THE THEORY AND CRAFT OF AMERICAN LAW

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To
The Memory of Karl Llewellyn
and to
The Memory of Sally Stotzky and Pinky

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THE AUTHORS' STATEMENT OF THE COURSE: AN EXPLANATORY NOTE TO STUDENTS AND TEACHERS

The Materials

It is our strong belief, both individually and collectively, that theory and craft are intertwined and essential concepts of the process of learning to become an artist in law. They are, in other words, the elements of the art of law. Yet much of law training is insufficient in laying the groundwork for this task. It is insufficient first because it fails to teach the necessary technical skills; it is insufficient second because without a rigorous grounding in the technical aspects—the craft of law—one lacks the base for theory. The intellectual side of the art of law emanates from and is directly responsive to the technical skills of the lawyer. Stated another way, we believe that a high technical mastery in law, as in other arts, liberates instead of binds. It allows one to explore, with disciplined imagination, the means to justice. At another level, one can explore practicability and the political, commercial, or social wisdom in resolving disputes. Simultaneously, it forces one to be continually responsive to the demand for reasoned justification within that system.

With this in mind, we have put together with great care, as part of the required materials, certain sets of cases, notes, and readings. We also require our students to read two books which are not included in these materials. The first book with which you should become intimate is *The Bramble Bush,* written by Karl Llewellyn. The book grew out of an attempt by Karl Llewellyn in 1929 and 1930 to introduce his students to the study of law. The book is a classic. In a way, it is analogous to the works of Shakespeare in that it can be read at many different levels. And, the more familiar you become with the book, the more times you read it, the greater perspective you will have on law and legal education. In point of fact, reading the book at each new level of legal experience has provided both of us with new understandings and insights.

For purposes of this course, we suggest that you read *The Bramble Bush* at least three times during the semester at differ-

ent points of your legal experience. Each time you read it you will be struck between the eyes by the fact that you are now seeing something you had missed in the prior reading. In addition, you will most certainly reinterpret what you had read in a different light.

The second required book, *An Introduction to Legal Reasoning*, written by Edward Levi, builds upon and is complimentary to the wisdom which evolves from *The Bramble Bush*. Levi's essay is "an attempt to describe the process of legal reasoning in the field of case law and in the interpretation of statutes and of the Constitution." The book is a concise introduction to the lawyers' craft. The basic pattern of legal reasoning, reasoning by example, is explained as a process of legal thought and as a key to understanding the craft of law. This book also grows in importance upon re-reading. It should, just as *The Bramble Bush*, be re-read during specific parts of the semester.

The books assigned for outside reading are not collateral to the materials but fundamental. They illuminate not only this course, but the whole curriculum of law training. Each of them rewards its second, third, and fourth re-study by yielding new high values as your capacity increases to mine and refine and use the rich ore on each page. But the books will be discussed almost not at all in class, *save as you may have questions to raise at the opening of any class.*

The classes are devoted to matters basic to gaining a sound approach to understanding and doing the jobs of a man or woman of law. Everything that happens or is said in class is a part of the course for which you are responsible. So also, as indicated from time to time, are those lectures or discussions arranged by the school for the ultra-curriculum instruction of the students.

The class materials have a rather interesting genesis. Their lineage is no less impressive. They have been developed and used, with changes and refinements, for the past three decades.[a] The course was originally conceived by Karl Llewellyn, who first prepared and used some of the cases in 1951 at the

[a] The original materials included many of the cases in this book. The notes and questions however, were *not* part of these materials.

University of Chicago. The cases were used at Chicago in a required first year course for the next twenty-three years. Since 1974, the year Soia Mentschikoff became Dean of the University of Miami School of Law, these materials have been the basis for a required first year course at Miami, Elements of the Law. We strongly believe that these materials have won the day in the courts of history. They are time tested and honored. Perhaps no other materials have withstood so much scrutiny over so long a period of time by the harshest critics imaginable, generations of law students.

Part I of the materials, entitled *Who is Suing Whom for What On What Theory?*, consists of a series of opinions dealing with various legal and equitable remedies, and the concept of justiciability. The function of this section of materials is to expose you to certain procedural matters that are important in *all* classes and cases, to orient you toward an understanding of the relationship between procedural and substantive law, to introduce you to legal reasoning (a thought process that is much different than anything you have experienced before), to explore the reasons for bringing lawsuits, and to begin the process of legal education. To aid you in this enterprise, we have asked you to work on writing assignments which are geared to a specific case or series of cases.

Part II of the materials, entitled *Legal Argument: Indefiniteness in New York*, involves a series of New York State cases dealing with indefinite terms in a contract. The indefiniteness series of cases present an excellent illustration of the problems posed to counsel and to the New York Court of Appeals in working out a solution over a period of years to a problem within the business world. Here, you will be exposed to the use of precedents by the skilled judge, Benjamin Cardozo, and sometimes by the unskilled judge or advocate in any particular case. As you will see, one sometimes learns more from the blunders of inept counsel than from the brilliance of a skilled lawyer or judge. Your job is to get involved in the process: to become proficient not merely in the substantive area of indefiniteness of contracts, but to understand just what it is that the parties and court are trying to accomplish. One manner of doing this

is to assume, in each case, the role of judge, of counsel for the plaintiff, and of counsel for the defendant. As an advocate for the plaintiff, for example, how does your statement of the facts, phrasing of the issue, and statement of past cases differ from that of the defendant? And, if you assume the role of the judge, how and why would you decide the case? How and why would you structure the written opinion? How and why would you use past cases? As in Part I of the materials, we have asked you to work on writing assignments which are geared to a specific case or series of cases.

The third part of the materials—*The Concept at Work*—involves another area of law largely developed in New York cases through interpretations of common law rules and legislative enactments. This area concerns the liability of those who sell food and drink and other goods to the public, and culminates in certain sections of the Uniform Commercial Code. In this connection, we will examine the theory and doctrine underlying warranty and products liability law. Here, you will be exposed to the head-on collision between the common law and legislative enactments. The goal is not merely to learn the "blackletter rule of law," but the art of advocacy and legal reasoning, although a mastery of the former is almost an inevitable consequence of learning the latter.

Part IV, the final section of the materials, entitled *Foreign Remittances: The Court in Search of a Concept*, has rather different jurisprudential purposes than the preceding cases and materials in the book. The foreign remittance cases that we have included in the materials were decided by the New York courts within a relatively short period of time. They are useful devices to show you, the student, how the pressures of fact and the skill of counsel in informing the court of the situation sense, carries legal interpretation of a single transaction-type through several totally disparate concepts. It also shows you how this process determines risk-bearing—which party bears the risk—in a commercial context. Finally, you will be exposed to the launching of an entirely new judicial enterprise in the vital phase of international banking.

Each judicial opinion—in any legal area—functions as an invitation to some sorts of arguments and as a discouragement

to others; it tells the reader what can persuasively be appealed and what cannot. In so doing, the judicial opinion defines a set of moves to be followed in future argument and thought. The foreign remittance decisions, of course, serve the same functions. The expressions of judicial attitudes and values, and the judiciary's understanding concerning the international banking industry, are certainly as important in these cases as the so-called "articulated legal reasons." But these cases are to be read not merely for their significance in foreign remittance law. Rather, we have chosen these cases for their representative significance—a value beyond the mastery of what may soon prove to be outmoded doctrines and rules.

Finally, scattered at appropriate points throughout the case materials, are several important essays. These readings are required, not suggested. They add background and theory to the study of the case materials. The most significant of these readings consist of:

1. *The Study of Law As a Liberal Art*
   by Karl Llewellyn;

2. *The Elements of Legal Controversy: An Introduction to the Study of Adjective Law*
   by Jerome Michael;

3. *The Path of the Law*
   by Oliver Wendell Holmes;

4. *Ethical Problems in the Performance of the Judicial Function*
   by Charles D. Breitel;

5. Excerpts from *The Common Law Tradition*, "The Leeways of Precedent" and "Argument: The Art of Making Prophecy Come True"
   by Karl Llewellyn;

6. Excerpt from *Due Process Methodology and Prisoner Exchange Treaties: Confronting An Uncertain Calculus*, "The Discipline of Judicial Balancing."
   by Irwin P. Stotzky and Alan Swan.

What To Do With The Materials

In a literal and figurative way, your first semester in law school will be quite similar to learning a foreign language, replete with enough Latin terms to make even the most open-minded newcomer xenophobic. Thus, if you do not understand a legal term, go directly to a legal dictionary. Carry one with you until you begin to incorporate the working definition of such legal terms into your mind-set. You are also going to restructure your prior thinking process into a critical legal-thought process. It is neither an easy nor painless task. The skill of rigorous legal thinking takes time and great effort to master. Be patient. Only through hard work can you improve and develop your legal mind and, ultimately, yourself.

First year class preparation is time and energy consuming. We suggest that you spend approximately 60 hours per week preparing for classes. If you do not spend time and effort preparing for class, the experience will be worthless if not wholly frustrating. With this in mind, it is a good idea to join a small study group in order to speak about the cases and classes. The group should analyze cases and critically examine its members. Remember, legal education is largely a self-learning process. From this day on you are a professional person, solely responsible for your own education, for the improvement of your mind, for the judgments you make in this legal culture. And speaking with fellow students is an integral part of the educational process.

Now that some of the mechanics are out of the way, we are confronted with a more serious question: Intellectually speaking, what are students to be doing in law school; that is, what are the teachers asking you to do with your minds as you read cases, prepare for class, ask and respond to questions in class, and think and talk about legal questions with one another in study groups?

There are two main approaches to teaching law and understanding the legal process: (1) the simple model or the "nuts and bolts" approach; (2) the dialectic and historical approach. These approaches need further elucidation if we are to answer our query.

Many entering students think that the word "law" refers to the laws themselves. All that distinguishes a lawyer from a layman, on this view, is that he knows where to find the rules—the laws—and how to be sure he has found all of them. Rules are clear, you either follow or disobey them. They are the roadmaps which, if memorized, lead the traveler to his destination.

Indeed, in many cases, the law is sufficiently intelligible to use easily. And, finding the "blackletter rule of law" is certainly a step of some importance in the legal process. But, as you will soon learn, there is no abstract rule of law outside of any specific fact situation. Moreover, this simple view—the nuts and bolts approach—does not account for all the ways in which the law works. In point of fact, it omits entirely what is most difficult, important and interesting in what we do.

In our view, and we think in the view of law professors across the country, the nuts and bolts approach—the simple model—is wholly wrong as a conception of the field of study and practice with which you are about to become engaged. Our primary field of concern is not the simple and orderly. Rather, our concern will be with the complex and problematic in the law.

This discussion curiously enough leads us into the dialectic and historical method of teaching and learning we mentioned at an earlier point. And, not incidentally, it leads us into a discussion of the course itself.

A study of the theory and craft of American law is an introduction to a method and process of law training and thinking that will stay with you for life. It is not a course which merely teaches "blackletter rules of law" nor one in which the only knowledge you will take with you from the course disappears after the final examination. The residual effect of the learning process in this course carries over into all courses and eventually into your law practice. This course will mainly be concerned with the art of legal reasoning. You are on the road to becoming an artist in the law. To attain this goal—that of a legal artist—we hope these materials will impart to you at least the minimum skills of (1) the theoretical or

intellectual bases of the law; (2) the technical craftmanship of the lawyer; and (3) the ethical aspects of the lawyer.

This course attempts to lay the foundation for the development of the legal artist with its attendant skills through the teaching of the art of legal reasoning. The art of legal reasoning, in turn, consists of the ability to *read, dissect*, and *analyze* cases, of which briefing cases is a first step; the ability to use cases by synthesizing, comparing, categorizing, and differentiating legal facts and concepts in order to support an argument; the creative ability to "put cases together," and the skill of statutory construction. The end result of this process will allow you to be a legal advocate, critic and theoretician.

Many of the cases in the materials are quite old and some of them have been eroded or overruled in many jurisdictions. They are, however, largely classic cases. More significantly, every case in the materials, except some note cases, are in full. None of them are edited. This is perhaps the *only* course in your legal education where you will not read edited cases. It is important to understand the process which led to the results in these cases (which can only be done through reading the case in full) in order to understand the law of today and to see the direction in which law may move in the future. This is not worthless advice nor idle talk. It is the purpose for the materials and the teaching method—the historical and dialectic approach. This process allows one to look at the world over time, to see which fact situation in the past led to which legal "rule," and to be able to apply precedent to new fact situations. All of this, in turn, allows one to work through new theoretical constructs; it also allows one to become an advocate for a particular position in the most technically perfect manner. Argumentation and prediction are tools to utilize in the art of law.

There is a caveat to offer, however. The art of law of which we are speaking is founded upon and practiced within a set of tensions between aims which are not simultaneously realizable in full. On the one hand we are confronted with the aim of attaining justice; of resolving disputes in a reasonable fashion—the aim of ideal results. On the other hand, we are confronted with the sometimes contrary aim of using law in a legitimate manner, within the techniques sanctioned as legiti-

mate within our legal culture—the limitation of means. The legal artist must learn to live within this tension of ideal result and limited means. What we can ask from you, the budding legal artist, is not that you espouse utterly certain conclusions, for if you try to do so you will be following an illusion, but that you explore the means to the ideal result within the legal system, and that you do so with disciplined imagination. At the same time, we expect you to continue this search, this odyssey, by being responsive to the demand for reasoned justification within that system. The search for a resolution of the tension between ideal result and limitation of means is to our minds one of the main components of the art of law.

Functions of the Law

Before we begin our odyssey through the materials, we must confront a basic question: what are the functions of law within our system?

Law has a multitude of functions within any given society. It is also clear that law may serve anywhere from one to several different functions in any particular case. For purposes of this course, you should be concerned with at least three functions of the law: a channeling function, a decision-making function, and a dispute settlement function.

(a) *Channeling Function*

Law channels the behavior of individuals and groups in society—to keep them within the mores of the society—in order to promote a smooth functioning system. This is the case in the economic, political and social sense. For instance, one reason for anti-trust laws is to break up monopolies and to shape the market; to allow for "free competition" within the marketplace.

(b) *Decision-Making Function*

The allocation of roles in the decision-making process is crucial to our society. This is best reflected in the theory of the internal separation of powers within a tripartite national government—executive, judicial and legislative—and the external division of powers within a federal-state system. Thus a court frequently must decide such issues as whether it will change a common law rule, or leave the making of such a change to the legislature; whether a particular action is a

"political question" and thus not subject to judicial review; whether state law or federal law is to govern a particular dispute. The legal system, therefore, is an integrated system—it is not legislative, executive or judicial law—it is all one integrated system with trial and appellate courts, both state and federal.

(c) *Dispute Settlement Function*

Because the legal system attempts to get people to settle their disputes in a nonviolent manner, it offers parties with distinct and different interests an opportunity to assert their interests and to resolve disputes without resort to violence. Of course, not every dispute becomes part of the legal system.

This course will mainly be interested in the dispute settlement function. With respect to the court's role in dispute settlement, it is important to realize that it is a residual role. Only if the other built-in mechanisms of the legal system fail, do the courts participate.

Mechanisms that Precede Court Intervention

What are the mechanisms that precede court participation? We have identified five.

(1) *Negotiated Settlement*

Only a small fraction of disputes end up in court. Most lawyers spend much more time in negotiating settlements binding on the parties than in court. Even more fundamental with regard to negotiation, however, is that lawyers do more than resolve disputes; they draft contracts, effect mergers and acquisitions, prepare wills, trust agreements, etc. Much of this is mechanical; much of it takes a high degree of technical proficiency. A good deal involves negotiating with other parties at a stage which has not yet escalated to that of a dispute. This is not an obvious point, either to lawyers or lay people. As frustrating and sad as it may be, Perry Mason is not the paradigm of the legal profession.[b]

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[b] *See generally* Eisenberg, *Private Ordering Through Negotiation: Dispute—Settlement and Rulemaking*, 89 HARV. L. REV. 637 (1976).

(2) *Mediation*

Another avenue that precedes court intervention is mediation. A mediator is appointed by agreement of the parties, by order of the court, or by statute, and attempts to work out a compromise between the parties. He has no power to compel parties to act in agreement with his decision.[c]

(3) *Arbitration*

Arbitration—another mechanism that precedes court intervention, is often written into contracts. Here, the arbitrator serves as the decision-maker, a quasi-judge. He hears the arguments of the parties and on that basis makes a decision that is binding on all sides. There is very limited judicial review of his decision. In the United States, there is often no review.[d] And in England, for example, arbitration is outside of the law.

(4) *Administrative Decision-Making*

Decisions made by administrative agencies, both state and federal, often are binding on the affected parties. For instance, the Securities Exchange Commission (SEC), the National Labor Relations Board (NLRB), the Atomic Energy Commission (AEC), and a large number of other administrative agencies, both state and federal, make binding decisions on important issues which may never be decided by a judicial officer. The decisions can be appealed, but the scope of review is often limited, *e.g.*, to "clearly erroneous" decisions. Additionally, review may be limited to questions of law rather than including questions of fact. Often disputes end at this level.[•]

(5) *Legislative Avenue*

Legislative bodies, on a local, state, and national level, pass laws which resolve disputes. Many times these laws are not

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[c] *See generally* Fuller, *Mediation—Its Forms and Functions*, 44 SO. CALIF. L. REV. 305 (1971).

[d] *See* 9 U.S.C. §§ 1–208 (1976). *See generally* Mentschikoff, *The Significance of Arbitration—A Preliminary Inquiry*, 17 LAW & CONTEMP. PROB. 699 (1952).

[•] *See generally* Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965).

challenged in court. And even if they are challenged in a court, they are usually upheld as valid.

What we are trying to bring home to you is that much of law and much of lawyering involves more than a courtroom. Lawyers play pivotal roles in all of the five areas. Lawyers generally spend more time as counselors than as advocates. As a counselor, a lawyer must do more than construct the best argument for his client. He must be well versed not only in the current state of law, but in the law changes over a period of time. He must also have a "situational sense" for the area in which he is advising. A lawyer will not be worth his salt in a construction labor dispute, for example, unless he not only knows the legal "rules" of labor law but also the daily operation of the construction field. He must be able to predict, and to predict accurately. This is an essential ingredient of a lawyer. He must predict what will happen if a legal dispute eventuates over a course of action which he suggests to his client. This kind of prediction is an *art* requiring considerable breadth and depth. *The aim of this course and our method of teaching—socratic, historical and dialectic—is to aid you in gaining some of the tools necessary to become an artist in the law.*

One of the most important tools of legal reasoning is the use of precedent. Suppose that Case #1 is decided by the United States Supreme Court. Tomorrow, Case #2 comes before the Supreme Court. Suppose that the Justices recognize a similarity between Cases 1 and 2. In deciding Case #2, the Court will announce a rule of law to support its decision which it believes is inherent in Case #1. That is the *crux* of legal reasoning: finding similarities and distinctions between past and present cases and then using past cases to arrive at a decision in the present case. This is called reasoning by example.

Legal reasoning is not a static process, but a dynamic one. Rules of law are often ambiguous, and it is a common occurrence that new fact situations necessitate new interpretations of old rules of law. Let us address a simple example.

In Case #1 three facts were present. Call these facts A, B, and C. The court holds for plaintiff. In Case #2 only facts A and B were present. After Case #1, we knew that when facts A, B, and C were present, and the same issue was presented to

the court, the plaintiff would win. In Case #2, the court must decide if plaintiff still wins when only facts A and B are present. Only when Case #2 is decided can we be sure whether fact C was really necessary for the result in Case #1. The rule in Case #1 is only made meaningful by its use in subsequent cases.

Suppose that in Case #3, facts A, B, C, and D are present. Can Case #1 be relied upon? Plaintiff in Case #3 will argue that the presence of fact D is not important; Defendant will argue that the presence of fact D makes the rule in Case #1 inapplicable.

The example shows that the law is constantly in a state of re-evaluation because of the inevitability of new fact situations. This is the part of law, and particularly of first year law school, that is most disturbing to those who search for answers. Take solace. Think of the dynamic factor of the law in a positive way. This dynamic function of law allows the courts to bring the law up to date with current realities of the age and to do "justice" in a particular case.

In summary, precedent services two main functions: (1) It provides a guide against inconsistency, so that similar cases are not decided dissimilarly. In other words, a precedent is a guide for judges to follow in making the system of law consistent. This is the stabilizing aspect of precedent, referred to as *stare decisis*; (2) It allows judges enough flexibility to do "justice" in a particular case. This means that precedent must often be vague and ambiguous to allow for various subsequent interpretations.

Precedent thus serves two functions which sometimes conflict: a stabilizing and a flexibility function. To briefly summarize, legal reasoning is reasoning by example, and the examples we use to reason with are precedents.

As a final note, if the reading of the cases begins to become tedious, the use of your imagination will help to keep you going. One fascinating element of the law is how it mirrors the conflicts in our society. For instance, as the civil rights movement grew in the 1960's, so grew the number of civil rights cases. The same phenomenon is currently occurring with envi-

ronmental and consumer problems. Serious social problems are almost always the source of extensive litigation especially when the problem concerns an unsettled area in the law. Oftentimes 80% of the conflict becomes settled law and then litigation ceases. Of course, in law school we grapple with the 20% that remains unsettled. Sometimes an area of law which is thought to be settled recurs as a conflict and is once again the source of considerable litigation. What we are suggesting is that as you read cases, especially old cases, you can often sense what social problems were the order of the day. It is an interesting and unorthodox way of learning history and it demonstrates that law is not confined merely to abstract rules. *At its best, law involves the blueprint of our society.*

Briefing Cases

We require our students to brief each and every case in the materials, including the note cases. We do so because of our belief that briefing cases is a necessary first step in the process of becoming an artist in law. There are, however, contradictory views on how to brief cases. There may not exist, in other words, a brief for all seasons. Every teacher will want you to brief a case in a different manner. That will force you to construct briefs differently for different methodological purposes. For this class, you are to brief in the most complete and thorough manner or in what we refer to as the long method. This long method allows you to adapt the brief for different teachers because it is so complete. *Remember, briefing is merely a method—the process is important—and not an end in and of itself!* By briefing, we mean summarizing the important features of a case in a coherent fashion. Briefing is much more than a handy study technique; it is a safety mechanism to prevent you from skimming over the tough issues presented in a case and it is also a tool for dissection and analysis of cases. Finally, briefing allows you to go over a large body of case law and to outline the area without a re-reading of the entire field. (It is also handy as a device to record those aspects of a case which will be relevant in reviewing for the final examination.)

The form of a brief is meant to be as practical as possible; there is no one correct form. For this class the required form of

a brief is seen on pp. 54–55 of Llewellyn's *The Bramble Bush*, although it is in a bit different order than what we shall require.

What should a brief contain?

It is important to read an entire section of the casebook before briefing.[f] This will enable you to tie the cases together. Not until you have read the second case can you have any idea what to do with the first case. Each brief should be written in terms of what this case adds to what you already know about this subject. At the end of briefing a section of cases you may wish to throw away your first brief and start again.

We require a nine-item format for a case brief which is set out below with instructions for each item.

1. *Citation.* Obviously you will state the name of the case, the date it was decided, and the citation which allows you to relocate the case on a moment's notice. The citation should be in the form prescribed by the book entitled *A Uniform System of Citation.*

2. *Statement of the Case.* The statement of a case is similar to a leadoff sentence in a newspaper article. Here, we wish to know *who* was suing *whom* for *what* and on what *basis.*

Let us address an example:

> This was an action by the seller against the buyer to recover damages for breach of contract.

Notice what this simple statement of the case consists of. It identifies the parties, their legal relationship, the remedy they seek, and the theory or reason for bringing suit. Always ask yourself the following questions when stating a case:

—What did the Plaintiff want; what did he ask for?

—What did the Defendant want; and how did the case come to an issue?

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[f] This cannot be applied to most of Part I of this book since there is rarely more than one major case in any area. You must therefore brief each case separately and brief all of the cases again after class discussions.

3. *Procedure—What Happened Below (The Judgment).* Most of the opinions we will study are from appellate courts. The primary job of the appellate court is to correct the error of the lower court from which the case is appealed. Thus, we want to know what happened at the lower court because this often frames the issues decided by the higher appellate court. We must find out who won below and what occurred procedurally.

4. *Statement of Facts.* All *relevant* and *material* facts arguably used as a basis for decision should be placed in the statement of facts. For instance, the Plaintiff may be a red-haired Bulgarian male. Is the fact that he has red hair relevant? Is the fact that he is a Bulgarian relevant? Is the fact that he is a male relevant? Does the combination of any two or all three factors make them relevant? You must realize that when you read appellate opinions the facts have already been filtered by the attorneys and the lower court. Thus, when writing the facts, err on the side of too many facts rather than too few. It is also important at this point to begin to classify and categorize facts which are relevant or irrelevant to the issues in front of the court, and which may later be useful to the advocate in a new fact situation.

5. *Issue. What Action of the Court Below is Being Questioned?* What has the appellant claimed to be the error in the decision of the lower court? The issue is, of course, conceptually tied to the facts, holding, and result below. You should state the issue as it arises out of the facts. For example, it is often useful to begin a statement of the issue in the following form: "Where facts A, B, C, and D have occurred, was the trial court correct in holding the buyer liable for the contract price?" Conceptually, this process will aid you in determining the elements of a case and their significance depending upon the purpose you wish to make of this case in future argument.

6. *Result on Appeal.* An appellate court has the option of affirming, reversing or remanding a case. In many cases, an appellate court will reverse and remand the lower court's ruling with specific instructions addressed to the lower court about how it must handle the case on remand.

7. *Holding.* Generally, the holding answers the issue in the

affirmative or negative. If, in the example above, the appellate court agreed with the ruling of the trial court, the holding might read: "Where facts A, B, C, and D have occurred, the trial court was correct in holding the buyer liable for the contract price."

When you state the holding you will want to include facts which are important to the rule of law in the case. In other words, use the facts that serve as the basis for the rule of law.

Statements of the rules of cases can be narrow, intermediate or broad. This categorization is dependent upon the use you make of the case. For an example, let us journey back to the turbulent late sixties and early seventies for a homely hypothetical.[9] Suppose that our case concerns a law passed by town X which forbids the distribution of leaflets at shopping centers and that the facts show an anti-war group has been arrested for handing out leaflets at shopping center Y in town X. Suppose further that the facts show the center contained a marine recruiting station, had permitted veteran's day parades in the past, and that it was raining on the day of the arrest. Suppose finally that the court held the law was unconstitutional because it infringed on the group's First Amendment rights.

What is the broadest possible statement of the rule of the case?

The broadest possible statement of the rule of the case is that all laws prohibiting leafletting are unconstitutional. What is the narrowest statement of the rule of the case? The narrowest possible statement of the rule of the case is that such a law is unconstitutional only when applied in town X on rainy days against anti-war groups in shopping center Y which contains a marine recruiting station, and which has allowed veteran's day parades in the past.

If you had a subsequent case that was supported by the result in our hypothetical, and the fact situations in the two cases were similar, would you argue a narrow or broad statement of the rule of the case? You would, of course, argue a narrow statement of the rule of the case. By contrast, if the

[9] *See* Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

result in our homely hypothetical was favorable to a subsequent case, but the fact situations in the two cases were different, you would be inclined to argue the applicability of a broader statement of the rule of the case.

Remember, the narrower the statement of the rule, the more important the precedent becomes. The broader the statement of the rule is framed, the greater the likelihood of having the court rule against your statement of the rule of the previous case on the ground that the case could not possibly stand for all you say it does.

State the holding in terms of a rule of law applicable to the facts of the case, but with an eye toward making the rule of law applicable to future cases. For example, suppose a court hears Case #1 and decides it in a way that is contrary to your client in Case #2. Your desire is to distinguish Case #1 by limiting the applicability of Case #1 to its facts. Suppose that in Case #1 plaintiff was a red-haired Bulgarian male and in Case #2 plaintiff is a black-haired Australian female. You might attempt to argue to the judge that the holding in Case #1 should be limited to plaintiffs who are red-haired Bulgarian males. Your distinctions, however, must be convincing, plausible and logical.

The "cornerstone" of the art of advocacy is the ability to analyze, develop and use precedents in your favor; to make a case stand for the rule you want it to. There is a caveat to offer, however. Even if a court states the holding of the case before it explicitly and in unequivocal terms, this does not necessarily stop other courts from broadening or narrowing that holding in subsequent cases.

8. *Reasons—The Herein of the Two Becauses.* The above description of the holding of a case as, essentially, the answer to the issue, is not complete, however. The holding does more than answer the issue in the affirmative or negative. It also states the doctrinal reason or *ratio decidendi*—the rule the court tells you is the rule of the case, the ground upon which the court itself has rested its decision. Additionally, there is the policy component which, although not a formal part of the holding, is also part of the brief. This adds the "situational sense" to the case. A holding, for briefing purposes, therefore,

is divided into three main components: the answer to the issue and doctrinal and policy reasons. We refer to the doctrinal reason as the first because. The policy reason is called, in our parlance, the second because.

(a) *Doctrinal reason.*

The first because is the line of argument that the court indulged in doctrinally. It is the *rule* of the case. This may be referred to as the *ratio decidendi* —the ground upon which the court itself has rested its decision. For example, does the court state the doctrinal reason in terms of statutory construction? Does the court state the doctrinal reason as a matter of legal theory? It may be instructive, at this point, to look at an example of the first because—the doctrinal reason—in the context of a case in the materials which you will be discussing in the near future. The case is *Hadley v. Baxendale*, 156 Eng. Rep. 145 (Ex. 1845), which can be found at p. 90 *infra*. The first because—the doctrinal reason—is specifically stated by the court at p. 101 *infra*.

> Now we think the proper rule in such a case as the present is this:—Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the con-

> tract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract.

You should be aware that courts do not always specifically state the doctrinal reason that underlies their holdings. Rather, it may be necessary for you to extrapolate the doctrinal reason from the case.

(b) *Policy reasons.*

The second because is made up of those parts of the court's arguments which are dicta or bright remarks not necessary to the decision or to the rule of law. They are not binding law; rather, such commentary gives us a hint about what the court may do in a future case with slightly different facts. For instance, in the shopping center hypothetical, the doctrinal reason—the first because—may be that the town's law infringes on the group's rights to freedom of speech as protected by the First Amendment to the United States Constitution. The policy because may be that the public good is promoted by a complete airing of political views. That is, that freedom of thought—of speech—is seen as "the matrix, the indispensable condition, of nearly every other form of freedom" in our society. *Palko v. Connecticut*, 302 U.S. 319, 327 (1937). The policy reason may be subjective, but it should be important for future cases.

9. *Additional Points.* Under this heading, you should include any other dicta which may aid you in argument in future cases. It is also appropriate to fully brief the views of concurring and dissenting judges.

At this point, it is important to remember Karl Llewellyn's admonition that all cases are decided on four assumptions and that a brief must always take these assumptions into consideration:

> (1) *The court must decide the dispute that is before it. . . .*
>
> (2) *The court can decide only the particular dispute which is before it. . . .*

(3) *The court can decide the particular dispute only according to a general rule which covers a whole class of like disputes. . . .*

(4) *Everything, everything, everything, big or small, a judge may say in an opinion, is to be read with primary reference to the particular dispute, the particular question before him.*

K. Llewellyn, *The Bramble Bush* 42-43 (1973).