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## Notes on Reading Criminal Law Cases

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**On What We Do in Criminal Law:** Virtually everything we do in criminal law, as in your other first year courses, involves reading appellate judicial opinions. The most common scenario goes like this: A convicted defendant in a criminal trial complains that something has gone wrong and that his conviction should be overturned. The things that can go wrong, at least for our purposes, are relatively limited: 1) The judge made an error in a ruling she made either before, during, or after the trial. 2) The jury, given the evidence it was presented, did not have sufficient evidence according to the legal standards they were asked to apply, to have found the defendant guilty. 3) The jury instruction given by the judge that defined the law to be applied was, in some way, in error.

There are other things that can go wrong at a trial, a good many things actually. The prosecutor can make a mistake of some kind that dramatically affects the outcome of the case, and that can be the subject of appeal. The defendant's own lawyer can do such a poor job that the defendant claims his lawyer provided ineffective assistance of counsel. (The defendant has a constitutional right to counsel and his 6<sup>th</sup> Amendment rights are violated when counsel provides "ineffective assistance.") The defendant is entitled to various constitutional protections, primarily outlined in the 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> Amendments to the Constitution; problems based on procedures guaranteed by the Constitution may arise from the execution of search warrants, the failure to exclude evidence at trial, the exercise of the privilege against self-incrimination, and the right to confront witnesses testifying against the defendant. These issues are addressed in Criminal Procedure, a companion course.

**More Specifically, What We Do in Criminal Law:** So, you're assigned a case, a judicial opinion authored by an appellate level judge who is reviewing the result and the record of what took place at the trial court level. You'll generally be asked to read 3 to 5 cases for each class. We will not be speeding our way through the casebook, although it may well feel at times as if that is exactly what we are doing. There is no imperative to cover every page in the Joshua Dressler book—957 pages in the 5<sup>th</sup> edition. Any attempt to cover the entire book would drive you, and me, crazy, much crazier. I might note that we'll be in the ordinary course of events.

You should know, as we get underway, that Criminal Law is not a "survey" course in the sense that you will be asked to learn the definition of the full array of crimes for which a person can be charged and convicted. This is not a Twenty Crimes course where you are asked to learn the definitions of a broad spectrum of crimes. I can assure you that I know of no credible criminal law teacher in the country who takes this approach to the course. Basically, what criminal law teachers do is select a crime or two—homicide, rape, burglary—and they focus primarily on a particular crime. Often the crime of choice is homicide.

In the scholarly literature written for criminal law teachers, the most frequent question is: Do you teach rape? Criminal law teachers are divided into two camps: those who do and those who don't. Those who teach rape in criminal law consider it an important subject to cover. Those who do not find no more pedagogical value in teaching the rape cases than any other area of criminal law. I'm agnostic on the pedagogical value that might be derived from teaching rape cases. I have decided to focus on homicide and by following causation, attempts, accomplice liability, conspiracy, and the psychological defenses using homicide I think we end up with a more coherent course.

**On Reading the Cases:** I understand that as a novice legal reader, you will, in your first days and weeks, find that you stumble your way through the assigned cases. You will find words, legal and otherwise, that you cannot be expected to know. It's difficult to read a law case when you don't understand half the words you are reading. In this sense, reading law is like learning a second language. The days when you feel like you have entered a linguistic jungle will pass.

You will find, lurking in the background of the cases you read, what we call the "procedural posture" of the case. All this means is that the case you read arrives on your desk by way of a trial (or other legal proceedings) in which the trial court judge and the prosecution and defense counsel have taken actions that shape the outcome of the case. The jury (or the judge sitting without a jury) made a decision on the guilt of the defendant. And then, lawyers (sometimes those involved in the trial of the counsel, sometimes other lawyers) appeal some action (or non-action) taken during the trial (and before and after the trial) that has resulted in the appeal of the case. You will need to keep track of the procedural posture of the case so you can keep your feet on the ground. Law may sometimes appear as an airy abstraction; the crimes we study are real, as are the lawyers and judges who appear in criminal trials.

You will learn to read more efficiently and effectively as the weeks proceed. There's absolutely no shame to be conferred on those who find reading law cases confusing, if not, at first, downright mystifying. You'll be beyond this stage as a novice law reader in a matter of months.

If you have trouble reading the cases, keep in mind that this is quite common. In fact, you might find it helpful to keep track of these troubles. Simply make a note, along with your case brief, when you find that you are reading a case and you have trouble understanding some aspect of the case, or even why you have been asked to read the case. Alternatively, you might note, for each of the cases you read, a single question that you'd like to put to a knowledgeable reader of this case.

You may find that your confusion about a particular case gets cleared up during class discussion. In fact, if you keep track of the problems you encounter in reading a particular case, you can also observe how your concern gets addressed during the class discussion. And, of course, it may not get addressed. If things don't get cleared up, you've got some other options: During the discussion, if you can find an appropriate time to raise your question and see how the teacher responds to it (and to you). Some teachers may not welcome questions from the novice student and if they don't they'll let you know. Other teachers welcome questions and will, if possible, answer them, or try to answer them. You may, of course, be asking a question that the teacher can't answer, in which case, my

practice is to simply say: “That’s a good question, I’ll have to think about it.” Or, “I’m afraid I don’t have sufficient background to try to answer your question.” Or, I may direct the student to a source where the student can learn more about the question they have raised. If the question bears directly on what we are studying, I may do the research required to try to answer the question in a later class. Some questions are sufficiently complex and I may not be willing to spend the time required to try to answer the question.

**The Search for a More Effective and Efficient Way to Read the Cases:** In the blooming confusion of the first days and weeks, you may feel like you’re stumbling around in the semi-dark. What you need is more light . . . and what follows is the inevitable question: Isn’t there a formula, a guide, some tried-and-true method, that will make me a better reader of the cases? I suspect that your teachers are going to be all over the map on this question (just as they are of different persuasions on how difficult they think the reading of cases may actually be). Some teachers try to make things easy on you, some may well think that you learn best when the reading is most difficult.

Some teachers may give a mini-lecture on “how to read a case.” In doing so, they undoubtedly have in mind trying to get you up to speed so the classroom discussion will be more productive. Some teachers will say little or nothing about how they expect you to read. They will assign cases and proceed to talk about them and they expect *you* to figure out how to read based on the questions being raised in class and how the time in the classroom is being used. Basically, these teachers leave the triangulation of case, your reading of it, and the class discussion, for you to figure out. A teacher may realize you are having trouble and see an educational value in leaving you to your own devices to figure out what the problem is and how you are going to resolve it. This teacher tells you less with the idea that the more you are told the less responsibility you take for your own learning. Law school is rather well-known for this kind of non-directive teaching, teaching that shifts the responsibility to the learner.

And what is my own stance on this business of telling you more about how to read cases and telling you as little as possible. I’ve been teaching a good many years now and I’m still arguing with myself about this. On any given day, I may try to light the path and help you see *exactly* what we are trying to do. On another day, I find I am of the firm conviction that Socrates had it right, that the kind of mind you must develop as a lawyer is the mind that makes it possible for you to figure out things for yourself. What it comes down to is basically: Who gets helped and who gets harmed by the different approaches? Or, we might say, it’s a short-run and long-haul problem: The easier I make things now, the less value to you over the long-haul.

In some fashion, I’m not exactly clear how, this idea of making things easy or letting them be as hard as they can be is related to the soft|hard problem: There’s soft courses and hard courses. There’s rigorous thinking and there’s fuzzy thinking. There are easy professors and there are hard professors. You’ll find yourself thinking and talking about this pedagogical fault-line that you now straddle. There’s likely to be discussion and argument about what your teachers are doing and whether it works. You’ll be carrying on these discussions with your self, and perhaps your colleagues. You may, somewhere along the way, want to sit down with some of your teachers and talk about all

this—and it may not harm the conversation if you have an espresso or glass of wine handy when you do! So, let's assume that you want as much guidance as you can get. Paradoxically, you may *need* less guidance than you *want*.

Some of you may find that in the first few weeks of law school about all you are interested in doing is to *survive*. The good news is that virtually all of you will survive whatever you do, so long as you read the cases, and read them carefully, and keep track of what you find in the cases you read. The survivalist doesn't need a roadmap: *Read. Keep track of the case in your notes. Pay attention to the discussion of the case in class.* And, I might note, as a bonus in all this, that surviving these first weeks of law school will leave you with plenty of stories to tell about how you did it, how it seemed at times that you might not, and how it so often looked like your colleagues were having a better go at it than you.

**Keeping Track of the Case and Preparing Case Briefs:** There is a bit of conventional thinking about this business of note keeping that you'll be exposed to, either in the orientation program, the twenty-minute introductions to your 1<sup>st</sup> year courses, or perhaps, during the first week of class. The conventional thinking is thus: You should read the case and prepare a "case brief." Students have been doing this for as many years as any of us can remember. The case brief might be thought of as a politician's "talking points." It condenses and organizes the information that you will need to discuss the case in class. This means that you need to know the facts: How did the crime occur? Who did what to whom? And in criminal law, there is a particular wrinkle on the facts that will plague you during the course of the semester: What was the defendant's intent in doing what was done? In criminal law, you will be dealing with two kinds of facts: Aimee Bell shot her abusive husband and killed him. The shooting is a fact. She shot him with the intention to kill him. The defendant, Aimee Bell's intention to take the life of her husband is a fact in the case. And how, you ask, do we know what her intention was? She shot him in the head with a gun while he was sleeping. The fact of Aimee Bell's intention is a matter of *inference*: We infer that there is an intent to kill when a person uses a deadly weapon and does so in a way that shows that death is likely to result from the use of the weapon. Criminal law is all about facts: What happened? What was the defendant's intent? Often we must infer from the facts what the defendant's intent is legally determined to be. All facts in a criminal case are legally determined facts. You'll note here that in criminal law, even the term "facts" takes on a different meaning. You can see from this discussion of the facts in criminal cases and the special problem posed by determining the defendant's intent, that a case brief may not be sufficient in criminal law.

You may find a few professors who will ask you to present your case brief in class and then initiate the class discussion of some aspect of your presented case brief. I assume that most of your professors will not do that, although I have may no survey of those who do and those who don't. I can tell you that I do know use class discussion for presentation of case briefs. In class, I try to encourage a discussion about the case that follows, as closely as possible a conversation that practicing lawyers might carry on about the case. What I want to do is raise questions that a lawyer might pose. Defense lawyers and prosecutors spend most of their time worrying about the "facts": *exactly what happened? what was said?—what did the defendant do and say?—what kind of proof*

*do we have of what happened and what was said? how will the crime be proven?* In criminal law we spend our time talking about the facts first, and then we begin to figure out how the facts present a problem in applying some legal definition of a crime.

You'll also find that the opinion may, at the beginning, during the analysis, or near the end of the opinion, opinion lay out its *holding* or the *rule of law* that the court wants the case to represent. That is, the court may say—and point to the fact that it is saying it—what they want the *rule* of the case to be. In the parlance of the law student, we've finally gotten to the *black letter law*. But this, like so much else in law, is not always as cut-and-dried as it may seem. You may find cases in which the court has been as disingenuous with its state of its *holding* as it has with the *facts*. We might also note that the court will often point out what it considers to be the legal issue. But this statement too must be viewed cautiously and may not always be accurately stated. My colleague, Lewis H. LaRue, at Washington and Lee, wrote a helpful guide to law students some years ago, *A Student's Guide to the Study of Law: An Introduction* (Matthew Bender, 1987), and in it, observes, on this matter of reliance upon the court's statement of the legal issue: The only essential point, for a law student at this point of the proceeding, is to realize that skepticism is a valuable professional trait. Merely because a judge says that a particular legal question is the issue does not entail the conclusion that the statement is true. Unfortunately, on first reading the case, particularly if one is a beginner, the truth or falsity of the judge's statement is not likely to be discernible. [*Id.* at 64]

I've been focusing on the "facts" and the "holding" in a criminal case, and I now want to broaden the discussion to the case brief more generally. There's not much in the way of rocket science in the facts|issue|conclusion|reasoning structural organization of a case brief. You will find, for the most part, that a judicial opinion is not, after you get a few of the cases behind you, a texts for which you need a guide to identify the component parts. The judges in their opinions will often lay out an opinion so that it looks almost like a case brief. The court may begin by stating either the legal issue or the facts, and will often announce its conclusion, and then present its supporting reasons. This doesn't mean that complications don't arise for each of the component parts. Sorting out what constitutes the facts, the legal issue, and the court's holding has long been a part of the law school *rite of passage* in which the student is confounded by a professor's questions that reveal that your case brief does not provide an answer for the most interesting questions about the case. What you've condensed so thoroughly and thoughtfully in the case brief may get exploded, expanded, and sp thoroughly revised during class discussion that it begins to appear that you did not read the case at all.

The case brief isn't mean to anticipate the questions that arise from the fertile mind of a professor, or to allow you to address every nook and cranny of the case. You might think of the case brief as a skeletal outline, an outline that allows you to say something when you find yourself in the spotlight. Yes, the case brief is a guide of sorts to the case, and you want to be able to make use of it (and I think you will). What you want the case brief to do is to anchor your thinking by having before you—preferably a single page—the basic outline of the case: Facts, Legal Issue, Conclusion (Holding, or, Ruling), Analysis. The case brief gets you in the ball park, and allows you to be a player in the game. How you perform, what position you play, and how you make use of the case

brief and its outline of the basic structure of the case is going to be a different matter.

The bottom-line: The traditional case brief may serve you well in some cases, and it may be inadequate in others. When you find the case brief doesn't provide you with what you need to know about the case, you will simply have to carefully assess what is going on in class and how the teacher is *working the case*.

**Working With Dissenting Opinions:** In some of the cases you read, you'll find a "dissenting opinion." The case gets decided but one or more of the judges on the appellate court refuse to go along with the conclusion presented in the majority opinion. The dissenters explain how the majority got it wrong and have, in some manner, gone astray. You'll want to read the dissenting opinion carefully. I assume that your professors will ask you questions about it. You will need to know the basis for the disagreement between the dissenters and the majority, and you will need to stake out your own position on the dispute: Where do you come out on this dispute? What is the basis for your opinion?

The dispute outline in a dissenting opinion can focus on the facts of the case or the law being applied. The dissent may present facts that were not mentioned or were given little emphasis by the majority. Or the dissent may simply "read" (that is, interpret) the facts differently. Of course, this raises some interesting issues about the conventional view that facts are to be resolved by the trial (by the jury or by the judge sitting without a jury) and that an appellate court deals only with legal issues.

In other cases, the disagreement presented in the dissent arises from an interpretation of the rules. The majority concludes that the rules say one thing, the dissent read them to say something else.

Dissents will often expose a policy dispute of some kind that has been raised by the case. (In some jurisprudential circles, you will find the contention that every case involves policy issues. If the policy issue is not explicit, it has been disguised or hidden in some way.) I think you'll find dissenting opinions much more open, in a jurisprudential sense, than are the majority opinions. Or, we might put it this way: The majority opinion is more likely to hide the policy decisions being made; the dissenting opinion is more likely to expose the policy basis for the disagreement that gives rise to the dissenting opinion. To write a dissent, a judge must have a burr of some kind under his saddle. He's an unhappy camper and he'll often tell you why.

**A Brief Return to the Procedure Posture of the Case:** Every case reaches the level of an appellate opinion by some path or another. You might consider adding to your case brief, at the beginning, a note on the procedural posture, or procedural history, of the case. For example:

The trial judge denied defendant's request for a jury instruction on self-defense. The defendant appealed this decision to an intermediate appellate court that ruled that the trial judge was in error to deny the defendant's proposed jury instruction on self-defense and ordered a new trial. (You'll learn that West Virginia has no such

intermediate appellate court, and that appeals from a trial court's rulings and decisions in West Virginia go directly to the state supreme court of appeals, the highest appellate court in West Virginia.) The intermediate appellate court's decision is appealed by the state (that is, by the prosecution, in the name of the state) to the highest appellate court in the state. In this opinion, the state's supreme court overturns the intermediate appeal court decision and finds that the defendant was entitled to a jury instruction on self-defense.

It's this kind of procedural history of the case that will help you respond to a question of this sort: *Ms. Brown, how did this case end up in the supreme court?*

**Making the Case Brief More Useful:** In criminal law you find case briefs more useful if they are not a "cut-and-paste" from the judicial opinion. There are several reasons to avoid the cut-and-paste method. First, preparing the case brief should not be a mechanical operation. Keep in mind that the value of the case brief is designed to do more than help you settle your nerves so you can discuss the case in class. A case brief is the process by which you *translate* the court's opinion into your own language. The case brief is a text that you will use—you create it for your own use—and thus it should be written in both legal language and in your own language. In the process of *translation*, from judicial opinion, to a structural outline of the case—the case brief (and a note about any troubles you've encountered in understanding the case)—you are learning how the law works, and how we, in the classroom acting as lawyers must, move constantly back and forth from ordinary language to legal language and from ordinary thinking to legal thinking. To create a new text—in this instance, the case brief—in your own language allows you to engage the case in a way that will help you understand not just the case but the law more generally. When talk about the case in class, you will need, at times, to resort to your reformulated language. There may be times when a particular passage in the case will be sufficiently important that you want to take verbatim note of it. There is nothing wrong in making use of the court's own language. But if your professor asks you a question about the case and your reply is limited to the language you have lifted from the court's opinion, you may find that you will falter as the questions proceed. The basic point is simply this: You will do a better job learning law, and *making sense* of the cases you read, if you use as much of your own language as possible in your case brief.

Of course, you should make ample use of underlining and marking the important language in the judicial opinion, so you can find the references you need during class discussion. Your mark-up of the case, along with your marginal notes, will be of real value when you respond to questions about the case that require answers not found in your case brief.

Reading the cases you are assigned is time consuming. And, preparation of the case briefs in the manner I have described is still more time consuming. It will be tempting, at some point, to dispense with the case briefing process and try to make do with only your mark-up copy of the case and your marginal notes. Many students find, somewhere along the way, that they are no longer willing to spend the time to brief every case they read. I don't have any way of knowing when you may reach this point, or what kind of risk it might pose for your success in law school. What you want to avoid

is giving up on the creation of the case briefs before you've learned everything you can from the process. Your personal involvement in translating judicial opinions from the stiff, formal language of the law into something resembling your own conversational language can only partially be learned from constructing case briefs. It is a beginning and you should continue to prepare case briefs until they no longer serve their purpose.

*personal note:* When I was a law student, I found that the habit of case briefs—expanded and reshaped for individual courses, individual professors, and for my own purposes—was something of a habit. I continued to brief cases all the way through law school.

**A Final Observation:** We could talk about *how to read a case* for a good many months and still find something more to say.