

## Section Three

### **Confusion, intimidation, case method instruction lay a foundation for mediocre exam performance in Emperor Law School**

It is an axiom that confidence promotes success in all endeavors. The student who goes into a law exam nervous (which pumps adrenalin and provides energy!), but also confident, will normally perform better than a student who is nervous (often to the point of paralysis) and lacking in confidence.

Most who choose to attend law school are confident, many extremely so. They have been highly successful in college, graduate school, their lives prior to law school. However, even months before entering law school the confidence of many begins to wane.

Fear of law school is capitalized upon by programs offering 1-2 week simulations of the law school experience prior to the start of law school.<sup>1</sup> Such programs are expensive. Curiously, complicit in this exploitation are law professors, who participate in such programs for a hefty recompense. Indeed, that actual law professors will conduct classes is a major selling point.

If students manage to maintain an optimistic outlook prior to entering law school, for reasons that will be explored in this section, enthusiasm and confidence quickly ebb once the term starts. Nor do professors or law school administration do anything to stem the erosion of zest. Indeed, ubiquitous case method instruction, coupled with the Socratic method, is very much at the root of the problem.

By the end of first term, as exams approach, virtually all who take exams in Emperor Law School lack confidence. This is as much so at YHS as at any other law school. All are intimidated, all are confused, most have been persuaded of their inadequacy. The only difference among students is one of degree.

Many would charge that law professors enjoy confusing and intimidating law students. At the very least, they profit from confusion and intimidation. They are less likely to be challenged in class. Mediocre exam results, and the instruction that makes such results predictable, are unlikely to be questioned. Law students typically fault themselves for shortcomings in handling exams.

If the foregoing is the case in Emperor Law School, and we shall see that, inevitably, it must be, then a student who can pierce the veil of confusion, who can yet approach exams with confidence and belief in herself, will enjoy a significant advantage.

As noted, one needn't perform with excellence to do well on all-important law school exams. Mere competence suffices to score 35, 45, and more out of a possible 100. 35 competes for an A. 45 or 55 competes for the top exam award!

LEEWS provides such assurance and confidence. A student who approaches exams not as an academic, but as a lawyer, at least a reasonable facsimile of a lawyer, will enjoy a significant advantage. For such a student, it's game on!

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1. Simulated law school programs: One and two-week programs, purporting to simulate what a student will encounter in law school, are one facet of an array of aids designed to ease the difficulty of law school. As noted, such programs are expensive. (\$2,000 and more!) Often conducted in actual law school classrooms rented for the purpose, albeit in a much more relaxed atmosphere, such programs introduce students to cases drawn from first year subjects. Simulated law classes are conducted by actual law professors, some of them quite reknowned. (Who are handsomely compensated!) At the end of the week or two weeks, students take a mini exam in each subject. They

thereby experience law school in truncated form.

Such programs are essentially hand-holding operations. They prey upon the fear and unease many students experience at the prospect of attending law school. (As, admittedly, this book and your author's program do, albeit at much less expense.) While they indeed ease student fears (perhaps falsely, as the collegial relationship with professors is unlikely to be duplicated in law school), there is no empirical evidence that such programs assist all-important exam performance. Predictably, whatever advantage is gained dissipates a few weeks into the first term of actual law school. Indeed, the problem with such programs is that, conducted as they are by law professors, they precisely mimic ineffective teaching methods in law school.

Quite a few years ago a simulation program called "Law Preview" was just getting off the ground. (It may be called something else today.) Your author was invited by Law Preview's founder to instruct the exam writing segment.

I asked "Don" (we were on a first name basis) to send me the syllabus of his program. I wanted to know what would precede my day of instruction. When I noted the page-long, conventional case briefing format students would be taught, and the typical case method instructional format -- the same as students encounter in any law school --, I declined his offer. I said to him, more or less verbatim, "At the end of my program, students will wonder why they wasted their money on the previous week."

Indeed. Over the years I have had many graduates of law school simulation programs in my classes. Some of their (attested) remarks can be found at the LEEWS website -- [leews.com](http://leews.com). Invariably, they lament wasting money on such programs.

A salient, perhaps telling question raised by such programs is why, if they are indeed beneficial, law professors who hire themselves out to such programs don't introduce such instruction at their schools? In point of fact, Pace University School of Law, just north and east of New York City, introduced such a program years ago. Pace conducts it prior to the actual start of fall term. Taking a page from commercial offerings, Pace charged participating students some \$700 over and above normal tuition and fees in the initial year. Week-long orientation programs, increasingly the norm in Emperor Law School, often feature a mini version of the simulation experience.

## Section Three, Chapter 1

### The awesome prospect of the law and Emperor Law School as both a barrier to success and a key to taking advantage

*Res ipsa loquitur* (the thing speaks for itself). Becoming a lawyer is a pretty big deal for most. This is so whether young or older, whether one comes from a family of lawyers. or one is the first in the family to attend college. In the first nation completely subject to the rule of law, lawyers as a collective are king. Lawyers make the laws, interpret the laws, occupy the highest seats of power in local municipalities, state and federal government, and private industry. Neighbors and the populace at large will not want to “mess with” the most modest, ambulance-chasing attorney .

It is likely for this reason that many Americans of all ages flock to law school. It is for this reason, also the forbidding, arcane nature of the profession, that law school and law professors inspire awe in entering students.

By the late nineteen sixties, suspicion and irreverence for authority had taken hold among collegians, certainly your author. Nevertheless, fresh off a successful college career (Yale ‘69), I was cautious, very impressed upon entering the stone, carved wood, gargoyle-festooned gothic cathedral that is the Yale Law School building.

I observed the gilt-framed portraits of dignified-looking past professors along the walls of tiered classrooms. They denoted seriousness of purpose. Second and third year students were earnest. They debated whether arch-conservative Yale law professor, Robert Bork, would be confirmed to the Supreme Court. (He was not, thanks in part to Yale Law-led opposition.) And, if not Bork, who among the illustrious faculty might be deserving of such an appointment? The place was impressive!

I was a confident young man in the fall of 1969. However, similar to most entering the hallowed precincts of Emperor Law School, I was poised to have my bubble of confidence burst. As will be made evident in Chapter 5 of this section, “*Day one of law school -- The ringmaster cracks the whip!*,” such bursting comes quickly for most new law students.

The musty old legal cases, containing Latin phrases that have to be looked up every other line of text, the confident, even smug air of the professor who knows so much that you don’t, the nervous aggressiveness of type-A, fellow students, seeking to disguise their unease,... Starting law school is a situation fraught with ego-damaging possibilities.

What entering law students don’t know about the law, courts, the legal process, etc., and are not taught, can and does hurt them. Inadequacies of conventional case briefing and case method instruction leave students vulnerable to exams.

Mediocre exam performance is almost inevitable in Emperor Law School. Moreover, as noted, students blame themselves! Indeed, such is the confusion and intimidation engendered in confident, life-long “A” students, that they are grateful for the B’s given to most following first term.

There is much light at the end of this tunnel of ego diminution for any who can maintain confidence, who can pierce the veil of confusion and intimidation, who can successfully overcome hurdles and difficulties that cause most at even YHS to falter.

Understanding and mastering law, especially the craft of a lawyer, is a painstaking endeavor. Law school

presents a significant challenge. However, as with most complex, outwardly forbidding processes and systems, taken apart, their components and workings examined and properly understood, the process, the system becomes manageable and doable.

So it is with Emperor Law School. For the properly initiated, for those who understand the law school game, especially the law exam game, the very challenge and complexity of the enterprise creates an opportunity for success. Once surmounted, once it becomes manageable, the mystery, ineffective instruction, misdirection, confusion, and fear, which renders the great majority of highly able classmates incompetent in handling exams, creates an opportunity to take advantage.

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## Section Three, Chapter 2

### The conventional case brief; the (many) problems with it

As noted, cases, set forth in hefty texts called “casebooks,” are accounts of court decisions in lawsuits the casebook author (usually a law professor) deems instructive in the legal subject being studied.<sup>1</sup>

The first thing a law student learns, after location of the registrar’s office and bookstore, is how to “brief” a case. “Briefing” will be instructed in any of the aforementioned prelaw, simulated law school programs. It will be part of all get-ready-for-law-school books. It will likely be instructed as part of law school orientation. Often a professor will devote part of the first day of class to “the proper way” to brief a case.

Such instruction typically points to what may be termed the “conventional case brief.” Such a brief is universal throughout Emperor Law School, with but minor differences. All law students devote themselves assiduously to briefing assigned cases in preparation for class.

#### Conventional case brief

If called upon in class, a student is expected to be able to articulate and discuss the following aspects of an assigned case. 1Ls will write or type these aspects in a “brief” of each case they are assigned to “prepare” for class.

I shall posit, as an example, the hypothetical case of X versus Y in a property law class. A conventional brief of X v. Y would contain the following:

#### 1 -- Procedure:

[How the case arrived at its current posture. As virtually all cases read in Emperor Law School are appellate opinions (something never noted to law students, which, we shall see, has a problematic implication), what court was the case appealed from? What was the disposition (result) below that was appealed from?]

[Respecting X v. Y (the “instant” case), ...] X, original defendant [party originally sued], appeals from an order of [Superior Court of County Z, United States District Court, State Court of Appeals, United States Court of Appeals, etc.] granting summary judgment awarding an easement right of way to X’s neighbor, Y.

[“Summary judgment” means a decision based on legal issues alone. There were no disputes (issues also) respecting facts.]

[X, therefore, is the “appellant,” Y, plaintiff below (party bringing the original suit), the “appellee.”<sup>2</sup>]

#### 2 -- Facts:

[Summary of salient facts of the case.]

Y had for many years accessed a public beach via a walkway that crossed a portion of X’s property. The walkway is the only convenient access to the beach from Y’s adjacent property. The prior owner of X’s property had given Y permission to use the walkway. Prior owners of Y’s property had long used the walkway for access to the beach, some with the permission of the then owner of X’s property, some without. Nothing respecting access to the beach over X’s property had ever been put in writing.

#### 3 -- Issue(s):

[What legal questions are raised for resolution in the case? Note that there are never factual issues in appellate cases. If there are, the case is “remanded” (sent back) to the appropriate lower (trial) court for further “findings of fact,” before a determination on appeal is made. Respecting X v. Y,...]

Did Y's long time use of the walkway, and use by prior owners of Y's property, and the permission given Y by X's predecessor in ownership, give rise to an implied easement [right of way], or perhaps an easement of necessity? Does the circumstance that real property is involved, and nothing respecting a right to cross X's property had been put in writing, have a bearing?

["Real property" means land, including structures thereon, as opposed to "personalty," meaning personal property, especially personal belongings. Whether "fixtures" (kitchen appliances and window appointments, drapes, etc.), for example, are real or personal property is typically an issue in the sale of a house. Normally, this determination must be "reflected" (set forth) in a "writing," meaning a contract, even an agreement or understanding set forth in a note or letter.<sup>3</sup>]

[Do you begin to get a feeling for how study of law, apart from learning principles, is simultaneously learning a foreign language? Unlike your author (providing definitions as we go along), Emperor Law School does no hand holding in this journey. This is a major reason new 1Ls are confused and intimidated. One has to wonder whether such a sink or swim approach is appropriate or useful, other than to preserve a professor's superior position.]

#### 4 -- Rule(s) of law:

[What legal rules, statutes, principles were introduced or touched upon in the case to guide determination of issue(s) raised? In X v. Y,...]

[Rules respecting easement by implication, easement by necessity. Also the general rule ...] Matters respecting real property and rights appurtenant thereto normally must be reflected in a writing.

#### 5 -- Holding:

[How the case, the issue(s) therein, was decided? Very likely, ...]

Y was held to have an implied easement right of use of the walkway over X's property to access the beach at reasonable times. [The court may have noted that midnight to dawn, for instance, would not be a reasonable time for appellee to be on appellant's property. Therefore, ...] Judgment for appellee, affirming (approving) the decision below.

#### 6 -- Rationale:

[This is not required by all professors, but is popular with those in upper tier schools, and in schools seeking to climb to the upper tier. What was the non-legal (common sense) reasoning underpinning the decision? In other words, upon what public policy, societal concerns and aims, larger than application of law to immediate facts, was the holding possibly based? Rationale is common sense background reasoning.

Here the professor wants a student to think outside the narrow box of what legally transpired in the case, and consider larger, wide-ranging reasoning and implications. For example, what is the underlying purpose of easements? Why was an easement found in this case? Changing what facts might have altered the outcome?

Rationale may be stated explicitly in the judicial opinion or hinted at. Often, it derives from mere common sense. In discovering rationale, it may fall to the student to bring to bear thinking and knowledge outside the case.<sup>4</sup> A professor seeking rationale wants students to draw upon general information and knowledge of other disciplines. In the instant case, rationale might be ...]

The case recognizes that property ownership and right of use is never absolute. It may be contravened by compelling public, even individual necessity. [Perhaps the court noted, or the student preparing the brief will note, ...] Where beachfront property is in danger of eroding, a municipality reasonably has a right to

erect buttresses on private property fronting the shoreline. This benefits not only the public, but private property owners.

Ownership rights respecting property may also be compromised, where to not do so would impose an unreasonable hardship. In this instance, absent a minor compromise to X's right of private enjoyment of his property, neighbor Y would have to travel an unreasonable distance to access a beach that is integral to enjoyment of *his* property. Such a minor compromise would be particularly appropriate where Y has traversed X's property for a long time, and permission to do so has been granted in the past.

#### 7 -- Policy aspects:

[Closely related to rationale, "policy" is also popular with professors aspiring to raise students' sights beyond the (mere) who, what, how particulars of a case. Policy aspects has to do with broader societal, economic, environmental, even philosophical implications of the decision. Is the holding correct, if judged by modern standards? Does it embody societal, cultural norms that may have been valid at the time and place of the decision, but perhaps now should be questioned? Are unspoken aspects of economics, class, race, or gender reflected in the decision or reasoning process of the court? Should they be considered? If so, what implications follow? (Review, once more, Section One, Chapter 4, footnote 1.) Respecting X v. Y, ...]

All rights are relative, none are absolute. Individual property rights, while fundamental under the United States Constitution, do not exist in a vacuum. They cannot be absolute. If need arises, they must be evaluated, measured as against other important fundamental rights. Here, there is the contravening right of the public to have the shoreline protected. There is also the right of another individual to enjoy his property, and his pursuit of happiness, a right also guaranteed under the Constitution. There are other, larger, societal rights, which may necessitate other rights giving way, at least somewhat. [And so on.]

#### **Writing/typing conventional briefs cannot be sustained**

In one sense, conventional case briefing is a comfort to new 1Ls. For an uncertain, anxious, neophyte law student, briefing cases provides a focus, something definite to do before class.

Naturally, new 1Ls suppose that briefing is key, not just in preparing for class and training to be a lawyer, but as preparation for exams. Indeed, "Brief cases! Attend class! Study hard! You'll be fine!," is the mantra of professors and deans throughout Emperor Law School.

(You'll be fine, providing, of course, you have an innate gift for the law, The Right Stuff!)

However, setting to paper even a fraction of the foregoing example of a conventional brief represents a lot of effort. Multiply this four or five times in a single evening. It cannot be sustained.

Moreover, we shall see that for all the effort producing such a brief requires, it is unproductive respecting what is needed for success on all-important final exams. This is an extreme, even cruel irony in Emperor Law School. Typing/writing conventional case briefs, as virtually all new 1Ls are taught, is too much work to be sustained. Yet, as the following chapter will demonstrate, it is not nearly enough work necessary in properly preparing for exams.

Fortunately, as the following chapter will describe, a solution exists.

1Ls soon abandon writing and typing briefs for the expedient of "book briefing."

#### **Key problem -- an obsession with briefing**

The drama of the Socratic method (see Chapter 5, following), the resulting extreme fear of embarrassment in front of a large group of strangers, very competitive strangers at that, compels an obsession with briefing.

Prior to start of first term, someone usually unnerves classmates by boasting he found out what casebook would be assigned a month earlier, and has “already briefed the first twenty-five cases!”

In the book, *Law School Confidential*, a Harvard Law graduate’s recounting of his first year in law school, the author acknowledges his fear, lest he be called on in a particular class. He notes that one day he purposefully skipped this class. He had calculated from the progression on the professor’s seating chart that he was likely to get called on.

Professors, naturally, want students to be prepared for class discussion. Not a few professors make an early object lesson of a student who fails to prepare for class. I have been advised of instances of professors who ordered an unprepared student to leave class. The stern admonition, “I’m not sure why you came today, Mr. X. We’ll wait while you gather your things and leave,” makes an indelible impression.

Conventional case briefs provide a clear, 1-5 (6,7) template of what, exactly, a law student should do to prepare for class. Accordingly, law students become engrossed in the task of briefing cases. Little or no thought is given to what should be focused on from day one -- the all-important final exam.

This is a big mistake. First term, the error is rendered less than grave by the circumstance that most classmates also make this mistake. However, those who know better, who understand early on that their primary focus should be on exams, enjoy a distinct advantage.

#### **“Book briefing” -- the “shortcut” that isn’t**

Within two or three weeks, sometimes days, 1Ls realize there isn’t time to write/type briefs for each of the many cases assigned. Writing/typing now gives way to so-called “book briefing.”

Book briefing has not changed since your author, as a fledgling law student, quickly adopted it as an expedient over forty years ago. Students literally highlight the 1-5 elements of a conventional brief in the text of the assigned case -- in different colors. Highlighting is supplemented with notes in the page margins.

For example, issue(s) may be highlighted or underlined. “Issue” is noted in the margin, with an arrow pointing to highlighted/underlined text. (Or, color of the highlighting/underlining suffices to indicate issue[s].) Likewise, a thought respecting rationale, policy might be noted in a margin.

Should one suspend from the ceiling of any law school classroom and look down, the impression of casebooks opened on desktops would be of a rainbow-like kalaidoscope of yellow, pink, green, orange, red, blue, purple, possibly magenta. Predominant colors would likely be yellow and pink, as significant facts, constituting the bulk of a brief, are normally highlighted in those colors. Legal rules might be underlined in red, holding in green, and so forth.

If called upon, a student refers to pages of the highlighted/underlined, annotated case. This shortcut is touted by some, including law professors and supposed experts, as a “secret to law school success,” an “important strategy,” a “tactic.”

Book briefing is the sole departure from the foregoing 1-5 (6, 7) prescription your author has encountered in over 30 years in the law school exam business. However, it is not really a departure. The book brief is merely a truncated form of conventional brief.

Moreover, book briefing poses a separate problem. This is altogether apart from and in addition to what is wrong with conventional briefing, which book briefing but mimics.



### **A necessary digression -- “course outlines”**

Preparation for exams will require compiling what is known as a “course outline.” It is a summary of legal rules, statutes, principles that may be relevant on the exam. Also key points and insights derived from cases and class discussion, in particular insights into the professor’s views and preferences.<sup>5</sup>

Ideally, construction of course outlines commences the first week of term. LEEWS counsels that students work on outlines each weekend as the term progresses. Class and briefing notes for the week should be consolidated into a growing (no more than 30-50 page) course outline. Conventional exam preparation wisdom terms this “synthesizing.”

[Note: Class notes should be much reduced following LEEWS’ instruction. Case briefs are but 2-4 lines in length. See following chapter.]

Most new 1Ls come to the end of first term having compiled hundreds of pages of class notes. Course outlines are in but rudimentary form. The typical period of days, sometimes a week, between the end of classes and the start of exams -- so-called “reading period” --, is spent feverishly constructing course outlines. There is no time to go back through voluminous, stale, marginally useful notes. There is a rushed attempt to memorize relevant black letter legal precepts.

Ideally, a law student comes to the end of term with no class or briefing notes, or very few! During the term, what is important in such (greatly reduced) notes should have been incorporated (weekly) in growing course outlines. The remainder should have been discarded -- literally thrown in the trash! (How this is possible is described in the following chapter.)

Reading period should be spent polishing course outlines and testing their utility on old exams, not frantically patching them together.

Polishing an outline means filling gaps in the law. Compare with classmates’ outlines to see if theirs contains law or an insight yours does not. Perhaps their outline is better organized. (Highly unlikely, unless they, too, did LEEWS.)

Never, however, adopt the expedient touted in the classic book, *One-L*. (Yet another Harvard Law grad’s recounting of his first year in law school.) Therein, well-known author and practicing attorney, Scott Turow, counsels that each person in a study group prepare the outline for one course, then give that outline to other group members.

Not so fast! To know one’s outline intimately (“toolbox” in LEEWS parlance), so as to be able to efficiently find relevant legal precepts, and use it effectively during a time-pressured exam, one must have constructed it oneself!

### **Another digression -- the problem with “this-is-what-helped-me” advice**

1Ls naturally look to upperclassmen, professors, books, all manner of sources for advice respecting, “What should I do to succeed?” (Including LEEWS.)

Law essay exams are so different and confusing, that what is required for success typically remains something of a mystery, even to those who do well. The latter were also confused and anxious, hardly masters of the situation. After all, 35, 45, even 65 out of a possible 100 points represents mere relative success. Far from being geniuses of the law, those who do well are often just marginally better at writing exams than equally smart, equally hard-working classmates.

Nevertheless, those who achieve A's are, of course, heedless, uncaring that their success is relative, dictated by the demand of a grade curve that some receive A's. Now deemed geniuses of the law, possessed of The Right Stuff, they are only too happy to point to practices they feel were "key" in their success.

Author/attorney Turow's Harvard study group strategy of exchanging course outlines apparently worked for them. However, the downside of using an outline prepared by another, suggested above, is obvious. More likely than not, it was the overall effort of Turow's group, including outline exchange, that provided the edge that lifted them above classmates.

Person-specific, this-is-what-I-did, this-is-what-helped-me advice needs be viewed with skepticism. It may have worked for the person offering the advice. However, it isn't necessarily calibrated to work for all. Indeed, on its face it may be bad advice. Students have credited such extreme measures as "200 page outlines" and "typing up my class notes" for their success.

One very successful student touted having written "fifty practice exams" in preparation for finals! Such overkill is neither necessary, nor recommended.

Rather, such advice suggests a highly motivated individual. The advantage of such individuals lies not necessarily in a correct approach, but in sheer effort. They did enough to separate themselves from classmates. Moreover, the likelihood is that they still fell far short of mastery. Perhaps they achieved 45 or 50 or 65 points out of a possible 100. Enough for an A. Hardly enough to pretend to be an expert on exam writing.

The aim of this book is to describe a comprehensive, true science of exam writing and preparation. The approach cuts through the chaff, the speculation, the helpful (or unhelpful) do's and don't's, the "I did this, I did that," which may or may not have contributed to success. The aim of this book is to lay bare the wheat, the beef of a rational, efficient, common sense, tried, proven, polished (for over 30 years!), A to Z precise science of how to get the job done masterfully -- for *any and all* essay exercises, in *any and all* legal subjects.

Insights and skills acquired in this context -- essentially, how to solve legal problems as a reasonable facsimile of a competent, knowledgeable lawyer --, will naturally aid performance on all manner of other problem-solving challenges encountered in Emperor Law School. For example, drafting a memo or brief;<sup>6</sup> writing a paper; true/false, multiple choice, short answer, "objective type" exam formats; mock trial and moot court exercises;<sup>7</sup> even interviewing a prospective client or witness.

I am especially gratified when lawyers, years into practice, say, "I'm still using LEEWS insights and approaches that helped me on law exams!"

### **Back to book briefing and an additional, unexpected problem -- inefficient!**

Almost all first term 1Ls make the mistake of starting course outlines too late. This is not such a disadvantage first term, as most others have made the same mistake. However, those who have done LEEWS prior to starting law school, or early in the term, have an immediate advantage in this important regard.

Law student efforts should point at all times toward exams, not class preparation. The sooner course outlines are started, the better. In this regard it is telling that law professors typically counsel, "Don't worry about exams." Also, "It's too early to start course outlines."

Say, what?! ...

I have consistently during three decades gotten reports of such seeming counterintuitive advice. The reason

for it, I believe, speaks to the disconnect noted between case method, classroom instruction, and the practical lawyering requirements of essay exams.

In a stunning example of cognitive dissonance and denial, law professors seek to tamp down the importance of exams, although they know that exam results are all-important. It is as if they are embarrassed at knowing they will ultimately give exercises that say, in effect, “Show me you are a lawyer!” This, in the eleventh hour, following scant instruction on the what and how of a lawyer’s craft. Doubtless, professors perceive the lack of connection between this requirement and what they instruct in class.

[Note! The show-me-you-are-a-lawyer nature of essay exams is dictated by bar exam requirements. Law schools must prepare students to pass bar exams. Bar exams feature hypothetical-type essay exercises. The essay format also happens to have been offered a long, long time. Professors generally did well on such exams, so they believe in them. However, I believe there is some embarrassment, some reluctance respecting exams. This is owing to the disconnect with academic, case method, classroom instruction.]

The immediate problem for 1Ls when they begin, belatedly, compiling course outlines, is that they have to go back and review each and every case that was book briefed! Highly inefficient!

What is needed from cases -- in LEEWS parlance, “legal tools,” and an understanding of how to use them -- must be extracted at the first reading. (And incorporated weekly into outlines.)

When one understands the game afoot and has requisite skills, this will be accomplished in a 2-4 line case brief! (See following chapter.) This highly condensed brief will yet be more thorough. It will and reflect far more insight into the case than a page-long, written/typed brief, or book brief. It will be written or typed, depending upon whether a student takes class notes in a notebook or computer. It will be noted in a 1/3 margin, at the left on the page where class notes are entered.

Moreover, no more than a page, often just 1/2 page of class notes will be recorded per hour of class. (These notes and case briefs, of course, go into the trash on the weekend, when what is important in them is transferred into the growing course outline.)

### **Another problem -- conventional briefing enables overly academic emphasis**

Whether typed/written, or executed in a casebook, conventional briefing enables precisely what is wrong with case method instruction. It touches upon and skirts about lawyerlike thinking and analysis. However, it fails to inculcate this essential skill. It brings students only marginally closer to becoming lawyers than they were the first day of law school.

Conventional briefing but reinforces the academic, theoretical mode of thinking most law students bring to law school. It in no wise provides instruction or a framework whence students can comprehend, much less implement the requirement on exams that they perform “as lawyers.”

Indeed, what is wrong with conventional briefing goes to the heart of what is amiss in law school instruction. It does little to move students beyond a passive, academic approach to studying and understanding the role and use of law. It differs little from assignments in previous academic learning, except that the reading involves legal cases. (And there is a 1-5 formula to fulfill.)

Conventional briefing, followed by class discussion, falls far short of conveying how lawyers think and solve legal problems. Failure to grasp what lawyers do -- achieve client goals via appropriate legal/factual strategies! --, much less, how they go about this, results in a misguided attempt to cope with essay exams as academic, regurgitative exercises.

Not surprisingly, most law students, whether at YHS or a school in the fourth tier, approach exams first term as regurgitative exercises. It is how they have approached exams during a lifetime of academic success. Moreover, law school instruction, with its emphasis on memorizing and regurgitating the 1-5 of cases, encourages this. New 1Ls naturally anticipate regurgitating legal rules and facts of cases on the final exam. Nothing about case method instruction disabuses them of this expectation.

For most, this results in a rude awakening.

### **Another problem -- failure to instruct lawyerly skill at parsing facts**

As noted, cases read, briefed, and discussed in Emperor Law School are invariably appellate. This means that facts of the case were adduced, debated, and established in a lower court proceeding. (E.g., a trial or hearing.)

In the course of exploring the reasoning process whereby issues were resolved, facts will be introduced in class discussion. However, they will not be debated. The close, nuanced, give and take of lawyers arguing over precise meaning of facts, including words, often heatedly, only occurs at the trial and hearing level. It is never seen or examined in classrooms of Emperor Law School.

### **Examples of lawyerlike parsing and nuancing**

Some readers may recall the 1998 scandal and resulting impeachment trial of former president, Bill Clinton, for his affair with a White House intern. During grand jury testimony, Clinton parsed meaning of words to obstruct and deflect questioning. His responses shed light to the public at large, as never before, on the close, incremental thought process of the lawyering mind.

In his most famous utterance, which gave rise to a book title,<sup>8</sup> Clinton said, “It depends on what the meaning of ‘is’ is.” Less publicized was a similar verbal dodge -- “It depends on how you define ‘alone.’”

Such parsing and nitpicking, while mystifying and irritating to laypersons, is at the heart of lawyerlike thought and analysis. It aptly illustrates the excruciating attention to detail of the experienced practitioner in seeking to gain advantage. Never seen or introduced in appellate opinions of law school classrooms, such parsing and nitpicking nonetheless aptly illustrates the “lawyerlike thinking” that instruction in Emperor Law School purports to inculcate.

Judging from disapproving public reaction, President Clinton’s close, lawyerly parsing of words was ill-advised. However, it probably was not his own invention, but that of someone in his team of legal advisors. Although a graduate of Yale Law School, as is his wife, Hillary, President Clinton, unlike his wife, never actually practiced law. In your author’s view, the nitpicking thought process reflected in Clinton’s responses is only acquired via the give and take of lawyers battling over facts, including nuanced meaning of words, in a courtroom.

Most law professors, particularly at top-tier schools, have never engaged in a trial, possibly never even participated in a hearing. (They likely witnessed them when they “clerked” for a judge [See chapter 6, following.]) Therefore, it is very likely they are unaware of the excruciating preciseness of lawyerlike thought, carried to its nth degree.

I’ll offer another example, this time drawn from records of another American president, Abraham Lincoln.

Since 1992 I have carried an article tucked in the worn, tattered-edged folder of my LEEWS live program lecture notes. Originally printed in the *Atlanta Journal and Constitution* newspaper, reprinted in *The New York Times*, it is entitled, “Newfound Record of Murder Trial Shows Skill of Lincoln the Lawyer.”

Unlike Bill Clinton, Abraham Lincoln practiced law for 25 years before becoming president. He was a skilled trial attorney. In the case that is the subject of the article, Lincoln spent “four sweltering days” in a Springfield, Illinois courtroom in 1859, successfully defending one Peachy Quinn Harrison on a murder charge. Characterizing Lincoln as “painstaking about details,” the article presents parts of a transcript of Lincoln cross-examining the brother of the victim. Lincoln was attempting to show that his client’s admitted knifing of the victim, one Greek Crafton, was in self defense.

The exchange highlights the importance in eliciting evidence -- facts! -- of a single word:

“You can’t remember Harrison saying to your brother that he would not fight or didn’t want to fight?” Lincoln asked.

“No sir, I don’t remember any such thing,” the victim’s brother testified.  
“I think I said the first thing spoken in the room. I told Mr. Short to let them loose -- that Greek could whip him.”

“You did not add that Greek *should* whip him?” Lincoln continued.  
(Original italics.)

“No, sir, but told him he *could* whip him,” Crafton said. (Original italics.)

### **MIA in classrooms of Emperor Law School -- the lawyering craft**

Unless they venture to a local courthouse, law students do not have the benefit of witnessing, first hand, two sharp legal minds debating the possible differing implications of facts, the nuanced meaning of words. Certainly, not in a classroom! Possibly, if they participate in or watch a mock trial. However, normally, not until they engage in the actual practice of law.

As noted, no new facts are adduced in appellate cases. There is no debate over facts. Further, there is no discussion in law school classrooms of how facts are gathered and introduced in a case. This will await a required, upper level course in evidence. Even in that course the fact-gathering process will only be touched upon tangentially, if at all.

What is examined in opinions law students brief is application of law to established facts in arriving at the determination. The questions for an appellate court are whether law applied to facts adduced below was correct? Also, was such law correctly applied?

At best, reading, briefing appellate cases merely hints at the lawyering craft of gathering, parsing, interpreting facts. It accomplishes only marginally more in inculcating the lawyerlike thought and analytic mindset.

### **Other problems -- de-emphasis of black letter law; failure to instruct complete black letter law**

Appellate courts, as just noted, review legal precepts applied below, and how they were applied. Further, they review only those aspects of such precepts that were contested (disputed) below, and “raised” on appeal.

Aspects that were not contested below, or were determined not to be in doubt, are not raised and discussed in appellate opinions. Often they are not mentioned.

Accordingly, appellate opinions cannot be relied upon to instruct complete black letter precepts. Moreover, legal precepts set forth in appellate opinions are often several, and introduced piecemeal.

Law students typically (naturally) seek confirmation from the professor that they have correctly corraled relevant law in their briefs. (In their highlighting!) All await a summary articulation by the professor of the law a case stands for. However, seldom, if ever, will they get it.

Facts, holdings, rationale is emphasized in case method instruction. Portions of legal precepts are touched upon. However, pronouncements such as, “The rule of law -- of battery, of slander, of a holder in due course, of adverse possession, etc. -- is ...,” “The law in this area is ...” are, startlingly, rarely heard in classrooms of Emperor Law School.

The reason, in your author’s considered view, relates to the conflict between the mission of law schools and training lawyers that has been noted. Law professors are loathe to be perceived as mere purveyors of black letter law. They don’t view instructing what, precisely, the law is to be their function. “This is not a bar review course,” is a sentiment sometimes expressed by law professors.

Concern that law school not seem a mere stepping stone to the bar exam, that law school not seem a trade school(!), seems to be a major determinant shaping a de-emphasis on black letter law. This, hand-in-hand with a de-emphasis of practicalities of the lawyering trade.

This is problematic, because not only precise knowledge of overall legal rules, statutes, and principles is a pre-requisite to skillful analysis on exams. Precise knowledge of elements, even sub-elements of rules, statutes, and principles is required.

Precise knowledge of legal rules, the same as precise attention to facts, is essential to the lawyering craft. We shall see that such is required for success on exams.

The de-emphasis of black letter law implicit in professors’ reluctance to articulate legal precepts, much less complete legal precepts, misleads students. It is yet another example of the disconnect between case method, classroom instruction and the practical, lawyering requirements of exams.

It is also, as suggested, an example of a mission that does not conform to, nor fulfill what law students naturally expect from a “legal” education; and, further, pay a great deal of money for.

A digression -- looking at old exams; exam grading

The passive, academic posture and format of instruction in classrooms of Emperor Law School doesn’t begin to impress the need for precise knowledge, not just of black letter law, but of element aspects of that law. Quite the contrary.

Belatedly, first term, as they (finally) begin to review old exams (often handed out by the professor), 1Ls realize they need to know black letter legal precepts much more precisely. Moreover, they realize cases cannot be the sole source of that knowledge. Not if they want to know the complete law.

It may be noted that new 1Ls tend to avoid looking at old exams for two reasons. First, they are not told to, quite the contrary. Second, looking at a hypothetical-type essay exercise is frightening. (Indeed, it still frightens 2 and 3Ls.) The typical reaction is, “I’m not ready for this!”

Old exams are typically kept on file at the library circulation desk, organized by subject, sometimes by professor. Students can ask to see them. Professors sometimes post old exams online at law school websites. Students can ask professors to see old exams. (Also models of “A” exam responses).

Often, however, it may be difficult to find old exams of a particular professor. Sometimes, the professor is new to teaching. More often, there are simply no old exams in circulation.

Creating a hypothetical fact pattern and a model response is hard work. Professors are loathe to have to create new exercises each term. Therefore, they frequently recycle hypos. They alter facts slightly. They thereby introduce or subtract issues. They may employ a three or five year recycling schedule in this regard.

For this reason it can be extremely advantageous to acquire or view old exams of one's professor. For this reason, most professors at most law schools do not allow copies of their exams to circulate. Physical copies of exams, typically handed out at the start of the examination, are collected at the end of the exam. (Responses will normally be typed into software.) If students want to review the exam, along with their response, they must normally do so in a controlled situation, usually by prior arrangement.

Your author has not heard this reported in many years. However, 10-15 years ago, when B represented a very good grade in Emperor Law School, it was not uncommon to hear of situations where students who achieved B's or (the very, very few) A's were accorded no absolute right to see their exams by certain professors.

Apart from wanting to recycle exams, a reason for this is likely the curious, disturbing aspect of most law exam responses, that they feature very few comments by the professor, sometimes none (!!). We shall see that a reason for few, even no comments, is partly occasioned by the large size of 1L classes. However, for the most part the reason is that professors often don't read the entire exam, certainly not carefully.

We shall see that the grade an exam response merits can be assessed rather quickly. Within 2-3 pages at most, a professor can judge whether an "A" is a possibility.

#### **An example of incomplete law in an appellate case**

One can be sued for maliciously saying or writing something untrue (and sometimes true!), that would tend to defame or injure another's reputation. It's called "defamation." If the defamation is spoken, it's slander. If written, it's libel. Typical of most legal precepts, there are exceptions and variations. For example, words normally slanderous and actionable are given a pass, if spoken within a group of common interest, and the words are relevant to that interest.

For example, at a union meeting pretty much anything disparaging can be said about someone running for office in the run-up to the vote. The rationale or policy behind the exception is that the right of union members to full disclosure in deciding whom to vote for outweighs potential damage, however unfair, to the reputation of one who presents himself for office. Likewise, remarks about public figures, especially politicians. If spoken or written as a mere opinion, otherwise defamatory words may be given a legal pass.

[Example of the influence of societal norms -- policy! As defamation in the United States must be balanced against the fundamental, constitutional right of free speech, protections against defamation are far more strict in other countries, such as Great Britain.]

One requirement of a claim of defamation is that alleged defamatory words be communicated to a third party (i.e., person). Calling someone every name in the book in front of a mirror is not slander at law. Nor is saying it to the person one intends to demean, so long as no one else hears it. (Nor does writing defamatory words in a personal diary constitute libel.)

Suppose a case in which someone (a defendant) is alleged to have spoken defamatory remarks in front of an audience of hundreds of people. If there is no question about the remarks being delivered in front of the audience (i.e., no chance of disproving this), then the defendant's lawyer won't challenge the requirement of communication to a third party. It won't be an issue. Contesting this "element" of defamation would waste time, erode credibility before a judge or jury, likely anger the judge.

This is litigation 101. However, you'll never hear it conveyed in a classroom of Emperor Law School.

In such a case, whether or not there was communication to a third party won't be raised as an issue for review on appeal. If the case introduces slander as a legal construct, this element may not be mentioned. Therefore, unless the professor brings up the requirement of communication to a third party in class, or another student raises it, a student relying solely on the assigned case for learning the law of defamation won't know the complete rule.

### **“Commercial outlines” as a necessary adjunct**

Given that professors rarely provide a tidy summary of the law, especially complete law, students need a source of black letter law beyond the case book. Such a source exists, and is termed a “commercial outline.”<sup>9</sup>

Most upperclassmen in Emperor Law School rely on commercial outlines. Some upperclassmen eschew purchasing casebooks altogether in favor of commercial outlines. Probably for this reason, purchase and use of commercial outlines is strongly discouraged by most law professors.

First term 1Ls typically come to the resource of commercial outlines belatedly. “Don't waste your money on commercial outlines,” is the near universal advisement of professors to new 1Ls. (Or, indeed, any other study aid, including LEEWS.) “Commercial outlines are the crack cocaine of law school!,” one professor disparagingly opined. “Stay away from that crack cocaine!,” he inveighed in complete seriousness.

We shall see where commercial outlines fit into the picture of an effective approach to exams, also the 2-4 line approach to case briefing, described in the following chapter.

The first thing your author did when his daughter started law school was guide her to the used book exchange, to secure a commercial outline for each subject -- at a significant discount! We shall see in the following chapter that a commercial outline must be at the ready when (properly) briefing any case!

### **Perspective going forward**

The following chapter should further impress the inadequacies of conventional case briefing. However, fully appreciating how inadequacies of conventional briefing translate into difficulty handling essay exam exercises will require more knowledge. It will require understanding the hypothetical-type essay exam exercise, and the challenge it poses. This will emerge in subsequent chapters.

The chapter that follows will demonstrate that, absent ability to analyze “as a lawyer,” absent proper briefing and use of cases, students can profit but minimally from class discussion. Confusion, uncertainty, and extensive, busywork note taking necessarily ensues.

In such fashion does the first term throughout Emperor Law School progress. Confused, anxious students take copious notes they will make little use of. Obsession with conventional briefing in preparation for class profits little on exams. Indeed, with the encouragement of the professor, the all-important final exam is paid little attention to.

It is much as lemmings heading for a cliff. It is also a scenario replayed almost without variation throughout Emperor Law School.

Possibly, the shock of a one-hour midterm exam 6-8 weeks into term will sound an alarm, and a wake-up. However, fewer and fewer professors seem willing to undertake the burden of giving and grading midterm exams. Students at top-ranked law schools in particular seem rarely, if ever, to encounter a midterm exam.

What an easy situation to take advantage of, if one understands the law exam game. Laughably easy.

\* \* \* \*



1. “Cases” are reproductions of court opinions/decisions, published in the hundreds of volumes of state, federal, and early English court “reporters.” Sometimes they just contain portions of the decision deemed relevant for instructional purposes. Casebooks constitute the foundation information source, sometimes the sole source material of most classes in law school.

Where a legal discipline is too new for sufficient cases to have been decided to justify a casebook -- e.g., environmental law when the Environmental Protection Act was enacted; likewise antitrust, other legislation-based courses --, or the professor wants to take her instruction in a direction other than what is presented in a casebook, a professor will assign reprints of individual cases and other materials. If a course is based upon legislation or a code of rules -- e.g., tax, civil procedure, bankruptcy --, the casebook will be supplemented by a copy of the applicable code and/or legislation.

Casebooks are weighty -- 500-1,000 pages -- and expensive. (\$160 and more as of this writing.) Cases selected for inclusion seek to introduce students to “common law” origins of such required first year subjects as torts, contracts, and property. “Common law” means law established and set forth in judicial decisions. (As opposed to law enacted by legislative bodies in statutes -- “statutory law.”)

Casebooks in first term subjects invariably open with very old decisions of English, sometimes American courts, designed to impress upon students the venerability of the law. Unfortunately, while colorful and amusing with their mention of “assizes” (English judicial sessions), “squibs” (large firecrackers), etc., such cases imprint an impression of law as something historical, rather than law as a currently viable tool, employed to achieve a client end.

One by one, cases introduce students to foundation rules of a discipline (or foundation legislation in the instance of legislation-based subjects -- civil procedure, bankruptcy, antitrust, domestic relations, environmental law, etc.), interpretations and variations on those rules, new directions in the field, essentially the entirety of law in the subject under consideration. (However, *not* necessarily complete law, for reasons discussed in this chapter. Hence, a supplement to the casebook will normally be needed, which is never explained to students. See fn. 9 following.) Each case is accompanied by footnoted references to related cases, parallel articles, materials that address points of the case in greater depth, etc. Cases are typically followed by “food for thought” questions, designed to probe aspects of the case in greater depth, or from a different angle.

What cases in casebooks do not contain is so-called “headnotes” that preface cases in “official” reports. Such headnotes summarize at the outset all legal rules and precepts of note set forth in the case, and where they can be found.

Get used books! I’ve noted how expensive casebooks are. Therefore, immediately upon arriving at law school, find the used book exchange, a room in which enterprising upperclassmen sell used books. Also check notice boards, or ask at the bookstore if they have used books. Secure a relatively clean copy of the assigned case book for 30 cents on the dollar or less. (Probably a better deal than you can find online, especially given shipping costs.) Also secure a used “commercial outline.” (See fn. 9 following.)

To circumvent this secondary market and consequent loss of revenue, law professor authors of casebooks frequently issue updated editions. Such updated editions merely add or subtract a few cases that can be looked up online or in the law library. (Where, per the *West Publishing Co.* “key” system [explained in Chapter 6 of this section], there will be the helpful headnotes mentioned above). So get the older edition (which will be even cheaper once the new edition comes out!).

2. Who is whom in a lawsuit on appeal is but one of many aspects of law study that confuses new 1Ls, and puts them on the defensive. At the outset, when a case first goes to court, there is a plaintiff (or “petitioner”), the aggrieved, initiating party, and a defendant (“respondent”), the supposed transgressor. On appeal, however, the posture of virtually all cases read and briefed in Emperor Law School, matters can get confusing.

The party unhappy with the decision “below” appeals that decision, and is called the “appellant.” The party appealed against is the “appellee.” If the appellant is the original plaintiff, one may see “plaintiff/appellant” (conversely, “defendant/appellant”). However, both parties may be unhappy with one or more parts of the determination below. (The judge gives something to one side, something to another. Neither side is satisfied with the result.) In that case, both original plaintiff and original defendant may appeal those parts of the determination. There are then “cross appeals.” One party (original plaintiff or defendant) can be “appellant” as to one part of the order/decision below, “appellee” as to another part. (Yes, it can get very confusing!)

Further confusing matters, if issues/grievances are shared, for reasons of efficiency, multiple plaintiffs/defendants may be “joined” in a single lawsuit. There are “class actions,” where the cases of hundreds, thousands of plaintiffs are combined in a single “action.” An example is the “BP” (British Petroleum) Gulf of Mexico oil spill lawsuit.

This subject, one would think, deserves at least ten minutes of explanation at the outset of a law school education. It would allay needless confusion. But, no! Unless an individual professor elects to, such practical orientation is never offered in Emperor Law School. The assumption, yet again, seems to be that those possessed of inner genius for the law, The Right Stuff, will push through and surmount this minor hurdle.

The many, many minor hurdles facing new 1Ls, of course, add up to major hurdles. These unfairly stymie performance reflecting ability and effort.

3. Matters now can get murky, indeed. In seeking to determine the intent of parties reflected in a “writing,” one

encounters an old, troublesome legal precept called the “parol evidence rule.” Namely -- It’s been a while. Let’s see if I can get this right. --, that which would normally and naturally be contained in a writing -- thoughts, intentions, etc. -- will be presumed to be contained in that writing. Extraneous matters -- belated expressions of intent, what someone meant to do, etc. -- will be excluded from consideration. In other words, barring special circumstances, a court will search for meaning in a writing only using the writing.

4. This is precisely the reason for the inter-disciplinary approach to law study now popular at, and promulgated by leading law schools. Yale Law School, for example, has long offered credit toward the J.D. for courses taken in other schools of the university -- the schools of forestry and public health, for example (!!). Stanford Law School recently, proudly announced a “new multidimensional Juris Doctorate program incorporat[ing] a more interdisciplinary approach while emphasizing team-oriented problem-solving techniques and expanded hands-on clinical training.” Whew! The description continues: “The new curriculum will allow students to tailor their own joint degree programs in almost any discipline while expanding the international dimension of the program to integrate international business, national security and trade and tax law into the traditional curriculum.” (Yes, the Stanford PR folk need punctuation instruction.)

Sounds very progressive. The new curriculum seems to have been developed in response to perceived needs of law firms representing global clients. Also, the typical complaints about lack of practical skills of law school graduates. However, it will also require a student to pay at least an additional year’s worth of tuition and fees (\$45,000+!).

It may also be noted that an expected ability of a skilled lawyer is to quickly get up to speed in the many and varying disciplines and fields of knowledge that may arise in the context of serving a client’s needs. What knowledge and expertise will be needed can never be precisely known in advance. The lawyer, as problem solver, brings in the necessary experts, gathers the necessary information, and makes herself as expert as necessary. Similar cases in future will, of course, be directed to this lawyer.

As suggested in the previous section respecting the origin of law schools, the foregoing points to an educational mission at cross purposes with training skills and the approach and mindset of a legal craftsman (craftsperson?), that are necessary for success on hypothetical-type essay exercises.

5. In this regard LEEWS advises that students to do a (LEXIS-NEXUS) search for any articles a professor may have written in the past several years. Such articles will highlight key ideas, thinking, possibly pet peeves of a professor. A student will want to be mindful of such thinking, possibly incorporate it into the exam response.

6. The difference between a legal “memo” and a legal “brief” (not to be confused with a case brief!) is yet another aspect of the lawyering craft that will not be explained in Emperor Law School. The former is not an advocacy tool. It is balanced and does not take a position. It objectively sets forth relevant facts and law pertaining to a case or issue. It is usually prepared for a more senior attorney, or for a judge by her clerk. That person decides what to do with memo contents in shaping legal and factual arguments -- for example, into a (legal) brief.

A legal brief is an advocacy tool. It shapes facts and law to support a position advanced by the author. If facts, law, arguments favorable to the opposing side are raised, it is only to demonstrate their fallacies, why they should not be persuasive.

7. “Mock trial” means what it suggests -- a pretend trial. Opposing teams of typically two students are given facts, documents, witness names and testimony, often from an actual case. All law schools have mock courtrooms. In that courtroom, which resembles an actual courtroom, upperclassmen, lawyers, sometimes actual judges preside. Opposing teams call witnesses, introduce evidence, conduct a facsimile of a trial. They are judged on opening and closing statements, ability to conform to rules of evidence in qualifying exhibits for admission into evidence, direct and cross examination of witnesses, making appropriate objections to testimony and evidence, providing legal justification therefore, etc. Because knowledge of rules of evidence is necessary, and evidence law is normally a second year subject, mock trial competitions are not usually open to 1Ls.

“Moot,” as a noun, means an assembly to decide matters, or a discussion, especially of a hypothetical law case. As an adjective, it means subject to or open to debate, debatable. As a verb, it means to meet for deliberation, to dispute, debate, discuss, to argue for and against, to propose or bring up for discussion.

Moot court competition in Emperor Law School is a kind of hearing conducted in a courtroom, usually before not one, but several judges. It mimics what occurs in state and federal appellate courts. In early rounds of competition judges will be upperclass law students, normally members of the “moot court board” (of directors). In later rounds lawyers, then judges will preside, some of them quite prominent. I recall then Supreme Court Justice, Potter Stewart, presiding at the final round of a moot court competition at Yale Law.

Student teams of two are assigned to defend or oppose a case, typically currently on appeal to the United States Supreme Court, therefore unresolved. They brief the legal issues, make arguments to support their position.

Often, as part of a research and writing course, 1Ls in spring term will be assigned a moot court brief. However, not all will participate in the oral argument, courtroom phase of the competition. There is much hustle, bustle, concern, and effort, as 1Ls engage, as they (erroneously!) suppose, in their first real activity “as lawyers.”

It may be noted that mock trials and moot court competitions tend to be spirited and well attended. Students don suits, classmates cheer on friends and favorites. It is the first time since entering law school that students actually

look like and feel like lawyers.

It may be noted that if 1Ls (and 2 and 3Ls!) really understood what was expected on law essay exams, they would realize that their first activity “as lawyers” should have been their approach to and performance on first term exams.

8. *The Meaning of IS, The Squandered Impeachment and Wasted Legacy of William Jefferson Clinton*, by Bob Barr.

9. Commercial outlines are summaries of law in a particular subject. They provide an overview of the complete law in the subject, together with case references, commentaries, and, most important, precise articulation of “black letter” rules. Examples of commercial outlines would be *Emanuel's on Torts, Contracts, Property, etc.*; *Gilbert's on Torts, Contracts, Property, etc.*; *Legal Lines on Torts, etc.*; *Nutshell Series on Torts, etc.*; *Glannon on Torts, etc.*; *Blonde's on Torts, etc.*

## Section Three, Chapter 3

### **The LEEWS 2-4 line case brief; more understanding, far fewer class notes**

This chapter will describe a brief very different from a conventional case brief. Should a student be called on in class, this brief will easily enable a satisfactory response. Indeed, more so than a conventional brief, because it will reflect far greater understanding of the case, far greater knowledge of law introduced by the case. It enables a student to gain more from class discussion. It enables a student to follow “What ifs?” posed by the professor.<sup>1</sup>

More important, this brief points to and prepares a student for the all-important final exam. It will enable taking far fewer notes in class. (A page, perhaps a half page of notes per class hour.) It will be no more than 2-4 lines in length!

This brief is not instructed in Emperor Law School, nor anywhere else. Indeed, such a brief would not be deemed possible by law professors or current law students.

The reason is that insights and skills necessary to produce such a brief are not instructed in Emperor Law School. For example, one must understand what is needed from cases in preparation for exams. One must also acquire skill at analysis. Practicing lawyers will grasp its possibility, and lament they did not produce such briefs in law school.

Nor will the reader be able to execute a 2-4 line case brief as a result, merely, of having it described. As suggested, skill at lawyerlike analysis will be required.<sup>2</sup>

This chapter is inserted as a preview. What is amiss in Emperor Law School has been explored. (With more to come!) At this juncture I want to offer a glimpse of what is possible. I want a reader to gain a sense of just how far in advance of classmates one can be, respecting handling law school and exams. The 2-4 line case brief provides an excellent example.

As has often been articulated, Emperor Law School can not only be taken advantage of, but easily. It is hoped that this example will provide substance to the outline of possibility that has been sketched thus far.

So how is a 2-4 line case brief that accomplishes all suggested above possible?

#### **Thumbnail sketch of the possibility of a 2-4 line (more effective) case brief**

I have noted that law professors and current law students are unlikely to fathom a case brief that accomplishes all that is suggested above -- in 2-4 lines! It has come back to me that professors, here and there, have held up one of my (flimsy gold) advertising flyers (often put in classrooms) and proclaimed, “You can’t brief a case in 2-4 lines!” This, as a means of discrediting LEEWS. (Along with, “He can’t know what I want on my exam!” Also, “Lose your money with LEEWS!” Ouch!)

No, a law professor probably cannot fathom the LEEWS 2-4 line case brief. However, a practicing lawyer can.

Practicing lawyers read and quickly digest cases every day. Their take on a case -- its gist --, reduced to notes, is probably no more than 2-4 lines. It will contain relevant law set forth in the case, and likely a terse (ten word?) synopsis of facts to jog the lawyer’s memory of the case. Everything else the lawyer needs to know about the case, especially how its law and lessons might be applied to the (new) facts of a case the lawyer is researching, will be tucked in the lawyer’s head.

Should such a lawyer find herself back in a law school classroom, called upon to recite the 1-2-3-4-5 (6,7)

elements of a conventional brief, do you imagine that lawyer, 2-4 line brief freshly prepared, would in the slightest be embarrassed? Do you imagine that lawyer would not be able to recite procedural aspects, facts, issue(s), holding, rule, rationale, even policy aspects of the case?

Likewise, a law student who understands the lawyering game, and the purpose and use of cases. In other words, the facsimile of a practicing lawyer that LEEWS creates.

### **Pointing toward the exam, not class discussion**

Producing an effective 2-4 line case brief begins with understanding two things few new 1Ls grasp. First, class participation will count little, normally not at all toward the final grade.<sup>3</sup> Second, two things are needed from cases respecting preparation for the final exam. One is a precise working knowledge of legal precepts introduced by cases. The other is ability to apply that law to new facts. (In LEEWS parlance, “legal tools,” and an understanding of how to use them.)

New 1Ls must appreciate that cases they are assigned to “prepare” (brief!) are not an end, but a means. Cases introduce legal precepts they will be expected to apply to altogether new facts on an exam. The facts of cases new 1Ls are at such pains to memorize, lest they be called upon to recite them in class, will never be seen again! Not on the final exam. Certainly, not the exact same facts.

### **First things first -- find the law!**

Once the foregoing perspective has been adopted, and skill at analysis has been acquired, a student can and should approach briefing a case in an entirely different manner.

[It must be noted that adoption of the foregoing perspective before taking an exam is not easy. Most law students have to undergo a set of exams to fully appreciate that exams, not class discussion, are the be-all, end-all of what needs to be focused on.]

Rather than seek to fulfill conventional (1-5) briefing requirements, the first thing a student should do upon opening to a case is search for legal precepts it introduces. This provides a simple focus. However, finding all the law may require some rummaging.

[In this regard, it may be noted that official, published versions of cases preface the opinion with so-called “headnotes.” (See, e.g., discussion of “West” case publishing, Chapter 6 of this section.) These summarize legal precepts set forth in the case. They also indicate the page in the case they can be found on. Such a handy summary will not be found in casebook versions of the opinion. Therefore, students may want to refer to the official version when starting their brief. (Online?)]

### **Use of the commercial outline**

Having located a legal precept, a student should immediately look it up in a commercial outline for the course. (Discussed, previous chapter.) This, before thinking about facts, issues, anything else respecting the case. A commercial outline should be at the ready when briefing any case. (See also fn. 6, preceding chapter.)

Appellate opinions, as noted, address only aspects of law contested below. Therefore, they cannot be relied upon to present complete black letter rules. A commercial outline sets forth complete legal precepts. It also presents these precepts in a context of larger, related, surrounding rules. In other words, it provides the big picture of the law.

For example, suppose a case in tort law describing the usual claim of injury to one party by another. Perhaps the issue for determination on appeal is whether the action of the “tortfeasor” was the proximate cause of the victim’s injury.

This case will have been assigned in a chapter of the torts casebook entitled “negligence.” Students spend at least a week exploring this important concept in tort law. Cases assigned in the chapter introduce various aspects of negligence -- duty of care, breach of that duty, proximate cause, foreseeability, etc.

However, very likely no single case will introduce all requisite elements (components) of the rule of negligence. The reason is that, if the existence of an element is not in doubt, it will not be contested in the court below.<sup>4</sup> Therefore, the element does not merit discussion on appeal. Often, it won’t be mentioned. Nor, as suggested, will the professor articulate the complete rule. She will not say, “The rule of negligence is ....”

Typically, new 1Ls get lost in discussion of permutations of various elements of negligence. The professor may go on and on about, say, the duty aspect of negligence. Who owes a duty to whom? Why should a duty be owed? Does duty vary with age? Can mental incapacity diminish duty owed? (Of course!) Is duty owed by a soldier to comrades different from that owed by a mere citizen to another citizen? Why?

Students don’t see the entire (legal) forest, because their faces are pressed closely to the individual (legal) trees.

A commercial outline alerts the student that duty, proximate cause, etc. are but components of a larger rule. (Trees in the negligence forest, if I may belabor the analogy.) It supplies that rule, which the student will incorporate in her course outline -- in a category entitled, “Negligence.” It alerts the student when what is discussed in class is but part of a larger rule, or an exception to a general rule. It provides perspective on the whole.

A student returns to the case only after taking time to gain perspective on the law. She looks for additional legal precepts. She endeavors to understand, more or less, the complete law relating to law raised in the case, and its component elements. She writes down the law she thinks she will need to know on the final exam (fleshed out with the help of the commercial outline). This is the start of her 2-4 line brief. Normally, this will amount to no more than a line or two.

In class, the student is alert for variations on the law that may emerge. Does the professor disagree with part of the law? How interested does the professor seem in a particular aspect of law? Does the federal rule, if any, differ from the state rule? Is there a minority view of the law? If so, how does it differ from the majority view? Which view does the professor seem to favor?

Understanding requirements of (lawyerlike) analysis, the student knows that precise knowledge of black letter rules is paramount. Also, knowledge of how to apply the law to new facts.

### **Back to the case, still focused on the law**

After acquiring a reasonable grasp of law introduced by a case, the student returns to the case. However, the focus is still not on procedure, facts, issue, holding, etc. Rather, focus now is on how law was applied in the case. What aspects (component elements) of principles and rule(s) were contested? What arguments were drawn from facts, and made for and against establishment of these aspects?

This focus on law and how it was applied will require understanding of, and reasonable skill at analysis. If such understanding and skill is absent, the connection between facts and law cannot be made, or can only partially be made. However, if present, even minimally, an interest in facts and arguments in a case is discovered that engages. There will be curiosity, and a far greater comprehension of what is transpiring.

Having applied a lawyerly, analytic eye to interplay of law and facts, a student can better appreciate why a judge may have dissented from the majority determination, why another may have “concurred.” (Agreed

with the majority, but for a different reason.) “Food for thought” questions, posed at the end of cases by the casebook author, now have greater meaning and resonance.

### **An example of focus on the law in a contracts case**

Suppose a case entitled “Used Auto Sale” in contracts. It holds that two weeks was not too long for the \$2,500 offer of sale by A to B of an old, used car to remain open. The guiding legal precept is, “an offer lapses after a reasonable period of time.” Also mentioned in the case, B, when A refuses B’s tender of \$2,500 after two weeks, sues A in small claims court for “specific performance.”

A student preparing a 2-4 line brief will first zero in on both the offer lapse and specific performance legal precepts. Her contracts commercial outline reveals the offer lapse precept to be a subset of a larger category, “offer and acceptance.”<sup>5</sup> Moreover, offer and acceptance is but one of quite a few requirements for establishing a valid contract. (Others are agreement, two or more persons, legal competence of parties, consideration, promises to perform [or not perform] specified [legal] acts, compliance with statute of frauds, etc.)

It may be that specific performance, although mentioned in the case, is neither defined, nor discussed in the case. (Because, presumably, it was not contested on appeal.) Nor does the professor introduce it in class the next day. However, the commercial outline reveals it to be a weighty legal proposition. Something resembling the following might be set forth:

Specific performance is an extraordinary equitable remedy that compels a party to execute a contract according to the precise terms agreed upon, or to execute it substantially so that, under the circumstances, justice will be done between the parties.

Specific performance grants the plaintiff what he actually bargained for in the contract, rather than damages for not receiving it (pecuniary compensation for loss or injury incurred through the unlawful conduct of another); thus, specific performance is an equitable rather than legal remedy. By compelling the parties to perform exactly what they had agreed to perform, more complete and perfect justice is achieved than by awarding damages for a breach of contract.

Specific performance can be granted only by a court in the exercise of its equity powers, subsequent to a determination of whether a valid contract that can be enforced exists and an evaluation of the relief sought. As a general rule, specific performance is applied in breach of contract actions where monetary damages are inadequate, primarily where the contract involves land or a unique chattel (personal property). Damages for breach of a contract for sale of ordinary personal property are, in most cases, readily ascertainable and recoverable, so that specific performance will not be granted.

Knowledge of the law of specific performance may or may not be required on the final exam. If it is, our student is prepared. She knows the rule. She can apply it. If not, strictly speaking, there may yet be facts that make demonstrating this knowledge relevant. Again, our student is prepared to impress.

Most law students take contracts first term. Similar to the aforementioned problem respecting negligence in torts, few have perspective that the many complex topics introduced by cases -- offer, acceptance, reliance, consideration, legal competence, statute of frauds, etc. -- are but components of the larger whole of what constitutes a valid contract.

Further obscuring perspective are corollary, related constructs that may excuse non-performance (breach of the contract) once a valid contract is established. Examples would be anticipatory breach and unequal bargaining position. Each such construct may be introduced in a different case.

Cases, entire classes may be devoted to such corollary precepts as specific performance and promissory estoppel. A professor will amuse with discussions of “more than a peppercorn” constituting adequate consideration. Overlaying these “common law” precepts (meaning law derived from cases, or “case law”) will be the huge parallel universe of “statutory law” suggested by the Uniform Commercial Code (UCC).<sup>6</sup>

All such precepts are but parts of the larger whole of what constitutes a valid contract, what will enable avoidance or permissible breach of a contract. They are variations and permutations thereunder. How these divers strands of contracts law are related and fit together must be understood. However, the professor will be of little assistance in untangling the hodgepodge. A commercial outline will.

Also, the lawyerlike focus and instruction provided by LEEWS. For example, LEEWS instructs an analogy of overall, larger “trunk” legal precepts (e.g., contract, negligence, First Amendment, Sherman Antitrust Act, etc.), and “branches” (component elements of trunks), and “sub-branches” (components of branches) of law emanating from and related to each trunk precept. This assists in understanding how to organize the many related legal precepts belonging in a single category of a course outline.

Most law students, at YHS or wherever, don’t begin to understand the downward progression (or the reverse) of rules to elements of rules, to elements of elements of rules, that, as we shall see, is necessary to perform “lawyerlike analysis.” (Trunks to branches to sub-branches, and the reverse!) Moreover, how does one apply this confusing web of law to facts in performing analysis?

**Preview of consequence of not grasping trunk-to-branch-to-sub-branch progression of legal precepts**

Absent understanding how analysis proceeds from trunks to branches to sub-branches, and the reverse, there is virtually no chance of impressing on an essay exercise. There is merely confusion of purpose. If such a student does well, it will only be by virtue of not being so incompetent as classmates. (30 or 35, rather than 25 out of a possible 100 points!)

When confronted with a (typically) complex, confusing fact pattern, describing multiple contractual situations, parties not performing as promised, etc., followed by the cryptic query, “What result?,” there is not just confusion. There is often panic!

Law essay exams are not, as law students seem to think, an exercise in regurgitating facts and legal precepts committed to memory. This -- mere regurgitating -- is what most end up doing. It but reflects many years of responding to exam questions that call, precisely, for regurgitation of information.

It has been noted that the Q & A format of conventional briefing and case method instruction, coupled with the vast amount of information that cascades at law students, reinforces an expectation that regurgitation is called for.

Rather, it will be taken as a given that legal rules -- black letter law -- are known. The test is to apply this knowledge to facts never seen before -- as a lawyer!

Neither cases nor the professor will provide necessary perspective on the law, nor the need for such perspective. Understanding the lawyering game, especially how to play it on exams, will aptly demonstrate the need for such perspective.

A commercial outline provides needed perspective on the law. So, also, it may be noted, does reviewing chapter headings and sub-headings of the casebook. (Why, for example, were legal precepts introduced in the order they were in the progression of chapters? What overall themes are reflected?)

However, the student assaying to produce a 2-4 line case brief is far from finished with thinking about the



case, using it to prepare for the final exam.

The importance of asking “Why?”; example of “A” versus “B” analysis

A law student must never be content to understand, merely, *what* happened in a case.

Imagine that a student has focused on the law in an assigned case, and thought about how it was applied. In particular, she has noted arguments for and against establishment of contested legal aspects of the rule(s). Would this student not, simultaneously, also have grasped facts, issue, holding, and other aspects of the case? Indeed, wouldn't the grasp of such information be quite thorough? (As would grasp of such information by a lawyer, reviewing the case to discern its lessons.)

Surely, it would. However, none of this information has been written down.

Having gathered the *what* of a case from her careful examination of how its law was applied, the student now shifts her thinking to *why*? Why did the court hold as it did?

In the instance of Used Auto Sale, why did the court hold two weeks to be a reasonable amount of time for the \$2,500 offer to be held open? Couldn't a decision by the prospective buyer reasonably have been made within days, or no more than a week? After all, the buyer presumably knows whether he can afford \$2,500.

The court in such a simple, straightforward case may not set forth its reasoning. The typical law student, briefing in the conventional way, satisfies himself with knowing the *what* of the case. If called on in class to give facts, issue, holding, etc., he is prepared. However, he has not prepared adequately for the final exam. There, a two-week, used auto sale situation will not be encountered.

Rather, an exercise on the exam may propose the following: “A offers his used bicycle to B for \$75. B returns three days later with \$75 to complete the purchase. However, A has already sold the bicycle to C for \$85. B really wanted the bicycle. It is an especially desirable model, and B is unlikely to find this or a similar model elsewhere at such a reasonable price. Indeed, B is incensed. He sues A in small claims court. What result?”

The response of the typical law student familiar with Used Auto Sale, will likely be something resembling the following: “Applying the rule that an offer will lapse after a reasonable period of time, in the case of Used Auto Sale it was held that two weeks was reasonable for an offer of \$2,500 for a used car to stay open. If two weeks was reasonable for an offer of \$2,500 to stay open, three days should be reasonable for an offer of \$75 for a bicycle to stay open. Therefore, judgment for B.”

As law student responses go, this one is not bad. Indeed, it has merit. It states and applies relevant, correct law. (Point awarded!) Normally, sources for law needn't be mentioned. It will suffice to merely state the law (with accuracy). For example, “The law is, ...;” or, “Cases have held that, ....” However, where, as here, it seems appropriate to draw an analogy to a similarity in a case (the case is “on point,” or is “on all fours,” or degrees thereof), or a difference in a case (the case is “distinguished”), it is appropriate to reference a case by name. (Possibly another point!)<sup>7</sup>

This response relates law to the professor's hypothetical facts, which many students neglect to do. However, the aforementioned urge to regurge -- in this instance, knowledge of Used Auto Sale -- subordinates lawyerly analysis. Clearly, the student lacks skill at analysis. (Otherwise, he would not have settled for such facile, superficial, very likely incorrect reasoning.) Under current inflated grading standards, the response will likely merit a B-, possibly a B at top tier law schools.<sup>8</sup>

An “A” response would reveal a more lawyerly mindset at work. It will note the two-week holding of

Used Auto Sale. It will simultaneously take advantage of an opportunity for extra points by introducing specific performance. Thus, for example, “As in the case of Used Auto Sale, this is an instance of specific performance. The rule is that, ...” (As time is normally at a premium, and specific performance, not mentioned in the hypo, may not be on the professor’s checklist [but should be, and probably is], there would follow a brief paragraph showing knowledge of this law and why it applies in this instance.)

In a second paragraph the “offer lapses when” rule is introduced. (LEEWS instructs: “Bam! No ‘hello, how are you’ preambles, ... Immediately state the rule at the outset of the paragraph. [The “R” of IRAC. As we shall see, a ‘premise’ in LEEWS terminology, which may or may not be a ‘rule.’]) The analysis follows. However, it will “distinguish” the case of Used Auto Sale. It will note the two-week holding of Used Auto Sale. However, it will recognize important differences that likely lead to a different result.

“A” response reasoning might resemble the following: “A bicycle, even a singular one, is different from an car. You get on, you ride it, you know what you have. \$75 is a relatively small amount of money. B should know immediately whether \$75 for a bicycle is affordable. Therefore, at most it would seem reasonable for A merely to wait while B goes home, or to a bank to get the \$75. Moreover, B should alert A when he or she would return with the \$75. Three days, even one day would seem too long for A to have to keep the \$75 offer on the table. Therefore, presumably, judgment for A.”

[Note. The words “seem,” “presumably,” reflect LEEWS instruction that pronouncements and conclusions should rarely be absolute. This but reflects the hedging a lawyer will engage in before a judge. An experienced lawyer typically prefaces remarks and arguments with, “it would seem,” “probably,” “may it please the court,” “I humbly submit,” and the like. Somewhat unctuous, yes, but wise. One seeks to determine which way the wind is blowing in terms of a judge’s thinking. One wants the judge (who often earns less money!) to feel herself master of her courtroom. Nothing so practical, of course, is instructed in Emperor Law School.]

The more nuanced reasoning of the “A” response is only possible if, in briefing Used Auto Sale, a student went deeper into the question of reasonableness of time for offers to remain open. Asking “*why?*” two weeks might have been reasonable for a \$2,500 offer for a used car to remain open achieves such depth. \$2,500 is not an insubstantial amount of money, especially if B were described as a “student” or “young person.” Moreover, other costs enter in when purchasing a car, such as insurance and garaging. B might reasonably need time to take the car to a mechanic. If repairs are necessary, this would have a bearing on price.

Law students in general, certainly 1Ls, don’t ask “*why?*” as part of briefing. (They are not instructed to!) “*Why?*” will surely be posed by the professor in class the next day, and students will scramble. Rather than think and attempt to formulate common sense reasons, such as above, most will merely listen to the responses of others (perhaps someone called on), eventually the professor’s take, and take notes. However, “*why?*” should be asked as part of preparation of every case.

There is, however, yet another step beyond asking “*why?*” that a student aiming for a 2-4 line brief will take in investigating and preparing a case.

She further experiments with and changes facts of the case. This promotes greater familiarity with law introduced by the case. It divorces law from the case. It prepares a student for the exercise of applying that law to new facts on an exam.

**Additional step -- changing facts; posing one’s own “what ifs?” (prior to class!)**

The suggested “B” response above illustrates what LEEWS terms, “marrying law to the case in which it is

found.”

The student aiming for a 2-4 line case brief understands she will encounter new facts, or altered facts in exam exercises. While she endeavors to understand how law was applied in the case in which she first encounters it, she wants to extract it from the case, be prepared to apply it to new facts. Having understood *what* happened in the case, having asked, “*why?*,” she now alters facts to see how doing so might result in different outcomes. (As the professor will do in class.)

For example, what if the two weeks posited in Used Auto Sale were two days? Clearly, not holding the offer open for two days would be unreasonable. However, in what circumstances might even two days be unreasonably long to hold an offer open? ... Perhaps something much simpler, cheaper, offered for sale. .... A used book or item of clothing. (Perhaps a used bicycle!)

What period longer than two weeks would be reasonable for the offer of the car at \$2,500 to remain open?... If three weeks, how about a month? Two months? ... When might three months be reasonable for an offer to stay open? ... Sale of a house or business?

In such fashion the student hones not only understanding of the legal precept (here, offer lapses after a reasonable period of time), but also skill at applying it in different fact scenarios. The precept is divorced, extracted from its connection to Used Auto Sale. It becomes a usable legal tool, familiar in the student’s hand. (Much as a scalpel in a surgeon’s hand, a wrench in a plumber’s hand, a chisel in a carpenter’s hand.)

The precept, fleshed out with the help of a commercial outline, is also ready for placement in its proper category in the growing (contracts) course outline -- offer and acceptance. It is understood to be a sub-branch of the trunk offer and acceptance precept of that category. (Offer and acceptance, of course, is but a branch of the overall trunk precept in the course -- contract.)

This student goes to class with an in depth understanding of Used Auto Sale. She understands the case does not stand for something so simplistic as, “two weeks is a reasonable period of time for an offer of a used car to stay open.” Rather, the case provides but one example of the application of the tool -- offer lapses after a reasonable period of time.

What constitutes a “reasonable period of time” is the main idea. This will vary, depending upon changes in facts and circumstances. Our student is ready to apply the tool, thoughtfully, to, for example, the \$75, used bicycle exercise.

Her thinking going into class is, “I think I understand this case. Is there anything new? Is there something I missed?”

Such a perspective is miles apart from that of the law student who has prepared a conventional brief of Used Auto Sale. The latter has recorded the rule (highlighted it, actually), but doesn’t really know it, not so as to be able to apply it skillfully to new facts. Indeed, first term he has no idea this will be expected of him.

The latter student also may have no inkling of the larger, offer and acceptance legal context, of which the precept is but a minor aspect. The latter student is waiting for the professor to ... articulate the law, clear up the confusion.

The latter student will not be able to follow “What ifs?” the professor may pose in class the next day. Uncertain what is going on (the analysis game afoot), the latter student will take copious notes.

The student constructing a 2-4 line brief, having posed her own “what ifs?,” easily follows the professor’s

“what ifs?” She further hones acquaintance and skill with the legal tool. Class and discussion is useful, even enjoyable.

**Voila! -- a 2-4 line brief!**

Although the student aiming for a 2-4 line brief has done considerable thinking about Used Auto Sale, the only thing written (or typed) to this point is a legal precept, fleshed out, if need be, with additional relevant law found in a commercial outline. No facts, procedure, holding, issue, etc. have been recorded. For the most part, they needn't be.

Given the involvement with Used Auto Sale described thus far, do you imagine that facts, issue, holding, and rationale are not firmly fixed in mind? If called on in class the next day, would the student described be unprepared to provide such particulars? Moreover, precisely and in depth? The only aspect of a conventional brief that might have been overlooked is procedure -- how did the case arrive at its present posture, from what court appealed, what disposition below?

Unless the subject matter is procedure (e.g., civil procedure, criminal procedure), procedural aspects and discussion thereof will never be wanted on an exam. Apart from a procedure course, a professor is unlikely to call for procedural aspects beyond the first week of classes. If such information is indeed wanted, then it can be noted -- mentally! It surely can be kept in mind for purposes of response the next day in class. It does not have to be written down (or highlighted).

Even the legal rule need not be written down by our student in preparation for class. It is firmly in mind. Nothing, in fact, need be recorded. The student writes down the law merely to later incorporate it in the course outline. She notes a ten word (or less) synopsis of facts for purposes of recalling the case weeks, months hence. In class the next day, she can proceed strictly from memory, as a lawyer could!

Having captioned her brief, “Used Auto Sale,” along with the page number of the casebook (in the unlikely event she ever need go back to the case), our student might note, “2 weeks held reasonable for \$2,500 offer to stay open.” (The case title reminds that a used auto was offered for sale.)

That's it! Law that may be relevant on the exam, a ten-word or less synopsis of facts. A 2-4 line (or less) brief of Used Auto Sale! Moreover, a brief that reflects far greater understanding of the case, far greater knowledge of the law.

In addition, this student is prepared to gain much more from class discussion, while taking far fewer notes. She will be able to follow “what ifs?” posed by the professor. Should she be called upon, she will have no fear. She will acquit herself impressively.<sup>9</sup> (The professor will think, “Aha! At last, a lawyer!”)

Indeed, she will likely find amusement in the class.

Professor “what ifs?”; taking far fewer notes in class

In the very best of classes in Emperor Law School there is wasted motion. Students stumble, mumble, and pontificate. This normally can be ignored. Professors detour into war stories, flights of policy and speculation that go on for many minutes, but require a mere mental note, at most a few words noted down. In the typical fifty minute class, there normally isn't more than 15-20 minutes of beef, usually less.

However, what part of what is said in class needs to be recorded? Which 15-20 minutes (or less) needs to be paid attention to in preparation for what counts -- the final exam? If confused; if you can't understand what the professor wants from you (to learn to think as a lawyer, despite inadequate instruction); if you don't know what is needed for the final exam (which you aren't even thinking about!); then you will record much that is unnecessary.

The typical new 1L takes 2-3 pages of notes per class hour long hand, more, if typing into software. This results in ten or more pages of class notes per week, per class, hundreds of pages of notes by term's end. As noted, there is no time later to go back through cold notes to make sense of them. Course outlines must be cobbled together. Black letter law must be nailed down.

In particular, students get confused when professors engage in "what ifs?"

"What ifs?," it turns out, are the manner whereby case method instruction seeks to inculcate lawyerlike thinking, the lawyer mindset. By changing facts in assigned cases -- posing "what ifs?" -- the professor challenges students to follow not only reasoning set forth in the case, but to reason their way to alternative outcomes, applying law to new facts -- analyzing! -- in the same way lawyers and judges in the cases do. It is imagined this will train the lawyerlike thought process.

Thus, as suggested previously, the professor will say, "What if the facts were as follows?" The professor now introduces a slightly changed scenario. "Would this alter the outcome? Would the holding be different? Is it possible this would have persuaded dissenting judges to come around to the majority view, ... the majority to have adopted the dissenting opinion? What about Justice X's concurrence? What if ...?"

In a very real sense, hypotheticals on final exams are a kind of massive, complex "what if?" exercise!

Some few students indeed seem to "get it." Their response to a professor's "what ifs?" suggests they are at least partially following the professor's train of thought. This is so singular, in contrast to the general confusion engendered by "what ifs?," that such students are immediately labeled in the professor's mind, also the minds of impressed fellow students, as "sharp legal thinkers." They are deemed possessed of lawyering aptitude and genius, The Right Stuff.

Of course, as was discussed in Chapter 3 of Section One, much to the befuddlement and consternation of professors, such students typically are not the ones who emerge with A's on exams. We shall see that law essay exams present additional challenges that easily derail students capable of following a professor's "what ifs?."

Moreover, it is likely that students able to follow a professor's "what ifs?" acquired their analytic ability *prior* to entering law school. Moreover, their skill still does not approach the nitpicking perceptiveness of the legal practitioner. They will have difficulty emerging from a 25-35 of 100 point level of mediocrity.

Meanwhile, the vast majority of students are not getting it. As discussed, the problem with professor "what ifs?" is that they presuppose two things law students lack -- skill at (lawyerlike) analysis; precise knowledge of legal principles being applied in the case.

Lacking this foundation, students cannot begin to follow a professor's "what ifs?." They are too accustomed to being spoon fed information in a lecture situation. To suddenly require that they .... Well, they aren't really sure what the professor is seeking, so they take refuge in taking the copious notes described.

However, not so our student possessed of 2-4 line case briefs. She gets it perfectly! She has already posed "what ifs?," when investigating, preparing the cases. She understands and can perform lawyerlike analysis. She can easily follow the professor. Class discussion is a cakewalk. The final exam is always her focus. She can discern what is wheat, what is chaff respecting what is needed for the final exam.

Indeed, class discussion is interesting and useful, at least when it does not detour aimlessly. Our student is cognizant of what, coming from the lips of a talkative classmate, and sometimes the professor, is irrelevant, off the mark, nonsense, a waste of her time. She takes no notes. She perhaps drums her fingers impatiently.

If a professor's "what if?" prompts a new insight, particularly respecting what may be encountered on the final exam, she makes a notation. Sometimes a fellow student offers a useful insight. Make a note! A law review article was mentioned? Get a citation from the professor later.<sup>10</sup> Read that article.

The professor disagrees with an aspect of the law, perhaps has a unique definition of what constitutes "reasonable period of time." Make a notation. It may be necessary on the exam to distinguish the general consensus view from the professor's view. And, of course, conclude on the side of the professor!

(Beyond demonstrating knowledge of relevant law and skill at discerning and concisely analyzing issues, an exam that impresses will tend to flatter the professor's ego. It will demonstrate that the writer has paid attention not just to facts the professor took the time to create, but also a professor's preferences. [And, of course, the professor is correct!] Naturally, professors want to be well thought of. Professors want to feel, in reading an exam response, that they have inspired interest, in addition to training a sharp legal thinker.)

At the end of a class hour, the 2-4 line briefer has taken no more than a page of class notes, normally less. LEEWS grads often report taking a half page of notes and less in a class hour. Taking far fewer notes is often reported as a chief benefit of LEEWS instruction.

As noted, the 2-4 line brief will be entered in a smaller margin on the left of the page.<sup>11</sup> Class notes are entered in the larger, right side of the page. At the end of a week of, say, three fifty-minute classes, where the typical new 1L has 6, 8, 10 pages of class notes (and must refer back to cases for book briefs!), our student has but two pages of notes, including briefs, possibly less. Moreover, she has complete understanding of what is in those notes and why.

At week's end, enter what is important in the (minimal) notes for the week in appropriate categories of the growing (30-50 page) course outline. Toss the remainder of the week's notes in the trash! Literally.

Conclusion; perspective going forward

Manifestly, a 2-4 line case brief is possible. Moreover, it is a vastly superior brief.

The interesting, very hopeful aspect represented by this brief is the effective bridge and transition between class and exams. In other words, case method can yet be an effective teaching tool!

However, the fundamental change must be made of properly instructing lawyerlike analysis. Also, instructing what will be required on exams. Students will further need the science LEEWS provides of systematically pulling apart confusing hypothetical exercises, presenting analysis concisely, etc.

Is Emperor Law School likely to effect such change? Are law professors prepared to accept that their appropriate mission is training lawyers, and therefore adapt case method instruction to preparation for exams? Probably not. Not even close! Therefore, the opportunity for taking advantage and gaming the situation will remain.

Clearly, armed with 2-4 line case briefs, and all that producing such a brief implies, respecting handling exams, a student is light years ahead of equally smart, perhaps smarter, equally hard working, but clueless classmates.

Arm this student in addition with a system for pulling apart *any* and *all* hypothetical-type essay exercises to reveal issues a professor wants identified ("spotted"), and a format for presenting analysis of issues in concise paragraphs. She is now poised to take significant advantage. Indeed, she is capable of exhibiting mastery on exams.

Note. Her superiority will have nothing to do with innate aptitude, genius for the law, The Right Stuff. What is required, which should not be a surprise, is reasonable intelligence, hard work, and most of all, proper instruction.

35 points out of a possible 100 is practically a given for this student. 45, 65, 85 points out of 100 is not unexpected for someone possessed of such an advantage. This student easily games Emperor Law School.

\* \* \* \*

1. Having elicited elements of the conventional brief, professors seek to prompt and inculcate lawyerlike, analytic thinking by asking students to imagine different outcomes, were certain facts of the case altered. They may posit changes in aspects of the law. They may substitute a different, possibly minority view of a legal precept. Thus, one hears, “What if [this fact were changed to that fact]?” “What if ...?”

“What ifs?” will be explored in depth toward the end of this chapter.

2. Lawyerlike analysis will be described in this book. Examples will be presented. (One is presented in this chapter.) The reader will gain a clear sense of what it entails. As suggested, while different, lawyerlike analysis is not rocket science. It is readily accessible. It will be learned via law practice. Properly instructed, it can be acquired prior to law practice. It can be acquired prior to starting law school!

However, acquisition of this critical skill requires a meticulous progression of hands-on instruction, followed by practice. It is unlikely this can be accomplished in a book. No more than one can learn to ride a horse by merely reading instructions and viewing diagrams in a book. Moreover, instructing analysis and other skills is not the aim of this book. This book aims merely to describe what is amiss in Emperor Law School, and how this can be taken advantage of.

3. See Section Four, Chapter 4.

4. A “trial” (or “hearing,” or other “court proceeding”) is the act or process in a courtroom of trying, testing, putting to the proof. It determines whether a fact, an aspect of law, etc. occurred, is satisfied, established, or not. Not every fact, not every aspect of law, etc. will be tried or tested. If the existence of something is not in doubt, cannot be denied, cannot be proven not to be, what is the point of trying or testing it? A lawyer who challenges, where no viable challenge can be made, wastes the court’s time. He also loses credibility before judge or jury. Moreover, he annoys or angers the judge. Never a good thing.

Therefore, when something relevant to a case cannot be disproved, it will normally be conceded or “stipulated.” (Agreed to exist.) For example, suppose a murder case, such as the Lincoln example in the preceding chapter, and there is no question but that the defendant stabbed the victim. Indeed, multiple times. A defense lawyer will not want to dwell on the stabbing. She will want to steer the focus elsewhere. Therefore, she may say to the jury, “There is no question but that my client stabbed the victim. Indeed, multiple times. That is not the issue in this case.” The grisly fact of the stabbing has thus been somewhat neutralized. The jury thinks, “Oh! What’s going on here? There must be something else the defense is going to show us.” Yes, facts that may establish that the stabbing was in self defense.

Stipulated facts are typically presented to a jury at the outset. The judge says, “Ladies and gentlemen of the jury, the following facts are conceded. ...” In other words, they are deemed to exist. Likewise, facts presented in hypotheticals. They exist! They cannot be disproven. A student who quibbles with, ignores, or contradicts the “facts,” is inviting trouble. Analysis, necessarily, will be faulty.

It may be noted that nothing of the above is likely to be presented or discussed in classrooms of Emperor Law School.

5. I’ll offer the following advice, respecting which of the many varieties of commercial outline one should select. I’ve already suggested getting used outlines. That is a consideration. (\$10-12, versus \$25-35 new.) Selection is best made after knowing how to perform lawyerlike analysis. Then, only then, will how black letter law must be known be understood. (Precisely, thoroughly.) Select a commercial outline (CO) that presents law in a fashion you find satisfactory. Is the law stated clearly and completely? Is it placed in a useful, larger context? Do you like the organization of material? Is the CO helpful in constructing your toolbox (course outline)?

6. First published in 1952, and a Herculean (and ongoing) undertaking, the UCC has to do with sales and commercial transactions, and primarily personal property -- goods, not real estate. It seeks to codify, harmonize, unify the law in this area of the 50 states, the District of Columbia, etc. The idea is that someone engaged in commerce, often interstate, not encounter a hodge podge of varying law, state to state. The UCC is not actually law, therefore binding. Rather, it presents a model for legislative entities to adopt, and most have. Law adopted by states, municipalities, the federal government, agencies thereof, any legislative body, is statutory law.

The (ideal) models of law the UCC contains offer guidance in almost all scenarios respecting sales transactions and the conduct of commerce that can be imagined. The models also reflect common law precepts derived from many centuries of contract cases. For example, if goods fall from or are damaged while being transported by truck, rail, plane, etc., one, and usually more than one of the many sections and subsections of the UCC seeks to guide (harmonize) the legal principles relevant to untangling of responsibility for loss between seller, buyer, previous owner, future owner, shipper, carrier, handler, receiver, etc., each of whom may be a different party having a stake in the mishap, some, very likely, residing in different states, .

It may be noted that entire courses in Emperor Law School are devoted to but one or two sections of the UCC. (Sections two and nine in combination come to mind.)

7. LEEWS instruction provides a template for approaching and writing *all* essay-type exams -- no exceptions! Although different law professors may, surely will have preferences, and may instruct, "You are to do X, Y, and Z in writing my exam," the differences are merely cosmetic. The heart, the body of all responses that impress will be concise paragraphs of balanced, insightful, "lawyerlike" analysis -- roughly one per issue.

Of course, if a professor wants a statement of issue; the conclusion at the beginning, the end, no conclusion at all (the enlightened view, in your author's opinion); wants case names cited (usually unnecessary); such preferences must be heeded. However, they are mere cosmetic additions and subtractions to concise paragraphs of lawyerlike analysis.

Once a student understands the exam game and its rules, pointed questions can be put to a professor respecting her preferences. Instructions offered in class, which students often don't fully understand, but are loathe to probe further, lest they be considered lacking in The Right Stuff, can be followed up with pointed, clarifying questions. (In private, after class! In effect, yes, the professor can be cross-examined!)

A professor will appreciate questions that indicate both interest and awareness of the exam/lawyering/analysis game. Such a student will be thought to have The Right Stuff. (Trust your author's long experience in talking to students here.) Law professors are not besided the way college professors sometimes are. They are willing to look at and critique sample responses a student may offer. (E.g., a LEEWS practice paragraph.) They sometimes lament that students don't come to them more often. "My door is always open," they sometimes say. (My e-mail inbox?!) However, they don't like open-ended generalities, such as, "What should I do?"; "What would enable me to follow class discussion more easily?"

8. Lawyers tend to be hard nosed, as compared with law professors. The grade in a legal case is often win, or lose, A, or F. Certainly, the grade on a bar exam is A -- pass, or F -- fail. Sometimes, especially on the winter administration of a (typically bi-annual) bar exam, when many takers have previously failed, the failure rate may top fifty percent! This is a harsh lesson in an era of self-esteem propelled, inflated expectations.

Were a summer associate (law student hired by a firm for the summer) to offer something approaching the superficial analysis of the "B" example to a lawyer in a brief, the lawyer might pointedly drop the effort in the trash. I heard tell of precisely this happening to summer associates when I was a law student. Today, perhaps not. Fragile modern egos might not withstand such an action. Indeed, the lawyer might be at risk of being sued for the tort of intentional infliction of emotional distress.

9. My impression is that LEEWS grads, understanding the unimportance of class response, do not project themselves overly into class discussion. They sit back, they think about things in a knowing way, they take a few notes. The final exam is their constant focus. However, should this student be called on, she will easily provide facts, issue, holding, etc. respecting Used Auto Sale. It is when the professor probes deeper that she will truly distinguish herself.

The professor might ask, for example, "What is this case about? ... I mean, it's about the offer of \$2,500 for a used car being held open for two weeks. But what is it really about?" To which the 2-4 line briefing student might respond, "It's about the reasonableness of offers. I think two weeks was held reasonable here, because ... [and she offers common sense thinking -- more cost than \$2,500 involved, time to get a mechanic involved, etc. -- that may be nowhere contained in the case]. ... However, if something of much lesser value were involved, say, ... [and she offers examples of less than two weeks being reasonable for an offer to stay open]. ... Of course, more than two weeks might be reasonable, if ...."

In the professor's mind this student now becomes a "go-to," when others cannot provide a satisfactory response. However, she will not be called upon often. It normally is not a professor's intent to have cases wrapped up so succinctly.

10. Getting to know one's professor: Given that first year classes, as noted, tend to be large -- 50-100 students, even in small schools --, remain relatively anonymous to a law professor is easy and the norm. The classic law school movie, *Paper Chase*, makes precisely this point. Toward the end of the movie (from a book by yet another Harvard Law grad!), the protagonist, who has been humiliated in class by stern Professor Kingsfield, and who imagines Kingsfield thinks little of him, comes to realize that Kingsfield doesn't know who he is. (They get on an elevator together, and Kingsfield evinces no recognition.) He has been but a foil in the Socratic theatre.

It was suggested earlier in the chapter that a professor might be approached with specific questions about



exam format, might even be given a sample paragraph of analysis to evaluate and comment on. (See also footnote 7, *supra*.) However, new 1Ls who engage professors after class, as, perhaps, was the habit of many in previous academic life, tend to be quickly dissuaded. Few know what to say or ask. General questions, such as, "What should I do in preparation for exams?," are answered with such impatient bromides as, "Study hard." Also, "Don't worry. It will 'click' for you." (Or not.) Also, a wearied expression that suggests, "If you had The Right Stuff, you wouldn't be asking me this." In point of fact, law professors don't have much useful, concrete advice to offer. As suggested, they genuinely believe that writing an "A" exam requires, beyond hard work and intelligence, an intangible, innate aptitude for the law.

Most 1Ls quickly gain the above impression from what classmates report about such interactions. For this reason, along with intimidation and a desire not to seem "stupid," most law students avoid personally engaging with professors. (Your author certainly did.)

This is a mistake. Law professors have contacts. They know judges, lawyers, law firms. Their personal recommendation may be needed, and can be valuable. No question, an "A" grade will be the primary factor in getting a top recommendation. Often, it is the only factor needed. A professor will open with, "... one of my top students." (Conversely, no A, and the best that will be said is, "... has promise, wonderful person," which will not impress a prospective employer.) However, a positive will be further enhanced, if the professor also knows a student personally. Once a student understands the lawyering game, once she can execute a 2-4 line case brief, engagements with professors can be useful. Pointed, practical, thoughtful questions can be asked, that yield insight into the exam and professor preferences. There will be no embarrassment. Such a student will neither feel stupid, nor be viewed as such. Quite the contrary.

11. Some notebooks in law school bookstores (probably a bit more expensive) will be seen to have a margin rule 1/3 across the page. (Versus the normal 1 1/4 inch left margin rule.) If taking notes long hand in class, LEEWS advises putting (2-4 line) case briefs in the 1/3 space to the left of this margin, class notes in the larger right side space opposite. Of course, what could be simpler than purchasing a cheaper, normal-margin ruled notebook, then ruling one's own margin 1/3 across the page?

## Section Three, Chapter 4

### Problems with case method instruction

The origin of case method instruction and its popularization by Harvard Dean Christopher Columbus Langdell has been described. Case method instruction, abetted by Socratic exchange, is today universal, predominant, the norm in Emperor Law School. No law professor merely lectures to note-taking students. All law students read, brief, and discuss cases in class, particularly in required first year survey courses. All law classes feature some degree of Socratic exchange, especially in first year. The extent will vary and depend upon a professor's skill and comfort level respecting such dialogue.

#### Shortcomings in general

Shortcomings of case method instruction have been noted. I trust preceding chapters on case briefing, especially LEEWS 2-4 line briefing, illustrate the unlikelihood of acquiring the incremental, nitpicking, analytic thought process of a practicing lawyer from passively reading, (conventionally) briefing, then discussing appellate opinions. This is particularly so when the discussion, especially professor "what ifs?," cannot be followed and effectively made use of.

Case method does little to disabuse students of the academic, theoretical, memorize/regurgitate approach to learning they bring with them to law school. Obsession with briefing in preparation for class distracts students from the appropriate goal -- preparing for the final exam. Students simply don't learn to think or analyze "as lawyers." Therefore, they are unable to make the transition from a rote focus on briefing elements to engaging in "what ifs?" propositions professors put forward in class. Further, cases are insufficient sources of black letter law.

In sum, case method instruction in its current form does little to advance students on the path to becoming lawyers. It is wholly inadequate in preparing students for an exam exercise that calls for performance "as a lawyer."

#### Potential for usefulness exists

Note my addition of "in its current form." Your author has never counseled students *not* to read and brief cases. I have always made the point that so-called "canned briefs," briefs of cases created by others on the order of *Cliff Note* summaries (often available online), are a shortcut to be avoided. Once a student understands the lawyer's role, and has a proper grounding in how a lawyer thinks and analyzes, cases become what I term a useful "block of wood for practicing with legal tools."

Indeed, as suggested by all that is implied and gained in producing a 2-4 line case brief, current mode of instruction in classrooms of Emperor Law School can be productive. At least, much more productive than at present. Students would lack confusion. They would become engaged. Students would perceive in greater measure the relevance of class discussion to future performance as a lawyer. Law school would become more meaningful, even occasionally enjoyable. (Many of my students report that law school has become "fun!")

With some tweaking, and the background instruction implicit in and necessary to 2-4 line briefing, case method instruction can be useful in inculcating lawyerlike analytic skill. Students *could* very easily be apprised of the need to know black letter law cold. They *could* very easily be advised that cases are insufficient sources of black letter law. Professors *could* very easily provide summaries of the law.

However, as I hope has been demonstrated in previous chapters, and as will be made plain in subsequent chapters (e.g., "*The lawyering art versus Emperor Law School*"), impediments to even these simple changes

are deeply embedded in the origins of Emperor Law School, and in the perspective and self concept of law professors.

### **Another problem -- unfulfilling; boring**

Beyond a busywork aspect, and its inadequacy, even misdirection respecting preparing students for exams, an immediate, glaring problem with case method instruction is that it is unfulfilling and quickly boring.

Virtually all who come to law school were stars in college, indeed throughout their academic lives. Many have advanced graduate degrees. Some are medical doctors, businesspersons, teachers, nurses pursuing a new career. For various reasons, most related to the attractiveness of the power, prestige, and central role the law and lawyers play in American society (a “nation under law,” after all), they have come to law school to become lawyers. Their aim is not to be academics, legal theoreticians, handmaidens to a law professor’s research and imaginings about what law could or should be.

Entering law students have watched countless television lawyer shows. They expect in short order, as part of their training for the profession, to don a suit, stand up in a courtroom, and begin to acquit themselves as the attorneys they aspire to become.

However, that doesn’t happen in Emperor Law School, certainly not in first term. In second term some may have occasion to wear a suit. As noted, many law schools require second semester 1Ls to research and write an appellate brief, then participate in an oral argument competition called “moot court.” Some fewer schools allow participation in a mock trial exercise. However, respecting acting, feeling as a lawyer, it doesn’t soon happen for most in Emperor Law School, and very rarely first term.<sup>1</sup>

Students engage the law passively, academically, at a remove. At no point do new 1Ls engage with legal principles as lawyers do -- as tools, as a vehicle to achieve client goals. They read legal cases, but becoming a lawyer remains distant. This is puzzling and disappointing. Law school is soon a frustrating, boring grind.

### **An example of the problem of case method instruction in action**

Consider how students in Emperor Law School are introduced to the concept of battery in “torts.”<sup>2</sup> Introduced as a “cause of action,” meaning a basis for recovery at law, battery is examined in the abstract and academically. Led by the professor, students perhaps initially mull over the concept of “harm.” “What is harm?,” the professor might ask. Also, “Why does the law need to regulate certain interpersonal behavior?”

Discussion perhaps now moves to the requisite element of intent in establishing battery. The professor may invite the class to consider appropriate consequences of causing harm to another. Perhaps she queries, “Should the circumstance that an act is intentional versus unintentional make a difference, if both acts result in injury?”

Culpability and the privilege aspect of battery may command a half hour of discussion. Students are likely interested in a distinction made between a punch administered during a boxing match, versus a blow administered outside a boxing match. The former is expected, consented to behavior, therefore privileged and not battery at law.

However, the professor is unlikely to put battery in a context that links students in a meaningful way to the actual practice of law. For example, it would be unusual for a professor in Emperor Law School to say, “Imagine, as a lawyer, you have a client who was set upon and pummeled by a neighbor. You’re thinking battery as an avenue of recovery, possibly assault. You inquire about medical bills, time lost from work, all part of your client’s damages. In order to establish a battery and win damages, you have to prove to a preponderance, meaning more likely than not, that the following four things occurred: the act was

intentional; it was harmful or offensive; it was unprivileged; it resulted in contact. Let's look at the facts, and explore whether each of these necessary elements of battery can be established.”

As noted, law professors almost never frame discussion of cases in terms of lawyer objectives, client objectives, lawyer tactics, etc. As noted, the words “lawyer” and “attorney” are rarely, if ever heard in law school classrooms. We shall see that, if anything, law school instruction is more than a little antithetical to lawyers and the legal profession.

Rather, beyond elicitation of the briefing aspects of a case, discussion in classrooms of Emperor Law School focuses on the perspective of judges, and evaluation of reasoning behind the decision. Students' grasp of legal principles tends to be abstract and academic, not so different from their grasp of principles of psychology, chemistry, themes of English literature, and other subjects in previous academic life.

Students are not led to understand that battery isn't merely an interesting legal construct to be thought about in an academic way. Battery is not introduced as a tool used by lawyers to redress a wrong to a client. It is not presented as a legal vehicle whereby a lawyer can establish liability in a courtroom, such that a client may recover damages. The discussion only occasionally turns to the various kinds of damages that might be awarded, and their distinctive elements or requirements of proof. (E.g., actual versus incidental damages; nominal, punitive, special damages, etc.)

Indeed, damages is rarely discussed in law school classrooms. Perhaps the torts professor thought the contracts professors would cover damages, or vice versa. Perhaps a discussion of damages -- money! -- seems tawdry. Perhaps it smacks too much of the real world of lawyering.

### **An alternative approach**

Here's an alternative or adjunct to abstract, theoretical, ultimately wearying mastication of a rather dry account of events on paper -- a case!

Students might be assigned to form teams of four or five. The teams might be given a fact scenario involving one party striking another, or causing another to be stricken in some way. Perhaps, simply, the facts of an assigned case. Then different teams might be given fifteen minutes to huddle and formulate arguments for or against establishment of the requisite elements of battery. Now open the class to discussion. Invite the teams to make their case.

However, none of the rambling, loose, superficial arguing found in current exam responses will be allowed. The professor would curtail extraneous, speculative introduction of facts with “Objection!,” just as a judge would in a courtroom. Loose, conclusory, inadmissible (in a courtroom!) forays, beginning with, “I feel ...,” “It seems to me ...,” and “Possibly ...,” would be cut off. Why such expressions are impermissible in analysis would be explained. Students would begin to feel like lawyers. They would begin to ratchet toward skill and the art of lawyerlike analysis.

Students would envision themselves in a courtroom with a client one day. They would begin to appreciate the close, parsing, nitpicking of language and fact, in arguing for and against establishment of each individual element of battery, that is the lawyer's art. For example, did the circumstance that party X was “momentarily blinded by the sun” mitigate the requisite element of intent? Does it matter that “seconds passed” after this blinding before the act giving rise to a battery claim arose?

All legal precepts are potentially tools, whereby lawyers seek to gain advantage for their clients. For example, imagine an accident on a ski slope. Someone falls, or runs into another, or goes off the course and hits a tree. There is an injury.

Persons who engage in skiing (or snowboarding, rock climbing, etc.) engage in an inherently dangerous activity. Potential for injury is apparent. A ski lift ticket may advise of such danger and risk. In any event, when obvious inherently dangerous activities are undertaken, the law recognizes a personal responsibility for consequences. The doctrine is called “assumption of risk.” It will shield the ski slope operator to some extent from liability for the injury above posited. It is a defensive legal tool.

On the other hand, if the ski slope was not maintained properly, if warnings of possible danger were not posted, if too many people were allowed on the course, etc., the ski slope operator might be found “negligent.” There might yet be recovery for an injury. Negligence would be an offensive legal tool, employed by a lawyer bringing suit on behalf of the injured skier. (Against which might be asserted the defensive legal tool of contributory or comparative negligence on the part of the injured party, which could reduce recovery of damages.)

In such fashion could learning law and the art of analysis easily be brought into the classroom. Students would begin to understand the role of law in practice. They would be roused from a passive, academic, note-taking habit and posture. They would feel themselves beginning to become lawyers. Law study would become vastly more engaging and interesting.

Nothing of the sort, however, happens in any classroom of Emperor Law School that your author is aware of. If it does, it is an experiment. It will likely be frowned upon by other professors, whose classes would be called into question by comparison.

Briefing and discussing cases inculcates a merely abstract, academic understanding of law. The rigorous dialectic of argument, counterargument of law and fact that is the lawyer’s art is but faintly glimpsed.

Shouldn’t law students be taken on field trips to courtrooms to watch lawyers in action in trials and hearings, much as medical students make hospital rounds and observe operations? They aren’t!

The law in Emperor Law School remains largely a construct on a page. It is something in musty cases with but minimal, if any immediate relevance. Lawyers are mere names mentioned at the beginning of a case. Students remain academics. They have no sense that they are becoming lawyers. They have no practical grasp of what lawyers actually do. They quickly become bored.

### **Perspective going forward**

Until considerable gaps in both the orientation and instruction given law students are filled, the current version of case method instruction is wholly inadequate to the task of training lawyers, and therefore preparing students for exams.

All of which, to repeat the familiar refrain, can and should be taken advantage of.

The gap in orientation can be easily remedied. Case method instruction could easily be put in a meaningful context of lawyer, client, client objectives, and the use of law to achieve those objectives. The solution will be described in Section Five. Section Six offers suggestions going forward.

Filling the gap in instruction, namely, teaching students -- finally! -- to think and analyze as lawyers, will be more problematic. It will require a re-orientation of Emperor Law School away from its current culture -- theoretical, academic moorings and inclinations --, toward its appropriate, as yet unfulfilled role of handmaiden, training ground for the legal profession.

The current divide (chasm really!) between Emperor Law School and the legal profession suggests an inconsistency, an antithetical posture, whereby legal scholarship and a theoretical bent contradicts

appropriate training for the practice of law. However, we shall see that nothing could be further from the truth.

Innovation and creativity in the law has long been led by practitioners, not law professors. Those with pretensions to legal scholarship and ground-breaking legal theory would do well to enlist a close relationship with practicing lawyers in their area of interest.

Whether Emperor Law School will awaken from its seeming disdain and disregard for the profession and practitioners is a questionmark. To do so will require significant, even wrenching change. One change, which would considerably ease the crushing financial burden on law students, would be to make a third year of law school optional, possibly in the nature of a masters program. Certainly, student dollars supporting legal scholarship, not a student's progression toward the profession, cannot be justified.

What is also certain is that so long as the *status quo* persists, Emperor Law School can be easily gamed. And it should be! Perhaps, only by being made to look foolish, to be revealed as a dupe, can meaningful change be forced upon such a flawed, but smug, hidebound institution.

\* \* \* \*

1. One law school in America comes to mind where students early on get something of a feel for being a lawyer. At Washington University School of Law in St. Louis, a "negotiations competition" is held for 1Ls in early October. (I have long tried to avoid scheduling my fall, live St. Louis program on that weekend.) Only a small proportion of the 250+ 1Ls at "WU Law" participate in this competition. However, classmates flock to observe their fellows dressed in suits, behaving as lawyers. Possibly, first termers at Northeastern University School of Law, which, alone among all law schools, I believe, heavily integrates practice internships into the curriculum, have some early exposure to the actual practice of law.

However, not so all other members of Emperor Law School. 1Ls at YHS and the many other law schools find themselves back in a familiar academic experience -- sitting in a classroom, taking copious notes. It is oh, so familiar, and comfortingly so. "Hey! Law school isn't so bad after all," some may think initially. The habit of approaching subject matter in a theoretical, passive manner is but reinforced by conventional briefing and classroom discussion.

2. "Tort" is an old, middle English (as in Middle Ages!) word meaning injury. At law a tort is a wrongful act, not involving a contractual breach, that results in injury, loss, or damages, for which the injured party can seek recovery in a civil action. Assault, battery, defamation, and trespass are examples of torts. As noted, the exact meaning of "tort" is never explained to entering law students. It's as if the professor fails to recall that at one time she didn't know what a tort was.

## Section Three, Chapter 5

### **Day one of law school -- The ringmaster cracks the whip! (Intimidation and the slide into confusion and self doubt begins.)**

This section of the book seeks to make the point that intimidation, confusion, and self doubt on the part of the great majority of law students sets the stage for taking advantage. This chapter takes the reader to law school. It will show how these factors begin to take hold the first day of class, even the night before.

For most law students, the prospect of becoming a lawyer is weighty. The forbidding nature of law, law school, and law professors makes some measure of intimidation, confusion, and self doubt inevitable. Preceding chapters, I hope, are persuasive that conventional case briefing and case method instruction, core elements of the law school experience, do little to allay these factors. Rather, in failing to adequately inform and instruct, particularly where preparation for exams is concerned, they abet them.

Let us venture now into a law school classroom to experience in some measure a beginning law student's exciting first day. It is a remarkably similar experience throughout Emperor Law School. Excepting introduction of computer technology,<sup>1</sup> it is an experience largely unchanged from when your author entered law school over forty years ago. If a student is not yet intimidated, confused, and beginning to feel stirrings of self doubt, for most, inculcation of such impairing feelings will surely now commence.

As noted, first term classes in Emperor Law School tend to be large, even at smaller law schools. Therefore, a class of 50-100 is to be anticipated. The number of women will equal, sometimes slightly exceed the number of men.

The accrediting/oversight body of law schools, the American Bar Association (ABA), requires certain core courses. These are contracts, torts, and civil procedure in first year, and constitutional law and criminal law (or criminal procedure) in second year. First term students also normally take a one-hour credit legal writing/research course. Property law is sometimes required (depending upon state bar requirements), and I strongly recommend it. Evidence is also required, but normally taken in second year.<sup>2</sup>

We shall attend a torts class at Anyone-Of-Them Law School. Tort, you'll recall, is an old English word meaning injury. Torts has to do with non-contractual injuries, usually involving the person -- assault, battery, defamation, etc. --, for which civil damages can be sought. Students easily grasp the concept of harm or injury, and recourse for same at law. They can relate tort precepts to personal experience, possibly to future law practice.

Having its roots in actual cases in Olde England, torts provides a logical introduction to the venerable role of law in western culture, and its historical origins in so-called "common law."

Common law, as noted, is established by holdings (decisions) in cases. Such holdings carry the weight of "precedent." (A model, an example, justification.) Followed over time, they gain the weight and authority of statutory law. (See fn. 5.)

Nothing of this background, of course, is explained to entering law students.

#### **Day one in torts**

Imagine an amphitheater-style classroom. You enter with many of your new classmates just before the 9 a.m. start of class. All are nervous, excited, expectant, removing laptops from bookbags, along with a heavy 800-1,000 page torts casebook. Some, perhaps, place an old-fashioned note pad at the ready. Some few also take out a set of multi-colored highlighters. They have already begun to book brief!

In your author's case, I can recall being impressed that my torts professor, a long-time, Connecticut railroad lawyer-turned-law-professor, was also the author of the casebook. It was at the time the leading tome in the field -- [Fleming] *James on Torts*.

As noted previously, a difference from college is that students will already have been assigned one or two cases to be briefed for this first class. Another difference is seating charts, often with photos. Prior to class in most instances, students will have examined a chart of the classroom, to which names -- their names! -- have been assigned to a particular seat.

In the amphitheater setting, students find their way to assigned seats along unbroken, curved expanses of desktop (wood in older buildings, laminate in more recent construction), sweeping in ascending, widening tiers up the expanse of the room. Chairs and electrical/data outlets positioned along the sweep of desktop demarcate each student's place. The seating chart was likely posted online. It is likely also posted at entrances to the room.

As some settle in, others review the first assigned case. Others converse with one or more of the bright, eager classmates they are just getting to know. There is a low hum of conversation, a palpable buzz of anticipation in the large room, which suddenly subsides. The professor has entered the room.

She strides briskly, matter-of-factly, to her position at a desk or podium in the center well of the room. Often this is a raised platform. All seats in the curved tiers of desktops face this center area.<sup>3</sup> Behind the professor is likely a long black or whiteboard, and there is a powerpoint assembly.

The professor immediately sets a tone that this experience is going to be different from college, graduate school, or any previous academic venue. Having arranged her materials, she scans her copy of the seating chart. As noted, it often features photographs along with names. Without further ado, often nary a smile or hello, perhaps using a microphone assist, she introduces students to the much-anticipated "Socratic method," that is the staple scenario in all law school movie scenes.<sup>4</sup>

She calls someone's name.

### **Socratic method**

"Mr. Caledon," the professor intones ominously, having ascertained that the presumed Mr. Caledon is in his assigned seat, "Can you give us the facts of *Scott versus Shepherd*, famously or infamously known as the case of the flaming squib?"

And before the somewhat stunned Mr. Caledon can say anything, she interjects, looking intently at her prey, "First off, Mr. Caledon, can you tell us what a 'squib' might be?" This prompts nervous chuckles among the tens of rapt, onlooking classmates, who are relieved not to have been called on.

Law school is indeed going to be an interesting experience. Why, it's just as depicted in such movies as *Paper Chase* and *Legally Blonde*! "Thank goodness I wasn't called on!" is the universal sentiment in the room, as Mr. Caledon attempts a response on this first day en route to becoming a lawyer.

Mr. Caledon will normally remain seated. Here and there in some classrooms, mostly in southern and western states, rarely in a (politically correct) California or New England law school, students called upon must stand when responding.

Classmates in such instances take to timing how long a student is kept standing. "31 minutes," one student told me. "Two hours!" trumped another. (It was a special 3-hour class.) The professor engages other students (not required to stand), but comes back to his foil for the various briefing aspects of the case.



Mr. Calledon defines a squib as “a firecracker.” Whereupon he may be interrupted and admonished to “Speak louder, please, Mr. Calledon!” “A rather large firecracker, yes?,” the professor perhaps corrects, again prompting nervous chuckles here and there.

“And who or what is a ‘larrikin,’” Mr. Calledon? “The case involves a larrikin, does it not?... Kindly tell the class who or what a larrikin might be.”

Mr. Calledon, hopefully, will be able to say, “A hoodlum, Ma’am. A boisterous, unruly person.”

“So I’m to be ma’am, Mr. Calledon?! Do I seem a ma’am to you? ... I suggest you not answer that!” Prompting snickers, laughter, and perhaps the first smile from the professor. “Perhaps you should address me as ‘Professor [X].’ Thank you. ... Please continue giving us the facts.”

Whereupon, partially reading from his initial, carefully prepared, often typed, page-long brief, Mr. Calledon proceeds to set forth the facts of the hoary case of *Scott v. Shepherd* (1773), 96 E.R. 525.

### **The hoary case of *Scott v. Shepherd* (1773), 96 E.R. 525**

Cases assigned for the first day, first term of law school are typically lengthy and vintage. They are designed to offer an entertaining introduction to the study of law. The professor (and casebook author) wants to impress that the law has a long tradition and historical roots. Legal principles enunciated decades, even hundreds of years prior, yet have life in the present day.

Archaic language and twists and turns of old opinions also impresses that reading, briefing, understanding a case is not the same as reading a novel or historical tract. If the case was decided by a tribunal of judges, chief or majority opinions are often followed by dissenting and concurring opinions. (Once again, a concurring opinion agrees with the majority decision, but sets forth different reasoning.)

New 1Ls find that reading cases proceeds slowly. (There is no inkling of the very different focus and approach of the 2-4 line brief.) Sometimes, it is even torturous. It is not unusual at the outset to spend two hours reading and briefing a single, 10-15 page case. Also, a dictionary need be close at hand. (An ordinary dictionary will suffice.)

*Scott v. Shepherd*, (1773) 96 ER 525, a/k/a the “case of the flaming squib,” is a popular introduction to the law of torts, and the exercise of reading and (conventionally) briefing a case. Students will be impressed that they are reading a case decided well over two hundred years ago (in 1773). The reference “citation,” 96 ER 525, refers to “English Reports,” 96th volume, (beginning) page 525. English Reports is a 178 volume series, reporting cases of significance in English courts between 1220 and 1860.

Long before stenograph machines, typewriters, recording devices, and computers, in 1773, when *Scott v. Shepherd* was decided, someone sitting in the courtroom summarized and recorded by written hand what was deemed of significance, said and decided by the participants.

A report or summary of *Scott v. Shepherd*, including verbatim remarks, opinions, and reasoning set forth by the judge (in the instance of *Scott*, as we shall see, several judges), was later printed in 96 English Reports. Such records of decisions become precedents, to be used as guides in deciding subsequent cases involving similar facts and legal issues. “*Stare decisis*,” meaning to stand by decisions, is an important principle in law.<sup>5</sup>

In *Scott* a “larrikin” tossed a flaming squib, a large, lit firecracker, into a covered market, where it landed in the stall of one Yates. Yates immediately tossed the squib into the neighboring stall of one Ryal, who immediately tossed it from his stall, where it exploded in the face of plaintiff Scott, blinding him in one

eye. As noted, “larrikin” is an old English expression meaning a mischievous or frolicsome youth, sort of a hoodlum.

Isn't this delightful? As will be evident in the language of *Scott*, however, no matter how interesting the plot, reading cases is typically tedious.

The going in *Scott* quickly gets sticky. The case introduces the principle of *novus actus interveniens*. Say, what? It's Latin (of course) for new act intervening. The issue before the court was whether, Shepherd's initial act of tossing a lit squib into an active marketplace having been shown to be negligent (i.e., breaching a duty of care, which breach is the proximate cause of injury to another), the intervening acts of Yates and Ryal, in tossing the squib from their stalls, served to break the legal chain of causation, therefore liability, between the original actor, Shepherd, and the loss or damage caused to Scott.<sup>6</sup>

I shall refer the reader at this point to footnote 7, where, at considerable length, much of the verbatim language of *Scott* is presented. Read as much as you care to. The painstaking logic of the several opinions, including the dissent of Blackstone, J. (the selfsame William Blackstone who promoted the idea of lawyers needing more education, now become “J.” -- judge), will provide a feel for the impressive thought devoted by judges in deciding cases. It will be understood why cases cannot be speed read, but must be parsed carefully to discern elements of a conventional brief.

Indeed, the reader should ponder the majesty of a system whereby such careful recognition is given to rights and liabilities of mere ordinary folk, such as Scott. In most other lands and cultures at the time *Scott* was being decided, mere citizens were routinely killed, maimed, and generally run roughshod over by kings, princes, potentates, and most anyone of higher rank. The reader should marvel at the close, patient, elegant, thoughtful intellectuality of the reasoning of jurists deciding cases in the eighteenth century.

It is precisely this sort of highly intellectual and masticating thinking in repose that law professors aspire to, and seek to inculcate (or discover!) in students. The reader would do well to admire the patient concern and thoughtfulness, respecting justice and the rights of citizens, inherent and implicit in a system of laws. Rule of and by law is a foundation of modern, democratic, civilized society. It is the (welcome!) substitute for rule by kings, dictators, brute force of arms, and cruel and outmoded custom. (E.g., respecting the latter, *ad hoc* hanging, stoning, tar and feathering.)

We shall see that a system of law is, at base, a highly intricate method of conflict resolution by means other than force. Appreciating this will be key in understanding how a common denominator perspective can be applied to *all* legal problem solving, including, most pertinent to this book, the problem posed by a hypothetical-type law essay exercise.

### **A digression to explore whether law professors consciously “hide the ball”**

It should be noted that the professor on day one typically does not stop to discuss or explain the historical process whereby cases came to be recorded and reported, the citation system, even the meaning of “citation,” although the words “cited” and “citation” may be heard. Nor at any point during term, although the expression will be encountered in cases and possibly mentioned in class, is, for example, *stare decisis* likely to be explained. At best, a professor might note, “It's a binding legal precedent.”

For that matter, many frequently used and encountered words are never precisely, adequately explained in Emperor Law School. For example, (conventional) case briefs call for a statement of “issue(s).” Professors constantly speak of this or that “issue.” Students understand that on exams they are charged with “spotting” or identifying issues. However, at no point will a professor stop and precisely define what an “issue” is.<sup>8</sup> (See following segment.)

Whether professors merely forget that at one time they themselves did not know the meaning of “tort” or “issue,” or, as students suspect, professors seek to “hide the ball,” thereby actively seeking to deceive or harm students, or, at the very least, seek to gain or maintain an advantage over students, is not settled.

Your author’s view, after many, many years, is that the answer is a combination of the two. As one progresses in legal studies, then in the practice of law, bit by bit concepts never encountered before entering law school -- tort, *stare decisis*, *res ipsa loquitur*, demurrer, etc. -- form into a vast, multi-layered, kalaidoscopic body of background knowledge, that informs understanding and navigation in legal thinking and practice.

(Should you wonder what is meant by, for example, “demurrer,” as your author did when first encountering the word in a case, look it up. I leave it undefined to provide a sense of the bewilderment of entering law students, as they haltingly attempt to not only brief their first cases, but, simultaneously, learn a new language.)

On the one hand, I think law professors forget how much background knowledge they had to acquire in order to provide a proper context for understanding what is encountered in a case and discussed in class. Moreover, lacking significant experience in the actual practice of law in many instances, particularly litigation (meaning preparation of a case for a possible courtroom trial), they are not so attuned to the importance of precise meaning as practicing lawyers. (Although they deem themselves very sharp, precise thinkers, indeed.)

On the other hand, knowing the arcane language of the law provides professors with an immediate advantage over a highly intelligent, aggressive, confident audience -- entering law students.

All teachers covet the respect of pupils. Few willingly concede advantage. Doubtless, there is a feeling on the first day that a potentially unruly group of (typically) arrogant, would-be lawyers must be brought to heel. A professor must impress students with not just the majesty of the law and the profession into which they seek entry, but also, very immediately, the respect due a professor and law school.<sup>9</sup> Therefore, why not exploit the easy advantage of not making all readily apparent and comprehensible?

If professors “hide the ball,” it is probably often not so much an act of calculated (and malicious) commission, as of convenient omission.

Should law students be given more orientation at the outset, perhaps a primer in legal lingo (jargon), such that cases seem less foreign and forbidding? I certainly think so. The ebb of confidence and enthusiasm that results from confusion, uncertainty, and intimidation will translate into diminished performance, not just in class, but more importantly on exams. That seems not to be a concern in Emperor Law School.

#### **Additional perspective: a digression into the onionlike nature of the lawyering process**

Respecting the aforementioned word, “issue,” which professors and students bandy about with frequency, but which is never precisely defined, I provide a context to my students with two pointed definitions. First, an “issue” is, simply, a legal inquiry. For example, was service proper? (“Service” means giving notice of a legal process. E.g., a “summons and complaint” initiating a lawsuit.) Did such service establish jurisdiction? (I.e., legal authority over the case, individual, corporation, etc.) Was there a battery?; did a robbery occur?; was the contract breached?; was the corporation in violation of antitrust law (The Sherman Act)?; was venue (the court, location where the action was commenced) proper?; etc. All such inquiries are legal “issues.” (See, again, the expanded discussion in footnote 8.)

However, a distinction must be made between such overarching, larger issues -- for example, was there a valid contract? --, and subordinate, included issues, which may be more the proper focus of attention, because they are closely contested. Indeed such sub issues (“real issues” in LEEWS parlance), where

lawyers and the judge will focus their primary attention, are where a student should focus attention in class, and on an exam.

For example, within the larger issue of “was there a valid contract?,” the “real issue” may be “was there a proper offer?,” valid offer (and agreement, consideration, etc.) being necessary, constituent components of a valid contract. Assuming the contract involved real estate, “was the statute of frauds violated?”

Obviously, this can get confusing. The distinction between larger issues and included, subordinate, but often more important “sub-issues” can only be understood once a student becomes grounded in the give and take of the litigation process, and how lawyers argue, and what they argue about in a courtroom.

Therefore, the distinction between issues and sub-issues (and sub-sub-issues!) must be introduced patiently. I introduce it as part of introducing how lawyers analyze issues, and it comes only in the second half of a day-long program.

Students perform exercises to cement understanding of issues and sub-issues. Then I instruct that a second definition of “issue” is something contested by competing lawyers, by competing parties in litigation.

Whether a legal proposition can be established can be an issue. (E.g., can battery be established? Can proper venue be established?) However, whether facts establish proof of an aspect of a legal proposition at issue can also be an issue (a sub-issue!). Indeed, the latter kind of issue is typically more important for purposes of analysis. The latter typically informs the meat of “real issues.” For example, do facts establish the requisite intent aspect of battery, assault, robbery, etc.? Do facts establish that one’s creditor client is “secured” or “unsecured” in a bankruptcy proceeding?

In sum, issues in cases to be briefed are overall (larger) legal inquiries. However, both legal and factual matters that are contested in the course of determining overall issues are also issues. Indeed, for purposes of analysis, they are the more important issues, as they will bring the professor’s facts into play.

If the foregoing gives you a sense of layers of an onion being revealed, then welcome to what is required to comprehend the lawyering process. There are indeed multiple layers of understanding to be uncovered.

Unfortunately (fortunately for those who become privy to this layering), law professors never adequately explain this layering. They don’t come close. Professors simply throw out concepts relating to this or that aspect of the lawyering process. Students flounder, as they attempt to connect the many dots, to piece together, even become aware of the confusing layers.

The lawyering process remains a kalaidoscope. It seems to be assumed -- by professors, deans, students themselves -- that those who have the presumed Right Stuff, an innate aptitude for the law, will figure this kalaidoscope out, sufficient to distinguish themselves on exams. This is a patently false assumption. It is but a fig leaf for inadequate instruction.

This may be called “hiding the ball,” as students suspect and grumble, not without a certain amount of anger. However, it is really just a failure to properly instruct. It is a failure born of an instructional approach that never adequately bridges the chasm between academe and actual law practice.

### **Back to *Scott v. Shepherd* -- conventional brief**

Confronted with such unfamiliar words and phrases as “squib,” “larrikin,” “*novus actus interveniens*,” “*vis impressa*,” “*per quod*,” “trespass *vi et armis*,” etc. (See *Scott* opinion, fn. 7.), a law student feels excited to be ushered into the sanctum of legalese. However, daunted as well.

As noted, the typical new law student will likely spend two hours and more mulling over *Scott*, guided (also comforted) by the requirements of completing her brief. She'll probably end up with something approximating the following, the heart of which -- issue, rule, holding -- can be found online by searching "Scott v. Shepherd."<sup>10</sup>

Procedure: Appeal to Court of King's Bench from jury verdict at Summer Assizes at Bridgewater, awarding plaintiff, Scott, 100 pounds damages in a suit for trespass and assault.

(Note. "Assizes" were outlying circuit courts. Judges from the "royal courts," who would otherwise hear cases at Westminster, traveled to and presided at assizes at various times. Similarly, American judges at the time [along with lawyers] traveled a regional circuit, holding court at appointed times in various locations.)

Facts: Defendant, Shepherd, tossed a lighted squib or firecracker into a crowded covered market. The squib landed in the stall of one Yates, who immediately threw it into the stall of one Ryal, who immediately threw it out of his own stall, whereupon it exploded in the face of plaintiff, Scott, blinding him in one eye.

Issue: Whether an action of trespass and assault against defendant is maintainable. In particular, whether injury to plaintiff, Scott, arose from force of the original act of defendant, Shepherd, or from a new force by an intervening third party.

Rule (of law): If an act is unlawful, trespass will lie for the consequences of it. Intermediate acts will not purge the original tort. He who does the first wrong is answerable for all consequential damages.

Holding: Judgment of lower court affirmed. An action of trespass is maintainable in the present case, where the "natural and probable consequences" of defendant's act were to injure someone, despite the circumstance of intervening actors. Injury to plaintiff was the result of the direct and immediate unlawful act of defendant. (Nares, J., concurring; Blackstone, J., dissenting.)

Rationale (reasoning): One is responsible for the normal, natural consequences of one's action, no matter that there be intervening acts, so long as those intervening acts do not consequentially alter, add to, or meaningfully attenuate the original action, which original action does not require an injurious intent (*malum animus*).

### **A problem for Mr. Caledon**

The problem for Mr. Caledon is that the professor won't be limited by the strictures of briefing requirements in posing her questions. She'll draw from all aspects of the case. It has been noted that one of the judges in *Scott* is the selfsame Blackstone of the seminal *Blackstone's Commentaries on English Law*. This was one of the first important legal books, and a book suggested by Abraham Lincoln as something an aspirant lawyer should read.<sup>11</sup>

The professor may pose a question such as the following:

"In his dissenting opinion, Mr. Caledon, Judge Blackstone opines that:

'I take the settled distinction to be that, where the injury is immediate, an action of trespass will lie; where it is only consequential, it must be an action on the Case.'

"What do you suppose is meant by 'an action on the Case,' Mr. Caledon?"

This information will not be in Mr. Caledon's brief. It is something only the closest reading and comprehension of *Scott* would bring immediately to mind. So Mr. Caledon must now scramble to find Judge Blackstone's opinion in order to attempt a response.

Too late! The professor, impatient, now opens the discussion to the class, all of whom also now hastily scramble to parse Judge Blackstone's opinion, lest they be called upon.

### **The professor as ringmaster in charge**

The professor has at this moment, mere minutes into the first term, secured her superior status. She is the ringmaster of the circus. Smartiepants lawyer aspirants, despite a lifetime of academic success and stellar LSAT scores, each so full of him or herself, are but clowns and dancing bears, responding to the crack of the professor's whip. They've been told their entire lives they have the "gift of gab," "You should be a lawyer." However, they are now but helpless, speechless babes.

It's as if the professor impresses upon the class, "You may read and brief assigned cases. You may examine and think about them for hours. (As law students indeed do.) However, I, the professor, am needed to help you truly decipher and understand their meaning."

Henceforth, students brief with this moment and the following lesson firmly implanted: I may be called upon, and I shall surely falter. The professor can lift me up; she can put me down. I do not know what the professor knows. I must attend well, .... at her feet!

How can any professor resist the temptation of such power?!

### **The chastened and intimidated go forth, focused on the wrong objective**

Following an hour of being intellectually whipsawed, a room full of former confident, top students slinks out cowed, determined to apply themselves with yet greater determination. The only certainty is that cases assigned for the next day must be examined much more closely. There is the possibility of being called upon, and the likelihood of being made to feel and appear stupid.

Confidence has significantly eroded in a mere hour. It will be further eroded in two or three more hours in contracts, property, and that most arcane, dry, and confusing of required subjects -- civil procedure. (The how, where, when, etc. of bringing civil [non criminal] cases to court. More the theoretical basics, of course, than the practical 1-2-3.)

Mind and emotion is now riveted on class the next day, and the need to prepare therefor. That such preparation is not necessarily consonant with preparation for all-important final exams, that such preparation may even be at cross purposes to preparing for final exams, is not known, not considered, not to be believed. (E.g., if suggested in a flimsy LEEWS flyer.)

### **Seeds of confusion, self doubt, mediocrity, and boredom sown**

Seeds of confusion, leading to self doubt and across-the-board mediocre exam performance, have now been sown. Also seeds of boredom.

No question, but initial exposure to turgid legalese and impressive mastication of precedent and law/fact interaction inspires an exciting sense of being admitted to the mysterious inner sanctum of the law. However, the lengthy inaugural cases, in particular, with their unfamiliar language and cadences, also inspire self doubt in the brightest of law students. Is it actually possible that one can come to a posture of easily deciphering cases, so as to join the professor in her various tangents?

As soon as the professor veers from the catechism of the brief, class discussion becomes something of a blur. Copious notes must be taken in the hope of discovering clarity later.

Students will now attempt to resist a feeling, a sense that very early on begins to hover ominously. They will be assiduous in this resistance, for to give in to this feeling strongly suggests they are missing something. However, after a few weeks of plowing through cases, only to find occasional clarity in the ensuing discussion of those cases, the feeling, the sense becomes insistent. Is it possible that law school is ... boring?!

No, no, of course not! The fault lies with the student. He simply isn't getting it. There are insights he is missing. He needs to study harder.

However, with no framework provided for understanding the utility of cases for lawyers, indeed no mention of the words "lawyer" and "attorney," reading and briefing is unbearably tedious.

Law school is boring!

The benefit of such misdirection and erosion of confidence, such boredom, may now be reaped by those savvy enough to heed the guidance of one who has been there, experienced the confusion and resulting mediocrity, and, as is the case for so many following an unsatisfactory law school experience, nevertheless discovered that he is very capable of lawyerly thought after all.

As noted, your author's credentials upon entering Yale Law School put me squarely within, indeed, somewhat above the intellectual orbit of classmates (including Hillary Clinton!), no fewer than nine of whom eventually clerked on the United States Supreme Court(!). However, I was precisely the confused, self doubting, quickly bored student posited.

Top-ranked Yale Law School was, as are all other law schools for most, a chore. No question about it. Apart from non-schoolwork-related political discussions, Yale Law was for the most part boring and tedious. I felt I wasn't "getting it," and I wasn't.

### **Some information that would have made a big difference**

Imagine, had I known the following as I began law school. Imagine, if any entering law student knew the following:

- 1) Whether one knows the unfamiliar words and Latin phrases matters scarcely a whit. You won't use them on all-important final exams. (Qualify that. I instruct proper use of a number of Latin phrases -- *supra*, *infra*, *inter alia*, *arguendo*, *sua sponte*, *etc.* Properly employed, they're useful. They also add a lawyerly flair to the response.)
- 2) Whether one stumbles and mumbles in class, or earns a "Good point!" from the professor, matters scarcely a whit.
- 3) One will never, ever revisit, precisely, the facts of *Scott v. Shepherd*, or any other case. Therefore, time spent memorizing those facts lest one be called upon in class is largely busywork. (If necessary, revisit preceding chapter on 2-4 line case briefing. If one focuses properly on legal precepts and their use [as tools!], sufficient familiarity with facts occurs as a byproduct.)
- 4) Learning how to think and analyze "as a lawyer" is key in impressing on exams. However, without more assistance than briefing cases and attending to class discussion provides, one will not acquire this skill.

5) This skill can be acquired, and with not much difficulty, if instructed properly.

6) The final exam counts for everything!

7) Once skill at analysis is acquired, once the nature of the law essay exam writing game is understood -- you have a system for dissecting confusing essay fact patterns to reveal issues; you know how to present analysis in concise paragraphs that impress; you know how to organize information in preparation for exams --, given the confusion and ineptitude of even the smartest of classmates, *you could skip going to class the entire term if you wanted, and still write a better exam than most (!)*. However, why not go to class to get a read on the professor's preferences and pet peeves? Why not be amused by the floundering of classmates? Why not find some enjoyment in the experience you are paying so much for the privilege of?

One would be very much in the driver's seat. One would be very much in the enviable position of taking advantage and gaming Emperor Law School.

\* \* \* \*

1. Internet and computers in law classrooms: Despite significant expenditure to make wireless internet accessible in law classrooms, students in more and more law school classrooms will leave their laptops idle in bookbags. Increasingly, law professors are banning computers from classrooms as distractions. At a minimum, many block internet access.

From personal experience, your author can attest that a forest of varying computer styles and colors, each emitting its own particular glow, is highly distracting. More disconcerting is students having their faces hunkered before a computer screen, rather than looking at the instructor. Of course, many students are surfing the internet, checking and sending e-mail, playing solitaire, and doing all manner of things other than attending to the lecture. Could they be bored?

2. Common law, statutory law: American torts, contracts, and property law derive largely from English "common law." Common law is law originating in judicial decisions rendered under English jurisprudence. This law is now heavily supplemented by and infused with "statutory law" -- law enacted by legislative bodies, such as municipalities, state legislatures, the United States Congress. Statutory law may incorporate, modify, or contradict and nullify common law precepts. As noted previously, the Uniform Commercial Code (UCC), for example, derives from efforts to codify (make systematic sense of) and harmonize numerous settled, common law contractual principles.

Constitutional law is statutory in that it derives from the United States Constitution and its amendments, and judicial interpretations thereof. However, the Constitution embodies principles of "natural law" (supposed universal, God-given legal precepts, such as the right to individual freedom, ... also ownership of property!), and also common law. Likewise, criminal law and evidence, while largely statutory, embody common law principles.

The numerous strictly statutory law subjects, such as tax, bankruptcy, antitrust, corporations, commercial paper, environmental law, wills and estates, etc., are normally upper level, elective courses.

3. As previously noted, his, her, he, she pronouns will be used interchangeably, but not together, so as not to disturb the flow of text.

4. Socratic method: So-called, because it originated with, at least was popularized by Socrates, the ancient Greek philosopher, educator, and imbibor of the poisonous juice of the hemlock. Socratic method purports to instruct by means of a series of questions, answers to which lead to enlightenment. Responding to deft and calculated questions, followed by yet more questions, the pupil's own answers lead to insights and knowledge. In the instance of law school, the idea is to bring students to knowledge of law (a secondary aim), and, more important, an understanding of, appreciation of, and inculcation of "lawyerlike thinking," being a lawyer's mindset and approach to analysis. This is to be accomplished by closely examining the logic and interaction of law and facts, set forth in judicial decisions in actual legal cases, usually lawsuits. (I.e., case method instruction.)

The overwhelming evidence, derived from your author's personal experience of law school, his observations of countless thousands of law students over a period in excess of 30 years, results on law exams both in Emperor Law School and on near 50 state bar exams, complaints of those in the legal profession who must train law school graduates from even YHS to "think as lawyers," is that Socratic case method instruction throughout Emperor Law School fails miserably in its aim.

Who "gets it" in law school: Those few who seem to "get it," who demonstrate lawyerlike characteristics of thought and application on first term exams, are rewarded with the few solid "A" grades. They are hailed, prematurely, as



“geniuses of the law.” However, I submit they “had it” prior to entering law school. They acquired something approaching the balanced, unemotional, nitpicking, analytic mindset of the practicing attorney elsewhere.

In this regard it may be noted that, although LSAT score and college GPA are poor predictors of success on law school exams, students with backgrounds in mathematics, hard science, philosophy, and Talmudic study typically fare better than those with backgrounds in English, history, political science, and other liberal disciplines. Those in the latter group are often “better writers” than those in the former group. “Good writer” is often, mistakenly, thought to be an important predictor of law exam success. However, “good writers” are also often unaccustomed to the close, analytic thinking, and concise expression thereof, that are hallmarks of the competent practicing attorney.

Those in the former group have been trained in precisely this pattern of thought and expression. Skill at close, balanced, nitpicking thinking, and concise expression thereof, are critical to law school exam success.

5. *Stare decisis*, deriving from the Latin, *stare decisis et non quieta movere*, may be better understood following the next chapter. It means “to stand by decisions and not disturb the undisturbed.” It signifies that courts should generally abide by precedents and not disturb settled matters.

“Lower” or “inferior” courts are required to follow (are “bound by”) decisions of “higher” or “superior” courts under the doctrine of *stare decisis*. For example, all American courts are bound by decisions of the United States Supreme Court. Courts are merely guided, but not bound by their own prior decisions, and decisions of “lateral” (similar rank) or “inferior” (lower ranked) courts.

6. The foregoing, 6-line sentence, necessarily containing numerous modifying clauses, is rather typical in the law. Each clause must be borne in mind, if the thought -- in this instance, the issue of *Scott* -- is to be understood. I shall attempt not to introduce too many such sentences. However, the (lawyerly) habit of convoluted sentences, containing multiple qualifiers -- e.g., “whereupon the party of the first part, being desirous of ..., then the party of the second part ..., etc. --, is hard to break.

7. The night before class, possibly earlier, students would have plowed through the following. We’ll begin with the majority opinion (in part) of De Grey, CJ (chief justice):

“This case is one of those wherein the line drawn by the law between actions on the case and actions of trespass is very nice and delicate. Trespass is an injury accompanied with force, for which an action of trespass *vi et armis* lies against the person from whom it is received. The question here is whether the injury received by the plaintiff arises from the force of the original act of the defendant, or from a new force by a third person. I agree with JUDGE BLACKSTONE [Yes, that selfsame Blackstone! He has by now been appointed a judge, and indeed is a judge in this case!] as to the principles he has laid down, but not in his application of those principles to the present case. The real question certainly does not turn on the lawfulness or unlawfulness of the original act; for actions of trespass will lie for legal acts when they become trespasses by accident, as in the cases cited of cutting thorns, lopping of a tree, shooting at a mark, defending oneself by a stick which strikes another behind, etc. They may also not lie for the consequences even of illegal acts, as that of casting a log in the highway, etc. But the true question is whether the injury is the direct and immediate act of the defendant; and I am of opinion that in this case it is. The throwing the squib was an act unlawful and tending to affright the bystanders. So far, mischief was originally intended; not any particular mischief, but mischief indiscriminate and wanton. Whatever mischief, therefore, follows he is the author of it; *egreditur personam*, as the phrase is in criminal cases. And though criminal cases are no rule for civil ones, yet in trespass I think that there is an analogy. Everyone who does an unlawful act is considered as the doer of all that follows; if done with a deliberate intent, the consequence may amount to murder; if incautiously, to manslaughter. . . . So, too, in 1 VENT 295 . . . a person breaking a horse in Lincoln’s Inn Fields hurt a man; held, that trespass lay: and, 2 LEV 172 . . . that it need not be laid scienter. I look on all that was done subsequent to the original throwing as a continuation of the first force and first act which will continue until the squib was spent by bursting. I think that any innocent person removing the danger from himself to another is justifiable; the blame lights on the first thrower. The new direction and new force flow out of the first force, and are not a new trespass.”

Then the concurring opinion (in part) of Nares, J:

“I am of opinion that trespass would well lie in the present case. The natural and probable consequence of the act done by the defendant was injury to somebody, and, therefore, the act was illegal at common law. The throwing of squibs has... been since made a nuisance. Being, therefore, unlawful, the defendant was liable to answer for the consequences, be the injury mediate or immediate. YEAR BOOK 21 Hen 7... is express that *malus animus* is not necessary to constitute a trespass... The principle I go on is what is laid down in [Reynolds v. Clark](#) ... that if the act in the first instance be unlawful, trespass will lie. Wherever, therefore, an act is unlawful at first, trespass will lie for the consequences of it. So, in YEAR BOOK 12 Hen 4... trespass lay for stopping a sewer with earth so as to overflow the plaintiff’s land. In YEAR BOOK 26 Hen 8... for going on the plaintiff’s land to take the boughs off which had fallen thereon in lopping... I do not think it necessary, to maintain trespass, that the defendant should personally touch the plaintiff; if he does it by a mean it is sufficient... He is the person who, in the present case, gave the mischievous faculty to the squib. That mischievous faculty remained in it until the explosion. No new power of doing mischief was communicated to it by Willis or Ryal. It is like the case of a mad ox turned loose in a crowd. The person who turns him loose is answerable in trespass for whatever mischief he may do. The intermediate acts of Willis and Ryal will not purge the original tort in the

defendant. But he who does the first wrong is answerable for all the consequential damages...”

Finally, the dissent (in part) of Blackstone, J:

“I am of opinion that an action of trespass does not lie for the plaintiff against the defendant on this Case. I take the settled distinction to be that, where the injury is immediate, an action of trespass will lie; where it is only consequential, it must be an action on the Case. . . . The lawfulness or unlawfulness of the original act is not the criterion, although something of that sort is put into LORD RAYMOND’S mouth in *Reynolds v. Clark* . . . , where it can only mean that if the act then in question, of erecting a spout, had been in itself unlawful, trespass might have lain; but as it was a lawful act (on the defendant’s own ground) and the injury to the plaintiff only consequential, it must be an action on the case. But this cannot be the general rule, for it is held by the court in the same case that if I throw a log of timber into the highway (which is an unlawful act) and another man tumbles over it and is hurt, an action on the case only lies, it being a consequential damage; but if in throwing it I hit another man, he may bring trespass because it is an immediate wrong. Trespass may sometimes lie for the consequences of a lawful act. If in lopping my own trees a bough accidentally falls on my neighbour’s ground and I go thereon to fetch it, trespass lies. . . . But then the entry is of itself an immediate wrong. And case will sometimes lie for the consequence of an unlawful act. ...

The solid distinction is between direct or immediate injuries on the one hand and mediate or consequential on the other, and trespass never lay for the latter. If this be so, the only question will be whether the injury which the plaintiff suffered was immediate, or consequential only; and I hold it to be the latter. The original act was, as against Yates, a trespass; not as against Ryal or the plaintiff. The tortious act was complete when the squib lay at rest on Yates’s stall. He, or any bystander, had, I allow, a right to protect themselves by removing the squib, but should have taken care to do it in such a manner as not to endanger others. But the defendant, I think, is not answerable in an action of trespass and assault for the mischief done by the squib in the new motion impressed on it, and the new direction given it, by either Willis or Ryal, who both were free agents and acted on their own judgment. This distinguishes it from the cases put of turning loose a wild beast or a madman. They are only instruments in the hand of the first agent. Nor is it like diverting the course of an enraged ox, or of a stone thrown, or an arrow glancing against a tree; because there the original motion, the *vis impressa*, is continued, though diverted. Here the instrument of mischief was at rest until a new impetus and a new direction are given it, not once only, but by two successive rational agents. But it is said that the act is not complete, nor the squib at rest, until after it is spent or exploded. It certainly has a power of doing fresh mischief, and so has a stone that has been thrown against my windows and now lies still. Yet if any person gives that stone a new motion and does further mischief with it, trespass will not lie for that against the original thrower. No doubt but Yates may maintain trespass against the defendant. And, according to the doctrine contended for, so may Ryal and the plaintiff. Three actions for one single act! nay, it may be extended in infinitum. If a man tosses a football into the street and, after being kicked about by one hundred people, it at last breaks a tradesman’s windows, shall he have trespass against the man who first produced it? Surely only against the man who gave it that mischievous direction. ...

But I think that, in strictness of law, trespass would lie against Ryal, the immediate actor in this unhappy business. Both he and Willis have exceeded the bounds of self-defence and not used sufficient circumspection in removing the danger from themselves. The throwing it across the market-house instead of brushing it down, or throwing it out of the open sides into the street (if it was not meant to continue the sport, as it is called) was at least an unnecessary and incautious act. Not even menaces from others are sufficient to justify a trespass against a third person, much less a fear of danger to either his goods or his person; nothing but inevitable necessity. . .

And I admit that the defendant is answerable in trespass for all the direct and inevitable effects caused by his own immediate act.

But what is his own immediate act? The throwing the squib to Yates’s stall. Had Yates’s goods been burnt or his person injured, the defendant must have been responsible in trespass. But he is not responsible for the acts of other men. The subsequent throwing across the market-house by Willis is neither the act of the defendant nor the inevitable effect of it; much less the subsequent throwing by Ryal. . . . The same evidence that will maintain trespass may also frequently maintain case, but not a converse. Every action of trespass with a *“per quod”* includes an action on the case. I may bring trespass for the immediate injury and subjoin a *“per quod”* for the consequential damages; or may bring case for the consequential damages and pass over the immediate injury, as in *Bourdon v. Alloway* before cited. But if I bring trespass for an immediate injury and prove at most only a consequential damage, judgment must be for the defendant: *Gates v. Bayley*. It is said by LORD RAYMOND, and very justly, in *Reynolds v. Clark*:

“We must keep up the boundaries of actions, otherwise we shall introduce the utmost confusion.”

As I, therefore, think no immediate injury passed from the defendant to the plaintiff (and without such immediate injury no action of trespass can be maintained) I am of opinion that in this action judgment ought to be for the defendant.”

8. LEEWS does. ALEWS attribute, an attribute of this book, I hope, is to patiently, thoroughly build understanding. “Issue,” as the term is used in LEWS instruction, has several definitions. Always, “issue” implies a question, something to be determined. In the sense of “issue spotting” on a law exam, issue means identification of a legal precept made relevant by facts and subject area of law being tested, and analysis of whether, upon given facts, that precept can be shown to be established. An example would be identifying battery, assault, and self defense as possibilities suggested by facts in a torts hypothetical. Likewise, subject matter or personal jurisdiction, also proper venue (place) in a civil

procedure exercise.

Respecting analysis, LEEWS distinguishes “larger” issues -- e.g., did a battery occur? -- from lesser “sub issues” contained within the larger issue. For example, was the requisite intent, content, etc. aspect or element of battery satisfied?

Some issues deserve more attention on an exam -- because their determination is problematic and interesting, OR, they are known to be of special interest to the professor giving the exam. Such issues may be thought of as “major,” therefore deserving of more time, versus “minor,” deserving of less time. Applying the important LEEWS concept of “conflict pairs” (explained in a subsequent chapter), issues always occur where competing parties of a conflict pair (their lawyers) will fight or contest in a courtroom.

Yes, it gets complex. Legal problem solving is complex. Small gaps in understanding -- here and there, a word or precept glossed over, not explained -- cumulate to large gaps in understanding. Large gaps in understanding cripple the ability of law students to master an exam format that requires confident application of multiple, complex skills. That is why highly intelligent, highly motivated law students have such difficulty with law essay exams.

Suffice that very patiently, adding necessary layers of understanding, LEEWS makes the complexity understandable, manageable. Hence, the significant advantage acquired.

9. Your author well remembers being made an example of in his first year, first term, in contracts class. The professor -- I'll call him “Professor X --, a very young man and a Yale Law graduate, was fresh off the most coveted of all post law school positions -- a clerkship on the United States Supreme Court. [I recall his name, but won't mention it. He is still a law professor, but at an upper midwestern school.] It was his first teaching assignment, and although probably but a few years older than we (most of us) newly minted college grads, he seemed of a loftier, remote, very adult plane.

I was seated toward the front, gabbing with nearby classmates, as was my wont, and I initially missed the telltale lowering of the noise level. I noticed students suddenly looking at me intently, and I turned to find that a question on the assigned case had been put to me by the professor. Having missed the question, I said, “I'm sorry. Would you repeat the question, sir?” Whereupon Professor X merely turned away and posed the question to a classmate.

Of course, I was called upon first thing next class, and I knew I would be. I recall Professor X's somewhat provocative preface, uttered with pointed sarcasm, “Are you prepared today, Mr. Miller?” It being the late sixties, when all authority figures, especially pompous young ones were fair game, I looked my adversary straight in the eye, and very slowly, pointedly, said, adding my own (modest!) measure of knowing sarcasm, “As a matter of fact, I am, .... Sir!” Which challenging retort, as I recall, earned me pats on the back in the hall following class from several classmates, and a bit of rep. Score one for student victims!

I may further note, and this is one key to what is amiss and may be taken advantage of in Emperor Law School, that Professor X only managed to bring us to page 87 of an over 500 page text in an entire semester(!). To this day, I feel a gap in my knowledge of contract law, owing to Professor X's early teaching incompetence. Were it not for my review of contracts law some years later in preparation for the New York bar exam, I doubt I would know much more about the formation of a contract than that it requires, *inter alia* (among other things), an agreement, two or more persons, and consideration (a *quid pro quo* [something for something] for entering into an agreement). And the latter must be “more than a peppercorn.”

Doubtless, Professor X has greatly improved his teaching technique since his first year in academe. However, in general law professors are not hired based upon any proven track record as teachers. They are hired, particularly at top-tier law schools, and schools seeking to ascend the *USNews* rankings, based upon stellar academic performance in law school, normally followed by -- witness Professor X -- a prestigious judicial clerkship. Most important, they are hired (at top tier schools) based upon perceived potential for producing scholarly publications that will bring recognition and reknown to their law school. (If they manage this, of course -- reknowned scholarly production, not teaching prowess --, they are immediately plucked, tapped, as it were, by yet higher-ranking law schools!)

10. Professors have condemned seeking case briefs online as “cheating.” However, in a pinch, pressed for time, why wouldn't a law student make use of new technology? Lawyers surely do. However, the problem, as I hope has been made evident, is that the standard brief, whether produced from scratch by a student or culled online, is far from adequate respecting preparation for the exam that lies ahead.

11. William Blackstone, the reader will recall, made his mark as a professor at Oxford after an undistinguished career as a barrister. (English lawyer who appears in court.) He was subsequently appointed a judge. He is one of the giants in the legal field. His voluminous writings on the law are cited in cases to this day. In a sense, all law professors aspire to be the Blackstone of their time. (If not appointed to the Supreme Court, where they may become the Learned Hand, Oliver Wendell Homes, Felix Frankfurter, or Louis Brandeis -- all distinguished Supreme Court justices -- of their time.) Blackstone, we shall see, tellingly more an academic than lawyer, may well be regarded as the father of American law schools.

## Section Three, Chapter 6

### Background perspective new 1Ls should be provided, but aren't: respecting courts, cases, "clerks," "reporters," etc.

#### The confidence factor

The psychological literature is in agreement that confidence is a major factor in achieving success. If you believe you can do something, you are more likely to succeed. If you don't, you are more likely to fail. Those who believe in and carry a lucky rabbit's foot, for example, perform less well on tests when they forget their touchstone. Not because the rabbit's foot actually provides luck (didn't for the rabbit!), but because they feel less confident.

Most students enter law school fresh off a successful college or other career. They are nervous about law school, but generally confident and eager. All doubtless assume that habits that have brought them success thus far will bring them success in law school.<sup>1</sup> I trust some of the reasons this is not the case are now understood.

Your author has had the pleasure for several summers of delivering LEEWS to a very select group of recent college graduates, minority group students all, headed for top law schools. How select is this group? In the 2011 session of over 60, there was but a smattering of students not bound for Yale, Harvard, Stanford, U. Chicago, Columbia, and NYU. The few not attending those schools were headed, as I recall, to UVA, Northwestern, Duke, Georgetown, and Penn.

What a confident, boisterous group this is! They ask questions, they banter. They are justifiably full of themselves, following highly successful college careers. However, predictably, during the program, when we investigate whether facts support the establishment of a legal precept at issue or no, their thought processes fall far short of the minute, nuancing investigation of a lawyer.

This is not surprising to me. Inability to parse facts at the incremental level of a practicing attorney has been observed in every one of the well over 100,000 law students I've instructed during over three decades.<sup>2</sup> I can recall no exceptions! I have noted that this was true of my own thought process when I graduated from law school. However, buoyed by their 4.0 college gpa's and high LSAT scores, the summer group remains feisty.

Contrast this with students who come to my program mere weeks into law school, and those who come after receiving first term grades. The former group is subdued, skeptical, but hopeful. The latter group is discouraged, skeptical, desperate. The former group has greatly diminished confidence. The latter group has no confidence. Indeed, in the latter group I sense dejection, gloom, resignation to a law school career of grinding mediocrity.

I find myself having to say to the post-exam group, "Cheer up! It's going to be okay! It's going to be more than okay!" And it is. I challenge every group to come up at the end of the day and tell me if they aren't actually beginning to look forward to taking exams. Not that they want to take an exam the next day, but they see their way to being able to handle an exercise that seemed incapable of mastery. No one ever tells me the contrary!

Frequently, students comment on the evaluation questionnaire I have handed to every student in every live class (over 1,000!) for over 30 years, "I'm actually looking forward to exams."

You would, too, if you understood that law exams (and law school) are a high-level, intellectual game, with rules and required skills. Moreover, you knew those rules and had acquired those skills.

More than confident, you would be eager to test your skills in the game!

### **The intimidation factor**

As noted, a significant contributor to diminution of confidence, and consequent difficulty with law exams, is intimidation. The law is mysterious, threatening, intimidating to most non lawyers. The thought of entering law school is intimidating. The idea of “lawyer,” possibly becoming the first lawyer in the family, is intimidating.

Most of this intimidation is born of ignorance. Judges and lawyers are the parents of some law students. However, to most, judges and lawyers are remote, forbidding figures. Courtrooms are known only via movies and television, where they are always scenes of high and important drama. The court system, state courts paralleling federal courts, is unfamiliar, as are legal cases.

### **Steps toward a solution (that are not taken in Emperor Law School)**

It would seem a logical first step in the training of a would-be lawyer to seek to allay mystery and intimidation. During orientation, why not take all students to a courthouse? There, lawyers, judges, court clerks, some of them misty-eyed alums, can tell 1Ls how they recall being in their very shoes, and how wide-eyed and mystified they were. Some of the workings of the court system, the nuts and bolts of what lawyers do, the lay of the legal landscape can be explained.

This would greatly assist in piercing the mysterious, intimidating veil of THE LAW. Students would see that lawyers and judges are just people with more education and experience (and wrinkles). Moreover, they began where all law students begin. Except, not all law students begin with the disadvantage of mystique and intimidation.

Law students related to lawyers and judges as sons, daughters, spouses, etc. tend to perform better in law school. They’ve heard law-related talk over the dinner table for years. They’ve been to court as observers and proud relatives, and spent time in law offices. Also, over the dinner table they’ve been somewhat schooled, via arguments conducted by the relative lawyer/judge, in attention to nuance, and remaining objective until all relevant facts are known.

More and more law students are coming from backgrounds as paralegals in law firms. They, along with students related to lawyers, students with math/science backgrounds, anyone trained in careful, objective, nitpicking thinking, are the students I contend enter law school more apt to approximate the lawyering mindset in analysis.

Such students begin with an advantage. Case method instruction does not inculcate lawyerlike thinking in such students any more than it does in other students. However, it may well stimulate and hone thinking skills already possessed.

There is not time in a LEEWS program to provide students with a grounding in many aspects of the legal profession that, I think, would demystify it, and thereby bolster confidence. I seek to introduce -- finally! -- the lawyer mindset, also skills and systematic approaches to daily, weekly preparation. I especially instruct a system for pulling apart and mastering *any and all* law essay exams.

Acquiring such skills, having a precise, disciplined, proven effective approach to handling exams, provides a significant measure of confidence. It provides a great advantage over clueless classmates.

However, imagine if, during the first weeks of law school, when the confidence of so many smart and able students quickly ebbs, students were to have the following context and perspective. I've no doubt, but it would be extremely helpful in allaying confusion and intimidation. I include this context, because it will assist a prospective student as he or she enters law school. It will assist in understanding what is amiss in Emperor Law School.

The utter absence of such context, as students begin their law school careers, is yet another factor explaining how and why advantage in Emperor Law School can so easily be gained.

### **Courts (state and federal), cases, jurisdiction, appeals, clerks, etc.**

One unfamiliar aspect of the legal system is the many courts in which cases may be found, the hierarchical nature of courts, the different functions of different courts, how cases are "reported," etc. New 1Ls might be introduced to this maze. This would have eliminated a layer of confusion for me as a law student. However, they aren't.

### **State court system**

The average, adult non-lawyer (layperson) is aware that a traffic ticket or dispute with a neighbor may require a visit to a local justice of the peace, small claims, or magistrate's court. This is known as a court of "first impression," meaning a court in which a legal case "originates." This means where the case is originally filed, heard, and decided. Justices of the peace and local magistrates normally hear and decide relatively minor criminal matters, such as traffic and other violations not rising to the level of a misdemeanor offense that could result in jail time, and civil matters under a certain monetary limit. (Currently \$15,000? It may vary in different states.)

Should a party to a decision in magistrate's court be dissatisfied, the case can be appealed to a higher ("superior") court, possibly what's called a court of "common pleas" in many jurisdictions.

Each of the 50 states has a hierarchical system of courts. It begins with a vast network of local, lower-level courts -- "small claims," "district," "magistrate's," etc. These entertain traffic offenses, criminal misdemeanors (e.g., breach of the peace), and civil claims below a certain dollar amount (\$15,000, or more or less), etc.

Above these are all-purpose trial courts, usually situated in larger towns and cities, often called courts of "common pleas." These entertain more important criminal and civil matters. Appeals from the aforementioned lower-level courts are made to these courts.

Parallel to these courts are specialized "family" or "domestic relations" courts. They hear divorce and child custody matters. Also domestic violence issues not rising to the serious crime level.

### **Appeals**

Appeals from decisions of entry level, all-purpose, so-called "plenary" (full, complete) courts, that handle criminal and civil matters of a more serious nature (and conduct trials), are made to a mid-level state "appellate" court.

There may be one or several such courts, depending upon the size of the state. There are no trials or findings of fact in such courts. Appeals are made via a written brief and "record." (Attached material introduced in evidence below.) Lawyers engage in "oral argument" in support of their appeal or defense thereto, before a panel or "tribunal" of three or more, and as many as nine appellate judges (always an odd number!), whose sole function is to hear and judge appeals. Such judges sit "en banc" (literally in or at a bench; all judges present in full session at the bench), and listen to "appellate arguments."

Appeals of decisions of mid-range appellate courts can be made to the single, highest court in a state, typically called “state supreme court.” (In New York the highest state court is the “court of appeals.”) Sometimes state supreme court decisions can be appealed to United States federal district and appellate courts.

### **Jurisdiction**

“Jurisdiction” of a court means the territory over which a court may exercise its authority. “Territory” may be physical -- a town or township, county, an entire state, several states constituting a region, and, in the instance of the Supreme Court of the United States, the entire nation. However, the territory of a court’s jurisdiction also implies the laws and legal matters over which a court may exercise authority.

Thus, state courts exercise jurisdiction over matters deriving from state and local laws, such as may relate to traffic and criminal matters, family matters, including divorce and child custody, commercial matters, and matters relating to the state constitution. Federal courts have jurisdiction over matters relating to federal laws, including the Constitution of the United States.

Sometimes, however, jurisdiction of state and federal courts intersects. For example, a state court decision having federal law implications may be appealed to the federal court having an overlapping territorial jurisdiction. The Supreme Court, of course, potentially has jurisdiction over all laws and all physical territory of the United States.

I say “potentially,” because the Supreme Court may, indeed, often refuses to exercise jurisdiction, when a matter appealed to it is not deemed to raise an issue or rise to a level worthy of its attention. The Supreme Court’s terse ruling refusing to exercise jurisdiction is called “certiorari denied,” or “cert. denied.”

Yes. It all gets rather confusing, and new 1Ls are never given the overview this chapter attempts to provide. Shall we continue?

### **Back to state courts**

A court of common pleas will normally have multiple judges, each presiding in her own courtroom. It is both an appellate court and a court of original jurisdiction. It hears and rules on cases appealed from the many small claims and magistrate’s courts, and justices of the peace. However, criminal and civil cases too serious to begin in a lower level court may originate or begin in the court of common pleas. (E.g., misdemeanor and felony level crimes; civil matters involving over \$15,000.) In dense jurisdictions, such as New York City, common pleas courts may be divided into separate, exclusively criminal and civil courts.

Above the court of common pleas is a superior court, often called “superior court.” This is also both a court of appeals (from the court of common pleas), and a court of origination, “first impression,” or “original jurisdiction.” Cases too serious to begin in the court of common pleas will begin in the superior court. Both the court of common pleas and the superior court are said to have “plenary jurisdiction,” meaning jurisdiction over a broad scope of legal matters, both criminal and civil, differing in their seriousness.

It may be noted that in the state of New York, where your author practiced and is licensed (retired status), such superior courts are called “supreme” courts.

Each of the aforementioned higher level state courts may have only one, but often multiple judges or “justices,” depending upon the population of their (physical) jurisdiction, and/or the number of cases they must process or decide. Ten, and possibly more judges, each with a clerk (or two) and secretary, would not be unusual.

Should there be more than one judge/justice taking the bench at the same time, each will have her own

courtroom, which in most jurisdictions is called -- no surprise! --, a “courtroom.” Thus, there may be “Courtroom 1,” “Courtroom 2,” etc. However, in New York City, a courtroom at the lower or superior court level is called a “part.” Thus, cases will be assigned to “Part 1,” “Part 2,” etc. Imagine the confusion of a citizen coming to court for the first time (or a neophyte lawyer), seeking his case in a “part.”

### **Appellate courts**

Above the state superior court comes the first court that is strictly “appellate” in nature. This means no cases originate in this court. Only cases “on appeal” from lower courts are heard. Appellate courts do not “try” cases or conduct “hearings” involving factual disputes. They hear no witnesses. They make no evidentiary findings (of fact) in the kinds of trials and hearings that are the staple of courtroom drama in movies and television.

Facts are determined at the lower, trial court level. They may be challenged as to interpretation at the appellate level, but not as to veracity. No new facts are introduced. Should an appellate court determine that important facts remain unclear, or further factual determination is needed, a case will be “remanded” to the lower court for such.

The United States Supreme Court and all 50 state supreme courts (and the courts immediately below them) are strictly appellate in nature.

Appellate courts make their determination based upon the “record” of proceedings below. This record is supplied by the party appealing from the decision below, known as the “appellant.” The appeal is supported by a “brief” (law, facts, arguments in support), to which is appended exhibits (documentary and other material admitted in evidence below), often voluminous, constituting the “record” of relevant proceedings “below” (in the lower court appealed from). The opposing party on appeal, called the “appellee” or “respondent,” responds in opposition to appellant’s motion, supplying his own counter brief in support, to which is appended his own exhibits.

Sometimes, both parties appealing are dissatisfied with aspects of the determination below. In such instance, both parties mount an appeal (“cross appeals”). Depending upon what aspect of the lower determination is being reviewed, the parties are, alternately, both appellant and appellee (or respondent). To further confuse matters, in order to be better informed in making a decision, particularly respecting weighty and difficult matters, a court (usually appellate) may invite individuals and groups having an interest in the appeal outcome to submit briefs as “friends of the court.” The Latin (singular) for this, often heard, is “*amicus curiae*.” Sometimes outside, interested parties submit “*amicus* briefs” uninvited.

An appeal having been “perfected” (completed satisfactorily), the appellate court hears “argument” from opposing counsel, meaning, literally, competing discussion respecting how facts and law adduced at the trial level should be viewed and interpreted in arriving at the same result (appellee’s position), or a different result (appellant’s position). Appellate courts determine whether the lower court properly applied relevant law in arriving at the decision(s) appealed from, or whether the lower court (judge[s]) “erred.”

If factual questions or issues arise needing clarification, or more factual findings need to be made before the appellate court can reach a decision, then, as noted, a case will be “remanded,” meaning sent back to the lower “trial” court for this purpose. Appellate courts will normally have multiple judges or justices, but they sit “*en banc*,” meaning together in one courtroom, at or on a bench (banc).

### **Clerks and clerking**

Each judge or justice, from magistrate level to the highest appellate court (in this country, of course, the United States Supreme Court and its nine justices), will have one, two, sometimes several “clerks” to assist her in reading briefs, researching legal matters, writing decisions, and otherwise managing and processing



the case load. These clerks are normally lawyers in the sense of being law school graduates, but have not necessarily passed a bar exam and been licensed to practice.

Clerking for a high ranking (appellate) state court judge, even better a federal court judge, is deemed a plum honor for a recent law school graduate. Law firms like to hire such clerks, as they normally ranked high in their classes, gradewise (the only ranking that matters in law school), and therefore are presumed “brilliant.”

Such prospective hires have gained useful practical experience observing and participating in the workings of their judge and court. They also will have developed useful ties, connections, friendships with not just their judge, but other judges and clerks of their court, and, equally significant, courthouse personnel, of whom there are many, from case intake workers, to courtroom bailiffs, clerks, and stenographers, to the highest non-judge person in a courthouse, the “clerk of the court.” This clerk, who normally holds a law degree, oversees the administration and budget of the court (often amounting to millions of dollars), and the daily operation of the entire court. He answers to the boss of the judges themselves, the most equal among equals, the “chief judge” of the court.

Now multiply the courts just described numerous times for populous states like California, Texas, New York, Florida, Illinois, New Jersey, Pennsylvania, and Ohio, and all the remaining 42 states, as well as the American territories. Add to this huge total of state courts a national overlay of federal courts.

### **Federal court system**

Each state, depending upon size and population, will be designated as one or more federal territorial “districts.” New York State, for example, has four such districts -- Western, Northern, Eastern, and, comprising Manhattan and several downstate counties above Manhattan (Bronx, Westchester, Putnam, etc.), Southern. Each district is presided over by a federal district court. Each court normally has multiple “federal district” judges.

Federal district courts are both trial and appellate. They decide criminal and civil cases originating under the many national federal laws, rules, and regulations. They also make initial decisions on the (federal) constitutionality of actions by both state and federal officials and agencies, up to and including the president and the United States Congress.

Every action of the president and congress that has an impact or potential impact within the territorial jurisdiction of a district court is subject to review by a federal district judge. Such review would occur as a result of a lawsuit challenging such action being brought in that court.

Thus, in addition to swearing in new citizens, and presiding over such relatively minor matters as violation of a federal drug law, a federal district judge can declare such far-reaching pieces of legislation as the Environmental Protection Act, the Americans With Disabilities Act, and the recent 2010 Affordable (health) Care Act, or an aspect thereof unconstitutional and void. For this reason federal district court judges, who are appointed to life terms (by the president, with consent of congress), are said to wield, and indeed wield “awesome power.”

Above federal district courts, most having jurisdiction over district courts from several states, are one of thirteen federal “circuit courts of appeal.” These courts are strictly appellate. They hear appeals from all district and other federal courts under their jurisdiction. Thus, for example, an appeal from any of the three federal district courts of Louisiana, the two district courts of Mississippi, or the four district courts of Texas, would be heard in the Fifth Circuit Court of Appeals, situated in New Orleans, and comprised, currently, of seventeen judges.

Above all courts, state or federal, including the highest court of each state, is the ultimate arbiter of the law of the land, the strictly appellate United States Supreme Court and its nine justices.

Add to the many foregoing federal and state courts, each with judges, clerks, and numerous ancillary personnel, many more specialized courts, both federal and state, each with its own full complement of participants. These would include tax courts, bankruptcy courts, maritime courts, housing courts, family courts, administrative courts for the various federal agencies, such as trademarks and patents, etc.

Clearly, the orderly administration of a nation ruled not just by law, but by countless laws, the violation or challenge of any one of which may give rise to a case, requires a lot of courts, a lot of judges, a lot of lawyers.

### **“Reporters”**

Careful records are kept of each and every proceeding in each of the many many foregoing state and federal courts, from the disposition of minor parking offenses, to murder trials, to titanic legal battles involving major corporations, states versus states, and individuals, states, corporations, and other entities engaged in disputes with agencies of the federal government.

Every case decided in every one of these many, many courts is “reported,” meaning recorded in some way and printed where it can be found, read, and reviewed by lawyers, judges, average citizens. Cases of significance emanating from these many hundreds of courts, meaning, generally, cases worthy of a written opinion, are published in books known as “reporters.”

There are sets of books, volumes of reporters, each volume running to some 1,500 pages, sometimes hundreds of volumes in each set, reporting cases going back 150 years and more, for each state (e.g., *New York Reports*, *California Reports*, *Iowa Reports*, etc.), various regions of states (e.g., *Northeast Reporter*, *Southern Reporter*, *Western Reporter*), as well as federal district courts, combined with federal bankruptcy, maritime, and other federal courts (“*Federal Supplement*” or “*Fed. Supp.*”), the thirteen federal circuit courts (“*Federal Circuit Reporter*” or “*Fed. Cir.*”), and reporters for various federal agencies and their decisions. (E.g., “*Tax Reports*,” “*Patent and Trademark Law Reports.*”).

In the instance of *Federal Supplement* and *Federal Circuit* reporter volumes, the number of cases and volumes are so many that the enumeration of volumes stopped after 1,000 and began again -- e.g. *Fed. Supp. 2d* and *Fed. Cir. 2d*, meaning the second series of volumes numbered 1-1,000. Both reporters are currently several hundred volumes into the 3d series -- e.g., *347 Fed. Cir. 3d!*

The United States Supreme Court has its own reporters, three in printed book form, and in recent years the addition of a fourth, online reference source called “United States LEXIS.” (Part of the online LEXIS-NEXIS legal research system.) All four sources are dedicated solely to reporting Supreme Court decisions.

The three book-form, traditional references are *United States* reporter, *Supreme Court* reporter, and *Lawyers Edition*. Each of these reporters runs now to hundreds of volumes, each volume some 1,500 pages in length, dating back well over 100 years. They “report” all Supreme Court decisions, including the many cases the Supreme Court refuses to hear (“*certiorari*” or “*cert.*” denied.). The volumes of United States and Supreme Court reports are still in the first series of 1,000. Lawyers Edition is in its second series.

Each reported decision identifies contending parties, the lower court or courts in which the case was heard, the date of all decisions and proceedings, subsequent history of the case, if any. (E.g., confirmed on appeal [court and citation]; reversed in part, confirmed in part; remanded; overturned; etc.) Also reported are the deciding judge or judges, lawyers representing the contending parties, underlying facts, “issues” or legal questions for determination, arguments of the lawyers, legal rules and precepts deemed to govern

determination of the issues, the “holding” or decision of the court, and reasoning leading to the holding/decision. The latter will include not only the reasoning of the majority, if the decision is by a panel of judges, but also dissenting and concurring opinions.

Such reported decisions/opinions may be less than a page in length, or run to many pages.

### **Citations**

To provide an example from a case many have heard of, the full citation or reporter reference to the famous (infamous?) Supreme Court, 1973 decision in *Roe v. Wade* is *Jane Roe, et al [and others] v. Henry Wade, District Attorney of Dallas County*, [volume] 410 U.S. [*United States* reporter] [beginning page] 113; 93 Sup. Ct. [*Supreme Court* reporter] 705; 35 L. Ed. 2d [*Lawyers Edition* reporter, second series] 147; 1973 U.S. LEXIS 159.

Citations of the court history of *Roe v. Wade*, both leading up to and following the historic “7-2” decision (seven supreme court justices in favor, 2 dissenting), might be as follows: judgment for plaintiffs, injunction denied, 314 F. Supp. 1217 (N.D. Tex. 1970) [report of the 1970 decision of the Federal District Court for the Northern District of Texas]; probable jurisdiction noted, 402 U.S. 941 (1971); set for reargument, 408 U.S. 919 (1972); rehearing denied, 410 U.S. 959 (1973). There would also be *Supreme Court* reporter, *Lawyers Edition* reporter, and LEXIS reporter citations corresponding to the *United States* reporter “cites.”

The important thing to bear in mind is that the foregoing background information is wholly unknown to your typical law student, sitting in class the first day of law school. Later in the term, in a typical one credit hour, legal research and writing course, she will be introduced to the foregoing to some extent. Together with classmates, she will go to the law library and learn to do legal research (now mostly via computer), in particular the “West Key System,” and what is called “Shephardizing.”

### **West Key System**

The West Key System is a categorization scheme whereby every conceivable legal topic and variation thereof is assigned a “key” number -- e.g., [actual key symbol] 201, section 4 (A) (23) (iii). For example, one may find a key number for something as specialized as divorce law, child custody, infants, disabled; or burglary, night, commercial property (versus private dwelling); or maritime, commercial vessel, steam powered, Liberian registry. An entire set of volumes of books, arranged by topic, A-Z, exists, containing key codes for all manner of legal topics. These volumes are updated, usually monthly, in so-called “pocket parts,” literally pockets in the back of each volume, into which a multi-paged, update summary is slipped.

“West” refers to the giant, law book publishing company, headquartered in Minneapolis, that publishes the many volumes of the various reporters. (Save for two of the three sets of Supreme Court reporter volumes.) West sells volumes of its various reporters to law school libraries, county law libraries, law firms, and individual practitioners, as well as subscriptions to all its volumes via an online research program called “LEXIS-NEXUS.” It’s big, big business.

At the beginning of each case reported in a West volume are “key” references for each of the legal topics that has been touched upon in the case (a literal key symbol, followed by a number), and what was decided respecting that topic. These so-called “headnotes,” which do not appear in casebook reports of cases, provide a quick overview/summary of all legal topics/precepts of note touched upon in the case.

Go to the West key reference volumes, and all cases in which a particular key topic was touched upon will be listed. In this way a practitioner can easily, quickly research legal “precedents” on a key topic. Meaning (as the reader already knows), previous legal decisions on that topic, in, for example, Maryland courts, Montana courts, federal district courts, federal circuit courts, and, of course, the Supreme Court.

## Shepardizing

“Shepardizing” means researching what became of a reported decision subsequently. Was it overturned on appeal? Was it followed in another case, in the sense of one or more of its holdings/findings being cited as a guiding precedent? Were its holdings/findings/reasoning cited with approval or disapproval in another case, particularly in a decision of a higher level court? Therefore, how much precedential value or weight does the decision, in particular a West key aspect of the decision, carry going forward? The Shepard’s West Key system has its own set of constantly updated volumes. It is also, conveniently, available online for a subscription fee.

Thus, for example, if one shepardized the initial *Roe v. Wade* decision of the Federal District Court for the Northern District of Texas, the foregoing history thereafter in the United States Supreme Court would appear. If one shepardized the Supreme Court’s *Roe v. Wade* decision, the 1973 denial of a rehearing would appear, followed by an impossibly long list of citations to numerous cases at all levels of courts since, both state and federal. This would include Supreme Court cases in which *Roe v. Wade* was cited as controlling precedent, “distinguished” (meaning reasons given to show why *Roe v. Wade* reasoning was not applicable and controlling respecting facts and the decision facing the court), etc.

Once again, bear in mind that at most a mere glimmer of the foregoing is known to law students, as they are assigned cases to brief for their first classes. Moreover, as noted, casebook opinions lack the aforementioned, helpful “headnotes” of official reports of the case.<sup>2</sup>

\* \* \* \*

1. “Success,” of course, means grades -- A’s! -- necessary to secure plum legal positions. As noted, the great majority of new law students conveniently ignore the circumstance that fewer than 20 percent of law school grades will be solid A’s. (Fewer than 10 percent in many instances.) Moreover, classmates will be equally smart and diligent, often more so. All naively assume, upon no basis other than (in the instance of most) youthful hubris, that they will be among the anointed 10-20 percent.

Law school is more forgiving than bar exams. However, in one semester, certainly one year, a ruthless sorting will occur. A small percentage will be winners. A much larger percentage, indistinguishable respecting college GPA, LSAT score, hours in the library, will be among the also-rans. This will result in serious career and life consequences.

2. The point has been made that teaching legal precepts (black letter law), *per se*, is rarely a goal of professors in Emperor Law School.

## Section Four

### The problematic, hypothetical-type essay exam exercise

It's time we get up close and personal with the bane of all law students, the challenging exercise upon which, normally, the grade for an entire semester will depend. Of course, I mean the hypothetical-type essay exam exercise, a/k/a "hypothetical," "hypo," "essay," "fact pattern," and the widely used misnomer, "question."<sup>1</sup> You have sufficient background and perspective at this point.

Only by looking at and reading through a couple hypotheticals, perhaps attempting one, can one appreciate the confusion and intimidation nearly all law students experience when confronted with such an exercise, particularly under severe time pressure.

An intimate understanding of problems posed by this exercise will instruct why case method instruction and conventional exam writing wisdom is ineffective. One will understand why so many doubt there can be a solution, much less a science enabling mastery, apart from having an "innate gift," "genius," "aptitude for the law," The Right Stuff. Becoming intimately acquainted with the essay hypothetical will assist in understanding and appreciating the unique, innovative, effective solution that is LEEWS.

It is not possible at this point to provide instruction that will enable you to immediately engage a law school exam with mastery. I am persuaded after over three decades (and nine incarnations of the "*Primer*" that accompanies LEEWS instruction) that, however carefully I endeavor to set forth LEEWS precepts on paper, proper inculcation and implementation requires the interactivity of the live or audio program. (And, in addition, follow-up practice of the various approaches and skills.)

Moreover, a body of substantive legal information must be acquired before addressing any essay hypo. This must await the day-to-day, week-to-week progression of law classes.

The important thing is to understand and appreciate what must be accomplished, and what *can* be accomplished. It is important to perceive how the solution achieved by LEEWS can immeasurably enhance exam results in Emperor Law School, indeed, the law school experience itself. I also want to further disabuse the reader of certain myths and misconceptions, encountered in all law schools. These distract and detract from what can be accomplished. For example, the idea that being a "good writer" is a key to law school exam success.

We'll come at the hypothetical-type exercise from different angles. Taken together, the chapters of this section should deeply acquaint you with a vexing, mystifying problem. Portions of this section, and in particular the section that follows, will provide an encouraging glimpse of light at the end of a dark tunnel.

\* \* \* \*

1. Anyone who has practiced law, especially anyone who has tried cases or drafted contracts, understands the extreme importance of nuance of language. To be a lawyer is to nitpick, and this is a favorite nitpick of your author. Improper use of the word "question" by law professors precisely illustrates the problem with law school education. It suggests the advantage to be had by any who acquire something approaching the mindset of a practicing lawyer while yet in law school.

A great many, perhaps most law professors refer to hypotheticals, fact patterns, as "questions." Law students follow this lead. One hears the expression (more in lower tier schools), "call of the question," meaning the question or instruction following the .... Wait a minute! Does a "question," meaning a literal question or instruction, typically at the end of an essay or fact pattern, follow a "question?" In other words, can a fact scenario, often several pages in length, ever properly be referred to as a "question?!"

Certainly, not if one is to respect precision in language. An essay or fact pattern is manifestly not a "question." Certainly, not when compared to a literal question that often follows a fact pattern -- e.g., "How should a motion to

dismiss the claim of party X in the foregoing fact pattern be decided?” To term a fact pattern a “question” is an imprecise, inaccurate usage. It further confuses an already confusing subject. To the mind of a practicing lawyer, such imprecision grates. It’s sloppy.

Confusion among law students arises precisely from such seeds of imprecision on the part of law professors. For example, law professors will say, “Think, analyze as a lawyer.” What, exactly, does that mean? ... It is never explained. Perhaps professors can’t explain it. (Although they know it when they see it! They saw it reading briefs when they clerked for a judge. They saw it in courtrooms standing at the shoulder of their judges.) Professors throughout Emperor Law School constantly speak of “issues” -- “Spot the issue!,” “What issue was raised?,” “What do you think of this issue?” However, they never precisely define the word, as LEEWS does.

We shall see that the very heart of the problem with law school instruction is that it seeks to train, inspire perhaps, future law professors, but not lawyers. Top law schools hire professors who show promise of publishing, advancing legal scholarship, and thereby bringing (scholastic) renown to the law school. (Which counts in advancing in all-important *USNews* rankings!) These professors often have scant experience as practicing attorneys. (Less than two years on average!) They often have a Ph.D. in a discipline other than law, and this is desired!

Yet, as we shall see, the essay exercise measures skill at the lawyering art. Manifestly, it requires performance “as a lawyer.” Students, however, not surprisingly, have not been adequately prepared to do this (by non-lawyer professors). Indeed, as they take their first exams, they know little of what being a lawyer and performing as a lawyer entails.

# Section Four, Chapter 1

## **Bane of all law students -- the hypothetical-type essay exam exercise**

The point has been made that in Emperor Law School a single exam at the end of term will largely, exclusively in most instances, determine a student's grade, particularly in first year.<sup>1</sup> As noted, exams will consist predominately of hypothetical-type essay exercises.

Featured on every bar exam and throughout Emperor Law School, particularly in required first year subjects, the essay hypothetical has been the predominant exam format in American law schools for over a century.<sup>2</sup>

Your author has never heard reasons articulated for why this exam format is omnipresent. However, they are fairly obvious. Law schools want their graduates to pass bar exams. Bar pass rate is an important advertising vehicle, particularly for lower tier schools. The bar exam tests substantive legal knowledge and minimal lawyerly competence. Essay hypotheticals, being, as we shall see, essentially exercises in what lawyers do, albeit in concentrated form, are appropriate devices for measuring legal knowledge and competence in "lawyerlike thinking."

I typically say to students, "The reason the essay hypothetical is featured in all law schools is that the purpose of law school, bottom line, is (should be!) to (properly) instruct "lawyerlike thinking". The essay hypothetical is an exercise in what lawyers do every day. Therefore, it is a useful measure of progress in becoming a lawyer."

Another reason for the prevalence of the essay exercise is that it is the exam format law professors encountered when they were in law school. Typically, professors did well on such exams, or at least received top grades. (It bears repeating that 35, even 45 or 55 out of a possible 100, is hardly mastery or doing well, although it may receive an A.)

Therefore, law professors tend to believe in essay exams as a measure of lawyering aptitude. (Along with law school administrators, lawyers, law firms, law students, etc.). Rightly or wrongly, hypothetical-type exams are regarded as an accurate indicator of whether a student has an aptitude for the law, The Right Stuff. As, of course, the professor obviously did.

What is certain is that the essay hypothetical has long been and continues to be the chief bane of law students. As suggested by two of the quotes that open this book, few law students exhibit mastery over essay exams. As noted, this is as true at YHS, where most every student has a stellar LSAT score and a 4.0 college gpa, as at lesser-ranked schools with more lenient admissions standards. If 35 points out of 100 merits an A, there is a deep-seated problem indeed.

Even in the current era of inflated grading, and curves mandating 20-30 percent A's at certain top tier schools, it is not uncommon that 80 percent and more in a first year law class will not receive a single "A" grade the entire year. (Possibly an A-, but not a solid A.) Many who have never received a single C in their lives, and nary a B, receive all B's and the occasional C. This, of course, provokes much anguish and ego deflation.

Essay hypotheticals are that confusing, that intimidating, that challenging. They are the primary reason law school is said to be "hard," "challenging," "difficult."

Of course, the converse of such a problematic challenge is that anyone who acquires a leg up in handling it will enjoy an advantage. LEEWS provides much more than a mere leg up. Therein the great potential, gradewise, for gaming Emperor Law School.

### **Essay hypothetical and law exams described**

The essay hypothetical is a fact scenario varying in length from several lines to many pages.<sup>3</sup> The “fact pattern” is typically dense and complex. It describes an unfolding web of problematic events requiring legal resolution. In order to make the exercise more interesting and relevant, the scenario often incorporates current news events. Thus, there have been Enron-based hypotheticals, Lewinsky hypos, OJ hypos (years ago, again recently), BP Gulf oil spill hypos. Doubtless, Bernie Madoff, Casey Anthony, and Trayvon Martin-inspired hypos are in the works.

Names of persons or institutions in hypos are often fanciful, such as “Fair Dealer” in a contracts exercise, or “Dididoit” in a criminal law exercise. Such names are intended to signal that the professor is not without humor, and to enliven an otherwise, for most, grimly unamusing undertaking.

The fact pattern may be followed by pointed questions of the sort, “If Party X seeks to recover damages from Party Y, how should a court decide?” However, more often the question or instruction is of a general, open-ended nature -- e.g., “Discuss the rights and liabilities of all parties, applying relevant principles of [subject tested] law;” “Resolve all issues raised in the foregoing fact pattern.”

Often the instruction is cryptic, on the order of “Discuss the legal significance of the above,” or, simply, “What result?” Professors have been known to merely instruct, “Show me your thinking.”

The typical final exam in Emperor Law School is 3-4 hours in length. Even so, students are severely pressed for time. In recent years somewhat longer exams here and there have been reported. These, presumably, much as the “take-home” exams described following, reflect an awareness of criticism leveled respecting time pressure.

An exam normally consists of several components, as many as five or six. Most components are essays, and each will be worked on individually. One or two may be “objective” in format. (Multiple choice, short answer, true/false.)

Typically, each component or exercise is timed or weighted, and time limits -- 20 min., 30 min., 60 min., 90 min., etc. -- should be observed. They will reflect the amount of credit given that portion of the overall response in grading. However, there has not been a control group. The professor is normally guessing respecting how much time it actually takes to fully address an exercise.

Therefore, in general there is no such thing as finishing a law exam. As I say to students, “Anyone who leaves the exam early is missing the point.” The objective is to do as much as possible in the time allotted, do enough to impress the professor, do more than most others.

### **“Take-home” exams**

So-called “take home” exams have become popular, mostly at top tier law schools. Not so long ago it was reported to me that, at least for that particular fall semester, all first term 1L exams at Duke Law were take-home. Reportedly, most first year exams at Harvard are take-home.

Generally, this means the student must observe an honor code. No collaboration, no study aids that have not been approved.<sup>4</sup> The exam will be picked up or downloaded at a specified time. The student has 8 hours, or as many as 24 hours to complete the exam, wherever she feels comfortable taking it -- such as home! A two-week, take-home torts exam was once reported to me!

Do not imagine, however, that an 8 hour, take-home exam is a license to produce a 40 page response, as



many law students are quite capable of doing. Invariably, the professor will impose a page, word, type-size limit that must be roughly observed. In any event, the student who types forever has likely not learned to think and analyze as a lawyer. Exams that earn top grades are often surprisingly concise.

Although additional time eliminates in large part (not completely) one of the most problematic aspects of law school exams, most students, even at YHS, still have little to no chance at mastery. Untangling confusing fact patterns to discern issues continues to be a problem. Not having come close to being properly instructed in how lawyers think and analyze, the great majority will ramble and flounder.

### **The “issue spotter”**

In much of Emperor Law School essay exams are described as “issue spotters.” One hears the expressions, “issue spotting,” “issue spotting is the name of the game!” “Issue” in this sense means legal topics/problems needing resolution, that would be of note (to a lawyer!), given the subject tested. Students are charged with discerning or “spotting” issues prompted by the fact scenario.

As “issue spotter” smacks of superficiality and a racehorse aspect, professors at top tier law schools tend to eschew the designation. Some exams, with many issues to be identified, are indeed called “racehorse exams.” A professor at Brooklyn Law School supposedly (proudly) announced, “There are 200 possible issues on my exam!”

Providing another example of the relative mediocrity of exams that receive top grades, a student reported his torts professor remarking, “The top exam last term only identified 60 of 200 possible issues.” (Yes, another exam with 200 possible issues.)

Naturally, in depth analysis is not expected on an exam with numerous issues. Merely identify the issue, provide brief analysis and resolution, move on to the next issue.

Professors at top schools like to suppose that their exams call for a more thoughtful approach. Nevertheless, “issue spotter” is not an inaccurate description of exams given at top tier law schools. Perhaps, “issue spotter plus.”

[Note. Inherent in the word “spotting” is a presumption of haphazard activity, something artful. Students delve into a morass of facts. Some will be better at “spotting” (issues) than others. Presumably, this reflects ability in future, as a lawyer, to more ably identify legal aspects, strategies meriting consideration in a fact situation.

The supposed artfulness and creative insight required to identify issues in a complex fact pattern likely contributes to the notion of lawyering aptitude being in some fashion innate. We shall see, however, that the typical time pressure factor makes the exercise unfair in this regard.]

### **Glimpse of the solution**

Confusion, intimidation, time pressure, and, most important, inadequate preparation for the exercise hopelessly skew, for most, whatever merit the essay exercise holds for discerning potential as a lawyer. However, we shall see that not only can such problem factors be largely eliminated, but issues needn’t be “spotted” at all. They can be efficiently, systematically, predictably identified -- in any essay exercise!

If this be thought to unfairly stack the cards, to permit less worthy individuals to do well by eliminating the guesswork and unproductive flailing inherent (for most) in an essay exercise, so be it. LEEWS is about eliminating unfair aspects of law exams and leveling the playing field.

Let reward be commensurate with effort and ability. At present that translates into taking advantage of a situation, and thereby taking advantage of a host of classmates.

### **The essay hypothetical as an exercise in what lawyers do**

Having identified (spotted) issues, students are expected to discuss or analyze them “as a lawyer.” They are to present analysis in something resembling the “IRAC” formulation -- Issue, Rule, Analysis, Conclusion.<sup>5</sup>

There follows an example of an essay hypothetical in property law. Your author has never encountered a reference in Emperor Law School, or in law school-related literature, to law essay exams as “exercises in what lawyers do.” I am aware of no instance of a law professor saying or pointing out to students, “The exam will be a series of exercises in what a lawyer does, a lawyer well-versed in my subject area.” However -- LEEWS insight! --, that precisely describes the task.

The essay hypothetical approximates an exercise a lawyer might encounter every day, but in super concentrated form. It is very much what a lawyer knowledgeable in the legal subject being tested might be charged with doing, but on steroids!

#### Property law hypothetical (75 minutes)

Imagine lawyer Counselwell sitting in a well-appointed office behind a fine wood desk. Ushered into the office are several individuals. They announce they have problems involving their abutting properties that need sorting out. Ms. Counselwell is the retired city solicitor, who long has had a practice on the side specializing in property law. She has agreed to offer legal advice to these neighbors *pro bono* [for free], in the hope they can resolve their differences and concerns amicably. And, by the way, did they all know that she is planning to run for mayor? As the neighbors' stories unfold, lawyer Counselwell's secretary takes the saga down in shorthand for later transcription.

[Note. This sort of fanciful preamble might precede a hypothetical on a final exam in property law. Very belatedly, the professor seeks to put students in the mood and mode of being actual lawyers (or judges).]

Continuing (fact patterns can go on and on), ...

It seems Mr. Affronted, upon reviewing and walking off a survey of his property that he recently dug out, preparatory to putting his house up for sale, has discovered that the fence of his neighbor on one side, Mr. Conceal, which runs the length of the driveway dividing their properties, encroaches a full foot onto his property the entire length. Confronted with this circumstance, Conceal acknowledges that he has known this all along, and that he had the fence situated one foot over the property line on purpose when he built it. He did this to spite one Ms. Departed, from whom Affronted purchased his house and property some eleven years previous. Departed had spurned Conceal's romantic advances. Moreover, the extra foot provided more space to avoid a large honeysuckle bush between Conceal's driveway and house.

Meantime, the neighbor behind Affronted, Mr. Besure, chimes in. In the event of the sale Affronted contemplates, Besure wants Affronted to get assurances from the new owner that the path from Besure's property across Affronted's yard, which Besure and his family have long used as a shortcut when they needed to go to the nearby supermarket, will not be closed off or obstructed in any way. Perhaps Affronted would be so good as to incorporate this in a rider to any deed he offers.

A fourth neighbor, Miss Vigilant, wants to bring to everyone's attention an article she happened to read in the local paper. It seems the current mayor and city council, in an effort to halt shrinking tax revenues, also remedy the deteriorating housing stock of some areas of the city, have targeted their neighborhood as a likely site for the assembly plant of a foreign auto maker. It will also be a

greenfield regional recreational development. It is proposed that homeowners in the targeted area be offered fair value, plus a ten percent bonus, in the hope of clearing the way for the revitalization project before competitor cities can act.

As if these were not problems enough, lawyer Counselwell happens to know that a portion of a large field near the homeowners, beyond which is the now shuttered factory of defunct recreational homes manufacturer, Forspaciousskies, Inc., has been discovered to contain harmful levels of contaminant in the soil. It seems that for many years leaded paint and unused formaldehyde, used in the construction of composite board components, was secretly spread on the field at night. It may be that the federal government will declare the field a so-called “superfund site,” and schedule it for cleanup.

You are Lawyer Counselwell for the next 75 minutes. Advise all parties of their rights and liabilities under applicable tenets of property law.

!!!

Here is the most problematic aspect of law school in a nutshell. The essay hypothetical is an unfamiliar, confusing exercise that virtually all law students are woefully unprepared to handle. It is somewhat akin to a math exam. Apply relevant theorems and formulas to solve problems in an analytic process. However, the problems -- issues! -- have not been supplied. They must first be identified (spotted) in a confusing factual morass.

Moreover, assuming issues have been identified, there is yet the problem of how to analyze them “as a lawyer” (as lawyer Counselwell), and how to present that analysis concisely.

**Add time pressure and a multiple of three such exercises (or four or five)**

The exercise, of course, is typically performed under time constraint. Very severe time constraint. Imagine trying to unravel and resolve the above exercise in 75 minutes.

Now multiply by three or four such exercises, of varying length, in a 3-4 hour property law exam. Imagine similar exams in two or three other courses. This, essentially, is what every law student faces at the end of each term throughout Emperor Law School, certainly at the end of first term.

What does one do? Where does one begin?

[Conventional exam-writing wisdom advises, “Read the facts and spot issues.” In other words, “Dive in and see what you can find.” However, doing this is precisely what confuses and overwhelms. Rather, the answer is, always, “Perform (LEEWS) Step One!”]

Small wonder former “A” students become “B” students. The problem has little to do with intelligence and how hard one has worked mastering information. (Or innate ability or lack thereof.) The problem is an altogether unfamiliar new game, with new rules, requiring new skills.

**Relief at B’s; acceptance that innate aptitude is required to do well**

The hypothetical-type essay exercise is so daunting, students at such top tier law schools as Columbia, Chicago, U. Pennsylvania, UVA, Duke, UCLA, etc., lifelong “A” students all, feel relieved, fortunate to receive B’s. They exult over B+’s. The occasional A- is cause for celebration.

Most law students know they floundered on exams, particularly in first term. They know their fevered, hit-and-miss responses didn’t come close to mastery of the exercises. They know they probably didn’t deserve

the B's most law schools now mandate for the great majority of students.<sup>6</sup> The idea of achieving an A on an essay exercise becomes remote, nigh an impossibility.

Conveniently for Emperor Law School and law professors, the very difficulty of the essay exercise tamps down criticism of inadequacy of the instruction preceding it. Smart, diligent students are so far off the mark in their ability to handle essays, they cannot fathom that the fault might lie with (case method) law school instruction, not themselves.

Law students easily buy into the myth of The Right Stuff being necessary for mastery. They readily suppose that acquitting oneself with anything approaching lawyerly competence on as challenging an exercise as an essay exam requires rare, innate qualities. One must indeed be a genius of the law, or nearly so.

Here's another example, this time corporations law.

### **Corporations law hypothetical (50 min.)**

As noted, law school exams normally have a preamble of general guidelines and instructions designed to be helpful. The "cover" to this exam tries to be friendly as well. Perhaps it begins with "Hello, students." It continues:

Imagine, as appropriate, that you are of counsel to various entities encountered in the three questions [sic] that make up this exam. Perhaps you are a judge's clerk, or, indeed, the judge!... Drawing upon principles gleaned in assigned cases and readings, ... Assume that all corporations are registered in the state of Delaware and subject to that state's laws.... Plan your response carefully.... Neatness and organization count.... I am not interested in mere regurgitation of legal principles. I am more interested in application of those principals to relevant facts -- analysis!... This is not to say that accurate knowledge of relevant legal principles does not count.... Be objective.... Be lawyerlike.... Be mindful of the time. No allowance will be made for 'Sorry. Ran out of time.'.... Good luck!"

First exercise. Suggested time 50 minutes:

The RIP Corporation, formed in 2008 by the Bottomline brothers, Ohmy, Padthe, and Savethe [Ho, ho, ho! What a card the professor is!],<sup>7</sup> for the purpose, as duly set forth in its bylaws and articles of incorporation, of manufacturing and retailing so-called "landscape rape" accessories for four wheel drive and other "off-the-road" vehicles, quickly prospered and "went public." Between 2009, when 100,000 shares were first sold "over the counter," and 2010, the total value of shares of RIPCORP (as the enterprise was affectionately known), after two splits, rose tenfold to four hundred million dollars. Flush with their success, invincible in their avarice, the Bottomline brothers led RIPCORP in the aggressive pursuit of profit wherever it might be found. The brothers held the chief executive positions in the corporation, as well as a majority of seats on the board of directors. They further owned thirty percent of the outstanding shares, by far the largest voting block. Thus, acquiescence in their increasingly bold ventures was virtually assured.

Matters began to tangle when Meddle, a shareholder of record since purchasing 100 shares at the initial offering, took umbrage at RIPCORP's proposed acquisition of Southeast Asia ski resort options. In the fall of 2011 Meddle sought permission to inspect the RIPCORP minutes and other records relating to the ski resort venture. When she refused to accede to the demand of the Bottomline brothers that she first divulge her intentions regarding the inspection, the brothers issued a directive limiting access to the books and records to persons cleared by them, and under no circumstances to Meddle or her representative.

Thereupon, Meddle brought suit in her own right and on behalf of RIPCORP against the corporation and the Bottomline brothers personally, to gain access to the books and records, to block the ski resort venture as an *ultra vires* [beyond its powers] act, and for repayment by the RIPCORP board of directors of any expenses incurred in connection with the pursuit of said venture.

1) RIPCORP moved to dismiss the action for, *inter alia* [among other things], lack of standing, failure to first make a demand on the board of directors, failure to state a cause of action.

2) RIPCORP moved in the alternative that the court require Meddle to post \$250,000 security for costs as a precondition to continued maintenance of the suit.

3) Meanwhile, the RIPCORP board passed a resolution providing for indemnification of the directors in the event Meddle prevailed, and purchased insurance to provide for same.

Meddle immediately moved to quash these actions.

How should the court decide the motions under 1, 2, and 3 above?

Doubtless, few readers are knowledgeable in corporations law. Knowledge of such law would begin to point in certain directions respecting a response. However, I am sure one can appreciate the problem of organization and execution under time pressure posed by such an exercise, whatever the subject, however much legal knowledge one has.

\* \* \* \*

1. As noted, even in smaller law schools first year classes tend to be large, often 60-80 and more students. Therefore, giving and grading a quiz, a paper, a mid-term exam would be extremely burdensome. However, we shall see that grading law exams is easier than one might suppose. Relatively few exams will compete for A's. Fewer and fewer D's and F's are given. The bulk of exams -- 60 percent and more -- quickly fall into the broad catchall of B- to B+. Papers (possibly a quiz that will be given little weight) are more the province of smaller, upper level, elective courses.

2. *Circa* 1978, a multiple choice component was introduced to bar exams. Testing knowledge in six foundation areas of legal knowledge -- torts, contracts, evidence, real property, criminal law, constitutional law --, the "multistate" is now a uniform exercise, occupying at least a half day (of a 2-3 day exam), administered nationally on most state bar exams. States determine what constitutes a passing multistate score on their exam. Scores are transferable from state to state.

The multistate component of bar exams legitimized introduction of multiple choice, short answer, even true/false exercises on law school exams. Previously, such exam formats were unheard of in Emperor Law School. They would have been considered "Mickey Mouse," unsuited for testing lawyerly aptitude.

Some law schools and professors went heavily into multiple choice questions, often taking questions directly from past bar exam multistates. So-called "objective" exams answered the fairness issue raised against the essay format, and were much easier to grade. However, students unaccustomed to essay formats later struggled with the essay component of bar exams. (Thereby lowering all-important bar pass rates.) Many professors still introduce objective components to exams. (More, it seems, at lower tier schools.) However, the essay hypothetical remains the predominant, often exclusive format, particularly in first year classes.

3. The norm would be a paragraph to 1-2 pages. However, 3, 4, 5 pages and more of single-spaced text would not be unusual. A professor at the University of Iowa was brought to my attention years ago. He was reknowned (reviled?) for giving an essay exercise over 50 pages in length. Many students couldn't finish reading it in the time allotted.

4. Honesty and integrity are extremely important in the legal profession. All attorneys are sworn in in a court of law as part of the process of being admitted to the bar (and law practice). They thereby become "officers of the court." They are invested with responsibility for conducting themselves in a manner that reinforces faith in the courts and the profession. To be charged with a client's confidence and trust, typically involving serious matters and substantial sums of money, to maintain client "escrow accounts," wherein substantial amounts of money may be in one's keeping, and the temptation to commingle funds occasionally great, to be trusted by one's opponent and the court (a judge) to do what you

say you will do, when and where and how you say you will do it -- e.g., draft and file a document, such as a release of a lien on property --, is to have considerable faith reposed in one's word and integrity. All lawyers will be governed by, and must abide by a professional code of ethics. Their actions will be overseen by state and local bar ethics committees, to which complaints about conduct may be made.

As a consequence, as a condition for being admitted to practice, a law graduate's complete work and behavioral record, going back to high school, and so far as can be reasonably ascertained, will be examined for indications that reflect on fitness of character to be admitted to the profession. The candidate for admission to the bar, having passed the state bar exam, will be examined by a "character and fitness" committee, composed of members of the state bar (lawyers), prior to be licensed to practice.

Didn't pay a parking ticket in college? Left a job at a fast food store under a cloud of suspicion at age 16? Such seeming innocuous, possibly forgotten miscues could delay, even block admission to the bar. Certainly, any sort of cheating or impropriety regarding an exam in law school would likely be costly indeed. Therefore, do not cheat, lie, or steal in law school! Ever! Not even close!

5. "IRAC the exam," and "follow IRAC" is advice normally only heard from professors at lower tier schools. The prevailing ethos in top tier schools seems to be to say little or nothing about something so pedestrian as exam preparation and exam taking. I don't recall any exam prep/writing advice from any of my Yale professors, beyond "study hard," "prepare for class." (i.e., brief cases.) I didn't hear of "IRAC" before getting practical exam writing instruction as part of my bar prep course.

Okay. Not exactly correct. I did receive a mimeographed copy of advice on how to prepare for and write exams, compiled by one Derrick Bell, an African American law professor, recently deceased, then at Harvard Law, later at NYU. A review of that document, which I still possess, replete with blue and yellow highlighting, reveals the elements indicated by IRAC. However, the word "IRAC" nowhere appears.

I note that Professor Bell is African American, because his rare status in the late 1960's, early 1970's, as a minority law professor in, at the time, an overwhelmingly male, Caucasian educational firmament, made him a spokesperson for those newly invited to the party. Indeed, Professor Bell was long an outspoken spokesperson, challenging many, as he viewed them, antiquated and discriminatory aspects of legal education. As part of his effort to give voice to newcomers, in particular minorities and women, and to even the playing field, he gave freely of his thoughts on what was required to be successful in law school, including taking law exams.

Professor Bell's advice is reprinted in its entirety in Section Five, Chapter 4. Over 40 years later, it remains an excellent compilation of what may be termed the "conventional wisdom of law exam writing and preparation." Indeed, respecting what is instructed by professors and other supposed experts, little apart from LEEWS has been added to Professor Bell's advice in the last 40 years. The exam writing/preparation advice offered by law professors, student groups, and commercial programs to this day is little more than the conventional wisdom offered by Professor Bell. It is helpful advice, but merely helpful.

6. Significant grade inflation in Emperor Law School has been noted. Up to fifty percent of grades in college today are A's. Most students entering law school have grown up in an era of self esteem being nurtured, whether deserved or no. Subjecting students to the grades their exam responses deserve would likely plunge many into psychological difficulty, for which consequence schools and professors might bear some responsibility. Years ago an assistant dean at Harvard Law, familiar with LEEWS, would send students who had been recommended for psychological counseling to my program.

As mandates for B, even B+ curves typically emanate from law school administration, not professors, one may in addition speculate about the motive of student retention in an era of \$30,000+ and \$40,000+ tuition. Attrition is significant enough in Emperor Law School to have caused many (lower tier) schools to appoint deans, even establish units devoted to student retention. Awarding the C's, D's, and F's the incompetence of most essay exam responses deserve would greatly exacerbate attrition.

7. Perhaps it should be noted that all hypotheticals and exercises in this book were created by your author!

## Section Four, Chapter 2

### Reasons law students have such difficulty with essay exams (and consequently little chance at A's)

As oft noted, even the smartest, most diligent students at YHS have significant difficulty with essay-type exam exercises. Reasons have been pointed out -- different kind of exercise; inadequate preparation for performing "as a lawyer;" time pressure; etc.

In this chapter these reasons will be explored in greater depth. By making problematic aspects crystal clear, the path to a solution and taking advantage of those problems should also become apparent.

#### **Reason -- Different kind of exercise**

As noted, most come to law school from lifelong, successful academic experiences. For the most part, memorize-regurgitate responses to tests were featured in those experiences. Where critical, thoughtful thinking and analysis was required, tests posed specific questions to consider.

For example, consider the following question, which might appear on an exam in American history: "What were the motives for pilgrim migration to the New World? Discuss each." What is wanted is clear. Assuming a student has read and digested the assigned text (*The Pilgrim Migration?*), and, further, paid attention and taken notes in class, the response unfolds in predictable fashion.

A top grade will be awarded responses that both correctly describe motives for migration, and in addition offer critique/analysis that reflects thoughtful interest. A student will want to slant the response to reflect particular views and preferences of the professor. A student who offers additional insights, possibly a secondary motive for migration not generally recognized, will receive added credit. In a class of smart, motivated students, there will be many A's.

Contrast the foregoing with its counterpart exercise in law school. First, it is taken for granted that motives for pilgrim migration are known and understood. Supposing political, economic, social, religious motives, and perhaps an underlying moral imperative, the task on a law exam is to apply that knowledge to a fact scenario never seen before.

That scenario would describe several pilgrim-like groups, each experiencing political, economic, religious, social, and moral influences. The instruction, following several pages of descriptive facts, might read, "Predict which, if any, of the five groups described will migrate to the New World. Defend/explain your assertions."

This is a different kind of exam. Emphasis is not on regurgitation of knowledge committed to memory. Possession of such knowledge is a given. Rather, does the student know what to do with the knowledge? Can she apply its lessons to new facts? In a close, analytic process, guided by such lessons, can the student predict a likely outcome? The analytic process, not regurgitation of knowledge or prediction of an outcome, is the main event.

As previously noted, such an exercise is reminiscent of exams in math, physics, chemistry, engineering, economics, accounting. Theorems and formulas are applied to factual data to solve problems. The grader instructs, "I want to see your steps of analysis!"

Hence, counterintuitively, the seeming advantage of math and (hard) science majors, engineers, accountants, when it comes to performing well on law essay exams. The similarity of their tests provides a slight edge in terms of expectation and approach.

As I characteristically say to students, “If you ask me to predict, randomly, who’s likely to do well on a law essay exam, I’m going with the chemical engineering undergraduate major over the English major every time.” Then I add, “So much for the myth, prevalent in law school, that being a good writer is the key to success. English and journalism majors are typically at sea on law essay exams.”

Indeed, so much for the notion that a background in, say, political science might be useful in becoming a lawyer. Actually, there is nothing wrong with a major in poli sci, or most any other discipline prior to attending law school. However, not all college majors are equal respecting preparation to perform well on law essay exams. Absent LEEWS, one indeed would have been better off majoring in math or quantum physics.

Of course, when I suggest “success” in the foregoing, it is a relative concept. Engineers and math/science types don’t do all that well on law essay exams either. They have the competitive advantage of greater inclination to close analysis and concise expression. That perhaps bumps them toward 35 out of 100 possible points, versus the class norm of 25-30. However, they, too, are relatively incompetent addressing law essay exams. They are merely somewhat less so than “good writer,” liberal arts background classmates.

As noted, a major problem all law students face is that, unlike previous exams, whether in math, science, engineering, or liberal arts, the problems to be analyzed and resolved on law essay exams -- issues! -- are normally not provided. They must be identified, discovered, “spotted” in the fact pattern. Therefore, absent much more instruction (yes, such as LEEWS provides), math/science types are unlikely to be much better at this hunt-and-find aspect than liberal arts majors.

We shall see -- engineers and math-science types indeed love this! --, that a systematic, even scientific approach to identifying issues exists that removes the guesswork, art, intuition in this process. Indeed, the 3-step issue identification approach is likely the most unique aspect of my instruction.

However, first consider the following, additional problematic aspects of law essay exams. Each, by itself, can thwart intelligence, diligence, the best of intentions.

### **Reason -- Time pressure**

Recall the property law hypothetical in the preceding chapter. Imagine an actual lawyer Counselwell in her office with the neighbors described in the fact pattern. Those persons are clamoring in unison for Counselwell to analyze and resolve the legal problems suggested by their facts -- in 75 minutes! This would precisely approximate the hypothetical exam exercise posed for a law student.

In real life lawyer Counselwell would immediately quiet the group. She might say, “Patience, please! There is no way I can identify and sort out the various problems you have raised in 75 minutes. Indeed, you wouldn’t want the kind of advice I would offer after only 75 minutes.” Pointing to one person, then another, she might add, “I’ll do my best to get back to you this afternoon, the rest of you tomorrow or the next day.”

In other words, no matter the level of expertise in applicable law, no appropriately prudent attorney, in advising a client, is going to accede to the time pressure imposed on most law exams. It would be unprofessional. It would be a disservice to the client.

Time-pressured exams do not allow for the thoughtful reflection and consideration normally expected from an attorney analyzing a legal problem. The cost (to a client) of overlooking a relevant detail of law or fact can be enormous. Although lawyers and judges are often pressed for time, if something problematic comes up during a trial, hearing, or other proceeding, if necessary, with consent of competing attorneys and the court, an adjournment will be taken -- until after lunch (which the lawyers will spend doing hasty research), until the next day, for two weeks if need be! Time will (or should) be taken to do necessary research and



investigation, submit supplemental briefs, motions, etc.

Time limits imposed upon essay exercises are particularly problematic, as there likely has been no control group. As noted, a professor is guessing respecting how much time it takes to competently address her exercise. For example, the 50 minutes suggested for the corporations hypo in the preceding chapter is merely a guess. Your author created the exercise many years ago. To this day, I don't know what would be a fair or reasonable time for addressing it.

Note. Weight allocations, sometimes assigned to essay exercises instead of time limits, are also time allocations. For example, "10 points for this exercise," "20 for that," "30 for this" (out of a possible 100). A student must divide the overall time allocation according to the various weight allotments.

I repeat the admonition to students noted in the preceding chapter, "There is no such thing as finishing a law school exam. Any who get up and leave early are missing the point. Which is not to finish, but to do *enough*. Enough to impress the professor, more than the next student."

A student who gets up and leaves an exam early likely didn't know enough law to identify all issues. And/or, he didn't know how to "analyze as a lawyer." (A patient, somewhat painstaking process when properly done.) He likely came too quickly to conclusions.

The upshot of artificial, typically pressing time limits is that what is tested is often more ability to organize under pressure than lawyering aptitude. Students frequently complain they "panicked." More than a few have said, "I sat there for a half hour. I didn't put anything on paper."

Perhaps this person should not enter a more pressured area of practice, such as litigation. However, there are many, less pressured areas of legal practice in which this person may excel. Students should not be penalized, gradewise, because working under extreme pressure is not their forte. Nor should an assessment of future capability as a lawyer be reached so unfairly.

LEEWS largely overcomes the problem of time pressure by enabling students to approach exams more efficiently than the competition. A disciplined, structured approach is contemplated, a predictable approach. Every essay exercise is addressed in exactly the same way. This imparts confidence. It reduces time wasting halts and missteps.

Because the great majority struggle so much, even a student who tends to freeze will do well comparatively. He never addresses the whole (e.g., plunging into a fact pattern, haphazardly seeking issues), but, always, manageable segments. A sense of being overwhelmed, which can intimidate and produce a freeze, is thereby avoided. Panic and paralysis is avoided. In this way the difficulty posed for many by time pressure is taken advantage of.

As noted, in recent years longer exams have come to my attention. In the previous chapter take-home exams were discussed. A longer exam format eliminates much of the time pressure factor. However, additional problems still serve to defeat the best efforts of the great majority of law students.

### **Reason -- The problem of "spotting" issues (and distinguishing major from minor issues)**

In Section Three, Chapter 5 (*Day One of Law School*), and elsewhere, specific LEEWS definitions of "issue" are provided. For the great majority of students in Emperor Law School "issue" remains a somewhat ambiguous concept, even as they set about taking the first set of exams. They know an issue is something legal, a topic the professor wants discussed. It will be prompted by an examination of the hypothetical fact pattern. However, they have no precise concept in mind.

“Read the facts,” students are almost always instructed, respecting how to approach an essay hypothetical. Indeed, “Read the facts *carefully*.” Then, “Spot the issues!”

How, exactly, to go about “spotting” issues remains something of a mystery. One must, of course, have knowledge of relevant legal principles when setting about spotting issues. However, whether, in a morass of facts, under typically severe time pressure, issues will materialize remains problematic. It is thought to be reflective of ... Well, of course, the same “genius,” “innate aptitude” that is always advanced as the key to successfully handling law essay exams.

That some students may be very good at identifying issues, given more time, seems not to be a consideration.<sup>1</sup> Presumably, if you have what it takes [to be a great lawyer?], an “inner gift,” The Right Stuff, then not only will you spot more issues, but you can and will do it quickly.

Not that advice on how to spot issues does not abound in study aids and how-to-be-successful-on-law-exams guides. Beyond the obvious, frequently repeated, “read the facts carefully,” students for decades have eagerly seized upon such additional clues as: “every word, every phrase in a fact pattern may have issue-generating significance.” Likewise, “circle issue-generating words and phrases;” “prepare a checklist [of legal topics the professor likely wants discussed];” “pay attention to adjectives, adverbs” [colons, semi-colons?]. A competitor used to advise, “Gather the Easter eggs!”

As I suggest to students, “When you boil standard advice on how to identify issues down to essentials, it basically says, ‘Here are some hints. Get in there and find issues!’” Such advice is neither scientific, nor systematic. It is somewhat helpful, but only somewhat. Questions and uncertainty remain.

Law students, of course, have not learned what, exactly, lawyers do and how they do it. They have not been disabused of a lifelong pattern of expecting to regurgitate memorized information on tests. Therefore, it is small surprise that, confronted with an impossibly complex fact scenario and the instruction, “Imagine you are party X’s lawyer. Discuss and resolve all relevant issues,” most are immediately put on the defensive.

Identifying (spotting) issues will continue to pose a challenge, whether under time pressure or no. However, LEEWS eliminates the haphazard, confusing, dive-in-see-what-you-can-find aspect.

### **Preview of a solution (preview of a science!)**

As noted, very likely the most innovative aspect of LEEWS is the disciplined, 3-step approach to identifying issues. It eliminates guesswork, hit-and-miss. It changes issue identification from art, chance, luck, to precise, proven effective science. It is a true system. As we shall see, it is applicable to *any and all* essay exercises.

No more “spotting,” which implies something mysterious, artful, haphazard. No more plunging, willy-nilly, into a fact pattern, which usually confuses. Indeed, one never simply *reads* facts. Rather, a fact pattern, a hypothetical is addressed in accordance with a catechism of precise steps and inquiries. It is engaged piecemeal, progressively. Legal precepts made relevant by facts are revealed systematically. The precepts in turn reveal relevant legal inquiries -- issues!

Predictably, many more issues are identified than other students spot. More issues, often, than the professor is aware of in the exercise she created(!).<sup>2</sup> However, issues, *per se* [for themselves], are never sought. Not in the problematic, confusing sense of plunge into a fact pattern, and read (carefully) to “spot” issues.

Provided one knows relevant legal principles, the more the better, systematically apply the step-by-step, issue identification approach -- to *any and all* essay exercises.

More on this in the next chapter, and the next section. In order to understand the systematic science of identifying issues, a reader must first be introduced to the insight that unlocks the puzzle of *all* legal problem solving.

### **Reason -- Inability to analyze “as a lawyer”**

I hope I have persuasively made the point that analyzing cases in accordance with a conventional briefing checklist doesn't adequately convey the close, nitpicking, analytic mindset of the practicing lawyer. Case method instruction is too similar to academic experience students have had prior to law school. Class discussion features too many political, sociological, and other digressions that water down and obscure the precise, orderly progression of logic that is lawyerlike analysis.

I have made the point that in over 30 years of instruction, I have yet to encounter a law student, including many hundreds from YHS, who was much good at analyzing “as a lawyer.” I have made the point that I, myself, wasn't much good at the close, analytic thought process of a lawyer upon graduation from Yale Law School. Eventually, however, I got pretty good. I learned to think and analyze as a lawyer as most do -- by actually practicing law!

The next section will introduce what is implied by lawyerlike analysis. It will provide examples thereof. I am quite sure nothing remotely close to these examples is ever encountered in a law school classroom. As suggested, students who come close to exhibiting lawyerly analytic skill, likely acquired parameters of this ability *prior* to entering law school.

Absent something akin to lawyerlike analytic skill, a law student has no shot at a solid “A” grade. None! It's that simple, that cut and dried. He may obtain B's, B+'s, possibly an A-. However, the jump from B, even A- to a solid A is the difficult thing in law school. If, when reading an exam response, a professor doesn't see a thought process approaching that of a (competent) lawyer, there is no possibility of an A.

The good news is that lawyerlike analytic skill can be instructed, practiced, and acquired rather quickly. It is not beyond the reach of someone of average intelligence. It is merely a different and unfamiliar way of thinking. As noted, I am fond of saying to students at the outset of a live program, “If you can find your way to this hotel room, you are capable of lawyerlike analysis.”

Some pick up on lawyerly analytic skill faster than others. However, with but little practice, it is readily apprehended and implemented.

Properly grasped and implemented, lawyerlike analysis is an engaging intellectual game. As I hope was made apparent in the description of 2-4 line case briefing, once skill at analysis is acquired, much that is mysterious and confusing in cases and class discussion becomes clear. Frequently heard admonitions, such as “be objective,” “argue both sides,” are not only understood, they become integral to one's analytic thought process.

Once skill at analysis is acquired, a student makes the necessary transition from focus on the end result, the conclusion or resolution of an issue (which earns the disapproving comment, “conclusory!,” and ends all chance at an A), to a focus on, even fascination with the thought (analytic) process whereby resolution of an issue becomes manifest.

Even better news is that once skill at lawyerlike analysis is acquired, the advantage vis-a-vis those who have not acquired the skill -- most classmates, however smart and diligent --, is enormous. The student who learns to think and analyze “as a lawyer” in the first term of law school (the earlier, the better), or at any point during law school, will be well positioned to excel on exams.

An immediate benefit will be ability to properly learn and “know” the law.

**Reason -- Not properly “knowing the law”**

Following the disappointment of first term grades, almost every law student complains, “I knew the law!” By this is meant, “I knew relevant legal principles.” Meaning, the student memorized numerous legal principles touched upon during the term. Indeed, there are flash card study aids designed precisely for this purpose.

However, memorizing a legal precept, so as to be able to recite it or write it down, and *knowing* a precept -- rule, principle, statute --, so as to be able to apply it to new facts in analysis, are not the same thing. The latter ensures the former. However, not the reverse.

Indeed, I do not believe it is possible to know law with sufficient precision to apply it to facts, in the analytic process one would deem “lawyerly,” without first knowing how to analyze “as a lawyer.” There is, in other words, a catch-22 at work.

If one cannot analyze as a lawyer, which, I contend, is virtually all law students, whether first or final year, then it is likely one cannot learn and know the law properly. Therefore, so far as this writer is concerned, there are precious few law students who, after a term of instruction (or four or six terms!), *know the law*.

What is meant here will become apparent only after one understands the lawyerly analytic process. However, perhaps I can provide an example from LEEWS instruction that begins to illustrate the point.

The requirements for establishing the tort of intentional infliction of emotional distress (IIED) are implicit in its definition -- conduct calculated to cause severe emotional distress.<sup>3</sup> However, to merely memorize this definition is certainly not to *know* this legal precept.

To the mind of a judge or practicing lawyer, for example, the word “conduct” in the definition is ambiguous. (Note. Not to a law student, and very likely not to a law professor who equates “question” to fact pattern!) Likewise, “severe emotional distress.”

The law is a stickler for precision of meaning. So long as a legal precept, even a word, is imprecise as to meaning, whether it -- the precept, the word -- can be established (proven to exist in a court of law) is not possible. For example, until agreement can be reached on the meaning of a behavior, an object, a concept, etc., whether that behavior, object, concept, etc. exists cannot be debated, cannot be determined.

Absent precise definition of legal precepts and terminology, lawyerlike analysis cannot be performed!

Much of discussion in cases students brief is preoccupation by lawyers and the judge(s) with definition and clarification. Lawyers and judges endeavor to establish tests, parameters for better grasping and understanding aspects, often words, of legal precepts to be applied.<sup>4</sup> Not understanding lawyerlike analysis and how to perform it (because not properly instructed in the skill by professors and case method), such discussion, often of a minute, seeming obsessing nature, is not understood or appreciated by students.

Returning to the word “conduct” in the context of IIED, interpretive case law has held that “conduct” requisite for establishing IIED must be “intentional.” In the alternative, behavior that is “reckless, shocking or extreme, and outrageous,” will also satisfy the conduct requirement of the tort.

(Note. Either way, the conduct must result in emotional injury to the plaintiff. Moreover, requisite intent for IIED may not be transferred. [For most torts -- assault, battery, etc. -- intent toward the victim is deemed transferred, if a third party is harmed.])<sup>5</sup>

It has been apparent during three decades of introducing IIED to classes, that students focus on the need for conduct to be intentional, but invariably overlook the alternative, secondary manner in which requisite conduct can be established. Although they've read the foregoing definition, students are characteristically stumped when facts of a hypo show that the plaintiff alleging IIED is not the intended victim of the defendant.

Despite having read, possibly even memorized the exception respecting IIED, most want to transfer the intent. Only after my prompt to once more "read the law," does someone eventually point out the secondary way in which requisite conduct may be established.

In other words, merely reading and memorizing a legal rule results in a superficial grasp of it. Only application to facts in an analytic process hammers home more nuanced aspects of a legal precept. Often, only application to facts demonstrates that a term, a word, an aspect of the precept is ambiguous and in need of clarification. Absent such clarification, the precept cannot be applied (to facts), analysis cannot be performed.<sup>6</sup>

Where someone not intended to be distressed is nevertheless distressed, and intent may not be transferred, the alternative of "reckless, shocking or extreme, and outrageous" (finally) comes into focus. Indeed, this less obvious, nuanced aspect of the definition of IIED now becomes locked into memory in association with the exercise. ("Associative" [in-depth, longer-lasting] memorization, versus [superficial, short-lived] rote memorization!)

### **Remembering the law associatively**

Following the IIED exercise, I put the following query to students: "Three weeks from now, three months from now, three years from now! ... If I reminded you of [brief synopsis of facts respecting IIED and no intent toward victim]. How many think you would remember 'reckless, shocking,' etcetera as an alternative way to establish requisite conduct?" Almost all raise a hand.

Approached and applied as usable tools (the way practicing lawyers apprehend the law!), legal precepts come to be known more intimately and in depth. They are committed to long term (associative) memory.

This distinction in how one may "know the law," this more in depth knowledge of nuanced aspects of a rule, made possible only by applying law to facts in a lawyerlike analytic process, is critical. It enables a student to display far greater insight when using a professor's facts in analysis. It enables (lawyerly) reasoning that impresses and earns top grades.

Note. This is a learned process, a learned skill. However, the genesis for the impressively close, insightful reasoning that will now be displayed, may well be regarded as "genius" and "innate" by all uninitiated in how the process and skill can be instructed. (I.e., virtually all law professors, all classmates.)

### **Reason -- Inability to present analysis concisely**

Time, of course, is normally a pressing factor. Therefore, ability to present analysis concisely is yet another advantage. Here is where "good writer," thought to be a key to success in law school, actually becomes a detriment.

Flowing, literary exposition that would cause one to be thought of as a "good writer" in most every other undertaking, wholly misses the mark on a law school exam. There is no time for prolixity. As I say to students, "It's not about being Holmesian or Brandeisian.<sup>7</sup> There is no time for literary flourish. You just want to get the job done. .... In a series of concise paragraphs, roughly one per issue."

Here is another clue, perhaps, to the seeming advantage of math/science types. They generally aren't "good writers." They are accustomed to concise, to-the-point, efficient presentation -- think lab report --, which is

all that is necessary on a law exam.

In an era of Twitter and small-cap e-mails, instruction in sentence structure, tense, spelling, grammar, and other aspects of proper literary exposition is not only absent in most school systems, but attributes of good writing are devalued in the culture at large. Thus, the prevalent notion in Emperor Law School that “good writer” is a key to success looms as but one more confidence-eroding hurdle.

Many law students know they don’t write well. Add this to other impediments to success on exams, and what chance does a student feel she has of “writing” an “A” exam? (Typing, of course.)

Here is more good news and instruction to be used to advantage. First, it is simply helpful to hear from an authoritative source (I hope by now you feel I am that.), something that won’t be heard in any law school classroom. “You do not have to ‘write well’ to do well on a law school exam!” Or a bar exam.

What you have to do is think and analyze closely, in the balanced, nitpicking, parsing manner a law professor will recognize as “lawyerlike,” and get such analysis down on paper concisely -- in a series of paragraphs, roughly one per issue.

The question is HOW?

### **Preview of a solution**

Respecting how to present concisely on a law exam, one encounters deafening, intimidating silence on the part not just of law professors, but all others your author is aware of in the small community of law exam instruction. Or, one encounters a shrug, a pitying look, and an acknowledgment that here, indeed, is a significant problem. “You want to be a good lawyer?,” the standard thinking and advice goes, then “You have to be a good writer.” And no law professor is going to take a student back for remedial instruction on how to construct a proper sentence, a proper paragraph.

Of course, there is an industry of tutors out there, most of them lawyers if only by degree, and probably former English majors, who are quite willing to red mark students’ prose in an attempt to raise the expository level to something approaching literary, if not analytic competence -- for a hefty fee!

Once more LEEWS comes to the rescue. Unfettered by the debilitating idea that good writing is a key to success on law exams, your author has turned presenting analysis in simple sentences and concise paragraphs to something approaching a math formula. At one point during programs I say, literally, “Abandon standard English, at least for the time being. We’ll make this math!” (Small wonder engineers and math/science types love LEEWS!)

Of course, the idea is to present thoughts in simple sentences that abide by the rules of evidence. (See segment following.) “Write as you talk,” is an admonition in the *LEEWS Primer*; and hardly a new idea. However, how, exactly, following years of dangling participles, run-on sentences, and mangled prose, does one accomplish this during the pressure of a law exam?

This is the truly impressive achievement of my innovative, mathlike formulation for presenting analysis concisely. I term it “ugly, but effective,” or “UBE.” Following a short amount of practice crafting paragraphs of analysis in accordance this formula, presentation is straightforward, more concise, altogether adequate to highlight impressive analytic thinking.

Most students write too much, owing to fear that not enough has been said. The key to writing less, therefore, is confidence that enough has been said to establish the point sought to be made. UBE imparts such confidence by instructing what needs to be presented, and how to do so in simple sentences in a

concise paragraph. (Roughly one paragraph of analysis per issue.)

Once again, as yet another ingredient for success is added, a student has confidence and an advantage over possibly smarter, equally diligent classmates.

### **Reason -- Lack of knowledge of rules of evidence**

Little in law school changes. Unless matters have altered significantly since your author was a law student, 1Ls quickly learn not to preface a remark in class with “I feel.” We shall see in a subsequent chapter that standard exam writing advice -- from professors, etc. -- cautions students to avoid such prefaces as “I feel,” or “I think.”

Not that feelings are without a place in the law. Feelings and emotions are embodied and reflected in rules, principles, and legislation that give rational voice and expression to custom and cultural determinants. However, the law, particularly legal analysis, prides itself on being unemotional.

It is facts and the dictates of relevant legal precepts that one may explore in analysis, preferably without emotion. No one wants to know what a witness in a courtroom *feels*, much less a student in a law classroom or on an exam response. What one can and cannot say in legal discourse, particularly in a courtroom, is strictly prescribed. It is set forth as what is known as “rules of evidence.”

For example, the words of someone not in a courtroom offered as evidence (offered for their truthfulness) are generally inadmissible as “hearsay.” The rationale (remember rationale, the reasoning behind the law?) is that the person who spoke the words, being unavailable for cross examination, the truthfulness of the words cannot be properly assessed.

There are, of course, exceptions to the Hearsay Rule. Words spoken under circumstances likely to ensure truthfulness -- e.g., in extremis, as when a person is nearing death, or spontaneously in excitement -- are admissible in a courtroom as exceptions to the Hearsay Rule. The former may be admissible as a “dying declaration,” the latter as an “excited utterance.”

However, none of this is known by a first year law student. Evidence law is a required subject, but is not taken first year.

2 and 3Ls learn that objection in a courtroom will be made to statements that “assume a fact not in evidence;” opinions (or feelings) of a witness, and especially a lawyer; irrelevant, immaterial, unduly prejudicial information; “leading questions” (which necessarily assume facts not in evidence); questions that have been “asked and answered”; and on and on. Such testimony will be excluded. Jurors are instructed to disregard it.

Hearsay, alone, merits an entire chapter in an evidence casebook. Its various manifestations and exceptions will be introduced via numerous cases. It will occupy at least two weeks of exploration.

What has this to do with problems relating to writing law exams? Simply this. Whether they realize it or not (your author is quite confident they do not), law professors judge exam responses in accordance with rules of evidence! Precisely what merits “Objection!” in a courtroom -- conclusory remarks, assumptions and arguments with no basis in the given facts, opinions, feelings, misstatements of law -- will likely prompt a reaction of “Ugh!,” a disappointed shaking of the head, and the thought, “No!” in a law professor.

Even if a professor has little experience practicing law, she is familiar with rules of evidence. She took evidence in law school, and reviewed it for the bar exam. If she clerked for a trial judge, she saw rules of evidence observed, often instructed in a courtroom. They are ingrained. They guide her judgment of whether analysis is “lawyerlike.”

Some knowledge of rules of evidence is therefore necessary, if a student is to acquit herself competently on a law essay exam. The rules needn't be precisely known, in the sense of being able to articulate them. However, their dictates must be incorporated, if analysis is to pass muster as "lawyerlike."

Some students, in their habit (acquired *prior* to law school!) of exploring arguments for arguments sake, and proceeding with a feel for objectivity and proper use of facts, probably adhere at least roughly to tenets of evidence rules. Their exam responses are accordingly viewed favorably by the professor, so long as they also know the law, identify issues, do not run afoul of time constraints, etc.

However, we are still talking 35, possibly 45 points out of a possible 100. Their effort is praiseworthy only in comparison with mediocre efforts of others.

I have found that in instructing students how to analyze "as lawyers," I have necessarily had to instruct them in certain rules of evidence. Not that such rules are specifically stated and studied. However, students learn what can and cannot be expressed in making arguments. For example, assertions must be grounded in facts. Speculative statements generally should be avoided. However, if facts supporting such a statement can be "reasonably inferred," then the statement may be permissible.

As I advise students at the outset of a program, "We shall be guided throughout by what happens in a courtroom." Not surprisingly, in judging exam responses, law professors are also guided by what passes muster in a courtroom.

If they are to progress toward a lawyerlike mindset, it is necessary in some measure to take law students into a courtroom. Law students are eager to be privy to what happens in a courtroom. They are eager to begin functioning and thinking as practicing attorneys.

I seek to give students a sense of what happens in a courtroom -- what is permissible in making arguments, what is not. They learn, for example, to adopt, alternately, in the manner of a tennis or ping-pong match, the role of attorney on both sides of issues. They learn to be at least facsimiles of lawyers, which has not happened (and won't happen!) sitting in a classroom discussing cases.

This, of course, puts a student far ahead of where she was at the beginning of a LEEWS program. It puts her far ahead of clueless classmates.

### **In sum**

If one were to accept that lawyerlike thinking ability is innate, decidedly rare, and one either has it or does not, as opposed to being an acquired skill, reflecting reasonable smarts and proper instruction, the essay hypothetical might be justified as a legitimate tool for revealing such ability. As the previous chapter suggests, the essay hypothetical indeed approximates in some measure the task a lawyer faces every day, if that task were injected with steroids. As such, it has potential to be a fair measure of lawyering aptitude.

However, given the severe time pressure normally imposed on the exercise, coupled with inadequacies of case method instruction, the essay hypothetical merely serves to thwart the best efforts of able students. The legal careers of countless, potentially excellent lawyers are stunted by their inability to achieve A's on essay exams.

In the first term of law school a student has never interviewed a potential client, often has not set foot in a courtroom. As described, law school does little to move academically-oriented students toward the practical, goal-focused, problem-solving posture of a practicing lawyer.

Abruptly, however, that is precisely the posture required on all-important final exams. Law school suddenly



shifts gears from the largely passive, academic exercise of discussing and reflecting on cases, to a time-pressured task that requires, in effect, “Sort out this daunting jumble of facts as a practicing lawyer might. Moreover, do it under severe time pressure.”

It is a truly stunning *non sequitur*.

It is as if the professor realizes in the eleventh hour that his students may one day be called upon to advise clients in his subject area. (Property law, for example.) Belatedly, he must impress upon them what it is lawyers actually do, also the importance of precise knowledge of legal rules and principles.

All semester long the professor has perhaps waxed theoretical about larger social policy aspects of property law. For example, the class may have been led to speculate on personal property rights implications of a Supreme Court decision permitting a municipality to acquire, via “eminent domain,” property not intended for municipal purposes, the normal justification required for such a taking. Rather, the taking was for a commercial shopping mall that would potentially benefit the municipality, but merely in the form of increased tax revenues.

On the exam, unexpectedly, the professor shifts gears. Students must now untangle the specific, legal rights of X, Y, and Z, each of whom claims ownership of the same piece of property. (Typically referred to as “blackacre” in property law classes, btw.)

The essay exam posits practical exercises in functioning as a lawyer. It requires skills that have not, or have only loosely been addressed in the classroom. Assuming, for example, an issue has been identified (“spotted”), *how*, exactly, does one go about analyzing it “as a lawyer?” Then *how* does one present this analysis on paper concisely? All typically to be accomplished under severe time pressure.

The numerous problematic aspects of the hypothetical-type essay exercise, explored in this chapter, point up the unfairness and arbitrariness of law school exams and what they purport to measure.

As noted, each problematic aspect, in and of itself, is capable of derailing the efforts of the most able, diligent law student. In that most law students, even at YHS, experience difficulty with several, often all of these aspects, it is small wonder that 35 out of a possible 100 points garners a top grade.

The good news is that each of these problematic aspects can be remedied. Some students will be better at certain aspects than others. Some will show faster or greater improvement than others. However, improvement in all is achievable.

The encouraging thing about the problems posed in Emperor Law School is not just that they can be solved, but that they can be so easily solved! However, across the board, for the vast majority of law students, the problems are never solved. Such being the case, the opportunity for those who solve the problems to take advantage is obvious.

\* \* \* \*

1. No question, for example, but lawyer Counselwell in the property hypo (of the previous chapter) must sort through the facts presented and ascertain what legal problems or issues need resolution. She will research those issues, analyze them in light of given (and likely follow up) facts, then advise her clients. Therefore, it seems fair to pose the challenge of spotting or identifying issues as a measure of lawyering aptitude. However, again, what of the time pressure factor? Lawyer Counselwell will take the time she needs. Surely patience and persistence can equal, if not exceed and count for more than a knack for sorting through complexity under time pressure.

2. A problem with the LEEWS issue identification approach is that often more issues in a fact pattern than the professor is aware of and expecting to be discussed are revealed. The issues are relevant. Professors, admirably, have

asked LEEWS grads, "How did you know to discuss this issue?" However, the issue is not on the professor's checklist.

This is not a bad problem. Identifying issues a professor is not aware of, but realizes a competent lawyer, knowledgeable in her subject would have addressed, tends to impress and put an exam response in the running for an A. (Provided issues the professor is looking for are also identified and addressed.) However, given the time pressure factor, and the need to distinguish major issues (deserving of more attention) from minor issues (deserving relatively short shrift), identification of additional issues can be somewhat problematic.

What all is entailed here -- the HOW of the LEEWS 3-step issue identification system -- requires instruction and explanation beyond the scope of this chapter.

3. From time to time, here and there in this book, legal definitions will be provided. As law changes over time and can vary, if only slightly, from one jurisdiction to another, the reader is advised *not* to accept any law presented as necessarily accurate. Check it out! For example, intentional infliction of *emotional* distress not so long ago was called intentional infliction of *mental* distress. Why the change? Because "mental" was felt to convey an unseemly negative connotation. It became politically incorrect.

4. In *Chimel v. California*, 395 U.S. 752 (1969), the Supreme Court held that police, when making a valid arrest of a suspect in his home, can search the area within the "immediate control" and "reach" of the person arrested (the arrestee) for weapons and destructible evidence. However, absent a search warrant, they cannot lawfully conduct a complete search of the premises. The rationale for this limited exception to the warrant requirement of the Fourth Amendment to the Constitution is protection or safety of the arresting officer(s), lest the person arrested acquire a nearby, possibly concealed weapon, also preservation of evidence that person might have access to. The terms "immediate control" and "reach," however, were not elaborated on.

What, exactly, was meant by these terms became an issue in subsequent similar situations. Case law eventually defined "immediate control" or "reach" to mean "immediate vicinity," which was further defined as "lunging distance." Lunging distance, if memory serves, was defined as "roughly 10-12 feet." Thus, within a roughly 10-12 foot radius of an arrestee, a protective search for weapons, contraband, or other destructible evidence can be made.

"Food for thought" questions are posed at the end of cases in casebooks to stimulate further thinking about implications of the case holding, etc. One such question might be what "immediate vicinity" means, if the person arrested was known to police to be a former college or high school long jump competitor?

5. The public policy-based reason or rationale for this exception respecting IIED is the practical consequence of allowing the intent aspect of this tort to be established by transferral. The result might be many lawsuits, raising what is called "floodgate" (of litigation) concern. For example, suppose an act in a domestic dispute intended to severely distress a spouse, such as threatening a child with harm. Perhaps the child is held at knifepoint, or hung from a window or balcony. The act might severely distress onlooking neighbors, also television viewers, if a news crew films the drama. To permit all these onlookers to sue for IIED on a theory of transferred intent would create obvious problems, not least of which a backlog in already overburdened courts.

Of course, recognition that some conduct is so beyond the pale as to merit a legal consequence, notwithstanding who the intended victim is, is the rationale for "reckless, shocking, ..." as a substitute for intent, and an alternative to permitting transfer of intent.

It may be noted that the law is often highly evolved in its incorporation of practicality and common sense, and its balance of individual and societal rights. The law seeks to rationally, reasonably adjudicate and regulate behavior -- of individuals, corporations, governments. At least it should. It should seek to be wise and fair. All this in a context, and in accordance with dictates of societal norm and custom, which is often far from static. It is precisely this interplay and fusion of various societal threads and logic, with an overlay of what is fair, just, appropriate, that fascinates the academic bent of law professors. However, for the most part the requirement of an essay exercise is to apply black letter law to facts in a straightforward, common sense manner.

If policy aspects, so beloved by law professors, are to be brought into play, it is only after the 1-2-3 of ordinary, law-applied-to-fact analysis has been satisfactorily accomplished. Law students, without exception in your author's view, have not been taught the basics of 1-2-3, black letter analysis.

6. Your author recalls reading a case as a 2 or 3L. I believe "commercial transactions" was the course. Contracts law, following the UCC (Uniform Commercial Code), requires, *inter alia* (among other things), that disclaimers of guarantees and assurances respecting a product a merchant sells -- "warranties" -- be "conspicuous." An auto dealer had printed in large letters in a new car manual, possibly red letters, "WARRANTIES ARE THOSE SET FORTH IN ... [a separate manual]." In other words, to read what was and was not warranted, a buyer had to consult a separate manual. The issue was whether the need to consult another manual, albeit announced prominently, met the requirement of "conspicuous?" The court, as I recall, held it did not.

The (presumed state) legislators who drafted the provision had not seen fit to further define "conspicuous." Probably they felt, as anyone merely reading the word might, that the meaning is straightforward, clear enough. However, application of the concept in a real life situation revealed ambiguity and the need for further clarification. Also the deviousness of those (presumably lawyers) crafting a manual so as to advantage the auto dealer.

In retrospect, I suppose the case provided an apt lesson in being a lawyer. However, even as an upperclassman, it did not register that on the final exam I might be called upon, in the manner of using a tool, to apply the precept requiring disclaimers be “conspicuous” to a very different set of facts from a new car manual.

7. Referring to famed United States Supreme Court justices Oliver Wendell Holmes and Louis Brandeis, who were reknowned for the literary elegance of their opinions.

## Section Four, Chapter 3

### Let's take a (mini) essay hypothetical: a test of ability to think "as a lawyer"

#### Getting ready

Imagine it's a few minutes before the 9 a.m. start of a three hour exam in corporations law. (Sounds boring, but corporations was an interesting course in law school. Likewise tax. Disputes that end up in court are usually interesting, no matter the subject.) You've studied like mad. Your brain is abuzz with article this, subsection that of federal and state corporations law.

You're not as rested as you should be. However, that is doubtless true of everyone else gathered in alternating seats in the amphitheatered banks of a large classroom. You've brought a cap to pull down over your eyes. It might be helpful to shield the distracting glow of classmates' computer screens. These stand at attention below and to either side, arrayed like so many bright, orderly ... headstones in a cemetery? (Sorry. Unfortunate metaphor.)

You have earplugs to muffle the quiet tat-tat-tat soon to commence, as many sets of fingers hit many keypads. You put your watch to one side, take a deep breath, get ready. Perhaps you now wish that when you chatted in the snack area earlier, you had asked so-and-so, a few rows away, about a legal precept that still confuses you. But maybe it won't be on the exam. Can't know everything!

At precisely nine, you're told to open the exam booklet that already sits on the desktop. One might think a code would be given to download and open the exam on your computer. However, law professors often don't want their exams circulated, and are therefore wary of them being saved or forwarded online.<sup>1</sup>

As noted and demonstrated in Chapter 1 of this section, exams normally have a preamble of guidelines and instructions. Recall the guidelines, also the fact pattern of the corporations exercise set forth in Chapter 1 -- RIP Corporation, Bottomline brothers, etc. This might be followed by two or three more hypothetical-type exercises.

You, the reader, are far from ready to cope with such an exercise. You don't know corporations law. Indeed, your author was not ready following completion of a semester-long course in corporations. No student in Emperor Law School is ready. As is said in Brooklyn, "Fuggeddaboutit!"

Rather, we'll engage a much simpler exercise lifted from the LEEWS *Primer*. If you are not yet in law school, no matter. This exercise does not require legal knowledge, only common sense. As I advise students, "The most important attribute you bring to an exam is common sense, which you may have checked at the door the first day of law school."

#### A test of lawyerlike ability

What I want you, the reader, to do -- I normally give students 5-6 minutes to perform this exercise --, is identify what I call "conflict pairings" in a fact pattern. "Conflict pair" means two "parties." "Party" means an individual, corporation, state agency, other entity, mentioned or implied in a fact pattern and/or the question/instruction. The parties are in conflict, in opposition.

In other words, facts in the hypo and/or the question/instruction describe or suggest a wrong, an injury, a transgression, even, merely, a problem or difference, that pits, or potentially pits two entities -- parties -- against one another, such that the parties could end up in opposition (in litigation) in a courtroom.

For example, we shall see that party E in the torts exercise that follows was likely injured. E, therefore, may end up in court versus parties D, A, and C. Consequently, three pairings. (E v. D; E v. A; E v. C.)

The reverse, however, D, A, or C versus E, does not add three additional pairings. Conflicts (and pairings) go both ways. Thus, E v. D = D v. E.

Yes, at first blush this may seem complicated, tricky. However, you don't have to know law to perform this exercise. It will seem like doing a puzzle. You may even enjoy the exercise.<sup>2</sup>

[Note. Sometimes it is helpful in such an exercise to have relevant background legal knowledge. Here, it would be the standard principle respecting liability for negligence in tort law. Duty, breach of that duty, which is the proximate cause of an injury, will give rise to liability.]

The brief fact pattern that follows might be part of a torts exam. The exam overall, of course, would consist of several such hypothetical exercises. This one might be allotted 30-45 minutes.

I offer the following advice to students to assist in performing the exercise: "Imagine you are the attorney for each party encountered. I think a mediocre lawyer would find at least nineteen (19) conflict pairings!"

[Note. Rarely, in the over three decades and over 1,000 live programs in which I have given this exercise, have more than 10-25 percent of law students identified more than thirteen pairings. Students agree that absent identification of the six pairings most miss, an "A" grade on the exercise is unlikely. In my spring 2009 live Boston program, despite having taken torts first term, none of five Harvard 1Ls in attendance identified the final six pairings.]

Should you identify fewer than thirteen pairings, I may further note that students in my program come to this exercise only after practice identifying conflict pairs with three other hypos.

Go for it! The answer follows the exercise. Don't peek! Find nineteen conflict pairings in the following fact pattern!:

A, driving his car with passenger B, approaches and enters an intersection with the green light. Although green for A, the light flickers yellow for C, approaching swiftly from A's right. The two cars collide in the intersection, injuring the occupants.

Simultaneously, D drives into the intersection from the direction opposite A. She swerves to avoid the collision between A and C. In so doing she strikes pedestrian E, who had just stepped off the curb with a "walk" signal.

B, meanwhile, leaps from A's car, and in a rage slugs C, breaking his nose.

Discuss the rights and liabilities of all parties.

(Your task, of course, is merely to identify all -- at least nineteen! -- conflict pairings.)

Note. Hypotheticals on most torts exams normally would be much longer, far more complicated and confusing than this example. However, no need to overwhelm you with a 5-10 page, single spaced fact pattern, which is not uncommon in law school. Just find the (19) pairings.

Partial answer (eight pairings)

Preliminarily, A v. C; B v. A and C (which encompasses C v. B [conflict pairs go both ways!]); D v. A and C; E v. A, C, and D. These are fairly obvious pairings = eight. There are another eleven.

Note. The remaining pairings don't involve anyone against an insurance company, as to sue a party is the same as suing that party's insurance company. If need be (if you haven't identified the other eleven), take a little more time.

More complete answer (thirteen pairings)

Most law students conclude, appropriately, that the traffic signal -- "green for A, ... flickers yellow for C" -- is not operating properly, and likely contributed to the accident. ABCDE (by their attorneys) will therefore move against whoever installed and maintained the traffic signal. This adds five more pairings.

This party is not identified in the fact pattern or instruction. It may be a town, city, or village. It may be a private entity contracted by a municipality, or even a county or state agency. To posit one of these specific entities -- "town," "state," "private contractor" -- would be an example of speculating beyond given facts, introducing new facts in an unwarranted manner. This is a major "no-no" in law exam writing.

However, it is fair, reasonable<sup>3</sup> to posit that *some* entity/party installed and/or was charged with maintaining the traffic signal. The objective on a law essay exam is to show knowledge of relevant law, also ability to apply that law to facts, "as a lawyer." Positing a private contractor or sub-contractor, versus municipality, state, etc., would likely not introduce any new legal topics or issues for discussion.

Students agree that terming the installing/maintaining entity "M," for municipality, is a reasonable catchall. Therefore, ABCDE versus M.

**An apparent contradiction (resolved)**

Notice that nowhere in the fact pattern is it stated that the traffic signal is faulty. Recognition of this circumstance, therefore M's possible liability, is dependent upon a student knowing how traffic signals operate -- i.e., the light should be red, not yellow, when the light for opposing traffic is green --, and inferring both that the signal is faulty, and that this caused or contributed to the accident and injuries.

It may also be noted that the creator of the exercise (your author) assumes certain background knowledge on the part of the person addressing the exercise. Should someone, for whatever reason, not know how traffic signals operate, that person would be at a decided disadvantage. The exercise might be said to be unfair respecting that person. (I.e., "culturally biased.")

In other words, it is taken for granted that students in responding will introduce or consider facts not contained in the exercise. They will infer outside information necessary and relevant to fully understand and analyze the facts given.

At the same time, exam writing advice in Emperor Law School uniformly advises, "do not assume facts;" "do not add facts;" "do not speculate beyond given facts." Such advice is heard all the time from professors, academic support persons, supposed exam writing experts.

What gives? How can such a seeming contradiction be reconciled?

The answer is that all law essay exercises necessarily assume a shared body of background life experience and knowledge on the part of persons addressing the exercise. Without such context -- knowing, for example, how traffic signals operate, characteristics of seasons of the year, the difference between a radio, television, and computer, and countless other bits of knowledge accumulated over many years --, facts in a hypothetical probably cannot be made sense of.

In other words, understanding most any set of facts requires inferring outside information that puts the facts in a proper context.

Therefore, when standard advice in Emperor Law School instructs, “do not assume facts (when addressing an essay hypothetical),” it doesn’t mean make no assumptions, no inferences whatsoever respecting facts. Assuming, for example, that a traffic signal should be red for one direction when green for the opposing direction is expected. What is meant is that students should not make unwarranted, speculative, “unreasonable” assumptions in interpreting facts.

As set forth in footnote 3 of this chapter (at length, because it is a very important concept in the law, and when performing analysis) “reasonable” implies a judgment call. A line must be drawn. A student can introduce additional, inferred facts in assessing a hypo; a student can make certain assumptions about facts in a hypo. However, assumptions and inferred facts must be “within reason.”

In short, reasonable inferences, reasonable factual additions are permissible in interpreting an essay exercise. They must be!<sup>4</sup>

[See footnote 4 for LEEWS instruction respecting when, whether, how to introduce additional facts and inferences. Also, how to alert the professor that one is doing so.]

Unfortunately, but perhaps no longer surprising, this nuanced, important distinction or clarification is altogether absent in Emperor Law School and elsewhere. It is never explained to law students. (Others seem not to have thought about this with sufficient care to be able to offer such advice.)

The blunderbuss admonition to “not assume facts” serves, therefore, in a not insignificant way to mislead. It is typically imprecise advice. It is incorrect advice.

It is the case that much of standard advice in Emperor Law School respecting exam writing and preparation, while often accurate at its core, is not carefully thought through. It can therefore be, and is frequently misleading.

It is assumed, of course, that those possessed of “innate aptitude,” “genius for the law,” The Right Stuff, will sift wheat from chaff respecting such advice. Indeed, they probably don’t need advice at all!

Your author’s view is that such nuanced distinctions can be learned, and easily, if pointed out, explained, and put into practice. (Duh-h!)

#### Complete answer (nineteen pairings)

As noted, typically, no more than 10-25 percent of a group of law students finds nineteen pairings. Moreover, missing the final group of six almost assures losing any chance at an A on the exercise.

Another five pairings would be ABCDE versus whoever *manufactured* the traffic signal. A defect in the traffic signal might be the cause of the malfunction, as opposed to improper installation or maintenance. This would be ascertained in what is called “discovery.” The manufacturing party might be termed “PM,” for product manufacturer.

The final pairing would be M versus PM, as each would seek to shift blame and liability to the other. Thus, nineteen pairings in all.

[Note. Some want to sue the auto manufacturer. This is an example of an unreasonable inference. For example, if set forth in the facts that a car “braked to no avail,” or “swerved out of control,” a malfunction contributing to the accident would be suggested, thereby introducing the auto manufacturer as a possible party. However, there is no basis for such an inference. Moreover, bringing in the auto manufacturer would likely add no legal topics (issues!) not already introduced by suing the traffic signal manufacturer.]

If you identified the 19 pairings, congratulations! If not, no big deal. The premise of LEEWS, your author's firm belief is that lawyers are made, not born. Some pick up on necessary skills and habits of thought faster than others -- as in most endeavors. However, given sufficient time and effort, both tortoise and hare can reach the finish line.

### **Out of the running for an A!**

All students agree that products liability and strict liability are tort precepts a professor authoring the foregoing exercise would want discussed. All agree that anyone who missed PM likely would not have noted and discussed these precepts. Absent discussion of whether PM was liable under theories of either strict or products liability (two relevant issues!), an "A" grade would probably be out of reach.

Thus, typically, 75-90 percent of students find themselves out of the running for an A. This but accords with and begins to explain the paucity of A's in Emperor Law School. Many very able students fail to identify sufficient issues in fact patterns to put themselves in the running for top grades.

Of course, a plunge-into-the-facts-see-what-one-can-find approach might have resulted in recognition and discussion of strict and products liability. Standard exam-writing advice posits that students have a "checklist" of topics a professor is likely to want discussed, and look for opportunities (excuses) in fact patterns to discuss such topics. Such an approach might well have resulted in seizing upon the defective traffic signal as an excuse to discuss strict and products liability.

However, as I trust has been demonstrated, identifying or spotting an issue is but one of several problematic hurdles to overcome.

The point to be made and reiterated is that, owing to the unfamiliar nature of the exercise, and other attendant problems, many very able students are immediately left out of the running for top grades. They aren't even in the game!

### **Why students miss PM**

I noted that five Harvard 1Ls in my spring, 2009 Boston live program missed PM. Even if they weren't the smartest in their class, they were doubtless very smart. Moreover, they were in their second term. They had already completed their course in torts. They were familiar with the concepts of strict and products liability. This should have triggered recognition of liability of PM.

Therefore, why did these able students miss PM? Why do most law students miss PM? If you did as well, why?

"PM isn't mentioned in the facts," many students complain. Neither is M, I point out. Moreover, that the traffic signal itself is faulty is no more a stretch than that installation and maintenance was faulty. All agree that any mediocre lawyer would have sued PM. Why? "Deep pockets," all agree.

This is partially the reason so many miss PM. If one approaches the exercise as an academic, theoretical thinker, one likely misses PM. If one approaches it practically, as a lawyer, moreover, a lawyer dedicated to maximizing gain for the client, one posits and sues PM.

Over a semester into their studies at top-ranked Harvard Law School, those five students, not surprisingly, remained academic and theoretical in their outlook.

An equally important factor, however, perhaps the most important characteristic preventing students from identifying PM, is passivity. In my instruction I call it "Improper Attitude." I deem it one of three key mistakes leading to mediocre exam performance. (Along with many, many lesser miscues that impair performance.)



If, as a result of confusion, uncertainty, lack of confidence, disinterest, etc., a student does not approach an exam exercise aggressively, opportunistically, less obvious parties such as PM will not be identified. (“Spotted,” of course, in Emperor Law School parlance.) Likewise, topics or issues related to those parties.

For the many reasons explored, few law students approach exams with a positive, confident, opportunistic posture. If they do, it does not last. Early on they are put on the defensive. They retreat from such a posture.

The chapter that follows will provide a preview of how such a posture, once acquired, can be carried into an exam, and, equally, probably more important, maintained during the exam.

It is precisely acquisition of a scientific, proven effective approach to preparing for and taking law essay exams, and acquisition of skills of analysis, presentation, etc. that enables acquisition of the appropriate (positive, confident, opportunistic) posture vis-a-vis not just exams, but law school in general, and one’s future as a lawyer.

\* \* \* \*

1. Typing versus writing exams: The last decade has witnessed a transition in how law exams are administered. Some schools and professors were quick to jump on the bandwagon of using computers and examination software. Others were slow to allow the use of laptops and computer software. Some few schools and the odd professor here and there still require that exams be written in “bluebooks” -- literally blue (or brown, green, etc.) covered booklets of lined pages, as when your author was in law school. Typically, students are given a choice of writing or typing their exam response.

My advice is that unless one truly can write faster than type (highly unlikely), then, of course, type exams. The response is going to be neater and clearer, and neatness counts (somewhat). A desire to obscure what they anticipate to be embarrassingly mediocre, confused rambling is, in your author’s estimation, the reason some students, when given a choice, elect to write, rather than type exams. Following LEEWS, there will be clarity of expression. There will be nothing to hide. Quite the contrary.

2. Students don’t believe me at the beginning of a program, when I remark that, “Law school, even exams can be fun.” However, games in general are fun, providing one knows the rules, and one has skills required to play the game well.

The practice of law at its best is a highly intellectual, often stimulating game. It pits lawyers, individuals, corporations, even nations against one another, typically with high stakes. Lawyers find this game very engaging. It is why not a few choose to practice well into their eighties.

We shall see that law school, in particular law essay exams, is a game, also with high stakes. The problem is that law students are not properly prepared for either game. They lack knowledge of the rules. They lack skills to play at more than a mediocre level. As a consequence, neither game is enjoyable. Quite the contrary..

Similar to any other game, the law school game, the law exam game can be, if not fun, at least engaging, interesting. My students frequently report they are “having fun in law school.” They are confident respecting upcoming exams. They even look forward to them, albeit with a degree of nervousness. They know the rules. They have the skills to play and play well.

3. “Reasonable” is a term frequently encountered in the law. Most any adult layperson knows that guilt in a criminal prosecution must be established “beyond a reasonable doubt.” However, in Emperor Law School, as is the case with so many other terms and concepts, “reasonable” is rarely explored. It is not defined beyond, perhaps, noting a case reference to “the man in the Clapham omnibus” as an exemplar of the “reasonable man.”

Clapham, years ago, was a working class suburb of London. Perhaps it still is. Omnibus refers to the red, double decker, London buses that today are seen in many places that offer tourist excursions. The man on the Clapham omnibus is thought to represent everyman, your average English adult. Indeed, the working definition of “reasonable” I give my students is “most people.” By whom is meant most people in the group that would properly make judgment. Reasonable, therefore, invokes an average point of view. Average for a particular, group, society, culture, etc.

It must be noted that “reasonable” in one societal, cultural, or other setting may differ from “reasonable” in another. Certainly, reasonable doesn’t mean, necessarily, the viewpoint or thinking of a law student analyzing a fact pattern. A law student is more educated than the average person, therefore may not have an appropriately average or reasonable viewpoint. For example, a law student may have a more politically correct outlook. The average person may be less likely to believe in a woman’s right to choose, respecting abortion, or the right of homosexual couples to marry.

At the risk of treading into sexism, it may be posited that a reasonable viewpoint for a man in a particular

circumstance may not be reasonable for a woman. For example, a recent study revealed men to be much more likely to react, often aggressively, to a disrespectful remark or gesture. There appears to be a (reasonable?) male code respecting violence, versus a (reasonable?) female code.

A reasonable outlook for an elderly person (perhaps less risky investing for less reward, but more security) may not be a reasonable outlook for a younger person (riskier investments with the hope of greater reward, and time left to make up losses).

A lawyer (and law student) must be sensitive to, able to recognize, and, if necessary, adopt an appropriate “reasonable” view when analyzing facts and their implications. This is surely necessary when presenting evidence to a jury. The reasonable view may be different from a personal view.

For purposes of a law exam, a student, in making a determination of what is reasonable, must endeavor to see matters from the viewpoint of the average target reference group. I caution students that here lies a pitfall, as very intelligent law students may have a somewhat unusual or skewed way of viewing things. To acquit oneself competently in lawyerlike analysis, one must compensate or adjust for an unusual or skewed viewpoint. One must adopt the perspective of the average person in the circumstance making a judgment. This would be the “reasonable” view.

It may be noted that a discussion such as the foregoing, which I deem necessary in apprehending what is contemplated in performing “lawyerlike analysis,” is unlikely to be heard in Emperor Law School.

4. LEEWS instruction respecting what facts may or may not be reasonably inferred in analyzing aspects of a fact pattern is twofold. First, a student has to know herself. Is one’s view of things (and the facts) a reasonable one? (See discussion, footnote 3 preceding.) Many very smart, creative people can see things in a different, somewhat skewed way. If the latter, an adjustment or allowance may have to be made for personal tendencies in order to make “reasonable” arguments.

It helps in this regard to write practice paragraphs of analysis (of issues). This should be done in any case. Compare efforts with model responses. Was too much read into facts? Were things seen or assumed that were absent by any reasonable standard? Was not enough seen? Comparison with models of “lawyerlike,” presumably reasonable models of analysis can assist in bringing one to a desirable mean. Model responses following the eight sample hypos in the LEEWS *Primer* provide tens of such paragraphs to compare with, all following the precise (“UBE”) mathematical format for presenting analysis in concise sentences and paragraphs.

Second, if in doubt about a word, an assumption being made, how something in a fact pattern should be interpreted, alert the professor to this. Literally introduce a note to the professor in the response. Write (type, of course), “Note. I’m not sure here what X means.” Or “Note. I am interpreting Y to mean the following ...”

Don’t be afraid, as it were, to talk to the professor personally. The exam response is very much an intimate, one-on-one communication. It is possibly the only such communication one will ever have with a given professor. It is possibly the only opportunity to impress! Alert the professor to any quandary. Write, “X confuses me, professor.”

Of course, even if confused or uncertain, a response should be offered. A useful word in this regard is “*arguendo*” (for the purpose of argument). LEEWS instructs the use of certain Latin words and expressions found in the law. If used properly, they can be helpful. They add a lawyerly aspect to a response. They should be either italicized or underlined. Generally, they should be bracketed with commas. Thus, “assuming, *arguendo*, by X is meant, ...,” (introduce one’s thinking). If one’s assumption, interpretation, inference, definition, etc. is off base, the professor will at least have some understanding of why. Perhaps leeway will be accorded.

Indeed, once one becomes highly proficient at handling exams -- making use of them for the purpose of demonstrating not only knowledge of relevant law, but in depth skill and insightfulness in applying it --, “*arguendo*” may be used to manipulate facts, in order to introduce new insights, possibilities not strictly called for by given facts. In other words, to show off! One might write, “Assuming, *arguendo*, this,... Assuming, *arguendo*, that ....” Then introduce facts of one’s own creation, beyond given facts, in order to pursue different, higher orders of thought and application of law. Here one calculates to impress the professor with not just knowledge and lawyerly skill, but interest and enthusiasm for both the course and the professor. We are talking major flattery here, graduate level skill at exam writing that is at present beyond the scope of what this book offers, competition for the top grade in the class. Also, one must take care before engaging in such flights, that all or most issues and analysis the professor has on the checklist have been covered.

Note. This advice does not apply to bar essay responses. Facts on bar essays tend to be straightforward, unambiguous. Questions/instructions are also straightforward and unambiguous. If you know relevant law and what you are about, analysis should proceed in a matter-of-fact manner to a correct conclusion. The anonymous lawyer grading the exercise does not want to be talked to!

## Section Four, Chapter 4

### **A confident approach to exams; maintenance thereof; a preview of the LEEWS 3-step system for identifying issues**

#### **LEEWS versus conventional approach to exams, issue identification**

LEEWS is about inculcating, enabling a confident, aggressive, exploitative posture vis-a-vis exams. Once such a posture is achieved, it is also necessary to maintain it. One way this is accomplished is by never simply plunging into a fact pattern, which is likely to confuse. Rather, engage every essay exercise piecemeal, in a series of disciplined steps.

Each step posits performance of a straightforward, manageable task. A fact pattern is never engaged as a whole or head-on, but in segments, corresponding to a single word, several words, one or two sentences, at most a paragraph of the fact pattern. The segments in turn prompt recognition of legal precepts that would assist a party to a conflict pair in achieving an objective.

Essay exercises, exams overall, thereby become manageable. Having applied the (three) steps, a student proceeds one conflict pairing, one party, one objective, one legal precept, roughly one paragraph of analysis at a time. Every response becomes, predictably, a series of competent, lawyerly paragraphs of analysis, each roughly corresponding to an issue the professor (or bar exam grader) wants identified and discussed.

Conventional exam writing advice presupposes a similar outcome. Words, phrases, sentences of the fact pattern are expected to prompt recognition of the relevance of legal precepts. However, the plunge-into-the-facts-see-what-you-can-find approach advocated is haphazard, disorderly. A student sinks or swims, and rarely the latter. It is presumed that once a student dives into a fact pattern, genius, inner aptitude, The Right Stuff is required for the response to unfold as something approximating “lawyerly.”

The conventional approach to exams and issue identification (and all attendant conventional advice [see Section Five, Chapter 4]) is far from scientific. Indeed, it does not comprehend, even conceive that a science of approaching and writing law essay exams is possible. All students are at least somewhat confused. Most are intimidated and put on the defensive as soon as they plunge into the first fact pattern.

As noted, the LEEWS approach recognizes the folly and adverse consequences of merely plunging into a fact pattern. Rather, as suggested and in stark contrast, an essay is engaged piecemeal, in disciplined steps. The exercise is put into the practical, goal-oriented context of a lawyer representing a client. Often many clients, with many opposing objectives.

Where the typical law student, lacking requisite lawyering skills, approaches the task as an academic exercise, willy nilly plunging into facts, with little more direction than “spot and discuss issues,” LEEWS posits a lawyer, or a facsimile thereof. Such a student peruses only facts relevant to a single party of a conflict pairing (a client!), moreover, with the specific, common sense objective of that party in mind -- money, ownership of property, redress for terms of a contract not being fulfilled (or enforcement of a contract), stay out of jail (or put someone in jail), suppress or admit evidence, etc.

This approach requires a certain discipline. However, it enables a student to focus on very limited facts, for a lawyerly purpose. This assists greatly in maintaining confidence. The exercise becomes one of functioning “as a lawyer.” It has a practical, as opposed to academic purpose. It continues to pose a significant challenge, especially given typical time pressure. However, it also becomes an engaging, even interesting puzzle to be taken apart and resolved.

As noted previously, issues, *per se*, are not sought. Rather, legal precepts to assist party-clients in achieving objectives are sought, all within a context of conflict pairings. Once a legal precept is recognized as a possibility, whether it will be successful in enabling the party to achieve the objective becomes the issue and subject for analysis.

The result, normally, is many issues identified. As noted, often more issues than even the professor is aware of. And always “relevant” issues. (Meaning issues the professor [or bar examiner] wants identified and addressed, or *should* want identified and addressed.)

The predictable, manageable, step-by-step approach enables a student to gain and maintain control in a situation fraught with potential to confuse and intimidate. This greatly aids not just in bringing a confident, aggressive approach to an essay exercise, but maintaining that approach.

As suggested, the folly of engaging an entire fact pattern, much less several fact patterns comprising an exam, is avoided. Rather, with discipline and efficiency, essays are reduced to manageable law-fact relationships. Each law-fact relationship reveals an issue the professor (or bar examiner) wants addressed, and is analyzed in roughly a single, concise paragraph.

The response unfolds as one paragraph of analysis after another. (Impressive, even masterful paragraphs, once how to analyze “as a lawyer” and present analysis in concise paragraphs is grasped and practiced.)

In such fashion addressing any and all law essay exams becomes a predictable exercise. Although nervous, a student may even begin to feel a certain eagerness anticipating the exercise.

This approach results in a radical departure from the confusion and occasional panic most law students experience when taking exams. Where others are immediately put on the defensive, often seeking merely to survive an exam, a student instructed in the LEEWS approach takes and maintains control.

### **Objectives of parties; the (very doable) step of identifying conflict pairs**

The initial step in the LEEWS issue identification process is to seek conflict pairs, as the reader did in the preceding chapter. Also, simultaneously, identify the common sense objective or objectives of each party to each pairing.

By common sense objective is meant the reason a litigant goes to court, and/or what is wanted, from a practical standpoint, when a party to a conflict pairing (by his lawyer -- the student taking the exam!) engages the other party to the pairing (represented by the same student).

This does not mean the high-toned, high-flying objectives loosely bandied about in a law school classroom -- “justice,” “equity,” etc. These lurk in the background, to be sure. However, what is meant is the more mundane, practical objectives that lawyers focus on when representing clients -- obtain money, not pay money; uphold or get out of the contract; establish jurisdiction, venue, etc., or challenge same; put the bad guy in jail (if the prosecutor), or stay out of jail (if representing the defendant); defend or cancel a trademark or patent; challenge the monopolistic practice of a business competitor; block evidence sought to be admitted, or the reverse, etc. (The countless objectives of clients and lawyers representing those clients.)

The objective of one party to a conflict pairing always begets a competing, counter objective on the part of the opposing party, and a student, alternately, will act as lawyer for both sides. Sometimes objectives are ultimate in nature, such as what happens at the end of a lawsuit. Sometimes they are intermediate, as when an objection is made to admission of evidence or responding to a discovery request. But enough on objectives for now.

On occasion a professor's question or instruction will point a student to a conflict pairing. It might posit, "Discuss party X's rights vis-a-vis party Y." However, as with the exercise previously undertaken, more often a student must find the pairings. No professor, for example, is going to instruct, "Look for nineteen conflict pairings."

Indeed, even when a question/instruction points to one or more pairings, a student will search for other possible relevant pairings. This first step is manageable and -- very reassuring early in an exam -- requires no legal knowledge. Moreover, it is key, as the preceding 19 pair exercise illustrates, in identifying possible issues. More pairings and party objectives leads to identification of more issues.

Seeking conflict pairs and party objectives in a fact pattern is a predictable, finite, manageable task. It is something one can get better at, faster at with just a little practice. It is a reassuring, comforting, I-have-something-definite-to-do initial approach to a hypothetical-type exercise. Knowing that one will initially address a fact pattern with the sole task of identifying conflict pairs and party objectives imparts confidence. The student is in control, not, as is most often the case, the exam.

This step typically results in identification of more issues in a fact pattern than classmates spot. As noted several times, issues are sometimes revealed that are relevant, but that the professor/author of the exercise is unaware of! This, of course, can be a key to impressing and earning a top grade.

### **Is identification of conflict pairs and party objectives applicable to all hypotheticals?**

An obvious question is whether the step of identifying conflict pairs (and party objectives) can be applied to all essay exercises. The answer is an unequivocal "yes!"

In over forty years of encountering legal problems, in over thirty years of interacting with thousands of law students who show me exams or describe them to me, your author has yet to encounter a legal problem solving exercise to which this approach cannot be applied. Not one!

How this can be so requires more insight than has yet been presented, more understanding than has yet been acquired. Suffice for now that conflict pairs and competing party objectives is a denominator common to *all* legal problem solving. Indeed, it reflects the key, unique insight upon which LEEWS is founded.

This insight was your author's eureka moment over thirty years ago. It eventually led him to leave the practice of law and develop LEEWS. It is the key to unraveling not just the problem of law essay exams, but addressing *all* legal problem solving.

It is an insight that, to my knowledge, is unknown to, unrecognized by law professors, lawyers, judges, the entire theoretical landscape relating to legal education and law practice. (Excepting, of course, the many lawyers, judges, professors, etc. who took LEEWS as law students.) In other words, it was a totally new concept and approach when introduced by LEEWS in 1981. It is unlikely to be gleaned by a law student on her own.

### **Implications going forward**

The discovery and implications of the conflict pairs, party objectives denominator will be explored in a subsequent chapter.

A salient question in the meantime is why, if this insight and approach is so useful, and has been introduced to so many over so many years (well over 100,000!), it has not filtered into the general firmament of exam writing instruction? It may be noted that LEEWS has been ignored by Emperor Law School all these many years, along with this insight.

It has come to your author's attention that law professors who themselves took and benefitted from LEEWS, have not passed this insight on to students.<sup>1</sup> I can only surmise that the reason is that this insight smacks too much of the practical. It would mean introducing law practice into law school teaching. It would be akin to admitting a Trojan Horse of change into a precinct that is comfortable with things just as they are.

What good news for those law students wanting, if not to take advantage, certainly to do well!

As has oft been posited, Emperor Law School is smug, arrogant, imperious, hidebound, largely unchanging, resistant to change. We shall see that the insight of conflict pairs and competing party objectives, in particular the science of approach to exams and law study that has followed from this insight, are highly threatening to beliefs, even the foundation of Emperor Law School.

Particularly threatened is the dearly held notion of talent for lawyerlike analysis and thought being innate, requiring a special inner aptitude ("genius for the law"). Also the prominence accorded the first year of law school.

Once possessed of the conflict pairs, competing party objectives insight (with some additions), and how to apply it to a client walking in the door (*a la* lawyer Counselwell), a new matter landing on a lawyer's desk, a law school hypothetical, indeed, all legal problem solving exercises become immediately intelligible, manageable.

The advantage over those who do not possess such an insight and the approach that follows from it is considerable. The opportunity for gaming deficiencies of instruction in Emperor Law School is apparent.

\* \* \* \*

1. The failure of even law professors who have taken and benefited from LEEWS to pass my instruction and insights on to students, the failure of LEEWS precepts to infiltrate the curriculum of Emperor Law School during these several decades and result in important, fundamental change in law school instruction and thinking, has indeed been a source of frustration and disappointment at times.

I recall some years ago two students from UCLA Law approaching me at the lunch break of a spring Los Angeles program. Theirs was a familiar story. First term they had been frequent contributors in a particular class, and had gotten to know the professor personally. They liked her. She seemed to consider them superior students. Then they got B's on the final exam. Disappointed, they had approached the professor for advice on what went wrong. The professor, a recent hire with a stellar pedigree -- Law Review at Harvard, a couple federal clerkships, [little practical experience] --, expressed the usual surprise and solicitous concern. She then allowed as how as a 1L she had taken a useful exam writing program -- LEEWS! That was why they had come. They were pleased with the program thus far. They wanted to tell me this story.

I have long had reports of law professors here and there who were LEEWS grads, and who recommended my program. However, it was usually as an aside, almost a confidence. Only a couple times had a professor recommended LEEWS to an entire class. Moreover, it never seemed that the professor had incorporated LEEWS approaches and insights into class instruction.

I believe a couple of factors are at work in this regard. First, as most take LEEWS in their first term (and, increasingly, prior to entering law school), there is always the questionmark respecting how things would have turned out without LEEWS. Was success the result of LEEWS, or ...? In other words, having gotten A's and received the usual congratulations, admiration, genuflections, many would like to embrace the idea of their having genius, inner aptitude, The Right Stuff as the explanation for their success, not LEEWS instruction. They are reluctant to give LEEWS credit, although I believe I merely supply the framework, insights, and skills necessary to achieve success. The student has to do the work and take the exams. Well knowing from my own experience as a law student what this entails, I am always impressed and admiring when students do well.

I actually had a woman request a refund once, who claimed LEEWS had not helped her. I happened to remember her, as she and a friend sat near the front in a NYC class, and they laughed and smiled and seemed to enjoy themselves throughout the day. And I denied her request, as she had gotten all A's first term following the program!

It is the students who take LEEWS second term, even second and, rarely, third year, and turn things around, often dramatically, who give LEEWS full credit. Otherwise, the siren call of anointment as "genius of the law" is powerful. The life of a law professor is comfortable and prestigious. One does not want to risk the ire of senior professors and

administration when starting out as a new professor. Later one does not want to rock such a comfortable boat. Perhaps, after all, a certain genius *is* required, and first year performance *is* the true measure of aptitude. Why introduce LEEWS, or even LEEWS precepts, which would result in significant shifts and who knows what changes and disruptions?

Having been advised of so many students who, after doing well and praising LEEWS to professors and administration, and suggesting that I be invited to the school, and LEEWS introduced into the curriculum, were met not just with extreme skepticism, but sometimes dismissive annoyance, I myself advise students not to mention LEEWS when they do well, and they become “TA’s” (teaching assistants) and school leaders. Professors and administrators of Emperor Law School don’t want to hear about a science that contradicts notions of innate aptitude. As many have said, “LEEWS is the best kept secret in law school.”

Moreover, curiously, sadly, advice to do LEEWS is typically unheeded when given by those who have done well. It is apparently that difficult to imagine that anything can be done to remedy the confusion, the seeming impossibility of mastering a law essay exam. Doing LEEWS, then not getting the A’s the person giving the advice got, would merely confirm a deeply held, debilitating belief -- “I lack what is required to master a law essay exam. I lack The Right Stuff.”

## Section Four, Chapter 5

### How law essay exams are graded

It has been repeated that, with rare exceptions, grades in Emperor Law School are based almost exclusively upon a single exam at the end of term. This is especially so in large first year courses. There are rarely quizzes in law school. Papers are normally assigned only in smaller, upper level courses. There may or may not be a midterm exam. (Mostly not in upper tier schools.) If there is, it will be given weight only if it assists the final grade.<sup>1</sup>

Professors reserve discretion to raise the grades of students who assist class discussion, but at most a half letter. It is extremely rare that a student's grade is adversely affected by classroom performance. The familiar, unnerving, Socratic class participation featured in movies such as "*Paper Chase*," is rarely factored into grades.

Getting to know a professor personally can sometimes influence grades in college or graduate school. Not so in law school. To protect professors against any hint of impropriety, grading in Emperor Law School is universally anonymous.<sup>2</sup> This also protects students who might air an opinion contrary to a professor's view.

Notwithstanding, a student shouldn't be too aggressive in challenging a professor. Should he or she choose to, a professor can certainly discern the author of an exam response.

#### **What professors look for -- issue identification**

Contrary to the widespread notion among law students that exams are graded subjectively,<sup>3</sup> professors of necessity are relatively consistent and predictable in what they look for in an exam response. First, were issues prompted by facts in the essay identified (spotted)? Professors create fact scenarios ("patterns") to prompt identification and resolution of issues, meaning legal problems. Issues, naturally, relate to law that is the subject matter of the course.

This is an objective standard. The professor has a checklist of issues she wants identified. Recall my mention of a professor remarking that the top exam in her torts class identified 60 of 200 possible issues. How many issues were even remotely touched upon in the response? Assuming an issue was identified, was it recognized as major or minor, as evidenced by the attention the student gives it?

The number of issues identified often provides an initial threshold for allocating grades. Assuming, say, ten possible issues in a given essay, it may be that at least six must be identified to qualify for a solid B, nine for a solid A. The professor may summarily assign a C to a response identifying fewer than six issues. There is no need for comment.

#### **What professors look for -- quality of analysis**

Identification of issues having placed a response within a grade range, the professor will evaluate the quality of analysis of issues to determine where in the range -- e.g., B- to B+ -- the grade will fall. Normally, the professor pays closer attention in the potential A range, less in the B range, not so much for responses falling below the B threshold. (Woefully floundering efforts these days are often given a C as a gift.)

Evaluation of analysis, many would contend, is where subjectivity creeps in. However, "lawyerlike analysis" is a more objective standard than most might suppose. All lawyers, judges, and law professors recognize skillful, appropriate application of law to fact in a dialectic of argument and counterargument, one contested element of a legal precept under investigation after another.



Although, as noted, many law professors have had little actual experience practicing law,<sup>4</sup> as also noted, they have likely seen good lawyers at work, both in a courtroom and in briefs. They know competent analysis when they see it.

Analysis either meets the standard of objective, insightful, balanced thinking, admissible in a court of law (i.e., conforms to rules of evidence), and is therefore “lawyerlike,” or it doesn’t!

Mostly, professors don’t see the standard of competent lawyer, knowledgeable in the legal subject tested, approached. Far from it. Issues are missed. Analysis falls far short of lawyerly competence. Hence, the expectation of 25-35 points out of a possible 100.

\* \* \* \*

1. Midterm exams in Emperor Law School simulate the final exam, but are much shorter. Normally no more than 45 minutes to an hour in length, they usually feature no more than one or two hypo exercises. Possibly there is an objective component -- a few multiple choice questions, a short answer exercise, perhaps a couple true/false questions. The idea is to give students a feel for the final exam, a heads-up, if you will.

Students naturally become nervous and “gear up” for a midterm. Given confusion, uncertainty, and lack of feedback in Emperor Law School respecting “How am I doing?,” any measure of worth/progress becomes significant. However, midterms rarely influence a final grade negatively.

A professor may, and will likely say, “The midterm can count up to 20, even 30 percent of the final grade.” Students miss the implication of the word “can.” All professors reserve discretion in grading. If a student who contributes significantly in class does poorly on the final exam, a professor may, likely will bump that student’s grade up by a half letter.

*Note bene!* (Note well.) As grading is anonymous, a student who contributes in class, a student known to the professor and thought well of, should approach the professor and make himself known if unhappy with the grade. (Yes, whine, “cop a plea!”) The professor, if sympathetic, may give the grade an upward bump.

Likewise, if a student does poorly on the final but did well on the midterm, the professor will likely factor in the midterm grade, but only give it 20 or 30 percent weight. However, conversely, if a student does well on the final but did poorly on the midterm, the midterm grade normally will not factor in at all. The midterm was merely a practice exercise.

This is so, I’ve been told by numerous students, even in year-long courses, where the midterm in December presumably should, and is typically announced as counting 30-40 percent of the final grade at year’s end. Do well on the year-end final in April or May, the December midterm grade is ignored or largely discounted.

I may note my impression that fewer and fewer midterms are given by professors, certainly very rarely in upper level courses. Moreover, it seems to be the case that professors at upper tier law schools are less likely to give midterms. I can’t remember when I last heard of a midterm at YHS.

There are a couple reasons for this. First, giving a midterm invites a lot of extra work. Professors at top tier schools, as opposed to some (many?) in lower tier schools, are probably not required to give midterms. (Would interfere with their scholarship?!) Second, very telling, I believe professors, particularly at more theory-oriented upper tier schools, are uncomfortable with the disconnect noted, between the manner in which class is conducted and the practical, legal problem solving exercise posed by exams. By bringing to center stage a practical exercise in lawyering -- the midterm --, the dissonance between academic, theoretical instruction, and what is required on a law exam would be on display.

As noted, grading midterm exams in a typically large, first year class is a lot of work. Students therefore should be grateful to professors who give a midterm. Midterm exams provide a useful corrective. They alert students to the need to learn black letter law -- cold! They alert students to the need to begin course outlining. They can help. They rarely, if ever, hurt.

2. See footnote 1, Section One, Chapter 3 for a more complete discussion of “blind” or anonymous law exam grading. It was introduced by Christopher Columbus Langdell, the same legendary Harvard Law School dean who popularized widespread use of case method instruction (*circa* 1900). Langdell was concerned lest professors be unduly influenced in grading by the wealth and privileged background of a student. Admirably, he sought to level the playing field for students who, similar to himself, hailed from more modest circumstances.

3. A persistent law school legend has it that professors place exam responses at the top of a staircase and give the pile a kick. Where a response lands determines the grade. I have heard of one or two instances in recent years where, owing to computer malfunction, a professor had to grade exams a second time, and there was some disparity between the first and second set of grades. Moreover, no question but that on occasion a professor will revise a grade when a student points out something for which credit in the model “A” response was given, but was overlooked in

that student's response. However, where grading in an era of computers and software leaves the staircase model is a questionmark.

4. Recall the study described in Section One, Chapter 6, showing that professor hires at top tier law schools in the last few years average less than two years actual experience practicing law, versus over seven years of experience for professor hires in the same period at lower tier law schools.

## Section Four, Chapter 6

### **B's guaranteed; getting rare law school A's; beyond A's to the top grade in the class!**

#### **B's Guaranteed**

From its inception in 1981, LEEWS has offered a partial (over fifty percent) money back guarantee to attendees of live programs. The guarantee was and still is “B’s minimum” (2.7 gpa in essay exam subjects), “better grades” (for those with existing grades, no matter their gpa). Prior to 2000, when many law schools graded on a C curve, a guarantee of B’s was meaningful.

For more than a decade, responding to grade inflation that has made B, even B+ the norm at many law schools, 1Ls have also been guaranteed to “finish in the top third” (of the class first term). LEEWS advertising also promises students will “compete for A’s.” However, while probable, A’s are not guaranteed.

Purchasers of the audio version of LEEWS are ineligible to take advantage of the money back guarantee. However, they have always had a 10-day free trial, during which time they can return the program for a full refund, no questions asked.<sup>1</sup>

In the early years, roughly 1981-1987, some one in 25 live attendees sought refunds. By the late 1980’s, LEEWS had been tweaked and improved in accordance with feedback and experience in hundreds of live programs. Tens of thousands of law students from all law schools had been instructed, most of them 1Ls. The number of live attendees seeking refunds decreased to one in 50, a remarkable one hundred percent improvement!

Doubtless, more than two percent of students qualified for refunds. However, feedback suggested that students faulted themselves and lack of practice of techniques, not LEEWS, when they didn’t get better grades or B’s minimum.

The insightful, structured LEEWS approach to identifying issues, coupled with the best instruction extant in analysis and concise presentation, easily enables most students to achieve B’s.

As noted, the “B” guarantee has become less meaningful with widespread grade inflation in Emperor Law School. B+ is now the average or mean grade at most top-ranked law schools. Schools that were on a C curve (e.g., University of Dayton School of Law) have had to inflate to a B curve, to enable their graduates to compete for jobs with graduates of B-curve schools.

As noted, responding to this grade inflation, for over a decade LEEWS has guaranteed a finish in the top third of the class for students in the first term.

#### **Getting rare law school A's**

LEEWS has never been about getting B’s. The objective has always been to give students a solid shot at rare law school A’s. Given deficiencies of law school instruction, and resulting ineptitude of most students on exams, LEEWS tilts the field dramatically in favor of those introduced to the rules of the game, and given requisite skills to play, and play well. LEEWS not only provides a pathway to top grades. Students who were once happy to receive B’s become dissatisfied with less than A’s.

However, solid A’s remain elusive. The jump from B+ to A, even A- to A is difficult in Emperor Law School. Professors are reluctant to award an A to any who do not at least approach the standard of lawyerly competence. This, as noted and described in the previous chapter, is a relatively clear standard, infrequently reached.

LEEWS puts that standard within reach, and predictably so.

Given the mediocrity of most exam responses, it is often the case that processing an exam via LEEWS to reveal more issues, then handling each with reasonable lawyerly competence, is sufficient to earn an A, certainly an A-2. If 25-35 points out of 100 is what a professor expects, LEEWS enables garnering 35 points, even 45, 55, 85 points!

On occasion I meet former students who have made Law Review. I must admit they often do not bowl me over intellectually. I can recall several of whom I had the opinion, "Wow! LEEWS works very well indeed!"

Full disclosure. I think I have enabled many to obtain plum legal positions who are probably far from the smartest in their classes. When others are clueless, the advantage of understanding how to pull apart an exam and acquit oneself as a knowledgeable lawyer is obvious and considerable.

However, for the longest time I harbored a mistaken belief that had a significant benefit. That belief motivated me to push the envelope of exam mastery beyond mechanics sufficient to ensure competence and garner A's.

### **Beyond A's to the top grade in the class!**

I have always recognized that some few in any class will do well on exams without the benefit of my instruction. What I didn't realize for the longest time -- over 25 years! -- was that "do well" was the wrong description. I didn't fully appreciate how far short of mastery and lawyerly competence many "A" exam responses are. I had no inkling until a few years ago that 35 out of a possible 100 points might merit an A, not a D or F.

I realize now, that in accepting, acknowledging that some few would merit A's without the benefit of LEEWS, I was promoting the erroneous idea of innate aptitude and The Right Stuff. Similar to everyone else who attends law school and is confused by essay exams, I had bought into this pernicious notion when I was a law student. I had never abandoned it.

For over 25 years I advised students that some few among their classmates indeed likely had a "knack," a "special ability" for handling law exams. Some few indeed might have The Right Stuff, or something or the sort. I wanted my students to be able to compete with such students and their presumed special ability, not just for A's, but for the very top grades.

Of course, eventually, perhaps three or four years ago, I came to the realization that has been noted previously. Some come to law school with prior training, habits of thought that begin to approximate the lawyerly dialectic of analysis wanted on exams. These students tend to impress in class early on.

However, such students learn little new respecting analysis from Emperor Law School. They don't learn how to "think as lawyers" via case method instruction. I hope I have persuaded that the fundamentals for acquiring this skill in a law school classroom are lacking. (If not, perhaps the chapter on analysis, soon to follow, will.)

Nor do such students possess any sort of "genius" or "aptitude for the law." They impress because, much as LEEWS grads, they have an edge over classmates. They get the few extra points necessary to push 25 to 35, possibly 45, and earn A's.

I feel I must repeatedly emphasize that there is no such animal or quality as "innate aptitude for the law," "genius for the law," The Right Stuff!

Nevertheless, my long-held, erroneous belief in a knack, a special ability, even The Right Stuff served a useful function. Believing that in order to compete with classmates of special ability, my students needed more than the mechanics of approach and preparation that were already producing remarkable results, I thought longer and harder on how to improve performance.

Beyond mastering a systematic science of approach and lawyerly skills, what more could be done? I came up with what I term “a strategic overlay in the effort to achieve not just A’s, but the top grade in the class.”

I now suggest that students study their professors, just as a savvy lawyer will study the habits and tendencies of a judge to whom her case is assigned.<sup>3</sup> What are a professor’s preferences and peeves? What are her tendencies?

For example, I had a professor of criminal law who, having long been a criminal defense lawyer, harbored a deep distrust, probably an active dislike of prosecutors and the police. It was well known that at the end of the day, given a suppression of evidence issue, the conclusion should always be in favor of the defense. Somewhere, somehow, the police botched the search and/or seizure. Alternatively, or in addition, the prosecution erred. A good (future defense?) attorney need only search the facts more carefully. Conclusion -- suppress the evidence!

I suggest students do a “lexis-nexis” computer search of each professor. Read any articles the professor has written in the last 2-3 years. Pay especial attention whenever a professor prefaces a remark with “I feel,” or “It is my considered opinion that,” or “Clearly,” “Obviously,” and “I disagree with.” Ask former students about professor X. What does she like or dislike in an exam response, ... in general? One may hear, “She only regards as intelligent her own thinking coming back at her off the page.”

Incorporate this insight into the exam response. An issue that seems minor, easily resolved, deserving of scant attention, may yet be major and deserving of more attention, just because the subject is of particular interest to the professor.

Beyond the mechanics of a competent, lawyerly approach to exams (in and of itself normally sufficient to garner an A), play to the professor! Stroke her! Flatter her! Every professor wants to be the favorite professor.

Late in the evening, as the professor reluctantly slogs through one disappointing, rambling, boring exam response after another, one’s response should emerge as a refreshing exemplar of a lawyer created and inspired -- finally! More issues identified, precise knowledge of relevant law, balanced, insightful analysis that make ample use of the professor’s facts!

The professor should nod with approval and appreciation. The professor should feel admiration, perhaps just a twinge of envy!

The foregoing advice may seem obvious. Perhaps 80 percent of what I instruct is mere common sense. Having sat through my program, students often have the reaction, “That just makes sense!” (Also, somewhat angrily, “Why isn’t this instructed at my law school?!”) However, important kernels we shall explore are altogether new, deeply insightful, even revolutionary. Moreover, how common sense facets are integrated into a meaningful, effective whole is key.

The “strategic overlay,” is the icing on the cake. Implemented in addition to competent, lawyerlike handling of an exam exercise, not only will a professor’s approval and admiration be commanded, but more, as suggested, sometimes her envy.

(Note. I believe it eminently possible to engender envy in a law professor. This is particularly so, if that professor has never engaged in the kind of law practice that hones the nitpicking mindset of the litigation practitioner. Indeed, I am more and more persuaded that it is relatively easy.)

### **In sum**

Sometimes, often in fact, one's insecurities are the best motivator. I am no longer surprised that so many LEEWS grads get not just A's, but the very top exam grades. I am not surprised that some have been pulled aside by professors and told, "I can't post your grade. It's too high above the class mean. It would upset other students."<sup>4</sup>

Are my students cheating? Is it improper, unfair that a student who is less intelligent than a classmate (perhaps many classmates), possibly less hard working, should get a higher grade, often a much higher grade, because, on top of many thousands she invested less than the price of a new casebook to gain instruction that has been around for over 30 years, and that has been ignored by her professors and law school?

Silly questions.

Cue the familiar refrain! Take advantage! Of course!

\* \* \* \*

1. The grade guarantee applies only to live programs, not the audio version. The reason is lack of control over whether a student actually does the audio program. What is known is that those who complete the audio program consistently do very well. They work at their own pace. The commitment necessary to do the (somewhat longer, roughly nine hour) audio program on their own probably ensures greater attention to and grasp of instruction. Follow-up practice of techniques and skills is essential, whether one does the live or audio program.

Respecting the 10-day free trial, a student only pays for return shipping. Moreover, there is no quibbling about a few days extra in returning a program. Perhaps one in 100 are returned, usually when it is late in the term and the purchaser doesn't think there is time to do the program. Which is a mistake! I recall a student at Georgetown Law who did the audio program in the midst of the exam period. Even that late in the game he said it was "very helpful!"

2. It has been noted that the grade of A- is of recent vintage in Emperor Law School. A- grades began to appear no earlier than 2005. They were in response to a new requirement at just a few upper tier schools that professors give more than ten percent "A" grades. (U. Pennsylvania comes to mind, shortly thereafter U. Texas.) Reluctant often to give A's to even ten percent of the class (even at Harvard), professors began giving A-'s to satisfy a grade curve requirement that, at some few law schools today, demands 20, even 30 percent A's. As noted, A- is the new B+.

The reason for more A's stems from several factors. First, there is the self esteem factor in society at large. In comparison with colleges, which now dole out 40-50 percent A's (!), ten percent and fewer A's, long the norm in Emperor Law School, seems starkly parsimonious. It begins to raise questions (as it should!) respecting law school instruction. There is also the circumstance of overly stressing students who have been told their entire lives, "You are excellent!"

Second, there is the arms race factor of giving graduates a better chance at employment in a declining jobs market. Many law firms will not consider a candidate who does not have at least one "A" grade. Graduates of schools giving fewer A's found themselves at a disadvantage vis-a-vis students from schools with inflating grades.

A third factor is doubtless not something someone with ties to Emperor Law School would want to articulate. I allude to student retention, especially profit retention. I have noted that D's and F's, once quite common in law schools, began to disappear when yearly tuition and fees topped \$20,000. (*Circa* 1995?) Given that many reputable state schools in the south and midwest have, to a large extent, bucked the trend of rising tuition and fees, no other reason than supply and demand has enabled law schools to get away with escalating cost. Simultaneously, concern has risen, lest a student and his current \$40,000, even \$50,000 in yearly tuition and fees be lost. (Lost not just to the law school, but to the university fund, to which up to 70 percent of some law school revenue has been found to be shunted.) A-'s, and the many B+'s that hold out the possibility of A's (should one just work a little harder), keep students accustomed to A's happier, less likely to drop out.

3. For example, is the brief or oral argument more likely to persuade this judge? Should one sit or stand when making an objection in court? What are the judge's views on amounts of damage awards, on punitive damages, on sentencing guidelines, etc.?

4. Recall the example at the end of the *Preface* of the student who finished as “Grand Chancellor” of the class of 2011 at the University of Texas School of Law (highest gpa in his graduating class. [Of over 400!]), and who scored 37 out of 50, when the class mean was 12!