



INTRODUCTION

The questions and answers in this chapter are about the fundamentals, not the complexities and exceptions. As a beginner, it is *vital* that you learn basics before you tackle complexities and exceptions. Otherwise, massive confusion is your likely destiny. Hence, in these initial questions, I have assumed that you have almost no knowledge of our legal system. I have striven to write concise answers and to resist the temptation to elaborate.

LAW: WHAT IT IS AND IS NOT

What is law?

You may be surprised to know that there is no single definition of law that commands complete agreement. I suggest that, as a beginner, you embrace the following definition:

Law is a process of legal reasoning for decision-making about particular controversies.

Why embrace this definition? Because it is defensible both in principle and in practice. More importantly, it sheds light on what the first year of law school is about. In the first year, the overriding emphasis is on teaching you to read, think, talk and write like a lawyer. To do this, you must develop a set of skills that will enable you to do legal reasoning for decision-making about particular controversies. The suggested definition of *law* matches the overriding emphasis of the first year.

What the first year of law school is not

To understand what you do in the *beginning* of law school, it may help to know what you will not do.

You will almost certainly not participate in lengthy class explorations of:

- justice and the requirements of a just society
- abstract philosophical and ethical questions
- economic and sociological theories
- social science research methods, reports and data
- political issues

Indeed, many of your professors will react negatively to student responses that reflect these “frequencies” of knowledge and analysis because they want to orient you to a legal frequency of vocabulary, concepts and analysis. Most *initially* seek to have you read, think, talk and write like a lawyer,

not like a philosopher, ethicist, economist, sociologist, researcher or politician. Later, at least some of your professors will also stress how law is, of course, *forged in struggles* rooted in history, politics, economics, culture, etc. At first, however, almost all insist on a legal frequency of formulation and analysis. Remember: You are not in law school to repeat what you already know.

What are the authoritative sources and types of law?

For your purposes in the first year, the main sources and types of law are:

- statutes
- cases
- state and federal constitutions
- regulations

What is a statute?

A statute is a particular law, or body of laws, enacted by a state or federal legislature in conformity with the procedures required by its constitution, state or federal. Such procedures include the usual requirements of majority vote and approval by the governor or President. Examples of statutes include:

- state penal codes
- the federal penal code
- state commercial codes
- increases or decreases in state or federal taxes
- a state's adoption of "no fault" divorce and car insurance
- appropriations of state or federal funds
- abolition of mandatory retirement for federal or state workers

What is a case?

In a general sense, a case is any judicial or administrative proceeding in which facts of a controversy are presented in technical legal form for decision-making. The object of such a proceeding is to enforce rights and remedy wrongs. A plaintiff is the party (individual or group) who initiates a case. A defendant is the party (individual or group) who responds. Examples of cases include:

- seeking money damage for breach of contract
- seeking money damages for injuries in a car accident (tort negligence)
- prosecuting a defendant for robbery (or any other crime)
- seeking a divorce, legal separation, child custody, or child support
- seeking an order from a court directing certain action or forbearance from action by an individual or by any public or private group (an injunction)

In another sense, a case is also the opinion and decision of an appellate court deciding appeals in any of the above-mentioned matters.

A case has two specific functions:

1. it authoritatively decides the particular controversy—e.g., A gets money damages from B for B's breach of contract.
2. it establishes a precedent, or a possible precedent, for the resolution of future controversies with similar facts and issues.

The parties to a case (A and B) are interested in the first function, which determines their rights and duties. As a law student, however, your interest is primarily in the second, precedent-setting function of appellate courts. Much of what you do in class concerns this very important second function.

What is a constitution?

It is a fundamental political and legal charter for the people of a particular state that is directly or indirectly approved by the people (e.g., the Constitution of California) or for the nation (the Federal Constitution). Sometimes called the fundamental law, a constitution defines the character of government by specifying the nature and extent of sovereign power; by distributing this sovereign power (state and federal); and by prescribing the basic principles for the exercise and checking of this power by the three separated branches of government: the executive, the legislative, and the judiciary. A democratic constitution also typically enumerates the basic rights of the people (a Bill of Rights). In a constitutional democracy, no public power may validly be exercised in violation of the Constitution.

What is a regulation?

Like a case or statute or constitutional provision, a regulation also has the status of law. A regulation is a legal rule authorized by statute (e.g., the Securities Exchange Act) and issued by an executive agency (e.g., the Securities and Exchange Commission) for the governance of matters within the authority of the agency (e.g., stocks, bonds, stock exchanges, selling condominiums in interstate commerce). Regulations are used to enforce and implement the statute and are usually more specific than the statute.

BRIEFING AND THE CASE METHOD

What is a brief of a case?

Very simply, it is an organized, written summary of the important elements of a written opinion. Briefing cases is comparable to diagramming sentences: the parts of a case brief (facts, procedural history, issue, holding, judgment, and reasoning) are analogous to the parts of a sentence (subject, verb, object, modifiers). Briefing, or summarizing, the parts of a case is a way to understand the whole. Distinguish this meaning of a brief from a second meaning that refers to the formal, written argument submitted to a court at motion, during trial, or on appeal.

What is the case method?

It is a method designed to teach legal reasoning for decision-making (including the substantive and procedural law) by analyzing many *appellate opinions* from state and federal appellate courts. It is the dominant pedagogic model used by law schools, particularly in the first year. Be aware that trial courts, in contrast to appellate courts, generally do not write opinions, and such opinions are not precedents that bind other trial (or appellate) judges.

THE COMMON LAW SYSTEM

What is the common law system?

It is a distinctive system of law, originated in England many hundreds of years ago, in which the king's *judges made the law* throughout the king's realm by deciding numerous cases that came before them. Earlier cases became *precedents* for deciding later cases with similar facts and issues. These cases accumulated over centuries into a vast body of case law. For a long time, the common law was primarily such judge-made case law. In the last century and more and especially in recent decades, statutory law has mushroomed and is at least as important as case law. The common law system today incorporates a focus on both cases and statutes. In fact, a great number of cases apply and interpret statutes.

The common law is the system of law in England, in the United States, and in the other former English colonies. In the *majority* of countries, however, the civil law system of law prevails. In the civil law system, judges' decisions in cases do *not* become precedents and cases do *not* accumulate into controlling case law. In both legal systems, important variations exist from country to country (the United States and England; France, Germany and Italy).

COURT SYSTEM

What is a trial court?

A trial court, state or federal, consists of a judge with or without a jury and performs four basic functions in the administration of legal justice within our governmental system of separation of powers (judiciary, executive and legislature):

1. It determines the facts that are in conflict—*fact-finding*—in particular controversies that are brought before it in technical legal form. It decides which witnesses are credible (believable) and which are not, who said what to whom and who did what to whom, and when. This fact-finding occurs in cases that span the spectrum from criminal law to commercial law, to torts, to copyright, etc.
2. It determines which rules of law from which areas of law are applicable to the particular facts presented—*law-finding*.
3. It applies the rules to the facts—*law application*—to decide the specific dispute presented to the court. The result is a judgment of the court (a decision of the controversy).
4. It does all of the above applying a prescribed procedure, which guides pre-trial, trial and post-trial proceedings (*civil procedure or criminal procedure*).

Trial courts are either courts of general jurisdiction, which have power to consider and decide any authorized civil or criminal case brought before it by private lawyers and public prosecutors, or courts of limited jurisdiction, which have power to consider and decide only limited types of cases (e.g., Traffic Court; Family Court; Criminal Court; Probate Court [wills and estates]). In many states, the court of general jurisdiction is called the Superior Court. In New York, however, it is called the Supreme Court. In yet other states it is called the Circuit Court or the District Court.

In our court system, trial courts are either part of the state court system that exists in each state, or part of the national, federal court system. The federal court of general jurisdiction is called the United States District Court. Each state has one or more federal district courts.

What is an appellate court?

An appellate court, state or federal, hears appeals from the trial courts within its jurisdiction (its purview) in the administration of legal justice. Except in very unusual cases, appellate courts accept the facts as determined (found) by the trial court. Appellate courts assess and decide claims that the trial court committed legal error. This is called an appeal. In deciding appeals, appellate courts do not ordinarily consider such factual questions as the credibility of witnesses or what happened on a particular day at a particular time. The trial court resolved all of that.

Examples of claims of legal error raised on appeal and decided by appellate courts include: prejudicial and other erroneous rulings by the trial court in admitting or excluding testimony or other evidence; mistakes in selecting and applying rules; insufficient evidence to prove the case (e.g., negligent tort; intentional tort; breach of contract; arson); and violation of state or federal constitutional provisions.

In many states, the highest court within the state is called the Supreme Court. In New York, however, it is called the Court of Appeals, and in Massachusetts it is called the Supreme Judicial Court. In addition, many states have intermediate appellate courts.

Like the trial courts, the appellate courts are either part of the state court system in each state or part of the national, federal court system. In the federal court system, the highest court is the United States Supreme Court. In addition, there is an intermediate appellate court, the United States Court of Appeals, which is organized on a regional basis into thirteen circuits.

TWO BASIC COMMON LAW DOCTRINES

What is res judicata?

The doctrine of *res judicata* (a “thing which has been adjudicated”) means that once a particular claim is conclusively decided by a court (including appeals) with jurisdiction over the claim and the parties, the court’s judgment and the factual and legal issues underlying it may not be relitigated by the parties.

The doctrine of *res judicata* serves the policy interest of barring endless relitigation of claims and the policy interest of judicial economy. *Res judicata* is a doctrine that is strictly applied by the courts.

What is stare decisis?

Very simply, the common law doctrine of *stare decisis* (“stand by the decision”) means that the decision of a court in one case provides a precedent (i.e., a standard) for the decision of future cases with like or similar facts and issues in the same or inferior courts within a particular jurisdiction. The rule or principle of law necessary to decide the facts and issues presented in one case provides a precedent for deciding future cases with similar facts and issues. The doctrine of *stare decisis* serves a number of fundamental policy interests in the common law system, including:

- one meaning of justice: like treatment of like cases
- a consistent, continuous, and coherent body of case law
- a reasonable degree of predictability so that lawyers can counsel clients and so that we can all legally arrange our commercial and personal affairs with reasonable confidence about the future
- authority for judges to build upon accumulated past experience, thereby eliminating the need to reconsider old rules of law in each new case
- fettering the choices and discretion of judges and juries within a framework of the rule of law rather than the rule of whim, arbitrariness, bias or paternalism.

While *stare decisis* is a wellspring of our law (in Cardozo’s word, “the everyday working rule of our law”), it is not absolute. Exceptions exist and will be illustrated in Chapter 5 (pp. 77-90).

BINDING PRECEDENT

A “binding precedent” means that a decision of a court in a prior case controls the decision in future cases with like or similar facts and issues for both the deciding court and for all inferior courts within the same jurisdiction. Thus, a decision of the Supreme Court of California is a binding precedent for all future cases with like or similar facts and issues that are decided by the Supreme Court of California and its lower courts. A binding precedent is both a norm and a prediction. It is a norm because the precedent *should* control the decision of future cases with similar facts in the same or inferior courts within a particular jurisdiction. It is also a prediction that the precedent *will* actually control such future cases.

PERSUASIVE PRECEDENT

A “persuasive precedent” means that a decision of a court in a prior case *may* be accepted or rejected by a court in a new case in a different state, even though the facts and issues in the new case are similar. For example, a New York court has discretion, but is not obligated, to accept or reject the precedent set by the Supreme Court of California in a case with similar facts and issues.

SUBSTANTIVE LAW

What is a rule of law?

A **rule of law** is/ an authoritative legal standard/ of general application/ requiring action or forbearance/ used by courts and administrative tribunals/ as a norm/ in deciding the legal significance/ of the particular facts/ presented in particular cases.

The two most important sources of rules for the first year of law school are: (1) the laws passed by the state and federal legislatures; and (2) the body of common law (judge-made law) embodied in many thousands of cases in each state. An example of a **statutory rule**, imposed by a legislature, is the requirement that drivers of cars and trucks obtain driving licenses. An example of a **case law rule** imposed by judge-made law is the requirement that such drivers exercise the degree of care in driving that an ordinary, prudent or reasonable person would use (tort law). An example of **statutory** and **case law** rules operating together is the requirement that such drivers refrain from driving in a criminally negligent manner.

What is a principle of law?

A **principle of law** has the characteristics of a rule (see prior definition), and in addition, a principle:

1. has a more fundamental status in law than a rule
2. has a broader or more inclusive scope or reach than a rule
3. may be used as a basis for creating rules
4. is sometimes used by a judge to select which one of two or more arguably applicable rules should be applied in a particular case

In our system of law, some fundamental principles are explicitly specified in the Constitution of The United States, including:

- the principle of due process
- the principle of equal protection of the law
- the principles of freedom of speech, press and assembly

Other federal constitutional principles are derived from those which are explicitly specified and then embodied into the case law of the U.S. Supreme Court, including:

- the principle that each person has a right of privacy, derived from the first, fourth and other amendments
- the principle that vague criminal statutes are a violation of due process

Many other important principles are *not* derived from state or federal constitutions but from state and federal statutes and case law, including:

- the principle that private contracts between individuals must not violate public policy (case law)

- the principle that core crimes (e.g., murder, robbery, rape, arson) must have a criminally culpable mental requirement including intent (case law and statute)

It is important to realize that just as rules exist at varying levels of concreteness, principles (and policies) exist at varying levels of breadth. Law spans the spectrum from extreme concreteness (e.g., the rule that an answer to a complaint must be filed within twenty days, or a statute of limitations of five years for initiating a criminal charge) to extreme breadth (e.g., the principle of equal protection).

What is a legal policy?

A *policy* (also known as a *policy purpose* or *policy objective*) is the interest or end expressed or served by a rule or principle.

Examples:

- The prohibition of murder by rules and principles based on statutes and case law expresses and serves the policy interest (or purpose) of protecting the life of each member of the society and punishing those who violate such ban.
- The prohibition of rape by rules, also based on statutes and case law, expresses and serves the policy interest (or objective) of protecting bodily integrity.
- The various rules and principles governing the making of a contract (e.g., offer, acceptance and consideration) express and serve the policy purposes (or interests) of freedom of contract and promotion of commerce.
- The tort rules spelling out the requirements for establishing negligence express and serve the policy objective (or purpose or interest) of fairness and monetary compensation for certain injuries due to the carelessness of others.
- The rules of civil procedure, based on the Constitution, statutes and case law, express and promote the policy purpose, among others, of equal access to the courts.

In addition, a broad policy purpose is sometimes applied directly (like a rule of principle) as a norm to decide individual cases—e.g., the policy norm in a child custody case of promoting the best interest of the child.

Is there consistency in the use of rule, principle and policy?

No. As I stated in my book, *How To Do Your Best On Law School Exams*:

Do not expect scientific precision and consistency here. What some cases and professors describe as a rule may be called a principle (or doctrine) or policy by others. Principle and policy are sometimes used interchangeably. If you do not expect consistency in these labels, you will not be disappointed and confused. Knowing these labels is far less important than understanding the rules, principles and policies and being able to apply them correctly. A safe approach for you is to follow your professor's usage in each course.

Moreover, many cases are poorly crafted; the quality of the legal writing is obscure, confused and confusing, making it difficult to spot the issue, identify the holding, and make sense of the reasoning. If you find a case confusing, one strong possibility is that you, as a beginner, are confused—and you must struggle to understand. Another possibility, however, is that the confusion is intrinsic to the case. Learning the difference is a skill to be acquired by analyzing and discussing numerous cases. Incidentally, the fact that a case is unclear provides no escape: you must, nevertheless, extricate the relevant facts, specify the procedural history, identify the issue and holding, and make as much sense of the reasoning as possible.

SKILLS FOR LEGAL REASONING

What are the basic skills required for legal reasoning?

- extricating the key facts
- spotting issues
- selecting relevant rules (and principles)
- applying rules, especially by interweaving of key facts with elements of rules
- adroitly using policy as appropriate
- writing out all of the above in a lawyerly argument.

Legal reasoning is circular. The necessary skills are like a web; they interconnect and overlap. Hence, while skills can be individually identified and analyzed, they must be practiced and learned as a *configuration*.

What is extricating key facts?

Extricating key facts is a process of selecting from all the mass of facts presented in a written opinion, by a client, or on an exam, those particular facts that have the most legal significance. Facts or a combination of facts, which have the most legal significance, are those that establish the elements of a legal rule and therefore require or permit application of that rule. *Key facts* are those facts that raise an issue of law. For example, the fact that A and B, business partners, are arguing about how profits should be split presents a business question that has no legal significance; such a fact is therefore not legally relevant, though it may be relevant from a business perspective to an MBA student or relevant psychologically (revealing unconscious childhood conflicts) to A's and B's psychotherapists. But the fact that A then declares, "I've had enough" and shoots and kills B is a fact having legal significance because the rules and principles of criminal law, which proscribe murder, and of tort law, which proscribe wrongful death, attach to the fact that A shot and killed B and make that fact legally relevant, a key fact.

What is issue spotting?

Issue spotting is the corollary of extricating key facts. A *legal issue* is simply a question raised by the key facts about their legal significance. To use the above illustration, while no legal issue is raised by A and B merely arguing, as a beginning law student questions should spring into your mind about the existence of a legal issue when you read that A said, "I've had enough" and shot and killed B. In criminal law the issue could be identified as follows: Did A's saying, "I've had enough" and shooting and killing B make A liable for intentional murder? Or, in torts, the issue could be specified as follows: Did A's saying "I've had enough" and shooting and killing B, make A liable for wrongful death?

As these simple examples illustrate, the formulation of an issue in a one-sentence question incorporates the key facts (or some of them) and points to an applicable rule of law. *Issue spotting* connects the key facts with the rule to be applied.

What is selection of a rule?

Judges in deciding cases, lawyers in arguing cases, and law students in studying for class and exams, select applicable rules to apply to the relevant facts. To illustrate, when A and B argue over the split of profits, it is *not* necessary to select any rule to resolve an issue posed by such facts. Why? There are no legally relevant facts that raise an issue requiring selection of a rule of law. A's and B's business argument does not pose a legal conflict. When A, however, proceeds to shoot and kill B, these are relevant facts which raise a legal issue in criminal law (Is A, in shooting and killing B, liable for intentional murder?) and which lead to selection of the applicable rule. The *rule to be selected* in light of these facts is *intentional murder*,

which has five elements—(1) intent to kill—(2) manifested in a—(3) criminal-law act which—(4) causes, factually and legally—(5) the death of another person.

Notice that this rule, as almost all rules, is composed of *elements*. To know a rule is to know its elements and to be able to specify them *precisely*, without additions and without omissions. In order to accomplish this task, especially on exams, you must *understand and memorize* the elements of *each* rule stressed by your professor. There is no escape from this formidable task.

What is rule-application, especially interweaving of facts with elements of rules?

Interweaving is the blending together of the key facts with the elements of an applicable rule. By so doing, a student and a lawyer demonstrate that the rule selected is applicable because there are sufficient facts to prove each element of the rule. For example, if A insults B, you know from studying tort cases and a tort primer that the applicable rule is “mere words of insult, even violent insults, are not in themselves actionable.” Interweaving the key facts with the applicable rule is illustrated below:

When A, however, says to B, “I’ve had enough,” and shoots and kills B, you interweave these facts with the five elements of the rule of intentional murder, as follows:

A is liable for intentional murder. When A says to B—“I’ve had enough” and shoots B—A’s intent to kill B is plain. The act of shooting also manifests A’s intent to kill and fulfills the requirement of a criminal-law act. When B then dies from the shooting, the remaining requirements of factual and legal causation and the death of another person are easily met.

Always keep in mind that interweaving is the chief skill of rule application.

What is adroit use of policy?

Adroit use of policy in an opinion, on an exam, or in practice stems from an understanding of the nature and function of policy (see p. 7). If you see policies as the ends or interests served by applying rules and principles, you will have a sharper and deeper understanding of legal reasoning and will be better able to decide whether or not a specific rule applies. You will be able to buttress your rule application, especially in close cases, with a succinct reference to the policy served by a particular rule. In novel fact situations, you will be able to apply the policy directly or to argue for application of a new rule to be applied in light of the policy to be served. Seeing rules as policies writ concrete sheds light.

Contrary to what some first-year students think, policy is not your latest political hallucination—or mine. Legal policies should not be equated with political policies. Most legal policy is entrenched in the law, embodied in cases and statutes. Most first-year professors stress such policy, not just rules and principles. The best way to learn to identify and use legal policies adroitly is to pinpoint how judges use policies in opinions and to pay close attention to your professors’ comments on such usage.

What is lawyerly writing?

Lawyerly writing, the final skill required for legal reasoning, makes the first five skills come alive. These five skills—extricating the key facts, issue-spotting, selecting rules, applying rules, and using policy—are neither abstract nor independent of each other. You demonstrate that you possess these skills by displaying them in lawyerly talk in class and lawyerly writing on exams and in legal memoranda.

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| <p>Lawyerly writing is:</p> <ul style="list-style-type: none"> • organized • purposeful • direct • clear | <p>Lawyerly writing is <i>not</i>:</p> <ul style="list-style-type: none"> • rambling • verbose • fancy, pretentious or pompous • conclusory or sweeping |
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| <ul style="list-style-type: none"> • concise • complete • logical (avoiding, e.g., contradictions inconsistencies and non-sequiturs) • persuasive • an argument blending fact, rule principle, and sometimes policy | <ul style="list-style-type: none"> • cryptic or cursory • abstract or academic • only about rules, principles and policies • only factual • the same as historical, sociological, philosophical, ethical, economic, literary or scientific analysis |
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THE FIRST YEAR

Why is the first year of law school formidable?

It's like being immersed suddenly in a foreign country and struggling with a strange language. You have to learn a new vocabulary (legal terms), a new grammar (skills in legal reasoning), and conversation (application for decision-making). Some confusion and awkwardness are inevitable.

More concretely:

Many of the words in cases are purely legal and you must learn their meanings one by one (e.g., *res ipsa loquitur*, *sua sponte*, *demurrer*, *mandamus*, *certiorari*, *mens rea*, *actus reus*).

Many of the words used in cases which have an ordinary meaning in English also have a technical, legal meaning which is the meaning intended in the cases (e.g., motion, answer, malice, provocation, the reasonable person, intent, trespass, equitable).

When you begin, you can spot words in the first category, but you won't know immediately which ordinary English words have a special legal meaning (second category).

Many of the words in the first two categories have multiple legal meanings. While a legal dictionary can be helpful, you may have difficulty in the beginning selecting which of the multiple meanings defined in the dictionary is the particular meaning intended in a specific case. Gradually, as you learn these meanings one by one, the mist will transform into clearer categories.

Since law is legal reasoning for decision-making, it isn't enough to understand the above-mentioned, basic skills abstractly. A skill is a habit of performance, not simply an abstract understanding. These skills can only be developed by practice over a significant period of time.

In developing these basic skills, am I learning to read, think, talk and write like a lawyer?

Exactly—and this is the dominant professorial priority in the first year of law school. Indeed, it is fruitful for you to visualize yourself as learning legal reasoning by studying torts, contracts, criminal law, civil procedure, etc. If, over a period of time, you develop and internalize these basic skills—make them part of yourself—you'll use some of these skills each day you work as a lawyer. You'll gradually perfect a lawyerly approach to *any* legal issue—your reading, thinking, talking and writing will become more precise and vigorous. This is one of the principal objectives of law school. In contrast, contrary to what you believe, much of the subject matter you learn in specific courses (e.g., criminal law, torts) will eventually fade, with the obvious exception of areas of your practice (e.g., wills and estates, real estate, or commercial law).

ROLE OF KNOWLEDGE

You don't emphasize knowledge—I thought law school meant learning the law?

Not in the sense of defining law as essentially a series of rules, principles and policies to be memorized and regurgitated upon proper cue. Not in the sense of seeing a law student and a lawyer as human computers to be programmed (stuffed) with thousands of statutes and case-based rules in thirty or more areas of law.

The knowledge that will help you is the knowledge that empowers you to extricate the key facts, spot issues, select and apply rules precisely, interweave, use policy and write in a lawyerly way. It is *not* knowledge in itself that will help you but knowledge filtered through these basic skills. Knowledge is not an end in itself but a means to the end of legal reasoning for decision-making. *Knowledge then is absolutely necessary and absolutely insufficient.*

The false idea that law and the learning of law are primarily a matter of memorizing and regurgitating is a classic, first-year blunder. Avoid it.

BRIEFING AND BASIC LEGAL SKILLS

How does briefing help me to learn and practice the basic legal skills necessary for legal reasoning?

The appellate cases that you brief in law school illustrate the use of the basic skills necessary for legal reasoning. Specifically, in writing an appellate decision, the judge:

- identifies and marshals the key facts from the trial record
- identifies the legal issue raised at trial by the facts
- reviews the rule of law applied at trial and incorporates the rule into a holding
- interweaves the elements of that rule with the key facts
- sometimes uses policy to buttress the reasoning
- does all of the above with lawyerly writing

Each case should be a vivid demonstration of the basic skills necessary for legal reasoning.

In briefing appellate cases, you identify and analyze each part of the decision that exemplifies the above-listed, basic skills. For example, you identify key facts, spot issues, and identify holdings, etc., as they are presented in the cases. Therefore, in briefing these cases and working with their component parts, (e.g., facts, issues, holdings), you practice the basic skills necessary for legal reasoning. The cases present a veritable Milky Way of legal reasoning for decision-making. Case briefing is your telescope.

Am I supposed to learn all about legal reasoning from briefing cases?

No. Briefing cases is one core means for decoding cases. Other methods include the Socratic method in class, class discussion, lectures, clinical practice, writing exercises, moot court, and study groups.

Do these basic skills of legal reasoning apply in doing other legal tasks?

Yes. In sharply different ways they apply in class discussion; law school and bar exams; written and oral argument for motions, trials, and appeals; and everyday legal practice, including assessing the merit of cases, writing legal memoranda and briefs, investigating and marshalling facts, etc.

How does briefing cases help me prepare for class?

To repeat, although many beginning students don't realize it, the dominant professorial priority in first-year *classes* is the teaching of legal reasoning by stressing the basic skills. Typically, students are asked questions about the core elements of the case (facts, procedure, issue, holding, judgment and reasoning). Your case brief provides the foundation for your responses. Moreover, if you are not called upon and do not volunteer, your brief also enables you to follow the questions, responses, discussion and lecture.

In addition, teachers ask hypotheticals—questions about the issues raised in a case or in a series of cases. What you have learned from case briefing enables you to respond and to understand the responses of others and your professor's comments.

Moreover, your professors will stress reconciling and synthesizing of a number of cases. What you have learned from briefing these cases enables you to participate in this process.

What is reconciling and synthesizing of cases?

To learn lawyerly reading, thinking, talking and writing by means of the case law method requires concentrating on a **chain** of related cases, not simply on individual cases, one by one. Each case is a link in a chain of reasoning. It is this **linkage** that makes each case important in the case law process and that underlies your professor's insistent question—what does this case add (meaning why is this case significant in light of the other relevant cases)? Once you understand the chain of reasoning in a group of cases, you are able to understand each case more deeply and more sharply. John Donne's line, "No man is an island," is paralleled—no case is an island.

The technique for identifying and analyzing the chain of reasoning in a group of related cases is called **reconciling and synthesizing** cases. It is a legal application of the logic of analysis by comparison, which stresses similarities and differences. The doctrine of *stare decisis* (see p. 5) makes the determination of similarities or differences the crucial step in legal reasoning. Your professor's questions should aim at pinpointing similarities and differences in the facts, the issues posed, rules selected, the holdings, and the analyses. Through this relentless questioning and answering, the ideal is that you unravel the meaning of a group of cases and hone your basic skills, including your knowledge of relevant rules, principles and policies. You therefore increase your legal reasoning ability and your confidence.

THE LAW SCHOOL CLASSROOM

What is the Socratic method?

Inspired by Socrates, the great Greek philosopher, the Socratic method is a series of professorial questions and student answers designed to unravel a particular case, especially within a particular chain of cases. The questioning is designed to teach students the substantive law by practicing the basic skills—e.g., what are the facts; what is the issue; what is the holding; what is the court's reasoning? Other questions typically focus on contrasts and similarities with prior cases—e.g., can you reconcile this holding and reasoning with the holding and reasoning in the prior case? In addition to the Socratic method, you will encounter substantial lecturing and discussion and, if you are lucky, a bit of wit.

In addition to briefing cases, what else should I do to prepare for class?

Read the sections in the hornbook recommended by your professor that cover the issues presented in the assigned class. A good hornbook or primer offers an organized, systematic presentation of the issues and relevant rules, principles and policies. It is comparable to a college textbook (e.g., Samuelson on Economics).

If the cases assigned in tort class, for example, cover self-defense issues, read the corresponding section in the recommended hornbook on self-defense. Exercise self-discipline—read *only* this section. Otherwise, you'll risk drowning in materials.

The important advantage in reading such relevant hornbook or primer sections is that you can acquire an overview of the substantive law from basics to complexities. This overview helps you to understand what occurs in class—the questioning and answering about cases and hypotheticals, and the reconciling and synthesizing of cases.

What is the value of class participation?

The answer is clear if you keep in mind two realities: (1) the first year is primarily designed to teach you legal reasoning—to read, think and write like a lawyer, and (2) the dominant pedagogic priority in first-year classes is to teach you the basic skills of such reasoning.

By participating in class, you are practicing listening, thinking and talking like a lawyer. Making mistakes is the norm; in fact, you can't develop the basic skills without making mistakes. Over time, participation aids you to internalize and hone the skills.

What are the disadvantages of learning by the case method?

There are many important disadvantages. First, the casebooks do *not* typically present the issues, rules, principles and policies in a systematic, basics-to-complexities order. In short, the substantive law is often confusingly presented. The highly disciplined use of a good hornbook or primer, however, is an effective remedy.

Second, the appellate opinions reprinted in casebooks tend to concentrate on the complexities and numerous exceptions as well as new developments, giving some students a warped, exception-obsessed view of the law. Again, the disciplined study of good hornbooks or primers that present the basics, as well as the complexities, exceptions, and new developments, is an effective remedy.

Third, a range of the most fundamental problem-solving and other lawyerly skills are *not taught*, or mostly not taught, with the case method. These include problem solving and other skills in:

- uncovering facts from clients, witnesses, documents and elsewhere (fact investigation)
- systematic interweaving of key facts with each element of a rule
- client counseling
- negotiating and mediating
- lawyerly writing
- motion, trial and appellate advocacy
- informal advocacy (e.g., with administrative agencies at federal, state and local levels)
- working collaboratively with others
- reflecting on and critically appraising the underlying values implicit in cases and the personal choices inherent in different forms of lawyering.

Fortunately, these skills can often be learned in clinical and simulation courses. In clinical courses, you represent, under supervision, actual clients. In simulation courses, you simulate such representation. I recommend taking at least one clinical course. In addition, you can acquire these skills by part-time paid and volunteer legal work. It is a mistake, however, to undertake such legal work during the first year of full-time law school, unless economic pressures allow no alternative.

STATUTES

What is the role of statutes and when do I learn them?

Even with the emphasis on the case method of teaching law in the first year, there is usually substantial emphasis on statutes. First, one of the principal functions of appellate courts in deciding cases is application and interpretation of statutes. Hence, many cases deal with specific statutes. Second, there is an emphasis on statutes in some first-year courses such as Contracts (the Uniform Commercial Code) and Criminal Law (the Model Penal Code or a particular state penal code). Third, some first-year professors stress statutes much more than others. Lastly, in second and third years, most students take courses with a strong statutory emphasis (e.g., wills and estates; commercial law; New York or Illinois or California Civil Practice).

THE BAR EXAM

How will briefing help me pass the bar exam?

The best way for you, as a beginner, to prepare for the bar exam is to forget the bar exam for the moment. Concentrate on developing your basic skills of legal argument that will serve you well in law school, on the bar exam, and in lawyering. To think about the bar exam now is to engage in “crackpot realism.” It’s like worrying about the twelfth-grade calculus exam as you begin ninth-grade algebra.

WHAT ELSE?

In addition to learning how to brief cases as a means of learning the basic skills, what else must I learn as a beginning law student?

It isn’t enough to learn how to brief cases. You must *actually brief* them. Intellectual understanding is only a prelude to actually briefing cases and thus learning to read, think, talk and write like a lawyer.

You must learn the *fundamentals of legal research*—how to use the law library. Remember that brilliant, experienced lawyers, judges and professors do not rely on their memories. They constantly verify by using the law library. In addition, learn, as quickly as you can, how to use computerized legal research systems such as *Lexis* and *Westlaw*. They are fun, quick and effective.

A WARNING

You must learn to *prepare for law exams*. This book prepares you for the classroom but does *not* prepare you for law exams. They are really different from college and graduate school exams. Law school classes, concentrating on appellate cases, **do not prepare you** for law exams. The exams do *not* flow directly from the classes and assigned materials. Be on guard! You must prepare for the exams in a different way by working with the old exams of each professor and practicing each rule you learn with hypotheticals. I recommend my own book, *How To Do Your Best On Law School Exams*, which is revised and in many printings. My exam book and this book complement each other by embodying common themes, approaches and methods that I believe will be most helpful to you. *Learning Legal Reasoning* should be studied before studying *How To Do Your Best On Law School Exams*.