

Section Five

Fundamentals en route to a solution

A helpful disservice provided by orientation programs

In the past decade, coincident with tuition and fees topping \$30,000 per year it may be noted, Emperor Law School has engaged in much more hand-holding of entering students than was the case when your author began law school. My introduction/orientation to law school in fall, 1969, consisted of a brief welcoming address to my assembled class by the dean and then a third year student.¹ Classes began the next day.

Today, most law schools have two-day to week-long orientation programs that precede the start of classes. Such programs typically feature instruction on how to brief cases (conventional format, of course), also a segment on exam writing preparation and technique.

At more and more (typically lower tier) schools an assistant dean, possibly an instructor or two, is charged with “academic support.” (And student retention!) The largest law school in the country, Thomas M. Cooley -- five campuses, four in Michigan, the most recent in Tampa, FL, over 3,000 students --, has “Academic Resource Centers” that offer study and exam writing instruction.

Respecting the topic of this book -- gaming, or gaining an advantage --, it certainly behooves a new 1L to participate in the orientation program. Not that doing so will clear the fog of uncertainty and dwindling confidence that fast approaches. However, to not participate would likely add to anxiety.

Exam writing advice offered by all orientation programs and academic support deans and services, however, -- no exceptions! -- consists of little more than the standard, conventional wisdom on the subject. The point has been made that such “wisdom,” typically featuring IRAC and helpful hints, has been around for many decades. It does little to solve the disconnect between case method instruction and what is required for mastery of essay exams. It doesn’t instruct “lawyerlike thinking,” effective issue identification, concise presentation, etc. It is neither science, nor system.

All such advice invariably presupposes, even emphasizes conventional briefing and extensive class note taking. It tends to reassure students without actually providing an effective game plan. It thereby does students a disservice. It lulls lemmings as they advance toward the cliff of final exams.

Viewed from a different perspective, however, one might be grateful for exam writing instruction offered by the school, a professor, a student organization. (Such as the Student Bar Association [SBA], the student affiliate of the ABA, which exists in all law schools.)

New 1Ls naturally trust that school and professors will do everything in their power to ensure success. They naturally assume such in-house advice is the best, the most up-to-date. Surely, there is no need to turn to outside sources (such as LEEWS). Indeed, law professors typically caution, often strongly, against outside study aids, including commercial outlines.²

Another helpful disservice -- the mirage of “conventional wisdom”

Chapter 4 of this section will present the standard exam writing/preparation advice, what may be termed “conventional wisdom.” Readers will doubtless be impressed. (Once upon a time your author was!) Conventional wisdom (CW) will seem thorough, logical, helpful, a welcome “aha!” to anyone who has glimpsed a law essay hypothetical.

One will understand why law students and law professors cannot imagine there being more, indeed, much more, something approaching the science of LEEWS.

However, CW is merely a start, the beginning of a solution. It scratches the surface. It gets the ball rolling. However, it isn't nearly enough. Indeed, often it misleads. Certainly, as noted, in providing reassurance without being effective, it does students a disservice.

Exam writing advice in 2012 in Emperor Law School is little changed from that offered in the mimeograph your author referenced receiving as a new 1L in the fall of 1969. As promised, and as I do in the *LEEWS Primer*, I shall (in Chapter 4) reproduce then Harvard Law professor Derrick Bell's advice verbatim, with some additions. As noted, on its face CW is clear, thorough, sensible. It seems very helpful.

However, as any who attempt to implement CW on an exam soon realize, it is a mirage that quickly fades. The exam, for reasons explored in the preceding section, immediately puts a student on the defensive. Students are left to flounder.

In the meantime CW lulls students into complacency. Advice isn't necessarily incorrect. (Unless, as I am fond of saying to students, "it contradicts anything I say.") However, it is heavy on the *what* to do, very light on the *how*. It does little to counteract confusion and anxiety a first perusal of an essay provokes. (As noted, CW typically instructs, "Read the facts!")

Going forward

Much greater depth, insight, and instruction is needed, if control is to be wrested from confusing hypos. Chapter 6 of this section will describe and explore aspects of LEEWS. It will introduce some of the needed insight and instruction.

Early on (Chapter 2), the mindset law students must acquire in order to be successful will be described. Namely, something approaching that of a competent, practicing attorney. I shall term it a "facsimile." The nature, art, and examples of lawyerlike analysis will be explored.

Chapter 5 will describe the origins of, and the insight I've alluded to and described somewhat, that inspired and prompted me to develop LEEWS over thirty years ago, and eventually leave law practice. As suggested, it is an insight that can inform one's approach to legal problem solving not only in law school, when reading a case, addressing an exam, or writing a paper, but, as numerous lawyers have assured me, throughout a legal career.

* * * *

1. It may be noted as an aside, that the third year student was self-assured and self-important to the point of being smug. It was also the case that Yale Law admissions folk had greatly underestimated the ability of admitted students, your author included, who were at the time mostly male, to avoid military service in Vietnam in order to enroll. Thus, where a typical entering class was 175, ours, at 230, was by far the largest in Yale Law history. Further, seeking, as all top tier institutions of higher learning do, particularly Ivy League schools and their ilk, to predict who, 20-30 years hence will be movers and shakers (and wealthy donors!), Yale Law had admitted an unusually large number of students who had been campus leaders during the turbulent late sixties. (Including my classmate, Hillary Rodham [later Clinton], who had been depicted on the cover of *Time Magazine*, giving an anti-war speech at her Wellesley College commencement.) Future president, Bill Clinton, would enroll the following fall, following his Rhodes scholar sojourn at Oxford.

Thus, while unexpected and startling, particularly to faculty and upperclassmen in attendance, it was not altogether surprising when a serious-looking (angry?), somewhat older (thirtyish?), African-American fellow student, as I recall, ("black," of course, was the appellation of the time) shouted out in response to whatever our third year well-wisher was blathering, something on the order of, "If you don't put more substance into your remarks, I'm going to come up and toss your [rear end] off the stage!" (Was that possibly Walter Beach, onetime Cleveland Browns all-pro corner back, now going to law school, and my classmate?)

This outburst naturally unsettled Mr. Third Year and others. It set the tone for what, with the prospect for the fall of Black Panther trials in New Haven, and the Supreme Court confirmation hearings of ultra-conservative Yale Law professor, Robert Bork, promised and proved to be an interesting term, indeed. In retrospect, it was fortunate that Yale

Law had just instituted pass/fail grading for the first term. Mostly relieved not to be in a Vietnam rice paddy, I hardly applied myself to my studies with appropriate assiduousness.

2. The animus of law professors against outside study aids can be extreme and defensive to the point of causing one to think, “What are they so afraid of?” As noted, “You don’t need that!” is the typical reaction when law students ask a professor whether they should purchase a commercial supplement to the assigned casebook (or take LEEWS). “Don’t let me catch you with a commercial outline!” is a not unfamiliar admonition. The memorable remark of a professor, once related to me, has been noted -- “Commercial outlines are the crack cocaine of law school!”

The fear, it seems, is that students will substitute commercial outlines -- *Emanuel’s*, *Gilbert’s*, *Glannon’s*, *Legal Lines*, *Blonde’s*, *Nutshell Series*, etc. -- for reading the casebook. Indeed, some upperclassmen, perhaps many upperclassmen, eschew purchasing expensive case books, and rely solely on a commercial outline. I believe they also have contented themselves with doing a lot less work, and getting the same “B” grades obtained when they diligently read and briefed every case. It is your author’s view that casebooks have a useful role. However, as noted elsewhere, get a cheaper, used edition. A commercial supplement is also needed.

Section Five, Chapter 1

Emperor Law School versus the lawyering art

The lawyering art

“Lawyering art” is an expression I use to describe how lawyers think and analyze. Also, how lawyers go about their business. The essence of the lawyering art is close attention to details of fact, law, procedure, etc.

For example, different courts and individual judges in the same court may have particular guidelines and requirements. It may be that written submissions have to be perfect bound, and/or all staples must be covered by tape. (Because a judge once caught his nail in an exposed staple!) Cover sheets of different kinds of motions may have color coding requirements. There may be page limits, type size requirements. A lawyer practicing in a particular court or before a particular judge must be aware of such procedural guidelines and requirements.

Precise knowledge and attention to detail is at the heart of a practicing lawyer’s trade and expertise. What is the statute of limitations for filing a claim of battery, fraud, violation of this statute or the other? What are the time limits for responding to a summons and complaint, a motion to dismiss, a reply brief? Is the brief or oral argument more persuasive before judge X? Indeed, does judge X even read briefs? These and countless other details are what a good lawyer tucks away. They are essential knowledge, if a client is to be properly represented.

Above all, a good lawyer is motivated by concern for the client. This professional duty motivates a conscientious lawyer to work harder, dig deeper, think more and longer in order to give the client the best chance of succeeding. Ground-breaking legal cases such as *Brown v. Board of Ed.*, *Roe v. Wade*, etc. (whatever one may think of these cases and their outcomes), came about not as a result of theorizing in an ivory tower, but because conscientious lawyers worked hard to solve a client’s problem.

Naturally, one would think that inculcating the lawyering art would be the primary business of Emperor Law School. Such, however, seems not to be the case. Possible reasons include the academic origin and bent of law schools, insecurity of law professors vis-a-vis lawyers, an animus, conscious or no, against lawyers, and fear that law school be regarded as a mere trade school.

What is certain is that exhibiting skill at the analytic aspect of the lawyering art is key to earning top grades on all-important exams. Professors want to see lawyerly competence in analyzing the issues they want identified.

A glaring contradiction in Emperor Law School

No one would contend that experience is not a teacher in the practice of law. No one would contend that lawyers do not get better at what they do over time. Nothing is more instructive in honing careful attention to law, fact, and nuance thereof than appearing in a courtroom and being bested, because a minor detail of fact or law was overlooked. (E.g., in a police report or transcript of witness testimony.)

Perhaps a legal precedent, recently published and decisive was missed to one’s detriment (one’s client’s detriment!), or found to one’s favor. Often a client is reassured when a lawyer is older, therefore likely more experienced. An expression sometimes heard in law practice is, “The case needs to be silver haired.”

Your author did not try many cases as a prosecutor. It is my firm belief that a case properly handled seldom goes to trial. However, the few trials I had focused the mind and instructed in a way that theory cannot. For example, upon cross examination in a simple domestic assault case, a defendant described the movement of his hand inside the front screen door of his ex girlfriend’s house not as “I reached in,” or “I extended my

arm,” but, in a moment of irritation with his cross examiner (your author), as “I punched.” An inadvertent but telling choice of a single word sealed his fate.

One would naturally suppose that emergence of legal acumen, skill, and aptitude occurs progressively over time. For example, imagine the complexity, the difficulty of persuading that one’s corporate client was injured by monopolistic practices of a competitor that violated antitrust law. Moreover, when, how, to what extent?

In the instance of education preparatory for the legal profession, one would imagine that skill in legal thought would emerge progressively, reaching its flowering in the second or third year of school. It would result from a succession of professors dedicated to producing able practitioners. Experience would be a teacher. Students would improve.

In medical, engineering, and other professional schools, a student’s capability and aptitude for the profession is assessed progressively. It is based upon the overall span of professional school performance. Not so in law school. As has been explored, who is or is not possessed of superior potential as a lawyer is decided in the first year. Indeed, for psychological reasons that may be summarized simply as defeat and resignation, this determination is largely over following the first term -- roughly four months into law school!

I’ll repeat the point, as it is the most obvious, persuasive evidence of something deeply amiss in Emperor Law School. The game, in terms of who is deemed qualified for plum career opportunities in the law, is largely over a mere four months into a 3-4 year course of study!

Any judge, any practicing lawyer, any casual observer possessed of common sense, I submit, would agree that this, manifestly, is a travesty. The lawyering art is surely not so easily acquired as to permit skill, or potential skill at such art to be manifested in a matter of months. Ability to parse and analyze relevant law, fact, and their relationship in the service of achieving a client objective, if need be to unearth more facts, more law in such service, is a skill that surely must be practiced and learned over time. It is a skill, I think all practitioners, even law professors would agree, necessarily takes time to acquire.

This is self-evident, if the practice of law, similar to ... video game development?, is not something to be turned over to clever teenagers. If not so, then experience in the practice of law counts for little. If not so, then experience in the practice of law is not a teacher. As is said in the law, *res ipsa loquitur* -- the thing speaks for itself.

To posit, as is currently the case in Emperor Law School, that lawyering aptitude can be appropriately measured after a term or two terms in law school suggests, of course, that lawyers are born, not made. Such a supposition, I submit, does a disservice to the very idea of “profession.” Further, it calls into question the very purpose of law school. Certainly, it calls into question the remaining years of law school.

That performance on initial exams, mere months into law school, should determine who does and does not have lawyerly aptitude, greatly contradicts the lawyering art as process. It insults the gravity of the profession. It is manifestly a farce!

Nevertheless, the view that first year grades are an accurate measure of lawyering aptitude is near universal in Emperor Law School. As noted, only at YHS, where grades have largely (not completely) been eliminated in first term, is some recognition given to this obvious contradiction.

It is therefore very much the case that students who acquire skill in performing “as a lawyer” sooner than classmates will enjoy an advantage. This is particularly so, if, in addition, they acquire a system for handling essay exams with mastery.

Law practice, not law school, instructs lawyerlike thinking

Looking back on my own progression in the profession, I had some of the finest law professors. There was Fleming James, former long time railroad lawyer, now author of the leading torts casebook at the time -- *James on Torts*. He was a giant in the field. Boris Bittker was a delightful man, and a leading authority on tax law. He had also authored the leading casebook. Such professors led eager, able groups in examination of case after case, all in accordance with standard Socratic case method.

As I recall, there was frequent mirth in these classes, also much theoretical musing and posturing. At no time in the first term or first year did I feel I was a lawyer, or getting close. However, this was not a concern. There being no lawyers in my family or experience, I had only an inkling of what being a lawyer was, above and beyond the Perry Mason model on television.

As was true of law students then, the same as today, I took it for granted that the prescribed path to the profession by my professors and law school, top-ranked Yale Law after all, was the appropriate path. If I was missing something, not getting it, if something was amiss in my progression and understanding, the fault lay with me. I remained an academic learner and thinker, and comfortably so until the first set of exams.¹

I did not learn my most important early lesson respecting practice of law, the lawyering mindset, what it means to be a lawyer in a Yale Law classroom. I learned it from a solo practitioner in New Haven, whom I worked for part time in order to earn extra money.

The significance of a single, unaccounted for dollar in an insurance contract made an indelible impression, as no amount of parsing cases in a law school classroom ever could. I learned that the essence of the lawyer mind is a close, parsing, nitpicking of law and fact that is different, unfamiliar, unexpected, even breathtaking in its exactitude.

This mindset and manner of thinking derives from nothing innate. It is accessible and achievable by anyone of average intelligence. However, desire to assist a client (also best an opponent and not be embarrassed in a courtroom!) is the best teacher.

I shall describe this lesson in the following chapter. Suffice for now that, in retrospect, it is clear that mere curiosity about a case in a book in a classroom is unlikely to bring one to such a patient, parsing, incremental level of thinking. Rather, one needs the motivation of deeply caring about and wanting to help a client. Beyond that one needs the experience of mulling over that client's problem for days and weeks in search of a solution, where initially there may seem none.

I may note that I did not take my employer to be an extraordinary intellect. He may or may not have been a Yale Law graduate. I cannot recall. Innate aptitude, genius for the law, The Right Stuff was not what this was about. He was merely an experienced, professional practitioner of the lawyering art.

I became a better law student as a result of my significance-of-a-dollar experience. I never mastered time-pressured essay exams. However, as an upperclassman, some of my classes required papers, not exams. Given time, my newly acquired, parsing, nitpicking thought process enabled me to excel in writing those papers. I began to fulfill, belatedly, the promise suggested by my high LSAT score.

I was singled out for particular praise for my thoughts and insights in a paper on the recently enacted (1974) Employees Retirement Income Security Act (ERISA). The professor in this smaller, upper year class was yet another esteemed professor and giant in his field. (Sterling emeritus professor Abraham Goldstein, as I recall.) I began to realize I had an aptitude for the law that had been contradicted by my flailing and floundering on time-pressured essay exams.

Law practice, not law school, is the primary innovator

As noted, law professors cogitate and muse over cases, mostly of recent Supreme Court vintage. They pontificate on National Public Radio and in scholarly articles about current legal issues, trends, and possibilities in the law. They doubtless see themselves as and aspire to be innovators and pioneers in legal thinking. They imagine paving the way via (brilliant) theorizing to breakthroughs in jurisprudential thought. Bored with what the law *is* (which partially explains reluctance to ladle out black letter law in class), their interest lies in probing frontiers of what the law could and should be. (Hence, policy emphasis in class.)

The possibility of breakthroughs in legal thought and method that will bring reknown to their law school, as well as the professor author (and a higher *USNews* ranking!), presumably serves to justify generous salaries for minimal teaching responsibility.² It presumably serves to justify an expensive edifice supported by back-breaking debt imposed on students -- Emperor Law School!

However, your author begs to differ respecting who and what pioneers breakthroughs in legal thought, method, and jurisprudence. For example, when a “penumbra of privacy right” was discovered in the Constitution, it was not thanks to a law professor scouring judicial opinions after the fact. Rather, as is the case with virtually all breakthroughs and new discoveries in the law, this incipient Constitutional “right” was discovered as the result of a lawyer bringing a case on behalf of a client, and lawyers and judges ratcheting through relevant law and fact to a resolution. In this instance, the famous or infamous case of *Roe v. Wade*. Likewise, ground-breaking legal precedents established in such case as *Brown v. Board of Education* and *The Pentagon Papers*.

Use of so-called “DNA” or genetic footprint evidence is perhaps the most profound development in criminal law since fingerprinting. Although the highly influential, praiseworthy DNA Innocence Project is at present co-directed and coordinated by law professor, Barry C. Scheck, out of Benjamin Cardozo Yeshiva School of Law in New York City, pioneering use of DNA evidence in criminal defense was derived not from the musing and theorizing of a law professor, but from lawyers’ attempts to find solutions for clients charged with crimes.

Mr. Scheck was a practicing criminal defense lawyer, not a professor, when, in 1992, together with Peter. J. Neufeld, he co-founded the Innocence Project. Mr. Scheck remains a practicing, criminal defense lawyer, as is Mr. Neufeld, currently the co-director of the Project.³

[It may be noted that Cardozo Law School offers an example of a lower tier law school hiring a professor with considerable experience as a practicing lawyer. However, there is no indication that Mr. Scheck’s practical experience or the practical nature of the Innocence Project has in any way infiltrated and modified case method instruction in classrooms of Cardozo Law.⁴]

My contention is that law professors, parsing entrails of cases already decided, much as medicine men reading bones and tea leaves, merely follow. At best, they make sense of trends in the law in hindsight. It is practicing lawyers, assiduously researching the law with specific goals and purpose, mulling, wrestling with legal issues, seeking creative solutions for clients they care about who pioneer breakthroughs in the law and legal thinking.

Often a lawyer’s mulling proceeds 24/7. Particularly challenging client problems are thought about by conscientious lawyers even as they eat and sleep!

A lawyer seeking to solve a client problem will sometimes consult a law professor, a supposed expert in the field in question, for ideas and advice. (E.g., in constitutional law, criminal law, environmental law, maritime law, etc.) However, the innovation, the breakthrough, if any, will emerge from the lawyer’s many hours of thought and research, her persuasive efforts inside and outside a courtroom, all on behalf of a client.

In sum (the opportunity for advantage)

The foregoing suggests a clear path of advantage. I am confident examples in the next chapter demonstrate that the exacting, analytic thought process of a lawyer can be learned. However, it cannot adequately be conveyed or grasped by pouring over abstract cases in a classroom. Therefore, whatever can inculcate such mindset will confer a decisive advantage.

I have several times expressed the view that, as a result of backgrounds that encourage and train close analytic thinking, a few students already possess something approaching a lawyerly mindset when they arrive at law school. These are the students who initially shine and impress in class. They are deemed “sharp legal minds” by professors and students alike.

However, what is deemed “innate,” “genius for the law,” “The Right Stuff,” is merely habit of thought that provides an initial advantage. Such early supposed “brilliance” is rarely an apt predictor of success -- A’s! -- on exams. Moreover, this analytic skill does not come close to that acquired in the practice of law, or to what can be trained, without much difficulty, during law school, even prior to attending law school!

If instruction can impress upon a 1L that “lawyerlike analysis” means focusing on a single, likely inadvertent dollar having legal significance, that student will be on track to write an exam more likely to impress. That student will be significantly ahead of classmates who have not been disabused of sloppy, academic thought processes that will overlook a single dollar among many dollars -- always!

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1. Your author’s experience. Owing to inability to analyze “as a lawyer,” along with failings of case method instruction described, as is true of virtually all law students, I continued to be academic in my approach to learning the law and taking exams following my first set of exams, although far from comfortably. I was too stubborn and self assured to accept the verdict, indicated by my lackluster exam performance, that I lacked what it took to be a first class lawyer. After all, I was able to attain “high passes” on the broad, newly instituted, honors, high pass, low pass, fail grading scale. I blamed disinterest and too much television watching for my mediocrity. However, had I concerned myself overly about it, which I did not, mastery of essay exams was highly improbable, however diligently I might have applied myself to my studies.

2. (Lavish) law professor compensation and lifestyle. Circa 2008, a document circulated at state-supported University of Virginia School of Law, revealed that salaries of senior law professors approached \$400,000 a year. This for three, at most four hours of instruction per week, and no more than thirty or so weeks in a year. Moreover, from year to year little need be changed in the content of instruction. (I.e., lecture notes can be used year after year.) In addition, with all their free time law professors write novels (*a la* Stephen Carter of Yale), textbooks (mostly editing the last edition), and can and do have lucrative outside consulting practices and speaking engagements. They can even practice law with paying clients. Their main requirement is researching and publishing articles that few read, and that have minimal influence in courtrooms and the legal profession. Appearing before a group of Columbia University law professors, a judge from the prestigious federal Second Circuit Court of Appeals (overseeing appeals from federal district courts in New York, Connecticut, and Vermont), acidly remarked not so long ago, “We never read your articles!” Law schools are very accurately described as “cash cows.” They contribute up to one third and more of overflowing revenues to the general funds of affiliated universities. (Private law schools retain all the loot!) Deans, associate deans, professors, and support staff enjoy a luxurious lifestyle, thanks to average debt per law student upon graduation (at this writing) of over \$100,000.

3. Mr. Scheck, it may be noted, is a Yale University graduate. (A year or two behind your author!) Long before he became a law professor, he was a member of the O.J. Simpson defense “dream team.” He and Mr. Neufeld, along with other defense lawyers, pioneered use of DNA evidence in the 1980’s to assist clients.

4. Inability/unwillingness of practicing lawyer/professors to impart lawyer skills. Alan Dershowitz of Harvard Law School is probably the prime example of a distinguished law professor who is simultaneously a noted, respected, practicing trial attorney. Your author has had numerous students from Mr. Dershowitz’s classes. They attest his classes are rife with energetic, stimulating theorizing about policy aspects, new directions in criminal law. However, black letter law is never precisely focused on. A Dershowitz student would be hard-pressed to define the difference between robbery and burglary. (The former involves force and taking from a person, the latter breaking into and unlawful taking

from a premises. Thus, to say, “The house was robbed,” is a complete non-starter at law.)

In other words, as law professor, practicing lawyer Dershowitz conforms to standard, case method, Socratic instruction mode. Albeit, it would seem, with more high-flying theorizing than usual. His practical knowledge of what, exactly, defense attorneys do (e.g., read police reports to discover errors and omissions, conduct investigations and hearing, make pretrial motions, interview and cross examine witnesses, etc.), and how, exactly, they go about their trade (e.g., the progression from arraignment to preliminary hearing to grand jury presentation, and the defense role at each stage), apparently is altogether absent from the classroom. Students are doubtless entertained, energized. Professor Dershowitz is popular. However, unless inspiration of future law professors is the legitimate aim of a law school, students are done a signal disservice respecting training as future lawyers.

High-flying policy theorizing on Mr. Dershowitz’s final exam will undoubtedly be rewarded. (I.e., theoretical musing about what the [criminal] law could and should be.) So, however, will precise knowledge of black letter rules, and close, insightful, element-by-element analysis of applicability of those rules to the complex, confusing, cutting edge criminal scenario facts Mr. Dershowitz will doubtless posit. Indeed, the bulk of the exam will likely involve the latter. Harvard 1Ls have confirmed for decades that where “policy” is wanted on exams, at most it is wanted on “only one of three or four [essay exercises].” The bulk of exams is black letter issue identification, requiring element-by-element analysis of rules applied to facts, the same as at all other law schools.

Professor Dershowitz, much as other law professors, probably gave few A’s when Harvard Law gave letter grades (until 2008). The reason likely was that few of the highly able, diligent students in his class came off the exam page as competent lawyers. Those who did probably did not acquire their “lawyerlike” analytic skill in Professor Dershowitz’s class, which had little to do with the *how* of being an attorney and taking law essay exams. As oft posited, they likely acquired characteristics of thought that elevated their performance somewhat over equally smart, hard-working (but clueless) classmates *prior* to entering Harvard Law School and Professor Dershowitz’s class.

It is undoubtedly exciting to be in Professor Dershowitz’s class. However, if a “fine teacher,” he is nevertheless instructing the wrong thing the wrong way! It is undoubtedly exciting to be at Harvard Law School, at least for a term. However, respecting learning to be a lawyer, this will not begin to happen until Harvard law students don suits and see and do what lawyers do in their first (very well paid!) summer associate, BigLaw job. The good news at Harvard Law, of course, is that the great majority, despite receiving less than stellar grades, will obtain such jobs. (Simple fact: employers like to say, “My [intern, associate, colleague, etc.] is from Harvard” [or Yale or Stanford]. It is reassuring to clients and prospective clients.)

Section Five, Chapter 2

Examples of “lawyerlike thinking;” implications, if progress in becoming a lawyer continues after law school

“The extra dollar the client paid [on a quarterly insurance premium], ... What does it signify? ... What’s the quid pro quo? ... Mightn’t the insurance company owe something extra in exchange for this additional consideration? ...”

– Musings of a New Haven solo practitioner

An example of lawyerlike thinking

Yearly tuition and fees when I attended Yale Law, *circa* 1975, was a fraction of the several tens of thousands law students are charged today. (Probably less than \$7,500!) Nevertheless, I needed to earn extra money. Therefore, I did part-time work, mostly research, for a solo practitioner in New Haven.

I recall an insurance case in which the client -- our client! -- had paid a single extra dollar on a quarterly auto insurance premium. Perhaps the premium was \$126, and he had paid \$127. The client had had an accident and was now making a claim. My employer had been engaged to negotiate the claim. He speculated whether this extra dollar in payment, unexplained respecting requirements of the insurance contract, might, as additional “consideration” (something in return for something), entitle the client to recovery above and beyond what was specified in the contract. In other words, might an additional recovery of hundreds, perhaps thousands of dollars, be owing in exchange, in consideration for an extra dollar payment?

“What?!” I thought. A dollar might have significance beyond an inadvertence, a mistake on the part of the client in writing a check?! I recall listening in disbelief as my employer directed me to research the issue. He counseled, “Courts tend to construe policies against the insurer.¹ See if you can find precedent for the proposition that an extra amount paid in premium entitles the insured to an extra benefit. Perhaps there is a case on point.” (Meaning a case just like ours, upholding my employer’s notion.) “Begin with *Corpus Juris Secundum*,” I was instructed.

In today’s personal computer age, legal research software permits canvassing the great mass of cases relating to insurance claims -- federal, state, local, international -- in mere seconds. However, computer research in 1975 at the fingertips of other than corporations, government agencies, and educational institutions with access to mainframe computers the size of closets, wasn’t a glimmer of a possibility.

When you had an esoteric question of law to investigate, you began with a massive tome called *Corpus Juris Secundum (CJS)* -- the second edition of the body or collection of all the law, in this instance all the law of the United States, as reflected in all the cases recorded since ... *Corpus Juris* the first? (*Primum*?)

No matter. I was being paid by the hour, perhaps the princely sum at the time of \$5. I planned to wade about in *CJS* for what seemed a reasonable number of hours, then report the obvious -- nothing “on point,” on “all fours,” or even “colorably in support.” Meaning no precedents -- judicial rulings, case authority -- directly or indirectly related to and supportive of the legal point my employer hoped to make.

I was wrong!

As pointed out by my employer, it is an axiom in the law that, as a matter of public policy (ensuring the good or welfare of the population at large), contracts issued by insurance companies, because they are presumed carefully crafted by well-paid, skilled lawyers in order to benefit the companies, will be closely construed against the company in the event of a claim.

Much to my surprise (astonishment, actually), I eventually found a Maryland state court case in which, as I recall, the very sum of a single dollar, the payment of which could not be explained by any requirement in the insurance contract, was held to give rise to an additional recovery being owed the claimant.

I did my research in the Yale Law School library. I duly made a photocopy of the case. Still in disbelief (admiring disbelief!), but proud of my efforts and anticipating approval by my employer, I took it to him. He was delighted. However, he didn't seem that surprised. Possibly I was given some additional recompense. My attorney/employer used this precedent to wrangle a more favorable settlement for the client. A single dollar, doubtless inadvertently paid, and unnoticed and not reimbursed by the insurance company, had provided a small windfall.

Despite being an upperclassman, it was the first time I felt I had been introduced to the meaning of the expression, bantered about in law school, but never precisely defined -- to "think as a lawyer."

Another example from real-life practice (school of hard knocks)

Perhaps another example from real life law practice will reinforce the point that sitting in a classroom, closely examining reasoning, holdings, etc. in a case, or, indeed, lots of cases, cannot instruct so well as the crucible of real life, adversarial law practice.

It will demonstrate that there is much room for growth and improvement beyond law school, certainly beyond first term and first year. It further puts the lie to the importance given first year grades, the myth of The Right Stuff, the utility, even advisability of case method instruction, at least without the changes suggested.

Early in my career as an assistant district attorney in Brooklyn, I was given a misdemeanor case to try. It was a relatively unimportant case, regarded as a "dog," a "loser." The idea was to give a greenhorn prosecutor -- me! -- a chance to get his feet wet without much untoward consequence should I lose, which I did.

The defendant was a fiftyish man, whose much younger wife had been romanced by a thirtyish neighbor. The neighbor was the complainant and chief and only prosecution witness. The defendant was alleged to have confronted the younger man, and, in the course of a weaponless scuffle, snatched a gold chain from the younger man's neck. The case had come in as a felony assault and robbery (theft by force). However, upon it transpiring that the parties knew one another, and, moreover, the cuckold husband being a sympathetic figure with no prior arrest record, the case had been knocked down to misdemeanor assault, misdemeanor theft of the gold chain.

Before a judge and jury of six, in my black, plain toe (versus wingtip), "lawyer shoes" and navy, pin-stiped "power suit," I carefully led the complaining witness, a charming, handsome fellow, as I recall, through each phase of the altercation leading to the dramatic, pivotal snatch of the chain from my witness's neck. Having established that my client was confronted and pushed, and the chain grabbed, I stated, feeling very much the dramatic, lawyer figure of television and movies trials, "Do you see the person you have described in the courtroom?" Whereupon, my witness pointed out the defendant.

The defense attorney, of course, upon cross examination of my witness and over my objection (summarily overruled), elicited details of the ongoing affair with the defendant's wife. The defendant, a hard working family man, admitted confronting my witness, admitted pushing him, but claimed that my witness had also pushed him. He emphatically denied taking anything, much less a gold chain.

It was a classic case of "he said, he said," and who are you going to believe. The jury felt the defendant had been punished enough, and probably was within his rights in any case. This was later ascertained in speaking with the jurors. A verdict of not guilty was quickly returned. No way had I established guilt

beyond a reasonable doubt.

No big deal. Justice was probably done. But losing is never fun. Later mulling over the case and wondering what I could have done differently, it occurred to me that having a chain snatched from one's neck would likely cause an abrasion, if only slight. There had been no report of such an abrasion in the police report. The witness never mentioned an abrasion when I interviewed him and prepped him for trial. Of course, I hadn't asked.

I got in touch with the witness. Had there been an abrasion on the back of his neck? Indeed, there had been. However, it had been so slight, so inconsequential, that he hadn't reported it. Indeed, he had completely forgotten about it.

I realized that had I engaged in a line of questioning that explored the abrasion, possibly a salve applied to it, and so on, milking this very minor, yet telling detail, it would have added needed verisimilitude to my unsympathetic witness's testimony. It might have persuaded guilt beyond a reasonable doubt, and yet won me (and office statistics!) a conviction. The defendant would doubtless have been sentenced to time served (a night in jail) and a brief probation.

That one very minor detail! I resolved to explore more carefully in my mind the likely occurrences, consequences, possibilities in a sequence of events. My mind was thereby ratcheted toward the close, analytic, exactitude of a lawyer in a way that no amount of parsing of cases in a book could ever approximate.

In short, there is no question but that even ever-so-smart, YHS law graduates will learn to "think as lawyers" in a progression over time, through experience. The instructional value of committed lawyers going at one another in a courtroom cannot be underestimated. The important stakes and consequences of real life practice, the lessons of failure in the school of hard knocks cannot be duplicated in a classroom of Emperor Law School. Real life experience ratchets thinking toward the minute, careful, nitpicking mindset of a lawyer in a way that no amount of academic focus on cases ever can.

Intelligent, hard-working students at YHS, indeed, any law school you may name, who don't exhibit lawyerly characteristics on an exam in first year have much progress to make in acquiring the lawyering mindset, in becoming lawyers. If that progress can be advanced, enhanced even in small measure beyond what is conveyed in a classroom, it will vault them ahead of classmates.

This is precisely what LEEWS accomplishes.

Implications, if progress in becoming a lawyer continues after law school (which it surely does)

I hope the foregoing demonstrates there is progress to be made in becoming a better legal thinker following graduation from law school. If so, what is accomplished and measured in a semester, or even a year of sitting in classrooms, pouring over cases in largely academic fashion?

Certainly, the mind is bent in some measure to a greater, more exacting discernment. (If not bored overly, the more usual result.) However, can it be imagined that the full measure of a student's lawyering aptitude can be measured after a semester or a year? Where is allowance made and measured for capacity and aptitude for learning from real life mistakes? Where is measured motivation to dig deeper and try harder, owing to concern for one's client?

If the true measure of lawyering talent is correctly assessed after months, or less than a year, what is the purpose of the second year of law school, much less the third? (Other than collecting tuition.) Why not, following a single year, send would-be lawyers off to apprenticeships in career paths for which their apparent aptitude suits them?

The answer, of course, is that there is more to becoming a lawyer than can be assessed by exams at the end

of four months or nine months. Unless experience in the legal profession is no teacher (an absurdity, of course!), the most that can be measured by first year law exams is a preliminary indication of aptitude for thinking and analyzing “as a lawyer.” Even here, given the inadequacy of the current instructional mode, the measurement must be suspect.

Once again, I hope persuasively, the unfairness and problematic nature of law school pedagogy becomes manifest.

Plainly, to reiterate yet again a key point, for a professor to suggest he expects scores of 25-35 out of 100 possible points, is to acknowledge that *everyone will be confused and will flounder* on a law school exam. There are no right-out-of-the-gate “geniuses of the law!” There is no The Right Stuff! Some few students are merely a bit less incompetent and floundering than equally smart, equally hard working classmates.

Unless instructional value and potential for growth inherent in the experience of practicing law is to be utterly discounted, none can be anointed “lawyer” or possessed of “genius for the law” following a semester or a year, or even three years of law school. At most, at best, some enter law school better equipped, better attuned to picking up on the lawyering mindset, despite failings of pedagogy. Very probably, as posited numerous times, whatever advantage they exhibit they possessed in advance, and brought with them to law school.

Clearly, there is much room for taking advantage. To the extent one can approximate the exacting, lawyerly thinking exhibited in the foregoing examples in first term and first year, or, indeed, at any point in law school, one stands to acquit oneself better than peers on all-important exams.

The question is only whether and how this advantageous lawyer mindset can be acquired sooner. The answer to whether is an emphatic “yes!” The answer to how is a salient portion of LEEWS instruction.

* * * *

1. Public policy example -- insurance contracts. That courts strictly construe insurance policies against companies offering them is an excellent example of the effect of public policy, advancement of the larger societal good. In this instance it is recognized that insurance companies employ skilled attorneys to draft agreements -- contracts! -- favorable to their interests. Therefore, in the interest of fairness or equity (equality), when a “little guy” -- the individual consumer -- makes a claim, the benefit of any doubt will be given to the insured party. If the insured party is itself a large company or corporation, whose lawyers presumably reviewed the document, then less leeway respecting interpretation might be accorded.

Your author’s take on how to think about public policy effects -- what should the law be?; what could the law be? -- is to simply query in common sense fashion, “In a fair and just world, what should happen here?” More simply, “Is this a good or bad law (or result)? Why, given considerations of what is best for society overall?”

LEEWS advises if a professor seems to be “into policy,” even if policy discussion is not specifically called for on the exam (e.g., many issues, and mere issue identification and black letter analysis seems to be wanted [usually the case, whatever the tenor of the class, especially in large first year classes]), then a student might do well to add a brief addendum paragraph following the paragraph of black letter analysis. (Not necessarily for every issue analyzed, but for a few, and where appropriate.) Label this paragraph “Policy aspects.” (Underline the label or put it in boldface!) Add some thoughts respecting the larger societal implications of the issue and its resolution. (Bound to impress!)

Section Five, Chapter 3

Why case method instruction cannot impart lawyerlike thinking; a path to improvement and advantage

As I trust has been illustrated, close, painstaking attention to detail characterizes the mindset of the skilled, practicing attorney. Not random, intellectualizing, willy-nilly attention to *some* details, but attention to *all* details. Moreover, with a focus, a purpose -- to assist the client's case, to assist the client in achieving an objective.

Indeed, concern for the client best motivates close attention to details of law and fact. (Also unwillingness to lose, and recognition that the attorney on the opposite side is also paying close attention to detail, and will prevail if one does not do the same.)

The experience of an actual case with an actual client, with serious consequences should one lose, provides an urgency that fuels exasperatingly close attention to detail. At least it should. Such is not even closely approximated in the academic precinct of a classroom of Emperor Law School.

Reading and discussing cases is too removed, too abstract an exercise. It doesn't begin to impress the importance of meticulously poring over nuances of law and fact in order to gain advantage for a client. This is particularly so, given that professors of Emperor Law School for the most part banish "lawyer" and "attorney" from their classrooms.

In a nutshell, this is why the precise how and what of lawyerlike analysis cannot come across via case method instruction. As often suggested, that some few students exhibit an approximation of the lawyering mindset early on is likely not the product of case method instruction, but of instruction *prior* to law school.

Can lawyerlike thinking be inculcated absent the motivation of assisting a client?

My considerable experience says "Yes!" Certainly, something approximating the analytic mindset of a practicing attorney can be imparted, apart from its further evolution in the process of assisting actual clients. The reason is that once students are properly introduced to the exacting intellectual game inherent in lawyerlike analysis, interest and momentum in developing the skill naturally takes hold.

There is a reason that even in their eighties some lawyers enjoy going to the office to work on cases. The lawyering art, properly understood and practiced, is an engrossing, high-level, intellectually engaging, enjoyable game!

No question but, in introducing students to the lawyering art, it would help to have actual clients. Law students typically learn more about being lawyers, as well as find greater enjoyment and satisfaction from extracurricular clinical activities, as opposed to passively sitting in class. The obvious reason is that hands-on representation of clients is the best teacher.

Many law schools have instructive prisoners rights, legal aid, and community assistance initiatives. The DNA Innocence Project at Benjamin Cardozo Yeshiva Law School in New York City has been mentioned. A student organization at Tulane University Law School has successfully challenged threats to the environment by oil companies and refineries along the Gulf Coast.

However, again it may be noted that such "extracurriculars" carry far less weight in the minds of professors and prospective employers than grades.

Absent actual clients, play acting can help. I admonish students to, "imagine you are the lawyer for party

X.” I suggest students pretend the client -- a party in a conflict pairing¹ -- is real. “Care about your client,” I urge. “Think about the law, about the facts! What can be done to help the client? Is there another argument, another legal strategy suggested by the (relevant) facts?”

Of course, then assume the role of attorney for the opposing side (of a conflict pairing). In this way -- active role playing, party versus party, with competing objectives -- analysis becomes more meaningful. Very quickly, much as in an actual case, the (student) mind is ratcheted via give and take, argument and counterargument, down to elements, even sub-elements of legal rules, and down to more nuanced interpretation of facts.

A level of detailed, incremental thinking evolves that is never glimpsed or even hinted at when mulling appellate opinions in a law school classroom.

For example, because there is great likelihood of residents being home, and because night adds a dimension of alarm (policy!), burglary at night is a more serious degree of crime than burglary during the day. However, when does day become night? Suppose weather bureau records state that at the time of a burglary, “dusk had fallen.” Does “dusk” imply darkness, and therefore night? Perhaps a witness has testified that the home, when burglarized, was “still bathed in the reflected glow of the sun that had just disappeared below the horizon.” Does this enable an argument that it was still “day?” Does it matter if only the front of the house was bathed in this glow, but the rear, indeed, most of the house was in darkening light?

Analysis becomes intellectually engaging. It becomes fun! However, as noted, cases briefed in Emperor Law School are appellate. Therefore, such parsing of facts is non-existent. Only interpretations of law and its application to “settled facts” is discussed. (I.e., facts not in dispute.)

Case method instruction is therefore lacking as a vehicle for instructing lawyerlike thinking. It bears repeating that the words “lawyer” and “attorney” are rarely heard in a law school classroom.

An improvement (upon case method instruction) that points the way to advantage

There is no substitute for the motivational impetus of a real client with real problems in prompting close, nitpicking, analytical thought. Perhaps instruction can be introduced that will do a better job of pulling law students out of the ivory tower and an academic mindset. Perhaps more of what a lawyer is and what she seeks to accomplish for a client can be introduced in classrooms of Emperor Law School.

As noted, pretending to be a lawyer, pretending to have a client would surely help. Perhaps the words “lawyer” and “attorney” can become a normal part of discussion in law school classrooms.

Rather than an altogether academic starting point, such as, “Let’s examine the facts, issues, rules, holding, rationale, etc. of such-and-such case,” the starting point in a classroom might be, “Let’s imagine we are lawyers, and X is the client.” Using the case as grist, the discussion might proceed along the following lines: “What is it the moving party in the case wants?,” “What legal precepts were advanced in achieving this objective?,” “Establishment of what aspects of these precepts seems to be problematic?,” “What facts are pivotal?,” “Would additional facts be helpful in arriving at a resolution?,” “If so, what?”

We’ll assume that students have been given a proper grounding in how to analyze as lawyers. Now a professor can alter facts, introduce what ifs to a knowing, engaged audience.

Students enter law school eager to become lawyers. The goal of the vast majority is not to become academics. (Law professors!) Weeks, months into the first term they have no sense that they are becoming lawyers. They read and dissect law cases, to be sure. However, the sense of what lawyers do, being a lawyer, serving a client is altogether lacking.

As noted previously in a footnote, every fall at Washington University School of Law there is a “negotiations competition” for first years. I know, because I try to avoid scheduling a live program in St. Louis the same weekend. Students get very excited about this competition. If they are not themselves in suits acting as lawyers, they flock to watch competing classmates in the role of lawyers.

I am aware of no other activity in all of the over 200 other American law schools that puts first term 1Ls in the role of lawyer. Typically, first years must await a “moot court” appellate advocacy competition in the spring for their first opportunity to don suits and act as lawyers. All research and write an appellate brief. However, only a small percentage participate before judges in the oral argument phase of the competition.²

Until at least second semester, progression toward the goal of becoming a lawyer consists solely of the abstract, academic, quickly boring exercise of reading and dissecting cases. Such an approach can only minimally inculcate lawyerlike thinking. The dream, the actualization of becoming a lawyer remains deferred, distant.

Opportunity for improvement on case method instruction is great. As a consequence, to repeat the familiar refrain, opportunity for taking advantage of the *status quo* is also great.

* * * *

1. Introduced in the 19 pairing exam exercise of the preceding section, conflict pairing means the pairing of opposing litigants in a fact pattern (with competing objectives). The nature and role of conflict pairings in the unique LEEWS approach to identifying issues is further explored in upcoming Chapter 5 of this section (on the eureka moment that led to LEEWS), also Chapter 6 (detailed description of LEEWS).

2. Researching and writing an appellate brief is required of all 1Ls as part of a (typical) one-hour credit, research and writing class. Participation in the oral advocacy competition is elective and non credit. “Moot court” is a student-run, extracurricular activity. The competition is organized and conducted by upperclass members of a “moot court board” (of directors), composed of winners and finalists from previous years competitions. A professor or, possibly, a local attorney provides loose oversight and guidance.

Winning a moot court competition is a signal honor. Winners may advance to regional, then national competition rounds against competitors from other law schools, much as a debate competition in high school or college. To prospective employers, winning or being a finalist in a moot court competition is a definite plus, as is winning the mock trial competition. However, grades remain the top credential in Emperor Law School. Membership on Law Review, normally based largely on grades, remains the more lasting, significant qualification in the eyes of prospective employers.

The likely reasoning is that advocacy skills can be taught. However, not inner genius, aptitude for the law, The Right Stuff. As has been oft noted and discussed, such is the influence of exams and grades, and especially the pernicious influence of myths respecting what is required to exhibit mastery on essay exercises.

Section Five, Chapter 4

The conventional wisdom (CW) of exam writing and preparation (It isn't enough!)

As previously noted, as long ago as the fall of 1969 when your author entered law school, recently deceased but then Harvard law professor (later visiting NYU law professor), Derrick Bell, Jr., took it upon himself to compile advice on how to prepare for and write law school exams.¹

At the time all law school exams were strictly essay.² Over the many years since, with the notable exception of your author's program, and now this book, books, articles, syllabi of law professors, competitor workshops, etc., all purporting to offer advice on this subject, have added little to what is contained in Professor Bell's several page handout.

Therefore, adding and noting additions from other sources (as I have at the LEEWS website and in successive editions of the LEEWS *Primer*), I shall reproduce that memo. It constitutes what I term the "conventional wisdom" (CW) of law essay exam writing and preparation.

I am sure that when I was given the Bell memo (by an officer of Yale BLSA -- Black Law Student Association), I was grateful to receive it. That I possess it to this day, as noted, highlighted in yellow with blue markings, indicates as much. However, I do not recall dedicating myself to its prescriptions. As is true of all law students, I was busy. Moreover, I probably reckoned I was good at taking tests. The Bell memo seemed merely to articulate what seemed obvious. It did not set forth a plan of attack that needed practicing.

There are certainly two things one may glean from Professor Bell's memo. First, insight into what an experienced professor at a top law school in 1969 looked for in an exam response. Second, what that professor had consistently found to be lacking on the part of the best and brightest -- his Harvard students! I believe it confirms the description provided herein of what is sought in an exam response, while adding cosmetic requirements. (E.g., "paragraph frequently," "avoid abbreviations.")

In the main Professor Bell's advice, indeed, CW in general is helpful. It is not incorrect. (Unless, as I have noted I tell my students, "It contradicts anything I tell you!") However, as is the case with all of CW, which has been around for many decades, it does not go nearly far enough. It is very much the *what* to do. It falls far short on the *how*, exactly, to do what it advises. It doesn't come close to being the precise, comprehensive science that is LEEWS.

The problem with CW ("*GTM*," for example)

As suggested, I did not keep Professor Bell's memo close while studying. My performance on exams clearly indicated I had not digested its advice. However, in retrospect it is doubtful that careful examination of Professor Bell's memo and religious adherence to its advice would have made much of a difference.

As noted, the problem with the memo, as with CW in general, is it describes *what* professors expect, and admirably. It describes *what* a law student should do. However, it does not adequately, practically instruct *how*, *exactly*, to implement its prescriptions.

For example, the popular book, *Getting to Maybe (GTM)*, written in 1999 by two law professors, both Harvard Law graduates, extols holding the conclusion in abeyance when analyzing issues, while pursuing various "forks" of inquiry. Appropriately terming its instruction (mere) "test-taking tips," *GTM* counsels that analysis should "argue both sides" [of issues] (good, good!), exploring "ambiguities" and "forks" lurking in fact patterns. *GTM* advocates searching out, exploiting, indeed, reveling in the ambiguity hidden

in exam “questions” [sic!] as being the key to doing well. However, when it comes to how, exactly, this may be accomplished, instruction gets murky.

GTM defines “issues” loosely (confusingly) as “meaning different things in different contexts,” but generally occurring where one finds “exam forks” (p. 21). These exam forks, coincident with issues/topics where arguments can and should be pursued in different directions, are then variously described and distinguished as “twin,” “linked,” reciprocal,” concurrent,” “proliferating,” and “hidden.” (pp. 87-102)

Hm-m!

We can readily understand and appreciate the thrust of *GTM*’s advice -- show the back-and-forth thought process of a lawyer mulling an issue. Don’t concern oneself with arriving at a conclusion, so much as showing the professor an inquiring thought process en route.

The problem is that amid advocacy of traversing various “forks” that might be encountered (while holding the conclusion in abeyance), nowhere is a precise *how* of doing so set forth. When it comes to practicalities of *how, exactly*, to structure and write the exam response, *GTM* falls back on IRAC and the same old, shopworn, ineffective CW bromides.

It is all well and good to instruct that one should “spot” issues, or “analyze as a lawyer,” but precisely how?! What, exactly, is “analysis,” as contemplated in a lawyering context? How, exactly, does one present analysis suggested by the “A” of IRAC, and concisely? What, exactly, is an “issue?” How, exactly, does one go about systematically identifying (“spotting”) issues in dense, confusing fact patterns, typically under severe time pressure?

Absent the how of implementing its generalities, CW is only minimally helpful. Minutes into an essay exercise students find themselves at sea. They have no precise plan of attack. Confidence quickly ebbs. CW skirts the edges of the most critical, necessary skill -- analysis. It doesn’t instruct how to perform it. A student has no idea how to implement IRAC.

Notably, CW instructs conventional briefing. It never challenges it. It accepts the passive, academic posturing of case method instruction with nary a questionmark.

In sum, we shall see that CW is but a handmaiden to an instructional approach that presumes innate abilities are required to master law essay exams. Accordingly, it has never been effective in enabling the great majority of law students to achieve results commensurate with effort and ability.

The (likely) reason CW offers so little *how* respecting writing exams

As noted, belief in Emperor Law School in The Right Stuff, that lawyering aptitude is something one either has or does not is near universal. Therefore, as suggested, a prevalent, possibly subconscious assumption and perspective that merely the *what* of what needs doing need be described would naturally follow.

In other words, if one has The Right Stuff, the how of implementing CW will manifest itself. Masterful exam writing will happen. (As it did for professors and others.) If one lacks The Right Stuff, the game is over. Nothing can be instructed that will make up for ... lack of what it takes to be an able legal problem solver/thinker, a masterful taker of law essay exams.

Belief in innate aptitude as a prerequisite for exam success has translated into a corresponding pessimism respecting the abilities of all but a special few in any group of law students. Even at YHS, where nearly all students have stellar LSAT scores and college GPAs, the presumption is that most will be lacking when it comes to writing masterful exams.

The point has been made that belief in innate ability, The Right Stuff as a prerequisite for doing well on exams serves as cover, an excuse for not providing adequate instruction. It likely has also stymied serious efforts in Emperor Law School to reduce law exam writing and preparation to a teachable science. Your author is certainly aware of no such effort.³

Given the attractive mystique, the extreme self-congratulatory aspect of “innate genius” and The Right Stuff for those deemed possessed of such attributes -- those who get rare A’s, including most law professors! --, there is also, naturally, a likely resistance, unconscious or no, to discovering anything that might seriously challenge the *status quo*.

Enter the sea change, a revolutionary breakthrough

LEEWS runs roughshod through such barriers. LEEWS dispels once and for all the mystique and myth of innate aptitude, genius for the law, The Right Stuff. LEEWS is precisely the comprehensive science of preparing for and writing law essay exams heretofore undiscovered and not believed to exist. For over 30 years LEEWS has proven what common sense should tell us -- lawyers are made, not born!

Some, indeed, will eventually demonstrate more aptitude for the legal profession than others. However, such aptitude will be a reflection not merely of intelligence, but of desire and effort. Can anyone seriously contend that the final parameters of such aptitude can be measured or demonstrated after four months, or a year of law school? It certainly cannot be measured by exams for which students are inadequately prepared.

As is the case with many revolutionary breakthroughs, LEEWS evolved somewhat fortuitously. Its evolution was much aided by the unusual circumstance of your author revisiting the vexing problem of essay exams while actually practicing law.

What distinguishes LEEWS from all CW is essentially twofold. First, LEEWS addresses in depth the *how* of implementing Professor Bell’s advice. Second, LEEWS goes much much farther and deeper into the problem and how to solve it than the Bell advice, and all other CW.

Herewith the CW of law exam writing and preparation. Commentary and additions to Professor Bell’s advice is presented in brackets.

CW of law exam writing/preparation (The Bell memo)

Respecting preparation for the [essay] exam:

“Know the subject area thoroughly.”

[I.e., study the law diligently. That’s it! This terse message was/is the sum of Professor Bell’s advice respecting preparation. It is pretty much the sum of advice all professors and others have to offer in this regard -- “Brief every case, attend class, know the law.” In addition, “Prepare a course outline. Review old exams.”

Yet again, the underlying assumption in not conceiving and offering more precise advice seems to be that a more scientific approach to preparing for exams, the same as writing exams, cannot be instructed. Ability is innate and will manifest itself. Merely point students to the law. Tell them to “study it, learn it.” That is enough for someone with The Right Stuff.

Of course, to an academic learner, therefore virtually all law students, studying, learning, “knowing” the law means “memorize the law!” Certainly, that was your author’s take as a law student. Yet so much more is needed.]

Respecting actual writing [now typing] of the exam:

“There is no single correct way to answer a law essay exam. If your answer demonstrates knowledge of the law and sound reasoning ability, it will favorably impress the grader.

In form a good answer will be the following: easy to read; clearly expressed; well organized. A poor answer, by contrast, will: be vague, rambling, and disorganized; miss major issues; give erroneous law on basic points; resolve issues by merely stating conclusions unsupported by law [and fact].

Be aware of the time limits as you begin your answer.

Spend no less than 1/3 of the allotted time, and preferably 1/2 of the time reading the question [sic] and organizing.

Read the question twice; note all issues on scratch paper; note what rules are applicable to your facts; and how you will use them; arrange a logical sequence for presenting your discussion. In this regard a chronological sequence may be effective, unless the rights of several parties must be given.

Make use of all the facts. Rarely do the facts contain red herrings; don't assume facts (i.e., don't assume 'agreement' means 'contract'); divide the discussion into separate issues, and cover one at a time.”

IRAC (more to the point -- CIRAC)

Professor Bell continues, introducing the standard “IRAC” component of all CW. (As in “follow IRAC,” “IRAC the exam.”) More to the point, he introduces “CIRAC,” a variation of IRAC. He says:

“For each major issue:

[C] -- Begin with a statement of conclusion; [I] -- State the specific legal issue involved; [R] -- State the legal rules applicable to the factual issues; [A] -- Set forth your reasoning, demonstrating why, in the context of the given facts, a particular rule or rules should be determinant of the legal issue. If there is another view, indicate your recognition of it, and why you reject it; [C] -- resolve the issue.

[In addition] Write clearly [problem solved by typing!]; use short sentences for clarity; paragraph frequently. This will make your answer easier to read; avoid expressions like 'I feel,' or 'I believe,' which may be substitutes for reasons. Use instead a third person expression, such as 'plaintiff may contend;' avoid dogmatic expressions such as 'certainly' and 'undoubtedly.' The point in most cases will be arguable; avoid abbreviations. At least limit them to those in common usage.”

Additional CW

To the foregoing compilation, law professors and others further instruct, advise, advocate as follows:

They distribute model “A” responses to old exams and recommend that students respond in similar fashion. (Monkey see, and monkey [with The Right Stuff] will do?) They emphasize that the point is not to demonstrate that rules of law have been memorized, but that issues can be “spotted” and resolved.

They insist that bald statements of law and conclusions are not wanted. Rather, what is wanted is “lawyerlike” [Aha!] analysis of issues. They instruct that the conclusion (who or what prevails) is unimportant. Far more

important are steps of analysis in arriving at the conclusion.

It is further advised by many professors and most other sources of exam writing instruction that, as Professor Bell suggests, up to 1/2 of time allotted for a hypothetical be spent “planning” the response. To ensure that students spend time planning the response, some professors won’t permit downloading of software for responding for the first hour of an exam. (Before the advent of computerized responses, they withheld distributing “bluebooks.”)

[Note. LEEWS advises that no more than 1/3 of allotted time be devoted to planning. 1/2 the allotted time is invariably too long. All students who have taken exams agree that 1/2 the time spent planning doesn’t leave enough time to execute the response. Moreover, planning -- performing LEEWS steps of approach -- should proceed in no more than 10-15 minutes segments, so as to keep a lid on growing nervousness.

Thus, if allotted time for an exercise is 60 minutes, the 1/3 segment for planning -- 20 minutes -- should be divided into two ten minute segments. If a 90 minute exercise, therefore 30 minutes to plan, break the 30 minutes into two fifteen minute, or 2 1/2 twelve minute, or three ten minute planning segments. “Plan, write! Plan, write! In short bursts.” Always!]

In order to promote concision, professors sometimes impose word or other limits on the permitted length of response to a given hypothetical. This will be set forth along with time allocations in aforementioned “cover instructions.”

Other, rather obvious helpful hints are offered, such as “bring earplugs, a watch, energy snacks” to the exam. I have advised in addition bringing a hat to pull down about the eyes to avoid the distracting glare of computer screens. (Tip of the cap to my lawyer daughter, who shared her more recent law exam writing experience with me.)

Years ago, before the advent of typing responses into software, a competitor advocated handwriting exercises in preparation for exams. (Literally!) In that computer systems may fail, one should always be prepared to write out responses longhand. Here, neatness and legibility will count. Such minutiae is addressed in the LEEWS *Primer* (manual).

Where the “C” is stated -- an example of LEEWS versus CW

Not a few law professors (including Bell) instruct that the statement of conclusion be introduced prior to analysis of an issue -- so-called “CIRAC” format. In doing so, they mislead students by giving undue emphasis to the conclusion.

Such an instruction may stem from what a professor recalls from his bar exam preparation. There are definite correct (or incorrect) conclusions to bar essay exercises. Bar graders want to see the conclusion at the outset of analysis. Sometimes the professor (or school) wants to prep students for the bar exam.

Whatever the reason, such advice compromises objectivity in analysis. If a student states or even thinks about a conclusion before completing analysis, reasoning will naturally tend toward attempting to justify that conclusion. It will likely be slanted, unbalanced, lacking in objectivity.

Advice, or an instruction to state the conclusion at the outset is always bad advice!

So as not to compromise analysis, LEEWS instructs that a conclusion should not be thought about or entertained in any fashion prior to completing analysis of an issue. If one has a conclusion in mind (often the case following Step Three), “Set it aside!” Certainly, “Do not write or type it!”

However, what if a professor wants a statement of conclusion prior to analysis? What if the professor specifically instructs, as some do, “State your conclusion at the outset?” (CIRAC.) The answer -- “Literally leave 2-3 lines of blank space where the conclusion would be entered, complete analysis, come back and insert the conclusion.” Likewise on a bar exam.

Such reflects the close thought given over many years to formulating instruction that is both precise, yet flexible enough to be applied to *any and all* law essay exams. Such reflects the difference between a carefully thought out science -- LEEWS, and the loosely considered, sometimes misleading, incorrect generalities of CW.

How CW performs a disservice (but creates an opportunity!)

No question but studying, digesting the foregoing CW will give a 1L a comforting sense that, “If I follow this advice, along with studying hard, learning the law, I’ll be well within the ballpark of performing adequately, of performing to my capabilities.”

Your author perhaps had such a sense over forty years ago, if not sharply defined. And it was a mirage, an illusion.

Why on earth would a law student, having been given such seeming thorough advice by a law professor (a Harvard law professor no less), imagine there is anything more to be known about writing and preparing for a law exam? Particularly when one’s professors affirm that “IRAC is all you need,” and similar assurances? Particularly when you are smart, hard working, and you have gotten A’s your entire academic life?

Surely, law professors, law school administrators know all there is to know about the subject. Surely, given all the money that is being borrowed for the privilege of attending law school, one would not be steered wrong by professors and administrators.

Moreover, one can readily appreciate the view that anything more than CW is mere handholding -- coddling! Some CW seems very precise respecting how to execute an exam response. (E.g., “paragraph frequently;” “support conclusions;” “avoid expressions such as ‘obviously,’ and ‘I feel.’”) If, given all this advice, a student cannot peruse a fact pattern and identify issues, and further analyze issues “as a lawyer,” in accordance with precepts digested during a semester of reading and examining legal decisions, then, perhaps, one indeed doesn’t have it -- the aptitude for being a good lawyer. Perhaps one indeed lacks The Right Stuff!

The unfortunate, pervasive truth throughout Emperor Law School is that law students, almost without exception and universally, accept this reasoning. Even at YHS, where supposed aptitude for the law, as measured by LSAT scores, is off the charts, and students have performed with excellence their entire lives, the verdict of mediocrity, lack of aptitude, lack of The Right Stuff is accepted following the first set of exams. Your author accepted such reasoning!

As noted numerous times, the great majority of 1Ls at YHS and elsewhere perform in lackluster fashion on the first set of exams.⁴ Those very few who exhibit a vestige of competence (35, 45 out of 100?!), are anointed “geniuses of the law,” possessed of The Right Stuff. They make law review and obtain prestigious judicial clerkships. Some eventually become ... law professors!

However, recall the article referenced in the *Introduction* herein (footnote 10, by a law professor, no less) finding that such persons do not necessarily become successful, influential lawyers!⁵

As noted, the eighty percent plus of 1Ls who don’t get a single “A” grade, including the great majority at YHS, despite being life-long top academic performers, no longer believe themselves capable of mastering law essay exams. They no longer believe themselves capable of A’s, at least not in exam-based courses.

Mere months into budding legal careers, they accept that they were not born to be great lawyers and legal minds after all.

The thesis of this book, of course, is that such a verdict of widespread ineptitude is not only tragic, but nonsense. I have proven for over 30 years that such a self-defeating, self-faulting view is a fallacy. That the blame in the minds of law professors, law school administrators, indeed, the legal profession at large is laid at the feet of students is something far worse.

In short, CW performs the disservice of sucking the air from the sphere of what can and needs to be known in order to perform according to one's abilities. Indeed, CW has long prevented the search for something new and better. CW lulls students. It provides a false sense of reassurance as 1L lemmings race toward the cliff. Simultaneously, it provides cover for wholly ineffective instruction.

In accomplishing the above, however, CW also creates an opportunity. It enhances the advantage of any who pierce the sham and acquire necessary additional instruction that indeed exists.

CW is not enough, not even close

Faced with fact patterns such as the ones the reader has been presented with (and most any others, some far more complex), an attempt under severe time pressure to apply the foregoing CW precepts, however well digested, will result in far from a polished, lawyerlike effort. The exercise is too different from past experience. CW leaves too many gaps and unanswered questions.

The many pitfalls that have been noted will come into play. Any one -- haphazard issue "spotting"; inability to analyze "as a lawyer," and/or present analysis concisely; concern with "good writing;" inadequate knowledge of law, etc. -- will derail the best intentions. Confusion, doubt, anxiety quickly take hold.

The only difference among students respecting extent to which they stumble will be one of degree. 25, 35, even 45 or 55 points out of a possible 100 does not reflect a lack on the part of very smart and able students. It represents a failure of teaching!

So what more is possible?

The following chapter introduces more on the breakthrough insight that led to the development of LEEWS. The lengthy chapter following describes in depth aspects of the science that is LEEWS.

CW is clearly false medicine, quackery, a witch doctor's brew. However, whether or not CW is sufficient to enable students to succeed has become, as is said in the law, "moot." CW is problematic only in that it distracts from the cure. It is problematic only for those blinded by its false promise. For those who are not (as a result of this book?), it facilitates an opportunity for advantage.

The present, hopeful reality is that much more insight respecting the *how* of implementing, indeed, far surpassing CW now exists. Those who acquire such insight will have a decided advantage. The sooner it is acquired, the better!

* * * *

1. Footnote 5, Section Four, Chapter 1, *supra*.

2. As noted elsewhere, in 1978 the so-called "multistate" multiple choice component was introduced to many state bar exams. Use of multiple choice questions on bar exams legitimized multiple choice, short answer, even true/false components on law school exams. Previous to 1978 such exercises were virtually unheard of in Emperor Law School. Some few (lower tier) law schools moved almost entirely to a multiple choice format, frequently using questions

from old multistate bar exam exercises. However, when their students faltered on bar essays, they moved back to a combination essay/multiple choice format.

Such is the influence bar exams exercise over exam formats in Emperor Law School.

3. Recall the conclusion, mentioned in a previous footnote, of now deceased, long time University of Kansas School of Law professor, Phillip C. Kissam, following an exhaustive (70 page) examination of "Law School Examinations," that, *inter alia*, "the exercise of examination productivity [professors speak for doing well on exams], especially in view of the speed required [i.e., time pressure], appears to involve a significant degree of natural talent [i.e., The Right Stuff]." (Vanderbilt Law Review, Vol 42, No. 2 [March, 1989], at p. 459.)

There is no mention, recognition, whiff of anything suggesting the possibility of a science of law exam writing and preparation. Indeed, Professor Kissam's conclusion discounts such a possibility.

4. Confusion/ineptness of YHS law students. Although pass/fail and variations thereon has replaced traditional grading at YHS, at least in first year, YHS students know whether they had command of an essay exam, or, as is normally the case, not. As I hope I have established, the bar in terms of expectations regarding exam performance in Emperor Law School is low. It is low even at YHS. Your author, for example, performed poorly despite a high LSAT. I knew I was relatively clueless and floundering. Yet I was hardly in the lower tier, gradewise.

The hundreds of Harvard 1Ls I have instructed over the years, and a lesser number of Stanford 1Ls, have been just as confused as students from lower tier schools. However, they seem to pick up on analysis instruction a bit faster. (I have instructed very few Yale 1Ls, as pass/fail grading, only introduced at HS in 2008, has long made Yale students relatively impervious to my advertising.)

In over 30 years I have never had a refund request from a Yale, Harvard, Stanford, U. Chicago, Columbia, NYU, U. Penn, Northwestern, UVA, or other similar top tier law student! Show a smart student how to play the lawyering game on exams, and they compete very well indeed. The aptitude is surely there. This is yet more proof of what is obvious to any practicing lawyer. Good, even great lawyers are made, not born!

5. A more complete discussion of the January, 2012 article, "Is a great lawyer born or made?," by Professor William D. Henderson of Indiana/Purdue University Law School, is set forth in the *Introduction*, footnote 10, *supra*. However, a couple of his observations and findings bear repeating. Criticizing "the propensity of lawyers and law professors to over generalize from academic performance," Professor Henderson dismisses the notion that "a lawyer's skill set is determined primarily by innate ability -- you either have enough or you don't." He finds this "does not align very well with the underlying facts." Rather, concurring with arguments your author has made, he posits:

"There are so many facets to effective lawyering that are never touched on during law school -- interpersonal skills, team work, client communication, resilience, leadership, the ability to follow and many others -- and so many years of focused effort ahead just to obtain the requisite technical skills and knowledge to become a true expert." [i.e., skilled lawyer in one's field.]

Section Five, Chapter 5

A breakthrough insight leads to LEEWS

As noted, an article about my preparation for and passage of the New York bar exam, written early in my legal career, resulted in my being drafted into a tutoring program sponsored by the Bar Association of New York City. The program was *pro bono*. (I did it for free.) I was charged with assisting recent minority group law school graduates cope with the essay portion of the upcoming (July) New York State bar exam.¹

I participated in this program for four or five summers, while simultaneously progressing in my legal career -- initially as a Brooklyn assistant DA (criminal law practice), later as an assistant United States attorney, civil side.

I was in no wise an expert on law exam writing. As a Yale Law grad, I was probably less knowledgeable than most respecting the CW of exam writing. For example, I was unfamiliar with the expression “IRAC.” (The Bell memo spells out the four IRAC elements. However, I was unfamiliar with the acronym.) Nevertheless, my article, which described my study schedule, thought process, and other efforts leading to a successful bar effort, made me as expert as any.

I may note that my bar exam prep course gave me the first definite structure for presenting analysis of an issue I had received since beginning law school.² Looking back, this format was CIRA(C), noted in the preceding chapter. (IRAC, except the conclusion is stated at the outset. If stated at both beginning and end = CIRAC.) As noted, I learned to leave several spaces blank, then come back and insert the conclusion after completing analysis.³

Search for a “handle”

The six week summer program paralleled students’ formal bar preparation course. It consisted of a weekly group session, at which some 40 students would hear a lecture on some aspect of the bar exam. They then took two timed practice essay exercises. Weekly, in my office at work (in Brooklyn) or an office provided for me at New York University (in lower Manhattan), I met individually with my 6-8 tutees to go over their essay responses, and offer criticism and advice.

I read articles about law exam writing. I soon brought myself up to speed on the CW. Nevertheless, nearly four years into my extracurricular tutoring gig, I found myself still casting about. I wanted to provide more practical guidance than merely pointing out clues to “spotting” issues lurking in fact patterns, or admonishing not to overlook possible countering arguments that might be drawn from facts.

I sought to give guidance in the form of something that would provide a better handle on the situation. I sought something, ... Well, I wasn’t sure exactly what I was seeking. It just seemed there had to be a better approach than “dive in and spot issues.” I sought something more precise than “read the facts carefully” and “spot all issues.”

I did not have the view that there was a denominator common to all essay exercises, a practical, universal template. I was not looking for such a denominator. I merely fretted over not being able to offer more precise direction.

Essay exercises continued to confuse and intimidate my tutees. (And they were law school graduates!) However, eventually, largely as a result of my work as a lawyer, I experienced a breakthrough insight that revealed a handle of sorts. This insight led, eventually, to the disciplined, programmatic LEEWS issue identification approach (“The Blender”). Other insights followed respecting instruction of analysis, concise presentation of analysis, an alternative to conventional briefing, course outlining, etc.

The result was to make addressing and writing law essay exams -- any such exams! -- a predicable, manageable exercise. However, it all began with an insight on a perfect summer afternoon, just off Washington Square in Greenwich Village in Manhattan.

I did not realize it at the time, but this insight would launch my future career. All I knew, initially, was that what I gleaned would have made a big difference for me as a law student. I got very excited.

Experience as an attorney provides the key.

As an appellate attorney in the DA's office, I was constantly confronting fact patterns in which I had to identify and analyze issues. Every day I explored fact patterns and issues needing resolution.

Four years into practice, in 1980, I made the unusual move from criminal prosecutor in a local DA's office (albeit an office of over 300 attorneys) to the civil division of the nearby United States Attorney's office for the Eastern District of New York (EDNY).⁴ The EDNY includes Brooklyn, Queens, Long Island, Westchester County, and Staten Island. In my new capacity as an assistant United States attorney (AUSA), I handled a full plate of civil litigation matters.

It may be noted that when the federal government (or any arm/agency thereof, including the armed forces) is sued or wants to initiate suit in a particular locality, the U. S. attorney's office for the state, or portion of a state in question, provides the lawyer or lawyers. (Four districts, four U.S. attorney offices in the state of New York, for example.) All U.S. attorneys' offices operate under the direct authority of the United States Department of Justice and the Attorney General of the United States. They are the local lawyer arms thereof in the various states and United States territories.

We 20 or so AUSAs in the civil division of the EDNY initiated and defended lawsuits and motions involving the INS (immigration and deportation matters), the postal service (tort claims, as when a postal truck hits someone, mail fraud, etc.), HUD (accidents on HUD properties, foreclosures, etc.), IRS tax suits, FAA (as when a bomb threat is made at a security point), VA (defending against malpractice claims), SBA (loan recovery, etc.), DEA, HHS (social security claim suits), FEMA (defending *against* insurance claims!), etc.

There were many more AUSAs in the criminal division upstairs. They addressed mostly drug-related matters. I recall that we overburdened civil division AUSAs regarded the goings on upstairs as so much mere (lesser) criminal practice.⁵

What began to crystalize in my mind after several years wrestling with the problem of essay exercises and how to get a handle on them, was that the practice of law always had to do with conflict. Someone was always aggrieved. Someone was fighting someone else. Someone was suing an agency I was defending. Or the federal government, in the person of one of its agencies, certainly the people of the state of New York when I was a criminal prosecutor, had a beef with someone or some entity. We were suing them.

Initiation of a lawsuit ushers in a prolonged joust of motions, phone calls, letters, (probably not so many e-mails!), depositions of witnesses, discovery (information retrieval from the other side via document requests, interrogatories, depositions, etc.), hearings, settlement discussions, and sometimes a trial.⁶ The trial outcome may be just the start of a long slog of appeals involving more research, motions, etc.

Throughout any legal proceeding there are contests over innumerable intermediate matters, from timing of meetings and information exchanged, to objections respecting discovery and introduction of evidence, to resolution of the ultimate objective(s) sought by either side. Contests at every stage, competing objectives at every stage, some minor, some large. Stakes involved are always of great importance to the contending parties -- considerable sums of money, survival of an enterprise, whether a person can stay in the country or out of jail, who gains custody of children, etc.

Each of us civil division AUSAs had nearly 300 active cases. (Yes, underpaid, overworked, but mostly enjoying the responsibility, the constant action, and the power!) Relevant facts and legal precepts come into play in determining the outcome of the many contests in the course of a single case. Sometimes relevant law is procedural, as when I sought to have a case dismissed as untimely (brought, for example, beyond a two-year statute of limitations), or as being in the wrong venue (i.e., jurisdictional location, and/or court). More often a substantive legal question or issue was on the table, such as whether someone hit by a postal truck can recover under federal tort law, or advertising sent through the mails violates federal law as false or deceptive.

The constant theme, however, was conflict. Legal matters always involved conflict of some sort, which, eventually, often at considerable expense to the parties, was resolved. This conflict always manifested itself in competing parties with, naturally, competing objectives.

It occurred to me that litigation, essentially, is a carefully orchestrated substitute for physical, possibly violent resolution of conflict. It is ritualized warfare of sorts between individuals, companies, states, nations -- parties all!

The central role of conflict in the law

As suggested, the idea of conflict as a common characteristic dawned on me suddenly one lovely, summer afternoon. It burst into my mind as a eureka moment actually, while sitting in my borrowed office at NYU following a tutoring session. I recall fairly floating along West 4th to Broadway to catch the “A” then “F” trains home to the Park Slope section of Brooklyn.

After, literally, several years of fretting (during summer tutoring) over what more could be conveyed to assist with the problem of confusing essays, I had stumbled upon a seeming common characteristic. The practice of law seemed always to have to do with conflict, in particular resolving conflict. Perhaps conflict provided an avenue for understanding and getting a consistent handle on law essay exercises.

In retrospect, I realize that what had happened was precisely what happens when lawyers are confronted with client problems. A conscientious lawyer thinks about the problem and how to solve it. Often, when the matter is routine, a lawyer knows the answer or easily finds it. However, when the problem is new and difficult, the lawyer frets over it, sleeps on it. The problem enters the lawyer’s subconscious, which begins to work on it. Sometimes there is no answer. However, as time goes by and new information is thrown into the hopper, a strategy and solution begins to emerge.

My tutees were ersatz clients. Over time a possible solution to their problem had emerged. The question now became whether a common denominator could be found. Did conflict provide a window or avenue for understanding essay exercises? How could it be applied to make some kind of consistent sense of hypotheticals?

I thought about areas of law less obviously contentious than criminal law and my many lawsuits. What about drafting a will or contract in the calm and quiet of a law office? Was conflict lurking?

The answer is that in drafting a will or contract one anticipates the possibility of conflict and seeks to avoid it. One doesn’t want a bequest contested. One doesn’t want a contract requirement avoided, because the meaning of a clause is subject to differing interpretation. Articles of incorporation and merger are drawn up carefully and in accordance with exacting guidelines and requirements, precisely to avoid confusion, conflict, possible lawsuits down the road.

It occurred to me that the very justification and reason for existence of a system of law, its *raison d’etre* is conflict resolution. Conflict resolution in accordance with societal custom and tradition, as reflected in

rules, laws, ordinances, as opposed to conflict resolution by means of force of arms. What is anathema to a system of law is that one side wins, merely because it is bigger, stronger. Such is certainly the case in America, a nation ruled by law.⁷

What a system of law wants is orderly, (hopefully) just resolution to conflict and differences -- in accordance with rules, statutes, precedents. If there are insufficient rules, laws, legal precedent to guide such a resolution, then draft new rules, laws, treaties.

I noted, as I do to students in my program, that every single case read in a law school classroom involves conflict. Moreover, such conflict implies competing entities. It is always party X versus party Y.

However, what if a question/instruction calls merely for interpretation of a rule? Where's the conflict?

Sometimes an essay exercise calls for evaluation of, say, a statute. Filtering the question through my new conflict-resolution-is-a-constant-in-the-law lens, I reasoned that if there is a law, rule, or ordinance, existing or proposed, someone has to be or was in favor of it, in order for that law, rule, etc. to be proposed and come into being. That law or rule was proposed and came into being because it benefited someone, maybe a governing body or company. At the same time it undoubtedly pinches someone's toes. Someone or something is likely in opposition to the rule or statute, or was.

In other words, one may have to hypothetically conjure a scenario to find a conflict pairing!

Here, at last, was a denominator that possibly might be applied to all essay exercises -- conflict, competing parties. (Competing objectives came a bit later, as I recall.) And judges were normally the arbiters of this conflict. As I am fond of saying to classes, "The first thing a law professor should say is, 'All roads at law lead, potentially, to a courtroom. A courtroom is always a conflict situation!'"

Applying a conflict perspective and lens

I later realized that what I had stumbled upon was a way of viewing the overall legal landscape. Lawyers operate in a world of constant conflict. However, they don't necessarily think, "Conflict is the world I operate in." They realize they have adversaries. Their clients have adversaries. However, they don't filter what they are doing through the perspective, the lens, "There is conflict. There are competing parties." And later -- LEEWS evolution --, "There are competing objectives, and facts and legal strategems, procedural and substantive, relevant to achievement of those objectives."

I invite law students to adopt precisely such a perspective and lens. I insist they do so! I invite lawyers to adopt this perspective and lens. It is a useful catechism for making sense of any legal problem, any new matter that lands on a lawyer's desk. It is a lawyerly perspective and lens. It aids significantly in the transition from abstract, academic thinker to goal-oriented, lawyerly thinker.

Filter any and all legal problems as follows: Who is against whom? What does each side want? What rules, substantive and procedural, might come into play (made relevant by facts) in achieving the competing objectives, in resolving the conflict?

However, such thinking and clarity emerged later. In the summer of 1981 the immediate problem was how to translate my newly discovered, seeming common denominator to a programmatic approach to hypothetical-type essay exercises.

* * * *

1. Minorities and the bar exam. In 1979-82, the New York Bar pass rate for minority law graduates, mostly at the time African American, was in the discouraging 25 percent range. This was not dissimilar to many other states. In Georgia some years earlier, not a single African American among some twenty sitting for that state's bar exam passed.

In writing my article -- *Taking the Bar Exam: My Experience as a Black Law Graduate (New York State Bar Journal, November, 1978; reprinted, Case and Comment, June, 1979)* --, my research into this area, including reviews of articles on the subject and the results of lawsuits brought in Georgia and Pennsylvania, found no indication of prejudice or discrimination being a factor. Rather, self-defeating psychological factors seemed to be at work. Even at Yale and Harvard at the time, passing the bar exam was a concern among African American students. That psychological factors were likely to blame was confirmed by my experience with tutees over several years.

Some among my tutees were the first in their families to attend college. Probably all were the first to attend law school. This was not unusual among minorities at the time. To this day most who attend law school will be the first lawyers in their families. I think most such students are somewhat daunted by the prospect of becoming lawyers. It is a great leap. Students realize the distance that will exist between them, their families, and people they have grown up with.

Respecting my tutees, I think some in small ways resisted going full bore for the goal. The slightest hesitation is enough to foil an attempt at the bar. Given that difficulty of African Americans in passing bar exams was at the time a well known and discussed circumstance, many minorities experience pessimism, albeit sympathetic, from relatives and friends. (I recall some of my relatives letting it be known that they would be understanding, should I, somewhat a family champion, falter.) This, added to one's own self doubts, can trigger defeatist attitudes and behavior. (I may note that the confidence, even arrogance one gains from having attended a prestige college can allay considerable doubt, no matter one's background, especially regarding the prospect of becoming a lawyer, whether first in the family or no. There is a palpable sense of entitlement!)

Thus, some of my tutees seemed to orchestrate excuses for failure that contributed to failure. Several over the years, for example, against my strong counsel, insisted on taking jobs during the 6-8 week prep period preceding the exam. I recall one tutee who insisted on helping a cousin move two days before the exam, when nothing should have interfered with intense preparation. He "had to," he insisted.

My tutees over the years passed the New York bar at roughly the rate all examinees did -- about 75 percent. Those I just described were among the failures. The key to success was simply no-holds-barred, no hesitation, flat-out, nose-to-the-grind hard work in the run-up to the exam. A tutee who called me the evening before the exam in a highly agitated state, and said, "I think I'm ready! I can recreate [on a scratch sheet of paper] ninety-five mnemonics in five minutes," is the paradigm of what is necessary. This woman, not surprisingly, passed. ("Mnemonics" are acronyms created to assist in remembering things, in this case legal precepts. E.g., "BAID" for battery, assault, intentional ... IIED!, damages.)

In hindsight, of course, inadequate instruction during law school in exam writing skills and techniques was a primary factor in my tutees lack of confidence and difficulties. In particular, failure to learn how to "analyze as a lawyer." For the most part, as I had not yet developed LEEWS, this didn't improve all that much under my tutelage. Such instruction as I was able to offer leading up to my breakthrough insight, including merely writing and going over practice essay exercises, instilled greater confidence. I was also a cheerleader. This led to improved performance for most.

Of course, my students would compete with nearly 4,000 others who also had not yet learned to analyze as lawyers. Improved confidence and practice put them at least on a par with that competition.

2. The bar preparation course I chose was offered by the now long defunct, non-profit, New York based Practicing Law Institute (PLI). The reason was simple -- cost! PLI, \$150 in 1977 as I recall, was \$100-200 cheaper than the much more popular and still extant BAR-BRI preparation course, which currently costs \$3,000 or more.

My view respecting bar review courses is that they are necessary. There is a lot of information that needs to be force fed over 6-8 weeks. It probably doesn't much matter which one is taken, so long as one applies oneself diligently to digesting black letter law. If LEEWS has been acquired, particularly The Blender, skill at analysis, and skill at presentation of analysis in concise paragraphs, you will be far ahead of the pack. Passing shouldn't be a problem.

As noted, bar exam prep courses are outrageously expensive. Bar prep is big business! (Following the model of law schools?) My advice is to sign up immediately at the start of law school as a "rep." The job isn't hard. From time to time you man a table, hand out literature, perhaps coordinate (with other reps) a free pizza promotion. My daughter did this, got a free course (BAR-BRI), saved thousands. And passed the Pennsylvania bar. Her husband (Yale Law) passed the New York and New Jersey bars first try, while prepping online from South Africa! (Yes, both took LEEWS. And yes, free of charge.)

3. Conclusion stated at the outset: As I believe I mentioned elsewhere, a law professor once asked me how to get his students to be "less conclusory" in exam responses. I asked where he instructed them to state the conclusion when analyzing issues. "At the beginning," he replied. I said, "There's the problem." He was emphasizing the conclusion. He was abetting the view law students bring from a lifetime of taking tests that the "correct answer" means the outcome. He was abetting students' tendency to want to arrive at a conclusion.

One might think, "Well, duh-h. That's so obvious!" However, not a few law professors give this instruction. The reason is twofold, threefold, actually. First, as noted, many (typically lower tier) law schools want to prep their students

for the bar exam. On the bar the conclusion is normally required to be stated at the outset. (I've noted this, and the importance of bar pass rate as an advertising tool for lower tier law schools.) Second, professors often are simply following what they learned, as your author did, from their bar exam preparation course. However, the third reason is the most telling and instructive respecting a central theme of this book.

This is yet another example of law professors simply not giving much thought to the advice they give students respecting writing exams and thinking "as a lawyer." If the obvious implications of where a conclusion is stated have not been thought through, how much credence can be given other advice casually tossed off by professors? How much credence can be given the case method instructional mode?

Lockstep, smugly self assured, harboring scarcely an inkling of doubt, Emperor Law School, its deans and professor minions, marches blithely forward, offering the same old, same old methodology that has failed students for many decades, and that is justified by the fig leaf of one either has or does not have what it takes to handle exams, be a great lawyer, etc. -- The Right Stuff! And there is little to be added.

This is a conceit that goes unrecognized, because it is too vast to be viewed clearly. There is carping on the edges, but nary a peep of meaningful criticism. Until now!

This is a situation in great need of remedy. It is highly and unnecessarily damaging to countless fragile egos. It is feudal and imperious. It badly and deservedly needs to be taken advantage of!

4. Typically, U.S. attorney offices recruit from major law firms (so-called "BigLaw"). If an aspiring litigator wants high-level (federal court) experience, client contact, etc., lots of it, and soon after law school, a stint in a U.S. attorney's office is recommended. I was able to make the unusual move upward from a local DA office, and from criminal to civil practice, doubtless thanks to my Yale, Rhodes background.

5. Civil v. criminal practice. I recall a case involving a teenager from Long Island who sold illegal quaaludes to an undercover federal agent. Although a dealer, because of his age, lack of prior record, doubtless also owing to his middle class status, the criminal prosecution ended quickly in a plea bargain involving no jail time and probation. The real action was downstairs, where I brought suit to forfeit to the government the new Nissan sports car in which the drugs were sold, which car belonged to the teen's mother.

The public at large generally doesn't know that federal drug laws provide not just for criminal penalties, but also forfeiture to the government of any items used to facilitate criminal drug activity. This includes not just vehicles -- cars, boats, airplanes --, but structures, including buildings and homes, even though the actual owner is someone other than the person arrested. A marina in Miami is chock full of boats of all sizes seized in drug-related activities. A multi-story building on 57th Street in Manhattan is devoted to storage of row after row of dust-covered, expensive vehicles seized and forfeited in drug-related activity. If not made use of by government agencies, such vehicles are sold at public auction.

Forfeiture of a vehicle requires a lawsuit against that vehicle. I filed a summons and complaint -- *United States of America v. One [1981?] Nissan 280Z Automobile, VIN No.[?]*. The car was worth nearly \$20,000, a considerable sum at the time. The irate mother hired an attorney, and fought the forfeiture vigorously, but unsuccessfully. Our impression in the civil division was that people fight harder for their money than their freedom.

6. Trials. I may note that in three years as an AUSA, I never had an actual trial. Hearings on motions, yes; cases moving toward trial, yes; a full-blown trial, no. To this day I am persuaded, as are many attorneys, that a trial is a failure of communication. An attorney's job is to persuade the opponent via motion practice, researched precedent and argument, etc. of the correctness of your position and the infirmity of his, such that compromise (settlement), even abandonment is the right thing to do. (There is also attrition -- prolonging a case, increasing expense to the point that the lawsuit isn't worth it for the other side. This is an option for well-funded clients with an expectation of likely losing, and for whom the cost of attrition is far outweighed by the cost of losing. Such is only somewhat an option for a government attorney.)

In order to whittle down the caseload, especially to avoid expensive, time-consuming trials, the judge to whom a case is assigned will aid, even take the initiative in making a settlement possible. (A plea bargain in a criminal context.) An experienced lawyer will seek over time to enlist a judge's help in putting pressure on the opposing side.

The cases I did not win via hearing and motion practice (e.g., motion for summary judgment -- there are no factual, only legal issues, and you move for judgment on the law), I settled, usually on terms that pleased my higher ups (who had to sign off on any settlement). I managed to get many opponents to abandon their cases by persuading them, via friendly pointing out of law and/or facts that must doom their chances, and/or cajoling (e.g., staging a blow-up during a deposition), apologizing, and once again pursuing the same friendly pointing out of infirmities. In effect, I assisted opposing counsel in selling his client on the idea that the case, which at first blush seemed so promising, was going nowhere, or had little prospect of success. (I may note that all opposing counsel I faced at the time -- no exceptions! -- were male.)

7. No question but bigger and stronger will convey an advantage in a legal context, if such translates to wealthier. Unfair advantage conveyed by money is an ongoing problematic theme in American justice. Nevertheless, the alternative -- corruption and/or brute force as the determining factor, which is the case in so much of the world -- is far worse.

Section Five, Chapter 6

LEEWS described -- overview, perspective

Introduction

Having assayed to debunk an edifice as respected and entrenched as Emperor Law School, I feel it behooves me to offer more than a mere glimpse and promise of a different approach. I need to provide actual grist that the reader, current law students, and especially law professors, lawyers, and others who may be interested can ponder, dissect, criticize, assail, approve, should they be inclined. The scrutiny is welcome.

Over thirty years, including eight editions of the 136 page “*Primer*” or manual that accompanies a LEEWS program, have persuaded that it is not possible to fully grasp LEEWS from a book, including this one. No more than one can learn to ride a horse by reading endless descriptions of what to do and how to do it.

However, LEEWS overall and in its individual facets can surely be described. I hope this has been accomplished to some extent in preceding chapters. A reader can now be walked through a LEEWS program and given a sense of not just what is instructed, but what happens, and what is intended to happen.

Lest a reader become overwhelmed or bored (overly), I feel this description should be set forth in two chapters. This first will offer perspective and an investigation of fundamental insights that gave rise to and inform LEEWS. Certain LEEWS terminology will be introduced. LEEWS will be contrasted with CW. What transpires in a LEEWS program will be described, in particular the transformative effect that LEEWS has on students. This effect has been observed for over thirty years.

In the following chapter, at length, because length is required, individual facets instructed in a LEEWS program will be described from beginning to end.

As I trust a reader who has gotten this far now understands all too well, significant complexity is implicit in the subject of law study, in particular the subject of addressing law essay exams “as a lawyer.”

“As a lawyer,” however, is far from sufficient to solve the problem of preparing for and addressing law essay exams. “As a lawyer” merely addresses analysis. New insights and approaches were needed to solve the problem of issue identification and presentation of analysis under severe time pressure. Absent such new insights and approaches, the most experienced practicing lawyer would yet have difficulty in these regards.

Patience will be appreciated if, on occasion there seem to be *non sequiturs*, sudden diversions and digressions. As suggested, grasping LEEWS from a book is difficult. My aim is to provide a complete picture. It is my hope not to cause eyes to glaze in incomprehension or boredom.

First, then, a description of the insights that led to developing LEEWS, and that inform its core. Also, terminology needed to understand LEEWS, and a description of what happens in a program. The following chapter will provide a detailed description of facets of the true science of law essay exam writing and preparation that is LEEWS.

In the beginning

As noted in the preceding chapter, I remember clearly when the breakthrough insight of conflict resolution as a possible common denominator in unraveling essay exercises came to me, at least in its rudiments. It was a perfect summer afternoon in 1981.

Of course, considerable thinking, tinkering, experimenting with the idea ensued during the remainder of the summer. I went back to old essay exercises. How might this insight be used to make sense of different fact

patterns in different areas of law, followed by different, often confusing questions and instructions? Did it offer the possibility of a consistent approach to seemingly varied exercises? The answer that emerged was yes. Emphatically, yes!

This realization occasioned great excitement. I knew what a difference my discovery would have made for me as a mostly bored, but also inept law student when it came to essay exams. Pursuit of this idea and its development eventually led me to abandon law practice for what has proven a lifelong career.

The seminal insight, the denominator of conflict pairs and competing objectives, has remained at the center of the system for approaching, dissecting, getting a handle on *all* essay exercises in exactly the same way. As noted, it enables a student to take immediate control in an essay exam, and to maintain that control.

It aids in making sense of any legal problem solving exercise. (E.g., a client walking into the office with a tale of woe, a new matter landing on a desk.)

Perspective on the LEEWS approach

What I hoped for, perhaps a reflection of a personal tendency to seek and see patterns, was a practical, one-size-fits-all, approach to making sense of essay exercises. Any and all essay exercises! The idea was to make taking on a fact pattern predictable and comprehensible, therefore less confusing and intimidating.

Today it is apparent that students can actually get to the point of nervous, but eager anticipation of essay exercises. Today it is apparent that taking an essay exam can be approached and thought of as a game. It is apparent that LEEWS can be applied to *any and all* legal problem solving exercises. However, such perceptions would emerge only down the road.

Much thought and years of trial and error with students lay ahead. The precise, orderly approach that is LEEWS today evolved in certain nuanced respects over many, many years. However, immediate changes in approach from merely plunging into fact patterns emerged. These alone provided significant dividends.

The insight of conflict pairs

Investigating how one might make consistent sense of different essay exercises, involving different areas of law and different questions/instructions, the answer that emerged was to look, initially, for what I came to term “conflict pairs.” If conflict resolution is the purpose of a system of law, it stood to reason that fact patterns describing legal problems needing resolution would imply competing entities -- at least one conflict pair!

This proved to be the case. Every essay exercise I investigated had at least one conflict pair -- opposing parties, potential litigants if you will. Some conflict pairs were obvious, such as someone suffering an injury in a torts exercise, or sustaining a loss in a contracts exercise. Some were less obvious.

I have noted, for example, that if facts describe a piece of legislation, a statute for example, and the instruction calls for evaluation of that legislation, no conflict pair is suggested or apparent. However, it stands to reason that an entity deriving a benefit from the statute would be in favor of it. An entity whose toes are in some way pinched by the legislation would oppose it. Therefore, competing parties!

In other words, it was sometimes necessary to step back and ask, “Were the facts described a real life situation, who might be against whom?”

What was required was not to approach an essay exercise from an academic perspective of “What is going on here legally?,” but, initially, to proceed with the simple inquiry, “Who is against whom?”

I realized that approaching a fact pattern more or less from the practical perspective of a lawyer was what was required. Indeed, here was a template that a lawyer might employ in initially getting a handle on a case!

I further perceived that where conflicting pair normally implied a lawsuit, it might also encompass an application before a local, state, or federal regulatory body, etc. If assistance of a lawyer was called for in achieving an objective, there must be an obstacle to be surmounted. That obstacle implied a party of some sort on the other side.

The insight of competing (party) objectives

Drawing from my practical experience as a lawyer, I reasoned that there can be no such thing as parties in conflict -- individuals, institutions, even nations --, but each party must want something the other side opposes. Competing parties must have one or more sets of competing objectives!

When a lawyer interviews a prospective client (potential party!), one of the first questions in the lawyer's mind should be, "what does my client want?" In other words, "what is my client's objective?" Likewise, the same questions from the perspective of a lawyer representing whatever party exists or emerges on the other side in opposition. Once objective(s) come into focus, a legal strategy for achieving the objective(s) can be mapped out.

By "objective" I conceived of what might be sought in a legal context. Not, for example, an objective that is not in the power of a lawyer to achieve, or a judge to award, such as securing another's love and affection. However, revenge or satisfaction in the form of money damages or putting a criminal in jail can certainly be sought in a legal arena. A party might seek to dismiss a traffic ticket, incorporate a business, process a successful application for a benefit of some kind.

By objective I also did not mean the amorphous, theoretical, high-minded objectives frequently articulated in law school classrooms. For example, justice, fair play, equity, truth, the greater societal good. No question, but such lofty objectives hover about and underpin a courtroom proceeding. They inspire and underpin a system of laws. However, a focus on such objectives can no more guide a precise, practical approach to unraveling law essay exams than it can the practicalities of daily law practice. Rather a narrow focus on more practical, immediate objectives is needed.

By objectives, then, would be meant tangible things clients seek the services of a lawyer to obtain -- money (primarily money, certainly as respects a tort or contract breach situation); securing a governmental benefit, or clear title to property (once again, "Blackacre" in law school parlance!); stopping a hostile takeover or theft of trade secrets; getting out of jail; and on and on. The objectives for purposes of LEEWS (specifically, Step One) are the infinite practical outcomes people, corporations, state agencies, nations pay a lawyer a fee to obtain.

Of course, if one party has an objective and it is opposed, an opposite, countering objective necessarily exists on the opposing side. For example, respecting the objectives suggested above, *not* pay money; not issue the loan if title isn't clear; initiate and prosecute the hostile takeover; keep someone in jail, etc. In LEEWS terminology these are "counterobjectives."

Many essays examined had more than one conflict pairing, as when party A wants to sue party B, B wants to sue another party C, etc. One conflict pairing implies at least two objectives -- an objective, its counterobjective. However, if a party to a pairing has more than one objective, prompting more than one counterobjective, or the different parties to a pairing have one or more objectives giving rise to counterobjectives on the other side, then there may be multiple pairs of objectives in the context of a single conflict pairing.

Here's an illustration. Quite naturally, in addition to establishing ownership of the land enclosed by C's

fence, party A in the property law example would have the objective of forcing C to remove the fence. C would naturally contest both of A's objectives, thereby creating two objective pairs within the single conflict pairing.

If it transpired that A had committed some transgression against C or C's property, for which C wanted to pursue a remedy against A, such as damages, then this would give rise to yet a third pairing of objective and counterobjective within the single A versus C conflict pairing.

I further found it necessary to distinguish "ultimate" or overall objectives -- what happens at the end of a lawsuit -- from "intermediate" objectives. The latter would be something sought by opposing parties -- by their attorneys! -- in the course of obtaining an ultimate objective.

Examples of intermediate objectives might be obtaining a change of venue or moving to dismiss for lack of jurisdiction or untimeliness (in a course on procedure); securing or quashing discovery of some sort (interrogatories,¹ documents, e-mail records, etc.); merely seeking to admit or exclude evidence. The party on the other side, of course, would have an opposing (intermediate) objective.

LEEWS terminology

As suggested by the foregoing, terminology to describe various aspects of the emerging LEEWS science was necessary. Over time, as LEEWS was tested and refined with generation after generation of law students and nuances of approach evolved, terminology to describe these nuances emerged.

"The Blender" issue identification process has been mentioned. It will be explored in depth shortly. The first of three steps in this process is the "Preliminary Overview." It has two phases. The second of the two phases is the first of the three steps constituting The Blender. In addition to this step and "Step One" and "Step Two," there is a "Step Three" that relates to analysis. It is performed just before starting to write (type!) the response.

The "ugly, but effective" (UBE) format for presenting analysis in concise paragraphs has been noted. It will be described in the following chapter.

"Relevant" issues are distinguished from "real issues."² There are "sub issues" and "sub-sub issues." Course outlines are called and usefully thought of as "toolboxes." Toolboxes consist of a series of "categories." Categories are organized around "trunk" legal precepts. Trunks have "branches" (related, corollary legal precepts), and branches have "sub-branches."

There is more. Unless introduced and explained one term at a time, and in a proper sequence and context, LEEWS terminology can be confusing, even overwhelming. However, with practice it becomes reflexive. Moreover, if LEEWS is to be implemented properly and efficiently, certain of its terms must come to replace commonly used expressions in Emperor Law School that have the potential to confuse.

For example, "cause of action" is an expression heard in law school relating to torts and certain other subjects. In seeking to understand the key LEEWS concept, "premise," students wonder if premise is not synonymous with cause of action. The answer is yes, but no.

All causes of action can be premises. However, premise is a much broader construct than cause of action. Many premises are not causes of action. Cause of action is but a subset of premise. To conflate the two would be highly imprecise. (Worse than confusing essay, hypo, fact pattern with question!) It would not only confuse what is meant by premise; it would impair ability to perform Step Two with facility.

Likewise thinking, as some do, that "counterpremise" equates with "affirmative defense."

Suffice that such distinctions are ironed out as a program progresses. They will be ironed out, so far as possible, in the description of LEEWS provided in the following chapter.

Key concept of “premise”

Perhaps the key LEEWS term and concept is “premise.” It means a legal construct -- rule, principle, statute, policy ground -- suggested as a possibility by facts (and one’s toolbox), that a party to a conflict would advance in order to achieve an objective or counterobjective. When posed as an inquiry -- e.g., will the premise be successful, can it be established? (say, before a judge or jury) --, a premise reveals a relevant issue!

For example, if battery is advanced as a premise for obtaining the objective of money in a torts exercise, the question, “Was there a battery?” raises an issue to be explored. If *ultra vires* act (beyond legitimate powers and purposes) is advanced by a shareholder as a basis for challenging behavior by a corporation, “Was the act of the corporation *ultra vires*?” is the issue.” Indeed, it is a “statement of issue” in CW terminology.

Similarly, if holder in due course is advanced as a basis to claim title to (personal) property, “Was X a holder in due course?” is the issue. (And issue statement.) If burglary is advanced (by the state) as a basis for putting X in jail, “Did X commit a burglary?” becomes an issue to be analyzed.

LEEWS in a nutshell vis-a-vis premises

In a nutshell, systematically finding, analyzing, presenting analysis of premises is what LEEWS is all about. LEEWS proposes methodically, efficiently identifying premises/issues in fact patterns, analyzing each, presenting analysis of each in roughly a paragraph. Thus, every essay response, predictably, becomes a series of paragraphs, each roughly the concise analysis of a premise/issue.

The grader (law school or bar) is guided to paragraphs of analysis by helpful labels. (Discussed in the following chapter.) Each paragraph roughly corresponds to an issue on the checklist.

Guarantees

Naturally, LEEWS overall has undergone modifications. It has improved over time. Insights eventually evolved that addressed every aspect of the law exam writing and preparation process. Thanks to many years of continuous interaction with countless law students, more refined techniques and better methods of conveying them were developed.

However, so confident was I of the benefit of my new insight and approach, that from the very first live program (fall, 1981) “Better grades, B’s minimum, or your money back!” was guaranteed.

B’s in most law schools no longer have the value they once did.³ As discussed, grade inflation in Emperor Law School has diminished the attractiveness of assuring B’s. However, most students who do LEEWS are first term, or entering first term. The “Top 1/3 (first term) finish” guarantee, added over ten years ago, is meaningful.

LEEWS has never guaranteed A’s. However, A’s become not only possible, but probable.

Results

As noted in the *Introduction* to this book, initially only one in twenty-five took advantage of the money back guarantee. Some years later, following sharpened focus on the concept of premise and other adjustments, this number was reduced to one in fifty!

It has been noted that LEEWS grads not only make Law Review rather routinely, they “Am Jur” classes with regularity.⁴ Remarkable successes have been described. (See, e.g., *Introduction*, fn. 14; also Section

Six introduction, fn. 3, *infra*.) Suffice that LEEWS grads too numerous to count have been first in their class at many schools. They have been editor-in-chief of law reviews at Stanford, Columbia, and a host of other law schools. Students go from B's and C's to A's with regularity.

At the same time, it must be acknowledged that LEEWS does not enable all to do well or improve. Some resist the precise structure and discipline required. Engineers and science types probably appreciate LEEWS more than liberal arts, social science types. More do not do sufficient follow-up practice to develop skill at various facets. And/or they don't work hard enough at gathering legal knowledge needed to effectively implement the issue identification approach.

The very few students who have requested refunds confirm such failings. Usually they do not blame LEEWS for subpar performance. Some students get distracted during exams by LEEWS mechanics -- the Steps --, which have not been mastered. Some, LEEWS notwithstanding, panic under pressure of the exam situation, and flounder.

Nevertheless, the great majority significantly improve performance. Given the confusion, intimidation, level of ignorance respecting exam taking, and ineptness of almost all law students, a LEEWS grad almost inevitably does better. There are very very few refund requests or complaints.

LEEWS versus CW

I hope it is unnecessary at this point to belabor that LEEWS is hardly mere tips, hints, helpful advice. That is precisely the extent of the CW others offer, be it a law professor offering a two-hour exam writing session (or six weeks of two-hour sessions, as one did at the University of Minnesota Law School), the student bar association (SBA) chapter conducting an exam writing workshop, the advice and efforts of upperclassmen and law student groups, or any of the many commercial offerings, such as Law Preview or Fleming.

All other exam writing/preparation instruction that has come to your author's attention during over 30 years in this field -- no exceptions! --, consists of variations of and differing takes on CW. IRAC is typically the centerpiece. Students address a practice essay exercise or two, then go over it. Do's and don'ts are pointed out. Merely helpful advice is offered.

As noted, given woeful ignorance, students are naturally grateful and reassured when exposed to CW. However, they don't learn to "analyze as lawyers." As a consequence, they don't learn the law properly. They don't learn to extract what is needed for exams from cases and class discussion. They don't learn to present analysis concisely. They don't progress much beyond the sink-or-swim approach to unraveling confusing fact patterns implied in "spotting issues."

CW enables scant, if any progress from academic mindset to facsimile of practicing lawyer. Not surprisingly, no matter how much indoctrination in CW they receive, law students go forth and produce unfocused, rambling, subpar exam responses.

CW exam writing/preparation advice has been around for decades. It has been ineffective for all those decades in enabling law students to even begin approaching mastery of essay exams.

Snapshot of a LEEWS program

Students often ask, respecting what happens in a LEEWS program, "Will we write lots of exams?" This wholly misinterprets LEEWS. "Analyze an exam?;" "Write an exam?" LEEWS envisions nothing of the sort. Indeed, LEEWS seeks to banish such thinking.

On its face, "how to analyze, how to write an exam" sounds like a good idea. However, much as "be lawyerlike" and "spot issues," these concepts are too nebulous to be of much practical value.

Rather, students learn, via the precise, disciplined, stepped LEEWS issue identification system (The Blender), how to dissect *any and all* fact patterns into manageable components. The components -- premises and (limited) facts giving rise to the premise -- reveal relevant issues.

Students then learn to analyze premises as lawyers, and how to present that analysis in the aforementioned, concise paragraphs. They learn to assist the grader with helpful labels that point to premise/issues and introduce paragraphs. They learn the day-to-day, week-to-week preparation approach that has been described in the early chapter on 2-4 line case briefing. (Section Three, Chapter Three.)

Handle the parts = handle the whole

The LEEWS aim and focus is never to “analyze or write an exam.” It is never to analyze and write the response to a single essay. Rather, the focus is much narrower -- identify, analyze, (concisely) present analysis of a premise!

Every essay in every exam will prompt a series of premises. These premises are made relevant by facts, applicable legal knowledge, question(s)/instruction(s) posed. Such premises, of course, translate to relevant issues. If each identified premise is handled effectively (properly analyzed and presented in roughly a concise paragraph), the sum of the effective handling of these parts or components will be an effective handling of the essay as a whole, eventually the exam as a whole.

In other words, find and manage the parts (premises), one after another, and the whole -- a single essay, the exam overall -- is thereby managed!

There is some truth to the observation that my students learn to be skilled, law essay exam-taking robots. Why not?! I suggest this is a beautiful thing!

Segments of a LEEWS program

First hour and a half

Initially, students are given an overview of the program and what is to be accomplished by the end -- the result described above. Students are introduced to the essay hypothetical, the nature and common characteristics of all law essay exams, the first of three major pitfalls in addressing such exams that must be avoided. (“The attempt to comprehend the whole.”)

The difference between law exams and exams students have previously encountered is described. Students are shown how habits and approaches that resulted in exam success in the past now serve to trip up both preparation for and taking law essay exams. What should occur at the start and during initial minutes of an exam is described.

The next two hours -- The Blender

Facets of The Blender three-step approach to identifying issues are then introduced. Concepts are reinforced with practice exercises. Students are shown how all essay exercises, no matter the subject or question/instruction posed, are at base the same, and amenable to the same approach. Essay exercises may seem different. However, any and all may be addressed in exactly the same way.

[Note. From a LEEWS perspective, all legal problem solving is a constant. A one-size-fits-all approach is indeed possible. The only variable is the nature of the law (tools!) to be applied to an exercise. (E.g., criminal law exercise -- criminal law tools; bankruptcy law exercise -- the federal bankruptcy act [and law established in cases that have interpreted it]; agency law exercise -- agency law tools; etc.)]

Students learn to engage exams and hypotheticals progressively. Common sense is paramount in performing initial steps. No legal knowledge needed. (A comforting thing in the first minutes of an exam!)

Legal knowledge then comes into play. However, always in predictable, piecemeal, manageable steps of engagement.

The concept of course outlines organized into categories of law designed to facilitate implementation of The Blender is introduced. Also the analogy of course outlines to legal toolboxes.

Transformation

Predictability and constancy in performing a task is reassuring. It engenders confidence going forward. As steps of The Blender are introduced, hopeful skepticism gives way to engaged interest.

Students have been introduced to insights and approaches never before glimpsed or conceived of. (Including the first and second of three mantras to be repeated during exams.) Despite the presumed dryness of the topic, students are surprised at how interesting a LEEWS program is. Learning how to solve, even master a vexing problem is never dull!

When it is shown that premises, systematically revealed via The Blender, translate into relevant issues, and lots of them, the effect is dramatic. A perceptible shift toward optimism occurs. Students grasp what a useful tool The Blender can be. They grasp that much more than merely surviving exams is possible.

Second half -- analysis, 2-4 line case briefing, concise presentation, more

However encouraging the first half of a LEEWS program, what happens in the second half far exceeds the promise of the first.

Patiently, with examples and exercises, students are shown and experience -- finally! -- what is meant by “analyze as a lawyer,” and how to perform the dialectic of this nitpicking art. This process occupies another hour and a half. Students are impressed by the ratcheting of mental focus from overall legal precept (e.g., battery, assault) to element thereof, to elements of elements (sub-elements!).

“Be objective” is understood. “Argue both sides” is understood. “Use the facts” is understood. “Think as a lawyer” is finally understood.

Students perceive that lawyerlike analysis is a game of sorts. Moreover, it is an engaging game when understood and properly played. There may even be enjoyment in the once dry, forbidding prospect of analysis or “applying law to facts.” (The “A” of IRAC.) Indeed, LEEWS introduces analogies of “playing detective in the facts” and “playing baseball.” (Described, following chapter.)

While some pick up on analysis faster, and likely will perform it more skillfully than others, all can play. No aptitude beyond ordinary intelligence is required. Innate qualities, genius for the law, The Right Stuff are understood to be non factors. They are myth and excuses for failure to properly instruct a teachable skill. This perception is liberating!

Perhaps the best news is the realization that classmates, while indeed smart, often brilliant, invariably diligent, cannot be fully participant in the game of lawyerlike analysis. Some may approximate lawyerlike thinking by dint of training prior to law school. However, none are fully and properly indoctrinated. Case method instruction is wholly inadequate to the task.

Transformation continues

The cluelessness of classmates, students realize, is akin to theirs at the start of the program. It is a vast cluelessness, that now, thankfully, seems to recede in the rear view mirror. This realization is confidence building, energizing, inspiring.

The unfolding of possibility, of a new beginning, of a likelihood of successful performance, where merely adequate performance was hoped for, is transformative. An “Aha!” is palpable. Students exhale, breathe anew. Law school, in particular preparing for and taking exams takes on an entirely new aspect. Confidence builds, even a nascent eagerness for the task ahead. The path to success becomes clear. Students become players!

2-4 line case briefing, 30-50 page course outlines, and more

To understand how to analyze as a lawyer is to understand how intimately black letter law must be learned. Students learn where and how to learn black letter law. They are instructed in 2-4 line case briefing, taking far fewer notes in class, and abbreviated (30-50 page) course outlining. They learn when and how to make use of secondary study aids -- commercial outlines, hornbooks, restatements, etc.

Final phase -- concise presentation on paper (UBE)

The program concludes with learning how to present analysis of issues in concise paragraphs, roughly one per issue. Students are introduced to and practice with the unique UBE (ugly, but effective) LEEWS math format formula for presenting analysis. UBE circumvents, indeed, renders irrelevant whatever is implied by “good writer.”

“Good writer,” failure to master rules of grammar and complex sentence structure, insecurity on paper -- all of this is taken out of the equation. Students move from UBE to simple, straightforward, more-than-adequate presentation of analysis in concise paragraphs. Paragraphs impress by virtue of the knowledge, lawyerly thinking, and insight they reflect.

UBE enables not only an easy transition to simple, effective sentences, but analysis that conforms to rules of evidence. UBE ensures that useful thoughts that often fail to be reflected in analysis are put on paper. It ensures presentation of the patient, lawyerly thought process that is contradicted by time pressure. (UBE will be explored in depth in the following chapter.)

IRAC and “follow IRAC” is now understood. All IRAC elements can be implemented. Indeed, armed with the central building block of knowing how to deliver effective analysis of an issue in roughly a paragraph, particular instructions of professors can easily be accommodated. (E.g., “Place the conclusion at the outset, at the end, both [CIRAC], no conclusion at all.”)

[Note: The final chapter of this section explores where IRAC -- omnipresent in Emperor Law School, supposedly “all-one-really-needs-to-know” -- fits into the picture.]

Follow up practice is necessary, and there is more instruction. However, students have the bit in their teeth. They have a precise plan of attack applicable to *all* subjects, *all* exams. Once confused and intimidated, they have confidence, even eagerness. They have a new lease on law school life.

The LEEWS *Primer* offers practice essay exercises with model Blender planning steps and model responses according to the paragraphing format in over eight subjects. It reviews all concepts, and provides a useful guide going forward.

A true science of exam writing and preparation

LEEWS is what a true science of law essay exam writing and preparation looks like. It incorporates CW that is useful, but goes much further. It adds critical new insights and approaches. The result is a seamless, systematic process, a comprehensive A-Z of exam writing and preparation.

In its individual facets LEEWS is common sensical, easily grasped. Law professors have on rare occasions sat in on a program. (They end up taking copious notes.) Afterward one remarked, not a little defensively,

“I think I instruct 85 percent of what you tell students.”

85 percent? Doubtful. Even if so, not so systematically, so precisely, so in depth. This is especially the case where, in addition, explanation and practice addresses concepts that are constantly bandied about in Emperor Law School, but never adequately explained. For example, as oft noted, what, precisely, an “issue” is.⁵

Much of LEEWS content indeed mirrors and reiterates aspects of conventional wisdom. However, much contradicts CW. For instance, as has been described and will be explored further, LEEWS counsels the opposite of such standard advice as (willy nilly) “read the facts.” The Blender is a world apart from “spot the issues.”

Where CW is mirrored or duplicated, it is incorporated into a much more systematic progression. There is also the unfolding context of a far deeper understanding of the lawyer role and thought process. Concepts such as “think and analyze as a lawyer,” “be objective,” “use the facts,” etc., constantly heard in Emperor Law School, but never adequately explained and demonstrated, are finally understood. With but minimal practice, they are integrated into a systematic approach to solving *any and all* legal problem solving exercises. (Including writing papers, memos, briefs, moot court, interviewing a client, etc.)

Most important are new insights and approaches. If LEEWS adds but 15 percent that is new -- It is surely far more than 15 percent! --, it is a critical and transformative 15 percent. It is a 15 percent that transforms floundering academics into reasonable facsimiles of practicing lawyers. It is a 15 percent that imparts confidence, born of a sense -- finally! -- of control and potential for mastery, where before there was confusion and uncertainty.

In the aggregate, LEEWS is complex, sophisticated, somewhat daunting in its comprehensive, A-Z solution to a problem as formidable and confusing as preparing for and handling law essay exercises.

Why LEEWS cannot easily be described to others

As noted, while individual facets of LEEWS are common sensical, readily grasped, LEEWS overall is complex and sophisticated. Facets are layered one upon another. Understanding a new aspect requires understanding all that preceded. Eventually, patiently, thoroughly, a complete edifice of preparation and exam writing mechanics is constructed.

LEEWS as a whole embodies perspectives and understanding that is altogether foreign to Emperor Law School. One must understand analysis, use of law as a tool, aspects of actual legal practice. This is beyond the ken of the most savvy, diligent, but uninitiated law student.

This is why students have such difficulty explaining LEEWS to others. It is kind of like the blind man trying to explain an elephant. (No offense to the sight impaired!) It is why a LEEWS grad in a study group with classmates who have not done LEEWS typically must leave the group.

[Note. Your author is a big fan of LEEWS grads practicing together. For example, writing and critiquing paragraphs of analysis (first UBE, then standard English); applying The Blender to essay exercises; comparing toolboxes; etc. However, a student should not put herself in the difficult position of attempting to instruct LEEWS to (skeptical) others.]

As LEEWS grads end up telling friends and classmates, as LEEWS teaching assistants (TA's) tell their tutees, as lawyers, judges, law professors (!!) tell law students and prospective law students (some of them their children!), echoing the familiar *Nike* refrain, “You just have to do [LEEWS]!”

* * * *

1. An interrogatory is a question designed to gain information about an opponent's case. For example, should someone slip and fall on a sidewalk or grocery floor, lawyers have devised questions (interrogatories!) designed to elicit necessary information in building a case, or initially determining whether a lawsuit might be in order. For example, time and place?; slippery substance on the floor or break in the sidewalk?; other similar incidents?; characteristics of the victim; insurance particulars; etc. Lists or "sets" of interrogatories exist respecting countless situations and circumstances, and are set forth in books, according to topic. They may be accessed online, I am sure.

None of this is ever mentioned, much less explained to students by professors in Emperor Law School! (By a lawyer/advisor in a mock trial exercise, perhaps. However, not by a law professor in a classroom.)

2. Relevant versus "real" issue. The former is the overall issue a professor [or bar grader] wants identified ("spotted") and discussed. The latter is the aspect of the determination of the overall or relevant issue that is most closely contested, therefore the most deserving of attention in analysis. Yes! Instruction and practice is required to grasp and master these fine points of lawyerlike analysis. Such will not happen in a classroom of Emperor Law School.

3. Grade inflation. When LEEWS was first offered in 1981, all B's placed a law student in the top third of the class at most law schools. I recall students from Loyola Law School in New Orleans saying that all B's placed them in the top ten percent! The average grade was simply that -- average, meaning C! Today, the median first year GPA at so-called "top tier" law schools -- NYU, Columbia, Chicago, Penn, UVA, Northwestern, Duke, etc.-- is at least a B+. Still, relatively few solid A's, often fewer than ten percent. There are many A-'s at the few schools that mandate 20-30 percent A's -- e.g., U. Texas, U. Penn --, but few solid A's. A+ is a grade awarded to no more than one or two in a first year class, and often no one in a class of over fifty!

4. "AmJur." Meaning receive the West Publishing Co. American Jurisprudence award for the best exam in the class. (Note. I know this mostly via word-of-mouth from the many students I talk to when recruiting reps. [E.g., the Stanford and Columbia ed-in-chiefs were reps.] I early on stopped keeping track of LEEWS grads' success. The system has to work. Given the many reasons that have been explored respecting why law students perform poorly on exams, that a LEEWS grad will outcompete classmates is almost child's play.)

5. The word "issue" is constantly heard in the law and in Emperor Law School. Every case brief references the issue or issues. Students are to "spot and analyze issues" on exams. Every class in every law school finds professors and students making such remarks as, "given this issue," "the issue is whether," "there is an issue involving," "another issue is," etc. However, the term is never precisely defined. If a student thought to ask, "What, exactly, is an issue?," he likely would not, lest he seem impaired.

Concepts that are not properly understood and digested, lead to uncertainty and incomplete comprehension. It is characteristic of LEEWS that nothing is glossed over. For instance, LEEWS does not assume, as law professors seem to, that students understand what a "tort" is. (See footnote 2, Section Three, Chapter 4.) LEEWS points out, as Emperor Law School never does, that the role of a lawyer is to achieve a client objective, via knowledge of relevant procedural and substantive legal precepts.

LEEWS defines "issue" as, in the first instance, "a legal inquiry." Not surprisingly, issue has other meanings. It may be "a factual inquiry." It is also a point of contention, sometimes legal, sometimes factual, between competing parties, to be contested by their respective attorneys. In this regard "major issues" must be distinguished from "minor issues." Moreover, as the precise, nitpicking regimen of lawyerlike analysis becomes understood, students discover that there may be "sub-issues" to be resolved in the context of resolving larger issues, and even "sub-sub-issues" to be resolved within the context of sub-issues.

Yes, it seems complicated. However, it also eventually becomes crystal clear and logical. It is a clarity and logic never imparted in Emperor Law School, and of which most unfamiliar with LEEWS have no inkling.

Section Five, Chapter 7

LEEWS described -- facets of a science, start to finish

Introduction

The previous chapter offered perspective on insights that inform LEEWS at its core, also an overview of what happens in a program. This chapter will provide a detailed description of each facet of the LEEWS science of taking *any and all* law essay exams.

In order that descriptions of facets be understood, it has proven necessary that surrounding context in which they occur also be understood. Much ancillary description and explanation is presented in footnotes (of which there are 39!). However, some is part of text. As a result, the chapter is lengthy. It is very lengthy.

A reader should bear in mind that practice of the various facets introduced is often a missing ingredient. Such practice, both as an adjunct to description and instruction, and as follow up, is required to integrate facets into a fully integrated, effectively applied science of approach.

Only after individual facets of the LEEWS exam-taking science are understood, in particular art of analysis, can the equally precise LEEWS approach to preparing for exams be properly understood, appreciated, and put into practice. This approach -- 2-4 line case briefing, 30-50 page course outlining, etc. -- has previously been described in large part in Section Three, Chapter Three ("2-4 line case briefing").

Some aspects of LEEWS will mirror concepts familiar from CW. However, such concepts are refined and integrated into a much more explicit, meaningful surrounding context. Other concepts are altogether new and unfamiliar. Once again, in addition to description, however detailed, the combination of lecture, diagrams, and reinforcing exercises in a LEEWS program is probably necessary for understanding that translates to effective application.

Indeed, all the describing in this chapter merely scratches the surface of instruction that requires over seven hours in a live program. (Over nine in the well-received, equally effective, audio version.)

The important thing to grasp and appreciate is that precise, innovative, proven effective, A-Z guidance respecting a most difficult problem exists. The goal of mastery of law essay exams is within reach.

The superficiality of CW should become apparent. The reason for the significant advantage enjoyed by those armed with LEEWS should become apparent.

Indeed, there are no ifs and buts respecting effectiveness. The science and system that is LEEWS has proven itself for over 30 years!

Here, then, the LEEWS exam-taking science described in detail.

Arrival at the exam, getting ready

Do's and don'ts respecting preparation just before starting an exam are fairly obvious. However, a few reminders don't hurt. Arrive rested. Don't come too early and sit around getting nervous. Don't come late. Most important, unless a specific piece of legal information you lack and think is needed can be provided by a particular person, do not engage in discussions of anything legal. In general it is too late to learn anything new. You'll only be reminded that there are things you don't know. Do not respond to law-related queries or comments.

It is advisable to have a couple pens or pencils, energy food, earplugs. Also a hat or cap to pull down to

avoid the glare of computer screens. In effect, create your own personal space. Your computer will serve as a timekeeper.

Review of “cover instructions”

As noted, despite the response being typed into software, the exam is normally received in hard copy. It is typically prefaced with a paragraph or more of “cover instructions.” Immediately upon opening an exam, glance over these instructions. Note anything unusual.

No surprise here. However, students should start looking at cover instructions of old exams early on in the term. Merely cover instructions, not entire exams. (Which might intimidate.) This builds familiarity with typical instructions, and will save time during an actual exam. Cover instructions can be skimmed quickly. The focus should be on discerning any unique or peculiar instructions.

At bottom, a LEEWS grad knows a professor wants issues discerned and addressed “as a lawyer.” However, are conclusions to be stated at the beginning, the end, not at all? Should state or federal law be followed? Does the professor want minority views of the law explored? Naturally, one should “paragraph frequently,” “argue both sides [of issues],” “clearly indicate what question [sic!] is being addressed,” “support all conclusions,” etc.

However, a particular concern or peeve of a professor might be reflected in cover instructions. For example, many professors have an aversion to an annoying, ping-ponging habit in writing some students adopt. A professor might specifically instruct, “I don’t want to see ‘plaintiff would argue, defendant would argue.’” (In LEEWS parlance, “Movant would argue, respondent would counter.”) A student could then make the minor change to, “It might be argued. However, it might also be contended.” The latter should probably be adopted in any case.

[Note. Exams and cover instructions reviewed beforehand need not be in a subject a student is currently preparing to be examined in. Any instructions will suffice, as they tend to be repetitive.]

Issue identification approach -- Preliminary Overview, Phase One

If a lot of cover instructions have been read, looking over one for an exam should occupy no more than a minute or so. The immediate order of business then becomes identifying issues in strict accordance with the disciplined, step-by-step LEEWS approach. The first step in this process is the “Preliminary Overview” (PO). It proceeds in two phases.

Phase One instructs, “Having reviewed the cover instructions [noting anything unusual, no more than a minute or so], literally flip or scroll through the entire exam to get an overview of what you’re up against. Note the number of essays, their relative lengths, their time allotments. However, *do not read any facts!* Note objective format segments, such as multiple choice and short answer. Note the number of pages of the exam.” One flips pages or scrolls, depending upon whether the exam is in hard copy format or on a computer screen.¹

The discipline contemplated by LEEWS is now required. The aim is to gain and to maintain control of a task that challenges, that confuses and intimidates, that threatens to spin out of control. The aim is to proceed with assurance and confidence, and to maintain that posture. The aim is to know exactly what one is about at all times. No confusion, no uncertainty. Just perform the steps -- always, every exam, every essay!

CW instructs that students “read facts -- carefully!” Students dearly want to peek at fact patterns. This is natural. It is also folly. Confusion, anxiety, even panic ensues for most. Such an instruction says, in effect, “Dive in the water. Providing you have The Right Stuff, you will swim just fine.” Most, of course, sink, barely tread water, swallow water, and progress with difficulty. Even those who can swim do so haltingly.

Facts will indeed be read. However, they will be read piecemeal, and always with a specific, narrowly defined purpose. Moreover, facts will be read only in due course, when, as, and how appropriate, and always with discipline.

Assuming a student does not read beyond headings and times allotted to essays and other exercises, Phase One of the PO should take no more than 30-45 seconds. Literally, 30-45 seconds flipping or scrolling through the entire exam, noting time limits, number of exercises, the relative length of fact patterns, and the like.

At this point, no more than two minutes into an exam, a student has an overall idea of what she is up against logistically. Now, immediately perform Phase Two of the PO.

Issue identification approach -- PO, Phase Two

Having completed Phase One of the PO (30-45 seconds), Phase Two -- discipline!, discipline! -- is to "return immediately to the first exercise in the exam." If the first exercise is an objective segment, address it. Give it roughly the time suggested.

A brief digression re "objective" exam components

A LEEWS program does not, *per se*, address "objective exam formats," meaning multiple choice, short answer, true/false. It has been noted that following introduction of the "multistate" component of bar exams in 1978, such components became part of some law school exams.

LEEWS addresses the more customary and problematic essay exam component. Skills necessary to handle essays, in particular analysis, are applicable to objective exercises. Indeed, all objective exercises test analytic skill. However, normally without the added problem of discerning issues in fact patterns. Issues are typically presented in objective exercises. Necessary legal knowledge may be assumed. However, often it is provided.

Once program instruction respecting essay exercises is digested (and practiced!), what is deemed necessary to know in addition respecting objective formats, along with practice exercises, is set forth on pages 87-89 of the LEEWS *Primer*.

Returning to Phase Two of the PO

The first exercise in an exam will normally be an essay. Such being the case, Phase Two continues with the instruction, "Skip over the fact pattern [altogether] to the question(s)/instruction(s)." These are normally at the end, but not always.

No casting about among the various essays, seeking to gain a sense of which might be easier, more manageable. "Easy," "manageable," when one is seeking to "spot" issues, typically means that something about the essay, usually a readily identifiable issue, draws a student to the exercise. Whether other issues will be identified and manageable becomes of no concern. Students tend to commit where they sense possibility. It is a typical approach, and a fool's approach.

Better to move through the overall exam chronologically, giving each exercise roughly the time allotted. No guessing, no jumping around.² If one becomes adept at identifying premises in fact patterns (therefore issues!), also analyzing and concisely presenting analysis of premises, then handling *any and all* essays becomes a predictable, manageable exercise. There are neither easy hypos, nor overly difficult ones. One more variable, one more area of uncertainty eliminated.

A choice of hypotheticals

One might reasonably ask, "What if I'm given a choice of hypotheticals? ... Say, 3 of 5, or 5 of 7?." LEEWS

offers specific guidance in any and all situations.

Simply ignore the choice. Address the first three hypos, or the first five. If one feels a need to choose, then choose hypos that on first impression seem more problematic!³

Choosing what initially seem more difficult hypos, of course, requires going into the facts. This is normally a major LEEWS no-no. The solution? Go into the fact pattern just long enough to get a sense of difficulty. (E.g., complex confusing facts.) Immediately get out! You'll work on those hypos. Continue with Phase Two of the PO.

It should be noted that Phase Two of the PO -- go immediately to question(s)/instruction(s), typically, but not always at the end of the essay -- will only be completed for each hypo as a student reaches that hypo. This, normally, will be a chronological sequence.

Thus, for example, if the time allotment for the first essay is 60 minutes, performing Phase Two of the PO for the second essay will occur slightly over an hour into the exam.

Issue identification approach -- Step One

Mere minutes into an exam, having reviewed cover instructions (one minute or so), having performed Phase One of the PO (30-45 seconds), having gone back and completed Phase Two of the PO for the very first hypo (mere seconds to find the question/instruction), a student performs Step One on the first hypo.

No legal thinking or knowledge required!

Because it is a "law exam," students feel they must come off the page "as lawyers." Early on many seek to spout something "legal." They reach for legal words and concepts. Right away their brains are inundated with law they have memorized. This adds to confusion.

However, up until this point, two minutes or so into an exam, no legal knowledge, no legal thinking has been required. Merely common sense. Nor is legal knowledge or thinking required to perform Step One. Thus, several minutes into any exam, no legal thought or knowledge is required. What is required is merely common sense and the discipline heretofore noted.

Knowing that one needn't think about legal precepts for the first few minutes of an exam imparts confidence.

Step One

Step One instructs: "Identify all conflict pairings relevant to the question(s)/instruction(s), and the objective or objectives of each party to each pairing." In other words, "Drawing clues from the question/instruction and the subject matter (e.g., civil procedure exam [procedural objectives]; versus evidence exam [evidentiary objectives]; versus property or wills or contracts or anti-trust exam, etc.), find relevant conflict pairs, and the objective or objectives of each party to each pairing." (LEEWS *Primer*, p. 28.)

Phase Two of the PO directs that students locate the question/instruction. Law professors and others offering CW might assert at this point, "We also tell students to look for the question before reading the facts. That's nothing new."

Indeed, such has been noted. CW advises, "Look for the 'call of the question,'" meaning the question or instruction following.... Recall that the misnomer of referring to a fact pattern as a "question" has been decried with some vehemence. (See. e.g., Section Four introduction, fn. 1.)

No question but that some CW advises that students consider a professor's question/instruction (or bar examiner's) before engaging a fact pattern. It is a fairly obvious thing to do. However, while CW guidance

respecting what happens beyond this point may seem specific -- e.g., “read the facts carefully;” “pay attention to adjectives, adverbs;” “every word can have issue-generating significance;” etc. --, it is far from a system. Indeed, it is only minimally helpful.

It basically says, with the benefit (added confusion?) of having looked at and thought about the question/instruction, “Plunge into the facts and find or ‘spot’ issues!”

It’s much the same old “Swim [if you have The Right Stuff]. Otherwise,”

By contrast, LEEWS Step One provides a specific, focused plan of engagement. It is limited, manageable, and, as 30+ years has proven, applicable to any and all law essay exercises. It is the key, the gateway to unlocking and achieving mastery over any and all essay hypotheticals. Identify relevant conflict pairs and the objectives of the parties to those pairings.

Applying LEEWS, when students initially read facts, they do so with narrow focus and purpose. In LEEWSspeak this is called “looking for elephant.” This means looking for something clearly and narrowly defined.⁴

Performing Step One without reading any facts

We shall see that Step One may or may not require engaging the fact pattern itself. Suppose a criminal law exercise, and the question, “What crimes, if any, are A, B, and C guilty of?” Given the context -- criminal law hypo, if one thinks about this question for a moment, the fact pattern need not be perused in order to perform Step One.

Relevant conflict pairs and objectives are apparent from context and question -- State versus A, State versus B, State versus C. Competing objectives would be, on the side of the state, vindicate the public interest by punishing A, B, and C. In other words, put them in jail. Versus, on the side of A, B, and C, the objective of getting off, or staying out of jail. (These competing objectives will be pursued by a student in the alternating roles of prosecutor, then defense lawyer for A, B, and C.)

Typically, a student reads *some* facts in performing Step One. However, always with the narrow purpose of finding relevant conflict pairs and objectives -- elephant!

[Note. Practice is needed to acquire the discipline of not reading facts, willy nilly, but seeking only conflict pairs and competing objectives. For example, a brief paragraph in a contracts exercise describes a party agreeing to sell a desk, but never delivering a desk. Step One requires merely that a student skim the paragraph (in seconds) and posit buyer versus seller, and the competing objectives of obtain desk and/or compensation versus not. This is straightforward, common sense thinking. No legal thinking required!

Students invariably complain when, after ten seconds or so, I say, “Time’s up!” They haven’t completed the step, because, invariably, they get distracted by thoughts of “Was there a contract?” “Was it breached?” “Is the buyer entitled to specific performance?” etc. In other words, practice and discipline is required to avoid engaging in thinking extracurricular to elephant.]

Sometimes the question/instruction itself presents a pairing. For example, “What are X’s rights and liabilities versus Y?” A question/instruction might present multiple pairings. For example, “Discuss X’s rights versus Y, A’s rights versus B, C versus D.” Facts need only be read to ascertain respective (common sense) objectives in order to complete Step One.

However, where a question/instruction presents conflict pairings, one should never assume that Step One is complete and one should immediately move on to Step Two. Other relevant pairings with competing

objectives may emerge from a perusal of the facts. These may prompt additional premises, therefore issues. Recall the exercise with nineteen possible pairings!⁵

To the extent form and content of the question/instruction enables performing steps of approach faster, one simply proceeds that much faster to analysis of issues. These issues, we shall see, are revealed by premises revealed in Step Two. Sometimes, for example, the question/instruction offers the information sought in Step Two.

The important thing is to proceed with discipline, assurance, a sense of purpose and control, where others flounder and flail. If the approach being described seems regimented, almost military in its precision, that would not be an inappropriate analogy.

More often, as in “Discuss the rights and liabilities of all parties,” or “How should the motion of party X be decided?,” facts must be perused to discover conflict pairs and objectives. The task, nevertheless, remains narrow, straightforward, predictable -- find conflict pairings and competing (party) objectives.

Perspective on Step One

If Step One seems a bit confusing, no question but practice is required. First, to get the hang of it. Second, to become disciplined and efficient at implementing it. Step One implies a very different mindset and approach from that advocated by CW. It runs counter to the natural inclination to dive into and read facts. The PO and Step One reflect a transition from unfocused, willy-nilly, academic thinker to goal-oriented, programmatic, problem-solving thinker. (I.e., practicing attorney with a systematic approach!)

Professors, upperclassmen who have done well (without LEEWS), sources on all sides instruct law students to “read the facts.” It is difficult to resist plunging into a fact pattern to “spot” issues. Some will be better at this than others. Perhaps, by temperament they are able to remain calm. Perhaps, by habit of mind they are more methodical. They can more deftly match facts with relevant legal precepts.

However, such is pure happenstance and luck of the draw. Frankly, it is a crapshoot. It has little to do with the patient, deliberative process lawyers (should) engage in when evaluating facts that may raise legal issues. At best, issues will still likely be missed. The myth is supported that mysterious, innate abilities are required for mastery.

The stepped LEEWS approach largely eliminates this X factor. There is great comfort in the consistency and sense of control imparted by Step One and the steps that follow. One always knows what, exactly, to do, what one is about.

There is always at least one conflict pairing. There is always, therefore, at least one set of competing objectives.⁶ The only variable, course to course, is the nature of the legal toolbox to be applied. (See Step Two, following.) Different course, different law, different legal toolbox!

I reiterate that in over 30 years of interacting with students, and looking at and having essay exercises described to me, I have yet to encounter one to which Step One may not be applied.

Grist for thought and application – a simple hypo

It is logical at this point to have a fact scenario in mind for purposes of thinking about and understanding the steps. In a LEEWS program each step is practiced on several hypos before continuing. The following three-line fact pattern can be used for this purpose. We shall see that a great deal can be contained in even three lines.

The following paragraph is part of a torts exercise in the LEEWS *Primer*:

Direct Hit Davis, he of the great but unrequited love, chancing upon
the object of his passion, Pucker Nicely, asleep in a meadow,
awakened her with a kiss. She reacted by bloodying his nose.

The instruction, following two much longer paragraphs that introduce more parties and events, is, “Discuss the rights and liabilities of all the parties.” The facts are typical in introducing fanciful, suggestive names. The task, as always, is to sort out the situation as a lawyer (knowledgeable in relevant tort law).

Step One analysis

A Step One analysis (conflict pairs, competing objectives) reveals a single conflict pair -- Pucker Nicely (PN from now on) versus Direct Hit Davis (DH). (I.e., PN v. DH.) PN is placed first, because, as I suggest to students, “Someone in a conflict pairing has to go first, has to be the initiating party in any litigation. That party is normally the one more aggrieved or angry. PN, I submit, is likely more pissed off.” (Common sense thinking. Always!)

However, what about competing objectives of the parties? What does each side want in the sense of objectives a party might seek, were this conflict to proceed to litigation? (It is assumed, always, that a conflict pairing implies litigation that proceeds toward a courtroom.)

Perhaps a reader should at this point attempt an exercise. Students in a LEEWS program are assigned to perform a PO/Step One analysis of the entire torts hypo, including the above three-line paragraph. Apply your own PO/Step One analysis to the three lines of PN/DH facts. What party objectives do you come up with?

Issue identification approach -- Step Two

Time required to perform Step One will vary. It may be a minute or less. With practice and a disciplined focus, at the outside on even an essay of multiple pages, Step One probably should not require more than five minutes. Therefore, well within the initial 10-15 minute planning segment, Step Two will be performed on the first hypo.

Overview

Allowing for perusal of cover instructions, the PO, and Step One, no more than seven or so minutes into an exam Step Two will be performed on the first hypo. Now and only now, for the very first time legal knowledge and the course outline is brought to bear. Step Two is a disciplined (always!), structured examination of facts for premises that reveal relevant issues. However, only limited portions of the fact pattern (!) -- several words, a sentence, rarely more than a paragraph at a time.

As I say to students at the start of a program, “The linchpin in comprehending and implementing LEEWS is the concept of premise.” In a nutshell, LEEWS is about systematically, efficiently identifying premises suggested by fact patterns, analyzing each premise, presenting the analysis of each premise in a concise paragraph, providing helpful labels to guide the grader.

A “premise,” to reiterate, is a legal precept, a legal tool. It is all the law required to, if satisfied or established based upon given facts and reasonable inferences therefrom, persuade the trier of fact (judge and/or jury) of a client’s entitlement to the objective sought. (The “client,” of course, is one of the parties to a conflict pair.)

A premise may be a statute, a rule, a policy position. Often, it is a combination of legal precepts. (E.g., battery *plus* a showing of damages in order to obtain money.) It is law prompted by given, relevant facts of the hypothetical under consideration, and also reasonable inferences from those facts.

A rather obvious premise in the foregoing PN/DH facts would be the tort of battery. In addition, in order to show entitlement to PN's likely objective of money, damages would have to be shown. Therefore, PN's premise ([mere] legal *possibility!*) would be battery *plus* damages. (*All* law needing establishment to achieve the objective, which often requires combining legal precepts.) Likewise, assault or IIED seem possible premises, each *plus* damages.

Note that each premise equates to a complete legal theory of entitlement. There can be multiple premises advanced to achieve the same objective, hence multiple (legal) theories of entitlement. In the law this is called "alternative pleading." However, there can only be one recovery of the (money) objective.

Legal knowledge has now been brought to bear. However, as with all facets of LEEWS, nothing unfolds willy nilly. Always a student proceeds with discipline, a precise procedure, a narrowly defined purpose. (Seeking elephant!) At this point a student's course outline ("legal toolbox") comes into play. It has been constructed with efficient implementation of Step Two in mind.

Step Two

As set forth on page 35 of the LEEWS *Primer*, Step Two instructs: "Consider one (conflict) pairing, one party, one party objective at a time. Cull through facts relevant to the pairing, party, and objective to identify the premise or premises that may assist that party in achieving that objective, or, where such is apparent, the overriding premise(s) that will control the resolution of the conflict."

It has been noted that LEEWS is cumulative. Approach builds from simple -- e.g., phases one and two of the PO -- progressively to steps requiring more in depth understanding. Matters become more complex in Step Two.

The LEEWS *Primer* devotes what would likely occupy twenty pages in this book to explain Step Two. Understanding and practicing Step Two occupies nearly an hour and a half of instruction in a LEEWS program. Follow up practice is needed. Step Two embodies the transition from helter-skelter, unfocused, academic perspective in seeking to untangle legal implications of a fact pattern, to the goal-oriented, narrow focus of an attorney seeking to achieving an objective on behalf of a client.

I propose to describe the process associated with Step Two, what it aims to achieve, what it should accomplish. Considerable understanding of the thinking required to perform Step Two should result. However, ability to apply Step Two to a fact pattern with facility will require actual practice.

The segmenting process

In a nutshell, Step Two enables a student to address a fact pattern -- *any* fact pattern! -- in manageable segments or components. By this is meant enabling a student to consider a fact pattern not as a whole, or even a substantial portion. Rather, a student focuses, methodically, on a mere phrase, a sentence, several sentences, at most a paragraph. In effect, Step Two enables accomplishment of what traditional CW issue spotting advice assumes can only derive from innate talent, The Right Stuff.

Simultaneously, Step Two reveals relevant issues. As noted, invariably more issues than others identify via "spotting." Often more issues than the professor is aware of in the hypothetical she created!

An example of Step Two

Consider the property law hypothetical in Chapter 1 of Section Four (p. 112). A Step One analysis reveals a number of potential litigating or conflict pairs with competing objectives. However, if one were to focus on just one pairing, for example, Mr. Affronted (A) versus Mr. Conceal (C), and A's probable objective of removing C's fence enclosing the extra foot of A's property alongside the driveway, only a limited portion

of the overall fact pattern is relevant to this objective, party, pairing. Namely, the second paragraph.

It would be rare to have to consider all facts when one is focused on a single party and objective. As in this example, respecting A's objective, the focus is on a mere few sentences.

The thought in Step Two is (or should be), "What law is suggested by these (relevant) facts that might (not *will*, but might!) assist the party in question -- A -- in achieving the objective in question." Respecting the instant example, what (property) law is suggested that might assist A in removing the fence enclosing his property? (Alternatively, C, in his counterobjective of keeping the fence in place. I.e., establishing legal claim to the foot-wide strip of property that he intentionally, deceptively enclosed with a fence?)⁷

The exam exercise, of course, is in property law. The facts themselves suggest property law as the applicable toolbox (course outline) in which to search for premises. (One category of law after another.) To a student knowledgeable in property law (reviewing her property law outline or a skeleton thereof),⁸ the (limited) facts relevant to A and C, and the respective objectives of the parties, should prompt several legal tools as relevant possibilities -- premises!

On the one hand (perspective of A's attorney), there would be basic rules respecting property ownership -- valid deed and title; proper conveyance to A; valid, recorded survey; etc. As the facts raise no apparent question (issue) respecting A's ownership of the enclosed strip of land, his "seeming valid ownership" can probably just be noted, and the discussion moved to the issue of C's deceptive, clear transgression in enclosing A's property.⁹

Is there any legal justification for C's action? Does he have a legal leg to stand on, so to speak?

In this regard (adopting the competing perspective of C's attorney, as a role-playing LEEWS grad will do), the doctrine of adverse possession would be the obvious counterpremise, and doubtless the proper focus of discussion.¹⁰

As noted in the foregoing definition of Step Two, the question is not *will* a premise assist in achieving a party objective, but whether it *may* assist. Analysis of whether a premise will ultimately prove successful in achieving an objective is not attempted in Step Two.

That determination normally requires a time-consuming, probing examination of facts. There is barely time to perform thoroughgoing analysis of a premise once during an exam. Therefore, logically, that task is performed later, when the paragraph of response is executed.

Step Two calls only for identifying *possibilities!* This greatly speeds execution of the step.

Premises generate issues!

It has been noted that the question or determination, "Will a premise succeed?," precisely defines an issue the professor wants discussed. If adverse possession is posed as a premise, the question, "Did C acquire legal title to the foot-long strip of A's property via adverse possession?," presents a legal inquiry, an issue! (Alternatively, more simply, "Can C claim the property enclosed by his fence under adverse possession?")

Manifestly, isn't this also a relevant issue? Isn't this an issue the professor would want discussed, an issue on the professor's checklist?

We shall see that if conflict pairs, party objectives, and premises relevant to a pairing, party, and objective are relevant to the question/instruction, facts, and legal subject being tested, then, willy-nilly, those premises generate relevant issues!

In effect, issues, *per se*, are not sought at all, merely premises. Moreover, systematically, methodically, with discipline. However, merely by posing a premise as an inquiry, a relevant issue is revealed!

As noted, this is eye-opening to students. It generates a true “Aha!” moment. Now the bit is in the teeth!

Perspective

A key aim of LEEWS is that a student not be overwhelmed by what presents as an overwhelming task. (I.e., sort out the confusion of several sets of facts as a lawyer knowledgeable in the subject being tested.) The PO, Step One, and now Step Two’s narrow focus on a single party, a single objective, and just the (normally limited) facts relevant to that party and objective, narrows the overall (overwhelming) task to a series of much smaller, manageable tasks. However, the discipline that has been emphasized will be required.

Step Two posits the methodical, sequential consideration of one conflict, one party, one objective, one relevant segment of facts at a time. At each such point of focus -- party, objective, facts relevant to same, a student considers virtually the entirety of legal information acquired in the subject area during the term. As noted, the operative question is, “Given these facts, what legal possibility might assist in achieving the objective?”

Now legal information (“legal tools”) organized into a course outline with precisely this task in mind comes into play. The task -- review the entirety of one’s legal knowledge in the subject area -- initially seems daunting. (If facts don’t overwhelm, surely, this will.) However, once again method and discipline come to the rescue. (Discussed presently.)

As described in the 2-4 line case briefing chapter, the course outline is organized into categories of legal precepts. These possibly correspond to chapter or subchapter headings in the casebook. Other category headings may seem feasible. (Essentially, whatever topic heading seems a useful way to group legal precepts for speedy reference.)

There might be five categories, or eight, or even fifteen. Each should have a central theme or focus -- e.g., negligence in torts, crimes against the person in criminal law, creditor remedies under the bankruptcy code.

Whether five, eight, or fifteen, a student can quickly review categories, thinking, “Given this objective and facts, what category seems a possible source of a premise?” More than one might qualify. However, most can quickly be eliminated from consideration.

For example, the following might be categories of a course outline in torts, each containing legal precepts drawn, largely, from assigned cases: negligence, defamation, strict liability, products liability, torts against the land, unintentional torts, intentional torts, etc.

Consider the three lines of PN/DH facts in light of PN’s objective of getting money from DH. A quick review of the above categories should eliminate all but intentional torts as a possible or likely source of a premise.

Once a category seems a possible source of a premise, its contents are scanned with the focus, “What seems a possibility respecting the party and objective in mind (given relevant facts)?” As there is no attempt at this point to analyze whether the premise will prove successful in achieving the objective, merely whether it is a possibility (“colorable” in LEEWSspeak), this review should proceed very quickly.

In other words, a student never finds herself simply immersed in facts (“wallowing in facts” in LEEWSspeak), randomly casting about for law-fact linkages that might result in a relevant issue. Issue identification

becomes not a hit-in-miss matter of what might pop into one's head.¹¹

Rather, in programmatic fashion, focusing on single parties and objectives, a student sifts relevant facts and relevant categories for premises.

If the exam is "open book" (references are permitted to be brought in), a student brings the (30-50 page) course outline into the exam. It can be consulted in Step Two. If "closed book" (no outside references allowed, excepting perhaps a code reference in a code course),¹² in accord with LEEWS instructions respecting closed book exams (*Primer*, p. 85), a student has practiced (fast and furious!) re-creation of a one to two-page skeletal outline of the course outline. (See footnote 8, *supra*.)

Respecting creation of a skeletal (course) outline, if the course outline has been properly constructed (see, e.g., 2-4 line case briefing chapter), knowledge therein is largely in one's head. All that is needed is something on paper to aid in accessing that knowledge in orderly, systematic fashion.

Naturally, efficient, disciplined implementation of Step Two requires practice. Moreover, if 10-15 minute planning segment limits are to be adhered to, it may be that Step Two cannot be completed in a single planning segment. (E.g., 15 minutes of a 90 minute exercise that, allowing one third of the time for planning, contemplates three 10 minute, two 12 1/2 minute, or two 15 minute planning segments.)

Implementation of Step Two may have to be halted, then continued in the next planning segment.

The important thing is that a student proceed in accordance with a systematic plan of attack. She doesn't plunge, willy nilly, into a fact pattern to "spot" issues. Predictably, she will identify at least some premises during a 10-15 minute planning segment. Now get on with the actual response. An agenda of premises (therefore, issues) to discuss now exists.

What remains is a quick application of Step Three to premises identified, followed by serial presentation of analysis of each such premise/issue in concise paragraphs. Then on to the next (10-15 minute) planning segment. More premises identified, more paragraphs of analysis.

Helpful labels enable the grader (law school or bar) to find issues expected to be "spotted" and discussed. (Explored presently.)

An example of Steps One and Two versus traditional "issue spotting"

I'll repeat the three-line PN/DH fact pattern for easy reference:

Direct Hit Davis, he of the great but unrequited love, chancing upon
the object of his passion, Pucker Nicely, asleep in a meadow,
awakened her with a kiss. She reacted by bloodying his nose.

Recall the instruction: "Discuss the rights and liabilities of all the parties." The task, of course, is to sort out the situation as a lawyer (knowledgeable in relevant tort law).

Standard "issue spotting" approach

Three lines of facts is unlikely to confuse, intimidate, or overwhelm. Nevertheless, a contrast with the traditional, plunge-into-the-facts-see-what-you-can-find, "issue spotting" approach can be made. The traditional approach readily suggests battery, intentional infliction of mental distress (IIED), and self defense as appropriate topics/issues for discussion. Three relevant issues.

Students usually mention these three when assigned this exercise at the beginning of a LEEWS program.

Can you “spot” any more?

Assault occurs as a possible issue. However, students reject it. They quickly reason (in their heads) that PN being asleep, the required component of awareness or apprehension in establishing assault is lacking. Therefore, no assault.

This is a mistake. Professors generally want to see every legal possibility discussed. The name of the game in any essay exercise is 1) demonstrate legal knowledge by identifying relevant issues; 2) demonstrate lawyerly skill at analysis.

In that assault occurs as a possibility, and, moreover, is likely on the professor’s checklist, it should be mentioned. However, it should not be dwelled upon, as it can quickly be discounted. The question is not so much *should* assault as a possibility against DH be discussed, but how much time should be devoted to it. Probably very little.

LEEWS avoids the problem of omitting topics easily dismissed by ensuring that anything meriting consideration gets reflected in the exam outline. If the legal possibility [premise!] occurs in Step Two, note it (in the exam outline)! One will decide in Step Three how much time, if any, should be devoted to analysis of premises noted.

Students also typically overlook the question or issue of damages. The reason is that damages -- essentially money! -- is rarely discussed in law school classrooms.¹³ However, damages offers an opportunity to demonstrate legal knowledge of different kinds of damages that may be obtained. (E.g., actual, nominal, compensatory, special, punitive.)

The foregoing three-line fact pattern suggests much law relating to damages that a student can and probably should show a professor.

LEEWS Step One applied

CW adds to the traditional, plunge-in-and-spot-what-you-can approach to issue identification such advice as, “read the facts carefully;” “every word (or phrase) may have issue-generating significance;” “pay attention to adverbs, adjectives [colons? ... semi-colons?!];” “review your ‘checklist’ (of legal precepts that a professor is likely to want discussed);” etc. Does any of this suggest further premises or issues?

By contrast, LEEWS envisions a disciplined, programmatic approach to even three lines.

Step One reveals the single conflict pairing of PN versus Direct Hit (DH). PN is placed first, because in real life she would likely be the one to initiate a legal action. She is the “movant” in LEEWS parlance. One pair of party objectives is (in common sense layman terms) obtaining money on PN’s part, versus not paying money on DH’s part.

Notice, however, that “bloody nose” suggests an objective of money on DH’s part, and the corresponding “counterobjective” of not paying on PN’s side.

There is one conflict pair (PN v. DH), but *two* sets of objectives.

(Note: Order of protection, suggested by some students as a possible PN objective, would not be relevant in a torts exercise. It is not relief a court entertaining a tort action can normally provide. Were the exam in domestic relations or criminal law, it would be a possible objective. Gaining PN’s love, suggested by some students as a DH objective, is also not something a court can provide. It bears repeating that a party “objective” in LEEWS parlance contemplates precisely defined, common sense goals, relevant to facts and

to facsimile of practicing attorney.

If one considers PN and her objective of money, Step Two suggests battery and IIED as legal possibilities -- premises -- to achieve this objective. A LEEWS grad will at least note assault as a possibility. In that a premise is *all* the law that must be fulfilled/satisfied in order to achieve an objective, a LEEWS grad will also note damages as a necessary component of each premise.

In other words, achieving PN's money objective will require, in addition to establishing that a battery occurred (or assault or IIED), that damages were also incurred. Battery (or assault or IIED) + damages = complete premise.

Damages, in effect, occurs three times. This should be noted to the professor. However, one normally need not demonstrate the same legal knowledge and thinking twice.¹⁶ As the discussion will be the same for each of the three premises, damages need only be discussed once. (A single paragraph.)

Turning to DH's counterobjective of not paying PN money, the facts do not suggest a "counterpremise" to any of PN's three premises.

(Note. "Consent" and "privilege" are invariably suggested as possible counterpremises. However, privilege, synonymous with consent, is but one of the four elements of battery. [Intentional act, (resulting in an) offensive or harmful, unprivileged (unconsented to), contact.] Consent and privilege, therefore, are not legal propositions. They are factual propositions.)

As is true of many aspects of legal thinking, understanding the distinction between a factual and legal proposition, as regards analysis, is something students wrestle with. It requires understanding the nature of and actually performing "lawyerlike analysis," such as would pass muster in a courtroom [and on a law exam]. In the LEEWS approach, establishment of consent and privilege has to do with competing *arguments*. Arguments always have to do with facts. [Premises, by contrast, introduce legal constructs.]

Consideration of DH's objective of money yields the same premises as those of PN -- battery + damages; assault + damages. However, IIED, as relates to DH, probably need not be discussed or even mentioned.¹⁷

Self defense, which most identify via standard issue spotting, now arises in support of PN's counterobjective of not paying DH. It occurs in response to each of DH's premises, therefore twice, which should be noted. However, similar to the repetitive occurrence of the damages portion of PN and DH's premise, it need only be discussed once. Self defense, a legal precept raised in opposition to a premise, is a "counterpremise."¹⁸

Results comparing LEEWS versus traditional "issue spotting"

By way of review, as noted, LEEWS presumes a disciplined, programmatic approach. There will be at least one, and possibly more than one set of parties and objectives. Examination of each pairing, party, objective in light of (typically limited) relevant facts and overall legal knowledge (in categories of course outlines), results in identification of premises (and counterpremises).

Premises (or counterpremises), when posed as legal inquiries, translate into issues. Issues so identified are necessarily relevant, because the conflicts, parties, objectives that generated them are relevant to facts and the question/instruction posed (by the grader), and the subject area being tested. (E.g., torts, contracts, etc.)

In the foregoing example, a conventional, dive-into-the-facts-see-what-you-can-find, "issue spotting" approach reveals at most three or four issues -- battery, possibly assault, IIED, self defense. However, probably not damages.

LEEWS Steps One and Two reveal at least *nine* issues! -- PN's premises plus DH's. (Minus IIED for DH.)

(As noted, PN has two self defense counterpremises. However, as also noted, self defense need only be discussed once. Therefore, nine issues altogether, but eventually only eight paragraphs of analysis.)

A tenth premise!

Sometimes legal precepts implied in facts -- premises, counterpremises -- are so subtle as to elude even the methodical sifting achieved by the PO, Steps One and Two. (Collectively -- LEEWS *Primer*, page 43 -- "The Blender.") They emerge only during the much finer sifting (of implications of facts) that occurs during analysis.

One such premise emerges for a very few students during analysis of PN's self defense counterpremise. Thus, a tenth premise or issue revealed via LEEWS in the mere three lines in question!¹⁹

Outline of exam response per LEEWS (post Step Two)

An outline of the exam response reflecting Steps One and Two should reflect conflict pairs, competing party objectives,* possible premises and counterpremises. An outline reflecting Steps One and Two in the instant exercise might appear as follows:

	<u>PN</u>	v.	<u>DH</u>	
m				np
	battery		(no counterpremises)	
	assault		---	
	IIED		---	
	+ damages			
np				m
	self defense		battery	
	self defense		assault	
	(discussed only once)		(IIED not "colorable")	
	+ damages			

* Note. Party objectives -- money, not pay money, etc. -- are often obvious, easily recalled, and therefore need not be noted in the exam outline.

Confused?

If a bit confused at this point, welcome to the club! Much is implied in the foregoing. Most law students are somewhat confused at the midpoint of a LEEWS program.

Program attendees (live or audio) naturally have greater understanding when Step Two is introduced. They have practiced the PO and Step One on several hypos. Points have been reinforced with diagrams. (30 diagrams in the audio program.) The programmatic approach to issue identification offers promise. However, premise-counterpremise, argument-counterargument, analysis.... These concepts remain unclear.

No problem. Instruction on analysis that follows clarifies premise versus argument, etc. Students learn how precisely they must know black letter law in order to perform analysis. They learn where to find it. (In commercial outlines. See Section Three, Chapter Two, and especially footnote 9 therein.) 2-4 line case briefing and the week-to-week how-to of constructing 30-50 page course outlines is put into place.

Students learn how to present analysis in concise paragraphs. They are introduced to strategic nuances, such as the importance of making an extra effort to "intellectually engage" a (bored, pessimistic) law professor in the "window" constituted by the first 2-3 pages of an exam response.

Eventually, with follow-up practice, a seamless science of law exam writing and preparation is put into place. From day one of law school (or the evening following indoctrination in LEEWS), from minute one of any exam, to the presentation of a series of relevant, concise, impressive paragraphs of lawyerlike analysis, no longer the exam, but the student is in control! Law school, even exams begin to be, at a minimum, interesting, at best almost an enjoyable game!

Transition from academic to facsimile of a lawyer

LEEWS seeks to achieve nothing less than producing a facsimile of a competent practicing lawyer. Moreover, a lawyer knowledgeable in the relevant subject matter, approaching a fact pattern in disciplined fashion with a proven effective science of approach. The student/lawyer has, in addition, acquired skill at analysis of components of an exercise (premises/issues), and skill at presenting analysis of each premise/issue in roughly a concise paragraph.

In order to accomplish this major feat -- transition from academic to facsimile of lawyer, armed with appropriate knowledge, skills, and approaches, including a day-by-day, week-by-week approach to preparing for implementation of such skills and approaches on any essay exam --, instruction must proceed with patience and attention to detail. Layer upon layer of understanding is put into place.

Deeply ingrained, inappropriate (academic) habits of thought and approach must be altered. Such is particularly the case for 2Ls, 3Ls, and recent law graduates.

At best, case method instruction imparts the perspective on the law of a law professor. Thinking remains academic. It lacks rigor, precision, focus on a practical, concrete goal. (I.e., achieving a client objective.)

In a LEEWS program, for the very first time in most instances, students begin to understand the role, the analytic perspective, the approach of the practicing legal advocate. For the first time they feel themselves to be lawyers-in-the-making. This is not just encouraging. It is inspiring.

The transition that must occur, and does occur via LEEWS, is transformative. It is nothing less than a revelation, an awakening, a confidence-building sea change. Students typically wonder, they sometimes exclaim, "What am I paying for in [Emperor Law School]?! Why isn't this taught?!"

As noted, follow-up practice is required. However, various skills and approaches -- PO, Step One, Step Two, analysis, presentation in concise paragraphs, etc. -- can be practiced in 10, 15, at most 30 minute segments. The various skills and approaches will be brought together to bear on an exam.

[Note: LEEWS does not advise, as many professors do, and CW often does, that a student sit for 2-3 hour stretches writing practice exams.²⁰]

Issue identification approach – Step Three

LEEWS instruction is progressive, cumulative. One facet builds upon the preceding facet and introduces the next. Eventually, the overall edifice of understanding, skills, and approaches becomes sophisticated indeed. However, individual facets are easily comprehended. Understanding deepens, as a slipshod, academic perspective and way of thinking is ratcheted toward precise, almost mathematic, lawyerly perspective and thinking.

Someone dropping in at the midpoint of a live LEEWS program, as sometimes happens, is invariably lost. Terminology is unfamiliar. They cannot grasp what is going on. However, they note the rapt engagement of others. They perceive that something important is unfolding. They scramble to catch up and become part of the process.

Step Three is set forth in footnote 21. Although somewhat simpler on its face than Step Two, Step Three is more sophisticated. For it presumes skill at lawyerlike analysis. As previously noted, in over 30 years your author has yet to encounter a law student (or recent law school grad) possessed of such skill in any significant degree.

Therefore, as students are advised at this juncture in a LEEWS program, “You cannot yet perform Step Three!” Step Three, however, provides a useful introduction to the critical skill and art of “lawyerlike” analysis.

Step Three is largely mental. It comes just before execution of the response.²² (Initially, no more than 1/3 of the allotted time into an exam essay exercise, and, ideally, no more than 15-20 minutes into an exam. [Several minutes are added to the first planning segment for review of cover instructions and the first phase of the Preliminary Overview.]

Premises having been identified during a planning segment,²³ a brief mental assessment of their relative complexity and importance is made. If a premise seems likely to warrant more time and attention, it raises a “major issue.” Others give rise to “minor issues.”

Again, mentally, what is likely to transpire respecting each premise is previewed. Elements of premises are matched with relevant facts of the hypothetical to determine whether analysis is likely to be straightforward and quick, or more involved. The former, as suggested, indicates a minor issue -- dispose of it quickly! The latter suggests a major issue, deserving more time. A brief notation may be made next to premises reviewed.²⁴

However, first things first. Step Three cannot be performed with any facility until students learn to analyze “as a lawyer.”

Analyzing “as a lawyer”

Over two hours of a LEEWS program is devoted to introducing, practicing, inculcating the “art of analysis.” Students learn, for example, that battery, *per se*, cannot be analyzed. The issue/inquiry, “Was there a battery?,” is too broad to be useful. Students who assay to address “Was there a battery?,” as most do, get confused. Their analysis lacks focus and precision. It likely rambles, and is superficial. It surely contains conclusory aspects.

Similar to a lawyer’s assessment in thinking, “Can battery be established?,” a student must segment the concept into the four component elements posed by its legal definition. Each deserves separate analysis. Thus, “Was there an intentional act?; was the act offensive (or harmful)?; was it unprivileged (unconsented to)?; did it result in contact (touching)?”

Such patient, segmented thinking is typically unfamiliar to a liberal arts background, academic thinker. It has some similarities to mathematic and scientific thinking, again offering a clue to the seeming greater exam success of students with those backgrounds. However, the task of precise, segmented thinking in a literary context makes the exercise unfamiliar to math/science students as well.

It is unlikely, nigh impossible that a student will make the necessary transition from classroom examples of lawyerlike thought, engaged in sporadically and at an academic remove as cases are discussed, to being able to demonstrate the discrete segments of logic that characterize proper legal analysis. In particular with succinctness under time pressure.

Indeed, preciseness of thought, particularly as it pertains to facts relating to elements of rules being discussed, is only partially glimpsed in appellate cases. When professors seek to introduce it via what ifs,

they are greeted with blank expressions. The cart has been placed before the horse.

However, we have only begun to unravel layers of the onion that is lawyerlike analysis.

If an element of battery is itself ambiguous or broad, requiring clarification and/or further definition, then a further segmenting and subdividing occurs, resulting in sub-elements. Each such sub-element merits individual analysis.

For example, the “unprivileged” element of battery is defined at law as meaning “unconsented to.” Unconsented to is further defined as no actual consent (one sub-element), also no implied consent (second sub-element). Both forms of consent must be found not to exist, if it can be concluded that the requisite element, unprivileged, is present.

Precision in thinking

It has been noted that the law is a stickler for precise definition. If parties (and the court) cannot agree on what something IS, then it is not possible to debate/argue about, and thereby establish whether that something exists, occurred, or not. Some may recall former president (and lawyer) Bill Clinton, during impeachment proceedings, saying, regarding a White House intern with whom he was accused of having sexual relations, “Depends on what you mean by ‘is.’”

Precision in thinking, nitpicking thinking. It is what being a lawyer is all about. This is not adequately conveyed by merely reading and briefing cases. Not even close!

For example, to determine whether, by kissing PN, DH committed a battery, *inter alia* (among other things), it must be determined that the kiss was “unprivileged.” One part of the definition of this element, as set forth above (a sub-element), is “actual consent.” All agree that “actual consent” means no express permission. That there was no actual consent to the kiss is easily satisfied/established by the circumstance of PN being “asleep.”

However, the second definition (second sub-element) of unprivileged, “implied consent,” is somewhat ambiguous. It needs clarification, further definition, if whether or not it exists is to be explored and settled.

Implied consent is defined at law as “[1] a manifestation that [2] would cause a reasonable person to believe consent was given.” Note, this definition of a sub-element itself has at least two elements -- 1 and 2 above. These, in effect, are sub-sub-elements! Further, the sub-sub-element, “manifestation,” perhaps also needs clarification. It may be thought of as something one can see, feel, hear, touch.

Analysis of whether there was implied consent, therefore, as explored in a LEEWS program, is a much more problematic task than establishing whether there was actual consent. It requires addressing both of the sub-sub-elements. Now ensues a close parsing of the foregoing three lines of facts. Such parsing gets to the heart of the nitpicking dialectic that is lawyerlike analysis.

The discussion, in effect, parallels two lawyers in a courtroom arguing over each required element, sub-element, and, if necessary, sub-sub-element of the legal precept at issue -- whether a battery was committed.

I shall not assay to present that back and forth of arguments and counter-arguments, element by element, sub-element by sub-element, etc. here. It would require several pages. It is set forth in the *Primer*. Suffice that after nearly an hour investigating the simple, three-line PN/DH paragraph, students are stunned at the arguments and counterarguments the lawyering mind can draw out of a mere three lines. They are stunned at and edified by the arguments they themselves have drawn from the brief paragraph.

They have noted, for example, that the word “by” in the context of DH’s nose being bloodied, if replaced by “and,” would impute a very different meaning. (Supportive of DH’s argument that the “bloodying” of his nose was intentional.) They have noted (with a major assist from your author) that the timing sequence implied by the period after the word “kiss” (the literal period!) would be altered, if a comma were substituted.

Students’ eyes are opened to the patient, precise, artful nature of lawyerlike analysis. Practice is needed to hone the skill. However, the bit of the analysis game is now in their teeth. Modeling on exercises in the *LEEWS Primer* (many paragraphs of analysis, each featuring a single premise), they are on their way to acquiring the essential lawyering skill.

Imagine the uplift to realize that this skill remains wholly mysterious to classmates!

Why lawyerlike analytic skill cannot be conveyed at present in ELS

As posited, it is highly unlikely, indeed, nigh impossible that the patient, precise, back and forth nature of lawyerlike analysis can ever be conveyed by case method classroom instruction. Certainly, it cannot be conveyed by present instruction.

Respecting application of precise aspects (elements) of legal precepts to facts, examples of such analysis are too few. Even if adequate examples existed, instruction that would effect the transition from academic to legal problem solver, thereby enabling proper understanding of such examples, is missing.

Manifestly, how to “analyze as a lawyer” is best instructed by practicing law. It is best instructed by the give and take, the adversarial engagement of litigation -- jousting with an able opponent, both prior to going to court, in filings, motion practice, depositions, discovery, etc.; and in the courtroom, in hearings, and especially during a trial. Lest an opponent take advantage of something missed, as an able lawyer surely will, close attention to details of both law and fact is honed in a school of hard knocks.

Reasonable facility at the analytic art is key in impressing and competing for top grades in law school. It can certainly be instructed. It is not rocket science. Most any person of average intelligence is capable of “analyzing as a lawyer.”

However, lawyerlike analysis is a very different way of thinking. Grasping it requires demonstration that approximates the precise, nitpicking, give-and-take contest in a courtroom over a single element of a legal precept at issue, even an element of an element, or an element of a sub-element (sub-sub-element!). Honing the skill requires follow-up practice.

As described in the chapter on 2-4 line case briefing (Section Three, Chapter 3), law professors attempt to inculcate this mindset by varying facts of cases under discussion in “what ifs.” They inquire, “What if the following fact were changed? How might that alter the outcome? Would it persuade the dissent to go with the majority, the majority to defer to the dissenting view? Why?”

However, as noted, lacking an adequate foundation respecting how to analyze as lawyers, few can participate in the exercise. Rather, students are mystified. They are correct in their self assessment that, “I’m not getting it.” They take refuge in copious notes they will not have time to review. Not that they could make much sense of them if they did. Confusion reigns. Also, well-founded concern.

Clearly, once skill at analyzing “as a lawyer” is acquired, a student has an enormous advantage over equally smart (and smarter!), equally diligent peers. An engaging, intellectual game of a high order now unfolds. Law school, even addressing law exams, becomes an interesting, even compelling activity. Many *LEEWS* grads have acknowledged that law school “became fun!” (Imagine that!)

I repeat once again my considered view, that to the extent skill at lawyerlike analysis is exhibited in a classroom of Emperor Law School, it was acquired outside of that classroom. If exhibited during all-important first term and first year of law school, it was likely acquired *prior* to entering law school.²⁵

“Good writer” as a non-factor in concise presentation of analysis

Once reasonable skill at analysis is acquired, how to present it concisely on paper is yet another considerable obstacle facing law students. Many students are appropriately insecure regarding their writing ability. Fundamentals of grammar and sentence/paragraph construction are rarely taught today. They are not even valued in the age of internet, twitter, and texting. However, they remain extremely important in the lawyering world.

At the same time, the myth persists in Emperor Law School that being a “good writer” is a key to success on exams. As noted, however, math, science, and engineering types, not likely “good writers,” tend to do better on law exams than English and journalism majors. The reason is that success on a law essay exam requires nitpicking, analytic thought, concisely expressed, not “good writing.” Nonetheless, considerable insecurity in this regard exists and impedes performance.

Here, as in all other areas, LEEWS comes to the rescue, again with an innovative approach. (Note. The UBE [ugly but effective] math-like format for presenting analysis in concise paragraphs will be explored in depth shortly.)

Suffice for now that students are instructed to literally “abandon standard English temporarily, and any pretence at good writing.” They are shown that analysis proceeds in a mathematical progression. Once this progression is grasped and expressed on paper, a transition to at least “adequate writing” is straightforward.

Evidence and arguments in support of a proposition at issue (something contested!) can be marshalled in a mathematical sequence. For example, evidence/argument (E/A) for the proposition (“for”), plus E/A for, plus E/A for. Or, as literally set forth in UBE format, “E/A [for] + E/A [for] + E/A [for].”

Set against the E/A in favor is any E/A in opposition. This would be similarly sequenced -- “E/A [against] + E/A [against] +”

Thus, presentation of analysis in UBE math-like format appears as “[Legal proposition (e.g., battery, assault, contract, robbery, subject matter jurisdiction, etc.)] occurs when 1) ..., 2) ..., 3) ..., 4)” (Legal definition is stated with elements numbered.) Then, “1 = (literally an equal sign!) E/A [for] + E/A [for] + E/A [for] versus (v.) E/A [against] + E/A [against]. 2 = E/A [for] + ... v. E/A [against] + 3 = 4 =” Then comes a conclusion.

More on the analysis/lawyering game

Analysis as baseball

An analogy is made to baseball and circling bases -- first base, second, third, ... --, eventually crossing home plate, thereby scoring a run. Imagine progression toward proof of a legal precept, or each element thereof, as likewise a progression around a baseball base path. Crossing home plate represents accumulation of requisite proof to a preponderance of evidence of whatever is at issue. *Arguendo* (for the purpose of argument), preponderance of evidence may be thought of as 51 percent or higher.²⁶

Sometimes in baseball a single hit scores a run. That would be a ball out of the field of play, a home run. Likewise, in analysis a single piece of evidence is sometimes sufficient proof. Thus, for example, the circumstance (fact, evidence!) that DH kissed PN would, by itself, seem conclusively to establish requisite contact in attempting to prove a battery. Certainly, it meets the burden of 51 percent. Cross home plate, score a run respecting contact!

More often in legal analysis, however, as in baseball, proof to a preponderance -- run scored! -- is not the result of a single piece of evidence, a single hit. A run scored in baseball is more often a progression -- accumulation of a single, plus a stolen base, plus a sacrifice fly, plus, perhaps, another hit.

Similarly, legal analysis normally proceeds in increments of E/A (evidence/argument). The goal of proof to a preponderance is achieved as a result of E/A being added to E/A -- 5 percent proof, plus 20 percent proof, plus another 20 percent, add 10 percent, and home plate is crossed respecting whatever is at issue.

Analysis as a detective game

Students grasp that in analysis proof of a legal precept implies proof of every element thereof. (Or sub-element, etc.) They learn to search for evidence and arguments in a fact pattern, much as a lawyer would. They learn that having pinpointed a legal precept or part thereof needing to be proved (or disproved!), lawyers become detectives. They are detectives of law and fact!

Students, detective-like, learn to patiently accumulate relevant E/A in order to establish proof of whatever is at issue. Simultaneously, or, rather, alternatively in the role of attorney for the opposing party, they seek E/A that might disprove the same item.

Often the same piece of evidence can be used to argue in support of opposing viewpoints/arguments. Evidence can “cut both ways.”²⁷ The question then becomes which party in a conflicting pair (with conflicting objectives) gets more mileage from the same evidence. Who gets more percentage points in the march toward home plate and the reverse?

For example, the facts indicate DH “loves” PN. This may be interpreted as motive, and used in conjunction with other E/A to establish, respecting battery, that his kiss was intentional. At the same time love may be cited in conjunction with other E/A -- e.g., chance meeting, passion, idyllic, romantic setting (“meadow”) -- to buttress an argument that DH’s emotions overrode requisite intent. (I.e., DH got swept away by love, etc., and couldn’t help himself.)

True appeal of being a lawyer

Understood as an intellectual detective game, analysis is seen in a new light. It is interesting and mentally stimulating. It is a kind of game. It is often fun!

The true appeal of being a lawyer, what causes some lawyers to eagerly go to their offices years after they might have retired, begins to be understood. It is not money or power, although those inducements are present in the profession. Rather, it is the stimulating intellectual game of marshalling law, evidence (facts), and arguments in the service of achieving a client objective, and managing to cross home plate!

Here is a game that can be played in the service of doing great good (or mischief!) -- for individuals, for causes, for companies, for nations. Played at its highest level, with great stakes in the balance, requiring marshalling and nuancing of law at the frontiers of jurisprudence (including bringing diverse policy strands from differing fields into the mix), in terms of exhilaration and excitement, it is a game barely short of entering a boxing ring, mixed martial arts octagon, or live fire combat zone.

As previously noted, litigation is but an alternative to physical combat in resolving disputes.

Now law school can begin to fulfill its promise. Students can envision themselves as future lawyers. They understand that their various courses but introduce legal tools. Potentially, those tools may one day put in the service of achieving a client end.

The game of lawyering is fun! Law school can be fun!

Wow!

“Be objective,” “argue both sides”

“Be objective” and “argue both sides” is standard CW throughout Emperor Law School. However, exactly what is meant by such advice, and how one actually goes about expressing this in analysis is never adequately explained or demonstrated. Finally, via LEEWS hands-on exercises, it is. Indeed, students come to understand the back and forth of objective analysis as the lawyering game described.

As just noted, legal analysis is not only a game, and a highly intellectual, interesting game. Properly understood and played, it is an engrossing game.

Rules of engagement in analysis

The point is made in a LEEWS program that what happens in a courtroom is an apt model for understanding how lawyers operate, make use of evidence, analyze, etc. Another reason law students fail to make the transition from academic to lawyer is that the model of what happens in a courtroom is rarely invoked in classrooms of Emperor Law School. No more so than “lawyer” and “attorney.”

The back and forth in a courtroom of lawyers arguing over evidence is conducted in accordance with rules -- “rules of evidence.” To belabor the baseball analogy a bit further, not all balls hit are “fair” or “in the field of play.” Many are “outs.” Only fair balls can advance a runner around the bases.²⁸

Likewise, respecting analysis wanted in an exam response, not all evidence and argument is fair and permissible in advancing proof.

For example, in legal analysis in general, the field of play, the ballpark so to speak, is evidence/facts that have been adduced, “reasonable inferences” therefrom, also evidence that may yet be discovered. Respecting the latter, if facts are ambiguous or more information is needed, a lawyer is free, indeed, is dutybound to seek clarification and/or additional facts.

Not so on a law essay exercise. The field of play is only given facts and reasonable inferences therefrom. Students may not “unreasonably add or make up new facts.” They may not “speculate unreasonably beyond given facts.” They may not “draw unreasonable inferences from (given) facts, or make unreasonable assumptions based upon (given) facts.”²⁹

Understandably, such rules and prohibitions, altogether familiar and comprehensible to an experienced courtroom practitioner, are Greek to a law student, especially an entering 1L. If, amid the noise of many other unfamiliar do’s, don’ts, and assertions never adequately explained in Emperor Law School, such rules are heard, they are not understood. Thus, they cannot be heeded. They but add to confusion and uncertainty.

Similar to how neophyte lawyers are educated by the instruction of judges in a courtroom (and objections of opposing experienced counsel), students in a LEEWS program are ratcheted toward an understanding and feel for what is and is not permissible in introducing evidence in analysis. Here, on the printed page, I shall endeavor to offer a semblance of feel and insight for certain rules of evidence.

In the foregoing, three-line, PN/DH fact pattern, for example, students typically surmise that DH and PN had a prior relationship. Seeking to establish that PN’s bloodying of DH’s nose was intentional (in order to establish PN’s battery premise), many also assert that PN “punched” DH, or at the very least was aware of her actions when she bloodied his nose. They say, “he awakened her, and *then* she bloodied his nose.”

However, note that “punched” is not in the facts. It is added! “Then” is also added. “Punched” is an inference that assists the argument for intent. (Greatly! Indeed, it conclusively establishes intent!) Ditto for “then.”

Both are speculative, conclusory additions that goes too far!

“Punched” and “then” are not supported by the facts. In a court of law an objection to both assertions would be made on grounds of “assumes a fact not in evidence,” “speculation,” “unwarranted inference.” The objection would be “sustained.” The proposed additions would be stricken as impermissible. A jury, if any, would be instructed to disregard the additions and any inferences therefrom. (A [doubtless neophyte] lawyer who asserted them would be chastened, embarrassed, made to look incompetent in the jury’s eyes.)

For these same reasons, a professor or bar examiner seeing such assertions in an exam response would have a disapproving reaction.

In addition, as suggested in the Bell memo of CW, professors do not want students to be “conclusory.” This means they may not make unsupported assertions. For example, stating, “there was a battery,” or “clearly there was a battery” [or robbery, or contract, etc.], without more is conclusory. “More” means relevant, supportive evidence and arguments.

Such conclusory statements, the same as unreasonable (self-serving) inferences and additions, would be objected to and excluded in a courtroom. They are likewise objectionable in a law exam response. A professor or bar grader would have a visceral reaction of, “Ugh! Conclusory!”

In other words, as noted previously, professors, unknowingly in your author’s view, judge student analysis in accordance with the same rules of evidence that hold sway in a courtroom. Precisely what is objectionable in a courtroom is objectionable in analysis on an exam response.

Yet law students do not take evidence law until second year!

Here again is persuasive evidence of the unfairness of law essay exams, given current inadequate instruction. Manifestly, exam performance would improve, and greatly, given proper instruction in this regard.

Ugly but effective (UBE) format for concise paragraphs of analysis

The “R” and “A” of IRAC

Having learned how to marshal E/A for and against a proposition at issue -- analysis! --, students are instructed to start paragraphs abruptly, with a precise statement of law constituting the premise to be analyzed. No introductions or preambles! No “Hello, how are you’s!”³⁰ Just an abrupt, concise, accurate statement of law constituting the premise. This would correspond to the “R” of IRAC.

Initially, students are instructed to literally number components or elements of the legal precept set forth. Identifying elements is yet another skill relating to analysis that needs practice. On an actual exam such numbering normally will not be done.³¹

Having abruptly started a paragraph with the premise, students are advised to underline or boldface any key word that will alert the professor (or bar grader), to what is being discussed. Thus, a paragraph might begin, “**Battery** occurs when”

Note. A LEEWS grad will have nothing to hide from the grader. (Quite the contrary!) Therefore, almost a LEEWS mantra is HELP THE PROFESSOR! Make his or her job of seeing the issues (premises!) and analysis she is looking for easy!

Now, per UBE, seriatim, literally using plus signs, present E/A in support of establishment of elements of the premise, followed by E/A, if any, in opposition to each element. As noted, no attempt is made at this juncture to write proper sentences. Grammar, sentence structure, “how to write,” (any concerns in this

regard) are completely taken out of the mix.

Thus, the UBE paragraph begins, “Battery occurs when 1) ..., 2) ..., 3) ..., 4) ...” Then, literally, “1 = E/A + E/A + E/A (support for establishing the first element) versus E/A + E/A (any opposition).” Then, “2 = E/A + E/A versus” Then, “3 = ... versus”

This is the “A” of IRAC presented in UBE math-like format.

Transition to proper, but simple sentences

I have noted the insecurity of many students respecting writing. Much stems from uncertainty about how to play the game of law school, and, especially, how to perform analysis on exams. However, writing has certainly been good enough to earn a lifetime of A's and get the student into law school.

UBE format, paragraph presentation is the final cog in instructing both how to perform analysis, and how to present analysis concisely. If the math format -- (concept/element at issue) = E/A + E/A + E/A (in support) [literal minus sign!] E/A (if any) + E/A (if any, in opposition)...; (concept/element) = E/A + ... -- (minus) ...; etc. is translated to simple sentences that express for and against E/A, writing will be concise. It surely will be good enough for a law exam!

An example

The contact element of battery is satisfied by the fact (in the PN/DH fact pattern) of DH kissing PN.³²

One does not, of course, want to make the conclusory statement, “There was contact,” or, “There was clearly (or obviously) contact.” This reflects a characteristic mistake of failing to translate more complete analysis that occurs in one’s head to paper. UBE format ensures that relevant information and analysis in one’s head gets put into the response. It ensures the patient, lawyerly progression of thought that has been described.

A typical law student, insecure about how to analyze, how to present, etc., will write something of the order, “The element of contact is established by the circumstance, as presented in the facts, that Direct Hit ‘awakened Pucker Nicely with a kiss.’”

This statement is not incorrect. However, it is far too long. If one writes this much on the incontestable element of contact, there won’t be time to discuss “real (sub) issues” deserving more attention, not to mention the many other premises/issues needing to be addressed. What to do?

Establishing contact is a straightforward proposition. In LEEWSspeak it is a “non-issue,” as no one (in general, in a courtroom) can credibly contest the proposition that contact occurred. (Any attempt to do so would likely move into the realm of the philosophic, which is never called for in lawyerlike analysis.³³) The discussion therefore deserves short shrift. (Revisit footnote 32 re “facts,” if necessary.) A student already knows this as she sets about crafting a paragraph of analysis of PN’s battery premise against DH.

UBE proposes matching elements with E/A for and against the proposition in addition/subtraction math format. Contact having been numbered as the fourth element of battery, analysis expressed in UBE format is, simply, “4 = kiss.” That’s it! Nothing more needs to be said! There is no additional relevant evidence either for or against the proposition of contact in the three lines of facts.

Realizing this, with practice a student should be able to confidently translate “4 = kiss” into the simple sentence, “Contact is shown by the kiss.” (Or “Contact is established by the kiss.”)

This is the ideal. Short, simple sentences that match legal propositions at issue with E/As for and against, that

resolve the issue. Clearly, practice is required. However, UBE format provides the template for confident, concise expression of analysis.

In no so-called “legal writing” courses of Emperor Law School or elsewhere that your author is aware of is such a hands-on format for both presenting analysis, and presenting it concisely on paper offered. UBE is unique!

Accommodating professor preferences

The foregoing format -- abrupt statement of law, followed by concise analysis of elements -- will certainly suffice on any bar exam. It will suffice for most law professors. However, some adjustment occasionally will be warranted.

Once the abrupt, to-the-point UBE format is mastered, I caution students that a little “softening” may be in order. Many professors appreciate the barebones, state-the-(relevant)-law, follow-with-analysis paragraphing approach. Admiringly, they say to LEEWS grads, “How did you learn to do this?”³⁴

Some, however, seem to have a problem with it. The concise paragraphs strike them as too ... abrupt, too concise. The format seems to place too much emphasis on black letter law. They offer criticism on the order of, “I feel the discussion should flow more.”

Perhaps, as non-practicing lawyers, as essentially, academics (many with Ph.D. in hand), they are uncomfortable with such a radical departure from a more literary exposition.

If one were to look at a model response of such uncomfortable professors, one would see what this means. Black letter law appears. However, often fitfully and in segments. All IRAC elements are present. However, loosely connected, and here and there. Discussion rambles in the manner of academic essays.

Perhaps the real objection to concise LEEWS paragraphs of analysis is the idea that response to a seeming complex, convoluted essay exercise can be reduced to what seems a formula. I believe some professors are mystified by and mistrustful of the simplicity and clarity. They think, “This can’t be this simple.” They have probably never practiced law. They think A-quality analysis necessarily rambles in a more academic essay form. What to do?

“Simply soften the beginning of the paragraph,” I caution students. “Once you have mastered UBE format, and expressing analysis in simple (confident!) sentences, add a softening preamble at the beginning of the paragraph, prior to the abrupt statement of law. Write, ‘Another (an interesting?) issue is battery.’ Immediately continue in UBE mode. That is, ‘Battery is (1,2,3,4)’ Next paragraph. ‘A seemingly minor issue is assault. Assault is (1,2,3)’”

This simple addition enables a professor, possibly initially put off by the prospect of one paragraph after another beginning with an abrupt statement of law, to venture into the paragraph itself. There, analysis should impress. He will recognize a lawyer at work.

Once presentation of analysis in concise paragraphs is mastered, all else is mere cosmetics, additions, subtractions. Look at examples of “A” exams a professor may have on file. Pay attention to a professor’s style and preferences -- do’s, don’t’s, requirements. Perhaps, for example, the professor wants a statement of conclusion at the outset of discussion (analysis) of an issue; at the end; not at all. (See discussion following.) Make appropriate adjustments.

The fundamental building block, a concise paragraph of insightful, objective, lawyerly analysis is in place!

More important, a student understands the game afoot, knows how to play with skill, even looks forward to playing. (Albeit not without a measure of nervous [energy-generating!] anticipation.) To borrow a current idiom of the younger (thuggish?) set, “Make the exam your ...!”³⁵

Statements of conclusion and issue (“C” and “I” of IRAC)

Statement of conclusion

Having completed analysis in roughly a paragraph, a student normally comes to and states a conclusion. The conclusion may be entered as a brief sentence at the end of the paragraph of analysis. It may be stated below the analysis in a separately labeled, “Conclusion.” (Yes, underlined or boldfaced, so as to be easily identified.)

The conclusion respecting an issue should be, and generally is unimportant. If stated at the end of a paragraph of analysis, or, as noted, below the analysis, it doesn’t much matter how it is stated. It will be concise, as there is no felt need to recap aspects of analysis just presented. If the professor disagrees with it, she has already read and likely been impressed by the analysis. There is little possibility of points being deducted.

If the professor wants the conclusion stated prior to analysis (CIRAC), a student goes back and fills in space left for this purpose. (Of course, opens space if using a word processor).

Conclusion stated at the outset

A conclusion stated at the outset will resemble a conclusion set forth below the analysis, but with a couple differences. In that the professor has yet to read (and be impressed with) the analysis, as per instruction on page 67 of the LEEWS *Primer*; unless there is no doubt as to outcome, the conclusion is never stated as an absolute. (E.g., “Direct Hit battered Pucker Nicely”; “There was a battery”; “The motion was decided correctly”; “Yes”; “No.”)

However much a professor may insist “There are no right answers,” having performed her own model of analysis (brilliant, naturally!), a professor likely has a notion of a correct outcome. If that notion is “Yes” (i.e., the motion in question was decided correctly, or party X prevails), obviously, a student doesn’t want to state, “No.”

The solution, altogether lawyerlike, is, as previously suggested, to hedge. Literally preface with language such as, “It would appear that ... [the motion was decided correctly, party X prevailed]”; “On balance it would seem...;” “Probably...” If the conclusion runs counter to the professor’s notion, confrontation is mitigated. The possibility for agreement with the professor exists!

Adverse reaction to a conclusion stated at the outset is further mitigated by previewing what is thought to be the key or pivotal aspect of analysis. Thus, “DH would seem to have committed a battery, because, *inter alia*, requisite intent *seems* to be present.” (Additional hedging!) (*Inter alia* [page 58. LEEWS *Primer*] is also a hedging device. It means among other things. It implies there are things possibly worth considering to come. [In the event what has been noted doesn’t impress.]

Statement of issue? (Yes, or no?)

The “I” of IRAC stands, of course, for issue. Some professors specifically instruct that they want a statement of issue prior to analysis. An instruction to “follow IRAC” or “IRAC the exam” suggests that the issue be stated at the outset.

Issue, in the sense of “spot the issue,” or “state the issue,” means the legal inquiry to be investigated. Namely, can a premise to be analyzed be established or no? Therefore, respecting PN’s battery premise against DH, issue statements would be of the order, “Did DH batter PN?”; “Did DH commit battery against PN?”; “Was there a battery?”

It has been noted that “help the professor” possibly warrants being a mantra. In this regard, if a professor wants an issue statement, it would be helpful to preface an issue statement with a label. Moreover, underscore or boldface the label for easy recognition. Therefore, “Issue: Did DH commit a battery against PN?” Later, “Issue: Did DH commit an assault against PN?” Etc.

The problem is time. There normally isn’t a lot of it. If discussion of every issue is to be introduced by a statement of issue, much time will be consumed. Therefore, can the “I” of IRAC be satisfied other than with a statement of issue?

An alternative to issue statements

My answer to students is “Yes.” However, as with so many other aspects of the difficult problem of addressing essay exams, more background and insight is required. A digression is necessary before the answer can be fully understood and a more expedient alternative implemented. However, not so much.

I have noted that common sense is the most important attribute in addressing an exam. Common sense suggests that the first thing to think about in structuring a “helpful” exam response is whether the question/instruction posed by the professor suggests a format. For example, if there are questions/instructions numbered 1, 2, and 3, the professor will naturally be looking for 1, 2, and 3 in the response. Pretty obvious it would seem. However, students overlook many obvious things.

Moreover, if the PN/DH fact pattern were followed by a specific numbered question of the order, “1) Did Direct Hit batter Pucker Nicely?,” then an issue statement, “Did Direct Hit batter Pucker Nicely?” is redundant and unnecessary. It suffices merely to put a “1,” then commence analysis by stating the premise to begin a paragraph. (I.e., “1) Battery occurs when”)

More often there is not a series of numbered questions/instructions, there is not a format suggested by the question/instruction. The question/instruction is broad and open ended, such as the one posed at the end of the PN/DH torts hypo -- “Discuss the rights and liabilities of all the parties.”

When a question/instruction is broad, open ended, or somewhat ambiguous (e.g., “What result?”), a student must think about labels that will assist and guide the professor in finding what she is looking for. As suggested, these labels should be underscored or boldfaced for easy recognition. (As noted, LEEWS grads, unlike many law students, have nothing to hide. Quite the contrary. Therefore, make recognition easy on the professor.)

Consider the instruction respecting the torts auto accident hypo on page 131. (Section Four, Chapter 3) -- “Discuss the rights and liabilities of all the parties.” One might have a series of labels relating to each party in the fact pattern. For example, “Rights/liabilities of A,” then B, C, etc. To save time, one might introduce an abbreviation -- “right/liabilities (R/L).” Thus, “R/L B,” “R/L C,” etc. There would follow paragraphs of analysis of relevant premises. (See footnote ³⁶ for advice respecting abbreviations.)

Alternatively, one might use the conflict pairings revealed in Step One as labels. For example, “Pucker Nicely (PN) v. Direct Hit (DH),” in the context of “Discuss rights and liabilities of all parties,” narrows the focus to PN and DH’s rights and liabilities. (Abbreviations are also now in place.) The professor’s checklist of issues to be identified doubtless has some associated with PN and DH. Those issues would likely be further classified according to the two major events occurring in the PN/DH encounter -- the kiss, the bloody nose.

What if, following “Pucker Nicely (PN) v. Direct Hit (DH),” a further label were added, namely, “The Kiss,” and later, “The Bloody Nose?” If, immediately following “The Kiss” a paragraph were to begin,

“Battery occurs when ...,” wouldn’t the professor think, “Ah! There’s the battery issue I’m looking for,” and award a checkmark?

In other words, if appropriate labels guide a professor to expect to see certain issues, won’t seeing a paragraph begin with the law relevant to the issue -- the premise -- imply that discussion/analysis of the issue is to commence? (Especially if key words are underlined or boldfaced.) Is it necessary that there be, in addition, a separate statement of issue?

In other words, can the “I” of IRAC be satisfied by *implying* the issue (in, e.g., the manner just suggested), rather than stating it?

In most instances I am certain it can. When professors instruct that the issue is to be stated, or IRAC is to be followed, their concern is being able to see or find issues they are looking for. Appropriate guiding labels, followed by paragraphs that consistently begin, abruptly, with the law of the premise that gives rise to an issue fulfill this function. The time-consuming busywork of stating issues is made unnecessary!

Such is the innovation and precise guidance of the LEEWS science. Here, as it pertains to exam response presentation.

And much more

If you have made it this far in this chapter, I am not sure what to say. Perhaps you are a glutton for tedium. More likely, and appropriately, you perceive that a true and effective science of exam writing and preparation exists, and you want to learn it.

I have done my best to describe important aspects of LEEWS in detail and in depth. I want doubters to see what a true science of exam writing looks like. I want to make manifest that CW merely scratches the surface of what is to be known.

Still, as regards actually learning LEEWS, so as to implement it day by day, week by week in preparation for class, and especially on exams, as advised, the methodology is hard to grasp from descriptions in a book, however detailed. Hands on, facets of approach must be practiced. Moreover, there are other facets, most relating to preparation for exams.

These would include how and where to learn black letter law; proper use and purpose of cases; preparation for class and abbreviated, 2-4 line briefing; how to reduce class notes to less than a page per class hour; construction of 30-50 page course outlines; knowing one’s professor; policy and policy discussion -- what is it?, does the professor want it?; how to incorporate policy into the exam response; impressing in the first 2-3 pages of an exam; etc.

Much of this is covered in the earlier chapter on 2-4 line case briefing. (Section Three, Chapter 3.) For example, the point is there made that students who, following typical disappointing exam results first term, profess that they “knew the law,” did not. Not really. Certainly, not well enough to apply it to facts in the kind of analysis just described.

As noted in that (2-4 line briefing) chapter, until one understands how to analyze “as a lawyer,” attempts to grasp the lawyering game, necessarily, remain theoretical. Effective implementation of LEEWS is unlikely.

In sum

LEEWS offers a perspective, a catechism if you will (The Blender), for understanding and setting about solving any and all legal problem-solving exercises. Not just essay exams, but research papers, briefs, memos, moot court advocacy, trials and trial preparation, client interviews, etc. All manner of legal problem-

solving exercises are usefully filtered through the prism of The Blender. (Who's against whom, what does each side want? [Step One]; legal strategies/precepts, procedural and/or substantive, suggested by facts [and research] as being possible avenues for achieving objectives? [Step Two].)

In chief LEEWS is a comprehensive, precise, A-Z of law essay exam writing and preparation. No aspect of preparation and exam taking is neglected. The result is nothing less than a tried and proven effective, evolved science. A student is able to approach any and all exams methodically, with confidence, with the ability and prospect of exhibiting mastery.

A LEEWS grad, after practicing skills and approaches, knows what to do and how to do it at all times in any exam. She has a confident sense of being in control of an otherwise confusing, chaotic situation. She is nervous, but also eager to show off her knowledge and lawyerly skills. She understands that her task is to demonstrate knowledge of law made relevant by a professor's [or bar examiner's] facts, and ability to apply that law to facts, as would a competent lawyer or judge.

Should a professor throw a curve ball, such as, "Show me your thinking on the following subject" (e.g., no fault insurance in tort law; the equal protection clause of the Constitution), and, moreover, there are no given facts (!!), a LEEWS grad knows what to do. (LEEWS *Primer*, p. 72, footnote.)

Small wonder that where a law professor expects scores in the range of 25-35 out of a possible 100, LEEWS grads regularly upset the applecart. They score 45, 55, 85 out of a possible 100 points. And more.³⁷

In sum, LEEWS is the science of law essay exam writing and preparation law professors might have discovered, *IF they believed a science of how to prepare for and write law essay exams could possibly exist, and they had endeavored to discover it!* Which, of course, has never come close to occurring.

A concluding diatribe

I cannot resist, at this point, once again taking aim at the colossal misallocation of blame that occurs in Emperor Law School. Namely, giving law students little chance at success on exams, then faulting them for their confusion and inability. This has destructive implications not just for students and their futures, but for the many lives students will impact as soon-to-be lawyers. It has negative implications for the nation.

Law school professors and deans seemingly cannot entertain the possibility of a science of law exam writing and preparation. Confronted with such a science (as they have by LEEWS for several decades!), they cannot acknowledge it. They will not investigate it. They dare not!

For the science represented by LEEWS wholly discredits "genius for the law," The Right Stuff, the specious idea that the superb lawyering mind is innate. Such fictions are foundation pillars of the suspect status quo in Emperor Law School.

In truth, rejecting, at very least ignoring the science represented by LEEWS is understandable. Imagine what the consequence of acknowledgment would be! Emperor Law School, from Yale, Harvard, Stanford down to the lowest ranking law school would have to undergo fundamental change. Indeed, the greatest change would have to occur at top-ranked schools. They are the ones most committed to training law professors, not lawyers. They are the ones whose professors have the least practical experience in, understanding of, and appreciation for what lawyers actually do.

Deeming 35, 45, even 75 points out of a possible 100 acceptable, much less excellent, is unsatisfactory. Belief that an elusive, innate ability, some sort of genius for the law, The Right Stuff is required to write, not an excellent, but merely a relatively less incompetent exam, is condescending and demeaning to law students. It underpins a pedagogy -- case method instruction! -- that results in super smart, hardworking

students at even YHS floundering on exams.

Flattering the egos of those rewarded with an A for relative incompetence is a travesty. The truly nefarious effect, however, is on the great majority of students throughout Emperor Law School -- over 80 percent! -- who fail to achieve a single "A" grade first term or first year.

These tens of thousands of individuals, heretofore enthusiastic, hard working, and superior in performance, are diminished by lack of appropriate reward for utmost effort. As noted, they naturally doubt themselves, not a system whose failings they cannot judge, but rather, hold in awe. As described, it is a system that intimidates, even as it misleads.

Students are discouraged. They give up on getting A's. They become less buoyant, less enthusiastic, less committed to and likely to pursue higher aims. Because they believe, after a single semester, often much sooner, that they lack what it takes to be great lawyers.

The worst effect is that tens of thousands, who will go forth to have an important impact on the lives of millions and the fortunes of a nation, become cynical. They become disenchanting with law school. They become bored, stultified at the prospect of more years of striving for what they now anticipate (correctly) will be mediocre results.

Simultaneously, in recent years the debt burden on law students -- as noted, currently over \$100,000 on average -- has become unmanageable. This, added to disillusionment and a sense of being taken advantage of, is ample reason for some, perhaps many to become grasping, and not a few venal. As lawyers, such persons will have great potential for mischief.

In other than very top tier schools, where decent-paying law jobs are still assured for most, law students must also feel great resentment and a sense of betrayal. They must assess the (unnecessarily!) punishing debt they are undertaking to support a gouging enterprise -- Emperor Law School! -- in light of dim prospects for repayment of such debt.

The accusing fingers pointed at Emperor Law School in this regard are many and increasing. Lawsuits have been filed charging false advertising of job prospects by some law schools. Articles are appearing that criticize the poor job law schools do preparing students for actual practice.³⁸ Some properly question the escalating cost of law school.³⁹ However, the true extent of the charade has not heretofore been revealed.

No one has mounted a serious challenge to the heart of the law school experience -- case method instruction, and its ineffectiveness in transitioning academics to legal practitioners. Very likely no one, by dint of experience, perspective, and inclination has been in a position to do so.

Until now. I trust this book effectively makes the case that something is deeply amiss, and that an alternative exists.

In that it is altogether lawyerlike to seek advantage where advantage can be had, unfair or no, students may as well take advantage of the status quo while awaiting what surely will be glacial change, if any.

* * * *

1. There is a tendency at the outset of an exam, when time pressure is minimal, to dawdle somewhat, to become overly involved with the first exercise, to linger on the first page. "Belatedly," reported one student, "I realized there were 18 more pages to the exam!" That student, predictably, had blown the time management aspect of the exam. Straight off, you want the big picture, an overview of the entire exam.

2. Once the LEEWS issue identification approach is grasped and implemented, there is no such thing as a "harder" or "easier" hypo. Reduced to a series of premises to be analyzed (that reveal relevant issues), any and all hypos become manageable. Reviewing hypos to determine which might be "easier" is, not surprisingly, what many students do. This invites the very confusion and intimidation that must be avoided. It is a fool's approach!

Some few professors, wanting to seem fair, give a choice of hypos. ("Fair" in the sense of allowing students to address an exercise they possibly feel their knowledge better equips them to handle.) "Choose 3 of 5, or 5 of the 7 hypos," the cover instruction instructs, inviting students to investigate the various hypos and make what, in LEEWS parlance, is called "Major Mistake No. 1." Naturally, LEEWS offers precise guidance in the event a professor gives a choice of hypos. (See following footnote.)

3. Respecting choice of hypotheticals, LEEWS advice is twofold. In the first instance, simply avoid the choice. Literally ignore it! Do the first three of, for example, five possible choices, the first five of seven, in chronological order. No fuss, no uncertainty. Avoid this confusing aspect altogether. Recognizing, however, that given a choice, some may feel compelled to choose, lest an advantage be lost, LEEWS advises in this second instance, "Go into a fact pattern just long enough to get a sense of, 'Whoa! This one is impossibly complex! This one is a killer!' Immediately get out. Choose that hypo!" In other words, choose hypos that initially seem more problematic. Why?

Because many, if not most classmates will avoid "killer hypos." There will be less competition. At the very least a student will impress the professor with her daring. It is unlikely any hypo is measurably more easy or more difficult than another. Some merely have more obvious and seemingly easy or difficult issues. As noted in the preceding footnote, once skill is acquired at the LEEWS issue identification approach (The Blender!), there is no such thing as a "killer hypo." Methodically and efficiently dissected into components that reveal issues (premises!), handling of any and all essay exercises becomes predictable and manageable.

4. "Looking for elephant." Imagine a speed-reading ad depicting a person moving two fingers back and forth swiftly down a page. Similarly, were a law student a "slow reader," he could nevertheless move swiftly down a page to find the word "elephant." The reason, students agree, is he knows exactly what he is looking for. He can ignore anything that is not elephant. Similarly, the stepped, LEEWS issue identification process poses a series of ersatz "elephants" -- well-defined objectives to be sought, or narrow tasks to be performed in fact patterns. With modest practice, a student can discipline himself to move quickly through facts looking only for elephant, while ignoring all that is not elephant.

5. More pairings than suggested by question/instruction. LEEWS instructs that students not confine themselves to conflict pairings evident or stated in a question/instruction. Certainly, these are factored into a Step One analysis. However, professor's questions/instructions tend to be imprecise. (Not so bar exam questions/instructions!) Facts may suggest conflict pairs beyond those stated. A student will want to identify these, any objectives relevant thereto, and premises that identifying these may lead to. This can result in identification and discussion of less obvious issues, for which credit may be given.

LEEWS is geared to answer a professor's question/instruction. However, never on terms dictated by a professor's question/instruction. The question/instruction may be hastily conceived, confusing, even misleading. Rather, the idea is to maintain control, to use the exercise for the student's purposes -- namely, 1) show off knowledge of relevant law, and 2) skill at applying such law to facts the professor took the time to create. This is accomplished by processing the exercise through the strict catechism of The Blender -- always, no matter the form or suggestions of the question/instruction! Respecting Step One, a student will seek *all* conflict pairs in a fact pattern, not just those posited by a question/instruction.

6. Can't find a conflict pairing? In over 30 years of looking at and hearing about essay exercises (from students with whom I interact, etc.), your author has yet to encounter an essay exercise to which Step One can not be applied. If a legal problem requiring resolution is proposed, there must be at least one conflict pairing! If there is a conflict pairing, there must be at least one set of competing objectives!

On occasion students have said, "I was able to use your approach on my torts exam [or criminal law, etc.]. I wasn't able to use it in [say, property law]." First, "*your* approach" suggests to me that a student has not practiced sufficient to make The Blender *his* approach! That omission or failing being noted, no question but torts, criminal law, and certain other subjects lend themselves more easily to seeing how the steps may be applied. That's why torts and criminal law examples are used to instruct. They are akin to "bunny slopes."

What is required is to hone a conflict perspective in viewing all legal problem solving exercises. If the topic is legal, there is either an existing conflict or a potential conflict that may be imagined. One needs to practice applying this template or prism. Respecting "I wasn't able to use [LEEWS] in property law," I ask whether there was property in the exercise -- personal property ("personalty"), or "real property" (land, buildings -- Blackacre!), and more than one party claiming it. Indeed multiple claimants, each against whomever, whatever might stand in the way of his claim! The student invariably agrees with this proposed scenario. "Oh!" they say.

"Oh!" indeed. Back to the drawing board! The transition from unfocused, academic perspective to goal-oriented lawyer perspective requires effort and practice.

7. Party behavior/objectives that offend. Never mind that one may be disapproving of C's behavior. When seeking to discern legal possibilities helpful to a party in achieving an objective (premises), one must put oneself in the role of attorney for that party and objectively (without emotion) assess the situation. In this instance, applying a Step Two analysis, one would alternately think and act as attorney for A, then C. (And back and forth again, if need be, as objectives or premises emerge on one side or the other, and invite a corresponding reaction.)

8. Course outline in the exam, or no? The topics relating to law essay exam writing the need instruction are obviously numerous, and LEEWS covers them all. (All!) Page 85 of the *Primer* addresses so-called "open book" versus "closed book" exams. Respecting having a course outline to refer to, for a LEEWS grad it is a meaningless distinction. If open book, the outline is simply brought into the exam. If closed book, a student knows this in advance and prepares accordingly. She practices recreating a mere skeleton of the course outline. Just enough on paper to get at what is essentially in her head in orderly, systematic fashion. Fast and furious on scratch paper in the first two-three minutes of the exam, she creates this skeletal course outline. Mostly, it is headings and acronym mnemonics. (E.g., in a torts course outline under the heading, "Intentional torts," "BAID," standing for battery, assault, intentional infliction of emotional distress, damages.)

This activity is a good way to calm down, burn off excess energy. The skeletal outline is reassuring. CW calls this a "checklist." It is kind of a security blanket. Now the student can go to work applying The Blender.

9. When neither party to a pairing contests something. The objective on an exam is always to show off legal knowledge and skill at analysis. However, legal knowledge to be demonstrated and applied in analysis should be *relevant*. Random, willy-nilly regurgitation of one's course outline is not called for. (Note. CW in some quarters advocates precisely such willy-nilly regurgitation. It says, "Throw it all down!," on the theory is that much will stick. [Points are rarely deducted for discussion the professor isn't looking for. Time is simply wasted.] There is even a name for this -- the "law school dump." Manifestly, this is a desperation measure intended to ensure a passing grade. Any notion of mastering essay exams has gone by the board.)

If facts do not suggest that either party to a conflict pairing is contesting something (e.g., facts state that a will was "validly executed."), normally that something (e.g., validity of the will) needn't be discussed. It is a "non issue." (In this instance, for example, A's legal ownership of the fenced in foot of property.)

If in doubt whether the professor wants the something not contested discussed, a brief statement recognizing the possible issue and suggesting appropriate knowledge may be introduced. For example, "A valid contract (will, etc.) is formed when ... (provide legal definition). However, validity of contract (will, etc.) seems not to be at issue."

On the other hand, one must be mindful of the objective of showing off legal knowledge. As a way of introducing, to use the present example, knowledge of basic rules for establishing property ownership, one might write (type!), "Assuming, *arguendo*, A's ownership of the one-foot strip was contested by C, ...," and here introduce such rules. However, generally, don't! It is likely not on the professor's checklist. If the professor is looking for demonstration of such knowledge, she will create an opportunity in the facts to offer same in a relevant way. Moreover, normally, there is not time to engage in demonstrations of legal knowledge that is not called for.

Again, if in doubt, call the professor's attention to the circumstance that you are aware of basic rules respecting property ownership. Perhaps list them quickly. Note that A's ownership doesn't seem to be questioned. Move on to the clearly relevant issue of C's questionable behavior.

10. Adverse possession: Doctrine in property law whereby title to real property (land, buildings) can be wrested from the rightful owner without compensation when certain conditions are met. Generally, the taking of the property must be actual and open ("notorious"), meaning of such a manner as to give notice to a legal owner exercising reasonable diligence in discovering that his ownership has been compromised. (Fencing in the property in question has been held by courts to meet this requirement.) The ownership of the one claiming must in addition be exclusive, hostile, or adverse (i.e., knowingly against the true owner's interests), continuous, and exist for a specified time period, in most jurisdictions at least ten years. The rationale for the doctrine is "quieting" or settling title of claim of ownership where disputes might otherwise arise and be unresolvable.

It may be noted that in 1990 the state of Georgia lost an entire island in the Savannah River to the state of South Carolina via adverse possession. South Carolina dredged the island as landfill to shore up its side of the river, eventually removing the island. Georgia was aware of this, and did not object in timely fashion.

11. As noted, it is from such a random, happenstance approach that the notion of issue identification being an artful talent, requiring innate gifts (The Right Stuff!), derives.

12. Some law school courses are called "code courses." Examples would be tax, civil procedure, bankruptcy, professional responsibility. The reason is that, apart from a casebook or other materials, a chief reference source is a legislative act, and regulations set forth in interpretation and implementation thereof in a book entitled "code." (E.g., *Federal Tax Code*, *United States Bankruptcy Code*, *Code of Professional [attorney] Responsibility*.) Students read cases that have arisen out of disputes involving violations or differing interpretations of provisions of the code. They investigate and discuss code provisions, legislative history, background, and reasoning behind and reflected in various

code provisions, etc. Sometimes common law (case law) predating a code will be juxtaposed with related or similar provisions of a code by way of comparison and contrast. (E.g., a provision of the *Model (federal) Penal Code*, or the *Uniform Commercial Code [UCC]*.) An exam may call for such comparison, and a discussion of whether common law or code law achieves a better result, given facts presented, and why? Here, normally, policy discussion is wanted.

Applying LEEWS, the question becomes whether common law rule or code provision is more helpful asserted as a premise by a party seeking to achieve an objective. In other words, under which is a more favorable outcome likely? One or the other having been asserted, the opposing party may now argue that the counterpart law is more appropriate. Apply each to facts to arrive at a result. Now compare and discuss why one or the other is preferable. This makes for a more focused, thoughtful discussion, bringing in policy considerations.

Codes set forth solely black letter law. As there is too much information to be replicated in a course outline and no reason why it should, along with the course outline, codes will be taken into open book exams. (However, not casebooks.) Typically, codes are permitted to be taken into closed book exams as well. A student will want to cross reference categories and/or aspects of categories of the course outline to related portions of a code.

13. Damages. Perhaps the subject of money is deemed unseemly and smacks too much of the practical world of lawyering. However, the idea is to show off knowledge of law made relevant by the subject area being examined and the professor's facts. Damages is relevant law and a proper topic/issue for discussion.

14. Testing progress in becoming a lawyer. The case has been made that instruction in Emperor Law School, at least as presently constituted, reinforces academic tendencies. The words "lawyer" and "attorney" are rarely heard. If anything, students are trained to be law professors, not lawyers. However, it has been noted that the bar exam greatly influences law school instruction. Bar essay exercises test lawyerly attributes, especially analysis, knowledge of black letter law, ability to discern issues. Hence, the jarring disconnect between law school classes and exams that has been discussed.

This also explains an exercise at term's end that unexpectedly tests progress in becoming a lawyer. It's as if, in the eleventh hour, law professors realize most students will go forth to represent clients. They must impress upon them what lawyers do, the need to know black letter law precisely, etc. At a minimum they must prepare students for an upcoming bar exam.

15. Exam outlines will not be seen by professors! As noted, CW advises students to "Outline the exam response." CW also advises, "If you're running out of time, turn in the (exam) outline. You may get some credit." This advice is universal in Emperor Law School. Students have confirmed it with a show of hands for over 30 years. It is also bad advice. Why? Because the moment the thought occurs, "My professor may see this outline," it ceases to be an outline. It will be made neater. Contents are labeled more carefully. Notations are written and fleshed out more completely. Time is wasted on the exam outline!

The correct advice is, "Have no thought of ever turning in the exam outline!" It should be brief, sketchy. Abbreviations should be plentiful. At base it should indicate results of Steps One, Two, and Three -- conflict pairs, premises, possibly a notation respecting a premise indicating where more or less emphasis should be placed. (Major and minor premises, therefore, major/minor issues.) Party objectives can usually just be noted mentally. The only person who has to understand the (exam) outline is the person creating it!

Running out of time! Obvious questions: "What if I'm running out of time?"; "What if I want to turn in the outline of what hasn't been addressed in order to gain a few extra points?" Answer: The outline indicates what has not yet been covered in the response. As instructed in a LEEWS program and the LEEWS *Primer*, fast and furious in the final few minutes allotted to the hypo, "At the end of the response, recreate just the portion of the outline that has not yet been addressed." Hopefully, this is a small portion of the outline. In this recreation helpful labels will be added. Notes and abbreviations will be fleshed out. This more fully realized version of a portion of the outline will be turned in in lieu of a fully developed response.

Students unanimously agree that the foregoing advice makes sense. They wonder why advice in this regard provided by professors and CW is not likewise nuanced in such a common sense manner. The reason, of course, is that professors and others haven't thought about the subject carefully enough. The reason they haven't thought more carefully, of course, is that they don't believe a science of law exam writing and preparation could possibly exist.

16. Repeating knowledge/analysis. It should not be necessary on a law school exam to demonstrate knowledge or analysis twice. (Never on a bar exam.) However, sometimes there is repetition of a topic or issue. Consider, for example, the damages attaching to each of PN's premises, and her self-defense counterpremise in response to each of DH's premises. A repeat discussion of these topics would occur in the same time frame, and would be in close proximity. Therefore, it suffices to note repetition of the topic, but merely refer back to the previous discussion. The useful and operative word here is "*supra*," meaning that which preceded. Thus, one might write, "PN would again counter with self defense. However, nothing to add to discussion of same, *supra*." (Note the underlining of self defense. One should flag concepts a professor may be looking for. Note also that Latin words and phrases are underlined or italicized. They are also normally bracketed with commas.) Or, once one becomes proficient in the LEEWS presentation format of helpful labels and concise paragraphs, under the labels, "Pucker Nicely (PN) v. Direct Hit (DH)," and "The Kiss," begin, "Self

defense...” (stated again), and conclude, “See discussion, *supra*.”

Making a professor’s job easy should become a guiding principle. If legal knowledge and thinking seems to bear repeating, and the previous discussion occurred at some remove, a professor shouldn’t have to go searching for the *supra* content. In this age of word processing, simply cut, paste, and repeat the discussion in full, adding or subtracting as the differing factual context may dictate. (Note. This latter gambit should never be necessary on a bar exam exercise.)

17. Whether to raise/discuss slightly colorable premises, or no. IIED (intentional infliction of emotional distress) should be considered as a possibility when thinking about DH’s objective of obtaining money from PN. However, PN is asleep. Moreover, the bloodying of DH’s nose seems to occur immediately. Thus, the required element of “calculation to cause severe emotional distress” necessary to establish IIED seems clearly lacking. Thus, IIED as a possibility or premise for DH is barely colorable. The question arises, therefore, whether to discuss IIED in the context of DH’s objective of money, or no? The answer is probably not.

Students query, “If PN’s (easily disposed of) assault premise is to be discussed, why not IIED respecting DH?” The answer lies in LEEWS mantra No. 2 -- “New (relevant) law, new (relevant) thinking!” Whether to discuss a topic or not in an exam response (legal inquiry or issue) is often a close call. There is limited time and likely many premises (issues/topics) to discuss. One should be guided by keeping in mind the objective in any exam response -- 1) demonstrate to the professor knowledge of relevant law (accomplished by identifying issues), 2) demonstrate ability to think about that law’s application to facts as a lawyer (analysis).

Assault in the context of PN’s objective of money is “new.” It occurs for the first time. If on the professor’s checklist, one wants the check. Therefore, discuss it. IIED in the context of DH wanting money from PN is not new. It has already been explored and given a checkmark in the context of PN’s objective. Moreover, it offers scant opportunity to demonstrate new analysis, as it is barely colorable. Therefore, being redundant under both tests (“new law, new thinking”), it can probably be safely omitted.

If in doubt whether to discuss a premise/topic/issue (because it does not meet the test of new law, new thinking), a simple statement recognizing that the topic/issue was considered and discarded can be made. For example, “IIED occurs as a possibility for DH. However, it is barely colorable. There is little to add to the previous discussion in the context of PN.” If a checkmark is possible, it will surely be awarded.

18. “Counterpremise.” A legal precept raised in opposition to an opposing party premise (or counterpremise), that, if established, will counter, nullify, essentially defeat that opposing legal precept. Whether or not a counterpremise can be established is, of course, an issue.

19. “Nuggets of gold” -- the tenth premise. Although your author created the three lines of PN/DH facts, also the model response reflecting the nine foregoing premises/counterpremises (which, similar to the view of professors respecting their model responses, I deem “excellent”), I did not catch this tenth possibility. It was pointed out over twenty-five years ago by a student in a live Los Angeles class. I recall this, because I was somewhat stunned, even embarrassed at something being pointed out to me in my own fact pattern that I (presumably astute, if not brilliant!) had missed.

I have long since incorporated this tenth premise into my model answer and my instruction. A “nugget of gold” is an unexpected, insightful discovery in a fact pattern that is relevant and worthy of discussion, but often surprises the professor. (Because she overlooked it.) It marks the finder as proficient in the two things a professor, at bottom, wants to know about a student -- skilled at analysis?; knowledgeable of relevant law? The tenth premise in this instance is a perfect example. Nuggets of gold elevate students beyond peers into the running for not just a top grade, but the highest grade in the class. (Meriting the previously noted West Publishing Company *American Jurisprudence* or “*Am Jur*” award.)

Note. Nuggets of gold should be given prominence in the exam response, particularly as the professor will not be looking for or expecting them. Indeed, their discussion should be inserted in the first 2-3 pages, even if out of order. (Go back and make space. *LEEWS Primer*, p. 78.)

20. Practice writing exams. Advocating sitting for two or three hours writing a practice exam is yet another example of lack of careful thought reflected in most CW. An actual exam, during which adrenalin provides energy to go for three or four hours, cannot be simulated. Sitting for two or three hours writing a practice exam will simply be tedious and boring. Rather, various LEEWS skills and approaches can be practiced independently in much shorter stints -- 10 or 20 minutes (practicing The Blender), a half hour for analyzing and presenting analysis of a premise in a concise paragraph. All skills and approaches can be brought to bear in an actual exam.

21. Step Three. Having completed Steps One and (at least partially) Two, just before beginning the exam response, perform Step Three: FOCUS ON ONE PREMISE (OR COUNTERPREMISE) AT A TIME. QUICKLY PREVIEW IN LIGHT OF RELEVANT FACTS, FIRST, WHETHER SOME ELEMENT IS SO CLEARLY LACKING AS TO IMMEDIATELY DISPOSE OF THE PREMISE (i.e., easily defeated, incapable of establishment, which, typically, would conclude a Step Three analysis of the premise), SECOND, WHETHER ANY *REAL ISSUES* ARE RAISED IN THE RESOLUTION

OF THE PREMISE. (LEEWS *Primer*, pp. 51-52.) In other words, is resolution of the premise likely to be simple and straightforward, by reason of a necessary element being incapable of establishment under any reasonable view of the facts, or more complex, by reason of no elements being clearly lacking, and the establishment of one or more elements likely proving a close contest?

As noted in a *Primer* footnote (p. 51), “Step Three requires that one *predict* what is likely to happen respecting analysis of a premise. (I.e., an element lacking, or ‘real issues.’) Therefore, until one becomes skilled at lawyerlike analysis (i.e., formulating arguments, element by element), one will not be able to perform (or perhaps even understand) Step Three with any facility.”

22. When and how Step Three is performed. LEEWS contemplates short bursts of planning, followed by writing/typing. Short planning segments apply pressure to get on with the response on paper. No dithering, no hesitating. In addition, students avoid anxiety that may build and undermine confidence and discipline, if too much time is spent planning. Step Three is performed at the tail end of each planning segment, just before writing the response. (At least part of the response.) It is performed on premises identified in that segment.

Recall that contrary to CW, which typically suggests that 1/3 - 1/2 of allotted time be spent planning, LEEWS advocates that 1/4 - 1/3 of allotted time be spent planning. Thus, if suggested time for a hypothetical is 90 minutes, up to 30 minutes, not 45 minutes may be devoted to planning. (60 minutes suggested = up to 20, not 30 minutes of planning.) Moreover, as no more than 10, 12, 15 minutes at the outside should be spent in a planning segment before commencing the response -- presentation of paragraphs of analysis --, a 30 minute, 45 minute, etc. planning segment must be broken into smaller, 10-15 minute units.

23. A 10-15 minute time segment! First phase of the preliminary overview (PO) has been completed. (30-45 second flip through or scroll through of the entire exam.) Second phase of PO -- go immediately to the question/instruction -- has been completed for this hypo. Likewise, Step One. (Identify conflict pairs and party objectives.) Step Two may or may not have been completed. However, one or more premises should have been identified.

24. Major issues. More time required for analysis and resolution indicates that a premise/issue is major, therefore deserving of more attention. In addition, knowing that a topic raised by an issue is of particular interest to a professor can make that issue major and deserving of more attention.

25. Background predictors of law exam success. If there is a predictor of success on law school exams (apart from taking LEEWS!), something in a student’s background that bears a seeming correlation, it is a background in math, hard sciences, engineering, possibly philosophy. As I say to students, “If you ask me to predict, randomly, who is likely to do well on a law school exam, I’m going with the chemical engineering undergraduate major over the English major every time!” The reason is that those with backgrounds in math, hard science, engineering, accounting, and the like are accustomed to close, analytic exercises -- nitpicking thinking --, concisely expressed. This approximates to a greater extent the analytic thought process, and concise expression thereof, necessary and wanted on a law essay exam. What is not wanted is the prolix, rambling, imprecise thought process of an English, poli sci, or history undergraduate major.

Further approximating a lawyerly approach, math/science/philosophy majors may also be more accustomed or inclined to an objective stance with respect to evaluating information, and reserving judgment as to outcome.

A background in Talmudic bible study perhaps illustrates my point. The practice of mulling over nuances of meaning of words and phrases trains the lawyer mindset precisely. Doubtless, this is a reason why those so tutored -- prior to law school! -- typically fare better on law essay exams.

In short, absent instruction not currently provided in Emperor Law School, those who do better on law school exams in the all-important first year likely do so not owing to innate qualities (The Right Stuff) and diligent application to case study methodology. Rather, their success is likely attributable to skills and habits of thought acquired *prior* to attending law school. Contrary to the axiom that it doesn’t matter what you major in before attending law school, a major in math or physics is probably advisable over one in English or French literature. Or take LEEWS!

“Good writer.” The myth, prevalent in Emperor Law School, that being a “good writer” is key to success on law school exams has been debunked. (See Section Four, Chapter 2.) To the contrary, nitpicking analytic thought, concisely expressed, is wanted. This chapter describes how this is achieved in concise, to-the-point paragraphs.

26. “Burden of proof” is an expression frequently heard in the law. It represents the degree of proof required to establish a proposition being advanced by one party or the other to a conflict pairing. If the party is the prosecution seeking to establish guilt of a crime, the burden is “beyond a reasonable doubt.” This, appropriately, is a heavy burden, a high threshold of proof. It is not *no doubt at all*, as some seem to think, but no “reasonable” doubt. Students agree that something north of 90 percent on a scale of 100 is a useful way of thinking about this burden.

In all other instances, including prosecution attempts to establish admissibility of evidence against an accused (anything short of elements of the crime[s] charged), the burden of proof of the moving party is “preponderance of the evidence,” “more likely than not.” This is not 51 percent or “over 50 percent,” as many students suppose. No lawyer goes to court thinking, “I can prove this to 51 percent. I’m all set. “ That would be too close a margin to ever risk attempting. However, 51 percent is a useful way to think about the burden of proof in civil proceedings, and anything

short of proof of a crime. Note that 51 percent is a fairly low threshold of proof.

27. Evidence that “cuts both ways.” In the sensational double murder trial of noted NFL athlete, O.J. Simpson, the prosecution attempted to tie him to a blood-stained glove found at the crime scene. Mr. Simpson was ordered by the judge to try on the glove. Whereupon, he made a great show of having difficulty getting his hand into the glove. This prompted the famous/infamous quip of Simpson’s flamboyant defense attorney, the late Johnny Cochran, before the jury, “If the glove don’t fit, you must acquit!”

28. Nitpick re advancing runners in baseball. Okay, sure. For the nitpicking baseball fan reader, I acknowledge that dropped fly balls in foul territory, passed balls, errors, and hit batters can advance a runner. Perhaps there are other ways. If this occurred to you, good! You’re thinking as a lawyer!

29. Unreasonable. The reader at this point may want to revisit Section Four, Chapter 3, footnote 3, in which the concept of reasonableness is explored at length and in depth.

30. Restating facts is a reflection of uncertainty regarding how to analyze “as a lawyer,” including how to begin a paragraph of discussion. Students often open by restating given facts. For example, respecting the three-line PN/DH facts and [introduce whichever premise/issue you care to], “The facts tell us Pucker Nicely was asleep [and so on].” It is a kind of nervous tic. This is such a common error that exam cover instructions often address it. Professors advise, “Don’t tell me the facts”; “I already know the facts”; “The facts are what they are.” There will be no such advisement prefacing a bar exam essay.

31. Numbering elements of a statement of premise. A student might sometimes choose to number a particularly lengthy element, then use the number as a shorthand or abbreviation. This would avoid having to repeat the element. For example, entrapment in criminal law is defined as occurring when 1) police create an opportunity to commit a crime, 2) which opportunity would tend to induce a person not normally disposed to commit a crime to do so. The latter element -- 2 -- means that whatever the police do (e.g., set up a sting operation) cannot be of such a nature that an average, law-abiding citizen would be induced to commit a criminal act. (One may wish to pause at this point to consider the public policy rationale reflected here.) If elements are numbered, “2” can be used as a substitute for repeating its lengthy description. Thus, “Respecting element 2, *supra*, it may be argued that”

32. Meaning and implication of “fact.” This seems obvious, doesn’t it? However, if anything has been learned to this point, it should be that what seems obvious, not in need of clarification from a non-lawyer standpoint, can be anything but in the world of precise, lawyerlike thought. I have found it necessary in every program for over 30 years to instruct students in the meaning and implication of “fact” respecting law exams and analysis. I was told in a program in Minneapolis that a professor at the University of Minnesota School of Law spent an entire class on the subject of what is meant by a “fact.” (Good for him or her! I think a mere footnote will suffice.)

“Fact” simply means it happened. No ifs, ands, or buts. (E.g., about whether DH kissed PN.) It is as if proven to the satisfaction of judge and/or jury in open court. (To a preponderance in a civil case; beyond a reasonable doubt on the prosecution side in a criminal case.) Respecting whether DH kissed PN, whether PN was asleep, whether PN was in a meadow, etc., there is no question or ambiguity. It all occurred as described. Given facts say, “Direct Hit ... awakened [PN] with a kiss.” Thus, it happened. No one reading the three lines has cause to think, “Did he kiss her, or not?”; “Was there actually a kiss?”

Failure to grasp that the word “fact” means the existence of whatever is described in the ambit of that word is beyond debate gets the academic thinker in trouble. Suddenly, everything is up for grabs. When given facts are questioned, introduction of new, speculative, unwarranted factual possibilities can (and will) ensue. Analysis in accord with rules of evidence (lawyerlike analysis!), already loose and rambling, becomes impossible. No professor (or bar examiner) will have patience with analysis that begins, “If the facts are read to mean X”; or “If by Y the facts mean”

Law professors attempt in their typical, non-detailed way to convey this message in exam cover instructions. They instruct, “Facts are facts!”; or, “Facts are what they are”; or, “Do not speculate beyond the given facts (or make up new facts).” They will also instruct, “Be guided by the facts”; and, “Don’t tell me what the facts are.” What this latter refers to is the tendency of many law students, uncertain about how to begin analysis, much less perform it, to preface remarks with such preambles as, “The facts tell us that Pucker Nicely was asleep in a meadow, when ... blah blah blah.” An utter waste of time! UBE paragraphing format addresses and counters this tendency.

It may be noted that in the interest of expedition, prior to a trial a judge will instruct opposing counsel to get together and “stipulate” any relevant facts that cannot be disproved. “Don’t waste the court’s time,” they will be admonished, “trying (testing and contesting) facts that will inevitably be proven.” (To do so will not only waste time. It will incur the ire of the judge. It will also cause a lawyer to lose credibility with both judge and jury (if before a jury). Thus, for example, if there is no question that the defendant stabbed the victim 31 times, the defense lawyer in her opening statement should probably say, “There is no question but that my client stabbed the alleged victim 31 times. That is not the issue before [you, this court, etc.].” Now the prosecution’s possible intention to hammer away at details of the stabbing, show the judge and a possible jury 31 lurid photos, etc. has largely been taken off the table. The judge

and jury are thinking, "Okay. What's the deal here?" Which may be to establish self defense or the lesser crime of manslaughter.

Facts stipulated by opposing counsel are often read to the jury at the outset of a trial or hearing. (And submitted to the court in written form.) The judge will say, "Ladies and gentlemen of the jury. The following facts are not in dispute. ..." Facts in law essay exercises (hypos) are akin to stipulated facts in a courtroom. (Something never stated in classrooms of Emperor Law School! But shouldn't it?)

33. Common sense and "lawyerlike analysis." It has been oft noted that common sense is the watchword, the most important attribute to bring to an exam. This, as much else in this inquiry, but mirrors legal practice. Lawyers must always bring common sense to bear in evaluating cases, clients, strategy, etc. I may note that very smart and otherwise able individuals can lack common sense. They tend to view matters through a different prism from the norm. In classes I have on occasion observed a pattern whereby a student consistently evinces an understanding or view that stands apart from most other students. This can be the result of an intelligence or creativity that augurs well for success in other areas of endeavor. However, normally not in evaluating legal problems. Certainly not in making arguments either before a jury or in an exam response. The idea is to come at legal problems (issues) and perceive matters from a normative or reasonable perspective. (See footnote [3] discussion of "reasonable," Section Four, Chapter Three.) I offer the instruction, "If you find you are lacking in common sense, as evidenced by consistently not seeing things as others -- classmates -- do, you have to learn to fake it for purposes of addressing law essay exams." Meaning fake common sense!

The need for applying common sense is apparent in making arguments in the context of "lawyerlike analysis." I advise students, in judging the merits of their arguments, to, "Imagine making the argument in front of a jury." If the argument is too esoteric, too abstract, too philosophic for a jury (or judge) to comprehend, it probably should not be made. "Lawyerlike analysis" is not philosophy or metaphysics. It is common sense reasoning. For purposes of a law exam, it is inductive, deductive logic, applying relevant law to relevant facts and reasonable inferences therefrom in a common sense manner, such as one would present to a judge or jury. (As opposed to the possibility [duty!] of finding and adding additional new facts in real life law practice.)

An example. We have concluded that the fact of DH kissing PN establishes contact. The reason is that contact is clear as to meaning. All agree it means a physical touching. "Kiss" is also clear as to meaning. It implies lips touching ... something, in this instance PN. (We are not sure where, but somewhere.) If DH kissed PN, as one must conclude from the "facts," then his lips touched her. Therefore, contact occurred.

Typically, someone suggests, "Maybe he blew her a kiss or made kissing noises." (Usually accompanied with sound effects that amuse the group.) Not at all! Speculative, lacks support in the facts, adds new facts. Someone of a philosophic bent might offer the notion, "What is 'contact,' after all?" And here the line of common sense and what is permissible in making arguments is crossed. One may appreciate the nitpicking (philosophic, metaphysic) thought process. However, imagine making such a statement in front of a judge or jury. It would not be understood. It would cause the lawyer making it to be suspect. He would immediately lose credibility. It would be foolish to utter. Therefore, it also has no place in analysis put forward in an exam response.

On the other hand, it has been noted that top-tier law schools favor candidates having a Ph.D. when hiring professors. The point will be made in Section Six, Chapter 2, *infra*, that professors with Ph.D.'s probably didn't want to be lawyers. They may not like lawyers. They always wanted to teach, but there were no jobs in academia. Now they are in a law school classroom, possessed of little practical lawyering experience, and still possessed of their academic bent. I make the point in programs that, "Sometimes, it really isn't a law exam [that the professor gives]. It may be more a history or sociology exam." If the professor has a Ph.D. in philosophy, it may well be that the argument, "What is contact?" will be appreciated! However, if it is an exam testing progress in becoming a lawyer,

34. Dramatic change in student performance. I recall a woman many years ago from SMU (Southern Methodist University) Dedmon School of Law (in Dallas, TX). She took LEEWS live in Austin following her first term, and happened to have the same professor in a course second term that she had had first term. She called me up to offer her story. In the first term with this professor her grade had been mid range -- a B, as I recall. Second term she received one of his highest grades. Her transformation in manner of presentation from first to second term -- using LEEWS paragraphing format -- was so marked that the professor pulled her aside. (His curiosity apparently caused him to pierce normal grading anonymity.) He said, simply, "What happened to you?!"

It may be noted that law as a preamble to a paragraph but mirrors what is found in virtually all judicial opinions students read. At some point, following discussion of facts, what transpired in the court(s) below, and issues presented, a paragraph opens with an often lengthy preamble of legal precepts deemed appurtenant and controlling, along with citations for the origin of each. (The latter generally unnecessary on either law school or bar essays. [LEEWS *Primer*, p. 74.]) Then commences application of that law to the facts of the case. Such is essentially the LEEWS approach, albeit just one legal precept (premise) per paragraph.

35. Rhymes with a certain creature normally depicted in a black pointed hat on a broomstick. Apologies to any who may take offense. However, grow up! The world of a lawyer can be rough and tumble.

36. Abbreviations. How to introduce an abbreviation has been instructed. (Write out what is to be abbreviated -- e.g., "holiday fun"; immediately follow with the abbreviation in parentheses [here brackets] -- i.e., [hf] [or, perhaps better, HF].) However, be careful respecting use of abbreviations. They can save time. However, they must not be used to the point of annoyance or confusion. (This is probably what causes some professors to ban their use.) Common sense and "help the professor" are watchwords. If it is possible the grader may not recall what an abbreviation stands for, simply repeat it. If a professor says, "No abbreviations!," that is likely the end of the matter.

However, it has been suggested that opportunities to get to know the professor be taken advantage of. (See footnote 10 of Section Three, Chapter 3 ["2-4 line case brief"].) Professors have many contacts. They can write recommendations, make introductions. Therefore, if the opportunity presents itself, go talk to a professor about abbreviations (or any subject). Explain why, for example, you would like to use abbreviations. Show her how you propose to do it. She may make an exception just for you. (She would also know that the response is yours!) She may pass along your suggestion to the class. If the answer is still "No," there is no harm done. You have made contact. You have impressed with your savvy and interest.

A LEEWS grad has nothing to fear from chats with professors. Quite the contrary. It has been noted that most law students shy away from personal interactions with professors. They don't know what to ask. They don't want to seem lacking in The Right Stuff. The general advice professors give is at best minimally helpful CW, often offered with slight impatience. On the other hand, pointed questions and knowledgeable dialogue -- e.g., a discussion about where, how, and whether to state the conclusion or issue -- will interest and impress. The knowledge a LEEWS grad has about the law school game enables such conversations. Get to know professors!

37. Off the charts LEEWS grad point totals. A former student told me her professor pulled her aside to advise, "I can't post your score. It's too far above the curve. It would upset the other students." (The score was 109! The average was below 50. She had exceeded 100 by identifying and addressing issues that were not on the checklist, but should have been.) I note once again the student described at the end of the *Preface*. He took LEEWS prior to starting at the University of Texas School of Law (audio program). He graduated in May, 2011 as "Grand Chancellor." (3L with the highest GPA. His was 4.13!). He said, "In one of my classes there were 50 possible points on the exam. The average score was 12. I scored a 37."

38. Criticism of lack of practical training in law school. See, for example, "What They Don't Teach Law Students: Lawyering," *The New York Times*, Nov. 19, 2011 (Business Day section, p. 1). The article by *Times* reporter, David Segal, describes a Q & A between a Philadelphia attorney and three recent law school graduates, all new associates at the attorney's corporate law firm, Drinker Biddle & Reath. "How do you get a merger done?," asks the attorney. This is followed by silence from the three. "What steps would you need to take to accomplish a merger?," he continues. "You buy all the stock of one company. Is that what you need?," ventures one of the three. The correct answer, "draft a certificate of merger and file it with the secretary of state," the article advises is part of a crash course in legal training made necessary by omissions in practical training in law school.

"What they taught us at this law firm is how to be a lawyer," says a graduate of the corporate program and George Washington University School of Law at the end of the article. He continues, "What they taught us at law school is how to graduate from law school."

39. Law school cost. A 5/11/12 article in *Employment Insider*, an "e-newsletter" of the prelaw edition of *The National Jurist*, a magazine for law students, reports recent findings of the non-profit organization, "Law School Transparency" (LST). Entitled, "*Law school education costs more than \$200,000 study finds*," the article makes the point that while "average debt" for law school graduates exceeds \$100,000, and tuition at some law schools exceeds \$50,000 a year, the true cost of a legal education is higher than normal calculations indicate. Adding "three years of tuition to cost of living expense, then calculating finance expenses," the study arrives at total figures as high as \$287,820 (Columbia University Law School), as low as \$117,955 (University of North Dakota School of Law), with an average in excess of \$200,000. Remarkably the LST executive director, "We did the study to show how absurd the cost of attendance is, and to make people really think about the debt they are taking on. It ends up being a lot more than people realize." He further noted, "We want to get into the faculties heads and the board of trustees that these costs will simply not work and that they are grossly unfair to students."

An economist, of course, would add three years of lost income opportunity to these figures. Conservatively, \$75-100,000?

Section Five, Chapter Eight

Omnipresent “IRAC”

(Where this [mere] formula fits into the picture)

“IRAC,” as a reader should know by now, is the acronym for Issue, Rule (of law), Analysis (application of law to facts), Conclusion. Another version is “CIRAC,” wherein the conclusion is also introduced at the outset.

One tends not to hear about IRAC in top tier law schools. Your author never heard the term at Yale Law. Of course, beyond “study hard,” “attend class,” “take good notes,” and, possibly, “make a course outline,” upper tier law schools tend to eschew the need for any sort of exam writing/prep advice.

At upper tier law schools belief in innate genius for the law and The Right Stuff is deeply held. How, otherwise, the thinking seems to be, can exam ineptitude of such smart, industrious, lifelong top students be explained? Moreover, yes, you are smart and hard working. (And a job awaits you!) However, only those very, very few possessed of a special aptitude for the law will perhaps clerk on the Supreme Court, perhaps one day become law professors.

From the lower first tier on down IRAC is omnipresent, frequently referenced, and believed, basically, to be “all you really need to know about exam writing.” Students have approached your author for thirty years with the question, “Are you familiar with the IRAC system?”

IRAC is not a “system!”

I trust by now that the reader can appreciate at this point that an acronym is far from a system. To one who knows little or nothing about the law essay exam writing process, IRAC may, indeed, seem a system. One can imagine this reaction from legions of newbie law students when they are introduced to IRAC -- “Aha! This is what I’m supposed to do!”

However, a more knowledgeable perspective reveals IRAC to be a mere *formula*. It identifies the four components most law professors (and bar examiners) want present in the discussion of an issue. Somewhere, normally at the outset, the issue identified -- “I!” Somewhere the applicable rule -- “R!” Somewhere the desired analysis or application of law to facts -- “A!” Somewhere a statement of conclusion -- “C!”

What IRAC does not offer is necessary instruction respecting *how*, exactly, certain elements of the IRAC formula are to be executed. For example, how, exactly, does one find issues -- *all* issues! -- in confusing fact patterns? How, exactly, does one “apply law to facts” -- i.e., perform analysis? How does one present analysis concisely?

Here, presumably, aptitude for the law, innate genius, and The Right Stuff is supposed to fill gaps of inadequate instruction.

IRAC instructs that an issue should be presented or introduced. (E.g., “Did party X commit a battery [burglary, breach of contract, etc.]?”) However, IRAC neither instructs what an issue is, nor, as noted, how to discern issues implied in confusing fact patterns.

A student is left to vagaries of the very inexact science of “issue spotting.” It has been mentioned that “gather the Easter eggs,” was the advice a competitor program years ago used to offer in this regard .

The “R” of IRAC

Rule, as in rule of law, is straightforward enough. An example of a rule is “when one owes a duty of care to

another, and negligently breaches that duty, which breach is the proximate cause of injury to that other, one will be liable for reasonably foreseeable consequences of the breach.” This defines the tort of negligence.

However, sometimes a mere portion of a rule may constitute the relevant law giving rise to an issue. For example, among explanations and embellishments of the rule of intentional infliction of emotional distress (IIED) -- “conduct calculated to cause severe emotional distress” --, one finds that “transferred intent (intentionally striking, throwing, or shooting at A, and unintentionally hitting a third party, B, will not excuse one from liability) may not be used to establish this tort.” This mere offshoot of IIED may give rise to an issue meriting a paragraph of discussion. However, to term it a “rule” is misleading.

Moreover, the “rule” may actually be a statute, part of a statute, or simply a policy position one party (to a conflict pair) feels may assist in advancing his position. Thus, as discussed in the previous chapter, LEEWS uses the more flexible term, “premise,” to cover any and all legal precepts that may be advanced to achieve an objective -- by either party to a conflict pairing.

Here, as in so much of CW, advice is broadly helpful, but only partially correct. It is not sufficiently nuanced to provide precise guidance in the varying situations in which it is to be applied. Indeed, in its blunderbuss aspect it often misleads and confuses.

Re the “A” of IRAC; more on the critical, MIA skill of analysis

There is further the significant problem of not merely inadequate, but almost non-existent instruction respecting how, exactly, one performs the “A” of IRAC -- analysis, application of law to facts.

For example, note the ambiguous nature of certain elements of the important tort principle of negligence -- “duty of care,” “negligently,” “breach of duty,” “proximate cause.” Each of these concepts requires and has a definition. The definitions in turn have components or elements = sub-elements! Each sub-element must be thought about (analyzed), if only briefly.

Sometimes the analysis of even a sub-element may merit an entire paragraph. Moreover, if a sub-element is ambiguous, ... (Yes, sub-sub-elements may emerge, requiring analysis.)

As noted, the law, necessarily, is a stickler for definition. Absent precise understanding of and agreement on what a contested item *is* (something at issue!), it cannot be determined whether that item is established. Put another way, you can’t argue over the existence of something until there is agreement on what that something is.

Only in a courtroom hearing or trial is such tedious, backward progression of argument/counterargument normally found. Only via the painstaking adversarial process of two able attorneys going at one another in such give and take -- what I term “the lawyering dialectic” -- is it instructed.¹ Only in a courtroom, with significant stakes in the balance for competing litigants, does the necessity for such tedious progression, and its patient, painstaking nature become apparent.

Because it involves back-and-forth argumentation over facts at the trial stage of litigation, such a progression of careful, focused (lawyerlike) analysis never appears in appellate cases law students read.

In posing “what ifs?” in class, law professors attempt to convey and inculcate the lawyering analytic skill. However, such engagement is much too lacking in rigor. Although students learn quickly not to preface remarks with “I feel,” there is nevertheless far too much rambling, too many digressions and asides. The strict template of lawyerlike analysis never gets beyond light shading.

Some few students get a sense of what is wanted. (As suggested, they come to law school with fundamentals

of the skill already in place.) The vast majority of students, however, are clueless, cowed, busy taking notes they will never make use of. The rigorous, close, nitpicking nature of proper lawyerly analysis remains vague, only tangentially glimpsed.

Indeed, because law professors never emphasize the crushing importance of a lawsuit to its participants, the necessity for such patient, nitpicking, backward progression of argumentation is never made apparent.² There is further the overlay of the, as yet, unknown rules of evidence. These determine what arguments can be made (relevance), and how they can be made (admissibility).

As noted, evidence is a second year subject in Emperor Law School. As noted, I do not believe law professors are cognizant of the (stunning!) *non sequitor* of at least some knowledge of evidence rules being required to perform proper analysis. However, necessarily, they will judge first year exam arguments and analysis according to evidentiary rules students have yet to be exposed to!

For example, the statement, “There was clearly a battery [or assault, or burglary, or robbery, etc.], because all necessary elements are satisfied,” would be inadmissible in a trial. It would be successfully objected to as “Conclusory, assumes facts not (admitted) in evidence.” A professor would disapprovingly note “conclusory!” next to such a statement in an exam response.

Students are certainly told, “Don’t be conclusory,” “Support your assertions.” However, the evidentiary basis for such instruction -- how it relates to fair, orderly presentation of facts and arguments in a trial -- is lacking. The instruction is merely that, an admonition without adequate foundation and understanding. Some students more or less get it. Most are uncertain. No one asks for greater clarification, lest they seem to be lacking in The Right Stuff.³

Your author is of the firm view that if a law professor has never actually practiced law, especially engaged in litigation, then it is unlikely that professor is more than minimally schooled in the tedious, nitpicking, yet necessary progression that is lawyerlike analysis.⁴

Over the years, many of my students have reported being called aside by professors and asked, respecting their analysis, “How did you learn to do this?”⁵ The professor seems to have been edified. He seems somewhat in awe. Indeed, that professor is probably envious!

(I have noted my belief that it is entirely possible, even probable that the exam response of someone versed in LEEWS will engender a measure of envy in some professors. Such, of course, propels a response from the pile of mediocrity, and puts it in contention for a top grade.)

The “C” of IRAC: “State a conclusion.”

IRAC’s admonition that analysis end in a conclusion seems logical and helpful. Surely, it needs little remark or discussion. Not so fast!

In the previous chapter, indeed, toward the end of that long, detailed foray into facets of LEEWS, exploration of differing ways to state a conclusion occupied more than a page. It was seen that whether a conclusion is at the beginning (CIRA[C]) or end of analysis guides its nature. There is an art to stating a conclusion.

LEEWS delves deeply into every aspect of the problem of addressing essay exams. Science is, after all, *science*. Advice should be examined and tested respecting effect, then examined again. Quite often, where CW of law exam writing is concerned, much more nuanced instruction is needed.

If students are to proceed with assurance, “state a conclusion” needs more explanation. Indeed, as with other seemingly helpful and obvious CW, “state a conclusion,” absent more, is misleading.

As I suggest to students, what professors *should* instruct, and some few do, is, “I don’t want to see a conclusion!”

The strong inclination of law students is to come to a conclusion. Many years of (successful) test taking has programmed them to seek a “right” answer. “Don’t state a conclusion” reinforces the message, rarely fully digested and taken to heart, that analysis on a law essay exam is what counts. The conclusion is normally unimportant. It *should* be unimportant!

Given the same law, facts, and arguments, different judges, different courts (all learned, thoughtful) can and do arrive at different conclusions. Therefore, if analysis is sound -- balanced, logical, insightful --, whether a student concludes one way or another should signify little.⁶ A “correct” answer or conclusion will not serve to excuse faulty analysis en route to a conclusion.

The great majority of law professors want a statement of conclusion. The instruction frequently heard (more at lower tier schools) to “follow IRAC,” “IRAC the exam” anticipates a conclusion. Queries such as, “Who should prevail?,” “How should the motion be decided?,” or simply, “What result?” seem to call for a conclusion.

Students are certainly advised in many instances, “Who wins is not important.” If asked, they articulate this. Nevertheless, most gravitate fairly quickly to a conclusion. Doing so, however, impairs objectivity. Analysis, such as it is, rambles loosely, and tends, merely, to support the already decided conclusion. Analysis is typically given short shrift.

As oft repeated, the goal on a law essay exercise is identification of relevant issues, and lawyerlike analysis of those issues. The “correct answer” is not who or what prevails, but proper analysis. I trust it has been demonstrated that proper analysis is a patient, even tedious dialectic of competing arguments. This process, this dialectic should command a student’s attention. It should be the focus of her efforts.

If a law student is relatively clueless respecting how to perform analysis, as most are, even at YHS, then a proper focus on analysis will necessarily be lacking. Such analysis as exists will be superficial. Indeed, absent understanding of and engagement in the “game” of analysis, there is little of interest in an essay exercise beyond determining who wins.

“State a conclusion,” in particular “state a conclusion at the outset” distracts from a proper focus on analysis. Students rush to judgment. Analysis is (properly) disapproved of as “conclusory,” “lacks objectivity.” Characteristic ineptitude is but encouraged by requesting or in any way emphasizing the conclusion.

In sum, until analysis becomes the main game or event, anything that highlights the conclusion is detrimental. Calls for a statement of conclusion, likewise instructions to “follow IRAC” or “IRAC the exam” abet distraction from the correct response.

Does *Getting to Maybe* offer more than IRAC?

As discussed elsewhere, the popular how-to-write-law-exams book, *Getting to Maybe* (GTM), attempts to convey the message of focus on analysis, not the conclusion. Follow the (many) “forks,” meaning focus on the thought process, the analytic process, not the conclusion, is GTM’s primary theme. However, GTM merely offers an insight into proper lawyerlike analysis. It doesn’t come close to providing adequate instruction respecting how, exactly, to perform it. (As previously described, the various “forks” ultimately become quite confusing.)

The reason for GTM’s failing is likely the circumstance that its co-authors are law professors. (As noted, both graduates of Harvard Law.) They have probably had little, if any actual experience as litigators. To

recap discussion in the foregoing segment on the “A” of IRAC, both professors may have observed proper analysis as judicial clerks. They appreciate it, know it when they see it. However, neither has likely debated facts against another able attorney at the trial level of litigation.

GTM correctly advises that the conclusion be held in abeyance while various forks of thought are mulled and explored. However, beyond that, predictably, instruction tends too much toward a loosely structured academic mode. Analysis described lacks the rigor, order, and precision of the march of proper, lawyerlike analysis. At the end of GTM, when its authors seek to offer pragmatic advice on how to present the forks of thought, they fall back on mere advocacy of IRAC.

In short, beyond an appropriate emphasis on analysis for the sake of analysis, GTM has little to offer beyond standard CW.

The “objectivity” trap

In testing “objectivity,”⁷ professors give vent to a certain mischievousness and adversality.⁸ Typically drawing inspiration for hypotheticals from news events, they tend to shade facts to depict good guys and bad guys, sympathetic victims and loathsome oppressors.

Not having been properly instructed respecting what, exactly, “objectivity” means, new law students in particular tend to react emotionally to such black/white scenarios. Via a combination of visceral feeling and superficial analysis, they early on conclude who, in a fact pattern, should prevail. Most often and naturally, it is the sympathetic underdog. Then, in an attempt to justify that conclusion, after-the-fact, lopsided, subpar analysis is produced.

For example, analyzing a criminal law hypo I use for instruction, students invariably react negatively to parties A, B, and C, described as “hardened and broke,” who hit, grab, steal, and kill. They particularly dislike C, who shoots and kills a police officer in a “gun battle.” Predictably, it occurs to very few that the “counterpremise” of self defense may be available to C, as police were shooting at him.

The facts also describe a pawn shop set upon by A, B, and C as “a front for an undercover police operation engaged in purchasing narcotics and fencing stolen goods.” When told to analyze robbery, respecting C, and “present all arguments, counterarguments, possible counterpremises,”⁹ no more than a handful in a group of, say, fifty, and often none raise the distinctly plausible defense -- counterpremise! -- of entrapment.

This is so, despite considerable previous practice discovering conflict pairs and competing objectives in fact patterns, and my frequent admonishment to “Role play. Be the attorney for both sides.”

I point out to the vast majority who fail to note and discuss the possibility of entrapment, that in real-life practice of law such an omission would not just be “incompetence of counsel.” It might rise to the level of malpractice, for which they could be sued by C! At the very least they might be disciplined by the local or state bar committee. They should be!

Of course, such an omission will also result in missing valuable points on an exam. Indeed, failure to raise and discuss self defense following discussion of felony murder respecting C (also first degree murder!) would surely and deservedly preclude award of an “A” grade for the exercise. Such is the penalty for Major Mistake No. 3 in LEEWS’ parlance -- lack of objectivity.

Students are appropriately chagrined, and hopefully instructed. They have come to a LEEWS program as academics. The aim is to send them forth as facsimiles of practicing lawyers. Finally, they understand the standard CW instruction to “be objective.”

As noted, requiring a conclusion abets lack of objectivity on the part of students. As discussed in the preceding chapter, requiring that the conclusion be stated at the outset, so-called “CIRAC,” abets and encourages lack of objectivity all the more.

In sum

In sum, IRAC is but a handy, catchy acronym. It indicates components of the analysis of an issue, and an order of presentation. IRAC is somewhat helpful advice. However, at best merely that.

Only to the unformed can IRAC be conceived of as anything approaching a “system” or “all one needs to know.” By providing the illusion of a system, IRAC is detrimental. Absent a deeper, proper context of understanding, similar to other CW, IRAC misleads.

Of course, nearly all law students fall into the category of “unformed.” Likewise, law professors, law school deans and administrators, lawyers, judges, and most others in the area of law essay exam writing, including so-called experts. Thus, an opportunity to take advantage is obvious.

Once LEEWS is grasped, especially the paragraphing format for presenting analysis, the *how* of implementing IRAC is understood. Admonitions to “follow IRAC” or “IRAC the exam” are easily followed. IRAC assumes a proper place in the overall scheme of how to write an exam response. It is neither misleading nor distracting.

A professor may want a conclusion stated, per usual and as indicated by IRAC, at the end, at the outset, or not at all. However, these are mere cosmetic rearrangements. The heart of any response is paragraphs of analysis, embodying the R and A of IRAC. Indeed, one concise, impressive paragraph of analysis after another. Each presents analysis of an issue the professor (or bar grader) wants identified and discussed.

As discussed in the preceding chapter, given helpful, guiding labels, it may be that merely stating the rule/premise at the outset of a paragraph will satisfy the “I” requirement of IRAC. The issue is implied!¹⁰

Given the abject ignorance of entering law students respecting the challenging task posed by law essay exams, IRAC can understandably seem a revelation, a system. It serves to placate law students. As noted in the preceding chapter, it lulls them into a false sense of, “Ah! Now I know what to do.” It dissuades them from digging deeper into the problem, seeking more.

In response to the question, “Why didn’t classmates attend [a live LEEWS program],” in addition to lack of funds, skepticism, busyness, etc., students often note, “They think IRAC is all you need.”

In sum, IRAC abets the disconnect between classroom instruction and what is required to master exams. It abets the failure of law professors and Emperor Law School to discover a true science of law exam writing and preparation, inculcation of which would enable essay exam performance to more accurately reflect intelligence and diligence. Indeed, IRAC abets the failure of law professors and Emperor Law School to embark upon such a discovery, much less believe that such a science could exist.

As such, IRAC is a useful fig leaf for the myth that lawyers are born, not made.

* * * *

1. As the preceding chapter hopefully demonstrated, LEEWS goes much farther than any other instruction in conveying the nitpicking lawyering art. As noted, nearly an hour is spent parsing competing arguments drawn from the mere three-line, PN/DH paragraph of facts. Element by element, sub-element by sub-element, in a couple instances sub-sub-element by sub-sub-element, the excruciating, but fascinating art of milking facts on both sides of an issue for advantage is demonstrated and practiced.

Such minute back and forth thinking, dwelling on words and phrases, pondering nuances of meaning, never occurs in classrooms of Emperor Law School. It is doubtful whether most law professors, particularly at top tier schools, where practical experience is not a criterion for hiring (and may even be a detriment), are familiar enough with such factual analysis to instruct it, were they so inclined. Which they most assuredly are not. (As opposed to more loosely structured theoretical and academic concept analysis, as they are in the habit of engaging in.) However, they recognize “lawyerlike analysis” when they see it in an exam response. They reward it. “This person has The Right Stuff,” a professor thinks.

Your author has decried his own indoctrination into the microcosmic (nanocosmic?) nature of proper legal analysis. Some of its tutelage must await the actual practice of law. However, if grasped even in moderate measure, possession of this eminently learnable skill and habit of thinking confers upon its possessor a significant advantage over clueless classmates.

2. Seriousness of lawsuits. Any and all lawsuits are serious! Not just companies, but entire industries may cease to exist depending upon the result of a single lawsuit. Economic destruction of families and entire communities may ensue. On a personal level, consequences of a lawsuit are clear. Both sides devote time and money to their lawyers. Individuals are ruined economically, or enriched. Individuals go to jail. A lawsuit proves itself to be but a substitute for hand-to-hand combat or shooting bullets. Individuals, vast corporations, even nations array against one another in a courtroom, rather than across a battlefield. Justice is precious. All seek justice! Lawsuits provide an orderly, if imperfect, alternative to violent resolution of conflict.

Nothing is more instructive respecting the luxury of the legal system that exists in the United States than being participant in a lawsuit. One appreciates the extreme privilege of having one’s day in court, the majesty of justice rendered. Even attendance at traffic court to fight a speeding or parking ticket, much less a more serious driving under the influence (DUI) charge, counts. Being served with a summons and complaint is much like being punched in the gut. Causing such service to be made has the satisfaction of landing a heavy first blow for one who feels so ill-served as to resort to a lawsuit.

This weightiness of the legal process is never impressed upon law students. Perhaps every law professor, as part of her preparation to instruct law students, should be made to go to court as a plaintiff or defendant.

3. Yet another pernicious effect of the myth of The Right Stuff and innate genius for the law is the dampening effect on questions. Fearful of embarrassment, and of being deemed lacking in The Right Stuff and innate aptitude, law students shy away from querying about the most fundamental things. For example, what, exactly, is an “issue,” or what is meant by “lawyerlike analysis,” “think as a lawyer,” and a host of other concepts bandied about by professors and show-off fellow students.

The kalaidoscopic onslaught of new terminology and unclear expectations in Emperor Law School ought to provoke the outcry, “Slow down! More explanation needed!” However, the myth that comprehension requires innate qualities one either has or does not stifles dissent. It is a perfect catch-22 for perpetuation of a faulty pedagogy. Instruction doesn’t work (i.e., enable students to handle law exams). However, no one complains or questions, because what is necessary for success can’t really be instructed!

As I hope the reader begins to glean, what is necessary for success can indeed be instructed. Those so instructed enjoy a great advantage over classmates.

4. Professor inability to instruct analysis. A professor may have observed the close, nitpicking dialectic of analysis in a courtroom as a judicial clerk. She doubtless has. (More so in in federal district court than federal or state appeals court.) She may have a feel for it, a sense of it. She recognizes and appreciates it in an exam response. However, if she has never actually performed it herself, then she has not fully grasped and appreciated the precise, plodding, cumulative nature and progression of proper lawyerlike analysis. She certainly cannot adequately instruct it.

5. I deem it not only possible, but likely that my students may end up providing useful pointers to their professors!

6. It has been noted that conclusions are invariably wanted in bar exam responses, and they normally are to be stated at the outset of analysis of an issue -- CIRA[C]. The reason is that facts in bar essays are straightforward. There is little shading. What is tested is whether relevant law is known, and can be properly applied to facts. Creative interpretation of facts, policy thinking (what the law could or should be) is never wanted. If a candidate knows relevant law and how to apply it, a particular (correct) response should be arrived at. This response at the outset immediately indicates to the bar grader whether analysis is on track.

7. Objectivity in analysis means taking a clear-eyed, non-judgmental view of facts and arguments respecting issues. It means not predetermining or caring how an issue may turn out -- who wins! --, but first, without taking sides, without emotion, appropriately (objectively) marshalling evidence and arguments in support of each side of an issue.

Objectivity is manifested every day in law offices when lawyers interview prospective clients. A savvy lawyer will initially play devil’s advocate. A lawyer should and will probe for facts and possibilities favorable to the side against whom the prospective client sitting in front of her is contending. At some point the prospective client should say, or

think, “Who’s side are you on?!” Only by sizing up the opponent’s case in a clear-eyed, unbiased way can a lawyer properly assess a client’s prospects and offer sound advice. Put another way, to jump up in indignation upon listening to a prospective client’s tale of woe, agreeing, “This is a travesty! This wrong must be righted!,” while undoubtedly reassuring to the prospective client, would be altogether un-lawyerlike. It would demonstrate lack of objectivity.

As law exams, appropriately, measure progress in becoming a lawyer, and objectivity is a hallmark of lawyerlike thinking, professors deem it fair to test objectivity. (Let’s see who the lawyers are!) Viewed another way, somewhat mischievous professors see exams as an opportunity to sucker students emotionally, and many do. Fact patterns describe situations that pull at students’ heart strings. Devastated rain forests, needy children, helpless animals, cruel landlords, over-reaching corporations and the like abound in law hypotheticals. Buried in facts are often nuances, aspects that trigger legal possibilities favorable to the unsavory side of an issue. (E.g., diplomatic immunity that may exempt a hit-and-run driver from punishment.) Should a student, favoring one side or the other to an issue, overlook law and arguments favoring the unsympathetic party, that student will miss points. That student is shown to be lacking in lawyerlike objectivity.

8. The foregoing footnote suggests an occasional motive of mischievousness on the part of law professors. In addition, a measure of adversality on the part of professors is to be anticipated in many classrooms of Emperor Law School. There are several likely reasons for this. First, every year there is a new crop of eager, young, would-be lawyers. The chapter entitled “*Day one of law school*” (Section Three, Chapter 5), describes the tendency of professors to assert control. If a professor is new and young, this is more the case. If the professor is older, there may be an unconscious old-young age dynamic at work. Certainly, there may be an underlying, subconscious resentment of persons who, when all is said and done, stand to one day be competitors in either a courtroom or the academic precinct. Mostly, it is probably just the desire to impress upon students that they are in a new ballgame of a higher, more difficult order.

In any event, in the most benign and convivial classrooms there seems often to be a slight adversarial flavor. There is a playful, mischievous sense of, “So you want to be lawyers? There will be hurdles ahead! My job is to put some of those hurdles in your path. ... For your own good. For the good of your future clients.” (It must be noted that there is rarely, if ever, mention of the word “client” in a law school classroom!)

9. Premise versus “cause of action”; counterpremise versus “affirmative defense” To reiterate, counterpremise is the LEEWS term for all possible legal counters to a premise. This would include, but is not limited to so-called “affirmative defenses,” such as self defense, entrapment, assumption of risk. Students initially, naturally, want to think of premises as being synonymous with causes of action, counterpremises as synonymous with affirmative defenses. Not so. All causes of action -- battery, assault, trespass, breach of contract, unlawful imprisonment, etc. -- can indeed be premises. (A legal precept that may assist in achieving an objective.) However, not all premises are causes of action. For example, hearsay or leading question as grounds for excluding evidence can be premises. They are not causes of action. Similarly, a counterpremise may be a precept as simple as the proposition that transferred intent may not be used to establish IIED. This falls far short of being an affirmative defense.

In positing a science broad enough to encompass all legal problem solving exercises, yet precise enough to offer specific guidance, LEEWS has developed new, more useful and flexible terminology. This terminology must become a reflexive lexicon when thinking about exams and, indeed, any legal problems.

10. Statement of issue, or no? As discussed in the preceding chapter, bar exam format normally calls for a separate statement of issue at the outset of analysis. Bar graders, typically lawyers, are often assigned to ferret out and grade the analysis of but one or two of numerous issues expected to be identified and discussed. They want a clear indication of those issues. Whether or not a professor wants an independent statement of issue is the sort of precise question a student can and should ask the professor. IRAC, of course, suggests a statement of issue. If the professor says, “Yes,” she wants a separate statement of issue, the matter is largely closed.

LEEWS instruction points out that a precise, separate issue statement for each issue identified can lead to a lot of issue statements, presentation of which will consume much precious time. (E.g., in a criminal law exercise, “Is X guilty of robbery?”; “Is X guilty of burglary?”; “Is X guilty of criminal possession of a weapon?”; “Is X guilty of felony murder?”; “Is X guilty of criminal possession of stolen property?”; etc. A lot of extra typing or writing!) This is especially so, given that application of the stepped LEEWS issue identification approach will normally result in numerous issues identified.

To reiterate, LEEWS instructs a twofold alternative. First, students may broaden the statement of issue. (E.g., following the criminal law example above, “What crimes is X guilty of?”) Under the broader umbrella statement of issue, merely starting a paragraph of analysis with the definition of the crime to be investigated should suffice to indicate that crime being at issue. Thus, “Robbery is the forcible taking of property from another.” (Note the underlining of robbery. LEEWS instructs students to “help the professor,” in this instance by flagging a word the professor is likely looking for.) Given the introductory, encompassing statement alerting “crimes of X,” beginning a paragraph with the flagged word “robbery” should earn a checkmark, and the thought, “There’s the robbery issue!” There would then follow paragraphs beginning, “Burglary is ...,” “Criminal possession of a weapon occurs when ...,” “Felony murder occurs when ...,” and so on.

Second, it may be unnecessary to open with an umbrella statement of issue. Perhaps a mere helpful, guiding

label will suffice, such as “X’s crimes,” or “X’s guilt.” The professor is looking for certain issues. Given such a label, paragraphs that follow and open with definitions of crimes should prompt a checkmark indicating an issue identified (“spotted!”). In other words, in this way *implying*, but not stating the issue satisfies the “I” of IRAC!

Such is the particularity of LEEWS instruction. Such instruction is somewhat esoteric in the abstract. However, encountered within a context of progressive understanding of how issues can be systematically parsed from confusing fact patterns and analyzed, it simply falls into place. It all makes sense!

Section Six

Observations/thoughts/recommendations going forward

Overview

This final section (Is that cheering I hear?) will be an attempt to take the nascent, scattershot discussion and critique of law schools currently afoot in the legal community to a deeper, more informed plane. I firmly believe that Emperor Law School not only does not train lawyers, but does not view training lawyers as its mission.

I think all would agree that training lawyers *should* be the mission of Emperor Law School. Surely, this is what students expect, and are entitled to expect when they enter law school and indenture their financial futures. I shall offer specific recommendations for change based upon this perspective.

The current discussion and critique of law schools is properly motivated by concern over escalating cost. It also, typically, decries the failure of law schools to impart practical training. However, in your author's view the hoopla utterly fails to come to grips with deeper, more fundamental problems that underpin both these concerns. I believe these problems make ineffective training of lawyers, and, to a lesser extent, cost overreaching by law schools unavoidable.

I hope this book has exposed the essay hypothetical-type exam, given present (inadequate) instruction, as a false predictor of lawyering aptitude. Absent deconstruction of this problem, and the reasons and fallacies giving rise to it, I do not believe recognition of the deeper, more fundamental problems of law school education is possible.¹

I see these problems as first, the ineffectiveness of case method instruction; second, a jarring disconnect between the underlying purpose of American law schools, and the requirements and appropriate approaches for training lawyers. An outgrowth of the second problem, contributing to the first, is the problem of law professor hires, particularly at so-called top-tier schools.

It may be that the first order of business in effecting needed change should be cashiering (yes, firing!) the majority of professors at YHS, etc. Most are not really lawyers, and never intended to be lawyers. This evidenced by their Ph.D.'s in other subjects. Moreover, they probably don't like lawyers!

The 30+ year LEEWS effect on Emperor Law School -- Nihil!

It was not my intention in developing and offering LEEWS to remake Emperor Law School. Nor even to challenge Emperor Law School. I simply realized I had stumbled upon an insight that would have made a big difference for me as a law student. I knew it would be of great benefit to law students. I was eager to share the knowledge.

(Yes, I also hoped to profit from selling this knowledge. I believe I have offered it at a more than fair price, given what can be gained.²)

I anticipated that over time LEEWS insights would filter into, influence, improve law school instruction. LEEWS is the needed bridge between overly abstract, academic law school instruction and practical, goal-oriented law practice. I believe exam results should reflect effort and abilities, not, as is more often the case, who is merely less confused. It occurred to me that, eventually, as LEEWS lore and approaches were adopted in law school classrooms, I might be put out of business.

I shouldn't have worried. Over 30 years and more than 1,000 live programs later, tens of thousands of audio

programs shipped, well over 100,000 law students instructed, my impression is that LEEWS has made nary a dent respecting curriculum or any aspect of Emperor Law School. I have managed only to enable a percentage, who likely would have been consigned to the pervasive mediocrity most achieve, to do better, indeed, often extremely well.³

I was wrong in supposing that bridging the academic/practice gap or training lawyers is of much concern to Emperor Law School and the law school professoriate. I failed to gauge the smug, unselfconscious arrogance of well-paid, esteemed deans and professors of Emperor Law School. They are much too comfortable with a status quo that promotes their every interest, while keeping grumbling generations of students cowed and quiescent.

My competitors, as well, over these many years have failed to pay careful heed to what LEEWS instructs. If they had, they might have made meaningful improvement in their variations of IRAC-based CW. Even a once ardent supporter, lawyer, and advocate of law school change, who examined LEEWS closely, failed to grasp a fundamental difference in the LEEWS approach, versus conventional approaches.⁴

A need for change

As suggested, however, winds (light breezes?) of change are afoot.⁵ They are driven by a combination of crushing, debilitating student debt (caused by greedy law school overreaching), disillusionment with the profession, stagnant lawyer salaries, and shrinking legal job opportunities. An article in the weekly ABA online journal the very day I type these words speaks to this point.⁶

Serious questions respecting what works and what does not, what is necessary and what is not, where preparation and entree to the legal profession is concerned, are long overdue. A serious debate needs to be had. Significant changes need to be made.

As suggested in the *Preface*, Emperor Law School, the same as individuals, other institutions, governments, and nations, should not be immune to judgment and criticism. If improvement and the best interests of students is a foremost concern, scrutiny should be welcomed.

If there are lapses and imperfections in law school instruction and curricula, they should be addressed and corrected. If the entire purpose and thrust of an institution widely misses the mark, if an emperor is indeed without clothing, then someone needs to call attention to this. Necessary corrections should be entertained.

I hope this book will stoke strong winds and fires fomenting change, and provide focus in this regard. I am confident there has never been as detailed and informed an exploration of what is amiss in American law schools as this book provides. Its observations and conclusions grow out of over 30 years of focus on the subject.

If a reader has progressed this far, I trust the case has been made for seriously questioning the methods and purpose of American law schools, as presently constituted.

In sum

There is no question, but, for the most part, lawyers continue to learn their trade via apprenticeship. That single, salient fact, that I doubt any practicing lawyer would seriously dispute, alone justifies calling Emperor Law School to account.

In this final section I shall offer thoughts, observations, and specific recommendations for change. In so doing, I hope it is now manifest that my loyalty and concern is with individual law students. I know what most students want -- to become lawyers, not law professors. I know, and I hope the reader is now persuaded that Emperor Law School is not adequately assisting in that aspiration, not even close!

Of course, such being the case, and law exams being exercises in performing as lawyers, one would be foolish not to take advantage of the status quo. Although Emperor Law School undoubtedly will give lip service to the need for *some* change, and, indeed, already does, Emperor Law School will surely resist meaningful change.

Even were change to occur, it would progress only incrementally. It would follow endless palaver by study committees set up by the ABA, Emperor Law School, etc. The likely denouement will be a mere semblance of necessary change.

Hence, LEEWS will continue to offer significant advantage for a long time!

* * * *

1. Origin of a meaningful critique. As described, law essay exams early on divide students into an elite, self-satisfied few, deemed “geniuses of the law,” possessed of The Right Stuff, and everyone else -- also rans. The anointed few, including most law professors, most lawyers at the largest, most prestigious firms, and most high-ranking judges, including most on the current Supreme Court, have no incentive to question case method instruction, essay exams, or, indeed, the law schools that have been launchpads to their success. Everyone else, the also-rans, having no basis to reject the verdict of the first set of exams, other than a miffed, self-serving sense that something wasn’t quite right, something was unfair, is cowed. Criticism of Emperor Law School smacks of sour grapes. Also rans, of course, have doubts about the verdict passed on them. However, they long ago moved on with their slightly diminished lives and careers. Indeed, they give money to dear old *alma mater*.

Motivation to mount a closer investigation and critique of law school exams and methods, and the amassing of ammunition and insight to support a more informed critique required a most unusual convergence. First, there had to be an also-ran who, doubtless the same as many others, found in the practice of law that he wasn’t so benighted respecting legal aptitude and acumen as results on essay exams seemed to indicate. Second, that individual -- your author, of course -- had to have occasion to revisit the unpleasant subject of law essay exams. Third, a breakthrough insight had to occur, leading to the unlocking of a scientific solution to the problem. This solution would also expose, starkly, the inadequacy of prevalent case method instruction.

Even then, it would take not years, but literal decades in the trenches, before this also-ran would have the certainty to mount the challenge to Emperor Law School that this book represents. The alternative, scientific approach to law essay exams had to be tested and refined. Its sterling, surprising results had to be seen and repeated again and again across the spectrum, top to bottom, of American law schools. Consistent patterns and nuanced truths had to evolve from countless discussions with students about their professors and professors’ methods, from articles, from anecdotal impressions, from a lot of questioning, thinking, and re-thinking.

The patterns and truths that emerged respecting the failure of *all* American law schools -- no exceptions! -- are clear, inescapable, irrefutable. They must inform any discussion of needed change going forward.

2. The LEEWS investment. The financial return to be gained from a single “A” grade in first year is considerable. A’s are the prime calling card at job interviews in the fall of second year. Indeed, at other than top-tier schools, A’s are often required to gain access to the interviewing process. A’s first year can enable a student to transfer to a higher-ranking law school. (Or negotiate additional financial aid from her lesser-ranking, but pecunious law school.) LEEWS makes this not just possible, but probable for less than the cost of a new casebook. (The 7 1/2 hour live program [including *Primer*] is currently \$135. The group of three discount rate reduces this cost to \$120. The 13 or more group discount rate is only \$110. The complete audio CD program, including shipping, is \$175.)

3. LEEWS effect on individual students. Enabling even one student to emerge from the fog of confusion, intimidation, and frustration that quickly settles over most in Emperor Law School is, of course, meaningful. Improved performance is not inconsequential for the many who have benefitted. Hundreds of LEEWS grads have transferred to higher ranking schools, thereby improving career prospects. Many more have ranked higher in their classes than they would have, gotten better jobs than they would have, or simply gotten jobs they might not have. Many have retained and gained scholarships as a result of better performance.

Transfers. With some 2,000 students, Georgetown University School of Law in Washington, D.C. is the second largest law school in the country, and one of the most highly regarded. Its large evening division accommodates federal government employees and others desirous of becoming attorneys. Georgetown takes in more transfers than any other law school. I can recall four LEEWS grads transferring from U. Tulsa Law to Georgetown in a single year, and a similar number from Hofstra U. Law on Long Island in a single year. A transfer from fourth-tier Nova Southeastern Law to Duke comes to mind. Also Texas to Harvard, Chicago-Kent to Michigan, Thomas Cooley students to Washington University and Northwestern, and on and on. A Korean national from U. Minnesota Law reportedly learned English just a year prior to attending law school. He transferred to the University of Chicago School of Law after taking LEEWS first term, and achieving a 3.66 GPA for the year. If he isn’t proof that being a “good writer” is not key to law exam success, what is?!

(The three U. Minnesota classmates who attended with him all made Law Review. One transferred to Georgetown. I have noted an uptick in audio program orders from Korean nationals headed to American law schools!)

A LEEWS success story that has stuck with me for over a decade is that of an older student at St. Louis University School of Law. He had gone to college while working in the St. Louis ship yards and raising a family of four or five children. In his forties he decided to go to law school. He didn't do well first term, and came all the way up to Chicago in the spring to sit in on a live LEEWS program. He finished the year third in his class and made Law Review. The following fall he became my rep. He mentioned one professor asking, respecting an exam response, "How did you know to sue these parties?" He continued to do well. The last I heard he went west with his family to a six figure law firm position in Silicon Valley.

I am extremely gratified by such results. I consistently hear of LEEWS grads not just making law review, but ending first in their class, being elected editor-in-chief of law reviews. (Columbia, Stanford, Texas, Georgia, Kansas, Washington University, U. Cincinnati, Willamette, Lewis & Clark, New York Law, and Quinnipiac immediately come to mind.) I normally hear of such successes when recruiting former students as reps.

I may note that I ceased researching LEEWS results soon after giving the first live programs in the early 1980's. I discovered after the first year, for example, that eight LEEWS grads (of perhaps 15 UCLA attendees in the live Los Angeles Program) had made law review at UCLA, even more at Harvard. I knew from the first that LEEWS would make a positive difference. My only underestimation was the magnitude of that difference.

4. The supporter was Atticus Falcon, pseudonymous author of the seminal, erudite, provocative, caustically critical (of law school) books, *Planet Law School I* and *II*. "Atticus" sat in on a LEEWS program prior to publishing his first book, and did so again at least twice before publishing the second version. A journalist-turned-lawyer, and a successful law student at a "top fifteen" law school (in all probability University of Texas Law), "Falcon" nevertheless missed a key component of the LEEWS approach -- namely, never attempt to address or analyze a hypothetical as a whole, but, having systematically broken the exercise into manageable components, address and analyze its components. (Which, of course, turn out to be relevant issues.) Falcon missed the very different idea of identifying, analyzing, and presenting the analysis of components as the primary objective, versus the amorphous, fruitless CW thrust of attempting to analyze a hypothetical as a whole.

Thus, in a blog he took LEEWS to task for not following the standard approach of other exam-writing workshops -- namely, have students address a practice hypo or two overall, then go over the responses, pointing out problems, and do's and don'ts. Of course, such is mere helpful advice and hints, hardly a true system.

Your author suspects the problem was impatience on the part of Falcon, that prevented fully grasping the revolutionary LEEWS approach. (Your author recalls him fidgeting greatly at a program in Houston.) Also, Falcon's own notions of how one should address a hypothetical. His idea of how to proceed was doubtless influenced by his own more or less conventional, yet successful approach to many sets of exams as a law student. Apart from describing LEEWS as a "Godsend" in *Planet Law School II* (p. 164), at some point in *Planet Law School I*, as I recall, Mr. Falcon acknowledges wishing that he, personally, had discovered LEEWS. Therefore, perhaps a touch of envy entered in. I believe Atticus Falcon has been unable or unwilling to fully grasp, understand, and appreciate the implications of The Blender.

5. At-large critique of law schools. Law graduates are suing their *alma maters*, claiming false advertising respecting job prospects. (Which advertising encouraged the plaintiffs to enroll.) Not all law professors are unaware of or unsympathetic respecting problematic aspects of Emperor Law School. Media outlets, such as the *New York Times*, have featured articles by law professors and others decrying the number of law schools, their cost, and their methodology. (Never case method instruction, but lack of more practical education.) They call for reforms, such as limiting law school to two years.

The notion of apprenticeships has re-emerged. Not as an alternative to law school -- No one has yet suggested that law schools be done away with! --, but as an adjunct. Possibly there could be a year or two years of law school, followed by an apprenticeship leading to a bar examination and licensing. This would reduce the cost of law school.

However, while articles also decry law school content and argue for more meaningful practical training for the profession, the primary driver in the mounting criticism is not the problematic nature of law school instruction, but the increasing and unsustainable debt imposed on would-be lawyers.

Your author's view, of course, is that change should begin with an overhaul of case method instruction, in accordance with precepts in this book.

6. 12/22/11 -- "700 Lawyers Apply for 12 Openings at DA's Office; Harvard Law Grad Likes the Job." The openings were in the office of the district attorney, Santa Clara County, California, starting salary \$92,000. (!!) The counterpart Santa Clara public defender's office, starting salary \$81,000, reported over 400 applications for limited openings. A comment below the article, from someone in a six-person law office, reported 40 applications for one position at "half the [above] salary." A successful applicant for one of the Santa Clara DA positions, a Harvard Law grad who had worked for a major law firm, reportedly said, "I would've come to the DA's office and worked as a volunteer for free, if I had to do that to get a job. I knew it was what I wanted to do."

Section Six, Chapter 1

The (real) problem with law schools

(It's not what the legal profession thinks.)

In your author's view, law schools, as presently constituted, should be disassembled altogether and reconstructed. As noted, the first order of business, particularly at so-called "top-tier" law schools, should be to pink slip most professors.

Of course, I aspire too far. We must content ourselves with the real world of what may be possible. I must reiterate, however, that although I am hardly alone in recognizing that problems exist respecting Emperor Law School, the fundamental problem is as yet not recognized.

The August 12, 2011 ABA online Law Journal announced the following:

The ABA House of Delegates voted Tuesday (8/9/11) to adopt a resolution to urge law schools to more adequately prepare law students for the real-life experience of practicing law and bolster CLE [continuing legal education] training to better bridge the gap between law school and actual practice.

Continuing, the ABA resolved to:

take steps to assure that law schools, law firms, law examiners, CLE providers and others concerned with continued professional development provide the knowledge, skills, values, habits and traits that make up the successful modern lawyer.

A former New York State Bar Association president commented:

Many new lawyers come out of law school never having drafted a complaint; never having seen a contract; interacted with a client, much less an adverse witness. However, those same lawyers, in increasing numbers, are hanging their shingles as solo practitioners. It is a real ticking time-bomb for our profession."

Now that cost has become truly burdensome, Emperor Law School is properly being scrutinized and questioned. However, the scrutiny and questioning does not go to the root cause of the problem. Not even close!

The problem with law schools, as diagnosed by the legal profession, is that they do an inadequate job preparing students for the practicalities of law practice.¹ However, that case method instruction may be ineffective in inculcating the lawyer mindset, or that preparation for law essay exams is inadequate, is altogether unrecognized as problems needing to be addressed.

Indeed, the inadequacy of law essay exams as an appropriate measure of lawyering aptitude, and their utter contradiction of an obvious truth, namely, that becoming a competent lawyer requires time and experience, goes completely unrecognized and unaddressed.

The real problem with law schools

However, a more fundamental reason for the foregoing unrecognized problems, as well as those recognized by the legal profession, must be addressed before needed change can occur. Namely, the real problem with American law schools is that they have never viewed their mission as training lawyers! Inculcating the inquisitive, inquiring lawyering mind, yes. However, training the practitioner, the “mere legal craftsman,” to recall Sir William Blackstone’s sniffing appellation, no.

The Litchfield Law School notwithstanding, as I hope has been demonstrated, Emperor Law School emerged primarily as an adjunct to American colleges and universities, and a new revenue source. The mission of university-affiliated law schools was to provide a broader educational foundation before would-be lawyers learned practical lawyering skills in the time-honored way -- apprenticeship! Sir William Blackstone lamented legal craftsmen’s lack of a liberal education. American colleges and universities ran with this idea.

The obvious contradiction to this foundational purpose of American law schools, of course, is that today’s would-be lawyer comes to Emperor Law School with at least a college degree, in many instances an advanced degree.

Even accepting the questionable proposition that law students need more non-legal education than they already have, I am certain most in the legal profession would agree that, if anything, minute examination of legal cases narrows the mind and outlook. Once they begin law school, few continue to read novels, history books, or much of anything besides casebooks, law-related material, and news articles.

US News top-ranked Yale Law School wins plaudits for its efforts at intellectual cross-fertilization. However, is giving credit toward the J.D. degree for courses in the divinity school, the school of public health, and the forestry school much more than an effort to justify three years that have little to do with training a lawyer?

The problem of Emperor Law School from the outset is that it cannot really justify itself. It doesn’t educate legal practitioners. Nor does it expand horizons of thought. Rather, it falls between stools of true intellectual scholarship and practical education. Arguably, it has merely set itself up as an expensive prerequisite to admission to the legal profession.

The questionable model of top-ranked Yale Law School

In June of 2011, while working on this book, I received a lengthy, state-of-the-law-school correspondence from the new dean of the Yale Law School, who happens also to have been a classmate. The letter was probably not so different from communications all graduates receive from their degree-granting *alma maters*. The institution has never been better! We’re doing a great job! Please send money!

What struck me was how the letter pointed up the differing purposes of Yale Law School, at least its dean and professors, and the students it supposedly serves. To be sure, in the second paragraph of a five-page communication the dean stated, “The building is still suffused by the thrill and exuberance of cutting-edge legal practice and scholarship. ... We still prepare our students to become first-rate lawyers, ...” It was also noted later that “... employer demand for our graduating students remains high despite the economic downturn.”

No question, but Yale Law, similar to other law schools in the *US News* top tier, continues to be a viable investment in terms of securing gainful legal employment. Moreover, no question, but numerous graduates of Yale and other law schools go forth to become first-rate lawyers. However, the question remains open whether law school, as opposed to law practice, enabled these highly intelligent and motivated individuals to become first-rate lawyers.

Other than the suggestion of excitement and intellectual energy in the law school community and building,

nothing in the remainder of the letter spoke to instruction that pointed from law school to first-rate law practice. No cases were mentioned or described in which a Yale Law grad had wended his or her way to victory, and that graduate gave credit to lessons learned in a classroom during law school. Indeed, not a single legal case of any kind was mentioned -- in five dense pages.

Rather, an eleven line paragraph opened with, “Our faculty were especially prolific last year, with new books by” Then were listed the ten books published by Yale Law professors in the preceding year on such topics as *Constitutional Redemption: Political Faith in an Unjust World*; *The Violence of Peace: America’s Wars in the Age of Obama* (by the acclaimed novelist, as well as law professor, Stephen Carter); *The Green to Gold Business Playbook*; *Political Theology: Four New Chapters on the Concept of Sovereignty*; *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms*; *the Death Instinct*; *Legality*; and the popular, mass market tome, *Battle Hymn of the Tiger Mother*, which, without having read it, I believe has much to do with the unusual and severe child rearing practices of the Yale Law professor author and mom.

Other paragraphs detailed the many notable guest lecturers and panelists who had visited the law school during the previous year -- Bob Woodward, Michael Chertoff, etc. --, and the hosting of conferences that “abounded,” including “Global Military Appellate Seminar,” the “first gathering of its kind at an American law school,” and “The Rebellious Lawyering Conference.” It was reported that the “Information Society Project sponsored many fascinating talks and events, including ‘From Mad Men to Mad Bots: Advertising in the Digital Age.’”

Admittedly, probably thanks more to talented, stimulating schoolmates than books written, conferences, and famous panelists, Yale Law School remains an exciting, intellectual place. Add films, pizza parties, and witty, collegial professors, and it is somewhat a fun place to be -- for over \$60,000 a year! Your author fondly recalls impassioned conversations about Black Panthers, the Vietnam War, Watergate, the Bork Supreme Court candidacy, and on and on. However, I have also described how my real education as a lawyer began with a solo practitioner in town, and in earnest when I began my first law job. (Also in law firms during the summer between second and third year.)

It would seem that Yale Law, setting the standard in Emperor Law School, is in very large part a support system for scholarly efforts that, when all is said and done, are of questionable value to the world at large, and of little value to students, whose undertaking of mountainous debt supports such endeavor. If one gives credence to voices questioning articles that seem to advocate world courts, and citizen rights that trump national sovereignty, the “scholarship” of law professors is possibly even mischievous,.

The most notable, striking aspect of the dean’s letter, as your author sees it, came midway. It stated, “And as for those of our graduates who wish to become law professors, I am especially delighted to report that the Yale Corporation [overseeing all university initiatives] has just approved our proposed program to grant the degree of Ph.D. in Law, which will be a major innovation in American legal education that we hope will produce superbly qualified candidates for the legal professoriate.”

Ah-h!, the innovativeness of Yale Law School! Ah-h!, the tacit admission that for purposes of instructing in Emperor Law School (and the purposes and aims of Emperor Law School), one may as well skip the actual practice of law altogether as a recommendation and qualification for instructing would-be lawyers.

Shouldn’t the scholarly efforts touted by Yale Law (and Emperor Law School) as a justification for its existence be incubated in think tanks and institutions, such as exist in foreign and domestic policy? (E.g., Hoover Institute, Heritage Foundation, Peterson Institute for the Study of Economic Issues, etc.) Surely, legal scholarship, questionable at best, should not be supported by crushing debt laid upon students, whose aim for the most part is simply to become practicing lawyers.

* * * *

1. Reference bears repeating to the November 19, 2011 *New York Times* article, “*What They Don’t Teach Law Students: Lawyering.*” The article, as noted, describes the efforts of a Philadelphia law firm to instruct new associates in practicalities of functioning as a lawyer. Also, under a picture and blurb from a former dean of Vanderbilt Law School, suggesting, “updating is needed,” it describes some of the instruction “corporate clients wish associates were taught in law school.” These include, *inter alia*, “A better understanding of modern litigation practice, which is about gathering facts and knowing how to settle a case; Greater familiarity with transactions law, including how to draft, evaluate, and challenge a contract; Deeper knowledge of regulatory law and the ability to respond to a regulatory inquiry or enforcement action,” etc.

Would it be a stretch to suggest that such instruction would amount to precisely the training of a “mere legal craftsman” that lawyer/professor/judge, Sir William Blackstone, decried in giving birth to American law schools?

Section Six, Chapter 2

The problem with (most) law professors

Respecting a proprietary claim to the term, “urban homesteading,” that created a minor tempest in summer 2011, the 7/27/11 edition of the ABA Online Journal reported: “University of Minnesota Law School associate professor, William McGeveran, says the Dervaes Institute likely overshot whatever trademark rights it ever had. ‘Trademark rights are intended to prevent consumer confusion,’ he says. ‘A phrase like *urban homesteading* could be protected to the extent that it is identified with the Dervaseses; insofar as it is a generic term, or has been in use by others, the Dervaseses couldn’t stop others from using these phrases [sic].’” Continuing, ...

“‘A lot of people think trademark registration is this automatic monopoly. And that’s not accurate,’ says McGeveran. ‘Someone who was already using *urban homesteading* could keep using it. You could still use the phrase descriptively. If the defendant is using the phrase in a way that would confuse consumers as to sponsorship of the goods, you can’t use it that way. It seems like this is a phrase that has been used by a lot of people in a lot of contexts.’”

In a more mundane vein, Karin Moore, law professor at Florida A&M University College of Law in Orlando, observed the sensational trial, broadcast on national television, of one Casey Anthony in that city in 2011. Ms. Anthony was accused of murdering her two-year old daughter, Caylee, then concealing the body, which was discovered buried near the Anthony home. Despite lying about her daughter’s whereabouts, and falsely claiming her daughter was kidnapped, Ms. Casey’s claim of an accidental swimming pool drowning was believed (or not disproved beyond a reasonable doubt), and she was acquitted. Commented Professor Moore in *USA Today* (Thursday, July 7, 2011, p. 3A), “I suspect [Casey Anthony’s] not going to have a very pleasant life. This will follow her wherever she goes.”

Even more mundane were comments of a Stanford law professor in an August 21, 2012 *National Public Radio* broadcast respecting the then ongoing, Silicon Valley “trial of the century,” pitting behemoths Apple Computer and Samsung Corporation in a patent infringement claim brought by Apple. The professor, whose name I did not catch, remarked to the effect, “The amount awarded, should Apple prevail, will be far less than the damages claimed by Apple, but a lot more than \$25,000 dollars. It will probably be somewhere in between.”

Well, hello! “Duh-h!,” as most might opine in a current vernacular.

(Update: The jury brought in a verdict for Apple of one billion dollars. Samsung is expected to appeal.)

Almost daily, at least weekly on television, more often on radio, a law professor is heard to give a 30-60 second pronouncement on a current news topic that raises a legal question. For example, the British Petroleum Gulf oil spill of 2010 brings commentary from a professor of maritime law. A dictator is brought before the International Court of the Hague in Brussels, and a professor of international law has a perspective. And, of course, there are such mundane commentaries as the above.

Got a topic with legal ramifications and a time slot to fill? Call a law professor in the field for a knowledgeable pontification. Perhaps there should be a law professor comment hotline.

Apart from such snippets of edification of the public, if law professors don’t train attorneys, one must question the importance of their role, and even whether they should have a role. One wonders if they sometimes ask themselves such questions.

They never wanted to be lawyers!

The expression in the communication of Yale Law Dean Post, “legal professoriate,” referenced in the previous chapter, is telling. It suggests an echelon removed from the practice of law. It has an even ominous sound and implication.

It has been noted that a study of hiring patterns in 40 law schools from 2005 to 2009, running the gamut from top to lower tier, revealed that the average amount of actual law practice experience of professors hired at top-tier schools was less than two years, that of professors hired at lower-tier schools more than seven.¹ Moreover, as the Ph.D. in law is only now being invented (by Yale), virtually all recent vintage professor hires at top-tier law schools have Ph.D.’s in disciplines other than law.

Elizabeth Warren is a former Harvard Law professor, the thwarted Obama nominee for head of the newly formed, federal Consumer Protection Agency (largely constructed by Professor Warren), and, as of this writing, a populist candidate for the senate seat from Massachusetts. Professor Warren’s area of expertise is consumer law, in particular federal bankruptcy law. She made her reputation with detailed analysis of the effects of bankruptcy laws on the middle class and the poor. It was her scholarship in this area that brought her to the attention of Harvard, and her former position on the Harvard law faculty. Professor Warren apparently never practiced law. She has never tried a case.

Your author recalls reading that, as a professor, Ms. Warren was in the habit of meeting with small groups of students who were desirous of becoming law professors. She helped them map a strategy mirroring her own path. In other words, scholarship, not law practice, would be the route to the legal professoriate.

One problem with professors, particularly at the top-tier schools that set the benchmarks in Emperor Law School, is that many never had the ambition to practice law. Acquiring a Ph.D. is a long, arduous process. As is said in the law, *res ipsa loquitor*. The thing speaks for itself. Clearly, law professors with Ph.D.’s had a strong interest in something other than law prior to attending law school, and for a long time at that.

Plainly, they wanted to teach and/or do scholarly research. Perhaps they wanted to be a professor of history, economics, English, etc. at a college or university. There have been limited college professor job positions in recent years. Moreover, entry level college teaching positions don’t pay very well. Therefore, as do many who cast about for another career path, these aspirant teachers/scholars/researchers went to law school.

Those at top law schools who did well on exams -- scored 35, 45 points out of 100?! --, found they could secure a prestigious judicial clerkship, spend a year or so in a prestigious law firm earning a big salary, then

Well, as evidenced by their Ph.D.’s, these are not cultivate-a-client, build-a-law-practice, take-on-the-opposition types. It is likely they never fancied the rough and tumble practice of law. However, a career in teaching as a law professor was now open to them.

Top-tier law schools don’t seem to care what kind of Ph.D. a prospective professor has. They like the idea of a professor with a broader interest and background than law practice. They like the idea of a “scholar,” someone disposed to do research, and publish articles and books that enhance the law school’s reputation. Not a reputation as a producer of sharp legal tacticians, of course, but as a hot bed of legal scholarship.

As evidenced by lack of proven teaching ability in the backgrounds of most law professor hires, whether the prospect is a good teacher or not is rarely a determining factor. Nor is love of the legal profession, or experience and proven ability as a practicing lawyer. Certainly not at top-tier schools that set the standard for the many lesser schools seeking to ratchet up the *US News* rankings.

The circumstance that a prospective law professor hire did well at a top law school, clerked with a high-ranking judge (preferably Supreme Court or Federal Circuit level), and spent some time (in the library or carrying the “elephant bag”²²) at a prestigious law firm is all the cover needed to awe incoming law students. It also satisfies any concerns of alumni, the most prosperous and chief benefactors among whom are doubtless practicing lawyers. This person will publish scholarly work, thereby enhancing the reputation of an institution that is not judged by success imparting practical training.

Can someone who never practiced law train the “lawyering mind?”

No question, but someone whose experience in the practice of law consisted largely of reading and cite-checking briefs, occasionally observing lawyers of differing abilities in a courtroom, and researching in a law library, cannot teach the fundamentals, much less the intricacies of legal practice, even were they so inclined. The question is whether such a person can impart the nitpicking art of lawyerlike analysis, as revealed by my one dollar insurance example? I think not.

Even in the rare instance where a law professor is both experienced practitioner as well as legal scholar, as a few of mine were, I trust shortcomings of case method instruction in moving students from an academic posture to the close, analytic application of law to facts that has been described have been persuasively demonstrated.

The point has been made that facts are never at issue in appellate cases. Thus, there is no parsing or contesting of facts in cases law students examine. At best, a professor hoping to inculcate skill at the nitpicking lawyering art artificially changes facts, poses “what ifs?” However, the cart has been placed before the horse.

Not having been adequately instructed in the art of analyzing “as a lawyer,” students cannot follow and be instructed by the very method -- what ifs? -- employed to instruct this skill. Catch-22! Rather than engage productively in parsing consequences of minor changes in fact, law students, as they have become accustomed from many years of academic learning, take copious notes, especially in first term.

Indeed, law students are encouraged to “take good notes.” The presumption of professor, and certainly students, is that a better sense of the discussion will emerge from a later review of these notes. “I’ll make sense of this later when I have a chance to review my notes,” is the hopeful thought of the typical 1L.

Of course, as noted, there is no “later” in Emperor Law School. There are more cases to read and brief. Notes pile up, and are cold and stale. Belatedly, the need to learn black letter law becomes apparent. Mountains of notes accumulated by first term 1Ls prove unmanageable, unavailing, useless.

Unproductive busywork of taking copious notes is yet another fig leaf covering the inadequacy of case method instruction in training the lawyering mindset. It is yet another prop for the fallacy that lawyering aptitude and skill is innate (itself a prop), and will emerge if one but has The Right Stuff. One either has lawyering aptitude, or not. Which, of course, is nonsense.

No question, but law professors in general are highly intelligent and thoughtful. However, judging from models of their own analysis that they offer as examples to students, and that some have published, it is apparent that most have not arrived at the minute, patient manner of thinking that, your author is persuaded, can best be inculcated by matching wits with a determined opponent in litigation. They have not become skilled at or even privy to the true lawyering dialectic.

I typically suggest to students that once they become skilled at the analytic lawyering art LEEWS so patiently instructs, “Not only will your analysis impress. Not only will you likely show the professor things in her own fact pattern she may not be aware of. I think it is possible to provoke envy in your professor!”

Not surprisingly, respecting their exam responses, LEWS grads often report versions of the following question from admiring, quizzical professors, “How did you learn to do this?” Meaning, presumably, “How did you learn to analyze and present in nitpicking, practicing lawyer fashion?”

Do law professors like (or admire or respect) lawyers?

I contend they do not and cannot. Simple as that. It has been oft noted that the words “lawyer” and “attorney” are rarely, if ever heard in classrooms of Emperor Law School. It is my belief that, inevitably, a certain animus against lawyers, even the legal profession, a certain disdain must germinate and be conveyed by professors, if only unconsciously.

I am not, of course, speaking of law professors with more than a modicum of practical experience as lawyers. They were real lawyers. Many still are. They understand the considerable intellectual demands of the profession. They doubtless like lawyers. They surely respect lawyers.

However, excepting those professors in top tier law schools who teach criminal law, normally former prosecutors or defense attorneys, who often continue to consult on and even try cases (think Alan Dershowitz of Harvard), professors with substantial practical experience are becoming the rarity at the top tier schools that set the standard in Emperor Law School.

Professors with substantial practical experience, but few scholarly credentials, whether at top tier or lesser law schools, will likely temper introduction of war stories and practical advice. They will likely unquestioningly adopt and adhere to case method mode of instruction. It is how they were instructed as law students. Although their experience will suggest the inadequacies and contradictions I have described, they will not question either case method instruction, or assumptions of innate aptitude and The Right Stuff.

I have such an professor in mind. He is a friend and Harvard Law grad. He clerked for a federal district judge following law school. He has practiced for many years as a litigator, primarily defending large corporations. He was a partner in a major law firm before founding his own firm. He still practices law, and is also an “adjunct” professor at fourth-tier University of Memphis School of Law.

I sense this person’s insecurity as he engages in teaching law students. (Also his excitement. He greatly enjoys teaching.) He has not been in the classroom for a long time. (Since he was a law classmate of Mitt Romney!) Although a highly competent practitioner, this man lacks credentials as a scholar. He is probably intimidated by the scholar-aspirant ethos that holds sway in even a fourth-tier law school. He readily and unquestioningly accepts his second-tier academic status, and the prescribed mode of instruction.

Although potentially legal scholars, and perhaps desirous of becoming such, practitioner-turned-professors are not nearly there. Few have Ph.D.’s. Therefore, they will likely feel ill at ease in an academic setting. As they set about establishing *bona fides* as law professors, they are likely to carefully adhere to accepted prescriptions of professorial conduct and instructional modes. In a fierce irony, they, too, will probably soon eschew the words “lawyer” and “attorney.”

Practitioner-turned-professors will doubtless accept askance looks, suspicions, and condescensions of their true-professor-scholar, fully tenured colleagues. They will know that as (mere) lawyers, however skilled and respected in their fields, in Emperor Law School they are interlopers, often invited in on an *ad hoc*, interim, second class (adjunct) basis. Their purpose is to satisfy grumblings about lack of practical skill education. It is the legal profession turned on its head. It is a farce and a shame.

The case that many law professors cannot like (or respect?) lawyers

Consider the oddity, the dissonance of instructing in a professional school, when one has little practical experience in the profession one is supposedly instructing. Imagine that you have never done open heart

surgery, but you are conducting an examination of case studies of open heart surgery. Imagine you have never wielded a wrench in close quarters in a basement, but you are instructing intricacies of plumbing patterns in a construction project.

Such an instructor doesn't know if she can execute the procedures and systems she is describing and instructing. Probably she can't, and she knows it. Inevitably, she is going to feel insecure vis-a-vis a heart surgeon or a master plumber. Naturally, she is going to develop psychological defenses, mechanisms, rationalizations to mask and overcome this incongruity, and her resulting insecurity.

Very likely, the scholarly side of the coin is emphasized. There is the practical side -- the mechanics of open heart surgery, installing a plumbing network, initiating and prosecuting a legal case. All well and good. Students are told they will encounter this practical side. They will develop skill at it when they leave school. (Or the practical side is never discussed or mentioned, as is the case in Emperor Law School!)

However, there is also the scholarly side, and it is equally important. Indeed, in some ways it may be, ... Actually, isn't it more important?

Assuredly, indeed, emphatically, yes! The scholarly side is more important, a scholar must conclude. Otherwise, a law professor is a lesser figure than a legal practitioner. Isn't such a psychic pathway for self esteem altogether plausible?

Isn't it inevitable that an anti-practitioner animus and bias germinate and be conveyed to law students, if ever so subtly? It is the simple, self defense, psychological math of one pretending to be expert at something never experienced. *Res ipsa loquitur!*

Falling between stools of (true) scholar and legal practitioner

It is my considered view that for the most part law professors fall between the stools of being true scholars and practicing lawyers. Certainly, those in top-tier schools that emphasize scholarship do.

Imagine for a moment a law professor from YHS, or a top-tier school such as Columbia, Berkeley, UVA, Texas, or Chicago, attending a faculty gathering with other professors from the university. This doubtless occurs on occasion. Possibly there are one or two Nobel prize winners in the group.

No one will question the scholarly credentials of the professors of history, philosophy, English, art history, archeology, plasma physics, applied mechanical science, chemical biology, etc. To obtain their Ph.D.'s, and to produce their scholarly articles and books, such professors have spent years delving into original works in the field. They have been in the field! They typically read in and speak more than one language. They have translated old manuscripts. They have conducted experiments and studies. They are experts from whom others seek advice. They are true scholars.

However, what of the professor of law? He may have a Ph.D. (In a field other than law, until the Yale-invented PH.D. in law begins to be awarded.) However, scholarship in the field of his Ph.D. has long ago bypassed his expertise. Therefore, he is loathe to mention that Ph.D.

Rather, his scholarship, such as it is, consists of parsing legal cases to discover patterns and trends in the law, judicial intent. Perhaps he is exploring the possible influence of a recent shift in societal opinion on judicial decision making. Perhaps as it relates to cases brought by the Environmental Protection Agency.

Decisions of the Supreme Court and federal circuit courts of appeal are his primary source material. What passes for scholarship is arguably mere opinion and speculation. Moreover, no one cares. Few read the scholarly works of law professors. By the time they are published, case law has moved on.

The point has been made that innovation in the law derives not from intellectual ruminations of law professors, but from creative efforts of practitioners trying to win cases for clients. The remark of a group of judges from the Second Circuit Court of Appeals in New York City to an assemblage of Columbia Law Professors has been noted -- “We don’t read your articles!” I have noted my impression as a law student that the aspiration of professors at Yale Law School was to be tapped for a judgeship on a high-ranking court.

So what is a law professor to do to command respect in a university-wide assemblage of professors who, with good reason, may question his credentials as a scholar? Isn’t law school after all, the thinking plausibly goes, a trade school?

Why, emphasize that he is, after all, a lawyer!

Here, your author is speculating. I have not attended wine and cheese or other presumed gatherings of university professors and law professors. However, I have attended such gatherings of type-A folk. I am familiar with human vanity and one-up gamesmanship. One naturally plays one’s trump.

It would be hard to fathom that amid professors from other disciplines, law professors would not emphasize their lawyer side. All in America fear lawyers, even if they do not like or respect them, including Nobel Prize-winning scholars. The law is arcane, omnipresent, influential in all aspects of American life. Fall afoul of it, and there are dire consequences.

Lawyers and judges are the arbiters and masters in this area of life. Knowledge of law conveys power. Therefore, why not bring the conversation around to a discussion of a recent Supreme Court case and its implications for Title Nine and athletic scholarships, or federal funding of grants to university professors? Who could resist such a gambit?

However, in the company of practicing lawyers, experienced in such matters as filing motions, the necessary practical steps to effect an “M and A” (merger and acquisition), and how to *voir dire* a potential juror, the professor of law will inevitably steer the discussion toward legal esoterica. He is ill at ease among these movers and shakers in the rough and tumble world of law practice. (Which he left as an amateur.)

Better to emphasize the role of legal scholar. Practicing lawyers do not have leisure to read cases unrelated to the matter at hand. They lack a birdseye view of the law. Unless a particular case requires it, they have not engaged in speculation about where the law could and should go. Perhaps they would be interested in certain policy considerations they are not aware of. “I am presently writing an article about,” the professor of law begins.

I contend that such a person cannot like lawyers, but must be wary of the practitioner, even the profession. I contend that such a person, even if once a practicing lawyer, must embrace an academic, scholarly approach to instruction, and will eschew anything that smacks of practical advice. (The exception being noted of the professor at North Carolina Central University School of Law, who takes it upon himself to instruct his students in the import of “the missing witness, Mr. Green.”²³)

Would such a person eventually become somewhat disdainful of lawyers, even the legal profession, and convey this attitude to students in subtle, unconscious ways?

Such a person -- law professors in general, not the NCCU professor in particular -- is but the failed-lawyer-turned-legal-scholar/observer/judge, William Blackstone, many times removed, still attempting to steer would-be lawyers toward something other (higher?) than the trade of lawyering. Such a person, understandably, is embarrassed at semester’s end to give the show-me-you-have-progressed-as-a-lawyer exercise represented by law essay hypothetical-type exams.

Small wonder law professors have not deigned to understand and impart skills and approaches that would equip students to master the exams they administer. Small wonder they have not endeavored to discover a science of effective preparation and exam writing. The final exam they administer is but an unpleasant reminder that, at the end of the day, their students must be prepared, at least minimally, for a state bar licensing exercise.

Implications going forward

Of this, your author is certain. Law students would not willingly undertake the crushing financial burden a law school education requires, if they were aware that such ambivalent diletantism is afoot in classrooms of Emperor Law School. However, law students are too lowly, too unknowing, too cowed to mount a serious critique.

Although, as noted, lawsuits against their law schools by disgruntled graduates are now forthcoming, the vast majority of lawyers are not likely to criticize, much less protest the institution from which they received their degrees. Nor are judges, and no one else really counts.

Therefore, Emperor Law School in much its current form will likely continue to exist. However, perhaps Emperor Law School can be embarrassed and chastened by being exposed. Sheer economic necessity will provide a primary engine for change. Perhaps some changes can be forced.

Cue refrain. This situation, of course, can and should be taken advantage of!

* * * *

1. See Section One, Chapter 6 (p. 31).

2. “Elephant bag.” Name given the double-wide briefcases in which litigators transport files to court. One who “carries this bag” refers to novice lawyers who accompany and assist the trial attorney. They research legal issues that arise during the trial or hearing. They observe and learn, often from the front pew, not counsel’s table. They run errands, including fetching coffee. (At \$175 an hour and more billed to the client!) They literally carry or push often voluminous files into court in carts similar to grocery shopping carts.

It may be noted that a lawyer at counsel table who is not the primary attorney is said to “second seat” the case. This more experienced lawyer performs a more active role, such as giving the opening statement. She may be a litigation specialist, for example, in cross examination.

3. To reiterate, an attorney who hasn’t been paid will sometimes seek adjournment of a pending matter, and use as his excuse needing time to locate “the missing witness, Mr. Green.” This signals to the judge that the lawyer, invariably a regular in the courtroom, has not been paid, anticipates difficulty securing payment, and needs the leverage of an adjournment to assist in getting paid. (In effect, yes, the lawyer seeks the court’s assistance as an ersatz collection collaborator.)

Such a request, naturally, provokes amusement on the part of court personnel, including the judge, but will likely be granted. The tactic normally requires present incarceration of the client to be effective. Moreover, lest the judge be seen to be overreaching, the request will only be granted once, and for a very brief interval.

It may be noted that courthouses, with a reappearing cast of judges, clerks, stenographers, court officers, lawyers, and support personnel, who know one another and contribute to and attend one another’s functions, tend to operate as highly ritualized communities and mini societies. Indeed, anthropological studies have been conducted on courthouse culture. Knowing the various actors, their likes, dislikes, and tendencies, actually contributes to more efficient conducting of the business of the court.

Early on as a criminal prosecutor in Brooklyn, for example, where at least ten courtrooms (“parts”) conducted daily business in the criminal courthouse alone, I was told who among the regular defense attorneys could actually try a case, who could not (and therefore was more likely to accept a plea bargain), and other such useful lore. I recall an effective partnership of two brothers. One was known as an effective trial attorney. The other couldn’t conduct a preliminary hearing. However, the latter, a sharp dresser and bon vivant, as I recall, was effective in making his way among the citizens crowding the halls, drumming up business among persons ensnared in the criminal justice system. He was likeable enough, and adept at schmoozing with judges, clients, and court personnel. This resulted in getting his cases called quickly, so he could be in and out of more court parts, and therefore conduct more business and make more money, some of which he contributed to the court officers fund, judicial functions, etc. This brother was known to

be amenable to a quick plea arrangement, which counted as a conviction. Often, as we prosecutors saw it, the client was sold out. The *quid pro quo*, always, was “no jail time.” If a case needed trying, or motions needed to be made -- i.e., actual legal work --, then the other brother entered the picture.

Such a symbiosis is seen even at prestigious, so-called “Biglaw” firms. Some partners are “rainmakers,” adept at bringing in clients and business, but ill at ease in a courtroom, or drafting documents and doing research. (Or, perhaps, they simply don’t want to be bothered with day-to-day legal practice, and don’t have to. Think, for example, Vernon Jordan, civil rights activist, Washington, D.C. insider, golf buddy and advisor of presidents, and one known to have contacts and influence in democratic political circles.) Some are more suited to the actual legal work. It is an axiom in law practice that an excellent lawyer who is a poor businessperson will not succeed in solo practice. To be successful, however large or small, a law office needs someone adept at business aspects. Some few individuals, of course, are good at both the business end -- securing clients, setting and collecting fees, etc. --, and the legal end -- drafting documents, doing research, conducting hearings, trying and otherwise prosecuting cases. Such individuals are the successful solo practitioners.

Section Six, Chapter 3

Ten recommendations going forward

The criticism at large currently directed at Emperor Law School, mostly having to do with cost and failure to provide practical training, has been noted. Also noted is the failure of this criticism to address fundamental problems that, in your author's view, prevent Emperor Law School from squaring with the appropriate task of training lawyers.

The likelihood that this book will make a difference, perhaps hasten change or give focus to change, is probably small. Emperor Law School is proud, entrenched, powerful, understandably resistant to change.

On the other hand, no one wants to be belittled. No one wants to be taken advantage of. No one wants to be gamed. An individual or institution will do whatever is required to avoid this. Therefore, perhaps your author will be invited to oversee a remake of Emperor Law School!

Not likely!

If, however, I were to be named Commissioner of Law Schools, with power to direct or at least recommend change, I would offer certain recommendations for improving and leveling the playing field in Emperor Law School. I would offer certain recommendations for building the needed bridge between Emperor Law School and the profession it purports to serve. I would offer certain recommendations to ease the financial burden on would-be lawyers.

Note bene (note well), Emperor Law school! These recommendations would make you far less capable of being taken advantage of, far less gameable. They follow.

First (surprise, surprise!): LEEWS should be a precursor/preamble to law school.

My intention in writing this book was and is primarily to persuade those about to enter law school, as well as students already in law school, that they needn't be cowed and confused. No one should! Why would any professor, presumably holding the welfare of students uppermost, want students to be cowed and confused? The only reason would be a desire to hide something, to gain a questionable advantage.

I hope I have demonstrated and persuaded that the fault for confusion, intimidation, misdirection, and especially inability to exhibit mastery on law essay exams rests not with law students, but with ineffective law school instruction. Offering LEEWS in a two-day format during first year orientation would go far to correct this.

Students would embark upon examination of cases and other law school pursuits with a vastly more informed, and therefore confident perspective. Students would feel themselves to be lawyers-in-training, rather than, as at present, merely engaged in another academic pursuit, albeit a confusing, forbidding one.

Needed changes in instruction to accommodate this heightened awareness and perspective would necessarily follow.

Two (consequence of One): Modify case method instruction (as follows).

Case method instruction can continue to have a role in legal education. If the understanding and approach to (2-4 line) case briefing introduced by LEEWS is implemented, cases can be appropriate vehicles for inculcating skill at analyzing and thinking "as a lawyer." However, the approach to cases must be less academic, more hands-on and practical.

The function of cases would be to demonstrate and practice application of legal precepts to facts. Legal precepts -- black letter law --, fleshed out with the assistance of commercial outlines, would become intimately familiar via such application. Professors' what ifs would be understood and engaged in.

Students would learn not to marry understanding of law to cases. Cases are merely examples of law being applied in one situation. All would understand that at the end of term, knowledge of legal precepts would be applied to new facts in hypotheticals. Students will have honed skill at analysis. They would know how to systematically dissect fact patterns to reveal relevant issues. Students would know what an issue is!

Exams would be reflective of knowledge and analytic skill, not, as at present, who is relatively less confused.

An addition and overlay to case method instruction

As an adjunct to reading cases, why not introduce in one or more first year classes a two-day segment involving a local lawyer with a current or recent case in the subject being studied? That lawyer would describe, step-by-step, how that case was initiated and prosecuted to both trial and appeal. Perhaps a field trip to a court and a law office would be in order. This walk-through would provide a counterbalance to the current, purely academic approach to cases.

As a further overlay and adjunct, several weeks into term, probably in only one class, a fact scenario involving opposing parties in litigation might be handed out. This (likely) thick packet, compiled from documents of an actual case, would provide grist for pursuing a lawsuit through its various stages. It would provide procedural as well as substantive facts, including interviews of the parties. An exercise would be fashioned to fit the subject area in which the exercise is conducted -- torts, civil procedure, contracts, property, etc.

The exercise would be in the nature of the lab component of a chemistry or engineering class. It would be supervised by the professor, who, of course, would be a former practicing attorney. Briefs and necessary research aspects of the exercise would be merged into, and made part and parcel of the legal research and writing class that is currently mandatory in first year in all law schools.

Students would be put in teams of 3-4. They would act as lawyers for opposing parties. In a civil procedure class, for example, opposing teams would hash out the procedural back and forth. Strategies and uses of legal principles of different teams could be compared and critiqued. Use of law as a tool to achieve client objectives would come to life. Similarly in torts, contracts, property law, etc.

From the very outset students would feel they were making progress in becoming lawyers.

Three: Impress upon students the importance of cases, therefore lawyers.

Something that seems not to be done at present in Emperor Law School, but should be, is to impress upon students what a significant, even cataclysmic event every case is for the parties involved. To be a party to a lawsuit is a very big deal, as any who have been plaintiff or defendant in a legal action can attest. Think about being stopped for a traffic infraction, then multiply that tenfold. That begins to speak to the import of being a party to litigation.

No criminal prosecution, divorce or custody proceeding, contract dispute, contest of a will, challenge to a copyright or trademark, attempt to fend off a hostile company takeover, or any of the innumerable legal contests individuals, companies, school boards, towns, cities, even states and nations find themselves embroiled in is of small consequence. Individuals go to jail and/or find themselves emotionally and financially devastated (or uplifted!) as a result of lawsuits. Businesses go bankrupt. Households can lose their sole source of support as a result of lawsuits. Whole industries -- shipping, fishing, farming, mining,

manufacturing, etc. -- are affected by decisions of courts respecting policy and trade practices.

A lawsuit is a big deal! No one seeks the services of a lawyer, except that something of significance is afoot. Litigation is warfare by more civilized means. This needs to be impressed upon naive, inexperienced law students.

Cases are not mere interesting, sometimes amusing stories to be explored at an academic remove. They are dramatic, consequential events for the participants. The flaming squib tossed about a marketplace has an amusing aspect. However, for the party who lost an eye it was a disaster.

If students are provided such perspective, they can better appreciate the importance given in cases to nuanced facts, definition of terms, shades of meaning. Upon interpretation of fine points and minutiae will often hinge the determination of a case. This results in serious consequences for the contending parties.

For example, as noted in an earlier example, burglary at night, versus in the day, is a more serious crime carrying a more severe penalty. Thus, one can understand the extreme lengths a defense attorney might go to to establish that the 6:39 p.m. sunset designated by the weather bureau for the day of the crime in question was possibly in error. Alternatively, critical minutes might be added to or subtracted from the 6:39 designated time, depending upon location of the premises in the county in question.

Professors in Emperor Law School do not impress upon students the seriousness of cases, and therefore the importance of the individuals who represent the parties to such serious matters -- lawyers!

Perhaps the reason is that, as noted, many (most?) professors at benchmark-setting, top-tier law schools have not practiced law sufficiently long to have personally represented clients, and to have taken cases from inception to completion. They have not been in the trenches, and witnessed first hand the significant impact of litigation.

Perhaps the reason is the possible disdain, even dislike for lawyers that has been speculated.

As suggested, perhaps all law professors should be required to have been a defendant or plaintiff in a case of significance.

Four: Bring “lawyer,” “attorney,” the courtroom, a conflict perspective into the classroom.

Describing the central role of conflict in the law is part of my introduction of Step One of The Blender. Having done so, I typically add, “The first thing a law professor should say to students is, ‘All roads at law lead potentially to a courtroom. A courtroom is always a conflict situation.’”

Something else law professors should say early on is, “Lawyers assist clients in achieving objectives. They employ the law to do so. They use procedural strategies. They use substantive strategies. Therefore, much as a hammer in a carpenter’s toolbox, a wrench in a plumber’s toolbox, or a scalpel on a surgeon’s table, the law is a tool. We want to learn the tools lawyers employ in [torts, contracts, agency, maritime law, whatever the subject under consideration]. We’re going to explore how those tools have been used in various cases to further and achieve client goals.”

They should say, “A system of law is a system of conflict resolution. It is an alternative to resolution by force and corrupt practice. It is civilized strife, conducted according to rules, custom, precedent.” And, perhaps again, as this perspective deserves emphasis, “All roads at law lead potentially to a courtroom, which is always a conflict situation.”

Discussion of cases should be put, always, in a context of conflict analysis, competing party objectives,

competing lawyers. The following kinds of questions should be posed: “Who are the contending parties in this case?; Why was a lawsuit initiated?; What were the respective objectives at the trial level?; As the lawyer for party X in the case, in this instance the firm of Blank in the person of Blank, esquire, what was your objective on appeal?; What was your strategy?; What legal precepts did you deem relevant in obtaining this objective?”

Discussion of cases should be tabled while relevant, precise black letter law is set forth in its entirety and clarified. Here, exploration of social policy and rationale underpinning legal precepts might be explored.

As opposed to the removed, academic investigation initiated by conventional case briefing, discussion might continue in the following vein: “Apart from contesting the following aspects of [relevant rule] advanced by moving party X, did the lawyer for opposing party Y introduce any legal precepts in opposition?; What was regarded as the possible weak link in establishing [relevant precept]?; Do you agree with the counter argument of the opposing attorney?; Explain your position.”

Continuing, “What facts seemed pivotal in resolving the issue of [whatever]?; How so?; Can you posit a differing view of these same facts?; What additional facts do you think should or might have been researched?”

Students would appreciate the ebb and flow of lawyers going at it in a courtroom, as first one legal precept relevant to a client or tactical objective is introduced and debated, then another. The importance of establishing minute aspects of legal precepts will be impressed, and why certain aspects are hotly contested, but not others. (Because their existence cannot reasonably be contested.) The importance of knowing black letter law intimately becomes apparent, as well as why appellate cases cannot be complete sources of such knowledge.

Students imagine themselves at all times as lawyers. They think about and begin to understand what lawyers do. Cases become not launching pads for speculation and pontification on larger societal currents, but instructional aids in inculcating the lawyering art.

If the course is civil procedure, and the case under examination involves a contest over appropriate venue (place) for bringing the lawsuit, couch the discussion not in terms of why rules respecting proper venue exist, but what tactical advantage did the lawyer challenging venue have in mind? Was the purpose to delay proceedings? ... To ramp up travel expense for the adversary?

As noted, consideration of larger societal currents and questions about the purpose of venue can be introduced. However, introduce this in a context of lawyers seeking advantage. Always, the context should be lawyers seeking client and/or tactical objectives, and employing legal precepts as tools in obtaining those objectives.

In such a context all manner of high-flying, policy-related, sociological, economic, philosophical, and other considerations may enter in. However, always as part and parcel of a lawyer’s attempt to gain advantage for her client.

It seems lost on Emperor Law School and its professoriate that men and women go to law school to become lawyers, not professors. Every case examined in a law school classroom was initiated by a lawyer representing a client. However, apart from a possible (but unlikely) mention of the attorneys names at the outset of an opinion, you would not know this in Emperor Law School. That has to change.

Five: Stop gouging law students!

The simple fact is law schools are cash cows. That is the primary reason new law schools are opening in an

era of insufficient jobs for new attorneys.¹ Law schools take in far more money than is required to operate. Piling burdensome, needless debt on would-be lawyers is unconscionable. Further, it is probably unethical for an institution purporting to train individuals who will have such potential for financial mischief. It needs to stop! Now!

In the nation pre-eminently ruled by law in the history of the world, where every adult citizen is aware of legalities and the influence of laws, it is no surprise that many want to be the arbiters, the windshield, not the bug. They want to be overseers -- lawyers! Members of Emperor Law School are taking shameful advantage of being the gatekeepers.

Law professor compensation

A noticeable disparity between the compensation of lawyers and law professors (and judges) emerged about 25 years ago. I recall squawking and lamenting on the part of law professors, as students graduated to higher starting pay than salaries received by their recent instructors and mentors. That disparity has vanished with a vengeance at most law schools.

It has been noted that even at state schools, law professors often make hundreds of thousands of dollars in annual pay for minimal teaching duties.¹ In addition to time pursue scholarly interests, they have time and license to consult, write books, have clients, and try cases. Law school deans, administrators, staff, and maintenance personnel are doubtless well compensated. (Lest they complain about professor pay.) And this large living is achieved on the backs of students taking on massive debt.

The compensation is much more than law school professors, deans, and staff need or deserve. (Really! Why should law professors earn more than college professors? The supply of potential law professors is limitless.) An institution charged with inculcating, *inter alia*, professional ethics and respect for the profession is simultaneously, by example, encouraging anger, cynicism, and a resolution to "Get mine!" on the part of persons who will soon wield great potential for financial overreaching and mischief.

Supply and demand versus the true cost of running a law school

No question, but a law school is far less costly to maintain and run than a college or medical school. Nevertheless, tuition and fees in law schools have kept pace with the rise in those institutions.

Law schools have no expensive labs or sports teams to underwrite. There is no gym or pool. Even in small law schools (total enrollment under 500), classes, especially in first year, tend to be large. (80-100!) There is normally only one building to maintain, and minimal grounds. The chief expense is professor and staff salaries, and updating library reference books.

As noted, there was considerable outlay by law schools in recent years to make classrooms internet accessible. However, more and more professors are banning computers from classes. (Bored, disengaged students are paying insufficient attention.) Some law schools have invested heavily in video centers for taping mock trials and other activities.

The true cost of running a law school is suggested by the tuition/fee scales of such highly regarded state law schools as Kansas, Nebraska, and Oklahoma. Tuition and fees, per year, for in-state resident students, as of 2011, were, respectively, under \$15,000, under \$13,000 (!), and under \$17,000 for those schools. For out-of-state students the figure was approximately \$25,000.

(Note. Cost for food, housing, books, etc. -- estimated [by law schools in the *ABA-LSAC Official Guide to ABA-Approved Law Schools*, 2011 edition] at \$14,000-24,000 in 2011 -- must be added to tuition/fees to arrive at the yearly cost of attending law school. Economists would also add the cost of deferred employment income.)

Similar relative tuition/fee bargains can be found at such reputable (state) law schools as Alabama and LSU, and an even better deal at the state schools of Arkansas, Mississippi, West Virginia, Montana, and Wyoming. (\$10,000 range for in-state students!) Ditto Georgia, Florida, North and South Carolina for in-state students. However, highly regarded Wisconsin, which charged just over \$16,000 in tuition and fees for in-state residents in 2011, raises the cost to \$36,000 for non residents.

The flagship state law schools of Virginia and Texas, with enrollment near triple that of aforementioned schools, therefore enjoying far greater economies of scale, mostly eschew giving in-staters a bargain, charging them \$38,000 and \$28,000 respectively. (U. Michigan Law, similarly large, charges even in-states \$45,000! The UC law schools -- Berkeley, Davis, Hastings, Irvine, and UCLA, are over \$30,000 for in-states.) If you are out-of-state and wanting to attend any of these schools, respecting tuition and fees, as is said in Brooklyn, “fuggedaboutit!”

Virginia, Texas, Michigan, Berkeley (Boalt), Wisconsin, and UCLA, of course, are top 25 in the *US News* rankings. They haven’t yet ventured into the \$40,000-50,000 tuition/fee scale of YHS, Chicago, Columbia, NYU, UPenn, Northwestern, Duke, and most every other private law school ranked in the top 25, but they are close. They could doubtless do so if they wanted.

However, also in the \$30,000-40,000 tuition/fee range are such fourth-tier newcomers to the law school party as Charleston, Charlotte, Drexel U., and Elon U. law schools, and such similarly low-ranking entities as Chapman (CA), Campbell (NC), Capital (OH), Barry (FL), John Marshall (Chicago and Atlanta), Albany, California Western, and a host of law schools most Americans and most lawyers have never heard of.

Thomas M. Cooley School of Law, with near 3,000 students on four Michigan campuses (and more on a fifth campus just opening in Tampa, FL), the largest law school (lawyer factory?) in America, admits most who apply (along with their borrowed tuition and fees). “Cooley Law” charged over \$28,000 in tuition and fees in 2011. Flush in funds, Cooley also rewards (pays?) students with high LSAT scores for enrolling, and students who do well, meaning get rare “A” grades, for not transferring.²

Oklahoma City University School of Law, hardly comparable in reputation to nearby, bargain-priced University of Oklahoma College of Law, charged over \$31,000 in yearly tuition and fees in 2011. One may well wonder, “What’s the deal?”

What the deal is respecting great disparity in law school cost

Possibly, the aforementioned, relative bargain prices for certain highly regarded state law schools are partially the result of state subsidies. However, the real deal seems to be what was suggested to your author by an assistant dean at the University of Oklahoma Law School.

Upon information and belief (lawyer expression meaning believed, but not necessarily ascertained as fact), word came down from legislatures in so-called “brain-drain” states, “Don’t charge our young people more to attend law school than necessary.”

However, the deal for most law schools seems to be to charge what the market will bear. Applications to Emperor Law School have recently dipped, owing to cost and poor job prospects for law graduates. However, some 50,000 Americans a year want to embark upon becoming lawyers. If they cannot gain admission to brand name schools, they are willing to borrow heavily to attend most any law school. And law schools are more than willing to take advantage.

Cash cow, capitalist ethics

As noted, not just the few admittedly for-profit law schools, such as Florida Coastal (Jacksonville) and Thomas Cooley, but all law schools are cash cows. That even university-affiliated law schools charge far

more than they need to is evidenced by revelations here and there of such schools shunting large portions of their revenue to the general university fund.

A brouhaha some years ago involving George Washington University Law School comes to mind. I believe the figure might have been as high as seventy percent of GWU Law revenues reportedly being transferred to the general university fund.

Is Emperor Law School cognizant of its overreaching, or at all ashamed? Not that one would notice. Not yet. Indeed, the following anecdotes suggest that market capitalism, not lawyer ethics are the guiding touchstone.

Over a decade ago, when Seton Hall University School of Law (NJ) wanted to build a new, reportedly twelve million dollar wing, I was told by students that “SHU Law” simply admitted 300 additional students in the first year class. Were more New Jersey lawyers needed? Probably not. Were plentiful jobs awaiting these additional 300 students? Not a concern. SHU Law could do this and raise the money they needed, so they did.

Tuition, fees, and estimated living costs at Columbia University School of Law (NYC) currently top \$70,000 a year. The following response to student grumbling about this was reported by more than one source source: “You’ll leave here and get a job paying over \$150,000 to start. There should be no problem repaying what you’ve borrowed.”

The many expensive new law school buildings erected in the past decade, being erected, and currently on the drawing board, are a monument to unconcern respecting debt heaped upon law students.

In short, Emperor Law School, with few exceptions, gouges and fleeces would-be lawyers. This, while providing wholly inadequate training for the profession.

Implication of exploitative law school ethics

It is an axiom that the legal profession is fraught with possibility for overreach. All too frequently, lawyers are censured, even disbarred and imprisoned for misuse of client funds comingled in lawyer escrow accounts.

Professional lawyer ethics are deemed so important a topic as to be a required course in all law schools. At the same time, the very institution that offers and instructs this course is itself, in your author’s view, engaged in questionable ethical behavior.

Perhaps the chief message and instruction currently offered to future lawyers by Emperor Law School is to take full advantage and extract what you can.

In sum

Average law student debt, currently topping \$100,000 (on top of other education debt), supports unreasonable salaries, inadequate instruction, and questionable scholarship. This, in an economy with all-too-few lawyer job opportunities that would begin to enable repayment of such debt.

It is an outrage! Heads should roll! Emperor Law School should be called on the carpet.

Six: Jettison the myths of innate genius, aptitude for the law, The Right Stuff.

I trust that innate legal genius and aptitude, The Right Stuff as a prerequisite, even a key factor in achieving law school success, has been shown to be a canard excusing faulty instruction and mediocre exam performance. The deeply entrenched notion that something innate is required to master law essay exams -- that great lawyers, in effect, are born, not made -- is probably the major obstacle to change and progress in

Emperor Law School. Indeed, it is the excuse for no change. It needs to be exposed as the sham and excuse it is, and gotten rid of.

Any practicing judge or lawyer will acknowledge that skill as a lawyer is acquired over time. Yes, intelligence counts. However, diligence is equally important. Competent practice of law in its many fields and specialties is complex. It can only be mastered over time.

No question, but some few will exhibit legal thinking of unusual distinction, and be deemed the potential Oliver Wendell Holmeses, Learned Hands, Felix Frankfurters, and Louis Brandeises of their time.³ However, scratch beneath the surface of their legal brilliance. Unquestionably, one will discover keen intelligence. However, there will also be large measures of diligent application and experience.

Competence as a lawyer can be acquired over time by any of reasonable intelligence who apply themselves to achieve it. Likewise, far greater competence in writing law exams can be achieved, if students are but given a proper foundation of skills and approach. At the same time, defeatism is easily engendered by confusion that professors do little to correct, coupled with the insidious idea that in the end, success will depend upon innate qualities of mind.

This latter notion, ubiquitous in Emperor Law School and pernicious in its effect, is utter nonsense!

Differences in exam performance will persist. However, level the playing field! Let differences represent true disparities in intelligence and effort, not varying degrees of incompetence.

Jettison the notion, nonsensical on its face, that lawyers are born, not made, and, certainly, that aptitude for the profession is manifested after one or two terms in law school.

Seven (consequence of Six): Require new thinking and credentialing for professors.

In light of foregoing reform proposal No. 6, law professors must abandon the idea that their “A” grades in law school proved them smarter and more gifted than classmates who didn’t get A’s, but who went on to become skilled lawyers.

Newsflash! Your A’s, (law) professor, are not a reflection of genius and inner aptitude! They very well may reflect merely less incompetence than equally smart, equally diligent peers. (35, 45 out of a possible 100?) Your conceit is insecure and specious. It is mere justification for persistence of an invalid pedagogy.

Moreover, your credentials are likely inadequate, as you didn’t go forth and spend requisite years learning the lawyering trade. (Yes! The practice of law is a trade! Nothing wrong with admitting that. It is an intellectual trade.) Your Ph.D. in something other than law is not a bonus. It makes you suspect. Had you spent time actually practicing law, you would have gained more respect for lawyers and the profession.

You would have realized that although indeed a trade and craft, practiced at its best, a lawyer’s work is highly intellectual. In the service of assisting a client, a good lawyer wracks her brain to the ultimate. In researching and seeking a solution, all mental resources are exhausted. In doing so, frontiers of legal thought and possibility may be probed that would never occur to a law professor.

A minimum number of years of actual legal practice should be a requirement for being hired as a law professor. One or two, even three years is surely not enough. Five years is probably not enough.

Probably, no one should come to the law professoriate with less than 8-10 years of experience in practice.

Eight: Farewell to support of idle, speculative legal scholarship.

There is, of course, nothing wrong with legal scholarship that detects trends in law and cases, and consequent probable influences and causal relationships affecting society at large. Legal scholarship as an incubator of societal, even global change can surely be justified. However, piling unnecessary debt on would-be lawyers to support such efforts cannot.

If scholarly work of law professors can be made integral in training students to achieve client objectives, it might have justification. Otherwise, current legal “scholarship,” serving no apparent purpose other than filling pages of law reviews, impressing *USNews* editors, or, perhaps, adding scholarly patina to law professors in the company of other university professors, must cease. It belongs in think tanks and institutions established for such purpose. It should not rest upon saddling students with unreasonable debt.

Therefore, I propose segregating legal education from legal research and scholarship.

Will segregation of law school and legal scholarship for the sake of scholarship diminish law schools and law professors in the eyes of other university scholars, or the public at large? Probably not.

Much as practice of medicine and schools that train doctors commands respect of those in more scholarly disciplines, likewise, practice of law and schools that train lawyers. Similar to healing the sick and saving lives, the subject matter and consequences of legal practice are of far greater importance than anything most historians or other academics can point to.

Those who properly prepare students for the competent practice of law will necessarily command respect.

The proper role of law schools is training competent lawyers. The proper inquiry going forward is how best to accomplish this.

Nine: No more interdisciplinary whatever in the name of “broadly educating” lawyers.

Law students in America already have a college degree. Many have advanced degrees. In the service of achieving a client objective, a good lawyer will seek pertinent information wherever it may be found. Quickly getting up to speed in disparate disciplines and fields of knowledge bearing relevance to a case is part of the lawyering art. It is what good lawyers do every day. The internet makes necessary information readily accessible.

Therefore, immediately scrap broad interdisciplinary approaches. Course credit toward the J.D. degree from the Yale School of Forestry is a joke! Instituting a Ph.D. in law has nothing to do with training lawyers. The inclination toward instruction in disciplines other than law reflects insecurity about the worth of properly training lawyers. Harkening back to Blackstone’s lament about “mere legal craftsmen” needing broader liberal education, it reflects fear of the label, “trade school.”

Respecting non-legal disciplines, all that is needed is to demonstrate to students, via actual cases, how lawyers may derive support for their positions from such disciplines. For example, it was not legal precedent, but a sociological study demonstrating adverse effects on African American children of “separate, but equal” education that was persuasive in the seminal case, *Brown v. Board of Education*.

In this regard, as has been discussed respecting creative innovation in the law, it was lawyers seeking support for a client position, not idle speculation by a law professor that led to employing a non-legal adjunct in *Brown*.

No question, but inviting students to probe other disciplines in search of support for a legal position is appropriate. However, do so in the context of an actual case and a client objective. Demonstrate this aspect of the lawyering art, plant this seed by investigating actual cases in which such an approach was followed.

Perhaps institute a course entitled, “Use of interdisciplinary approaches in litigation.”

Credit for courses in sociology, public health, etc. as part of a law school curriculum is mere fluff. It is an attempt to buttress academic *bon fides* of legal education. It is a waste of the time and money of a would-be lawyer.

Ten: Make the third year of law school optional, perhaps a master’s program.

Lawyers need a foundation of knowledge in legal disciplines that impact the lives of potential clients a lawyer may encounter in practice. (Also relatives!) This is recognized by subjects all law students are required to take -- contracts, torts, civil procedure, constitutional law, criminal law, evidence, professional responsibility, sometimes property. It is reinforced by the emphasis given most of these subjects in the multistate component of state bar exams.

Beyond this, a would-be lawyer needs to understand a lawyer’s role (achieve client objectives), know how to think and analyze “as a lawyer,” know how to conduct legal research, and be able to perform various tasks that judges, practitioners, and law firms may want to bring to the attention of Emperor Law School.

The foregoing can easily be accomplished in two years. Beyond that, apprenticeship, which has always been and remains the best mode of training a legal craftsman, is the appropriate route.

Should a student wish to pursue knowledge in more esoteric areas of law, let her do that in a third year of elective study. Fringe subjects such as maritime law, international law, environmental law, and the like come to mind in this regard. A one-year masters degree program in tax currently exists in some law schools. (E.g., NYU.) Such could be offered in other legal disciplines.

Law students are normally bored and mark time in the third year of law school, at considerable expense. A two-year course of study leading to the *juris doctor* or doctor of laws degree (J.D.) would significantly reduce the cost of becoming a lawyer.

If two years seems too little time for the granting of a doctorate (of course it is!), then revert to the bachelor of laws (LL.B.) that for many decades was awarded upon graduation from law school.⁴

Prospects for change

Apart from cost considerations, whether Emperor Law School makes needed changes or no, and the time frame in which such change may occur, is of little concern to someone reading this book. What matters is making necessary changes in one’s individual approach to law school and law school education, in order to bring about a more favorable personal result.

I recommend that such changes be made ASAP.

Go forth and work hard and smart. Cue refrain! Take advantage of the current situation.

* * * *

1. Another reason for opening a law school is the allure of the prestige and influence a law school can confer on a university or city. In this regard, an article in the December, 2011 *National Jurist Prelaw* magazine may be noted. It describes the name change of Indiana University School of Law -- Indianapolis to “Indiana University Robert H. McKinney School of Law,” in recognition of a 24 million dollar bequest from that graduate, a lawyer and founder of a bank. The article notes that no fewer than 80 current CEOs of Indiana companies are graduates of that law school. It may be further noted that this law school, one of four in the state, is not the flagship state law school. Indiana University Maurer School of Law -- Bloomington is. (The other Indiana law schools are those of Notre Dame and Valparaiso Universities.)

The above reason, along with financial benefit, is the only explanation for Drexel, Elon, Florida International, and Liberty Universities recently opening law schools; acquisition/incorporation of private Detroit College of Law by Michigan State University over the past decade; recent acquisition/incorporation of private Dickinson College of Law by Penn State University; and enthusiastic city support of newly opened, private Charlotte (NC) College of Law, in a state with six other law schools. Orange County, California, south of Los Angeles, is one of the fastest growing, most prosperous areas of the state. At least two private, ABA-accredited law schools already exist in the county, along with several unaccredited schools. Nevertheless, the University of California saw fit to open UC Irvine School of Law, its fifth law school, in Orange County several years ago. (Other UC law schools are Berkeley [Boalt], UCLA, Hastings [SF], and Davis.)

2. Your author has been told this by Cooley students. I recommend that if one does not transfer from a lower-ranked school after achieving A's, one should investigate the possibility of obtaining additional scholarship aid. Lower-ranking private schools (not state schools) will often reward top students for not leaving. Normally, a student must ask to receive additional monies. (Intimate to a professor or dean that the possibility of a transfer is being explored. First negotiations exercise!)

3. Where, oh, where are the law professors I might name? Those named are Supreme Court justices. All are regarded as heavyweights in American jurisprudential thinking. No names of law professors possessing equivalent *gravitas* come to mind.

4. Award of the current J.D. degree was a mere a cosmetic change, instituted (some forty years ago) solely to accord lawyers more equal status with medical doctors. Although wikipedia entries give lip service to “recognizing the demanding graduate study” characteristics of legal study, and standardizing the international import of a law degree as reasons for it being awarded, the J.D. of American law schools derived from precisely such petty posturing. It is perhaps to the credit of the profession and its members that American lawyers have not taken to referring to themselves as “doctor,” although they could.

Conclusion

For a long time I have been frustrated in efforts to persuade that a true science of preparing for and writing law essay exams exists. The chief problem has been skepticism. It has not been possible via advertising snippets, chiefly in flyers distributed at law schools, to convey the full extent of the revolutionary process LEEWS represents.

LEEWS grads have tried. However, the difficulty in describing LEEWS should now be apparent. Law professors and administrators typically wave off students who have done well and urge consideration of LEEWS. Committed to The Right Stuff as the formula for success, they don't want to hear about something that would rock the boat.

The many, many smart, hard-working students who have no shot at a single "A" on essay exams should be customers. However, as noted, self doubt and defeatism sets in early on. Most law students remain skeptical that anything can make a meaningful difference. They content themselves with B's. Indeed, they are grateful for B's.

For competitive reasons, most who take LEEWS won't tell any but "a very close friend" about the program. The truly frustrating thing, however, is the seeming inability of the many LEEWS grads who have done well to persuade classmates to do LEEWS. They can persuade underclassmen or a friend at another school, but not classmates. I have had numerous student reps who were first in their class, who could not persuade struggling peers to do LEEWS.

My supposition is that such students, having adopted belief in the need for innate aptitude in order to do well, fear further confirmation of lack of such aptitude. The thinking seems to be, "What if I take this program, and I still don't do well?" I suspect that in their heart of hearts, students surmise that they are as smart and hard working as their classmate who did LEEWS and did well. However, they are loathe to risk putting a final nail in the dream of being a great lawyer.

Large, fragile egos and bedeviling ego games are rampant in all law schools. One of the most unfortunate aspects of Emperor Law School is its needless legacy of diminishing the confidence of bright, able (mostly) young people. Also, of course, saddling them with crushing debt.

My hope is that this book will pierce the stubborn crust of skepticism. My hope is that the patient, penetrating analysis of the problem of law school, law exams, and how to address exams set forth in these many pages will make the case that inadequate teaching, not lack of aptitude on the part of students is the root problem. I hope this book will lay to rest the pernicious myth and mystique of inner genius and aptitude for the law, The Right Stuff being required not only to do well on law essay exams, but to be a good, even great lawyer.

Granted, one must be smart and hard working to be a good lawyer. However, as oft repeated, good lawyers and great lawyers evolve and are made. They are surely not born!

As noted, I felt that in order to dispel the entrenched notion of innate genius, The Right Stuff being required for success, I had to literally take prospective law students to law school. I had to show, step by step, how quickly confusion, intimidation and acceptance of this myth takes hold and why. I had to show how it is abetted and encouraged, not only by Emperor Law School, but by preconceptions and the vast ignorance of entering law students.

I had to show that the enduring nature of this myth derives not just from its usefulness as an excuse and cover for ineffective law school instruction, but from its usefulness to law students as an excuse for mediocre performance.

I had to show the near perfect catch-22 at work.

No more excuses! If the lessons of this book have been digested, a law student or prospective law student must realize a choice exists. On the one hand -- first choice! --, one may assume against all logic and odds that in a group of equally smart and hard working students, one will be among the 10-15 percent or so awarded a solid "A" grade.

(Because you are possessed of The Right Stuff, inner genius, aptitude for the law! Never mind, of course, that this problematic success will rest on a foundation of being merely somewhat less incompetent than equally smart, hard working classmates. [35, 45 out of a possible 100!])

On the other hand -- second choice! --, for less than the cost of a new casebook, from the outset one can acquire a different perspective, insight, and, thereby, confidence. One can implement a game plan that, in the minefield of misdirection, myth, confusion, intimidation, and disconnect that characterizes Emperor Law School at present, must provide a decided advantage.

If you, the reader, are already in law school, and have not garnered precious A's, you can still choose the second option. Hopefully, this book has allayed skepticism and discouragement, and provided renewed hope.

In conclusion, it is never too late to learn to take advantage. It is incumbent upon any lawyer (or would-be lawyer) to do so on behalf of a client. In this regard, of course, at this juncture you are your own client!

Given the stakes, given the arrogance, incalcitrance, and simple incompetence of instruction that has thwarted your best efforts, or threatens to, there is no shame in taking advantage. There is no shame in gaming Emperor Law School.

One would be remiss, unlawyerlike not to!

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