Legal Reasoning Toolkit Lesson Three: Facts

Contents

Part I: Introduction ........................................................................................................................................... 2
  1. Recap of Lesson 2 ........................................................................................................................................... 2
  2. Overview of Lesson 3 ..................................................................................................................................... 3

Part II: Working with Facts .............................................................................................................................. 3
  1. What Is a Fact? .............................................................................................................................................. 4
  2. Relevance ..................................................................................................................................................... 5
  3. Spinning, Shading or Coloring ....................................................................................................................... 7
      Lesson 3 Quiz ?? .................................................................................................................................... 10

Part III: Subjective versus Objective Intent to Be Bound .................................................................................. 10

Part IV: Scoring Exam Questions ..................................................................................................................... 12
  1. Warning! Your Results May Vary ................................................................................................................ 12
  2. Why the Answer to Law School Exam Questions is Usually Maybe ......................................................... 13
  3. Practice Exam Question ............................................................................................................................. 13
      A. Answer Key ............................................................................................................................................ 15
      B. Weak Student Answer .......................................................................................................................... 16
      C. Acceptable Student Answer ............................................................................................................... 17
      D. Strong Student Answer ....................................................................................................................... 18

Part V: Analogy .................................................................................................................................................... 19
  1. Deductive, Inductive and Informal Logic ................................................................................................... 19
  2. Reasoning by Analogy ............................................................................................................................. 23
      Lesson 3 Quiz ?? .................................................................................................................................... 28

Part VI: Barnes v. Treece Case ........................................................................................................................... 28

Part VII: Apply the Holding in Barnes v. Treece to New Facts ......................................................................... 31

Part VI: Conclusion ............................................................................................................................................ 33
  1. Recap Lesson 3 ............................................................................................................................................ 33
  2. Preview of Lesson 4 .................................................................................................................................... 34

Part VII. Lesson 4: Case Brief and Exam Question Preview ............................................................................... 34
Part I: Introduction

1. Recap of Lesson 2

Here are some of the main points covered in Lesson 2 together with their associated learning objectives:

<table>
<thead>
<tr>
<th>L-Ob2</th>
<th>Distinguish R/F</th>
<th>Distinguish rules from facts</th>
</tr>
</thead>
</table>

As the first step in learning how to distinguishing legal rules from legal facts, Lesson 2 explored the nature of rules and noted that, in the common law system of judicial precedent, it may be difficult to distinguish the two because judges may often deliberately blur the distinction to make their decisions appear more persuasive. Lesson 2 also noted that legal rules may be thought of as an algorithm or logical process, or as a conditional if/then statement, to help distinguish them from facts which in turn may be thought of as information about the world or data.

<table>
<thead>
<tr>
<th>L-Ob3</th>
<th>R Own Words</th>
<th>Describe a legal rule accurately in the student’s own words, not merely copy it verbatim from primary materials</th>
</tr>
</thead>
</table>

Although an authoritative version of a legal rule, such as Restatement Contracts 2d § 24 is accorded great deference in legal reasoning, the words used to describe the legal rule are not exactly the same thing as the legal rule itself. By learning how to describe legal rules accurately in their own words, law students can demonstrate that they know that the “real” legal rule is lurking just below the surface of the words used to describe it.

<table>
<thead>
<tr>
<th>L-Ob4</th>
<th>LR → RE</th>
<th>Break a complex legal rule down into elements</th>
</tr>
</thead>
</table>

The process of breaking rules down into their elements involves separating the logical structure of a legal rule, then analyzing the logical structure of the rule.

<table>
<thead>
<tr>
<th>L-Ob8</th>
<th>Irr-Block</th>
<th>Filter content for relevance and ignore anything not relevant</th>
</tr>
</thead>
</table>

It was not relevant to the outcome of either the Ziglin case that Ziglin was playing blackjack, i.e., attempting to cheat the casino, or in the practice exam question, that Alfonse rides a motorcycle.

<table>
<thead>
<tr>
<th>L-Ob11</th>
<th>CB ↔ IRAC</th>
<th>Identify similarities and differences in descriptions of issues in case briefs and in exam answers</th>
</tr>
</thead>
</table>

In the discussion of strategies for briefing the Ziglin case and for writing an IRAC-style answer to the Susan and Alphonse practice exam question, similarities between the two four part issue statements were emphasized. The legal rule applied in both analyses was the same—Restatement (Second) of Contracts, § 24—while the facts were all different.

One of the most important differences between a case brief and an IRAC exam answer is that—unless there is a dissenting opinion that criticizes the majority opinion—there will be nothing in a case brief that corresponds to the “on the one hand, on the other hand” structure of the apply rule to facts analysis in an IRAC exam answer.

<table>
<thead>
<tr>
<th>L-Ob15</th>
<th>Meta</th>
<th>Accurately assess own progress toward specific learning objectives</th>
</tr>
</thead>
</table>
Lesson 2 described the “you can’t succeed in law school without learning to do what you managed to avoid doing as an undergraduate” paradox confronting all law students in the “less gifted than Justice Ginsberg” category, which includes pretty much all law students. To help students begin to think about what kind of new and different study methods they might need to acquire to succeed in law school, the exam preparation strategies of hypothetical law students Fathima, Milo, LaShonda & Steve were analyzed.

2. Overview of Lesson 3

Lesson 3 begins by examining a third building block of legal reasoning—rules—and the process of separating relevant from irrelevant facts so that only relevant facts can be matched up with elements of rules. Learning how to describe rules accurately and memorizing them so that they can be described quickly and accurately on an exam is not easy, but it is actually much easier than learning how to interpret facts correctly. Lesson 3 provides a basic framework that can be used to interpret facts in cases as well as facts in the hypothetical fact patterns used in exam questions. Because the process of reasoning by analogy is an integral part of figuring out which facts and which rule elements are most relevant, Lesson 3 includes a brief introduction to reasoning by analogy.

Lesson 3 also includes simulated weak, acceptable and strong student answers to a practice exam question and shows how the list of learning objectives introduced in Lesson 1 can be used to analyze how those student answers might be graded by an instructor.

The practice exam question in the exam scoring section, in the _Barnes v. Treece_ case and in the practice exam answer following it all deal with the same issue: can someone avoid liability for not performing a contract by claiming that it was only a joke. The legal rule is clear: if someone was really joking, then no contract was formed. The hard part about the “We never formed a contract because I was only joking” defense is interpreting the facts, i.e., deciding whether someone is just trying to get out of a bad deal made in all seriousness by later claiming to have been only joking. When courts are required to decide whether someone made a really bad deal that is enforceable under contract law or was only joking, their analysis is based on the “objective” meaning of the speaker’s works, not the “subjective” meaning. Lesson 3 includes a brief introduction to the distinction between “objective” and “subjective” intent because it is a fundamental building block of legal reasoning used in all branches of law, not just contract law.

Part II: Working with Facts

Many students come to law school with the naïve conviction that the legal system is made up of rules. While no one would deny that “black letter law”\(^1\) is an absolutely fundamental part of both legal reasoning and the legal system as a whole, learning what legal rules say is a relatively easy task compared to learning how to apply legal rules to new fact patterns correctly. Most instructors in law school naturally focus their attention on what they know to be the hard part of legal reasoning, leaving

\(^1\) American lawyers often refer to legal rules as “black letter law” because it is conventional in legal reference books to print the legal rule itself in bold and the commentary on the legal rule in regular type to make the rule stand out for easy reference.
students who were expecting to be taught about rules frustrated and confused. One law professor described that disconnect in these terms:

Most law students don’t appreciate the importance of the facts when they read a case. Students think, “I’m in law school, not fact school; I want to know what the law is, not just what happened in this one case.” But trust me: the facts are really important. If you don’t believe me, you should take a look at a few law school exams.²

As noted in Lesson 2, the boundary line between rules and facts is not as clear as it might first appear, and the ability to deliberately blur the distinction between rules and facts is often an important tool of advocacy. But before a student can begin to master such advanced legal reasoning skills, the student must have a rock-solid grasp of the more elementary ways that facts are used in legal reasoning.

1. What Is a Fact?

As noted in Lesson 1, there is no simple answer to the question of what is a fact. One way to think about facts is as information about the world. There is also a long, rich tradition in Western philosophy of questioning what reality really is and whether humans can really know anything about it. The 1999 science fiction movie The Matrix explores the philosophical issue of whether or not it is ever possible for humans to know what is real and what is not. The movie is about a dystopian future created by machines that cause humans to believe they are living normal lives while they are actually imprisoned and being exploited as an energy source. The nature of facts in legal reasoning lies somewhere between these two extremes: many “facts” described in judicial decisions are simply information about the world, but there are also “facts” in judicial decisions that were actually created through a complex process of interpretation and evaluation carried out by the judge.

Just how much human interpretation is involved in describing facts relevant to legal proceedings may vary considerably. Some facts may be described in a way that tries to approximate their “raw” state divorced from the conflict of human interest. On the other hand, some facts may be obviously “tailored” to insure that they fit a particular rule in a particular way. When that tailoring is done by a master, the subtle shading of facts designed to make a conclusion more persuasive can be hard to detect.

The process of embellishing the description of facts to make a legal outcome more persuasive will be referred to in these chapters as shading, spinning or coloring the facts. Because the power of the state is exercised through decisions of courts, and one of the primary functions of legal reasoning is to legitimate that exercise of power, it is probably safe to say that the “shading” of facts to make judicial decisions appear justified commonly occurs in legal reasoning. Fact finding in science rarely carries the same heavy political weight that fact finding often bears within the legal system.

Sometimes it may be obvious that an advocate or a judge is “spinning” the facts but at other times, it may be hard to separate the “raw” facts from the spin. While an 18 year old might look at someone aged 50 and describe that person as “old,” someone aged 80 might look at the same 50 year old and describe that person as “middle-aged.” In Dragnet, a popular television show produced in the

---

1950s, police detective Joe Friday would tell citizens that, “All we want are the facts.” Applying the Dragnet filter to the descriptions of the person’s age, it is clear that the only “fact” that everyone could agree on is that the person is 50 years old. Whether that makes someone old or middle-aged is not something everyone would recognize as a “fact.” One way to peel away layers of shading in order to get closer to the “raw” facts might be to ask how a completely disinterested person without any connection to the dispute or training in law might describe the facts.

Since that level of objectivity is hard to sustain in the context of dispute resolution, the common law system relies on a different process to try to get at the truth. In the adversarial process, it is simply presumed that each side will trying to spin the facts, and so permits the two sides to confront each other in open court. The judge or jury observes the adversarial contest between the parties, and then must decide whose version of events is closer to the truth. After a jury reviews the evidence and makes a decision about what “really” happened, the jury traditionally gives a simple answer, such as guilty or not guilty in a criminal case, or liable or not liable in a civil case, perhaps together with the amount of damages if one party was found liable to the other.

Unlike a jury, a judge has the option of explaining the basis of his or her decision in a written opinion. After a judge reviews the evidence, and arrives at a decision about what “really” happened, or at least what most likely happened, the judge then writes up a description of the facts. Judicial decisions can include both “basic” facts for which the parties have offered direct evidence as well as “inferred” facts that can be reasonably presumed from basic facts. Although trial courts have considerable latitude in making sense of the evidence offered by the parties, a trial court’s characterization of the facts may be overturned on appeal if it later appears to be too partial to one side or the other.

The challenge facing a law student analyzing hypothetical facts provided in a law school or bar exam question might appear on the surface to be quite different from that faced by a trial court judge or jury:

- The law student’s hypothetical fact pattern is so simplified and abstract it is almost cartoonish, and law students must limit their analysis to only the facts they have been given and not embellish them.
- The trial court judge or jury is often forced to wade through a bewildering morass of evidence offered by the parties that may be inconsistent or even contradictory, and must be ever vigilant to the possibility that a witness may be lying or that tangible evidence is fake.

At another level, however, law students, judges and juries are all engaged in the same activity: trying to separate relevant from irrelevant facts, and to match up relevant facts with elements of rules.

2. Relevance

3 A Ninth Circuit judge has argued that in most cases, however, there is no difference between neutral application of precedent and the process of deciding who “really” deserves to win a case. Alex Kozinski, What I ate for breakfast and other mysteries of judicial decision making, 26 Loy. L.A. L. Rev. 993 (1993).
Whether facts are relevant (or material) to a legal outcome is not a characteristic of the facts themselves, but rather the result of an intermediate step in applying rules to facts. In this Legal Reasoning Toolkit online course, the most relevant facts that serve as the pivot on which the legal outcome turns will be referred to as “key” facts. In other words, if a “key” were changed or eliminated, it would change the outcome of the case.” In this example from Lesson 2, the speed at which the motorist was driving is the key fact:

- Speed limit = 30
  - Motorist speed = 25, motorist wins
  - Motorist speed = 50, motorist loses

Another way to describe key facts is to say that they are “material” to the outcome of a dispute.

The circularity problem should be obvious: relevant (or material) facts trigger the application of legal rules, but it is the application of legal rules that decides whether facts are relevant or not. In common law legal reasoning, the way to break out of this circularity problem is to engage in reasoning by analogy which will be discussed in more detail later in this Lesson.

In practice, lawyers do research within the system of case law precedent to find judicial decisions issued for past disputes that could be applied to a dispute in the present through the process of reasoning by analogy. For law school exams, however, law students are not allowed to do any original legal research to find answers to exam questions. Law students are expected to find answers to law school exam questions by reasoning by analogy from the cases that were taught in the class. Students are discouraged from drawing on their real world experience in analyzing law school exams, and are expected to focus their analysis on the small slice of reality presented in the casebook and class discussions.

Even though the cases in a modern American law school casebook have been edited to remove some of the most irrelevant material, they generally remain very long, dense texts. While individual judicial decisions may vary considerably in length, almost all provide some kind of narrative overview of how the dispute being litigated arose between the parties. Most of the facts in the narrative are simply background information to help the reader understand the context of the litigation. Even though enormous quantities of background information contained within cases is found in law school casebooks, knowledge of background information is almost never tested on law school exams.

A fundamental challenge for students in the first year of law school is thus to figure out how to sort through pages and pages of judicial decisions in casebooks to find the “key” facts and extract them. Just as the process of breaking a rule of law into elements normally involves an act of interpretation by the judge, lawyer or student, so too does the process of separating the facts described in a case into essential key facts that determine the outcome of the case, and background facts that merely aid the reader in understanding the context of a dispute.

---

Some modern casebooks used in American law schools include very helpful explanations in addition to cases. These modern casebooks may provide commentary on cases that make it easier for students to separate key facts and background facts when briefing cases. Very traditional casebooks, however, consist of cases plus cryptic notes and rhetorical questions that no one but the instructor could possibly understand. A student confronting a dense, obscure traditional casebook may find the task of trying to brief the cases in it overwhelming. When neither an instructor nor the casebook assigned by the instructor provides enough guidance to make it possible to separate out the “outcome determinative” key facts from background information in cases, then there may be no alternative but to resort to a commercial study aid or other secondary material for guidance. How to make effective use of commercial study aids will be discussed in more detail in Lesson 6.

3. Spinning, Shading or Coloring

Any American who has ever watched any TV shows dealing with lawyers and courts should know that the lawyer for each side is expected to be a zealous advocate. What might be obvious to the lawyers but not so obvious to the public at large is the fact that once a judge has decided how to rule, the judge may become an advocate for the reasonableness of that decision. If a judge’s ruling in a case is persuasive to the parties and to the American public generally, then that increases the legitimacy of the legal system. By contrast, putting the machinery of the state behind unpopular or controversial rulings reduces the legitimacy of the legal system. In order to make their decisions as persuasive as possible, judges may include facts in them that are neither key facts nor mere background information. These facts are added because they make the outcome of the case look more palatable, not because they perform a necessary role in the reasoning of the decision.

In the television show The Mentalist, the character Patrick Jane observes, “...why do magicians have beautiful girls as assistants?...Because they're reliable distracters of attention. People will look at a beautiful girl for a long time before they look where they should be looking if they want to see how the trick really works.”5 Some facts that are technically not relevant at all appear in judicial decisions for the same reason: to distract attention away from the weak parts of their arguments. In these chapters, these kind of facts will be referred to as “spin” or “shading.”6

In Lesson 5, we will brief Mesaros v. U.S. Department of the Treasury. The U.S. government created a special program of minting and selling commemorative coins to collectors to create a special fund to maintain various national monuments. When some investors did not get the coins they ordered, they sued for breach of contract damages because the price of the coins in the secondary market rose rapidly after they were sold to collectors by the U.S. Treasury. On the first page of the decision, Judge Skelton observes:

Perhaps in this day and age it will surprise no one that such a laudable piece of legislation has spawned a civil action against the government. More accurately, the manner in which the coins

6 The term “spin” is used to describe the presentation of information in a deliberately misleading way in order to influence the listener unfairly.
were sold to the public, rather than the legislation itself, led to the initiation of this lawsuit by the plaintiffs.

The “Perhaps in this day and age it will surprise no one that such a laudable piece of legislation has spawned a civil action against the government” comment is “spin.” In effect, the judge is saying “no good deed goes unpunished” and the one who tried to do a good deed is the defendant in the lawsuit. It is completely irrelevant to the contract law issue in the case whether or not the Treasury’s program of minting and selling commemorative coins to collectors has a laudable goal. But if Judge Skelton thought it was completely irrelevant to the case, he wouldn’t have added it to the opinion. The comment is relevant to Judge Skelton’s perceptions of the “equities” of the case, i.e., the question of whether or not both parties were behaving fairly in their conduct toward each other in the events leading up to the lawsuit.

Once you recognize Judge Skelton’s comment as “spin” and not as a “key” fact or “background” fact, then without reading any further, you can predict how the judge will rule in this case. What Judge Skelton is doing by making this comment here is “tipping his hand” or showing where his reasoning is going to go. And when you read to the end of the case in Lesson 5, you will see that he does rule for the defendants in the case.

The cases you are asked to brief in Lessons 1-5 were chosen because they are short, clearly written decisions about the same basic issue in contract law: was an offer to form a contract made? Outside of that one comment by Judge Skelton in the Mesaros case, there are no other obvious examples of “spin” facts being introduced to change the reader’s perception of the “equities” of the case. By contrast, the cases that appear in law school casebooks are often chosen precisely because they are controversial, and hence more likely to generate a lively class discussion. So you will encounter a lot more “spin” in law school casebook materials than in the materials for this Legal Reasoning Toolkit course.

Unlike a trial judge, the reader of a published judicial decision does not have access to all the facts that the parties offered into evidence. As a result, it may be very difficult to distinguish between a balanced description of the facts and blatant “spin” unless the reader has an independent source of information about the dispute, or the case includes a dissenting opinion that highlights facts omitted from the majority decision. The judge writing the dissent has an incentive to “shade” or “color” the facts in the opposite direction, so much so that sometimes it appears that the majority opinion and dissenting opinion are discussing two different cases altogether.

When first year law students brief the cases that appear in their casebooks to prepare for Socratic Method class discussions, they will find it difficult to isolate the key facts and ignore spin and background facts. The instructor is well aware of this, and will use the Socratic Method to suggest that some of the facts in the case are spin facts intended direct the reader’s attention to things that are technically not relevant to the reasoning in the case. In other words, instructions about how to separate key facts from other facts including spin are often transmitted over the second, implicit channel of communication and not stated explicitly.
If the Mesaros case were being discussed in a Socratic Method class discussion and an instructor wanted to call a student’s attention to Skelton’s “no good deed goes unpunished” comment, the instructor would ask questions, trying to elicit a specific answer from the student being called on. Here is a table showing what kind of questions an instructor might ask plus the ideal answer that a law student who could “guess what the instructor is thinking” might give.

<table>
<thead>
<tr>
<th>Socratic Method question asked to student</th>
<th>Answer of law student with supernatural ability to guess what the instructor is actually thinking</th>
</tr>
</thead>
<tbody>
<tr>
<td>“In what way would the motive of the Treasury in issuing the coins be relevant to the issue of whether an offer to form a contract was made?”</td>
<td>It wouldn’t be relevant at all.</td>
</tr>
<tr>
<td>“What do you think Judge Skelton really meant by that comment?”</td>
<td>Judge Skelton meant that he was going to rule for the Treasury based on the equities of the case</td>
</tr>
<tr>
<td>“Why do you think Judge Skelton added that comment to the decision if it isn’t relevant to the legal reasoning?”</td>
<td>Just because something isn’t relevant to the legal reasoning doesn’t mean it doesn’t belong in a decision. Background information isn’t relevant to the reasoning but it helps the reader understand the context of the dispute. This is not background information, however. Judge Skelton added this comment to change the reader’s perception of the equities of the case.</td>
</tr>
</tbody>
</table>

To recap the discussion of the role of facts in legal reasoning, in order to produce an accurate case brief, a law student must learn how to:

- Isolate the key facts in a case and add them to the case brief;
- Merely skim over background facts to understand the context of a case without adding them to the case brief; and
- Note the presence of “spin” facts without being tricked into treating them as key facts even though they are technically not relevant to the holding of the case.

At this point, it should be clear why analyzing the facts of a case can be every bit as challenging for law students as analyzing the legal rules in a case.

While the legal rules are the same whether they appear in cases or students apply them to hypothetical facts in law school exam questions, the facts are not. Law students do not receive credit on law school exams for memorizing the facts of cases and regurgitating them on the exam. What law students are expected to do with facts on exams is to draw analogies between cases studied in class and the hypothetical facts of exam questions. This is a much more difficult task than memorizing the text of a legal rule and repeating it in an exam answer.

***
Lesson 3 Quiz ??

***

Part III: Subjective versus Objective Intent to Be Bound

Before we start the process of analyzing how law school exam answers might be graded, we will need to make a slight detour to explain the difference between subjective and objective intent in law. The mental state or intent of a person is often an explicit or implicit element of a legal rule, and when it is, then plaintiff must offer some proof of the defendant’s state of mind in order to make a prima facie case. Of course it is normally impossible for one party in a lawsuit to offer irrefutable scientific proof of what the other party to the lawsuit was thinking at a specific moment in the past. Rather than make it impossible for aggrieved parties to seek relief in the courts by setting the proof requirements too high, courts generally allow plaintiffs to offer proof of what the other party was likely to be thinking. The name for the higher standard—proof of what the other party was actually thinking—is referred to as a “subjective” standard, while the name for the lower standard—proof of what the other party was likely to be thinking—is referred to as an “objective” standard.

The problem of first deciding what a person’s intentions were so that the legal consequences of that person’s intentions can be determined is a problem that occurs in all branches of law. The intentional, deliberate killing of another person in criminal law is called premeditated murder or murder in the first degree, while killing someone by accident or as an unintended consequence is called manslaughter. Even though prosecutors in criminal trials are required to prove the defendant’s guilt “beyond a reasonable doubt,” prosecutors are not required to provide scientific evidence of what the defendant was actually thinking. Prosecutors are allowed to prove a defendant’s intent by proving what the defendant said and did at the relevant time, and allowing the jury to infer what thoughts must have been going through the defendant’s mind. A similar principle applies in contract law.

The practice exam question in the exam scoring section, in the Barnes v. Treece case and in the practice exam answer following it all involve disputes where one person has made a very bad deal and so doesn’t want to perform, while the other person is demanding performance. In all three disputes, the person who made the bad deal is trying to get out of it by claiming it was only a joke. When a judge has to decide whether or not someone was joking when apparently entering into a contract, three different outcomes are possible:

- If the alleged offeror said something that any reasonable person could only interpret as a joke (e.g., “Would you take my car in exchange for your three magic beans?”) then it is easy to predict that the judge will rule that no offer was made.

- If the alleged offeror said something that any reasonable person could only interpret as an offer (e.g., “Here’s $5, I’m offering it to you if you agree to sell me your travel mug right now.”), then it is easy to predict that the judge would rule that an offer was made.

- The alleged offeror said something that some people might think was a real offer but other people might think was a joke, in which case it will be much harder to predict what the judge would rule.
Just as a prosecutor in a criminal case is not required to prove what the defendant was actually thinking at the time the crime was committed, a party seeking to prove that words should be interpreted as a real offer and not as a joke is not required to prove what the other party was actually thinking when the words were spoken.

Furthermore, the judge is not required to accept at face value anything either of the two parties to the lawsuit say about what they were thinking at the time the alleged contract was formed. This is because a party to a lawsuit has a strong incentive to “misremember” or even lie about what happened. But if the judge can’t simply accept at face value what the parties claim their intentions were, how can the judge make a decision about what the parties did or did not intend? The answer is that the parties to the lawsuit provide as much information as possible about what the parties said, wrote or did in connection with the dispute, and then the judge interprets that evidence from the perspective of a “reasonable person.” This means that the parties words and deeds are given their conventional meaning, and not some special, secret meaning known only to the author of those words and deeds.

The solution to the judge’s problem is to conjure up a hypothetical reasonable person who is similar but not identical to the plaintiff, and decide what that hypothetical person would have thought when the alleged offeror spoke. This proof of the speaker’s intent is called “objective” because it is based on what an objective person would have thought. If the court were required to actually get inside the alleged offeror’s head and figure out what he or she was actually thinking, that standard of proof is called “subjective” because it is based on the subjective, inner experience of the alleged offeror, not objective facts.

Solving the judge’s problem of what kind of proof is required of the alleged offer’s intent creates a new problem, however. As noted in Lesson 2, contract law is supposed to be based on the free will of the parties. Basing contractual liability on what some objective, reasonable third person thinks someone’s intent was is not the same as basing contractual liability on the actual, subjective free will of the parties. Judge Learned Hand described this apparent contradiction in the following terms:

> A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party when he used the words intended something else than the usual meaning which the law imposes on them, he would still be held, unless there were mutual mistake or something else of the sort. Hotchkiss v. National City Bank, 200 F. 287, 293 (S.D.N.Y. 1911) (Learned Hand, J.)

Judge Hand is being ironic by noting that even in the highly unlikely event someone were able to find twenty bishops (i.e., spiritual advisors who might actually know what a person’s true, inner thoughts are) who would be willing to testify about what that person’s subjective intention really was, a court would refuse to accept that proof. Most people would never be able to come up with that kind of evidence, so it wouldn’t be practical for the legal system generally to require such a high level of proof every time the intent of one the parties has to be proven. The legal system only requires a level of proof that is feasible even though that means once in a while an incorrect decision will be made.
Part IV: Scoring Exam Questions

1. Warning! Your Results May Vary

Until very recently, it was traditional in American legal education for instructors to simply turn in final grades and disclose nothing about how they arrived at them, making the grading process an inscrutable black box for most law students.\(^7\) The lack of transparency about grading practices extends to communications among faculty members as well: American legal education lacks detailed, national standards equivalent to those used in many areas of K-12 education, Advanced Placement exams or even state bar exams to assess student performance. So for now, there is really no way to predict with any precision how any individual instructor in law school might score issue spotter exam answers.

Yet students need to understand how their performance is assessed in order to set their own priorities while studying and to assess the quality of their preparation for exams. So the goal of this section of Lesson 3 is to explain some general principles involved in grading issue spotter exam answers. To illustrate how those principles might apply in practice, several different hypothetical student answers to a practice exam question will be scored, and the relationship between those scores and the learning objectives introduced in Lesson 1 will be explored.

**Warning! Your Results May Vary:** given the lack of standards for grading law school exams, there is no way to guarantee that any instructor you have in law school will grade your exams in the way explained in this section (unless you happen to take a class from me). One author of a “law school success guide” described the variation in approaches taken to grading by instructors in these terms:

“ivory tower” professors want slightly different answers than “in the trenches, I had to kill another lawyer with a shovel” law professors.\(^8\)

Although there may be considerable variety among law school faculty members in their approach to grading law school exams, there is less variety in how bar exam questions are designed and graded. The exam answer scoring system presented here is generally consistent with the approach taken by state bar examiners.

Some law schools and some individual law school faculty members are trying to make the process of assessing student work more transparent for students. A common way to do this is to provide students with answer keys to practice exam questions or examples of student answers that got high marks. Following recent changes in the accreditation standards for American law schools requiring greater use of “formative” assessment, i.e., informal, low-stakes feedback to students on their performance in advance of “summative” assessment, i.e., the final exam, it is likely that the number of law schools and individual faculty members providing this kind of support to students will gradually increase over time. It is even possible that those disclosures by individual schools and faculty members

---

\(^7\) Changes in accreditation standards introduced in 2015 requiring instructors to provide more concrete feedback to students may eventually eliminate this practice in American law schools, but the pace of change in response to the changes in accreditation standards is likely to be slow and uneven for some time.

might eventually coalesce into national standards for grading issue spotter exams similar to those
enforced by state bars with regard to bar exams, although that is unlikely to happen any time soon.

Information about how an instructor will grade issue spotter exams is the kind of information
that is generally sent over the second, implicit channel of communication during Socratic Method class
discussion. If a student generally understands the framework within which issue spotter exam answers
can approach an instructor outside of class and ask for clarification of how that instructor will assess
student performance. Instructors who have not already provided students with general guidance on
their grading policies are unlikely to be willing or able to provide general guidance. This is why the
strategy used by LaShonda and Steve in the student study habit vignettes in Lesson 2—writing out
practice exam answers independently and when their results differed significantly, showing both
answers to the instructor and asking for clarification about which result the instructor thought was
better—would be a good strategy for eliciting constructive feedback from the instructor.

2. Why the Answer to Law School Exam Questions is Usually Maybe

In most academic disciplines and in most student assessment contexts, it is conventional to
assume that the correct answer to a direct question will be either affirmative or negative, i.e., yes or no.
American law school issue spotter exam questions do not follow this pattern, however, because
students are normally required to choose from among three possible correct answers: yes, maybe or no.
Anecdotal evidence from students and instructors in other common law countries (such as the UK,
Canada, Australia and New Zealand) suggests that the correct answer to exam questions in those
countries likely to be affirmative or negative rather than maybe.

One of the most likely explanations for the practice of writing exam questions for which the
correct answer is “maybe” rather than “yes” or “no” is that it allows faculty members to test students
directly on their ability to grapple with the ambiguity inherent in common law legal reasoning. Learning
Objective 12 introduced in Lesson 1 described this skill as being able to “distinguish more ambiguous
from less ambiguous outcomes and describe the ambiguity clearly and concisely.” If some facts in a law
school issue spotter fact pattern are unambiguously within the scope of a rule, some are unambiguously
outside the scope of a rule and some are poised precariously on the razor’s edge between inside and
outside the scope of a rule, then the instructor can assess a student’s ability to recognize and describe
all three different results. The answer to the practice exam question involving Hector and Jorge, and the
practice exam question involving Oswald and Brianna in this Lesson are both examples of questions for
which the correct answers is “maybe” so the discussion of those problems will provide practical
suggestions for constructing “maybe” answers to exam questions.

Some other reasons for this apparently uniquely American phenomenon of setting “maybe” as
the correct answer to exam questions are examined in more detail in Lesson 5. For students who are
not satisfied by the brief explanations for this phenomenon contained in this Lesson or in Lesson 5 may
be interested to know that an entire book has been written on the subject: Richard Michael Frischl and

3. Practice Exam Question
The process of grading law school exams will be illustrated by using hypothetical answers to the following issue spotter exam question:

When their daughter Ysabel turned 15, Hector and Helena Hernandez threw her a fabulous quinceañera party to celebrate. (A quinceañera is a traditional Latin American celebration of a daughter’s 15th birthday.) Hector and Helena invited 500 of their closest friends and business associates to the Bougainvillea Party Hall for the celebration. At 2 a.m., after the band stopped playing and the staff of the party hall started clearing away the dishes and leftover food and drink, Hector, Helena, and Ysabel sat down at a table with Jorge, Josefina, and their 15 year old daughter Teresa to rest and chat about the evening’s activities. Hector and Jorge had worked together at the El Dorado real estate management company for more than 20 years, and their wives and daughters were best friends. Ysabel asked Teresa about the beautiful emerald necklace she was wearing, and Teresa said it had been a gift from her father for her own quinceañera one month earlier. Teresa rolled her eyes and told Ysabel she didn’t like it, she’d asked for a pearl necklace instead. Teresa said Ysabel should have the necklace because it brought out the color in Ysabel’s green eyes. Hector turned to Jorge and offered to pay $1,000 for the emerald necklace. Jorge laughed and said he couldn’t give it up for less than $5,000. Hector wrote “IOU $5,000” on one of Ysabel’s quinceañera party napkins and gave it to Jorge who stopped laughing. Jorge told Teresa to give the necklace to Ysabel, he was going to buy her the pearl necklace she wanted instead. Ysabel wore the necklace home that night, but the next morning, her father Hector took it to work with him and tried to return it to Jorge. If Jorge won’t take the necklace back but instead demands that Hector pay him $5,000 for it, can Hector refuse to pay? Why or why not?

Before we start analyzing hypothetical student answers to this question, it may be helpful to identify the “rule element in dispute.” The relevant rule is:

Restatement (Second) of Contracts, § 24 Offer Defined: An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.

In Lessons 1 and 2, this rule was broken down not the following elements:

- **E1** Manifestation of willingness to enter into a bargain made by offeror
- **E2** Communicated
- **E3** Offeree is justified in understanding assent will conclude a bargain

If the law required proof of subjective intent, then the first element would be the rule element in dispute, but as it does not, that means we can cross off the first element. As discussed in Lesson 2, the second element is almost never in dispute. So by process of elimination, it is clear that the third element must be the one in dispute.

But the court is required to consider how a hypothetical reasonable person would interpret what the alleged offeror said, not what the alleged offeree thought, and the third element does not refer to a hypothetical reasonable person. Or does it? The reference to “justified” in the third element means that if a hypothetical reasonable person would agree with the alleged offeree’s interpretation of what the other person said, then that interpretation is “justified.”
Here is an answer key for the Hector-Jorge question together with the learning objectives being tested and the maximum possible points a student could score out of a total of 25 for the question.

### A. Answer Key

<table>
<thead>
<tr>
<th>Answer Key</th>
<th>Score</th>
<th>Max</th>
<th>Learning Objective</th>
</tr>
</thead>
<tbody>
<tr>
<td>UNDER Rstmt 2d 24, DOES Hector make an offer to Jorge to buy a necklace WHEN Hector wrote “I O U $5,000” on a napkin and gave it to Jorge after Jorge said he wouldn’t sell the necklace for less than $5,000.</td>
<td>n/a</td>
<td>10</td>
<td>L-Ob9 4 Part Issue Stmt               L-Ob1 Spot Issue                                      L-Ob4 Legal Rule → Rule Element L-Ob7 Rule Element → Dispute L-Ob8 Irrelevance Block</td>
</tr>
<tr>
<td>An offer is a manifestation of intent to be bound communicated to another in such a manner that the other understands a contract can be formed by accepting</td>
<td>n/a</td>
<td>2</td>
<td>L-Ob3 Rule in Own Words</td>
</tr>
<tr>
<td>Jorge may be justified in understanding it was an offer because he had just rejected Hector’s offer of $1,000 and told him he wouldn’t take less than $5,000 for the necklace; the fact that Hector took the necklace home with him suggests he thought it was a real contract</td>
<td>n/a</td>
<td>5</td>
<td>L-Ob2 Distinguish Rule/Fact               L-Ob5 In-Out Rule Scope                                      L-Ob6 Fact = Key/Back/Spin L-Ob8 Irrelevance Block</td>
</tr>
<tr>
<td>Jorge may not be justified in understanding that it was an offer because it was late at night after a big party when everyone was probably tired and maybe even drunk, writing I O U $5,000 on a napkin is not a normal way to offer to pay that much money for a necklace, and as old friends, Hector and Jorge may be in the habit of joking around like this</td>
<td>n/a</td>
<td>5</td>
<td>L-Ob2 Distinguish Rule/Fact               L-Ob5 In-Out Rule Scope                                      L-Ob6 Fact = Key/Back/Spin L-Ob8 Irrelevance Block</td>
</tr>
<tr>
<td>While a court might find that a contract was formed, there is no way to be sure</td>
<td>n/a</td>
<td>2</td>
<td>L-Ob10 Correct Result                                                    L-Ob12 Grapple with Ambiguity</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td>25</td>
<td></td>
</tr>
</tbody>
</table>
### B. Weak Student Answer

<table>
<thead>
<tr>
<th>Student Answer</th>
<th>Score</th>
<th>Max</th>
<th>Learning Objective</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>UNDER Rstmt 2d 24 DOES Hector have to give back the necklace WHEN he already took it home with him then changed his mind and tried to give it back</strong></td>
<td>4/10</td>
<td>10</td>
<td>L-Ob9 4 Part Issue Stmt</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>L-Ob1 Spot issue</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>L-Ob7 Rule Element → Dispute</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>L-Ob4 Legal Rule → Rule Element</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>L-Ob8 Irrelevance Block</td>
</tr>
<tr>
<td><strong>Explanation of score:</strong> what follows “DOES” is not the rule element in dispute; this student was distracted by the “spin” fact about Hector’s behavior the day after the contract was allegedly formed</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>After Jorge accepted Hector’s offer, it was too late for Hector to cancel, the contract was already formed</td>
<td>0/2</td>
<td>2</td>
<td>L-Ob3 R Own Words</td>
</tr>
<tr>
<td><strong>Explanation of score:</strong> the student used own words, but mixed some facts from the exam question into what should be an abstract, general statement of the rule; the student is also trying to describe the wrong rules (what is acceptance of an offer; what are the consequences of contract formation)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>On the one hand, the fact that Teresa actually handed the necklace over to Ysabel and Ysabel took it home with her shows there was a meeting of the minds</td>
<td>2/5</td>
<td>5</td>
<td>L-Ob2 Distinguish Rule/Fact</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>L-Ob5 In-Out Rule Scope</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>L-Ob6 Fact = Key/Back/Spin</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>L-Ob8 Irrelevance Block</td>
</tr>
<tr>
<td><strong>Explanation of score:</strong> “meeting of the minds” is a generic label for the contract formation process, it is not an element of Rstmt 2d 24; the focus should be the objective meaning of Hector &amp; Jorge’s words and acts, if the student meant that by allowing Teresa to give the necklace to Ysabel and Ysabel to take it home, Hector and Jorge provided objective evidence they thought a contract had been formed, then the explicit connection between Teresa &amp; Isabel’s behavior and Hector &amp; Jorge’s intentions needs to be made explicit to get credit</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>On the other hand, Hector did not actually sign “Hector” on the napkin and Jorge didn’t even sign it at all</td>
<td>0/5</td>
<td>5</td>
<td>L-Ob2 Distinguish Rule/Fact L-Ob5 In-Out Rule Scope</td>
</tr>
</tbody>
</table>
**Explanation of score:** The legal reasoning here is simply wrong. Because there is no requirement in American contract law that anyone sign their own name on a piece of paper to be bound by a contract, this student could not have gotten this idea from a law school class, it might be a vague, inaccurate memory of something taught in an undergraduate business law course, or from watching a TV show or some other popular culture source.

Hector and Jorge formed a contract, so Hector can't get out of it the next day.

**Explanation of score:** the correct answer here is to this question is MAYBE not a categorical YES or NO.

<table>
<thead>
<tr>
<th>Score</th>
<th>Max</th>
<th>Learning Objective</th>
</tr>
</thead>
<tbody>
<tr>
<td>2</td>
<td>25</td>
<td>L-Ob10 Correct Result</td>
</tr>
<tr>
<td>½</td>
<td>7/25</td>
<td>L-Ob12 Grapple with Ambiguity</td>
</tr>
<tr>
<td>Total</td>
<td>7/25</td>
<td>25</td>
</tr>
</tbody>
</table>

### C. Acceptable Student Answer

<table>
<thead>
<tr>
<th>Student Answer</th>
<th>Score</th>
<th>Max</th>
<th>Learning Objective</th>
</tr>
</thead>
<tbody>
<tr>
<td>UNDER Rstmt 2d 24 DOES Hector make an offer to Jorge WHEN he writes I O U $5,000 on a napkin</td>
<td>8/10</td>
<td>10</td>
<td>L-Ob9 4 Part Issue Stmt</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>L-Ob1 Spot issue</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>L-Ob7 Rule Element → Dispute</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>L-Ob4 Legal Rule → Rule Element</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>L-Ob8 Irrelevance Block</td>
</tr>
</tbody>
</table>

**Explanation of score:** generally correct, however the fact that Hector & Jorge were engaged in preliminary negotiations before Hector wrote I O U $5,000 on the napkin is also a key fact that should be noted after WHEN.

An offer is a promise from the offeror to the offeree to perform the bargain.

**Explanation of score:** the student has the right general idea and is using own words, but the description of the rule is too general

On the one hand, Hector and Jorge might have been joking around after a long evening, they don’t seem to be that
serious, and anyway what Hector wrote on the napkin isn’t the normal way to make a contract offer

**Explanation of score:** the student has done a good job of interpreting the facts in a way that is favorable to Hector’s position, but omitted BECAUSE and didn’t explicitly note which rule element made these facts relevant

On the other hand, After Jorge told Hector he wouldn’t sell the necklace for less than $5,000 and Hector offered pay that much, Jorge let Teresa give the necklace to Ysabel, and Hector let Ysabel take it home which seems like it was a real contract and not a joke

**Explanation of score:** the student has done a good job of interpreting the facts in a way that is favorable to Jorge’s position, but omitted BECAUSE and other than mentioning “joke,” didn’t explicitly note which rule element made these facts relevant

Jorge can force Hector to pay $5,000 and keep the necklace

**Explanation of score:** the correct answer here is to this question is MAYBE not a categorical YES or NO

**Total** 19/25 25

---

**D. Strong Student Answer**

<table>
<thead>
<tr>
<th>Student Answer</th>
<th>Score</th>
<th>Max</th>
<th>Learning Objective</th>
</tr>
</thead>
<tbody>
<tr>
<td>UNDER Rstmt 2d 24 DOES Hector make an offer to Jorge to form a contract WHEN Jorge says he won’t take less than $5,000 for the necklace and Hector writes I O U $5,000 on a napkin and gives it to Jorge</td>
<td>10/10</td>
<td>10</td>
<td>L-Ob9 4 Part Issue Stmt</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>L-Ob1 Spot issue</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>L-Ob7 Rule Element → Dispute</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>L-Ob4 Legal Rule → Rule Element</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>L-Ob8 Irrelevance Block</td>
</tr>
<tr>
<td><strong>Explanation of score:</strong> after <strong>DOES</strong> is correct indication of rule element in dispute in subject-verb-object form, after <strong>WHEN</strong> are both key facts: after Jorge informed Hector his minimum price (which was not an offer, it was only</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
preliminary negotiations but it provides the context within which Hector’s response must be interpreted), and Hector offered to pay that in response

An offer to form a contract is a manifestation of intent to be bound to specific terms directed to another person who should understand that by accepting a contract will be formed

Explanation of score: All three elements of Rstmt 2d 24 are present, all accurately summarized in student’s own words

On the one hand, because Hector and Jorge might have been joking around after a long evening, and because writing on a napkin seems like a very informal way to promise to pay so much money, Hector might not have intended to make an offer

Explanation of score: Key facts connected to rule element in dispute with “because,” no spin or background facts

On the other hand, After Jorge told Hector he wouldn’t sell the necklace for less than $5,000 and Hector offered pay that much, Jorge let Teresa give the necklace to Ysabel, and Hector let Ysabel take it home which seems like it was a real contract and not a joke

Explanation of score: Key facts connected to rule element in dispute with “because,” no spin or background facts

It appears that a contract may have been formed between Jorge and Hector, but that outcome is not certain

Explanation of score: the student indicated the correct answer is maybe even though the word “maybe” does not appear

Total 25/25 25

Part V: Analogy

1. Deductive, Inductive and Informal Logic

Legal reasoning is what courts and lawyers do every day. Although the practice is so widespread and plays such an important role in society, it can be surprisingly difficult to define it with any precision. In philosophy, various forms of reasoning can be distinguished:
• Deductive reasoning (formal logic);
• Inductive reasoning; and
• Informal reasoning.

Presenting the conclusions of legal reasoning in the IRAC form makes legal reasoning look like a form of deductive logic. Legal arguments are often presented in introductory legal textbooks as a kind of deductive syllogism equivalent to:

• All men are mortal
• Socrates is a man
• Socrates is mortal

Describing the IRAC form of presenting legal reasoning as a kind of deductive syllogism is a bit misleading, however. Legal reasoning bears only a superficial resemblance to formal deductive logic, as Justice Oliver Wendell Holmes famously noted:

The life of the law has not been logic; it has been experience... The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.\(^9\)

Professor Gidon Gottlieb noted that the recurring attempts to reduce legal reasoning to some other form of reasoning are not accidental but reflect a longing to make legal reasoning resemble its more respectable neighbors formal logic and the scientific method:

The history of the study of legal reasoning in the judicial process is the story of an epistemological inferiority complex.\(^10\)

Gottlieb argues that the misunderstanding arises not because of the failure of legal reasoning to conform to other, higher forms of reasoning, but that legal reasoning is designed to solve different kinds of problems than formal deductive logic or inductive logic are. Legal reasoning operates within the sphere of dispute resolution, which is a different “field of argument” or context than that of formal logic, mathematics or physics.\(^11\)

In deductive logic, an argument is made up of statements that can be divided into premises and a conclusion. The premises are the statements that provide the foundation for the statement that is the conclusion. Deductive arguments are expressed in the form of a syllogism that contains two or more premises and a conclusion. The famous Socrates is mortal syllogism can be presented as:

• Major Premise: All A are X
• Minor Premise: B is an A
• Conclusion: B is X

---

Deductive logic is formal and abstract. The “validity” of a deductive argument does turn on whether or not the statements in it are factually accurate. An argument is deductively valid if and only if it is impossible that the conclusion be false if the premises are true.

Legal reasoning is not formal and abstract because it exists to solve problems in the real world. For example, the statement “If P, then P” is valid as matter of formal logic but it isn’t very interesting and it wouldn’t help to resolve a real world dispute. Deductive logics is the study of the form of arguments, and it can be used to improve legal writing by helping the writer become more conscious of the form of argument being used, but formal logic does not do any of the “heavy lifting” in legal reasoning because its validity does not depend on anything in the real world. The “heavy lifting” (i.e., the part of the decision that justifies an exercise of power by the court to help one party and hurt the other) in legal reasoning is done by inductive reasoning, informal reasoning and reasoning by analogy instead.

Inductive reasoning is based on generalizations drawn from observations and deals with the strength or weakness of inferences drawn from observation. Conclusions in valid deductive reasoning follow necessarily from their premises, while in inductive reasoning the conclusion must address issues that extend beyond the premises. Inductive reasoning may be used to describe evidence, or to explain causation. Here is an example of an argument based on inductive logic used to describe evidence:

- All ravens observed by humans are black.
- Therefore it is reasonable to assume that all ravens, even the ones that have never been observed by any human, are black.

Unless all ravens have been observed, there remains an inferential leap from the information collected and the conclusion that all ravens are black, so the conclusion can only said to be true with a high degree of probability. This is not the same criteria as valid/invalid used to assess deductive syllogisms.

Legal reasoning is closer to inductive logic than deductive logic because a central concern of legal reasoning is how legal rules and facts related to disputes should be described. For example, in 1965, the U.S. Supreme Court decided *Griswold v. Connecticut*, a famous case about the scope of privacy rights of individual citizens that are protected by the U.S. Constitution and so cannot be violated by state laws. The main issue in that case can be described in the form of a deductive syllogism:

- A law is unconstitutional if it encroaches on the zone of privacy created by the Bill of Rights.
- A state law banning the use of contraceptives by married couples encroaches on the zone of privacy created by the Bill of Rights.
- A state law banning the use of contraceptives by married couples is unconstitutional.

This is an accurate description of the holding of the case, but teaching students about the case this way actually makes it harder for a law student to understand the subtle and complex issues being decided in the case. Shifting the framework of discussion to inductive logic highlights the controversial, difficult aspects of the case:

- If the word “privacy” does not appear in the Constitution or Bill of Rights, how can there be a constitutionally protected “zone of privacy” that cannot be infringed?
• If the Connecticut law only applies to doctors and pharmacies, how can the State of Connecticut be said to be interfering with the private sex lives of married couples?

These are questions related to the description of evidence that cannot be answered with the kind of formal certainty required for a deductive argument to be valid. A court can consider the strength of evidence offered in support and against the use of these descriptions. When the Supreme Court made its ruling in the *Griswold* case, it created a new judicial precedent that extended beyond the scope of the judicial precedents offered for and against the ruling.\(^\text{12}\)

Most law students may remember having had exchanges something like this with their parents, or if they are parents, having had them with their children:

“It’s time for bed, please turn off the TV.”

“But the next show is my favorite and I already finished my homework.”

“You can record the show and watch it later, now it’s time for bed.”

“But I already finished my homework and no one else in my grade has to go to bed as early as I do on a school night.”

Parent turns off TV.

“Why do I have to go to bed now, I’m not even tired!”

“Because I said so.”

This exchange provides an example of informal reasoning with the parent using an “argument by authority” to cut off the discussion. The subject of informal reasoning extends from the arguments between parents and children to newspaper editorials and the President’s State of the Union Address. Unlike deductive and inductive logic, which have been studied continuously for over 2,000 years and form part of the bedrock of Western civilization, the study of informal logic as an academic discipline is only a few decades old. Informal logic attempts to provide criteria for distinguishing between good and bad forms of arguments that are actually used by real people in social contexts. While deductive logic begins with explicit assumptions in the form of premises, and inductive logic begins with evidence, informal logic calls attention to implicit assumptions that affect the strength or weakness of arguments. In other words, while a deductive argument may be either valid or invalid without any grey area in between, an informal argument may be better or worse without any absolute right and wrong.

Although the field is new and its boundaries are unclear, the Stanford Encyclopedia of Philosophy suggests that “informal logic” includes:

• an account of the principles of communication upon which reasoned argument depends;
• distinctions between appropriate and inappropriate moves in reasoned argument depending on the context;

\(^{12}\) A very helpful framework for assessing the strength or weakness of new judicial precedents based on the interpretation of older judicial precedent is a particular form of inductive logic that will be discussed in a later lecture: reasoning by analogy.
• an account of what it means to say that some claim is a logical consequence of another;
• general criteria for what constitutes a good argument in different contexts;
• distinctions between fallacious and sound use of arguments (such as appeal to authority or an
  ad hominem attack) that were once thought to be categorically fallacious;
• some theoretical account of fallacies in arguments generally;
• an account of the role that rhetorical notions such as audience (pathos) or character (ethos) play
  in assessing arguments.\textsuperscript{13}

2. Reasoning by Analogy

Reasoning by analogy has been recognized as a specific form of reasoning since the time of
Aristotle.\textsuperscript{14} It shares some features in common with deductive, inductive and informal reasoning but
cannot be reduced to any of those more general categories of reasoning. Reasoning by analogy is
pervasive within common law legal reasoning, and differs from reasoning by analogy in other contexts
because its ultimate objective is to justify an exercise of power by government that revolves disputes
rather than simply the pursuit of knowledge.\textsuperscript{15}

An analogy is a comparison between two different things that highlights those respects in which
those different things appear to be similar.\textsuperscript{16} The first point of the comparison is referred to as the
source, and the second is referred to as the target. An analogical argument may be represented
formally as:

1. SOURCE is similar to TARGET with regard to some characteristic named QUALITY ONE.

2. SOURCE has some other characteristic named QUALITY TWO.

3. Therefore, TARGET should also have the characteristic QUALITY TWO.

Analogical reasoning is a form of inductive reasoning because it is based on inferences drawn from facts.
It is not a form of deductive reasoning because it is always possible that, upon investigation, the target
will be discovered not to have the characteristic “Quality Two” after all.\textsuperscript{17}

The 1896 case of Adams v. New Jersey Steamboat is often used as an example of analogical
reasoning in law.\textsuperscript{18} The case involved a dispute between the passenger of a steamship and the carrier

\begin{thebibliography}{9}

\bibitem{Groarke} Groarke, Leo, “Informal Logic”, \textit{The Stanford Encyclopedia of Philosophy} (Spring 2013 Edition), Edward N.

\bibitem{Aristotle} “Clearly then to argue by example is neither like reasoning from part to whole, nor like reasoning from whole to
  part, but rather reasoning from part to part when both particulars are subordinate to the same term and one of
  them is known.” Aristotle, Prior Analytics 69a (McKeon ed., 1941).

\bibitem{stare decisis} The common law system of binding precedent known as \textit{stare decisis} is based on a particular form of analogical
  reasoning but is too complex to explain in a short introductory course such as this. The focus of the Legal
  Reasoning Toolkit online course is only to introduce students about to start law school to the basics of American
  common law legal reasoning, more advanced topics in legal reasoning such as \textit{stare decisis} are beyond the scope of
  this course.

\bibitem{deductive reasoning} With deductive reasoning, if the premises are true, then the conclusion must be true (e.g., Socrates is a man, all
  men are mortal, Socrates is mortal).

\end{thebibliography}
over the theft of the passenger’s property from a stateroom. While the journey was under way, the passenger left his stateroom after locking the window and door, but someone was still able to reach through the window and steal some of the passenger’s money. The carrier conceded that the passenger had not contributed to the loss through his own negligence. The parties also agreed that if a steamship is like a floating inn, and a steamship operator is like an innkeeper, then the carrier was liable to the passenger for the lost property, but if a steamship is like a railroad and the steamship operator like a railroad operator, then the carrier was not liable to the passenger. The court concluded that because the passenger had paid an extra fare for special accommodations, the correct analogy was to inns and innkeepers, and held the carrier liable for the stolen money. Using the formula presented above, this argument can be restated as:

1. Innkeepers that provide rooms to guests (SOURCE) are similar to steamship carriers that provide staterooms to guests (TARGET) by providing rooms (QUALITY ONE).

2. Innkeepers that provide rooms to guests (SOURCE) have a duty to safeguard their guests’ property (QUALITY TWO).

3. Therefore, steamship carriers that provide staterooms to guests (TARGET) have a duty to safeguard their guests’ property (QUALITY TWO).

By contrast, if the court had decided for the carrier instead of the guest, the argument might have looked something like this:

1. Railroads that provide overnight accommodations to guests (SOURCE) are similar to steamship carriers that provide staterooms to guests (TARGET) by providing overnight accommodations (QUALITY ONE).

2. Railroads that provide overnight accommodations to guests (SOURCE) do not have a duty to safeguard their guests’ property (QUALITY TWO).

3. Therefore, steamship carriers that provide overnight accommodations to guests (TARGET) do not have a duty to safeguard their guests’ property (QUALITY TWO).

With reasoning by analogy, either of the two opposing outcomes are possible as a matter of logic, and the conclusion with regard to which one is “correct” and which one is “not correct” depends on the relative persuasiveness of the two analogies. This is a very different logical process than deductive reasoning where a specific conclusion must inevitably follow from the premises in order to be valid, and the opposite conclusion would be invalid.

The analogies drawn between precedential cases and a dispute currently being decided by a judge may be narrow or broad. A narrow analogy focuses tightly on similar key facts, while a broad analogy focuses on similarities between key facts that may not be apparent until reference is made to an underlying “general principle” or “public policy” argument that will be discussed in Lesson 5. Broad

---

analyses can be used to extend existing precedent to cover novel, unique or unusual facts.\textsuperscript{19} For example, in the 19\textsuperscript{th} century, a broad analogy was drawn between pen and paper and the use of the telegraph. Unlike postal correspondence which could be written by only one person, the text of a telegraph could not be transmitted without the assistance of two different operators and an electrical communications network.

Given the number of different individuals involved in the transmission process and the message author’s lack of control over the transmission process, it was unclear whether a telegraph was analogous to a paper and pen written communication for “statute of frauds” purposes.\textsuperscript{20} When the original Statute of Frauds was enacted in England in 1677, the only technology available to meet the requirements of the statute were pen and paper. The statute of frauds is only a formal requirement: it blocks the enforcement of otherwise enforceable contracts if the party seeking enforcement does not have a writing signed by the party against whom enforcement is sought setting forth the material terms of the agreement. If messages sent by telegraph did not constitute a signed writing for statute of frauds purposes, then that would considerably reduce the value of the telegraph for business correspondence.

In 1869, a court in New Hampshire was the first American court to hold that a telegram could be used to meet the signed writing requirement of the statute of frauds:

So when a contract is made by telegraph, which must be in writing by the statute of frauds, if the parties authorize their agents either in writing or by parol,\textsuperscript{21} to make a proposition on one side and the other party accepts it through the telegraph, that constitutes a contract in writing under the statute of frauds; because each party authorizes his agents, the company or the company’s operator, to write for him; and it makes no difference whether that operator writes the offer or the acceptance in the presence of his principal and by his express direction, with a steel pen an inch long attached to an ordinary penholder, or whether his pen be a copper wire a thousand miles long. In either case the thought is communicated to the paper by the use of the finger resting upon the pen; nor does it make any difference that in one case common record ink is used, while in the other case a more subtle fluid, known as electricity, performs the same office.\textsuperscript{22}

The relevance of the factual analogy was determined with reference to the statute of frauds rule which requires that the complaining party be able to introduce a writing signed by the other party that contains the terms of the agreement in dispute:

<table>
<thead>
<tr>
<th>In writing</th>
<th>\textbf{SOURCE:} Pen &amp; Paper</th>
<th>\textbf{TARGET:} Telegraph</th>
</tr>
</thead>
<tbody>
<tr>
<td>\textbf{(QUALITY ONE)}</td>
<td>Words written on a piece of paper</td>
<td>1st telegraph operator reads and encodes message, then electrical transmission, then 2nd telegraph operator decodes and records message</td>
</tr>
</tbody>
</table>

\textsuperscript{19} David S. Romantz and Kathleen Elliott Vinson, Legal Analysis: The Fundamental Skill (2\textsuperscript{nd} ed. 2009) at 49.
\textsuperscript{20} See Lesson 7, Part 4 for a general explanation of the concept of a “statute of frauds.”
\textsuperscript{21} Editor’s note: “parol” is an archaic term for “oral.”
\textsuperscript{22} Howley v. Whipple, 48 N.H. 487 (1869).
The court in *Howley v. Whipple* had to make two different kinds of factual analogies before it could claim that the legal outcome in the source cases and the target case should be the same:

- **Narrow:** in both cases, the party against whom enforcement is sought manifested intent be bound by contract; and
- **Broad:** in both cases, that intent was expressed in a signed writing.

Using the formula presented above, the broad analogy drawn in the *Howley v. Whipple* case is:

1. Pen on paper as a writing method (**SOURCE**) is similar to the telegraph as a writing method (**TARGET**) in being examples of “signed writings” (**QUALITY ONE**)
2. A writing made with pen on paper (**SOURCE**) can be used as key fact to meet the “signed writing” element of the statute of frauds rule (**QUALITY TWO**).
3. Therefore, a writing made by telegraph (**TARGET**) can also be used as key fact to meet the “signed writing” element of the statute of frauds rule (**QUALITY TWO**).

Not all common law judges are as prescient as the New Hampshire Superior Court judge who wrote the *Howley v. Whipple* decision, however. In 1996, a court of appeals in Georgia opined in dicta that a fax could not meet a statute of frauds requirement:

> It may also be added that a facsimile transmission does not satisfy the statutory requirement that notice be “given in writing.” Such a transmission is an audio signal via a telephone line containing information from which a writing may be accurately duplicated, but the transmission of beeps and chirps along a telephone line is not a writing, as that term is customarily used.  

After it became an object of widespread ridicule as the opposite of what common law courts are expected to do when confronted with technological innovation, the opinion was later withdrawn.

In *Hubbert v. Dell Corp.*, the Illinois Court of Appeals drew an analogy between multipage written paper contracts and hyperlinks to the terms and conditions of an online contract:

> The blue hyperlink entitled “Terms and Conditions of Sale” appeared on numerous Web pages the plaintiffs completed in the ordering process. The blue hyperlinks for the “Terms and Conditions of

---

23 Department of Transportation v. Norris, 474 S.E.2d 216 (Ga. Ct. App. 1996), at 217 (applying a Georgia statute requiring that local governments receive notice of intent to sue by certified mail within one year of an injury to reject a claim submitted by fax on the last day before the statute of limitations had run).
Sale” also appeared on the defendant's marketing Web pages, copies of which the plaintiffs attached to their complaint. The blue hyperlinks on the defendant's Web pages, constituting the five-step process for ordering the computers, should be treated the same as a multipage written paper contract. The blue hyperlink simply takes a person to another page of the contract, similar to turning the page of a written paper contract.²⁴

Using the formula presented above, this argument can be restated as:

1. The presentation of terms of a multipage written paper contract (SOURCE) is similar to the presentation of terms of an Internet contract spread over several Web pages connected by blue hyperlinks (TARGET) as a way for one party to contract negotiations to communicate proposed terms to the other party to a proposed contract (QUALITY ONE).

2. If the other party manifests intent to be bound to them, then the terms of a multipage written paper contract (SOURCE) are enforceable (QUALITY TWO).

3. Therefore, if the other party manifests intent to be bound to them, all terms of an Internet contract spread over several Web pages connected by blue hyperlinks (TARGET) are also enforceable (QUALITY TWO).

Reasoning by analogy is one of the essential skills tested on issue spotter exams as well as in traditional legal research and writing by law students and attorneys. Here’s how the process of reasoning by analogy works for issue spotter exams:

1. Read the facts in the exam question carefully and form a working hypothesis about one rule element in dispute and key fact combination might be embedded in them.
2. Using the complete rule from which the rule element in dispute is drawn, refer to the cases in your class outline that include that rule in the legal analysis.
3. Find one case that has at least one obvious key fact in common with the current dispute. (In law school the decided case will be chosen from the cases included in the syllabus while in legal research, various different strategies are used to find similar cases from the universe of all case law).
4. Compare other qualities of the rule element in dispute and key facts of the decided case to the current dispute to see whether one of them can be used to construct a plausible solution to the current dispute.
5. If not, then discard that decided case and move on to the next one that has one obvious key fact in common with the current one.
6. Repeat this process as needed until a case that also has some other additional “relevant” qualities (i.e., related to the rule element in dispute and key facts in the working hypothesis about the exam facts) in common with the current dispute is found.
7. Make the outcome in the current dispute “match” the outcome in the decided case in terms of who wins and who loses.

8. If no decided cases with multiple relevant qualities in common with the exam fact pattern emerge from your course outline for the rule included in your working hypothesis, then you have proven that your working hypothesis is incorrect. You will need to start over from the very beginning with a new rule element in dispute/key fact working hypothesis that involves a different rule.

***

Lesson 3 Quiz ??

***

Part VI: Barnes v. Treece Case

Background Information on Punchboards:

“Punchboards” were an early kind of lottery game first used in the 18th century. Tavern owners would drill holes in a board, insert pieces of paper marked with different numbers or different game pieces, and then cover the holes with paper or foil. Customers would pay to punch out the hole and retrieve the number or game piece, and if it was designated as a winning number or piece, then the customer would win a prize. In the 19th century, punchboards were manufactured out of paper so that neither the merchant nor the customer could tell which holes would win. As with modern lottery tickets or gambling casinos, the odds of winning are calculated to insure a profit for the house. Below is a picture of a paper “punch board” that has 1,000 “punches” that sell for 5¢ each. The tavern owner might buy a punch board for $5 and let customers pay 5¢ for each “punch” producing revenues of $50. If all the prizes the bar owner was required to pay out for all the punches on the punch board totaled $40, then by the time all the punches had been sold, the bar owner would make a profit of $5 on the board. If the board was “crooked” then it would have fewer prizes and more profits for the bar owner. In the 20th century, punchboards were very popular until after World War II when they were eventually eclipsed by lottery tickets as a form of gambling. In the 20th century, many states outlawed the use of punchboards because cheating was so widespread.

***

Vernon Barnes v. Warren Treece


May 10, 1976

Callow, J.25 The plaintiffs Barnes appeal, and the defendant Warren Treece cross-appeals, from a judgment entered in plaintiffs’ breach of contract action against Treece and the defendant Vend-A-Win, Inc...We affirm the trial court’s holding that Treece was personally liable on a valid, enforceable contract...

---

25 Judge Callow’s first name was Keith. The letter “J” that appears after a judge’s surname in older opinions indicates his or her status as a judge, it is not an abbreviation for a first name beginning with the letter J.
Vend-A-Win is a Washington corporation engaged primarily in the business of distributing punchboards. Warren Treece served as vice-president, was a member of the board of directors, and owned 50 percent of the stock of Vend-A-Win. On July 24, 1973, Treece spoke before the Washington State Gambling Commission in support of punchboard legitimacy and Vend-A-Win's particular application for a temporary license to distribute punchboards. During the testimony, as stated by the trial judge, Treece made a statement to the following effect:

I'll put a hundred thousand dollars to anyone to find a crooked board. If they find it, I'll pay it.

The statement brought laughter from the audience.

The next morning, July 25, 1973, the plaintiff Barnes was watching a television news report of the proceedings before the gambling commission and heard Treece's previous statement that $100,000 would be paid to anyone who could produce a crooked punchboard. Barnes also read a newspaper report of the hearings that quoted Treece's statement. A number of years earlier, while employed as a bartender, Barnes had purchased two fraudulent punchboards. After learning of Treece's statement, Barnes searched for and located his two punchboards. On July 26, 1973, Barnes telephoned Treece, announced that he had two crooked punchboards, and asked Treece if his earlier statement had been made seriously. Treece assured Barnes that the statement had been made seriously, advised Barnes that the statement was firm, and further informed Barnes that the $100,000 was safely being held in escrow. Treece also specifically directed Barnes to bring the punchboard to the Seattle office of Vend-A-Win for inspection.

On July 28, 1973, Barnes traveled to Seattle, met Treece and Vend-A-Win's secretary-treasurer in Vend-A-Win's offices, produced one punchboard, and received a receipt for presentation of the board written on Vend-A-Win stationery, signed by Treece and witnessed by Vend-A-Win's secretary-treasurer. Barnes was informed that the punchboard would be taken to Chicago for inspection. The parties next met on August 3, 1973, before the Washington State Gambling Commission. Barnes produced his second punchboard during the meeting before the commission.

Both Treece and Vend-A-Win refused to pay Barnes $100,000. Barnes then initiated this breach of contract action against both defendants. The trial court found that the two punchboards were rigged and dishonest, that Treece's statements before the gambling commission and reiterated to Barnes personally on the telephone constituted a valid offer for a unilateral contract, and that Barnes' production of two dishonest punchboards constituted an acceptance of the offer. The trial court also found that Vend-A-Win had not [authorized Treece to make the offer] and therefore was not liable on the contract.

The following questions are presented on appeal: (1) Did Barnes and Treece mutually manifest assent to an agreement that formed an enforceable contract...?
When expressions are intended as a joke and are understood or would be understood by a reasonable person as being so intended, they cannot be construed as an offer and accepted to form a contract. However, if the jest is not apparent and a reasonable hearer would believe that an offer was being made, then the speaker risks the formation of a contract which was not intended. It is the objective manifestations of the offeror that count and not secret, unexpressed intentions. 1 A. Corbin, Corbin on Contracts § 34 (1963); 1 S. Williston, A Treatise on the Law of Contracts § 21, at 43 (3d ed. 1957). As stated in Wesco Realty, Inc. v. Drewry, 9 Wn. App. 734, 735, 515 P.2d 513 (1973):

If a party's words or acts, judged by a reasonable standard, manifest an intention to agree in regard to the matter in question, that agreement is established, and it is immaterial what may be the real but unexpressed state of the party's mind on the subject.


The trial court found that there was an objective manifestation of mutual assent to form a contract. This was a matter to be evaluated by the trier of fact. In re Estate of Richardson, 11 Wn. App. 758, 525 P.2d 816 (1974). The record includes substantial evidence of the required mutual assent to support the finding of the trial court. Although the original statement of Treece drew laughter from the audience, the subsequent statements, conduct, and the circumstances show an intent to lead any hearer to believe the statements were made seriously. There was testimony, though contradicted, that Treece specifically restated the offer over the telephone in response to an inquiry concerning whether the offer was serious. Treece, when given the opportunity to state that an offer was not intended, not only reaffirmed the offer but also asserted that $100,000 had been placed in escrow and directed Barnes to bring the punchboard to Seattle for inspection. The parties met, Barnes was given a receipt for the board, and he was told that the board would be taken to Chicago for inspection. In present day society it is known that gambling generates a great deal of income and that large sums are spent on its advertising and promotion. In that prevailing atmosphere, it was a credible statement that $100,000 would be paid to promote punchboards. The statements of the defendant and the surrounding circumstances reflect an objective manifestation of a contractual intent by Treece and support the finding of the trial court.

The trial court properly categorized Treece's promise of $100,000 as a valid offer [to form a contract. The offer made promised that a contract would result upon performance of the act requested. Performance of the act with the intent to accept the offer constituted acceptance. The trial judge entered a specific finding that Barnes performed the requested act of acceptance when he produced a rigged and fraudulent punchboard. We concur with the trial court's holding that a binding...contract was formed between Barnes and Treece and uphold the conclusions of the trial court in that regard.

Treece also contends that an oral contract would be unenforceable [but the trial court correctly rejected this argument].

In addition, Treece asserts that the contract is unenforceable due to an unconscionable discrepancy in consideration [but the trial court correctly rejected this argument].

The last question presented is whether Vend-A-Win is also liable on the contract [and the trial court correctly rejected this argument].
The judgment is affirmed. James and Andersen, JJ., concur.

***

Case Brief Format

- Title and citation of the case [Names of parties, short citation]
- Facts [Key Facts Only]
- Issue [WHETHER + Rule Element in Dispute + WHEN + Fact]
- Holding [Yes/Maybe/No]
- Rule [in your own words]
- Rationale [Persuade you of the correctness of the result]

***

Strategies for briefing this case will be discussed in the video lecture. The case brief will follow the following format:

Title & Citation:

Facts:

Issue:

Holding: [Yes/No]

Rule:

Analysis/Rationale:

Part VII: Apply the Holding in *Barnes v. Treece* to New Facts

Here is a short issue spotter exam question designed to raise more or less the same issue as in the *Barnes v. Treece* case. If the issue in Barnes is thought of as simply whether or not Barnes was “justified” in thinking that Treece made a real offer to pay $100,000 for a crooked punchboard, then the rule element in dispute is the third element of Restatement (Second) of Contracts § 24. The issue of whether or not a person who appears to have made a really bad deal was actually only joking and so not bound can also be described as whether or not Treece was joking when he said he’d pay $100,000 for a crooked punchboard.

The outcome in terms of who wins and loses the dispute is the same whether the rule element in dispute is described as “was the other person justified in thinking this was an offer” or “was the speaker joking and so not making an offer.” This is an example of how the legal rule is not identical to the words used to express it; the legal rule may sometimes be understood as the meaning underlying the words, which in this example is the same with both versions of the rule.

If we treat the rule element in dispute in the Barnes case as being something like “a joke cannot be an offer to form a contract,” then we can practice using the holding in the Barnes case as the rule of
law to be applied in the practice exam question below rather than the Restatement (Second) of Contracts § 24 as the rule as we have done in Lessons 1 and 2. This will permit us to think about how judicial precedent is a kind of reasoning by analogy. In order to analyze the Oswald and Brianna problem below, you will have to decide whether or not an analogy can be drawn to the Barnes case.

Analogy can be drawn

1. Treece’s offer to give Barnes something of great value ($100,000) in exchange for something of small value (crooked punch board) (SOURCE) is similar to Oswald’s offer to give Brianna something of great value (horse) in exchange for something of small value ($10) (TARGET) with regard to manifesting intent to be bound to a contract (QUALITY ONE).

2. Treece’s offer to give Barnes something of great value ($100,000) in exchange for something of small value (crooked punch board) (SOURCE) was not a joke (QUALITY TWO).

3. Therefore, Oswald’s offer to give Brianna something of great value (horse) in exchange for something of small value ($10) (TARGET) was not a joke (QUALITY TWO).

Analogy cannot be drawn

4. Treece’s *BUSINESS* offer to give Barnes something of great value ($100,000) in exchange for something of small value (crooked punch board) (SOURCE) is *NOT* similar to Oswald’s *SOCIAL* offer to give Brianna something of great value (horse) in exchange for something of small value ($10) (TARGET) with regard to manifesting intent to be bound to a contract (QUALITY ONE).

1. Treece’s offer to give Barnes something of great value ($100,000) in exchange for something of small value (crooked punch board) (SOURCE) was a valid offer (QUALITY TWO).

2. Therefore, Oswald’s offer to give Brianna something of great value (horse) in exchange for something of small value ($10) (TARGET) was *NOT* a valid offer (QUALITY TWO).

***

Practice Exam Question

Oswald Ortega and Brianna Baker were both horse owners and members of the same hunt club as well as old friends. One spring, after a long, hard ride organized by the hunt club, Oswald felt disgusted with the performance of his horse and announced loudly several times that he would sell it for $10 to anyone who wanted it. Oswald and Brianna both knew that Oswald had purchased his horse 5 years ago when it was 3 years old for $25,000; that the average life span for a horse like this is 28 years and that under normal conditions, it could continue to participate in hunts for at least another 10 years if not longer; and that up until this ride, Oswald had been very happy with it. Brianna said that she could pay Oswald the $10 after they got back to the hunt club because her wallet was locked up inside her locker in the women’s changing room. Oswald said “Fine!” and helped Brianna load his horse into her horse trailer (which just happened to be a 2 horse trailer) along with her own horse. After all the riders had returned to the hunt club and had a drink, Brianna got $10 out of her wallet and tried to hand it to Oswald. Oswald laughed, refused to take the money, said “Don’t be silly” and asked Brianna if she’d help move...
his horse from her trailer to his so he could go home. Is Brianna entitled to keep the horse? Why or why not?

***

Strategies for answering this issue spotter question will be discussed in the video lecture for this course. Before you listen to the video, you should try to write your own answer in IRAC form:

[Issue] UNDER [source of rule] DOES [question derived from rule element in dispute] WHEN [rule element in dispute plus key facts]

[Rule] In your own words, don’t include any facts from the question

[Apply]

ON THE ONE HAND, [rule element in dispute] BECAUSE [key facts/analogies]

ON THE OTHER HAND, [rule element in dispute] BECAUSE [key facts/analogies]

[Conclusion] select one:

Yes, Brianna is entitled to keep the horse...

[Maybe yes or Maybe or Maybe no], Brianna is/is not entitled to keep the horse...

No, Brianna is not entitled to keep the horse...

Part VI: Conclusion

1. Recap Lesson 3

- Facts can be thought of as the data that is processed by algorithms in the form of rules; they can be divided into key facts that change the outcome of a dispute, background facts that help a reader to understand the context of the dispute and spin facts that color the reader’s perception of a dispute but are technically not relevant

- The distinction between subjective and objective intent is recognized in all fields of law; in contract law the objective standard of proof of intent is applied when deciding whether or not one of the parties really intended to form a contract or was merely joking

- The learning objectives in Lesson 1 can be used to analyze how issue spotter exam answers might be scored by an instructor in law school

- Because American legal education lacks standards for how issue spotter exam answers should be scored, there is generally no way to know how an instructor will grade exams without actually taking a class from that instructor

- Information about how an instructor will grade issue spotter exams is generally sent over the second, implicit channel of communication during Socratic Method class discussion

- Reasoning by analogy is pervasive in legal reasoning and is one of the key skills tested on issue spotter exams. It involves noticing that a decided case and the current dispute share one quality
in common, so they might also share a second quality in common, a conclusion that can then be used to resolve the current dispute

- The idea that a legal rule is not identical to the words used in the authoritative version of it but is embedded in the meaning of the words helps to explain why the practice exam problem can be solved correctly using either the third element of Restatement (Second) of Contracts § 24 or the holding of a case that says a joke cannot be an offer to form a contract

2. Preview of Lesson 4

- After a rule element in dispute is applied to a key fact, a legal outcome is produced. Lesson 4 discusses legal outcomes and judgments.
- The meaning of the aphorism, “Law is predicting what a court will do” will be explored.
- The kind of information is being communicated explicitly and implicitly during Socratic Method class discussion is explored using a hypothetical dialogue between an instructor, a “telepathic” law student who can guess everything the instructor is thinking, and an ordinary law student who cannot.
- Practice briefing a new case, and answering a new exam question

Part VII. Lesson 4: Case Brief and Exam Question Preview

BEFORE YOU BEGIN LESSON 4, please read the following case and do your best to brief it using the format explained in Lesson 2 (which now includes “rule” in the case brief). The issue spotter exam answer that we will discuss in Lesson 4 follows the case. Feel free to try organizing your own IRAC-style answer to the exam question before you start Lesson 4.

***

Chia T. Chang, et al. v. First Colonial Savings Bank

Supreme Court of Virginia, 242 Va. 388 (1991)

The primary issue that we consider in this appeal is whether a newspaper advertisement constitutes an offer which, when accepted, creates a legally enforceable contract.

The litigants stipulated the relevant facts. Chia T. Chang and Shin S. Chang, who resided in the Richmond area, read the following advertisement which appeared in local newspapers on November 18, 1985. The advertisement states in part:

**You Win 2 ways**

**WITH FIRST COLONIAL'S**

**Savings Certificates**

1 Great Gifts
2 & High Interest
Savings at First Colonial is a very rewarding experience. In appreciation for your business we have Great Gifts for you to enjoy NOW -- and when your investment matures you get your entire principal back PLUS GREAT INTEREST.

Plan B: 3 1/2 Year Investment

Deposit $14,000 and receive two gifts:

a Remington Shotgun and GE CB Radio, OR an RCA 20” Color-Trac TV,

and $20,136.12 upon maturity in 3 1/2 years.

...Substantial penalty for early withdrawal.

Allow 4-6 weeks for delivery.

Wholesale cost of gifts must be reported on IRS Form 1099.

Rates shown are . . . 8 3/4% for Plan B.

All gifts are fully warranted by manufacturer.

DEPOSITS INSURED TO 100,000 by FSLIC.

Interest can be received monthly by check.

Relying upon this advertisement, the Changs deposited $14,000 with First Colonial Savings Bank on January 3, 1986. They received a color television that day from First Colonial and expected to receive the sum of $20,136.12 upon maturity of the deposit in three and one-half years. First Colonial also gave the Changs a certificate of deposit when they made their deposit.

When the Changs returned to liquidate the certificate of deposit upon its maturity, they were informed that the advertisement contained a typographical error and that they should have deposited $15,000 in order to receive the sum of $20,136.12 upon maturity of the certificate of deposit.

First Colonial did not inform the Changs nor were the Changs made aware that the advertisement contained an error until after the certificate of deposit had matured. First Colonial, however, did display in its lobby pamphlets which contained the correct figures when the Changs made their deposit.

The Changs instituted this proceeding in the general district court seeking to recover $1,312.19, the difference between the $20,136.12 amount in the advertisement and $18,823.93, the amount that First Colonial actually paid to the Changs. The general district court awarded a judgment in favor of the Changs, and First Colonial appealed that judgment to the circuit court. The circuit court held that the advertisement did not constitute an offer but was an invitation to bargain or negotiate and entered a judgment in favor of First Colonial. We awarded the Changs an appeal.

The Changs argue that when members of the public reasonably rely upon a bank advertisement which offers a specific gift and dollar amount upon maturity in return for a deposit of a sum certain, and the bank fails to notify those who made deposits of an error in the advertisement until the certificate of deposit matures, then the specific term of the advertisement constitutes an offer which, when accepted, is a binding and enforceable contract. First Colonial argues, however, that the advertisement did not
constitute an offer but rather was an invitation to make an offer because the advertisement was directed to the general public and required no performance on the part of the parties to whom it was directed.

The general rule followed in most states, and which we adopt, is that newspaper advertisements are not offers, but merely invitations to bargain. Restatement (Second) of Contracts § 26, pp. 75-76 (1981); 1 Corbin on Contracts § 25, pp. 74-75 (1950). However, there is a very narrow and limited exception to this rule. "[W]here the offer is clear, definite, and explicit, and leaves nothing open for negotiation, it constitutes an offer, acceptance of which will complete the contract." Lefkowitz v. Great Minneapolis Surplus Store, Inc., 251 Minn. 188, 191, 86 N.W.2d 689, 691 (1957). See also Izadi v. Machado (Gus) Ford, Inc., 550 So.2d 1135, 1139 (Fla. Dist. Ct. App. 1989); Osage Homestead, Inc. v. Sutphin, 657 S.W.2d 346, 351-52 (Mo. App. 1983); R.E. Crummer & Co. v. Nuveen, 147 F.2d 3, 5 (7th Cir. 1945); Oliver v. Henley, 21 S.W.2d 576, 578-79 (Tex. Civ. App. 1929). As Professor Williston observed:

In any event there can be no doubt that a positive offer may be made even by an advertisement or general notice. . . . The only general test which can be submitted as a guide is an inquiry whether the facts show that some performance was promised in positive terms in return for something requested.

1 Williston on Contracts § 27, p. 65 (3d ed. 1957).

Applying these principles to the facts before us, we hold that the advertisement constituted an offer which was accepted when the Changs deposited their $14,000 with the Bank for a period of three and one-half years. A plain reading of the advertisement demonstrates that First Colonial's offer of the television and $20,136.12 upon maturity in three and one-half years was clear, definite, and explicit and left nothing open for negotiation...

Even though the Bank's advertisement upon which the Changs relied may have contained a mistake caused by a typographical error, under the unique facts and circumstances of this case, the error does not invalidate the offer. First Colonial did not inform the Changs of this typographical error until after it had the use of the Changs' $14,000 for three and one-half years...

An offer, which is usually but not always a promise, is a manifestation of a willingness to enter into a bargain. Restatement (Second) of Contracts § 24, pp. 71-72. The offer identifies the bargained for exchange, Id., Comment b, and creates a power of acceptance in the offeree. Id. § 29(1). See Richmond Eng. Corp. v. Loth, 135 Va. 110, 153, 115 S.E. 774, 786 (1923).

It is true that an offer that is not supported by consideration may be withdrawn any time before it is accepted. J. B. Colt Co. v. Elam, 138 Va. 124, 128-29, 120 S.E. 857, 858 (1924); Crews v. Sullivan, 133 Va. 478, 483-84, 113 S.E. 865, 867 (1922). However, First Colonial was required to communicate the withdrawal of the offer to the Changs before they accepted it. As we have noted, First Colonial did not inform the Changs that the offer had been withdrawn or that the advertisement purportedly contained a typographical error until the Bank had used their $14,000 for three and one-half years.
We also reject First Colonial’s argument that the advertisement did not create a contract because there was no meeting of the minds. As we stated in Gibney & Co. v. Arlington B. Co., 112 Va. 117, 70 S.E. 485 (1911):

The offerer has a right to prescribe in his offer any conditions as to time, place, quantity, mode of acceptance, or other matters, which it may please him to insert in and make a part thereof, and the acceptance to conclude the agreement must in every respect meet and correspond with the offer, neither falling within or going beyond the terms proposed, but exactly meeting them at all points and closing with these just as they stand.

Id. at 120-21, 70 S.E. at 487 (citation omitted). When the Changs tendered their $14,000 to First Colonial for three and one-half years, they complied with all of the conditions in First Colonial’s offer. Hence, there was a meeting of the minds and an enforceable contract.

Accordingly, we will reverse the judgment of the circuit court and enter final judgment here in favor of the Changs for $1,312.19 plus interest.

Reversed and final judgment.

***

Case Brief Format

- Title and citation of the case [Names of parties, short citation]
- Facts [Key Facts Only]
- Issue [WHETHER + Rule Element in Dispute + WHEN + Fact]
- Holding [Yes/Maybe/No]
- Rule [in your own words]
- Rationale [Persuade you of the correctness of the result]

***

Practice Exam Question

Mabel Murray was thinking of selling her house in Midville. Her cousin Daphne Darrow was a real estate agent in Midville. On September 1, Daphne discussed with Mabel the price she might receive if she sold her house. Daphne shared with Mabel information about recent sales of “comparable” homes and discussed current market conditions. At the end of the conversation, Mabel said, “If I decide to sell my house, I will let you be the listing agent so you can get the commission.” Daphne left with Mabel a copy of the standard National Association of Real Estate Professionals Listing Agreement so Mabel could review the terms. On October 1, Mabel offered her home for sale on Buyer-Seller-Net.com, a website that permits homeowners to sell their homes without the assistance of a real estate broker. Mabel sold her home one month later for $100,000 to a buyer who learned about the sale of the house on Buyer-Seller-Net.com. If Daphne later demands that Mabel pay her the standard listing agent commission of 6% (i.e., $6,000) from the proceeds of the sale of the house, can Mabel refuse? Why or why not?
Please try to apply the holding of the Chang case to these facts and write your answer in this form:

[Issue] UNDER [source of rule] DOES [question derived from rule element in dispute] WHEN [rule element in dispute plus key facts]

[Rule] In your own words, don’t include any facts from the question

[Apply]

ON THE ONE HAND, [rule element in dispute] BECAUSE [key facts/analogies]

ON THE OTHER HAND, [rule element in dispute] BECAUSE [key facts/analogies]

[Conclusion] select one:

Yes, Mabel can refuse...

[Maybe yes or Maybe or Maybe no], Mabel can/cannot refuse...

No, Mabel cannot refuse...