

Section One

The case for something amiss in Emperor Law School that can be taken advantage of

Doubtless, most in a law school community -- deans, professors, students -- would strongly dispute that their law school, or any law school for that matter, can be gamed or taken advantage of. They would aver that law school is hard. However, confronted with the universal circumstance of mediocre exam responses on the part of smart, diligent students (even at YHS), they would also concede a belief that the special, innate, intangible ability beyond hard work and intelligence that has been described -- The Right Stuff --, is required to exhibit mastery, even to score 55, 65, 75 points out of a possible 100 on law essay exams!

At the same time, most any practicing attorney would likely acknowledge that had she known in law school what she knows after practicing law for several years, her fortunes in law school -- her performance on exams -- would have benefited greatly. What, then, is learned *after* law school that would have made a difference during law school? Could the answer be learning, finally, how to think and function as a lawyer?

Many may find it difficult to accept that an institution as respected as a law school could be so faulty in the mission of training attorneys and “lawyerlike thinking” as to be capable of being gamed. Therefore, Section One of this book sets forth chapters presenting evidence that something is indeed seriously amiss with law school teaching, and universally in Emperor Law School. It is correction of grievous problems and omissions in law school teaching that makes taking advantage of Emperor Law School not only possible, but rather easy.

The job of a lawyer and your author

Few law students hear this, not during their entire time in law school, certainly not from professors, but the job of a lawyer, plain and simple, is to build a persuasive “case” or argument to achieve a client objective. It is also to assist the client in precisely defining an appropriate and achievable objective. The objective will be one of the countless goals clients seek legal assistance to achieve -- avoid jailtime on a simple DUI (driving under the influence) or more serious charge; purchase a house, a business, etc. free of legal encumbrance; draft a will; set up a trust; protect a patent or copyright; thwart a hostile corporate takeover; comply with or avoid a government regulation; execute a billion dollar merger; etc.

The lawyer will seek to achieve the client objective by marshalling relevant law and facts to persuade -- a judge, jury, regulatory body, municipality, the opposition, be it person, corporation, state, nation, or other -- that the client is entitled to the objective.

As a one-time practicing attorney, in writing this book I tend to view law students, especially persons about to enter law school, or contemplating going to law school (“prelaws”), as clients. As it has been for each and every one of my well over 100,000 students over the past three decades, my objective, which I feel should be the objective of my clients, is to take advantage of characteristic, systemic shortcomings in law school instruction, in order to do well. Simply put, it is not just to make rare “A” grades possible, but probable.

The serious charge against law schools

The charge that law schools -- all of them! -- are so amiss in their presumed mission of preparing future lawyers, as to be capable of being gamed, and rather easily, is a serious one. It will doubtless be greeted by extreme skepticism, derision, very likely anger by many in the legal establishment, in particular law school professors and administrators.

All, including prelaws and their parents, will correctly judge what is contained herein to be not merely a

critique, but an assault on law schools as presently constituted and conducted. Absent ample evidence in support, this book, and the charge against Emperor Law School, can and should be disregarded.

Although critics will be law professors and law school administrators (probably not all), and perhaps some, but probably very few practicing lawyers and judges, surprisingly, many will likely be current law students. The latter suspect that something is amiss with law school instruction. However, they will be highly skeptical of a book that posits that what is amiss may be taken advantage of, and that, in effect, a solution to the problem exists. They will also want to defend the institution in which they have invested so much time, money, and effort, which institution's reputation will be a component of their future standing in the legal profession.

However, the primary judge of this book, the only judge who matters so far as I am concerned, will be you, the reader, the person I have proposed to be my client. In order to achieve the objective I have defined -- make rare "A" grades in law school not just possible, but probable --, I have to persuade first, that serious problems with law school instruction exist; second, that an alternative, a solution to those problems exists that will enable you to take advantage, so as to achieve the objective.

This is not an easy task. I am, at first blush, merely an individual writing yet another how-to-succeed-in-law-school book, albeit someone with reasonable credentials, who has been attuned to the problem of succeeding in law school for over 30 years. Whereas, Emperor Law School is a revered, major higher education edifice on the American landscape. This is, therefore, upon first impression, very much a David and Goliath situation. However, we shall see, and quickly, that David has large and persuasive stones in his sling.

Making the case

Herewith, then, I proceed to make my case, primarily to you, the curious, perhaps skeptical, hopefully hopeful reader, but also to any others who may be interested.

I shall first present, in several chapters, broad strokes of evidence I believe to be persuasive that serious, systemic shortcomings in instruction exist in all American law schools -- no exceptions!

The list of shortcomings is surprisingly long. It is (1) a suspicious overemphasis on first year grades, even first term grades; (2) universal mediocre exam results, despite the stellar qualifications and diligence of most law students; (3) a prevalent disconnect between classroom instruction and requirements of and performance on exams; (4) lack of correlation between law practice experience of professors and exam results; (5) failure to adequately instruct "lawyerlike analysis"; (6) problems with conventional case "briefing"; (7) problems with "case method" and Socratic instruction; (8) wholly inadequate preparation for the hypothetical-type law essay exam; and more!

In subsequent chapters particulars of the foregoing shortcomings will be explored and fleshed out. I shall offer explanations for why they exist that have not, to my knowledge, ever before been broached and discussed. Simultaneously, initially by implication, later in more precise detail, I shall outline and describe alternatives. I shall describe solutions to the problems with law school instruction that enable taking advantage and achieving the objective of "A" grades.

Perspective going forward

The legal profession, including Emperor Law School, is conservative and slow to change. Probably it should be. Little in Emperor Law School has changed in the past 30 years.¹ The same instructional failings persist across the board. Meanwhile, LEEWS, the precise science of law essay exam writing and preparation I have developed, has become more and more polished, refined, effective.

LEEWS was revolutionary and highly effective when it made its debut in 1981. However, over 30 years of individual interaction with thousands of students, from all law schools, does not count for naught. I have learned from the successes, stumbles, and individual stories of innumerable students.

From tiny Faulkner University, Thomas Goode Jones School of Law in Montgomery, Alabama (150 students), to reincarnated Florida Agricultural and Mechanical (A & M) University (FAMU) College of Law in Orlando,² to internet-based Concord, British American, and Abraham Lincoln Law Schools, to newly minted Charleston (SC), Charlotte (NC), and University of California, Irvine, Schools of Law, to the flagship schools of all the states, to the traditional prestige law schools -- YHS, Chicago, Columbia, NYU, Boalt Hall, U. Penn, Georgetown, Michigan, Northwestern, UVA, Cornell, Duke, and the like --, students have educated me about their schools, classes, exams. They have educated me about their professors.

It is impossible that anyone could have a more comprehensive, ear-to-the-ground perspective on both the great scope and the intimate particulars of Emperor Law School than your author. Quite simply, I've heard it all, observed it all, thought about it all, many times and over and over during more than three decades. (Yes, I have definitely obsessed about the subject.) What follows draws upon over three decades of perspective, knowledge, experience, observing, thinking, re-thinking, obsession.

I submit that each chapter of evidence that follows, standing alone, is adequate proof of the charge of something being amiss in Emperor Law School. Taken together, they constitute overwhelming proof.

Indeed, the conclusion is inescapable that unless significant change is made in the manner in which students are prepared (or not prepared) for the legal profession, Emperor Law School can continue to be taken advantage of -- gamed! --, and rather easily. Moreover, the existence of law schools in present form, especially given the enormous debt burden placed upon future lawyers -- currently \$100,000 per student, on top of previously accumulated education debt! (subsidizing lavish pay to law professors and law school administrators) --, must seriously be questioned.

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1. The only change of note in Emperor Law School in the last 30 years has been the addition of computers in classrooms and as a research tool. Law Schools spent significant sums in the past decade to wire classrooms to be internet accessible. However, as more and more students have been found to be engaged in playing solitaire, surfing the net, and doing other than attend to classroom discussion, more and more professors are banning computers from their classrooms.

2. It is of note that FAMU School of Law, similar to FAMU as a whole, based in Tallahassee, was until 1969 a state-supported, exclusively African-American institution in the mold of segregated educational institutions throughout the southern states. (And some northern states! E.g., Cheney and Lincoln Universities in Pennsylvania.) It was also located in Tallahassee, capital of Florida and the home of then all-white Florida State University (FSU). FSU opened a law school in the mid 1960's. FAMU Law School, despite protests of its many graduates, despite having been in existence several decades, was forced to shut its doors in 1969. FAMU School of Law was re-opened in 2001 in Orlando, Florida, and accredited in 2004. The student populations of both FAMU and FSU Schools of Law are, of course, now multi racial. Your author notes that he attended segregated Tallahassee schools as a third grader when his father was registrar for a year at FAMU.

Section One, Chapter 1

The importance accorded first year grades as evidence of something amiss

Importance of grades in Emperor Law School

Early fall is prime job interviewing season throughout Emperor Law School. New law students (1Ls) will be impressed at the sight of upperclassmen (2 and 3Ls), clad in suits, bustling along hallways and sitting nervously outside classrooms and offices. Interviews for summer and post-graduate employment are being conducted by representatives of law firms, government and public interest institutions, corporate legal departments.

Owing to leverage their placement offices can exercise, 1Ls at the most prestigious law schools can participate in the interviewing process. However, rare is the 1L who secures a law-related job in the summer following first year via this process. No matter their stellar credentials prior to entering law school, excepting YHS and a select few other schools where an early relationship is valued, in the view of hiring entities 1Ls are as yet unproven quantities.

Respecting getting admitted to law school, in addition to college/grad school grades and score on the Law School Admission/apptitude Test (LSAT), activities, offices held, volunteer work, athletics, and an essay explaining why one wants to be a lawyer count. (Respecting the latter, don't mention money!) However, once admitted to law school, don't think for an instant that such items on a resume are of more than passing interest to a law firm hiring partner. Nor is being elected section or class representative, or presidency of the SBA (student bar association).

Law school is a professional school. Integrity should count. Concern for the client should count. And they do, but not during the hiring process. Grades will be the primary currency. They are considered the key indicator of aptitude for success in the profession. (Also, would the interviewer want to encounter you at the water cooler. Pretend you like sports. Steer away from politics and religion.)

Indeed, should both apply for the same public interest legal position, the student who volunteers in the community, whose life bespeaks ambition to use the law for the betterment of mankind, will usually lose out to the classmate who never extended a hand to anyone, but has higher grades. Every law firm, every judge, every client wants to harness the most able legal talent.

Importance of first year grades

Grades are considered the universal, paramount predictor of legal ability, both in Emperor Law School and, until actual performance as a lawyer can be judged, the profession. Not just grades, but, curiously, grades right out of the chute -- in first year.

First year grades will largely determine success in job interviews at the beginning of second year, who makes Law Review, a key stepping stone to future career opportunities (see following), who wins prestigious judicial clerkships.

Securing a job following graduation is greatly assisted by having a job offer in hand from the firm one worked for the summer following second year. Securing that job following second year, as noted, is largely dependent upon first year grades.

Law Review

Membership on Law Review, the prestigious flagship publication of every law school, staffed and edited by

students, is normally offered only to those in the top 10-15 percent of the first year class, as determined by grades.¹ Readers may recall much being made of President Barack Obama's election to the presidency of the prestigious Harvard Law Review. Most members of the Supreme Court were members of Law Review in law school, as were most law professors.

The application process for prestigious judicial clerkships following graduation normally begins second term of second year. Such clerkships are a must for any student harboring aspirations of becoming a law professor. They weigh heavily in enhancing future job prospects. And they are normally extended only to members of Law Review.

YHS exception to first year grade emphasis suggests awareness of a problem.

There is a notable exception in Emperor Law School to the curious circumstance of future professional worth being measured mere months after entering an institution that supposedly prepares one for the profession. This exception suggests that some in Emperor Law School recognize the contradiction, possibly even an indictment of law schools, represented in the disproportionate weight given to early grades.

As long ago as fall of 1969, when your author entered that institution, *U.S. News* number one ranked Yale Law School de-emphasized first year grades by making first term strictly Pass/Fail. Moreover, grade categories following first term were broadened from the normal A - F to Honors, High Pass, Low Pass, Fail. The bulk of students were to receive a High Pass, indicating respectable competency in the subject. Distinction would be recognized with Honors. Anyone receiving a "Low Pass," Well, here is where a clever student marshalls clever excuses.

Yale also opened membership to its prestigious Law Review (called "Law Journal") to anyone writing a publish-worthy article or "note," the latter being a scholarly analysis of and reflection on a legal case. First year grades were no longer a factor.

Nearly forty years later, in 2008, Harvard and Stanford Law Schools, perennially a close second and third to Yale (indistinguishable really) in the *U.S. News* rankings, followed Yale's lead in moving to a broader (more forgiving?) grading system than A - F. First year grades in particular would largely, although not quite so strictly as at Yale, be Pass/Fail.²

Those 1Ls at Harvard or Stanford with a class prize or more than one honors grade, are, of course, anointed early on as "geniuses of the law." They will have choice job opportunities the following year. They will clerk for judges on the highest courts.³

A contradiction inherent in the emphasis given first year grades

The moves to (somewhat) de-emphasize first year grades by leading lights in Emperor Law School appear to give cognizance to the obvious contradiction, even indictment of Emperor Law School, implicit in the notion that future worth as a lawyer, indeed "genius for the law" can be recognized shortly after entering law school. (Indeed, after but a few short months of instruction in the profession.)

To wit (popular expression in the law meaning in particular or point of emphasis), if aptitude for the lawyering art is something that manifests itself a single term into law school, and therefore is innate, something one is born with, something one either has or does not, rather than something that can be taught and nurtured over time, then what is the purpose of the second and third years of law school?!

Why not conduct a semester of law school, identify aptitude early on via exams (basically, what is currently done), then usher students into appropriate apprenticeship tracks in the profession? This, fundamentally, is what current disproportionate emphasis on first year grades achieves, except students must endure two and more costly additional years of law school before taking a bar exam.

No practicing lawyer would accept the notion that his or her worth as a future lawyer was accurately measured by exams taken after a semester of law school instruction. They would insist that there was much to be learned, that they progressed in their lawyering abilities and got better over time. However, this did not occur in the second and third years of law school. It occurred only after they began practice.

Everyone who practices law knows that one improves over time with experience. The practice of law is a craft mastered not in weeks or months, but over many years. Yes, some will be more clever, some will demonstrate a greater aptitude for thinking about the law creatively, applying it to facts, persuading before a judge or jury. But that such will happen and be revealed mere months into law school is an absurdity.

Yet, save for the University of Chicago Law School, which is small, as Yale and Stanford are, and near equally highly regarded, only YHS amid the vast pantheon of Emperor Law School can get away with not determining supposed legal aptitude via grades in first year. Why?!

Well, for one thing, not sorting out law students respecting supposed professional aptitude via grades in first year (waiting, for example, until the end of second year to judge relative worth) would frustrate the efforts of law firms and other legal entities in their hiring, as well as judges seeking the “best” law clerks.

Belief of professors, administrators, students in the validity of first year grades

As noted previously, law professors and the establishment of Emperor Law School, including most at YHS, even YHS students, seem to truly believe that results on first semester exams are an accurate measure of worth and aptitude as a future lawyer. They believe in innate “genius for the law.” They believe in The Right Stuff. One either has it -- very, very few, even at YHS --, or, as revealed by mediocre performance on first term exams, one doesn't.

They must! For law students have no reference point other than previously (their entire lives for most) they got A's. Now, after studying harder than ever before in their lives, they have B's (or High Pass) and worse. Law professors, who themselves typically were among the rarified group who got A's following first term, are deeply invested in the highly flattering, self-congratulatory notion of themselves as “geniuses of the law,” possessors of The Right Stuff.

Moreover, in order not to believe in the validity of first year grades as the measure of lawyering aptitude, professors would have to conclude that the fault for the disappointing mediocrity of the great majority of exams following a semester of their (brilliant) teaching lies with them. Professors, deans, and administrators of Emperor Law School, including those at YHS, would have to conclude that law school teaching, even the very existence of law schools must seriously be called into question.

Obvious evidence to the contrary ignored

Never mind that it is so commonplace in Emperor Law School as to be a truism, that many students whom professors deem brilliant based upon class participation write “B” exams, and sometimes students the professor recalls to have stumbled in class, or even to have on occasion had their heads down napping, write the top exams. Never mind that the student who wrote a “B,” even a “C” exam in first year later becomes a successful lawyer, known for brilliance and sharpness, while a leading light emerging from first term exams becomes a lackluster lawyer or judge.

Failure begets failure, or at least resignation

In Emperor Law School the die is largely cast following not first year grades, but first term grades. Students who fail to get A's first term tend to give up. They buy into the notion that they lack what it takes to achieve A's. They realize they can get B's with a lot less effort, and they stop trying so hard. Most seek other avenues of fulfillment and ego repair during their typically tedious, dissatisfying, and debt-producing remaining years in law school.

An opportunity for advantage

In this scenario of preconception, disappointment, and defeatism, which is surprisingly constant and recurring throughout Emperor Law School, is surely opportunity for many, properly instructed, to take great advantage.

Recall that “I expect scores in the range of 25 to 35 [out of 100]” indicates not just low expectations, but a very low level of competition. Those who are rewarded with an A for a 35, a 45, even a 65 are hardly geniuses, hardly possessed of The Right Stuff. They are merely somewhat less incompetent than classmates.

A key lesson your author must impress upon second term students is that “genius for the law,” The Right Stuff, “innate aptitude for the law” is myth. Such notions are mere self congratulation on the part of professors and those who do well. They are an excuse for ineffective instruction of the lawyering art.

My students come to understand that the hypothetical-type law essay exam exercise is not the enemy it seems. Far from it! Properly understood, with tools for mastery in hand, this exercise can be a law student’s greatest ally. For such exam exercises are practically guaranteed to confuse and bring low the cleverest of classmates who so impress in class.

Some very good news I delight in giving to students is that one needn’t write a brilliant exam to get an A in law school. One must merely write a reasonably competent, lawyerly exam. In comparison with floundering efforts of classmates, such an exam will not only impress and compete for an A, it will often compete for the American Jurisprudence (Am Jur) award, given to the best exam in the class!

Much more insight into Emperor Law School is needed, however, before the how and why of the success of what LEEWS instructs can be fully grasped and appreciated.

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1. Membership on some Law Reviews is based on a combination of grades and a writing competition. However, invitation to the competition normally requires ranking in the top quarter or third of the class at the end of first year. Yale Law School is possibly the only school where first year grades do not factor into who makes “Law Journal.” Producing a publishable case “note” or article is the sole requirement for membership. (A case note is a scholarly reflection on a case, typically a recent vintage Supreme Court case.)

2. Upon information and belief (lawyer expression meaning not proven as fact, but reason exists to believe it so), first year at Harvard Law School is all Pass/Fail. However, concerned lest distinction not be recognized, professors have the discretion to recognize the top one or two exams in a class with a “Deans’ Scholar Prize.” In second and third year the grades are Honors, Pass, Low Pass, and Fail (and Withdraw), and there are no guidelines as to how many of each grade must be awarded.

Stanford, unlike Yale and Harvard, operating on a quarter system (three, rather than two terms, one fewer course each term), awards Honors, Pass, Restricted Credit, and Fail in all three years. Professors may award 30-40 percent Honors grades in “exam-based” courses, which includes all first term courses, and 35-50 percent honors grades in “paper-based” courses. Some one in 18 students may in addition be recognized with a “class prize” to designate a superior honors grade. (Your author was told by someone in the Stanford Law School Registrar’s office that six was the limit of class prizes that could be awarded, and that would be in a class of 100. Who would imagine a class of 100 in a law school with only 175 or so in a class?!)

3. The sense of high LSAT, high college gpa types at YHS tends to be that they couldn’t possibly need the help of an outside aid such as LEEWS. Thus, I have had relatively fewer students from those schools. (I don’t even advertise at my alma mater.) The advent of pass/fail and broader grading at Harvard and Stanford Law Schools has further dampened interest of their students in LEEWS. However, I am very pleased to note the success of two in the fall 2010 Stanford 1L class who did the LEEWS audio program the summer before starting. One, a woman who became my rep in fall 2011, received three Honors in her three first quarter classes. The other person was a military vet, concerned that his LSAT was one of the lowest in the class. He reported that some classmates reacted with obvious surprise when he was elected to Law Review (as was my rep) after receiving two Honors his first quarter, and doing equally well thereafter in first year.

Section One, Chapter 2

Universal poor performance on exams and expectation of same as evidence of something amiss

Universal poor performance on exams as evidence of something amiss

It is a universal fact in Emperor Law School that at the end of a semester of diligent effort, virtually all law students, even at YHS, write mediocre exams and worse. The typical law student essay exam response is rambling, regurgitative, and only tangentially makes use of facts the professor has carefully concocted in hypotheticals. Such “analysis” as is evident is loose and superficial by any lawyerly standard. Professors don’t know where to begin to offer constructive critique. Therefore, typically, little commentary is offered beyond the occasional “conclusory,” or “needs more analysis.”

“Conclusory” means the student offered a conclusion, often an opinion, unsupported by facts or appropriate analysis. “Needs more analysis” will require much more understanding of the lawyering process, and we shall make some progress here. Suffice that few law students ever decipher this criticism. Failure to do so means no chance at an A.

Legions of heretofore straight-A students, or close to it, typically do not receive a single “A” grade first term or first year throughout Emperor Law School. More to the point, they don’t come close to mastering skills that enable the possibility of an A.

Recall the quote that anticipated scores in the range of 25-35 out of a possible 100. In that 35, 45, even 65 points out of 100 falls far short of mastery, it is evident that an “A” grade in law school likely will merely represent less incompetence than that demonstrated on other exams. Indeed, it is very much the case that the B’s awarded the great majority of law students are a gift.¹

Across the board in Emperor Law School, particularly in first year, so abysmal are exam responses that most professors, if pressed, will acknowledge that beyond ticking off points for identifying “issues,” little attention is paid to analytic content beyond the first two or three pages. Some professors have admitted not reading more than three pages of most exams. Another reason for so little commentary and criticism.

Surely, given proper instruction, students with the intelligence and diligence of law students in general, particularly law students at top-ranked schools, would perform much better. Professors typically explain away persistent mediocrity in exam performance after a semester of their instruction with the assumption that very very few have what it takes (The Right Stuff!) to perform in a lawyerly fashion on exams. This supposition has the hollow ring of an excuse. It is both self serving and absurd.

Expectation of mediocre exam performance as evidence of something amiss

The great majority of the near 50,000 students who matriculate into Emperor Law School every year are highly intelligent and work hard. They have behind them a history of academic success. Nevertheless, it is a given in all of Emperor Law School that, however stellar their qualifications upon entering law school, however diligent their efforts may be, the great majority of law students, following a semester of (presumably able) instruction, will fail to exhibit more than a modicum of competence in handling exams.

As indicated by the 25-35 out of a possible 100 quote, law professors anticipate mediocrity after a semester of their instruction. They regard mediocre performance on exams as the norm!

In no other professional school but law school is the comment heard, and not infrequently, “I studied less, and got better grades.” (Not A’s, but “better” grades.)

Such a sorry state of affairs would raise eyebrows, indeed, would demand an investigation of teaching methods in any other educational setting. Not so Emperor Law School. Not from administrators, not from faculty, not, beyond muttering and grumbling, from the great majority of students who consistently and predictably flounder.

As previously discussed, the reason is the pervasive and pernicious notion, omnipresent in Emperor Law School, that mastery of challenging, hypothetical-type law essay exams requires more than intelligence and hard work. Even the great majority of matriculants at YHS, where the few who gain admission have off-the-chart qualifications, are not expected to distinguish themselves overly on exams.

Consider Harvard Law School, which, by virtue of its large size -- 550 graduates per year --, Yale Law's perennial number one *U.S. News* ranking notwithstanding, exerts the greatest influence on the legal profession among law schools. Prior to the noted move to a mostly Pass/Fail system of first year grades in 2008 (footnote 2, preceding chapter), only two A+ grades could be awarded in each of seven 1L sections of some 80 students. No more than two A+'s in a group of 80!, Moreover, so your author was told, often only one A+ was awarded, sometimes none.

The expectation that no more than two in a group of 80 are capable of writing exams of "exceptional distinction" continues at Harvard. Under the new grading regime, professors have reserved discretion to recognize the top one or two exams in a 1L class with a "Deans' Scholar Prize."

In other words, despite a caliber of students whom most would classify genius or near genius by any objective standard, whose LSAT scores are uniformly off-the-charts, who, in many instances, have never had a grade less than A in their entire lives, whose members' qualifications are not merely stellar, but include having earned Ph.D.'s in many instances, written books, built and sold software companies for millions, who, in most academic settings would project a majority of "A" grades, and certainly many more than just a few exams of exceptional quality meriting an A+, it is taken for granted that but one exam in forty will be distinguished, and perhaps none.

Does that make sense, or doesn't it defy common sense? If so very few among diligent, superior students can exhibit mastery on exams at the end of term, can come off the exam page resembling lawyers competent in the subject being tested, doesn't it suggest that the fault lies not with students, but with their instruction?

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1. Law school grading will be explored in Section Four, Chapter Four. At this point the reader may want to review the discussion of grade inflation and grade distribution in Emperor Law School, set forth in footnote 9 of the *Introduction*.

Section One, Chapter 3

Disconnect between classroom and exam performance as evidence of something amiss

Chapter 1 of this first section described the importance of grades in Emperor Law School, particularly first term, first year grades. It was further noted that law professors are often surprised when a student deemed brilliant in class does not perform well on the final exam, while someone undistinguished gets a top grade.

Assuming appropriate instruction, one would suppose a direct line between preparation for class, performance in class, and performance on the exam at the end of term. Surely, thinking and responses that win praise in the classroom should predict successful performance on the final exam.

This is far from the case in Emperor Law School. “Nine times out of ten, the student who impresses in class does not get the A,” I’ve said to groups of mostly second term law students for over thirty years. No one has ever contradicted me.

Who gets the rare A on law essay exams seems always to be a crapshoot. Professors rarely predict correctly. Nor do students.

It has been noted that in no other professional school would you hear the remark, frequently heard in Emperor Law School, “I studied less, and got a better grade.” Also frequently heard in Emperor Law School, “I hated that class! Never went. Got a higher grade than in the one where I always went and took careful notes.” Also, “Memorized three principles the night before the exam. I did great!”

An awkward moment in hallways of Emperor Law School

Year after year in the 200+ schools that comprise Emperor Law School, the following awkward scene, or something close to it, occurs in hallways following the first set of exams:

A professor approaches a student she has gotten to know in class. First term classes are typically large, so she doesn’t know most students by name. However, this student sits up front, contributes a lot, seems eager, smart, thoughtful. She knows his name. She asks, “How did you like my little exam, [John]?” She smiles approvingly. Perhaps she adds, “Piece of cake, I suspect, for someone of your abilities.”

The professor doesn’t know [John’s] grade, because law school grading is invariably anonymous.¹ She merely, naturally assumes good results, because [John] has impressed her in class.

Sheepish, embarrassed, because he thinks he has let the professor down, [John] mutters something to the effect of, “Didn’t go as well as I expected.”

Surprised, the professor frowns with concern. Now she is embarrassed. “Oh!,” she says. “I know you know the law. What do you think was the problem?”

[John] is barely able to look his former admirer in the eye. (I say “former,” because [John’s] star is already dimming in the professor’s mind. She’s thinking, “He must not have The Right Stuff after all.”) “I don’t know,” he will begin. “Yes, I thought I knew the law.” He fidgets, still not able to look the professor in the eye. “I guess I didn’t know it well enough. I don’t know. I got confused, I think.”

Perhaps the professor touches [John’s] arm or shoulder. Her tone remains sympathetic, but is now matter of fact. “Make an appointment to see me. We’ll go over your exam. Try to diagnose what went wrong. I’ve no doubt you can do very well [John]. You have a sharp legal mind!”

[John] nods. He is grateful for the expression of confidence. However, he won't make an office appointment. One semester into law school [John] is defeated. He is one of the also-rans. His confidence has been shattered. He will have little to say in class going forward.

“Legal eagles” as evidence of disconnect; sowing acceptance of also-ran status

Throughout Emperor Law School, preparation for class is the primary focus of students until late in first term. At the very moment on the very first day, when someone is called upon in Socratic fashion to “Give me the facts of [case Y],”² students will be riveted on preparing for class. No one wants to be embarrassed in front of a group of strangers. This is particularly so in Emperor Law School.

The great majority of law students are so-called “type A” personalities. Law schools are full of the grown-up version of smart, talkative kids, who were told their entire lives, “You ought to be a lawyer!” So commonplace in law school is the student who can't help but wave a hand and share thoughts -- often! --, that there is a name for such students -- “gunners.” The gunner phenomenon, however, normally doesn't persist much beyond first term. (Usually, only until the first set of grades come out in mid January to early February.)

As will be described in Section Three, Chapter 5, entitled “*Day One of Law School*,” there is considerable excitement and anticipation at the start of first term in Emperor Law School. All are eager to begin the journey to becoming lawyers. All are also nervous about the prospect of competition with so many aggressive and smart classmates. A game common to all classrooms of Emperor Law School, early in first term, same as when your author entered law school, is to look about and try to identify the “legal eagles.”

Everyone who has attended law school -- no exceptions! -- can recall a response by a classmate early in first term that seemed so erudite it intimidated and provoked awe. A student offers opinion and analysis regarding the same case everyone else spent an hour and more the night before briefing. However, the analysis (very possibly carefully choreographed and assisted of late by an excursion into the internet) soared, mystified, and impressed with its use of legalese, its insights, its references to the concurring opinion of this judge, the dissenting opinion of that judge, the holding of a “predecessor case of a similar ilk.”

The reaction of almost everyone in a room full of life-long, straight-A, top-of-the-class academic performers is a stunned and awed, “OMG! I can't do that!”

Mostly, such students are not the aforementioned gunners. They are merely thoughtful and unusually astute. (And/or, as suggested, carefully choreographed.) They are identified early first term in every law school class as legal eagles. Professors acknowledge those who continue to impress as the “sharp legal minds” in the class, and fellow students concur.

It is assumed, quite reasonably, by students, professors, and the erudite speakers themselves, that impressive response in class will translate to A's on exams. Legal eagles, surely, will make Law Review and proceed to brilliant legal careers. However, as noted, such is rarely the case. As noted, nine times out of ten the student who shines in the classroom is not the one who writes an “A” exam. Hence, the awkward scene previously described.

An unfortunate consequence of this early, intimidating, seeming brilliance of a few is that, simultaneously, many in the class begin to doubt their ability, their aptitude for legal study and thinking. Many begin to resign themselves to second class citizenship in the law school. Confused, often unable to make sense of class discussion, where a certain few seem to have penetrating insight, many begin to buy into the debilitating notion that we have explored.

In this manner the idea of innate gift, genius, aptitude for the law, The Right Stuff, surfaces very early on in Emperor Law School. Many law students, knowing “A” grades will be far less plentiful than in college or

graduate school, begin to accept the idea that achieving an A may be beyond them. A's will be reserved for the legal eagles, with whom they do not feel they can compete.

Who gets rare law school A's?

The importance of exams, how exams are graded, and whether or not classroom performance has any bearing on grades will be explored elsewhere. (Respecting the latter, mostly not, but sometimes a little, possibly a half letter grade, if the bump can assist a classroom favorite.)

As described in footnote 1 to this chapter, in order to protect professors from charges of impropriety (and lawsuits), exam grading throughout Emperor Law School is typically anonymous. As will be explored elsewhere, despite grade inflation, very few "A" grades are awarded in Emperor Law School.³

The point to be made here is that law professors are typically mystified when grades are matched with students, and the all-important division occurs between the ten percent or so who make Law Review and are invited to be research assistants and teaching assistants (TAs), and the great majority of also-rans.

The student who gets the A, more often than not, and none of my students ever disputes me on this, is someone who didn't respond in class, responded unimpressively if she did, and may even have put her head down on the desk for an occasional nap. I proudly note that LEEWS grads often write the best exams. They also fully grasp the unimportance of class responses and classroom impressions.

The disconnect between classroom performance and exam performance is consistent, typically profound, and should raise more than eyebrows in terms of implication.

* * * *

1. Blind, or anonymous grading was introduced by Christopher Columbus Langdell, legendary, influential dean of Harvard Law School, over 100 years ago at the turn of the twentieth century. Despite his exalted rank in the law teaching profession and his impressive name, Langdell hailed from humble origins and very much believed in meritocracy. Langdell was concerned lest students from privileged backgrounds be given preference in the awarding of grades. Anonymous grading is *de rigueur* in Emperor Law School, and has been for many decades. Students are instructed not to put their names on booklets or software responses. Rather, they are to enter an anonymous identifier, often a portion of their social security number.

Not that any law professor cannot identify who wrote what exam if she wants to. Of course she can! I caution students not to challenge or annoy a professor to the point that she might want to exact retribution come exams. Stories abound.

However, here and there over the years law professors have been sued over grades. There have been allegations of bias and other impropriety by (former straight-A) students, who have been not just disgruntled, but shocked and dismayed by their grades. There have even been serious shooting incidents. Yes! Disgruntled law students with guns!

All law professors read and hear about such lawsuits and incidents. Emperor Law School is a relatively small community. Law professors themselves want grading to be anonymous. It protects them. It also protects students. We shall see that classroom participation, impressions in the classroom, which new law students are so concerned with, matters little, partially owing to anonymous grading.

We shall also see that Dean Langdell was also responsible for "case method" instruction becoming universal in Emperor Law School.

2. New law students are typically surprised (shocked?) when they learn that an assignment has been posted, likely online (to "brief" one or more cases), prior to the first of each of their classes. As will be made apparent in Section Three, Chapter 5, entitled, "Day One of Law School," unlike college or graduate school, where the first class is often a friendly, twenty minute "Hello-here's-what-we'll-be-covering-here's-the-syllabus-containing-your-first-assignment," first day classes in Emperor Law School will occupy the full time allotment and begin in earnest. One or more cases will have been assigned to "brief." Someone will be called on.

3. More and more A's (A minuses!) are being awarded at certain top tier schools to satisfy curve requirements mandating that as many as 20-30 percent of grades be A's. Such is the case, for example, at U. Pennsylvania Law School, U. Texas School of Law. However, typically fewer than 15 percent of grades are solid A's, even less at lower tier schools.

Section One, Chapter 4

The standard for judging exams as evidence of something amiss

In fretting over disappointing grades, law students typically assume a subjective standard applied by professors. “They were kicked down the stairs. Where they landed determined the grade,” is a familiar, persistent assessment of law exam grading.

But nothing could be further from the truth. The standard for grading law exams is actually consistent and crystal clear throughout Emperor Law School. It exists in every law professor’s mind, although most might not consciously acknowledge it. Simply stated, 1) did you identify (“spot”) the issues a competent lawyer would discern, given the facts presented (hypotheticals) and the legal information covered in the course; 2) how close did your analysis of each issue come to that a competent, knowledgeable lawyer, attuned to the professor’s preferences, would produce?

This standard can be somewhat compromised when a professor leans heavily toward a historical, economic, or other non-legal emphasis in the course. A survey of law professor hiring from 2000-2009 (noted in the segment following) found a preference at so-called “top tier” law schools for professors who hold a PhD in addition to a law degree. (The latter being a *juris doctor*, or “JD.”) The exam may skew somewhat into a historical or economic emphasis.

Sometimes, often in fact, a bias on the part of the professor enters into the evaluation of an exam response. For example, the professor may disagree with an accepted legal principle, or part thereof. The professor may strongly believe in a minority view interpretation of a rule. The professor may believe that the minority view should trump the majority view, that the federal rule should supercede the corresponding state rule.

Much as a good lawyer will research the thinking patterns, biases, and requirements of the judge before whom she appears -- E.g., should I sit or stand when making an objection?; does the judge tend to sentence harshly or limit the size of monetary awards? --, so students must be attentive to a professor’s preferences, and play to those preferences in crafting the exam response.

If the professor is “into policy,”¹ as indicated by the tenor of class discussion, policy aspects surrounding an issue may be of more importance than “black letter,” analytic aspects in influencing a professor’s assessment of merit. However, I may note that for reasons of economy, also the circumstance that students who cannot adequately perform so-called “black letter” analysis are likely to disappoint when policy analysis is wanted, a student should never assume that policy emphasis in a classroom will translate to policy emphasis on an exam.

This is yet another disconnect between the manner in which classes in Emperor Law School are conducted, and what is actually required by hypothetical-type exam exercises. We shall see that there are many disconnects between classroom instruction and what is required on all-important final exams. These disconnects reflect a contradiction between theoretical, policy inclinations of law professors, and the practical, “black letter” dictates of all legal problem solving exercises. Naturally, such disconnects contribute significantly to confusion, even bewilderment that results in mediocre exam performance.

Such shading aside, and these are at most shadings that any good lawyer would incorporate into analysis, bottom line, the professor necessarily will judge an exam against the standard of “what would a competent lawyer, knowledgeable in the subject area tested, do?”

Not that most law professors are competent attorneys! It is well established that, at least at so-called top tier

law schools, practical experience as a lawyer is not an important criterion in hiring professors. Nor, as the final chapter of this section explores, does a professor having practical experience correlate with student exam performance.

* * * *

1. What, exactly, is meant by “policy,” “policy emphasis,” and how and when policy might be introduced in an exam response, will be discussed elsewhere. Examples of policy and policy application will be provided

Suffice at this point that for years at top tier law schools professor have introduced a policy emphasis in classroom discussion. Reputation in the profession is one of the *US News* ranking criteria. In recent years, when I have posed the question, “Whose professors are into policy?,” more and more hands from students at lower ranked schools have gone up. However, for two practical reasons little or no policy discussion will be wanted on final exams, especially in first year courses.

Number one, first year classes tend to be large. Policy discussion invites longer, rambling response. Therefore, more policy wanted on an exam means fewer items on the professor’s checklist of issues to be identified. Fewer items on the checklist means the professor has to read exams more carefully to distinguish them for grading purposes. This extra work discourages inviting policy discussion in more than one exercise at most.

Second, very few law students can properly analyze a simple issue such as “Did a battery occur?” Inviting policy discussion invites even more rambling discourse, and therefore greater disappointment in reading responses. I was told by students from Emory University Law School in Atlanta many years ago, that following disappointing results when they asked for policy discussion on first term exams, Emory professors got together and agreed not to ask for policy discussion the second term. “Just a license to BS,” was the general sentiment.

First year students from Harvard, Chicago, Michigan, Columbia, Stanford, and even Yale, all schools know for policy emphasis, consistently report that if an exam featured, say, four hypothetical fact patterns, only one might call for discussing policy aspects.

Students should research carefully whether policy emphasis in the classroom will translate into more than, at most, one exercise out of four or five on the final exam that will call for policy discussion. Appropriate sources for such research are former students and old exams, not the professor. Having emphasized policy in class, a professor is unlikely to allow that there will be little or no policy wanted on the exam.

Section One, Chapter 5

Excuses for failure to adequately instruct how lawyers think and analyze – “genius for the law,” “innate aptitude,” “The Right Stuff” – as evidence of something amiss

“Genius for the law,” “gift for the law,” “aptitude for the law,” “The Right Stuff,” and similar expressions abound in law school. As noted several times, the idea is omnipresent in Emperor Law School, and quickly takes hold among students, that something more than intelligence and diligence is required to do well on exams. Something is required beyond LSAT score, college gpa, hours in the library. Moreover, that something is either present, or, more likely, not.

An expression heard from professors when students express frustration that they are not understanding what is going on, what is wanted, is, “Don’t worry. It will ‘click’ for you.” What is actually meant is, “If you have what it takes -- The Right Stuff --, you’ll be fine. If not, there is little I can do for you.” (And, “Don’t worry. You’ll get through. You’ll be a lawyer. [Not, of course, a law professor!] You’ll make money.”)

As noted in Chapter 3 of this section, intimidating responses of legal eagles early in first term inculcates suspicion in the smartest, most confident law students, that an intangible aptitude for the law is a factor in success. Second term, when it becomes known that, in the main, those who impressed in class first term did not get A’s, but an unlikely student did, far from kindling suspicion respecting law school instruction, this realization reinforces belief in mysterious, innate factors at work.

An excuse for students, a problem long past

The idea of innate aptitude for the law, The Right Stuff being required to get A’s, becomes an attractive notion following disappointment over first term grades. It explains, justifies poor performance. It excuses the many hours of effort that went for naught. A disappointed student can yet deem himself smart, capable. Just not smart and capable in the special, intangible manner necessary to master confusing, intimidating law exams. Perversely, the myth of The Right Stuff becomes a comfort.

Never mind that the great majority of law students are now consigned to second class citizenship in the law school by virtue of less-than-stellar grades. Never mind that the potential for jobs that will enable repayment of heavy debt has been greatly diminished. Never mind that the excitement and eagerness with which a student began law school is now past, that the bloom is off the rose. Never mind that remaining years of law school now loom as a boring slog, with scant remaining opportunity to demonstrate potential for excellence in the profession.

Never mind that years later, as practicing attorneys, students who stumbled and bumbled on first term exams in law school -- your author included! -- realize that they indeed have what it takes to be good, even excellent lawyers! They are sharp legal practitioners! They have aptitude for the law after all! Confusing law school exams might have measured something -- perhaps cool under fire --, but not work ethic and desire to help the client. Certainly not aptitude as a lawyer!

Law school and the disappointment of first term is now years in the past. Former bored, discouraged, disgruntled law students are busy being lawyers and parents. If asked, they would agree something was amiss with law school education. It only minimally prepared them for the actual practice of law.¹ However, a practicing lawyer hasn’t the time or inclination to worry about what was right or wrong with law school education, much less define it. (This book will perform that task!)

Moreover, it behooves a law school graduate to burnish, not demean the reputation of *alma mater*. Law graduates soon become misty-eyed reunion attendees, reminiscing with classmates about the ordeals of law school and the bar exam, thankfully past. Law graduates happily respond to entreaties for alumni contributions. If something was amiss in law school education, it is no longer a concern.

The abandoned quest for excellence

Following first term, the typical law student, even at YHS, gives up the idea of excellence respecting his potential as a first-rate legal thinker. He does not question his professors and his instruction. (Yes, he carps a bit. But he is too lowly, too unknowing, too much an also ran to mount a serious critique.) He blames himself for his less-than-stellar performance! He lacked The Right Stuff!

So confused, so intimidated by hypothetical-type essay exams are the great majority of law students, that, knowing how truly scattershot and mediocre were their efforts, they are grateful for the B's most law students now receive!

When law students see one of my advertising flyers following first term, suggesting, promising that they can do better, that A's are not just possible, but probable, they typically disregard them. They are not merely skeptical. They are annoyed by the suggestion that results could have been otherwise, had they but responded to an inexpensive program offered by someone outside the law school orbit.

"You don't need outside aids," is the message universally conveyed to students by professors in Emperor Law School. "Brief your cases," "attend class," "take careful notes," "make a course outline," "study hard," "follow IRAC," "you'll be all right," "it will click for you," is the unchanging advice given by law professors, echoed by the few students who did well. After all, this advice sufficed for them.

If such standard advice didn't work for you, ... If you didn't get an A (not a single one!), ... Well, it couldn't be helped. Students themselves will acknowledge, "I didn't have what it takes."

There is an effective, self-serving circularity at work. To do well requires innate qualities -- genius! If, after studying hard, you didn't do well, you lack ... what it takes -- genius! No one seriously questions the instruction. No one seriously questions across-the-board incompetency of exam responses. No one seriously questions the glib, even smug explanation and justification put forth in Emperor Law School -- lack of The Right Stuff.

Until now.

Over the years numerous of my students have not just made Law Review, but have been first in their class. These students tell classmates about LEEWS, urge them to attend. Although they have been able to influence underclassmen -- I recall over 60 coming to a Los Angeles program at the urging of their TA (teaching assistant), who was No. 1 in the third year class at USC Law; 33 flocking to an Atlanta program, when it was learned the the editor-in-chief of the Law Review had taken LEEWS as a first year, etc. --, they cannot seem to persuade classmates that they, too, might achieve similar success.

This is speculation. It is not based upon empirical data. However, the anecdotal impression I have gotten over many years is consistent. Given their confusion, given the mediocrity of their effort, classmates of those who do well are grateful for their B's. They may well be wary of doing LEEWS and not achieving the results of classmates who get A's.

Never mind that prior to exams, the newly anointed "genius of the law" was perceived to have no greater intelligence, was no more diligent, possibly was perceived as lesser on both scores. What if, after doing LEEWS -- whatever the heck that is! Sounds funny! --, they don't do well?

Rather than take the bull (BS?) by the horns, they hesitate. They shy from confronting a situation where they persist in suspecting the fault lies with themselves. They know they can get B's, probably with a lot less effort. Perhaps focusing more on "black letter law" and starting (course) outlines earlier, two typical areas of deficiency for first term students, will yet make a difference. But if not, there remains the comfort of the idea that The Right Stuff is also necessary.

Following the frustration of an all-out effort first term that didn't come close to enabling mastery of exams, most law students cannot believe anything can alter their second class status. They accept the verdict of grades on exams they had no chance of handling. They retreat behind and take comfort in the idea of The Right Stuff. It has become a useful crutch.

An excuse for professors and Emperor Law School

The convenient, circular logic that law exams test aptitude for "lawyerlike thinking," and those who don't get A's are lacking in such aptitude, is also a useful crutch for law professors. Indeed, it is a useful crutch for Emperor Law School. It excuses the same old, same old inadequate ("case method") teaching approach. It has been immune to challenge for over 100 years, because it has never been seriously challenged.

This book mounts the challenge. This book says "NONSENSE!" It is law schooling teaching, even law school itself that is lacking and at fault, not smart, hard-working students!

Because this pernicious, self-serving logic is so entrenched and pervasive in Emperor Law School, it also enables a continuing opportunity to, we shall see, rather easily take advantage.

* * * *

1. Your author recalls learning how to "shephardize" (track the precedential influence of a case) and use the law library as the primary benefit of his law school education. Also understanding supply and demand, thanks to an upperclass elective entitled "Economics for Lawyers."

Section One, Chapter 6

Lack of correlation between a law professor's experience/background/ orientation and exam results as evidence of something amiss

Your author is not the only critic of Emperor Law School. There are many within the profession, not just judges and lawyers, but law professors as well. For example, both the American Bar Association's 1992 *MacCrate Report* and the 2007 *Carnegie Foundation for the Advancement of Teaching* report concluded that law schools are not doing a good enough job preparing students for the real-world practice of law.

Animus on the part of law professors against lawyers, teaching practical skills

In a July, 2010, article entitled, *“Preaching What They Don't Practice: Why Law Faculties Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy,”*¹ Georgetown University School of Law adjunct professor, Brent Evan Newton, illustrates in his choice of title a major problem with law school instruction -- emphasis on theory and scholarship, such as one finds in academic fields like history, economics, philosophy, medieval literature, etc., over practical training for the profession.

More to the point, Newton, following analysis of entry-level, tenure track hiring from 2000-2009 at 40 law schools, finds that the average amount of “practical experience” of professors at *U.S. News* top-tier law schools is “less than two years.” Meanwhile, that at *U.S. News* bottom tier law schools is “more than seven years.” In other words, very inexperienced lawyers teach at top law schools, more experienced attorneys at lesser law schools.²

What gives? ... No medical school is going to hire a mere resident in cardiac surgery to instruct students, over a surgeon who has conducted hundreds, perhaps thousands of heart procedures. No school of accounting is going to hire someone who's been through two tax cycles with a handful of clients as an instructor, over someone with years of experience handling the accounts of numerous companies. No trade tech is going to hire a plumber's apprentice as an instructor, over a master licensed plumber with many years of experience.

Here is the key to a major component of the problem with law schools and law school instruction. The last thing professors and administrators of a law school want is for their institution to be thought of as a trade school, a school that teaches practical skills. Yet, as will be made clear, law students have difficulty with essay exams precisely because, at bottom, such exams are practical exercises in what lawyers do, albeit in compressed fashion. (On steroids, as it were.) This is something law professors have not investigated, and do not grasp. (They don't really care!)

This yawning disconnect is a major factor in the confusion and resulting floundering and mediocrity of the great majority of exam responses. Those very few students who in some fashion manage to connect theoretical, academic emphasis in class to the practical, lawyering requirements of exams do better. (Not great, but better -- 35, 45, 65 points out of a possible 100.) They get A's. They are anointed geniuses of the law, possessors of The Right Stuff.

It may be noted that their “genius” lies in not being completely misled by law school teaching!

Apparently, professors and administrators don't even want law school to be thought of as a professional school. Newton contends that law schools hire professors with little practical experience, and then emphasize scholarship more than teaching. He says these “impractical professors whose chief mission is to produce theoretical legal scholarship ... feel indifferent towards -- and sometimes outright disdain for -- practicing

lawyers and [fellow] faculty members with a practical bent.” He continues. “Especially at [upper echelon *U.S. News* schools], the core of the faculties seem indifferent or even hostile to the concept of law school as a professional school with the primary mission of producing competent partitioners.”

A problem deeper than practical experience or no, animus against lawyers or no

The problem, however, is not lack of practical experience, possible animus against lawyers and the practice of law, theoretical inclinations of the professor, or anything of the kind. Rather, the problem lies in the manner of law school teaching itself -- so-called “case method.” In case method students purportedly become “legal thinkers,” whether that thinking be theoretical or practical, via reading and briefing actual legal cases, then closely examining those cases in class, especially the reasoning behind “holdings” (court decisions).

The failings of the case method approach will become apparent when the reader becomes more familiar with case briefing, the nature of law exams, and the disconnect between the former and latter.

My professor of torts first term at Yale, Fleming James, was the personification of what both a law school and Mr. Newton would want in a law professor. Professor James had been a leading Connecticut railroad lawyer for many years before becoming a law professor. He had loads of practical experience, and he would occasionally amuse us with real life tidbits. As a professor, he had authored the leading textbook (“casebook”) in the field -- *James on Torts*. His was the highest rank at Yale Law School -- “Sterling Professor” of law. He was a giant in the field of legal education. He was both experienced practitioner and legal scholar.

However, in retrospect, given what I now know, Professor James’ instruction left me wholly unprepared to exhibit mastery over the eminently practical exercise represented by my final exam. (And the great majority of my highly able and industrious classmates, as well.) Namely, come off the exam page as a competent lawyer, knowledgeable in tort law. This was especially so given time pressure. Although the exam, as I recall, was at least three hours in length, possibly four.

Standard applied in judging exams by inexperienced, scholarly-oriented law professors and experienced practitioner law professors -- much the same!

Whether experienced as a lawyer or inexperienced, whether theoretical and scholarly, or practical in her orientation, the standard of a law professor applied in judging an exam response will be much the same -- what would a competent, “lawyerlike thinker” do with this exercise, given adequate knowledge of the subject matter tested?

The only difference might be a nod to, or preference for a smidgeon of policy discussion on the part of the more theoretical, scholarly professor. However, as noted, for practical reasons, particularly in first year when classes are large, there normally will be little policy discussion wanted. At most on but one of several essay exercises.

Although a professor may be more academician than experienced practitioner, she has seen competent lawyers at work. As the clerk for a federal or highly ranked state court judge (normally a requirement to become a professor at top tier law schools), she has read numerous briefs of lawyers submitted in support of motions. Standing at the shoulder of her judge in a courtroom, she has witnessed and absorbed the close, nitpicking, dialectic (back and forth argumentation) that characterizes “lawyerlike analysis.” Whether experienced as a lawyer or no, a law professor knows lawyerly work, lawyerly thinking when she sees it! As we shall see, “lawyerlike thinking” isn’t subjective, random, or unpredictable. It is eminently predicable and recognizable. It is expressed within well-defined parameters. This is why, within two to three pages of reading an exam, most law professors can judge whether that exam has a chance of competing for a rare “A” grade. The professor knows whether she sees a lawyer coming off the page or not!

Either law relevant to issues raised in fact patterns is stated accurately, or it is not. More to the point, either application of that law to facts -- analysis! -- proceeds in accordance with the prescribed lawyerly dialectic in a courtroom -- balanced, logical, “objective,”³ etc. -- or it does not.

If the first few pages of an exam response do not reveal what a professor recognizes to be a competent, lawyerly effort, or a reasonable facsimile thereof, the professor tends to lose interest. The professor is disappointed, bored! There is little need for close examination of the remainder of the exam. There is no chance of the response competing for an A.

The professor need only quickly peruse the remainder of the response to tally issues identified, then compare the tally with that of other students, to determine where in the grade curve parameters below A the response falls. This is one reason why, to the great consternation and dismay of students, there are so few comments on law exams.

If pressed, most law professors will admit to extreme boredom, in addition to disappointment when it comes to grading exams. Occasionally, a professor has been reported to me as admitting to reading “only the first few pages” of an exam response, then awarding a grade. Indeed, most require a nudge to attend to the onerous task of grading exams. Almost all law professors have a deadline for turning in grades!

An obvious question and obvious answer

The circumstance that, experienced as a lawyer or no, law professors want to see the same thing -- a competent lawyer, knowledgeable in the subject -- coming off the exam page, raises an obvious question: Is lawyering ability, as measured by hypothetical-type exams (i.e., ability to perceive legal issues prompted by a fact scenario and analyze those issues “as a lawyer”), so rare and special, so difficult, as to be only possessed by a very few? Moreover, a very few possessed of an innate genius or aptitude for the law, The Right Stuff? Moreover, does this special talent or ability manifest itself right out of the chute, mere months into law school?

The rather obvious circumstance that many who do not attain A’s on law exams later become able and competent, indeed, distinguished legal practitioners, would seem, incontrovertibly, to prove the contrary. Most any practicing lawyer would vigorously dispute the idea that ability to perform competently is in any fashion innate -- unlearnable!

Isn’t the only logical explanation for the abject lack of lawyering skill and aptitude on the part of so many smart and industrious students, as demonstrated by first term, second term, even third year essay exam responses in law school, that case method instruction does a poor job training students to function as lawyers on time-pressured essay exams?!

* * * *

1. Scheduled for publication in the South Carolina University Law School Law Review.
2. Recall the thesis put forth by your author toward the end of the lengthy footnote 7 of *Preliminary background information,* *supra*, (Latin expression used frequently in legal writing, meaning “that which preceded”), that lesser law schools hire prominent (experienced) local lawyers and judges in order to strengthen their standing in the local community and state, where most of their students will seek jobs and practice.
3. “Objective” analysis means presentation of arguments that might be made [by a lawyer] on both sides of an issue (or sub-issue!). “Be objective” is typical advice given respecting writing exams. However, what, exactly, this means in practice; moreover, how, exactly, to do this is never adequately explained or demonstrated in a law school classroom. Objective analysis appropriately marshalls facts and logic in support of and opposition to legal points, observing rules of evidence. (I.e., no conclusory and irrelevant assertions.) More on what is meant by “objective” will be presented elsewhere.

Section Two

Origin and history of law schools as explanation for the failure of Emperor Law School to (properly) instruct “lawyerlike thinking”

A simple fact goes a long way in explaining why Emperor Law School is amiss in the mission of training lawyers. Namely, training lawyers was not the primary reason for law schools coming into being. To this day it is not a primary motive of law schools.

Certainly, law schools did not come into being owing to a dearth of lawyers. Apprenticeship and self-study, traditional routes to the bar prior to the advent of law schools, sufficed to fulfill the need for lawyers. Rather, it is not a stretch to posit that Emperor Law School exists and came into being for reasons of money, power, and prestige.

In 1868 the president of tiny Trinity College in North Carolina, later to become Duke University, exulted over the added revenue being brought in by the college’s new “Department of Law.” In 1875 he noted with approval to college trustees that “nearly one-fifth” of the North Carolina legislature were graduates of their law school.¹

Given the central role of law in American society (a “nation under law”), law school graduates disproportionately occupy positions of power and influence. They are not just lawyers and judges. They head many corporations and businesses, hold numerous local, state, and federal offices, and dominate state and federal legislatures. Law schools enhance the power and prestige of any university, town, or city with which they are associated.

However, there is yet another, more telling reason that law schools came into being. It had its origin in a premise promulgated just prior to the American Revolutionary War by one William Blackstone, arguably the father of the very concept of law school.

Blackstone was for a short time in the mid eighteenth century a London lawyer of no special repute. He subsequently gained stature as an Oxford University professor and lecturer on English law. He was an author, and an observer and recorder of court proceedings. He was eventually appointed a judge, and later knighted. He remains an influential figure in the law to this day.

Blackstone took note of the significant impact and influence of certain legal decisions on English society. Disparaging lawyers as “mere legal craftsmen,” he reasoned that the architects of such decisions -- lawyers! -- should be more broadly and liberally educated before being admitted to practice. Indeed, they should be university educated.²

Blackstone’s thesis was rejected in England. Lawyers in Britain to this day, who, proportionate to overall population number less than half of their United States counterparts, continue to come to the bar primarily via an apprenticeship route that bypasses university study.³

It may be noted that in most countries around the world, lawyers enter the profession via a combination of undergraduate law degree, coupled with apprenticeship requirements. Nowhere else in the world has law school assumed the predominant posture of gatekeeper to the profession that Emperor Law School enjoys in America.

Blackstone’s idea of “broader liberal education” needed before being admitted to the bar was acted upon by American colleges and universities in search of new sources of revenue. It paved the way for the first American law schools in the early nineteenth century.

Blackstone's idea has morphed into the modern day thesis, promulgated by YHS and other leading lights of Emperor Law School, that would-be lawyers should be grounded in a broad context of larger societal themes and information that impact the law. It is believed that influences from many currents of thought and disciplines of learning swirl about, inform, emanate from, and are reflected in laws and legal decisions.

The belief is strong in leading law schools that a would-be lawyer should be aware of such larger influences and cross-currents before entering practice. Thus, a preference has been found in hiring at top tier schools, not for candidates possessing extensive practical experience as lawyers, but for candidates possessing a Ph.D.⁴ This Ph.D. was invariably awarded in a field other than law.

The need to impart practicalities of the lawyering art has never been a primary motive in Emperor Law School. Herein lies a salient reason for the disconnect between law school classrooms and exams.

We shall see that law school exams, mirroring at bottom, not surprisingly, bar essay exams, test progress in applying lawyering skills. The focus on larger themes swirling about and influencing the law inculcates

Well, what classrooms of Emperor Law School impart will be explored in some measure. Perhaps it is aspiration to be a law professor. However, it is surely not lawyering skills. It is not even the ability to "think and analyze as a lawyer," although many, as they must, would vigorously deny this.

The gulf between the aim and purposes of Emperor Law School, and an exam that tests lawyering skill, is the reason for confusion of law students in taking exams, and their resulting mediocre performance.

Herein, rather obviously, lies an opportunity for taking advantage.

The following thumbnail sketch of how law schools came to be is instructive. Likewise, the individual histories of Duke and Yale Law Schools, and the very first American law school.

* * * *

1. From *Duke Law School, 1868 - 1968: A Sketch*, by W. Bryan Bolich (Duke University emeritus professor of law), pp. xiii to xv.
2. In Blackstone's words, the problem of unlettered legal craftsmen could never "be effectively remedied but by making academical education a previous step to the profession of the common law, and at the same time making the rudiments of law a part of academical education." *Duke Law School, 1868 - 1968: A Sketch*, loc. cit.
As noted, Blackstone continues to be an important figure in American jurisprudence. He is best known as the author of the still influential and celebrated *Blackstone's Commentaries on the Law of England*. The idea of "pursuit of happiness" in the American Declaration of Independence derived from *Blackstone's Commentaries*. His work is cited by courts to this day.
3. Although some come to the bar in England via university and a bachelor of letters in law (B. Litt.) degree, most proceed into a formalized self study, apprenticeship program in what are called "Inns of Court" following completion of secondary school education. There are four Inns of Court in London, with satellites elsewhere. Prospective "barristers" (lawyers who appear in court) self study under the guidance of experienced barristers and judges, until such time as they are deemed sufficiently learned and proficient to be "called to the bar." Whereupon, they are examined by a licensing body, and, if deemed worthy, are given a license to practice. As noted, Great Britain has half the number of lawyers as the United States in proportion to overall population.
4. See article of Georgetown University law professor, Brent Evan Newton, referenced at the outset of Section One, Chapter 6, *supra*. (That which went before.)

Section Two, Chapter 1

The rise of law schools and a quandary

The Rise of Law Schools

As noted in the introduction to this book, it is assumed by most that if you want to be a lawyer, you must attend law school. This is not so, at least not in many states. The apprenticeship route to taking the bar exam and becoming licensed in New York, Virginia, and California has been mentioned.¹

Long before the Revolutionary War there were lawyers in America. However, not until shortly before 1800 was there anything that could remotely be called a law school. Until well into the nineteenth century, most became lawyers via self study, apprenticeship, or a combination of the two. They learned the law, procedures, the legal trade by reading the few law books then in existence that they could get their hands on, and/or by studying and observing under the tutelage of a lawyer or judge.

In practice this meant that an earnest young man -- lawyers were invariably men at the time -- swept out the office, hauled the water, ran errands, and otherwise assisted the lawyer or judge, while observing his mentor in action. He meantime cobbled additional knowledge from whatever law books that mentor or his associates might possess. At such time as the young man was adjudged sufficiently knowledgeable and prepared, he was examined by local lawyers and judges. If deemed capable of offering adequate legal counsel, he was admitted to practice law and began seeking clients.

Until late in the 1800's, it did not occur to anyone that the self study and apprenticeship routes to the bar were inadequate to the task of producing capable lawyers. Alexander Hamilton, aide-de-camp of General Washington, Revolutionary War hero, primary author of the influential *Federalist Papers*, Founding Father, secretary of the United States treasury, primary architect of the banking system that exists to this day, father of the New York stock exchange, and distinguished practicing New York lawyer, came to the bar via the apprenticeship route. Abraham Lincoln, some fifty years later, and fifty years after the opening of what is considered the first American law school, came to the Illinois bar via self study. To this day both men occupy places in the pantheon of America's finest lawyers.

Well into the nineteenth century the idea of law school as a necessary, even appropriate route to becoming a lawyer was of little moment. Thus, when asked in 1858, for advice on how one Mr. Widmer, who was seeking to apprentice in Abraham Lincoln's law office, might best go about becoming a lawyer, Lincoln responded in a letter as follows:

“... my judgment is, that he reads the books himself without an instructor. That is precisely the way I came to the law. Let Mr. Widmer read Blackstone's Commentaries, Chitty's Pleading -- Greenleaf's Evidence, Story's Equity, and Story's Equity Pleadings, get a license, and go to the practice, and still keep reading. That is my judgment of the cheapest, quickest, and best way for Mr. Widmer to make a lawyer of himself.”

There was no mention of law school by Mr. Lincoln, who, in 1858, two years before ascending to the presidency, had nearly twenty-five years of practice under his belt and a reputation as a skilled lawyer. One may note “cheapest” and “quickest” as possible reasons for Honest Abe not mentioning law school, considerations that loom large today. However, in ignoring law school as a route to the profession he also cited “best way.” Even as Lincoln offered his advice, however, money and elitism were conspiring to end the primacy of self study and apprenticeship as routes to the bar.

In the 1700's, as described previously, William Blackstone lamented that the self study, apprenticeship

route to the legal profession resulted in “legal craftsmen unlettered in the broad context and implications of the law.”²

As noted, the requirement of a broader education as a prerequisite to becoming a lawyer was rejected in England. However, the idea that lawyers should first receive the imprimatur of colleges and universities came to be embraced in America.

A question that begs asking and reflecting on

Isn't the problem in a nutshell that Emperor Law School finds itself very much between two stools?

On the one hand a law school wants and purports to fulfill Blackstone's ideal of providing perspective on the “broad context and implications of the law.”³ Yet, arguably, that function has already been fulfilled, leastwise to a large extent, by the circumstance that all who attend law school arrive with at least a college degree. Indeed, many have post-college degrees.

On the other hand there is the matter of providing practical instruction in the manner in which lawyers think and function. Given that, as noted, law school exams mirror essay exercises on bar exams, practical aspects of the lawyering craft, not surprisingly, are a necessary ingredient for mastery of such exams.

Arguably, therefore, all the probing and pontificating many law professors engage in respecting not what the law is -- useful knowledge for a future practicing lawyer! --, but what it could and should be -- so-called “policy” --, is so much superfluous naval gazing. (Recall “policy” discussion, preceding Section One, Chapter 4, footnote 1.) Lawyers disposed to employ policy considerations in aid of achieving a client objective arguably already have educational background necessary to that purpose.

Alternatively, as will be proposed in the final section of this book -- *Observations/thoughts/recommendations going forward* --, the larger policy context should be but an overlay or adjunct to a much more thorough grounding in what lawyers do, and how, exactly, they do it.

Emperor Law School has never engaged in instructing mechanics of the actual practice of law. Nor, lest in any fashion it be considered a mere trade school, would any law school at present be so inclined.

Such a quandary -- seeking to fulfill a mission that arguably has already largely been accomplished; averse to instruction of practical mechanics of lawyering -- surely provokes considerable dissonance respecting aims, purpose, and methods. It explains why Yale Law School, which, in the service of an “interdisciplinary approach,” encourages students to take courses in fulfillment of its J.D. requirement in departments outside the law school (which can include a course in the undergraduate college or the School of Forestry [!!]), is touted as innovative and accorded the top spot, year after year, in *U.S. News* rankings.

Is, simultaneously, what is required for success on hypothetical-type law essay exams is the thought process of a practicing lawyer (not a philosopher, economist, historian, etc.), as we shall see it surely is, then what is amiss in law school education and why becomes manifest. It further follows that law students are being unfairly victimized, while being saddled with unsustainable debt.

As noted, the potential for taking advantage and gaming such a situation is also obvious.

* * * *

1. Whether one can find employment after such a route, other than with the attorney or firm with whom one apprenticed, is an open question. Until a lawyer has a track record of experience and proven worth, the first thing a prospective legal employer normally asks is where you attended law school. However,

the apprenticeship route would likely be a much less expensive way to become a lawyer. Any interested in pursuing the apprenticeship route to becoming an attorney should check with the applicable state bar association.

2. *Duke Law School, 1868 - 1968: A Sketch*, by W. Bryan Bolich (Duke University emeritus professor of law), pp. xiii to xv.

3. While doubtful that many law schools consciously view their aim as fulfilling Blackstone's ideal, there is no question but the trend, driven by US News rankings, is toward greater, not less abstraction in law school classrooms. A factor in the rankings is academic reputation among law schools and in the profession. Given that Yale, with its interdisciplinary leanings, ranks number one, it is no surprise that in recent years when I have posed the question in live programs, "Whose professor is into policy?," I have noticed the hands of more and more students from lower-ranking law schools go up.

Section Two, Chapter 2

Three case studies: Duke; Yale; the first American law school

Origin of Duke Law School

Prior to the Revolutionary War and the birth of the American nation, there were no law schools. Formal legal instruction, such as it was, was offered via law chairs or professorships within colleges and universities. Thus, William and Mary College in Williamsburg, Virginia, instituted the Wythe chair of law in 1779, Columbia College the Kent chair in 1793, and Harvard College the Parker chair in 1815. The “aim was not to train lawyers, but to lay a broad foundation in responsible citizenship for the further education of prospective lawyers and non-lawyers alike.”¹

In 1850, as part of its liberal arts curriculum, Trinity College of North Carolina, later to become Duke University, advertised lectures on “Political and Natural Law,” replaced in 1855 by lectures on “Constitutional and International Law.”

In 1868, “to meet another need for specialized training” and to meet a “growing demand for leadership in the area of law” following the devastation of the Civil War, the aforesaid Trinity College organized a “School of Law.” Instruction was to be “as thorough as possible,” and “be given by textbooks and lectures,” including *Commentaries (on the Law of England)* by (the selfsame) William Blackstone, *Stephen’s Pleadings*, *Vattels’s International Law*, *Law of Executors*, *Greenleaf’s Evidence*, *Adam’s Equity*, etc. Unable to raise funds for professorships of law, the president, chief promoter and fundraiser of Trinity, one Braxton Craven, who had delivered the aforementioned in-college legal lectures of 1850 and 1855, did all the teaching himself until 1873. At that point an instructor in common and statute law was added.

A key motive in incorporating legal instruction into college curriculums -- surprise, surprise! -- was generating revenue. Higher education in early America was promoted by religious bodies. It had as its primary purpose the education of ministers, who would go forth and preach and promote the faith. Thus, Trinity College was founded and supported by methodists. The very small proportion of the population that sought education beyond the equivalent of present day eighth grade was largely limited to the prosperous and the near prosperous.²

Trinity president Braxton actively sought students. The 1868 catalogue of the “Department of Law” advertised “complete instruction is given by daily lectures, examinations, etc. Students are fully prepared to obtain license. College students \$20 per annum. Law students exclusively \$60 per annum. Young gentlemen who desire to study law will find many advantages at Trinity, not usually found at Law Schools.”³ Notably, tuition for law students was significantly higher than for college students receiving the same instruction.

The number of students in these fledgling law schools was not large. At the time of Braxton’s death in 1882, his class “had dwindled to 6 students from an 1870-71 high of 37.” Moreover, a majority of students were not prospective lawyers, but “academic enrollees.” Only a third of Trinity’s law students went on to practice law. However, Braxton’s recruitment efforts were deemed a “fine record,” given “the turmoil and poverty of Reconstruction, and the competition of office-apprenticeship and private law schools.”

Of particular note is a report from Braxton in 1875 to the Methodist Conference overseeing Trinity College. Braxton noted approvingly that Trinity law graduates “in recent years have made [i.e., constituted] nearly one-fifth of the legislature [of North Carolina].” Early on, the benefit to a college or university was recognized of having alumni who would one day wield local, state, and national levers of power as judges and lawyer-politicians.

Origin of Yale Law School

The origin of Yale Law School echoes the theme of revenue and power as a motive in the development of law schools.⁴

An attractive feature at the center of many New England towns and cities is a “green.” It is an open space, often as large as several acres, harkening back to colonial times. In order to safeguard them, villagers and townsfolk grazed cattle and other livestock in a central area surrounded by homes and businesses. In the early 1800’s, one of the “law schools” referenced above as a competitor to the Trinity School of Law (along with apprenticeship), emerged just off the New Haven, Connecticut green. New Haven was home to the then small institution known as Yale College.

One Seth Staples, a New Haven lawyer, had assembled a library of law books. Such books were at the time relatively rare. As was the practice of other lawyers, for a fee Mr. Staples gave young men aspiring to be lawyers access to these books, and also trained them. In 1810 this enterprise had come to be known as the “New Haven [Law] School.”

Over the next thirty years the New Haven School “affiliated” with nearby Yale College. In 1843, the year cited as the founding of Yale Law School, graduates of the New Haven School began receiving Yale College degrees.

The manner in which the New Haven School “affiliated” with Yale College to become Yale Law School, points again to the attraction for a college or university of a law school as an avenue to both revenue and influence.

The New Haven School was sufficiently profitable that Mr. Staples took on partners in the enterprise. One such partner was a former United States senator, David Daggett, who purchased a co-proprietorship of the New Haven School in 1824. In 1826 Mr. Daggett was named a professor of law at Yale College.

Your author was an undergraduate, as well as a law student at Yale during a time (late 1960’s, early 1970’s) when cities such as New Haven, strapped for funds, demanded that wealthy, tax-exempt colleges and universities do more to financially assist their surrounding communities. I recall insistent demands upon the Connecticut legislature by New Haven officialdom to do away with the tax-exemption for Yale’s vast New Haven real estate holdings.

For public relations reasons, Yale, of its own accord, eventually reached an accommodation with its host city to make a generous annual contribution. However, Yale was never in any danger of losing its tax exempt status. We undergraduates, and later we law students well understood that by virtue of the many Yale graduates in the Connecticut legislature and judiciary, as well as in other seats of power in state and federal government, all unfailingly maudlin in their loyalty to *alma mater*, Yale was never in any danger of being pushed around. Leastwise, not via legal maneuvers.

Doubtless, academic poohbahs of Yale College in the early nineteenth century perceived both the financial and power/influence advantage in recruiting a former United States senator and his law school into the fold.

The first American law school

The Litchfield Law School of Litchfield, Connecticut, is generally recognized as the first American law school. It began as a source of revenue -- there’s that word again! -- in the parlor of a newly minted lawyer’s small home.

Circa 1775, one Tapping Reeve had just been admitted to the Connecticut bar, following apprenticeship under a Hartford judge. The ongoing Revolutionary War had stripped towns of men and put a damper on

commerce. Thus, Reeve was unable to find employment as a lawyer. To support himself and his new wife, Reeve took in his wife's brother as a boarder. He also endeavored to instruct his brother-in-law, preparatory to the latter's becoming a lawyer himself. It may be noted that said brother-in-law was none other than Aaron Burr, future vice president of the United States, slayer of Alexander Hamilton in their infamous duel.

Despite having little practical experience as a lawyer (the parallel to many law professors today is inescapable!), Reeve displayed a talent for instructing principles and practices of law. Wealthy families desirous of their sons becoming attorneys began sending them to him for instruction. For a fee, of course.

So successful and remunerative did the business of instructing future lawyers become, that Reeve added an annex to his house for the purpose of conducting a school. That one-room addition became the "Litchfield Law School," which operated from 1784 to 1833, closing soon after Mr. Reeve's death. During this time over 1,100 students were enrolled, including an entering class of 54 at the school's zenith. The modest wood frame house of Mr. Reeve and his law school is maintained to this day in Litchfield, Connecticut, as a historical site and tourist attraction.

Students from all of the original thirteen states, but mostly New England attended the Litchfield Law School. They were lectured in legal principles and practices by Reeve and other attorneys, took careful notes, and used these notes as guides in their initial practice. They also read the books mentioned in the previously noted Lincoln letter. At approximately the time the Litchfield Law School closed its doors, Abraham Lincoln was pursuing a self-study route to the Illinois bar.

The influence factor

The history of the Litchfield Law School (set forth at the Litchfield Historical Society website) demonstrates the far-reaching influence of an American institution that produces lawyers. Given the impact the rule of law was to have in the new American nation, unique in the annals of history, and given the influence of lawyers and judges in wielding, shaping, and interpreting government, business, legal, even educational institutions, this was particularly so for a school producing lawyers shortly after America's birth.

In addition to the aforesaid Aaron Burr, and also John C. Calhoun, both eventual vice presidents of the United States, the Litchfield Law School boasts among its graduates 100 United States congressmen, 28 United States senators, 6 United States cabinet members, 3 justices of the Supreme Court, 14 governors, 13 chief justices of state supreme courts, numerous state and local political office holders, and a large number of graduates who "became leaders of the nation's emerging mercantile, industrial, and banking establishments." In addition, tellingly, "More than a dozen students of the Litchfield Law School founded university law schools, and many became university presidents."

* * * *

1. Information in this segment is derived from the aforesaid *Duke Law School, 1868 - 1968: A Sketch*, by W. Bryan Bolich, pp. xiii to xv.

2. As an interesting side note in this regard, Alexander Hamilton rose from extremely humble beginnings as an illegitimate child in the Virgin Islands. In his early teens, as an employee of a shipping enterprise who was whip smart with numbers, he attracted the attention of protestant missionaries, who collected funds sufficient to send him to America. There he was educated at the College of New Jersey (later Princeton), and Kings College (later Columbia). As there were at that time no law schools, Hamilton, as noted, came to the bar via the customary apprentice route.

3. "Law Schools" refers to the practice of some lawyers at the time, as a means of earning extra money, of instructing young men desirous of being admitted to the bar in "schools" conducted in their offices. See descriptions that follow in the chapter of the "New Haven School" as progenitor of Yale Law School, and the first American law school.

4. Information culled from an address several years ago by Anthony Kronman, then dean of the Yale Law School.

Section Two, Chapter 3

A proliferation of American law schools

From the very first law schools generated revenue. Revenue generated today by many law schools is substantial. As a later chapter will explore, it is also in many instances excessive. At least until recently, law school graduates were likely to be wealthy and able to donate monies to *alma mater*.

Law schools produce graduates who, by virtue of positions as powerful judges and lawyers, heads of enterprises, and elected officials, bring favorable recognition to, and, if need be, can protect *alma mater*. Such advantages being obvious, proliferation of law schools in America was inevitable and continues to this day.

It has been noted that Emperor Law School constitutes well over 200 institutions. Most flagship state universities have law schools. Michigan and Penn State Universities were exceptions. However, both institutions apparently felt a need to remedy that gap. Both recently purchased and incorporated existing private law schools.¹

Numerous prestigious American universities, and numerous not-so-prestigious American universities have law schools. There is no shortage of lawyers in America. However, the trend of adding a law school to the fold for likely reasons of prestige, revenue, and influence proceeds inexorably.

In addition to the MSU and PSU additions, in the last ten years Liberty (VA), Barry (Orlando), Elon (NC), University of Nevada-Las Vegas, St. Thomas (MN), Drexel (Philadelphia), Phoenix (AZ), and Florida International (Miami) Universities opened law schools. Florida A & M University, whose law school in Tallahassee was closed in 1969 after many years of operation, re-opened a law school in fast-growing Orlando in 2001.

The University of California added a fifth law school several years ago at its Irvine campus, which happens to be in prosperous, fast-growing Orange County, south of Los Angeles. Belmont University in Nashville (TN) opened a law school in the past year. Fresh off the press, North Texas State University proposes to open a law school in Dallas in 2015, joining those of Southern Methodist and Texas Wesleyan Universities. It may be noted that the first dean of the new Dallas law school will be a prominent, retired local judge.

Much as the addition of a professional sports franchise is welcomed by cities as signifying big-league status, in recent years the burgeoning cities of Charlotte (NC) and Charleston (SC) celebrated the opening of (private) law schools named for their cities.

Wealthy individuals, anticipating that graduates of their schools will further their political, social, religious, and other agendas in corridors of power where law graduates exert influence, have started law schools.

Tom Monaghan, for example, founder of Domino's Pizza, in order to "further Catholicism-centered principles" -- no abortions, pornography, birth control, etc. --, established Ave Maria School of Law in Ann Arbor, Michigan in 1999, replete with a gigantic cross at its entrance. In 2009 he moved the entire school, staff, and student body to his newly-established, Catholic-centered town of Ave Maria, near Naples, Florida.

Similarly, (Yale Law grad) Reverend Pat Robertson, presidential candidate, media mogul, founder of the "700 Club," founded Regent University, and later, in the 1980's, Regent University School of Law in Virginia Beach, Virginia.² The late Reverend Jerry Falwell, founder of "The Moral Majority" and Liberty

University, in the past decade opened the aforementioned Liberty University School of Law in Lynchburg, Virginia.

Reflecting the revenue potential in the desire of so many in America to become lawyers, as noted, for-profit, mostly online University of Phoenix, the largest university in the country (nearly 500,000 students!), opened a law school in 2004. Florida Coastal School of Law in Jacksonville, founded in 1996 with a “capitalization of 1.5 million dollars,” according to a Jacksonville news article, was purchased in 2004 by Sterling Capital Management, reputedly with plans for franchising the school nationwide.

Thomas M. Cooley School of Law, based in Lansing, Michigan, expanded in the last five years to satellite campuses in Auburn Hills, Grand Rapids, and very recently Ann Arbor and Tampa, Florida. Admitting most who apply (but with significant attrition) and boasting over 3,000 students, it is the largest American law school. “Cooley Law” is described by some as a “lawyer factory.”³

Status consciousness being what it is, both in the eyes of prospective clients, community, and lawyers themselves, inevitably the questions, “Did you attend a law school?” and, eventually, “What law school did you attend?” made attending law school a preferred, even necessary route to the profession.

That, as suggested in the previously referenced Lincoln letter, law school may have been too expensive an option for many, such as Lincoln himself, was probably never of any real moment. Exclusivity and elitism but add allure. The self study, apprentice route to the legal profession was bound to eventually confer suspect, secondary status, as those who could afford to went to law schools. The self study, apprentice route to the profession was bound to wither in the face of law school as a desirable credential.

Of course, there remains the problematic disconnect between Blackstone-inspired, university-based law school instruction, and an exam exercise that requires functioning “as a lawyer.” What is significant in this regard is that, in supplanting apprenticeship, there was no effort to incorporate practical lessons of apprenticeship into law school curriculums. Quite the contrary.

This void in practical instruction naturally creates a disadvantage on an exercise requiring, if not practical lawyering skills, as we shall see, a practical lawyering perspective. The instruction following many essay exam exercises opens with words to the effect, “Imagine you are a lawyer (or law clerk) ...,” “Imagine you are a judge ...,” “You are the attorney for party X.” (Finally, the words “lawyer” and “attorney” emanate from the professor!)

However, the requirement of such exam exercises that one identify and analyze issues “as a lawyer” seems to make academically-inclined law professors uneasy. This is reflected in their reluctance to entertain discussion of exams until late in the term. The somewhat impatient brush-off is frequently heard from law professors in Emperor Law School, “It’s too early to worry about the final exam.” This is often followed by something of the order, “I’ll tell you what you need to know about exams when the time comes.”

New law students, not surprisingly, adopt and are comforted by such advice. They retreat back into the hopeful posture of waiting for understanding, clarity, etc. to “click.”

The potential for advantage of one who acquires the perspective of a practicing attorney, who, in addition, learns a system for identifying issues, and who learns how, exactly, to analyze and present analysis of such issues “as a (practicing) lawyer,” is obvious.

* * * *

1. Michigan State University (MSU) purchased the former Detroit College of Law (DCL) some fifteen years ago. Several years ago Penn State University (PSU) purchased the over one hundred year old Dickinson College of Law in

Carlisle, PA. Both law schools were moved to new facilities on the respective university campuses. Doubtless, to avoid confusion and give the many graduates of DCL and Dickinson Law time to get accustomed to the change, both MSU and PSU transitioned the name change of the new schools over a period of several years. "DCL at MSU" eventually became MSU College of Law. PSU's law school is currently called "PSU, The Dickinson School of Law."

Your author may note his observation that students at MSU Law have seemed eager to drop the DCL association. Likewise, current PSU law students seem to emphasize PSU over the Dickinson connection. The prestige of one's alma mater is of great importance to law students in securing permanent employment, and to practicing lawyers in reassuring clients and securing new business. Both law schools have climbed significantly in U.S. News rankings, and greatly increased their applicant pool since being incorporated by nationally known universities.

2. Quite a few years ago, and for a period of several years, your author was invited by the then president of the Regent School of Law student bar association (SBA) chapter, a LEEWS grad, to instruct programs at the law school. The facility is magnificent. As is the rest of the university, it is built to look old, in the orange-colored brick of such venerable Virginia institutions as William & Mary University. In the center of the building is a large, glass-roofed, enclosed atrium, overlooked from three or four upper floors by professors' offices. Students were well-scrubbed, bright, eager, polite, and surprisingly diverse. I recall a woman saying to me, "Now that John Ashcroft is the Attorney General [of the United States under President George W. Bush], our graduates are getting jobs [in the Justice Department]."

It may be noted that in 2007, two years after Ashcroft was replaced by President Bush (by later disgraced Alberto Gonzales) for apparent failure to sufficiently co-ordinate with White House intentions, one Monica Goodling, a 1999 Regent Law graduate and Department of Justice lawyer, was found to have violated federal law as a result of her role in a scandal over firings of several (supposedly non-political) United States Attorneys for apparent political reasons.

3. Your author has probably instructed over 2,000 Cooley law students over the years, including 475 in a two-day program at the invitation of the law school.* Some of these students have come to my attention as having transferred to higher ranking law schools, including Northwestern and Washington U. My experience with Cooley students is that while many enroll with lesser college gpa and LSAT qualifications than students from other law schools, they seem as able (and confused) as students I instruct from neighboring Michigan law schools. (It may be noted that many Cooley students have high LSAT scores, as Cooley gives scholarships to students with high LSAT scores. Indeed, a "calculator" exists on the Cooley Law website for determining how much financial aid an applicant's LSAT score may result in.) Cooley facilities are excellent. Professors are well compensated. (And, predictably, more locally based.) Instruction is as good (or, in your author's view, inadequate!) as that in most any other law school.

* I was never invited to return. My host/coordinator at the program, a Dr. Wilson, was the newly appointed director of a new Academic Resources Center (ARC), which adjunct service was so elaborate as to have its own building. (Ever since tuition and fees topped \$20,00 a year, I may note, many lower tier law schools have instituted programs, replete with an assistant dean, devoted to student retention. Even Harvard Law offers counseling to students. I know, because the dean in charge of the program, who had gotten to know of LEEWS while at Hofstra University School of Law, used to send his students to me!) Dr. Wilson had a Ph.D., but not a law degree. She described her philosophy of how best to go about preparations as a law student in a preamble to me being introduced. (In the familiar vein of "study hard," "attend all classes," "come to the ARC should you experience any difficulty," etc.) I recall thinking, "Nope. She's not going to like what I have to say." And, of course, Dr. Wilson didn't, we didn't hit it off, and I knew I would not be invited back.

The hand-holding of the Cooley ARC has substantially reduced attendance by Cooley students at subsequent Detroit live programs I have offered. However, Cooley students who have attended have uniformly pronounced the instruction offered by their ARC to be vastly inferior to LEEWS. I may note that Cooley charged the 475 students \$25 per to attend my program, and also (with my permission) reproduced copies of my instructional manual. Thus, the law school netted a profit after paying my fee!

Section Two, Chapter 4

Law school instruction prior to advent of case method; a salient question going forward

Law school instruction prior to advent of “case method”

As private law schools were incorporated into colleges and universities (Yale model), or law schools sprang up anew from colleges and universities (Duke model), no attempt seems to have been made to incorporate the practical instruction afforded by apprenticeship.

Early on, as now, aspiring lawyers were in no position to judge what might be the best course of instruction for entry into the profession. Early on, as now, law school graduates soon moved into law practice or other fields. If there were regrets about lack of practical instruction in the lawyering art, there was little inclination to do other than mutter about it briefly.

Perhaps what counted in early years was gaining access to the limited law books available. This, of course, is no longer a concern. It is also unlikely that, until recently, law school graduates were burdened with anything approaching the debt law students today assume for the “privilege” of attending law school.

Being university affiliated, as most law schools until the last half century were, the instructional modes and expectations of a college or university initially held sway in law school classrooms. To wit, (to use a popular turn of phrase in the law, meaning that is to say; namely), professors, who were not necessarily lawyers, lectured, as at the Litchfield and Trinity (later Duke) Law Schools, and students took notes.

As noted, law books were scarce. Rote memory and regurgitation on exams was likely the norm, as in other learning. With a nod to the intentions of Sir William Blackstone, a professor perhaps supplemented instruction of legal precepts by informing them within a larger historical context. As undergraduates also attended lectures, early on there was probably little to distinguish law study from a course of study in history or philosophy, other than subject content.

Indeed, different modes of legal instruction were afoot and equally valid until just before the turn of the twentieth century. At that time Christopher Columbus Langdell, dean of Harvard Law School, for whom the present main Harvard Law building -- Langdell Hall -- is named, borrowed from and experimented with teaching modes likely pioneered at New York University and Columbia Law Schools. In time he evolved (or refined) and began to popularize so-called “case method” legal instruction.

Owing to Langdell’s influence, backed by the clout of Harvard, which graduated more lawyers by far than any other law school at the time, case method instruction is today the universal norm and omnipresent in Emperor Law School.

Case method instruction, supplemented to a greater or lesser degree with “Socratic method,” and what is wrong with it, will be addressed in subsequent chapters of this section. Suffice, for now, to note that, although probably an improvement upon university-style lecturing and note taking as a means of introducing aspiring lawyers to the profession, case method instruction made and makes no attempt to introduce day-to-day, practical aspects of law practice into the law school curriculum.

As noted, the words “lawyer” and “attorney” are rarely heard in a law school classroom. Blackstone’s antipathy to “training a mere craftsman” is given full force.

A salient question going forward

Section One of this book opened with the assertion that most lawyers would agree that had they known in law school what they learned after several years of practice, it would have benefitted them significantly on exam performance.

In view of the foregoing, a salient question presents itself: Whatever the merits or demerits of case method instruction, can a student in a single term (or year or three years?) learn to think and analyze “as a lawyer” in a classroom environment that ignores practical aspects of law practice, such that she can perform “as a lawyer” on an exam that, as we shall see, is at bottom an exercise in performing as a lawyer knowledgeable in the subject being tested?

Alternatively, are there kernels of knowledge and understanding contained within the requirements of actual law practice, particularly a cadence, discipline, and rigorous set of rules respecting “analysis,” without exposure to and knowledge of which, it is unlikely one can adequately learn to “think and analyze as a lawyer,” particularly in a single term (or even two or three or four years!), on an exam that requires and rewards precisely such ability?

We shall see that the answer to the former is emphatically “no,” and to the latter emphatically “yes.” Therein lies the fatal omission of current law school teaching, and the opportunity, given instruction in certain insights, and development of certain analytic skills deriving from actual law practice, to take advantage.

* * * *

1. “Socratic method” is a manner of instruction pioneered by Socrates, famed Greek Athenian philosopher, teacher of Plato and Aristotle. Socrates’ method was to pose a series of questions that would eventually bring his students to awareness and knowledge via their own responses.

Socratic exchange or dialogue is dramatic and a staple of movie scenes depicting law school. (E.g., *Paper Chase*, *Legally Blonde*.) All law professors introduce Socratic give and take to some extent. Law students expect it. Professors perhaps expect it of themselves. Naturally, some professors are more adept and given to Socratic method than others. Some are known for witty, but friendly use of Socratic method. Some use it to bully, skewering hapless victims. Others, probably a majority, are less comfortable with the clash of wit and ego implied in a Socratic exchange.

An illustration of Socratic method will be provided in Section Three, Chapter 4, “*Day one of law school –The ringmaster cracks the whip!*”