dobbs* overruled an important decision of the U.S. Supreme Court (actually two of them), the justices of the Court found it necessary to talk about *stare decisis* in some detail. Their discussions (partly set forth in the excerpts I have posted on Canvas) are a good introduction to the rules of *stare decisis* and the role of precedent in a common-law jurisdiction

Appendix C

Chapter II:

The Legal Profession in the U.S.: Admission to Practice, Regulation of Law Practice, and the Economics of Law Practice

Week of September 12-15

Chapter Objectives:

Students should be able to:

- Recognize and use about fifteen essential words and phrases relating to law practice in the U.S.
- Describe the several ways lawyers are admitted to practice in state and federal courts in the U.S.
- Use online tools to search legal job listings.

Homework Assignments:

For Monday's class: Read Chapter II A., B., and C.. and watch "My Cousin Vinny." There will be a Sunday night showing at the media room in the basement of Golda Meir Library. Risa and Kurumi will be give brief presentations about the movie. Read the excerpts from Chapter 20 of the Wisconsin Supreme Court Rules that I have posted on Canvas.

For Tuesday's class: Read the sample Multistate Professional Responsibility examination questions also posted on Canvas. Read the excerpts from *People v. Belge,* prepare a case brief, and be ready to answer questions about it.

For Wednesday's class: Read Chapter II. D. and review essential vocabulary words from Chapters 1 and 2.

Monday:

Siskel and Ebert at the movies. Film critics, please give your review and report to the class: This week's movie shows a recently admitted lawyer trying his first case – Vinny Gambini (Joe Pesci), a jobless New York lawyer who only passed the bar exam on his fifth try. Questions: 1.) Did you like the movie? Why or why not? 2.) Keeping in mind that films are not always 100% accurate in their depictions of the U.S. legal system -- what did you learn about the practice of law in the U.S.? How does it differ from law practice in Japan? (Note that the number of times Cousin Vinny failed the bar exam is more typical of the Japanese bar exam than it is of bar exams in the U.S.!) 3.) Were some of this week's essential vocabulary words used in the film? What were the contexts?

D. Essential vocabulary.

Associate: A lawyer, usually a younger person, employed in private practice at a law firm, typically for the first 7 to 10 years after graduating from law school, who is not yet an owner of the firm, either a "partner" or a "shareholder."

Bar exam, bar examination: A test given to people who want to become admitted to practice law. In most states, the bar exam consists of three parts: the Multistate Bar Exam, covering general legal questions not unique to particular states; a state law essay exam; and a Multistate Professional Responsibility Exam that tests knowledge

of legal ethics and professional duties. Most bar exams last a total of two to two and a half days.

Bar review: A course offered by a private seller that helps law school graduates study for the bar exam, typically lasting a few nights a week for month or two. Barbri and Kaplan are two of the better known courses. Bar review courses are similar to Japan's cram schools, but typically much shorter.

Clerk: A word that used to refer to young people who were learning the law in an older lawyer's office. Today it has two main uses. A "summer clerk" is a law student working a summer job for a law firm. A "law clerk" can also refer to a law student working for a law firm, but more typically refers to a law school graduate who works as a legal assistant for a judge.

Diploma privilege: The ability to be admitted to practice law without having to take a bar exam, solely by graduating from a law school within a particular state and passing the required character and fitness exam (required of all applicants). Wisconsin is the only state that still has a "diploma privilege."

Disbarment, disbar, disbarred (noun, verb, adjective): When a lawyer permanently loses a license to practice law, typically as the result of a very bad disciplinary violation.

Discipline: The system of punishing lawyers for misbehavior. Punishments can include reprimands (which may be either private or public), suspension from practicing law for a period of time, or disbarment.

L.L.P., S.C., P.C.: L.L.P. stands for "Limited Liability Partnership." "S.C." stands for "Service Corporation." "P.C." stands for "Professional Corporation." These are three forms of business entities that are commonly used to organize law firms. In most states, a law firm cannot be an ordinary business corporation, but must be a sole proprietorship, a general partnership, or an entity such as one of these.

Multistate or Multistate Bar Examination (MBE): A six-hour-long, 200-question multiple-choice, standardized bar exam that is used in many states. The MBE tests knowledge of general principles of law that are the same in many states. Most states that use the MBE also have another day of testing that focuses on issues that are unique to that particular state.

Multistate Professional Responsibility Examination (MPRE): A two-hour-long, 60-question multiple-choice, standardized bar exam that tests knowledge of legal ethics. It is used in many states.

Of counsel: A term used to refer to lawyers, typically older lawyers, who are still practicing with a firm but may have reduced hours.

Partner, shareholder: A lawyer, generally an experienced lawyer, who is an owner of a law firm. Law firms organized as partnerships have "partners;" law firms that are service corporations or professional corporations have "shareholders."

Patent bar exam: A specialized bar exam taken by lawyers who want to practice before the U.S. Patent and Trademark Office.

Pro hac vice: Latin for "for this time." Permission to practice law for a particular case where the lawyer is not admitted to practice law in that state.

Reciprocity: Admission to practice law in a state without having to take its bar exam for someone who is already a practicing lawyer (typically for at least five years) in another state if that other state has "reciprocal" privileges for lawyers seeking to practice there after practicing for some years in another state.

E. **Admission to law practice.** As in Japan, in the U.S., one must first pass a bar exam to become a lawyer. Unlike Japan, there is not one national bar examination. Rather, each state has its own bar exam. Pass rates range from a low of about 44% (in California) to a high of about 78% (in Iowa), and vary from year to year. Most state bar exams require the test-taker to take the Multistate Bar Examination – a six-hour, 200-question multiple choice exam that covers laws that are the same from state to state – plus an additional day of testing on state law questions, usually in essay form. In addition, most states require the Multistate Professional Responsibility Examination, a two-hour multiple-choice test of legal ethics. To prepare for the bar exam, many law school graduates attend a "bar review" course from a private company – similar to cram schools in Japan, only much shorter -- a few nights a week the summer after they graduate from law school. Most states require people who take the bar exam to be graduates of accredited law schools – which usually requires three years of graduate study after obtaining an undergraduate degree.

This was not always the case. Traditionally in England and for many years in the United States, one could become a lawyer by "clerking" for a lawyer – working in the

lawyer's office, often for low pay -- and "reading the law" for a period of years. In the nineteenth century, a number of U.S. presidents, including Abraham Lincoln, as well as distinguished jurists like Chief Justice John Marshall, had become lawyers by "reading the law" rather than going to law school. And this route remains at least theoretically available today. Four states – California, Vermont, Virginia, and Washington – still allow people to become lawyers through self-study with a lawyer before taking the bar exam, although very few people actually do so. (The celebrity Kim Kardashian is currently trying to do this. After one failure, she passed California's initial bar exam, sometimes called the "baby bar," in December, 2021.)

After passing one state's bar exam, it is usually relatively easy to be admitted to practice in federal court in that state without having to take a bar exam. But admission to practice in federal court is different from practicing in state court, and does require a separate application. Admission to practice before the federal Patent and Trademark Office is

Because admission to law practice is state-by-state in the United States, being admitted to practice in one state doesn't allow a lawyer to practice in another. If one just seeks to be admitted for a particular case and not generally, a lawyer can seek admission *pro hac vice* (pronounced pro hock vee-chee), as shown in "My Cousin Vinny." In many states, if you have practiced in another state for at least five years, you can apply for admission through "reciprocity," if the other state would show the same courtesy – without having to take a bar exam. Or, you may have to take a second bar exam. I was admitted to the Vermont bar first, and later had to take the Wisconsin bar exam – although I did not need to take the Multistate part again.

C. Regulation of law practice. Lawyers have continuing duties after they are admitted to the bar. They typically need to pay annual dues, take continuing legal education classes, and avoid committing a violation of the rules governing lawyer behavior. In Wisconsin, the rules governing lawyer behavior are set forth in the Wisconsin Supreme Court Rules, Chapter 20, excerpts from which are posted on Canvas. Each state has different ways of enforcing its rules, but they usually involve an agency that acts as prosecutor of rules violations, with punishments, if any, decided by the state Supreme Court. Punishment can take the form of a reprimand or warning (which can be either private or public), fines, suspension from practicing law for a period of time, or disbarment – permanent loss of a law license.

Exercise II.C.1.: Identify the ethical violations in "My Cousin Vinny." Review the excerpts from the Wisconsin Supreme Court Rules, chapter 20, posted on Canvas. Vinny Gambini was a New York lawyer trying a case in an Alabama court, so Wisconsin's ethical rules would not have applied to him. However, New York and Alabama have legal ethics rules that are quite similar in most respects to those of Wisconsin. Assuming that the rules would have been the same, which rules did Vinny Gambini violate? Which rule did he obey?

Tuesday:

Exercise II.C.2.: I have posted sample questions from the Multistate Professional Responsibility Examination on Canvas. I am not expecting that you will know the answers, but wanted to give you an idea of what a U.S. bar exam is like, and also to spark some

discussion. In your small groups, discuss what you think the answers should be. Do you think the answers would be different under Japanese law?

Exercise II.C.3.: Discuss *People v. Belge*. Do you think the court reached the right result? Why or why not?

D. Jobs after graduating from law school and passing the bar exam. The United States does not have anything like the Legal Training and Research Institute of Japan. New lawyers, if they are lucky, start to work in private practice or government law jobs as soon as they have passed the bar. Even though Americans may tend to use legal services more than Japanese people do, the far greater number of lawyers in the United States – around a million, or one for every three hundred or so people – means that if anything there is an oversupply of lawyers, as compared with Japan, where there are perhaps 36,000 lawyers, judges, and prosecutors in a nation of 124 million people. Thus the range of employment opportunities for new lawyers ranges from becoming an associate at a big firm, making a very good salary (as in "The Firm"), to becoming a prosecutor in a busy prosecutor's office and making perhaps $46,000 a year (about what a starting prosecutor makes in Wisconsin), down to having no job and "hanging out a shingle," the term for opening up one's own law practice with, at least initially, no clients and no cases (as in "My Cousin Vinny").

Those who do well in law school and end up at firms like The Firm, if they continue to do well and bring in business, can look forward to becoming partners (or shareholders) after six to ten years and making even more money. Average partner pay at the very largest U.S. law firms is more than $1 million a year. Most lawyers, of course, aren't so lucky.

Lawyer movement from job to job is greater in the United States than in Japan. Although there are career prosecutors – lawyers who work as prosecutors their entire working career – it is perhaps more common for lawyers to go to work as a prosecutor for a few years and then become a criminal defense lawyer. Lawyers who start their careers as Assistant United States Attorneys – attorneys for the federal government in both civil and criminal cases – often later go into private practice. And lawyers in private practice firms may stay in the same firm for decades, but it is more common for lawyers to work for several firms over the course of their careers. As in Japan, many law school graduates (including lawyers who pass the bar exam here) end up not practicing law at all, but going to work for corporations or in government.

Exercise II.D.1.: Using the search engine www.indeed.com look for law jobs in Milwaukee, Chicago, and one other city of your choice. What kinds of jobs are available? What do they pay? What kind of experience do they require? Do you see any jobs that might be open to a foreign lawyer?

Exercise II.D.2: Kahoot vocabulary quiz (on essential vocabulary from the first two chapters).

Thursday: Guest speakers Michael Richman and Claire Ann Richman on law practice in the U.S.

Appendix D

Chapter III:

Litigating in the Trial Court: Pretrial Proceedings in Civil Cases

Chapter Objectives:

Students should be able to:

- Recognize and use about twenty essential vocabulary words and phrases relating to pretrial procedure in civil cases.
- Understand the principal steps involved in pretrial proceedings in civil cases.
- Identify the principal types of trial courts in the legal systems of the U.S.
- Identify the component parts of a complaint.
- Draft a civil complaint to be filed in state or federal court.
- Identify the component parts of an answer in a civil case.
- Draft an answer in a civil case to be filed in state or federal court.
- Identify the principal types of discovery procedures available in civil cases.
- Understand how the mediation process works.

Homework Assignments:

For Monday's class: Read Chapter III A, B, and C., and watch either "Erin Brockovich" or "A Civil Action. Two students will be assigned in advance to discuss the movies (each student will discuss one movie) and should be prepared to give a short presentation on the assigned movie.

For Tuesday's class: Read Chapter III D., E., and F., the complaints in *Obergefell v. Wymyslo* and *Ruby v. West Bend Insurance Company*, and the decision in *Commonwealth v. Wiseman*.

For Wednesday's class: Read Chapter IIIG., H., and I., and the answer in *Obergefell.*

For Thursday's class: Read Chapter III J.

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Monday

Siskel & Ebert at the Movies. Two students have previously been assigned to be this week's film critics. Each is to review one movie. (Everyone in the class was assigned to watch at least one of the movies.) This week's movies to be discussed are "A Civil Action" and "Erin Brockovich." Both films involve private litigation relating to so-called "toxic torts," environmental pollution that affected the health of many people. Both movies are also based on actual cases. Film critics, please give your review and report to the class, and address these questions: 1.) Did you like the movie? Why or why not? 2.) Keeping in mind that films are not always 100% accurate in their depictions of the U.S. legal system – what did you learn about the U.S. legal system? What did you learn about pretrial proceedings in civil cases? 3.) Were some of this week's essential vocabulary words used in the film? What were the contexts?

A. **Essential vocabulary**.

Allege (v.), allegation (n.): 主張する，申し立て To make a claim that someone has done something illegal or wrong; such a claim

Answer: A defendant's response to a complaint

Arbitration: 仲裁 An alternative dispute resolution method with a binding result

Claim, claim for relief: A set of facts that creates a right to a judicial remedy

Class action: 集団訴訟 A lawsuit in which one or more plaintiffs sues on behalf of a large group of people

Complaint: 苦情文句 The document that starts a civil lawsuit

Counterclaim: A defendant's claim against a plaintiff

Crossclaim: A defendant's claim against another defendant

Defendant: The person or business or other entity against whom a lawsuit is brought

Deposition: A proceeding to take a witness's testimony under oath before trial

Discovery: A process where parties are required to exchange certain information before trial

Document production, production of documents: A process where parties are required to produce or make available for inspection documents they have relevant to a lawsuit

Injunction: 差止命令 A court order requiring a person or business or other entity to do a certain thing (other than pay money)

Interrogatory: A formal written question posed to another party in litigation

Judgment: A court order that decides a lawsuit

Mediation: 調停 A process for the parties to a lawsuit to try to settle, with a neutral party assisting; non-binding

Motion: A request for a court order

Plaintiff: 原告 The party that files a civil lawsuit

Pleading: A formal document that states a claim or responds to a claim

Summary judgment: A decision by the court for one party against the other, without a trial

Summons: A form that tells a defendant it has been sued

Venue: The location where a lawsuit is filed and will be decided

B. **Introduction**. The vast majority of civil cases in U.S. courts are resolved without a trial ever being conducted. Most cases are settled or resolved by a judgment without a trial, as for example when a defendant does not defend the case, or admits there is no defense, or when a judge decides that there is no defense that needs to go to a trial. As in Japan, trial courts generally have a particular geographic territory. Also as in Japan, there are certain types of trial courts that handle specialized types of cases. Unlike Japan, the United States has multiple sets of trial courts: trial courts of the federal government, the various trial courts of the fifty states, the District of Columbia, and U.S. territories, and local and tribal courts.

Exercise: Discussion. What do you know about trial courts in Japan? How is a civil case initiated? What steps take place after that? Does the court have hearings on pretrial matters, with appearances by lawyers? How does the investigation of the case proceed? Are there procedures to get a judgment without a trial? Have you ever visited a Japanese trial court?

Exercise: Essential civil pretrial proceedings vocabulary bingo. You will each be given a bingo card with twenty-five blocks, five across and five down. In each block is an essential vocabulary word from this chapter. I will give you a definition of a legal term. If that definition matches one of the words on your card, mark that block with an X. If you get a

row of X's either five across, five down, or five diagonally, you can yell Bingo! The first person who gets Bingo with correct matches of words to definitions wins.

Tuesday

C. **Types of trial courts – federal, state, local, and tribal.** The federal court system is divided into 94 federal judicial districts. Each federal judicial district has a federal district court, called the "United States District Court for the [ ] District of [name of a state, D.C., or U.S. territory such as Puerto Rico]." In Wisconsin, we have two federal judicial districts, the Eastern District of Wisconsin, which has a courthouse in Milwaukee and (a much smaller) one in Green Bay, and the Western District of Wisconsin, which has its main courthouse in Madison and a little-used courthouse in Eau Claire. Other states have as many as four districts. For example, New York has Southern, Northern, Eastern, and Western Districts. Some states, such as Massachusetts, Rhode Island, Connecticut, and Hawaii, only have one district, although they may have courthouses in several cities.

Federal district courts are "Article III" courts – courts established under Article III of the Constitution. Judges in Article III courts receive lifetime appointments and cannot have their pay reduced.

There are also a number of federal courts that are not Article III courts. Typically, they deal with specialized types of cases. These courts include the United States Court of International Trade, the United States Tax Court, and the United States Court of Federal Claims.

Bankruptcy courts have their own judges and staff, but are considered part of the federal district courts. Bankruptcy judges are appointed for 14-year terms; they are not Article III judges.

State trial courts vary in name and structure from state to state. Many states call their general trial courts "Superior Court." Wisconsin and some other states call their general trial courts "Circuit Court." Ohio and Pennsylvania call their general trial courts the "Court of Common Pleas." New York has an unusual name for its trial courts: it uses the term "Supreme Court." In most states, the Supreme Court is the name for the highest court in the state, an appellate court, not a trial court.

As in Japan, some states have a general trial court and a court that handles cases of a smaller size. Vermont, for example, has a Superior Court as well as a District Court that handles certain smaller matters.

Some states have specialized courts, such as a Probate Court (that handles the administration and distribution to heirs of property of dead persons). Sometimes, as in Wisconsin, the general trial court is divided into various divisions, such as Civil, Small Claims, Family, Probate, Felony, and Misdemeanor.

In addition to federal and state courts, there are municipal courts – the courts of cities, towns, and villages. They handle cases involving violations of local law, such as citations for driving faster than the speed limit on a local road, and violations of local building codes.

Native American tribes have tribal courts that handle violations of tribal law occurring on Native American reservations.

The names of the various courts and one commonly accepted system of citing to their decisions are set forth in "A Uniform System of Citation," one of the textbooks for this course.

D. How to start a case. Federal Rule of Civil Procedure 3 says how to start a civil case in federal district court. It is a short rule, one of the shortest Federal Rules: "A civil action is commenced by filing a complaint with the court." Federal Rule of Civil Procedure 8(a) states what a complaint must contain:

(a) Claim for Relief. A pleading that states a claim for relief must contain:

(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) a demand for the relief sought which may include relief in the alternative or different types of relief.

To "state a claim" means to set forth allegations that, if true, would entitle the pleader to some kind of relief from the court. If a complaint doesn't "state a claim," this means that even if everything the plaintiff says is true, there is nothing the court can do about it – the plaintiff isn't entitled to recover money from the defendant, or get any other kind of remedy from the court. Certain wrongs don't entitle people to judicial remedies. If a plaintiff said, for example, "the defendant said I am fat, and that hurt my feelings," the plaintiff has not stated a claim for which the plaintiff is entitled to a judicial remedy.

Complaints in federal district court must include jurisdictional allegations, because federal courts are courts of limited jurisdiction. They only have jurisdiction to hear certain types of cases, such as cases brought under federal laws or cases between citizens of different states involving a specified amount of money.

State courts on the other hand – at least those that are general trial courts – are typically courts of what is called general jurisdiction: they can hear any kind of claim, between any parties (provided that the defendant is subject to personal jurisdiction). So it is usually unnecessary to allege jurisdiction over the subject matter of a case in state court complaints. In most states, the initial pleading commencing a civil case is also called a complaint, and most states have rules of civil procedure that are similar to the Federal Rules of Civil Procedure.

Certain specialized types of cases may be started by filing an initial document called something other than a complaint. Bankruptcy cases are commenced by filing a bankruptcy petition, which is a standard form document that asks a series of questions about the debtor. Divorce cases, which are always filed in state rather than federal court, are also usually commenced by filing something called a petition.

Exercise: Sample complaints. Attached hereto are the complaints in *Obergefell v. Wymyslo* and *Ruby v. West Bend Insurance Company*. *Obergefell* was a federal district court case that ultimately led to the United States Supreme Court's ruling in *Obergefell v. Hodges* that there is a constitutional right to same-sex marriage. The *Ruby* case was a Wisconsin state court case. Read each complaint. After you have read each complaint, in your small group, identify: 1.) the caption; 2.) jurisdictional allegations, if any; 3.)

claims for relief; and 4.) the demand for relief. Both of these cases involve the death of a loved one, but the relief being sought in each case was different. What was Mr. Obergefell wanting to get in his case? Why did this matter? What was Mr. Ruby wanting to get in his case?

Vocabulary for Exercise:

(Obergefell):

Committed relationship: A serious and lasting romantic relationship between two people.

Hospice: ホスピス A place to go and be taken care of when you have a condition that will certainly result in death. Not the same as "hospital."

Declaratory relief: A type of judicial remedy where the court declares what the law is, says what a party's rights are. To be distinguished from "injunctive relief," where the court orders someone to do something, and relief that awards money damages.

Death certificate: An official statement from some government authority saying that someone has died. It typically gives the date, place, cause of death, and states whether the person was married or not.

Official capacity: When someone is sued because, and only because, they hold a certain government position. To be distinguished from "personal capacity."

Tarmac: The landing strip a plane lands on at an airport.

Marital status: Whether a person is married or single.

"Upon information and belief": Lawyers use this expression in complaints when they don't know something to be true but think it may be true.

Irreparable harm: Harm that cannot be fixed by paying money or other property.

(Ruby):

Funeral home: 葬儀場 A business that embalms or cremates dead human bodies and arranges funeral services.

Cremation: 火葬 The act of burning dead human bodies.

Remains: Here, a noun meaning a dead human body. To be distinguished from "remains" as a verb in the present tense, meaning "stays."

Consumer transaction: A purchase by a person for personal, family, or household use. To be distinguished from "business transaction."

Withhold: To keep something from someone, not let them have it.

Compensatory damages: Money awarded by a court for someone's actual losses.

Punitive damages: Money awarded by a court in excess of someone's actual losses, designed to punish someone for conduct that was wrongful.

Jointly and severally: A legal term meaning that each party is liable for (has to pay) the full amount of a judgment, whether or not the other parties pay any part.

Taxable costs and disbursements: The expenses (not including lawyers' fees) that a party incurs in connection with a lawsuit, such as the costs of photocopies needed for the case, witness fees, court filing fees, and other out-of-pocket expenses for the case besides lawyers' fees that are allowed to be recovered by law (that are "taxable").

Exercise: Drafting a complaint. You and your team are the lawyers for Norman Bates. Mr. Bates is an inmate at the Washoe State Mental Hospital for the Criminally Insane. The superintendent of the Washoe State Mental Hospital gave permission for a documentary filmmaker, Frederic Wiseguy, to film activities at Washoe. Mr. Wiseguy did so and produced a documentary, "Washoe Follies," that exposes how bad conditions are at Washoe. However, it exposes more than that. It shows inmates naked, in the showers and elsewhere, and otherwise in intimate and embarrassing situations. Norman

Bates did not give his consent to be filmed. He believes that the showing of the film violates his right of privacy under the Wehatchee State Constitution. (Wehatchee is a fictional state we are imagining for purposes of this exercise.) Mr. Bates wants the showing of the film to be prohibited by an injunction;

In your group, draft a complaint to be filed in the Circuit Court for Washoe County, State of Wehatchee, for your client, Mr. Bates. Because you are in state court, you do not need jurisdictional allegations. But you do need a caption, allegations about the parties and their addresses, allegations about what happened, how it harms Mr. Bates, what his basis for legal relief is, and what relief he seeks. The only defendants in the case are Mr. Wiseguy and his company, Wiseguy Productions, Inc. Use your imagination to invent any facts you need that are not stated (for example, dates, addresses, etc.). (In real life, allegations in a complaint must be based on known facts or things believed to be true after a reasonable investigation.)

Cf. Commonwealth v. Wiseman, 356 Mass. 251, 249 N.E. 2d 610 (1969) (attached). How is *Commonwealth v. Wiseman* similar to *Bates v. Wiseguy*? How is it different?

E. **Service of process**. Although a case is commenced typically just by filing a complaint, the defendants need to be given notice of the case and told when to respond to it. In federal court and most or all state courts, this is done by delivering a "summons" to the defendant. A summons is a standard form document that notifies the defendant that it has been sued and states when a response is due. If the defendant cannot be located after reasonable efforts, service by publication – publishing the summons in a newspaper – is allowed.

Wednesday and Thursday

F. **Responsive pleadings**. In federal court and typically in state court as well, the response to a complaint is one of two things: a motion to dismiss or an answer. Federal Rule 12(b) recognizes seven possible grounds for dismissal at this stage, such as the court lacks personal jurisdiction over the defendant, or lacks jurisdiction over the subject matter of the case; the defendant wasn't properly served with process; the case was filed in the wrong venue; the complaint doesn't state a claim; or a necessary party wasn't sued. If a defendant files a motion to dismiss, it does not have to answer the complaint unless and until the court denies the motion to dismiss. If a defendant answers the complaint, it needs to answer the allegations of each paragraph of the complaint either by admitting or denying them (in part or in whole) or by saying that it "lacks sufficient information to form a belief as to the allegations" of a particular paragraph, which has the effect of denying the allegations.

If the defendant has affirmative defenses to the plaintiff's claim, it should state them in its answer. For example, everything the plaintiff alleges might be true, but the plaintiff might not have sued within the time limits imposed by a "statute of limitations," a law requiring the plaintiff to bring a lawsuit within a certain period of time after the event that gave rise to the claim. If so, the defendant can raise the statute of limitations as an affirmative defense.

If the defendant has its own claim for relief against the plaintiff, it may respond by filing (in addition to an answer and any affirmative defenses) a counterclaim. It is not unusual for example in a breach of contract case for each party to allege that the other breached the contract. If one defendant has a claim against another defendant, it can file a "cross-claim" against the other defendant.

There can be additional pleadings. The defendant can sue to bring another party into the case who might be liable. Such a pleading is called a third-party complaint, and the third-party defendant then files an answer or motion to dismiss.

A sample answer, from the *Obergefell* case, is attached hereto.

Exercise: Drafting an answer. Now you and your team represent Frederic Wiseguy, rather than Norman Bates. Give the complaint you drafted for Norman Bates to another team, and receive another team's complaint against Wiseguy and draft an answer to it, admitting what you need to admit, denying what you think should be denied, stating if you lack knowledge and information sufficient to form a belief as to the truth of an allegation, and raising any affirmative defenses you think apply.

G. Discovery. Procedures for "discovery" are the procedures that allow the parties to investigate the facts of the case and the other party's legal arguments. In federal court the rules governing discovery are Rules 26-37 of the Federal Rules of Civil Procedure. Discovery can be used not only to learn information that the other side has, but also to obtain relevant documents and testimony from persons who are not parties to the case but are witnesses or otherwise possess relevant information. Depositions are probably the most important discovery tool. In a deposition, a witness's testimony is taken under oath as if he or she were testifying at trial. Non-party witnesses can be required to appear for a deposition by being served with a document called a subpoena. A "subpoena duces tecum" is a subpoena that requires a non-party witness to produce documents. Some discovery tools can only be addressed to parties to the case. Interrogatories (written questions asking for information), requests to produce

documents, and requests to admit are discovery procedures that are only used with other parties to the case.

H. Pretrial motions. A request for a court order is done through a "motion." The moving party, sometimes called the "movant," "moves" the court for an order. In federal court, unless this happens during a hearing or trial, the motion is required to be in writing, *cf.* Federal Rule of Civil Procedure 7(b)(1), and to give its reasons "with particularity" and state specifically what is being requested. State courts have similar rules.

Motions range from small things that may not be opposed or may in fact be jointly sought by all parties – such as a motion for an extension of time to do something in the case – to motions that could dispose of the entire case, such as a motion for "summary judgment." In a motion for summary judgment, the moving party says that there are no facts really in dispute that need to be decided at a trial, and the court should decide the case in its favor – for example by granting a money judgment, or a judgment dismissing the case – without a trial.

I. Mediation. Increasingly, because of the expense and delay of litigation, parties to civil litigation bring in a mediator – a neutral party who is not the judge in the case – to try to help the parties reach a settlement. Mediation is non-binding. The mediator cannot force the parties to settle if they fail to reach an agreement. The mediator can only meet privately with each party to the case, relay settlement offers to the other side, and act as a go-between. Some mediators are evaluative, that is, they tell the parties (privately) what they think are weaknesses in the party's claims or defenses, and why it might be a good idea to settle. Since mediators are often retired judges or otherwise

experienced legal professionals, it can be helpful for a party to hear a respected third party's honest assessment of its side of the case.

Mediation can last a half day or a day or longer or sometimes extend over multiple sessions. The parties can and often do submit written mediation statements to the mediator in advance of the mediation so that the mediator becomes knowledgeable about the case and its issues.

Typically, in a mediation, the parties to the mediation will be in separate rooms, and the mediator goes back and forth between the parties, relaying offers. Rules of judicial ethics prohibit judges from meeting individually with parties without the other side present, but mediators are allowed to do so and can often use their private conversations to cut through posturing that may occur in public settings.

Appendix E

Chapter IV:

Criminal Law

Chapter Objectives:

Students should be able to:

- Recognize and use about twenty essential words and phrases relating to pretrial proceedings in criminal cases.
- Identify the most common types of pretrial proceedings in criminal cases.
- Use appropriate language to present evidence in and argue common two common types of pretrial motions in criminal cases.

Homework Assignments:

For Monday's class: Read Chapter IV A. and B. and watch at least one of "Anatomy of a Murder" and "Reversal of Fortune." Two students will be appointed to give brief presentations about one or the other movie. Read the sample indictment I have posted on Canvas.

For Tuesday's class: Read Chapter IV.C. and the New York Times article about Jeffrey Epstein's bail hearing that I have posted on Canvas.

Monday:

Siskel and Ebert at the movies. Film critics, please give your review and report to the class: This week's movies show criminal defense lawyers at work. Both films are adaptations of books written by lawyers about real cases. "Anatomy of a Murder" was written by a Michigan Supreme Court justice, and "Reversal of Fortune" was written by Harvard Law School professor and criminal defense lawyer Alan Dershowitz about a case in which he.represented Claus von Bulow, who had been convicted of the attempted murder of his wife Sunny. Questions: 1.) Did you like the movie? Why or why not? 2.) These two films are relatively accurate in their depictions of the U.S. legal system. What did you learn about criminal procedure in the U.S.? How does it differ from criminal procedure in Japan? 3.) Were some of this week's essential vocabulary words used in the film? What were the contexts?

F. Essential vocabulary.

Acquit, acquittal: When the jury (or in a case tried to a judge, the judge) finds the defendant not guilty after the trial has been held.

Arraignment: A proceeding in court in the early stages of a criminal case where the defendant is brought before a judge or judicial officer, has the charges read, and enters a plea of either "guilty," "not guilty," or "nolo contendere" or "no contest."

Arrest: (From the Old French word for "stop") To stop a person and take him into police custody. A police officer can arrest someone if the officer has reason to believe the person has committed a crime, or if a judge or other judicial officer has signed an

arrest warrant. When someone is arrested, the police officer will generally say "You are under arrest" and give the person a *Miranda* warning.

Arrest warrant: A document authorizing the arrest of a person, signed by a judge or other judicial officer, and based on an affidavit or other evidence establishing probable cause that the person committed a crime.

Bail: Money or a promise to pay money (a "bond") if someone is released from jail after arrest and later does not show up for trial or otherwise violates the conditions of pretrial release.

Bond: A written promise to pay money if the defendant doesn't show up for trial or otherwise violates the conditions of pretrial release. Bonding companies sell bonds – much like an insurance policy -- to criminal defendants, often for a percentage of the amount of the bond. Thus if bail is set at $10,000, a bonding company might charge the defendant $1000, nonrefundable, to issue the bond. A "signature bond" is a bond that is just signed by the defendant.

Conviction: When a criminal defendant is found guilty, either as the result of a guilty plea or after trial.

Felony: A category of crimes that includes the more serious ones, such as murder, armed robbery, theft (of more than a small amount of money or property), sexual assault, etc. Distinguished from "misdemeanor."

Grand jury: In federal court and some state court systems, a jury of more than twelve (in federal court, between 16 and 23 people) that investigates potential crimes and issues criminal charges in a document called an indictment.

Guilty plea: Where a defendant admits that he or she committed the crime charged. A defendant who pleads guilty may need to "allocute," that is, admit in their own words what they did. Why do defendants plead guilty rather than just go to trial and take their chances? There are two main reasons. Defendants who plead guilty will almost always get a shorter sentence than if they go to trial and are found guilty. Also, a guilty plea might be the result of a "plea bargain," in which the prosecutor agrees to drop some charges and/or recommend a particular sentence that is more favorable than what the defendant might otherwise get.

Indictment: A criminal charge issued by a grand jury. Distinguished from an "information."

Information. A criminal charge issued by the prosecutor or other official, without a grand jury. An information is sufficient to start a criminal case in many state court systems (some of which do not have grand juries), and also in federal court to start prosecutions for misdemeanors or if the defendant gives up his or her right to require an indictment (as, for example, when they plan to plead guilty and just want to save time).

Initial appearance: The first time a criminal defendant appears in court after arrest. At the initial appearance, the defendant will be told what the charges are and what the maximum penalties are, and will either set bail and other conditions of release or determine that the defendant should not be released pending trial.

Miranda warning: A statement police officers must make to a criminal defendant when the defendant is arrested. The name comes from the case that began this requirement, *Miranda v. Arizona*. A *Miranda* warning must say, approximately, this, and usually says exactly this: "You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney. If you cannot afford an attorney, one will be provided for you." If a defendant is not given a *Miranda* warning and then confesses to the crime, the confession will likely later be suppressed – that is, not allowed in evidence at trial.

Misdemeanor: A category of crimes that includes the minor offenses, such as stealing relatively small amounts of money. Distinguished from "felony."

Nolo contendere" or no contest plea: A plea to a criminal charge in which the defendant does not admit that he or she committed the crime, but agrees not to fight conviction in court

Plea bargain: A deal a prosecutor makes with a criminal defendant. The prosecutor may agree to drop some charges, and/or recommend a particular sentence. Whether a plea bargain will be approved is up to the judge, who can reject it if the judge wants to do so.

Preliminary hearing: A court hearing in the early stages of a criminal case in which the defendant can try to challenge whether there is enough evidence to justify holding the defendant for trial. It is sometimes used by criminal defense lawyers as an opportunity to cross-examine the witnesses that will testify at trial.

Sentence: The penalty imposed by the judge (or in certain cases the jury) after a criminal defendant is found guilty. A sentence may include a fine or other financial penalty, time to be spent in prison, and a period of supervised release or probation after release from prison. And, in states that have the death penalty and in rare cases in federal court, a sentence may be capital punishment, that is, the death penalty.

Search warrant: A document signed by a judge or other judicial office, based on information presented to the judge typically in an affidavit (sworn statement), authorizing the police to enter into someone's home, business, or car (or other location) to look for evidence of a crime.

Suppress: When evidence has been illegally obtained, for example, when the police were required to get a search warrant and did not, the judge may "suppress" the evidence – that is, not let it be used at trial.

Warrantless search: A search conducted by the police without a search warrant. These can be legal in some circumstances, for example, where the police have good reason to believe that evidence is about to be destroyed, and therefore they do not have time to go to a judge to get a search warrant.

G. **Pre-charge procedure, federal.** Both state and federal prosecutors use search warrants, when necessary, to do electronic surveillance, enter into private places to gather evidence, etc. An additional tool for federal prosecutors is the grand jury, a body of 16 to 23 ordinary citizens that meets in secret to hear evidence. Witnesses can be subpoenaed (required to testify by being given a document called a subpoena) before a grand jury. Because grand jury proceedings, unlike trials, are conducted in secrecy, witnesses cannot have lawyers with them while they are being questioned (although they can and do leave the room to consult with their lawyers outside the presence of the grand jury). Defense lawyers do not have the opportunity to appear before the grand jury; only prosecutors can. The purpose of the grand jury is to investigate possible crimes and, if the grand jury believes a crime has been committed, to issue an indictment charging a crime. It is not the grand jury's job to decide the ultimate question of guilt or innocence; that happens at trial. The grand jury need only decide if there is probable cause to believe that a crime was committed, and if so, to issue the indictment. Because grand juries only hear the evidence that prosecutors present to them, and do not hear from defense lawyers, they tend to be tools of the prosecutors and issue indictments whenever the prosecutors want them to. It has been said that a good prosecutor "can get a grand jury to indict a ham sandwich." This is somewhat contrary to the original purpose of the grand jury. The purpose of the U.S. Constitution's requirement of grand jury indictment in serious cases (a requirement found in the Fifth Amendment) was to protect citizens from abusive prosecution. The drafters believed that, if a prosecutor had to get a body of ordinary citizens to approve a serious criminal charge, it was less likely that prosecutors would start unjustified prosecutions to harass political enemies. There are rare occasions when a grand jury declines to issue an

indictment. In those cases, the result will be a determination by the grand jury of "no bill" or "no true bill."

H. **The criminal charge and next steps**. After an indictment or information is issued charging a defendant with a crime, the defendant will be arrested and very soon thereafter appear in court at the initial appearance. It is also sometimes the case that a defendant will be arrested immediately after a committing a crime, before any charges have yet been issued. In those cases, criminal charges must be issued within a matter of a day or two after the initial appearance. The purpose of the initial appearance is to let the defendant know what he or she is being charged with, and to determine whether the defendant should be released on bail (that is, not held in jail pending trial).

There can be a number of pretrial proceedings before a criminal case is ready to go to trial. A preliminary hearing, if it is conducted, serves the purpose of deciding whether there is enough evidence to warrant continuing to hold the defendant for trial. The prosecutor's burden at this stage is not much: merely showing that there is probable cause to believe that a crime was committed, and the defendant committed it. Sometimes defense lawyers will move to suppress evidence – that is, not let it be used at trial – usually on the ground that the evidence was illegally obtained, for example without a warrant when a warrant should have been obtained, or where the information submitted to get a warrant was false. If evidence is suppressed and can't be used at trial, and the prosecutor can't prove the case, the defendant may move to dismiss the prosecution.

Exercise: Prepare Ephraim "Ephry" Jeppstein bail hearing. One group of you will be the prosecutor and the witnesses to be called by the prosecutor (an FBI agent and a financial analyst) at a hearing on whether Jeppstein should be released on bail, on

conditions, as requested by his lawyers. Another group of you will be Jeppstein's attorney and the witnesses to be called by Jeppstein's lawyer. Jeppstein is a billionaire hedge fund manager with assets in the United States, the Bahamas, the United Arab Emirates, and other places. His assets are estimated to be worth more than $2 billion. He has been charged with arranging for teenage girls to be transported illegally across state and national lines for immoral and illegal sexual favors. The prosecutor will call the FBI agent to the witness stand to testify about Jeppstein's alleged crimes, the evidence of their continuing within the recent past, a forged Austrian passport discovered at Jeppstein's mansion with his picture on it, and the risk that Jeppstein might flee the country rather than face trial. (The United Arab Emirates does not have an extradition treaty with the U.S.; it is not legally required to return criminal defendants who are charged with crimes here.) The prosecutor will call the financial analyst to testify about Jeppstein's vast wealth. The defense lawyer – who wants Jeppstein to be released to his own mansion pending trial, subject to being guarded by guards that Jeppstein himself would pay for – plans to call two witnesses: a medical doctor who would testify about a medical condition Jeppstein has that cannot easily be treated in the prison where Jeppstein is currently being held; and a psychiatrist who will testify that Jeppstein is very depressed and is a suicide risk if he remains held in jail. Feel free to make up additional facts as you prepare your witnesses. This hypothetical is based on – but different in some respects from – the bail hearing for financier Jeffrey Epstein, which you will be reading about in your homework assignment. Three of you will be on the prosecution team; three of you will be on the Jeppstein team; and one of you will be the judge conducting the bail hearing. Prepare your witnesses and testimony for tomorrow's hearing. Legal issues in a bail hearing include (1) Does the defendant have

close ties to the community and do other circumstances make it likely that conditions of bail can be set that will ensure that the defendant appears for trial? (2) Would release on bail create a risk of the defendant committing more crimes? (3) Are there special circumstances justifying release on bail?

Tuesday:

Exercise: Presentation of Ephry Jeppstein bail hearing. Counsel, present your witnesses, cross-examine the other side's witnesses, and make your arguments. Judge, be prepared to rule.

Exercise: Preparation of motion to suppress hearing. Once again, three of you will be on the prosecution team, three will be the defense lawyer or witnesses for the defense, and one will be the judge. Police in Whitefish Bay, Wisconsin, arrested Daunte Briscoll, a young Black man, after, they say, they saw him driving in an odd way on a Whitefish Bay street, and pulled him over on suspicion of drunken driving. Once they pulled him over, they asked him to open the glove compartment in his car, because, they said, they wanted to make sure there was no gun in there. With a gun pointed in his face, Mr. Briscoll opened the glove compartment. There was no gun in the glove compartment, but a baggie of illegal drugs. Mr. Briscoll was arrested and charged with possession of illegal drugs with intent to distribute. The prosecutor plans to call the two arresting officers who, they say, saw Mr. Briscoll driving erratically and later smelled alcohol on his breath. The defense lawyer plans to call Mr. Briscoll's two friends who, they say, were with him all day and in the car when he was arrested. The friends will testify that Mr. Briscoll only had "two sips" of a glass of wine at his girlfriend's house, which he then spat out, saying, "Man, this tastes bad!" – and no other alcohol during the entire eight hours they had been with him, and no

drugs, either. They will also testify that Mr. Briscoll was not driving erratically when he was pulled over. Feel free to make up additional details for your witnesses. The defense will be moving to suppress the baggie of drugs as evidence, without which the prosecutor will have no case and will need to dismiss the charges (or will be forced to by the judge).

Wednesday:

Exercise: Presentation of motion to suppress hearing. Counsel, call your witnesses, cross-examine the other side's witnesses, and make your arguments. Judge, be prepared to rule.

Exercise: Verbal charades. Without using the essential vocabulary word in question, describe an essential vocabulary word from this Chapter to a classmate and get the classmate to guess the word. Take turns.

Thursday: Guest speaker Barry Cohen on criminal law and practice in Wisconsin.

Appendix F

Chapter V:

Trials

Chapter Objectives:

Students should be able to:

- Recognize and use about twenty-five essential words and phrases relating to civil and criminal trials.
- Recognize and describe the several events and the order in which they happen in a civil or criminal bench trial or jury trial in the U.S.
- Make appropriate objections based on the rules of evidence and the form of improper questions.

Homework Assignments:

For Monday's class: Read Chapter V A., B., and C. and watch at least one of "The Verdict" and "A Few Good Men." Two students will be appointed to give brief presentations about one or the other movie.

For Tuesday's class: Read Chapter V.D. and the excerpts from the post-trial briefs in the Lampe case that I have posted on Canvas.

Monday:

Siskel and Ebert at the movies. Film critics, please give your review and report to the class: "The Verdict" is a movie about a jury trial in state court in Massachusetts. "A Few Good Men" is a movie about a trial in a U.S. military court, called a court-martial. Questions: 1.) Did you like the movie? Why or why not? 2.) Keeping m mind that movies may not always be 100% accurate in their depiction of trial proceedings, what did you learn about trials in the U.S.? How do they differ from trials in Japan? 3.) Were some of this week's essential vocabulary words used in the film? What were the contexts?

Monday

I. Essential vocabulary.

Bench trial: A trial conducted in front of a judge without a jury. Distinguished from jury trial.

Burden of proof: Which party has to provide more believable evidence as to an issue in order to win the case (or at least that issue) – and how much more persuasive evidence than the other side. There are, usually, three different standards of proof: the "greater weight of the credible evidence," which is the ordinary civil standard of proof; "clear and convincing evidence," a higher standard sometimes required for things like proving fraud; and "beyond a reasonable doubt," the standard prosecutors must meet in criminal cases.

Case in chief: The evidence the plaintiff (including the prosecutor in a criminal case) puts on first, before the defense presents its case.

Closing argument: The arguments lawyers make to the jury (or the judge in a bench trial) explaining what they think the evidence showed and why the jury or judge should find one way or the other.

Deliberation, deliberations: After all the evidence has been presented in a jury trial, the lawyers have made their final arguments, and the judge has instructed the jury, the jury goes back to the jury room or jury chamber and decides the case. This stage is called the jury's "deliberation" or "deliberations." Jury deliberations are done in secret, and the jury does not give reasons for the verdict that it reached when the verdict is read.

Direct examination: Questioning by the lawyer who called the witness. Distinguished from "cross-eaxmination."

Evidence: The testimony, exhibits, or other things that the finder of fact (either judge or jury) is allowed to consider in deciding a case.

Expert: A witness who has some special knowledge about a field, beyond what ordinary people know, and is therefore entitled to give an expert opinion. (Generally, lay witnesses – people who are not experts – can only testify to facts, not their opinions.)

Foundation: Some preliminary matter that must be established before a document can be received in evidence or a witness's testimony allowed. For example, for a business record to be admitted as a business record, a witness must testify that it was maintained in the ordinary course of business. For someone to give an opinion as to a medical diagnosis, the witness must first be qualified as a medical expert. If the proper foundation is not shown, the standard objection is, "Objection. Lack of foundation."

Hearsay: In general, a statement made out of court by someone other than the witness now testifying or by the opposing party. Although there are a number of exceptions to the rule, generally witnesses cannot testify to what they heard other people say – that's hearsay – only what they themselves saw or said.

J.n.o.v. (for "judgment non obstante veredicto," meaning "judgment notwithstanding the verdict"). In some cases, after the jury reaches its verdict, the judge decides that there was no evidence to support the verdict and no reasonable jury could have reached that verdict. The judge will then grant j.n.o.v. to the party that the jury ruled against.

Jury instructions: Before the jury begins deliberating to decide a case, the judge will read some "instructions" to the jury about the evidence they should consider, who has the burden of proof, and the applicable rules of law.

Leading question: A question that suggests its answer or "leads" the witness to the answer: "Isn't it a fact, Mr. X, that . . . ?" or "You picked up your gun and shot him,

right?" Lawyers are not allowed to lead their own witnesses, unless the witnesses are hostile or adverse witnesses. Lawyers are allowed to ask leading questions of the other side's witnesses, or adverse or hostile witnesses, and routinely do so during cross-examination.

Mistrial: When something goes very badly wrong in the middle of a trial – a party referencing evidence the judge has ruled inadmissible, for example – in a way that is likely to affect the outcome, such that the judge stops the trial and, typically, orders a new trial.

Objection: A lawyer's statement objecting to such things a question by opposing counsel or the introduction in evidence of an exhibit.

Objection as to the form of the question: When a question is improper in form, for example, asking multiple things rather than just one thing. One type of objection to form is to questions that "assume facts not in evidence." The classic example of this type of question is "When did you stop beating your wife?" when there has been no evidence that the witness ever beat his wife.

Opening statement: The statements lawyers make at the beginning of a trial, outlining what they expect the evidence will show. Unlike closing arguments, opening statements are not supposed to be argumentative.

Overrule: When a judge denies a lawyer's objection. Distinguished from "sustain."

Peremptory, peremptory challenge, or peremptory strike: In the jury selection process, after voir dire, each side is allowed to challenge jurors, either for cause or as a "peremptory" challenge. The parties are allowed unlimited challenges for cause, such as a witness having a bias and therefore not being capable of being fair – but the judge must agree that cause exists in order to excuse the juror. Each side is also allowed a certain number of "peremptory" strikes – meaning that the lawyer doesn't need to give a reason for eliminating that juror. If a party uses a peremptory strike, that juror is automatically eliminated.

Privilege: Certain communications are protected from disclosure by privileges. For example, what a client says to his or her lawyer (and what the lawyer says to the client) is ordinarily protected by the attorney-client privilege. Communications between doctor and patient are protected by the doctor-patient privilege. And what someone says to a religious advisor is protected by the priest-penitent privilege ("penitent" meaning someone who is confessing something to the religious advisor). There are other privileges.

Rebuttal: After the plaintiff has presented its case, and the defense presented its case, the plaintiff is allowed to present evidence to rebut, or counter, evidence offered by the defense.

Rest: When a party is done presenting its side of a case, its lawyer will say that he or she "rests," that is, has no more evidence to offer.

Sequester: To keep separate and apart. A witness can be sequestered, meaning not allowed to be in the courtroom when other witnesses are testifying. Juries can also be sequestered, meaning kept in a hotel at night during the trial (or at least during

deliberations on the verdict), away from their families and possible outside influences. Jury sequestration is fairly rare.

Sustain: When a judge agrees with a lawyer's objection.

Verdict: From the Latin for "a true statement." The decision of the jury in a jury trial (either civil or criminal). A verdict may be a "general verdict," of either guilty or not guilty in a criminal case or liability or no liability in a civil case, or it may be a "special verdict." A special verdict is a verdict in which the jury is asked to answer a number of specific questions about the events of the case.

Voir dire: From the French for "to see to say." Voir dire is a term that has two meanings, both related to asking questions. One is the process in a jury trial when the jury is being selected where lawyers have the opportunity to ask questions of potential jurors. (In some courts the lawyers submit questions to the judge, and the judge is the one who asks the questions.) The other meaning has to do with asking questions of a potential expert witness, to see if the expert is qualified. Both types of voir dire happened in "My Cousin Vinny" – first, when the prosecutor asked if any potential juror was opposed to the death penalty, and, second, when the prosecutor asked Mona Lisa questions about her knowledge of automotive mechanics.

J. **Initial matters at trial.** It is common in both state and federal court to have a final pretrial conference with the lawyers and the judge relatively shortly before the trial is to begin. The lawyers may want the judge ro rule in advance on whether certain evidence will be admissible. Typically, they will discuss administrative matters, such as how long the trial will last, any time limits there might be for each side to present its case, and so on.

Once trial begins, the first thing to be done, in a jury trial, is selecting, or "empaneling," the jury. Prospective jurors are typically chosen at random from residents of the county or federal judicial district and receive a notice in the mail requiring them to appear in court for possible jury duty, unless they are excused from appearing for a good reason. They may be required to fill out a questionnaire giving some background information about themselves. A group of these prospective jurors – often twice or more the number of jurors that will ultimately be chosen – is then brought to a courtroom, sworn to tell the truth, and then questioned in the "voir dire" process, either by the lawyers for the parties or in some jurisdictions by the judge, based on questions submitted by the lawyers. If the prospective jurors give answers that reveal a reason why they shouldn't be jurors in the case – they know one of the parties or one of the witnesses that will be called, they have some kind of bias that will affect the outcome, they have a financial interest in the outcome of the case for some reason – the lawyers will have the opportunity to challenge them "for cause." The judge will excuse those persons from serving on the jury if the judge finds that cause exists that they shouldn't serve. Then the lawyers have the opportunity to use a certain number of "peremptory" challenges. These are challenges for which the lawyers don't need to give a reason. Maybe the potential juror looked at the lawyer in a way the lawyer didn't like, or maybe the person looked like he or she really didn't want to be forced to be in court to hear a case. Figuring out who is likely to be a friendly juror to your side is an art – and even a science. There are such things as "jury consultants" who are hired in very high-stakes cases to research what types of people are likely to be friendly jurors. A current TV show, "Bull," is a fictional portrayal of a jury consultant. In the vast majority of cases –

even the relatively rare cases that actually go to jury trial – most parties don't have the money to hire a jury consultant.

Exercise: Conduct voir dire in trial of Congressman Jeffer "Cold Cash" Williamson. Congressman Jeffer Williamson is a Republican Congressman from New Orleans, who is Black. (This is a hypothetical, but based in part on the real case of Congressman William Jefferson.) Executing a search warrant, the FBI found $90,000 in hundred dollar bills in Congressman Williamson's refrigerator's freezer. This, together with other evidence that Congressman Williamson had accepted bribes, caused him to be indicted and charged with sixteen felonies. He has pleaded not guilty and is going to jury trial. One of you will be Congressman Williamson's lawyer. Another one of you will be the prosecutor who is trying the case for the government. The rest of you will be prospective jurors in the case. I will give each of the prospective jurors (in advance) some information about your race, your own prejudices (or lack of prejudice), your own political views, what you think about Republicans and politicians in general, and other things that the lawyers in the case might want to know about you. It will be the lawyers' job to ask questions of the prospective jurors to figure out if there are grounds to challenge any juror for cause, whether they would want you on the jury, or whether they would exercise a peremptory strike to get you off the jury. I will be the presiding judge during voir dire. In general, the lawyers will be required to ask one question at a time, for all of the prospective jurors to answer, and to take turns asking questions. And, when the lawyers are done with the questioning, the lawyers should then make any challenges for cause they want to make, and, after I have ruled on those, to exercise any peremptory strikes.

Tuesday:

K. **Stages of the trial.** After the jury has been empaneled, the trial will begin with ***opening statements*** for each party, followed by the plaintiff's ***case in chief***. After the plaintiff finishes the direct examination of each of its witnesses, the other party (or parties) will have the opportunity to cross-examine the plaintiff's witnesses. When the plaintiff has called every witness it intends to call, it will "rest." The defendant at this point may move to dismiss the case if it believes the plaintiff hasn't offered enough evidence to prove its case. Such motions are fairly common, but are almost always denied. Then the defense presents the ***defense case***, unless it elects not to present a defense case and decides simply to "rest" as well. After the defense case, the plaintiff may call ***rebuttal*** witnesses, if it wants to. When the plaintiff is done presenting all evidence, it again rests. The defendant may at this point move for a "directed verdict," again if it believes the plaintiff hasn't presented enough evidence to prove the case. Such motions are also common and are also rarely granted. Finally, the lawyers for the parties present their ***final arguments*** (also called ***closing arguments***) to the jury. As with the evidence, the plaintiff gets to go first, then the defendant, then the plaintiff gets to present rebuttal arguments. After final arguments, the judge will read the ***jury instructions*** to the jury, and it will go to the jury room and conduct its ***deliberations***. When the jury notifies the judge that it has reached a verdict, the parties and their counsel will be called back into the court, and the ***verdict*** will be read by the clerk or announced by the person the jury elected as foreperson (head of the jury).

D. The rules of evidence and other grounds for objection. The following are grounds for excluding something from evidence or not allowing a question to be answered:

-- **Irrelevant**. The information in question doesn't make anything that matters in the case more or less likely.

-- **Argumentative:** The lawyer is arguing with the witness.

-- **Assumes facts not in evidence**: The question assumes things that have not yet been shown: "Have you stopped beating your wife?".

-- **Calls for speculation:** The question doesn't ask the witness for factual information, but asks the witness to guess or speculate.

-- **Cumulative**: When lots of similar information has already been offered in evidence and the evidence in question is simply more of the same thing, it is said to be "cumulative" and could be a waste of time.

-- **Leading question:** Lawyers can't ask leading questions of their own witnesses in direct examination, unless the witness is hostile or adverse. Leading questions are allowed in cross-examination.

-- **Multiple:** A question is objectionable if it asks more than one question.

-- **More prejudicial than probative**: Sometimes an opposing party seeks to offer information about a party that is embarrassing and makes that party look bad, but the information in question has little if any relation to the issues in the case (though it might have some relevance). If the evidence is very prejudicial and doesn't prove much, it may be excluded from evidence on this ground.

-- **Privileged:** Lawyer-client, doctor-patient (and other medical professionals and patients), husband-wife (a spouse can't be forced to testify about something the other spouse said), communications to religious advisors (also called priest-penitent) are examples of privileges.

-- **Lack of foundation**: The witness hasn't been shown to be an expert able to offer an expert opinion, or some other basic step hasn't been taken to show that something is what it is supposed to be (a business record, for example, with no testimony that it was kept in the ordinary course of business).

-- **Settlement discussions and offers**. That one party offered to pay money to settle the case isn't admissible.

-- **Hearsay:** Out-of-court statements by other people are generally inadmissible as hearsay, with some exceptions. A witness ordinarily can't testify that he heard X say something, because X is not in court to be cross-examined. There is an exception where the out-of-court statement was made by another party to the case.

-- **Prior bad acts**: It is generally not allowed to make a witness look bad (which is called "impeaching" the witness) by asking about prior bad acts of the witness. There is an exception for criminal convictions. It is also generally not allowed to offer evidence of prior bad acts of a criminal defendant, with some exceptions showing knowledge or a pattern of behavior, etc.

Exercise: **Kahoot quiz: What's the basis for your objection, counselor?**

Exercise: Preparation for Lampe trial. I have posted on Canvas excerpts from the two post-trial briefs in the Lampe bankruptcy case. The legal issue in this bench trial was whether the Lampes were entitled to a Wisconsin homestead exemption. The factual issue was, had the Lampes left Wisconsin temporarily, with the intention of returning? Or had they established permanent residency in Oregon, in which case they would not be entitled to a Wisconsin homestead exemption? Using the facts as described in the two briefs, prepare for trial tomorrow. Two of you will be the Lampes' lawyers; two of you will be

Mr. and Mrs. Lampe; two of you will be the trustee's lawyers (objecting to the homestead exemption); and one of you will be the judge. Each lawyer should ask questions of one witness (Mr. or Mrs. Lampe). Today, prepare your questions for the trial tomorrow. In the case of the Lampes and their counsel, you should prepare your clients to testify. In the case of counsel for the trustee, prepare the questions you are going to ask on cross-examination. Remember – opposing counsel will be able to object if you ask a question that is subject to an objection! (And the judge will then rule on the objection.)

Wednesday: Presentation of Lampe trial on homestead exemption.

Thursday: Guest speaker (to be announced) on trial practice.

Appendix G

Chapter VI:

Appeals

Chapter Objectives:

Students should be able to:

- Recognize and use about twenty essential words and phrases relating to appeals.
- Recognize and describe the parts of an appellate brief.
- Use appropriate language to present an appellate oral argument..

Homework Assignments:

For Monday's class: Read Chapter VI A. and B. and watch either "On the Basis of Sex" or "Amistad." Two students will be appointed to give brief presentations about one or the other movie.

For Tuesday's class: Read the www.scotusblog.com summaries of four petitions for certiorari in the U.S. Supreme Court that I have posted on Canvas. I will assign each of you different additional excerpts from petitions and oppositions to petitions, based on which Justice you are assigned to role play on Wednesday.

For Wednesday's class: Read Chapter VI.C.

For Thursday's class: Read the excerpts from the briefs in *Dobbs v. Jackson Women's Health Organization* that I have posted on Canvas.

Monday:

Siskel and Ebert at the movies. Film critics, please give your review and report to the class: This week's movies show appellate lawyers at work: "On the Basis of Sex" shows the late Justice Ruth Bader Ginsburg when she was in private practice, arguing an appeal that challenged a statute on equal protection grounds. "Amistad" shows a nineteenth century case about ownership of a slave ship. In it real U.S. Supreme Court Justice Harry Blackmun (the author of the opinion in *Roe v. Wade*) plays a role as, you guessed it, a U.S. Supreme Court Justice! Questions: 1.) Did you like the movie? Why or why not? 2.) What did you learn about appeals in the U.S.? How do they differ from appeals in Japan? 3.) Were some of this week's essential vocabulary words used in the film? What were the contexts?

L. Essential vocabulary.

Affirm: What an appellate court does when it upholds a lower court's ruling. The opposite of "reverse." (There can be appeals where a lower court's judgment gets affirmed in part and reversed in part.)

Appellant: The party that is appealing (and lost in the lower court). In the federal courts, the party that appeals to the court of appeals is the "appellant," and any party that seeks review in the U.S. Supreme Court is the "petitioner."

Appellee: The party that is responding to another party's appeal. If an appellee lost on one issue in the lower court and wants to appeal on that issue, it is called a "cross-appellant."

Appendix: Document filed with a brief in an appeal that includes relevant parts of the record and statutes involved in a case.

Certiorari: A "writ of certiorari" is what the U.S. Supreme Court issues when it agrees to decide a case, in those cases where it is not required to take the case. (Almost all of the U.S. Supreme Court cases are cases it has the discretion either to take or not take.) Certiorari is often abbreviated and called "cert." .

En banc: Old French for "in the bench." In unusual cases an entire multijudge court of appeals (often, a dozen or more judges) can agree to hear a case – hear it "*en banc*" -- rather than the usual three-judge panel. This typically happens after a panel has first heard the appeal and one party moves for a rehearing before the full court – a rehearing *en banc*.

Interlocutory: An adjective that refers to an appeal taken during the middle of the case, before a final judgment. Interlocutory appeals are only allowed in certain special circumstances.

Notice of appeal: A short document, typically just a page (with one sentence in the body of the text), filed in the trial court that starts the appeal process.

Oral argument: The formal spoken arguments presented by the parties to an appellate court, typically after written briefs have been submitted.

Petitioner: The party seeking review in the U.S. Supreme Court through a petition for certiorari.

Record: The transcripts, briefs, other documents, and exhibits that are sent to an appellate court to enable it to review what happened in a lower court.

Remand: What a higher court does when it sends a case back down to the lower court. Can be either a verb ("We remand the case . . . ") or a noun ("On remand, the court of appeals ruled for the appellants.")

Respondent: The party that is responding to another party's petition for certiorari. Typically, the party that won in the court of appeals.

Response brief: The brief filed by the appellee after the appellant has filed its brief.

Reply brief: A second brief filed by the appellant after the appellee has filed its response brief.

Stay pending appeal: When a lower court's order is not put into effect – is "stayed" -- until an appellate court can decide the appeal.

M. **State and federal appellate courts.** The structure of state appellate courts can be somewhat different from state to state. But most states have a system of appellate courts that is similar to the federal system of appellate courts, with one appeal as of right and beyond that only an opportunity to ask the highest court to hear a case. In Wisconsin, for example, there is an intermediate appellate court called the Wisconsin Court of Appeals and above it the Wisconsin Supreme Court. The Wisconsin Court of Appeals is geographically divided into four districts. Parties who lose in the trial court (Wisconsin

Circuit Court) have a right to appeal to the Wisconsin Court of Appeals. Parties who lose in the Wisconsin Court of Appeals do not have a right to have their case heard in the Wisconsin Supreme Court, but must ask it to take the case, which they do through a "petition for review" (similar to what is called a "petition for certiorari" to the U.S. Supreme Court).

Parties who lose in federal district court have a right to appeal to the court of appeals for the appropriate circuit. Appeals from Wisconsin, Indiana, and Illinois go to the United States Court of Appeals for the Seventh Circuit, which is in Chicago. Most other circuit courts of appeals handle appeals for other geographic regions. For example, the Sixth Circuit covers Michigan, Ohio, Kentucky, and Tennessee. There is one special court of appeals that don't have a geographic jurisdiction. The U..S Court of Appeals for the Federal Circuit handles all appeals in patent cases (no matter where the trial court sat) and it handles appeals from two special federal courts, the Court of International Trade and the Court of Claims.

N. **Appellate jurisdiction**. If a party doesn't like what the trial judge does on a particular matter, it can't just run to the appellate court right away and complain. Most of the time, parties must wait until there is a final judgment in a case before they can appeal. The appellate court usually doesn't have jurisdiction over non-final orders, such as a ruling on whether certain evidence should be admitted. There are exceptions to this that allow for what are called interlocutory appeals – appeals taken while the case is still going on in the trial court. For example, if a trial court issues a temporary injunction during a case, the injunction is generally appealable.

O. **The decision to grant or deny certiorari.** The U.S. Supreme Court grants a very small percentage – approximately 1% -- of the thousands of petitions filed each year seeking a writ of certiorari. A number of factors influence its decision to take a case and "grant cert." A very important one is conflict in the lower courts. Especially where there are multiple conflicting decisions on an issue by the various federal courts of appeals – what is called a "circuit split" – the Court may grant review to decide the issue. The importance of the legal issue is another factor. Finally, if the Court feels that a lower court has blatantly disregarded a controlling decision of the Supreme Court, it may grant cert to correct the error.

Wednesday:

Exercise: The Supreme Court in conference. Today, each of you will be a United States Supreme Court Justice. Two Justices, Justice Alito and Justice Jackson, have conflicts of interest and therefore will not be participating. Each of you will be assigned to be one of the other seven Justices. The Court meets in private, in what is called "conference," to decide which cases it is going to take. The vast majority of the petitions that are filed obviously do not raise "certworthy" issues – that is, issues important enough to be decided by the United States Supreme Court. The party is just unhappy that it lost in the court of appeals, and wants another chance. The Justices don't waste their time discussing these cases. However, if a Justice feels that a petition raises an important issue that the Court should consider, the Justice can put that petition on a list for discussion. Each of you will be assigned one case to either recommend the Court take, or to recommend the Court not take. Is the issue an important issue? Do the lower courts need guidance from the Supreme Court? Is there a circuit split on the issue? Did the lower court get something very, very

wrong? You all will read short summaries of the four cert petitions that are up for discussion. But each of you will have read additional information that I will provide to you about one particular cert petition, and you should be prepared to make some points as to why the Court should or should not take that case. The junior Justice – that is, the Justice most recently appointed to the Court – speaks first in conference, then the next junior Justice, etc., and the Chief Justice speaks last. After each of you gives your thoughts about a case, the Court will vote on whether to take that case.

Show and tell: I will pass out samples of various appellate briefs and we will identify in class different types of briefs and other documents filed in appellate courts, and identify the parts of the briefs. We will also review on screen various briefs and other documents filed in *Dobbs v. Jackson Women's Health Organization* and identify the component parts of those documents.

Thursday:

Oral argument in *Dobbs v. Jackson Women's Health Organization*. We will listen to excerpts from the recording of the oral argument in *Dobbs* and discuss the arguments, the questions asked by the Justices, and the responses.

Exercise: Kahoot appeals vocabulary quiz.

Appendix H

Chapter VII:

Constitutional Law

Chapter Objectives:

Students should be able to:

- Recognize and use essential words and phrases relating to the U.S. Constitution.
- Describe the three branches of the federal government.
- Identify the articles of the original U.S. Constitution, the amendments found in the Bill of Rights, and the three Civil War era amendments.
- Present an oral argument using an "originalist" approach or a "textualist" approach.

Homework Assignments:

For Monday's class: Watch "Loving." Two students will be appointed to give brief presentations about the movie

For Tuesday's class: Read the excerpts from *Loving v. Virginia* posted on Canvas.

For Wednesday's class: Counsel for the parties in *Loving v. Virginia*, prepare your arguments.

For Thursday's class: Read the article I have posted on Canvas on the Flag Salute Cases, *Minersville School District v. Gobitis* and *West Virginia State Board of Education v. Barnette*. Two students will be asked to give presentations about *Tinker v. Des Moines School District* and *Cohen v. California*.

For next Monday's class: Watch "The Freedom to Marry." Two students will be appointed to discuss the film. Read the excerpts from *Obergefell v. Hodges* I have posted on Canvas. Read Justice Thomas's concurrence in *Dobbs v. Jackson Women's Health Organization.* I have posted a link to it on Canvas.

For next Tuesday's class: Read the excerpts from opinions in *Dobbs v. Jackson Women's Health Organization* and *District of Columbia v. Heller* that I have posted on Canvas.

For next Wednesday's class: Read the excerpts from Justice Gorsuch's opinion in *Bostock v. Clayton County* that I have posted on Canvas. Read the article by Noah Feldman, "Scalia's Ghost Is Haunting Conservative Justices," that I have posted on Canvas.

Monday:

Siskel and Ebert at the movies. Film critics, please give your review and report to the class: This week's movie show the story behind a landmark U.S. Supreme Court decision, *Loving v. Virginia,* which struck down, on equal protection and due process grounds under the Fourteenth Amendment, a Virginia law making interracial marriage illegal. Questions: 1.) Did you like the movie? Why or why not? 2.) What did you learn about the making of U.S. Supreme Court constitutional law cases? 3.) Were some of this week's essential vocabulary words used in the film? What were the contexts?

P. Essential vocabulary.

Article III court, Article III judge: A federal court that is an Article III court is one in which the judge has a lifetime appointment, cannot be removed from office except through impeachment, and cannot have his or her pay reduced. Article III imposes

these requirements. There are certain other courts set up by Congress for special purposes that are called "Article I" courts – for example, immigration courts. Article I judges can serve for a limited term and can be fired without having to be impeached.

Bill of Rights: The first ten amendments to the U.S. Constitution, adopted shortly after the Constitution was adopted.

Cases and controversies: Article III of the U.S. Constitution gives the federal courts the power to hear only actual "cases and controversies" – that is, real cases involving real parties, with real stakes, and not advisory opinions on hypothetical situations.

Double jeopardy: Under the Fifth Amendment, it is unconstitutional for the government to prosecute someone twice for the same offense. If a defendant is found not guilty, he or she cannot be prosecuted again for the same crime.

Due process: A requirement found in the Fifth Amendment (for the federal government) and the Fourteenth Amendment (for the States) that government shall not take anyone's life, liberty, or property without a fair procedure. See also "substantive due process."

Eighth Amendment: Prohibits "cruel and unusual punishment." What constitutes "cruel and unusual punishment" has been the subject of dispute.

Equal protection: A provision in the Fourteenth Amendment that prohibits States from denying people the same legal protections as those given other people. It has been extended to require the same of the federal government.

Establishment Clause: The provision of the First Amendment that prohibits the government from setting up a state religion or favoring one religion.

Fifth Amendment: Requires a grand jury indictment for major crimes (in federal court); prohibits double jeopardy; prohibits having to testify against one's self as to a criminal matter; prohibits government takings of property from people without paying for it; and requires the federal government to provide due process of law before taking away anyone's life, liberty, or property. To "invoke the Fifth Amendment" or "invoke the Fifth" means to refuse to testify in response to a question on the ground that the line of inquiry might lead to self-incrimination.

First Amendment rights: The freedoms protected by the First Amendment are freedom of speech, freedom of the press, freedom of religion, freedom from an established government religion, freedom to assemble, and freedom to petition the government.

Fourth Amendment: The Fourth Amendment protects against unreasonable searches and seizures, and generally requires police to get warrants.

Free Exercise clause: The clause of the First Amendment that guarantees the freedom to practice one's religion.

Impeachment: The process to remove certain federal officials, such as the president or a federal judge, from office. The House of Representatives has to vote, by majority vote, to "impeach" or charge someone, but the Senate must then vote, by a two-thirds majority, to convict. Donald Trump was impeached twice but not convicted either time.

Judicial review: The power of a court to declare a statute unconstitutional and therefore unenforceable.

Originalism:: The legal theory that statutes and constitutions should be interpreted the way they were understood at the time they were enacted.

Second Amendment: The amendment that protects the right to "keep and bear arms," *i.e.*, to own guns.

Seventh Amendment: Protects the right to jury trial in civil cases in federal court for cases involving at least $20.

Sixth Amendment: In criminal cases, protects the right to a speedy trial, to a jury trial, to counsel, and to confront the witnesses against the defendant and to be able to summon witnesses in his or her defense.

Substantive due process: Rights not otherwise specifically granted in the Constitution but which are believed to be deeply grounded in history and tradition –

for example, the right to marry. Justice Thomas has criticized the idea of "substantive due process."

Textualism: The theory that the plain meaning of words should govern the interpretation of statutes or the Constitution, without regard to what the drafters might have intended.

Q. **Discussion: Overview of Articles I through III of the Constitution, the Bill of Rights, and the Thirteenth through Fifteenth Amendments; *Marbury v. Madison.*** We will review and discuss these constitutional provisions in class. We will also watch a video about *Marbury v. Madison,* the case that established the power of the U.S. Supreme Court to declare laws unconstitutional.

R. **Exercise:** How are the U.S. Constitution and the Japanese Constitution similar? How are they different? We will divide the class into two groups. One group will find similarities. The other will find differences.

Tuesday:

S. Exercise: **Preparation for oral argument in *Loving v. Virginia*.** Two students will be appointed to be counsel for the parties in *Loving v. Virginia,* presenting oral argument to the Supreme Court. The rest of you will be the Justice of the Supreme Court. In advance of the argument tomorrow, read over the opinion carefully and prepare the arguments you (the two students who are arguing) will be making. Those of you who are Justices, read the opinion and think of some questions you might ask at oral argument. We will listen to excerpts from the actual oral argument in the case.

Wednesday:

T. **Exercise: Presentation of oral argument in *Loving v. Virginia*.** Two students will have been appointed to be counsel for the parties in *Loving v. Virginia*, presenting oral argument to the Supreme Court. The rest of you will be the Justices of the Supreme Court. We will have a guest speaker, Tom Shriner, who has litigated a number of constitutional cases and is teaching a Supreme Court seminar this year at Marquette Law School. Mr. Shriner will act as Chief Justice of the Supreme Court for the oral argument and, after the oral argument, will discuss litigating constitutional cases.

Thursday:

U. **Student presentations: *Tinker v. Des Moines School District* and *Cohen v. California*.**

V. **Discussion: The Flag Salute Cases, *Tinker*, and *Cohen*.** None of these cases was a unanimous decision. In each case, there was at least one spirited dissent. But, at least with *Barnette* overruling *Gobitis*, a majority of the Supreme Court allowed conduct that in many cultures and places would be considered shockingly disrespectful of authority. Indeed, the conduct in these cases was considered disrespectful of authority by several of the Justices. What do you think of these cases? Should the First Amendment be interpreted to allow such conduct? Japan is a society that, at least historically, has been very respectful of authority. Would a Japanese court rule the same way as the Supreme Court did in *Barnette, Tinker,* and *Cohen*? Or would it rule the way the Court did in *Gobitis*?

W. **Exercise: Kahoot Bill of Rights quiz:** Which amendment protects which right?

Next Monday:

Siskel and Ebert at the movies Film critics, give your review and report to the class on "The Freedom to Marry." Questions: 1.) Did you like the movie? Why or why not? 2.) What did you learn about the effort to make same-sex marriage a constitutional right? 3.) Were some of this week's essential vocabulary words used in the film? What were the contexts?

X. Discussion: Substantive due process – a contradiction in terms? Justice Thomas has been a vocal critic of the idea of "substantive due process." What do you think of the arguments he gives in his concurring opinion in *Dobbs*? Should constitutional lawyers look to other constitutional provisions for support? What theories would (or has) a Japanese court use to find a right to marriage or a right to same-sex marriage? Or would a Japanese court not find any such right?

Next Tuesday:

Exercise: Presentation of oral argument in *Obergefell v. Hodges*. Two students will have been appointed to be counsel for the parties in *Obergefell v. Hodges*. The rest of you will be the Justices of the Supreme Court. I may or may not be Justice Scalia.

Y. Discussion: Originalism. Originalism seems to have taken over at the Supreme Court. Indeed, Justice Kagan, one of the liberal Justices on the Court, said at her confirmation hearing that "we are all originalists" now. But are there different varieties of originalism? Does originalism always produce the same result? What do you think of the Court's use of originalism in *Heller* and *Dobbs*? In a civil law system such as Japan's, would there be – is there – the same effort to find the original public meaning of a statute or constitution?

Next Wednesday:

Z. **Discussion: Textualism.** There was a time when originalism and textualism were thought to be pretty much the same thing. But, as Professor Feldman points out in his article, they are not. *Bostock v. Clayton County* is a statutory interpretation case, not a case of constitutional interpretation. But it interprets a statute, the Civil Rights Act, that implements the Fourteenth Amendment. Justice Gorsuch's majority opinion relies on a textualist approach to reach a different result from the result the "originalist' members of the Court would reach. Which approach do you think is better? Just looking at the words of a law or constitutional provision, and if they have a plain meaning, we are done? Or do we need to look at the original public meaning? Or should we look at intent? Or something else? What would a Japanese court look at?

Exercise: Preparation for oral argument in *Doe v. Alabama*. Following *Dobbs*, abortion is now illegal in Alabama in all circumstances except when necessary to save the life of the mother. There is no exception in Alabama law for rape. Two of you represent "Jane Doe," a young Alabama woman who was raped and is now pregnant as a result. Two of you work for the State of Alabama as Assistant Attorneys General and defend its laws. Three of you are going to be judges of the United States Court of Appeals for the Eleventh Circuit, which handles appeals coming from federal courts in Alabama, Georgia, and Florida. We now know, as a result of *Dobbs*, that the Supreme Court, or a majority of it at least, doesn't recognize a general right to abortion based on a right of privacy or on substantive due process. But could there be a right to abortion based on other constitutional grounds where the abortion is the result of a rape? In particular, would forcing a woman who had been raped to carry a fetus to term violate the Thirteenth Amendment's prohibition on "involuntary servitude"? The lawyers for Jane Doe go to federal court in Alabama to

try to get an injunction against the enforcement of Alabama's law at least as it applies to Jane Doe. The federal district court did not grant the injunction. Now, Jane Doe's lawyers have appealed, and the appeal will be heard in the Eleventh Circuit. Doe's lawyers, research the Thirteenth Amendment, and see if you can come up with some creative arguments for appeal (to be argued tomorrow). Alabama's lawyers, research the Thirteenth Amendment, and see what arguments you can use to argue your side of the case – why the Thirteenth Amendment doesn't help Ms. Doe. Judges, research the law and see which side is likely to be right and how you are going to rule.

Next Thursday:

Exercise: **Presentation of oral argument in the United States Court of Appeals for the Eleventh Circuit in *Doe v. Alabama*.**

Appendix I

Chapter VIII:

Contracts

Chapter Objectives:

Students should be able to:

- Recognize and use essential words and phrases relating to contracts.
- Explain key concepts in contract formation, performance, and breach.
- Draft a simple distributorship agreement.

Homework Assignments:

For Monday's class: Read Chapter VIII A. Watch "The Paper Chase." A student will be appointed to give a brief presentation about the movie.

For Tuesday's class: Read *Raffles v. Wichelhaus* and the Termination Agreement between Timothy Goggins and National Graphics, Inc., and the opinion of the Wisconsin Court of Appeals in *Goggins v. National Graphics, Inc*., both of which I have posted on Canvas.

For Wednesday's class: Read Chapter VIII C. Read *Hadley v. Baxendale* and excerpts from the opinion in *Market Street Associates Limited Partnership v. Frey*, both of which I have posted on Canvas.

For next Monday's class: Watch "The Founder" Two students will be appointed to give a brief presentation about the movie. . Read Chapter VIII D.

Monday:

Siskel and Ebert at the movies. Film critics, please give your review and report to the class: This week's movie, "The Paper Chase," shows how a contracts law class was taught, some years back, at Harvard Law School. Questions: 1.) Did you like the movie? Why or why not? 2.) What did you learn about studying contracts in a U.S. law school? 3.) Were some of this week's essential vocabulary words used in the film? What were the contexts?

Monday:

A. Essential vocabulary.

Acceptance: Agreement to the terms of an offer. If the other elements of a contract (consideration, mutuality, capacity, and legality) are present, the acceptance of an offer creates a contract.

Assign (verb), assignment (noun), assignable (adjective): The transfer of one party's rights and duties under a contract to someone else. For example, a mineral lease giving the right to extract petroleum from land would ordinarily be assignable. Employment contracts, on the other hand, are not assignable.

Breach: When one party doesn't do what it is required to do by the contract.

Choice of law clause: Contracts often contain a provision that specify the law of a particular jurisdiction as the controlling law to determine how to interpret the contract.

Consequential damages: Damages that arise as a result or consequence of a breach of contract. Thus if a mechanic promises to repair a car's engine, but doesn't do a good job and the car blows up, the consequential damages would include the entire value of the car.

Consideration: Some benefit one party to a contract gets, or detriment the other party suffers, as a result of the contract. There must be some present or future consideration for a contract to be enforceable.

Duress: When someone does not enter into a contract of their own free will, but is forced to enter into it. Duress is a defense to contract enforcement. The classic example would be where someone signed a contract with a gun pointed at his or her head. Sometimes, after the fact, parties to contracts will try to get out of their obligations by arguing duress; they had no choice but to enter into the contract, because otherwise some bad thing would have happened. For duress to be a valid defense, there has to have been some kind of threat usually of something illegal.

Exclusivity: Contracts may contain a provision making one party the sole or "exclusive" distributor or seller of the other's products, at least within a certain territory.

Express terms vs. implied terms: Express terms are the terms of a contract that are specifically stated. Implied terms are terms that are not specifically stated, but may for example be based on terms that are standard in the industry.

***Force majeure*:** "Greater force" in French. A contract provision that can relieve parties of their obligations under contracts if some intervening natural catastrophe – "act of God" -- or act of government makes performance of the contract impossible or impractical. For example, relying on clauses like this, some restaurants tried to get out of their obligations under leases when COVID lockdowns required them to be closed.

Forum selection clause: Contracts often contain a provision that specifies where (which court or arbitration body) any disputes between the parties shall be resolved.

Indemnity: A promise to protect the other party from costs and liabilities that may arise as a result of something.

Integrated contract, integration clause: Some contracts say, in what is called an "integration clause," that they represent the complete agreement between the parties and cannot be varied, added to, or contradicted by anything else (except perhaps a writing signed by both parties).

Liquidated damages: Where the parties agree in advance on a specific amount of money that would be awarded as damages in the event of a breach of contract.

Mitigation of damages, duty to mitigate: When one party breaches a contract, typically the other has a duty to mitigate – that is, keep as small as reasonably possible – its damages. Thus, if one party contracted to buy something, but failed to do so, the damages the other is entitled to recover would not be the full purchase price, but the purchase price minus whatever the seller could reasonably get by selling the thing to someone else.

Modify, modification: To change, or a change in, the terms of a contract by the agreement of the parties.

Mutuality: For a contract to be enforceable, both parties must be obligated in some way, have some duty to do something. If I say "I promise to pay you $100," but the promise is not in exchange for anything, it is not an enforceable contract, because there is no mutuality.

Offer: A proposal to enter into a contract.

Performance: Doing the things that are required to be done by a contract. Distinguished from "breach."

Statute of frauds: Refers to several types of contracts that must be in writing to be enforceable. Although the rules vary a little from state to state, common examples are contracts for the sale of goods worth more than $500; contracts for the sale of real estate; and contracts that are not capable of being fully performed within a year.

Term: The duration of a contract.

Termination: Ending. Contracts often contain provisions as to how the contract may be terminated or ended.

Warranty: A specific promise in a contract that the goods sold will be in some specific condition or free from defects, etc. Warranties may be limited, for example, to repair or replacement, with no liability for consequential damages.

Warranty disclaimer: Where the seller specifically states that it is not making any promises as to the quality of the goods being sold.

Tuesday:

AA. **Contract formation.** A contract is created when an offer is accepted, there is consideration for the contract, there is mutuality of obligation, the parties have capacity to contract, and the contract is not illegal. To use an extreme example, even though criminals might use the term "contract," a "contract" to take out a "hit" on someone, that is, to kill the person, is not a legally enforceable contract.

It is often said that for a contract to exist, there must be a "meeting of the minds" There must be agreement on all the material terms of the contract. A contract that doesn't specify a price term, for example, would often be too vague to be enforceable. But frequently terms can be implied from industry practice or other circumstances. A contract to buy a certain number of pork bellies "at the market price" would likely be enforceable (assuming the other terms were understood), because there is in fact a market for pork bellies, with publicly available price information.

Defenses to the existence of a contract include duress, illegality or violation of public policy, lack of capacity of one party to enter into the contract, impossibility or frustration (doing the contract has become impossible), fraud in the inducement (one party was defrauded into entering into the contract), and mutual or unilateral mistake. *Raffles v. Wichelhaus* is an example of a case of mutual mistake: the parties were thinking about different ships named Peerless. Unilateral mistake is a defense to contract formation only if the other party knew that one party was mistaken as to a key thing in entering into the contract, and took advantage.

A separate issue from mutual mistake is contract ambiguity. Lawyers try hard to avoid ambiguity in drafting contracts, but invariably words and phrases end up having two possible meanings, and parties end up in court disputing the meaning of the contract. We will discuss the *Goggins v. National Graphics, Inc.* case. The contract in that case and the Wisconsin Court of Appeals opinion finding it ambiguous are both posted on Canvas.

Exercise: Redraft the ambiguous provision in the Termination Agreement to remove the ambiguity.

Wednesday

C. Some standard contract terms/issues. The following are some of the common issues that a variety of types of contracts specify:

-- Price. A price term can be a flat dollar amount, or calculated by a formula, fixed by reference to some market price, subject to annual increase for inflation, etc.

-- **Term or duration:** How long the contract will be in place. There may be provisions for renewal.

-- **Exclusivity:** Some contracts, especially distributorship or agency contracts, may specify that the distributor or agent will be the only one – the exclusive distributor or agent – either worldwide or within a specified territory. Or a contract may specify that the agent or distributor is non-exclusive.

-- **Assignability:** Contracts may specify whether they are assignable, that is, whether one party's rights under the contract can be sold or transferred to someone else.

-- **Liquidated damages**: Although such provisions are not common, some contracts will specify liquidated damages for breach (especially for breach of a confidentiality provision).

-- **Confidentiality:** Many contracts, especially settlement agreements where one side doesn't want publicity about how much it is paying, have provisions that require confidentiality (except to the extent the agreement may be legally required to be produced to a third party, such as a taxing authority or a court)..

-- **Attorneys' fees:** Some contracts provide that in the event of a dispute, one side or the prevailing party may be entitled to get its attorneys' fees from the other party.

-- **Forum selection clause**: The contract may provide that any disputes between the parties will be filed in the courts of a particular jurisdiction – typically, the home court of the party with more bargaining power. Or the contract may provide that any disputes will be arbitrated before a particular arbitration tribunal, such as the American Arbitration Association. Arbitration offers the benefits that its proceedings are typically more confidential than court proceedings.

-- **Choice of law:** Contracts may specify that they shall be interpreted in accordance with the law of a particular jurisdiction (usually the home state of the party with more bargaining power). The contracting party, at least the one with more bargaining power, is likely to be more able to predict the outcome under its home jurisdiction law than if it is forced to defend a lawsuit raising legal issues under some foreign law.

-- **Warranties, warranty disclaimers**: Contracts may have express warranties, limited warranties as to some things, or disclaimers of warranties..

-- **Indemnification provisions:** One party may indemnify the other for liabilities the other might incur because of the first party's product or conduct. For example, a manufacturer might indemnify a distributor if the distributor gets sued for selling a defective product made by the manufacturer.

-- **Termination:** Contracts may be terminable only at certain times or for certain reasons, such as "cause," or only upon giving a certain amount of notice.

-- **Notice provisions**: When some kind of notice might need to be given under a contract, contracts may specify how that notice is to be given, for example, by email to a certain person with copy to the company's lawyer, etc.

Show and tell: I will circulate a variety of contracts from various contexts. See if you find provisions of the kind listed above.

Exercise: Draft a distributorship agreement. One group of you will be the management of and lawyers for Oishi Mochi Boru Seizogaisha, a Japanese manufacturer of mochi ball ice cream. The other group of you will be the principals and lawyer for Mochi Ball Startup, LLC, an American company whose owners are familiar with food distribution in the United States and the marketing of new products. Oishi is wanting to

enter the U.S market. with its product. Mochi Ball Startup, LLC wants to be the exclusive distributor for Oishi. There already are competitive products being sold in the United States, so Oishi will have a challenge introducing its product and gaining market share. The management of Oishi has gotten to know the owners of Mochi Ball Startup a little bit, but is a little nervous locking itself into a contract with a startup business. Mochi Ball Startup wants to be the exclusive distributor for Oishi brand mochi balls if it is going to be devoting all of its time to getting the product sold. Negotiate the terms of a distributorship agreement, if you can!

Thursday: Guest speaker (Joe Goode) on contracts.

Next Monday:

Siskel and Ebert at the movies. Film critics, please give your review and report to the class: This week's movie, "The Founder," shows how things can go wrong in contracts. Questions: 1.) Did you like the movie? Why or why not? 2.) What did you learn about negotiating contracts? 3.) Were some of this week's essential vocabulary words used in the film? What were the contexts?

D. Contract performance and breach; law and economics theory in judicial decisionmaking. For today's class, you have read two of the most commonly studied contracts cases in U.S. law schools – *Hadley v. Baxendale* and *Market Street Associates Limited Partnership v. Frey.* *Hadley v. Baxendale* discusses the limits on consequential damages that can be recovered after breach, and *Market Street Associates* discusses the duty of good faith in contract performance under Wisconsin law.

We will discuss both cases in detail. Judge Richard Posner, now retired from the United States Court of Appeals for the Seventh Circuit, was a law professor at the University of Chicago Law School before he was appointed to the Seventh Circuit, and continued to teach there while he was a judge. Judge Posner was the most influential legal scholar of his generation and the most widely-quoted legal scholar, and one of the most widely-quoted judges, in U.S. history. He was one of the leading theorists of the "law and economics" movement, and his opinion for the Seventh Circuit in *Market Street Associates* employs a law-and-economics approach. Do you find his approach in *Market Street Associates* interesting? Helpful? Have any Japanese courts used a "law and economics" approach to decide any cases? Are there Japanese legal scholars who are known for following the approach?

Exercise: Kahoot contracts vocabulary quiz.

Appendix J

Chapter IX:

Debtor-Creditor, Secured Transactions, and Bankruptcy

Chapter Objectives:

Students should be able to:

- Recognize and use essential words and phrases relating to debtor-creditor law, secured transactions, and bankruptcy.
- Identify common creditor remedies.
- Identify the significant events in Chapter 7, Chapter 13, and Chapter 11 bankruptcy cases.

Homework Assignments:

For Monday's class: Read Chapter IX. A. and B.

For Tuesday's class: Read Chapter IX..C. and D..

For next Monday's class: Read Chapter IX.E. and watch one of "The Big Short" of "Inside Job." Two students will be appointed to give presentations about the movies..

Monday:

Siskel and Ebert at the movies. Film critics, please give your review and report to the class: This week's movies, "The Big Short" and "Inside Job," are both about the causes of the Great Recession that began in 2008. Questions: 1.) Did you like the movie? Why

or why not? 2.) What did you learn about the U.S. financial system and the causes of the Great Recession? How did the U.S. financial system differ from the financial system in Japan? 3.) Were some of this week's essential vocabulary words used in the film? What were the contexts?

BB. Essential vocabulary.

Adversary proceeding: A lawsuit that is filed within a bankruptcy case. A case between specific named plaintiffs and defendants within the bankruptcy case of a person, business, or other entity.

Article 9 sale: Under Article 9 of the Uniform Commercial Code, a debtor may give a lender its personal property collateral, to be sold by the lender in any "commercially reasonable" way, including either a public or private sale. An Article 9 sale does not require a court order, if the debtor voluntarily gives the property to the lender.

Automatic stay: The filing of a bankruptcy case immediately stops, or "stays," all lawsuits and other attempts by creditors to collect what they are owed. The "automatic stay" is that legally required halt to creditor collection actions.

Bond: Written evidence of borrowing money, with interest at a stated rate. Large corporations often borrow money by selling bonds to investors. Bonds can be either unsecured or secured by liens on the company's assets.

Collateral: Specific property that has a lien on it to secure a loan. A house, for example, is the collateral for a home mortgage loan.

Credit score: A numerical rating between 300 and 850 that is provided by one of three national companies judging whether an individual is a good, creditworthy customer, likely to pay his or her bills, or not.

Discharge: In bankruptcy, an order that has the effect of eliminating – wiping out – those debts that are of a type that can be wiped out in bankruptcy. Certain debts, such as alimony, child support, and many kinds of tax debt, are not dischargeable in bankruptcy

Execution: A legal process in which a creditor, having gotten a judgment, sends a local law enforcement officer out to collect property of the debtor to be sold to pay the debt.

Exempt (adjective), exemption (noun): Debtors both in bankruptcy and outside bankruptcy are allowed to keep certain property from their creditors' efforts to collect what they are owed. This is called "exempt" property – property that creditors can't take away. An "exemption" is the claim debtors can make that the law allows them to keep a particular item of property.

Foreclose (verb), foreclosure (noun): The process by which a secured creditor uses its lien (especially a mortgage) to have the mortgaged property sold to pay the secured creditor.

Fraudulent transfer: When a debtor hides property and tries to keep it from his or her creditors by giving it or selling it to someone for less than it is worth. Outside bankruptcy, creditors can try to recover property that is fraudulently transferred. In

bankruptcy, the trustee tries to recover property that is fraudulently transferred, for the benefit of creditors.

Garnish (verb), garnishment (noun): The process by which a creditor that has gotten a judgment against a debtor can get third parties (such as banks where the debtor has a bank account) to turn over property of the debtor. A "wage garnishment" is a process in which a judgment creditor can collect a certain percentage (in Wisconsin, 20%) of a debtor's paycheck every time the debtor gets a paycheck, to be applied to the debt.

Judgment: At the end of a lawsuit, the court will enter a "judgment," that is, its final ruling. A judgment can be for an amount of money. But the entry of a judgment doesn't mean that the creditor necessarily gets the money. The creditor still needs to collect it somehow.

Lien: A legal claim or charge against specific property to secure a debt – for example, a mortgage against a house or other real estate. Liens can be either consensual – created by the agreement of the property owner – or imposed as a matter of law, such as a lien against property for taxes owed the government.

Mortgage: A lien against real property granted by the owner of the real property, such as a mortgage to a bank to get money to buy a house.

Perfected lien: A lien that is valid against all other creditors of the debtor. Typically, liens are perfected either by being recorded in some government office, to give

everyone notice of the lien, or by possession, such as a mechanic's lien on an automobile that is in the possession of the mechanic who did repair work on the car.

Petition: The document that starts a bankruptcy case. It can be filed either by the debtor (the individual or business in bankruptcy), in which case it is a voluntary petition, or, in certain circumstances, by creditors seeking to put the individual or business into bankruptcy, in which case it is an involuntary petition.

Plan of reorganization: In Chapter 11 bankruptcy, a proposal that must be approved by the court for a business's finances to be restructured so that the business can survive.

Receiver: A court-appointed official that tries to collect a debt on behalf of a creditor. Receivers can also operate businesses on behalf of their creditors.

Replevin: The legal process by which a secured creditor with a lien on personal property recovers the property and has it sold to pay its debt.

Schedules: At the beginning of a bankruptcy case, the debtor must prepare lists of everything the debtor owns (with values) and everyone the debtor owes money to, with amounts. These lists – which also ask other questions -- are called "schedules."

Security agreement: A contract in which a company or individual agrees to give a lender a lien on certain personal property, such as the equipment and machinery in a factory. Most bank financing of businesses (other than very large businesses) involves security agreements granting security interests in the assets of the business.

Security interest: The lien created by a security interest.

Self-help repossession: A process, legal in some states for some types of collateral, where, if a debtor has defaulted, the creditor can simply pick up its collateral, without a court order, and sell it and apply the proceeds to the debt.

Trustee: In bankruptcy, the individual who reviews the debtor's schedules, asks questions of the debtor, and collects any available assets for creditors.

Unsecured: A debt for which there is no specific property as collateral (that is, property with a lien on it for that debt).

CC. **Secured and unsecured creditors.** Creditors fall into one of two categories: secured and unsecured. A secured creditor is a creditor that has a lien on specific property of a debtor (or, often, all of its property) to secure the creditor's debt. Examples of common forms of secured debt include mortgage loans, car loans, and business loans made by a bank (which are almost always secured). An unsecured creditor is a creditor that doesn't have any specific property securing the debt. Examples of common forms of unsecured debt include credit card bills, debts owed companies that sell supplies to a business, and medical bills. There can be debts that are partly secured and partly unsecured – or what we call "undersecured." In those cases, the collateral isn't worth enough to pay the debt in full.

When a business or an individual is in financial difficulty, generally speaking, secured creditors have better luck collecting their debts than unsecured creditors do – although this depends on the value of the collateral and the value of the business or the net worth of the

individual. In large corporate bankruptcies, the secured creditors are typically owed millions of dollars – but they usually have liens on all the company's assets, and are usually paying pretty close attention to how the business is doing. In those same cases, there may be millions of dollars of trade debt – money owed to suppliers who sold machinery, supplies, raw materials, and the like to the company. All these creditors have as protection is the company's promise to pay. In bankruptcy, that promise is often worthless, or worth at most a few pennies on the dollar, after the secured creditors have been paid in full.

When a business starts having financial problems, secured lenders often try to get more collateral, if it is possibly available. The two most common form of liens in business loans are mortgages on real estate and security interests in personal property such as equipment, inventory, and receivables (money owed the company by its customers). To be "perfected" and valid against third parties, mortgages get recorded in a state government office, usually called the "register of deeds" office, and security interests (sometimes called "UCC filings," referring to the Uniform Commercial Code), get recorded in a different government office, often called the state's Secretary of State or Department of Financial Institutions. But there are a variety of other types of liens for some other specific types of property. Liens on motor vehicles get recorded in what is usually called a state's Department of Motor Vehicles. Liens on insurance policies get recorded with the insurance company that issued the policy. Liens on large, ocean-going ships are called ship mortgages and get recorded with a federal government office, the National Vessel Documentation Center. Liens on airplanes are recorded with another federal office, the Federal Aviation Administration. And so on; there are some other unusual types of liens.

When individuals are in financial difficulty and need to file bankruptcy, secured creditors also usually end up doing better than unsecured creditors. A mortgage lender that has a mortgage on the debtor's house will, generally, still get paid. On the other hand, credit card bills are often discharged – wiped out completely – in bankruptcy.

It perhaps is not surprising that current interest rates on mortgage loans are somewhere between 4.3% and 5.3% or a little higher – while interest rates on credit cards can be 18% or higher, even to customers with very good credit scores.

Tuesday.

DD. **Creditors' remedies.** There are certain remedies secured creditors have that unsecured creditors do not have. They generally involve getting the collateral back fairly quickly – if not in the creditor's hands, at least subject to control by a court – and selling the property through a foreclosure or replevin process. In Wisconsin, foreclosure of real estate is always done in court, but in some other states, it is not a judicial process. And secured creditors of personal property can, if the debtor cooperates, sell it without court proceedings through a public or private sale, pursuant to Article 9 of the Uniform Commercial Code. (Article 9 is a state law, but it has been enacted in all 50 states and the District of Columbia.)

If the debtor doesn't cooperate, a secured creditor will usually need to file a lawsuit to recover its collateral and sell it. One exception, in Wisconsin and some other states, is self-help repossession of motor vehicles. If the creditor can pick up the car without "breach of the peace," that is, some sort of an argument, it can legally pick it up, drive it away, and take it to be auctioned off – without having to go to court at all. A "repo man" can see a

debtor's car parked on the street, "hot-wire" it, and drive it to be auctioned off. (The debtor, of course, must be in default.)

Remedies for unsecured creditors often take more time and may be expensive. Unless the debtor voluntarily pays a debt or the parties negotiate a settlement, the creditor will have to sue the debtor. If the debtor doesn't answer the complaint, the creditor can get a judgment "by default" – that is, because there was no answer – and start trying to collect on the judgment. However, if there is any basis at all to dispute the creditor's claim, and the debtor does so by filing an answer, it can be months or years before the creditor ever gets a judgment. Once the creditor gets a judgment, it can try to collect it. Probably the most common way to collect is through garnishment – trying to collect property of the debtor in other people's possession, such as the debtor's bank account or the debtor's paycheck. But this can take time, and might not work. In Wisconsin, for example, up to $5000 in a bank account is exempt from execution, meaning it can't be garnished. In Wisconsin, only 20% of a paycheck can be garnished – the remaining 80% is exempt. In some states, 100% of wages are exempt. In some states (including Wisconsin), a judgment becomes a lien on real estate, junior to any existing mortgages. But it can be years before the real estate is ever sold – and in some states, such as Florida, a judgment isn't a lien against the debtor's home. One of the least used ways to collect on a judgment is to send the sheriff or other local law enforcement officer to pick up property of the debtor in what is called "execution." One practical difficulty with this approach is, again, that the property of the debtor may be exempt. In Wisconsin, for example, household goods worth up to $12,000 (per spouse) are exempt from execution. Most households don't have that much value in household goods.

EE. Remedies for debtors: Chapter 7 and Chapter 13 bankruptcy. Although it is not necessarily easy for a creditor to collect from a debtor through legal process, there may be circumstances where debtors need bankruptcy relief to stop creditor collection efforts. For example, if a creditor has gotten a judgment and is garnishing 20% of the debtor's paycheck every two weeks, it may be in the debtor's best interests to file bankruptcy and stop the garnishment. Debtors who have lost their jobs or their businesses and who face a number of lawsuits may file bankruptcy to stop the lawsuits. Or the debtor may have fallen behind on mortgage payments, and the bank has started proceedings to foreclose the mortgage. Chapter 13 bankruptcy allows the debtor time to catch up on mortgage payments and reinstate the mortgage.

The two main kinds of bankruptcy for individuals are Chapter 7 and Chapter 13. There is also a special chapter for farmers and fishermen, Chapter 12, which is similar to Chapter 13. And Chapter 11, which is mainly used by businesses, is available for individuals, but such cases are rare.

Most Chapter 7 cases are completed in about four months. Chapter 13 bankruptcy, on the other hand, if it is successful, takes at least between three and five years, as it involves a payment plan over time. In a Chapter 7 case, the debtor files a petition seeking bankruptcy relief, and usually files schedules – lists of property owned and debts – with the petition or at least within the next 14 days. About five weeks after the case is filed, the debtor is required to appear at a hearing called the "section 341 meeting" or "first meeting of creditors" and answer questions about the debtor's property, debts, and related financial information. A person called the Chapter 7 trustee, who administers the bankruptcy case, does the questioning, which in the average case lasts less than five minutes (although it can

take much longer). In the vast majority of cases, the trustee will decide at the hearing or very shortly thereafter that there are no assets that are not exempt, so there is nothing for creditors, and will file a "no asset report." Sixty days later, unless a creditor or other interested party files an adversary proceeding (lawsuit within the bankruptcy case) objecting to the debtor's discharge, the debtor will get a discharge of all dischargeable debts, and shortly thereafter the case will be closed.

In an "asset case" in Chapter 7 – that is, a Chapter 7 case where the trustee decides there are some available assets for creditors – it may be a year or more before the case is closed. Often the trustee will have to sue someone to recover an asset, or will have an asset, such as real estate, that needs to be marketed for sale.

In Chapter 13, the debtor also files schedules of assets and liabilities, and there is also a first meeting of creditors or section 341 meeting. But Chapter 13 cases are more complex, usually, because the debtor proposes a plan to repay some debts over the next three or five years, usually with monthly payments from the debtor's earnings. Creditors or the Chapter 13 trustee have the opportunity to object to the plan, and it may take a few months for a Chapter 13 plan to be confirmed. In Chapter 13, the debtor doesn't get a discharge (usually, although there can be exceptions for hardships) until the debtor finishes making all the payments over the three- or five-year period.

Show and tell: I will circulate some sample bankruptcy schedules.

Exercise: Bankruptcy policy discussion. Throughout U.S. history, the ability of debtors to discharge debts in bankruptcy has been controversial. In the nineteenth century, Congress repeatedly enacted bankruptcy laws (typically during an economic downturn), only to repeal them a few years later when it appeared debtors were abusing the system.

We will consider and discuss these questions: Why should people be able to discharge debts in bankruptcy? After all, they owe the money, right? Are there some types of debts that should not be dischargeable in bankruptcy? If you were creating a bankruptcy system, what types of debts would you make nondischargeable? Are there some people who shouldn't be able to get bankruptcy discharges? Who, and why? Should there be income limits on the ability to file bankruptcy – so that people who make a certain amount of money can't file, or have to pay some amount or percent? When a debtor in bankruptcy does have some property for the trustee to distribute to creditors, should some creditors be entitled to be paid before other creditors – in other words, enjoy a priority? Which creditors? If you think so, who should enjoy the highest priority, who the next priority, and so on? What are the rules in Japan on all these things?

The following Monday:

Siskel and Ebert at the movies. Film critics, please give your review and report to the class: This week's movies, "The Big Short" and "Inside Job," are both about the causes of the Great Recession that began in 2008. Questions: 1.) Did you like the movie? Why or why not? 2.) What did you learn about the U.S. financial system and the causes of the Great Recession? How did the U.S. financial system differ from the financial system in Japan? 3.) Were some of this week's essential vocabulary words used in the film? What were the contexts?

FF. Remedies for debtors: Chapter 11. Chapter 11 of the Bankruptcy Code governs business reorganizations, although it is also available to (though seldom used by)

individuals. One of the major purposes of Chapter 11 is to preserve what is called the "going concern bonus" of an ongoing business. That is, most businesses are worth more, usually much more, as operating businesses than they are if they are shut down and the assets sold off. The difference between what a business is worth as a going concern compared with what it is worth if its assets are auctioned off is called the "going concern bonus." For a variety of reasons, businesses may find themselves insolvent – having more debts than assets – or at least temporarily unable to pay all of their creditors. In these situations, creditors start to sue, get judgments, and start collecting the assets of the company, such as by garnishing its bank account. When a business can't pay its employees because its bank account has been garnished, or when an equipment seller has picked up a piece of equipment because the company couldn't make the payments, or when companies just face very large legal bills to defend multiple lawsuits, it can be time to file Chapter 11 to keep the business intact as a going concern, to maximize the "going concern bonus" and make sure that, even if creditors don't get paid in full, they get at least as much as is possible. The filing of a Chapter 11 case stops creditor collection actions, at least temporarily, and allows the company some time to restructure its finances.

What rules should govern the restructuring of a company in bankruptcy? We will review section 1129 of the Bankruptcy Code, which sets forth the requirements to confirm a Chapter 11 plan. We will also discuss the policies underlying Chapter 11 of the Bankruptcy Code and discuss how corporate bankruptcy in the United States differs from or is similar to corporate bankruptcy in Japan.

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Exercise: Kahoot debtor-creditor vocabulary quiz.

Tuesday: Guest speaker Mark Metz.

Appendix K

Chapter X:

Voting and Elections

Chapter Objectives:

Students should be able to:

- Recognize and use essential words and phrases relating to voting, elections, and election law in the United States.
- Identify common elected positions.
- Identify issues surrounding campaign finance and political contributions.

Homework Assignments:

For Monday's class: Read Chapter X. A. and B.

For Tuesday's class: Read Chapter X C. and the excerpts from *Citizens United v. FEC* posted on Canvas..

For Wednesday's class: Read Chapter X D. and the Washington Post article on the conviction of Jesse Benton, posted on Canvas.

Monday

GG. **Essential vocabulary.**

Ballot: A piece of paper or an electronic record on which voters mark their choices in an election. When a voter fills out a ballot, the voter "casts" the ballot. To cast your ballot for someone means to vote for that person.

Absentee ballot: A ballot that is not filled out in person on election day at a government office, but is filled out at home and mailed in by a voter, for example because that person is disabled and cannot get to the government office, or because the person will be out of town on election day (for example, the person is in the military). There are rules governing when absentee ballots are allowed.

Bribe (verb); bribery (noun): Offering money or something valuable to a politician or candidate for office in exchange for the politician's promise of some specific action. This is illegal. However, political donations (within certain dollar limits) are legal – as long as the politician hasn't promised something specific to the person that gave the money.

Campaign: An organized effort to elect a person to a political office.

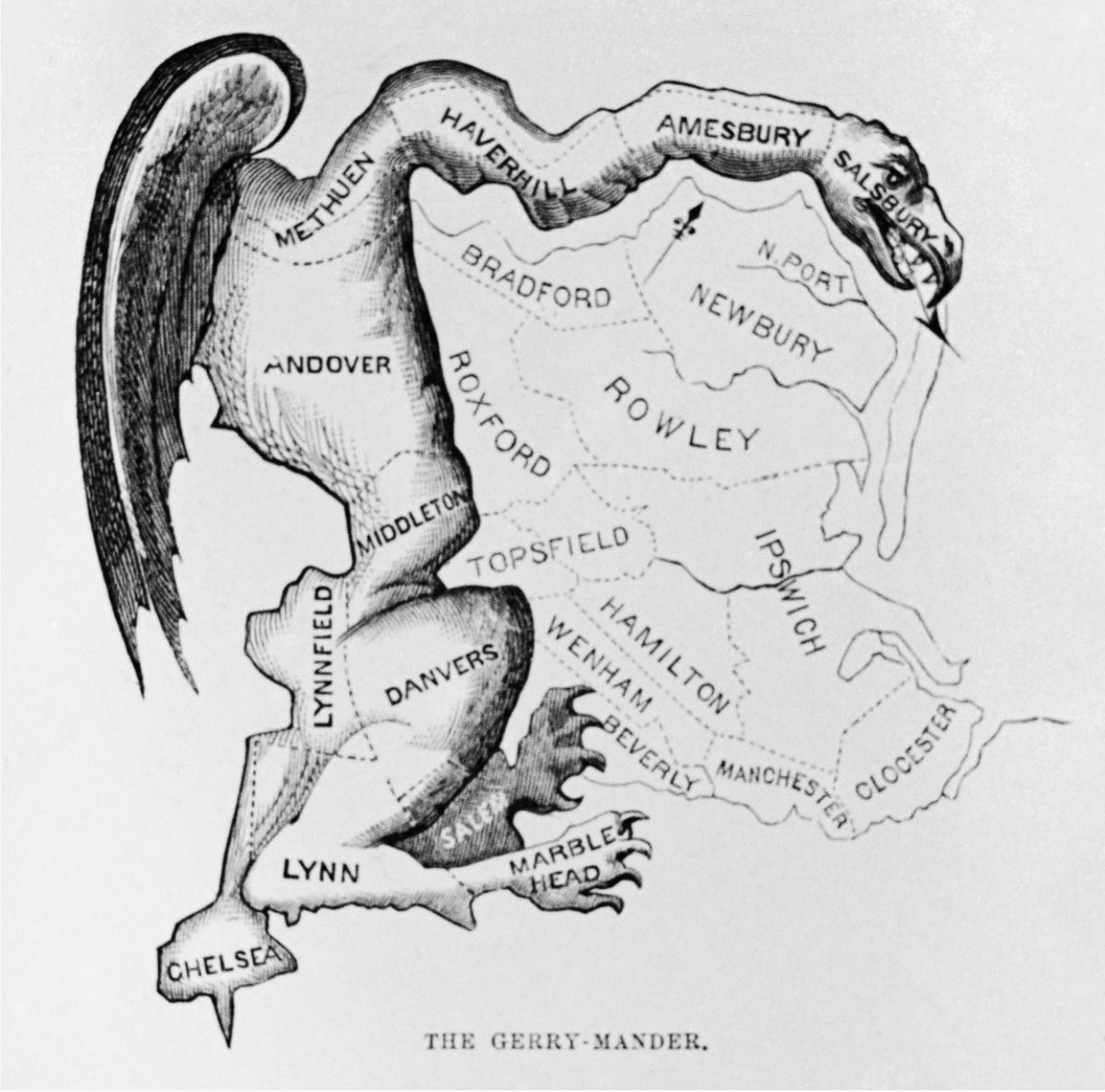
Campaign finance: How political campaigns raise money to spend on such things as advertising, staff salaries, etc. There are laws governing what can and cannot be done to raise money for political campaigns.

Candidate: Someone who has officially announced that he or she is running for a particular political office. Laws specify what must be done to become an official candidate. They usually require getting a certain number of signatures in support of the candidate.

Convention: A meeting of a political party. In presidential election years, each political party has a convention to choose or announce its candidate.

Early voting: In recent years, many states have allowed voters to vote in person at a government office before the actual election day.

Gerrymander: A political district drawn to favor one political party or another. Named after 19th century Massachusetts Governor Elbridge Gerry and a salamander, a type of amphibious animal, because Gerry drew up an odd-shaped political district that looked like a lizard in order to help his party win. Here is a cartoon of the original gerrymander:



THE GERRY-MANDER.

.Gerrymandering works by "packing" and "cracking." That is, a large number of voters of one party are "packed" into one district, while district lines are drawn to create small majorities in several other districts. Thus, in an area that contains roughly equal numbers of Democrats and Republicans, district boundaries might be drawn to "pack" a large number of Democrats (who are often people who live in cities) into one district that might be 90% Democratic, while three surrounding

districts might be 55% Republican. The result is four districts end up with three Republican representatives and one Democratic representative. Both major political parties have engaged in gerrymandering when they have political power

Nominate (verb), nomination (noun), nominee (noun): When a party picks a candidate for an office, it has nominated, or named, that person as its candidate.

Discussion questions: Gerrymandering works in the U.S. because voters In different places ten to vote differently. Voters who live in big cities tend to vote for Democrats. Voters in the suburbs and in rural areas tend to vote for Republicans. This is often because racial and ethnic minorities tend to live in big cities, and white voters tend to live in the suburbs and in rural areas. Population patterns reflect other differences, too. College towns like Madison, Wisconsin have lots of young residents, who tend to vote for Democrats. Does Japan have similar differences in voting patterns? Do people who live in big cities in Japan vote differently from people who live in rural areas? Or do Japanese voting patterns reflect fewer differences between big cities and rural areas?

The United States also has large regional differences in political preferences. The Northeast and the West Coast tend to vote for Democrats, while the South and some Mountain West states like Utah and Wyoming tend to vote for Republicans. States like Wisconsin, Arizona, Nevada, Michigan, and Pennsylvania are often called ‘purple” states – a mix between red and blue – because sometimes Democrats win and sometimes Republicans win. Does Japan have similar regional differences in voting patterns or are political preferences less divided by geography?

PAC (political action committee) and Super PAC: A PAC organization that collects money from donors and distributes it to political candidates, usually because the candidates are on one side or the other of some political issue that is important to the donors. Regular PACs are allowed to coordinate their advertising and campaign efforts with the candidate, but there are limits on how much people can contribute to PACs. "Super PACs" were started after the Supreme Court's decision in *Citizens United v. FEC.* Super PACs are not allowed to coordinate with candidates, but they are allowed to spend – and raise from people – unlimited amounts of money in support of any candidate.

Polls: This word has two meanings. One meaning is a survey or opinion poll directed at a small number of people to find out how popular a particular candidate is. Another meaning refers to the actual physical locations where people can cast their ballots.

Primary: An election conducted to reduce a larger number of candidates to a smaller number or to pick one candidate who will be the candidate of a particular party. Presidential elections always involve partisan primaries, in which each party conducts primaries to select their candidate. But there can be nonpartisan primaries, as well, in some states if there are more than two candidates running for an office.

Recount: When the results of an election are very close, the ballots may sometimes be counted a second time.

Referendum (plural "referenda"): A popular vote on an issue or legal question, as opposed to a vote on a person running for an elected office. Whether referenda are allowed is a question of state law; there are no federal referenda. Referenda can

sometimes be non-binding (only advisory), sometimes binding. In some states, citizens can make new laws by voting directly on them through a referendum.

Runoff: Some states have a second or runoff election if a first election does not produce a winner with 50% or some other specified percent of the vote.

Write-in: Where a voter writes in the name of someone else on an official ballot rather than voting for one of the listed candidates. It is rare that a write-in candidate gets elected, but it happens sometimes. Senator Lisa Murkowski of Alaska is an example of someone who once ran a successful write-in campaign after she did not win the Republican Party's primary.

HH. **Elective offices in the United States.** The U.S. has a large number of elective offices. Although the names can be different from state to state, typically every village, town, and city has its own legislative body, called something like a village board of trustees, or town board, or, in cities, common council (whose members are usually called "aldermen"). Cities also usually have an elected mayor. Larger political areas are called counties and have a county legislature usually called a board of supervisors. Sometimes, counties have an elected county executive. Again, these names can be different from state to state. At the state level, most states have two legislative bodies – a State Assembly and a State Senate are the usual names – just as Congress has a Senate and a House of Representatives. The only state in the U.S. that just has one state legislative body is Nebraska. Its legislature is called the Unicameral. States also elect governors and lieutenant governors. Lieutenant governors are similar to the vice-president of the U.S. They take over if, for example, the governor dies, resigns, or is appointed to some other

job. In addition to all of these positions, however, the U.S. has many more elected offices. Public schools are run by elected school boards; county sheriffs are usually elected; and city and county clerks (people who keep government records) are also usually elected. Wisconsin, like many other states, has an elected state Treasurer and an elected Secretary of State with certain official duties. Federal elections choose a smaller number of political office holders: U.S. senators, who serve for six-year terms; U.S. representatives, who serve for two-year terms; and the President and Vice-President, who have four-year terms. Other than the President, who under the Constitution may only be elected to two four-year terms, many federal elected officials (senators and representatives) are reelected many times, often serving for decades in Congress.

> Discussion questions. What differences do you see between elective offices in the U.S. and elective offices in Japan? Are there as many elected offices at the local and prefecture levels in Japan as there are at the local (village, town, or city), county, and state levels in the U.S.?

Exercise: How well do you know Japanese politics?

Kahoot quiz. Identify the Japanese political party or parties that supported these policies in the 2021 Japanese general election.

Discussion: Where do you think U.S. political parties stand on the issues of importance in Japan? Or, in some cases, are they not important issues here – maybe because they are already settled in the U.S.?

- Legalize same-sex marriage.
- Couples should be able to adopt separate surnames.
- Universal free education.
- Higher minimum wage.
- Less government regulation.
- Support renewable energy.
- Wealth redistribution.
- Lower consumption taxes.
- Raise income taxes and capital gains taxes on the rich.
- Universal basic income.
- Opposition to corporate political donations.
- Increase spending on research in science and technology.
- Increase defense spending to more than 2% of GDP.

Tuesday.

II. **Campaign finance law.** Congress has imposed some limits on federal political campaign contributions for over 100 years. Currently, individuals are limited by federal law to donating $2900 per candidate for federal office, $5000 per year per political action committee (PAC), $10,000 per year per state, district, or local party, and $36,500 per year per national party. These are limits on direct donations – that is, money contributed directly to a candidate. Under *Buckley v. Valeo*, a 1976 Supreme Court decision, candidates themselves can spend unlimited amounts on their own campaigns, and individuals and

groups can spend unlimited amounts on independent efforts for or against a candidate. The basis for the Court's decision allowing this spending was the First Amendment.

In 2010, in *Citizens United v. FEC*, the Supreme Court held that it violates the First Amendment to limit indirect spending by corporations in favor of or against a political candidate.

> Discussion: What do you think? Should corporations be allowed to spend unlimited amounts of money supporting or opposing political candidates? A separate issue is disclosure: should corporations or others who spend money for or against a candidate be required somehow to disclose their spending? Is there a risk that politicians will be, essentially, for sale to the highest bidder? Or does freedom of speech mean that any individual, any group of individuals, or any corporation should be able to express its opinions about a candidate without any limit on how much they spend (or whether they have to disclose their spending)? What are the rules about campaign finance in Japan? Are there limits to how much people or corporations can contribute to a campaign? Or can spend on independent speech?

Wednesday

JJ. Foreign campaign contributions. Although current Supreme Court precedent provides very substantial protections for the First Amendment rights of U.S. citizens in connection with speech related to elections, federal law does not allow foreign citizens to donate to U.S. federal, state, or local political campaigns or parties, or even to make independent expenditures in favor of a candidate. In fact doing so can be criminally

prosecuted. The policy behind these laws is to protect U.S. elections from foreign influence.

Exercise: The trial of Jesse Benton. Based on the Washington Post story (posted on Canvas) about the criminal trial of Jesse Benton for covering up a political contribution to Donald Trump by Russian businessman Roman Vasilenko, prepare the testimony of (1) Jesse Benton; (2) Roman Vasilenko; and (3) a representative of the Republican National Committee. One of you will be Benton; two of you will be Benton's lawyers; one of you will be Vasilenko; one of you will be the RNC representative; and two of you will be the prosecutors in the case.

Thursday

KK. Guest speaker on voting and elections.

We will have a guest speaker (to be announced) on voting and elections.

Appendix L

Legal English and U.S. Legal Institutions

UWM Intensive English Program, Fall 2022

Midterm Assessment

Part I. Fill in the blank. (30 points)

Fill in the blank with the appropriate English word (3 points each):

1. The party that files a lawsuit is called the _____.
2. The party that gets sued is called the _____.
3. A civil lawsuit is started by filing a document called a _____.
4. In response, the party that is sued can file either an _____ or a motion to dismiss.
5. If the defendant thinks it has a claim against the plaintiff, it can file a _____.
6. In the U.S., trials can either be to a jury or to a judge sitting without a jury. A trial that is in front of a judge without a jury is called a _____ trial.
7. The party that loses at trial can start an appeal by filing a document called a _____ __ _____.
8. The party that appeals is called the _____.
9. If a party loses an appeal in a federal court of appeals, it can ask the U.S. Supreme Court to hear the case by filing a document called a petition for _____.
10. A party that asks the U.S. Supreme Court to hear a case is called the _____.

Part II. Multiple choice (30 points)

Circle the correct answer (3 points each):

11. Federal courts of appeals sit in panels of how many judges, usually?

a.) 2 b.) 3 c.) 5 d.) 7

12. The exception to this occurs when all of the judges of a federal court of appeals are sitting to hear a case, which is called a hearing

    a.) of full

    b.) de novo

    c.) en banc

    d.) en bank

13. In federal court, when a grand jury issues a criminal charge against a person, it issues a document called

    a.) an indictment

    b.) an arrangement

    c.) an information

    d.) no true bill

14. The first hearing in a criminal case, where the charges against the defendant are read and the defendant must enter a plea of either guilty or not guilty, is called the

    a.) first hearing

    b.) preliminary hearing

    c.) arraignment

    d.) indictment

15. In both civil and criminal jury trials, possible jurors can be questioned about their background and opinions that might be relevant to the case, to see if they have some sort of bias. This process is called

    a.) voir dire b.) dire voir c.) discovery d.) interrogatory

16. Out-of-court statements by someone who is not a witness on the stand are generally not admitted into evidence. Such statements are called

    a.) declamations

    b.) hearsay

    c.) protractions

    d.) subtrusions

17. The rules of evidence protect the confidentiality of communications between doctors and patients, lawyers and clients, and spouses. Such communications are subject to a _____ that protects them from having to be disclosed.

    a.) nondisclosure

    b.) privilege

    c.) noncommunication

    d.) executive

18. For the police to search a home, they generally need to have a _____ signed by a judge or other judicial officer.

    a.) search command b.) search and seizure c.) search order d.) search warrant

19. What kind of witness is usually the only kind of witness allowed to testify to opinions?

    a.) lay witness b.) police officer c.) expert witness d.) opinionated witness

20. An opinion written by a judge who joins the majority opinion but wants to express some additional thoughts is called

    a.) a concurrence b.) an additur c.) a dissent d.) a remand

Part III. Short answer (40 points)

21. Name five rights that are protected by the Bill of Rights to the U.S. Constitution, and name the Amendment that protects each right. (More than one right can be protected by the same Amendment.) (2 points per right, 2 points per correct Amendment)

    a.) _____ Amendment: _____]

    b.) _____Amendment: _____

    c.) _____Amendment: _____

    d.) _____ Amendmnet: _____

    e.) _____ Amendment: _____

Extra credit (1 point per right named, 1 point per correct Amendment):

Name up to three additional rights protected by the Bill of Rights, and the Amendment that protects each right. (Note: You get extra points for correct answers. No points will be taken off for incorrect answers.)

a.) _____ Amendment: _____

b.) _____ Amendment: _____

c.) _____ Amendment: _____

22. In *Loving v. Virginia* and *Obergefell v. Hodges*, the Supreme Court protected the right to marry, relying on two clauses found in the Fourteenth Amendment.

    a.) What kind of marriages did the Supreme Court protect in the *Loving* case? (5 points) _____

    b.) And what kind of marriages did it protect in *Obergefell*? (5 points)

_____

c.) Name the two clauses of the Fourteenth Amendment that the Supreme Court relied on in both *Loving* and *Obergefel.*. (10 points) _____

and _____

Extra credit. (Up to 10 points)

In Japan, a district court in Sapporo has ruled in favor of a right to a same-sex marriage, and a district court in Osaka has ruled against such a right. The issue is probably going to go to the Japanese Supreme Court. For up to 10 points in extra credit, describe the argument in favor of a right to same-sex marriage under the Japanese Constitution, and describe the argument against a right to same-sex marriage under the Japanese Constitution