INTRODUCTION TO LAW AND ITS STUDY
§1.1 The Origin of Common Law

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

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

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

From this history comes much of the law’s specialized vocabulary, which you’ll learn in law school. Norman French was the tongue of the new rulers, and eventually it became the language of the courts as well. The sub-language called Norman Law French could still be heard in courtrooms many centuries later, even after the everyday version of Norman French had merged with Middle English to produce Modern English. Even today the bailiff’s cry that still opens many American court sessions—“Oyez, oyez, oyez!”—is the Norman French equivalent of “Be quiet and listen.”

Law is filled with terms of art that express technical and specialized meanings, and a large proportion of these terms survive from Norman Law French. Some of the more familiar examples include allegation, appeal, arrest, assault, attorney, contract, counsel, court, crime, damages, defendant, evidence, felony, judge, jury, misdemeanor, plaintiff, slander, suit, tenant, tort, and verdict. In the next few months, you’ll also encounter battery, damages, demurrer, devise, easement, estoppel, indictment, lien, livery of seisin, and replevin. Some law terms are from Latin, such as res judicata and habeas corpus. (Begin now the habit of looking up every unfamiliar term of art in a law dictionary, which you should keep close at hand while studying.)

Some words entered the English language directly from the events of the Conquest itself. In the course on Property, you’ll soon become familiar with various types of fees: fee simple absolute, fee simple conditional, fee simple defeasible, fee tail. These aren’t money paid for services. They’re forms of property rights, and they’re descended directly from the feudal enfeoffments that William introduced into England in order to distribute the country’s land among his followers. Even today, these terms appear in the French word order (noun first, modifiers afterward).

More importantly, the Conquest profoundly influenced the way our law is created. It is a comparatively modern invention for a legislature to “pass a law.” (Lawyers say “enact a statute.”) The embryonic medieval parliaments of England and Scandinavia instead made more specific decisions, such as when to plunder Visby or whether to banish Hrothgar. Although in some countries law might come from royal decree, in England before the Conquest it arose more often from the custom of each locality, as known to and enforced by the local courts. What was legal in one village or shire might be illegal (because it offended local custom) in the next. “This crazyquilt of decentralized judicial administration was doomed after 1066. From the
time of the Norman Conquest, . . . the steady development in England was one of increasing dominance of the royal courts of justice over the local, customary-law courts.”  

The reason was that the newly created Norman aristocracy, which now operated the local courts, got into conflict with Norman kings over the spoils of power, while the English, defeated in their own country, began to find more justice in the king's courts than in their local lords' capricious enforcement of what had once been reliable custom. Because communication and travel were so primitive, the “crazyquilt” pattern of customary law had not before troubled the English. Instead, it had given them an agreeable opportunity to develop, through local habit, rules that suited each region and village relatively well. For two reasons, however, the king's courts would not enforce customary law. The practical reason was that a judge of a national court cannot know the customary law of each locality. The political reason was that the monarchy's goal was to centralize power in itself and its institutions. Out of this grew a uniform set of rules, common to every place in the country and eventually known as the common law of England. Centuries later, British colonists in North America were governed according to that common law, and, upon declaring their independence, adopted it as each state's original body of law. Although much of the common law has since been changed through statute or judicial decision, it remains the foundation of our legal system. Common law methods of reasoning dominate the practice and study of law.

In a medieval England without a “law-passing” legislature and with a king far too busy to create law by decree, where did this common law come from? The somewhat oversimplified answer is that the judges figured it out for themselves. They started from the few rules that plainly could not be missing from medieval society, and over centuries—faced with new conditions and reasoning by analogy—they discovered other rules of common law, as though each rule had been there from the beginning, but hidden. The central tool in this process has been a doctrine called stare decisis, Latin for “let stand that which has been decided,” or, more loosely, “follow the rules courts have followed in the past.” Those past decisions of courts are called precedents. Eventually, the English parliament did become a law-passing legislature, a role later adopted by the U.S. Congress and the American state legislatures. That has left us with two ways in which law can be made (or, as lawyers would say, two sources of law). One is statutes enacted by legislatures together with other statute-like provisions. The other is common law and other judicial precedent.

§1.2 Language as a Professional Tool

A lawyer's stock-in-trade is words: writing them, speaking them, and interpreting them. This is true not only because lawyers spend so much time

reading and writing, but—more importantly—because words are the most fundamental tool lawyers use to gain advantage for their clients. Lawyers must choose their words carefully in court, during negotiation, in drafting a contract or will, and in writing an appellate brief.

Law is "one of the principal literary professions. One might hazard the supposition that the average lawyer in the course of a lifetime does more writing than a novelist."2 "Language is the lawyer's scalpel. If he cannot use it skilfully, he is apt to butcher his suffering client's case."3

A lawyer must be able to conduct research and analyze complex legal problems and explain them succinctly in plain English. Plain English is streamlined, elegant, and practical. Elaborate paragraphs and convoluted sentences take too long to read, and clients won't pay for them. Unnecessarily convoluted writing leads to misunderstandings because the content can be hard to understand. Good legal writing is clear, concise, and precise.

You might write to a supervisor, a client, a judge, or a bench of several judges. Your tone and style may change depending on the reader. But all legal readers share certain characteristics. All of them must make some sort of decision. They want you to explain how to make that decision with the law and facts at hand. Legal writing is decisional writing. Your readers are busy and probably in a hurry, with no time to read your writing twice. They expect to read your writing once and learn from it everything needed to make the decision. Legal readers are also inherently skeptical because skepticism helps them make better decisions. They'll look for weaknesses in your analysis. And legal readers tend to be hypercritical about grammar, style, and citation errors—all of which can affect your credibility as a writer.

The ability to write well is essential to a young lawyer looking for a job. As you scan employment ads, you'll see phrases like these over and over: "seeks attorney with proven writing ability," "excellent research and writing skills required," "recruiting for associate with superb writing skills." Many employers use writing samples to confirm that you're capable of doing the job. They look for basic analytical skills and clean writing. Regardless of the nature of your first law-related job, you're going to write there, and you'll be evaluated, at least in part, on your writing ability.

Legal writing is put to practical tests in a real world. That's why "excellent writing skills are a form of future job security."4 A person who has supervised 400 lawyers at a major corporation put it this way: "You are more likely to get good grades in law school if you write well. You are more likely to become a partner in your law firm, or receive comparable promotions in your law

4. Mark E. Wojciek, Perspectives 7 (Fall 1994).
department or government law office." It really is true that “good writing pays well and bad writing pays badly.”

The legal profession’s writing expectations are so high that they come as a shock to many law students. That’s why legal writing is taught in a required course during the first year of law school. If you’ve had trouble with your writing in the past, now is the time to learn how to do it right.

§1.3 Predictive Writing and Persuasive Writing

Much of what lawyers do in writing is either predicting or persuading. Lawyers are regularly asked to predict what a court will do. For example, a newspaper might ask its in-house counsel whether an article it wants to publish is defamatory. If the answer is yes, the newspaper will want to know how to change it. Clients also ask lawyers to evaluate their potential for success in a lawsuit. A person mentioned in the newspaper article who feels defamed, for example, might ask a lawyer whether a lawsuit against the newspaper would succeed. In each of these situations, a client will rely on a lawyer’s prediction of how a court would rule.

Predictive writing is sometimes called objective writing, but objectivity only partly defines the genre. Any writing that simply describes the law can be classified as objective. For example, a lawyer might be asked to research and explain all of a state’s defamation law. But predictive writing does more than that. It foretells how the law will resolve a particular controversy. Will a defamation suit against the newspaper succeed? If it seems likely, the newspaper will change the article. If the person mentioned in the article isn’t likely to win, he’ll probably decide not to sue.

Persuasive writing is different. The goal of persuasive writing is to influence a court to make a favorable decision. Persuasive writing requires all the skills needed for predictive writing, but it requires others as well, such as strategic thinking and the abilities to make persuasive arguments and to tell the client’s story in a compelling way.

§1.4 The Art Forms of Legal Writing

Predictive writing takes many forms: office memoranda, in both long and short form; letters to clients; and email to supervisors, colleagues, and

5. Richard S. Lombard (formerly general counsel at Exxon), remarks reprinted in Lost Words: The Economical, Ethical and Professional Effects of Bad Legal Writing, Occasional Paper 7 of the ABA Section of Legal Educ. Admissions to the Bar, at 54 (1993).
clients. Regardless of the form, these predictions must provide everything a lawyer needs to advise a client, plan the next step in the litigation, decide how to structure a contract, and so on. These are confidential documents not normally distributed to third parties. You can read an office memorandum in Appendix A, a professional email in Appendix B, and a client letter in Appendix C.

Persuasive writing takes primarily two forms: motion memoranda submitted to trial courts and appellate briefs submitted to appellate courts. To persuade a court to make a favorable decision, the writer’s arguments must be accurate, reasonable, and convincing. You can read a motion memorandum in Appendix D and appellate briefs in Appendices E and F.

Lawyers write a wide range of other things, too: contracts, wills, trusts, pleadings, motions, interrogatories, affidavits, stipulations, judicial opinions, orders, judgments, statutes, administrative regulations, and more. But instruction in these other forms of legal writing might wait until after you have learned more about law and procedure, perhaps in upper-class drafting courses, clinics, and simulation courses.
At this moment the King, who had for some time been busily writing in his notebook, called out “Silence!” and read from his book, “Rule Forty-two. All persons more than a mile high to leave the court.”

Everyone looked at Alice.

“I’m not a mile high,” said Alice.

“You are,” said the King.

“Nearly two miles high,” added the Queen.

— Lewis Carroll,

Alice in Wonderland

A rule is a formula for making a decision.

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

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

Alice was confronted with a test of two elements. The first was the status of being a person, which mattered because at that moment she was in the company of a lot of animals—all of whom seem to have been exempt from any requirement to leave. The second element went to height—specifically a height of more than a mile. The result would have been a duty to leave the court, because the causal term was mandatory (“All persons . . . to leave . . .

No exceptions were provided for.

Alice has denied the second element (her height), impliedly conceding the first (her personhood). The Queen has offered to prove a height of two miles. What would happen if the Queen were not able to make good on her promise and instead produced evidence showing only a height of 1.241 miles? (Read the rule.) What if the Queen were to produce no evidence and if Alice were to prove that her height was only 0.984 miles?

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

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

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

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

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

Below are examples of all these types of rules. The examples come from the Federal Rules of Civil Procedure, and you’ll study them later in the

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course on Civil Procedure. (Rules of law are found not just in places like the Federal Rules. In law, they are everywhere—in statutes, constitutions, regulations, and judicial precedents.)

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

**mandatory:** If a defendant located within the United States fails, without good cause, to sign and return a waiver requested by a plaintiff located within the United States, the court *must* impose on the defendant (A) the expenses later incurred in making service and (B) the reasonable expenses, including attorney’s fees, of any motion required to collect those service expenses.¹

**prohibitory:** The court *must not* require a bond, obligation, or other security from the appellant when granting a stay on an appeal by the United States, its officers, or its agencies, or on an appeal directed by a department of the federal government.²

**discretionary:** The court *may* assert jurisdiction over property if authorized by a federal statute.³

**declaratory:** A civil action *is* commenced by filing a complaint with the court.⁴

Here’s a three-step method of figuring out what a rule means:

*Step 1:* Break the rule down into its parts. List and number the elements in the test. (An element in a test is something that must be present for the rule to operate.) Identify the causal term and the result. If there’s an exception, identify it. If the exception has more than one element, list and number them as well. (Exceptions can have elements, too; an exception’s element is something that must be present for the exception to operate.) In *Step 1,* you don’t care what the words mean. You only want to know the *structure* of the rule. You’re breaking the rule down into parts small enough to understand. Let’s take the mandatory rule above and run it through *Step 1.* Here’s the rule diagrammed:

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

the court must impose on the defendant (A) the expenses later incurred in making service and (B) the reasonable expenses, including attorney’s fees, of any motion required to collect those service expenses.

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

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

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

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

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

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

**elements:**

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

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

**exception:**

Does Raymond have good cause for his failure to comply?

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

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

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

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

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

Often you cannot know the number of elements in a rule until you have consulted the precedents interpreting it. Is “breaking and entering” one element or two? The precedents define “breaking” in this sense as the creation of a gap in a building’s protective enclosure, such as by opening a door, even where the door was left unlocked and the building is thus not damaged. The cases further define “entering” for this purpose as placing inside the dwelling any part of oneself or any object under one’s control, such as a crowbar. Can a person “break” without “entering”? A would-be burglar would seem to have done so where she has opened a window by pushing it up from the outside, and where, before proceeding further, she has been apprehended by an alert police officer—literally a moment too soon. “Breaking” and “entering” are therefore two elements, but one could not know for sure without discovering precisely how the courts have defined the terms used.

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

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

Instead of elements, some rules have factors, which operate as criteria or guidelines. These tend to be rules empowering a court or other authority to make discretionary decisions, and the factors define the scope of the decision-maker’s discretion. The criteria might be few (“a court may extend the time to answer for good cause shown”), or they might be many (like the following, from a typical statute providing for a court to terminate a parent’s legal relationship with a child).

In a hearing on a petition for termination of parental rights, the court shall consider the manifest best interests of the child. . . . For the purpose of determining the manifest best interests of the child, the court shall consider and evaluate all relevant factors, including, but not limited to:

(1) Any suitable permanent custody arrangement with a relative of the child. . . .
(2) The ability and disposition of the parent or parents to provide the child with food, clothing, medical care or other remedial care recognized and permitted under state law instead of medical care, and other material needs of the child.
(3) The capacity of the parent or parents to care for the child to the extent that the child’s safety, well-being, and physical, mental, and emotional health will not be endangered upon the child’s return home.
(4) The present mental and physical health needs of the child and such future needs of the child to the extent that such future needs can be ascertained based on the present condition of the child.
(5) The love, affection, and other emotional ties existing between the child and the child’s parent or parents, siblings, and other relatives, and the degree of harm to the child that would arise from the termination of parental rights and duties.
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(6) The likelihood of an older child remaining in long-term foster care upon termination of parental rights, due to emotional or behavioral problems or any special needs of the child.

(7) The child’s ability to form a significant relationship with a parental substitute and the likelihood that the child will enter into a more stable and permanent family relationship as a result of permanent termination of parental rights and duties.

(8) The length of time that the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.

(9) The depth of the relationship existing between the child and the present custodian.

(10) The reasonable preferences and wishes of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference.

(11) The recommendations for the child provided by the child’s guardian ad litem or legal representative.6

Only seldom would all of these factors tip in the same direction. With a rule like this, a judge does something of a balancing test, deciding according to the tilt of the factors as a whole, together with the angle of the tilt.

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

§2.2 Organizing the Application of a Rule

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

You probably said “no,” and your reasoning probably went something like this: “That’s not burglary. Burglary happens when somebody gets into the house when you’re not around and steals all the valuables. Maybe this will turn out to be some kind of trespass.” But in law school a satisfactory answer

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is never merely “yes” or “no.” An answer necessarily includes a sound reason, and, regardless of whether Welty is guilty of burglary, this answer is wrong because the reasoning is wrong. The answer can be determined only by applying a rule like the definition of common law burglary found earlier in this chapter. Anything else is a guess.

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

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

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

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

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

The case law might turn up a variety of results. Suppose that, although local precedent defines Welty’s actions as a breaking and an entry, the cases on the sixth element strictly require corroborative evidence that a defendant had a fully formed felonious intent when entering the dwelling. That kind of evidence might be present, for example, where an accused was in possession of safecracking tools when he broke and entered, or where, before breaking and entering, the accused had told someone that he intended to murder the occupant. Against that background, the answer here might be something like the following: “Welty is not guilty of burglary because, although she
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broke and entered the dwelling of another in the nighttime, there’s no evidence that she had a felonious intent when entering the dwelling."

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

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

§2.3  Some Things to Be Careful About with Rules

A rule might be expressed in any of a number of ways. Where law is made through precedent—as much of our law is—different judges, writing in varying circumstances, may enunciate what seems like the same rule in a variety of distinct phrasings. At times, it can be hard to tell whether the judges have spoken of the same rule in different voices or instead have spoken of slightly different rules. In either situation, it can be harder still to discover—because of the variety—exactly what the rule is or what the rules are.

Ambiguity and vagueness can obscure meaning unless the person stating the rule is particularly careful with language. The classic example asks whether a person riding a bicycle or a skateboard through a park violates a rule prohibiting the use there of “vehicles.” What had the rule-maker intended? How could the intention have been made more clear?

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

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

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

More than any others, two skills will help you become agile in the lawyerly use of rules. The first is language mastery, including an “ability to spot ambiguities, to recognize vagueness, to identify the emotive pull of a word . . . and to analyze and elucidate class words and abstractions.”

The second is the capacity to think structurally. A rule is a structured idea, and the rule’s structure is more like an algebraic formula than a value judgment. You need to be able to figure out the structure of an idea and apply it to facts.

§2.4 Causes of Action and Affirmative Defenses

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

A harm the law will remedy is called a cause of action (or, in some courts, a claim or a claim for relief). If a plaintiff proves a cause of action, a court will order a remedy unless the defendant proves an affirmative defense. If the defendant proves an affirmative defense, the plaintiff will get no remedy, even if that plaintiff has proved a cause of action. Causes of action and affirmative defenses (like other legal rules) are formulated as tests with elements and the other components, as explained in §2.1.

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

But that isn’t always so: If the defendant can prove that she caught the plaintiff shoplifting in her store and restrained him only until the police arrived, she might have an affirmative defense that is sometimes called a shopkeeper’s privilege. Where a defendant proves a shopkeeper’s privilege, a court will not award the plaintiff damages, even if he has proved false imprisonment. Again, the test is expressed as a list of elements: “A shop-

keeper's privilege exists where (1) a shopkeeper or shopkeeper's employee (2) has reasonable cause to believe that (3) the plaintiff (4) has shoplifted (5) in the shopkeeper's place of business and (6) the confinement occurs in a reasonable manner, for a reasonable time, and no more than needed to detain the plaintiff for law enforcement purposes.”

Notice that some elements encompass physical activity (“a confinement”), while others specify states of mind (“intentionally”) or address status or condition (“a shopkeeper or shopkeeper's employee”) or require abstract qualities (“in a reasonable manner, for a reasonable time, and no more than needed to detain the plaintiff for law enforcement purposes”). State-of-mind and abstract-quality elements will probably puzzle you more than others will.

How will the plaintiff be able to prove that the defendant acted “intentionally,” and how will the defendant be able to show that she confined the plaintiff “in a reasonable manner, for a reasonable time, and no more than needed to detain the plaintiff for law enforcement purposes”? Because thoughts and abstractions cannot be seen, heard, or felt, the law has to judge an abstraction or a party's state of mind from the actions and other events surrounding it. If, for example, the plaintiff can prove that the defendant took him by the arm, pulled him into a room, and then locked the door herself, he may be able—through inference—to carry his burden of showing that she acted “intentionally.” And through other inferences, the defendant may be able to carry her burden of proving the confinement to have been reasonably carried out if she can show that when she took the defendant by the arm, he had been trying to run from the store; that she called the police immediately; and that she turned the defendant over to the police as soon as they arrived.

§2.5 Where Rules Come From (Sources of Law)

In our legal system, the two main sources of law are statutes and case law. Legislatures create rules through statutes. When we say, “There ought to be a law punishing people who text-message while driving,” we vaguely imagine telling our state representative about the dangers of distraction behind the wheel and suggesting that she introduce a bill along these lines and persuade her colleagues in the legislature to enact it into law. Statute-like provisions include constitutions, administrative regulations, and court rules.

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

Thus, our two sources of law are statutes and judicial precedent. Statutes and opinions are hard to read and understand, and much of the first year of law school is devoted to teaching you the skills needed to interpret them.

**Exercise. Rule 11 of the Federal Rules of Civil Procedure**

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

- **Provision A** The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney’s or party’s attention.
- **Provision B** If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation.
- **Provision C** Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.
- **Provision D** This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.
An Opinion announcing a court's decision can include up to nine ingredients:

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

Most opinions don't include all these things, although a typical opinion probably has most of them. Let's look at each of them.

Opinions often begin with (1) a recitation of procedural events inside the litigation that have raised the issue decided by the court. Examples are motions, hearings, trial, judgment, and appeal. Although the court's descrip-
tion of these events may—because of unfamiliar terminology—seem at first confusing, you must be able to understand procedural histories because the manner in which an issue is raised determines the method a court will use to decide it. A court decides a motion for a directed verdict, for example, very differently from the way it rules on a request for a jury instruction, even though both might require the court to consider the same point of law. The procedural events add up to the case’s procedural posture at the time the decision was made.

Frequently, the court will next describe (2) the pleaded events or the evidentiary events on which the ruling is based. In litigation, parties allege facts in a pleading and then prove them with evidence. The court has no other way of knowing what transpired between the parties before the lawsuit began. A party’s pleadings and evidence tell a story that favors that party. The other party’s pleadings and evidence tell a different and contrary story. As you read the court’s description of the pleadings and evidence, you can often tell, even before reading the rest of the opinion, which party’s story persuaded the court.

A court might also set out (3) a statement of the issue or issues before the court for decision and (4) a summary of the arguments made by each side, although either or both are often only implied. A court will further state, or at least imply, (5) the holding on each of the issues and (6) the rule or rules of law the court enforces in making each holding, together with (7) the reasoning behind—often called the rationale for—its decision. Somewhere in the opinion, the court might place some (8) dicta. (You’ll learn more about dicta in the next few months, but for the moment think of it as discussion unnecessary to support a holding and therefore not mandatory precedential authority.)

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

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

Read Roberson v. Rochester Folding Box Co. below and determine where (if anywhere) each ingredient occurs. Mark up the text generously and be prepared to discuss your analysis in class. Look up in a legal dictionary every unfamiliar word as well as every familiar word that is used in an unfamiliar way.

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

Like the cases reprinted in your casebooks for other courses, the version of Roberson printed here has been edited extensively to make it more readable. In casebooks and in other legal writing, certain customs are observed when quoted material is edited. Where words have been deleted, you’ll see ellipses (strings of three or four periods). Where words have been added, usually to substitute for deleted words, the new words will be in brackets (squared-off parentheses).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[Of the American cases offered in support of a common law right to privacy, none actually does so when the decisions are examined in detail.]
An examination of the authorities [thus] leads us to the conclusion that the so-called “right of privacy” has not as yet found an abiding place in our jurisprudence, and, as we view it, the doctrine cannot now be incorporated without doing violence to settled principles of law by which the profession and the public have long been guided. [Thus, there is no common law right of privacy in New York.]

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

Gray, J. (dissenting). . . . These defendants stand before the court, admitting that they have made, published and circulated, without the knowledge or the authority of the plaintiff, 25,000 lithographic portraits of her, for the purpose of profit and gain to themselves; that these portraits have been conspicuously posted in stores, warehouses and saloons, in the vicinity of the plaintiff’s residence and throughout the United States, as advertisements of their goods; that the effect has been to humiliate her . . . and, yet, claiming that she makes out no cause of action . . . .

Our consideration of the question thus presented has not been foreclosed by the decision in Schuyler v. Curtis, (147 N.Y. 434). In that case, it appeared that the defendants were intending to make, and to exhibit, at the Columbian Exposition of 1893, a statue of Mrs. Schuyler, . . . conspicuous in her lifetime for her philanthropic work, to typify “Woman as the Philanthropist” and, as a companion piece, a statue of Miss Susan B. Anthony, to typify the “Representative Reformer.” The plaintiff, in behalf of himself, as the nephew of Mrs. Schuyler, and of other immediate relatives, sought by the action to restrain them from carrying out their intentions as to the statue of Mrs. Schuyler; upon the grounds, in substance, that they were proceeding without his consent, . . . or that of the other immediate members of the family; that their proceeding was disagreeable to him, because it would have been disagreeable and obnoxious to his aunt, if living, and that it was annoying to have Mrs. Schuyler’s memory associated with principles, which Miss Susan B. Anthony typified and of which Mrs. Schuyler did not approve. His right to maintain the action was denied and the denial was expressly placed upon the ground that he, as a relative, did not represent any right of privacy which Mrs. Schuyler possessed in her lifetime and that, whatever her right had been, in that respect, it died with her. The existence of the individual’s right to be protected against the invasion of his privacy, if not actually affirmed in the opinion, was, very certainly, far from being denied. “It may be admitted,” Judge Peckham observed, when delivering the opinion of the court, “that courts have power, in some cases, to enjoin the doing of an act, where the nature, or character, of the act itself is well calculated to wound the sensibilities of an individual, and where the doing of the act is wholly unjustifiable, and is, in legal contemplation, a wrong, even though the existence of no property, as that term is usually used, is involved in the subject.” . . .

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

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

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

A decision's citation is made up of the case's name, references to the reporter or reporters in which the decision was printed, the name of the court where the decision was made, and the year of the decision. For Roberson, all this information appears in the heading on page 25.

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

In Torts casebooks, Roberson is often used as an example of how the law makes false starts as it grows. The 1890 Harvard Law Review article to
which Judge Parker refers is probably the most famous law review article in history. It was written by Louis Brandeis, who was later appointed to the U.S. Supreme Court, and Samuel Warren, who was Brandeis’s law partner at the time the article was published. Brandeis and Warren argued that the common law should recognize a new cause of action for tortious invasion of privacy. In *Roberson*, the New York Court of Appeals refused to do so. But eventually courts in other states — virtually all of them after *Roberson* — did adopt Brandeis and Warren’s cause of action.

Facts typically make the case, and the *Roberson* facts illustrate why Brandeis and Warren were right. A large company used an 18-year-old girl’s photograph in advertising without her permission and without offering to compensate her with the kind of fee that models are paid today. She was a private person who didn’t want that kind of publicity, and she felt used—which she had been. Even if the Court of Appeals wasn’t moved by her story, the public certainly was, and the New York legislature enacted a statute specifically written to overrule the Court’s decision.

Despite that statute, *Roberson* is some respects still the law in New York. The reasons are explained, with the statute, later in this chapter.

In 1904, two years after *Roberson*, Judge Alton Parker, author of the majority opinion, ran for president of the United States. He was nominated by the Democratic Party but lost in a landslide to the incumbent, Theodore Roosevelt. During the campaign, Parker complained that newspaper photographers often took his picture while he was slouching or looking otherwise unpresidential, and that his family had lost their privacy because they were so frequently photographed. He commanded the photographers to stop.

When Abigail Roberson learned of this, she wrote a letter to Parker sarcastically pointing out that “you have no such right as that which you assert. I have very high authority for my statement, being nothing less than a decision of the Court of Appeals of this State wherein you wrote the prevailing opinion [and] I was the plaintiff.” She was 21 years old when she wrote the letter, and it was printed on the front page of the *New York Times*.

§3.2 The Interdependence Among Facts, Issues, and Rules

Many facts appear in an opinion merely to provide background, continuity, or what journalists call “human interest” to what would otherwise be a tedious and disjointed recitation. Of the remaining facts, some are merely related to the court’s thinking, while others caused the court to come to
its decision. This last group could be called the determinative facts or the essential facts. They are essential to the court’s decision because they determined the outcome. If they had been different, the decision would have been different. The determinative facts lead to the rule of the case—the rule of law for which the case stands as precedent. The most important goal of case analysis is discovering and understanding that rule. Where several issues are raised together in a case, the court must make several rulings and an opinion may thus stand for several different rules.

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

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

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

Facts recited specifically in an opinion can sometimes be reformulated generically. In the hypothetical above, for example, a generic restatement of fact G might be the following: “You have a rent-free alternative to the apartment, but the alternative would require 45 minutes of travel each way plus...
§3.2 Introduction to Law and Its Study

the expense of public transportation.” This formulation is generic because it would cover other possibilities that would have the same effect. It could include, for example, the following, seemingly different, facts: “you’re a member of the clergy in a religion that has given you a leave of absence to attend law school; you may continue to live rent-free in the satisfactory quarters your religion has provided, but to get to the law school, you will have to walk 15 minutes and then ride a subway for 30 minutes more, at the same cost as a bus.”

A rule of law is a principle that governs how a particular type of decision is to be made—or, put another way, how certain types of facts are to be treated by the official (such as a judge) who must make a decision. Where a court ambiguously states a rule, you might arrive at an arguably supportable formulation of the rule by considering the determinative facts to have caused the result. There’s room for interpretive maneuvering wherever you could reasonably interpret the determinative facts narrowly (specifically) or broadly (generically).

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

A law student who has a choice between renting an apartment and living in the second floor of an aunt’s house should choose the aunt’s house where the apartment’s rent is $500 per month but the aunt’s second floor is free except for bus fares; where the student must work in El Paso during the summer; and where it would be difficult to sublease the apartment during the summer.

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

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

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

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

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

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

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

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

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

What was the issue on appeal in Roberson? What rule did the appellate court enforce? What were the determinative facts?

**§3.3 The Anatomy of a Statute**

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

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

§ 51. Action for Injunction and for Damages

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

A judicial opinion always includes a story (“the facts”), and the rule of law for which the opinion stands is embodied in how the court uses rules of law to resolve the story. But statutes don’t contain stories. Some statutes create things. If a state has a public university or a system of state parks or a public utility commission, those things were all created by statutes. A statute can also grant permission. It might, for example, grant to a state university the authority to open a law school. But the statutes that lawyers most frequently encounter either prohibit something or require it. And those statutes usually also provide remedies for violations, as § 51 does. Sometimes a statute will define certain conduct as a type of crime, and some other statute, found in a criminal code, will define the penalty. That is true of § 50.

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

Reading §§ 50 and 51 together as a single statute, what do they prohibit or require? If a person subject to New York law were to violate this prohibition or requirement, what might be the consequences? In what ways did §§ 50 and 51 change the rule of Roberson?
§3.4 How Statutes and the Common Law Interact

The common law has grown to include four separate invasion of privacy torts, and many states recognize all four of them. *Intrusion upon seclusion* is invasion of a person’s private space—for example, by opening his mail or by spying through his windows with binoculars. *Public disclosure of private facts* is the dissemination of facts that don’t legitimately concern the public and that are sufficiently private that a reasonable person would consider their disclosure highly offensive. *False light* is the dissemination of facts that, even if true, create a misleading and highly offensive impression about a person. *Appropriation of name or likeness* is what happened to Abigail Roberson.

The Court of Appeals held in *Roberson* that no common law right to privacy of any kind existed in New York. Section 51 of the New York Civil Rights Law created a statutory cause of action for appropriation. But no legislation in New York has created a statutory cause of action for intrusion, public disclosure of private facts, or false light.

Because the legislature created a statutory cause of action only for appropriation, *Roberson* is still the law in New York on the other three invasion of privacy torts. If a plaintiff sues in New York for intrusion, public disclosure of private facts, or false light, that plaintiff will lose. A court will hold that those common law torts don’t exist in New York, citing *Roberson*, and that New York recognizes only appropriation.

A statute does only what its words express. Sections 50 and 51 are narrowly drafted, and they only create a misdemeanor and a cause of action for appropriation. The following case illustrates that.

**COSTANZA v. SEINFELD**

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

HAROLD TOMKINS, J.

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

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

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

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

While legal scholarship has been influential in the development of a tort for intentional infliction of emotional distress, it has had less success in the development of a right to privacy in this State. In a famous law review article written more than a century ago, Samuel Warren and Louis Brandeis advocated a tort for invasion of the right to privacy. . . . Relying in part on this article, Abigail Marie Roberson sued a flour company for using her picture, without consent, in the advertisement of its product (Roberson v. Rochester Folding Box Co., 171 N.Y. 538). Finding a lack of support for the thesis of the Warren-Brandeis study, this Court, in a four to three decision, rejected plaintiff's claim.

The Roberson decision was roundly criticized. . . . The Legislature responded by enacting the Nation's first statutory right to privacy (L. 1903, ch. 132), now codified as sections 50 and 51 of the Civil Rights Law. Section 50 prohibits the use of a living person's name, portrait or picture for "advertising" or "trade" purposes without prior written consent. . . . Section 50 provides criminal penalties and section 51 a private right of action for damages and injunctive relief.

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

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

Plaintiff Michael Costanza’s claim for violation of Civil Rights Law §§ 50 and 51 must be dismissed.
INTRODUCTION TO LEGAL WRITING
Inside the Writing Process

§4.1 Product and Process

A writing course teaches both the product created through writing and the process of creating it.

An office memo is an example of product. What should it look like? What should it accomplish? Chapter 6 answers these questions. Later chapters do the same for professional emails, client letters, motion memos, and appellate briefs.

The process of writing is what you do at the keyboard while creating an office memo—how you think while you write. Partly it's analyzing legal issues, using the tools explained in Chapters 7 through 11. And partly it's deciding how to communicate your analysis. Process is explained in this chapter, in Chapter 5, and in later chapters that address specific writing problems.

Process is harder to learn than product. Product is tangible. It can be held in the hand. A sample office memo, like the one in Appendix A, can be discussed in class to learn what makes it effective or ineffective. Process is much harder to observe because it happens mostly in your mind when you’re alone. And there are many different effective processes of writing. If you put 50 best-selling book authors in one room and ask them how they write, they’ll probably give you 50 different answers. But most effective processes of writing share some basic traits, which this book explains.
§4.1 Introduction to Legal Writing

A process that works for one writer won’t necessarily work for another. Finding one that works best for you can happen only through experimentation in which you simultaneously do the writing and think about how you’re doing it. Observe yourself writing. What did you do first? Second? Did you feel ready to write? How did you organize your materials? What did you do when you felt stuck?

Reflect on what you observe. Do it then or later, by yourself or with your teacher or another student. Reflecting on what you do and how you do it is the most effective way to improve your writing process.

§4.2 Five Phases of Writing

Writing happens in five phases:

1. Researching authorities and analyzing what you find (§4.4)
2. Organizing your raw materials into an outline (§4.5)
3. Producing a first draft (§4.6)
4. Rewriting it through several more drafts (§4.7)
5. Polishing it (§4.8)

Writing is recursive and not linear. Writers rarely, if ever, start at the beginning, write until they get to the end, and then stop (which would be in a line, or linear). And they don’t go through the five writing phases in strict order, finishing one phase before starting the next one (which also would be linear).

Instead, writers often circle back (recursively) to reopen something already done and redo some aspect of it. For example, you’ll continue to analyze while you organize, while you write the first draft, and while you rewrite it several times, although much of the analytical work comes at the beginning. While writing the first draft, you might decide to go back and rewrite something you wrote a few pages ago. While rewriting, you might reorganize.

Still, it helps to think about writing in the five phases listed above. Each phase is a different kind of work, requiring somewhat different skills.

§4.3 Planning the Work

Suppose your teacher distributes an assignment and with a deadline three weeks later for submitting your work. On the day you receive the assignment, you have two options.
The first is to toss it aside when you get home so you can try not to think about it for at least two weeks, leaving only the last few days before the deadline to do the entire job. Many students did this in college and turned in their first draft as their final product. When they try that again in law school, the result is disappointment because legal writing requires much more preparation and many more drafts. When you’re learning professional skills, each new task will usually take longer to accomplish than you might think because the complexities of the task are not immediately apparent. (Later, with experience, you’ll get much better at predicting how long it will take to get things done.)

The other option is to use the full three weeks to get the job done. Very few students have good internal clocks that pace them through the work without having to set a schedule for themselves. For most students, time will get out of control unless they plan ahead. In this sense, planning the work is

1. estimating how long it will take you to do the research and analyze the results, to organize your raw materials, to produce a first draft, to rewrite it through several more drafts, and to polish it; and
2. budgeting your time so that you can do each one of these tasks well.

When you first get the assignment, it can seem huge and intimidating. But once you break it down into a group of smaller tasks, it’s not as big and seems much more doable.

§4.4 Researching and Analyzing

Begin by identifying the issues. What questions about law and facts need to be resolved to accomplish the assignment’s goals? As you research, analyze, and write, you may change your mind about the precise definitions of these questions. And while working you may identify subissues not apparent at the outset. But start researching and analyzing.

Researching is finding relevant authority, such as statutes and cases. Your teacher has probably assigned a research textbook or other materials that explain how to research. Allot plenty of time for research. It may take more time than you realize.

Analysis is identifying the authorities on which to rely (Chapter 8), figuring out what they mean (Chapters 9 and 10), and how they govern the client’s facts (Chapter 11). Students and lawyers usually print out or photocopy the authorities that research suggests might be relevant and mark them up while reading and rereading them, identifying the most significant passages. It helps to outline the statutes (Chapter 2) and brief the cases.
§4.5 Organizing Raw Materials into an Outline

For two reasons, good organization is crucial in legal writing. First, legal writing is a highly structured form of expression because rules of law are by nature structured ideas. The structure of a rule controls the organization of its application to facts—and thus controls the organization of a written discussion of the rule and its application.

Second, legal writing is judged entirely by how well it educates and convinces the reader that your reasoning is correct. Good organization makes your analysis more easily understandable to the reader by leading the reader through the steps of your reasoning.

In college, most teachers criticize organization only infrequently. But the reader of legal writing is different from the reader for whom you might have written college essays. Legal writing is organized in ways that reflect the way lawyers and judges analyze legal issues. Good organization puts material exactly where the reader will need it. Unplanned writing is inefficient because it ignores the reader’s needs and frustrates the reader’s expectations. And a reader whose needs are ignored and whose expectations are frustrated quickly becomes an irritated reader.

Students are told to outline but often resist doing it. Outlining seems like an arbitrary and useless requirement. If you dislike outlining, the problem might be that you were taught an outlining method that is unnecessarily rigid. Rigid methods of outlining demand that you draw an outline tree with roman numerals, capital letters, arabic numerals, lowercase letters, and italic numerals. That stifles creativity, and it isn’t the way effective writers plan their writing in detail.

A fluid outlining method is simpler and helps you write. A fluid outline is a flexible collection of lists. Your raw materials (statutes, cases, facts, hypotheses, and so on) flow through it and into your first draft.

Many students find that organizing in legal writing is especially challenging. That’s why several chapters in this book explain how to outline and how to organize. Chapter 12 sets out the most effective methods of organizing analytical legal writing. Chapters 13 and 14 explore those methods in further detail. And Chapter 15 explains how to make a fluid outline.

§4.6 Producing a First Draft

All good writers write [awful first drafts]. This is how they end up with good second drafts and terrific third drafts . . . . A friend of mine says that the first draft is the down draft—you just get it down. The second draft is the up draft—you fix it up . . . . And the third draft is the dental draft, where you check every tooth . . . .

—Anne Lamott
Many students treat the first draft as the most important part of writing. But that’s wrong. The first draft is often the least important part. Most of the other phases contribute more to an effective final product. And when writing on a computer, first-draft writing might not be separate from rewriting. That’s because of the ease with which you can interrupt your first draft and go back to rewrite something you initially wrote only a few minutes ago.

The only purpose of a first draft is to get things down on the page so you can start rewriting. The first draft has no other value. A first draft accomplishes its entire purpose merely by existing. It can be full of errors. That’s fine. It just needs to exist.

You don’t need to write the first draft from beginning to end. You can start with any part of the document you feel ready to write—no matter where in the document it will finally be. You can write the middle before you write the beginning, for example. If your mind is mulling over a certain part of the document, start writing that part. You can write the rest later.

Do your first draft as early as you possibly can. The first draft may be the least important part of the writing process, but you can’t start rewriting until you have a first draft. And if you leave little time for rewriting, the document you submit will disappoint both you and your reader.

§4.7 Rewriting

There is no such thing as good writing. There is only good rewriting.

—Justice Louis Brandeis

A clear sentence is no accident. Very few sentences come out right the first time, or the third.

—William Zinsser

A scrupulous writer, in every sentence that he writes, will ask . . .: What am I trying to say? What words will express it? What image or idiom will make it clearer? . . . Could I put it more shortly?

—George Orwell

A first draft is for the writer. You write to get your thoughts onto the page. Later drafts, however, are for the reader. In rewriting, you continue to develop your thinking, getting more thoughts onto the page while deleting weak ideas. But your focus shifts to the reader. How much will this reader need to be told? Will she or he understand what you say without having to read twice? Will this reader become convinced that you’re right?

To answer these questions while you read your first and later drafts, pretend to be your reader—the one described in §1.2. Will this skeptical person see issues that you haven’t addressed? Will this busy person become impatient at having to wade through material of marginal value that got into
your first draft? Will this careful person be satisfied that you have written accurately and precisely?

You’ll do a better job of impersonating the reader if, between drafts, you stop writing for a day or two, clear your mind by working on something else, and come back to do the next draft both “cold” and “fresh.” Obviously, that can’t happen if you put off starting the project and later have to do the whole thing frantically at the last minute. To make sure that you have time to rewrite, start on an assignment as soon as you get it, and then pace yourself, working at regular intervals within the time allotted.

Most of the writing lawyers do in the practice of law can be made effective in three to six drafts. Larger documents need more drafts than shorter ones. Beginning lawyers need to go through more drafts than experienced lawyers do. An experienced lawyer might be able to produce a client letter with three drafts. A first-year law student might need six or eight or even ten drafts to produce a high-quality appellate brief.

Focus on the big picture as well as individual sentences and paragraphs. Is your organization natural and effective? As you reread and rewrite, do you have doubts about your analysis? Don’t limit yourself to “surface-level changes,” but instead use rewriting as “an opportunity to re-see” the whole document.1

For many people, rewriting is the hardest phase in the writing process. Set aside a lot of time for it. Sometimes you’ll get discouraged because the problems you thought you’d solved earlier really haven’t been solved. At other times, when you piece things together well, you might experience relief (or even a little thrill because of what you’ve accomplished).

Rewriting is hard because much of it involves reimagining your first draft and reexamining the decisions you made there. Experienced writers say that they can enjoy rewriting because that’s where they can turn barely adequate writing into top-quality material. “The pleasure of revision [another name for rewriting] often arises when you refine what you intend to say and even discover that you have more to say, a new solution, a different path, a better presentation.”2 Empirical studies of the writing process have shown that experienced writers use rewriting for deep rethinking, and usually they reorganize the earlier draft.3

Don’t be afraid to delete material from your first draft, even if it hurts to take it out. The fact that you’ve written something doesn’t mean you have to keep it.

While rewriting, use the checklists on the inside front and back covers of this book to test your writing for good organization, paragraphing, style, and proper use of quotations. (If you’re writing an office memo, a checklist on the inside back cover will also help you test your writing for predictiveness.)

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3. Id. at 40.
Inside the Writing Process

To experience what the reader will experience, some writers read their drafts out loud. When they hear themselves speaking a draft's words, these writers are better able to imagine how the same words will strike the reader for whom they’re writing. Other writers can get the same effect without speaking because they've developed the ability to “hear” a voice saying the words they read. Reading a draft aloud can also alert you to wording problems. Bad phrasing often sounds terrible when you say it.

Eventually after putting the writing through several drafts, you'll notice that after a certain point the problems you find are mostly typographical errors and small matters of grammar, style, and citation. When that happens, you've moved from rewriting into polishing (see the next section in this chapter), and the project is nearly finished.

Don’t confuse rewriting with polishing. If all you do is fix typographical errors, awkward wording, grammatical errors, and errors in citation form, you're polishing, and you've skipped rewriting completely.

§4.8 Polishing

This is the last phase. Allow a day or more to pass before coming back to the writing to polish it. If you’re away from it for at least a day, you’ll come back fresh and be able to see things you’d otherwise miss.

Print the document so you can see it exactly the way the reader will see it. Readers often see problems on the printed page that aren't so obvious on a computer screen. Before returning to the computer to fix problems, you can mark up the printed copy.

Take one last look for wording that doesn’t say clearly and unambiguously what you mean. This is the biggest reason for waiting at least a day. When you wrote the words, they seemed clear because at that moment you knew what you were trying to say. But after some time has passed, you’re no longer in that frame of mind. If you’re not sure what the words mean or what you intended them to mean, fix them.

And take one last look for wording to be tightened up. Can you say it equally well in fewer words? If you can, do so.

Look for typographical errors, awkward wording, grammatical errors, and errors in citation form. Does the formatting make the document attractive to read? If not, choose a different font (but one that looks professional), add white space so the document doesn’t seem crowded, or find other ways to make it look attractive. Use your word processor’s spell-check function. Make sure the pages are numbered.

Now, you’re finished.