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Orientation & Academic Success

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CHAPTER 1

Legal Method

Defining law is a difficult philosophical problem, but law can generally be understood as the rules and underlying policies for guiding or regulating behavior in society. Rules describe what behavior is permissible or impermissible, what procedures must be followed to achieve certain ends, and what happens to those who do not follow them. Legal rules are intended to provide a means of resolving disputes peaceably, predictably, and more or less efficiently. They define relationships among individuals and groups and help people arrange or conduct their business with greater security.

LEGAL RULES

Legal rules come about when the legislature enacts a statute, when a court resolves a dispute, when the President ratifies a treaty with another nation after the Senate has given its advice and consent, or when a government agency promulgates administrative regulations. Legal rules differ from other rules because their creation and enforcement require the participation of government. The police, courts, and other governmental bodies are responsible for ensuring compliance with these rules.

Rules vary considerably in their scope, clarity, and precision. Some rules are created one case at a time, particularly in the common law. Although they may apply to more situations than just the case at hand, they may be so narrowly tailored that they have little application beyond the particular case from which they arose. Some rules are phrased in broad or general language. Many federal constitutional rules, for example, prohibit persons from being denied "freedom of speech" or "equal protection of the laws." Much tort law turns on what is "reasonable" in particular cases. Rules with such broad terms offer attorneys and judges considerable freedom for interpretation. Other rules are much more specific. Statutes tend to be more detailed than constitutions, and administrative regulations tend to be even more detailed. An administrative regulation, for example, may require a person who uses explosives to be certified by the state after paying a $300 fee and passing a competency test. Such regulations offer less room for interpretation than rules defined by concepts like "freedom of speech." Common law rules, such as those involving property conveyancing, can also be quite specific.

This range reflects, at each extreme, contrasting approaches to the creation and application of law. In some situations, law is made on a case-by-case basis. This typically occurs in the common law, when a court fashions or applies a rule to the case before it. Other laws confront problems in groups. Statutes and administrative rules are often written in this manner. This approach is bolder, relies on the premise that problems can be understood in categorical terms, and makes law about particular situations in advance. Each approach works to solve certain problems, but neither approach works for all problems.

LAW AND POLICY

Policies are the specific underlying values or purposes for legal rules. Policies reflect varying and sometimes inconsistent views about what is socially good. Much property law survives from feudal times primarily because of the convenience of adhering to custom. A good deal of more recent lawmaking, on the other hand, is directed toward the achievement of specific political goals. Policies also vary greatly in abstractness, even for the same rules. A building code provision requiring a certain kind of fire extinguisher for apartment buildings will probably be premised on technical judgments concerning the safety or efficiency of certain products or materials. These technical judgments, in turn, will be premised on certain moral or value judgments about the degree of protection that ought to be afforded tenants of apartment buildings. Sometimes policies are articulated clearly, but frequently they are stated unclearly or not at all. Often, a single rule is buttressed by several policy considerations.

Because legal rules are based on social judgments, they tend to act as a shorthand way of deciding what is just in a specific factual situation. Instead of simply asking what is right, for example, a court will first apply the relevant legal rule. The Twenty-Sixth Amendment to the United States Constitution provides that a United States citizen who is 18 years of age or older cannot be denied the right to vote simply because of the person's age. The answer to the question, "Can Isaac vote in the national presidential election?" depends on whether Isaac is a United States citizen and is 18 years of age or older. There are good reasons for restricting the national voting privilege to United States citizens. But we all know of 10- and 12-year-olds who could vote more intelligently than some adults. Could we fairly select and include these children while excluding certain adults? Probably not. The age of 18 is simply a reasonable place to draw a line. Line drawing is one of the most important policy considerations in creating and applying legal rules.

Because legal rules are often created to achieve socially desirable goals, they are not etched in stone for eternity, nor do they necessarily reflect the "natural" order of things. Change in underlying values or policies will often be followed by change in the legal rules.

The evolution of the law regarding gender-based discrimination is illustrative. The Fourteenth Amendment to the United States Constitution, which went into effect in 1868, provides in part that no state shall "deprive any person of life, liberty, or property, without due process of law." In 1872, the Supreme Court of the United States decided that this provision of the Constitution did not prevent Illinois from refusing to license an otherwise qualified woman to

practice law in that state. The legislature had said, in effect, that only men could be lawyers. Justice Bradley, writing for himself and two other justices, commented:

> The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases. . . . I am not prepared to say that it is one of her fundamental rights and privileges to be admitted into every office and position, including those which require highly special qualifications and demanding special responsibilities.[1]

Although the Court's sex discrimination decisions leave open some important questions about equality, more than a century later, there can be little question that its outlook has undergone a marked change. It is difficult to imagine the Court drawing the same conclusion today as it did in 1872, particularly with the increasing number of women enrolled in law schools, practicing law, and judging cases. As Justice Brennan, referring to the Bradwell case, wrote in a 1974 opinion:

> There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of "romantic Paternalism" which, in practical effect, put women, not on a pedestal, but in a cage.[2]

This change in the Court's attitude, and ultimately in the law, came as a direct result of changing public views about the role of women. This is not to suggest that judicial (or even legislative) decisions are made only after a poll is taken; the point is rather that public attitudes and values influence the environment in which these decisions are made.

The law, in turn, is a source of social norms and expectations. What the law requires, permits, or prohibits often comes to be associated with what is good or right. Just as the Supreme Court's early decisions helped maintain or create patterns of sex discrimination, so its more recent opinions can be credited with helping to lessen it.

The conclusion that rules are created to carry out socially desirable goals has an important corollary; rules should never be applied to a factual situation without consideration of the consequences. This may seem like a paradox. If the rule is thoughtfully designed to achieve a particular goal, after all, then every application of that rule to a factual situation ought to further that goal; there should be no need to examine its fairness in each case. The practical difficulty with this proposition, however, is the impossibility of knowing in advance the full range of situations to which the rule might ultimately apply. As a result, the rule may not achieve the desired result in all cases. It is even possible for rules to achieve exactly the opposite of what was intended.

The old legal adage "hard cases make bad law" is rooted partly in the tremendous difficulty that lawyers and judges have when a rule is clearly applicable to a

1. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141-42 (1872) (Bradley, J., concurring).
2. Frontiero v. Richardson, 411 U.S. 677, 684 (1974) (footnote omitted).

factual situation in which it would work a manifestly unjust result. Sometimes the rule is flexible enough that the problem can be solved by interpretation. Sometimes the rule provides for exceptions. Sometimes it is more important to maintain the integrity of the category than it is to work justice in all cases. And sometimes it is necessary to change the law.

Other hard cases require a judge to reconcile competing policy considerations. At what point, for example, does a criminal defendant's right to a fair trial limit the public's right to full media reporting of that trial? To what extent can a person's right to run her own business as she sees fit be limited by society for the protection of her employees? You will constantly be probing the cases you read for the justness of their rules and policies.

Law practice and legal education tend to focus on hard cases. Easy cases do not necessarily require a lawyer at all. One does not need a law degree to know that a person who drives seventy miles per hour in a residential neighborhood is breaking the speeding law. Lawyers are most necessary when hard cases arise. Their training and experience help them solve problems that others cannot resolve.

Suppose, for example, the rule is that the named beneficiary in a will inherits the property of the deceased. The rule respects the wishes of the deceased and provides a way for the orderly distribution of the dead person's property. But what if the beneficiary murders the person who wrote the will to collect the inheritance? The rule contains no exceptions or room for interpretation. If it is applied as written, the beneficiary will collect the inheritance. Although the basic purposes of the rule would be served, applying the rule seems terribly wrong. A court's best alternative in this situation is to change the rule: A beneficiary may not inherit property from a person he has murdered.[3]

The importance of recognizing that value choices support legal rules, therefore, cannot be overstated. You will need to explain and weigh competing policies in your office memos. As an advocate, moreover, you will be writing briefs to explain why certain policies outweigh others, and you will have to understand and be responsive to the values of your audience to do so.

Value choices are also important for their moral implications. Obviously, your work as a lawyer will be important to your clients, but on a larger scale, your work will affect the way society operates. Lawyers have obligations to their clients, but they also have obligations to society. When these obligations are in tension with one another, the tension is not always easy to resolve. If you successfully help a company develop a shopping mall near a city, for instance, you will have a significant effect on local land use, transportation, and housing patterns. If you successfully represent a landowners' group seeking to block that development, you prevent those effects but cause others. Whichever side you represent, you will be arguing for the social good your clients ostensibly seek. "Justice" and "the social good" have many meanings, and you will develop and refine your own understanding of these concepts as you study law.

3. Riggs v. Palmer, 22 N.E. 188 (N.Y. 1889).

EXERCISES

The following exercises are intended to show you some of the difficult problems judges and legislators face. As you answer the questions in the exercises, ask yourself where your policy or value judgments come from, whether other judgments might be more appropriate, and what consequences your judgments would have.

Exercise 1-A

1. Assume you are a state legislator voting on the following bills. State whether you would vote for or against these bills and explain your decisions.
   a. A bill requiring persons who ride motorcycles to wear protective helmets.
   b. A bill requiring companies that produce food or beverages for public consumption to place warning labels on products known to contain cancer-causing agents.
   c. A bill requiring couples applying for a marriage license to undergo twelve hours of psychological counseling and testing before the license is granted so they can better determine whether marriage is appropriate for them.
   d. A bill prohibiting any person from smoking tobacco.
2. Are your decisions consistent with one another? Explain.
3. Do you think it is important that your decisions be consistent? Is it more important that judicial decisions be consistent? Explain.

Exercise 1-B

1. Assume you are a trial judge. Decide each of the following cases according to your idea of a just result and explain the reasons for your decision. Do not refer to any of the other cases in making your decision and do not invent additional facts.
   a. Dale Price was arrested and charged with armed robbery shortly after three men stole $20,000 from Crabtree National Bank. Two of the men escaped. Price objected to his prosecution on the ground that he should not be tried unless the other two were tried with him. Does Price have a valid defense? Explain.
   b. Jennifer Fong was arrested for driving sixty-four miles per hour in a fifty-five mile-per-hour zone. She objected to her prosecution because she had just been passed by two trucks and a car, all traveling five to ten miles per hour faster than she. Most of the other vehicles were traveling at the speed limit. Does Fong have a valid defense? Explain.
   c. Sally Hyde was arrested and charged with possession of marijuana at the annual "Hash Bash," an unofficial celebration of spring that drew 2,000 people. She objected to her prosecution because most of the other people there also possessed marijuana. There were no other arrests for drug possession, and the police said she was arrested at random "as an example to others." Does Hyde have a valid defense? Explain.

d. Denise Gilman was arrested for cohabitation with a male friend. She is an outspoken and militant critic of the Motor City police department's practice of random traffic stops in poor, primarily African-American, neighborhoods. The cohabitation law had not been enforced for years. She objected to her arrest on the ground that she was being unfairly singled out. Does Gilman have a valid defense? Explain.

2. Using your decisions and your stated reasons for those decisions in these four cases, frame a rule that will reconcile your conclusions. Remember that your statement of the rule should be clear and precise. Justify your rule.

SOURCES OF LAW

The United States has many sources of law because of our federal system. Power is divided between the federal government and the fifty states. The United States Constitution is the nation's charter and the source of authority for federal laws and the federal courts. The Constitution delineates the limits of federal power and reserves considerable authority to the states. Each state has authority over persons and activities within its boundaries. State governments, in turn, delegate some authority to local governments.

The federal government, state governments, and many local governments are divided into three branches. The legislative branch writes laws, the executive branch carries out those laws, and the courts interpret them. Thus, each of these governmental units may, within certain constraints, make law.

Understanding how laws arise and how they affect our activities requires an understanding of two key concepts: (1) the relationships among laws within a single jurisdiction and (2) the relationships among federal, state, and local governments in the system. This chapter describes these two concepts and briefly describes resources for legal research.

THE HIERARCHY OF LAWS

Four basic kinds of laws exist: constitutions, statutes or ordinances, administrative regulations, and judge-made law.[4] These sources form a hierarchy with constitutions at the top and judge-made laws at the bottom. Constitutions include the United States Constitution as well as state constitutions. Within a jurisdiction, the constitution is the highest authority; statutes, regulations, and common law must not conflict with the constitution.

Statutes create categorical rules to address particular problems. The Food, Drug, and Cosmetic Act, for example, was adopted by Congress to ensure the safety and healthfulness of the nation's food supply. A statute is controlling as to the subject it encompasses, unless the statute is unconstitutional.

The federal government and most states have many agencies with diverse responsibilities (e.g., labor, veterans' affairs, transportation, commerce, environmental protection). Administrative regulations are rules promulgated by

4. This summary is limited to the basic internal laws of the United States. International agreements and laws of other countries are not described here.

such agencies to help implement specific statutes. For example, the "laws" relating to declarations of nutritional information required on the packages of certain foods are largely administrative regulations promulgated by the Food and Drug Administration under the Food, Drug, and Cosmetic Act. Properly adopted administrative regulations have the same legal effect as statutes, so long as they are consistent with the Constitution and relevant statutes.

Judicial decisions often interpret or apply constitutions, statutes, or regulations. At other times, when such law is not applicable, they interpret or apply a body of judge-made law known as the *common law*. In either situation, law is made whenever a court decides a case. Once a constitutional provision, statute, or regulation has been construed by a court, that construction becomes law.

The charts below illustrate the order of authority within the federal government and within a state government:

United States
United States Constitution
Food, Drug, and Cosmetic Act, passed by Congress to ensure the safety and healthfulness of the nation's food supply
Administrative regulations promulgated to effectuate the Act, such as rules relating to the declaration of nutritional information required on the packages of certain foods
Judicial decisions construing the Act or the regulations

California
California Constitution
California Environmental Quality Act, passed by the California Legislature to protect and enhance the quality of the environment in the State of California
Administrative regulations promulgated to effectuate the Act, such as the rule that an environmental impact report must be filed before a construction project is approved
Judicial decisions construing the Act or the regulations

THE HIERARCHY OF JURISDICTIONS

The United States has fifty-three sovereign systems of law: federal law and the laws of each of the states and territories. Although these systems are parallel, they sometimes intersect. Federal law controls when they do. Article VI of the United States Constitution provides that the Constitution and federal laws made pursuant to the Constitution "shall be the supreme law of the land."[5]

5. This is commonly referred to as the "Supremacy Clause."

Therefore, a state may not act, through its legislature or its courts, in a way that is inconsistent with applicable provisions of the United States Constitution or with federal statutes and regulations. For example, the federal Voting Rights Act restricts or bars entirely devices used to discourage voting by racial and ethnic minorities, such as poll taxes, literacy tests, and voting and registration instructions written only in English. A state whose laws conflict with this Act must change its laws to conform to the federal statute.

Subdivisions of the state, including counties, townships, cities, boroughs, villages, or parishes, may also make laws. These laws, usually called "ordinances," must comply with the applicable provisions of the state and federal constitutions as well as state and federal statutes.

THE HIERARCHY AND JURISDICTION OF COURTS

The federal court system and most state court systems consist of three tiers: the trial courts, the middle-level court of appeals, and the court of last resort. Within each system, the jurisdiction of the courts, that is, the authority of courts to hear a case, is limited by geography and subject matter. In the federal system, the trial courts are known as *district courts* because the jurisdiction of each is limited to cases brought within its geographic district. A district might be an entire state (such as Maine) or a portion of a state (such as Texas, which currently has four federal judicial districts). The jurisdiction of the middle tier, the *federal appeals courts*, is also generally defined by geographic boundaries. The fifty states and the territories are currently divided into eleven judicial circuits, with the District of Columbia Circuit forming the twelfth and the Federal Circuit forming the thirteenth.

The eleven judicial circuits that are geographically limited include the following states and territories:

Circuit	States Included
1st Circuit:	Maine, Massachusetts, New Hampshire, Puerto Rico, Rhode Island
2nd Circuit:	Connecticut, New York, Vermont
3rd Circuit:	Delaware, New Jersey, Pennsylvania, Virgin Islands
4th Circuit:	Maryland, North Carolina, South Carolina, Virginia, West Virginia
5th Circuit:	Louisiana, Mississippi, Texas
6th Circuit:	Kentucky, Michigan, Ohio, Tennessee
7th Circuit:	Illinois, Indiana, Wisconsin
8th Circuit:	Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota
9th Circuit:	Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Northern Mariana Islands, Nevada, Oregon, Washington
10th Circuit:	Colorado, Kansas, Oklahoma, Utah, Wyoming
11th Circuit:	Alabama, Florida, Georgia

Each federal court of appeals has jurisdiction to hear appeals from districts within its circuit and may affirm or reverse district court decisions. The final level of appeal is to the United States Supreme Court, which may affirm or reverse federal court of appeals decisions as well as certain decisions by a state's highest court.

The chart below illustrates the hierarchy of courts within three jurisdictions:

Jurisdiction	Federal	Florida	Indiana
Highest Court	United States Supreme Court	Florida Supreme Court	Indiana Supreme Court
Middle Level Appeals Court	United States Court of Appeals for the First Circuit	Court of Appeals of Florida, Fifth District	Indiana Court of Appeals, Second District
Trial Court	United States District Court for the District of Massachusetts	Circuit Court for Seminole County	Marion County Superior Court

The power of a court to hear certain types of cases is known as *subject-matter jurisdiction*. The subject-matter jurisdiction of the federal courts is limited by the United States Constitution and Congress. Federal courts have no authority to hear cases that fall outside those limitations. As a general matter, the federal courts have subject-matter jurisdiction over (1) civil actions that arise under the Constitution, laws, or treaties of the United States (federal-question jurisdiction); (2) cases involving admiralty or maritime law; (3) civil cases in which the amount in controversy exceeds $75,000 if the plaintiff and defendant are citizens of different states (diversity jurisdiction); and (4) cases involving federal crimes. Congress has also created specialized civil courts, such as federal bankruptcy courts, whose jurisdiction is limited to a particular area of the law.

The jurisdiction of state courts is similarly defined by the state's constitution and legislature. A trial court's jurisdiction ordinarily is limited by geography (usually all or part of a county or municipality), subject matter, and the amount in controversy. The court system in a municipality or county may include criminal courts and civil courts of limited or general jurisdiction. The latter are often called "circuit courts," "superior courts," "district courts," or "county courts."

A state court may hear questions of federal law as well as state law. For example, a defendant who has been charged with violating a local ordinance and who believes the ordinance violates the right to assemble guaranteed by the United States Constitution may raise the constitutional claim in state court. Federal courts may also hear questions of state law, but they must apply the law of the state under whose laws the claim arose. If the law of the state is unclear, the federal court must either make an educated guess about what the highest court of that state would do if confronted with the question before it or, if state law permits, certify the question to the state's highest court.

Within each jurisdiction, the decision of the highest court is binding on the lower courts. A decision of the United States Supreme Court on a federal question would be binding on all courts that entertain the identical federal question. As explained more fully in this chapter (Precedent and *Stare Decisis*), when the question is one of state law, state courts are bound by their court of last resort, but they are free to accept or reject decisions by courts of other states and decisions by federal courts interpreting their state law. Judicial decisions outside the jurisdiction may be persuasive but are never binding.

SOURCE MATERIAL FOR RESEARCHING THE LAW

The sources of law described above—constitutions, legislation, regulations, and judicial decisions—are referred to as primary authority. They are "law," and the outcome of legal disputes turns on their applicability and interpretation.

Other resources, in which people write about the law or collect and offer general theories about selected rules of law, are known as *secondary authority*. Included in this category are treatises, restatements of the law, articles in law reviews and other legal periodicals, annotations, and legal encyclopedias. These resources may describe the law in a general way or suggest what the law should be, but they are not sources of law. Although secondary authority may assist in persuading a court that a given result is correct or better, it cannot mandate that result. Nevertheless, some secondary authority has greatly influenced the courts, and many courts have adopted various statements in secondary authority as the law of the jurisdiction. Once a court has adopted a rule proposed or stated in secondary authority, that rule becomes primary authority.

The following is a brief overview of the main sources in which primary and secondary authority are located.[6]

PRIMARY AUTHORITY

Federal statutes are published chronologically as they are enacted, first in pamphlet form called "slip laws" and then in a series of books called *United States Statutes at Large*. They are also published by subject matter in the *United States Code* (U.S.C.), the official version; in *United States Code Annotated* (U.S.C.A.), published by West Publishing Company; and in United States Code Service (U.S.C.S.), published by Lawyers Cooperative Publishing Company. The publication of state statutes follows a similar pattern. Recent enactments are first published in pamphlet form and then in books organized by subject matter. U.S.C.A., U.S.C.S., and most, if not all, state codes are annotated, which means that the compilations include the history of successive amendments to a code section, references to analogous statutes, references to secondary

6. Primary authority and some secondary authority are also published in electronic databases, such as LEXIS and Westlaw, in addition to the print sources described in this section.

authority and finding aids, and brief annotations or descriptions of cases construing a particular section.

Constitutions are published in the same manner as statutes. The United States Constitution is published in U.S.C., U.S.C.A., and in U.S.C.S., for example. State constitutions are also usually published in compilations of state statutes.

Administrative regulations are printed in the *Federal Register*, which is published five days per week by the United States Government Printing Office. The Federal Register also contains proposed regulations and various notices. Regulations are then published by subject matter in the *Code of Federal Regulations* (C.F.R.), the official source for United States government regulations. In many states, administrative regulations are published in a state version of the *Federal Register (e.g., Pennsylvania Bulletin) and then codified by subject matter (e.g., Pennsylvania Code).*

Judicial opinions are published in hardbound volumes, roughly in chronological order, with pamphlet supplements that contain opinions too recent to be published in hardbound. Decisions by the United States Supreme Court are published in *United States Reports* (U.S.), the official version; the *Supreme Court Reporter* (S. Ct.), published by West Publishing Company; and *United States Supreme Court Reports, Lawyers' Edition* (L. Ed.), published by Lawyers Cooperative Publishing Company. West publishes decisions by the federal appeals courts in *Federal Reporter* (F., F.2d, F.3d) and by the federal district courts in *Federal Supplement* (F. Supp., F. Supp. 2d). Not all federal district court and court of appeals decisions are published.

Most states publish their own court decisions. West also publishes state court decisions by region. It has divided the country into seven regions:

West Regions	States Included
Atlantic (A. and A.2d):	Connecticut, Delaware, Maine, Maryland, New Hampshire, New Jersey, Pennsylvania, Rhode Island, Vermont, the District of Columbia
Northeastern (N.E. and N.E.2d):	Illinois, Indiana, Massachusetts, New York, Ohio
Northwestern (N.W. and N.W.2d):	Iowa, Michigan, Minnesota, Nebraska, North Dakota, South Dakota, Wisconsin
Pacific (P., P.2d, and P.3d):	Alaska, Arizona, California, Colorado, Hawaii, Idaho, Kansas, Montana, Nevada, New Mexico, Oklahoma, Oregon, Utah, Washington, Wyoming
Southeastern (S.E. and S.E.2d):	Georgia, North Carolina, South Carolina, Virginia, West Virginia
Southwestern (S.W., S.W.2d, and S.W.3d):	Arkansas, Kentucky, Missouri, Tennessee, Texas
Southern (So. and So. 2d):	Alabama, Florida, Louisiana, Mississippi

Because of the efficiency of the West national reporter system, some states have discontinued the publication of official versions of their decisions. Their published decisions are available only in West's regional reporters.

SECONDARY AUTHORITY

This category includes encyclopedias, annotations, scholarly publications, and restatements.

Encyclopedias. Two encyclopedias, found in virtually every law library, attempt to cover the entire scope of Anglo-American jurisprudence—*American Jurisprudence, Second Series (Am. Jur. 2d), published by Lawyers Cooperative, and Corpus Juris Secundum* (C.J.S.), published by West. Some encyclopedias are devoted to the law of a particular state. If a state encyclopedia is published by one of the two national publishers, West or Lawyers Cooperative, topics are arranged to conform to the national encyclopedia. Like other encyclopedias, the topics in legal encyclopedias are arranged alphabetically with cross-references in the index.

Annotations. *American Law Reports* (A.L.R.) publishes selected cases along with annotations that survey the law within a discrete area suggested by a particular case. The cases are selected for their interest to the practicing lawyer. A selected case might represent, for example, a new development in the law or one approach to an issue on which the jurisdictions have split. An annotation on the issue you are researching will give you not only an overview of the law nationwide but also citations to the most useful cases in each jurisdiction.

Scholarly Publications. Scholars and practitioners publish books within their particular area of expertise. These are called "treatises" (multivolume sets) or "hornbooks" (single volumes). In addition, law reviews, law journals, and other legal periodicals throughout the country, most of them run by law students, publish numerous scholarly articles each year on current topics of interest to the legal community. These publications cover subjects in more depth than legal encyclopedias or A.L.R. annotations, and the research is usually comprehensive. They frequently propose solutions to particular legal problems.

Restatements of the Law. At the beginning of the twentieth century, a group of lawyers formed the American Law Institute. In 1932, the Institute initiated a series of publications consisting of black-letter rules that generally reflect the majority view on a given common law issue. For example, the American Law Institute has issued restatements of the law on the following subjects: Agency, Conflict of Laws, Contracts, Foreign Relations Law of the United States, Judgments, Property—Landlord and Tenant, Property—Donative Transfers, Torts, and Trusts. Each rule is followed by a Comment that further explains the rule or the reasons for its adoption and Illustrations that demonstrate how the rule applies in specific situations. In format, a Restatement resembles a code. It is divided into sections, with each section stating a separate rule.

Here is an example from the Restatement (Second) of Agency:

> **§ 14. Manifestations of Consent**
>
> An agency relationship exists only if there has been a manifestation by the principal to the agent that the agent may act on his account, and consent by the agent to act.

This code-like structure has led many law students to believe that a restatement is more authoritative than it actually is. Restatements are only secondary authority. They are written by authors who describe what the law is in some jurisdictions or what it ought to be, but who have no authority to make laws. Courts and legislatures, however, sometimes adopt a particular restatement provision. When that occurs, the restatement provision is the law of that jurisdiction.

This description of the origin of laws, the hierarchy of authority in our federal system, and the published sources of laws and commentary about the laws should enable you to put the resources you will find in a law library in the proper perspective.

PRECEDENT AND *STARE DECISIS*

Judges have considerable freedom to modify legal rules and principles in accordance with social norms and their views of justice and common sense. The concepts of precedent and *stare decisis* serve as important checks on this judicial freedom and ensure that the law develops in an orderly fashion.

One of the fundamental principles of our legal system is that courts look to previous decisions on similar questions for guidance in deciding present cases. Previous decisions on similar questions are known as precedent, and their usefulness is premised on the idea that an issue, once properly decided, should not be decided again. Reliance on precedent ensures that similar cases are decided according to the same basic principles and helps courts to process cases more efficiently. Durable rules also reinforce the social norms they define, encourage confidence in the legal system, and assist people in planning their activities.

The values that surround the notion of precedent are reinforced by the principle of *stare decisis*. Whereas precedent merely requires that courts look to previous decisions for guidance, *stare decisis* requires that a court follow its own decisions and the decisions of higher courts within the same jurisdiction. A state trial court, for example, must follow the decisions of appellate courts in that state; an intermediate appellate court must follow the decisions of the state's highest appellate court. Federal courts of appeal must follow those of the United States Supreme Court, but decisions of federal district courts or other federal courts of appeal do not bind them.

Precedent, then, can be of two types—binding or persuasive. When the doctrine of *stare decisis* applies, precedent is binding and a court must reconcile the result in a given case with past decisions. Only after explaining why previous cases are inapplicable may a court fashion new rules or modify or expand existing ones; a court may never simply ignore or contradict binding precedent. When the doctrine of *stare decisis* does not apply, as with decisions from other jurisdictions or lower courts in the same jurisdiction, courts are free to follow, or refuse to follow, previous decisions. Although not binding, such decisions may be *persuasive*. The reasoning of other courts often illuminates the issues and suggests solutions to a problem.

The concept of binding precedent may seem absolute. But in practice, *stare decisis* is a flexible concept. Because a judicial opinion may be interpreted in different ways, judges have significant latitude even when dealing with binding

precedent. Differing interpretations result from internal tension—on one hand, between the facts and holding of a case, and, on the other hand, its underlying reasons or policies. Viewed most narrowly, a case stands for a particular result regarding that set of facts. Courts often do confine cases to narrow factual categories, but such interpretations give the case relatively little importance. Viewed more broadly, a case stands for the articulated reasons or policies. Because the court was concerned primarily with the facts of the case before it, legal analysis travels on increasingly risky ground the further it ventures from those facts in trying to predict the outcome of future decisions. The best guides in venturing from those facts are the reasons and policies given in the opinion.

The various ways in which a case can be interpreted highlight the fundamental role that *stare decisis* plays in the process of legal analysis. In his well-known book, *The Bramble Bush*, Professor Karl Llewellyn defined this range of interpretation in terms of "strict" and "loose" views of precedent. The *strict* view, applied to "unwelcome" precedent, limits the reach of prior cases to show that they are not applicable to the case at hand. Strict construction of precedent requires careful distinguishing of the facts and policies of the prior case(s) from those of the present case. The *loose* view, applied to "welcome" precedent, maximizes the reach of these cases to show how they are applicable, or analogous, to the present case. As Llewellyn pointed out, both approaches are "respectable, traditionally sound, [and] dogmatically correct."[7]

The varying levels of case interpretation permit flexibility within the confines of *stare decisis*. This flexibility is necessary to the legal system because it allows the law to adapt to evolving conditions and to accommodate new factual situations.

Although there is much flexibility, the stabilizing effect of *stare decisis* should not be underestimated. When the rules are well defined and the factual situations are clearly similar or plainly different, *stare decisis* mechanically dictates the result. Even when the rule is ambiguous or the factual situation complex, *stare decisis* at least defines the starting point for analysis. This tension between restraint and freedom, between stability and change, embodies the essence of our common law system.

Determining the precedential value of rules or ideas in a court's opinion requires a close reading of the case. Statements made by a court that do not bear on the issues before it are known as *dicta* (from the Latin phrase *obiter dictum*, literally, "said in passing"). *Dicta* have little precedential value because a court is supposed to decide only the issues before it and *dicta*, by definition, are not part of the reasoning process that led to the decision. Courts sometimes rely on dicta nonetheless because dicta reflect other judges' concerns and often indicate how a court would rule in the future, given a particular set of facts.

Courts may also rely on the ideas and reasoning of concurring and dissenting judges. Appellate courts consist of a panel of judges who may not agree on how a dispute should be resolved or why a particular decision should be reached. If the court is divided, one of the judges in the majority will write the opinion of the court. Judges who disagree with the decision reached by the majority and refuse to join the court's opinion are said to *dissent*. Judges who agree with the decision but either disagree with the majority's reasons or would have reached the same decision on other grounds are said to *concur*. These judges frequently write separate opinions.

7. Karl Llewellyn, *The Bramble Bush* 66-69 (1930).

Unlike *dicta*, which may indicate how a court would rule in the future, a concurring or dissenting opinion indicates only that a judge disagreed strongly enough to write a separate opinion. Nevertheless, these opinions can be a valuable resource. Often, a dissenting or concurring opinion sharpens the focus of the debate. It may offer a different interpretation of precedent, emphasize social policies disregarded by the majority, or frame the legal question in a different way. A court that is considering a change in the law of its jurisdiction or facing an issue of first impression will read concurring and dissenting opinions on the issue in question with great interest. And dissenting opinions in an earlier case are sometimes adopted by a majority of the court in later cases.

The following two cases illustrate how precedent and *stare decisis* function. They concern the question whether a landlord should be held liable for negligently exposing tenants to foreseeable criminal activities. After deciding the first case, *Brainerd v. Harvey*, in 1982, the same state appellate court was presented with an opportunity four years later, in *Douglas v. Archer Professional Building, Inc.*, to expand the scope of the rule to cover a different factual situation.

Brainerd v. Harvey (1982)

The plaintiff is an elderly man who lived in a small building in a high crime area. The building had poor lighting on its front porch and a continuously unlocked outer door. As the plaintiff was about to enter the building one night, the outer door was jerked open by an unknown youth who had been hiding inside. The youth struck and robbed the plaintiff. The plaintiff brought suit against the landlord, but the trial judge granted the defendant's motion for a directed verdict of no cause of action.

We reverse. We have from time to time held that persons are liable for negligently exposing others to foreseeable criminal activities, and this is such a case. The inadequate lighting and locks were physical defects in a common area of the building under the landlord's control; this would be a far different case if the building had not contained such defects. The landlord's negligence in failing to repair them made it more likely than not that the plaintiff would be victimized by a criminal attack.

The trial court also erred in refusing to grant the plaintiff a jury trial. The plaintiff demanded a jury trial. He did not waive that right by waiting until the pretrial conference to make his demand. Remanded for a jury trial.

Douglas v. Archer Professional Building, Inc. (1986)

In 1978, a mental health clinic leased and began occupying an office on the fifth floor of the Archer Professional Building. About two years later, an outpatient at the center stabbed Carol Douglas, a physician with an office in the building, while both of them were riding in the building's elevator. Dr. Douglas brought suit against the owner of the building. At trial, the director of the clinic testified that the stabbing was the first such incident in his ten years of experience with such programs. There was also testimony that before the incident other tenants in the building had voiced concern over use of the elevators and stairwells by the clinic's patients. Dr. Douglas won a jury verdict for $115,000 in damages. We affirm.

We stated in *Brainerd v. Harvey* that landlords are liable for damages caused when they negligently expose others to foreseeable criminal

attacks in common areas of buildings they lease. In both this case and *Brainerd*, the attack occurred in an area of the building under the landlord's control and used by all tenants. Just as the landlord in *Brainerd* knew or should have known about the absence of adequate lighting and locks in the apartment building, the defendant here knew or should have known about the potentially dangerous condition in the professional building. When the landlord is informed by his tenants that such a condition exists, he has a duty to investigate and take any possible preventive measures. The jury could properly find that the landlord's failure to do so was negligence.

Fisher, J., dissenting. The court here imposes unwarranted and unreasonable burdens on landlords by vastly extending their potential liability. In *Brainerd v. Harvey*, we expressly limited the landlord's liability to his failure to detect and repair dangerous physical conditions in common areas of leased buildings. Unlike the front door, this professional building had no physical defect that enabled the assault to occur. In *Brainerd*, we also limited liability to foreseeable criminal attacks, rather than those based merely on the subjective fears of some tenants in the building. The majority opinion suggests a medieval fear of persons who receive mental health care and will impede the state's goal of returning mental patients to the community.

Although the majority and dissenting opinions reached opposite conclusions in the *Douglas* case, they both relied on *Brainerd* for the basic principles of decision. Both opinions acknowledged that landlords are liable when they negligently expose their tenants to foreseeable criminal attacks in common areas of buildings they lease. The principle of *stare decisis* requires that the court start from that position, rather than craft new and different rules.

The division of the court in *Douglas* illustrates the flexibility of *stare decisis*. The majority interpreted *Brainerd* broadly as "welcome" precedent. When the landlord is informed by his tenants of their subjective fears of a potentially dangerous condition in a common area of the building, the majority ruled, he has a duty to investigate the situation and take precautionary measures. The court departed from *Brainerd* by refusing to limit the landlord's liability to situations in which there was tangible evidence suggesting the possibility of a criminal attack. The court responded to the different factual situation presented in *Douglas* by pushing the law in a different direction, even as it reasoned that it was merely following the *Brainerd* decision.

The dissenting opinion interpreted *Brainerd* more narrowly as "unwelcome" precedent. *Brainerd*, it concluded, conditions the landlord's liability on the presence of physical defects in the building and objective evidence suggesting the possibility of a criminal attack, neither of which were present in *Douglas*. To support its narrow reading of *Brainerd*, the dissent also raised an objection about the effect of the court's decision on landlords in general and outpatient mental clinics in particular. The dissenting opinion is buttressed by dicta from *Brainerd* that states the case would be different if the building did not have physical defects. The statement is *dicta* because it was not necessary to the resolution of the *Brainerd* case and was thus disregarded by the majority in *Douglas*.

These two cases illustrate the tension between change and stability that is central to the study and practice of law. Certain factors militate in favor of stability. The *Brainerd* decision altered business expectations and forced landlords to

modify their practices to avoid liability. In addition, because the corporate owner was found liable in the second case, it paid damages pursuant to a rule that was not articulated until the owner was found to have breached it. After *Douglas*, landlords for other office buildings no doubt made significant changes in their leasing procedures and plans. Uncertainties would be magnified by any perception that the law was subject to further modification.

Other factors counseled for change. The injury to Carol Douglas underscored the majority's view that landlords should keep their common areas free of foreseeable criminal activity. Even if the risk seemed most apparent after the harm occurred, the court concluded that a subjectively perceived risk of great bodily harm should be sufficient to warrant extra protective measures by the landlord. In addition, even though the defendant is liable under a new formulation of the rule, such liability is the only realistic incentive for encouraging a plaintiff to seek relief in court. *Douglas* was based on an evolving view of the landlord-tenant relationship. Although the arguments vary somewhat from case to case, the tension between change and stability remains.

Two additional considerations are necessary for a full understanding of the mechanics and policies of precedent and *stare decisis*. First, appellate courts are supposed to decide only as many issues as are necessary for the disposition of a case. As Chapter 3 (Case Analysis and Case Briefs) [John C. Dernbach, et al. A Practical Guide to Legal Writing and Legal Method, 4th ed. (2010)] points out, sometimes this requires courts to decide multiple issues. Each holding on an issue—regardless of the number of holdings—is precedent for later decisions. The court's holding in *Brainerd* concerning the plaintiff's demand for a jury trial, as well as its holding on the negligence issue, are both precedent and will have to be considered by future courts rendering decisions on the same issues.

Second, trial courts are responsible for finding facts and applying the law, while appellate courts have greater authority to modify and expand the law. Appellate courts therefore have greater freedom in treating precedent than trial courts. Appellate courts sometimes find it impossible to use previous cases and still reconcile their decisions with their own values or social norms. When this happens, the court may simply overrule the previous cases and chart a new course rather than show how these cases may be distinguished. Courts usually justify overruling previous decisions by pointing to the outdated principles or poor reasoning that supported them. These decisions are often spectacular, as when the United States Supreme Court, in the 1954 case of *Brown v. Board of Education*,[8] held that a state could not constitutionally require racial segregation in public schools, overruling its 1896 *Plessy v. Ferguson*[9] decision permitting "separate but equal" accommodations. Cases may also be more subtly overruled; a series of decisions, for example, may chip away at the scope of an earlier rule or undercut its policy basis.

8. 347 U.S. 483 (1954).
9. 163 U.S. 537 (1896).

CHAPTER 2

Case Briefing & Legal Analysis

A. WHAT'S IN A JUDICIAL OPINION

When law teachers refer to ''a case,'' they mean a judicial opinion through which a court makes a decision. A judicial opinion can include up to ten ingredients:

1. the case name and citation
2. the factual story (what happened *before* the lawsuit began)
3. the procedural story (what happened *during* the lawsuit)
4. the issue or issues to be decided by the court
5. the arguments made by each side
6. the court's holding on each issue
7. the rule or rules of law the court enforces through each holding
8. the court's reasoning
9. dicta
10. the remedy the court granted or denied

Most opinions don't include *all* these things, although a typical opinion probably has most of them.

When you first look at an opinion, it can seem mysterious. Reading the opinion is a lot easier if you label each passage as one or another of these ingredients. That breaks the opinion down into smaller chunks so that you can more easily understand its parts. It also helps you see how the parts are related to each other and produce the court's decision.

The *case name* is made up of the names of the plaintiff and defendant separated by ''v.'' (That's how lawyers abbreviate ''versus.'') The *citation* is the volume, publication, and page where opinion can be found, together with the date.

Opinions often begin with the *factual story*. What did the parties and other people do before the lawsuit began? The court can know this story from what the parties allege in their pleadings or from what the witnesses testify to or what other evidence shows. For that reason, sometimes it's hard to separate this part of the opinion from the next part (the procedural story).

Often the court will next describe the *procedural story*, which lawyers and teachers more often call the *procedural history*. What did the lawyers and judges do? Examples are motions, trial, judgment, and appeal. Although a court might

ascribe a procedural action to a party (''The defendant moved to dismiss . . .''), that's really a lawyer's work. As you will learn later in this book, and in your course in Civil Procedure, the manner in which an issue is raised determines the method a court will use to decide it.

A court might also set out—or at least imply—the *issue or issues* to be decided and *the arguments* made by each side. A court will further state, or at least imply, the *holding* on each of the issues and the *rule or rules of law* the court enforces in making each holding, together with the *reasoning*—often called the *rationale*—for its decision. The reasoning often discusses or hints at the *policy* behind the rules the court enforces. A rule's policy is its purpose, what the law tries to accomplish generally through the rule. Somewhere in the opinion, the court might place some *dicta*, which is discussion unnecessary to support a holding and therefore not part of binding precedent.

An opinion usually ends with *the relief granted or denied*. If the opinion is the decision of an appellate court, the relief may be an affirmance or a reversal of the lower court's decision. If the opinion is from a trial court, the relief is most commonly the granting or denial of a motion.

In an appellate court, several judges will decide together. An appellate court's decision is announced in *the court's opinion* or *the majority opinion*. If one of the judges does not agree with some aspect of the decision, that judge may write a *concurrence* or *dissent*. A dissenting judge thinks the court reached the wrong result. A concurring judge agrees with the result the majority reached but would have used different reasoning to get there. Concurrences and dissents are not binding precedent. Only the court's opinion has that authority.

B. WHY READING IN LAW SCHOOL IS DIFFERENT—AND WHAT TO DO ABOUT IT

In college, most assigned reading is in textbooks. Textbook authors try to write in a way that communicates efficiently to their audience, which is primarily students.

Law school is different. Law students read mostly judicial opinions and statutes. A judge writing a judicial opinion does not wonder, ''How should I write this so that any first-year law student can understand it?'' A judge instead writes for an audience of lawyers and judges—who quickly understand wording and concepts that may baffle students.

Several studies have shown that an important part of success in the first year of law school is learning to read the way that experienced lawyers do.[1] Experienced lawyers don't move from sentence to sentence waiting for meaning to appear. Instead, they read *aggressively*, dissecting the opinion as they go through it.

You can start to develop this skill by carving up judicial opinions, looking for the ingredients listed at the beginning of this chapter and marking each ingredient with handwritten notes in the margin. Experienced lawyers identify the

1. See Ruth Ann McKinney's book, *Reading Like a Lawyer: Time-Saving Strategies for Reading Law Like an Expert* (2005), as well as the following law review articles: Leah M. Christensen, *Legal Reading and Success in Law School: An Empirical Study*, 30 Seattle U. L. Rev. 603 (2007); Laurel Currie Oates, *Beating the Odds: Reading Strategies of Law Students Admitted through Alternative Admissions Programs*, 83 Iowa L. Rev. 139 (1997).

ingredients quickly and almost unconsciously. Because of their experience, they no longer need to write notes in the margin, but they instantly recognize, for example, the end of the factual story and the beginning of the procedural story. They also interpret to find meaning at every step along the way, asking themselves questions like, ''Now that I know the factual story, what does that tell me about what's going on here?''

Learning how to read like a professional takes time. Most law students are challenged by this task at the beginning, but within a few months they will begin to become more efficient. You will see much more meaning in what you read and take less time to read it. But it will take time and work to get there.

***Exercise. Dissecting the Text of* Conti v. ASPCA**

Read *Conti v. ASPCA* below and determine where (if anywhere) each of these ingredients occur. Mark up the text generously so you can discuss your analysis in class. Look up in a legal dictionary every unfamiliar word as well as every familiar word that is used in an unfamiliar way.

CONTI v. ASPCA

77 Misc. 2d 61, 353 N.Y.S.2d 288
(Civ. Ct., Queens Co. 1974)

Rodell, J.

Chester is a parrot. He is fourteen inches tall, with a green coat, yellow head and an orange streak on his wings. Red splashes cover his left shoulder. Chester is a show parrot, used by the defendant ASPCA in various educational exhibitions presented to groups of children.

On June 28, 1973, during an exhibition in Kings Point, New York, Chester flew the coop and found refuge in the tallest tree he could find. For seven hours the defendant sought to retrieve Chester. Ladders proved to be too short. Offers of food were steadfastly ignored. With the approach of darkness, search efforts were discontinued. A return to the area on the next morning revealed that Chester was gone.

On July 5, 1973 the plaintiff, who resides in Belle Harbor, Queens County, had occasion to see a green-hued parrot with a yellow head and red splashes seated in his backyard. His offer of food was eagerly accepted by the bird. This was repeated on three occasions each day for a period of two weeks. This display of human kindness was rewarded by the parrot's finally entering the plaintiff's home, where he was placed in a cage.

The next day, the plaintiff phoned the defendant ASPCA and requested advice as to the care of a parrot he had found. Thereupon the defendant sent two representatives to the plaintiff's home. Upon examination, they claimed that it was the missing parrot, Chester, and removed it from the plaintiff's home.

Upon refusal of the defendant ASPCA to return the bird, the plaintiff now brings this action in replevin.

[I]f [the parrot] is in fact Chester, who is entitled to its ownership?

The plaintiff presented witnesses who testified that a parrot similar to the one in question was seen in the neighborhood prior to July 5, 1973. He further contended that a parrot could not fly the distance between Kings Point and

Belle Harbor in so short a period of time, and therefore the bird in question was not in fact Chester.

The representatives of the defendant ASPCA were categorical in their testimony that the parrot was indeed Chester, that he was unique because of his size, color and habits. They claimed that Chester said ''hello'' and could dangle by his legs. During the entire trial the court had the parrot under close scrutiny, but at no time did it exhibit any of these characteristics. The court called upon the parrot to indicate by name or other mannerism an affinity to either of the claimed owners. Alas, the parrot stood mute.

Upon all the credible evidence the court does find as a fact that the parrot in question is indeed Chester and is the same parrot which escaped from the possession of the ASPCA on June 28, 1973.

The court must now deal with the plaintiff's position, that the ownership of the defendant was a qualified one and upon the parrot's escape, ownership passed to the first individual who captured it and placed it under his control.

The law is well settled that the true owner of lost property is entitled to the return thereof as against any person finding same.

This general rule is not applicable when the property lost is an animal. In such cases the court must inquire as to whether the animal was domesticated or ferae naturae (wild).

Where an animal is wild, its owner can only acquire a qualified right of property which is wholly lost when it escapes from its captor with no intention of returning.

Thus in *Mullett v. Bradley* (24 Misc. 695) an untrained and undomesticated sea lion escaped after being shipped from the west to the east coast. The sea lion escaped and was again captured in a fish pond off the New Jersey coast. The original owner sued the finder for its return. The court held that the sea lion was a wild animal (ferae naturae), and when it returned to its wild state, the original owner's property rights were extinguished.

In *Amory v. Flyn* (10 Johns. 102) plaintiff sought to recover geese of the wild variety which had strayed from the owner. In granting judgment to the plaintiff, the court pointed out that the geese had been tamed by the plaintiff and therefore were unable to regain their natural liberty. . . .

The court finds that Chester was a domesticated animal, subject to training and discipline. Thus the rule of ferae naturae does not prevail and the defendant as true owner is entitled to regain possession.

The court wishes to commend the plaintiff for his acts of kindness and compassion to the parrot during the period that it was lost and was gratified to receive the defendant's assurance that the first parrot available would be offered to the plaintiff for adoption.

Judgment for defendant dismissing the complaint without costs.

C. HOW TO IDENTIFY ISSUES, RULES, AND DETERMINATIVE FACTS

Many facts are mentioned in an opinion just to provide background, continuity, or what journalists call ''human interest.'' Of the remaining facts, some are

related to the court's thinking but are not crucial. Still others *caused* the court to come to its decision.

This last group could be called the *determinative facts* or the *essential facts*. They're essential to the court's decision because they determined the outcome: if they had been different, the decision would have been different. The determinative facts lead to the rule of the case—the rule of law for which the case stands as precedent—and discovering that rule is the most important goal of reading cases. Of course, when several issues are raised together in a case, the court must make several rulings and an opinion may thus stand for several different rules.

The determinative facts can be identified by asking the following question: *If a particular fact had not happened, or if it had happened differently, would the court have made a different decision?* If so, it's one of the determinative facts. This can be illustrated through an example of a decision that has nothing to do with law.

Suppose you're trying to find a place where you can live while attending school. A rental agent has just shown you an apartment. The following are also true:

A. The apartment is located half a mile from the law school.
B. It is a studio apartment (one room plus a kitchenette and bathroom).
C. The building appears to be well maintained and safe.
D. The apartment is at the corner of the building, and windows on two sides provide ample light and ventilation.
E. It is on the third floor, away from the street, and the neighbors do not appear to be disagreeable.
F. The rent is $500 per month, furnished.
G. You have a widowed aunt, with whom you get along well and who lives alone in a house 45 minutes by bus from the law school, and she has offered to let you use the second floor of her house during the school year. The house and neighborhood are safe and quiet, and the living arrangements would be satisfactory to you.
H. You have taken out substantial loans to go to law school.
I. You neither own nor have access to a car.
J. Reliable local people have told you that you're not likely to find an apartment that is better, cheaper, or more convenient than the one you have just inspected.

Which facts are *essential* to your decision? For example, if the apartment had been two miles from the law school (rather than a half-mile), would your decision have been different? If the answer is no, fact *A* could not be determinative. It might be part of the factual mosaic and might explain why you looked at the apartment in the first place, but you would not base your decision on it.

The determinative facts, the issue, the holding, and the rule all depend on each other. In the apartment hypothetical, for example, if the issue were different—say, ''How should I respond to an offer to join the American Automobile Association?''—the selection of determinative facts would also change. (In fact, the only determinative one would be fact *I*: ''You neither own nor have access to a car.'') You will often find yourself using what the court tells you about the issue or the holding to fill in what the court has not told you about the determinative facts, and vice versa.

Often, courts do not explicitly state the issue, the holding, or the rule for which the case stands as precedent, and courts do not usually label the determinative facts as such. Whenever a court gives less than a full explanation, we have to use what's explicitly stated to pin down what's only implied.

If the court states the issue but doesn't identify the rule or specify which facts are determinative, you might discover the rule and the determinative facts by answering the following questions:

Who is suing whom over what series of events and to get what relief?
What issue does the court say it intends to decide?
How does the court decide that issue?
On what facts does the court rely in making that decision?
What rule does the court enforce?

Facts from a case can often be reformulated to be more general than the court described them. In the hypothetical above, for example, a generalized reformulation of fact *G* might be the following: ''You have a rent-free alternative to the apartment, but the alternative would require 45 minutes of travel each way plus the expense of public transportation.'' Why would you generalize the facts in this way? The generalized version of the facts can supply a guide to deciding later cases where the factual details are not identical. For example, suppose a later case involves a person who is a member of the clergy in a religious organization that has granted a leave of absence to attend law school and who may continue to live rent-free in the satisfactory quarters the religious organization has provided, but getting to the law school would require walking for 15 minutes and then riding a subway for 30 minutes, at the same cost as a bus ride. Isn't this really the same situation, but with different details? The generalized reformulation covers both sets of facts.

D. FORMULATING A NARROW, MIDDLING, OR BROAD RULE

When a court does not state a rule of the case, you might be able to formulate the rule by converting the determinative facts into elements of a rule. Often, you can interpret the determinative facts narrowly (specifically) or broadly (generically). Notice how different formulations of a rule can be extracted from the apartment example. If the student decides to stay with the aunt, a narrow rule formulation might be the following:

> A law student who has a choice between renting an apartment and living in the second floor of an aunt's house should choose the latter when the student has had to borrow money to go to law school and when the apartment's rent is $500 per month but the aunt's second floor is free except for bus fares.

Because this formulation is limited to the specific facts given in the hypothetical, it could directly govern only a tiny number of future decision-makers. But it could be stated more broadly to govern a wider range of situations:

> A student on a tight budget should not pay rent when a nearly free alternative is available.

An even more general formulation would govern an even wider circle of applications:

> A person with limited funds should not lease property when there is a satisfactory and nearly free alternative.

The following, however, is so broad as to be meaningless:

> A person should not spend money unnecessarily.

E. POLICY AND WHY COURTS CARE ABOUT IT

In the Bookstore

(Time: August. Place: the campus bookstore. Student walks up to a counter, behind which stands a store clerk.)

Student: I'd like to return these books.
Clerk: Do you have a receipt?
Student: No.
Clerk [points to sign]: The rule is *[reading sign aloud]* ''No returns without a receipt.''
Student [frustrated]: But I just bought them.
Clerk [looks at sign]: It doesn't say, ''except when you just bought them.''
Student: But I just bought them.
Clerk: Maybe I should rephrase the rule: ''If you have a receipt, you may return the books.'' You don't have a receipt, so you may not return the books. Sorry.
Student: Look, I bought them half an hour ago. When I got back to my dorm room, there was an email message from the registrar saying they switched me into a different section, where the teachers are different, and those teachers assigned different books. I don't have any choice in this. I'm a first-year law student, and all the courses are required. They assign me to a section. I need completely different books for five courses.
Clerk [in a snide tone]: Did your dog eat your receipt?
Student: No. I just can't find it. Don't you ever lose things?
Clerk: Not within a half hour. A rule's a rule. Sorry.
Student: But every rule has a purpose. What's the purpose of this rule?
Clerk: To protect the store from people who bring in books they found or stole or bought more cheaply elsewhere. A rule's a rule.
Student: But a rule should be applied in a way that's consistent with the rule's purpose. I can prove that I didn't find or steal them or buy them more cheaply elsewhere. I bought them half an hour ago from that clerk over there.
Second Clerk [looks up]: I did ring up a sale to you. I don't remember what books you bought. I just scan the bar codes. Bring them over here and let's see if my register recorded the book titles.

(The two clerks compare the books to the register's record and explain to a supervisor who has wandered over.)

Supervisor [to student]: We'll take all these books back and give you credit toward the books you need to buy now. The only reason we can do this is because we're confident that in these circumstances you actually did buy these books from us. Don't assume in the future that you can return things without a receipt.

F. WHAT IS POLICY?

Notice the *method* through which the student wins this argument. The student showed store employees that the purpose of the rule could be accomplished without enforcing the rule in the most obvious way. Instead, the store enforced the rule in a novel way—by treating the second clerk's memory and the store's internal records together as the equivalent of a receipt. If the student had not been able to persuade store employees to interpret their rule in light of its purpose, the student would have lost the argument.

Every rule of law, whether found in a statute or a case, has a purpose—a reason for being. That purpose is called the rule's *policy* or the *policy behind the rule*. Some policies are obvious. Why is it illegal to drive while intoxicated? You probably already know the answer.

Other policies are more complicated, and understanding them requires some special knowledge. Why is your internet service provider (ISP) not liable if you send email messages to a million people accusing Britney Spears of stealing another singer's style. (She did *not* do that.) An ISP provides access to the internet. Every email message is sent through the sender's ISP and received through the recipient's ISP. And every website is accessible through the website owner's ISP. For several reasons, Congress enacted a statute exempting ISP's from liability for publishing defamatory material. If every ISP had to read and screen every email message that a website transmitted or made accessible through its equipment, the internet would suddenly become very slow and very expensive to use. And ISP's often wouldn't be able to tell what is defamatory and what is not.

Policy also exists in a wider sense—not tied to one specific rule. A broad policy might lead the law to adopt many separate rules. For example, courts everywhere like solutions that are easily enforceable, promote clarity in the law, are not needlessly complex, and do not allow true wrongdoers to profit from illegal acts. Other policy considerations may differ from state to state. In many Sunbelt states, for example, public policy favors development of land by building homes and businesses, while in states like Vermont policy prefers preservation of the environment and agriculture. Some states favor providing tort remedies even if that slows down courts because of additional lawsuits, although in others the reverse is true.

G. WHY COURTS CARE ABOUT POLICY

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon

which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

—Justice Oliver Wendell Holmes

Law is not just rules. It is rules *plus* their policies. To understand a rule, it's not enough to know its elements, results, and exceptions. You also need to know what the law is trying to accomplish through the rule.

Wherever there's doubt about what a rule means or how it should be applied, the rule's purpose provides one solution to the problem. If you're not sure what a rule means, choose the meaning that is most consistent with its purpose. If you're not sure how to apply the rule, apply it in whatever way is most consistent with its purpose. If you know the rule but not its purpose, you don't really know what to do with the rule. And if rules did not have policies, they could be arbitrary and might cause more harm than good.

Policy is also important in a different context. When the law does not yet have a rule on a given subject and courts or legislators have to decide what rule to adopt, they consider the policies the law already has for other rules and those the law should have, and they try to choose a rule that is consistent with and achieves those policies. Policy thus is valuable not only in the interpretation and enforcement of existing rules but also in the adoption of new rules.

Policy as an extra layer of analysis might seem like a burden. ''Why can't we just have rules and stop there,'' you might ask. We can't stop there because lawyers and judges will always have questions about what a rule means and how to apply it, and we have to know a rule's policy to resolve those questions. And you can understand and write about law more easily and more effectively—in this course and on exams in other courses—if you frequently ask yourself questions like, ''What is the law trying to accomplish through this rule?'' and ''Why does this rule exist?''

H. HOW TO RECOGNIZE POLICY IN A JUDICIAL OPINION

A rule itself doesn't tell you its policy. You have to look in the judicial decisions and statutes that are the sources of most law, or in commentaries on the law, such as law review articles. Sometimes, courts openly say something like, ''The policy behind this rule is. . . .'' But more often a court will discuss policy without calling it policy—for example, by explaining what would happen if the rule didn't exist. The rule's purpose is to prevent that from happening. It may be confusing for courts to talk about policy without calling it policy. But with some practice, you'll be able to spot a policy discussion in a judicial decision—and write about it in this course.

In the case below, the court uses policy to decide whether to adopt a new rule.

ASH v. NEW YORK UNIVERSITY DENTAL CENTER

164 A.D.2d 366, 564 N.Y.S.2d 308 (1st Dep't 1990)

Ellerin, J.

The issue before us in this dental malpractice action is the validity of an agreement that plaintiff Arthur Ash was required to sign as a precondition to

obtaining treatment at defendant New York University Dental Center which prospectively exculpated the various defendants from any liability for negligence in treating plaintiff.

Plaintiff seeks to recover for injuries suffered as a result of his aspiration, during dental treatment, of two dental crowns, which became lodged in his right lung and required surgical removal. Plaintiff [needed] substantial dental work which would cost over $6,000[, and he therefore sought treatment at the clinic associated at the defendant's dentistry school], where the work could be done [by dentistry students under supervision] for $3,000. . . .

When plaintiff arrived at the clinic . . . , he was required to sign a form containing the following provision: ''In consideration of the reduced rates given to me by New York University, and in recognition of the risks inherent in a clinical program involving treatment by students, I hereby release and agree to save harmless New York University, its trustees, doctors, employees and students from any and all liability, including liability for its and their negligence, arising out of or in connection with any personal injuries (including death) or other damages of any kind which I may sustain while on its premises or as a result of any treatment at its Dental Center or infirmaries.''

[P]laintiff testified that he believed the signing of this form was an insignificant registration procedure and he was never told, nor did he imagine, that he was relinquishing any of his legal rights. . . .

. . . There is no decision of the Court of Appeals [the state's highest court] that expressly deals with this precise issue. . . .

It is clear that the State's substantial interest in protecting the welfare of all of its citizens, irrespective of economic status, extends to ensuring that they be provided with health care in a safe and professional manner. Toward that end, the State carefully regulates the licensing of physicians and other health care professionals and monitors such activities to prevent untoward consequences to the public from ''the ministrations of incompetent, incapable, ignorant persons''. A similar concern for the enforcement of established minimum standards of professional care provides the underlying rationale for a cause of action for malpractice in favor of those who have been subjected to substandard care. Unquestionably public clinics such as defendant, which are used primarily by those who are unable to pay the rapidly escalating fees for private medical and dental care, play an important role in delivery of such care to those who may not otherwise be able to obtain it. However, important as this role is, it cannot serve as a basis for excusing such providers from complying with those minimum professional standards of care which the State has seen fit to establish. It is the very importance of such clinics to the people who use them that would create an invidious result if the exculpatory clause in issue were upheld—i.e., a de facto system in which the medical services received by the less affluent are permitted to be governed by lesser minimal standards of care and skill than that received by other segments of society.

There is, of course, no public policy against allowing patients of such clinics to agree to fewer amenities, longer waits or greater inconvenience in exchange for lower prices than they would pay elsewhere. Nor is there any public policy against such a clinic limiting itself to certain types of care or refusing to perform certain procedures. There cannot, however, be any justification for a policy which sanctions an agreement which negates the minimal standards of professional care which have been carefully forged by State regulations and imposed by law. . . .

The fact that defendant New York University Dental Center is a clinical program associated with an educational institution does not alter this conclusion. Defendant, of course, has a substantial interest in providing its students with clinical experience as part of their education. However, this interest cannot negate the State's overriding concern in seeing that defendants fulfill their equally important obligation to their patients. That obligation includes ensuring that students are sufficiently prepared and supervised so that the treatment which is provided to human patients is at least at the minimally acceptable reasonable level of skill and care. If defendants cannot fulfill this obligation, they must not hold themselves out as being providers of dental care. . . .

Other jurisdictions which have addressed attempts by health care professionals to relieve themselves of liability, particularly to those who stand in a disadvantageous bargaining position, have arrived at a conclusion similar to the one we have reached.

[For example, i]n *Emory Univ. v Porubiansky* . . . the Supreme Court of Georgia refused to enforce a very similar contract in a setting identical to the one herein, stating: ''A contract between a medical practitioner and patient must be examined in light of the strong policy of the state to protect the health of its citizens and to regulate those professionals that it licenses. . . .''

This court is able to create new law only because existing law had a gap in it. How do we know there's a gap? The fifth paragraph tells us: ''There is no decision of the Court of Appeals [the state's highest court] that expressly deals with this precise issue.'' The court uses policy as a guide in filling that gap.

I. SELECTING THE MOST APPROPRIATE CASES, STATUTES, AND OTHER AUTHORITY

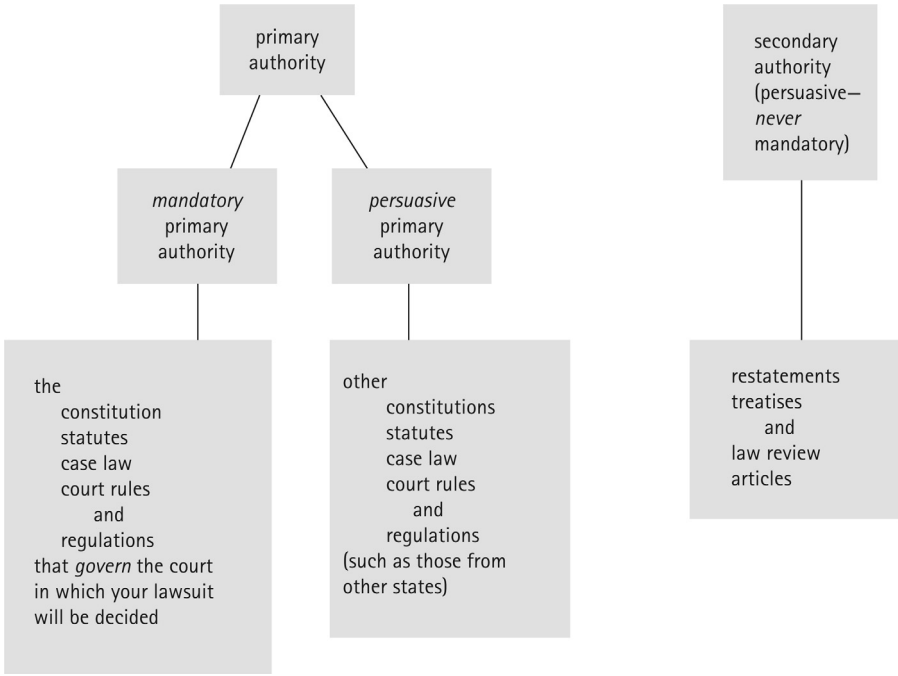
This chapter explains how to select the best available authority. The next two chapters explain how to use the two most important kinds of authority: cases (Chapter 10) and statutes (Chapter 11) [Richard K. Neumann, Jr. and Sheila Simon. Legal Writing. 2nd ed. (2011)]. In reading this chapter, remember that the federal government and each state have separate bodies of law, which in most respects are independent of each other.

J. THE HIERARCHY OF AUTHORITY

Primary authority is a *source* of law. It creates or determines law, and its words are the words of the law. The most often used primary authorities are cases and statutes. Others are constitutions, court rules, and regulations promulgated by administrative agencies. Primary authority is produced by a legislature, a court, or some other governmental entity with the power to make or determine law.

Secondary authority is *commentary about* the law. It explains the law but does not create it. Examples are treatises and law review articles written by legal scholars. Secondary authority is only a description of what a private person or a private group believes the law to be. The author of secondary authority may know a lot about the law but lacks the power to create law.

Courts use a complicated set of preferences—called the *hierarchy of authority*—to determine which authority they will follow. You can follow the hierarchy of authority more easily if you visualize it this way:



1. *Primary Authority*

Primary authority is subdivided into mandatory authority and persuasive primary authority.

Mandatory authority—which *must* be followed—includes statutes and statute-like materials of the government whose law controls the question to be resolved. It also includes the decisions—the precedents—of the appellate courts to which an appeal could be taken from the trial court where the issue is being or could be litigated. The appellate courts' precedents must be followed because those courts have the power to reverse a decision of the trial court.

Within a state or the federal government, some mandatory authority outranks other mandatory authority. A constitution prevails over all other forms of authority from the same government. A constitution is the fundamental law creating a government in the first place. A legislature can enact only those kinds of statutes allowed by a constitution, and the courts' power to create and reinterpret common law is also subservient to the constitution that created the government of which the courts are a part. A statute trumps a court rule or

administrative regulation because statutes gave courts and administrative agencies the power to adopt court rules and regulations. Statutes trump case law because the legislature's power to make law prevails over the courts' power to interpret or reinterpret statutes and common law. And case law made by higher courts prevails over inconsistent case law made by lower courts.

What happens if two mandatory authorities of the same rank are inconsistent with each other—for example if one statute preserves the cause of action for alienation of affection and another abolishes it? If the two cannot be reconciled, dates matter. A later statute prevails over the earlier one, and a later case prevails over the earlier one from the same court.

Persuasive primary authority can be followed, or it can be ignored. It usually comes from a jurisdiction other than the one whose law controls the matter at issue. In this context, another jurisdiction means another state or another federal circuit.

You can see a map of the federal circuits at http://www.uscourts.gov/courtlinks/ or by looking in the front of any volume of Federal Reporter, Third Series (Fed. 3d). A federal circuit is made up of the United States Court of Appeals for that circuit and the federal district courts that are geographically within the circuit. A federal district court is a trial court, from which appeals would go to the Court of Appeals.

Suppose Wyoming law controls. And suppose that the issue is one of common law, which means that it was part of the common law developed by courts and no Wyoming statute has changed it. Decisions of the Wyoming Supreme Court are mandatory authority (they must be followed). But suppose those cases don't settle the issue, which means there's a gap in Wyoming law. Cases from other states' supreme courts are persuasive primary authority. They're primary because courts have the power to make law. But in Wyoming they're at most persuasive because Wyoming courts are not required to obey the courts of other states. A Wyoming court might follow the reasoning of a South Carolina decision if the Wyoming court is persuaded that the South Carolina case's reasoning does a good job of filling a gap in Wyoming law.

Persuasive primary authority includes (1) decisions by courts of other states (for example, the South Carolina precedent in a Wyoming court); (2) decisions by coordinate appellate courts, to which an appeal could *not* be taken from the trial court where the issue would be or is being litigated (an example is given in the next paragraph); (3) decisions made by trial courts anywhere; and (4) dicta in any decision.

To be mandatory, a decision must have been made by an appellate court to which the matter at hand could be or already has been appealed. For example, the United States Court of Appeals for the Sixth Circuit hears appeals from federal trial courts in Kentucky, Michigan, Ohio, and Tennessee, while the Court of Appeals for the Third Circuit decides appeals from federal trial courts in Delaware, New Jersey, and Pennsylvania. An opinion by the Sixth Circuit is mandatory authority to a United States District Court in Ohio, because the Sixth Circuit can reverse, on appeal, a decision of that trial court. The same opinion is mandatory to the Sixth Circuit itself, which is bound by its own prior decisions. But that opinion is only persuasive authority to a United States District Court in Pennsylvania, because the Third Circuit—not the Sixth—hears appeals from federal trial courts in Pennsylvania. And that opinion is only persuasive authority in the Court of Appeals for the Third Circuit (a coordinate court to the Sixth Circuit) and

in the Supreme Court of the United States (which is superior to all the circuits).

Decisions by the United States Supreme Court, on the other hand, are mandatory in every federal court because the Supreme Court has the power ultimately to reverse a decision by any federal court. But decisions of the United States Supreme Court are mandatory authority in a state court only on issues of federal law because the United States Supreme Court has no jurisdiction to decide matters of state law.

2. Secondary Authority

Mandatory authority always trumps secondary authority. But in the hierarchy of authority, persuasive primary authority and secondary authority start out approximately equal: A court can either follow them or ignore them. A court's decision to follow or ignore depends on how impressed it is with the reasoning and credibility of a persuasive primary authority or a secondary authority. The most significant forms of secondary authority are (1) restatements, which are formulations of the common law drafted by scholars commissioned by the American Law Institute; (2) treatises written by scholars; and (3) articles and similar material published in law reviews.

Since 1923, the American Law Institute has commissioned restatements in contracts, property, torts, and several other fields in an attempt to express some consensus about the common law as it has developed in the 50 states. When a restatement is no longer up-to-date, it is superseded by a second or third version. Thus, the Restatement (Third) of Property replaced the Restatement (Second) of Property. A restatement consists of a series of black-letter law rules organized into sections followed by commentary.

The authoritativeness of a treatise depends on the reputation of its author and on whether the treatise has been kept up to date. Some of the outstanding treatises have been written by Wigmore (evidence), Corbin (contracts), Williston (contracts), and Prosser and Keeton (torts). Some treatises are multivolume works, and some double as hornbooks.

Law reviews print two kinds of material: articles (written by scholars, judges, and practitioners) and comments and notes (written by students). If an article is thorough, insightful, or authored by a respected scholar, it may influence a court and might therefore be worth citing. Most articles, however, do not fit that description, and the mere fact that an article has been published does not mean that it is influential. Only in the most unusual circumstances does a student comment or note influence a court. But even when law review material would not influence a court, it might nevertheless stimulate your thinking, and its footnotes can help you find cases, statutes, and other authority.

Legal encyclopedias, legal dictionaries, digests, and *American Law Reports* are not really authority. Their true function is to provide background information and to help you research the law. All except dictionaries collect cases and summarize them. The true authority is the cases they cite. Years ago, lawyers and judges cited to legal encyclopedias and dictionaries because at that time genuine authority was harder to find. You will see that done occasionally in older opinions printed in your casebooks, but the practice is no longer considered acceptable.

K. HOW COURTS USE DICTA

In a court's opinion, only the holding and the reasoning necessary to support it (including rules of law) are mandatory authority. Comments in an opinion that are not needed to state and support a holding are *obiter dicta*—words said in passing.[2]

Because *dicta* is not a holding or support for a holding, it cannot be mandatory authority. If that is so, why do courts write dicta in the first place? Often, dicta adds clarity to an opinion. Here are some examples:

- A court may want to make clear what the case is *not*: ''If the plaintiff had presented evidence of injury to his reputation, he might be entitled to damages.'' Because that issue was not before the court, whatever the court says about it is not a holding.
- The court may want to illustrate the possible ramifications of its decision: ''When a minor is at the controls of a power boat—or for that matter a car or an airplane—she is held to the standard of care expected of a reasonable adult.'' If the quote comes from a powerboat case, the case stands for a rule on power boats but it's only dicta on cars and airplanes.
- The court may make a suggestion to a lower court on remand: ''Although the parties have not appealed on the question of appropriate damages, that issue will inevitably arise in the new trial we order, and we believe it necessary to point out. . . .'' Because damages were not part of this appeal, whatever the court says about them is dicta.

Sometimes dicta is accidental: A judge might get carried away with extravagant wording or might formulate the issue or the rule or the determinative facts so that it is not clear whether a particular comment is really within the scope of the decision. Sometimes, it's not clear what is holding and what is dicta: Even when a judge is careful in defining the issue, rule, and determinative facts, readers might reasonably disagree about whether a particular comment is necessary to the resolution of the issue.

Sometimes a court decides that it has two separate and independent grounds for a holding, either of which alone would have been sufficient. When that happens, neither ground is dicta. Both were the basis of the decision, even if only one would have been needed.

It is not wrong to rely on dicta, but it is wrong to use it inappropriately. Dicta can never take the place of a holding, and it is inappropriate to treat it as though it could. When you use dicta, identify it as such—for example, ''The court said in dicta that. . . .'' A holding is introduced differently: ''The court held that. . . .'' or ''The court decided that. . . .'' or other words describing something the court *did*. Dicta is talk. A holding is a decision.

2. Although in Latin *dictum* is the singular and *dicta* is the plural, *dictum* is falling into disuse among lawyers and judges, who now often use *dicta* as both the singular and the plural.

L. HOW COURTS REACT TO PRECEDENT FROM OTHER JURISDICTIONS

If you cite a Missouri case to a Kansas court, how will the Kansas judge react? If you are in a federal court in the Ninth Circuit, how will the judge react if you cite precedent from the Eighth Circuit? These are the two most common situations where case law from another jurisdiction might be involved—precedent from another state (if you are or could be litigating in state court) or from another federal circuit (if you are or could be in federal court).

Courts rely on cases from other jurisdictions only for guidance and only when a gap appears in local law. A gap exists when a state's or circuit's case law does not settle an issue. Courts can fill a gap in local law in two situations. One is where the issue is one normally resolved through the common law. Because courts developed the common law, they can continue to fill gaps in it and in doing so are often guided by precedent from other states.

The other situation is where a statute is unclear and courts must decide what it means. Courts can fill that gap, although only some types of precedent from other jurisdictions will be relevant. Opinions interpreting a statute from another state might persuade, but only if the other state's statute is similar to your statute. If the two are *identical*, precedent from the other state can be particularly persuasive. Two statutes can be virtually identical even if there are minor differences in wording that do not affect the statutes' meaning. When the *substance* of the statutes is different, precedent from the other state has more limited value. If the two statutes take radically different approaches to solving the same problem, precedent from the other state is usually irrelevant.

If your state has no statute on the subject, precedent interpreting statutes from other states has no value at all. If your state treats the issue as one of common law, it will consider only precedent based on other states' common law.

What impresses a court when you cite case law from other jurisdictions? First, a court that must fill a gap will want to know what the majority rule is in other states or other circuits. Second, if a majority of states or circuits follow one rule but there is a modern trend toward a second rule (in other words, the majority is declining), a gap-filling court would want to know that. The modern-trend rule might be more appropriate to current conditions than an older, declining majority rule. Majority, by the way, means number of states or circuits, not number of cases. For this purpose, count a state or circuit only once. Third, a gap-filling court will care about how well courts elsewhere have reasoned their way to a solution. Careful and thoughtful reasoning impresses.

CHAPTER 3

Study Tips & Outlining Law School Courses

Most law students experience "grade shock" when they realize that all the members of their entering class earned A's in college but that only a small percentage of them can claim a place at the top of the demanding grading curve mandated at most law schools. Many law students simply underestimate the level of academic performance invited by the exams and the intellectual strengths and studious habits of their classmates.

Chapters 3 and 4 [Charles R. Calleros. Law School Exams: Preparing and Writing to Win, 1st ed. (2007)] consist partly of a pep talk on the virtues of discipline, hard work, and effective use of your time. This might come off as a little corny or preachy, but it might also provide the best advice you receive on entering law school.

Your preparation for law school exams should begin even before the first day of class. Careful planning will help you lay a foundation for progress throughout the semester leading up to exams.

A. THE IMPORTANCE OF ATTITUDE

1. Take Your Studies Seriously

If you applied good study habits in college, and took care to analyze, organize, and express complex information in college term papers, you are well prepared for the challenges of studying the law. On the other hand, if you breezed through college without a disciplined study routine, cramming for exams at the last minute while still managing to convey sufficient information to earn high grades, you are obviously bright and resourceful, but you can only hope that you are bright enough to grasp that those habits will not serve you well in law school.

It is true that a few upper division law students will delight in telling you that they rarely opened the casebook for a course, seldom attended class, surfed the Internet through most of the classes they did attend, and still managed to earn a passing grade by studying a commercial outline of the course a few days before the exam. When you hear such stories, you should take them with a large grain of salt. Some upper division students have a tendency to exaggerate the extent to which they were able to "beat the system," because reciting such stories makes them feel "cool" and clever. In contrast, if you observe the habits of most successful law students, you will see them organizing their time carefully,

studying conscientiously throughout the semester, discussing course material with members of their study group, and working with assigned legal material in ways that develop lasting skills.

Of course, as a law professor, I must consider the possibility that I preach the values of conscientious study habits with excessive zeal, especially because I am forced to admit that hard work in law school will not always translate to top grades and will not address every skill and personal characteristic that is important to lawyering. Still, it seems irrational for you to do anything but commit to the most ambitious study habits possible in law school, for the following reasons:

- Your grades, and the opportunities on which grades are based, will be defined on a demanding curve in most law schools, and most of your classmates will be highly motivated, academically well prepared, and diligent. You will want to develop the capacity to run with this crowd and study effectively with them, rather than let them pass you by while you spend excessive time in front of the TV or at the local pub.
- By studying conscientiously, you will develop skills that will not only maximize your chances of scoring well on exams, but also help you work effectively in your first job at a law firm, where you will be called on to research and analyze law that you have never studied and will not find in a commercial outline.
- When a good law school accepted you into its entering class, you acquired a scarce and highly coveted opportunity denied to many others. After acquiring such an opportunity and paying substantial tuition for your training, it is difficult to justify any course of action other than doing your very best.

2. But Put a Positive Spin on It

Okay, let's assume that I have persuaded you to prepare for law school exams by studying conscientiously throughout the semester. To clarify, I am not advocating that you elevate the stress in your life to counterproductive levels. Just as successful lawyers derive maximum satisfaction by striking a healthy balance in their lives, you will do your best in law school if you are able to maintain good physical and emotional health, continue to nurture important relationships, and study diligently because you take pride in your work and enjoy the progress that you are making.

Notice that I mentioned enjoyment. To some extent, the ultimate measure of your success in law school is the extent to which you are positively motivated to work hard because you enjoy the intellectual stimulation, the academic challenges, and the sense of accomplishment when you have an "a-ha" moment as some elusive concept comes into focus. If this sense of academic enjoyment does not come naturally, you might try to devise ways to appreciate the intellectual challenges of your studies.

Only you can identify the techniques that will enable you to bring a positive attitude to the study of law. Remember, however, that enjoyment of a challenging task is sometimes partly a matter of consciously deciding to see the positive side of an activity rather than dwelling on the negative. To illustrate, have you ever found yourself walking along a sidewalk, sulking over some minor setback, only to be struck by the realization that it is a beautiful day, you are passing by trees and shrubs that are blooming, and you are lucky to be alive to enjoy these sensations? If you then convince yourself to change your scowl to a smile, you

sometimes can consciously transform a negative outlook to a more positive one. Similarly, if you find yourself dreading your class preparation or participation, try to consciously put a smile on your face by remembering the value of your scarce seat in law school, the opportunities that it represents, the marketable skills that hard work will bring, and the ways in which you will be able to apply those skills to assist clients and the community.

B. HIT THE GROUND RUNNING

Before your first semester of law school begins, you should get your life fully in order so that you are ready to immerse yourself in your studies without reservation or distraction. Move into your new apartment, secure your finances, ask family members or your significant other for patience and support, and leave time for a relaxing, mind-clearing week before the first day of class. Get the most out of your school's orientation session, and remember that most law professors will assign readings for the first day of class.

For most students, terminating even part-time employment is an essential step in preparing for law school, because law schools expect students to immerse themselves completely in their studies during the first year of law school. Therefore, rather than work substantial hours during your first year of law school, you should consider taking out student loans, which you can repay after graduation. If you must work during the first year, you are a good candidate for a part-time law school program, if one is available to you, which would allow you to spread your studies over a greater number of semesters.

Still, if the only educational program available to you is a full-time program, and if you must work or if you have substantial family obligations, all is not lost. Sometimes the busiest people can manage multiple obligations through skillfully organizing their time and cutting all waste from their schedules. The discussion in the next section will help you assess whether you can handle the workload of law school while assuming other important responsibilities.

C. ORGANIZE AND USE YOUR TIME WISELY

1. Prepare a Schedule

One of your most important tasks before classes begin will be creating a weekly schedule of activities that helps you organize your time efficiently. Your schedule will obviously depend on your personal circumstances. Nonetheless, the following tips might be helpful to most students.

- *Set aside time to prepare for each class.* Many law students find that they need to set aside two to three hours to prepare for each hour of class. If you meet in class for 15 hours each week, you can easily spend 30 to 45 hours each week reading assigned materials and preparing written case briefs. When this commitment is added to the time spent in class, you are already spending

45 to 60 hours each week immersed in the law. Create a weekly schedule that identifies the hours each day, including weekends for most students, during which you will prepare for class.

- *Set aside time for other assigned schoolwork.* In addition to class preparation, you will be spending time reviewing course material alone or in study groups, drafting course outlines in preparation for exams, writing legal memoranda for one or more courses, attending special public seminars featuring guest speakers, meeting with your professors during office hours, participating in student organizations and community service, and posting questions or responses on an Internet component of one or more of your courses. If you are called on to participate in several of these activities in a single week, you might be forced to slice into the time you have set aside for class preparation. Set aside some extra time in your schedule, however, for these additional activities so that you can minimize encroachment on your class preparation time.

  If you must also devote time in your schedule to employment or family responsibilities, you likely will need to borrow some hours from all of the academic tasks just described. You can do this by sacrificing some desirable but nonmandatory law school activities, such as public seminars and student organization meetings, and by reducing your study time and compensating for the reduced time with particularly intense concentration.
- *Make room for your studies and make the most of your time.* It must be obvious by now that the study of law, as well as the practice of law, will require you to lead a fairly disciplined life, with a minimum of wasted time. This is not such a bad thing; a brisk, full, well-organized life can be much more satisfying than one lacking any objectives that would motivate you to productive activity. Moreover, I am not suggesting that you sacrifice things that are important to your life and well-being, such as activities with family or a partner; rest and exercise; and meditation, reflection, or spirituality. You should be prepared, however, to bid farewell to excessive hours in front of the television, playing computer games, or drinking at your favorite bar.

  To optimize your precious time, make effective use of minutes that might otherwise be wasted. If you expect to wait an hour at the doctor's office before being called for your appointment, bring some of your assigned reading with you. You will pass the time much more quickly, and with less anxiety, than if you were staring at the clock and worrying about the reading awaiting you at home.

  When unanticipated circumstances upset the most carefully planned schedule, however, or if you are simply unable to read another page, give yourself a break without wallowing in guilt. An occasional unscheduled break for a bit of exercise or a musical interlude might enable you to return to your work with increased productivity.

2. Use Class Time to Your Advantage

One obvious way to make effective use of time might be the most difficult to implement. Consider this: You probably have taken on significant debt to pay tuition for law school while foregoing the opportunity to earn a salary in a full-time job; as a consequence, rather than punch the clock at a workplace each weekday, you are now required by school policy to attend classes regularly, where you will receive the benefits of those tuition dollars.

In light of this, it would be incredibly wasteful to "tune out" during class. After all, because you have paid for the scarce and valuable commodity of a seat in that class, and because you are required to attend class, you have every incentive to be as actively engaged in the class proceedings as possible, so that you can make the maximum amount of intellectual progress in class, thus increasing the efficiency of your study and review outside of class.

Here are some ideas for getting the most out of class discussion:

- *Be an engaged, active listener.* If the professor has directed a question to another student, pretend that the question has been put to you, and formulate your response, in writing in your notes if you have time. Be ready at a moment's notice to take over for the other student without missing a beat, in case the professor shifts his or her attention to you.

  Listen carefully to the professor's comments, legal terminology, and style of questions. These might provide verbal clues to the kinds of questions likely to appear on the exam or the kinds of exam answers that the professor will value.
- *Do not be afraid to ask questions or share ideas.* Do not ask tangential questions or make self-serving observations just to show off; respect the needs of your classmates by making contributions to class discussion that advance the education for everyone. On the other hand, do not shy away from asking for a clarification out of a misplaced fear of sounding dim-witted; if you are well prepared and have been paying attention, it is much more likely that many other students are sharing your confusion and will be grateful if someone asks for further discussion on a topic. If you remain confused about an area of law after studying diligently for class, reviewing your notes, and seeking clarification in study groups, make an appointment to visit your professor during office hours, or post your question on the discussion forum of the Internet component of some courses.
- *Take effective notes.* If you have prepared well for class, you will already have a substantial set of notes that summarizes assigned cases and other text. You can then supplement your class preparation notes by writing down further points and questions that strike you as significant during class discussion.

  During class, avoid taking verbatim dictation of every word spoken by the professor, even if your use of a laptop computer enables and encourages you to do so; the resulting notes will be too voluminous and insufficiently selective to be of much use to you later. Instead, summon your intellectual energies for the demanding tasks of listening, thinking, and making mental connections in class, allowing you to record points, questions, or conclusions that you judge to be significant. Then, take some time after class to review your notes, to fill in gaps in the notes, and sometimes even to strike out superfluous or confused passages, while the discussion is fresh in your mind.

D. OUTLINING COURSE MATERIAL

Commercial outlines of various courses are available in bookstores, and they might be useful to you as one of several types of resources to which you refer

occasionally to help clear up confusion about the law you are studying. Each professor, however, has different views about helpful terminology, coverage of issues, points of emphasis, and important themes underlying the course. Accordingly, no generic study guide can be tailored to the particular course that your professor offers.

Moreover, any text is a just a collection of words, and those words will be meaningful to you only to the extent that you have worked with the legal material in ways that develop your skills of analysis and expression. In turn, your exams will require application of those skills and a working knowledge of the law, not just a regurgitation of words that spell out a rule.

For most students, the best way to develop these skills and a working knowledge of the law is to develop their own outlines of each course, either working independently or in small study groups. Such an outline, tailored to your course and your professor's views about the course, will be an excellent study guide and will help you see how the elements of your course fit together in the "big picture."

More importantly, the process of creating the outline will develop the skills and working knowledge that you seek to acquire. Indeed, after completing the outline, if you suffered the misfortune of losing your only copy of it, you would still be better off than if you had spent money on a commercial outline, because your level of understanding of the material would be vastly increased by the substantial intellectual labors that you invested in producing the outline.

E. WHY OUTLINE?

There are several benefits of producing outlines of complicated masses of material. First, to the extent that it allows you to summarize voluminous notes and other course materials, you can reduce your exam review guide to a manageable size. Second, a good outline requires you to engage in the analytic processes of categorizing and reorganizing materials, drawing connections between them, deriving rules from them, and recognizing how the contrasting facts of particular cases illustrate the satisfaction or nonsatisfaction of a rule. Engaging in these analytic activities will help you develop skills and acquire knowledge that you will later apply directly to essay exams, office memoranda, and briefs to a court.

Finally, you might think that you know the law that you are studying, but it is one thing to be comfortable with a fuzzy ball of concepts in your mind and entirely another thing to organize the legal concepts in a logical fashion and express the rules in your own words, reflecting a deep understanding. You will find that the task of outlining your course materials will reveal gaps in your knowledge, spurring you to fill the gaps and clear up the confusion while you outline, weeks before the exam. That is a much better state of affairs than recognizing your confusion only when you try to express your ideas on the exam itself.

F. THE OUTLINING PROCESS: GETTING STARTED

At the most general level, outlining requires you to categorize so that you can place information within a logically organized framework. If summarization was your only aim, you could simply set out your case briefs, one after another, and then try to condense them further while incorporating insights that you gleaned from class discussion. Your exam, however, will require you not merely to recall the holdings and reasoning of cases in your casebook, but also to spot issues and to apply your understanding of the law to the facts of new hypothetical cases that you have never seen before. To accomplish those tasks well, you must understand how the pieces of the law fit together, and how some rules and issues form subsets of more general principles and broader inquiries.

1. A Nonlegal Example

For example, imagine that you are a clerk in a grocery store and are helping move stock to new locations during a store remodeling. For some reason, the existing stocks of candies were mixed together in two large cardboard boxes. True, just like each of your case briefs, each item of candy is neatly packaged. However, your customers will be confused and frustrated if you simply place the items on the shelf randomly, in the order in which you happen to reach for each one in the box. So, what would you do?

You probably would begin by sorting the candy into general categories, so that those customers who want pure chocolate products can find them in one section of a shelf and can compare brands and cocoa content, while those hunting for licorice twists can compare brands, sizes, and prices of that product on a separate shelf. Thus, you are looking for ways in which some items share important characteristics that make them belong together within some more general classification.

Once you had sorted the candy into categories that would be helpful to shoppers, you would then place items that are not identical, but are in the same category, in some logical order in the same section of a shelf. The following represents such a categorization in outline form, with much of the content omitted to give you a broad view of the structure:

I. Aisle 15A Products
  A. Gum and Breath Mints
    . . .
  B. Candies
    1. Chocolate Bars and Related Products
      a. Premium Chocolates
        1. Chocolate Truffle Assortments
          . . .
        2. Premium Chocolate Bars
          a. Premium Dark Chocolate Bars
            i. Belgian and German Semi-Sweet
              . . .
            ii. Latin-American Single-Origin
              . . .

b. Premium Milk Chocolate Bars
. . .
b. Popular Candy Bars with Milk Chocolate
1. Mars Line of Products
a. Snickers Bars
b. Milky Way
. . .
2. Hershey Line of Products
. . .
2. Fructose-Based Chewy Candies
a. "Licorice" Twists
. . .

This list could go on for many pages, and in much more detail, as will your course outlines. Classification of cases and concepts in your course outline, however, will be a much more intellectually challenging exercise, because the concepts will likely be much less familiar to you than types of candy. Thus, an example in a legal setting will prove helpful.

2. Example: Misrepresentation and Nondisclosure in Contract Formation

In your Contracts course, you will learn that a contract is not enforceable against you if you were induced to enter into the contract by the other party's misrepresentation. Of course, whether you can avoid enforcement on that ground depends on a number of factors that help define the details of the rules governing this topic. To acquire a working knowledge of those rules, you will undoubtedly read background information in your casebook, analyze and synthesize cases, and draw further insights from class discussion.

After you complete your study of this unit in your Contracts course, let's suppose that you decide to add this topic to your running outline of that course. Even the few cases in that short unit introduced new terminology and several new concepts, and you might find yourself staring at four or five cases in your casebook, several pages of case briefs that you prepared for class, and handwritten notes or a computer file of notes from class discussion.

The table of contents of your casebook, or the assignments in your class syllabus, might help you see how this unit of study relates to other general topics of the course. When outlining this particular unit, however, you will need to develop some ideas for organizing your outline at a finer level of detail.

If you focused intently on the discussion during class, and if you reviewed your notes after each class, you might have already worked out in your mind how you intend to organize the material on misrepresentation in contract formation. If not, and if you have trouble getting started, you might want to identify all of the terms or concepts that the courts deemed to be important to their analyses and decisions, and then set them out randomly in a laundry list. If you took a few minutes to scan your notes and perhaps some terms that you underlined in your casebook, you would end up with a list similar to this:

misrepresentation; half-truth; reliance; fact v. opinion; nondisclosure; material facts; falsehood; summary judgment; confidential or fiduciary relationship; justifiable; sales of homes; sales puffing; rescission; arms-length transaction

In making such a list, you should be fairly uninhibited; you are doing no more than focusing attention on some key terms as a way of starting some brainstorming.

As your next step, you should draw connections between terms that address similar topics, distinguish terms that address different topics, and determine which terms define general categories that encompass other concepts conveyed by other terms. After seeing the terms *misrepresentation* and *contract formation* in your list, for example, you recall the nature of this topic at its most general level. You quickly glance at the table of contents in your casebook, and you recall that this unit deals with one of several defenses to contract enforcement that could preclude enforcement of a contract. Accordingly, you could begin this section of your outline with a general heading that describes this unit and helps to show its place among other topics in your outline:

VII. Defenses to Enforcement
  A. Statute of Frauds: Absence of a Required Writing
  . . .
  B. Lack of Capacity
  . . .
  C. Duress
  . . .
  D. Misrepresentation During Contract Formation

Next, you remember from other units of study that *rescission* is an equitable remedy through which a court can cancel a contract that is unenforceable, and you also remember that the equitable nature of this remedy allows courts some flexibility in analyzing the elements of this defense, a point worth discussing in your outline. You also recall that the term *misrepresentation* not only was a popular way to refer to the defense as a whole, but was also used more specifically to refer to one of several elements of this defense to enforcement. As you recall those elements, you remember that the misrepresentation must be *material,* or important, to contract formation; otherwise, it would be harmless and would not warrant upsetting the contract. That thought, in turn, reminds you that—for the same reasons—the party seeking to deny enforcement must have relied on the misrepresentation in entering the contract or agreeing to particular terms.

So, what about the reference to "half-truth"? Maybe after glancing at your class notes or one of the cases in this unit, you recall from your reading and from class discussion that the term misrepresentation, as an element of the defense, was a general term that encompassed several different kinds of misrepresentation, including half-truth—or at least that's the terminology and categorization that your professor appeared to favor. Once down that path, you then look for other examples of specific forms of misrepresentation that belong with half-truth, and you recall that affirmative falsehoods, half-truths, and active concealment were all potentially forms of misrepresentation. So far, your skeletal outline of this unit might look like this:

> D. Misrepresentation During Contract Formation—A party can rescind a contract or otherwise avoid contract enforcement if it relied on a material misrepresentation in agreeing to the contract.

1. Misrepresentation—This can be in the form of a falsehood, half-truth, or active concealment of material information.
   a. Falsehood—
   b. Half-Truth—
   c. Active Concealment—
2. Material—
3. Reliance—
4. Equity and Flexibility—

Do you see how the outline leads you to address topics first at the most general level and then in increasing detail? It is a little like viewing the broad contours of a forest from a distance of 100 yards, then walking closer to identify several species of trees that make up the forest, and then even closer to examine the characteristics of the bark, branches, and leaves of each species of tree. When you walk out of the forest again, you will see its broad outlines more clearly now, with a better understanding of how it fits into the geography of the surrounding area.

However, you have only scratched the surface. What about this term *justifiable* and the reference to fact versus opinion? After scanning your notes, you recall that each of these terms relates to others already in your outline. You recall, for example, that a party's reliance on a misrepresentation generally must be justifiable, rather than foolish. Moreover, you remember a general rule that parties are permitted some leeway in expressing *opinions*—sometimes in the form of "sales puffing" that extols the general virtues of a product or service—and you remember that only a misrepresentation of existing *fact* will warrant a defense to enforcement of a contract. You add to your outline accordingly:

D. Misrepresentation During Contract Formation—A party can rescind a contract or otherwise avoid contract enforcement if it relied on a material misrepresentation in agreeing to the contract.
   1. Misrepresentation—This can be in the form of a falsehood, half-truth, or active concealment of material fact.
      a. Falsehood—
      b. Half-Truth—
      c. Active Concealment—
   2. Material—
   3. Fact, Rather Than Opinion—
   4. Reliance—
   5. Equity and Flexibility—

The only terms left in your brainstorming list are confidential or fiduciary relationship, summary judgment, sales of homes, and arms-length transaction. After a moment's reflection, you drop summary judgment from the list; it might have been important to your understanding of the procedural posture of a case, and your professor might have made some point about it in class discussion, but you realize that it relates to procedural rules that apply to any case and that it does not have special significance to this unit of study.

The significance of the remaining terms puzzles you at first, but a few minutes of reviewing your materials leads you to the conclusion that they are related to a subtopic, one that must have been challenging for you, because you left these terms for last. After rereading a case and some notes in your casebook,

you put it together, at least at a general level: Simple nondisclosure of facts generally is not a ground for avoiding enforcement; however, this general rule is subject to exceptions in many states for sales of real estate or at least of dwellings, and in all states for transactions between parties with special relationships, such as confidential or fiduciary relationships. Some of these terms are still a little fuzzy to you, but you are beginning to recall readings and discussion about them, and you will cement your knowledge of them when forced to define them and provide examples of them in your outline. In the meantime, however, you decide to show how these remaining terms fit into the skeleton of your outline:

D. Misrepresentation During Contract Formation—A party can rescind a contract or otherwise avoid contract enforcement if it relied on a material misrepresentation in agreeing to the contract.

1. Misrepresentation—This can be in the form of a falsehood, half-truth, active concealment, or—in some cases—nondisclosure of material fact.

a. Falsehood—

b. Half-Truth—

c. Active Concealment—

d. Nondisclosure generally is not a ground for avoidance, with common exceptions for special relationships and for sales of homes or possibly other real estate.

(1) Special Relationships—A confidential or fiduciary relationship might give rise to a duty to disclose material facts.

(2) Real Estate Transactions—By statute or by judicially created warranties, most states now follow a trend of requiring disclosure of material facts for sales of homes, and more broadly in some states for any sale of real estate.

2. Material—

. . .

G. PUTTING FLESH ON THE BONES OF YOUR OUTLINE

You can see now that your skeletal outline is a little like a tree, with the most general topic forming the trunk, major elements of this defense to enforcement forming the main branches, and subtopics and examples forming smaller branches and leaves. Your definitions of the general topic and of each element form rules, some of which divide further into subtopics and more specific definitions and rules.

Each time you struggle to categorize a concept and show its relationship to others, you are developing skills of issue spotting and organization. Each time you labor to express these definitions in your own words, you are practicing written expression so that the outlined material will flow more quickly and effortlessly during the exam. By taking the time to work through a definition in your outline, you are rooting it somewhere in your brain, like a body movement that is rooted in the muscle memory of a dancer or other athlete.

However, essay examinations also call for you to apply rules to facts, a form of analysis that requires more than memory of an array of rules. It requires an appreciation of the way in which facts arguably satisfy or fail to satisfy a rule, and the way in which different facts, or different ways of looking at the same fact, can support arguments for either conclusion about the satisfaction of a rule. Fortunately, because you have analyzed and synthesized many cases, you have seen and critiqued judicial reasoning in the application of rules to facts, and you have compared and contrasted cases to better understand how differing facts have influenced the outcomes in the cases. As you will soon see, your periodic synthesis of cases will form an effective bridge to your outlines.

You can summarize the insights that you glean from case analysis and synthesis by illustrating the satisfaction or nonsatisfaction of a rule with a brief summary of the holdings of cases that you briefed for class. Ideally, each summary will refer to critical facts or reasoning but will sum it up in a single sentence. For example, the following cases illustrate the breadth of the concept of half-truth, because both cases can be interpreted to find a misrepresentation by half-truth, although on very different facts:

> b. ***Half-Truth***—A party engages in half-truth when he or she misleadingly addresses a topic by revealing some, but not all, the material facts.
>
> (1) Example: In *Kannavos* (CB at 357), advertisements created a false impression by revealing that property had been used as income-producing apartments, without revealing that this use violated zoning laws.
>
> (2) Example: In *Vokes* (CB at 363), the court stated that dance instructors' flattery left a false impression when they failed to provide the "whole truth" about the student's limited potential.

Alternatively, if you synthesized two cases with *different* outcomes on the same issue, and you found that differences in the facts justified the different outcomes, you are now armed with an excellent set of illustrations of the applicable rule: The differing facts and outcomes of the cases help to define the line between satisfaction and nonsatisfaction of the rule. For example, illustrations (a) and (b) in the following outline summarize interpretations of cases that reach different conclusions about a party's duty to disclose material facts, based on facts that establish the presence or absence of a special relationship:

> (1) Special relationships—A confidential or fiduciary relationship might give rise to a duty to disclose material facts.
>
> (a) In *Swinton*, the seller was under no duty to disclose a hidden termite infestation, because the seller and buyer were strangers and thus were bargaining in an "arms-length" transaction rather than in the context of a special relationship.
>
> (b) In contrast, under one interpretation of the *Vokes* case, the dance instructor had a fiduciary duty to disclose all material facts about the dancer's limited potential before signing her to lifetime contracts, because he was then performing a preexisting shorter term contract with her and thus was being paid to provide his expert advice and assessment.
>
> (c) Note: Many states would now avoid enforcement on the facts of *Swinton*, because they would impose a duty to disclose material facts in the sale of a home, regardless of any special relationship between the parties.

When you thus illustrate the scope of a rule in your outline by comparing or contrasting the facts of different cases, you are developing skills of fact analysis applicable to an essay exam. You might not have time in your essay exam answer to explicitly compare or contrast the exam facts with the facts of a case summarized in your outline. However, your previous use of cases as illustrations of a rule will equip you to identify and develop factual arguments for your exam answer.

H. USING YOUR OUTLINE AS A STUDY GUIDE

1. Learning Through Outlining

As should be clear by now, the process of constructing an outline might be your best form of exam preparation: It forces you to confront gaps in your knowledge and to work with your course material in a way that develops analysis, organization, and expression skills. If you never had the opportunity to read your outline after creating it, you would still be well prepared to take your exam. Ideally, of course, you would complete each outline a few days or a week before the exam, so that you could read your outline several times to help you remember the rules that you have derived from your studies and the way in which the facts of cases have satisfied or failed to satisfy those rules.

2. Spin-Offs from Your Main Outline

a. Outline of Main Headings

You can benefit further by adapting your outline to serve as a final study guide. For example, you can use your word processor to make an "outline of your outline." This shorter version will set forth the headings that identify major issues or topics, as well as major rules and definitions, allowing you to review the broad contours of your course. Although it leaves out the fine details, by now you should be able to recall those details on any topic if the need arises.

b. Checklist of Issues

For still tighter focus, you should reduce your outline to a single page that sets forth a checklist of issues, adapted from the major section headings that identify general topics or issues. This very short version of your outline might not state any rules, but it will remind you of problem areas that could arise on the exam, helping you to identify issues to analyze.

c. Flowcharts and Other Graphics

In addition to outlining the course material, you might find that you can restate some of the rules in vivid and accessible fashion in some kind of chart or other visual aid. One popular example is a flowchart that uses a series of boxes

and arrows to show how a multifaceted rule leads from one decision fork to another, depending on what answer is provided in the previous fork. Place no limits on your creativity. If you can think of a novel way to illustrate a legal point graphically, put it down on paper; you likely will remember the point precisely because you created an original graphic to illustrate it.

Remember, however, that you will express your essay exam answer in prose, rather than graphics. Therefore, a graphic or a flowchart works best to help you visualize a legal analysis, and perhaps to puzzle it through at the outset. After you create the graphic to help you fully comprehend a topic, express your understanding in writing, such as in outline form.

d. Strategic Guide for Problem Solving

Finally, you might see the opportunity to adapt your materials in yet another way, at least for some courses. If the course you are studying lends itself to a particular mode of problem solving, you can generate a single-page strategic plan for addressing a problem. For example, in your Contracts course, you might decide that it will make sense for you first to determine whether a party might be able to bring a claim on an agreement (contract) or on some alternative basis for relief such as quasi-contract or promissory estoppel, or on two or more of these grounds. If so, you will make a checklist that starts with these issues:

Basic Claims:
Contract through agreement (look for this first)
Quasi-contract, through unjust enrichment
Promissory estoppel, through reliance on a promise

Next, if your exam question appears to raise a question about liability on a contractual agreement, you might then ask whether issues are raised at the stage of contract formation, performance, or enforcement (remedies), or some combination of these. Accordingly, the next three entries on your checklist might list these three stages. Next, you might address the possibility that the exam problem raises a question about contract formation, and you might select an order in which you will look for issues and analyze them if you find them raised by the facts of the problem. For example, you might decide that you prefer to first determine whether the facts raise a problem about reaching agreement through offer and acceptance, and then—assuming an agreement is arguably present—whether the facts raise a question about the traditional requirement of consideration.

Contract—look for issues at three stages in this order:
Formation (including defects or misbehavior in formation)
Performance (including interpretation questions)
Remedies
. . .
Contract formation:
Offer & acceptance issues (first, because it's possible to agree to a transaction that lacks consideration)
Consideration
Defenses and defects (such as duress during bargaining, etc.)

You might not be familiar with all the terms presented in the previous paragraph right now, but the discussion should suffice to illustrate that your exam strategy checklist could lay out potential issues in a different order and organization than the way in which they appear in your casebook or your outline. The outline will present issues, topics, and rules in a logical order that effectively shows their relationships to one another. You might find, however, that a different mode of organizing a checklist of major issues conforms to your personal strategy about efficiently addressing an exam question.

I. THE NEXT STEP

You will steadily acquire a working knowledge of the material in each of your courses throughout the semester, culminating in a course outline and related short outlines and checklists. You will then be ready to take the final steps in exam preparation: researching the kinds of exams that your professor tends to give and taking practice exams for that course. For more on those topics, begin the next chapter.

CHAPTER 4

Law School Exams

Students who are unhappy with their grades often say that they "know" the law and that the grade does not reflect what they "know." But there are many levels of knowledge in law. Which do you think is tested on essay exams?

A. I know it because I can recognize it.
B. I know it because I memorized it.
C. I know it because I can explain how the cases applied it.
D. I know it because I can apply it to new and different factual situations.

Answer A is a fairly typical answer for material that is tested on undergraduate multiple choice exams. Answer B captures what is often tested on college essay exams. Answer C would be right if your required learning were limited to mastering the cases in the text. Answer D is what is required in essay exams. Answers A, B, and C are all necessary skills, but only Answer D will make you a lawyer.

The initial steps in the exam-writing process involve time allocation and issue spotting. You can begin the first even before you have read the problem.

A. TIME ALLOCATION

Law school essay exams tend to run from two to four hours, depending on the number of credits in the course. Each exam, in turn, is usually divided into several parts. A three-hour exam, for example, might contain three separate parts. Sometimes the parts are divided evenly, but sometimes they are not. The three-hour exam, for example, might contain a problem that counts for half the grade and two other problems that each count for a quarter of the grade. This method of dividing the exam has two important consequences for managing your time.

1. Allocate your time according to the value of the problem

When time suggestions are provided by the exam (e.g., 45 minutes for Problem I), follow them. If you are told in a three-hour exam that one problem will count for half the grade, use half the time (90 minutes) to answer it.

2. Treat each part as a separate exam

Write on one problem until your time is up or until you have nothing more to say. Even if you have more to say, wrap things up when the allocated time is over. Then write on the next problem, and so forth. Don't worry about whether your answer is perfect before you move on; every additional minute you take on this problem is a minute you don't have for the next one, and you are not likely to get as many points fine-tuning your first answer as you will get for writing the next one.

Some students figure that a three- or four-hour exam gives them a while to decide which problem to answer first. Some students find value in reading the entire exam and then deciding which problem they want to write about first; they might be more comfortable writing about some issues than others. But unless you have strong reason to think that might help you, you should simply move methodically from one problem to the next. Every minute you spend deciding which problem to answer first is a minute you are not using to answer any problem.

B. ISSUE SPOTTING

One of the key skills that professors test is your ability to identify the legal rules that are relevant to a particular problem: This is issue spotting. An issue exists if a plausible argument can be made that a relevant legal rule applies to the facts of that problem, or if the answer on that rule could "go either way" under the facts. It is not necessary that the rule ultimately be applicable. The rule must also be relevant; it must respond to the question.

Issue spotting requires you to understand both the question being asked and the legal rules covered in the course. As Chapter 8 [John C . Dernbach. Writing Essay Exams to Succeed in Law School: (Not Just to Survive), 3rd ed. (2010)] explains, issue spotting is not simply an exam-taking skill; it is also a crucial part of law practice. When your client explains a problem to you, for example, you need to pay attention to what the client wants (the question being asked) and the factual situation, and you need to know the legal rules relevant to that problem. A hallmark of good lawyers is their ability to spot issues of importance to their clients.

Before you start writing, be sure to understand the question, understand the context, and identify the basic legal rules that could plausibly be used to address the problem.

1. Understand the question

The question or "call of the question" is what you are asked to answer. Ordinarily, the question is contained at the end of the fact pattern or story in the problem. You may be asked to write an opinion based on these facts, to predict how a court would decide the case, to make the best arguments for one side, or something else. In the Hayakawa problem, the call of the question is to assess her options and assess the likelihood of success on each.

Law professors all too often read exam answers that have been based on misunderstandings of the question. Sometimes it's not even clear from the answer that the student read the question. Don't let the stress of the exam get in the way of your ability to make sense of the question. From a scoring perspective, the consequences of a mistake in understanding the question are great. For

example, if you write about strict liability when the question asks about negligence, you may get no points at all for your answer.

Understanding the question is the most basic prerequisite for issue spotting. If you do not understand the question, you are not likely to identify the right issues. The factual situation contained in most essay exams usually covers a great many legal rules you studied in class. Use the question to focus on the legal rules that are relevant. Highlight or underline the question. Periodically check your answer-in-progress against it.

Some students find it helpful to read the call of the question first and then read the factual material on which the question based. By reading the question first, they have developed a sense of the relevant parts of the problem. If you do that, read the question again after you have read the rest of the problem.

2. Understand the context

Each problem in an essay exam comes with a story and characters, and you need to understand both. Sometimes, the story is complicated enough that you need to diagram it or draw a picture. This often happens in property exams where there are multiple transactions or where the description of a parcel doesn't convey as much information as the map you draw in your notes. While you don't know very much about the characters, you do know what happens to them in the story and you should have a pretty good idea from the story what they want. The characters in the story are usually litigants or potential litigants. Often, in the story, they make statements or act in ways that reveal their objectives. Think of them as genuine people, and figure out what they care about. This is, by the way, exactly what lawyers do in the real world.

Essay exam problems typically involve parties who are making opposing claims or who are opposing each other in litigation. In essay exams and in real life, if there is a lawsuit, you can be very sure that the defendant will explore every possible way of resisting liability, including affirmative defenses. If a claim is based on one interpretation of facts, you can also be sure that the person against whom the claim is made will see if the facts can be interpreted differently or if there are other facts that support her position. The better you understand each of the characters in the story, the more likely you are to see counterarguments. Counterarguments are arguments, often based on relevant facts and policies not already discussed, for a conclusion opposing the one you reach. Sometimes there is no plausible defense to a lawsuit or no possible answer to a claim. But you are not likely to see an essay exam based on such cases and, in any event, that conclusion should be reached only after careful analysis.

Understanding the context is essential to issue spotting because it helps you understand what legal rules could be invoked on behalf of the characters in the story, and what legal rules will likely be invoked in response. It also helps you understand what facts will be important to each person who has a stake in the legal outcome. And it will help you evaluate possible remedies.

3. Identify the basic legal rules that could plausibly be used to answer the question

To a great degree, issue spotting involves pattern recognition. In preparing an essay exam, a professor will ordinarily develop fact patterns that are similar to, but not the same as, the cases you read for class. When you read the problem,

you should see those similarities. The better you know those cases, the more likely you are to spot relevant issues.

Some questions involve only one relevant rule, so your identification of the rules will be complete when you find that one. Other questions (in fact, most questions) will involve more than one relevant rule. Therefore, don't quit looking for relevant rules after you have found one. Make sure you have found all of the relevant rules, realizing that some issues will likely be easier to spot than others. When more than one question is asked, moreover, be sure you are responding to each question.

Students who find and discuss two or more relevant rules tend to do far better on essay exams than those who find and discuss only one. Consider two students, Maria and Louise, who both see the same issue in an essay problem and write about it equally well. Maria, however, sees a second issue and writes an answer to that issue that is as long and effective as her answer on the first issue. Maria is likely to get twice as many points for her answer to this problem as Louise, and will likely get a much higher grade.

Sometimes a problem raises more than one issue, but the resolution of the first issue in a particular way may seem to make discussion of the other issues unnecessary. A problem might involve a lawsuit against your client, and the question requires an assessment of your client's potential liability and the remedies (e.g., damages, injunctive relief), if any, to which she is most vulnerable. You may conclude that your client is not liable and therefore not subject to any remedies. But if you don't discuss remedies, you are making a big mistake. There will probably be grounds for a different conclusion, or your conclusion might be wrong. Either way, you need to write about the remedies that a court might order against your client. You can begin your answer to this part of the question by saying something like this: "If, despite the previous analysis, she is held liable. . . . "

In developing your answer, everything that was in your assigned reading or covered in class is fair game—regardless of how easy or hard it seems. Unless you are told otherwise, you should not consider other material in your answer, or worry about studying it.

For each essay problem, write an issues checklist before you begin your answer. The checklist doesn't need to be any more than some shorthand references to each relevant rule. This becomes the basic outline for your answer. The checklist also becomes a kind of navigational device; when you are through writing about the first issue, your checklist will show you the next thing you need to write about.

Students often think that they need to start writing right away, and having a few sentences written almost immediately may give you a sense of security or confidence. If you don't have a plan (and a good one), however, you are likely to repeat yourself, concentrate on one issue to the exclusion of others, and even write about the wrong issues. You may even find yourself crossing out several pages of your answer and starting over midway through the allotted time. Think before you write.

If you find that you can't think of any relevant legal rules for a particular problem, you might consider setting that problem aside and reading the next problem, which may be easier. Coming back to the previous problem, you may have thought of the relevant issues. This is not something you should plan to do, however; it is a damage-control strategy for that rare situation when you simply find yourself stuck.

To get a sense of how these principles work, let's revisit the essay problem from Chapter 1 [John C . Dernbach. Writing Essay Exams to Succeed in Law School: (Not Just to Survive), 3rd ed. (2010)].

Problem 1 **60 Minutes**

Daniel Wallace owned a house in which Herman Melville lived for a year while he was writing *Moby Dick*. At Wallace's request, the house was included in promotional brochures for the city and several tour companies, as well as in several well-known travel books. The house was already mentioned in one travel book when Wallace moved into it. People frequently stood out in front of the house, looking at it and taking pictures. Wallace, a writer, worked at home and enjoyed greeting tourists and showing them the house.

Every prospective buyer was told that Melville had lived in the house for a year, including Amy Hayakawa. When Wallace got ready to sell the house, he used Melville's former residence in the house to ask a higher price for it. When Hayakawa signed a contract to purchase the house less than a week ago, she agreed to pay that price.

Earlier today, Hayakawa stopped by the house with a friend. To her horror, she discovered a busload of foreign tourists parked in front of the house, taking pictures and milling around on the yard and sidewalk. When she asked the tour bus driver what was going on, the driver said the tour company showed the house to tourists twice a month, and that Wallace often let them inside the house to look around.

Hayakawa has just come to you for advice. What are her legal options? What is her likelihood of success on each?

As you can see from the description at the beginning of the problem (Problem 1 (60 minutes)), you would have 60 minutes to answer this problem. The time starts when you begin reading the problem and ends one hour later, whether you have finished writing your answer or not.

There are two questions here: identification of Hayakawa's legal options and her likelihood of success on each. Because the Hayakawa problem does not name any particular rule, you need to figure out the rule(s) from clues provided. One important clue here is that Hayakawa signed the contract less than a week ago. Another is that she discovered an apparent difficulty with the house after she signed the contract. (You also have the clues provided by the *Stambovsky v. Ackley* case in Chapter 1! [John C . Dernbach. Writing Essay Exams to Succeed in Law School: (Not Just to Survive), 3rd ed. (2010)]) This exam problem thus involves land transfers, which should take you to the part of the course concerning contracts to purchase real estate, and particularly the duty to disclose defects. Failure to disclose material defects, as we saw earlier, is grounds for rescission of the contract. Although not discussed in Chapter 1 [John C . Dernbach. Writing Essay Exams to Succeed in Law School: (Not Just to Survive), 3rd ed. (2010)], fraudulent misrepresentation of a material defect is also grounds for rescission.

These are both arguable grounds for rescission of the contract in this problem. Wallace was not asked about the tourists, and never said anything to Hayakawa, which could fit the failure-to-disclose rule. There could also be misrepresentation here, albeit indirectly. By emphasizing that Melville's residence in the house made it more attractive, Wallace arguably was saying there was nothing to worry about.

The problem raises at least one more legal option. She could go ahead with the deal and then use the trespass rule to prevent tourists from walking on the property. In general, trespass is any intentional and unprivileged entry onto land owned or occupied by another. The most common remedies for trespass are injunctive relief and damages. In order to take advantage of these remedies, though, she would first need to own the property. Because she has only signed a contract, and has not obtained the deed for the property, she is not yet the owner.

As for the second question—likelihood of success on each option—you probably won't have a good answer to that until you have actually analyzed the options. Because Hayakawa is your client, you have a professional obligation to tell her the truth about her likelihood of success, whether she wants to hear it or not. Be aware as you start writing that Wallace has some strong counterarguments; the fact that a famous author once lived in the house, for instance, is not ordinarily considered a negative thing. Hayakawa also had far more knowledge about the notoriety of the house than did the buyer in *Stambovsky*. How much of that notoriety wasn't disclosed adequately to the buyer? Was that nondisclosure fraudulent? So you should keep yourself focused on both arguments and counterarguments as you write your answer.

Thus, an issues outline for your answer to this problem might look like this:

Assess Hayakawa's likelihood of success—

Failure to disclose
Fraudulent misrepresentation
Trespass

You should have this, or something like it, written in your notes before you begin to write your answer in any essay exam. You can even use the points in the outline as underlined headings when you write your answer. If you are required to discuss the legal rights or interests of multiple parties, be sure you have included each of these parties in your issues outline, along with a brief statement of the legal rules that are relevant to each. That will help ensure that you actually discuss the legal rights or interests of each party when you are writing your answer. Be sure, in sum, that your issues outline is fully responsive to the call of the question.

Handwriting vs. Typing

Many schools now offer students the option of answering their exam on a laptop computer instead of handwriting the exam. If you have this option, you should consider it seriously.

When I was in law school, we were given the opportunity to type our exam answers instead of writing them by hand. This was before personal computers were available, and I used a portable electric typewriter. I typed much faster than I could write by hand. In addition, my handwriting was hard to read when I wrote under pressure. So the typewriter enabled me to write more, and more legibly, than I could otherwise.

Laptop computers present a different situation from typewriters because they come with hard drives that can store lots of information. To prevent students from cheating by using information stored on their hard drives, some companies have developed software programs for exam taking that block access to the hard drive during the exam period. These

programs enable students to use a laptop in much the same way that I used my typewriter.

If you have the choice, and if you are comfortable with a laptop and type fairly fast, you should consider typing your exam. When, despite your best efforts, you need to insert text or move blocks of text, using a laptop can be handy. If your handwriting under pressure borders on illegible, you should also consider typing. Otherwise, do what seems comfortable and appropriate. Typing does not make you more knowledgeable or better prepared, however. Nor does it assure you of a higher grade.

C. FROM PROCESS TO WRITING

Spotting the right issues is a huge first step, but it is only that. For each relevant rule, your answer needs to do three things: identify each element of the rule, apply each element to the relevant facts, and draw a conclusion for each element and each rule.

The standard law school formula for solving legal problems is known as IRAC, an acronym for Issue, Rule, Application, and Conclusion. As you can see, the "I" part of IRAC is reflected in the previous chapter. The "RAC" part is described here.

D. IDENTIFY EACH ELEMENT OF THE RULE

To analyze a rule completely, you need to break the rule into elements and discuss each element separately. An element is a factual condition that must exist for the rule to apply; most rules have more than one element. The elements of a claim for failure to disclose a material defect, for example, are: 1) there is a material defect—a condition that materially affects the value of the contract; 2) the defect is peculiarly within the seller's knowledge or unlikely to be discovered by a prudent buyer exercising reasonable care; 3) the seller failed to disclose the defect; and 4) the seller created the defect (applicable in some states). Once you've found the legal rule(s), identifying the elements should be straightforward. Many common law rules are based on lists of elements that are numbered for your convenience. Other rules, like this one concerning failure to disclose a material defect and most statutory rules, are based on elements that you can understand only if you break a sentence or sentences into parts. As part of your outline of the course work, you should already have broken such rules into elements.

E. APPLY EACH ELEMENT TO THE RELEVANT FACTS

When you apply a legal element to facts, you are really doing two things: You are describing facts that are legally relevant, and you are explaining how these

facts lead to your conclusion. Once you have identified each element, find facts in the problem that correspond to it. Use as many facts from the problem as you can, including facts that tend to undermine your tentative conclusions about how the question should be answered. Reading and rereading the problem helps you identify those facts. If you find "unnecessary" facts in the question, there is also a very good chance that they raise another issue or suggest a counterargument to an existing issue.

Before starting to write, some students highlight, underline, or otherwise mark those facts. Some simply take mental note of particular facts, though they risk forgetting them in the rush of writing their answer. Others reread the problem as they write about each element, looking for relevant facts.

Professors will often introduce facts that are completely irrelevant to the question being asked. These facts may even suggest the importance of rules that are, in reality, unrelated to the question. Professors include these "red herrings" because irrelevant facts come up all the time in law practice. Clients often tell their stories without knowing what matters, and you need to be able to recognize when facts are not relevant.

Identifying the relevant facts is a good start, but in many situations, the facts themselves do not lead unquestionably to one particular conclusion. When that occurs, you need to explain why the facts lead to your conclusion. All too often, law students think that applying the law to the facts simply means identifying the facts that correspond to specific elements, and then drawing a conclusion without further discussion. Sometimes the rule is so precise and the facts so clear that little explanation is required. But most of those cases are resolved without lawyers, and are unlikely to find their way onto your exam.

F. WRITE A CONCLUSION FOR EACH ELEMENT AND FOR EACH RULE

As you write about a particular element, you will need to think about what your conclusion will be. In addition, you need to draw a conclusion for each overall rule, which, of course, will be based on your conclusions for each element. Be sure to state these conclusions clearly in your answer. Much of the time, your conclusion will simply be a prediction of how a court would likely decide the particular issue. If there is little doubt about the outcome, your conclusion can be more definite. If there is a reasonable basis for more than one conclusion, then qualify your conclusion with words such as "likely" or "probably." Remember that your conclusions are much less important than your analysis.

Some law school essay exams will ask you to advocate a particular position on behalf of a client, in much the same manner as a lawyer would represent a client in real life. In such exams, of course, the basic conclusion is already established before you begin writing, but everything else should be the same as for an exam in which you are asked to reach your own conclusions. Similarly, some professors simply want you to describe arguments and counterarguments, and are not interested in your conclusions. In that case, of course, you can simply skip conclusions.

A student's answer to the Hayakawa problem might look like Answer 1. Let's focus on the failure-to-disclose issue to keep the example manageable:

Answer 1

Hayakawa recently signed a contract to purchase property and then discovered a problem. She wants to know her legal options and her likelihood of success for each.

Failure to disclose. Hayakawa's first option is to try to rescind the contract, if she can show that Wallace is liable for **failure to disclose a material defect.** In order to prevail, Hayakawa must show all of the following:

◀ Rule 1
◀ Explanation of Rule 1

1) **There must be a material defect.** A material defect is a condition that materially affects the value of the contract. There are two possible tests for a material defect. **The objective test for a material defect is based on whether a reasonable person would attach value to the defect in deciding whether to buy.** A reasonable buyer would expect that the house would be more attractive because it is Melville's former residence, not less attractive. Indeed, Wallace asked—and received from Hayakawa—a higher price for the house because it is Melville's previous residence. A reasonable person would buy a home for a residence, and would expect privacy in his or her home. A reasonable person would probably recognize that some tourists may want to visit a former Melville home, but the same person would not likely buy a significant tourist attraction for use as a residence. The routine presence of tourist buses, and tourists taking pictures and perhaps expecting a tour of the house interior, is not compatible with the privacy a reasonable person would expect in his or her home. Wallace might say the tour buses come only twice a month. But there are almost certainly tourists at other times, and the buses could become more frequent in the future. This condition is probably an objective material defect.

◀ Element 1
◀ Explanation of Element 1
◀ Sub-element 1A
◀ Application of Sub-element 1A to facts
◀ Conclusion on Sub-element 1A

The subjective test is whether the condition affects the value of the home to the particular buyer. Hayakawa was horrified to find a busload of tourists outside the house. On that basis, the subjective test is probably met. It can be argued that she is a hypersensitive buyer, and that someone's feelings should not be grounds for rescission. If the buyer's feelings were enough, anyone could rescind a contract under the subjective test. Here, though, her negative reaction to the regular presence of tourists by the busload outside her home would probably be shared by a great many other people. That suggests she is not a hypersensitive buyer, and that there is some reasonable basis for her feelings. Whether the subjective test or objective test is applied, there appears to be a material defect.

◀ Sub-element 1B
◀ Application of Sub-element 1B to facts
◀ Conclusion on Sub-element 1B
◀ Further application of Sub-element 1B to facts
◀ Conclusion on Element 1

2) **The defect must be peculiarly within the seller's knowledge or unlikely to be discovered by a prudent buyer exercising reasonable care. Is the condition peculiarly within the seller's knowledge?** Yes. Both Wallace and Hayakawa knew that Melville had lived in the house. But Wallace also knew the number of tourists and their expectation of coming inside the house, which Hayakawa didn't know.

◀ Element 2
◀ Sub-element 2A
◀ Conclusion on Sub-element 2A
◀ Application of Sub-element 2A to facts

Would the defect likely have been discovered by a prudent buyer exercising reasonable care? She could have visited the house beforehand more often. Because the tourist buses come only twice a month at present, she might not have seen anything anyway. She could have perhaps found the passage in the travel books and brochures describing the house, but prudent buyers should not be expected to check such materials when buying a home. Also, she could not be expected to know everything that Wallace had done to promote Melville's former presence in the house. On the other hand, she had to know that other people would also be interested in seeing the house where a famous author lived. A prudent buyer exercising reasonable care in the purchase of such a home should have asked Wallace about the possibility of tourists or other interested persons, but she didn't. Hayakawa is not likely to be able to satisfy this requirement.

◀ Sub-element 2B
◀ Application of Sub-element 2B to facts

◀ Conclusion on Sub-element 2B

The two parts of this element are connected with "or," and the defect was peculiarly within Wallace's knowledge. A court might decide against Hayakawa, reasoning that the defect could not be peculiarly within Wallace's knowledge if Hayakawa could discover it with reasonable care. But that would require changing the rule. Hayakawa satisfies this element.

◀ Application of Element 2 to facts

◀ Conclusion on Element 2

3) **The seller must have failed to disclose the defect.** It does not appear from the problem that Wallace said anything about tourists. He did use Melville's former residence in the house to get a higher price, and thus disclosed that a famous author had lived there. But a place where Melville lived for only one year is not automatically a significant tourist attraction. This element is satisfied.

◀ Element 3
◀ Application of Element 3 to facts

◀ Conclusion on Element 3

4) In some states, **it also necessary that the seller create the defect.** If that is required in this state, it is satisfied. Wallace, the seller, created the condition because he requested that the house be used in promotional brochures for the city and several tour companies, as well as in several well-known travel books. It appears that his promotional effort is the reason that a tour company bus stops in front of his house twice a month. Wallace might say the house was already in one travel book when he moved into it. But now, because of his efforts, it is in several brochures and travel books. Wallace might also say he is not responsible for the fact that Melville lived in the house for a year. That is true, but he is responsible for the increase in tourists, which is the relevant condition.

◀ Element 4
◀ Conclusion on Element 4.
◀ Application of Element 4 to facts

Therefore, Hayakawa is probably entitled to rescission of the contract based on nondisclosure of a material defect.

◀ Conclusion on Rule 1

Fraudulent misrepresentation. A second option is to seek rescission based **on fraudulent misrepresentation of a material defect**. [Discussion omitted.]

◀ Rule 2

Trespass. The third option is to complete purchase of the property and then use **trespass** to keep tourists away. [Discussion omitted.]

◀ Rule 3

This answer has a structure that directly follows the principles stated in this chapter and the preceding chapter. It identifies the rule and then works through the rule element by element. For each element, the answer states (and, when necessary, explains) the element, describes the relevant facts, shows how the rule does or does not apply to these facts, and states a conclusion either at the beginning or the end of the discussion. At the end of the analysis, the answer includes a conclusion on the overall rule. (Can you think of ways to improve this answer?) The pattern would be repeated for the answers to the second and third rules, which are not shown here.

This problem, like nearly all essay exam problems, has no single "correct" answer. A student could decide the problem in a different way and still get a very good grade. What matters is that the student identified the right rules and applied them in a detailed way on an element-by-element basis. Your teacher will be looking for the quality and thoroughness of your analysis, not the particular result you reach.

Exam Quest: A Mental Map

The pattern shown for answering this problem is the same in most essay exams. This pattern, or mental map, will help you understand exactly how your exam should be organized. It also gives you directions, at each step in writing your answer, for the next step you should take. The answer to a two-issue exam problem, when the first rule has two elements and the second rule has three elements, could be diagrammed like this:

RULE I
- Element 1
  - Apply Element 1 to facts
  - Conclusion on Element 1
- Element 2
  - Apply Element 2 to facts
  - Conclusion on Element 2
- Conclusion on Rule I

RULE II
- Element 1
  - Apply Element 1 to facts
  - Conclusion on Element 1
- Element 2
  - Sub-element 2A
    - Apply sub-element 2A to facts
    - Conclusion on sub-element 2A
  - Sub-element 2B
    - Apply sub-element 2B to facts
    - Conclusion on sub-element 2B
  - Conclusion on Element 2
- Element 3
  - Applly Element 3 to facts
  - Conclusion on Element 3
- Conclusion on Rule II

As Answer 1 indicates, and as the preceding box shows, there is a standard pattern for writing about each element. If an element has several parts,

or sub-elements, you simply analyze each sub-element in the same way you would analyze elements. This is illustrated by Sub-elements 2A and 2B for Rule 2. If both are required to satisfy Element 2, you need to write about both. If either would satisfy Element 2, you should still write about both if you have time. When you have completed your discussion of all the sub-elements for an element, draw a conclusion for that element.

This pattern suggests another way of thinking about the process—as a series of directions or prompts. You start by figuring out what the issues are. After that, once you've learned the pattern, the completion of each step should direct you to the next step. When you've identified the first rule, for instance, you should prompt yourself to write it down, then to write the first element of the rule, then to write the relevant facts, then to explain how the element does or doesn't apply to the facts, and then to write a conclusion. Next you direct yourself to go on to the second element, where you repeat the process. When you have finished the last element of a rule, you prompt yourself to draw a conclusion for both that element and the rule itself. Then you direct yourself to go to the next rule.

Every time you finish a step, you should know what the next step will be. This pattern, this mental map with its self-contained directions, gives you an overall guide to writing the exam. It will save you substantial time in writing your answer. Its foundation is the issues outline you prepare before you even start writing.

G. GETTING READY

Taking exams is stressful for everyone, even those who do well. In many classes, the entire semester's grade hangs on your performance in a single final exam. But different students handle the pressure more effectively than others. These students have worked hard, but they have also worked smart.

It should go without saying that working hard is part of the law school experience. Students who work hard—who regularly attend class, who keep up with the reading, and who have prepared an outline—are more likely to do well than those who do not. But you must also work smart. That means you should know what is actually required to do well on essay exams. This book of course, is intended to help you learn that. But students who work smart also have a good attitude, learn as much as they can about what their professor wants, and practice answering hypothetical problems. These things don't eliminate anxiety from the exam process, but they do help control it.

H. HAVE A POSITIVE ATTITUDE

Everyone is nervous, but it helps to believe that you can do well. If you believe that, you are more likely to prepare adequately than if you don't. Even if you

don't believe that you can do well, at least act like you believe it. Many students who work nervously but diligently are pleasantly surprised by their grades.

Perspective is another aspect of a positive attitude. Essay exams are only one small part of life. Students who are able to anchor their lives in something positive other than law school—family, friends, faith, or something else—are more likely to think clearly than those who don't.

I. LEARN YOUR PROFESSOR'S PREFERENCES

This book provides a conceptual framework for thinking about, and answering, law school essay exams. My simple claim is that most law professors who write and grade essay exams do so in a way that is generally consistent with this framework.

This is not to say, however, that every law professor writes and grades essay exams *exactly* as described here. As in music, there are many variations on this theme. Many of these variations, in fact, have been identified in this book. Ordinarily, they are minor variations. But knowing these variations—and answering your exam based on the particular preferences of your professor—can make the difference between a good grade and a wonderful grade.

As you attend each class, listen for your professor's preferences. The conceptual framework in this book should help you know what to listen for. Your professor may say that he or she only wants you to write about issues, as opposed to each element of a rule, whether or not application of that element raises an issue. If so, you are not likely to score points on "givens." Your professor may never discuss the policy reasons that support the cases you discuss in class. If so, you are not likely to get many points for policy arguments.

If you see such differences among your professors, remember that the similarities in their approach to scoring almost certainly outweigh these differences. And be aware that judges have different preferences. Learning how to tailor your analysis for each professor is good practice for learning how to tailor your argument to a judge.

J. PRACTICE, PRACTICE, PRACTICE

You should practice doing, over and over, the kind of things that are tested on the exams themselves. That is, you need to get in the regular habit of applying legal rules to new factual situations. It is not enough to read and reread your outline and text. You don't learn how to drive just by reading a booklet and observing others; you learn how to drive by driving. Soccer players don't read books on soccer technique and soccer rules before they play competitively—they practice. You learn law the same way you learn anything else that requires skill—by doing it a lot. You don't want the exam to be the first time—or even one of the first times—that you are answering hypothetical problems.

But if there is only one exam—the final exam—how do you do get the opportunity to practice? Here are some suggestions:

1. Brief the cases for class routinely, and do it yourself. That helps you with issue spotting, identification of significant facts, and evaluation of the court's analytical reasoning. It also helps you understand how policies matter and how the rules work.
2. Pay attention in class. When the professor asks you a question, you obviously need to be attentive. When the professor is calling on other students, though, try to answer the questions in your head, and compare your answers to the answers provided by other students or your professor.
3. Treat each hypothetical question as a sample exam problem. Get comfortable answering such questions. Hypothetical problems will come up all the time in class. Hypothetical questions likely reflect your professor's current thinking about what could be tested on the exam. Some texts use a lot of problems. You also can develop such problems in your study group. For most courses, too, there are other published materials containing problems you can answer. Work through them in class or on your own. As much as you can, write out your answers as if you were writing an essay exam. Then compare your answers with those the professor gives in class, the answers in a book, or the answers given by other members of your study group. Figure out what you did right and what needs to be improved.
4. If your professor gives you written problems or old exam questions, go through them with care. Try to answer them as if you were taking the exam. Then compare your answers with your professor's answers or the answers written by classmates who have done the same thing. Again, evaluate the strengths and weaknesses of your answers.
5. If you have already taken a midterm exam, or a set of exams, review your exam answers with your professor(s) to find out what you have done well and what you can improve. Do this for each semester's exams.

This is all well and good, you might say, but it is also a lot of work. And this work is in addition to reading cases as well as the other course work. So it is easy to think that on top of all of that work, reading this book once is enough. But reading about exam writing is much different than actually writing your answer. The real challenge for many students is understanding just how hard you have to work to do well in law. One student said his study group's "rallying cry" when sitting down to practice old exams has been, "If it's something you really dread, it's probably something you really need to do." This dread of the hard work of thinking critically changes as you get experience with it. Learning any new skill can be hard and frustrating at first. But through continuing practice you gain mastery and confidence, and that makes the work more enjoyable.

There is another problem, you might add: Even if I write practice exam answers, how can I tell whether my answers are any good if my professor doesn't read them? While your professor will read your answer to an actual exam, you are not likely to get your professor to routinely read practice exam answers that you write. So you need to learn to diagnose the basic strengths and weaknesses of your own practice exam answers, without necessarily having to talk to your professor.

You can do that with a simple two-step process. For starters, write answers to practice essay problems under simulated exam conditions. Study the relevant material beforehand. Give yourself a specific time period to answer the problem. Don't consult books, notes, or other material while you write your answer. When you have finished, set your answer aside for a while.

Then reread it, asking yourself questions like these:

- Did I start with a statement of the question from the problem?
- Did I discuss each element in a separate paragraph?
- Did I accurately state each legal element?
- Does each paragraph apply the element to all of the relevant facts and draw a conclusion?
- Did I discuss all of the elements that apply to each rule?
- Did I discuss each issue raised by the problem?

You may also ask yourself other questions based on this book that are not on this list. In a study group, you might read and comment on answers written by classmates to the same practice questions. As you learn to diagnose and correct problems on your own or with classmates, your skills and understanding will improve. One student—who was surprised by his success in law school—told me:

> My goal in simulating the exam experience was to prevent me from 'freezing up' when I got to the real exam. However, using the rules to construct answers also forced me to think critically about the elements, and in the process, gain a far deeper understanding of the purpose and application of the rules. I believe this understanding helped me tremendously with issue spotting and choosing which facts apply to each element.

Outlining

As you move through a course, you should be writing a detailed outline. The outline is an essential study tool for the exam. When you prepare an outline, you pull together the most important material from the class, you organize that material, and you learn it better. Then, when you've prepared the outline, you study it in the same way that you would study published materials. You should be preparing your outline as you go through the semester. The material is much too dense and complicated to be mastered in the 24 to 48 hours before the exam.

The outline should include the basic rules from the cases as well as their underlying policies. If the rule has several elements, your outline should show those elements. You may want to include case names and key facts from those cases, but the outline should not be organized case by case. You may also want to include hypothetical problems discussed in class. In addition, your outline should include statutory or constitutional rules, as well as any cases that interpreted or applied the rules. Because your outline is a study tool, it must be accurate.

The simplest way to organize your outline for a course is to follow the organization of the text, as shown in its table of contents. The table of contents is divided into sections and includes major and minor headings. You should modify that outline for any changes contained in the syllabus provided by your professor. The professor may omit from his or her assignments some material contained in the text, or may add other material.

This outline should be your own work product, the result of your own thinking. A remarkable thing happens when you prepare an outline: You get a sense of how the pieces of the course fit together. By understanding

the relationships among the parts, you better understand which rules might be applicable, and thus enhance your ability to spot issues and write about them.

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