PART ONE: LEARNING THEORY & STUDY SKILLS

I. Introduction to the Course in Legal Analysis

A. Methods of Legal Education

1. The Last 140 Years

Professor Christopher Columbus Langdell was a brilliant teacher who introduced the "case method" system of legal education in the 1870's. He surmised that the teaching of law is not merely the memorization of legal rules but is a more comprehensive process that involves analytical and expressive skills such as synthesis, deduction, analogization, issue articulation, persuasive argumentation, etc. Although Langdell's breakthrough seems obvious to us now, it was revolutionary from the perspective of legal educators and lawyers in the 1870's. Prior to Langdell's approach to law teaching, all lawyers had been trained through apprenticeships or by the tedious process of memorizing legal rules, set forth in authoritative treatises.

To implement his theory of legal education, Langdell created the first "case book." The book was an assembly of cases, without any direct reference to, or discussion of, the legal rules the cases were interpreting and applying. By presenting students with the raw cases, he forced his students to "discover" or "induce" the legal rules by extracting them from cases (finding the "holding" of the case) and synthesizing the holdings into a rule structure for that area of law. This process has become known as the "case method" of legal instruction. You will notice that the contents of most, if not all, of your first year case books consist primarily of legal cases.

To a limited degree, the case method of instruction has been augmented in most law schools with clinical, simulation and problem method approaches to legal education. Clinical education engages the student in a "real life" clinical internship, where the student is placed as an intern with actual lawyers, judges and administrators. Typically, the clinical experience is supervised by clinical professors or others on the law school faculty.

1. Langdell sought to "construct a rational scheme for the arrangement of legal doctrine by analytically unfolding the implications of a few foundational ideas." Kronman, THE LOST LAWYER (1993), at 182. Indeed, Langdell and his disciples, James Barr Ames and William Keener, believed that cases could be used both to identify the existence of basic legal principles (the legal rules) and that these legal rules are the product of a general process of legal reasoning.

2. The case method of instruction is also widely used by business schools throughout the U.S.
Simulation is similar to clinical education but students are not placed in a real life internship. Instead, the professor(s) construct a life-like setting in which students are asked to act as though they were attorneys.

Problem method legal education is a method of instruction where the professor poses a series of problems for the students that must be solved. The solution to the problems typically requires that the student first read cases and/or other sources of legal rules, elements, policies and justifications – and then apply them to solve the problem.

Although clinical, simulation and problem method courses have been present in most American law schools to one degree or another for thirty years, the central focus of law school education is still primarily the case method of instruction – especially in the first year of legal education.

2. More Recently

The case method process is, in fact, effective in teaching certain skills to law students. The process teaches students the skill of *rule extraction* – the process of reading a series of cases and extracting the holding of each case. The case method process is also effective in teaching students the skills of *rule synthesis* – using cases, treatises and classroom discussions to formulate a complete *rule structure* for a particular area of law.

The case method also contributes to a mastery of what is often referred to as *legal reasoning* or "thinking like a lawyer." Lawyers must be able to use cases, and statutes, to support their clients' positions. They must also be able to distinguish cases that set forth holdings that are contrary to the positions of their clients.4

Unfortunately, the process of case method instruction is both incomplete and complex. The fundamental tasks of law students are to find, understand and organize legal rules, the elements of those legal rules, and the policies for each of the elements of the legal rules. Another fundamental objective of legal education is to train law students to apply, in a logical and persuasive way, the legal rules and their elements (and the policies behind the legal rules & elements) to novel factual circumstances.

3. Many modern states, such as California, have codified common law rules by enacting statutes that restate the common law legal rules. States also enact statutes creating new legal rules that did not exist at common law. Once statutory rules are enacted (whether codifications or new rules), the statutes supercede any inconsistent case law. One role of the courts is to interpret and apply statutes.

4. Lawyers, in fact, use cases only as a part of their day-to-day practice of law. Most lawyers rely on statutes, treatises and experience to arm themselves with a mastery of the legal rules, elements, policies and justifications to assist their clients in resolving their problems. Occasionally, lawyers will turn to cases to bolster their position in an argument on a point of law.
The ultimate appraisal of whether students have succeeded in accomplishing these tasks is the law school examination.

Perhaps the most interesting aspect of the case method system of instruction is that it is rarely explained to students, despite its lofty goals and complexity. At virtually every law school in the country, law students begin their education by reading cases for class and then being asked to present their “briefs” or summaries of the cases in class, without any explanation of the purpose, system or process of case method instruction. Indeed, students are quickly placed on the treadmill of case method instruction without any guidance as to the goals of such training.

For approximately 120 years, American legal educators have used this "sink or swim" methodology that evolved from the Langdellian style of law teaching.

*Many students eventually figure out the objectives of this type of training and arrange their studies accordingly. Many other students get lost along the road from the first day of classes to their final exams. Indeed, some students whose profiles indicate a high likelihood of success in law school do poorly on their final exams. Both the winners (the students who figure out the system) and the losers (the students who don’t) are at a disadvantage, since they all lack the information and experience necessary to efficiently and productively use their time during the first year of law school.*

Neither the methods nor the goals of legal education should be mysterious. The Legal Analysis course will help explain both. Perhaps more importantly, the course will offer recommendations for getting the most from your legal education so that you can become a capable and helpful lawyer who can solve problems for his or her clients.

**B. The Fundamental Assumptions of Legal Analysis**

The Legal Analysis course is based on the fundamental assumption that the skills of studying the law and writing law school examinations can be identified, isolated, understood and enhanced. The skills focused on in Legal Analysis are:

1. *Strategic planning for law study:* Using task identification, goal setting and short & long term planning to optimize the law school experience.

2. *Use of source materials:* Using treatises, student guides and other secondary sources to master and understand the basic rule structures all law students must know.

3. *Issue identification and articulation:* Understanding and applying the skill of succinct, clear and accurate issue identification and communication.

4. *Briefs, note taking and summarizing:* Using writing (briefs, class notes, summaries, outlines) as tools for mastering and understanding basic rule
structures—as well as using writing to enhance organizational clarity, understanding, memory and expression.

5. Organizational skills: Using cases, class, source materials and one’s own written materials to construct organizational formats for complex material.

6. Critical thinking, problem solving and judgment: Using rule structures, policy, analogy, deduction and precedent to practice high level skills of analysis, problem solving and judgment.

7. Expression skills: Writing and speaking in a clear, powerful, precise and effective way. Understanding the contribution of structure, organization and methodology to effective communication in oral and written settings. Expression skills include the ability to write well-organized, cogent and effective exam answers, as well as memoranda, legal briefs and other documents.

C. Grading & Attendance

Grading in the Introduction to Legal Skills course will be on a pass/fail basis and counts for 10% of the total points in your first semester Legal Skills class. Attendance is mandatory and each absence from Introduction to Legal Skills classes (either Legal Writing or Legal Analysis) will be counted against the total number of absences permitted in your first semester Legal Skills class. A student who fails one portion of the Introduction to Legal Skills course will be considered to have failed the entire Introduction to Legal Skills course.

In the Legal Analysis component of the Introduction to Legal Skills course, you will be expected to attend every class, prepare for each class by doing the assigned reading and completing the assigned exercises. There will also be a written examination at the end of the week which you must satisfactorily complete to receive a passing grade.
D. Goal Identification and Skills Identification.

1. Why Bother Identifying Goals?

Effective lawyering requires a clarity of mind about the objectives of the lawyer and his or her clients. For instance, a lawyer who is a truly effective negotiator has a crystal clear set of objectives to be accomplished during the negotiations. He or she will never lose track of those objectives, regardless of how complex or frenzied the negotiations may become.¹

Learning the law is also complex, difficult and, sometimes, frenzied. It makes sense to establish appropriate goals and keep them in mind throughout the law school experience.

Law school requires the expenditure of a great deal of time, money and energy. A reasonable estimate of the time involved is about 5,760 hours!² A reasonable estimate of the money involved is – well – staggering.³ Perhaps most importantly, law school is the place you build the foundation for a successful law practice for the next 10 to 40 years. It makes sense that no one should begin, or continue, law school without a very clear idea of his or her goals, and a realistic game plan for achieving those goals.

2. Identifying Goals

The questionnaire on the next few pages is intended to stimulate some thought about your long term goals in attending law school, your intermediate range goals while in law school, and your immediate goals concerning the current semester of law school. Our thesis is that goal identification serves two important functions:

First, goals serve as motivators for performance. Many law students find that, from time to time, they lose the motivation to fully engage in their law studies. Goal setting and evaluation often serves as an excellent motivator.

Second, identification of goals assists students in optimally structuring their time and effort to achieve those goals.

¹. The art of negotiation is a difficult and complex one. In a now famous book, Professors Fisher & Ury, of the Harvard Negotiation Project, set forth in great detail the importance of clear objectives in the negotiation process. They state, as the first of four fundamental principles of effective negotiation: “Don't bargain over positions. Focus on the interests of the parties, not their positions.” GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN, Fisher & Ury (2d ed. 1991)

². About 60 hours per week, 16 weeks per semester of classes and exams for 6 semesters.

³. Three years of tuition & fees at about $40,000 per year, plus books and living expenses, etc.

© 2013 Prof. Scott B. Ehrlich
Law school education is filled with opportunities to identify and achieve goals. Our objective is to assist you in a functional approach to legal education. By functional approach, we mean that you have a clear idea of your goals in law school and how to achieve them.

EXERCISE TO PREPARE FOR CLASS:

For the first class session, complete the following questionnaire:⁴

⁴ Be honest and complete in filling out the form. This material is confidential. You will be asked to share it in class if you desire, but you will not be required to reveal anything to anyone.
1. **My primary goals in attending law school are:** (examples: help people solve their problems; pursue a political career; be a successful and powerful lawyer; be able to provide a comfortable life style for myself and my family; make lots of money; do interesting and exciting work; undertake a difficult challenge; represent disadvantaged people; expand my education; get away from my parents, etc.)

2. **My primary goals during the current semester of law school are (list at least two):** (examples: speak effectively in class; get an "A" in at least one course; learn the law of Property, Contracts, Criminal Law, and Civil Procedure; decide which area of law to practice; make some professional contacts and friendships; improve my study habits; etc.)
3. My primary goals during the remainder of law school are (list at least three): (examples: Get a summer internship or job; figure out what area of law to specialize in; improve my writing and oral advocacy abilities; prepare for the bar, obtain a job for post-graduation, etc.)

4. My reservations, concerns, doubts and uncertainties are: (examples: I'm not as smart as everyone else; I'm not sure I want to be a lawyer; I'm not sure I want to devote the time; I don't have the money; I'm petrified of speaking in class; I'm not good at taking exams; I'm worried about my family; all the lawyers I know are jerks; all the lawyers I know are brilliant and articulate; etc.)

5. My goals for the first three weeks of school are?
The purpose of the preceding exercise is to begin to identify short, intermediate and long range goals, so that students can plan a strategy to achieve those goals. **The primary purpose of the first part of Legal Analysis is to determine the tasks of the law student and provide strategies for accomplishing those tasks.** Hopefully, the first part of Legal Analysis will provide students with the background and information that students need to plot a course to achievement of their goals.

The goals exercise includes an identification of reservations, concerns, doubts and uncertainties, so that students can determine the factors that place some "drag" on achievement of goals. Doubts and reservations are potent, real considerations that inhibit the achievement of goals. They need to be identified and managed, so that the drag they create can be reduced. Keep in mind the fact that the stresses of economics, family, relationships and anxieties have a strong impact on success in law school.

**II. The Primary Tasks of the Law Student**

**A. The #1 Task of the Law Student: Finding, Understanding and Organizing Legal Rules & Their Elements.**

1. The Task

The primary task of the law student is to *find, understand, organize* and be able to *apply* legal rules and their elements. Legal rules can be complex but can always be broken down into constituent elements or factors. Legal rules may have many elements, and each element may have sub-elements. The law student (and lawyer’s) job is to find, understand, organize and be able to apply these rules/elements/sub-elements.

To add to the difficulty of this task, legal rules cannot always be described with certainty. Lawyers, professors and judges may have different, but equally workable, ways of describing the legal rules that are applicable in a particular case or situation. Thus, the complexity of the task of finding, understanding and organizing legal rules is compounded by the fact that the rules and their elements can be stated differently depending on the organizational skills of the law student or lawyer. There may be majority/minority viewpoints, there may be traditional/modern viewpoints or there may be well-thought/poorly-thought out viewpoints.

Legal rules are not created in a vacuum. The law is constantly expanding and contracting. The elements of any particular rule of law reflect underlying economic, social, historical and cultural policies. By understanding these policies, students and lawyers are better able to understand, organize and effectively apply the elements to new cases. To really understand the rules of law, you will also need to understand the policies underlying the legal rules.
Most of what you will be tested on in your final exam is your understanding and organization of legal rules, their elements and the policies underlying them. You will also be tested on your ability to apply the rules/elements/policies to novel factual circumstances. This is true for both essay and multiple choice exams.

The focus of this part of the Legal Analysis course is to identify and enhance the skills necessary to accomplish the tasks of understanding, organizing and applying legal rules and their elements.

2. What are Rules of Law and Elements?

Every law suit is based on at least one constitutional, statutory or common law "cause of action" or, synonymously, "legal claim" or "theory of recovery." A law suit may contain several claims based on more than one cause of action or theory of recovery. For instance, in a civil case, a plaintiff may have been injured when the car she was driving suddenly accelerated and caused an accident. Evidence in the case shows that the car was defectively manufactured. The plaintiff may sue the manufacturer and the dealer, seeking damages under several theories of recovery: (i) she may seek damages for breach of contract; (ii) she may seek damages for negligence; (iii) she may seek damages for breach of implied warranty of fitness; and/or, (iv) she may seek damages for strict product liability. Each of these theories of recovery is based on a distinct legal rule. Each legal rule has specific elements which must be satisfied for the plaintiff to succeed under that legal rule.

Suppose we focus on the negligence cause of action. To win, the plaintiff will to prove that the defendant was negligent. The legal rule for negligence is often stated as:

A defendant is liable for negligence when:

- a duty of care was owed by the defendant to the plaintiff;
- the defendant breached that duty;
- the breach was the cause in fact of plaintiff's injury;
- the breach was also the proximate cause of the injury;
- and the plaintiff has suffered compensatory damages.\(^5\)

To understand why understanding the legal rules and their elements is so important, consider what will happen if this dispute proceeds to a trial. The trial is a forum where two events will occur. First, there may be a dispute about the facts of the case. If the parties disagree about the facts, the jury (or the judge in a "bench trial" without a jury) is

---

5. This is a simplified statement of the legal rule for negligence. You will spend much time on the tort of negligence in your Torts classes.
vested with the authority to determine the actual facts. The lawyers will present witnesses and evidence to convince the jury of the true facts.

Second, the judge will have to determine which legal rules apply to this dispute. The attorneys will seek to convince the judge that certain legal rules should, or should not, be applied in this case. The judge will select the appropriate legal rule(s) and then instruct the jury to apply the rule(s) and each of the elements of the rule(s) to the facts of the case.

To win the case, the plaintiff must present facts convincing the jury that each of the elements of the legal rule have been satisfied. Let's use another concrete example.

3. Example: Defamation

Suppose that Peter is a math teacher at Valley High School. The school is located in the State of Western. On March 1st, there was an evening meeting of teachers and parents in the school auditorium. At that meeting Donna (a parent) announced that Peter (a teacher) was an incompetent teacher, who often attended class intoxicated or "high on drugs," and molested children. As a result, Peter lost his job and was so embarrassed by the publicity following the meeting, that he moved to another state. In fact, Donna's statements were not true, although she believed that they were true when she made them. Donna was restating what she had heard from her son, Larry, who had received a grade of "F" from Peter.

If Peter commences a law suit against Donna, seeking money damages for the harm resulting from her false statements, he will not simply assert generally that he was wronged by Donna's actions. He will have to prove that there is a legal cause of action (i.e.: legal rule) that entitles him to the remedy of damages, based on these facts.

The legal rule that supports a legal claim or "cause of action" in Peter is known as the tort of "defamation". Suppose that in the State of Western, defamation is defined as a cause of action that entitles a plaintiff in a legal action to recover damages from: "A person who publishes an untrue defamatory statement, of or concerning the plaintiff, that causes damage to the plaintiff and is not privileged."

6. Prior to trial, the parties will indicate which facts they agree on and which they do not. If there is a dispute as to the facts, the parties will present witnesses and evidence so that the jury (or judge if there is no jury) can determine which facts are true.

7. In law school we traditionally use a fictitious state, like the “State of Western.” This allows us to discuss legal principles in general, without focusing on the law of any specific state.

8. Remember, these are the elements for the tort of defamation in the State of Western. The rule may be differently stated and/or applied in other states.

© 2013 Prof. Scott B. Ehrlich
Notice that the cause of action for defamation is comprised of a legal rule having several "elements" (sub-rules).  

1. The statement must be "published"
2. The statement must be "untrue"
3. The statement must be "defamatory"
4. The statement must concern the plaintiff
5. The statement must cause damage
6. The statement must not be privileged.

Each of these "elements" have special definitions, explanations, tests and justifications. For instance, consider element #1 of the defamation cause of action.

9. Special note: The elements of defamation can be extremely complex. Defamation is typically divided into two different sub-categories: libel and slander. In cases where the defamatory statements are made by the press, or the plaintiff is a public figure, the plaintiff will have to prove additional elements to recover damages. We are using a simple statement of the elements of defamation for purposes of discussion in this course. You will study the elements in much greater detail in your Torts classes. The California Book of Approved Jury Instructions ("BAJI") provides the commonly accepted definition of defamation in the State of California:

The essential elements of a claim for defamation by [libel] [slander] are:

1. The defendant . . . made a defamatory statement about the plaintiff;
2. The defendant published the defamatory statement;
3. The defendant: [knew the statement was false and defamed plaintiff;] [or] [published the statement in reckless disregard of whether the matter was false and defamed plaintiff;] [or] [acted negligently in failing to learn whether the matter published was false and defamed plaintiff;]

Reckless disregard for whether the matter was false and defamed plaintiff means that the defendant actually had serious doubts about the truthfulness of the statement at the time of the publication.

A defendant acts negligently if [he] [she] does not act reasonably in checking on the truth or falsity or defamatory character of the communication before publishing it.

In determining whether the defendant's conduct was reasonable you should consider:

1. The time element;
2. The nature of the interest that the defendant was seeking to promote by publishing the communication; and
3. The extent of the injury to the plaintiff's reputation or sensibility that would be produced if the communication proves to be false.

4. [Either] [the publication caused plaintiff to suffer special damages] [or] [the statement was defamatory on its face].

BAJI 7.04.01 (1992 Revision) 7.04.1 private Figure Plaintiff/public Figure Plaintiff–private Matters–essential Elements.
To be “published,” the statement must be communicated to a person other than the plaintiff, who understands its defamatory meaning and its application to the plaintiff.¹⁰

To win the case, the lawyer for Peter must prove facts sufficient to satisfy each of these elements. If any element cannot be proved, then the cause of action fails and Peter loses. The lawyer for the defendant will admit that some of the allegations of fact are true, and will deny the truth of other allegations. At the trial, Peter's lawyer will have to present evidence and witnesses to show that each of the disputed elements have been satisfied. After the attorneys complete the presentation of evidence and witnesses, the judge will read the instructions to the jury. The instructions will contain a list of the elements of defamation and a definition or test for each element. The jury then determines if each of the elements have been satisfied by the factual evidence.

A facsimile of a defamation complaint is set forth on the next page:

---

¹⁰ The California Book of Approved Jury Instructions provides:

A "publication" of defamatory matter is its communication to a person other than the plaintiff, who understands its defamatory meaning and its application to the plaintiff. To be a publication, the communication also must be made intentionally or negligently. [A publication is intentional if made for the purpose of communicating the defamatory matter to a person other than plaintiff, or with knowledge that the defamatory matter is substantially certain to be so communicated.] [A publication is negligent if a reasonable person would recognize that an act creates an unreasonable risk that the defamatory matter will be communicated to a person other than plaintiff.] [It is also essential to publication that the recipient of the defamatory communication understood the statement was intended to refer to the plaintiff. If the defendant intended to refer to the plaintiff, and the recipient so understood the statement, it is immaterial what words the defendant used to identify the plaintiff. If the recipient mistakenly, but reasonably, believed that the defamatory statement was intended to refer to the plaintiff, it is immaterial that the defendant did not intend to do so.]
COMPLAINT

First Cause of Action: Defamation

1. On March 1, 2013 the Defendant, Donna Dogood, attended a meeting of parents and teachers at Valley High School, with over 20 teachers and 100 parents.

2. At that meeting the Defendant made oral statements that the Plaintiff, Peter Piqued, was an incompetent teacher, who often attended class intoxicated or "high on drugs," and molested children.

3. The statements were untrue.

4. The statements were defamatory.

5. Defendant knew the statements were untrue, or Defendant made the statements with reckless disregard for the truth or falsity of the statements, or the Defendant was negligent with regard to the truth or falsity of the statements.

6. The statements were heard by teachers, parents, members of the School Board and members of the public, who understood the defamatory nature of the statements and that the statements concerned the Plaintiff.

7. The statements made by Defendant were not privileged.

8. The statements made by Defendant were defamatory per se.

9. As a result of the publication of the statements by Defendant, Plaintiff suffered actual pecuniary damages in the amount of at least one million dollars.

WHEREFORE, Plaintiff prays for the following relief:

1. Damages in the amount of $1 million.
2. Costs of this action.
3. Such other and further relief as the court shall deem appropriate.

Alex B. Smith
Attorney for Plaintiff

11. This complaint is intended as a reasonably close facsimile of an actual complaint. Some allegations that would normally be separately stated have been combined. Some jurisdictional and other procedural allegations have been omitted.
B. The #2 Task of the Law Student: Applying the Legal Rules to New, Different Facts.

If a student has really found, understood and organized the legal rules (and their elements and policies), then he or she should be able to apply those legal rules to new factual disputes and argue persuasively for a certain outcome in the dispute. For instance, a student who understands the rules of defamation should be able to look at the dispute between Peter and Donna and apply each element to the facts and argue persuasively that either: (i) Peter should win because he can prove each of the elements of the tort of defamation; or, (ii) Donna should win because Peter cannot prove each of the elements of defamation. To argue persuasively in favor of Peter or Donna, the student will need to be prepared with the following knowledge and understanding:

1. The definition of a cause of action for defamation (i.e.: a list of the elements and a general description of the cause of action).
2. The definition of each element.
3. The explanations, justifications and policies that are reflected in each element.

Notice that you cannot begin to analyze new fact situations until you understand the rules and their elements for the area of law you are studying. Large amounts of class time are devoted to discussing hypothetical fact patterns. If you go to class without understanding the legal rules, you are wasting your time and missing out on the major purpose of the classroom experience.

EXERCISES TO PREPARE FOR CLASS: Apply the elements of defamation to these new fact patterns:

(1) Suppose that instead of Donna speaking publically at the parent-teacher meeting, she makes the same remarks solely to the principal of the school in the confines of the principal’s office. Does that change your conclusion about whether Donna is liable to Peter for defamation?

(2) Suppose Donna speaks publically at the Parent-teacher meeting, but rather than accuse Peter as in the original example Donna instead asks for his dismissal because, she says, Peter had been fired from a previous teaching job on account of his frequent political remarks in class. Actually, Peter resigned from that school in anger after the principal there criticized Peter for Peter’s political remarks. Following Donna’s speech at the Parent-teacher, Peter is indeed dismissed. Is Donna liable for defamation?

(3) Suppose Donna makes the statement to Peter (the plaintiff) in Peter’s classroom. The classroom was vacant at the time but the principal happened to be in the hallway & overheard the conversation. Peter loses his job as a result.
C. The #3 Task of the Law Student: Reducing Uncertainty and Predicting Results

In the preceding materials it was stated that the #2 task of the law student is to apply legal rules and their elements to novel factual situations. This is done by applying the elements of the rule of law in a methodical way. However, the elements may not always be easily applied. For one thing, the case may contain new facts not covered by traditional definitions of the rule and its elements. Or, there may be disagreement among lawyers and judges regarding the proper formulation of the rule. There might be majority views, minority views, traditional views, modern views, trends, etc.

In other words, there may be a great deal of uncertainty about the legal outcome of the factual case being discussed. Good lawyers, and good law students, are expected to be able to argue rationally and persuasively for a reduction of the uncertainty.

To accomplish this task, students must be able to use their understanding of rules, elements, policies and justifications to argue cogently and persuasively for a particular outcome. This task will be intensely focused on in the materials on Legal Analysis, Problem Solving and Expression beginning at page 59 of these materials.

D. Where Do Legal Rules Come From?

Your three primary tasks in law school require that you devote considerable concentration and effort on finding, understanding, organizing and applying legal rules and their elements. We thought it would be helpful to carefully focus on the sources of legal rules.

1. The Statutory and Common Law Sources of Legal Rules

Legal rules and their elements are the culmination of centuries of law-making. Legal rules are a concrete reflection of underlying social, political and economic policies and justifications. Some legal rules are set forth in statutes by our city, county, state and federal legislatures. In countries that follow "civil law" traditions, the vast bulk of legal rules are written in statutory form. In "common law" jurisdictions, such as England and the United States, many (if not most) causes of action for civil monetary damages, or

12. Statutes are laws created by federal, state, county and municipal legislatures. So long as statutes meet the constitutional restraints imposed upon the legislative branch of government, the statutes supersede "common law" rules of law created by the courts. Statutes are often accumulated into "codes" so that they are readily accessible. For instance, the statutory law of the United States is contained in the U.S. Code. The U.S. Code is divided into "titles." Title 18, the Criminal Code contains the criminal laws enacted by the U.S. Congress. Title 11, the Bankruptcy Code, contains the Bankruptcy laws. The statutory law of the State of California is contained in a series of codes: the Penal Code, the Code of Civil Procedure, the Motor Vehicle Code, etc. The statutory law of the City of San Diego is contained in the San Diego Municipal Code.
other relief, are not codified in statutory form. The legal rules are "found" by reading reports of cases, in which judges reveal the legal rules they used to resolve a factual dispute between two or more parties. The judges may also reveal the social, political and economic policies that influenced them in their interpretation of prior common law cases. When interpreting these "common law" legal rules, lawyers and law students must use persuasive logic to support their interpretation of the common law legal rules.

Legal rules that are codified in statutes are relatively easy to find, although they are not necessarily easy to understand or interpret. Moreover, it is unlikely that all potential disputes were foreseen by the legislative drafters of the statute. When the statute is ambiguous or does not cover a particular dispute, the task of a lawyer (or law student) is to understand the policies and history of the statute, so that a favorable, and persuasive, interpretation of the statute can be asserted.

Here is an example of a current statute concerning defamation. It is from Louisiana, and it makes the expression of certain words criminal. In other words, under the circumstances described in the elements of the statute, the speaker will be prosecuted by state attorneys and potentially imprisoned, rather than merely open to civil liability, i.e., being privately sued by the injured party without the state being directly involved in the dispute.

"§ 47. Defamation

Defamation is the malicious publication or expression in any manner, to anyone other than the party defamed, of anything which tends:

(1) To expose any person to hatred, contempt, or ridicule, or to deprive him of the benefit of public confidence or social intercourse; or

(2) To expose the memory of one deceased to hatred, contempt, or ridicule; or

(3) To injure any person, corporation, or association of persons in his or their business or occupation.

Whoever commits the crime of defamation shall be fined not more than five hundred dollars, or imprisoned for not more than six months, or both."

EXERCISES TO PREPARE FOR CLASS:

1. Construct a hypothetical scenario of a person expressing words to another that (a) satisfies the elements of the Louisiana statute; and (b) you believe justifies criminal prosecution.


© 2013 Prof. Scott B. Ehrlich
2. Construct a hypothetical scenario of a person expressing words to another that (a) satisfies the elements of the statute; and (b) nonetheless you DO NOT believe justifies criminal prosecution.

3. Construct a hypothetical scenario of a person expressing words to another “maliciously,” but that could NOT result in a successful prosecution. Be prepared to explain what element of the statute is not satisfied, and why.

4. Speaking ill of the dead can result in criminal liability in Louisiana. Could the same words satisfy the elements of the civil law tort of defamation? (Review the elements of defamation given above). If not, what policies justify the difference? Can you construct a scenario that could result in civil liability in tort, but not result in criminal liability?

E. The Importance of Understanding the Rationale and Policies Supporting Common Law Legal Rules

Legal rules are not given to us by a deity, nor are they inscribed in stone by ancient scriveners. Legal rules are produced by men and women – judges and lawyers who work hard to reflect upon historical, social, political and economic justifications for the rules that comprise case-made common law. Although there is a tradition of "stare decisis" or "precedent,"

14 the doctrine of "stare decisis" is a self-imposed doctrine substantially followed by the judges who decide cases. The doctrine requires that courts abide by, or adhere to, previously decided cases.

14