

ORIENTATION MATERIALS

2019

The following materials will be covered during the Orientation Program. The first 42 pages serve as the foundation for the *Introduction to Legal Study* sessions. In preparation for the Orientation Program, please review all materials, attempt to brief the case beginning on page 30 and come prepared to respond to the assigned problem on page 42.

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AN OVERVIEW OF THE LEGAL SYSTEM

The United States of America does not have a single legal system. Instead, dozens of systems operate simultaneously, each with its own, largely independent structure. These include one for the federal government; one for each of the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands; and one for each of many Native American tribes.

FEDERAL V. STATE LAW

To understand the various legal systems, it is necessary to understand the allocation of power between the states and the central government.

Federal power is limited to those areas entrusted to the central government by the Constitution of the United States. Congress is empowered, among other things, to regulate interstate and foreign commerce, establish post offices, declare war and maintain order, raise and maintain armed forces, punish counterfeiting and piracy, regulate naturalization, and make rules on bankruptcy, patents, and copyrights. In addition to its specific powers, Congress is authorized to make all laws “necessary and proper” for carrying into execution the powers vested in the central government. Within the areas enumerated, but only within them, Congress may legislate and thereby impose criminal and civil responsibility upon individuals. It cannot define crime generally for the nation as a whole, nor can it establish a general national law of torts, contracts, or domestic relations. But when Congress acts within the sphere of its constitutional authority, it is supreme and its laws supersede any conflicting state laws.

All power not vested in the federal government is reserved to the several states, each of which is legally the equal of every other. Thus, each state has its own laws on virtually every aspect of human interaction, from crime to contract, and dealing with virtually every societal goal and function, from environmental protection to education. No one of them is allowed to usurp the legitimate powers of any other any more than it is allowed to interfere with legitimate federal power. It is not surprising, therefore, that the law varies significantly from state to state. Conduct that is criminal in Kentucky may be completely legal in Minnesota; grounds for divorce in Nevada may differ vastly from those recognized in Vermont; and a prosecution that would have to be initiated by the indictment of a grand jury in Maine may be initiated in California by the accusation of a prosecuting attorney.

SOURCES OF LAW

Each of the legal systems in this country is comprised of law from multiple sources. Fortunately, with the exception of those for the District of Columbia and for Native American

tribes, which are beyond the scope of this overview, most of the systems have the same basic sources and give each the same relative authority.

Constitutions

Each legal system in this country has its own constitution. The federal constitution was the first written constitution designed for an entire nation. It was drafted in 1787, ratified the following year, and went into effect in 1789. It consists of seven Articles and 27 amendments. The Constitution creates the Congress and the presidency, identifies their respective powers, and guarantees a variety of individual rights. The Constitution is also the supreme law of the land; any state or federal law in conflict with it is invalid.

Each state also has a written constitution. Some are quite old – the Massachusetts Constitution was adopted in 1780 and is the oldest written constitution of government still in effect anywhere in the world – while others are more modern. Each creates the structure for its state government, specifies how laws may be enacted, and contains a bill of rights to protect individual civil liberties. Some also contain rules on a myriad of other subjects, such as taxes and homesteads.

Statutes

Statutes are the work of legislatures. Federal statutes are enacted by Congress, a process that requires a majority vote of the House of Representatives and a majority vote of the Senate. They must then be approved by the President. If instead the President vetoes (disapproves of) the bill, it does not become law unless Congress overrides the veto, a rare event that requires a 2/3 vote of each chamber.

Most states follow the same general approach: to become law, a bill must pass both houses of the state legislature and then be approved by the governor (or the governor's veto overridden). The one main exception is in Nebraska, which has a unicameral (one house) legislature.

Regulations & Ordinances

The federal government has a variety of executive departments (*e.g.*, the Department of the Treasury) and administrative agencies (*e.g.*, the Federal Trade Commission; Securities and Exchange Commission), which issue regulations designed to enforce and administer statutes. All their rulemaking authority is granted by statute. As a result, regulations may supplement or interpret statutes, but to the extent they contradict statutes or exceed the scope of authority granted by Congress, they are invalid.

At the state level, there are also a variety of departments and agencies with similar regulatory authority. In addition, states have political subdivisions – counties, parishes, cities, and towns – which have jurisdiction over a limited geographic area. These political subdivisions

generally have limited authority to enact ordinances. Such authority may derive from the applicable state constitution or from one or more state statutes, and is typically subject to generally applicable state law.

Judicial Decisions: The Common Law

Law is made not only by legislatures, but also by courts. Such judge-made law is generally referred to as the common law. In its traditional sense, the common law was the expression of courts on a variety of issues on which the legislature had not spoken. In other words, even though the legislature had provided no rules or guidance on an issue (such as tort or contract) nor expressly empowered courts to do so, courts would resolve disputes and in doing so create legal rules. In this traditional sense, there is state common law but little federal common law, since the federal government is one of limited powers.

In a more modern sense, the common law is the name given to the vast body of precedents created by judges in the course of deciding cases, and embodied, for the most part, in the written opinions of appellate courts. In this more modern sense, both state and federal courts enunciate the common law, since all American judges feel obliged to follow precedents in deciding current cases. This is partly because they see no sense in working out a fresh solution to a problem each time it recurs, and partly because they are convinced – by notions of fundamental fairness – that like cases should be treated alike, that every person ought to be treated as any other would be under similar circumstances. Without this conception, judges would be more free to decide cases according to their private notions of right and wrong throughout the entire area of human relations not covered by statute. With it, the goal of stable and equal justice under law comes closer to realization.

The common law – in both the traditional and modern senses – originated in England, and its fundamental ideas were brought to America by the early English settlers. There were few lawyers among the early settlers and few law books available, but the general principles of the common law were understood and, being generally acceptable, were applied (sometimes in a rather hit-or-miss fashion) by those who came to adjudicate disputes. In this manner, each colony “received” the common law, and so filled a legal void that otherwise would have existed. In some places, the reception of the common law was formalized by the legislature, as Maryland did in 1639 and Virginia did in 1776. Virginia’s legislature passed the following:

Be it ordained by the representatives of the people now met in General Convention,
That the common law of England . . . shall be the rule of decision, and shall be considered as in full force, until the same shall be altered by the legislative power of this colony.

As the nation moved westward, the common law moved westward too. In the Ordinance for the Northwest Territory, Congress provided that judicial proceedings should be conducted “according to the course of the common law.” As new state constitutions were adopted, they too

often contained provisions that the “common law” should continue in force until modified by legislation. So the common law spread throughout the nation, even into states like Louisiana, California, and Texas, which had started with legal principles and institutions derived from nations other than England.

Most or all of the legislation adopting the common law recognized explicitly that the body of law thus received could be changed by legislation. Implicit also was the idea that the common law itself might change through judicial decision. Thus, it is not surprising that the common law developed differently in different areas. The judges of Oklahoma knowing little about decisions being made elsewhere and, in any event, not being bound by them, could hardly be expected to reach precisely the same results as the judges of Massachusetts, Illinois, or New York. Today, as a result, there are substantial differences – as well as substantial similarities – between the common law of the various states.

It is worth noting that the common-law tradition that this country inherited from England is not the legal tradition most prevalent in the world today. The civil law tradition is. The civil law tradition is older, having its roots in Roman law compiled and codified in the sixth century, A.D. It is the dominant legal tradition in Europe, Latin America, and parts of Asia and Africa. It is even found in enclaves embedded in areas otherwise governed by common law, such as Louisiana, Quebec, and Puerto Rico. It differs from the common law tradition in that judges are not expected to make law, merely to apply it.

Judicial Decisions: Equity

Historically, the common law covered matters both criminal (prosecutions by the state) and civil (actions by one person against another for money or other relief). Today, most common-law crimes have been superseded by statute. Moreover, the federal constitution prevents states from creating a crime and imposing a penalty for its transgression without providing the accused with advance notice of the criminal nature of the act involved. As a result, the common law is now relegated mostly to civil matters.

What we now regard as the common law was historically divided into two branches: law and equity. The monarch’s courts dispensed law. That is, they would adjudicate disputes – typically through the use of a jury – and enter judgment for one side. If the plaintiff won, the judgment would commonly order the defendant to pay a specified sum of money to the plaintiff. If the law was inadequate to do justice, the Chancellor (and later, the chancery courts) might do equity. In other words, the Chancellor – acting without a jury – might issue an order for some form of equitable relief even though the law provided either no remedy at all for the alleged wrong or only a type of remedy (an award of money) that was not adequate under the circumstances.

In short, England had two parallel court systems. One for law and one for equity. Today in this country, law and equity have largely been combined. Most states authorize their courts to dispense both law and equity. Thus, most courts are empowered to make legal rulings and awards as well as to issue orders for what would traditionally be considered an equitable remedy, such as

an injunction. As a result, lawyers can make both legal and equitable arguments to the same court. Nevertheless, the historical division between law and equity remains relevant. Legal disputes must often be tried before a jury. Requests for an historically equitable remedy are resolved by a judge. Moreover, equitable remedies normally remain available only when the legal remedy would be inadequate.

JUDICIAL SYSTEMS

State Court Jurisdiction

Criminal Cases

State courts are primarily engaged in enforcing and applying the laws of the state in which they are situated. This is particularly true in the area of criminal law. Each state possesses power to determine what conduct within its own borders will be criminal and to provide for appropriate punishment. It then enforces its own criminal law, not the criminal law of any other state or of the federal government. Hence if a person commits murder in Pennsylvania, he or she may be tried only in the courts of that state. If the perpetrator has fled to another part of the country, he or she must be brought back to Pennsylvania to stand trial.

There are, of course, some limitations to such state power imposed by the United States Constitution. No state can criminally punish conduct protected by the Constitution, as interpreted by the Supreme Court of the United States. Thus, for example, if any state attempted to punish an African American for enrolling in the state university, or a Democrat for speaking disrespectfully of the incumbent Republican governor, its action would be unconstitutional and would be struck down.

Just as there are substantive limitations, so also are there procedural limitations imposed by the Constitution. If, for example, a state attempted to deny to a person accused of a crime the right to a trial, or to be represented by counsel, its action would be invalid.

Civil Cases

Just as a state has power to define crime within its own borders, so also it has power to create civil rights and liabilities within those borders. Subject to a few limitations imposed by the United States Constitution, each state is free to prescribe the rules that govern contracts, torts, domestic relations, property, succession, and the like within its borders.

Nevertheless, a civil lawsuit, unlike a criminal prosecution, may be brought in a state other than the one where the events giving rise to it took place. A claim arising in Washington and governed by Washington law need not be tried in a Washington court. It may be brought in a court of Florida, and, indeed, it may have to be brought there if that is where the defendant resides. In such a situation, the Florida court would adjudicate the claim, traditionally, according to the

substantive law of the place where the liability arose (Washington) but according to the procedural law of the forum (Florida).

State courts also adjudicate claims based on federal civil law. Congress does not ordinarily require that the civil rights and obligations it creates be enforced solely in the federal courts. State courts typically have an equal power – and duty – to enforce them.

Despite the fact that state courts enforce civil liabilities created by the federal government and by other states, most of their cases are local. The typical state case is one in which a local resident is suing another local resident on a claim governed by local law.

Federal Court Jurisdiction

Superimposed upon the judicial systems of each of the states and territories is a network of federal courts. Some matters involving federal law must be resolved in federal court. These include all trials based on federal criminal law, and all cases involving federal law pertaining to admiralty, bankruptcy, patents, and copyrights. In these cases, federal courts have exclusive jurisdiction. On other issues of federal law, federal courts have jurisdiction concurrent with that of the state courts, and any claim based on such federal law may be brought in either federal court or state court.

Just as state courts may hear some cases based on federal civil law, federal courts may hear some cases based on state civil law. One reason for this lies in the fear that state courts may be prejudiced against nonresidents. Thus, consider the case of a resident of Rhode Island who, while driving a car in Mississippi, has a collision with a car driven by a resident of that state. If the Rhode Islander brings an action in state court in Mississippi (which is probably the only place where a summons can be served compelling the defendant to appear), the Rhode Islander may be an outsider engaged in a contest with an insider; the case will be tried by a Mississippi jury before a Mississippi judge under Mississippi law. In such circumstances, the outsider may suffer because of local prejudice, or at least be concerned about the possibility of such prejudice.

Hence the Rhode Islander in our example may be permitted to bring the claim in a federal court in the state of Mississippi. To do that, the amount in controversy must exceed \$75,000. If the claim is for less than that, it must be litigated in a state court. Congress, in this manner, has attempted to not burden the lower federal courts with minor cases. If the claim is brought in federal court, the law that will be applied will be that of Mississippi. The jurors will still come from that state, and the judge will still be a resident of it, probably born and raised there. They will, however, be sitting in a federal courthouse. The assumption that this fact makes a difference is the basis for federal jurisdiction over *diversity of citizenship* cases (a corporation, incidentally, is treated as a “citizen” of both the state in which it is incorporated and the state in which it has its principal place of business). Bear in mind, however, that a federal court applying state law is bound by the interpretations of the state’s highest court. Just as the United States Supreme Court is the final

arbiter of federal law, and state courts must follow its decisions, the court of last resort in each state is the final arbiter of what that state's law means, and no federal court – not even the United States Supreme Court – may disregard that state court's decisions about state law, unless they conflict with the U.S. Constitution or other federal law.

State Court Structure

Each state is free to create whatever courts it sees fit and to distribute judicial business among them as it desires. Given this, it is not surprising that the judicial systems of the various states are diverse in structure and authority. Nevertheless, a general pattern can be discerned (a flowchart of the Washington court system appears on page 14 of these Materials).

Trial Courts

At the bottom of the judicial hierarchy are the so-called inferior courts, which try minor civil cases involving small sums of money (such as bill collections), and minor criminal cases involving light penalties (such as traffic offenses). Inferior courts also conduct preliminary hearings in the more serious criminal cases, to determine whether the accused person should be released or held for trial in a higher court, but they do not in such hearings determine guilt or innocence or impose sentence.

Such courts are both numerous and highly localized; they are located not only in every city, but in virtually every town and village throughout the country. Usually they are called justice of the peace courts, but in some places, particularly urban centers, they may go by other names, such as municipal courts. In metropolitan areas they are likely to be staffed by full-time legally trained judges; but in rural areas the judges are often part-time officials and occasionally laypeople without legal training.

Regardless of the quality and location of an inferior court, the actual business that it handles is important. This is especially true of those courts which, in addition to being entrusted with so large a share of responsibility for traffic safety, are also charged with handling other sensitive areas: juvenile delinquency, family support, and similar social problems.

Above the inferior courts are other trial courts, staffed by full-time, legally trained judges. These courts handle the more serious cases – criminal trials carrying heavy penalties (*e.g.*, murder), and civil trials involving large sums of money (such as actions for severe personal injuries).

Such courts are less numerous and less localized than the inferior courts and are usually organized on a county basis, one court to each county. If a county is in a metropolitan area, one or perhaps several judges will likely be assigned permanently to that county. If it is a rural area, a single judge may serve several adjoining counties, traveling between them “on circuit.” Hence the

name *circuit court* frequently is used. Other names commonly used are superior court, county court, and district court.

In some states, for instance California, such a court may possess truly general jurisdiction; it is thus empowered to try all types of cases – civil, criminal, matrimonial, and probate. In other states, jurisdiction may be fragmented between several coordinate courts, one handling civil cases, another criminal cases, another matrimonial cases, another probate cases, and so forth.

Appellate Courts

Every state has an appellate court of last resort, usually, though not invariably, called the supreme court.¹ Whatever the name of the court, it reviews the decisions and judgments of lower courts within the state and is the ultimate tribunal for hearing appeals from them. Well, almost the ultimate tribunal; a few of its cases – those involving federal law – are subject to further review by the United States Supreme Court.

In more than two-thirds of the states, one or more intermediate appellate courts is interposed between the superior trial courts and the court of last resort, thus creating the three-tiered system, rather than a two-tiered system. Where the population is large and the litigation voluminous, and where there are many trial judges, the number of appeals tends to grow so large that it is not feasible to hear all of them in a single court. Hence several states have established multiple intermediate appellate courts (ranging from two in Arizona to fourteen in Texas), each to hear appeals from the trial courts within a limited geographic area of the state. Thus one court may hear appeals from the northern portion of the state, and another from the southern portion. The state's highest court then hears appeals from all the intermediate appellate courts, although it may have discretion on which appeals to take for decision.

Federal Court Structure

The structure of the federal judicial system is similar to what is found in the various states. For the most part, there are three levels of courts: trial, intermediate appellate, and top appellate (a flowchart of the federal court system appears on page 13).

District Courts

The trial courts are called district courts. There are ninety-four such, one for each of the judicial districts into which the nation is divided. Each state has at least one United States district court, but large, populous states have several. Thus, for example, California, New York, and Texas

¹ Both Texas and Oklahoma have two such courts, one to hear and decide criminal appeals and another for civil cases.

each have four districts. In contrast, states with a small population, such as Vermont and Alaska, and states encompassing a small geographic area, such as Massachusetts and New Jersey, have only one district court. In such states, district boundaries are therefore coterminous with state boundaries. Washington has two districts: Eastern and Western.

Whether a district court is staffed by a single judge or by several depends upon the population of the district. The court for the Southern District of New York, which serves New York City and a few adjacent counties and is the busiest in the nation, has twenty-eight judges. Other districts have only a single judge.

The district courts are essentially on the same level as state trial courts of general jurisdiction, and are neither superior nor inferior to them. However, the jurisdiction of the district court is not as broad as that of many state trial courts. In general, it is limited to the three classes of cases already mentioned: prosecutions for federal crimes, civil claims based upon federal law, and civil claims for more than \$75,000 based on state law between citizens of different states. With respect to criminal prosecutions and a small group of civil actions, the jurisdiction of the district courts is exclusive. With respect to the bulk of civil actions, it is concurrent with that of state courts. That is, the parties may litigate their dispute in either federal court or in the courts of at least one state. In situations where concurrent jurisdiction exists, a case tried in a state court must be appealed through the state judicial system, and a case tried in a federal district court must be appealed through the federal appellate system.

Circuit Courts of Appeals

There are eleven numbered intermediate appellate courts, called United States Courts of Appeals, one for each of the circuits into which the nation is divided. There is also one circuit court for the District of Columbia (which reviews both matters involving residents of the District and much of the federal administrative action taking place in the national capital), and one for the Federal Circuit (which handles appeals primarily on certain tax and patent matters). Each of the numbered circuits encompasses the geographic area of several states. The circuits along the eastern seaboard, where the population is heavy, cover only a few states, whereas those in the western part of the nation cover many states. For example, the Court of Appeals for the Second Circuit hears appeals from federal district courts in only three states: New York, Connecticut, and Vermont. In contrast, the Court of Appeals for the Ninth Circuit hears appeals from federal district courts in nine states: Washington, Oregon, California, Montana, Idaho, Nevada, Arizona, Alaska, and Hawaii.

Each of the eleven numbered circuits courts of appeals hears appeals from all the lower federal courts within the circuit on both civil and criminal matters. In addition, they review the decisions of various federal agencies in cases that involve people who reside in the circuit. The circuit courts have no power to review the decision of state courts or state administrative agencies.

Most cases at the circuit court level are decided by a panel of three judges. In other words, three judges collectively decide whether the trial court erred in some material way. Note, though, that each of the circuit courts has substantially more than three judges. The Ninth Circuit alone has 26 (plus another 23 semi-retired judges on “senior” status who have a reduced workload). Because it would be impractical for all of the judges on the court to hear every case, the judges are randomly assigned to panels. When deciding an issue of law, each panel binds all future panels of the circuit. This helps to maintain consistency. However, most opinions are circulated to the whole court before they are released and judges not on the panel can request that the case be reheard and decided en banc (by the court sitting as a whole).

The Supreme Court

Decisions of the courts of appeals are subject to further review in the Supreme Court of the United States. Unlike the circuit courts, the Supreme Court sits en banc all the time: all nine justices hear every case (although a judge may recuse himself or herself because of a conflict of interest). A few cases go to the Supreme Court as a matter of right, but most only as a matter of discretion of the Supreme Court. The Court exercises its discretion sparingly, usually granting fewer than five percent of the petitions for review.

The Supreme Court is not only the highest federal court, but also has power to review decisions of the highest court of each state if the decision is based on federal law, including constitutional law. It is thus the ultimate arbiter of federal law and the tying force that binds together all the courts of the nation.

Appellate Review

Not many cases are actually contested. Most criminal prosecutions result in a plea of guilty and most civil actions are resolved by default (the defendant fails to show up and the court enters a judgment for the plaintiff) or settled. Relatively few contested cases are fought vigorously to a judgment that leaves one side unhappy. However, when this does occur, the aggrieved party may want to appeal to a higher court.

Today there is a widespread belief among American judges and lawyers that every losing litigant should have the right to at least one appeal. There are several reasons for this. First, appellate courts provide a means of ensuring that the law is interpreted and applied correctly and uniformly. In each state and in the federal system there are numerous trial judges – ranging from dozens in small states to hundreds in the largest states and in the federal system – hearing and deciding cases individually. Even if those judges were all able and conscientious, it is inevitable that different interpretations of the law would surface from time to time and that, in the tumult inherent in many trials, errors would be made. Correctness and uniformity in legal rulings among such a multitude of trial judges could not be assured without a common higher court clothed with authority to review their decisions and, if necessary, reverse them.

Second, appellate courts provide a means for the ongoing development and evolution of the common law. Legislation alone cannot deal with the multitude and variety of issues arising in litigation or accommodate the law in a coherent way to changing circumstances; nor are trial courts equipped for this task. Appellate courts, through their decisions in cases and their explanations for those decisions, declare, make, and reshape legal doctrine in common-law, statutory, and constitutional fields.

Third, appellate courts heighten the legitimacy and acceptability of judicial decisions. Losing litigants in the trial court are sometimes convinced that they have lost unjustifiably, and are thus unwilling to accept the judgment. The public too may think a trial court decision was wrong, unfair or the result of bias, and thus be reluctant to consider it a legitimate resolution to the controversy. These attitudes erode respect for the law. The opportunity to take the case to a higher, multi-judge forum provides a healthy outlet for these feelings. If the appellate court affirms the judgment, the parties and the public have additional assurance that the proceeding was lawfully and properly conducted, and that the result was not the product of a single judge's bias or idiosyncratic action. They will also have had time to let passions subside and adjust themselves to the decision.

For each of these reasons, and perhaps more, there is now an almost universal right to appeal every type of case, large or small, civil or criminal. There is one very important exception, however: In most states, the government may not appeal a criminal case. If the defendant is acquitted, that is the end of the matter. Only when the defendant is convicted may an appeal be taken, and then only by the defendant.

Despite the universal right to appeal, no automatic review is provided; it must be sought and initiated by one of the litigants. Appellate courts, like trial courts, are not self-starting mechanisms. And, of course, the fact that a litigant may have a right to appeal does not mean that he or she will take advantage of it. Fewer than ten percent of the cases tried are appealed. Unless there is some reasonable likelihood that the judgment will be reversed – unless, in other words, it is demonstrable that the trial court reached a wrong result on the law or the facts – there is no point in spending further time and money on the litigation. Appeals are expensive as well as time consuming.

The Appellate Process

Appellate proceedings are vastly different from those of a trial court. Instead of a single judge there are several – at least three, sometimes five or seven or nine.² The judges who sit on

² American judges and lawyers widely believe that a court of last resort should have a minimum of five and a maximum of nine judges. The view is reflected in the American Bar Association's *Standards of Judicial Administration*, a comprehensive statement of the optimal features of court structure and process. Five is thought to be the minimum number needed to provide an appropriate balance of perspectives and judicial

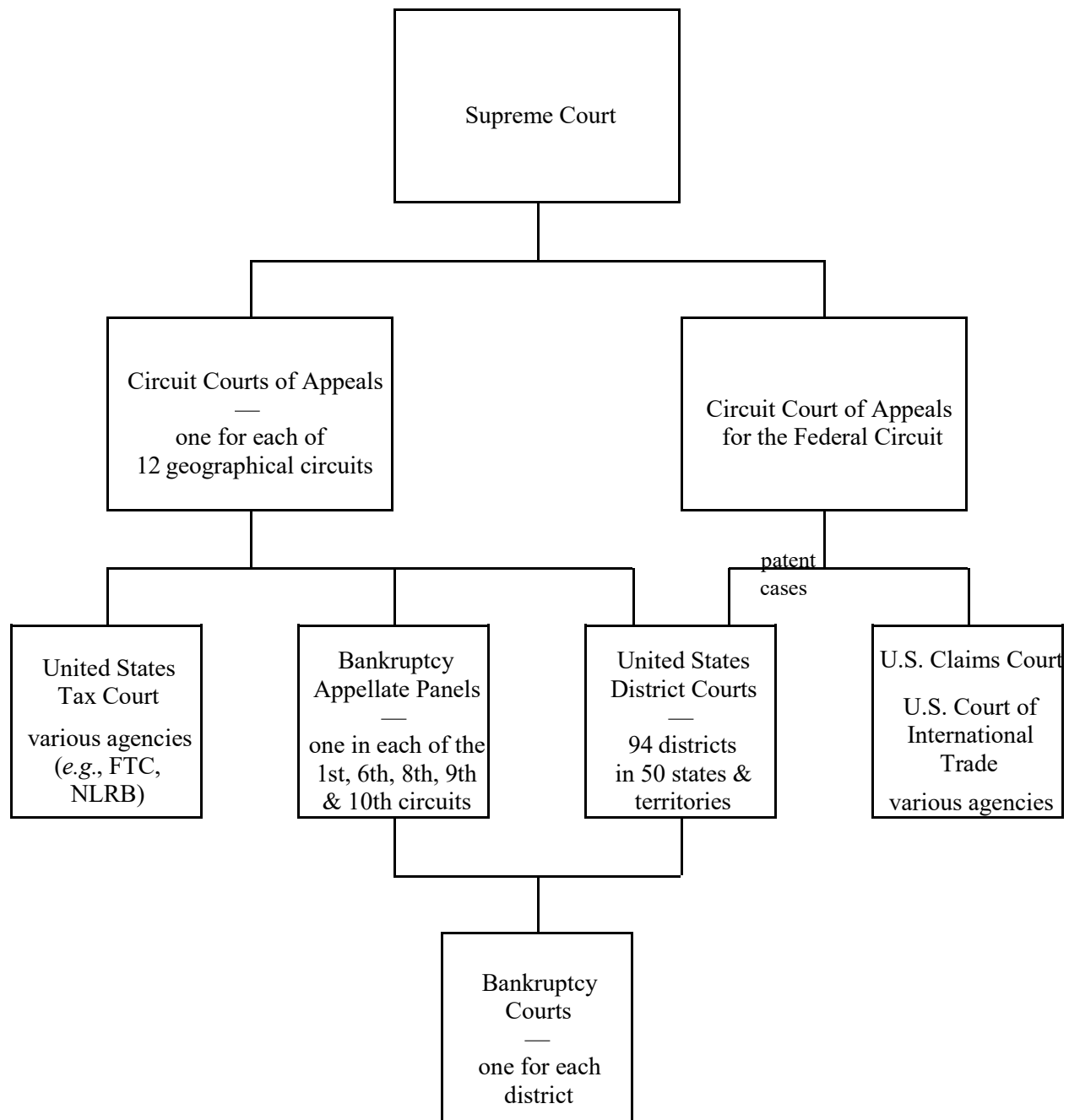
appellate courts hear no witnesses, empanel no juries, and rarely even see the parties to the litigation. In short, they do not retry the case. Instead, they review the record of the proceedings before the trial court to determine if the judge or the jury erred in a way substantial enough to affect the outcome.

In resolving appeals, appellate courts review different aspects of the trial court proceedings under different standards of review, reflecting different degrees of deference. Because appellate judges do not hear or see the witnesses in person – they merely review a written transcript of the witnesses’ testimony – they strongly defer to any findings of fact made below, whether by the trial judge or by jury. They reverse a factual determination only if it was clearly erroneous. At the other extreme, they review the trial court’s legal rulings on a *de novo* standard. This means that they look at the issue completely fresh and without deference to the lower court at all. Other matters are subject to one or more intermediate standards, such as abuse of discretion.

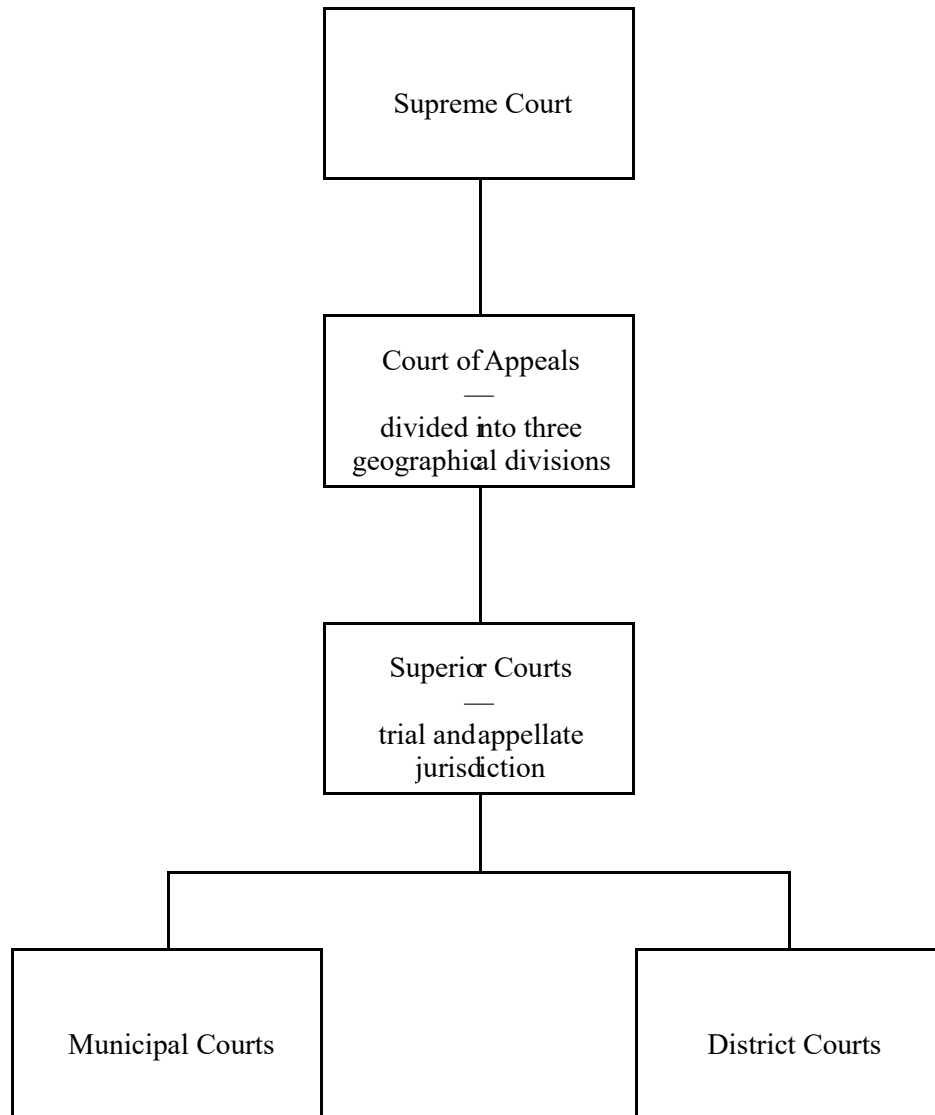
Appellate courts are expected to do more than decide whether to affirm (sustain) or reverse (reject) the trial court’s judgment. They are also expected to explain their reasons in writing. Partly this is to demonstrate to the disappointed litigants that the court carefully considered their arguments. Partly it is to improve the decisional process itself by forcing the judges into reasoned decisions and away from snap judgments. Mostly, it is to clarify and mold the law, for each decision becomes a precedent, governing like cases that may arise in the future. Accordingly, almost all appellate decisions in this country – from both state and federal courts – are routinely published in both print and electronic form. Lawyers and law students can therefore readily access them – once they learn how to find the ones that are relevant – in an effort to ascertain what the current state of the law is.

judgments for a tribunal that is authoritatively enunciating the law for an entire jurisdiction; nine is considered the maximum number that can participate meaningfully in a genuinely collegial decision.

This attitude about size is based on the belief that a court of last resort should sit *en banc* (all of its judges sitting together) when deciding a case on its merits, in order to promote consistency. All courts of last resort in the United States function in this manner.

FEDERAL COURT STRUCTURE

TYPICAL STATE COURT STRUCTURE (Washington)



THE PERSUASIVENESS OF DIFFERENT SOURCES OF LAW

Type of Primary Authority	When & Where Binding	When & Where Persuasive
U.S. Constitution	Always binding on all federal and state courts	N/A
Federal statute*	Always binding on all federal and state courts	N/A [‡]
Federal administrative regulation**	Always binding on all federal and state courts	N/A [‡]

U.S. Supreme Court decision interpreting and applying federal law	Always binding on all federal and state courts, except the U.S. Supreme Court	May be regarded as persuasive by the U.S. Supreme Court
U.S. Court of Appeals decision interpreting and applying federal law	Always binding on lower federal courts within the jurisdictional boundaries of the court issuing the decision	May be regarded as persuasive by federal and state courts that need not treat the decision as binding
U.S. District Court decision interpreting and applying federal law	Possibly binding on specialized lower federal courts (<i>e.g.</i> , Bankruptcy courts) within the jurisdictional boundaries of the District Court issuing the decision and over which the District Court has appellate jurisdiction	May be regarded as persuasive by federal and state courts that need not treat the decision as binding
U.S. Supreme Court decision interpreting and applying state law	Binding on all federal courts until the law is interpreted differently by a state court	May be regarded as persuasive by federal and state courts that need not treat the decision as binding
U.S. Court of Appeals decision interpreting and applying state law	Binding on federal courts within the jurisdictional boundaries of the Court of Appeals issuing the decision until the law is interpreted differently by a state court	May be regarded as persuasive by federal and state courts that need not treat the decision as binding
U.S. District Court decision interpreting and applying state law	Possibly binding on specialized lower federal courts (<i>e.g.</i> , Bankruptcy Courts) within the jurisdictional boundaries of the District Court until the law is interpreted differently by a state court	May be regarded as persuasive by federal and state courts that need not treat the decision as binding
State Constitution***	Always binding on all federal courts and all state courts within the given state	N/A†
State statute†	Always binding on all federal courts and all state courts within the given state	N/A‡
State administrative regulation††	Always binding on all federal courts and all state courts within the given state	N/A‡
Decision of a state's highest court interpreting and applying state law***	Always binding on all federal courts and all state courts within the given state except the court which issued the decision††	May be regarded as persuasive by the court which issued the decision
Decision of a state's intermediate appellate court interpreting and applying state law***	Always binding on lower state courts within the jurisdictional boundaries of the intermediate appellate court issuing the decision; in some states may also be binding on lower state courts outside those jurisdictional boundaries	May be regarded as persuasive by federal and state courts that need not treat the decision as binding

* Assuming there is no conflict with the U.S. Constitution.

** Assuming there is no conflict with the U.S. Constitution or a federal statute.

*** Assuming there is no conflict with the U.S. Constitution, a federal statute, or federal administrative regulation.

†

Assuming there is no conflict with the U.S. Constitution, a federal statute, federal administrative regulation, or that state's constitution. ††

Assuming there is no conflict with the U.S. Constitution, a federal statute, federal administrative regulation, that state's constitution, or any of that state's statutes. †††

Federal courts may disregard the decision if they have reason to believe the state supreme court would do so under similar circumstances. ‡

Constitutions, statutes and regulations are rarely persuasive outside of the jurisdiction in which they apply.

THE LAW SCHOOL CASE METHOD

Many of your law school courses, particularly in the first year, will be taught at least in part through the use of cases – particularly the written decisions of courts in appellate cases. This teaching method was developed in 1870 by a Harvard law professor named Christopher Columbus Langdell. Langdell was impressed with the results of the scientific method in the natural sciences, by which scientists formulated theories to explain specific phenomena. In a similar vein, Langdell suggested that individual cases could be studied to determine what general rules could be derived from specific results. For example, if judges routinely refused to award damages in accident cases where the defendant was not at fault, the conclusion could be drawn that fault is a necessary element to the recovery of damages in an accident case.

This scientific method affected not only the study of law, but also prevailing notions about what law was. At the time Langdell developed the case method, few lawyers would have characterized the common law as judge-made. Instead, they considered the common law to be an offshoot of natural law, which judges could discover or discern through the use of reason. Such views are rare today. Most lawyers and scholars now consider the common law to be the creation of judges, just as statutes are the creation of legislatures.

Nevertheless, the case method of study endures. Indeed, if the changing perceptions about law have had any effect at all, they have made the case method more relevant. The case method focuses on judicial opinions not merely to discern legal rules and predict how future cases are likely to be resolved. In short, its goal is not limited to the dissemination of legal doctrine. The case method is also – perhaps primarily – a technique to help students develop the legal reasoning skills essential to the practice of law. In other words, by reading and analyzing cases, students can learn what types of legal arguments work best (*i.e.*, are most likely to persuade judges). From there, they can begin to construct effective legal arguments on their own.

Thus, for our purposes (and, indeed, for the purposes of lawyers too) the outcome of any particular case is often far less important than the reasoning upon which it rests. For that reason, you must quickly learn to focus on the court's analysis of the problem before it. One way to focus your study is to brief each case.

READING AND BRIEFING CASES

A “brief” of a case is a short, written summary of the important facts, issues, reasoning, and points of law discussed in an appellate decision.³ Mastery of brief-writing skills is imperative for success in law school.

The key to writing a functional brief lies in first determining its purpose. There are several different reasons for briefing cases, each calling for a different type of brief. Students often prepare written briefs solely for use in class recitation. Rather than resort to memory when called upon to discuss the case in class, a student may rely upon the brief – sometimes to the point of reading it aloud. Briefs written for this purpose are not usually very helpful, largely because most students, particularly during their first year, will fail to anticipate most of the questions that the professor will ask. On a more practical level, the chances of being called upon in class to discuss any particular case are slim, the probabilities obviously varying with class size, the professor’s teaching method, and other considerations. Briefing cases for classroom recitation may avoid a momentarily embarrassing classroom experience, but the effort and time consumed in preparing a brief solely for this purpose generally outweigh its benefits.

Preparation for final examinations is another standard justification for briefing. After all, in all your courses combined there will simply be too many cases and they will be too complex for you to remember without some form of written organization. Yet early in your law studies it is difficult to write briefs that will accomplish this purpose. You may find, once your ability to analyze legal opinions has developed, that briefs prepared during the first few months of law school are of minimal assistance. Accordingly, when you are preparing for final examinations and grades are at stake, do not rely too heavily on briefs you prepared in the early days of law school.

Thus we reach the real objective of brief writing: to aid in the comprehension of cases. Brief writing requires precise analysis. The process of distilling information into the brief forces the reader to think about what is being decided and to follow the court’s reasoning. Committing your impression of a case to paper also forces you to learn legal terminology and to begin thinking critically. Briefing cases thus refines legal analysis and writing skills, and, like a dress rehearsal, prepares you for writing exams and practicing law. Preparing briefs should also reveal those areas in which your comprehension is less than adequate. Appreciating what you do not know is a necessary stage in the learning process.

Because brief writing is best thought of as part of the learning process, and all of us learn a bit differently, there is no single right way to brief cases. You must develop the style and format that suit your purpose. That said, one thing about briefs is universal: the benefit is not from *having* a brief; it is from *writing* it. You can acquire briefs from someone else, but that act will not help

³ Distinguish this from a lawyer’s brief to the court, which is a persuasive memorandum of law addressing legal issues involved in a case.

you develop the skills you need. Indeed, it may actually interfere with the development of those skills.

Until such time as you acquire a reasoned basis for using some other format, you are well advised to prepare briefs that: (1) have wide margins or occupy just one side of a page, so that you may take your class notes next to your brief of the case under discussion; and (2) contain separate sections for Facts, Procedural History, Issue(s), Holding, Reasoning, Judgment, and Evaluation. A short description of each of these sections and a sample case brief follow.

ELEMENTS OF A CASE BRIEF

Identification of the Case

At a minimum, in each brief you should include the case name, the deciding court, and the year of the decision. Knowing the case name allows you to refer to the case easily; the deciding court provides insight into the precedential value of the decision; the year tells you the historical context of the case and the opportunity of subsequent courts to limit, expand, or overrule the decision. You also may want to include the page of your casebook on which the case appears, so that you may refer back to it easily when you review, or the volume number of the reporter and the page on which the case begins (its citation), so that you may refer others to the case should the need arise.

Facts

Your brief should include all the legally significant facts on which the court relied in deciding the case. The factual circumstances of a dispute are essential to understanding a court's opinion and to predicting the outcomes of future disputes. You must read the entire opinion and understand the issue and the court's rationale before you can select which facts were necessary for its result. For this reason, some students find it easier to write the facts section of a brief after they have written the issue and rationale sections.

Appellate courts typically do not decide what the facts are; rather, they determine the legal significance of the facts found by the trial court. Moreover, in writing their opinions, appellate courts often cull the facts they deem significant from all the other facts asserted in the pleadings or proven at trial. Nevertheless, you should not simply adopt verbatim the appellate court's statement of the facts. Courts often mention facts that are not necessary to its result. For example, specific amounts, dates, and similar details rarely are essential to a court's rationale or to the outcome of a case. The court may include other facts because they add drama or narrative continuity to an opinion. So, go through the opinion carefully and extract those facts that are necessary to explain and evaluate the decision. That said, bear in mind that the court may have neglected to mention facts that, in the Evaluation section of your brief, you decide are or should be important. Be sure to include those too.

At a minimum, your facts section of a brief should identify the parties, their relationship to each other or “status,” and the nature of their dispute. Your briefs may be easier to understand if you use the trial court designations for the parties (plaintiff, defendant), rather than the appellate court designations. At first glance, you cannot know whether the appellant was the plaintiff or defendant below. Using appellate labels can also be confusing because appellate labels may differ from jurisdiction to jurisdiction. Some jurisdictions call the party bringing the appeal the “appellant”; others use the terms “plaintiff-in-error” or “petitioner.” Correspondingly, some jurisdictions call the party that prevailed at trial the “appellee,” while others use the terms “defendant-in-error” or “respondent.” Eliminate confusion by consistently using the trial court labels.

Alternatively, you also may find it helpful to refer to parties by their role in the drama, for example “seller” or “buyer,” “landlord” or “tenant.” This role may reveal something about the nature of the dispute, especially if you also include information about the status of the parties, for example “plaintiff/buyer.” Employees usually bring certain kinds of suits against employers; tenants bring certain kinds of suits against landlords.

Include the nature of the dispute in your brief, for example, whether it is a contract, tort, or criminal proceeding, and the facts on which the claim is based – that is, who did what to whom, with what result.

First-year law students frequently underestimate the importance of the facts section of the brief because it seems less “legal” than other sections of the brief and closer to the kind of literary narrative they encountered as undergraduates. For this reason, they sometimes skim over the facts when reading cases and recount them in a cursory manner in briefs. Because the first-year courses emphasize the common law, however, the facts of cases are extremely important. They may be the only factor upon which to distinguish later cases. Moreover, the facts, or “story,” personalize a dispute and can provide a good mnemonic device for remembering other elements of the case.

Procedural History

The procedural history section of your brief should explain what happened in the trial court and in any intermediate appellate court. It contains the legal history of the case. You should include who sued whom, the legal theory or kind of action, the relief sought, and the outcome in the trial court. Pay particular attention to the procedural device through which the trial court decided the case. Was it decided on a motion to dismiss? A motion for summary judgment? After a trial before a jury? The answers to these questions affect how much deference the appellate court will give to the judgment rendered by the trial court.

In the procedure section, you should also include the result of any intermediate appeals. For example, if one of the parties appealed to an intermediate appellate court and that court reversed the judgment of the trial court, the court of last resort will review the intermediate

appellate court's decision, not the trial court's. You therefore should summarize the bases on which the trial and intermediate appellate courts rendered their judgments. The bases on which the court of last resort renders its opinion may differ from those of both lower courts.

This section will be more important in some contexts than in others. In any event, however, the procedural posture of a case often can explain what otherwise appears to be an anomalous result and thus the importance of the procedural context in comprehending the ruling of an appellate court cannot be overstated.

Issue

The issue is the question that the appellate court must answer to resolve the dispute before it. Many opinions address multiple issues; casebook authors, however, usually edit opinions so that they contain only one or two issues on which students should focus. If the case addresses more than one issue, you should have a separate statement of each issue and holding, and separate paragraphs for each issue with the Reasoning and Evaluation sections.

Write the issue in question form, tailoring it to the case by including the legally significant facts of the case. Frame your issue in two different ways. In one phrasing, state it as narrowly as possible because courts usually attempt to resolve the disputes before them on the narrowest possible grounds. If your issue statement can apply to other cases, your statement may be too general. Check to see whether you have missed any legally significant facts that make this case differ from others. Then phrase your issue more broadly. This may help identify the possible significance of the case and the types of other disputes to which the court's decision may be applied in the future.

The interplay between the facts and the applicable law creates the issue in a case. Legal principles regulate the relationships among parties, their respective rights and responsibilities, and their remedies if a dispute develops. The facts of a case thus determine whether a particular legal principle will apply. For example, the plaintiff in a civil case must establish all the elements of a cause of action; the absence of a single element may bar the plaintiff from obtaining relief. If, on appeal, the defendant disputes whether the plaintiff demonstrated a particular element of the action, the appellate court will focus its analysis on the proof surrounding that element. In other cases, the court may focus on a procedural defect (for example, lack of personal or subject matter jurisdiction or an improper jury instruction) or an affirmative defense (such as statute of limitations or payment). Liability, guilt, or innocence are less important in issue questions than the legal theory and facts on which the outcome is premised.

Courts often state issues in broad terms that do not describe the case before them very well. For example, a statement that "we must decide whether the trial court erred in entering summary judgment for the defendant" tells little about the case before the court. You must glean the precise issue from the facts and the court's evaluation of their significance. Remember that the law does not exist in a vacuum: without the specific facts of the dispute, the court cannot determine the

appropriate application of law. Thus, the issue asks what law appropriately applies to the facts of the case.

Holding

The holding is the court's response to the issue question. The holding may be stated as a single word ("yes" or "no") if it immediately follows a statement of the issue, or as an affirmative or negative restatement of the issue question. If you restate the issue as a declarative sentence incorporating the holding, you state the "rule" of the case. For example, suppose that the issue in the case you are reading is, "should a 16-year old driver of a motor vehicle be held to an adult standard of care – rather than a child's standard of care – because driving is in an adult activity?"⁴ If the holding is "yes," you can form the "rule" from the case by combining the issue and the holding into an affirmative statement: a 16-year old operator of a motor vehicle must comply with an adult's standard of care rather than a child's standard because driving is an adult activity.

Often courts call the specific result of a case its holding, for example, "We hold that defendant is liable to plaintiff." Because the purpose of a case brief is to understand the court's decision and to predict the outcome of future cases, such a statement divorced of factual context is of little concern to anyone except the immediate parties. A well crafted holding will always include sufficient facts to indicate what the issue is.

Reasoning

This section, along with the Evaluation section, should be the heart of your brief. Use it to explain why the appellate court decided the controversy as it did. The court's reasoning provides the grounds on which future litigants or courts will predict or defend similar results. Courts usually rely – sometimes expressly, sometimes not – upon precedent, principle, or policy to justify their decisions. To the extent you are able to identify these rationales, you should note them in this section of your brief.

Sometimes more than one reason justifies the result in a particular case. These reasons usually are not equally important to the result, however, and you should attempt to discern on which the court relied most heavily. This can be a difficult task. Sometimes the relative importance of the court's justifications will become clear only in later opinions. Moreover, sometimes courts make remarks that do not directly support their result. Such remarks are called "dicta" or, when singular, "dictum." The court may use dicta to address hypothetical facts or issues that are not before it. Because the dicta was expressed in passing and therefore was not necessary to the court's decision, it will not bind lower courts in future cases, although it may have strong persuasive value. Thus, dicta may be more important in resolving future disputes than in

⁴ See *Baxter v. Fugett*, *infra*.

explaining the decision in which they occur. Nevertheless, dicta may be useful in distinguishing which rationales a court did find compelling.

Do not ignore dissenting and concurring opinions. A dissent is an opinion by one or more judges on the court who do not agree with the outcome reached by the majority. A concurring opinion is one in which the author agrees with the outcome reached by the majority but for slightly different or additional reasons. Although dissenting and concurring opinions do not have the force of law, they can nevertheless be very important. They often critique all or part of the majority opinion, and thus can help you understand it. They sometimes identify important additional facts and they usually raise additional analytical points. Beyond all this, dissents can become law. On occasion, a court will reconsider its earlier decisions and conclude that a dissent was better reasoned.

Indeed, that is one of the main reasons that judges write dissents: they hope to influence the law in the future.⁵ Most of the cases in casebooks have been edited, some quite substantially. If the casebook authors have included a dissenting or concurring opinion, it is because they thought you should read and pay attention to it.

Judgment

The judgment is the result or outcome of the case. This section tells who won and what relief the court ordered, for example, “Judgment for defendant is reversed.” It probably is of more interest to the immediate parties, however, than it is to future litigants or law students. Many people incorporate this section into the Holding. Alternatively, you may wish to maintain this as a separate section for class recitation purposes or as a mnemonic device – remembering who won may trigger the more important consideration of why that party won.

Evaluation

Courts do not always reach the correct result; indeed, the fact that a case appears in your casebook may be *because* the court reached an unwise or unsupported decision, rather than as a model of judicial wisdom. There is no single formula for evaluating a decision. The one constant, though, is to be critical.⁶ This is your opportunity to question the court’s decision and to go beyond

⁵ Justice Oliver Wendell Holmes, Jr. became known as “The Great Dissenter” for his consistent, principled stand on free expression issues, positions which the Court ultimately adopted after some change in its membership.

⁶ Many beginning law students are reluctant to evaluate courts’ decisions because criticism seems presumptuous and disrespectful. Usually, however, this reluctance quickly evaporates after exposure to professors’ criticism of opinions. Remember that most of the cases you will be reading probably presented close questions or introduced novel legal theories, which is why they were included in the casebook.

what is on the page. The questions to ask often vary with context and issue. For example, you may:

- Consider whether the court's reasoning is logical, internally consistent, and whether what the court did corresponds to what the court said.
- Identify facts (things which occurred) or nonfacts (things which did not occur) that are or should be critical to the outcome, but which the court did not discuss.
- If the decision is one of several in your materials on a particular issue, determine whether it follows the rules of other cases established. Or, does it extend them? Limit them? Reverse them? Disregard them?
- Ask yourself if there are useful analogies to other legal issues or doctrines you have studied, and if so, whether this decision is consistent or inconsistent with them.
- Identify analytical points – policy, principle, or precedent – that the court overlooked and which might support a contrary result.
- Ask whether the decision is fair, whether it is practical, and whether some alternative approach might not have been better. Are there issues that the decision implicitly raises but does not answer? Have social or economic circumstances significantly changed since the court issued its decision, such that the decision should no longer be followed? If I were appealing this decision to a higher court, what arguments would I make?

Moreover, some of these theories later were abandoned or ignored. Ask yourself how you would have reacted to the court's decision if you were the losing party. Also ask yourself how the decision will affect future litigants. Will they be better able to vindicate their legal rights? Is society better off because of the court's decision?

Remember too that law, unlike some other disciplines, contains few absolute rules or "right" answers. The skill you acquire in evaluating courts' decisions is essentially the same skill you will use in making persuasive arguments, an ability that will serve you well in law school and in practice.

SAMPLE CASE

Baxter v. Fugett 425
P.2d 462 (Okla. 1967)

McINERNEY, Justice.

This is an appeal by plaintiff from verdict and judgment for defendant in a negligence action arising out of a collision, at an Oklahoma City street intersection, between a bicycle ridden by a 12 year old plaintiff and an automobile driven by a 16 year old defendant. The mothers of the two boys were made parties plaintiff and defendant respectively, but in view of the single proposition argued on appeal, it will not be necessary to notice their respective interests in the case.

In the petition, the 16 year old defendant was charged with specific acts of negligence; in the answer, defendant pleaded contributory negligence, unavoidable accident, and the defense of sudden emergency.

No detailed summary of the evidence is necessary to an understanding of the single question raised on appeal. Plaintiff was riding his bicycle north on a through street. He could not recall any facts pertaining to the cause of the accident. Defendant testified, as a witness for plaintiff, that he was driving his automobile west toward an intersection where the through street was protected by a stop sign. After stopping and observing plaintiff about fifty feet away, defendant proceeded into the intersection and his automobile was struck at a point just behind the driver's seat on the left side by plaintiff's bicycle.

In his "statement of the case and pleadings" the trial judge informed the jury that plaintiff alleged that the defendant automobile driver was negligent in two particulars: (1) failure to keep a proper lookout, and (2) failure to yield the right of way. From the language in the petition, and from uncontradicted circumstances shown in evidence, it is clear that the allegation of failure to yield the right of way was based upon the requirement of Okla. Stat. tit. 47, § 11-403(b) that "every driver" approaching an intersection protected by a stop sign shall stop, and "after having stopped shall yield the right of way to any vehicle which . . . is approaching so closely on said highway as to constitute an immediate hazard." The trial judge also told the jury, among other things, that the defendant alleged that the 12 year old plaintiff was guilty of contributory negligence. No objection to the court's statement of the issues and pleadings was made by either party.

From verdict and judgment for defendant, plaintiff appeals.

The precise argument made on appeal, and the only one, is that the court erred in giving the following instruction:

You are instructed that the plaintiff Robert Baxter at the time of this accident was 12 years of age and the defendant William M. Fugett was 16 years of age. In

determining whether or not the defendant William M. Fugett was guilty of negligence and whether or not the plaintiff Robert Baxter was guilty of contributory negligence as heretofore defined in these instructions, you are instructed that by the term “ordinary care” as applied to children is meant that degree of care and caution which would usually and ordinarily be exercised by children of the age of 12 and 16 years under the same or similar circumstances. The conduct of children 12 years of age and 16 years of age is not necessarily to be judged by the same rules which would apply to an adult. The degree of care and caution required of a child is according to and commensurate with his age and mental capacity and his power to exercise such degree of care as a child of his age may be fairly presumed capable of exercising. Insofar as Robert Baxter and William M. Fugett may be presumed to do so it was their duty to take into consideration the fact that each was attempting to cross a public street upon which vehicular traffic could ordinarily be expected and in crossing the street to exercise ordinary care for his own safety and to watch out for traffic proceeding along the street.

It was the duty of each to take into consideration all the circumstances and conditions surrounding the place of the accident and the possibility of injury which might result in crossing or attempting to cross the street at the time and place in question.

This instruction follows the general rule that when a minor is charged with common law negligence, his conduct is to be measured by a “child’s standard of care” under which consideration is given to his age, mental capacity, judgment, etc. *Davis v. Bailey*, 162 Okla. 86, 19 P.2d 147; *Witt v. Houston*, 207 Okla. 25, 246 P.2d 753; *Morris v. White*, 177 Okla. 489, 60 P.2d 1031; *Bready v. Tipton*, 407 P.2d 194 (Okla.). These cases, however, involve the standard of care required of a child while engaged in activities commensurate with his age.

We are asked to approve the above standard of care for a 16 year old minor engaged in an adult activity. We decline to do so. The better reasoning is expressed in *Dellwo v. Pearson*, 259 Minn. 452, 107 N.W.2d 859. The Minnesota Supreme Court, in disapproving a similar instruction, and distinguishing between the contributory negligence and primary negligence of minors, said as follows:

However, this court has previously recognized that there may be a difference between the standard of care that is required of a child *in protecting himself against hazards and the standard that may be applicable when these activities expose others to hazards*. (Emphasis supplied)

The instruction complained of permits a minor to engage in adult activities which expose others to hazards, while imposing only a child’s standard of care on the minor so engaged. This legal sanction is impractical and contrary to the circumstances of modern life. We hold that a minor, when operating an automobile, must exercise the same standard of care as an adult.

Jurisdictions surrounding Oklahoma generally follow the rule announced in this case. See *Harrelson v. Whitehead*, 236 Ark. 325, 365 S.W.2d 868; *Allen v. Ellis*, 191 Kan. 311, 380 P.2d 408; *Wilson v.*

Shumate, 296 S.W.2d 72 (Mo.); *Renegar v. Cramer*, 354 S.W.2d 663 (Tex. Civ. App).

The Highway Safety Code, Title 47, Motor Vehicles, makes no distinction between minors and adults in defining “person,” § 1-144, “driver,” § 1-114, and “operator,” § 1-140. No statute or rule of the road prescribing the operation of a motor vehicle makes any such distinction, but refers to “every person,” when reference is made to the person, operating a vehicle and the duties required in the operation of a vehicle. It is the announced legislative policy of this state to prescribe only one standard of care upon a person operating a motor vehicle, regardless of the age of the person, and that is an adult standard of care. There is no reason to apply a different standard of care to negligent acts committed by a minor while driving an automobile, even though the negligent act is not a specific violation of a statute, since the activity of operating a motor vehicle on a public highway is the basis for imposing the standard of care, rather than the age of the person, and that is an adult standard.

Having determined that the giving of the instruction was error, and being of the opinion that this error was prejudicial to the plaintiff, the judgment of the trial court is reversed and the cause is remanded with directions to grant a new trial.

SUGGESTED BRIEF***Facts***

Action for damages – negligence. Plaintiff, a 12-year old, was riding a bicycle on a through street. Defendant, a 16-year old driver, approached from a side street in his car. Defendant came to a full stop at the stop sign, then pulled out. Plaintiff ran into the driver’s side of Defendant’s car, injuring himself. Plaintiff claims that Defendant negligently failed to keep proper lookout and failed to yield the right of way. Defendant claims contributory negligence.

The court instructed the jurors that in considering whether both Plaintiff and Defendant used ordinary care, they should apply the standard of “care ordinarily exercised by children” 12 and 16 years old, respectively, and that the parties should not necessarily be judged by standard of care of an adult.

Procedure

Verdict and judgment for Defendant. Plaintiff appeals, urging error in the jury instructions.

Issue

Narrow: Should a 16-year-old automobile driver be judged by the standard of ordinary care applicable to a 16 year-old child, rather than that applicable to an adult?

Broad: What standard of care should courts use to judge children?

Holding

Narrow: No. A 16-year-old automobile driver is to be judged by the standard of ordinary care applicable to an adult because driving is an adult activity.

Broad: Courts should judge children by the same standard applicable to adults when children are engaged in an adult activity.

Judgment

Judgment for Defendant is reversed and the case is remanded for a new trial.

Reasoning

1. The general rule is to hold children to the standard of care of others their age, but this rule applies if they are engaged in activity commensurate with their age. The child's standard is appropriate to require of a child in protecting himself, but a different standard may apply to protect others from harm. In dealing with driving automobiles, an adult activity, society must hold minors to the adult standard of care to protect the public.

2. Highway safety codes and other rules of the road do not distinguish between minors and adults. The code refers only to "every person," indicating a legislative policy to apply one standard of care to all drivers.

3. In the new trial the jury will be instructed that the minor driver should be held to the standards of an adult, whereas the contributory negligence of the bicyclist may be judged by standards relating to children.

Evaluation

1. Can a jury truly understand such an instruction? What if the bicyclist were 17 years of age? Should age be a factor in resolving other issues as well?

2. To the extent that this ruling discourages minors from engaging in certain activities (or adults from letting their children engage in them), is that desirable? In rural and farming areas, children need to be able to drive. On the other hand, for their own protection and the protection of others traveling on or by public roads, children driving motor vehicles need to drive skillfully. A tort rule requiring this may prevent accidents, to the extent that negligence can ever be deterred.

3. How are we to distinguish "adult activities" from "children's activities"? Does the answer depend on whether adults often engage in the activity, on whether the activity is primarily the province of adults, on the seriousness of the potential consequences, or on something else entirely? What other activities in which minors engage are likely to qualify as adult activities?

4. Is this case relevant in states with no-fault auto insurance?

5. Why did I read this case? – One answer may be to further explore the tensions in tort law between evaluating conduct according to an objective standard while appropriately accounting for the characteristics of the parties and the circumstances in which they found themselves.

ASSIGNED CASE

Read the case that follows and prepare a brief for it.

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

EARL, J.

On the 13th day of August, 1880, Francis B. Palmer made his last will and testament, in which he gave small legacies to his two daughters, Mrs. Riggs and Mrs. Preston, the plaintiffs in this action, and the remainder of his estate to his grandson, the defendant Elmer E. Palmer, subject to the support of Susan Palmer, his mother, with a gift over to the two daughters, subject to the support of Mrs. Palmer, in case Elmer should survive him and die under age, unmarried, and without any issue. The testator, at the date of his will, owned a farm, and considerable personal property. He was a widower, and thereafter, in March, 1882, he was married to Mrs. Bresee, with whom, before his marriage, he entered into an antenuptial contract, in which it was agreed that in lieu of dower and all other claims upon his estate in case she survived him she should have her support upon his farm during her life, and such support was expressly charged upon the farm. At the date of the will, and subsequently to the death of the testator, Elmer lived with him as a member of his family, and at his death was 16 years old. He knew of the provisions made in his favor in the will, and, that he might prevent his grandfather from revoking such provisions, which he had manifested some intention to do, and to obtain the speedy enjoyment and immediate possession of his property, he willfully murdered him by poisoning him. He now claims the property, and the sole question for our determination is, can he have it?

The defendants say that the testator is dead; that his will was made in due form, and has been admitted to probate; and that therefore it must have effect according to the letter of the law. [However], all [wills], as well as all contracts, may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes. They were applied in the decision of the case of *Insurance Co. v. Armstrong*, 117 U.S. 599. There it was held that the person who procured a policy upon the life of another, payable at his death, and then murdered the assured to make the policy payable, could not recover thereon. Mr. Justice Field, writing the opinion, said:

Independently of any proof of the motives of Hunter in obtaining the policy, and even assuming that they were just and proper, he forfeited all rights under it when, to secure its immediate payment, he murdered the assured. It would be a reproach to the jurisprudence of the country if one could recover insurance money payable on the death of a party whose life he had feloniously taken. As well might he recover insurance money upon a building that he had willfully fired.

These maxims, without any statute giving them force or operation, frequently control the effect and nullify the language of wills. A will procured by fraud and deception, like any other

instrument, may be decreed void, and set aside; and so a particular portion of a will may be excluded from probate, or held inoperative, if induced by the fraud or undue influence of the person in whose favor it is. So a will may contain provisions which are immoral, irreligious, or against public policy, and they will be held void.

Here there was no certainty that this murderer would survive the testator, or that the testator would not change his will, and there was no certainty that he would get this property if nature was allowed to take its course. He therefore murdered the testator expressly to vest himself with an estate. Under such circumstances, what law, human or divine, will allow him to take the estate and enjoy the fruits of his crime? The will spoke and became operative at the death of the testator. He caused that death, and thus by his crime made it speak and have operation. Shall it speak and operate in his favor? If he had met the testator, and taken his property by force, he would have had no title to it. Shall he acquire title by murdering him? If he had gone to the testator's house, and by force compelled him, or by fraud or undue influence had induced him, to will him his property, the law would not allow him to hold it. But can he give effect and operation to a will by murder, and yet take the property? To answer these questions in the affirmative it seems to me would be a reproach to the jurisprudence of our state, and an offense against public policy. Under the civil law,⁷ evolved from the general principles of natural law and justice by many generations of juriconsults, philosophers, and statesmen, one cannot take property by inheritance or will from an ancestor or benefactor whom he has murdered. Dom. Civil Law, pt. 2, bk. 1, tit. 1, § 3; Code Nap. § 727; Mack. Rom. Law, 530, 550. In the Civil Code of Lower Canada the provisions on the subject in the Code Napoleon have been substantially copied. But, so far as I can find, in no country where the common law prevails has it been deemed important to enact a law to provide for such a case. Our revisers and law-makers were familiar with the civil law, and they did not deem it important to incorporate into our statutes its provisions upon this subject. This is not a *casus omissus*. It was evidently supposed that the maxims of the common law were sufficient to regulate such a case, and that a specific enactment for that purpose was not needed. For the same reasons the defendant Palmer cannot take any of this property as heir. Just before the murder he was not an heir, and it was not certain that he ever would be. He might have died before his grandfather, or might have been disinherited by him. He made himself an heir by the murder, and he seeks to take property as the fruit of his crime. What has before been said as to him as legatee applies to him with equal force as an heir. He cannot vest himself with title by crime. My view of this case does not inflict upon Elmer any greater or other punishment for his crime than the law specifies. It takes from him no property, but simply holds that he shall not acquire property by his crime, and thus be rewarded for its commission.

The facts found entitled the plaintiffs to the relief they seek. The error of the referee was in his conclusion of law. Instead of granting a new trial, therefore, I think the proper judgment upon the facts found should be ordered here. The judgment of the general term and that entered upon the report of the referee should therefore be reversed, and judgment should be entered as follows: That Elmer E. Palmer and the administrator be enjoined from using any of the personalty

⁷ [Recall the brief discussion of the civil law tradition on p. 4 – ed.]

or real estate left by the testator for Elmer's benefit; that the devise and bequest in the will to Elmer be declared ineffective to pass the title to him; that by reason of the crime of murder committed upon the grandfather he is deprived of any interest in the estate left by him; that the plaintiffs are the true owners of the real and personal estate left by the testator, subject to the charge in favor of Elmer's mother and the widow of the testator, under the antenuptial agreement, and that the plaintiffs have costs in all the courts against Elmer.

GRAY, J., dissenting.

This appeal presents an extraordinary state of facts, and the case, in respect of them, I believe, is without precedent in this state. The respondent, a lad of 16 years of age, being aware of the provisions in his grandfather's will, which constituted him the residuary legatee of the testator's estate, caused his death by poison, in 1882. For this crime he was tried, and was convicted of murder in the second degree, and at the time of the commencement of this action he was serving out his sentence in the state reformatory. This action was brought by two of the children of the testator for the purpose of having those provisions of the will in the respondent's favor canceled and annulled. The appellants' argument for a reversal of the judgment, which dismissed their complaint, is that the respondent unlawfully prevented a revocation of the existing will, or a new will from being made, by his crime; and that he terminated the enjoyment by the testator of his property, and effected his own succession to it, by the same crime. They say that to permit the respondent to take the property willed to him would be to permit him to take advantage of his own wrong. To sustain their position the appellants' counsel has submitted an able and elaborate brief, and, if I believed that the decision of the question could be effected by considerations of an equitable nature, I should not hesitate to assent to views which commend themselves to the conscience. But the matter does not lie within the domain of conscience. We are bound by the rigid rules of law, and within the limits of which the determination of this question is confined.

I cannot find any support for the argument that the respondent's succession to the property should be avoided because of his criminal act, when the laws are silent. Public policy does not demand it; for the demands of public policy are satisfied by the proper execution of the laws and the punishment of the crime. There has been no convention between the testator and his legatee nor is there any such contractual element, in such a disposition of property by a testator, as to impose or imply conditions in the legatee. The appellants' argument practically amounts to this: that, as the legatee has been guilty of a crime, by the commission of which he is placed in a position to sooner receive the benefits of the testamentary provision, his rights to the property should be forfeited, and he should be divested of his estate. To allow their argument to prevail, would involve the diversion by the court of the testator's estate into the hands of persons whom, possibly enough, for all we know, the testator might not have chosen or desired as its recipients. Practically the court is asked to make another will for the testator. The laws do not warrant this judicial action, and mere presumption would not be strong enough to sustain it. But, more than this, to concede the appellants' views would involve the imposition of an additional punishment or penalty upon

the respondent. What power or warrant have the courts to add to the respondent's penalties by depriving him of property? The law has punished him for his crime, and we may not say that it was an insufficient punishment. In the trial and punishment of the respondent the law has vindicated itself for the outrage which he committed, and further judicial utterance upon the subject of punishment or deprivation of rights is barred. We may not, in the language of the court in *People v. Thornton*, 25 Hun, 456, "enhance the pains, penalties, and forfeitures provided by law for the punishment of crime." The judgment should be affirmed, with costs.

AN INTRODUCTION TO STATUTORY INTERPRETATION

When something bad happens, the first response of many legislators and interest groups is, “there ought to be a law.” Witness the reaction to the accounting scandals in the financial markets a few years ago. Congress quickly responded with the Sarbanes-Oxley Act, Pub. L. 107-204, 116 Stat. 745 (2002). Whether, in the rush to legislate, the resulting enactments actually solve the problems to which they are addressed is debatable. What is not in doubt is that the legislative branch is now the first place to which many turn to change the law. The judiciary, traditionally the major source of change through its power to adjust the common law to changed circumstances, is now often bypassed as too slow in a fast-paced, electronic world. Accordingly, as students and as practitioners, much of your work will involve ascertaining the meaning of statutes. The following materials are designed to provide you with some basic assistance on how to deal with and interpret statutes.

The proper starting point for a lawyer or judge in interpreting a statute is, of course, the words of the statute itself. Accordingly, the first “rule” in statutory construction is to read the statute. To emphasize its importance, it is also the second rule and the third rule. In other words, read it several times. See the chart on page 38 of these materials. Beginning with the statute’s language makes intuitive sense; after all, it is those words that the legislature so “carefully” enacted into law. This seemingly simple task, though, can occasionally be rather difficult. Try the following problem.

Illustrative Problem

Last month, Delinquent was being pursued by several creditors for unpaid bills. At the time, Delinquent’s only significant asset was a collection of baseball cards that Delinquent had owned for more than 20 years. The retail value of the cards (*i.e.*, the amount for which a dealer would sell them) was about \$10,000. The wholesale value (*i.e.*, the amount a dealer would pay for them) was about \$6,000. Delinquent sold them to Friend for \$4,500 and used all the money to buy lottery tickets. None of the tickets was a winner. The state in which Delinquent and Friend are located has a statute that provides:

A transfer made by a debtor is fraudulent and avoidable by a creditor of the debtor if the debtor made the transfer without receiving reasonably equivalent value in exchange for the transfer and, at the time of the transfer, the debtor either was insolvent or was unable to pay debts as they became due.

The statute also provides that “[a] debtor is insolvent if the sum of the debtor’s debts is greater than all of the debtor’s assets at a fair valuation.” Has Delinquent made an avoidable fraudulent transfer? As you work on this problem, consider how

your analysis is different from the way in which you read judicial opinions. What information do opinions have that statutes do not?

As difficult as that problem may have been, it presented just one kind of interpretive problem. Moreover, from the nature of the problem it was clear that the statute did provide the answer to the question. Delinquent either made a fraudulent transfer or did not. Sometimes, the meaning of a statute or statutory provision is very unclear and its application to a particular set of facts is very questionable. This may be because the words chosen have no clear meaning or have several different meanings. It may be because of a grammatical mistake or ambiguity caused by relative placement of words or clauses. It may be because that statute is long and highly complex, with many exceptions and exceptions to exceptions. Or it may be because the answer the statute appears to provide seems counter-intuitive or contrary to obvious public policy.

When the problem relates to individual words, one commonly cited rule is to interpret the words according to their plain and ordinary meaning. This makes some sense. After all, many legislators are not lawyers and thus lack training in a specialized legal vocabulary. Moreover, statutes are designed, at least in theory, to be understandable by everyone in the community (or at least by everyone to whom they apply). As a result, it is not uncommon for lawyers to resort to dictionaries for help in understanding a statute.

Yet in many circumstances this “plain meaning” rule may prove to be of little guidance. As Justice Frankfurter so aptly put it: “[t]he notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification.”⁸ One need only examine the Internal Revenue Code to see the obvious truth of this observation. Perhaps more to the point, words – indeed, languages – are merely tools that people use to communicate, to express meaning. The mere fact that misunderstandings occur is enough to suggest, if not prove, that words are imprecise tools. Words carry different connotations to different people and may even change in meaning over time. To provide colloquial examples, for most people the word “wicked” means evil. Yet for many people on the East Coast, it is an expression of approval or of being impressed, such as “cool” or “neat.” Similarly, “bad” means “bad,” except when it means “good.”

So what is a student of statutes to do? Well, beginners to statutory construction sometimes overlook the possibility that terminology in a particular section of a statute may be defined elsewhere in that section, or in a different section entirely. Even a relatively mundane word may be statutorily defined, and occasionally in a surprising way. For example, in the Uniform Commercial Code a gift qualifies as a “purchase,” *see* § 1-201(b)(32). Thus, one of the first steps in interpreting or construing a statutory provision is to define the key terms.

Of course, not every word is statutorily defined, and even if all were, interpretational problems would still exist. So, lawyers being lawyers, they have developed a whole series of rules to help themselves read and understand statutes. Some of these are statutorily based – appearing

⁸ *United States v. Monia*, 317 U.S. 424, 431 (1943) (dissenting).

either within the particular statute requiring interpretation,⁹ or elsewhere in a jurisdiction's statutory scheme.

Statutory rules of construction of course carry the force of law. Thus you ignore them only at your own peril. The most comprehensive source of such statutory rules is the Uniform Statutory Construction Act (enacted in only four jurisdictions). Selected provisions of one state's version of the Act are reproduced beginning on page 39 of these materials. Take particular note of sections 2-4-201 and 2-4-203. The latter contains what might be the most important rule: a statute should be interpreted to effectuate its underlying purposes. Put another way, no provision of any statute should be interpreted or applied in a manner that cuts against the legislation's purpose. Courts do not – and lawyers therefore should not – mechanically apply a statutory provision in a literal way if doing so would undermine the approach the legislature has taken to solve the problem that the legislation addresses. In short: policy always limits application. Thus, while the starting point for every statutory interpretation effort should be the language of the statute, you should never forget to consider what policies underlie both the statute and the provision under interpretation and how those policies might reasonably affect the statute's meaning.

The other major source of rules for interpreting statutes and codes are the so-called “canons of construction.” These canons are common-law maxims, or guides, that suggest interpretations of certain types of statutes and of certain word patterns in statutes. They are not rules of law, but “axioms of experience.”¹⁰

Scholars have frequently criticized many of the canons of construction. As Judge Posner has pointed out, courts have no way of knowing whether legislators have enacted a particular statute with the canons in mind, or even whether legislators have ever heard of the canons of construction.¹¹ Moreover, the canons tend to be inconsistent with one another and courts may invoke them to justify decisions rather than to help make decisions.¹² For an excerpt of a classic illustration of how these canons can conflict with each other, see the chart on page 41. On the other hand, some canons are rarely criticized and courts continue to use the canons regularly. Some of the least criticized and most commonly used canons are:

- Where possible, statutes are to be construed so that their constitutionality is preserved.
- A statute is to be construed in light of the harm the legislature meant to remedy.
- Statutory words and phrases are to be construed in the context of the entire statute of which they are a part.

⁹ See, e.g., 11 U.S.C. § 102(3) & (5) (giving readers guidance on the meaning of the words “includes” and “or”).

¹⁰ *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 293 (1956) (Frankfurter, J., dissenting).

¹¹ *Statutory Interpretation – in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 806 (1983).

¹² KARL LLEWELLYN, *THE COMMON LAW TRADITION* 521-35 (1960).

- Statutory words and phrases are to be construed so as to give meaning and effect to eachword.

Other generally accepted canons of construction include:

- Penal statutes are to be narrowly construed.
- Remedial statutes should be liberally construed.
- Statutes in derogation of the common law are to be narrowly construed.

Two other useful, but more criticized, canons of construction are used to interpret word patterns and are usually referred to by their Latin translation. The first is known as *expressio unius, exclusio alterius* (“the expression of one thing excludes another”). This maxim is applied to mean that if a statute expressly lists what is within its coverage, then the statute excludes that which is not mentioned. For example, if a statute that prohibits importing aliens contains a section that excludes “actors, artists, lecturers, professional musicians, and domestic servants,” a court applying this canon would interpret the list of exemptions as an exclusive one, and thus not to include ministers. Of course, the legislature may not have intended the enumerated exclusions to be exclusive or may not have thought about other categories of people who should also have been excluded from the statute’s broad coverage. Moreover, if the list in the statute were preceded by the word “including,” then arguably the list is not to be read as exclusive. *Compare* 11 U.S.C. § 102(3) (“includes” and “including” are not limiting in the Bankruptcy Code).

The other well-known Latin canon is *ejusdem generis* (meaning “of the same genus or class”). *Ejusdem generis* is applied to a statute that contains a specific enumeration of items followed by a general catchall phrase, so that the general words are interpreted to include only things of the same kind or same characteristics as the specific words. For example, in the language “no one may transport vegetables, dairy, fruit, or other products without a certificate of conveyance,” the catchall words “or other products” could be interpreted to mean food products but not manufactured goods. However, the term may also be interpreted to include non-manufactured goods that are not foods, such as fresh flowers or lumber. To determine the scope of this phrase, it may be more important to know that the legislature’s purpose in requiring a certificate of conveyance was to ensure sanitary conditions during transport.

Bear in mind that all of these common-law canons of construction are essentially used to isolate the legislative intent. Yet many judges and scholars believe that inquiry into legislative intent is pointless. Most state legislatures are comprised of one to two hundred voting members, and Congress includes 100 Senators and 435 Representatives (along with delegates from the U.S. territories and the District of Columbia). Arguably it is simply fiction to say that groups of these size have a collective state of mind. Moreover, legislatures consider such a staggering number of bills that most members are not likely to have a clear and complete understanding of what a bill means when they vote for or against it. Most legislators have no more understanding of a bill than they can get from a quick reading of it or – more likely – from reading a short synopsis of it. They

may have differing – even conflicting – motives in voting on it. Finally, many questions of statutory interpretation arise long after enactment, as new situations and transactions arise that the legislators would have to have been prescient to foresee.

There is little doubt that determining the general legislative purpose and isolating the broad policies underlying a statute can clarify ambiguities in the text and can limit or expand the reach of particular provisions in the context of specific factual circumstances. However, as the search for meaning becomes more focused (*i.e.*, not what was the general purpose but what did the legislature intend with respect to a specific problem), the approach is highly criticized.

STEPS IN ANALYZING STATUTORY AUTHORITY

1	Read the statute.
2	Read the <i>whole</i> statute.
3	Read the statute again. Parse each provision so that you understand what it is proscribing or requiring, even if you do not yet understand why. Construct and demolish mental paradigms about what the statute is doing.
4	Understand the basic scheme of the statute (what it does). This may require going to secondary sources (<i>e.g.</i> , treatises, articles) for complex legislation.
5	Determine the purpose(s) of the statute generally and of the specific provisions under scrutiny. Isolate the principles and policies which underlie the statute's enactment. Determine what the "protected class" is (public or individuals).
6	Look for definitions: (a) in the specific provision; (b) elsewhere in the statute; and (c) in other applicable statutes.
7	Read any official comments for help in 3-6.
8	Look at other statutes that may affect the issue.

9	Examine the case law interpreting the statute.
10	Examine the legislative history of the statute (if available) (only if the words are ambiguous?).
11	Apply the canons of statutory construction, where appropriate.

**SELECTED PROVISIONS OF THE COLORADO REVISED STATUTES
(BASED ON THE UNIFORM STATUTORY CONSTRUCTION ACT)**

§ 2-4-101. Common and Technical Usage

Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.

§ 2-4-102. Singular and Plural¹³

The singular includes the plural, and the plural includes the singular.

§ 2-4-103. Gender¹⁴

Every word importing the masculine gender only may extend to and be applied to females and things as well as males; every word importing the feminine gender only may extend to and be applied to males and things as well as females; and every word importing the neuter gender only may extend to and be applied to natural persons as well as things.

§ 2-4-104. Tense¹⁵

¹³ Compare 1 U.S.C. § 1; Wash. Rev. Code § 1.12.050.

¹⁴ Compare 1 U.S.C. § 1; Wash. Rev. Code § 1.12.050.

¹⁵ Compare 1 U.S.C. § 1.

Words in the present tense include the future tense.

§ 2-4-201. Intentions in the Enactment of Statutes

- (1) In enacting a statute, it is presumed that:
 - (a) compliance with the constitutions of the state of Colorado and the United States is intended;
 - (b) the entire statute is intended to be effective;
 - (c) a just and reasonable result is intended;
 - (d) a result feasible of execution is intended;
 - (e) Public interest is favored over any private interest.

§ 2-4-203. Aids in Construction of Ambiguous Statutes

(1) If a statute is ambiguous, the court, in determining the intention of the general assembly, may consider among other matters:

- (a) the object sought to be obtained;
- (b) the circumstances under which the statute was enacted;
- (c) the legislative history, if any;
- (d) the common law or former statutory provisions, including laws upon the same or similar subjects;
- (e) the consequences of a particular construction;
- (f) the administrative construction of the statute; (g) the legislative declaration of purpose.

§ 2-4-204. Severability of Statutory Provisions

If any provision of a statute is found by a court of competent jurisdiction to be unconstitutional, the remaining provisions of the statute are valid, unless it appears to the court that the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one; or unless the court determines that the valid provisions,

standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

§ 2-4-205. Special or Local Provision Prevails Over General

If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.

EXAMPLES OF CONFLICTING CANONS OF CONSTRUCTION

In his classic book “The Common Law Tradition,” Karl Llewellyn documented how canons of statutory construction can point to contrary resolutions of an interpretive problem. These are a few of his many examples.

Thrust	Parry
A statute cannot go beyond its text.	A statute should be interpreted to effectuate its purpose.
Statutes in derogation of the common law are to be narrowly construed.	Remedial statutes are to be liberally construed.
Statutes affirming a common-law rule are to be construed in accordance with the common law.	A statute designed to revise a whole body of law supersedes the common law.
If language is plain and unambiguous it must be given effect.	A literal interpretation which would lead to an absurd result or thwart the manifest purpose of the statute is not to be applied.
Words are to be taken in their ordinary meaning unless they are technical terms or words of art.	Popular words may bear a technical meaning and technical words may have a popular significance, and they should be so construed as to agree with the statute’s purpose.

Every word and clause must be given effect.	Words inadvertently inserted or repugnant to the rest of the statute may be rejected as surplusage.
Titles do not control meaning; preambles to not expand scope; section headings do not change language.	Titles may be consulted as a guide when there is doubt or obscurity; preambles may be consulted to determine rationale, and thus the true construction of terms; headings are part of the statute itself.
Words are to be interpreted according to the proper grammatical effect of their arrangement.	Rules of grammar will be disregarded if strict adherence would defeat the statutory purpose.

ASSIGNED PROBLEM

Several years ago, the legislature of the State of Concordia enacted a statute that provides as follows:

No person guilty of murder, manslaughter, or conspiracy to commit murder for personal gain, may take any portion of the estate of the decedent by will or inheritance. The portion of the decedent's estate to which such murderer would otherwise be entitled shall pass to the persons entitled thereto as though the murderer had died during the lifetime of the decedent.

A few weeks ago, Mike shot and killed his second wife, Carol, and immediately thereafter committed suicide. Carol's will provides that Mike is to inherit her entire estate unless he predeceases her, in which case her estate is to go in equal shares to her children by a former marriage: Marcia, Jan and Cindy. Mike's will directs that his entire estate be shared equally by his children from a former marriage: Greg, Peter and Bobby. Who is entitled to Carol's estate? In answering this, be sure to identify all the textual issues. Then consider the policies underlying the statute and how they apply to the facts of this problem.