

ON READING AND BRIEFING CASES¹

On Briefing a Case for the First Time

When he was teaching creative writing at Stanford University, Scott Turow decided to apply to law school. He entered Harvard Law School in 1975, and after graduation he became an assistant United States Attorney. He is the author of the best-selling novels *Presumed Innocent* and *The Burden of Proof*. While still at law school, Mr. Turow chronicled the experience of his first year in the bestseller *One L*. The following is his reaction to having briefed a case for the first time.

“In baseball it’s the rookie year. In the navy it is boot camp. In many walks of life there is a similar time of trial and initiation, a period when newcomers are forced to be the victims of their own ineptness and when they must somehow master the basic skills of the profession in order to survive.

“For someone who wants to be a lawyer, that proving time is the first year of law school.... Not only is it a demanding year – the work hugely difficult and seemingly endless, the classroom competition often fierce – but it is also a time when law students typically feel a stunning array of changes taking place within themselves. It is during the first year that you learn to read a case, to frame a legal argument, to distinguish between seemingly indistinguishable ideas; then that you begin to absorb the mysterious language of the law, full of words like estoppel and replevin. It is during the first year, according to a saying, that you learn to think like a lawyer, to develop the habits of mind and world perspective that will stay with you throughout your career.

“Tried tonight to read a case for the first time. It is harder than hell.

“OK. It was nine o’clock when I started reading. The case is four pages long and at 10:35 I finally finished. It was something like stirring concrete with my eyelashes. I had no idea what half the words meant. I must have opened *Black’s Law Dictionary* twenty-five times and I still can’t understand many of the definitions. There are notations and numbers throughout the case whose purpose baffles me. And even now I’m not crystal-clear on what the court finally decided to do.

“Even worse, [Professor] Henley asked us to try our hand at briefing the case – that is, preparing a short digest of the facts, issues and reasoning essential to the court in making its decision. Briefing, I’m told, is important. All first-year students do

¹ This section was originally written by Professor Byron L. Warnken. It was revised and condensed by Professor Elizabeth J. Samuels and further modified for this course by Professor Easton.

it so they can organize the information in a case, and the various student guide books make it sound easy. But I have no idea of what a good brief looks like or even where to start. What in the hell are “the facts,” for instance? The case goes on for a solid page giving all the details about how this woman, Olga Monge, was fired primarily because she would not go out on a date with her foreman. Obviously, I’m not supposed to include all of that, but I’m not sure what to pick, how abstract I’m supposed to be, and whether I should include items like her hourly wage. Is a brief supposed to sound casual or formal? Does it make any difference how a brief sounds? Should I include the reasoning of the judge who dissented, as well? Is this why students hate the case-study method?

“Twenty minutes ago, I threw up my hands and quit.

“I feel overheated and a little bit nervous. I wouldn’t be quite so upset if I weren’t going to be reading cases every day and if understanding them weren’t so important. Cases are the law, in large part....

“...Well, tonight the common law has prevailed over me, beaten me back. I suppose it will not be the last time, but I feel frustrated and disturbed.

“I am going to sleep.

“The Method class the next morning made me feel more at ease. We met in a small group of twenty-five and Henley’s teaching manner was casual. He first handed out a sample brief of the *Monge* case. It resembled the brief I had done only in that both were written on paper, but I felt some comfort in knowing that I now had a model to work from. Then he slowly led us through the case itself, unpacking the mystery of many of the details which had so confused me the night before.

“[T]he experience of having been so confounded the night before had a definite effect on me. The first year of law school was no longer something I’d heard tales about and was trying to imagine. I knew for myself now how frustrated, how sheerly incapable of doing what I was supposed to, I was liable to feel.”

What Is a Case?

This section should be studied in conjunction with the pages assigned in the Neumann & Simon legal writing text and the Sloan legal research text.

The word “case,” common in everyday language, is a basic legal term with at least three meanings: (1) the subject of a lawyer-client relationship; (2) a trial, hearing, or other formal proceeding; and (3) the written opinion of a court or another adjudicatory body.

The first use of the word “case” concerns the lawyer’s role of representation. “I took on three new cases today,” says an attorney, meaning the attorney opened three new “files.” These may be three new clients, or perhaps two new clients and a new “matter” for an existing client. The word “case” in this sense frequently means an adversarial situation – a dispute such as a divorce, a criminal prosecution, a medical malpractice claim – or a seemingly non-adversarial matter that has the potential for becoming adversarial – such as a will, an incorporation, or a property settlement.

Legal disputes generally fall into two categories, criminal and civil. In the former, a governmental body represents the interests of the public at large against an individual accused of a crime. In the latter, private or public parties oppose other private or public parties in non-criminal legal matters. Approximately ninety percent of all legal disputes are resolved outside the formal legal arena of the courtroom, some before formal legal proceedings are filed in a court or administrative agency and some after such proceedings are filed. Such resolutions are usually referred to as settlements in civil cases. In criminal cases, such resolutions usually result in charges being “dropped” or a guilty plea being entered pursuant to a plea bargain.

Those legal disputes that do not “settle,” or that settle only after some activity in a formal legal arena, lead to the second use of the word “case,” meaning either a trial or hearing before an administrative agency or a court, or an appeal to a higher court. “I’ve got three cases next week,” says an attorney, meaning the attorney has three trials or hearings set in various courts. Those adversarial legal disputes that do not settle and are resolved in court lead to the third use of the word “case,” meaning a written judicial opinion issued by a court. “The Supreme Court handed down the *Jones* case yesterday.” The published opinions of appellate courts account for most of the pages in law school textbooks. “I briefed four cases for tomorrow’s class.”

The Court Systems That Produce Case Law

In civil procedure you will study jurisdiction issues in depth. A brief overview of jurisdiction may help the new law student read and analyze cases.

Subject matter jurisdiction concerns what types of disputes may be heard by which courts. All trial courts are courts either (1) of limited or special jurisdiction, or (2) of general jurisdiction. Special jurisdiction courts are limited to certain types of cases, e.g., tax court, bankruptcy court, housing court. Non-specialized, limited jurisdiction courts, at least on the state level, are usually limited to certain “size” cases, meaning smaller amounts of money in controversy in civil cases and lesser maximum penalties in criminal cases. General jurisdiction courts usually have the power to hear more “kinds” of cases as well as larger “size” cases. In addition to having either limited or general jurisdiction, all courts have either exclusive or concurrent jurisdiction in any particular category of cases. Exclusive jurisdiction

means that only one court has the power to hear a case, while concurrent jurisdiction means that more than one court would have the power to hear the case.

In addition to having limited or general jurisdiction, and exclusive or concurrent jurisdiction, all courts are courts either of original jurisdiction or of appellate jurisdiction. A court of original jurisdiction is a court that has the power to “try” a case, resolving the merits of a dispute by determining the facts, deciding the legal issues, and applying the law to the facts. Original jurisdiction is also referred to as trial court jurisdiction, lower court jurisdiction, court of first instance, and *nisi prius* court. Appellate courts review the legal rulings of lower courts. Some courts have both original jurisdiction in certain types of cases and appellate jurisdiction in others.

Most states have a two-tier trial court system. The lower trial court is usually a court of limited jurisdiction and the higher trial court a court of more general jurisdiction. Frequently, there is some overlap, i.e., some concurrent jurisdiction, between the lower trial court and the higher trial court. In Maryland, for example, the lower trial court is called the District Court of Maryland for _____ County (or Baltimore City). The higher trial court is called the Circuit Court for _____ County (or Baltimore City). For some types of cases, there is exclusive jurisdiction in either the district court or circuit court. For example, the district court has exclusive jurisdiction over certain types of landlord-tenant cases, and the circuit court has exclusive jurisdiction over declaratory judgments. For most cases, however, jurisdiction is determined by the amount in controversy in civil cases and the felony versus misdemeanor classification, or the maximum potential penalty, or both, in criminal cases. Additionally, the district court hears only non-jury trials.

The federal court system has only one trial court level, called the United States District Court for the District of _____. The nation is divided into ninety-four districts, with each state having at least one district. Maryland has one federal judicial district. When a state has more than one district, its districts’ names are based on geography, e.g., the United States District Court for the Northern District of California. Sometimes a district court “sits” in multiple locations, which are called divisions. Cases are usually heard by one judge, but very occasionally by a three-judge court. Sometimes, usually by consent of the parties, cases are heard by a federal magistrate judge. Some federal trial courts have specialized jurisdiction, e.g., the United States Tax Court.

As noted above, a court of appellate jurisdiction is a court that has the power to review the legal rulings made by another court. Although the court being reviewed is most often a trial court, it can be a lower appellate court or an administrative agency. When a court exercises appellate jurisdiction, it is either hearing an appeal of right or a discretionary appeal. An appeal of right means that one or more of the parties is entitled to appeal as a matter of law. A discretionary appeal is one that may be heard only if the appellate court decides to grant an appeal. An appeal of right is usually

obtained by simply filing a notice of appeal. A discretionary appeal, on the other hand, usually involves an appellate court issuing a writ of certiorari to the court below, in response to a party's petition for a writ of certiorari. Most of the appeals heard by the Supreme Court of the United States, and the "courts of last resort" in the states, are discretionary appeals. (Courts of last resort in the states are usually called supreme courts. Two exceptions are New York and Maryland, in which the court of last resort is called the court of appeals.) A typical appeal is heard "on the record," with each side filing an appellate brief, accompanied by the appropriate portions of the record of the case (e.g., of the pleadings, the trial transcript, and exhibits), and with each side presenting a brief oral argument. However, in some "small" cases appealed from a lower level to a higher level trial court, the appeal may be a "re-litigation" of the trial. The second trial or new trial, called a trial de novo, supersedes the original trial.

The majority of states nowadays have a two-tier appellate court system. The lower appellate court generally is referred to as an intermediate appellate court and hears "appeals of right" from trial courts. The higher appellate court generally is referred to as the "court of last resort" and hears discretionary appeals from the intermediate appellate court.

In Maryland, for example, the lower appellate court is called the Court of Special Appeals of Maryland, and the higher appellate court is called the Court of Appeals of Maryland. Every case in Maryland can have one appeal of right and the possibility of one discretionary appeal. Cases that are tried in district court have an appeal of right to the circuit court. (Thus, the circuit court, itself a trial court, also serves as an appellate court, hearing appeals from the district court. Civil cases appealed from the district court to the circuit court are heard either on the record or by way of a trial de novo, depending upon the amount in controversy. Criminal cases appealed from the district court to the circuit court have a trial de novo.)

Those cases may then be heard as discretionary appeals by the Court of Appeals. Cases tried in a circuit court have an appeal of right to the Court of Special Appeals, which was created in 1967 and by 1975 had jurisdiction over almost all appeals of right from the circuit courts. (The Court of Special Appeals is composed of thirteen judges, who hear cases in panels of three. In rare instances, after a panel has decided a case, the court as a whole decides that the parties should reargue to the court sitting en banc, meaning to all thirteen judges.) Cases that are heard by the Court of Special Appeals may then be heard as discretionary appeals by the Court of Appeals.

The Court of Appeals of Maryland since 1975 has been almost exclusively a "certiorari court." The court is composed of seven judges and hears all cases en banc. In two circumstances the Court of Appeals hears an appeal of right; all death sentences are automatically docketed in and reviewed by the court of appeals, and occasionally a case that would normally be heard on appeal in the Court of Special

Appeals is heard by the Court of Appeals instead. This occurs either because one of the litigants successfully petitioned for, or the Court of Appeals on its own motion issued, a writ of certiorari “taking the case away from” the Court of Special Appeals.

The federal court system has a two-tier appellate system. Appeals of right go from the federal district court to the United States Court of Appeals for the _____ Circuit. There are thirteen circuits (First Circuit through Eleventh Circuit, the District of Columbia Circuit, and the Federal Circuit). Twelve of the circuits (the numbered circuits and the circuit for the District of Columbia) hear appeals based upon geographical origin of the case. (Certain types of cases are directed by statute to the Court of Appeals for the District of Columbia.) The Federal Circuit hears appeals based upon the subject matter of the appeal, e.g., appeals from the United States Claims Court. Appeals are heard in three-judge panels or, on occasion, by the circuit sitting en banc. The number of judges per circuit varies. Discretionary appeals from the federal circuit courts, as well as appeals in certain types of cases from the state courts of last resort, go to the Supreme Court of the United States. The Supreme Court is composed of nine justices and hears all cases sitting en banc. Petitions for writs of certiorari are granted by the Supreme Court if at least four justices vote to hear the case.

Beyond these courts, there are many administrative agencies created by federal and state legislatures that also adjudicate disputes. Many of these agencies exercise the quasi-legislative function of promulgating administrative regulations and the quasi-judicial function of adjudicating matters arising under those regulations. When an administrative agency fulfills an adjudicatory function, the trial level is usually referred to as a hearing. The judge and fact finder is a person usually called a hearing officer, hearing examiner, or administrative law judge. This person takes testimony and evidence, makes findings of fact, applies law to fact, and then either renders a decision as a trial judge would, or makes a recommendation to an official who has the authority to render a decision.

Depending upon the structure of the administrative agency, there may be an appellate review level within the agency itself. If there is no appellate review level within the agency, or if all administrative remedies have been exhausted, the parties usually may have the case reviewed by the judicial branch, sometimes by a trial court acting as an appellate court and sometimes by an appellate court.

The Types of Opinions Issued

The written decision in a case is called the opinion of the court and, when more than one judge has heard the case, is usually written for the court by one of the judges, whose name appears at the beginning of the opinion. Separate opinions may be concurring or dissenting opinions. A concurring opinion agrees with the disposition of the case, i.e., whether to affirm or reverse, but differs with the majority’s reasoning. If

the opinion of the court is agreed upon and joined in by a majority, it is called the majority opinion and is binding in future cases. The existence of one or more separate concurring opinions does not affect whether the reasoning will be binding in subsequent cases. If there is any common ground on which a majority agree, then, as to that position, the opinion is a majority opinion and is the law. But when the opinion of the court is only a plurality opinion, that is, when a majority has concurred in the result only but *not* in the reasoning, then the reasoning of the plurality is not binding in future cases.

A dissenting opinion disagrees with the disposition of the case as well as with the reasoning. Sometimes separate opinions concur in part and dissent in part. Almost every U.S. Supreme Court case has one or more separate opinions. Separate opinions are written in a minority of Maryland Court of Appeals cases and in a distinct minority of Court of Special Appeals cases.

A per curiam opinion is an opinion of the court with no author identified. Memorandum opinions are opinions that provide a disposition of the case on the merits but with little or no analysis, i.e., no reasoning.

The Need to Make Written Case Briefs

A written case brief is an analytical summary of a judicial opinion. A written case brief should not be confused with an appellate brief submitted by an attorney to an appellate court. The process of preparing a case brief helps the law student understand the case, and the completed brief can be a valuable document for preparing for class, analyzing cases in class, reviewing after class, making outlines in preparation for midterm or final examinations, and studying for those exams. In the first-year legal skills courses, learning how to prepare case briefs is an essential part of the research and analysis work students must perform in order to write their memoranda of law and appellate brief.

The appropriate length of a written case brief is a function of the complexity of the case, the sophistication of the briefer, and the purposes for which the brief is made. Briefing style and briefing length evolve rapidly during the first semester of law school. During the first month of law school, in particular, a new law student should review briefs that he or she prepares for quality and length. If upon subsequent review, the student needs to “brief the case brief” in order to have a workable tool, then the case brief is too long. On the other hand, if upon subsequent review, the case brief does not contain enough information to permit sufficient recall of the case, then the case brief is too short.

There may be as many briefing techniques as there are briefers. This section discusses six different techniques: (1) the “maxi brief,” (2) the “mini brief,” (3) the

“pretend brief,” (4) the “felt-tip brief,” (5) the “pedigree prefab brief,” and (6) the “illegitimate prefab brief.” Only the first two types of these six methods are good briefing techniques for law students. And before the student switches to the shorter of those two types of briefing formats, he or she should have a good idea of how to produce a high quality maxi brief. The ability to carefully and completely brief cases can aid the student’s law school performance immeasurably.

The Components of the “Maxi Brief”

The twelve components of the highly compartmentalized maxi brief are described below, and two sample maxi briefs follow.

(1) Citation: At a minimum, every case brief should note (1) the last names of the parties (the first-named party on each side, if there is more than one party), (2) the jurisdiction and name of the court, (3) the year of decision, and (4), if applicable, the page of the casebook on which the case begins. (The second and third items provide the information necessary to determine the precedential value of the case, whether it will be mandatory or only persuasive, in a particular subsequent case.)

Legal citation is a shorthand method both for conveying the information above and for identifying the exact page or pages on which, and volume or volumes in which, the opinion has been published. The most widely used standard system of legal citation is *The Bluebook: A Uniform System of Citation*, which is currently in its nineteenth edition.

(2) Parties: The parties to the case are the litigants. Each party can usually be identified by one or more factual categorizations, e.g., employee, agent, landlord, invitee, the State. Also determine the litigation status of both parties for each trial level and each appellate level of the proceedings. For example, at the trial level, it is usually a plaintiff versus a defendant, or the State (or Commonwealth or People) versus a defendant. At the appellate level, it is appellant versus appellee or petitioner versus respondent, usually depending nowadays upon whether it is an appeal of right or a discretionary appeal. Sometimes the decision below will be appealed by both litigants. In such cases, an appellee or respondent may also be a cross-appellant or cross-petitioner, making the appellant or petitioner a cross-appellee or cross-respondent.

(3) Disposition/mandate sought: What was the legal objective or result sought by the moving party when instituting legal proceedings, and what was the legal objective or result sought by the non-moving party when confronted with the legal proceedings? At each trial and appellate level of the proceedings, identify the disposition or mandate sought by the parties. For example, in a civil case at the trial level, the moving party may seek to establish the liability of the non-moving party

and to be awarded monetary damages. The non-moving party then seeks to avoid liability and monetary damages. A civil case may be brought to obtain remedies other than damages.

For example, at the trial level the moving party may seek an injunction to force the other party to refrain from doing something or to do something, such as an injunction against an employer to prevent the firing of an employee. The moving party may seek a change in legal status, such as divorce or child custody. In a criminal case, at the trial level the prosecution seeks a criminal conviction and sentence, and the defendant seeks to avoid them.

For those civil and criminal actions that go to the appellate level, the moving party, who may or may not have been the moving party at the trial level, usually seeks a reversal, either a vacating of the judgment or a modification of the legal result at the trial level. The non-moving party, on the other hand, usually seeks an affirmance.

(4) Legal theories: Any time that a moving or non-moving party at the trial or appellate level seeks a particular disposition or mandate, that litigant must have a legal basis for his or her objective. At the trial level in a civil case, the moving party must have one or more “causes of action.” Common law or enacted law must provide one or more grounds for obtaining a legal remedy. In a criminal case, the moving party, which is the state or federal government, bases its legal action on the commission of one or more common law or statutory criminal offenses. The legal theory of the non-moving party, in either a civil or criminal action, is referred to as a defense, which is usually in the form of a general denial (e.g., “I did not commit the offense,” or “I did not breach the contract,”) or in the form of an assertion of one or more affirmative defenses (e.g., “If I committed the offense, it was done in self-defense or was done under duress”).

At the appellate level, the moving party, who is the appellant or petitioner, usually bases the appeal upon a claim that the trial court has made one or more errors of law. The non-moving party, the appellee or respondent, usually contends that the trial judge made no legal errors or that if the trial judge did make a legal error, the error does not require reversal.

(5) Procedure: Understanding the procedural history and current procedural posture of every case is essential. The case brief should list all procedural steps, from the initial proceeding through the present proceeding. Each step in the procedural history of the case should be identified by (a) the nature or type of proceeding, e.g., a civil tort case, a divorce action, a suit for an injunction, a criminal case, (b) the party initiating that step in the proceeding, (c) the court or agency hearing that level of the proceeding, and (d) the result, i.e., the disposition or mandate.

There may be many steps in the procedural history of the case or there may be only one. Most judicial opinions are written by appellate courts. Thus, there is usually at least one prior level in the procedure, i.e., the trial level below, plus the current procedural posture, i.e., the current appeal. Listed below are a number of the major procedural steps that may be encountered. No single case has every step, but most cases have two or more.

(a) Trial level:

- (i) Pretrial motions and hearings:** Before a case comes to trial, the parties may submit a variety of motions to the court, such as a motion to dismiss the case because the plaintiff's complaint does not contain a legally sufficient cause of action. A pretrial hearing is a trial-like proceeding prior to trial. The purpose of a pretrial hearing is usually the resolution of preliminary matters and motions, which may greatly affect the outcome of the subsequent trial on the merits, e.g., a hearing on a motion to suppress evidence. Motions and pretrial hearings may lead to the trial court disposing of the case without a trial, e.g., a motion to dismiss based upon the statute of limitations.
- (ii) Trial:** A trial on the merits of the case is conducted before a jury or before a judge sitting without a jury. A trial usually produces a result based upon the merits of the case, e.g., a judgment or a conviction or acquittal.
- (iii) Post-trial motions and hearings:** Post-trial motions and hearings are subsequent steps required or permitted by the resolution of the case on the merits, e.g., a motion for a new trial or a sentencing procedure.
- (iv) Collateral proceedings:** For example, a criminal defendant by means of a habeas corpus petition may be afforded a chance in a separate legal proceeding to challenge the result of a trial on the merits.
- (v) Administrative hearing:** An administrative hearing before an administrative agency is a judicial type of proceeding conducted by the executive branch of a government acting in a quasi-judicial role. The administrative case is heard by an official called an administrative law judge, a hearing officer, or a hearing examiner.

There may be a second or subsequent round of one or more of the trial-level proceedings after a remand from an appellate court (i.e., an order sending the case

back because of an error of law), or following the termination of the initial proceeding (e.g., a retrial following the grant of a motion for a mistrial).

(b) Appellate level:

(i) Appeal of right: The appellate level may be an appeal of right heard by an appellate court from a decision in a pretrial, trial, post-trial, or collateral proceeding.

(ii) Denial of certiorari: The appellate level may include a decision to deny the second or third appellate level proceeding. The appellate court may deny a petition seeking a discretionary appeal.

(iii) Discretionary appeal: The appellate level may include a discretionary appeal, heard by an appellate court that has granted a writ of certiorari, following or in lieu of an appeal of right heard by a lower-level appellate court.

(iv) Administrative appeal of right: The administrative appellate level may be an appeal of right heard by an administrative agency appeals board, by a trial court sitting as an appellate court, or by an appellate court.

(6) Legally significant facts: Because like cases should be decided in like manner under the principle of *stare decisis*, it is necessary to understand the facts of the case to which the law has been applied. The reader must determine which facts were significant to the court in reaching its result. Legally significant facts are also referred to as operative facts, key facts, material facts, and salient facts.

The law school process, particularly in the first-year curriculum, does not require the student to do much factual analysis. The first-year student does not have to investigate the facts, sift them out, and determine how to establish them in a court of law. Only rarely does the student have to review a voluminous trial transcript to determine which facts should be argued on appeal. Consequently, a first-year law student may place too much emphasis on law and not enough on the facts, while a busy practitioner, on the other hand, may sometimes place too much emphasis on the facts and not enough emphasis on law -- either not keeping up-to-date on the law generally or not researching it in a particular case. As a result, a law student may have difficulty adjusting to the law school "hypothetical," the problem method of applying the law to factual situations different from the facts in the assigned cases. But mastery of such problems is essential in the long run for practicing law, and is essential in the short run for law school classes and examinations.

Facts are determined at the trial level. Evidence is produced by the litigants, and the facts are ascertained by the “finder of fact,” also referred to as the “trier of fact.” If three prosecution witnesses testify that they saw the defendant shoot the victim, and three defense alibi witnesses testify that the defendant was playing pool with them at Joe’s Bar and Grill at the time of the murder, it is the finder of fact who will decide where the defendant was and what he did. The finder of fact will be either a jury, in a jury trial, or a judge, in a non-jury trial. A non-jury trial is also referred to as a court trial or bench trial.

The reader of the appellate opinion will learn the facts solely from the appellate court, which is not the fact finder. To determine what facts were found below, the appellate court relies on the appellate briefs of the parties, the oral arguments of the parties, and the record of the case, or at least pertinent parts of the record, including the written decision of the lower court. The reader’s understanding of the appellate court’s understanding of the facts is crucial.

Certain signals in the court’s opinion will help the reader understand what the court understands to be the facts found below: (a) The appellate court states that the record directly supports certain facts. (b) The appellate court states that certain facts can be inferred from the record. (c) The appellate court states that certain facts were agreed upon or stipulated to by the parties. (d) The appellate court states that the trial court took “judicial notice” that certain facts exist (which is a court’s determination that a fact exists without requiring proof of the fact, e.g., a determination that the White House is located in Washington, D.C.) or that the appellate court itself takes judicial notice that certain facts exist. (e) The appellate court accepts allegations of one of the parties that certain facts exist. (f) The appellate court makes unsupported assumptions that certain facts exist.

It is also helpful to consider indications of what facts the appellate court determines the court below found did *not* exist: (a) The appellate court expressly states or implies that certain facts do not exist. (b) The appellate court rejects allegations made by one or more of the parties that certain facts exist, or refuses to take judicial notice that certain facts exist.

A fact is legally significant if altering or eliminating that fact would change the legal conclusion or result of the case. The reader must understand the appellate court’s view of which facts are legally significant. Again, certain signals in the court’s opinion may help the reader. For example, the appellate court expressly states or implies that certain facts are legally significant. Facts that the appellate court mentions first, emphasizes, or repeats are likely considered by the court to be legally significant. The facts as described by the court of prior cases relied on by the court in the present case may aid the process of determining which facts the court considered legally significant in the present case.

Because facts gain their legal significance only in light of the controlling law, the relevant factual categories depend upon the legal issues. Thus, the same facts may acquire or shed their legal significance depending upon the issue. Assume that the facts include a green 1981 Chevrolet Camaro, with the serial number 6857109. “Green,” “1981 Chevrolet Camaro,” and “serial number 6857109” may all be irrelevant, and the legally significant fact or factual category may be “automobile,” if the issue is the automobile exception to the requirement for a search warrant under the Fourth Amendment. “Green” and “serial number 6857109” may both be irrelevant, and the legally significant fact or factual category may be “1981 Chevrolet Camaro,” if the issue is an automobile recall. “Serial number 6857109” may be irrelevant, and the legally significant fact or factual category may be “green 1981 Chevrolet Camaro,” if the issue is an eyewitness identification of the getaway vehicle in a robbery. When evaluating facts for legal significance, the reader must evaluate the facts of the case as a totality to the extent possible. And when determining factual categories, the reader should use the broadest factual category for which the result would be identical for every fact within that factual category.

(7) Issue(s): An issue is a question of law. It is usually a question that asks, “What is the result when you apply this rule of law to these facts?” Lawyers constantly look for the legal problem or problems at hand; they are problem solvers, and sometimes the toughest problem is pinpointing the problem. In an appeal the lawyers on both sides have selected their legal battlegrounds and put forth their theories, both at the trial and on appeal. The court selects from among, and may reframe, the issues presented by the parties. Nonetheless, it may still be difficult for the reader of the court’s opinion to precisely identify the legal issues.

Most cases raise more than one question of law. A case may involve three issues, but have only one or two of them resolved by the court. When this happens, it is often because the multiple issues are related in such a way that whether one issue must be resolved depends upon the resolution of another issue. If “issue one” must be decided in order to determine whether “issue two” must be addressed, then the first question is referred to as a “threshold issue.” For example, if a statute of limitations question is resolved in favor of the defendant and the cause of action is dismissed, then the case is concluded without the court considering issues related to the merits of the suit. (If you are writing about the pending case, you must discuss all of the issues that the court might possibly reach, of course, because you do not know what the court will conclude about the threshold issue.)

An issue can usually be framed in the form of a question that can be answered “yes” or “no.” In order to yield a legal conclusion that can be applied under the principle of *stare decisis* to future similar situations, the issue must be stated neither too narrowly nor too broadly. Two examples are included below to illustrate this point.

(Students should note well that the process of formulating issues when one is acting as an advocate and writing an appellate brief is a *very* different enterprise from framing issues for a case brief or an objective memorandum of law. The process of writing issues for appellate briefs will be studied and practiced next semester.)

Issues should have two components – one legal and one factual. If the source of the legal component is enacted law, it is necessary to refer specifically to the law, e.g., constitutional provision, statutory section, or administrative regulation. The factual component includes facts legally significant to the issue. Depending on the nature of the legal question, the issue might read as follows: “Do [legally significant facts] constitute [particular portion of the rule of law] within the meaning of [the rule of law]?” Two examples follow.

1. **Well-framed issue:** Whether a person who does not register brain waves is a human being for purposes of common law murder, which is the felonious killing with malice of a human being?

Inadequate factual component (no factual category or factual category too narrow): Whether Mr. Jones is a human being for purposes of common law murder, which is the felonious killing with malice of a human being?

Inadequate factual component (factual category too broad): Whether a person with no chance of recovery is a human being for purposes of common law murder, which is the felonious killing with malice of a human being?

Inadequate legal component (no rule of law): Whether a person who does not register brain waves is alive?

In the first of the two examples of the issue with an inadequate factual component, the rule of law is provided but nothing is known about Mr. Jones. An answer of “yes” or “no” will not be helpful because there will be no way to consider whether the next set of facts is sufficiently similar to dictate the same answer. In the second example, the facts are stated too broadly. Even if the answer is “yes” to the well-framed issue, it could only be “maybe” to this issue because “an individual with no chance of recovery” is broad enough to include a terminally ill cancer patient, who also has no chance of recovery but who is a human being for purposes of common law murder and in every other legal context.

In the example of the issue with an inadequate legal component, the person may no longer be a human being from the standpoint of common law murder, meaning that a doctor or nurse who “pulls the plug” cannot be charged with murder, but he may still be a human being and still be very much alive from the standpoint of contract law or the law of trusts and estates. While he may no longer be a potential murder victim,

his life insurance policy beneficiary may not be able to collect and his estate may not be subject to probate.

2. Well-framed issue: Is a non-motorized bicycle a vehicle within the meaning of section 53(a) of the Elm City Code, which prohibits “all vehicles, other than Elm City transit authority vehicles, in the far right-hand traffic lane from 4:00 to 6:00 p.m.”?

Inadequate factual component (no factual category or factual category too narrow):
Did Mr. Jones violate section 53(a) of the Elm City Code, which prohibits “all vehicles, other than Elm City transit authority vehicles, in the far right-hand traffic lane from 4:00 to 6:00 p.m.”?

Inadequate legal component (no rule of law): Is a non-motorized bicycle a vehicle?

The characterization of the factual component depends, of course, on the law. If “vehicle” means anything with wheels, then “non-motorized” is not a significant fact and a bicycle is a vehicle. If a vehicle means at least four wheels, a bicycle is not a vehicle. Of course, there are numerous other possibilities, such as “vehicle” meaning modes of transportation that require registration or for which you need a driver’s license to take them onto a public road. In the issue with the inadequate factual component, Mr. Jones presents the same problem he presented in the murder issue. In the example of the issue with an inadequate legal component, the answer may be “maybe.” What is a vehicle within section 53(a) of the Elm City Code may be different from what is a vehicle within another section of the Elm City Code requiring annual emission inspection under the Elm City Air Pollution Ordinance. A third meaning of vehicle may apply in a vehicular manslaughter statute.

(8) Holding(s): A holding is a conclusion of law. It is generally the affirmatively stated “yes” or “no” answer to the legal issue, to the question that asks, “What is the result when you apply this rule of law to these facts?”

(9) Court’s rationale: The court’s rationale consists of *both* its reasons and its policy considerations. While the holding provides the “what,” the rationale provides both the “how” and the “why.” If every case that arose thereafter were exactly the same as the case being briefed, then knowing the “what” would probably be enough. However, because later cases will not be exactly “on point,” or “on all fours” with the present case, it is necessary to understand the court’s rationale in order to consider how the law of the case may be applied to future cases.

(10) Dictum: Obiter dictum, usually shortened to dictum, is Latin for “a remark by the way.” It is “an observation or remark made by a judge in pronouncing an opinion upon a cause, concerning some rule, principle, or application of law, or the solution of a question suggested by the case at bar, but not necessarily involved in the

case or essential to its determination; any statement of the law enunciated by the court merely by way of illustration, argument, analogy, or suggestion. Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand are obiter dicta, and lack the force of an adjudication.” *Black’s Law Dictionary* 541 (6th ed. 1990) (citation omitted). Dictum is not mandatory authority but may be persuasive.

Dictum often takes one or more of the following forms. (a) The court may analyze facts different from those before the court, e.g., “Had the bicycle been a motor bike, our conclusion would be different.” (b) The court may analyze rules of law not necessary to resolve the issues before the court, e.g., “Had this cause of action arisen today, under the amended statute, the claimant would be entitled to benefits.” (c) The court may analyze an issue not before the court, e.g., “Although the question is not raised by this case, it appears that the statute would have precluded coverage had the injury occurred on the first day of employment.” (d) The court may analyze an issue not necessary to resolve in light of the resolution of one or more threshold issues, e.g., “While reversing the judgment below and remanding for a new trial because of the erroneous admission of evidence, we note that the award of punitive damages could not have withstood appellate review because this is not a case of pure tort but a case of tort arising out of contract.” It is essential to distinguish holding from dictum -- the former is the law, the latter may or may not be the law but is certainly not the law of the case.

(11) Separate opinions: Separate opinions are extra opinions that are written by individual judges and are not the opinion of the court. These opinions are either concurring or dissenting ones and do not contain the court’s holding. These are not mandatory authority but may be persuasive. The author of a concurring opinion agrees with the majority’s disposition of the case but for different reasons, for additional or more expansive reasons, or for fewer or more limited reasons. The author of a dissenting opinion disagrees with the majority’s disposition of the case. The separate opinions should be summarized and analyzed.

(12) Disposition/mandate: In light of its conclusions, the court disposes of the case and enters its mandate, instructing the lower court from which the case came and to which the case usually is remanded, what action must be taken. The court usually affirms, reverses, modifies, or vacates the judgment of the lower court, or mandates some combination of these actions, e.g., judgment reversed and case remanded for new trial.

Note: You should use quotations from the opinion extremely sparingly, only when it is absolutely necessary to repeat the court’s language, such as when you must note the exact wording of a legal test or standard. When it is necessary, quote as brief a phrase as possible. Put the elements of the case into your own words.

A Sample “Maxi Brief”

Julian v. Christopher (the full opinion in this case appears in Appendix I to this section)

(1) *Julian v. Christopher*, 320 Md. 1, 575 A.2d 735 (1990). (This parallel citation form was particularly useful before computer access to cases was widely available. It allowed the reader to find the case easily in whatever bound volumes she had at hand. Today, one can retrieve a case from an on-line database by party name, docket number, or any proper citation. Maryland cases in documents submitted to Maryland courts need only carry the official (Md.) citation, while foreign (i.e., other state) cases need only carry the unofficial (A.2d) citation. *See ALWD Manual*, Rule 12.4(d)(2) and Appendix 2: Maryland.)

(2) Parties

Guy D. Christopher -- landlord, plaintiff at trial in District Court, appellee in Circuit Court, respondent in Court of Appeals.

Douglas Julian and William J. Gilleland, III -- tenants, defendants at trial in District Court, appellants in Circuit Court, petitioners in Court of Appeals.

(3) Disposition/Mandate Sought

Christopher/landlord: in trial court, an order granting repossession of the leased premises, based on a finding of a breach of the lease by the tenant. In Circuit Court, affirmance of the judgment below. In Court of Appeals, affirmance of affirmance of the judgment.

Julian and Gilleland/tenants: in trial court, denial of an order granting repossession. In Circuit Court, reversal of the judgment below. In Court of Appeals, reversal of affirmance of the judgment.

(4) Legal Theories

Christopher/landlord at trial: Under the common law rule followed by the Maryland Court of Appeals, when a lease requires a landlord’s consent for subletting, and is silent concerning acceptable bases for denying consent, then the landlord may withhold consent for any reason, even an arbitrary and capricious reason. Therefore, Christopher’s withholding consent was permissible, and the tenants’ subletting of the premises constituted a breach of the lease that entitled the landlord to repossession.

Julian and Gilleland/tenants at trial: not stated in opinion. Presumably either (1) when a clause requires consent for subletting and is otherwise silent, then a landlord may not refuse consent unreasonably, or (2) the parties intended that under the consent clause in their lease the landlord would only refuse consent in order to prevent subletting to “someone who would tear the apartment up,” or both.

Julian and Gilleland/tenants in Circuit Court: same as at trial. Therefore trial court erred in entering judgment in favor of Christopher.

Christopher/landlord in Circuit Court: same as at trial. Therefore judgment was properly entered by trial court.

Julian and Gilleland/tenants in Court of Appeals: same as at trial. Therefore Circuit Court erred in affirming trial court.

Christopher/landlord in Court of Appeals: same as at trial. Therefore Circuit Court properly affirmed District Court.

(5) Procedure

(a) Christopher/landlord sues in District Court for repossession of premises leased to Julian and Gilleland/tenants.

(b) District Court judgment for Christopher/landlord.

(c) Julian and Gilleland/tenants appeal to Circuit Court for Baltimore City.

(d) Circuit Court affirms District Court.

(e) Julian and Gilleland/tenants file a writ of certiorari to the Court of Appeals of Maryland, which grants the writ.

(6) Legally Significant Facts

Tenants Julian and Gilleland rented business premises from landlord Christopher. The lease contained a “silent” consent clause, i.e., a clause that required written consent of the landlord for a sublease or assignment and that did not specify what would be acceptable bases for denial of consent. The tenants requested permission to sublet part of the premises. The landlord responded that he would not consent unless they paid an additional \$150/month. The tenants allowed the sublessee to take possession anyway.

(7) Issue(s)

- (a) Under Maryland law, is a landlord prohibited from unreasonably withholding consent to a sublease or assignment when a clause in a lease requires the landlord's consent but is silent with respect to permissible reasons for refusal?
- (b) Does this new rule prohibiting a landlord from unreasonably withholding consent apply in this case in which the rule is adopted even though the lease between the parties was entered into before the adoption of this rule, when the landlord could withhold consent for any reason?

(8) Holding(s)

- (a) Yes. Under Maryland law, a landlord is prohibited from unreasonably withholding consent to a sublease or assignment when a clause in a lease requires the landlord's consent but is silent with respect to permissible reasons for refusal.
- (b) Yes. This new rule prohibiting a landlord from unreasonably withholding consent does apply in this case in which the rule is adopted even though the lease between the parties was entered into before the adoption of this rule, when the landlord could withhold consent for any reason.

(9) Court's Rationale

(a) In *Jacobs v. Klawans*, 225 Md. 147, 169 A.2d 67 (1961), the Court followed the common law rule that when a lease specifies simply that the tenant may not sublet or assign without the landlord's consent, then the landlord may withhold consent for any reason, even if the withholding is arbitrary and unreasonable. When that case was decided, most authorities supported the rule.

Today, secondary authorities reject the common law rule and the modern trend of judicial decisions is also to reject the traditional rule. Now the current Restatement (Second) of Property states that the landlord may not withhold consent unreasonably unless the parties have freely negotiated a provision giving the landlord an absolute right to withhold consent. Powell on Real Property now states that because landlord-tenant relationships have become more impersonal, and because housing and commercial space have become more scarce, modern courts strictly construe restrictions on tenants' power to transfer leased property. Whereas at the time of *Jacobs v. Klawans* most jurisdictions followed the common law rule, the trend today is to impose a reasonableness standard. (Louisiana, Alabama, and then eight of the next fourteen states to consider the issue have imposed such a standard.)

Public policy requires that the landlord act reasonably when a lease clause requires consent for subletting or assigning. If a landlord may arbitrarily withhold consent,

then the tenant's right to sublet or assign is virtually nullified. Most tenants would expect that a landlord under such a clause would be required to act reasonably and would not be free to completely deny the right to sublet or assign.

There are two public policy reasons why the common law should be rejected. First, public policy disfavors restraints on alienation. In the absence of a consent clause, tenants may freely sublet or assign. Although lease clauses restricting alienation are permitted, they are strictly construed so as to favor tenants' rights of alienation. Secondly, in a lease as in other contracts, there is an implied covenant of good faith and fair dealing, which dictates a reasonableness standard in a lease that does not specify a standard for withholding consent.

(b) The new rule applies to this case for two reasons. (1) If the ruling were purely prospective it would be mere dictum. (2) The tenants should benefit from their effort and expense in challenging the old rule. Otherwise, there would be no incentive for a litigant to appeal from a decision upholding a precedent. However, the new rule should not be applied to this case if the landlord carries the burden at the trial on remand of proving that he actually knew of and relied upon the common law rule of *Jacobs v. Klawans*.

(10) Dicta

(a) Obvious examples of reasonable refusals to consent to a particular sublease are: financial irresponsibility or instability of the transferee and unsuitability or incompatibility of the transferee's intended use of the premises.

(b) If the landlord refuses to consent to a sublease solely for the purpose of increasing the rent, the refusal is unreasonable, unless the sublease will necessitate extra expenditures by or more economic risk for the landlord.

(c) The new Maryland rule prohibiting a landlord from unreasonably withholding consent to sublease or assign applies, beyond this case, only to cases involving leases entered into after the date of this decision.

(Leases entered into before the date of this decision should be interpreted under the law that existed at the time the agreements were executed. It would be unfair to upset those transactions, and the courts should protect the right of contracting parties to rely on existing law.)

(11) Separate Opinions

None.

(12) Judgment/Disposition

Circuit Court judgment reversed, and case remanded to the Circuit Court for that court to vacate the judgment of and remand the case to the District Court for further proceedings.

Now that you have seen an example of the oxymoronic maxi brief, you will rarely create them except to dissect a very difficult opinion for your own understanding. The briefs you prepare for class participation or oral argument can be much more streamlined. The mini brief described below is usually adequate for most purposes.

In this course, you need only prepare a maxi brief on the first case. The other three briefs can be mini briefs. Do not use any of the other formats described below.

The “Mini Brief” and Others

(a) **The Mini Brief:** The mini brief is often referred to as a standard four-point brief. It is a somewhat condensed version of the maxi brief, without the maxi brief’s high degree of compartmentalization. The mini brief is usually divided into facts, issue, holding, and rationale. In the mini brief, facts include the parties and a skeletal account of the procedure (the procedural facts). (Failure to properly comprehend the procedural history and present posture of the case is a common danger for first-year students.) The holding includes the mandate/disposition. The parties’ legal theories, and mandates/dispositions sought, are absorbed into the rationale. Dictum is ignored or discussed in the rationale section, which can lead to confusion. Separate opinions are not usually noted.

In this course when you experiment with this less compartmentalized briefing format for assignment four, you must still include the full case citation and a separate section summarizing and analyzing any separate opinions.

Sample “Mini Brief”

(a) The following is a mini brief of *Julian v. Christopher*, 320 Md. 1, 575 A.2d 735 (1990)

Julian v. Christopher, 320 Md. 1, 575 A.2d 735 (1990)

Facts:

Plaintiff/Landlord Christopher leased business premises to defendants/tenants Julian et al. The lease contained a “silent” consent clause (a clause requiring the landlord’s consent for a sublet but not specifying what would be acceptable bases for withholding

consent). The tenants requested permission to sublet, and the landlord demanded an additional \$150 per month in rent in exchange for permission to sublet. The tenants sublet the premises without the landlord's permission.

Plaintiff/Landlord sued defendants/tenants Julian et al. in District Court for repossession of his property, claiming that under a lease clause requiring the landlord's consent for a sublet, the landlord may withhold consent for any reason, and that the tenants' subletting without permission constituted a breach of the lease that entitled the landlord to repossession of the premises. The District Court entered judgment for landlord/Christopher and the tenants/Julian appealed to the Circuit Court for Baltimore City, which affirmed the judgment.

The tenants/Julian filed a writ of certiorari to the Court of Appeals of Maryland, which granted cert.

Issue(s):

(a) Under Maryland law, is a landlord prohibited from unreasonably withholding consent to a sublease or assignment when a clause in a lease requires the landlord's consent but is silent with respect to permissible reasons for refusal?

(b) Does this new rule prohibiting a landlord from unreasonably withholding consent apply in this case in which the rule is adopted even though the lease between the parties was entered into before the adoption of this rule, when the landlord could withhold consent for any reason?

Holding(s):

(a)Yes. Under Maryland law, a landlord is prohibited from unreasonably withholding consent to a sublease or assignment when a clause in a lease requires the landlord's consent but is silent with respect to permissible reasons for refusal.

(b)Yes. This new rule prohibiting a landlord from unreasonably withholding consent does apply in this case in which the rule is adopted even though the lease between the parties was entered into before the adoption of this rule, when the landlord could withhold consent for any reason.

Court's Rationale:

(a) In *Jacobs v. Klawans*, 225 Md. 147, 169 A.2d 67 (1961), the Court followed the common law rule that when a lease specifies simply that the tenant may not sublet or assign without the landlord's consent, then the landlord may withhold consent for any reason, even if the withholding is arbitrary and unreasonable. When that case was decided, most authorities supported the rule. Today, secondary authorities reject the common law rule and the modern trend of judicial decisions is also to reject the traditional rule. Now the current Restatement (Second) of Property states that the landlord may not withhold consent unreasonably unless the parties have freely negotiated a provision giving the landlord an absolute right to withhold consent. Powell on Real Property now states that because landlord-tenant relationships have become more impersonal, and because housing and commercial space have become more scarce, modern courts strictly construe restrictions on tenants' power to transfer leased property. Whereas at the time of *Jacobs v. Klawans* most jurisdictions followed the common law rule, the trend today is to impose a reasonableness standard. (Louisiana, Alabama, and then eight of the next fourteen states to consider the issue have imposed such a standard.)

Public policy requires that the landlord act reasonably when a lease clause requires consent for subletting or assigning. If a landlord may arbitrarily withhold consent, then the tenant's right to sublet or assign is virtually nullified. Most tenants would expect that a landlord under such a clause would be required to act reasonably and would not be free to completely deny the right to sublet or assign.

There are two public policy reasons why the common law should be rejected. First, public policy disfavors restraints on alienation. In the absence of a consent clause, tenants may freely sublet or assign. Although lease clauses restricting alienation are permitted, they are strictly construed so as to favor tenants' rights of alienation. Secondly, in a lease as in other contracts, there is an implied covenant of good faith and fair dealing, which dictates a reasonableness standard in a lease that does not specify a standard for withholding consent.

(b) The new rule applies to this case for two reasons. (1) If the ruling were purely prospective it would be mere dictum. (2) The tenants should benefit from their effort and expense in challenging the old rule. Otherwise, there would be no incentive for a litigant to appeal from a decision upholding a precedent. However, the new rule should not be applied to this case if the landlord carries the burden at the trial on remand of proving that he actually knew of and relied upon the common law rule of *Jacobs v. Klawans*.

(In dicta, the Court stated that obvious examples of reasonable refusals to consent to a particular sublease are: financial irresponsibility or instability of the transferee and unsuitability or incompatibility of the transferee's intended use of the premises. The Court also stated that if the landlord refuses to consent to a sublease solely for the purpose of increasing the rent, the refusal is unreasonable, unless the sublease will

necessitate extra expenditures by or more economic risk for the landlord. Finally, the Court stated that the new Maryland rule prohibiting a landlord from unreasonably withholding consent to sublease or assign applies, beyond this case, only to cases involving leases entered into after the date of this decision. Leases entered into before the date of this decision should be interpreted under the law that existed at the time the agreements were executed. It would be unfair to upset those transactions, and the courts should protect the right of contracting parties to rely on existing law.)

The Court reversed the Circuit Court's affirmance and remanded.

Separate Opinions: None.

Other Kinds of Briefs (Not Recommended)

(b) **The Pretend Brief:** The pretend brief is usually referred to as a squib brief. It consists of a sentence or two of the facts, and a sentence or two for each holding and its supporting rationale. The pretend brief constitutes a few notes for recall but is not a substitute for written case analysis.

(c) **The Felt-tip Brief:** The felt-tip brief is usually referred to as a book brief. It usually consists of felt-tip pen markings underlining or highlighting significant passages in the case, accompanied by notes in the margin. The felt-tip brief is a pre-briefing organizational tool.

(d) **The Pedigree Prefab Brief:** The pedigree prefab brief is the case headnotes. The West Publishing Company publishes all reported opinions, and located at the beginning of each opinion are the headnotes or scope notes for that case, which consist of a one-paragraph blurb for each point in the case. The divisions into "points of law" are based upon West's compartmentalization of the law into the thousands of topics and sub-topics that make up the West digest system. The headnotes have a pedigree because they are compiled by West's staff. This prefab brief, while a good introduction to the case, is no substitute for written case analysis because it lacks several requisite elements, sufficient emphasis on facts, and independent analysis by the student or lawyer briefer.

(e) **The Illegitimate Prefab Brief:** The illegitimate prefab brief is usually referred to as a canned brief, found in books of commercially prepared briefs of cases that appear in law school casebooks. They are always superficial, frequently incorrect, and no substitute for written case analysis.

Appendix I

Douglas JULIAN, William J. Gilleland, III d/b/a The
Open Hearth, Inc. v. Guy D. CHRISTOPHER

No. 114, September Term, 1989

Court of Appeals of Maryland

320 Md. 1; 575 A.2d 735; 1990 Md. LEXIS 97

June 29, 1990

PRIOR HISTORY: [***1] Certiorari to Circuit Court for Baltimore City; Thomas Ward
Judge.

DISPOSITION: JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY
REVERSED, AND CASE REMANDED TO THAT COURT WITH DIRECTIONS TO
VACATE THE JUDGMENT OF THE DISTRICT COURT OF MARYLAND IN BALTIMORE
CITY AND TO REMAND THE CASE TO THAT COURT FOR FURTHER PROCEEDINGS
NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY RESPONDENT.

COUNSEL: Philip O. Foard (Jay D. Miller, White, Mindel, Clarke & Hill, on brief), Towson,
for petitioners.

Charles E. Yankovich, Towson, for respondent.

JUDGES: Murphy, C.J., and Eldridge, Cole, Rodowsky, McAuliffe, Adkins and Chasanow,
JJ.

OPINION BY: CHASANOW

OPINION

[*3] [**736] In 1961, this Court decided the case of *Jacobs v. Klawans*, 225 Md. 147,
169 A.2d 677 (1961) and held that when a lease contained a "silent consent" clause
prohibiting a tenant from subletting or assigning without the consent of the landlord,
landlords had a right to withhold their consent to a subletting or assignment even though the
withholding of consent was arbitrary and unreasonable.

In 1983, in *The Citizens Bank & Tr. v. Barlow Corp.*, 295 Md. 472, 456 A.2d 1283 (1983),
we noted that the issue was [***2] not preserved for appeal, but "[i]f the common law rule
applied in *Klawans* is to be reconsidered, it will have to be done on a record which preserves
the question for review." *Id.* at 486, 456 A.2d at 1290. We now have before us the issue of
whether the common law rule applied in *Klawans* should be changed.

[*4] In the instant case, the tenants, Douglas Julian and William J. Gilleland, III,
purchased a tavern and restaurant business, as well as rented the business premises from
landlord, Guy D. Christopher. The lease stated in clause ten that the premises, consisting of

both the tavern and an upstairs apartment, could not be assigned or sublet "without the prior written consent of the landlord." Sometime after taking occupancy, the tenants requested the landlord's written permission to sublease the upstairs apartment. The landlord made no inquiry about the proposed sublessee, but wrote to the tenants that he would not agree to a sublease unless the tenants paid additional rent in the amount of \$ 150.00 per month. When the tenants permitted the sublessee to move in, the landlord filed an action in the District Court of Maryland in Baltimore [***3] City requesting repossession of the building because the tenants had sublet the premises without his permission.

At the district court trial, the tenants testified that they specifically inquired about clause ten, and were told by the landlord that the clause was merely included to prevent them from subletting or assigning to "someone who would tear the apartment up." The district court judge refused to consider this testimony. He stated in his oral opinion that he would "remain within the four corners of the lease, and construe the document strictly," at least as it pertained to clause ten. Both the District Court and, on appeal, the Circuit Court for Baltimore City found in favor of the landlord. The circuit judge noted: "If you don't have the words that consent will not be unreasonably withheld, then the landlord can withhold his consent for a good reason, a bad reason, or no reason at all in the context of a commercial lease, which is what we're dealing with." We granted certiorari to determine whether the *Klawans* holding should be modified in light of the changes that have occurred since that decision.

While we are concerned with the need for stability in the interpretation [***4] of leases, we recognize that since the *Klawans* case was decided in 1961, the foundations for that [*5] holding have been substantially eroded. The *Klawans* opinion cited *Restatement of Property* § 410 as authority for [**737] its holding. The current *Restatement (Second) of Property* § 15.2 rejects the *Klawans* doctrine and now takes the position that:

A restraint on alienation without the consent of the landlord of the tenant's interest in the leased property is valid, but the landlord's consent to an alienation by the tenant cannot be withheld unreasonably, unless a freely negotiated provision in the lease gives the landlord an absolute right to withhold consent.

Another authority cited in *Klawans* in support of its holding was 2 R. Powell, *Powell on Real Property*. The most recent edition of that text now states:

Thus, if a lease clause prohibited the tenant from transferring his or her interest without the landlord's consent, the landlord could withhold consent arbitrarily. This result was allowed because it was believed that the objectives served by allowing the restraints outweighed the social evils implicit in them, inasmuch as the restraints gave [***5] the landlord control over choosing the person who was to be entrusted with the landlord's property and was obligated to perform the lease covenants.

It is doubtful that this reasoning retains full validity today. Relationships between landlord and tenant have become more impersonal and housing space (and in many areas, commercial space as well) has become scarce. These changes have had an impact on courts and legislatures in varying degrees. Modern courts almost universally adopt the view that restrictions on the tenant's right to transfer are to be strictly construed. (Footnotes omitted.)

2 R. Powell, *Powell on Real Property* § 248[1] (1988).

Finally, in support of its decision in *Klawans*, this Court noted that, "although it, apparently, has not been passed upon in a great number of jurisdictions, the decisions of the courts that have determined the question are in very substantial accord." *Klawans*, 225 Md. at 151, 169 A.2d at 679. [*6] This is no longer true. Since *Klawans*, the trend has been in the opposite direction. ¹ "The modern trend is to impose a standard of reasonableness on the landlord in withholding consent to a sublease [***6] unless the lease expressly states otherwise." *Campbell v. Westdahl*, 148 Ariz. 432, 715 P.2d 288, 292 (Ariz.Ct.App.1985).

1 At present the following courts have adopted the minority rule: *Homa-Goff Interiors, Inc. v. Cowden*, 350 So.2d 1035 (Ala.1977); *Hendrickson v. Freericks*, 620 P.2d 205 (Alaska 1980); *Tucson Medical Center v. Zoslow*, 147 Ariz. 612, 712 P.2d 459 (Ariz.Ct.App.1985); *Warmack v. Merchants Nat. Bank of Fort Smith*, 272 Ark. 166, 612 S.W.2d 733 (1981); *Kendall v. Ernest Pestana, Inc.*, 40 Cal.3d 488, 709 P.2d 837, 220 Cal.Rptr. 818 (1985); *Basnett v. Vista Village Mobile Home Park*, 699 P.2d 1343 (Colo.Ct.App.1984), *rev'd on other grounds*, 731 P.2d 700 (Colo.1987); *Warner v. Konover*, 210 Conn. 150, 553 A.2d 1138 (1989); *1010 Potomac Assoc. v. Grocery Manufacturers*, 485 A.2d 199 (D.C.1984); *Fernandez v. Vazquez*, 397 So.2d 1171 (Fla.Dist.Ct.App.1981); *Funk v. Funk*, 102 Idaho 521, 633 P.2d 586 (1981); *Jack Frost Sales v. Harris Trust & Sav. Bank*, 104 Ill.App.3d 933, 60 Ill.Dec. 703, 433 N.E.2d 941 (1982); *First Federal Sav. Bank v. Key Markets*, 532 N.E.2d 18 (Ind.Ct.App.1988); *Gamble v. New Orleans Housing Mart, Inc.*, 154 So.2d 625 (La.Ct.App.1963); *Newman v. Hinky Dinky Omaha-Lincoln, Inc.*, 229 Neb. 382, 427 N.W.2d 50 (1988); *Boss Barbara, Inc. v. Newbill*, 97 N.M. 239, 638 P.2d 1084 (1982).

[***7] In his article, *Correctly Interpreting Long-Term Leases Pursuant to Modern Contract Law: Toward a Theory of Relational Leases*, 74 Va.L.Rev. 751 (1988), Alex M. Johnson, Jr., tracks the development of what he calls the "burgeoning minority position." Professor Johnson notes that:

In 1963 Louisiana became the first state to adopt the minority position on alienability by holding in *Gamble v. New Orleans Housing Mart, Inc.* [154 So.2d 625 (La.Ct.App.1963)] that lessors must act reasonably in situations requiring the lessor's consent to a transfer.

Following Louisiana's lead, two common law jurisdictions, Ohio and Illinois, rejected the common law view and adopted the holding and rationale in *Gamble*. In 1977 the Alabama Supreme Court addressed the lessor's right to withhold consent unreasonably in a frequently cited opinion, *Homa-Goff Interiors, Inc. v. Cowden* [350 So.2d 1035 (Ala.1977)] and concluded that the common [**738] law view [*7] was archaic in today's urban society. The Alabama court was the first to base its decision on the policy of alienability. The court balanced the right of the lessor to withhold consent unreasonably [***8] against society's interest in the alienability of commercial leaseholds, concluding that the "reasonable" alienation of commercial leasing space is paramount and predominates over any attempt by the lessor to restrict alienability arbitrarily.

Since *Homa-Goff*, fourteen states have reexamined their law on this issue. Six states have adopted or reaffirmed their adoption of the common law view, while eight states have rejected the common law view and restricted, either in whole or in part, the lessor's right to restrain alienability arbitrarily. The eight states that have adopted the minority position were influenced by the position taken recently by the American Law Institute (ALI).

The ALI endorses the minority position that a lessor must act reasonably when withholding consent to alienate the lease, absent express terms to the contrary. (Footnotes omitted.)

74 Va.L.Rev. at 761-63.

Traditional property rules favor the free and unrestricted right to alienate interests in property. Therefore, absent some specific restriction in the lease, a lessee has the right to freely alienate the leasehold interest by assignment or sublease without obtaining the permission [***9] of the lessor. ² R. Schoshinski, *American Law of Landlord and Tenant* § 5:6 (1980); 1 *American Law of Property* § 3.56 (1952).

2 The common law right may have some limitations. For example, a lessee may not sublet or assign the premises to be used in a manner which is injurious to the property or inconsistent with the terms of the original lease.

Contractual restrictions on the alienability of leasehold interests are permitted. R. Cunningham, W. Stoebuck, and D. Whitman, *The Law of Property* § 12.40 (1984). Consequently, landlords often insert clauses that restrict [*8] the lessee's common law right to freely assign or sublease. *Id.* Probably the most often used clause is a "silent consent" clause similar to the provision in the instant case, which provides that the premises may not be assigned or sublet without the written consent of the lessor.

In a "silent consent" clause requiring a landlord's consent to assign or sublease, there is no standard governing the landlord's decision. Courts must [***10] insert a standard. The choice is usually between 1) requiring the landlord to act reasonably when withholding consent, or 2) permitting the landlord to act arbitrarily and capriciously in withholding consent.

Public policy requires that when a lease gives the landlord the right to withhold consent to a sublease or assignment, the landlord should act reasonably, and the courts ought not to imply a right to act arbitrarily or capriciously. If a landlord is allowed to arbitrarily refuse consent to an assignment or sublease, for what in effect is no reason at all, that would virtually nullify any right to assign or sublease.

Because most people act reasonably most of the time, tenants might expect that a landlord's consent to a sublease or assignment would be governed by standards of reasonableness. Most tenants probably would not understand that a clause stating "this lease may not be assigned or sublet without the landlord's written consent" means the same as a clause stating "the tenant shall have no right to assign or sublease." Some landlords may have chosen the former wording rather than the latter because it vaguely implies, but does not grant to the tenant, the right to assign [***11] or sublet.

There are two public policy reasons why the law enunciated in *Klawans* should now be changed. The first is the public policy against restraints on alienation. The second is the public policy which implies a covenant of good faith and fair dealing in every contract.

[*9] Because there is a public policy against restraints on alienation, if a lease is [**739] silent on the subject, a tenant may freely sublease or assign. Restraints on alienation are permitted in leases, but are looked upon with disfavor and are strictly construed. *Powell on Real Property, supra*. If a clause in a lease is susceptible of two interpretations, public policy favors the interpretation least restrictive of the right to alienate freely. Interpreting a "silent consent" clause so that it only prohibits subleases or assignments when a landlord's refusal to consent is reasonable, would be the interpretation imposing the least restraint on alienation and most in accord with public policy.

Since the *Klawans* decision, this Court has recognized that in a lease, as well as in other contracts, "there exists an implied covenant that each of the parties thereto will act in good faith and deal fairly [***12] with the others." *Food Fair v. Blumberg*, 234 Md. 521, 534, 200 A.2d 166, 174 (1964). When the lease gives the landlord the right to exercise discretion, the discretion should be exercised in good faith, and in accordance with fair dealing; if the lease does not spell out any standard for withholding consent, then the implied covenant of good faith and fair dealing should imply a reasonableness standard.

We are cognizant of the value of the doctrine of *stare decisis*, and of the need for stability and certainty in the law. However, as we noted in *Harrison v. Mont. Co. Bd. of Educ.*, 295 Md. 442, 459, 456 A.2d 894, 903 (1983), a common law rule may be modified "where we find, in light of changed conditions or increased knowledge, that the rule has become unsound in the circumstances of modern life, a vestige of the past, no longer suitable to our people." The *Klawans* common law interpretation of the "silent consent" clause represents such a "vestige of the past," and should now be changed.

REASONABLENESS OF WITHHELD CONSENT

In the instant case, we need not expound at length on what constitutes a reasonable refusal [***13] to consent to an [*10] assignment or sublease. We should, however, point out that obvious examples of reasonable objections could include the financial irresponsibility or instability of the transferee, or the unsuitability or incompatibility of the intended use of the property by the transferee. We also need not expound at length on what would constitute an unreasonable refusal to consent to an assignment or sublease. If the reasons for withholding consent have nothing to do with the intended transferee or the transferee's use of the property, the motivation may be suspect. Where, as alleged in this case, the refusal to consent was solely for the purpose of securing a rent increase, such refusal would be unreasonable unless the new subtenant would necessitate additional expenditures by, or increased economic risk to, the landlord.

PROSPECTIVE EFFECT

The tenants ask us to retroactively overrule *Klawans*, and hold that in all leases with "silent consent" clauses, no matter when executed, consent to assign or sublease may not be unreasonably withheld by a landlord. We decline to do so. In the absence of evidence to the contrary, we should assume that parties executing leases [***14] when *Klawans* governed the interpretation of "silent consent" clauses were aware of *Klawans* and the implications drawn from the words they used. We should not, and do not, rewrite these contracts.

In appropriate cases, courts may "in the interest of justice" give their decisions only prospective effect. Contracts are drafted based on what the law is; to upset such transactions even for the purpose of improving the law could be grossly unfair. Overruling prospectively is particularly appropriate when we are dealing with decisions involving contract law. The courts must protect an individual's right to rely on existing law when contracting.

Ordinarily decisions which change the common law apply prospectively, as well as to the litigants before the court. *Williams v. State*, 292 Md. 201, 217, 438 A.2d 1301, 1309 [*11] (1981). What is meant by "prospectively" may depend on the fairness of applying [**740] the decision to cases or events occurring after the effective date of the decision. *See, e.g., Boblitz v. Boblitz*, 296 Md. 242, 275, 462 A.2d 506, 522 (1983) (abrogating interspousal immunity in negligence cases [***15] -- decision applicable to the case before the court and causes of action accruing or discovered after the date of the decision); *Kelley v. R.G. Industries, Inc.*, 304 Md. 124, 162, 497 A.2d 1143, 1162 (1985) (imposing strict liability on manufacturer of "Saturday Night Specials" -- decision applicable to the case before the court as well as retail sales after the date of the mandate). It is reasonable to assume that landlords may have relied on the *Klawans* interpretation when entering into leases with "silent consent" clauses. This reliance should be protected. Contracts should be interpreted based on the law as it

existed when they were entered into. Therefore, whether the *Klawans* case or the instant case governs the interpretation of a "silent consent" clause depends on whether the lease being interpreted was executed before or after the mandate in this case.

For leases with "silent consent" clauses which were entered into before the mandate in this case, *Klawans* is applicable, and we assume the parties were aware of the court decisions interpreting a "silent consent" clause as giving the landlord an unrestricted right to withhold consent.

[**16] For leases entered into after the mandate in this case, if the lease contains a "silent consent" clause providing that the tenant must obtain the landlord's consent in order to assign or sublease, such consent may not be unreasonably withheld. If the parties intend to preclude any transfer by assignment or sublease, they may do so by a freely negotiated provision in the lease. If the parties intend to limit the right to assign or sublease by giving the landlord the arbitrary right to refuse to consent, they may do so by a freely negotiated provision of the lease clearly spelling out this intent. For example, the clause might provide, "consent [*12] may be withheld in the sole and absolute subjective discretion of the lessor."

The final question is whether the tenants in the instant case, having argued successfully for a change in the law, should receive the benefit of the change. There should be some incentive to challenge an infirm doctrine or seek reversal of unsound precedent. As the Supreme Court of Illinois has stated:

At least two compelling reasons exist for applying the new rule to the instant case while otherwise limiting its application to cases arising in the [**17] future. First, if we were to merely announce the new rule without applying it here, such announcement would amount to mere *dictum*. Second, and more important, to refuse to apply the new rule here would deprive appellant of any benefit from his effort and expense in challenging the old rule which we now declare erroneous. Thus there would be no incentive to appeal the upholding of precedent since appellant could not in any event benefit from a reversal invalidating it.

Molitor v. Kaneland Community Unit District No. 302, 18 Ill.2d 11, 163 N.E.2d 89, 97 (1959).

For these reasons, even though a decision is to have only prospective effect, this Court has applied the new rule to the case before it, unless it would be unfair to do so. *See Deems v. Western Maryland Ry.*, 247 Md. 95, 115, 231 A.2d 514, 525 (1967). *See also Lewis v. State*, 285 Md. 705, 404 A.2d 1073 (1979).

The tenants in the instant case should get the benefit of the interpretation of the "silent consent" clause that they so persuasively argued for, unless this interpretation would be unfair to the landlord. We note that [**18] the tenants testified they were told that the clause was only to prevent subleasing to "someone who would tear the apartment up." Therefore, we will reverse the judgment of the Circuit Court with instructions to vacate the judgment of the District Court and remand for a new trial. At that trial, the landlord will have the burden of establishing that it would be unfair to [*13] interpret the "silent consent" clause in accordance with our decision that a landlord must act reasonably in withholding [**741] consent. He may establish that it would be unfair to do so by establishing that when executing the lease he was aware of and relied on the *Klawans* interpretation of the "silent consent" clause. We recognize that we may be giving the tenants a benefit that other tenants with leases entered into before our mandate will not receive.

The reasons why we do so were well stated, though in a slightly different context, by Justice Brennan in *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967):

Sound policies of decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete [***19] cases or controversies, and in the possible effect upon the incentive of counsel to advance contentions requiring a change in the law, militate against denying [these litigants] the benefit of today's decisions. Inequity arguably results from according the benefit of a new rule to the parties in the case in which it is announced but not to other litigants similarly situated in the trial or appellate process who have raised the same issue. But we regard the fact that the parties involved are chance beneficiaries as an insignificant cost for adherence to sound principles of decision-making. (Footnotes omitted.)

Id. at 301, 87 S.Ct. at 1972, 18 L.Ed.2d at 1206.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED, AND CASE REMANDED TO THAT COURT WITH DIRECTIONS TO VACATE THE JUDGMENT OF THE DISTRICT COURT OF MARYLAND IN BALTIMORE CITY AND TO REMAND THE CASE TO THAT COURT FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY RESPONDENT.