



Legal Foundations
Academic Orientation Program
August 2019
Course Materials & Assignments

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Legal Foundations

Course Description

Legal Foundations is a one-credit graded course that will provide instruction and assignments on key academic skills you will use during law school, on the bar exam, and in the profession. The first part of the course will be administered during the week of Orientation, prior to the start of your regular class schedule. Successful completion of this course is a requirement of your admission into the law school.

Reading and Assignments

This packet contains the material to read and the assignments to prepare prior to the start of Orientation. You should not procrastinate completing the reading and assignments in preparation for Orientation as it will take longer than you anticipate. The following material will be used extensively throughout the Orientation. You must come to Orientation fully prepared or you will not receive the benefits that flow from the program and you may not receive a passing grade for the course.

First, read the background material which includes the following: (1) Legal Skills for Law School & the Practice of Law; (2) Make it Stick; (3) Law School Materials for Success; (4) Introduction to American Legal System; and (5) The Six-Step Approach to Law School Study provided at www.lawnerds.com.

Second, read the cases and the hypothetical problems pertaining to the topic of the Intentional Tort of Battery.

All reading should be completed in the order in which it is presented in this packet. Do not try to read the cases and problems prior to reading the background materials.

Third, prepare written case briefs for each of the four cases contained in this packet. Use the techniques of reading, note taking, case briefing, and outlining that you study in the background materials and the LawNerds six-step approach. Then consider how to apply the law that you outline to the problems at the end of the packet and write answers to the problems.

Type all your case briefs and your answers to the problems. Organize your work into a printed packet and make two copies. Place your name and your division (Full-time; Part-time Day; Part-time Evening) on your packet and be ready to submit one copy when you arrive for orientation. Keep the second copy to use during the workshops.

Each day of the Orientation program will involve lecture, discussion, and exercises, as well as additional homework assignments to be completed and submitted the following day.

The law school library will be open during the week prior to Orientation Monday - Saturday 12-6pm and Sunday 1-9pm. Beginning on August 12, 2019, the library hours will be Monday – Thursday 8am-10pm, Friday 8am-6:30pm, Saturday 11am-7pm, Sunday 1-9pm.

Questions about the reading and assignments due may be addressed to Professor Suparna Malempati at smalempati@johnmarshall.edu.

Background reading assignment #1:

LEGAL SKILLS FOR LAW SCHOOL & THE PRACTICE OF LAW

Read this article first. This article provides an overview of the skills needed to be successful in law school and during practice. More detailed information about critical reading, case briefing, and outlining will be provided in later material and throughout the course.

LEGAL SKILLS FOR LAW SCHOOL & THE PRACTICE OF LAW

To be successful, every lawyer must master seven basic skills. Not surprisingly, law schools teach these skills. Many law students do not recognize the importance of these skills until they have become practicing lawyers and need to use these skills on a daily basis.

The purpose of this document is to highlight the nexus between law school and legal practice. In other words, to explain why these seven basic skills are essential to the practice of law and how you can begin to hone these skills from your first day at John Marshall Law School.

The seven skills are:

1. Critical thinking.
2. Critical reading.
3. Critical listening.
4. Case briefing.
5. Note taking.
6. Outlining.
7. Effective legal writing.

At first you may think all of these skills are for law school only and this talk of a nexus between law school courses and the practice of law is pure fantasy. In fact, the experience of most lawyers, whether government lawyers or private practitioners, indicates that this is decidedly not true. The seven skills mentioned above are used virtually every day by lawyers in all types of legal practice.

1. Critical Thinking.

Because grades are based on exams, many law students believe that exam writing is the most important skill needed for success in law school. But, before you can write it, you must be able to think it. It is all about "thinking like a lawyer."

The dictionary defines "critical" as "exercising or involving **careful judgment** or **judicious evaluation**." (Emphasis added.) In this context, law students must learn to question and analyze what they hear, what they see, what they read, what they feel, and what they think. First impressions are often wrong and frequently change after more thoughtful analysis.

Many law school classes use the Socratic method of questioning students about the cases they have read. This process is referred to as "active learning." It is designed to engage the students in analyzing the facts and law presented in the case rather than have the professor talk while students sit as idle spectators. The Socratic method requires the students to think about the facts and law and then explain whether a court's decision is well reasoned. It is an exercise in critical thinking. The hypotheticals presented by your professors are designed to stretch your thinking by forcing you to apply the law and/or the court's reasoning to a new set of facts. It is common for some students to believe that their professors are "hiding the ball"

when they do not give an answer to each and every hypo. In reality, there may not be an answer. The appellate courts may not have considered the issue as presented in the hypo. The hypo is designed to exercise your critical thinking skills as to what a possible answer might be in the future (either before an appellate court or on a future exam). This is precisely what a lawyer must do when confronted by a client's set of facts.

Critical thinking often includes **deductive reasoning**, that is, reasoning from a general rule to a specific conclusion. Most law school exams require students to identify issues, state the general legal rules that apply, and then analyze the facts in light of the rules to formulate conclusions. Applying a general rule to a set of facts is an example of deductive reasoning. Sherlock Holmes was famous for using deductive reasoning to solve mysteries.

Consider the case of the dog that did not bark. A suspect claimed that he ran through a yard at a certain time. A neighborhood dog was quartered outside in the same area. The general rule is that dogs bark when strangers enter their area. No dog barked at that time. Conclusion: the suspect was lying.

Reasoning from the specific to the general is called **inductive reasoning**. Lawyers and judges often use inductive reasoning when they analyze a series of specific cases to develop a general legal rule.

Another form of critical thinking is **reasoning by analogy**. This process is based on the concept that similar facts or principles should lead to similar conclusions. Lawyers often look for analogies in other cases or fields of law to make arguments that are beneficial to their clients. For example, if an employer is not liable for the intentional torts of her employees, then by analogy, an employer should not be liable for the criminal conduct of her employees. The element of intent is similar in both cases; thus, the result should arguably be the same. When a case is virtually identical to the facts and law of your case, it is said to be "on all fours" with your case.

In the same vein, lawyers look for **distinctions** in the facts or law when they argue that adverse cases do not apply to their client's circumstances. Being able to distinguish a case is just as important as being able to make an analogy.

In private practice, clients will often come to your office, give you a handful of documents and a long string of disjointed facts, and ask you if they have a case. First, you must understand the facts as thoroughly as possible. Then you must research the law and think through how the facts and law relate. Only then are you in a position to form a competent conclusion for your client. The same process applies in a law school class and on a law school exam where you are given a set of facts and asked to apply the correct legal rules to reach conclusions. Critical thinking is the key. The only significant difference between legal practice and law school exams is the time available to respond. Unless a deadline is imminent, you normally have several days or weeks in legal practice to gather the facts and research the law. Not so in the typical essay exam. You often have only one hour to formulate your answer. So,

what gives? One practical reason for timed exams in law school is that the Georgia Bar Exam contains four forty-five-minute essay exam questions. Thus, one purpose is to prepare you for the Bar Exam. More importantly, another purpose is to prepare you to think quickly, as well as critically. Lawyers must be able to "think on their feet" during trials, arbitrations, mediations, negotiations, communications with opposing counsel, and even communications with your own client.

You know you are succeeding in your critical thinking skills when it causes stress at home when you dissect and analyze every statement or request from your parents, spouse, or roommates. "Wash the car? Oh. You mean our car? Today? Using our water?"

2. Critical Reading.

Critical reading is a logical extension of critical thinking. While you read, you question the use of key words, phrases, and sentences. You think about the organization of the material and whether it is logically sequenced. Even the punctuation should not escape your scrutiny. As importantly, you should think about what is not said. This sounds laborious, but it becomes second nature with practice. Whether you realize it or not, most law students during their first semester begin to analyze everything they read in much more detail than in college.

Lawyers are expected to be wordsmiths. Clients expect lawyers to be experts in communicating both orally and in writing. Lawyers are expected to know and explain the meaning of words in laws such as statutes, ordinances, and regulations, and in legal documents such as court opinions, contracts, deeds, and wills. Critical reading, along with a good dictionary, advances your skill as a wordsmith. Do not skip over words you do not know the meaning of. That word may be critical to the court's reasoning, the application of the statute, or the meaning of the contract. You must learn the definition of every word you do not know.

As a law student and a lawyer, you must think about why certain language was used. Why was a particular word chosen? Is it a term of art with a special meaning? Should the common dictionary definition be applied? Does the word have legal significance? For example, does the statement in the following sentence constitute an offer:

Cal: "I have looked at the cabin. I can tear it down and remove the debris for \$7,000."

In deciding whether these two sentences constituted an offer, a lawyer must analyze whether Cal manifested an intent to be bound. One important key was the use of the word "can." Cal did not say "I will tear it down" - clear words of promise. Instead, Cal used the word "can," which communicates capability, but not necessarily a promise to tear down the cabin. This example came from a first-year contracts exam, where the word "can" was specifically used in order to spur discussion of whether Cal had sufficiently manifested an intent to be bound. Yet many students, new to the art of critical reading, passed right over this issue.

Often lawyers in private practice will argue that a statute or case applies or does not apply by emphasizing the specific language used by the statute or the court and the intended

meaning of that language. And many a case has been won or lost based on whether a statute is stated in the conjunctive ("and") or disjunctive ("or").

3. Critical Listening.

Just as critical reading is important to the written word, critical listening is important to the spoken word.

People can listen at a rate four times faster than people can talk. Yet few listeners have trained themselves to listen carefully and analytically. During class, non-critical listeners become lazy and bored. They doodle (in the old days) or play solitaire on their laptops (more today). While doodling does not normally bother other students, playing solitaire, checking emails, or watching videos on a laptop is distracting and disrespectful to other students and the professor. As important, it indicates that you are not training yourself to be a critical listener by digesting and analyzing every word and sentence.

For instance, as defense counsel at the end of a long trial, ask yourself why the District Attorney said in his closing argument that "the people believe the defendant committed the murder" rather than simply "the defendant committed the murder." Seems like an innocuous point. But is it? Is the evidence weak? Is there a hole in the case? The clever defense attorney who is listening closely can exploit the use of the word "believe" and challenge the government's proof. She might argue that the DA did not say "the people believe beyond a reasonable doubt the defendant committed the murder." Belief beyond a reasonable doubt is the standard and the DA so much as admitted no such belief exists based on the words chosen for his closing argument. The defense attorney must only convince one juror that the DA's case is weak to hang the jury. Quoting back the DA's inartful language may do it.

Trial lawyers will tell you that listening carefully at trial is so important that they have systems for their associates and paralegals to communicate with them when witnesses are testifying or opposing counsel is making an opening statement or closing argument. The system usually involves written notes so as not to distract the trial lawyer from hearing and evaluating every word and phrase. Critical listening is crucial to making timely objections and counterarguments.

Initially, critical listening requires serious concentration. However, like other skills, it becomes easier over time. Train yourself in each class to be a critical listener. Test yourself in your next class by trying to listen to each word and making a note each time your mind wanders. You may be surprised how often you are not listening.

4. Case Briefing.

Law schools have been using cases as the primary vehicle to teach law for decades. It makes sense. Court opinions deal with a set of real-world facts, discuss the applicable law and the court's rationale for applying the law to the facts, and then reach a conclusion. Most court opinions are written in a specific format - CREAC (conclusion sentence on the legal issue, rule of

law, explanation of the rule, application of law to fact, conclusion). Case law provides an interesting and informative context for the general rules of law. Can you imagine not reading cases but trying to learn the law by reading statutes? The Federal statutes have 50 different "titles" covering thousands of pages. The Georgia Code has 31 different categories of statutes also covering thousands of pages. If statutes were the mode for learning law, our school would be named "The Georgia Institute for The Bored and Insane."

Case law is critically important to all lawyers. Every large city has a legal newspaper that highlights the latest cases. Atlanta's newspaper is the Daily Report. These newspapers are widely circulated throughout law firms. Westlaw and Lexis advertise how quickly they post the latest cases. And now they offer case notification services by email. Lawyers use these resources to stay on top of the case law.

To many first-year law students, court opinions can be frustrating at times because students are new to the process of identifying the key facts and law as well as understanding the distinctions made in the opinion.

This is where good case briefing comes in. A case brief **summarizes** the key facts, law, and holdings. For law school purposes, a good brief should be about one to two handwritten or typewritten pages, and often can be shorter. For all but the very longest opinions in a typical case book, a first-year law student should be able to read and brief a case in about 45 minutes. If, after the first few weeks of class, you are spending more than 45 minutes briefing a case, you must become more efficient at case briefing, i.e., identifying the key facts and rules of law that were the basis for including the case in the book. Do not: 1) stop briefing cases altogether; 2) rely solely on commercial briefs; or 3) rely solely on book briefs.

It is the written summarization process where the learning occurs. Do not short cut this process! Colorful highlighting is not an adequate substitute for a written summary that you prepare.

There is no right/wrong way to brief a case. Find the method best for you. Many use a FIRAC method - facts, issue, rule, analysis, and conclusion. In FIRACing the case, think about the case in three stages: 1) the facts that brought the case to court; 2) the actions by the trial court and the mistakes alleged against the trial court; and 3) the action taken by appellate court and why.

Under "facts," you should include the procedural posture that brings the case before the appellate court. The procedural posture often will dictate the standard of review.

The "issue" part of the case brief may need to remain open until you have read the complete case. Ideally, you should read the case through before you brief it. However, you may be able to brief sections of the case as you read, e.g., the facts. If you brief as you proceed section by section, leave the issue blank until you can formulate a correct statement of the issue.

The "rule" summary is very important. In most instances, the casebook author selected the case for the rule it propounds. Look for a clear statement of the rule and copy it verbatim, or if lengthy, summarize it accurately.

The "analysis" portion of the brief should include a tight summary of the court's rationale or reasoning along with the key facts.

The "conclusion" states the holding of the case and action taken by the appellate court, e.g., affirmed, reversed, or remanded to the trial court.

Students should have a written brief for each case to be discussed in class. If properly prepared, the brief can be used to recite the facts, explain the court's rationale and holding, and give the disposition of the case. These are the basics. They ensure the student can provide at least basic responses in class if called upon. Ideally, each student should take a few minutes after completing the brief and think about whether the court's opinion would change if the facts were changed just slightly. In other words, test the court's rationale with your own hypos. Driving to school is a good time to think about the cases for that day's classes. Ask yourself why the case was included in the casebook and then play with the facts and see whether the court's rationale holds up. (This does not mean losing the tunes on the radio, just turn them down a notch.)

If you are in a study group that meets weekly (and you should be in one), playing the hypo game with the past week's cases and the next week's cases will pay dividends at exam time. Also think about how the case issues will come up, that is, how you will recognize the issue. Try to anticipate how the professor will frame the issue in an exam.

5. Note Taking.

Going to **all** classes is imperative. If you must miss a class due to illness or medical appointments, make arrangements ahead of time for another student to share their notes.

Professors work long and hard to prepare each day's class discussion. Class discussions are windows into their thinking. 98% of exams come from class discussions. You do not have to figure out what is most important, your professors will tell you that each day.

It's a fact. Good note taking will make your life easier. Once again there is no right/wrong method of taking notes. Find what works for you. Capture all the key points, arguments, and hypos in sufficient detail that they make sense later when you read the notes.

What does "later" mean? If you are smart, "later" means that day. Spend 15-20 minutes after class going over your notes, adding points, clarifying issues, and lights will come on that you did not know existed.

The purpose of class notes is to help understand and record the discussions about the assigned cases. This is another instance when you are summarizing key points from the professor and other students. **It is the summarization process where the learning occurs.**

Obviously, taking notes does not stop when you graduate law school. You start scribbling notes from the first day a client walks in until the last day of your practice.

6. Outlining.

Along with briefing cases and taking class notes, outlining is the third critical learning point in law school. Here the student reorganizes all her/his case briefs and class notes into **usable** information for the exams.

The concept of "usable" means clear rules of law with all applicable exceptions. It also means a listing of key cases in the area with the facts that raise the relevant issues along with a summary of hypos discussed in relation to each case. Often the class hypos turn up in the exams.

Usable means about 25-30 page summary. Reducing the large volume of material into 25-30 pages is hard, but necessary work. It requires that a student understand the issues and the law well enough to effectively summarize a group of cases and class notes into short statements of law.

Remember that the job of your outline is to get you ready to write essay exams.

Why not use a commercial outline where all the hard work is already done? The question answers itself - because you the student did not do the hard, but necessary work to truly understand the material and use it effectively on an exam. There is nothing wrong with buying a commercial outline as another resource to help you understand the law. Just do not rely on it to the exclusion of your own written outline. The same goes for using someone else's outline.

Once you prepare your 25-30 page outline, reduce it down to a one-page "attack sheet" of key topics that you memorize. As soon as you receive your exam, before reading the question, write down the key topics on the first sheet of blank paper. This has proven to be an effective essay exam technique that will be discussed in the next section.

7. Exam Writing.

For law school, the six legal skills discussed above culminate in taking exams and prepare you for the bar exam. For legal practice, they culminate in winning cases through well written briefs, persuasive argument, and excellent trial/arbitration skills.

Law school exams commonly come in three forms: 1) fact pattern essays; 2) short answer; and 3) multiple choice.

Essays.

Essay exams are common in law school, especially in the required courses. They are also on the Georgia Bar Exam. Essay exams are different from college exams in that they require

issue spotting, rule statements, and reasoning through a set of facts to reach certain conclusions. Unlike college, telling the professor all you know about a topic will not cut it.

For exams, most law students use IRAC (issue, rule, analysis, conclusion) as a **tool** to organize their thoughts and answers. IRAC is a very helpful technique and is recommended for most fact pattern essay exams. Some professors want students to CREAC their answers. Rule # 1 is always do what your professors want. They are the graders.

Regardless, both IRAC and CREAC help students organize and write better answers on exams. Both methods require you to spot the issue, produce a clear, crisp statement of the law, analyze all the pertinent facts in the context of the law, and state a conclusion.

Many students experience a panic attack or "go blank" when they first read an exam question. Sometimes I wondered if I was in the right classroom. One technique to overcome this is to write out your "attack sheet" or the key headings on one of the blank pages before you even turn to the first question. This affirmative act will calm your nerves and ensure that any "blank out" is short lived.

Once you begin reading the question, you must zone out all other matters - noises, students, past and future exams, and what's for dinner later. Go first to the call of the question and note what your task is for the question. Then read the question several times paying particular attention to the facts. The facts will tell you what issues are present and require your attention.

You must understand all the facts and use 95% of the facts in your answer. Why 95%. Some facts merely advance the narrative fact pattern and are not legally significant. Count the number of facts in one of your practice or mid-term exams and then count the number in your answer. If there is a large disparity, you probably did not score well.

After you feel you understand all the facts, even identifying the legally insignificant facts, begin preparing your outline of the answer by listing the issues in a chronological order. Pay particular attention to **dates** and **quoted statements**. List key facts under each issue.

Next, note how many issues you have identified and how much time exists to discuss each issue. If there are 5-6 major issues in a one-hour question, you will have only 6-8 minutes per issue in the remaining 40 minutes. Yikes! While this can be a daunting prospect, understanding it up front means you can deal with it. Never lose points because you ran out of time!

For the normal one-hour exam, take a full 15 -20 minutes to read the question several times and outline the answer. Because there is time pressure, this requires considerable discipline. Don't jump the gun because the student next to you begins to write within a few minutes after receiving the exam. Professors want a short, well-organized, well-reasoned discussion of the issues, not a rambling, unorganized discourse of whatever jumps into your head.

Use a **modified outline approach**. That is, use headers and short paragraphs. There is no need for long flowing paragraphs of prose that would have dazzled your college English professors. Of course, use proper grammar, punctuation, and spelling.

The first line of your answer should be "The first issue is ..." or "Issue #1 is" Note you do not need an introduction and you do not need to recite the facts. There is no need for an opening sentence that says something like this: "Cal is a general contractor and made a statement to Harry about tearing down the cabin." Such an introductory sentence gets you no points and wastes valuable time. Remember 6-8 minutes per issue!

Once you have identified the issue, you need to provide a clear, accurate statement of the law. This is not an area for technique or style, you need to have the rules of law memorized cold.

In your analysis that follows, you should cover each element in the statement of the law. Announce each element with a header. Then apply all the relevant facts to that element and come to a "likely" conclusion. You can use language like "On balance, I believe a court would find that Cal made an offer to Harry."

Most exam questions will have several issues and require several IRACs. Occasionally, a professor will test only in one major area - medical malpractice or products liability - and one long IRAC will suffice with several subsections in the analysis.

Your conclusions should follow directly from your analysis. Avoid disconnects, that is, an analysis that leans one way while your conclusion goes the other way.

Background reading assignment #2:

Read the following excerpt from the book:

Make it Stick

The Science of Successful Learning

Peter C. Brown, Mark A. McDaniel, Henry L. Roediger (2014)

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Make It Stick

NO MATTER WHAT YOU MAY set your sights on doing or becoming, if you want to be a contender, it's mastering the ability to learn that will get you in the game and keep you there.

In the preceding chapters, we resisted the temptation to become overtly prescriptive, feeling that if we laid out the big ideas from the empirical research and illustrated them well through examples, you could reach your own conclusions about how best to apply them. But early readers of those chapters urged us to get specific with practical advice. So we do that here.

We start with tips for students, thinking in particular of high school, college, and graduate school students. Then we speak to lifelong learners, to teachers, and finally to trainers. While the fundamental principles are consistent across these groups, the settings, life stages, and learning materials differ.

To help you envision how to apply these tips, we tell the stories of several people who, one way or another, have already found their way to these strategies and are using them to great effect.

Learning Tips for Students

Remember that the most successful students are those who take charge of their own learning and follow a simple but disciplined strategy. You may not have been taught how to do this, but you *can* do it, and you will likely surprise yourself with the results.

Embrace the fact that significant learning is often, or even usually, somewhat difficult. You will experience setbacks. These are signs of effort, not of failure. Setbacks come with striving, and striving builds expertise. Effortful learning changes your brain, making new connections, building mental models, increasing your capability. The implication of this is powerful: Your intellectual abilities lie to a large degree within your own control. Knowing that this is so makes the difficulties worth tackling.

Following are three keystone study strategies. Make a habit of them and structure your time so as to pursue them with regularity.

Practice Retrieving New Learning from Memory

What does this mean? “Retrieval practice” means self-quizzing. Retrieving knowledge and skill from memory should become your primary study strategy in place of rereading.

How to use retrieval practice as a study strategy: When you read a text or study lecture notes, pause periodically to ask yourself questions like these, without looking in the text: What are the key ideas? What terms or ideas are new to me? How

would I define them? How do the ideas relate to what I already know?

Many textbooks have study questions at the ends of the chapters, and these are good fodder for self-quizzing. Generating questions for yourself and writing down the answers is also a good way to study.

Set aside a little time every week throughout the semester to quiz yourself on the material in a course, both the current week's work and material covered in prior weeks.

When you quiz yourself, check your answers to make sure that your judgments of what you know and don't know are accurate.

Use quizzing to identify areas of weak mastery, and focus your studying to make them strong.

The harder it is for you to recall new learning from memory, the greater the benefit of doing so. Making errors will not set you back, so long as you check your answers and correct your mistakes.

What your intuition tells you to do: Most studiers focus on underlining and highlighting text and lecture notes and slides. They dedicate their time to rereading these, becoming fluent in the text and terminology, because this feels like learning.

Why retrieval practice is better: After one or two reviews of a text, self-quizzing is far more potent for learning than additional rereading. Why might this be so? This is explained more fully in Chapter 2, but here are some of the high points.

The familiarity with a text that is gained from rereading creates illusions of knowing, but these are not reliable indicators of mastery of the material. Fluency with a text has two strikes against it: it is a misleading indicator of what you have learned, and it creates the false impression that you will remember the material.

By contrast, quizzing yourself on the main ideas and the meanings behind the terms helps you to focus on the central

precepts rather than on peripheral material or on a professor's turn of phrase. Quizzing provides a reliable measure of what you've learned and what you haven't yet mastered. Moreover, quizzing arrests forgetting. Forgetting is human nature, but practice at recalling new learning secures it in memory and helps you recall it in the future.

Periodically practicing new knowledge and skills through self-quizzing strengthens your learning of it and your ability to connect it to prior knowledge.

A habit of regular retrieval practice throughout the duration of a course puts an end to cramming and all-nighters. You will need little studying at exam time. Reviewing the material the night before is much easier than learning it.

How it feels: Compared to rereading, self-quizzing can feel awkward and frustrating, especially when the new learning is hard to recall. It does not feel as productive as rereading your class notes and highlighted passages of text feels. But what you don't sense when you're struggling to retrieve new learning is the fact that every time you work hard to recall a memory, you actually strengthen it. If you restudy something after failing to recall it, you actually learn it better than if you had not tried to recall it. The effort of retrieving knowledge or skills strengthens its staying power and your ability to recall it in the future.

Space Out Your Retrieval Practice

What does this mean? Spaced practice means studying information more than once but leaving considerable time between practice sessions.

How to use spaced practice as a study strategy: Establish a schedule of self-quizzing that allows time to elapse between study sessions. How much time? It depends on the material. If you are learning a set of names and faces, you will need to

review them within a few minutes of your first encounter, because these associations are forgotten quickly. New material in a text may need to be revisited within a day or so of your first encounter with it. Then, perhaps not again for several days or a week. When you are feeling more sure of your mastery of certain material, quiz yourself on it once a month. Over the course of a semester, as you quiz yourself on new material, also reach back to retrieve prior material and ask yourself how that knowledge relates to what you have subsequently learned.

If you use flashcards, don't stop quizzing yourself on the cards that you answer correctly a couple of times. Continue to shuffle them into the deck until they're well mastered. Only then set them aside—but in a pile that you revisit periodically, perhaps monthly. Anything you want to remember must be periodically recalled from memory.

Another way of spacing retrieval practice is to interleave the study of two or more topics, so that alternating between them requires that you continually refresh your mind on each topic as you return to it.

What your intuition tells you to do: Intuition persuades us to dedicate stretches of time to single-minded, repetitive practice of something we want to master, the massed “practice-practice-practice” regime we have been led to believe is essential for building mastery of a skill or learning new knowledge. These intuitions are compelling and hard to distrust for two reasons. First, as we practice a thing over and over we often see our performance improving, which serves as a powerful reinforcement of this strategy. Second, we fail to see that the gains made during single-minded repetitive practice come from short-term memory and quickly fade. Our failure to perceive how quickly the gains fade leaves us with the impression that massed practice is productive.

Moreover, most students, given their misplaced faith in massed practice, put off review until exam time nears, and then they bury themselves in the material, going over and over it, trying to burn it into memory.

Why spaced practice is better: It's a common but mistaken belief that you can burn something into memory through sheer repetition. Lots of practice works, but only if it's spaced.

If you use self-quizzing as your primary study strategy and space out your study sessions so that a little forgetting has happened since your last practice, you will have to work harder to reconstruct what you already studied. In effect, you're "re-loading" it from long-term memory. This effort to reconstruct the learning makes the important ideas more salient and memorable and connects them more securely to other knowledge and to more recent learning. It's a powerful learning strategy. (How and why it works are discussed more thoroughly in Chapter 4.)

How it feels: Massed practice feels more productive than spaced practice, but it is not. Spaced practice feels more difficult, because you have gotten a little rusty and the material is harder to recall. It feels like you're not really getting on top of it, whereas in fact, quite the opposite is happening: As you reconstruct learning from long-term memory, as awkward as it feels, you are strengthening your mastery as well as the memory.

Interleave the Study of Different Problem Types

What does this mean? If you're trying to learn mathematical formulas, study more than one type at a time, so that you are alternating between different problems that call for different solutions. If you are studying biology specimens, Dutch painters, or the principles of macroeconomics, mix up the examples.

How to use interleaved practice as a study strategy: Many textbooks are structured in study blocks: They present the solution to a particular kind of problem, say, computing the volume of a spheroid, and supply many examples to solve before moving to another kind of problem (computing the volume of a cone). Blocked practice is not as effective as interleaved practice, so here's what to do.

When you structure your study regimen, once you reach the point where you understand a new problem type and its solution but your grasp of it is still rudimentary, scatter this problem type throughout your practice sequence so that you are alternately quizzing yourself on various problem types and retrieving the appropriate solutions for each.

If you find yourself falling into single-minded, repetitive practice of a particular topic or skill, change it up: mix in the practice of other subjects, other skills, constantly challenging your ability to recognize the problem type and select the right solution.

Harking back to an example from sports (Chapter 4), a baseball player who practices batting by swinging at fifteen fastballs, then at fifteen curveballs, and then at fifteen change-ups will perform better in practice than the player who mixes it up. But the player who asks for random pitches during practice builds his ability to decipher and respond to each pitch as it comes his way, and he becomes the better hitter.

What your intuition tells you to do: Most learners focus on many examples of one problem or specimen type at a time, wanting to master the type and “get it down cold” before moving on to study another type.

Why interleaved practice is better: Mixing up problem types and specimens improves your ability to discriminate between types, identify the unifying characteristics within a type, and improves your success in a later test or in real-world settings

where you must discern the kind of problem you're trying to solve in order to apply the correct solution. (This is explained more fully in Chapter 3.)

How it feels: Blocked practice—that is, mastering all of one type of problem before progressing to practice another type—feels (and looks) like you're getting better mastery as you go, whereas interrupting the study of one type to practice a different type feels disruptive and counterproductive. Even when learners achieve superior mastery from interleaved practice, they persist in feeling that blocked practice serves them better. You may also experience this feeling, but you now have the advantage of knowing that studies show that this feeling is illusory.

Other Effective Study Strategies

ELABORATION improves your mastery of new material and multiplies the mental cues available to you for later recall and application of it (Chapter 4).

What is it? Elaboration is the process of finding additional layers of meaning in new material.

For instance: Examples include relating the material to what you already know, explaining it to somebody else in your own words, or explaining how it relates to your life outside of class.

A powerful form of elaboration is to discover a metaphor or visual image for the new material. For example, to better grasp the principles of angular momentum in physics, visualize how a figure skater's rotation speeds up as her arms are drawn into her body. When you study the principles of heat transfer, you may understand conduction better if you imagine warming your hands around a hot cup of cocoa. For radiation, visualize how the sun pools in the den on a wintry

day. For convection, think of the life-saving blast of A/C as your uncle squires you slowly through his favorite back-alley haunts of Atlanta. When you learned about the structure of an atom, your physics teacher may have used the analogy of the solar system with the sun as the nucleus and electrons spinning around like planets. The more that you can elaborate on how new learning relates to what you already know, the stronger your grasp of the new learning will be, and the more connections you create to remember it later.

Later in this chapter, we tell how the biology professor Mary Pat Wenderoth encourages elaboration among her students by assigning them the task of creating large “summary sheets.” Students are asked to illustrate on a single sheet the various biological systems studied during the week and to show graphically and through key words how the systems interrelate with each other. This is a form of elaboration that adds layers of meaning and promotes the learning of concepts, structures, and interrelationships. Students who lack the good fortune to be in Wenderoth’s class could adopt such a strategy for themselves.

GENERATION has the effect of making the mind more receptive to new learning.

What is it? Generation is an attempt to answer a question or solve a problem before being shown the answer or the solution.

For instance: On a small level, the act of filling in a missing word in a text (that is, generating the word yourself rather than having it supplied by the writer) results in better learning and memory of the text than simply reading a complete text.

Many people perceive their learning is most effective when it is experiential—that is, learning by doing rather than by reading a text or hearing a lecture. Experiential learning is a

form of generation: you set out to accomplish a task, you encounter a problem, and you consult your creativity and storehouse of knowledge to try to solve it. If necessary you seek answers from experts, texts, or the Web. By wading into the unknown first and puzzling through it, you are far more likely to learn and remember the solution than if somebody first sat you down to teach it to you. Bonnie Blodgett, an award-winning gardener and writer, provides a strong example of generative learning in Chapter 4.

You can practice generation when reading new class material by trying to explain beforehand the key ideas you expect to find in the material and how you expect they will relate to your prior knowledge. Then read the material to see if you were correct. As a result of having made the initial effort, you will be more astute at gleaning the substance and relevance of the reading material, even if it differs from your expectation.

If you're in a science or math course learning different types of solutions for different types of problems, try to solve the problems before you get to class. The Physics Department at Washington University in St. Louis now requires students to work problems before class. Some students take umbrage, arguing that it's the professor's job to teach the solution, but the professors understand that when students wrestle with content beforehand, classroom learning is stronger.

REFLECTION is a combination of retrieval practice and elaboration that adds layers to learning and strengthens skills.

What is it? Reflection is the act of taking a few minutes to review what has been learned in a recent class or experience and asking yourself questions. What went well? What could have gone better? What other knowledge or experiences does it remind you of? What might you need to learn for better

mastery, or what strategies might you use the next time to get better results?

For instance: The biology professor Mary Pat Wenderoth assigns weekly low-stakes “learning paragraphs” in which students are asked to reflect on what they learned the previous week and to characterize how their class learning connects to life outside the class. This is a fine model for students to adopt for themselves and a more fruitful learning strategy than spending hours transcribing lecture slides or class notes verbatim into a notebook.

CALIBRATION is the act of aligning your judgments of what you know and don’t know with objective feedback so as to avoid being carried off by the illusions of mastery that catch many learners by surprise at test time.

What is it? Everyone is subject to a host of cognitive illusions, some of which are described in Chapter 5. Mistaking fluency with a text for mastery of the underlying content is just one example. Calibration is simply the act of using an objective instrument to clear away illusions and adjust your judgment to better reflect reality. The aim is to be sure that your sense of what you know and can do is accurate.

For instance: Airline pilots use flight instruments to know when their perceptual systems are misleading them about critical factors like whether the airplane is flying level. Students use quizzes and practice tests to see whether they know as much as they think they do. It’s worth being explicit here about the importance of answering the questions in the quizzes that you give yourself. Too often we will look at a question on a practice test and say to ourselves: Yup, I know that, and then move down the page without making the effort to write in the answer. If you don’t supply the answer, you may be giving in to the illusion of knowing, when in fact you would have difficulty rendering an accurate or complete response. Treat prac-

tice tests as tests, check your answers, and focus your studying effort on the areas where you are not up to snuff.

MNEMONIC DEVICES help you to retrieve what you have learned and to hold arbitrary information in memory (Chapter 7).

What are they? “Mnemonic” is from the Greek word for memory, and mnemonic devices are like mental file cabinets. They give you handy ways to store information and find it again when you need it.

For instance: Here is a very simple mnemonic device that some schoolchildren are taught for remembering the US Great Lakes in geographic order, from east to west: Old Elephants Have Musty Skin. Mark Twain used mnemonics to teach his children the succession of kings and queens of England, staking the sequence and length of their reigns along the winding driveway of his estate, walking it with the children, and elaborating with images and storytelling. Psychology students at Bellerbys College in Oxford use mnemonic devices called memory palaces to organize what they have learned and must be prepared to expound upon in their A-level essay exams. Mnemonics are not tools for learning per se but for creating mental structures that make it easier to retrieve what you have learned.

Brief stories follow of two students who have used these strategies to rise to the top of their classes.

Michael Young, Medical Student

Michael Young is a high-achieving fourth-year medical student at Georgia Regents University who pulled himself up from rock bottom by changing the way he studies.

Young entered medical school without the usual foundation of premed coursework. His classmates all had backgrounds in biochemistry, pharmacology, and the like. Medical school is plenty tough under any circumstances, but in Young's case even more so for lack of a footing.

The scope of the challenge that lay before him became abruptly evident. Despite his spending every available minute studying his coursework, he barely eked out a 65 on his first exam. "Quite honestly, I got my butt kicked," he says. "I was blown away by that. I couldn't believe how hard it was. It was nothing like any kind of schooling I had done before. I mean, you come to class, and in a typical day you get about four hundred PowerPoint slides, and this is dense information."¹ Since spending more time studying wasn't an option, Young had to find a way to make studying more effective.

He started reading empirical studies on learning and became deeply interested in the testing effect. That's how we first learned of him: He emailed us with questions about the application of spaced retrieval practice in a medical school setting. Looking back on that stressful period, Young says, "I didn't just want to find somebody's opinion about how to study. Everybody has an opinion. I wanted real data, real research on the issue."

You might wonder how he got himself into medical school without premed coursework. He had earned a master's degree in psychology and worked in clinical settings, eventually as a drug addiction counselor. He teamed up with a lot of doctors, and he slowly began to wonder if he would be happier in medicine. Had he missed his calling? "I didn't think of myself as being especially intelligent, but I wanted to do more with my life and the idea wouldn't leave me." One day he went to the biology department of his local university, Columbus State in Columbus, Georgia, and asked what courses he would need to become a doctor. They laughed. "They said, 'Well, nobody

from this school becomes a doctor. People at the University of Georgia and Georgia Tech go to medical school, we haven't had anybody go to medical school in a decade.'” Not to be put off, Young cobbled together some courses. For example, for the biology requirement, the only thing he could take at Columbus State was a fishing class. That was his biology course. Within a year he had gotten whatever medical background was available from the school, so he crammed for a month for the Medical College Admission Test and managed to score just well enough. He enrolled at Georgia Regents.

At which point he found himself very far indeed from being over the hump. As his first exam made all too clear, the road ahead went straight up. If he had any hope of climbing it, something about his study habits had to change. So what did change? He explains it this way:

I was big into reading, but that's all I knew how to do for studying. I would just read the material and I wouldn't know what else to do with it. So if I read it and it didn't stick in my memory, then I didn't know what to do about that. What I learned from reading the research [on learning] is that you have to do something beyond just passively taking in the information.

Of course the big thing is to figure out a way to retrieve the information from memory, because that's what you're going to be asked to do on the test. If you can't do it while you're studying, then you're not going to be able to do it on the test.

He became more mindful of that when he studied. “I would stop. ‘Okay, what did I just read? What is this about?’ I'd have to think about it. ‘Well, I believe it happens this way: The enzyme does this, and then it does that.’ And then I'd have to go back and check if I was way off base or on the right track.”

The process was not a natural fit. “It makes you uncomfortable at first. If you stop and rehearse what you're reading

and quiz yourself on it, it just takes a lot longer. If you have a test coming up in a week and so much to cover, slowing down makes you pretty nervous.” But the only way he knew of to cover more material, his established habit of dedicating long hours to rereading, wasn’t getting the results he needed. As hard as it was, he made himself stick to retrieval practice long enough at least to see if it worked. “You just have to trust the process, and that was really the biggest hurdle for me, was to get myself to trust it. And it ended up working out really well for me.”

Really well. By the time he started his second year, Young had pulled his grades up from the bottom of his class of two hundred students to join the high performers, and he has remained there ever since.

Young spoke with us about how he adapted the principles of spaced retrieval practice and elaboration to medical school, where the challenges arise both from the sheer volume of material to be memorized and from the need to learn how complex systems work and how they interrelate with other systems. His comments are illuminating.

On deciding what’s important: “If it’s lecture material and you have four hundred PowerPoint slides, you don’t have time to rehearse every little detail. So you have to say, ‘Well this is important, and this isn’t.’ Medical school is all about figuring out how to spend your time.”

On making yourself answer the question: “When you go back and review, instead of just rereading you need to see if you can recall the learning. Do I remember what this stuff was about? You always test yourself first. And if you don’t remember, then that’s when you go back and look at it and try again.”

On finding the right spacing: “I was aware of the spacing effect, and I knew that the longer you wait to practice retrieval the better it is for memory, but there’s also a trade-off with how successful you are when you try to recall it. When you have these long enzyme names, for example, and this step-by-step process of what the enzyme is doing, maybe if you learn ten steps of what the enzyme is doing, you need to stop and think, can I remember what those ten steps are? Once I found a good strategy for how much to space practice and I started seeing consistent results, it was easy to follow from there because then I could just trust the process and be confident that it was going to work.”

On slowing down to find the meaning: Young has also slowed down the speed at which he reads material, thinking about meaning and using elaboration to better understand it and lodge it in memory. “When I read that dopamine is released from the ventral tegmental area, it didn’t mean a lot to me.” The idea is not to let words just “slide through your brain.” To get meaning from the dopamine statement, he dug deeper, identified the structure within the brain and examined images of it, capturing the idea in his mind’s eye. “Just having that kind of visualization of what it looks like and where it is [in the anatomy] really helps me to remember it.” He says there’s not enough time to learn everything about everything, but pausing to make it meaningful helps it stick.

Young’s impressive performance has not been lost on his professors or his peers. He has been invited to tutor struggling students, an honor few are given. He has been teaching them these techniques, and they are pulling up their grades.

“What gets me is how interested people are in this. Like, in medical school, I’ve talked to all of my friends about it, and now they’re really into it. People want to know how to learn.”

Timothy Fellows, Intro Psych Student

Stephen Madigan, a professor at the University of Southern California, was astonished by the performance of a student in his Psych 100 course. “It’s a tough course,” Madigan says. “I use the most difficult, advanced textbook, and there’s just a nonstop barrage of material. Three-quarters of the way through the class, I noticed this student named Timothy Fellows was getting 90 to 95 percent of the points on all the class activities—exams, papers, short-answer questions, multiple-choice questions. Those were just extraordinary grades. Students this good—well he’s definitely an outlier. And so I just took him aside one day and said, ‘Could you tell me about your study habits?’”²

The year was 2005. Madigan did not know Fellows outside class but saw him around campus and at football games enough to observe that he had a life beyond his academics. “Psychology wasn’t his major, but it was a subject he cared about, and he just brought all his skills to bear.” Madigan still has the list of study habit Fellows outlined, and he shares it with incoming students to this day.

Among the highlights were these:

- Always does the reading prior to a lecture
- Anticipates test questions and their answers as he reads
- Answers rhetorical questions in his head during lectures to test his retention of the reading
- Reviews study guides, finds terms he can’t recall or doesn’t know, and relearns those terms
- Copies bolded terms and their definitions into a reading notebook, making sure that he understands them
- Takes the practice test that is provided online by his professor; from this he discovers which concepts he doesn’t know and makes a point to learn them

- Reorganizes the course information into a study guide of his design
- Writes out concepts that are detailed or important, posts them above his bed, and tests himself on them from time to time
- Spaces out his review and practice over the duration of the course

Fellows's study habits are a good example of doing what works and keeping at it, so that practice is spaced and the learning is solidly embedded come exam time.

Background reading assignment #3:

Read the following chapter from Law School Materials for Success by Barbara Glesner Fines (CALI eLangdel Press 2014):

Chapter Two: Preparing for Class

This chapter excerpt explains critical active reading and provides an introduction to case briefing.

Chapter Two: Preparing for Class

Class preparation requires more than simply reading the material. You will need to re-read and work with the materials -- writing notes, re-writing notes, practicing applications and preparing outlines. In this chapter, we will review the critical thinking, reading and writing skills you will use as you prepare for class.

Critical, Active Reading Skills

Law school requires that you read large quantities of dense material. You must have efficient reading habits to simply complete your assignments. You must have critical, active reading habits to be effective in learning from what you read. The following is a suggested method for reading your assignments. It is an elaboration of the classic SQ3R method developed by Professor Frank Robinson at The Ohio State University in the 1940s.² That method suggested that you approach each assignment by

- Surveying
- Questioning
- Reading
- Reciting
- Reviewing

This text suggests three more “R”s - Reflecting, Writing, and Research. The SQ3R method is sufficient if what you are trying to learn is rote knowledge. But in law school, you are learning to develop the skills of written and oral analysis. This requires a critical engagement with the ideas you encounter when you read, not merely memorization of those rules. Reflection is central to this critical engagement – stopping and thinking about what you are learning, its possible applications, and the limits of your learning.

Writing makes your critical reflection very precise. Moreover, writing is a key legal skill. The best way to improve your writing is to write a lot. Thus, your note-taking and case-briefing are not only important to your learning legal doctrine, but are important to mastering the skills of written legal analysis. In addition, written summaries of your learning enables your review. The review you must conduct in learning law is an iterative review: that is, you review today's assignment today; then you review this same material again at the end of the chapter or unit, when you have learned more context that deepens your understanding; then you review again at the end of the course, when you must integrate all of your understanding of course doctrine in a manner that you can apply to new problems. If you have written notes to review, you will be able to improve this review each iteration.

Finally, there is a role for research in your law study. At a minimum, you will need to research vocabulary by regularly using a legal dictionary to decipher the language of the law. At times, you may wish to research concepts or cases to clarify or extend your understanding. You will soon learn that there is rarely time for elaborate research of each class assignment; however, you must not overlook the essential research called for to engage your understanding.

With this modified SQ6R method in mind, consider the following guidelines for reading for class.

1. Know your assignment and actually read it.

Before you can read efficiently or effectively, you have to know what to read. Check the syllabus and listen in class for instructor guidance on your reading assignment. If neither the syllabus nor the instructor provides guidance, adopt a rule of thumb that reflects the pace at which you actually cover materials in the class - 20 pages a class, for example - and read at least that much, regardless of whether you are expressly assigned materials or not.

Do read what is assigned. Even if the instructor doesn't cover the material in class. Even if you won't get to the material in class for a week. Be sure to read everything that you are assigned. If you are

given an assignment to read pages 20-34 of your textbook, read those pages of the textbook. Some students read a lot of material, but never really read their assignments. They skim pages 20-34, or they read the cases contained on pages 20-25 and 29-33 but skip the notes, comments, problems, footnotes, or article excerpts in between. Other students actually move their eyes over all the pages, but mostly for the purposes of following their highlighter as they color their books. Then there are the students who read other materials instead of the assignment: canned briefs (the Cliff notes of law school) or outlines, or hornbooks. Sometimes extra reading is a good idea (remember the “Research” R); but first, read your assignment.

2. Prepare to read.

Put yourself in the right place and time for reading. You know what works for you. If reading in your easy chair is really a signal for a nap, find less soporific surroundings. If reading in the library is really an opportunity for socializing, find some isolation. Set aside a place and time that works for you and stick to it.

Put yourself in the right frame of mind as well. Know that cases, in particular, are not easy readers. There is much you will need to learn in order to understand what you are reading and there is even more you will need to infer or interpret. Judges are not necessarily selected for the bench because they are clear writers. Even clear writers sometimes may prefer to create some ambiguity in their opinion. So be prepared.

3. Prepare to learn as you read.

Most law students know that they need to have an outline for their exams. Successful law students know that they need to start their assignments with an outline for their reading. The best sources for such an outline are the table of contents for the textbook or the course syllabus. Before you read any particular assignment or case, look over your reading outline, paying particular attention to the overall topics and "themes." Identify where, in this organization, the materials to be studied fit. Skim through the entire reading assignment (This is the first of several reads). How many pages? How many cases?

Begin to wonder about what you will be reading. Ask yourself some motivational questions about the material. For example, why might I want to know this material? Have I ever had experiences with this subject area? Ask some questions to help identify what you are looking for. For example, read some of the questions in the notes following cases or ask yourself what rules or concepts might you be exploring and guess what they might mean.

4. Read thoroughly.

Read the entire assignment, trying to get a sense of what's going on. This will take a long time at the beginning because you will likely have to stop often to look up unfamiliar words or to re-read confusing passages. Do be sure to use references as you read. Look up unfamiliar terms in the dictionary (standard and legal). Get background on concepts from secondary sources. Re-read each portion of the assignment (each case, for example) looking for key ideas and reasoning.

5. Reflect as you Read.

Engage your critical mind as you read. Be sure that you are not just passively taking in the information, but are searching, questioning, comparing and otherwise thinking as you read. Some students do this by reading out loud if their mind wanders. Many students find it useful to highlight, underline and annotate the text as they read. Argue with the text as you read. Compare what you are reading to what you already know. Whatever technique you use -- keep thinking. and *Re-read*.

Once is rarely enough. On each subsequent read, have a different purpose and read for that purpose. You might want to re-read to understand simply what happened in the case, for example. Or you might want to re-read in order to compare how what you have read today fits with what you read yesterday.

6. Write.

Briefing the cases assigned is only one aspect of writing as you read. Take notes on other aspects of your reading. Keep a vocabulary list and write out definitions for yourself. If you read statutes or rules,

diagram them or write them in your own words. If there are articles or commentary accompanying a case, be sure you summarize the main points in your notes. If you have questions about your readings, write them down and look for answers.

7. Review.

Throughout the semester, you will need to review everything you have read. Review your readings after you have completed your notes, by comparing them with others or inventing and discussing problems raised by the readings. Review with a purpose of discovering what you know and -- perhaps even more important -- what you don't know. Generate more questions and then try to answer them.

As part of your review, go back to materials that you have read for prior classes and review those materials in comparison to the materials that you have most recently read. Look for connections and themes. Write these ideas down. Review all your notes immediately before class, skimming through the textbook to be sure that you are familiar with where to find important points.

Critical Writing Skills: An Introduction to Briefing

One of the most important aspects of writing as you read is "briefing" the cases in your text. It is the process of preparing the brief that provides the primary benefit, not the brief itself. The process of briefing helps you concentrate on key ideas, compare one case with another, organize your analysis, and review your materials. Remember that your purpose in reading cases is NOT TO LEARN ABOUT THE CASE -- the case is simply one fact situation to which one court has responded. MUCH OF WHAT YOU NEED TO GET OUT OF A CASE IS NOT TO BE FOUND IN THE EXPRESS WORDS OF THE CASE.

You study cases because they provide:

RULES & DOCTRINES -- You must learn to identify the legal concepts and rules that are applied in cases. Learning the rules is the easy part. Interpreting the rules is the difficulty. Remember that **RULES ARE TOOLS** to solve problems --they are not formulae to

provide answers. So identify and memorize the language of the rules, yes, but also work on identifying all the different uses that could be made of the rule.

ARGUMENTS -- Cases provide examples of techniques of argumentation that can be applied to all kinds of situations. They also provide fact situations to which you can apply your own argumentation skills, creating arguments that are different from or more carefully crafted than those provided by the court.

POLICIES -- Cases implicate public policy considerations that the judges may or may not expressly discuss but which you need to explore.

STRATEGIES AND OUTCOMES -- Cases provide examples of choices and outcomes that affect clients. You need to think about whether the choices made were wise and about what options were available. These are matters rarely discussed explicitly in the case.

Especially during the first month of classes, you will need to read the cases several times before you can produce a final brief. The "policy analysis" and "personal analysis" sections may be rather thin as you concentrate on describing opinion itself. After several weeks, you will be able to brief the cases with less effort and fewer readings. Now, the time saved should be spent thinking about analysis. The focus of your study will shift from the top sections of the briefing format to the bottom.

A Sample Briefing Format

Citation: Name of the case, date decided, court

Statement of the Case: "Who is suing whom for what remedy on what basis?" (from viewpoint of trial court)

Statement of Facts: Chronological summary of all relevant facts (sometimes drawing a diagram helps)

Procedure Below: What happened in the lower court? Who won?

Result on Appeal: Was the trial court reversed or affirmed?

What is the issue? There are usually two kinds of issues: "what is the law? (e.g., which rule should the court apply? or which interpretation of the rule should the court adopt?)" or "how does the law apply to these facts? (e.g., should these facts be characterized in such a way as to fit within the rule or outside the rule?)". A third issue: "what are the facts" is equally important in practice, but we will not usually be addressing those issues in this course. Note that one case may contain several issues.

Arguments and Analysis of Appellant: Why is the trial court wrong and what legal theory or interpretation should have been applied?

Arguments and Analysis of Appellee: What is the trial court's legal theory or application and why is that correct?

What is the Holding? One way to think of a holding is: "Under this doctrine of law, if these facts occur, then this condition of the law has been fulfilled."

Policy Analysis: What public policies or goals are furthered by the court's choice? What would be the effect if the court has chosen an alternative rule or application of the rule? How does this opinion fit in with others you have read on the same topic? How does the law applied in this case fit into the overall scheme?

Personal Analysis: Do you agree with the holding? How far do you think the next court would be willing to extend the holding? Do you agree with the results? Is it fair? Do you agree with the analysis? Is it logical and consistent? What's likely to happen now to the people and the property involved? What would you have done differently if you had represented one of the parties or had been the judge? Why is this case in the book? Why did the professor assign it? How might it be tested?

Holdings and "What's the Answer"

Students often have the most difficulty in arriving at a 'holding' in their brief. This is often the point at which students approach their professors and ask "Did I get the holding right?" or "What's the answer?" The "answer" to all legal questions is the same: IT

DEPENDS. What the holding of a case is depends on how you interpret the result of the case in light of the facts and the court's reasoning. Students must understand that a holding is not the same as a 'rule', which is the law the court applies to the facts in the case to reach the holding. It is also different than the court's 'rationale' for why it chose to apply the rule in the way it did. Over time, a series of 'holdings' in related cases, crystallize into 'rules'. Even when the court says "We hold..." the statement they make may not be what develops into the "holding" of the case as other courts apply that case.

So, there is no "right or wrong" holding -- only interpretations of cases that are more strongly supported and better reasoned than others -- and when is a particular interpretation "better reasoned"? IT DEPENDS on the use you wish to make of the holding. If you are defending someone for whom the interpretation of a holding will be favorable precedent and you can make a good argument that that interpretation is correct, then that is the better holding. If you are trying to predict how a future court will apply a case, the interpretation that results in a holding that best predicts the future is the "better" holding -- at least until the future changes.

Here is one way of looking at a holding that can help to reflect the complexity of this concept.

Suppose a court has a case in which A discovers that B has a son who requires a special operation. Out of the goodness of A's heart, A pays for the operation. B discovers A's generosity and then promises to pay for A's education. B later reneges on the promise, just as A is about to finish the degree program and begin a teaching job. The court finds that B has no legal obligation to pay for A's education (the result). The holding might be phrased as follows:

Functional Result:

The Court will not grant restitution to a Plaintiff who performs a Defendant's obligation...

Facts Tending to Lead to Result

AT LEAST IF:

- 1) Defendant has not requested Plaintiff to perform the obligation
- 2) Plaintiff and Defendant have not entered into a contract under which Defendant agreed to reimburse Plaintiff
- 3) There existed an alternative remedy through which someone could have required Defendant to perform its obligation itself

Facts Tending to Lead to Opposite Result

EVEN THOUGH:

- 1) Defendant did have the obligation
- 2) Performance of the obligation was of great public importance
- 3) Plaintiff performed Defendant's obligation
- 4) Plaintiff's performance of the obligation conferred a benefit on Defendant.
- 5) Plaintiff had an obligation (e.g. teaching contract) which could not be performed unless Defendant's obligation was performed

Facts Tending to Mitigate the Effect of the "Even Though" Facts

AT LEAST SO LONG AS:

- 1) Plaintiff was not an intended beneficiary of the statute or contract (or other source) creating Defendant's obligation
- 2) Plaintiff has some other remedy for any damage Plaintiff suffered by reason of his inability to perform his obligation (e.g. teaching contract)

The Importance of Vocabulary

It is tempting for students to gloss over words that they don't understand. Many professional schools' students have developed their vocabulary to the point that, when faced with unfamiliar words, they simply guess their meanings from context and let it go at that. They have gotten out of the dictionary habit. In law school, while

guessing meaning from context is not a bad first step, the dictionary habit is critical. Every word that you pass over (whether legal or not) creates a hole in your understanding that has a cumulative effect on your ability to master the material.

The study of law revolves around the learning of a whole new language. Some legal words are foreign looking and sounding (for example, "res judicata" "mens rea"); others look like words that you think you know (judgment, reasonableness, intent) but have peculiar and complex legal meaning. Often, the meaning of these terms is the key issue in interpreting cases and statutes. Having the vocabulary of the law at hand is essential to being able to research the law. The fact that separate (very voluminous) dictionaries exist for legal terms should indicate to you the importance of acquiring and mastering a legal vocabulary.

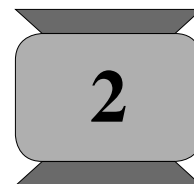
Thus, part of your daily class preparation should include looking up and striving to understand the definitions for every unfamiliar word. At first, this will mean that you will be stopping to look up words nearly every other sentence. Take heart. As the semester progresses and your legal vocabulary expands, however, you will find fewer and fewer unfamiliar words. You can use a classic legal dictionary such as Black's or Ballentine's, which courts cite as authoritative sources of legal definitions; however, if you find online legal dictionaries more convenient, these are fine for class preparation. Just be sure that your online sources are from a reliable source – learning your vocabulary from the notes of another 1L student posted to the web is not necessarily the best route to accurate understanding.

The task of becoming skillful in case analysis is indeed difficult and time consuming. It may take hours to comprehend a single opinion. If you apply yourself diligently, however, and if you have a realistic outlook of what must be done, you will find that the time needed to handle opinions will tend to decrease. What will increase from this approach will be your satisfaction in being able to use case law effectively in the resolution of legal problems and effectively research law in order to learn more.

Background reading assignment #4:

Read the following chapter from *Legal Reasoning, Writing, and Other Lawyering Skills* by Robin Wellford Slocum (3d Ed., Carolina Academic Press 2011).

This material provides information for the session on Introduction to the U.S Legal System, including the court systems, sources of law, the branches of government, and the concept of *stare decisis*.



INTRODUCTION TO AMERICAN LEGAL SYSTEM

I ***INTRODUCTION***

You likely have a basic understanding of how our legal system works from current events reported in the news, and perhaps even from a civics course you took in high school or college. At the risk of revisiting material with which you are already familiar, this chapter begins by summarizing some core points about our legal system that will serve as a foundation for your work as a lawyer. The importance of this background information will become clearer to you as the chapter and exercises unfold, when you will be asked to apply your knowledge of our legal system to better understand its specific relevance to you as a lawyer.

A. Two Basic Court Systems

Before you begin reading about the sources of law in our court system, you might find it helpful to have some context that directly applies to your life as a law student. Consider for a moment your decision to attend orientation classes at your new law school. The first decision you had to make when you arrived for orientation (assuming this was your first visit to your new law school) was to make sure you found the right building in your university. Knowing that you were to appear for an orientation meeting in Room 201, for example, wouldn't help you at all if you ended up in the school of arts and sciences instead of the law school building. The law school and school of arts and sciences are two very different schools in two very different buildings — while classes are taught in each building and some of the room numbers might be the same, the classes themselves are different and are centered around two different disciplines.

Similarly, as a law student and ultimately as a lawyer, you will likewise need to identify “where you are” in terms of the legal issues you will be researching and evaluating. There are two basic court systems in our country — federal and state. The federal court system has its own set of laws and courts, and each state also has its own unique set of laws and courts. Like your law school and the school of arts and sciences, both federal and state legal systems operate simultaneously and pretty much independently.

When a client asks you for legal advice, one of the first things you will need to do is figure out which court system and set of laws controls your client’s actions. Some conduct is governed solely by the state court legal system, while other conduct is governed solely by the federal court legal system. And there are also some instances in which *both* federal and state laws apply. So, for example, if your client lived in Chicago, Illinois and had a legal issue that arose there, you would first need to consider whether federal laws or Illinois state laws governed the client’s conduct — or both. Assuming the legal matter happened to involve litigation, that information would also denote the type of court (Illinois state court or federal court) in which you would file a lawsuit on behalf of the client. As a general rule, federal courts and agencies interpret legal issues that arise from federal law, while state courts resolve legal disputes that arise from state laws.¹

B. Sources of Law

The laws from both the federal and state legal systems stem from three primary sources: the Constitution, statutes, and common law.

1. Constitutions

Although constitutional laws are relatively small in number, they are important because they protect rights that we as a society have found to be of fundamental importance. The right to be free from “unreasonable searches and seizures” is one such important right. As a law student, you will have the opportunity to study cases interpreting the important rights that are embodied in the Constitution in a specific class focused on constitutional law.

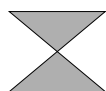
¹ As you will learn in your civil procedure class, there are a few exceptions. Even though the federal and state court systems are separate legal systems, federal courts, in limited circumstances, sometimes hear disputes that arise from state laws. Similarly, state courts sometimes consider federal laws, assuming certain jurisdictional issues are satisfied.

2. *Statutes & Administrative Regulations*

In both the federal and state legal systems, the legislative branch of government also creates law by enacting statutes that govern the rights and duties of the people who have the requisite minimum contacts within that jurisdiction. Although legislators enact statutes, they also authorize agencies to issue regulations that help interpret and clarify what a statute means. For example, you might be familiar with Title VII, a statute that makes it illegal for employers to discriminate against their employees on the basis of their race, religion, gender, or place of birth. Congress also gave a federal agency the authority to implement regulations and guidelines that help interpret Title VII and give it practical effect — the Equal Employment Opportunity Commission (the EEOC).

3. *Common Law*

Some laws do not have their source in a constitution or statute. Instead, these laws evolve solely from court decisions, and are called the “common law.” How did common law evolve? Judges started from a few basic ideas that seemed to be universally accepted in medieval society. As new factual controversies arose, the judges expanded on and refined their interpretations of the common law by focusing on the similarities to and distinctions from previous cases. Although the common law originated in England, it was brought to the United States by British colonists, eventually becoming each state’s original body of law.² Today, although statutes have replaced a fair amount of the common law, the common law still exists today. As importantly, the common law method of reasoning by analogy is still the primary means by which lawyers evaluate cases and predict what the law might say about their clients’ conduct.



EXERCISE 2-1: NATURE OF THE LAW

Sometime in the future, as a result of a major catastrophe, life as we know it no longer exists.³ A group of survivors congregated and formed a new society, Gilligan’s Island. During one of the many social gatherings on the island, the Skipper became enamored with Ginger, an attractive young woman who had captured the interest of a number of men, including the Professor. In fact, Ginger

² Richard K. Neumann, Jr., *Legal Reasoning and Legal Writing: Structure, Strategy, and Style* 5 (4th ed. Aspen L. & Bus. 2001).

³ The ideas for Exercises 2-1–2-3 were inspired by James E. Moliterno & Fredric I. Lederer, *An Introduction to Law, Law Study, and the Lawyer’s Role*, Ch. 3 (1991).

and the Professor had been romantically involved for a period of months and the Professor was hopelessly in love with her. However, Ginger was a shameless flirt and encouraged the attention of both the Skipper and the Professor. During one particularly heated confrontation over which man was more deserving of Ginger's affection, the Professor became enraged and struck the Skipper over the head with a shovel, killing him.

The group of survivors quickly elected you as judge and directed you to empanel a group of citizens to try the Professor for killing the Skipper. During his trial, the Professor admitted that he killed the Skipper, but claimed that he had broken no law because the island does not have a law that forbids killing.

As the judge in the *Professor's* case you clearly have been delegated the power to hear the case, i.e., you have jurisdiction. However, before you can proceed with the Professor's trial, you must decide if killing someone is against the law on the island. Deciding whether killing is against the law on the island requires you to think about the question of what "law" is.

Does law consist only of positive, affirmative declarations? That is, must someone with recognized authority enact a rule in order for there to be a law that can be enforced? If that definition of law is too narrow, from where else might "law" be derived? From religious doctrine? From societal values? From natural law?

In our legal system, the judge typically decides what the "law" is. As judge, what is your decision in the *Professor's* case? What value judgments does your decision embody?

If you believe that you should penalize the Professor for killing the Skipper, what are the limits of this approach? Would you reach the same result if the Professor had only injured the Skipper rather than killed him? What if the injury was merely a bruised rib cage from which the Skipper fully recovered? If you would rule differently under these facts, why?

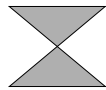
C. How the Branches of Government Work Together

Although each source of law stands on its own, there is also significant interplay between the three branches of government. Because constitutions and statutes are generally future-oriented, they are written in broad, general terms that embrace a wide range of future conduct that might fall within their ambit. Inevitably, when the broad language of a statute or constitution is applied to a specific factual situation, questions arise. Does this specific conduct fall within the ambit of that law? Is this particular individual the type of person the legislature intended to cover? As these questions arise in individual cases, judges are required to interpret the meaning of specific statutes and

constitutions. By giving texture and additional substance to the law, judges play an active role in the evolving interpretation of what a law means, even when the law itself is based on a statute or constitution.

Sometimes when a judge interprets a statute, the legislature disagrees with how the court interpreted the statute. When that happens, the legislature might amend the statutory language to clarify its meaning. In the process, the new legislation invalidates earlier court decisions that interpreted the statute in a different manner. For example, in 1991, Congress amended the Civil Rights Act of 1964 so as to nullify a series of Supreme Court cases that interpreted the Civil Rights Act in a manner with which Congress disagreed.

The process sometimes works the other way as well. When the legislature passes a statute it must pass constitutional muster — a judge can invalidate a statute if the judge concludes that it violates either the relevant state’s or United States constitution. For example, in the landmark civil rights case of *Brown v. Board of Education*, the United States Supreme Court invalidated a Kansas statute that permitted the segregation of public schools, holding that the state-sanctioned segregation violated the 14th Amendment to the Constitution.



EXERCISE 2-2: NATURE OF THE LAW

Consider again the Gilligan’s Island scenario. Assume that, following your ruling in the *Professor’s* case, the new society realized that it should enact some laws that embody the values of the people. The citizens elected a twenty-person legislative body and authorized that representative group to adopt any laws they believe to be fair and just. The legislative body quickly and without debate enacted the following statute:

Any person who kills another person shall be guilty of murder and shall be sentenced to death or life in prison.

Some months later, Mr. Thurston Howell, III injured his back while helping to build a new community center. To help relieve the pain, Mr. Howell took a powerful herbal pain reliever before going to sleep. The herbs not only help relieve Mr. Howell’s pain and allow him to sleep, but make his dreams unusually vivid. During that particular night, Mr. Howell dreamt that he was being attacked by a lion. While still asleep, Mr. Howell believed that he was subduing the lion that was attacking him. In reality, Mr. Howell suffocated Mrs. Howell with a pillow, killing her.

You are the duly elected judge on the island. The island constable arrested Mr. Howell and brought him before you for trial on murder charges. Mr. Howell admitted he killed Mrs. Howell, but claimed that the killing was not against the law because it was an accident and he certainly did not intend to kill his wife.

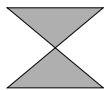
As the judge, you must decide what the statute means. When interpreting a statute, judges typically begin by reading the statutory language to identify its plain meaning. When the language is ambiguous or when the plain meaning would lead to an absurd or unreasonable result, judges sometimes go beyond the literal language of the statute and look for legislative intent by examining the statute's legislative history. Here, however, there is no legislative history, as the legislative body passed the statute quickly and without debate.

What is your decision in *Howell's* case? Should you apply the plain meaning of the statute and find Mr. Howell guilty of murder? Or should you go beyond the plain meaning and conclude that the legislatively body surely would have exempted killing under these circumstances had they thought of it? What arguments support your decision?

Before reading any further, take a moment and consider the potential problems with the decision you just reached — what undesirable consequences could result from that decision?

D. Our System of Stare Decisis

By now, you have identified a conundrum that judges sometimes face when interpreting the law. On the one hand, judges want to impose rulings that are fair and seem to further the legislative intent or policy concerns underlying the law. On the other hand, our legal system is premised on the idea that there be predictability and consistency in how our laws are interpreted. It would be difficult for us, as citizens, to know what behavior is lawful unless we know what the law means and can trust that it will be interpreted consistently in the future. Therefore, judges look to the decisions of prior courts for guidance in interpreting the law. This process of judicial interpretation is known as *stare decisis* — a Latin phrase that means that courts should stand by earlier legal decisions (“precedent”) and interpret the law in the same way as earlier courts have done.



EXERCISE 2-3: NATURE OF THE LAW

Consider again the Gilligan's Island scenario. Whatever your actual decision in Exercise 2-2, assume for present purposes that the judge in *Howell's* case decided to apply probable legislative intent rather than the

plain meaning of the statute. Therefore, the judge instructed the jury, in the form of a written decision, that “*the crime of murder requires the intent to kill.*” After deliberating, the jury acquitted Mr. Howell, finding that he did not possess the intent to kill Mrs. Howell. Some members of the legislative body vocally criticized the judge for “creating” law in this manner, arguing that only the legislative body should have the ability to create law. Despite such criticism, the legislative body did not change the statute. Now assume that the judge retired, and the legislative body selected you as the new judge.

Six months later, another killing occurred. After drinking seven margaritas and becoming sloppy drunk, Marianne got into a heated argument with Ginger. Although the two women were friends, they had a contentious history between them and were known to quarrel. In the heat of the argument, Marianne became so enraged that she pulled out a small, snub-nosed pistol and began waving it around. During her drunken rambling, Marianne pulled the trigger and shot Ginger in the chest, killing her. Marianne was so intoxicated that she could not walk and had to be carried away to the local jailhouse. The next morning when Marianne awoke, she experienced a blackout from the previous evening. Marianne didn’t recall anything about her argument with Ginger, nor did she recall shooting Ginger or killing her. Marianne has expressed horror that she could have done such a thing, and claims that she would never knowingly have shot her dear friend.

The constable arrested Marianne and, because you are the new judge, the constable brought her before you for trial on murder charges. Marianne claims that the killing was not against the law. Marianne argues that she was so intoxicated that she didn’t know what she was doing and could not therefore have possessed the “intent” to kill Ginger.

As the new judge, you must first decide whether to recognize the former judge’s decision that the “crime of murder requires the intent to kill.” Assume that the Anglo-American system of *stare decisis* applies. As the new judge, would you, or should you, follow the retired judge’s interpretation of the statute?

Assume you decide that your decision should be consistent with *Howell* and that you therefore adopt the same interpretation of the law as the judge in the *Howell* case — that the crime of murder requires the intent to kill. You are now faced with an additional question as you apply the legal definition of murder to the facts of *Marianne’s* case. Are the facts in *Marianne’s* case close enough to the facts of *Howell* as to require the same result (to acquit Marianne of the charge of murder)? Or are the facts different enough to reach a different decision than the judge in *Howell’s* case? What is your decision in *Marianne’s* case?



STARE DECISIS — MANDATORY & PERSUASIVE PRECEDENT

In evaluating cases under our system of *stare decisis*, judges consider two different kinds of precedent: *mandatory* and *persuasive* precedent. As you might guess from what the names imply, courts are *required* to follow only earlier cases that qualify as mandatory precedent. In contrast, courts may or may not be persuaded to follow earlier cases that are only persuasive precedent. As a future lawyer who will advise clients of their legal rights, it is critical that you know how to tell the difference between mandatory and persuasive precedent.

Whether a case is mandatory or persuasive precedent depends on two questions — the jurisdiction within which the case arose and the hierarchal level of that court within the jurisdiction. If you remember the following two-part test, you can resolve any jurisdictional question. A previous case is binding on a new court only if: (1) the previous case arose within the *same jurisdiction* as the dispute presently before the court; and (2) the earlier case was decided by a *higher-level court* within the same jurisdiction.

A. The Jurisdictional Part of the Test

The jurisdictional part of the test can be deceptively challenging if you are unfamiliar with the way in which the federal and state court systems are organized. You can't begin to answer the question of whether a legal precedent is mandatory or persuasive precedent unless you have a very clear understanding of (a) the jurisdiction in which your new legal problem is based, and (b) the jurisdiction in which the earlier case arose. This is a fundamentally important question that merits some review, even if you are already somewhat familiar with the federal and state court jurisdictions.

1. Federal Courts

Federal courts have jurisdiction to resolve disputes that involve the United States Constitution, federal statutes, and federal regulations. In addition, federal courts have jurisdiction to resolve disputes that involve state laws if the parties satisfy other jurisdictional requirements (i.e., diversity of citizenship; pendent jurisdiction). Unlike the differing state laws, federal laws are, by definition, national in scope and apply irrespective of whether conduct covered by the law arises within the State of New York, the State of Florida, or the State of Illinois.

Because our nation is so vast and the volume of lawsuits so expansive, for practical reasons Congress has divided the country into thirteen federal

judicial circuits. There are eleven numbered circuits, such as the United States Court of Appeals for the First Circuit, the Second Circuit, and so on. In addition to the eleven numbered circuits, there is also the United States Court of Appeals for the District of Columbia and the United States Court of Appeals for the Federal Circuit. The Federal Circuit resolves disputes involving patents, certain international trade disputes, and some cases involving damage claims against the United States government. Take a look at the accompanying map of the thirteen judicial circuits to gain a sense of how the country is divided into separate regions. Note that each numbered federal judicial circuit encompasses a number of different states. As you review the map, recall, however, that the jurisdiction of a federal judicial circuit extends only to acts within those states that affect a *federal* law. In what federal circuit do you reside?

How do the different federal judicial circuits affect the doctrine of *stare decisis*? An earlier case is mandatory, or binding, precedent only with respect to new federal court cases that arise within the same judicial circuit. For example, a decision issued by the United States Court of Appeals for the First Circuit is binding only on future cases that arise within the First Circuit. That decision does not carry any binding weight within any other circuit. A judge or panel of judges within the Second Circuit is free to agree or disagree with the manner in which the First Circuit Court of Appeals interprets a federal law.

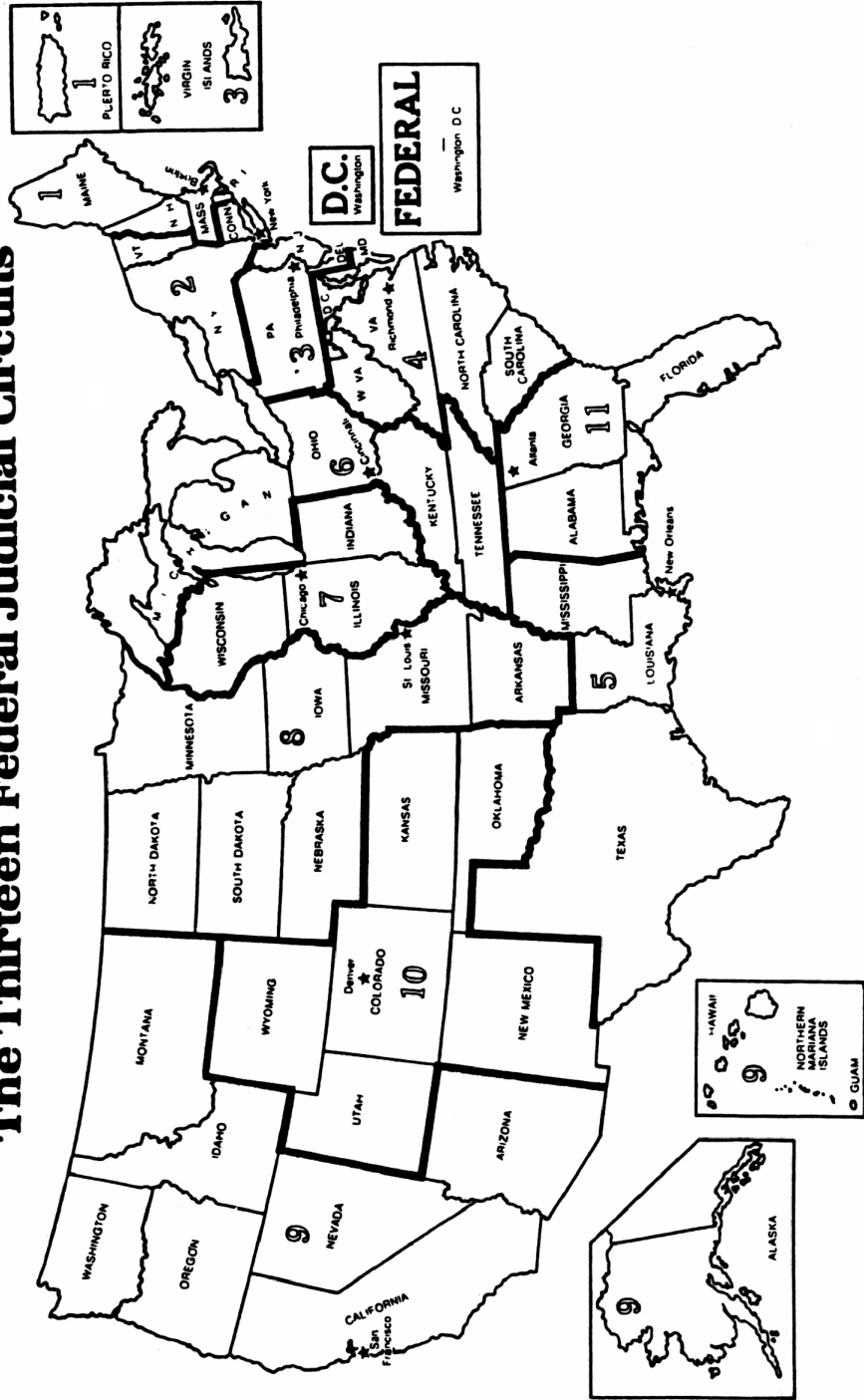
2. *State Courts*

Each individual state has its own laws and court system. State court judges have sole jurisdiction to resolve controversies involving their state's constitution, statutes, and common law. Therefore, earlier cases have binding effect only on future disputes that arise within that same state. In fact, a case from one state has very little persuasive impact on a judge in another state. As an example, a judge in the State of Illinois interpreting Illinois' burglary statute would not be required to follow a Wisconsin judge's interpretation of a similar Wisconsin statute and would likely not even find the Wisconsin case persuasive. Unlike the sources of federal law, which apply nationwide, each state's laws are different from the laws in other states and result from a unique balancing of interests and public policy within that state.

B. The Court Hierarchy Part of the Test

In order for an earlier case to have mandatory precedential effect, the earlier case must not only arise from within the same jurisdiction as the problem you are researching, but the earlier case must be decided by a *higher-level court* within that jurisdiction. The federal government, the District of Columbia,

The Thirteen Federal Judicial Circuits

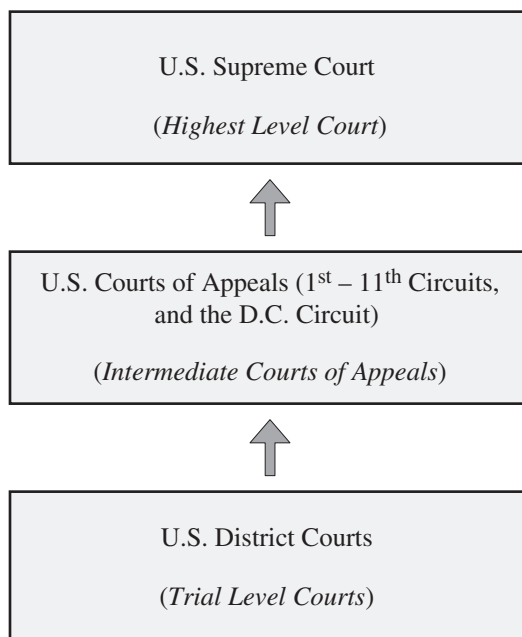


and each individual state have their own hierarchy of courts within their court systems. However, irrespective of the jurisdiction in which you practice law, an overriding principle applies: higher-level courts are binding on lower-level courts. Lower-level courts are never binding on higher-level courts.

1. *Federal Court System*

The federal court system has three levels of courts: (1) the trial court level (*District Courts*); (2) the intermediate appellate court level (*United States Courts of Appeals*); and (3) and the highest appellate court level (the *United States Supreme Court*). As the highest level court in the federal system, decisions of the United States Supreme Court are binding on all other federal courts. Decisions of each United States Court of Appeals are binding only on the lower federal courts within their jurisdiction. Federal district court decisions are not binding on other courts — even other court decisions within the same jurisdiction.

Graphically, the federal court system is organized like this⁴:



⁴ In addition, there are also federal courts that have special subject matter jurisdiction, such as federal claims courts, bankruptcy and tax courts, and veterans, armed forces, and international trade courts.

(a) Federal District Courts

If you were to file a lawsuit that involved a federal law, you would file the lawsuit in a federal district court, which is the name of the trial level court within the federal judiciary system.⁵ Each of the twelve federal circuits (the eleven numbered circuits and the District of Columbia), has a number of district courts within its jurisdiction. The size and number of federal district courts within a particular circuit depends upon the size and caseload of that district. Additionally, each federal district court is typically comprised of more than one judge, again depending upon the size and caseload of the district.

(b) United States Courts of Appeal

If you were to try a case in federal district court and end up in the position of having to appeal the decision of that court, you would appeal to the next highest level court in the federal system — one of the United States courts of appeals. If your case were tried in a New York district court, you would appeal the decision to the Second Circuit Court of Appeals, the circuit that encompasses New York. On the other hand, if your case were tried in a Texas district court, you would appeal to the Fifth Circuit Court of Appeals, the circuit that encompasses Texas.

All active judges on a federal court of appeals do not hear every case that comes before that court. Instead, cases are heard by three-judge panels during one week of the month. Sometimes, for unusually significant cases, all active judges on a federal court of appeals hear a case together, as a group. These decisions are called *en banc* decisions — a French term that simply signifies that the entire panel of judges heard the arguments and rendered an opinion.

(c) United States Supreme Court

Assuming that you were in the position of appealing a decision from one of the United States courts of appeals, your appeal would be filed with the United States Supreme Court. As the highest level of court in the land, the nine-member Supreme Court consents to review only a select few appeals each year. Out of

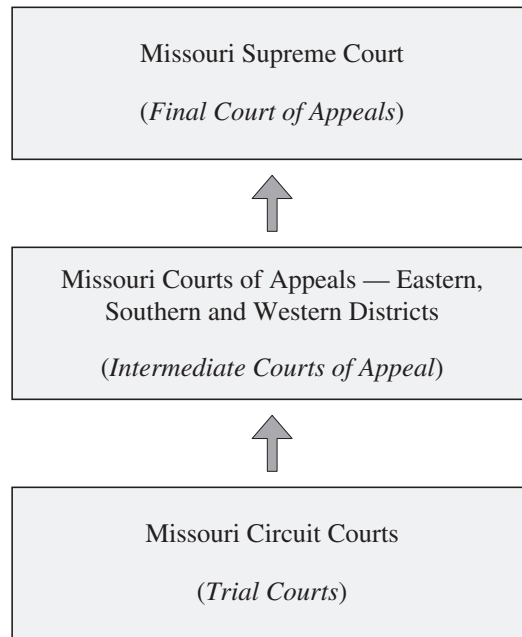
⁵ For present purposes, assume that the legal matter you are handling does not involve a specialized issue that would be addressed by the United States Tax Court, the Court of Federal Claims, or the Court of International Trade.

thousands of petitions for appeal every year, the Supreme Court consents to hear only 100 to 200 per year. Generally, it agrees to hear only those cases that are of exceptional constitutional or statutory magnitude, or those cases upon which lower courts have disagreed in their interpretation of federal law, i.e., where two or more federal circuit courts of appeal are split in their interpretation of an important law. When the Supreme Court declines to hear an appeal, the technical term is that it has *denied certiorari*. This term is abbreviated for citation purposes. Thus, when you see the phrase “*cert. denied*” following the citation of a case, that means that the lawyers in that case appealed the case to the United States Supreme Court and that the Supreme Court declined to hear the appeal.

2. State Court Systems

Like the federal court system, many, but not all, states have three levels of courts — trial level courts, intermediate appellate level courts, and a final appellate level court. (Most states have courts of limited jurisdiction as well, such as small claims courts or municipal courts.) However, some states have only two levels of courts. To complicate matters even further, some states call their final appeals court the “Supreme Court,” while other states call their final appeals court the “Appellate Court.” Thankfully, you are likely to practice law only in a few different jurisdictions and will become familiar with your jurisdictions’ court systems during summer clerkships or externships, or as you begin practicing law. As law students, however, the *Bluebook* and the *ALWD Manual* can be helpful in unraveling a particular state’s court system. Appendix 1 of the *ALWD Citation Manual*, and Table 1 of the *Bluebook*, list each state alphabetically and designate each state’s court structure.⁶ Ignoring the courts of very limited jurisdiction, such as small claims and municipal courts, a typical state court system such as Missouri would look like this:

⁶ The *ALWD Citation Manual* and the *Bluebook* only list those state courts from which decisions are actually published. In most states, intermediate appellate court and final appellate court decisions are published and are therefore denoted in the *ALWD Citation Manual* and the *Bluebook*. However, most states do not publish their trial court opinions. For example, the State of Missouri does not publish trial court opinions. Thus, the citation manuals do not list Missouri’s trial level courts.



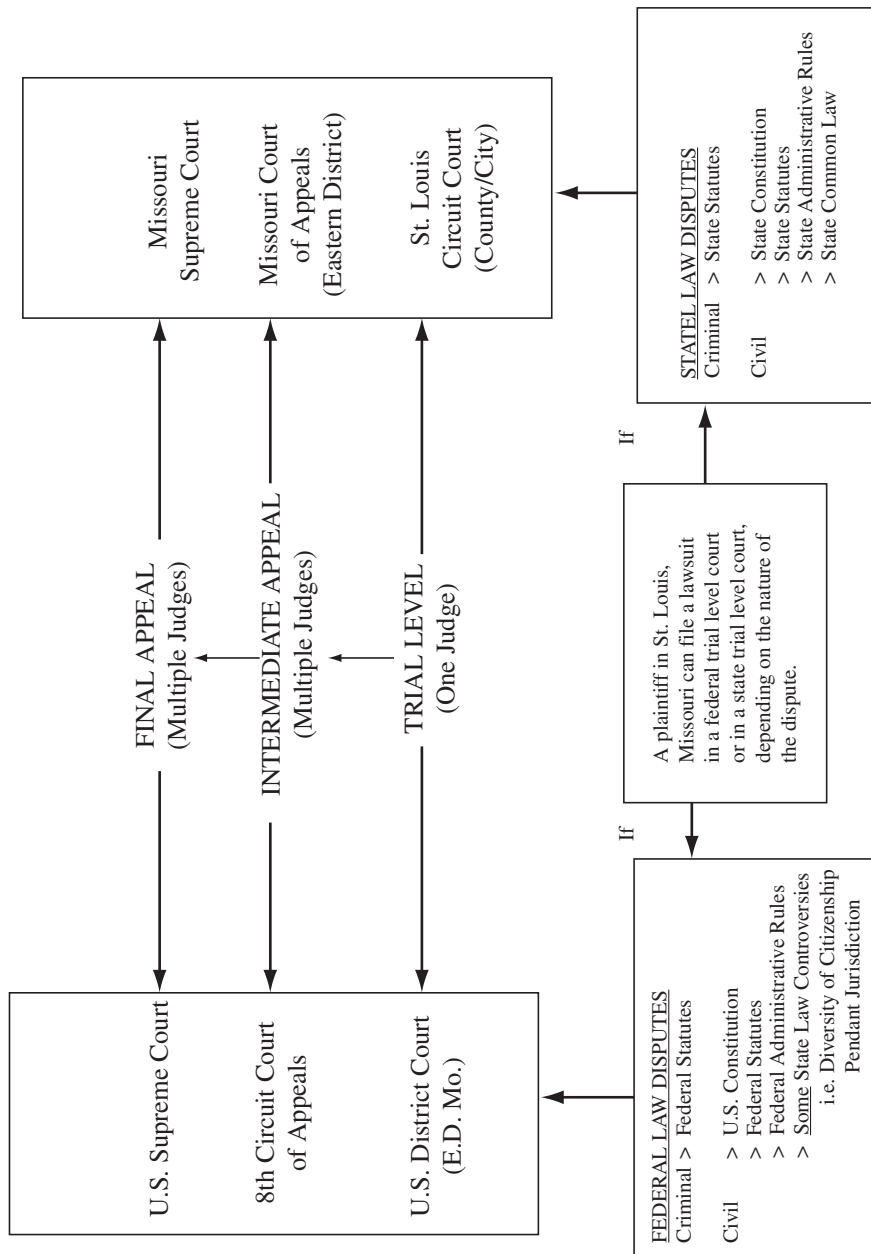
Like the federal court system, in a state system, the highest level of appellate court binds all lower level courts. Intermediate level appellate courts bind all trial level courts within all districts within the state. For example, an earlier case decided by the Court of Appeals for the Western District of Missouri would bind all state trial courts within the state, even those trial courts that sit within the Eastern District of Missouri.

However, there is a caveat of which you should be aware: because court decisions are not binding on other courts that operate at the same level, it is possible for different intermediate appellate courts within a state to conflict. For example, suppose the Court of Appeals for the Western District of Missouri disagreed with a decision of the Court of Appeals for the Eastern District of Missouri. As a lawyer trying to sift through the conflicting opinions, you would need to consider the district under which your case falls. If, for instance, you were involved in a lawsuit in a trial court that happens to fall within the Western District of Missouri, the earlier decision of the Court of Appeals for the Western District of Missouri would be mandatory, binding authority for your case. The trial judge in your case would be required to follow the interpretation of the law rendered by the Court of Appeals for the Western District of Missouri — even if the trial court judge happened to personally agree with the legal interpretation rendered by the Eastern District.

C. Illustration of the Federal and State Court Structures

The illustration below reflects, in practical terms, the two parallel court systems, how the source of law affects whether you would litigate a dispute in federal or state court, and the appeals process.

TYPICAL COURT STRUCTURE



Background reading assignment #5:

Read the Six-Step Approach to Law School Study provided at www.lawnerds.com

Be sure to read all the material contained in each of the links found on each of the six sections of the website. You do not need to take any of the practice exams.

CASE BRIEF – Garrat v. Dailey

Case Citation:

Facts:

Procedural History:

Issue:

Rule:

Holding:

Reasoning:

Miscellaneous information:

Assignment Due

- Read the following materials using the techniques you have studied in the preceding background reading assignments. The following materials pertain to one of the important topics that all law students in the U.S. encounter in their first semester of law school: Course - Torts; Topic - Intentional Torts; Specific rule - Intentional Tort of Battery.
 - Restatement 2d of Torts
 - Garrat v. Dailey, 279 P.2d 1091 (Wisc. 1955)
 - Fisher v. Carrousel Motor Hotel, Inc., 424 S.W.2d 627 (Tex. 1967)
 - Wishnatsky v. Huey, 584 N.W.2d 859 (N.D. App. 1998)
 - Lambertson v. U.S., 528 F.2d 441 (2d Cir. 1976)

- Create a case brief for each case listed above and an outline of the tort of battery. Use the techniques of case briefing and topic outlining that you have studied in the LawNerds Six -Step Approach and other background reading assignments. You may use the format for a case brief shown above.

- After completing case briefs for the cases, consider how to apply the law that you have outlined to the **Problems** at the end of the packet. Type your answers and be prepared to submit them at the start of the Orientation program.
 - Be sure to organize all your case briefs and answers to the problems into a typed and printed packet. Put your name and your division (Full-time; Part-time Day; Part-time Evening) on your packet. Make two copies of the packet, one to submit and one for you to use during the workshop sessions.

EXCERPT FROM THE RESTATEMENT (SECOND) OF TORTS (1961)

NOTE: Learning to be a lawyer is learning how to formulate and ask the right QUESTIONS – not simply spouting answers. Among the QUESTIONS you should ask yourself and then research the answer: What is a “tort”? What is “a Restatement” in American Law? What, specifically, is the “Restatement (Second) of Torts?” Who writes and publishes it? Who uses it? When do they use it? Why do they use it? What “kind” of legal authority is a Restatement? Are there any “terms of art” – words or phrases – in the reading that I need to look up in a legal dictionary to make sure that I understand them correctly and can define if I’m called upon to do so?

§ 18. Battery: Offensive Contact

(1) An actor is subject to liability to another for battery if

(a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and

(b) an offensive contact with the person of the other directly or indirectly results.

46 Wn.2d 197 (1955)
279 P.2d 1091

RUTH GARRATT, Appellant,
v.
BRIAN DAILEY, a Minor, by George S. Dailey, his Guardian ad Litem,
Respondent.

No. 32841.

The Supreme Court of Washington, Department Two.

February 14, 1955.

Kennett, McCutcheon & Soderland and James P. Healy, for appellant.

Frederick J. Orth and Rode, Cook, Watkins & Orth, for respondent.

HILL, J.

The liability of an infant for an alleged battery is presented to this court for the first time. Brian Dailey (age five years, nine months) was visiting with Naomi Garratt, an adult and a sister of the plaintiff, Ruth Garratt, likewise an adult, in the backyard of the plaintiff's home, on July 16, 1951. It is plaintiff's contention that she came out into the backyard to talk with Naomi and that, as she started to sit down in a wood and canvas lawn chair, Brian deliberately pulled it out from under her. The only one of the three persons present so testifying was Naomi Garratt. (Ruth Garratt, the plaintiff, did not testify as to how or why she fell.) The trial court, unwilling to accept this testimony, adopted instead Brian Dailey's version of what happened, and made the following findings:

"III.... that while Naomi Garratt and Brian Dailey were in the back yard the plaintiff, Ruth Garratt, came out of her house into the back yard. Some time subsequent thereto defendant, Brian Dailey, picked up a lightly built wood and canvas lawn chair which was then and there located in the back yard of the above described premises, moved it sideways a few feet and seated himself therein, at which time he discovered the plaintiff, Ruth Garratt, about to sit down at the place where the lawn chair had formerly been, at which time he hurriedly got up from the chair and attempted to move it toward Ruth Garratt to aid her in sitting down in the chair; that due to the defendant's small size and lack of dexterity he was unable to get the lawn chair under the plaintiff in time to prevent her from falling to the ground. That plaintiff fell to the ground and sustained a fracture of her hip, and other injuries and damages as hereinafter set forth.

"IV. That the preponderance of the evidence in this case establishes that when the defendant, Brian Dailey, moved the chair in question *he did not have any willful or unlawful purpose* in doing so; that *he did not have any intent to injure the plaintiff, or any intent to bring about any unauthorized or offensive contact*

with her person or any objects appurtenant thereto; that the circumstances which immediately preceded the fall of the plaintiff established that the defendant, Brian Dailey, did not have purpose, intent or design to perform a prank or to effect an assault and battery upon the person of the plaintiff."

(Italics ours, for a purpose hereinafter indicated.)

It is conceded that Ruth Garratt's fall resulted in a fractured hip and other painful and serious injuries. To obviate the necessity of a retrial in the event this court determines that she was entitled to a judgment against Brian Dailey, the amount of her damage was found to be eleven thousand dollars. Plaintiff appeals from a judgment dismissing the action and asks for the entry of a judgment in that amount or a new trial.

[1] The authorities generally, but with certain notable exceptions state that, when a minor has committed a tort with force, he is liable to be proceeded against as any other person would be. .

In our analysis of the applicable law, we start with the basic premise that Brian, whether five or fifty-five, must have committed some wrongful act before he could be liable for appellant's injuries.

[2] It is urged that Brian's action in moving the chair constituted a battery. A definition (not all-inclusive but sufficient for our purpose) of a battery is the intentional infliction of a harmful bodily contact upon another. The rule that determines liability for battery is given in 1 Restatement, Torts, 29, § 13, as:

"An act which, directly or indirectly, is the legal cause of a harmful contact with another's person makes the actor liable to the other, if

"(a) the act is done with the intention of bringing about a harmful or offensive contact or an apprehension thereof to the other or a third person, and

"(b) the contact is not consented to by the other or other's consent thereto is procured by fraud or duress, and

"(c) the contact is not otherwise privileged."

We have in this case no question of consent or privilege. We therefore proceed to an immediate consideration of intent and its place in the law of battery. In the comment on clause (a), the Restatement says:

"*Character of actor's intention.* In order that an act may be done with the intention of bringing about a harmful or offensive contact or an apprehension thereof to a particular person, either the other or a third person, the act must be done for the purpose of causing the contact or apprehension or with knowledge on the part of the actor that such contact or apprehension is substantially certain to be produced."

We have here the conceded volitional act of Brian, *i.e.*, the moving of a chair. Had the plaintiff proved to the satisfaction of the trial court that Brian moved the chair while she was in the act of sitting down, Brian's action would patently have been for the purpose or with the intent of causing the plaintiff's bodily contact with the ground, and she would be entitled to a judgment against him for the resulting damages. ...

The plaintiff based her case on that theory, and the trial court held that she failed in her proof and accepted Brian's version of the facts rather than that given by the eyewitness who testified for the plaintiff. After the trial court determined that the plaintiff had not established her theory of a battery (*i.e.*, that Brian had pulled the chair out from under the plaintiff while she was in the act of sitting down), it then became concerned with whether a battery was established under the facts as it found them to be.

In this connection, we quote another portion of the comment on the "Character of actor's intention," relating to clause (a) of the rule from the Restatement heretofore set forth:

"It is not enough that the act itself is intentionally done and this, even though the actor realizes or should realize that it contains a very grave risk of bringing about the contact or apprehension. Such realization may make the actor's conduct negligent or even reckless but unless he realizes that to a substantial certainty, the contact or apprehension will result, the actor has not that intention which is necessary to make him liable under the rule stated in this Section."

[3] A battery would be established if, in addition to plaintiff's fall, it was proved that, when Brian moved the chair, he knew with substantial certainty that the plaintiff would attempt to sit down where the chair had been. If Brian had any of the intents which the trial court found, in the italicized portions of the findings of fact quoted above, that he did not have, he would of course have had the knowledge to which we have referred. The mere absence of any intent to injure the plaintiff or to play a prank on her or to embarrass her, or to commit an assault and battery on her would not absolve him from liability if in fact he had such knowledge. Without such knowledge, there would be nothing wrongful about Brian's act in moving the chair, and, there being no wrongful act, there would be no liability.

[4] While a finding that Brian had no such knowledge can be inferred from the findings made, we believe that before the plaintiff's action in such a case should be dismissed there should be no question but that the trial court had passed upon that issue; hence, the case should be remanded for clarification of the findings to specifically cover the question of Brian's knowledge, because intent could be inferred therefrom. If the court finds that he had such knowledge, the necessary intent will be established and the plaintiff will be entitled to recover, even though there was no purpose to injure or embarrass the plaintiff. If Brian did not have such knowledge, there was no wrongful act by him, and the basic premise of liability on the theory of a battery was not established.

[5] It will be noted that the law of battery as we have discussed it is the law applicable to adults, and no significance has been attached to the fact that Brian was a child less than six years of age when the alleged battery occurred. The only circumstance where Brian's age is of any consequence is in determining what he knew, and there his experience, capacity, and understanding are of course material.

The cause is remanded for clarification, with instructions to make definite findings on the issue of whether Brian Dailey knew with substantial certainty that the plaintiff would attempt to sit down where the chair which he moved had been, and to change the judgment if the findings warrant it.

Costs on this appeal will abide the ultimate decision of the superior court. If a judgment is entered for the plaintiff, Ruth Garratt, appellant here, she shall be entitled to her costs on this appeal. If, however, the judgment of dismissal remains unchanged, the respondent will be entitled to recover his costs on this appeal.

Remanded for clarification.

SCHWELLENBACH, DONWORTH, and WEAVER, JJ., concur.

May 3, 1955. Petition for rehearing denied.

Emmit E. FISHER, Petitioner,
v.
CARROUSEL MOTOR HOTEL, INC., et al., Respondents.

424 S.W.2d 627

Supreme Court of Texas.

No. B—342.

Dec. 27, 1967.

GREENHILL, Justice.

This is a suit for actual and exemplary damages growing out of an alleged assault and battery. The plaintiff Fisher was a mathematician with the Data Processing Division of the Manned Spacecraft Center, an agency of the National Aeronautics and Space Agency, commonly called NASA, near Houston. The defendants were the Carrousel Motor Hotel, Inc., located in Houston, the Brass Ring Club, which is located in the Carrousel, and Robert W. Flynn, who as an employee of the Carrousel was the manager of the Brass Ring Club. Flynn died before the trial, and the suit proceeded as to the Carrousel and the Brass Ring. Trial was to a jury which found for the plaintiff Fisher. The trial court rendered judgment for the defendants notwithstanding the verdict. The Court of Civil Appeals affirmed. The [question] before this Court [is] whether there was evidence that an actionable battery was committed. . . .

The plaintiff Fisher had been invited by Ampex Corporation and Defense Electronics to a one day's meeting regarding telemetry equipment at the Carrousel. The invitation included a luncheon. The guests were asked to reply by telephone whether they could attend the luncheon, and Fisher called in his acceptance. After the morning session, the group of 25 or 30 guests adjourned to the Brass Ring Club for lunch. The luncheon was buffet style, and Fisher stood in line with others and just ahead of a graduate student of Rice University who testified at the trial. As Fisher was about to be served, he was approached by Flynn, who snatched the plate from Fisher's hand and shouted that he, a Negro, could not be served in the club. Fisher testified that he was not actually touched, and did not testify that he suffered fear or apprehension of physical injury; but he did testify that he was highly embarrassed and hurt by Flynn's conduct in the presence of his associates.

The jury found that Flynn 'forceably dispossessed plaintiff of his dinner plate' and 'shouted in a loud and offensive manner' that Fisher could not be served there, thus subjecting Fisher to humiliation and indignity. It was stipulated that Flynn was an employee of the Carrousel Hotel and, as such, managed the Brass Ring Club. The jury also found that Flynn acted maliciously and awarded Fisher \$400 actual damages for his humiliation and indignity and \$500 exemplary damages for Flynn's malicious conduct.

The Court of Civil Appeals held that there was no assault because there was no physical contact and no evidence of fear or apprehension of physical contact. However, it has long been settled that there can be a battery without an assault, and that actual physical contact is not necessary

to constitute a battery, so long as there is contact with clothing or an object closely identified with the body. ... In Prosser, Law of Torts 32 (3d Ed. 1964), it is said:

'The interest in freedom from intentional and unpermitted contacts with the plaintiff's person is protected by an action for the tort commonly called battery. The protection extends to any part of the body, or to anything which is attached to it and practically identified with it. Thus contact with the plaintiff's clothing, or with a cane, a paper, or any other object held in his hand will be sufficient; * * * The plaintiff's interest in the integrity of his person includes all those things which are in contact or connected with it.'

Under the facts of this case, we have no difficulty in holding that the intentional grabbing of plaintiff's plate constituted a battery. The intentional snatching of an object from one's hand is as clearly an offensive invasion of his person as would be an actual contact with the body. 'To constitute an assault and battery, it is not necessary to touch the plaintiff's body or even his clothing; knocking or snatching anything from plaintiff's hand or touching anything connected with his person, when, done in an offensive manner, is sufficient.

The rationale for holding an offensive contact with such an object to be a battery is explained in 1 Restatement of Torts 2d s 18 (Comment p. 31) as follows:

'Since the essence of the plaintiff's grievance consists in the offense to the dignity involved in the unpermitted and intentional invasion of the inviolability of his person and not in any physical harm done to his body, it is not necessary that the plaintiff's actual body be disturbed. Unpermitted and intentional contacts with anything so connected with the body as to be customarily regarded as part of the other's person and therefore as partaking of its inviolability is actionable as an offensive contact with his person. There are some things such as clothing or a cane or, indeed, anything directly grasped by the hand which are so intimately connected with one's body as to be universally regarded as part of the person.'

We hold, therefore, that the forceful dispossession of plaintiff Fisher's plate in an offensive manner was sufficient to constitute a battery, and the trial court erred in granting judgment notwithstanding the verdict on the issue of actual damages.

WISHNATSKY v. HUEY
1998 ND App 8
North Dakota Court of Appeals
September 15, 1998

PER CURIAM. ¶1 Martin Wishnatsky appealed a summary judgment dismissing his battery action against David W. Huey, and an order denying his motion for an altered judgment. We conclude, as a matter of law, that no battery occurred, and we affirm the judgment and the order.

¶2 On January 10, 1996, [defendant] Huey, an assistant attorney general [in the North Dakota Office of the State Attorney General], was engaged in a conversation with attorney Peter B. Crary in Crary's office. Without knocking or announcing his entry, [plaintiff] Wishnatsky, who performs paralegal work for Crary, attempted to enter the office. Huey pushed the door closed, thereby pushing Wishnatsky back into the hall. [plaintiff] Wishnatsky reentered the office and Huey left.

¶3 Wishnatsky brought an action against Huey, seeking damages for battery. Huey moved for summary judgment of dismissal. The trial court granted Huey's motion and a judgment of dismissal was entered. Wishnatsky moved to alter the judgment. The trial court denied Wishnatsky's motion.

¶4 Wishnatsky appealed, contending the evidence he submitted in response to Huey's motion for summary judgment satisfies the elements of a battery claim and the trial court erred in granting Huey's motion. ...

¶6 "In its original conception [battery] meant the infliction of physical injury." By the Eighteenth Century, the requirement of an actual physical injury had been eliminated: At Nisi Prius, upon evidence in trespass for assault and battery, Holt, C. J. declared,

1. That the least touching of another in anger is a battery.
2. If two or more meet in a narrow passage, and without any violence or design of harm, the one touches the other gently, it is no battery.
3. If any of them use violence against the other, to force his way in a rude inordinate manner, it is a battery; or any struggle about the passage, to that degree as may do hurt, is a battery.

Cole v. Turner, Pasch. 3 Ann., 6 Mod. 149, 90 Eng.Rep. 958 (1704). Blackstone explained:

The least touching of another's person willfully, or in anger, is a battery; for the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it: every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner.

3 William Blackstone, Commentaries *120. On the other hand, "in a crowded world, a certain amount of personal contact is inevitable, and must be accepted." W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 9, at 42 (5th ed. 1984).

[¶7] The American Law Institute has balanced the interest in unwanted contacts and the inevitable contacts in a crowded world in Restatement (Second) of Torts §§ 18, 19(1965):

19. What Constitutes Offensive Contact

A bodily contact is offensive if it offends a reasonable sense of personal dignity.

[¶8] Huey moved for summary judgment of dismissal, because, among other things, “as a matter of law, a battery did not occur on January 10, 1996.” Huey supported the motion with his affidavit stating in part:

8. That Attorney Cray and I had settled into a serious discussion about the case and had established a good rapport when the door to his office suddenly swung open without a knock. An unidentified individual carrying some papers then strode in unannounced. I had not been told that anyone would be entering Attorney Cray’s office during the private meeting. . . . I subsequently learned that the individual’s name is Martin Wishnatsky.

[¶9] Wishnatsky responded to Huey’s motion for summary judgment with an affidavit of Cray and with his own affidavit stating in part:

2. On January 9, 1996, Mr. David Huey of the North Dakota Attorney General’s office, visited the ministry where I was working at 16 Broadway in Fargo, North Dakota with an ex parte court order.

3. The following morning I entered the office of Peter Cray, an attorney for whom I do paralegal work, to give him certain papers that had been requested. Mr. Cray was speaking with Mr. David Huey at the time. As I began to enter the office Mr Huey threw his body weight against the door and forced me out into the hall. I had not said a word to him. At the same time, he snarled: “You get out of here.” This was very shocking and frightening to me. In all the time I have been working as an aide to Mr. Cray, I have never been physically assaulted or spoken to in a harsh and brutal manner. My blood pressure began to rise, my heart beat accelerated and I felt waves of fear in the pit of my stomach. My hands began to shake and my body to tremble. Composing myself, I reentered the office, whereupon Mr. Huey began a half-demented tirade against me and stormed out into the hall. I looked at Mr. Cray in wonder.

[¶10] ... [W]hen Wishnatsky attempted to enter the room in which Huey was conversing with Cray, “Huey apparently reacted in a rude and abrupt manner in attempting to exclude Wishnatsky from that conversation.” As a matter of law, however, Huey’s “rude and abrupt” conduct did not rise to the level of battery.

[¶11] The evidence presented to the trial court demonstrates Wishnatsky is “unduly sensitive as to his personal dignity.” Restatement (Second) of Torts § 19 cmt. a (1965). Without knocking or otherwise announcing his intentions, Wishnatsky opened the door to the office in which Huey and Cray were having a private conversation and attempted to enter. Huey closed the door opened

by Wishnatsky, thereby stopping Wishnatsky's forward progress and pushing him back into the hall. The bodily contact was momentary, indirect, and incidental. Viewing the evidence in the light most favorable to Wishnatsky, and giving him the benefit of all favorable inferences which can reasonably be drawn from the evidence, we conclude Huey's conduct in response to Wishnatsky's intrusion into his private conversation with Crary, while "rude and abrupt," would not "be offensive to a reasonable sense of personal dignity." In short, an "ordinary person . . . not unduly sensitive as to his personal dignity" intruding upon a private conversation in Wishnatsky's manner would not have been offended by Huey's response to the intrusion. We conclude that Huey's conduct did not constitute an offensive-contact-battery, as a matter of law, and the trial court did not err in granting Huey's motion for summary judgment dismissing Wishnatsky's action.

[¶13] Affirmed.

Richard LAMBERTSON, Plaintiff-Appellant,
v.
UNITED STATES of America, Defendant-Appellee.

United States Court of Appeals,
Second Circuit
528 F.2d 441

No. 135, Docket 75—6033.

Argued Oct. 28, 1975. Decided Jan. 14, 1976.

VAN GRAAFEILAND, Circuit Judge:

This is an appeal from an order of Judge Edmund Port of the United States District Court for the Northern District of New York dismissing plaintiff's action against the United States [because plaintiff's claim is one for battery, and the United States has not waived its sovereign immunity as to intentional tort claims, such as battery, committed by its agents and employees in the course of their work].

Appellant, an employee of Armour & Co., sustained serious injuries to his mouth as a result of the actions of one William Boslet, a meat inspector for the United States Department of Agriculture [USDA]. For the most part, the circumstances of the incident are not in dispute. What variations do exist are not significant for purposes of this appeal.

On August 30, 1972, a truck shipment of beef arrived at the receiving dock of Armour's Syracuse plant. Plaintiff was one of the employees assigned to unload this truck. While he was so engaged, he was suddenly and without warning jumped by Boslet [the USAD inspector on duty], who, screaming '**Boo!**', pulled plaintiff's wool stocking hat over his eyes and, climbing on his back, began to ride him piggyback.

As a result of this action, plaintiff fell forward and struck his face on some meat hooks located on the receiving dock [less than six inches from his plaintiff's head], suffering severe injuries to his mouth and teeth.

It is apparently agreed by all witnesses that the mishap was the result of one-sided horseplay with no intention on Boslet's part to injure plaintiff. Indeed, immediately after the incident Boslet apologized to plaintiff, telling him that he was only playing around and meant no harm.

It is hornbook law in New York, as in most other jurisdictions, that the intent which is an essential element of the action for battery is the intent to make contact, not to do injury. A plaintiff in an action to recover damages for an assault founded on bodily contact must prove only that there was bodily contact; that such contact was offensive; and that the defendant intended to make the contact. The plaintiff is not required to prove that defendant intended

physically to injure him. Certainly he is not required to prove an intention to cause the specific injuries resulting from the contact.

Harper and James put it that 'it is a battery for a man . . . to play a joke upon another which involves a harmful or offensive contact.' Prosser says that a 'defendant may be liable where he has intended only a joke.' Accord **Restatement (Second) of Torts s 13**, comment c (1965). Since there is not the remotest suggestion that Boslet's leap onto plaintiff's back, his piggy back ride and his use of plaintiff's hat as a blindfold might have been accidental, there was no error in the District Court's determination that it was a battery.

[Affirmed.]

PROBLEMS

PROBLEM ONE (Multiple-Choice Question):

Choose the best answer to the following question. After indicating your answer choice (A, B, C, or D), then write an explanation for [1] why the answer you chose is the best answer to the question, considering the law and the relevant facts; and [2] why each of the other three answers are not as good, considering the applicable law and the relevant facts.

Advocate has for many years been a leading figure in the national debate over the risks of cigarette smoking. Advocate strongly opposes cigarette smoking and argues that it should be outlawed by the states and the federal government. Host appears on a talk show broadcast over satellite FM radio in which Host argues that adults should be free to do what they want with a minimum of government regulation. Host invited Advocate to appear on Host's radio show to debate with him Advocate's views on cigarette smoking. The participants in the program must sit closely to one another around a broadcast desk in the studio. During the program, Host lit up a cigar and smoked it. Whenever Advocate was talking during their debate, Host casually blew the cigar smoke toward Advocate's face. Advocate said nothing about what Host was doing. However, Advocate did make hand gestures to fan the smoke away and coughed throughout the show. In addition, it was obvious that Advocate's sinuses became congested and that Advocate's eyes watered profusely.

If Advocate later sues Host for the tort battery, will Advocate prevail?

- A. Yes, because Host intended to harm Advocate.
- B. Yes, because Host knowingly caused an offensive contact with Advocate.
- C. No, because Host did not actually touch Advocate.
- D. No, because Host is not liable to those who, like Advocate, are unduly sensitive about their personal dignity.

PROBLEM TWO (Essay Question):

Advocate has for many years been a leading figure in the national debate over the risks of cigarette smoking. Advocate strongly opposes cigarette smoking and argues that it should be outlawed by the states and the federal government. Host appears on a talk show broadcast over satellite FM radio in which Host argues that adults should be free to do what they want with a minimum of government regulation. Host invited Advocate to appear on Host's radio show to debate with him Advocate's views on cigarette smoking. The participants in the program must sit closely to one another around a broadcast desk in the studio. During the program, Host lit up a cigar and smoked it. Whenever Advocate was talking during their debate, Host casually blew the cigar smoke toward Advocate's face. Advocate said nothing about what Host was doing. However, Advocate did make hand gestures to fan the smoke away and coughed throughout the show. In addition, it was obvious that Advocate's sinuses became congested and that Advocate's eyes watered profusely.

- a. Assume Advocate later sues host, claiming personal injuries as a result of Host's actions during the taping of the radio program.

Discuss whether Advocate has a viable intentional tort claim against Host. Make sure to consider the likely arguments to be raised by Advocate and by Host, and to assess those arguments using applicable law. Explain your answer thoroughly.

- b. Consider the following additional facts:

After the show was taped, Advocate was admitted to the hospital with serious hemorrhaging from Advocate's lungs. While an adult of average health would have gotten over the effects of the cigar smoke exposure within 24 hours, Advocate had an undiagnosed, pre-existing lung disease that made Advocate unusually susceptible to having a very severe reaction to the smoke exposure. Advocate spent two months in the hospital afterwards; must continue breathing therapy for the remainder of her life; and can no longer conduct the daily activities of life and work without using a portable oxygen concentrator to assist with breathing.

Discuss whether (and if so, how) the changes in the facts change your analysis of whether advocate has a viable intentional tort claim against Host. Make sure to consider how, if at all, the changed facts would change the parties' arguments and the persuasiveness of those arguments, as well as the likely outcome of the case. Explain your answer thoroughly.



Legal Foundations

Academic Orientation Program

August 12-15, 2019

Addendum to Course Materials

In order to effectively answer Part b of Problem Two contained on page 78 of the course materials, you will need to read and brief one additional case, Vosburg v. Putney, 50 N.W. 403 (Wisc. 1891). The case excerpt is attached.

Please note that this will require you to submit case briefs for five (5) cases upon your arrival to Orientation.

Vosburg v. Putney
80 Wis. 523, 50 N.W. 403 (Wisc. 1891)

During horseplay among students in a 7th grade classroom, Putney kicked Vosburg in the shin. Rather than just leaving a scrape or a bruise, as might ordinarily be expected, Putney's kick resulted in Vosburg's being hospitalized and having two surgeries on the injured leg, after which Vosburg walked with a pronounced, permanent limp. Vosburg's leg had been previously injured in a sledding accident which made it more susceptible to injury by the simple kick of a classmate in horseplay. Vosburg did not contend that Putney knew this when Putney kicked Vosburg. Vosburg sued Putney for damages caused by this battery. At trial, Putney's lawyers argued that he should not be held liable for injuries that at least in part were the result of Vosburg's unusual susceptibility to injury of that leg. The trial court rejected that argument. The jury returned a verdict against Putney for the full damages sought by Vosburg. Putney's lawyers appealed to the Wisconsin Supreme Court.

HELD: The Wisconsin Supreme Court rejected Putney's "theory that only such damages could be recovered as the defendant might reasonably be supposed to have contemplated as likely to result from his kicking the plaintiff. The [trial] court refused to submit such questions to the jury. The ruling was correct. The rule of damages in actions for torts was held in [previous Wisconsin cases] to be that the wrong-doer is liable for all injuries resulting directly from the wrongful act, whether they could or could not have been foreseen by him."

Judgment for Vosburg affirmed.