A Practical Guide to Legal Writing and Legal Method
Sixth Edition

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Introduction

A good lawyer is much more than a professional. A good lawyer is a crafts-person, applying his or her talents with imagination, diligence, and skill. Although the practice of law requires a combination of negotiation, counseling, research, and advocacy skills, there is one skill upon which all others depend: The good lawyer, the crafts-person, must be able to write effectively.

Effective legal writing combines two elements—legal method and writing. Legal method is the process of explaining legal rules, applying them to specific factual situations, and drawing justifiable and well-organized conclusions. Law school, it is often said, is designed to teach you to "think like a lawyer." The myriad legal rules presented in torts, civil procedure, property, and other courses are important, but law school courses should also instill the logic or method of law. A good lawyer knows how to resolve a particular problem, even though he or she may not yet know the relevant legal rules.

A thorough understanding of the legal problem-solving process is of little value, however, unless the analysis can be communicated on paper. Good legal writing is in many ways the same as good writing in general. Legal writing should be clear, precise, and complete, yet fully understandable to a layperson. Although it may be surprising, good legal writing is not a legalistic style of Latin phrases and archaic words.

Effective legal writing is hard work. Nothing is included without good reason, and nothing of significance is omitted. Each word and each sentence is chosen or structured with care. If the document reads smoothly and intelligently, it is not usually because it was easy to write. The reverse is more often true; the document that was easy to write is often muddled. The beauty of well-crafted writing is that the final product masks the pain-taking and difficult process by which it was created. The good writer—the crafts-person—makes it look easy.

The good writer also understands his or her audience. Not surprisingly, the audience is most often lawyers. It includes friendly or supportive lawyers, lawyers for the opposing side, lawyers who are judges, and lawyers who are clerks. They have different experiences and legal skills, but you should assume that they understand legal method and legal writing and that they bring certain expectations to what they read. They don't necessarily know the law relevant to a particular problem, so they expect that a memorandum or brief will explain it. They have good noses for the strengths and weaknesses of legal conclusions, so they expect conclusions to be explained
and counterarguments answered. They are sensitive to the real-world consequences of decisions based on legal documents, so they take these documents seriously. And they are busy—often extremely busy and working under a deadline—so they expect memos and briefs to be as direct, easy to read, and understandable as the material will allow.

This book is designed as a legal writing text, primarily for first-year law students. Its value as a learning tool is based on two classroom-tested premises. First, the fundamental principles of legal writing and legal method can be reduced to a series of fairly simple guidelines. Second, these guidelines can best be learned by practice, particularly by working through highly focused exercises. More than thirty-five years with the first five editions of this book have confirmed these premises.

This book provides practical guidance in the basic skills of legal writing and legal method.1 Each chapter covers a specific topic, such as organization or precedent. Most chapters set out a short series of principles or guidelines. These guidelines are explained and then illustrated with hypothetical legal problems. The book shows good and bad ways of applying these guidelines to the problems and explains why one way is better than the others. Exercises of varying complexity, which afford an opportunity to learn and apply the rules, are provided at the end of each chapter (except Chapters 19). Most of the illustrations and exercises are based on altered or abridged versions of real cases and statutes, citations to which are set out in the Bibliography.

Because legal writing and legal method are skills, they are best learned and improved through the type of practice provided here. Because many different skills are involved, you need to master each one of them, and you must be able to use many of them in a single document. While mastery of basic knowledge about writing and legal method is also essential, simply memorizing that information will not do. If you cannot apply that information on your own in a particular problem, you do not know it.

Learning new skills is often difficult, particularly at first. This is true of all skills, such as riding a bicycle, keyboarding (or typing), driving, playing a musical instrument, or participating in a sport. The more you practice these legal writing and legal method skills, the better you will get, and the more you will enjoy using them.

The book is divided into five parts. The first three parts focus on analytical and writing lessons that are common to most legal documents. These three parts introduce the law (Part A) and explain basic concepts of legal method (Part B) and legal writing (Part C). Although the examples used in these parts tend to be based on legal memoranda, the guidelines in these parts also apply to briefs and other legal documents. The last two parts of

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1. Legal research, basic grammar, and citation form are not discussed. These subjects are covered in detail elsewhere, and there is little value in summarizing them here.
the book show how these guidelines apply to the writing of memoranda and opinion letters (Part D) as well as briefs (Part E), and give additional guidelines for writing these types of documents.

In addition, Appendices at the end of the book show several examples of legal memoranda and a client letter, as well as trial court briefs and appellate briefs. These appendices are intended to be helpful models of the kind of writing taught in this text—not only for class but afterwards in the practice of law.

Although the book offers a step-by-step approach to legal writing and legal method, you need to be aware that legal writing is a recursive process. You may outline a memorandum or brief, begin writing, and then find you need to change your outline. You may find, as you revise your explanation of how a particular statute is applicable to your case, that the statute actually is not applicable. The steps in this book, in other words, do not move inevitably from “earlier” to “later.” You will often find yourself going back to “earlier” steps.

The book integrates and synthesizes many of the fundamental lessons of other law courses. It explicitly states the basic principles of legal method and provides a way of learning this method by explicating the thinking and writing necessary to analyze specific legal problems.

The materials in this book are intended to be straightforward, manageable, and easy to understand. After the guidelines are understood in this context, they can be applied to legal writing assignments and to more complex situations. With time and practice, the finer points of legal writing and legal method can be mastered. Ultimately, this book provides tools that will be helpful wherever you go in the practice of law.
Defining law is a difficult philosophical problem, but law can generally be understood as the rules and underlying policies for guiding or regulating behavior in society. Rules describe what behavior is permissible or impermissible, what procedures must be followed to achieve certain ends, and what happens to those who do not follow them. Legal rules are intended to provide a means of resolving disputes peaceably, predictably, and, more or less, efficiently. They define relationships among individuals and groups, and help people arrange or conduct their business with greater security.

Legal Rules

Legal rules come about when the legislature enacts a statute, when a court resolves a dispute, when the president ratifies a treaty with another nation after the Senate has given its advice and consent, or when a government agency promulgates administrative regulations. Legal rules differ from other rules because their creation and enforcement require the participation of government. The police, courts, and other governmental bodies are responsible for ensuring compliance with these rules.

Rules vary considerably in their scope, clarity, and precision. Common law rules are created one case at a time. Although they may apply to more situations than just the case at hand, they may be so narrowly tailored that they have little application beyond the particular case from which they arose. Some rules are phrased in broad or general language. Many federal constitutional rules, for example, prohibit persons from
being denied “freedom of speech” or “equal protection of the laws.” Much tort law turns on what is “reasonable” in particular cases. Rules with such broad terms offer attorneys and judges considerable freedom for interpretation. Other rules are much more specific. Statutes tend to be more detailed than constitutions, and administrative regulations tend to be even more detailed. An administrative regulation, for example, may require a person who uses explosives to be certified by the state after paying a $300 fee and passing a competency test. Such regulations offer less room for interpretation than rules defined by concepts like “freedom of speech.” Common law rules, such as those involving estates in land, can also be quite specific.

This range reflects, at each extreme, contrasting approaches to the creation and application of law. Common law is made on a case-by-case basis when a court fashions or applies a rule to the case before it. The common law thus develops cautiously and is premised on the view that problems are best understood and analyzed in light of the facts of each particular case. Other laws, such as statutes and administrative rules, confront problems in groups. This approach is bolder, relies on the premise that problems can be understood in categorical terms, and makes law about particular situations in advance. Each approach works to solve certain problems, but neither approach works for all problems.

**Law and Policy**

Policies are the specific underlying values or purposes for legal rules. Policies reflect varying and sometimes inconsistent views about what is socially good. Much property law survives from feudal times primarily because of the convenience of adhering to custom. More recent lawmaking, on the other hand, is often directed toward the achievement of specific political goals. Policies also vary greatly in abstractness, even for the same rules. A building code provision requiring a certain kind of fire extinguisher for apartment buildings will probably be premised on technical judgments concerning the safety or efficiency of certain products or materials. These technical judgments, in turn, will be premised on certain moral or value judgments about the degree of protection that ought to be afforded tenants of apartment buildings. Sometimes policies are articulated clearly, but frequently they are stated unclearly or not at all. Often, a single rule is buttressed by several policy considerations.

Because legal rules are based on social judgments, they tend to act as a shorthand way of deciding what is just in a specific factual
situation. Instead of simply asking what is right, for example, a court will first apply the relevant legal rule. The Twenty-Sixth Amendment to the United States Constitution provides that a United States citizen who is 18 years of age or older cannot be denied the right to vote simply because of the person’s age. The answer to the question, “Can Isaac vote in the national presidential election?” depends on whether Isaac is a United States citizen and is 18 years of age or older. There are good reasons for restricting the national voting privilege to United States citizens, but we all know of 10- and 12-year-olds who could vote more intelligently than some adults. Could we fairly select and include these children while excluding certain adults? Probably not. The age of 18 is simply a reasonable place to draw a line. Line drawing is one of the most important policy considerations in creating and applying legal rules.

Because legal rules are often created to achieve socially desirable goals, they are not etched in stone for eternity, nor do they necessarily reflect the “natural” order of things. Change in underlying values or policies will often be followed by change in the legal rules.

The evolution of the law regarding sex-based discrimination is illustrative. The Fourteenth Amendment to the United States Constitution, which went into effect in 1868, provides in part that no state shall “deprive any person of life, liberty, or property, without due process of law.” In 1872, the United States Supreme Court decided in *Bradwell v. Illinois* that this provision of the Constitution did not prevent Illinois from refusing to license an otherwise qualified woman to practice law in that state. The legislature had said, in effect, that only men could be lawyers. Justice Bradley, writing for himself and two other justices, commented:

> The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases. . . . I am not prepared to say that it is one of her fundamental rights and privileges to be admitted into every office and position, including those which require highly special qualifications and demanding special responsibilities.¹

Although the Court’s sex discrimination decisions leave open some important questions about equality, there can be little question that its outlook has undergone a marked change. It is difficult to imagine the Court drawing the same conclusion today as it did in 1872. As Justice Brennan, referring to the *Bradwell* case, wrote in a 1974 opinion:

There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of "romantic Paternalism" which, in practical effect, put women, not on a pedestal, but in a cage.\(^2\)

This change in the Court's attitude, and ultimately in the law, came as a direct result of changing public views about the role of women. This is not to suggest that judicial (or even legislative) decisions are made only after a poll is taken; the point is rather that public attitudes and values influence the environment in which these decisions are made.

The law, in turn, is a source of social norms and expectations. What the law requires, permits, or prohibits often comes to be associated with what is good or right. Just as the Supreme Court's early decisions helped maintain or create patterns of sex discrimination, so its more recent opinions can be credited with helping to lessen it.

The conclusion that rules are created to carry out socially desirable goals has an important corollary: Rules should never be applied to a factual situation without consideration of the consequences. This may seem like a paradox. If the rule is thoughtfully designed to achieve a particular goal, after all, then every application of that rule to a factual situation ought to further that goal; there should be no need to examine its fairness in each case. The practical difficulty with this proposition, however, is the impossibility of knowing in advance the full range of situations to which the rule might ultimately apply. As a result, the rule may not achieve the desired result in all cases and may even achieve exactly the opposite of what was intended.

The old legal adage "hard cases make bad law" is rooted partly in the tremendous difficulty that lawyers and judges have when a rule is clearly applicable to a factual situation in which it would work a manifestly unjust result. Sometimes the rule is flexible enough that the problem can be solved by interpretation. Sometimes the rule provides for exceptions. Sometimes it is more important to maintain the integrity of the category than it is to work justice in all cases. And sometimes it is necessary to change the law.

Suppose, for example, the rule is that the named beneficiary in a will inherits the property of the deceased. The rule respects the wishes of the deceased and provides a way for the orderly distribution of the dead person's property. But what if the beneficiary murders the person who wrote the will to collect the inheritance? The rule contains no exceptions or room for interpretation. If it is applied as written, the beneficiary will collect the inheritance. Although the basic purposes of the rule would be served, applying the rule seems terribly wrong. A

court's best alternative in this situation is to change the rule: A beneficiary may not inherit property from a person he has murdered.3

Other hard cases require a judge to reconcile competing policy considerations. At what point, for example, does a criminal defendant's right to a fair trial limit the public's right to full media reporting of that trial? To what extent can a person's right to run her own business as she sees fit be limited by society for the protection of her employees? You will constantly be probing the cases you read for the justness of their rules and policies.

Law practice and legal education tend to focus on hard cases. Easy cases do not necessarily require a lawyer at all. One does not need a law degree to know that a person who drives seventy miles per hour in a residential neighborhood is breaking the speeding law. Lawyers are most necessary when hard cases arise. Their training and experience help them solve problems that others cannot resolve.

The importance of recognizing that value choices support legal rules cannot be overstated. You will need to explain and weigh competing policies in your office memos. As an advocate, moreover, you will be writing briefs to explain why certain policies outweigh others, and you will have to understand and be responsive to the values of your audience to do so.

Value choices are important in the practice of law. Lawyers have obligations to their clients, but they also have obligations to society. When these obligations are in tension with one another, the tension is not always easy to resolve. If you successfully help a company develop a shopping mall near a city, for instance, you will have a significant effect on local land use, transportation, and housing patterns. If you successfully represent a landowners' group seeking to block that development, you prevent those effects but cause others. Whichever side you represent, you will be arguing for the social good your clients ostensibly seek. "Justice" and "the social good" have many meanings, and you will develop and refine your own understanding of these concepts as you study law.

The United States has many sources of law because of our federal system. Power is divided between the federal government and the fifty states. The United States Constitution is the nation's charter and the source of authority for federal laws and the federal courts. The Constitution delineates the limits of federal power and reserves considerable authority to the states. Each state has authority over persons and activities within its boundaries. State governments, in turn, delegate some authority to local governments.

The federal government, state governments, and many local governments are divided into three branches. The legislative branch writes laws, the executive branch carries out those laws, and the courts interpret them. Thus, each of these governmental units may, within certain constraints, make law.

Understanding how laws arise and how they affect our activities requires an understanding of two key concepts: (1) the relationships among laws within a single jurisdiction, and (2) the relationships among federal, state, and local governments in the system. This chapter describes these two concepts and briefly describes resources for legal research.

The Hierarchy of Laws

Four basic kinds of laws exist: constitutions, statutes or ordinances, administrative regulations, and judge-made law.¹ These sources form

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¹ This summary is limited to the basic internal laws of the United States. International agreements and laws of other countries are not described here.
a hierarchy with constitutions at the top and judge-made laws at the bottom. Within a jurisdiction, the constitution is the highest authority; statutes, regulations, and common law must not conflict with the constitution.

Statutes create categorical rules to address particular problems. The Food, Drug, and Cosmetic Act, for example, was adopted by Congress to ensure the safety and healthfulness of the nation’s food supply. A statute is controlling as to the subject it encompasses, unless the statute is unconstitutional.

The federal government and most states have many agencies with diverse responsibilities (e.g., labor, veterans’ affairs, transportation, commerce, environmental protection). Administrative regulations are rules promulgated by such agencies to help implement specific statutes. For example, the “laws” relating to declarations of nutritional information required on the packages of certain foods are largely administrative regulations promulgated by the Food and Drug Administration under the Food, Drug, and Cosmetic Act. Properly adopted administrative regulations have the same legal effect as statutes, so long as they are consistent with the Constitution and relevant statutes.

Judges often interpret or apply constitutions, statutes, or regulations. At other times, when such law is not applicable, they interpret or apply a body of judge-made law known as the common law. In either situation, law is made whenever a court decides a case. Once a constitutional provision, statute, or regulation has been construed by a court, that construction becomes law.

The charts below illustrate the order of authority within the federal government and within a state government:

<table>
<thead>
<tr>
<th>United States</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>United States Constitution</strong></td>
</tr>
<tr>
<td>Food, Drug, and Cosmetic Act, passed by Congress to ensure the safety and healthfulness of the nation’s food supply</td>
</tr>
<tr>
<td>Administrative regulations promulgated to effectuate the Act, such as rules relating to the declaration of nutritional information required on the packages of certain foods</td>
</tr>
<tr>
<td>Judicial decisions construing the Act or the regulations</td>
</tr>
</tbody>
</table>
The Hierarchy of Jurisdictions

The United States has fifty-three sovereign systems of law: federal law and the laws of each of the states and territories. Although these systems are parallel, they sometimes intersect. Federal law controls when they do. Article VI of the United States Constitution provides that the Constitution and federal laws made pursuant to the Constitution "shall be the supreme law of the land." 3

Therefore, a state may not act, through its legislature or its courts, in a way that is inconsistent with applicable provisions of the United States Constitution or with federal statutes and regulations. For example, the federal Voting Rights Act restricts or bars entirely devices used to discourage voting by racial and ethnic minorities, such as poll taxes, literacy tests, and voting and registration instructions written only in English. A state whose laws conflict with this Act must change its laws to conform to the federal statute.

Subdivisions of the state, including counties, townships, cities, boroughs, villages, or parishes, may also make laws. These laws, usually called "ordinances," must comply with the applicable provisions of the state and federal constitutions as well as state and federal statutes.

The Hierarchy and Jurisdiction of Courts

The federal court system and most state court systems consist of three tiers: the trial courts, the middle-level court of appeals, and the court

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2. This is commonly referred to as the "Supremacy Clause."
of last resort. Within each system, the jurisdiction of the courts—that is, the authority of courts to hear a case—is limited by geography and subject matter. In the federal system, the trial courts are known as *district courts* because the jurisdiction of each is limited to cases brought within its geographic district. A district might be an entire state (such as Maine) or a portion of a state (such as Texas, which currently has four federal judicial districts). The jurisdiction of the middle tier, the *federal appeals courts*, is also generally defined by geographic boundaries. The fifty states and the territories are currently divided into eleven judicial circuits, with the District of Columbia Circuit forming the twelfth and the Federal Circuit forming the thirteenth.

The eleven judicial circuits that are geographically limited include the following states and territories:

<table>
<thead>
<tr>
<th>Circuit</th>
<th>States Included</th>
</tr>
</thead>
<tbody>
<tr>
<td>1st Circuit:</td>
<td>Maine, Massachusetts, New Hampshire, Puerto Rico, Rhode Island</td>
</tr>
<tr>
<td>2nd Circuit:</td>
<td>Connecticut, New York, Vermont</td>
</tr>
<tr>
<td>3rd Circuit:</td>
<td>Delaware, New Jersey, Pennsylvania, Virgin Islands</td>
</tr>
<tr>
<td>4th Circuit:</td>
<td>Maryland, North Carolina, South Carolina, Virginia, West Virginia</td>
</tr>
<tr>
<td>5th Circuit:</td>
<td>Louisiana, Mississippi, Texas</td>
</tr>
<tr>
<td>6th Circuit:</td>
<td>Kentucky, Michigan, Ohio, Tennessee</td>
</tr>
<tr>
<td>7th Circuit:</td>
<td>Illinois, Indiana, Wisconsin</td>
</tr>
<tr>
<td>8th Circuit:</td>
<td>Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota</td>
</tr>
<tr>
<td>9th Circuit:</td>
<td>Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Northern Mariana Islands, Nevada, Oregon, Washington</td>
</tr>
<tr>
<td>10th Circuit:</td>
<td>Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming</td>
</tr>
<tr>
<td>11th Circuit:</td>
<td>Alabama, Florida, Georgia</td>
</tr>
</tbody>
</table>

Each federal court of appeals has jurisdiction to hear appeals from districts within its circuit and may affirm or reverse district court decisions. The final level of appeal is to the United States Supreme Court, which may affirm or reverse federal court of appeals decisions as well as certain decisions by a state’s highest court.
The following chart illustrates the hierarchy of courts within three jurisdictions:

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Federal</th>
<th>Florida</th>
<th>Indiana</th>
</tr>
</thead>
<tbody>
<tr>
<td>Highest Court</td>
<td>United States Supreme Court</td>
<td>Florida Supreme Court</td>
<td>Indiana Supreme Court</td>
</tr>
<tr>
<td>Middle-Level</td>
<td>United States Court of Appeals for the First Circuit</td>
<td>Court of Appeals of Florida, Fifth District</td>
<td>Indiana Court of Appeals, Second District</td>
</tr>
<tr>
<td>Appeals Court</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Trial Court</td>
<td>United States District Court for the District of Massachusetts</td>
<td>Circuit Court for Seminole County</td>
<td>Marion County Superior Court</td>
</tr>
</tbody>
</table>

The power of a court to hear certain types of cases is known as subject-matter jurisdiction. The subject-matter jurisdiction of the federal courts is limited by the United States Constitution and Congress. Federal courts have no authority to hear cases that fall outside those limitations. As a general matter, the federal courts have subject-matter jurisdiction over (1) civil actions that arise under the Constitution, laws, or treaties of the United States (federal-question jurisdiction); (2) cases involving admiralty or maritime law; (3) civil cases in which the amount in controversy exceeds $75,000 if the plaintiff and defendant are citizens of different states (diversity jurisdiction); and (4) cases involving federal crimes. Congress has also created specialized civil courts, such as federal bankruptcy courts, whose jurisdiction is limited to a particular area of the law.

The jurisdiction of state courts is similarly defined by the state's constitution and legislature. A trial court's jurisdiction ordinarily is limited by geography (usually all or part of a county or municipality), subject matter, and the amount in controversy. The court system in a municipality or county may include criminal courts and civil courts of limited or general jurisdiction. The latter are often called circuit courts, superior courts, district courts, or county courts.

A state court may hear questions of federal law as well as state law. For example, a defendant who has been charged with violating a local ordinance and who believes the ordinance violates the right to assemble guaranteed by the United States Constitution may raise the constitutional claim in state court. Federal courts may also hear questions of state law, but they must apply the law of the state under whose
laws the claim arose. If the law of the state is unclear, the federal court must either make an educated guess about what the highest court of that state would do if confronted with the question before it or, if state law permits, certify the question to the state’s highest court.

Within each jurisdiction, the decision of the highest court is binding on the lower courts. A decision of the United States Supreme Court on a federal question would be binding on all courts that entertain the identical federal question. As explained more fully in Chapter 4 (Precedent and Stare Decisis), when the question is one of state law, state courts are bound by their court of last resort, but they are free to accept or reject decisions by courts of other states and decisions by federal courts interpreting their state law. Judicial decisions outside the jurisdiction may be persuasive but are never binding.

Source Material for Researching the Law

The sources of law described above—constitutions, legislation, regulations, and judicial decisions—are referred to as primary authority. They are “law,” and the outcome of legal disputes turns on their applicability and interpretation.

Other resources, in which people write about the law or collect and offer general theories about selected rules of law, are known as secondary authority. Included in this category are treatises, restatements of the law, articles in law reviews and other legal periodicals, annotations, and legal encyclopedias. These resources may describe the law in a general way or suggest what the law should be, but they are not sources of law. Although secondary authority may assist in persuading a court that a given result is correct or preferable, it cannot mandate that result. Nevertheless, some secondary authority has greatly influenced the courts, and many courts have adopted various statements in secondary authority as the law of the jurisdiction. Once a court has adopted a rule proposed or stated in secondary authority, that rule becomes primary authority.

The following is a brief overview of the main sources in which primary and secondary authority are located.\(^3\)

\(^3\) Primary authority and some secondary authority are also published in electronic databases, such as LexisNexis and Westlaw, in addition to the print sources described in this section.
Primary Authority

Federal statutes are published chronologically as they are enacted, first in pamphlet form called slip laws, and then in a series of books called United States Statutes at Large. They are also published by subject matter in the United States Code (U.S.C.), the official version; in United States Code Annotated (U.S.C.A.), published by West Publishing Company; and in United States Code Service (U.S.C.S.), published by Lawyers Cooperative Publishing Company. The publication of state statutes follows a similar pattern. Recent enactments are first published in pamphlet form and then in books organized by subject matter. U.S.C.A., U.S.C.S., and most, if not all, state codes are annotated, which means that the compilations include the history of successive amendments to a code section, references to analogous statutes, references to secondary authority and finding aids, and brief annotations or descriptions of cases construing a particular section.

Constitutions are published in the same manner as statutes. The United States Constitution is published in U.S.C., U.S.C.A., and in U.S.C.S., for example. State constitutions are also usually published in compilations of state statutes.

Administrative regulations are printed in the Federal Register, which is published five days per week by the United States Government Printing Office. The Federal Register also contains proposed regulations and various notices. Regulations are then published by subject matter in the Code of Federal Regulations (C.F.R.), the official source for United States government regulations. In many states, administrative regulations are published in a state version of the Federal Register (e.g., Pennsylvania Bulletin) and then codified by subject matter (e.g., Pennsylvania Code).

Judicial opinions are published in hardbound volumes, roughly in chronological order, with pamphlet supplements that contain opinions too recent to be published in hardbound. Decisions by the United States Supreme Court are published in United States Reports (U.S.), the official version; the Supreme Court Reporter (S. Ct.), published by West Publishing Company; and United States Supreme Court Reports, Lawyers’ Edition (L. Ed.), published by Lawyers Cooperative Publishing Company. West publishes decisions by the federal appeals courts in Federal Reporter (F., F.2d, F.3d) and by the federal district courts in Federal Supplement (F. Supp., F. Supp. 2d, F. Supp. 3d). Not all federal district court and court of appeals decisions are published.

Most states publish their own court decisions. West also publishes state court decisions by region. It has divided the country into seven regions:
<table>
<thead>
<tr>
<th>West Regions</th>
<th>States Included</th>
</tr>
</thead>
<tbody>
<tr>
<td>Northeastern (N.E. and N.E.2d):</td>
<td>Illinois, Indiana, Massachusetts, New York, Ohio</td>
</tr>
<tr>
<td>Northwestern (N.W. and N.W.2d):</td>
<td>Iowa, Michigan, Minnesota, Nebraska, North Dakota, South Dakota, Wisconsin</td>
</tr>
<tr>
<td>Southeastern (S.E. and S.E.2d):</td>
<td>Georgia, North Carolina, South Carolina, Virginia, West Virginia</td>
</tr>
<tr>
<td>Southwestern (S.W., S.W.2d, and S.W.3d):</td>
<td>Arkansas, Kentucky, Missouri, Tennessee, Texas</td>
</tr>
<tr>
<td>Southern (So., So. 2d, and So. 3d):</td>
<td>Alabama, Florida, Louisiana, Mississippi</td>
</tr>
</tbody>
</table>

Because of the efficiency of the West national reporter system, some states have discontinued the publication of official versions of their decisions. Their published decisions are available only in West's regional reporters.

**Secondary Authority**

This category includes encyclopedias, annotations, scholarly publications, and restatements.

**Encyclopedias.** Two encyclopedias, found in virtually every law library, cover the scope of Anglo-American jurisprudence—*American Jurisprudence, Second Series* (Am. Jur. 2d), published by Lawyers Cooperative, and *Corpus Juris Secundum* (C.J.S.), published by West. Some encyclopedias are devoted to the law of a particular state. If a state encyclopedia is published by one of the two national publishers, West or Lawyers Cooperative, topics are arranged to conform to the national encyclopedia. Like other encyclopedias, the topics in legal encyclopedias are arranged alphabetically with cross-references in the index.

**Annotations.** *American Law Reports* (A.L.R.) publishes selected cases along with annotations that survey the law within a discrete area suggested by a particular case. The cases are selected for their interest to the practicing lawyer. A selected case might represent, for example,
a new development in the law or one approach to an issue on which the jurisdictions have split. An annotation on the issue you are researching will give you not only an overview of the law nationwide but also citations to the most useful cases in each jurisdiction.

**Scholarly Publications.** Scholars and practitioners publish books within their particular area of expertise. These are called *treatises* (multivolume sets) or *hornbooks* (single volumes). In addition, law reviews, law journals, and other legal periodicals throughout the country, most of them run by law students, publish numerous scholarly articles each year on current topics of interest to the legal community. These publications cover subjects in more depth than legal encyclopedias or A.L.R. annotations, and the research is usually comprehensive. They frequently propose solutions to particular legal problems.

**Restatements of the Law.** At the beginning of the twentieth century, a group of lawyers formed the American Law Institute. In 1932, the Institute initiated a series of publications consisting of black-letter rules that generally reflect the majority view on a given common law issue. For example, the American Law Institute has issued restatements of the law on the following subjects: Agency, Conflict of Laws, Contracts, Foreign Relations Law of the United States, Judgments, Property—Landlord and Tenant, Property—Donative Transfers, Torts, and Trusts. Each rule is followed by a Comment that further elaborates the rule or the reasons for its adoption, and Illustrations that demonstrate how the rule applies in specific situations. In format, a Restatement resembles a code. It is divided into sections, with each section stating a separate rule.

Here is an example from the Restatement (Third) of Agency:

§ 1.01 Manifestations of consent.

Agency is the fiduciary relationship that arises when one person (a “principal”) manifests assent to another person (an “agent”) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.

This code-like structure has led many law students to believe that a restatement is more authoritative than it actually is. Restatements are only secondary authority. They are written by authors who describe what the law is in some jurisdictions or what it ought to be, but who have no authority to make laws. Courts and legislatures, however, sometimes adopt a particular restatement provision. When that occurs, the restatement provision is the law of that jurisdiction.

This description of the origin of laws, the hierarchy of authority in our federal system, and the published sources of laws and commentary about the laws should enable you to put the resources you will find in a law library in the proper perspective.
EXERCISES

The following exercises will test your understanding of the information in this chapter.

Exercise 2-A

You represent Chad Hollister, who has been accused of raping his companion while the two were on a date. Hollister admits that he had sexual intercourse with the victim but claims that she consented. The prosecution has brought charges in state court and has sought to introduce evidence that Hollister has been publicly accused of rape several times in the past and prosecuted for rape once. You wish to offer a motion to exclude this evidence. You have found the following:

1. A section of the code of your state that says evidence of prior wrongs is usually inadmissible but may be admissible to show the accused person’s criminal intent.

2. A law review article on the difficulty of proving criminal intent in date-rape cases.

3. A decision by a middle-level appeals court in another state in which the court held that if the accused rapist admits the act, his intent is irrelevant, the only issue being the consent of the victim.

4. A decision by a federal court of appeals, applying the law of another state, in which the court held that prior rapes are irrelevant to both the defendant’s intent and the victim’s consent, and are therefore inadmissible.

5. A section of the code of your state that defines rape as compelling another person to engage in a sexual act by force or threat of force.

6. A decision by the highest court of another state in which the court held that evidence of prior rapes is relevant to show the defendant’s awareness that the victim had not consented and therefore his intent to rape.

7. A decision by the highest court of another state in which the court held that prior acts of rape are not admissible because they are unfairly prejudicial and have no bearing on the defendant’s intent at the time of the rape for which he is on trial.

8. A dissent by a judge in the case described in item 7. The judge believed that the prior acts were similar enough to show the defendant’s characteristic behavior and thus to rebut the defense that the victim consented.

Divide these sources into three categories: (A) primary authority that is binding, (B) primary authority that is persuasive, and (C) secondary authority. Which source in category (B) is likely to be most persuasive?
CHAPTER 4
Precedent and Stare Decisis

Judges have considerable freedom to modify legal rules and principles in accordance with social norms and their views of justice and common sense. The concepts of precedent and stare decisis serve as important checks on this judicial freedom and ensure that the law develops in an orderly fashion.

One of the fundamental principles of our legal system is that courts look to previous decisions on similar questions for guidance in deciding present cases. These decisions are known as precedent, and their usefulness is premised on the idea that an issue, once properly decided, should not be decided again. Reliance on precedent ensures that similar cases are decided according to the same basic principles and helps courts to process cases more efficiently. Durable rules also reinforce the social norms they define, encourage confidence in the legal system, and assist people in planning their activities.

The values that surround the notion of precedent are reinforced by the principle of stare decisis. Whereas precedent merely requires that courts look to previous decisions for guidance, stare decisis requires that a court follow its own decisions and the decisions of higher courts within the same jurisdiction. A state trial court, for example, must follow the decisions of appellate courts in that state; an intermediate appellate court must follow the decisions of the state's highest appellate court. Federal courts of appeal must follow those of the United States Supreme Court, but decisions of federal district courts or other federal courts of appeal do not bind them.

Precedent, then, can be of two types—binding or persuasive. When the doctrine of stare decisis applies, precedent is binding and a court must reconcile the result in a given case with past decisions. Only after
explaining why previous cases are inapplicable may a court fashion new rules or modify or expand existing ones; a court may never simply ignore or contradict binding precedent. When the doctrine of *stare decisis* does not apply, as with decisions from other jurisdictions or lower courts in the same jurisdiction, courts are free to follow, or refuse to follow, previous decisions. Although not binding, such decisions may be *persuasive*. The reasoning of other courts often illuminates the issues and suggests solutions to a problem.

The concept of binding precedent may seem absolute. But in practice, *stare decisis* is a flexible concept. Because a judicial opinion may be interpreted in different ways, judges have significant latitude even when dealing with binding precedent. Differing interpretations result from internal tension—on one hand, between the facts and holding of a case, and, on the other hand, its underlying reasons or policies. Viewed most narrowly, a case stands for a particular result regarding that set of facts. Courts often do confine cases to narrow factual categories, but such interpretations give the case relatively little importance. Viewed more broadly, a case stands for the articulated reasons or policies. Because the court was concerned primarily with the facts of the case before it, legal analysis travels on increasingly risky ground the further it ventures from those facts in trying to predict the outcome of future decisions. The best guides in venturing from those facts are the reasons and policies given in the opinion.

The various ways in which a case can be interpreted highlight the fundamental role that *stare decisis* plays in the process of legal analysis. In his well-known book, *The Bramble Bush*, Professor Karl Llewellyn defined this range of interpretation in terms of "strict" and "loose" views of precedent. The *strict* view, applied to "unwelcome" precedent, limits the reach of prior cases to show that they are not applicable to the case at hand. Strict construction of precedent requires careful distinguishing of the facts and policies of the prior case(s) from those of the present case. The loose view, applied to "welcome" precedent, maximizes the reach of these cases to show how they are applicable, or analogous, to the present case. As Llewellyn pointed out, both approaches are "respectable, traditionally sound, [and] dogmatically correct."

Flexibility is necessary to the legal system because it allows the law to adapt to evolving conditions and to accommodate new factual situations. However, the stabilizing effect of *stare decisis* should not be underestimated. When the rules are well defined and the factual situations are clearly similar or plainly different, *stare decisis* mechanically

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dictates the result. Even when the rule is ambiguous or the factual situation complex, *stare decisis* at least defines the starting point for analysis. This tension between restraint and freedom, between stability and change, embodies the essence of our common law system.

Determining the precedential value of rules or ideas in a court’s opinion requires a close reading of the case. Statements made by a court that do not bear on the issues before it are known as *dicta* (from the Latin phrase *obiter dictum*, literally, “said in passing”). *Dicta* have little precedential value because a court is supposed to decide only the issues before it and *dicta*, by definition, are not part of the reasoning process that led to the decision. Courts sometimes rely on *dicta* nonetheless because *dicta* reflect other judges’ concerns and often indicate how a court would rule in the future.

Courts may also rely on the ideas and reasoning of concurring and dissenting judges. Appellate courts consist of a panel of judges who may not agree on how a dispute should be resolved or why a particular decision should be reached. If the court is divided, one of the judges in the majority will write the opinion of the court. Judges who disagree with the decision reached by the majority and refuse to join the court’s opinion are said to *dissent*. Judges who agree with the decision but either disagree with the majority’s reasons or would have reached the same decision on other grounds are said to *concur*. These judges frequently write separate opinions.

Unlike *dicta*, which may indicate how a court would rule in the future, a concurring or dissenting opinion indicates only that a judge disagreed strongly enough to write a separate opinion. Nevertheless, these opinions can be a valuable resource. Often, a dissenting or concurring opinion sharpens the focus of the debate. It may offer a different interpretation of precedent, emphasize social policies disregarded by the majority, or frame the legal question in a different way. A court that is considering a change in the law of its jurisdiction or facing an issue of first impression will read concurring and dissenting opinions on the issue in question with great interest. Dissenting opinions in an earlier case are sometimes adopted by a majority of the court in later cases.

The following two cases illustrate how precedent and *stare decisis* function. They concern the question whether a landlord should be held liable for negligently exposing tenants to foreseeable criminal activities. After deciding the first case, *Brainerd v. Harvey*, in 1982, the same state appellate court was presented with an opportunity four years later, in *Douglas v. Archer Professional Building, Inc.*, to expand the scope of the rule to cover a different factual situation.
**Brainerd v. Harvey (1982)**

The plaintiff is an elderly man who lived in a small building in a high crime area. The building had poor lighting on its front porch and a continuously unlocked outer door. As the plaintiff was about to enter the building one night, the outer door was jerked open by an unknown youth who had been hiding inside. The youth struck and robbed the plaintiff. The plaintiff brought suit against the landlord, but the trial judge granted the defendant’s motion for a directed verdict of no cause of action.

We reverse. We have from time to time held that persons are liable for negligently exposing others to foreseeable criminal activities, and this is such a case. The inadequate lighting and locks were physical defects in a common area of the building under the landlord’s control; this would be a far different case if the building had not contained such defects. The landlord’s negligence in failing to repair them made it more likely than not that the plaintiff would be victimized by a criminal attack.

The trial court also erred in refusing to grant the plaintiff’s demand for a jury trial. He did not waive that right by waiting until the pretrial conference to make his demand. Remanded for a jury trial.

**Douglas v. Archer Professional Building, Inc. (1986)**

In 1978, a mental health clinic leased and began occupying an office on the fifth floor of the Archer Professional Building. About two years later, an outpatient at the center stabbed Carol Douglas, a physician with an office in the building, while both of them were riding in the building’s elevator. Dr. Douglas brought suit against the owner of the building. At trial, the director of the clinic testified that the stabbing was the first such incident in his ten years of experience with such programs. There was also testimony that before the incident other tenants in the building had voiced concern over use of the elevators and stairwells by the clinic’s patients. Dr. Douglas won a jury verdict for $115,000 in damages. We affirm.

We stated in *Brainerd v. Harvey* that landlords are liable for damages caused when they negligently expose others to foreseeable criminal attacks in common areas of buildings they lease. In both this case and *Brainerd*, the attack occurred in an area of the building under the landlord’s control and used by all tenants. Just as the landlord in *Brainerd* knew or should have known about the absence of adequate lighting and locks in the apartment building, the defendant here knew or should have known about the potentially dangerous condition in the professional building. When the landlord is informed by his tenants that such a condition exists, he has a duty to investigate and take any possible preventive measures. The jury could properly find that the landlord’s failure to do so was negligence.

Fisher, J., dissenting. The court here imposes unwarranted and unreasonable burdens on landlords by vastly extending their potential liability. In *Brainerd v. Harvey*, we expressly limited the landlord’s liability to his failure to detect and repair dangerous physical conditions in common areas of leased buildings. Unlike the front door, this professional building had no physical
defect that enabled the assault to occur. In Brainerd, we also limited liability to foreseeable criminal attacks, rather than those based merely on the subjective fears of some tenants in the building. The majority opinion suggests a medieval fear of persons who receive mental health care and will impede the state's goal of returning mental patients to the community.

Although the majority and dissenting opinions reached opposite conclusions in the Douglas case, they both relied on Brainerd for the basic principles of decision. Both opinions acknowledged that landlords are liable when they negligently expose their tenants to foreseeable criminal attacks in common areas of buildings they lease. The principle of stare decisis requires that the court start from that position, rather than craft new and different rules.

The division of the court in Douglas illustrates the flexibility of stare decisis. The majority interpreted Brainerd broadly as "welcome" precedent. When the landlord is informed by his tenants of their subjective fears of a potentially dangerous condition in a common area of the building, the majority ruled, he has a duty to investigate the situation and take precautionary measures. The court departed from Brainerd by refusing to limit the landlord's liability to situations in which there was tangible evidence suggesting the possibility of a criminal attack. The court responded to the different factual situation presented in Douglas by pushing the law in a different direction, even as it reasoned that it was merely following the Brainerd decision.

The dissenting judge interpreted Brainerd more narrowly as "unwelcome" precedent. Brainerd, he concluded, conditions the landlord's liability on the presence of physical defects in the building and objective evidence suggesting the possibility of a criminal attack, neither of which were present in Douglas. To support its narrow reading of Brainerd, the dissent also raised an objection about the effect of the court's decision on landlords in general and outpatient mental clinics in particular. The dissenting opinion is buttressed by dicta from Brainerd that states the case would be different if the building did not have physical defects. The statement is dicta because it was not necessary to the resolution of the Brainerd case and was thus disregarded by the majority in Douglas.

These two cases illustrate the tension between change and stability that is central to the study and practice of law. Certain factors militate in favor of stability. The Brainerd decision altered business expectations and forced landlords to modify their practices to avoid liability. In addition, the corporate owner was found liable in the second case pursuant to a rule that was not articulated until the owner was found to have breached it. After Douglas, landlords for other office buildings no doubt made significant changes in their leasing procedures and plans.
Uncertainties would be magnified by any perception that the law was subject to further modification.

Other factors counseled for change. The injury to Carol Douglas underscored the majority’s view that landlords should keep their common areas free of foreseeable criminal activity. Even if the risk seemed most apparent after the harm occurred, the court concluded that a subjectively perceived risk of great bodily harm should be sufficient to warrant extra protective measures by the landlord. In addition, liability under the new formulation of the rule is the only realistic incentive for encouraging a plaintiff to seek relief in court. Douglas was based on an evolving view of the landlord-tenant relationship. Although the arguments vary somewhat from case to case, the tension between change and stability remains.

Two additional considerations are necessary for a full understanding of the mechanics and policies of precedent and stare decisis. First, appellate courts are supposed to decide only as many issues as are necessary for the disposition of a case. As Chapter 3 (Case Analysis and Case Briefs) points out, sometimes this requires courts to decide multiple issues. Each holding on an issue is precedent for later decisions. The court’s holding in Brainerd concerning the plaintiff’s demand for a jury trial, as well as its holding on the negligence issue, are both precedent and will have to be considered by future courts rendering decisions on the same issues.

Second, trial courts are responsible for finding facts and applying the law, while appellate courts have greater authority to modify and expand the law. Appellate courts therefore have greater freedom in treating precedent than trial courts. Appellate courts sometimes find it impossible to use previous cases and still reconcile their decisions with their own values or social norms. When this happens, the court may simply overrule the previous cases and chart a new course rather than show how these cases may be distinguished. Courts usually justify overruling previous decisions by pointing to the outdated principles or poor reasoning that supported them. These decisions are often spectacular, as when the United States Supreme Court, in the 1954 case of Brown v. Board of Education, held that a state could not constitutionally require racial segregation in public schools, overruling its 1896 Plessy v. Ferguson decision permitting “separate but equal” accommodations. Cases may also be more subtly overruled; a series of decisions, for example, may chip away at the scope of an earlier rule or undercut its policy basis.

3. 163 U.S. 537 (1896).