Notes on Reading Criminal Law Cases || James R. Elkins || August 10. 2009

On What We Do in Criminal Law: Virtually everything we do in criminal law, as in other first year courses, is work with a case, a judicial opinion written by judges who sit on an appellate court (most often the highest court in a state). 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 here, 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 that it had before them could not, by standards they were asked to apply, have found the defendant guilt. (You'll be hearing a good deal more about this issue: Was there sufficient evidence for the jury to find, beyond a reasonable doubt, that the defendant, committed the offense. This is called a "sufficiency of the evidence" argument. The defendant is saying, there may have been some evidence that raised your suspicious about me; simply put, the evidence was not enough to convict me.) 3) The jury instruction approved by the judge in which the jury was told what law applied was, in some way, in error.

There are other things that can go wrong at a trial, a good many things actually, and we'll simply not cover most of them in the criminal law course. A couple of things that can go wrong, I should, however, caution you about. 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. Even the defendant's own lawyer can do such a poor job, that the defendant claims his lawyer was ineffective. So, the defendant may have a constitutional argument that his conviction was based on ineffective assistance of counsel and thus his 6th Amendment rights were violated. The defendant is, of course, entitled to various constitutional protections, primarily those outlined in the 4th, 5th, and 6th Amendments to the Constitution, so problems arise from the execution of search warrants, the exclusion of evidence at trial, the privilege against self-incrimination, right to counsel, 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'll not be speeding our way through the casebook. There is no imperative to cover every page in the Joshua Dressler book—969 pages by my count. 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, now, that Criminal Law is not a "survey" course in the sense that you'll be asked to learn 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. Some of you may think that's what a Criminal Law course should be. I can reassure you that I know of no credible criminal law teacher in the country who takes this approach (although there is undoubtedly one, somewhere, who does). Basically, what criminal law teachers do is

select a crime or two (homicide, rape, burglary) and teach the course by focusing primarily upon a particular crime, most often, homicide. Other criminal law teachers focus on homicide and rape; a few through in the theft crimes. If you read the scholarly literature on teaching criminal law, the question that most often arises is this: Do you teach rape? My reading of the situation suggest that 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 important to do so. Those who do not consider it of no particular pedagogical value, and prefer not to have to deal with the troubling discussion of rape issues in class. Since I have never included rape as an offense that I try to teach, I'm agnostic on the pedagogical value that might be derived from teaching the rape cases.

My focus in criminal law is on homicide. What I try to do is teach a fully packaged course by way of this single substantive offense. I think criminal law takes on more coherence when we study causation, attempts, accomplice liability, and conspiracy by using homicide cases. We may get less coverage of substantive crimes but we avoid that sense of moving along on the surface from crime to crime.

On Reading the Cases: First, I can understand that you will, at times, in these first days and weeks, be confused by some of the cases you read. You'll find words, legal and otherwise, that you cannot be expected to know. Students sometimes say that it's difficult to read a law case when they find they must look up the meaning of so many words in a legal dictionary. I can assure you that this early sense that you've entered a linguistic jungle will pass. You'll learn the meaning of a good many new words, and begin to get a sense of the legal procedures involved so that you'll know what we call the "procedural posture" of the case, that is, how the case got to be where it is and is being decided by the court in the way it is trying to decide it.

I can further assure you'll learn to read more efficiently and effectively as each week proceeds. There's absolutely no shame to be conferred on those who find reading law cases confusing, if not downright mystifying. You'll be beyond this stage as a novice law reader in a matter of months.

So, I think it fair to say that a good many of you can expect to have trouble reading the cases. I don't see anything untoward in having some troubles. In fact, you might find it helpful to keep track of these *troubles*. Simply make a note, along with your case brief, when you're reading a case and sketch out the trouble you have in your understanding the case. (Or, you might make a 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, you might keep track not only of the problems you encounter in reading a case but observe whether class discussion of the case clears up the confusion. If things don't get cleared up, you've got some other options: During the discussion, if you can find an appropriate time, then 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 you to a source where you can learn more about the question you've raised. If the question bears directly on what we are studying, I may seek out the answer and provide it, later, in class or out. Some questions are sufficiently complex that I may simply forego trying to answer it based on the time required to do so.

The Search for a More Effective/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 . . . ah, what you begin to think you might need is a formula, a guide, some tried-and-true method that will make you a better reader of the law cases you're assigned to read. I suspect that your teachers are going to be all over the map on this question of how and whether they try to make things easy on you. Some teachers may give a a little mini-lecture on "how to read a case." In doing so, they try to get you up to speed so the classroom discussion will be more productive. (Some teachers want you to be a "happy camper.") Still other teachers will say little about how they want you to read. They will assign the case and then proceed to talk about the case (in one way or another) and they expect *you* to figure out what's going on, what you are to do with the case. Basically, they leave the triangulation between the case, your reading of it, and the class discussion, for you to figure out. This less directive teacher may realize that you're having trouble and see a long-range value in pushing you to resolve your problems and troubles without his or her intervention. This teacher tells you less with the idea that the more you are told the less responsibility you take for your own learning.

And my own stance on: tell you more/tell you less. I've been teaching a good many years and I'm still arguing with myself about this. On any given day, I try to light the path and help you use the map we're trying to draw (working together). On another day, I'm of the firm conviction that you must develop the kind of mind that makes it possible for you to figure out things for yourself. I can genuinely see the value in both approaches. What it comes down to is basically: Who gets helped and who gets harmed by the two different approaches. Or, we might say, it's a short-run and long-haul problem: The easier I make things now, the less value what we do now will have for you in the long-haul. Ah . . . it's the old soft|hard problem and you'll see it come up often in law school. 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. We might think of this as a pedagogical fault-line and when we get astraddle it, there's likely to be discussion and argument about what we're doing and how we *should* do things in law school. You'll be carrying on these discussions with your colleagues, and perhaps, with yourself. You may, somewhere along the way, want to sit down with your teacher 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 going to want as much guidance as you can get. Truthfully, you may *need* less guidance than you *want*, but I get ahead of myself. All you want to do these first few

weeks is to *survive*—and without the use of any magic whatsoever, that's exactly what happens. *You survive*. And, you survive whatever you do, so long as you read the case, and read it carefully, and keep track of what you've read. You may, with some particularly confusing cases, want to consider rereading the case. I don't know of anyone, including most teachers, who can discuss a case without adequate notes. *Read. Keep track of the case in your notes. Pay attention to the discussion of the case in class. You will survive.* And, I might note, that in surviving these first weeks, you'll have 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 survival than you.

Keeping Track of the Case and 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 Friday short short introduction to the courses by your 1st year professor, 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 know to discuss the case in class. Well . . . maybe. It would be more accurate to say that the case brief will make it possible for you to have before you—hopefully in your own language—the most basic information that you will need. Regretfully, you can expect that in many instances, your case brief will not be enough. You may find a few professors who will ask you to present your case brief in class as you have written it. I assume that most of your professors will not do that; I know I do not. Indeed, my own practice is to try to talk about the case in all kinds of ways, raising as we talk about the case the kinds of questions that a lawyer might pose. I will be particularly interested in the facts, and I begin the discussion of most cases by asking a student to present the facts. Since the facts of the case are the first structural part of a case brief, they come in handy when you've written them out in a succinct style and can draw on your notes when you've been called on to talk about a case.

I've talked generally about the case brief, now let me be more specific. There's not much in the way of rocket science in this conventional structure (and still some room to get things plenty messed up). You'll find, for the most part, that a judicial opinion is not a post-modern text of the kind for which you'll need a guide to identify the component parts of the case opinion. In criminal law (as in most cases), the court will begin by stating either the legal issue or the facts, and will tell you that's what it's doing. This doesn't mean that complications don't arise as to what constitutes the facts and the legal issue, and some part of the law school *rite of passage* is being confounded by a professor's questions about not only the the facts, the legal issue, but also the court's analysis, indeed, every part of the opinion. What you've condensed so thoughtfully in the case brief may well get exploded, expanded, and thoroughly revised as the discussion about the case takes place. Still . . . *you will survive*.

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 the words you have before you, words and phrases that you have selected, that settle

your nerves when you find yourself in the spotlight. Yes, the case brief is a guide of sorts to the case, and you hope you'll 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—on 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 matter of personal style.

What Do You Do With a Dissenting Opinion: Let me add a couple of new wrinkles before we go on to another topic. 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 and want to 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 professor will ask you questions about it. So, you'll need to know the basis for the judge's disagreement as outlined in the dissenting opinion.

The dissenting opinion may help you better understand the case in any number of different ways. 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 court (and the jury) and that the appellate court deals only with legal issues. More often you'll find that there's a disagreement of some kind about the applicable rules, or an interpretation of the rules. You may find that there's a policy dispute of some kind that's gotten entwined in the case in some way or that prompted the case from day one (this ignores the fact that there is, we might think, policy issues present in every case). You can learn a great deal about how lawyers reason and how they think, by reading the dissents closely. 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 Short Note on the Procedure Posture of the Case: Before we proceed further with this inquiry into how you brief a case, we might note a missing element: the procedural posture, or procedural history of the case. E.g., the trial judge denies defendant's request for a jury instruction on self-defense. The defendant appeals this decision to an intermediate appellate court. (You'll learn that West Virginia has no such 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 rules in favor of the defendant and orders a new trial. The 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, and the state's supreme court overturns the intermediate appeal court decision and finds that the defendant was not 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: I think you'll find your case briefs more useful if they are not a "cut-and-paste" from the judicial opinion. There are several reasons for this admonition. First, preparing the case brief should not be a mechanical operation. Keep in mind that the value of the case brief is not only designed to help you discuss the case (to settle your nerves as I noted earlier), but it is also 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 in your own language as much as possible. In the process of *translation*, from judicial opinion, to your written structural outline of the case (along with any troubles you've encountered in understanding the case), you are learning how the law works, and how we, in the classroom and as lawyers, must constantly move 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 to better understand it. When you try to talk about the case in class, you'll need this reformulated language. You may, of course, as you peruse the case and talk about it in class, find that you and your professor will at times want to quote a particular passage and make specific reference to the court's own language. But if your professor asks you a question about the case and your reply is made up of language you've lifted from the court's opinion, you may find that you'll not get very far before you're asked to make sense of what you're saying in your own language. You will do a better job of this *making sense of it* if you've constructed the case brief in your own language.

Of course, you'll want to make ample use of underlining and marking (in whatever fashion you've grown accustomed) the important language in the judicial opinion, so you can find it when you need it. You'll find that marking-up the case, along with your marginal notes, of real value when you are required to respond to questions about the case that are not illuminated by the case brief itself.

You will find that reading the cases you've been assigned is time consuming. And, preparation of the case briefs in the manner that I've described more time consuming still. It will be tempting, at some point, to dispense with the case briefing process and try to make do with only your marked-up copy of the case and your marginal notes. Most students find that somewhere along the way the preparation of a case brief is no longer necessary and that their time is better spent in other pursuits. I don't have any way of knowing when you'll cross the line, and give up on case briefing. It will most likely happen. 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. And, I might note, that it's in your personal involvement in the process, *translating* the case from the stiff, formal language of the law into something resembling your own language, that you will learn to survive law school.

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.

When the Court's Opinion Leads You Astray: We could, perhaps, talk about *how to read a case* for a good many months and still find plenty to say. What I want to do now is suggest still another reason why your case brief can be difficult to prepare, or an easily prepared case brief can get you in trouble when you try to discuss the case.

You're going to find, in some appellate opinions, that the court will set out the facts of the case, in the first part of the opinion, and sometimes will "label" the facts section of the opinion. But as I've noted, you may find a dissenting opinion in the case, and in it, new facts that the majority opinion failed to mention. You may also find that the court sets out the facts in the beginning of the opinion, but then as the opinion proceeds and the analysis is presented, still additional facts are introduced.

You'll also find that the opinion may, at the beginning, during the analysis, or near the end of the opinion, opinion lay out it's *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]