



HOMEWORK ASSIGNMENTS FOR ORIENTATION CLASSES

Dear New Student,

Congratulations on your admission to law school and welcome to Santa Clara. One aspect of law school this is often different from students' previous educational experiences is that you will typically have reading and/or other homework due on your very first day of class. Orientation week is no different as you will attend lectures led by doctrinal faculty, faculty from Academic & Professional Development, and meet with your Legal Analysis, Research, and Writing class for the first time. **Your assignments, to be completed before Orientation begins, are as follows:**

Before the First Day of Orientation:

- Read the opening section of these materials (pages 1 and 2), including the assigned online materials.

For Introduction to Legal Analysis with Professor Peter Wendel:

- Read the second section of these materials (pages 2 through 6), including *Pierson v. Post*. Make sure to bring this packet to Professor Wendel's presentation so you can reference the case.

For Tools for Academic Success with Professor Devin Kinyon:

- Read the third section of these materials (page 7), including the assigned online materials.

For LARAW:

- Read the fourth section of these materials (pages 8 through 25), including *Gideon v. Wainwright* and *US v. Forfeiture*. Make sure to bring this packet to your LARAW classes so you can reference the cases

For Learning in the Law School Classroom with Professor Michelle Oberman:

- Read the fifth section of these materials (pages 25 through 29), including *Owens v. State*. Make sure to bring this packet to Professor Oberman's presentation so you can reference the case.

For Debriefing and Academic Planning:

- Reading the sixth section of these materials (page 29). Make sure to bring a calendar to this session as instructed in the materials.

To find the first assignments for each of your doctrinal classes, which begin on August 19, consult your professors' ClaraNet course pages.

- 1) Go to: <http://claranet.scu.edu/>
- 2) Choose: Main Index to Course Materials and Departmental Information
- 3) Click on: Course Reserves Pages by Instructor
- 4) Select your professor's last name, and click "Search."
- 5) Click on the course number next to the name and semester of your course.

If there are no assignments listed, the professor has not yet assigned anything. Your professors may post their first assignments close to the date of your first class meeting, so you are encouraged to check ClaraNet regularly for assignment updates.

We look forward to meeting you in August.

These materials were prepared by the faculty members in:

Academic & Professional Development
<http://law.scu.edu/apd/>

Legal Analysis, Research, and Writing
<http://law.scu.edu/laraw/>



ORIENTATION READING MATERIALS

Welcome to Santa Clara. This packet of materials introduces you to some of the basic ideas behind legal education, and includes your assignments for the classes that will meet during Orientation. Our goal for Orientation is to help you get your bearings so that the first few weeks of the semester are a bit less overwhelming. Law school is an incredibly challenging undertaking that will require you to work harder and think more deeply than you probably ever have before. We hope to ease your transition into this new academic environment, and look forward to supporting and advising you along the way.

The Legal System and Lawyers

If you went to high school and/or college in the United States, you probably have some background knowledge of the structure of our government, how our laws are made, and what the court system does. These are foundational concepts to the study of law, so we provide here links to some articles that introduce (or reintroduce) this material. Please review each of the assigned portions below before Orientation. Most come from longer publications that may be useful to read in full, though that is not required.

- ***Introduction to the American Legal System***
<http://www.lexisnexis.com/lawschool/StartingLawSchool.aspx?articleid=393>
Read sections A, B, and D.
- ***Outline of the US Legal System***
<http://www.america.gov/publications/books/outline-of-u.s.-legal-system>
Read the Introduction (pages 1 to 17.)

As Santa Clara is located in California and most of our graduates go on to practice in this state, some portion of our curriculum focuses on the specifics of California law and legal practice.

- ***Fact Sheet: California Judicial Branch***
http://www.courts.ca.gov/documents/Calif_Judicial_Branch.pdf
Read in full.
- ***Summary of Requirements for Admission to Practice Law in California***
<http://admissions.calbar.ca.gov/Portals/4/documents/Admit-Summary-Requirements.pdf>
Read in full.

Finally, you are entering into one of the world's most respected professions. Lawyers serve a unique role in our society, and have important professional obligations that come along with that position. Lawyers are "officers of the court," not only serving the interests of our clients, but the entire legal-judicial system.

- ***California Attorney Guidelines of Civility and Professionalism***
http://slocourts.net/downloads/court_documents/AttorneyCivilityGuidelines072007.pdf
Read the Introduction, and Sections 1 through 5, 14, 16, and 17.

INTRODUCTION TO LEGAL ANALYSIS **PROFESSOR PETER WENDEL**

In your first year of law school you will learn the law primarily from the study of appellate opinions written by judges deciding a case. A case is simply a dispute in court with each party normally represented by a lawyer. The lawyers analyze the previous cases and other laws, investigate all the facts, and then try to persuade a judge or jury to resolve the dispute in their party's favor.

After a judge or jury decides a case at trial, it is sometimes appealed to a higher court. An appellate court reviews the trial court decision, and decides if the correct law was used and/or if that law was applied to the case correctly. Of those cases appealed, some result in a written opinion setting forth the appellate court's decision and its reasoning. These opinions are mostly what you will read, analyze, and learn from in your first year of law school.

During Orientation, you will spend some time in large- and small-group settings beginning to make sense of the process by which you should read and analyze cases. We have included four cases that you are assigned to read and be prepared to discuss for various Orientation classes. The goal of these exercises is exposure, so don't feel panicked if reading cases and making sense of them is challenging at first. This is a skill that you'll work on for the next few years; we're just beginning the journey.

Your First Case

The first academic component of your law school Orientation will be a session with Professor Peter Wendel¹ called Introduction to Legal Analysis. In this session, Professor Wendel will expose you to three different concepts included in a court opinion – facts, law, and policy. Lawyers and judges bring together these three concepts to make legal arguments and reach legal decisions.

In preparation for Professor Wendel's session, please read the case below. It is a bit challenging (it was written over 200 years ago), so do your best to make sense of the events that gave rise to the dispute, what the parties' arguments were, and how the judges came to a resolution.

¹ Professor Wendel teaches Community Property, Real Property, and Wills & Trusts. He has written a book that expands on his presentation called *Deconstructing Legal Analysis: A 1L Primer* (2009, Aspen Publishers).

PIERSON v. POST
Supreme Court of Judicature of New York
3 Cai. R. 175 (1805)

This was an action of trespass on the case commenced in a justice's court, by the present defendant against the now plaintiff.

The declaration stated that Post, being in possession of certain dogs and hounds under his command, did, "upon a certain wild and uninhabited, unpossessed and waste land, called the beach, find and start one of those noxious beasts called a fox," and whilst there hunting, chasing and pursuing the same with his dogs and hounds, and when in view thereof, Pierson, well knowing the fox was so hunted and pursued, did, in the sight of Post, to prevent his catching the same, kill and carry it off. A verdict having been rendered for the plaintiff below, the defendant there sued out a certiorari, and now assigned for error, that the declaration and the matters therein contained were not sufficient in law to maintain an action.

TOMPKINS, J., delivered the opinion of the court.

This cause comes before us on a return to a certiorari directed to one of the justices of Queens County.

The question submitted by the counsel in this cause for our determination is, whether Lodowick Post, by the pursuit with his hounds in the manner alleged in his declaration, acquired such a right to, or property in, the fox, as will sustain an action against Pierson for killing and taking him away?

The cause was argued with much ability by the counsel on both sides, and presents for our decision a novel and nice question. It is admitted that a fox is an animal *feroe naturae*, and that property in such animals is acquired by occupancy only. These admissions narrow the discussion to the simple question of what acts amount to occupancy, applied to acquiring right to wild animals.

If we have recourse to the ancient writers upon general principles of law, the judgment below is obviously erroneous. Justinian's Institutes, (lib. 2. tit. 1. s. 13), and Fleta, (lib. 3. c. 2. p. 175), adopt the principle, that pursuit alone vests no property or right in the huntsman; and that even pursuit, accompanied with wounding, is equally ineffectual for that purpose, unless the animal be actually taken. The same principle is recognized by Bracton, (lib. 2. c. 1. p. 8).

Puffendorf, (lib. 4. c. 6. s. 2. and 10) defines occupancy of beasts *feroe naturae*, to be the actual corporal possession of them, and Bynkershoek is cited as coinciding in this definition. It is indeed with hesitation that Puffendorf affirms that a wild beast mortally wounded, or greatly maimed, cannot be fairly intercepted by another, whilst the pursuit of the person inflicting the wound continues. The foregoing authorities are decisive to show that mere pursuit gave Post no legal right to the fox, but that he became the property of Pierson, who intercepted and killed him.

It therefore only remains to inquire whether there are any contrary principles, or authorities, to be found in other books, which ought to induce a different decision. Most of the cases which have occurred in England, relating to property in wild animals, have either been discussed and decided upon the principles of their positive statute regulations, or have arisen between the huntsman and the owner of the land upon which beasts *feroe naturae* have been apprehended; the former claiming them by title of occupancy, and the latter *ratione soli*. Little satisfactory aid can, therefore, be derived from the English reporters.

Barbeyrac, in his notes on Puffendorf, does not accede to the definition of occupancy by the latter, but, on the contrary, affirms, that actual bodily seizure is not, in all cases, necessary to constitute possession of wild animals. He does not, however, describe the acts which, according to his ideas, will amount to an appropriation of such animals to private use, so as to exclude the claims of all other persons, by title of occupancy, to the same animals; and he is far from averring that pursuit alone is sufficient for that purpose. To a certain extent, and as far as Barbeyrac appears to me to go, his objections to Puffendorf's definition of occupancy are reasonable and correct. That is to say, that actual bodily seizure is not indispensable to acquire right to, or possession of, wild beasts; but that, on the contrary, the mortal wounding of such beasts, by one not abandoning his pursuit, may, with the utmost propriety, be deemed possession of him; since, thereby, the pursuer manifests an unequivocal intention of appropriating the animal to his individual use, has deprived him of his natural liberty, and brought him within his certain control. So also, encompassing and securing such animals with nets and toils, or otherwise intercepting them in such a manner as to deprive them of their natural liberty, and render escape impossible, may justly be deemed to give possession of them to those persons who, by their industry and labor, have used such means of apprehending them. Barbeyrac seems to have adopted, and had in view in his notes, the more accurate opinion of Grotius, with respect to occupancy.... The case now under consideration is one of mere pursuit, and presents no circumstances or acts which can bring it within the definition of occupancy by Puffendorf, or Grotius, or the ideas of Barbeyrac upon that subject.

The case cited from 11 Mod. 74, 130, I think clearly distinguishable from the present; inasmuch as there the action was for maliciously hindering and disturbing the plaintiff in the exercise and enjoyment of a private franchise; and in the report of the same case, (3 Salk. 9), Holt, Ch. J. states, that the ducks were in the plaintiff's decoy pond, and so in his possession, from which it is obvious the court laid much stress in their opinion upon the plaintiff's possession of the ducks, *ratione soli*.

We are the more readily inclined to confine possession or occupancy of beasts *feroe naturae*, within the limits prescribed by the learned authors above cited, for the sake of certainty, and preserving peace and order in society. If the first seeing, starting, or pursuing such animals, without having so wounded, circumvented or ensnared them, so as to deprive them of their natural liberty, and subject them to the control of their pursuer, should afford the basis of actions against others for intercepting and killing them, it would prove a fertile source of quarrels and litigation.

However uncourteous or unkind the conduct of Pierson towards Post, in this instance, may have been, yet his act was productive of no injury or damage for which a legal remedy can be applied. We are of opinion the judgment below was erroneous, and ought to be reversed.

LIVINGSTON, J. My opinion differs from that of the court. Of six exceptions, taken to the proceedings below, all are abandoned except the third, which reduces the controversy to a single question.

Whether a person who, with his own hounds, starts and hunts a fox on waste and uninhabited ground, and is on the point of seizing his prey, acquires such an interest in the animal, as to have a right of action against another, who in view of the huntsman and his dogs in full pursuit, and with knowledge of the chase, shall kill and carry him away?

This is a knotty point, and should have been submitted to the arbitration of sportsmen, without poring over Justinian, Fleta, Bracton, Puffendorf, Locke, Barbeyrac, or Blackstone, all of whom have been cited; they would have had no difficulty in coming to a prompt and correct conclusion. In a court thus constituted, the skin and carcass of poor Reynard would have been properly disposed of, and a precedent set, interfering with no usage or custom which the experience of ages has sanctioned, and which must be so well known to every votary of Diana. But the parties have referred the question to our judgment, and we must dispose of it as well as we can, from the partial lights we possess, leaving to a higher tribunal, the correction of any mistake which we may be so unfortunate as to make. By the pleadings it is admitted that a fox is a "wild and noxious beast." Both parties have regarded him, as the law of nations does a pirate, "hostem humani generis," and although "de mortuis nil nisi bonum," be a maxim of our profession, the memory of the deceased has not been spared. His depredations on farmers and on barn yards, have not been forgotten; and to put him to death wherever found, is allowed to be meritorious, and of public benefit. Hence it follows, that our decision should have in view the greatest possible encouragement to the destruction of an animal, so cunning and ruthless in his career. But who would keep a pack of hounds; or what gentleman, at the sound of the horn, and at peep of day, would mount his steed, and for hours together, "sub jove frigido," or a vertical sun, pursue the windings of this wily quadruped, if, just as night came on, and his stratagems and strength were nearly exhausted, a saucy intruder, who had not shared in the honors or labors of the chase, were permitted to come in at the death, and bear away in triumph the object of pursuit? Whatever Justinian may have thought of the matter, it must be recollected that his code was compiled many hundred years ago, and it would be very hard indeed, at the distance of so many centuries, not to have a right to establish a rule for ourselves. In his day, we read of no order of men who made it a business, in the language of the declaration in this cause, "with hounds and dogs to find, start, pursue, hunt, and chase," these animals, and that, too, without any other motive than the preservation of Roman poultry; if this diversion had been then in fashion, the lawyers who composed his institutes, would have taken care not to pass it by, without suitable encouragement. If anything, therefore, in the digests or pandects shall appear to militate against the defendant in error, who, on this occasion, was the foxhunter, we have only to say tempora mutantur; and if men themselves change with the times, why should not laws also undergo an alteration?

It may be expected, however, by the learned counsel, that more particular notice be taken of their authorities. I have examined them all, and feel great difficulty in determining, whether to acquire dominion over a thing, before in common, it be sufficient that we barely see it, or know where it is, or wish for it, or make a declaration of our will respecting it; or whether, in the case of wild beasts, setting a trap, or lying in wait, or starting, or pursuing, be enough; or if an actual wounding, or killing, or bodily tact and occupation be necessary. Writers on general law, who have favored us with their speculations on these points, differ on them all; but, great as is the diversity of sentiment among them, some conclusion must be adopted on the question immediately before us. After mature deliberation, I embrace that of Barbeyrac, as the most rational, and least liable to objection. If at liberty, we might imitate the courtesy of a certain emperor, who, to avoid giving offence to the advocates of any of these different doctrines, adopted a middle course, and by ingenious distinctions, rendered it difficult to say (as often happens after a fierce and angry contest) to whom the palm of victory belonged. He ordained, that if a beast be followed with large dogs and hounds, he shall belong to the hunter, not to the chance occupant; and in like manner, if he be killed or wounded with a lance or sword; but if chased with beagles only, then he passed to the captor, not to the first pursuer. If slain with a dart, a sling, or a bow, he fell to the hunter, if still in chase, and not to him who might afterwards find and seize him.

Now, as we are without any municipal regulations of our own, and the pursuit here, for aught that appears on the case, being with dogs and hounds of imperial stature, we are at liberty to adopt one of the provisions just cited, which comports also with the learned conclusion of Barbeyrac, that property in animals *feroe naturae* may be acquired without bodily touch or manucaption, provided the pursuer be within reach, or have a reasonable prospect (which certainly existed here) of taking, what he has thus discovered an intention of converting to his own use.

When we reflect also that the interest of our husbandmen, the most useful of men in any community, will be advanced by the destruction of a beast so pernicious and incorrigible, we cannot greatly err, in saying, that a pursuit like the present, through waste and unoccupied lands, and which must inevitably and speedily have terminated in corporal possession, or bodily seisin, confers such a right to the object of it, as to make any one a wrongdoer, who shall interfere and shoulder the spoil. The justice's judgment ought, therefore, in my opinion, to be affirmed.

Judgment of reversal.

TOOLS FOR ACADEMIC SUCCESS **PROFESSOR DEVIN KINYON**

As you saw in Professor Wendel's presentation, understanding and studying cases can be very challenging. One very important idea that we hope you took away from that session is that you need to develop a new approach to learning in law school if you hope to be successful. Simply put, law school isn't like anything else you've experienced, so the strategies you've used in the past for college will have to change for you to succeed.

Professor Devin Kinyon² will begin your exposure to the various tools, techniques, and strategies that successful law students employ at your next academic session. Our goal is to show you a variety of ideas, and empower you to do those things that align with your learning preferences, background, and needs.

In preparation for Professor Kinyon's session, please complete the following learning styles assessments:

- ***Index of Learning Styles Questionnaire***
<http://www.engr.ncsu.edu/learningstyles/ilsweb.html>
Note your learning style for discussion at Professor Kinyon's session.
- ***VARC: A Guide to Learning Styles***
<http://www.varc-learn.com/english/page.asp?p=questionnaire>
Note your learning style for discussion at Professor Kinyon's session.

We also will be discussing a concept called Self-Regulated Learning³, an idea employed by the very best students in all disciplines to get the most out of their learning experience. Please watch the following video presentation in preparation for our discussion:

- ***Expert Learning for Law Students: Part III***
http://lawschoolasp.org/eLearning/expert_learning_part3/viewer.swf
There are two additional presentation (parts I and II), that are not required for our discussion, but may be useful to view. They are available at:
http://lawschoolasp.org/students/learning_opps.php

² Professor Kinyon teaches Advanced Legal Writing: Analysis, and as a part of the faculty in Academic & Professional Development, directs the first-year Academic Success Program.

³ Self-Regulated Learning is discussed in depth in the book *Expert Learning for Law Students* by Michael Hunter Schwartz (2008, Carolina Academic Press).

READING AND BRIEFING CASES **LARAW ORIENTATION CLASSES**

Reading cases will make-up the bulk of your assignments in your first-year law school classes. Creating briefs for those cases is the process by which you make sense of that reading material, prepare for class, and ultimately, study for your exam. In your LARAW class meetings during Orientation, you will begin practicing that skill. This section provides some background information that should be reviewed before your first LARAW meeting.

The Basic Structure of a Case

Cases contain two main parts: the heading and the opinion. The heading precedes the opinion, and normally consists of:

- The title of the case
- The name of the court issuing the opinion
- The date of the opinion
- The case citation

After the heading is the main opinion, the part of the case written by the court. It usually (though not always) contains the following parts:

- The name of the judge writing the opinion
- The facts of the case
- The procedural history of the case
- The issue(s) presented to the current court
- The rule(s) of law that resolve those issues
- The court's application of those rules to the facts
- The court's conclusion, or holding, and any orders the court makes

Sometimes, court opinions or the edited versions of them in your casebooks omit some of these elements, or the elements must be inferred from other parts of the opinion. Read opinions to glean information pertinent to each element, but do not be discouraged if an opinion is so cryptically written that you can't determine all of these parts. Analyze the opinion as best you can and discuss it with others (such as your study group members), as you will find that different readers often have different understandings of what an opinion means. Lawyers confer with each other often about the meanings of cases; as law students, you should start that practice through your study groups and class discussions.

First Steps to Reading a Case

Unlike your undergraduate college where you might have just jumped right into your reading, in law school you'll want to understand the context of your assignment so that you can fit it into the larger framework of your course. For example, in your Criminal Law course you won't learn homicide all in one day, but over the span of many class sessions. Your reading assignment for a particular class session might address one specific aspect of homicide, for instance the mental

state required for a first-degree murder. While the cases have value independently to help you understand the discrete topic covered – mental state for first-degree murder – they also fit into the larger analytical framework for homicide crimes.

To figure out that context, you'll want to review the topics assigned on your course syllabus and the table of contents. Look at what your professor's focus will be for that class session so you can understand why this case is being assigned. This is important because most cases will address multiple issues and legal rules. Typically, your professor assigns a case because it addresses one specific legal topic very well. Because you've identified the focus area for that date's class, you'll be able to zero-in on that topic in the case and pay special attention to it. That topic should make-up the bulk of your case brief so that you're ready for the discussion in class, and ultimately can use that case material in preparing for exams.

The Case Heading

As outlined above, the first part of the case that you'll see is the heading. The heading helps you understand some very basic aspects of the case.

The title typically contains the names of at least two parties to the lawsuit. There may be other parties, but for brevity's sake, the title generally includes only one party on each side of the lawsuit. In a trial court, the parties are referred to as plaintiff and defendant. In appellate courts, the parties are typically renamed as the appellant or petitioner (the losing party at trial asking the appellate court to review the decision) and the appellee or respondent (the party who was successful at the trial level).

The name of the Court issuing the opinion, i.e., the US Supreme Court, a Missouri appellate court, or the Federal District Court for the Northern District of California. Knowing which court issued the opinion helps you assess its relative weight.

The year of the opinion is also critical because it tells you when the opinion was decided relative to other cases that involve the same issues. Many older cases are still relevant, but a current court may decide that an earlier decision was wrong, or that circumstances have changed so dramatically since the issuance of an older opinion that a new rule or rationale should be used instead.

The case citation. Lawyers and judges must be able to access decisions quickly and accurately. For this reason, each case has a citation, including the name and the volume and page number of the books, called reporters, where the decision is published. These citations, and a larger set of rules employed by lawyers when writing legal documents, will be covered in depth in your LARAW course.

Depending on the course and your professor's preference, when creating your case brief, it is useful to note some of the information from the heading. For some classes, it is simply enough to note the case's title and which party is which. Some professors and classes focus more on the procedural and precedential aspects of the cases, so having more detail about the court and timeline of the case is important.

Some Tips for Reading a Court Opinion

The opinion is the main text of the case, explaining the fact situation, the relevant law, and how the court applied that law to the facts. If you are a “big picture” person, it may be helpful to skim the case for a basic understanding of what occurs before beginning your in-depth reading. Others may wish to highlight text and make margin notes on an early read-through so you can go back and retrieve parts for your brief. This can be especially helpful for kinesthetically-oriented people, who tend to learn best when moving or “doing.”

As you read cases, try to identify each of the components of the opinion, listed below. This will help you stay focused on what you are reading and what you should be looking for as you read the decision. The court may not address the components in the order listed above, but you should be able to identify one or more of the components in each of the paragraphs of the decision. When you brief the case, you will be using these same components as the headings for the sections in your brief.

As a new student of law, understanding the terminology used by judges and lawyers is very important. Whenever you’re reading, make sure to have a legal dictionary with you and look up any term that you don’t know. Don’t just assume you understand the gist of a word or that its conversational English definition applies. The preferred resource used by most law students is *Black’s Law Dictionary*.

Components of a Court Opinion

The name of the judge writing the opinion is found at the beginning of the body of the opinion. Trial courts typically have only one judge presiding. Appellate courts consist of multiple judges, and the judge whose name appears at the beginning of the opinion is either writing on behalf of the entire court, the majority of the court, or a minority of the court. If the court’s decision is not unanimous, then other judges on the panel may publish concurring or dissenting opinions, which are printed at the end of the majority opinion.

The procedural history of the case, sometimes called procedural facts, is usually found towards the beginning of the court’s decision, if it has not been edited out by your casebook editor. It explains how the case worked its way to this court from the initial trial. Procedural history is very important in your Civil Procedure class, but may also be of interest to your other professors as well.

The facts about the parties’ conduct that gave rise to the case are typically stated at the beginning of the opinion in narrative form. By the facts, we refer to the events that led to the judicial proceeding. In effect, the facts are the story of the people or institutions that become the parties to the judicial proceeding.

Issues are the legal questions posed by the specific case. Issues generally fall into one of three categories. These are (1) ***issues of law***, in which the court must interpret the meaning of a particular rule of law; (2) ***issues of fact***, in which a court must determine what the true facts of the case are (especially where the evidence is conflicting); and (3) ***mixed questions of law and***

fact, where the court determines the outcome of a dispute by applying the applicable legal rules to the specific facts before it.

Sometimes, though not always, the court makes it simple to identify the issues by stating them as questions; other times they just appear as headings or introductory sentences. And there may be more than one issue in a case. This is why it's important to know what your professor's focus is for assigning the case. If you're just looking at one of the topics addressed, you'll want to focus your analysis (and briefing) on that issue. If all the issues are important to your class, you'll want to include each of them in your brief, in full.

In the application or rationale section, usually the lengthiest part of the decision, the court explains the reasoning or analysis that justifies its holding. The court's reasoning will generally be based upon two things. First, the court will explain ***the rules of law*** on which it bases its decision. Rules of law originate in primary sources of law, including the federal and state constitutions, statutes, regulations, and, under the doctrine of stare decisis, the holdings of courts superior to the deciding court. The court will summarize pre-existing rules, or, if the case addresses an issue of first impression (a legal question that's never been decided before), the court will state the new rule that it has identified. If the court is identifying a new rule, it will generally state the public policy reasons supporting that new rule. Identifying a clear rule statement from your assigned cases is essential to being prepared for class discussion (this is how you learn the law.)

Second, the court's reasoning will include its ***application of the rules of law to the facts of the case*** before it. By application, we mean the Court's analysis of whether the facts in the case meet the requirements of the applicable rules of law, and why or why not.

The analysis of each issue usually ends with a ***conclusion or holding***. The holding may be as simple as identifying the outcome when the law is applied to the facts, but usually briefly summarizes the issue-rule-application discussion as well. Typically, the holding (or final holding in a multiple-issue case) will be followed by ***the court's order***. The order describes the next procedural steps for the case, such as remanding (sending back) the case to a lower court for further action.

Concurring and dissenting opinions may be included with a case as judges on an appellate panel may not be in agreement with each other as to the outcome of the case, or agree as to the outcome, but not as to the reasoning the majority opinion applied to get there. A ***concurring opinion*** agrees with the judgment rendered by the majority, but disagrees either with the issue to be decided or the method of deciding it. A ***dissenting opinion*** disagrees with the judgment rendered by the majority. These opinions are retained in the casebook to demonstrate the varying viewpoints within the court and to aid you in understanding the scope and reasoning of the case. These opinions tend to be important in classes where the evolution of the cases is an essential aspect in understanding the current state of the law, such as in Constitutional Law.

Writing a Case Brief

A case brief is a written summary of a court's opinion. It serves several critical purposes. Its preparation forces deeper reading so that the student or lawyer understands how the opinion applies and advances the law. It also boils down the content of an opinion and organizes it in a useful format for later reference in class discussions and outlining for exams.

Because the process of creating briefs advances the law student's legal analysis and writing skills, the use of commercially-published briefs is counterproductive as it preempts the activity of studying opinions and distilling their content. This is a skill mastered only through practice. (Commercial briefs are often also inaccurate or misleading because they focus on different aspects of the case than your professor prioritizes.) Similarly, "book briefing," i.e., merely highlighting the text and writing notes in the margin of the casebook without creating a separate brief, is inadequate. It skips the important exercise of distilling the legal reasoning into your own words, which is a proven step to truly making sense of and learning the law.

A brief should be just that. More than a page or so defeats the usefulness of the tool. Early in the semester, you will probably write longer briefs. Edit them for focus after class discussion to make them more usable and to improve your briefing skills for the next case. Do not be discouraged that brief-writing is difficult at first; it is a sophisticated activity that takes time. You will improve with practice.

Another important reminder as you begin briefing: your briefs for each subject will be slightly different based on the types of questions your professor asks in class and the overall subject nature. It's already been noted that the procedural aspects of a case tend to be very important in a Civil Procedure course, but may not be in your Torts class. These kinds of differences will become clear after a few weeks of paying careful attention to your different professors. Adapt your briefs as you go.

One final, but critical note: it is very difficult to identify the elements of a brief by simply reading an opinion from beginning to end; several readings of the opinion to ferret out and infer the parts are usually necessary. One usually must dissect the rationale to find the rules and facts the court relied upon; those key facts and formulation of the rule are then necessary to construct the issue statement and the corresponding holding. Do not expect to find the items in order, nor on your first reading of the case. Be ready to draft your brief "out of order" and to adjust the contents of your brief as you compose it.

Elements of a Brief

1. **Heading:** Start your brief by listing:
 - a. Title of the case
 - b. Name of the court writing the opinion
 - c. Year of the opinion
 - d. Casebook page number
 - e. Topic area from your syllabus or table of contents

2. **Facts:** Summarize the relevant facts of the dispute before the court. Your fact section should always include an identification of the parties (beyond a reference to plaintiff and defendant, which becomes very confusing to follow throughout a brief.) To determine which facts are relevant, you'll need to remember the reason your professor assigned the case, and focus on the facts that address that specific issue area. These facts may be imbedded in the overall factual discussion at the beginning of the case, as well as reviewed in the specific application section where the court is addressing the specific issue. Sometimes it is more efficient to identify relevant facts to include in your brief after you have determined the basis for the holding.
3. **Procedural History:** A summary of the relevant procedural details. Include who originally sued whom and the cause of action (what laws they were suing over.) In addition, include the judgment of the trial court, who appealed the judgment, and how any appellate court(s) have ruled so far. End with what the present court is being asked to do.
4. **Issue:** A statement of the pertinent legal question(s) before the court. Sometimes courts explicitly state the issues presented in the case with language like "the issue presented is whether..." or "the question in this case is whether..." or comparable language. If not expressly stated, you can usually identify the issues from the court's summary of earlier proceedings or the arguments advanced by counsel.

The issue section of your brief may be lengthy or short, depending on your and your professors' preferences. Some professors are more interested in the holding than the issue and prefer simple, general issue statements. If you use a shorter version of an issue statement, then your holding section must capture the components discussed below. The instructions here relate to creating a more comprehensive issue section that links key facts to a governing rule and one or more of its elements.

A good issue statement incorporates two components: a brief statement of the facts and a brief statement of the law. Here's an example:

Did Darwin have the required intent to commit arson when, while burning leaves in his backyard, a tornado suddenly appeared and spread his fire to ten nearby houses?

In this example, the issue statement briefly summarizes the facts to be considered (that Darwin had been burning leaves and a tornado spread the fire to nearby houses.) The issue statement then also points to the relevant legal rule (the required intent to commit arson.)

5. **Rule:** As noted, the rule section is critically important for class preparation. This is a clear, concise, and accurate statement of the law that the court then applied to resolve the case. Phrasing of the rule statement is important, as using a precise rule statement on an exam is a hallmark of solid legal analysis. When you begin briefing, extracting the rule statement verbatim from the casebook tends to be the best approach. Over

time, you will see how your professor rephrases or polishes the rule statement, and you'll want to mirror that approach in your briefs, an ultimately on your exam.

6. **Application:** Think of this section as the “showing your work” portion of a math problem. As you'll remember from elementary school, getting the right answer on a math test didn't carry a lot of weight if you didn't demonstrate correctly how you got to that result. The same rule applies to legal analysis – it's not enough to understand the question a court asked and what it concluded. To really understand the case, and to be able to use that law in a meaningful way on an exam or in a paper, you need to understand that court's rationale. Focus on how the court applied the rule identified above to the specific facts of the case.
7. **Holding/Conclusion:** Just as a court's opinion sometimes contains an explicit statement of the issue, it may also include an explicit statement of the holding. You should look for phrases like “the holding is...” or “we hold...” or sometimes “we conclude...” or “we find...” Whether or not this signaling vocabulary is used, a well-written opinion usually shows precisely how each part of the legal rule is or is not met by the facts that the court determines to exist.

Your holding should be a mirror-image response to the issue statement. When you construct a comprehensive issue statement as a question linking key facts with the element(s) of the applicable rule, a holding is simply the yes or no answer to that question. If you use simpler issue statements, your statement of the holding must include both the key facts and the legal rule applied by the court.

Articulating the holding of a case is not always simple. In many cases, the readers of an opinion (lawyers and judges, law professors and law students) disagree about the precise holding of a case. Some may reasonably argue that a holding is very narrow, applicable to only a very small range of future situations. Others may reasonably argue that a holding is very broad, applicable to a wide variety of future cases. There is not always one correct way to articulate the holding of a case; only time and later cases will tell.

The issue, rule, application, conclusion format (abbreviated to IRAC, pronounced “eye-rack”) – is the backbone of legal reasoning, and is the essential skill that you'll apply (with some variation) in all of your coursework and on exams, on the Bar Exam, and in legal practice. You'll begin seeing more and more IRACs as you read cases and legal writing.

In some court opinions, there will multiple issues addressed that should each be included in your brief. In that scenario, it's best to break your brief up into separate subsections by issue:

- Issue (1)
- Rule (1)
- Application (1)
- Holding/Conclusion (1)

Issue (2)
Rule (2)
Application (2)
Holding/Conclusion (2)

Issue (3)
Rule (3)
Application (3)
Holding/Conclusion (3)

By organizing your brief this way, it's easier to understand which aspects of a court's rationale applied to which legal issues and factual situations. This type of structure is a hallmark of thoughtful, clear legal writing.

8. **Concurring and Dissenting Opinions:** Your brief may include a short summary of a concurring and/or dissenting judge's opinion. You will find that persuasive dissenting opinions sometimes become the majority opinions of tomorrow.

Finally, leave space to amend your brief based on class discussion. What did the professor emphasize? Ignore? You will find it far easier to make these notes during or immediately after class rather than many days and thousands of pages later. What are the two or three takeaways that this case adds to your understanding of this area of law? Is it the major statement of the rule moving forward? A source of a new exception or element of the rule? A particularly good example of the application of a familiar rule to interesting facts? Was it used with a hypothetical in class? As you approach the end of each topic area of your course, be sure to consider how each case relates to others in that section.

In providing this template, our goal is to give you a starting point for your briefing. As you gain experience preparing for class and checking your preparation against your class participation, you will develop your own style of brief writing. Below, we've provided a sample brief written by Professor Evangeline Abriel⁴ to give you a sense of what a good brief might look like. Remember that not all briefs are the same, and that you will develop your own style based on your preferences and professors.

⁴ Professor Abriel teaches LARAW, Advocacy, and Immigration Appellate Practice. She is also the director of the LARAW program.

SAMPLE BRIEF

Heading: People v. Majors
Supreme Court of California 2004
14 Cal. Rptr. 3d 870

Comment [SCU1]: Case name, deciding court, citation.

Facts: As 18 year old victim (V) was riding home on bike from a shopping mall, defendant (D), standing in street next to white van, flashed a badge and asked her to stop, said he was security guard at mall and there was suspicion that someone on bicycle had stolen something from store V had been in. D. told V she must return with him to store to resolve matter. V testified she was afraid she would be arrested if she did not get into the van. D tried to put V's bike in van; when would not fit, took her backpack and told her to lock bike at nearby school. Would not let V call her parents. Made cell phone call apparently to office. V had no prior dealings with police. D drove to isolated area of mall, where attacked V. V fought back; D let her go.

Comment [SCU2]: Include only relevant facts; facts that make a difference in the outcome of the case or that are necessary to understand context or sequence of events. Summarize or leave out unnecessary words in the way that works best for you.

Procedural history: D charged criminally, found guilty of several counts of kidnapping; D appealed to appellate court, which reversed the judgment on simple kidnapping for insufficient evidence on the element of force or fear. The Cal. Supreme Court granted Attorney General's petition for review.

Comment [SCU3]: The procedural history explains how the case arrived before this Court.

Issue 1: Whether an implicit threat of arrest satisfies the force or fear element of a simple kidnapping?

Comment [SCU4]: The first issue is an issue of law, which the Court determines without reference to the particular facts of this case. Notice that the issue is just the legal question, without reference to the facts of this case.

Issue 2: If so, was the force or fear element met where the defendant identified himself as a security guard, showed a badge, took the victim's backpack, and told the victim that she was a suspect in a theft and must accompany him, where the victim had no had prior dealings with the police and testified that she thought she would be arrested if she did not comply, and where the defendant did not display any weapons or threaten or touch the victim?

Comment [SCU5]: The second issue is a mixed question of law and fact, in which the Court will apply the new rule that it has just announced (that implicit fear of arrest can satisfy the force or fear element) to the facts of this case. An issue statement on a mixed question of law and fact contains the legal question plus the determinative facts of the case (the facts that make a difference in the outcome). And yes, you're right – this question is too long – we would have to decide to take out some of the determinative facts.

Holding 1: Yes. An implicit threat of arrest satisfies the force or fear element of section 207(a) kidnapping if the defendant's conduct or statements cause the victim to believe that unless the victim accompanies the defendant the victim will be forced to do so and if the victim's belief is objectively reasonable.

Comment [SCU6]: The first holding, responding to an issue of law, sets out the new legal rule the Court has fashioned.

Holding 2: Yes. Here, there was substantial evidence that defendant's conduct and statements caused V to fear she would be arrested if she did not comply, including her testimony that she was afraid and asked to see his badge. There was also substantial evidence that her fear was objectively reasonable. D held up badge, identified himself as security guard, exerted control over her belongings, and continued ruse in van by making call.

Comment [SCU7]: The second holding, responding to a mixed question of law and fact, explains in summary fashion how the elements of the new rule are met by the facts of this case. In other words, the holding very briefly applies the legal rules to the facts of this case.

Rules:

1. A person is guilty of kidnapping if he or she takes or holds the V forcibly or by any other means of instilling fear and moves V elsewhere.
2. Movement is forcible if accomplished through giving of orders that victim feels compelled to obey because he or she fears harm or injury from accused and apprehension not unreasonable under circumstances.
3. Force need not be physical or involve express threats.
4. Threat of force satisfies force element for kidnapping.
5. **An implicit threat of arrest satisfies the force or fear element of section 207(a) kidnapping if the defendant's conduct or statements cause the victim to believe that unless the victim accompanies the defendant the victim will be forced to do so and if the victim's belief is objectively reasonable. (Holding = new rule.)**
6. Kidnapping may be accomplished by means that are both fraudulent and involve force or fear. But if movement is found to be by fraud alone, and not force or fear, circumstances suggest victim exercised free will in accompanying perpetrator and it is not kidnapping.
7. Determining characteristic of kidnapping as opposed to fraud is that kidnapping must generally be against will of victim, i.e., without victim's consent.

Application (or "Reasoning"):

1. Earlier cases distinguished between situations where victim went with kidnapper through fraud and where victim forced to go with kidnapper. Court says concepts of consent and force or fear are inextricably intertwined and are not mutually exclusive. The use of force is implicit when arrest is threatened. This is quantitatively different than if def. had asked her to help find a puppy or offered her a ride. The use of force is implicit when arrest is threatened.
2. Evidence shows both that the defendant's conduct caused the victim to fear arrest if she did not comply and that her fear was objectively reasonable. Victim testified she was afraid she would be arrested, believed defendant had authority to arrest her, had not dealt with police before. Defendant showed realistic badge, identified himself as security guard, said he stopped her for law enforcement purpose. Defendant exerted control over victim's belongings, trying to put bike in van and putting backpack in van. Continued the ruse when victim in van.

Court's order: The Supreme Court reversed the decision of the Court of Appeal and remanded to that court for further proceedings.

Comment [SCU8]: Identify the legal rules that the Court sets out. You will want to start at the logical beginning, which may be somewhere before the specific rule or rules involved in the case. Include any rules from constitution, statutes, and regulations as well as rules from cases. Rules from the Constitution or statutes should go first, as the preeminent source of rules.

Set the rules out in a logical order.

The rules will include rules the Court repeats from statutes or earlier cases (sometimes called "original" rules). In addition, the Court may announce new, or "processed" rules. In an issue of law, the court's holding will generally be a new rule in response to that issue. That new rule becomes part of the list of rules from the case. Thus, rule number 6 here is the Court's holding and is also a new or "processed" rule.

Note overlap between the precedent rules and the Court's reasoning on an issue of law.

There will generally be overlap between the list of rules, the holding, and the reasoning. You may want to abbreviate the analysis or reasoning on a question of law if the list of rules already expresses the Court's reasoning.

Comment [SCU9]: The reasoning on an issue of law will include statutes, legislative history, amendments to statutes, rules from precedent cases, policy, justice, and others.

The reasoning is particularly important for mixed questions of law and fact, because it shows how the Court applied the legal rules to the facts. The reasons for the Court's holding on a mixed question of law and fact will be the facts, analogous cases, ideas of fairness and justice, and others.

Comment [SCU10]: The Court's order states the practical steps to be taken to effect the holding(s).

Practicing Reading and Briefing

You will work with briefing cases in your LARAW class meetings during Orientation. The LARAW faculty has identified the two cases that follow for briefing practice. Prior to your first LARAW class meeting please read the cases thoroughly and prepare any notes that you believe will be useful in briefing them. You do not need to create briefs in advance.

[Note: Your typical law school casebook will have edited court opinions connected by explanatory text written by the casebook authors. Assume these two cases appear in a chapter on “The Right to Have Appointed Counsel.” Some sample introductory and “note” materials precede and follow the *Gideon* case in this first example so you can see a case in context.]

THE RIGHT TO HAVE APPOINTED COUNSEL

A. An Introduction to the Substantive Law

The first case in which the Court required a state to provide counsel for indigent criminal defendants was *Powell v. Alabama*, 287 U.S. 45 (1932), holding that “in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law.” The question after *Powell* was whether its counsel rule would be limited to the narrow set of circumstances set out in the holding or expanded to include most or all indigent defendants.

In *Betts v. Brady*, 316 U.S. 455 (1942), the Court stated a test for the due process right to appointed counsel at state expense: whether the failure to appoint counsel would be so “offensive to the common and fundamental ideas of fairness” as to amount to a denial of due process. Using that test, the Court held that *Betts*, charged with robbery, did not have a right to appointed counsel. He was forced to try his own case before a jury, while the state was represented by a law-trained prosecutor. Almost twenty years after *Betts*, the Court defined fairness by a more expansive view of the right to counsel.

**GIDEON, Petitioner v.
WAINWRIGHT, Director, Division of Corrections**
Supreme Court of the United States
372 U.S. 335 (1963)

Mr. Justice BLACK delivered the opinion of the Court.

Petitioner was charged in a Florida state court with having broken and entered a poolroom with intent to commit a misdemeanor. This offense is a felony under Florida law. Appearing in court without funds and without a lawyer, petitioner asked the court to appoint counsel for him, whereupon the following colloquy took place:

“The COURT: Mr. Gideon, I am sorry, but I cannot appoint Counsel to represent you in this case. Under the laws of the State of Florida, the only time the Court can appoint Counsel to represent a Defendant is when that person is charged with a capital offense. I am sorry, but I will have to deny your request to appoint Counsel to defend you in this case.

“The DEFENDANT: The United States Supreme Court says I am entitled to be represented by Counsel.”

Put to trial before a jury, Gideon conducted his defense about as well as could be expected from a layman. He made an opening statement to the jury, cross-examined the State’s witnesses, presented witnesses in his own defense, declined to testify himself, and made a short argument “emphasizing his innocence to the charge contained in the Information filed in this case.” The jury returned a verdict of guilty, and petitioner was sentenced to serve five years in the state prison. Later, petitioner filed in the Florida Supreme Court this *habeas corpus* petition attacking his conviction and sentence on the ground that the trial court’s refusal to appoint counsel for him denied him rights “guaranteed by the Constitution and the Bill of Rights by the United States Government.” ...[W]e granted certiorari. Since Gideon was proceeding *in forma pauperis*, we appointed counsel to represent him and requested both sides to discuss in their briefs and oral arguments the following: “Should this Court’s holding in *Betts v. Brady*, 316 U.S. 455, (1942), be reconsidered?”

We accept *Betts v. Brady*’s assumption, based as it was on our prior cases, that a provision of the Bill of Rights which is “fundamental and essential to a fair trial” is made obligatory upon the States by the Fourteenth Amendment. We think the Court in *Betts* was wrong, however, in concluding that the Sixth Amendment’s guarantee of counsel [in criminal cases] is not one of these fundamental rights. Ten years before *Betts v. Brady*, this Court, after full consideration of all the historical data examined in *Betts*, had unequivocally declared that “the right to the aid of counsel is of this fundamental character.” *Powell v. Alabama*, 287 U.S. 45, 68, (1932). While the Court at the close of its *Powell* opinion did by its language, as this Court frequently does, limit its holding to the particular facts and circumstances of that case, its conclusions about the fundamental nature of the right to counsel are unmistakable....

...The fact is that in deciding as it did – that “appointment of counsel is not a fundamental right, essential to a fair trial” – the Court in *Betts v. Brady* made an abrupt break with its own well-considered precedents. In returning to these old precedents, sounder we believe than the new, we but restore constitutional principles established to achieve a fair system of justice. Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime.

Lawyers to prosecute are everywhere deemed essential to protect the public’s interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the

strongest indications of the wide-spread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him....

The Court in *Betts v. Brady* departed from the sound wisdom upon which the Court's holding in *Powell v. Alabama* rested. Florida, supported by two other States, has asked that *Betts v. Brady* be left intact. Twenty-two States, as friends of the Court, argue that *Betts* was "an anachronism when handed down" and that it should now be overruled. We agree.

The judgment is reversed and the cause is remanded to the Supreme Court of Florida for further action not inconsistent with this opinion.

Reversed.

[The concurring opinion of Mr. Justice DOUGLAS has been omitted.]

Mr. Justice CLARK, concurring in the result.

[T]he Constitution makes no distinction between capital and noncapital cases. The Fourteenth Amendment requires due process of law for the deprivation of 'liberty' just as for deprivation of 'life,' and there cannot constitutionally be a difference in the quality of the process based merely upon a supposed difference in the sanction involved. How can the Fourteenth Amendment tolerate a procedure which it condemns in capital cases on the ground that deprivation of liberty may be less onerous than deprivation of life – a value judgment not universally accepted – or that only the latter deprivation is irrevocable? I can find no acceptable rationalization for such a result, and I therefore concur in the judgment of the Court.

Mr. Justice HARLAN, concurring.

I agree that *Betts v. Brady* should be overruled, but consider it entitled to a more respectful burial than has been accorded, at least on the part of those of us who were not on the Court when that case was decided.

I cannot subscribe to the view that *Betts v. Brady* represented 'an abrupt break with its own well-considered precedents.' [In *Powell*] this Court declared that under the particular facts there presented – "the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility...and above all that they stood in deadly peril of their lives" – the state court had a duty to assign counsel for the trial as a necessary requisite of due process of law. It is evident that these limiting facts were not added to the opinion as an after-thought; they were repeatedly emphasized, and were clearly regarded as important to the result.

Thus when this Court, a decade later, decided *Betts v. Brady*, it did no more than to admit of the possible existence of special circumstances in noncapital as well as capital trials, while at the same time insisting that such circumstances be shown in order to establish a denial of due process. The declaration that the right to appointed counsel in state prosecutions, as established in *Powell v. Alabama*, was not limited to capital cases was in truth not a departure from, but an extension of, existing precedent.

The principles declared in *Powell* and in *Betts*, however, have had a troubled journey throughout the years that have followed. Even by the time of the *Betts* decision, *dictum* in at least one of the Court's opinions had indicated that there was an absolute right to the services of counsel in the trial of state capital cases....

In noncapital cases, the 'special circumstances' rule has continued to exist in form while its substance has been substantially and steadily eroded. The Court has come to recognize that the mere existence of a serious criminal charge constituted in itself special circumstances requiring the services of counsel at trial. In truth the *Betts v. Brady* rule is no longer a reality. This evolution, however, appears not to have been fully recognized by many state courts, in this instance charged with the front-line responsibility for the enforcement of constitutional rights.

The special circumstances rule has been formally abandoned in capital cases, and the time has now come when it should be similarly abandoned in noncapital cases, at least as to offenses which, as the one involved here, carry the possibility of a substantial prison sentence. (Whether the rule should extend to all criminal cases need not now be decided.) This indeed does no more than to make explicit something that has long since been foreshadowed in our decisions.

I join in the judgment of the Court.

NOTES AND QUESTIONS

1. Perhaps signaling that the Supreme Court was ready to change its mind about the rule of *Betts v. Brady*, the Court appointed Abe Fortas to represent Gideon. Fortas, who later went on to become a Justice on the Supreme Court, was in 1962 "a high-powered example of that high-powered species, the Washington lawyer."

During oral argument Fortas ingeniously made the federalism argument work for rather than against, Gideon. In response to Justice Harlan's argumentative question about federalism Fortas reassured that it was "a fundamental principle for which I personally have the highest regard and concern," then made the argument work for him: "*Betts against Brady* does not incorporate a proper regard for federalism. It requires a case-by-case supervision by this Court of state criminal proceedings, and that cannot be wholesome. Intervention should be the least abrasive, the least corrosive way possible." For Fortas, the "least abrasive" intervention was a bright-line rule that state judges could apply without having federal judges looking over their shoulder.

2. Following a retrial at which he was represented by appointed counsel, Gideon was acquitted. See Anthony Lewis, *Gideon's Trumpet* 223-38 (1964).

3. *Gideon's* legacy. How has *Gideon* been applied? There are basically three forms of publicly-financed representation of criminal defendants, listed here from the least to the most common systems used by the states:
- A contract-attorney program is one in which a jurisdiction enters into an agreement with private attorneys, law firms, or bar associations to represent indigents in the community. About one-tenth of the counties use such a program. Attorneys in this system maintain a substantial private practice and agree to accept an undetermined number of cases for a determined flat fee or on a fixed-fee-per-case basis. Frequently the fees are so low that quality representation particularly in capital cases, is difficult to obtain.
 - A public-defender system is an organization of lawyers designated by a jurisdiction to provide representation to indigents in criminal cases. Over a third of the nation's counties have such defender programs.
 - In the remainder of counties (slightly more than half), an assigned-counsel program exists. Here, many lawyers, often inexperienced private practitioners, are placed on a list to provide representation to poor defendants on a case-by-case basis. They are paid by the hour – usually well below ordinary local rates – or a flat fee per case.

The National Legal Aid & Defender Association estimated in 2003 that the annual number of indigent defense cases nationwide is “as many as 10 million.”

4. In *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970), The Court recognized that “the right to counsel is the right to the *effective* assistance of counsel.” In *Strickland v. Washington*, 466 U.S. 668 (1984), the Court established standards for deciding whether a defendant has been deprived of effective assistance of counsel. The defendant must show: (i) that his attorney's performance was deficient, when measured against an objective standard of reasonableness; and (ii) that the defendant was prejudiced in the sense that there was a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. For the suggestion that *Strickland's* two prong test is reminiscent of *Betts v. Brady's* “facts and circumstances” test, see Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths-A Dead End?*, 86 Colum. L. Rev. 9, 99 (1986).

* * *

B. The Scope of the Right

**UNITED STATES OF AMERICA, Plaintiff, v.
FORFEITURE, PROPERTY, ALL APPURTENANCES
AND IMPROVEMENTS, Located at
1604 Ocoola, Wichita Falls, Texas, Defendant**
U.S. District Court for the Northern District of Texas
803 F. Supp. 1194 (N. D. Texas 1992)

BELEW, District Judge.

Before the Court is the motion of claimant John Amescua Garcia styled Introduction of Claimant, Petition for Counsel and Additional Time. Upon consideration of all pleadings, motions and applicable law, the Court is of the opinion that the motion is of merit and should be GRANTED in part. The motion is otherwise DENIED without prejudice to refileing at a later date if the conditions of representation are met.

This is an *in rem* forfeiture action against the property of John Amescua Garcia and Mary Lou Garcia. The property in this instance is the home of the Garcias. The government, plaintiff in this suit, seized the property upon authority of an ex-parte seizure warrant issued pursuant to 18 U.S.C. 881 and Rule 41 of the Federal Rules of Criminal Procedure. Based upon the motions and affidavits as presented to the Court for that seizure warrant, the Court determined that probable cause existed to seize the respondent property. Both Garcias are currently incarcerated in federal institutions upon crimes which the Court presumes to be related to this forfeiture proceeding.

* * *

A court's authority to appoint counsel in a forfeiture proceeding stems from three possible sources. A court may do so under the statute authorizing *in forma pauperis* proceedings, 28 U.S.C. 1915, which also allows a court to request an attorney to represent a party in any case. Under 18 U.S.C. § 3006A a court may appoint and compensate counsel for representation of a defendant in criminal proceedings and proceedings ancillary thereto. Finally, the Due Process Clause of the United States Constitution requires a court, in some circumstances, to appoint counsel on behalf of a party. Upon review of these possibilities, the Court finds that the appointment of counsel to represent the Garcias is not appropriate at this time.

When the action of a court clearly implicates the substantial interests of a party, the Due Process Clause of the Constitution may require a court to appoint an attorney to insure the adequate representation of that party's interests. *Lassiter v. Department of Social Services*, 452 U.S. 18, 27, 101 S. Ct. 2153, 2159, 68L.Ed.2d 640 (1981). Historically, due process required the appointment of counsel only in cases threatening the physical liberty of criminal defendants. *Lassiter*, 452 U.S. at 25, 101 S. Ct. at 2158. In *Lassiter*, the Supreme Court found this historical interpretation merely "to be a presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty." *Lassiter*, 452 U.S. at 26-27, 101 S. Ct. at 2159. If a citizen is not automatically entitled to representation simply

because of the character of the proceeding or the nature of the possible deprivation, due process may still require the appointment of counsel in a particular case. *Id.* The *Lassiter* Court held that the presumption against appointed representation must be balanced against the tripartite due process equation enunciated in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976). *Lassiter*, 452 U.S. at 26-27, 101 S. Ct. at 2159. In *Eldridge*, the Supreme Court listed three factors a court must evaluate when determining whether Due Process requires an additional procedural safeguard, (such as the appointment of counsel), in an official action by the government. *Eldridge*, 424 U.S. at 335, 96 S. Ct. at 903. Those factors are: 1) the private interest that will [803 F. Supp. 1197] be affected by the action of the government; 2) the risk of an erroneous deprivation of that interest and the probable value of an additional procedural safeguard; and 3) the government's interest involved, including the burdens entailed by the additional procedural safeguard. *Id.* This is a case-by-case determination to be made by the district court. *Lassiter*, 452 U.S. at 31, 101 S. Ct. at 2161.

In the case at bar, the private interest affected is the Garcia's possession of their family home. They have been paying a mortgage upon the house for nearly twenty-five years and currently owe only about \$2,300. Clearly, this interest is substantial and important.

The government interests involved are less compelling. The forfeiture seems to be primarily sought to further the punitive and exemplary interests of the government. There is no evidence that the home is a present danger to society, that it is enabling the continued trafficking of narcotics, or that it will pose a danger to society in the future or enable the Garcias to do so. The government is seeking to impose an additional penalty upon the Garcias, (who are already incarcerated), and to set an example of the costs involved in dealing drugs. While the government's interests in deterrence can be important, forfeiture of the Garcia's home would not significantly further those interests beyond the penalties already imposed. Any remedial interest the government has in seeking forfeiture to reimburse itself for the investigation and prosecution of Garcias is equalled by the Garcias['] monetary interest in maintaining their home. The government's interests in seeking forfeiture are important, but not compelling. Further, there is no showing that the government's interests will be substantially affected by the appointment of counsel for the Garcia.

The additional burdens imposed upon the government by appointment of counsel in this case would not be overwhelming. The mechanism to appoint counsel already exists, and though a question might arise of where funds for such an appointment might be found, no substantial procedural or administrative burdens would be created by a decision in the claimant's favor. Perhaps the most substantial imposition upon the government would be requiring the Plaintiff to oppose an attorney in a complicated and abstruse field where the Plaintiff normally expects to meet only pro-se litigants struggling through the claimant process. This imposition is not sufficient to deny the appointment of counsel.

The remaining *Eldridge* factor requires an examination of the likelihood of an erroneous deprivation and the probable value of an additional procedural safeguard. *Eldridge*, 424 U.S. at 335, 96 S. Ct. at 903. It is quite likely that in most, if not all forfeiture cases, the appointment of counsel would substantially aid a claimant in negotiating the arcane forfeiture procedures. It is also quite likely that in forfeiture cases where the claimant has a chance of success, the risk of an

erroneous deprivation of property rights is substantially higher if the claimant must proceed pro se.

Unfortunately for the Garcias, there is little chance a deprivation of their property through this particular proceeding would, in fact, be erroneous. Based upon evidence submitted by the government, the Court previously found sufficient probable cause existed to issue seizure warrants under Fed. Rule Crim. Pro. 41(c). The Garcias pled guilty to narcotics charges stemming from transactions involving their home. Examining the affidavits of the plaintiff, submitted for the purposes of the seizure warrant, and the guilty pleas of the claimants, there is ample evidence in the record to support a finding of forfeiture. Without deciding whether this evidence would eventually result in a forfeiture, the Court merely decides that an erroneous deprivation of property is unlikely in this case.^[5] Therefore, when balancing the *Lassiter* presumption against required appointment of counsel and the ambivalent *Eldridge* factors in the case at bar, the Court finds that due process does not require the appointment [803 F. Supp. 1198] of an attorney to represent the Garcias.

[Discussion of Criminal Justice Act omitted]

IT IS SO ORDERED.

LEARNING IN THE LAW SCHOOL CLASSROOM **PROFESSOR MICHELLE OBERMAN**

Not only do different professors choose different reading materials and cases for their classes, but they all teach a bit differently based on their own background and goals for your learning. (You've probably already seen the different teaching approaches between Professor Wendel, Professor Kinyon, and your LARAW professor.) Some professors lecture, some engage you in discussion, many ask you to resolve specific hypothetical problems, and others utilize simulations and role-play. This diversity of approaches mirrors the legal culture into which you will graduate.

Probably the most widely known law school teaching approach is the Socratic method, which will be used in some form or another in most of your first-year classes. Traditional Socratic method begins with your professor assigning you a group of cases. Before coming to class, your task is to read and make sense of those cases individually and as a whole by briefing them. You'll bring your briefs and casebook to class and your professor will begin asking questions. He/She may ask for some basic information, such as a summary of the facts or the procedural history. He/She will likely ask a student to explain the legal reasoning the court applied (what law the court decided to use and why, and how it was applied to the facts.) And sometimes, he/she will ask how that law would apply to a different, hypothetical situation. You should see that this process mirrors the approach to reading and briefing cases that we've introduced you to, which is why it is so important that you are prepared for class. This approach will not only help you make sense of the law, it is the way that courts, judges, and lawyers do their jobs every day.

^[5] While the Court is not unmindful that those with the least chance of success are often those most in need of counsel, that is not the appropriate due process inquiry under *Eldridge*.

Sometimes students are nervous about being called-on by their professors and worry about being able to think on their feet. This is a perfectly normal reaction. The best way to manage your nerves and to get the most out of the experience is to be fully prepared for class. Preparation for class, homework assignments, and exam study in law school is very different from undergraduate education, so the tactics and approaches you used in college will have to be adapted once you reach law school. From the sessions during Orientation week, we hope you're already thinking about how you'll need to adapt to this new environment. If you're not sure, make an appointment to see a faculty advisor in APD.

For this session, Professor Michelle Oberman⁶ will lead you through a traditional classroom discussion of the case below. Unlike Professor Wendel's presentation, Professor Oberman will assume that you understand the various parts of the case, and will dive right into a blended lecture/discussion/Socratic conversation. Before this class, please read and brief the case below so that you are prepared for class.

OWENS v. STATE
Court of Special Appeals of Maryland
93 Md. App. 162 (1992)

MOYLAN, JUDGE.

This appeal presents us with a small gem of a problem from the borderland of legal sufficiency. It is one of those few occasions when some frequently invoked but rarely appropriate language is actually pertinent. Ironically, in this case it was not invoked. The language is, “[A] conviction upon circumstantial evidence *alone* is not to be sustained unless the circumstances are inconsistent with any reasonable hypothesis of innocence.”

We have here a conviction based upon circumstantial evidence alone. The circumstance is that a suspect was found behind the wheel of an automobile parked on a private driveway at night with the lights on and with the motor running. Although there are many far-fetched and speculative hypotheses that might be conjured up (but which require no affirmative elimination), there are only two unstrained and likely inferences that could reasonably arise. One is that the vehicle and its driver had arrived at the driveway from somewhere else. The other is that the driver had gotten into and started up the vehicle and was about to depart for somewhere else.

The first hypothesis, combined with the added factor that the likely driver was intoxicated, is consistent with guilt. The second hypothesis, because the law intervened before the forbidden deed could be done, is consistent with innocence. With either inference equally likely, a fact finder could not fairly draw the guilty inference and reject the innocent with the requisite certainty beyond a reasonable doubt. We are called upon, therefore, to examine the circumstantial predicate more closely and to ascertain whether there were any attendant and ancillary circumstances to render less likely, and therefore less reasonable, the hypothesis of innocence. Thereon hangs the decision.

⁶ Professor Oberman teaches Contracts, Criminal Law, and Health Care Law.

The appellant, Christopher Columbus Owens, Jr., was convicted * * * by Judge D. William Simpson, sitting without a jury, of driving while intoxicated. Upon this appeal, he raises the single contention that Judge Simpson was clearly erroneous in finding him guilty because the evidence was not legally sufficient to support such finding.

The evidence, to be sure, was meager. The State's only witness was Trooper Samuel Cottman, who testified that at approximately 11 P.M. on March 17, 1991, he drove to the area of Sackertown Road in Crisfield in response to a complaint that had been called in about a suspicious vehicle. He spotted a truck matching the description of the "suspicious vehicle." It was parked in the driveway of a private residence.

The truck's engine was running and its lights were on. The appellant was asleep in the driver's seat, with an open can of Budweiser clasped between his legs. Two more empty beer cans were inside the vehicle. As Trooper Cottman awakened him, the appellant appeared confused and did not know where he was. He stumbled out of the vehicle. There was a strong odor of alcohol on his breath. His face was flushed and his eyes were red. When asked to recite the alphabet, the appellant "mumbled through the letters, didn't state any of the letters clearly and failed to say them in the correct order." His speech generally was "slurred and very unclear." * * * A check with the Motor Vehicles Administration revealed, moreover, that the appellant had an alcohol restriction on his license. The appellant declined to submit to a blood test for alcohol.

After the brief direct examination of Trooper Cottman (consuming but 3½ pages of transcript), defense counsel asked only two questions, establishing that the driveway was private property and that the vehicle was sitting on that private driveway. The appellant did not take the stand and no defense witnesses were called. The appellant's argument as to legal insufficiency is clever. He chooses to fight not over the fact of drunkenness but over the place of drunkenness. He points out that his conviction was under the Transportation Article, which is limited in its coverage to the driving of vehicles on "highways" and does not extend to driving on a "private road or driveway."

We agree with the appellant that he could not properly have been convicted for driving, no matter how intoxicated, back and forth along the short span of a private driveway. The theory of the State's case, however, rests upon the almost Newtonian principle that present stasis on the driveway implies earlier motion on the highway. The appellant was not convicted of drunken driving on the private driveway, but of drunken driving on the public highway before coming to rest on the private driveway.

It is a classic case of circumstantial evidence. From his presence behind the wheel of a vehicle on a private driveway with the lights on and the motor running, it can reasonably be inferred that such individual either 1) had just arrived by way of the public highway or 2) was just about to set forth upon the public highway. The binary nature of the probabilities – that a vehicular odyssey had just concluded or was just about to begin – is strengthened by the lack of evidence of any third reasonable explanation, such as the presence beside him of an inamorata or of a baseball game blaring forth on the car radio. Either he was coming or he was going.

The first inference would render the appellant guilty; the second would not. * * * For the State to prevail, there has to be some other factor to enhance the likelihood of the first inference and to diminish the likelihood of the second. We must look for a tiebreaker. * * *

In trying to resolve whether the appellant 1) had just been driving or 2) was just about to drive, it would have been helpful to know whether the driveway in which he was found was that of his own residence or that of some other residence. If he were parked in someone else's driveway with the motor still running, it would be more likely that he had just driven there a short time before. If parked in his own driveway at home, on the other hand, the relative strength of the inbound inference over the outbound inference would diminish.

The driveway where the arrest took place was on Sackertown Road. The charging document (which, of course, is not evidence) listed the appellant's address as 112 Cove Second Street. When the appellant was arrested, presumably his driver's license was taken from him. Since one of the charges against the appellant was that of driving in violation of an alcohol restriction on his license, it would have been routine procedure to have offered the license, showing the restriction, into evidence. In terms of our present legal sufficiency exercise, the license would fortuitously have shown the appellant's residence as well. Because of the summary nature of the trial, however, the license was never offered in evidence. For purposes of the present analysis, therefore, the appellant's home address is not in the case. We must continue to look for a tiebreaker elsewhere.

Three beer cans were in evidence. The presence of a partially consumed can of beer between the appellant's legs and two other empty cans in the back seat would give rise to a reasonable inference that the appellant's drinking spree was on the downslope rather than at an early stage. At least a partial venue of the spree, moreover, would reasonably appear to have been the automobile. One does not typically drink in the house and then carry the empties out to the car. Some significant drinking, it may be inferred, had taken place while the appellant was in the car. The appellant's state of unconsciousness, moreover, enforces that inference. One passes out on the steering wheel after one has been drinking for some time, not as one only begins to drink. It is not a reasonable hypothesis that one would leave the house, get in the car, turn on the lights, turn on the motor, and then, before putting the car in gear and driving off, consume enough alcohol to pass out on the steering wheel. Whatever had been going on (driving and drinking) would seem more likely to have been at a terminal stage than at an incipient one.

Yet another factor would have sufficed, we conclude, to break the tie between whether the appellant had not yet left home or was already abroad upon the town. Without anything further as to its contents being revealed, it was nonetheless in evidence that the thing that had brought Trooper Cottman to the scene was a complaint about a suspicious vehicle. The inference is reasonable that the vehicle had been observed driving in some sort of erratic fashion. Had the appellant simply been sitting, with his motor idling, on the driveway of his own residence, it is not likely that someone from the immediate vicinity would have found suspicious the presence of a familiar neighbor in a familiar car sitting in his own driveway. The call to the police, even without more being shown, inferentially augurs more than that. It does not prove guilt in and of itself. It simply makes one of two alternative inferences less reasonable and its alternative inference thereby more reasonable.

The totality of the circumstances are, in the last analysis, inconsistent with a *reasonable* hypothesis of innocence. They do not, of course, foreclose the hypothesis but such has never been required. They do make the hypothesis more strained and less likely. By an inverse proportion, the diminishing force of one inference enhances the force of its alternative. It makes the drawing of the inference of guilt more than a mere flip of a coin between guilt and innocence. It makes it rational and therefore within the proper purview of the factfinder.

DEBRIEFING AND ACADEMIC PLANNING **APD FELLOWS**

The final academic component of your Orientation is a small-group session led by your APD Fellow. As you learned in Professor Kinyon's session, all first-year students participate in our Academic Success Program (ASP) and will meet weekly in small groups with an upper-division APD Fellow. This session marks the beginning of your ASP experience, and provides an opportunity to debrief this week's Orientation activities and to plan out the first two weeks of your semester.

There is nothing to prepare for this session, but please bring your calendar as you will be scheduling out your time for the coming days. (If you don't have a calendar – print or electronic – we encourage you to use the academic planner provided by Law Student Services at Orientation check-in.)