Syracuse University
College of Law

ORANGE EDGE
PROGRAM

Introductory Materials and Assignment
For
Initial Legal Writing & Analysis Session

Professor Risman

CASE BRIEFING ASSIGNMENT

Assignment Description: Please read the attached materials pertaining to the underpinnings of the process and purpose of case briefing. Then, prepare a brief of the attached case, *In re Winter*, 43 Kan. 345 (1987), as augmented and adapted from Helene Shapo, et al., *Writing and Analysis in the Law* (1989).

Assignment Purpose and Goals: Case briefing is an essential skill that is critically important to the understanding of how to read and interpret reported cases. Because our hybrid legal system is based largely on the concept of precedent, you will have to read and interpret cases, and identify their various substantive components as they pertain to factual scenarios and the merits of legal situations presented to students and practitioners alike. Learning the process and methodologies of case briefing will help you to develop these essential skills.

Due Date: Your brief should be submitted for discussion and evaluation during your first Legal Research, Writing and Analysis session.

In Re Estate of Winter, 34 Kan. 345 (1987). *

On appeal from a trial court decision granting rescission of a contract of the sale of land to the Supreme Court of Kansas:

The heirs of Robert Winter seek to void a contract for the sale of land Mr. Winter made three weeks before his death. They allege that Winter was mentally incompetent to make a contract at that time. In this state, a contract may be voidable on grounds of mental incompetence if, because of a person's mental illness, he was unable to reasonably understand the nature and consequences of the transaction in question. Since Winter was incompetent under this standard, the contract he made for the sale of land is voidable and will not be enforced.

Mr. Winter had a stroke in 1982. He suffered from a vascular disease which resulted in partial amputation of his foot. As a result of this amputation, he became unable to continue to operate his farm himself. In 1983, Mr. Winter's wife died. Since he was unable to take care of himself, he moved in with one of his daughters, Sandra Bright. Another one of his daughters testified that from that point on, Winter seemed to lose interest in everything. He stopped managing his own affairs. Mrs. Bright handled all of his finances. She balanced his checkbook, deposited his social security checks, and managed the farm.

As time went on, Mr. Winter became easily confused and lethargic, spending much of his time sitting in a chair, staring out of the window. A family friend testified that when Winter described the farm, he sometimes said it was 200 acres and sometimes said it was 2,000 acres. (The farm is 2,000 acres.) Dr. Crabtree, Winter's longtime physician, said that in his opinion, from March 1984 until he died, Winter was totally incompetent to handle any of his own affairs, including taking care of his own body.

In May 1984, while Mrs. Bright was out for the afternoon, Herbert Spencer paid Winter a visit. Mr. Spencer offered to buy the farm from Winter. Winter agreed and signed a contract for the sale of the farm to Spencer for what a local real estate agent said was far below its actual value. In addition, Winter did not reserve a right of way for himself and his family, creating a problem of access from the road to their other piece of property. Mr. Winter died three weeks after the sale of the farm.

Under Kansas law, one who lacks capacity to contract may later rescind such a contract. Kansas Code sec. 574 (1988). Such incapacity is manifested through medical testimony and observations as to diminished mental capacity of the contracting party, including unusual behavior and diminished mental capacity to understand the consequences of such agreements. In Re Estate of Jones, 46 Kan. 533 (1978).

Attorneys for Mr. Spencer cite to Logan v. Johnson, 23 Kan. App. 462 (1976) for the proposition that "a court will not look to the consideration paid for a parcel of real estate in determining whether the contract should be voidable on grounds of incapacity." However, the seller in that case was a practicing real estate broker who sold the land in question at a reduced price because he thought it was "so far out of town that it would never be developed." A sale at below market price, by itself, does not constitute grounds for rescission. However, here, given the overwhelming additional circumstantial evidence, Winter's below market price may be used to show incapacity. In addition, that decision is not binding on this court.

The evidence suggests that at the time of the contract, Winter was unable to understand the nature and consequences of the transaction of the sale of land. He did not appear to have a clear idea of the number of acres in question. The price he received was below the fair market value of the property. He failed to reserve an important right of access for himself. His physician testified that he was incompetent to handle his own affairs. His daughter had, in fact, been taking care of his personal and business affairs before the sale took place, as Winter had lost interest in these matters. Under these circumstances, I hold that Winter was unable to understand the nature and consequences of the transaction, and, therefore, the contract for the sale of land is voidable.

* - From Helene Shapo, et. al., Writing and Analysis in the Law (1989).

ABOUT THIS PAMPHLET

As part of a continuing information campaign aimed at educating individuals who are interested in bringing law-related education into their classrooms, the New York State Bar Association and the New York State Education Department have prepared a number of pamphlets furnishing ideas for law-related resources in the community.[1] This pamphlet gives details on how to write a case brief.

The term "brief" in this context, pertains to a summary of one particular case. It should be noted that the term "brief" also can connote a more elaborate document prepared by a lawyer for file in court, which usually contains a number of cases and legal points to support a client's position.

Footnotes which correspond to the superscript numbers are in the rear of the pamphlet. As they refer to lengthy supplemental information and authoritative references, space and continuity dictate such a form.

PURPOSE OF THE BRIEF

Since the United States is governed by a federal system, both the 50 state governments and the national government make and enforce laws. Each year, state and federal courts across the country hear and decide thousands of cases.[2] The court decisions are published in voluminous legal books called reporters. If an individual wishes to discuss a case or a number of cases, it is impractical to carry many of these bulky reporters. Likewise, photocopying every case is only of limited use because of the difficulty in remembering the facts and court decisions in each case.

The purpose of the case brief is to organize and summarize the essential elements of a case in order to quickly convey its relevance.

FORM OF THE BRIEF

Generally, a legal brief of a case contains four divisions:

I. The Facts of the case.
II. The Issue of the case.
III. The Holding.
IV. The Rationale of the Court.

If the decision of the court is of great legal significance or one or more of the judges deciding the case writes a notable dissent, two additional divisions may be added to the brief:

V. Major Rule of law set forth.
VI. Dissents.

HOW TO GET STARTED

The top of the brief should always contain a heading. The heading consists of the title of the case to identify the parties involved in the action and the case's citation which identifies its location in the various court reporters.

It is not necessary in the title of the case to use the full names of the parties involved. Generally, an individual is referred to by last name and widely recognized organizations may be cited by their initials. Ordinarily one should use the case name as it appears in the official court reporter.

Directly below the title of the case is its citation. The citation identifies the location of the case in the various court reporters, the court which decided the case and the year it was decided. Regardless of the book the case is reported in, the number preceding the named reporter refers to the volume and the number following the reporter name refers to the page on which it will be found. A case is cited first to the official reporter in which it is published (government publication) and then to certain unofficial reporters (private publications). The reason for the "parallel" cites is that many smaller libraries and law firms cannot afford to buy all of the official reporters, but the unofficial reporters contain information from a number of official reporters condensed into one series.

For specific rules detailing case titles, legal citations and other legal authorities, consult the Uniform System of Citation.[3]

BARNES v. TREECE

15 Wash. 437, 549 P2d 1152 (Ct. App. 1976)

In the preceding example, the Title of the case is BARNES v. TREECE. It is reported in Volume 15 of the Washington Appellate Reports (Official Reporter) on page 437 and also in Volume 549 of the Pacific Reporter (Unofficial Reporter) on page 1152. The case was decided in 1976 by the Washington Court of Appeals.

THE BODY OF THE BRIEF

I. FACTS

The Facts section contains statements explaining the incidents which occurred between the parties and the decisions of any lower courts regarding the case. The facts should be stated in sentence form and numbered consecutively. This is preferred to paragraph form to facilitate swifter recognition of the case background. Below is an example of the FACTS division in a brief:

Facts

1. Treece was Vice-President of Vend-A-Win, Inc., a manufacturer of punchboards.
2. While giving testimony before the State Game Commission, he stated, "I'll pay $100,000 to any one to find a crooked board." The audience laughed.
3. A few years earlier, Barnes had bought two take punchboards. He called Treece and asked if he was serious about the statement he had made. Treece said yes.
4. Barnes presented the crooked board to Treece. He refused to pay.
5. The trial court awarded Barnes $100,000.
6. Treece appeals.

II. ISSUE

The issue in a case is the underlying question of either fact or law which the court must decide to settle the dispute between the parties. There can be one or more issues to be decided in a case. Each issue in a case should be framed as a question. Below is an example of the ISSUE division in a brief:

Issue

Whether Treece's intention to make an offer should be determined by what he, as the offeror, subjectively intended or by what a reasonable person in the offeree's (Barnes) position would conclude from the words and conduct of the offeror.

III. HOLDING

The Holding is the court's decision answering the issue presented to it. The holding should be a concise statement of the court's ruling. Below is an example of the HOLDING division in a brief:

Holding

The court held that the test of the offeror's intention to be bound by a contract is measured by what a reasonable person would conclude from the words or conduct of the offeror. Treece is bound by his manifestation to Barnes of an intention to contract. Trial court decision is affirmed.

IV. RATIONALE

The Rationale is the court's basis and justification for reaching its decision. It is attained by analyzing the facts and circumstances surrounding the case and then applying the pertinent points of law and authorities to settle the issue presented. Below is an example of the RATIONALE division in a brief:

Rationale

Since a contract is based on a voluntary assumed obligation, the offeror's proposition must be made with the intent to contract. Because it is often impossible to prove what was intended by the offeror, the law measures intent by an objective standard. The court considers the circumstances surrounding the parties, their acts and words which assist in deciding whether a reasonable person listening to a proposition would be justified in believing that an offer had been made.

NOTES

1. Other pamphlets available through the Law, Youth and Citizenship Program include Law-Related Resources; The Firefighter, The Policeman and How to Find the Law. Write to the LYC Program, New York State Bar Association, One Elk Street, Albany, NY 12207.

2. The New York State Bar Association, The Courts of New York, is an excellent guide to the State's court system, and includes a glossary of legal terms. Write to the New York State Bar Association, One Elk Street, Albany, NY 12207.

3. A Uniform System of Citation, 13th edition, Harvard Law Review Association, Cambridge, MA, 1983.

This pamphlet has been prepared in conjunction with the Law-Related Education Program of the Phi Alpha Delta Law Fraternity International—Nelson A. Rockefeller Chapter, Albany Law School of Union University, Albany, New York.

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SAMPLE FINAL PRODUCT:

CITATION: Jones v. Dodge, 456 N.E.2d 122 (N.Y. 1999).

FACTS: Plaintiff sued for alleged manufacturing defect which caused a vehicle he purchased from a dealer and which he was operating lawfully, to lose a wheel, lose control, hit a tree, injuring him.

PROCEDURE: Vehicle purchaser sued manufacturer. Trial court granted trial, non-jury verdict for injuries, ruling manufacturer was strictly liable for the clear defect since the vehicle was used for its intended purpose, and that injured purchaser need not prove the manufacturer acted negligently. Manufacturer appealed.

ISSUE: Does a purchase who uses a vehicle for its intended purpose need to prove negligence on the part of a manufacturer whose defective product injured him? **ANSWER:** No.

HOLDING: Where a purchaser is using a defectively manufactured product within the ambit of its intended use and the defect injures him, he need not prove manufacturer's negligence, merely that the defect existed to recover.

RULE OF LAW: Manufacturers are strictly liable for injuries caused to purchasers by defective products that are used in a manner consistent with their intended purpose.

REASONING: 1. The court reasoned that making injured purchasers prove negligence would be too stymieing and complex; manufacturers have a general responsibility to deliver safe products as a matter of *public safety policy*.

2. The court relied on Alexander v. Chrysler, 203 U.S. 245 (1978), where court rules manufacturers must safeguard the public as a duty "unto itself," and that an injured buyer need only prove that (1) the defect existed, and (2) it caused injury while (3) the buyer was operating it for its intended purpose.

3. The court distinguished Ronson v. Kevlar Vests, Inc., 456 U.S. 888 (1999) because there, the kevlar's intended use was for bullet-proof vests, not base-jumping. The tearing in the fabric was not related to intended use. The plaintiff recovered on grounds of proving negligent manufacture of the Kevlar, but NOT on strict manufacturer's liability for defect.

4. Here, Jones, a buyer, used the vehicle for its intended purpose. The defect was Dodge's, not his. He need not prove negligence.

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1 An Introduction to American Law

§1.1 *The Origin of Common Law*

At Pevensey, on the south coast of England, a man named William, Duke of Normandy, came ashore, together with ten thousand soldiers and knights, on a morning in late September 1066. Finding the town unsatisfactory for his purpose, he destroyed it and moved his people nine miles east to a coastal village called Hastings. A few days later, the English king, Harold, arrived with an army of roughly the same size. The English had always fought on foot, rather than on horseback, and in a day-long battle they were cut down by the Norman knights. According to legend, Harold was at first disabled by a random arrow shot through his eye and then killed by William himself, who marched his army north, burning villages on the way and terrorizing London into submission.

Although in December he had himself crowned king of England, William controlled only a small part of the country, and in the following years he had to embark on what modern governments would call campaigns to pacify the countryside. In 1069, for example, his army marched to York, executed every English male of any age found along the way, flattened the town, and then marched on to Durham, burning every farm and killing every English-speaking person to be found — all with the result that seventeen years later the survey recorded in Domesday Book revealed almost no population in Yorkshire. In the five years after William landed at Pevensey, one-fifth of the population of England was killed by the Norman army of occupation or died of starvation after the Normans burned the food supply. To atone for all this, William later built a monastery at Hastings. For nine centuries, it has been

known as Battle Abbey, and its altar sits on the spot where Harold is said to have died.

The picturesque Norman castles throughout England were built not to defend the island from further invasion, but to subjugate and imprison the English themselves while William expropriated nearly all the land in the country and gave it to Normans, who became a new aristocracy. With the exception of a few collaborators, everyone whose native language was English became—regardless of earlier social station—landless and impoverished. Normans quickly occupied even the most local positions of power, and suddenly the average English person knew no one in authority who understood English customs, English law, or even much of the language. William himself never learned to speak it.

Pollock and Maitland call the Norman Conquest "a catastrophe which determines the whole future history of English law."[1] Although the Conquest's influences on English law were many, for the moment let us focus only on two.

The first concerns the language of law and lawyers. Norman French was the tongue of the new rulers, and eventually it became the language of the courts as well. The sub-language called Norman Law French could still be heard in courtrooms many centuries later,[2] even after the everyday version of Norman French had merged with Middle English to produce Modern English, a language rich in nuance because it thus inherited two entire vocabularies. As late as 1731, Parliament was compelled to enact a statue providing that all court documents "shall be in the English tongue only, and not in Latin or French."[3]

Law is filled with terms of art that express technical and specialized meanings, and a large proportion of these terms survive from Norman Law French. Some of the more familiar examples include *appeal, arrest, assault, attorney, contract, counsel, court, crime, defendant, evidence, judge, jury, plaintiff, suit,* and *verdict.* In the next few pages, you will also encounter *allegation, cause of action, demurrer, indictment, party,* and *plead.* And in the next few months you will come across *battery, damages, devise, easement, estoppel, felony, larceny, lien, livery of seisin, misdemeanor, replevin, slander, tenant,* and *tort.* (Begin now the habit of looking up every unfamiliar term of art in a law dictionary, which you should keep close at hand while studying for each of your courses.) Even the bailiff's cry that still opens many American court sessions—"Oyez, oyez, oyez!"—is the Norman French equivalent of "Listen up!"

Some words entered the English language directly from the events of the Conquest itself. In the course on property, you will soon become familiar with various types of *fees: fee simple absolute, fee simple conditional, fee simple defeasible, fee tail.* These are not money paid for services. They are

§1.1 1. Frederick Pollock & Frederick William Maitland, *The History of English Law Before the Time of Edward I* 79 (2d ed., Little, Brown & Co. 1899).

2. Blackstone called Norman Law French a "badge of slavery." William Blackstone, *Commentaries,* vol. 4, *416. Before the Conquest, courts were conducted in English, and law was written in English or Latin.

3. Records in English Act, 1731, 4 Geo II ch. 26.

forms of property rights, and they are descended directly from the feudal enfeoffments that William introduced into England in order to distribute the country's land among his followers. Even today, these terms appear in the French word order (noun first, modifiers afterward).

The second, and more important, influence concerns the way law is created. It is a comparatively modern invention for a legislature to "pass a law." (Lawyers say "enact a statute.") The embryonic medieval parliaments of England and Scandinavia instead made more specific decisions, such as when to plunder Visby or whether to banish Hrothgar. Although in some countries law might come from royal decree, in England before the Conquest it arose more often from the custom of each locality, as known to and enforced by the local courts. What was legal in one village or shire might be illegal (because it offended local custom) in the next. "This crazyquilt of decentralized judicial administration was doomed after 1066. From the time of the Norman Conquest, . . . the steady development in England was one of increasing dominance of the royal courts of justice over the local, customary-law courts."[4] The reason was that the newly created Norman aristocracy, which now operated the local courts, got into conflict with the Norman monarch over the spoils of power, while the English, defeated in their own country, began to find more justice in the king's courts than in their local lords' capricious enforcement of what had once been reliable custom.

Because communication and travel were so primitive, the "crazyquilt" pattern of customary law had not before troubled the English. Instead, it had given them an agreeable opportunity to develop, through local habit, rules that suited each region and village relatively well. For two reasons, however, the king's courts would not enforce customary law. The practical reason was that a judge of a national court cannot know the customary law of each locality. The political reason was that the monarchy's goal was to centralize power in itself and its institutions. Out of this grew a uniform set of rules, common to every place in the country and eventually known as the common law of England. Centuries later, British colonists in North America were governed according to that common law, and, upon declaring their independence, adopted it as each state's original body of law. Although a fair proportion of the common law has since been changed through statute or judicial decision, it remains the foundation of our legal system, and common law methods of reasoning dominate the practice and study of law.

In a medieval England without a "law-passing" legislature and with a king far too busy to create a body of law by decree, where did this common law come from? The somewhat oversimplified answer is that the judges figured it out for themselves. They started from the few rules that plainly could not be missing from medieval society, and over centuries—faced with new conditions and reasoning by analogy—they discovered other rules of common law, as though each rule had been there from the beginning, but hidden. The central tool in this process has been a rule called

4. Harry W. Jones, *Our Uncommon Common Law*, 42 Tenn. L. Rev. 443, 450 (1975).

stare decisis, Latin for "let stand that which has been decided," or, more loosely, "follow the rules courts have followed in the past." Those past decisions of courts are called *precedents.*

Eventually, the English parliament did become a law-passing legislature, a role later adopted by the United States Congress and the American state legislatures. That has left us with two ways in which law can be made (or, as lawyers would say, two sources of law): One is statutes enacted by legislatures together with other statute-like provisions. The other is common law and other judicial precedent.[5] (We will come back to this in §2.5).

Before we can look at law as a system of rules (in Chapter 2), you will need some background in how courts are structured.

§1.2 *How American Courts Are Organized*

Because the United States has a federal system of government, it has two different kinds of court systems. Each state has its own courts, enforcing that state's law, and in addition the federal government has courts throughout the country, enforcing federal law.[1] The Constitution allocates certain responsibilities to the federal government and reserves the rest to the states. State court systems tend to be organized as variations, from state to state, on similar themes, while the federal courts operate rather differently.

§1.2.1 State Courts

A very simple state court system might include one trial court in each county seat, together with an appellate court in the state capital to hear appeals arising out of the work of the trial courts. Although that was once the system in most states, so simple an organization would be unrealistic under modern conditions. Virtually every state now has several different kinds of trial court, and most now have more than one appellate court.

The usual pattern goes something like this: A trial court of *general jurisdiction*—called the Circuit Court, the Superior Court, the Court of Common Pleas, or something similar—will try all cases except those that fall within the *limited jurisdiction* of some specialized trial court. Specialized courts might include a Court of Claims to hear suits against the state government, a Probate Court to adjudicate questions involving wills

5. The doctrine of stare decisis is generally observed only in countries whose law is descended in one way or another from English law. For the most part, judicial precedent is *not* a source of law in continental Europe or in Latin America.

§1.2 1. As you will learn in the course on civil procedure, federal courts on occasion will enforce a state's law, and vice versa.

and inheritances, a Family Court to settle matters of support and child custody, a Juvenile Court to determine whether minors have committed crimes or are otherwise in need of special supervision, a Small Claims Court to decide (perhaps without lawyers) disputes where the value at stake is not large, a Magistrate's Court or the like to try some misdemeanors and other offenses, and a Housing Court to resolve litigation between landlords and tenants. Often these functions are merged. A Family Court, for instance, might have jurisdiction not only over support and custody, but also over matters that, in another state, would be adjudicated by a Juvenile Court. A Small Claims Court might not be a separate court, but instead a Small Claims Division of the court of general jurisdiction.

About two-thirds of the states have intermediate courts of appeal, which sit organizationally between the trial courts and the final appellate court. In some states, such as Pennsylvania and Maryland, the intermediate court of appeals hears appeals from every part of the state, while in others, such as California, New York, and Florida, the intermediate appellate court is divided geographically into districts, departments, or the equivalent, which function as coordinate courts of equal rank. In any event, a party dissatisfied with the result in an intermediate court of appeals can attempt to appeal—within certain limitations—to the highest court in the state.

The names of these courts are not consistent from state to state. In California and many other states, the Superior Court is the trial court of general jurisdiction, but in Pennsylvania the Superior Court is the intermediate court of appeal. In Maryland and New York, the Court of Appeals is the highest court in the state, but in many other states the intermediate appellate court has that name or a similar one. In New York, the trial court of general jurisdiction is called the Supreme Court, but in most states that is the name of the highest court in the state.

§1.2.2 Federal Courts

The federal court system is organized around a general trial court (the United States District Court); a few specialized courts (such as the United States Tax Court); an intermediate appellate court (the United States Court of Appeals); and the final appellate court (the United States Supreme Court).

The United States District Courts are organized into approximately one hundred districts. Where a state has only one district, the court is referred to, for example, as the United States District Court for the District of Montana. Some states have more than one district court. California, for instance, has four: the United States District Court for the Northern District of California (at San Francisco), the Eastern District of California (at Sacramento), the Central District of California (at Los Angeles), and the Southern District of California (at San Diego).

The United States Courts of Appeals are organized into thirteen circuits. Eleven of the circuits include various combinations of states: the Fifth

Circuit, for example, hears appeals from the district courts in Louisiana, Mississippi, and Texas. There is also a United States Court of Appeals for the District of Columbia and another for the Federal Circuit, which hears appeals from certain specialized lower tribunals.

The United States Supreme Court hears selected appeals from the United States Courts of Appeals and from the highest state courts where the state court's decision has been based on federal law. The United States Supreme Court does not decide questions of state law.

2 Rule-Based Reasoning[1]

§2.1 *The Inner Structure of a Rule*

> At this moment the King, who had for some time been busily writing in his notebook, called out "Silence!" and read from his book, "Rule Forty-two. *All persons more than a mile high to leave the court.*"
>
> Everyone looked at Alice.
>
> "*I'm* not a mile high," said Alice.
>
> "You are," said the King.
>
> "Nearly *two* miles high," added the Queen.
>
> — *Lewis Carroll,*
> Alice in Wonderland

A rule is a formula for making a decision.

Some rules are *mandatory* ("any person who pays a fee of a hundred rubles shall be entitled to a beach permit"), while others are *prohibitory* ("no person shall transfer more than two million pesos to another country without a license from the Ministry of Finance") or *discretionary* ("the curator of the Louvre may permit flash photographs to be taken when, in the curator's judgment, no damage to art will result") or *declaratory* ("failure to pay the fare on the Konkan Railway is an offense"). Some appear to be one kind of rule, but on examination turn out to be something else. For example, the following seems mandatory: "a person in charge of a dog that fouls the footway shall be fined ten pounds." But it would actually be discretionary if some other rule were to empower the judge to suspend sentence.

1. This term was suggested by Steven Jamar.

Every rule has three separate components: (1) a set of elements, collectively called a test; (2) a result that occurs when all the elements are present (and the test is thus satisfied); and (3) what, for lack of a better expression, could be called a causal term that determines whether the result is mandatory, prohibitory, discretionary or declaratory. (As you will see in a moment, the result and the causal term are usually integrated into the same phrase or clause.) Additionally, many rules have (4) one or more exceptions that, if present would defeat the result, even if all the elements are present.

Consider Alice's situation. She was confronted with a test of two elements. The first was the status of being a person, which mattered because at the time she was in the company of a lot of animals — including one with the head and wings of an eagle and the body of a lion — all of whom seem to have been exempt from any requirement to leave. The second element went to height — specifically a height of more than a mile. The result would have been departure from the court, and the causal term was mandatory ("*All* persons . . . *to* leave . . ."). No exceptions were provided for. Alice has denied the second element (her height), impliedly conceding the first (her personhood). The Queen has offered to prove a height of two miles. What would happen if the Queen were not able to make good on her promise and instead produced evidence showing only a height of 1.241 miles? (Read the rule.) What if the Queen were to produce no evidence and if Alice were to prove that her height was only 0.984 miles?

A causal term can be mandatory, prohibitory, discretionary, or declaratory. Because the causal term is the heart of the rule, if the causal term is, say, mandatory, then the whole rule is, too.

A mandatory rule requires someone to act and is expressed in words like "shall" or "must" in the causal term. "Shall" means "has a legal duty to." "The court shall grant the motion" means the court has a legal duty to grant it.

A prohibitory rule is the opposite: it forbids someone to act and is expressed by "shall not," "may not," or "must not" in the causal term. "Shall not" means the person has a legal duty not to act.

A discretionary rule gives someone the power or authority to do something. That person has discretion to act but is not required to do so. It is expressed by words like "may" or "has the authority to" in the causal term.

A declaratory rule simply states (declares) that something is true. That might not seem like much of a rule, but you are already familiar with declaratory rules and their consequences. For example: "A person who drives faster than the posted speed limit is guilty of speeding." Because of that declaration, a police officer can give you a ticket if you speed, a court can sentence you to a fine, and your state's motor vehicle department can impose points on your driver's license. A declaratory rule places a label on a set of facts (the elements). The rule's power is what that label permits people to do (the police officer to give you a ticket, and so on). Often the declaration is expressed by the word "is" in the causal term. But other words could be used there instead. And some rules with "is" in the causal term are not declaratory. You have to look at what the rule *does*. If it simply

states that something is true, it is declaratory. If it does more than that, it is something else.

Below are examples of all these types of rules. The examples come from the Federal Rules of Civil Procedure, and you will study them later in the course on Civil Procedure. (Rules of law are found not just in places like the Federal Rules. In law, they are everywhere — in statutes, constitutions, regulations, and judicial precedents.)

If the rules below seem hard to understand at first, don't be discouraged. In a moment, you will learn a method for taking rules like these apart to find their meaning. For now, just read them to get a sense of how the four kinds of rules differ from each other. (The key words in the causal terms have been italicized to highlight the differences. In the prohibitory rule, the square brackets mean that the rule has been edited: words in the original have been replaced by the words in brackets.)

mandatory:	If a party is represented by an attorney, service under this rule *must* be made on the attorney unless the court orders service on the party.[1]
prohibitory:	The court *must not* require a bond, obligation, or other security from the appellant when granting a stay on an appeal by the United States, its officers, or its agencies, or on an appeal directed by a department of the federal government.[2]
discretionary:	The court *may* assert jurisdiction over property if authorized by a federal statute.[3]
declaratory:	A civil action *is* commenced by filing a complaint with the court.[4]

These rules might make no sense to a student who has just started law school. But within a few months, you will easily understand them as well as hundreds of other rules that are equally difficult. Here is a three-step method of figuring out what a rule means.

Step 1: Break the rule down into its parts. List and number the elements in the test. (An element in a test is something that must be present for the rule to operate.) Identify the causal term and the result. If there is an exception, identify it, and if the exception has more than one element, list and number them as well. (Exceptions can have elements, too; an exception's element is something that must be present for the exception to operate.) In Step 1, *you do not care what the words mean*. You only want

§2.1 1. Rule 5(b)(1) of the Federal Rules of Civil Procedure.
2. Rule 62(e) of the Federal Rules of Civil Procedure.
3. Rule 4(n)(1) of the Federal Rules of Civil Procedure.
4. Rule 3 of the Federal Rules of Civil Procedure.

to know the *structure* of the rule. You are breaking the rule down into parts small enough to understand when you do Step 2. Let's take the mandatory rule above and run it through Step 1. Here is the rule diagrammed:

elements in the test:

If
(1) a defendant
(2) located within the United States
(3) fails to comply with a request for waiver
(4) made by a plaintiff
(5) located within the United States,

causal term:

the court shall

result:

impose the costs subsequently incurred in effecting service on the defendant

exception:

unless good cause for the failure is shown.

You do not need to lay out the rule exactly this way — and you certainly do not need to use boxes. You can use any method of diagramming that breaks up the rule so you can understand it. The point is to break the rule up visually so that it is no longer a blur of words and so that you can *see separately* the elements in the test, the causal term, the result, and any exception. When can you combine the causal term and result? You can do it whenever doing so does not confuse you. If you can understand the following, you can combine, at least with this rule:

causal term and result:

the court shall impose the costs subsequently incurred in effecting service on the defendant

Step 2: Look at each of those small parts separately. Figure out the *meaning* of each element, the causal term, the result, and any exception. Look up the words in a legal dictionary, and read other material your teacher has assigned until you know what each word means. You already know what a plaintiff and defendant are. If you look up "service" in a legal dictionary (see the result box above), you will learn that it is the delivery of legal papers. If you read other material surrounding this rule in Civil Procedure, you will learn that a "request for a waiver" (see element 4) is a plaintiff's request that the defendant accept service by mail and *waive* (give up the right to) service by someone who personally brings the papers to the defendant. The surrounding materials also tell you that the costs of service (see the result) are whatever the plaintiff has to pay to have someone hired for the purpose of delivering the papers personally to the defendant.

Step 3: Put the rule back together in a way that helps you *use* it. Sometimes that means rearranging the rule so that it is easier to understand. If when you first read the rule, an exception came at the beginning and the elements came last, rearrange the rule so the elements come first and the exception last. It will be easier to understand that way. For many rules — though not all of them — the rule's inner logic works like this:

What events or circumstances set the rule into operation?
(These are the elements in the test.)

When all the elements are present, what happens?
(The causal term and the result tell us.)

Even if all the elements are present, could anything prevent the result?
(An exception, if the rule has any.)

Usually, you can put the rule back together by creating a flowchart and trying the rule out on some hypothetical facts to see how the rule works. A flowchart is essentially a list of questions. You will be able to make a flowchart because of the diagramming you did earlier in Step 1. Diagramming the rule not only breaks it down so that it can be understood, but it also permits putting the rule back together so that it is easier to apply. The flowchart below comes straight out of the diagram in Step 1 above. (When you gain more experience at this — in a few months — it will go so quickly and seamlessly that Steps 1, 2, and 3

will seem to merge into a single step.) Assume that Keisha wants Raymond to pay the costs of service.

elements:

1. Is Raymond a defendant?
2. Is Raymond located within the United States?
3. Did Raymond fail to comply with a request for waiver?
4. Is Keisha a plaintiff who made that request?
5. Is Keisha located within the United States?

If the answers to all these questions are yes, the court shall impose the costs subsequently incurred in effecting service on Raymond — but only if the answer to the question below is no.

exception:

Has Raymond shown good cause for his failure to comply?

Step 3 helps you add everything up to see what happens when the rule is applied to a given set of facts. If all the elements are present in the facts, the court must order the defendant to reimburse the plaintiff for whatever the plaintiff had to pay to have someone hired for the purpose of delivering the papers personally to the defendant—unless good cause is shown.

The elements do not have to come first. If you have a simple causal term and result, a long list of elements, and no exceptions, you can list the elements last. For example:

> Common law burglary is committed by breaking and entering the dwelling of another in the nighttime with intent to commit a felony therein.[5]

How do you determine how many elements are in a rule? Think of each element as an integral fact, the absence of which would prevent the rule's operation. Then explore the logic behind the rule's words. If you can think of a reasonably predictable scenario in which part of what you believe to be one element could be true but part not true, then you have inadvertently combined two or more elements. For example, is "the dwelling of another" one element or two? A person might be guilty of some other crime, but he is not guilty of common law burglary when he breaks and enters the restaurant of another, even in the nighttime and with intent to commit a felony therein. The same is true when he breaks and enters his own dwelling. In each instance, part of the element is present and part

5. This was the crime at common law. Because of the way its elements are divided, it does a good job of illustrating several different things about rule structure. But the definition of burglary in a modern criminal code will differ. A statute might break the crime up into gradations (burglary in the first degree, burglary in the second degree, and so on). A typical modern statute would not require that the crime happen in the nighttime, and at least the lower gradations would not require that the building be a dwelling.

missing. "The dwelling of another" thus includes two factual integers — the nature of the building and the identity of its resident — and therefore two elements.

Often you cannot know the number of elements in a rule until you have consulted the precedents interpreting it. Is "breaking and entering" one element or two? The precedents define "breaking" in this sense as the creation of a gap in a building's protective enclosure, such as by opening a door, even where the door was left unlocked and the building is thus not damaged. The cases further define "entering" for this purpose as placing inside the dwelling any part of oneself or any object under one's control, such as a crowbar. (These definitions are declaratory sub-rules. They are declaratory because they are statements rather than requirements, prohibitions, or grants of discretion. They are sub-rules because they exist only to explain parts of the main rule, the definition of burglary.) Can a person "break" without "entering"? A would-be burglar would seem to have done so where she has opened a window by pushing it up from the outside, and where, before proceeding further, she has been apprehended by an alert police officer — literally a moment too soon. "Breaking" and "entering" are therefore two elements, but one could not know for sure without discovering precisely how the courts have defined the terms used.

Where the elements are complex or ambiguous, an enumeration may add clarity to the list:

> Common law burglary is committed by (1) breaking and (2) entering (3) the dwelling (4) of another (5) in the nighttime (6) with intent to commit a felony therein.

Instead of elements, some rules have criteria or guidelines. These tend to be rules empowering a court or other authority to make discretionary decisions, and the criteria define the scope of the decision-maker's discretion. The criteria might be few ("a court may extend the time to answer for good cause shown"), or they might be many (like the following, from a typical divorce statute).

> Marital property [at divorce] shall be distributed equitably between the parties, considering the circumstances of the case and of the respective parties. . . . In determining an equitable disposition of property . . . , the court shall consider:
>
> (1) the income and property of each party at the time of marriage, and at the time of the commencement of the action;
>
> (2) the duration of the marriage and the age and health of both parties;
>
> (3) the need of a custodial parent to occupy or own the marital residence and to use or own its household effects;
>
> (4) the loss of inheritance and pension rights upon dissolution of the marriage as of the date of dissolution;
>
> (5) any award of maintenance . . . ;
>
> (6) any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a

spouse, parent, wage earner and homemaker, and to the career or career potential of the other party;

(7) the liquid or non-liquid character of all marital property;

(8) the probable future financial circumstances of each party;

(9) the impossibility or difficulty of evaluating any component asset or any interest in a business, corporation, or profession, and the economic desirability of retaining such asset or interest intact and free from any claim or interference by the other party;

(10) the tax consequences to each party;

(11) the wasteful dissipation of assets by either spouse;

(12) any transfer or encumbrance made in contemplation of a [divorce] action without fair consideration;

(13) any other factor which the court shall expressly find to be just and proper.[6]

Only seldom would all of these criteria tip in the same direction. With a rule like this, a judge does something of a balancing test, deciding according to the tilt of the criteria as a whole, together with the angle of the tilt. If the criteria favor a party only slightly, she or he may get most of the marital property, but less than if the party had been favored overwhelmingly.

Criteria rules are a relatively new development in the law and grow out of a recent tendency to define more precisely the discretion of judges and other officials. But the more common rule structure is still that of a set of elements, the presence of which leads to a particular result in the absence of an exception.

§2.2 *Organizing the Application of a Rule*

Welty and Lutz are students who have rented apartments on the same floor of the same building. At midnight, Welty is studying, while Lutz is listening to a Radiohead album with his new four-foot speakers. Welty has put up with this for two or three hours, and finally she pounds on Lutz's door. Lutz opens the door about six inches, and, when he realizes that he cannot hear what Welty is saying, he steps back into the room a few feet to turn the volume down, without opening the door further. Continuing to express outrage, Welty pushes the door completely open and strides into the room. Lutz turns on Welty and orders her to leave. Welty finds this to be too much and punches Lutz so hard that he suffers substantial injury. In this jurisdiction, the punch is a felonious assault. Is Welty also guilty of common law burglary?

You probably say "no," and your reasoning probably goes something like this: "That's not burglary. Burglary happens when somebody gets into the house when you're not around and steals all the valuables. Maybe this will

6. N.Y. Dom. Rel. Law §236, Part B(5)(c) & (d) (McKinney 1999).

turn out to be some kind of trespass." But in law school a satisfactory answer is never merely "yes" or "no." An answer necessarily includes a sound *reason*, and, regardless of whether Welty is guilty of burglary, this answer is wrong because the reasoning is wrong. The answer can be determined only by applying a rule like the definition of burglary found on page 21. *Anything else is a guess.*

Where do you start? Remember that a rule is a structured idea: the presence of all the elements causes the result, and the absence of any of them causes the rule not to operate. Assume that in our jurisdiction the elements of burglary are what they were at common law:

1. a breaking
2. and an entry
3. of the dwelling
4. of another
5. in the nighttime
6. with intent to commit a felony therein.

To discover whether each element is present in the facts, simply annotate the list:

1. *a breaking:* If a breaking can be the enlarging of an opening between the door and the jam without permission, and if Lutz's actions do not imply permission, there was a breaking.
2. *and an entry:* Welty "entered," for the purposes of the rule on burglary, by walking into the room, unless Lutz's actions implied permission to enter.
3. *of the dwelling:* Lutz's apartment is a dwelling.
4. *of another:* And it is not Welty's dwelling: she lives down the hall.
5. *in the nighttime:* Midnight is in the nighttime.
6. *with intent to commit a felony therein:* Did Welty intent to assault Lutz when she strode through the door? If not, this element is missing.

Now it is clear how much the first answer ("it doesn't sound like burglary") was a guess. By examining each element separately, you find that elements 3, 4, and 5 are present, but that you are not sure about the others without some hard thinking about the facts and without consulting the precedents in this jurisdiction that have interpreted elements 1, 2, and 6.

The case law might turn up a variety of results. Suppose that, although local precedent defines Welty's actions as a breaking and an entry, the cases on the sixth element strictly require corroborative evidence that a defendant had a fully formed felonious intent when entering the dwelling. That kind of evidence might be present, for example, where an accused was in possession of safecracking tools when he broke and entered, or where, before breaking and entering, the accused had confided to another that he intended to murder the occupant. Against that background, the answer here might be something like the following: "Welty is not guilty of burglary

because, although she broke and entered the dwelling of another in the nighttime, there is no evidence that she had a felonious intent when entering the dwelling."

Suppose, on the other hand, that under local case law Welty's actions again are a breaking and an entry; that the local cases do not require corroborative evidence of a felonious intent; and that local precedent defines a felonious intent for the purposes of burglary to be one that the defendant could have been forming — even if not yet consciously — when entering the dwelling. Under those sub-rules, if you believe that Welty had the requisite felonious intent, your answer would be something like this: "Welty is guilty of burglary because she broke and entered the dwelling of another in the nighttime with intent to commit a felony therein, thus meeting all the elements of common law burglary."

These are real answers to the question of whether Welty is guilty of burglary: they state not only the result, but the reason why.

§2.3 *Some Things to Be Careful About with Rules*

Rules must be expressed in terms of categories of actions, things, conditions, and people, and you have already had a taste of how slippery those kinds of definitions can be. Some of the slipperiness is there because precision takes constant effort, like weeding a garden. But some of it is there to give law the flexibility needed for sound decision-making. The language "in which law is necessarily expressed . . . is not an instrument of mathematical precision but possesses . . . an 'open texture.'"[1] That is because a rule's quality is measured not by its logical elegance — few rules of law have that — but by how well the rule guides a court into making sound decisions. A rule that causes poor decisions begs to be changed.

In addition, a given rule might be expressed in any of a number of ways. Where law is made through precedent — as much of our law is — different judges, writing in varying circumstances, may enunciate what seems like the same rule in a variety of distinct phrasings. At times, it can be hard to tell whether the judges have spoken of the same rule in different voices or instead have spoken of slightly different rules. In either situation, it can be harder still to discover — because of the variety — exactly what the rule is or what the rules are. All this may at first seem bewildering, but in fact it opens up one of the most fertile opportunities for a lawyer's creativity because in litigation each side is free to argue a favorable interpretation of the statements found in statutes and precedents, and courts are free to mutate the law through their own interpretations.

Ambiguity and vagueness can obscure meaning unless the person stating the rule is particularly careful with language. The classic example asks

§2.3 1. Dennis Lloyd & M. D. A. Freeman, *Lloyd's Introduction to Jurisprudence* 1139 (5th ed., Stevens 1985).

whether a person riding a bicycle through a park violates a rule prohibiting the use there of "vehicles." What had the rule-maker intended? How could the intention have been made more clear?

Even where the rule-maker is careful with language, a rule does not always express its purpose—or, as lawyers say, the policy underlying the rule. But the rule's policy or purpose is the key to unravelling ambiguities within the rule. Is a self-propelled lawn mower a prohibited "vehicle"? To answer that question, try to imagine what the rule-makers were trying to accomplish. Why did they create this rule? What harm were they trying to prevent, or what good were they trying to promote?

Not only is it difficult to frame a rule so that it controls all the rule-maker wishes to control, but once a rule has been framed, situations will inevitably crop up that the rule-maker did not contemplate or could not have been expected to contemplate. Would a baby carriage powered by solar batteries be a "vehicle"?

Finally, the parts of a rule may be so complex that it may be hard to pin down exactly what the rule is and how it works. And this is compounded by interaction between and among rules. A word or phrase in a rule may be defined, for example, by another rule. Or the application of one rule may be governed by yet another rule—or even a whole body of rules.

More than any others, two skills will help you become agile in the lawyerly use of rules. The first is language mastery, including an "ability to spot ambiguities, to recognize vagueness, to identify the emotive pull of a word . . . and to analyze and elucidate class words and abstractions."[2] The second is the capacity to think structurally. A rule is a structured idea, and the rule's structure is more like an algebraic formula than a value judgment. You need to be able to figure out the structure of an idea and apply it to facts.

§2.4 *Causes of Action and Affirmative Defenses*

The law cannot remedy every wrong, and many problems are more effectively resolved through other means, such as the political process, mediation, bargaining, and economic and social pressure. Unless the legal system focuses its resources on resolving those problems it handles best, it would collapse under the sheer weight of an unmanageable workload and would thus be prevented from attempting even the problem-solving it does well. Thus, a threshold task in law is the definition of wrongs for which courts will provide a remedy.

A harm the law will remedy is called a *cause of action* (or, in some courts, a *claim* or a *claim for relief*). If a plaintiff proves a cause of action, a court will order a remedy unless the defendant proves an *affirmative*

2. William L. Twining & David Miers, *How to Do Things with Rules* 120 (Weidenfeld & Nicolson 1976).

defense. If the defendant proves an affirmative defense, the plaintiff will get no remedy, even if that plaintiff has proved a cause of action. Causes of action and affirmative defenses (like other legal rules) are formulated as tests with elements and the other components explained in §2.1.

For example, where a plaintiff proves that a defendant intentionally confined him and that the defendant was not a law enforcement officer acting within the scope of an authority to arrest, the plaintiff has proved a cause of action called *false imprisonment.* The test is expressed as a list of elements: "False imprisonment consists of (1) a confinement (2) of the plaintiff (3) by the defendant (4) intentionally (5) where the defendant is not a sworn law enforcement officer acting within that authority." Proof of false imprisonment would customarily result in a court's awarding a remedy called *damages,* which obliges the defendant to compensate the plaintiff in money for the latter's injuries.

But that is not always so: if the defendant can prove that she caught the plaintiff shoplifting in her store and restrained him only until the police arrived, she might have an affirmative defense that is sometimes called a *shopkeeper's privilege.* Where a defendant proves a shopkeeper's privilege, a court will not award the plaintiff damages, even if he has proved false imprisonment. Again, the test is expressed as a list of elements: "A shopkeeper's privilege exists where (1) a shopkeeper or shopkeeper's employee (2) has reasonable cause to believe that (3) the plaintiff (4) has shoplifted (5) in the shopkeeper's place of business and (6) the confinement occurs in a reasonable manner, for a reasonable time, and no more than needed to detain the plaintiff for law enforcement purposes."

Notice that some elements encompass physical activity ("a confinement"), while others specify states of mind ("intentionally") or address status or condition ("a shopkeeper or shopkeeper's employee") or require abstract qualities ("in a reasonable manner, for a reasonable time, and no more than needed to detain the plaintiff for law enforcement purposes"). State-of-mind and abstract-quality elements will probably puzzle you more than others will. The plaintiff, for example, might be able to prove a confinement through a witness who saw a door being locked. And if the shopkeeper's own testimony is not good enough to prove her status, she can probably produce a license to do business at the place where the plaintiff says he was confined, or some other evidence tending to show that she operates a store. These elements are straightforward because the evidence that satisfies them can be seen, heard, or felt.

But how will the plaintiff be able to prove that the defendant acted "intentionally," and how will the defendant be able to show that she confined the plaintiff "in a reasonable manner, for a reasonable time, and no more than needed to detain the plaintiff for law enforcement purposes"? Because thoughts and abstractions cannot be seen, heard, or felt, the law has to judge an abstraction or a party's state of mind from the actions and other events surrounding it. If, for example, the plaintiff can prove that the defendant took him by the arm, pulled him into a room, and then locked the door herself, he may be able — through inference — to carry his burden of showing that she acted "intentionally." And through other inferences, the

defendant may be able to carry her burden of proving the confinement to have been reasonably carried out if she can show that when she took the defendant by the arm, he had been trying to run from the store; that she called the police immediately; and that she turned the defendant over to the police as soon as they arrived.

§2.5 *Where Rules Come From (Sources of Law)*

In our legal system, the two main sources of law are statutes and case law.

Legislatures create rules through statutes. When we say, "There ought to be a law punishing people who text-message while driving," we vaguely imagine telling our state representative about the dangers of distraction behind the wheel and suggesting that she introduce a bill along these lines and persuade her colleagues in the legislature to enact it into law. Statute-like provisions include constitutions, administrative regulations, and court rules. Constitutions are created in varying ways, but every state has one in addition to the Constitution of the United States. Administrative regulations are promulgated by administrative agencies, and court rules are promulgated usually, but not always, by courts.

A large amount of our law is created by the courts in the process of enforcing it. That is because the courts, having created the common law (see §1.1), can change it, and periodically do, in decisions that enforce the law as changed. And it is also because legislatures do not really finish the job of legislating. Statutes have ambiguities, and often we do not know what a statute means until the courts tell us — through judicial decisions enforcing the statute. (You saw in §2.2 how that can happen.) Courts record their decisions in judicial opinions, which establish precedents under the doctrine of *stare decisis* (see §1.1). Lawyers use the words *cases*, *decisions*, and *opinions* interchangeably to refer to those precedents.

Thus, our two sources of law are statutes and judicial precedent. Statutes and opinions are hard to read and understand, and much of the first year of law school is devoted to teaching you the skills needed to interpret them. Statutes are explained in Chapter 16, and judicial opinions in Chapters 3, 4, and 15. We take on judicial opinions earlier because in the first few weeks of law school you will read many more judicial opinions than statutes.

Exercise. Rule 11 of the Federal Rules of Civil Procedure

Exercise A. A provision from Rule 11(a) appears below. Decide whether it is mandatory, prohibitory, discretionary, or declaratory. Then diagram it. Finally, create a flowchart showing the questions that would need to be answered to determine when a court must strike a paper.

> The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

Exercise B. A provision from Rule 11(c)(1) appears below. Decide whether it is mandatory, prohibitory, discretionary, or declaratory. Then diagram it. Finally, create a flowchart showing the questions that would need to be answered to determine a sanctions issue under this provision.

> If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation.

Exercise C. A provision from Rule 11(c)(1) appears below. Decide whether it is mandatory, prohibitory, discretionary, or declaratory. Then diagram it. Finally, create a flowchart showing the questions that would need to be answered to determine a joint responsibility issue under this provision.

> Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

Exercise D. A provision from Rule 11(a) appears below. Decide whether it is mandatory, prohibitory, discretionary, or declaratory. Then diagram it.

> This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.

3 An Introduction to Judicial Decisions and Statutes

§3.1 *The Anatomy of a Judicial Decision*

An opinion announcing a court's decision can include up to nine ingredients:

1. a description of procedural events (what lawyers and judges did before the decision was made)
2. a narrative of pleaded or evidentiary events (what the witnesses saw and the parties did *before* the lawsuit began)
3. a statement of the issue or issues to be decided by the court
4. a summary of the arguments made by each side
5. the court's holding on each issue
6. the rule or rules of law the court enforces through each holding
7. the court's reasoning
8. dicta
9. a statement of the relief granted or denied

Most opinions do not include all of these things, although a typical opinion probably has most of them. Let us look at each of them in turn to see what they mean.

Opinions often begin with (1) a recitation of *procedural events* inside the litigation that have raised the issue decided by the court. Examples are motions, hearings, trial, judgment, and appeal. Although the court's description of these events may—because of unfamiliar terminology—seem at first confusing, you must be able to understand procedural histories because the manner in which an issue is raised determines the method a court will

use to decide it. A court decides a motion for a directed verdict, for example, very differently from the way it rules on a request for a jury instruction, even though both might require the court to consider the same point of law. The procedural events add up to the case's procedural posture at the time the decision was made.

Frequently, the court will next describe (2) the *pleaded events* or the *evidentiary events* on which the ruling is based. In litigation, parties allege facts in a pleading and then prove them with evidence. The court has no other way of knowing what transpired between the parties before the lawsuit began. If the procedural posture involves a motion to dismiss a pleading (see pages 8-9), that will have occurred before any evidence could be submitted, and the decision will be based on the allegations in the challenged pleading (usually a complaint). Otherwise, the court's knowledge of the facts will come from evidentiary events such as testimony and exhibits at trial or at a hearing, or perhaps affidavits and exhibits submitted in connection with a motion.

A court might also set out (3) a statement of the *issue or issues* before the court for decision and (4) a *summary of the arguments* made by each side, although either or both are often only implied. A court will further state, or at least imply, (5) the *holding* on each of the issues and (6) the *rule or rules of law* the court enforces in making each holding, together with (7) the *reasoning behind*—often called the *rationale for*—its decision. Somewhere in the opinion, the court might place some (8) *dicta*. (You will learn more about dicta in the next few months, but for the moment think of it as discussion unnecessary to support a holding and therefore lacking binding precedential authority.)

An opinion usually ends with (9) a *statement of the relief granted or denied*. If the opinion represents the decision of an appellate court, the relief may be an affirmance, a reversal, or a reversal combined with a direction to the trial court to proceed in a specified manner. If the opinion is from a trial court, the relief is most commonly the granting or denial of a motion.

An opinion announcing a court's decision is called *the court's opinion* or *the majority opinion*. If one or more of the judges involved in the decision do not agree with some aspect of the decision, the opinion might be accompanied by one or more *concurrences* or *dissents*. A concurring judge agrees with the result the majority reached but would have used different reasoning to justify that result. A dissenting judge disagrees with both the result and the reasoning. Concurrences and dissents are themselves opinions, but they represent the views only of the judges who are concurring or dissenting. Because concurrences and dissents are opinions, they contain some of the elements of a court's opinion. A concurring or dissenting judge might, for example, describe procedural events, narrate pleaded or evidentiary events, state issues, summarize arguments, and explain reasoning.

Exercise I. Dissecting the Text of Roberson v. Rochester Folding Box Co.

Read *Roberson v. Rochester Folding Box Co.* below and determine where (if anywhere) each of these types of pronouncement occurs. Mark up the text

generously and be prepared to discuss your analysis in class. Look up in a legal dictionary every unfamiliar word as well as every familiar word that is used in an unfamiliar way.

The majority opinion in *Roberson* discusses—and disagrees with—one of the most influential articles ever published in an American law review: Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890). Law reviews are periodicals that publish articles analyzing legal questions in scholarly depth. Almost every law review is sponsored by a law school and edited by students.

Like the cases reprinted in your casebooks for other courses, the version of *Roberson* printed here has been edited extensively to make it more readable. In casebooks and in other legal writing, certain customs are observed when quoted material is edited. Where words have been deleted, you will see ellipses (strings of three or four periods). Where words have been added, usually to substitute for deleted words, you will not see ellipses, but the new words will be in brackets (squared-off parentheses).

ROBERSON v. ROCHESTER FOLDING BOX CO.
64 N.E. 442 (N.Y. 1902)

PARKER, Ch. J. [The defendant demurred] to the complaint . . . upon the ground that the complaint does not state facts sufficient to constitute a cause of action. [The courts below overruled the demurrer.]

[We must decide] whether the complaint . . . can be said to show any right to relief either in law or in equity. [We hold that it does not show any right to relief.]

The complaint alleges that the Franklin Mills Co., one of the defendants, was engaged . . . in the manufacture and sale of flour; that before the commencement of the action, without the knowledge or consent of plaintiff, defendants, knowing that they had no right or authority so to do, had obtained, made, printed, sold and circulated about 25,000 lithographic prints, photographs and likenesses of plaintiff . . . ; that upon the paper upon which the likenesses were printed and above the portrait there were printed, in large, plain letters, the words, "Flour of the Family," and below the portrait in large capital letters, "Franklin Mills Flour," and in the lower right-hand corner in smaller capital letters, "Rochester Folding Box Co., Rochester, N.Y."; that upon the same sheet were other advertisements of the flour of the Franklin Mills Co.; that those 25,000 likenesses of the plaintiff thus ornamented have been conspicuously posted and displayed in stores, warehouses, saloons and other public places; that they have been recognized by friends of the plaintiff and other people with the result that plaintiff has been greatly humiliated by the scoffs and jeers of persons who have recognized her face and picture on this advertisement and her good name has been attacked, causing her great distress and suffering both in body and mind. . . .

[The] portrait . . . is said to be a very good one, and one that her friends and acquaintances were able to recognize; indeed, her grievance is that a good portrait of her, and, therefore, one easily recognized, has been used to attract attention toward the paper upon which defendant mill company's advertisements appear. Such publicity, which some find agreeable, is to plaintiff very distasteful, and thus, because of defendants' impertinence in using her picture without her consent for their own business purposes, she has been caused to suffer mental distress where others would have appreciated the compliment . . . implied in the selection of the picture for such purposes; but as it is distasteful to her, she seeks the aid of the courts to enjoin a further circulation of the lithographic prints containing her portrait made as alleged in the complaint, and as an incident thereto, to reimburse her for the damages to her feelings, which the complaint fixes at the sum of $15,000.

There is no precedent for such an action to be found in the decisions of this court. . . . Nevertheless, [the court below] reached the conclusion that plaintiff had a good cause of action against defendants, in that defendants had invaded what is called a "right of privacy"—in other words, the right to be let alone: Mention of such a right is not to be found in Blackstone, Kent or any other of the great commentators upon the law, nor so far as the learning of counsel or the courts in this case have been able to discover, does its existence seem to have been asserted prior to about the year 1890, when it was [theorized] in the Harvard Law Review . . . in an article entitled, "The Right of Privacy."

The so-called right of privacy is, as the phrase suggests, founded upon the claim that a man has the right to pass through this world, if he wills, without having his picture published, his business enterprises discussed, his successful experiments written up for the benefit of others, or his eccentricities commented upon either in handbills, circulars, catalogues, periodicals or newspapers, and, necessarily, that the things which may not be written and published of him must not be spoken of him by his neighbors, whether the comment be favorable or otherwise. . . .

If such a principle be incorporated into the body of the law through the [process of judicial precedent], the attempts to logically apply the principle will necessarily result, not only in a vast amount of litigation, but in litigation bordering upon the absurd, for the right of privacy, once established [through judicial precedent], cannot be confined to the restraint of the publication of a likeness but must necessarily embrace as well the publication of a word-picture, a comment upon one's looks, conduct, domestic relations or habits. [Thus, a] vast field of litigation . . . would necessarily be opened up should this court hold that privacy exists as a legal right enforceable in equity by injunction, and by damages where they seem necessary to give complete relief.

The legislative body could very well interfere and arbitrarily provide that no one should be permitted for his own selfish purpose to use the picture or the name of another for advertising purposes without his consent. In such event, no embarrassment would result to the general body of the law, for the rule would be applicable only to cases provided for by the statute. The

courts, however, being without authority to legislate, are . . . necessarily [constrained] by precedents. . . .

So in a case like the one before us, which is concededly new to this court, it is important that the court should have in mind the effect upon future litigation and upon the development of the law which would necessarily result from a step so far outside of the beaten paths of both common law and equity [because] the right of privacy as a legal doctrine enforceable in equity has not, down to this time, been established by decisions.

The history of the phrase "right of privacy" in this country seems to have begun in 1890 in a clever article in the Harvard Law Review—already referred to—in which a number of English cases were analyzed, and, reasoning by analogy, the conclusion was reached that—notwithstanding the unanimity of the courts in resting their decisions upon property rights in cases where publication is prevented by injunction—in reality such prevention was due to the necessity of affording protection to . . . an inviolate personality, not that of private property. . . .

. . . Those authorities are now to be examined in order that we may see whether they were intended to and did mark a departure from the established rule which had been enforced for generations; or, on the other hand, are entirely consistent with it.

The first case is *Prince Albert v. Strange* (1 Macn. & G. 25; 2 De G. & S. 652). The queen and the prince, having made etchings and drawings for their own amusement, decided to have copies struck off from the etched plates for presentation to friends and for their own use. The workman employed, however, printed some copies on his own account, which afterwards came into the hands of Strange, who purposed exhibiting them, and published a descriptive catalogue. Prince Albert applied for an injunction as to both exhibition and catalogue, and the vice-chancellor granted it, restraining defendant from publishing . . . a description of the etchings. [The] vice-chancellor . . . found two reasons for granting the injunction, namely, that the property rights of Prince Albert had been infringed, and that there was a breach of trust by the workman in retaining some impressions for himself. The opinion contained no hint whatever of a right of privacy separate and distinct from the right of property. . . .

[In similar ways, the other English cases cited in the Harvard article do not actually support a common law cause of action for invasion of privacy.] In not one of [them] was it the basis of the decision that the defendant could be restrained from performing the act he was doing or threatening to do on the ground that the feelings of the plaintiff would be thereby injured; but, on the contrary, each decision was rested either upon the ground of breach of trust or that plaintiff had a property right in the subject of litigation which the court could protect. . . .

[Of the American cases offered in support of a common law right to privacy, none actually does so when the decisions are examined in detail.] An examination of the authorities [thus] leads us to the conclusion that the so-called "right of privacy" has not as yet found an abiding place

in our jurisprudence, and, as we view it, the doctrine cannot now be incorporated without doing violence to settled principles of law by which the profession and the public have long been guided. [Thus, there is no common law right of privacy in New York.]

[That does not mean] that, even under the existing law, in every case of the character of the one before us, or indeed in this case, a party whose likeness is circulated against his will is without remedy. By section 245 of the Penal Code any malicious publication by picture, effigy or sign which exposes a person to contempt, ridicule or obloquy is a libel, and it would constitute such at common law. Malicious in this definition means simply intentional and willful. There are many [items], especially of medicine, whose character is such that using the picture of a person . . . in connection with the advertisement of those [items] might justly be found by a jury to cast ridicule or obloquy on the person whose picture was thus published. The manner or posture in which the person is portrayed might readily have a like effect. In such cases both a civil action and a criminal prosecution could be maintained. But there is no allegation in the complaint before us that this was the tendency of the publication complained of, and the absence of such an allegation is fatal to the maintenance of the action. . . .

The judgment of the Appellate Division and of the Special Term [is] reversed. . . .

GRAY, J. (dissenting). . . . These defendants stand before the court, admitting that they have made, published and circulated, without the knowledge or the authority of the plaintiff, 25,000 lithographic portraits of her, for the purpose of profit and gain to themselves; that these portraits have been conspicuously posted in stores, warehouses and saloons, in the vicinity of the plaintiff's residence and throughout the United States, as advertisements of their goods; that the effect has been to humiliate her . . . and, yet, claiming that she makes out no cause of action. They say that no law on the statute books gives her a right of action and that her right to privacy is not an actionable right, at law or in equity.

Our consideration of the question thus presented has not been foreclosed by the decision in *Schuyler v. Curtis*, [147 N.Y. 434]. In that case, it appeared that the defendants were intending to make, and to exhibit, at the Columbian Exposition of 1893, a statue of Mrs. Schuyler, . . . conspicuous in her lifetime for her philanthropic work, to typify "Woman as the Philanthropist" and, as a companion piece, a statue of Miss Susan B. Anthony, to typify the "Representative Reformer." The plaintiff, in behalf of himself, as the nephew of Mrs. Schuyler, and of other immediate relatives, sought by the action to restrain them from carrying out their intentions as to the statue of Mrs. Schuyler; upon the grounds, in substance, that they were proceeding without his consent, . . . or that of the other immediate members of the family; that their proceeding was disagreeable to him, because it would have been disagreeable and obnoxious to his aunt, if living, and that it was annoying to have Mrs. Schuyler's

memory associated with principles, which Miss Susan B. Anthony typified and of which Mrs. Schuyler did not approve. His right to maintain the action was denied and the denial was expressly placed upon the ground that he, as a relative, did not represent any right of privacy which Mrs. Schuyler possessed in her lifetime and that, whatever her right had been, in that respect, it died with her. The existence of the individual's right to be protected against the invasion of his privacy, if not actually affirmed in the opinion, was, very certainly, far from being denied. "It may be admitted," Judge Peckham observed, when delivering the opinion of the court, "that courts have power, in some cases, to enjoin the doing of an act, where the nature, or character, of the act itself is well calculated to wound the sensibilities of an individual, and where the doing of the act is wholly unjustifiable, and is, in legal contemplation, a wrong, *even though the existence of no property, as that term is usually used, is involved in the subject.*" . . .

[The majority misinterprets both the English and the American precedents.] Security of person is as necessary as the security of property; and for that complete personal security, which will result in the peaceful and wholesome enjoyment of one's privileges as a member of society, there should be afforded protection, not only against the scandalous portraiture and display of one's features and person, but against the display and use thereof for another's commercial purposes or gain. The proposition is, to me, an inconceivable one that these defendants may, unauthorizedly, use the likeness of this young woman upon their advertisement, as a method of attracting widespread public attention to their wares, and that she must submit to the mortifying notoriety, without right to invoke the exercise of the preventive power of a court of equity.

Such a view, as it seems to me, must have been unduly influenced by a failure to find precedents in analogous cases . . . ; without taking into consideration that, in the existing state of society, new conditions affecting the relations of persons demand the broader extension of . . . legal principles. . . . I think that such a view is unduly restricted, too, by a search for some property, which has been invaded by the defendants' acts. Property is not, necessarily, the thing itself, which is owned; it is the right of the owner in relation to it. The right to be protected in one's possession of a thing, or in one's privileges, belonging to him as an individual, or secured to him as a member of the commonwealth, is property, and as such entitled to the protection of the law. . . . It seems to me that the principle, which is applicable, is analogous to that upon which courts of equity have interfered to protect the right of privacy, in cases of private writings, or of other unpublished products of the mind. The writer, or the lecturer, has been protected in his right to a literary property in a letter, or a lecture, against its unauthorized publication; because it is property, to which the right of privacy attaches. . . . I think that this plaintiff has the same property in the right to be protected against the use of her face for defendant's commercial purposes, as she would have, if they were publishing her literary compositions. The right would be conceded, if she had sat for her photograph; but if her face, or

her portraiture, has a value, the value is hers exclusively; until the use be granted away to the public. . . .

It would be, in my opinion, an extraordinary view which, while conceding the right of a person to be protected against the unauthorized circulation of an unpublished lecture, letter, drawing, or other ideal property, yet, would deny the same protection to a person, whose portrait was unauthorizedly obtained, and made use of, for commercial purposes. . . .

O'BRIEN, CULLEN and WERNER, JJ., concur with PARKER, Ch. J.; BARTLETT and HAIGHT, JJ., concur with GRAY, J.

If you found the *Roberson* decision distressing, that is not the end of the story. We will come back to *Roberson* at the end of this chapter and in the Exercise in Chapter 4.

A decision's *citation* is made up of the case's name, references to the reporter or reporters in which the decision was printed, the name of the court where the decision was made, and the year of the decision. For *Roberson,* all this information appears in the heading on page 31.

The case name is composed by separating the last names of the parties with a "v." If the opinion was written by a trial court, the name of the plaintiff appears first. In some appellate courts, the name of the appellant comes first, but in others the parties are listed as they were in the trial court. In a case with multiple plaintiffs or defendants, the name of only the first listed per side appears in the case name. That is why the *Roberson* opinion mentions two defendants, but only one appears in the case name.

Reporters are publications that print decisions, mostly from appellate courts. *Roberson* was decided by the New York Court of Appeals. Decisions of that court are published in North Eastern Reporter (abbreviated "N.E."). The decision you have just read begins on page 442 of volume 64. Thus, *Roberson* is cited to in the following form: *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902). (In Chapter 20, you will learn more about constructing legal citations.)

§3.2 *The Interdependence Among Facts, Issues, and Rules*

Many facts are mentioned in an opinion merely to provide background, continuity, or what journalists call "human interest" to what would otherwise be a tedious and disjointed recitation. Of the remaining facts, some are merely related to the court's thinking, while others *caused* the court to come to its decision. This last group could be called the *determinative facts* or the *essential facts.* They are essential to the court's decision

because they determined the outcome: if they had been different, the decision would have been different. The determinative facts lead to the rule of the case — the rule of law for which the case stands as precedent — and the discovery of that rule is the most important goal of case analysis. Of course, where several issues are raised together in a case, the court must make several rulings and an opinion may thus stand for several different rules.

The determinative facts can be identified by asking the following question: *if a particular fact had not happened, or if it had happened differently, would the court have made a different decision?* If so, that fact is one of the determinative facts. This can be illustrated through a nonjudicial decision of a sort with which you might recently have had some experience. Assume that a rental agent has just shown you an apartment and that the following facts are true:

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

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

Facts recited specifically in an opinion can sometimes be reformulated generically. In the hypothetical above, for example, a generic restatement of fact *H* might be the following: "you have a rent-free alternative to the

apartment, but the alternative would require 45 minutes of travel each way plus the expense of public transportation." This formulation is generic because it would cover other specific possibilities that in the end would have the same effect. (Compare it to the original *H* above.) It could include, for example, the following, seemingly different, facts: "you are a member of the clergy in a religion that has given you a leave of absence to attend law school; you may continue to live rent-free in the satisfactory quarters your religion has provided, but to get to the law school, you will have to walk 15 minutes and then ride a subway for 30 minutes more, at the same cost as a bus."

A rule of law is a principle that governs how a particular type of decision is to be made—or, put another way, how certain types of facts are to be treated by the official (such as a judge) who must make a decision. Where a court does not state a rule of the case, or where it ambiguously states a rule, you might arrive at an arguably supportable formulation of the rule by considering the determinative facts to have caused the result. There is room for interpretive maneuver wherever you could reasonably interpret the determinative facts narrowly (specifically) or broadly (generically).

Notice how different formulations of a rule can be extracted from the apartment example. A narrow formulation might be the following:

> A law student who has a choice between renting an apartment and living in the second floor of an aunt's house should choose the latter where the student has had to borrow money to go to law school; where the apartment's rent is 500 per month but the aunt's second floor is free except for bus fares; where the student must work in El Paso during the summer; and where it is difficult locally to sublease an apartment.

Because this formulation is limited to the specific facts given in the hypothetical, it could directly govern only a tiny number of future decision-makers. It would not, for example, directly govern the member of the clergy described above, even if she will spend next summer doing relief work in Rwanda.

Although a decision-maker in a future situation might be able to reason by analogy from the narrow rule set out above, a broader, more widely applicable formulation, stated generically, would directly govern *both* situations:

> A student on a tight budget should not sign a year's lease where the student cannot live in the leased property during the summer and where a nearly free alternative is available.

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

> A person with limited funds should not lease property that that person cannot fully use where there is a nearly free alternative.

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

> A person should not spend money in a way that would later lead to problems.

Reading opinions is not easy. "Cases do not unfold their principles for the asking," wrote Benjamin Cardozo. "They yield up their kernel slowly and painfully."[1] Kenney Hegland adds, "Reading law is a skill . . . which must be developed. . . . Usually, when we read, we are passive; it's like watching television. . . . Reading judicial opinions, [however,] you must be an active participant; you must take them apart"[2] until you figure out what makes each decision tick.

Often, courts do not explicitly state the issue, the holding, or the rule for which the case is to stand as precedent, and the determinative facts are not usually labelled as such. Whenever a court gives less than a full explanation, you must use what is explicitly stated to pin down what is only implied.

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

For example, if the court states the issue but does not identify the rule or specify which facts are determinative, you might discover the rule and the determinative facts by answering the following questions:

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

In answering the fifth question, use the same kind of reasoning we applied to the apartment hypothetical: develop several different phrasings of the rule (broad, narrow, middling) and identify the one the court is most likely to have had in mind.

§3.2 1. Benjamin Nathan Cardozo, *The Nature of the Judicial Process* 29 (Yale U. Press 1921).

2. Kenney Hegland, *Introduction to the Study and Practice of Law* 72 (2d ed., West 1995).

Exercise II. Analyzing the Meaning of Roberson v. Rochester Folding Box Co.

What was the issue on appeal in *Roberson*? What rule did the appellate court enforce? What were the determinative facts? Be prepared to state and argue your conclusions in class.

§3.3 The Anatomy of a Statute

The *Roberson* decision was so unpopular that the following year the New York legislature enacted a statute providing exactly the relief that the *Roberson* court held was unavailable under the common law. The *Roberson* majority understood that that might happen. Recall the majority's words: "The legislative body could very well interfere and arbitrarily provide that no one should be permitted for his own selfish purpose to use the picture or the name of another for advertising purposes without his consent." The statute has been amended several times since enactment. Here is its current form:

New York Civil Rights Law §§ 50–51

§ 50. Right of Privacy

A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person . . . is guilty of a misdemeanor.

§ 51. Action for Injunction and for Damages

Any person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided [in § 50] may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait, picture or voice, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait, picture or voice in such manner as is forbidden or declared to be unlawful by section fifty of this article, the jury, in its discretion, may award exemplary damages. . . .

(Although these sections are an improvement over *Roberson*, they still represent a narrow view of the right to privacy. In the Exercise in

Chapter 4, we will see how narrow it is. In many other states, the right to privacy protects against a wider range of harms.)

A judicial opinion always includes a story ("the facts"), and the rule of law for which the opinion stands is embodied in how the court uses rules of law to resolve the story. The New York Court of Appeals denied a remedy to Ms. Roberson, and, because of that decision's effect on her story, we know that—at the time of the decision—an advertiser in New York could use a person's picture in advertising without any legal obligation to get that person's permission or pay damages.

Statutes do not contain stories. Some statutes create things. If a state has a public university or a system of state parks or a public utility commission, those things were all created by statutes. A statute can also grant permission. It might, for example, grant to a state university the authority to open a law school. But the statutes that lawyers most frequently encounter either prohibit something or require it. And those statutes usually also provide remedies for violations, as § 51 does. Sometimes a statute will define certain conduct as a type of crime, and some other statute, found in a criminal code, will define the penalty. That is true of § 50.

Exercise III. Analyzing the Meaning of §§ 50 and 51 of the New York Civil Rights Law

Reading §§ 50 and 51 together as a single statute, what do they prohibit or require? If a person subject to New York law were to violate this prohibition or requirement, what might be the consequences? (List all the possible consequences.) In what ways did §§ 50 and 51 change the rule of Roberson?

4 Briefing Cases

§4.1 *Introduction*

In law school, the word *brief* can mean either of two things. Within a few months, you will learn how to write an *appellate brief,* which—despite its name—is a large and complex document, written to persuade a court to rule in favor of one's client.

Another kind of brief is a short analytical outline of a court's opinion. Students make these outlines to prepare for class, and you are about to write one now. (In law students' vernacular, you are about to *brief a case.*) The purpose of briefing is to figure out the logic through which the case was decided.

§4.2 *How to Brief a Case*

Just as no two lawyers share exactly the same thinking and working methods, no two law students brief in precisely the same way. Moreover, you will brief individual cases differently depending on the case's complexity and the course for which you are reading it.

Think of the briefing method set out below as a starting point. Adapt it as needed to the different sorts of opinions you study, and, as you go along, modify it also to suit the work habits you find most effective in the different classes for which you must prepare.

A brief might include, in outline form, the following items:

1. the title of the case, its date, the name of the court, and the place where the opinion can be found
2. the identities of the parties
3. the procedural history
4. the facts
5. the issue or issues
6. a summary of the arguments made by each side
7. the holding and the rule for which the case stands
8. the court's reasoning
9. the judgment or order the court made as a result of its decision
10. any comments of your own that may be useful but that are not covered by any other category

Each of these categories bears explanation.

*1. **Title, date, court, location of opinion.*** This is the easiest part. For *Roberson,* a brief might begin as follows:

Case: *Roberson v. Rochester Folding Box Co.*
(N.Y. Ct. App. 1902)
page 29

If you were briefing a case researched in the library, however, you would use the citation (64 N.E. 442) in place of a page number in the text. The point is to identify the place where the opinion can be found.

*2. **Identities of parties.*** This requires some thought: how do the identities of the parties frame the controversy? In *Roberson,* for example, you might write:

Parties: P = a person whose picture was used in advertising
Ds = two companies that used that picture

Should you add that one of the defendants manufactured flour and the other apparently manufactured its packaging? Should you also add that the plaintiff did not consent to the use of her picture in advertising? If you believe those are mere background facts, then you would include them in your brief only if they are needed to make sense out of the story. On the other hand, if you believe that either the nature of the defendants' businesses or the plaintiff's nonconsent is important to the court's reasoning, then you should make sure that your brief records those facts. (Because these are matters of identity as well as events in the story, it really does not matter much whether you add them under "Parties" or under "Facts.")

*3. **Procedural history.*** Here list the litigation events that are essential to the decision the court must make. Most published opinions are from

appellate courts, and an appellate procedural history includes the trial court rulings appealed from. In *Roberson,* for example:

> **Proc. Hist.:** P sued to enjoin distribution of the picture and for damages. Ds demurred to complaint. Ct below held complaint stated a cause of action. Ds appealed.

4. Facts. Here write a short narrative limited to the determinative facts and whatever other details are necessary to make sense out of the story. Omit facts that neither are determinative nor are needed to make the story coherent. Do not just repeat the story you read in the case. Isolate and list the facts that the court considered important enough to emphasize.

5. The issue. Define the dispute before the court. Usually, the issue can be framed well in more than one way. But it can also be framed badly in more than one way. These statements of the issue in *Roberson* are technically correct but not very helpful:

> Did the complaint state a cause of action?
> Did the lower court correctly hold that the complaint stated a cause of action?

The *Roberson* court did have to decide whether the complaint stated a cause of action. But the first example tells us nothing about the real controversy. The second example is better because it is a little more precise. *Roberson* was an appeal, and appeals determine whether lower courts have erred. But we still do not know what all the fuss was about. This is much more helpful:

> **Issue:** Did New York recognize a common law right to privacy?

So is this:

> **Issue:** Could a plaintiff enjoin and get damages for the use of the plaintiff's picture in advertising where the plaintiff had not consented to that use?

These are the important questions that the *Roberson* court answered, and either would be fine in a brief for a law school class. They are the reasons why lawyers, judges, and law students would read the case a century later.

In framing issues, keep the following in mind:

First, refer to the governing rule, and if a particular element of that rule is in controversy, specify the element. You can refer to the rule explicitly ("Did New York at that time recognize a common law right to privacy?") or implicitly ("Could a plaintiff enjoin and get damages for the use of the plaintiff's picture in advertising where the plaintiff had not consented to that use?").

Second, it often helps to allude to enough of the determinative facts to make the issue concrete. The last example above refers to the picture, the advertising, and the lack of consent. That is enough here. Do not pack into the issue every one of a long list of determinative facts. Include only the most central ones. But when a court is faced with the question of whether to recognize a rule that it has not recognized before, a perfectly good issue can be framed without reference to facts because the real question—whether to change the law—can be bigger than the parties' facts, even though the facts are a significant part of the court's reasoning. That is why *both* of the last two examples above are good statements of the issue.

Finally, in some cases the procedural posture is important and should be part of the issue. But *Roberson* is not one of them. There, the real issue was whether New York would recognize a particular kind of cause of action. Although the court also had to decide whether a lower court had erred in refusing to dismiss the complaint, adding that aspect to the issue makes it needlessly complicated:

> Did the lower court err in overruling the demurrer on the ground that New York should recognize a common law right to privacy?

You will, however, read other cases in which the procedure is important enough that it should be stated in the issue.

6. ***A summary of the arguments made by each side.*** Do not go overboard. Record the *essential* points of each side's argument.

7. ***The holding and the rule.*** *Holding* and *rule* have overlapping meanings. *The rule of a case,* or *the rule for which a case stands,* is a principle that can be applied to decide other controversies in the future, like the rules examined in Chapter 2 and in §3.2. When discussing cases (but not statutes), *holding* can mean that, too. Or it can mean, in a narrower sense, the answer to the issue before the court, and often that issue is put in procedural terms.

In *Roberson,* you could say that the holding was that the complaint did not state a cause of action, or that the lower court erred in overruling the demurrer. The rule, of course, would be that New York did not recognize a common law right to privacy, or that in New York at that time a plaintiff had no remedy when someone else used the plaintiff's picture in advertising, even without the plaintiff's consent. And a great many lawyers, when referring to that rule, might call it the holding.

A law school professor who asks you for the holding of a case might want to know the procedural holding, or the rule, or both. Most probably, the professor wants to know the rule, and will be interested in the procedural holding only if the nature of the case makes it important. That is understandable: after all, we read these cases to learn about that rule and for little else.

If your formulation of the issue asks—as in *Roberson*—whether a certain principle is law, it might be enough just to list the issue and its answer:

Issue:	Did New York recognize a common law right to privacy?
Holding:	No.

That does represent the rule of *Roberson*. There is no need for a separate statement of the rule.

But another statement of the issue might call for a separate statement of the rule. That is particularly true when the issue is expressed with specifics about the facts or the procedure:

Issue:	Could a plaintiff enjoin and get damages for the use of the plaintiff's picture in advertising where the plaintiff had not consented to that use?
Holding:	No.
Rule:	New York did not recognize a common law right to privacy.

Just as we formulated broad and narrow principles from the apartment hypothetical in §3.2, a case's rule can be stated narrowly or broadly, depending on how you conceptualize the determinative facts:

Narrow:	At that time, a New York plaintiff could not enjoin and get damages for the use of the plaintiff's picture in advertising where the plaintiff had not consented to that use.
Broad:	New York did not recognize a common law right to privacy.

As with the apartment example, the narrow rule would directly govern only a smaller number of future controversies, while the broader formulation will have a wider utility. (The common law right to privacy is not limited to advertising.) Part of a lawyer's creativity is discovering deeper meaning in an opinion by devising several alternative formulations of a rule. The art is to phrase the rule broadly enough that it has a reasonably general applicability, but not so broadly that it exceeds the principle that the court thought it was following. Within these limits, many opinions will afford several different but arguable ways to phrase a particular rule.

Sometimes a court provides a succinct statement of the rule. At other times, the court merely sets out the facts and issue and then, without saying much more, decides for one party or the other. In the first kind of opinion, the court's words provide one—sometimes the only—phrasing of the rule. In the latter, you must construct the rule yourself out of the determinative facts.

8. The court's reasoning. Here summarize the court's thinking, noting both the steps of logic the court went through and the public policies the court thought it was advancing through its decision.

9. Judgment or order. What did the court do as a result of its holding? Usually, it will be enough for you to write "reversed," "affirmed," "motion denied," or whatever judgment or order the court made.

10. Comments. Did the court write any instructive dicta? Do you agree or disagree with the decision? Why? Does the briefed case give you a deeper understanding of other cases you have already studied in the same course? Does material in a concurring or dissenting opinion add to your understanding?

If an opinion resolves several issues, you will need to go through items 5 through 8 separately for each issue. For example, the middle of a brief of a two-issue decision might look something like this:

Issue #1: . . .
arguments: . . .
holding: . . .
rule: . . .
reasoning: . . .

Issue #2: . . .
arguments: . . .
holding: . . .
rule: . . .
reasoning: . . .

Read the entire opinion at least once before beginning to brief. You might work efficiently by making some temporary notes as you read, but you will waste effort if you start structuring your understanding—which is what briefing does—before you are able to see the decision *as a whole.*

A long-winded brief filled with the court's own words is far less useful than a short one in which you have boiled the opinion down to its essence. Briefs are a means, not an end: for you the hard work will be to understand what happened in the case and why, and the brief is only a repository for your analysis. You will waste effort if you spend too much time in writing and too little in thinking. In fact, if you do little more than edit the court's words into a brief, you have probably not understood the case. A better practice is to quote only those words that are truly essential to the case's meaning.

"You brief cases, not to get them right, but as a way of forcing yourself into the thick of things."[1] And "you learn law by struggling with it, not by memorizing it, not by buying commercial outlines."[2]

§4.2 1. Kenney Hegland, *Introduction to the Study and Practice of Law* 85 (2d ed., West 1995).
2. *Id.* at 58.

Exercise. *Briefing Costanza v. Seinfeld*

Using the techniques described above, write out a brief of *Costanza v. Seinfeld.*[3]

COSTANZA v. SEINFELD
181 Misc. 2d 562, 693 N.Y.S.2d 897
(Sup. Ct., N.Y. County 1999)

HAROLD TOMKINS, J.

A person is seeking an enormous sum of money for claims that the New York State courts have rejected for decades. This could be the plot for an episode in a situation comedy. Instead, it is the case brought by plaintiff Michael Costanza who is suing the comedian, Jerry Seinfeld, Larry David (who was the cocreator of the television program "Seinfeld"), the National Broadcasting Company, Inc. and the production companies for $100 million. He is seeking relief for violation of New York's Civil Rights Law §§ 50 and 51. . . .

The substantive assertions of the complaint are that the defendants used the name and likeness of plaintiff Michael Costanza without his permission, that they invaded his privacy, [and] that he was portrayed in a negative, humiliating light. . . . Plaintiff Michael Costanza asserts that the fictional character of George Costanza in the television program "Seinfeld" is based upon him. In the show, George Costanza is a long-time friend of the lead character, Jerry Seinfeld. He is constantly having problems with poor employment situations, disastrous romantic relationships, conflicts with his parents and general self-absorption.

. . . Plaintiff Michael Costanza points to various similarities between himself and the character George Costanza to bolster his claim that his name and likeness are being appropriated. He claims that, like him, George Costanza is short, fat, bald, that he knew Jerry Seinfeld from college purportedly as the character George Costanza did and they both came from Queens. Plaintiff Michael Costanza asserts that the self-centered nature and unreliability of the character George Costanza are attributed to him and this humiliates him.

The issues in this case come before the court [through] a preanswer motion to dismiss. . . . [P]laintiff Michael Costanza's claims for being placed in a false light and invasion of privacy must be dismissed. They cannot stand because New York law does not and never has allowed a common-law claim for invasion of privacy, *Howell v. New York Post Co.*, 81 N.Y.2d 115 (1993); *Freihofer v. Hearst Corp.*, 65 N.Y.2d 135 (1985). As the New York Court of Appeals explained,

> While legal scholarship has been influential in the development of a tort for intentional infliction of emotional distress, it has had less success in the

3. This case was suggested by Julie Close, together with Grace Tonner, Kenneth Chestek, and Jo Anne Durako.

> development of a right to privacy in this State. In a famous law review article written more than a century ago, Samuel Warren and Louis Brandeis advocated a tort for invasion of the right to privacy. . . . Relying in part on this article, Abigail Marie Roberson sued a flour company for using her picture, without consent, in the advertisement of its product (*Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538). Finding a lack of support for the thesis of the Warren-Brandeis study, this Court, in a four to three decision, rejected plaintiff's claim.
>
> The *Roberson* decision was roundly criticized. . . . The Legislature responded by enacting the Nation's first statutory right to privacy (L. 1903, ch. 132), now codified as sections 50 and 51 of the Civil Rights Law. Section 50 prohibits the use of a living person's name, portrait or picture for "advertising" or "trade" purposes without prior written consent. . . . Section 50 provides criminal penalties and section 51 a private right of action for damages and injunctive relief.

Howell at 122-123. In New York State, there is [still] no common law right to privacy, *Freihofer v. Hearst Corp.* at 140, and any relief must be sought under the statute.

The court now turns to the assertion that plaintiff Michael Costanza's name and likeness are being appropriated without his written consent. This claim faces several separate obstacles. First, defendants assert that plaintiff Michael Costanza has waived any claim by [personally] appearing on the show. [This defense fails because the] statute clearly provides that written consent is necessary for use of a person's name or likeness, *Kane v. Orange County Publs.*, 232 A.D.2d 526 (2d Dept. 1996). However, defendants note the limited nature of the relief provided by Civil Rights Law §§ 50 and 51. It extends only to the use of a name or likeness for trade or advertising, *Freihofer v. Hearst Corp.*, at 140. The sort of commercial exploitation prohibited and compensable if violated is solicitation for patronage, *Delan v. CBS, Inc.*, 91 A.D.2d 255 (2d Dept. 1983). In a case similar to this lawsuit involving the play "Six Degrees of Separation," it was held that "works of fiction and satire do not fall within the narrow scope of the statutory phrases 'advertising' and 'trade,'" *Hampton v. Guare*, 195 A.D.2d 366 (1st Dept. 1993). The Seinfeld television program was a fictional comedic presentation. It does not fall within the scope of trade or advertising. . . .

Plaintiff Michael Costanza's claim for violation of Civil Rights Law §§ 50 and 51 must be dismissed. . . .

After briefing a decision, ask yourself how it fits into the subject you are learning. Why did the editor of the casebook include the decision you briefed? What lesson does it teach you about the law? If the preceding decision or decisions involve similar issues, how does the one you have just briefed expand on what you learned from the others? What, for example, did you learn about the right to privacy from *Roberson*, and how does *Costanza* add to that? In other words, step back far enough to see the larger picture.