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# THINKING LIKE A LAWYER

## AN INTRODUCTION TO LEGAL REASONING

KENNETH J. VANDEVELDE

*Second Edition*

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*An Introduction to Legal Reasoning*

SECOND EDITION

Kenneth J. Vandevelde

*Thomas Jefferson School of Law*


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*For Lidia, Jenny, and Shelly*

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KENNETH J. VANDEVELDE

# INTRODUCTION

People who have learned to think like lawyers usually also talk like lawyers, often to the considerable annoyance of their families and friends. Yet many lawyers talk that way because they find legal reasoning so powerful that they cannot resist thinking about nearly everything in the same way that they think about the law. The paradox, however, is that very few lawyers are consciously aware of what it means to think like a lawyer.

Although lawyers, law professors, and law students frequently refer in conversation to the process of "thinking like a lawyer," attempts to analyze in any systematic way what is meant by that phrase are rare. Law students may be told that they must learn to think like a lawyer but are not told precisely what that means. This book is an attempt to define this elusive phrase and, more specifically, to identify the techniques involved in thinking like a lawyer.

## I. How Lawyers Think

The phrase "to think like a lawyer" encapsulates a way of thinking that is characterized by both the goal pursued and the method used. The method will be discussed momentarily. The goal of legal thought, which is addressed

first, is generally to identify the rights and duties that exist among particular individuals or entities under a given set of circumstances.

As an illustration of the difference between lay thought and legal thought, imagine that two friends—a lawyer and a nonlawyer—are discussing a newspaper reporter who promised an informant anonymity and then published the informant's name.[1] The nonlawyer, astonished by the reporter's conduct, may say to the lawyer, "He can't do that, can he?" The nonlawyer's conception is that the law tells you what you "can" or "cannot" do.

Lawyers rarely think that way, although they may occasionally speak in those terms as a kind of shorthand for a more elaborate thought process. A lawyer would ask instead, "Has the reporter breached any legal duties to the informant, and, if so, what rights to relief from the reporter does the informant have?" That is, a lawyer's goal is to identify the rights and duties that exist between the reporter and the informant in the situation described.

As the illustration suggests, thinking like a lawyer essentially requires beginning with a factual situation and, through some process, arriving at a conclusion about the rights and duties of the persons or entities involved in the situation. Let us turn now to the method used by lawyers—a method known as legal reasoning.

Identifying a specific person's rights and duties requires a process of legal reasoning that includes five separate steps. They can be summarized briefly as follows: The lawyer must

1. identify the applicable sources of law, usually statutes and judicial decisions;
2. analyze these sources of law to determine the applicable rules of law and the policies underlying those rules;
3. synthesize the applicable rules of law into a coherent structure in which the more specific rules are grouped under the more general ones;
4. research the available facts; and
5. apply the structure of rules to the facts to ascertain the rights or duties created by the facts, using the policies underlying the rules to resolve difficult cases.

A lawyer may perform these steps in any of several different settings. A litigator may gather facts concerning events that have already occurred to determine whether the client has certain rights or duties with respect to the client's adversary. A business lawyer may be shown a contract and asked for advice concerning the rights and duties that the contract creates. In these two examples, the facts are fixed, and the lawyer's task is to identify the legal consequences of those facts.

In other cases, the process is reversed: the desired legal consequence is already known, and the lawyer's task is to identify the facts that would result in the desired consequence. A businessman may tell his lawyer, for example, that he wishes to obtain the right to purchase a thousand widgets for one dollar each. The lawyer's task now is to create a set of events, such as the negotiation of a contract, that will give rise to that right.

The rights and duties that lawyers identify through the legal reasoning process are those that they believe would be enforced by a court of law. Regardless of how convinced a lawyer may be that a particular right or duty *should* exist, if a court would not enforce the right or duty, then it does not exist insofar as the legal system is concerned. Legal reasoning, then, is essentially a process of attempting to predict or, in the event of litigation, influence the decision of a court.

The reader will notice two conclusions in particular that emerge from the discussion of legal reasoning. First, although the legal reasoning process in form is structured as if it were based on logic, in reality legal reasoning is impossible without reference to the policies, that is, the values, underlying the law. Second, these policies are in conflict, and thus legal reasoning requires one to make judgments about which policies are to prevail in particular circumstances.

For these reasons, lawyers often cannot predict with certainty how a court will decide a dispute. In those cases, legal reasoning can do no more than identify some of the possible results, suggest the arguments that may lead a court to reach each of these possible results, and perhaps provide some indication of the relative probability that each possible result will occur.

In short, legal reasoning is not a process of identifying rights and duties with certainty by consulting a set of rules. Rather, legal reasoning is a process of constructing arguments that a set of rules should be read to impose

certain rights and duties. This process is most obvious in the case of an advocate in court, but it also characterizes the work of a lawyer structuring a transaction. In some cases, the argument for a particular result is so convincing that it will not even be perceived as an argument, but will merely be seen as the obvious application of the rule. In other cases, arguments will be vigorously contested, and even the ablest lawyers will disagree over which argument should prevail. Legal reasoning, however, is always a kind of argument.[2]

## II. The Plan of This Book

This book is an introduction to the process of using legal reasoning to ascertain the rights and duties of specific persons in a given situation, that is, it exposes the process of thinking like a lawyer. It is divided into three parts.

Part 1, "Basic Legal Reasoning," provides an introduction to the five steps in the legal reasoning process, with each step treated in a separate chapter. It is written from the perspective of a self-aware practitioner and describes the orthodox version of mainstream legal reasoning as practiced by American lawyers at the beginning of the twenty-first century, although not every lawyer would be equally conscious of using all the techniques described in part 1. This part of the book should be of special interest to a first-year law student seeking a systematic summary and explanation of the techniques of legal reasoning that he or she will encounter in law school. It also should be of interest to those who do not intend to become lawyers but wish to understand the special techniques used by lawyers to construct arguments about the application of the law.

Part 2, "Reasoning with Policies," begins with chapter 6, which develops a systematic approach to the analysis, synthesis, and application of the policies with which the lawyer constructs legal arguments. Despite the importance of policy judgments to legal reasoning, lawyers have no widely acknowledged method for utilizing policies in legal reasoning. Lawyers are taught to support a particular interpretation of the law by arguing that their preferred interpretation would be consistent with sound public policy, but they have no prescribed way of constructing such arguments. Chapter 6 seeks to systematize arguments from policy. It suggest ways of identifying

relevant policies and establishing relationships among policies that will aid in constructing arguments. Chapters 7–10 demonstrate how the ideas in this book, but most specifically ideas about how to reason with policies, are reflected in four different areas of the law—contracts, torts, constitutional law, and civil procedure—each of which is treated in a separate chapter. These chapters are intended not to constitute a complete summary of the law in any one area but to illustrate a way to think about each subject, to make some of the abstract ideas in the book more concrete, and to demonstrate that the same techniques of legal reasoning apply to all areas of the law.

Whereas part 1 explicates the orthodox approach to legal reasoning as taught in every American law school, part 2 is innovative in many respects and owes much to recent insights from contemporary legal thought (which is described in greater detail in part 3). It is hoped that the reader will find part 2 to be illuminating, provocative, and, ultimately, useful. No claim is made, however, that the content of part 2 represents any kind of consensus view of how lawyers think about policy; no consensus view exists. Part 2, however, should be useful to anyone interested in the policies that underlie the law or in the way that lawyers use policies to construct arguments.

Part 3, "Perspectives on Legal Reasoning," consists of two chapters intended to place the legal reasoning process in a historical context. Chapter 11 traces the origins of the contemporary model of legal reasoning. The purpose of the discussion is to explain how mainstream legal reasoning came to be seen as a distinctive mixture of logic and judgment and to introduce the reader to some of the problems generated by this method of resolving legal disputes. Chapter 12 describes some contemporary critiques of mainstream legal reasoning. As will be seen, many of these critiques are in disagreement with each other, and all of them are controversial in various respects. Few of these critiques have altered mainstream legal reasoning in any profound way, but some of their insights have influenced the practice of law and all of them in some way enrich our understanding of legal reasoning, even if only to identify ways that it cannot or should not be done. Part 3 should be of special interest to those who wish to know not only how lawyers think but why they think that way and whether they should think in a different way.

## III. Thinking Like a Law Student

Since the first edition of this book appeared, I have heard from many who read the book because they were curious about the nature of the law or because it was a required text in a university course of study. Yet many of those reading this book are students preparing to enter, or already enrolled in, the first year of law school.

Law students invariably are told that the purpose of law school is to teach them to think like a lawyer. Thus, the skills taught in this book are among the most important skills needed not only to survive but to excel in law school. For this reason, I have included in this revised edition an appendix that describes for potential and new law students the ways in which legal reasoning skills are taught in law school, particularly during the first year, and explains how students can use this book to develop those skills.

PART ONE

# Basic Legal Reasoning

1

# IDENTIFYING APPLICABLE LAW

The first step in legal reasoning is to identify the law that is potentially applicable to a particular situation. Law is generally of two types.

One type is case law or, as it is sometimes referred to in American courts, "common law." This is law created by a court for the purpose of deciding a specific dispute. Case law is announced by a court in the written opinion in which it decides the dispute. Under the doctrine of stare decisis, discussed at length in chapter 2, a judicial decision is binding on future courts deciding similar cases. That is, later cases must be decided in a way that is consistent with earlier cases, which are known as precedents.

The other type is enacted law. This consists of laws adopted, usually by a legislature or other elected body, not to decide a single dispute but to create general rules of conduct. Enacted law governs all persons subject to the power of the government in all future situations in which the rule by its terms applies. Enacted law includes, for example, constitutions, statutes, treaties, executive orders, and administrative regulations. For the sake of brevity, the different forms of enacted law are often referred to collectively here as statutes.

Two differences between case law and enacted law are of particular importance to the process of legal reasoning. First, enacted law binds the

courts. Case law, however, may be changed by a court with sufficient justification.[1] Second, enacted law is cast in authoritative language; that is, the precise words of an enacted law rule are clear and fixed until such time as the enacting body modifies them. Case law, by contrast, often cannot be captured by a single authoritative and uncontroversial formulation. Rather, lawyers sometimes disagree among themselves concerning the law that was established by a particular case. The result of these differences is that the application of case law is considerably more flexible than the application of enacted law. As will be seen, a court frequently can manipulate the language of a rule from a case or even overrule the case entirely, whereas the language of enacted law is subject to judicial interpretation but cannot itself be manipulated or modified by the court. This means that the application of enacted law tends to involve principally the interpretation of the text of the statute, whereas the application of case law may involve subtle refinements of prior articulations of the law, the introduction of new qualifications or exceptions, or the outright rejection of a well-established rule of law.

As is discussed in this and later chapters, the method by which the lawyer identifies, analyzes, synthesizes, and applies both case law and enacted law depends upon which governmental entity creates the law. This chapter thus begins with a very brief introduction to the sources of American law, focusing on the role of each governmental entity in producing a particular type of law, with special emphasis on the judicial branch. Following that introduction, the discussion turns to its principal concern—the process of identifying potentially applicable rules of law.

## I. The Sources of American Law

Lawyers organize the law by subject matter. A very basic distinction is between public law and private law. Public law prescribes the rights, duties, and other legal relationships that exist among governmental entities or between the government and private persons. Private law prescribes the rights, duties, and other legal relationships that exist among private persons. In both of these definitions, the term *person* includes corporations and other entities that the law recognizes as having legal personality.

Examples of public law include constitutional law and criminal law. For example, when a crime is committed, the perpetrator is prosecuted by the

state, rather than by private individuals, because the duty imposed by criminal law is to the state.

Examples of private law include contracts and torts. The legal relationships created by these bodies of law exist between private persons. If a contract is breached, the party injured by the breach, rather than the state, sues the party who breached because the contractual duty is to the other party to the contract.

Lawyers also distinguish between substantive law and procedural law. Substantive law is the body of rules that creates rights, duties, and other legal relationships. Procedural law, although it technically does create various kinds of legal relationships, addresses the manner in which substantive law is enforced through the courts. The procedural rules applicable in criminal cases generally are different from those applicable in civil cases.

None of these distinctions is completely sharp. All of them oversimplify to some extent. For example, procedural law shapes substantive law. An ancient maxim of the law holds that "where there is no remedy, there is no right." To say that I have a certain right arguably is an insignificant statement unless I can enforce that right in the courts. Thus, a legal relationship created by substantive law has practical significance only to the extent that it can be enforced through procedural law. These distinctions must be qualified in other ways as well. For example, as will be seen in chapters 7 and 8, certain contract rules function much as tort rules, while certain tort rules seem to be based on contract principles.

Although these categories are useful tools for organizing large bodies of law, they are of limited importance for the topic of this book, the process of legal reasoning. Legal reasoning functions in much the same way, whether the law is public or private, substantive or procedural.

Some ways of classifying the law are important for the purposes of understanding the legal reasoning process. We turn to those now.

## *A. Enacted Law*

The supreme law in the American legal system is the United States Constitution, which sets down principles of law binding on all branches of the federal and state governments. The Constitution was drafted in 1787 by a convention in Philadelphia and was ratified by each of the states. The Constitution begins with the words "We, the People of the United States" and

purports to have been adopted directly by the people, who are regarded as the ultimate source of law in the United States.

The Constitution establishes three branches of the federal government: legislative, executive, and judicial. The legislative and executive branches produce enacted law and are discussed in this subsection. The judicial branch produces case law and will be discussed in the next subsection.

Each of the fifty states has a constitution that establishes a similar tripartite government. Each state has a legislature, an executive branch headed by a governor, and a judicial branch headed by an appellate court, usually called a supreme court. These state entities function similarly to their federal counterparts, but are bound by the state constitution as well as by the U.S. Constitution. For the sake of brevity, the discussion of the role of each branch in creating law will refer primarily to the federal government.

### 1. THE LEGISLATIVE PROCESS

The federal legislative branch is Congress, whose members are elected by the people and which is empowered by the Constitution to enact statutes governing various subjects of federal concern, such as interstate commerce and national defense. Congress consists of the Senate, in which every state is represented by two senators, and the House of Representatives, whose members represent districts of roughly equal population. The number of representatives from each state thus is proportionate to its population. A senator serves for six years, while a representative serves for two. Both can be reelected an indefinite number of times.

As long as a congressional statute is consistent with the Constitution, that statute binds all persons subject to the laws of the United States. Further, under the doctrine of the separation of powers, the legislative branch is the lawmaking branch, and thus the executive and judicial branches are obligated to apply and enforce the statutes enacted by Congress.

The enactment of legislation begins when a senator or a representative introduces a bill, essentially a proposed legislative enactment. Often, a bill is introduced by several individuals, known as "sponsors" of the legislation. After a bill is proposed, it is assigned a number, printed, and usually referred to one of many committees for consideration. Each committee has jurisdiction over legislation relating to certain subjects. For example, legislation relating to international relations is referred to the Committee on Foreign

Relations in the Senate and to the Committee on Foreign Affairs in the House. Occasionally, a bill is referred to more than one committee.

If the bill is of sufficient importance, the committee is likely to hold hearings, in which interested persons, referred to as witnesses, are invited to testify about the legislation. Those not invited to testify in person may submit written comments. Hearings generally are transcribed, and any written comments are included with the transcription. Before taking action, the committee holds a markup session, in which the bill is likely to be amended to take into account suggestions or objections by committee members. The markup sessions are not transcribed, and thus the record is often silent with respect to the reasons that various changes in the language of the bill were made. The committee then votes on whether to report the bill to the full house. If the committee votes to report the bill, the committee staff will prepare a report explaining the legislation.

Next, the bill is debated and then voted upon by the full house. These debates are transcribed and published in the *Congressional Record*. Members who are not present for the debate are permitted to insert their comments into the record, although the record will identify these remarks as not having been spoken on the floor. In the course of the debate, members may propose amendments, which will be voted upon before the members vote upon the bill itself.

The process is similar in both the Senate and the House. Assuming that a bill passes both houses, it likely will have been amended so that the versions adopted are different. Accordingly, each house appoints members of a conference committee, which meets to draft a compromise version and a report explaining the compromise. Assuming that the compromise is passed by both houses without change, the legislation will be presented to the president.

The president may sign the bill, in which case it becomes law. Alternatively, he can veto the bill, in which case the bill will become law only if two-thirds of both houses vote to override the veto. The president also may do nothing, in which case the bill will become law without signature, unless Congress has adjourned. If Congress has adjourned, then the bill does not become law through presidential inaction. At the time they sign legislation, presidents sometimes offer comments, known as signing statements, on their interpretation of the legislation.

## 2. THE ADMINISTRATIVE PROCESS

The executive branch is headed by an elected president and is composed of various agencies responsible to the president, such as the Department of State, the Department of Justice, and the Department of Defense. The Constitution empowers the executive branch to administer and enforce the statutes enacted by Congress.

As the world has become more complex and the function of government more expansive, Congress has increasingly enacted statutes that establish only very general principles of law and has delegated to various agencies the authority to adopt more specific regulations consistent with the statutes. These administrative regulations define the terms of the statutes and describe how they apply to particular types of situations. The rationale is that Congress does not have the resources, such as the time and expertise, to write detailed legislation.

Among the agencies of the federal government are a number of so-called independent agencies, which are created by statute and whose members are appointed by the president. Examples include the Federal Communications Commission, the Securities and Exchange Commission, and the Federal Trade Commission. These agencies are considered independent because their members are generally appointed for a fixed term and, unlike the heads of the executive branch agencies, cannot be removed at the discretion of the president.

Federal regulations are typically adopted through a notice and comment process. A proposed regulation is published in the *Federal Register*, and all interested persons are provided a period of time within which to submit written comments. At the end of the period, the agency may adopt the regulation, although it must respond to the comments submitted. Federal regulations may be voided by a court if they are contrary to legislation or if they are "arbitrary and capricious."

Administrative agencies often have the authority not only to issue administrative regulations but also to enforce those regulations through procedures that resemble the judicial process and, like judicial proceedings, result in case law.[2] The results of these proceedings are also subject to judicial review. Courts, however, generally hold that they will defer to the interpretation of

a statute by the agency responsible for administering the statute, on the ground of the agency's greater expertise.

### *B. Case Law*

The federal judicial branch consists of the federal courts. The judges of the federal courts are appointed by the president, subject to the advice and consent of the Senate. To ensure their independence from the other branches, federal judges are appointed for life. State court judges in some cases are appointed by the governor and in other cases are elected.

The courts resolve disputes concerning the application of law to particular factual situations. In many instances, the law to be applied is enacted law. Courts, however, also have the authority to create law, known as common law, to decide disputes.

Under the English legal system, on which the American system is based, courts were empowered to create rules of law in order to decide the disputes brought before them. For example, originally, the law governing contracts and torts was not enacted by statute but was created by the courts. The law was called common law because it was common to the entire realm and was distinguished from local law.

Following the American Revolution, the individual states incorporated English common law into state law, either by a provision in the state constitution, by a statute known as a reception statute, or by judicial declaration. State courts deciding disputes thus apply the common law as well as statutory law. Under the doctrine of separation of powers, mentioned previously, a state legislature has the power to modify the common law of that state at any time. State courts may also modify the common law of their state. Thus, the common law continues to evolve, and its substance varies from state to state.

Congress did not enact the equivalent of a federal reception statute. It did, however, pass the Rules Decision Act, which provides that federal courts shall apply *state* law, except where the Constitution, treaties, or federal statutes otherwise require.[3] Moreover, the Supreme Court held in 1938 in the famous case of *Erie R.R. Co. v. Tompkins* that the federal courts do not have the constitutional authority to create a general federal common law.[4]

As a result of the Rules Decision Act and the *Erie* decision, there is no general federal common law, although federal courts do create federal common

law in two situations. First, federal courts create federal common law on a few subjects, such as foreign affairs, which are the responsibility of the federal government under the Constitution. Second, federal courts create what is sometimes called "interstitial common law," which is a body of judicial decisions interpreting and applying federal statutes.

Federal courts also create common law rules in cases where they are applying state law. In such instances, however, they are creating state common law, not federal common law. When a federal court does apply state law, it is expected to apply it in the same way that a state court would.

Because so much of the legal reasoning process entails a careful analysis of judicial decisions, a somewhat detailed description of the operation of the judicial branch is necessary. To avoid needless complexity, the focus here is on the federal court system. State courts generally operate in the same way, although state courts may be named differently than federal courts.

## 1. THE DISTRICT COURT

### a. Bringing a Dispute Before the Court

The purpose of a judicial decision is to resolve legal disputes. Disputes are initially brought before the trial courts, which in the federal system are in most cases known as district courts. The courts in which claims are first made are generally described as courts of "original jurisdiction" or courts of "first instance."

In a civil case, a dispute is initiated by the plaintiff by the filing of a complaint against the defendant.[5] Before filing a complaint, the plaintiff must ascertain in which court to file the complaint. The complaint may be filed only in a court that meets three criteria. First, the court must have subject-matter jurisdiction, that is, the court must have been authorized to hear that type of claim.[6] The federal district courts, for example, are authorized to hear principally two types of claims: those arising under federal law and those involving disputes between citizens of different states. Second, the court must have personal jurisdiction over the defendant. In very general terms, this means that the defendant must have some kind of contact with the territory in which the court sits.[7] Third, venue must be proper in the district where the court sits. The rules of venue are adopted by court systems to ensure that cases are tried in a geographically appropriate location, if one

exists. For example, if a litigation involves land, the venue rules typically require that the case be tried in the district where the land is situated.

The complaint alleges facts that the plaintiff believes to be true and that the plaintiff believes entitle her to some remedy from the court, usually either an order that the defendant pay compensation to the plaintiff, that the defendant take some action, or that the defendant refrain from taking some action. For example, the plaintiff may allege that the defendant breached a contract with the plaintiff. The plaintiff may demand compensation or may demand an order that the defendant be required to perform the contract as promised. A copy of the complaint must be delivered to (in legal terminology, "served upon") the defendant by the plaintiff.

The defendant responds by motion or by filing an answer.[8] The defendant generally responds by motion if the plaintiff has chosen the wrong court, in which case the defendant files a motion to dismiss for lack of jurisdiction or improper venue. The defendant also may respond by motion if the defendant believes that the plaintiff has no legal claim, even assuming that all of the plaintiff's factual allegations are true. In that situation, the defendant files a motion for failure to state a claim upon which relief can be granted.

Assuming that the defendant does not file a motion or that the motion is denied by the court, the defendant must file an answer. The answer must respond to each allegation in the complaint in one of three ways: admit the allegation, deny the allegation, or state that the defendant has insufficient information to admit or deny the allegation. The answer also includes affirmative defenses, that is, defenses based on some fact other than a denial of the plaintiff's allegations. For example, if the plaintiff is alleging a breach of contract, the defendant may assert as an affirmative defense that the contract is void because it was induced by fraud. The defendant may believe that the plaintiff is liable to him and, if so, may include with his answer one or more counterclaims against the plaintiff. If the defendant does file counterclaims against the plaintiff, the plaintiff must file with the court a reply, essentially the plaintiff's answer to the counterclaims.

Of course, the plaintiff may have sued more than one defendant. Perhaps the plaintiff's contract was with multiple parties and the plaintiff believes that all of them breached the contract. If so, these defendants may have claims against each other, known as cross-claims. These cross-claims similarly may

be included in the answer and, if so, require a reply from the other defendants. In some cases, other parties may be added to the litigation, although the rules governing which additional persons and which additional claims may be included in a single case are too complex for summary here.

The various documents stating or answering claims are known as pleadings. The purpose of the pleadings essentially is to give each party notice of the allegations by the other party. The pleadings are supposed to define the dispute. In reality, they do not always serve that function very well. Plaintiffs often allege facts that they will never seriously endeavor to prove but are intended to cast the defendant in the worst-possible light. Defendants generally admit as little as possible.

Once the pleadings have been filed, the parties proceed to a phase of litigation known as discovery. In discovery, each party obtains information about the claims from the other party. Discovery takes several forms. A party may send to another party interrogatories, that is, written questions that the other party must answer. For example, an interrogatory by the defendant may ask the plaintiff to state the facts that the plaintiff believes prove that the defendant breached the contract. A party may send to another party a request for admissions, that is, a request that the other party admit some fact for purposes of the litigation. For example, the plaintiff may ask the defendant to admit that the two parties entered into a contract. A party may send to another party a request for production of documents or things. For example, the defendant may request that the plaintiff send the defendant a copy of the contract that the defendant is alleged to have breached or a copy of all correspondence between the parties concerning the contract. A party may take the deposition of a witness (who may be one of the parties). A deposition is a proceeding that occurs outside of court in which the lawyers for the parties question a witness under oath before a court reporter, who transcribes the questions and answers. Usually, the lawyer for each party takes the deposition of important witnesses who may be likely to testify in court on behalf of the opposing party.

Discovery serves two purposes. First, it informs each party about the facts in possession of the other party and about the arguments being made by the other party and thereby defines the dispute more precisely than did the pleadings. That is, during discovery each lawyer finds out what the other party is probably going to argue at trial. This allows each party to evaluate

the strength of the case for each side, which enables each party to evaluate whether a settlement offer should be made or accepted. Although the vast majority of cases are settled, if no settlement does occur, the information also assists each party in preparing its own case for trial. A second purpose of discovery is to prevent a party from changing its arguments at trial. In other words, in evaluating the strength of the evidence in support of each party's claims, the lawyer can expect that for the most part the evidence at trial will be the same as that adduced during discovery. For example, all of the key documents will have been exchanged between the parties, and each party will likely have admitted that the documents are authentic. Further, all of the key witnesses will have been deposed. If they testify at trial differently than during the deposition, any lawyer can draw attention to the fact that the witness testified differently under oath prior to the trial and thereby damage or destroy the credibility of the witness.

The degree to which discovery eliminates the element of surprise from a trial should not be overstated. For example, witnesses often provide testimony that is different in some ways from their testimony at the deposition. Their memory may have changed, perhaps because they thought about the matter more after the deposition, or the question asked at trial may be worded differently than the one asked at the deposition, causing the witness to answer differently.

Assuming that the dispute is not settled, it will be decided either upon motion of a party or by trial. Before proceeding to a discussion of how disputes are decided, it is necessary to identify more precisely the kinds of questions that must be resolved in order to decide a dispute.

Resolving a dispute requires the court to decide three things: first, what the facts were that gave rise to the dispute; second, what laws govern those facts; and third, how the law applies to the facts. By applying the law to the facts, the court determines the rights and duties that exist between the parties under the law and thereby resolves the dispute.

The parties to a dispute usually have a considerable number of areas of agreement. They almost always agree on many of the facts underlying the dispute and often agree on much or all of the law. Frequently, the core of the dispute concerns how the law applies to the facts.

Anything on which the parties do not agree, assuming it is relevant to resolving the dispute, is put at issue. Thus, in legal reasoning, an issue is simply

a question to be decided. The court resolves a dispute by identifying the issues and then deciding them.

### b. Identifying Issues

As has been seen, questions, or issues, that may come before a court are of three types: issues of fact, issues of law, and issues requiring the application of law to fact.

Issues of fact all pose essentially the same basic question: what is the situation to which the law must be applied? In other words, what events have occurred to create the dispute?

Issues of law also pose essentially one basic question: what are the rules of law governing this dispute?

Issues requiring the application of law to fact similarly pose one general question: what rights or duties exist between the parties under the governing law in this situation? These issues are sometimes called mixed questions of law and fact.

A single dispute may present all three types of issues or any combination of them. For example, assume that a man sues a physician claiming that she was negligent in failing to administer a particular diagnostic test to him and that, as a result, he sustained injuries three years later that would have been preventable had his disease been diagnosed earlier.

The physician may put at issue some of the plaintiff's factual allegations. She may raise, for example, such issues as whether the diagnostic test would have actually revealed that the patient was suffering from the disease and whether the disease would have been less injurious had it been discovered earlier.

The parties may also disagree on the applicable law. For example, the physician may raise as an issue of law whether the statute of limitations for negligence claims against a medical practitioner requires the claim to be filed within two years of the time when the negligence *occurred* or within two years of the time when the negligence was *discovered.* If the law requires the claim to be filed within two years of the time the negligence occurred, then the patient would have no right to compensation from the physician.

In addition, the parties may disagree about the application of the law to the facts. For example, the parties may present to the court as a mixed issue

of law and fact the question whether the physician's failure to administer the test constituted negligence. This is a mixed question of law and fact because it requires the court to apply the legal definition of negligence to the facts to determine whether the physician's conduct constituted negligence. If the physician was not negligent, then the patient has no right to compensation.

### c. Deciding Issues

Determining which category an issue falls into is critical because it determines who decides the issue at trial and the extent to which the issue can be reviewed on appeal. This subsection presents a discussion of how each type of issue is decided by the district court. The next subsection sets forth how each type of issue is reviewed on appeal.

Issues of fact can be resolved only by a trial. Thus, if there are relevant issues of fact, the dispute will lead to a trial in the district court.

Trials are of two types: bench trials and jury trials. Either party may demand a jury trial if the Constitution or a statute creates a right to a jury trial in the type of dispute that is in litigation. If there is no right to a jury trial, then the dispute will be decided in a bench trial, that is, a trial in which no jury sits and all issues are decided by a judge.

In either case, the parties begin with an opening statement, explaining their respective versions of the facts. The plaintiff offers its opening statement first. After opening statements, the plaintiff calls each of its witnesses to testify. The witness swears to tell the truth and is questioned by the plaintiff's counsel, a process called direct examination. Following direct examination, the defendant's counsel may question the witness, a process called cross-examination. After cross-examination, the plaintiff's counsel may question the witness, but only on matters addressed in cross-examination, a process known as redirect examination. After redirect examination, defense counsel is permitted a re-cross-examination.

After the plaintiff has called all of its witnesses, the defendant may call its witnesses. Sometimes the defendant defers making its opening statement until this point in the trial. The questioning proceeds as before, although now it is the defendant's counsel who engages in direct examination and the plaintiff's counsel who engages in cross-examination. Following the last of the defendant's witnesses, the plaintiff is entitled to call rebuttal witnesses.

Once all the witnesses have been heard, the parties make closing statements. Because the plaintiff has the burden of proof, the plaintiff generally is heard last.

In a bench trial, the judge decides all the issues. That is, the judge determines what law applies to the dispute, resolves any factual questions necessary to decide the dispute, and applies the law to the facts. The court then records its decision by entering judgment, which generally entails signing a formal document. The judgment is accompanied by a written statement of the court's findings of facts and conclusions of law.

In a jury trial, the judge decides any issues of law and presides over the trial. After the parties have presented all the evidence and made their closing statements, the judge instructs the jury on the law applicable to the dispute. The jury then decides all issues of fact and applies the law to the facts. At the conclusion of its deliberations, the jury announces its decision, known as a verdict.

A jury trial, of course, differs from a bench trial in that the jury must be selected. The jury is selected from a larger group of persons known collectively as the venire. The attorneys for the parties are permitted to question the members of the venire, known as veniremen, in order to ascertain possible grounds of bias, a process known as voir dire. For example, if a case involves someone who slipped on the wet floor of a department store, counsel may ask the veniremen if they have ever slipped on a wet floor in a business. Once the questioning ends, each attorney is permitted to challenge veniremen in either of two ways. First, each attorney is permitted to challenge a certain number of veniremen without any explanation. These are called peremptory challenges. If an attorney makes a peremptory challenge to a venireman, the latter will be dismissed from the venire. Second, each attorney is permitted to challenge additional veniremen for cause, such as the fact that a venireman is related to a party and therefore may be biased. The judge decides whether to grant challenges for cause. Attorneys uses peremptory challenges to eliminate from the venire persons who may be predisposed against their client's case, although the attorney cannot prove bias. For example, an attorney representing an employee in a litigation against a company's management may try to eliminate those with managerial experience from the jury, believing that managers will tend to favor management

in a dispute. Once the challenges have been exhausted, the remaining veniremen constitute the jury.

Occasionally, it appears during a jury trial that the evidence presented is so one-sided that a reasonable jury could reach only one result. In such a case, upon a motion of a party, the judge may simply rule in favor of that party without sending the dispute to the jury to decide, a process known as entering judgment as a matter of law or entering a directed verdict.

Assuming that the judge does decide to send the case to the jury for resolution and the jury reaches a verdict, the judge must then determine whether to enter judgment in accordance with the verdict. Normally, the judge does enter judgment in accordance with the verdict. In some cases, however, if the judge believes the verdict is contrary to the clear weight of the evidence, the judge can order a new trial, which requires impaneling a second jury and retrying the case. Alternatively, if the judge believes that in light of the evidence no reasonable jury could have reached the verdict that it reached in favor of one of the parties, then the judge can enter judgment as a matter of law in favor of the other party, a process sometimes referred to as entering judgment notwithstanding the verdict.

If there are no relevant issues of fact, then there is no need for either a bench or a jury trial, and the case will be decided by the judge upon the motion of a party. A number of different motions may result in a resolution of the litigation without a trial. For example, a defendant may dispute some of the plaintiff's factual allegations but may take the position that the factual disputes need not be resolved because, even assuming that the plaintiff's allegations are true, the plaintiff must still lose. In that situation, as noted above, the defendant may file a motion to dismiss the complaint for failure to state a claim upon which relief can be granted.

Alternatively, if either party believes that the evidence allows the factual issue to be decided only one way, that party may argue to the court that there are no genuine issues of fact and that the court should decide the legal issues and render a judgment, a process known as entering summary judgment. A genuine issue of fact exists if a reasonable jury could decide the issue in favor of either party. Whether there are issues of fact, of course, may be a matter on which the parties do not agree. If both parties agree that no genuine issue of fact exists, both may move for summary judgment.

Motions made prior to trial are made in writing. The party making the motion, known as the moving party, submits a document, the motion, requesting that the court take some action. This normally is accompanied by a memorandum explaining why the court should grant the motion. In some cases, evidentiary material is attached as well. The opposing party then submits a memorandum arguing against the motion. In some instances, the judge may ask both parties to appear before the court for an oral argument, in which the lawyers explain their clients' positions and provide the judge with an opportunity to question them about their arguments. Motions made during trial sometimes are in writing, but sometimes are made orally in court.

### d. Distinguishing Between Issues of Law and Fact

The prior discussion implies that the distinctions among the three types of issues are relatively sharp. In fact, however, at least two situations exist in which the theoretical distinctions among the types of issues seem to disintegrate.

The explanation for the disintegration begins with the fact that the prototypical trial in the American legal system is the jury trial. In a jury trial, the judge decides questions of law, and the jury decides questions of fact and questions requiring the application of law to fact. Because the judge's function in a jury trial traditionally is to decide issues of law, lawyers have become accustomed to regarding any issue decided by a judge as an issue of law.

In any jury trial, however, at least two situations may arise in which a judge decides questions that, strictly speaking, are not questions of law. In both of these situations, the theoretical distinctions among the various types of issues seem to dissolve.

The first situation arises where a reasonable jury could decide an issue in only one way. As noted above, in such a situation, the judge may grant a motion for summary judgment or for judgment as a matter of law. In other words, if the facts cannot reasonably be disputed, the judge may take the factual issues away from the jury and decide them.

When the judge takes an issue away from the jury and decides it, lawyers often say that the judge decided the issue "as a matter of law" (even if the formal name of the motion was, for example, a motion to dismiss for failure to state a claim upon which relief can be granted or a motion for summary

judgment). The usage may be confusing because what the judge may have actually decided was either a factual question or a mixed question of law and fact. Saying that the issue was decided as a matter of law is merely another way of saying that a judge, rather than a jury, decided the issue. In effect, questions of fact or mixed questions of law and fact can be converted nominally to questions of law if the evidence is sufficiently one-sided.

The second situation in which a question that might otherwise seem to be a question of fact or a mixed question of law and fact is treated as a question of law occurs when the law states that the question shall be decided by a judge rather than a jury. For example, the determination of whether a term in a contract is ambiguous is sometimes said to be a question of law. Although as a theoretical matter one could argue that this determination falls within the definition of a question of fact or a mixed question of law and fact, some courts believe that judges rather than jurors should determine whether a contractual term is ambiguous and thus have declared that to be a question of law. Again, what that really means is simply that the question is decided by a judge rather than a jury.

The root of the confusion is that courts have often been ambivalent about giving juries too much discretion. In situations where the evidence on an issue is one-sided or where the issue seems especially appropriate for determination by a judge, courts have taken the issue away from the jury. Yet because of the tradition that judges decide questions of law and juries decide the remaining questions, the only way to accomplish the task of taking an issue away from a jury while seeming to remain consistent with the tradition was to declare certain issues to be questions of law.

## 2. THE COURT OF APPEALS

After a district court has entered judgment (based either on a motion or on a trial), a party that has lost on one or more issues may appeal the decision of the district court to an appellate court. In the federal system, the district courts are organized into regional groups called circuits. Each circuit has a court of appeals that decides appeals from the decisions of the district courts in that circuit.

Decisions in the court of appeals are based on the record produced by the trial court. That is, appellate courts do not conduct trials, hear additional

witnesses, or gather any other additional evidence. Their function is to review the decision of the district court on the basis of the evidence before the trial court.

The appellate process thus is much simpler than the trial process. The party who believes that the trial court committed some error is the appellant. The appellant submits a brief arguing that particular decisions made in the trial court were erroneous and requesting that the judgment in the trial court therefore be reversed. The opposing party, known as the appellee, submits a brief arguing in support of the trial court's decision and requesting that the decision be affirmed. The appellant concludes the written proceedings by submitting a reply brief responding to the brief of the appellee. The court may then schedule the case for oral argument. Oral argument is usually brief, lasting perhaps an hour. Counsel for each party is allowed half the allotted time to summarize the arguments in its brief, during which time the judges may question counsel, frequently interrupting counsel in midsentence to ask a question. When the oral argument ends, the case is submitted to the court for decision.

The court of appeals must determine as an initial matter which standard of review to use in deciding the appeal. The standard of review establishes the extent to which the court of appeals will defer to the decision of the trial court. At one extreme, the court of appeals may review the trial court's decision on the appealed issue *de novo*, a Latin phrase that can be translated as "anew." A de novo review is one in which the court of appeals gives no deference at all to the trial court's decision and decides the issue entirely in accordance with its own interpretation of the law or the facts. At the other extreme, the court of appeals may defer completely to the trial court, holding that the trial court's decision on the issue was not reviewable on appeal. Other standards of review fall between these extremes.

The standard of review depends upon the nature of the issue and whether the issue was decided by a judge or a jury. The court of appeals generally reviews de novo the district judge's determination of which law applies. If the court of appeals disagrees with the trial court's decision, it will reverse the judgment of the trial court.

The court of appeals' review of the district judge's factual findings, by contrast, is not de novo. Rather, the court of appeals defers to the district

judge on factual matters and thus will overturn the judge's findings of fact only if they are clearly erroneous. Jury verdicts are given even greater deference and are overturned on appeal only if they are not supported by substantial evidence.[9]

Other standards of review are applied in certain circumstances. For example, some decisions by a trial judge in the course of a trial are overturned by the appellate court only if considered an abuse of discretion.

### 3. THE SUPREME COURT

A party that loses with respect to one or more issues in the court of appeals may seek a review of the decision of the court of appeals in the United States Supreme Court by filing a petition for a writ of certiorari. The Supreme Court has the discretion to grant or deny the petition.[10] The vast majority of petitions are denied, in most cases without any reasons given. The number of petitions submitted is too great to permit the Court to explain why each was denied.

If the Supreme Court denies the petition, the decision of the court of appeals becomes final. If the Supreme Court grants the petition, it will then review the court of appeals' decisions on questions of law de novo, but will give the district court's factual findings or the jury's verdict the same deference that the court of appeals did.

The proceedings before the Supreme Court are very similar to those before the court of appeals. The party seeking review, the petitioner, submits a brief, as does the opposing party, the respondent. After the submission of the petitioner's reply, the case is scheduled for oral argument.

Following oral argument, the justices meet to discuss the case. They will vote on whether to affirm or reverse, with a majority required to do either. Once the disposition of the case has been decided, one justice is assigned to write the opinion explaining the result. If the chief justice is in the majority, then he assigns the opinion. If the chief justice is not in the majority, then the senior justice in the majority assigns the opinion. After the opinion is drafted, it is circulated to the other justices. Various changes may be suggested. In some cases, a justice may refuse to join, that is, support, the opinion unless certain changes are made. When five or more of the nine justices support the opinion, it becomes the opinion of the Court and is made public.

Individual justices, if they wish, may write separate opinions explaining their view of the case.

## II. Identifying Applicable Law

In this section, the process of identifying the law that potentially applies to a particular set of facts is discussed. As the first section suggests, the lawyer confronts an array of case law and enacted law that could potentially apply to a given situation. The process of determining which law applies is really a process of winnowing out the law that could not plausibly apply.

A law may not apply to a given situation for any of three reasons: the governmental entity that adopted the law does not have the power to prescribe law applicable to the specific persons or transactions involved in the situation, the law by its terms does not apply to the situation, or although the governmental entity that adopted the law may have power as a general matter, another entity of greater power has enacted a contrary law that prevails in this situation. By applying these three criteria, the lawyer can eliminate the inapplicable law. The next three subsections examine each of these three criteria in turn.

### *A. Identifying the Government with Power: An Introduction to Choice of Law Theory*

The first reason that a law may not apply to a situation is that the government that adopted the law does not have power over the persons or transaction involved in the situation. All governments are governments of limited powers; that is, no government has the power to govern all persons and transactions everywhere in the world. Thus, for example, the United States generally has no power to regulate activity in the Netherlands that does not affect persons or property in the United States.

This means that some laws may appear by their terms to be applicable to a particular situation, but, in fact, do not apply. They do not apply because the government that adopted the laws does not have the power to regulate the persons or the transaction involved in the situation.

Accordingly, the lawyer's first inquiry in identifying the applicable law must be to determine which government's law applies. This determination

is made based on a body of legal rules known as the conflicts of law or choice of law rules.

Choice of law is a complex area of law that cannot possibly be reduced to a few sentences here. Choice of law analysis, however, is absolutely critical to finding the applicable law, and thus a brief overview is necessary.

Assuming that U.S. law applies, the choice of law analysis has two dimensions: vertical and horizontal.[11] Vertical choice of law rules determine whether federal law or state law, or both, applies. Assuming that at least some state law applies, horizontal choice of law rules determine *which* state's law applies. If only federal law applies, then horizontal choice of law analysis is unnecessary.

### 1. VERTICAL CHOICE OF LAW ANALYSIS

Federal law and state law are generally not mutually exclusive. In most cases, if federal and state law both address a situation, then both apply. An exception exists when federal and state law conflict, in which case federal law prevails.[12]

As it happens, the great majority of events in daily life are governed by state law. For example, family relations, the transfer of property, the formation of contracts, and the redress of personal injuries are all governed by state law. In some instances, federal law also applies. For example, certain business conduct constitutes fraud under state common law and also violates federal antiracketeering statutes. Occasionally, some aspect of a transaction may be governed solely by federal law.

Vertical choice of law analysis thus ultimately results in one of three determinations: federal law applies, state law applies, or both federal and state law apply. In other words, vertical choice of law analysis *may* winnow out all federal law, or all state law, but sometimes it eliminates neither.

### 2. HORIZONTAL CHOICE OF LAW ANALYSIS

Horizontal choice of law analysis generally results in a substantial winnowing out of applicable law. This occurs because, to the extent that state law applies, the applicable state law is usually the law of only one state.[13] The laws of different states, generally, are mutually exclusive, meaning that they are not applied simultaneously to the same transaction.

Fortunately, many transactions occur in a single state and involve residents of that state. Thus, the lawyer knows instinctively that, to the extent that state law applies, it is the law of that state that applies. Therefore, as a practical matter, legal reasoning often requires very little conscious horizontal choice of law analysis.

However, whenever a situation involves transactions affecting more than one state or involves residents of more than one state, the possibility always exists that the law of more than one state may be potentially applicable. Which state's law applies is ultimately determined in either of two ways: by agreement of the parties or by filing a lawsuit.

An agreement in advance between the parties is the simplest way to determine the law applicable to a situation. Two parties preparing to engage in a transaction often insert a provision in their contract specifying which state's law applies to the contract. These provisions, generally known as "choice of law clauses," will usually be enforced by the courts.

The other way to determine which state's law applies is to wait until a dispute arises and then file suit to resolve the dispute. Every jurisdiction has its own choice of law rules that tell the court which state's law to apply. Normally, a court applies its own procedural rules, but it may apply the substantive law of another state. The choice of law rules differ from state to state, and thus which law applies may depend entirely on where the suit is filed.[14]

In short, the lawyer may not know with any certainty which state's law will apply until the situation leads to litigation. Indeed, the lawyer deciding to file suit may choose to do so in the courts of a particular state solely because those courts will apply the law most advantageous to his client. Choosing a court for tactical reasons is a common practice known as "forum shopping."

When more than one state's law is potentially applicable, the lawyer's only recourse is to research all potentially applicable law. In the end, the lawyer could determine that, depending upon where suit is filed, the client may be subject to any of several different states' laws on a subject. It is in part to eliminate this kind of uncertainty that parties insert choice of law clauses into their contracts.

Choice of law analysis thus plays a major role in the winnowing process. It ideally results in the elimination from further consideration of all law except that of a single state and, perhaps, that of the federal government.

## *B. Identifying Law by Subject Matter: An Introduction to Rule Analysis*

Having narrowed the potentially applicable law to that of one or two sovereigns—one state, the federal government, or both—the lawyer must next winnow out those statutes or cases that, by their terms, do not apply to the subject matter of the situation under review. Lawyers do so by using the process of rule analysis. This section discusses precisely what that entails.

Each statute or case contains one or more rules of law. In the next chapter, the techniques to be used to identify the rules of law in a statute or case are discussed in some detail. For now, the reader should simply assume that the lawyer, upon reading each statute or case, is able to identify at least one rule of law in that statute or case. It is these rules of law that the lawyer must analyze to determine if the statute or case, by its terms, is potentially applicable to the situation.

### 1. THE NATURE OF RULES: FORM

In general, rules of law have the form "if X, then Y," meaning that if these facts occur, then this legal right or duty arises.

Rules of law thus have a factual predicate and a legal consequence. For example, a case may announce the rule that a physician performing medical services for a patient has a duty to exercise reasonable care to prevent injury to the patient.[15] In other words, if these facts (a physician-patient relationship and the rendering of a medical service) occur, then this consequence (duty to exercise reasonable care) will result. The physician's performance of a medical service for a patient is the factual predicate, and the duty to exercise reasonable care is the legal consequence.

Usually, the factual predicate requires some combination of facts. Each of these facts is referred to as an element. In the example above, the factual predicate has two elements: the existence of a physician-patient relationship and the rendering of a medical service. When facts constituting all of the elements occur, then the legal consequence exists. The legal consequence is generally the creation of some right or duty among certain persons.

Identifying rules of law applicable to a particular situation means identifying those rules of law with factual predicates that accurately describe the situation.[16] If one or more elements of the rule is not present in the situation

under review, then the rule will not apply. For example, the rule above would not apply to a physician assisting his patient with the latter's income tax return because the second element, the rendering of a medical service, is absent.

As this suggests, the only way to determine whether a rule is applicable to a situation is actually to endeavor to apply it. Applying a rule to a situation is a potentially complex process that is described in some detail in chapter 5. Suffice it to say here that during the initial stage of identifying potentially applicable law, the lawyer looks for all laws that plausibly, or arguably, could apply to the situation.

## 2. THE NATURE OF RULES: SUBSTANCE

Rules are presumed by the American legal system not to be mere arbitrary pronouncements but to be based on some underlying policy. That is, rules create a right or duty not for its own sake but in order to further a public policy.

When the rule is a statute, the underlying policy is generally that which the legislature intended to further when it enacted the statute. When the rule is a case law rule, the underlying policy is generally that which the court articulated as the justification for the rule at the time the rule was announced. In some instances, courts may find policy justifications for a rule in prior cases not necessarily involving that rule. Case law rules may also be based on the policies underlying legislative enactments, even in cases that do not involve a statute. For example, a court may adopt a rule favorable to consumers. In support, the court may cite another case announcing a different rule in which the court articulated a policy of consumer protection. Or the court may cite in support of the rule recent legislation that may not be applicable to the case under consideration but nevertheless reflects a public policy of protecting the consumer against the superior bargaining power of merchants and manufacturers.

Rules, moreover, are usually not based on a single policy but represent compromises among sets of opposing policies. Typically, one set of policies favors creation of a broad right or duty, whereas an opposing set of policies favors restricting or eliminating the right or duty.

If the policies favoring the right or duty were to prevail all of the time, the right or duty would become absolute—with no exceptions or limitations.

If the policies opposing the right or duty were to prevail all of the time, the right or duty would disappear.

In fact, however, both sets of policies are important, so neither can be permitted to prevail in every situation. Rather, the policies supporting the right or duty will prevail in some situations, whereas the opposing policies will prevail in others.

The elements of the rule define exactly the situation in which the policies favoring the right or duty prevail. When the elements are satisfied, the right or duty exists; when they are not satisfied, the right or duty does not exist.

The policies underlying the rule are of great importance to the process of legal reasoning. If it would not further the underlying policies, then applying the rule to a particular situation would be undesirable, and a court sometimes will decide not to apply it, especially if the rule is based on case law rather than enacted law. Further, at least where case law rules are concerned, even though the factual predicate of the rule may seem clearly not to apply, if the policy behind the rules would be furthered by finding the rule to be applicable, the court sometimes will nevertheless apply the case law rule by analogy, synthesize a new case law rule to govern the situation, or modify the rule so that it becomes applicable. Thus, as will be discussed in greater detail in subsequent chapters, the underlying policies provide much assistance in identifying those situations in which the rule will be applied.

### 3. THE PROBLEM OF GENERALITY

The elements of a rule are typically phrased in very general terms. This is especially true with respect to statutes and other forms of enacted law. Thus, for example, a rule does not usually refer to something as specific as a red Chevrolet, or even an automobile, but refers more broadly to a motor vehicle. The elements, in other words, describe the facts in broad, generic terms.

The elements are phrased in general terms for reasons of both fairness and efficiency. If rules were written narrowly, legislatures and courts would need to adopt far more rules, which would be inefficient and would carry the risk that similar situations might not be treated the same way, which would be unfair.

Imagine, for example, that instead of enacting a single rule for the speed limit, the state enacted a different rule for every type of automobile. Such detail would be enormously time-consuming for the legislature to write and

for the lawyer to research. Further, such a detailed code would create the possibility that some cars might be overlooked or that certain cars might be given preferential treatment. Our intuitive notions of fairness tell us that there should be equal justice under the law and that like cases should be treated in a like manner. A few rules of great generality are more efficient to write and research and are usually thought to reduce the prospect of unequal treatment, since all persons are subject to the same rule.

Yet this generality also impedes the legal reasoning process. The general language is often so vague that it simply leaves unclear whether a particular set of events satisfies the elements of the rule. In the case of the rule described above, for example, it may be unclear whether someone who casually asks a physician for advice at a cocktail party has established a physician-patient relationship.

Thus, in identifying rules of law, the lawyer must be alert to any rule with a factual predicate that might *plausibly* be said to describe the specific facts under review. Further, as will be seen in chapter 5, case law rules can often be phrased at different levels of generality, and thus, in examining those rules, the lawyer must be alert to whether they can plausibly be said to apply if rephrased in more general terms.

### *C. Identifying Void Rules: An Introduction to Constitutionalism*

Once legal research has identified all the statutes and cases that are plausibly applicable to the situation under review, the winnowing process is usually complete. It occasionally happens, however, that a statute enacted or a case decided by one governmental entity is contradicted in some way by a law created by another entity of superior authority, with the result that the statute or case must be disregarded. Most often, this occurs when a law is unconstitutional, that is, contrary to the Constitution.

A few basic principles of constitutional law determine the hierarchy of authority among the different sources of law. In this last section, some of the most important of these principles are summarized.

First, as a fundamental principle of the American legal system, the Constitution prevails over all other law, federal or state. The Supremacy Clause of the Constitution, set forth in Article VI, explicitly states that the Constitution and federal laws made pursuant to the Constitution are the supreme

law of the land. Thus, if one of the applicable rules is a constitutional provision, then it voids any contrary statute or case, whether federal or state, at least to the extent of the conflict. A state constitution prevails over all other state law.

Second, as just noted, the Supremacy Clause also provides that federal law made pursuant to the Constitution is the supreme law of the land. Thus, under a doctrine of constitutional law known as the preemption doctrine, federal law invalidates *all* state law on a subject where Congress has either explicitly or implicitly prohibited state regulation of the subject. Even when Congress has not explicitly or implicitly prohibited all state regulation of a particular subject, a specific state law is void if it directly conflicts with a federal law. Of course, there are countless situations in which federal and state law on the same subject are not in conflict, and thus both are applicable.

Third, under the doctrine of separation of powers, the courts are required to apply the law enacted by the legislature. Thus, a statute prevails over contrary case law.[17] The power of courts to interpret statutes allows them to apply statutes in ways not intended by the legislature. As a result, a legislature occasionally enacts a statute specifically intended to overturn a prior judicial decision that it believes applied another statute incorrectly.

Fourth, under the doctrine of judicial review, the courts have the power to determine the constitutionality of all laws, including statutes. Thus, a judicial decision holding a statute unconstitutional renders the statute void, and the court will refuse to apply it.

Fifth, because administrative agencies are created by statute, their regulations are subordinate to statutes enacted by the same or a superior sovereign.[18] Thus, statutes generally prevail over contrary administrative regulations.

2

# ANALYZING THE LAW

The second step in legal reasoning is to analyze the plausibly applicable statutes and cases to identify both the rules of law and the underlying policies contained therein. In this chapter, the techniques for analyzing statutes and cases are discussed. Enacted law, described generically here as statutory law, is discussed separately from case law.

## I. Analyzing Statutes

The analysis of a statute for purposes of identifying the rule of law is simple because the statute itself is the rule of law. Thus, the process of identifying an applicable statute and the process of extracting the rule of law are the same.

Identifying the policies underlying the statute can be quite difficult, however. The policies underlying a statute are those that the legislature sought to promote when it enacted the law.

Lawyers use a variety of approaches to identify the policies underlying a statute, and they often disagree concerning which of these approaches is appropriate. In other words, statutory interpretation is an aspect of legal

reasoning that can be controversial even among mainstream lawyers. All of the approaches, however, are sometimes relied upon by the courts.

One approach is to examine the statute itself. Occasionally, a legislature enacting a law, especially a comprehensive reform measure, includes a section that states explicitly at least some of the policies underlying the legislation. This section of the legislation often is described as "legislative findings." All lawyers agree that it is appropriate to use these findings to identify the policies underlying a statute.

Another approach is to examine the history of the statute. Many courts have said that the best indication of legislative policy is the language of the statute itself, and, therefore, if the meaning of the language is clear on its face, a court should not delve into its history. In this view, only when there is some doubt about the meaning of the statute should a court look beyond the statutory language.[1] Some lawyers argue that one should never consider more than the language of the statute because only the statute itself is the law, and, as discussed below, the history may be unreliable.

Courts nevertheless often do examine legislative history. They may choose to justify reference to legislative history by declaring the statutory meaning to be unclear, or they may simply cite the history as confirming the meaning that was evident on the fact of the statute.

As discussed in chapter 1, this history may include records of various committee hearings, the reports issued by the committees when they sent the bill to the full body, the debate on the floor of each body of the legislature prior to passage, and conference reports and statements made by the president or governor at the time the bill was signed or vetoed. This research, however, may also be inconclusive because, for reasons discussed in chapter 6, legislative history is often incomplete or misleading or allows more than one interpretation. In any event, suffice it to say that rarely would a competent lawyer deliberately omit an argument based on legislative history that was favorable to her client.

Researching the history of a statute may involve inquiry into events beyond the formal process by which the statute was enacted, such as investigating the social conditions that prompted its passage. For example, a lawyer may examine the circumstances prior to enactment of the statute; try to determine the nature of the problem, sometimes referred to as the "mischief," that led to its enactment; and argue that the policy of the statute was to eliminate or diminish the mischief.

Identification of the mischief, however, does not necessarily reveal with sufficient clarity the policy underlying the statute. As explained in chapter 1, lawyers prefer to draft rules using general language, and thus the legislature very likely used language in the factual predicate that covered more than the exact situation that prompted the legislative enactment. An anti-corruption law enacted after revelations that a senator had accepted very large honoraria from special interest groups might not simply prohibit honoraria but is likely to be much broader, prohibiting, for example, the giving of "any thing of value." Because the language is broader than the precise situation that the legislature had in mind, the lawyer must still decide what the legislature supposedly "intended" with respect to all of the situations that are arguably covered by the language but do not constitute the precise mischief consciously addressed. Does the statute, for example, prohibit giving a senator information that has no commercial value but that the senator may nevertheless find useful and thus valuable?

The indeterminacy of the investigation into the history of a statute provides the lawyer with the opportunity for advocacy on behalf of a client. The lawyer may argue successfully that a particular policy underlies a statute, even when no evidence exists that that policy was consciously in the minds of all those involved in the enactment of the statute or when evidence exists that some involved in the enactment opposed the policy.

The lawyer's examination of the policies underlying a statute may also extend beyond the historical events that originally prompted its enactment to include an inquiry into contemporary notions of good public policy. Interpreting a statute according to current public policy, as opposed to the policy of the legislature that originally enacted the law, is controversial. Considering policies not embraced by the legislature may seem undemocratic. Further, as explained in chapter 1, the courts in theory are authorized only to apply the law enacted by the legislature, not to modify the law by using it to further policies not contemplated by the legislature. Most courts would agree, however, that no statute should be interpreted in a way that would lead to an "absurd" result. This position can be reconciled with the view that the intent of the drafters should prevail by assuming that the legislature would never have intended an absurd result.

As long as the result is not absurd, however, most courts would insist that the apparent intent or purpose of the legislature be followed. Thus,

the lawyer's examination of current notions of public policy is usually very limited.

The choice between interpreting a statute by reference to its language alone and interpreting it by reference to extrinsic sources, such as the legislative history or current notions of public policy, is a fundamental tension that pervades the legal reasoning process. This tension will be further discussed in chapters 5 and 6.

## II. Analyzing Cases

### *A. The Components of a Case*

Analyzing case law is a much more complex undertaking than analyzing a statute. The discussion in this section covers the various components that may be found in a well-written judicial opinion, the significance of each, and how each should be analyzed. Because most published judicial opinions are appellate decisions, this discussion assumes that the case under analysis is an appellate decision.

#### 1. FACTS

A judicial opinion usually begins with a description of the facts. This is a narrative of the events that gave rise to the dispute submitted to the court for decision.

Many of the facts in the opinion are of meager significance but are there merely to provide a context for the facts that do matter. Without them, the rest would not make sense. On a first reading, however, a lawyer generally does not know which of the facts are significant. As will be seen, determining which facts are significant requires first identifying the rules of law and the underlying policies that govern the case.

#### 2. PROCEDURAL HISTORY

Next, the procedural history is summarized. This portion of the opinion sets forth a description of the events that occurred in the trial or lower appellate court during the course of the litigation, beginning with the filing of a complaint, which is the first step in a litigation.

Like the factual recitation, much of the procedural history is of minimal importance in itself but provides context. The procedural history generally

indicates one detail that is of fundamental importance: the precise nature of the decision in the lower court that has been appealed.

The nature of the decision from which the appeal is taken is critical because, as discussed in chapter 1, it determines the standard of review that the court of appeals applies to the trial court's decision. The standard of review, in turn, determines what the appellate court must decide and the effect that the appellate court's decision will have on future cases.

For example, if a physician is appealing a jury verdict that she was negligent in providing medical care, the appellate court reviews the verdict only to determine whether it was supported by substantial evidence. To affirm the judgment against the physician, the appellate court need not decide that the physician was negligent but only that there was substantial evidence to that effect, which is a much different determination. The appellate judges may believe that the physician in fact was not negligent. As long as there is substantial evidence that supports the verdict, however, the judgment will be affirmed.

Moreover, because the appellate court is not deciding whether the physician was negligent but only whether there was substantial evidence that she was, the appellate court's opinion upholding the jury's verdict against the physician cannot be cited by lawyers in future cases as deciding that such conduct by the physician *was* negligent. Rather, the appellate court's opinion can be cited only as establishing that such conduct *could be* negligent. The use of a prior decision is discussed further in chapter 5.

### 3. QUESTIONS PRESENTED

At the end of the procedural history, the opinion states the questions presented. These are simply the questions that the appellant has asked the court to decide. In other words, they are the issues on appeal.

Each question asks, in effect, whether some decision made in the trial or lower appellate court was erroneous, requiring reversal of the judgment. The entire rest of the opinion is devoted to deciding the questions presented.

### 4. RULES OF LAW

To decide the questions presented, the opinion begins by announcing rules of law. These are general principles of law that state that, under a particular set of circumstances, a certain right or duty exists.

The court announces these rules because it believes they govern the questions that it must decide. In effect, the rules establish the parties' rights and duties in this case as well as in all similar cases. Usually, most or all of the rules have been announced in prior cases, and the court cites the earlier cases from which each rule is taken.

The rules of law are of great importance. Much of the factual and procedural history is significant because it provides the context for some other part of the opinion, but the rules of law are important simply in themselves. Because they are thought to govern the reported case as well as similar cases, these rules may ultimately determine the results of the situation that the lawyer has been asked to review. The lawyer must carefully read and extract from the opinion each of the rules of law announced.

Identifying the rules of law can be difficult because they may not be stated in a clear, concise fashion. The elements may be scattered throughout a lengthy discussion, requiring the lawyer to construct the rules from a series of statements. The same rule may be stated more than once, in slightly different form, requiring the lawyer to choose the version that best explains the result reached.

As this suggests, extraction of the rule from a judicial opinion is not always a mechanical process. Two lawyers reading the same opinion may well disagree on the rule of the case. And because of the need at times to construct rules, the rule extracted by the lawyer may be phrased in the lawyer's own words rather than in the words of the court.

A case law rule thus differs from an enacted rule. Less importance is attached to the literal language of a case law rule simply because often no single authoritative version of the case law rule exists. The indeterminacy of the language of a case law rule, of course, provides the lawyer with the opportunity to articulate the rule in the form most favorable to the client's position.

### 5. APPLICATION OF LAW TO FACT

The next portion of the opinion applies the law to the facts. This is a discussion of how the court has decided whether each element of each rule was satisfied by the facts before it.

Recall from chapter 1 that the elements of a rule are typically phrased in very general terms. When writing an opinion, the court must decide whether

the specific facts of the dispute before it fall within the meaning of the broad, generic facts set forth in the rule. In some cases, the court finds the language of the rule of law so clear that it believes only one result is possible. For example, a court would likely hold that a red Chevrolet is a motor vehicle.

In other cases, the court may decide that the language of the rule is too general to dictate a single result and that the policy behind the rule must be examined. The court will attempt to decide which result would best further the policies underlying the particular rule.

For example, if the rule to be applied prohibits the use of a "motor vehicle" in a park, the court may have to decide whether a remote-controlled toy operated by a child falls within the definition of a motor vehicle.[2] The court may decide that the purposes underlying the rule are to promote the recreational use of the park and to ensure the safety of pedestrians. Because a remote-controlled toy presents relatively little danger to pedestrians, ensuring pedestrian safety probably does not require that the toy be considered a motor vehicle. Moreover, promoting the recreational use of the park would require that the toy *not* be considered a motor vehicle. Thus, the court would further the policies underlying the rule by deciding that the toy does not fall within the meaning of the term *motor vehicle*.

These discussions of policy are of considerable importance. They reveal the policies behind the rules, and, as will be shown in chapter 5, they provide a basis for deciding whether the elements of the rules are satisfied in future cases or even whether the rules should be changed.

Paradoxically, despite its importance, the policy discussion may be the portion of the opinion that is the least structured or methodical. The court may simply announce that public policy favors a particular result, without attempting to explain how the court knew such a policy existed.

Moreover, a judicial decision, rather than being based on a single policy, almost always reflects a balance between at least two competing policies, one of which supported creation of the right or duty and the other of which opposed it. In the example above, the motor vehicle rule was based on policies of promoting the recreational use of a park and protecting pedestrians. On the one hand, the policy of ensuring pedestrian safety, taken to extremes, would have required banning the toy, since a pedestrian could trip over it or be startled by it. On the other hand, promoting the recreational use of the park, as noted, required that the toy be allowed.

The court has to decide, under the circumstances of the case before it, how to resolve the conflict. Explanations of how such conflicts are resolved are very often brief and conclusory. The court may decide that the result is necessary to further a particular policy, ignoring competing policies altogether.

Courts are sometimes not explicit about the policies that underlie their decisions, and thus lawyers and judges in later cases must infer those policies—that is, they must in effect explain the basis for the decision after the fact. A creative lawyer litigating subsequent cases can attribute policy judgments to the court that plausibly explain the earlier decision and simultaneously support the client's position in the later case.

In any event, the completion of the analysis of how the court applied the law to the facts permits the lawyer to ascertain which were the dispositive facts in the opinion. The dispositive facts were those on which the court relied in deciding whether the elements of the rule were satisfied. Perhaps the court decided that the toy was a motor vehicle in part because it was self-propelled. The lawyer would infer from this that self-propulsion was a dispositive fact.

Or perhaps the court decided that the toy was not a motor vehicle because it could not carry a driver or passengers. The lawyer would infer that the inability to carry people was a dispositive fact. Although other details, such as the shape, color, or price of the toy may have been mentioned in the opinion, the court did not rely upon them in deciding whether the element of a motor vehicle was met, and thus they were not dispositive facts.

In identifying the dispositive facts, the lawyer must distinguish between necessary and sufficient facts. Necessary facts are those that *must* be present for the element to be satisfied. If a necessary fact is not present, the element cannot be satisfied and the rule cannot apply. The absence of a necessary fact thus means that the element is not met. The presence of a necessary fact, on the other hand, does not mean that the element *is* met. The fact may be necessary, but not sufficient, to establish the element.

For example, if a device is deemed a motor vehicle only if it has a motor and is capable of carrying passengers, then the presence of a motor is a necessary fact, but it is not sufficient. The device must also be capable of carrying passengers.

Sufficient facts are those the presence of which establishes the element but which need not be present for it to be satisfied. If a sufficient fact is pres-

ent, then the element is satisfied. At the same time, its absence does not mean that the element is not satisfied, because some other sufficient fact may be present. The fact is sufficient to establish the element but not necessary.

For example, if a device is deemed to be a motor vehicle if it is self-propelled, the presence of an internal combustion engine would be a sufficient fact to satisfy the element. The fact is not necessary, however, because an electric engine would also satisfy the element.

The importance of the dispositive facts and the distinction between necessary and sufficient facts will be discussed further in chapters 3 and 5.

## 6. HOLDING

The decision of the court with respect to a question presented is called the holding. This is the most important part of the decision. In some cases, the court announces the holding with an expression such as "we hold." In other cases, the court leaves to the lawyer the task of identifying the holding.

All of the problems attendant to identifying rules may exist in equal or greater measure in identifying the holding. When the court does not clearly state the holding, the lawyer may have to construct it from scattered statements. This process can be an indeterminate one, which may leave lawyers in disagreement about what the case actually held and may present a lawyer with the opportunity to articulate the holding in the terms most favorable to the client.

The holding must be distinguished from *obiter dictum*, often referred to simply as *dictum*. The Latin phrase *obiter dictum* can be translated as "a word said in passing." The holding essentially is the decision in the case, whereas dictum consists of statements made by the court that were not strictly necessary to the decision. Dictum is not binding in future cases.

The distinction between the holding and dictum promotes a number of important policies. First, it enhances the quality of judicial decisions. Matters not strictly necessary to the decision of the case may not have been carefully considered by the court. Even if the court does try to consider matters unnecessary to the decision, judges have limited competence and limited information available to them. Unlike at least some legislators, they do not have large staffs of experts, nor can they hold extensive hearings to which they can summon witnesses to provide expert testimony. Rather, judges typically have a small staff of clerks, usually other lawyers, and the facts available

to them are those presented by the parties. Facts not strictly relevant to the dispute may not have been fully researched by the parties to the litigation. Indeed, as will be discussed in chapter 4, information not relevant to the dispute before the court is generally not admissible into evidence at trial and thus will not be considered by the judge or jury. A litigant whose principal interest is simply to win a particular dispute may not have the willingness or the ability to devote resources to arguing about the purely hypothetical future consequences of a particular broad rule. A broad rule that appears to promote public policy in the situation before the court may be counterproductive in other situations not contemplated by the court when it articulated the broad language. Further, because circumstances change, even a rule that was sound at the time it was announced may become obsolete, a problem that is exacerbated if broad rules are announced unnecessarily. Leaving matters unresolved until they must be resolved allows the law to evolve to meet changing circumstances without the need to overrule prior cases. Where a statement is only dictum, courts may disregard it in subsequent cases because it is not binding. In this way, the potentially adverse consequences of an ill-considered rule are avoided.

Second, the distinction between the holding and dictum may be defended on the basis of liberal democratic theory. Liberal democracies usually feature the separation of powers, in which the legislature makes law while the court interprets the law in order to resolve disputes. The authority of the court to make common law is regarded as consistent with the doctrine of separation of powers because the legislature can always modify the common law. To the extent that the legislature does not do so, it is presumed to approve the decisions of the court. Nevertheless, for the court to pronounce legal rules unnecessary to the dispute expands the role of the court beyond the function of merely resolving a dispute and invades the legislature's role as the lawmaking body. Further, each pronouncement of law is an act of coercion by the state. By minimizing the scope of its pronouncements, the court refrains from unnecessary invasions of individual freedom.

Third, the distinction between the holding and dictum strengthens the judiciary as an institution. Because judges are unelected, judicial decisions threaten to become disconnected from popular sentiment and to undermine popular support for the judicial branch. By deciding only the minimum nec-

essary and remaining silent otherwise, the court conserves the goodwill and support of the people.

Fourth, the distinction between the holding and dictum promotes both certainty and flexibility in the law. By stating general rules in dictum, the court indicates how it intends to decide future cases that are in some way like the present case, thus promoting certainty. At the same time, however, because dictum is not binding, the court may at any time refuse to follow dictum without having to overrule the prior case, a circumstance that promotes flexibility.

In a technical sense, given the distinction between a holding and dictum, no court can ever hold that a particular fact was necessary to the result. To hold that the fact was necessary would be to hold, in effect, that in any situation where the fact is not present the result would be different. Such a situation, however, is not before the court, and thus the court's statement concerning the result that would occur in the absence of the fact is dictum. For this reason, a court, strictly speaking, can hold only that a fact is sufficient for the result, not that it is necessary. This point is of limited importance, however, given that dictum, very often, *is* followed in subsequent cases, and thus the fact will be treated in future cases as if it were necessary. The use of dictum in future cases is discussed further in chapter 5.

### 7. DISPOSITION

Finally, the opinion contains the disposition. A disposition is essentially a procedural directive of some kind that gives effect to the court's decision. Typically, the disposition is either that the trial court's judgment be affirmed or that it be reversed. In some cases, in addition to reversing the judgment of the trial court, the appellate court remands the case to the trial court for additional proceedings, such as a new trial. This might occur, for example, where the trial court improperly admitted certain testimony into evidence. The appellate court will order that the case be retried without the inadmissible testimony.

### 8. DISSENTS AND CONCURRENCES

Appellate courts generally consist of more than one member and decide cases by a majority vote. Where the appellate court has three members,

unanimous decisions are common. Where the appellate court has more than three members, the probability of a divided court is much greater. The U.S. Supreme Court, for example, consists of nine justices, and split decisions by the Court are common. The appellate judges who constitute the majority issue a majority opinion, usually authored by one of them, but indicating that the other members of the majority "join," that is, agree with, the opinion. Occasionally, a court issues a *per curiam* (Latin for "by the court") opinion. Such an opinion does not bear the name of the author or of any other judge.

If an appellate judge disagrees with the majority with respect to the disposition of the case, that judge may write a dissenting opinion explaining the basis of his or her disagreement. If the court has more than three members, other judges in the minority may join the dissent. A dissenting opinion has no binding authority of any kind. To use the terminology of the next section, it has neither a vertical nor a horizontal stare decisis effect. Courts in future cases may disregard it entirely. Only statements that are supported by a majority of the judges voting in the case have any binding effect. Yet a dissenting opinion is useful to the lawyer for at least two reasons. First, the dissent provides arguments against the result reached by the majority, which inevitably means that it includes criticisms of the majority's reasoning. A lawyer seeking a result contrary to that reached by the majority may adopt arguments advanced in the dissenting opinion and may cite the dissent as persuasive authority, that is, a precedent that provides guidance but is not binding. For example, the lawyer may be appealing the appellate court's decision to a supreme court, where he or she will rely on the dissent for arguments in favor of reversing the appellate court's decision. Alternatively, the lawyer may be attempting to persuade an appellate court to overrule its own prior decision, and in this situation as well the lawyer may adopt arguments from the dissent and cite the dissent as persuasive authority. A second reason that a dissent is useful to the lawyer is that it reveals the reasoning of one or more members of the court. A lawyer arguing a future case before the court can study a dissent for indications of the kinds of arguments that will appeal to those members who wrote or joined the dissent. U.S. Supreme Court cases are often decided by a very close vote, with five justices in the majority and four in dissent. A lawyer can ascertain from the dissent how the dissenting justices are likely to vote in future cases and tailor arguments to appeal to them. As the membership of the Court changes over time, the justices who

wrote in dissent may gain a majority, allowing them to reverse or modify the prior decision from which they dissented.

In some cases, an appellate judge agrees with the majority with respect to the disposition of the case and much or all of the reasoning, but nevertheless writes his or her own opinion. A separate opinion written by a member of the majority but is not the majority opinion is called a concurring opinion. Judges write concurring opinions for a variety of reasons. For example, a judge may wish to offer arguments in support of the decision that are not included in the majority opinion, perhaps because not all of the judges in the majority agree with the arguments. A judge in this situation may believe that her concurring opinion strengthens the argument in favor of the decision. Alternatively, a judge may wish to emphasize the limits of the majority opinion or the limits of her support for the majority opinion. That is, the concurring judge may indicate that while she voted with the majority in the circumstances of this case, she might vote differently under other circumstances. Because a concurrence does not have the support of a majority of the court, it has no binding effect. Yet concurrences are useful to lawyers for the same reasons that dissents are useful. They provide arguments, often in favor of the decision in this case, but sometimes in favor of a different decision in future cases, and they reveal the reasoning of one or more members of the court. A lawyer reading the concurrences and dissents may realize that a future case may be decided differently than a past case by a combination of votes from dissenting judges who disagreed with the prior case and concurring judges who supported the decision in the prior case only in the limited circumstances of that case.

Occasionally, a judge agrees with the majority only with respect to the disposition of the case. In that situation, the judge is likely to write an opinion concurring in the result. That is, the judge states that she agrees with the majority with respect to the disposition in the case, but does not agree with the majority's reasoning. The judge then explains her own reasons for reaching that result. Such concurrences, of course, have no binding effect. Again, however, they are of interest to the lawyer because they are a source of arguments and because they reveal the reasoning of one or more members of the court.

Periodically, the majority cannot agree on the reasons for the result. For example, the U.S. Supreme Court sometimes decides cases in which a majority agrees on the disposition, but no single reason for that disposition

commands the support of five of the nine justices, that is, of the majority. In that situation, the judges in the majority with respect to the disposition will break into groups based on their reasoning. The single largest such group will issue a plurality opinion. The plurality opinion announces the result and explains the reasoning of the members of the Court who have authored or joined that opinion. Technically, however, nothing in the opinion other than the disposition has any binding effect because nothing else in the opinion commands the support of a majority. In other words, technically, the plurality opinion has no more binding authority than a concurrence. Yet because the opinion reflects the views of a large part of the Court, it may have strong persuasive effect in future cases.

Because decisions are by a majority and every judge decides every issue individually, a decision can comprise a complex web of votes, particularly on a large court such as the U.S. Supreme Court. Cases have arisen in which three or four justices wish to decide the case in one way, three or four justices wish to decide it in another way, and the remaining justices find themselves in agreement with one group of justices on some issues and the other group of justices on other issues. These remaining justices cast the "swing votes" that decide the case. They may combine with one group of justices on certain issues and the other group on other issues, so that neither group prevails on all of the issues. Sometimes a single justice holds the critical swing vote. The final result will reflect the views of that single justice.

### *B. An Introduction to Stare Decisis*

Whereas statutes are binding on the courts because of the doctrine of separation of powers, case law is binding because of the doctrine of stare decisis. This term is a shortened form of the Latin phrase *stare decisis et non quieta movere,* meaning "to stand by decisions and not to disturb that which is settled." Under this doctrine, a court is expected to decide "like" cases in the same way. That is, a decision in one case is binding in all future like cases.

The principle of stare decisis is sometimes said to have a vertical and a horizontal dimension. The vertical dimension applies to the relationship between a higher and a lower court in the same jurisdiction. In theory, a lower court must always adhere to the decisions of a higher court. If a lower court departs in a particular case from the decisions of a higher court, the losing party in that case presumably will appeal, and the ruling of the lower court

will be reversed by the higher court. The horizontal dimension applies to the way that a court must treat its own prior decisions. In this book, references to stare decisis generally will refer to the horizontal dimension.

The horizontal dimension of stare decisis does not impose an absolute prohibition on departures from precedent. When there is sufficient justification, a court may overrule a prior case—in effect, deciding a similar case differently than it did the last time such a case arose. Yet stare decisis imposes a heavy presumption that prior cases will be followed.[3]

Stare decisis is thus a source of both certainty and flexibility in the law. New cases are generally to be decided in a way that is consistent with prior cases, thus promoting certainty. At the same time, stare decisis permits change when the underlying policies seem to require it.[4] Stare decisis also promotes both fairness and efficiency. It promotes fairness by requiring that like cases be decided in the same way, thus leading to equal justice under the law. It promotes efficiency by avoiding the need to relitigate the same issue anew each time it arises.

One consequence of the doctrine of stare decisis is that courts do not necessarily seek to decide a case in the way that yields the best result. Rather, courts in theory seek to decide a case in a way that is consistent with prior cases. Only with substantial justification can the court depart from precedent. If the court was free to decide every case in such a way as to yield the best result, then stare decisis would be meaningless. Courts would follow precedent only when doing so happened to yield the best result, although they presumably would have decided the case the same way even without the precedent. The hope is that following precedent will yield the best results in most cases. If a court believes that a particular precedent no longer produces the best result in most cases, then overruling the precedent may be justified.

The doctrine of stare decisis is qualified by a distinction between the holding of a case and dictum, already described. Under the doctrine of stare decisis, only the holding is considered binding; dictum is not. Dictum indicates the policy of the court, and it offers clues as to how the court would decide future cases. Further, barring changes in circumstances or the membership of the court, dictum will likely be followed in future cases. Dictum, however, need not be followed, whereas the holding must be, unless there is sufficient justification to depart from the doctrine of stare decisis.

For this reason, the holding is the most important part of a judicial opinion. It is the only part that, strictly speaking, will be binding in future cases. Above all else, case analysis must result in identification of the holding. Everything else is secondary.

The claim that the holding is of primary importance seems oddly inconsistent with the emphasis in prior pages on identifying rules of law. There really is no inconsistency, however, because a holding is in essence a rule of law stated at a low level of generality. It is merely a rule of law restated in terms of the facts of a particular case.

For example, a particular case may state the rule of law that an individual who fails to exercise reasonable care for his or her own physical safety is contributorily negligent.[5] The case may go on to hold that a person who fails to look both ways before crossing a railroad track is contributorily negligent. The factual predicate in the rule is the failure to exercise reasonable care, whereas the factual predicate in the holding is the failure to look both ways. Failure to look both ways is merely a specific instance of failure to exercise reasonable care. The holding is just a specific instance of the more general rule of law.

Indeed, courts in later cases may not even distinguish between a rule of law taken from a prior case and the holding from that same case. Thus, a statement of a rule of law that constituted dictum in an earlier case may be characterized in later cases as a holding, in order to make the statement appear to be binding in the later cases. In fact, the court in the earlier case may have referred to its rule statement as a holding. As this suggests, courts are not always careful to distinguish between dictum and the holding.

The doctrine of stare decisis rests on a paradox. On the one hand, a court has the power to decide only the dispute before it, and the rules that it announces are binding only in like cases. On the other hand, the courts deciding future cases determine whether those future cases are like the prior case and, therefore, whether the prior case must be followed. The paradox is thus that a prior case binds a court, but only if the court decides that the prior case is applicable.

Most lawyers, noting this paradox, eventually come to the understanding that the common law is not a set of fixed rules, but rather a process. It is a process whereby later cases are decided in a way that seems consistent with prior cases, although it is only when the later cases have been decided that

the true meaning of the prior cases becomes known. By continually deciding which cases are similar or dissimilar to prior cases, courts in effect are shaping the content of the previously announced rules. The rules are defined as they are applied, and the law is in a constant state of evolution, explication, and elaboration.

## III. Analyzing Rights and Duties

In identifying rules of law, whether those rules are drawn from case law or from enacted law, the lawyer must be careful to characterize correctly the precise right or duty created. In this last section, some of the important characteristics of a right or duty are identified.

### *A. The Meaning of Right and Duty*

As an initial matter, rights and duties should be understood as types of legal relationships among persons or entities. The law sometimes uses terms other than right or duty to identify a legal relationship. Other such terms include *power*, *liability*, *privilege*, and *immunity*.

Most lawyers, however, tend to use the two terms *right* and *duty* in a sense broad enough to encompass nearly all legal relationships. The term *duty* generally refers to a legal relationship that requires a person to take some action, as in the case of the duty to exercise reasonable care in performing a surgical operation. The term *right* is often used in two different ways. First, it refers to a legal relationship that entitles a person or entity to take some action, as in the right to vote in an election. Second, it also refers to a legal relationship that entitles a person or entity to action from another, as in the right to receive payment of compensation.

For the sake of brevity, the discussion in this book follows the common practice of using *right* and *duty* in a broad sense to refer to legal relationships generally. Occasionally, when common usage has settled on one of the other terms, as in the case of *attorney-client privilege*, the other term will be used.

The terms *right* and *duty* can often be used to describe exactly the same legal relationship, although from the perspective of a different person in the relationship. For example, a lawyer may say that a negligent physician has a duty to pay compensation to an injured patient and that the patient has a right to receive compensation from the physician. The two have a single

relationship that can be described from the patient's perspective as a right and from the physician's perspective as a duty.

The terms *right* and *duty* can also be used to refer collectively to several more specific rights or duties. Thus, for example, the landowner's right of property refers collectively to a number of rights, such as the right to exclude others from the land and the right to convey the land to another person.

### *B. Three Characteristics of Rights and Duties*

Describing a right or duty requires the lawyer to identify three characteristics of the legal relationship. Each of these is discussed in turn.

First, the lawyer must identify the persons among whom the relationship exists. Assume, for example, that the patient has a right to compensation from the physician. That right would create a legal relationship between only those two persons. It would create no relationship between the patient and the physician's uncle in Louisville.

Legal relationships may exist among more than two persons. Indeed, some rights create a legal relationship between one person and the entire world. The owner of real property, for example, is generally said to have a right to exclude everyone in the world from that property. Rights that exist against all people are often referred to as rights *in rem* (a Latin phrase meaning "toward the thing"). Rights that exist only against specified individuals are often referred to as rights *in personam* (a Latin phrase meaning "toward the person").

A second characteristic of a legal relationship that the lawyer must identify is its subject matter, that is, the type of conduct that the right or duty governs. For example, the duty to pay compensation requires one person to pay money to another. The right to exclude others from land may entitle the owner to build a fence, but not to place land mines, around the perimeter of the land. Each right or duty requires or permits only certain types of conduct.

A third characteristic that the lawyer must identify is the nature of the relationship, assessing whether the relationship is mandatory or permissive. Thus, the lawyer must be alert to whether a legal relationship *requires* or merely *permits* certain conduct.[6] For example, the right to exclude others from one's land permits the owner to build a fence but does not require that the landowner do so.

### *C. The Significance of the Three Characteristics*

As has been discussed, legal reasoning is the process of using rules to draw conclusions about the existence of particular rights or duties in a given situation. More specifically, the lawyer must reach some conclusion about whether the right or duty described in the legal consequence of a rule also applies to the situation under review. In applying a rule to a new situation, the lawyer must ensure that the characteristics of the right or duty are not changed. To change the characteristics is to change the legal relationship.

For example, returning to the illustration from the introduction, the lawyer may conclude that the reporter has a contractual duty not to publish the informant's name. In analyzing the rules describing the legal consequences of a breach of contract, the lawyer must be precise about whether the promisee's right as described in the rules is to obtain performance of the promise or compensation for the breach. That, in turn, will determine whether the informant's right is to obtain a court order prohibiting publication of the name or merely to obtain compensation after the name is published. Failure to be precise could result in reaching the wrong conclusion, such as a conclusion that the reporter's promise conferred on the informant the right to stop publication when it conferred only the right to obtain compensation in the event of publication.

One source of difficulty is that references to a right—such as the right of property, the right of privacy, or the right of free speech—can mean different things in different contexts. In each context, the term may have slightly different characteristics. It may be that in announcing the existence of a right or duty the court itself was not precise about the characteristics of the right or duty.

Another source of difficulty is that lawyers can manipulate the level of generality at which a case law rule is stated. In so doing, the lawyer changes the characteristics of the right or duty described in the legal consequence of the rule. The right or duty found to exist in the situation under review thus has different characteristics than the right or duty described in the governing rule.

As this suggests, in some cases, the lawyer in the course of applying a rule to a situation may deliberately change one or more of the characteristics of the right or duty described in the governing rule in order to change the result

that the rule seems to require. For example, the lawyer may find a rule stating that a landowner has a right to build a fence around his land to exclude others but may restate the right more generally as a right to exclude others from the land. The lawyer now argues that the client has a right to dig a trench around the perimeter of the land. By manipulating levels of generality, the lawyer attempts to transform the right to build a fence into a right to dig a trench.

3

# SYNTHESIZING THE LAW

The third step in legal reasoning is to synthesize the rules of law into a single coherent framework that can be applied to the facts. This requires that the lawyer determine the relationship that each rule bears to the others.

In addition, legal reasoning at times requires that the lawyer construct a second, somewhat different, type of synthesis: the synthesis of a single rule from a number of holdings to govern a situation not within the factual predicate of any prior rule or holding. Thus, in this second type of synthesis, the result is not a framework of rules but a single rule. This rule, of course, once constructed, is integrated into the larger framework of rules.

This chapter discusses both types of synthesis. In the first section, the techniques for organizing rules into a framework are described. In the second, the ways in which a lawyer synthesizes a new rule to be placed within the framework are discussed.

## I. Synthesizing Rules: General to Specific

Synthesizing the rules into a coherent framework means, in effect, that the lawyer creates an outline of the applicable rules, with more specific rules categorized under more general rules. To the extent that the lawyer's analysis

of statutes and cases has identified the policies underlying the rules, the lawyer should include those in the synthesis as well.[1]

As will be discussed in chapter 5, not all rules are applied the same way. Thus, in synthesizing the rules, the lawyer must make note of the source of the rule and, if the rule was derived from case law, observe whether it was a holding or dictum.

## *A. The Basic Organizing Principle*

The key organizing principle in legal reasoning is to move from the general to the specific. For this reason, the lawyer usually begins with general rules of law, which direct the search to more specific rules, which then can be applied to specific facts to produce a conclusion.

Thus, in constructing a synthesis, the lawyer similarly moves from the general to the specific, endeavoring to identify the general rules under which the more specific rules can be categorized, essentially in an outline form. These more specific rules may be thought of as "subrules" to the more general rules.

The categorization process is carried out by determining the type of relationship that each rule bears to the others. The relationship among the rules determines the placement of each rule in the synthesis or outline.

Lawyers have developed conventional ways of organizing large categories of rules. As discussed at the beginning of chapter 1, a synthesis of the entire body of law at the highest level of generality typically organizes rules as public law and private law and then as substantive law and procedural law. Within these broad categories, subject classifications are made. For example, within private substantive law, the conventional subject categories include contracts and torts, categories that are defined in chapters 7 and 8, respectively. Within each of the subject classifications, the lawyer must determine the relationship that each rule has to the others.

## *B. Relationships Among Rules*

For the most part, any two rules can have only one of a few possible relationships to each other. This subsection describes several possible relationships.[2]

### 1. RULES DEFINING AN ELEMENT OF A MORE GENERAL RULE

First, one rule may define an element of another rule. For example, a rule found in a first case may state that one who intentionally touches another

in an offensive way is liable for a battery. A rule found in a second case may state that a touch is offensive if a reasonable person under the circumstances would find it so. In this example, the second rule defines an element—the element of offensiveness—of the first rule. The second rule is more specific than the first and should be categorized as a subrule of the first. Other cases may have produced rules defining the other elements of a battery, and they too would be categorized under the more general rule creating liability for the commission of a battery.

When the general rule is a statutory rule, the more specific rules defining its elements are likely to include both statutory and case law rules. In enacting a statute, a legislature very commonly enacts specific sections that have the sole function of defining the elements of the statutory rule. Many statutes include a section that is explicitly labeled as a "definitions" section. If the legislature fails to define an element of the statute, the courts may need to create case law rules defining the element in order to apply the statute to particular disputes. It may also happen that the legislature does enact a definition, but the definition itself may be unclear. In that situation the courts must create case law rules defining the elements of the definition. In any event, the elements of statutory rules are often defined by a mixture of statutory and case law rules.

Where the general rule is a case law rule, the lawyer usually finds that the more specific rules defining elements of the general rule are based only on case law. It is unusual to find a statute that was enacted for the purpose of defining an element of a case law rule. Statutory definitions are enacted almost exclusively for the purpose of defining the elements of statutory rules.

### 2. RULES APPLYING A MORE GENERAL RULE

Second, one rule may serve as an application of another rule. In other words, one rule may state the manner in which a more general rule applies to a specific situation.

For example, a case may announce the rule that a physician who performs surgery on another person without consent is liable for a battery. This rule is really nothing more than a specific application of the rule just described, creating liability for the commission of a battery. The rule imposing liability on a physician is more specific than the first rule, imposing liability on any

person for the commission of a battery and should be categorized as a subrule of the first.

A specific rule applying a more general rule to a particular sets of facts may technically be a holding of a case. As has been seen, holdings are very often merely particularized applications of rules. For reasons that are explained in chapter 5, the fact that a particular rule is the holding of a case, as opposed to dictum, should be noted by the attorney, but that will not affect the placement of the rule in the synthesis.

A specific rule applying a more general rule may also have the effect of illustrating the definitions of the elements. For example, the rule imposing liability on the physician for a battery in effect designates a surgical operation as an illustration of what is meant by an offensive touching.

Regardless of whether the general rule is a statutory rule or a case law rule, the more specific rule applying it is usually created by case law. Indeed, the principal function of the courts is to apply statutes and case law rules to specific situations.

It is unusual for a statutory rule to serve as the specific application of a more general statutory or case law rule. As has been explained in chapter 1, legislatures generally attempt to enact statutes that operate at a high level of generality and usually do not enact statutes that are merely more specific applications of another statute already in force.

Recalling, however, that the word *statute* is being used in this book in a broad sense to refer to all enacted law, the reader should note that there are instances where one enacted rule is actually the application of another enacted rule. This is perhaps most likely in situations where an administrative agency has issued regulations implementing a statute. Certain of the administrative regulations may be nothing more than statements applying the statute to specific factual situations.

### 3. RULES LIMITING A MORE GENERAL RULE

Third, one rule may serve as a limitation on the scope of another rule, which means that one rule may specify situations in which another rule does not apply.

For example, a case may state the rule that one who uses reasonable force against another person necessary for self-defense against imminent bodily injury is not liable to that other person for a battery. At first glance,

this rule concerning self-defense seems to contradict the general rule imposing liability for a battery. And, in a sense, the rules are contradictory. But the contradiction exists only in a specified set of circumstances—those circumstances where force is necessary for self-defense. Because the self-defense rule describes the circumstances under which it prevails over the general rule, the contradiction can be resolved by treating the self-defense rule as simply a limitation on, or an exception to, the general rule.

A rule that creates an exception to, or limits the scope of, another rule is obviously more specific than the other rule. Thus, the narrower, limiting, rule should be categorized as a subrule of the more general rule.

When two rules contradict each other, the question sometimes arises as to which is the general rule and which is the exception. The general rule, of course, is simply the rule that applies to the broader set of circumstances.

Often, identifying the rule that constitutes the exception requires little more than examining the text of the rules. For example, a rule may state explicitly that it is an exception to a more general rule. Even if a rule does not state explicitly that it is an exception, its exceptionality may be implicit because the rule defines a relatively narrow set of circumstances in which it prevails over another rule, making clear that the other rule prevails in all other circumstances.

At times, the question of which is the general rule and which the exception is unclear. Moreover, the answer may change over time. Sometimes an exception is applied to an increasingly broader range of circumstances until the supposed exception becomes more broadly applicable than the general rule. Lawyers speak of this situation as one in which "the exception swallows the rule." Eventually, the "exception" is openly acknowledged to be the new general rule.

Statutory rules, of course, are likely to state explicitly which is the general rule and which the exception. Further, because the language of statutes is fixed, statutory rules are less likely to produce the phenomenon in which an exception grows until it swallows the general rule.

When the general rule is a case law rule, most of the exceptions usually are also case law rules. Occasionally, a legislature enacts a statute intended to modify the common law in some respect, and that statute in effect may create a limitation on a case law rule.

When the general rule is a statute, the exceptions are nearly always statutory rules. The doctrine of separation of powers, described in chapter 1, precludes the courts from modifying statutes through case law.

Occasionally, however, a court may create what amounts to a case law limitation on a statute. One way to create a case law limitation on a statutory rule is to interpret the language of the statute not to apply to certain situations. In so doing, the court does not claim to override the legislature. Rather, it claims to be achieving the result that the legislature would have intended had it anticipated the particular situation before the court.

Another way to create a case law limitation on a statutory rule is to hold that the statute would be unconstitutional without the limitation. As noted in chapter 1, under the doctrine of judicial review, courts have the power to determine the constitutionality of legislation. Again, the court does not claim to override the legislature. Rather, it claims that the legislature's enacted rule in this situation is overridden by an enacted rule of the Constitution.

### 4. RULES CUMULATIVE TO ANOTHER RULE

Fourth, one rule may be cumulative to another. In other words, one rule may describe a different right or duty than another rule. Or it may describe a different set of facts that will give rise to the same right or duty.

In either case, the two rules are not mutually exclusive alternatives because both may apply simultaneously. Because the rights or duties are cumulative, there is no contradiction between the two rules; that is, neither rule limits the other.

For example, a case may state a rule that one who intentionally causes another the apprehension of an imminent offensive touching is liable in tort for an assault. This rule defines a liability—the liability for an assault—that is cumulative to the liability for a battery. One may commit an assault, without also committing a battery, by putting a victim in fear of bodily harm that ultimately is not inflicted. Or one may commit a battery, without also committing an assault, by offensively touching a sleeping victim. Further, one may commit both torts by causing the fear of bodily harm, accompanied by the actual infliction of the harm. These rules are cumulative in the sense that either or both may apply to the facts without affecting the applicability of the other.

Where two rules create cumulative rights or duties, they occupy parallel places in the synthesis. Neither is more general than the other. Thus, neither

is categorized as a subrule of the other. Rather, they exist at the same level of generality.

Cumulative rules can be case law rules or statutory rules, or they can be a combination of the two. It is not unusual, for example, for common law rules imposing liability for certain conduct to exist side by side with statutory rules imposing liability for similar conduct. One instance of this occurs when statutory rules imposing liability for unfair and deceptive trade practices exist cumulatively with common law rules imposing liability for fraud.

### 5. RULES CONTRADICTING ANOTHER RULE

Fifth, one rule may contradict another. That is, one rule may provide that a particular right or duty exists under a specific set of circumstances, whereas the other rule provides that no such right or duty exists under those same circumstances.

This state of affairs, in theory, is not supposed to occur. The law is assumed to be an internally consistent framework of rules that can be harmonized so that the rules lead to only one result in a given situation.

Mainstream legal reasoning thus requires that the contradiction between the two rules be resolved. Lawyers can resolve a contradiction between rules in any of at least three ways.

One resolution is found by treating one rule as simply superseding the other rule. If the rules emanate from different sources, then constitutional principles may provide a basis for subordinating one rule to another. For example, a federal rule generally prevails over a contrary state law rule.[3]

If the rules emanate from the same source, then the rule that was developed later in time is often treated as displacing the earlier rule. When both rules are statutory, this resolution is virtually unavoidable because of the principle of statutory interpretation under which a later statute prevails over a prior inconsistent statute. When both rules are case law rules, the court in the later case sometimes states explicitly that the earlier decision is overruled, and thus no contradiction exists. In other instances, the later case so thoroughly repudiates the reasoning of the earlier case as to suggest implicitly that the earlier case no longer states the law, a situation in which the earlier case is said to have been overruled *sub silentio*, that is, by silence.[4]

Because of the doctrine of separation of powers, a case law rule can rarely supersede a statutory rule. The principal situation in which a case law rule

supersedes a statutory rule occurs when the court declares a statute unconstitutional. Of course, in that situation, the court has held, in effect, that one enacted rule, a provision of the Constitution, supersedes another enacted rule, the statute. In addition, a case law rule may effectively supersede a statutory rule when a court interprets or applies the statutory rule in a way that is seemingly inconsistent with its language.

A second way to achieve resolution of the conflict is by treating one rule as a limitation on, or an exception to, another rule. As discussed earlier, this explanation of the relationship between the rules is especially plausible if one rule, by its terms, applies only to a limited set of circumstances. In those exceptional circumstances, the narrower rule prevails, but in all other circumstances the general rule applies. This form of resolution thus requires that the situations to which the two rules apply be somehow distinguished from each other, preferably on grounds related to furthering the underlying policies.

A third method of resolution treats neither rule as the general rule but regards them as applicable to mutually exclusive sets of circumstances. Here, in effect, there is no general rule that applies in all situations. Rather, there are two complementary rules, each of which applies to certain situations. As in the case of cumulative rules, these mutually exclusive rules are parallel to each other. Neither is more general, and neither is categorized as a subrule of the other.

For example, property law establishes certain duties that owners and occupiers of land owe to persons who come onto their land. In some states, the extent of the duty depends upon whether the person coming onto the land is classified as a trespasser, a licensee, or an invitee. A different rule defines the duty owed by the landowner to each of these types of persons. In short, there is no general rule that defines the duties owed by landowners to persons on their land. Rather, there are three complementary rules, each of which applies to a particular set of situations.

This third method of resolution also requires that the lawyer articulate a distinction between the types of situations to which the two rules apply. Again, the distinction should be one related to the underlying policies. The lesser protection afforded trespassers, for example, may be related to the policy of protecting property rights by discouraging trespassing.

In some cases, the exact boundary between the situations governed by two contrasting rules is left unclear. Two rules that are plainly inconsistent are acknowledged to exist, and each has been applied to specified circumstances. Which rule would be applied to some novel situation, however, is left undetermined until the situation arises.

For example, one rule of constitutional law states that the government may not condition the receipt of a benefit on the surrender of a right. Thus, the government cannot require that all clerical employees refrain from criticizing the president because that would condition the receipt of a benefit (a government job) on the surrender of a right (the right of free speech).[5] At the same time, the courts have also recognized the rule that the government may refuse to subsidize speech with which it disagrees. Thus, the government may refuse to allow public funding for medical clinics to be used to discuss abortion as a method of family planning.[6]

The two rules are inconsistent. Thus, if the first rule were applied to the second situation, it would lead to a result opposite to that reached by the courts. That is, the court would hold that the government may not condition the receipt of a benefit (funding for a clinic) on the surrender of a right (the right to discuss abortion). Despite their inconsistency, both rules are part of constitutional law, although it remains unclear in which circumstances a court would apply the first rule and in which it would apply the second.

### *C. Outlining the Synthesis*

The rule synthesis just described can be sketched as an outline in the form that follows. By determining each rule's relationship to the other rules, the lawyer establishes its place in the outline. Rules defining, applying, or limiting a more general rule are organized together under that more general rule. Cumulative rules, on the other hand, occupy the same relative position in the outline.

OUTLINE

I. Battery: Rule imposing liability for a battery

A. definition of elements

1. *Definition of intent*
2. *Definition of a touching*

3. *Definition of offensiveness*
4. *Etc.*

B. RULE APPLICATIONS

1. *Case of surgeon operating without consent*
2. *Etc.*

C. EXCEPTIONS

1. *Self-defense*
2. *Etc.*

## II. Assault: Rule imposing liability for an assault

A. DEFINITION OF ELEMENTS

1. *Cases defining individual elements*
2. *Etc.*

B. RULE APPLICATIONS

1. *Cases applying the rule*
2. *Etc.*

C. EXCEPTIONS

1. *Cases creating exceptions to the rule*
2. *Etc.*

## III. Owners and occupiers of land

A. RULE DEFINING THE LIABILITY TO INVITEES

1. *Definition of elements*
   a. Cases defining the elements of the rule
   b. *Etc.*
2. *Rule applications*
   a. Cases applying the rule
   b. *Etc.*
3. *Exceptions*
   a. Cases creating exceptions to the rule
   b. *Etc.*

B. RULE DEFINING THE LIABILITY TO LICENSEES

1. *Definition of elements*
   a. Cases defining the elements of the rule
   b. *Etc.*

2. *Rule applications*
   a. Cases applying the rule
   b. *Etc.*
3. *Exceptions*
   a. Cases creating exceptions to the rule
   b. *Etc.*

C. RULE DEFINING THE LIABILITY TO TRESPASSERS

1. *Definition of elements*
   a. Cases defining the elements of the rule
   b. *Etc.*
2. *Rule applications*
   a. Cases applying the rule
   b. *Etc.*
3. *Exceptions*
   a. Cases creating exceptions to the rule
   b. *Etc.*

## II. Synthesizing a Rule: Specific to General

Situations arise in which a lawyer wishes to establish the existence of a rule not previously recognized in explicit terms. The lawyer's client, for example, may be in a situation that is essentially unprecedented.[7] Or the situation may be one that is not unprecedented but one in which courts in times past have declined to impose rights or duties.

The lawyer can address these situations by synthesizing a new rule based on the holdings of prior cases.[8] Indeed, some of the most influential examples of legal scholarship have consisted of analyses of a number of cases followed by a conclusion that these cases have established a general rule not previously recognized.[9]

This section describes the way in which a lawyer can fill a gap in the law by synthesizing a new rule. Once the new rule is synthesized, the lawyer places it in the larger framework discussed in the preceding section.

A lawyer in this situation would probably not admit that he or she is synthesizing a new rule, arguing instead that, in fact, an applicable rule already exists, although it has not yet been explicitly recognized as such. The rule

would be described as newly discovered rather than newly invented because, if the rule already exists, then under the doctrine of stare decisis the court must apply it. An existing rule, in other words, is binding.

A second reason that the lawyer would prefer to argue that the rule has been discovered rather than invented is that some courts question whether the creation of new rules of law by a court is consistent with democratic principles. The court thus may be reluctant to adopt a new rule but may be quite willing merely to apply a rule that supposedly already exists. This matter is discussed further in chapter 11.

### *A. The Basic Model*

The lawyer synthesizes the new rule by a method similar to the logical process of induction.[10] Induction is a method of reasoning that, in essence, proceeds from the particular to the general.

For example, after tasting several blueberries and finding that each of them is sweet, one may reason by induction that all blueberries taste sweet. Induction produces a conclusion that is probable, though not certain. No matter how many blueberries one eats, the possibility always exists that the next one may taste different from the others.

Nevertheless, courts formulate rules of law by a process that is inductive in form. If a number of cases have been decided in which a particular right or duty was found to exist, then the court may conclude that the same right or duty exists in all similar cases. By studying several particular instances, the court formulates a general rule.

For example, assume that several courts decide a number of cases imposing a duty on landowners to warn guests about various conditions on the land, such as a concealed pit, quicksand, or an unstable slope. As the number of cases grows, it becomes possible to think of these cases as collectively establishing a rule that requires the landowner to warn guests about hazards. In this situation, a rule is formulated by a process of induction. The rule, however, is broader than any of the specific cases on which it was based. The whole thus becomes greater than the sum of the parts.

By creating a rule broader than any one prior case, the court creates a rule broad enough to apply to the novel case. The novel case, accordingly, can be decided by application of the newly synthesized rule.

As noted above, induction does not compel a particular conclusion but can only suggest that the conclusion is probable. In the same way, the court is not compelled to accept the new broader rule. Just as tasting a few blueberries does not force one to conclude that all blueberries taste the same, the prior decisions in cases involving certain specific hazards do not require the court to decide that other hazards are subject to the same rule. The court may correctly note that the holdings in the prior cases did not reach beyond quicksand, a concealed pit, and an unstable slope and may decide not to extend the holdings beyond those situations.

The more such cases the lawyer finds, however, the more likely the court is to accept the existence of the new rule. The techniques that the lawyer uses to propose or oppose recognition of the new rule are discussed later in this chapter.

### *B. The Problem of Indeterminacy*

The premise for using inductive reasoning is that several similar items have been identified about which a generalization can safely be made. Yet the lawyer will find that the process of formulating a generalization is not a mechanical one. Rather, it is a process that requires the exercise of judgment, and that can lead to more than one result.

The lawyer must make at least two decisions in synthesizing the rule. First, the lawyer must decide which facts to include in the factual predicate, thus determining how to characterize the prior cases. Each of the prior cases may be subject to multiple characterizations, depending upon which facts of those cases the lawyer chooses to emphasize. In deciding how to characterize the cases included in the rule, the lawyer in effect is choosing the elements of the rule.

For example, the lawyer may characterize the cases involving the quicksand, the concealed pit, and the unstable slope as cases involving abnormal conditions, provided that each condition was abnormal for that area. Or the lawyer may characterize them as cases involving hazards, because each condition was dangerous. Alternatively, the lawyer may characterize them as cases involving concealed hazards, on the theory that none of the hazards was obvious to the casual observer. Or the cases may be characterized as involving natural hazards, if they were not the result of human activity.

Finally, the lawyer may choose to emphasize the especially dangerous nature of the hazards and characterize the cases as involving life-threatening hazards.

All of these characterizations may be equally accurate. No one characterization is the "correct" one that must be chosen to the exclusion of the others. The process of characterizing the facts is indeterminate. The lawyer can reach a particular characterization only by the exercise of judgment.

The second decision the lawyer must make is to set the level of generality at which the new rule should be formulated. This means deciding whether the prior cases are to be described in broad, general terms or in narrow, specific terms.

In the case of the concealed pit, the unstable slope, and the quicksand, for example, the lawyer must decide at what level of generality to characterize the conditions on the land that give rise to a duty to warn. At one extreme, they could be characterized as hazards. In that case, the lawyer could conclude that the various cases identified by research establish a general rule that the landowner has a duty to warn guests about all hazards on the land.

At the other extreme, the lawyer could characterize the conditions as falling within the three narrow categories of quicksand, concealed pits, and unstable slopes. Each of these categories might be characterized even more narrowly so that, under the lawyer's characterization of the rule, a landowner has a duty to warn only of concealed pits of a certain depth, unstable slopes of a specified angle, and quicksand pools of a particular size.

Between these extremes is a range of possible rules of differing levels of generality. The term *life-threatening hazards*, for example, is more specific than the term *hazards*.

Each of these levels of generality may yield a rule that is equally accurate. No particular level of generality is correct to the exclusion of the others. The choice of the level of generality at which to state the rule is indeterminate. The lawyer's selection of a particular level of generality must therefore be based on the exercise of judgment. Different lawyers generalizing about the same group of cases may produce rules at different levels of generality.

The judgments concerning which facts to include in the factual predicate and the level of generality at which to state a rule are interrelated. The more general the rule, the fewer the facts that need to be specified. For example, if the rule is formulated as applying to all hazards, then whether the hazards

are natural or life-threatening is irrelevant and would not be specified in the rule. Put another way, stating the rule at a high level of generality allows the lawyer to be agnostic about which of various specifics to include in the factual predicate. The corollary, of course, is that if the lawyer decides to include numerous detailed facts in the factual predicate, then, necessarily, the rule cannot be stated at a high level of generality.

### *C. Addressing Indeterminacy Through Policy Judgments*

The lawyer may attempt to solve the indeterminacy involved in synthesizing a rule by referring to the policies underlying the cases. In this situation, the lawyer uses the underlying policies as a guide in selecting the facts to include in the factual predicate of the rule and in choosing the level of generality at which to state the rule. As will be seen, however, use of the underlying policies does not entirely solve the problem of indeterminacy.

The first decision the lawyer must make is to select the facts to include in the factual predicate of the rule. As an initial matter, some of the prior cases may have specified that certain facts were dispositive. For example, the case involving the pit may have specified that a duty to warn was imposed because the pit was a concealed hazard; that is, the case made clear that the rule imposing a duty was based on the presence of two facts—the fact that the condition was hazardous and the fact that it was concealed.

To the extent that the prior cases leave unclear which facts were dispositive, the lawyer selects for inclusion in the newly synthesized rule those facts in the prior cases that were relevant to accomplishing the underlying policies. For instance, if the policy was solely the protection of personal safety, then the fact that the conditions were natural probably should not matter, since a condition may be hazardous whether it is natural or not. Nor perhaps should it matter that the conditions were concealed, since even an obvious hazard can threaten safety. If the policy, however, was to encourage people to be responsible for their own safety, then the fact that the condition was concealed becomes more relevant. In such situations, the court may wish to deny recovery to guests who put themselves at risk by failing to avoid an obvious hazard.

The second decision the lawyer must make is to select the level of generality at which to state the elements in the newly synthesized rule. As a

practical matter, the lawyer must state the elements in terms general enough to include the facts of any prior case from which the rule is being synthesized. Thus, if the lawyer wishes to include the quicksand, the slope, and the pit cases, then the lawyer may need to use a term at least as general as *hazard*. A term any narrower could arguably exclude some of the cases.

The lawyer must also state the elements in terms at least general enough to include the novel case to which the rule will be applied. For example, assume that the lawyer concluded that, in the prior cases, the quicksand, the pit, and the slope were all in some way concealed, and thus the term *concealed hazard* would include all prior cases. The lawyer's client, however, was injured by a hazard that was not concealed, although the client unfortunately did not notice it. If the lawyer characterizes the facts of the prior cases as involving concealed hazards, the very case for which a rule is being formulated will be excluded. Accordingly, the lawyer characterizes the facts of the prior cases in still more general terms—perhaps as *hazards*—in order to include the case under consideration.

The lawyer, however, also has the choice of synthesizing a rule in terms broader than is absolutely necessary in order to include the prior cases and the current case. Assume for a moment that the term *concealed hazard*, in fact, would embrace all of the cases the lawyer wishes to include. If *concealed hazards* would include all of the cases, then so would the more general term *hazards* and the even more general term *potentially dangerous conditions*. The lawyer must decide whether to use one of these more general characterizations or to be only as general as is absolutely necessary to include the current case.

In choosing the level of generality, the lawyer must avoid overreaching. In other words, the lawyer cannot formulate the rule in terms so broad that it includes new cases that make the policy judgments underlying the prior cases inapplicable. If the rule is too broad, application of the rule can yield undesirable results.

For example, assume that in the quicksand, pit, and slope cases the courts were attempting to strike a balance between, on the one hand, compensating injury and, on the other hand, encouraging safety by refusing to compensate the careless. In each case, the court held that because the hazard was concealed, the victim could not have avoided injury by exercising care. Thus, the policy of encouraging safety did not preclude imposing liability on the landowner.

The lawyer who characterizes these cases as imposing liability for all "hazards" may well be overreaching, because the policy judgments in the prior cases would not apply in the same way to any case in which the hazard was obvious. In the case of an obvious hazard, the victim might well have avoided injury by exercising care, and thus the policy judgment made in the prior cases does not apply. In cases in which the hazard is obvious, the policy of encouraging safety could require leaving the careless plaintiff uncompensated by not imposing liability on the landowner.

Thus, the lawyer must state the newly synthesized rule at a level of generality sufficient to include the prior cases and the client's case. At the same time, the rule must not be stated at a level of generality high enough to encompass new cases in which the policies underlying the prior cases would require a different result.

Between these extremes, however, the lawyer may well have some degree of choice. Thus, reference to the underlying policies may not eliminate all of the indeterminacy in synthesizing a new rule.

## *D. Using Rule Synthesis as an Advocate*

The lawyer engaged in the synthesis of a new rule is very often acting as an advocate, with the purpose of either constructing a new rule that will compel the result the client seeks or opposing the creation of the new rule. This section discusses the tactical moves that a lawyer in either situation may make in support of a client's position.

### 1. SUPPORTING THE NEW RULE

First, the lawyer attempting to create the rule probably wants to generalize from as many cases as possible. Recall that the lawyer would probably argue that the rule being advocated is not a new rule at all but rather a well-established rule, perhaps not previously articulated in explicit terms. The more cases that have recognized the rule, the more the rule looks like a well-established rule of law that the court must apply and the less the court feels that it has ventured onto new terrain.

Second, the lawyer obviously wants to include in the factual predicate of the rule only those facts that clearly have counterparts in the current case. At times, that may be difficult because the court in a prior case may have stated explicitly that a particular fact—say, the fact that the hazard was

concealed—was dispositive. If the fact was treated as dispositive in the prior case from which the new rule is to be synthesized, then the fact generally has to be included in the new rule as well.

There is at least one argument the lawyer can make for excluding a dispositive fact in a prior case from the new rule. Specifically, the lawyer may contend that the dispositive fact was a sufficient, but not a necessary, condition for the result reached in the prior case. Thus, the fact need not be an element of the rule. This argument is bolstered considerably if the dispositive fact was absent from some prior cases. Even if it was present in all of them, the lawyer can argue that it was only a sufficient fact. This is done by demonstrating that the policies underlying the rule do not dictate that it be present. The lawyer might argue, for example, that the only policy mentioned by the court in the prior case was protecting persons against avoidable injury, and that policy would have required imposition of a duty to warn whether the hazard was concealed or not. The lawyer is arguing, in effect, that the fact of concealment was not truly necessary to the result and any statements about the necessity of the fact should be considered dictum. Further, because the policy underlying the rule does not require that the hazard be concealed, the prior court's dictum to the effect that a concealed condition was a necessary fact should not be followed.[11]

Third, the lawyer probably wants to formulate the rule in the most general terms possible, without overreaching. A more general rule embraces more prior cases because the broad language obscures the minor differences among the cases, thus allowing more cases to fall within the rule. As explained above, the more cases that seem to have embraced the rule, the more willing the court will be to apply it in the novel case. At the same time, the broader the rule, the more likely it is to encompass the lawyer's case.

### 2. OPPOSING THE NEW RULE

A lawyer opposing recognition of the new rule may also employ a set of standard tactical moves. First, the lawyer attempts to restrict the number of cases on which the generalized rule may be based. This is done by confining the prior cases to their facts. That is, the lawyer points out that the quicksand case addressed only quicksand; the concealed pit case, only concealed pits; the unstable slope case, only unstable slopes. Therefore, anything beyond quicksand, concealed pits, and unstable slopes is mere dictum that need not

be followed. Ultimately, the argument is that no general rule exists; there are only several specific rules, none of which applies here. This argument, in essence, is an appeal to the reluctance of courts to make new law.[12]

Second, the lawyer tries to identify dispositive facts in the prior cases that are not present in the novel situation, searching through the prior cases for as many details as can be found and arguing that all of these details were necessary to (and not merely sufficient for) the decisions and thus belong in the factual predicate of any newly synthesized rule. Thus, for example, the lawyer may argue that the quicksand, pit, and slope are all concealed life-threatening natural hazards, and thus the rule should be limited to concealed life-threatening natural hazards. Obviously, the strategy is to formulate a rule that excludes the current case.

Third, the lawyer tries to formulate the rule as narrowly as possible, again with the hope that it will exclude the current case. One way to do this is to characterize the facts narrowly—a concealed pit would be called a concealed pit (perhaps of a certain depth), not a hazard or an abnormal condition. For this argument to be effective, the lawyer must be prepared to explain why the policy judgments that underlie the rule do not apply in the same way when the rule is formulated in more general terms; that is, the lawyer must explain why a rule formulated in more general terms would overreach.

# 4

# RESEARCHING THE FACTS

The fourth step in legal reasoning is to research the facts to which the law must be applied. In a real sense, it is misleading to suggest that factual research follows the process of analysis and synthesis described in the prior chapters. As should have been clear from the introduction, the lawyer cannot even begin the legal reasoning process without a general idea of the circumstances to which the law is to be applied. Thus, a limited factual inquiry is, in fact, the first step of the legal reasoning process.

## I. The Role of Factual Research

There is a constant interplay between factual research and the other steps of legal reasoning. The lawyer uses the basic facts known at the beginning of the inquiry to identify the likely sources of applicable law. As potentially applicable general rules are identified, the lawyer may realize that additional facts are needed to determine the applicability of the more specific rules defining, applying, or limiting the general rules. Thus, the lawyer continues to alternate between legal and factual research until all of the plausibly applicable rules have been identified.

At some point, the lawyer believes that the governing rules have been identified and synthesized into a framework. It is at this point that the lawyer must complete the factual research to make certain that all the relevant facts have been discovered. Thus, the fourth step really marks not so much the beginning as the end of the lawyer's factual investigation.

While the factual research determines which rules of law may plausibly apply, the rules of law identified by the lawyer in turn shape the factual research. At the very beginning of the research, the lawyer conceives of the process as an attempt to determine simply what happened. As the legal research progresses, however, the lawyer comes to understand the potential legal consequences of the facts being researched. Very quickly, the lawyer begins to ask not simply what happened, but also whether the elements of the rules have been met.

Assume, for example, that the lawyer's client was injured while on the land of another person. The lawyer is attempting to determine whether the landowner had a duty to warn the client about the particular hazard that caused the injury. Legal research identifies a rule providing that the landowner would have had a duty if the client was an invitee but not if the client was a trespasser. The lawyer's factual research now shifts to determining whether the client was an invitee. If a factual detail does not make it more or less likely that the client was an invitee, then the lawyer regards that fact as irrelevant to the inquiry. The rules of law thus guide the attorney's selection of facts.

The rules also shape the lawyer's characterization of the facts. The lawyer cannot usefully characterize the facts in any way that seems intuitively appealing. Rather, the facts must be characterized as demonstrating that the elements were or were not met. Thus, in the example, the lawyer would characterize the facts as establishing that the client either was or was not an invitee.

## II. The Rules of Factual Investigation

The law has its own unique rules for factual investigation. To a scientist, a fact is that which can be empirically observed. To a lawyer in a dispute, a fact is that which can be proved to a jury or to a judge sitting as the finder

of fact. Although a scientist may find it highly probable as an empirical matter that the accused was present at the scene of the crime, if a jury finds otherwise, then it is a "fact" for purposes of the trial that the accused was not present.

One way to keep this point in mind is to draw a distinction between evidence and facts. In a trial, evidence is the empirical information that the lawyer presents to the jury.[1] A fact is that which the judge or jury finds to be true, which may or may not be consistent with most of the evidence.

The facts found by the jury may differ from the evidence adduced by the lawyer for at least three reasons. First, the law of evidence may exclude from the trial some of the information in the lawyer's possession, and thus the jury may know less about the client's situation than the lawyer does.[2] Second, even assuming that all available evidence is admitted at trial, the evidence is very often incomplete, uncertain, or contradictory, and thus fact-finding will require some degree of inference and judgment, about which reasonable people can differ. Third, fact finders are influenced by predispositions that may cause one to perceive facts differently than another. The balance of this section discusses each of these three problems.

## *A. The Law of Evidence*

The law of evidence prescribes rules that govern factual investigation in a court of law.[3] A lawyer engaged in legal reasoning can assume that a fact is true only if that fact can be proved in court using admissible evidence. Like any rule, the rules of evidence may lead to injustices in a particular case, but they exist because they are thought on balance to result in more accurate fact-finding in most cases and, thus, to produce more justice in the trial courts.[4] Although space does not permit a detailed summary of the rules of evidence, a description of a few of the main principles of evidence law will illustrate the kinds of restrictions on the use of information at trial that the law imposes.

### 1. TYPES OF EVIDENCE ADMISSIBLE

In general, the jury is permitted to consider two types of evidence: oral testimony and physical objects, such as a document, a photograph, or a knife. Nontestimonial evidence must be authenticated. This usually requires that

a witness identify the object. In this way, the jury knows that all evidence is what it is purported to be—the contract between Smith and Jones, a photograph of the intersection where the collision occurred, the knife found at the scene of the killing.

Further, the witness testifying or authenticating an object must lay a foundation for the testimony; that is, the witness must explain how he or she knows the information about which he or she is testifying. For example, if a witness is going to testify that Frank shot Ned, that witness must first testify to being present at the time of the shooting and being able to see it occur or must give some other acceptable explanation for having obtained the information. The witness can testify only to facts gained through observation and is usually not permitted to inject opinion or speculation.

A witness's opinion *is* admissible when the witness is testifying as an expert. For example, the court would admit testimony by an expert in the field of surgery to the effect that a surgeon's failure to utilize a particular procedure caused the patient's injury. Expert opinion testimony is admissible because it is thought that, in deciding certain kinds of issues, lay jurors can benefit from the assistance of those with specialized knowledge or training.

## 2. THE REQUIREMENT OF RELEVANCE

Evidence is admissible only if it is relevant, that is, it tends to prove or disprove a fact of consequence to the action. This rule has two elements. First, the fact to be proved must be of consequence to the action. That is, the fact must be "material." Second, the evidence must make it more probable or less probable that the fact is true.

For example, assume that the defendant is alleged to have committed a battery by punching the plaintiff in the face. The defendant's testimony that he eats a hamburger every day for lunch would not be material because the defendant's diet is not a fact of consequence to the claim of battery. A lab technician's testimony that the plaintiff's blood was found on the defendant's hand would be admissible. First, touching is an element of a battery. That is, the occurrence of a touching is a fact of consequence and, therefore, is material, to the battery action. Second, evidence that the plaintiff's blood was on the defendant's hand makes more probable the fact that the defendant touched the plaintiff. Accordingly, the evidence is relevant.

## 3. REASONS TO EXCLUDE RELEVANT EVIDENCE

Even though evidence is authenticated and relevant, it may nevertheless be excluded because of concerns about its reliability or its potential to prejudice the jury, or for other reasons. It may be useful to consider an example of evidence that is excluded for each of these reasons.

### a. Unreliability: The Example of Hearsay

Hearsay is the classic example of evidence excluded because of its unreliability. Hearsay is an out-of-court statement offered into evidence for the truth of the matter asserted in the statement. Because the statement was made out of court, the jury cannot assess its reliability, and thus it is excluded.

For example, assume that an issue at trial is whether the gun belonged to the defendant. Assume, moreover, that the defendant's ex-girlfriend Marsha told a police detective that the gun *did* belong to the defendant. The detective nevertheless could not testify in court about Marsha's statement because her statement is hearsay. That is, her statement was made out of court and is being offered into evidence as proof of the matter asserted in her statement, which is that the gun belonged to the defendant.

Like most hearsay, Marsha's statement is of questionable reliability. Perhaps Marsha was intoxicated at the time she asserted this, perhaps she lied because she was angry with the defendant, or perhaps she was merely mistaken. If the prosecutor wishes the jury to conclude, based on information available to Marsha, that the gun belonged to the defendant, he should call Marsha as a witness and have her testify under oath, allowing defense counsel the chance through cross-examination to test the reliability of the testimony.

The statement would not be hearsay if it were offered to prove something other than the matter asserted in the statement. For example, assume that the prosecution wished to prove that Marsha feared the defendant because she thought he was a gun-toting gangster and thus was testifying against him reluctantly.[5] Her statement that the gun belonged to the defendant would be admissible to show not that the gun actually did belong to him but only that she *believed* that it belonged to him and thus feared him. In that situation, the fact that her statement about gun ownership is unreliable is unimportant because it is being admitted only to show her belief, not the

actual fact of ownership. Because the unreliability of the statement with respect to the defendant's actual gun ownership does not undercut its reliability with respect to her belief about his gun ownership, the court is likely to admit it into evidence for the purpose of showing Marsha's belief. The statement would continue to be inadmissible for the purpose of proving ownership of the gun.

If the judge did admit Marsha's statement, he would probably instruct the jury that her statement is to be considered only as evidence of her belief and not as evidence of the defendant's gun ownership. Yet some jurors might not be able to compartmentalize the information in that way and, despite the judge's instruction, might consider it as evidence of the defendant's gun ownership.

In the end, the hearsay rule can often be circumvented by thinking of a reason to admit the testimony other than to prove the truth of the matter asserted. Lawyers speak of this as offering the evidence for a "nonhearsay purpose," and it is an effective way of putting before the jury testimony that may be helpful to one's case but would otherwise be inadmissible as hearsay. Offering Marsha's statement for the nonhearsay purpose of proving her state of mind is an example of this technique. The prosecutor may hope that the jury will not be able to compartmentalize the information and will rely on it to conclude that the defendant owned the gun.

It also is possible to get out-of-court statements admitted into evidence by persuading the court that the statement fits within one of the exceptions to the rule excluding hearsay. These exceptions are generally based on the idea that certain hearsay, because of the circumstances in which the statement was made, is sufficiently reliable to be admitted into evidence. For example, statements made by someone against his or her own interest can often be introduced into evidence even though they are technically hearsay, on the assumption that anyone who admits something against his or her own interest is probably telling the truth.

### b. Prejudice: The Example of Prior Bad Acts

Evidence of prior bad acts by a criminal defendant provides an example of evidence that may be excluded because of the possibility of prejudice to a party, in this case the defendant. Such evidence is often excluded because, even though the evidence may be relevant to establishing guilt, courts are

concerned that a jury may give too much weight to such evidence. In other words, the jury may convict the defendant solely because he committed prior crimes. However, when the evidence establishes a certain pattern to a crime, as when a con artist has used a similar scam in the past, such evidence is more probative of a later crime involving the same pattern than is evidence of bad acts generally. Such evidence is often admitted.

#### c. Other Policies: The Example of Privilege

A statement made by a client to his attorney for the purpose of obtaining legal advice provides an example of evidence excluded for other policy reasons. Such a statement is a privileged attorney-client communication and is generally not disclosed to the jury unless the client waives the privilege. The statement, of course, may be of enormous relevance and reliability, but the policy of encouraging people to seek legal advice by permitting them to speak freely to their lawyer is thought to outweigh the value of admitting the privileged communication into evidence. This is particularly true given that eliminating the privilege likely would discourage a client from speaking freely to his or her lawyer. That is, eliminating the privilege would not necessarily bring a statement into evidence. It might only prevent the making of the statement.

### *B. The Burden of Proof*

Factual investigation by a lawyer is characterized by conditions of incompleteness, inconsistency, and uncertainty.[6] That is, the lawyer must attempt to establish facts on the basis of imperfect information.

Factual investigation is characterized by incompleteness because the lawyer can never obtain all the relevant evidence. For example, the accused denies that he committed the murder, but has no recollection or other evidence of where he was at the time the crime occurred. The evidence is incomplete.

Factual investigation is characterized by inconsistency because the relevant evidence may support multiple conclusions. For example, one witness testifies that he saw the accused entering the victim's apartment building on the evening of the crime, while another witness swears that the accused was with her the entire evening. The evidence is inconsistent.

Factual investigation is characterized by uncertainty because the evidence, even if consistent, may not establish a fact conclusively. For example,

the evidence may prove that the plaintiff was given certain medication and that studies have found that the medication increases the risk of a certain illness by 10 percent. Yet the evidence does not establish conclusively that the medication caused the illness.

For these reasons, the law does not require that facts be proved irrefutably. Rather, the law requires that the evidence satisfy one of several different burdens of proof. The burden of proof simply indicates the level of confidence that the fact finder must have that the fact is true.

## 1. TYPES OF BURDENS OF PROOF

At trial, one party bears the burden of proof with respect to a fact. Burdens of proof are of two types: the burden of production and the burden of persuasion.

The burden of production is in essence the burden of presenting enough evidence that a reasonable jury could decide that the party's factual allegations have been established. Meeting the burden of production is sometimes referred to as establishing a prima facie case. If a party does not meet its burden of production, then no reason exists to send the party's factual allegations to the trier of fact, because by definition the party cannot prevail. Typically, if a party fails to meet its burden of production, the court will order judgment in favor of the opposing party. Often, this is done by granting a motion for a directed verdict or for judgment as a matter of law.[7] As this suggests, whether the burden of production has been met is a question of law, to be decided by the judge rather than the jury.

Assuming that the burden of production has been met, the case will be sent to the trier of fact, often a jury, for resolution of the issues of fact. Before the trier of fact, one party will bear another burden of proof, the burden of persuasion. This burden, as the name implies, is the burden of persuading the trier of fact that the fact is true. It corresponds to what most nonlawyers imagine when they hear the term *burden of proof*. Usually, the burden of persuasion is borne by the same party that bore the burden of production, although exceptions exist.

The party with the burden of persuasion must establish the fact at the required level of confidence. If the party meets the burden of persuasion, the fact is established. If the party does not meet the burden, then the fact is not established. The failure of a party to establish a fact does not mean that a contrary fact is established. For example, at trial the prosecution has the bur-

den of proving that the accused committed the crime and, if it fails to do so, the accused will be found not guilty. That does not mean that the accused is innocent of the crime, but only that the prosecution failed to meet its burden of proof. In other words, at trial, the trier of fact does not necessarily decide what happened. Rather, the trier of fact decides only whether the factual allegations made by the party with the burden of persuasion have been established at the required level of confidence, that is, whether the burden of persuasion has been met.

In most cases, the party with the burden of persuasion must establish its factual allegations by a preponderance of the evidence. This standard is met where the trier of fact concludes that it is more probable than not that the factual allegation is true. In other words, the probability that the factual allegation is true is greater than 50 percent. In reaching this decision, the trier of fact considers all of the evidence presented by both parties.

In a criminal case, the prosecution must prove the facts necessary to establish the elements of a crime beyond a reasonable doubt. This is a higher burden of proof than the preponderance of the evidence standard, but it cannot be quantified. A higher burden of persuasion is required in criminal cases than in civil cases because acquitting the guilty is regarded as preferable to convicting the innocent.[8] For this reason, a jury may believe that the defendant probably committed the crime yet find the defendant not guilty of criminal charges because proof beyond a reasonable doubt requires more confidence than a mere probability. A defendant sued in a civil case and prosecuted in a criminal case for the same conduct, with perfect consistency, could be found liable in the civil case but not guilty in the criminal case, because the evidence was strong enough to satisfy the preponderance of the evidence standard but not strong enough to satisfy the reasonable doubt standard.

Other burdens of persuasion sometimes are required. For example, in some cases the plaintiff must establish its factual allegations by clear and convincing evidence, a level of confidence that is higher than proof by a preponderance of evidence, but not as high as proof beyond a reasonable doubt. As in the case of proof beyond a reasonable doubt, the law has not assigned a statistical probability to this standard.

The burden of proof may rest on different parties with respect to different facts. Generally, the burden of proof of a fact rests on the party whose claim

or defense depends upon the fact. For example, if the plaintiff is arguing that she was injured by the surgeon's negligence, she bears the burden of proving the facts establishing the surgeon's negligence. If the surgeon is arguing that, even assuming that he was negligent, the plaintiff cannot prevail because the claim is barred by the statute of limitations, the surgeon bears the burden of proving the fact that the complaint was filed after the limitations period had ended.

The burden of proof governs fact-finding at trial. As discussed in chapter 2, on appeal, the court will not reevaluate the evidence against the burden of proof. Rather, the court will evaluate the evidence only against the standard of review. For example, in a civil case, the appellate court will examine a jury verdict only to determine whether it is supported by substantial evidence. If so, the court of appeals will affirm the judgment of the trial court, even if the appellate court itself would not have found the burden of proof to have been met. In other words, a factual finding at trial is usually not disturbed on appeal.

### 2. TECHNIQUES TO PERSUADE THE TRIER OF FACT

Lawyers employ several techniques to meet their burden of proof in the face of incomplete, inconsistent, and uncertain information. First, they make arguments about the credibility of the evidence. For example, if the evidence is testimonial, lawyers may argue about the ability of the witness to perceive the events with respect to which she has testified, about her ability to recall those events accurately, or about her truthfulness. If the evidence is documentary, lawyers may argue about the authenticity of the document. Second, lawyers make arguments about the certainty of the evidence, that is, about the strength of the inference that can be drawn from it. For example, a photograph may unquestionably be an accurate photograph taken by a surveillance camera of the robber entering the convenience store. Defense counsel, however, may argue that the image on the photograph is poor and does not clearly show the face of the accused. Third, lawyers make arguments based on the quantity of evidence. For example, plaintiff's counsel may note that she has offered three eminent experts who have testified that the defendant surgeon failed to exercise reasonable care in performing a surgery, while the defendant has been able to find only one expert to testify on his behalf. Fourth, lawyers make arguments based on

the coherence of all of the evidence taken together. One of the ways that humans most commonly organize new information is in the form of a narrative. For example, one who wishes to learn about an important person is likely to begin by reading that person's biography, a narrative in which the significant events of someone's life are recounted in chronological order. A lawyer presenting her evidence to a judge or jury similarly must attempt to organize the evidence in the form of a narrative. The lawyer begins the presentation of the case with an opening statement explaining the story that the evidence will tell, after which each witness gives his or her testimony. The trier of fact is likely to find a party's evidence credible to the extent that each bit of evidence is consistent with the others and to the extent that the story that the evidence tells is plausible.

As this suggests, the process of fact-finding, like other steps in the legal reasoning process, involves the use of judgment. It is not a mechanical process. Triers of fact must exercise judgment as they assess the credibility, certainty, quantity, and coherence of the evidence based upon their own life experiences.

### 3. PRESUMPTIONS

In some cases, a rule of law, known as a presumption, declares that a particular fact is to be regarded as true, at least under certain circumstances. That is, proving the occurrence of one set of facts, which may be termed the "foundational facts," establishes the presumed existence of another fact, the "presumed fact." For example, establishing the foundational facts that a letter was properly addressed, stamped, and deposited in a mailbox may be regarded as establishing a presumption that the letter was delivered to the addressee.

Presumptions are of two types: rebuttable and irrebuttable. A rebuttable presumption states that, under certain circumstances, a presumed fact shall be considered by the trier of fact as true, unless the contrary is proved. To use the example above, once a party demonstrates that the letter was mailed properly (the foundational fact), delivery of the letter (the presumed fact) is presumed unless the other party presents evidence that the letter was not delivered.

A rebuttable presumption is really just a way of articulating the burden of proof. To say that a letter is presumed delivered is merely to say that the

party disputing delivery bears at least the burden of production on the issue of whether the letter was delivered.

An irrebuttable presumption states that a presumed fact shall be considered by the trier of fact to be true, regardless of any evidence to the contrary. For example, a state may adopt a rule that a child born to a married woman shall be irrebuttably presumed to be the biological child of the husband. Thus, no matter how much evidence is presented on the issue of whether the husband is the biological father, as long as the trier of fact concludes that the child was born while the mother and her husband were married (the foundational facts), the husband's paternity (the presumed fact) is established as a matter of law.

An irrebuttable presumption, in contrast to a rebuttable presumption, is not really an evidentiary rule, but a substantive rule of law phrased in the language of an evidentiary rule. To say that the mother's husband shall be presumed to be the father of the child is no different in effect from adopting a rule of law that defines a father as the husband of the mother. That is, one can articulate a substantive rule of law that has the same effect as the irrebuttable presumption, but without using the language of presumption.

Presumptions reflect a variety of different policies. For example, sometimes a presumption is made against the party that has superior access to the evidence, on the theory that imposing the burden of proof on the party best able to prove the existence or nonexistence of a fact is the fairest approach. If the party with the better access to the evidence fails to produce it, one can reasonably infer that the evidence was contrary to that party's position in the litigation. Sometimes a presumption is intended to facilitate litigation by establishing as a fact the most probable event, unless evidence to the contrary is produced. For example, if a letter was mailed, it probably was received and thus the presumption described above results in a finding that the letter was received, unless a party can produce evidence that it was not.

Presumptions represent one additional way in which the facts established at trial may not correspond to the facts as they occurred. In the case of an irrebuttable presumption, the lawyer cannot possibly prove that the contrary occurred, no matter how convincing the evidence. In the case of a rebuttable presumption, the lawyer can rebut the presumption and establish the contrary fact, but the effect of the presumption is to place the burden of proof

on the lawyer attempting to rebut the presumption. If the lawyer cannot meet the burden of proof, she cannot establish the contrary fact.

### *C. The Problem of Cognitive Bias*

In making judgments, triers of fact inevitably act with predispositions that may affect how they evaluate the evidence. The psychological literature has documented a variety of cognitive biases that affect judges and juries. Cognitive biases are often in the form of heuristics. Heuristics are rules for resolving problems that are usually based on past experience. For example, asked which of two people—a sixteen-year-old girl or a fifty-five-year-old man—was a babysitter, most people would choose the sixteen-year-old girl. Past experience has taught them that babysitters are very often teenage girls and not often middle-aged men. Faced with having to identify a babysitter, they will rely on that past experience.

In the same way, triers of fact tend to assume that events occur in a way that is consistent with their own experience. Thus, a judge or juror who has seen a police officer lie will likely be more skeptical of testimony by all police officers than a judge or juror who has witnessed an act of heroism by a police officer. Either fact finder is likely to assume that the police officer on the witness stand is like other police officers encountered in the past. A factual account that is entirely accurate may be rejected by a fact finder if the account suggests that the parties behaved in a way that is inconsistent with the past experiences of the fact finder. Triers of fact thus bear a cognitive bias against factual narratives that are inconsistent with their personal experience. This is sometimes described as the confirmation bias, that is, a tendency to interpret events to confirm existing preconceptions.

Another cognitive bias is the availability bias. People tend to attach unwarranted significance to information that is most available to them. For example, if a narrative of events includes a great deal of information about a particular individual, that individual will tend to be seen as of great significance to the events. Thus, in a trial involving a complex transaction with multiple parties, a judge or jury may be more likely to assign culpability to those individuals who are most frequently mentioned in the testimony.

Yet another cognitive bias is the anchoring effect. When people must estimate some value, they are greatly influenced by the first estimate suggested,

even if the first estimate is obviously incorrect. For example, in one study, people provided a higher estimate of the average temperature in San Francisco if they were first asked whether it was higher or lower than 558 degrees.[9] Although 558 degrees is an obviously absurd estimate, the mere suggestion of a high figure increased the estimates provided by study participants. Thus, a judge's or jury's estimate of the plaintiff's damages may be influenced merely by the fact that the plaintiff demands a large amount.

Still another cognitive bias is the hindsight bias. People tend to see events that have already occurred as having been predictable. A number of legal rules attach significance to whether an event was foreseeable. For example, courts sometimes hold a defendant liable for harm caused by negligence only if the harm was foreseeable. Hindsight bias predisposes a judge or jury to find that an event was foreseeable.

The psychological literature on cognitive biases is rich and interesting.[10] These few examples are intended merely to illustrate some of the psychological factors that influence fact-finding at trial, whether by a judge or by a jury. The role of personal experience in the operation of cognitive biases serves only to emphasize the importance of the identity of the fact finder. Judges, whose work exposes them to a particular set of experiences, may well reach a different decision from lay jurors. Further, individual jurors may interpret the same evidence quite differently because of their own different experiences. Two juries may reach different verdicts based on the same evidence for reasons related entirely to the identity of the jurors. Thus, a case may be won or lost at the time the jury is selected.

In sum, the essential point is that the facts that matter to legal reasoning are the facts that can be proved at trial. Establishing facts requires the lawyer to obtain admissible evidence that is sufficient to meet the prescribed burden of proof in light of a host of cognitive biases on the part of the trier of fact.

# 5

# APPLYING THE LAW

The final step in the legal reasoning process is to apply the law to the facts to determine the rights and duties of those involved in the situation. The law, as we have seen, consists of rules and the underlying policies.

Application of the rules requires the use of one of two methods: deduction or analogy. When using deduction, the lawyer determines whether the facts of the situation are or are not described by the factual predicate of a rule and thus whether the legal consequence imposed by the rule does or does not apply to the situation. When using analogy, the lawyer determines whether the facts of the situation are or are not like those described by the factual predicate of the rule and thus whether the legal consequence imposed by the rule does or does not apply to the situation. In applying either of these methods, the lawyer uses rules to determine the rights and duties that exist in the situation and thereby completes the legal reasoning process.

As will be seen, however, deduction and analogy often produce indeterminate results. That is, the lawyer cannot determine with sufficient certainty whether the facts of the situation are described by, or are like, the situation described in the factual predicate of the rule. In that case, the lawyer must

refer to the underlying policies to ascertain the rights and duties that exist in the situation.

The application of policies to a situation involves the use of methods quite different from those used to apply rules. Rather than comparing the situation of the case to that described in the factual predicate of the rule, the lawyer determines whether imposing the legal consequence described in the rule would further the underlying policies to a greater extent than not imposing the legal consequence. The application of policies is thus neither deductive nor analogical in form. It involves a process of weighing policies and assessing the relationship between ends and means.

The relative extent to which the lawyer relies on the rules and the policies is to some degree a matter of choice. For example, the lawyer may take the position that disputes should be settled by the application of rules and that policies will be consulted, if at all, only when there is extreme uncertainty concerning the applicability of the rule. Alternatively, the lawyer may take the position that it is always preferable to seek the result that would further the underlying policies, unless (or, perhaps, even if) that result would be contrary to very clear language of the rules.

The choice between rules and policies is profound. In applying rules, the lawyer seeks consistency with past decisions, regardless of whether the result seems desirable. In applying policies, the lawyer seeks the most desirable result. Rules refer the lawyer to prior decisions, whereas policies refer the lawyer to future consequences. Rules require the use of the logical methods of deduction and analogy, whereas policies require the use of an empirical method for assessing ends-means relationships and a normative method for weighing values.

The appropriate role of rules and policies is perhaps the most debated issue in modern American jurisprudence. The debate proceeds on both descriptive and normative grounds.

The descriptive question that lawyers debate is whether in fact courts resolve issues primarily by the application of rules or by the application of policies. The orthodox theory is that judges apply rules through the logical processes of deduction and analogy, turning to policies only in the occasional hard case. The competing theory is that judges in reality intuit the best result, that is, the result that is most satisfactory to them as a matter of

policy, and only then do they turn to the rules to explain and justify the result they have reached on other grounds. In this view, the judge may even have the sensation of following the rules, but the interpretation of those rules as the judge applies them is guided by a prior intuition about the most desirable resolution. In this way, the rules can seem to produce the correct result. Indeed, some argue that the application of the rules always requires some reference to the underlying policies.[1]

The normative question that lawyers debate is whether rules or policies should be given primacy in deciding disputes. For reasons described in chapter 11, the orthodox position again is that courts should give primacy to rules, referring to the underlying policies only to resolve indeterminacies or to decide whether the rules should be changed. Policy application is thus treated as a supplement to rule application.

In this chapter, the application of rules is treated as involving either deduction or analogy.[2] In the next two sections, these two methods are described, followed by a discussion of some of the ways in which each method is supplemented by the application of policies. The principal concern here is thus the application of rules. A fuller discussion of the application of policies is reserved for chapter 6.

## I. Deduction

### *A. The Basic Model*

Reasoning in the deductive form using a syllogism is the dominant style of legal reasoning. A syllogism of the type used in legal reasoning has an established structure, consisting of a major premise, a minor premise, and a conclusion. The major premise posits a statement that is true of a class of objects, the minor premise characterizes a particular object as belonging to the class, and the conclusion asserts that the statement is therefore true of the particular object.

For example, one might be told that all Kentucky colonels wear string ties (major premise). Upon hearing that Mr. Sanders is a Kentucky colonel (minor premise), one could deduce that Mr. Sanders wears a string tie (conclusion). The major premise, which posits a statement true of a class of objects, states that all Kentucky colonels wear string ties. The minor premise,

which describes a particular object, states that Mr. Sanders is a Kentucky colonel. The conclusion asserts that the statement about Kentucky colonels generally is true of Mr. Sanders specifically.

In legal reasoning, the major premise states a rule of law applicable to a class of situations described in the factual predicate, the minor premise characterizes a particular situation as either satisfying or not satisfying the elements of the factual predicate, and the conclusion states whether the rule has therefore been shown to apply to the particular situation. That is, the major premise announces a rule of law, the minor premise describes the facts of the client's situation, and the conclusion states whether the right or duty described in the rule of law has been demonstrated to exist under the facts of the client's situation.

For example, assume that the lawyer must decide whether the client, a man who punched a neighbor in the face, is liable for a battery. A legal rule may state that a person is liable for a battery if through some voluntary act that person causes an offensive touching of another with the intent to cause the touching. This rule states the major premise.

Having formulated the major premise, the lawyer must next formulate a minor premise that characterizes the facts of the client's situation. The minor premise characterizes the facts as either satisfying or not satisfying each of the elements of the factual predicate of the rule.

One may think of the lawyer's treatment of the facts as a process of categorization. The rule creates a category of facts that gives rise to a legal consequence. The lawyer must decide whether the client's situation is included in the category or excluded from it.

In the case of the rule stated above, the factual predicate has four elements: (1) a voluntary act (2) causing (3) an offensive touching (4) with intent. The lawyer with some degree of confidence can state a minor premise that the client (1) did perform a voluntary act (2) that caused (3) an offensive touching (4) with the intent to cause the touching. Combining the major premise with the minor premise, the lawyer concludes that the client is liable for a battery. In other words, the lawyer has categorized the facts of the client's situation as falling within the factual predicate of the rule. The conclusion is that the legal consequence stated in the rule of law exists in the client's situation.

This basic model of syllogistic reasoning assumes that the lawyer can apply the law to facts by reference solely to the language of the legal rule, an approach that is sometimes called textualism (because of the exclusive focus on the text of the rule), or formalism. In effect, the lawyer examines the words of the rule and attempts to decide whether the general facts set forth in the rule embrace the specific facts of the client's situation.

### *B. The Problem of Indeterminacy*

Legal reasoning in the deductive form, however, is often indeterminate. When it is, the lawyer cannot reach a firm conclusion merely by applying the plain language of the rule to the facts.

Legal reasoning is indeterminate because the elements of the factual predicate are stated in such general terms that the lawyer cannot determine with certainty whether they include the facts of the client's situation.[3] Thus, it is often possible to characterize the facts of the client's situation in more than one way and thereby to derive two or more alternative minor premises. The conclusion of the legal reasoning process depends entirely upon which minor premise the lawyer selects.

Consider the example of the client who punched his neighbor. Few would doubt that a punch in the face satisfies the elements of a battery, including the element of a touching. Thus, the only plausible minor premise would include an assertion that the client did cause a touching.

Assume now, however, that the client, rather than punching the neighbor in the face, had tugged on the neighbor's necktie, pulled on his shirtsleeve, pushed his hat off his head, or knocked a box of pizza out of his hand. Or consider less tangible contacts, such as blowing air on the neighbor, causing sound waves to reverberate in his ear, or sending electromagnetic radiation through his body.

The problem is that the term *touching* is so general that lawyers may differ over which, if any, of these examples constitutes a touch. Whether the client has satisfied the elements of a battery in each case depends upon how the lawyer characterizes the client's conduct.

The problem of indeterminacy is especially difficult if the factual predicate incorporates a legal standard, such as "reasonableness" or "good faith." Rather than stating the facts that must be present, standards merely characterize

the facts at a high level of generality. Whether the characterization applies may depend upon innumerable circumstances that cannot be, and are not, specified in the factual predicate. Thus, standards are so general that their language is particularly unlikely to decide a case with complete certainty.

For example, one tort law rule states that a person is negligent if he or she fails to exercise reasonable care. Driving a car at sixty miles per hour is unreasonable if the road passes through a school zone and children are present but may be entirely reasonable if the road is a deserted four-lane highway and the driver is rushing a coronary patient to the hospital. In short, standards do not create a sharply defined category of facts giving rise to the legal consequence, and thus they can intensify the indeterminacy of a legal rule.[4]

### *C. Addressing Indeterminacy Through Specificity*

The problem of indeterminacy, as noted above, stems from the fact that the language of rules is so general that the lawyer cannot be certain whether the language embraces the facts of a particular situation. In other words, it is unclear whether the facts should be characterized as constituting the elements of the rule.

Because the problem of how to characterize facts arises from the generality of the language of the rule, the difficulty can sometimes be addressed by finding a more specific rule that defines the elements with greater precision or illustrates them. Recall that, in step 3, the lawyer has organized the rules into a framework in which specific rules are categorized as subrules of more general rules.

One type of subrule illustrates a general rule or an element of a general rule. Thus, for example, the lawyer may identify a case holding that knocking a box of pizza out of the victim's hand was an offensive touching. If the current case involves a defendant who knocked a hat off the head of the plaintiff, the lawyer for the plaintiff will argue that, by analogy, knocking a hat off one's head should be treated the same as knocking a box of pizza out of one's hand. This use of analogy is discussed further below.

Another type of subrule defines an element of a more general rule. Thus, for example, the lawyer may identify a rule defining the element of a touching. Such a rule may state that a touching occurs when the defendant causes

physical contact with the plaintiff's person or with something closely identified with the plaintiff's person. This rule adds a degree of specificity to the word *touching*.

Once a more specific rule is identified, the lawyer again performs syllogistic reasoning, now using the specific rule as the major premise. Assume that the defendant has tugged on the plaintiff's necktie. The new major premise in this syllogism is that one who causes physical contact with the plaintiff's person or something closely identified with the plaintiff's person commits a touching. The minor premise might be that a necktie is closely identified with the plaintiff's person. The conclusion then would be that pulling on the necktie constitutes a touching.

A similar syllogism might be used in an effort to decide whether knocking a box of pizza out of the plaintiff's hand is a touching. In this case, however, even the more specific rule may be too general. It simply may not be self-evident to the lawyer whether the box is "closely identified" with the person. The lawyer may look for an even more specific rule defining the elements of the specific rule, such as the phrase *closely identified*, and, if there were such a rule, the lawyer would again use it syllogistically to decide about the box. If no more specific rule exists, the lawyer will be in a quandary over how to determine whether the box is closely identified with the plaintiff's person and, thus, whether striking the box is a touching.

In short, identifying more specific rules at times may seem to solve the problem of indeterminacy. Lawyers often find, however, that even the most specific rule is sufficiently general to leave room for doubt. Something other than formal reasoning is necessary to reach a conclusion.

## *D. Addressing Indeterminacy Through Rules of Statutory Interpretation*

### 1. THE SPECIAL RULES OF STATUTORY INTERPRETATION

Courts have adopted a number of special rules for interpreting statutes. These rules, often referred to as "canons of interpretation" or "canons of construction," are intended to assist the lawyer in interpreting language that is of uncertain meaning. Some canons are characterized as linguistic canons, because they address how words should be interpreted. For example, one linguistic canon of statutory interpretation is that a statute shall be interpreted

in accordance with its plain meaning. That is, words are presumed not to have a special or unusual meaning.

A second canon is that every word or phrase in a statute is to be given effect. Thus, if an interpretation can be reconciled with the language of a statute only by assuming that a certain word is redundant or without effect, the court will generally reject that interpretation.

A third canon, sometimes expressed in the Latin maxim *Expressio unius est exclusio alterius* (meaning "The expression of one thing is the exclusion of another"), is that the language of a rule is presumed to be exhaustive. Thus, if a statute lists certain instances to which it applies, the court will presume that the legislature meant to exclude any instance not listed.

A fourth canon, known as the doctrine of *ejusdem generis* (a Latin phrase meaning "of the same kind"), states that when a statute contains a list of instances to which it applies followed by general language indicating other instances, the statute will be presumed to apply to other instances only if they are of the same type as those listed. For example, a statute that authorized an investigator to inspect "books, papers, and other records" would authorize inspection only of other records that were like books and papers. A similar canon is that of *noscitur a sociis* (a Latin phrase meaning "let it be known by its associates"), under which a vague word is to be interpreted by reference to accompanying words.

Another canon, which is also frequently summarized by a Latin maxim—*Generalia specialibus non derogant* (meaning "The general does not derogate from the particular")—provides that a specific statute prevails over a more general one. For example, if one statute provides that claims of negligence must be brought within three years and a second statute provides that malpractice claims against physicians must be brought within one year, the latter statute would probably govern a negligence suit brought by a patient against a surgeon. Because malpractice actions against physicians are a narrower category of lawsuits than negligence actions generally, the malpractice statute is likely to be considered more specific and thus the governing statute.

A final linguistic canon is that statutes *in pari materia* (a Latin phrase meaning "on the same matter" or "on the same subject") shall be interpreted with reference to each other. For example, a term used in different statutes relating to taxation should be interpreted in harmony.

Other canons of statutory interpretation are categorized as substantive. For example, one such canon is that a statute will not be interpreted in a way that leads to an absurd result. Another such canon is that an ambiguous statute shall be construed so as to be consistent with the Constitution. A third such canon is that an ambiguous statute shall be construed against the government. Thus, a criminal statute will be interpreted, in doubtful cases, so as not to apply to the accused. Still another substantive canon provides that statutes in derogation of the common law shall be construed narrowly. Thus, a statute that alters common law rules will be interpreted, in doubtful cases, so as not to apply.

## 2. THE INDETERMINACY OF THESE SPECIAL RULES

Even with numerous canons of statutory interpretation like those just described, textual analysis of a statute is often indeterminate for two reasons.

First, a canon of interpretation is itself a form of rule and, as such, may be too general to lead to a single conclusion. For example, in the case of the doctrine of *ejusdem generis*, lawyers may disagree concerning the features that the listed items have in common.[5] Thus, in the illustration just given, one lawyer may conclude that the kinds of records that the investigator may inspect include only those that are in printed form on paper, which would exclude microfilm and computer discs, whereas another lawyer may conclude that they include any record that is in printed form whether on paper or not, which would include microfilm but not computer discs. Each of these characterizations accurately describes books and papers, but each has a somewhat different scope and, if used, would give a different meaning to the term *other records*. Thus, the rules of interpretation are very often victims of the same problem of generality that they are intended to address. For that reason, the rules of statutory interpretation can be indeterminate.

Second, canons of statutory interpretation may be indeterminate because they are sometimes contradictory on their face. Indeed, Professor Karl Llewellyn, who taught at Columbia Law School from 1925 to 1951 and then at the University of Chicago, wrote a well-known article in 1950 in which he attempted to show that, for each of numerous canons of statutory interpretation, one could state another canon that seemed to contradict it, at least in part.[6] For example, Llewellyn noted that one commonly stated canon to

the effect that "if language is plain and unambiguous it must be given effect" was contradicted by another canon stating that a literal interpretation will not be adopted if it would "lead to absurd or mischievous consequences or thwart manifest purpose."

One explanation for this phenomenon is the underlying tension in statutory interpretation concerning the extent to which a lawyer should consult extrinsic sources in interpreting a statute. Put another way, conflicts between rules of statutory interpretation are rooted in a dispute about the relative primacy to be afforded the language of the rule and the underlying policies. As discussed in chapter 2, a lawyer may attempt to interpret a statute by examining its language alone or by consulting extrinsic sources. If the lawyer decides to consult extrinsic sources, there are at least two types of extrinsic sources that might be consulted. One is the legislative history, which would be researched in an effort to interpret the statute in accordance with the intent of specific legislators. Another is the subsequent understanding of what is just or wise, which could lead to an interpretation of the statute in accordance with current notions of justice or good policy.

Each of these theories of statutory interpretation is reflected in a variety of canons of statutory interpretation. Consider, for example, the two canons taken from Llewellyn's article. The first theory—that interpretation is based on the language alone—is reflected in the canon that plain and unambiguous language is to be given effect. The competing theory—that interpretation may be based on extrinsic sources—is reflected in the second canon. Under the second canon, the literal language is not to be followed if it would "thwart manifest purpose" (i.e., run contrary to legislative intent) or lead to "absurd and mischievous consequences" (i.e., contradict current notions of justice or sound policy). Thus, the first canon tends to restrict the lawyer to the text alone, whereas the second encourages the lawyer to look outside the language of the statute at legislative history and common notions of justice and sound policy.

The rules of statutory interpretation, in other words, are based on competing theories of statutory interpretation, that is, on different conceptions of the relative importance of rules and policies. Because the theories point in opposite directions, the rules also point in opposite directions. Thus, the result reached may depend upon which rules of statutory construction are applied.

## *E. Addressing Indeterminacy Through Policy Judgments*

The principal nontextualist or nonformal technique for addressing the indeterminacy of rules, whether embodied in statutes or judicial decisions, is the use of policy judgments. The lawyer must decide whether the policies underlying the rule would be furthered by characterizing the facts as satisfying or as not satisfying the elements of the rule.

### 1. THE TWO TYPES OF POLICY JUDGMENTS REQUIRED

The use of policies to address indeterminacy requires the lawyer to make two different kinds of judgments, both of which are discussed in this subsection.

The first type of judgment required is a judgment about the relationship between ends and means. In the battery example given earlier, one end is to preserve the peace. The lawyer must decide whether that end would be served by requiring the client to pay compensation for, say, pushing a hat off someone's head.

In theory, the extent to which a particular means will further a given end is an empirical question. Controlled experiments to determine the effects of a particular rule, however, are rarely performed. Thus, lawyers and courts generally use a combination of experience and intuition to make judgments about the relationship between ends and means. In making the judgments, lawyers may reach conclusions about which reasonable people can differ.

The second type of judgment required is a judgment about the relative importance of policies. This judgment is required because all rules represent a compromise among a number of opposing policies. For example, the rule defining a battery may be based on the policy of preserving the peace, but it is also based on the opposing policy of discouraging litigation over trivial offenses. The lawyer must decide which policy is to prevail in a given situation. Again, such judgments may yield conclusions about which reasonable people may differ.

The lawyer, in effect, makes two judgments: which policy to prefer and which means are effective in furthering that policy. In the next subsection, the nature of policy judgments is described, and in the subsection thereafter, the discussion centers in general terms on how these judgments are combined to decide a case. These topics are discussed in further detail in chapter 6.

## 2. THE NATURE OF POLICY JUDGMENTS

The lawyer begins the process of making policy judgments by identifying the policies articulated by the legislature or the courts in formulating the rule to be applied. In the battery example, for instance, the lawyer may have found language in the case law stating that the tort of battery is based on several policies. One may be a policy of preserving the peace, which is furthered by encouraging the victim to go to court rather than retaliating or instigating a feud. Another may be a policy of discouraging frivolous litigation, which is furthered by limiting tort liability to conduct causing significant injury. The lawyer must decide whether these policies require compensation in the particular situation under review.

Assume that the lawyer must apply the policies to the question of whether pushing a hat off someone's head is a battery. One may be tempted to structure the reasoning process in a syllogistic form. To simplify matters, assume momentarily that there is but one policy—preserving the peace. In this proposed syllogism, the major premise is that one commits a touching by causing a physical contact with something closely identified with the person of another such that the contact is likely to cause a breach of the peace. The minor premise is that pushing a hat off someone's head is likely to cause a breach of the peace. The conclusion would be that pushing the hat is a touching.

Using policies to decide cases, however, is not truly deductive. This is so because policies do not state a major premise from which one can reason deductively; policies are not general rules describing an entire category of cases that have a particular legal consequence. Rather, policies are the ends for which rules are the means. Thus, policies by their terms are stated as absolutes, as goals to be sought in all circumstances by any means, whereas legal rules by their terms create a specified legal consequence only in the limited circumstances set forth in the factual predicate.

In using policies to complete the legal reasoning process, the lawyer is not reasoning from a general rule to a specific case. Rather, the lawyer is reasoning from a specific case toward at least one, and probably several, policy goals. This form of reasoning requires the lawyer to make empirical judgments about the relationship between ends and means and value judgments about the relative weight of policies.

Policies, of course, can be stated at different levels of generality. A policy of protecting individual freedom, for example, can be stated more specifically as the policy of protecting free speech and more specifically still as the policy of protecting newspapers against libel actions. As policies are stated at lower levels of generality, they become limited in their scope of application and begin to take on the character of rules. Thus, as policies become more specific and rules become more general, the distinction between the two dissolves. This idea will be discussed in greater detail in chapter 6. At the moment, suffice it to say that policies can be stated at different levels of generality and that, as will be shown below, lawyers can manipulate the level of generality in order to create arguments for or against the application of a rule.

## 3. COMBINING THE POLICY JUDGMENTS TO DECIDE CASES

### a. In General

Deciding a case requires that the lawyer combine the two judgments to determine the overall policy benefit yielded by each possible result. The preferred result is that which yields the greatest policy benefit.

The lawyer cannot simply decide that one policy is more important than the others and then propose any result that furthers that policy. The problem with such an approach is that a particular result may not further the preferred policy enough to justify the cost to the competing policies. In predicting the result that a court is most likely to reach, the lawyer chooses the result estimated to provide the most benefit, taking into account the relative weight of the competing policies and the extent to which each result will further or impede those policies.

For example, the rule creating liability for a battery, as already noted, is based on policies that include deterring violence and avoiding wasteful litigation. Assume that the court decides that the former policy is more important than the latter. Using that assumption, the court might well be inclined to adopt a rule that all physical contacts result in liability for a battery, in order to discourage any physical contact that could even remotely lead to violence. Yet two objections to that rule exist. First, it would encourage too much litigation—the morning commute on a crowded subway could spawn dozens of lawsuits. Second, many physical contacts would never lead to violence. Thus, the benefit of such a rule in preventing violence would be

small, while the cost in terms of the policy of avoiding wasteful litigation would be great. Accordingly, despite the greater importance of preventing violence, the court might decide to impose liability only for those touchings likely to provoke violence, such as touchings that a reasonable person would find offensive. If avoiding litigation were to become a relatively more important policy, then the court might require an even greater likelihood of violence before imposing liability. For example, the court might require outrageous conduct before imposing liability, thus avoiding liability in all but the most extreme cases. In combining the judgments, then, the lawyer considers both the importance of the policies and the degree to which they will be furthered or impeded by each result.

Although reasonable persons may differ about the relative weight of policies and the degree to which particular results will further or impede a given policy, policy judgments are not wholly indeterminate. As will be discussed in chapter 6, policy judgments are made in a particular context that includes the historical setting, the individuals who are making the judgments, the facts to which the judgments will be applied, and prior judicial decisions. This context often constrains, even if it does not wholly determine, judgments about the weights of policies and the relationships between ends and means.

### b. Line Drawing

Some lawyers describe the application of law to facts by using the metaphor of line drawing: by adopting a rule, the lawyer draws a line between two categories of factual situations. In the category of situations on one side of the line, the right or duty created by the rule exists. In the category on the other side of the line, the right or duty does not exist. The location of the line is very much a matter of judgment because, in order to place situations on either side of the line, the lawyer must decide the relative importance of each policy and the extent to which applying the rule to any given situation will further or impede each policy.

Ideally, the situations on one side of the line should be qualitatively different from those on the other side. This qualitative difference justifies treating the situations differently. In practice, however, it is often characteristic of line drawing that, no matter where the line is drawn, there will be situations on either side that appear *not* to differ qualitatively, that is, the difference will seem to be one of only very slight degree. Given that the situations

on either side differ only slightly, the precise location of the line will seem arbitrary.

In extreme cases, the choice of the side of the line on which to place the factual situation will seem easy. To return to the example of the landowner's duty to warn about hazards, at one extreme it may seem obvious that a twenty-foot deep pit is so dangerous that the court should impose on the landowner the minimal burden of warning about the pit. At the other extreme, it may seem equally obvious that a one-inch deep depression in the ground poses so little danger that no discernible benefit would result from imposing a duty to warn. The twenty-foot-pit case and the one-inch-depression case seem clearly to belong on different sides of the line. The situations are qualitatively different, and this difference justifies their having different legal consequences.

As cases arise, however, involving pits of varying depths, some of the situations on opposite sides of the line may begin to resemble each other rather closely. At some point, the distinction between two cases on opposite sides of the line may seem arbitrary because there is no qualitative difference between them.

Nevertheless, the line must be drawn somewhere. The alternative would be to allow one policy to prevail all of the time. The landowner either would have no duty to warn of any hazard, no matter how dangerous, or would have a duty to warn of any condition on the land, no matter how trivial. Because both of these rules are highly undesirable, the drawing of a line that may seem arbitrary in close cases is tolerated, as long as the location of the line appears to reflect a qualitative difference between at least most cases on either side of the line and to yield a desirable result in most situations.

### c. Balancing

Some lawyers describe legal reasoning by using the metaphor of a set of scales and refer to "balancing" the policies in a particular situation. If the benefit to public policy associated with creating a right or duty in a particular situation outweighs the cost to public policy associated with creating the right or duty, the right or duty will be determined to exist. If the cost outweighs the benefit, then the right or duty will not be determined to exist.

The metaphor of balancing seems to suggest that deciding a case requires the lawyer to make only the first type of judgment—a judgment about the

relative importance of policies. And, indeed, most lawyers, to the extent that they think about it at all, probably do think of balancing tests as just that: a stark weighing of one policy against another.

In fact, however, balancing generally requires both types of judgments. The lawyer is not simply weighing, for example, free speech against the state's desire to suppress speech. If that were so, then one policy would outweigh the other, with the result that free expression would be either always protected or never protected.

Rather, the lawyer is really weighing the value of this particular act of suppression against the value of this particular instance of speech. The lawyer must make judgments about the extent to which this instance of speech truly furthers the policies underlying free expression as well as about the extent to which this instance of suppression truly furthers the policies underlying the state's desire to suppress, both of which are judgments about the relationship between ends and means.

For example, the lawyer may decide that the policy of free speech is more important than the policy of preserving a tranquil neighborhood. If that were the full extent of a balancing test, then the lawyer, if asked to decide whether the law permits a man to use a loudspeaker in a residential neighborhood at three in the morning, would have to answer in the affirmative—because free speech outweighs tranquillity.

The lawyer, however, engages in a more sophisticated balancing test. More specifically, the lawyer also considers the relationship between the policy goals and the means adopted by the state to advance those goals. Thus, the lawyer considers the extent to which a ban on the loudspeaker at three in the morning would promote tranquillity and impede free speech. If the speaker were permitted to use the loudspeaker during other times of the day to broadcast the same message, then the interference with free speech would be minimal. The lawyer may conclude that the ban's strong nexus with preserving tranquillity justifies the minimal interference with free speech.[7]

### *F. The Special Problem of Dictum*

Thus far in this section it has been assumed that the rules identified and synthesized into a framework are binding if they apply and that the critical task for the lawyer is to determine whether the rules do indeed apply to the

situation under review. Although this assumption is correct concerning enacted law, it is problematic with regard to case law.

The difficulty is that not all case law rules have the same force. As has been noted, the law distinguishes between the holding of a case, which is binding in future cases, and dictum, which is not.

The distinction, however, is not as clear in practice as it is in theory. Apart from the problem that two lawyers may not agree on which aspects of a case are the holding and which are dictum, courts in later cases may choose to treat a statement that rather plainly was dictum as if it were a binding rule of law.

That is, although a court need not follow dictum, it very often does so. Dictum represents, in effect, the court's prediction of how it would decide all future cases within the scope of the rule. The more cases that have cited a particular rule in dictum, the greater are the chances that a later court will follow it.

A court, however, will not apply dictum if the lawyer can persuade the court that the dictum would lead to an undesirable result in the present case. As an illustration, assume that the lawyer in the battery example finds a prior case stating that clothing worn by someone is "closely identified" with that person's body and, thus, pulling on someone else's clothing is a touching. In the prior case, however, the clothing was a necktie worn by the plaintiff. Because it was necessary to decide only whether a necktie is closely identified with the plaintiff's body, to the extent that the rule refers to any clothing besides a necktie, the rule is dictum.

Now assume that the lawyer learns that his client pulled the shirtsleeve of the neighbor. A shirt quite obviously is an article of clothing. The rule was dictum, however, except concerning neckties, and thus the court need not characterize the shirtsleeve as an article closely identified with the body. But should it?

The court decides whether to follow dictum through the exercise of policy judgments. For example, the court will have to assess the extent to which imposing a duty of compensation on the client may further the end of deterring violence. That is, the court will have to decide whether pulling on a shirtsleeve is as likely to provoke violence as pulling on a necktie. The lawyer may argue, for example, that a breach of peace is less likely to result from pulling a shirtsleeve than a necktie because tugging on a shirtsleeve does not

pose a potential danger of strangulation, and therefore the wearer may feel less threatened or invaded. Thus, imposing liability for pulling on the shirtsleeve is less closely related to the end of deterring violence than imposing liability for pulling on the necktie. At the same time, the argument will continue, pulling on shirtsleeves is such a common device for calling someone's attention that to impose liability for that act could lead to frivolous litigation. Accordingly, imposing liability for pulling on the shirtsleeve would hinder the policy of discouraging litigation more than imposing liability for the much less common act of pulling on the necktie. In short, the lawyer will conclude, the greatest policy benefit will be derived from disregarding the dictum and not imposing liability for pulling on the shirtsleeve.

As is explained in the final section of this chapter, a court makes the same type of policy judgments in deciding whether to overrule a prior case entirely. Because dictum is not binding, however, the court in theory finds it easier to disregard dictum than to overrule the prior decision. Any attempt to overturn a prior decision must overcome the heavily weighted policy of stare decisis and thus requires very strong policy grounds for changing the law.

The distinction between the holding and dictum adds a further dimension of indeterminacy to the legal reasoning process. As has been illustrated, very often the lawyer cannot be certain what result a given rule requires in a particular case. That is, the terms of the rule are indeterminate. If the rule is dictum, however, then the lawyer cannot even be certain that the rule will be applied. In attempting to predict the decision of the court, the lawyer must include in the calculation the possibility that the dictum will not be followed.

### *G. Using Deduction as an Advocate*

The discussion of legal reasoning in the deductive form thus far has generally assumed that the lawyer is acting as a counselor and is attempting to determine in a disinterested way how the law applies to the facts. In many instances, however, the lawyer applying law to fact is acting as an advocate and wants to reach a conclusion favorable to the client.

Although the legal counselor may be frustrated by the indeterminacy of the law, to the legal advocate this same indeterminacy provides opportunities to fashion arguments in support of the client's position. The indeterminacy

of the law results from the generality of rules and from the fact that the underlying policies can be applied only through the exercise of judgment. Indeterminacy, in other words, is built into the very structure of the legal reasoning process.

The advocate seizes on these structural sources of indeterminacy. Because the indeterminacy has its roots in certain constant features of the legal reasoning process, lawyers have developed standard techniques for using the indeterminacy to their clients' advantage.

In this section some of these standard techniques are described. The case of the lawyer arguing that a rule does apply is examined first, followed by the case of the lawyer arguing that the rule does not apply.

### 1. SUPPORTING APPLICATION OF THE RULE

The lawyer arguing for application of a case law rule typically seeks to broaden the factual predicate of the rule, stating the elements in relatively general terms. At a minimum, the lawyer must state the factual predicate in terms general enough to include the facts of the current case.

Often, this will require that the lawyer rely not on the narrow holding of a prior case but on the broader rules set forth in dictum. The prior case may have stated the rule that a hazardous condition on the land gives rise to a duty on the part of the landowner to warn of the hazard and may then have held that the landowner had a duty to warn of a concealed pit. The lawyer for the plaintiff in the current case, unless the client was injured by a concealed pit, would want to cite the broad rule stated in dictum rather than the narrower holding. Alternatively, the lawyer may synthesize a new rule from the holdings of several prior cases in the manner described in chapter 3.

The lawyer may also choose to formulate the *legal consequence* of the prior cases at a high level of generality. Assume, for example, that in one prior case the landowner was held to have a duty to post a warning about an unstable slope. In the current situation, the landowner did post a sign warning his party guests about the hazard, but the client, distracted by the party, was inattentive and sustained injury. The lawyer may formulate the duty in the prior case as a duty to give adequate notice to guests about a hazard, a somewhat broader formulation. The lawyer can now argue that, while a posted warning was adequate notice under the circumstances of the prior

case, the warning posted by the landowner in this case was not adequate notice under the circumstances of a boisterous party, and thus the host is liable to the client.

Another way to broaden the legal consequence of a rule is to synthesize a new rule from several prior cases. For example, if in addition to the case imposing a duty to warn about an unstable slope, there is another prior case imposing a duty to put a fence around a concealed pit, the lawyer citing both cases may synthesize a broader rule imposing a duty to exercise reasonable care, arguing that the warning and the fence constituted the exercise of reasonable care under the circumstances of the prior cases but that the posted warning was not an exercise of reasonable care under the circumstances of the client's situation.

It may be necessary for the lawyer to find or synthesize rules that are applicable only at a very high level of generality. If no cases involving hazards on the land can be found, the lawyer may look for cases involving defective consumer products in which there is dictum stating, or from which the lawyer can synthesize a rule stating, that one has a duty to warn those who may be foreseeably injured by a danger of which one is aware. Although the prior cases dealt with defective consumer products, when the applicable rule is stated with sufficient generality, it seems to apply directly to the hazardous land.

At the same time, the lawyer must avoid overreaching, being careful not to state the rule at such a high level of generality that it seems to apply to cases in which it would produce a clearly undesirable result. For example, the rule from the consumer products cases stated above is probably too broad. Read literally, it suggests that a landowner would have a duty to warn others about hazards on someone else's land, merely by being aware of them, or that a manufacturer would have a duty to warn others about defects in another company's products.

In describing a rule or an argument that goes too far, lawyers sometimes say that it "proves too much." That is, although the rule or argument produces desirable results in some instances, it produces undesirable results in others. Thus, a rule that proves too much is often rejected by a court in favor of a narrower rule.

Apart from stating the rule broadly, a second technique for arguing that a case law rule applies to a situation is to hold to a minimum the number of

elements in the rule. The more numerous the elements in the rule, the greater the likelihood that one of them will be found not to apply to the client's situation. In quoting the rule or holding from a prior case, the lawyer attempts to eliminate from the factual predicate any fact that was not necessary to the decision. As just explained, any fact that the lawyer *does* include will probably be stated in general terms. Facts in the prior case that have no counterparts in the current case will be characterized, if possible, in one of two ways. They may be characterized as sufficient, but not necessary, grounds for applying the rule, which means that their absence does not necessarily preclude application of the rule. Alternatively, if the facts were held to be necessary, they may be characterized as representing special instances of more general necessary facts. The lawyer then argues that other facts in the current case may also be regarded as special instances of the more general necessary facts in the rule. In other words, the lawyer substitutes different facts in the current case for the absent facts from the prior case, arguing that the substituted and the absent facts are equivalent.

A third technique for arguing that a rule applies to a case is to demonstrate that the policies underlying the rule would be furthered by applying the rule to the current case. The lawyer may argue, for example, that the policy that required imposition on the landlord of a duty to warn about a concealed pit equally requires imposition of a duty to warn about an unstable slope. Thus, although a slope, concededly, is not a pit, the difference between the two is irrelevant to the accomplishment of the underlying policies.

This technique may require the lawyer to manipulate the level of generality at which the policies underlying the rule are stated. Assume that the rule imposing a duty to warn about pits arose in cases involving rock quarries and that the courts had stated that the policy underlying the rule was to ensure that those who profit from economic activity on their land compensate those injured by that activity. Stated at this level of generality, the policy would seem inapplicable to a later case involving a hole dug for a residential swimming pool. If the policy is restated more generally, however, as one that requires those who own land to compensate those injured by activity on the land, then the policy seems to apply to the swimming pool case. In other words, if the policy is stated at a sufficient level of generality, the distinction between economic and noneconomic activity disappears. The lawyer, however, must be prepared to defend restating the policy at a more general level,

perhaps by reference to an even more general policy. For example, as discussed in chapter 6, one very general policy is utilitarianism, under which the law should promote the greatest good for the greatest number. The lawyer may argue that because unproductive noneconomic policy is less beneficial to society than productive economic activity, a policy that permits burdening economic activity surely must permit burdening noneconomic activity.

### 2. OPPOSING APPLICATION OF THE RULE

The lawyer opposing application of the rule employs techniques that are the mirror image of those employed by the lawyer supporting application of the rule. First, the lawyer opposing application of a case law rule tries to phrase the rule as narrowly as possible and may attempt to state both the factual predicate and the legal consequence in narrow terms.

Thus, the lawyer opposing application of a rule imposing liability on landowners quotes the narrowest possible version of the holding, noting, for example, that the prior cases referred to pits—not hazards. The effort, obviously, is to state the factual predicate of the rule in such specific terms that it clearly cannot include the facts of the current case. The lawyer may note as well that the duty imposed in the prior cases was to warn those invited onto the land for business purposes. It was not a duty to warn persons generally, nor was it a duty to eliminate the hazard. Here, the attempt is to narrow the legal consequence.

As an adjunct to this argument, the lawyer opposing application of the rule may note that the adversary is citing mere dictum and that no case has ever adopted a rule as broad as that proposed by the adversary. He may suggest that the adversary, rather than applying existing law, is trying to persuade the court to make new law. Further, because the dictum would lead to an undesirable result in this case, it should not be followed. In other words, the dictum proves too much.

Second, the lawyer tries to include as many elements in the factual predicate as possible. In stating rules, courts often focus on those elements that are doubtful in the dispute before them, perhaps omitting elements that have clearly been met. The lawyer opposing application of the rule may look for several different formulations of the rule and combine elements from each formulation to produce a rule that contains every element ever included in

any prior formulation. The goal, of course, is to include an element that is not satisfied in the current case.

Third, the lawyer may contend that the policy judgments underlying the rule do not apply to the current case. This argument may actually follow either of two different approaches.

One approach is to argue that the policies that underlie the rule would not be furthered by the result sought by the adversary. For example, assume that the adversary is arguing that a rule imposing liability on a landowner for failing to give adequate warning about a hazard should impose liability on a landowner who made only a single announcement at a party, because the single announcement was not an adequate warning for a boisterous and intoxicated crowd. The lawyer for the landowner may reply that the policy of promoting safety, on which the duty to warn was based in prior cases, would not be furthered by requiring repeated warnings because such a requirement could result in compensating those who failed to exercise care for their own safety. Rather, a rule that did not impose liability on the landowner would best further the policy of promoting safety, because declining to compensate the injured would encourage people to be careful.

Note that to make the argument it may be helpful to manipulate the level of generality at which the underlying policies are stated. The prior cases may have stated that the duty to warn was based on a policy of requiring landowners to maintain safe premises. At that level of generality, the policy would seem to require application of the rule. By stating the policy more generally as promoting safety, the lawyer makes the policy less determinate. Safety can be promoted by requiring the guests *or* the host, or both, to exercise reasonable care.

The other approach is to argue that this situation affects policies not contemplated by the legislature or court that formulated the rule. Because every rule is a compromise among conflicting policies, the lawyer is virtually always able to find a policy that would be impeded by application of the rule.

For example, assume that the adversary is arguing that the rule imposing liability for injuries caused by an unstable slope should apply to a construction site. More generally, the adversary is arguing that the rule imposes liability for hazardous conditions, including construction sites, in furtherance of the policy of fairness to the injured individual. As discussed in chapter 6, the policy of protecting individual rights is in tension with utilitarian theories of

justice that promote the greatest happiness for the greatest number. Utilitarianism thus provides a potential argument against application of the rule, particularly if the new situation seems to conflict with utilitarian values in ways that the prior cases did not. The lawyer may argue, for example, that imposing liability on a landowner for injury caused at a construction site penalizes beneficial economic activity that was not penalized by the rule imposing liability for injury caused by natural hazards. Thus, the rule should not apply to the construction site.

Fourth, the lawyer can argue that to apply the rule to this case would require that it be applied to other cases in which it would yield undesirable results. This argument is sometimes referred to as a "parade of horribles" or a "slippery slope" argument. The lawyer demonstrates that any definition of the elements of the rule broad enough to encompass this case would also encompass other hypothetical cases in which application of the rule would be undesirable. Application of the rule to this case would start the court down a slippery slope to an undesirable result; it would produce a parade of horrible results.

This last argument is different from the others in that it does not require demonstrating that application of the rule would lead to a bad result in this case. It requires persuading a court only that application of the rule to this case would entail application of the rule to other cases in which it would produce an undesirable result. In making this argument the lawyer attempts to state the elements of the factual predicate at as high a level of generality as possible in order to bring within the rule as many undesirable cases as possible.

For example, the lawyer arguing that knocking a hat off someone's head should not be considered an offensive touching could assert that to define contact with an article of clothing as an offensive touching would mean that one who brushed another's coat on a crowded bus, for example, or stepped on another's shoe could be liable for a battery. Thus, the concept of an offensive touching should be defined narrowly enough to exclude this case as well as those cases in which a finding of the existence of an offensive touching would lead to clearly undesirable results. The concept, therefore, should not be extended to contact with articles of clothing.

Again, however, in making this argument the lawyer must be careful not to overreach, to try to prove too much. If the lawyer's characterization of

this case and the undesirable cases is too broad, the adversary may be able to suggest a narrower characterization that would exclude the undesirable cases yet be coterminous with the cases to which the underlying policies suggest the rule should apply.

### *H. Addressing Indeterminacy Through Analogies*

Another approach to addressing the problem of indeterminacy is to examine the case law for analogies to the current situation. Recall that the lawyer's synthesis may include specific holdings that apply a general rule. The cases from which these applications are drawn provide a basis for reasoning by analogy.

Assume that the lawyer is attempting to determine whether a box of pizza held by someone is closely identified with the body and that the lawyer's synthesis contains a holding that a tray carried in one's hand is closely identified with the body. Note that the tray case does not define a touching but merely illustrates it. If a box of pizza were a tray, one could perform another syllogism: striking a tray held in another's hand is a touching, a box of pizza is a type of tray, and therefore the client committed a touching.

Even if a box of pizza is not a tray, the lawyer may nevertheless use the tray case by way of analogy to form a conclusion about how to characterize or categorize the box of pizza. Specifically, the lawyer may decide that because a box of pizza is like, or analogous to, a tray in relevant respects, a box of pizza should also be considered closely identified with the body.

The use of analogy is discussed in greater detail in the next section. For now, it is sufficient to see that reasoning by analogy can be used to supplement reasoning in the deductive form. More specifically, the lawyer may use analogies to assist in attempts to decide how the facts should be characterized for purposes of reasoning in the deductive form.

## II. Analogy

### *A. The Basic Model*

The second form of reasoning through which lawyers apply rules to facts is reasoning by analogy. An analogy is a form of logic by which one reasons that because two items are alike in at least one respect, they are alike in at least one other respect.

For example, if one had been told that the 9:03 a.m. train for London had left Cambridge station on time, by reasoning by analogy one might then conclude that the 11:15 a.m. train for London would also leave Cambridge on time. That is, because the two phenomena were alike in that they were British morning trains headed for London from Cambridge, the observer reasoned by analogy that they would also be alike in being punctual.

Legal reasoning by analogy operates in the same manner, except that the objects being compared are judicial decisions. In the preceding example, the purpose of the analogy is to determine whether the second train would be punctual. In legal analysis, the purpose of the analogy is to determine whether, in the second case, a person has some legal right or duty that existed in the first case.

Under reasoning by analogy, the lawyer identifies at least one prior case—that is, one precedent—that seems to have facts in common with the client's situation. The lawyer analyzes the case to identify the legal consequence of those facts.

If the lawyer believes that the facts of the client's situation are analogous to those of the precedent—that is, if the lawyer believes that the facts of the client's case are like those of the precedent—then the lawyer concludes that the precedent should be *followed*. In other words, the client's situation should yield the same legal consequence as the facts in the precedent.

If the lawyer believes that the facts of the client's situation are different from those of the precedent, then the conclusion is that the precedent should be *distinguished*; that is, the precedent should be treated as if it were not a like case, and therefore it need not be followed.

Analogy, like deduction, involves three steps. First, the lawyer identifies a rule or holding announced in a prior case. The rule or holding serves the same function as the major premise in a syllogism: it is the statement of law potentially to be followed. Second, the lawyer determines whether the facts of the client's situation are like those of the prior case. Characterizing the facts as like or unlike those in the precedent is similar to the characterization of the facts in the minor premise of a syllogism. Finally, the characterization of the facts as like or unlike those of the precedent yields the conclusion that the client's situation should or should not have the same legal consequence as the facts in the precedent.

Analogy differs from deduction, however, in that a lawyer reasoning by analogy is using one specific case to decide another specific case. By contrast, a lawyer using legal reasoning in the deductive form is using a general rule to decide a specific case.

### *B. The Problem of Indeterminacy*

The problem for the lawyer using legal reasoning by analogy is to determine whether the precedent and the client's situation are alike. If they are identical, the lawyer can refer to the precedent as like the client's situation and conclude that the two cases have the same legal consequence.

No two cases, however, are identical in every respect. If nothing else, the date of the events or the names of the parties are different. Thus, in theory every case is distinguishable from every other case, and no precedent need ever be followed.

To permit every difference to be a basis for distinguishing prior cases would render analogy useless. Accordingly, for the doctrine of stare decisis to apply to a later case, it is not necessary that the facts of the later case be identical to those of the precedent in every respect but only that they be identical in relevant respects. Thus, the lawyer must determine which were the dispositive facts in the prior case. For the cases to be alike, the second case should involve facts similar to, or like, the dispositive facts in the precedent.

The dispositive facts are those upon which the court relied in deciding the prior case. The court in the prior case may have specified which were the facts giving rise to the right or duty that it found to exist. Alternatively, it may have left to future lawyers the task of inferring which facts were dispositive.[8] In the same way that an attorney can later attribute policy considerations to a court that in fact were not explicitly part of the court's reasoning, an attorney can also attribute legal relevance to facts that the court may not actually have considered dispositive. In other words, in a practical sense, a judicial decision means whatever a lawyer can persuade another court that it means.

Having identified the dispositive facts of the precedent, the lawyer must then decide whether the facts of the later case are like the dispositive facts of the precedent. The determination, however, is not mechanical. Often, the

lawyer can manipulate the extent to which two cases seem alike by changing the level of generality at which the relevant facts are described.

For example, assume that the lawyer's client wishes to know whether he has a duty to warn guests about a concealed two-foot pit on his land. Legal research identifies a case holding that a landowner has a duty to warn guests about a concealed ten-foot pit. If the two cases are described simply as cases involving pits, they are alike. If the two cases are described more specifically as involving a two-foot pit and a ten-foot pit, they are distinguishable. By stating the relevant facts at a very low level of generality (i.e., at a high level of specificity), the lawyer creates differences between the cases. Two cases can always be distinguished by stating the facts with sufficient specificity.

At the same time, cases can often be made to seem more alike by stating the facts of the cases with greater generality. Assume, for example, that the lawyer finds no precedents involving pits, but does find one holding that the landowner has a duty to warn about an unstable slope. A slope, of course, is not the same thing as a pit. The lawyer can eliminate the difference, however, by restating the relevant facts of the slope precedent in more general terms. The precedent can be characterized as holding, for instance, that the landowner has a duty to warn of hazards, a term that would include a pit. By restating the specific facts of the precedent in terms broad enough to encompass the facts of the later case, the lawyer can characterize the two cases as alike.

Note that legal reasoning in the analogical form presents the same problem as legal reasoning in the deductive form. The problem with deductive reasoning is that because of the generality of the rule, it is often possible to characterize facts in more than one way, and thus the lawyer must somehow choose from among more than one minor premise, thereby permitting a conclusion that the rule either does or does not apply. Similarly, the problem with analogical reasoning is that by manipulating the generality at which facts are described, the lawyer can characterize facts in more than one way and thus conclude that the two cases either are or are not alike. This permits the lawyer to choose whether to distinguish or to follow the precedent.

### *C. Addressing Indeterminacy Through Policy Judgments*

The problem of indeterminacy in analogical reasoning is addressed in much the same way that it is in deductive reasoning: by recourse to the un-

derlying policies. The lawyer must determine which characterization of the facts would further the policies that underlie the precedent. As in the case of legal reasoning in the deductive form, policy determinations associated with reasoning in the analogical form require judgments about the relative importance of policies as well as about the relationship between ends and means.

In general terms, the lawyer must decide, based on these judgments, whether characterizing the facts of the current case as like those of the prior case would yield more policy benefit than characterizing them as unlike those of the prior case. If so, then the prior case will be followed. If not, then the prior case will be distinguished.

For example, a prior case may have held that a landowner has a duty to warn guests about a concealed pit on the land. The holding represented a compromise between competing policies of preventing injury and permitting landowners to use their land as desired.

The holding must be described as a compromise because either policy, taken alone, would have led to a different result. On the one hand, if the prevention of injury were the only relevant policy, the court would probably have required the landowner to eliminate the hazard, since that is the surest way of preventing injury. On the other hand, if permitting landowners to use their land as they wish were the only relevant policy, the court would probably have imposed no duty at all on the landowner.

The holding that the landowner has a right to maintain a concealed pit on the land, subject to a duty to warn guests, essentially represented the compromise between these two policies that the court believed would yield the greatest policy benefit. The posting of a sign would greatly further the policy of promoting safety, while only slightly restricting the landowner's use of the land. The alternative result—not requiring a warning—would permit a potentially grave threat to safety, while providing only minimal benefits for the policy of landowner control. Accordingly, the court imposed a duty to warn.

Now assume that the lawyer must decide, in a new case involving a landowner with an unstable slope on the land, whether the concealed pit case should be followed or distinguished. The lawyer can do so by applying the prior policy judgment to the facts of the current case.

In applying that same judgment to the slope case, the lawyer would note that the burden of warning a guest is the same, whether the hazard is a pit

or a slope. If the slope is as dangerous as the pit, or more dangerous, then the policy judgment that underlay the pit case would require a duty to warn in the slope case as well.

Applying the prior judgment to the facts of the current case is not a mechanical process, however. In the example, the lawyer must evaluate the relative dangers of a slope and a concealed pit. This is essentially a judgment about the relationship between ends and means. The lawyer is making a judgment concerning whether the slope impedes safety less than, as much as, or more than the pit. Although there may be empirical evidence, usually the judgment is based largely on intuition and experience, matters about which reasonable persons can differ.

The indeterminacy of applying the prior policy judgments is even more apparent in the situation where the lawyer concludes that a slope is less dangerous than a concealed pit. The prior case decided that the danger of a concealed pit outweighed the burden of a warning. If a slope is less dangerous, then how does the lawyer know whether the danger still outweighs the burden? The lawyer again has to make judgments about the relative weight of policies and the extent to which a particular result would further or impede the various policies. These judgments have to be combined to determine whether the greatest policy benefit results from treating the slope case like the pit case or treating it differently.

As noted in the section on deduction, lawyers often conceive of making policy judgments as a process of line drawing or balancing. The lawyer must draw a line that separates those situations in which the danger justifies the requirement of a warning from those in which it does not. Or, to use the language of balancing, the lawyer must balance the danger against the burden of a warning in each particular situation.

Logic alone cannot dictate how policies are to be balanced or where the line is to be drawn. The decision requires judgments about the relative importance of the competing policies and about the extent to which a particular result will further or impede each policy.

As noted in the section on deduction, this does not mean that results are wholly indeterminate. Judgments are made in a particular context that includes factors such as a historical setting, the identity of the person making the judgments, the facts to which the judgments will be applied, and prior judicial decisions. As discussed in chapter 6, the context constrains, even if

it does not wholly determine, the nature of the judgments that can plausibly be made.

## *D. The Special Problem of Dictum*

Reasoning in the analogical form is similar to reasoning in the deductive form in that it must take into account the problem of dictum. The court in the later case will often follow dictum and may do so without even acknowledging that the statement is dictum.

Dictum, however, is not binding and may be disregarded by courts in later cases without departing from the principle of stare decisis. A lawyer typically persuades a court not to follow dictum by arguing that the case in which the dictum appears is distinguishable. The argument is stronger if the lawyer can demonstrate that the policy judgments underlying the dictum do not apply in the same way to the current case. Examples of this technique have been given earlier.[9]

The concept of dictum thus brings indeterminacy to the process of analogy, just as it brings indeterminacy to the process of deduction. In applying the rules set forth in a precedent, the lawyer must be alert to the fact that some of the rules are dictum and can be disregarded on a much weaker showing than would be necessary to persuade the court to overrule the precedent entirely.

## *E. Using Analogy as an Advocate*

The indeterminacy of analogy often frustrates a lawyer's attempts to predict the result in a given case. The legal advocate, however, knows that this same indeterminacy offers the opportunity to fashion arguments in support of the desired result.

Because indeterminacy is rooted in the generality of language and in the existence of opposing policies, the lawyer as advocate exploits both of these features to support the arguments. Indeed, these features give rise to a set of standard arguments for following and distinguishing a prior case. In this subsection, some of those arguments are described.

### 1. ARGUMENTS FOR FOLLOWING THE PRECEDENT

As an initial matter, the lawyer arguing that a prior case should be followed in a later case emphasizes the numerous factual similarities between the two

cases. Strictly speaking, the only relevant facts are those that are like the dispositive facts in the precedent. The advocate arguing that a prior case should be followed, however, rarely limits the argument to those facts. Rather, the advocate includes in the recitation of similarities virtually any fact that is not a trivial coincidence. The lawyer will also cite any fact that suggests that following the precedent will promote the policies underlying the precedent, even if that fact has no direct analogue in the precedent.

Second, the advocate argues that the inevitable dissimilarities are irrelevant, the basic contention being that none of the facts that make the cases different is relevant to furthering or impeding any of the underlying policies. Obviously, for example, the fact that the parties' names differ is nearly always irrelevant to any legitimate policy.

This argument may be difficult to make where the court in the prior case has stated explicitly that a particular fact, not present in the current case, is dispositive. The best argument for following the case in that situation is to contend that in light of the policies underlying the prior case, the prior case would have been decided the same way even without the so-called dispositive fact. The lawyer is arguing, in effect, that the fact was not truly necessary to the result. Since it was not actually necessary to the result, any discussion of that fact should be considered dictum and need not be followed. It may be difficult to prevail in this argument because it requires the court to disregard how another court characterized its own decision.

A third technique for arguing that a precedent should be followed is to state the factual predicate of the precedent at a higher level of generality. For example, if the prior case held that the presence of a concealed pit on the land gives rise to a duty on the part of the landowner to warn a guest, but the current case involves a guest who fell down a slope, the lawyer for the injured guest may characterize the prior case as involving a "hazard" rather than a concealed pit. As the language becomes more general, it will tend to encompass the facts of the current situation and thereby suggest that the two cases are similar.

The lawyer can also manipulate the level of generality of the legal consequence. For example, assume that a prior case held that married couples have a constitutionally protected right to use contraceptives, and thus a statutory ban on contraceptives was unconstitutional. A lawyer wishing to

use that case to invalidate a statutory ban on sodomy among married persons would characterize the prior case as holding that married couples have a right of choice with respect to their sexual relations. By restating the legal consequence of the prior case in sufficiently broad terms, the lawyer transforms the case into one that appears to involve the same right as the current case.

In restating the factual predicate or legal consequence of the prior case in more general terms, the lawyer must avoid overreaching. The more general the lawyer's statement, the more likely it is to include factual situations in which the rule, as restated by the lawyer, would lead to results that are undesirable as a matter of policy.

For example, if the lawyer restates the contraceptive case as creating a right of choice in sexual relations for all persons, the right would seem to apply to unmarried minors. Arguably, it suggests, for example, that statutory rape laws would be unconstitutional. A court would very likely be unwilling to characterize the contraceptive case as creating such a broad right of choice. In that situation, the court would reject the lawyer's overly broad characterization of the legal consequences from the prior cases.

A fourth technique is to characterize the prior case not in terms of its facts, but in terms of the underlying policy judgments, which the lawyer argues should be followed. For example, the lawyer seeking to impose on a landowner a duty to warn customers coming onto the land about concealed hazards on the land may rely on cases holding that a manufacturer has a duty to warn consumers of product defects. The lawyer would then argue that the prior cases adopted a policy of protecting the unwary against physical injury and that such policy should prevail in the current case as well.

This technique may require manipulating the level of generality at which the policy underlying the precedent is stated. The product defect cases, for example, may have described the underlying policy as protecting the stream of commerce against unsafe products. By restating the policy more generally as protecting the unwary, the lawyer makes the policy seem applicable to the subsequent case. That is, the impression is created that the result the lawyer seeks in the later case would further the policies articulated in the earlier case.

## 2. ARGUMENTS FOR DISTINGUISHING THE PRECEDENT

The arguments for distinguishing a prior case mirror those for following it. First, the lawyer emphasizes every possible difference between the two cases, particularly facts that the court in the prior case regarded as dispositive. Even if the facts were only sufficient for the holding and not necessary, the lawyer notes that the dispositive facts are not present in this case. If the later case differs concerning some such dispositive fact, then it is likely the court will distinguish the two cases. Assuming that the cases do not differ concerning any fact explicitly considered dispositive in the earlier case, the lawyer attempting to distinguish the precedent may nevertheless point to differences in other facts in an effort to make the cases appear as different as possible.

Second, the lawyer attempts to dismiss similarities between the cases as irrelevant. If possible, the lawyer argues that particular facts in the precedent that are similar to those in the later case were not explicitly found to be dispositive and are therefore irrelevant coincidences. If the facts were held to be dispositive, the lawyer can attempt to argue that the facts were not relevant to accomplishing the underlying policies, although this can obviously be a difficult argument to make, given that the court that decided the precedent believed those facts to be at least sufficient for, if not necessary to, its decision.

Third, the lawyer attempting to distinguish the cases characterizes the precedent in the narrowest possible terms. The lawyer states the facts and the legal consequence with great specificity, noting that any broader reading would constitute dictum, which the court need not follow. By stating the facts at very specific levels, the lawyer produces new dissimilarities. Thus, a pit is not merely a pit, but a concealed, life-threatening twenty-foot pit.

Fourth, the lawyer may contend that the policy judgments underlying the prior case do not apply to the current case. This argument may follow any of several different approaches.

One approach is to argue that the policies that prevailed in the prior case require a different result in this case than was reached in the prior case. For example, assume that the prior case held that the government has the power to prohibit the use of offensive language on a television broadcast because the danger that a child might be harmed by hearing the language outweighed

the broadcaster's right to use it. In a later case, a television station broadcasts a documentary that realistically portrays the lives of young drug users in an effort to persuade juveniles that drug use could ruin their lives. To make the documentary more realistic and thus more credible, the station broadcasts film of drug users engaged in conversation with the police, their families, and each other—conversation involving the use of the same offensive language. The lawyer might argue that, in this case, the policy of protecting children would actually be *furthered* by permitting the offensive language to be broadcast.[10] Thus, to further the policy that prevailed in the prior case the court should distinguish the prior case and void, rather than uphold, the ban on offensive language.

Note that this argument requires manipulating the level of generality at which the policies are stated. In the first case, the policy was to protect children against the moral harm caused by offensive language. In the second case, the policy was to protect children against the quite different injury caused by illegal drugs. By restating the policy of the first case more generally as protecting children, the lawyer creates the appearance that the result being sought in the second case would further the policy underlying the first case.

Another approach is to argue that this situation affects policies that were not relevant to the prior case. Because every decision represents a compromise among conflicting policies, the lawyer can almost always find an opposing policy that provides grounds for distinguishing the prior case.

As an illustration, assume that the adversary has found a precedent holding that a contract between two large businesses must be enforced even if one business, through its failure to investigate adequately the value of what it was purchasing, was the victim of an unequal exchange. The adversary now argues that this precedent requires enforcing a one-sided agreement signed by an illiterate consumer. As will be discussed in chapter 6, enforcement of contracts to which parties agree is consistent with a policy of autonomy, which generally enforces the choices made by individuals. As is also discussed in chapter 6, the policy of autonomy is in tension with the policy of paternalism, which calls upon the court to scrutinize choices to make sure that they were not the result of private domination. Thus, the policy of paternalism may provide a basis for a contrary argument by the lawyer. For example, the lawyer may argue that the contract was in fact coerced because the consumer did not have the mental or financial resources to make a free

choice. The precedent did not implicate the policy of paternalism in the same way because the two businesses were of approximately equal power. Accordingly, the precedent should be distinguished.

Finally, the lawyer can argue that if the precedent is applied to this case, stare decisis would require that it also be applied to other cases in which it would produce a clearly undesirable result. This, again, is the parade of horribles or the slippery slope argument. The lawyer demonstrates that this case is indistinguishable from other hypothetical cases in which application of the precedent would lead to undesirable results. As with legal reasoning in the deductive form, this argument does not require a demonstration that following the precedent would lead to a bad result in this case, only that it would entail application of the precedent to other cases in which it would produce an undesirable result.

For example, assume that the adversary is arguing that a case holding that a contract signed at gunpoint is void should apply so as to void a one-sided contract signed by an illiterate consumer to purchase a refrigerator needed for storing perishable medicine. The adversary asserts that the consumer is like the man threatened with violence because neither had any realistic choice but to sign. In both cases, signing the contract was a matter of life or death. The lawyer attempting to distinguish the precedent must decide which facts to characterize as distinguishing this case from the precedent. The lawyer may argue, for instance, that this case involves coercive circumstances rather than coercion from the other contracting party and that to treat them as equivalent would lead to absurd results in other cases. For example, all contracts for the purchase of food would arguably be void because the purchaser has no realistic choice but to buy the food. The same would be true of the contract to purchase an automobile needed to drive to the market to buy the food (and the medicine and the refrigerator). Ultimately, only contracts for luxury items would be enforceable. Thus, the lawyer would conclude, coercive circumstances should not be confused with coercion from the other contracting party.

Again, however, in making this argument the lawyer must be careful not to overreach, to try to prove too much. For example, by characterizing the refrigerator case as involving coercive circumstances, the lawyer has arguably overreached. The adversary can counter with a narrower characterization

of the refrigerator case that would exclude the undesirable cases yet be coterminous with the cases to which the underlying policies suggest the rule should apply. Thus, the adversary may assert that the refrigerator case is like the gunpoint case because both involved serious, imminent threats to life or safety. Although food may be a necessity, any specific purchase of food may not be a matter of immediate survival. An automobile purchase is very likely even less urgent. Thus, the likelihood that a consumer did not freely exercise his or her will is much greater in the gun or refrigerator case than in the food or car case. The adversary, in other words, demonstrates that the policy judgments underlying the precedent involving the gun also apply to the refrigerator case, though not to the hypothetical cases suggested by the lawyer. The adversary may thus persuade the court that applying the precedent to the refrigerator case is consistent with the policies underlying the precedent but will not entail applying it to the food or automobile cases.

## III. Comparing Deduction and Analogy

Despite underlying similarities, deductive reasoning and analogical reasoning perform somewhat different functions in the legal reasoning process. In deduction, one concludes that what is true of an entire class of objects is true of a single object in that class. In analogy, one compares two objects and concludes that because they are alike in at least one respect, they must be alike in another respect.

Legal reasoning in the deductive form, in other words, requires a general rule applicable to an entire class of situations. Statutes, of course, are general rules, and thus enacted law is applied through reasoning in the deductive form, often supplemented by analogies to particular cases to determine how to characterize certain facts.

Because analogy compares one object with another, analogy is generally the appropriate form of legal reasoning through which to decide one case by reference to another. The problem, however, with using analogy to compare precedents to a current situation is that because of the sheer volume of previously decided cases, to analogize a single factual situation to every prior case involving similar facts would often be a practical impossibility. It is far easier to extract from the case law a general rule that governs an

entire category of cases. For that reason, courts commonly base their decisions on general rules drawn from cases and applied in deductive form to the facts.

The general rules may have been stated in the cases as dictum, or the lawyer may have used the inductive process described in chapter 3 to synthesize a general rule that seemed to encapsulate the holdings of a category of cases. In either event, once the rule is derived, the lawyer uses legal reasoning in the deductive form to apply it to the facts of the case.

Analogy, nevertheless, is a frequently used method of legal reasoning. One typical setting in which the lawyer uses analogy is as an aid to completing a syllogism. As explained above, the lawyer often uses analogy to decide how to characterize the facts, thereby deciding which of several minor premises to adopt in order to complete the syllogism.

Analogy is also used in a novel situation for which there may be no general rules. The lawyer may search for cases that seem similar in at least a few respects and then analogize them to the novel situation.

## IV. Deduction and Analogy in a Jury System

Although case law holdings are theoretically binding on subsequent cases, in a jury system a prior case often has little impact on subsequent similar cases. This phenomenon occurs because a decision by one jury does not bind another jury. In other words, the jury's decision in the first case does not create a rule binding in the next case.

Assume that the jury in a case decides that a physician who failed to administer a particular diagnostic test was negligent. A jury in a later case involving virtually identical facts would nevertheless be free to decide that the physician in that case was *not* negligent. The first jury's verdict does not bind the second jury, despite the similarity of the facts.

A jury verdict, however, can be "transformed" into a binding holding if the losing party challenges the verdict in some way, such as by moving for a new trial or for judgment as a matter of law,[11] or by appealing. As a result of the challenge, the trial or appellate court reviews the jury verdict and renders a decision, perhaps set forth in a written opinion. Assuming that the opinion is published, its holding becomes a binding precedent in future similar cases.

For example, let us assume that the losing party appeals. As explained in chapter 1, the appellate court does not decide the facts de novo. Rather, it merely considers whether the jury's verdict was supported by substantial evidence.

This inquiry produces one of two possible results. First, the appellate court may hold that the jury's verdict is supported by substantial evidence.

Consider carefully, however, the exact nature of the holding. The appellate court did not hold that a physician who fails to administer the test is always negligent but only that the jury had before it sufficient evidence to conclude that the physician in that case was negligent.

This holding is that certain facts *may* constitute negligence, not that they necessarily do. The holding, nevertheless, can influence the resolution of future similar cases. For example, if a physician's lawyer in a later case involving similar facts moves for summary judgment on the ground that failure to administer the test cannot constitute negligence, the patient's lawyer may cite the earlier decision holding that failure to administer the test may constitute negligence and thereby defeat the motion.[12] When the later case goes to trial, however, the jury will be free to decide that the physician in the later case was not negligent. Thus, the appellate court's holding essentially does little more than ensure that patients in later similar cases are entitled to a trial on the issue of whether the physician was negligent.

Of course, the physician's lawyer in the later cases may attempt to defeat even that limited use of the earlier case. The lawyer may attempt to distinguish the earlier case or, failing that, argue that it was wrongly decided.

The other possible result on appeal is that the appellate court could hold that the failure to administer the test cannot be considered negligence. This holding too can influence the resolution of future similar cases. Another physician sued for failure to administer the test could move to dismiss the claim against him, arguing that the prior case established as a matter of law that failure to administer the test does *not* constitute negligence. The patient can attempt to distinguish the prior case or to persuade a court that it was wrongly decided. Should the patient fail in that argument, the prior holding will become controlling.

This is not to suggest that a jury trial never has an impact on future cases unless the jury's verdict is challenged. In a jury trial, the judge decides all questions of law. The judge's decisions on these questions along with the

decisions of the appellate court reviewing those decisions, if published, also constitute binding precedents.

## V. Epilogue: Changing Case Law

The description of the legal reasoning process in the preceding chapters has often assumed implicitly that the common law never changes, except by an act of the legislature. If the law changed frequently, then predicting the rights and duties of parties would be an impossibility. Further, conceding that a court is free to change the law at any time renders the principles of the rule of law and stare decisis meaningless.

Yet the courts do have the power to modify the common law with sufficient justification. In this final section, the situations in which a court may be persuaded to modify case law rules and the techniques that the court may use are briefly discussed.

### *A. Flexibility Without Changing Case Law*

As an initial matter, courts have considerable ability to reach the desired result without changing the law. This flexibility exists because, as discussed above, common law rules are often indeterminate. First, prior cases applying the language are binding only to the extent of their narrow holdings, and thus the prior cases very often do not apply or can be distinguished. Second, even binding language may be too general to require only one result. Third, application of the policies may also support any of several results, depending upon the court's judgment about the relative weight of the policies and the relationship between the policies and the means used to further them.

Thus, except in the easy cases, the existing law does not really require a single result. Courts often have the ability to reach the result sought by either party to a dispute. As long as the result can be reconciled with the language of the rules and any contrary precedents can plausibly be distinguished, the court has not "changed" the law. The court has merely created law where none existed.

### *B. Justifications for Changing Case Law*

Occasionally, however, a situation arises in which the result that the lawyer wishes to reach cannot plausibly be reconciled with the language of the ex-

isting rules. The rights or duties that the client wants to exist in some situation can arise only by changing one or more existing rules of case law.

The principle of stare decisis creates a strong presumption against overturning a prior decision but does not prohibit the practice. If the court is going to change the law, it will do so for reasons of policy.

Because the original rule was based on policy judgments, the lawyer must essentially persuade a court that the prior judgments can no longer be considered correct. Recall that applying policies to decide cases requires two types of judgments. The lawyer may argue that either or both of the judgments were wrong.

The first type of judgment pertains to the relative weight given to different policies. The prior court struck a balance between two policies, based on the perceived importance of each. The lawyer may now argue that the relative importance of the policies has changed. As a result, a new rule is necessary. Or, to put it another way, a new balance must be struck, a new line drawn.

For example, courts in the nineteenth century adopted a rule known as the "fellow servant rule," which held that an employee injured on the job could not sue his employer for negligence if the injury was caused by another employee. The courts essentially concluded that the policy of promoting economic development outweighed the policy of compensating the injured worker. In the twentieth century, however, courts began to abandon the fellow servant rule, thereby allowing employees to sue their employers for injuries caused by the negligence of other employees. The courts had simply decided that the policy of compensating the injured was now entitled to greater weight.

The second type of judgment pertains to the relationship between ends and means. The prior court adopted a rule because it believed that such a rule would best promote certain policies. The lawyer now argues, without necessarily quarreling with the ends sought by the prior court, that the rule adopted simply does not promote those policies any longer, if it ever did. The rule, in other words, has not worked in practice and must be changed.

For example, the traditional common law rules governing the duties that landowners owe those who come onto the land categorized those who entered the land as trespassers, licensees, or invitees. The landowners' duties varied, depending upon the category into which the entrant fell. Some courts, however, came to believe that the various categories were difficult to apply and that the underlying policies could best be effectuated by adopting

a single duty requiring the landowner to exercise reasonable care under the circumstances.[13]

Changes in the law of this type are perhaps easier for the court to adopt because, as noted above, the relationship between ends and means, in theory, is a matter that the court can decide empirically. Thus, in the example above, the court announced that the prior rule was "difficult to apply"—a conclusion that was ostensibly based on factual observation. By changing the law in this way, the court is not admitting that it has changed policies but only that it is "correcting" the law in light of new information. The underlying policies of the prior cases may continue to receive the same weight.

## *C. Techniques for Changing Case Law*

A court that has decided to change case law may use a variety of techniques, some of which may blunt the impression that it has departed from the principle of stare decisis. In this subsection, a few of these techniques are discussed.

### 1. CONFINING A CASE TO ITS FACTS

First, the court may confine a prior case to its facts. This is, in effect, a relatively weak form of overruling. The holding in the prior case is treated as correct, yet the court refuses to generalize from that holding to any future case. The court has effectively repudiated any dictum in the prior case that suggested that the holding reflected a more broadly applicable rule.

For example, a case holding that to knock a cafeteria patron's dinner tray out of that person's hand is an offensive touching might be confined to its facts by a court. The court is now free to hold that it is not an offensive touching to knock a box of pizza, a deck of cards, a family heirloom, or anything else out of the hand. The holding in the prior case has been confined to the facts of that case. The court need not find some basis on which to distinguish later cases involving pizza or heirlooms. The law has changed, permitting the court to treat pizza and heirlooms differently from dinner trays, even though the court has not explicitly overruled the prior case.

### 2. OVERRULING *SUB SILENTIO*

Second, the court may overrule a prior case *sub silentio*. The court generally does this by articulating a set of policy judgments in a later case that, if ap-

plied to the earlier case, would have caused a different result. The court declines explicitly to overrule the prior case, yet the lawyer understands that the prior case no longer controls future decisions.

For example, assume that a case holds that a court must give a consumer prior notice and an opportunity to be heard before authorizing the sheriff, who is acting on behalf of a store, to seize goods for which the consumer has allegedly failed to pay the store. Assume also that a later case permits seizure of the goods without prior notice and an opportunity to be heard, as long as the court at the time it authorizes seizure has adequate grounds to believe the store's claim to the goods is well founded and gives subsequent notice to the consumer. This may amount to a *sub silentio* overruling of the first case.[14] Nothing in the first case suggested that the court there did not have adequate grounds to believe that the store's claim was well founded, and thus the first case is arguably indistinguishable from the second. The second case reached a different result because the court changed its policy. The first case is not explicitly overruled, but future cases will apparently be decided differently.

### 3. CREATING EXCEPTIONS

Third, the court may create an exception. This is an explicit, but only partial, repudiation of the prior case. The prior case remains good law, but it no longer controls all of the situations it once did.

The last example could be used to illustrate this technique as well. Assume that, in the first case, there had *not* been adequate assurances that the store's claim was well founded. In that situation, the second case, rather than overruling the prior case *sub silentio*, might simply create an exception—holding that, although prior notice is generally required, subsequent notice is sufficient if the court has adequate assurances that the store's claim to a right of seizure is well founded.

Obviously, lawyers may differ at times over whether the second case represents an exception to the first case or an overruling of it *sub silentio*. To the extent that the two cases are truly different, the second case may well be carving out an exception to the general rule set forth in the first case. To the extent that the two cases seem indistinguishable, however, then the conclusion is almost inescapable that the first case has been overruled *sub silentio*. As has been seen, lawyers may differ over whether two cases are distinguishable,

and thus they may differ over whether the second case created an exception to, or overruled *sub silentio*, the first case.

Any exception changes the law with respect to those situations embraced within the exception. Moreover, by defining the factual predicate of the exception broadly, the court can bring large numbers of cases within the exception. Eventually, the exception may become more widely applicable than the so-called general rule, with the result that the exception is said to "swallow the rule." At the time it was created, the exception seemed a minor change in the law, but over time it proved to be a virtually complete repudiation of the earlier rule.[15]

### 4. EMPLOYING LEGAL FICTIONS

Fourth, the court may use a legal fiction to change the law. A legal fiction, in effect, is a declaration that the law regards something as true even though it is not. Often, a legal fiction is used to supply a missing element in a rule. By declaring the element to be present, the court permits the rule to apply to facts where it would not otherwise apply. To all appearances, the law has not changed. In reality, however, the court has rewritten the rule so that the missing element is eliminated or replaced.

One of the most commonly used legal fictions is the technique of implication, in which a court declares that some element is implied to be present, even though in any meaningful sense it is not present.

For example, assume that a case holds that a corporation cannot be sued in a state unless that corporation consents to the jurisdiction of the courts. Assume now that a second case holds that a corporation, by doing business with a citizen of the state, implies consent to jurisdiction. Obviously, the corporation did not truly consent to jurisdiction, yet it may now be sued. The law appears not to have changed because it still bases jurisdiction on consent. In effect, however, the element of consent has been replaced with the element of "doing business," which is converted to consent by a legal fiction.

Legal fictions can prepare the legal community for an explicit change in the law. When first created, the fiction conceals any explicit change in the law. Once the fiction has become well established, a court may decide to abandon the pretense and admit that the fiction is only that. By this point, however, the rule as modified by the use of the legal fiction is so sufficiently entrenched that the court will very likely not be criticized for having changed

the law. If anything, it may be praised for candor in abandoning what had been an obvious fiction all along.

### 5. EXPLICIT OVERRULING

Finally, a court may explicitly overrule a prior case. The policy justifications for changing the law are sufficiently compelling to override the presumption in favor of stare decisis, and the court simply changes the law.

PART TWO

# Reasoning with Policies

# 6

# POLICY ANALYSIS, SYNTHESIS, AND APPLICATION

This chapter develops a systematic understanding of the manner in which lawyers analyze, synthesize, and apply policies in the legal reasoning process. In the first section, the way in which a rule can be analyzed as a compromise among various pairs of conflicting policies is described. The discussion then turns to some of the more pervasive policy conflicts in American law. The second section explains one method by which the policies relevant to a particular situation can be synthesized by identifying the relationship that each policy bears to the others in that situation. In the third section, the manner in which policies are applied to decide particular disputes is explored, a topic that was introduced in chapter 5.

Whereas part 1 of this book describes mainstream legal reasoning as it is commonly understood by lawyers at the beginning of the twenty-first century, this chapter represents in some respects an innovation. Lawyers commonly argue that a particular result is desirable because it would further certain public policies or that the contrary result is undesirable because it would impede certain public policies. Yet lawyers have devised no systematic method for analyzing, synthesizing, and applying policies. This chapter offers a sketch of such a method.

## I. Policy Analysis

### *A. The Dilemma of Choosing Among Opposed Policies*

Every legal dispute poses a conflict between at least two opposing policies. In adopting a rule to govern the dispute, the court strikes a compromise between these policies.

Indeed, policy conflicts are built into the structure of the legal system. That is, the American legal system seeks to further a multitude of opposing policies all at the same time. Thus, for example, the system attempts to adhere to majority rule while also protecting individual rights; it strives to be just, but also efficient.

The system cannot promote all these policies fully at the same time. If the majority decides that all persons at the age of eighteen shall be subject to military induction, a court faced with an individual who refuses military service because of religious beliefs must choose between majority rule and individual religious freedom. One policy must give way to the other in specific cases.

Yet all of the policies are important, and few would advocate that any one policy should always prevail. Indeed, as is discussed in the next section of this chapter, one paradox of the American legal system is that to pursue any one policy to the exclusion of the opposing policies would ultimately be destructive of the ends represented by that very policy. The task of the court in resolving disputes is to decide, under a particular set of facts, which policy to prefer in that case and how to strike the compromise with the opposing policies.

Because each of the policies receives preference in some cases, any set of rules embraces opposing policies simultaneously. The typical experience of the lawyer in synthesizing a body of rules is that during synthesis a general rule will be identified that represents the triumph of one policy but that is both defined and limited by more specific rules that give preference to an opposing policy.

Thus, no rule ever fully resolves the conflict between the opposing policies. At best, it merely relocates the conflict to some issue presented at a lower level of generality. Although the rule on its face may seem to further a particular policy, each time the rule is defined or qualified, the original

policy conflict reemerges and must be resolved anew. Several examples of this phenomenon are presented in chapters 7–10.

The fact that legal rules are compromises between opposed policies forms one of the bases of the lawyer's intuition that there are two sides to every case. No matter which policies appear to support a particular position, there are always competing policies to which the courts, on at least some occasions, have given preference. Thus, any set of rules embraces at various levels of generality conflicting policies that support diametrically opposed results. The lawyer who can identify the various combinations of opposed policies underlying the rules will understand instantly the nature of the argument that can be made on each side of the case.

This is not to say that every case as a practical matter can be decided either way. In a given context, factors such as history, precedent, individual judicial preferences, and the specific facts of the case may combine in such a way as to leave only one plausible result. Even in that situation, however, the existence of competing policies permits the lawyer to articulate a perfectly coherent argument in favor of the losing side. Indeed, the losing argument may be one that in a different time would have prevailed or perhaps at one time did prevail, but in the current setting is seen as unpersuasive.

### *B. Specific Policy Conflicts*

Policy analysis is the process of identifying which policies support each possible result in a particular dispute. That process requires an understanding of the principal policy conflicts that underlie American law. In the remainder of this section, a number of the more pervasive policy conflicts are introduced.

These policy conflicts are by no means exhaustive of those that lawyers must resolve. For example, many disputes in constitutional law pose a conflict between a policy of centralizing power in the federal government or decentralizing it in the states. This policy conflict, like many others, is not discussed here because the discussion is intended to demonstrate a methodology rather than to provide any kind of comprehensive survey of policies.

The policies discussed here can be characterized in a variety of ways. Some are more general than others. For example, the policy of paternalism, discussed later, is a very general term that embraces more specific policies,

such as consumer protection. Judicial opinions refer to the policies at different levels of generality and thus do not necessarily use the terminology employed here.[1]

Before commencing the discussion, however, let me emphasize that in this book, and especially in part 2, I have used the word *policy* in a very broad and inexact way. Essentially, by the word *policy*, I mean any consideration other than the text of a rule on which the court bases a decision involving the creation or application of the rule. For example, in the discussion that follows, I speak of positivism and naturalism, which are generally regarded as jurisprudential theories and not policies. Similarly, I discuss formalism and instrumentalism, although they too are really jurisprudential theories and not policies as that word normally is understood. In some instances, I have used the term *theory* to refer to positivism, naturalism, formalism or instrumentalism, but I have not been scrupulous about it.

I have used the term *policy* in this very broad and inexact way for two reasons. First, grouping these many different concepts under the single term *policy* serves the interest of brevity. Second, because all of these concepts influence the way in which lawyers and courts create and apply rules, some kind of collective term was appropriate. That said, I would not quarrel with the suggestion that another word, such as *theory*, would have been a better choice. I chose *policy* because lawyers commonly speak of "making a policy argument" when they mean, essentially, looking outside the language of rules to construct an argument with respect to the application of the rules. Lawyers rarely refer to "making a jurisprudential argument" or "making a theoretical argument."

Some legal scholars, particularly Ronald Dworkin, whose work is discussed in some detail in chapter 12, and those in the legal process school, which is discussed very briefly at the end of chapter 11, draw a distinction between principles and policies. For the legal process school, for example, a principle is a moral precept on which a court may base its decision, such as the precept that "no person should profit from his or her own wrong." A policy, by contrast, is a goal that a legislature may seek to achieve in enacting legislation, such as a policy of promoting highway safety. The distinction is useful for a number of scholars addressing the problem, discussed in chapters 11 and 12, of how to distinguish adjudication, the work of a judge, from legislation, the work of a legislature. As will be seen in those chapters, dis-

tinguishing adjudication from legislation is often regarded as critical to preserving democracy and the rule of law. Although the distinction between principles and policies is useful for many purposes, it is not one that most lawyers strive to maintain in their practice. For example, a lawyer may refer to a policy of preventing a wrongdoer from benefiting from his or her wrongful conduct, without pausing to consider whether according to a particular theorist that idea is a principle rather than a policy. This book is not intended as an argument for how lawyers should think. Rather, it is intended as a description of how lawyers actually do think, although I concede that parts of the book, particularly this chapter, attempt to elaborate in an explicit, systematic way a process that for most lawyers is unconscious, intuitive, and ad hoc. That is, I am attempting to describe what they do, even if they are not entirely aware that they are doing it, much in the way that a coach might assist a tennis player in analyzing her forehand stroke. Thus, I use the term *policy* in a broad and inexact way, much as practicing attorneys often do.

In any event, the reader is duly warned that perhaps nowhere else but in this book will all of the concepts discussed in this chapter be grouped under the single term *policies*. I hope that the reader ultimately will conclude that the benefits of treating all of these various influences on judicial decision making as part of a collective grouping will justify the violence that I may have done to the English language or to conceptual clarity.

## 1. THE INDIVIDUAL AND THE COMMUNITY

A first basic tension in American law is essentially political in nature and centers on whether to grant primacy to the individual or the community (or its representative, the state). This tension, no matter at what level of generality it is resolved, always seems to reemerge at a lower level of generality. Thus, the same tension reappears in different contexts throughout American law.

At its most general level, this tension raises the question of whether the will of the state or the will of the individual is to prevail in a given situation. The conflict between the will of the state and the will of the individual is characterized here as a conflict between majoritarianism and individualism.

Assume that a rule exists providing that, in a particular situation, the state must give effect to the will of the individual. Such a rule, however, does not fully resolve the question of primacy between the community and the

individual; it merely relocates it. Although the rule states that the individual's will is to prevail, the question of primacy reemerges as the question of how to define the individual's will. Because an individual may be coerced by circumstances into choices that are not truly free, deference to the will of the individual may require the state to intervene to protect the individual against private domination. Thus, the tension between the community and the individual reemerges as a tension between the policy of state evaluation of the circumstances of individual choice and the policy of presuming that individual choices represent the uncoerced will of that individual. This tension is discussed below as the conflict between the policy of paternalism and the policy of autonomy.

Now assume that the rule provides that the will of the state, rather than the will of the individual, shall prevail in a particular situation. Again, this does not fully resolve the question of primacy between the community and the individual but only relocates it. Because the law has authorized the state to impose its will, the state must decide whether to exercise its will in favor of the collective welfare or the rights of particular individuals. This tension might be characterized in a number of ways but is described below as the tension between efficiency and justice.

If the state chooses in a particular situation to seek justice, for example, that choice again merely relocates the tension between the community and the individual. The tension reemerges as a choice between a utilitarian theory of justice, which gives primacy to the welfare of the community, and a rights-based theory of justice, which gives primacy to the entitlements of the individual.

As this discussion illustrates, the tension between the community and the individual is never fully resolved. It constantly reemerges at different levels of generality as different cognate policy conflicts, with courts often preferring one policy at one level of generality and the opposing policy at another.

### a. Individualism and Majoritarianism

The framers of the Constitution understood that they were constructing a government based on two opposing values: democracy (as we now use the term) and individual rights. Democracy requires that the will of the majority as represented by the decisions of the state be obeyed, but individual rights

theory subordinates the will of the majority to the will of the individual. The court must decide in particular cases whether to embrace a policy of majoritarianism and defer to the will of the majority or to embrace an individualist policy and defer to the will of the individual.

The conflict between majoritarianism and individualism exists most obviously where the legislature enacts a statute on behalf of the majority. Assume, for example, that a legislature enacts a law prohibiting the advocacy of communism as a form of government and the law is challenged as a violation of the Constitution's guarantee of freedom of speech. A majoritarian court generally believes that the people have the power to punish speech that they consider injurious and is likely to uphold the law. An individualist court generally attempts to protect the right of individuals to express their political views and is likely to invalidate the law.

Because the common law is presumed to represent the popular will, the conflict between majoritarianism and individualism also pervades common law adjudication.[2] For example, under the legal doctrine of defamation, the court may force a speaker to compensate another individual whose reputation was injured by the speaker's remarks. The majority's wish to impose liability for defamatory comments thus conflicts with and prevails over the speaker's right to say what he believes.

One can distinguish between a policy of majoritarianism and the more specific policies in support of which the majority may exercise its will, just as one can distinguish between a policy of individualism and the more specific decisions made by a given individual. A majoritarian takes the position that the will of the majority should generally prevail, whether that will is to prohibit nudity at the beach, ban smoking in restaurants, or impose an implied warranty on the sale of an automobile. An individualist takes the position that the will of the individual should prevail, whether the individual wishes to criticize the president, agree to mine coal for one dollar an hour, or practice animal sacrifice as a religious rite. Thus, the general policies of majoritarianism and individualism may be linked in a particular situation with any of a countless number of other more specific policies, ranging from the protection of the tobacco industry to the prevention of cruelty to animals.

American law does not consistently favor either majoritarianism or individualism. In some situations, one policy prevails, whereas in other situations

the opposing policy does. The law of a particular community, for example, may allow smoking in a restaurant, but not nudity on the beach. Which policy prevails often depends upon the nature of the other policies with which each is linked in a particular situation. Thus, the lawyer can predict the choice between these two policies only within specific contexts.

If majority rule prevails in every case, then democracy will harden into the totalitarian state. If individual will prevails in every case, then the democratic society will collapse into anarchy. Majority rule and individual rights each act as a check on the other. The conflict between majoritarianism and individualism can never be fully resolved.

Further, the policies of majoritarianism and individualism are so general that even the choice of one or the other in a particular situation may not resolve the dispute. For example, as is discussed in the next subsection, individual will may be defined in more than one way. The choice of individualism thus leaves the conflict unresolved, merely shifting it to the more specific issue of how to define the will of the individual.

### b. Autonomy and Paternalism

Where the law seeks to give effect to the will of the individual, it confronts a choice between a policy of paternalism and a policy of autonomy. Under a policy of paternalism, the law protects the weak from domination by the strong. Under a policy of autonomy, the law avoids regulating individual choices.

The conflict between paternalism and autonomy is rooted in two competing views of the possibility of individual freedom. The policy of autonomy assumes that the government is the primary threat to individual freedom and thus holds that the law should facilitate rather than regulate individual choice. The policy of paternalism assumes that the primary threat to individual freedom is powerful individuals or private organizations that dominate others, whether for economic or other reasons, and thus the law should regulate private transactions to prevent domination and to ensure that individual exercises of will are truly free.

Assume, for example, that an illiterate man has purchased a refrigerator from a department store and has signed a finance agreement permitting the store, whenever it believes he has missed a payment, to repossess his refrigerator and all other appliances previously purchased from the store.[3]

If the court prefers a policy of autonomy, it will probably conclude that the consumer freely signed the agreement without having someone read it to him and he should be bound by his choice. Indeed, continues the argument, invalidation of the repossession provision could force the store to adopt more expensive remedies, such as suing the consumer to obtain return of the refrigerator, thus raising the cost of doing business, a cost passed on to consumers. The store might even decide not to sell on an installment basis to individuals who are bad credit risks, thereby eliminating entirely their ability to purchase expensive appliances. In this view, refusal to enforce the contract would very likely lead to fewer choices for future consumers. The policy of autonomy, in other words, assumes that government interference in private arrangements is ultimately destructive of freedom.

If the court prefers a policy of paternalism, it will question whether the consumer freely chose a contractual arrangement that he did not understand. The court may also question whether he could realistically have found anyone who could have adequately explained the provision to him, whether any store would have sold him a refrigerator without such a term in the contract, and whether he had any real choice other than to sign the contract or forgo owning a refrigerator entirely. If the court enforces the provision, then all vendors will insert such provisions in their financing agreements. Thus, enforcing the agreement could limit the freedom of consumers to obtain goods considered virtual necessities in the modern world, in effect allowing them to do so only on certain unfavorable terms. The policy of paternalism, in other words, assumes that real freedom requires the state to police private arrangements to ensure that those with less power are not coerced by circumstances into agreements to which no person with equal bargaining power ever would consent.

Private domination is a greater threat to individual freedom in some situations, whereas state coercion is a greater threat in others. The lawyer can thus predict the choice between paternalism and autonomy only in specific contexts.

The conflict between autonomy and paternalism, moreover, is persistent and can never be fully resolved. If autonomy were to prevail in every case, the court would enforce all private arrangements, including contracts induced with a gun to the head. The threatened party, having freely chosen to sign rather than die, should be held to the agreement. If paternalism were

to prevail in every case, then no individual decision would be free from judicial intervention. Every transaction that resulted in disappointment would lead to litigation over claims that the transaction was not the result of a truly free, informed choice.

Even where the choice between paternalism and autonomy is made in a particular situation, that choice may not resolve the dispute. The policies of paternalism and autonomy are so general that they may be indeterminate. For these policies to be determinate, one must have a relatively specific conception of what constitutes coercion or domination in a particular situation and what means would be effective in reducing or eliminating coercion or domination.

For example, assume that a woman complains to her employer about a male coworker who reads, in his cubicle during lunchtime, magazines that feature photographs of nude women. The supervisor then fires the male employee for sexually harassing the woman, whereupon the man sues the employer for wrongful termination. A paternalistic court determined to intervene in the workplace to prevent private domination of the weak by the strong needs more than its commitment to paternalism to decide the dispute. It must decide whether the man, by reading the magazine, is forcing the woman to endure sexist denigration or whether the employer, by firing the man for reading the magazine, is forcing the reader to defer to the employer's vision of proper gender relations. Only by deciding what coercion means in this very specific situation can the paternalist court resolve the dispute.

### c. Justice and Efficiency

Where the will of the state prevails, the conflict between primacy for the community and primacy for the individual is not completely resolved. The state must make a series of choices about the ends for which it will exercise its will, choices that resurrect the same conflict. Thus, for example, the conflict between the community and the individual often reemerges as a conflict between a policy of social efficiency and a policy of justice for the particular individuals involved in a transaction.

A good example of the conflict between justice and efficiency involves the procedural doctrine of *res judicata*, a Latin phrase that can be translated as "the thing adjudicated." That doctrine precludes a party from relitigating a previously adjudicated claim against the same party. The doctrine prevents

wasteful relitigation and thus is based on the policy of efficiency. It can lead to injustice in particular cases, however. Assume, for example, that a worker receives a slight burn injury as a result of his employer's negligence. The worker sues the employer and receives minor compensation. Ultimately, the burn does not heal properly, becomes cancerous, and causes severe injury.[4] Most people would probably agree that because the employer's negligence caused the injury, justice requires that the employer fully compensate the worker. Yet the doctrine of res judicata precludes the worker from filing a new suit to recover additional compensation for the unforeseen severity of the injury. In that case, the policy of efficiency prevails over the policy of justice.

If it is to retain the support of the people, the American legal system can never abandon its aspiration for justice. At the same time, a legal system that squanders its own resources and those of the society that it serves also will lose the respect and support of the people. The legal system must be both just and efficient. The conflict between these policies can never be fully resolved. The lawyer can predict the choice between efficiency and justice only in specific contexts.

Even where the choice between efficiency and justice is made in a particular case, that choice does not necessarily resolve the dispute. The concepts of efficiency and justice are so general that they often are indeterminate. For example, a decision that the court will seek the most just result does not resolve the dispute because there are many different conceptions of justice. And in selecting a particular conception of justice, the lawyer will again confront the tension between the community and the individual. That is, as discussed in the next subsection, the desire to seek the just result shifts the tension to the more specific question of how to define justice.

### d. Rights Theory and Utilitarianism

Where the state decides to pursue a policy of justice for the individual, the tension between the individual and the community remains unresolved. Rather, it reemerges as a conflict between rights-based theories of justice and utilitarian theories of justice.

Rights theory posits that individuals have certain rights that the law should protect and enforce because to do so is just. A court that held a strong conception of individual rights, for example, might hold that the manufacturer

of a product that injured a consumer must compensate the consumer because the consumer has a "right" to be free of physical injury caused by others. Rights theory can generally be traced to the natural law assumptions of Enlightenment thinkers like John Locke and has been reinforced by the deontological ethics of Immanuel Kant.

Utilitarianism generally posits that justice requires the result that affords the greatest happiness for the greatest number. That is, a just result is one that is beneficial for society as a whole, regardless of its impact on particular individuals. Utilitarianism is often traced to the work of Jeremy Bentham.

In utilitarianism, the importance or even the existence of individual rights is essentially denied. Under a utilitarian theory of justice, the court must do what is best for the community in general, even if that severely limits the rights of individuals. Individuals may be protected by utilitarianism, but only to the extent that their protection benefits the society as a whole.

The pursuit of the just result often poses a choice between a utilitarian theory of justice and a rights-based theory. For example, a motorist who is sued by a recreational bicyclist for accidentally striking the bicyclist on a crowded city street may base her defense on having taken every reasonable precaution to avoid hitting the bicyclist, claiming therefore that the only way to guarantee the safety of the bicyclist would be to ban traffic from the streets, which would be injurious to the welfare of the society. The bicyclist may base his claim for compensation on a person's right to use the street free of injury caused by others. Thus, in this instance, the motorist has adopted a utilitarian theory of justice, whereas the bicyclist relies on rights theory.

Even making the choice between these two theories of justice, however, often does not resolve the dispute. The concepts of rights and utility are both so general that they can be highly indeterminate.

Deciding that individuals have rights, for example, does not determine which rights they have. And, even assuming that there was broad agreement that people have certain rights—such as the right to property, the right to privacy, or the right to free speech—the nature of the rights must still be defined.

Defining rights as absolute is unworkable because two absolute rights will eventually conflict.[5] For example, a newspaper that wishes to publish the name of a rape victim who desires anonymity raises a conflict between the

right of free speech and the right of privacy. If both rights are absolute, the case cannot be resolved. One or both rights must be limited in some way. But the simple statement that there is a right of free speech or a right of privacy provides no guidance as to how to limit the rights or which to prefer.

Because of the indeterminacy of the concept of rights, in many disputes the position of each party may be supported by a different conception of the nature of their respective rights. A musician who wants to play the tuba in an apartment house late at night will talk about her "right" to use her property, whereas a neighbor who wishes to sleep at that hour will talk about his "right" to peaceful enjoyment of his home. The court cannot decide the case merely by deciding that it wishes to protect individual rights. It must adopt a very particular conception of specific individual rights.

Utilitarianism poses a problem analogous to that of rights theory. The concept of the greatest happiness for the greatest number is so general that it can be highly indeterminate. To find the utilitarian result, one must first decide what forms of happiness are to be counted, how they are to be measured, and whether some forms are entitled to more weight than others. One person may believe, for example, that the greatest happiness for the greatest number requires closing down a factory that pollutes the air, whereas another person may believe that the greatest happiness for the greatest number requires permitting the factory, which employs a large segment of the community, to continue to operate. One needs to believe not merely in utilitarianism but in a particular conception of the greatest happiness before utilitarianism can be of assistance in resolving a dispute.

Individualism is a deeply rooted value in American society, and thus arguments based on individual rights have strong intuitive appeal. Indeed, most utilitarians at some level incorporate a notion of individual rights into their theory. For example, most utilitarians would probably recoil from a psychopath's argument that he should be allowed to murder a comatose patient because he would obtain great pleasure from the act, whereas the comatose patient would suffer nothing, and thus the murder would increase the aggregate happiness in society. In effect, utilitarians would regard individual rights, in this case the right of the patient to life, as setting some kind of limit on the application of the utilitarian calculus. At the same time, a complete rejection of utilitarianism in favor of individual rights could allow

the single, unreasonable individual to undermine the welfare of the entire community.

Thus, utilitarianism tends to be limited in extreme cases by individual rights, and extreme assertions of individual rights are usually limited by some utilitarian calculus. Few, if any, of us would be prepared to accept either theory without some limitation from the other. The tension between these different theories of justice can never be fully resolved. The lawyer can predict the choice between these theories of justice only in specific contexts.

## 2. NATURALISM AND POSITIVISM

A second basic tension in American law, between positivism and naturalism, is essentially metaphysical. This tension occurs between two different conceptions of the source and nature of law, each of which is regarded as justifying a series of specific policy choices. The following discussion concerns the general conflict between these two theories, while alluding to some of the policy choices associated with a positivist or naturalist theory of law.

Naturalism generally holds that universal laws exist that are applicable to all persons at all times and that these laws are based on the will of God or the nature of the universe. Naturalism is often traced to the Stoic philosophers of ancient Greece, who found natural law through reason. In the medieval period, Catholic theologians found the source of natural law in the will of God, which was revealed through the scriptures. The religious skepticism triggered by the Renaissance, the Reformation, and the Scientific Revolution shifted naturalism back to secular grounds so that by the time of the eighteenth-century Enlightenment, naturalists referred more often to reason than revelation for the source of law.

Naturalists generally take the position that human laws inconsistent with natural law are not truly law. Naturalism was an important element of American legal thought at the time of the Revolution, and, in the early years of the republic, courts claimed the right to void legislation that was inconsistent with natural law.

Positivism regards law as the command of a sovereign. Law is thus the creation of human society; it is not the product of God's will or inherent in nature. Positivism is commonly traced to the work of Jeremy Bentham and John Austin in the eighteenth and nineteenth centuries and is represented in the twentieth century by the work of H. L. A. Hart.

As discussed in chapter 11, positivism displaced naturalism as the dominant theory of law in the United States during the early nineteenth century, thus bringing an end to the practice of voiding legislation that was inconsistent with unwritten natural law. Because sovereignty in the United States resides in the people, positivism seemed more consistent with democratic theory than naturalism, which found the source of law outside the will of the people.

Positivism has never entirely displaced naturalism, however. First, positivism seems an incomplete theory of law because it does not explain why the will of the majority should prevail. For that, one must resort to a naturalist explanation, such as the explanation that it is in the nature of things that the majority should rule or that democracy is the only morally just form of government. Thus, the legitimacy of positive law seems to rest ultimately on naturalist assumptions. The result is that positivist justifications of a particular rule or result inevitably lead back to naturalism.

Second, because positivism looks only to the commands of the sovereign, it seems not to provide an adequate basis for deciding disputes when the sovereign is silent or unclear. Naturalism thus offers a source of guidance when, as often occurs, positive law is indeterminate. For example, a court attempting to apply a statute to a wholly unanticipated situation may interpret the statute in a way that seems reasonable or just. Unable to discern the will of the people, the court may base its interpretation on natural law.

Third, because positive law in the United States is based on popular consensus, it may be inconsistent with deeply held notions of justice. As this suggests, courts have adopted various rules that permit them to invoke naturalist considerations to override positive law in certain cases. For example, assume that the legislature enacted a statute providing that the beneficiary of a life insurance policy may sue the insurance company directly to enforce the policy. Subsequently, the beneficiary of a policy murders the insured and sues to collect the proceeds. Although the language of the statute may direct the court to order payment of the proceeds to the beneficiary, most would find that result reprehensible. A court would likely refuse to reach the result, despite the clear language, perhaps invoking a rule that allows it to interpret statutes so as to avoid manifestly unjust or absurd results.[6] Naturalism thus provides a moral basis for interpreting the content of positive law.

Naturalism, then, coexists with positivism, providing the theoretical underpinnings for positivism, supplementing positive law where it seems

inadequate to resolve a dispute and, in extreme cases, countermanding the results required by positivism.

At the same time, naturalism can never displace positivism entirely. First, as noted above, the idea that law is based on any source other than the will of the people seems to many profoundly undemocratic.

Second, natural law as unwritten law introduces tremendous discretion and indeterminacy into the legal system. Without an authoritative codification of the tenets of natural law, naturalism threatens to undermine the uniformity and predictability of the law. To the extent that a judge may confuse his or her personal preferences with divine revelation or the dictates of reason, naturalism undercuts the rule of law.

Third, much law in the modern world governs mundane, trivial matters that could be regulated in any of a number of ways. It is simply implausible that the thousands of minute regulations applicable to daily life are rooted in God's will or the nature of the universe. Naturalism thus provides an unconvincing justification for the content of much of contemporary law.

For these reasons, American law contains strands of both positivism and naturalism. The court must determine in specific situations which issues to resolve in accordance with rules adopted by the sovereign and which to resolve with reference to naturalist notions of justice or reasonableness. The tension between naturalism and positivism can never be fully resolved. It reemerges throughout American law in different contexts and at different levels of generality.

## 3. INSTRUMENTALISM AND FORMALISM

### a. In General

A third basic tension in American law, between formalism and instrumentalism, is essentially epistemological. Formalism and instrumentalism are competing theories about the way in which courts ascertain the law, that is, about the nature of adjudication. Each of these theories entails a number of more specific policy choices.

Formalism conceives of adjudication as the mechanical application of general rules to particular situations. Formal rules specify facts that give rise to rights or duties. Application of the rules consists of an examination of the evidence to determine whether the specified facts are present.

Formalists believe that the formulation of law as a set of rules brings uniformity and predictability to the law. Predictable rules put everyone on notice about their rights and duties, one aspect of justice, and permit the parties to rely on a stable legal regime, another dimension of justice, reflected in the popular notion that it is unfair to change the rules in the middle of the game. By permitting individuals to anticipate how the law will apply, rules facilitate the making of enforceable private arrangements necessary to a modern market economy. At the same time, they simplify the adjudication of disputes, thus leading to a more efficient judicial system. Indeed, by allowing parties to predict which claims are likely to be successful, rules discourage frivolous, wasteful litigation. Uniform rules treat like cases alike, another aspect of justice.

Formalists endeavor to state rules at the highest possible level of generality. The more general the rules, the more cases they embrace and the greater the uniformity of application.

Instrumentalism conceives of adjudication as deciding a dispute in the way that will further the relevant policies. Under this view, a rule must always be interpreted so as to effectuate the underlying policies. If a literal reading of the terms of the rule would not serve those policies, the terms should be read more broadly. Additionally, implicit terms might be inserted in the course of interpretation under the theory that these terms must be treated as present if the rule is to promote the policies that led to its adoption.

One question facing the instrumentalist is the source of the underlying policies. Naturalism and positivism offer theories about the source of the law and instrumentalism has been associated with both. Theories of interpretation that look to the intent of the framers of a law, for example, are essentially instrumentalist and positivist, because they attempt to effectuate the policy behind the law and find that policy in the will of the sovereign. Theories of interpretation that apply a law in a way that is just or reasonable may be instrumentalist and naturalist.

Instrumentalists sometimes prefer to express the intention of the court or legislature with flexible standards, such as "good faith" or "reasonableness," which then must be applied to the facts of each individual case. Such standards differ from rigid rules in that they do not specify all of the facts necessary or sufficient to create a right or duty. Rather, they characterize the

facts that will produce the legal consequence and leave it to the court to determine which facts satisfy that characterization in a particular situation.

Instrumentalists do not claim that their approach to adjudication necessarily produces the same degree of uniformity or predictability that formalism does but argue instead that much of the predictability attributed to formal rules is illusory in any event because the language of the rules is often indeterminate. Indeed, they argue that the formalist penchant for generality produces indeterminacy. The more general the rule, the less determinate it is.

As for the uniformity associated with formalism, instrumentalists argue that it is often undesirable. They claim that flexible standards are more likely to yield the most just result in particular cases. Rules are likely to be overinclusive or underinclusive. That is, a rule may be overinclusive in applying to situations where that result is not demanded by the policy underlying the rule. It may be underinclusive in failing to apply to situations where the policy underlying the rule requires that it apply. For example, imagine that a rule declaring only men to be eligible to apply for a position as a firefighter is based on the policy of ensuring that firefighters have sufficient physical strength to perform their duties. The rule is overinclusive in that it prohibits women who are strong enough from applying, and it is underinclusive in that it allows men who are not strong enough to apply. Overinclusive rules are undesirable because they limit freedom unnecessarily, whereas underinclusive rules are undesirable because they fail to solve fully the problem that they are intended to address. Rules are inevitably overinclusive or underinclusive because of the difficulty of crafting a rule that anticipates every circumstance that will arise and of finding words that precisely correspond to the exact situations in which the rule should apply.

Thus, the instrumentalist contends that the formalist effort to formulate law in terms of general rules is inherently flawed because it nearly always leads to disjunctions between the language and the policy of the law. Flexible standards permit the court to take account of special circumstances not contemplated by a more rigid rule and thus avoid overinclusiveness or underinclusiveness.

The difference between formalism and instrumentalism may be illustrated by a hypothetical rule that requires all persons to walk on the left side of the road.[7] Formalism would require that the rule be applied so as to find that one who walked on the right side was in violation of the rule, regardless

of the reason. In this way, all persons are treated uniformly, and everyone can act on the assumption that pedestrians will walk on the left side of the road. If a pedestrian is found on the right side of the road, the court can determine without a difficult inquiry that the pedestrian was a wrongdoer.

A problem arises, however, in the case in which traffic is extremely heavy on the left side of the road and very light on the right, with the result that walking on the side of the road prohibited by the rule is actually safer. The rule is overinclusive because it requires walking on the left side of the road when the policy underlying the rule, public safety, does not demand that result. The rule is also underinclusive because it fails to require walking on the right side of the road when public safety demands that result.

The formalist position is that to allow the pedestrian to deviate from the letter of the rule would defeat the advantages of a uniform and predictable rule. The instrumentalist position, by contrast, is that it is absurd for a so-called safety rule to require the pedestrian to take the unsafe action and to punish the pedestrian for furthering the policy underlying the rule. It is for this reason that instrumentalists often formulate the law as a flexible standard rather than a rigid rule. For example, an instrumentalist might propose that the law be reformulated as a standard that requires all pedestrians simply to walk safely. Thus, the pedestrian could always act so as to promote the policy behind the law, whether that meant walking on the left or the right side of the road.

Such a flexible standard, unlike a rigid rule, does not prescribe the exact facts under which a right or duty arises but permits the court to consider any facts relevant to the underlying policy of safety. By allowing the court to take account of special circumstances, standards permit a just result in particular cases. Standards may make it more difficult, however, for motorists to anticipate the side of the street on which pedestrians will be walking and for pedestrians to determine on which side of the street the law requires them to walk. It also requires a more complex inquiry to determine whether the pedestrian was acting in accordance with the law than in the case of a rigid rule. Thus, standards may lead to the perception that the law is neither uniform nor predictable.

If formalism is subject to the charge that rigid rules are overinclusive and underinclusive, instrumentalism is subject to the opposite criticism: that it undermines uniformity and predictability in the law, permitting courts to

decide cases in accordance with personal preferences, rather than as prescribed by law. Thus, instrumentalism is said to effect injustice by departing from the norm of equal justice under the law and by defeating the parties' reliance on a stable legal regime. Its unpredictability discourages investment, increases transaction costs, and encourages litigation, all of which result in the inefficient use of resources.

Formalists tend to respond to problems of overinclusiveness or underinclusiveness, that is, to situations in which the language and policy of a rule are not coextensive, in several different ways. One is to generate a series of subrules creating exceptions to the general rule. For example, the rule requiring pedestrians to walk on the left side of the street could include an exception for rush hour, when there may be heavy traffic in one direction and light traffic in the other. The creation of an exception, however, undercuts any claim that the rule must remain absolute and leads to demands that other exceptions be created to address other problems of overinclusiveness or underinclusiveness. The endless proliferation of exceptions undermines the predictability of the rule because people can never be certain when a new exception may be created and because, as the structure of rules becomes more complex, the probability that someone will misunderstand the complex edifice or that the elaborate structure will create unintended gaps or conflicts becomes greater. The existence of numerous exceptions also prevents uniformity in the application of the rule.

Further, the exceptions themselves will be overinclusive or underinclusive, with the result that the problems created by the general rule are merely shifted to the subrule. For example, the exception for rush hour traffic would be overinclusive on holidays, when traffic does not follow the usual rush hour pattern. One could create an exception to the exception for holidays, but certain holidays are not widely observed and other days that are not legal holidays may be observed by large numbers of people, with the result that the exception to the exception could itself be overinclusive or underinclusive.

As the exceptions and qualifications proliferate, the advantages of formalism are lost. That is, a body of rules that seeks to address narrower and narrower categories of cases begins to take on the characteristics of an instrumentalist approach—rejecting predictability and uniformity in favor of reaching the correct result in each particular case. Indeed, if the body of rules becomes too complex and detailed, there may ultimately be a reaction

leading to the abandonment of the entire structure in favor of a single standard that, like the complex body of rules, permits the best result in each case.

Another way to address the disjunction between the language and policy of the rule is to interpret the rule so that it does not apply in the way that most people would expect. This prevents the rule from defeating the underlying policy, but it undercuts the predictability and the uniformity of the rule by disregarding its plain meaning and breeds cynicism about a legal system that appears to manipulate rules.

In the end, the core formalist position is that rules are defensible if they yield the best result in most cases. Some degree of overinclusiveness and underinclusiveness, although regrettable, is justified by the uniformity and predictability attributable to rules. In contrast, instrumentalists seek to obtain the best result in every case, even at the cost of uniformity and predictability.

Formalists, then, organize phenomena in broad categories, the members of which are subject to general rules. That is, formalists seek to universalize phenomena, to regard each situation as representative of a general type, requiring that it be treated like situations of the same type.

Instrumentalists, by contrast, place phenomena in categories of one. That is, they seek to particularize phenomena, to regard each situation as unique, requiring that it be treated individually in the way that will further the relevant policies. Inasmuch as they regard situations as unique, instrumentalists may conceptualize situations as falling along a continuum rather than into large, sharply defined categories.

Because of its abstraction and the accompanying tendency toward overinclusiveness and underinclusiveness, formalist reasoning is often criticized as both artificial and superficial.

The artificiality is attributable to formalism's divorce from policy, such that in extreme cases its rules or categories may serve little purpose other than their own existence. Thus, distinctions are sometimes referred to as formal when they seem unrelated to furthering any relevant policy. Or, lawyers will refer to some act or situation as existing in form (but not substance) when the mechanical rules defining the act or situation have been complied with, but the policy that attaches significance to the act or situation has not been furthered.

For example, assume that a governor signs legislation by mistake, believing that the bill is a different piece of legislation. A lawyer might characterize the

governor's approval as formal because the governor complied with all the mechanical requirements for approval, although the policy that justifies requiring the governor's approval (the policy that a bill should not become law unless both the legislative and the executive branches of the government concur) was not furthered by the signature. Lawyers will say, in such a circumstance, that to give effect to the governor's signature is to exalt form over substance, which means to apply the rules without regard to the underlying policies.

The superficiality of formalism is attributable to its level of abstraction, such that legal consequences turn on fewer and fewer facts and thus may be divorced from reality. For example, the concept of equality is sometimes referred to as formal equality when the persons in question are equal in only superficial ways, as where a rich man and a poor man are said to be equal in a court of law. At its extreme, formalism may ultimately produce a regime of law separated from values or facts, consisting merely of self-referential rules and categories that are neither good nor true.

Instrumentalism, because of its unstructured examination of consequences, is often criticized as a political rather than a legal method of reasoning. At its extreme, instrumentalism produces a series of ad hoc decisions that seems merely to accomplish the purposes of the individual decision maker. The distinction between adjudication and legislation vanishes and, with it, the concept of the rule of law.

Whereas formalists must address the over- and underinclusiveness of rigid rules, instrumentalists must address the ad hoc nature of flexible standards or policy-driven interpretations of rules. Instrumentalists often attempt to bring some degree of uniformity and predictability to adjudication by developing sets of presumptions or maxims that reflect the manner in which past cases have been decided and that provide some guidance to the lawyer. As these presumptions and maxims proliferate and are applied with some frequency, they may begin to take on the character of rules—becoming more conclusive and hence more rigid in their application. Thus, just as formalism's need to avoid over- and underinclusiveness may push it toward instrumentalism, instrumentalism's need to provide uniformity and predictability may push it toward formalism. Neither theory alone seems to offer a completely adequate method of adjudication.

Formalism is associated with objectivist theories of interpretation, whereas instrumentalism is associated with subjectivist theories. Objectivists interpret

a rule or situation from the perspective of some generalized or ideal person, whereas subjectivists interpret it from the perspective of actual, particular individuals. For example, an objectivist would interpret a word in a contract from the perspective of a hypothetical "reasonable person," whereas a subjectivist would interpret the word from the perspective of the particular parties to the contract. Thus, objectivism (like formalism and rules) generalizes phenomena, and subjectivism (like instrumentalism and standards) particularizes them.

Arguments for and against objectivism and subjectivism thus mirror the arguments for and against formalism and instrumentalism. Objectivism provides uniformity and predictability but may be over- or underinclusive, whereas subjectivism presents the opposite situation.

Although formalism is associated with rules and objectivism, and instrumentalism is associated with standards and subjectivism, in practice these different theories or approaches may appear in a variety of permutations. The same desire for uniformity and predictability that pushes the law toward formalism also pushes it toward rules and objectivism, and the same desire for the correct result in each case that pushes the law toward instrumentalism also pushes it toward standards and subjectivism.

Yet just as the law alternates between giving primacy to the community and giving it to the individual and alternates between naturalism and positivism in different contexts and at different levels of generality, so too it vacillates between approaches associated with formalism and those associated with instrumentalism in different contexts and at different levels of generality. Rigid rules may be qualified by subrules that incorporate flexible standards. Standards may be defined by objective tests in some situations and by subjective tests in others. The policy conflicts associated with formalism and instrumentalism are never fully resolved.

### b. Application to Statutory Interpretation

The tension between formalism and instrumentalism has been of particular significance in the development of theories of statutory interpretation. Formalism is generally associated with a textualist theory of interpretation, that is, interpretation by examination of the text alone.

The use of a textualist theory of interpretation is defended on the ground that the text of a law is all that was adopted by the legislature. In this view,

attempts to discern some underlying intent are speculative and permit the interpreter to introduce personal preferences under the guise of enforcing the underlying intent. Because it links interpretation to concrete language on a page, textualism is often claimed to be the most certain method of interpretation. Textualist interpretations also ensure that those to whom the law applies will not be penalized for having relied on the law's apparent meaning.

Textualism is criticized on the ground that the pure language of a rule is often, if not always, indeterminate and that interpretation is not possible without making at least some minimal assumptions about the underlying policy of the law. Thus, the critique continues, the supposed certainty of textualist interpretations is an illusion that masks the fact that the court has supplied meaning to the terms of the text. Textualism may limit the range of possible interpretations, but it cannot assist in choosing among those that are permissible. Thus, according to critics, textualism does not provide a complete theory of interpretation. Some recourse to nontextualist theories of interpretation must be made in at least some cases.

Textualism nevertheless currently appears to enjoy a greater degree of legitimacy among courts than other theories. Courts commonly begin their interpretation of a statute with its text, and the "Golden Rule" of textual interpretation, discussed in chapter 2, states that if the meaning of the text is clear, the interpretation of the statute is at an end. Even when a court relies on nontextual sources, it often minimizes the role of those sources or treats them as merely confirming the text.

Instrumentalism is generally associated with a number of different theories of interpretation, which are distinguished by the source of the underlying policy. These theories are identified here as intentionalism, purposivism, and nonoriginalism.

Intentionalism is the theory that a statute should be interpreted so as to further the intent of the drafters, and it permits examining the history of the statute, including statements of the legislators, to discern that intent. Intentionalism, in other words, seeks to look beyond the text of the statute to ascertain intent.

Intentionalism is subject to a number of criticisms. First, the record may be silent because the issue was not anticipated (and thus the drafters had no intent with respect to it) or because the only way to obtain a consensus was to remain deliberately vague about the statute's intended effect. Some legis-

lators may have had no intent at all, only motives, such as getting reelected or repaying a favor from another legislator. Other legislators may have voted for a law that they opposed, hoping to avoid enactment of a more extreme measure or, if this law was the extreme measure, hoping to prompt a popular backlash or constitutional challenge that a less extreme measure would not have triggered. The history will be partial, because complete records of every relevant incident leading to enactment of the law will certainly not exist. It may be misleading, because some expressions of legislative intent may have represented the position of only a few of those voting on the statute or because legislators opposed to the legislation may have engaged in strategic behavior, inserting comments in the record, hoping to influence later interpretations of the statute inconsistent with the intent of the supporters. And, of course, under even ideal circumstances, all historical accounts are shaped by the perspective of the historian. The problem of inferring intent is compounded by the fact that the statute probably was a compromise among conflicting interests and thus among competing intents.

Because of these difficulties, some instrumentalists proposed a purposivist theory of interpretation in which a law is interpreted so as to promote its ostensible purpose. Purposivism is distinguished from intentionalism in that purposivism avoids inquiry into the minds of the drafters and looks at the apparent object of the law. For example, the purposivist may ask simply what the mischief was that existed when the law was adopted, on the assumption that the purpose of the law was to remedy the mischief. In a sense, purposivism is an objectivist theory of intent, whereas intentionalism is a subjectivist theory. The purposivist eschews all the difficult empirical questions that arise concerning the actual thoughts of the legislators and looks simply at the language and setting of the law to determine the purpose it appears to serve.

Purposivism, too, has been subject to criticism. By divorcing interpretation from the actual intent of the framers, purposivism seems to license the interpreter to infer almost any purpose that can be reconciled with the language of the statute. Moreover, the broader the range of circumstances from which the interpreter may infer purpose, the less constraining purposivist interpretation is. At the same time, if purposivism seeks to constrain interpretation by limiting the range of circumstances from which the purpose may be inferred to the text of the law, then purposivism seems to add very

little to textualism. That is, under a text-bound version of purposivism, the interpreter will infer that the purpose of the statute is to do whatever it is that the statute appears to do. Determining what the statute does, however, is the very issue to be resolved. Thus, in using the language of the statute to determine its purpose, one ends where one began: with the language of the statute.

Purposivism is also flawed in its assumption that a law has a single purpose or a set of consistent purposes. In fact, statutes represent compromises among multiple conflicting purposes. In applying a statute, a court must decide which of these purposes to further at the expense of the others. Given that the statute was drafted, however, so as to accomplish all of the purposes in some measure, the court has no basis on which to decide to what extent one of the purposes shall prevail over the others in future applications of the statute to unforeseen circumstances.

Nonoriginalism is a theory of interpretation that draws its name from the fact that it does not rely on the original intent or purpose behind the law. Rather, it interprets a rule in accordance with some other source of policy, such as contemporary community values. The merit of nonoriginalism is that it avoids all of the empirical problems associated with attempting to identify an authentic intent or purpose underlying a law. It also permits the language to be interpreted in a way that produces the best result.

Nonoriginalism, however, is perhaps the least legitimate method of interpretation in the minds of many contemporary judges. The principal criticism is that it seems to grant to the interpreter virtually complete discretion to choose the policy to be furthered. Critics charge that nonoriginalism is, in fact, not interpretation at all, but judicial legislation under the guise of interpretation.

Defenders of nonoriginalism point to all of the indeterminacies associated with textualism, intentionalism, and purposivism and argue that all forms of interpretation permit lawmaking by the interpreter. They assert that nonoriginalism has the virtue of authorizing explicitly an interpretation that is desirable on substantive grounds. They also contend that it is the most candid method of interpretation because it does not seek to hide the interpreter's policy choices behind a facade of the plain meaning of the text, the intent of the framers, or the purpose of the law.

In any event, nonoriginalism is a theory of interpretation applied primarily to the Constitution, rather than to ordinary statutes. First, because statutes generally are not nearly as old as the Constitution, the problems associated with identifying the intent of the framers, or drafters, are often less severe than in the case of a Constitution drafted more than two hundred years ago. Second, statutes can be rather easily repealed or amended if they are found to produce an undesirable result, whereas the Constitution is intended to endure permanently and is difficult to amend. Accordingly, the rationale for an evolving interpretation of the Constitution is greater than the rationale for an evolving interpretation of a statute. Thus, although the meaning of the Constitution has evolved over time in light of changing understandings of good policy, few judges would interpret a statute in that way. Judges may refuse to interpret a statute in a way that produces an absurd result. Even in that case, however, they will take the position that the legislature would never have intended an absurd result, and thus they are merely acting in accordance with the intent of the legislature, although no evidence of the legislature's actual intent exists.

## II. Policy Synthesis

After the lawyer, through policy analysis, has identified the policies supporting each possible result, the lawyer may attempt to develop a more sophisticated or convincing argument by synthesizing the policies. This requires determining the relationship that each policy has to the others.

The relationship between two policies may be determined by examining their relationship in theory or their relationship in their consequences. Depending upon which criterion is used, theory or consequences, the policies may have a different relationship. Thus, discussion begins with consideration of how policies might be related in theory, followed by considering how they might be related in their consequences.

### *A. The Relationship in Theory Among Policies*

As will be discussed in chapter 11, the American legal system rests on a set of dualisms that were characteristic of Enlightenment liberal philosophy. In political philosophy, the dualism was the community (or its organ, the state)

and the individual. In metaphysics, it was realism and nominalism. In epistemology, it was rationalism and empiricism.

Each of these three dualisms can be restated at a higher level of generality as a dualism of the universal and the particular. The universal is represented by realism, rationalism, and the community. The particular is represented by nominalism, empiricism, and the individual.

Many of the policy conflicts in American law are simply more specific cases of one of these three dualisms or, at a very high level of abstraction, of the basic dualism of the universal and the particular.

The first four policy conflicts discussed in the first section of this chapter, for example, are specific cases of the political dualism of the community and the individual. Policies of majoritarianism, paternalism, efficiency, and utilitarianism all afford relative primacy to the community, whereas individualism, autonomy, justice, and rights theory all afford relative primacy to the individual. Majoritarianism gives primacy to the will of the community, whereas individualism gives primacy to the will of the individual. Paternalism, although it claims to protect individual freedom, reserves for the community the prerogative to define the conditions of freedom. Autonomy, by contrast, rejects community supervision of private choice. The law seeks justice out of concern for individuals, but seeks efficiency to ensure the prosperity of the community. Utilitarianism defines justice according to the welfare of the community, but rights theory favors the welfare of the individual. The political dualism of the community and the individual thus reappears pervasively in almost every aspect of American legal doctrine at multiple levels of generality. Adherents to each of the policies that grants primacy to the community seek to universalize the exercise of power, whereas proponents of the policies that grant primacy to the individual seek to particularize it.

The conflict between naturalism and positivism is a specific case of the metaphysical dualism of realism and nominalism. The metaphysical dualism thus addresses the question of the nature of law. Naturalism, as a form of realism, holds that laws have ontological existence. It universalizes law as a phenomenon that is true for all societies at all times. Positivism, as a form of nominalism, holds that laws are merely human creations. It particularizes law as a phenomenon that is the product of a particular society at a particular time.

The conflict between formalism and instrumentalism is a specific case of the epistemological dualism of rationalism and empiricism. The epistemological dualism addresses the question of the nature of adjudication. Formalism, like rationalism, rests on the method of reason and functions by deducing conclusions from universal principles. Instrumentalism, like empiricism, rests on the method of experience. Thus, cases are decided individually rather than categorically, through the attempt to determine which means in a particular situation would best serve the relevant ends. In other words, instrumentalists seek to particularize each case, to treat each case as belonging uniquely to a category of one.

In short, various policy conflicts, at moderately high levels of generality, represent choices among political, metaphysical, and epistemological theories. Further, the competing political, metaphysical, and epistemological theories, at an even higher level of generality, represent the opposite poles of the dualism of the universal and the particular.

This thesis provides a basis for evaluating the theoretical relationship among many different policies. Any two policies may be consistent in that they represent the same pole of a dualism, or they can be opposed in that they represent opposite poles of a dualism.

The relationship among the various sets of opposed policies discussed in the first section of the chapter may be diagrammed as follows:

| | Universal | Particular |
|---|---|---|
| *Politics* | Community | Individual |
| | (Majoritarianism) | (Individualism) |
| | (Paternalism) | (Autonomy) |
| | (Efficiency) | (Justice) |
| | (Utilitarianism) | (Rights Theory) |
| *Metaphysics* | Realism | Nominalism |
| | (Natural Law) | (Positivism) |
| *Epistemology* | Rationalism | Empiricism |
| | (Formalism) | (Instrumentalism) |
| | —Rules | —Standards |
| | —Objectivism | —Subjectivism |

Judicial opinions often do not even seek to be consistent in theory at high levels of generality. For example, instrumentalism and utilitarianism are often associated with each other, as are formalism and positivism as well as natural law and individual rights, despite the fact that each of these pairings draws from opposite columns in the diagram.

Inconsistencies in theory at high levels of generality are of little, if any, concern to a court. Indeed, to go one step further, it is virtually inevitable that a judicial decision will be inconsistent in theory at some level of generality. Or to restate the assertion, judicial decisions cannot make every policy choice in favor of the same pole of the dualism of the universal and the particular.

The inability to rest consistently on the same pole of the dualism of the universal and the particular reflects a paradox underlying Enlightenment liberalism. The paradox is that either pole of these three dualisms, if pursued to its logical conclusion, is ultimately destructive of itself.

In politics, individual freedom, if taken to its extreme, leads to anarchy and the tyranny of the strong over the weak. Individual freedom can be guaranteed only by the power of the state. State power, by contrast, if taken to its extreme, leads to a completely totalitarian society in which individuals have no liberty or value and thus no stake in preserving the state.

In metaphysics, to be an extreme realist and claim that every rule is eternally fixed and absolute eliminates the possibility of change or of resolving conflicts between apparently conflicting absolutes. To be an extreme nominalist, however, and claim that every rule is contingent and constantly mutable reduces law to a set of arbitrary ad hoc decisions. In either case, law loses the capacity to function as law.

In epistemology, to be an extreme formalist and state rules at the highest possible level of generality renders the rules incapable of determining any situation and thus ineffective. To state every rule at the lowest level of generality, however, would preclude any rule from governing more than the precise situation for which it was formulated and similarly render it incapable of determining any future situation.

This paradox has been reflected in each of the policy conflicts described above, under the heading "Specific Policy Conflicts." Tensions between rights theory and utilitarianism, for example, or between naturalism and posi-

tivism or formalism and instrumentalism were described as incapable of full and final resolution. Courts choose rights theory one day and utilitarianism the next. They decide one case on purely formal grounds without any reference to policy and decide the next case entirely on grounds of policy.

This paradox restated is simply that to adhere to policies or ends that are completely consistent as a matter of theory produces consequences that are contrary to those same ends. Total freedom leads to anarchy and domination. Complete control leads to collapse. Extreme formalism as well as extreme instrumentalism yields complete indeterminacy.

The paradox is addressed as a practical matter through compromise. The legal system does not pursue any policy consistently or to its logical extreme. Rather, legal doctrine is the product of a series of compromises that produce the consequences desired but that are theoretically inconsistent. They cannot be otherwise.

The inconsistencies discussed in this subsection for the most part were at very high levels of generality—at levels that would be of little or no concern to a court. Theoretical inconsistency, however, is also not uncommon at very low levels of generality. Chapters 7 and 8, for example, discuss a number of areas of law in which courts have favored one policy in adopting a rule but have preferred the opposite policy in adopting definitions of or limitations to that same rule. Any body of rules is very likely to embrace simultaneously policies that are in direct conflict, as a matter of theory, at very low levels of generality. The point here, however, is that if the conflict does not appear at a low level of generality, it is virtually certain to appear at a high level.

That is, judicial decisions inevitably rest on theoretical inconsistency at some level of generality. They simultaneously embrace policies that represent contradictory poles of the various cognate dualisms. The law will never be internally consistent. It will always rest on policies that support opposing results in any particular case.

Theoretical inconsistency, in any event, provides the lawyer with a basis for critiquing the internal coherence of an opposing lawyer's argument. For example, if the adversary is relying on policies of individualism and efficiency to support the argument that a contract should be enforced as written, the lawyer can point out the inconsistency of efficiency with individualism

and thus call into question the ultimate consistency of the adversary's position with individualism. If the court is more committed to individualism than efficiency as a philosophical matter, the lawyer's ability to characterize the adversary's position as efficiency based and anti-individualist may result in the court's rejection of the adversary's argument.

### *B. The Relationship in Consequence Among Policies*

Deciding cases through policy judgments is an inherently consequentialist practice. In other words, the lawyer is concerned primarily with finding the result that has the best consequence, meaning that it yields the most policy benefit, rather than the result that is internally consistent as a matter of theory.

Although the theoretical relationship among policies is fixed, the relationship among policies as measured by their consequences is not. Some policies may be consistent in their consequences in one case but opposed in the next. For example, promoting efficiency in one situation may require an individualist policy, whereas in the next situation it may require a majoritarian one. Thus, the process of synthesizing policies with respect to their consequences requires determining the relationship in consequence among various policies in a given situation.

In a particular situation, any two policies may have any of three relationships with respect to their consequences. They may be consistent, opposed, or independent in their consequences.

#### 1. CONSISTENT POLICIES

Two policies may be consistent with each other in their consequences in a particular situation; that is, both policies may be furthered by the same result. Thus, both policies support an argument that that result is correct.

For example, a lawyer for an appliance store attempting to decide whether a court will enforce a harsh sales contract between the store and a consumer may perform a policy analysis and determine that at least three policies support his client's position that the harsh term ought to be enforced. First, enforcement of the contract would further the policy of autonomy, because it would give effect to the choices made by the parties when they entered into the contract despite their unequal bargaining power. Second, enforcement

of the contract would further the policy of efficiency, because any other result would encourage litigation by consumers seeking to avoid agreements they later regretted and could require the store to raise prices to all parties to pay for the litigation. Third, enforcement of the contract would further the policy of textualist interpretation (formalism), because it would honor the language of the agreement as written without inquiry into what the parties might secretly have intended or thought.

All three of these policies are consistent in their consequence in this case. In arguing this client's case, the lawyer can rely upon the standard arguments that typically support each of these policy choices.

Lawyers find that certain policies seem to be consistent in their consequence in the great majority of cases, or at least are widely perceived as such. For example, many lawyers believe that formal rules are more certain and thus more efficient than instrumentalist standards. That is, formalism and efficiency are thought to be generally consistent in their consequences. Arguments for either of these policies thus overlap with arguments for the other. Similarly, individualism is often said to be consistent in its consequences with efficiency. This view is based on the assumption that allowing private individuals to negotiate their own arrangements through the market usually leads to the most efficient result.

The usefulness of this insight is that it can facilitate the process of developing arguments in favor of a particular position. Once the lawyer realizes that the client has adopted a formalist position, the awareness that formalism is often thought to be consistent with efficiency will lead the lawyer to think immediately of that policy as lending potential support to his client's position.

### 2. OPPOSED POLICIES

Two policies may be opposed in their consequences in a particular situation. That is, the result that furthers one policy would impede the other policy. Thus, one policy would support a determination that a particular result is correct, whereas the opposing policy would support a determination that it is incorrect.

Lawyers find that certain policies seem to be opposed in their consequences in a great number of cases, or at least are widely perceived as such.

This phenomenon can facilitate the process of anticipating arguments against a particular position. After identifying the policies supporting the client's position, the lawyer can anticipate that the commonly opposed policies are very likely, if not certain, to support the position of the adversary.

The lawyer for the appliance store, for example, having identified autonomy, efficiency, and formalism as policies supporting the client's position, can anticipate that the standard arguments based on paternalism, justice, and instrumentalism are likely to be raised by the adversary. For instance, because the opposing policy of paternalism is based on the assumption that private parties dominate each other, the lawyer can anticipate that the adversary may question whether the consumer freely and knowingly entered into the contract.

One mark of a creative lawyer is the ability to marshal as many policy arguments on the side of the client as possible. A particularly strong argument is one that demonstrates that two policies that are often opposed in theory or in their consequences—such as efficiency and justice—both lead to the same result.[8] This argument is especially strong because the lawyer, by finding support in both policies, in effect has neutralized one of the potential arguments against the client's position.

### 3. INDEPENDENT POLICIES

Two policies may operate independently of each other in consequence in a particular situation. That is, the result that furthers one policy would not necessarily further or impede the other policy.

For example, assume that a lawyer represents the neighbor of a tuba player who insists on playing the tuba in an apartment house late at night. Through policy analysis, the lawyer determines that the client's position is supported by a policy of utilitarianism—the greatest happiness for the greatest number would result from restricting the hours during which the tuba player can play.

In that situation, the policy of utilitarianism may operate independently of the policies associated with formalism and instrumentalism. The neighbor's chances of prevailing are thus the same regardless of whether the court is inclined in this case to take a formalist or an instrumentalist approach. A formalist court, persuaded by the lawyer's utilitarian argument, might im-

pose a rigid rule, such as a rule that the tuba player could not play after nine o'clock. An instrumentalist court, persuaded by the lawyer's utilitarian argument, might fashion a flexible standard, such as a requirement that the tuba player not play at an unreasonable hour of the night.

## III. Policy Application

### *A. The Technique of Deciding*

As explained in chapter 5, courts use policies to resolve cases in the way that they believe will yield the greatest policy benefit. Determining how to achieve this result requires that the lawyer make two types of judgments—the first about the relative importance of policies and the second about the relationship between ends and means.

As an initial matter, the lawyer, through policy analysis and synthesis, identifies the policies supporting each result. The lawyer then attempts to determine the benefits that each possible result would produce through furthering the supporting policies, at the same time attempting to determine the cost that each possible result would produce through impeding the opposing policies. If a result would further the supporting policies more than it would impede the opposing policies, then, assuming that all of the policies were equally important, the result would be desirable.

The problem, however, is that all policies are not equally important. At any given moment in history in any given court, certain policies are preferred. Thus, the court is very likely to decide that the result that furthers the preferred policies is correct, unless that result is enormously costly in terms of the opposing policies.

For example, many courts prefer individual rights over majority rule in freedom of speech cases. Thus, those who demand impeachment of the president or display in a museum paintings of nude figures are likely to find that their right to engage in these activities will prevail over the power of the majority to prohibit them. Because the right of free speech is preferred, the result supported by that policy usually prevails.

Yet the man who attempts to incite a riot or reveal the position of troops in time of war would probably find that the majority's power to prohibit those instances of speech prevails over his right to engage in them. A riot or

a defeat in battle could deal a serious blow to democratic government. The cost of permitting individual rights to prevail in these cases is considered too great.

In the end, there is nothing mathematical or mechanical about the process of making these judgments. In general, lawyers can sense that if a preferred policy supports their position, they are likely to prevail—just as they are likely to lose if a preferred policy supports their adversary's position.

At the same time, if the result lawyers seek seems only remotely to further the policies supporting their position, their argument is considerably weakened. For example, a woman who demands the right to deliver a speech over a loudspeaker at three in the morning in a residential area is in a weak position (even though the preferred policy of free speech supports her case) because permitting her to deliver the speech at that time and place and in that manner is only distantly related to the policy of free speech. As long as she is permitted to give the same speech to the same audience at other times and places, there is very little cost to free speech in denying her the permission she seeks. The relationship between the preferred ends and the means she seeks to employ is simply too attenuated for her to prevail, even though the policy of free speech is given great weight and supports her position.

### *B. The Indeterminacy of Policy Judgments*

Policy judgments are often indeterminate for three reasons. First, there is not always a general consensus concerning the relative weights that should be assigned to policies. Thus, a lawyer cannot be certain whether, for example, a court will weight justice more heavily than efficiency or weight majoritarianism more heavily than individual rights.

Second, judgments about the relationship between ends and means, although ostensibly empirical in nature, in fact are usually based on speculation. For example, one lawyer may believe that a prohibition on sexually explicit films will further the end of reducing crime, whereas another lawyer may believe that it will not. Often, the available empirical evidence is limited or inconclusive. Because frequently neither lawyer in a dispute can prove the nature of the relationship between ends and means, the lawyer cannot be confident of the court's ruling on that issue.

Even apart from these difficulties, however, there is a third source of indeterminacy in policy judgments, which arises from the fact that policies can be stated at multiple levels of generality. Thus, the problem of generality that creates indeterminacy in rules and forces courts to resort to policy judgments reemerges in the realm of policy.

As will be seen, the problem of generality poses the same dilemma for policies that it does for rules. A rule must be general if it is to control more than a single situation, yet as it becomes general it also becomes indeterminate. Similarly, a policy must be stated at a certain level of generality if it is to assist in interpreting a rule, yet as a policy becomes more general, it also becomes indeterminate.

The explanation for this problem must begin with a consideration of the relationship between policies and rules. The relationship between policies and rules essentially is the same as that between ends and means. As noted in chapter 1, the American legal system assumes that rules do not exist for their own sake, but rather are adopted as the means to ends. The ends, of course, are the underlying policies, and the means are the rules.

In general, policies and rules are both structurally and functionally different. The structural difference is that policies are typically stated as abstract absolutes, whereas rules are typically stated in more limited, concrete, and contingent terms. Policies by their terms are to be pursued in all circumstances, whereas rules apply only to the limited circumstances described in the factual predicate.

The structural distinction between ends (policies) and means (rules) blurs, however, when ends are stated at a sufficiently low level of generality. For example, one may be in pursuit of the end of maintaining a clean home. Ends stated at a high level of generality can often be furthered in a very large number of ways. One of the many possible means to the end of a clean home would be to dust the figurines on the top shelf in the parlor. One also could claim as a much more specific end, however, keeping the figurines on the top shelf in the parlor dusted. Thus, dusting the figurines could be characterized as either a relatively specific end or a means to a more general end. Note that, as the end becomes more specific, the range of possible means narrows until, at some point, the distinction between the end and the means vanishes.

Restated in legal terms, as policies are articulated in more specific terms they take on the character of rules, and the structural distinction between policies and rules dissolves. For example, one might begin with the very general policy of protecting free speech. This policy could be restated in more specific terms, such as repealing all statutes regulating speech, providing free desktop publishing software to every adult citizen, or insulating newspapers from liability for defamation. Each of these three actions may be characterized as either a more specific policy or a means to the general policy of promoting free speech.

Further, the policies can be stated even more specifically. For example, the policy of insulating newspapers from liability for defamation can be stated more specifically as the policy of requiring that public figures prove as an element of a defamation claim against a newspaper that the newspaper published the defamatory statement with actual malice. At this low level of generality, the policy is readily characterized as a rule. It is relevant to a quite narrow range of circumstances: defamation suits by public figures against newspapers. It has lost the character of an absolute end to be pursued in all circumstances.

The functional difference between rules and policies is that rules create legal consequences, whereas policies do not. Policies provide the justification for the rules but have consequences only to the extent that they are given effect in rules.

Because they are part of the context in which the rules are adopted, policies do provide a basis for interpreting the rules when the rules are unclear. The housekeeper who has been given a rule—she is under a duty to dust the figurines on the top shelf in the parlor—may wonder whether the rule requires brushing it with a feather duster or using some more painstaking method. The act of dusting the figurines may serve a variety of ends, such as improving the appearance of the figurines or reducing the amount of dust in the room. If improving the appearance is the end, then quick use of a feather duster may be sufficient. If reducing the dust in the room is the end, then it may not be sufficient. By understanding the context in which the rule requiring the dusting of the figurines was given, including the end that the order was intended to further, the housekeeper is better able to interpret the rule.

Thus, policies function to provide an interpretive context for rules. To do so, however, they must be stated at a higher level of generality than the rule itself. That is, the functional role of policies depends upon maintaining the structural distinction between policies and rules. As has been shown, if a policy is permitted to drop to the same level of generality as the rule it underlies, the policy will collapse into the rule.

For example, a statute exempting a newspaper from payment of certain taxes may rest on a policy of promoting the sale of newspapers. Stated this narrowly, the policy adds no context to the rule and would not aid in deciding, for example, whether a local shoppers' guide should be considered a newspaper within the meaning of the rule.

If the policy is stated more generally as protecting the economic viability of newspapers threatened by competition from broadcast media, then one might conclude that a local shoppers' guide was not a newspaper within the meaning of the rule because it operated in a market not served by broadcast media. The broader context provided by the more general policy supplies additional information that permits the lawyer to determine which interpretation would further the underlying policy. The policy is able to supply an interpretive context for a rule, but only if it is stated at a higher level of generality than the rule itself.

The dilemma, however, is that stating a policy at a higher level of generality often renders it less determinate. Greater generality creates indeterminacy in two ways.

First, by varying the level of generality at which policies are stated, lawyers vary the context within which the rule will be interpreted, which in turn affects the interpretation of the rule. For example, if the policy underlying the tax exemption for newspapers described above is stated still more broadly as encouraging the free flow of information, then the argument that the shoppers' guide is a newspaper becomes stronger, because the shoppers' guide includes information, the flow of which could be stifled if the guide were required to pay the taxes and thereby made less profitable. Thus, as the level of generality at which the policy is stated by the lawyer changes, the result that the policy seems to support also changes.

Second, stating a policy at a high level of generality may render the policy less determinate because this expands the range of means that might

further such a broad end. For example, the policy of promoting the free flow of information is so general that it arguably supports a tax exemption for an enormous number of activities. A blogger may claim a tax exemption for her computer equipment and home office, on the ground that her blog is a newspaper. Not to treat it as such would stifle the free flow of information. Stated at this level of generality, the policy may be of little assistance in determining which activities should be regarded as within the meaning of the term *newspaper*.

Policies stated at a very high level of generality can become so indeterminate that they seem to support diametrically opposed rules. For example, the policy of protecting freedom of contract could require that a court enforce all contracts as written in order to avoid imposing its own will on the parties or could require the court to scrutinize every contract for indications of unequal bargaining power in order to avoid enforcing domination of one party by another. Thus, the policy of protecting freedom of contract, when stated at a high level of generality, can justify extreme judicial deference or extreme judicial scrutiny.

### *C. Predicting the Decision of the Court*

In nearly every case in which the law is indeterminate, most lawyers nevertheless have an opinion about the most likely result. The opinions are based on informed speculation concerning the way in which courts will resolve the relevant policy judgments—both the judgments about the relative weight of policies and the judgments about the relationship between ends and means. The speculation is informed by the lawyer's knowledge of the context in which these policy judgments will be made. The context includes a number of factors.

One important factor is the historical setting. Specific policies are given greater weight in one era than in another. Courts in the late nineteenth century, for example, favored a laissez-faire policy in which they intervened very little in market decisions, whereas in the mid-twentieth century courts rejected that policy in favor of more closely regulating market decisions. As discussed earlier, all else being equal, the result supported by the favored policy is likely to prevail.

Another factor influencing policy judgments is the philosophy of the individual judge deciding the case.[9] Specific judges accord greater weight to

some policies than to others and, in doubtful cases, are likely to decide the dispute in the way that furthers the policies they prefer. This is most visibly illustrated by the United States Supreme Court, which has typically comprised blocs of liberal and conservative justices, the members of which vote together a very large percentage of the time.[10] Judges on less prestigious courts, however, are no less influenced by personal preferences. Although at any given time there may be a dominant judicial ideology, specific judges differ in the degree to which they adhere to that ideology. Again, all else being equal, the result supported by the policy favored by the court is likely to prevail.

The precise facts of the situation giving rise to the dispute also affect which result will prevail. This is so because the relationship between ends and means varies with the situation. Accordingly, as the circumstances change, the total policy benefit derived from each result changes. Different results thus seem preferable under different circumstances.

For example, a court is much more likely to adopt a laissez-faire attitude toward the interpretation of a contract between two large corporations than toward the interpretation of a contract between a large corporation and an uneducated consumer. In this example, the choice is between a policy of enforcing private contracts and a policy of supervising the contracts to ensure voluntariness; that is, the choice is between autonomy and paternalism. Where the two contracting parties are large corporations with equal bargaining power and competent legal counsel, the contract is unlikely to be the result of coercion. Thus, enforcing the contract in that situation furthers the policy of autonomy at very little cost to the policy of paternalism. That result yields the greatest policy benefit.

By contrast, if the contract is between a large corporation and a consumer, the likelihood of unequal bargaining power is much greater. The court may therefore decide that enforcing the contract in that situation is too costly in terms of the policy of paternalism. Thus, as the facts change, the relationship between the end of promoting genuinely voluntary contracts and the means of scrutinizing their terms also changes. As the facts change, the likely result changes.

A final factor included within the context is the existence of binding precedent and, to a lesser extent, persuasive authority from other jurisdictions. In the great majority of cases, courts decide disputes in a way that they can plausibly describe as consistent with applicable precedents.[11] If the

precedents have regularly given preference to one policy over the other in a given situation, it becomes more difficult for the court to reverse the preference in a similar situation and still maintain that it has followed the law.

For example, a court's decision that an outdoor movie theater has a constitutional right to exhibit a film depicting nudity would seem to require a decision in a later case that an individual has a right to exhibit the same film in his own home. In the earlier case, the court concluded that the policy of free expression outweighed the policy of protecting individuals from being inadvertently offended while on the public street. Because passersby can avert their eyes, allowing the film greatly furthers free expression, while only slightly impeding the policy of avoiding offense. In the later case, the policy of free expression seems equally strong. Because the film is being shown in a private residence, however, allowing the film to be shown impedes the policy of avoiding offense *even less* than in the earlier case. Thus, to be consistent with the policy judgment made in the prior case, the film should be permitted in the later case as well.

Note in this example that the two cases are distinguishable. Open-air exhibition and private exhibition are sufficiently different factually that no one could suggest that the two cases are identical in all relevant respects. If the earlier case seems to control the later case, it is only because we recognize that the policy judgments in the prior case, if they are followed, require the same result in the later case.

Yet if different policies had been involved, the two cases might have seemed to require different results. For example, imagine that one of the policies that supported the result in the earlier case was permitting the government to monitor the viewing habits of the population, particularly with regard to sexually oriented materials. Allowing an open-air exhibition would further that policy, whereas allowing private home screening would impede it. The court would likely allow the open-air exhibition but would prohibit the private screening. The first set of facts, in other words, would not control the second set of facts. Whether a first case "controls" a second case thus depends upon which policies are affected by the results.

7

# CONTRACTS

The law of contracts defines those duties that individuals or organizations voluntarily assume, generally through promises. Contractual duties may arise in either of two general situations: under the doctrine of traditional contract or under the doctrine of detrimental reliance, also known as promissory estoppel.[1]

Contract law is generally said to be based on the policy of individualism. A person is bound if, and only if, that person consents to the duty. The idea that one should be bound only through consent grew out of a naturalist conception of legal obligation. As will be seen, however, in the course of constructing the specific rules of contract law, the courts have embraced a more positivist conception of law and have given preference to policies other than individualism, including majoritarianism, paternalism, efficiency, and those policies associated with formalism.

## I. Traditional Contract

One situation that gives rise to contractual duties exists where two or more persons form a traditional contract. The rule defining traditional contract

provides that a contract is formed where two elements are present: an offer is accepted, and the contract is supported by consideration.

## *A. Offer and Acceptance*

The first element is an offer by one party that is accepted by the other party. The offer or the acceptance may occur by the express words of the parties or by their conduct. An example of an acceptance by conduct occurs where the first party sends a letter to the second party offering to purchase one lot of widgets for three hundred dollars and the second party ships the widgets.

### 1. THE OBJECTIVE TEST

One of the rules defining the element of an offer and acceptance states the test to be used to interpret the meaning of the parties' words or conduct. This rule, usually called the objective test, provides that words or conduct shall be interpreted in the way that a hypothetical "reasonable person" would interpret them.

For example, a man who is negotiating to buy a car from his neighbor, upon hearing the neighbor's proposed terms, may exclaim, "Sounds good!"—which could be interpreted either as an expression of acceptance or merely as comment that the offer appears favorable. A jury applying an objective test would decide whether a reasonable person would interpret "Sounds good!" as an acceptance of the offer or as the expression of an opinion about the offer.

One of the policy considerations supporting the objective test is that it leads to predictability and uniformity in the law. It does so by allowing both parties to assume that words and conduct have a reasonable meaning. It also does so by encouraging parties to deal with each other in the normally expected manner, because parties who choose an unusual way of expressing themselves do so at their own peril. Another policy consideration underlying the objective test is that it promotes efficiency in adjudication because it allows the jury to avoid determining what the parties really meant. It may also diminish the frequency of frivolous litigation because it discourages parties from filing suit in the hope that they can persuade a jury that they attributed their own special meaning to the terms of the contract. Finally, because the objective test permits the court to supply its own definition of a term under

the banner of the reasonable person, the objective test is also supported by the policy of majoritarianism.

In using an objective test, a jury may give the speaker's words a meaning that the person never intended them to have. In this sense, an objective test imposes on parties those obligations that they will be deemed to have assumed based on a reasonable interpretation of their words or conduct, whether they actually intended to assume them or not. By finding an offer or acceptance where it does not truly exist, the objective test, like formalism generally, is subject to the charge that it produces artificial results, that it treats as a contract something that is not a contract at all. The objective test thus is inconsistent with the policy of individualism, under which courts are expected to enforce the will of the parties.

The use of the objective test illustrates the phenomenon in which a general rule is defined by a more specific rule that is based on a policy inconsistent with the policy underlying the general rule. The general rule is based on a policy of individualism, whereas the more specific rule is based on majoritarianism, efficiency, and policies associated with formalism. Despite the theoretical inconsistency, however, the objective test for interpreting expressions of individual will is well established in contract law.

## 2. THE SUBJECTIVE TEST

The alternative to an objective test is a subjective test, which interprets a party's words or conduct to mean what that party actually intended them to mean, no matter how idiosyncratic.

A subjective test in theory ensures that no party is required to assume a contractual obligation that that party did not actually intend to assume. The test thus is based on a policy of individualism rather than majoritarianism. It leads, however, to uncertainty and to some degree of inefficiency. The hearer cannot assume that the words mean what might be reasonably thought; thus, the hearer must attempt to probe the speaker's true intent.

Another objection to the subjective test is that the true intent of a party can never be known with confidence. The speaker may not have consciously considered the disputed issue at the time, and even if the speaker did, time and the pressure of a dispute may have changed that recollection. The greater uncertainty inherent in a subjective test might encourage frivolous litigation

because a party would always have the hope of persuading a jury that the words spoken had a special meaning.

If the naturalist and individualist conception of contract were to prevail, the court would embrace a subjective test. In fact, however, subjective tests are rare in contract law. Predictability and efficiency are of such great importance in contract law that the courts almost uniformly use an objective test to interpret the meaning of a contract.

### *B. Consideration*

The second element of a contract is that both parties must have given consideration. A more specific rule defines the element of consideration as a benefit conferred or a detriment incurred by a party in exchange for a benefit from or a detriment to the other party. An even more specific rule defines the phrase "in exchange" to mean that consideration must be bargained for as part of the contract.

The requirement of consideration renders some agreements unenforceable under traditional contract doctrine. For example, if an aunt offers to give her nephew $1,000 and the nephew accepts, no enforceable contract has been formed even though there has been an offer and acceptance. No contract exists because the nephew did not confer a benefit or incur a detriment in exchange for the promise.

At one time, the requirement of consideration seems to have had an evidentiary function: it was more plausible that the parties had actually entered into a contract if both were seen to be exchanging something of value. Thus, contracts under seal did not require consideration because the signed and sealed document provided sufficient evidence of an agreement.

In more recent times, the requirement of consideration appears to rest on a policy of limiting contractual liability. Courts apparently did not wish to enforce what, in effect, were promises of gifts—promises for which the promisor received nothing in return. The doctrine seems to have achieved its modern form in the late nineteenth century and reflects the individualist policy of the courts of that era, which sought to limit government intervention in the private sphere.[2]

The doctrine is internally inconsistent, however, because although justified by a policy of individualism, it does not enforce individual will.[3] An individual may wish to be bound to give a gift yet cannot effect that result

under contract law. The court, in the name of limiting government involvement in private affairs in order to maximize private choice, refuses to enforce what is in fact the private choice of the parties. In its consequences, then, the doctrine is consistent with a majoritarian policy.

Although the consideration doctrine seems majoritarian in its consequence, the existence of the doctrine does not fully resolve the conflict between the community and the individual. The conflict reemerges as the issue of how to define a benefit or detriment.

An individualist policy would support a rule that the court will not inquire into the value of a purported benefit or detriment but will accept the parties' characterization of it, even if the supposed benefit or detriment appeared to be completely worthless. To adopt an individualist definition of consideration would subvert the majoritarian policy underlying the doctrine. By divorcing the doctrine from its underlying majoritarian policy, such a definition would convert the doctrine to a merely formal requirement.

A majoritarian policy would support a rule that the court will inquire into whether the purported benefit or detriment is in fact that. To adopt a majoritarian definition of the doctrine would only further deepen the community's involvement in scrutinizing a contract that was supposed to represent the will of the parties. That is, the law not only would require that there be consideration on both sides of the contract (even though the parties wished to make a contract unsupported by consideration on both sides) but would also reserve for the community the prerogative to decide what constitutes sufficient consideration.

The law of contract has struck a compromise between the competing values and adopted a rule that the court generally inquires into the adequacy but not the sufficiency of consideration. This means that the court requires that some minimal benefit or detriment actually exist but does not examine very carefully the value of the consideration. Thus, the doctrine of consideration is all but formal. The consideration must be adequate, but this is not a demanding requirement.

## II. Detrimental Reliance

A second situation where a duty based on a promise may arise occurs where the parties satisfy the elements of the doctrine of detrimental reliance. Under

the rule that creates that doctrine, a party has a duty to perform a promise upon which another party has reasonably and foreseeably relied to his or her detriment. Thus, the elements are (1) a promise, (2) reasonable and foreseeable reliance upon the promise, and (3) detriment incurred by the promisee.

For example, assume that after an aunt promised her nephew that she would give him $1,000, the nephew signed up for $1,000 worth of French lessons that he otherwise could not afford, relying on the promised money to pay for the lessons. Unless the promise is enforced, the nephew will have to default on his debt, with adverse consequences to him. If the court believed that the nephew's reliance on the promise was reasonable and foreseeable, it would enforce the promise to the extent necessary to remedy the detriment suffered by the nephew as a result of his reliance on the promise.

Under the theory of detrimental reliance, duties are created in situations where the elements of a contract are not present. First, a duty arises even though the promisee in no way indicated to the promisor that an offer was being accepted. Second, the element of consideration is also unnecessary. The detriment incurred by the promisee may be one for which the promisor did not bargain.

Thus, the rule creating a duty under traditional contract and that creating a duty under detrimental reliance are "cumulative," as that term was used in chapter 3. Either duty may arise, regardless of whether the other one does.

Detrimental reliance has different elements than traditional contract because it rests on somewhat different policy considerations. In general, traditional contract rests on the policy of individualism: a duty arises only as a result of individual choice by a party. Imposition of a contractual duty is thought to be just, because no party is bound without consent. It is thought to be efficient, because it facilitates the allocation of resources through private choices made in the market.

Detrimental reliance, by contrast, is a relatively more majoritarian doctrine under which the state intervenes to protect a party against unjust loss caused by reliance on a promise. The duty that arises under detrimental reliance has been compared to a tort duty because it is imposed by the court out of considerations of policy, rather than as a result of an agreement between the parties. At the same time, the requirement that the reliance be foreseeable reintroduces an individualist element into the doctrine.[4]

## III. The Nature of the Contractual Duty

### *A. The Duty to Perform the Express Promise and Any Implied Promises*

The discussion thus far has summarized two situations in which duties arise under contract law. It has not, however, defined the exact nature of the duty. In this section, the nature of the contractual duty is discussed, although for brevity's sake, the discussion is limited to duties imposed by traditional contract.

As discussed in chapter 2, a legal relationship, including a duty, is typically defined by three characteristics: the subject matter of the relationship, the nature of the relationship (whether permissive or mandatory), and the persons included within the relationship. How each of these characteristics defines traditional contract duties is considered here.

The duty imposed by traditional contract law is to perform the promises that were contained in the accepted offer and, in some cases, certain additional implied promises not explicitly set forth in the offer. The subject matter of the duty, in other words, is to perform the express and implied promises.

The implied duties are often referred to as implied-in-law because the law will imply them in a contract regardless of whether they were included in the offer.[5] For example, contract law generally imposes on a merchant entering into a contract for the sale of a good an implied warranty of merchantability, or a duty to ensure that the good is fit for the ordinary purposes to which people put such a good. Such implied-in-law contractual duties closely resemble tort duties because they are implied by the law for reasons of policy, rather than because the parties agreed to them.

Contracts may create mandatory or permissive relationships. Consider, for example, bilateral and unilateral contracts.

In a bilateral contract, each party promises to perform in exchange for the other party's promise of performance. For example, one party may promise to pay three hundred dollars for widgets, and the other party may promise to sell the widgets for three hundred dollars. Both parties are required to perform. The relationship is mandatory for both.

In a unilateral contract, one party promises to perform if the other party takes some voluntary action. For example, a party may promise to ship the widgets if the other party pays three hundred dollars. The other party,

however, has not promised to pay the three hundred dollars. Thus, only the first party is under a duty to perform. Put another way, the relationship is mandatory only for the first party.

Finally, contracts usually create a relationship only between the parties to the contract: the promisor and the promisee. The promisor has a duty to the promisee to perform the promises and that duty extends to no other person. An exception exists, however, in some situations where the parties intend that a third person receive the benefit of the promise. In such a situation, the promisor's duty may extend to this third person—called a third-party beneficiary—as well as to the promisee.

## *B. Liability for Breach of the Duty to Perform*

Where a promisor breaches a contractual duty, contract law may impose on the promisor a liability to pay compensation to the promisee. Alternatively, where compensation would be an inadequate remedy, the court may order the promisor to perform the promise (generally referred to as ordering "specific performance"). For the sake of brevity, only the situation in which the promisee seeks damages from the promisor is considered here.

The general rule is that a promisor is liable in damages for breach of contract if the promisor fails to perform the promise and the failure causes loss to the other party. That is, the elements of the rule creating liability are (1) a breach of a contractual promise (2) with loss to the plaintiff (3) as a consequence of the breach.

### 1. BREACH OF A CONTRACTUAL PROMISE

The first element necessary to establish liability is a breach of the contractual promise by the promisor. Contract law includes a more specific rule defining the term *breach*. That rule distinguishes between material breaches and minor breaches. Where the contract is substantially performed, the breach is treated as minor. In that situation, the promisee is entitled to damages for the breach, but must still perform the contract. Where the contract is not substantially performed, the breach is treated as material. Again, the promisee is entitled to damages, but in addition the promisee's own duty to perform is extinguished.

Assume, for example, that a builder constructs a house with a wall located one inch away from the position designated in the design. Because the

builder has breached, the builder will be liable to pay compensation for any damage to the owner, although the amount of damage may possibly be zero. Because the breach is minor, however, the owner may not terminate the contract on the ground that it was breached. The owner still must pay for the house.

To understand the purpose of the substantial performance rule, imagine that the owner, upon discovering the minor breach, refuses to pay the builder for the house. If even a minor breach permitted the promisee to terminate the contract, then the owner would be under no duty to pay. Thus, the only way that the builder could obtain payment would be to tear down the wall and rebuild it one inch away from the original location, an incredibly wasteful exercise. Under the substantial performance rule, however, the owner is still obligated to perform the promise to pay and thus may not refuse to pay until the wall is moved one inch.

Thus, the substantial performance rule reflects a positivist, utilitarian theory of contract, rather than a naturalist, rights-based theory. A naturalist, rights-based theory may regard a contract as having moral force. The promisor by the promise confers on the promisee a right to performance. The promisee thus is entitled to a perfect tender, and if it is not received, the promisee may declare the contract at an end. Such a conception of contract law is also supported by a policy of individualism, under which the court gives effect to the will of the parties.

A positivist, utilitarian theory of contract, by contrast, does not regard a contractual promise as having moral force. Rather, a contract is simply a promised but unexecuted exchange of goods or services that should not be completed if to do so would not benefit society as a whole. The substantial performance rule seeks to avoid the economic waste involved in exacting strict performance from the promisor. The rule is supported by a majoritarian policy because the court is declining to enforce the parties' will as set forth in the contract in order to further the state's utilitarian policy of avoiding waste.

### 2. LOSS BY THE PROMISEE

The second element of this rule is that the promisee must have suffered a legally cognizable loss, that is, an injury recognized as such by the law. Although one can imagine a variety of injuries that could result from a contract

breach, usually only certain pecuniary losses are regarded by the courts as satisfying the element of an injury. For example, the promisor's failure to perform may have disappointed the promisee. This emotional injury, however, almost certainly will not constitute an injury within the meaning of the rule imposing liability for breach of contract.

This result represents a choice of efficiency over justice. The promisee may have suffered emotional injury from a breach, but such injuries are easy to allege and difficult to prove. Permitting recovery for them could turn every contract dispute into a lengthy litigation over claims of speculative validity. The rule assumes that it is better to deny recovery in the occasional instance where it is deserved than to invite endless, wasteful litigation. Moreover, the policy of encouraging breaches when to do so is economically efficient militates against awarding damages for noneconomic injury attributable to the breach.

Losses are legally cognizable only if they are certain, that is, not speculative. This rule is consistent with a utilitarian theory of contract law. Under a utilitarian theory, a party should not be discouraged from breaching a contract if a breach would result in the most socially advantageous use of resources. The promisor, however, can determine whether a breach would be efficient only if it is possible to calculate the cost of a breach. By excluding speculative damages, the courts facilitate the promisor's attempt to determine whether a breach would be utilitarian.

To avoid the effect of the rule requiring that damages be certain, the parties to a contract sometimes include a liquidated damages clause. Such a provision states the amount of damages that shall be payable in the event of a breach. That is, the parties establish the amount of the loss in advance by agreement.

Although a policy of individualism would suggest that these clauses should be enforced as the expression of the will of the parties, courts in fact often decline to enforce them if they require a payment so unreasonably high as to appear to be a penalty. A liquidated damages provision that imposes damages on the promisor disproportionate to the promisee's actual loss could force the promisor to perform a wasteful promise simply to avoid the penalty. Under the positivist, utilitarian conception of contract, promises should not be performed if performance would use resources inefficiently. Thus, in this situation, the policies of individualism and efficiency, which

are often assumed to be consistent in their consequences, appear to be potentially opposed. Recall that the same opposition between individualism and efficiency appeared in the choice between an objective and a subjective test.

### 3. LOSS AS A CONSEQUENCE OF THE BREACH

The third element of this rule is that the breach must have caused the promisee's injury. That is, damages are recoverable only if they are a consequence of the breach.

Additional rules, however, limit the consequential damages recoverable by the promisee.[6] The additional rules are needed because every act has an infinite number of consequences. Without these additional rules, a breach of even the most trivial contract would lead to enormous liability.

Assume, for example, that a taxi company breaches its promise to drive an accountant to a job interview. The result is that the accountant is late for the interview and is denied the job. He therefore takes a less desirable job in a different building, where he is physically assaulted one evening three years later while in the parking garage. Because the accountant would not have been attacked but for the taxi company's breach of contract, the physical injury would seem to be a consequence of the taxi company's breach, thus requiring that the taxi company compensate the accountant for the injury.

Yet there are policy reasons for regarding such a result as undesirable. Holding one liable for losses that occur years later could result in the imposition of staggering liability for even the most trivial promise, which would discourage economic activity. Further, if the justification for enforcing a contractual duty is that the promisor voluntarily assumed the duty, then it seems inconsistent with that individualist policy to hold the taxi company responsible for a loss it could not have foreseen and thus could not knowingly have agreed to compensate. Based on these policy considerations, the courts have adopted a further rule under which the promisor is liable only for those consequential damages foreseeable at the time the contract was formed or actually foreseen because of special circumstances communicated to the promisor.[7]

Another rule, known as the doctrine of mitigation of damages, further limits the promisor's liability. Under this rule, a promisee who fails to take reasonable steps to minimize the loss from a contract breach may not recover

the part of the loss that would have been prevented by those steps. Assume, for example, that a factory owner enters into an employment contract with a manager whereby the owner agrees to pay the manager to run the factory for five years. The evening before work is to begin, the owner breaches the contract by firing the manager on a whim. That same evening, however, the manager receives an offer of an equally desirable job from a different employer. The manager declines the offer and sues the owner for five years' lost salary. Because the manager failed to accept the equally desirable job, he did not take reasonable steps to mitigate his damages, and, therefore, any compensation he received would be reduced by the amount he would have received from the job he declined, had he accepted the job instead.

The mitigation of damages doctrine is another reflection of the modern positivist, utilitarian concept of contract law. It requires the promisee to prevent unnecessary injury, that is, wasteful injury. A naturalist, rights-based view of contract might hold that the manager, having entered into an agreement for five years with the owner, was entitled to the job and should not be required to work elsewhere simply to spare the owner the consequences of the wrongful act. That same view might regard the second offer of employment as an undeserved "windfall" to the owner, which unfairly spared the owner the consequences of the wrongful act. The positivist, utilitarian concept, in contrast, regards promoting the socially beneficial use of resources as more important than enforcing the moral content of the contract.

As this last example illustrates, a promisor's breach of contract may not be the sole cause of a loss. The manager's loss was caused both by his firing from the first job, which breached the contract, and by his refusal to accept the second job. Indeed, no result has only one cause. Every event has an indefinite number of causes.

For example, the assaulted accountant's loss can be attributed to a number of causes. Had the accountant's prospective employer been more sympathetic, the accountant would have been given the first job and thereby spared the injury. Thus, the loss was caused in part by the prospective employer's attitude. At the same time, had the building been better guarded, the accountant would not have been attacked and thus the building owner's poor security was also a cause of the accountant's loss. Or, viewing the situation yet another way, had the accountant allowed himself enough time to get to the job interview in the event that the taxi company failed to perform, he

would not have been late, and in this respect his loss was ultimately caused by his own imprudence.

The law does not contain any general rule that singles out one cause to which consequences should be attributed. If the accountant can demonstrate that his prospective employer or the owner of the building breached some duty to him, he may in fact have a right to compensation from both. In other words, various cumulative rules of contract and tort law may give an injured party the right to compensation from a large number of persons whose conduct constituted a cause of the injury.

Under a rule that limits the amount of compensation, however, the injured party may recover compensation for an injury only once. Thus, if one of the wrongdoers who caused the accountant's injury compensates him, his right to compensation from the others is extinguished.

# 8

# TORTS

The law of torts defines certain duties that the law imposes upon persons in the absence of a contract. A tort is a violation of one of these duties. One who commits a tort is sometimes called a tortfeasor.

## I. The Nature of Tort Law

No single principle determines under what circumstances tort law will impose a duty. Rather, the history of torts shows a gradual accumulation of duties newly imposed whenever policy considerations appeared to the courts to justify that result. Tort law is an intrinsically majoritarian body of law because tort duties are based not on the will of the parties involved in a situation but on the will of the state.

The distinction between tort and contract law illustrates the manner in which policy conflicts resolved at one level of generality reemerge at another level of generality. In theory, the law of contracts concerns duties that parties voluntarily assume, whereas the law of torts concerns duties that the state imposes on persons. In other words, the conventional understanding is that in contract law the court enforces the will of the individual, whereas in tort law the court enforces the will of the state.

Although the decision about whether a subject is to be governed by the will of the individual or by the will of the state initially appears to have been resolved by the allocation of that subject to contract or tort law, in fact the issue reemerges within each of these two fields of law. In contract law, the issue of whether to give primacy to the will of the state or to the will of the individual reemerges, for example, as the issue of whether to impose an implied warranty on a party. An implied warranty, although part of contract law and thus in theory a duty voluntarily assumed, is in fact, like a tort duty, imposed by the state for reasons of policy. Similarly, in tort law, as will be seen below, the issue of whether to give primacy to the will of the state or to the will of the individual also reemerges repeatedly, in forms such as the issue of whether to allow a tortfeasor to plead as a defense the fact that the victim consented to the injury or voluntarily assumed the risk of injury. Consent and assumption of risk, although part of tort law, are doctrines that allow the will of the individual, in this case the victim, to limit the general duty imposed on the basis of the will of the state.

## II. The Structure of Modern Tort Law

Modern tort law, following the lead of Oliver Wendell Holmes Jr., organizes tort duties according to the defendant's state of mind at the time the duty was breached. This has resulted in three categories of torts: those in which the tortfeasor intentionally caused injury (intentional torts), those in which the tortfeasor negligently caused injury (negligence), and those in which the tortfeasor caused injury without fault or intent (strict liability).

This organizational scheme illustrates the way in which a policy conflict reemerges in a body of legal doctrine at differing levels of generality but is resolved differently at different levels. Tort law is in theory a body of rules based on the will of the state, yet the central organizing principle is the nature of the tortfeasor's act of will causing the injury. Although the concept of tort liability is majoritarian, the more specific rules imposing liability reflect at least limited deference to individualism in that they condition liability on some act of will by the tortfeasor.

### *A. Intentional Tort*

Intentional torts are generally categorized according to the type of injury caused. They include interferences with the person, such as assault, battery,

and false imprisonment; interferences with property, such as trespass to land, trespass to chattels, and conversion; and interference with economic relations.

The rules creating the intentional torts all have essentially the same generic elements. As a general matter, liability for an intentional tort arises where the defendant (1) performed some voluntary act (2) with intent that the act cause an injury, and (3) where the act causes (4) an injury.

The basic conflict in tort law between an imposition of a duty based on the will of the state and an imposition of duty based on the will of the individual reemerges within intentional tort in the form of the issue of how to define the concept of intent. This issue is reflected in the contrasting definitions of intent adopted in two well-known cases: *Garratt v. Dailey* and *Cleveland Park Club v. Perry*.[1] Under the *Garratt* definition, which is the more commonly accepted of the two, intent exists where the tortfeasor acts with either the desire to bring about the injury or the knowledge with substantial certainty that the injury will occur. Under the *Cleveland Park* definition, however, intent exists where the tortfeasor intended to perform the act causing the injury. That is, under the *Cleveland Park* definition of intent, the only exercise of will necessary for the imposition of liability is a voluntary muscular contraction. Accordingly, the *Cleveland Park* definition requires a much weaker form of intent and thus a much weaker expression of the will of the individual. Under the *Cleveland Park* definition, intentional tort seems to collapse into strict liability, which, as will be seen, is the least-individualist form of tort.

The difference among the intentional torts rests primarily on the type of injury involved. An intentional infliction of offensive bodily contact, for example, is a battery, whereas an intentional restraint on another's freedom of movement is a false imprisonment.

Additional rules limit the scope of liability under the intentional torts by creating defenses to those torts. One common rule, for example, provides that one is not liable for an intentional tort if the injured party consented to the infliction of the injury. Thus, a boxer who is injured fighting in the ring would probably find that any claim for a battery against an opponent is barred by his consent to the fight.[2]

Although tort law is generally majoritarian, the consent defense reflects a judicial decision to favor the policy of individualism over the policy of majoritarianism in those instances where the defense applies. Were majoritarianism accorded greater weight, a court might refuse to permit individuals to consent to their own destruction.

Yet the doctrine of consent does not represent a complete victory of the policy of individualism even in those circumstances in which it does apply. This fact is reflected in the rule that measures consent with an objective test. Under that test, a person is held to have consented if a reasonable person would have interpreted the words or conduct of that person as indicating consent, even if that person believed consent had not been given. For example, a boxer who puts on his gloves and climbs into the ring still carrying mental reservations about whether he wishes to fight may be found to have consented because his external conduct suggested to a reasonable person that he had consented. Thus, consent may be found where it does not really exist. In finding consent where it does not truly exist, the objective test, like formalism generally, is subject to the charge that it produces artificial results, that it treats as consent something that is not consent at all. In short, the majoritarian policy underlying the battery rule is limited by an individualist policy underlying the consent defense, which in turn is subverted by the majoritarian objective test used to interpret expressions of individual will. Different policies prevail at different levels of generality.

As in the case of the objective test in contract law, the objective test in tort law is based in part on a policy of efficiency, because it avoids the need to engage in time-consuming and uncertain inquiries concerning a person's actual state of mind. Although individualism and efficiency are often thought to be consistent in their consequences,[3] the objective test reflects a situation in which courts promote efficiency by *limiting* individual freedom. In the case of the objective test, then, the two policies of individualism and efficiency are opposed.

### *B. Negligence*

The rule that imposes liability for negligence generally requires that four elements be present: (1) the defendant owed a duty of reasonable care to the plaintiff, (2) the defendant breached the duty, (3) the plaintiff was injured, and (4) the breach was the actual and proximate cause of the injury.

The distinguishing feature of negligence is that the duty imposed is usually one to exercise reasonable care. One who fails to exercise reasonable care is commonly said to be "at fault." Thus, liability based on negligence is often referred to as liability based on fault.

Some legal historians argue that the creation of the tort of negligence represented a conscious policy choice to limit liability in order to promote eco-

nomic growth.[4] According to this view, prior to the mid-nineteenth century, one who injured another was very often liable even if not at fault.[5] The Industrial Revolution in the nineteenth century brought about increasing numbers of injuries that would have been expensive to compensate. In order to limit liability for these newly emerging industrial enterprises and promote economic growth, courts modified the existing rules so that liability would arise only in situations where the defendant failed to exercise reasonable care.

Negligence was thus based on a utilitarian theory of justice, under which courts concluded that society as a whole would benefit more from having trains and factories than from compensating the victims. The courts chose utilitarianism over the rights of the injured and decided that the injured would not receive compensation if the defendant had acted reasonably. At least some rights-based theories of justice, by contrast, would have supported the conclusion that a railroad that set fire to crops on farmland adjacent to the railroad or a factory owner whose faulty equipment mangled a worker should compensate the injured.

The rule imposing liability for negligence, like those imposing liability for intentional torts, is limited by various rules creating defenses to liability. For example, in many jurisdictions the defendant is not liable for negligently caused injury if the victim assumed the risk of the injury, such as in situations where a person rides in a car with an obviously intoxicated driver. The defense of assumption of risk in negligence cases is analogous to the defense of consent in intentional tort cases. Like the defense of consent, it is based on an individualist policy under which the victim's expression of will in encountering a hazard limits the liability that the state would otherwise impose on the tortfeasor. This illustrates the phenomenon in which a general rule based on one policy is limited by a more specific rule based on an opposing policy. Again, although tort duties are generally majoritarian, the assumption of risk defense reflects the opposing policy of individualism.

Let us now consider some of the rules that define the elements of the tort of negligence.

### 1. INJURY

The element of an injury was limited for many years by a rule that restricted liability largely to cases of physical injury to persons or property. Thus, for example, one was not liable for negligence where the only injury was emotional distress or lost future profits. This rule was based in part on a policy

of efficiency. Courts wished to avoid time-consuming litigation over claims that were difficult to evaluate.

In the twentieth century, courts shifted their policy preferences toward justice for the injured, with the result that lost profits and emotional distress are sometimes considered to constitute an "injury," as that term is used in the tort of negligence. Courts seem to regard the opposing policies as almost evenly balanced, however, and thus they define emotional distress or lost profits as a compensable injury in only certain limited circumstances.[6] Courts have preferred to weigh the policies almost on a case-by-case basis, rather than laying down a broad rule for or against liability.

### 2. CAUSATION

The element of causation is satisfied when the defendant's breach of the duty of reasonable care is the actual and proximate cause of the injury. As a general rule, actual causation exists where, but for the defendant's breach, the injury would not have occurred.

This "but for" test has proved inadequate where two defendants jointly cause an injury that would have occurred even if only one of them had acted. For example, if two men negligently discharge firearms, both of which fire fatal shots into the victim, in a lay sense of the term both men "caused" the injury. Yet by applying the "but for" test, neither man can be shown to have caused it. If the first man had not fired his weapon, the victim would still have been killed by the second shot. Thus, one cannot say that but for the first man's negligence, the injury would not have occurred. The same reasoning exonerates the second man as well. The "but for" test, in other words, would absolve both gunmen of liability for the shooting.

Accordingly, many courts have adopted a rule that provides an alternative definition of actual causation. Under this rule, a defendant's breach of duty is considered the actual cause of an injury if it was a substantial factor in bringing about the injury, even though the breach may not have been the "but for" cause. The outcome of applying this test to the shooting circumstances would be that either of the two gunmen would be considered the cause of the death.

A major difficulty encountered in defining causation is that an act has an infinite number of consequences. Tort law has dealt with this problem in much the same way as contract law: by using the concept of foreseeability.[7]

To avoid the imposition of infinite liability, courts have defined the element of causation to require that the defendant's breach be not only the actual, but the proximate, cause of the injury. One common rule defining proximate causation holds that an act is the proximate cause of an injury if it was foreseeable that the act would cause that type of injury to that class of persons.

The rule limiting liability to foreseeable injury seems to be contradicted as a matter of policy by another rule that defines the extent of damages recoverable. That rule provides that the defendant takes the plaintiff as the latter is found. That is, if the defendant performs an act that would cause only a very minor physical injury to the ordinary person, but that, because of a peculiar sensitivity, causes grievous injury to the victim, the defendant will be liable for the entire injury. Thus, the type of injury must have been foreseeable, but not the degree of injury. These inconsistent rules may be regarded as the result of a series of deliberate policy choices in which the courts alternate between a rights-based theory of justice, which requires compensating the victim, and a utilitarian theory of justice, which seeks to promote productive activity by limiting liability. Neither policy prevails in every case.

### 3. BREACH

The rule that defines a breach of the duty of reasonable care adopts an objective test. Specifically, the defendant will be held to have breached the duty if the defendant failed to exercise that degree of care that a reasonable person would have exercised in the same circumstances. As in other situations where it applies, the use of the objective test to measure negligence reflects formalism and policies of efficiency and majoritarianism. Under the objective test, the standard of care required is not particularized to the individual but is generalized for everyone. It thus promotes uniformity and predictability in the application of the law. The objective test promotes efficiency because parties and juries are spared the task of inquiring into what reasonable care is for specific individuals. It also promotes efficiency to the extent that reasonable care is equated with conduct that conserves resources. It is a majoritarian doctrine in that it permits the court on behalf of the community to define reasonable care in accordance with its own views of sound policy.

Like formalism generally, the objective test is likely to be overinclusive and underinclusive. That is, the objective test may be overinclusive in requiring conduct by some persons that for them would be an extraordinary,

or even impossible, exercise of care. It may be underinclusive in requiring conduct by some persons that is far less care than they could have reasonably taken. Negligence as measured by an objective test does not mean that the person acted less carefully than that person normally does, but only that the person failed to exercise the degree of care that some hypothetical reasonable person would have exercised.

The use of an objective standard to measure negligence may impose on some persons what amounts to liability without fault. No matter how much effort such a person exerts, liability cannot be avoided because that person is not capable of the level of care required by the reasonable person standard. This illustrates again how a specific rule defining a more general rule may be based on a policy that subverts the policy underlying the general rule. Although tort liability is generally majoritarian, the move to a negligence standard, by its focus on individual will, pushed tort law toward a policy of individualism. The objective standard, however, to the extent that it imposes liability on a particular defendant regardless of his or her state of mind, shifts tort law away from individualism and back toward a majoritarian policy—indeed, to such an extent that negligence under an objective standard may collapse into strict liability in specific cases.

The term *reasonable care* illustrates the indeterminacy of many legal standards. The term is so general that it is often almost impossible to determine whether the element of a breach of duty is satisfied.

Courts have addressed the problem of indeterminacy with efforts at greater specificity. For example, some courts have adopted a rule defining reasonable care in accordance with the well-known Hand Formula, named after Learned Hand, a federal appellate judge from New York. Under that formula, reasonable care requires the defendant to prevent an injury only if the burden of prevention is less than the potential injury, discounted by the probability that the injury will occur.[8]

The Hand Formula reflects a preference for a utilitarian theory of justice over a rights-based theory of justice. Under the Hand Formula, if preventing the injury will consume more resources than allowing the injury to occur, then it is reasonable to allow the injury. A defendant may engage in conduct that is enormously destructive to others, as long as that conduct is beneficial to the society as a whole. The Hand Formula also represents an acknowledgment by the court that the term *reasonable care* should be applied not

by formal logic, but by determining whether the defendant's conduct furthers the underlying policies. At the same time, the Hand Formula seeks to define a standard in terms of a rule.

#### 4. DUTY

The element of duty is usually defined by a very general rule that states that the court shall determine whether a duty exists based on considerations of policy. Because the existence of a duty is determined by the court rather than a jury, whether a duty exists is said to be a question of law.

The rule defining when a duty exists does not prescribe any specific facts that must be present for a duty to exist but simply authorizes the court to consider any fact relevant to what it considers a legitimate policy consideration. This does not mean that the law is completely indeterminate on the issue of whether a duty exists. In fact, the case law has given rise to a number of rules that declare that a duty does or does not exist in specific factual settings.

Thus, for example, most courts hold that all individuals have a duty not to cause physical injury to those who foreseeably might be harmed by a failure to exercise reasonable care. At the same time, most courts hold that a lawyer has no duty to exercise reasonable care to prevent even foreseeable economic loss to the opposing party in a litigation.

### *C. Strict Liability*

The third category of tort duties is based on "strict liability" or "liability without fault." Where strict liability is imposed, the defendant may have acted without negligence or intent to injure, yet he must compensate the plaintiff for any resulting injury.

The classic modern example of strict liability involves abnormally dangerous activity. The rule creating liability for such conduct states that one is liable for compensation if one engages in abnormally dangerous activity that causes injury.

Strict liability is the least individualist of the three forms of tort liability. The only exercise of individual will required is the act of engaging in the activity.

The element of an abnormally dangerous activity is often defined by a rule that lists a number of factors that may indicate whether an activity is abnormally dangerous, although no one factor is dispositive. One factor

exists, for example, where the activity poses a high risk of danger. Another exists where the danger cannot be prevented by the exercise of care. A third factor exists where the value of the activity to the community is outweighed by its dangerous attributes.

In the case of abnormally dangerous activities, courts have weighed the same utilitarian and rights-based theories of justice that they weighed in the case of negligence but have reached a different result. They have concluded that justice for the individual victim requires that abnormally dangerous activities pay their way by compensating the injured.

The imposition of strict liability on abnormally dangerous activities illustrates the way in which a change in facts alters the relationship between ends and means and thus produces a different result, even when the relative weights of the policies remain the same.[9] Allowing abnormally dangerous activities is potentially much more costly to the rights of victims and less beneficial to society as a whole than allowing ordinary activities. Indeed, one factor defining an abnormally dangerous activity is that the danger outweighs the benefit to the community. A negligence rule, which effectively encourages activity by insulating it from liability where reasonable precautions have been taken, would be far more costly in terms of justice to the victim and far less productive of social benefit in the case of abnormally dangerous activities than in the case of ordinary activities. Indeed, because by definition abnormally dangerous activities are those that cannot be prevented by reasonable care, a negligence rule would exonerate those who took preventative steps known in advance to be ineffective. The courts have thus decided that, in the case of abnormally dangerous activities, the greatest policy benefit will be derived from imposing a standard of strict liability rather than a standard of negligence. That is, in the case of abnormally dangerous activities, negligence is an inferior means, relative to strict liability, of furthering the policies sought by both rules.

Strict liability has also been imposed on manufacturers of defective consumer products. Under the doctrine of strict products liability, courts generally hold that one who sells a product that is in a "defective condition unreasonably dangerous" has a duty to compensate foreseeable users of the product who are injured by the defect, regardless of whether the defect was the result of negligence.

The strict products liability doctrine was originally modeled after breach of warranty in contract law. Courts noted that the law implied in contracts for the sale of goods a warranty that the goods were of merchantable quality. This warranty was breached when the goods were not of such quality.

Because warranties were implied in sales contracts regardless of whether the parties had included them in their promises, courts in the mid-twentieth century began to acknowledge that implied warranties created duties more akin to tort than contract. Accordingly, they imposed a tort duty not to sell a product in a defective condition unreasonably dangerous. Implied contractual warranties continued to exist but were subject to the technicalities of contract law. Thus, injured parties could often recover more easily under the tort doctrine of strict products liability than under the contract doctrine of implied warranty.

The policies underlying implied warranty and strict products liability included those of majoritarianism and a rights-based theory of justice. Under the policy of majoritarianism, parties were protected by the court against their failure to obtain express guarantees of safety. At the same time, courts thought it just to require the seller whose product had caused injury to compensate the injured. Some argued that strict products liability was also supported by a policy of efficiency because the doctrine forced manufacturers to internalize the cost of injuries caused by products and to build that cost into the price of the product. In that way, products that cause damage disproportionate to their social value (and thus are socially inefficient) will be priced at more than consumers are willing to pay and will thereby be forced from the market.

In adopting more specific rules to define the element of a defective product, some courts have fashioned rules that resemble the definition of the breach of reasonable care in negligence theory. One definition of that element holds that a product is defective if the ordinary prudent manufacturer, aware of the risk, would not have put it into the stream of commerce, a standard suggestive of the reasonable person test.[10] Another definition states that a product is defective if it poses excessive preventable danger, which is determined by weighing the burden of preventing the danger against the degree of danger and the likelihood of its occurring,[11] a test reminiscent of the

Hand Formula for negligence. As noted above, negligence theory rests on a utilitarian theory of justice rather than on a rights-based theory.

Thus, the policy conflict that appeared to have been resolved in adopting the strict products liability rule simply reemerged in the course of adopting more specific rules defining the general rule. Moreover, the courts resolved the policy conflicts differently in adopting the more specific rules than they did in adopting the general rule. Unable to fully resolve the policy conflicts, the courts favor one policy in adopting a general rule and the opposing policy in defining the terms of the general rule.

The lawyer attempting to argue for a particular result in a case involving products liability doctrine can find policy support for many different results explicitly within the cases creating and defining the doctrine. The policies that warranted initial creation of the doctrine favor expanded liability for the manufacturer, whereas the policies that underlay the definition of a defective product support a more limited potential liability for the manufacturer. Strict products liability doctrine is based on policies that can justify arguments for both expanded and diminished liability.

# 9

# CONSTITUTIONAL LAW

Constitutional law is the law defining those legal relationships, such as powers, rights, duties, privileges, and immunities, created by a constitution. In other words, it is the law governing the application of the provisions of a constitution. As the term is commonly used by most American lawyers, it usually refers to the application of the provisions of the United States Constitution, and that is the primary sense in which the term is used here.

The Constitution is a charter that has four primary functions. First, it establishes a federal government and defines its powers. Second, it creates within the federal government three branches and defines the legal relations among those branches. Third, it defines certain rights that individuals have against the federal and state governments. Finally, it defines the legal relations that exist among individual states.

## I. Constitutional Interpretation

Many of the provisions of the Constitution are phrased in very general terms, and thus they are especially indeterminate. Accordingly, the language of the Constitution resolves relatively few disputes. The courts have addressed the

problem of indeterminacy by adopting more specific rules of case law that define, apply, and limit the provisions of the Constitution.

The more specific case law rules add content to the Constitution's broad provisions and provide whatever predictability there is in constitutional law. For this reason, a constitutional scholar spends very little time studying the language of the Constitution. Rather, the study of constitutional law is almost entirely the study of cases.[1]

Indeed, entire bodies of constitutional law have arisen that are not based on any specific provision. Such law may be based on the nature of the Constitution as a whole or on several provisions taken together. An example of the former is the doctrine of separation of powers. The Constitution does not anywhere use that term, yet the Supreme Court has decided that certain limitations on the power of each branch of government are implicit in the Constitutional scheme. An example of a constitutional doctrine based on several provisions taken together is the right of privacy. The Constitution does not mention a right of privacy, but the Supreme Court has decided that it is created by "emanations" from several of the articles in the Bill of Rights.[2] In other words, like the separation of powers doctrine, the right of privacy is implied.

Constitutional interpretation is a weightier matter than statutory interpretation. One reason for this is that constitutional provisions, as fundamental law, are intended to be more enduring than statutes and are generally difficult to amend. If a court misconstrues a statute, the legislature can amend the statute with relative ease to make clear the intended meaning. If the court errs in constitutional interpretation, however, the error cannot easily be corrected by an amendment.

Another reason that the ramifications of constitutional interpretation are usually much greater than the ramifications of statutory interpretation is that the Constitution is the supreme law of the land. An interpretation of the Constitution may invalidate laws ranging from federal statutes through local ordinances, whereas the effect of a statutory interpretation is usually far less sweeping.

The differences between constitutional and statutory interpretation have given rise to a rule of judicial restraint whereby the courts seek to decide cases without applying constitutional law, if possible. Assume, for example, that a criminal statute prohibits the sale of "pornography." A person charged

with violation of the statute has at least two arguments: the statute does not apply because the item sold by that person was not pornography as defined by the statute, and even if it applies, the statute is invalid as applied to that person because it violates that person's constitutional right of free speech. If the court determines that the material is not pornographic, that decision requires that the charges be dismissed, regardless of whether the statute is constitutional or not. Thus, the court will usually consider the issue of statutory interpretation before reaching the issue of constitutional interpretation, because that approach may avoid the need to interpret the Constitution at all.

The tension between an interpretation based on text and one based on extrinsic evidence that pervades statutory interpretation[3] is reflected in constitutional interpretation as well. In interpreting the Constitution, courts employ a variety of interpretive theories, including textualism, the theory that questions of constitutional law should be decided by reference to the language of the Constitution, and intentionalism, the theory that questions of constitutional law should be decided by discerning the intent of the framers as expressed in sources outside the text. Textualism and intentionalism are sometimes referred to collectively as originalism because they ultimately look to the original understanding of the framers.

A third alternative, often called nonoriginalism, attempts to interpret the Constitution according to some evolving set of community norms. This third approach is similar to intentionalism in that guidance is sought outside the text, but it differs from intentionalism in that the policies that it seeks to further are not those in the minds of the drafters but those of the contemporary community.

This nonoriginalist approach avoids the obvious limitations of the other approaches. It recognizes that the text of the Constitution is usually too vague to settle most disputes. At the same time, the attempt to discern the intent behind the language is doomed to failure because to fathom the minds of men dead for nearly two hundred years is often not possible, and, in any event, the framers would have had no intent with respect to many issues that arise in the modern world. Indeed, all of the problems that characterize intentionalist theories of statutory interpretation apply with equal or greater force to intentionalist theories of constitutional interpretation. A nonoriginalist theory of interpretation permits a static document to evolve with the times, giving new meaning to terms in response to changing

historical circumstances. Many argue that this flexible approach is especially appropriate for a Constitution, which is meant to endure over a period of centuries and thus must be adapted to new situations. Indeed, some argue, the framers of the Constitution themselves believed that the Constitution should be interpreted in this way.

At the same time, nonoriginalism is subject to the criticism that it allows the court to rewrite the Constitution in accordance with its own views, under the pretext that these views represent community sentiment—a criticism that mirrors objections to nonoriginalist theories of statutory interpretation as well. Further, even if the court's interpretation of community sentiment is accurate, one purpose of the Constitution is to provide a stable set of legal principles that withstand shifts in political sentiment. If the court looks beyond community sentiment to interpret the language of the Constitution, critics of nonoriginalism argue, then the court may become little more than an unelected tyrant, imposing law on the basis of its own whims. Thus, nonoriginalist theories of interpretation are politically controversial, although many scholars argue that no other form of interpretation is truly possible.

## II. Powers of the Government: Federalism

A major purpose of the Constitution is to define the powers of the federal government.[4] A long series of clauses confers on the federal government the power to take various actions or enact certain types of laws.

The distribution of powers between the federal and state governments reflects the theory of federalism. This section provides a basic description of that theory and illustrates how the Constitution empowers the federal government by discussing briefly one of those empowering clauses, the commerce clause.

The term *federalism* refers collectively to several rules and the underlying policies. One rule, codified in the Tenth Amendment to the Constitution, holds that the federal government has only those powers granted to it by the Constitution. Another rule, set forth in the Supremacy Clause, holds that where the federal government does have the power to enact a law, that law is the supreme law of the land and prevails over all inconsistent state and local laws in all American courts. The rules of federalism, in other words, limit the power of both the federal and the state governments.

Federalism represented a compromise between the opposing policies of protecting liberty and ensuring the efficaciousness of the government. A strong centralized government was thought more likely to destroy individual rights, but experience under the Articles of Confederation, the charter of the national government that preceded the Constitution, showed that if power was too decentralized, the national government would be unable to function. The compromise was to give the federal government only certain specified powers but to make it supreme within the ambit of those powers.

Federalism thus reflects the recurrent tension between the community and the individual. The welfare of the community demands an effective government, but protecting the rights of the individual requires limited and thus divided government.

Federalism also illustrates the phenomenon in which a policy stated at a moderately high level of generality is actually a means to an even more general policy. The framers did not consider the division of power between the federal and state governments to be an end in itself but merely a means to the end of preserving liberty.

One of the powers most often relied upon by the federal government in enacting legislation is the commerce clause. The commerce clause provides that Congress shall have the power to regulate commerce "among the several States." Thus, the constitutional rule creating this power has two elements. First, the statute must be a regulation of commerce. Second, the commerce must be among the several states.

Early in the nineteenth century in *Gibbons v. Ogden*, the Supreme Court defined these elements.[5] Commerce was defined as "intercourse," meaning more than mere trade and extending to navigation. Commerce among the states was defined as "that commerce which affects more states than one."

The rules defining these elements have changed over time, however, depending upon the political philosophy of the Supreme Court. In the late nineteenth century, for example, a Supreme Court hostile to federal economic regulation added rules limiting the scope of these elements. One such rule provided that the commerce power did not include the power to regulate manufacturing. That is, the term *commerce* was defined to exclude manufacturing.[6]

The Court's hostility to federal regulation of commerce ended in 1937 with *NLRB v. Jones & Laughlin Steel Corp.*, in which the Court defined the

commerce power to authorize regulation of any activity having a "close and substantial relation" to interstate commerce. Subsequent cases have refined this rule to require a substantial economic effect on interstate commerce. In *Wickard v. Filburn*, the Court added a rule further defining the commerce power to include the power to regulate activity that, although trivial in itself, when aggregated with all other activity of the same class has a substantial economic effect on interstate commerce.[7] Thus, the federal government could regulate a farmer's production of wheat for consumption on his farm because all the homegrown wheat in the country when aggregated together has a substantial effect on interstate commerce.

By the 1990s, the Supreme Court's philosophy had changed again, and it sought to narrow federal power under the commerce clause. For example, in *United States v. Morrison*, the Court held that an exception to the *Wickard* aggregation rule exists when the activity being regulated is noneconomic violent crime.[8] Thus, a federal statute authorizing women who were victims of domestic violence or sexual assault to sue the perpetrator for money damages was held to exceed Congress's power under the commerce clause, even though Congress had determined that violence against women, when aggregated, had a substantial effect on interstate commerce.

Another line of cases has created a rule that Congress has plenary power to exclude any article from commerce. For example, in the 1941 case of *United States v. Darby*, the Court held that Congress has the power to exclude from interstate commerce goods made by employees who are paid less than the federal minimum wage.[9] The rule established by *Jones & Laughlin Steel* and the rule established by *Darby* are cumulative because if the facts satisfy the elements of *either* rule, then federal power to regulate under the commerce clause exists.

The rules defining the commerce clause in modern times grant Congress far more power than it possessed prior to 1937. The shift in power from the states to the federal government reflected a change in the Supreme Court's judgment about the relationship between ends and means. The policy underlying federalism continued to be the protection of liberty. In the mid-1930s, however, the Supreme Court concluded that for many Americans the greatest threat to their freedom came from large corporations and other private entities that, by virtue of their national scope and their ability to relocate

facilities, could not be effectively regulated by any one state. Thus, the Court decided that a stronger federal government capable of regulating these private entities anywhere in the nation would promote rather than impede individual liberty.

The rules defining the commerce power after 1937 also reflected a change in the relative weight accorded to policies, which was, more specifically, a shift from autonomy to paternalism. Prior to 1937, the Court was hostile to congressional attempts to intervene in the private sphere to protect farmers, laborers, children, and other vulnerable groups. After 1937, no longer persuaded that many private transactions were truly free, the Court gave greater weight to the policy of paternalism, believing that the federal government has a constitutionally permissible role to play in regulating private transactions to protect the vulnerable.

One of the notable features of mid-twentieth-century commerce clause doctrine was that it seemed to confer very broad power on the federal government. Few areas of regulation seemed beyond the reach of Congress under the commerce clause. One explanation for this result is that the Court's conclusion that a stronger federal government was necessary to protect individual freedom seemed to suggest that, in this case, majoritarianism and individualism were consistent in their consequences. Protection of individual freedom was thought to be furthered by lodging greater power in the federal government.[10] The evolution of commerce clause doctrine in the twentieth century thus illustrates the point made in chapter 6 that a particularly strong argument is one that seems to demonstrate that two policies normally seen as inconsistent both support the result advocated by the lawyer.

Changes in the allocation of power between the federal and state governments in the twentieth century also illustrate the way in which policies stated at a high level of generality are indeterminate unless one makes additional assumptions about the relationship between ends and means in a particular factual context. Even assuming that one decides that the law should protect individual liberty, stating the policy at that level of generality decides few questions. In the late nineteenth century, the protection of liberty was thought to be furthered by sharply limiting the power of the federal government, whereas in the mid-twentieth century it was thought to be furthered by a strong federal government. Stated at a high level of generality, the policy

of individualism is largely indeterminate about the proper allocation of power between federal and state governments.

Only as courts make additional, more specific assumptions about the most effective means of protecting liberty does the policy of individualism become more determinate, and only then does it direct the lawyer to expand or contract federal power. These additional assumptions are drawn from the factual context in which the policy is to be applied. By ascertaining in a particular context the greatest threats to individual liberty and making judgments about how those threats are best counterbalanced, the lawyer is able to reach some conclusions about whether the individualist policy underlying federalism in that context calls for a stronger or weaker federal government.

## III. Individual Rights

The Constitution, particularly in the Bill of Rights, prescribes certain rights that individuals have. These provisions may be regarded as creating rules that limit the rules defining the power of the federal government. Moreover, because of the Supremacy Clause, to the extent that the rules codifying individual rights are interpreted as applicable to the states, they prevail over inconsistent state law. In that situation, these rules would also limit the power of state governments as defined in the state constitutions.

The framers of the Constitution conceived of natural law as creating certain rights that no government could lawfully impair. The Bill of Rights was considered to be a kind of codification of some of these rights, not an exclusive listing. Indeed, the Ninth Amendment expressly provides that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." That is, the framers believed that individuals have additional rights arising out of natural law that were not expressly included in the Bill of Rights.

In the years immediately following adoption of the Constitution, the Supreme Court sometimes claimed the power to invalidate legislation on the ground that it was inconsistent with natural law.[11] As belief in natural law diminished, however, that idea fell into disfavor. Today, consistent with positivism, the Supreme Court will not recognize a right as existing under the

Constitution unless the right can be said to have been codified at least implicitly in one or more of the specific written provisions of the Constitution.

### *A. Free Speech*

One of the most important rights enumerated in the Bill of Rights is that of free speech, which is set forth in the First Amendment. The text of the amendment provides that "Congress shall make no law . . . abridging the freedom of speech."

Although this rule is phrased as a limitation on congressional power, it has been held to limit the power of the states as well.[12] The rule has three elements: if (1) an exercise of governmental power (2) abridges (3) freedom of speech, then the government's power to take the action is extinguished unless the government can offer a sufficient justification.

The Supreme Court has adopted case law rules defining each of these three elements. The term *speech*, for example, is defined as any activity that is intended to convey a message, when it is likely that an observer would understand the message. Thus, for example, wearing a black armband and burning the American flag as forms of political protest have both been considered "speech," even if no words are spoken, because both actions communicate a message.[13]

One significant rule limiting the right of free speech is the obscenity doctrine. That doctrine states that, if speech is obscene, then it does not fall within the meaning of speech protected by the First Amendment. Thus, the factual predicate has only one element: obscene speech.

The factual predicate of the obscenity doctrine has been defined by another rule, referred to as the *Miller* test.[14] Under that test, speech is obscene if (1) the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest in sex; (2) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (3) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

The rule that freedom of speech does not protect obscenity is based on a compromise between competing policy considerations. The policy of majoritarianism calls for deferring to the judgment of the legislature, in particular the judgment that obscenity must be suppressed for the good of the

community. Balanced against this majoritarian policy is the policy of protecting individual expression, including that which may be objectionable to the majority.

Recall that balancing usually requires the lawyer to make judgments about the relationship between ends and means. In the case of obscenity, the courts have decided that obscenity does not contribute very much to the policies supporting free speech. For example, the propagation of obscenity is not a means that is closely related to promoting the functioning of a democracy, particularly given that obscenity, by definition, has no serious literary, artistic, political, or scientific value. Accordingly, the individual's right to self-expression in obscene ways is outweighed by the majority's desire to suppress obscenity.

The rule defining obscenity illustrates the indeterminacy of many legal rules. The definition of obscenity frequently has been criticized on the ground that reasonable people could differ concerning whether the definition applies to a particular instance of expression. Indeed, the inherent difficulty of defining the term prompted Supreme Court Justice Potter Stewart to write in a much quoted opinion that it would perhaps be impossible to define obscenity intelligibly, although, he said, "I know it when I see it."[15]

### *B. Due Process*

The due process clause of the Constitution prohibits the federal or state government from depriving any person of life, liberty, or property without due process of law.[16] This clause, like the First Amendment's guarantee of free expression, is phrased as a limitation on government power.

The due process clause actually imposes several different limitations on government power, each of which has been formulated as one or more rules. One such rule, sometimes called the doctrine of substantive due process, provides that the government may not deprive a person of liberty or property unless the deprivation is rationally related to a legitimate state interest—a rule sometimes referred to as the rational relationship test or the rational basis test.

A second rule included in the doctrine of substantive due process provides that the government may not deprive a person of a *fundamental* right of liberty or property unless the deprivation is narrowly drawn to serve a compelling state interest—a rule sometimes referred to as the strict scrutiny test.

The courts have not adopted any single definition of the term *fundamental right*. Disagreements among the members of the Supreme Court concerning how to define a fundamental right illustrate the phenomenon in which a policy conflict that is resolved at one level of generality merely reemerges at a more specific level. The rule imposing strict scrutiny on infringements of fundamental rights seemed to resolve the conflict between majoritarianism and individualism in favor of individualism because of the strong protection it provided to individual rights. The conflict reemerges, however, in the various attempts to formulate more specific rules defining fundamental rights. One suggested definition would require that such a right be "deeply rooted in this Nation's history and tradition," a definition that tends to limit the number of such rights and to base them on a national consensus. Another suggested definition would define a fundamental right as one that forms a "central . . . part of an individual's life," a definition that tends to expand the number of such rights and to identify them by their value to the individual rather than by their recognition by a national consensus.[17] Thus, the first definition would move the law toward a policy of majoritarianism, whereas the second would move the law toward a policy of individualism.

A series of cases has illustrated the term *fundamental right*. For example, one group of cases has held that the right of privacy is a fundamental right. The fundamental right of privacy has not been treated as a single indivisible right. Rather, like many legal relationships, the fundamental right of privacy actually refers to a collection of more specific rights, such as the right to use a contraceptive and the right to an abortion.[18]

The concept of a fundamental right illustrates the ways in which lawyers can manipulate the generality of rules in order to broaden or narrow their scope. In *Michael H. v. Gerald D.*, members of the Court divided over whether the father of a child born to a woman married to another man had a fundamental right to establish his paternity. Justice Antonin Scalia's opinion announcing the judgment of the Court took the position that a fundamental right should be proved by reference to "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[19] Justice Scalia found that no prior case had recognized as fundamental the right of a father to establish parental rights with respect to a child born into a marriage other than his own. By reading the

right recognized in each prior case at a very specific level, Justice Scalia effectively distinguished all prior cases and concluded that no case had recognized the right asserted by the father. Justice William Brennan's dissent, by contrast, read prior cases as protecting the parent-child relationship. By reading the right recognized in prior cases at a higher level of generality, Justice Brennan found repeated protection of the parent-child relationship and concluded that the biological father's right to establish paternity was supported by precedent.

The form of the rational relationship and strict scrutiny tests makes explicit that their application to a particular set of facts consists of a policy judgment. Specifically, both rules require the court to make a judgment about the relationship between ends and means and the relative importance of policies.

The factual predicate of the strict scrutiny rule has three elements. The law must be (1) narrowly drawn (2) to further (3) a compelling state interest. Because strict scrutiny applies in cases where the state has burdened a fundamental right, the cost imposed by the challenged law in these cases to the policy of individual rights is very high. To uphold the law, the court therefore requires that the state have a weighty policy in support of the law and that the law be a highly effective way of furthering that weighty policy.

First, the interest furthered by the law must be compelling. The courts have adopted no rule that determines which interests are compelling and which are not. Rather, the court simply makes a judgment about the weight of the policy underlying the challenged law. If the court believes that the policy is important enough, it will declare the government's interest in that law to be compelling. This element illustrates in the starkest possible terms the ad hoc nature of the policy judgments required by the process of applying law to fact.

Second, the law must further the policy of the state. That is, the law must make accomplishment of the policy more likely than if there were no law. For example, in *Zablocki v. Redhail*,[20] the Supreme Court held unconstitutional a statute that denied a marriage license to noncustodial parents with unpaid child support obligations. The state's policy was to ensure that noncustodial parents support their children. The Court found, however, that the statute might simply cause such parents to cohabit with their lovers and produce children out of wedlock. The net result would be the birth of more

children of unwed parents, which would not further any state policy. In other words, the law was not an effective means of furthering the state's ends.

Third, the law must be narrowly drawn. Courts have articulated various factors that they consider in determining whether a law is narrowly drawn. If the law is overinclusive or underinclusive, it may not be considered narrowly drawn. An overinclusive law regulates conduct that is not part of the mischief the legislature intended to remedy, whereas an underinclusive law addresses only part of the mischief that the legislature was attempting to remedy.

For example, in *Zablocki*, the Court held that the statute was not narrowly tailored enough to satisfy the requirements of the Constitution. The Court found the law underinclusive because it did not prevent the parent from assuming other costly obligations, such as the purchase of a house, that might equally prevent the parent from supporting his or her children. That is, the law addressed only a small part of the problem of parents who spend their money in ways other than to support their children. The Court found the law overinclusive because marriage might make the parent more financially secure and thus better able to provide for his or her children. That is, the law applied to parents who were not part of the problem that the legislature was addressing. The fit between the legislative ends and the means chosen was too attenuated to justify the burden on the right to marry.

The rational relationship test, by contrast, requires only that the law be reasonably related to a legitimate state policy. If it is, the law will not be void under the due process clause. Thus, the policy supporting the rule need not be as weighty as under the strict scrutiny test. The policy must be merely legitimate, not compelling. Further, the relationship between ends and means need not be as close as is required under strict scrutiny. The law must be merely a reasonable means of furthering the ends. As already noted, the rational relationship test is applied to laws that do not burden fundamental rights. Because in such cases the cost to individual rights imposed by the law is relatively low, the court allows the law even upon a relatively meager showing of benefit to the state.

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# CIVIL PROCEDURE

Civil procedure is the law governing civil litigation in the courts. It prescribes the mechanisms by which parties obtain judicial determination of the rights and duties created by civil substantive law, such as contracts, torts, and constitutional law.

Civil procedure has largely been codified. Congress, in Title 28 of the United States Code, has enacted a number of statutes governing various aspects of federal court procedure. One such statute is the Rules Enabling Act of 1934, which authorizes the Supreme Court to adopt rules of civil procedure, subject to congressional approval.[1] Pursuant to this act, the Supreme Court has adopted the Federal Rules of Civil Procedure to govern procedure in the federal district courts, as well as several other sets of rules to govern procedure in the specialized trial courts and the appellate courts. A large number of states have adopted modified versions of the Federal Rules of Civil Procedure, and even those states that have not done so have adopted some of the innovations included in those rules.

Among the most important rules governing procedure are those that prescribe the jurisdiction of the courts, that is, the power of the courts to decide cases.[2] The power of a court over a case actually comprises two distinct powers, either of which may exist without the other: power over the defendant

and power with respect to the type of case. These powers are known, respectively, as personal jurisdiction and subject matter jurisdiction. The balance of this chapter is devoted to discussing some of the rules defining personal and subject matter jurisdiction.

## I. Personal Jurisdiction

A party can obtain judicial determination of a right only by filing suit in a court with power over the defendant, a power generally referred to as personal jurisdiction. For example, as will be seen shortly, a California court generally has no personal jurisdiction over a citizen of Kentucky who has never had any contact with California. Thus, the California court would have no power to adjudicate whether the Kentuckian owed a duty to someone.

Power over the defendant exists as a general matter where two elements are satisfied. First, the legislature by statute must have conferred power on the court. Second, the exercise of that power must be consistent with the due process clause of the Constitution.[3] Each of these elements is discussed in turn.

### *A. Statutory Basis of Personal Jurisdiction*

The first element of the rule defining the personal jurisdiction of the courts is the existence of a statute conferring on the courts power over the defendant. Some states, such as California, have authorized their state courts to exercise personal jurisdiction to the full extent permitted by the Constitution. Thus, any constitutional exercise of power is authorized by statute. In other states, however, the legislature has enacted narrower statutes that may provide the courts with less power than the Constitution would permit them to have.

In the case of the federal courts, Congress prescribed the limits of personal jurisdiction in Rule 4 of the Federal Rules of Civil Procedure. Thus, for a federal court to have power over the defendant, the defendant must be subject to service of process under Rule 4.

### *B. Limitations Imposed by Due Process*

#### 1. TRADITIONAL BASES OF PERSONAL JURISDICTION

The second element, that personal jurisdiction be consistent with the due process clause, was imposed by the Supreme Court in the well-known case

of *Pennoyer v. Neff*.[4] For the sake of brevity, only the limitations that the due process clause imposes on personal jurisdiction exercised by state (as opposed to federal) courts are discussed here.

Prior to the decision in *Pennoyer*, state courts generally exercised power over a defendant in only three situations: when the defendant was a citizen of the state in which the court was located, when the defendant was served with legal process while present in the state's territory, or when the defendant had consented to the court's jurisdiction. These traditional limitations were based in part on a concern that a defendant who did not fall into one of those categories as a practical matter might be able to ignore the court's order, to the great embarrassment of the court.

*Pennoyer* held, however, that these limitations were not merely voluntary limitations based on policy but were imposed by the due process clause. That is, under *Pennoyer*, a court's exercise of jurisdiction would violate the Constitution unless one of the three traditional bases of power just described was present.

The traditional bases of power proved increasingly inadequate under modern circumstances. For example, a nonresident motorist who caused a collision and then left the state seemed beyond the power of the courts as defined in *Pennoyer.* States responded by enacting statutes that deemed certain conduct, such as driving within the state, to be implied consent to jurisdiction, an approach held to be consistent with the due process clause in *Hess v. Pawlowski.*[5] By adopting the legal fiction[6] of implied consent, states were able to expand the power of the courts while staying within the literal terms of the rule in *Pennoyer*.

Another problem was posed by the existence of corporations engaged in interstate transactions. Assume, for example, that a Massachusetts corporation breached a contract that its sales agent had negotiated with a California customer. Although the Massachusetts corporation may have property and employees in California, the corporation itself is an abstract legal concept and is not physically present in California or anywhere else. Thus, the only possible basis the California courts would have for exercising jurisdiction over the Massachusetts corporation would be consent, which might not be forthcoming. To solve this problem, courts again resorted to various legal fictions, finding that an out-of-state corporation's conduct of business in state constituted "presence" in the state or an implied consent to suit.

## 2. MINIMUM CONTACTS

As a result of the growing dissatisfaction with the restrictiveness of the traditional bases of jurisdiction, the Supreme Court created a new basis in *International Shoe Co. v. State of Washington*.[7] In that case, the Court adopted a rule that a state has power over individuals who have "minimum contacts" with the territory such that the exercise of jurisdiction over them would not offend traditional notions of fair play and substantial justice. The minimum contacts rule permitted courts to exercise jurisdiction over out-of-state motorists and corporations without having to resort to the legal fiction of implied consent or presence. Those legal fictions had allowed the courts to assert jurisdiction in cases where jurisdiction seemed unwarranted under the traditional bases of jurisdiction. The adoption of the minimum contacts rule represented an abandonment of the pretense and a concession that the law had in fact changed. In a series of subsequent decisions, the Supreme Court has defined two different types of power that the court may have over the defendant under *International Shoe.* One type of power, called general jurisdiction, permits the court to assert power over the defendant with respect to any claim that the plaintiff may allege. The other type of power, called specific jurisdiction, permits the court to assert power over the defendant only with respect to a claim related to the contacts that form the basis for the jurisdiction. Each of these two types of power is created by a separate rule.

### a. General Jurisdiction

General jurisdiction exists if the defendant's contacts with the state are systematic and continuous.[8] Thus, the factual predicate necessary to establish general jurisdiction has only one element: systematic and continuous contacts.

### b. Specific Jurisdiction

Specific jurisdiction exists if (1) the defendant has purposefully availed himself or herself of the benefits and protections of the laws of the state and (2) the exercise of jurisdiction would be reasonable under the circumstances. The factual predicate necessary to establish specific jurisdiction thus has two elements. Additional rules have further defined and limited each of these two elements.

*(1) Purposeful Availment*

The first element is purposeful availment of the benefits and protections of the laws of the forum state. In *World-Wide Volkswagen Corp. v. Woodson*, the Supreme Court articulated the rule that the unilateral act of someone unaffiliated with the defendant does not constitute purposeful availment.[9] More specifically, the Court held that the decision of the plaintiff to drive to Oklahoma a car sold to him by a New York car dealer did not constitute purposeful availment of the benefits and protections of Oklahoma law by the New York dealer.

An exception to this rule exists, however, where the defendant places a product in a stream of commerce that foreseeably will carry the product to the forum state.[10] Even though the product may be carried to the forum state by individuals with no affiliation with the defendant, the defendant's act of placing the product in the stream of commerce is considered a form of purposeful availment.

There are currently two versions of the stream of commerce rule, neither of which has yet obtained the support of a majority of the members of the Supreme Court. In *Asahi Metal Industry Co., Ltd. v. Superior Court*, Justice Brennan wrote an opinion joined by four of the nine justices of the Court endorsing a rule that purposeful availment exists when the defendant places the product in the stream of commerce with *knowledge* that it will reach the forum state.[11] Justice Sandra Day O'Connor wrote an opinion, also joined by four of the nine justices, stating that purposeful availment exists when the defendant places the product in the stream of commerce with some indication of a *purpose* that the product reach the forum state. Justice O'Connor's opinion suggested, by way of illustration, that one such indication of purpose would be designing a product for sale in the forum state. Which version of the rule is correct will remain unclear until the Supreme Court clarifies that question in a future case.

*(2) Reasonableness*

The second element of specific jurisdiction, that the exercise of power be reasonable, was also further defined in *World-Wide Volkswagen*. The Supreme Court adopted the rule that the reasonableness of jurisdiction is determined by balancing five elements: the burden on the defendant, the

convenience to the plaintiff, the interest of the forum state, judicial efficiency, and any substantive policies affected by the choice of forum.

The definition of this second element is an example of the use of a standard in place of a formal rule. The law does not state that if certain facts are present, jurisdiction will be reasonable. It merely states the policies to be achieved—such as minimizing burden on the defendant, providing a convenient forum for the plaintiff, and promoting efficient adjudication—and then leaves to future courts the task of applying these policies to particular factual situations. Like any standard, the reasonableness test permits the court to arrive at the fairest result in any particular case, though at some cost to predictability and uniformity in the law.

The reasonableness test, again like standards generally, permits a court to reach virtually any result it believes just. Although cases arise in which a particular result would further all of the policies, often a given result promotes some policies while impeding others. Because the test does not indicate how much weight each policy is to be given, the court can assign the greatest weight to the policies that would be furthered by what it believes to be the best outcome.

In the case of the reasonableness test, once more as in the case of standards generally, precedent is less likely to seem controlling than in cases where the law prescribes a rigid rule. Whereas a rigid rule specifies the facts that must be present for a particular legal consequence to occur, the reasonableness standard allows any set of facts to give rise to the legal consequence of power over the defendant, as long as those facts seem to further at least some of the policies underlying the standard. With so many facts potentially relevant, the likelihood is low that the relevant facts of one case will be similar enough to the relevant facts of a later case to require the conclusion that the earlier case controls the later case.

### c. Jurisdictional Rules as a Compromise

The due process clause's limitations on court power seem to represent a compromise between the policies of individualism and majoritarianism.[12] An individualist policy suggests that the state should have minimal power over individuals, whereas a majoritarian policy is consistent with the government's having power to enforce its laws against wrongdoers. Were individualism to prevail all the time, a court's power over persons might be limited

to cases in which the defendant consented to jurisdiction. Were majoritarianism to prevail all the time, a court's power might extend to all persons who have had any contact with the state.

The Supreme Court has reached a compromise in which a defendant's claim to freedom from the exercise of state power represented by specific jurisdiction ends once the defendant has reached out to the forum state in a purposeful way and jurisdiction is reasonable. Because general jurisdiction is a more substantial exercise of state power, the defendant's claim to freedom from general jurisdiction is lost only where the defendant has engaged in systematic and continuous contacts with the forum state or meets one of the traditional bases of jurisdiction. That is, a greater act of will by the defendant in relation to the forum state must exist before the state can exercise the more sweeping form of power represented by general jurisdiction.

The history of the minimum contacts rule illustrates the way in which policy conflicts that appear to be resolved at one level of generality simply reemerge at a lower level of generality. In adopting the minimum contacts rule, the Court seemed to resolve the conflict between majoritarianism and individualism in favor of majoritarianism. The conflict reemerged, however, in the course of adopting a more specific rule defining minimum contacts. In adopting the purposeful availment requirement, the Court seemed to resolve the dispute at that level of generality in favor of individualism. The conflict nevertheless reemerged yet again in the course of defining purposeful availment in the stream of commerce cases. Four justices, led by Justice O'Connor, sought to resolve the conflict in favor of the policy of individualism by requiring that the defendant acted purposefully, while four other justices, led by Justice Brennan, sought to resolve the conflict in the direction of majoritarianism by requiring only knowledge. The Court has not resolved the conflict at that very specific level.

The adoption of the minimum contacts standard also illustrates the way in which policies that are inconsistent in theory may be consistent in their consequences. In adopting the minimum contacts standard, courts moved from a formalist, rule-based system of defining personal jurisdiction to a more instrumentalist, standard-based system. The rigid *Pennoyer* triad of consent, citizenship, and presence was supplanted by the flexible standard of minimum contacts. Thus, the Court used a particularized inquiry under the minimum contacts standard not to protect the individual, but to expand state

power over the individual. The technique of examining each individual case was employed in the name of majoritarianism rather than individualism.

Thus, the shift from an individualist theory of jurisdiction to a more majoritarian one was accompanied by a shift from a formalist concept to a more instrumental one. As has been shown in chapter 6, formalism at a very high level of generality is inconsistent with individualism. The inconsistency was noted, for example, in the use of the objective standard in contract and tort law, where the formalism of the objective standard subverted the individualism underlying the doctrine of offer and acceptance in contract law and the negligence and consent doctrines in tort law.[13] In the case of personal jurisdiction, however, a formalist approach was perceived as more protective of individual will, whereas the flexible minimum contacts standard seemed to provide the state a broader opportunity to impose its will. Policies that seem to support opposing results in one case may seem to support the same result in another case.

## II. Subject Matter Jurisdiction

A court can enforce a right only if it has power with respect to the type of claim being brought, a form of power generally known as subject matter jurisdiction. The extent of a court's subject matter jurisdiction is defined by statute.

State judicial systems typically have a number of courts of "limited jurisdiction," such as probate court, family court, or small claims court. These courts have the power to adjudicate only certain types of disputes, such as those involving a will, a divorce, or a claim for less than a prescribed amount of money. A state court system typically also has a court of "general jurisdiction," that is, a court with power to hear any type of claim not assigned specifically to a court of limited jurisdiction.[14]

All federal courts are courts of limited subject matter jurisdiction. This fact reflects the doctrine of federalism, which holds that the federal government possesses only the limited powers delegated to it by the Constitution.[15] Given the limited nature of federal power, the framers of the Constitution thought it inappropriate to create federal courts of general jurisdiction.

Accordingly, the Constitution authorizes Congress to confer on the federal courts the power to hear only certain categories of cases. Congress, how-

ever, has chosen not to confer on the federal courts all of the subject matter jurisdiction authorized by the Constitution. In this section, two of the most important forms of jurisdiction conferred by Congress on the federal courts are examined: federal question jurisdiction and diversity jurisdiction.

### *A. Federal Question Jurisdiction*

Federal statute confers on the federal district courts power over cases "arising under" federal law,[16] a form of jurisdiction generally referred to as federal question jurisdiction. Federal question jurisdiction exists so that federal courts can hear certain cases in which federal law will be controlling. In this way, the federal government can ensure that the policies underlying federal law are advanced by the courts applying that law.

The courts have adopted several cumulative rules defining the phrase "arising under" as used in the statute. These rules are cumulative in that if any one of them is satisfied, the case "arises under" federal law.

One rule provides that a case arises under federal law if the cause of action, that is, the legal basis of the claim, was created by federal law.[17] For example, claims alleging a violation of a federal civil rights statute arise under federal law because the civil rights statute creates the cause of action.

Another rule provides that a case arises under federal law if the cause of action was created by state law, but the success of the plaintiff's claim depends upon an interpretation or application of federal law.[18] For example, a negligence claim alleging that a corporation was negligent because it violated a federal safety regulation could be held to arise under federal law. Although the cause of action for negligence is created by state law, in order to prevail the plaintiff must prove that the federal safety regulation was violated. Thus, the success of the claim depends upon an application of federal law.

The statute granting federal question jurisdiction to the district courts has been limited by a judicially created rule known as the "well-pleaded complaint" rule.[19] Under this rule, the federal question must be a necessary part of the plaintiff's complaint. That is, a federal question raised by a defense does not bring the case within federal subject matter jurisdiction.

For example, assume that a retail store sues a manufacturer for breach of contract because the manufacturer failed to ship some toys that the retail store had ordered. The manufacturer raises as its sole defense the fact that after the order was placed, the federal government issued regulations banning

this type of toy. Although the result in the case may well depend on an interpretation or application of the federal toy regulation, that federal law was raised as part of a defense and not as a necessary part of the plaintiff's claim. The plaintiff's claim was for breach of contract and could be set forth in its entirety without ever mentioning the toy regulation. Thus, under the well-pleaded complaint rule, the court probably would not have federal question jurisdiction over the retailer's claim.

The purpose of the well-pleaded complaint rule is to permit a federal court to ascertain at the commencement of a lawsuit whether it has jurisdiction, rather than having to wait until all the pleadings have been filed to see whether any party raised a federal question. Of course, the fact that a federal law is applicable to a crucial defense, as opposed to the plaintiff's claim, does not in any way lessen the federal government's interest in furthering the policies underlying that law. Yet under this rule, when the federal question arises in connection with a defense rather than the plaintiff's complaint, federal question jurisdiction does not exist. As has been discussed,[20] the Constitution confers only limited power on the federal government because the drafters believed that limiting its power would preserve liberty. The well-pleaded complaint rule is sometimes defended as consistent with the policy underlying federalism because it limits the federal courts' exercise of jurisdiction. The rule may also be defended as promoting efficiency, because it avoids the situation where a federal court assumes jurisdiction over a case on the assumption that a federal question will be raised by the defendant, only to be required to dismiss the case when the defendant fails to do so. The rule represents a situation in which policies of individualism and efficiency, which often seem to support different results, are regarded as supporting the same result.

### *B. Diversity Jurisdiction*

Federal statute also confers on the federal district court power over cases between citizens of different states,[21] a form of power known as diversity jurisdiction. The rule created by this statute has been defined by the courts to require "complete diversity," meaning that no plaintiff may be a citizen of the same state as any defendant.[22] As a rule of judicial interpretation, the complete diversity requirement illustrates the situation in which a case law

rule ostensibly interpreting a statutory rule may give the statutory rule a different scope than its language might have seemed to warrant.

The term *citizen* has been defined to include one who is a U.S. citizen and who is domiciled in a state. The term *domicile*, in turn, has been defined as the place where one resides with the intent to remain indefinitely.

The apparent policy behind diversity jurisdiction was to allow out-of-state litigants to adjudicate their claims in federal courts, which might be less prejudiced against an out-of-state party than a state court, an assumption that has by no means been proved. Assuming that this is correct, however, the rule creating diversity jurisdiction is far broader than this policy would require. Put another way, it is overinclusive. For example, a federal district court in Kentucky has subject matter jurisdiction over a claim filed by a citizen of Massachusetts against a citizen of California in Kentucky, despite the fact that both litigants are from out of state, and thus there is no reason to believe that the court would favor either party over the other. Similarly, a Kentuckian suing a Californian in Kentucky may file the complaint in federal court, even though the Kentuckian has no reason to fear the prejudice of the local state courts.

The rule is underinclusive as well. For example, if twenty-five Kentuckians sued twenty-five Californians and one Kentuckian in Kentucky, the fact that there was at least one Kentuckian on each side would preclude the exercise of diversity jurisdiction, even though the presence of so many Californians among the defendants seems to invite uneven justice, if one assumes, as the doctrine does, that state courts may be prejudiced against out-of-state litigants.

In the case of diversity jurisdiction, then, the precise line drawn by the statutory rule seems difficult to explain on policy grounds. The diversity rule illustrates the problem discussed in chapter 2 of identifying a legislative policy that adequately explains a statute, particularly when the statute is based on a series of crude compromises. It also illustrates the tendency of rigid rules to be overinclusive as well as underinclusive.

PART THREE

# Perspectives on Legal Reasoning

11

# A HISTORICAL PERSPECTIVE ON LEGAL REASONING

The premises underlying the process of legal reasoning in the United States reflect deeper assumptions about the relationship between individuals and the community, about the possibilities of human understanding, and about the nature of reality itself. That is, assumptions that govern the realms of philosophy, religion, science, politics, literature, and other disciplines also shape our understanding of law and of legal reasoning.

The American Constitution was written in the late eighteenth century at the height of the Enlightenment and thus reflects the assumptions underlying Enlightenment thought. Two centuries later, however, developments in every area of human endeavor have challenged, often successfully, these same assumptions. The result has been to cast grave doubt upon the theoretical underpinnings of legal reasoning.

American lawyers, accordingly, have struggled continually to reconceptualize the law and the legal reasoning process in light of their changed understanding of the world. Legal reasoning today is thus a patchwork of ideas that have survived from earlier times combined with ideas borrowed from contemporary thought.

The chapter explains American legal reasoning at the beginning of the twenty-first century as the product of a historical process. The discussion begins with an investigation of some of the Enlightenment assumptions on which the American legal system was constructed and moves on to a description of how one of those assumptions, a belief in natural law, was successfully challenged in the early nineteenth century, leading to the emergence of a new synthesis, known as formalism, at the end of the nineteenth century. Formalism was itself successfully challenged in the early twentieth century by the legal realists. Legal thought today is dominated by attempts to reexplain the legal reasoning process in the wake of the legal realist critique.

## I. The Enlightenment Origins of American Legal Thought

### *A. The Emergence of Enlightenment Epistemology*

The eighteenth-century architects of the American legal system worked on the basis of the assumptions that characterized Enlightenment philosophy. The inquiry here thus begins with a brief summary of Enlightenment thought.

The roots of the Enlightenment are generally traced to the Renaissance, the Protestant Reformation and the Scientific Revolution. The fourteenth-century Italian Renaissance was sparked by the rediscovery of classical Greek writings and featured a return to secular concerns, in sharp contrast to the theological focus of medieval thought. The Reformation, which began with Martin Luther's posting of his ninety-five theses in 1517, challenged the traditional authority of the Roman Catholic Church, claiming that individuals could acquire religious truth through their own interpretation of the scriptures. The Scientific Revolution, which is usually dated from the sixteenth century as well, was an endeavor to ascertain truth through a scientific, that is, a rational and empirical, method.

The Reformation and the Scientific Revolution shared a commitment to the pursuit of truth by individuals who exercised reason rather than passively accepting traditional authority. To a considerable extent, then, both of these movements were concerned with epistemology, or the theory of how knowledge is obtained. They emphasized skepticism, individualism,

and reason. In common with the Renaissance, they were primarily secular in orientation.

In the seventeenth and eighteenth centuries, these currents of thought produced two distinct schools of philosophy, which combined to form the Enlightenment. The first school, known as rationalism, began with the work of René Descartes. Descartes adopted a position of radical skepticism, questioning everything and accepting nothing on authority. He then attempted to determine whether there was anything that could be known with certainty and found only one thing: he could know for certain his own doubt. From the fact of his doubt, he deduced his own existence—a deduction sometimes referred to as the cogito, after the famous proposition *Cogito, ergo sum* (I think, therefore I am). Descartes went on to develop an entire philosophy, including an explanation of the existence of God, by a series of deductions originating with the cogito. Descartes' model of epistemology was mathematics, a system that begins with certain intuitive truths and then arrives at further truths by a process of deduction. Descartes rejected as unreliable the information provided by one's senses because he found that appearances often deceive us—things are not as they seem.

In Cartesian philosophy, then, the pursuit of knowledge originates with the individual who refuses to accept any truth that cannot be established by his own exercise of reason. Cartesian rationalism dominated European philosophy in the seventeenth and eighteenth centuries and is represented, for example, in the work of Benedict de Spinoza and Gottfried Leibniz.

By beginning with his own self-consciousness, Descartes separated his mind from the tangible things of the world. He first proved the existence of his own thoughts, then reasoned from that to the existence of his body and the other objects in the world. Thus, built into Descartes' epistemology is a distinction between one's individual, subjective consciousness and the objective world existing beyond one's mind.

The other school of philosophy that arose out of the Reformation and the Scientific Revolution was empiricism, whose most important figures include three seventeenth- and eighteenth-century British empiricist philosophers, John Locke, George Berkeley, and David Hume. Locke, too, began with a skeptical posture. He believed, however, that knowledge came not through Cartesian introspection, but rather through the experience of the senses. In Locke's view, the only things we can know for certain are those that we can

learn empirically. Berkeley and Hume each pushed the implications of Locke's empiricism a step further. Berkeley argued that to exist is to be perceived. Because abstract ideas cannot be sensed, they cannot exist outside the mind. Hume took the position that because we experience only isolated sensations, no principle can be known through induction and no causal link between phenomena can be established with certainty. All we can know is the particulars that we experience. Our notion that these particulars demonstrate a unifying principle or a chain of causation is merely a psychological predisposition, a habitual assumption that the particulars are related, not something we can definitely know.

Despite the disagreement between Descartes and Locke concerning whether intuition or sense impression are the starting points of knowledge, the rationalists and empiricists made certain common assumptions growing out of Descartes' work. Both Descartes and Locke subordinated metaphysics to epistemology, meaning that they started with a theory of knowledge from which they constructed their account of reality. Both began their inquiry with the individual. Descartes began with individual intuition, whereas Locke began with individual sense impressions. With both, however, the individual was at the center of their philosophy. Finally, in beginning with the individual, both the rationalists and the empiricists assumed a distinction between the subjective mind of the individual and the objective world outside of individual consciousness.

Rationalism and empiricism represent the two strands of Enlightenment epistemology. Enlightenment thinkers believed that we can know only by reason or by experience, the methods used by science. They turned away from tradition, authority, and revelation as a means of knowing the world. The Enlightenment thus represented an attempt to apply the scientific method to all forms of knowledge. The Enlightenment image of the natural world was inspired by Isaac Newton's laws of physics: the universe is an elaborate machine, like a clock, that operates in a regular fashion according to a natural law established by the Creator. The eighteenth-century Enlightenment has been called the Age of Reason and, at least at the time of the American Revolution, the Cartesian rationalist strand dominated the empirical strand, particularly in political philosophy.

Medieval philosophers had divided in their metaphysics between the realists and the nominalists. The realists believed that general concepts have a

real existence and traced their lineage to Plato and his belief in the existence of "forms" that are the universal essences of particular earthly objects. The nominalists believed that only particulars actually exist and that general concepts are merely names that humans apply to groups of particulars. As early as the fourteenth century, William of Ockham had associated nominalism with empiricism in a way that anticipated Berkeley and Hume. Although the work of the British empiricists brought a nominalist strand to Enlightenment philosophy, the dominant metaphysic in the late eighteenth century was realist: the universe is governed by natural laws that reason can perceive.

### *B. The Emergence of Liberalism*

Enlightenment developments in epistemology were accompanied by a parallel development in political philosophy: the emergence of liberalism. The challenges to the religious authority of the Catholic Church posed by the Reformation and the Scientific Revolution coincided with a challenge to the political and economic authority of the state. This challenge came from a rising middle class that rejected the mercantilist economic policies of the European monarchs. Liberalism, the political and economic philosophy of the middle class, shared with Enlightenment epistemology a belief in freedom for the rational individual—whether freedom of inquiry or freedom of economic enterprise.

Liberal political theory, particularly as expounded by its most influential theoretician, John Locke, held that individuals have natural rights to liberty and equality, that individuals through a social contract agree to form governments for the sole purpose of protecting those rights, and that the only legitimate government is based on the consent of the governed. Liberal economic theory asserted that a market economy allowing individuals the freedom to pursue their rational self-interest would produce greater wealth than the heavily regulated economies of mercantilism.

In Locke's view, the purpose of government was the protection of individual liberty. Locke also wrote about the form that government should take, arguing for a separation of powers among different branches of government so that no one branch would dominate. After studying the British constitutional system, Baron de Montesquieu refined Locke's separation of powers theory, calling for a division of government into the legislative, executive, and judicial branches.

The fundamental premise of Lockean liberalism was that individuals have rights based on natural law. A belief in natural law was traceable to the Stoics of ancient Greece and had been incorporated into medieval theology, which understood natural law to be law based on the will of God as revealed in scripture and to be binding on all people.

Belief in a natural law that governed human affairs also fit comfortably in the Enlightenment image of the universe as an elaborate machine governed by Newtonian laws of physics. People, like nature, were subject to a natural law. Thus, Thomas Jefferson in the Declaration of Independence could proclaim the existence of "self-evident" truths concerning the equality of men at birth and their natural right to life, liberty, and the pursuit of happiness. This natural law, however, was to be ascertained through the exercise of intuition and reason in the tradition of Descartes rather than to be derived from religious revelation. Natural law had acquired a basis in secular thought.

The epistemological and political theory of the Enlightenment converged in the late eighteenth century to produce the experiment of the American Constitution. Reduced to its essence, eighteenth-century American legal philosophy might be characterized as the use of reason to protect liberty. Through the exercise of reason, men could discern their natural rights, some of which they codified in the Bill of Rights of the U.S. Constitution.

So intense was the belief that these natural rights had genuine existence that many considered their codification in a Bill of Rights superfluous and even dangerous, because it could lead courts to assume that only the codified rights were enforceable. In the years following the Revolution, courts claimed the right to invalidate legislation that was contrary to natural law, even though not prohibited by anything in the Constitution.

Eighteenth-century American legal philosophy held that the common law was similarly based on principles that could be discerned by a court through the exercise of reason. These case law principles included the natural rights of men, and thus the common law posed no threat to liberty. In fact, eighteenth-century Americans regarded the common law as a source of liberty, precisely because it embodied long-established principles, and they challenged the right of British Parliament to modify those principles through legislation, such as the imposition of taxes without the consent of the taxed.

The institutional structure that ensured that reason would protect liberty was the separation of powers. Judges, who in theory were guided by reason rather than political passion, would review the constitutionality of legislation or apply the common law. Judges as rational decision makers would guarantee the preservation of liberty.

Reason would thus protect liberty through the rule of law. Courts were not to decide cases in accordance with the individual preferences of the judge but in accordance with the dictates of law ascertained by reason.

### *C. The Decline of Naturalism*

In the early nineteenth century, a number of forces delegitimated explicit appeals by judges to natural law. Jacksonian democracy, with its emphasis on popular sovereignty, favored a conception of law as something created by the consent of the people rather than discovered through the exercise of reason. The rise of the market economy demanded by liberalism undercut belief in objective value. Value was not eternally fixed but was reestablished daily by the consensus of those in the market.

Naturalism was also challenged by the utilitarian philosophy of Jeremy Bentham and John Stuart Mill. Bentham argued that a society should seek the greatest happiness for the greatest number, a philosophy that seemed congenial to majoritarian democracy because it argued for the welfare of the society as a whole rather than for the inalienable rights of individuals. The greatest happiness for the greatest number could be inconsistent with the interests of any particular individual, and thus utilitarian philosophy was deeply corrosive of any naturalist belief in individual rights. Individual rights would be protected, if at all, not because of the worth of the individual, but because to do so would benefit the society as a whole. Utilitarianism suggested that courts should not look backward to determine what preexisting rights were determinative of a dispute but should look forward to the consequences of each possible resolution of the dispute.

Gradually, naturalism in legal theory was supplanted by positivism, a school of jurisprudence associated with John Austin. Positivism is the belief that law is the command of a human sovereign, which in the case of the United States is the people. Individual rights were seen as merely the correlatives of duties, and thus rights, like duties, were simply the creation of law. Although natural law might continue to exist as a moral category, only

laws adopted by a sovereign could form the basis of a judicial decision. Law no longer originated in God or nature, but in popular consent.[1]

## II. Legal Formalism

In the late nineteenth century, the emergence of university-based law schools with full-time faculties spawned a body of theoretical writing on the subject of how lawyers and judges apply positive law to ascertain individual rights and duties. One of the most influential commentators on the subject was Christopher Columbus Langdell, who was appointed dean of the Harvard Law School in 1870.

Langdell proposed the idea that law is a science, like biology or physics. The data on which this science is based are judicial decisions. Dean Langdell continued the analogy far enough to argue that the library is to a lawyer what the laboratory is to the chemist or physicist. As he explained in an 1887 commencement address at Harvard:

> [It] was indispensable to establish at least two things; first that law is a science; secondly, that all the available materials of that science are contained in printed books. . . . If it be a science, it will scarcely be disputed that it is one of the greatest and most difficult of sciences. . . . We have also constantly inculcated the idea that the library is the proper workshop of professors and students alike; that it is to us all that laboratories of the university are to the chemists and physicists, all that the museum of natural history is to the zoologists, all that the botanical garden is to the botanists.[2]

Just as the scientist could discern the laws of nature by studying empirical data, the lawyer could discover the laws of society by studying cases. The method used by the lawyer to discover these laws was that of induction. After reading some number of cases articulating a particular rule, the lawyer could infer that this rule must be a general rule of law.

Langdell believed that the end result of this process of observation and induction would be the discovery of a small number of very general rules. All future cases could be decided by applying these general rules to the facts through the process of deduction. Those judicial decisions that did not adhere to these general rules could be dismissed as wrongly decided.

Langdell made this approach explicit in the preface to his 1871 casebook on contract law:

> Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer. . . . [M]uch the shortest and best, if not the only way of mastering the doctrine effectually is by studying the cases in which it is embodied. But the cases which are useful and necessary for this purpose at the present day bear an exceedingly small proportion to all that have been reported. The vast majority are useless, and worse than useless, for any systematic study. Moreover, the number of fundamental legal doctrines is much less than is commonly supposed; the many different guises in which the same doctrine is constantly making its appearance . . . being the cause of much apprehension. If these doctrines could be so classified and arranged that each should be found in its proper place, and nowhere else, they would cease to be formidable from their number.[3]

Langdell's approach has often been called "legal formalism" or, simply, "formalism." The term refers to a process of deciding cases by the mechanical application of general rules.

Formalism in many respects represented the apotheosis of Enlightenment philosophy in American legal thought. Langdell's belief that law was a science was consistent with the Enlightenment endeavor to apply the scientific method to all forms of knowledge. The combination of induction and deduction in Langdell's method brought both the empiricist and the rationalist strands of Enlightenment epistemology into legal reasoning.

Formalism was also consistent with the political liberalism of the Enlightenment. Specifically, formalism affirmed the principle of the rule of law by insisting that all adjudication was the mechanical application of rules. The rules were either those enacted by the legislature or those already announced in prior cases. The judge, in effect, had little or no discretion; he was bound by preexisting law. Law restrained the courts and thereby protected liberty.

Formalism affirmed the liberal belief in the natural equality of men. In applying a relatively few very general rules to a large number of transactions,

formalism denied the relevance of differences among the people involved in a transaction. That is, formalism denied the relevance of social or economic hierarchy.

Formalism also held, as did liberalism, that individuals were free to exercise their will. In its refusal to take account of social or economic hierarchy or many of the particulars of individual transactions, formalism was systematically blind to all but the crudest forms of coercion and thus saw human activity as predominantly free. Because individuals were free, as formalism defined freedom, judicial intervention in the private sector should be limited to acts that in some way enforced or ratified the will of the private parties rather than imposing the will of the state. The mechanical application of rules brought predictability to adjudication, which promoted trade and investment among private actors. Formalist assumptions that individuals were free to exercise their will and to assume or decline legal obligations mirrored the assumption of market economics that market participants act as rational maximizers of their own utility. Judicial abstention from the imposition of the will of the state, in other words, was the legal analogue to laissez-faire economic policy. Formalism thus seemed consistent with liberal economic theory as well.

Formalism held an additional attraction for lawyers in particular because its ostensibly "scientific" character elevated the study and practice of law to a plane of specialized, technical expertise, equivalent to that required of physicists, chemists, and other scientists. Formalism, in short, seemed to promise a scientific legal system characterized by liberty, equality, economic prosperity, and political legitimacy.

Despite the consistency of formalism with much of Enlightenment philosophy, the political consequences of formalism in the late nineteenth century were quite different from those of Enlightenment philosophy in the late eighteenth century. Enlightenment epistemology and political theory had been revolutionary in their impact. Enlightenment epistemology challenged centuries of established religious authority, while its political theory justified the overthrow of a monarchical feudal order that could trace its origins to the collapse of the Roman empire.

Formalism, by contrast, tended to legitimate the existing distribution of wealth and power. Its essential premises were that there is a single correct rule of law that has been laid down in prior cases and that the only

task for the court is to discover and apply it. Such a system assumes implicitly that prior cases are correct and that the existing order is intrinsically just. Indeed, any decision that departed from the existing rules would be erroneous.

Formalism also departed from late-eighteenth-century Enlightenment philosophy in its refusal to embrace naturalism explicitly. The positivist revolution of the early nineteenth century had progressed far enough so that Langdell could not have credibly argued that judges could find law through the exercise of Cartesian reason. Rather, law was to be found empirically, by reading actual decisions of the courts. Nor did the U.S. Supreme Court of the late nineteenth century claim the power to invalidate legislation that conflicted with natural law not codified in the Constitution.

Naturalism, however, did survive in the sense that nineteenth-century courts often interpreted the law against a backdrop of Enlightenment assumptions about the inherent "nature" of liberty or property. Formalism, in other words, inherited from naturalism a realist metaphysics. Formalist thinkers assumed that concepts such as liberty or property existed in the abstract and had an established content. Once a judge had determined that a particular concept was applicable to the case under consideration, that judge could reason deductively from the nature of the concept to determine the correct result.

## III. The Critique of Legal Formalism

From its inception, formalism was under attack by a small, but growing, number of legal scholars. The assault on formalism was a challenge to both its methodological assumptions and its political consequences. In the ensuing sections, the methodological critique and then the political critique of formalism are outlined.

### *A. The Methodological Critique*

Formalism was a vulnerable target methodologically because the assumptions upon which it rested were cast into doubt by developments in science and philosophy. The same skepticism that had undercut religious faith at the dawn of the Enlightenment now corroded belief in the existence of discernible a priori categories.

The skepticism was both epistemological and metaphysical. The epistemological skepticism questioned the ability of humans to perceive reality accurately. The metaphysical skepticism questioned whether there was a reality to be perceived. More specifically, the empiricist strand of Enlightenment philosophy began to dominate the rationalist strand and then was itself called into question, while nominalism in metaphysics displaced realism. The collective effect was a claim that there are no a priori categories, but, even if there were, we could not know them. This claim evolved in the mid-twentieth century into the philosophical perspective generally known as postmodernism and seemed to bring the modern era in philosophy to a dead end.

The skeptical stance that culminated in postmodernism was not a sudden break with the past, but rather a continuation of a process of critical inquiry that had begun with the Renaissance, the Reformation, and the Scientific Revolution. In the eighteenth century, Immanuel Kant had challenged both the rationalist and the empiricist strands of Enlightenment epistemology. He agreed with the empiricists that reason alone can teach us nothing and that knowledge must come from sense experience. At the same time, sense impressions, unless organized by some kind of a priori categories, were meaningless, and thus empiricism alone was inadequate. The result was that humans could never know the world as it actually exists. They could know only appearances.

In the realm of science, Charles Darwin's *On the Origin of Species,* published in 1859, placed humanity within the animal kingdom, thus calling into question whether men possessed a privileged position from which they could rationally perceive the world. Within a few decades, Sigmund Freud began to explore the workings of the unconscious mind, further challenging man's claim to rationality and freedom. The emerging social sciences of the late nineteenth and early twentieth centuries, particularly behaviorist psychology, sociology, and anthropology, treated human behavior as biologically, socially, and culturally determined rather than as the product of reason or free choice. Karl Marx in particular proposed a theory of economic determinism, in which human behavior was shaped by the means of production. All of these developments coalesced to create a vision of humanity as consisting not of autonomous, rational actors in the Cartesian tradition but merely of intelligent animals responding to their environment.

Developments in linguistic theory further undermined man's claim to rational thought. Ferdinand de Saussure, a leading nineteenth-century linguist, argued that words refer to other words, not to objects in the world. That is, language is a closed, self-referential system, not a mechanism that exactly represents reality. By the mid-twentieth century, Edward Sapir and Benjamin Lee Whorf proposed their hypothesis that language actually determines an individual's perception of reality. That is, rather than inventing words to reflect objects in the world, people perceive the world in terms of the words they know. Thus, knowledge is shaped by language, which is a cultural phenomenon. The beginning of knowledge is not individual introspection, but collective inquiry, because we think in socially constructed categories.

The methodological critique also drew strength from a romantic, historicist tradition that emerged during the early nineteenth century in reaction to the mechanical worldview of the Enlightenment. Whereas Enlightenment liberals envisioned societies of rational individuals governed by timeless and universal law, the romantics placed greater emphasis on the historical, contextual, and nonrational aspects of human life. Individuals were to be understood not as autonomous citizens of the world but as members of a nation formed by, and sharing in, the myths and beliefs the nation held at a particular time. The historicist tradition was reinforced by Darwin's work, which demonstrated the evolving and contextual nature of human existence.

In the early twentieth century, Newtonian physics, the cornerstone of the Enlightenment vision of the universe, came under attack. Albert Einstein's theory of relativity asserted that time moves at different rates for observers moving at different velocities. Einstein also found that matter and energy, which had been understood as the irreducible minima of the universe, in fact could be converted into each other and that even time and space were on a continuum. Werner Heisenberg's uncertainty principle asserted that, at least at the subatomic level, phenomena are changed by the act of being observed, and the quantum mechanics of Max Planck and Niels Bohr found that subatomic phenomena could best be described for some purposes as taking the form of a wave and for other purposes as taking the form of particles. The discovery that the movement of subatomic particles at best could be predicted only with degrees of probability suggested that if nature at its most elementary level was indeterminate, the search for certain knowledge was futile.

The effect of these developments was to cast into doubt the Enlightenment assumption that humans could understand ultimate reality by either the exercise of reason or empirical observation. Instead, all knowledge was perspectival or situational—the world was understood differently by human observers according to their circumstances. Thus, judges could not be completely objective or rational observers.

The metaphysical element of the critique of Enlightenment philosophy raised the question whether there was an ultimate reality to be perceived. Enlightenment metaphysics had rested on its epistemology, and with the epistemology under attack, the metaphysics collapsed. Nineteenth-century philosopher Friedrich Nietzsche declared that God was dead and that there were no facts, only interpretations. Late-nineteenth-century pragmatist philosophers, most prominently William James and John Dewey, influenced by the consequentialism of utilitarianism and the contextualism of the historicists, abandoned the attempt to determine whether propositions were a priori true and measured the truth of an idea only by its consequences. Early-twentieth-century anthropologists who conducted ethnographic studies of primitive societies found cultures functioning successfully based on widely varying moral beliefs, which suggested that ethical principles were culturally determined and did not have ontological existence. Again, twentieth-century relativity theory and quantum mechanics called into question whether there was a "true" characterization of any phenomenon.

Early-twentieth-century thought, in short, seemed to dismiss the possibility of a meaningful metaphysics. There were no fixed truths to be known. Further, the claims of rationalism and empiricism having been debunked, there appeared to be no privileged means of knowing. For the postmodernists, then, there was only endless critique.

Postmodern philosophy in the mid-twentieth century produced two principal movements. The existentialists, such as Martin Heidegger and Jean-Paul Sartre, following Nietzsche, argued that in the absence of God or truth, men are free to be what they wish and must choose the principles on which to base their actions. Existentialism is sometimes characterized by the proposition that "existence precedes essence"—meaning that the only thing certain about man is his existence and that his nature, his essence, is established only through his own actions.

The linguistic analysts, following Ludwig Wittgenstein, attempted to reduce philosophy to the analysis of propositions. Questions of philosophy, they argued, resulted from misunderstandings of language. The task of the philosopher, then, was to analyze language and to resolve questions by correcting linguistic errors.

### *B. The Political Critique*

Formalism was subject to a political critique based on disagreement with both the formalist vision of society and the political uses of formalist legal theory. This critique held that formalism was out of step with reality and that it led to judicial decisions that were inconsistent with majority rule.

The problem with the formalist vision of society was that it denied the relevance of social hierarchy. By bringing all cases under a few general rules, formalism treated all people in the same way. Thus, for example, consumer contracts, employment contracts, and commercial contracts were all governed by a single body of contract law. A laborer negotiating with her employer was governed by the same rules as two merchants negotiating with each other. Inequalities in wealth, knowledge, or power were irrelevant.

The formalist vision drew on the liberal conception of society as an aggregation of rational, autonomous individuals. In the Lockean concept, all persons were born free and equal. With that premise, there was no justification for narrowly drawn and detailed laws that attempted to distinguish among persons based upon their individual circumstances.

The industrialization of America in the nineteenth century seemed to many to destroy the plausibility of the Lockean vision. At the end of the century, American society was characterized by gross inequities of wealth, power, and opportunity, to the disadvantage of workers, farmers, women, and racial and ethnic minorities.

Formalist judicial decisions, such as *Lochner v. New York*, voiding New York's maximum hour law for bakers on the ground that it interfered with the bakers' liberty of contract, were attacked by progressives as hopelessly blind to social reality.[4] Bakers were not, in fact, equally free with their employers to negotiate their contracts.

Much formalist jurisprudence was also criticized as simply inconsistent with majority sentiment and thus undemocratic. Justice Oliver Wendell

Holmes Jr., began his dissent in the *Lochner* case with the observation that "this case is decided upon an economic theory which a large part of the country does not entertain."[5] The Great Depression that began in 1929 solidified a substantial electoral majority against the political consequences of formalism and ushered in the New Deal of President Franklin Delano Roosevelt. By the end of the New Deal, the progressive opponents of formalism constituted a consistent majority of the U.S. Supreme Court, and the term *Lochnerism*, referring to the New York bakers' case, had become a term of opprobrium.

## IV. Legal Realism

The methodological attack on formalism was led by Oliver Wendell Holmes Jr., a lawyer, Harvard Law School professor, and justice of both the Massachusetts Supreme Judicial Court and the United States Supreme Court. His incisive critique of formalism led to its eventual demise and established for him a reputation as America's greatest legal philosopher.

The shift to legal positivism in the early nineteenth century had represented a shift from law as a divine creation or a natural occurrence to law as a human creation. Holmes understood the consequences of this shift: as human creations, the conceptual categories of the law, such as property or liberty, were not self-defining, but manipulable and thus often incapable of determining results.

Holmes, in other words, denied the central premise of formalism: that abstract rules could be mechanically applied to decide individual disputes. He summarized his view in one of his most famous epigrams, written in *Lochner v. New York*, in which he said that "general propositions do not decide concrete cases."[6]

Holmes believed that judges actually decide cases not by formal deduction from rules but by reference to policy considerations. As he explained in his 1881 book, *The Common Law*: "The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."[7]

Holmes's work thus mixed the historicist, pragmatist, and positivist themes in nineteenth-century thought. Law was not a fixed body of rules having ontological existence but the evolving product of historical circumstances.

Over the course of the next half century, an increasingly large number of lawyers and judges came to accept Holmes's view that formalism did not describe the actual process of adjudication. Roscoe Pound, the dean of the Harvard Law School from 1916 to 1936, founded a movement known as sociological jurisprudence, which he regarded as a movement for pragmatism as a philosophy of law. Pound insisted that judges be sensitive to the actual facts of the world, to the issue whether, for example, laborers were truly equal to their employers and thus able to bargain freely, and emphasized the ways in which law in action could differ from the law in books. He proposed that judicial decisions be made through the weighing of policy interests, a proposal regarded by some as the origin of modern "balancing" tests, and referred to judges approvingly as social engineers.

By the 1920s, a new school of jurisprudence, known as legal realism, had developed around the attack on formalism.[8] The logical positivists of early-twentieth-century philosophy asserted that only propositions that could be empirically verified were true. Truth was accessible through science. In much the same way, the legal realists of that era believed that social science could rescue law from the collapse of formalism.

In looking to science, the realists might at first be thought to share the methodology of the formalists. In fact, however, whereas Langdell had seen in science primarily the deductive rationalism of Descartes, the legal realists were drawn to empiricism. Thus, the move from formalism to legal realism represented an epistemological shift from a deductive science to a more empirical one. Science would reveal for the legal realists how the law actually operated in practice and thereby provide a basis for sound decisions. While Langdell originated the casebook, consisting entirely of excerpts from appellate decisions, the legal realists added commentary and other documents intended to place the law in context and renamed the books as collections of "cases and materials."

Legal realism also reflected a shift in the metaphysics of American legal thought. Despite the name, realism in fact represented a move from the realist metaphysics that dominated the Enlightenment to a nominalist metaphysics. The legal realists saw legal concepts as merely empty labels placed

on phenomena by a society. The concept of property, for example, had no intrinsic content. To declare that some legal interest was property did not necessarily say anything in particular about that interest. One could not deduce any specific conclusion from the designation of the interest as property.[9]

Indeed, some of the best-known work of the realists consisted of attempts to ridicule the formalists' reification of legal concepts. Felix Cohen, for example, wrote a much discussed article, "Transcendental Nonsense and the Functional Approach," in which he posed questions such as "Where is a corporation?"[10] His point was that a corporation is a concept, not a thing; it does not exist anywhere. A court may choose for policy reasons to treat a corporation for some purpose as if it were "present" in a particular location. Such a result, however, is justified on the grounds that to treat the corporation as present in the jurisdiction is sound policy, rather than on the grounds that the corporation is actually there.

The skepticism about the determinacy of rules was accompanied by a reconceptualization of the categories of the law. The formalists had conceived of the law as creating sharply defined categories into which factual situations could be placed. Each category was associated with a specific legal consequence. Thus, the placement of a situation in a particular category determined the rights or duties applicable to that situation. Drawing upon developments in twentieth-century science, the realists no longer believed that the phenomena of the world fell into natural categories, such as matter and energy or space and time. The dominant model of reality was no longer categories, but continua. Coercion and free will, for example, defined opposite poles of a continuum, not two mutually exclusive categories. Thus, facts did not fall into a category, but along a continuum. Legal reasoning was not a process of categorizing distinct phenomena, but rather of drawing lines to create distinctions among essentially indistinguishable phenomena. Such a process could not be mechanical in the way that formalism imagined adjudication; it necessarily involved the exercise of judgment.

Scientific advances, particularly those in the social sciences and in evolutionary biology, had called into question the rationality of the human mind. Judges could be regarded not as logicians applying rules, but as intelligent animals responding in both rational and nonrational ways to their environment and impulses. One legal realist, Jerome Frank, wrote a book titled *Law and the Modern Mind* in which he explored the psychology of judging.

He argued that judges decide cases by intuiting the correct result and then consulting the rules to find a justification for their decision. Indeed, as early as 1921, Benjamin Cardozo, later a justice of the U.S. Supreme Court, had delivered a series of lectures published under the title *The Nature of the Judicial Process* in which he had discussed the subconscious element in judicial decision making.

Legal realism was characterized not only by skepticism about the technique of formalism but also by a disagreement with the political views of the formalists. The realists were sympathetic with Franklin Roosevelt's New Deal. They favored a legal system that was much more willing to regulate economic activity to protect the weaker members of society against the strong.

The realists challenged the efforts of the formalists to state legal rules at a high degree of generality. Even apart from the emptiness of the categories, the realists contended that because there were inequalities within society, for the law to treat everyone the same was in fact to give preference to the stronger. For example, to treat a worker and an employer simply as two equals engaged in freely negotiating the terms of an employment contract was to deny the reality that the worker may have had little true bargaining power. Realists were more likely to evaluate judicial decisions according to their actual effect on society, rather than according to their consistency with prior cases or abstract rules.

If the realists were correct and judges were not deciding cases by the mechanical application of rules, then formalism was simply a fiction used by judges to legitimate decisions based on their own political views. Because judges were not elected, that method of adjudication seemed undemocratic. Moreover, if the judges were not mechanically applying rules, then adjudication was not the uniform, predictable process that formalism had promised.

The realist critique of formalism was devastating. All of the virtues of formalism had rested on the assumption that rules could be applied mechanically. Yet the realists were unable to articulate a new theory of adjudication that avoided resorting to the judge's individual policy preferences. To advocate that judges simply decide cases based on their personal preferences seemed profoundly inconsistent with American democratic theory, under which the people make the laws and judges merely apply them. The realists had destroyed formalism, but they could offer no entirely acceptable theory with which to replace it.

The realists generally favored certain techniques. They believed that the process of applying a rule required an examination of the policy behind the rule. Their preferred method of adjudication was a case-by-case balancing of policies in light of the facts of the particular case, with consideration given to how the rule would operate in practice. They disfavored grand statements of abstract rules. Such rules offered a false hope of predictability and obscured the true nature of the policy judgments that were required.

Some realists proposed the use of social science techniques to study the operation of the law in practice. Realist law professors launched ambitious empirical projects to study social behavior, the functioning of the legal system, and the relationship between the two. Yale law professor Underhill Moore, for example, studied parking and traffic patterns in New Haven, Connecticut, during the 1930s in an effort to determine the extent of compliance with municipal ordinances under various circumstances. The hope was that social science could replace formal rules as the basis for structuring legal rights and duties. Realists particularly favored legislative reform and the codification of the common law to remove obscurity and to place the law firmly on the pillars of scientific research. Karl Llewellyn, for example, a leading realist, was the principal draftsman of the Uniform Commercial Code during the 1940s.

Legal realism thus had both a critical and a constructive strand. The critical strand emphasized the indeterminacy of rules and was directed at debunking the claims of formalism and proving that general concepts could not conclusively decide specific disputes. The constructive strand attempted to use emerging social science techniques to guide the work of legislatures and courts.

To a large extent, however, the social science studies undertaken by the realists did not seem to accomplish much. The results were often inconclusive or trivial. Further, it was never clear how the descriptive project of studying the law in practice could perform the normative task of determining what the law should be.

By the mid-1940s, legal realism as a movement was in eclipse. At a time when the United States was waging a world war against fascism and then a cold war against communism and contended that American political and legal institutions were superior to those of its ideological foes, legal realism's critique of legal reasoning and its lack of normative content seemed to un-

dercut the claim of superiority or at least render it more difficult to advance. As the cold war became a dominant force in American life and America tired of New Deal reforms, the country turned in a more conservative direction. As a reformist movement, legal realism did not fit the ideological temper of the 1940s and 1950s. Further, its constructive program seemed to lead to a methodological dead end in any event.

Legal realism left important legacies, however. One was its claim that social science methods should be used to evaluate the effects of law in practice. Another, more controversial, legacy was its claim that the law is often indeterminate, and thus adjudication is a matter of politics, not reason. That is, judicial decisions are the product not merely of the logical application of rules, but reflect political, economic, social, cultural, and other trends in society.

## V. Contemporary Mainstream Legal Reasoning

Legal philosophy since the middle of the twentieth century has been dominated by efforts to respond to the realist critique. In the 1950s, a number of scholars engaged in similar kinds of arguments became known as the legal process school, whose most prominent figures were Professors Henry Hart and Albert Sacks of the Harvard Law School. The legal process school contended that legal decisions should be allocated to the institutions most competent to make them. Thus, courts should refrain from making certain types of decisions because those were best left to the legislature. Where a court was the appropriate entity to decide, the judge should make the decision through a process of "reasoned elaboration," that is, by writing opinions that carefully explain (and accurately reflect) the basis of the decision. Further, the decision should be based on legal principles, rather than political considerations, which they sometimes referred to as "policies." Such an approach, they believed, would provide the necessary constraint on judicial decision making. The legal process school thus sought to rescue law from the legal realist critique, that is, to demonstrate that law could to some extent transcend politics.

Beginning in the 1960s, a number of new movements emerged in the legal academy, several of which are discussed in chapter 12. Many in these later movements regarded the idea that judges could or would decide cases

based only on the rational application of neutral principles as naive. As legal scholars flocked to these new movements, the legal process movement faded. Yet mainstream legal reasoning today has much in common with the legal process school. Lawyers and judges behave as if cases are decided by the rational application of rules and their underlying principles, although the word *policies* is more often used than *principles* and includes a much broader array of considerations than legal process theorists would have considered appropriate. Adjudication, however, is treated as a rational process, a process of "legal reasoning." Lawyers acknowledge that a judge's own values do play a role in the decision. This is regarded as a perhaps inevitable flaw that should be avoided whenever possible, but that in the meantime the lawyer probably will use to tactical advantage.

The result of the realist critique is that mainstream legal reasoning at the beginning of the twenty-first century is a sort of modified formalism. Most lawyers today are neither formalists nor realists. Formalism is too discredited to provide a complete philosophy of legal reasoning. At the same time, realism never developed a suitable substitute and thus never entirely displaced formalism as the dominant mode of legal reasoning.

As modified formalists, mainstream lawyers do not think all cases can be decided by the mechanical application of rules, but neither do they think adjudication is entirely unconstrained. Sometimes the rules dictate the results, and sometimes they do not. Lawyers speak of cases as being "easy" or "hard." An easy case is one in which it appears that a rule seems to determine the outcome. A hard case is one in which the rules do not seem to require one specific result.

When a case is easy, lawyers generally expect that the rules can be applied in the essentially mechanical way contemplated by formalism. When a case is hard, the rule is applied so as to further the policies underlying the rules.

The justification for judicial power in contemporary mainstream legal thought rests on the assumption that law is determinate enough that most transactions never give rise to a dispute, most disputes are resolved without adjudication, adjudication in most cases is constrained by the law, and the limited judicial discretion exercised in comparatively rare hard cases is simply a function of the unique role assigned by the Constitution to the courts. Thus, in the mainstream view, the power of the judge to exercise discretion

in deciding the occasional dispute in which the law is silent or unclear does not delegitimate the entire legal system.

Jurisprudential debates in the postrealist era, however, have been dominated by the question of whether the resolution of legal disputes on policy grounds is consistent with democratic government or is an illegitimate usurpation of power by unelected judges. One important result of this debate has been the rise of several different schools of thought concerning how to address the problem of legitimacy. Just as legal realism began as an academic discussion that found its way into mainstream legal practice, the work of these modern schools is certain to have an impact on legal practice in the future. Some of these new schools of thought are the subject of the next chapter.

12

# CONTEMPORARY PERSPECTIVES ON LEGAL REASONING

Contemporary mainstream legal reasoning has been the subject of extensive commentary and criticism by several schools of legal thought that have emerged since the 1960s. This chapter provides a very brief introduction to several of these schools.

The reader is cautioned that schools of legal thought typically comprise a diverse collection of scholars who disagree among themselves in many respects and who may share little more than a particular political orientation or a methodological technique. Thus, the brief summaries here cannot begin to describe adequately the variety of approaches within each school, and the generalizations about each school may not apply to many of those regarded as members of the school.

The purpose of this chapter is not to survey the full range of legal scholarship on the subject of legal reasoning at the beginning of the twenty-first century. Rather, this chapter seeks only to introduce the reader to some of the most prominent contemporary perspectives on mainstream legal reasoning, particularly those that have been a force in legal education for at least a couple of decades and thus seem most likely to have a long-term impact.

Without a doubt, much scholarly work that is not discussed in this chapter will make a significant contribution. For example, many legal scholars utilize interdisciplinary approaches to the law, focusing on how the law is shaped by the context in which it operates. One of these interdisciplinary approaches, known as law and economics, is a major school and is discussed separately below. Legal scholars, however, also draw on history, sociology, psychology, anthropology, literary criticism, and other disciplines to better understand the law and legal reasoning. Much of this work is performed by scholars who identify themselves as members of the law and society movement, a very broad-based group formed in the 1960s that studies law in its social context and is in many respects an extension of the legal realist movement. Some law schools now seek to appoint to their faculties candidates who have a Ph.D., often in one of the social sciences, in addition to their law degree. As might be expected, given the popularity of interdisciplinary approaches to law, legal scholars are increasingly engaging in empirical research. These increased emphases on interdisciplinary and empirical work will not only strengthen existing schools, such as law and society and law and economics, but likely give rise to new schools of legal thought as well.

## I. Law and Economics

The beginning of the contemporary law and economics school is often traced to an article written in 1960 by Professor Ronald Coase of the University of Chicago.[1] Coase began with the observation, already noted in chapter 8, that injuries are jointly caused. Consider the example of farmers whose crops are located near railroad tracks and are burned by sparks from passing trains. Many intuitively would regard the train as the cause of the loss. If the railroad tracks were in place before the farmer decided to plant crops in that location, some might regard the farmer's decision to plant near the tracks as the cause of the harm. In fact, however, the cause of the injury is both the emission of sparks by the train and the decision of the farmer to plant crops in that location.

Although the harm is jointly caused, the law must determine which party shall bear the loss. The law can either impose liability on the railroad or leave the farmer to suffer the loss. Coase proposed what became known as the "Coase theorem." He argued that, if there were no transaction costs involved

in bargaining, then the parties through bargaining would impose the cost on the party that could most cheaply avoid the harm.

Assume that the cheapest way to avoid the harm is for the farmer simply not to plant crops near the railroad tracks. If the railroad is made liable for the loss, the railroad will pay the farmer not to plant crops because that will be cheaper for the railroad than preventing the emission of sparks. If the railroad is not made liable, the farmer will cease planting crops near the tracks. Thus, if the cheapest way to avoid the harm is for the farmer not to plant, regardless of whether the railroad is made liable, the end result will be that the harm will be avoided by the farmer not planting crops.

Assume that the cheapest way to avoid the harm is for the railroad to prevent the emission of sparks. If the railroad is made liable for the loss, the railroad will take the necessary steps to prevent spark emission in order to avoid liability. If the railroad is not made liable, then the farmer will pay the railroad to prevent emission of sparks, because that will cost the farmer less than suffering the loss. Thus, if the cheapest way to avoid the harm is for the railroad to prevent spark emissions, regardless of whether the railroad is held liable, the end result will be that the harm will be avoided by the railroad's preventing the emission of sparks.

In short, the Coase theorem holds that, where no transaction costs exist, the content of the legal rule does not matter for purposes of reaching the most efficient result. Regardless of the rule, the parties will bargain to ensure that the harm is prevented by the cheapest cost avoider. That is, in the absence of transaction costs, the parties will bargain to yield the most efficient result.

Coase recognized that transaction costs are often significant, in which case the parties may choose not to bargain. He suggested that, where private bargaining will not occur, the law should require the result that the parties would have reached through private bargaining in the absence of transaction costs. He emphasized, however, that government regulation itself imposes costs and that sometimes the most efficient course of action is to do nothing about the problem at all. One inference widely drawn from Coase's argument was that government regulatory activity should be curtailed.

The Coase theorem has been criticized on several grounds, apart from the fact that transaction costs always exist. One criticism is that the decision of where to impose liability potentially has major consequences for the participants in the transaction. Consider, for example, the situation where the

cheapest way to avoid the harm is for the farmer not to grow crops. If the railroad is held liable, it will pay the farmer not to grow crops. If the railroad is not held liable, the farmer will not plant crops, but will receive no payment from the railroad. Under either rule, the farmer will not grow the crops. Under one rule, however, he is compensated, while under the other rule he is not. Thus, the parties to the transaction may care deeply about which rule is adopted.

This criticism becomes especially salient when the injury involves not property rights but personal rights. Application of the Coase theorem to violent conduct suggests that, in the absence of transaction costs, it does not matter whether the law prohibits murder or rape. If avoiding the crime is worth more to the potential victim than committing the crime is worth to the potential perpetrator, the former will simply pay the latter not to commit the crime, and society will benefit from this socially optimal use of resources. Yet no one really imagines that, in a world of low or no transaction costs, the state should repeal laws prohibiting murder or rape and allow the parties to negotiate. Thus, the Coase theorem does not take into account deeply held moral beliefs.

Another criticism is that, even apart from high transaction costs, the bargaining envisioned by Coase may not occur because those denied a right initially may be too poor to purchase it. Alternatively, those who have the right may simply refuse to sell it (even though it would be efficient for them to do so) because they have no need for the money. These problems are known as "wealth effects," because the behavior of the participants in the transaction is influenced by their initial wealth. Of course, at the time the rule is fashioned, a court or legislature does not know whether the person who should purchase the right will be able to afford it or the person who should sell the right will do so. The court or legislature cannot assume that people will act as the model predicts.

A third criticism is that the Coase theorem fails to take into account the "endowment effect." A number of psychological studies have demonstrated that an individual who has some entitlement will demand more to surrender that right than she would have paid to buy it.[2] Thus, purchasers may be unwilling to pay the price sought by sellers.

In any event, the Coase theorem inspired others to begin to analyze the economic consequences of various common law and statutory rules. By the

1970s, the law and economics school was an important force in legal education. Today, a vast and sophisticated literature on the economic analysis of law exists, and some of the insights produced by this literature have been employed by the courts. In 1991, Coase won the Nobel Prize in Economics for his 1960 article and an article he had written in 1937 on the nature of the firm.

One of the most influential proponents of law and economics theory has been Richard Posner, formerly a professor at the University of Chicago and now a judge on the United States Court of Appeals for the Seventh Circuit. Judge Posner's judicial opinions are an important means by which law and economics theory has begun to influence the development of legal doctrine.

The early practitioners of law and economics theory believed that they had an approach that eliminated the indeterminacy of policy judgments. Their premise was that the legal system, rather than referring on an ad hoc basis to various individual policy preferences, should adopt the rule in every case that would lead to the most efficient use of economic resources.

For example, a proponent of law and economics theory might oppose publicly funded lawyers for poor plaintiffs.[3] If the case has any merit, goes the argument, a lawyer will be found who will take it, even if only on a contingent fee basis. If the case does not have merit, then it should not be brought in the first place and most certainly should not be brought at taxpayers' expense. In other words, the operation of a free market will guide lawyers to the meritorious cases. By appointing lawyers, the state wastes resources on meritless cases, contrary to the policy of wealth maximization.

Adherents to law and economics theory sometimes claim that the policy of efficiency provides the principled basis for adjudication that, as it had turned out, formalism could not. At the same time, law and economics theory generally reflects the same promarket bias as late-nineteenth-century formalism and classic liberal economics.

In addition to making the normative claim that the law should promote efficiency, law and economics theoreticians have also made a number of descriptive claims. One of these is the claim that the common law in fact embraces the value of efficiency, and thus legal rules, if their effects were analyzed, would be found to promote efficient results. For example, under Judge Learned Hand's well-known formula, the law of negligence imposes liability on those who fail to take precautions to prevent accidents when the

cost of prevention is less than the potential liability, discounted by the probability that the loss will occur, while exonerating those who do not take precautions when the cost of prevention is greater than the probable loss.[4] In this way, the law of negligence imposes liability on an actor only when that actor behaves inefficiently. Another descriptive claim is that people actually behave as rational maximizers of their individual economic well-being. Again, the link between law and economics and classic liberal theory is clear.

Criticisms of early law and economics theory centered on both its political orientation and its methodological assumptions. Progressive critics of law and economics theory disagreed that wealth maximization should be identified as the primary goal of the law. They favored a system that, at times, may seek other goals, such as compensating injured victims or protecting the vulnerable against the more powerful, as in the case of laws to protect consumer safety.

They also observed that efficiency, as an essentially utilitarian value, is destructive of individual rights. For example, a negligence rule that exculpates an actor who declined to prevent an injury because the cost of prevention was greater than the potential loss may conserve the resources of the society as a whole, but it leaves the victim with an uncompensated injury. That is, the society prospers, though at the expense of those who have the misfortune of suffering the injuries for which the negligence rule does not require compensation.

For example, in the 1970s, Ford Motor Company built an automobile called the Pinto, the gas tank of which tended to explode in the event of a rear-end collision at more than twenty-five miles per hour, severely burning or killing the passengers. Eventually, it was discovered that Ford had been aware of the problem, but calculated that the cost of preventing the explosion would be $11 per car. Given the number of Pintos Ford expected to sell, the total cost of prevention would have been more than $100 million. At the same time, Ford estimated the number of cars likely to be involved in collisions leading to an explosion and the number of burn victims. Knowing the average jury award in cases involving similar injuries or deaths, Ford concluded that the cost of compensating all the victims would be less than the cost of preventing the explosions. Accordingly, Ford decided not to modify the Pintos to prevent the explosion. Under a negligence rule that adopts the

utilitarian approach of law and economics, Ford should not be held liable to the burn victims because its conduct was economically efficient.

Even assuming that efficiency is the primary goal, these critics also questioned whether the market, in fact, is the most efficient means of allocating resources. Market economics rests on a number of assumptions, such as the availability of information, the absence of transaction costs, and the absence of barriers to entry, that may not be true in practice. Economists use the term *market failure* to refer to situations in which the conditions assumed by market theory do not exist in practice. For example, to return to the example from above, an indigent with a meritorious legal claim may not be able to obtain a lawyer through the free market because in fact the parties do not have sufficient access to the necessary information. Lawyers may be unaware of the claim and unable to learn about it without incurring prohibitive costs. Indigents may be unacquainted with private attorneys and uncertain how to find a qualified attorney to represent them. Thus, deference to the market may not yield the results promised by market theory.

In fact, critics have charged that much law and economics scholarship is based not on empirical research but on deductions from unexamined assumptions, such as the premise that humans are rational maximizers of their self-interest. This criticism regards the law and economics school as having more in common with Langdellian formalism than with social science. Recognizing the force of this critique, some practitioners of law and economics have begun to conduct empirical experiments in the field of behavioral economics, investigating the extent to which behavior is influenced by nonrational factors. Such factors may include wealth and endowment effects, already mentioned above, as well as other cognitive biases, such as those discussed briefly in chapter 4. As the law and economics school has grown, its research has become increasingly empirical, although mathematical models of behavior remain an important part of its work. Some law and economics practitioners respond to these criticisms by arguing that no science can study a phenomenon in its totality and that scientific investigation requires simplifying assumptions.

Critics have also challenged the conservative political bias of law and economics theory. A system that values a choice according to the dollar amount that an individual is willing to pay for that choice necessarily gives preference

to those who have the most money and can pay the most for the satisfaction of their whims. And, if one believes in the diminishing marginal utility of money,[5] then in a society where some have more money than others, dollars do not represent a uniform or constant method of valuation. In this view, law and economics theory uncritically reinforces the existing distribution of wealth by disproportionately valuing the preferences of the wealthy.

These criticisms of law and economics theory, in combination with a growth in the numbers and thus the diversity of practitioners of that theory, have resulted in a moderation of some of the claims made by the early theorists. Increasingly, at least some proponents of law and economics theory no longer see efficiency as the only or as the central value of the law, but as merely one of many values to be promoted. The value of law and economics theory in this view is that when efficiency is the preferred value, it provides a scientific basis for selecting the best result, and when other values are preferred, it demonstrates how those values can be promoted in the most efficient way.

In this incarnation, law and economics theory loses some of its conservative coloration. Once efficiency is deprived of its privileged status among values, law and economics theory seems predominantly a claim that judges should use social science, more specifically economics, as an aid to reaching decisions. That is, deprived of its normative claim, law and economics theory appears more than anything else to constitute a revival of the legal realist tradition, without the progressive political agenda. More specifically, law and economics theory shares with legal realism a belief that, with the death of formalism, law can be resurrected as a social science.

## II. Critical Legal Studies

While law and economics theory is a principal heir to the constructive, social scientific strand of legal realism, the modern successor to its critical strand and the keeper of its progressive political flame was a movement called critical legal studies (CLS).

The origin of CLS as a movement is generally traced to a conference organized in 1977 by a small group of law professors, including Harvard law professors Duncan Kennedy, Morton Horwitz, and Roberto Unger; Wisconsin law professors David Trubek, Mark Tushnet, Tom Heller, and Stewart

Macauley; UCLA law professor Richard Abel; and Rutgers law professor Rand Rosenblatt. The conference brought together a number of scholars whom the organizers believed were engaged in similar kinds of work, including in particular a number of scholars involved in the law and society movement. By the mid-1980s, the movement had become a major presence in American legal education. Even those who were not proponents of CLS often found themselves defining their position in opposition to that of prominent CLS scholars.

By the mid-1990s, however, CLS as an organized movement had collapsed, although those who belonged to the movement continued to write and teach, and thus their ideas continued to influence legal thought. One reason for the collapse of the movement was that many of the younger members of CLS were women or people of color who rebelled against a leadership that was predominantly white and male and that, in their view, was insufficiently interested in issues relating to race and sex. Those who might otherwise have formed the next generation of CLS scholars began to identify their work as part of feminist legal theory or critical race theory, both of which are discussed below. As significant parts of the CLS movement splintered into new schools, the CLS movement disintegrated.

At its core, CLS combined a skepticism about the determinacy of textual interpretation with a leftist political orientation. Defined this way, CLS appears almost indistinguishable from legal realism. Indeed, one is tempted to see it as a continuation of the realist critique of formalism by people who in many cases are farther to the left politically than were the New Deal realists. Such a view, however, overlooks the fact that the CLS movement emerged a full half century after legal realism and thus shows to a much greater degree the impact of postmodernism on legal thought.

In the postmodern view, there are no foundational principles that permit the derivation of other assertions. That is, certain knowledge cannot be obtained either by deduction from intuited first principles or by empirical observation. The individual is not an autonomous, self-generating entity, but rather a social creation. Thus, there is no knowledge, only belief—and that belief is socially constructed.

Some of the work of the CLS movement involves an analysis of the premises underlying various legal rules in an effort to demonstrate that the rules are the product of choices between various sets of inherently conflicting and

irreconcilable values. This approach, generally referred to as structuralism, is often traced to the work of twentieth-century anthropologist Claude Lévi-Strauss, who believed that human understanding rests on "deep structures" of binary opposites. Each member of the pair can be understood only in reference to the other.

A structuralist analysis of the law begins with the premise that a court deciding any given case must choose between different outcomes, each of which is justified by one of the opposing values. Because the American legal system assumes the validity of both opposing values, a coherent argument can be made in favor of either result. To choose repeatedly the result that favored one of the values would completely negate the other value, a consequence to be avoided because the other value has an assumed validity. Thus, each case presents anew the question of which value is to be preferred in that instance.

The courts avoid both extremes, choosing one policy in most cases but never ruling out the possibility that the opposing policy may prevail in the next case. CLS scholars claim that a conservative, market-oriented ideology will prevail most of the time because of the political preferences of most judges in American society. The larger point, however, is that the choice of which ideology prevails is not dictated by a rule but is a matter of the ideological preferences of the judge who hears the case. Law, in other words, is not neutral, but political. Judicial decisions are the product of power rather than reason.

The CLS movement also attempted to describe how judges write their opinions in a way that obscures the political nature of adjudication and attempts to justify their decision as consistent with, or even compelled by, the language of a rule, widely shared principles of justice, or sound policy. CLS scholars view legal doctrine as constituting an elaborate facade of legitimacy and inevitability that masks the political and contingent nature of judicial decisions. Many CLS scholars are especially critical of liberalism, which they believe legitimates the status quo through its rhetorical embrace of ideas of liberty and equality, but has failed to deliver a sufficiently egalitarian society. That is, liberalism offered just enough reform to defuse calls for more radical reform, but without threatening in any significant way the existing distribution of wealth and power. This is another respect in which CLS differed from legal realism. The legal realists generally were liberals.

The CLS analysis of legal texts sometimes draws upon a technique associated with the French literary critic Jacques Derrida, known as deconstruction. As practiced by CLS scholars, the deconstruction of a legal rule consists of identifying the conflicting policies that justify the rule and then demonstrating that those policies are equally consistent with a variety of other rules, including perhaps those that are antithetical to the original rule being deconstructed.[6] The technique is thus based on a strong view of legal indeterminacy.

The CLS movement is also defined by its leftist political orientation. As discussed in chapter 11, the effect of demonstrating that courts adopt rules based on political preferences is to undercut the legitimacy of the judicial process in a democracy. The CLS movement attacked the legitimacy of current mainstream legal thought in order to pave the way for change to a more egalitarian or communitarian society. Yet CLS adherents did not share a detailed political program. For the most part, CLS scholarship was not much concerned with specific, practical reforms in the realm of law or politics.

Like the legal realist movement, the CLS movement was much more successful at critiquing mainstream legal thought than at proposing a coherent theory to take its place. And, indeed, those CLS scholars most heavily influenced by postmodern thought, sometimes referred to collectively as the irrationalist strand of CLS, believe that the construction of a coherent theory is impossible. In this view, any theory that one might propose is subject to a deconstructive critique.

It is this absence of an affirmative methodological or political program that gave rise to perhaps the most powerful criticism of the CLS movement. Its members were sometimes denounced as nihilists because they pressed on with their efforts to delegitimate the American legal system without having a clearly defined alternative.

Indeed, opponents contended that the CLS movement proved both too little and too much. On the one hand, the CLS opponents said, the CLS movement greatly overstated the indeterminacy of the law. These opponents contended that, in common experience, the courts are controlled by precedent far more often than the CLS movement was willing to admit, that legitimate adjudication has never required absolute certainty of result, and that the movement could be regarded as much ado about very little. On the other hand, CLS opponents argued, the withering deconstructive critique

of the CLS movement undercut its own political program by leaving no basis upon which to prefer the egalitarian or communitarian values of CLS over any other set of values. Indeed, some civil rights lawyers seeking to end racial discrimination, who shared many of the political goals of the CLS movement, were concerned that the CLS critique of legal rights as indeterminate would undermine their efforts to use the law to achieve racial equality.

Legal realism was subject to similar criticisms—arguments that, on the one hand, its indeterminacy thesis was overstated, and that, on the other hand, legal realism was ultimately nihilist. The criticisms persisted and in the 1940s eventually helped to destroy legal realism as a movement.

Such criticisms, however, did not prevent legal realism from having an enormous impact on American law, although much of that impact was felt only after the ideologically compatible New Deal won success at the polls. And, since the death of the movement, many of its insights have survived as elements of mainstream legal thought, while much of its methodology has been resurrected by proponents of law and economics or critical legal studies.

The CLS movement has yet to claim the success enjoyed by the legal realists. While legal realism emerged at a time when the national political climate was growing more liberal, with the result that some important legal realist figures were appointed to political office by the Roosevelt administration, CLS emerged just as the nation was entering a period of conservative dominance, all but eliminating the possibility both that CLS adherents would be appointed to important political office and that leftist CLS ideas would be adopted as policy. Although the CLS movement has produced a creative and stimulating body of legal scholarship, its impact on legal practice is difficult to discern. Yet many CLS ideas continue to influence the work of those pursuing feminist legal theory or critical race theory, and thus the opportunity for CLS to influence legal practice is hardly at an end. Contemporary mainstream legal thought is highly eclectic, and one can anticipate that in time some CLS ideas will be absorbed into mainstream thinking about the law.

## III. Identity-Based Movements

### *A. Feminist Legal Theory*

Feminist legal theory rests on the contention that the American legal system is characterized by male domination of women. Feminist legal theorists seek

first to understand the ways in which the law subordinates women and then to initiate reforms that would end that subordination.

The feminist legal theory movement traces its origins to the late 1960s and early 1970s, when lawyers, inspired by the civil rights movement's quest for racial equality, began to challenge sex discrimination, particularly with respect to employment. An early goal of the feminist movement was the enactment of an Equal Rights Amendment to the U.S. Constitution, which would have prohibited government discrimination on the basis of sex. The amendment ultimately failed to gain a sufficient number of state ratifications to become law, but a series of U.S. Supreme Court decisions starting in the 1970s held that the equal protection clause of the Fourteenth Amendment prohibits sex discrimination unless it is substantially related to an important government interest.[7] The government interest that justifies the law may not include the perpetuation of traditional gender roles or stereotypes. This is the same clause of the Constitution that prohibits race discrimination, although the Supreme Court has treated the prohibition on race discrimination as stronger than that on sex discrimination. These Supreme Court decisions, in any event, eliminated much of the perceived need for the Equal Rights Amendment.

Early feminist lawyers argued that no justification existed for treating women differently than men, at least under the circumstances of the cases in which they were challenging specific discriminatory practices. In so doing, they necessarily emphasized the similarities between men and women. In this stage of its history, the feminist movement did much to eliminate sex discrimination under the law, but it had little to say about legal reasoning that was distinctive.

In the 1980s, a new school of feminist legal theory emerged that emphasized not the similarities between men and women but their differences. These "difference" feminists argued that requiring women to conform to a male norm constituted sex discrimination or, more generally, a form of male domination of women. Some prominent voices in this new school of feminists were women who had been part of the CLS movement and, for a time, were referred to as "fem crits."

A classic case that illustrated the problems with demanding simply that women be treated like men was *Geduldig v. Aiello*.[8] In that case, the Supreme Court held that providing insurance coverage for virtually every medical

condition except pregnancy did not constitute sex discrimination. The court noted that women were covered for the same medical conditions as men, and, therefore, they were treated equally with men. Thus, notwithstanding that the insurance plan excluded a condition that only women experienced, the court found no sex discrimination.

The argument that women are different from men soon moved beyond the obvious physical differences relating to human reproduction. Feminists of the difference school asserted that women have different values than men and different ways of approaching disputes. Deeply influential in the difference school was a book published in 1982 by Carol Gilligan, titled *In a Different Voice*. Gilligan had conducted experiments in which young boys and girls were asked to consider various moral dilemmas. From their responses, she inferred that males are rights oriented and try to resolve a dispute by determining which party has the superior right and, therefore, should win. She argued that females, by contrast, are relationship oriented and try to resolve a dispute by bringing the parties together in a mutually satisfactory resolution of their dispute.

Assuming that men and women in fact do approach disputes differently, the question arose as to the reason for these differences. Feminists did not agree entirely on the answer to that question. Some feminists argued that women in their role as mothers, or potential mothers, are called upon to be nurturing and to bond with their children, and thus they display an ethic of care and a concern for relationships in all their dealings with others. Some rested the female ethic on the biological experiences of women, observing that heterosexual penetration, pregnancy, and breast feeding are all experiences that connect women to others. These feminists sometimes were described as cultural feminists, because they regarded the difference between men and women as resting on their different cultural roles. Cultural feminists were sometimes criticized by other feminists, who warned that efforts by the difference school to create a distinct feminine identity risked reinforcing old gender stereotypes used to subordinate women in the past. These critics feared that drawing attention to the ways in which women are different from men would provide a justification for different treatment of women that would disadvantage them.

Other feminists, sometimes described as dominance feminists, of whom the most influential has been University of Michigan law professor Catharine

A. MacKinnon, argued that the law must be understood as an instrument of male domination of women. Thus, women are different because a male-dominated society has socialized women to be different. For example, women are more caring because men want women to care for them and, therefore, have defined the woman's role as that of a caregiver. Dominance feminists argued that many legal concepts that appear to be neutral are in fact biased in favor of the dominant group, particularly males. For example, the "reasonable person" standard used in tort law would define reasonable behavior as male behavior. The concept of consent as used in the law of rape would reflect male ideas of how consent is expressed. Dominance feminists, however, were challenged by other feminists who believed that the portrayal of women as victims was overstated and risked resurrecting old stereotypes of women as the weaker sex in need of special legal protection. For example, in the 1980s, Professor MacKinnon became involved in a controversial campaign against pornography, which she believed eroticized male domination of women and depicted women as nothing more than objects of sexual desire. Some feminists disagreed, arguing that the antipornography legislation proposed by Professor MacKinnon would curtail the choices available to women and deny the legitimacy of some forms of female sexual expression, which women might find liberating rather than degrading. Although dominance feminism has been controversial, it played an important role in establishing the principle that sexual harassment is a form of sex discrimination.

The difference feminists were launching a radical critique of legal reasoning. They were alleging that contemporary mainstream legal reasoning is a model of male reasoning that should be modified, supplemented, or displaced by a female model. Feminists might differ, however, over the nature of a female model. One conception holds that, in the female model of legal reasoning, general rules would not govern cases. Rather, judges would decide cases by taking into account the entire context of the dispute, with the purpose not of deciding the parties' rights, but of effecting a solution that would heal their relationship.

Difference feminists essentially turned upside down the approach of early feminists who sought to end sex discrimination by calling for equality of treatment. Difference feminists argued that to treat as formally equal those who are in fact unequal is really to perpetuate the inequality. Male

dominance could not be ended, they argued, merely by ending the different treatment of women. The inquiry should not be whether a law treats women differently, but whether it perpetuates male domination.

As part of their attack on formal rules, feminists sometimes resorted to narratives in order to demonstrate the extent to which formal rules failed to take into account the reality of those to whom the rules applied and thus failed to achieve their purpose. For example, assume that a rule intended to promote equality in the workplace prohibits discriminatory treatment on the basis of sex. In a case where an office is rife with jokes about sex, formal application of the rule may suggest that no sex discrimination exists because men and women both are permitted to joke about sex to the same extent. Narratives in which women recount the ways in which they are humiliated or intimidated by jokes about their bodies and capabilities can serve to illustrate how practices that may seem formally neutral (everyone can joke about sex) in fact disadvantage women (only women are portrayed as incompetent office ornaments by the jokes). Thus, to apply the rule against discrimination in a way that furthers its purpose, the rule must take into account more facts than simply whether an employer has policies that favor one sex over another and must examine whether facially neutral office policies have the effect of favoring one sex over another. Narratives are intended to expose actors in the legal system to experiences other than their own and thereby call into question familiar modes of thinking. These kinds of narratives have been incorporated into the briefs submitted in cases pending before the Supreme Court, notably reproductive-rights cases where women tell stories of their experiences with respect to abortion.

By the 1990s, a third school of feminist legal theory appeared. This school argued that the difference feminists, in characterizing the ways that women are different from men, portrayed women in ways that were not faithful to the experiences of many women. They argued that the typical woman, in the account of the difference feminists, seemed to be a white, middle-class, heterosexual American woman. The different perspectives of black or lesbian women, for example, were disregarded. Adopting the antiessentialist stance of postmodernism, these feminists argued that no single perspective captures the experience of all women. That is, gender is a social construction. Different societies construct gender differently, but no single construction represents the "true" nature of gender. Gender has no "true" nature. Rather,

particular constructions are adopted because they further the interests of dominant groups in the society.

In the 2000s, the desire to expand feminist legal theory to embrace the experience of all women has drawn the movement's attention to the problems of women in developing countries. In recent years, feminist legal theorists have written extensively about international human rights law as it relates to achieving equality for women.

### *B. Critical Race Theory*

Critical race theory emerged in the late 1980s as a distinct movement when some in the critical legal studies movement came to believe that the movement, dominated by white males, was insufficiently interested in issues of race. Critical race theory asserts that American law is structured to maintain white privilege. Critical race theorists seek to expose the structures by which white privilege is maintained and to dismantle those structures.

Critical race theorists do not allege that all cases of racial subordination are the result of acts deliberately taken for the purpose of maintaining white privilege. Rather, they argue that whites are privileged and that the legal system functions so as to reinforce the status quo and thus to preserve white privilege. Harvard law professor Derrick Bell, one of the most important figures in critical race theory, has contended that the law advances the interests of African Americans only when it is in the interests of the white majority to do so. For example, he notes that the Department of Justice, in supporting Supreme Court decisions in the 1950s desegregating the public schools, argued that continued segregation provided a propaganda benefit to the Soviet Union in the cold war, and thus it was in the national interest to end segregation.

One way in which even rules that seem to require equality may in fact be used to preserve white privilege is by taking advantage of the indeterminacy of rules. Thus, a requirement such as "equal protection of the laws," incorporated into the Fourteenth Amendment after the Civil War to end racial discrimination against the recently freed slaves, is susceptible of more than one interpretation. For example, in its 1896 decision in *Plessy v. Ferguson*,[9] the Supreme Court held that the clause permitted Louisiana to compel whites and blacks to ride in separate railway cars. The Court reasoned that each race was required to ride in a separate car, and thus the races were

treated equally. That is, the requirement of equal treatment was interpreted to permit "separate, but equal" treatment. Only in the mid-twentieth century did the Court abandon that interpretation of equal protection.

Another way in which the legal system preserves white privilege is by stating facts at high levels of generality. For example, the concept of equality is often defined at a very high level of abstraction. As long as the law does not require adverse treatment of one race relative to another, then the members of each race are regarded as receiving equal treatment. Members of one race in reality may be in a subordinate position as a result of past discrimination, but defining equality as the current absence of legally compelled discrimination renders those specific circumstances legally irrelevant. Thus, if a public university requires all applicants to take an admissions exam and bases admissions decisions on the applicants' scores, it treats all applicants with formal equality. If some applicants have received an inferior education as a result of past racial discrimination and are disadvantaged on the exam, then the admissions exam does not in fact result in genuine equality of treatment. Rather, the requirement of an exam reinforces the subordinated position of the disadvantaged race.

Critical race theorists adopted the technique of storytelling that had been utilized by feminists. Narratives were included, for example, in briefs relating to hate crimes. Such stories are intended to document continuing cases of racial subordination, to demonstrate that white privilege is not a problem only of the past, to provide members of the court, who are overwhelmingly white, with a different perspective, and to illustrate how seemingly neutral rules operate in practice.

Critical race theorists have sometimes adopted the same antiessentialist stance as feminist legal theory and argued that race is a social construction. The argument draws in part on DNA research that has revealed that there is no genetic basis for racial classifications. For example, a person generally regarded as white may be closer genetically to a person regarded as black than to another person regarded as white. The thesis that race is socially constructed implies its arbitrariness as a basis for establishing hierarchies and thereby delegitimates hierarchies based on race. Further, some critical race theorists have argued that racial subordination will end only when concepts of race are dismantled. That is, as long as people are categorized by race, they will be assigned superior and subordinate positions based on race.

At the same time, however, some critical race theorists have been reluctant to embrace antiessentialism. The civil rights movement made enormous progress by arguing that race discrimination violated the constitutional requirement of equal protection of the laws. If legal norms, as antiessentialists argue, are empty concepts that contain only that which individuals subjectively project onto those concepts, then the civil rights movement, they feared, would lose a potent weapon for racial equality. The claim of a right to equality before the law generated a norm to which society aspired, even when the norm was not realized in practice, and provided a source of inspiration for those fighting against subordination. Yet, many critical race theorists replied, the claim of equality before the law over time has become an instrument not of racial equality but of white privilege. Precisely because of the success of the civil rights movement, legal forms of discrimination have been dismantled, and racial hierarchies are now maintained through other means. The focus on legal equality obscures the continued existence of racial subordination and denies that anything more is necessary to achieve a just society. Further, the norm of legal equality has been used to invalidate efforts to remedy the effects of past discrimination, such as affirmative action programs. That is, liberal rights, in the view of many critical race theorists, have become counterproductive.

Critical race theory has clashed with liberal rights theory in other contexts. For example, many critical race theorists have supported legislation to ban hate speech, arguing that the effect of hate speech on victims is in some cases more severe than the effects of a physical assault. It not only inflicts a wound at the moment it is uttered, but also perpetuates the prevailing racial hierarchy by reminding the victim of his or her social subordination and by reaffirming white privilege. In some ways, the critical race theorists' critique of hate speech parallels the feminist legal theorists' attack on pornography. Both seek to curtail speech used as an instrument of subordination. Further, both argue that because legal concepts are defined from the perspective of the dominant group, the legal system takes into insufficient account the impact of the speech on the victim.

### *C. Other Identity-Based Movements*

Other identity-based movements appeared in the 1990s. In the same way that the postmodern school emerged in feminist legal theory, some within

the critical race theory movement noted that African Americans are not the only group disadvantaged by white privilege. Latinos and Latinas as well as Asian Americans argued that they too were subject to various forms of racial or ethnic subordination. Their efforts to expand critical race theory to address the experiences of racial or ethnic minorities other than African Americans have given rise to movements known as LatCrit theory and Asian American Jurisprudence. These movements have focused new attention, for example, on immigration policy.

Similarly, gay and lesbian scholars have created a movement, known as queer theory, that examines the ways in which the law maintains heterosexual privilege. This movement seeks to understand the role of sexual orientation in the law in the same way that feminist legal theorists examine sex and critical race theorists examine race.

Some of these identity-based movements have overlapping memberships. An African American woman, for example, may be engaged in both feminist legal theory and critical race theory. In fact, enough scholars fall into this category that a movement known as critical race feminism has emerged.

Some scholars have noted that categories such as race and sex have the effect of denying the particular experience of certain segments of society. For example, an African American lesbian who believes that she has been disadvantaged by discriminatory conduct, in order to state a claim under civil rights law, must specify whether the discrimination is based on race, sex, or sexual orientation, because the law prohibits those forms of discrimination but not others. In fact, however, she may believe that she was disadvantaged by her status as an African American lesbian and that the disadvantage she suffers may be different from that of, say, straight African American men or white lesbians. An African American woman who is raped may see the crime not only as a reflection of her status as a woman, but more particularly her status as a black woman. To attribute these forms of discrimination to a single aspect of the victim's identity distorts the nature of the discrimination. These observations have led to the concept of intersectionality, the idea that the intersection of various subordinate statuses can give rise to a form of subordination different from that associated with any one status alone.

All of the identity-based movements, including feminist legal theory and critical race theory, share similar assumptions. All of them are committed to critically examining and ending various forms of hierarchy and domination in society. All of them share a nominalist metaphysics, which they call "antiessentialism," in which they see race, sex, and sexual orientation as socially constructed categories used to preserve existing patterns of power. All of them regard general rules as indeterminate, so that rules adopted to end subordination can be used to perpetuate it. They also have in common the use of narratives that challenge dominant understandings of the impact of law on society and introduce the perspective of the subaltern. Given these common assumptions and argumentative techniques and given the problem of intersectionality, some believe that all of the identity-based movements at some point may coalesce as a single movement of outsiders.

## IV. Liberalism

Each of the schools of legal thought described above is corrosive of the liberal theory on which the American legal system was originally founded. Liberalism sought to protect liberty through reason. It was individualist and rationalist.[10] Law and economics, by contrast, is a utilitarian theory that in the case of some of its proponents seemed prepared to disregard individual entitlements in the name of economic efficiency. Critical legal studies and the various identity-based schools that emerged from CLS were more communitarian than individualist in their politics, and they generally regarded law as political rather than as rational.

Since the 1970s, several legal scholars have sought to rescue liberalism from its contemporary critics. These theorists generally reject utilitarian ethics in favor of principles based on the preservation of individual rights, and they take seriously the possibility that reason can separate law from politics.

Among the most influential of these liberal theorists has been Professor John Rawls of Harvard. In his 1971 book, *A Theory of Justice*, Rawls attempted to discern the basic principles of justice by imagining a hypothetical situation in which the members of society were asked to choose the principles that should govern the society without knowing the nature of their own

abilities or advantages in that society. Rawls argued that the result would be a broadly egalitarian ethic that would attempt to neutralize all natural advantages with which people were born and create the maximum opportunity for everyone.

In many respects, Rawls's theory is reminiscent of the social contract theories developed during the Enlightenment by writers such as John Locke. Just as Locke imagined presocial man in a state of nature creating a government that would protect a person's property against the incursions of others, Rawls imagined people in an "original position" shrouded by a "veil of ignorance" about their own situation devising an egalitarian set of principles to protect their opportunity for advancement.

The liberal theorist who has written most extensively in recent years on the problem of legal reasoning is Professor Ronald Dworkin of New York University and Oxford University. Much of Dworkin's work explicitly addresses the problem of legal reasoning. In his 1986 book, *Law's Empire*, Dworkin developed a concept of law as representing the value of integrity. Dworkin imagined a hypothetical judge, whom he named Hercules, who can find the one right answer in a dispute by a process that involves, first, finding those results that can be reconciled with the body of existing law taken as a whole and then, second, choosing from among those results that which places the law in the best light as a matter of political morality. Hercules differs from a formalist in that his method is not deduction from rules, but an elaborate interpretation of existing legal doctrine including both rules and underlying principles. Hercules differs from an instrumentalist, however, in that he seeks not to reach the result that furthers some desirable policy, but to reach the result that is consistent in the best possible way with existing law.

Dworkin has explained his thesis through the metaphor of what he calls a chain novel. This is a novel that is written through a process in which each of a series of authors writes one chapter. As each author writes his or her chapter, the author adds something new to the story, but attempts to remain as faithful as possible to the story as it has been developed in prior chapters. In the same way, a judge addressing a novel issue (no pun intended) must make new law, but seeks to do so in a way that reconciles the new law in the best way possible with the entire corpus of existing law.

Dworkin's work has provoked a rich debate in the legal academy. His argument is both epistemologically and ethically provocative. It is epistemo-

logically provocative because it seeks to restore the sense that the law can be known, that reason is distinct from power, and that knowledge can be distinguished from politics. It is ethically provocative because it reclaims a place for the dignity and worth of the individual in a legal culture that has become predominantly utilitarian.

In both its epistemology and its ethics, Dworkin's work cuts against the grain of postmodern thought. When Dworkin argues that disputes can have one right answer, he rejects the postmodern belief that all knowledge is a matter of perspective. And, in placing the individual at the center of law, Dworkin rejects the postmodern tendency to treat the group as prior to, and constitutive of, individuals.

Although Dworkin is often described as America's greatest living jurisprudent, critics raise a number of objections to his thesis. Some find his desire to reconcile each new case with existing law an intrinsically conservative approach that delegitimates efforts to reform the law. Others question whether the method of adjudication he describes plausibly explains how judges do, or could, decide cases. They note that Dworkin himself seems to acknowledge that his theory posits an ideal form of adjudication requiring Herculean ability and effort.

## V. Pragmatism

Pragmatism began with the philosophy of Charles Sanders Pierce, William James, and John Dewey in the late nineteenth century. Pragmatism and legal reasoning theory met very early in the person of Oliver Wendell Holmes Jr., who was a member of the Metaphysical Club, a group of intellectuals, including James, who gathered periodically in Boston during the late nineteenth century to discuss philosophy. Holmes appears to have influenced James, and contemporary legal pragmatists often claim Holmes as their intellectual forebear. Pragmatism slipped into dormancy with the passing of James and Dewey but was revived in the 1980s by the work of philosopher Richard Rorty, sometimes under the rubric of neopragmatism.

Pragmatism, as it is understood at the beginning of the twenty-first century, rests on two core themes: antifoundationalism and instrumentalism. Antifoundationalism, which pragmatism shares with critical legal studies, is simply the postmodern belief that there are no a priori truths. All knowledge

is really socially constructed belief, although members of the society may experience the belief as true and act upon it. And, because societies differ, knowledge is perspectival.

Pragmatism differs markedly from CLS, however, in the consequences for legal thought that it draws from antifoundationalism. Whereas CLS adherents take the position that postmodernism has destroyed the last vestiges of an objective basis for law and thus has revealed the utter subjectivity of judicial decisions, pragmatists regard the dichotomy of objective and subjective decision making (as those terms traditionally are understood) as representing a false choice. That is, pragmatists seek an alternative to the view that law must be either objectively true or completely subjective.

One strand of pragmatism has found this alternative in the concept of an interpretive community, which builds on the philosophy of Ludwig Wittgenstein. Wittgenstein argued that no reality exists apart from our observations. Words thus do not correspond to Platonic essences; they have no core meanings. They are given meaning, however, by the community of people that interprets them. A word is not completely indeterminate because the shared assumptions of the interpretive community about the meaning of the word limit the range of ideas that the word can communicate. The meaning of legal texts, such as statutes or judicial decisions, is thus constrained by the society that interprets them. Although legal texts may not have an objective meaning in the sense that they represent a Platonic essence or some idea having ontological existence, neither is their meaning to be ascertained subjectively. The ability of an interpretive community collectively to give meaning to a text undermines the claim that legal reasoning is subjective. The text may be said to have "objective" meaning in the sense that the meaning is socially rather than individually constructed; that is, meaning is not subjective, but intersubjective. This meaning, however, is a culturally relative one. A different society might interpret the text differently.

The pragmatist movement in the law, in other words, attempts to find some basis for constrained judicial decision making in a postmodern world. It abandons the Enlightenment quest for objective certainty as a false start and an impossible task and thus is untroubled that legal reasoning cannot resolve disputes mechanically. The pragmatist movement has also attempted to offer the constructive program that CLS is said by its critics to lack and that some CLS adherents say is impossible to create.

It is in this constructive program that the second theme of pragmatism—instrumentalism—is particularly evident. Pragmatic instrumentalism is the belief that actions should be judged by their results, rather than being judged according to consistency with first principles. Pragmatists do not attempt to maintain consistency with respect to any single principle or value. Thus, a value that may be given great weight in determining which action to take in one context may be given far less weight in determining which action to take in another context.

Some pragmatist scholars trace their methodology to the Aristotelian concept of practical reasoning. Aristotle's theory was that one can determine the correct solution in particular cases without having a universal theory of what is true. No single principle always prevails; no single approach always suffices. Rather, cases are decided individually, by studying the consequences of each possible result. Pragmatism is empirical rather than rationalist.

In pragmatism, there is an echo of the kind of policy science reflected in the law and economics movement. And, indeed, Richard Posner is now regarded as both a leading exponent of law and economics theory and a pragmatist. Where pragmatism parts ways, however, at least with early law and economics theory, is in its refusal to accept as privileged any single value or approach. A pragmatist may choose the most efficient result in one case and a less efficient one in the very next case.

Pragmatism also features a marked compatibility with the case-by-case decision-making process of the common law. Much as common law judges decide only the precise dispute before them and treat as nonbinding dictum any pronouncement not strictly necessary to the decision of the single case, so too do pragmatists solve problems one at a time rather than trying to construct a universal theory. In the pragmatic view, knowledge is to be gained through attempts to solve specific problems as they arise and not to be constructed as a systematic theory in a vacuum. Indeed, pragmatism could be characterized not only as a normative theory of how legal reasoning should operate, but as a descriptive theory of how it actually operates in practice.

Although pragmatists believe that their methodology justifies the results they reach, they generally do not claim that it compels those results. That is, a pragmatist judge could explain the result reached in a case by listing the relevant policies and explaining how that result furthered each of the various

policies. The process is not mechanical, however, and other judges might have found that the same considerations led them to a different result.

While pragmatists do not believe that the law requires a specific result, they do see law as constraining decision making. In reaching a decision, a pragmatist judge would take into account not only the consequences for the parties to the dispute, but the consequences for the legal system and even the society. Thus, a judge must always include among the relevant considerations the contribution that adherence to precedent will make to the pursuit of both justice and efficiency. Although the value of adherence to precedent will usually weigh heavily, other considerations will have weight as well. Precedent thus influences and constrains decision making, but does not dictate the result.

Many pragmatists claim for themselves a progressive political agenda. They argue that pragmatism's refusal to treat any single principle as unassailable or privileged and its willingness to try different approaches in different situations provides a methodological basis for social change. They further argue that pragmatism's instrumentalism is forward looking and thus corrosive of tradition and the established order.

Pragmatism has its critics. Some critics argue that pragmatism's refusal to privilege any particular value undermines any claim that it is a progressive political force. Pragmatism, they contend, can equally accommodate a wide array of leftist, centrist, and rightist political ideologies. Indeed, because pragmatism rejects grand theories in favor of a case-by-case approach, some have argued that pragmatism is an inherently conservative movement that will inevitably reject radical change in favor of incremental and contextual tinkering.

The pragmatist methodology has also been subject to criticism. Some critics see in its antifoundationalism the same postmodern nihilism that they find in critical legal studies. Antifoundationalism is said by others to be self-contradictory because to claim that there are no a priori truths is to assert an a priori truth. Some point out that pragmatism does not have, and would reject as unpragmatic, any general theory of how various considerations are to be deemed relevant to deciding which result in a case is to be preferred or even how the case itself is to be defined. From this perspective, pragmatism is not so much a theory as a willingness to admit that one has no theory.

## VI. Conclusion

The question of the place of legal reasoning in the American legal system began as a problem of political philosophy. The liberal political theory of the Enlightenment posits that the purpose of government is to protect the liberty of the individual. The means by which this is to be accomplished is the rule of law. Law will limit the power of government and thereby guarantee individual liberty. Liberal political theory thus places upon the courts the task of deciding disputes in accordance with law.

To decide in accordance with law necessitates that the court first ascertain the law. The political project of subordinating government to the rule of law thus entails an epistemological task: to find the law.

Enlightenment epistemology, as was seen in chapter 11, had two strands: rationalist and empiricist. Both, however, shared the Cartesian dualism between subjective individual consciousness and the objective world beyond that consciousness. On this premise, the task of adjudication in accordance with law was equated with deciding on objective, rather than subjective, grounds.

Enlightenment metaphysics was predominantly realist in 1776, and thus the early American judge believed that objective law did exist. In the late eighteenth century, realist metaphysics in law took the form of a belief in natural law. Natural law, which could be ascertained through reason, would control the judge and provide an objective basis for decision in accordance with law.

The empiricist strand of Enlightenment epistemology, however, began to cast doubt on the authenticity of a natural law discernible only through reason. Jacksonian democracy, moreover, called for a more consensus-based theory of law, one in which the law was found in the consent of the governed rather than through the exercise of intuition. The result was the displacement of naturalism by positivism.

The late nineteenth century produced a new synthesis under the rubric of formalism: positive law could be found through a process of induction and could be applied to individual disputes through a process of deduction. That is, the law was now to be found empirically by examining the statutes and the cases. Legal reasoning was a science that, like physics or biology, enabled the judge to find the law. The realist metaphysics had shifted from a

late-eighteenth-century naturalism to a late-nineteenth-century positivist conceptualism.

The skeptical empiricism that had undercut naturalism, however, also began to undermine conceptualism. By the end of the first one-third of the twentieth century, at least in the academy and on many appellate courts, the dominant metaphysics was nominalist: legal concepts did not really exist; they were merely names attached to groups of particular cases that appeared from one perspective to share some common attribute.

Without a metaphysics, lawyers were left with only epistemology or method. Members of the new dominant movement, the legal realists (who were philosophical nominalists), sought to reconceive law as an empirical process. Lawyers and judges would study how the law functions in practice. Disputes would be decided in a way that would promote sound public policy.

From the beginning, however, the Enlightenment task had been to decide cases objectively rather than subjectively. If decisions were to be based on policy, then the Enlightenment project seemed to require that policy be objectively ascertained. The dilemma was to find an objective basis for judicial decision making.

The history of legal reasoning at the beginning of the twenty-first century is the story of the different responses to this dilemma. Four have been considered here.

The first response, which characterizes contemporary mainstream legal thought, is simply to refuse to acknowledge the victory of nominalism. Most disputes, it is argued, can be decided by finding principles in the prior cases and reasoning deductively from them. This may not be true in a few hard cases or occasional cases of first impression, but these are exceptional and do not undermine the legitimacy of the system as a whole.

The second response has been to seek in a putative public consensus an objective basis for policy making. Although such an endeavor would seem obviously empirical, this approach by and large has involved a resurrection of rationalism. By a process of intuition and deduction, legal scholars have attempted to identify those policies or principles that would seem necessarily to inhere in our legal system and thus to be at least implicitly the product of broad popular consent. This approach has been adopted by the liberal theorists, who search for principles in the case law, and by the early work of the law and economics movement, which found in efficiency the fundamental,

unassailable value needed to decide cases. Although their accomplishments are impressive as an intellectual exercise, the liberal theorists have served more as departure points for scholars than as sources of guidance for courts deciding cases. The law and economics movement has had somewhat more influence on the courts but to some extent has abandoned the claim that efficiency is a privileged, fundamental value.

The third response, which characterizes much of the critical legal studies movement and the identity-based schools of legal thought, is to concede completely the victory of nominalist metaphysics and to declare dead the search for an objective basis for adjudication. In this view, adjudication is inherently subjective, and the Enlightenment conception of law is a failure. Liberal individualism is doomed and must be replaced with a more communitarian or egalitarian theory that rejects the subordination of outside groups, such as women, racial and ethnic minorities, and gays and lesbians. The content of this alternative theory, however, remains largely under development.

The fourth response, which characterizes the pragmatists, is to reject the Cartesian dualism of subject and object as presenting a false choice. In this view, Descartes was wrong to place the individual at the center of knowledge. Knowledge is socially constructed; the truth is what a community believes at a particular time. Truth is not objective in the sense of being eternally fixed, but neither is it subjective in the sense of being individually constructed.

In pragmatism, the Enlightenment epistemological and metaphysical framework is thus abandoned entirely. Pragmatists endeavor to find solutions to particular cases as they arise, without first constructing a Newtonian body of laws to govern all cases.

Pragmatism has much in common with contemporary mainstream legal thought. Mainstream legal thought is in many respects antitheoretical. Having lost formalism and being unable to embrace realism entirely, it proceeds without a single coherent theory. It is formalist in easy cases and realist in hard cases, attempting to use the best of both theories and unable to adopt either fully.

Further, the policy judgments that are pervasive in early-twenty-first-century judicial decisions, especially in hard cases, seem methodologically indistinguishable from the practical reasoning advocated by contemporary legal pragmatists. Pragmatism thus provides a philosophical position for policy scientists operating in a postmodern world.

Enlightenment philosophy, of course, had been employed by legal theorists in pursuit of liberal political ends. If the epistemology and metaphysics are wrong, then what of liberal individualism? If pragmatism refuses to accept any particular value as privileged, then does it adequately protect liberty? Pragmatism as an approach would seem to be capable of reconciling the resolution of a dispute with various quite different political ideologies, a thought that should not be particularly comforting to liberals—or communitarians, social democrats, or conservatives. If the dilemmas of contemporary legal reasoning began as problems of political philosophy, that would seem to be precisely where they end.

# CONCLUSION

The preceding chapters have had a single goal—to teach the techniques of thinking like a lawyer. By now it should be clear, however, that legal reasoning is not a mechanical process, but rather one involving the exercise of judgment.

Thus, the result that the lawyer reaches through the legal reasoning process can depend to a very great degree on the policies or values that the lawyer believes a court would prefer. When the lawyer is counseling a client, the lawyer can make clear that more than one outcome is possible and explain the considerations that would militate in favor of each. The lawyer's knowledge of the prevailing policy preferences of the local courts may assist the lawyer in estimating the probability that a court would reach any given result. When the lawyer is an advocate, the lawyer is expected by the norms of the profession to urge the court to prefer those policies that will lead to the result most favorable to the client, regardless of the lawyer's personal preferences.

The legal reasoning process thus deals with advocacy and prediction, not with fixed truth. The lawyer is engaged not in mechanically explicating what the law is, but rather in formulating a series of arguments about what the

law ought to be as applied to a particular situation. In that process, political and moral values play as large a role as neutral logic or reason.

Faced with the intrinsically political nature of law, lawyers adopt a variety of poses. Some believe that they have no obligation other than that imposed by the professional code of ethics and that they may use their skills for all who employ them. Others see every case as political advocacy and find it difficult to represent anyone whose views are not their own. Some lawyers find themselves somewhere between these poles—perhaps being generally willing to represent nearly anyone who retains them, except for certain specific types of clients or cases.

In writing this book, I have avoided passing judgment on the question of the purposes for which a lawyer should or may provide legal representation. I have tried, insofar as I can, simply to teach the tricks of the trade.

This book, in other words, has been a kind of "how-to" book. The author of a how-to book in some sense empowers other people, without having any control over the way in which the power is used. The automotive repair manual can as easily be used to fix the getaway car as to repair the church bus.

A how-to book can equally distract attention from the fact that obtaining a replacement would be better than making repairs. The automotive repair manual makes it possible to keep the lemon running a little longer, when what the owner really should do is haul it to the junkyard and buy a new car.

Although I have avoided expressing my judgment on questions of political policy and moral value, I hope that I have not distracted the reader from recognizing that such questions are inherent in every act of legal reasoning. It is my hope, as well, that in learning how to think like men and women of the law, we do not forget how to judge like people of conscience.

# APPENDIX: THINKING LIKE A LAW STUDENT

Because the principal purpose of law school is to teach students to think like a lawyer, much of the law school curriculum is intended to teach the skills described in this book. This appendix describes some of the most important ways in which law schools teach students how to think like a lawyer, suggests strategies for excelling as a law student, and indicates how this book can be useful.

## I. LEARNING ESSENTIAL SKILLS OF LEGAL REASONING

### *A. The Case Method*

Most law school courses use the case method. The case method was introduced into legal education by Christopher Columbus Langdell, who was appointed dean of the Harvard Law School in 1870. As explained in chapter 11, Langdell believed that law is a science and that judicial opinions are the data that the science of law examines. Thus, he believed, students should learn the law by reading judicial opinions or "cases." Although Langdell's assumptions about the nature of the law are no longer widely shared, the case method survives.

For each course, students are assigned a textbook called a casebook. The casebook consists primarily of edited versions of appellate court opinions issued by various state or federal courts. One case may articulate an important rule of law that is followed in many or even all states. Another case may articulate a competing rule of law that has been adopted in perhaps a minority of states. Or a case may articulate an exception to the general rule announced in the first case. Alternatively, it may raise the question of how the rule should be applied in some especially difficult or controversial set of circumstances.

Prior to each class session, students will be assigned to read and "brief" a few cases from the casebook. Briefing a case means to extract from the case certain specific items of information. Thus, the first skill taught by the case method is case

analysis. Students will not be expected to submit their briefs to the instructor, but they may be called upon in class to summarize their briefs orally. As already noted, the vast majority of opinions in the casebook will be appellate court decisions, and hence this discussion of how to brief a case will assume that the case being briefed is an appellate opinion.

Your brief begins with a summary of the **facts** of the case, that is, the events that gave rise to the dispute. This need not be a comprehensive summary. Include only enough facts to understand the nature of the issue that the court was asked to decide and those facts on which the court based its decision, that is, the dispositive facts.

Second, it describes the **procedural history** of the case, that is, the events that occurred in court from the filing of the complaint to the appeal of the trial court's judgment. (A description of the legal process from complaint to appeal is included in chapter 1 under the heading "Bringing a Dispute Before the Court.") In this part of the brief, the most important information is the nature of the decision from which the appeal was taken, such as, for example, whether the appeal is from a jury verdict or the decision of a lower appellate court. As explained in chapter 2, this determines the standard of review, that is, the degree to which the appellate court will defer to the decision already made by the trial court.

Third, the brief identifies the **issue presented** to the appellate court for decision. Usually, the issue can be stated beginning with the word *whether*, such as "whether grabbing the plaintiff's necktie during an argument constituted a battery." Typically, the issue can be answered "yes" or "no."

Fourth, the brief states the **holding** of the court, that is, the court's decision regarding the issue. A court very often, though not always, introduces the holding with the words "We hold . . . . "

Fifth, the brief summarizes the court's **reasoning**. This portion of the brief may be the most difficult to write because the reasoning may be scattered over a large portion of the opinion. In general, you are looking for the rules applied by the court, the facts that the court treated as dispositive, and any policy-based justifications provided for those rules or for their specific application to the facts of the case.

Finally, the brief indicates the **disposition** of the case, that is, whether the judgment of the trial court was reversed or affirmed.

Occasionally, particularly when the case is a U.S. Supreme Court decision, the casebook will include a **concurring or dissenting opinion**, that is, an opinion written by a judge who is not speaking for the majority of the court. If the separate opinion is a dissent, your brief should summarize the basic disagreement between the dissent and the majority opinion and the justification for the dissent's position. For example, the dissent may contend that the majority applied the wrong rule or that it applied the correct rule, but reached the wrong result under the circumstances of the case. If the separate opinion is a concurrence, your brief should indicate how the concurrence differs from the majority opinion. For example, the

concurrence may offer a different justification for the decision or may attempt to limit the implications of the majority's decision in some way.

All of these elements of a brief are explained in greater detail in chapter 2 under the heading "The Components of a Case."

Case analysis, however, is only the first step in reading a case. Equally important is to synthesize the cases, that is, to place each case in a larger framework consisting of all of the other cases read up to that point in the course. You do this by asking what this case teaches you that you did not know before. In other words, why is this case in the book? Then ask how the teaching of this case relates to the teaching of other cases read thus far. The final exam in the course will not ask about the details of individual cases. Rather, it will require you to understand the structure of rules that emerges from the cases so that you can apply the structure to future cases. Thus, it is critical that you ascertain how each case contributes to that structure.

You may determine, for example, that a case limits the rule that governed another case, or defines one of the elements of a rule from another case. Or two cases may seem to contradict each other in some way. This process of placing cases in a framework is essentially the technique of synthesis described in chapter 3 under the heading "Synthesizing Rules."

As noted in chapter 3, the fact that cases even in a single jurisdiction are often in conflict complicates the process of synthesizing rules into a coherent framework. Learning how to think like a lawyer requires that you develop two different strategies for handling conflict in the cases. First, you must learn how to **harmonize** the cases, that is, to synthesize and apply the rules and policies in a way that seems to eliminate any conflict between the cases. Second, you must learn how to **distinguish** the cases, that is, to synthesize and apply the rules and policies in a way that treats contrary decisions as arising from facts that are different in relevant respects and therefore do not require the same result. These strategies are discussed extensively in chapters 3 and 5.

The case method is sometimes criticized because of its emphasis on appellate court decisions. Most legal disputes are resolved without ever reaching trial, let alone an appeal. Indeed, only a small percentage of attorneys practice before the appellate courts. Further, the ability to read an appellate court decision is just one skill among many that a lawyer needs. Many of these other critical skills cannot be learned from reading appellate decisions. Moreover, the case method tends to overstate the importance of formal rules in the legal system. Litigants make claims that they do not expect ultimately to be successful in the hope that the other side may settle, which the other side will often do to avoid the cost of litigation, adverse publicity, or even a remote risk of losing. A trial judge may render a decision without adequately researching or considering the law, but the decision may never be appealed. Although the rule may suggest that one party should prevail, that party may be unable at trial to prove the facts necessary to demonstrate that the rule applies. Juries may misunderstand or ignore the instructions given to

them, but not in a way that provides a basis for overturning the verdict. A losing party may not have the resources for an appeal. In these and other ways, the rules of law adopted in an appellate decision may fail to govern the result in a particular dispute.

Yet despite all these legitimate criticisms, the case method has persisted because it is a highly effective way of teaching students how to think like a lawyer—a skill that they will utilize constantly in practice, regardless of whether they are an appellate lawyer, a trial lawyer, or a lawyer who engages in transactional work rather than litigation. Other skills will be necessary as well, but the ability to think like a lawyer is the foundational skill that defines the legal profession and on which the usefulness of other skills rests.

Further, even if very few disputes reach the appellate courts, the lawyer always has in mind the possibility that a particular transaction could reach an appellate court and must plan accordingly. Thus, the lawyer must be able to advise his client how to act in the way that will provide the best probability of success should a dispute arise, should the dispute be litigated, and should the litigation reach the court of appeals. For example, a trial lawyer preparing a case will sometimes seek assistance from an appellate specialist in order to structure the case in such a way as to create, in the event of a loss at trial, the best case on appeal.

The case method also persists because it is an especially effective way of introducing students to the operation of the law in practice. Each case represents a conflict that arose in real life. Thus, reading cases illustrates the context in which the law is likely to be applied. In reading the procedural history of a case, students become accustomed to the ways in which disputes are brought before the courts and how courts address those disputes. Courts not uncommonly will summarize at least some of the party's arguments, allowing the student to see how experienced counsel attempted to shape the law to his or her client's advantage. The court's opinion, in announcing the applicable rules, often provides a brief summary of the rules that govern disputes of the type before it, with citations to the most important precedents. The court may explain some the policies underlying this area of law. And, of course, the court will decide the dispute, illustrating one way in which the rules were applied to a particular set of facts. If a dissenting opinion was written, the student is able to see an alternative view of how the law applies to the facts before the court. In short, an appellate decision is a narrative about a real dispute that was resolved by men and women who were thinking like lawyers. The daily reading of cases immerses the student in the operation of the law. The immersion is an incomplete form of instruction, but an invaluable one nonetheless.

### *B. The Socratic Method*

Class sessions are often conducted using the "Socratic method," a method of instruction named after the Greek philosopher Socrates, who taught philosophy by asking his students a series of questions. Under the Socratic method, the professor does not lecture or explain. Rather, she uses class time to question students about the cases that they were assigned to read prior to class.

The Socratic method was also introduced to legal education by Dean Langdell. It was deeply unpopular among his students, who wondered why he was asking them all these questions to which he presumably already knew the answers. And, if he did not know the answers, was he qualified to teach the course? U.S. Supreme Court Justice Benjamin Cardozo, one of the most respected judges of the twentieth century, left Columbia Law School in 1891 at the end of his second year (and thus never earned his degree) because the law school administration decided to replace the lecture method with the Socratic method and hired new faculty from Harvard who were familiar with Langdell's approach.

Teaching by the Socratic method is a difficult skill to master, and, if not well executed, it may leave students with the idea that law school consists of guessing at the answers to a series of incomprehensible or at least unanswerable questions.[1] In the hands of a skilled practitioner, however, the Socratic method can yield an exhilarating and illuminating exchange.

Most law professors no longer use the Socratic method exclusively. The instructor may lecture for a period of time, invite questions from students, or ask the students to discuss as a group how to resolve a single hypothetical dispute. This last technique is often referred to as the problem method. In some courses, the students may be given the hypothetical, that is, the problem, prior to class and asked to consider, as they read the assigned cases, how those cases suggest that the problem should be resolved. Sometimes, the professor will conduct a simulation exercise, perhaps assigning students to argue different sides of a case. The Socratic method is distinctive to legal education, however, and it is the technique that leads to both the most apprehension and the most puzzlement for students. Thus, it deserves some discussion here.

The Socratic dialogue between the instructor and the student usually begins with the instructor asking a student to brief a case that was assigned for that day's class session. The student replies by summarizing his or her brief, starting with the facts of the case. The instructor may ask the student a number of questions simply to clarify the student's summary. In particular, the instructor will want to identify the rules of law adopted by the court and the facts that were critical to the court's application of the rules.

Once the case has been explicated, the instructor may ask the student to fit the case into the synthesis of cases that the class has read. The instructor may ask, for example, whether the case is consistent with another case. In effect, the instructor is asking the student what this case adds to what the student already knows. Does it modify some previously existing rule from another case? Does it elaborate in some way upon the meaning of a rule from another case? Does it create an exception to a rule seen in another case? Does it contradict another decision? To the extent that the case is inconsistent with another case, what is the nature of the disagreement between the two courts? What policies support the position taken by each court? Which court had the better argument? In attempting to place this case in a larger framework, the instructor in effect is asking the student to use the techniques of synthesis described in chapter 3.

Next, the instructor may ask the student to consider how the rule of this case is to be applied to the facts of other cases. This process of rule application is described in detail in chapter 5.

In examining the application of the rule, the instructor may pose a series of hypothetical cases that differ only slightly from the facts of the case that the student briefed. The question will be whether the court should reach the same result in the hypothetical cases that it reached in the case that was briefed. Many of the questions may be intended to clarify the meaning of the rule, perhaps by examining whether a particular word in the rule does or does not apply to various factual settings.

Instructors often base hypothetical questions on hard cases. The term *hard case* can refer to either of two types of cases. First are cases in which the result required by the rule seems unclear. Second are cases in which the result required by the rule seems clear but unjust or unwise.

If the instructor wishes to discuss the first type of hard case, where the result seems unclear, a common sequence of questions begins with an easy case, that is, a case in which the application of the rule to a new set of facts does seem clear. The instructor then proceeds gradually through a series of cases in which application of the rule in the same way seems increasingly difficult to justify. The professor is demonstrating that the result that seemed sound under the facts of one case may seem incorrect under a different set of facts. The student may be asked to find the point at which the policy justifications underlying the case seem to shift in the opposite direction, that is, the point at which a different result seems required.

As explained in chapter 5, this process is sometimes referred to as line drawing. The student must draw a line separating the cases where a certain right or duty was found to exist from those where it was found not to exist. The professor will ask the student why he drew the line where he did.

Finding the point at which to draw the line may be difficult. Lawyers sometimes use the metaphor of a "slippery slope" to refer to the absence of an easily definable limitation on the court's preference for a particular result. By arguing that a landowner should have a duty to warn about a fifteen-foot pit on his land, the student starts down a slippery slope. Each time the student argues that some slightly less hazardous condition, such as a twelve-foot pit, triggers a duty to warn, she slips further down the slope. At some point, the student realizes that the next argument she is asked to make—such as an argument that the landowner has a duty to warn about a one-inch depression in the ground—would be absurd. Yet she may find herself unable to explain precisely where the line should be drawn. In other words, once she starts down the slope, she finds it difficult to stop.

Legal reasoning, however, requires that lawyers draw lines between the groups of cases governed by opposing policies, to categorize cases as belonging on one side of the line or the other, and to defend those choices. By posing these difficult hypothetical questions, the instructor is testing the student's ability to draw the line and to defend it on policy grounds.

As the student opines on how the rule applies in each case, the instructor may bring other students into the discussion, inquiring whether they agree. If other students disagree, all of the participants may be called upon to defend their positions. In this way, students explore the ways in which a rule may lead to more than one defensible result.

The instructor may also pose hypothetical questions intended to pose the second type of hard case: the case in which the result may seem clear but highly undesirable. One purpose of such questions is to demonstrate that even good rules may lead to bad results in some cases. The instructor may ask the student whether the rule should be modified in light of the result it seems to produce in the hard case. If the student suggests a modification of the rule, then the process may begin anew—first clarifying this proposed new rule and then examining the results it would produce in various easy and then hard cases. Ultimately, the student may find that no rule produces the most desirable result in every case. Yet some rule must be adopted, and so the task is to identify and to defend the most desirable rule, all things considered.

Another purpose of questions about hard cases is to train students to discuss cases with reference to the relevant rules and policies rather than merely their personal reaction. At one time, law students might have been told that the law is based on logic, not emotion. Few, if any, lawyers today believe that legal reasoning is based entirely on logic. Indeed, a central premise of this book is that the legal reasoning process depends upon judgments that require a subjective weighing of policies. Thus, moral outrage or other value preferences have a legitimate place in legal reasoning. The student, however, must learn to articulate his or her feelings about a case in terms of the rules and policies established by statute and precedent. Further, the student must also learn how to formulate arguments in support of a position that he or she finds personally objectionable. Hard cases, because of their pull on our emotions, present good opportunities to develop both of these skills.

### *C. The Course Outline*

As the semester progresses, you will accumulate a considerable number of rules extracted from the cases. These must be organized into a coherent synthesis. Students do this by creating an outline of the rules they have learned. The process of synthesizing the rules, of creating an outline, is discussed in chapter 3.

Law students can purchase outlines of most subjects from almost any law bookstore. A commercial outline can be useful in helping to clarify specific points, but it should never be a substitute for your own outline. You will not understand the material completely unless you have been forced to assemble your own outline. Or, to put it another way, if you cannot create an outline, then you do not understand the subject.

### *D. The Final Exam*

The final step in a course is taking the exam. In most law schools, the student's entire grade is based on a single exam administered at the end of the course. Some

law schools may administer a midterm exam, but that has not been the typical practice. A law school exam question is usually an essay question formulated as a hypothetical case. As this suggests, the typical law school exam focuses on the last step in the legal reasoning process, the application of law to fact.

The structure of your answer should follow a format known by law students as "IRAC," an acronym for Issue, Rule, Application, Conclusion. Under this format, you identify an issue raised by the question, state the rule that resolves the issue, apply the rule to the facts given in the exam hypothetical, and reach a conclusion about how the issue is likely to be resolved in light of the law and the facts. You repeat this process until all of the issues have been identified and discussed.

Chapter 5 describes legal reasoning as a process of syllogistic reasoning, in which a major premise is combined with a minor premise to produce a conclusion. The IRAC format is simply a form of syllogistic reasoning. The major premise is the rule of law, the minor premise is the application, and the conclusion of the syllogism is the conclusion of the IRAC format.

The issues to be addressed in the exam answer will depend upon the question posed. Because the central organizing principle in the law is to move from the general to the particular, that should be your approach on the exam. After reading the question carefully at least twice, you identify the most general rule or rules that answer the question.

For example, if the question asks whether Kristen is liable for committing any torts, you must quickly canvass in your mind each of the rules that creates liability in tort. If it appears that a particular rule—say, the rule imposing liability for false imprisonment—could arguably impose liability in tort under the circumstances of the exam hypothetical, then that rule creates an issue. Thus, a first issue identified in your exam answer may be whether Kristen is liable for a false imprisonment.

In canvassing the rules in your mind, go through your entire outline mentally, in order. Be systematic so that you overlook nothing. You need not discuss rules that do not even arguably apply. If a rule at least arguably applies, however, then it creates an issue that merits discussion.

You should begin your discussion of an issue by stating the rule that governs the resolution of the issue. In this case, the rule to be stated is the one that describes when one is liable for a false imprisonment.

Some students begin their answer by summarizing the facts of the question. That is a waste of time. No instructor will be impressed by your ability simply to repeat the facts set forth on the paper sitting in front of you. Rather, begin by identifying an issue to be discussed and then move immediately to the rule that resolves the issue.

As discussed in chapter 2, legal rules include a factual predicate comprising one or more elements that must be present for the rule to create a right, duty, liability, or other legal relationship. If all the elements are present, then the right, duty, liability, or other legal relationship exists. If all the elements are not present, then the right, duty, liability, or other legal relationship does not exist. For example, the rule imposing liability for false imprisonment may state that liability for a false

imprisonment exists where the defendant acts intentionally to confine the plaintiff to a bounded area. Thus, the elements include an act by the defendant, a bounded area, confinement of the plaintiff to that bounded area, the defendant's intent to confine the plaintiff, and a causal link between the defendant's act and the plaintiff's confinement. Kristen will be liable for false imprisonment only if each of these elements is present.

Accordingly, after stating the rule, your next step is to examine each element to determine whether it is present under the facts given. As you begin examining each element, you are moving from the general (the rule) to the particular (the individual elements of the rule). If you have learned a rule that defines an element, begin your discussion of that element by stating the rule defining the element and then determining whether the elements of that rule are present. As you state the rule defining an element and then examine the elements of that rule, you are again moving from the general to the particular.

For example, after stating the rule defining a false imprisonment, you might begin your discussion of the element of confinement with a rule that defines a confinement, such as "A confinement exists where movement is restrained by physical barriers or by intimidation." If the elements of the rule defining a confinement are met, then a confinement exists. In deciding whether the elements of a confinement are met, you may need to refer to an even more specific rule, such as "Intimidation occurs where a threat creates a reasonable apprehension of violence." As you proceed through the analysis, working from more general rules to more particular rules, you must identify the specific facts that demonstrate the presence or absence of each element of each rule discussed.

In some instances, whether an element is present will seem very clear. For example, if the plaintiff was locked in a closet, the elements of confinement to a bounded area seem clearly present. In these instances, you should indicate that these elements are met, and you should identify the facts that establish them. Do not simply say that the elements are clearly met. You must explain why you think that they are met. Extended discussion, however, is probably not necessary.

In other instances, whether an element is present will seem unclear. Some facts may indicate that the element is present, while other facts indicate that it is not. These instances require the most discussion. You should be sure to identify all the relevant facts and to discuss which facts support finding the element present and which facts support the opposite result. If you have read any cases with analogous facts, you may refer to the case and discuss what result the analogy suggests.[2] That is, you may supplement the syllogism with an analogy, as described in chapter 5. On some occasions, you may wish to refer to the policies underlying a rule for guidance in determining whether the facts should be characterized as establishing that an element is met. Some of the policies to which you can refer are discussed in chapter 6. For example, in a situation where a rather trivial incident seems arguably to constitute the elements of a tort, you might note that to treat the incident as tortious would encourage wasteful litigation, and therefore a court may conclude that, under these circumstances, no liability for a tort exists.

By now, it may be apparent why your discussion of an issue should begin with a statement of the applicable rule. Stating the rule at the beginning of your answer provides a road map for the rest of your answer. You can continue to refer back to the rule to ensure that every element of the rule is discussed.

You should end your discussion of an issue with a conclusion. Frequently, which conclusion the student reaches does not matter, because the facts were such that more than one conclusion was plausible. The conclusion, however, should be consistent with the discussion.

Do not simply list arguments with no indication of the probable conclusion. Students sometimes write answers that read like this: "The plaintiff will argue that she was confined while the defendant will argue that she was not confined. The court will decide." One problem with answers like this is that they fail to identify the facts that are relevant to each argument and thus fail to demonstrate your ability to construct arguments using the facts. Another problem is that they fail to evaluate the strength of the arguments and thus fail to demonstrate your ability to exercise judgment. As this book explains in great detail, the application of law to facts is not a mechanical process but requires the lawyer to make judgments. Thus, a better style would read something like this: "While Kristen's stern command to the plaintiff to 'Stay in the room!' is arguably a confinement resulting from intimidation, the door remained unlocked, Kristen left the building, and she at no point threatened violence if the plaintiff were to leave the room. Moreover, the facts do not indicate any prior history of violence by Kristen. Thus, the court likely would conclude that the plaintiff remained in the room voluntarily rather than because he interpreted Kristen's command as a threat or had a reasonable apprehension of violence if he were to leave."

Remember that no fact appears in the exam question by accident. Every fact was placed quite deliberately in the question by the instructor. Some facts may be there only to structure the plot. A few facts may be "red herrings," irrelevant facts that the instructor placed in the exam hypothetical to see whether you could be tricked into believing that they are relevant. Many facts will be in the question, however, because they raise an issue or are helpful in resolving an issue. After you have completed writing your answer, review the question one more time and ask yourself why each fact appears and whether you have used the facts as effectively as possible to raise and resolve issues.

Organize your answer. A good way to do this is to make frequent use of paragraph breaks. Place the rule in a separate paragraph. Discuss each element in a separate paragraph. Being organized has two benefits. First, students sometimes have a tendency to become distracted in their discussion, that is, to begin discussing one element and then suddenly to shift to the discussion of another element, after which they may return to the first element. The result is that the discussion of one element becomes interlaced with irrelevant observations about a second element and the second element may never be fully discussed. Allocating each element to a separate paragraph is a way of staying focused on the element under discussion. Second, writing an organized answer assists the instructor in

following the logic of your discussion. Another way to organize your answer is with headings. Many students begin the discussion of each issue with a heading, such as "False Imprisonment." Some students even begin the discussion of each element with a heading, such as "Confinement." Headings can be of further assistance in keeping you focused on a particular element and in alerting the instructor to a change in topic. They also reduce the likelihood that the instructor will overlook your discussion of some point, a real possibility when an entire answer is one extremely long paragraph.

Your grade will depend principally upon your success in identifying all of the issues raised by the question, the accuracy of your rule statements, the thoroughness of your discussion applying the rules, and your ability to reach a conclusion based on the rules, the policies of the law, and the facts. In particular, you should look for every fact that can be used to argue for or against the possible resolutions of the issue. As discussed throughout this book, legal reasoning ultimately is a process of argument. Students thus are evaluated on the basis of their ability to construct arguments using the law and the facts. The best answers usually are those that are the most thorough. Your goal in writing the answer is not simply to reach a conclusion as quickly as possible. Rather, your goal is to demonstrate that you know how to think like a lawyer, that you can use the law and the facts to construct arguments that particular rights or duties should or should not be found to exist in a particular situation. The cases that you have read and the hypothetical cases discussed in class provide examples of how this is done in that particular subject.

Make sure that you have answered the question asked and only the question asked. Do not answer the question that you wish had been asked. You may make reasonable inferences from the facts given, but you may not add new facts to the question. Remember that the instructor is comparing answers. To award you credit for discussing matters not within the scope of the question would be unfair to other students who followed the directions and answered the question asked.

## II. ENHANCING YOUR UNDERSTANDING OF LEGAL REASONING

The preceding discussion outlined the most important skills needed in learning to think like a law student: briefing cases, participating in class discussion, outlining courses, and writing exam answers. To excel, however, other skills can also be useful.

### *A. Policy Arguments*

For example, at an early point in their careers, most law students notice that no matter which position they take in a Socratic dialogue, their instructor can make an argument in favor of a competing position. As discussed throughout this book, the reason is that the law is based on sets of competing policies that justify opposing results. The first section of chapter 6 identifies some of the competing policies that arise frequently in the law and provides some arguments in favor of each. Pay

special attention to the portion that deals with formalism and instrumentalism. That portion discusses tensions in the law that are especially pervasive.

The next subsection of chapter 6, "The Relationship in Theory Among Policies," is a highly theoretical discussion that essentially makes a single point: that the law cannot possibly be internally consistent. That is, contradiction is built into the structure of the system because the system rests on opposing policies. For that reason, the law will never be completely settled and the process of legal argument will never end. The remainder of chapter 6 seeks to explain how the lawyer can use policies to argue in favor of one result or another and to predict the decision of a court. You should be able to use the policies identified in chapter 6 to argue either side of a great many of the issues that you will encounter in law school.

Chapters 7–10 then provide an introduction to four of the courses that every law student must learn: contracts, torts, constitutional law, and civil procedure. These chapters demonstrate that the techniques taught in this book, particularly those involving the use of policies to construct arguments, apply equally to every area of the law.

### *B. Factual Arguments*

Proving the relevant facts is a topic rarely covered in most law school courses. Class discussion and exams utilize hypothetical facts that are supplied by the instructor and that the student is expected simply to accept as true. Occasionally, a law student will dispute the possibility that a particular hypothetical fact could be true, an act that is known as "fighting the hypothetical." Fighting the hypothetical is a waste of time because the very premise of a hypothetical question is that the facts have not actually happened but are presumed to have happened for the sake of discussion. In any event, the ability to construct factual arguments is critical to the practice of law. All law schools offer courses in evidence law and in trial practice, where students do learn how to construct factual arguments at trial. Chapter 4 provides an introduction to some of the problems of factual argument.

### *C. Critiques of Legal Reasoning*

At some point, many students start to wonder why lawyers think the way that they do. For example, this happens for some students when they begin to see contradictions in the law. Chapter 11 explains the particular form of mainstream legal reasoning used today as the result of a historical evolution. Even if you are not particularly curious about the origins of legal reasoning or much interested in history, you may find that the historical perspective will assist you in better understanding the legal reasoning process. Some of this material is covered in greater detail in law school courses on American legal history or jurisprudence.

Not everyone is entirely satisfied with the nature of mainstream legal reasoning. Legal scholars in particular have criticized it from a variety of perspectives. Chapter 12 summarizes some of these contemporary perspectives on legal reasoning. Some or all of the material in chapter 12 is covered in much greater detail in perspective courses offered by many law schools, such as jurisprudence, law and economics, feminist legal theory, or critical race theory.

# NOTES

## INTRODUCTION

1. This example is based on the U.S. Supreme Court case *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991).

2. There is an old joke that reflects this unalterable truth. A mathematician, an economist, and a lawyer are asked this question: "How much is two and two?" The mathematician pulls out a paper and pencil, scribbles for a moment, and announces, "Four." The economist consults a series of charts, puzzles over them, and finally says, "Well, if all current trends continue, I project that the answer will be four." The lawyer stands up, shuts the door, lowers the shades, leans close to the questioner, and asks in a conspiratorial whisper, "How much do you want it to be?"

## CHAPTER 1

1. The topic of changing case law is discussed in chapter 5.

2. For example, the Federal Trade Commission has the authority to conduct an adversarial hearing to determine whether a business is engaged in an unfair or deceptive trade practice in violation of federal statute. If this agency proceeding determines that the business is in violation of the law, the commission is empowered to issue an order that the business cease the unlawful practice. Administrative agency decisions are subject to review by the federal courts under the Administrative Procedure Act, 5 U.S.C. §§ 551–559. For the sake of brevity, administrative case law will not be discussed further.

3. 28 U.S.C. § 1652.

4. 304 U.S. 64 (1938).

5. For the sake of simplicity, the discussion of court procedure throughout this chapter will assume that the dispute is a civil case. The procedure in a criminal

case differs in numerous respects that will be ignored here in order to avoid complexities that are peripheral to this discussion.

6. For further discussion of subject-matter jurisdiction, see chapter 10.

7. For further discussion of personal jurisdiction, see chapter 10.

8. A motion is a request for the court to issue a judgment or an order. Although the court's ruling on a motion may be oral, if the ruling is important the court is likely to prepare a written opinion explaining its decision.

9. The appellate court defers to the factual findings made in the trial court in order to avoid what, in effect, would be a retrial of the entire case. The theory here is this: because the trial judge or members of the jury actually saw and heard the witnesses testifying, they are in the best situation to assess the credibility of the evidence and to decide the facts. Trial judges, however, are in no better position to decide the law than the appellate court. Moreover, an incorrect decision on the law would be binding in future cases, whereas an incorrect finding of fact affects only one case, and thus it is particularly important that legal issues be correctly decided. For these reasons, appellate courts do not defer to trial courts on issues of law.

10. In a very small number of cases, a losing party has the right to appeal to the Supreme Court and thus does not need to petition for certiorari. Rather, the party simply files a notice of appeal, and the Supreme Court is then required to hear the case.

11. There is also the possibility that the law of another country or international law applies. These possibilities raise problems too complex for inclusion in this introductory survey. Thus, the assumption used here is that the applicable choice of law rules have identified U.S. law as the governing law.

12. This situation is discussed further at the end of this chapter under the preemption doctrine.

13. An exception exists when a state court applies its own procedural law but uses the substantive law of another state. The difference between substantive and procedural law was discussed at the beginning of section 1 of this chapter.

14. An example may help clarify all this. Suppose that Slade, who is standing in state A, shoots Tenderfoot, who is standing in state B. Tenderfoot now wishes to sue Slade for battery. In a case involving physical injury, some courts apply the law of the state where the wrongful act occurred—in this case state A. Other courts apply the law of the state where the injury occurred—in this case state B. Thus, whether the law of state A or B applies depends on which court Tenderfoot files suit in. Tenderfoot would probably choose the court that would apply the most favorable law. It could even happen that state A would apply the law of state B, whereas state B would apply the law of state A. In some cases, Tenderfoot may choose to file suit in state C, even though it has nothing to do with the dispute, because state C would apply the most favorable law.

15. See, e.g., *Keene v. Wiggins*, 69 Cal. App. 3d 308 (1977).

16. This does not require that the lawyer study every case decided or statute enacted in the jurisdiction. Rather, lawyers over the years have developed a series

of research techniques intended to identify relatively quickly the statutes and cases within a given jurisdiction that could plausibly apply to various types of situations. The assumption is that if these techniques do not identify a statute or case, then it is probably not applicable. Legal research techniques are far too complex to summarize here. See, for example, Christopher G. Wren and Jill Robinson Wren, *The Legal Research Manual* (2d ed. 1986).

17. This statement assumes that both the statute and the case law were issued by the same sovereign. Because of the Supremacy Clause, federal statutes prevail over all contrary state law.

18. Here I use the word *statute* in its technical sense to refer to legislative enactments and not to other forms of enacted law.

## CHAPTER 2

1. This is the so-called golden rule of statutory interpretation, which has been stated as follows: "The general rule is perfectly well settled that, where a statute is of doubtful meaning and susceptible upon its face of two constructions, the court may look into prior and contemporaneous acts, the reasons which induced the act in question, the mischiefs intended to be remedied, the extraneous circumstances, and the purpose intended to be accomplished by it, to determine its proper construction. But where the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it. . . . The whole doctrine applicable to the subject may be summed up in the single observation that prior acts may be referred to solve but not to create an ambiguity" (*Hamilton v. Rathbone*, 175 U.S. 414, 420–421 [1899]).

2. This example was inspired by a well-known hypothetical case suggested by H. L. A. Hart ("Positivism and the Separation of Law and Morals," 71 *Harv. L. Rev.* 693 [1958]).

3. Cases are generally binding only in the same jurisdiction, unless a court in a second jurisdiction is applying the law of the first jurisdiction. Thus, for example, decisions of the Massachusetts state courts do not bind the California state courts, unless California has decided to apply Massachusetts law. (The situation in which one state may apply the law of another state is discussed in chapter 1.)

4. The circumstances in which a court is likely to change case law are discussed in chapter 5.

5. Contributory negligence is negligence by the injured party. The traditional rule, now changed in nearly all jurisdictions, was that a party whose injury was partly attributable to that person's own negligence could not recover compensation from another party whose negligence also was a partial cause of the injury. In other words, the injured party's contributory negligence barred recovery.

6. Arguably, there is a third possibility—that the relationship is prohibitory; that is, the relationship may prohibit certain conduct by certain persons. Prohibitions and requirements, however, may be regarded as merely two different ways of articulating the same relationship. One can say, for example, that a student is required to attend school or that she is prohibited from missing school. To simplify

matters, the text treats requirements and prohibitions as conceptually indistinct and refers to them collectively as requirements.

## CHAPTER 3

1. The analysis, synthesis, and application of policies are discussed in detail in chapter 6.

2. The terminology used in describing the relationships is my own. Very little has been written on how to perform the task of organizing rules according to their relationship to each other, and thus there is no widely accepted terminology for these relationships.

3. See chapter 1.

4. The technique of overruling *sub silentio* is discussed in section 5 of chapter 5.

5. See, e.g., *Rankin v. McPherson*, 483 U.S. 378 (1987).

6. See, e.g., *Rust v. Sullivan*, 500 U.S. 173 (1991).

7. As will be seen in chapter 5, because no two cases are exactly alike, every case technically is unprecedented. Yet, as is also explained in chapter 5, most lawyers will consider one case to be a precedent for another case if the two cases do not differ in any way that is relevant to an underlying policy. Lawyers sometimes are able to persuade a court that one case is a precedent for another by describing it at such a high level of generality that any differences are elided.

8. Another important way to resolve a dispute for which no obviously applicable rule exists is to create an analogy between the novel situation and another situation for which rules do exist. The use of analogies to decide cases is discussed in chapter 5.

9. See, e.g., Samuel D. Warren and Louis D. Brandeis, "The Right of Privacy," 4 *Harv. L. Rev.* 193 (1890); and L. L. Fuller and William R. Perdue, "The Reliance Interest in Contract Damages," 46 *Yale L. J.* 52, 373 (1936, 1937).

10. In this book, I discuss three different logical processes: induction, deduction, and analogy. The latter two are discussed extensively in chapter 5.

In broad terms, I am defining *induction* as the process of reasoning from specific cases to a general rule. I define *deduction* as reasoning from a general rule to a specific case. I define *analogy* as the process of reasoning from one specific case to another specific case.

I acknowledge that some logicians would regard these definitions as technically inaccurate. The definitions do, however, serve my purpose, which is to demonstrate that lawyers reason in three different ways—sometimes using specific cases to create a general rule, sometimes using a general rule to decide specific cases, and sometimes using a specific case to decide another specific case.

11. As noted in chapter 2, any statement by a court that a fact is necessary to its holding can technically be regarded as dictum. The policy discussion here, however, provides a basis for arguing not merely that the prior statement need not be followed but that it should not be followed.

12. The reasons that courts are reluctant to make new law are summarized in chapter 2 in the discussion of the holding and dictum.

## CHAPTER 4

1. Although, as explained in chapter 1, in many trials no jury is impaneled and the judge decides all factual issues, for the sake of simplicity the discussion in the remainder of this chapter generally refers only to the process of presenting evidence to the jury. Unless otherwise noted, however, the discussion applies equally to the presentation of evidence to a judge sitting as the finder of fact.

2. It is, of course, the judge who decides whether evidence will be admitted at trial. When the judge is sitting as the finder of fact and rules that certain evidence is inadmissible, that judge quite obviously must hear the evidence to rule on its admissibility, but, at least in theory, the judge will disregard any evidence that he or she has determined to be inadmissible.

3. There is at least one other commonly encountered body of law, apart from evidence, that regulates factual investigation. As discussed in chapter 1, the procedural rules that govern civil and criminal litigation typically contain rules of discovery. Under these discovery rules, one party may be able to compel the other party to provide certain types of information upon request. These rules, of course, are of assistance in factual research only when the client has already commenced litigation.

Moreover, the fact that the lawyer has obtained the information through discovery does not mean that it is admissible. Each item of information obtained will be admitted at trial only if it is admissible under the rules of evidence.

Although in theory the lawyer, prior to litigation, has investigated the facts to determine the client's rights and duties, the discovery process yields so much otherwise unavailable information that by the end of discovery the facts may look very different than they did prior to the commencement of litigation. Furthermore, the lawyer may learn still more facts once the trial begins. Because the information available changes, the lawyer engaged in litigation must often continually reapply the law to the latest version of the facts to determine whether his or her prior reasoning is still sound.

4. For further discussion of the problem that rules often lead to injustice in particular cases, see chapter 6.

5. The prosecution may want to prove that Marsha is a reluctant witness for a variety of reasons. First, to the extent that she does incriminate the defendant, the jury may give her testimony special weight on the assumption that one who testifies at personal risk must be telling the truth. Second, to the extent that she tends to exonerate the defendant, the jury may disbelieve her because of the assumption that she is too frightened to testify truthfully. Third, if she is a reluctant witness, the court may permit the prosecutor to ask leading questions, thus allowing the prosecution to control her testimony more tightly.

6. For an excellent discussion of these problems and their relationship to the burden of proof, see Kathleen Freeman and Arthur M. Farley, "A Model of Argumentation and Its Application to Legal Reasoning," 4 *Artificial Intelligence and Law* 163 (1997), reprinted in Henry Prakken and Giovanni Sartor, *Logical Models of Legal Argumentation* (1997), 1.

7. These motions are discussed in section 1 of chapter 1.

8. This idea is deeply rooted in Anglo-American law. Sir William Blackstone wrote in 1769 in his famous *Commentaries on the Laws of England* that "the law holds, that it is better that ten guilty persons escape than that one innocent suffer."

9. The experiment is described in Chris Guthrie, Jeffrey J. Rachlinski, and Andrew J. Wistrich, "Inside the Judicial Mind," 86 *Corn. L. Rev.* (2001): 777, 788–789.

10. See, e.g., D. Ariely, *Predictably Irrational: The Hidden Forces That Shape Our Decisions, Revised and Expanded Edition* (2010); S. Plous, *The Psychology of Judgment and Decision Making* (1993); and T. Gilovich, D. Griffin, and D. Kahneman, eds., *Heuristics and Biases: The Psychology of Intuitive Judgment* (2002).

## CHAPTER 5

1. One of the most famous statements of this position is that by Harvard Law professor Lon Fuller. See Lon L. Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart," 71 *Harv. L. Rev.* 630 (1958).

2. As explained in chapter 3 (note 10), some logicians would consider my use of the terms *induction*, *deduction*, and *analogy* technically inaccurate. I have used these terms, however, to demonstrate that legal reasoning has three different modes: moving from specific cases to a general rule (induction), moving from a general rule to a specific case (deduction), and moving from a specific case to another specific case (analogy).

3. The reasons for writing rules in such general terms are discussed in chapter 1. They also are discussed in chapters 6 and 11 under the topic of formalism.

4. Legal standards are discussed in more detail in chapter 6, under the heading "Instrumentalism and Formalism."

5. Deciding which features that several items on a list have in common for purposes of applying the doctrine of *ejusdem generis* is a process similar to deciding which features several cases have in common for purposes of creating a new rule through legal reasoning in the inductive form. This latter process and the problems of judgment involved are discussed in chapter 3.

6. Karl Llewellyn, "Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed," 3 *Vand. L. Rev.* 395 (1950): 401–405.

7. The rule that the court would actually apply in this case would consider whether a ban on the loudspeaker is narrowly drawn to serve a significant state interest and leaves open ample alternative channels of communication. That is, the court must first consider whether preserving tranquillity is important enough to be considered a significant interest. If not, then the policy of free speech will prevail, because it is so much more important than a state interest that is not significant. Next, the court must consider whether the prohibition is narrowly drawn to serve the state's interest in tranquillity. That is, the court must determine whether the prohibition sufficiently furthers the interest in tranquillity, without suppressing too much speech. Finally, the court must consider whether the pro-

hibition leaves open ample alternative channels of communication. This final consideration combined with the requirement that the prohibition be narrowly drawn ensures that the prohibition does not impede free speech too much. Thus, the court has considered the weight given to the policies as well as the extent to which the prohibition furthers the policy of tranquillity and impedes the policy of free speech, that is, the relationship between ends and means. Both types of judgments are required to decide the case.

8. The method used to identify the dispositive facts in a case is discussed in chapter 2.

9. See Sections I.E.2 and I.F.

10. The first case in this example is based on *F.C.C. v. Pacifica Foundation*, 438 U.S. 726 (1978), in which the Supreme Court held that the Federal Communications Commission could, consistent with the First Amendment's guarantee of free speech, regulate a radio station's broadcast of George Carlin's comedy routine on the seven dirty words you cannot say on television. The justification for the decision was that the regulation would further the policy of protecting children. The second case is based on a hypothetical question posed by Doc Anderson, one of my former constitutional law students.

11. The grounds for these various motions are discussed in chapter 1.

12. Summary judgment is discussed in chapter 1.

13. See, e.g., *Basso v. Miller*, 40 N.Y. 2d 233, 386 N.Y.S. 2d 564, 352 N.E. 2d 868 (1976).

14. This example is based on *Fuentes v. Shevin*, 407 U.S. 67 (1972), and *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974).

15. If no future cases follow the earlier rule, a lawyer may well conclude that the earlier case has been confined to its facts.

## CHAPTER 6

1. The terminology employed here draws upon Professor Duncan Kennedy's pathbreaking article, "Form and Substance in Private Law Adjudication," 88 *Harv. L. Rev.* 1685 (1976), although I do not claim to be using the terms in precisely the way that Professor Kennedy did. Further, the courts do not necessarily use these same terms, even when they are referring to the same concept. Because no widely accepted general theory of policy analysis exists, a standard terminology is not available.

2. The common law long has been assumed to represent the popular will, even though it is made by judges rather than elected legislators. This assumption of popular consent in the United States can be justified by the fact that in many states the common law of England was accepted by a state constitutional provision or a legislative enactment and that in all states the legislature may change the common law at any time.

3. This hypothetical example is based on *Williams v. Walker-Thomas Furniture Company*, 350 F. 2d 445 (D.C. Cir. 1965). The facts have been modified, although the contract provision is essentially the same as that at issue in the *Williams* case.

4. This example is based very loosely on the facts of *Smith v. Leech Brain & Co.*, 2 Q.B. 405 (1962).

5. For a discussion of how the belief in absolute rights of property proved unworkable, see Kenneth J. Vandevelde, "The New Property of the Nineteenth Century: The Development of the Modern Concept of Property," 29 *Buff. L. Rev.* 325 (1981).

6. This example is based on the facts of *Slocum v. Metropolitan Life Ins. Co.*, 245 Mass. 565 (1932), discussed in H. Hart and A. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (1994), 76. See also *Riggs v. Palmer*, 22 N.E. 188 (N.Y. 1889).

7. This example is suggested by the cases of *Martin v. Herzog*, 228 N.Y. 164, 126 N.E. 814 (1920); and *Tedla v. Ellman*, 280 N.Y. 124, 19 N.E. 2d 987 (1939).

8. See, e.g., *Doe v. Miles Laboratories, Inc.*, 675 F. Supp. 1466 (D. Md. 1987), which finds that requiring a manufacturer to compensate a consumer injured by the manufacturer's product, even when the manufacturer was not negligent in any way, is both just and efficient.

9. Some studies have suggested that personal ideology is the most important factor in predicting the decisions of U.S. Supreme Court justices and, in particular, is more important than precedent. See, e.g., J. Segal and H. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (2004); and L. Baum, *The Puzzle of Judicial Behavior* (1997).

10. The *Harvard Law Review* publishes annually a table that indicates the percentage of the time that each justice voted consistently with each other justice in the prior term.

11. As noted in chapter 2, under the concept of stare decisis, consistency is valued more than reaching a sound result in each individual case.

## CHAPTER 7

1. Arguably, there is a third situation: under the doctrine of quasi contract. The doctrine of quasi contract creates a legal duty to pay compensation for goods or services that is imposed on the recipient of those goods or services in order to prevent unjust enrichment. For example, assume that an automobile mechanic repairs a car under the mistaken belief that the car owner has requested the service. Even though the parties never actually reached an agreement, the court nevertheless may impose on the car owner a duty to compensate the mechanic. Otherwise, the owner would be permitted unjustly to retain the benefits of the service provided.

Quasi contract is often said to be more like a tort duty than a contract duty because it is imposed by a court to prevent injustice and because it is not based on an agreement. For reasons of space, quasi contract is not considered further here.

2. See, generally, Grant Gilmore, *The Death of Contract* (1974).

3. See, e.g., Charles Fried, *Contract as Promise* (1981).

4. The link between foreseeability and individualism is discussed later in this chapter and again in chapter 8.

5. These implied-in-law promises should be distinguished from promises that are implied-in-fact. The latter are promises that the parties actually do make to each other, although they do so through conduct rather than by explicit language.

6. Courts sometimes award what are known as incidental damages. These damages must also be attributable to, or the result of, the breach, but they are not technically referred to as consequential damages.

7. See *Hadley v. Baxendale*, 9 Exch. 341 (1854).

## CHAPTER 8

1. *Garratt v. Dailey*, 46 Wash. 2d 197, 279 P. 2d 1091 (1955); *Cleveland Park Club v. Perry*, 165 A. 2d 485 (1960).

2. See *McAdams v. Windham*, 208 Ala. 492, 94 So. 2d 742, 30 A.L.R. 194 (1922).

3. See chapter 6.

4. See Morton Horwitz, *The Transformation of American Law, 1780–1860* (1977), 85–108.

5. Although the term *negligence* appears in pre-nineteenth-century decisions, Professor Horwitz has argued that negligence in those cases referred to a failure to perform a specific duty imposed by statute or contract rather than a failure to exercise reasonable care. Negligence, in other words, meant nonfeasance rather than misfeasance.

6. See, e.g., *Union Oil v. Oppen*, 501 F. 2d 558 (9th Cir. 1974) (permitting commercial fishermen to recover lost profits caused by an oil spill); and *Dillon v. Legg*, 68 Cal. 2d 728, 69 Cal. Rptr. 72, 441 P. 2d 912, 29 A.L.R. 3d 1316 (1968) (permitting a mother to recover for emotional distress inflicted by the death of her child, who was killed by a negligent automobile driver).

7. See chapter 7.

8. See *United States v. Carroll Towing Co.*, 159 F. 2d 169 (2d Cir. 1947).

9. The shift to strict liability in any particular context, of course, could also reflect a shift toward rights-based theories of justice and away from utilitarianism.

10. See, e.g., *Phillips v. Kimwood Machine Co.*, 269 Or. 485, 525 P. 2d 1033 (1974).

11. See, e.g., *Barker v. Lull Engineering*, 20 Cal. 3d 413, 143 Cal. Rptr. 225, 573 P. 2d 443 (1978).

## CHAPTER 9

1. As Charles Evan Hughes, who would later become chief justice of the U.S. Supreme Court, observed in 1907 (when he was Republican governor of New York), "We are under a Constitution, but the Constitution is what the judges say it is." See also David A. Strauss, "Common Law Constitutional Interpretation," 63 *U. Chi. L. Rev.* 877 (1996).

2. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

3. See chapters 2, 5, and 6.

4. As noted in chapter 1, a power—like a right or duty—is a type of legal relationship created by rules.

5. *Gibbons v. Ogden*, 22 U.S. 1 (1824).

6. See *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895).

7. *NLRB v. Jones & Laughlin Steel Corp.*, 310 U.S. 1 (1937); *Wickard v. Filburn*, 317 U.S. 111 (1942).

8. *United States v. Morrison*, 529 U.S. 598 (2000).

9. *United States v. Darby*, 312 U.S. 100 (1941).

10. As suggested above in connection with the discussion of the *Morrison* case, by the mid-1990s, the consensus in favor of expanded federal power to regulate interstate commerce was weakening. Thus, the Supreme Court in *Morrison* invalidated a federal statute protecting women against violence on the ground that it exceeded federal power under the commerce clause. How far the Court will go in reversing the expansion of federal power under the commerce clause is unclear. For example, five years after *Morrison* was decided, the Court in *Gonzales v. Raich* (545 U.S. 1 [2005]) upheld a federal statute prohibiting the cultivation and possession of small amounts of marijuana for medical purposes. In so holding, the Court analogized the growth of marijuana for home consumption to the growth of wheat for home consumption, which the Court held to be within Congress's power to regulate in *Wickard v. Filburn*, discussed above. Thus, *Gonzales* reaffirmed that *Wickard*, a case that significantly expanded federal power under the commerce clause, was still good law.

11. See *Calder v. Bull*, 3 U.S. 386 (1798).

12. The Supreme Court has held that the enactment of the Fourteenth Amendment resulted in the application of the First Amendment to the states as well as to the federal government. See *Gitlow v. New York*, 268 U.S. 652 (1925).

13. See *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969) (wearing a black armband to protest the Vietnam War), and *Texas v. Johnson*, 491 U.S. 397 (1989) (burning a flag to protest the policies of the Reagan administration).

14. *See Miller v. California*, 413 U.S. 15 (1973).

15. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

16. Technically, there are two due process clauses—one in the Fifth Amendment and one in the Fourteenth Amendment. The former applies to the federal government, whereas the latter applies to the states. The substance of the clauses is the same, and they are treated here as if they constitute a single clause.

17. *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977); *Bowers v. Hardwick*, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting). The quoted language from *Bowers* comes not from the majority opinion but from Justice Blackmun's dissent. The *Bowers* decision was overruled in *Lawrence v. Texas* (539 U.S. 558 [2003]), where the Court, in effect, adopted Justice Blackmun's position (although not his language) in *Bowers*.

18. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (contraception); *Roe v. Wade*, 410 U.S. 113 (1973) (abortion). Recall the discussion from chapter 2 of the fact that the term *right* or *duty* may refer collectively to several more specific rights or duties.

19. *Michael H. v. Gerald D.*, 491 U.S. 110, 127n6 (1989).

20. *Zablocki v. Redhail*, 434 U.S. 374 (1978). The statute was challenged as a violation of both the due process and the equal protection clauses. The equal protection clause imposes ends-means tests very similar to those imposed by the doctrine of substantive due process. Ultimately, the Supreme Court held that the law violated the equal protection clause. The case is discussed here, though, because its reasoning is equally applicable to a discussion of substantive due process.

## CHAPTER 10

1. The current version is codified at 28 U.S.C. § 2072.

2. As explained in chapter 2, a power, like a right or duty, is a type of legal relationship created by rules.

3. As noted in chapter 9, the Constitution has two due process clauses, one in the Fifth Amendment and the other in the Fourteenth Amendment. The former applies to the federal government, whereas the latter applies to the state governments. They are treated here as a single clause.

4. *Pennoyer v. Neff*, 95 U.S. 714 (1877).

5. *Hess v. Pawlowski*, 274 U.S. 352 (1927).

6. The use of legal fictions is discussed in chapter 5.

7. *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945).

8. See, e.g., *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952).

9. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

10. The "forum state" is the state in which the court adjudicating the case is located.

11. *Asahi Metal Industry Co., Ltd. v. Superior Court*, 480 U.S. 102 (1987).

12. For a fuller discussion, see Kenneth J. Vandevelde, "Ideology, Due Process, and Civil Procedure," 67 *St. John's L. Rev.* 265 (1993).

13. See chapters 7 and 8.

14. The term *general jurisdiction*, when used in the context of subject matter jurisdiction, has a different meaning than when used in the context of personal jurisdiction.

15. Federalism is discussed in greater detail in chapter 9.

16. 28 U.S.C. § 1331.

17. See *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257 (1916).

18. See *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921).

19. See *Louisville & Nashville Railroad Company v. Mottley*, 211 U.S. 149 (1908).

20. See chapter 9.

21. 28 U.S.C. § 1332.

22. See *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). The Constitution would have permitted Congress to confer on the federal district courts power over claims in which diversity was not complete, but Congress elected not to do so. See *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523 (1967).

## CHAPTER 11

1. Although the common law was created by judges and not by an elected legislature, after the Revolution it was explicitly incorporated into the law of most states by a constitutional or statutory provision adopted through democratic processes. Moreover, in all states, under the doctrine of separation of powers, the legislature has the power to modify or reject any part of the common law. Under these circumstances, early-nineteenth-century theoreticians had little difficulty conceptualizing the common law as based on popular consent.

2. Quoted in W. Twining, *Karl Llewellyn and the Realist Movement* (1973), 12.

3. C. Langdell, *A Selection of Cases on the Law of Contracts* (1871), viii.

4. *Lochner v. New York*, 198 U.S. 45 (1905).

5. Ibid., at 75.

6. Ibid., at 76.

7. O. Holmes, *The Common Law* (Howe ed., 1963), 5.

8. Among the most prominent realists were Karl Llewellyn, Jerome Frank, Walter Wheeler Cook, Arthur Corbin, Hessel E. Yntema, Underhill Moore, Herman Oliphant, and William O. Douglas.

9. See Vandevelde, "New Property of the Nineteenth Century" (see chap. 6, n. 5).

10. Felix Cohen, "Transcendental Nonsense and the Functional Approach," 35 *Colum. L. Rev.* 809 (1935).

## CHAPTER 12

1. Ronald Coase, "The Problem of Social Cost," 3 *J. L. & Econ.* 1 (1960).

2. See, e.g., J. F. Shogren et al., "Resolving Differences in Willingness to Pay and Willingness to Accept," 84 *American Economic Review* 255 (1994). In a typical study, participants are divided into two groups. One group is given some object, such as a nice pen. They are asked to specify the price at which they would sell the pen. The other group is asked to specify the price at which they would buy the pen. Those who have the pen place a much higher value on it than those who do not. A variety of theories have been proposed to explain this so-called endowment effect. One theory, for example, is that losses are more salient than gains. Another is that people are risk averse, which causes both parties to avoid the transaction: the seller does so by demanding a high price, and the buyer does so by offering a low price. Yet another is that people form emotional attachments to their entitlements, once they have them, and thus place a higher value on their entitlements than people who do not yet have them.

3. See, e.g., *Merritt v. Faulkner*, 697 F. 2d 761 (7th Cir. 1983) (Posner, J., dissenting). This case involved a prison inmate, Billy Merritt, who accidentally in-

jured his left eye. When he complained of blurred vision, Merritt was sent by a prison physician to a hospital for treatment. The hospital performed a procedure on the wrong eye, and Merritt became functionally blind in both eyes. The court of appeals held that Merritt was entitled to a court-appointed attorney, who negotiated a settlement for Merritt under which the state agreed to provide vision care for Merritt and Merritt's lawyer agreed to accept no fee for his services. Justice Posner, applying a law and economics analysis, dissented from the court's holding that Merritt was entitled to a court-appointed attorney. Merritt was subsequently examined by specialists, who determined that his blindness was incurable. With the assistance of new attorneys, Merritt asked the court to order that the settlement agreement not be enforced, but the court found that the agreement satisfied the requirements of a binding contract. See *Merritt v. Faulkner*, 823 F. 2d 1150 (7th Cir. 1987).

4. The Hand Formula is discussed in chapter 8.

5. This is the thesis that each additional dollar received by someone is of less value to that person than each of the dollars previously earned, so that a rich woman places less value on a dollar than a poor woman.

6. The technique of demonstrating that the policies believed to justify one rule can be used to justify the opposite rule was sometimes described by CLS adherents as "flipping." For example, as noted in chapter 6, a policy of protecting consumers could be used to oppose harsh terms in a merchant's sales contract, but could also be used to support those same terms on the ground that the harsh terms permit the merchant to lower his prices and sell to consumers who are bad credit risks and thus who could not otherwise purchase the product. The proconsumer policy is flipped so that it seems to support the harsh terms.

7. See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976). *Craig* was the first Supreme Court case explicitly to adopt this more rigorous standard for scrutinizing gender discrimination. Ironically, the case involved a law that discriminated against men.

8. *Geduldig v. Aiello*, 417 U.S. 484 (1974).

9. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

10. The use of the term *individualist* is not meant to suggest that those who founded the Republic were laissez-faire libertarians. Early American society, particularly in economic matters, was extensively regulated.

## APPENDIX

1. There is a classic parody of the Socratic method in which the professor asks a student if she has read the assigned case. When the student replies that she has, the professor responds, "Fine. Now, tell me. What am I thinking?" Law students seem to relish this particular bit of satire, I suspect, because it captures their sense of befuddlement at times over what the Socratic method is trying to accomplish.

2. In most first-year classes, professors do not expect students to discuss particular cases by name. Many of the cases in the casebook are selected for their pedagogical value rather than because they are famous cases that students should remember. Professors thus place more emphasis on the rules, the rationales for

the rules, and the method of applying the rules than the names of particular cases. In some courses, however, the names of cases are important. For example, in constitutional law, students read almost exclusively decisions of the U.S. Supreme Court, including some of the most important decisions in American history. Students in constitutional law thus will be expected to be familiar with at least some of the cases by name. In any course, however, if the facts of the exam question seem analogous to the facts of a case you have read, noting the analogy and using it as the basis for arguing for a particular result can strengthen your answer.

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