

SAN JOAQUIN COLLEGE OF LAW

LEGAL METHODS I

STUDENT COURSE READER

Fall 2026

Legal Methods I

Fall 2026

Course Reader

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COURSE OVERVIEW

Welcome

Legal Methods is designed to introduce you to the foundational skills that are essential for success throughout law school and the legal profession. The course focuses not only on what the law is, but on how the law works—how legal rules are developed, interpreted, applied, and communicated.

Throughout the semester, you will learn how to:

- read and analyze judicial opinions,
- identify legal issues and legally significant facts (LSFs),
- synthesize legal rules from legal authority,
- understand precedent and the hierarchy of authority,
- organize legal analysis using structured formats such as TREAT and IRAC, and
- communicate legal analysis through legal writing.

During orientation week, your primary focus will be learning how to read judicial opinions, prepare case briefs and participate effectively in class discussions. As the semester begins, you will build on those foundational skills through rule synthesis, explanatory parentheticals, legal analysis, outlining, exam preparation, and formal legal writing assignments.

The assigned readings and class discussions are designed to work together. Professors will assume that you have completed the assigned reading before class and have a working understanding of the concepts introduced. Class sessions are intended to build on the reading—not repeat it. As a result, you will be responsible not only for concepts discussed during lecture, but also for concepts introduced through the assigned readings and supplemental materials.

Many of the concepts introduced in this course will first appear in the assigned readings rather than lecture. You should approach the readings as part of the instruction itself—not merely as preparation for class discussion.

Finally, one of the primary goals of this course is to support your transition into law school. Your professors are available to help you understand the concepts introduced in this course and adjust to the demands of legal education. You are encouraged to ask questions, seek clarification, and meet with your professors throughout the semester.

Your objective during orientation is not to master every concept. Instead, focus on becoming comfortable with the process of reading, organizing, and discussing judicial opinions.

Orientation Week Assignments

During orientation week, Legal Methods classes meet twice (Tuesday and Thursday) and focus heavily on introducing the case method, legal reasoning, case briefing, and the systems and resources you will use throughout the semester.

Complete the following before the first orientation class session on Tuesday.

Assigned	Located
Assigned Course Reading	
Foundations of Legal Analysis and the Case Method, SJCL Orientation Reading	pp. 20-34
The Green Bag: <i>How to Read a Legal Opinion</i> by Orin Kerr (Volume 11, Number 1)	pp. 35-50
Applying the Framework: <i>Gray v. State</i> - A guided case-reading chart using <i>Gray v. State</i> - An example case brief using <i>Gray v. State</i>	pp. 51-55
Textbook Reading (Chapters assigned for orientation week ONLY are in this packet)	
<i>Legal Writing and Analysis</i> (3rd ed.), by Michael Murray and Christy DeSanctis: Chapters 1 & 2 (pp. 1-21) To be purchased	pp. 57-77
<i>Cracking the Case Method*</i> , by Paul Bergman , Patrick Goodman, and Thomas Holm: Chapters 6 & 8 <i>Note: available FREE in digital study aids or purchased in paperback.</i>	pp. 112-146
Case Reading	
Read and prepare case briefs for: <i>The State v. Wilson</i> <i>State v. Billings</i> <i>Gray v. State</i>	pp. 148-153

Complete the following before the second orientation class session on Thursday.

Assigned	Located
IRAC Response to Hypo #0; Email to your Legal Methods professor before class	Circulated after class #1
Textbook Reading	
Murray : Chapter 3 (pp. 39-50), Chapter 4 (pp. 51-54), Appendix A (pp. 407-411), and Appendix C (pp. 433-445)	pp. 78-111
Case Reading	
Read and prepare case briefs for: <i>Woods v. State</i> <i>State v. Bennett</i> <i>Hamilton v. State</i> <i>People v. Winhoven</i> <i>People v. Moreno</i> <i>State v. Neff</i>	pp. 154-164

Technology and Course Systems

Different platforms will be used throughout the semester for various purposes. You are responsible for ensuring that you can access these systems before classes begin.

Free Digital study aids are available on the library website. *Cracking the Case Method*, from the assigned reading, is one of these study aids available through West Academic. *Plain English for Lawyers*, also from the assigned reading, is available through LexisNexis. These are also available to purchase in hard copy.

Below you will find instructions for accessing both of the free digital study aids on our library website.

West Academic

1. Go to www.sjcl.edu/library
2. In the “Study Aids” box, click “West Academic”
3. Click “Sign In” in the top right corner

If you already have a BarBri or West Academic account (i.e., previously bought textbooks through West Academic):	If you are creating a new account:
4. Sign in and verify your SJCL email with a verification link. 5. After verifying, click “Go to Study Aids Collection”	1. Click “Create an Account” under the login bar. 2. Use your SJCL email address and password to log in. 3. After registering, check your email to verify your school email 4. Then log in and click “Access My Digital Study Aids”

LexisNexis

1. Go to www.sjcl.edu/library
2. Click “LexisNexis Study Aids Library”
3. Log in with your SJCL email and Exam ID
4. On left side click on Browse Library (Aids are listed in alphabetical order by subject area)
5. Search, annotate, highlight, and download titles

TWEN

TWEN will be used for course assignments, handouts, announcements, and other course materials. The following pages provide setup instructions for TWEN.

Student's Guide to TWEN

What Is TWEN?

TWEN is an online extension of the law school classroom. You can use TWEN to access your course materials, participate in class discussions, receive and submit online assignments, complete quizzes, exchange email messages with your instructors and classmates, and more.

To participate in TWEN, you need a WestlawNext password. You also must add a course created by one of your professors (see "How Do I Add a Course to the My Courses Page?" below). If you do not have a WestlawNext password, contact your academic account manager.

How Do I Access TWEN?

1. Open your Internet browser and type lawschool.westlaw.com.
2. Enter your OnePass username and password in the appropriate text boxes.
3. Choose **TWEN** from the *Sign-On to:* drop-down list and click **Sign On**. The My Courses page is displayed.

How Do I Add a Course to the My Courses Page?

The My Courses page is your personal directory, which contains links to the TWEN courses you choose. Complete these steps to add a course:

1. Click **Add Course** at the top of the My Courses page. The TWEN courses that are available at your school are displayed.
2. Select the check box next to each course you want to add.
3. If a password is required to add the course, type the password in the *Password(s)* text box. You will need to obtain the course password from the professor.
4. Click **Submit** to return to the My Courses page and view your courses.

How Do I Navigate Within a Course?

To enter a course, click the course title on the My Courses page. The course home page is displayed, which provides access via links on the left side of the page to all of the materials and resources your professor has chosen. Click these links to access course materials, such as forums, quizzes, a course calendar, live discussions, and assignments.

For research assistance 24 hours a day, seven days a week, call the Reference Attorneys at 1-800-850-9378, click **Live Chat** on WestlawNext® or **Help** on Westlaw® Classic for a live help session.

For technical support, call **1-800-486-4876**.

You can also send an email message to west.twensupport@thomson.com.



How Do I Read Materials in Forums or Document Pages?

Document pages and forums are areas created by your professor for distributing course materials and facilitating course discussions. To access an item posted on a document page or to read a forum posting, first enter the course by clicking the course name on the My Courses page. To access a forum, click **Forums** on the left side of the course home page. Then click a forum name on the right side to enter a forum and read postings. To access a document page, click a document page name on the left side of the course home page, such as **Syllabus** or **Course Materials**. Then click a document page item on the right side to display the item.

How Do I Create Messages in a Forum?

You can post messages in a forum only if your professor has allowed it.

1. Click **Forums** on the left side of the course home page.
2. Click the forum name you want to enter.
3. Click **Add Topic** at the top of the forum page.
4. In the *Subject* text box, type the title of the posting.
5. Type the content of your posting or edit the format of your posting.
6. To add an attachment to the posting, click **Add Attachment**. The Attach a File to Forum Posting dialog box is displayed.
 - To attach a file from your computer, click **Browse**. Locate the file you want to attach and then click **Open**. The path and file name are displayed in the text box.
 - Select the **Translate file to HTML for browser viewing** check box to translate the file to HTML for viewing in the web browser. Many file formats, such as those created by most word-processing, spreadsheet, graphics, and presentation programs, can be converted and displayed in the body of your posting. For a complete list of file formats, consult TWEN online Help.
 - Select the **Mark citations in the attached file to link to WestlawNext** check box if you want the citations in your document to be linked to full-text documents on WestlawNext.
 - Click **Upload File**.
7. If anonymous postings are allowed, a check box labeled *Post this message anonymously* is displayed. If you select this check box, your name and e-mail address are not displayed with your posting.
8. Specify when you want others to be able to view the posting by selecting one of three posting availability options: **Make this post available now**, **Hide this post from student view until further notice**, or **Show this post**.

Note: The scheduling option is available only if you are a course administrator and only when posting main topic messages.
9. Select the **Automatically mark citations in the message text to link to WestlawNext** check box if you want the citations in your message to be linked to full-text documents on WestlawNext.
10. Select the **Send e-mail ...** check box if you want to send an email message to all course participants to notify them that a new item has been added to the forum.

Note: This option must be enabled by your administrator.
11. Click **Post Topic** to add your posting to the discussion list.

How Do I Respond to Messages in a Forum?

1. Click **Forums** on the left side of the course home page and click the name of the forum you want to enter.
2. Click the posting you want to review.
3. Click **Reply**. Then follow steps 5–10 on page 2 for posting a main topic message.
4. Click **Post Message**.

How Do I Send an Email Message to My Professor?

You can send an email message to your professor from the My Courses page or from a course home page by clicking the professor's email link (if available) and completing the form. Or, if your professor has granted students email rights, click **E-Mail Options** on the left side of the page to send a message to your professor or other students. At the displayed E-Mail Options page, you can select recipients, type a subject and message, and include attachments, if desired.

How Do I Participate in a Live Discussion?

TWEN provides an easy-to-use chat room window you can use to participate in live discussions with your professor and other students.

1. Click **Live Discussion** on the left side of the course home page. The Live Discussion page is displayed, containing a list of scheduled live discussions.
2. Click the name of the session you want to enter. (If the live discussion is moderated, the messages you submit do not appear in the chat window until they are approved by the moderator.)
3. When you enter a live discussion, the session opens in a separate chat window.
4. To send a message, type the message in the text box and click **Send**.
5. If the session is moderated, the moderator reviews the messages and decides which ones to post to the live discussion.

How Do Custom Polls and InstaPolls Work?

TWEN provides polling features your professor can use to survey students. You have these polling options:

- Customized polling—Your professor can set up customized polls for each course. To take the poll, click **Customized Polling** on the left side of the course home page. Click a poll title and answer the question. When the professor is ready to display the results, you can view the poll as a bar graph or pie chart. Custom poll results are saved in TWEN so you and your professor can view the results later.
- InstaPolls—Your professor asks a question in class and you click the **InstaPoll** icon on the course home page to submit your vote. When voting is complete, you can view the results as a bar graph or pie chart. InstaPoll results are not saved.

What Are the TWEN System Requirements?

To use TWEN, you need the following:

- A OnePass username and password and access to the web
- Microsoft® Internet Explorer® 7.0 or later, Apple® Safari® 3.0 or later, Google® Chrome 2.0 or later, or Mozilla® Firefox® 3.0 or later
- JavaScript enabled in your browser

How Do I Get More Help Using TWEN?

TWEN assistance is available online by clicking **TWEN Help**. To download free reference materials, visit store.westlaw.com/westlaw/guides.

For general or technical questions about TWEN, call 1-800-486-4876 or send an email message to west.twensupport@thomson.com.

For assistance using WestlawNext, call 1-800-850-9378.

For free reference materials, visit store.westlaw.com/westlaw/guides.



Legal Methods I

SYLLABUS

Course: Legal Methods I

Course Number: L151F

Number of Units: Two

Term: Fall 2026

**Meeting Time: Thursdays 1:30-4:30 PM OR
6:30-9:30 PM**

Instructor: ALL

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COURSE DESCRIPTION

The purpose of this course is to introduce students to the skills that are essential for their ultimate success in law school. Students will be introduced to the importance of time management and class preparation. In addition, students will learn about precedent, the federal and California legal systems, and the hierarchy of legal authorities. Early in the semester, students will be taught how to read a case, prepare a case brief for class participation, and take class notes. Soon thereafter, they will be introduced to the important skill of outlining their course materials and to how those outlines can help them to prepare for an exam. Students will also be instructed on how to effectively take law school exams. Finally, students will learn about legal analysis, TREAT/IRAC, and the importance of developing their writing skills.

STUDENT LEARNING OUTCOMES

This course will cover and assess the following Student Learning Outcomes (SLOs):

- **Student Learning Outcome 1.** Comprehend the structures and processes of the U.S. legal system and foundational substantive law.
- **Student Learning Outcome 2.** Demonstrate proficiency in legal analysis and problem solving.
- **Student Learning Outcome 3.** Demonstrate competence in written and oral communication.
- **Student Learning Outcome 4.** Demonstrate mastery of strategies and technologies of legal research.
- **Student Learning Outcome 5.** SJCL graduates will recognize and resolve ethical issues.

CLASS PREPAREDNESS & ATTENDANCE

Per the attendance policy, you are allowed **three (3)** absences. The failure to be prepared for class and/or turn in required material to the instructor will result in the student being marked absent for that day of class.

In the event that this course has to take place remotely via Zoom, students are expected to sign-in to the class Zoom session at least five minutes before class time. *Students shall not turn off their video stream or use avatars in place of a live video stream of themselves during class time.* Failure to adhere

to these rules will result in the student being marked absent per the attendance rules in the Student Handbook.

Weekly class lectures will be designed to complement and build upon the assigned readings, rather than repeat them. Professors will assume that you have completed the assigned reading prior to class and have a working understanding of the concepts introduced. As a result, lectures are designed to build on the reading—not to repeat it. Lectures may not cover every concept presented in the reading. Instead, class time will focus on applying those concepts, working through examples, and developing the analytical skills introduced in the materials.

You are responsible for all assigned reading, including concepts and skills that may not be discussed directly in lecture. Mastery of these materials is essential, as they form the foundation for class discussions, written assignments, and exams. Refer to the syllabus for the weekly assigned readings.

INSTRUCTOR AVAILABILITY

One of the primary aims of this course is to support you during your first year of law school. This includes helping you with the concepts taught in this class and helping you adjust to the rigorous demands of law school. Each of your instructors is happy to meet with you either before or after class or outside of class. We want you to feel supported throughout this first year, so do not hesitate to reach out to each of us for assistance or advice. Some of your instructors will have formally designated office hours outside of class. Others will accommodate you on request. It is incumbent on you, however, to reach out and ask for assistance.

GRADING

Your class grade will be based upon a total of 100 available percentage points. The points are earned through graded writing assignments, in-class practice exams/midterms, and a final exam. One percentage point is awarded for each of the three scheduled practice exams. The student must make a good faith effort on the practice exams and the professor retains sole discretion over awarding percentage points for these practice exams. Each student must meet individually for an informal status meeting with their professor during the semester. These meetings do not have to be in person and can occur outside of class time at the discretion of the professor. If a student fails to meet with their professor, a percentage point will be deducted from their final course grade. Grades are calculated as follows:

- Assignment #1 – Hypothetical #1 IRAC Response with Explanatory Synthesis (3%)
- Assignment #2 – Hypothetical #2 IRAC Response with Rule and Explanatory Synthesis (7%)
- Assignment #3 – TREAT Portion of a Law Office Memo (15%)
- Assignment #4 – Second TREAT (20%)
- Assignment #5 – Full Law Office Memo (20%)
- For Credit – Bio, Schedule, Revised Schedule, Case Briefing, and Hypothetical #0 (2%)
- Practice Exams – Civil Procedure, Contracts, Torts (1% each)
- Final Exam – Final Exam (30%)

ASSIGNMENTS

In this course, you will be required to prepare and submit written assignments. These assignments will comprise the majority of your course grade during the semester. These assignments are to be uploaded to TWEN on or before the dates and times specified in this syllabus or by your professor. If you need assistance with how to use TWEN, consult your professor. It is your responsibility to turn in your assignments on time. Late assignments will be accepted; however, the late assignment's grade will be decreased by **15 points** (15% out of 100) for each successive 24-hour period the assignment is turned in following the due date and time. The point

deductions are cumulative. Thus, an assignment due August 28, 2026 at 11:00 PM that is turned in on August 30, 2026 at 1:00 AM (26 hours later) would suffer a total decrease of 30 points.

Assignments that will be graded are to be uploaded to the appropriate TWEN folder for your Legal Methods 1 section. Pursuant to the instructions provided here and SJCL policy, **use your nine-digit Student Exam ID number** for purposes of identification on all graded course assignments. **DO NOT include your name on any assignment you upload to TWEN.** Please remove the identifying metadata properties from submitted Word documents before submitting them by following these instructions:

[How to remove identifying properties from a Microsoft Word file before submitting it. \(sjcl.edu\)](https://www.sjcl.edu/how-to-remove-identifying-properties-from-a-microsoft-word-file-before-submitting-it)

Please submit your documents in MICROSOFT WORD ONLY. Files uploaded to TWEN in .pdf format will be treated as late submissions.

PLAGIARISM

SJCL abides by a student honor code, as set forth in the student handbook. If you have not read the section of the student handbook relating to the honor code, please do so prior to the beginning of this class. As such, all students are expected to act with utmost honesty, fairness, and concern for their professional reputation and the reputation of the school. Students are strictly prohibited from engaging in “unethical conduct,” which includes plagiarism and as listed below, unauthorized collaboration.

Plagiarism is taking someone/something else’s words or ideas and presenting them as your own without attributing them to the original source(s). If you are going to utilize or rely upon the work of another in a submitted assignment, you **MUST** provide proper attribution to the source used. Typically, this is done through legal citation. Attribution refers not only to actual quotations from another’s work, but also includes the basis for an idea you expressed or the authority for a proposition that you stated in your own words. Therefore, if any submitted assignment contains an idea or a proposition that you did not create entirely on your own, you *must* attribute to its source.

SJCL’s student honor code requires that all submitted work either be your own or be attributed to its source. Direct copying from either a source or from another student’s work and submitting it as your own without prior authorization from your professor(s) is prohibited and *will* result in a grade of zero for the assignment and *will* result in disciplinary action and possible expulsion from SJCL.

GENERATIVE ARTIFICIAL INTELLIGENCE

Students are prohibited from using generative AI tools, including paraphrasing tools, to complete any assignments for this class, unless indicated otherwise by the professor. It will be considered a violation of the academic standards for this course for any student to submit writing generated by any other person or entity, including any generative AI program, unless otherwise indicated. This prohibition does not include the spelling and grammar checks that are included in the Microsoft Office software that is supplied through SJCL. If you have any questions about which tools are permitted or prohibited on any assignment, you must ask in advance. Finally, generative AI detection tools may be used in reviewing assignments.

UNAUTHORIZED COLLABORATION ON ASSIGNMENTS

Writing courses at SJCL are unlike your substantive classes. In your substantive classes, you are typically graded almost exclusively based on your performance during a final exam. In these classes, collaboration between students to understand the concepts explained in class is encouraged because it is just you, the student, taking the final exam. Your writing classes are different.

In your writing classes, you are graded based on your performance with assignments spaced throughout the semester. These assignments are meant to introduce, reinforce, and assess your understanding of concepts presented in class during the semester. It is essential to the process of learning and assessing what you have learned in your writing classes *for you to perform all your own work*. This includes research for your assignments, editing your assignments, and proofreading your assignments. Specifically, you may not collaborate with other students on your assignments in this course, *unless specifically instructed to do so by your professor*. This means that you may not discuss your research with other students. You may not share how you addressed the issues presented by an assignment with other students. You may not share how you organized your assignment with other students. You may not ask for other students to proofread or edit your assignments. If you have questions about a particular assignment or are having difficulty understanding what is being asked of you, you need to speak to your professor. This is only fair to all students, as it allows the professor to recognize any confusion and address it with all students during class time.

If your professor determines that there has been unauthorized collaboration on an assignment, the professor will have the authority to deduct points from your assignment as they deem appropriate, including giving a zero for the assignment. Should students continue to unauthorizedly collaborate on subsequent assignments, the students will be subject to greater disciplinary action, including failing the class, or in extreme cases, expulsion. For additional information on disciplinary actions related to academic conduct violations, please consult your student handbook under the Academic Standards and Procedures section.

COUNSELING SUPPORT SERVICES:

SimpleTherapy is a confidential resource for students and their immediate household members provided at no cost by San Joaquin College of Law. The program is designed to help students address a variety of concerns, such as anxiety, stress, substance abuse and adjustment issues that may impact academic performance and cause personal distress.

Simple EAP gives you access to a variety of clinical and non-clinical resources, including confidential access to a licensed therapist 24/7 for short-term counseling, and up to three sessions per situation every six months. Contact Simple resources by phone at 1-888-425-4800, through the App, eConnect Mobile, or at <https://www.simpleeap.com/> with the user name: sjclstudents. For questions, please contact Dean Tennerelli tennerelli@sjcl.edu or Beth Pitcock at bpitcock@sjcl.edu.

ACCOMMODATIONS:

Because of SJCL's anonymous grading policy, faculty are not aware of which students receive accommodations. Accordingly, students seeking classroom recordings as a disability accommodation must do so by contacting the Law School Coordinator, Pat Smith per SJCL's Student Handbook.

RECORDING LECTURES AND OTHER CLASSROOM ACTIVITIES:

The use of technologies for audio and video recording of lectures and other classroom activities, whether in-person or on zoom, is allowed only with the express permission of the professor. Your instructor(s) will personally only give this permission in cases of ADA accommodations. In cases where recordings are allowed, such content is restricted to personal use only. "Personal use" is defined as use by an individual student for the purpose of studying or completing course assignments. You may not send recordings to others, including other students, or publish or share the recording online.

REQUIRED MATERIALS:

- *Legal Writing and Analysis* (3rd ed.) by Michael Murray and Christy DeSanctis
- *Plain English for Lawyers* (7th ed.) by Wydick and Sloan (Available for FREE on the library website in Study Aids→LexisNexis)
- *Cracking the Case Method* (4th ed.) by Paul Bergman, Patrick Goodman, and Thomas Holm (Available for FREE on the library website in Study Aids→West Academic)

Note: Other assigned course readings contained in the Course Reader or that can be downloaded from TWEN.

ORIENTATION WEEK CLASS MEETINGS

The initial week of instruction for Legal Methods 1 is different than all of the subsequent weeks in the course. For this week only, classes will meet twice—one on Tuesday, one on Thursday. Both sessions will be three hours long, as the material we cover will be critical to your ability to prepare for your substantive classes for the rest of your time in law school. Daytime classes will be held 1:30-4:30 PM. Evening classes will be held 6:30-9:30 PM. If you have further questions do not hesitate to contact the law school facilitator.

Date	Topic(s)	Read for class	Assignments	SLO
8/11 Orientation Week Class 1 (Tuesday)	Introduction to the Case Method; Rules of Law and Legal Reasoning Introduction to TWEN	Murray: Chs. 1 & 2 (pp. 1-21) Bergman: Chs. 6 & 8 Course Reading: • Foundations of Legal Analysis and the Case Method; • Applying the Framework: <i>Gray v. State</i> • The Green Bag Vol. 11, No. 1; • Student's Guide to TWEN; Cases: • <i>The State v. Wilson</i>; • <i>State v. Billings</i>; • <i>Gray v. State</i>	Due: Student Bio and Two-week life schedule (Email bio and schedule to your professor by 8/10/25. Write your name on it and DO NOT WRITE YOUR EXAM ID ON THESE). Assign #0: IRAC Response; Due 8/13 before class begins.	SLO 1 and SLO 2
8/13 Orientation Week Class 2 (Thursday)	Case Books; Case Briefing; Hierarchy of Authority; Determining legal rules from legal authority; Rule Synthesis	Murray: Chs. 3 (pp.39-50) & 4 (pp.51-54); Appendix A (pp. 407-411) and Appendix C (pp.433-445) Cases: • <i>Woods v. State</i>; • <i>State v. Bennett</i>; • <i>Hamilton v. State</i>; • <i>People v. Winhoven</i>; • <i>People v. Moreno</i>; • <i>State v. Neff</i>.	Due: Hypo #0 IRAC Response; (Email to your professor before class on 8/13/26. Write your name on it; DO NOT WRITE YOUR EXAM ID ON THIS).	SLO 1 and SLO 2

COURSE SCHEDULECourse: Legal Methods 1Term: Fall 2026Instructor: All

Date	Topic(s)	Read for class	Assignments	SLO
8/20 Week 1	Rule synthesis (cont.) & Explanatory synthesis	Murray: Chs. 5 and 6 Wydict: pp. 3 – 24 Cases: • <i>Shoemaker v. State</i>; • <i>Commonwealth v. Harlow</i>; • <i>State v. Ellison</i>	<u>Assign #1:</u> IRAC Response with Explanatory Synthesis; due 8/26.	SLO 1 and SLO 2
8/27 Week 2	Rule synthesis (cont.) & Explanatory synthesis	Murray: Ch. 6 Cases: • <i>People v Dupree</i> • <i>Jones v State</i> • <i>Pack v State</i> • <i>Walker v State</i>	<u>Due:</u> Hypo #1 IRAC Response with Explanatory Synthesis Upload to TWEN on 8/26 before 11:00 PM. <u>Assign #2:</u> IRAC Response with Rule and Explanatory Synthesis; due 9/2.	SLO 2
9/3 Week 3	Rule synthesis & Explanatory synthesis (cont.)	Course Reading: Explanatory Parentheticals Can Pack a Persuasive Punch by Voigt Wydict: pp. 25-36	<u>Due:</u> Hypo #2 IRAC Response with Rule and Explanatory Synthesis Upload to TWEN on 9/2 before 11:00 PM. <u>Assign #3:</u> TREAT Response; due 9/23.	SLO 2
9/10 Week 4	Explanatory synthesis (cont.), Analysis, and the TREAT Format	Murray: Ch. 7 Wydict: pp. 37-52 Cases: • <i>State v. Bowen</i>		SLO 2
9/17 Week 5	TREAT Format	Murray: Ch. 10 and Chs. 5-7 Review	<u>Due:</u> Hypo #3 TREAT Response Upload to TWEN on 9/23 before 11:00 PM. <u>Assign #4:</u> Hypo #4 TREAT Response; due 10/9. <u>Assign:</u> Revised two-week life schedule; due 9/24.	SLO 1 and SLO 3
9/24 Week 6	TREAT Format and Revising & Editing Text	Wydict: pp. 53-70	<u>Due:</u> Revised two-week life schedule; email to professor before class on 9/24.	SLO 2 and SLO 3
10/1 Week 7	Outlining, Exam taking, Study Methods	Murray: Appendix D Bergman: Chs. 10, 11, and 12		SLO 1
10/8 Week 8	Contracts Midterm (advisory graded) to be taken on 10/8 in class using Word; Legal Memoranda	Wydict: pp. 71-85	<u>Due:</u> Hypo #4 TREAT Response Upload to TWEN on 10/9 before 11:00 PM.	SLO 1, SLO 2, and SLO 3
10/15 Week 9	Civ Pro Midterm (graded) to be taken on 10/15 at 6:30 PM for all class sections	None		SLO 1, SLO 2, and SLO 3

Date	Topic(s)	Read for class	Assignments	SLO
10/22 Week 10	No Class	None	Individual Student Meetings set during the week either over Zoom or telephonically.	N/A
10/29 Week 11	Legal Memoranda	Murray: Ch. 8	<u>Assign #5: TREAT</u> Revisions with Full Law Office Memo; due 11/18.	SLO 2 and SLO 3
11/5 Week 12	Torts Practice Exam (advisory graded) to be taken on 11/5 in class using Word; Revising and Editing Text	Murray: Ch. 8 Review		SLO 1, SLO 2, and SLO 3
11/12 Week 13	Review Exam Taking/ Prepare for Final Exam	Wydict: pp. 87-104		SLO 2 and SLO 3
11/19 Week 14	Final Exam to be taken on 11/19 at 6:30 PM for all class sections	None	Due: Hypo #5 Revisions with Full Law Office Memo Upload to TWEN before 11:00 PM on 11/18.	SLO2 and SLO3

The course schedule is subject to change at the discretion of all Legal Methods instructors. Any and all changes will be discussed with the students prior to instituting the change and will apply to all sections of Legal Methods.

ASSIGNED COURSE READING

Foundations of Legal Analysis and the Case Method

SJCL Orientation Reading

I. Legal Method

Law school requires a different way of thinking. New students often assume that success depends on memorizing large amounts of legal information—rules, cases, and terminology. But law school is not simply about learning what the law is. It is about learning how the law works. While you will learn legal rules, cases, and terminology, your success will ultimately depend on your ability to analyze—and articulate—how those rules operate in specific situations. This packet introduces some of the foundational skills that will help you make that transition.

Law school teaches you how to analyze problems using legal reasoning. This means learning how to identify which legal rules apply to a set of facts, how those rules are structured, and how they should be applied to reach a reasoned conclusion. In other words, law school is not about learning what the law is in the abstract—it is about learning how the law works when applied to real situations.

Legal problems rarely present themselves in a neat or obvious way. The relevant rule is not always clearly stated, and the important facts are not always easy to identify. Part of learning to “think like a lawyer” is becoming comfortable with this uncertainty and developing the ability to work through it in a structured way.

For most, this process is not intuitive at first. You may feel unsure about what matters, how to organize your thinking, or whether you are focusing on the right issues. That is expected. Over time, however, you will begin to recognize patterns in how legal problems are framed and resolved.

At its core, legal reasoning involves a few fundamental steps:

- identifying the legal issue presented by a set of facts,
- determining the rule that governs that issue,
- understanding how that rule is structured, and
- applying the rule to the facts in a logical and persuasive way.

These steps form the foundation of legal analysis. Every assignment you complete—whether reading cases, briefing them, outlining material, writing exams, or drafting memoranda—will build on this process.

Importantly, legal reasoning is not about reaching a single “correct” answer. In many situations, more than one outcome may be plausible. What matters is your ability to construct a clear, logical, and well-supported analysis that explains *why* a particular

Foundations of Legal Analysis and the Case Method

SJCL Orientation Reading

conclusion should follow from the rule and the facts. As you move through this course, you will learn how to break complex legal problems into manageable parts, identify what matters, and apply the law in a structured way.

II. The Case Method

Law school reading is different from any reading you have done before. The majority of your reading will focus on judicial decisions, often referred to as *cases*. These cases are the primary way you will encounter the development and application of the law. This approach is known as the case method. Rather than simply being told what the law is, you will read decisions in which courts interpret, apply, and sometimes reshape legal rules.

The case method is not used simply because it is traditional. It is literally the process that practicing lawyers use to determine what the law is when representing clients and making arguments in court. Lawyers rarely encounter legal problems with clear answers. Instead, they must derive what the law is by looking at how courts have ruled in other cases in the past. This process involves working through complicated facts, identifying the legal issues, determining which rules apply, and analyzing how courts have resolved similar disputes.

Learning to read cases helps you develop this way of thinking. These are the analytical skills lawyers use throughout their careers. With practice, this process will become more natural and efficient. You are not reading cases simply to understand what happened or even to identify what the law is. You are reading them to understand how the law operates—how legal rules are developed, defined, and applied to specific facts.

Cases often contain lengthy narratives, procedural history, and discussions that may not seem directly relevant. It is easy to lose focus or to treat every detail as equally important. However, effective case reading requires a different approach.

When you read a case, your goal is not to absorb everything, but to extract what matters most and understand why it matters. This includes identifying the legal issue before the court, the rule the court applies, how the court defines or refines that rule, and how the court uses the facts to reach its conclusion. Not all facts in a case matter equally, and part of this process is learning to distinguish between background facts and *legally significant facts* (LSF).

This process takes time and practice to develop. You will not immediately know which parts of a case are most important, and you will need to read cases more than once to fully

Foundations of Legal Analysis and the Case Method

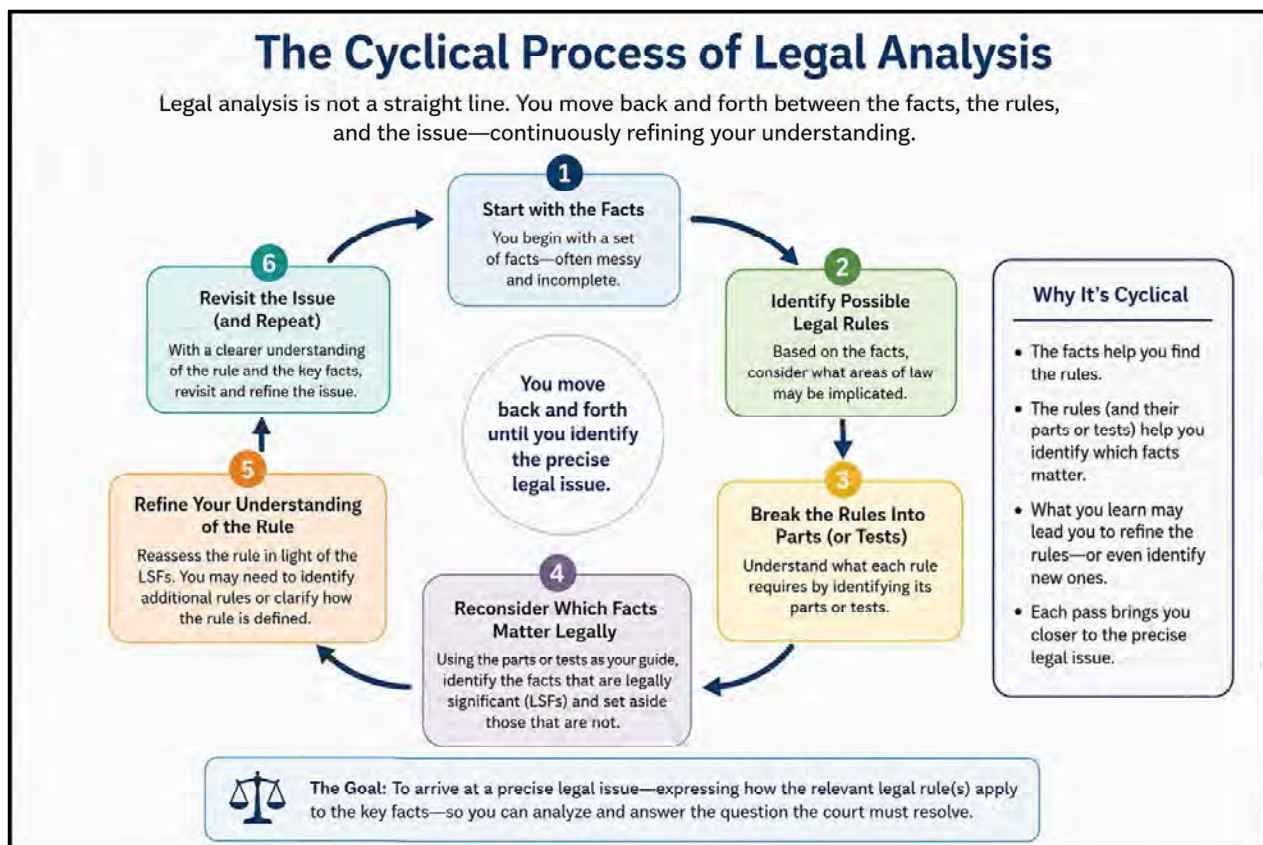
SJCL Orientation Reading

understand them. That is expected. As your understanding improves, you will become more efficient at identifying the key components of a case and filtering out what is less important.

This shift—from passive reading to active, analytical reading—is one of the most important transitions you will make in law school. It is also the foundation for everything that follows, including legal writing—a major component of this course.

III. Foundations of Legal Analysis

If there is one skill that will determine your success in law school, it is this: the ability to identify the precise legal issue. Everything else—briefing cases, outlining, writing exams, and drafting legal memoranda—hinges on it. However, getting to the correct issue is rarely a linear process. Lawyers often move back and forth between the facts, the governing rules, and the issue because each helps shape and clarify the others.



In other words, legal analysis often requires you to break the problem down into smaller parts before rebuilding it into a precise legal issue.

Foundations of Legal Analysis and the Case Method

SJCL Orientation Reading

A. Legal Rules Are Made of Component Parts

Identifying the legally significant facts (LSF) depends on understanding what the rule actually requires—and which facts the rule “cares about.” The problem is that judges often state rules (and even legal issues) at a level that is too broad to do that work effectively. To get to the heart of a legal issue, you must move beyond these general labels. Categories or monikers—such as “burglary”—are almost always too broad to be useful on their own.

Legal rules are not single, indivisible statements. Rather, they are made up of multiple parts—each of which plays a distinct role in determining whether the rule is satisfied. Not all legal rules are structured in the same way. We address this by breaking rules down into their component parts: elements or factors.

Elements

Some rules require looking at their individual parts and making a blunt determination of whether each is independently satisfied. These kinds of parts are called elements. Although the analysis may require careful reasoning, the final determination for each element is either yes or no: the element is satisfied, or it is not. Once each element has been evaluated, the elements are put together to determine whether the overall rule is met.

- Some element rules require every element to be satisfied for the overall rule to be met. These are often referred to as “and” tests since the rule requires elements A and B and C etc.
- Other rules are structured as “or” tests, where satisfying any of the elements is sufficient, as in A or B or C etc.

Elements tend to be more straightforward and formulaic. In other words, elements ask: has this requirement been satisfied?

Factors

Some rules are structured around factors rather than elements. Unlike elements, factors do not require a simple yes/no determination. Instead, you evaluate the degree to which each factor is present and the weight it should receive. This attempt to quantify how strongly the facts of the case support each factor means no single factor controls. It also means that no formulaic combination of factors controls. Whether the overall rule is met depends on considering the totality of the circumstances—what all of the factors indicate when considered together.

Foundations of Legal Analysis and the Case Method

SJCL Orientation Reading

Factors are flexible and less formulaic. In other words, factors ask: how strongly does this consideration weigh in the analysis and how does it compare to the weight of the other considerations?

These different structures matter because they determine how the rule is applied—and, in turn, which facts are legally significant.

Identifying the parts of the rule and its structure is only an initial step. Each part (element or factor) is often defined more specifically and may include its own definition, standard, test, or even sub-parts. In other words, an element or factor is not just a word or label—it is a concept that must be measured or evaluated in some way. This is why breaking a rule into its parts is a critical step: it prepares you to analyze the rule in a structured and precise way.

Element-based rules provide a useful example of how breaking rules into parts guides legal analysis. Occasionally, courts will break a rule down into its parts for you. In *State v. Wilson*, for example, the court stated:

The crime of which the prisoner stands accused is technically called burglary, and is defined to be, the breaking and entering into the mansion house of another, with the intent to commit some felony therein, and that in the night time. This definition is an accurate one, and should be carefully kept in mind, for almost every word of it is significant and important. Before any man can be legally convicted of this crime, therefore, these five circumstances must be proved: 1st. There must be what the law calls a breaking. 2d. There must be an entry. 3d. The breaking and entry, or one of them, must be in the night. 4th. It must be done in a mansion-house. 5th. It must be done to the intent of committing some felony therein.

(*State v Wilson*, (1793) 1 N.J.L. 439.) Although courts do not often present rules in such a clearly organized, numbered format, the analysis still proceeds element by element. Most of the time, you will need to determine where the court articulates the rule of law and how that rule breaks down into elements—or even subelements. This often requires you to move beyond the court’s language and organize the rule in a way that makes it usable for analysis, because each component must be examined individually to determine whether the rule, as a whole, is met.

The *Wilson* court’s discussion of “breaking,” one of the elements of burglary, provides a useful example of how an element is defined and applied.

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As to the breaking, I take the law to be that, by this term, it is not meant to imply any actual violence or force. If a man lifts up the latch of an outward door, or if an outward door, being open, a thief enters and unlatches or unlocks a chamber door, with a felonious intent, in either case his act comes up to the idea affixed by the law to the word breaking, so as to constitute the crime of burglary....If, however, all the doors be open, and the thief enters through an open door, and after getting into the house should break open a chest or a cupboard, even fixed in the wall, this is not such a breaking as the law requires as one of the ingredients of a burglary.

(*State v Wilson*, (1793) 1 N.J.L. 439.) Rather than requiring violent force, the court explains that “breaking” can be satisfied by the mere opening of a closed exterior door. While the court does not formally label this as a “test,” it effectively provides one: whether the defendant used even slight force to gain entry.

This is an example of rule synthesis. Courts do not always present rules in a clear, usable format. Instead, you must extract the governing principle from the court’s reasoning and restate it in a structured way. Here, the court’s discussion can be synthesized into the following rule: “breaking” is met when a defendant uses even slight force to gain entry, such as opening a closed exterior door.

This synthesized rule, in turn, directs the analysis toward specific facts, such as whether the door was closed, whether it had been secured, or whether, if the owner had left it slightly ajar, the opening was wide enough to allow entry. Those facts become legally significant because they help determine whether the “breaking” element is satisfied.

In this way, elements act as a guide: they tell you what to look for in the facts and how those facts should be evaluated. In other words, they help you identify which facts are legally significant. Facts are legally significant because they relate to a particular rule—or, more precisely, to a particular part of that rule.

In short, breaking rules into their component parts helps you determine what must be proven so that you can begin to identify which facts matter for proving it.

B. Identifying Legally Significant Facts (LSF)

Not every fact in a case matters in the same way. Some facts provide background, context, or narrative detail. Other facts are legally significant because they affect whether a legal rule—or a particular part of that rule—is satisfied. In legal analysis, we often say that an element is “satisfied” (or met) when a set of facts fulfills the rule’s requirements. These are the facts you must learn to identify.

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A LSF, therefore, is a fact that affects the outcome of the legal question being analyzed. In other words, it is a fact that helps determine whether a rule applies, whether an element is satisfied, the weight of a factor, or whether one side has a stronger argument under the law. Your task is not simply to collect facts, but to determine which facts matter legally and how they matter.

For example, if the issue is whether a burglary occurred in the nighttime, then facts about the time of sunset, the amount of available light, and the time the events occurred may be legally significant. By contrast, facts that do not bear on the nighttime requirement (such as what was taken or what the suspect was driving) may provide context, but they are not outcome determinative for that issue.

At first, identifying LSFs can be difficult. You will not always know which facts matter on your initial read of a case. In fact, you will likely need to read each case more than once. This is because identifying LSFs depends on understanding the rule—or more precisely, the part of the rule—being analyzed and why it matters.

At the same time, identifying the relevant rule depends on recognizing which facts are legally significant. These concepts are interconnected: each helps define the other. This interdependence can feel frustrating, especially for new law students. However, your understanding will develop gradually as you move back and forth between the facts, the rule, and the issue.

As you read cases, you should begin asking yourself: Which facts actually matter to the legal issue before the court? Which facts could change the outcome if they were different? Asking these questions is not a sign that you are doing something wrong. To the contrary, it is a sign that you are engaging in legal analysis.

This is why legal analysis often feels cyclical. As your understanding of the rule becomes clearer, you begin to see different facts as legally important. Those facts, in turn, may refine your understanding of the rule and the issue itself.

C. What Is a Legal Issue?

Once you understand how rules are structured and which facts matter legally, you can begin identifying the actual legal issue. At its core, a legal issue is not just a question. It is a structured connection between the law and the facts. This relationship can be expressed as a simple formula:

$$\text{Legal Issue} = \text{Legal Rule(s)} + \text{Key Facts LSF.}$$

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This means:

- You are not simply asking, “What happened?”
- You are not simply asking, “What is the law?”
- You are asking whether and how a specific legal rule applies to a specific set of facts.

The wording of the issue is often in the form of a question. It should be detailed enough to begin to focus the reader’s attention on the specific legal rule being analyzed and the legally significant facts that affect the outcome.

Example:

A weak legal issue that is overly broad:	“Is this burglary?”	Vague; could apply to any set of facts that involves burglary
A stronger legal issue that is precise/narrow:	“Is the ‘nighttime’ requirement for burglary satisfied when the events occurred at 8:00 p.m., while it was dusk but not fully dark?”	Connects a specific legal concept about burglary to specific facts.

This distinction—between broad labels and precise, element/factor-focused questions—is critical to effective legal analysis. Effectively applying this structure will depend on your ability to (1) identify which facts are legally significant and (2) determine which rule—or more precisely, which part of that rule—those facts relate to.

D. The Big Picture

Once you identify the governing rule, break it into parts, and determine which facts are legally significant, you can begin identifying which specific parts of the rule are actually in dispute—that is, which issues truly matter to the analysis. Legal analysis does not always require that every part of a rule be examined in equal depth. You will need to determine, from the facts, which are actually in dispute—that is, which parts of the rule are at issue. Some elements will be clearly met, while others will be less certain. Your task is to identify which parts of the rule the facts place in dispute and to explain how those facts apply to each disputed part.

This process is often referred to as *issue spotting*—the ability to identify which legal rules apply and which parts of those rules are truly at issue given the facts. Effective issue spotting requires you to move beyond broad labels and instead focus on the specific parts of the rule that will determine the outcome.

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A helpful way to approach this process is to ask yourself: What rule applies? What are its parts? Which of those parts are actually in dispute? And which facts are relevant to applying the governing test to those parts—that is, determining whether and how the disputed elements are satisfied or how the factors weigh and compare? These questions will guide your analysis and help you focus on what matters most. In other words, strong legal analysis is not about discussing everything; it is about focusing on how specific facts relate to the parts of the rule that are at issue.

IV. Understanding the Role and Sources of Law

In law school, you will read primarily appellate court decisions. Unlike trial courts, appellate courts generally do not determine what actually happened or decide which witnesses to believe. Instead, they focus primarily on questions of law—interpreting legal rules, defining legal standards, and determining whether the law was applied correctly to the facts already established at trial.

As a result, your focus in law school will be on understanding and analyzing how legal rules operate when applied to established facts—not on disputing what actually happened. To understand this process, you must first understand the distinction between questions of law and questions of fact.

A. Questions of Fact vs. Questions of Law

Legal disputes involve both questions of law and questions of fact, and understanding the difference between the two is essential.

- A **question of fact** asks what actually happened. It involves evaluating evidence, determining credibility, and deciding which version of events is more persuasive. These questions are typically decided by a jury (or by a judge acting as the factfinder in a bench trial).
- A **question of law** asks what the law is. It involves interpreting legal rules, defining legal standards, and determining how the law should be applied in general. These questions are decided by judges.

This distinction has important implications for how cases are decided and reviewed.

For example, at trial “Witness A” says that they heard a loud banging noise at 9:00 p.m. and “Witness B” says the noise was a soft tapping and closer to 8:00 p.m. This may lead to the following:

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Question	Type	Trial Court Role	Appellate Court Role	Law Student's Role
Whose version do we believe?	<u>Question of Fact</u>	The factfinder (usually the jury) determines which testimony to believe. If the jury believes Witness A, then the established fact becomes that there was a loud banging noise at 9:00 p.m.	Generally do not disturb findings of fact.	Accept the facts as given.
What does “nighttime” mean?	<u>Question of Law</u>	The judge determines the governing legal definition of “nighttime” (e.g., after sunset or after complete darkness) and instructs the jury accordingly.	Independently determines the governing law.	Understand the governing legal rule and its component parts.
Was 9:00 p.m. on the date of the occurrence “nighttime”?	<u>Mixed Question of Law and Fact</u>	The judge defines the law, the factfinder determines what happened, and the legal standard is then applied to those facts to determine whether the requirements are satisfied.	Reviews whether the law was correctly applied to the established facts.	Analyze how the established facts satisfy (or fail to satisfy) the legal rule.

When reading appellate opinions, your role closely mirrors that of the appellate court. As a result, most of the legal analysis you will perform in law school involves first identifying the governing legal rule and its component parts (a question of law) and then applying those requirements to an established set of facts (a mixed question of law and fact).

When reading appellate decisions in law school, the relevant facts have generally already been determined. Your task is to examine the legal questions and understand how the court applies the law to those established facts. In other words, legal analysis operates at the intersection of law and fact. You must first identify the legal rule and understand its component parts (a question of law). Then you determine how the facts as stated in the decision relate to those requirements (mixed question of law and fact).

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B. Sources of Law: Statutory Law and Common Law

Legal rules come from different sources, and understanding those sources is critical to understanding how the law operates.

Statutory law consists of laws enacted by legislatures. These rules are written and codified, often in statutes or codes. When a statute governs an issue, courts must interpret its language and apply it to the facts of the case.

Common law, by contrast, develops through judicial decisions. Courts interpret prior decisions, refine legal principles, and apply those principles to new factual situations. Over time, this process creates a body of precedent that guides future decisions.

In practice, these sources often work together. A statute may establish a general rule, while courts interpret that rule, define its terms, and apply it in specific contexts. As a result, understanding the law often requires both reading statutory language and analyzing judicial opinions.

C. Stare Decisis and the Role of Precedent

The common law system is built on the principle of stare decisis, which means that courts generally follow prior decisions when resolving similar issues. This principle promotes consistency, predictability, and fairness. When a court decides a legal issue, that decision becomes part of the body of law that future courts will consider when addressing similar questions.

However, stare decisis does not mean that the law is static. Courts may distinguish prior cases based on their facts, refine legal rules over time, or, in some circumstances, depart from precedent. As a result, the law evolves through the interaction between past decisions and new factual situations.

For you, this means that reading cases is not just about understanding one outcome—it is about understanding how legal rules develop and how they are applied across different contexts.

D. Why This Matters for Legal Analysis

These concepts—questions of law and fact, sources of law, and precedent—are not abstract. They directly affect how you analyze legal problems.

- The rule you apply may come from a statute, a case, or both.
- The meaning of that rule may depend on how courts have interpreted it over time.

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- The outcome of a case will depend on how the facts are evaluated in relation to that rule.

Your role, therefore, is to bring these pieces together. You must identify the governing rule, understand how it is structured, determine which facts are legally significant, and explain how those facts relate to the rule's elements or factors.

This is the foundation of legal analysis—and the framework you will continue to develop and refine throughout this course (and your practice of law).

V. Organizing Legal Analysis: IRAC

The concepts discussed in the previous sections—identifying legal issues, breaking rules into parts, recognizing legally significant facts, and analyzing how rules apply to those facts—form the foundation of legal reasoning. Lawyers must not only think through these concepts but also organize and communicate their analysis clearly.

One of the most common organizational frameworks used in legal analysis is called IRAC. IRAC stands for:

- Issue: the legal question(s) that must be resolved
- Rule: the legal rule(s) that govern the question
- Application (or Analysis): how the LSFs relate to the rule and its parts/tests
- Conclusion: the outcome that follows from the analysis

IRAC is not simply a writing formula. Rather, it is a structured way of organizing and communicating legal reasoning. It provides a framework for explaining the legal issue, presenting the governing rule, demonstrating how the rule applies to the relevant facts, and supporting a reasoned conclusion.

Importantly, the analytical process underlying IRAC is often more complicated and cyclical than the written structure itself suggests. As discussed in the previous section, lawyers frequently move back and forth between the facts, the governing rules, and the issue before arriving at a final analysis. The written product, however, is usually presented in a more organized and linear format so that the reader can follow the reasoning clearly.

For example:

Issue:	Is the “nighttime” requirement for burglary satisfied when the events occurred at 8:00 p.m. while it was dusk but not fully dark?
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Rule:	Burglary requires that the offense occur during the nighttime. Nighttime generally exists when there is insufficient natural light to recognize a person's face.
Application /Analysis:	Here, there was still sufficient natural light to recognize a person's face because the witness recognized the suspect when they saw them from across the street. Although it was 8:00 p.m. and dusk, darkness had not yet created the level of concealment required to satisfy the nighttime element because the witness could identify the suspect without artificial illumination.
Conclusion:	Therefore, a court will conclude that the nighttime element is not met.

Strong legal analysis begins with a strong understanding of the rule. Throughout the semester, you will develop, organize, and internalize the legal rules that govern each area of law. And yes, you will memorize these rules. Unlike many exams you may have taken before, however, law school exams rarely test your ability to simply repeat information you have memorized.

Effective legal analysis requires not only correct and precise rules, but also the ability to apply those rules to unfamiliar facts. Each part of IRAC serves a different purpose in moving from a legal problem to a reasoned conclusion:

- I The facts presented in a hypothetical help you identify the question(s) that must be answered and determine which rules govern it (issue spotting);
- R The rules —which you have memorized —tell what elements, factors, tests, or standards must be evaluated;
- A Analysis explains why the facts do (or do not) satisfy those requirements; and
- C The conclusion states the outcome that follows.

In other words, the facts identify the issue(s) and relevant rule(s), the rules provide the measuring standard(s), and the analysis applies those standards to the facts. While each part of IRAC serves an important function, the analysis is the heart of legal reasoning because it is where the law and the facts come together. The analysis is where you explain the connection between the rule and the facts and demonstrate how the rule operates in practice.

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A common mistake new law students make is treating application as a place to simply list relevant facts (fact dumping). However, facts alone do not create legal analysis. Another common mistake is stating an outcome without explaining which facts support it (being conclusory). An outcome alone is also not legal analysis. Analysis *explains why* a particular fact matters by connecting it to a specific element, factor, definition, or test within the rule.

One way to think about this connection is:

Here, [element/factor outcome] because [factual justification].

This structure forces you to connect the law and the facts. It begins by identifying the specific element, factor, test, or standard you are discussing and its outcome. It then explains the specific facts that support that outcome. Without both pieces, your analysis risks becoming either conclusory (stating an outcome without explaining why) or simply fact dumping (listing facts without explaining their legal significance).

For example:

Conclusory	It was nighttime because there was sufficient natural light to recognize a person's face.
Fact Dump	Although it was 8pm and dusk, the witness recognized the suspect when they saw them from across the street.
Analysis	Here, there was still sufficient natural light to recognize a person's face because the witness recognized the suspect when they saw them from across the street. Although it was 8:00 p.m. and dusk, darkness had not yet created the level of concealment required to satisfy nighttime because the witness could identify the suspect without artificial illumination.

Learning IRAC is not about memorizing a format. It is about developing a disciplined way of thinking. As you practice legal analysis, you will become better at identifying the right issue, selecting and organizing the relevant rules, recognizing which facts matter, and explaining how those facts affect the outcome. You will begin developing these skills by studying judicial opinions and learning to recognize how courts use this same process when deciding cases.

VI. Introduction to Case Briefing

As you begin reading judicial opinions, one tool that will help you identify and organize this legal reasoning is a case brief. A case brief is a structured set of notes that helps you extract,

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organize, and analyze the most important components of a judicial opinion. The purpose of briefing is not simply to summarize a case. Rather, it is to help you:

- identify legally significant facts;
- understand how legal rules are defined, structured, and applied;
- recognize how courts reason through legal problems; and
- prepare for and participate in class discussions.

As emphasized in earlier sections, not all facts in a case matter equally, and not all parts of a rule are equally important. Case briefing helps you focus on what matters most by organizing your reading around the structure of legal analysis.

Case briefing is a skill that develops over time. Initially, it may feel mechanical or time-consuming. That is expected. With practice, you will become more efficient. But the underlying skills will remain essential throughout law school and beyond.

You will be introduced to case briefing through the assigned readings for Orientation Week. These materials are designed to show how the concepts introduced here—identifying issues, isolating LSFs, breaking rules into parts, and synthesizing rules—operate in practice.

As you work through these materials, focus on how they reinforce the core concepts introduced in this packet—particularly:

- identifying the legal issue,
- distinguishing legally significant facts from background information, and
- breaking legal rules into their component parts.

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HOW TO READ A LEGAL OPINION

A GUIDE FOR NEW LAW STUDENTS

Orin S. Kerr

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HOW TO READ A LEGAL OPINION

A GUIDE FOR NEW LAW STUDENTS

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This essay is designed to help new law students prepare for the first few weeks of class. It explains what judicial opinions are, how they are structured, and what law students should look for when reading them.

I. WHAT'S IN A LEGAL OPINION?

When two people disagree and that disagreement leads to a lawsuit, the lawsuit will sometimes end with a ruling by a judge in favor of one side. The judge will explain the ruling in a written document referred to as an “opinion.” The opinion explains what the case is about, discusses the relevant legal principles, and then applies the law to the facts to reach a ruling in favor of one side and against the other.

Modern judicial opinions reflect hundreds of years of history and practice. They usually follow a simple and predictable formula. This

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section takes you through the basic formula. It starts with the introductory materials at the top of an opinion and then moves on to the body of the opinion.

The Caption

The first part of the case is the title of the case, known as the “caption.” Examples include *Brown v. Board of Education* and *Miranda v. Arizona*. The caption usually tells you the last names of the person who brought the lawsuit and the person who is being sued. These two sides are often referred to as the “parties” or as the “litigants” in the case. For example, if Ms. Smith sues Mr. Jones, the case caption may be *Smith v. Jones* (or, depending on the court, *Jones v. Smith*).

In criminal law, cases are brought by government prosecutors on behalf of the government itself. This means that the government is the named party. For example, if the federal government charges John Doe with a crime, the case caption will be *United States v. Doe*. If a state brings the charges instead, the caption will be *State v. Doe*, *People v. Doe*, or *Commonwealth v. Doe*, depending on the practices of that state.¹

The Case Citation

Below the case name you will find some letters and numbers. These letters and numbers are the legal citation for the case. A citation tells you the name of the court that decided the case, the law book in which the opinion was published, and the year in which the court decided the case. For example, “U.S. Supreme Court, 485 U.S. 759 (1988)” refers to a U.S. Supreme Court case decided in 1988 that appears in Volume 485 of the *United States Reports* starting at page 759.

The Author of the Opinion

The next information is the name of the judge who wrote the opinion. Most opinions assigned in law school were issued by courts

¹ English criminal cases normally will be *Rex v. Doe* or *Regina v. Doe*. Rex and Regina aren’t the victims: the words are Latin for “King” and “Queen.” During the reign of a King, English courts use “Rex”; during the reign of a Queen, they switch to “Regina.”

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with multiple judges. The name tells you which judge wrote that particular opinion. In older cases, the opinion often simply states a last name followed by the initial “J.” No, judges don’t all have the first initial “J.” The letter stands for “Judge” or “Justice,” depending on the court. On occasion, the opinion will use the Latin phrase “per curiam” instead of a judge’s name. Per curiam means “by the court.” It signals that the opinion reflects a common view among all the judges rather than the writings of a specific judge.

The Facts of the Case

Now let’s move on to the opinion itself. The first part of the body of the opinion presents the facts of the case. In other words, what happened? The facts might be that Andy pulled out a gun and shot Bob. Or maybe Fred agreed to give Sally \$100 and then changed his mind. Surprisingly, there are no particular rules for what facts a judge must include in the fact section of an opinion. Sometimes the fact sections are long, and sometimes they are short. Sometimes they are clear and accurate, and other times they are vague or incomplete.

Most discussions of the facts also cover the “procedural history” of the case. The procedural history explains how the legal dispute worked its way through the legal system to the court that is issuing the opinion. It will include various motions, hearings, and trials that occurred after the case was initially filed. Your civil procedure class is all about that kind of stuff; you should pay very close attention to the procedural history of cases when you read assignments for your civil procedure class. The procedural history of cases usually will be less important when you read a case for your other classes.

The Law of the Case

After the opinion presents the facts, it will then discuss the law. Many opinions present the law in two stages. The first stage discusses the general principles of law that are relevant to cases such as the one the court is deciding. This section might explore the history of a particular field of law or may include a discussion of past cases (known as “precedents”) that are related to the case the court is de-

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ciding. This part of the opinion gives the reader background to help understand the context and significance of the court's decision. The second stage of the legal section applies the general legal principles to the particular facts of the dispute. As you might guess, this part is in many ways the heart of the opinion: It gets to the bottom line of why the court is ruling for one side and against the other.

Concurring and/or Dissenting Opinions

Most of the opinions you read as a law student are “majority” opinions. When a group of judges get together to decide a case, they vote on which side should win and also try to agree on a legal rationale to explain why that side has won. A majority opinion is an opinion joined by the majority of judges on that court. Although most decisions are unanimous, some cases are not. Some judges may disagree and will write a separate opinion offering a different approach. Those opinions are called “concurring opinions” or “dissenting opinions,” and they appear after the majority opinion. A “concurring opinion” (sometimes just called a “concurrence”) explains a vote in favor of the winning side but based on a different legal rationale. A “dissenting opinion” (sometimes just called a “dissent”) explains a vote in favor of the losing side.

II. COMMON LEGAL TERMS FOUND IN OPINIONS

Now that you know what's in a legal opinion, it's time to learn some of the common words you'll find inside them. But first a history lesson, for reasons that should be clear in a minute.

In 1066, William the Conqueror came across the English Channel from what is now France and conquered the land that is today called England. The conquering Normans spoke French and the defeated Saxons spoke Old English. The Normans took over the court system, and their language became the language of the law. For several centuries after the French-speaking Normans took over England, lawyers and judges in English courts spoke in French. When English courts eventually returned to using English, they continued to use many French words.

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Why should you care about this ancient history? The American colonists considered themselves Englishmen, so they used the English legal system and adopted its language. This means that American legal opinions today are littered with weird French terms. Examples include plaintiff, defendant, tort, contract, crime, judge, attorney, counsel, court, verdict, party, appeal, evidence, and jury. These words are the everyday language of the American legal system. And they're all from the French, brought to you by William the Conqueror in 1066.

This means that when you read a legal opinion, you'll come across a lot of foreign-sounding words to describe the court system. You need to learn all of these words eventually; you should read cases with a legal dictionary nearby and should look up every word you don't know. But this section will give you a head start by introducing you to some of the most common words, many of which (but not all) are French in origin.

Types of Disputes and the Names of Participants

There are two basic kinds of legal disputes: civil and criminal. In a civil case, one person files a lawsuit against another asking the court to order the other side to pay him money or to do or stop doing something. An award of money is called "damages" and an order to do something or to refrain from doing something is called an "injunction." The person bringing the lawsuit is known as the "plaintiff" and the person sued is called the "defendant."

In criminal cases, there is no plaintiff and no lawsuit. The role of a plaintiff is occupied by a government prosecutor. Instead of filing a lawsuit (or equivalently, "suing" someone), the prosecutor files criminal "charges." Instead of asking for damages or an injunction, the prosecutor asks the court to punish the individual through either jail time or a fine. The government prosecutor is often referred to as "the state," "the prosecution," or simply "the government." The person charged is called the defendant, just like the person sued in a civil case.

In legal disputes, each party ordinarily is represented by a lawyer. Legal opinions use several different words for lawyers, includ-

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ing “attorney” and “counsel.” There are some historical differences among these terms, but for the last century or so they have all meant the same thing. When a lawyer addresses a judge in court, she will always address the judge as “your honor,” just like lawyers do in the movies. In legal opinions, however, judges will usually refer to themselves as “the Court.”

Terms in Appellate Litigation

Most opinions that you read in law school are appellate opinions, which means that they decide the outcome of appeals. An “appeal” is a legal proceeding that considers whether another court’s legal decision was right or wrong. After a court has ruled for one side, the losing side may seek review of that decision by filing an appeal before a higher court. The original court is usually known as the trial court, because that’s where the trial occurs if there is one. The higher court is known as the appellate or appeals court, as it is the court that hears the appeal.

A single judge presides over trial court proceedings, but appellate cases are decided by panels of several judges. For example, in the federal court system, run by the United States government, a single trial judge known as a District Court judge oversees the trial stage. Cases can be appealed to the next higher court, the Court of Appeals, where cases are decided by panels of three judges known as Circuit Court judges. A side that loses before the Circuit Court can seek review of that decision at the United States Supreme Court. Supreme Court cases are decided by all nine judges. Supreme Court judges are called Justices instead of judges; there is one “Chief Justice” and the other eight are just plain “Justices” (technically they are “Associate Justices,” but everyone just calls them “Justices”).

During the proceedings before the higher court, the party that lost at the original court and is therefore filing the appeal is usually known as the “appellant.” The party that won in the lower court and must defend the lower court’s decision is known as the “appellee” (accent on the last syllable). Some older opinions may refer to the appellant as the “plaintiff in error” and the appellee as the “defendant

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in error.” Finally, some courts label an appeal as a “petition,” and require the losing party to petition the higher court for relief. In these cases, the party that lost before the lower court and is filing the petition for review is called the “petitioner.” The party that won before the lower court and is responding to the petition in the higher court is called the “respondent.”

Confused yet? You probably are, but don’t worry. You’ll read so many cases in the next few weeks that you’ll get used to all of this very soon.

III. WHAT YOU NEED TO LEARN FROM READING A CASE

Okay, so you’ve just read a case for class. You think you understand it, but you’re not sure if you learned what your professor wanted you to learn. Here is what professors want students to know after reading a case assigned for class:

Know the Facts

Law professors love the facts. When they call on students in class, they typically begin by asking students to state the facts of a particular case. Facts are important because law is often highly fact-sensitive, which is a fancy way of saying that the proper legal outcome depends on the exact details of what happened. If you don’t know the facts, you can’t really understand the case and can’t understand the law.

Most law students don’t appreciate the importance of the facts when they read a case. Students think, “I’m in law school, not fact school; I want to know what the law is, not just what happened in this one case.” But trust me: the facts are really important.²

² If you don’t believe me, you should take a look at a few law school exams. It turns out that the most common form of law school exam question presents a long description of a very particular set of facts. It then asks the student to “spot” and analyze the legal issues presented by those facts. These exam questions are known as “issue-spothers,” as they test the student’s ability to understand the facts and spot the legal issues they raise. As you might imagine, doing well on an issue-

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Know the Specific Legal Arguments Made by the Parties

Lawsuits are disputes, and judges only issue opinions when two parties to a dispute disagree on a particular legal question. This means that legal opinions focus on resolving the parties' very specific disagreement. The lawyers, not the judges, take the lead role in framing the issues raised by a case.

In an appeal, for example, the lawyer for the appellant will articulate specific ways in which the lower court was wrong. The appellate court will then look at those arguments and either agree or disagree. (Now you can understand why people pay big bucks for top lawyers; the best lawyers are highly skilled at identifying and articulating their arguments to the court.) Because the lawyers take the lead role in framing the issues, you need to understand exactly what arguments the two sides were making.

Know the Disposition

The "disposition" of a case is the action the court took. It is often announced at the very end of the opinion. For example, an appeals court might "affirm" a lower court decision, upholding it, or it might "reverse" the decision, ruling for the other side. Alternatively, an appeals court might "vacate" the lower court decision, wiping the lower-court decision off the books, and then "remand" the case, sending it back to the lower court for further proceedings. For now, you should keep in mind that when a higher court "affirms" it means that the lower court had it right (in result, if not in reasoning). Words like "reverse," "remand," and "vacate" means that the higher court thought the lower court had it wrong.

Understand the Reasoning of the Majority Opinion

To understand the reasoning of an opinion, you should first identify the source of the law the judge applied. Some opinions interpret the Constitution, the founding charter of the government. Other cases

spotter requires developing a careful and nuanced understanding of the importance of the facts. The best way to prepare for that is to read the fact sections of your cases very carefully.

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interpret “statutes,” which is a fancy name for written laws passed by legislative bodies such as Congress. Still other cases interpret “the common law,” which is a term that usually refers to the body of prior case decisions that derive ultimately from pre-1776 English law that the Colonists brought over from England.³

In your first year, the opinions that you read in your Torts, Contracts, and Property classes will mostly interpret the common law. Opinions in Criminal Law mostly interpret either the common law or statutes. Finally, opinions in your Civil Procedure casebook will mostly interpret statutory law or the Constitution. The source of law is very important because American law follows a clear hierarchy. Constitutional rules trump statutory (statute-based) rules, and statutory rules trump common law rules.

After you have identified the source of law, you should next identify the method of reasoning that the court used to justify its decision. When a case is governed by a statute, for example, the court usually will simply follow what the statute says. The court’s role is narrow in such settings because the legislature has settled the law. Similarly, when past courts have already answered similar questions before, a court may conclude that it is required to reach a particular result because it is bound by the past precedents. This is an application of the judicial practice of “stare decisis,” an abbreviation of a Latin phrase meaning “That which has been already decided should remain settled.”

In other settings, courts may justify their decisions on public policy grounds. That is, they may pick the rule that they think is the best rule, and they may explain in the opinion why they think that rule is best. This is particularly likely in common law cases where judges are not bound by a statute or constitutional rule. Other courts will rely on morality, fairness, or notions of justice to justify

³ The phrase “common law” started being used about a thousand years ago to refer to laws that were common to all English citizens. Thus, the word “common” in the phrase “common law” means common in the sense of “shared by all,” not common in the sense of “not very special.” The “common law” was announced in judicial opinions. As a result, you will sometimes hear the phrase “common law” used to refer to areas of judge-made law as opposed to legislatively-made law.

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their decisions. Many courts will mix and match, relying on several or even all of these justifications.

Understand the Significance of the Majority Opinion

Some opinions resolve the parties' legal dispute by announcing and applying a clear rule of law that is new to that particular case. That rule is known as the "holding" of the case. Holdings are often contrasted with "dicta" found in an opinion. Dicta refers to legal statements in the opinion not needed to resolve the dispute of the parties; the word is a pluralized abbreviation of the Latin phrase "obiter dictum," which means "a remark by the way."

When a court announces a clear holding, you should take a minute to think about how the court's rule would apply in other situations. During class, professors like to pose "hypotheticals," new sets of facts that are different from those found in the cases you have read. They do this for two reasons. First, it's hard to understand the significance of a legal rule unless you think about how it might apply to lots of different situations. A rule might look good in one setting, but another set of facts might reveal a major problem or ambiguity. Second, judges often reason by "analogy," which means a new case may be governed by an older case when the facts of the new case are similar to those of the older one. This raises the question, which are the legally relevant facts for this particular rule? The best way to evaluate this is to consider new sets of facts. You'll spend a lot of time doing this in class, and you can get a head start on your class discussions by asking the hypotheticals on your own before class begins.

Finally, you should accept that some opinions are vague. Sometimes a court won't explain its reasoning very well, and that forces us to try to figure out what the opinion means. You'll look for the holding of the case but become frustrated because you can't find one. It's not your fault; some opinions are written in a narrow way so that there is no clear holding, and others are just poorly reasoned or written. Rather than trying to fill in the ambiguity with false certainty, try embracing the ambiguity instead. One of the skills of top-flight lawyers is that they know what they don't know: they know

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when the law is unclear. Indeed, this skill of identifying when a problem is easy and when it is hard (in the sense of being unsettled or unresolved by the courts) is one of the keys to doing very well in law school. The best law students are the ones who recognize and identify these unsettled issues without pretending that they are easy.

Understand Any Concurring and/or Dissenting Opinions

You probably won't believe me at first, but concurrences and dissents are very important. You need to read them carefully. To understand why, you need to appreciate that law is man-made, and Anglo-American law has often been judge-made. Learning to "think like a lawyer" often means learning to think like a judge, which means learning how to evaluate which rules and explanations are strong and which are weak. Courts occasionally say things that are silly, wrongheaded, or confused, and you need to think independently about what judges say.

Concurring and dissenting opinions often do this work for you. Casebook authors edit out any unimportant concurrences and dissents to keep the opinions short. When concurrences and dissents appear in a casebook, it signals that they offer some valuable insights and raise important arguments. Disagreement between the majority opinion and concurring or dissenting opinions often frames the key issue raised by the case; to understand the case, you need to understand the arguments offered in concurring and dissenting opinions.

IV. WHY DO LAW PROFESSORS USE THE CASE METHOD?

I'll conclude by stepping back and explaining why law professors bother with the case method. Every law student quickly realizes that law school classes are very different from college classes. Your college professors probably stood at the podium and droned on while you sat back in your chair, safe in your cocoon. You're now starting law school, and it's very different. You're reading about actual cases, real-life disputes, and you're trying to learn about the law by picking up bits and pieces of it from what the opinions tell

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you. Even weirder, your professors are asking you questions about those opinions, getting everyone to join in a discussion about them. Why the difference?, you may be wondering. Why do law schools use the case method at all?

I think there are two major reasons, one historical and the other practical.

The Historical Reason

The legal system that we have inherited from England is largely judge-focused. The judges have made the law what it is through their written opinions. To understand that law, we need to study the actual decisions that the judges have written. Further, we need to learn to look at law the way that judges look at law. In our system of government, judges can only announce the law when deciding real disputes: they can't just have a press conference and announce a set of legal rules. (This is sometimes referred to as the "case or controversy" requirement; a court has no power to decide an issue unless it is presented by an actual case or controversy before the court.) To look at the law the way that judges do, we need to study actual cases and controversies, just like the judges. In short, we study real cases and disputes because real cases and disputes historically have been the primary source of law.

The Practical Reason

A second reason professors use the case method is that it teaches an essential skill for practicing lawyers. Lawyers represent clients, and clients will want to know how laws apply to them. To advise a client, a lawyer needs to understand exactly how an abstract rule of law will apply to the very specific situations a client might encounter. This is more difficult than you might think, in part because a legal rule that sounds definite and clear in the abstract may prove murky in application. (For example, imagine you go to a public park and see a sign that says "No vehicles in the park." That plainly forbids an automobile, but what about bicycles, wheelchairs, toy automobiles? What about airplanes? Ambulances? Are these "vehicles" for the purpose of the rule or not?) As a result, good lawyers

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need a vivid imagination; they need to imagine how rules might apply, where they might be unclear, and where they might lead to unexpected outcomes. The case method and the frequent use of hypotheticals will help train your brain to think this way. Learning the law in light of concrete situations will help you deal with particular facts you'll encounter as a practicing lawyer.

Good luck!





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Applying the Framework: *Gray v. State*

SJCL Orientation Reading

Although most case briefs will not be collected, you are expected to prepare them and to be ready to discuss the assigned cases in class. Case briefing is a valuable and indispensable tool toward that preparation. As you brief cases, you should apply the framework introduced in this packet: identify the legal issue, determine the governing rule and its elements, and focus on the legally significant facts that relate to those elements.

The following materials demonstrate how the concepts introduced in this packet work together in practice using *Gray v. State*, one of three cases assigned for Orientation Week class #1.

I. A Guided Case-Reading Chart Using *Gray v. State*

As you read, move across each row from left to right: identify what the court is doing, then apply the corresponding analytical task.

243 Wis. 57
Supreme Court of Wisconsin.

GRAY et al.
v.
STATE.

April 13, 1943.

CASE TEXT	WHAT THIS IS	YOUR GOAL(S)
Opinion MARTIN, Justice. The dwelling of Edmund Feldner, located on highway 38, about three-fourths of a mile west of the village of Rosendale in the town of Fond du Lac, Fond du Lac county, Wisconsin, was burglarized on the night of June 19, 1941. Mr. Feldner and members of his family retired at about 8:30 p. m. When he retired his overalls and two suits of clothing were hanging on a hook in his bedroom. His winter overcoat was in a room next to his bedroom. When Mr. Feldner arose at 5:30 a. m. the following morning he noticed that his overalls, his two suits and overcoat were missing and that some of the rooms of his	Facts: A neutral recitation of events.	Begin identifying which facts may be legally significant (LSFs), even though that determination hinges on understanding the rules and the issue(s).

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residence had been ransacked. He found his overalls and the vest and coat of one suit lying outside. One suit, the overcoat and trousers of the other suit were missing. At about 1 a. m. on June 20, 1941, George Habeck, a truck driver, left the city of Fond du Lac for Ripon and Berlin via highway 38. When he reached a point on said highway about three-fourths of a mile west of Rosendale, in the immediate vicinity of the Feldner residence, he saw three Negroes, whom he later identified as the defendants, with their car parked alongside the road. Defendants followed Habeck to Ripon. At Ripon they inquired of Habeck as to the direction to Fond du Lac. He gave them the proper direction, whereupon defendants left but did not go in the direction which had been given them. The facts here related took place between 1 and 2:30 a. m. on June 20th....		
To the information charging burglary of a dwelling in the nighttime with intent to commit larceny, defendants entered a plea of not guilty. The jury found defendants guilty in the manner and form as charged in the information. Defendants contend that the evidence did not establish beyond a reasonable doubt that the Feldner dwelling was burglarized in the nighttime.	Procedural History/Issue: Explains how the case reached the court and often hints at the issue. The issue is often stated too broadly.	Refine the issue based on what is actually in dispute.
Sec. 353.32, Stats., defines the term “nighttime” as follows: “The term ‘nighttime,’ when used in any statute, ordinance, indictment or information shall be construed to mean the time between one hour after the setting of the sun on one day and one hour before the rising of the same on the following day; and the time of sunset and sunrise shall be ascertained according to the mean solar time of the ninetieth meridian west from Greenwich, commonly known as central time, as given in any published almanac.”	Rule: A rule drawn from a statute is often clearly stated.	Interpret the language and begin identifying the rule’s elements. Then anticipate which facts are likely to be LSFs and why.
Sunset on the evening of June 19th was at 7:39 p. m., and sunrise on the morning of June 20th was at 4:23 a. m. Thus, nighttime, within the meaning of the statute, on the night in question, was from 8:39 p. m., June 19th, to 3:23 a. m., June 20th.	Application (Analysis): The court begins applying the rule to the facts.	Focus on how specific facts relate to the rule’s requirements—this is where LSFs

Applying the Framework: *Gray v. State*

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		may begin to emerge.
Defendants argue that since Feldner testified that he retired about 8:30 p. m. on June 19th, and that he arose at about 5:30 a. m. the following morning, his dwelling may have been burglarized either in the daytime or in the nighttime, and that therefore the state failed to establish that the crime had been committed in the nighttime as alleged in the information.	Issue: This section reveals what is actually being disputed.	Distill the disagreement into a precise issue statement. Determine which element(s) of the rule are at issue and which LSFs place those elements in dispute.
It is definitely established that the crime was committed sometime between 8:30 p. m., June 19th, and 5:30 a. m., June 20th. The witness Habeck testified that he left the city of Fond du Lac at about 1 a. m. on June 20th. Rosendale is about eleven miles west of the city of Fond du Lac. According to Habeck's testimony, he would, with normal driving, have arrived at the place where he saw the three defendants and their parked car in the immediate vicinity of the Feldner residence at about 1:30 a. m. The circumstance of defendants having been seen in the immediate vicinity of the burglarized residence at the time fixed by Habeck, well warranted the jury in concluding that the burglary had been committed in the nighttime. See <i>Simon v. State</i> , 125 Wis. 439, 103 N.W. 1100; <i>Winsky v. State</i> , 126 Wis. 99, 105 N.W. 480, 481.	Application (Analysis): Continued application of the rule to the facts. Courts often do not clearly organize or even articulate their reasoning.	Identify which facts the court relies on and how those facts support its conclusion.
In the latter case, referring to <i>State v. Bancroft</i> , 10 N.H. 105, it is said: "There was no direct proof that the burglary was committed in the nighttime, other than the fact that the property was in the house after dark and was missing the next morning when the witness arose; and the court said that this evidence 'led very strongly to the conclusion that it was taken in the course of the night, although the precise hour when the witness called it dark did not appear, and the time when she arose in the morning was not stated. At whatever time in the morning the loss was	Rule: When a court quotes a prior case, it is often referencing a common law rule. These rules are rarely stated in a clean, usable format and	Synthesize and restate the rule in a clearer, more workable form for analysis and discussion. (Reflect back on pg. 25 in <i>Foundations of Legal Analysis and the Case Method</i> .)

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discovered, the jury might well weigh the probability whether the article would have been taken from the house in the daytime, in connection with the other evidence. It was sufficient that, upon the whole case, they had no reasonable doubt that the act was done in the nighttime.’ Sufficient appears from the evidence in the case before us to warrant the jury in finding that the entry was made in the nighttime. <i>Simon v. State</i> , supra.”	typically require rule synthesis.	
... Judgment affirmed.	Holding: The court’s final decision. This answers the legal issue and reflects how the rule applies to the facts (although the court’s reasoning is often only implied).	Extract and restate the governing rule in a clear, structured way—often by working backward from the court’s analysis and conclusion.

Key Idea: A case is not just a story—it is a structured example of how legal rules are applied to facts. Your job is to identify the rule, break it into elements, and determine how the legally significant facts (LSFs) relate to those elements.

Applying the Framework: *Gray v. State*

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II. An Example Case Brief Using *Gray v. State*

Case: *Gray v State* **Topic:** Burglary **Subtopic(s):** Nighttime **Page:**

Facts

<u>8:30pm</u>	Felder (victim) went to bed (in his home in Fond du Lac)	Dwelling/ Nighttime
	Clothing hanging in bedroom & coat in the next room	Felonious Intent
<u>1:00-2:30am</u>	Habeck (truck driver/witness) saw Ds $\frac{3}{4}$ of a mile away	It was Ds
	Asked directions to Fon du Lac; went a different direction	Nighttime
<u>5:30am</u>	Feldner woke up	Nighttime
	Clothes and coat were missing; rooms ransacked	Felonious Intent

Procedural Posture

- D was charged with burglary. Trial court found D guilty. D appealed.

Issue (What constitutes “nighttime”?)

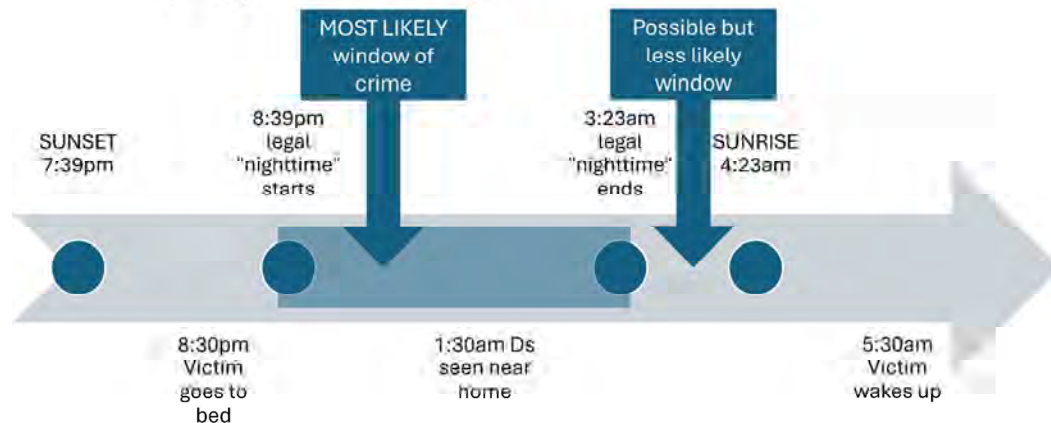
- Whether a jury could conclude theft occurred in the “nighttime” when victim goes to bed at 8:30pm, wakes at 5:30am, & suspects are seen at 1:30am.

Rules

- Nighttime is defined by statute as specific window of time
 - 1 hour after sunset – 1 hour before sunrise (according to central time)
- This is different than common law’s “concealment afforded by darkness”

Analysis:

- Sunset was 7:39pm and sunrise was 4:23am → nighttime = 8:39pm to 3:23am.
- Victim went to bed at 8:30pm and woke up at 5:30am
 - Did the crime occur within 9 minutes after he went to bed?
 - Or after 3:23am (but before he woke at 5:30am)?
- Habeck saw the Ds at about 1:30am and they drove away from Victim’s home
- Theft likely happened after 8:39pm and before 1:30am



TEXTBOOK READING

We recognize that many of you may be waiting for your textbooks to arrive. We have included the assigned readings from *Legal Writing and Analysis* by Murray for Orientation Week only. However, you are responsible for having your own copy to read for the rest of the semester.

You can purchase the other two textbooks, but they are available free in our digital Study Aids libraries:

- Cracking the Case Method by Bergman (West Academic)
- Plain English for Lawyers by Wydick (LexisNexis)

For instructions on accessing the digital Study Aids libraries, See the “Technology and Course Systems” section of this packet on page 4.

CHAPTER 1

Introduction to American Legal Method

I. OVERVIEW OF THE METHODS OF LAW IN THE UNITED STATES

- Who can be a good law student and legal writer?
- Does a student have to have special training and be excellent in writing *before* becoming a law student?

If you are a student in your first semester of legal study in the United States, then you have come to the right book. The authors wrote this book primarily for use in a first semester legal research and writing or “legal methods” course for J.D. and LL.M. students. We crafted the topics and examples for readers who are new to the law and legal study in the United States. We do not presume that you will bring extensive knowledge of American law and the American legal system to your study of this book. You need not have previous experience in logic or legal reasoning and analysis. What is necessary is that you have an open mind and the ability to critically analyze language, arguments, concepts, and complicated writing.



FOOD FOR THOUGHT

Do I have the right stuff to be a lawyer?

Legal method, the work of lawyers, does not require any particular set of skills or experience in life or education for you to do well in law school and in the practice of law. The ability to read comprehensively, to think critically, and to write coherently certainly are assets for lawyers, but these are skills that are possessed or can be developed by a wide variety of people who have studied or worked in a wide variety of disciplines. Our top students over the years have studied acting, art, music, computer science, engineering, religion, or mathematics, as well as philosophy, history, political science, or English as an undergraduate major. That is one reason that American law schools have no specific prerequisites beyond an undergraduate degree. So, count yourself in and expect that the skills and experience you bring are sufficient for the study of this book and the law.

The study of law is not easy, but it does not require one set of experiences or one focus of training leading up to it. You have come to law school with training in diverse disciplines, but law practice requires diverse skills. Close reading, critical thinking, and the understanding and appreciation of historical context may come naturally to humanities majors. But the law also requires considerable skills in logic, scientific proofs, and the application of known authorities to new situations. In short, there is no one set of skills that you need to bring to law school to succeed, and it is

safe to say that many people with a skill set just like yours have gone before you and excelled.

Similarly, while entering a legal writing course with strong general writing skills may be an advantage in terms of your ability to organize your thoughts and express your ideas on paper, it is not a towering advantage, because this is a different kind of writing. Legal writing can be mastered as quickly by students with little writing experience as those with vast experience. The objectives and skills taught in this book allow everyone to have a fair chance to express legal information clearly, concisely, and correctly, regardless of her prior background or experience.

II. WRITING LIKE A LAWYER?

- What does it mean to learn to write like a lawyer?
- What are the “Three C’s” of legal writing?
- Can lawyers be taught to avoid the problems of *legalese*?

Even in the third decade of the twenty-first century, lawyers still communicate primarily in writing—whether in paper or electronic form. Clients, supervisors, and judges will ask you to explain the intricacies of a legal problem, its factual details, the complex facets of the governing cases and legal rules, and the proper outcome in the context of a *written document*—a letter (or even an email), an office memorandum, or a court brief. Writing thus is unavoidable in the legal profession. However, “writing like a lawyer” does not mean infusing your once clear prose with specialized jargon, excessively complicated verbiage, and an overly formal tone.

In fact, you may be asking yourself, “Why should I want to write like a lawyer? Lawyers are terrible writers!” You have a point. Lawyers are held up to popular ridicule for writing that is prolix, overly complex, obfuscatory, and even disingenuous. Indeed, the work product of lawyers constantly is used as an example of what is wrong with modern professional communication. This is unfortunate, because a lawyer’s ability to communicate advice on how the law should be applied to a particular factual situation, no matter how intricate, is just as important as the ability to determine an answer in the first instance. Yet, while many lawyers easily recognize the importance of proper research and analysis, they often neglect the importance of good communication. As a result, people admire lawyers for their keen skills in reasoning and problem solving but scratch their heads when it comes to legal writing. The causes of the basic complaints of prolixity, excessive complexity, and dishonesty or obfuscation are many and varied, but the problems can be targeted and eliminated.



DO IT WITH STYLE!

Language of the Law—the Three C's

You may have heard that in law school you must “learn the language of the law.” That is true to a certain extent—the law does have a vocabulary of its own, and to practice law you will learn terms that are not used in daily conversation. But learning to write in the law is not about learning to speak Latin or French or the convoluted, impenetrable fog of words known as “legalese.” It is not about learning to speak in a fancy way popular centuries ago. It is not even about learning to make your writing sound like the judicial opinions you will read. Good legal writing is like good, professional writing of any kind: it should be **clear** and readily understood, it should be **concise** and tailored to the task at hand and the audience of the work, and it must be **correct**, setting out the facts, legal rules, and legal analysis without error or obfuscation. These **Three C's** of legal writing are the most important elements of the legal writing discourse community that you are joining.

Why are lawyers notoriously wordy? Perhaps one answer is the notion that “more is better”: if I write more, it will prove that I know more. Nothing could be further from the truth; in fact, excessive verbosity often correlates to knowing (or being clear about) less. As an entering law student, you may be experiencing a similar influence driving you toward excessive verbosity. That is, for several undergraduate years, you may have been told to meet minimum page expectations of fifteen, twenty, thirty or more pages. You might have explained things four times if you wanted to, inserted many quotes from your sources, and watched the pages fly off the printer. To continue in this manner, however, will be a hindrance in legal contexts.

Complexity is a different animal. No one will tell you the law is uncomplicated. Indeed, you will soon find out how complicated it can be. But your written and oral communication should never mirror the same complexity as the legal issues you are discussing. A great lawyer takes the complex and explains it in a simple, straightforward, and easily understandable manner. Part of this skill comes with knowing what and how much to write about in a given document; part of it comes with mastering a legal topic so well that you can explain it to anyone, lawyer or layperson. Make it clear, make it appropriately simple for the audience at hand, and your writing will be valued more because of it.

Finally, there is a fine line between the impulse to obfuscate and the impulse to mislead. The latter is unethical, not to mention terrible for your client's case and your reputation. Obfuscation, though, is no less insidious. The lawyer who attempts to cloud or distort the meaning of the law or who piles on complexity with the sole purpose of defeating the reader's ability to grasp and deal with the true issues of a case is achieving the same end as the lawyer who intentionally misleads.

One of our goals is to prevent you from developing these bad habits. We will remind you to write clearly, concisely, and correctly. Admittedly, this is not always easy for even the best writers to do. But instead of worrying about filling up pag-

es—rarely a problem with strict word and page limits and material as complex as the legal rules you will be dealing with—we would rather have you worry about leaving sufficient time to edit and proofread your work. In addition, because legal writing is targeted to a specific audience, and the content, tone, and degree of objectivity with which you present your conclusions will vary according to the persons to whom you are writing, you should always keep in mind *what type of writing you are being asked to do*. This book is part of a legal research and writing series whose titles are divided according to the main division in legal writing types: **objective** (or **predictive**) writing and **advocacy-oriented** (or **persuasive**) writing. The first book, which you are reading now, focuses on objective, informative writing, the prime example of which is an office memorandum. The third book focuses on writing as a partisan and advocate in the American adversarial system, using the examples of trial court briefs and appellate briefs. The second book links the two together by discussing the process of legal research and the analysis of specific types of legal authorities. Oral advocacy in trial and appellate courts is addressed in a separate chapter at the end of the third book.

III. LEGAL METHOD

- What is the law?
- What are *primary* sources of law?
- What are *secondary* sources of law?
- What is the role of the lawyer in finding and learning the law?

Among the first things a law student should attempt to grasp are: what is the law, where does the law come from, and what is the lawyer's role in the legal process? These three ideas, discussed in more detail below, necessarily interrelate to form the basis for the phrase that titles this Chapter. "Legal method" is an expression to describe the fact that the practice of law at all levels and in all places of employment requires a *methodology* according to which each participant in the process must properly research the law, interpret the law, explain the law to others, and, if appropriate, to advocate a certain interpretation of the law that may require the law to be modified, revoked, or extended. This process fits within the three general terms of legal method: **research**, **analysis**, and **communication**.



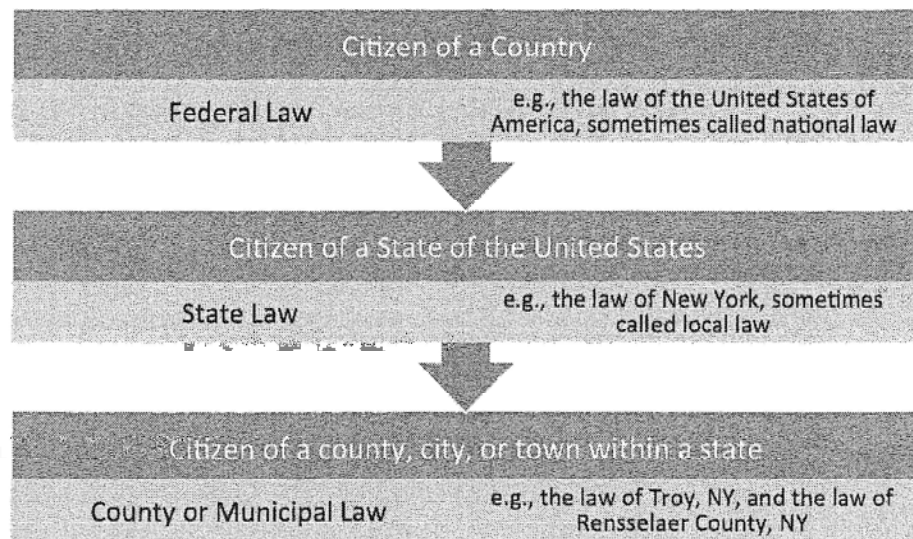
MAKE THE CONNECTION!

Legal method is research, analysis, and communication. A lawyer analyzes facts to determine issues (questions) that must be answered in order to render legal advice, and performs research to find the law—the legal authorities—that define and lead to answers to these issues. The lawyer then analyzes the law and determines how it interacts with the facts and communicates the results of this analysis.

You soon will learn many ways to approach and think about legal problems, but the goal of legal education is to equip you with the skills to find the governing law on *any* given topic and to apply that law in new contexts or situations. Your legal research and writing course typically is the first course to teach the skills necessary to do just that. Accordingly, your assignments in your legal writing class likely will be designed to familiarize you with the processes of **determining legal issues** (legal questions that need to be answered from the facts presented in a given situation); **researching the law** that applies to answer such issues; **analyzing and articulating the law** as you uncover it; **applying the law** to a set of facts; and **writing your conclusions to an audience**.

A. What is the law?

A nutshell definition of “the law” may seem easy to state, but you will spend the better part of your law school career trying to get your arms around this concept. The law is authority—that which we hold to be authoritative in governing, regulating, and adjudicating human interaction in a civilized society. The law also is the body of statutes, ordinances, administrative rules and regulations, treaties, executive orders, judicial opinions, legal principles, and interpretations of all of these sources, that govern human actions and relations. *Black’s Law Dictionary* states that the law is “The aggregate of legislation, judicial precedents, and accepted legal principles; the body of authoritative grounds of judicial and administrative action; esp., the body of rules, standards, and principles that the courts of a particular jurisdiction apply in deciding controversies brought before them.”



A brief civics lesson may aid this introduction. Recall that as a citizen of a country, the United States for example, you are a citizen of a community—a village, township, city, or other municipal area—and a citizen of a county or parish, and a citizen of a state of the United States, and a citizen of a country, the United

States of America. All of these levels of relationship within the United States have a governing body or institution—a government—that can regulate your activities by passing statutes, rules, ordinances, acts, laws, regulations, executive orders, treaties, or international conventions. In addition, these various governmental units have corresponding **legislative entities** (town or county councils; boards of alderman; state, national, or federal legislatures); **executive entities** (mayors, county executives, governors, presidents); **regulatory bodies** (zoning boards, licensing bureaus, housing commissions, or regulatory or administrative agencies); and **judicial entities** (justices of the peace, municipal courts, state and federal courts, administrative law judges, arbitral tribunals). In the United States, all of these entities can contribute to the law by creating it, modifying it, interpreting it in official or advisory capacities, and by applying it to particular persons and situations.

Given the breadth of these definitions and the vast array of entities from which “the law” can emerge, it may seem impossible to answer the question “what is the law?” on any single topic. But reality dictates otherwise. The law is recorded and relatively well organized in only a certain number of sources (albeit a growing number). A solid understanding of what those sources are, how they are searched, and what they are likely to cover will direct your attention (more easily with practice) to the most likely places to find the answers you are looking for.

B. Sources of the law: primary and secondary authority

The four main *primary* sources of the law are:

Constitutions—Fundamental law within a legal system, e.g., the United States Constitution. Constitutions are the highest primary authority.

• PRIMARY AUTHORITY

Legislation—Statutes, codes, ordinances, laws, charters, treaties, and other international agreements. Legislation is the second highest form of primary authority after constitutions.

• PRIMARY AUTHORITY

Administrative Law—Rules, regulations, decrees, orders, and licenses promulgated by administrative agencies, non-legislative governmental entities, and other regulatory boards and commissions. Administrative law is the third highest form of primary authority after constitutions and legislation.

• PRIMARY AUTHORITY

Cases—judicial opinions on legal matters that have come before the courts. Cases are the fourth highest form of primary authority after constitutions, legislation, and administrative law.

• PRIMARY AUTHORITY

**TAKE NOTE!***Primary Authority*

Primary authority is a key concept to learn in this Chapter, so make sure you understand it. Primary authorities are the most important sources that you will look for in your research to find the answers to the issues raised by the facts of a situation. Constitutions, legislation, administrative rules and regulations, and cases are the only authorities that can control and dictate the answers to legal questions in the United States. Anything short of a primary authority can only be used as a (persuasive) guide that gives advice on the proper way to answer the question. But it is never the answer itself.

In your quest to find an answer to the question “what is the law” on a given topic, you also may refer to commentary and interpretations of the law written by legal scholars, judges, legislators, and legal practitioners in treatises, Restatements of the Law, hornbooks, law review articles, annotations, encyclopedias, legislative history documents, and other compilations. These are **secondary sources** of the law or **secondary authority**.

Commentary—interpretation and explanation of law written by legal scholars, judges, legislators, and practitioners, including treatises, law review articles, encyclopedias, hornbooks, citators, Restatements of the Law, practitioner guides, and continuing legal education materials.

• **SECONDARY AUTHORITY**

It is important to get a good grip on these definitions and distinctions. As the name indicates, primary authorities carry much more weight in determining what the law is. Primary authorities will determine the law for every situation where the primary authorities speak to the legal issue, and secondary authorities are only used to explain or supplement them. That said, secondary authorities can be of great assistance to lawyers in interpreting the law in areas where the law is unclear or ambiguous, and this kind of commentary can be very persuasive to lawyers, legislators, and judges. But secondary authorities cannot create law. At most, they can provide guidelines for courts or legislatures to act in areas that are not yet defined by a primary authority or where a change in the law is needed.

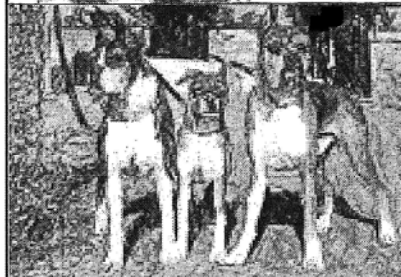
EXAMPLE: PRIMARY AND SECONDARY AUTHORITY

In a certain town, dogs were allowed to run loose and several people were bitten by dogs running wild in public places.

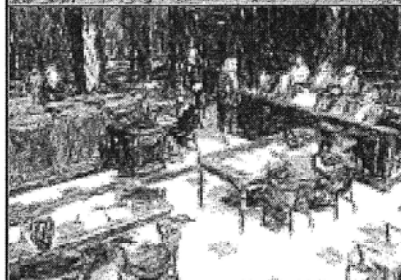
EXAMPLE: PRIMARY AND SECONDARY AUTHORITY



The local legislature passed an ordinance (**legislation—primary authority**) making dog owners responsible for all injuries caused by their dogs who were not kept on a leash.



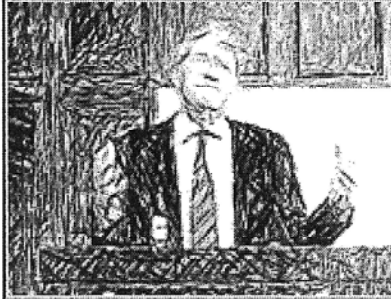
An administrative agency, the Bureau of Parks and Recreation, passed a **regulation (primary authority)** further interpreting the ordinance to require leather or metal chain leashes on dogs.



A lawsuit arose between a dog owner and a person bitten by the owner's dog.



The lawsuit was resolved in a **judicial opinion (primary authority)** holding that a dog owner was not responsible when his dog unexpectedly broke free from a strong leather leash and bit someone.

EXAMPLE: PRIMARY AND SECONDARY AUTHORITY

Later, a law professor studied this area of law and wrote a law review article (**secondary authority**) explaining that the referenced judicial opinion interpreted the ordinance and regulation to require a finding of fault on the part of a dog owner before holding him responsible for unleashed dog injuries. He explained that the legislature could have imposed a strict liability standard, but the courts have interpreted the statute to require negligence or fault on the part of the dog owner. The law professor's article explains the effect of the primary authorities, but it does not change what the authorities actually say.

C. The role of the lawyer

The nature of lawyering is to determine what the law is and how it may affect a client in a given situation. The client can be a person or business entity that hires the lawyer, or a private or public entity that employs the lawyer, or a court or judicial body in which the lawyer is employed. A good lawyer in each of these sectors can tell what the current law is, predict how the law will work in various real or hypothetical situations, and offer advice to the client on what to do or to avoid doing in those situations.

Rarely will you know what the law is ahead of time. You will know a great deal of legal principles in many areas of the law, and a number of actual legal rules of general and specific application, but these will not be enough to answer even the average question that reaches your desk. What usually happens is that a client or a supervisor will come into your office with a problem that has legal implications. You will listen to the problem, ask questions to gain additional information relating to the problem, and then go to your sources in the library or on-line and attempt to ascertain what will happen based on the law that applies. Occasionally, you will have had this exact issue come up recently, and you will already know what happens and what to do about it. (When this happens, you should enjoy a momentary feeling of great wisdom and power, and then go and double-check yourself by looking it up and making sure you still are the master of this legal information.)

**PRACTICE POINTER**

When you contemplate stepping into the role of a lawyer, you should realize that a lawyer's job is to analyze problems, most often to render advice to a client about the problem. The basic structure is simple: know the facts, know the rules, and decide how the rules govern the facts.

If your niece and nephew have a simple dispute over a board game ("She can't move there!" "Yes, I can!"), how do you act like a lawyer to help them resolve the dispute?

The answer: Know the facts (What is she trying to do? Or where is she trying to move?), know the rules (What game are they playing? What are the rules of this game?), and decide how the rules govern the facts (At this time, she is allowed to move to that spot because a rule of this game allows that kind of move here).



The process of finding the law—looking it up, finding the proper sources, compiling the information, following up on leads, and using what you have found to find other sources—is the first essential skill of a lawyer, which is referred to as **legal research**. The process of determining what legal issues are implicated by the facts of the problem and what sources should be consulted, reviewing and analyzing what these sources say, and reaching a conclusion about what the law is (or should be), is the second essential skill, referred to as **analysis**. The third part of the process is being able to communicate your findings to a variety of persons—your colleagues where you are working, senior lawyers in your firm, your clients, the courts, your opponents, and various governmental or regulatory bodies. This skill will be referred to as **communication**, and much of the focus of this book will be on communication in writing.

Test Your Knowledge

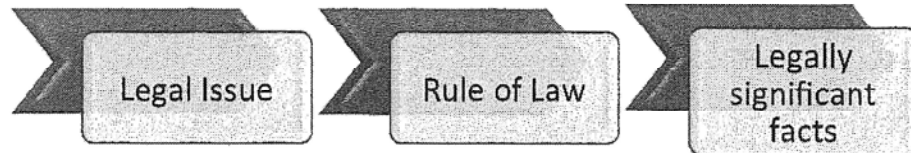
To assess your understanding of the material in this chapter, [click here](#) to take a quiz.

CHAPTER 2

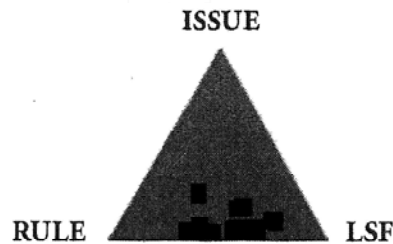
Rules of Law and Legal Reasoning

I. ISSUES, RULES, AND FACTS

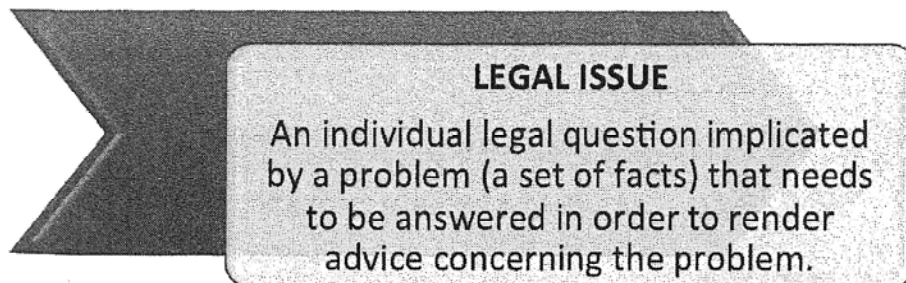
As you approach any legal problem, you can think of your task as requiring three basic steps:



Step 1 is determining the **legal issue** you need to address. Step 2 is finding and articulating the applicable **rules of law** governing that issue. And Step 3 is determining **the legally significant facts** that will drive your analysis. These three basic factors are the building blocks for all legal analysis, and you should see them as working together. In many cases, determining one depends on the answers to the other two. And in many cases, you will not have all three immediately at your fingertips, but you will need to determine each one before you can proceed.



What do these terms mean?



The **legal issue** is a question you have been asked to address. Sometimes, determining the question is easy because someone has come into your office and stated the issue directly. For example, your boss asks whether a client can make out

a case for discrimination against her employer. Or, your legal writing professor asks whether your client has a viable claim for intentional infliction of emotional distress.

Very often, the question is not immediately apparent, as in the situation where a non-lawyer client tells you she is being bothered by her supervisor at work and then was accused of stealing office supplies and she asks you, "Can I sue my boss?" and "What can I do about the accusation of theft?" As a lawyer, you would form the issues as asking whether she has a claim for relief or a valid defense to the claim asserted against her.

Each legal issue has a **rule of law**, or more often than not, several rules of law that govern its analysis. You must find the correct rules and apply them to the facts of the problem to answer the legal issue you are analyzing.

RULE OF LAW

A statement of the legal principles and requirements that govern the analysis of the legal issue at hand.

You should start to think of "**rule of law**" as a group noun—a description of multiple items—because often the statement of the principles and requirements of the law governing an issue requires more than one sentence and includes more than one rule or element. Many of our examples in these early chapters have fairly simple, straightforward statements of the principles and requirements of the law that are presented in a single sentence. But be aware that a statement of the rule or rules may take several sentences or even paragraphs in more complex cases.

Finally, it is not enough simply to gather all the facts of a situation and stop there. You must determine the **legally significant facts** (also called outcome determinative facts, or operative facts), the facts that, if changed or deleted, will affect the outcome of the determination of the issue. The process of discerning and determining the legally significant facts requires paying careful attention to the reasons for previous legal determinations on your issue in precedent cases as well as knowing the facts of your client's situation in detail.

LEGALLY SIGNIFICANT FACTS

The facts that, if changed or deleted, will affect the outcome of the determination.

This process need not be complicated. In many cases the issues will be simple and straightforward and the significant facts will be few. Finding the correct rules will be the only challenge. Even then, the application of the correct rules to the significant facts may be simple. Consider the following:

A friend wants to know if he can save some time and cross the busy city street in front of his house (located right in the middle of the block) instead of going all the way to the end of the block where there is a crosswalk.

The Issue is, "Can he cross the city street in the middle of the block?" You suspect that he cannot, so you research the city ordinances and you find one entitled "Jaywalking prohibited."

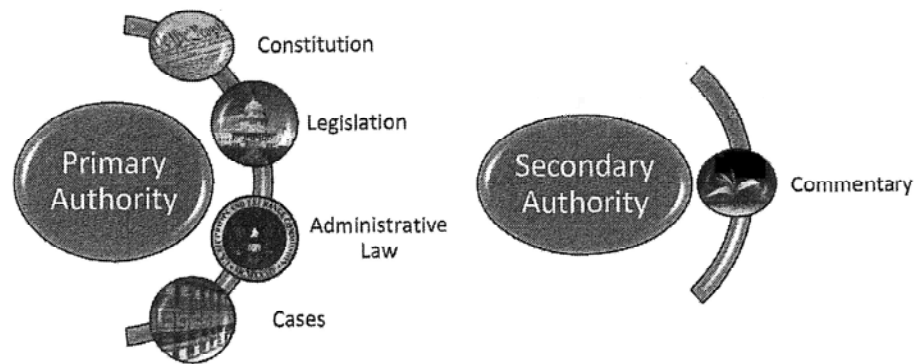
The ordinance reads: Jaywalking prohibited.
 (1) Jaywalking is prohibited on all city streets.
 (2) Jaywalking is defined as a pedestrian crossing a city street in the middle of the block. Crossing a city street at the end of a block or at the intersection of two streets or at any designated crosswalk is not jaywalking and is permitted.

The last box is, of course, the **Rule**. Thus, the **Legally Significant Facts** (your friend wants to cross a city street in the middle of a block) are met with the **Rule of Law** (that prohibits such activity), providing a very clear answer (No) to the **Issue** (can he cross a city street in the middle of a block).

II. FINDING, BREAKING DOWN, AND OUTLINING A RULE OF LAW

A. Sources of the law

Rules of law may be found in the various sources we discussed in Chapter 1, both **primary** (constitutions, legislation, administrative rules and regulations, and cases) and **secondary** (commentary on and explanations of the law).



As an example, if a client has a question about dog bite liability—his dog bit a Girl Scout after she rang his door bell and shouted at the dog—you would look for the rule of law that governs liability of dog owners for dog bites. The legal issue is:



Will my client be liable for this dog bite injury? To research this issue, you would probably look for a statute or other form of legislation, an **administrative rule or regulation**, or one or more **cases**—reports of judicial opinions in prior lawsuits and other legal actions—in your state that discuss dog bites and dog owner liability to find the rule.

Ler's suppose you are in the State of Apex,¹ and you did not find any legislation or administrative rules or regulations on point, but you came across two cases, *Smithy v. Jonesy*, 123 W.2d 345, 347 (Apex 1965), and *Johnson v. Anderson*, 789 W.2d 234, 237 (Apex Ct. App. 1st Dist. 1989),² that both say the following about dog-bite liability:

"In Apex, a dog owner is liable for all injuries caused by his dog unless the dog is provoked by the victim."

Assuming you did not find any other authorities on point that add to, change, or articulate a different wording of the rule or a different rule altogether, you have the rule of law that governs this issue.

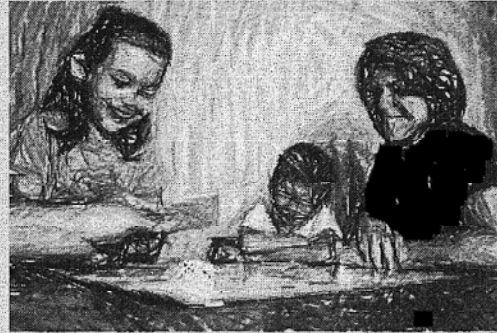
¹ Fictitious jurisdictions are popular in law school. Apex is our fictitious jurisdiction. You should assume that it is a state of the United States, located between Maine and California.

² Naturally, these two cases do not exist. From time to time we will invent cases to illustrate certain principles of legal analysis and communication. The citations follow proper Bluebook citation form (see Chapter 9), but the actual volume abbreviation ("W." for Western Reporter), page numbers, and dates given in the citations are imaginary. West Group does not publish a "Western" regional reporter as you will learn in the Bluebook or ALWD Manual.



MAKE THE CONNECTION!

Think back to the board game dispute between your niece and nephew in Chapter 1. The **facts** (What game they are playing, what move is she trying to make?) and the **issue** (Can she make that move here?) are the same. To find the **rules**, where do you go? If the rules of the game are fully known to you or are printed inside the box top, the task is as easy as if you were presented with a legal issue whose rules you already knew. But, as in the legal world, accessing the rules of the game may require you to consult a source (e.g., Hoyle's Rules of Games) or to go online (e.g., Google) to find them. You would look for the primary authorities first—sources stating the actual rules of the game—rather than a secondary authority—someone's commentary on why the game is a great game, or on how the rules of the game could be improved. You may have to account for local variations of the rules on how the game is played—rules of certain games vary from place to place, and so do laws and legal rules. Once you have the rules, you can analyze how the rules apply in the situation and communicate your conclusions to your niece and nephew.



B. Definitional and Interpretive Rules

- **Definitional Rules** are rules defining the requirements, standards, or terms that govern a legal issue. Where a rule has required elements or factors that will be considered (*see* section E below), there will be a definitional rule that defines the elements or factors.
- **Interpretive Rules** are rules that give guidance on how to interpret and apply definitional rules or other interpretive rules. Where definitional rules often have lists, and sometimes even numbered or lettered line items that identify the elements or factors, interpretive rules are phrased as an instruction, guideline, or recommendation. (Consider the examples below in section D). You can usually tell an interpretive rule because it is telling you something helpful about a previously identified rule, as opposed to defining a new concept or requirement of the law.

C. Main Rules and Sub-Rules

- **Main rules** apply to the main issue of your analysis. The primary definitional rule that provides the elements or factors that will

address your issue will be called the **Main Definitional Rule**. Any interpretive rule that speaks to rules addressing the main issue (e.g., the Main Definitional Rule), will be called **Main Interpretative Rules**.

Very often a Main Definitional Rule will have subparts (elements or factors) that each present separate legal questions to be answered before the rule can be applied to answer the main issue. Because these issues raised by the elements or factors of the Main Definitional Rule are subordinate to the main issues, we call them **Sub-Issues**. And any rules that address these Sub-Issues are referred to as **Sub-Rules**.

- **Sub-Rules** can be definitional rules that define the requirements, standards, or terms that govern the Sub-Issue, or they can be interpretative rules giving guidance on how to interpret and apply the other Sub-Rules on the Sub-Issues.

D. Examples of a Main Rule, Sub-Rules, Definitional Rules, and Interpretative Rules

Consider the example of a client who has a question about a potential negligence claim against her. The **Main Issue** posed by the client's situation is: "Whether under Apex tort law, the client will be liable for negligence when her leashed dog broke free from her while she was tying her sneakers during a walk in a park, and the dog interfered and collided with a jogger who fell to the ground and was injured?"

The rule on the Main Issue ("Is the client liable for negligence when . . .") may be categorized as follows:

Main Definitional Rule:

In Apex, liability for negligence requires: (1) duty of care, (2) breach of that duty, (3) causation, (4) injury.

Interpretive Rules on the Main Definitional Rule:

Negligence is defined as a failure to behave with the level of care that someone of ordinary prudence would have exercised under the same circumstances.

Negligent behavior usually consists of actions, but can also consist of omissions when there is some duty to act.

Sub-Rule (Definitional Rule) regarding the element of "Duty of Care":

A duty of care is a legal obligation which is imposed on an individual requiring adherence to a standard of reasonable care while performing any acts that could foreseeably harm others.

We only provided one or two examples of each category of rule. In reality, with most issues there will be one main definitional rule but several interpretive rules instructing lawyers on how to interpret and apply the main definitional rule or other interpretive rules, and with sub-issues there generally will be one main definitional rule on the element giving rise to the sub-issue, but there could be several interpretive rules instructing lawyers on how the sub-rules are to be interpreted and applied.

E. Breaking down a Definitional Rule into its parts—*Elements or Factors*

The first thing to do when you find a definitional rule is to break it down into its parts, which are called *elements* or *factors*. The elements of a definitional rule are those facts or circumstances that must be present (or the conditions that must be satisfied) for the rule to be triggered. If the rule requires the presence of three facts, it has three elements. If you are an advocate in a lawsuit seeking to apply the rule in your client's favor, the elements are the facts that you have to prove for your client to prevail. The opponent in the same lawsuit must try to disprove one or more elements so that she will prevail. Not all definitional rules have elements, as discussed in the next paragraph, but those that do are called *elemental rules*.

Factors, on the other hand, are facts or circumstances that will be taken into account in applying the definitional rule, but not all the factors need be present for the definitional rule to be triggered. Presumably, some of the factors will be present, or it will be peculiar for one to consider looking to the rule at all. In a *factor-based rule*, the factors may be added up, compared, weighed, or balanced against other factors to determine the outcome of the application of the definitional rule.



FOOD FOR THOUGHT

How can you tell an elemental rule from a factor-based rule?

You will quickly learn to pick up on the clues that tell a lawyer whether a definitional rule uses elements or factors. In an elemental rule, the source will probably use a mandatory word or phrase, such as "must find" or "requires," as in "False imprisonment requires . . ." [followed by the facts or circumstances that are required, i.e., the elements]. An authority laying out a factor-based rule will refer to certain facts or conditions in terms stating that "the factors include" or "will be taken into account" or "will be considered," or other variations on these words that mean the facts or conditions will be examined or weighed or compared, but not that any one must be present. It is not always cut and dry—it is popular for a source to state that a claim or cause of action "is defined as . . ." but the source does not use mandatory language such as "must find" or "requires." At that point you will have to look to how other authorities, particularly cases, have interpreted or applied the items "defined" in the rule to see if they are being applied as elements or factors.

In our last dog bite example above, the main definitional rule as stated in the cases was: **"In Apex, a dog owner is liable for all injuries caused by his dog unless the dog is provoked by the victim."** Going further, the cases might also break the definitional rule down into parts that are described as "required elements":

- (1) **ownership of the dog by the person from whom the victim seeks recovery,**
- (2) **an injury,**
- (3) **that is caused by the dog, and**
- (4) **a lack of provocation by the victim.**

One thing to note is that **there can be more than one way to break a definitional rule into elements**, and if a primary source of the law has not done it, you should create an outline of the elements or factors to help you organize your discussion of the rule in writing.

The concept of **elements** is important because elements indicate separate legal questions that must be addressed to fully answer the issue at hand.

If the authorities have broken down the rule for you—for example, a statute or a line of cases have separated the dog bite rule identified above into four elements—then **you should follow what the authorities instruct you to do** when you write about it, and **address all four parts in your writing**.

Even so, you should be aware that certain elements create multiple questions and others rarely present any contested issues for analysis. For example, in a dog bite situation, it may be true that injury and causation almost never are contested issues; no one sues unless they actually have been injured, and, barring some complications of mistaken identity or additional probable causes of the injury, rarely will causation be a seriously contested issue in the case. You would therefore not be alarmed to see the elements listed as three: ownership—**injury caused by the dog**—no provocation of the dog. But if the authorities list it as four parts, so should your outline.

The authorities say:	You prepare to answer:
• A dog owner is liable for all injuries caused by his dog unless the dog is provoked by the victim	• Liability for a dog bite requires • (1) ownership of the dog by the person from whom the victim seeks recovery, • (2) an injury, • (3) the injury is caused by the dog, and • (4) lack of provocation of the dog by the victim.

As noted above, factor-based rules are not phrased in a form with one or more required facts. Therefore, with factor-based rules, your outline will separately list the factors that will be considered, or weighed, or balanced (as in a balancing test, where certain factors are weighed against other factors to determine the outcome). No matter what the form, it is always possible to break a definitional rule down into the separate parts that must be considered (or balanced) when preparing to perform and later communicate the analysis of the application of the rule to the client's facts.

F. Outlining the parts of a definitional rule

As noted, in the course of your analysis, you should list in outline form the parts of the definitional rule, the purpose of which is to create an organizational structure for your discussion of the rule in writing. The four required elements for dog bite liability in Apex potentially create four questions (i.e., **sub-issues**) to answer that may be outlined briefly as follows:

1. Ownership
2. Injury
3. Caused by the dog
4. No provocation

As stated above, the authorities that provided the definitional rule often do this outlining work for you. For example, *Smithy v. Jonesy* might have expressly stated the rule on dog bite liability as follows: **"To recover, a dog-bite victim must prove the following: (1) defendant owned the dog; (2) plaintiff suffered actual physical injury; (3) the dog caused plaintiff's injury; and (3) plaintiff did not provoke the dog into attacking."**

Other times, where the rule is articulated and discussed as part of a longer narrative, you may have to work a little harder to break it down into workable parts.

If there were a different definitional rule in Apex that incorporated a balancing test, for example, balancing the extent of any provocation against the viciousness of the dog's attack, you might outline the rule as follows:

1. Ownership
2. Injury
3. Caused by the dog
4. The severity of the attack was disproportionate to the provocation.

The outline of the definitional rule still can be stated in four parts even though this rule would work differently than the first because of the balancing equation in the fourth part. There, you would consider whether the dog was provoked into

attacking, but even if provoked, the victim might still recover if the attack was disproportionately severe compared to the provocation. For instance, a person might shake a fist at a dog and shout "Down boy!" and receive only a nip from the dog (a proportionate attack), and not recover. But if the person did the same thing and were mauled by the dog, he might recover because the attack was disproportionately severe. If you decide that the analysis of severity and provocation is complicated enough to warrant a further breakdown of the rule into subparts, you might outline the rule as follows:

1. Ownership;
2. Injury;
3. Causation;
4. Balancing of:
 - a. the severity of the attack and
 - b. the provocation of the dog.

At bottom, the outline you produce should be an aid to help you with your analysis and explanation of the main definitional rule. There is no need to over-complicate the situation; if the authorities provide a ready-made outline for the rule that accurately states the separate questions (sub-issues) needed to answer the main issue, the best practice is to use that outline for the convenience of the audience to whom you will communicate your analysis.

G. Use of the outline of parts for structure

Chapter 7 discusses how to create an overall outline for your writing based on the elements or parts of the legal rules involved. As a preview of this, you could outline a memorandum reporting the analysis of a **main issue** of dog-bite liability in the following way:

Thesis: The Homeowner will be liable for the injuries to the Girl Scout caused by his dog because the Girl Scout did not provoke the attack.

1. Ownership sub-issue

Sub-Thesis: It is undisputed that the Homeowner owned the dog.

2. Injury sub-issue

Sub-Thesis: It is undisputed that the Girl Scout was injured.

3. Causation sub-issue

Sub-Thesis: It is undisputed that the dog caused the injury to the Girl Scout.

4. No provocation sub-issue

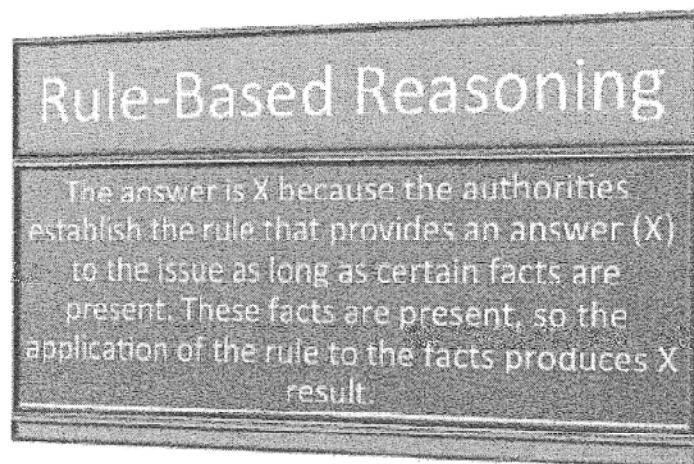
Sub-Thesis: The Girl Scout did not do anything to provoke the dog within the meaning of this element under the law.

While the sub-issues outlined in sections one, two, and three above might be dealt with rather quickly and in relatively few words, the fourth sub-issue would require the full application of the steps of analysis described in Chapter 7, to present the Rules (i.e., sub-rules) on the sub-issue, Explanation of the sub-rules, and Application of the sub-rules to the client's facts. Only after each of the sub-issues is addressed can the answer to the main issue be determined.

III. LEGAL REASONING

Legal writing requires logical and orderly construction. Your audience consists primarily of lawyers (including judges) and clients who are consumers of properly constructed legal writing. The proper term for this audience is the **legal writing discourse community**. This is a demanding audience because law-trained readers are attuned to look for errors in logic, grammar, and style, as well as inaccurate or improper legal reasoning and analysis.

An explanation of legal principles, whether in an informative memorandum to a client or an advocate's brief to the court, generally requires the use of several types of reasoning:



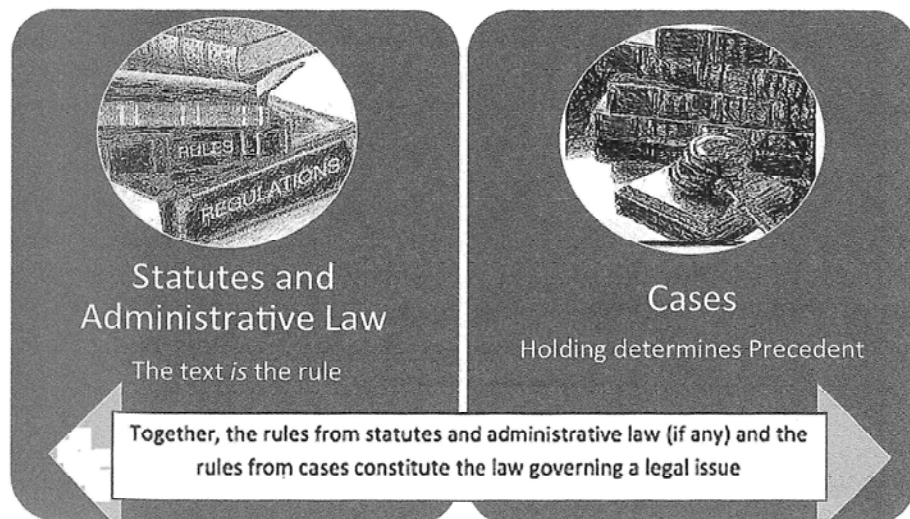
CHAPTER 3

Analysis of a Single Case

To begin analyzing a legal issue, you must identify the governing rule or rules of law referred to (in Chapter 2 above) as the main definitional rule and other interpretive rules and sub-rules. Articulating the legal rules that apply to the issue is, of course, the point of the "Rule" section of your discussion.

This Chapter discusses the analysis of a single case. In our Common Law legal system in the United States, a case is a primary source of law. While not proceeding by authoritativeness, we begin with cases because rules can sometimes be quite difficult to extract from cases. Chapter 4 will continue the discussion by examining the analysis of constitutions, statutes, and administrative rules and regulations. With constitutions, statutes, and regulations, determining the rule often is more straightforward because these sources are themselves rules. If on point, the terms of such sources state the rule—or at least provide the starting point for interpretation. Of course, determining the *meaning* of those terms (through the process of statutory interpretation) thereafter can be tricky; we will address this in Chapter 4.

Determining the rules applied by a court in its decision is not a simple feat. Sections I and II of this Chapter discuss how to read and analyze a court order or opinion for this purpose. The rules which are part of the **holding** of the case are a principle part of the **precedent** for which the case stands (the other principle parts are the facts of the case and how the rules applied to those facts to produce the outcome). In conjunction with the rules from other primary sources you select, the rules and lessons from the precedent cases constitute the governing law you will use to analyze a legal issue in a given jurisdiction.



I. FINDING THE RULES IN A SINGLE CASE

Judges are not charged with the official task of *making* law. Rather, their primary task is to find, interpret, and apply the law to adjudicate disputes that come before them. As you will learn, judges are often criticized for “judicial legislating” and “judicial activism”—terms referring to some judges’ tendency to go out of their way to establish a certain rule in a case, thereby taking on the normative role traditionally assigned to lawmakers. Judicial activists tend to be the exception among jurists.

Nonetheless, judicial opinions are a *primary* source of the law, and judges can create, modify, or abandon rules of law. In most circumstances, rules are made or modified as a by-product of the judge’s adjudicatory functions. The description of this process leads neatly into a discussion of what to consider in determining the rules that a case stands for and the *precedent* it establishes.

A. The legal method of judges

A judge is in a similar position to a lawyer when it comes to the methodology used to solve the problems that reach her desk. Judges receive a set of “problems” in the form of a lawsuit; when they have to make a decision concerning one of these problems, they turn to the same sources of law as the attorneys who appear before them. Yes, the court has the benefit of legal briefs from the parties on both sides of the dispute, but it is atypical for a judge (or law clerk) not to check it out for herself.



Of course, after determining and analyzing the law, judges also have the opportunity and obligation to apply the rule(s) to real persons in concrete situations; when they do this they have created a precedent for how the rule works in a specific set of circumstances.

Judges at the trial level report their decisions in the form of a written **order** (also called a **memorandum and order**, **order and memorandum**, or **order and judgment**), and at the appellate level, in a written **opinion**. Through these orders and opinions new law sometimes is made, most often in small, incremental steps, as the judge explains what the law is, what it means, and how it works in the situation at hand. This brings us to the topics of the “**Borrowed Rule**” and the “**Applied Rule**” and the “**Precedent**” established by the case.



The terms **Borrowed Rule** and **Applied Rule** describe concepts that are familiar to all lawyers and legal academics. The terms themselves, however, likely will not be familiar to them. Legal writing professors have chosen different terms for the same concepts over the years, and there is little uniformity in the choices. Accordingly, do not presume that anyone who has not read this book will understand these terms until you explain the concepts for which they stand. In contrast, the terms "**precedent**" and "**holding**" have uniform meanings commonly understood in the legal community.

B. The "Borrowed" Rule

Because judges follow the same methodology as practitioners in determining what the law is on an issue, they often include in their writing a statement of the applicable rule found in earlier authorities. Thus, the court "borrows" or adopts a prior statement of a rule as the basis for its own opinion. We refer to this reiteration as the **borrowed rule**.

The discussion below assumes there is one borrowed rule—the main definitional rule on an issue—that is the focus of our analysis, but of course there could be several additional definitional or interpretive rules borrowed from earlier authorities and discussed or applied in the case. Each of these rules would need to be examined using the methods described in Sections B and C here. For simplicity's sake, we will only walk through the process once using a single borrowed rule.

The **borrowed rule** may be the precise rule articulated and applied by the court in its decision, thus becoming part of the **holding**. If so, the case becomes one **more precedent** informing the meaning and application of that rule.

However, the borrowed rule is not necessarily the rule actually applied by the court and, thus, it is not necessarily part of the holding and established precedent. In fact, the borrowed rule is part of the holding only when the court does nothing in its discussion to alter the borrowed rule. If the court does not alter, reject, or replace the borrowed rule, and simply applies it to the facts at hand, then the borrowed rule is the rule from the case that is part of the holding, and the case is one more precedent in its lineage. Thus, there are two options:

- the court applies the borrowed rule without modification, and the borrowed rule is part of the holding and precedent;
- or
- the court modifies, rejects, or replaces the borrowed rule, and creates a different rule (the "applied" rule, described in the next section), and the applied rule becomes part of the holding and precedent.

For example, presume Case 1 in the hierarchy establishes the rule that “the sky is blue on sunny days.” If Case 2 in the same hierarchy applies this rule exactly and determines that because the sky was not blue, the day was not sunny, then Case 2 is further embedding the borrowed rule in the line of precedent. If, in contrast, the court in Case 3 adds that “if there is less than 25 percent cloud cover, the sky is still blue” under the rule, then the rule has been altered.

Why does this matter? There may be more than one version of a rule on a given issue in a given jurisdiction. The two articulations may compete; one version may have more or different requirements than the other. In these situations, it is important to know *which* version of the rule you are tracing (because one may be more favorable than another).

C. The “Applied” Rule

Typically, a court will explain the borrowed rule and how it works in a new situation. This discussion may modify the rule, and an attorney can use the judge’s opinion as a source not only for the wording of the rule, but also for the meaning and interpretation of its specific terms. This may cast a new light on the terms of the borrowed rule or alter the rule’s application.

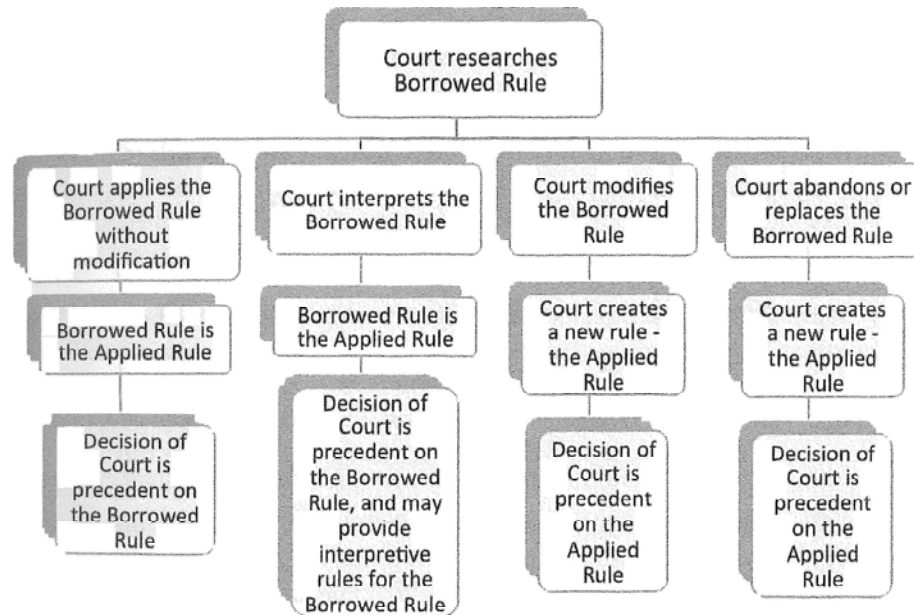
Expanding on the points above, the court, in analyzing a case and applying the borrowed rule(s) may:

- **Apply** the borrowed rule as is, without interpretation or change—As discussed above, in this instance the *borrowed rule* is the *applied rule*; the new decision is one more precedent on the borrowed rule. This is a very typical situation in the analysis of a single case. Quite often a court finds and applies pre-existing rules (*i.e.*, *borrowed rules*) without altering or interpreting the borrowed rules.
- **Interpret** the borrowed rule—The court may offer a new interpretation of the rule. This might just indicate that the new case is a source for a new interpretive rule in this area of law on the specific issue in the case. However, the court may apply the rule or an element in such a way that its effect is changed in a legally significant way. In either instance, the borrowed rule remains intact, but the case is both a source for a new interpretive rule, and an important case to use in the Explanation Section to show how the borrowed rules (definitional and interpretive borrowed rules) work in situations similar to that of this case.
- **Modify** the borrowed rule—The court may redefine or even reword a rule or an element so as to alter its effect. The court may add an element or factor or take one away. In this case, the court

has created a new rule, and in this case the rule that is applied to the facts of the case (i.e., the *applied rule*) is different than the *borrowed rule* the court started with.

- **Abandon (Strike, Abrogate, or Overturn)** the borrowed rule or part of it, and **Replace** the rule—The borrowed rule is gone from the case, and the court has created a new rule—the applied rule. This practice is much more common with courts of last resort that have the last word on the law in a given jurisdiction. With respect to statutory law, a court usually will only strike a statute down because of a state or federal constitutional defect in the law or because the law clashes with federal or international law under the Supremacy Clause of the United States Constitution.

Following are examples of what can happen to a borrowed rule.



Example 1

The first situation is a court that inherits a rule and does nothing to interpret, modify, or change the rule in a legally significant way:

The Borrowed Rule in the Apex case you are reading, *Astro v. Scooby*, 887 W.2d 234, 236 (Apex 1996), states:

To prevail on a claim for injuries caused by a dog, a plaintiff must plead and prove: (1) ownership of the dog by the defendant; (2) causation of the injury by the dog; and (3) lack of provocation of the dog. *Lassie v. Benji*, 667 W.2d 234, 236 (Apex 1993).

The judge applies the rule—"The defendant owned the dog, the defendant's dog bit the plaintiff, and the plaintiff did nothing to provoke the dog. The plaintiff wins."

This case applies the borrowed rule to the case as it found it. *Astro* becomes one more precedent on the borrowed rule laid down in *Lassie*.

Example 2

The second example is a case that writes new rules—in this case, interpretive rules—on certain elements of the borrowed rule:

The borrowed rule in the Apex case you are reading, *Snout v. Roscoe*, 987 W.2d 134, 136 (Apex 1998), states:

To prevail on a claim for injuries caused by a dog, a plaintiff must plead and prove: (1) ownership of the dog by the defendant; (2) causation of the injury by the dog; and (3) lack of provocation of the dog. *Blue v. Bingo*, 667 W.2d 234, 236 (Apex 1993).

But this judge goes on to state: "The concept of 'ownership' of the dog is not limited to a person having actual possession of title to the animal, but includes a person who harbors or has control over a dog." Later, the judge states: "Provocation requires an actual physical attack on the dog; verbal attacks do not count."

We now know two things about the rules on dog bite liability in Apex that we did not know from a reading of the initial borrowed rule: ownership is not limited to title and includes harboring and controlling a dog; and provocation requires a physical attack, while verbal attacks are excluded. The initial borrowed rule that the court started with has not been modified, but the applicable law on this issue has important new interpretive rules which in this example both are sub-rules addressing parts of the original borrowed rule (a main definitional rule). In the one instance, the sub-issue of "ownership" has been expanded by a new interpretive rule; in the other instance, the sub-issue of "provocation" has been limited by a new interpretive rule.

Example 3

Occasionally, a judge will reject or abandon certain terms of the rule, as in the following example:

The borrowed rule in the case *Garfield v. Marley*, 777 W.2d 333, 335 (Apex 1989), is presented as follows:

The rule in Apex on liability for damages caused by a domestic cat has traditionally been phrased to require proof that: (1) the defendant owned and controlled the cat; (2) the injury was caused by the cat; (3) the plaintiff did not provoke the cat; and

(4) the cat weighed more than eight pounds at the time of the attack. *Piper v. Daisy Mae*, 456 W.2d 654, 658 (Apex 1956).

The court then states: "The last requirement concerning the weight of the cat has never been applied by any court in Apex as a basis for granting or denying relief to any plaintiff. The requirement is a dead letter, and the Court will give it no consideration in this matter."

We now know that the court in question will only apply the first three elements of the cat bite rule, and this opinion will be authority for the argument that the cat bite rule only has three elements in Apex. The case becomes a precedent for a new definitional rule on cat bit liability—the new *applied rule* with only three elements.

Example 4

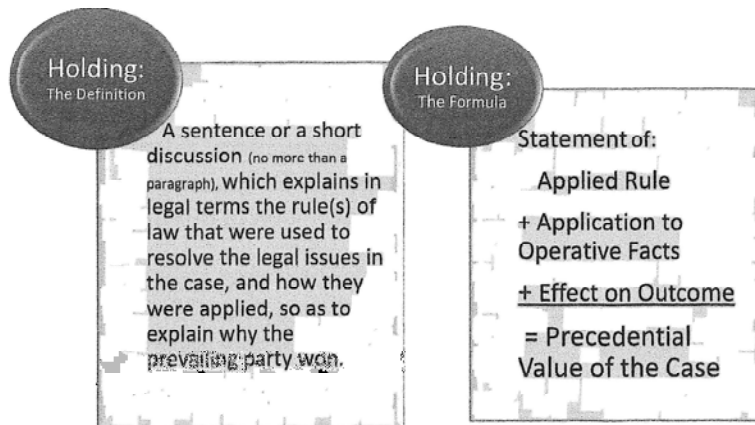
The court may add to the requirements of the rule, as follows:

The borrowed rule in the case *Haley v. Toonces*, 676 W.2d 545, 548 (Apex Ct. App. 1st Dist. 1985), is stated as follows:

The rule from *In re Morris*, 345 W.2d 987 (Apex. Ct. App. 1st Dist. 1965), was that "a party wishing to exercise the option of waiving the right to a trial by jury must give notice of this decision to the other party in the matter." *Id.* at 988.

The court goes on to say: "In addition, the party must not only give notice of the exercise of the option to her opponent, but must do so promptly, at the earliest opportunity in the case."

The definitional rule has been altered by adding an additional requirement. Attorneys should look at the requirements of the rule differently because of this opinion. When the court is finished, it will apply the rule as modified to the facts of the case to determine the outcome. It is the modified version of the rule actually used to determine the outcome of the case that is most important to the analysis. We will call this the "applied rule" (part of the "**precedent**") set by the case. By this definition, the **precedent** is equivalent to the **holding** of the case, and the holding of the case determines the precedential value of the case.



D. How do you phrase the Applied Rule?

The applied rule is the rule you will use in drafting the **Rule Section** of your discussion.

You have two choices for how to phrase it: you can articulate the borrowed rule in text followed by an explanation of its modification(s) over time (typically producing a few sentences or a paragraph), or you can **synthesize** one or more cases into a single, revised version of the rule—thus, revealing the applied rule in one or two sentences. Which option you take depends on the complexity of the rule (its historical status and iterations), as well as on your own ability to explain its iterations in as straightforward but accurate a manner as possible.

There are some guidelines to follow:

- **Never change the wording of borrowed rules from constitutions, statutes, and administrative regulations.**

If a case modifies a borrowed rule taken from a constitution, statute, or administrative regulation, write the modification separately, after you have laid out the specific wording of the primary source. In other words: do not paraphrase or rephrase the terms of a statute or regulation in the first instance of use.

- **Do not change the wording of a “famous,” much-cited historical rule. Write the rule first, and any modifications second.**

A borrowed rule from case law is sometimes so commonly stated in one phrasing that it is tantamount to a statute. *I.e.*, if a multitude of cases in a jurisdiction cite the same borrowed rule as *the* rule on the issue, and the rule always is phrased using the same language—same terms, same number of elements—then you should adopt the same phrasing. Respect the authorities by starting with the same (traditional, historical version) of the rule, followed by a separate discussion of the ways in which the borrowed rule has been modified, if necessary.

- **Synthesize the applied rule if you can generate a clear, succinct, and coherent statement. Do not synthesize the rule if you must write a long, overly complicated, run-on sentence.**

In some instances, it is appropriate to modify the wording of the borrowed rule when you present it in writing. For example, the court in Example 4 above added a new requirement that affected one of its existing elements. The rule and modification are short and simple enough that when we present the applied rule, we would go ahead and add the change:

Example 4: Synthesized Statement of the Applied Rule

A party seeking to waive the right to a trial by jury must give notice of this decision to the other party in the matter promptly, at the earliest opportunity in the case. *See Haley v. Toonces*, 676 W.2d 545, 548 (Apex Ct. App. 1st Dist. 1985); *accord In re Morris*, 345 W.2d 987, 988 (Apex Ct. App. 1st Dist. 1965) (notice required).



FOOD FOR THOUGHT

When it is more accurate to present a current, synthesized version of a rule created over time by a string of cases (frequently true with Common Law rules), then you should **synthesize** the authorities in your rule section. But when the rule comes from a statute or administrative rule or regulation, or is the product of a single, well-known, and controlling case, then it makes sense to present the rule first and the modifications second. Readers familiar with the well-known version of the rule will be educated by your history of the subsequent modifications and will not be put off by first seeing an unfamiliar synthesized rule.

In re Morris was the source of the borrowed rule, and *Haley* added to it, so both cases should be mentioned. There are no quotation marks around the rule because the exact wording presented does not appear in either of the cited sources, although the meaning of the rule would be apparent to anyone reading the two cases (this is the reason to use the signal “See” before the citations).

Example 2 is different. The terms of the borrowed rule have not been altered directly, but we now know a lot more about what two of those terms mean. The two new applied rules are **sub-rules** on **sub-issues** pertaining to two of the elements of the main definitional borrowed rule. If we were presenting these applied rules in a rule section, we would not try to cobble together all of the rules, borrowed and applied, into a single statement. Do not produce something like the following:

Example 2: DO NOT WRITE A RULE SECTION LIKE THIS:

To prevail on a claim for injuries caused by a dog, a plaintiff must plead and prove: (1) ownership of the dog by the defendant, which is not limited to a person having actual possession of title to the animal, but includes a person who harbors or has control over a dog; (2) causation of the injury by the dog; and (3) lack of provocation of the dog, meaning lack of an actual physical attack on the dog, because verbal attacks do not count. *Astro v. Scooby*, 887 W.2d 234, 236 (Apex 1996); *Lassie v. Benji*, 667 W.2d 234, 236 (Apex 1993).

Simply cobbling the two together makes a long and cumbersome rule that is too wordy to be useful in the application of the law to the facts. Judges and other audiences will not trust your synthesis of the two authorities if the end product looks like a Frankenstein monster (metaphorically speaking). Instead, put these interpretative sub-rules where they belong—in the sub-sections of the discussion that handle these elements of the rule (referred to in Chapter 7 as “sub-TREAT” sections):

Example 2: WRITE A MAIN RULE SECTION AND SUB-RULE SECTIONS USING THE APPLIED RULES:**Rule on Main Issue:**

To prevail on a claim for injuries caused by a dog, a plaintiff must plead and prove: (1) ownership of the dog by the defendant; (2) causation of the injury by the dog; and (3) lack of provocation of the dog. *Astro v. Scooby*, 887 W.2d 234, 236 (Apex 1996); *Lassie v. Benji*, 667 W.2d 234, 236 (Apex 1993).

**Sub-Rule on Ownership
(from the sub-TREAT on Ownership):**

The concept of “ownership” of the dog is not limited to a person having actual possession of title to the animal, but includes a person who harbors or has control over a dog.” *Astro*, 887 W.2d at 236.

**Sub-Rule on Provocation
(from the Sub-TREAT on Provocation):**

Provocation requires an actual physical attack on the dog; verbal attacks do not count. *Id.*

Example 3 eliminated the fourth element of the borrowed rule. In expressing this change, do not simply rewrite the rule with the last element missing. Instead, give notice to the reader that there was a fourth element, but it is no longer applicable:

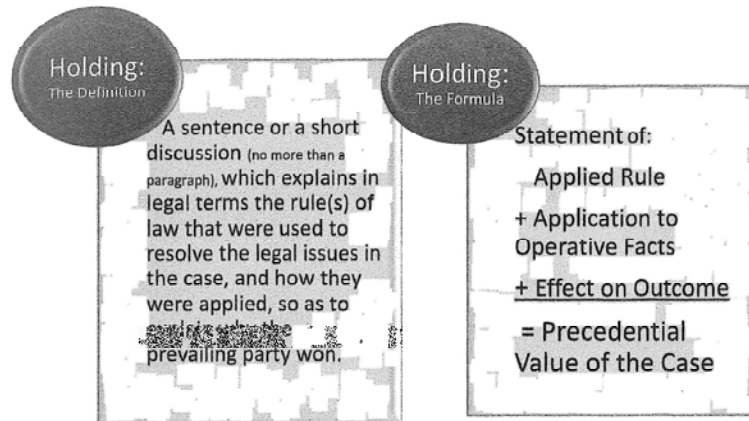
The rule in Apex on liability for damages caused by a domestic cat has traditionally been phrased to require proof that: (1) the defendant

owned and controlled the cat; (2) the injury was caused by the cat; (3) the plaintiff did not provoke the cat; and (4) the cat weighed more than eight pounds at the time of the attack. *Piper v. Daisy Mae*, 456 W.2d 654, 658 (Apex 1956). The fourth element, the weight of the cat, has fallen out of favor with courts in Apex, and no longer is applied. See *Garfield v. Marley*, 777 W.2d 333, 335 (Apex 1989).

By presenting the borrowed rule first followed by the modification, the reader is given the correct rule, but she will not be surprised if she goes and reads cases that still list four elements to the rule.

II. THE HOLDING OF THE CASE AND DICTA

Remember, the definition of and formula for holding is:



The holding is a combination of the applied rules (which might be the same borrowed rules that that court started with) and a discussion of how they were applied to the legally significant facts in the case to produce the result. A proper description of the holding would discuss all three of these things—the applied rules, legally significant facts, and how the rules were applied to the facts to produce the result in the case.

There should be a separate holding on each issue raised by the parties in support of their demands for relief that is adjudicated by the court. An appellate opinion typically takes up and resolves a number of independent issues, each of which is offered by the appellant as a ground for reversal of the judgment below, and each of which produces a separate holding.

Dicta is a legal discussion in the case that is not part of the holding. Sometimes it is difficult to determine what is dicta as opposed to the holding. Consider the definition and factors regarding dicta in the diagram on the next page:

DICTA - The Definition**What is Dicta?**

Dicta is anything in a case (any statement about the law, legal analysis, discussion of an element or factor) that is unnecessary to the outcome of the case. If the discussion of the law you are considering has no impact on the outcome of the case (the decision of the court as to who won and lost and why), then it is dicta.

DICTA - The Formula**Factors Establishing Dicta:**

- Did the court make its decision halfway through the case, and announced it, but went on to discuss several elements, items, or factors anyway? If so, the items discussed after the court announced its decision are probably dicta.
- Did the court say that it was not reaching certain issues? This is a dead giveaway that any discussion of these issues is dicta.
- Did the court predict an outcome for a future case if the facts or circumstances were different? That kind of prediction is dicta.
- If you simply dropped the issue or the discussion of the issue from the case—removed every mention of it—would it still be possible to:
 - a. Discern why the prevailing party prevailed?
 - b. State the factors, policies and considerations that brought about the decision?
 - c. Explain the rule(s) or element(s) that were analyzed and applied to determine the outcome?
 - d. State the facts that the court found to be important to the decision?

If you answer YES to a, b, c, and d, you have dicta.

Dicta is not irrelevant; to the contrary, it can be important. As you will see in the chapters that follow, lawyers and judges often will be very curious to find out what other courts have said in previous cases, especially cases from a higher court in the appropriate hierarchy, no matter if the statements are holding or dicta. Dicta can be a useful predictor of what a court will do in a future case where the issue discussed in dicta is finally reached and resolved. The important distinction is that a lower court is not bound by dicta, while it is bound by the holding.

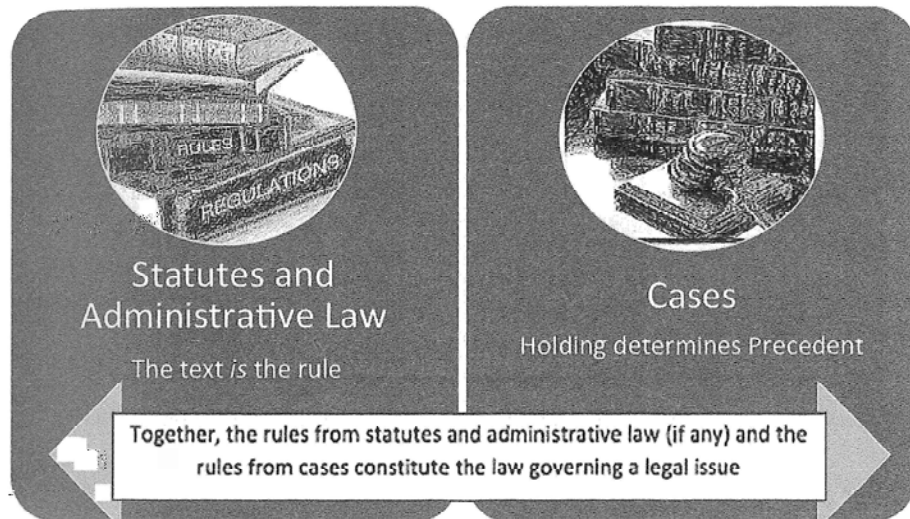
Test Your Knowledge

To assess your understanding of the material in this chapter, [click here](#) to take a quiz.

CHAPTER 4

Analysis of Rules from Constitutions, Statutes, or Administrative Rules and Regulations

This Chapter discusses how to find and interpret the rules in primary authorities other than case law, namely constitutions, statutes, and administrative rules and regulations. With constitutions, statutes, and regulations, determining the rule often is more straightforward than determining the rules in cases because these primary sources are themselves rules. What we mean by this is that if a statutory or constitutional provision or an administrative rule or regulation is on point, the terms of such sources state the rule—or at least provide the starting point for interpretation. Of course, determining the meaning of those terms (through the process of statutory and rule interpretation) thereafter can be tricky; we address this in Section II below.



I. FINDING THE RULES IN STATUTORY OR CONSTITUTIONAL PROVISIONS OR ADMINISTRATIVE RULES AND REGULATIONS

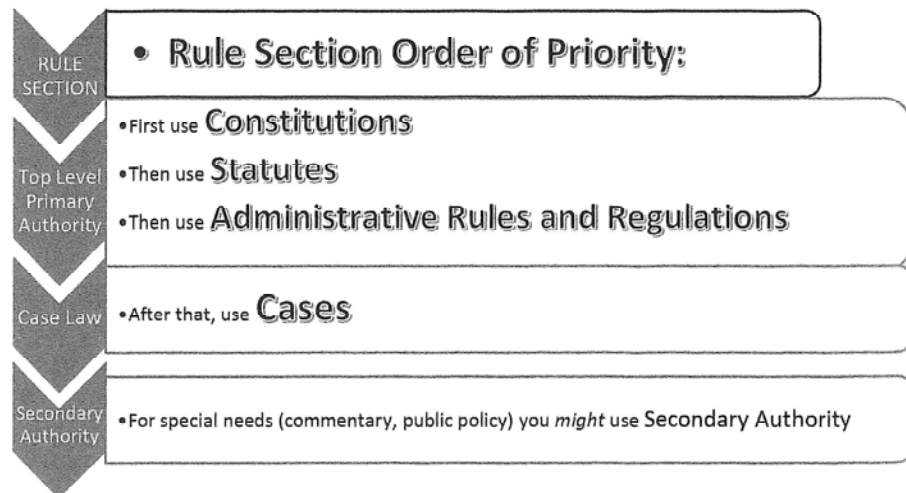
In the American legal system, legislatures and administrative agencies are charged with the official task of *making* law. Constitutions are enacted and ratified to be a fundamental set of basic, foundational laws for a jurisdiction, with the added strength that they are not intended to be modified or amended without some monumental political action. Legislatures and executive agencies and commissions are charged with the task of writing the rules and regulations that define the law. As such, statutory or constitutional provisions and administrative rules and regulations are themselves rules that an attorney and judge can find, interpret, and apply to legal issues.

Because of this status as a word for word source of the rules, and because the institutions associated with constitutional and statutory provisions (constitutional conventions and legislatures) and administrative rules and regulations (administrative agencies) are charged with making rules through the democratic and administrative processes, this status imposes guidelines for attorneys to follow in reporting rules from these sources:

➤ **Put rules from a constitution, statute, or administrative rule or regulation first in your Rule Section**

Because constitutions, statutes, and regulations are the official versions of rules created by entities charged with rule-making, you must give these rules priority in your discussion by placing them *first* in the **Rule Section** of your analysis. When constructing the Rule Section and reporting the body of law on an issue (see Chapter 5), constitutions, statutes, and regulations often will supply the main definitional rule on an issue, further requiring that they be given priority in a Rule Section. Other primary authorities (cases) will add rules and further interpret the rules from the top three primary sources of law, and sometimes cases will define the entire body of law on an issue (i.e., in a purely Common Law crime, claim, or defense). Secondary authorities (law review articles, treatises, scholarly commentary, etc.) may interpret the official language of rules from a constitution, statute, or administrative rule or regulation, and comment on the law or the public policy behind the law, but the rules from the top three levels of primary authorities should take the lead in your discussion, followed in rapid succession by case law.

In a situation where there are **constitutions, statutes, administrative law, and case law** on point on your issue, you must follow this **order of priority**:



Note that this chart is only a chart on *priority*. Case law will be used in almost every Rule Section because cases define, redefine, interpret, amend, or add to the law on most topics in the American legal system. All this chart intends to communicate

is that the top-level primary authorities should be listed first in the Rule Section, and then cases afterwards.

- Quote constitutions, statutes, and administrative regulations word for word.

The top-level, priority status of constitutions, statutes, and administrative regulations means that when a rule on an issue comes from one or more of these top-level primary authorities, you must quote the terms of the constitution, statute, or administrative regulation word for word as it appears in the source. This is an exception to the normal practice where rules from cases can and often should be paraphrased to fit the context and syntax of a rule section.

When we say “quote the terms of the source of the rule word for word,” we of course mean that you need only quote the relevant and operative terms of the rule, not every word in an entire statute or regulation. These terms are referred to as **operative, pertinent, or applicable terms** of the statute or regulation. A generous and liberal use of ellipses (. . .) is necessary so that you can excerpt and limit the words of the rule appearing in a rule section only to those words that matter to the analysis of the issue.

For example, if you are analyzing an issue regarding government censorship of speech, and wish to start the rule section with the constitutional provision on freedom of expression, U.S. Const. amend. I (the “First Amendment”), it would be best not to quote the entire First Amendment, but only the part about freedom of expression:

Write:

“Congress shall make no law . . . abridging the freedom of speech . . .”
U.S. Const. amend. I.

Do not write:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. Const. amend. I.

In another example, your client has waited four years after a car accident to decide she wants to sue the other driver. She asks you if it is too late to sue. You understand her cause of action to be for negligence, and you correctly deduce that the answer to the timing issue will be covered by a statute, which in this case is called a “statute of limitations.” You find the following statute in Apex:

**Apex Rev. Stat. § 300.2–102.
Limitations on Tort and Contract Actions.**

All actions of libel, slander, intentional torts, negligence, fraud, negligent misrepresentation, and for breach of contract (except contracts for the provision or payment of money, which are covered by section 300.2–101), shall be brought within five years of the date the cause of action accrued.

You have the rule, no question, and would write it up—the first time you mention it in the main part of your analysis—as follows:

“All actions of . . . negligence . . . shall be brought within five years of the date the cause of action accrued.” Apex Rev. Stat. § 300.2–102 (1997).

Quoting only these terms is helpful for the reader, because the rest of the statute is irrelevant to the legal issue you are researching. But be sure to use ellipses (. . .) to show where you took information out of the statute.



DO IT WITH STYLE!

Ellipses are used to mark text that has been removed. Three ellipsis dots are used if the removal was in the middle of a sentence (“John fell . . . and broke his leg.”). Four ellipsis dots are used if the material was taken at the end of a sentence (“John fell into a hole Marsha came to rescue him.”). Additional rules on ellipses are presented in Appendix B, Section II(C).

There are, of course, interpretive issues raised by this Apex rule: What does “accrued” mean, and when did this action accrue? There will be cases interpreting and applying this and other language in the rule, which should be addressed in your paper. But the starting point in the rule section is the language of the statute quoted above.

- **Do not change the wording of rules from constitutions, statutes, and administrative regulations.**

As noted above, statutes, constitutional provisions, and administrative rules and regulations are themselves rules. As such, the wording of such rules in legal writing should be and remain completely true to the wording of the original source even if the rule subsequently is altered or amended by case law. If a case modifies a rule taken from a constitution, statute, or administrative rule or regulation, write the modification separately, after you have laid out the specific wording of the primary source. In other words: do not paraphrase or rephrase the terms of a statute or regulation in the first instance of use.

APPENDIX A

Preparing a Case Brief or Case Analysis for Class

The decades-old tradition of teaching first year classes via the “case method” (*i.e.*, closely scrutinizing judicial opinions) remains in force today. To prepare for the intensity of the often-deployed Socratic Method, you are well-advised to “brief” assigned cases in advance of class. Even if upper-level students tell you that this practice is unnecessary, our sincere advice is to make this decision for yourself—and make it after completing several weeks of class preparation and classroom experience.

Yes, case briefing is time consuming, but its benefits outweigh its costs. The process also gets much easier with practice. We—like most of your 1L professors—encourage you to give it a chance, certainly until you are used to the expectations in each class and are more comfortable with case analysis, and hopefully well beyond that.

Why do we care so much about cases?

The Common Law tradition in the United States (and other British-influenced countries) allows courts to make binding law through the process of interpreting, and sometimes modifying or reversing, legal rules from prior sources and then applying newly-crafted rules to the case at hand. The result is a growing body of case **precedent** that lawyers and judges use to evaluate and determine the outcome of new cases. The related doctrine of *stare decisis* roughly translates to “standing by the decisions of the past” in order to resolve the disputes of the present. Throughout much of the history of England, this process of advancing the law through a series of court decisions was more important than the passage of laws by Parliament or royal decree. Especially in the bedrock (“Common Law”) subjects (torts, contracts, and property—*i.e.*, a good chunk of the required 1L curriculum), we still discuss the law and its development primarily by reference to case law.

What kinds of things are you looking for in the cases?

Precedent can be **binding** (or **controlling**) on future courts, or it can merely be persuasive. A controlling case presumably dictates the actions of courts bound by it. *I.e.*, courts must handle a legal matter in the same way as in the precedent case. A persuasive opinion, in contrast, may be used to persuade a court that it should do things the same way as a prior case, even though it is not bound to do so.

A decision is binding only on cases that involve the same type of situation and similar facts as those of the precedent case. Therefore, the **facts** (the circumstances

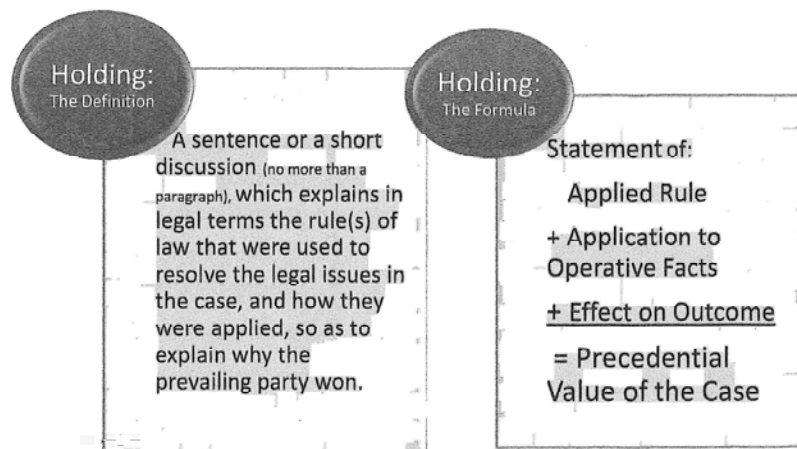
and events that resulted in the lawsuit) and the **issues** (the individual legal questions addressed) in each case are extremely important.

Also important is the **procedural history** (or **procedural posture**) of a case. This term refers to the events of the case in the judicial system after it was filed. You should understand both the stage the case was in when the opinion was issued as well as how the case arrived at the court issuing it.

For example, is the court looking at the case before or after trial? Is a particular type of motion involved (e.g., motion for summary judgment, or motion for a directed verdict), or is the case on appeal? If on appeal, how many steps or stages have passed? Is the case in the court of last resort in the particular jurisdiction? (See Chapter 3 and Appendix C for more information on these topics). This information is important; different types of opinions carry different weights. A ruling in a case from the trial court issued before trial has a different effect on future cases than a ruling from the court of last resort after a full jury trial occurred in the case below.

The ultimate **judgment** rendered on each issue (who won) involved in a case likewise is important because the more integral a discussion is to the judgment, the more significant it is in the long term.

Along these lines, you should know that only the holding of the case is controlling on future cases.



The holding is more than just the yes or no answer to a legal question. It is a sentence or short discussion explaining how the issue was answered. The holding explains the rule(s) that applied to resolve the issue in the case. A complete understanding of the holding also entails some discussion of the operative (**legally significant**) facts—those essential to the decision reached.

If part of the discussion has no bearing on the outcome of the case but, rather, indicates what would or should be the law in different or future circumstances, that

material is called dicta. While not binding on future courts in future cases, **dicta** is important for predicting how a court would handle a future case where the facts and issues in the future case match the situation predicted in the dicta of earlier cases. Dicta can be valuable **persuasive** authority. (Chapters 3 and 5 discuss these concepts in more detail.)

Dicta is not an easy concept to grasp; it can be difficult to locate and distinguish from the holding. Sometimes the line between them is tough to draw. In the beginning, do not expect to get every aspect of your case brief correct every time. Consider the following definition:

DICTA - The Definition

What is Dicta?

Dicta is anything in a case (any statement about the law, legal analysis, discussion of an element or factor) that is unnecessary to the outcome of the case. If the discussion of the law you are considering has no impact on the outcome of the case (the decision of the court as to who won and lost and why), then it is dicta.

DICTA - The Formula

Factors Establishing Dicta:

- Did the court make its decision halfway through the case, and announced it, but went on to discuss several elements, items, or factors anyway? If so, the items discussed after the court announced its decision are probably dicta.
 - Did the court say that it was not reaching certain issues? This is a dead giveaway that any discussion of these issues is dicta.
 - Did the court predict an outcome for a future case if the facts or circumstances were different? That kind of prediction is dicta.
 - If you simply dropped the issue or the discussion of the issue from the case—removed every mention of it—would it still be possible to:
 - a. Discern why the prevailing party prevailed?
 - b. State the factors, policies and considerations that brought about the decision?
 - c. Explain the rule(s) or element(s) that were analyzed and applied to determine the outcome?
 - d. State the facts that the court found to be important to the decision?
- If you answer YES to a, b, c, and d, you have dicta.

Why brief a case?

Case briefing forces you to engage in active learning, whereas merely reading a case (even with several highlighters in hand) constitutes only passive learning. You learn more and *retain more* when you step back from reading, determine the information that needs to go into each line item of the case brief, and write or type that information into a separate document or outline. You perform a level of analysis that merely reading does not achieve.

In addition, case briefs can serve a very practical purpose: they give you something to rely on when you are called on in class (easier to read in the heat of the moment than the multi-colored, highlighted pages of your casebook). And they are a good place to write your notes regarding the professor's and other students' discussion of the case. Make notes and corrections to your briefs in the midst of class discussion. What parts of the case were discussed just as you wrote them up, and which differed from your description or analysis of the case?

After class—or even more likely, after a week of class—write an outline summarizing the information collected and recorded on your corrected case briefs. This method requires discipline at a time when you most likely will just want to get on with the reading. But the outline you create most likely will match the process put in place by the professor for unfolding the contents of the course and building the structure for your understanding. At the end of the semester, you will have a full outline of the course before you dive into preparation for finals and mastery of the material.

What should a “case brief” include?

There is no magic formula or mandatory structure for a case brief, and your goal might be different for different classes or professors. The purpose is to capture the key pieces of information from the cases you read in a format that makes sense to you.

Presumably you will want to note the following key details:

1. the Name (or Caption) of the case;
2. the identity of the Parties (buyer/seller, employer/employee, building owner/invitee, driver/pedestrian, etc.);
3. the Court level and jurisdiction (state or federal? trial, intermediate, last resort?);
4. the Facts (i.e., relevant factual history);
5. the Procedural History, also known as Procedural Posture (events in the case after it was filed in the courts; how the case got to the court issuing the opinion);
6. the legal Issues (questions) answered in the opinion;
7. the Holdings on those issues;
8. Discussion of the court's rationale and reasoning behind the decision (you might also note the rationale and reasoning of the dissents, because if they are included in a case book or case

excerpt, it is likely they will be used in a Socratic case method exercise to probe and challenge the majority's rationale);

9. the Judgment (which party won, and what did they win);
10. Dicta, and any other information that ~~seems~~ ^{seems} particularly noteworthy, memorable, or important (e.g., the name of the author judge; vote count in the majority vs. dissent).

What does it look like?

As for organization, that really is up to you. Below is a sample format that follows a logical structure; you can also ask your professors or upper-class friends for examples.

CASE BRIEF

Style of the Case, and identity of the Parties:

Court and Judge (author of the opinion):

Facts:

Procedural History:

Issues:

Holding:

Judgment:

Discussion (and Dicta):

How long should a case brief be?

At first, your case briefs may consume a page or more. The longer and more complicated they are, however, the more likely you will tire of preparing them. Instead, aim to develop an efficient method that suits you (and the material). After several weeks, you will have a better sense of what to focus on for each class. Your case briefs in Civil Procedure, for example, may require more procedural history. In Contracts, perhaps the focus will be on certain factual details—the various discussions among the parties, and certainly the topics the parties agreed on. Experiment a little with different formats and content before you give up the practice entirely.

The loser at trial in a civil case can **appeal** to the **intermediate level appellate court** (if one exists in that jurisdiction). The party who brings the appeal usually is called the **appellant** or petitioner. The appellant assigns “**errors**” to the court’s rulings on the law (including on evidentiary or procedural matters), to factual findings, and to anything prejudicial that occurred during the litigation. The appellant files an **appellant’s brief** or **opening brief**. The opponent is called the **appellee** or **respondent**. The appellee files an **appellee’s brief** (or **answering brief** or **opposition brief**). In some courts, the appellant is entitled to a **reply brief**. At present, **oral argument** is available in most appeals, but some appellate courts are moving away from this practice and requiring the parties to make a special demand for it.

If unsuccessful on appeal, the appellant may attempt to seek review by the highest level appellate court, the **court of last resort** in the state or federal system. Such appeals often are not automatic. Instead, these higher courts usually have the right to pick and choose the cases they take, so this level of review is not guaranteed. In other words, you generally only get one appeal “of right,” and if you want additional appeals, you must obtain permission to pursue them. If you make it to the highest court in the jurisdiction, the titles of the parties may change (for example, from appellant to **petitioner** and appellee to **respondent**).



The appellate court (at the intermediate or highest level) has several options for addressing a case that comes before it. If the court agrees with the decision below, it will **affirm** the lower court’s ruling. If it disagrees, the court will **reverse**—and either: (a) order the lower court to enter judgment for the appellant (and likely issue an opinion correcting the lower court’s errors); or (b) identify the procedural errors and **remand** the case back to the trial court for further proceedings consistent with the appellate court decision.

II. FEDERAL, STATE, AND LOCAL COURT SYSTEMS

As noted in Chapter 1, every person in this country is governed by the laws of the nation, state, county or parish, and community (city or town) in which she lives. Citizens of the United States thus are subject to several “sovereigns”—national (also known as federal), state, and local authorities. The laws of the United States, referred to as federal laws, govern everyone living in the United States, while the laws of Illinois only govern people who are living or conducting business in Illinois, and the laws of McLean County in Illinois only apply to people who are living or conducting

Often, however, the coverage of the laws and even the court systems of the nation and the states overlap. Depending on who you are (for example, a citizen of a state), and the subject matter of your action (what you did, or what was done to you—discussed below under the topic of **subject matter jurisdiction**), you may become involved in a state action or a federal action, or both.

2 Map of USA, Illinois, McLean County, Normal and Bloomington (2014), copy on file with author
Michael D. Murray.

were blocking your way as you ran to your getaway car, you might be prosecuted in a Montana state court for murder or felony murder and also prosecuted in the United States District Court for the District of Montana (a trial level court in the federal court system, located in Montana) for bank robbery and use of a firearm in connection with a bank robbery, both of which are federal crimes. If you are a citizen and resident of Nevada and you have been swindled out of \$100,000 by a Wisconsin citizen and resident, you might sue that person for fraud in state court in Wisconsin or, alternatively, in the United States District Court for the Eastern District of Wisconsin (a federal trial level court) because your state citizenship is "diverse."



WHAT'S THAT?

Federal, State, and Local Laws and Court Systems

If government relations has been a special area of study in your life, the concepts of federal laws, state laws, and local laws, and federal courts, state courts, and local courts may be quite familiar to you. For the rest of us, the concepts can be confusing. It is easiest to start with the idea of territory—the actual physical place in which we live. The United States of America is a physical place that has its own laws, "federal laws," intended to be applied and enforced within its boundaries. The United States has its own system of courts to enforce and adjudicate its laws—the United States courts which are referred to as federal courts. These courts are found across the nation, which is divided into districts; there is at least one and oftentimes more than one federal district in each state of the nation. But the "district" is not part of the state it sits in, it simply is located there. The process is repeated for divisions of territory known as states, counties (or parishes), cities, towns, or villages. States of the United States will have state courts that operate within the state and enforce the state's laws, and counties or towns may have lower level courts devoted to adjudicating matters of county or town laws.

The territory of the United States is divided into fifty states and one District of Columbia (leaving aside other territories and protectorates, such as Puerto Rico, Guam, etc.). Each of the states and districts has laws that only apply within these individual states and districts, i.e., within the State of Oregon, or the Commonwealth of Virginia, or the District of Columbia. And each place has a court system to enforce those laws, *e.g.*, the Kentucky courts enforce Kentucky laws applicable within the State of Kentucky. And the process is repeated again for places within a state, such as counties or parishes, and again for places within a county or parish, such as cities and towns and villages. So, you may be standing in the town of Des Peres, Missouri, and at that moment you would be subject to Des Peres's ordinances, St. Louis County laws, Missouri laws, and United States laws each of which might be adjudicated in a different court system.

Different states have different names for their courts, while the federal system uses the same terminology wherever the courts are located across the United States. For example, compare the terms used in the federal system and in the states of California, New York, and Texas:

A. The Federal System

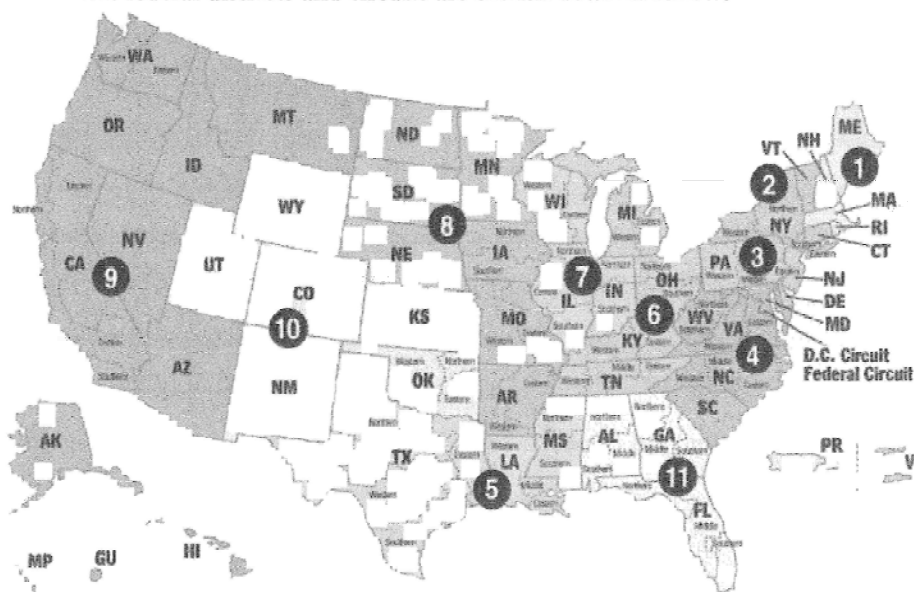


As discussed above, the federal government maintains a court system that operates in each state of the union. The organization of the courts in the federal system is uniform throughout the United States. The federal trial level courts are called the **United States District Courts**. Each of the fifty states (and some U.S. territories) has one or more **districts**, which correspond to a specific geographic region. For example, North, South, East, West, Middle, or Central. Federal trial courts in states with **one district** are called the United States District Court for the District of [State]; for example, the United States District Court for the District of Maryland and the United States District Court for the District of Kansas. The District of Columbia is one district, and the court there is called the United States District Court for the District of Columbia (a cumbersome title). Often, singularly districted courts are located in different **vicinages**, such as the United States District Court for the District of New Jersey, which is comprised of judges sitting in three locations (Newark, Trenton, and Camden). Federal trial courts in states with **multiple districts** are identified as the United States District Court for the [geographic region] District of [State]; for example, the United States District Court for the Eastern District of Missouri, the United States District Court for the Southern District of New York, the United States District Court for the Central District of California, and the United States District Court for the Middle District of Pennsylvania.

Each federal district court is subdivided into courts identified by a number, letter, or the judge's name (or initials). These courts are presided over by a **United States District Judge** or a **United States Magistrate Judge**. On a tier below the district courts are the federal trial level courts with more limited jurisdiction—the **United States Bankruptcy Court** and the **United States Tax Court**.

The intermediate level appellate courts in the federal system are known as the **United States Courts of Appeals**. The United States Courts of Appeals are located in thirteen circuits, eleven of which encompass the fifty states. The remaining two are the United States Court of Appeals for the District of Columbia Circuit, which hears appeals from the United States District Court for the District of Columbia (and many cases involving appeals from federal agencies); and the United States Court of Appeals for the Federal Circuit, which has nationwide jurisdiction over appeals based on subject matter (arising from the United States Court of Federal Claims, the United States Court of International Trade, and appeals from the district courts in patent cases).

The federal districts and circuits are broken down as follows³



1st Circuit Court of Appeals	Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island
2nd Circuit Court of Appeals	New York, Vermont, and Connecticut
3rd Circuit Court of Appeals	Pennsylvania, New Jersey, Delaware, and the Virgin Islands
4th Circuit Court of Appeals	Maryland, North Carolina, South Carolina, Virginia, and West Virginia
5th Circuit Court of Appeals	Louisiana, Texas, and Mississippi

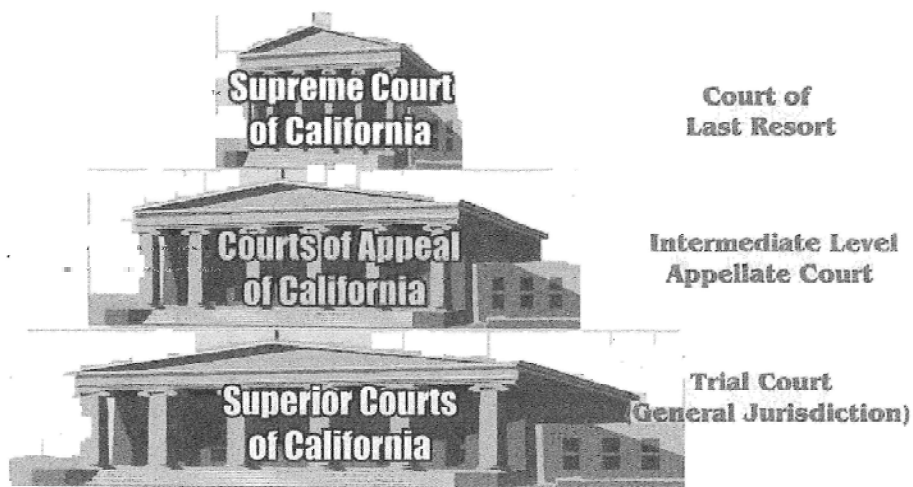
³ Circuit map provided by the U.S. Courts page of the Administrative Office of the U.S. Courts, <http://www.uscourts.gov/courtlinks/>.

6th Circuit Court of Appeals	Michigan, Ohio, Kentucky, and Tennessee
7th Circuit Court of Appeals	Illinois, Indiana, and Wisconsin
8th Circuit Court of Appeals	North and South Dakota, Minnesota, Nebraska, Iowa, Missouri, and Arkansas
9th Circuit Court of Appeals	California, Oregon, Washington, Arizona, Montana, Idaho, Nevada, Alaska, Hawaii, Guam, and the Northern Mariana Islands
10th Circuit Court of Appeals	Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming, plus those portions of the Yellowstone National Park extending into Montana and Idaho
11th Circuit Court of Appeals	Alabama, Georgia, and Florida
District of Columbia Circuit Court of Appeals	The United States District Court for the District of Columbia, the United States Tax Court, and appeals from many administrative agencies of the federal government
Federal Circuit Court of Appeals	The U.S. Court of International Trade, U.S. Court of Federal Claims, the Court of Veterans' Appeals, and most patent appeals

The court of last resort in the federal system is the **United States Supreme Court** with its nine **justices**, all of whom sit to hear each appeal.

B. The State System

Each state is also a separate sovereign with its own system of courts. Some states have more complex systems than others. When you practice in a particular state, you will learn that state's court system inside and out (if it doesn't happen in law school, then the learning process will begin when you study for the bar exam of the state or states you select). Obviously, we cannot cover all of them here. To give you a flavor for how the structure and vocabulary differ from state to state, we will briefly cover the court systems of three states—California, New York, and Texas—all of which use different terminology.

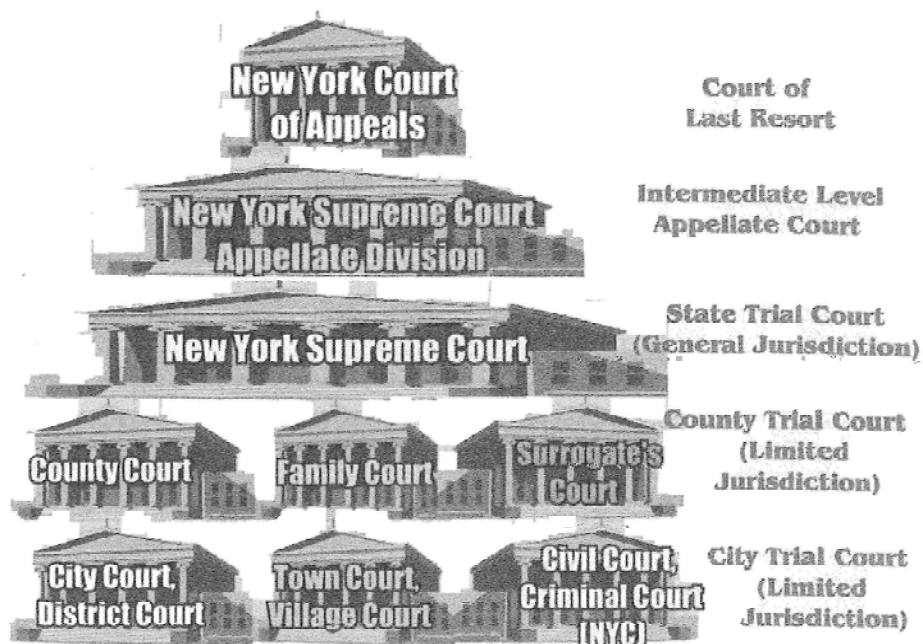


1. California

Of the three states we will mention, California has the most typical structure to its court system. The trial level courts of general jurisdiction where cases commence are called the **Superior Courts of California**. There is a superior court for each county (for example, the Superior Court, San Mateo County). The courts are divided into **departments** where the superior court judges are assigned; for example, the Superior Court, Los Angeles County, Department 23.

There is an intermediate level appellate court in California called the **Court of Appeal of California**. Note that the word "appeal" is singular—that is unusual to see because most jurisdictions use the plural. The court of appeal is divided into six appellate districts, numbered First Appellate District through Sixth Appellate District, and two of the larger districts (the First District in the area of San Francisco and the Second District in the area of Los Angeles) are subdivided into multiple divisions. Accordingly, you might find your case in the Court of Appeal, First Appellate District, Division 3. The court of appeal hears appeals from superior courts in panels of three **justices**. Superior court judges have some appellate duties. Appeals in "limited civil cases" (in California, where \$25,000 or less is at issue) and misdemeanor cases are heard by the **appellate division of the superior court**, where superior court judges sit on three judge panels. When a small claims case is appealed, a superior court judge decides it. Another exception to the rule that all appeals from the superior court go to the court of appeal is in death penalty cases (appealed directly from the superior court to the Supreme Court of California).

The court of last resort in California is called the **Supreme Court of California**. There are seven **justices** on the Supreme Court of California who sit together to hear each appeal, which is called sitting **en banc**.

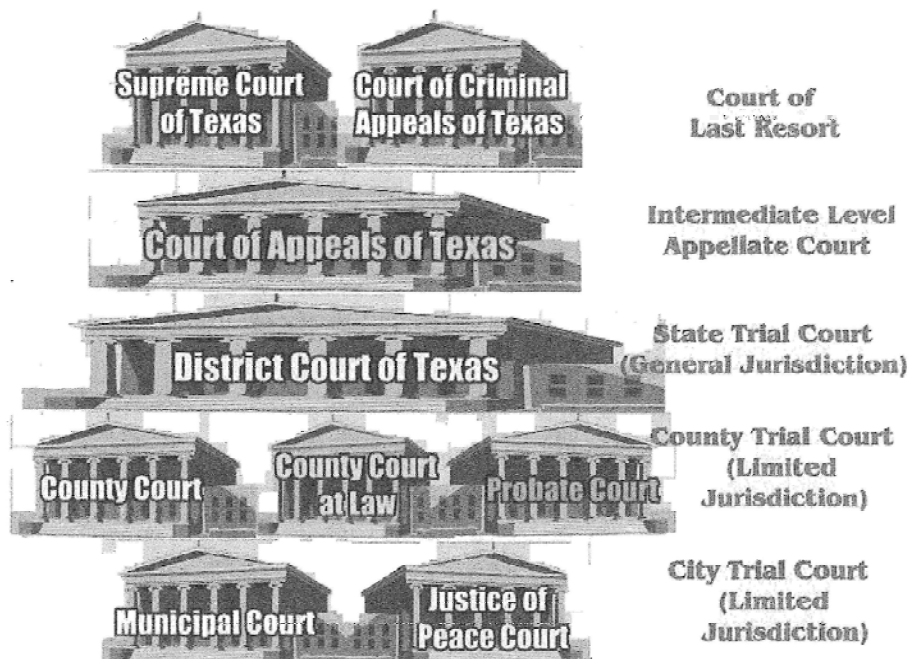


2. New York

New York is quite different from other court systems in its terminology. The state trial level court of general jurisdiction in New York is called the **New York Supreme Court**. That is not a misprint. Each trial judge is called a justice. And there is a supreme court for each county. The supreme courts are divided into parts where the justices sit. At the county level, there also are lower courts with more specific subject matter jurisdiction, called the **County Court**, the **Family Court**, and the **Surrogate's Court**. Outside New York City, there is a third tier of limited jurisdiction courts called the **City Courts**, **District Courts** (on Long Island), **Town Courts** and **Village Courts**. In New York City, the second tier of trial courts below the supreme court is divided between the **Civil Courts** and **Criminal Courts**.

The intermediate level appellate court in New York is called the **New York Supreme Court Appellate Division**. It is divided into four numbered **departments**. Appellate division **justices** sit in panels of three and hear civil and criminal appeals from the supreme courts. Appeals from second tier trial level courts in the First and Second Departments go to the **Supreme Court Appellate Term**.

The court of last resort is called the **New York Court of Appeals**, and there are seven **judges** who sit **en banc** on this court. Thus a judge (of the Court of Appeals) may overturn the opinion of a justice (of the Supreme Court) in New York.



3. Texas

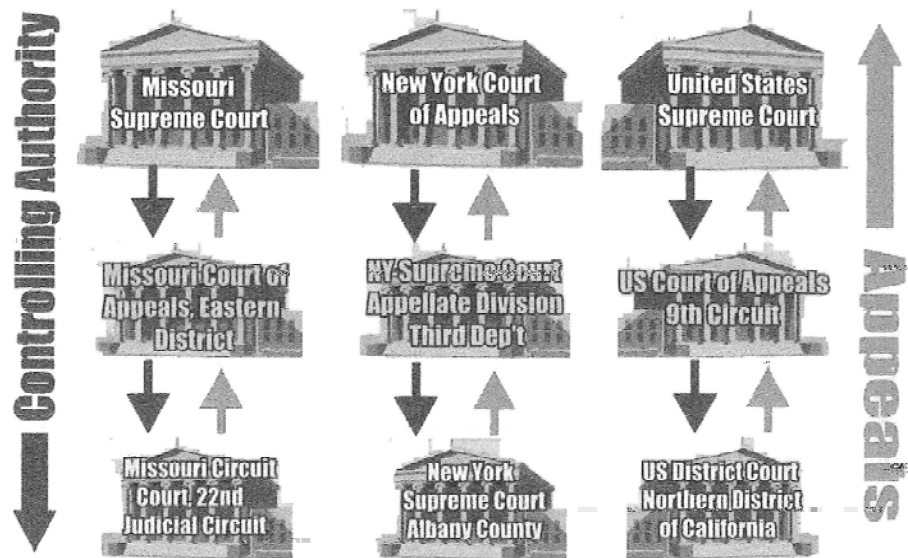
Texas also has a fairly complicated court system. The state trial level courts are called District Courts of Texas, and although they correspond to a county, they are numbered (for example, the 238th District Court of Midland County, Texas). Many counties have more than one numbered district. For example, Collin County, Texas has the 219th, 296th, and 366th District Courts. There is one judge in each district. Below the district courts are courts of more limited jurisdiction, also associated with a county, called the County Courts, County Courts at Law, and the Probate Courts. Some counties are large enough to have more than one of these limited jurisdiction courts; for example, Probate Court No. 2, Dallas County, Texas. Even lower are courts at the local level, cities and townships, called the Municipal Courts and Justice of Peace Courts.

The intermediate level appellate court in Texas is called the **Court of Appeals of Texas**. There are fourteen courts of appeals that are numbered and identified by the city where they sit; for example, Third Court of Appeals, Austin. Houston has two—the First and the Fourteenth Courts of Appeals. The court of appeals hears civil and criminal appeals from the district courts and county courts in panels of three **justices**.

There are two courts of last resort in Texas—one for civil appeals, called the **Supreme Court of Texas**, and one for criminal appeals, called the **Court of Criminal Appeals of Texas**. The Supreme Court of Texas has nine **justices** and the Court of Criminal Appeals of Texas has nine **judges**. Both courts hear cases **en banc**.

III. HIERARCHY OF JUDICIAL AUTHORITY

One of the key concepts to master in legal analysis concerns the weight that is afforded to different judicial decisions based on the level of the court that issued the opinion. The basic structure of the court systems described above—trial level court → intermediate level appellate court (if any) → court of last resort—is known as a **hierarchy of judicial authority**. It refers to the power of courts higher up *in the same system* to **reverse** or **affirm** the decisions of the courts below. It also refers to the principle that the **decisions of the courts higher up in the hierarchy are controlling authority** for any courts directly below the court in the same system.



If you think of an appeal as climbing the hierarchy of judicial authority, then the hierarchy of controlling authority uses the same path in reverse. Appeals climb the hierarchy, while controlling authority descends it.

Following are several important principles to keep in mind concerning the ability of one court to control the decisions of another. These are important principles to remember while researching, because they will help you sort your findings into the categories of mandatory (controlling, or binding) versus persuasive authority.

- **Courts on the same tier do not bind each other.**

If a court is on the *same tier* with another court, it does not control the decisions of that court. Thus, a trial court of general jurisdiction in a state will not control the decisions of another trial court of general jurisdiction in the same state. (Nor does it bind any court of *another state* on the same tier, or even on a higher or lower tier, because two different states are two different systems). In the above chart, the decisions of judges of the Missouri Circuit Court, 22nd Judicial Circuit, St. Louis City, are not binding on the judges of the Missouri Circuit Court, 21st

Judicial Circuit, St. Louis County. That said, many courts on the same level will look to other decisions from courts on that same level as **persuasive** authority, but not binding authority.

- **Judges on the same court do not bind each other.**

Even the decisions of judges sitting on the same court are not binding on other judges of the court because the judges are all working on the same tier of the hierarchy. For example, the decisions of one judge of the New York Supreme Court, Albany County, are not binding on the other judges of the New York Supreme Court, Albany County, because these courts are on the same tier. A court does not bind itself.

Individual trial courts and appellate courts may decide—per their own court rules—to deviate from this general principle. A trial court may initiate a rule (sometimes referred to as a “bench rule”) that requires all judges on the court to follow the decisions of all other judges on the court unless and until those decisions are overturned by a higher court or otherwise become bad law. It is up to the judges of the court to decide how strenuously they will follow this rule. Similarly, an appellate court may adopt a rule (sometimes referred to as a “panel rule”) that any decision of a three judge panel of the appellate court must be followed by all subsequently assembled panels of the court unless the decision is overturned or called into question by an intervening en banc decision of the court or by the court of last resort.

- **En banc opinions of an intermediate level appellate court bind all judges on that court.**

An exception to the general rule that a court does not bind itself is the situation of an intermediate level appellate court that sits **en banc** (all available judges on the court sitting together) to reconsider a case. These opinions are binding on each judge and subsequently assembled panel of judges of the intermediate level appellate court. The same is not true of courts of last resort, because the judges or justices of these courts often sit en banc to hear every case that comes before them. Thus, an en banc decision of the United States Court of Appeals for the Ninth Circuit binds each subsequently assembled three-judge panel of the Ninth Circuit, but an en banc decision of the United States Supreme Court, which always sits en banc to hear each case, does not bind future decisions of the United States Supreme Court.

- **Courts that are not in the direct line of appeal do not bind lower courts.**

The general rule is that a court must be in the *direct line of appeal* in a hierarchy to bind a court on a lower tier, even if the two courts belong to the same state or federal court system. So, for example, if there are multiple divisions of an intermediate level appellate court in the same jurisdiction, as was the case in all of the state court systems discussed above, only the division that hears appeals from the

state trial level court will bind that court with controlling authority. Consider the following examples:

- **The Missouri Court of Appeals, Eastern District hears appeals from the Missouri Circuit Court, 22nd Judicial Circuit, St. Louis City. Accordingly, it binds the judges of that court as well as all of the other Missouri Circuit Courts located in territory of the Eastern District. However, the Missouri Court of Appeals, Western District and the Missouri Court of Appeals, Southern District do not bind the Missouri Circuit Court, 22nd Judicial Circuit, St. Louis City or any other circuit court found within the territory of the Eastern District.**
- **The United States Court of Appeals for the Ninth Circuit controls the decisions of all of the United States District Courts located in the territory of the Ninth Circuit, such as the United States District Court for the District of Oregon or the United States District Court for the Central District of California. However, it does not bind any district court located outside of the Ninth Circuit, such as the United States District Court for the Middle District of Georgia or the United States District Court for the District of Maryland.**

Once again, states may decide to deviate from this rule and adopt a rule that all opinions of the intermediate level appellate courts are binding on all trial level courts wherever they are located within the state. Illinois is one such state that has adopted this rule.⁴

- **Courts of last resort control all courts in the same hierarchy.**

The highest court in any hierarchy controls all courts below it in the same hierarchy. The Illinois Supreme Court controls the decisions of each district of the Illinois Appellate Court and all of the Illinois Circuit Courts, because all of these courts are below it in the same hierarchy. The United States Supreme Court controls the decisions of the United States Courts of Appeals for each circuit and all of the United States District Courts, because all of these courts are below it in the same hierarchy.

- **Courts of one hierarchy do not bind courts of another hierarchy, but the court of last resort of one hierarchy can bind courts of a second hierarchy *if the first hierarchy's law is being applied by the courts of the second hierarchy.***

⁴ See *State Farm Fire and Cas. Co. v. Yapejian*, 605 N.E.2d 539 (Ill. 1992) (decisions of one appellate district are not binding on other appellate districts but are binding on all circuit courts across the state).

This principle is trickier because it requires an understanding not only of *who* decided a case, but of *what* was decided (*i.e.*, which law was applied). Recall that decisions of a court higher up in one hierarchy are not necessarily controlling in courts outside that hierarchy, even if the courts outside are on a lower tier. Thus, courts in the Minnesota state system generally do not bind courts in the Wisconsin state system, nor those in the federal court system, nor the federal courts that sit within the jurisdictional territory of Minnesota.

The exception takes hold when a court of one state is applying another state's law, when a federal court is applying state law, or when a state court is applying federal law (in sum, when a court of one hierarchy is applying the law of another hierarchy).⁵

In these instances, the *court of last resort* of the hierarchy whose law is being applied controls the decisions of a court in another hierarchy. Decisions of lower tiered courts of the hierarchy whose law is being applied do not have this power. For example:

- **The Wisconsin Supreme Court does not control the decisions of any Mississippi court or federal court unless the non-Wisconsin court is applying Wisconsin law in the case it is adjudicating. However, if the Mississippi court is applying Wisconsin law on a particular issue, it must follow the decisions of the Wisconsin Supreme Court. However, the decisions of the Wisconsin Court of Appeals (an intermediate level appellate court) will not bind a Mississippi court even if the court is applying Wisconsin law.**

It is important to note here something that might sound counterintuitive. That is, the United States Supreme Court does not automatically control the decisions of state courts, because they are outside the federal court hierarchy. Of course, if the issue that concerns the state court is a matter of federal law, such as a decision interpreting the U.S. Constitution, then the U.S. Supreme Court's decision is binding. Although the U.S. Supreme Court is popularly referred to as the "highest court in the land," it is only the highest court of the federal hierarchy, not the highest court of every hierarchy in the United States. This concept is discussed further in Chapter 5.

⁵ The reasons why courts are called upon to apply the law of another jurisdiction in various instances are the subject of complicated areas of the law known as conflicts of law and choice of law, which are taught in second semester or advanced civil procedure and conflict of law courses. Suffice to say that courts are, on occasion, required to apply the law of another jurisdiction, be it another state, or federal law, or the law of another nation.

KING THE CASE METHOD

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CHAPTER 6**CASEBOOKS**

Casebooks, the heavy equipment of the Case Method of instruction, are primarily collections of appellate court opinions.¹ Casebooks often carry titles such as *Cases on Torts* and *Cases and Materials on Contracts*. Creative titles such as these make it nearly impossible for you to carry the wrong casebook into a class. This chapter will help you crack the Case Method by examining how casebooks' typical contents further the Case Method's goal of helping you learn how to think like a lawyer.

With changed technology, you may read e-casebooks rather than the traditional printed ones, and professors may direct you to websites to read materials that formerly would have been in casebooks. However, fear not for the Case Method's longevity. Whether materials are printed or electronic has no impact on the process of legal analysis.

1. ANATOMY OF AN APPELLATE COURT CASE

Most of the cases in a casebook will have spent a considerable time in the formal legal system before arriving in an appellate court. The cases normally begin life in a trial court, with a plaintiff (or in criminal cases, a prosecutor) filing civil complaints or criminal charges against one or more defendants. After defendants' responses, the path to a final trial court judgment often includes the following: 1) pre-trial motions and court hearings (which may be virtual); 2) conferences and exchanges of information between the parties (sometimes with a judge present); and 3) especially in civil cases, formal discovery (like depositions and requests for admissions). The trial court phase of a case that reaches an appellate court can conclude in a variety of ways. A judge may enter judgment after terminating

¹ Casebook authors edit most of the opinions. Partly they do so to save paper and to save you reading time. But as opinions may delve into a variety of legal issues, casebook authors may edit out discussions of legal issues that don't pertain to a casebook's subject matter. And authors commonly delete facts that they consider unnecessary to an opinion's outcome and therefore lacking in rhetorical value.

a case short of trial. For example, a judge might grant a criminal defendant's Motion to Dismiss, or in a civil case may grant either party's Motion for Summary Judgment. If a case goes to trial, a judge will enter judgment following a verdict either by the judge (in a "bench trial") or by a jury.

The losing party in the trial court has one appeal "as of right." That is, the right to trial includes review by at least one intermediate appellate court. The party who comes out on the short end in the intermediate appellate court can petition for further appellate court review. (The exception is the government in criminal cases. The government cannot appeal a judge or jury's Not Guilty verdict.) The petition for further review may be made to a larger panel of judges in the same intermediate appellate court, often called a petition for *en banc* review. More commonly, the loser in the intermediate appellate court files a petition for review in a higher level appellate court normally called a supreme court. However, parties typically do not have a *right* to supreme court review. After the appeal as of right, other courts have discretion to decide which cases they want to take up. For example, a supreme court may turn down a petition for review simply because the court's calendar is so crowded that the court lacks the time to review a case whose outcome does not raise broadly applicable legal issues but rather affects only the two parties to the litigation.

Back in the intermediate appellate court, the appellant (the losing party in the trial court) sets forth legal issues and arguments in a "brief" specifying the errors that the party claims require reversal or modification of the adverse trial court judgment. The adversary (the "appellee" or "respondent") submits a brief of its own in support of the trial court judgment.² The usual rule is that appellate court judges consider only claimed *errors of law*, not *errors of fact*. So appellate court judges virtually always ignore an appellant's claim that amounts to little more than, "the jury had no business accepting the testimony of the abject liars called to the stand by my opponent." Errors of law include such matters as the validity of and proper interpretation of statutes, lack of jurisdiction, jury instructions

² As you probably know, these "briefs" may be anything but!

WINNING THE CASE METHOD

A judge might grant a criminal judgment. In a civil case may grant either judgment. If a case goes to trial, a judge a verdict either by the judge

A court has one appeal "as of right" includes review by at least one party who comes out on the losing side. An appellate court can petition for review. The exception is the government. The government cannot appeal a judge or a jury verdict. A petition for further review may be granted in the same intermediate appellate court. More than one intermediate appellate court files a petition. A state level appellate court normally grants review. Parties typically do not have a right to appeal as of right, other than in cases they want to take to the Supreme Court. The court may turn down a petition for review. The court's calendar is so crowded that it will not hear a case whose outcome does not affect the public interest but rather affects only the parties.

In an appellate court, the appellant (the party who lost in the trial court) sets forth legal issues and argues the errors that the party claims in the adverse trial court judgment. The "appellee" or "respondent" supports the trial court judgment.² Appellate court judges consider only the facts of the case. So appellate court judges consider the appellant's claim that amounts to saying "I had no business accepting the judgment. I was misled to the stand by my opponent." The appellant argues as to the validity of and proper exercise of jurisdiction, jury instructions

"Briefs" may be anything but!

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that allegedly misstate the law and evidence that was allegedly improperly admitted or excluded.

Following the submission of briefs, appellate court judges typically review the relevant trial court records (including transcripts of testimony) and may hear oral argument on their way to issuing decisions ("holdings"). An appellate court may affirm a trial court judgment either because no error occurred, or because any errors that did occur were not serious enough to justify reversing a judgment. Litigants, you may hear often, are entitled to fair trials but not perfect ones. Courthouses are crowded with parties seeking their day in court, and a balance must be struck between trying to achieve perfection and giving all litigants reasonably prompt access to the courts.

When appellate courts decide that errors are serious enough to justify reversal of judgments, they normally set aside (or "vacate" or "overturn") a judgment and send the parties back to the trial court for further proceedings. Very occasionally, appellate courts go further and actually enter a final judgment in favor of the appealing party and against the party who won in the trial court. Appellate court judges may even both affirm and overturn a judgment. For example, an appellate court may decide that a criminal defendant's conviction should stand, but that the sentence was improperly harsh. If so, the appellate court might affirm the conviction but enter what it considers the proper sentence.

Appellate court opinions often include a majority opinion and one or more dissenting opinions. If a split occurs in a three-judge panel, one of the two judges in the majority will prepare the opinion of the court and the dissenting judge may (or may not) write an opinion explaining the reason(s) for disagreement. If a split occurs among the judges in a larger panel, one of the judges in the majority prepares the opinion of the court and the dissenting judges may issue a single dissent in which they all join, or separate dissents, or none at all. Dissenting judges are not necessarily sore losers. An intermediate-level appellate court judge might issue a dissenting opinion in order to catch the eye of a supreme court, hoping that the dissent will convince the higher court to take up the case and rule in accordance with the dissenter's view. Of course, dissenting U.S. Supreme Court

justices have no eyes to catch with respect to the case before them. However, they may issue a dissenting opinion in the hope of catching the eye of legislators or future judges, one of whom may even be you!

2. CASE SELECTION

Casebook authors, most of whom are law professors, select from the thousands of opinions that discuss legal issues relevant to a casebook's subject matter and group those opinions according to useful sub-divisions. For example, torts casebooks may separate cases dealing with intentional torts from those dealing with negligent torts, and might further separate negligence cases according to the kinds of harms that result from allegedly tortious conduct.

Court opinions often find their way into casebooks for reasons that have little to do with the current legal accuracy of their holdings.³ Casebooks reflect the "national" focus of most U.S. law schools, and therefore do not reflect any specific jurisdiction's legal regime at any particular point in time. For example, a criminal law casebook may include an opinion written by an English judge in the sixteenth century not because it represents good law today, but because it illustrates the roots from which current legal principles developed or because of the relevance of its arguments to current legal issues.

Perhaps somewhat surprisingly given law schools' focus on legal analysis, the opinions that find their way into casebooks may not even represent stellar examples of legal reasoning. Authors may include what they consider to be poorly-reasoned opinions because training you to think like a lawyer includes developing your ability to identify and respond to weak arguments. Indeed, casebook authors may select a case in which a judge's reasoning is all but non-existent, thereby placing the burden on you to tease out relevant legal theories, disputed legal issues, arguments and holdings.

³ The opposite may also be true. Professors John Kaplan and Jon Waltz, the late authors of a very successful Evidence casebook, included in it a fictional appellate court opinion which they themselves wrote in order to teach a basic point about hearsay law for which they could not find a case they believed suitable. They called the case *Estate of Murdoch*, and even provided a fictional citation: 32 Muc 352 (1983). ("Muc" stood for "Made Up Case.")

KING THE CASE METHOD

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3. ORDER IN THE COURT'S OPINION

When you go to restaurants, you expect meals to unfold in
accord with culturally-accepted procedural norms. For example,
appetizers precede entrees and entrees precede sweets. In the
same way, legal analysis generally unfolds according to
procedural norms that the legal culture accepts. Opinions offer
you a chance to become familiar with the procedural norms that
explain the order in which lawyers and judges address legal
issues.

For example, judges can decide disputes only if they have
jurisdiction over the parties and the subject matter of their
dispute. Thus, arguments often begin with the circumstances
indicating that a judge has (or lacks) jurisdiction to decide a case.

Similarly, a party may be liable for damages only if its
conduct violates a legal principle. As a result, arguments
typically address liability issues before addressing those
relevant to damages.

You generally read opinions primarily for the content of the
judges' arguments. But part of cracking the Case Method
depends on familiarizing yourself with the order in which
opinions usually address legal issues.

4. WHERE HAVE ALL THE LAWYERS GONE?

Casebook authors routinely include the names of the judges
who wrote the opinions (including the names of the judges who
wrote the dissents), but invariably omit the names of the lawyers
who represented the opposing parties. This is a particularly
unfortunate omission, and not simply because a few practicing
lawyers are denied a chance for minor fame. From the
perspective of rhetoric, the omission of lawyers' names conveys
a misleading impression that judges develop the arguments that
shape legal principles. While this is of course sometimes true,
arguments far more often originate with lawyers. In the lawyer-
centric common law tradition, lawyers drive common law
development by deciding which cases to bring to court, which
legal theories and remedies to pursue and what arguments to
put forth in support of their desired legal outcomes.

For example, your constitutional law casebook is likely to include the seminal civil rights-era opinion in *Brown v. Board of Education*, 347 U.S. 483 (1954). The opinion established the principle that public school districts cannot operate a system of racially segregated schools. The lawyers for the plaintiff school children decided when to file the case and what arguments to put forth. And the lawyers furnished the U.S. Supreme Court with the studies on the harmful effects of attending racially segregated schools that the opinion cites in support of its outcome. Because he himself later became a Supreme Court Justice, your constitutional law casebook may refer to the plaintiffs' lead lawyer, Thurgood Marshall. But it may not mention any of the other plaintiffs' lawyers' names, nor the names of the respondents' lawyers, nor the names of most of the lawyers whose efforts were central to the opinions that fill your casebooks.

5. CASE NOTES

The earliest casebooks were little more than their names suggested. Casebooks like the first one that Christopher Columbus Langdell produced in 1871 consisted of appellate court opinions and nothing else. Casebook authors' intellectual tasks were pretty much limited to selecting and organizing opinions according to sub-topics.

By contrast, the "author's hand" is far more evident in twenty-first century casebooks. For example, casebook authors follow many opinions with case notes. Most case notes briefly summarize cases that involve the same legal principles as "principal" cases, except in different factual contexts. Case notes often end with a question along the lines of, "How should this case come out?" Your initial reaction may be along the lines of "How the heck should I know?" Often you may feel that the casebook author might just as well have asked, "How would The Beatles have decided this case?" A more helpful reaction is to read the case; case notes normally include citations that enable you to find the opinions online or in an official court reporter. Before reading a case, rephrase the author's "How should this case come out?" question to "If you were representing the parties in that case, what arguments would you have made in support of their desired legal outcomes?" The outcomes of case note

KING THE CASE METHOD

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examples to the side, you develop legal analytic skills by comparing your arguments to those put forth in the opinions.

6. SECONDARY AUTHORITIES

Modern casebooks also typically include excerpts from a variety of *secondary* authorities. Secondary authorities are not themselves sources of enforceable law. Rather, secondary authorities *explain* or *analyze* primary authorities. Law professors are the typical authors of secondary authorities, and their efforts include:

- Legal treatises.
- Legal encyclopedia; these are often multi-authored and multi-volume works.
- Articles published in law journals.
- Restatements of the law, in which a "reporter" organizes the work of committees.
- Legal dictionaries.

Secondary authorities are not all created alike, and casebook authors may include excerpts from them for different reasons. For example, authors may include excerpts from legal dictionaries and treatises in order to facilitate your understanding of existing legal principles. But casebook authors offer other secondary authorities to further your ability to think like a lawyer. For example, articles in law journals often argue for changes in the law. An author's arguments may reflect a particular ideological perspective, such as an article written from a "law and economics" perspective that argues that an existing contracts or torts rule is inefficient and therefore could do with a bit of change. Judges often refer to articles in law journals in the course of justifying their decisions, and many legal academics publish in law journals in the hope that their views will work their way into judicial opinions and thus contribute to legal development. Regardless, the usual reason for including materials other than cases in casebooks is to illustrate the variety of arguments that can be brought to bear on legal issues.

7. TABLES OF CONTENTS

This section's heading is not a typo. Most casebooks provide not just one but two tables of contents. One is a "Summary of Contents," consisting only of the chapter titles. The second is a "Detailed Table of Contents," a much longer version that provides a chapter-by-chapter list of subparts, case names, secondary authorities and other materials.

Even a lowly creature like a Table of Contents can promote your ability to think like a lawyer. During a course and when preparing for final exams, refer to a Table's divisions of topics, and to the cases that appear in the subparts. The visual qualities of Tables of Contents can stimulate your recollection of the arguments that tend to arise in the context of those topics. Furthermore, the structure of Tables of Contents can help you by providing useful context for your case reading and briefing (see Chapter 8), and useful ideas for how to structure your course outlines (see Chapter 10).

8. OLD CHESTNUTS

Casebook authors often have idiosyncratic reasons for selecting opinions. But virtually every casebook will include an old chestnut or two that will likely have been a part of every casebook since the days of Christopher Columbus Langdell. For example, whoever the authors of your contracts casebook, almost surely they will have included the case of *Hadley v. Baxendale*, decided by an English court in 1854. The opinion involves the proper measurement of damages to assess against a party who breaches a contract. Scads of opinions since 1854 have addressed that issue, and authors would have no trouble eliminating the case and focusing exclusively on more recent cases. However, as long as law schools continue to exist, most law students will undoubtedly continue to read about how the court let Baxendale off relatively cheaply for his failure to make timely delivery of a new crankshaft for a steam engine.

9. OUTLIERS

Casebook authors are fond of spicing up their books with outlier cases. One common type of outlier case consists of colorfully-written opinions. For example, many editions of the

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CONTENTS

typo. Most casebooks provide tents. One is a "Summary of chapter titles. The second is a much longer version that lists of subparts, case names, materials.

Table of Contents can promote order. During a course and when you go to a Table's divisions of topics, subparts. The visual qualities facilitate your recollection of the material in the context of those topics. Tables of Contents can help you organize your case reading and briefing or how to structure your course

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have idiosyncratic reasons for why every casebook will include an outlier. They have been a part of every casebook since the time of Christopher Columbus Langdell. For example, in your contracts casebook, almost every case is an outlier. The case of *Hadley v. Baxendale*, 1854. The opinion involves the duty of a carrier to assess against a party who has not been assessed since 1854 have addressed the issue. You have no trouble eliminating the outlier from more recent cases. However, as outliers exist, most law students will wonder how the court let Baxendale decide to make timely delivery of a barrel of beer.

OUTLIERS

of spicing up their books with outliers. One type of outlier case consists of outliers. For example, many editions of the

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classic casebook that started life as *Prosser on Torts* included a judicial opinion filled with alliterations. The opinion addressed the liability of a cabbie who drove off the road and injured nearby people in response to an emergency situation: an armed gunman had jumped into the cab, pointed a gun at the cabbie, and ordered him to speed away. When setting out the circumstances leading to the crash, the judge pointed out that the gunman's command was "couched in the convincing cant of the criminal." This alliterative style continued through much of the opinion and perhaps was the reason that Prosser included it in his casebook.⁴

You may find a second type of outlier case more troublesome. The opinions in casebooks generally address disputes of the type that students should be able to understand and that raise legal issues that tend to arise repeatedly. The idea is that beginning law students should become familiar with arguments that relate to bedrock interpretations of legal principles. But occasionally casebook authors choose opinions that address complex and unfamiliar factual settings and that involve narrow and eccentric legal issues that infrequently arise. These opinions can be troublesome if the opinion-writers neglect to address the more fundamental legal issues that you have to understand if you are to grasp the arguments that pertain to the eccentric legal issue. (Another possibility is that the casebook author edited out an opinion-writer's discussion of fundamental legal issues.) In these situations, you will have to rely on classroom discussion or other opinions in the same section of the casebook to provide the stepping-stones that may enable you to understand the arguments in this type of outlier case.

10. WELL-KNOWN JUDGES

The notoriety of a judge is another factor that helps authors decide which cases to include in casebooks. Certain judges appear as regularly in casebooks as certain home run hitters appear on lists of all time baseball greats. For example, you probably won't be a 1L for very long before you read opinions written by Learned Hand and Benjamin Cardozo. Indeed, appellate court judges may even write opinions with an eye to

⁴ Ch. 4 includes a discussion of this case as well.

having law school professors select them for inclusion in casebooks. For example, one author has said of Judge Richard Posner, a federal judge on the Seventh Circuit Court of Appeals, that he "uses certain rhetorical strategies to attract casebook editors and law professors to his opinions . . . the frequency with which his opinions appear in the casebooks simply shows that they meet some demand in the market for legal educational texts."⁵

11. THE CADAVER METHOD?

Some critics of the Case Method have compared appellate court opinions to cadavers. They argue that while medical students may learn anatomy by studying corpses, it makes no sense for law students to learn how to think like a lawyer by studying dead disputes. The critics' argument may be unfair. Though the disputes that give rise to opinions may belong to the past, the opinions' arguments belong to the future. The arguments are tools of legal analysis that you use initially in final exams, and then again after law school.

Whatever the accuracy of the cadaver metaphor, a way to keep alive the spirit that led you to law school is to remember that each case you read was a problem that real people endured, and sometimes at the cost of great suffering. At the end of the day, the opinions in casebooks consist of arguments about how society can fairly resolve often vexing legal issues. Becoming a lawyer is your chance to contribute to those arguments.

⁵ Kate O'Neill, *Rhetoric Counts: What We Should Teach When We Teach Posner*, 39 Seton Hall Law Review 507, 507-08 (2009).

WORKING THE CASE METHOD

incorporate plenty of information
you on the exam. Specifically,
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CHAPTER 8

READING AND BRIEFING CASES

The rumors are true—as a law student you do a lot of reading!¹ To deal *effectively* and *efficiently* with the volume of assigned reading, you need to (1) learn how to identify the most significant portions of assigned cases; and (2) grapple on your own with the legal concepts presented in the case. This chapter will focus on these two essential, learnable skills.

As you read this chapter, remember *why* you read cases instead of legal treatises or outlines. Appellate court opinions illustrate the process of legal analysis, a process by which judges distill legal issues from stories and present arguments in support of holdings. Of course courts' legal conclusions matter, as they typically establish legal principles. But the process of legal reasoning is at least equally important, both in class discussions and on final exams. A focus on the issues and arguments helps you read cases efficiently and prepare case briefs that target the most significant portions of opinions and avoid the "equal dignities" trap of thinking that everything stated in opinions has equal importance. Case briefing shouldn't *add* to your reading burden. Instead, effective case briefing helps you to read more *selectively*.

1. WHY BRIEF CASES?

"Case briefs" are an efficient and effective tool for focusing on legal reasoning. Think of preparing case briefs as a form of *active reading*. You probably have developed note-taking habits as you've progressed through school. If so, briefing cases involves adapting these habits to the process of legal rhetoric, in which you organize notes according to legal issues, arguments, and holdings.²

¹ A reading assignment may consist of 20–25 pages. If your undergraduate major was English or social science, you might expect to breeze through an assignment of this length. But appellate court cases tend to make for dense reading; allocate your time appropriately.

² There is something about the law that inspires law students, lawyers, and judges to substitute legal phrases for routine ones. For example, "briefing" = "taking written notes about your reading." "Outlining" = "cleaning up and organizing your messy

Consider these three primary benefits of briefing cases:

First, *briefing helps your reading comprehension*, while also teaching you how to speed up the reading process. Like elements bonding together to create different molecules, a judicial opinion is made of component parts that predictably recur, though judges might structure those components various ways. Briefing encourages you to hunt for the core elements: *issues*, *holdings*, and *factual reasoning*. These elements may be dotted over several pages of the case or tucked away near the end. If you practice speeding up your reading while looking for these elements and slowing down to a crawl when you find them, you can improve both the efficiency and effectiveness of your reading. Even the edited cases in your casebook are frequently overstuffed with history, citations, procedural detail, and interesting diversions. Deconstructing cases actively when you brief the case encourages you to notice which portions of cases are worthy of greater attention and deliberation, and which parts you can skim. And preparing briefs that re-state judges' legal reasoning in your own words encourages you to read opinions *critically*, thus advancing your own rhetorical skills.

Second, *briefing cases helps prepare you for class*. Because classes are interactive and focused on legal reasoning, briefs serve as essential quick-reference guides. They provide a record of your analyses and place case facts, procedural histories, arguments, and holdings at your fingertips. (Tip: Consider amending case briefs right after class ends to reflect classroom discussions.)

Third, *case briefs are essential final exam preparation tools*. Compared to the opinions themselves, case briefs are advantageous because they are shorter and they reflect your personal style and syntax. And compared to commercial outlines or AI-generated summaries, case briefs are advantageous because they emphasize legal reasoning rather than collections of disembodied legal principles. By all means, feel free to re-read opinions and study commercial outlines, but you should strive to minimize that kind of extra reading as much as possible. Instead, brief carefully so that your brief is of sufficient quality

notes." "Estopped from arguing" = "stopped from arguing." Just because the terms are new does not mean the concepts are.

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to provide a strong foundation from which to outline your course.³ You can outline much more efficiently if you can rely on your briefs rather than re-read the case opinions. Moreover, you may wish to review some of your briefs while you are studying for your exam if you need a refresher on how various rules are applied in the context of particular facts.

Now let's walk through the steps of reading and briefing an assigned case:

2. READING EFFICIENTLY AND EFFECTIVELY

Read and brief with a purpose, or else reading and briefing become chores and obstacles to success rather than learning tools.

So, how might one read efficiently but effectively?

A. Step 1: Preparing to Read the Case

First, ask yourself, "Why was I assigned *this* case at *this* point in the course? How does it fit into the larger picture of the course?"

Check the class syllabus for topic headings. Then check the section headings in the casebook that appear before the case. This information will help you narrow your focus and anticipate what will be most important in the case even before you read it.

Why do this? Because every sentence should *not* be treated with equal dignity. Some phrases or even whole sections of the case are more important than others. You earn your efficiencies in reading and briefing by learning how to focus on the richest parts of the case, although it may take some time (weeks, even months) to get a reliable sense of what those parts are. The first step towards achieving these reading efficiencies is to simply look at the syllabus and the casebook for hints as to how an assigned case fits into a larger picture.

This sounds too easy, even elementary, in the abstract. But we frequently see students forgetting to focus on why a case has been assigned when they are absorbed in their reading. Indeed,

³ Case briefs are personal, ungraded study tools. If you believe feedback on your briefing would be helpful, consider submitting a few samples to one of your instructors.

some students will read a case as if it was assigned for a different class.

For example, imagine you are assigned a case where an environmental advocacy organization sued the Navy to halt underwater sonar exercises in the Pacific Ocean because of the potential harm to endangered marine life.

- This case might be assigned in a Constitutional Law course or a Federal Courts course to analyze whether the plaintiff environmentalists should have *standing* to bring the case at all.
- Or you might read the same case in a Civil Procedure course or a Remedies course to analyze whether the Navy must stand down while the lawsuit wends its way through the courts, or may it continue with its exercises pending trial, despite possible harm to marine life.
- Or you might read the case in an Environmental Law class to analyze whether the Navy is violating federal law.

Your reading experience should differ dramatically based on which class has assigned the case. Focus your attention only on the aspects of the case that are relevant to the course. Skim the rest. While these other dimensions to the case might provide helpful context, you should efficiently focus on what is relevant to (1) the class you are in, (2) the section of the syllabus you are addressing, and (3) the heading in the casebook you are reading.

The earlier you master the skill of *mindfully* reading and briefing, the more efficient and efficacious your studying will become.

B. Step 2: Skim the Case

Next, quickly skim your assigned case just to get the big picture. Skim for the main characters/actors and transactions/events. Who won, and who lost? Are there headings in the opinion that tip you off as to where the important reasoning is? Is there a main opinion, followed by a concurrence or a dissent? Multiple concurrences or dissents? If the case has multiple opinions, without explicit direction from the instructor

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or the book itself, you should spend most of your time on the main opinion, but do not ignore the others.

C. Step 3: Informed, Focused, Close Reading

At this point, you have very quickly (maybe in less than a minute or two) determined quite a bit. First, you know why you were assigned the case and what to focus on. Second, you also know the general contours of the case, both on the page and on the merits. Now you may begin your informed, focused, close reading and briefing, drilling down on the most important parts of the case—frequently just a few paragraphs near the end!—and treating the rest as mere context for comprehension.

This means you can (and should) accelerate through the many parts of the case that provide mere context for comprehension. But apply the brakes and read carefully when you reach the court's application of law to fact to reach a result (more on this later in the all-important "Reasoning" section for your brief). Look up words that you do not know. Use a highlighter or other means of identifying relevant information during your thorough review of the case.

A word of warning: you will sometimes (or even frequently) seem to make the "wrong" choice about what is pivotal material and what is mere "context," based on class coverage the next day. You might ask yourself: "Did I even read the right case? Everything I thought was important has been skipped, and I skipped the only thing we are covering in class." That's okay! With experience, you will get better at predicting class coverage. And, as noted in the next chapter, one important function of class is it provides you with a chance to calibrate your brief and, indeed, your understanding of the case, after the fact.

3. THE ANATOMY OF A CASE BRIEF

Case briefs are idiosyncratic documents that reflect your personal note-taking practices. Remember, these briefs are your notes, *for you*. Don't strive for some kind of perfection—briefs are meant to be time savers rather than added burdens, and you will not be turning them in to anyone. Because briefs needn't conform to any prescribed format or style, the format, organization and style of your briefs is entirely up to you. But

you probably haven't had much experience preparing notes that capture the essential components of legal analysis. So consider using the more formalized approach to case briefing demonstrated in this chapter. Later, you can modify this approach as you become more comfortable with legal analysis and with your own learning and note-taking style.

Furthermore, consider adopting a *gestalt* perspective before briefing a case. For example, as noted earlier, figure out where a case rests in the legal solar system by checking out the section of the chapter in which the case appears. Then skim the case quickly to get a sense of disputed issues. Initially familiarizing yourself with a case from a relaxed perspective can help you cut a path through its details. You might even find it helpful to first determine which party wins the dispute, so that you can be aware of which arguments prevail as you read them, rather than being kept in suspense until you reach a holding near the end of the case. And now for your anatomy lesson.

A. Case Name

The heading of a typical case brief includes basic information such as a case's title, jurisdiction, and a reference to the location where you can access it again. For example, the brief of a case called *Hopkins v. Hopkins* that appears in a casebook might be headed "*Hopkins v. Hopkins* (Cal. 1995) p. 52." The name of a case can occasionally tell you a lot about the circumstances giving rise to the dispute. For example, the case name *Estate of Smith v. Big Boom Blasting Corp.* suggests a violent series of events that ended badly for Smith.

B. Facts

Facts are important rhetorical tools. They are the gateway to disputed legal issues, and they often are the bases of arguments about a holding's impact on future disputes. Thus, like appellate court opinions, you may include in your briefs a summary of *determinative* facts which you should usually present chronologically. Determinative facts are those facts on which a court relied to justify its decision. Stated differently, determinative facts are facts that, if they had been different, would likely have changed the result of the case. You cannot rely

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on the factual summaries with which many opinions begin as an indication of which facts are determinative. Nor can you count on judges to make statements along the lines of, "For the benefit of law students, here are the determinative facts." But opinions often do point you to determinative facts. For example, a judge may re-state a fact in the context of a holding. Or a dissenting opinion may refer to the majority's misplaced reliance on a particular fact. Ultimately, identifying determinative facts is itself a rhetorical skill that the Case Method helps to develop.

For example, assume that a disputed issue in a civil procedure case is whether the plaintiff's cause of action was barred by the applicable statute of limitations.⁴ The court's initial factual summary may indicate the plaintiff's age and marital status, and a description of the events that culminated in the lawsuit. But only the facts relevant to the court's arguments concerning the timeliness of the lawsuit are determinative.

Your brief need not refer to other details, but if the case is part of a series of assigned cases interpreting a single issue, you might drop a memorable *contextual* fact into this section to help you distinguish each case from the others. For example, if your brief of a case involving the requirements for establishing the existence of a trade secret included the non-determinative fact that "the plaintiff was suing his own parents for selling trade secrets to his fiercest competitor," this memorable (but purely contextual) factual detail should help you distinguish the case from other trade secret cases, even several months later.

One way of limiting briefs to determinative and necessary contextual facts is to delay preparing this section until you have completed the other parts of a brief.

C. Procedural History

This section of a brief provides a short overview of the formal litigation. For example, you might identify the legal claims and

⁴ A statute of limitations is a statute that assigns a certain time period after which a person cannot assert his or her rights by legal action. For example, if a person breached his contract with you and the statute of limitations in your state for breach of contract lawsuits is two years, you have two years from the date of the breach within which you may file your lawsuit for breach of contract. After the two years is up, you may no longer sue in court for that breach of contract.

defenses, the trial court judgment, and the appellant: "Plaintiff (P) Henry Hopkins sued ex-wife Ellen (D) for fraud. D filed a motion for summary judgment, raising the statute of limitations as a defense. The trial court granted D's motion and P appealed."

D. Legal Issues

This section should identify each legal issue that an opinion addresses. Typically, each issue should join a legal principle to determinative facts, presented in the form of a question the court is trying to resolve.⁵ A court can only decide the particular controversy before it. Broad pronouncements of law that go beyond the facts of a case are known as "dicta" (singular, "dictum"). Although dicta may in the future prove to be persuasive, the only law that ~~can be binding on later judges~~ is the court's resolution of the particular issues before it. Thus, legal issues that join legal principles to determinative facts help you understand arguments and holdings.

For example, consider this version of a legal issue: "Was P's cause of action barred by the statute of limitations?" This question hints at a legal principle, but it is totally devoid of determinative facts. Thus, it is too broad to serve as a guide to the court's arguments or its holding.

Consider next this version: "Was P's cause of action barred by the four-year fraud statute of limitations, in a situation in which P filed the complaint one year after discovering that, five years after they were married, his wife had misrepresented her net worth in order to induce him to enter into the marriage?" This version includes determinative facts, but perhaps too many descriptive facts as well.

How about a third version of the legal issue: "Was P's fraud cause of action barred by the four-year statute of limitations when he filed his complaint five years after his wife's misrepresentation, but only one year after he discovered it?" This version improves the prior one. The determinative facts remain; the unnecessary descriptive ones have been shorn away.

Some of your assigned cases will contain more than one legal issue. With a multi-issue case, be sure to write a multi-issue

⁵ See Chapter 2 for an analysis of legal issues.

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; and the appellant: "Plaintiff Ellen (D) for fraud. D filed a motion for summary judgment, claiming the statute of limitations barred D's motion and P appealed."

Issues

Each legal issue that an opinion should join a legal principle to the form of a question the court must not only decide the particular legal issue but also announce the legal principle. Announcements of law that go beyond the particular facts known as "*dicta*" (singular, *dictum*) are not binding in the future prove to be *binding* on later judges in similar issues before it. Thus, legal principles that help determine determinative facts help determine holdings.

Formulation of a legal issue: "Was P's fraud cause of action barred by the statute of limitations?" This is a legal issue, but it is totally devoid of legal principle, broad to serve as a guide to legal analysis.

Formulation of a legal issue: "Was P's fraud cause of action barred by the statute of limitations, in a situation in which P discovered that, five years after discovering that, five years after his wife had misrepresented her age to enter into the marriage?" This is a legal issue, but perhaps too many facts, but perhaps too many facts.

Formulation of a legal issue: "Was P's fraud cause of action barred by the four-year statute of limitations when he filed his complaint five years after his wife's misrepresentation, but one year after he discovered it?" This is a legal issue. The determinative facts are the ones that have been shorn away.

Formulation of a legal issue: "Was P's fraud cause of action barred by the four-year statute of limitations when he filed his complaint five years after his wife's misrepresentation, but one year after he discovered it?" This is a legal issue. The determinative facts are the ones that have been shorn away.

Issues.

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brief. For example, you might separately identify and number the issues in your Legal Issues section, and then address each of the issues in kind when you develop the later Holdings and Reasoning sections.

E. Holding

A holding is a court's answer to an issue. For example, return to the legal issue: "Was P's fraud cause of action barred by the four-year statute of limitations when he filed his complaint five years after his wife's misrepresentation, but one year after he discovered it?" In this instance, you might state the holding as, "No. P's fraud cause of action was not barred because the statute of limitations in a fraud claim does not begin to run until discovery of the facts that gave rise to the cause of action." As you see, like the legal issue itself, the holding combines a legal principle with determinative facts.

Objectively correct statements of holdings are often impossible to arrive at. Good legal minds often differ as to the "proper" statement of a holding. As you will learn through the Case Method, using a case to support either a broad or a narrow legal proposition, depending upon a client's desired legal outcome, is itself a component of legal analysis.

F. Reasoning (Arguments)

This section will likely be the most important part of your brief because it summarizes judges' explanations (arguments) for their holdings. To write it clearly will require you to document: (1) the law that the court relies on to reach its conclusion; (2) the reasons for the rule, or stated differently, the policy outcomes the rule seems designed to accomplish or encourage; and (3) how the court is applying that law to the determinative facts. If a case includes one or more dissenting opinions, your brief might also include the dissenters' principal arguments.

Unfortunately, this section is often much more of a creative act than you would imagine. Judges' arguments are often murky. For example, an opinion may be poorly organized, making it hard for you to link outcomes to determinative facts. An opinion may omit assumptions or leave inferences

unidentified. Even in a close case, an opinion may nonetheless have little to say about why the particular outcome reached by the court is consistent with or supportive of the policy behind the rule's existence. Some opinions consist of *ipse dixit*, in which judges say little more than, "Because facts A, B and C occurred, I hold X." In these instances, do your best to tease out the arguments that a judge seemed to rely on, including the ways in which those arguments ostensibly support the reasons for the governing rule's existence.

Remember, your final exam answers will consist of arguments where you are applying the same rule the court is applying to a novel set of facts developed by your professor. And in a close case on the final where you are expected to make robust arguments and counterarguments, you will need to rely on the policy behind the rule to animate and justify the arguments you put forth for both sides of the issue. Your intellectual energy spent putting together a thorough Reasoning section should pay off when you go to class, and especially when you prepare your outlines and take final examinations.

G. Comments

An optional Comments section gives you a chance to step outside the boundaries of a case and reflect on any aspect you deem worthy of comment. For example, you may record your own reasons for agreeing or disagreeing with a judge's arguments. You might relate a case to other similar ones, perhaps noting conflicting outcomes or reliance on competing social policies. You might use this section to add ideas that emerged through class discussion. Remember that a brief is a personal learning tool, and a Comments section is simply a convenient place for you to record reactions and insights.

H. A Concluding Note on Format

The above descriptions may suggest to you that case briefing is a formal and intimidating task. If so, please keep in mind that these suggestions are simply a *starting point* for you to think about a type of note-taking that is likely to be new to you. Even if you start with a format as formal as that set forth above, as you acculturate to legal analysis you will likely move to a more

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Note on Format

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informal and idiosyncratic briefing format. You might even see your briefs start to shrink to the size of a few quick lines on a page without any formatting at all. But you can only reasonably expect to get to that stage if you first gain an experiential understanding of the utility of formal briefing.

In the end, we have observed successful students who formally brief for all three years of law school. We have also observed successful students who by the end of their law school career had gradually dispensed with the formal brief method, and were relying on very informal reading notes. As long as your reading notes accomplish the three goals of briefing stated above—reading comprehension, preparation for class, and preparation for outlining and finals—you will be briefing effectively and efficiently, no matter how those notes may look to the outside world.⁶

4. TWO FORMAL CASE BRIEF EXAMPLES

This section illustrates how you might use the principles set forth in Section 3 to prepare two formal case briefs.

A. Family Law Example

Assume that you are enrolled in a Family Law course in a community property state such as California, and that you are studying “prenuptial” and “postnuptial” agreements.

In a community property state, spouses and legally recognized domestic partners share ownership of property obtained through the labor of either partner during their marriage or partnership. This property is community property. Thus, if a divorce or termination of the partnership occurs, the court will split 50/50 all property characterized as community property.

If both spouses or partners agree, they may enter into “prenuptial” (before marriage) or “postnuptial” (after marriage) agreements changing the community property rules for that

⁶ One word of warning: remember that one of the three goals of briefing is to create a time-saving set of materials to help you study for the final exam, weeks or even months after you have read the case the brief is based on. If your reading notes are too informal, you might have a hard time recalling what it all means, causing you to have to re-read the case. That would defeat one of the reasons you bothered to brief in the first place—to save yourself time later.

partnership. Thus, if one of the spouses expects to be the primary wage earner, that spouse may ask the partner to agree that in the event of divorce, the partner is not entitled to a full half of the "wealthy" partner's earnings, as would normally be permitted under the default community property rules.⁷

Prenuptial (or "antenuptial") and postnuptial agreements are somewhat modern contracts. In the not-so-recent past, these agreements were generally legally invalid because courts ruled that they ran afoul of a separate judicial rule forbidding contracts or conditional gifts that facilitated divorce. Thus, so the explicitly-gendered judicial reasoning went, a prenuptial agreement that fixed the amount a wife might recover from a husband at a low figure was forbidden under the law because it failed to adequately protect the wife from the husband's abusive or philandering behavior. Specifically, in a not-so-long ago time, the court was concerned that the husband would have no incentive to behave well during marriage if there was no threat that the wife would walk away with half of his earnings upon divorce.

That rule has changed; now pre- and post-nuptial agreements are generally legally effective. But in a Family Law class, you might explore the arguments for and against the existence of the rule, based on old and new cases that argue both sides of the issue.

To practice your briefing skills, assume that you have been assigned the case of *Whiting v. Whiting*. The decision is an older one that provides students with a chance to explore the historical antecedents to the current rule that permits parties to enter into pre- and postnuptial property agreements. Note the importance of this contextual information, usually found in the course syllabus or casebook table of contents—this information informs you why you are reading the case, and helps you focus on the important disputed legal issues. Remember, first skim the

⁷ Rules for non-community property states, or "separate" property states, vary widely from state to state, but they generally prevent the non-earner from taking the full half of earnings during marriage. Hollywood is located in a community property state, and so you might already be aware of its rules—the celebrity press regularly files reports about prenuptial agreements when a celebrity marries a non-celebrity of lesser means, or more salaciously, when a divorce occurs in the absence of such an agreement.

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gs, as would normally be
unity property rules.⁷

and postnuptial agreements
n the not-so-recent past, these
y invalid because courts ruled
ate judicial rule forbidding
t facilitated divorce. Thus, so
reasoning went, a prenuptial
a wife might recover from a
dden under the law because it
fe from the husband's abusive
ally, in a not-so-long ago time,
he husband would have no
arriage if there was no threat
with half of his earnings upon

now pre- and post-nuptial
effective. But in a Family Law
gments for and against the
and new cases that argue both

s, assume that you have been
iting. The decision is an older
h a chance to explore the
nt rule that permits parties to
property agreements. Note the
rmation, usually found in the
of contents—this information
the case, and helps you focus
ues. Remember, first skim the

ates, or "separate" property states, vary
event the non-earner from taking the full
located in a community property state,
the celebrity press regularly files reports
marries a non-celebrity of lesser means,
e absence of such an agreement.

READING AND BRIEFING CASES

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case, then read it closely. After that, prepare a case brief,
following the formal structure that Section 3 describes.

Following the case, you will find a sample brief of the case,
which you can compare to your own. Remember that every brief
is personal, so you should certainly expect to find differences
between the two.

1. Sample Case #1

WHITING V. WHITING

62 Cal. App. 157, 216 P. 92 (1923)

[Mrs. Whiting sued Mr. Whiting to obtain a divorce. Before
they had married, they had signed an agreement providing that
in case of divorce Mrs. Whiting would accept \$5,000 as full
payment and settlement of all claims against her husband,
including claims for spousal support, costs, attorneys' fees, and
property claims. The trial judge entered an order in the divorce
action that ignored this agreement. Mr. Whiting appealed.]

CURTIS, J.—This is an appeal from an order requiring the
defendant to pay plaintiff alimony, costs, and attorneys' fees on
appeal in an action for divorce. . . . [D]efendant contends that the
antenuptial contract, entered into between the parties,
precluded the court from making any order for alimony, costs,
and attorneys' fees. . . . The position of plaintiff is that . . . the
antenuptial contract, wherein it attempts to fix the amount
which plaintiff can recover in any future divorce action as
alimony, costs, and attorneys' fees, is against public policy, and
void.

"It is not the policy of the law to encourage divorce." (*Morgan*
v. Morgan, 190 Cal. 522 [213 Pac. 993].) "Any agreement for
divorce, or any collateral bargaining promotive of it, is
considered unlawful and void. Under our code either husband or
wife may enter into any agreement or transaction with the other,
or with any other person, respecting property, which either
might if unmarried. Notwithstanding this freedom to enter into
any contract between themselves or with other persons, it has
been held in this state repeatedly that an agreement between
husband or wife founded upon consideration to withdraw or
abandon a defense to a suit for divorce, or do anything to

facilitate procuring the same, is illegal and void." (*Newman v. Freitas*, 129 Cal. 283 [50 L.R.A. 548, 61 Pac. 907].) Quoting further from this case (129 Cal., on page 290 [50 L.R.A. 548, 61 Pac. 909]), the court says: "The courts of other states have expressed themselves similarly in reference to such contracts."

[. . .]

In *Pereira v. Pereira*, 156 Cal. 1 [134 Am. St. Rep. 107, 23 L.R.A. (N. S.) 880, 103 Pac. 488], the parties had entered into an agreement which provided that if the wife should thereafter procure a divorce against her husband, the latter would pay her the sum of \$10,000 in full satisfaction of all her claims for alimony, costs, counsel fees, and her rights in the community property. The lower court declared the agreement void, and the supreme court in affirming the judgment uses the following language: [. . .] "By this contract, if valid, he was left free to inflict upon his wife the most grievous marital wrongs, such as would compel her to obtain a divorce, secure in the protection of his contract that \$10,000 would satisfy all her claims against him of a pecuniary nature or in relation to the community property. If he should, after its execution, be moved by evil impulse to commit anew the offenses against his wife which first gave her cause for divorce, or other acts having the same legal effect, the existence of a valid contract of this sort could not but encourage him to yield to his baser inclinations, and inflict the injury. As it was obviously adapted to produce this result, it is presumed that this was one of the inducements which made him desire its execution. The law does not countenance such agreements. 'Any contract between the parties having for its object the dissolution of the marriage contract, or facilitating that result, . . . is void as *contra bonos mores*.'"⁸

Our attention has not been called to any authority prescribing a different rule than that laid down in the case above cited. The only suggestion we have received from appellant, offering any reasons why the doctrine enunciated in these cases should not be followed, is that in the present action the contract

⁸ Do you know what *contra bonos mores* means? Well, perhaps you can infer what it means from the context, but you can expect to encounter many new words and phrases in your case readings. Don't let unfamiliar words and phrases get past you. Be an active reader and look up confusing or unfamiliar words and phrases in a law dictionary right when you encounter them to make sure you understand the case.

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illegal and void." (*Newman v. Newman*, 548, 61 Pac. 907[.] Quoting on page 290 [50 L.R.A. 548, 61 Pac. 907].) The courts of other states have no reference to such contracts."

1. [134 Am. St. Rep. 107, 23 Pac. 107.] The parties had entered into an agreement that if the wife should thereafter leave her husband, the latter would pay her satisfaction of all her claims for breach of her rights in the community property. If the agreement void, and the court judgment uses the following language, "if valid, he was left free to commit the most grievous marital wrongs, such as divorce, secure in the protection of the law," ~~satisfy all her claims~~ against her in relation to the community property. If, on the execution of the agreement, he was moved by evil motives against his wife which first induced him to enter into the contract of this sort could not but be the result of his own inclinations, and inflict the same on her to produce this result, it is not the fault of the inducements which made him enter into the contract. It does not countenance such conduct when the parties having for its purpose a marriage contract, or facilitating the same, *bonos mores*."8

When called to any authority that laid down in the case above that the wife should have received from appellant, the principle enunciated in these cases that in the present action the contract

means? Well, perhaps you can infer what the court meant to encounter many new words and phrases and phrases get past you. Be an active reader and phrases in a law dictionary right to understand the case.

READING AND BRIEFING CASES

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was made prior to marriage, while those considered in the authorities above cited were made subsequent to marriage. We can see no good reason why any such distinction should be made. If contracts of this nature tend to facilitate the dissolution of the marriage relation, then they should not be sanctioned by the courts, irrespective of the time of their execution. If by such an agreement "the husband is left free to inflict upon his wife the most grievous marital wrongs, such as would compel her to obtain a divorce, and at the same time he could rest secure that the payment of the amount stipulated in the contract will satisfy all her claims against him of a pecuniary nature," would the situation of the parties be any different if the agreement had been made prior rather than subsequent to marriage? Would such a provision be any less a menace to the marriage relation, if made prior rather than subsequent to its consummation? If the existence of such an agreement would "encourage the husband to yield to his baser inclinations to commit marital offenses against his wife," is there any good reason to believe that his conduct would be less reprehensible from the mere fact that the instrument, by which he had sought thus to protect himself, was an antenuptial rather than a postnuptial agreement? We believe that all these questions should be answered in the negative, and that contracts like the one involved in the present action are a menace to the marriage relation and should not be tolerated, and this irrespective of the time when the same might have been executed in reference to the time of the marriage. We are, therefore, of the opinion that the contract in this action is absolutely void, and its existence furnished no ground that would preclude the court from making the order appealed from. . . .

The order appealed from is hereby affirmed.

2. Sample Brief #1

Whiting v. Whiting (Cal. App. 1923)
(p. 43 [of casebook])

Facts

- Before getting married, H (defendant/appellant) signed

Comment: Because your brief should be functional, you may choose to use bullet points to

prenuptial agreement with W (plaintiff/appellee).

- Prenuptial agreement provided that in case of divorce W would accept \$5,000 as full settlement of any claims against H arising out of the divorce.

organize your thoughts, rather than full-text paragraphs.

Comment: While this case did not have many facts, in cases with more facts, use a chronology to organize the facts of the precedent case. Reviewing your brief will be easier if you present facts in chronological order.

Procedural History

- W sued H for divorce.
- Trial court entered order that ignored H and W's prenuptial agreement.
- H appealed, contending that the prenuptial agreement was enforceable.

Comment: This procedural posture identifies the core issues in an appellate case:

- 1) who sued whom for what;
- 2) the trial court's resolution of the parties' action; and
- 3) the issue the appealing party contends was wrongly decided by the lower court.

Issue

Is a prenuptial contract that provides for a spouse's financial settlement in case of divorce enforceable in a divorce action?

Comment: This is a good issue statement. It identifies the legal issue (was the prenuptial contract enforceable) in the context of the determinative facts (the contract fixed the spouse's financial settlement).

Holding

No. A prenuptial contract that attempts to fix the amount a spouse can recover in a divorce action is void as against public policy.

Comment: The holding answers the question raised in the issue. It also states a rule that can be derived from the decision. Of course, a range of holdings is possible, depending on how broadly or narrowly you read the case.

Reasoning

- Court notes that Cal. S. Ct. precedent (*Pereira*) has held that post-nuptial contracts

Comment: The reasoning section breaks down the court's analysis into five logically connected ideas. Each idea is clearly articulated in

ACKING THE CASE METHOD

W organize your thoughts, rather than full-text paragraphs.

Comment: While this case did not have many facts, in cases with more facts, use a chronology to organize the facts of the precedent case. Reviewing your brief will be easier if you present facts in chronological order.

Comment: This procedural posture identifies the core issues in an appellate case:

- 1) who sued whom for what;
- 2) the trial court's resolution of the parties' action; and
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Comment: The holding answers the question raised in the issue. It also states a rule that can be derived from the decision. Of course, a range of holdings is possible, depending on how broadly or narrowly you read the case.

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fixing the amount of a divorce settlement are void as against public policy because these types of contracts facilitate divorce.

- *Pereira* reasoned that if W's recovery against H was fixed by contract, H would be encouraged to commit a "marital wrong" (e.g., adultery, cruelty) because H would not have the disincentive of a potentially large divorce settlement.
- Court adopts *Pereira* reasoning and applies it to pre-marital contracts.
- Court reasons that, regardless of whether a contract was signed before the marriage (like here) or after the marriage (like in *Pereira*), H would have no incentive to avoid committing a "marital wrong" if these types of contracts were enforced.
- Because these types of premarital contracts facilitate actions that lead to divorce, court concludes they are void as against public policy.

its own bullet point. The brief avoids Latin terms that can be expressed in plain English. The brief changes the phrase "void as *contra bonos mores*" to "void as against public policy."

Comment: This last bullet point concludes the reasoning section with the court's *reason* for the "no premarital contracts" rule.

B. Remedies Example

Assume that you are enrolled in a Remedies class, and you are studying the amount of compensatory damages plaintiffs may typically recover in breach of warranty cases.

When a seller represents, or “warrants,” that a good he or she is selling is capable of performing certain functions, or is worth a particular amount on the fair market, the buyer is usually entitled to rely on the seller’s representations. The buyer is not usually under an obligation to investigate whether what the seller warrants is true. Because buyers are generally entitled to rely on sellers’ representations, courts consider that buyers are damaged when they buy goods from sellers who “breach” their warranties by incorrectly representing the value or capability of the good.

It is common in both Contracts and Remedies classes to explore the amount of money the law should permit a plaintiff to recover as “compensatory damages” from a defendant who has breached a warranty, and to debate whether in some cases the amount is far too high when one considers the amount of harm actually suffered by the particular plaintiff.

To practice your briefing skills, assume that in order to explore this debate you have been assigned the case of *Chatlos Systems v. Nat’l Cash Register Corp.* The case is helpful for exploring whether it is wise to permit plaintiffs to recover amounts that exceed the contract price. You might know this helpful context from the syllabus, the professor’s instructions, or the casebook itself. Remember that this context helps you to focus your brief. Like with the prior case, remember to skim the case first, then read it closely before preparing your case brief. Following the case, you will find a sample brief that you can use to compare with your own.

1. Sample Case #2

CHATLOS SYSTEMS V. NAT’L CASH REGISTER

670 F.2d 1304 (3rd Cir. 1982)

PER CURIAM.

Plaintiff-appellee Chatlos Systems, Inc., initiated this action . . . alleging, inter alia, breach of warranty regarding an NCR 399/656 computer system it had acquired from defendant National Cash Register Corp [at a contract price of \$46,020. The trial court found the defendant had indeed breached its warranty to plaintiff regarding the capabilities of the computer

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"warrants," that a good he or forming certain functions, or is the fair market, the buyer is er's representations. The buyer n to investigate whether what se buyers are generally entitled is, courts consider that buyers ods from sellers who "breach" y representing the value or

acts and Remedies classes to law should permit a plaintiff to es" from a defendant who has ate whether in some cases the considers the amount of harm r plaintiff.

ills, assume that in order to n assigned the case of *Chatlos Corp.* The case is helpful for o permit plaintiffs to recover et price. You might know this the professor's instructions, or hat this context helps you to or case, remember to skim the fore preparing your case brief. a sample brief that you can use

AT'L CASH REGISTER
d Cir. 1982)

ystems, Inc., initiated this ach of warranty regarding an had acquired from defendant contract price of \$46,020. The t had indeed breached its e capabilities of the computer

system.] [A]pplying the "benefit of the bargain" formula . . . [t]he district court found the fair market value of the system as warranted to be \$207,826.50; from this it subtracted its determination of the value of the goods delivered, \$6,000. [Therefore], the district court determined the damages to be \$201,826.50 . . . Defendant now appeals . . .

. . . [A]ppellant faults the district judge for rejecting its contention that the contract price for the NCR 399/656 was the only competent record evidence of the value of the system as warranted. The district court relied instead on the testimony of plaintiff-appellee's expert, Dick Brandon, who, without estimating the value of an NCR model 399/656, presented his estimate of the value of a computer system that would perform all of the functions that the NCR 399/656 had been warranted to perform. Brandon did not limit his estimate to equipment of any one manufacturer; he testified regarding manufacturers who could have made systems that would perform the functions that appellant had warranted the NCR 399/656 could perform. He acknowledged that the systems about which he testified were not in the same price range as the NCR 399/656. Appellant likens this testimony to substituting a Rolls Royce for a Ford, and concludes that the district court's recomputed damage award was therefore clearly contrary to the evidence of fair market value—which in NCR's view is the contract price itself.

Appellee did not order, nor was it promised, merely a specific NCR computer model, but an NCR computer system with specified capabilities. The correct measure of damages, under N.J.Stat.Ann. § 12A:2-714(2), is the difference between the fair market value of the goods accepted and the value they would have had if they had been as warranted. Award of that sum is not confined to instances where there has been an increase in value between date of ordering and date of delivery. It may also include the benefit of a contract price which, for whatever reason quoted, was particularly favorable for the customer. Evidence of the contract price may be relevant to the issue of fair market value, but it is not controlling. *Mulvaney v. Tri State Truck & Auto Body, Inc.*, 70 Wis.2d 760, 767, 235 N.W.2d 460, 465 (1975). Appellant limited its fair market value analysis to the contract price of the computer model it actually

delivered. . . . Appellee developed evidence of the worth of a computer with the capabilities promised by NCR

Essentially, then, the trial judge was confronted with the conflicting value estimates submitted by the parties. Chatlos' expert's estimates were corroborated to some extent by NCR's supporters. NCR, on the other hand, chose to rely on contract price. Credibility determinations had to be made by the district judge. Although we might have come to a different conclusion on the value of the equipment as warranted had we been sitting as trial judges, we are not free to make our own credibility and factual findings. We may reverse the district court only if its factual determinations were clearly erroneous. *Krasnov v. Dinan*, 465 F.2d 1298 (3d Cir. 1972). . . .

Upon reviewing the evidence of record, therefore, we conclude that the computation of damages for breach of warranty was not clearly erroneous. We hold also that the district court acted within its discretion in awarding prejudgment interest. . . .

The judgment of the district court will be affirmed.

ROSENN, CIRCUIT JUDGE, dissenting.

. . . I respectfully dissent because I believe there is no probative evidence to support the district court's award of damages for the breach of warranty in a sum amounting to almost five times the purchase price of the goods. . . .

[. . .]

Chatlos presented its case under a theory that although, as a sophisticated purchaser, it bargained for several months before arriving at a decision on the computer system it required and the price of \$46,020, it is entitled, because of the breach of warranty, to damages predicated on a considerably more expensive system. Stated another way, even if it bargained for a cheap system, i.e., one whose low cost reflects its inferior quality, because that system did not perform as bargained for, it is now entitled to damages measured by the value of a system which, although capable of performing the identical functions as the NCR 399, is of far superior quality and accordingly more expensive.

WING THE CASE METHOD

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The statutory measure of damages for breach of warranty specifically provides that the measure is the difference at the time and place of acceptance between the value "of the goods accepted" and the "value they would have had if they had been as warranted." [] The focus of the statute is upon "the goods accepted"—not other hypothetical goods which may perform equivalent functions. . . .

[. . .]

. . . [O]rdinarily, the best evidence of fair market value is what a willing purchaser would pay in cash to a willing seller. . . . In the instant case we have [a sophisticated consumer] who for a considerable period of time negotiated and bargained with an experienced designer and vendor of computer systems. The price they agreed upon for an operable system would ordinarily be the best evidence of its value. . . .

[. . .]

The purpose of the N.J.S.A. 12A:2-714 is to put the buyer in the same position he would have been in if there had been no breach. . . . The remedies for a breach of warranty were intended to compensate the buyer for his loss; they were not intended to give the purchaser a windfall or treasure trove. The buyer may not receive more than it bargained for; it may not obtain the value of a superior computer system which it did not purchase even though such a system can perform all of the functions the inferior system was designed to serve. . . .

[. . .]

On this record, therefore, the damages to which plaintiff is entitled are \$46,020 less \$6,000, the fair market value at time of trial of the retained hardware

2. Sample Brief #2

Chatlos v. NCR (3rd Cir. 1982)
(p. 118 [of casebook])

Comment: Don't bother writing out the full case name. Some are quite complicated with multiple parties. Even just referring to this

as the *Chatlos* case will likely suffice for a brief.

Facts

- Seller NCR, a designer and vendor of computer systems, sold a computer to Buyer Chatlos, a sophisticated purchaser.
- S warranted to B that the computer could perform functions that would have made the computer worth \$207,826.50.
- S sold the computer to B for \$46,020.
- The computer was only worth \$6,000.

Comment: Notice that the parties are abbreviated "B" and "S" to represent "Buyer" and "Seller." Use whatever abbreviations will help you jot your notes down more quickly.

Procedural History

- B sued S for breach of warranty.
- Trial court entered judgment for \$201,826.50 in damages for the breach of warranty.
- S appealed, contending that the amount of damage awarded by the trial court was greater than the harm suffered by B.

Comment: Again, this section quickly identifies the cause of action, the result at trial, and the basis of the appeal.

Issue

Should damages for breach of warranty be equal to the difference between the value of what was

Comment: This issue focuses on the controversial legal policy being addressed by the majority and the dissent, and is closely tied to the

PACKING THE CASE METHOD

as the *Chatlos* case will likely suffice for a brief.

Comment: Notice that the parties are abbreviated "B" and "S" to represent "Buyer" and "Seller." Use whatever abbreviations will help you jot your notes down more quickly.

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Comment: This issue focuses on the controversial legal policy being addressed by the majority and the dissent, and is closely tied to the

READING AND BRIEFING CASES

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promised and the value of what was received, even when that measure of damage results in the buyer being awarded far more than it spent on the contract?

reason you would have been assigned this case in a Remedies class.

Holding

Yes. The buyer is entitled to the full measure of recovery for what it was promised by the seller, even if that exceeds what the buyer expected to pay on the contract to obtain the good.

Comment: Holdings usually mirror issues. Notice that this holding is simply a direct response to the issue, and uses the same framing as the issue.

Reasoning

- Court cites the governing New Jersey "benefit of the bargain" formula: "The correct measure of damages is the difference between the fair market value of the goods accepted and the value they would have had if they would have been as warranted."
- Court reasons the benefit of the bargain rule has been used to award buyers more than the contract price in situations where the value of the good has increased after the contract is entered into. Court reasons the same rule should apply in situations like this where the contract terms themselves are favorable for the buyer.
- Applying the rule here: \$207,826.50 (what was promised) minus \$6000 (what

Comment: Don't be afraid to simply quote the governing rules from the case to kick off the reasoning section. The rule is frequently a logical starting point for a court's reasoning.

Comment: The court has expanded the reach of the "benefit of the bargain" rule. Notice how in this bullet point, the brief documents this broader application of the rule to new facts.

Comment: This bullet contains the core of the factual reasoning of the case: the application of law to

was received) equals \$201,826.50 in damages.

fact. Document it in your brief so you can practice applying the rule to different facts later.

- Court rejects S's argument that the contract price was the only credible measure of the value of the promised computer; instead, credible evidence showed that the contract price failed to reflect the actual fair market value of what S promised.
- Court does not explicitly state the reason for upholding a "benefit of the bargain" rule that rewards B more than it was willing to pay in the first place.

Comment: Unlike in the above *Whiting* case, this court failed to articulate the policy for the rule. You should still articulate your best inference regarding the reason for the rule in your brief.

Perhaps the court is crediting B with obtaining a favorable contract and finding that B is harmed by losing the "benefit of that bargain." Perhaps the rule embodies a policy of encouraging buyers to obtain bargains when they can find them, and discouraging sellers from competing with each other through the use of escalating misrepresentation.

- **Dissent:** Really? How can B be entitled to five times the purchase price?
 - (1) No credible evidence supports such a high value for what was promised
 - (2) As a matter of law, the contract purchase price is the best reflection

Comment: When you are assigned the dissent, make a note in your brief about what the dissenting argument is. The disagreement will frequently be an important part of class discussion.

CKING THE CASE METHOD

fact. Document it in your brief so you can practice applying the rule to different facts later.

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of the value of the
purchased good,
particularly here where
the transaction is between
an experienced vendor
and a sophisticated
purchaser.

C. Longer May Not = Better

The *Whiting* and *Chatlos* cases as they appear above have been edited by the authors to a mere fraction of their actual lengths (to keep things moving). The case book versions of these cases would be longer. But a useful brief based on the case book version should still be as short as the two samples here. The opinions as they appear in the case book might include things like the entire text of the prenuptial agreement in *Whiting* and lengthy transcripts of expert testimony in *Chatlos*. But a brief based on the full assigned case would not need to say any more about the contents of the agreement than the sample briefs above already say. The reason is that these additional factual details neither raise additional legal issues nor lead to additional arguments. Unlike many lawyers' briefs, your case briefs should be, well, brief.

Comment: Unlike in the above *Whiting* case, this court failed to articulate the policy for the rule. You should still articulate your best inference regarding the reason for the rule in your brief.

Comment: When you are assigned the dissent, make a note in your brief about what the dissenting argument is. The disagreement will frequently be an important part of class discussion.

CASE READING

The cases in this section serve two purposes. First, they are part of the required reading. Second, they will be used throughout a sequence of progressively developing Legal Methods assignments (#0–#3) designed to help you revisit familiar cases while developing increasingly sophisticated analytical and writing skills.

The chart below shows:

- when each case should be read, and
- how the assignments progressively build on prior readings and analytical work.

	Case Name	Page #	Read by	Use in Assign #			
				0	1	2	3
a.	The State v. Wilson	148	8/11				
b.	State v. Billings	150					
c.	Gray v. State	152					
d.	Woods v. State	154	8/13				
e.	State v. Bennett	155					
f.	Hamilton v. State	157					
g.	People v. Winhoven	160					
h.	People v. Moreno	162					
i.	State v. Neff	164					
j.	Shoemaker v. State	165	8/20				
k.	Commonwealth v. Harlow	167					
l.	State v. Ellison	168					
m.	People v. Dupree	169	8/27				
n.	Jones v. State	171					
o.	Pack v. State	173					
p.	Walker v. State	175					
q.	Hebron v. State	177					
r.	People v. Gauze	179					
s.	Stowell v. People	182					
t.	Vasquez v. State	183					
u.	People v. Johnson	186					
v.	State v. Schneider	189					
w.	People v. Frye	191					
x.	People v. Nible	194					
y.	State v. Bowen	197					

Citations

For assignments #0-3, you should rely on the cases provided in the Course Reader that correspond with each assignment.

The page numbers printed at the top and bottom of each packet page (for example, “Page 149 of 204”) are the page numbers you should use for these citations.

For example:

- (*Wilson*, p. 149.)
- (*Hamilton*, pp. 158-159.)

Using accurate pinpoint citations is an important legal writing skill because it allows the reader to locate the authority being discussed.

* A shaded box indicates that the case is part of the body of authority available for that assignment.

Howard, Jodie 4/7/2026
For Educational Use Only

State v. Wilson, 1 N.J.L. 439 (1793)

1 Am.Dec. 216, Coxe 439

1 N.J.L. 439
Supreme Court of Judicature of New Jersey.

THE STATE
v.
WILSON.

December Term, 1793.

The prisoner, Wilson, was indicted...for burglary. The indictment charged him with having feloniously and burglariously broken into and entered the dwelling-house of one Daniel Cooper, during the night, and of having feloniously stolen several articles of clothing and pieces of money, the property of the said Daniel Cooper. To this indictment the defendant pleaded not guilty, and upon the trial the following circumstances appeared by the evidence of Cooper:

[O]n the night upon which the burglary was laid to have been committed, the witness was awakened by a noise in the house, and upon hearing a further noise, he got up, went to the window, where hung a quantity of yarn, some of which appeared to have been removed. On turning round, he observed a chest open; he put his hand into it, and immediately remarked another person withdrawing his hand from the chest. The other caught the witness round the lower part of his body, upon which the witness struck him. A scuffle ensued, and at length was terminated by the witness succeeding in throwing the intruder upon his back, jumping upon him, and holding him until some of the members of the family arrived. On lighting a candle the witness found his jacket on the floor, and a number of small pieces of silver scattered about the room. On examining his clothes, he discovered that his money and papers had been taken out of his pocket, and his silver knee-buckles were missing....The witness found his watch on the floor, which he had left, when he went to bed, in his breeches pocket; and three pieces of linen and some stockings on the floor, at the end of the chest....The witness had gone to bed about half-after ten o'clock, and when he went to look at the clock afterwards it was about twenty minutes after two. The witness was the last person in the house who went to bed, and had fastened the outer and inner door himself, according to his usual custom....

Opinion

KINSEY, C. J., delivered the following charge to the jury:

The prisoner at the bar stands indicted for burglary. The indictment charges that he, on the 13th of December, 1792, about one in the morning of that day, with force and arms, &c., the dwelling-house of Daniel Cooper feloniously and burglariously did break and enter, and certain articles enumerated in the indictment, the property of the said D. Cooper, did steal, take, and carry away.

To this indictment he has pleaded not guilty, and whether the evidence produced on the part of the state has been sufficient to establish his guilt, is the question which you have been sworn to try. This question, like most others of a criminal nature, is compounded both of law and fact; of the latter you are in all cases the constitutional judges, and although the court in stating the law, may perhaps be compelled to touch upon some of the facts, yet they must ultimately be left to your determination.

The crime of which the prisoner stands accused is technically called burglary, and is defined to be, the breaking and entering into the mansion house of another, with the intent to commit some felony therein, and that in the night time. This definition is an accurate one, and should be carefully kept in mind, for almost every word of it is significant and important. Before any man can be legally convicted of this crime, therefore, these five circumstances must be proved: 1st. There must be what the law calls a breaking. 2d. There must be an entry. 3d. The breaking and entry, or one of them, must be in the night. 4th. It must be done in a mansion-house. 5th. It must be done to the intent of committing some felony therein.

If the testimony which you have heard is to be believed, three of these five requisites need engross but little of your attention, because it is evident that the prisoner had entered the lodging room of the prosecutor, which was a part of the mansion-house,

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State v. Wilson, 1 N.J.L. 439 (1793)

1 Am.Dec. 216, Coxe 439

and was actually detected there in the night time. These three particulars seem to be placed beyond a question, if you believe the witnesses; and, having disposed of them, there remain but two others, viz., the breaking, and the intention with which the breaking was done, to occupy your attention.

On these points it may be proper to be a little more particular, for if any doubts can arise in the case, it must be upon one or both of these requisites. As to the breaking, I take the law to be that, by this term, it is not meant to imply any actual violence or force. If a man lifts up the latch of an outward door, or if an outward door, being open, a thief enters and unlatches or unlocks a chamber door, with a felonious intent, in either case his act comes up to the idea affixed by the law to the word breaking, so as to constitute the crime of burglary. 1 *Hawk.* 160, *b.* 1, *c.* 38, § 4; 1 *Hale* 553. If, however, all the doors be open, and the thief enters through an open door, and after getting into the house should break open a chest or a cupboard, even fixed in the wall, this is not such a breaking as the law requires as one of the ingredients of a burglary.

A man's house is said to be his castle--its security must not be lightly invaded; and to preserve this security and this sanctity, the law has created safeguards, and imposes severe penalties upon their infringement. This is particularly the case in the night, a season appointed for rest, when a man is usually incapable of making any defense, and when assistance is frequently remote and contingent. But it is necessary, before you find the prisoner guilty upon this indictment, that you should be satisfied the doors of this house were shut, and were opened by the prisoner, or with his concurrence or connivance.

If these circumstances are established to your satisfaction, it is a breaking sufficient to constitute one of the ingredients of burglary; if they are not, though the prisoner may be guilty of larceny, there is no burglary proved. It is necessary to recapitulate the testimony which bears upon this point--you will judge how far it ought to operate.

The last thing to be considered, supposing the breaking to be proved, is, was the felony actually committed so as to manifest the intention with which he entered the house? The designs of the heart can rarely be proved in a direct manner by the testimony of witnesses. When a man designs to perpetrate a scheme of wickedness, he seldom communicates his intention, unless to an accomplice; hence, the intent must, in most cases, be collected from the circumstances. These may sometimes prove deceptive, but when, without any forced construction, they speak the intention in a language clear and intelligible, they may be relied on as the best evidence which the nature of the case will admit of.

It is impossible to lay down any general rule, or to declare from what circumstances particular intentions are to be inferred. No two cases are exactly similar, and it is the business of the jury to form their opinion from a serious and deliberate consideration of the facts which appear in the testimony. It is, however, a good rule, and it is also a humane rule, to which every virtuous man will assent, that where reasonable doubts exist, the jury, particularly in capital cases, should incline to acquit rather than condemn. Facts are, however, the fairest criterions from which to infer the intention: I mean, from the facts which occurred in the house, we may presume the intentions and views with which he entered it.

On this point you are, in the first place, to examine the facts, to weigh the evidence, and then to ask yourselves these questions--1st. Did the prisoner open any chest, or appropriate to himself any part of the property of the owner, and manifest any intention to steal it--or rather did he actually steal it, for the indictment charges that the larceny was actually committed?

Upon this I must observe if one takes the property of another from the place where it was situated, and removes it to another, as he who takes goods out of a trunk and lays them on the floor, and is surprised and detected before he goes off, this is larceny. It is a sufficient carrying away if it be done with an intent to steal.

In the next place you are to ask yourselves whether the facts detailed in the evidence, show clearly, either collectively or separately, that the design of the prisoner was actually to steal, and was the theft actually committed?

...The jury found a verdict of guilty....

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State v. Billings, 242 N.W.2d 726 (1976)

242 N.W.2d 726
Supreme Court of Iowa.

STATE of Iowa, Appellee,
v.
Jerry Lee BILLINGS, Appellant.

No. 58384
|
May 19, 1976.

Opinion

McCORMICK, Justice.

Defendant appeals his conviction and sentence for burglary without aggravation in violation s 708.3, The Code. He contends the trial court erred ... (2) in allowing a witness to express an opinion on an issue of law, (3) in providing the jury an incorrect definition of nighttime.... We reverse and remand because we find merit in his...contentions.

The charge was based on the alleged burglary of the Kipton Prendergast farm home in Webster County in the evening of January 29, 1975. The State produced sufficient evidence to send the case to the jury against defendant.

Prendergast testified he left home to drive to Fort Dodge at about 6:00 p.m. He locked the doors of the home. He said the sun had set and it was dusk but not dark. He did not remember whether he used his automobile headlights while driving to the city. When he returned home about 9:00 p.m. he found the front door open and his stereo equipment and TV missing. He reported the theft to the Webster County sheriff's office and provided that office with the serial numbers of his equipment.

Michael Bradwell, an alleged accomplice of defendant, testified he and defendant drove to the Prendergast home that evening for the purpose of breaking in to steal Prendergast's stereo equipment. He said Prendergast passed them on his way to Fort Dodge. He said they forced the front door open, took the equipment, and put it in defendant's automobile. He estimated the time of the theft as 7:30 or 8:00 p.m. He said they were able to see the equipment without turning lights on in the house. Although the yard light was on, he said he would have been able to see well enough outside without it to recognize a person with whom he was acquainted. Bradwell testified they drove to Des Moines where they planned to sell the equipment to a friend of his. He called his friend from the downtown Holiday Inn in Des Moines. They were stopped near there by police who though they had seen defendant drinking a can of beer. When the police inquired about the stereo equipment in the car, defendant said it was his. With defendant's help they recorded the serial numbers of the equipment. Then the police said Bradwell and defendant could go. Bradwell said he and defendant later sold the equipment to his friend for \$350 and split the proceeds.

Ned Osborn, a Des Moines police officer, testified he and another officer observed defendant and Bradwell in defendant's car at about 10:00 p.m. on the day involved pulling out of the downtown Holiday Inn parking lot. Osborn saw defendant drinking from a can the officer believed contained beer. He said he directed Morris to follow and stop the car because of the apparent violation of s 123.46, The Code, proscribing consumption of alcoholic beverages on a public highway. When they stopped defendant's car, Osborn checked his driver's license. He also saw some of the stereo equipment in the back seat. Defendant got out of the car. In doing so, according to Osborn, he attempted to hide the beer can under the seat and it spilled. Defendant first denied but then admitted he had the beer. The officer confirmed Bradwell's testimony about subsequent events. He testified defendant gave him permission to search the car, including the trunk. He also testified he warned defendant about the beer violation but did not then charge him with that or any other offense.

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Through the testimony of other witnesses, the State showed the Des Moines police contacted the Webster County sheriff's office the next morning and inquired whether that office had received a report regarding stolen stereo equipment. The sheriff's office sent the serial numbers of the Prendergast equipment to the Des Moines police, and it was determined the numbers matched those recorded by officer Osborn. The equipment was later recovered, and defendant and Bradwell were charged with burglary.

Defendant now appeals his subsequent conviction and sentence....

II. The evidentiary ruling.

During the course of direct examination, the alleged accomplice Bradwell estimated the time of the offense as 7:30 or 8:00 p.m. The prosecutor then asked, 'And it was night at 7:30 or 8:00 on a winter night, is—?' Defense counsel objected that the definition of night is a legal one and the witness was not shown to know it. The court overruled the objection, and Bradwell answered, 'Yes, it was night'.

Proof the offense occurred 'in the nighttime' is an element of burglary. s 708.1, The Code; State v. Osborn, 200 N.W.2d 798, 807 (Iowa 1972). The term has a definite legal meaning as an element of burglary.... In view of the specialized legal meaning of the term as used in the definition of burglary, Bradwell was called upon to express an opinion on a question of mixed law and fact. The subject matter was inappropriate in this context for opinion testimony....

III. The trial court's definition of nighttime.

Over defense counsel's timely and adequate exception, the trial court instructed the jury that 'nighttime', as an element in a burglary charge, 'is defined as the period between sunset and sunrise'. Defendant assigns the court's overruling of his exception as error.

In State v. Osborn, supra, at 807, we held nighttime in a charge of burglary under s 708.1, The Code, is, as it was at common law, a period between sunset and sunrise during which there is not daylight enough by which to discern a man's face. Authorities in support of this definition are listed in the majority and dissenting opinions in Osborn.

Recognizing that the definition given by the trial court was broader, the State urges us to abandon the common-law definition and adopt the one given by the trial court. We decline to do so. We believe the legislature intended the term to have its common-law meaning in s 708.1. At common law, the circumstance of aggravation signified by the 'nighttime' factor was not sunset but the concealment afforded by darkness, and the common-law definition gives effect to that distinction. Bowser v. State, 136 Md. 342, 110 A. 854 (1920).

A question of fact for the jury existed regarding whether the State proved the 'nighttime' element of the offense under its proper definition.

The trial court's erroneous definition of nighttime was reversible error....

Since the State's proof of the nighttime element of burglary presented a question for the jury in this case, the trial court committed reversible error in refusing to submit the lesser included offense here.

REVERSED AND REMANDED.

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Gray v. State, 243 Wis. 57 (1943)

9 N.W.2d 68

243 Wis. 57
Supreme Court of Wisconsin.

GRAY et al.
v.
STATE.

April 13, 1943.

Opinion

MARTIN, Justice.

The dwelling of Edmund Feldner, located on highway 38, about three-fourths of a mile west of the village of Rosendale in the town of Fond du Lac, Fond du Lac county, Wisconsin, was burglarized on the night of June 19, 1941. Mr. Feldner and members of his family retired at about 8:30 p. m. When he retired his overalls and two suits of clothing were hanging on a hook in his bedroom. His winter overcoat was in a room next to his bedroom. When Mr. Feldner arose at 5:30 a. m. the following morning he noticed that his overalls, his two suits and overcoat were missing and that some of the rooms of his residence had been ransacked. He found his overalls and the vest and coat of one suit lying outside. One suit, the overcoat and trousers of the other suit were missing.

At about 1 a. m. on June 20, 1941, George Habeck, a truck driver, left the city of Fond du Lac for Ripon and Berlin via highway 38. When he reached a point on said highway about three-fourths of a mile west of Rosendale, in the immediate vicinity of the Feldner residence, he saw three Negroes, whom he later identified as the defendants, with their car parked alongside the road. Defendants followed Habeck to Ripon. At Ripon they inquired of Habeck as to the direction to Fond du Lac. He gave them the proper direction, whereupon defendants left but did not go in the direction which had been given them. The facts here related took place between 1 and 2:30 a. m. on June 20th....

To the information charging burglary of a dwelling in the nighttime with intent to commit larceny, defendants entered a plea of not guilty. The jury found defendants guilty in the manner and form as charged in the information. Defendants contend that the evidence did not establish beyond a reasonable doubt that the Feldner dwelling was burglarized in the nighttime. Sec. 353.32, Stats., defines the term "nighttime" as follows:

"The term 'nighttime,' when used in any statute, ordinance, indictment or information shall be construed to mean the time between one hour after the setting of the sun on one day and one hour before the rising of the same on the following day; and the time of sunset and sunrise shall be ascertained according to the mean solar time of the ninetieth meridian west from Greenwich, commonly known as central time, as given in any published almanac."

Sunset on the evening of June 19th was at 7:39 p. m., and sunrise on the morning of June 20th was at 4:23 a. m. Thus, nighttime, within the meaning of the statute, on the night in question, was from 8:39 p. m., June 19th, to 3:23 a. m., June 20th. Defendants argue that since Feldner testified that he retired about 8:30 p. m. on June 19th, and that he arose at about 5:30 a. m. the following morning, his dwelling may have been burglarized either in the daytime or in the nighttime, and that therefore the state failed to establish that the crime had been committed in the nighttime as alleged in the information. It is definitely established that the crime was committed sometime between 8:30 p. m., June 19th, and 5:30 a. m., June 20th. The witness Habeck testified that he left the city of Fond du Lac at about 1 a. m. on June 20th. Rosendale is about eleven miles west of the city of Fond du Lac. According to Habeck's testimony, he would, with normal driving, have arrived at the place where he saw the three defendants and their parked car in the immediate vicinity of the Feldner residence at about 1:30 a. m.

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The circumstance of defendants having been seen in the immediate vicinity of the burglarized residence at the time fixed by Habeck, well warranted the jury in concluding that the burglary had been committed in the nighttime. See *Simon v. State*, 125 Wis. 439, 103 N.W. 1100; *Winsky v. State*, 126 Wis. 99, 105 N.W. 480, 481. In the latter case, referring to *State v. Bancroft*, 10 N.H. 105, it is said:

“There was no direct proof that the burglary was committed in the nighttime, other than the fact that the property was in the house after dark and was missing the next morning when the witness arose; and the court said that this evidence ‘led very strongly to the conclusion that it was taken in the course of the night, although the precise hour when the witness called it dark did not appear, and the time when she arose in the morning was not stated. At whatever time in the morning the loss was discovered, the jury might well weigh the probability whether the article would have been taken from the house in the daytime, in connection with the other evidence. It was sufficient that, upon the whole case, they had no reasonable doubt that the act was done in the nighttime.’ Sufficient appears from the evidence in the case before us to warrant the jury in finding that the entry was made in the nighttime. *Simon v. State*, supra.”

...

Judgment affirmed.

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Woods v. State, 186 Miss. 463 (1939)

191 So. 283

186 Miss. 463
Supreme Court of Mississippi, Division A.

WOODS

v.

STATE.

No. 33695.

|
Oct. 9, 1939.

Opinion

GRIFFITH, Justice.

Appellant was indicted and convicted under the charge of the burglary of a dwelling-house. The undisputed proof showed that the house in question, although intended for a dwelling-house, had been only recently erected and had not yet been occupied as a dwelling. It was vacant.

Appellant relies on Haynes v. State, 180 Miss. 291, 177 So. 360, wherein the court held that a house from which the occupants had permanently removed on the day before the night of the burglary was not a dwelling at the time of the commission of the alleged crime; and that proof of the burglary of such a house would not sustain the conviction under an indictment charging the burglary of a dwelling. Appellant submits that if a house from which the occupants have permanently removed is not a dwelling-house within the statutes on burglary, then, upon the same reasoning, a house into which no dwellers have ever yet moved is not a dwelling-house; and in this contention appellant is clearly correct....

Reversed and remanded.

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State v. Bennett, 565 So.2d 803 (1990)

15 Fla. L. Weekly D1941

565 So.2d 803
District Court of Appeal of Florida,
Second District.

STATE of Florida, Appellant,
v.
Tommy Reaben BENNETT, Appellee.

No. 89-02537.

July 25, 1990.

Rehearing Denied Aug. 23, 1990.

Opinion

PER CURIAM.

The state appeals an order of the circuit court partially granting appellee Tommy Bennett's sworn motion to dismiss. Fla.R.Crim.P. 3.190(c)(4). The effect of the order is to reduce burglary charges against Bennett from a second degree (burglary of a dwelling) to a third degree felony (burglary of a structure). Finding the order to be based on an erroneous interpretation of the statutory definition of "dwelling," we reverse.

Bennett was one of three individuals apprehended while removing furniture from a mobile home which was located on a sales lot. This mobile home, apparently one among several models offered for sale, was fully furnished but unoccupied and not connected to utilities. The state charged Bennett with burglary of a dwelling. § 810.02, Fla.Stat. (1987). Bennett's motion to dismiss admitted that Bennett had participated in the break-in, but asserted that the structure in question did not qualify as a "dwelling" for purposes of enhancing the degree of the offense.

The common law definition of "dwelling," for purposes of a burglary prosecution, contemplated that a structure was actually occupied and not merely capable of or suitable for occupation. *Smith v. State*, 80 Fla. 315, 85 So. 911 (1920); *Tukes v. State*, 346 So.2d 1056 (Fla. 1st DCA 1977). It was generally viewed as immaterial whether the structure was a "mobile home" rather than a more traditional type of house. *State v. Ryun*, 549 S.W.2d 141 (Mo.App.1977). See also, *Kanaras v. State*, 54 Md.App. 568, 460 A.2d 61 (1983) ("minimotorhome"); *Luce v. State*, 128 Tex.Crim. 287, 81 S.W.2d 93 (1935) (cabin constructed on auto chassis); *State v. Ebel*, 92 Mont. 413, 15 P.2d 233 (1932) ("movable sheep wagon"). However, under this definition an unoccupied mobile home on a sales lot would not qualify as a "dwelling." *Graybeal v. State*, 228 Va. 736, 324 S.E.2d 698 (1985).

In some jurisdictions this common law definition has been abandoned to permit a broader scope of prosecution for acts analogous to our crime of residential burglary. For example, Arkansas uses the term "occupiable structure," which is defined as any structure "customarily" used for the accommodation of persons. Ark.Stat. Ann. §§ 5-39-101(1)(c), -201(a) (1987). Under this provision an accused could be prosecuted and convicted for breaking into a mobile home which was vacant, unattached to utilities, and used only for a storage facility. *Julian v. State*, 298 Ark. 302, 767 S.W.2d 300 (1989). The Illinois statute, Ill.Rev.Stat. ch. 38, para. 2-6(b), includes in its definition of "dwelling" unoccupied living quarters which are intended for habitation within a reasonable period of time. See *People v. Pearson*, 183 Ill.App.3d 72, 131 Ill.Dec. 646, 538 N.E.2d 1202, appeal denied, 127 Ill.2d 633, 136 Ill.Dec. 600, 545 N.E.2d 124 (1989) (vacant residential property into which new tenant planned to move in near future).

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State v. Bennett, 565 So.2d 803 (1990)

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Florida, too, has amended its applicable statute. § 1, Ch. 82–87, Laws of Fla. Section 810.011(2), Florida Statutes (1989) now defines “dwelling” as “a building or conveyance of any kind, either temporary or permanent, mobile or immobile, which has a roof over it and is *designed to be occupied* by people lodging therein at night, together with the curtilage thereof” (*emphasis supplied*). It is undisputed that this 1982 amendment is applicable to the present case, wherein the offense is alleged to have occurred between November 12 and 13, 1988. The state argues that this revised definition is broad enough to cover a mobile home on a sales lot, because it is “designed” for eventual human habitation. We agree that the present definition of “dwelling” significantly expands the common law definition. Legislative staff analysis, which suggests the 1982 enactment was prompted by concern over burglaries of “unoccupied recreational vehicle[s] or travel trailer[s],” does not unequivocally establish whether unsold mobile homes were contemplated. However, the plain meaning of the word “designed” supports the state’s argument.

The trial court, in reducing the charge against Bennett, appears to have based its ruling exclusively upon the belief that the legislature did not intend to depart from prior case law narrowly defining “dwelling.” Because we disagree with this conclusion, we cannot say *as a matter of law* that the state may not prosecute Bennett for residential burglary. We stop short, however, of holding that the amended statute justifies such a charge any time someone enters a structure that theoretically could serve as housing. A prefabricated “mobile home,” while certainly capable of serving as someone’s residence, can also be converted to any number of other uses, such as office space. When still on a sales lot, it may not always be possible to determine beforehand exactly what use a purchaser will make of such a structure. Therefore, in order to establish that the structure is a “dwelling” within the purview of the burglary statute, we believe the state must introduce some evidence that it is actually to be used for habitation. Given the rationale for the trial court’s ruling, the record before us lacks an adequate factual basis for determining whether that burden has been met in the present case. We therefore remand for further proceedings consistent with this opinion.

Reversed.

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Hamilton v. State, 354 So.2d 27 (1977)

354 So.2d 27
Court of Criminal Appeals of Alabama.

Henry Alexander HAMILTON, alias

v.
STATE.

1 Div. 788.

|
Oct. 4, 1977.

|
Rehearing Denied Oct. 25, 1977.

Opinion

CLARK, Supernumerary Circuit Judge.

Appellant was convicted of burglary in the second degree as charged in an indictment alleging, inter alia, that he, “with intent to steal, broke into and entered the dwelling house of Mike Tinker.” The court sentenced him to imprisonment in the penitentiary for a term of thirteen months, one month more than the minimum punishment provided by Code of Alabama 1940, Recomp. 1958, Tit. 14, s 86.

The evidence is ample to support a finding that defendant, with intent to steal, broke into and entered two houses adjacent to each other that were owned by Mike Tinker. The only serious question raised on appeal is whether either was a “dwelling house.”

According to the evidence for the State, both buildings were broken into and entered by defendant and another about 5:00 P.M. May 16, 1976, and plundered of valuable contents. One was a 20 X 20 ft. concrete block building, the other a 16 X 16 ft. wooden building. Neither building was occupied at the time of the burglary. They were located on a lot fronting on Highway 98 at Wilmer, Mobile County, Alabama.

Mr. Tinker, the owner of the buildings and the lot upon which they were located, was in Texas at the time of the burglary. About sixteen years before the burglary he had built a concrete block house and had had the wooden house, as well as an outhouse, moved onto the lot. During this sixteen-year period he had worked as a mailman in Texas, but looked forward to his retirement and residence during retirement at Wilmer. Each of the houses had a bed in it. During the sixteen years he worked in Texas, Mr. Tinker would return periodically to Mobile County and would usually stay in one of the buildings and sleep there. On cross-examination, he testified:

“Q Mr. Tinker, you said ‘garage.’ And then you said that is your dwelling house. When did this become your dwelling house? Didn’t it become your dwelling house when you moved back to Wilmer from Texas in the summer of 1976? Isn’t that when you slept in the block building?

“A I slept in there before that.

“Q When did you sleep in the block building?

“A Well, when it was made.

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“Q Sixteen years ago?

“A Yes.

“Q And then you slept in it again when you moved back to Wilmer from Texas?

“A No. Periodically I would sleep in there and out in the shed, too.

“Q Is there a bed there?

“A Yes.

“Q When was the last time you had slept in the building prior to the summer of 1976?

“A Well, I was sleeping in there after it was made and periodically.

“Q When was the last time you slept in the block building prior to the summer of 1976?

“A After the building was built and sometimes after that.

“Q All right. You say you hadn’t been back in this building in almost two years, is that correct? Sometime in 1974, you came back to Wilmer, is that correct? And then you came again in the summer of 1976.

“A It was October that I was here in ‘74.

“Q O.K. So we are talking about a year and a half, then. You hadn’t been there in a year and a half. When was the last time prior to that year and a half that you slept in the building?

“A When the building was built, I slept in it, and then several times after that.

“Q Did you sleep in the building each night?

“A No, not each night.

“Q Where did you stay the other nights?

“A Well, sometimes in the shed.

“Q Which one is the shed? Now, we’ve got block, wood and outhouse.

“A Wood.

“Q All right. Is there a bed in the wood house?

“A Yes.”

Although the evidence is rather vague and weak as to the number of times Mr. Tinker had used either house as a “dwelling house” during the sixteen years he worked in Texas, the evidence is practically conclusive to the effect that he constructed the block house to be used by him in the future as a garage, to which he planned to build a larger house in which to live, but that he considered the concrete block house and the wooden house as his home, his dwelling, when on a large number of

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occasions he returned to Mobile County from Texas. There was no plumbing in either house, but there was electric current, and the contents of the block house included a stove, two refrigerators and “a lot of clothes.” The following is a part of his testimony:

“Q Had all this stuff been in there quite some time? A number of years perhaps?

“A Well, not all at one time. Everytime, I came on vacation, I was planning to, when I retired that I would have the materials handy to build another house, or something like that.

“Q This was going to be the garage portion of your house?

“A Yes. I was using it as a house, like my father would do. He would always build a garage first, we would live in it, and then when he had the time and money, he’d build a house.”

...[W]e are greatly aided by what has been held and stated in *Reeves v. State*, 245 Ala. 237, 16 So.2d 699 (1943) and *Moore v. State*, 35 Ala.App. 95, 44 So.2d 262 (1950).

In *Reeves*, it is stated:

“... The dictionary definition of a ‘dwelling’ per se is a ‘habitation.’ Webster’s Unabridged Dictionary. ‘Dwell’ as a verb means to abide, to abide as a permanent resident, etc. So the word ‘dwelling house’ within itself imports a habitation or house where people dwell as a place of residence, although they may be temporarily absent. So it seems to us by inserting the word ‘uninhabited’ as opposed to ‘inhabited’ dwelling under s 85, the lawmakers had in mind a dwelling house not occupied by anyone at the time of the burglary. The expression ‘uninhabited dwelling’ is sui juris (sic) and should be given some meaning not covered by the term ‘dwelling’ itself. The idea that an uninhabited dwelling house means a vacant house not occupied at all as a place of residence is to extend the crime of burglary to vacant buildings merely because they may have been constructed for residence purposes or formerly occupied, but now vacant, a notion entirely out of keeping with the entire spirit and purpose of our statutes on burglary. Wilful injury to buildings is penalized as malicious injury. Code, Title 14, s 80.” 245 Ala. at 240, 16 So.2d at 702.

In *Moore v. State*, supra, the court said:

“Generally speaking, a dwelling house is a house which is occupied as a residence, as distinguished from a store, office, warehouse, shop, etc. Within the contemplation of the burglary statute it is said to be ‘uninhabited’ if the occupants have closed the dwelling and have gone away for a time, with the intent and purpose of returning and again residing therein.

“The duration of the absence is not controlling. It is the animus revertendi which fixes the status in this particular. *Olds v. State*, 19 Ala.App. 162, 95 So. 780; *Schwabacher v. People*, 165 Ill. 618, 46 N.E. 809, 812.”

We cannot say that the status of either house as a dwelling was lost by Mr. Tinker’s failure to live there for a period of a year and a half prior to the burglary. No definite period of time, however long, is the criterion. The intention to return or not to return is determinative. Nor can we say that the fact that the houses were used largely for storage purposes deprives either of them of its status as a dwelling. The fact that they were so used emphasizes Mr. Tinker’s nostalgia and the constancy of his desire to return to the salubrious shores of Mobile Bay to spend his retirement years. We find no error in the record prejudicial to appellant. The judgment of the trial court should be affirmed....

The judgment below is hereby AFFIRMED.

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People v. Winhoven, 65 Mich.App. 522 (1975)
237 N.W.2d 540

65 Mich.App. 522
Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff-Appellee,
v.
Patrick Mark WINHOVEN, Defendant-Appellant.

Docket No. 21544.
|
Nov. 13, 1975.
|
Released for Publication Jan. 30, 1976.

Opinion

D. E. HOLBROOK, Jr., Judge.

Defendant was convicted by a jury on June 11, 1974, of breaking and entering an occupied dwelling with intent to commit larceny. M.C.L.A. s 750.110; M.S.A. s 28.305. Defendant was sentenced to a term of from 2 to 15 years in prison. He appeals as of right.

The object of the breaking and entering was a 12 60 mobile home situated in a mobile home park. The mobile home was the principal residence of Mr. and Mrs. William Lang. The structure rested on cement blocks which served to level it, although the axle and tires were still attached. However, a metal skirt attached to a wooden frame concealed the underside of the mobile home from view. The mobile home consisted of a kitchen, a living room, a bathroom, and two bedrooms. The mobile home was connected to sewage, water, electric and telephone service and the Langs received their mail there....

Defendant's initial claim of error is that he was charged and convicted under an inappropriate statute. Since the crime occurred 'in' a mobile home, defendant claims he should have been charged and tried under the statute concerning breaking and entering of a motor vehicle or house trailer. M.C.L.A. s 750.356a; M.S.A. s 28.588(1). It is defendant's contention that since the latter statute specifically mentions house trailers that the occupied dwelling statute does not apply when the breaking and entering is of a mobile home. See *Reithmiller v. People*, 44 Mich. 280, 282, 6 N.W. 667 (1880), *Mentel v. Monroe Public Schools*, 47 Mich.App. 467, 469, 209 N.W.2d 506 (1973).

While defendant makes an interesting argument, it must fail for several reasons. It is true that a mobile home is another name for a house trailer. *Allstate Insurance Co. v. Walker*, 111 Ga.App. 120, 122, 140 S.E.2d 910, 912 (1965), *Lower Merion Twp. v. Gallup*, 158 Pa.Super. 572, 575, 46 A.2d 35, 36, Appeal dismissed, 329 U.S. 669, 67 S.Ct. 92, 91 L.Ed. 591 (1946). However, a dwelling house has been defined as a place where a man lives with his family. *DesRoches v. McCrary*, 315 Mich. 611, 614, 24 N.W.2d 511 (1946), *Schadt v. Brill*, 173 Mich. 647, 654, 139 N.W. 878, 45 L.R.A.N.S. 726 (1913). Thus, it is also possible for a mobile home to be a dwelling house. *Artman v. College Heights Mobile Park, Inc.*, 20 Mich.App. 193, 198, 173 N.W.2d 833 (1969), *Allstate Insurance Co. v. Walker*, supra, *Lower Merion Township v. Gallup*, supra. When a mobile home is used as a person's principal residence, it more nearly fits within the meaning of the dwelling house statute than the house trailer statute.

Although this is a case of first impression in Michigan, in the context of the arson statutes, the Supreme Court has discussed the purposes for protecting dwelling houses more than other structures or objects. The burning of a dwelling house has been described as a crime against habitation rather than against the fee. *Snyder v. People*, 26 Mich. 106, 107, 12 Am.Rep. 302

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People v. Winhoven, 65 Mich.App. 522 (1975)

237 N.W.2d 540

(1872). Consequently, a charge that a person burned a dwelling house of another could not be sustained when the defendant lived in the house even though he did not own it. *People v. Handley*, 93 Mich. 46, 52 N.W. 1032 (1892), *Snyder v. People*, supra. Likewise, what is sought to be protected in statutes proscribing breaking and entering of a dwelling house is the right to peaceful habitation. *Smart v. State*, 244 Ind. 69, 72—73, 190 N.E.2d 650, 652 (1963), *State v. Ebel*, 92 Mont. 413, 416—417, 15 P.2d 233, 234—235 (1932), Annotation, 43 A.L.R.2d 831, 835 (1955).

This concept that what is sought to be protected is the habitation has been applied to a mobile home in an arson case. In *Harden v. State*, 417 S.W.2d 170, 172—173 (Tex.Cr.App.1967), the defendant had been convicted after burning a trailer. Separate statutes proscribed the commission of arson against houses and trailers. The court affirmed a conviction under the former statute. It ruled that the mobile home was a house when it was used as a residence.

The theory that a person's habitation is to receive more protection also finds support in the statutory breaking and entering scheme in Michigan. The maximum penalty for breaking and entering a motor vehicle or house trailer is 5 years in prison. M.C.L.A. s 750.356a; M.S.A. s 28.588(1). A person convicted of breaking and entering any 'tent, hotel, office, store, shop, warehouse, barn, granary, factory or other building, structure, boat or ship, railroad car or any private apartment in any of such buildings or any unoccupied dwelling house' may receive 10 years in prison. M.C.L.A. s 750.110; M.S.A. s 28.305. But if the breaking and entering occurs in an occupied dwelling house, a person may be imprisoned for 15 years. M.C.L.A. s 750.110; M.S.A. s 28.305....

Affirmed.

All Citations

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People v. Moreno, 158 Cal.App.3d 109 (1984)

204 Cal.Rptr. 17

158 Cal.App.3d 109
Court of Appeal, Fourth District, Division 2, California.

PEOPLE of the State of California, Plaintiff and Respondent,
v.
Anthony Eugene MORENO, Defendant and Appellant.

Cr. 16121.
|
June 12, 1984.
|
Hearing Denied Aug. 9, 1984.

OPINION

RICKLES, Associate Justice.

Defendant Moreno was convicted by a jury of first degree burglary in connection with the entry of a garage attached to a dwelling. (Pen.Code, §§ 459, 460.) He appeals, contending...the evidence presented at trial was insufficient, as a matter of law, to establish first degree burglary....

FACTS

On May 7, 1983, Raymond Briones (victim's father) went to victim's house to investigate unusual noises. He found defendant in the yard, and asked him what he was doing. Defendant responded that he was looking for a woman named Martinez. After Briones informed him that no such woman was present, defendant left. A short time later, however, defendant returned, jumped the fence, and grabbed victim's lawn mower which was situated in the yard. Briones again confronted him, and defendant reiterated that he was looking for Martinez. When Briones threatened to call the police, defendant fled. Briones then discovered that victim's garage door was open and the latch broken.

Victim testified that when he had left his residence that evening the garage door had been locked. He also stated that the lawn mower had been in the garage, and that various items of clothing and fishing equipment stored in the garage were missing.

Victim's garage was attached to his residence by means of a common wall, but accessible only through an exterior entrance. It housed family laundry facilities and was used for storage purposes.

DISCUSSION

Defendant...contends that the evidence presented at trial was insufficient as a matter of law to establish the elements of first degree burglary. Specifically, he asserts that entry of the attached garage does not constitute entry of an "inhabited dwelling" within the meaning of section 460. We disagree.

In *People v. Cook* (1982) 135 Cal.App.3d 785, 795–796, 185 Cal.Rptr. 576, a similar issue was raised and rejected. According to the court, "where the garage is an *attached and integral part* of the house, it is simply one room of several which together compose the dwelling." (*Id.*, at p. 796, 185 Cal.Rptr. 576.)

Defendant's attempts to distinguish *Cook* are inapposite. He places excessive emphasis on the fact that, unlike *Cook*, this case did not involve a door connecting the garage to the interior of the house. The *Cook* court itself noted, however, that a connecting door was only one method of demonstrating that a garage was an attached and integral part of a dwelling. (*Id.*)

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People v. Moreno, 158 Cal.App.3d 109 (1984)

204 Cal.Rptr. 17

Moreover, given the fact that the garage was under the same roof, functionally interconnected with, and immediately contiguous to other portions of the house, simple logic would suffer were we to leap over this interrelationship to a conclusion that a garage is not part of a dwelling because no inside entrance connects the two. (Accord *Burgett v. State* (1974) 161 Ind.App. 157, 314 N.E.2d 799, 802–803; *State v. Haas* (1973) 13 Or.App. 368, 510 P.2d 852, 853–854, reversed on other grounds, *Oregon v. Haas* (1975) 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570.) Accordingly, defendant's contention is rejected....

The judgment is affirmed.

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State v. Neff, 122 W.Va. 549 (1940)

11 S.E.2d 171

122 W.Va. 549
Supreme Court of Appeals of West Virginia.

STATE
v.
NEFF et al.

No. 9105.
|
Oct. 15, 1940.

Opinion

HATCHER, Judge.

The two Neffs were charged with burglariously breaking and entering in the night time a chicken house, an outhouse adjoining the dwelling house of J. A. Trent and belonging to him, and stealing from the chicken house his chickens valued at \$30. The Neffs were found guilty of burglary and sentenced to the penitentiary.

The evidence is incomplete as to the size of the alleged chicken house and its proximity to the Trent dwelling. The former is described as a "small house", having a floor space of four and a half by five feet; but neither its height, nor evidence from which the height might be estimated, is shown. It had a hinged door fastened by a chain drawn through holes bored in the door and "the building face", respectively. The dwelling "sets back about" seventy-five feet from a public road; the chicken house is "out across" the road somewhere, but its distance from the road or the dwelling is not shown.

At common law burglary was "an offense against the habitation not against the property." 9 C.J. 1009; 12 C.J.S., Burglary, § 1. But burglary could be committed on uninhabited structures, provided they were "parcel of" and within the same common fence as the mansion-house, though not contiguous to it. IV Blackstone 225; *Armour v. State*, 3 Humph., Tenn., 379, 385-388. The Virginia Assembly, Acts 1847-48, c. 120, subc. IV, Sec. 13, modified the common law by restricting the burglary of a building other than the dwelling house to "any outhouse adjoining thereto and occupied therewith." That restriction remained in the Virginia statute until this state was formed and then we adopted it. West Virginia Acts 1882, Ch. 148, Sec. 11, substituted the alternative "or" for the connective "and", so that the phrase read "outhouse adjoining thereto (the dwellinghouse) or occupied therewith." There has been no further change. See Code, 61-3-11.

All the words in the phrase are plain and well understood. No reason appears for not holding that they are used in their ordinary sense. *State v. Randall*, 36 Wash. 438, 78 P. 998. We held in *State v. Crites*, 110 W.Va. 36, 156 S.E. 847, that the word "outhouse" was so used, and, in effect, that it meant a building constructed at least large enough for an adult to enter erect and to turn around comfortably within. The State, failing to show the height of the structure in question, did not prove it to be a house at all. But if we should concede that because the Trents called it a house, it should be taken as such, the State has still failed to make a case because the so-called house, being across the public road one hundred feet or more from the dwelling house, cannot, under any fair construction, be said to adjoin it. Since the statute limits the burglary of an outhouse not occupied in connection with the dwelling house, to one "adjoining" it, such contiguity must be proven. We are not advised of any decision on a statute like ours. But the statute, as amended in 1882, differs from the common law more in words than substance. And under the common law an outhouse across a public road from its owner's dwelling house is held to be not parcel thereof and not the subject of burglary. *State v. Sampson*, 12 S.C. 567, 32 Am.Rep. 513; *Curkendall v. People*, 36 Mich. 309.

The judgment is reversed, the verdict set aside and a new trial awarded defendants. Reversed and remanded.

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Shoemaker v. State, 716 P.2d 391 (1986)

716 P.2d 391
Court of Appeals of Alaska.

Kent L. SHOEMAKER, Appellant,
v.
STATE of Alaska, Appellee.

No. A-1011.
|
April 4, 1986.

OPINION

SINGLETON, Judge.

Kent L. Shoemaker was convicted of burglary in the first degree in violation of AS 11.46.300(a)(1). The facts are not in dispute. Shoemaker boarded the fishing vessel Windrush sometime in late July 1984. He gained entry to the cabin by sawing through the hasp on the door lock. It appears that Shoemaker lived aboard the Windrush from July 20, 1984, until he was arrested on August 17, 1984. Shoemaker falsely claimed to have purchased the vessel....

Burglary in the first degree is defined under AS 11.46.300(a)(1) as follows:

A person commits the crime of burglary in the first degree if the person violates AS 11.46.310 and

(1) the building is a dwelling....

Alaska Statute 11.46.310(a) states:

A person commits the crime of burglary in the second degree if the person enters or remains unlawfully in a building with intent to commit a crime in the building.

The terms “building” and “dwelling” are defined in AS 11.81.900(b):

(3) “building,” in addition to its usual meaning, includes any propelled vehicle [which is defined to include vessels in AS 11.81.900(b)(44)] ... adapted for overnight accommodation of persons or for carrying on business ...

(17) “dwelling” means a building that is designed for use or is used as a person’s permanent or temporary home or place of lodging....

Shoemaker assigns as error the trial court’s denial of his motion to dismiss the indictment and his motion for judgment of acquittal. Both motions were based on the same two arguments. First, Shoemaker argues that the vessel Windrush was neither a “dwelling” nor a “building,” because no one was living in it or planning to live in it at the time he took possession. Shoemaker reasons that the owners of the boat had decided to sell it and had left it in the Ketchikan boat harbor for that purpose. We are satisfied that a jury could properly find beyond any reasonable doubt that the Windrush is a “dwelling.” It was designed to sleep two crew members during the fishing season and was equipped for this purpose. It had a galley, two bunks and an indoor head. In fact, Mike McDonough, the son of the owners, fished with the boat during the 1983 fishing season and lived aboard it from early June until early October of 1983. We note that Shoemaker apparently was living on the boat at the time of his arrest. The fact that the boat was unoccupied at the time Shoemaker took possession is irrelevant. *See State v. McDonald*, 77 Or.App. 267, 712 P.2d 163, 166–67 (1986).

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Shoemaker v. State, 716 P.2d 391 (1986)

Shoemaker next argues that he could not be convicted of burglary since the state proved, at most, that at the time he entered and remained aboard the boat he intended to steal or engage in the unauthorized use of the entire boat. He concedes that an intent to steal items stored in the boat would support a finding of burglary, but contends illegal use of the whole boat would not. We disagree. Our burglary statute is violated if a person unlawfully enters a dwelling with the intent to commit any crime therein. Shoemaker was charged with entering the Windrush with the intent to commit criminal mischief. A person commits the crime of criminal mischief in the third degree if, without lawful authority, he takes the propelled vehicle of another. AS 11.46.484(a)(2). This vessel was a propelled vehicle. AS 11.81.900(b)(44). It is clear that Shoemaker had to illegally enter the cabin of the Windrush in order to be able to illegally take it away. He therefore committed criminal mischief in the boat. We agree with the Oregon Court of Appeals that the legislature could not have intended it to be a less serious offense for a person to enter a vessel intending to steal it and its contents, rather than to enter intending to steal only the contents. *See State v. Spencer*, 24 Or.App. 385, 545 P.2d 611, 612 (1976).

The judgment of the superior court is AFFIRMED.

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**Howard, Jodie 4/6/2026
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Commonwealth v. Harlow, 162 Mass. 481 (1895)

162 Mass. 481
Supreme Court of Massachusetts

COMMONWEALTH of Massachusetts, Appellee,
v.
John Harlow, Appellant.

May 19, 1895.

Opinion

The defendant, John Harlow, seeks reversal of his conviction for common-law burglary, arguing that the Commonwealth failed to establish that the entry occurred in the nighttime. ...

The common law has long asked whether sufficient natural light existed to permit recognition of a person's face. The difficulty, however, lies not in stating that rule but in determining whether the surrounding circumstances demonstrate that the rule has been satisfied. ...

Mrs. Purcell testified that, shortly after sunset, she was awakened by the sound of breaking glass. Looking from a second-story bedroom window, she observed a man crossing an open pasture approximately sixty-five feet from the residence. The individual remained within her view for nearly twenty seconds before disappearing beyond a fence line. She identified the defendant as the person she observed. ...

Upon cross-examination, Mrs. Purcell acknowledged that the defendant had lived on the adjoining farm for more than twenty years. She testified that she first recognized his distinctive gait and full beard and conceded that she could not describe the color of his eyes, the contour of his nose, or other facial features. ...

The defendant contends that the witness's lengthy opportunity to observe necessarily demonstrates that sufficient natural light existed. We cannot agree; the common law does not measure nighttime by a stopwatch.

A prolonged observation, in and of itself, furnishes no evidence of sufficient natural light. While the length of the opportunity to observe is a relevant circumstance, the ultimate question is whether the facial recognition achieved under the particular circumstances tends to indicate that sufficient natural light existed. Here, although Mrs. Purcell observed the intruder for nearly twenty seconds, her recognition rested on his distinctive gait and full beard, characteristics familiar to her from twenty years of acquaintance, rather than an ability to distinguish his facial features in the available natural light. The jury was entitled to conclude, from Mrs. Purcell's testimony, that it was nighttime.

Recognition founded upon acquaintance is not the equivalent of recognition made possible by sufficient natural light. ...

AFFIRMED.

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**Howard, Jodie 4/6/2026
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State v. Ellison, 214 Or. 317, 329 P.2d 103 (1958)

214 Or. 317, 329 P.2d 103
Supreme Court of Oregon

STATE of Oregon, Appellee,
v.
Douglas Ellison, Appellant.

July 1, 1958.

Opinion

The defendant, Douglas Ellison, appeals his conviction for common-law burglary, contending that the evidence was insufficient to establish that the offense occurred during the nighttime. ...

Our prior decisions identify facial recognition as the governing inquiry. This appeal concerns the circumstances by which that inquiry is evaluated. ...

The evidence disclosed that, shortly after sunset, the principal witness encountered the intruder while walking along a residential sidewalk. No streetlights, porch lights, vehicle headlights, or other artificial sources of illumination were present. The two men were separated by no more than twelve feet, and the encounter lasted only two or three seconds before the intruder fled. The witness had never seen the defendant before that evening. ...

Within minutes of the encounter, the witness described the intruder as having light-colored eyes, a narrow face, a dark mustache, and a pronounced scar extending across the left cheek. Those characteristics corresponded to the defendant, whom the witness later identified at trial. ...

The State places particular emphasis upon the brief duration of the encounter. Although duration is a relevant circumstance, it has no direct bearing on the sufficiency of the natural light. Courts must evaluate the totality of the objective viewing circumstances in determining whether the facial recognition achieved reliably indicates that sufficient natural light existed.

Here, the witness observed the intruder from no more than twelve feet away through an unobstructed line of sight. Although the witness had never seen the defendant before and had only two or three seconds in which to observe him, he immediately described the intruder's light-colored eyes, narrow face, dark mustache, and pronounced facial scar. Because no artificial illumination was present, the jury could reasonably infer that the available natural light permitted the witness to distinguish those facial characteristics. Indeed, that the witness distinguished several facial characteristics despite the brief encounter and his lack of prior familiarity strengthens, rather than weakens, the inference that sufficient natural light existed.

The State therefore failed to prove that the entry occurred during the nighttime, an essential element of common-law burglary. The conviction cannot stand.

Reversed.

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People v. Dupree, 98 Mich. 26 (1893)

56 N.W. 1046

98 Mich. 26
Supreme Court of Michigan.

PEOPLE
v.
DUPREE.

Dec. 4, 1893.

Opinion

GRANT, J.

The respondent was convicted of burglary under section 9132. The evidence on the part of the people tended to show that the owner of the dwelling house occupied the front room for a shoe shop, and the rear and overhead part as a dwelling. The shop was upon the ground floor, and had two windows, each about four feet from the ground. These windows had double sash; were without pulley weights; were fastened when raised, and bolted when down, by stops operated by springs. When the windows were closed, the springs threw the bolts into the slots in the cases, so that the window could not be raised without drawing the bolt. One of these windows was opened during the night of October 8th, and three pairs of shoes were stolen. The owner closed the shades on the night of the 6th, and did not notice that the window was raised even an eighth of an inch. On the morning of the 9th, on opening his shop, he found the window raised about 1½ feet.

The respondent had called at the house on October 6th, between noon and 2 P. M., and asked for dinner. He asked permission to step into the shoe shop for the purpose of changing his pantaloons. This request was granted. The window was not broken. If the bolt was in the slot, the window could have been raised from the inside only. On Monday following the burglary, respondent had in his possession, and offered for sale, a pair of shoes alleged to have been taken upon the night of October 8th. On the following Wednesday, he sold a pair of shoes which were identified as one of the three pairs stolen on October 8th. The complaining witness testified that he believed that the window was unfastened and raised on October 6th from the inside, and something placed under the sash so as to keep the bolt from entering the slot. The owner left the shop about the time it was necessary to light the lamps to see, and did not return to it till the next morning. No testimony was introduced on the part of the respondent. His counsel moved the court to discharge the respondent for the reason that the crime was not established against him. This the court refused.

It is contended on behalf of the respondent (1) that no breaking or entering in the nighttime was established; (2) that this shop was not a part of the dwelling house; (3) that if the window was partially raised on October 6th, and was further raised on the night of the 8th, the crime was not established. We think the motion was properly overruled, and the case properly submitted to the jury.

1. It is apparent from the charge of the court that the record does not contain all the evidence bearing upon the question whether the breaking and entering were in the nighttime. The court correctly instructed the jury as to the meaning of the term "nighttime." It does not clearly appear that the complaining witness did not testify as to the time he entered his shop in the morning. It is stated in the people's brief that he rose about break of day, and before sunrise, and found the window open, and the shoes gone. The house was situated in a city. Its surroundings, and the location of the window, were competent and important facts in determining the question. Is it probable, considering the public character of the place, that the breaking and entering were done in the daylight? When a merchant enters his store in a city at the usual hour in the morning, though it be after daylight, and finds that it has been broken open and entered from the front door or window, it is contrary to good sense to say that the crime might have been committed after daylight, and therefore the court must direct an acquittal. Such crimes are not committed in broad daylight, but in the nighttime. The question was one for the jury, and not for the court.

**Howard, Jodie 3/26/2026
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People v. Dupree, 98 Mich. 26 (1893)56 N.W. 1046

2. The building was a dwelling house, and occupied as such. The owner used one room as a shoe shop. This room was connected with the rest of the house, and was properly held by the court to be a part of the dwelling. *Pitcher v. People*, 16 Mich. 142; *Stearns v. Vincent*, 50 Mich. 209, 15 N. W. 86.

3. The theory of the prosecution was that the respondent, when in the shop, either on the 6th or 7th of October, (the court, in its charge, referred to the date as Friday, October 7th,) raised the window just enough to prevent the bolt from entering the slot, and there was evidence to sustain it. It is insisted that even if this was so, and the respondent raised the window on the following night, it did not establish the crime of burglary. We cannot agree with this contention. It is said in *Dennis v. People*, 27 Mich. 151: "If an entry is effected by raising a trapdoor which is kept down merely by its own weight, or by raising a window kept in its place only by pulley weight, instead of its own, or by descending an open chimney, it is admitted to be enough to support the charge of breaking; and I am unable to see any substantial distinction between such cases and one where an entry is effected through a hanging window over a shop door, and which is only designed for light above, and for ventilation, and is down, and kept down by its own weight, and so firmly as to be opened only by the use of some force, and so situated as to make a ladder, or something of the kind, necessary to reach it for the purpose of passing through it." We think the doctrine there enunciated covers the present case. If there had been no bolt, and respondent had raised the window and entered in the nighttime, under all the authorities, he would have been guilty of burglary. Upon what reason can it be said that his removal of the bolt, or his raising the window a fraction of an inch, in the daytime, changes the character of his offense? If the owner had failed to see that the bolts were in place, or if something had been accidentally placed upon the window sill, which was of slight thickness, but sufficient to prevent the bolts from entering the slots, the raising of the window would have been sufficient breaking to support the charge. *Rex v. Ryan*, 7 Car. & P. 854; *State v. Reid*, 20 Iowa, 421; *Lyons v. People*, 68 Ill. 280. How can the act be relieved of criminality by secretly fixing the window in the daytime so that the bolt or lock will not be effective, and thus render the perpetration of the crime more easy and certain? There is no reason in such a rule. In *Lyons v. People*, the door was left unlocked, and the court was requested to instruct the jury that, in order to constitute the crime, it must appear that the door was secured in the ordinary way. The supreme court, in determining the question, said: "We are not aware of any authority which goes to the extent of these instructions. To hold that the carelessness of the owner in securing and guarding his property shall be a justification to the burglar or thief would leave communities very much to the mercy of this class of felons. It would in effect be a premium offered for their depredations, by the removal of the apprehension of punishment. Whether property is guarded or not, it is larceny in the thief who steals it. When a door is closed, it is burglary for any one, with a felonious intent, to open it, and enter the house, in the nighttime, without the owner's consent; and it makes no difference how many bolts and bars might have been used to secure it, but which were neglected." The language of the court was perhaps too broad, in stating that if the window was raised any distance, but was not sufficient to permit the defendant to enter, and he raised it further, it would be breaking, in the meaning of the law; but the entire evidence was to the effect that it was raised so little as not to attract the notice of the occupant. We therefore think that the jury could not have been misled by the language....

Conviction affirmed....

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Howard, Jodie 4/1/2026
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Jones v. State, 537 P.2d 431 (1975)
1975 OK CR 124

537 P.2d 431
Court of Criminal Appeals of Oklahoma.

Michael JONES, Appellant,
v.
The STATE of Oklahoma, Appellee.

No. F—75—197
|
June 23, 1975.

OPINION

BLISS, Judge:

¶ 1 The appellant, Michael Jones, hereinafter referred to as defendant, was charged, tried before a jury in a two-stage proceeding and convicted of the crime of Burglary in the Second Degree After Former Conviction of a Felony in the District Court of Creek County, Oklahoma in case No. CRF—74—16. Punishment was assessed at a term of fifteen (15) years in the state penitentiary. From a judgment and sentence in conformance with the verdict the defendant has perfected his timely appeal.

¶ 2 Briefly stated the evidence adduced at trial is as follows: On June 5, 1974, at about 1:00 A.M., Mr. Carl Oldham, a private citizen residing in Bristow, was returning to his home from work when he glanced at a public housing project near his house and saw three men working very hard to carry what appeared to be shiny garbage cans. Thinking this was unusual, he called the Bristow Police Department.

¶ 3 Officer Mike Newell of the Bristow Police Department was dispatched to investigate and contacted Oldham, who described the direction from which the men came. Driving over to Bob Webb's Grocery Store, he observed that the back light over the loading dock was out and the overhead door was raised about 8 or 10 inches, meat was lying outside the door, the handle of the door was 'cocked over' as if hit by a large force, and a large pile of food lying inside the door.

¶ 4 Newell then entered the building, searched same, placed the door in its original position and 20 minutes later he heard the door being opened and three men, including the defendant, entered the store with a galvanized garbage can. He identified the defendant as one of the men who came through the door. They started picking up the food that was piled on the floor and putting it in the trash container. After observing for a few minutes, Newell stepped out and informed them that they were under arrest. The defendant attempted to escape by running through the store and out the front window, but was immediately apprehended.

¶ 5 Douglas Tuttle, Deputy Sheriff of Creek County, Oklahoma, testified that he and another officer were outside the front of the store when the defendant came out through the front window. The defendant was apprehended after two warning shots.

¶ 6 Robert Webb, owner of the grocery store, testified that he did not give the defendant or anybody else permission to enter or remove articles from his store and that the back door had been pried open.

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Jones v. State, 537 P.2d 431 (1975)

1975 OK CR 124

¶ 7 Following the overruling of a demurrer to the evidence on the grounds that there was insufficient evidence to show the defendant broke into the building, the defendant introduced the testimony of Charles Franklin, one of the two persons apprehended with the defendant at the scene of the crime. Franklin testified that he and the defendant were on their way to visit some friends when a truck stopped and they were told that Bob's Grocery Store was open and there was merchandise that could be taken from there. They proceeded to the store where they found the door open about 2 or 3 feet and gained entry to the store without lifting the door. After they were inside the store, they were apprehended by Officer Newell.

¶ 8 After presenting the testimony of Mr. Franklin, both sides rested, the jury was instructed, closing arguments were had and the jury retired and brought in a verdict of guilty....

¶ 11 Defendant's first proposition in error contends that the verdict was not supported by the evidence since there was no evidence that the defendant broke into the store. With this contention we disagree.

¶ 12 The statute defining burglary in the second degree, 21 O.S. s 1435, reads in pertinent part as follows:
'Every person who Breaks and enters any building . . . in which any property is kept, . . . with intent to steal any property therein or to commit any felony, is guilty of burglary in the second degree.' (Emphasis added)

In the instant case it is necessary to determine whether there was sufficient proof of the element of 'breaking'. It is apparent from the evidence presented by the State that the overhead door to the storage area had been forcibly opened and left up approximately 8 to 10 inches. Although the door was partially open at the time Officer Newell arrived, the opening was not sufficient to allow an intruder's body to pass through into the interior of the building without removing the obstruction. This is obvious from the testimony of Officer Newell since he observed the defendant and two others raise the door and come inside.

¶ 13 This Court has held on numerous occasions that the 'breaking' necessary to constitute the crime of burglary may be by any act of physical force, however slight, by which the obstruction to entering is forcibly removed. See *Stanley v. State*, Okl.Cr., 512 P.2d 829, wherein this Court held that the bending of the top strand of wire on a fence was sufficient forcible removal of an obstruction to constitute the necessary breaking. The partially closed door in the instant case constituted an obstruction to entry and the removal of said obstruction constitutes a breaking sufficient to constitute the crime of burglary. Therefore, there was sufficient, although conflicting, evidence to support the verdict and defendant's first proposition is without merit.

¶ 14 Defense counsel next submits that the trial court erred in admitting evidence of a previous break-in, thus forcing the defendant to stand trial for a crime not charged in the information. However, it appears that the State submitted only evidence of a continuous crime. There was sufficient circumstantial evidence presented to prove that the defendant and his companions had been there before. Three men were seen earlier leaving the general vicinity with a heavy garbage container. Shortly thereafter the defendant and his companions appeared with an empty container and go directly to the remaining pile of food. Mr. Webb's testimony concerning items missing from the store which were not found in the possession of the defendant or his companions was not erroneously admitted since such testimony related to a continuous crime and not to a prior crime for which the defendant was not charged....

The judgment [is] affirmed.

BRETT, P.J., and BUSSEY, J., concur.

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Pack v. State, 819 P.2d 280 (1991)

1991 OK CR 109

819 P.2d 280
Court of Criminal Appeals of Oklahoma.

James Martin PACK, Appellant,
v.
The STATE of Oklahoma, Appellee.

No. F-89-1026
|
Oct. 9, 1991.

OPINION

PARKS, Judge:

¶ 1 James Martin Pack, appellant, was tried by jury in Tulsa County District Court and convicted of ... First Degree Burglary....

¶ 2 The facts of appellant's crimes are set forth below....

¶ 4 [T]he State established that during the early evening hours of October 3, 1988, appellant went to the north Tulsa home of seventy-nine (79) year old J. T. Banks, informed Banks that he had done some work for him in the past, and asked the elderly man if he had any work recommendations. Because Banks had failing vision and hearing, he opened his storm door one (1) to two (2) feet in an attempt to see and hear appellant more clearly. Thereupon, appellant pushed his way into the house, tied Mr. Banks' hands and feet, and placed a blanket over Bank's head. Appellant then took Banks' billfold, which contained forty-six dollars (\$46.00), approximately twenty-five dollars (\$25.00) in change, and some coin purses containing old coins.

¶ 5 Although Mr. Banks could not identify his attacker, circumstantial evidence established appellant as the perpetrator. On October 4, 1988, police officers arrested appellant and found two coin purses in his possession. Pursuant to a search of appellant's home, officers also discovered a ledger notebook similar to one left at Mr. Banks' house. Appellant acknowledged ownership of both of the notebooks, but claimed that he lost one of them several months earlier. Appellant also claimed that he obtained the coin purses in a drug deal on the day of his arrest. Mr. Banks testified that appellant had previously performed yard work for him....

¶ 9 [A]ppellant contends that the State presented insufficient evidence to sustain the burglary charge.... Specifically, appellant maintains that the prosecution failed to prove that he forcibly broke into victim J. T. Banks' home. We disagree.

¶ 10 Title 21 O.S.1981, § 1431(1), provides that the crime of First Degree Burglary is committed by:

Every person who breaks and enters the dwelling house of another, in which there is at the time some human being, with intent to commit some crime therein ... [b]y forcibly bursting or breaking the wall, or an outer door....
The word "breaking" has been defined as "any act of physical force, however slight, by which obstructions to entering are removed." *Brecheen v. State*, 732 P.2d 889, 893 (Okla.Cr.1987). *See also Oklahoma Uniform Jury Instructions—Criminal* (OUJI-CR) 516.

¶ 11 In the present case, Mr. Banks testified that his front door was open one (1) to two (2) feet when appellant pushed the door further open to gain entry. (Tr.91). Under the definitions set forth above, we find that any rational trier of fact could have found beyond a reasonable doubt that appellant forcibly broke into Mr. Banks' home. *See Sanchez v. State*, 665 P.2d

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1218 (Okl.Cr.1983)....

¶ 22 [T]he Judgment ... is AFFIRMED.

LANE, P.J., and BRETT, and JOHNSON, JJ., concur.

LUMPKIN, V.P.J., concurs in result.

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Walker v. State, 63 Ala. 49 (1879)

35 Am.Rep. 1

63 Ala. 49
Supreme Court of Alabama.

Walker
v.
The State.

December Term, 1879.

Opinion

BRICKELL, C. J.

The statute (Code of 1876, § 4343) provides, that “any person who, either in the night or day time, with intent to steal, or to commit a felony, breaks into and enters a dwelling-house, or any building, structure or inclosure within the curtilage of a dwelling-house, though not forming a part thereof, or into any shop, store, warehouse, or other building, structure or inclosure in which any goods, merchandise, or other valuable thing is kept for use, sale, or deposit, *provided* such structure, other than a shop, store, ware-house or building, is specially constructed or made to keep such goods, merchandise, or other valuable thing, is guilty of burglary,” etc.

The defendant was indicted for breaking into and entering “a corn-crib of Noadiah Woodruff and Robert R. Peeples, a building in which corn, a thing of value, was at the time kept for use, sale, or deposit, with intent to steal,” & c. He was convicted; and the case is now presented on exceptions taken to instructions given, and the refusal of instructions requested, as to what facts will constitute a breaking into and entry, material constituents of the offense charged in the indictment. The facts, on which the instructions were founded, are: that in the crib was a quantity of shelled corn, piled on the floor; in April, or May, 1878, the crib had been broken into, and corn taken therefrom, without the consent of the owners, who had the crib watched; and thereafter the defendant was caught under it, and, on coming out, voluntarily confessed that, about three weeks before, he had taken a large auger, and, going under the crib, had bored a hole through the floor, from which the corn, being shelled, ran into a sack he held under it; that he then got about three pecks of corn, and with a cob closed the hole. On these facts, the City Court was of opinion, and so instructed the jury, that there was such a breaking and entry of the crib, as would constitute the offense, and refused instructions requested asserting the converse of the proposition....

The boring the hole through the floor of the crib, was a sufficient breaking; but with it there must have been an entry. Proof of a breaking, though it may be with an intent to steal, or the intent to commit a felony, is proof of one only of the facts making up the offense, and is as insufficient as proof of an entry through an open door, without breaking. If the hand, or any part of the body, is intruded within the house, the entry is complete. The entry may also be completed by the intrusion of a tool, or instrument, within the house, though no part of the body be introduced. Thus, “if A. breaks the house of B. in the night time, with intent to steal goods, and breaks the window, and puts in his hand, or puts in a hook, or other engine, to reach out goods; or puts a pistol in at the window, with an intent to kill, though his hand be not within the window, this is burglary.”--1 Hale, 555. When no part of the body is introduced--when the only entry is of a tool, or instrument, introduced by the force and agency of the party accused, the inquiry is, whether the tool or instrument was employed solely for the purpose of *breaking*, and thereby effecting an *entry*; or whether it was employed not only to *break and enter*, but also to aid in the consummation of the criminal intent, and its capacity to aid in such consummation. Until there is a *breaking* and *entry*, the offense is not consummated. The offense rests largely in intention; and though there may be sufficient evidence of an attempt to commit it, which, of itself, is a crime, the attempt may be abandoned--of it there may be repentance, before the consummation of the offense intended. The *breaking* may be at one time, and the *entry* at another. The *breaking* may be complete, and yet an *entry* never effected. From whatever cause an *entry* is not effected, burglary has not been committed. When one instrument is employed to *break*, and is without capacity to aid otherwise than by opening a way of *entry*, and

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35 Am.Rep. 1

another instrument must be used, or the instrument used in the breaking must be used in some other way or manner to consummate the criminal intent, the intrusion of the instrument is not, of itself, an *entry*. But when, as in this case, the instrument is employed, not only to *break*, but to effect the only *entry* contemplated, and necessary to the consummation of the criminal intent; when it is intruded within the house, *breaking* it, effecting an *entry*, enabling the person introducing it to consummate his intent, the offense is complete. The instrument was employed, not only for the purpose of *breaking* the house, but to effect the larceny intended. When it was intruded into the crib, the burglar acquired dominion over the corn intended to be stolen. Such dominion did not require any other act on his part. When the auger was withdrawn from the aperture made with it, the corn ran into the sack he used in its asportation. There was a *breaking* and *entry*, enabling him to effect his criminal intent, without the use of any other means, and this satisfies the requirements of the law.

Let the judgment be affirmed.

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Hebron v. State, 92 Md.App. 508 (1992)

608 A.2d 1291

92 Md.App. 508
Court of Special Appeals of Maryland.

Wayne Sylvester HEBRON

v.

STATE of Maryland.

No. 1630, Sept. Term, 1991

|
July 8, 1992.

Opinion

WILNER, Chief Judge.

A jury in the Circuit Court for Montgomery County convicted appellant of breaking and entering a dwelling house, attempted breaking and entering a dwelling house, and malicious destruction of property.

These convictions stemmed from an incident that occurred on May 21, 1991 at the home of Dr. Hilary Weiner, located in the Tanglewood development. When she left in the morning to go to work, Dr. Weiner secured the house, presumably meaning that she closed and locked the front door. When she returned later in the afternoon, she found the door frame “splintered” and “broken apart.” As a result, “you could just push the door open and could not secure the door afterwards.” Evidence from a neighbor established that, about 11:00 that morning, appellant, driving a gray car with what turned out to be stolen plates, parked near Dr. Weiner’s home and proceeded to walk between two buildings in the direction of the home. The neighbor lost sight of him but shortly heard “a loud, really loud, bang noise. Not a pop bang, but a bash bang.” About 20 seconds later, she saw appellant emerge from between the two buildings, get into his car, and drive away.

Appellant makes three complaints in this appeal: ... that the evidence was legally insufficient to sustain his conviction for breaking and entering,

Sufficiency of Evidence

Appellant’s argument as to evidentiary sufficiency goes only to the conviction for breaking and entering and indeed only to the question of whether the State adequately proved an entry into Dr. Weiner’s home. He does not contest that the evidence sufficed to show a breaking.

It is true, as he posits, that no one saw him enter Dr. Weiner’s home; nor was anything taken from the house. The only evidence indicating an entry came from the condition of the door frame and the fact that, when she returned home, Dr. Weiner found her cats “spooked.”

Although there are many cases in which the Maryland courts have discussed and defined what constitutes a “breaking” for purpose of our various burglary and trespass statutes, we seem not yet to have addressed the requisites of an entry. The law on that elsewhere, stemming from the English common law, is well established, however. Wharton states the law this way:

“There is an entry when any part of the defendant’s person passes the line of the threshold.

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Hebron v. State, 92 Md.App. 508 (1992)

608 A.2d 1291

Thus, there is an entry when the defendant, after opening a closed door, steps across the threshold; when, after breaking the glass of a door or window, he reaches inside to unlock the door or window or to steal property; when, in the course of breaking the glass of a door or window, his finger, hand, or foot happens to pass through the opening; *or when, in the course of pushing open a closed door or raising a closed window, his finger or hand happens to pass the line of the threshold.*”

(Emphasis added). 3 *Wharton’s Criminal Law*, 14th Ed., § 332. See also LaFave and Scott, *Criminal Law*, p. 710; R. Perkins, *Criminal Law*, pp. 155–56; Clark and Marshall, *A Treatise on the Law of Crimes*, 7th ed., § 13.04. We see no reason not to adopt that view.

Apart from the splintering of the door frame, Dr. Weiner stated that she observed splintered wood on a mat inside the house. Officer Hall also noticed splinters or chips on the inside floor. That evidence, coupled with the loud bang heard by the neighbor and the fact that the frame was so damaged as to make it impossible to close and latch the door, could lead a rational trier of fact reasonably to find that appellant used his body to batter the door with such force as to defeat the lock and open the door. From that, the trier of fact could further reasonably infer that, with the application of that kind of body pressure to the door, some part of appellant’s body must necessarily have crossed the threshold when the door opened. We therefore conclude that the evidence was sufficient to sustain the charge....

JUDGMENTS AFFIRMED....

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People v. Gauze, 15 Cal.3d 709 (1975)

542 P.2d 1365, 125 Cal.Rptr. 773

15 Cal.3d 709
Supreme Court of California.
In Bank.

The PEOPLE, Plaintiff and Respondent,
v.
James Matthew GAUZE, Defendant and Appellant.

Cr. 18482.
|
Dec. 12, 1975.

Opinion

MOSK, Justice.

Can a person burglarize his own home? That is the quandary which emerges in the case of James Matthew Gauze, who appeals from a judgment of conviction of assault with a deadly weapon (Pen.Code, s 245, subd. (a)) and burglary (Pen.Code, s 459).

Defendant shared an apartment with Richard Miller and a third person and thus had the right to enter the premises at all times. While visiting a friend one afternoon, defendant and Miller engaged in a furious quarrel. Defendant directed Miller to 'Get your gun because I am going to get mine.' While Miller went to their mutual home, defendant borrowed a shotgun from a neighbor. He returned to his apartment, walked into the living room, pointed the gun at Miller and fired, hitting him in the side and arm. Defendant was convicted of assault with a deadly weapon and burglary; the latter charge was predicated on his entry into his own apartment with the intent to commit the assault.

Common law burglary was generally defined as 'the breaking and entering of the dwelling Of another in the nighttime with intent to commit a felony.' (Italics added.) (Perkins on Criminal Law (2d ed. 1969) p. 192.) The present burglary statute, Penal Code section 459, provides in relevant part that 'Every person who enters Any house, room, apartment with intent to commit grand or petit larceny or any felony is guilty of burglary.' (Italics added.)

Facially the statute is susceptible of two rational interpretations. On the one hand, it could be argued that the Legislature deliberately revoked the common law rule that burglary requires entry into the building of another.¹ On the other hand, the Legislature may have impliedly incorporated the common law requirement by failing to enumerate one's own home as a possible object of burglary. (Comment, Burglary: Punishment Without Justification 1970 Ill.L.Rev. 391, 397.) No cases directly on point have been found. Therefore, in determining which statutory interpretation should be adopted it is necessary to examine the purposes underlying common law burglary and how they may have been affected by the enactment of the Penal Code.

Common law burglary was essentially an offense 'against habitation and occupancy.' (Perkins, Op. cit. supra, p. 192.) By proscribing felonious nighttime entry into a dwelling house, the common law clearly sought to protect the right to peacefully enjoy one's own home free of invasion. In the law of burglary, in short, a person's home was truly his castle. (2 Blackstone, Commentaries (Jones ed. 1916) s 258, p. 2430.) It was clear under common law that one could not be convicted of burglary for entering his Own home with felonious intent. This rule applied not only to sole owners of homes, but also to joint occupants. (Clarke v. Commonwealth (1874) 66 Va. 908; Perkins, Op. cit. supra, p. 206.) The important factor was occupancy, rather than ownership.

California codified the law of burglary in 1850. (Stats.1850, ch. 99, s 58, p. 235.) That statute and subsequent revisions and

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People v. Gauze, 15 Cal.3d 709 (1975)

542 P.2d 1365, 125 Cal.Rptr. 773

amendments preserved the spirit of the common law, while making two major changes. First, the statute greatly expanded the type of buildings protected by burglary sanctions. Not only is a person's home his castle under the statute, but so, *inter alia*, are his shop, tent, airplane, and outhouse. (See fn. 1, Ante.) This evolution, combined with elimination of the requirement that the crime be committed at night, signifies that the law is no longer limited to safeguarding occupancy rights. However, by carefully delineating the type of structures encompassed under section 459, the Legislature has preserved the concept that burglary law is designed to protect a possessory right in property, rather than broadly to preserve any place from all crime.

The second major change effected by codification of the burglary law was the elimination of the requirement of a 'breaking': under the statute, every person who *enters* with felonious intent is a burglar. This means, at a minimum, that it no longer matters whether a person entering a house with larcenous or felonious intent does so through a closed door, an open door or a window.² The entry with the requisite intent constitutes the burglary.

The elimination of the breaking requirement was further interpreted in *People v. Barry* (1892) 94 Cal. 481, 29 P. 1026, to mean that trespassory entry was no longer a necessary element of burglary. In *Barry*, this court held a person could be convicted of burglary of a store even though he entered during regular business hours. A long line of cases has followed the *Barry* holding. (See, e.g., *People v. Deptula* (1962) 58 Cal.2d 225, 228, 23 Cal.Rptr. 366, 373 P.2d 430; *People v. Brittain* (1904) 142 Cal. 8, 75 P.2d 314; *People v. Edwards* (1972) 22 Cal.App.3d 598, 602, 99 Cal.Rptr. 516; *People v. Garrow* (1955) 130 Cal.App.2d 75, 83, 278 P.2d 475.)

Barry and its progeny should not be read, however, to hold that a defendant's right to enter the premises is irrelevant. Indeed, the court in *Barry*, by negative implication, substantiated the importance of determining the right of an accused to enter premises. When the defendant thief in *Barry* argued he had a right to be in the store, the court could have replied that his right to enter the store was immaterial. Instead the court declared, 'To this reasoning, we can only say a party who enters with the intention to commit a felony enters without an invitation. He is not one of the public invited, nor is he entitled, to enter. Such a party could be refused admission at the threshold, or ejected from the premises after the entry was accomplished.' (Id., 94 Cal. at p. 483, 29 P. at p. 1027.) Thus, the underlying principle of the *Barry* case is that a person has an implied invitation to enter a store during business hours for legal purposes only. The cases have preserved the common law principle that in order for burglary to occur, 'The entry must be Without consent. If the possessor actually invites the defendant, or actively assists in the entrance, e.g., by opening a door, there is no burglary.' (1 Witkin, Cal. Crimes (1963) Crimes Against Property, s 457, p. 420.) (Italics in original.)

Thus, section 459, while substantially changing common law burglary, has retained two important aspects of that crime. A burglary remains an entry which invades a possessory right in a building. And it still must be committed by a person who has no right to be in the building.

Applying the foregoing reasoning, we conclude that defendant cannot be guilty of burglarizing his own home. His entry into the apartment, even for a felonious purpose, invaded no possessory right of habitation; only the entry of an intruder could have done so. More importantly defendant had an absolute right to enter the apartment. This right, unlike that of the store thief in *Barry*, did not derive from an implied invitation to the public to enter for legal purposes. It was a personal right that could not be conditioned on the consent of defendant's roommates. Defendant could not be 'refused admission at the threshold' of his apartment, or be 'ejected from the premises after the entry was accomplished.' (*People v. Barry* (1892) supra, 94 Cal. 481, 483, 29 P. 1026, 1027.) He could not, accordingly, commit a burglary in his own home....

To hold otherwise could lead to potentially absurd results. If a person can be convicted for burglarizing his own home, he could violate section 459 by calmly entering his house with intent to forge a check. A narcotics addict could be convicted of burglary for walking into his home with intent to administer a dose of heroin to himself. Since a burglary is committed upon entry, both could be convicted even if they changed their minds and did not commit the intended crimes.

In positing such hypotheticals, we indulge in no idle academic exercise. The differing consequences are significant, for the punishment for burglary is severe. First degree burglary is punishable by imprisonment for five years to life, while a second degree burglar is subject to imprisonment in the county jail for a one-year maximum or in state prison for one to fifteen years.

**Howard, Jodie 3/23/2026
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People v. Gauze, 15 Cal.3d 709 (1975)

542 P.2d 1365, 125 Cal.Rptr. 773

(Pen.Code, s 461.) In contrast, the punishment for assault with a deadly weapon, the underlying crime committed in this case, is less severe: imprisonment in state prison for six months to life or in county jail for a maximum of one year, or a fine. (Pen.Code, s 245, subd. (a).)

For the foregoing reasons, we conclude defendant cannot be guilty of burglarizing his own home, and the judgment of conviction for burglary must therefore be reversed....

Footnotes

- ¹ The term 'building' is used throughout this opinion for literary convenience; section 459 actually encompasses entry into a variety of structures, not all of them buildings.
- ² At common law, entry through a closed door or window, whether locked or unlocked, was a breaking, but further opening a partially opened window was not. (Note, A Rationale of the Law of Burglary (1951) 51 Colum.L.Rev. 1009, 1012—1013.)

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Stowell v. People, 104 Colo. 255 (1939)

90 P.2d 520

104 Colo. 255
Supreme Court of Colorado.

STOWELL
v.
PEOPLE.

No. 14557.
|
May 1, 1939.

Opinion

BURKE, Justice.

[D]efendant, was convicted of burglary and sentenced to a term of three to seven years in the penitentiary....

Defendant was a freight conductor employed by the Rock Island railway. As such he was furnished with a 'switch key' which he used in his work. It opened all switches and all depot and freight room doors on his division. There were no regulations governing its use. By means of it he entered the company's freight warehouse at Genoa and had taken therefrom two parcels of the value of \$10, when he was arrested. The question here presented was raised by an instruction tendered and refused and by motion for a directed verdict at the close of all the evidence.

Had the switch key not been furnished defendant by the company, nor any authority given him under the terms of his employment to enter the building at the time and place in question, the evidence would have supported a conviction of burglary under the statute. For present purposes we assume, without deciding, that it would also have supported a conviction under this information. From the record it appears that defendant had a right to enter this warehouse at the time and in the manner he did, provided his intent in so doing was lawful. Hence this offense, if burglary, is raised to that grade solely by his unlawful intent. But intent alone is not always sufficient for that purpose. There is 'no burglary, if the person entering has a right so to do, although he may intend to commit, and may actually commit, a felony, and although he may enter in such a way that there would be a breaking if he had no right to enter.' 9 C.J. sec. 20, p. 1016. Considering the history of the crime of burglary, and its evolution, this rule appears reasonable and necessary. The common law crime was an offense against habitation. Its purpose was to give security to the home when it was presumably least protected. Essential elements thereof were an actual *breaking*, in the *night time*, with intent to commit a *felony*. It has been extended by statute in most states to entry in any way, into any kind of building, at any time, for any unlawful purpose. Under the rule of strict construction of statutes in derogation of the common law courts must necessarily be careful not to extend such acts beyond the clear intent of the Legislature. For instance, among the buildings enumerated in our statute are 'schoolhouses'. Hence, but for the rule above stated, a school teacher, using the key furnished her by the district to re-open the schoolhouse door immediately after locking it in the evening, for the purpose of taking (but not finding) a pencil belonging to one of her pupils, could be sent to the penitentiary....

The judgment is accordingly reversed.

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**Howard, Jodie 3/24/2026
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Vazquez v. State, 350 So.2d 1094 (1977)

350 So.2d 1094
District Court of Appeal of Florida, Third District.

Francisco VAZQUEZ, Appellant,
v.
The STATE of Florida, Appellee.

No. 76-714.
|
Sept. 27, 1977.
|
Rehearing Denied Nov. 8, 1977.

Opinion

HUBBART, Judge.

This case is a criminal prosecution for burglary and battery. The defendant was convicted as charged and appeals. The only substantial issue involved in this appeal is whether it is a burglary for a husband who is physically separated from his wife to enter upon premises possessed by his wife without the wife's consent with intent to commit an offense therein....

[O]n December 7, 1975, in the early morning hours, the defendant, Francisco Vazquez, went to an apartment in Miami where his wife, Emma Vazquez, resided. The defendant had been physically separated from his wife for a year without either party having obtained a marriage dissolution, legal separation or restraining order. He formerly resided with his wife at this apartment prior to their physical separation. All the bills for the apartment were still made out in the defendant's name although his wife had always paid for them. The record reveals that the parties subsequently obtained a dissolution of their marriage by the time of the trial of this cause.

On the night in question, the defendant knocked on the apartment door and demanded that his wife let him in. His wife made no reply, but fearing possible violence called the police and several neighbors. The defendant eventually broke the apartment door down, entered the apartment and physically struck his wife in the face with his fists causing certain injuries. Several neighbors came to the wife's rescue and restrained the defendant from any further attack on the wife....

The defendant...contends that the evidence is insufficient as a matter of law to sustain the burglary conviction. He argues that his motion for judgment of acquittal as to the burglary charge should have been granted at the close of the state's case. We agree.

Section 810.02, Florida Statutes (1975), the statute which the defendant was convicted of violating, provides in a relevant part as follows:

“810.02 Burglary

(1) “Burglary” means entering or remaining in a structure or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain.

(2) Burglary is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment or as provided in s 775.082, s 775.083, or s 775.084, if, in the course of committing the offense, the offender:

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(a) Makes an assault upon any person.

(b) Is armed, or arms himself within such structure, with explosives or a dangerous weapon.”

The crime of burglary under this statute is the unconsensual entering or remaining in a structure or conveyance of another with the intent to commit an offense therein. The purpose of the statute is to punish an invasion of the possessory property rights of another in structures and conveyances. *Presley v. State*, 61 Fla. 46, 48, 54 So. 367, 368 (1911); *Holzapfel v. State*, 120 So.2d 195, 197 (Fla.3d DCA 1960). There can be no burglary under the statute, however, where (1) the premises are open to the public at the time of the alleged entering or remaining, or (2) the defendant is licensed, invited or otherwise has a legal right to be on the premises at the time of the alleged entering or remaining, or (3) the defendant had no intent at the time of the entering or remaining to commit an offense on the premises. *Findley v. State*, 128 Fla. 341, 174 So. 724 (1937); *Simpson v. State*, 81 Fla. 292, 87 So. 920 (1921); *Balletti v. State*, 261 So.2d 510 (Fla.3d DCA 1972).

In the instant case, the wife had a possessory right in the apartment which the defendant entered without the wife’s consent with intent to physically abuse the wife. Ordinarily, this would constitute a burglary if the parties had been unmarried. But the parties were married and this fact makes a crucial difference because the defendant for purposes of the burglary statute had a legal right to be on the premises with his wife at the time of the entry.

One of the essential characteristics of the marriage relationship is consortium. Consortium means much more than sexual relation and means, also, affection, solace, comfort, companionship, conjugal life, fellowship, society and assistance so necessary to a successful marriage. *Gates v. Foley*, 247 So.2d 40, 43 (Fla.1971). Consortium necessarily implies that each spouse has a legal right to be with the other spouse which relationship neither one can unilaterally terminate. *Kennedy v. Kennedy*, 101 Fla. 239, 244-45, 134 So. 201, 203 (1931).

In the instant case, the defendant and his wife were married at the time of the entry into the subject apartment. No final decree dissolving the marriage and no legal separation agreement, restraining order or court decree limiting or ending consortium rights had been entered. The defendant, therefore, had a legal right to be with his wife on the subject premises at the time of entry which must preclude the application of the burglary statute. He did not, of course, have a legal right to physically abuse her and for his attack upon her he was properly convicted of battery.

Domestic disputes such as that reflected by this record present persistent and perplexing problems for the police and the courts. Traditionally, the criminal law has intervened in such disputes at the point of threatened or actual violence against either spouse, or when one spouse steals the separate property of the other spouse. *State v. Herndon*, 158 Fla. 115, 27 So.2d 833 (1946); *Grantz v. State*, 268 So.2d 572 (Fla.4th DCA 1972). See also *Bullard v. Bullard*, 195 So.2d 876 (Fla.2d DCA 1967). No prior case, however, has ever applied our burglary statute or any of its predecessor statutes to a domestic dispute between husband and wife where one spouse forcibly enters premises possessed by the other spouse without the latter’s consent. Moreover, our independent research indicates that no court in any other jurisdiction has so applied its burglary statutes. Such disputes in which one spouse bars the other spouse from certain premises occupied by one or both spouses have been treated as purely civil disputes which can only be resolved under the marriage dissolution and domestic relations laws, not the criminal law.

We conceive this well-settled part of our law to fully comport with the legislative purpose of the burglary statute. The statute is designed to protect people in the quiet enjoyment of their possessory property rights in structures and conveyances against criminal invasions by outsiders, not entries by persons occupying a marital or immediate familial relationship with the legal possessor. We cannot conceive that the legislature intended to apply the burglary statute with its harsh criminal penalties to domestic disputes within the immediate family unit over the right to be on certain premises. Such disputes have been and should continue to be treated as purely civil matters to which the burglary statute is inapplicable. We see no valid reason for departing from this sound and well-established precedent.

The defendant’s conviction and sentence for battery is hereby affirmed. The defendant’s conviction and sentence for burglary

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is hereby reversed and the cause remanded to the trial court with directions to discharge the defendant on the burglary charge only.

Affirmed in part and reversed in part.

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People v. Johnson, 906 P.2d 122 (1995)
64 USLW 2383

906 P.2d 122
Supreme Court of Colorado,
En Banc.

The PEOPLE of the State of Colorado, Petitioner,
v.
Richard Eric JOHNSON, Respondent.

No. 95SC213.
|
Nov. 14, 1995.

Opinion

Chief Justice VOLLACK delivered the Opinion of the Court.

[W]e granted certiorari in *People v. Johnson*, No. 94CR99 (Dist.Ct. Dec. 12, 1994), a case pending in the court of appeals. The issue before us is whether, absent a restraining order, an estranged spouse is privileged or licensed to enter the separate residence of the other spouse so as to create a defense to charges of second degree burglary

The trial court granted the defendant's motion to dismiss the charges of burglary ..., noting that the defendant and the victim were still married at the time of the alleged criminal conduct and that there were no restraining orders which prohibited the defendant from being on the premises. The trial court concluded that the defendant's conduct was not an unlawful entry into the victim's apartment.

We reverse the trial court's order and remand with directions to reinstate the charges of burglary and criminal trespass against the defendant. We hold that, even in the absence of a restraining order, an estranged spouse is not privileged or licensed to enter the separate residence of the other spouse so as to create a defense to charges of second degree burglary

The defendant, Richard Eric Johnson (Mr. Johnson), and the victim, Tina Johnson (Ms. Johnson), were married on March 7, 1992. On July 21, 1993, Ms. Johnson leased a separate residence after her separation from Mr. Johnson. Mr. Johnson never shared the leased apartment with Ms. Johnson and was not a party to the lease. Ms. Johnson filed a petition for dissolution of marriage on November 12, 1993.... Ms. Johnson did not obtain a restraining order to exclude Mr. Johnson from her new residence.

On March 18, 1994, Mr. Johnson entered Ms. Johnson's home on two occasions. On the first occasion, Mr. Johnson went to Ms. Johnson's residence and, shouting obscenities, entered into an altercation with Ms. Johnson's friend who was on the premises. Later that same day, Mr. Johnson returned to Ms. Johnson's residence and kicked in the door of her apartment. At the time of these incidents, Mr. Johnson and Ms. Johnson were separated but still legally married. On March 29, 1994, final orders were entered in their dissolution of marriage action. At no time in the dissolution action did Mr. Johnson claim any interest in Ms. Johnson's separate leasehold.

Mr. Johnson was...charged with three counts of second degree burglary of a dwelling, pursuant to section 18-4-203, 8B C.R.S. (1986).... Each of the...charges included an allegation that Mr. Johnson unlawfully, feloniously, and knowingly broke an entrance into, and entered and remained unlawfully in, the dwelling of Ms. Johnson.

Mr. Johnson filed a motion to dismiss on all counts. The trial court granted the motion to dismiss, finding that Mr. Johnson could not have committed a burglary ... because his entry into Ms. Johnson's residence was not unlawful while the two were

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still married. The prosecution filed a motion for reconsideration, which the trial court denied. The prosecution then filed a notice of appeal to the court of appeals and a petition to this court for certiorari pursuant to C.A.R. 50.¹

The defendant argues that he was licensed to enter Ms. Johnson's residence because the two were still married at the time of the incident at issue. The People counter that, even if Mr. Johnson had a right to division of Ms. Johnson's lease as marital property, he was still unlicensed to enter Ms. Johnson's separate residence because he had no possessory rights to the property. We agree with the People that Mr. Johnson was not licensed or privileged to enter Ms. Johnson's residence absent a possessory right to the apartment.

Pursuant to section 18-4-203, 8B C.R.S. (1986), ... the crime[] of second degree burglary[,] requires the prosecution to prove that the defendant's entry was "unlawful." Section 18-4-201, 8B C.R.S. (1986), provides:

A person "unlawfully enters or remains" in or upon premises when he is not licensed, invited, or otherwise privileged to do so.

Because it is undisputed that the defendant was not invited onto the premises, we must determine whether he was licensed or privileged to enter the separate residence of his estranged wife.

Mr. Johnson claims that, absent a restraining order, he was licensed or privileged to enter his estranged wife's separate residence because the residence was marital property. Section 14-10-113(3), 6B C.R.S. (1987), which provides for disposition of property in a marriage dissolution, states in pertinent part:

All property acquired by either spouse subsequent to the marriage and prior to the decree of legal separation is presumed to be marital property, regardless of whether title is held individually or by the spouses in some form of co[-]ownership....

According to this statute, the lease obtained by Ms. Johnson is arguably marital property because she acquired it subsequent to the marriage but prior to a legal separation. Assuming that the lease is marital property, the defendant may have had some right to assert an economic interest in the lease when the Johnsons' property was divided in their dissolution of marriage action.

The fact that the defendant may arguably have had some divided ownership interest in Ms. Johnson's lease does not mean that he could not be charged with ... burglary on that property. In Colorado, first degree criminal trespass is an unlawful entry into the dwelling of another. *See* § 18-4-502. A dwelling is defined as "a building which is used, intended to be used, or usually used by a person for habitation." § 18-1-901, 8B C.R.S. (1986). Hence, trespass is an invasion of one's interest in habitation or possession of a building, rather than an invasion of one's ownership interest in a building.

Similarly, in determining whether the crime of burglary has been committed, the focus is upon the possessory rights of the parties, and not their ownership rights. *People v. Barefield*, 804 P.2d 1342, 1345 (Colo.App.1990), *cert. denied*, No. 90SC696 (Colo. Jan. 28, 1991); *see also Sloan v. People*, 65 Colo. 456, 176 P. 481 (1918); *Howard v. People*, 62 Colo. 131, 160 P. 1060 (1916). Consequently, Mr. Johnson's purported ownership interest in Ms. Johnson's lease does not equate with a possessory interest that shields him from charges of trespass and burglary.

The issue of whether the entry of an estranged spouse upon the property of the other spouse constitutes an "unlawful entry" supporting charges of ... burglary is an issue of first impression in Colorado. The majority of other jurisdictions which have addressed this issue have found that the uninvited entry of an estranged spouse into the residence of the other spouse constitutes an "unlawful entry." *See, e.g., Cladd v. State*, 398 So.2d 442 (Fla.1981) (finding that a husband can be guilty of burglary if he makes a nonconsensual entry into premises which are in the sole possession of his wife)....

The facts in *Cladd*, 398 So.2d at 443, are particularly similar to those in the instant case. The defendant Cladd and his wife had been separated for approximately six months, although there was no formal separation agreement or restraining order. Cladd's wife had obtained a separate apartment, to which Cladd had no possessory interest and in which he had never lived. Cladd broke through the locked door of his wife's apartment and was subsequently charged with burglary. The *Cladd* court

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rejected the defendant's contention that the marriage relationship precluded the state from establishing a nonconsensual entry requisite to the crime of burglary. *Id.* at 444.

A majority of courts agree that the mere existence of the marriage relationship does not put a spouse's separate property beyond the protection of the law and subject to the depredation of the other spouse. *Dively*, 431 N.E.2d at 543. The law of burglary was designed to protect the dweller and hence the controlling question is occupancy rather than ownership. *Schneider*, 673 P.2d at 203. The fact that the property burglarized was in community ownership does not by law preclude a burglary conviction of one of the owners. *Id.* at 204....

In the instant case, there is no evidence that Mr. Johnson had any right to possession of the leased property. Ms. Johnson obtained the apartment in her own name and then filed for a divorce. Mr. Johnson never lived at the apartment and did not sign the lease as a renter or occupant of the property. Ms. Johnson clearly did not want her estranged husband to have any right of entry into her apartment. At best, Mr. Johnson arguably had a right to division of Ms. Johnson's lease as marital property pursuant to section 14-10-113, 6B C.R.S. (1987). This does not, however, give Mr. Johnson a possessory right or a license or privilege to make an unauthorized entry into Ms. Johnson's separate residence. Additionally, Mr. Johnson used violence when he kicked down the door of his estranged wife's apartment. This method of entry is inconsistent with any kind of permissive entry. *Schneider*, 673 P.2d at 204.

We hold that Mr. Johnson's uninvited entry into Ms. Johnson's separate residence was unlawful, even in the absence of a restraining order to that effect. We therefore reverse the trial court's order dismissing the charges of burglary ... and remand with directions to reinstate these charges.

Footnotes

- ¹ C.A.R. 50 provides that "[a] writ of certiorari from the Supreme Court to review a case newly filed or pending in the court of appeals, before judgment is given in said court, may be granted."

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State v. Schneider, 36 Wash.App. 237 (1983)

673 P.2d 200

36 Wash.App. 237
Court of Appeals of Washington,
Division 1.

STATE of Washington, Respondent,
v.
Nina Dean SCHNEIDER, Appellant.

No. 11340-2-I.
|
Dec. 14, 1983.

Opinion

DURHAM, Acting Chief Judge.

Nina Dean Schneider appeals her convictions of ... burglary in the second degree and conspiracy to commit burglary in the second degree. She claims that she was legally incapable of committing burglary because she owned a community interest in the house in question.... We affirm.

In May of 1980, Nina Schneider and her husband Larry Schneider separated. Larry Schneider moved into a trailer behind a rental house owned by the Schneiders. The house was located at Bush Point, on Whidbey Island, several miles away from Mrs. Schneider's residence. Mr. Schneider stayed in the trailer until October of 1980, when he had a heart attack. He then moved into the rental house and the tenant, Janna Rome, nursed Mr. Schneider back to health. In January of 1981, Mrs. Schneider filed a petition for dissolution of the marriage.

In February of 1981, Mr. Schneider left for a vacation in California. The tenant, Ms. Rome, was apparently away at this time also. On February 28, a neighbor who had been asked to watch the house noticed that the door was ajar and the jam had been split. The neighbor called the sheriff, and, when the deputies left, she had the door nailed shut until Mr. Schneider's return. When Mr. Schneider returned several days later he listed as missing a dinghy, a tape recorder, a calculator, a coin collection and some change. The tape recorder belonged to Ms. Rome....

Prior to this time, Mrs. Schneider had been the youth leader at the local church. In this capacity, she met a number of teenaged boys, almost all of whom had criminal histories. Six of these boys were arrested in March and April of 1981 in connection with the burglary of the Schneider house at Bush Point.... In July of 1981, Mrs. Schneider was charged with ... second degree burglary as an accomplice and criminal conspiracy to commit second degree burglary. At Mrs. Schneider's trial the six boys testified against her. Four of them testified that they committed the burglary of the Bush Point house with Mrs. Schneider's aid and approval. They testified that she drove them to the house and back after the burglary....

The jury found Mrs. Schneider guilty as charged on all counts.... Mrs. Schneider appeals her convictions for ... second degree burglary and conspiracy to commit burglary....

Schneider...contends that she cannot be convicted as an accomplice and conspirator for the burglary of her estranged husband's residence, because the residence was community property at the time. In particular, she contends that the State failed to introduce evidence to show that the entry of the house was "unlawful." As stated in the statutory definition of second degree burglary:

A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein,

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he enters or remains *unlawfully* in a building other than a vehicle.
(Emphasis added.) RCW 9A.52.030(1). The definition of “enters or remains unlawfully” is:

A person “enters or remains unlawfully” in or upon premises when he is not then licensed, invited, or otherwise privileged to so enter or remain.
RCW 9A.52.010(3). Schneider contends, in effect, that to prove she entered “unlawfully” the State must prove that Mr. Schneider owned the house and Mrs. Schneider did not. Since the house was purchased during the marriage, Schneider contends that the State must “rebut the strong presumption that the house was community property.” These contentions are erroneous, because they misconstrue the nature of the offense of burglary.

The law of burglary was designed to protect the dweller, and, hence, the controlling question here is occupancy rather than ownership. *See* R. Perkins, *Criminal Law* 206 (2d ed. 1969). The law in Washington has long reflected this principle:

“The test, for the purpose of determining in whom the ownership of the premises should be laid in an indictment for burglary, is not the title, but the occupancy or possession at the time the offense was committed.”
State v. Klein, 195 Wash. 338, 342, 80 P.2d 825 (1938), *quoting* 9 C.J. 1044 § 79. An owner of property can be guilty of burglarizing that property. For example, it is well established that a landlord can be guilty of burglarizing the premises of his tenant. *See, e.g., Bradley v. State*, 244 Ind. 630, 195 N.E.2d 347 (1964). *See also* AGO 10 (1974).

To establish that an entry is “unlawful,” the State must introduce evidence that the entrant was “not then licensed, invited, or otherwise privileged to so enter or remain.” RCW 9A.52.010(3). In this case, there is sufficient evidence from which a reasonable juror could infer that Schneider was not licensed, invited or privileged to enter the house in question. At the time of the burglary, the house was occupied by a tenant, who had lived there for some time before Mr. Schneider moved in with her. It is also clear that Mrs. Schneider never actually lived in the house during the time in question. Thus, Mrs. Schneider’s legal status was analogous to that of a landlord’s at the time of the break-in. In addition, Mr. Schneider testified that when he left on vacation before the burglary no one had permission to enter the house except the neighbor, whom he had asked to pick up the mail. Finally, as the State argues, the method of entry—breaking the door latch—is inconsistent with any kind of permissive entry....

The judgment is affirmed.

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People v. Frye, 18 Cal.4th 894 (1998)

959 P.2d 183, 77 Cal.Rptr.2d 25, 98 Cal. Daily Op. Serv. 5949...

18 Cal.4th 894
Supreme Court of California

The PEOPLE, Plaintiff and Respondent,
v.
Jerry Grant FRYE, Defendant and Appellant.

No. S007198

July 30, 1998.

As Modified on Denial of Rehearing Sept. 23, 1998.

Opinion

BROWN, Justice.

A jury convicted defendant Jerry Grant Frye of first degree robbery (§ 211)....[T]he judgment is affirmed....

The prosecution's chief witness, Jennifer Warsing, testified under a grant of immunity. Warsing first met defendant in a Sacramento bar in April 1984 while she was separated from her husband of many years. A romantic relationship between Warsing and defendant quickly developed, and, in early May 1984, the couple moved in together in an apartment outside of Sacramento. On several occasions during the time they lived together, defendant assaulted Warsing.

Defendant and Warsing returned to Sacramento in December 1984 or January 1985, and resided together at the River City Motel. Defendant worked at a construction job next door to the motel. Rick Evans worked with defendant at the construction site and socialized with him outside of work. Evans testified he and defendant discussed the prospect of quitting their jobs and growing marijuana for profit instead. Evans had access to a gold mining claim in Amador County that members of his family had worked for many years.

In April 1985, defendant and Evans quit their jobs to pursue the marijuana venture. With approximately \$500 between them, they purchased camping equipment and other supplies. The next day, a group comprised of defendant, Warsing, Evans and his girlfriend, and Warsing's adult son drove to the mining claim property in Amador County. In addition to the camping gear and supplies they had purchased, defendant and Evans brought along marijuana seeds, a 12-gauge shotgun, a .22-caliber semiautomatic rifle, and ammunition.

A quarter-mile down the hill from the group's campsite was a cabin occupied by an older couple, Robert and Virginia (Jane) Brandt, who worked a gold mining claim with their son, Bobby. Evans testified that before setting up camp and sowing the marijuana seeds, he sought and obtained the Brandts' permission for the group to camp on the property.

The campsite had no running water or electricity, and meals were prepared over an open campfire. Although defendant and Warsing had a car when they moved to the campsite, they sold it to Warsing's son who left the group after a couple of days. Evans and his girlfriend returned to Sacramento a week or two later, leaving only defendant and Warsing at the campsite. Before Evans departed, it was decided Evans would return to the property once or twice a week with food and supplies, and defendant would tend the marijuana plants.

About a week after moving to the campsite, Warsing met the Brandts, and became friendly with them. Warsing would occasionally accompany Jane Brandt in the Brandts' 1982 Lincoln Towncar to run errands in town. On these excursions,

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People v. Frye, 18 Cal.4th 894 (1998)

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Warsing became aware that Mrs. Brandt carried an unusually large amount of cash with her to pay for goods and services. Rick Evans testified defendant and Warsing mentioned the Brandts' money during one of his weekly visits to the campsite. Defendant also showed Evans a small glass container filled with about a quarter-inch of gold he had scraped from the bucket of the front-end loader used by the Brandts in their mining operation.

On the morning of May 14, defendant and Warsing walked from their campsite down the hill to the Brandts' cabin. Warsing had agreed to accompany Mrs. Brandt to the dentist's office in case she did not feel well following her dental procedure.

Sometime during the late morning of May 14, an acquaintance of the Brandts, Ron Wilson, drove to the cabin. Wilson occasionally worked the Brandts' mining claim with them, receiving a percentage of the gold that was extracted. Seeing the Lincoln gone, Wilson drove by the cabin without stopping, and proceeded up another road. After investigating a potential mining area, Wilson hiked to the upper part of the claim, in the vicinity of defendant's campsite. As Wilson headed back down towards the cabin to see if anyone had returned, he met defendant walking up the road.

Defendant showed Wilson the marijuana-growing operation. A short time later, Wilson drove with defendant into town where Wilson bought them lunch and a couple of beers. After lunch, Wilson and defendant made several more stops. Wilson bought a carton of cigarettes for defendant, and two 12-packs of beer. Wilson also retrieved several flats of marijuana seedlings from his girlfriend's residence for defendant to tend for him, and picked up some watering equipment from a friend. During this time, defendant and Wilson each consumed several more beers.

Defendant and Wilson arrived back at the mining claim about 3:00 in the afternoon, and went up the hill to the campsite. Mrs. Brandt and Warsing arrived back at the cabin some time later. When Warsing got out of the car, Mrs. Brandt asked her to come down for coffee later in the evening. Warsing said they probably would, and set off for the campsite up the hill. When Warsing arrived at the campsite, defendant and Wilson were talking and drinking beer. Around dusk, Wilson left the campsite and drove back home.

Warsing testified that shortly after Wilson's departure, defendant said he saw the Devil moving around the campsite. He also told her he thought he was being set up, and that he would "just take what he could." Defendant then stood by the fire where Warsing was heating water for coffee, and asked her if she had ever seen people dead before. According to Warsing's testimony, defendant was going to go down and kill the Brandts, and told her if she didn't go with him, he would have to kill her too.

Hoping to run away, Warsing told defendant she needed to use the campsite's makeshift bathroom. Defendant accompanied her, shotgun in hand. When Warsing was finished, defendant took her by the arm and walked down the hill toward the cabin, still clutching the shotgun in the other hand.

When defendant and Warsing arrived at the Brandts' cabin, Mrs. Brandt greeted them, asking them to come inside. Defendant placed the shotgun against the kitchen doorway, and sat down in a chair nearby. Warsing sat at the table where Mrs. Brandt was working on an afghan and began helping her.

Defendant complained to Mr. Brandt that he had drunk too much and his head was hurting. Mr. Brandt started laughing. When Mrs. Brandt got up and offered coffee, defendant said he would like a cup. Hearing defendant joking with Mr. Brandt and asking for coffee, Warsing believed things had returned to normal, and she began to relax. Moments later, however, she heard a noise, and looked up to see defendant pointing the shotgun at Mr. Brandt who was now standing up in front of his recliner. Defendant shot Mr. Brandt, and he fell back in the chair.

Defendant claims the evidence is insufficient to support his convictions for burglary.... Defendant's claim of insufficient evidence requires us to determine whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. In making this determination, we view the evidence presented at trial in the light most favorable to the prosecution. (*Id.* at p. 678, 286 Cal.Rptr. 801, 818 P.2d 84.)

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959 P.2d 183, 77 Cal.Rptr.2d 25, 98 Cal. Daily Op. Serv. 5949...

Defendant asserts the evidence is insufficient because he entered the Brandts' cabin at the personal invitation of Mrs. Brandt. Defendant's argument is based on the erroneous premise that a burglary has not occurred if a person enters a building with the owner's express consent.

Any person who enters a house or building with the intent to commit a felony or theft is guilty of burglary. (§ 459.) The entry need not be a trespass to support a burglary conviction. Thus, a person who enters for a felonious purpose may be found guilty of burglary even if he enters with the owner's or occupant's consent.

Notwithstanding these settled principles, defendant asserts that *People v. Gauze* (1975) 15 Cal.3d 709, 125 Cal.Rptr. 773, 542 P.2d 1365 (*Gauze*), supports his view that Mrs. Brandt's invitation to enter the cabin precludes a burglary conviction. In *Gauze*, the court stated that in order for burglary to occur, "[t]he entry must be *without consent*. If the possessor actually invites the defendant, or actively assists in the entrance, e.g., by opening a door, there is no burglary." (*Id.* at pp. 713–714, 125 Cal.Rptr. 773, 542 P.2d 1365, quoting 1 Witkin, Cal. Crimes (1963) Crimes Against Property, § 457, p. 419.) Defendant takes this statement out of context. Moreover, later decisions make clear that *Gauze* is inapposite.

In *Gauze*, *supra*, 15 Cal.3d 709, 125 Cal.Rptr. 773, 542 P.2d 1365, the defendant was convicted of burglary after he entered his own apartment with the intent to assault his roommate. The court concluded the defendant could not be guilty of burglarizing his own home, even if he entered with a felonious intent, because burglary requires an entry that invades a possessory right in a building, and must be committed by someone who has no right to be in the building. (*Id.* at p. 714, 125 Cal.Rptr. 773, 542 P.2d 1365.) As *People v. Pendleton* (1979) 25 Cal.3d 371, 158 Cal.Rptr. 343, 599 P.2d 649 (*Pendleton*) explained, *Gauze* did not overrule earlier decisions finding burglary convictions proper when there was a consensual entry. (*Pendleton*, *supra*, 25 Cal.3d at p. 382, 158 Cal.Rptr. 343, 599 P.2d 649.) "The law after *Gauze* is that one may be convicted of burglary even if he enters with consent, provided he does not have an unconditional possessory right to enter." (*Ibid.*; see also *People v. Salemme* (1992) 2 Cal.App.4th 775, 779–781, 3 Cal.Rptr.2d 398.)

Although the evidence shows defendant was invited into the Brandts' cabin on the early evening of May 14, 1985, there is no evidence from which to reasonably infer defendant had an unconditional possessory right to enter. Indeed, Rick Evans testified that before setting up the campsite and marijuana-growing operation, he sought and obtained the Brandts' permission for the group to camp on the property. Viewing this evidence in a light most favorable to the prosecution, the jury could reasonably have found such action to be inconsistent with the notion that any member of the group enjoyed an unconditional possessory right to any of the property, including the Brandts' cabin.

Moreover, there is substantial evidence supporting defendant's burglary conviction. According to Warsing's testimony, defendant told her on the night of the murders he was planning to "just take what he could" and was going to go down and kill the Brandts. Defendant then armed himself with a shotgun, ushered Warsing down the hill to the planned visit with the Brands, and promptly committed the crimes. Ron Wilson testified that earlier the same day defendant told him Mr. Brandt "should be more careful about displaying the bundle he has or somebody would hit him in the head and take it from him." ... The testimony of these witnesses, in conjunction with evidence defendant had no steady income and had come to Amador County to cultivate marijuana for profit, provides ample support for the conclusion that defendant entered the Brandts' cabin with the intent to commit theft. The jury properly convicted defendant of burglary....

For the reasons stated herein, the judgment is affirmed....

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People v. Nible, 200 Cal.App.3d 838 (1988)

247 Cal.Rptr. 396

200 Cal.App.3d 838
Court of Appeal, Third District, California.

The PEOPLE, Plaintiff and Respondent,
v.
William L. NIBLE, Defendant and Appellant.

Crim. Co01729.

|
April 18, 1988.

Opinion

DEEGAN, Associate Justice.

In this case of first impression, we hold the penetration of a window screen but not the window itself constitutes a burglarious entry. Defendant was convicted following a jury trial of first degree burglary (Pen.Code, §§ 459; 460, subd. 1).... On appeal, he contends he was guilty at most of attempted burglary because no entry occurred We disagree and shall affirm.

In the early morning hours of April 17, 1986, Mary Rice was asleep with her young son in the bedroom of her Sacramento apartment. Before going to bed, Rice left the bedroom window open about an inch-and-a-half. Sometime between 1:00 and 1:30 a.m., she was awakened by a loud noise caused by something banging against her window. Rice looked out through the window and noticed the window screen was in place. She also noticed defendant on the ground below the window, lying on his back in the fetal position.

Rice hurried to the kitchen where she called her husband on the telephone. She told him to call the sheriff. She then unplugged the telephone and returned with it to the bedroom. As she entered the room, she heard the screen being pulled back from the window. Rice pushed aside the curtains and encountered defendant, who had pulled back part of the screen and crawled underneath it so that his face was about two to three inches from the window. Rice slammed the window shut and yelled in a deep voice. Defendant ran away but was soon captured by sheriff's officers.

Rice described her bedroom window as consisting of two panels, each three feet wide and four feet high, sitting three feet above the ground. Only one of the panels could be opened, by sliding it horizontally. The frames of both panels and the window screen were aluminum and rested within a larger aluminum frame that sat inside the wall. The window screen rested in a slot one-quarter inch from the window and did not have any protuberances to facilitate its removal from the exterior of the apartment. Between the time of the incident and trial, Rice attempted to remove the screen from outside her apartment; she was successful only by sliding a screwdriver under the screen and lifting the screen outward.

There was no evidence defendant touched Rice's window or crossed the boundary formed by the window into Rice's bedroom.

Defendant contends the trial court erred both by denying his motion for judgment of acquittal and in its instructions on the entry element of burglary. Defendant moved under Penal Code section 1118.1 for judgment of acquittal on the ground there was no evidence of a burglarious entry. The court denied the motion. Later, the court instructed the jurors they could find an entry if they believed a part of defendant's body or a tool or instrument used by him penetrated "... the area inside where the screen was normally affixed in the window frame in question." The trial court did not err.

"Every person who enters any ... apartment ... with intent to commit grand or petit larceny or any felony is guilty of

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burglary.” (§ 459.) Entry occurs at the moment any part of the person’s body, or a tool or instrument wielded by the person, is inside the premises. (*People v. Failla* (1966) 64 Cal.2d 560, 569, 51 Cal.Rptr. 103, 414 P.2d 39; *People v. Osegueda* (1984) 163 Cal.App.3d Supp. 25, 31, 21, Cal.Rptr. 182; *People v. Walters* (1967) 249 Cal.App.2d 547, 551, 57 Cal.Rptr. 484.) Because the common law requirement of breaking was eliminated at the time of the codification of section 459, “... it no longer matters whether a person entering a house with larcenous or felonious intent does so through a closed door, an open door or a window.” (*People v. Gauze* (1975) 15 Cal.3d 709, 713, 125 Cal.Rptr. 773, 542 P.2d 1365; fn. omitted.)

No California authority has considered whether the penetration of a window screen, without penetration of the plane formed by the window beyond, constitutes an entry within the meaning of section 459. Defendant contends the correct analysis to determine whether a burglarious entry has occurred is whether the “air space” of a protected structure has been penetrated by a part of the defendant’s body or an instrument or tool wielded by him. The “air space” analysis ... does not necessarily lead to the result defendant suggests. Rather, it is reasonable to conclude that a window screen contains the outer boundary of a building’s air space, especially when, as here, the window itself was left open. However it might be applied here, in our view the “air space” test, although useful in some situations, is inadequate as a comprehensive test for determining when a burglarious entry occurs.

Rather, a more comprehensive test is suggested by the California Supreme Court’s analysis in *People v. Gauze*, supra, 15 Cal.3d 709, 125 Cal.Rptr. 773, 542 P.2d 1365. “ ‘Burglary laws are based primarily upon a recognition of the dangers to personal safety created by the usual burglary situation—the danger that the intruder will harm the occupants in attempting to perpetrate the intended crime or to escape and the danger that the occupants will in anger or panic react violently to the invasion, thereby inviting more violence. The laws are primarily designed, then, not to deter the trespass and the intended crime, which are prohibited by other laws, so much as to forestall the germination of a situation dangerous to personal safety.’ Section 459, in short, is aimed at the danger caused by the unauthorized entry itself.” (*Id.*, at p. 715, 125 Cal.Rptr. 773, 542 P.2d 1365, quoting *People v. Lewis* (1969) 274 Cal.App.2d 912, 920, 79 Cal.Rptr. 650.)

As the burglary statute is designed to protect against unauthorized entry and its attendant dangers, the ultimate test of whether a burglarious entry has occurred must focus on the protection the owners or inhabitants of a structure reasonably expect. The proper question is whether the nature of a structure’s composition is such that a reasonable person would expect some protection from unauthorized intrusions. A structure with a locked door or window clearly affords a reasonable expectation of protection from invasion. But even an open door or window affords some expectation of protection from unauthorized intrusion because reasonable persons understand the social convention that portals may not be crossed without permission from the structure’s owner.

Thus, the focus of the question whether the penetration of a window screen constitutes a burglarious entry must be on whether a reasonable person would believe a window screen provides some protection against unauthorized intrusions. The answer is unequivocally in the affirmative. “The opening of a screen door or window is deemed a burglarious breaking, ... In such cases the screen door [or window] is not to be considered as a mere protection against flies, but rather as a permanent part of the dwelling. The holdings proceed, it would seem, on the grounds that the screen door [or window] is a part of the house on which the occupants rely for protection and that to open such a door [or window] is a violation of the security of the dwelling house which is the peculiar gravamen of a burglarious breaking.” (13 Am.Jur.2d, Burglary, § 19, p. 331.) This analysis is especially apposite to the instant case, where the window screen was affixed in a slot in the frame with no handle or other device to facilitate its removal from the exterior of the apartment. We hold, therefore, that when a screen which forms the outer barrier of a protected structure is penetrated, an entry has been made for purposes of the burglary statute.

The purposes of the burglary laws are best served by our holding the penetration of a window screen constitutes entry within the meaning of section 459. As noted above, the burglary law protects against the dangers caused by unauthorized entry. The inhabitants of a building are just as likely to react violently to an intruder’s penetration of their window screen as to the penetration of the window itself. In this case, Rice slammed her window closed when she discovered defendant crawling under the screen. Had she been armed, or had she reacted differently to that frightening specter, the situation might indeed have erupted into violence.

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Because we conclude the penetration of a window screen constitutes entry within the meaning of section 459, we hold the trial court did not err either in denying defendant's motion for judgment of acquittal or in its instructions on entry.

The judgment is affirmed.

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State v. Bowen, 262 Kan. 705 (1997)

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262 Kan. 705
Supreme Court of Kansas.

STATE of Kansas, Appellee,
v.
Travis W. BOWEN, Appellant.

No. 76069.
|
July 11, 1997.

Opinion

McFARLAND, Chief Justice:

Travis W. Bowen, in a trial by jury, was convicted of aggravated burglary (K.S.A. 21-3716), a severity level 5 person felony; possession of methamphetamine (K.S.A.1994 Supp. 65-4160), a severity level 4 drug felony; and possession of marijuana (K.S.A.1994 Supp. 65-4162), a misdemeanor. He was sentenced to 41 months' imprisonment, 15 months' imprisonment, and 30 days' in the county jail, respectively. These terms were ordered to run concurrently for a controlling term of 41 months. Defendant appeals only his aggravated burglary conviction, contending that the evidence is insufficient to support his conviction....

K.S.A. 21-3716 defines aggravated burglary as follows:

“Aggravated burglary is knowingly and without authority entering into or remaining within any building, manufactured home, mobile home, tent or other structure, or any motor vehicle, aircraft, watercraft, railroad car or other means of conveyance of persons or property in which there is a human being, *with intent to commit a felony*, theft or sexual battery *therein*.” (Emphasis supplied.)

Specifically, defendant challenges the sufficiency of the evidence as to his intent to commit a felony in the residence.

The State alternatively charged the aggravated burglary intended felony element, and the jury was instructed on the elements of each intended felony in the following format:

Theft (Instruction 6-A)
Possession of methamphetamine (Instruction 6-B)
Aggravated Battery (Instruction 6-C)
Aggravated Assault (Instruction 6-D)

The verdict form submitted as to the aggravated burglary count was completed as follows:

“Count 3

- ✓ Guilty of Aggravated Burglary pursuant to Instruction Number:
 - 6-A (Theft)
- ✓ 6-B (Possession of Methamphetamine)
- 6-C (Aggravated Battery)
- ✓ 6-D (Aggravated Assault)
- Not Guilty of Aggravated Burglary”

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Thus, we need not speculate as to which of the alternative felonious intents the jury found. Further, possession of methamphetamine and aggravated assault are the only two with which we are concerned.

The physical facts relative to the crime were not seriously controverted, nor was there any question of identity.

As the facts are crucial to the determination of the issue raised, they must be set forth in considerable detail.

During the early morning hours of December 7, 1994, Layne and Ruth White were asleep in a second floor bedroom of their rural home. They were awakened by a loud impact sound on the side of the house, which was followed by the sound of footsteps on the first floor. Mr. White's parents live about 1 1/2 miles away. Pursuant to a sort of mutual protection agreement, the parents were called and requested to seek help. Layne White had his wife take their young child and hide in a closet. Meanwhile, the senior Whites arrived and illuminated the house with their headlights. Reno County Sheriff's officers then arrived.

Defendant was found on the first floor of the residence on his knees beside a wood stove. He had a knife in each hand. He told officers he had placed a pressure-activated bomb in the home's basement beams. Defendant put down the pocket knife but refused to push it out of his reach. The long butcher knife was held and moved in a threatening manner toward the officers. It took approximately 30 minutes to disarm and arrest defendant. Marijuana and methamphetamine were found on defendant.

Defendant testified that he was on methamphetamine at all pertinent times. He had been at his uncle's home located some unspecified distance down the road from the Whites' home. He started walking up the road in the direction of Nickerson to meet up with some friends. It was a very cold and icy night and defendant became chilled. He walked to the Whites' home in order to get warm. He took his pocket knife out for protection. He kicked the door open and went to the kitchen to get a knife better suited "[t]o protect myself if need be." Officer Flynn testified that defendant told him after his arrest that he had opened the pocket knife before entering the residence. In further recounting defendant's statements, the officer testified:

“[H]e stated to me he was going to defend him, himself if someone tried to hurt him or bother him or jump him while he was asleep. I asked him why he had the knife before he entered the house in his hand as he kicked the door. He stated to me for the same reason. I asked him what he would have done if he was approached by someone, and he said he would have to cut them because he was going to defend himself, whatever it took.”

We shall first consider the sufficiency of the evidence relative to the intent to commit the felony of possession of methamphetamine.

It is undisputed that defendant's possession of methamphetamine was wholly incidental to his entry of the Whites' home. The drug was on defendant's person but played no role in his decision to enter the residence by force or otherwise or in his decision as to what he intended to do after entering. The State does not argue otherwise. Rather, the State contends that as possession of a narcotic has been held to be a continuing offense, its mere possession by defendant is sufficient to support the aggravated burglary conviction. In support of this contention, the State cites *State v. Chapman*, 252 Kan. 606, 847 P.2d 1247 (1993).

The question in *Chapman* was venue. Three individuals were involved in drug transactions which by travel occurred in multiple counties....

Thus, *Chapman* is concerned with where a crime may be charged, a question wholly unrelated to the issue before us. The State cites no authority for the proposition that the mere happenstance of methamphetamine being on Chapman's person with no showing or inference that its possession was in any manner related to defendant's unlawful entry into the residence is legally sufficient to support a conviction of aggravated burglary based upon entering with the intent to commit the felony of possession of methamphetamine. Our research has yielded no authority for this contention.

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Although the precise issue before us was not present in *State v. Mogenson*, 10 Kan.App.2d 470, 701 P.2d 1339, *rev. denied* 238 Kan. 878 (1985), the case is helpful by analogy. In *Mogenson*, defendant had entered a residence with authority, and then became embroiled in an argument therein, which resulted in the withdrawal of the authority to be there. Defendant remained and committed battery. He was convicted of aggravated burglary. On appeal, defendant argued that the intent to commit battery had to be present at the time of the entering. The Court of Appeals disagreed, holding that the formation of intent to commit the ulterior felony must have existed either at the time defendant entered the house or after defendant remained in the house without authorization. The intent and the entering or remaining without authority must at some time be concurrent. 10 Kan.App.2d at 472-76, 701 P.2d 1339.

The specific intent in an aggravated burglary, where one is charged with entering into the dwelling without authority, must exist at the time of the unauthorized entry. *State v. Brown*, 6 Kan.App.2d 556, 560, 630 P.2d 731 (1981). Although defendant's methamphetamine possession in the case before us was wilful and wanton, he did not enter the residence with the purpose of possessing the drugs therein. We must conclude that there was insufficient evidence to support the conviction of aggravated burglary based upon entry with the intent to possess methamphetamine.

We turn now to the sufficiency of the evidence relative to aggravated burglary based upon the intent to commit an aggravated assault. The jury was instructed:

“The elements of aggravated assault are as follows:

1. That the defendant intentionally placed another person in reasonable apprehension of immediate bodily harm;
2. That the defendant used a deadly weapon;
3. That this act occurred on or about the 7th day of December, 1994, in Reno County, Kansas.

“No bodily contact is necessary.”

There was evidence defendant kicked in the door and entered the residence armed with a knife in his hand to use against any occupant who approached him. Additionally, upon entry, he immediately searched for and acquired a much larger knife. He had a knife in each hand when first seen by the officers. We conclude that the evidence of aggravated burglary, based upon the intended felony of aggravated assault, is sufficient to support the conviction.

The final question to be determined is whether the insufficiency of the evidence as to the intended felony of possession of methamphetamine requires reversal of the aggravated burglary conviction even though the evidence was legally sufficient as to the intended felony of aggravated assault.

In this case, we are not dealing with a general verdict on an aggravated burglary charge which set forth multiple theories as to the element of felonious intent in entering a building, such as was present in *State v. Skelton*, 247 Kan. 34, 795 P.2d 349 (1990), nor are we dealing with a general verdict on a felony-murder charge which alleged multiple underlying felonies, as in *State v. Garcia*, 243 Kan. 662, 763 P.2d 585 (1988). Likewise, we need not discuss *State v. Grissom*, 251 Kan. 851, 840 P.2d 1142 (1992), which disapproved some of the language quoted in *Garcia*. The case herein does not involve a general verdict. The jury specifically found defendant had two felonious intents when he entered the residence—the possession of methamphetamine and the commission of an aggravated assault. We have held the evidence was insufficient as to the former, but sufficient as to the latter. Thus, there is no opportunity to even speculate that the jury may have convicted defendant of aggravated burglary based upon a felonious intent which was not supported by the evidence. The State was not required to prove more than one of the alternatively charged felonious intents.

The judgment is affirmed.

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HYPOTHETICALS

Hypo A

At approximately 11:15 p.m. in late December, neighbors heard glass shatter at a nearby home. Ms. Chen looked outside from her porch but testified she could only see “a dark figure” moving near the driveway. She stated that she could not recognize the person’s face until motion-activated floodlights illuminated the yard. Police later discovered forced entry into the home and arrested Jordan Pike several blocks away carrying jewelry and electronics belonging to the homeowner.

Discuss whether Jordan can be charged with burglary.

Hypo B

At approximately 7:45 p.m. in early spring, Maria Lopez returned home and discovered her back door partially open. A neighbor reported seeing Tyler Boone leave the property on foot carrying a backpack. The neighbor testified that the sky was “still somewhat bright with the last streaks of orange and pink from the beautiful sunset” and that she recognized Tyler because she had known him for years and recognized his distinct uneven walk and posture. Another witness stated that he turned on his headlights just minutes before he saw Tyler because it was becoming too dark to see clearly while driving.

Discuss whether Tyler can be charged with burglary.

Hypo C

Dr. Elena Morales inherited lakeside property from her grandfather about 3 years ago. She has fond memories of family vacations to the lake during her childhood but has not visited the property in nearly 10 years.

Two months ago, a severe storm badly damaged the cabin located at the center of the property. Inspectors informed Dr. Morales that the damaged roof and mold rendered the cabin “unsafe for human habitation.” When she returned to the property a month later, she discovered that nearly all of the furniture and appliances in the cabin were destroyed. The only salvageable items, which Dr. Morales left in the cabin, were the refrigerator, some canned food, and fishing equipment. She took everything else to the local landfill.

The day before cabin repairs were scheduled to begin, neighbors saw Jordan Pike riding his motorcycle away from Dr. Morales’ property towing a small trailer. Investigators later discovered forced entry into the cabin and evidence that Jordan attempted to pawn items from Dr. Morales’ property.

Discuss why Jordan may or may not be charged with burglary of the cabin.

Hypo D

About 50 feet from the cabin sat a large detached shed used primarily as a workshop and storage space. It had electricity and a small utility bathroom with a functioning toilet and sink. The shed served as the primary location for storing the tools and materials used to repair and maintain the cabin. One exterior wall of the shed served as the family's outdoor cooking area. A built-in barbecue was permanently attached beneath a covered overhang. Although the cabin contained a fully functioning kitchen before the storm, family members frequently prepared meals on the barbecue during the warmer months.

Because the cabin remained uninhabitable while repairs were underway and it was getting very late, Dr. Morales decided to spend the night in the shed. Looking through boxes and storage bins for something to keep warm, she eventually found a sleeping bag packed deep inside a storage trunk with other camping and outdoor equipment. Although the shed provided adequate shelter for the night, it was cold and drafty, and she later decided she would not sleep there again. The next morning, she returned the sleeping bag to the storage trunk with the other camping and outdoor equipment.

Later, investigators discovered signs of forced entry into the shed, and some of the items Jordan later attempted to pawn were reportedly taken from the shed.

Discuss why Jordan may or may not be charged with burglary of the shed.