35+ YRS—PROVEN SCIENCE OF PREPARING FOR/WRITING THE "A" LAW ESSAY EXAM

(Accomplishes [where law school does not!] the critical transition from academic thinker/learner to [reasonable facsimile of] practicing lawyer thinker/learner.)

There is a system for handling the law school essay exam well. It's the single most important key to law school success. Its creator is Wentworth Miller, founder of "LEEWS." –PLANET LAW SCHOOL

It's not often that advice is easy—especially advice on a subject as endlessly distressing as law exams. Here it is easy. (The advice anyway.) The answer? In a word—LEEWS.

– LAW SCHOOL: GETTING IN, GETTING GOOD, GETTING THE GOLD

LEEWS

(Law Essay Exam Writing/Preparation Science/System)

PRIMER

(Tenth Edition)

Features:

- **The best instruction (by far!) on how to perform the balanced, nitpicking ("lawyerlike") analysis that impresses and earns A's;**
- **Three unique (revolutionary!), proven-effective (35+ years!) systems:**
  1) **Issue Identification: Disciplined, 3-step approach to breaking *any* "hypothetical" down into manageable components that reveal issues—all of them—, law school or bar. (No more haphazard "spotting!")**
  2) **Analysis/Presentation: Innovative format instructs both analysis and concise presentation (roughly one paragraph per issue). Makes a "poor writer" good enough, a "good writer" much better.**
  3) **Effective! (exam, not class-focused) Preparation: Day-to-day, week-to-week (2-4 line!) case briefing and (30-50 page!) course outlining pointing to all-important final exams enables implementation of issue identification system.**

Plus:

- **ABC's of effective study strategy, environmental/emotional/physical preparation for any bar exam**
- **Eight practice essay exercises with model (step-by-step) LEEWS planning/issue identification approach and paragraphed responses (roughly one per "premise"/issue)**
- **And much, much more—a proven effective (30+ years!), comprehensive, true science of law exam writing and preparation that goes far beyond "IRAC" and standard advice.**

LEEWS.COM

by

Wentworth Miller

"*If 100 points are possible on my [final] exam, I expect scores in the range of 25 to 35*."
— University of Georgia law professor to first year torts class, *circa* 2006.

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"You don't have to write a great exam to get a rare law school A. [Or be a "genius of the law," or even be one of the smartest, hardest working students in the class.] The hypothetical-type, law essay exercise is so confusing and intimidating… Most exam responses are so mediocre, even at Yale, Harvard, Stanford, that a reasonably 'lawyerlike' effort will impress and compete for an A."

—Wentworth Miller, LEEWS founder/instructor

Preface to Tenth Edition

LEEWS (Wentworth Miller's Law Essay Exam Writing Science) was founded nearly four decades ago.[1] Well over 100,000 law students representing all (200+) American law schools and many law schools abroad have been instructed. Many "LEEWS grads" are law professors, as well as lawyers and judges. Your author—Wentworth Miller, LEEWS founder/instructor—has to smile when someone asks whether LEEWS works. In particular, why LEEWS is so much more effective than all other law study aids, including advice offered by law schools and law professors.

The reasons are several, but one in particular. *Successfully addressing the "hypothetical-type" essay exam format* (featured on state bar exams and in all law schools, especially first-year survey courses),[2] *requires*—this should be no surprise—*approaching the exercise with a mindset approximating that of a practicing lawyer. American law schools*, including Yale, Harvard, Stanford—all of them!—, *fail for the most part to effectively transition academic thinkers/learners* (virtually all entering law students—"1Ls") *to something approaching the mindset of a practicing lawyer.* Not even close.[3]

LEEWS alone focuses on and accomplishes this critical, elusive transition. In addition, LEEWS instructs unique, innovative, proven effective systems for addressing an exercise that typically confuses and intimidates the smartest, most diligent academic thinker/learner. This Primer contains this proven effective (35+ years!) instruction.[4]

Exam skills needed for a chance at rare law school A's, in particular ability to "analyze as a lawyer," are very different from what brought success in college and elsewhere. Writing ability, college GPA, LSAT score are largely irrelevant in predicting who does well on law essay exams (and therefore succeeds in law school). As almost all law students lack one or more necessary skills, and LEEWS imparts these skills so well (adding important new insights), it is inevitable that LEEWS grads compete for the highest grades. As is said in the law, "res ipsa loquitur"—the thing speaks for itself. The question after these many, many years is not whether LEEWS works, only how well LEEWS is grasped and implemented.

Here is welcome news indeed. As indicated in the quote of a University of Georgia law professor above the Table of Contents, the bar in terms of performance expected on law school exams is extremely low. (35-45 points of a possible 100 competes for an A!) One who has properly grasped and implemented what is contained herein should easily exceed that bar.[5]

Although an honors graduate of Yale College, my own efforts at addressing law essay exams at Yale Law School (YLS) in January 1970, doubtless similar to those of classmates (most of whom had a lower LSAT score,[6] nine of whom clerked on the United States Supreme Court [!!], one of whom is Hillary Clinton!), were decidedly lackluster. Laughable actually in retrospect. Whatever strategy/intentions I had going into exams (based largely on diligent preparation in the vein that had brought me success in college) quickly gave way to fevered, haphazard, rambling response. Page after page was filled with irrelevant, quasi legal discourse. [Exams then were written in "bluebooks." Computers did not exist.] "Issues" (whatever that meant) were missed altogether or addressed superficially. "Analysis" lacked rigor and focus. Response was academic—loose, opinionated thought, hit-and-miss regurgitation of memorized legal precepts. It bore scant resemblance to what a minimally competent practicing lawyer might produce.

However, as is true for most law students, I did enough to get by. As is also true for the great majority of law students (typically 85 percent and more, despite significant grade inflation since 2000), no matter the lower bar of expectation and performance than might have been supposed, I did not come close to producing an "A" effort.[7]

A smart, experienced lawyer would have significant difficulty translating the swirl of knowledge law students bring into exams into a concise, organized,

"lawyerlike" presentation within typically severe time constraints. Never mind academically-oriented law students. LEEWS corrects and takes advantage of this situation. Simply put, LEEWS produces a reasonable facsimile of practicing attorney (in mindset), armed with disciplined, proven effective approaches to pulling apart and handling confusing essays under severe time pressure. LEEWS instructs the only true science of preparing for/taking law essay exams ever devised!

The student who comes off the exam page "as a lawyer" enjoys a significant advantage. She will compete for a top grade, and rather easily.

The Law Essay Exam Writing System Primer *(Primer)* presents in chief a unique, comprehensive, true science of preparing for, taking, exhibiting mastery of *any* essay exam exercise in *any* subject. What is envisioned is the aforesaid facsimile of practicing lawyer in mindset, knowledgeable in subject matter tested, armed with approaches (systems) for taking immediate control of and handling *any* exam. (Any subject, any professor, all exam exercises [!!], especially the essay variety.) What will unfold is nothing less than a precise, evolved (over 35+ years!), proven effective, true science of taking and preparing for any law exam, especially problematic essay exercises.

Nothing remotely compares with LEEWS. No other study aid or advice, for example, has bothered to critique current law school instruction in depth, and thereby take advantage of its severe failings. None other has evolved much beyond "IRAC" and standard advice and prescriptions that have been around for many decades, and that have never proven more than minimally helpful.

If "A" grades are not guaranteed,[8] it is only because control over the extent to which LEEWS is imbibed, practiced, mastered is lacking. No question, however, but A's become not only possible, but probable. This is so, not because LEEWS makes one a "genius of the law." (Although often such is ascribed to LEEWS grads.) It is so, because, as evidenced by the quote at the outset, law essay exams so lower the bar for demonstrating proficiency.

The (very) good news is that skills/systems for successfully addressing law exams can be taught and learned. "Thinking as a lawyer" can be instructed much in advance of the traditional tutelage afforded by actual law practice. Confused, certainly on exams, law students assume the problem lies with them. Despite intelligence, diligence, and past exam success, generations of law students quietly find fault with themselves when best efforts produce mediocre results. They assume they haven't got the "Right Stuff"—innate lawyering ability that "case method" instruction fails to convey—, end of story. In fact, it is law school and law professors who are most at fault.[9]

Once mastered, LEEWS assures concise, effective responses to any legal problem-solving exercise. A professor/bar grader will be gratified to see that rarity in a law exam response—a lawyer (reasonable facsimile thereof) coming off the page. The *Primer* further describes the "bar exam," and emotional, physical, environmental considerations to be aware of in preparing for a bar exam. Section One sets forth a model bar study strategy and routine. Section Three briefly addresses the problem of multiple choice, short answer, and true/false "objective" exam formats. The *Primer* addresses relevant corollary matters, such as use of secondary source materials—"hornbooks," "restatements," commercial law summaries, etc.

Instruction in exam writing approach and preparation occupies the bulk of the *Primer (Section Two)*. Although this Tenth Edition (greatly expanded over previous 136 page editions) is by far the best effort to make every aspect of LEEWS comprehensible, as noted (fn. 4), well over thirty-five years of experience instruct that it is difficult to master content with a book alone. The conceptual scheme is unfamiliar, with many facets. Self-help with mere written instruction and practice exercises is tedious. At the outset, a reader will likely lack sufficient confidence that effort and time necessary to grasp all that LEEWS entails is worth it. (Especially if one is busy with classes—briefing, taking notes. [Busywork!])

Thus, it is strongly recommended that the *Primer* be used only as a supplement to a live or audio LEEWS program. Visit **leews.com** for information on these programs.

Insights and techniques herein were acquired and developed over a period of years following your author's graduation from (Yale) law school in 1977. While practicing law, initially as an assistant district attorney in Brooklyn, later as an assistant United States attorney (civil division—EDNY), and also tutoring prospective bar examinees, I grappled first hand with the problem of bar exam preparation, especially how to address my old bugaboo—the essay hypothetical-type

exercise. The combination of law practice + wrestling with how to help law graduates cope with impending essay exams prompted a breakthrough insight *circa* 1981. LEEWS soon evolved. Some readers may want to look up an old (ancient now), but still useful article on my (successful) experience taking the challenging New York bar exam, and especially my thoughts respecting special problems of attitude and psychology minority law graduates often must overcome, if success on a bar exam is to be achieved.[10]

The First Edition of the *Primer* appeared in 1981. The Second followed two years later. Bottom line, a common denominator underlying *any and all* legal problem solving provided the key to a one-size-fits-all approach to understanding and handling all legal problem-solving exercises. This includes reading/briefing cases, law school or bar essay exercises, writing a legal paper, interviewing a prospective client, evaluating a new case, preparing a moot court argument. All can be addressed and made comprehensible in exactly the same way. The approach is at once precise enough to provide concrete, step-by-step guidance during an actual exam, yet flexible enough to be applied to any and all legal problem solving.

LEEWS proved its worth in the field. Thousands improved exam performance. Hundreds earned membership on law reviews. Very few took advantage of the money back guarantee.[11] Nevertheless, room for improvement existed.

The Third Edition of the *Primer* (1986) reflected modifications evolved over another three years, and interaction with and feedback from thousands more students. Principally, Step Three (p. 80) was modified. The innovative "Ugly But Effective" (UBE) format for both instructing and concisely presenting analysis, first introduced in 1985 in live programs, was incorporated. By popular demand, a civil procedure exercise was added. Model responses for other sample hypotheticals were modified to reflect the change in Step Three and the more concise writing format. In addition, instruction on developing the course outline and handling other exam formats (e.g., multiple choice) was enhanced.

In 1990, as LEEWS began a tenth year of national operation, a two-page update was added to the Third Edition. The bulk of this Update, itself updated, follows below. It reflects insights gained during an additional four years instructing many thousands more law students from over 125 law schools (of over 200 nationwide) in the vicinity of 28 cities. No significant changes to the Third Edition were indicated. The approach and instruction set forth in the *Primer* continued to be on the mark across the spectrum of law school and bar offerings. [The Lawyering Art is a constant!]

LEEWS worked marvelously well. Nevertheless, your author is obsessive, perfection driven. Improvements in communicating aspects of LEEWS and the approach/science itself inevitably evolved during live presentations and interactions with countless more law students. (Students described their professors, different exam exercises, etc.)

The 1993 Fourth Edition brought page-by-page, chapter-by-chapter instruction in line with appropriate emphasis on the focal LEEWS concept of "premise." Grasping "premise" and its central role is germinal in understanding/implementing all aspects of the integrated LEEWS approach to day-to-day preparation for class, week-by-week development of course outlines, and, especially, the three-step system for breaking down and identifying issues in *any* and *all* fact patterns.

Moving into the new century, more and more sources—professors, bar review programs, books, individuals—offered law exam-writing/preparation advice. The glut of offerings then and now is bewildering. However, none apart from LEEWS among the many offerings—none!—recognizes, much less challenges the foundation problem of failure of (case method) law school instruction to transition academic thinker/learners to something resembling lawyer thinker/learners. No other advice offers more than variations on, additions to "IRAC"[12] and conventional wisdom that has been around for decades. (See pp. 24-27, *infra*.) LEEWS is far and away nonpareil in comprehensiveness, innovation, effectiveness.[13]

The Fifth (1997), Sixth (2003), and subsequent *Primer* editions continued polishing, tweaking, refining. LEEWS became somewhat new age. Three mantras were introduced. They are to be literally chanted during exams (under one's breath, of course). These proved amusing as well as instructive in live programs.

Experience, careful attention to a problem, and desire to improve produces additional insight. The Eighth Edition (2009) was actually a ninth edition, as

minor changes had been made to the Seventh prior to a reprint order. However, there was no retitling. The Eighth Edition introduced a crucial realization that came very late in the game to your author. (A measure of my own law school brainwashing.) Namely, "A" grades are never the result of "innate lawyering aptitude"—so-called "Right Stuff." Rather, *everyone*—the smartest, most diligent law student—is confused by essay exercises. Those deemed "geniuses of the law," "can't miss, future great lawyers," are merely somewhat less confused than equally smart, equally diligent classmates. (As indicated by 35, 45, 55 points out of a possible 100 competes for A! Hardly genius level performance.)[14]

LEEWS therefore, necessarily, provides edge and advantage. LEEWS inevitably elevates one above the level of clueless—academic thinking/learning—classmates.[15]

It bears repeating that use of *Primer* alone is not so effective in grasping LEEWS and gaining mastery as a combination of live or audio program + *Primer*. Nevertheless, what is contained herein, properly grasped and applied, should engender confidence and enthusiasm in even the casual reader (whether law student or prospective bar examinee). The catch is that there are no tricks, no shortcuts to mastery. The consistent admission elicited from law students for whom LEEWS has not produced improvement [such, admittedly, exist] is that they did not devote sufficient time, such that what is contained herein becomes reflexive, second nature. They did not, for example, take time to write practice paragraphs of analysis, comparing efforts with models provided in the Appendix.

Such practice can be tedious, but is essential. As exams approach, one is particularly loathe to set aside 20-30 minutes to write out analysis of a premise or two in concise paragraphs. However, if LEEWS is to prove a useful tool, not a mere collection of helpful do's and don'ts during stress and confusion of an exam, then not only must one practice with exercises in the Appendix (p. 134 *et seq*.), but one must move on to practice LEEWS approaches on old exams, samples of which may be found online or in one's law library.

Wentworth Miller

Overall Perspective—1990 Update (updated 2009, reaffirmed 2018)

There are five interrelated components of exam writing success: 1—[in depth] knowledge of relevant "black letter law;"[16] 2—[skill at] issue identification; 3—[skill at] "lawyerlike analysis;" 4—concise presentation [of analysis] on paper; 5—an effective course outline. KEY TO MASTERY OF ALL FIVE AND MASTERY OF LEEWS IS COMPREHENDING WHAT SHALL BE TERMED "PREMISE" OR "LEGAL TOOL."

The exam in law school is all that really matters![17] Everything a law student does (especially first year) should point to final exams (not class!). Every aspect of this focus should be geared to pinpointing, understanding, organizing for speedy reference—weekly in course outlines—premises/legal tools. Premises constitute kernels of legal knowledge needed on exams. Premises (not issues) will be identified in implementing the LEEWS issue identification approach. Generally, *each paragraph of an exam response presents analysis of a premise*. The key to LEEWS mastery, therefore, to success in both preparing for/executing the exam response, is a firm grasp of what is meant by "premise" and/or "legal tool."

Respecting exam response, *abandon any notion that an effective response requires that one be a "good writer."* (Often heard in law school.) *What must be reflected in concise paragraphs is balanced, concise, logical, nitpicking thinking*—reasonably competent, "lawyerlike" analysis. Mastery of "UBE" format for presenting analysis concisely and effectively solves the problem of good (exam) writing/typing!

Once the unique LEEWS issue-analysis (UBE) paragraphing format is mastered (via practice), instructions of a particular professor—e.g., "place conclusion before discussion," "omit conclusion," "paragraph responses," "paragraph frequently," "no statements of law (!!)," etc.—become mere cosmetic variations on a fundamental building block—the (concise) paragraph of analysis. They are easily incorporated into the response presentation scheme. (See Chapters Ten, Eleven, Twelve, Thirteen, *infra*.)

In this regard the LEEWS focus is not on how to "write/type exams," but how, applying the stepped issue identification approach (with discipline) to identify premises, one crafts a series of concise paragraphs, each roughly presenting analysis of a premise. Precise form is finally given to the broad, heretofore ambiguous concept—"how to write an exam."

For *each* "hypothetical" (fact pattern essay exercise) in *every* exam, relevant premises will be identified. Premises reveal issues professors (and bar graders) want identified and discussed. Premises are analyzed in a series of concise paragraphs. In every instance, therefore, "writing an exam" implies crafting one concise paragraph after another, each roughly presenting analysis of a relevant premise/issue.

A disciplined, step-by-step approach to a situation that threatens to devolve into chaotic confusion—time-pressured law essay exams—is envisioned. BECOME ADEPT AT SYSTEMATICALLY IDENTIFYING PREMISES AND CRAFTING CONCISE, EFFECTIVE PARAGRAPHS OF ANALYSIS, AND THE PROBLEM OF LAW ESSAY EXAMS IS SOLVED!

Of course, much effort and many skills are implied in comprehending/implementing the foregoing. It is important in terms of preview/overview of what follows that the objective overall be defined. It is nothing less than *completely demystifying the law school process/experience, respecting both preparing for and taking any exam*. It is to *make all law school exams predictable, manageable*. Likewise, day-to-day, week-to-week preparation for exams. When mired in the attempt to grasp Step One, Step Two, or one of many facets of LEEWS, it will prove useful to call to mind this overall objective.

Respecting problematic Step Three of the exam planning/outlining approach, it is unlikely this step can be either comprehended or performed with facility until one becomes skilled at "lawyerlike analysis." In other words, doing Step Three well, efficiently, presupposes skill at lawyerlike analysis. Therefore, first practice Preliminary Overview, Steps One and Two—"The Blender"—on "hypos" herein (Appendix), then hypos in exams found online or on file in the library, etc. Practice analyzing, presenting analysis of premises as instructed (in concise paragraphs). Now come back to Step Three.

Practice Makes Perfect!

Respecting practice of the many LEEWS facets, such is essential if full benefit of LEEWS is to be realized. In this regard, set aside 20 minutes two, three times a week, isolate a single premise from one of the eight practice hypos in the Appendix, analyze and present in accordance with the paragraphing format.

Begin with "Ugly, But Effective" (UBE, p. 94, *infra*). Then rewrite in standard (more concise as a result) sentences. Compare with the model in the Appendix. Never assay to write out an entire response to a hypothetical. (Boring, unnecessary.) Become adept at analyzing, presenting analysis of single premises! Overall response will be but a series of premises/paragraphs, each roughly corresponding to analysis of an issue the grader wants discussed.

The goal is for LEEWS systems/science to be automatic, a disciplined [Yes, somewhat robotic] approach to *any and all* legal problem-solving exercises—law school, bar, practice (!!). Addressing a research paper, moot court assignment, client interview, trial preparation, oral argument, as well as exams, day-to-day case briefing, course outlining—all are encompassed. LEEWS enables making sense of any and all legal problem-solving exercises, including and especially the daunting task of preparing for and addressing the hypothetical-type law essay exercise—in piecemeal fashion. The person taking the exam is in control, not the exam!

Many precepts in this Update are unlikely to be understood at this juncture. Thus, **re-read the Update after completing indoctrination in LEEWS.**

PREFACE FOOTNOTES

[1] A more rudimentary version of LEEWS (with basic pioneering precepts in place) was first offered as a live, one-day program in New York City in 1981.

[2] **"Hypothetical-type" law essay exercise.** Refer to Appendix herein if you've never looked at a law essay "hypothetical." Look at several. Think about them, especially the confusing jumble of hypothetical (made up) facts. However, do not at this early juncture assay to attempt a response. Do not look at model responses or law provided. Differences in format and requirements between the typical essay exams featured in law school and those on bar examinations will be pointed out, as appropriate.

[3] **A moment of truth.** (Faith required?) LEEWS—what is said, instructed—is sometimes jarring. LEEWS poses nothing less than a revolution in law school instruction. LEEWS is the link long (always!) missing in American law school education. LEEWS merges standard, oft-criticized, overly theoretical, "case method" instruction—reading, "briefing," dissecting appellate law cases—into the framework and perspective of one actually practicing law. Imagine for a moment an individual corralling, harnessing legal precepts, substantive and procedural, and employing those precepts, much as a plumber or carpenter might use tools of those professions, to achieve client ends. LEEWS inculcates that practical, goal-oriented perspective, along with innovative, proven effective (for 30+ years!) A-Z systems and skills for handling the only thing that really counts in *any* law school—final exams.

[Note. **One rarely hears the words "lawyer," "attorney" in a law school classroom.** Client objectives, even the lawyer's function of *achieving client goals by means of legal strategies* (!!), are rarely, if ever discussed. Moreover, such should not surprise, given that law professors, certainly at so-called "top tier" law schools, are mostly PhD's with limited practical experience as lawyers. Yet exams, for reasons set forth elsewhere, are at base a practical exercise in what lawyers do every day, albeit highly compressed. (On steroids as it were.) It may be noted that this, too, is a perspective/insight absent in (all) law schools.]

Were LEEWS to be incorporated into law school curricula, law school instruction would change dramatically. (Students would feel from the outset they were becoming lawyers, which at present they do not.)

All this to make the point that making the modest investment of time and expense to do LEEWS requires suspending skepticism that there is nothing new under the law school sun. [Note. YOU DON'T KNOW WHAT LEEWS IS OR ENTAILS. Nor can you (or any law professor) guess. LEEWS is too much the product of accident, years of trial and error, years of obsession with a seeming intractable problem—how to take control of and manage an exercise that in the main befuddles the smartest, most diligent law student. (Including your author when he was a law student at Yale… The smart part, if not, admittedly, so much the diligent part.)]

DON'T BE ANGERED IF LEEWS SEEMS CRITICAL OF LAW SCHOOLS, including the one you are pleased to have been admitted to. (It deserves criticism!) Appreciate the truth of what follows. Get hold of LEEWS and, as have well over 100,000 law students before you, take advantage of the current problematic state of American legal education.

Law schools, professors, and students recognize the need to think/analyze "as a lawyer" to be successful on all-important final exams. "Lawyerlike thinking" is a lodestar set for law students. However, curiously, while such thinking is easily recognizable and, indeed, is habitual among seasoned attorneys, who among law students will manifest such thinking on exams remains unpredictable. The few who do and earn A's are deemed "geniuses of the law," possessors of a seeming "innate," "born-with-it" quality of thought that cannot be taught. "You either have it, or you don't," and "It will click" is heard. As explored in your author's 2012 book—*Gaming Emperor* L*aw School: 30+ years taking advantage of the failure of American law schools—all 200+ of them!—to train lawyers, 30+ years of LEEWS—(GELS),* **the prevalent assumption** (in all law schools) **that lawyers are born, not made, and lawyerlike thought is an elusive habit of mind that cannot precisely be instructed is nonsense!** The problem goes back to the founding and initial purposes of American law schools (explored in *GELS*).

Note. The foundational idea of American law schools was never to train the legal practitioner, but something more academic. (Perhaps it was/is to train future law professors!) The bottom line is that reviewing appellate opinions in an academic way in an academic setting (current "case method" MO) is wholly ineffective in training the (recognizable) close, nitpicking, analytic way of thinking that is characteristic of the law practitioner, and that is necessary to exhibit mastery of what at base are legal problem-solving exercises. **Those few deemed, by birth or accident, to have "The Right Stuff," an (imagined) aptitude for lawyerlike thought, normally acquired their desirable habit of thought (approximating that of a practicing lawyer) owing to mental training**—in math, physics, other hard sciences, philosophy, Talmudic examination; anything that inculcates nitpicking analytic thought—*prior* **to entering law school.** At the heart of LEEWS is recognition that anyone of reasonable intelligence—anyone admitted to a law school—can acquire the lawyerlike mindset via proper instruction.

[4] **Learning LEEWS from the *Primer.*** No question, but LEEWS—ins and outs, techniques, etc.—is contained herein (more so than in previous editions). This edition substantially adds to previous 136 page editions. However, can one learn to ride a horse or drive a car from a book, however carefully written?—doubtful! There are critical subtleties, nuances that would be overlooked. THE PROBLEM IS THERE IS SIMPLY TOO MUCH COMPLEX, NEW INSTRUCTION/DETAIL HEREIN! Failing confidence that the (considerable) effort in learning LEEWS will pay off—very hard to gain from a book that has so much that is new and needs digesting—, one is unlikely to make the effort necessary from a book alone to grasp LEEWS. Therefore, pay for the accompanying audio instruction by your author, with explanatory diagrams, etc. It, too, has been polished to be better and better. By all accounts, the cost of LEEWS remains a great bargain. (E.g., what is a single "A" grade first year in law school worth?... Much more than a prelaw can imagine.)

[5] It has not been uncommon these several decades plus for professors to advise LEEWS grads that, "I cannot post your grade. It is too far above the class mean and might upset some students." It is a commonplace that perfectly "average" students, as judged by college GPA and LSAT score, often score the highest grade in classes after taking LEEWS.

[6] A graph plotting college GPA and LSAT scores of the 230 students entering YLS in the fall of 1969 was published. My 750 (of a possible 800) was one of the highest scores.

[7] **Law school grading.** See footnotes, pp. 27, 87, etc. *infra*, for a brief discussion of how grades have inflated in law school and possible reasons why. At Harvard, Stanford, Duke, NYU, U. Penn., University of Virginia, etc. the average grade is now B+ (and higher!). A-'s (the new B+!) are awarded to satisfy curves calling for 20-30 percent A's (accounting for a 35/100 competing for an A). However, relatively few solid A's are awarded. I may note that I did much better—got Honors [Yale A equivalent]—in upper level, smaller classes, where the grade was dependent upon a paper, and I had time to compose my thoughts. As is true for many law students, only later in actual law practice was the depressing verdict conveyed by time-pressured essay exams respecting aptitude as a lawyer reversed. Thoroughly reversed, I am

pleased to boast.

[8] **LEEWS guarantees.** From its inception in 1981, LEEWS guaranteed "Better Grades, or Your Money Back" to those attending live programs *only* (as completion of instruction was assured). For over a decade only students with prior (essay exam) grades could take advantage of the guarantee. Some 1 in 25 did. Advances in LEEWS (see fn. 11 following) reduced refund requests to 1 in 50. LEEWS began guaranteeing "B's Minimum," "Top 1/3 Finish" (for first term students). These guarantees continued to cessation of live programs in 2014, as well as an option to "leave at the first break [75 min.] and receive a full refund, no questions asked." Again, this applied only to live program attendees. However, every indication these several decades plus has been that those who *complete* the audio version of LEEWS, if anything, do better than those attending live programs. (See leews.com re, e.g., free trial of audio program.)

[9] **Failure of law schools to train lawyers.** Numerous articles, blogs, pronouncements decry the failure of American law schools to prepare students for the profession. Recognition of a problem goes back, for example, to "The Trouble With America's Law Schools," *New York Times Magazine*, May 22, 1983, p. 20. See discussion at the LEEWS website—www.LEEWS.com—, and in particular the aforementioned book—*GELS* (fn. 3, *supra*)—for in depth discussion of problems with law school instruction respecting preparing students for both exams and law practice. (Even and especially at such elite schools as Yale, Harvard, Stanford, etc.)

[10] See Miller, Wentworth E., "Taking the Bar Exam: My Experience as a Black Law Graduate," *New York State Bar Journal,* November, 1978; reprinted in *Case and Comment,* June, 1979.

[11] Consistently from 1981-1993, fewer than one in twenty-five law students taking LEEWS (with prior grades) took advantage of the "better grades, or your money back" guarantee. Following changes in 1993, principally a sharpened focus on the concept of "premise," despite adding the guarantee of a (then meaningful) minimum 2.7 GPA, the refund request ratio improved to one in fifty!

[12] "**IRAC**" is an acronym for **I**ssue, **R**ule [of law], **A**pplication [of rule to facts—i.e., analysis], **C**onclusion. "Follow IRAC," and "IRAC the exam" are standard instructions respecting how to organize exam responses. IRAC is deemed by many a "system," "all you need to succeed." However, while useful, indeed, a revelation to the neophyte law student, IRAC is no more than a formula broadly indicating WHAT to do, not precisely HOW. IRAC does not address *how,* methodically, efficiently, under severe time constraint, to identify (relevant) issues lurking in a complex fact pattern, *how* to perform analysis that impresses and earns A's, *how* to present analysis concisely, *how* to prepare, day-by-day, week-by-week, etc. Indeed, what is an "issue?" (See Section 2, Chapter 11 for more thorough exploration of IRAC [and its shortcomings].)

[13] **LEEWS versus *all* other advice.** From the very beginning, owing to the breakthrough recognition of a denominator common to *all* legal problem solving noted, LEEWS departed radically from conventional, IRAC-centered advice. Such "conventional wisdom" ("CW"—see pp.24-27) was the gist of "what one needed to know" when your author entered law school. With but modest additions, CW continues to be the sum of what *all* others offering advice on "how to succeed in law school" advise—ALL!—, and it has never been particularly effective. While CW instructs WHAT to do—e.g., "analyze as a lawyer;" "paragraph frequently;" "support conclusions"—, it falls far short on the precise HOW. Here is one example: Professors and all others advise that students "spot issues." This is supplemented by "employ a checklist," "read facts carefully," "pay attention to key words, transactions," "make notes in the margin," etc. However, "spotting" presupposes something artful, haphazard, even accidental. A student proceeds in hit-and-miss fashion, and, typically, remains anxious, confused. (And misses issues.) It is not imagined that issues can be identified via a more precise, predictable science of approach. (*It is not imagined that addressing essay exams can be reduced to a science!* Therefore no science has ever been sought.) **LEEWS introduces the science that cannot be imagined by others** (that is not imagined possible). LEEWS introduces a true science of approach to issue identification, learning how to "analyze as a lawyer," concise presentation of analysis, and day-to-day, week-to-week preparation (including a radically different, more effective approach to briefing cases). See, e.g., "Preliminary Overview" and "Steps One and Two" herein.

This, at base, is the difference between LEEWS and CW—all other exam writing/preparation advice. **LEEWS is an evolved, exact, proven effective science. All else is mere hints and (somewhat) helpful advice.** The law school and law study aid establishment simply doesn't know (or apparently want to know or understand) what we know and instruct.

[14] Your author admits to himself subscribing (for over 25 years while instructing LEEWS) to the notion that some few—perhaps 5 percent of law students—really do have it figured out, have some sort of "gift for the law" (and don't need LEEWS). The quote of the U. Georgia law professor re his expectations (passed along by a former student who went from no A's first term to [after LEEWS] all A's second term) began to reveal my own self-deception. (Born of confusion during law school, and the seeming clarity exhibited by some classmates.) The notion of "genius" and "inner gift" being required to master law essay exams is universally subscribed to by law professors and law students. (The former typically got A's and, of course, want to think themselves geniuses.) It is debilitating. Indeed, it is an excuse for the failure of law schools and professors to properly instruct skills and approaches needed. (See aforementioned book—*GELS*—at LEEWS.com.) Shucking this myth has proved liberating. Countless "average" law students, once LEEWS is grasped, have scored not just 35 or 45 out of 100, but much higher. LEEWS grads have exceeded 100! (Issues were noted that professors were unaware of in their own exams, for which credit was given.)

[15] As suggested in the footnote preceding, LEEWS grads rather easily exceed low-bar professor expectations. Armed with LEEWS, a facsimile of a practicing lawyer (in thinking/learning) should have no difficulty achieving 45, 65, and better out of a possible 100.

[16] **"Black letter law"** means legal rules, principles, statutes. E.g., see "Relevant Legal Principles" following hypos in Appendix.

[17] **Exams in law school are EVERYTHING, particularly first year.** This is difficult for prospective and beginning law students (1Ls) to grasp and accept, particularly the logical consequence thereof. It is a lesson typically learned the hard way and too late. As, naturally, they want students to attend and participate in class (and for other reasons that will become clear, especially a startling disconnect between class and exams), law professors in first year survey classes tend to pooh-pooh concern about final exams. "Don't worry about exams," they will say. Further, "Brief all cases, pay attention in class, take good notes. Everything will be fine." Meaning, if you have a certain small edge that enables 35 points out of 100 (versus the class average of 25), which earns a rare "A" grade (and confirms one as possessed of "The Right Stuff"), everything will be fine. (If you don't have this edge, which some few acquire prior to law school [and that LEEWS will more than compensate for, so don't worry about it!], the professor's assumption is "There is little I can do for you [but no matter, as I'll give you a B anyway].") Re-read fn. 3 preceding. **DO READ GELS** (free at leews.com), **so as to understand the why/wherefore of these truths one needs to know about American law schools**. (That one can and should take advantage of!)

First year law classes in particular (excepting legal writing) feature no papers, no quizzes, rarely a midterm—only a 3-4 hour (or

longer) final exam, upon which one's entire grade will depend. Class participation counts only to bump one's grade by (at most) half a letter. Bumbling, mumbling, even saying, "not prepared" (no more than once!) rarely, if ever occasions a lower grade.

[18] "**Knowing the law."** Following mediocre exam performance, students typically say, "I knew the law." What is meant is that they rote memorized legal rules—academic learning/knowledge! "Knowing the law," so as to apply it to facts as a lawyer (in the analytic process we'll term "the lawyering dialectic"), requires a far more intimate knowing than an academic thinker/learner can imagine. One must "use the law" in tool-like fashion (as a lawyer would) to know it (as a lawyer must) in its nuances. One must first acquire a semblance of the (practicing) lawyer mind, and skill at her (analytic) craft.

Thus, it is easy to advise (as professors and others do), "know the law." It is easy for students using flash-card study aids to memorize rules and think, "I know the law." However, until transition to something approximating practicing lawyer/thinker is made, one cannot possibly "know the law" as needed. Thus, virtually all taking exams sans LEEWS are necessarily deficient "knowing law."

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Notes

SECTION ONE

BAR EXAM PREPARATION, STRATEGY

(Don't forget to pull out the *Primer* and re-read this section as you get ready for the bar!)[1]

In the author's view there are four fundamental reasons someone intelligent enough to gain admission to and graduate from an accredited law school fails a bar exam:

1—He/she[2] does not overcome certain environmental, emotional, physical impediments to success;

2—His study strategy/routine is seriously flawed;

3—He doesn't put enough sweat into preparation;

4—He never learns to analyze "as a lawyer" and craft concise, effective, essay exam responses.[3]

Attention to what follows should go far in eliminating shortcomings relating to the above.

CHAPTER ONE

THE BAR EXAM, BAR ASSOCIATIONS, LICENSING REQUIREMENTS

Something law students, recent law graduates, prospective law students should bear in mind is that practice of law is a venerable profession. License to engage in the profession is a privilege, not a right. Both privilege and licensing are overseen and regulated by members of the profession in each of the 50 States—lawyers, judges—all of them members of the state bar association ("bar"). Any wishing to practice law in a state must be admitted to the state bar. (Sometimes a temporary membership is extended—e.g., as a convenience to one needing to appear in court in the state.) There are also local bar associations—city, county, neighborhood, etc.—to which one may seek membership for networking and other purposes.[4] [Suggestion: Join the nearby local bar association during law school! (Meet judges, lawyers.) Seek a waiver of fee.][5]

Membership in many bar associations requires the mere filling out of forms, payment of a fee. Sometimes recommendation from a current member is required.[6] However, in the instance of gaining [state] bar admission for license to practice, completion of law school or an approved apprenticeship program is not enough.[7] The days when one might be examined and approved for license to practice by an influential group of lawyers/judges in the state or local jurisdiction are long past. In all states (and Washington, D.C.), in order to be licensed to practice law one must pass a rigorous two, often three-day examination, typically administered twice yearly. In varying formats the exam tests knowledge of "common law"[8] and other legal subjects, and ability to apply this knowledge resolving legal "issues"[9] as a practicing lawyer would. In more and more states—38 as of this (2016) writing—a test of minimal competence in practical lawyer skills will be part of the exam. This practice hurdle is the "bar examination." One "sits for the bar [exam]." As reputed, it is a daunting hurdle. Various commercial, bar-preparation programs will begin vying for a law student's attention (and $$) Day One of law school.

The unique insights that prompted LEEWS to come into being derived from your author's experience tutoring (minority) candidates for the difficult New York State bar exam. This Section and Chapters (in addition to a reputable [typically pricey] "bar review" course) is intended to provide useful guideposts in successfully negotiating any and all bar exams once law school is completed.

License Requirements Beyond Law School and Bar Exam

Practice of law entails use (manipulation) of the laws governing virtually every aspect of life in the one nation—the United States of America—that more than any other in the history of the world is ruled by law. (Versus rule by custom, divine right of kings, tribal chiefs, etc.) As such, knowledge of law and license to practice conveys significant influence. There exists temptation to misuse and abuse such influence.[10] As a consequence, in addition to achieving a state bar committee-prescribed passing score on the bar exam (which score may be adjusted to regulate perceived standards of minimal competence [also numbers of

lawyers admitted to practice in the state!]), further requirements pertaining to character and fitness to practice law will be imposed. (E.g., not having a felony criminal conviction.) Check (in first year!) with appropriate state bar examining/licensing bodies for individual state requirements respecting license to practice.

In some few instances one need not take a bar exam in order to be licensed.[11] Having passed a bar exam, if licensed in one jurisdiction (state), one may sometimes "waive" into another state or jurisdiction for practice purposes without taking that state's bar exam and/or meeting further requirements. (E.g., from Maryland, Virginia, and other states into the District of Columbia [Washington, DC].) A typical requirement once the bar exam is passed is application to a "character and fitness" body, typically composed of lawyers and judges.[12]

Bar Exam Described

As noted, the bar exam is a two, often three-day test of legal knowledge and ability to apply such knowledge as a practicing lawyer. Six hour, day-long formats feature a combination of essay and "objective" exercises—multiple choice, short answer, true/false. In an increasing number of jurisdictions—as noted, 33 states in 2016—there is also a "performance" component. (See below.)

The exam varies less and less among states, except insofar as score needed to pass and tweaking of essay exercises. (The latter reflecting states' desire to test and ensure familiarity with unique, recent changes in state law.)[13] Nearly all states employ the Multistate Bar Exam (MBE). This is a standardized, 200 multiple-choice question, one-day (six hour) component. [The MBE is developed each year and sold to states by the National Conference of Bar Examiners (NCBE).] The MBE tests knowledge of the aforesaid six common law-based subjects (plus, as of 2015, Federal Civil Procedure), and, in addition, Article 2 of the Uniform Commercial Code (UCC) (law respecting sale of goods). Only Louisiana, following the Napoleonic civil code, does not use the MBE. (See fn. 5.) MBE scores in one state normally can be applied to another's bar exam. However, what constitutes a passing MBE score will vary among states.

Also part of more and more bar exams are the Multistate Essay Exam (MEE) and the Multistate Performance Test (MPT). These also are developed and sold to state bar examining bodies each year by the NCBE. The MEE is a full day, and consists of six essay "questions"—hypothetical-type fact patterns in which issues in divers legal subjects must be identified, then analyzed to conclusion. As of July, 2016, 30 jurisdictions had opted in. The MPT, modeled on the California bar performance model,[14] is a typed or written exercise mimicking real-life tasks lawyers might perform—e.g., drafting an affidavit, drafting a legal memorandum, drafting an opening statement or closing argument, drafting a client letter, analyzing a contract, will, or statute, etc. As of July, 2016, 38 jurisdictions had adopted the MPT. It is usually offered in conjunction with the MEE.

It may be noted that the MBE, MEE, and MPT are increasingly grouped under the umbrella heading of Uniform Bar Exam (UBE).

[Note. "UBE," meaning Uniform Bar Exam in the context of bar exam, must not be confused with LEEWS "UBE" (Ugly But Effective) analysis presentation format. (Introduced, Sect. Two, Chap. Eleven.) LEEWS "UBE" usage predates bar exam "UBE" usage by over two decades!]

[Note. Preparing for the performance segment of bar exams will not be part of LEEWS instruction. Preparation for this aspect should be part of a reputable bar preparation course, and/or course supplement thereto.]

CHAPTER TWO

NON-TECHNICAL BASICS

Elementary Environmental and Economic Considerations

For most law graduates, success on a bar exam will require an unprecedented investment of time, energy, and mental concentration. The investment will likely prove unavailing if environmental surroundings and/or economic factors distract from the effort.

The first order of business should be to secure a quiet place for study during the [typical] six to seven weeks of preparation that precede the exam. This means a place removed from the distractions of family, friends, spouse, child, lover. The non-lawyer, while professing sympathy and understanding, is simply unable to comprehend the magnitude and intensity of effort required during this period. Negative repercus-

sions will be forthcoming as loved ones feel neglected. (If loved ones are not neglected, one is not studying hard enough!) Preoccupation with the challenge at hand should enable selfishness, even rudeness. The stakes are that high. The appropriate response to the protests of others (and one's own) is: "My career depends upon passing this exam. Do you want me to go through this again?" The library or a rented room may be necessary solutions.

Needless to say, DO NOT HOLD A JOB DURING THIS PERIOD! "But I need money to live. I have to work," is what some tutees would tell me. "Borrow the money," was my response. Borrow it from parents, friends, professors, your future employer, the bank. Doubtless, one is already heavily in debt with school loans. Another thousand or more will not make much difference. The cost of failing the bar exam, in terms of a job that may be lost, or an employment opportunity missed, makes working while preparing poor economics.

This is not to say one cannot possibly work part-time and prepare successfully for a bar exam. Doubtless, a mature, well-organized person can. However, reducing hours on a job one already has and starting a new job, albeit part-time, are different propositions. Everyone your author has known to attempt the latter while preparing for a bar exam failed (!!).

Again, as a matter of wise economics, there is no excuse for not taking one of the commercial bar review courses, at least on one's initial effort. Typically costing $3,000 and more, they are an expensive but necessary investment.[15] Should one not pass, most reputable courses offer the opportunity of repeating for a nominal sum, or at no cost. Electing to go with another course (the idea being that one's course, not oneself, is to blame for one's failure) is an expensive, probably unnecessary option.

Physical Considerations

Preparing for a bar exam is like climbing a mountain to reach the start of a marathon. It is an arduous, seven week march, requiring energy and stamina. The culmination is a two or three-day ordeal requiring alertness and even greater energy and stamina. Success in both phases will be achieved only with proper mental and physical conditioning—and pacing.

The example comes to mind of a mature woman who dedicated herself during the preparation phase to the point of reclusiveness. Others went out for coffee, took an evening off. She declined, in effect chaining herself to her exertions for the duration. Her final evening before the exam was a frenzy of cramming. Then she nearly fell asleep during the exam. She had exhausted herself on the march to the starting line. She failed by a slim margin. Her preparation, although thorough, was faulty.

As deeply as you must become involved in preparations, you must not lose sight of the need to come into the exam at a peak of health and mental fitness. Common sense and pacing are watchwords. Train hard each day, but also eat properly, get an adequate amount of sleep. Periodically, as mood and need dictate, abandon study for a movie, even a day at the beach, mountains, etc. Such refreshing pauses are of vital importance in combating mental staleness and psychological disorientation.

Psychological Considerations

Following five years of, in effect, holding the hands of prospective bar examinees during their preparations, I formed the opinion that *attitude and character, more than intelligence, are decisive factors in achieving success*. Although intelligence is required, passing a bar exam is accomplished largely by applying sufficient time and energy to commit a mass of detailed information to memory, then regurgitating it as required in response to test prompts. The individual with a positive, mature outlook plugs along with true grit, refusing to throw in the towel. She neither over, nor underestimates the task at hand. She neither panics, nor takes too relaxed an approach.

The challenge posed by a bar exam is considerable. In some states virtually the entirety of a state's law, plus the majority view in subject areas tested by the MBE component[16] is the field from which questions may be drawn. The prospective examinee, flush with the achievement of recent graduation from law school, begins her bar review course confident [perhaps slightly bored], blissfully ignorant of how much information she will be expected to assimilate. Several days into the course, facing perhaps thirty to sixty pages of concise legal doctrine to be covered in each three hour class, she begins to realize that the mass of detail she has already been exposed to is but a fraction of the whole. It is then that the task may begin to seem improbable.

Two weeks into the course the typical examinee is depressed. She is behind in her assignments. Belated graduation exercises, competing demands of "important commitments" have upset her schedule. There seems to be no breathing space for catching up. She has done a few practice MBE exercises and performed poorly. If not a LEEWS alum (!!), the essay exercise attempted was but a shadow of the model answer in terms of issues identified and substantive law correctly applied. Her law school it would seem has failed her. (Indeed!) The situation appears grim.

Although daunted by this challenge, the mature individual draws upon logic and character. She realizes that many, many thousands no more capable than she have survived the process. Although she cannot presently perceive light at the end of the tunnel, she has faith that it exists. She has resolve that if she but perseveres, she will discover that light. Her attitude remains positive, if subdued. She may be resentful of the whole business, but she is determined. She digs in. She handles the pressure.

If one but perseveres, one will indeed perceive light at the end of the tunnel. One will absorb more precise knowledge of legal rules/principles than one imagined oneself capable of. However, midstream you must keep the faith. You must suppress anxiety, ignore confusion. You must simply apply oneself doggedly, day by day, sticking to you study routine. This requires character.

THE FAILURE SYNDROME—Three Examples

I am mindful of several types likely to fail bar exams for psychological/attitudinal reasons. Monitor preparation to correct tendencies toward the following problem syndromes.

Type One is familiar. His demise is readily comprehensible. He is simply overwhelmed by the task. The many subject areas, the precision of detail that must be mastered—he doesn't know where to begin; he can't see the end. The prospect overwhelms his delicate emotional circuitry, and he bails out in several ways. Possibly he prepares in disorganized, helter-skelter fashion. Or preparations are overly organized in rigid rituals. In either case there is more show than substance to preparation. He quickly slips into a state of nervousness bordering on panic. Eventually, unlike equally nervous comrades, he does panic.

Some among this type channel energies into careful mastery of minutiae that is wholly out of sync with the bar review course (often attended only intermittently) and what is required to succeed. More than one person comes to mind who wasted precious hours each day typing or rewriting class notes. Such efforts provide a comforting sense of being industrious. However, it may be counterproductive busywork, a kind of head-in-the-sand approach to preparation and the exam. (E.g., "I'm working so [very] hard… The JUSTICE of the cosmos won't allow me to fail.")[17]

Others suddenly profess not to really care whether they pass. They prepare halfheartedly, or not at all, thereby laying the foundation [read excuse] for eventual demise.

Type Two is superior in intelligence and ability, and simply overconfident. Success in college, law school, and other academic endeavors has come easily to such a person.[18] He has no doubt but he will pass the bar exam, although it will be "a little tougher." Not paying sufficient attention to logistics of the sheer volume of material to be digested and memorized, he miscalculates time needed to prepare. For several weeks he merely goes through the motions of attending class and reviewing materials. He assumes he can pull it out with a last minute cram.

Possibly he will realize his folly in time. Four, even three weeks may afford enough time once this type puts his able mind to the task. However, often he waits longer, and is lost. This individual typically attended a better law school. (A Harvard Law grad comes to mind.) He is surprised to find his name missing from the list (formerly published in newspapers, now online) of those who passed. YOU CANNOT CRAM THE BAR EXAM!

Type Three is a more difficult nut to crack (or recognize). This person sees the problem clearly. There is no structural or technical reason why she should not pass, if she but puts her heart and mind fully into the effort. However, therein lies the problem. Possibly this individual is ambivalent about becoming a "lawyer," with all the connotations of adult responsibility, etc. implicit in that title. Possibly she carries the burden of becoming the first lawyer (even first college graduate) in her family. The pressure of being "family champion" is great, while the emotional and financial support her modest background provides is inadequate. Such an individual may also fear the implicit [in becoming a lawyer] quantum increase in the already distressing educational/social gulf yawn-

ing between her and her roots. She may feel alone, insecure, disoriented.

Typically, Type Three is wary (possibly terrified) of putting herself to an ultimate test—i.e., going all out, having no excuses—and failing. She avoids this ego-threatening possibility by bailing out in ways reminiscent of Type One. One familiar tactic is to take or at least seek a job during the preparation period. This provides an excuse for failure. (E.g., "If I hadn't had that job…") One such individual I recall was continually distracted by "family emergencies." One week before the exam he spent an entire day "helping my brother move." Others, women in particular, engender or experience romantic upheavals/ruptures during the preparation period. (In fairness, this doubtless is not the woman's doing, so much as a reflection of the accelerating, ego-threatening aspect of pending lawyer status in the husband/boyfriend's eyes.) In various ways does Type Three build an excuse for not putting in necessary effort, and thereby ensure her demise.

I have no advice to give Type Three other than to have courage. You *do* care whether or not you pass the bar exam. You *do* want to become a lawyer. ONLY BY CARING ENOUGH TO PUT FORTH MAXIMUM EFFORT, ONLY BY CARING ENOUGH TO RISK FAILING WITH NO EXCUSES DOES ONE EMBRACE THE PROSPECT OF SUCCESS.

CHAPTER THREE

FUNDAMENTALS OF BAR EXAM STUDY STRATEGY

Most law graduates prepare for the bar exam by enrolling in a course, then doing "what comes natural." "What comes natural" may or may not imply a successful approach. It means, basically, falling back on routine study habits, then adjusting as exigencies, impressions, tips from fellow preparers dictate changes. The majority of prospective examinees survive this unscientific approach. They ultimately pass the exam. However, many suffer confusion and anxiety as a result of uncertainty about their approach. For substantial numbers the anxiety is well founded. Doubtless, they will structure their routine differently as they face the bar exam a second time.

Given that doing what comes natural proves successful for the majority of [non-minority] bar examinees, is there such a thing as a right or wrong approach in preparing for the bar exam? I would say, precisely speaking, "No." Generally speaking, "Yes."

Choice of a Bar Review Course

Passing a bar exam presumes mastery of a considerable body of detailed legal knowledge, coupled with the technical ability to express this mastery in multiple choice, short answer, and essay formats. The standard vehicle of preparation, opted for by almost all law graduates, is the so-called "bar review course." Such courses are expensive ($3,000.00 and more),[19] and in one form or another to be found online and/or in the vicinity of most law schools.

Bar review courses typically consist of 3-4 hour lectures on a pre-announced subject (e.g., bankruptcy, domestic relations, etc.). If live lectures are offered (often delivered by a single person), six days a week for approximately six weeks preceding the exam approximates the norm. Online (and recorded) courses and lectures, naturally, are available 24/7. If one elects such a course, one must, of course, be disciplined enough to do the work on one's own.

Live lectures, held in hotels, auditoriums, law school classrooms, etc., are usually offered from 9-1, days, or 6-10, evenings, or at both times. Several scheduled lectures will usually be practice exam sessions, at least one of which will be devoted to UBE (Uniform Bar Exam) components. UBE constitutes more than half the bar exam in most states. [Again, check one's state format]. Practice exercises can normally be handed/sent in for critique.

At the outset of the course one is provided books or booklets (or online materials) of varying quality that purport to outline and survey all legal subjects that may be tested. From time to time addenda should be received that reflect recent significant developments in state law. As noted, such are a favorite source of (non-MEE) essay issues. There will usually be make-up options in the event a live lecture is missed. Courses normally conclude ten days to a week before the exam.

Bar review courses essentially fall into two categories. One exposes prospective examinees to virtually the entirety of (legal) subject matter from which exam questions may be drawn, giving emphasis to items specialist lecturers deem more likely to be tested. The other, often conducted by a single, guru-like "expert" or team of experts, covers a narrower

range of subjects and areas within subjects. Apparently assuming a predictable cycle of favorite question areas on the part of bar examiners, the latter course in effect attempts to "psych out" the exam. Rote memorization of spoon-fed rules of law is standard fare in such courses.

When the crystal ball of the latter course is on target, the success rate of its students is unusually high. However, beware when the guru is off the mark. Whole areas of legal knowledge will be "Greek" to students. Both course types should include the practice sessions noted above. [Note. There is no substitute for doing extensive practice exercises on one's own.] Add to either of these approaches comprehension of law one has memorized, adequacy in technical aspects of exam taking (especially analysis and systematically addressing essays), and *sweat*, and the basic elements of a successful bar-passing formula are present.

Providing a course is reputable—has up-to-date, accurate legal surveys and plentiful essay and (UBE) "objective" (multiple choice, short answer, true/false) practice exercises with model answers—, it is doubtful choice of course will be determinative of success. Rather, *one's choice should be guided by what one perceives to be the more comfortable fit*. For example, a course is very appealing to many that regards one as a kind of *tabula rasa,* and in paternalistic fashion says, in effect: "Do everything we say; write down everything we say; we will get you through." Or does one prefer to be more of a free agent, exposed to virtually all the law and given occasional tips on what to expect, but given more latitude in developing one's approach?[20]

Prospective examinees should be aware of the availability of other, ancillary, specialized preparation offerings. These include writing courses (unnecessary after LEEWS!), UBE offerings, and courses on specialized subjects, such as professional responsibility, various state-specific "performance exams" (e.g., California, Georgia?), and New York State civil practice law and rules (CPLR).[21] In general, such courses are an unnecessary burden on one's time and pocketbook. Quality bar review courses typically include such supplements as standard fare or less expensive options. Talk to professors and recent graduates about review courses offered. Providing one heeds the advice that follows, the review course alone should suffice.

Constitution of an Effective, Two-phase Study Strategy and Routine

Whatever course one chooses, given that basic elements for success are present, how, specifically, should one proceed? IN TWO PHASES, I would suggest. The first would correspond to the six or so weeks of the review course proper. During this phase one would seek primarily to *comprehend* material covered in lectures. Comprehension (and memorization) would be tested and abetted by frequent (daily) practice exam exercises. These exercises—essay, short answer, multistate/UBE—would also develop and sharpen technical skills needed.

The second phase would commence in the (typical) week to ten days between the close of the review course and the examination. The objective during this period would be to review all materials with the aim of memorizing, memorizing, memorizing.

The following step-by-step particulars of such a biphasic approach make eminent logical sense. They also proved effective with generations of my tutees. Barring dislocations of the sort previously discussed, if one tailors one's study strategy and routine in accord with the program that follows, the march toward success on a bar exam should be inexorable.

PHASE ONE—Daily Routine

Having enrolled in a suitable bar review course, attend every lecture (live, online, etc.). Make up any missed. This golden rule observed, organize one's daily schedule around the 3-4 hour instructional session.

Prior to [the lecture], material to be covered should be previewed. [In most instances lectures will follow closely the survey/outline of the subject assigned for the session.] However, no more than 1/2-1 hour should be devoted to this exercise. Some will want to plunge in and devour materials prior to class. I found tutees spending up to four hours reviewing materials to be covered in an upcoming lecture. (What is the point of the lecture?!) Others had not considered looking at materials beforehand. Both approaches are seriously flawed. PREVIEW MATERIALS TO GAIN PERSPECTIVE ON WHAT WILL BE COVERED, IN PARTICULAR TO PINPOINT POTENTIAL TROUBLE AREAS.

It is certain one's mind will wander at times during 3-4 hours of lecture, despite occasional breaks. [Note. This problem is largely mitigated by an online format. The prospective examinee can set the pace.]

One would not want to be "tuned out" when a point one is unsure of is covered. (E.g., parol evidence rule of trusts law.) To the contrary, one wants to be especially alert. Previewing materials enables one to know when to sit at attention and take advantage of the lecturer's guidance (even online). Note emphasis given the point. Does the lecturer think it will appear on the exam?

If questions persist after the discussion moves on, one may want to submit them. It is simply an inefficient use of time to attempt to master a subject prior to the lecturer's guidance as to important aspects, complex issues, and (possible) new developments in the law. *The preview,* even in areas of unfamiliar law, *should be cursory, not exhaustive*. Attempts to master material should come following the lecture.

Another benefit of previewing material is taking (far) fewer notes on the lecture. One realizes when what is being said is repetitive of the subject outline. Lecture notes should expand on the outline, not reproduce it.[22] In particular, one will want to capture commentary regarding new developments in state law. As noted, this is a logical, favorite issue source for examiners in non-UBE exercises.

In this regard it should be noted that bar exam exercises, particularly non-UBE exercises, may be relied upon *not* to focus on basic concepts of law (e.g., negligent tort). They will probe knowledge of law unique to the jurisdiction, especially new directions and developments introduced by recent legislation and case law. Thus, it is to peripheral areas of law encountered that one should give especial attention.

As suggested previously, budget time in the schedule for "R 'n R." Following the lecture seems an appropriate time for an hour or two of diversion—lunch plus a few errands, exercise, etc. Such pauses refresh and increase efficiency of study time. Indeed, if one is having difficulty concentrating, better to take a ten minute break after every 45 minutes to an hour of study, than to chain oneself to the books for long, but inefficient stretches.[23]

Then it's back to the books, bearing down on material covered in the lecture. It is important not to postpone this *third* review of material covered in the lecture. While the subject is "hot," one wants to perform the tedious exercise of going through outline and notes line by line to nail down comprehension of the subject. This is the heavy exercise of the day. It should consume several hours. The objective is to be able to say to oneself: "Okay, I understand this material."

A good deal of associative memorization will occur as a byproduct of one's efforts to comprehend. This kind of memorization—retaining facts in association with concepts and context—is best, because retention is longer. (Information is committed to long term memory.) THE OBJECTIVE IN PHASE ONE IS COMPREHENSION, NOT MEMORIZATION BY ROTE. (Facts memorized by rote are committed to short term memory. They will fade long before the exam.)

If there are concepts encountered during this review that continue to puzzle, now is the time to pull out a hornbook, consult a fellow student, otherwise iron out the problem. MASTERY OF TROUBLESPOTS CANNOT BE POSTPONED!

Tomorrow brings a new subject area, and the next day another. In the 7-10 day period between completion of course and exam there is no time to cope with problems of incomprehension. One will be on too tight a schedule. (E.g., twenty pages an hour of memory work, twelve to fifteen hours a day.) The anxiety level will be high. One will not be willing to spare time necessary to research a problem area that very likely will not appear on the exam. Therefore, one skips this area. It is a gamble with good odds. However, too many such gaps in comprehension will undermine confidence going into the exam. And what if the point skipped appears on the exam?

When you think you have material under control, test yourself on it. Apart from being necessary practice for the exam, short answer, multiple choice, and essay exercises provide a good indication of one's grasp of material. Self-testing is also an excellent study technique. You will likely remember points addressed satisfactorily. You will not forget points missed. One further gains insight into both preciseness of detail that bar examiners expect, and effectiveness of one's study technique in mastering material. [Bar review courses typically offer essays from previous bar exams as practice exercises.] For example, if several hours have been spent on a subject, and you miss more than fifty percent of questions, adjustments to one's approach are in order. Possibly, self-testing at more frequent intervals is needed.

The self-testing process—perhaps 10-15 MBE

(multiple choice) questions, 20-30 short answer/true/false questions, and one essay exercise per day—must not be neglected. It should consume approximately one-two hours every day. Respecting non-essay exercises, at the outset one is likely to score only 50-60 percent correct. As one becomes more attuned to both detail of knowledge expected, and flavor of questions asked, percentage score should improve to 65-70. Just prior to the exam, when one reviews materials yet a *fourth* time in order to nail down any loose ends, one's percentage of correct answers on such exercises should rise to 80 and higher.

The day is almost finished. Perhaps it is late evening and a couple hours remain before turning in. [If a live lecture is in the evening, it will be mid-afternoon.] Take a break. Watch a favorite television program. Jog. [Not at night! Moreover, brisk walking is better for the knees!] Take a shower. Whatever. Refresh the mind. Then begin previewing material for the next lecture. STUDY TIME FOR THE FULL DAY'S CYCLE (including 3-4 hours of lecture) SHOULD AMOUNT TO APPROXIMATELY 10-11 HOURS.

Stick to this routine six days a week for the duration of the review course. [Note. At least one half of the seventh day should be devoted to makeup sessions or otherwise catching up.] When the course ends, you will have covered all material at least three times—in cursory fashion before lectures, during lectures, and intensively after lectures. Now begins the second, more intense phase of preparation—final review for memorization. Assuming good physical condition, motivated by healthy anxiety regarding the fast-approaching exam, you should have no difficulty increasing your study effort to 14-15 hours a day.

PHASE TWO—Home Stretch

In contrast to several weeks earlier, in the final ten days or so before the exam all should be crystal clear. One should have tunnel vision. Light at the end of the tunnel should burn brightly. Impossibly, it seems, virtually the entire field of law from which examination questions may be drawn has been surveyed. More than that, one has (hopefully) mastered this field in terms of comprehension. What remains is committing the many stray details firmly to memory. You will review material yet a *fourth* time. Knowing precisely what has to be accomplished, establish a review schedule that will take you from A to Z prior to the exam.

Do you query how, in a week or so, one can review with any effect what has taken six weeks to cover? Such is possible, because a wondrous phenomenon has occurred. Constant absorption with preparing for the bar exam over 6-7 weeks has honed powers of concentration to a sharpness likely never before experienced. Assuming health (recall pacing advice), one's brain is operating at peak efficiency. Moreover, anxiety that should build as the exam nears (assuming one really wants to become a lawyer and properly appreciates the significance of the exam) gives increased energy to efforts. Virtually nothing should be able to distract intense concentration upon the task at hand. You already have a solid grasp of materials you propose to review. With photographic precision, at unexpected rapid rate, your brain will lock into place information that has thus far eluded memory.

Owing to this phenomenon of increased energy and mental efficiency, it may be observed that the typical prospective bar examinee learns more in the third and fourth weeks of preparation than she does in the first and second; and possibly as much in the fifth and sixth weeks as in the previous four combined. Certainly, what she achieves in the final few days will be unprecedented. For this reason a word of caution is in order. Although diligent application from the outset of the preparation period is to be encouraged, IT WILL NOT SUFFICE TO MAINTAIN THE PACE OF WEEKS TWO AND THREE INTO WEEKS FOUR AND FIVE.

Having witnessed the failure of a number of tutees who were capable and diligent, but who never "caught fire," in the sense of increasing energy level and study output in the final two weeks, I am of the firm opinion that THE RACE IS WON BY THOSE WHO CHARGE INTO THE FINAL THREE WEEKS WITH EVER-INCREASING (ANXIETY-FUELED) ENERGY AND APPLICATION. In other words, the diligent tortoise must at some point become something approaching a diligent hare.

Two additional points regarding mechanics of study during this second phase should be noted. First, while multiple choice, short answer, and essay exercises should be part of the daily routine right up until the exam, there is probably no longer sufficient

time in one's schedule to permit fully developed essay exercises. To save time, you may want to outline and think through, but not actually write/type out essay responses.

Rote, short-term memorization one engages in during Phase Two will be particularly short-lived. In that retention ebbs with passage of time, if only days and hours, REVIEW AND MEMORIZATION IN SUBJECT AREAS PERCEIVED TO BE MOST COMPLEX AND FULL OF MINUTIAE SHOULD BE POSTPONED UNTIL THE ELEVENTH HOUR. (E.g., domestic relations, wills.)

You will certainly be ready for the exam if you reach the level of preparedness of a particular tutee I recall. Her review course emphasized use of mnemonic devices to remember legal principles. (Acronyms. E.g., B-A-I-D for battery, assault, IIED, damages.) The evening before the bar exam she called me. Highly agitated, she gasped: "I think I'm ready. I can recreate [on scratch paper] ninety-five mnemonics in five minutes." I merely smiled to myself. She was indeed ready. And she passed.

Troubleshooting Practice Exam Performance

Instruction on how to approach the problematic (hypothetical-type) essay exam format in particular is offered in Section Two following, and its many chapters. (Multiple choice, true/false, short answer questions are addressed in a brief Section Three.) If, after digesting this advice, one finds that practice exam results are poor, do not show improvement, or fluctuate between good, fair, and poor, consider the following characteristic problems of approach as you troubleshoot the situation. (See pp. 15-16, *supra*, for a rough gauge of satisfactory versus unsatisfactory practice exam results at various stages of preparation.):

1—Knowledge of applicable law is insufficient in depth and/or precision to enable one to distinguish the *better* between two attractive [multiple] choices, or to pinpoint a short answer. [Go back and re-read the law. Wrong answers provide guidance as to depth and precision with which law must be learned.]

2—Perception of what the question calls for and/or implication of a critical fact or set of facts is slightly off, because one does not read carefully enough. (E.g., do you tend to read something into a question that is not there, or fail to see subtle distinctions or nuances of fact? Perhaps more work on the analysis instruction and practice exercises herein is needed.)

3—Performance falls off as a result of fatigue (which reduces concentration). As we tend to fall into bad habits of technique when tired, it is advisable not to attempt so many questions in a setting that fatigue becomes a factor. Take a nap!

4—When an answer selection is changed (owing to uncertainty), the new choice is incorrect more often than not. Generally, unless a specific reason for changing an answer can be articulated, it is best to stick with the initial choice. See if this is true for you.

SECTION ONE FOOTNOTES

[1] **Caveat.** Law school exams, not bar prep, has been the [exclusive!] LEEWS focus these past 30+ years. Legal problem solving is a constant, and your author has kept his ear to the ground respecting changes in bar exams, if at a remove. Upon information and belief,* all of what is contained herein is valid. However, particularly as regards instruction in legal substance, what is contained in this section should not be construed as other than an overlay or adjunct to enrollment in a reputable bar review preparation course.

*Note. "Information and belief" is a lawyerly expression meaning, "Based on what I know, I believe this to be true. (Not positive!)"

[2] **Gender pronouns.** Your author is aware that women are law students, lawyers, professors, and judges. [Indeed, a majority now in many law schools.] An effort has been made to use both gender pronouns, but alternately, so as not to disrupt flow of text.

[3] Note. The ability of the typical American law school graduate, whether from Harvard or Internet Law School, to "analyze as a lawyer" and craft concise, effective essay responses is not merely subpar, but seriously subpar. (Because law schools—all of them!—fail to instruct inadequately in this regard.)

[4] **Bar associations.** In addition to state (and District of Columbia—Washington, D.C.) bar associations, to which membership must be gained in order to practice (via exam or waiver in), and local bar associations, there are numerous other bar associations relating to type and place of practice. There is, for example, an association for every type of federal court, including the Supreme Court. There is a bar association for bankruptcy lawyers, admiralty and maritime law practitioners, and insurance lawyers (of different types). (E.g., Bankruptcy Bar.) There are criminal lawyer bars and defense attorney bars, local and national. There are plaintiffs lawyer bars. There are women lawyer and minority lawyer bars. In short, the same as other professions and groups of common interest, it behooves lawyers with common interests to band together for mutual support, sharing of information, promotion of common interests. (This may include setting rules/requirements that not only smooth and regulate common interest, but also restrict competition.)

[5] **Reasons to join local bar association as a law student.** First, it's likely free! Bar associations typically waive membership fees for law students. (Ask!) Second, it's an excellent way to meet local lawyers, judges, many from one's law school—networking! The members love to reminisce about their experience at *alma mater.* They like talking to, offering advice to law students. Volunteer for a couple committees and, suddenly, there you are—hanging with lawyers/judges informally. They can answer questions. In particular, they can advise of job opportunities both during and following law school. Someone may write a recommendation. WHO ONE KNOWS IS OF CRITICAL IMPORTANCE IN LAW PRACTICE. Plus, it's good to get away from law books and the library once in a while.

[6] For many years your author has been a member of the Westchester County, New York, bar association. I pay yearly dues, but have never participated in activities or visited the bar building in White Plains, NY. [Note. I was sponsored to membership by the brother of famed sixties protest lawyer, William Kunstler, a fellow Yalie.]

[7] **Apprenticeship route to becoming a lawyer.** Long before there were law schools, would-be lawyers "apprenticed" to become lawyers. Similar to learning blacksmithery or fashioning of wagon wheels (wheelwright), an educated person (typically male) read the law books of a practicing lawyer or judge, assisted that person in his practice (including cleaning and running errands), and when it was deemed the candidate had accumulated sufficient knowledge, he would be examined by a panel of lawyers and judges to determine fitness to be admitted to practice law in the jurisdiction. This was the prescribed route to becoming an attorney and the precursor to the modern day bar examination. Such noteworthy and able American lawyers as Alexander Hamilton and Abraham Lincoln came to the bar in this fashion. What is not known to many would-be lawyers is that in many states—New York, California, Virginia, etc.—one may still become a lawyer in this way. ONE NEED NOT ATTEND LAW SCHOOL! One can apprentice in accordance with prescribed requirements, take and pass the state bar exam, and apply to be licensed to practice law.

[8] **Common law** refers to legal doctrine derived from judge or court-decided cases that are followed as binding precedent. (Vs. statutory law created by legislative bodies.) Derived from English and American decisions, common law subjects tested on all bar exams excepting Louisiana's* are constitutional law, criminal law and procedure, contracts, evidence, torts, real property, and (as of 2015) federal civil procedure. Article 2 of the Uniform Commercial Code may also be tested. (Having to do with law respecting sale of goods.)

*Alone among the 50 states, Louisiana follows the (French) Napoleonic civil code instituted at its inception.

[9] **"Issue."** Especially "legal issue," a term/expression heard every day in both law school classrooms and law practice, is rarely defined. It will be addressed elsewhere and often in the book and LEEWS instruction. Suffice for now that it means an inquiry, specifically a legal inquiry—will application of a particular legal theory, statute, rule, precept (to facts) prove availing, or no?

[10] **Example of lawyer misconduct.** Often, a lawyer will hold funds belonging to a client and needed for payment of various fees, etc. in "escrow." Should a lawyer be tempted to dip into or borrow or otherwise improperly make use of such funds for his personal needs (or greed) or office convenience, this is termed "comingling." It is grounds for immediate disbarment. (Determined by a state or local lawyer/judge body set up to field complaints against lawyers and make such determinations.)

11 **When/where no bar exam is required.** Very likely in order to encourage newly-minted graduates not to leave the state, graduates of the two Wisconsin law schools—U. Wisconsin, Marquette U.—needn't take the state bar exam. (Law graduates from outside Wisconsin do.) A similar proposal has been floated in Iowa for its law schools—U. Iowa, Drake U. Again, check for requirements with the appropriate body in the state(s) you are interested in.

[12] **Character and fitness requirements.** Practice of law, similar to other professions, is fraught with possibility for misdeed and abuse of the power inherent therein. As a consequence, it is deemed a privilege, not a right. Members of the profession in each state are deemed appropriate arbiters of who shall be admitted to the profession, and examining bodies are designated for this purpose. In New York, for example, where your author was admitted to practice, the state has several "departments" for examining fitness to practice. Each (of four, as recalled) sets its own timetable for application and admission following passage of the bar exam. In addition, although not so much as long ago, what personal characteristics of a candidate will be probed may be somewhat subject to whims of members of the examining membership. For example, admission to the 2nd Department, to which, living and working in Brooklyn at the time your author was subject, took months longer than the 1st Department (Manhattan, Bronx, Westchester County, etc.), which—early lesson in careful (lawyerly) reading!—resulted in a delay in getting a pay raise dependent upon "being admitted to the bar" (not merely passing the bar exam). It was said at the time (1978) that a member on the 2nd Department used to ask candidates if they had read *Das Kapital,* and if they had it was an

immediate disqualification. (Possibly apocryphal.) Even a felony crime conviction will no longer necessarily derail application for admission to the bar in most states. However, it may be noted that character fitness examining bodies will typically investigate one's employment history back through high school, and inquire about unpaid parking tickets!

[13] **Recent changes in state law** are a favorite source of issues for identification and discussion on (essay) exercises that depart from the standardized Multistate Essay Exercises increasingly utilized on bar exams. Whether the state one sits in composes its own essay exercise "questions" is something to be investigated.

[14] **California bar performance test model.** As of this writing, the three-day (very tough!) California bar exam has two three-hour performance segments, one administered on the first day, the other on the final day. Combined, they count for 26 percent of the total score. Candidates are required to perform any of a number of practical lawyer skills—e.g., draft a settlement offer, client letter, will, statute, etc. Also a closing argument or opening statement in a trial, etc. Factual data and a reference "library" are provided. Performance instruction is becoming part of the curricula of more and more law schools. One's bar review course will provide requisite performance instruction as part 'n parcel of the course overall, and/or as an optional supplement (for additional fee.) Once again, one is advised to research requirements/ options vis-à-vis state and bar review program offerings. Knowing the New York bar exam would test New York Civil Practice Law and Rules (CPLR), a discipline instructed in New York law schools, your author (in Connecticut at Yale Law) opted to pay for and take a commercial New York CPLR course offered in New Haven apart from the law school in his final semester before graduation.

[15] **Free bar review course.** Your author's (lawyer) daughter earned a free ($3,000+) bar review course by volunteering to be one of several class reps–manning tables, distributing literature, hosting free pizza parties. (Nothing onerous.) If interested, contact bar review courses ASAP in first year (better, summer prior!). Compensation is aforesaid free course, or waiver of substantial portion of the fee.

[16] See fn. 8, *supra.* Advice and practice respecting MBE multiple choice-type questions is offered in Section Three herein.

[17] **Law school busywork.** Type One's approach is reminiscent of that of virtually *all* first term 1Ls. Endless class notes are taken (as in college and graduate school; and as advised by law professors), because they can't make sense of class discussion. (The thought is, "I'll make sense of this later." However, *there is no later in law school!*) It is imagined that sheer industriousness will bring reward (as it did in previous academic endeavor). Such thinking, insofar as reward is imagined to be "A" grades, is incorrect. Voluminous class notes will prove largely useless. (Review of notes will give way way under the time crunch of semester's end to working on course outlines and memorizing legal principles). Most will get B's (for which they will feel grateful). More insight into the BIG PICTURE, and a much more savvy approach—provided herein!—is needed.

[18] Actually, this person probably was not overly successful in law school. He probably did not get A's. However, grade inflation and the low bar of expectation in law school ensured that B's and B+'s were easily obtained.

[19] **Choice of bar review course.** Your author's choice, should you wonder, was the cheapest offering—the (now defunct?) NY Practicing Law Institute (PLI) program. I recall the cost (1977) to be $150 (versus $250-350 for alternative BAR-BRI). At the time—pre-credit card for students!–, $100 was a concern. Note. I shall not recommend a particular course. Ask around. Considerations are online v. in-person lectures, cost, experience in one's state, overall-survey-of-law approach v. "Do-exactly-as-I-tell-you" guru approach. See fn. 4, *supra.*

[20] It is reiterated that *bar exam preparation has not been a LEEWS focus for many years.* Change in law school and bar admissions tends to be glacial. Nevertheless, change occurs. Prospective bar exam takers are cautioned to explore more current information sources respecting bar exams and bar exam prep. Notwithstanding, insights and precepts set forth herein should still prove largely on the mark.

[21] Your author took this latter commercial offering during his final semester in law school. It was not offered at Yale. Competitors from New York law schools typically had it as part of standard curriculum. (See fn. 14, *supra*.)

[22] Some students insist on recreating the course outline plus lecture notes "in my own words." Re-writing/[typing] is sometimes an effective memorization technique. However, it is hugely time consuming. Moreover, something is often lost in translation. (E.g., a rule misstated.) Should one have this inclination, beware of falling into the busywork syndrome described in Chapter Two.

[23] *One* may feel or be advised that studying in three-hour stretches is useful, as segments of the bar exam will be approximately three hours long. There is no comparison. One's energy and concentration level on the day of the exam will be far greater. Whatever one's study segments at home, one should have no difficulty sitting 3-4 hours at a stretch during the bar exam.

NOTES

SECTION TWO

PREPARING FOR / EXECUTING THE "A" LAW ESSAY EXAM RESPONSE[1]

(PROVEN EFFECTIVE [30+YEARS!], A-Z SCIENCE OF ISSUE IDENTIFICATION, ANALYSIS, CONCISE PRESENTATION, AND PREPARATION THAT MAKES ADDRESSING *ANY* ESSAY EXERCISE IN *ANY* SUBJECT ON *ANY* EXAM PREDICTABLE, MANAGEABLE)[2]

CHAPTER ONE

THE PROBLEM DISSECTED

Introduction

There is much more to be said about tackling the hypothetical-type law essay exercise featured in law school and on bar exams than the typical law graduate (with, perhaps, twenty such exams under her belt) will have heard. (Hereinafter "hypothetical," "hypo," "essay," "fact pattern.") Certainly, the novice law student will be completely in the dark regarding this omnipresent exam format. In January of her first year, this likely lifelong "A" student will become a "B" student! Moreover, so confused and floundering was performance on December exams, she'll likely be relieved to get B's. Fewer than ten percent of 1Ls will get more than one "A" grade. Most will get no A's, not a single one (even at top law schools).[3]

Despite eagerness to do well, intelligence, and exhaustive study efforts, the typical law student achieves B's, B+'s, the occasional C. Many law students receive their first ever D. (Even F, although such are few.) They have run afoul of an examination format unlike any encountered before, for which they are wholly unprepared to exhibit mastery. The vast majority of first, second, third year students (1Ls, 2Ls, 3Ls), have much to learn if they are to have any possibility of achieving an A on a time-pressured essay exam.[4]

Failure of Law Schools and Law Professors

It is not the normal province of a "how-to" book to decry the institution, circumstances, etc. that give rise to or perpetuate a problem needing solution. A kernel aspect of the problem of preparing for and handling law essay exams, however, is that the hypothetical-type format, in particular the response all professors are looking for, bears at best a misleading relationship to what is instructed in law school classrooms, especially how it is instructed.

In short, omnipresent "case method" instruction is wholly ineffective in transitioning entering 1Ls—academic thinker/learners in the main—to something approaching the (client) goal-oriented, nitpicking thinking/learning approach of the practicing attorney.[5] LAW ESSAY EXAMS, it will become evident, not surprisingly, ARE AT BASE EXERCISES IN WHAT LAWYERS DO. They test ability to problem solve—identify and resolve legal "issues"—much as a lawyer competent in the subject tested might. To this task, normally, is added severe time pressure. ONE WHO HAS NOT ACQUIRED IN REASONABLE MEASURE THE REQUISITE LAWYER MINDSET (who remains academic in thought and approach) HAS NO CHANCE OF COMPETING FOR AN "A" GRADE. None!

However a professor may describe what he/she is looking for in an exam response, AT BASE EVERY PROFESSOR WANTS EXACTLY THE SAME THING—IDENTIFY RELEVANT ISSUES; RESOLVE THEM AS A LAWYER COMPETENT IN MY SUBJECT WOULD. Indeed, examinees are often instructed to "imagine you are a law clerk" or "party A's attorney."

It is, of course, supposed that briefing/discussing (appellate) law cases—"case method" instruction—will prepare students for such an exercise. Such, presumably, will accomplish the necessary transition from academic thinker/learner to reasonable facsimile of (practicing) lawyer thinker/learner. However, for reasons set forth in footnotes 4 and 5 of this chapter and elsewhere, the instruction fails. It fails abysmally.

The academic tenor of law school classrooms does little to shift students, accustomed to theoretical, academic perspective, toward the goal-oriented, application-of-legal-tools-to-facts perspective of the practicing attorney. Case method instruction is especially ineffective in instructing the nitpicking dialectic of so-called "lawyerlike thinking."[6] Thus, NO ONE EMERGES FROM FIRST YEAR AMERICAN LAW SCHOOL CLASSROOMS PREPARED TO FUNCTION EVEN REMOTELY AS A COMPETENT LAWYER WHEN CONFRONTED WITH COMPLEX SETS OF FACTS—hy-

potheticals—ON EXAMS. For a bare handful, analytic skills and mindset akin to that of lawyers, acquired prior to law school, is enhanced somewhat. It is these few students who out-perform equally smart, equally diligent classmates—35, 45 points out of 100—, and receive scarce A's.

The classroom-exam disconnect contributes to and is exacerbated by mystique surrounding law, lawyers, law school, law professors. Confusion about what is wanted—in class, on exams—, coupled with mediocre exam performance (despite doing everything thought necessary to succeed), adds to the perception there is a mysterious, innate "lawyering aptitude" afoot that only a select few possess. Frustration and a sense of resignation sets in. Professors and law schools, subscribing to the self-serving idea that few have "The (necessary) Right Stuff" (of which great lawyers are made), seem scarcely to recognize the problem.

Not that efforts to allay law student unease have not been forthcoming. Responding to student complaints, possibly spurred by commercial efforts to address the problem, certainly sensitive to the escalating financial burden of student-consumers, most law schools offer some form of hands-on exam writing instruction. 1L orientation, greatly expanded from the hour-long welcome talk your author's class received upon entering law school (by a 3L), typically includes sessions on case briefing [the impractical, ineffective conventional mode is invariably instructed], studying, and exam writing. A professor or student organization may offer a program on how to prepare for and write law exams. Practice mini exams may be given and dissected (but usually not graded).

Although initially reassuring to new law students, such efforts do little to allay confusion resulting from making little progress in becoming a lawyer as term progresses. Preparation and exam-taking advice from various sources (excepting LEEWS!) offers standard do's and don'ts that have been around for decades, mere variations on "IRAC." (See footnote, p.7.) Such advice, what will be termed "conventional wisdom" (CW), is summarized at the end of this chapter. It has never been effective in enabling law students to exhibit reasonable competence, much less mastery respecting law essay exams.

By inadvertence or no, fundamental terms and concepts such as "issue" and "lawyerlike analysis" are never adequately defined or explored in depth in law school classrooms. (Students are embarrassed and/or afraid to ask.) Never even is what, exactly, lawyers do spelled out. (Revisit fn. 5.) Certainly, the essay hypothetical format itself is never seriously questioned. For all her smarts, diligence, and preparation, following the first set of exams the typical law student, whether at Harvard or Internet Law, realizes she did not really "get it" respecting how, competently, to go about addressing time-pressured, hypothetical-type exam exercises.

Why the Hypothetical-type Essay Format Persists (and is Omnipresent) in Law School

The fundamental problem with law school instruction has been noted—failure to transition academic thinker/learners to something approximating a practicing lawyer thinker/learner. Reasons for this trace back to influential, nineteenth century professor/lawyer/judge/jurist/author, William Blackstone's desire that lawyers have more university education, that they not be "mere craftsmen." Ever since law school supplanted apprenticeship as the primary route to becoming a lawyer, instruction for admittance to the profession has largely been in classrooms. It has been more academic than practical. An academic thrust and overlay is evidenced most recently by the seeming requirement of a PhD (in whatever subject) in addition to JD (plus superior law school grades and prestigious judicial clerkship) as prerequisite to being hired at benchmark law schools.

[Note. This subject is explored at length in your author's aforementioned 2012 GELS book. Also to some extent in footnote 5 of this chapter.]

Academic inclinations notwithstanding ["interdisciplinary legal education" is a current fad], respecting exams, law professors bow to custom (what they did [and were successful at!] as law students) and need to prepare students to pass a bar exam. Hypothetical-type essay exams remain the staple, especially first year.

[Note. Class-exam disconnect appears to be recognized by law professors. They seem embarrassed to give exams ending with an instruction of the order, "Imagine you are a lawyer." Often they are reluctant to discuss exams. One frequently hears, "Don't worry about exams." However, the hypothetical-type essay format—dense fact patterns to be sorted out under severe time pressure—is never seriously challenged.][7]

Class-exam disconnect notwithstanding, law professors, law school administrators, and law students (not so much lawyers) believe, near universally, that qualities and aptitude predictive of ability as a lawyer are ably tested by the time-pressured essay format. It is universally believed that one must have certain innate qualities of aptitude—The Right Stuff—to do well.[8] Thus, although indeed challenging, such exams are deemed appropriate, even fair.

It is believed that apart from following IRAC and standard exam-writing advice (again, set forth at chapter's end), a capable student need only "prepare for and attend class"—i.e., brief cases; take "good notes"—, "learn the law" (which students take to mean memorize rules), and "study hard."

Despite stellar qualifications of most students, law professors would likely be surprised if more than a handful were to exhibit exam proficiency meriting an A. The notion is afoot that even at Yale, Harvard, Stanford, only a very select few deserve the mantle, "genius of the law."

Sad Denouement for First Year Also-rans

Where does existence of an exam for which they are ill-prepared leave the great majority of smart, hard-working law students after a single term of law school? These students—80+ percent of the class—studied harder than ever before in their lives, yet managed nary an A. Moreover, they no longer believe themselves capable of A's, owing to (as demonstrated by exam performance) absence of The Right Stuff.

The answer, sadly, is summed up in "also ran." Following first term, certainly following first year in all American law schools—no exceptions!—the great majority of students are also-rans. Most in a law school class, all able, industrious, intelligent types, no longer have a shot at Law Review (top ten percent) and prestigious judicial clerkships. Apart from the top fifteen law schools, so-called "Big Law" jobs (high-paying jobs with large law firms) are out of reach.

Realizing they can achieve the same B's with far less effort, such students no longer work so hard. They slog through remaining years of law school bored, often cynical. For the first time in very successful academic lives, ego sustenance must be sought apart from grades—in lesser journals and extra-curricular pursuits. (E.g., prisoner's rights clinic.) The dream of being a great lawyer is much diminished, if not extinguished.[9]

The worst part is that also-rans blame themselves. They buy into the myth of The Right Stuff as be-all, end-all. They are persuaded they lack this elusive (mythical!) quality.

Despite ample evidence that time-pressured essay exams are a suspect indicator of future ability as a lawyer,[10] none (save LEEWS) seriously question the omnipresent essay exam format or, in particular, inappropriateness of case method instruction in preparing students to take such exams. The relatively few students who do well suffice to fill needs for "top-notch" research assistants (to professors), judicial clerkships and associate openings at large law firms, and highly sought after spots with prestigious government and non-profit legal bodies. Given the intensely competitive, ego-threatening, hierarchical atmosphere of law school, can one imagine a student or group of students with mediocre grades complaining to professors that the exam format does not provide a fair opportunity to demonstrate knowledge and ability?

In general, law student also-rans suffer silently. Perniciousness of the problem of essay exams and ill preparedness prompts rumblings of discontent. However, it is a low, self-conscious rumble sounding of sour grapes, and is largely unheeded. The idea there is a serious problem respecting essay exams and how students are prepared to address an exam that says, in effect, "Be a lawyer!", rarely surfaces.[11] Most also-rans accept the verdict they lack The Right Stuff. (Until success in actual law practice corrects this canard.)

Reluctance to Train the Practitioner as Impediment

Even were the problem of exam-classroom disconnect and failure to transition academic to lawyer generally recognized, the solution (such as LEEWS) must embrace the practical world of lawyering. Thus, law schools would likely shy away from changes in instructional format such a solution would dictate.

Here is fine irony. As will become apparent, the *essay hypothetical is omnipresent precisely because it is a useful device for both measuring and abetting a law student's progress in becoming a lawyer.* Therein its raison d'etre. Moreover, is the primary purpose of law schools not training lawyers?

Law schools can surely be faulted if they have not endeavored to train students to competently, ethically perform the lawyer's function. Yet law schools are loathe to think of themselves as a "trade school," as

but a training ground for the practical how-to of actual law practice. Hence, there is resistance to introducing clinical ("hands-on") programs to the curriculum. Instructors of clinical programs (often practicing lawyers from the community) are invariably second class faculty members. They are not given tenure. Their voices carry little weight.

Academic, Scholarly Focus as Impediment

By definition more teacher/scholars than lawyer/practitioners, law professors tend to be enamored with new trends and possibilities in jurisprudential thought. A factor in all-important US News yearly law school rankings is reputation for scholarship. As a result, law professors (more and more at benchmark schools possessed of PhDs) are encouraged in their allegiance to scholarly aspects of legal education. As a result, even experienced practitioners and judges, turned law professor late in careers (typically at lower-tier law schools)[12] are encouraged to introduce "policy issues" and shifting "rationale" into class discussion.

Nuts and bolts of "black letter law" (statutes, rules, principles), and how in straightforward fashion to apply it to facts—something akin to actual law practice—, tends to bore law professors. They overlook that mastery of a legal precept is prerequisite to inquiry into what that precept could or should be—so-called "policy." (E.g., how can a student think usefully about what law could or should be [policy aspects] until that student knows what, precisely, the law is?)

Frequently, classrooms are rife with conceptualizing and probing of the jurisprudential frontier—a comfortable atmosphere, to be sure, for academic thinker/learners. However, this is misleading respecting skills and thinking required to master an essay exercise. Again, the classroom-exam disconnect.

[Note. STUDENTS ARE SURELY EXPECTED TO KNOW BLACK LETTER LAW ON EXAMS—COLD! What a first term 1L fails to realize is that YOU MUST LEARN LAW ON YOUR OWN!][13]

Only belatedly, doubtless reluctantly, perhaps forced by realization that students are soon to go forth, supposedly competent in the subject matter, professors seem to recognize a responsibility to train legal practitioners. On the typical final exam, a student's ability to untangle and make legal sense of a morass of facts, parties, and circumstances, much as a practicing lawyer would, is tested. Unexpectedly, an abstract, academically-slanted course culminates in a complex, but eminently practical exercise in lawyering. NOT PHILOSOPHY OR POLICY, BUT NUTS AND BOLTS KNOWLEDGE OF BLACK LETTER LAW AND HOW TO APPLY IT WILL BE THE FOUNDATION OF A SUCCESSFUL RESPONSE.

Significantly, it is an observation reinforced by many students that precisely the professor who conducts a relaxed, policy-centered, academically appetizing type of course, will give a "spot-the-issue-give-me-the-black-letter-law," traditional exam. His counterpart, the intense, "Kingsfield type" [of *Paper Chase movie* fame], who is forever challenging (but ineffectively teaching!) students to "think like a lawyer," may surprise with a question calling for "your view as a matter of policy."

However, do not ask either of these professors (or school administration) to instruct how to analyze a problem as a "real lawyer" would. That would be rubbing a nose in something it wishes to avoid. Leave the practical world of lawyers (and how they think!) to second-class (non-tenured) faculty (brought in in response to student and bar association pressure). The latter are "adjunct" instructors of clinical programs. (E.g., trial technique, prisoners' legal rights clinics.)

Adjunct professors, typically local practicing attorneys, are of the real world. Unlike "real professors," they likely had more difficulty with essay hypotheticals in law school. They tend to be sympathetic to the plight of law students. Unfortunately, they don't normally give essay exams. Nor do they have clout necessary to broach to administration with any effect the problem of disconnect between class and what is required to handle exams "as a lawyer."

[Note. The problem of disconnect between law school classroom instruction and essay exams, certainly what, if anything, to do about such a problem, is far beyond the ken (or interest) of judges and lawyers. Moreover, they, same as adjunct professors and most everyone else, tend to believe in the time-pressured essay exercise as a fair measure of legal thinking aptitude (although they have suspicions).]

Study and Exam-writing Advice Law Professors Impart

The foregoing notwithstanding, law professors are aware their exams are problematic and provoke discontent. Moreover, they are sympathetic (to a

point), and not unwilling to offer assistance. The point is that by virtue of background, inclination, and commitment—to both essay format, and belief that special, innate qualities are necessary to handle such exams—, they are not up to the task of meaningfully addressing the problem. Typically, when professors offer advice about how to prepare for and address the upcoming exam, or exams in general (invariably late in the term, reflecting afore-noted reluctance to address exams), it is in the nature of the following [LEEWS additions in brackets.]:

- —An emphasis [naturally] that one "attend every class," "read every case," "know the law;"
- —Provision of model "A" responses to old exams and recommendation that one respond in similar fashion;
- —Admonition to "follow IRAC," or "IRAC the exam." [Meaning state Issue, then applicable Rule [of law]; Apply rule to facts [analysis]; state a Conclusion.];
- —[Proper] emphasis that the point is not to demonstrate memorization of rules of law, but to "spot" [identify] and resolve relevant—to facts, to legal subject area—legal issues;
- —Insistence they don't want, merely, to see bald statements of law and conclusions. Rather, "lawyerlike" [Aha!] analysis of issues is wanted. [However, "lawyerlike" is never adequately instructed.];
- —Observation [correct] that conclusion [outcome, who prevails] is unimportant. Far more important are steps of analysis in arriving at a conclusion;
- —Admonition that one spend up to 1/2 time allotted for a given "question" [meaning hypo] "planning" one's response. [To ensure that one plan (thereby, hopefully, produce less verbiage to be waded through), some (few) professors withhold access to software (how the response will be expressed) for the first hour of the exam.];
- —Imposition of word limit on responses to promote concision and planning;
- —More do's, don'ts, other general advice. [All of which is helpful, reassuring, but hardly a science of approach. None of it approaches LEEWS in depth or effectiveness.]

All of which is ultimately ineffective in raising anyone much above a remarkably low bar of exam performance. (Again, imagine 35, 45 out of a possible 100 points meriting an A. [50+ = A+?!])

The point is that even when law professors deign (or design) to offer advice on exam writing, they do so fitfully, cryptically. *They haven't really given the subject much thought, because they don't believe that effective response to exams can be reduced to a science*. [Such—a true science of approach—would diminish the mystique of their own typically superior (relative to classmates) law school exam achievements.]

For reasons given, law professors persist in feeling that exam-writing advice is largely unnecessary, even beneath them. [Many have the view that such will be largely unavailing, absent The Right Stuff.] Students perceive the latter in pained expressions and posture of professors as they (briefly) expound on this nuisance subject. Then, without fully satisfying students' needs, there is a terse: "Let's get back to more important matters." Topic closed!

[Query. Thinking about the foregoing advice, although helpful—manna from Heaven for clueless 1Ls!—, does it offer more than a general notion of what to do, or not do, but not exactly how?]

Although questions about exams abound, few dare raise more questions. One might query, for example, how, exactly, one goes about "spotting" an issue?[14] (See footnote for typical advice.) For that matter, what precisely *is* an "issue?" What, exactly, is "lawyerlike analysis?" Such, the impression students get, are questions of persons lacking The Right Stuff.

Conventional Wisdom of Essay Exam Writing/ Preparation (It isn't enough.)

Simple fact—law professors cannot provide meaningful assistance coping with essay exams without challenging, significantly altering overly academic bent of current law school teaching! Which they are unlikely to do. Nevertheless, it has been noted that some professors are sympathetic, even troubled by the problem students experience with exams.

There follows advice on the subject of preparing for and taking law essay exams, compiled by no less than a Harvard law professor, the now deceased, Derrick Bell.[15] To this very day your author possesses stapled, mimeographed sheets containing Professor Bell's prescriptions. These were given to me as a 1L by an upperclassmen, and have my original blue and yellow highlighting. This advice is reproduced at length and almost verbatim, because it represents a law professor's best effort at addressing what was obviously deemed an important problem—to Harvard students!

Professor Bell's advice is useful as reflection of what a law professor at a preeminent law school expects and wants to see in an essay exam response. Should one attend an exam-writing/study session offered by any law professor, any law school administrator, any law school organization, any commercial enterprise (excepting LEEWS!), or any and all of the bewildering array of law exam writing/study preparation offerings online and elsewhere, one is unlikely to encounter advice more thorough that that compiled by Professor Bell over forty years ago. Most offer far less.[16] Professor Bell's is a near-complete distillation of "conventional wisdom" (CW) of law essay exam writing and study advice.

And it is not enough! Not nearly enough!

Your author perused Professor Bell's advice eagerly and carefully. For me, the same as most confused, intimidated 1Ls when they first learn of IRAC, such advice (from a Harvard professor, no less) was indeed manna from Heaven. I felt I now knew what I needed to know. Put one's nose to the grindstone, follow this roadmap, success assured!

No! Same as all 1Ls, I immediately got confused and began to flounder when confronted with the first exercise featuring a bewildering morass of facts, followed by "Discuss rights and liabilities …"

The reason, of course, was 1) I was still an academic thinker/learner [Being told to "think as a lawyer," coupled with case method instruction, did not get the job done.]; 2) being told what one should do does not resolve how, exactly, to do something so complex or foreign as addressing several law essays under severe time pressure. (Or how, for the first time, to ride a horse, drive a car, surf, ski, hang glide, or merely walk [if infants could grasp instruction].)

More than merely told what to do, in instances of new and difficult challenges, one must be carefully shown how to address them.

In a nutshell, this is the problem with all CW. It is the problem with all advice that does not first question, dissect, and remedy a system of instruction—case method—that fails to adequately transition academic thinker/learner to something approaching (practicing) lawyer thinker/learner; and is, moreover, undergirded by the belief that how, exactly, to gain mastery of something so daunting as a law essay exam cannot really be taught, but requires innate aptitude, an undefined "genius for the law."

Professor Bell's prescriptions follow. Additions by your author are added in brackets.

[Note. Essay exams—hypothetical fact pattern exercises—were the only exam format extant in Professor Bell's time. Only following 1978 introduction of the uniform bar exam multiple choice component did multiple choice, short answer, true/false, and other "objective" formats begin to appear on law school exams.]

<u>Respecting preparation for the [essay] exam:</u>

—Know the subject area thoroughly (i.e., study the subject matter diligently).[17] [That's it!]

<u>Respecting actual writing [now typing] of the exam:</u>

—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. [More *what* to do.]

—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.

—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 [Meaning the fact pattern, not the question/instruction typically at the end of the "question."] and organizing.

  —Read the question [fact pattern] twice;

  —Note all the 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.

—Regarding the actual writing [now mostly typing]:

  —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;

—For each major issue:

—Begin with a statement of the 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 given facts, a particular rule or rules should be determinant of the legal issue. If there is another view, indicate recognition of it, and why you reject it;

[C!] —Resolve the issue;

—Write clearly;

—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;" [Note. In LEEWS parlance it is never "plaintiff." Rather, "movant!"]

—Avoid dogmatic expressions such as "certainly" and "undoubtedly." The point in most cases is arguable;

—Avoid abbreviations. At least limit them to those in common usage.

Dear reader. The what, as in what to do, what an "A" response is like, what a good response is and is not, is certainly contained in the foregoing. It is a thoughtful, well-intentioned effort at assisting law students. Excepting "state the conclusion first," your author, following 30+ years instructing this vexing subject, finds little to gainsay. Again, this is an excellent window into the mind of a law professor respecting what is wanted in an exam response. Re-read the foregoing before continuing.

Then ask yourself, "Having read the above (having studied it carefully), do I know how to implement it?" Confronted with a fact pattern and the task of addressing it "as a lawyer" (under significant time pressure), do I grasp in even small measure anything approaching a precise how of implementing the foregoing?

The answer must be an emphatic "No!" In a nutshell, however, enabling precisely such implementation is what instruction that follows will accomplish (!!). How to implement and reflect Professor Derrick Bell's advice—all of it!—will be integrated into systems, skills training, and instruction that follows. (Including whether to state a conclusion at the beginning [of analysis of an issue], the end, not at all; how and why.)

As suggested, current or updated CW offers scant more in the way of practical advice than the foregoing. [Not much changes in the law school exam writing firmament.] In the typical commercial, exam-writing offering, one receives such additional admonitions as "read through the hypothetical line by line to spot issue-generating words and phrases." By "attacking" various exams (segments thereof) one gains a better feel for what is and is not "lawyerlike" in problem analysis and resolution.

[Note. See leews.com (especially Standard Advice and How LEEWS is Different), for additional discussion of conventional exam writing/study advice and what it lacks. There are comparisons with some competitor offerings. (E.g., BAR-BRI; Flemings Fundamentals; the book, Getting to Maybe, etc.)][18]

Shortcomings of CW become apparent as soon as a student faces a new hypo exercise. There is immediate tentativeness, uncertainty how to begin to make sense of the tangle of facts.[19]

In sum, conventional wisdom and standard modes otf approach provide little more than a foundation for surviving an essay exam. They fall far short of affording smart, hard-working students the prospect of not being stymied from doing their best by (needless) confusion/uncertainty respecting how, exactly, to address the challenge presented by law school and law exams.[20]

Advice and methods that follow build upon CW, ignore or contradict it as appropriate, ultimately go far beyond. What is put in place is a disciplined, systematic science of preparing for and addressing any essay hypothetical-type exam; indeed, skills and approaches for addressing any legal problem-solving exercise. Addressing any and all exams becomes predictable. At all times YOU are in *control of the exam (!!), not the other way around*.

Mastery of what follows eliminates confusion about what one is doing, how one should proceed--whether in class, studying, taking an exam. There are no shortcuts, no tricks. One *does* have to know

law. However, how, as a practical matter, must law be known? However, how. as a practical matter, does one systematically identify *all* issues? How does one perform "lawyerlike analysis?" How does one present analysis concisely, effectively? (How does one brief any and all cases in 2-4 lines, while understanding them far better?!)

What follows enables exam results commensurate with ability and effort. What follows is no less than–-finally!–-a proven effective, true science of law essay exam response technique and preparation. What follows are rules, insights, a methodology, and a grounding in skills–-analysis; concise presentation; 2-4 line, exam-focused case briefing; etc.—-, that, with practice (essential!), enables a competent, even enthusiastic player in a most challenging game–-preparing for and taking law school exams.

There is much to learn! Carry on!

SECTION TWO CHAPTER 1 FOOTNOTES

[1] Most law school and bar exams are now typed into internet-blocking software. Law students are usually still given a choice of writing or typing exams. (Sometimes computer systems crash, and all must write exams.) Here and there a law professor still insists that exams be written long hand in "bluebooks." It has been noted that given a choice, one should type. (It's faster for most, neater.) A LEEWS grad will have nothing to hide or obscure. (A reason some might choose to write exams longhand.)

[2] **A true *science* of exam writing/preparation.** By "science" is meant a body of knowledge acquired via study and practice. One might add tested empirically. Science is distinct from ignorance and misunderstanding. It is not myth and supposition. It is in-depth "systematized knowledge." It is systems, general laws, knowledge perceived and tested via principles of scientific method. At best it is ultimate truth and clarity in a subject area.

In the instance of LEEWS, one will perceive a thoroughly integrated, logical progression that causes many to say, admiringly, "This just makes [common] sense," and "Why has no one thought of this?" (Latter question addressed below.) Suffice that many facets of LEEWS, tested, polished, proven effective over three decades, indeed seem common sense. Many are articulated by others. However, LEEWS near seamlessly integrates these along with important *new* facets and insights into a whole constituting several *systems*. LEEWS introduces unique, revolutionary foundational precepts and insights that unify the many facets, that make them comprehensible individually, but extremely sophisticated in their entirety. LEEWS is both broadly applicable—-to *every facet* of *every essay* in *every subject* in *every exam*, no matter question/instruction posed—-, while at the same time providing precise guidance in all phases of exam taking and preparing. This sets LEEWS far apart, and makes it *the only true science extant in the field*.

Proof, however, is in the pudding, not the blah blah. One must bend to the task of comprehending, progressing all the way through–-ideally, the live or audio program, supplemented by this book. (As noted more than once, learning from book alone, while possible, is difficult, owing to effort required, coupled with uncertainty the effort is worth it.) This latest, likely final edition, is the very best effort at making comprehension possible (and palatable).

Why law professors, etc. have never discovered (or adopted) the LEEWS Science. One may query why law schools, law professors, other sources never discovered or developed the LEEWS science (or anything approximating it). Why hasn't LEEWS been incorporated into law school teaching after all these years? This subject is addressed more extensively in *GELS*, your author's 2012 book. (Currently free download at www.leews.com.) Suffice, respecting discovery, one major reason is that law professors, law schools, law students, lawyers, etc. *cannot conceive/imagine the science LEEWS represents can exist.* Thus, none have sought to discover such a science. Nor do they want to! [Note. Your author happened upon the insight that put him on the path to evolving LEEWS by accident!] Developing LEEWS has required challenging not just assumptions and teaching methods that have existed for over 100 years that are at the heart of law schools' failure to adequately train the [practicing] lawyer mind, but law school itself as presently constituted. Hence the failure to adopt or incorporate LEEWS. Incorporation IS possible. It *should* happen. [Your author certainly thought it would.] However, significant power would shift to students. LEEWS IS A REVOLUTION! Professors or law school deans who implement LEEWS into curricula (e.g., in first year orientation) would significantly rock the law school boat. The seamlessly integrated, proven-effective approach now offered evolved over years and decades of thinking, testing, adding, refining.

[3] **Law school grading.** Grade inflation isn't nearly so great in law schools as in college (where often 50 percent and more of grades are A's). However, the time when law professors awarded no more than 2-3 A's in a class of 100 has gone the way of 1/3 of first year law classes routinely being flunked out of school (!!)I. Mandated curves at some schools—-U. Texas, U. Penn. etc.—-require that 20-30 percent A's be awarded. However, as has been and will be noted elsewhere, such is the (clear) standard of minimally competent performance "as a lawyer," that no professors give 20-30 percent A's! They satisfy the quota requirement by awarding A-'s (the new B+), which students are grateful to receive. Law professors continue to be stingy awarding solid A's–-typically fewer than ten percent. A+ is an exceedingly rare grade. (E.g., when Harvard Law awarded letter grades [until *circa* 2008], only two grades in a 1L section of 80 were reserved for A+. Often only one or none were given. This in a class of stellar LSAT scores and lifelong, straight-A, hard workers.) The average first year grade in top-tier law schools is now B+ and slightly higher.

[4] **Knack—-aptitude, genius?—-for writing law exams?** The point has been made that even those who get A's in law school [w/out LEEWS assist] don't come close to mastery of exams. Their efforts—-35, 45 points out of 100?—-are merely less incompetent than efforts of

classmates. However, what explains their seeming edge over equally smart, equally hard-working classmates? Are they not, after all, gifted in some way? Is there such a thing as "innate aptitude", "innate gift," "genius" for the law, The Right Stuff?

For over 25 years instructing LEEWS, your author subscribed to the notion of some few students having at least a knack. At this very point in eight (technically nine) previous editions of the *Primer* I wrote, "Save for those fortunate few with a knack for responding effectively to the essay hypothetical format (5-7 percent, and generally indistinguishable in college GPA, LSAT, and diligence from another 30-40 percent of their classmates)"… I had bought into the myth that some few indeed had something… innate, a special aptitude–-The Right Stuff. Moreover, they did not need an assist from LEEWS. (I.e., they could compete with a LEEWS grad of equal intelligence and diligence.) I now realize this latter notion is incorrect. **If true mastery of law essay exams is to be achieved**–-75, 85, 110 points out of a possible 100–-, especially given time pressure, **it will only be achieved via LEEWS!**

The opening off-hand quote of the U. Georgia torts professor (again, courtesy of a former student) opened my eyes. What I have since realized is that some law students indeed have a leg up in terms of approximating on exams the rarely manifested (practicing) lawyer mindset that impresses. It has long been recognized that engineering, math, hard science majors tend to do better on law exams than "good writers"–-e.g., English, journalism majors. To the list of those with an edge may be added any tutored in the close, mincing, nuancing thought processes of Talmudic study, computer science, some avenues of philosophy–-anything that hones nitpicking thinking and holding a conclusion in abeyance. Such mental instruction occurs *prior* to starting law school. It enhances the benefit of "follow IRAC" and other exam-writing advice that is of but minimal assist to more academic thinker/learners.

[5] **Case method instruction–-what's wrong with it?** So-called "case method" instruction–-reading/briefing *appellate* cases; discussing them in class via Socratic method–-was popularized by the influential dean of Harvard Law School, Christopher Columbus Langdell, over 100 years ago. (For whom the main Harvard Law building–-Langdell Hall–-is named.) Academic alternatives to "apprenticeship," the prevailing mode whereby lawyers once became lawyers, were tried elsewhere–-e.g., NYU, Columbia, Yale. [It may be noted that apprenticeship, learning at the feet of lawyers and judges, which continues to be the primary way lawyers learn to be lawyers in Great Britain *and here as well!*, was not suited to the bottom line purpose of law schools–-bringing instruction of lawyers (and revenue that implied) into the academic realm.] Langdell appropriated from the other instruction models, tinkered a bit, then promoted his case method model. Harvard was by far the largest law school at the time, sending graduates all over the nation. Case method became preeminent, *de rigueur* in virtually all American law schools. (Northeastern Law, which combines case method and practice internships, is one of few exceptions.) Here's the problem.

Appellate cases (cases on appeal) do not determine facts. Facts are determined at the trial level. (Cases on appeal are remanded [sent back] if additional fact-finding is necessary.) Thus, **gathering of facts, especially the nitpicking, nuancing, back-and-forth arguing of facts that practicing attorneys routinely engage in a trial, even hearing, is wholly absent from law school classrooms.** Law professors *do* try to encourage thinking about facts by introducing hypothetical changes in facts of cases–-so-called "what ifs." This is supposed to instruct ability to "think as a lawyer." However, it only succeeds for those with a propensity to such thinking acquired *prior* to entering law school. (Described in the previous footnote. Or LEEWS grads! [See Chapter 14 of this section.]) For most, such exercises fall flat. 1Ls in particular just take copious, largely useless notes.

There is little respecting what is discussed in appellate cases–-(established) facts, holding (result), law applied, rationale (reasoning)–-, and what goes on in an American law school classroom (typically amphitheater seating in large first year courses), especially with an overlay of socioeconomic, political, etc. "policy" woven into the discussion (comfortingly reminiscent of college and graduate school classrooms), to transition students away from the academic posture of thought/approach brought with them to law school. Again, **words such as "lawyer" and "attorney" are rarely if ever heard in law school classrooms (!!).** Discussion of clients, client outcomes, strategies–-*what, essentially, lawyers do!* (Employ substantive/procedural legal strategies to achieve client goals)–-… All such is missing in first year classrooms!

[6] **"Lawyering dialectic."** By this is meant back-and-forth argumentation respecting law and facts that opposing lawyers engage in. In an exam context this is implied in the expression, "be objective [in analysis]." This, along with "think as a lawyer" and other aspects of solving the complex puzzle of law school exams, will only become understood as one works through the complete LEEWS science, in particular instruction and practice of analysis..

[7] **Why the hypothetical-type essay format is not questioned.** One reason is that law professors likely has such exams when they were in law school, and in general did well. [A typical hiring requirement at top law schools is that one have made Law Review (top ten percent), clerked for a federal or high-ranking state court judge, and of late have a PhD.] "Doing well on exams," as has been noted, may only mean 35 or 45 points out a possible 100. Nonetheless, those professors happily accepted the verdict of their A's in law school–-"You have The Right Stuff!," "You're a genius of the law!" Having accepted this verdict on their worth, professors naturally believe in the essay format. They believe this not in spite of the format's difficulty, but *precisely because of its difficulty!* This, notwithstanding studies showing that those who later in life make the biggest impact in law are not usually the exam high flyers! They believe the time-pressured essay format is a fair test and measure of potential worth, aptitude, etc. as a legal *thinker* (if not practicing lawyer).

[8] See, e.g., "Law School Examinations," by professor Phillip C. Kissam, Vanderbilt Law Review, Vol. 42, No. 2 (March, 1989), in which, during a 70-page, somewhat abstruse treatise, the professor concludes, *inter alia (among other things),* "the exercise of examination productivity [meaning doing well on exams], especially in view of the speed required [time pressure], appears to involve a significant degree of natural talent." (At page 459.)

[9] It may be noted that skill and success where it counts–-practicing law–-easily revives confidence and the ambition of being a fine lawyer. (It did for your author.) However, many are indeed (and unfairly) relegated to lower echelons of the profession in terms of job opportunities. This is especially so at law schools below the first tier in prestige. GRADES ARE EVERYTHING IN LAW SCHOOL!

[10] **Evidence essay exams are invalid indicators.** The best evidence, of course, is the complete turnabout LEEWS has produced for over three decades in performance of law students who had already taken essay exams and performed at a mediocre level. Countless students have gone from C's to A's. Your author recalls a woman from SMU Law in Dallas, who took a live LEEWS program in Austin following so-so grades first term. She wrote following winter/spring term to report that she had gotten A's. So dramatic was her turnaround, that a professor she had both terms pulled her aside and demanded, "What happened to you?!"

Additional evidence lies in the circumstance that law professors are continually baffled when students they deem "brilliant," based upon class participation, falter on the final exam, while someone who never said a word in class or was inarticulate gets an A. Of course,

the profession has numerous distinguished lawyers whose exam performance in law school was unremarkable. This topic, along with many others, is explored more fully in the aforementioned 2012 book—*GELS.* (Free download at leews.com.)

[11] It should be noted that some few professors and law school administrators do seem to recognize the problem. However, nothing meaningful emerges beyond providing additional ineffectual conventional study and exam-writing advice. (See end of chapter.)

[12] **Practitioners as law professors.** A 2009 study of 40 law schools in various tiers found that average practice experience of new professor hires at lower tier law schools was 7 ½ years, versus *less than 2 years at top-tier schools (!!)* (which tend now to hire law grads with PhDs, fresh off prestigious judicial clerkships). Lower tier law schools—e.g., Thomas Cooley, Charlotte, Belmont, NCCU, U. Memphis, St. Louis U., Florida Coastal, John Marshall (Chicago and Atlanta), Georgia State, UNLV, and many others, including a host in California (e.g., Laverne, Humphreys, People's College, Venture, Santa Barbara, Lincoln, Northwest)—draw largely from a local populace (unless internet-based). Most graduates practice locally. Thus, it behooves such schools to curry favor and develop ties to the local bar—judges, practitioners—in order to enhance job prospects for graduates. (It may be noted that many, decent-pay jobs are to be had as clerks to local judges, in courthouses, etc.) Newly opened law schools in Dallas and Fort Wayne, Indiana, for example, have, not surprisingly, chosen prominent local judges as their initial deans, and local practitioners (at handsome salaries) as professors.

Do practitioner professors teach practical skills? Generally, no! Judging from the recent experience of a friend—Harvard Law grad, former BigLaw partner, current practitioner, now teaching a course at U. Memphis Law—they are somewhat intimidated to be back in academe (where they often did not ace essay exams). They may amuse and regale students with war stories from practice. However, generally they toe the line in terms of teaching formal (versus clinical) legal subjects. They employ the same case method they experienced in law school. Gradually, they ease into Socratic node. They do not rock the boat respecting how formal classes are conducted.

An exception. A professor comes to mind at NCCU Law (North Carolina State U.), a traditionally African-American, albeit state institution, now roughly half 'n half black/white mix. Knowing most of his students would hang up shingles as solo practitioners, this former practicing lawyer has long felt it incumbent to instruct students about "the missing witness, Mr. Green." The expression, "[If it please the court,] I request a postponement while the important witness, Mr. Green, is located," is code between lawyer and court that the lawyer has yet to be paid, does not think payment will be forthcoming should the case conclude (e.g., client be let out of jail), and would appreciate the indulgence of the court—consent to a delay, etc.—in assisting in this important aspect of small-bore law practice.

Students in live LEEWS programs love this anecdote, as all (bored reading appellate cases) are eager for a sense of actual nuts and bolts of being a lawyer. However, this single instance of practical advice being delivered by a (full, tenured) law professor is the *only one* I can offer after over three decades of instructing countless law students, from 200+ American law schools (!!). No others have been brought to my attention in countless interactions with students. None!

[13] **"This is not a bar review course!"** Such seems a prevailing attitude among professors at top-tier law schools. It reflects the scholar/practitioner divide, and reluctance to be seen as an enabler in a (mere) trade school.

[14] **Issue "spotting" advice.** First, note! The very concept—issue spotting—presumes a haphazard, hit/miss process. The idea that a disciplined, systematic, even scientific approach to identifying relevant issues might exist is altogether absent. In contrast with the unique, proven effective, *science* of issue identification presented herein, the answer given by law professors (and all others!) to the question, "How does one spot (identify) issues?," will be of the following: "Read facts carefully;" "Make notes in margins;" "Circle 'issue-generating' words and phrases;" (???!) "Follow the transactions;" "Follow a checklist." Such advice is helpful. (Better than nothing.) However, it is far from a science. The impression that "issue spotting" is an art of sorts, something some (innately) will be better at than others, remains. An initial problem is that "issue" remains a concept never precisely defined. (As it surely will be herein. Of course, there are different kinds of "issues." Some are major, others minor, others "real.") (See also fn. 19 following.)

[15] A Pittsburgh native, first tenured African-American law professor at Harvard, one-time dean of U. Oregon Law, visiting law professor at Stanford and NYU, celebrated teacher, and prolific author, Professor Bell was an iconoclast and noted supporter of students, minorities, and women.

[16] Beyond variations on CW, what is often offered in such sessions that Professor Bell's handout does not, is experience writing a practice exam or two, then going over the exam and having good and bad aspects pointed out. This is helpful, but hardly solves the problem. LEEWS, it will be seen, in stark contrast, takes an approach whereby "writing a response to an exam," "writing [even] a response to a single hypo" is too broad an undertaking to be of practical, instructional value. It may be noted that writing practice exams, versus the LEEWS approach (essentially focusing on practice *paragraphs,* the sum of which constitute the response to either hypo or exam as a whole), has occasioned a minor difference of opinion with the pseudonymous author of a popular book (that highly tout LEEWS), *Planet Law School.*

[17] Meaning, "know the law," the standard WHAT to do (vs. HOW) advice (plus "IRAC") given by law professors.

[18] For contemporary examples of useful, far-from-a-science advice law professors offer, Google search "law exam" for leads to articles by various law professors. Virtually every professor, every law student has views on what works, what does not, respecting preparing for/addressing the problematic essay exam. The menu is bewildering. Who does one believe? Who does one trust?

There is **a simple dividing line, a simple test of whether an exam writing methodology offers anything new, useful.** (I.e., more than CW?) *Does it challenge and address—at all!—the disconnect of class and exam? Does it challenge, dissect, remedy failure of case method to transition academic thinker/learner to something approaching practicing lawyer thinker/learner?* Does it fault law school?

If not, what is offered is warmed over variation on CW, especially IRAC. In addition, one encounters extreme notions promulgated as solutions—e.g., "Course outlines should be 200 pages long, minimum;" "Take at least 50 practice exams." Such overkill, *sui generis* approaches doubtless helped someone at some time do well—35, 45 of 100? However, they are person/situation specific, impracticable, far from a science of approach.

[19] **CW re "issue spotting."** (Adding to fn. 14) CW advises, in effect, that one merely dive into fact patterns. Thus, "Read facts carefully [maybe twice];" "Pay attention to transactions;" "Develop a timeline;" "Circle issue-generating words and phrases" (i.e., words/phrases suggesting legal topics to discuss); "Follow a checklist" (of legal topics). Well and good, IF one has a talent (knack?) for remaining calm in a tense, time-pressured situation; IF one has a methodical cast of mind that holds firm amid chaos. No reliable system, much less science is implied. Rather, as noted—fn. 14—, such approaches suggest haphazard approach. Art, knack, innate traits seem requisite. Some will be more adept. Sink or swim. [Is this of more than superficial relevance to future ability as a lawyer?]

It will be seen that simply plunging into a fact pattern, attempting to discern issues in the midst of all that a complexity of facts contains, is an initial major error (made by most). The foregoing CW approaches are fraught with potential for being overwhelmed, confused, intimidated. The most calm and methodical will miss issues. At best, results will be in the 35-45 range (out of a possible 100).

LEEWS, in sharp contrast, **instructs that one *never dive into a fact pattern.*** LEEWS cautions that hypos are a morass, a quagmire. *Only* in segmented, piecemeal fashion should they be addressed. A*lways* there is a limited, piecemeal focus. In *disciplined fashion* the whole—a fact pattern—is systematically dissected, components are addressed, then they are put back together. Such management—control of the hypo vs. vice-versa—is accomplished *every time* by a true science of approach, applicable to *any and all* essay exercises.

[20] **Advice of supposed experts.** It is noteworthy that exam writing advice of a supposed "expert," published by *The National Jurist magazine* in Spring, 1992 (magazine distributed free to most law schools), in a special issue entitled "Surviving the Bar Exam," offered far less than the generalities expressed by Professor Bell. The same can be said of similar articles by law professors, administrators, and others that appear every fall in this publication in its "law school survival" issue. As noted, not much changes in the law exam writing firmament. The essay exam format persists. CW remains merely helpful, ultimately ineffective for most. With but the rarest of exceptions, **no one masters a law essay exam**—85, 95, 110 points of a possible 100—, **except that they have mastered the LEEWS Science!**

CHAPTER TWO

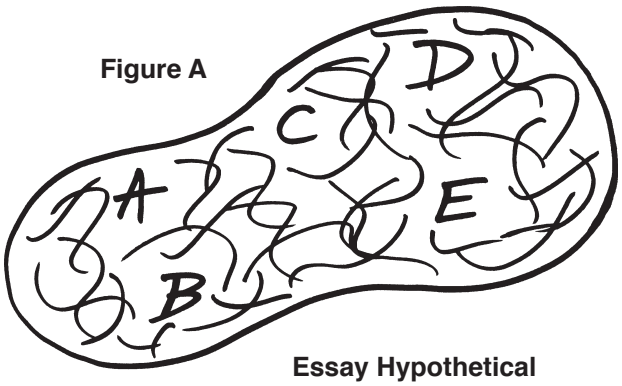
PERSPECTIVE ON THE EXAM, THE PROBLEM, THE PATH TO A SOLUTION

Nature of the Beast

The Appendix herein contains eight hypotheticals in various legal subjects. Each is followed by legal precepts necessary to address the exercise, also model planning and response, executed per LEEWS. All but the so-called "Combination Law Hypo" (p. 146) are representative of exercises one might encounter on a law school exam. The Combination Hypo is representative of an essay format sometimes found on bar exams—several legal subjects combined in a single hypo. If you have never taken or looked at a law essay exam, refer to the Table of Contents before continuing. Look at a few of the hypos in the Appendix. Think about the questions/instructions following the fact patterns, and how one might go about responding. However, do not at this time try to make sense of either model planning or responses.

Consider the following figure:

Figure A



Essay Hypothetical

Imagine squiggles inside Figure A represent *facts*—dates, places, circumstances, events, other information. Imagine the (5) letters represent *parties*—persons, groups, corporate entities, government agencies, etc. Such constitutes your author's (the LEEWS) figurative representation of any and all essay hypotheticals, whether encountered in law school or on the bar, whether three lines or 5-10 pages in length.

Typically, in passages varying in length from a few lines to several pages, a hodge-podge of facts is presented. Lurking within this factual chaos, we shall see, will be *at least two,* often more parties. In its most troubling specie (because SO little guidance is provided) the exercise concludes with a terse question or instruction ("question/instruction" [Q/I]) such as the following: "Discuss rights and liabilities of all parties," "Draft a memorandum addressing all relevant legal issues," or, simply, "What result?"

The task of an examinee is to identify ("spot") all legal issues prompted by the fact pattern, then resolve those issues, applying relevant legal precepts—rules, statutes, etc.—and logic in a penetrating ("lawyer-like") analysis. Typically, such must be accomplished under severe time constraint—15, 20, 30, 60, 75, 90 minutes.

The exam format is different from any encountered in high school, college, graduate school. As noted, a problematic difference is that topics to be addressed—issues—must first be discerned/located amid the factual hodge-podge. Imagine a math exam presenting mere data, and instructing, "Figure out the questions. Then answer them!"

Understandably, there is confusion over what is expected. Being laymen (academic thinker/learners!),

not lawyers, law students, particularly 1Ls, have difficulty grasping the import of "rights and liabilities," "resolution of issues," "application of rules of law," "interweaving of law and fact" (analysis). Law professors, accustomed to thinking in such terms, perhaps for reasons previously noted, neglect to define such concepts. (Intimidated law students do not ask.)

Left to their own devices, examinees naturally fall back upon habits of exam taking that for many years have brought success. The following illustration of the difference between what is required on a law school exam, and what was expected on exams previous, demonstrates the degree of adjustment necessary if success is now to be attained.

Key Difference Between Law Essay and (All) Other Exams

Prior (non-law essay) exams for the most part call, merely, for regurgitation of information and ideas gleaned from assigned reading and class discussion. For example, a question on a history exam might ask for "Root causes of pilgrim migration to the New World." An examinee on top of assigned reading now perhaps recalls a religious motive, an economic motive, a political motive, a social motive, a moral imperative, etc. The task in successfully responding to the question is to but present and explore those various motives, as they were presented in assigned readings and elaborated on in class discussion. *Memorization and regurgitation* is key! Addition of new, original insight earns bonus credit.

THE LAW ESSAY FORMAT TAKES MEMORIZATION OF RELEVANT (NECESSARY) LEGAL INFORMATION AS A GIVEN. It is assumed any law student/graduate can memorize legal rules and precepts. Thus, respecting the above pilgrim example, it is assumed root causes for migration are known. What is tested is not memorization/regurgitation, but ability to *apply* known information in problem-solving fashion to facts and circumstances not seen before, arriving at resolution. In no small measure, the exercise is math-like!—apply known principles (akin to theorems/formulas), but first discern the problems (issues) needing resolution. No wonder non-math/science—liberal arts—types have a problem (a lump in the throat), and math/hard science/engineering types have something of an advantage.[1]

The pilgrim example in law school (or on a bar exam) becomes the following exercise (fact pattern followed by instruction):

> You're in the land of OZ. The political situation is as follows…. [A scenario is described.] Economic conditions are as follows.... The religious situation is as follows.... Social conditions are as follows.... (Additional facts are introduced.) [Societal] groups A, B, C, D, and E reside in OZ. These groups have the following respective characteristics, beliefs, hopes, circumstances....

[Figure A, preceding, figuratively represents this tangle of parties and facts.]

> [Instruction:] Predict which, if any, of the above-named groups will migrate to the New World. Defend your positions.

Knowledge of reasons that would motivate a group to migrate is taken for granted. [Learned via reading/briefing a series of pilgrim cases.][2] What is tested is ability to apply correct reasons/rules to relevant facts in an interweaving called (lawyerlike) "analysis," so as to predict whether group A, B, C, D, E will migrate or no, and why? Whether A, B, C, D, E will migrate—conclusion—typically is not nearly so important as the analytic process in arriving at the determination. (This differs on bar essay exercises.)[3]

Regurgitation of memorized reasons/rules (governing migration) is but the starting point. What counts is analysis—ability to think and reason (as a lawyer). THE HYPOTHETICAL-TYPE EXERCISE PRIMARILY TESTS ABILITY TO EXPLORE RELEVANT, IDENTIFIED LEGAL PROBLEMS (ISSUES) IN A THOUGHTFUL, BALANCED WAY—as a lawyer competent in the subject matter (reasonable facsimile thereof) might. (Easy to describe; not so easy to do!) Issues (legal problems), must first, however, be identified ("spotted").

Description of Typical Law School Exam

Bar exams were described in the preceding Section. The *typical law school exam* is 3-4 hours,[4] and will entail several hypotheticals (a/k/a "questions").[5] Some exams include a multiple choice segment, similar to what is encountered on a bar exam. (Often questions from past bar exams.) Infrequently, true/false and short answer formats are encountered.

In rare Instances *no fact pattern is provided*, only a question or instruction. (E.g., on a property law exam: "Who owns the moon?" [1/3 of the exam!]) Such an exercise seeks to probe not just knowledge of property law principles, but exploration of why and wherefore of such principles—"policy emphasis."

(Advice respecting this specie of exercise is provided in due course.)

However, in the main there are characteristically complex, fanciful fact scenarios, often populated by entities with amusing names. (E.g., "Mr. Whodunit;" "Mr. Contract Complete;" "Paul Polluter;" etc.)[6]

"Hypotheticals" are normally assigned time limits. (*Which should be observed*, as responses will be weighted accordingly.) Limits vary from 10-90 minutes or more, depending upon the grader's assessment (never precise) of a hypo's relative complexity.

Very rarely, an examinee is offered a choice of hypotheticals. E.g., "Choose 3 of 5,"... "5 of 7." This option, thought to be progressive, is designed to mitigate penalty owing to gaps in knowledge that cripple performance on a given hypo. (Thus, choose another.) However, it also entails far more work in grading. Thus, the (extreme) rarity of the option. TIME PRESSURE ON ALL LAW EXAMS IS NORMALLY SEVERE.

The salient difference between law school and bar essay exercises is that the former normally test knowledge and application of but a single area of law (from the course in question), while a bar hypo often requires drawing from knowledge of several areas of law—e.g., criminal law, evidence, procedure. (Rarely more than three or four areas of law, which areas typically are segregated by question and/or paragraphs. See Combination Law Hypo, p. 146.)

Response of Typical Law Essay Examinee (Exercise in survival, not mastery)

During 30+ years, countless LEEWS attendees who've taken even a one-hour midterm have snickered, nodded knowingly, approvingly at the following description of how most law students react to hypothetical format exams. Effective address of the exam, much less mastery, seems highly improbable:

> You enter the exam room nervous, but confident.[7] Considerable law has been committed to memory. Indeed, your brain is bursting with legal precepts. So is your course outline, likely completed the night before. (Assuming an "open book" exam.)[8]
>
> You select a seat, perhaps nod to a fellow student, force a smile of confidence. (Again assuming "open book,")[9] out of roller bag/book bag is pulled computer, course outline, casebook, perhaps a commercial outline. These are arranged around the (typical) hard copy of the exam, picked up coming in, or already on the desk. Per instructions (on chalkboard or announced), you do not open it. You also grabbed several sheets of scratch paper coming in.[10]
>
> A couple more days to polish, master the course outline would have been helpful. There was a law review article you didn't get around to reading. However, a little luck... You're reasonably confident. YOU KNOW A LOT OF LAW!
>
> Told to begin, you open the exam [hard copy or software] and skim a paragraph or more of—"cover sheet" general instructions. (E.g., "Pay attention to time limits;" "Unless otherwise instructed, assume that state [federal] law applies;" "Read questions [meaning fact patterns. Sic!] carefully, preferably twice;" "Do not assume facts;" "Support conclusions;" "Do not merely restate facts, as I [grader] already know them;" etc.)
>
> [Advice! Read cover instructions on lots of old exams. This enables you to skim and pinpoint what, if anything, is new/unique to instructions for the exam you're confronting.]
>
> You're still unsure what "apply law to facts" means.
>
> Having read the cover instructions (hopefully 2min., not 5…10?), you plunge into the first hypo, "reading carefully" (as instructed by professor, upperclassman, all offerings but LEEWS). You seek to "spot" "issues, which you correctly take to mean legal topics meriting discussion. You know to "circle issue-generating words and phrases," "make notes in the margin," pay attention to parties, transactions," etc.
>
> 15-20 seconds into the first hypo, you perhaps peripherally notice a few heads popping up. Maybe yours does as well. What's going on?... Some have not yet found anything reminiscent of the course! Perhaps they/(you) have the thought, "Am I in the wrong room?!"... They/(you?) scan nearby faces… Okay. Familiar. This is the correct room.
>
> What a crazy fact pattern! ... [Head raised or no, you agree in this regard.]
>
> [Advice! Along with earplugs to screen out incessant tapping on keyboards, bring hat or cap to create personal space shielded from distracting glare of surrounding computer screens.]
>
> You reach the end of the first hypo. Minutes have ticked off the clock. Although the room is chilly, you perspire slightly. Also palpitate. Confidence rapidly ebbs. Impossibly, given the amount of law digested, you're drawing a blank. "I DON'T SEE ANY ISSUES!" is the paralyzing thought. [What, exactly, is an "issue," anyway?!]

Sudden furious tapping on a nearby keyboard is heard. (If no earplugs.) A quick glance, an anxiety pang. What could that person be discussing so soon? Got to get going! However, the first hypo seems tough… Perhaps peek at the next. Advice of a professor provides comfort. She said, "Read through the entire exam before beginning your response."

You quickly scan the second hypo. Principles surge in your brain. Must calm down! However, focusing on anything in particular is elusive. The end of hypo #2 is reached.

A few things to discuss have emerged—issues? You hastily scribble some notes. As instructed, you're "planning" your response. On to the next hypo….

Fifteen minutes down! [TIME IS FLYING!!] You've surveyed the entire exam. However, you've yet to begin your response. Fatigue of recent late nights settles over you like a blanket. Your heart pounds. A sense of panic rises. You're confused, way beyond nervous.

[Note. Occasionally (not often) a law student is seen to leave the room... Just gets up, gathers materials, leaves… Perhaps gets a medical excuse and retakes the exam… Perhaps does not return to school… Most law students are tough, accustomed to success. They persevere.]

You're also tough, accustomed to success. You persevere as well.

Deep breath. Back to first hypo. Time to dig in. But what is there to discuss for three, four hours?

[Note. Most law students are frustrated at this juncture—20 minutes into an exam. The exercise doesn't seem to provide fair opportunity to demonstrate knowledge of law. Questions/instructions are confusing—e.g., "Pretend you are a judge," "Imagine you are a law clerk." (???) There is no opportunity to… Pour out (regurgitate) all one has committed to memory?! Which one expects to do.]

With bated breath, you call upon exam-writing advice you've encountered—e.g., "Read facts carefully," "Every word, every phrase may have issue-generating significance," "Outline the response."

[Note. Does any of this offer guidance much beyond, "Go in and find and discuss issues?!"]

You move through the first hypo again, concentrating. Aha! You're reminded of a case, a principle. Surely this is an ISSUE!

Gratitude, relief floods your body. Fingers tap the keyboard furiously. You fill the computer screen with anything and everything tangentially relevant that pops into your head. Major issue, deserving of much attention and discussion, or minor issue?... You could care less. At this juncture you're literally in survival mode... *HELP!!*

Fingers slow, as nothing more on one topic is forthcoming… But then something else legal pops into your head—another topic, issue! Off you go!… Then something else to discuss,… Something else.

Law and discussion are flowing. Everything that pops into your frontal lobe the professor might remotely be interested in,… You tap, tap it onto the computer screen—furiously!

It's uncertain where one discussion ends, the next begins. Thus, few paragraph stops. Few, if any, labels. [Hard to label when not sure what something is, where it's going.] Response is fugue-like, nonstop, rambling—a rule half stated, a snatch at facts, a conclusion, something else,... So long as the discussion has a legal feel, couched in the subject area, so long as it is something the professor *may* be interested in,… Express it!

And you feel better, much better. You actually feel pretty good! Because, similar to classmates, you're engaged, you're busy.

Are you mastering the exercise?...The answer would have to be "FAR FROM IT!"…Too haphazard, too disorganized! Any notion of mastery left the building long ago. However, enough, surely, is being produced… to pass. At least on this hypo.

[Note. From the outset the law essay exam, not the student is in control. Students are immediately put on the defensive by unfamiliarity of the exercise, uncertainty re what is wanted. Accordingly, THERE IS NO POSSIBILITY OF MASTERY, SCANT POSSIBILITY OF AN "A" GRADE! The advice of not a few "experts" is, "Start writing (typing) from the outset. Toss in the kitchen sink! The name of the game is scoring points." It bears reiterating that no one believes law essay hypos (under severe time pressure) are subject to disciplined, scientific approach and management. 25-35 points out of a possible 100 is the expectation!]

A glance at the time. Whoa! Suggested time on the first hypo is 45 minutes! Over an hour has passed.

More hypos to address. Where has the time gone? Pang of anxiety. More to say, but must move on. ...

So it goes. Fast, furious. Chance, haphazard identification of topics. Rambling outpouring of law. "Analysis" is superficial, conclusory…

[Note. The effort described in the foregoing is about survival. Approach is too hit-and-miss for all, even most issues to be identified. Much discussion is irrelevant. "Lawyerlike analysis" (whatever that is) is largely absent. The skill was never acquired. Mastery, "A" grades, the exam taker now readily agrees, requires something innate, a genius aptitude for the law—The Right Stuff! A passing grade would be welcome. A "B" would occasion tears of gratitude.]

Eventually, much sooner than would have been expected, the command to "STOP" is heard. One taps a few more words, pauses, exhales, presses "send."

With more time more could have said more, one could have done a little better. However, no matter. You yawn, stretch. You've produced so much response… You're pretty confident a passing grade has been achieved. You've heard most students get B's. You're even somewhat pleased with yourself. The ordeal is over. The predominant sentiment is, "I survived!"

A passing classmate asks if a particular point was discussed— "Did you see the issue about …?"

A pang of anxiety is suppressed. Perhaps amid the outpouring of content you *did* discuss the point, you did spot that issue. Hard to recall. And you have no desire to rehash, to revisit… the ordeal.

You don't try. You grin, ignore the question…."Too late to worry about that," you say.

One-up-man-ship nonsense! You did your best.... What's for lunch?

Later, exhausted, you take a nap. You'll resume studying in the evening. Tomorrow brings another exam.

Satisfied with surviving, passing? Hoping for a B? As much as law students study, as important as grades are to job prospects, this is not just a curious, but a pitiable reaction. However, it is an altogether typical. IT IS THE NORM AT YALE, HARVARD, STANFORD—ALL LAW SCHOOLS!

Such is the confusion and anxiety engendered by the essay hypothetical-type exercise that virtually all law students are reduced to variations on the response described above. Such an effort—25 points out of 100, 30?—deserves a "C" and worse. Failing fully one-third of entering classes was once the law school norm.[11] However, inflated grading curves at most law schools will now award a B, even a B+ for sub-mediocrity.

However, good news! "A" grades—35, 45 out of 100?—are not so far out of reach as law students imagine. [The "A" standard is not something students research, nor professors readily divulge (U. Georgia example excepted).] Given the difficulty of exams, A's indeed seem out of reach. Students know full well they haven't exhibited anything close to mastery, and don't deserve an A. (Or a B!) As noted, they fault themselves. They surmise they lack what is necessary for mastery—The Right Stuff.

Getting a Leg Up on the Problem—Breaking the Hypo (any hypo!) Down into Manageable Units

If one considers various essay exam exercises, it will be realized that those concluding with a series of pointed inquiries—e.g., following a civil procedure hypo: a) Was service proper?; b) Was the venue ruling correct?; c) Was party Y's answer timely?—are less daunting than ones concluding with an ambiguous "Discuss rights and liabilities of all parties."

[If one has taken no essay exams, or only a couple, contrast at this point the questions/instructions following the Torts and Corporations hypos. Appendix, pp. 134, 166.]

The reason the prior question format is preferable is it provides specific guidance respecting what to do. It focuses attention, question by question, on finite portions of the fact pattern—i.e., facts relating to, respectively, service, venue, timeliness. These facts will constitute but limited portions of the hypo overall—segments thereof. Moreover, pointed questions suggest what portion of the swirl of law in one's brain to focus on—respectively, principles having to do with proper service, proper venue, timely answers.

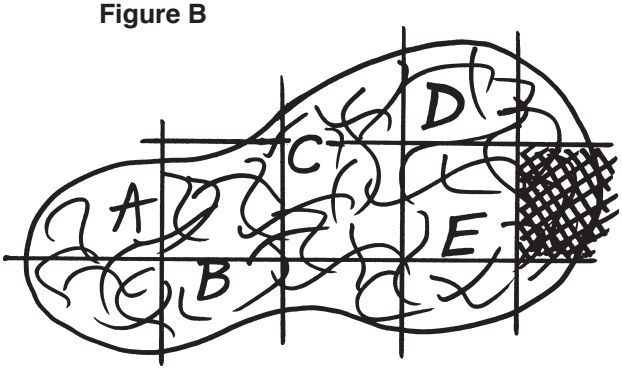
The latter format—"Discuss rights and liabilities of all parties"—, what may be termed an *"open-ended inquiry"* (question/instruction [Q/I]), leaves one confused. (E.g., "Where do I begin? What are the issues? What facts should be considered? What law, and in what order?") Open-ended inquiries (Q/I's) require that specific questions to be addressed first be deter-

mined. (I.e., one must first identify—"spot"—specific issues.) Only then can response commence.

Clearly, having a specific, focused legal inquiry to address is a leg up on having first to determine what the legal inquiries are. The more specific and focused the inquiry—issue!—, the better. The question arises then: *is there a consistent method for reducing confusing tangles of facts, parties, circumstances* (*the typical essay hypothetical*) *to a series of specific, relevant* (*to facts and Q/I, whatever the latter's form*)*, focused inquiries?* If so, such a technique would go far toward lessening anxiety and improving exam performance.

Consider the following figure:

Figure B



Manageable Component

Perhaps the most innovative aspect of LEEWS is development of the method suggested above the figure. Figure B represents its figurative imposition on the hypo represented by Figure A (p. 30), or *any* essay hypo. In effect, the fact pattern is subdivided into the units or components represented by blocks of the grid. *Each component corresponds to that finite portion of the fact pattern to which a narrowly focused inquiry would direct attention—several words, a sentence, at most a paragraph—, the inquiry itself, and the law that such an inquiry would require to be applied* (which will also be finite in scope.)

Addressing a hypothetical as a whole poses a confusing, daunting prospect. Addressing but a single component posits a task capable of orderly resolution. The component may be said to be *"manageable."*

The approach system to which you will now be introduced will enable you in disciplined, step-by-step fashion, to break *any* fact scenario down to manageable components. Confronted with the jumbled chaos of a hypo, open-ended inquiry or no, one can consistently generate a series of narrowly focused, relevant legal inquiries (corresponding to narrowly focused, relevant *issues!*). These allow you to focus attention on a *limited* amount of legal knowledge, a *limited* portion of facts. THE TASK IS *NEVER* TO ADDRESS A HYPO AS A WHOLE (confusing, daunting!). RATHER, MANAGEABLE COMPONENTS THEREOF.

What must be grasped at this point, the mindset with which one must at all times approach the problem of exam writing, is that HOW ONE ORGANIZES/WRITES AN ESSAY EXAM (OVERALL) IS *NOT* A RELEVANT, USEFUL INQUIRY. ["Who knows?," "How confusing?" seem appropriate responses to this black hole.]

THE RELEVANT INQUIRY IS HOW, CONSISTENTLY, TO BREAK *ANY* AND *ALL* HYPOTHETICAL-TYPE ESSAY EXERCISES DOWN INTO MANAGEABLE COMPONENTS, EACH COMPONENT REVEALING A RELEVANT ISSUE. (I.e., narrowly focused legal inquiry?) If you can do this *efficiently*, if you can analyze and present analysis of each such component (issue!) concisely, effectively (in roughly a single paragraph), the problem of law essay exams is solved!

THE SUM OF EFFECTIVE HANDLING OF EACH COMPONENT (EACH ISSUE), ONE AFTER ANOTHER — as we shall see, a series of concise paragraphs (roughly one per issue)—WILL BE EFFECTIVE HANDLING OF A HYPOTHETICAL OVERALL! It will be a far more impressive effort than the confused, hit-miss, typical approach described. Unlike the norm described, the test taker—YOU!—will be in control, not the exam.

The idea is to make addressing any and all hypothetical-type essay exercises predictable, manageable. The approach that follows accomplishes this. It provides confidence, even eagerness as one acquires a proven-effective handle on the problem, a genuine science of approach.

Processed via the (three-step) LEEWS issue identification system, response to any and all hypos becomes, essentially, a series of concise paragraphs, each presenting analysis of an issue a professor (or bar grader) wants discussed. If most issues are addressed and analysis impresses, top grades result.[12]

As noted, possessed of a system that makes such predictability possible, one feels confident. Confidence is a key success factor on any exam.

SECTION TWO CHAPTER 2 FOOTNOTES

[1] **Advantage of math/science majors.** That math/hard science/engineering types tend to perform better on law essay exams than liberal arts/"good writer" types is recognized (Why this is, is not!). Similar to law essay exercises, math, physics, chemistry, engineering, and other "hard science" problem solving requires application of rules, theorems, principles to facts (data), plus steps of analysis to resolution. However, *on a law exam problems to be addressed must first be discerned in a hodge-podge of facts.* The greater kinship of format and expectation to law exams likely accounts in some measure for seeming greater success of math/science types. However, more important, such persons are likely accustomed to presenting their thought process more concisely, a big plus on time-pressured exams. (Lawyerlike expression, we shall see, properly presented, is concise. LEEWS paragraphing instruction ensures concision.) Nonetheless, that problems/issues to be resolved must first be discerned in a factual hodge-podge adds a layer of difficulty for all students needing a more scientific address.

[2] We shall see that cases and casebooks are insufficient sources of ("black letter") law one must know.

[3] **Bar exam versus law school exam.** Generally, one's conclusion (resolution of an issue) is relatively unimportant on a law school exam, but important on bar essay exercises. The latter is reflected in the standard bar admonition that conclusions be stated at the outset of analysis (of issues)—so-called "CIRAC" (conclusion before issue, sometimes stated again after analysis). Mindful of this, perhaps seeking to prep students for the bar, many law professors insist upon CIRA or CIRAC, rather than IRAC format. Given students propensity to seek/arrive at "the answer" (thought on law exams to mean who wins), this distracts from the main event—analysis! The problem will be discussed in Chapter 12. Distinctions between law school and bar exam exercises will be pointed out as needed.

[4] **Take-home exams.** Particularly at so-called "top tier" law schools, often a longer, "take home" exam format—8 hours, 24 hours, even longer—will be encountered. First term exams at Duke Law in fall 2008 (also Harvard) were reportedly all 8-hour take homes. The idea is to eliminate time pressure, thought to be a primary reason otherwise smart, hard-working students flounder. (Also student complaints.) Lest forty page responses (and longer) be submitted after 8 hours, such exams are invariably subject to length restrictions. (Discussed, Chapter 14.)

[5] **Fact pattern as [sic!] "question."** Characteristic of inattention to detail and misleading nature of conventional exam-writing advice, professors, commercial purveyors of law exam-writing advice, law students (following professors lead), and *all* others refer to hypos or fact patterns as "questions," as in "call of the question." "*Call*" actually refers to the literal question or instruction (Q/I) typically found at the end of… Of what? Both hypo (fact pattern) and literal Q/I at the end (of a hypo) are being referred to as "question," which is both confusing and inaccurate. It is careless, sloppy use of language, unworthy of a lawyer's characteristic attention to precise language use. **A key aspect of LEEWS instruction** (mot achieved by case method) **is inculcation of such nitpicking, nuanced thinking.**

Note. When the term "question" is used herein, the literal question or instruction, typically at the end of the fact pattern, is meant, *never* the fact pattern itself. Lest this seem nitpicky, it will be seen that such nitpicking is the very essence of lawyerly thinking

[6] The intent of amusing names, references to current events and the like, seems to be to lighten the mood of an otherwise, for most, grim ordeal. Occasionally, however, as in the instance of the Torts Hypo that will be a primary vehicle of instruction herein, names are diversionary red herrings. (E.g., "Direct Hit, "Pucker Nicely," "Ruthless Nicely.") They contribute to testing such (lawyerly) analytic qualities as "objectivity" (earnestly making arguments that both sides of an issue would advance).

[7] **Exam setting/atmosphere, advice related thereto.** As noted, take-home exams (in first year) have become the norm at many elite law schools. A student downloads the exam at an appointed time. An honor code is normally in place (imposing restrictions, for example, on source material). The exam may be taken at a coffee shop. Most often, however, students gather in one of the large, amphitheater-style classrooms popular in law schools, and there is staggered, unassigned seating.

Your author's (UVA law grad) daughter, who took exams via computer (vs. longhand for your author), offered useful advice in this regard. Beyond pen, scratch paper, energy food, she suggested a hat/cap that one might pull down to create personal space. (E.g., helpful to shield glare from surrounding computer screens.) Also ear plugs against the distraction of incessant tapping on keyboards.

It goes without saying that nervous energy, tension, and anxiety in such a setting, whether at 9 a.m. or 6 p.m., is extreme.

[8] **"Open book"/"closed book" exams.** Bar exams are strictly "closed book," meaning absolutely no aids may be brought into the exam room. There was a time when most law school exams were closed book—meaning nothing beyond pen, watch, snack (possibly), and copy of the code in a "code course." (E.g. Federal Rules of Procedure, Tax Code.) Doubtless responding to student grumbling about unfairness, most exams are now "open book." Anything short of a tutor can be brought in. Students arrive with roller bags containing casebook, course outline, treatise/hornbook, etc. Exam software blocks Internet and other computer memory access.

We shall see that open book/closed book is largely a meaningless distinction for a LEEWS grad. There is insufficient time to conduct research during an exam. (Not if the objective is to do well, not merely survive.) Relevant legal precepts must largely be committed to memory. A code, if applicable, and one's course outline, either brought in or hastily recreated, will be the only ancillary assist needed. (See more complete discussion of both exam types in Chapter 14.)

One should investigate whether open book or no, and rules that will apply in advance of exams. Professors may be unwilling to commit one way or the other until a couple weeks prior to the exam.

[9] See fn. 8 preceding.

[10] Although response typically will be typed into software, and the exam likely can/will be downloaded, a hard copy of the exam is also normally handed out. Notes may be made on this. Scratch paper is also usually available. Along with any scratch paper used, this hard copy normally must be turned in at exam's end. Again, exam conditions and rules—what is or is not permitted—should be investigated in advance of the exam.

[11] "Look both ways. One of you will not be here next term," was at one time a standard remark by professors to new 1Ls. To your author's knowledge, Louisiana State U. School of Law was the last to abandon a policy of flunking a third of entering classes (*circa* late 1990's). Why? Perhaps the self-esteem movement, more likely economics. Why would one forego one third of the considerable revenue now represented by each law student?

[12] **Universality of mediocre exam response.** The quote of the U. Georgia torts professor has been featured, referred to. Given

intimidation/confusion engendered by the hypothetical-type exam format, coupled with relative cluelessness of law students respecting HOW, exactly, lawyers think and analyze (indeed, what, exactly, lawyers do [assist clients in achieving goals via legal stratagems!]), and, moreover, HOW, exactly, to present analysis concisely (IF capable of analysis), *virtually all law school exam responses are distinctly mediocre.* They are rather pathetic, slapdash efforts, even at the Harvards, Yales, Stanfords. (Law school teaching is that ineffective at transitioning the academic thinker/learner to something approximating the [practicing] lawyer thinker/learner!)

The "A" or "brilliant" exam. A truly lawyerlike effort on a law school exam is rare. However, such exams, earning "Am Jur" and "CALI" awards (for best exam in the class), are rather routinely produced by LEEWS grads.

Note. AN "A" EXAM IS NOT NECESSARILY A BRILLIANT EFFORT, BUT MERELY AN EFFORT RISING SOMEWHAT ABOVE OTHER, MEDIOCRE RESPONSES—35, 45 points out of 100! I.e., merely in contrast with mediocrity and given low expectations is it "brilliant." Where a grade curve mandates more than ten percent A's, professors fulfill this with A–'s. (The new B+.) An excellent, possibly brilliant effort will earn an A+. As noted in a previous footnote, professors at Harvard prior to institution of non-letter grades (*circa* 2008) typically reserved only two grades for A+ in a section of 80 1Ls. Often no A+'s were awarded, or only one.

CHAPTER THREE

FUNDAMENTALS OF APPROACH— PRELIMINARY DO'S & DON'TS

Preparing for Exams From Day One

Effective exam writing begins, ideally, Day One of term with 2-4 line (exam-focused, not class-focused) briefing of assigned cases.[1] As one grasps the how to of approach *during* an exam, things to be done in preparation in order to take maximum advantage of LEEWS will become apparent. These involve, principally, learning/gathering law—legal "tools"—that may be relevant on an exam, organizing this law for speedy reference in course outlines (worked on weekly), practicing facets of LEEWS (particularly paragraphs of analysis). Subsequent chapters offer specific guidance developing course outlines, preparing for class (especially 2-4 line, exam-focused case briefing), and use of sources beyond casebooks, such as law review articles, commercial outlines, hornbooks/treatises, "restatements."

First Things First—Arrival at Exam/Getting Ready

Take-home exams have been noted and described. (See, e.g., fn. 8, preceding chapter.) Obviously, taking exams in a situation as free from distraction as possible is helpful. Advisability of ear plugs in the normal large gathering of students has been noted, also a hat to pull down to shield glare from surrounding computer screens. Being reasonably rested and healthy is normally a plus.[2]

If 9 a.m. is the start of an exam, arriving 30 to 45 minutes early may not be a good idea. Anxiety can build as one sits counting down to the start. Clearly, arriving at 8:55 will produce dislocations. TEN TO FIFTEEN MINUTES BEFORE THE START OF AN EXAM SEEMS AN OPTIMUM ARRIVAL TIME. It is sufficient to find a seat and get organized. Then the exam begins.

Law school or bar, do not talk to anyone about the exam, one's preparations, or anything legal as one awaits the start of the exam. (Unless it is believed that person can clarify a specific point, *and you initiate the conversation*.) It is too late to learn more law. It will not help to be reminded of what one does not know.

[Note. It is doubtful a law student would do the following maliciously. In order to reassure himself respecting his own preparedness, a student may seek to test knowledge he is already confident of against yours. E.g., "Is it your understanding that theft is an absolute defense against a holder in due course?" Such an exchange may well leave you feeling more confident as well. However, it may not. Best to avoid it altogether. A polite smile, followed by "too late to worry about that," should do the trick.]

The First Ten Minutes of the Exam—Avoiding Major Mistake No. 1

Recall the description of the response of the typical examinee in the previous chapter. Or recall your own examination experience. *The first ten minutes are critical. As noted, now too often comes* perspiration on the brow, churning in the gut. The chief reason is failure to immediately identify topics (issues) for discussion—drawing an initial blank reading facts of the first hypo. Why does this occur? As described, issues (topics at any rate) later become apparent.

Three major mistakes likely to be made when addressing essay exams have been identified (plus many minor ones). The First Major Mistake occurs when, typically, one plunges into the first hypothetical (seeking to "spot" issues). Adrenalin flows. One's brain pulsates with legal rules and principles. Following habits that have been successful on past (non-legal)

exams, misperceiving what is wanted, the objective, what one would really like to do, whether perceived consciously or no, is regurgitate knowledge (legal precepts) diligently stuffed into one's brain.

One simultaneously seeks a sense of control, a sense of whether the exercise can be handled. It will feel good if a couple topics pop out, if legal knowledge begins to flow and match with facts. However, often during this initial foray nothing emerges, the mind is a blank. Because you are too hyped, too much is going on. Nervousness, law pulsating in the brain, a kaleidoscope of facts. Nothing comes into focus.

For the typical examinee, it's as if he doesn't know any law. Mere minutes into the exam, anxiety rises, overwhelming ability to think clearly, methodically.

Another reason for drawing a blank is that one has set oneself a nigh impossible task. Namely, attempting to sort out in orderly fashion all that is prompted by a typical hypothetical fact pattern—in a minute or two, or three or four or five minutes.

Most hypothetical fact patterns trigger a myriad of possible issues to discuss. Some are obvious. However, many are not. As one scans facts, the brain *does* register some of the possibilities. The problem is seeking to do too much, too quickly. One attempts, *within minutes,* to sort out in the mind's eye the blur of legal discussions prompted by various words and phrases. However, the notion that relevant legal principles, much as obedient soldiers, will attach in orderly fashion to facts encountered creating issues is unrealistic.

Unless your brain is highly methodical, computer-like indeed (and a good computer at that), an attempt to, in effect, "psych out" the hypothetical (i.e., figure everything out) *in a minute or two or five* will backfire. Overwhelmed by the task assigned, the brain sends out confused signals. Connections between principles in one's head and facts to which they relate cross and tangle. Nothing comes into focus. Your confused, overwhelmed brain indeed seems blank.

One then, typically, compounds the problem by lurching off to subsequent hypotheticals, to which an increasingly frenzied (desperate), similar approach is applied. Eventually, when you breathe deep and begin to work more patiently through the first hypo and topics begin to emerge, considerable damage has been done. Whatever confidence and discipline was brought into the exam is largely vanished. The striving now is merely to pass, to survive. Control has been ceded to the exam. Any chance at mastery Is gone.

The foregoing illustrates Major Mistake No. 1—THE ATTEMPT TO COMPREHEND THE WHOLE. Never think about an entire hypothetical, even a substantial segment of a hypothetical from the standpoint, "What is going on here legally?" Such an overview (bird's eye) approach will merely confuse, as described.

Such is the complexity of typical essay exercises respecting legal implications, that lawyers (even the professor who authored a hypo) would be confused, if they attempted to sort out legal/factual relationships *in a minute or two (or three, or five)*. Far from you being able to psych out a hypo (or segment thereof), the hypo psyches you out!

Temptation to plunge into a fact pattern and make Major Mistake No. 1 is great. It is abetted by professors and others who typically instruct, "Read the facts (i.e., entire hypo!), before starting your response."[3]

Wrong![4] Fact patterns must be approached piecemeal. MASTERY IS POSSIBLE ONLY VIA *PIECEMEAL* ENGAGEMENT. LEEWS contemplates systematic carving out of and addressing components of a whole.

The manner in which one reduces any and all hypos into (manageable) components will be methodical, disciplined. (It must be! Apologies to free-and-easy, loosey-goosey types.) NOTHING IS MORE FRUITLESS IN THE FIRST MINUTES OF AN EXAM THAN TRYING TO THINK CLEARLY ABOUT ANYTHING LEGAL. Having a consistent, formulaic, step-by-step approach that leads *piecemeal* to legal thinking is a security blanket. One can cling to the approach while calming down, while warming up. A daunting task is progressively engaged. Thus, at no point does it overwhelm. This makes any and all essay exams doable. Mastery (of components that add up to a whole) becomes possible.

Much practice and discipline is required to avoid Major Mistake No. 1.

First 2-3 Minutes of the Exam—Preliminary Overview

What will be termed "*Preliminary Overview*" (PO) proceeds in two phases. Phase One commences immediately following reading cover instructions, if any.[5] It entails (happily) no legal thinking! Literally, flip (scroll, if not hard copy)[6] page by page through the entire exam to gain a sense of the overall format.

E.g., how many hypos must be addressed? How long are they? What are the time limits? Is a portion of the exam multiple choice, short answer, true/false? How many *pages* to the exam?[7]

[Note. As noted—footnote 5 herein—, looking at cover instructions of old exams (in any subject) aids in quickly reviewing, digesting such instructions on a new exam, saving precious seconds. Scan for "what's new."]

Do not during Phase One look at facts of any hypothetical! Repeat. Do not look at facts of any hypothetical! Avoid Major Mistake No. 1. This—not peeking at facts—will require extreme discipline. Temptation to glance at the fact pattern is almost irresistible. One wants to read the story (seeking issues).

Phase One contemplates *quickly reviewing* the entire exam to broadly preview what one is up against. As one does not look at facts, PHASE ONE SHOULD CONSUME NO MORE THAN *30-45 SECONDS.*

Phase Two commences immediately upon completion of Phase One (30-45 seconds later). However, only for the first hypothetical! Go back to the beginning of the exam, the very first hypo. Skip over the fact pattern (entirely)—ignore facts altogether! Locate and focus on question(s)/instruction(s) (Q/I's) associated with the hypo. (Such, typically, are at the end, following the fact pattern. However, not always.)

One's task at this juncture is simple—locate Q/I's relating to the hypo!

Commencing Issue Identification / Response

As soon as one finds and focuses on Q/I's (Phase Two of PO), perform Steps One, Two, Three (introduced presently) on the first hypo only. Performance of these Steps accomplishes breaking of the hypo—any hypo!—down into the components of Figure B (p. 35). Such components, we shall see, reveal issues a grader (professor/bar examiner) wants identified ("spotted") and discussed. (Normally many more than others identify.)

Now commence response to the first hypo (only), roughly observing time limits. (A sequence of 10-12-15 minute planning segments, followed by response-execution segments, will be introduced presently.)

One will address (analyze) each component/unit (relevant issue) identified (and evaluated—i.e., major or minor issue, meriting more or less time) via the Steps in roughly a paragraph. RESPONSE OVERALL (to a hypo)—*ALWAYS!*—WILL BE A SERIES OF CONCISE PARAGRAPHS OF ANALYSIS THAT IMPRESS.

No Legal Thinking Required!

The law essay exam, as description of the typical examinee response perhaps suggests, is a kind of black hole, a vortex waiting to swallow examinees in a bewildering swirl of confusion and intimidation. Essay exams quite literally assert control over examinees from the outset. Far from taking charge and addressing an exam with confident purpose, students react defensively. The result is the floundering response described.

Although discussing legal cases and taking notes in class fails to transform academic thinker/learners to anything resembling practicing lawyers,[8] the intent when plunging into a hypothetical is surely to demonstrate ability to think and function "as a lawyer." The typical examinee is eager to demonstrate he "knows law."

However, neither review of cover instructions, nor Preliminary Overview in either of its two phases—what one does in the first 4-5 minutes of any exam addressed per LEEWS—requires *legal analysis/thinking*. As your author emphasizes to live and audio audiences, "ONLY GARDEN VARIETY LOGIC AND COMMON SENSE IS REQUIRED IN THE FIRST FEW MINUTES OF *ANY* EXAM. NO LEGAL THINKING!"[9]

Indeed, as we shall see, no legal thinking will be required to perform the next aspect of approach—Step One. Only in Step Two, 5-10 minutes into an exam, is legal knowledge and thinking required.

Discipline Required!

It follows that if sudden coming together of student-eager-to-demonstrate-legal-knowledge-and-lawyerly-aptitude with exam-requiring-that-one-perform-as-a-lawyer is not to combust into the confused response described; if control is to be exercised over law essay exams, not the reverse; if one is to have any prospect of exerting mastery, then EXTREME DISCIPLINE MUST BE EXERCISED AND MAINTAINED!

Effective implementation of the (somewhat rigid, yes, even robotic) LEEWS stepped approach to addressing and taking control of (any and all!) law essay exams, to breaking complex fact patterns down into manageable units/components revealing relevant issues, requires extreme discipline.

Adrenalin pumps. Your brain is full-to-bursting with legal knowledge you are eager to display. Anxiety builds as classmates shift and groan, and tapping of fingers on keyboards is heard. [Once again—ear plugs, a hat to pull down.] Amid this brewing maelstrom one must keep it together. One must hew faithfully to a disciplined (proven effective for 30+ years!) regimen.

You must calmly, yet efficiently follow prescribed (LEEWS) steps of approach, secure in the knowledge that others are clueless, that your disciplined, regimented, proven effective method will, surely, inexorably, predictably, whittle the most challenging essay exercise down to manageable components/units, which components/units—narrowly focused inquiries, issues!—will be addressed in concise paragraphs that impress.

Only in such fashion—disciplined march, disciplined progression—can mastery over the complex challenge posed by law essay exams be attained. Only in this fashion can handling any and all essay exercises become predictable, manageable.

The LEEWS Science has been likened to a military campaign and plan of attack. Your author readily subscribes to this analogy. History is replete with evidence that the soldier and army with discipline is the soldier and army likely to prevail.

ACHIEVING, EXERCISING, MAINTAINING DISCIPLINE IS AN IMPERATIVE IN IMPLEMENTING LEEWS. It must become a lodestar, a necessary component of approach (the same as learning law [correctly!], and all other aspects of the LEEWS Science).

Here, as in all other facets of LEEWS, practice—on exercises herein, on old exams—will be key to consistent, effective implementation.

Beyond the Preliminary Overview

Review of cover instructions should consume no more than 2-3 minutes. (Particularly if you have reviewed cover instructions of old exams [in any subject], and thus merely skim for new wrinkles.) No more than a minute or so should have elapsed upon completion of Phase One of the PO, and Phase Two for the first hypo. (Provided one has exercised discipline and first, avoided looking at facts, second, avoided thinking about law-related aspects.)

Thus, no more than 5 minutes into any exam, one should be focused on Q/I's for the first hypo. Now perform Steps One, Two, Three on that hypo (only!). Execute the response, endeavoring to stay within or close to the suggested time allotment.

[Note. *Only following completion of response to the first hypo does one proceed to the next (second) hypo. Only then*—20 minutes, 45 minutes, 90 minutes later?—*does one complete Phase Two of the PO on this (second) exercise.* In other words, PHASE TWO OF THE PRELIMINARY OVERVIEW FOR A HYPO WILL ONLY BE COMPLETED (LATER!) WHEN ONE GETS TO SUCCESSIVE HYPOS. (You skip over facts to Q/I's, perform Steps, execute paragraphs of response.)]

Addressing Objective Exam Exercises

No advice has yet been offered respecting what to do about, or the sequence of addressing objective exercises—multiple choice, true/false, etc.—noted in a Phase One (flipping, skimming, 30-45 second) review of the overall exam. Normally, such exercises will be addressed in the sequence encountered, observing time allotments. How to address such exercises is far less problematic than essay hypos, and will be discussed in Section Three herein. At this juncture focus is on the sequence of essay exercises and the approach to addressing them. .)

Proceed Chronologically or No?

Implicit in the foregoing is the assumption that hypos are addressed in chronological order. Such, of course, is not necessarily the case. Assuming you clearly label what is being discussed (Chapter 14), it should not matter that exam segments are addressed out of order. However, *providing you have not looked (peeked) at facts*—discipline!—, you should have no opinion respecting which hypo to address first.

[Note. Choosing to address hypos in other than chronological order likely would be based upon a prediction that one hypo presents a less difficult challenge than another—i.e., is easier. Typically, what transpires is that a student identifies one or more issues he feels he can handle in the hypo he chooses to address first, versus none or fewer in another hypo. Of course, such determination can only be made by *looking at facts!*—i.e., by risking Major Mistake No. 1.]

Beginning with a more manageable exercise, warming up so to speak, makes sense. You may indeed form a notion of relative difficulty of hypos via quick inspection of facts. However, the likelihood is not. The likelihood is that in plunging into a fact pattern to (quickly) get a sense of things (i.e., discern issues), and thereby judge relative difficulty, one will make

Major Mistake No. 1. You will become confused and intimidated as described.

Moreover, the hypo that upon first inspection seems easier (because one or more obvious issues are identified), may yet prove the more troublesome, as less obvious issues emerge. Indeed, in one's eagerness to respond to obvious issues, one may overlook more subtle ones, identification of which latter issues the grader may deem the better test of lawyering aptitude (therefore awarding more credit).

The LEEWS issue identification approach is designed to avoid confusion and intimidation by making address of any and all hypos predictable, manageable. It enables recognition of issues only a facsimile of a lawyer would discern. BEST TO AVOID MAJOR MISTAKE NO. 1. Proceed chronologically. Accord each hypo roughly the time allotted or suggested.[10]

Choice of Hypos Offered by Professor

It is unlikely there would (ever) be a choice of hypos on a bar exam. Should a professor offer a choice—e.g., "choose 3 of 5, 5 of 7"—, this is precisely invites Major Mistake No. 1. As it creates more work grading, such a choice option is extremely rare. Should it occur, LEEWS advice is twofold. In the first instance, ignore the choice. Do the first 3, the first 5.

Alternatively, should you elect to choose [given a choice, some feel they *must* choose], choose hypos that on first impression seem more problematic—because no issues are apparent, because the hypo seems more confusing. The reason is that classmates will tend to avoid hypos that seem tougher. Thus, there will be less competition. One may impress with one's daring.

[Note. Once LEEWS is mastered, effectively handling any and all hypos becomes predictable. Systematically reduced to manageable components/units (narrowly focused issues!), all hypos present a similar task. Thus, there is no advantage in choosing. Rather, one wastes time. One merely risks Major Mistake No. 1.]

Planning (Outlining) the Response

Implicit in the foregoing is the thesis that EXAM RESPONSE PROCEEDS IN TWO PHASES—PLANNING/OUTLINING PRECEDING RESPONSE. As noted, some advice contradicts this.[11] However, the logic of such bifurcation is irresistible.

Law professors often keep model "A" exams on file. One can ask to see them. Such models are sometimes handed out toward end of term as examples of what is sought in a response. (Once again, the what is shown, not the how.) Should you review such an "A" response, you will likely first be struck by its concision. THE NAME OF THE GAME IS *NOT* HOW MANY PAGES ONE CAN GENERATE.

The "A" effort typically reflects a patient, orderly approach. Relevant law is applied to relevant facts. Rambling, irrelevant discussion is rarely present. Overworking of minor points is avoided. More issues are identified. Analysis impresses with probing insight, thoughtful use of facts. (Again, the what.) Such, normally, only results from planning.

Some few individuals may indeed be able to plunge into a fact pattern and produce an orderly, thoughtful response. Possibly they avoid Major Mistake No. 1 owing to orderly, compartmentalizing habits of thought. They methodically isolate and focus on one component (issue) at a time. Intellectual curiosity (and training prior to law school!) leads to an appropriate emphasis on analysis rather than conclusion. However, such is a fortuitous, rare happenstance, unpredicted by class participation, LSAT score, hours in a library, college GPA. Moreover, such advantage is unlikely to push performance past 35, 45 points of a possible 100.

For most, planning is essential. The examinee who begins typing at first glimmer of an (apparent) issue will indeed fill panels. However, he likely will miss key points (and issues) while belaboring minor ones. The only way to consistently achieve a concise, orderly, relevant ("lawyerly") discussion—the only path to mastery!—is to have *perspective before one responds, to follow a plan*.

[Note. Conventional wisdom (e.g., Bell advice, Chapter 1) suggests "up to one half" of allotted/suggested time be devoted to planning. However, 1/2 allotted time—e.g., 45 of 90 minutes—invariably leaves too little time for response. NO MORE THAN 1/4 TO 1/3 OF TIME ALLOTTED A HYPO SHOULD BE SPENT PLANNING (OUTLINING) THE RESPONSE.]

Allotted time (typically stated at the outset) is, of course, merely a guesstimate of time actually needed to address an exercise. (See fn. 10.) Actual time needed may be more or (very rarely) less. Therefore, *often one cannot finish within allotted time*. Nor is finishing necessary for a top grade. What must be accomplished is *enough*—enough to impress the professor, more than classmates. (35, 45 points out of 100!)

If 90 minutes is suggested time, some 22-30 minutes (1/4-1/3) should be spent planning. (60 minutes—15-20 minutes, and so on.) Again, this modifies conventional wisdom, which recommends that 1/3 to 1/2 of allotted time be spent planning. HOWEVER, UNDER NO CIRCUMSTANCE SHOULD MORE THAN *TEN (10), TWELVE (12), FIFTEEN (15) MINUTES (TOPS!!)* BE SPENT PLANNING BEFORE COMMENCING RESPONSE. Reasons will be explored presently.

10, 12, 15 minute segments means planning allotments for anything over a suggested 45 minute time limit must be divided. For example, a 60 minute hypo prompts up to 20 minutes of planning, 90 minute hypo up to 30. 20 minutes, however, is 5 minutes over the 15 minute limit. (30—15 minutes over.) (Again, reasoning will be provided presently.) [Yes… Simple math. Think it through!] Thus, break 20 minutes into two 10 minute segments. Break 30 minutes into three 10 minute, two and a half 12 minute, or, as an outside limit, two 15 minute segments. The idea is to plan for but a short burst—10-12-15 minutes—, get part of the response completed. (Possibly analysis of two or three issues, expressed in two or three concise paragraphs.) Then comes another 10-12-15 minute planning segment. One completes more paragraphs. PLAN…RESPONSE! PLAN…RESPONSE! PLAN…RESPONSE!... Short bursts!

Limiting planning to 10-15 minute segments accomplishes two important, beneficial results. First, there is a natural tendency to put off committing oneself to a response. "I'm planning," must not become an excuse to procrastinate. ONE MUST PRESS ON TO THE MORE DIFFICULT, ESSENTIAL BUSINESS OF COMMITTING TO A RESPONSE. A*rbitrarily* imposing 10-15 minute limits on planning, after which at least part of the response is executed, avoids procrastination. One is *forced to get going*, to get on with the daunting aspect of committing to something the grader will judge. In effect, you force yourself to break the ice within a reasonable time.

The second benefit has to do with what may be termed "anxiety management." It is not only natural to feel anxious at the start of any exam. It is productive! (Yes!) Anxiety generates adrenalin. It provides energy (for a sleep-deprived law student) to go strong for 3-4 hours. One must question the student who is overly calm and composed at the start of a law school exam. (Not fully aware of the importance of the exercise? Drugged?)

On the other hand, excessive anxiety can lead to panic, which must be avoided. As one plans, as students nearby shift, grunt, sigh, groan, type/scribble furiously, and time tick-ticks away, anxiety inevitably builds. Should one's anxiety level become too great, panic and loss of concentration likely occur. Discipline and the programmatic LEEWS approach may go out the window. The (panicked) response described in the preceding chapter ensues.

By limiting duration of planning segments, one limits anxiety buildup. Completing part of the response—two or three paragraphs that impress—reassures. Anxiety abates. Useful nervous energy is managed. It does not overwhelm. Then begins another 10-15 minute planning segment, followed by response.

In other words, EVERY EXAM PROCEEDS AS A SERIES OF BRIEF PLANNING SEGMENTS, FOLLOWED BY RESPONSE—paragraphs of analysis (of issues) reflecting planning. Once again—plan…response!, plan…response! Intermittent, energetic, planning/response segments until time is called.

In no small measure, effective exam response reflects effective anxiety management. Anxious energy is harnessed. It does not get the best of one.

Once again, ONE NEED NOT FINISH—i.e., exhaust all possibilities—TO DO (VERY) WELL.

SECTION TWO, CHAPTER 3 FOOTNOTES

[1] See *"What to Do When It's Late in the Game"* (p. 125) for a summary of strategy when exams are fast approaching. What must be borne in mind is how clueless classmates are (however confident they may seem). Students have done LEEWS *during* the exam reading period and benefitted greatly.

[2] It may be noted that adrenalin driven by nervousness can compensate for and mask fatigue and minor ailments. Indeed, the "excuse" of a cold (and/or fatigue) can sometimes have a helpful, calming effect. One focuses on one's misery rather than grow anxious.

[3] Some few [professors, other "experts"] instruct that one first read the Q/I (typically at the end of the hypo), the so-called "call of the [sic] question." However, in that Q/I's such as "Discuss rights and liabilities," "What result?," "Draft a memorandum," etc. are unlikely to add clarity to the task, this detour suspends Major Mistake No. 1 only momentarily. One commences the plunge into facts with scant additional, helpful guidance.

[4] **Are professors wrong?** To assert, as often occurs in this book (also the LEEWS live or audio program—explicitly/implicitly) that law professors (and all others for that matter, where there is a contradiction) are wrong and LEEWS is right is jarring. It seems arrogant, even disrespectful. However, the point has been made that a fundamental premise upon which LEEWS rests is that law school case method instruction fails (utterly!) in the central task of transitioning academic thinker/learner to something approaching (a facsimile of) practicing lawyer thinker/learner. It is precisely upon this (and innovative insights and systems) that the considerable LEEWS advantage rests. LEEWS reflects not only revolutionary insights that caused it to come into being, but over 30 years of trial and error, and proven effectiveness. No law professor or other entity has devoted more thought and effort to the problem of instruction, as it relates to mastery of the law essay exercise. LEEWS is nothing less than a revolution.

Therefore, **one must get over the awe naturally accorded law school, law professors, the legal profession.** At least suspend it for purposes of digesting lessons herein. One must have a measure of faith (in LEEWS) initially. In the end, particularly after a term in law school, all doubts will have been erased. IF WE SAY LAW PROFESSORS (AND OTHERS) ARE WRONG, AND LEEWS IS RIGHT, one can, as is said, TAKE THAT TO THE BANK! We know what we know (after so very many years).

[5] **Cover instructions revisited.** As discussed in the previous chapter, an exam is typically prefaced by "cover" instructions or guidelines. One may, for example, be instructed to "Plan for an hour before responding," or length of response may be limited. (A professor [re the latter] wants to impress that better responses are also more concise. He also wants to limit his grading task.) One may be instructed to place conclusions at the beginning or end of analysis, or in both places. (CIRAC.) One may be told to assume the grader is a Martian to whom all must be explained, or one is in a jurisdiction that follows federal law only. One may be instructed to address fewer than the number of hypos presented. (I.e., choice of hypos.) Look at lots of old exams to become familiar with such instructions. Thereby save precious time on actual exams by scanning cover instructions just for what's new and unusual, something unique and/or peculiar to a professor. (E.g., "No statements of [black letter] law!"… Say what?!... This particular [very rare] curve ball and how to handle it is addressed elsewhere.)

[6] **Hard copy of exam, or no.** As noted (previous chapter), hard copies of exams are normally distributed. One will literally flip through this in Phase One of the Preliminary Overview. (Discussed this chapter.) Respecting take-home exams, it may be one picks up or can download a hard copy at a designated place/time. (If a download cannot be printed as a hard copy, one will scroll through panels in Phase One.) As always, ascertain particulars respecting exam rules, logistics, etc. in advance. You are learning the questions to ask!

[7] **How many pages to an exam?** Is that relevant? How? Eager to get going and gain a sense of control, law students plunge into a hypo (normally the first), get involved with it, and lose perspective on the overall task (and time). After spending too much time on the first hypo, one examinee lamented, "Belatedly, I realized there were eighteen more pages to the exam." This examinee had blown time management. Quickly flipping through all pages helps avoid such an ostrich-like, head-in-the-sand oversight.

Some persons and programs (not professors) advise not to plan, but to plunge immediately into facts, addressing as many issues as possible. Apart from inviting Major Mistake No. 1, it seems no useful advice to offer respecting planning exists.

[8] **First term lack of progress in becoming lawyers.** As new 1Ls, reading, briefing, discussing law cases, students have the sense of gaining entry into the profession, of becoming lawyers. Learning how to do legal research and writing a memo in the (typically) one-hour credit, legal writing course helps. However, it has been noted that the words "lawyer" and "attorney" are rarely heard in law school classrooms. (Nor "client" or "client aims, objectives.") Not much happens to suggest one is actually becoming a lawyer.

At Washington University School of Law in St. Louis a "negotiations" competition for 1Ls is held in October of first term. Not all participate. However, those who do don suits, and the finals of this lawyerly activity are eagerly attended and observed. One has the sense that 1Ls are hungry for concrete manifestations beyond the (academic) classroom that bespeak of becoming lawyers. Doubtless, there may now be first term activities of similar ilk in other of America's 200+ law schools. There is a clamor in the profession for more practical training and experience in law schools. However, during 30+ years of interaction with students from all law schools, your author was not made aware of any such activities in first term other than the competition at Wash U. (Intern research assignments of Northeastern 1Ls don't quite make the grade. 1L moot court and trial advocacy activities normally occur only in second term.)

[9] **Legal thinking vs. common sense.** As your author constantly remarks, "The most important thing one brings to an exam is common sense." In point of fact, legal thinking and common sense are not distinct. "Legal thinking" is merely common sense applied to analyzing the relationship of law and fact. Steps Two and Three, and analysis of issues require such legal thinking. However, reading cover instructions, the Preliminary Overview, and Step One require common sense *without* a legal overlay.

We shall see that common sense implies a mediate, sound way of thinking and judging. It is more or less how *most folk* (of reasonable intelligence and similar [cultural] background) *might see or interpret things.* (The thinking of *most* is one handle on common sense.) Astute, creative individuals can lack common sense, tend to view things in a skewed or different way (albeit perhaps creative). Sort of through a hyper-individuated lens. For example, they might read more into something—e.g., fact patterns—than most people would, or not enough. Exercises in analysis will shed light here. Should one find that one's insights and interpretations *consistently* are out of step with model responses, it may be an adjustment in perspective is warranted. As your author says to all groups, **"If it transpires you lack common sense, you must learn to fake it** [for purposes of addressing law exams]." (Also in practice before judges and juries! Weird and unusual, albeit creative, perspective is generally not appreciated in law practice. However, out-of-the-box thinking may indeed lead to creative arguments

and uses of law that benefit a client in achieving an objective.)

[10] **Time limits.** Keep in mind at all times that **suggested time limits are guesses on the part of professors** (to a lesser extent bar exercises). There likely has not been a control group. A professor merely *thinks,* say, a 60 minute allotment is sufficient. In point of fact, one may need 75 or 90 minutes to finish. Thus, never expect to *finish* a law essay exam! Finishing is not necessary to achieve A's. What one must do is enough!—enough to impress the professor, more than classmates.

Often, specific time limits are suggested at the outset of a hypo, as with exercises in the Appendix. However, sometimes rather than assign a specific time allotment, a professor assigns proportionate weight to each hypo or segment of an exam—e.g., 20% for hypos 1 and 2; 30% for #3; 30% for multiple choice section. In such instance appropriate time allotments for each exercise must be calculated.

[11] **No planning** (of response). As noted (fn. 7, *supra*), some (few) supposed experts counsel *not* to plan, but to immediately plunge into fact patterns, addressing "as many issues as one can spot." Such an approach, typically addressed to time-pressured, not take-home exams, wholly jettisons the idea that planning and a measure of deliberation can make a difference. In a universe of relative mediocrity and grade inflation, such an approach, differing little from what many students do anyway, may well result in a B or B+. (25-35 points out of 100.) However, Major Mistake No. 1 is invited. The possibility that law essay exams can be mastered is abandoned. The possibility that law students can approximate the orderly, deliberative progression of a lawyer is abandoned.

In sum, such an approach gives up on the possibility of the science LEEWS represents. In only the rarest instances will an "A" grade be achieved, and this only by virtue of a response being, relatively, less incompetent.

CHAPTER FOUR

PLANNING PHASE—STEP ONE

Completion of Phase One of the Preliminary Overview—flipping/scrolling through exam (30-45 seconds)—brings one back to the first hypo to perform Phase Two (on that hypo only!). Mere seconds—Discipline! Skip over facts!—should bring one to consideration of Q/I's (normally at the end).[1] One now performs the first of two steps to identify "premises" (which in turn will reveal relevant issues). Discovery of this unique, innovative approach—"Step One"—inspired development of LEEWS (!!).

STEP ONE—IDENTIFY ALL CONFLICT PAIRINGS RELEVANT TO QUESTION(S)/INSTRUCTION(S) (TYPICALLY) AT THE CLOSE OF THE HYPO, AND OBJECTIVE(S) OF EACH PARTY TO EACH PAIRING.

Step One requires explanation. It builds upon a unique insight of your author's (prompted by law practice), that provides a key or denominator for understanding, resolving any and all legal problem-solving exercises.[2] At present, of course, the problem focused on is how to break essay hypotheticals down to manageable components/units that reveal relevant issues. Any and all essay hypotheticals! All relevant issues!

Step One, we shall see, can sometimes—often!—be performed merely by inspecting the Q/I.[3] In performing Step One, one wants to glean and be guided by any clues offered by a Q/I. Most often one will peruse facts for the first time. However, *quickly,* with a limited objective (which makes quickly possible)—*find relevant conflict pairs and party objectives.*

Relative to the Preliminary Overview, the going now gets a bit sticky. The strict discipline spoken of becomes an imperative. To better enable comprehension of this unique (revolutionary!) step, it is necessary to extricate from the academic mindset law school does little to correct, and re-orientate to the "real world" province of lawyers thinking about client problems. (Yes, the transition begins.) We'll take it in stages.

Role of Conflict in Law, Legal Problem Solving, All Law Essay Exercises

If one but thinks about it, *the raison d'etre of a system of law is orderly conflict resolution,* nothing more. Statutes, legal precedents, lawsuits, etc. are first, foremost concerned with resolution of present or (anticipated) future conflict. Why, for example, would Congress, federal regulatory bodies, various state and municipal legislative bodies concern themselves with drafting, enacting rules, regulations, ordinances—legislation!—, if not in response to problems (and resulting conflict) that had arisen (e.g., air pollution and those who favor and oppose certain emission restrictions, abortion, highway safety measures, etc.), or is anticipated to arise (e.g., proposed treaties regarding permissible uses, etc. to which nations may subject space and the ocean bottom)?

To put the proposition another way, if there were no problems, no conflict (if, suddenly, one was in Heaven?!), would laws, lawyers, judges, courts, legislatures, and the like be necessary? Would the very concept of law have meaning?

Conflict and the Lawyer's Role

Lawyers do not have to wax philosophical to

comprehend the central role of conflict in the profession. They understand they are advocates for individuals, groups, institutions, etc. that seek to prevail in obtaining an objective. "Prevail" presupposes opposition or an obstacle to overcome. Whatever that opposition or obstacle—another person, entity (corporate, otherwise), rule, regulation, lack of finances, objection of opposing counsel in court, bureaucratic/legislative inertia, etc.—, it creates a conflict situation. A lawyer will seek to resolve the conflict in a manner favorable to a client's interest. She will seek to overcome the opposition, best the adversary. (Hence, "adversary system.")[4] Legal principles—substantive/procedural—, precedents, policy, facts, analysis, and persuasive argument are the lawyer's tools and means to accomplishing this end.

Examples of Conflicts, "Conflict Pairs/Pairings"

The conflicts a lawyer confronts on behalf of clients are myriad in nature and kind. Most obvious are lawsuits or potential lawsuits. Imagine, for example, hypothetical fact patterns depicting a buyer aggrieved because seller's failure to deliver in timely fashion has cost him money; divorcing spouses in a custody dispute; a one-time beneficiary left out of the new will; an individual committing a crime; two persons claiming title to "Blackacre;"[5] an accident involving a failed mechanical safety device; a corporate shareholder unhappy with recent actions of the board of directors; a claimed infringement of patent or trademark.

From a legal standpoint, these and ten thousand other situations involving aggrieved *parties* have the potential to end up in a courtroom. *Each pairing of litigants that may be discerned in the above-referenced fact patterns*—buyer v. seller, husband v. wife, beneficiary v. person taking under the new will, state v. defendant, claimant one v. claimant two, victim v. manufacturer and seller, shareholder v. board, patent holder v. alleged violator—, *if relevant to a Q/I following a hypo, is a "conflict pair or pairing" to be identified in Step One*.

Far greater in number than the larger (umbrella) conflict implied by a lawsuit or potential lawsuit are innumerable jousts occurring within the ambit of each lawsuit. For example, consider what happens when a motion is made by one side or the other in litigation. (E.g., motion to dismiss, motion for change of venue, motion to strike a portion of the complaint [or answer, or interrogatories], motion to compel discovery, or simple objection to testimony offered [in effect a motion to "strike" or preclude].) An intermediate conflict with parties on both sides is evident!

Frequently, Q/I's at the close of hypothetical fact patterns in, for example, evidence and civil procedure law are framed in terms of motions, objections, (court) rulings. One is instructed to "Decide the motion," "Evaluate the ruling." Conflict and conflict pairs of Step One are whoever is for and against the motion/ruling (in the litigation context in which the motion/ruling occurs).

Often and more problematic, conflict is less apparent. E.g., the instruction is to "Draft a statute legitimating the status of certain heretofore illegal immigrants," or "Evaluate entitlement of group A, claiming right to a broadcast or transmission license under [new technological developments]." Where is the conflict? What are the conflict pairs?

The answer is found in the certainty that some individual or entity will object to the aforesaid legitimization, and to conferring the broadcast/transmission license. (The latter perhaps impairing/impacting another's license.) At the same time, certain groups and individuals surely will support both outcomes.

Providing one adopt the adversarial—who's against whom?—mindset of a practicing attorney,[6] *every legal problem (every legal situation!), implies conflict or prospect of conflict, and, therefore, at least one "conflict pairing."* One merely may have to dig a bit deeper, look harder to discern conflicts and parties.

Perspective

[Note. (Discipline!) Implicit in Step One—you do not attempt immediately to address/respond to a Q/I in the (normal) mode of "How do I answer/respond to [the Q/I]?" (I.e., "What does the [professor/bar grader] want me to do?") For example, thinking, "How do I respond to the [draft/evaluate] instructions just preceding?" (as virtually all students confronted with such would be wont to do), would clearly pose a daunting challenge. One likely would think, "What am I supposed to do?," "How do I begin?" Confusion and ebbing of confidence would ensue.

[Note (bottom line). LEEWS SEEKS IN ESSENCE TO MAKE ADDRESSING *ANY* AND *ALL* LAW ESSAY EXAMS, *ANY* AND *ALL* HYPOS, *ANY* AND *ALL* LEGAL PROBLEM SOVING (!!) PREDICTABLE AND MANAGEABLE. In the manner of sausage making, via disciplined application

of LEEWS Steps, any and all hypos, any and all Q/I's posed by professor or bar examiner, any and all exams, are processed in consistent, predictable fashion to a similar result—identification of relevant premises! (The sausage!)

One's approach to any and all exams becomes predictable (thereby inspiring/maintaining confidence). You are able to maintain control of any exam (not the typical reverse). We shall see (faith, confidence in LEEWS' 30+ years of experience/proven effectiveness is required!) that in the end the professor's (bar grader's) Q/I will be answered—correctly, impressively!—in the manner of a knowledgeable, competent, practicing attorney, not a rambling academic. Professors/bar graders will indeed be given what they want—consistently. However, on your terms, in predictable fashion. No flailing, no hit and miss, no confusion and uncertainty.]

LEEWS appreciates the folly of addressing a professor's Q/I's (to a lesser extent bar Q/I's)[7] as is, head on, in the form encountered. Professor Q/I's) come in myriad, unpredictable forms. They are often cryptic, confusing—e.g., "Draft a set of jury instructions to guide deliberations on the foregoing facts," "Imagine you are the newly appointed executor of X's will," "You are a prosecutor [a defense attorney, a judge, an arbitrator]," etc. Attempting, upon first reading, a response to such Q/I's invites immediate confusion, uncertainty, intimidation.

What is needed, what did not exist prior to LEEWS (and could not be imagined!),[8] WHAT LEEWS PROVIDES (and Step One contemplates/initiates) IS AN APPROACH, A SYSTEM, A PLAN OF ATTACK *FOR ALL SEASONS,* APPLICABLE TO *ANY* AND *ALL* Q/I's ONE MAY ENCOUNTER (no matter exam, legal subject, professor).

One of many unique, probing, LEEWS insights is that AT BOTTOM ALL PROFESSOR (AND BAR) Q/I's ARE *EXACTLY THE SAME!* ALL SEEK THE SAME RESPONSE! All, when it comes down to what is wanted, instruct, "Identify/discuss (all) relevant issues!" (I.e., identify/discuss legal topics relevant to facts provided, legal subject[s] tested, Q/I's posed [as a (practicing) lawyer would].)

The rigid, stepped, disciplined LEEWS approach posits, in effect, that one postpone thinking about the answer/response! (Discipline!) Rather, merely focus on and perform specific, limited, manageable tasks set forth by Step One, and later Steps Two and Three.

As noted above, *question(s)/instruction(s) will surely be answered*—efficiently, impressively, "as a lawyer." However, they will be answered in systematic, predictable, programmatic fashion—*on one's own (the examinee's) terms!* Graders—professor/bar—will, in due course (predictably) be given what they want. Step One initiates the process of doing so.

DISCIPLINED IMPLEMENTATION OF STEP ONE INITIATES THE PROCESS OF AN EXAMINEE TAKING/MAINTAINING CONTROL OF EXAM AND HYPOS THEREIN, versus the reverse.

"Objectives," Examples

Implicit in any conflict are competing *"objectives"* of the opposing sides—parties! Such objectives are to be noted in a Step One analysis. However, in formulating "objectives" of Step One, (academically-oriented) law students are initially likely to miss the point.

Consider the conflicts posed earlier. What is it opposing sides want? For example, is the aggrieved buyer's objective to establish that seller *breached a contract*? (Normal student/professor focus.) Is the spouse's objective to establish that grounds favoring his/her custody exist? Is the victim's objective to establish that the safety device was negligently manufactured, or that an implied warranty of fitness was breached? Certainly, lawyers for these parties will have the objective of establishing these respective *legal* objectives. However, *legal* objectives must be distinguished from *client* or *party* objectives contemplated by Step One.

Clients, flesh and blood real life litigants [even corporations are personified in the vice president in charge of coordinating litigation], do not have *legal* objectives. Their objectives are more down to earth, more "bottom line." The buyer above wants to be "made whole." He wants money (damages)![9] Each spouse wants custody. He/she doesn't particularly care about the legalities [leave that to the lawyers!], just the practical outcome. The victim wants compensation. He, too, is not concerned with legalities (except, perhaps, as a matter of curiosity). The "(counter) objectives" of opposing parties are likewise not to establish certain legalities, but, respectively, not to pay money, not to concede custody, etc.

IN SEEKING "OBJECTIVES" OF STEP ONE, therefore, ONE IS CONCERNED *NOT* WITH LAW, BUT WITH PRACTICAL, COMMON SENSE, END RESULTS—e.g.,

money (or not having to pay), ownership of (clear title to) property, putting a miscreant in jail (or miscreant staying out of jail), obtaining custody, reinstatement of a job, and more money. Welcome to the real world of lawyers and what lawyers do—seek to obtain client objectives (via legal processes).

Steeped in the academic side of the profession (possibly disdainful of "crass," nuts and bolts trade aspects of the profession), law professors rarely touch upon such mundane, non-legal objectives. For example, where facts of a case describe woes of a town downstream from a toxic waste disposal site, the bottom line issue for class discussion is rarely the amount of money (damages) to which townspeople may be entitled. Rather, discussion typically focuses on whether liability at tort or otherwise exists, the role of law in shaping social policy, and/or whether an injunction is feasible. In such fashion is academic orientation encouraged at the expense of the practical, goal-oriented lawyer thinking required to master hypothetical-type essay exercises.

HIGH-FLYING ACADEMIC ORIENTATION, BIAS, AND THINKING MUST BE TABLED, IF ONE IS TO THINK AS A LAWYER AND IDENTIFY OBJECTIVES OF STEP ONE. You must role play in effect—imagine yourself a lawyer with a client. Actually, two clients (both sides to a conflict). "What (as a practical, common sense matter, given facts presented) does each side want?" is what one must think when a conflict pair is identified.

[Note. Defining objectives of Step One does not require engaging in legal thinking. That comes later. Mere common sense is needed.][10]

For example, where the question posed is how a court should rule on objection to an item offered in evidence, objectives of the conflicting pair [of opposing counsel, as agents of their clients] are not, respectively, to establish or disestablish that the item offered is "more probative than prejudicial," or relevant or irrelevant, etc. Rather—practical vs. legal level of thinking—, it is to *get the item admitted into evidence* on the one hand; *keep it out* on the other. The importance of the distinction between *legal* and *practical* objectives will become manifest as Step Two is implemented.

What Lawyers Do in Advising Clients is What You Will Do on an Exam

No one engages a lawyer, except that a problem, an objective is of sufficient magnitude to justify a lawyer's time and (normally considerable) expense. When a lawyer advises a client as to "rights and liabilities," he is called upon to advise of the likelihood that the client (or whoever/whatever opposes the client in a conflict situation), will be successful in achieving that side's objective(s), and/or to what extent. The manner in which a lawyer arrives at conclusions in this regard is analysis of feasibility/applicability of various legal theories, policy arguments, etc. that *each side* would logically advance in support of its position, given known and reasonably implied facts relating to the problem/conflict. In other words, he performs precisely the practical, goal-oriented, objective (two-sided) analysis called for in responding effectively to essay hypotheticals.

What a law student is called upon to do in responding to a hypothetical fact pattern is little different from an exercise lawyers perform every day. The difference is that lawyers *never* [certainly rarely] have to cope with facts of such complexity under such severe time constraints. [On the other hand, lawyers are not such experts on relevant law as, presumably, a law student going into an exam.]

By way of illustration, suppose a situation where six potential clients barge into a lawyer's office at once. Rather than consult with each individually, the lawyer invites a collective story. Taking up yellow pad, she takes notes on a torrent of facts tumbling from six mouths. An intricate weave of problems emerges, some involving two or more of the six. At the end of the tale the six clamor in unison, "Advise us of our rights and liabilities!" Some pose more specific questions. E.g., "Am I entitled to take the house under the will?," "Does Blackacre belong to me?," "Can I be convicted of tax fraud?" If the lawyer has but 90 minutes in which to respond, providing legal reasoning in support of her conclusions, an essay hypothetical and the challenge it poses is precisely described.

Contrast this with the real-life response of a lawyer confronted with such a situation—"I'll get back to you… This afternoon [tomorrow, a week from now]."

If one thinks, "the lawyer has it easier," one is correct! Rarely do lawyers face the time pressure law students experience on exams. Whether in a hearing, midst of a trial, brief due the next day, a lawyer can often extend time to respond. Not so law students.[11]

[Note. No one said life is fair. The student who can organize and perform better under pressure than

classmates (as ably implementing LEEWS ensures!) will do just fine. 35, 45, 55 and more points out of 100 should not be a problem. The idea of LEEWS is not to carp about such unfairness, but take advantage of it!]

If one can untangle facts, analyze their interaction with relevant law, and resolve issues pertinent to the six, *more or less as their lawyer would* (assuming a practitioner competent in the legal areas involved), *but faster,* then you have the wherewithal for effectively addressing *any* essay hypothetical. If that seems a tall order, it is. However, the solution is now unfolding.

The first thing the described hypothetical lawyer does (or should) corresponds to Step One. She reviews facts recorded—the hypothetical—to pinpoint practical objectives of each of the six clients. (I.e., what does each want her to achieve for him/her/[them]?) Almost simultaneously she considers who or what stands between client and objective—i.e., the opposition. In effect, she begins by defining conflict pairs and party objectives. *You will do the same!*[12]

Exercises

Orientation to and grasp of Preliminary Overview and Step One will remain merely theoretical, unless one practices applying the approaches to actual hypos. Consider now the Torts, "Combination," and Corporations exercises in the Appendix (pages 134, 146, 166, respectively). Never mind that you may not know law in these areas. Sufficient law to address all practice exercises is provided. Moreover, legal knowledge is not needed at this point. Imagine these three hypos comprise an actual 4-hour exam.

EXERCISE ONE: Simulate a Preliminary Overview (PO) for this (4-hour) exam. (Literally flip through the pages on which the three hypos are found, noting time allotted each, length of each, etc. *Do not [of course] look at any facts!)* Complete the PO by returning to the Torts hypo and ... Do you recall Phase Two (skip facts to locate…)? Return and continue when the exercise is completed. Take no more than 30 seconds!

Note the discipline required to not look at facts. Did you note that allotted times—90 min., 90 min., 50 min.—do not add up to four hours? Think about this a moment… What is evident?… [Math!]

Ten minutes is unaccounted for! This is the sort of logistical detail one should note in Phase One of the PO. It is not unimportant information. Pressed for time during an exam (as you likely will be), knowing you have a ten minute cushion reduces pressure.

EXERCISE TWO: [Note. Instruction at the end of the Torts hypo—"Discuss rights, liabilities of all parties"—is open-ended (i.e., non-specific, broad in scope). Save for "all parties," it provides no clues to assist in performing Step One. It will be necessary to review facts to find all parties and identify (common sense, practical) objectives of parties to conflict pairs. However—discipline!—, so long as focus is (solely) on identifying parties, conflict pairs, objectives, one can speed-read (skim) the fact pattern. Only look for "elephant!"[13]

Limit the scope/task in Step One to identifying parties in conflict, objectives of parties—WHO'S AGAINST WHOM? WHAT DOES EACH SIDE WANT? *(Mantra No. 1.) As* Step One is the first stage in the "response outline," at this time *label a sheet of paper* "Torts."

Do it! (I.e., label a sheet of paper "Torts.")

Now, go back to the Torts hypo (only). Perform Step One! (On the sheet) list conflict pairs and competing party objectives, leaving space between listings. Take no more than 2-3 minutes.

EXERCISE THREE: Label separate sheets "Combination," "Corporations." Conflict pairs one discovers, along with party pairing objectives, will constitute the broad framework of the response outline. Again, leave space between each pairing listed.

Complete Phase Two of the PO for each of these hypos, and perform Step One. *Take no more than 6-8 minutes (total for both) to complete the exercise!*

[Note. Foregoing time limits are mere guides to emphasize Step One should consume very little time.]

The key to efficiency in performing the PO and Step One—indeed, all Steps, all facets of LEEWS—is to *limit oneself to just the task at hand—elephant!* In other words—discipline!—, respecting Step One, do not become involved with facts beyond what is necessary to identify conflict pairs and objectives. Do not, for example, think about *legal* aspects (issues!) relating to conflict pairs. That comes later (Step Two). At this point one will skim facts solely to perform a limited task—find relevant (to question/instruction) conflict pairs and objectives! ONE READS, BUT SELECTIVELY—WITH DISCIPLINE!

Facility performing Step One will indeed require discipline, and practice with lots of hypos. Upon opening an exam, performing PO, Step One [Two, Three, etc.] must be automatic. There can be no hesitation, no pause, thinking, "What was that first Step?" THE DISCIPLINED, STRUCTURED, STEPPED LEEWS APPROACH MUST BECOMESECOND NATURE—*HOW ONE ROLLS!* The result is a comforting sense of confidence and control (even, many LEEWS grads report, eagerness) going into any essay exam. (Whoa!)

When satisfied all relevant conflict pairs and appurtenant party objectives have been noted, compare your effort with models of Step One for the (3) hypos in question. (Appendix, pp. 137, 150, 168) Did you miss any conflict pairs? Are any pairs unresponsive to the question(s)/instruction(s)? Are objectives listed realistically those of the party-client(s)? (I.e., are they legal, not practical, common sense [client] objectives?) Are objectives relevant to facts and question(s)/instruction(s)?

CONGRATULATIONS! IN SYSTEMATIC FASHION YOU'VE BEGUN THE RESPONSE OUTLINE FOR THE TORTS, COMBINATION, AND CORPORATIONS HYPOS.[14]

SECTION TWO, CHAPTER 4 FOOTNOTES

[1] Note (again). You should not find yourself attempting to decide what hypothetical to address first. Such would imply peeking at facts, which one is to scrupulously avoid doing in performing the Preliminary Overview. Reasons for not plunging into a fact pattern and for not choosing among hypos were explored in the preceding chapter. Advice was also offered for the rare instance when a well-meaning professor (not wanting to penalize understandable gaps in knowledge) invites Major Mistake No. 1 by offering a choice of hypotheticals. (See following.) As previously advised (and implied by the Preliminary Overview), better to simply follow chronological ordering of exercises, giving each approximately the time suggested.

Advice re choice of hypos. As noted in the previous chapter, on rare occasions a professor offers a choice of hypos—e.g., "Address three of five." This is thought to be progressive. A typical exam touches upon no more than 40-60 percent of material covered in a course. You will likely have gaps in knowledge (because absent, not paying attention, etc.). A choice of hypos presumably avoids the (unfair) possibility of a 5 percent gap in knowledge causing you to blank on a hypo worth, perhaps, 20 percent of an exam. You can elect a hypo you can (presumably) better handle. The problem is the unlikelihood of knowing whether you can "handle" an exercise until you are involved with it. Reading facts risks the frenzied attempt to identify issues of Major Mistake No. 1, with attendant confusion, intimidation.

Advice in this regard, as noted, is twofold. First, simply avoid the choice altogether. Address the first three (five?) hypos, whatever they may be, in chronological order. Second, if making a choice (as some feel they must), get involved with facts just long enough to get an idea of which hypos seem more problematic. Address these! Broken down via the stepped, LEEWS issue-identification approach, the most daunting hypo becomes manageable. Classmates, meantime, tend to avoid tougher seeming hypos. Thus, less competition on these. Moreover, as noted, a hypo that upon first reading seems easier may be sucker bait. Beyond an obvious issue or two that draws one to the hypo may lurk issues most will not discern.

[2] **Seminal LEEWS insight.** Description of when/how the insight underpinning Step One came to your author is found in the aforementioned book—*GELS.* (See fn.X, p.XXX.) LEEWS grads have acknowledged that this insight guides initial strategic thinking about cases encountered in law practice. It guides thinking in law school about moot court and trial advocacy problems, research assignments, papers, and understanding (2-4 line, exam-focused) case briefing. Here is a denominator enabling a structured approach to thinking about and resolving *all* legal problem solving (!!).

[3] An example is the Criminal Law hypo, Appendix, p. XXX. However, refer to it only after gaining a grasp of Step One.

[4] **"Adversary system"** also refers to the overall process of adversaries (presumed equally matched lawyers) ratcheting toward outcomes of conflicts in accordance with prescribed law and rules.

[5] **"Blackacre"** is the universal term for "real property" ("realty") in property law—land, structures (e.g., houses). As opposed to "personal property" ("personalty"), meaning personal, movable property—not land or fixed structures—, including animals.

[6] **WHO'S AGAINST WHOM?!** At this juncture in a LEEWS program this first of three mantras is introduced. As students in live and audio programs are exhorted to do (and do!), repeat this mantra *out loud.* Indeed, say it three times. *Do it!*

[7] Questions following bar hypos are rarely open-ended. They tend to be straightforward, easily understood, narrow in focus. Steps One and Two can easily be applied. *Always perform the Steps*—process question[s]/instruction[s] via the Steps—, no matter the form (or seeming relative ease) of question(s)/instruction(s). (Discipline!)

[8] And to this day cannot be imagined by the great majority of law professors, law students, lawyers, *all* other exam-writing/ preparation study aids.

[9] **"Damages"** is a legal term of art. It is an objective that comes to the mind of a lawyer (or law student), but not a client, at least not initially. A client thinks, "Money." *Objectives in Step One are to be couched in common sense language, not legal language.* STEP ONE REQUIRES *NO* LEGAL THINKING.

[10] The major failing in Major Mistake No. 1 is attempting to focus on and sort out legal ramifications of a hypo (and exam) too quickly. There is significant advantage in *not thinking about anything legal the first few minutes of an exam.* The disciplined LEEWS approach enables this. Indeed. *One needn't know any law at all in order to read cover instructions and perform Preliminary Overview, Step One (!!).* The first 4-5 minutes of *any and all* exams are therefore now covered! (Without any studying!) How reassuring is that?!

[11] **Extra time on exams.** If one has cause to receive extra time on exams, by all means seek same. Investigate this possibility and requirements immediately.

[12] **Omnipresence of essay, hypothetical-type exams.** Noteworthy is the circumstance that the hypothetical-type essay exam format is featured at *all* of more than 200 law schools in the United States. The reason is that THE PURPOSE OF LAW SCHOOL, at bottom, all other pretensions notwithstanding, IS TO TRAIN LAWYERS. Such being the case, doesn't it make sense that law school exams should measure progress in becoming a lawyer? Wouldn't the best vehicle for this be something measuring performance in the typical task faced by lawyers each day? As one now begins to grasp, this is accomplished by the hypothetical-type essay exercise.

[13] **Looking for "elephant" (a remedy for "slow readers").** Students following the first (Step One) exercise in live programs often express frustration at not being able to "read fast enough" to perform the exercise in time allotted. The idea, they are reminded, is *not to read fast,* but *selectively.* Focus on the limited task at hand. For example, if instructed to find the word "ELEPHANT" on a page, even a "slow reader" can skim to find the word in a matter of seconds. Why?... Because you know *exactly* what you are looking for. You ignore all that is not the defined objective—ELEPHANT. Thus, in performing Steps, whenever you go into a fact pattern, in effect define, look only for ELEPHANT. At this juncture, look solely for *who is against whom?* (who is not happy with some other entity?), relevant to the question/instruction under consideration. And *what does each party* (in a common sense way) *want?* That's Step One!

Once again, DISCIPLINE IN PROGRESSIVELY BECOMING INVOLVED WITH BOTH EXAM AND EACH EXERCISE IS KEY!

[14] **Exam response outline.** Always keep in mind that *an exam response outline is but that, an outline. It is not a substitute for the response.* Contrary to advice given by some professors and others, never think in terms of turning in the exam outline should you run short of time. If you have a notion the professor (never bar grader) may read your outline, it will cease to be an outline. You will tend to make it more complete, more legible, more reflective of analysis. It begins to compete with the actual response. You thereby waste precious time.

Short of time? If running short of time, in the final few minutes at the end of the response recreate the portion of the exam outline not yet reflected in the response. As quickly as possible, flesh out (with brief analysis) and make legible just that portion. Such truncated addition to the exam response would be calculated to grab a few more points. However, unless specifically instructed to do so,…

Never turn in the outline itself. An outline is mere work product. Only *you* need be able to comprehend (read/decipher) it. Normally executed on scratch paper (typically made available—check!), the exam outline should be as brief and sketchy as possible—just enough to remind what is to be discussed, conflict by conflict, party objective by party objective.

We shall see that THE EXAM OUTLINE WILL CONSIST LARGELY OF A LISTING OF "PREMISES," arranged by conflict pairing, with some indication of what one previews will occur respecting analysis of each premise. (E.g., minor, major issue? More time, less time?) THE RESPONSE ITSELF MUST REMAIN THE MAIN EVENT, THE PRIMARY FOCUS OF ONE'S TIME AND ATTENTION. An example of an exam outline will be developed in pages that follow.

CHAPTER FIVE

MENTAL COMPONENTS OF AN EFFECTIVE APPROACH

Consider the following hypothetical (torts law):

> A, driving his car with passenger B, approaches and enters an intersection with the green light. Although green for A, the light flickers yellow for C, approaching swiftly from A's right. The two cars collide in the intersection, injuring the occupants.
>
> Simultaneously, D drives into the intersection from the direction opposite A. She swerves to avoid the collision between A and C, and in so doing strikes pedestrian E, who had just stepped off the curb with a "walk" signal.
>
> B, meanwhile, leaps from A's car, and in a rage slugs C, breaking his nose.
>
> — / —
>
> Discuss rights and liabilities of all parties.

A "tort" is a non-contractual harm for which damages (money) can be sought. Examples of torts are assault, battery, false imprisonment. Another is negligence. When one owes a duty of care to another, and negligently—carelessly, thoughtlessly—breaches that duty, which breach is the proximate cause of injury to that other, one is liable for reasonably foreseeable consequences of the breach.

EXERCISE: Take no more than 4 or 5 minutes. Identify as many conflict pairings as you can relevant to the instruction. (E.g., A v. C.) Don't worry about objectives. They're all the same—money/not pay money. *Just identify relevant conflict pairs*.

[Hint: It may assist to imagine you are *attorney for each party* encountered, posing the question, "Who can be sued?" Note that A v. B and B v. A (likewise B v. C, C v. B) constitute *one,* not two pairings, as *conflicts go both ways*. Another hint—a mediocre practicing attorney would likely identify *at least nineteen (19) pairs!*]

[Note. The foregoing exercise was given for 30+ years to mostly 1Ls (1st and 2nd term), numerous 2Ls, quite a few 3Ls, some recent law graduates, and in latter years more and more pre-laws. Results were consistent. Rarely did more than 10-20 percent of any student group identify nineteen conflict pairs. Often fewer than 10 percent. (On occasion up to 25 percent!)[1]

Of particular note was a group of five second-term Harvard 1Ls at the Boston live (day-long) program in winter/spring 2008. All had taken Torts first term! *None of the five* identified the final six pairs. Yet a mediocre practicing lawyer would likely do so—easily.]

[Note. Suggested response follows. Do not read on until you have given your best effort! Try to find at least nineteen (19) conflict pairs!]

Pretty much all students identify the following eight pairings—A v. C; B v. A *and* C; D v. A and C; E v. A, C, and D. Note that C v. A, and C v. B are redundant. They are encompassed by A v. C, B v. C. (Did you find another eleven? If not, give it another shot before continuing. Most students in the live program have identified 13 pairings at this point.)

To find the additional eleven, one must be aware that when a hypo ends with the instruction, "Discuss rights and liabilities of *all* parties" (as opposed to [rarely] "all *named* parties"), one is not confined to parties *actually mentioned* in the fact pattern. Sometimes, as in the hypo above, implied, but unnamed parties would as naturally be part of ensuing litigation (conflict!) as those named.

[Want another chance? Take another minute or so to identify implied, but unnamed parties (and resulting conflict pairs). Do not read on until you've given up.]

Additional unnamed parties who would be brought into litigation by even a mediocre lawyer (with client and his own [$$] interests at heart), are the municipality (M) responsible for installation/maintenance of the (faulty) traffic signal [identified by a large majority in live programs], and the (product) manufacturer of the (defective) signal (PM). The latter—PM—, and (six) associated pairings are typically identified by no more than 10-20 percent of live attendees, despite hints given above.

Note that M and PM are readily inferred. Postulating, however, say, a subcontractor to the municipality responsible for the installation and maintenance in question (in, e.g., a very small town), would be an example of "going beyond the reasonable scope of (facts of) the hypothetical."

[Note. It is assumed, based upon normal (American!) life experience, it will be concluded the traffic signal was functioning improperly, and this contributed to the mishap.[2] This adds the following pairings—all (5) named parties versus M and PM (=10), plus M v. PM (each seeking to shift liability to the other). (=19 altogether.) Again, typically, only 10-20% of students in live programs identify PM as a party.]

If you're still wondering, "Where does he see M and PM in the facts?," they emerge from what may *reasonably* be inferred, and is not contradicted by given facts. To wit, it is reasonable (in any common sense view) to suppose that a municipality (M) exists (although one is not told whether M is a city, town, hamlet), that M installed and maintains the signal, and M may have performed either or both tasks in a faulty way, contributing to the accident.

Likewise, an entity (PM) must have manufactured the signal; and faulty design or assembly of the product—a safety device, one may reasonably note—, may have been a causal factor. Nothing in the facts contradicts the forgoing (M, PM) possibilities. To the contrary, common sense—as noted, *the most important attribute one brings into an exam*—dictates their consideration.

Identifying M, especially PM (and consequent pairings) demonstrates a lawyerly mind at work—i.e., digging in, ferreting *all* possible litigants. Notably, M and PM create opportunity (read *excuse*) to demonstrate knowledge of additional, relevant legal precepts—namely, strict and products liability. Live attendees who've taken Torts agree that failure to address these topics—issues!—would likely remove one from the running for an "A" grade on this exercise. [Thus, as was long pointed out to (most groups of) rueful, nodding students, "80-90 percent of you are out of the running for an A on this exercise!"]

THE OBJECTIVE—ALWAYS!—IS TO EXPLOIT A HYPO'S FULL POTENTIAL IN TERMS OF OPPORTUNITIES TO IMPRESS (the grader)—with legal knowledge and ability to apply it—AND DISTINGUISH ONESELF FROM CLASSMATES. This requires identifying M and PM's potential involvement.

[Note. A practicing attorney would be led to M and PM by the "deep pockets" factor alone.]

By the same token (should the following have occurred to you, as it does some), there is no basis in given facts or common sense for positing additional unnamed passengers as parties. (Where would it end? Unreasonable!) Nor for suing an auto manufacturer. (There is no suggestion of an auto defect contributing to the accidents, as might be indicated if facts posited, "swerved out of control," or "braked to no avail.") Nor

would insurance carriers of the various participants add new pairings or possibilities. Insured parties in a liability action normally stand in the shoes of their carriers (as "subrogees"). They are thus one and the same party.

It has been noted that what is *not* called for is mere regurgitation of memorized legal precepts. Rather, DEMONSTRATION OF LEGAL KNOWLEDGE MUST OCCUR VIA APPLYING *RELEVANT* LEGAL PRECEPTS TO ANALYSIS AND RESOLUTION OF *RELEVANT* CONFLICTS ARISING OUT OF A FACT PATTERN. (I.e., only demonstration of relevant legal knowledge is wanted.) Any other (mere regurgitative) exhibition of legal knowledge will likely be ignored, regarded as pedantic. (It will also waste time, thereby possibly costing points. It suggests to the grader that you don't know what you're doing.) SKILL AT THE (LEEWS) STEPS ENABLES TAKING ADVANTAGE OF ALL OPPORTUNITIES TO DEMONSTRATE *RELEVANT* LEGAL KNOWLEDGE AND ANALYSIS.[3]

The Importance of Attitude—Avoiding Major Mistake No. 2

Apart from being unaware one should look for implied, but unnamed parties that might create a conflict pairing (as in the foregoing example), *the reason most law students fail to identify PM*—75-90+% in live programs!—*is they bring the wrong attitude to the exercise*. "*IMPROPER ATTITUDE*" IS THE SECOND MAJOR MISTAKE law students (and bar examinees) make in approaching an essay exam.

Few law students or graduates face the prospect of an essay exam with other than reluctance and trepidation. How and why trepidation proves well founded has been described. Content is the student who identifies a few issues and babbles on about them in somewhat knowledgeable fashion. He survives the exam, passes the course (typically, now, with a B, even B+). However, is this an appropriate attitude, if optimal results are desired? If one's entire grade is dependent upon the outcome of a single 3-4 hour exam (normally the case in law school), if one is ambitious and success-oriented (*all* law students!), and has worked feverishly preparing, if it is grasped that the primary ticket to limited, attractive summer and postgraduate legal jobs are top grades—A's!—, can one be satisfied with less than optimal results?

It has been posited that *if you are to handle an essay exam effectively,* you must address it as a (competent) practicing lawyer. Such lawyers are motivated to discover every advantage for a client.[4] They actively mull over nuance of relevant law and fact. They probe and examine from every angle. *They are interested!* You must be as well, if *mastery* of the complex challenge posed by an essay hypothetical is to be exhibited.

SUCCESS WILL ONLY BE ACHIEVED BY VIEWING HYPOS AS *OPPORTUNITIES*—TO DEMONSTRATE BOTH KNOWLEDGE OF RELEVANT LAW, AND ABILITY TO APPLY THAT LAW TO FACTS IN ORDER TO RESOLVE ISSUES, much as a competent lawyer would.

Consider this. *The final exam is likely the only meaningful opportunity to impress where grades are concerned!* This is especially so in a typically large (75-100 students) first year class.[5] It is your only meaningful chance to, as might be put, "strut your stuff!" The examinee who adopts an aggressive, exploitative attitude and approach is more likely to mull facts and legal possibilities, to discern parties (e.g., PM), conflict pairs, and issues, and (we shall see) make arguments that cause a professor to nod and smile with approval. In short, she will *exhaust a hypo's possibilities.*

Adoption (and maintenance) of requisite aggressive, exploitative attitude naturally requires confidence in one's ability to handle, indeed master *any* exam. Such confidence is what LEEWS grads garner via acquiring (owning!) the *science* instructed herein. There is yet a long way to go.

SECTION TWO, CHAPTER 5 FOOTNOTES

[1] Reasons for occasional higher (20-25) percentages are set forth in footnote 6 herein. Do not look at this footnote at this time! Doing so would compromise present efforts at the exercise.

[2] **Reasonably inferred facts.** Note. A backdrop of shared or common knowledge and experience is always assumed respecting how facts of hypos will be perceived. Only against such backdrop can a fact pattern be properly, fully comprehended. For example, the grader in the instance of the torts accident scenario opening this chapter (your author!), consciously or no, invites recognition/introduction of the circumstance that the traffic signal operated in a faulty manner, likely contributing to the mishaps. This added fact is expected to be inferred, if the hypo is to be properly evaluated and analyzed. Moreover, in any reasonable view it *should* be inferred. However, what if a student reading the hypo, for whatever reason, doesn't know how traffic signals function? (Such is hard to imagine, but ….) If a grader's assumption of common knowledge/shared experience is faulty, as in this (unlikely) example, a hypo may be faulted as culturally or otherwise biased.

In other words, IN ADDITION TO GIVEN FACTS OF A HYPO, REASONABLY INFERRED FACTS MUST BE ADDED TO THE MIX (and, therefore, one's calculations and analysis). This contradicts the following standard advice, frequently heard in law school (from professors and most others)—"Do not assume facts." As with much posited as orthodoxy by those who have not given sufficient thought to a *science* of exam taking and preparation, *yes*, and also *no*. We shall see that what may or may not be assumed or inferred is a fine line, but a line that must be understood and observed if analysis is to be "lawyerlike." As often is the case, the test is *reasonableness*. Assuming the traffic signal is faulty is reasonable. (Most would see it so. No one seriously objects to such.) However, for reasons set forth, assuming a subcontractor, or that an automobile defect was a causal factor goes too far. It crosses the line of reasonableness—how *most* (in a target reference group) would see things.

[3] Fully grasping, appreciating what is meant by *relevant* legal knowledge and analysis must await immersion in Step Two, and practice at analysis.

[4] Also not to be bested by an opponent who discovers an overlooked, nuanced aspect of law or fact that proves *dispositive*. (I.e., critical in determining outcome of a motion or entire case.)

[5] **Class participation effect on grades.** It has been noted that grading is (invariably) anonymous. MIDTERMS COUNT ONLY IF THEY *ASSIST* THE FINAL GRADE. The final exam is normally the sole determinant of one's grade, especially in first year. The exception is the instance of a mediocre grade earned by someone who has participated often and helpfully in class. If he/she were to go to the professor and complain about a B or lesser grade, the professor *might*, upon making the (usually unexpected) connection between student and grade, bump the grade upward a half. However, it is unlikely a B+ will be bumped to an A. (Possibly to an A-.) However, given that grading is (normally) anonymous, *such effort to see and talk to the professor must be made.*

On the flip side, LACKLUSTER CLASS PARTICIPATION IS UNLIKELY TO ADVERSELY AFFECT ONE'S GRADE. Only if a student challenges a professor in class (repeatedly), and/or makes a nuisance of him/herself, is a professor likely to bother to match grades with names with an adverse consequence. [Of course any professor can know which is a student's exam, IF she wants to.]

[Note. In some (typically lower-tier) law schools a strict policy may be followed respecting grades and the number of times a student can say, "Not prepared" (and be passed on). Of course, the lawyer mind thinks, "What constitutes *'not prepared."* E.g., would rambling blah blah, tangentially related to the question posed avoid penalty? Normally, presumed embarrassment is deemed penalty for a "NP."]

[6] **Higher percentage totals.** Typically, on occasions when the percentage of students correctly identifying 19 conflict pairings approached 20, even 25, classes were smaller (under 30), and/or a sizable segment of students was from a single school and class, and had recently covered strict and products liability in torts or other class. Others identifying 19 were often older, with experience in business. Some few, of course, simply grasped the exercise and dug deeper. (Were more lawyerlike!)

CHAPTER SIX

PLANNING PHASE—STEP TWO / DEVELOPMENT/USE OF COURSE OUTLINE

Exercising discipline (seeking only "elephant" [p. 60, p. 50, fn.13.]), having practiced as instructed (also with remaining hypos in the Appendix, and on other hypos [any subject]), STEP ONE SHOULD TAKE NO MORE THAN A MINUTE, TWO MINUTES, AT MOST FIVE MINUTES TO COMPLETE FOR THE MOST COMPLEX, LENGTHY (5-10 page) HYPO. If a question/instruction provides conflict pairs—e.g., "Discuss A's rights against B; B against C," etc.—, apart from identifying respective party objectives, *it may be possible to skip Step One and begin with Step Two*.[1]

Step One provides but the broadest outline of one's response to a hypo. It is not Step One, but Step Two that accomplishes subdivision of *any* hypothetical-type fact pattern into the manageable component units represented by the grid of Figure B. (P. 35, *supra*).

[Note. If Step One yields three conflict pairs, a hypo's complexity, in effect, has been reduced by a factor of three, as each pairing (and relevant facts) is considered separately. (Yes?) If, however, Step One yields but one conflict pairing—e.g., the entire hypo has to do with a contract dispute between two parties—, little has been achieved in terms of reducing complexity. Step Two is the more important vehicle in reducing a hypo's complexity.]

Having identified (relevant) pairs and (practical) objective(s) of each party to each pairing (having performed Step One), ***STEP TWO*** IS TO CONSIDER ONE PAIRING, ONE PARTY, ONE PARTY OBJECTIVE AT A TIME. NOW CULL THROUGH FACTS RELEVANT TO THAT PAIRING, PARTY, OBJECTIVE (thereby typically focusing on but segments of the fact pattern—words, phrases, a sentence, no more than a paragraph) TO IDENTIFY THE PREMISE OR PREMISES THAT *MAY* ASSIST A PARTY IN ACHIEVING AN OBJECTIVE, OR, WHERE SUCH IS APPARENT,THE OVERRIDING PREMISE(S) THAT WILL CONTROL RESOLUTION OF THE CONFLICT.[2]

[Note the predicate to performing Step Two—"One pairing, one party, one party objective at a time." "Elephant" at this juncture is identification of premises. However, as always, with narrow focus—*one conflict, one party, one objective at a time*.]

If a hypo is to be engaged in increments, if mastery over seeming chaos is to be achieved, one proceeds with discipline and [narrow] focus.) By focusing on a single pairing, party, objective, one normally limits the amount of a fact pattern—segments, portions of facts—that are "culled" (examined closely) to identify (relevant) premises. If one focuses on a single pairing/party/objective, segments of hypos that must be examined may be no more than a word, several words, a phrase, a sentence, rarely more than a paragraph. ALWAYS (!!) ONE SEEKS TO LIMIT THE SCOPE OF THE IMMEDIATE TASK—ELEPHANT!

Premises as Pivotal Concept, linchpin

In Step Two one engages the linchpin, the pivotal concept of the LEEWS approach. *"PREMISES"* sought in Step Two shape and reveal manageable components/units one will address in (concise) paragraphs. They reveal narrowly focused, relevant "issues" a grader wants identified and discussed. Comprehend the meaning of "premise,"… All falls into place!

Simply stated, one's task preparing for all-important final exams is to gather premises (in course outlines) and practice (thereby understanding) their application. One will seek to identify premises in every hypo on every exam (via Steps One and Two). Premises will be analyzed (roughly one concise paragraph after another in the response), giving appropriate emphasis (major vs. minor issue) as indicated by Step Three analysis and one's knowledge of the professor.

It is so important you grasp this "bottom line" perspective on the LEEWS approach that you are advised to read the foregoing paragraphs again. *Maybe after each chapter that follows (!!).*

Given that a party to a conflict pairing has an objective—damages, job reinstatement, etc.—, if he is to obtain that objective at law (i.e., in a legal proceeding), then he (by his attorney) must advance a *"legal basis of entitlement."* He must propose a statute, rule, principle, legal precedent, policy ground, or combination thereof that, standing alone in light of existing and reasonably implied facts, *may* entitle him to the objective.3 [One does not, for example, gain something in court over objection of the opposing side merely by asking for it, or because one *feels* one's client is entitled to it.] This basis of entitlement is the "premise" of Step Two.

Step Two is to seek *all* premises suggested by relevant facts of the hypo under consideration (and

one's knowledge of applicable law [organized in a course outline]), relevant to attaining (party) objectives and resolving conflicts identified in that hypo.

[Note. Step Two necessarily remains confusing at this point. Facility in implementing this critical step requires considerable explanation and practice, which follows. (Also discipline!) Step Two solves both the problem of segmenting *any* hypo (into manageable components/units), and identifying *any* and *all* (most, at least) relevant issues.]

Another way to think about Step Two and premises is to understand that lawyers for respective parties in real-life legal conflicts think as follows: "Given my client wants X, given certain facts, what legal basis or bases can I possibly assert that may assist in obtaining X?" The good lawyer further thinks, "What legal bases might the opposing party—his/her lawyer—assert to prevent my client from obtaining X?"

This is precisely how one wants to think in performing Step Two. Having pinpointed a party objective, if a judge were to ask, "What, as a matter of law, entitles your client to that objective?", drawing from legal knowledge (collected in a course outline), what premise(s) might be advanced to achieve that objective? Simultaneously, are there premises that can be advanced to achieve the competing party (counter) objective?

[Note. A lawyer will assert as many legal bases or theories of entitlement—*premises!*—as seem appropriate. This is called "alternative pleading." EACH THEORY OR LEGAL BASIS—*PREMISE!*—BY ITSELF, IF ESTABLISHED, WOULD SUFFICE TO GAIN THE OBJECTIVE.][4]

Exercise Applying Steps One and Two

Suppose, for example, a fact pattern describing an attempt by party X to introduce into evidence the statement of C, who is not present. There is an objection by party Y, and the court sustains (upholds) the objection. The instruction is to "Determine the correctness of the court's ruling."

Evidence (law) is a required second year subject in law school. The fact pattern is from an evidence exam (or portion of a bar hypo testing knowledge of evidence law). Providing one has taken evidence, it should immediately be recognized (thinking along conventional lines) that the "hearsay rule" is involved.[5] The "issue" has to do with whether the rule has been violated. [Note. This is conventional "issue spotting." Facts, willy-nilly, (may or may not) prompt recognition of legal topics or issues, in this instance hearsay.]

The problem is merely how to respond to the instruction in a concise, effective way. However, back up a moment. How would one go about applying Steps One and Two to this same scenario in outlining/organizing a response?

Applying Step One, one should quickly note conflict pairing of X, party seeking to introduce statement of C, versus Y, objecting to the admission. X, of course (and X's lawyer), has a larger, substantive objective. (Namely, whatever is achieved by winning the legal contest/lawsuit.) However, immediately [evidence hypo objectives typically are *intermediate* in nature], X's objective (his lawyer's) is to get C's statement admitted in evidence. Y's is to keep it out. That completes Step One [in mere seconds?].

Y, by objecting (in effect making a motion to preclude the evidence), precipitates the (intermediate) conflict. It is Y who initially *affirmatively* wants something—keep C's statement out of evidence. A court, therefore, would look first to Y for the (legal) basis of his objection—for a premise! Burden of proof would be on Y. For this reason, applying Step Two, *one considers Y's position first*. The same as Y's lawyer, one would assert "hearsay" as a legal basis for keeping C's statement out of evidence. (I.e., premise that *may* assist in achieving the objective.)

Movant(s), Respondent(s)

In LEEWS parlance, Y in the foregoing is initial *"movant."* A movant initiates. A movant *does something, makes a move,* in order to achieve an objective. Counterpart opposing party X, responding to Y's initiative, is *"respondent."* A respondent *does not initiate*. Indeed, if movant fails to initiate (*make a move* for an objective), respondent's objective often is achieved by default. However, not always.

Example. If, in the instant example Y's attorney does not object to admission of C's statement, X's attorney normally need do nothing to obtain the default objective of the statement being admitted. However, particularly as regards (intermediate) courtroom evidentiary objectives, should breach of Rules of Evidence be evident, egregious, a judge, *sua sponte* [acting on her own initiative], will (*may*)

bar something seemingly improperly offered, such as hearsay. In such instance, a move or initiation by Y (an objection) is unnecessary.

Where court or judge [*sua sponte*] acts as movant to initiate (and often resolve) conflict over an objective, one nevertheless thinks in terms of an opposing party other than the court (in this instance Y). Premises advanced to meet either judge's or Y's opposition would be the same.

What is especially significant about movants/respondents (apart from the former having an objective requiring affirmative [initiating] behavior to achieve), is that *in a courtroom a movant normally carries the initial burden of proof*. Thus, whether plaintiff or defendant, movant's position is considered first. What premise (or premises) assist a movant is always the first order of business.

[Note. Patience! Bear with this. No one said learning to be a lawyer is easy. It should not be, and isn't. Indeed, the advantage LEEWS provides is that law schools—all of them!—do such a poor job in this regard.]

Steps One and Two Versus Conventional "Issue Spotting"

Identifying hearsay as a relevant topic/issue in the foregoing example via mere inspection of facts—conventional issue spotting—is straightforward, relatively easy. However, even here Steps One and Two offer advantage.

In the instance of whether a contract is invalid (on a contracts exam), or whether a statement is hearsay (in the instant example), law students often skirt past such larger (but obvious) issues to what are (correctly) deemed topics (also issues!) more germane and of interest to a professor. Namely, in the instance of a contracts exam, which of various aspects of contract—consideration, offer, acceptance, etc.—is contested; in the instance of hearsay, which of several exceptions to the hearsay rule might come into play. In other words, there is a tendency to give short shrift, to sometimes breeze past background, foundational (larger) legal aspects/issues.

Thus, a response such as the following might be offered in the instant example:

> "Whether or not the statement offered by X can be admitted into evidence raises a clear issue of hearsay. An exception to the hearsay rule is … [Here, dying declaration, admission against interest, business records exceptions, etc. is introduced and discussed.]"

Without, at this juncture, addressing the rambling aspect of the foregoing (corrected by LEEWS paragraphing format, yet to be instructed), what may be noted is the mere summary ("conclusory") mention/assumption of hearsay, because it is so obvious. There are in point of fact *two issues for discussion*—namely, (1) whether hearsay exists, (2) whether an exception to the hearsay rule applies. Discussion of each issue probably merits a checkmark. However, very likely only the exception will be addressed/analyzed by the great majority of examinees. This may be an oversight costing points.

Generally, PROFESSORS WANT TO SEE *EVERYTHING RELEVANT* ADDRESSED. In haste, owing to time pressure, students tend to give short shrift to more obvious legal aspects meriting at least passing attention in a courtroom.[6] Thus, as suggested, the issue of whether hearsay occurred likely will not be addressed. (I.e., "hearsay" defined, and a [brief] showing of why C's statement is hearsay.)[7]

Step One posits the Y v. X pairing (in that order), and respective objectives of keeping statement out of evidence versus getting it admitted. Step Two prompts hearsay as Y's (movant) premise, then—*counter*premise!—the possible exception to hearsay for respondent X. Thus, *two* premises, each addressed in separate phases of presenting give and take of Y v. X. (As would occur in an actual courtroom.)

As noted in footnote 7, the Steps ensure orderly, *complete* discussion. They ensure appropriate attention to *all* relevant legal precepts, and in proper chronology. In this instance, they indicate that *two issues, not just one*—two premises!—warrant addressing. Moreover, as we shall see, each in its own (concise) paragraph of analysis. Such orderliness and attention to *all* aspects needing exploration can only be accidental and rare in the normal, haphazard progression of conventional "issue-spotting."

The Course Outline, Its Use in Step Two

Step Two is where a well-stocked (with premises), well-organized (see following) summary of relevant law in a subject—a "*course outline*"—is critical. "Open book" exam or no, one pairing/party/objective at a time, in light of *relevant* facts—a sentence, paragraph, [typically limited portion/segment of a fact pattern]—, you quickly review your course outline in Step Two. Pluck relevant legal *possibilities* (premises). (From the outline, from [prompted by the outline] your brain.)

[Note. IN STEP TWO YOU DO *NOT* STOP TO ANALYZE

WHETHER A PREMISE WILL ACTUALLY SUCCEED. Such would consume too much time. Close analysis required for such determination comes later—in Step Three (and more completely during the response itself). ALL YOU NEED NOTE IN STEP TWO IS PREMISE AS *POSSIBILITY*—i. e., *may* succeed in achieving the party objective in mind. The legal term of art is "*colorable*," meaning something has the potential to be possible (to be [somewhat] colored in). PREMISES IN STEP TWO ARE MERELY *COLORABLE* LEGAL POSSIBILITIES! (Again, disciplined, orderly progression is contemplated.)]

Organize the course outline into categories (of law) for quick reference in Step Two. (More on this later in the chapter and in subsequent chapters.) *"Categories"* are *groupings of premises by topic*. Topics in the outline (and topic headings) might correspond to chapter or subchapter headings in a casebook or commercial outline (discussed later). You might make up a topic heading, such as [for torts outline], "Torts requiring intent" and "Torts *not* requiring intent." (Or "Intentional torts," "Unintentional torts.") A category in a contracts outline might be "conditions voiding otherwise valid contract."[8] One might lift a useful topic/category heading from a classmate's outline.

Under categorical/topical headings, organize legal precepts that seem to "hang together"—e.g., exceptions to hearsay rule; environmental torts; ownership of found property. Should a category/topic become large and unwieldy, consider whether you might usefully subdivide into separate (new) categories/topics. The idea is to be able to *quickly associate party conflicts/objectives and categories of law*. THE COURSE OUTLINE SHOULD BOTH REMIND ONE OF RELEVANT LEGAL PRECEPTS, AND ENABLE SPEEDY LOCATION OF APPROPRIATE LAW.

Example of a Category—Hearsay

"Hearsay" would be a major category in an evidence law outline. The category likely would open with a definition of hearsay. (Lifted from an assigned case or, better, as we shall see, from a commercial outline.) Following the definition (and possibly an illustration, perhaps with a case reference), might be what is termed *"rationale,"* meaning common sense reasoning/logic behind the rule. Respecting hearsay, the rationale would be prohibition of evidence that is inherently unreliable, because it cannot be tested by cross examination.

There would follow recognized exceptions to the hearsay rule. These include statements that by their nature [the justifying rationale] offer guarantees of reliability absent cross examination—e.g., dying declarations, admissions against interest. Also, records kept in the normal course of business. Should an exception prove complex, requiring elaboration, it might deserve its own separate category. One might add case references, explanatory addenda, insights from class discussion (particularly viewpoints/emphases of the professor). One should synthesize class and case briefing notes/insights into a growing course outline from week one of term (ideally) or ASAP, on a regular—weekly!—basis.[9]

As noted, STEP TWO SEEKS TO *IDENTIFY* PREMISES, NOT ANALYZE WHETHER THEY WILL SUCCEED. Therefore, once a premise of one side is noted, move immediately to the opposing party side to consider the possibility of a counter to that premise—a *"counter-premise."*

[Note. As is true for most live program attendees, distinguishing premise/counterpremise (how each gives rise to issues meriting analysis), and argument/counterargument is confusing. The distinctions will remain cloudy until lawyerlike analysis is grasped and practiced. All will be revisited in greater depth in Chapter Eight following, and en route.]

Doubtless, matters now begin to seem complex indeed. There is much to digest in terms of the thinking process involved in Step Two. New terminology has been introduced. (And there is much more to learn respecting Step Two. Also the course outline). Take a break, if necessary. As noted in the Preface, learning from book alone is difficult. (Owing to effort required, uncertainty whether effort is worth it. [It is!]).

More on Premises (identification and analysis of which = exam response)

Hearsay, exception to the hearsay rule… These legal precepts were called "premises" in the foregoing Y v. X example. Given different facts, a different conflict, a different legal subject, Step Two would reveal different premises. For example, assault and/or battery in a torts context; robbery, felony assault, various types of burglary, Fourth Amendment, self-defense (the latter possible defendant *counter*premises!) in a criminal law context; breach of contract and parol evidence rule in a contracts context; and so on.

THE NUMBER OF PREMISES NOTED IN STEP TWO IS LIMITED ONLY BY *LEGAL KNOWLEDGE*, *RESOURCEFULNESS* OF PERSON PERFORMING STEP TWO—I.e., all legal avenues a fact pattern would suggest to an experienced, knowledgeable lawyer—, RELEVANCE (whether *colorably* of assistance in achieving an objective), AND *TIME*.[10]

UPON COMPLETION OF STEP TWO (for all pairs/parties/objectives), THE EXAM OUTLINE SHOULD REFLECT MOST PREMISES TO BE ADDRESSED. Should one (in concise paragraphs, roughly one per) analyze feasibility of each premise in attaining the objective to which it relates—i.e., does it succeed on given, relevant facts?—, response to a hypo is largely complete.

As noted in footnote 10 of this chapter, as one analyzes premises during the response (simultaneously becoming more deeply involved with facts), the occasional additional, less obvious premise may emerge. However, move through the planning phase—Preliminary Overview, Steps One, Two, Three—as quickly as possible, mindful of time, especially 10-15 minute planning limits.

ALL THAT IS REQUIRED 10-15 MINUTES INTO A HYPO EXERCISE IS THAT AT LEAST *SOME* RELEVANT PREMISES BE NOTED (possibly only one), and one have a sense of time needed for analysis. (The latter provided by Step Three.) Immediately execute a paragraph or more of analysis! If need be, come back and continue Step Two-Step Three planning in another 10-15 minute planning segment. (Plan, execute (the response)! Plan, execute!)

We shall now see that for a given hypothetical (*any* hypo!), *at the conclusion of Step Two a list of "issues" a professor (or bar examiner) wants "spotted" exists*.

Premises = Manageable Components = Relevant (narrowly focused) Issues!

It has been noted that premises identified in Step Two correspond to the "manageable components" represented in the Figure B grid (p. 35). The squares of Figure B figuratively correspond to finite portions of a hypo/fact pattern—a word or words, a phrase, a sentence, a paragraph—, each of which prompts recognition of a premise that *may* assist a party to a conflict pair in achieving an objective. In that "issue," by definition, *inter alia,* is "a point, matter, or question to be disputed or decided" (also a "conflict," and in legal pleadings "a point in fact or law on which the parties join [contest] and rest the decision of the cause") THE INQUIRY/QUERY, *"WILL THE PREMISE SUCCEED?"* [in achieving the objective] NECESSARILY RAISES AN ISSUE—A NARROWLY-FOCUSED *LEGAL* ISSUE (!!).

Should one address (analyze/discuss) one premise after another (each in roughly a paragraph), the shape/content of an overall exam response becomes evident. RESPONSE TO EVERY EXAM WILL BE A SERIES OF PARAGRAPHS, EACH (ROUGHLY) ANALYZING A PREMISE.

For example, call to mind examples of premises noted earlier—assault, battery, robbery, felony assault, Fourth Amendment, self-defense, breach of contract, parol evidence rule. Imagine a thousand more, each colorably of assistance to a party in conflict in achieving an objective. Should one pose the questions: "Was there an assault?"; "Was there a battery?"; "Was there a robbery?"; "Does the Fourth Amendment [no unlawful search or seizure] bar the evidence?"; "Was the contract breached?"; etc., *legal issues for determination are raised—narrowly-focused legal issues!*

Do such inquiries seem topics/issues a grader would want identified/discussed? Do they seem *relevant* legal topics/issues?… They *must be* for the following reason: IF CONFLICT PAIR/PARTY/OBJECTIVE(S) ARE RELEVANT TO FACTS AND Q/I, PREMISES RELEVANT TO CONFLICT PAIR/PARTY/OBJECTIVE (generated by relevant facts) WILLY-NILLY GENERATE RELEVANT ISSUES (!!).

[Note. As will become apparent, often *lots* of relevant legal issues are generated in/by Step Two. Often more issues than the hypo's creator—professor, bar committee—is aware of. Which is never a bad thing. *Identifying more issues in a hypo, so long as relevant, is one way of impressing, scoring more points, emerging from the pile of mediocre responses, achieving a top grade!* Indeed, if there is a problem with the thorough ferreting of issues from fact patterns achieved by LEEWS Steps, it is sometimes having to sort and prioritize many issues, including ones that are relevant, but not on a grader's checklist.]

In addition [Yes, there is more.], issues generated by Steps One and Two, and the question, "Will the premise succeed?," are rarely broad, amorphous, confusing. Consider, for example, the following typical law student formulations of issues: "Is what happened [in the facts] constitutional?"; "Does the Fourth Amendment come into play?"; "What crimes might party X be guilty of?"; "What torts were committed

by Y?"; "Who owns Blackacre?"; "Who is responsible for [whatever]?" Such queries indeed raise issues. However, they progress little beyond Q/I's posed at the end of hypos in terms of focusing discussion/analysis. They are overly broad. One remains confused respecting how/where to begin.

BECAUSE STEPS ONE AND TWO NARROW FOCUS TO A SINGLE CONFLICT PAIR/PARTY/OBJECTIVE, AND CORRESPONDING LIMITED FACTS (that gave rise to a colorable premise), THE QUESTION "WILL THE PREMISE SUCCEED?" INVARIABLY GENERATES A NARROWLY-FOCUSED, MANAGEABLE INQUIRY/ISSUE.

[Note. How to analyze and present analysis of a narrowly-focused inquiry/issue will be the subject of subsequent chapters.]

Providing one becomes adept at analyzing narrowly-focused inquiries/issues, THE SUM OF EFFECTIVE HANDLING OF ALL INQUIRIES/ISSUES WILL BE EFFECTIVE HANDLING OF *ANY* HYPO OVERALL! One, in effect, addresses the squares of the Figure B grid one after another (roughly one paragraph per).

Perspective

[Note! What you are about—in reducing hypos to premises/components/issues via disciplined steps—is *taking control of a fact pattern*. Via the Steps, the aim is nothing less than processing, in effect reconstituting the Q/I format(s) of *any* and *all* hypos into something familiar, predictable, manageable—*a list of premises!* (Which premises, again, posed as questions—"Will [the premise] succeed (in achieving the party objective?"—become narrowly-focused, relevant issues!)

Inevitably, differing Q/I formats of the many hypos one encounters (from different professors on different exams in different subjects) will likely confuse. (E.g., "Draft a memo"; "Discuss the legal implications"; "Pretend you are a judge"; "Draft a statute"; "You are the attorney for ..."; etc.) Should one attempt, as most do (lacking an alternative), to address a Q/I from the perspective, "What does the professor want?," one is likely put on the defensive. One sits, squirms, becomes anxious as minutes tick by. *The exam is in control!*

A salient LEEWS insight is that *ALL* PROFESSORS' QUESTIONS/INSTRUCTIONS, IN WHATEVER FORM, AT BOTTOM ARE *EXACTLY* THE SAME—*"FIND AND DISCUSS RELEVANT (LEGAL) ISSUES!"*

Think about this for a moment. If an exam tests progress in becoming a lawyer [What else would a law school exam test?], won't a professor, when all is said and done, want identification and discussion of legal topics (issues!) a competent judge or lawyer would deem relevant, given the exercise posed?

If one approaches a hypo *not* from the perspective, "How do I answer the Q/I?" (whatever the [unpredictable] form), but, "I'll [first] reduce the hypo to components corresponding to relevant issues," then all one needs for any hypo, no matter question/instruction format, is the mechanism to accomplish this.

That mechanism exists! You are learning now! APPLY PRELIMINARY OVERVIEW/STEPS ONE/TWO TO *ANY* HYPO, *ANY* Q/I FORMAT, AND A SERIES OF PREMISES RESULTS. THE QUESTION, "WILL EACH SUCCEED?," GENERATES ISSUES (*ALL* THE ISSUES!) A GRADER WANTS DISCUSSED!

Naturally, practice is required to gain facility at Steps One and Two (and Three). You need to learn and practice the critical skill of analyzing "as a lawyer." Beyond these skills remains to be learned (and *practiced*) how, exactly, to present analysis of premises/issues in concise paragraphs that impress.

When Do I Really Read the Facts?

At roughly this point in live programs (three hours in) someone typically asks this question. Meaning, "When do I immerse myself in the hypo, and *very carefully* read (all) the facts?" This accords with such CW instruction as "Read facts carefully," and "Read through the facts at least twice."

I invite the answer from other students. Some, having better grasped the implication of Preliminary Overview, Steps One and Two, respond, "NEVER!!" (Which is not entirely correct. However, certainly one does not at this juncture immerse oneself in facts with the [amorphous] aim of *reading facts carefully*.)

Immersion with the aim of *reading facts carefully* precisely invites Major Mistake No. 1. WHAT LEEWS IS ALL ABOUT IS APPROACHING A COMPLEX WHOLE *PIECEMEAL*. Steps One and Two *do* require that one read facts. However, *limited facts*, for a *limited purpose*—ELEPHANT! (See following segment.)

Respecting Step One, for example… Exercising *discipline*, one reads *just* facts necessary to ascertain relevant conflict pairs—who's against whom?—and party objectives. This *only after* giving thought to clues (to Step One) offered by the Q/I. (E.g., "*all* par-

ties.") Total time for the exercise, however lengthy/complex the hypo, might be mere seconds, surely no more than five minutes.

Respecting Step Two, referring to course outline and legal knowledge in your head, you successively read facts relating to but a single party, single objective (discipline!) to discern *colorable* premises (mindful of 10-15 minute planning segment limits). This should result in focusing on only a phrase here, a sentence there, at most a paragraph or two. YOU READ CAREFULLY, BUT SELECTIVELY, AND (ALWAYS!) *WITH DISCIPLINE.* One reads—always!— to find *elephant*.

In sum, you needn't worry re "*really reading facts*." Just do the Steps! Piecemeal, you'll sift (read) through the same facts again and again. However, *selectively*, with *discipline*, with *differing objectives*. Each perusal of facts has a different purpose, a different perspective and objective, a *different definition of elephant*. One reads in segmented fashion, with differing, limited perspective. Thus (necessarily) *carefully!*

We shall see that when one completes analysis and response, one will have attended to (read) facts with a thoroughness that cannot at this juncture be imagined. Not even close! One will have read facts "as (something approaching) a (practicing) lawyer."

Selective Reading of Facts (Seeking only Elephant!)

Your initial reading of facts—Step One—is typically a quick survey, a cursory kind of skim-read. Aided by clues gleaned from a question/instruction, you seek (only!) conflict pairs and competing party objectives. If, for example, the instruction is, "Discuss X's rights," you scan facts for whomever/whatever may be in opposition to X (conflict pairs), and respective party objectives. Such investigation enables you to often overlook significant portions of facts (unrelated to X and this task). A more open-ended instruction—e.g., "Discuss rights of all parties"—requires paying more attention to the entirety of facts. However, your limited task should yet enable a faster, somewhat cursory review.

Step Two normally requires a closer reading of facts. However, you focus on but *one* conflict, *one* party, *one* objective at a time. Thus, you should not be focused on more than *limited portions* of a fact pattern. You pay attention *only* to facts triggering relevance of one or more of numerous legal precepts in your course outline (and head).

AT NO POINT ARE YOU ADRIFT (IMMERSED) IN A FACT PATTERN READING *CAREFULLY,* BUT WITH NO PURPOSE MORE SPECIFIC THAN "SPOTTING ISSUES." (Often with less than clear understanding of the question[s]/instruction[s] posed.)

As noted, when one analyzes premises (following Steps One, Two, Three), relevant facts will be parsed and probed more carefully than can at this point be imagined. You will read "as a lawyer," normally a revelation, even for law school graduates. You will discover much, much more than a typical, unfocused, immersion in facts can possibly reveal. However, everything in its proper (disciplined) sequence.

Importance and Role of "Knowing the Law"

Obviously, to do well on a law school exam (any exam!), one must know the subject matter of the course in question.[11] Step Two makes clear the importance and role of legal knowledge. THE MORE LAW YOU CAN SUMMON TO MIND—statutes, principles, policy considerations underpinning legal precepts, majority/minority views of legal precepts, specific cases establishing parameters for application of certain principles, etc.—, THE MORE PREMISES A FACT PATTERN WILL SUGGEST AS POSSIBILITIES. (Thus, more issues.) *Successful application of Step Two presupposes legal knowledge*—the more, the better.

There are no shortcuts in this regard. If approaching a hypothetical as a lawyer is key to success, approaching as a lawyer well versed in relevant law is more key to success. The best measure of "good lawyer" (by analogy, successful examinee) is probably ability to come up with colorably viable legal avenues of attack and defense—premises!—in aid of achieving client goals. This is a direct function of legal knowledge (organized for speedy reference), lawyerly focus and creativity, disciplined approach.

More on Development, Use of the Course Outline in Step Two

If one grasps that in Step Two facts relating to a party objective should suggest legal possibilities (premises), and the more legal knowledge at one's fingertips, the more legal possibilities may present themselves, then an important aspect of study strategy in anticipation of Step Two manifests. As facts are "culled" in Step Two (seeking to identify premises), it behooves one to have ready to hand virtually all legal knowledge that may prove relevant. In short, *you want all possible premises ready to hand*.

The student who must refer to casebook, hornbook, etc. during an "open book" exam, in effect researching a response, has scant prospect of covering sufficient territory to merit a top grade. However, unless your memory is indeed computer-like, it is difficult amid churn of emotion and information in your brain to systematically lay hold of precise facets of legal knowledge needed (premises), *when needed*. This is where a properly constituted course outline comes into play. *You must be able to get at relevant law quickly and systematically, not haphazardly.*

Consider at this point "Relevant Legal Principles for the Torts Hypothetical" accompanying the Torts Hypo (Appendix p. 134). As you progress through the term in torts, the same as any other course, legal rules, principles, statutes, etc. encountered—*all potential premises!*—should be gathered by category in a course outline. As noted, categories may correspond to chapter headings/subheadings of a casebook, you can make up categories, you may borrow categories from a commercial outline or a friend's outline. Categories (a/k/a topical headings), are a means of grouping legal precepts in such a way as to easily, predictably locate them. THE AIM IS TO BE ABLE TO FIND RELEVANT LAW EFFICIENTLY.

By way of illustration, first paragraph of the Torts Hypo presents a conflict between Pucker Nicely (PN) and Direct Hit Davis (DH). Assuming maturation to a lawsuit (as one must in proceeding to Step Two), PN likely would initiate suit, seeking money.[12] PN would be the initial movant. Applying Step Two, facts relevant to PN's money objective—first paragraph only?!—are perused with the thought, *"What premise(s) do these facts suggest that might assist PN in achieving money from DH?"*

Of course, you give some thought to facts beyond the first paragraph. (I.e., "Anything suggested elsewhere that seems relevant to PN getting money from DH?") Following a cursory survey (mere seconds), you likely conclude, "No." The only facts you need be concerned with are those in the first paragraph—a mere 2 1/2 lines! Thus, with no assist from the open-ended instruction—"Discuss rights and liabilities of all parties."—you segment the hypo to focus on just the 2 1/2 lines. WILLY-NILLY, STEPS ONE AND TWO NORMALLY ENABLE A USEFUL SEGMENTING OF *ANY* HYPO!

The point will be made (and reinforced) that IN LARGE PART RELEVANT LAW SHOULD BE IN YOUR HEAD (i.e., memorized). How this is accomplished will be instructed. [Preview. It occurs as a result of 2-4 line case briefing, and what this implies in terms of class preparation.] However, during the helter-skelter and adrenalin pump of an exam, you also need a means to get at law in your head in *systematic, efficient fashion*. This is the role and purpose of the course outline.

[Note. Instruction is provided on p. 126 on how to approximate one's course outline when an exam is "closed book." In a "closed book" exam nothing more than, possibly, a code (such as IRS Code or Code of Civil Procedure) can be brought to the exam.]

Subdivided into clearly defined categories of legal precepts, a category in a torts course outline might be "Defamation," the law of libel and slander (perhaps corresponding to a chapter/subchapter of the casebook). Another might be "Torts against the land," being a compilation of legal precepts relevant to that subject. Another might be "Unintentional tort;" another (big one) "Negligence;" and yet another "Intentional tort."

Thinking about the first 2 1/2 lines (only!) of the Torts Hypo, do any of the foregoing categories seem fertile ground for yielding a premise that might assist PN in obtaining money from DH?

Scanning the Course Outline for Premises—in Seconds!

Even if one has minimal knowledge of tort law, facts of the first paragraph (2 1/2 lines) should not suggest "Defamation" as a category in which to seek a premise to assist PN. Nor "Torts against the land," "Negligence," or "Unintentional tort." Thus, in a matter of seconds vast areas of tort law are removed from consideration. Indeed, following a term of instruction in tort (or mere perusal of Relevant Legal Principles for the Torts Hypo), one's mind should go immediately to "Intentional tort" as a likely source of premises/possibilities for PN.

THE NAME OF THE GAME IN STEP TWO IS FINDING RELEVANT LAW QUICKLY. Although all course outlines will contain numerous legal precepts—rules, statutes, etc.—, the number of categories will be far fewer. Perhaps an outline contains eight categories. Perhaps it contains fifteen. No matter. One can quickly perform a mental scan of eight, ten, fifteen, even twenty categories, immediately eliminating from consideration those having no apparent relationship

to the conflict/party/objective/facts focused on.

One may have to consider *more than one category* as a possible source of premises. Go immediately to the category (or two or three) seeming relevant. Quickly scan for *possibilities*. (Recall. One needn't determine a premise will succeed at this juncture. Merely recognize it as colorable—a *possibility*.)

Structure, Length of Course Outlines, Example of Category Content

LEEWS recognizes that construction of a course outline will reflect personal preferences and tendencies. Therefore, unlike the Steps for breaking hypos into manageable components, NO HARD AND FAST ADVICE IS OFFERED RESPECTING PRECISE STRUCTURING OF CATEGORIES OF COURSE OUTLINES. (Merely that categories will suggest and be comprised of legal precepts that seem to "hang together.")

Respecting *length* of a course outline, the suggested LEEWS guideline is *30-50 pages*. As one masters analyzing "as a lawyer," one better grasps *how* one must know law and *how* one learns law. Retention is enhanced. Outlines should become far less voluminous than those of classmates. Some outlines will nevertheless exceed 50 pages. However, numerous LEEWS grads have reported course outlines for an entire term that were a mere 10-12 pages long! [How such is possible (and 30-50 page outlines) is discussed in due course.] Certainly, *outlines of 100 pages* (fairly common among law students) *should no longer result*.

The key in reducing outline length is amount of information stored in one's head, versus on a page. One factor is ability to memorize. Simple fact—some have better memories than others. However, learning law *associatively* greatly assists retention. In this regard, practice in application of law *as a "tool,"* as part and parcel of learning it (see segment following), will cause it to "stick" in one's mind via association. [This in contrast to typical *rote* memorization—e.g., flashcards—, which is short term and ineffective respecting use and application of law (i.e., analysis).] More on this subject later.

As an example of content of a category in a torts outline, once again review "Relevant Legal Principles for Torts Hypothetical" following the Torts Hypo (pp. 135-136). Indeed, as suggested beneath the title, this body of legal precepts might be entitled "Intentional torts, defenses thereto."

[Note. Far more information—definitions, explanations, etc.—is provided on pp. 135-136 than would be put in a course outline. As noted, when you have learned *how* to properly know and learn law (via use, application), much of such information need not be put in the outline. It's in your head!]

Toolbox Analogy (Law School as Trade School)

The following analogy has proven useful to students in understanding what should be done in preparation for (all-important!) exams, how to learn the law and construct effective course outlines, and inculcation of the lawyer thought process.

Law schools, professors, certainly most law students tend *not* to hold the following view. However, when all is said and done, respecting reason for existence (*raison d'etre)* law schools are little more than trade schools. Practicing lawyers surely view themselves as tradespersons of sorts. The difference from what are conventionally thought of as trades—carpentry, plumbing, electronics, auto mechanics, etc.—, and what presumably accounts for the greater estimation (respect, fear?) of law practice in the public mind (although not above the hands-on trade of surgery!), is that the lawyer's trade is intellectual in nature. Also, stakes (consequences) are usually greater and more costly than, say, breakdown of a car or washer/dryer.

Unique among nations, the United States is not merely governed by law, it is suffused (suffocated?) by law. And lawyers and judges are the arbiters. Hence the importance of law, lawyers, judges in the minds and daily lives of most adult Americans. Hence the importance and esteem of institutions and individuals that (supposedly) produce lawyers—law schools, law professors. Nonetheless, law practice *is* a trade. Law schools *are* (and should be!) trade schools.

Application of law to achieve client goals is the practicing lawyer's trade modality. Where the carpenter's tool is a hammer, the plumber's a wrench, the surgeon's a scalpel, THE LAWYER'S TOOL IS LEGAL INFORMATION—STATUTE, PRINCIPLE, ETC. Hence, one can make the analogy of course outline as *"toolbox."*

Consider the following. A carpenter has the objective (for customer/client) of properly hanging a door. He (or she) must address/overcome whatever impedes proper hanging. He sizes up the situation—relevant facts. Based upon experience, he decides what

tools in a toolbox—chisel, plane, level, hammer, saw, drill, screwdriver, etc.—are likely to be of use. As the toolbox is his and he loaded in the tools, he knows its contents. Providing the toolbox is well organized (every tool in its appointed place), the carpenter can efficiently locate tools deemed useful in achieving the objective. He might lay these out in preparation.

Similarly plumbers, electricians, surgeons, the well-prepared lawyer and law student. As she reviews facts relevant to a party/client objective (akin to Step Two), a lawyer thinks, "What legal strategies, precepts [premises all!] *may* be relevant in achieving the objective?" Such facets of legal information may be thought of as "*tools"* that one side or other to a conflict may apply in attempting to achieve an objective. And where can such *legal tools* be found?… In a toolbox. In this instance the course outline!

THE COURSE OUTLINE IS USEFULLY THOUGHT OF AS A TOOLBOX. You stock it with tools/premises as you progress through course material. Indeed, the law student's task progressing toward all-important final exams may be simply stated—Gather, understand, organize for potential use all legal tools in a toolbox (i.e., course outline). In short, LOAD UP THE TOOLBOX!

Legal tools/premises are gathered from cases, secondary sources—hornbooks, articles—, commercial outlines. Understanding of tools is enhanced via class discussion and proper preparation for class. (Chapter 14!) Tools should be organized and placed in toolboxes *weekly,* in a way that makes them easy to locate—categories!

Mere loading of legal tools into outlines, however, is not enough. Before loading a tool, it must be *understood*. You must be able to apply it to facts in the key process/skill called "analysis." When you extract appropriate (relevant) legal precepts/tools from a toolbox, you must *know how to use the tool*.

[Note. Most students load tools after a fashion, if belatedly first term. However, organization of legal precepts is haphazard. Moreover, knowledge of law remains abstract, academic. There is little understanding of *how* to apply law to facts (analysis). Precepts are not usable tools.]

Just as an experienced carpenter knows his hammer and chisel (their feel, balance) and how to use or apply them, so, must you know how to apply such legal tools as battery, rule against perpetuities, choice of venue, the contract law precept of anticipatory breach, etc., etc.

THE ONLY WAY TO BE COMFORTABLE (SKILLED!) APPLYING A PREMISE (as the carpenter a chisel) IS BY HAVING USED IT PREVIOUSLY. One must practice using toolboxes and contents *prior* to exams, if one is to do so efficiently and effectively during an exam. More on use of toolboxes and legal tools presently.

Exercises in Applying Step Two

At this point return to the response outlines begun for the Torts, Combination Law, and Corporations exercises in the Appendix. Take as long as necessary to familiarize yourself with "relevant legal principles" that accompany the torts exercise. In effect, consider pp. 135-136 a category of a toolbox.

Allotted planning time on the torts hypo (1/4 to 1/3 of 90 minutes) is 22-30 minutes. Thus, you have at least *two* 12-15 minute planning segments. [Note. 90 minutes is a low estimate of how long it takes to fully address this hypo. At least two hours is required.]

Recall that Step Two is to consider one conflict pair/party/objective at a time. Cull through relevant facts to identify premises that *may* assist the party in achieving the objective(s).

FIRST EXERCISE—4-5 minutes! Quickly scan the Torts Hypo. Note premises relevant to PN v. DH (only). Compare with model for PN v. DH, Step Two, p. 137.

SECOND EXERCISE—Same hypo. Take approximately 10-15 minutes. Perform Step Two on remaining conflict pairs. [Note. It may happen you do not finish. No matter. You have not used the full allotment of planning time.]

Compare effort with the model of Step Two for remaining pairs, p. 138.

Reflections on First and Second Exercises

If PN's *assault* premise against DH was not identified and noted, also DH's *battery and assault premises against PN (!!)* (which latter premises give rise to self-defense *counter*premises being advanced by PN), perhaps it is because one or all of the following common pitfalls of Step Two was committed. [Before reviewing them, you may want to take another look at the first paragraph (first 2 1/2 lines) of the Torts hypo.]:

1—[Lengthy discussion] **You consider a premise**—e.g., DH assault against PN—, **but do not note it**, because you immediately perceive (correctly) it can't succeed. The problem is that beyond noting a premise as *colorable,* you have also *analyzed* the outcome—whether, ultimately, the premise succeeds. (E.g., respecting whether DH committed assault, you likely perceived the necessary "apprehension" element to be absent, as PN was asleep.)[13]

Sometimes, possibly often, outcome of analysis is apparent, even obvious. However, this doesn't mean the legal precept—premise—is not on a professor's checklist, and discussion of it is not wanted. As noted previously, PROFESSORS GENERALLY WANT TO SEE DISCUSSION OF *EVERYTHING* RELEVANT. If a premise is colorable, note it in the exam outline (abbreviation thereof)! Continue.[14]

[Note. STEP TWO DOES *NOT* CALL FOR ANALYSIS OF WHETHER A PREMISE CAN SUCCEED, MERELY IDENTIFICATION AS *COLORABLE*—[again] something that *may* occur to a party's knowledgeable attorney as a *possibility*, given facts, legal subject matter tested, client objective(s).]

In executing the response, give short shrift to such "minor issues." (Demonstrated later.) However, always show lawyerlike analysis leading to rejection of the premise. (E.g., absence of apprehension causing the DH assault to fail.)

RULE OF THUMB TO BE APPLIED IN DECIDING WHETHER TO DISCUSS A TOPIC, PRINCIPLE, ETC., OR NO, IS—*MANTRA NO. 2!!*—**NEW** (and relevant) **LAW, NEW** (and relevant) **THINKING!** I.e., "NEW LAW, NEW THINKING!"

In a nutshell, this is what you want to show a professor on *any* exam. Keep this in mind. Assault is *new,* it is a relevant possibility. Therefore, mention it. Get the checkmark! The most you have to lose is a small amount of time analyzing it. YOU DO NOT LOSE CREDIT FOR DISCUSSING ITEMS NOT ON THE CHECKLIST, MERELY TIME. (What is meant by *"new thinking"* is explored in Chapter Eight.)

At this point, as should have been done with Mantra No. 1 (fn. 6, p. 49), say "NEW LAW, NEW THINKING!" three times *out loud.* (Do it!) This is the second of three mantras to bear in mind (*and actually say*) during exams.

2—**Having identified a premise one party would raise** (e.g. DH's battery premise against PN), **you neglect to consider a colorable response of the other side to the premise.** (E.g., PN's self-defense counterpremise.) Realize that FOR EVERY PREMISE RAISED BY ONE SIDE TO A CONFLICT PAIRING, THERE WILL BE A REACTION IN DEFENSE FROM THE OTHER SIDE—a counterargument (discussed presently), and/or a counterpremise.

3—**You fail to be "*objective*"**—i.e., analyze legal implications of facts from the standpoint of *both* parties. (See discussion in Chapter Seven following.)

THIRD EXERCISE—*After* reading Chapter Seven, familiarize yourself with accompanying "relevant legal principles." Then perform Step Two on the Combination Law and Corporations Hypos. To gain a feel for how quickly this step should progress, allot yourself *no more than 15 minutes* on the Combination Law Hypo, *10 minutes* on the Corporations Hypo. Compare your effort with model Step Two analyses for these exercises. (Respectively, pp. 151 and 168.)

SECTION TWO, CHAPTER 6 FOOTNOTES

[1] **Skipping Step One.** Be cautious in this regard. Although a Q/I posits conflict pairs, it may be that additional pairs lurk within the facts, consideration of which may yield additional relevant issues. Thus, beyond conflict pairs provided by a Q/I, at least a cursory Step One review should probably always be made. Also, determine party objectives, whether pairs are provided or not.

It has been noted that the LEEWS approach (to issue identification) is designed to circumvent, reconfigure, even *ignore* professors' Q/I's, respecting responding to them *as presented.* As noted, THE OBJECTIVE, ALWAYS, IS TO FULLY EXPLOIT A HYPO'S POTENTIAL FOR DEMONSTRATING 1) KNOWLEDGE OF RELEVANT LAW, 2) ABILITY TO APPLY THAT LAW TO FACTS.

[2] Do not be concerned at this point with "overriding premises." The concept will be revisited.

[3] "May," because at this stage one must not attempt to analyze whether the statute, rule, etc.—*premise!*—will actually succeed in gaining entitlement to the objective. Such determination (requiring closer, more time-consuming analysis) comes later. If you are to perform Step Two with facility, you must practice it, of course. However, most important, you must be content to merely recognize the *possibility* of the statute, rule, etc.—*premise!*—being of use. Quickly note this legal basis—*premise!*—in your exam outline (under pertinent pairing, party, objective). Move on to seek additional legal bases of entitlement (i.e., additional premises!). ANALYSIS of respective legal bases—*premises!*—COMES LATER.

[4] Nothing of such practical ilk is normally heard in a law school classroom (!!).

[5] **Hearsay** is a statement by an out-of-court-declarant offered for its truth. Generally, a hearsay statement is inadmissible in evidence as unreliable, because, the declarant being unavailable, its truthfulness cannot be tested in cross examination.

[6] **Courtroom as appropriate model.** At the outset of live programs, and at times throughout, the point is made that "what happens in a courtroom is the appropriate model for thinking and presenting on an exam." Arguably, what happens in a courtroom is the appropriate frame of reference for all of legal education. However, although all law schools have courtrooms for mock trial exercises, rarely, if ever, is there an excursion to an actual courthouse. "Courtroom as model" is not introduced in classroom instruction.

[7] Note. Unless facts and/or question so instruct, you may *not* assume that hearsay is established, despite the court's ruling. The foregoing example of typical student analysis should first define and analyze whether the statement was hearsay, but does not. It should continue in the following vein, by way of demonstrating legal knowledge and setting the stage for discussion of the possible exception to hearsay that is likely the chief issue for discussion: "Generally, a 'hearsay' statement is inadmissible in evidence as unreliable, because, the declarant being unavailable, its truthfulness cannot be tested in cross examination. The instant statement is hearsay and normally inadmissible because C is not present. Therefore, truthfulness of his statement cannot be tested." Such **methodical, patient presentation is characteristic of lawyerly analysis, and is rarely present in a law student response.** Steps One and Two highlight and enforce a more patient, chronological, orderly presentation.

This is a problem with conventional, helter-skelter approaches to issue identification ("issue spotting"). Discussion of whether the statement in question was hearsay is normally expected by the grader. Eager to display knowledge that seems more the real test of perceptiveness and legal acumen, namely the possible exception to the hearsay rule, students tend to give short shrift to or omit altogether discussion of obvious, foundational aspects, such as what constitutes hearsay (and whether the statement was), or what constitutes a contract (before exploring whether the contract was enforceable). LEEWS steps of approach ensure a lawyerly progression that gives proper attention to *all* relevant legal aspects, and in a proper sequence.

[8] E.g., unequal bargaining position, anticipatory breach.

[9] **Synthesizing class/briefing notes into course outlines.** Assuming one grasps and implements subsequent instruction respecting 2-4 line case briefs and reducing class notes to ½-1 page per class hour (all made possible by learning to analyze and think about law and its application *as a lawyer* [not an academic!]), **the weekly total of class and (case) briefing notes should amount to no more than 2-3 pages.** Then it is a simple matter of cutting/pasting into appropriate categories of an eventual 30-50 page (or less!) outline. IDEALLY, A COURSE OUTLINE IS COMPLETED IMMEDIATELY FOLLOWING THE FINAL CLASS. TIME BETWEEN FINAL CLASS AND EXAM IS SPENT HONING, *NOT COMPILING* THE OUTLINE. One tests its utility on old exams, refines it, polishes it.

[10] Note. Although you want to identify as many premises as possible in Step Two, we shall see that certain more subtle legal aspects may only emerge during close, element-by-element analysis of the response. You must move quickly to the response (within 10-15 minutes!). IT IS NOT THE PURPOSE OF STEP TWO THAT *ALL* LEGAL POSSIBILITIES BE REVEALED. Rather, Step Two is part of the systematic process of YOU taking control of any exam, any hypo (versus the reverse). *The Steps enable a predictable, piecemeal, orderly address of any exam, any fact pattern*. Within 10-15 minutes of the start of an exam, at least some relevant topics for discussion—premises giving rise to issues—will be revealed. (As we shall see, normally more issues than others will discern.)

[11] Focus here and at other times is on the law school exam and examinee. However, while portions of the discussion will have little relevance to the graduate facing a bar exam, there are often lessons to be gleaned with respect to executing a bar essay response.

[12] **Objective(s) revisited.** It has been noted that *objectives in Step One are common sense in nature*—money, stay out of jail, get evidence admitted or precluded, etc. For purposes of Step One, objectives are *never legal* in nature. Nor are they simply win or prevail. (The latter objective is always present. However, framing the objective in such broad fashion—win/prevail—achieves little in terms of focus leading to premises.) Thus, PN's objective is not to *win* or establish battery, assault, etc. PN's objective in some respect is undoubtedly to punish DH, to gain revenge. However, such objective in court is achieved by obtaining money or other specific goal.

Often in a live program someone suggests that a counter-objective of DH, beyond not paying money, is to secure PN's love or affection (typically eliciting chuckles). It must further be noted that **objectives for purposes of Step One can only be *something within a court's power to bestow, enforce, or prohibit.***

[13] Students think, "[Lack of apprehension defeating DH's assault premise against PN] is so obvious!" However, this doesn't mean a professor does not want to see discussion re the possibility of assault. As noted, **generally, professors want to see *everything,*** including something so basic in a contracts exam as defining "contract."

If law (and thinking) is at all relevant, show it. **The question is not so much whether to show (relevant) knowledge, but *how much time to expend doing so.*** This is where Step Three comes in—(quick preview) determination of "major" versus "minor" issues. (See Chapter 9.) PN's assault premise, easily disposed of as untenable, would be a very minor issue. However, it presents an opportunity to show off *new knowledge* (and a small bit of thinking/analysis). Therefore, it is deserving of mention, but short shrift. More on this presently.

[14] I say "[law] professor," as it is highly unlikely that an issue to be identified and discussed on a bar essay will be capable of short shrift analysis/discussion.

CHAPTER SEVEN

THIRD MAJOR MISTAKE—LACK OF OBJECTIVITY

The Third Major Mistake is *"lack of objectivity."* This implies lack of an even-handed approach to analysis. It stems from misconceiving the objective on an essay exercise, the "correct answer" to be determining who or what should prevail—who wins. It is a primary reason premises/issues and important aspects of analysis are missed.

On a law essay exercise WHO WINS OR PREVAILS IS RELATIVELY UNIMPORTANT. What counts, one's proper focus is to identify all relevant premises (and arguments)[1] that the lawyer for each party to a conflict would make in the course of resolving that conflict.

Unmindful of this proper focus, many examinees seem compelled to pick "the winner" at the outset of investigation. A tendency to leap to conclusion is abetted by such typical Q/I's as, "Who should prevail?," "What result?," "Was the court's ruling correct?" The examinee assimilates law and facts in a rapid, cursory mental calculation (much of which analysis is not reflected in the response), and prejudges the outcome. Prejudgment is often biased by emotional preference for one side or other to the conflict.

For example, whatever their reaction to Pucker Nicely, most students dislike Direct Hit. Owing to this bias, they swiftly prejudge a successful outcome to PN's battery *cause of action* (i.e., premise against DH). Not surprisingly, the possibility of DH advancing battery and assault premises against PN, although colorable under any *objective* reading of facts, is overlooked. It rubs the wrong way, seems unfair from an *emotional* standpoint. Yet DH's lawyer must surely recognize these possibilities, if only as possible defensive strategy.

The point is that ANY SORT OF EMOTIONAL INVOLVEMENT WITH FACTS HAMPERS OBJECTIVITY. It is not lawyerlike. It blinds you to legitimate premises and arguments the disfavored side would raise. In many instances it distorts your reading of facts in order to assist argument on behalf of the favored side. Supporting a foregone conclusion becomes the goal, not *objective* analysis. Analysis, such as it is, serves merely to buttress prejudgment. This results in distortion of facts and blind spots.

You must keep an open mind. You must remain neutral, objective at all times. YOU MUST NOT CARE WHO WINS! You must be concerned only with identifying and discussing relevant premises (= issues!)—*all* of them.

Objectivity of Lawyers

A competent, practicing attorney knows that an outcome, win or lose, normally follows meticulous presentation of relevant facts and legal arguments *from the perspective of both sides*. Such might be termed the "dialectic of analysis."[2] So as not to be blindsided by legal positions and arguments of the other side, an attorney will adopt a skeptical view of a client's position. This enables not only better evaluation of feasibility of the client's position, both legal and factual, but anticipation of response from the other side.

For example, a lawyer representing PN, playing devil's advocate, would surely adopt DH's perspective, and identify his potential battery and assault premises. She would then posit self-defense as a counter to each.

If one is to *see all there is to see,* analysis in Step Two must proceed in similar fashion. Indeed, many professors delight in developing a good-guy/bad-guy scenario, attempting to arouse student sympathy and bias, thereby obscuring issues and arguments. (E.g., babies, cute animals versus greedy, rape-the-land, corporate villain.)[3]

OBJECTIVITY IS A HALLMARK OF A GOOD LAWYER. If measuring progress toward becoming a lawyer is what an exam is about [What else could or should it be about?], law professors deem it fair (amusing?) to test susceptibility to being suckered in emotionally. Put another way, professors will test who the *real lawyers* are.

ONLY THE STUDENT WHO PURSUES LOGICAL IMPLICATIONS OF OBJECTIVE ANALYSIS *AS AN END IN ITSELF*—the lawyerlike student!—, WILL IDENTIFY AND DISCUSS ALL A PROFESSOR IS LOOKING FOR.

Solution

The solution, as a matter of approach mechanics, is to *follow the back-and-forth dialectic indicated by the Steps*. First take an advocacy view on behalf of one side. Then, in a kind of role playing exercise, take the other side's view. In other words, referring to the PN/DH example, *first take a view as if PN's attorney.* [Begin with PN, because she is the likely

initial movant.] Cull relevant facts (first paragraph) with an eye to relevant law to discover possibilities (premises) advancing her money objective. Then, in a kind of mental gymnastic, flip over to DH's side and scrutinize the situation as if his attorney.

In that positing a premise or argument on one side may trigger a response from the other, return once again to PN's side, then back to DH. Each premise or argument asserted by one party potentially begets a counter from the other side. Via this back and forth, you avoid the one-sided perspective that flaws many responses. It is also the best way to exhaust a hypo's possibilities in terms of opportunities to show off (relevant) legal knowledge and impress with your balanced, insightful thought process.

The back and forth of premise/counterpremise, argument/counterargument, a kind of lawyering ping pong or tennis, is the *"(objective) analysis game."*[4] PLAY THE GAME!

Lest you have the impression this process could go on forever, bear in mind time constraints. The idea is not to keep bouncing back and forth, but to adopt an approach best suited to achieving successful results *within allotted time limits*.

[Note. Uncertainty and a measure of confusion perhaps reign at this moment. You've been given much to digest, yet lack the most important ingredient for understanding (and appreciating) this process—skill at analysis. Not to fear. Rome was not built in a day. This is a challenging puzzle. Stay the course. You are already ahead of clueless (academically-oriented) classmates.]

Exercise

Before continuing, perform the exercise suggested at the close of Chapter Six (p. 64, *supra*).

SECTION TWO, CHAPTER 7 FOOTNOTES

[1] The important distinction between "premise" and "argument" will be made presently.

[2] **"Dialectic of analysis" and "lawyering dialectic"** are expressions coined by LEEWS to describe the objective, back-and-forth analytic process *all* professors and bar graders want to see reflected in exam responses. We shall see that this process is indeed a *game* of sorts. Lawyers view it as a game—a high-stakes, engaging, intellectual game. (A game many lawyers enjoy immensely. It keeps many practicing into old age.) Most can play the *"Game of Lawyering."* However, few learn to prior to actual law practice.

[3] Such is rarely the case respecting more impersonal bar exam hypos.

[4] It should be noted that some professors disapprove of and denigrate what is called "ping-pong arguing." What is meant by this is a tendency of many students to present analysis as follows: "Plaintiff would argue … Then defendant would argue … Then plaintiff might argue … Then defendant …" The objection is not to back and forth argumentation, *per se,* but to the somewhat *annoying form* in which it is presented. The solution is to adopt a less obviously ping pong, annoying manner of presentation. Thus: "It could be argued that … On the other hand, it might be contended … To which it could be countered that …" LEEWS instruction on (concise) presentation of analysis—indeed, seeing a facsimile of lawyers in a courtroom coming off the exam page—should temper any bias re ping-ponging.

CHAPTER EIGHT

"ISSUES," "REAL ISSUES," LAWYERLIKE ANALYSIS

"Issue Spotting"—Problem Solved (by "The Blender")

In the book *ONE L,* an account of best-selling author Scott Turow's first year at Harvard Law School, the hypothetical-type essay exam is termed an "issue spotter." One has undoubtedly heard or will hear the conventional wisdom that on essay exams "issue spotting is the name of the game." Although this is only half true, one should feel very encouraged. A system is now in hand for not only systematically identifying *all* issues on a professor's (or bar grader's) checklist, but often issues the professor missed (!!).

"Issues" referred to correspond, of course, to legal inquiries—i.e., was service proper?, was there an assault?, was the contract breached?, was the will valid?, was the ordinance constitutional?, etc. If, as you peruse hypotheticals, you are able to identify such legal inquiries for resolution, then you are "issue spotting." Reading facts to "spot issues," however, invites confusion—Major Mistake No. 1. It is precisely the haphazard approach LEEWS Steps seek to avoid.

Once again, returning to the Steps of approach, IF ONE IDENTIFIES A RELEVANT CONFLICT PAIRING/PARTY/OBJECTIVE (Step One), AND COLORABLE PREMISES THAT PARTY MIGHT ADVANCE IN SEEKING TO OBTAIN THAT OBJECTIVE (Step Two), ONE HAS SYSTEMATICALLY IDENTIFIED (IN EFFECT "SPOTTED") ISSUES. The question need only be posed—"Can [the premise] be established?" A legal issue is presented.

For example, respecting PN's objective of money from DH, battery, assault, and intentional infliction of emotional distress (IIED) are colorable premises she can advance. Pose the questions: Can battery be established?, Can assault be established?, Was there IIED?, and three issues are apparent. However, are they issues a professor wants identified ("spotted!")? Are they "relevant issues?"

Certainly, they seem relevant to the instruction at the end of the Torts Hypo—"Discuss rights and liabilities of all parties." Indeed, it bears repeating: IF A PREMISE IS RELEVANT TO CONFLICT PAIR/PARTY/OBJECTIVE/FACTS RELEVANT TO A Q/I,—WILLY-NILLY!—THE ISSUE RAISED BY QUERYING WHETHER THE PREMISE CAN BE ESTABLISHED WILL BE RELEVANT. Thus, IDENTIFY RELEVANT PREMISES, AND YOU IDENTIFY RELEVANT ISSUES!

Steps One and Two *solve the problem* of issue spotting. Together with the Preliminary Overview, they will be termed *"The Blender."* PROCESS FACT PATTERN AND Q/I OF *ANY* PROFESSOR, *ANY* BAR HYPO VIA "THE BLENDER," AND PREMISES THAT EMERGE REVEAL RELEVANT ISSUES!

It will become apparent, however, that identifying issues, albeit an important part of the process, is hardly all there is to effectively addressing an essay hypothetical. Indeed, the surface of addressing essay exam exercises in competent lawyerly fashion is barely scratched.

Perspective Update

Understand what we—you!—are about. A key problem is unpredictability of Q/I's posed in conjunction with hypos. For example, a professor instructs, "Draft a set of jury instructions...." Another, "Imagine a conversation between Supreme Court Justices X and Y...." Another, "You're a Martian who digested the Uniform Commercial Code (in a matter of seconds)...." Another, "Draft legislation to resolve...." Should you review old exams (as you should), a myriad of question/instruction types will be encountered. You do not want to find yourself, as many students do, scratching your head, puzzling, "What is it my professor wants?"[1]

As noted several times, what every professor/bar grader wants is known! Law exams test progress in becoming a lawyer.[2] Therefore, bottom line, there is only one thing that could possibly be wanted (whether a professor/bar grader consciously realizes or articulates it). Given facts presented and parameters of Q/I's—identify/analyze all legal issues that would be of interest to a competent judge or lawyer, knowledgeable in the legal subject being tested.

In effect, Q/I's POSED RESPECTING *ALL* HYPOS (boiled down to their essence) ARE INVARIABLY THE SAME—FIND AND DISCUSS ALL RELEVANT ISSUES! (As would a competent lawyer, knowledgeable in the subject matter.)

Therefore, as noted, if one had a strategy, a mechanism for, in effect, sidestepping/avoiding the unpredictable, likely confusing form/aspect of Q/I's presented, yet consistently revealing issues that facts, subject tested, and the Q/I's make relevant, one would

thereby always be in control of the important aspect of issue identification.

You now possess this precise strategy/mechanism—The Blender! (Preliminary Overview, Step One, Step Two!)

You don't want to puzzle over unpredictable, often quirky Q/I's emanating from (often) mischievous minds of law professors. Rather, in disciplined, step-by-step fashion—B-R-R-U-U-G-H! (Imagine sound of blender or food processor.)—, process *all* essay exercises via The Blender to reveal relevant premises. Put each premise in question form. (Will it succeed?) Narrowly focused, manageable, *relevant* legal inquiries—issues!—are revealed![3]

The problem, oft noted, is one of *control*. The unfamiliar, daunting task posed by hypothetical-type essay exercises causes nearly all to quickly cede control (to the exam). Students scramble in confusion. They become intimidated, defensive. THE BLENDER ENABLES ONE (in disciplined fashion) TO IMMEDIATELY TAKE CONTROL OF AN UNWIELDY EXERCISE. IT MAKES MANAGING *ANY* HYPOTHETICAL PREDICTABLE. This imparts confidence, even (many report) a nervous eagerness to *Play the Game*.

"Elements," the Nitty-Gritty of Lawyerlike Analysis

Webster's defines "issue," *inter alia*, as "a matter that is in dispute between two or more parties, a point of debate or controversy." Whether or not DH battered PN meets this definition. However, what, specifically, does one discuss in resolving the issue? Is "Was there a battery?"—the question/inquiry/issue—a useful starting point?

An academic thinks, "Yes." Such query is a typical starting point for discussion in law school classrooms. (Following "What were the facts [of the case], the issue, the rule, the holding?") However, it is unlikely a practicing lawyer—e.g., PN's lawyer—would initiate investigating battery from this standpoint. Not that "Was there a battery?" is invalid as issue or starting point. However, from a lawyer perspective it is *too broad an inquiry* to be useful.

Questions such as "Was there a battery?," "Was the *parol* evidence rule violated?," "Was the act of corporation X *ultra vires*?," "Was Mr. Jones a secured creditor under relevant bankruptcy law?," etc., are all issues a relevant premise might reveal. However, it will become apparent that in addressing/resolving such inquiries, a lawyer must focus on subordinate or component inquiries, corresponding in the instance of battery to the four *"elements"* of its legal definition. Moreover, should an element itself require further elaboration (definition) at law, then components of that definition ("*sub-elements!"*) will give rise to additional (sub) inquiries. If this peeling away of layers seems tedious, welcome to lawyerlike analysis, an often tedious, always meticulous process.

Consider the following legal definition of contract. [Note. Be sure to verify law presented herein.]:

> (1) An agreement entered into by (2) two or more persons, (3) who are legally competent, (4) for consideration, (5) embodying one or more promises to perform or forbear from specified acts (6) enforceable at law, which agreement is (7) offered and (8) accepted (9) in a manner in accord with lawful requirements. (E.g., Statute of Frauds.)

Numbered segments are components of the definition of contract. They are *"elements"* of contract. When one says, "I have a contract," as a matter of law it is implied that *all* of the above elements are fulfilled or satisfied. (I.e., arguments fashioned from known and reasonably inferred facts would persuade a trier of fact [judge, jury] to a preponderance [51 percent?] that the element is established.) Should even one element not be satisfied—e.g., it is not established that adequate consideration was given; or the agreement is unlawful (e.g., to commit a crime); or one of the parties is a minor—, the law generally will not recognize a contract.[4]

EVERY LEGAL PRECEPT, therefore EVERY PREMISE IS COMPOSED OF COMPONENTS OR ELEMENTS. One has only to define a precept/premise to perceive those elements. For example, "battery" is defined as (1) an intentional act resulting in (2) an offensive, (3) unprivileged (4) contact. One form of "burglary" is (1) the breaking and entering (2) of a dwelling (3) at night (4) with intent to commit a crime. If "night" is changed to "day" or "dwelling" becomes "commercial building," then a lesser degree of burglary results.

"Self-defense," "jurisdiction," "insider trading," "abandonment," "conversion," "holder in due course," "conspicuous,"… If one but thinks about it, these precepts are somewhat imprecise. To determine whether the precept can be established, one would likely first query, "What [exactly] does it mean?"

In other words, *if a legal precept is to be applied to facts in resolving an issue, there must be agreement as to its meaning*. Legislators, lawyers, law professors, in particular judges rendering decisions endeavor to iron out ambiguity of meaning of legal (and non-legal) terminology.[5] *Should any element of a definition not be met (established), a precept does not obtain at law.*

Put bluntly, LAW HAS SCANT TOLERANCE FOR AMBIQUITY! If the meaning of *each and every* aspect of a legal precept cannot be agreed upon, the precept cannot be applied to facts. It cannot be determined to the satisfaction of competing parties whether or not the precept is established.

For example, respecting elements of battery, students agree "unprivileged" is somewhat ambiguous. It requires clarifitcation. The element "contact" does not. [It Is readily understood to imply physical touching.]

"Unprivileged" at law is defined as "unconsented to." (See p. 136.) "Unconsented to" is clear enough. It means not agreed to. However, distinction is made between "actual" and "implied" consent. "Actual" is express permission. "Implied consent," however, requires further defining, giving rise to *"sub-sub-elements"*—namely, (1) a manifestation (something one can see, feel, hear, touch [*"sub-sub-sub-elements!"*]) (2) upon which a reasonable person can rely. (See fn. 7 for definition of "reasonable.")

SHOULD EVEN A SINGLE COMPONENT—element, sub-element, sub-sub-element—OF A LEGAL PRECEPT NOT BE SATISFIED (established to a preponderance in a civil matter, beyond a reasonable doubt in a criminal matter), THEN THE PROPOSITION OF WHICH THAT COMPONENT IS A NECESSARY PART WILL NOT OBTAIN. (E.g., absence of contact would mean battery cannot be shown. Presence of either actual or implied consent would mean "unprivileged" cannot be established. Again, therefore, no battery.)

"Elements," "sub-elements," "sub-sub-elements,"— this surely becomes confusing. We seem embarked on a tedious uncovering of ever more complex layers. We seem to be nitpicking semantics.

Ah! *Nitpicking semantics!* Indeed. If one is to become truly "lawyerlike" in one's thinking, one must closely engage in probing of nuanced meaning of law and fact. ONE MUST NITPICK!

Lawyerlike Analysis Explained, Demonstrated (Finally!)

What transpires in *"lawyerlike analysis"* is somewhat mathematical. (Again, a clue to the seeming advantage of math/science background respecting law exams.) Having party (client) and party objective in mind, when a lawyer versed in relevant law examines a fact pattern, she automatically matches facts and arguments (derived from facts) with elements (or sub-elements, as the case may be) of premises that seem to apply. A premise putting a legal handle on facts and client objective pops into her head.

For example, upon hearing someone was struck by another with a pipe, a prosecutor immediately thinks, "felony assault"—(1) intentional striking (2) of another (3) with a dangerous instrument. Should the struck individual be hospitalized with stitches as a result of the blow, the degree of felony assault is upgraded by adding a 4th element—"causing serious injury." (Stitches normally satisfy the legal definition of "serious injury.") Given the same facts, a civil practitioner thinks, "Elements of battery seem present."

When analyzing a case in terms of feasibility of various premises as avenues of attack/defense, lawyers are accustomed to thinking not so much about premises overall—"Can the premise succeed?"—, but (automatically, habit of thought) individual elements thereof. ("Can intent be established? Can lack of privilege be established?") They must.

If given facts, or such additional facts as may be developed (via discovery and investigation)[6] or reasonably inferred,[7] do not establish existence of *each and every element* of a premise relied upon ("beyond a reasonable doubt" from a prosecution perspective in the criminal sphere; "to a preponderance" in a civil sphere), the premise fails. Thus, it is largely meaningless for a lawyer to think, "Was there a battery?," "Was service proper?," "Was there a robbery?" Rather, a lawyer thinks (respecting battery), "Was there contact?," "Was it unprivileged?," "Was it offensive?," "Was it intentional?"

In other words, if one is to think and analyze "as a lawyer," one must be in the habit of thinking *not* whether a legal precept obtains *overall*, but whether *each* element exists (and, if necessary, elements of elements—sub-elements!). Only in this way, *ratcheting thinking from larger whole to component (even sub-component) parts,* will one be able to order, pinpoint what needs discussing in resolving an (overall) issue.

(In Depth) Example of (Lawyerlike) Analysis

Consider PN's battery premise against DH. Within the larger issue—"Was there a battery?"—there are four sub-issues or (sub) questions, corresponding to the four elements necessary to establish battery. ("Was there intent?," "Was the act offensive?," etc.) Each must be satisfied to establish the battery premise overall. "*Lawyerlike analysis*" requires consideration of *each* element of a premise in light of given and reasonably inferred facts, and presentation of the most persuasive, insightful *argument(s)* and *counterargument(s)* to be made for establishment *and* disestablishment of that element (Which is "at Issue).

The following (indented portions!) is characteristic of the approach and content of lawyerlike analysis. It is *not* (repeat, *not!*) what will be presented in response paragraphs. Rather, it represents thought process involved (more or less) in analyzing PN's battery premise against DH, set to print. Significant insights, do's, don'ts of the analysis are pointed out en route.

PN's premise is considered first (from the perspective of her attorney), because PN is initial movant. As noted, in a courtroom (always the model!) movant carries the initial burden of persuasion. Therefore, via lawyer, movant normally argues first.

> The kiss is the basis of the battery premise (cause of action!)[8] against DH. Establishing the fourth component or element (of battery definition)—contact—is straightforward enough.[9] "Contact" is a physical touching, and is established by the given fact of [awakened her with a] "kiss."[10]

[Note. Nitpicking of nuance of meaning is part and parcel of the "*lawyering art*." However, to suggest, as some students do, that a kiss that awakens *possibly* did not involve contact or touching—e.g.., "maybe DH made kissing noises!"—, is not reasonable. Blowing a kiss is a somewhat unusual act. It would not likely awaken. Further positing accompanying kissing sounds sufficient to…. This (impermissibly) builds inference upon inference, *nowhere supported by given facts*. It borders on ridiculously speculative, even metaphysical. Metaphysical arguments—i.e., highly abstract, philosophical—, while attractive to an academic holding forth in a classroom, would likely confuse and/or annoy a judge or jury. Thus, *just as abstract arguments and arguments likely to confuse should be avoided in a courtroom* (where simple language presenting incisive, common sense logic is the preferred path) CONFUSING, OVERLY METAPHYSICAL ARGUMENTS ARE TO BE AVOIDED IN (lawyerlike) ANALYSIS.

> The second element—"offensive"—, is somewhat more a problem. The reason, should one think about it [lawyerlike analysis is very much about close, analytic *thinking*], is that, unlike "contact," the term is somewhat ambiguous. What, exactly, is meant by "offensive?"… It has been noted that unless all parties to a controversy—PN, DH, the trier of fact—agree to a concept's meaning, the existence of that concept cannot be established or disestablished. [Note. Judicial opinions often are preoccupied with precisely such clarification of terms.] More precise definition of "offensive" is needed.
>
> In the battery context, "offensive" has been defined to mean "would offend the sensibilities of a reasonable person." (See p. 135.) The *sub-element,* "reasonable person," much bandied about in the law, needs clarification. (Revisit fn. 7.) It has been defined as "most people." (E.g., if *most* people think the earth is flat, then, correct or no, positing that the earth is flat would be a reasonable point of view.)

Seeking to establish the contact (kiss) was "offensive," many students cite PN's reaction—"bloodying DH's nose." Indeed, this reaction tends to establish PN *herself* was offended. However, note the definition says "reasonable person." It is not offensiveness to the presumed victim of a battery that must be established, but offensiveness to *people in general*—most people!

> Lacking evidence PN is representative of "most people," her *personal* reaction is (at this point) not relevant! [Note. Little about PN is offered, other than being the daughter of "prim" Mrs. Nicely.] Indeed, PN's reaction would likely be inadmissible in court as evidence of "offensive." Rather, *argument must be framed in strict accord with the definition*—i.e., establish that *people in general*—most people—would find the kiss offensive, given the circumstances.
>
> PN (her lawyer, of course) could posit as a reasonably inferred fact based on common experience (Re-read footnote 7.), that people in general (most people) do not like to be awakened. Moreover, to be awakened in an intimate way—kiss—by someone toward whom one has never shown affection, possibly even a stranger (inferred from "unrequited love"), while

presumably minding one's own business (reasonable inference from the "chance," or accidental nature of the encounter) would *probably* offend most people.[11]

[Note. "Chanced upon" means what?... Accidental, yes? Not, as some posit, "DH is taking chances." Together with a common sense view of things, understanding vocabulary and nuance of language are important in formulating appropriate arguments. A LAWYER SHOULD BE MASTER OF NUANCE OF LANGUAGE!]

Assuming this argument, derived from given, reasonably inferred facts, persuades to 51 percent, PN (by her lawyer) has carried her burden of proving the kiss "offensive."

DH in his turn [Don't forget the other side!] might argue (framing argument, as he must, in terms of people in general) that "a kiss, but an expression of affection, should not offend anyone." Perhaps so in an ideal world where motives are not suspect. However, *the real world is the reference point for reasonableness*. DH is unlikely to get far with this argument. [Do not hesitate to, as it were, take *"judicial notice"* (i.e., infer reasonableness based upon common sense and life experience)[12] of shared life experience and behavior of *most* (American) people. A COMMON SENSE VIEW OF THINGS IS CRITICAL IN FASHIONING LAWYERLIKE ANALYSIS. Think of it this way. One's argument must "ring true" before a jury of ordinary folk.]

As previously noted, "unprivileged" (3rd element) means "unconsented to," which is bifurcated into "actual consent" [Ah! Clear enough—express permission!], *or* "implied consent" (a "manifestation [something one can see, hear, feel, or otherwise perceive] upon which a reasonable person can rely" [to imply consent]). Establishing lack of *actual* consent is easy. PN was "asleep."

Should one be tempted, as some are, to surmise PN "might have given actual consent at a prior time," this is an example of what one may *not* do. One would be speculating beyond what is reasonably inferable from given facts. (I.e., inferring that "unrequited love" implies a prior relationship, during which [hours, days, weeks previous?] consent was given—an inference upon an inference!) Further, this is contradicted by the "chance" nature of the encounter.

Unreasonably inferring additional facts creates, in effect, a new, different hypo or fact pattern.[13] It then becomes difficult for a grader to gauge one's response against others. *One plays the game, so to speak, in a different ballpark,* a ballpark not contemplated by the professor (or bar grader). Never a good thing to do.

YOU MAY USE GIVEN FACTS, *REASONABLE* INFERENCES THEREFROM. (Inferences *most* would make.) However, YOU MAY NOT CONTRADICT GIVEN FACTS (and reasonable inferences therefrom). YOU MAY NOT GO *UNREASONABLY* BEYOND GIVEN FACTS. YOU MAY NOT MAKE UP NEW FACTS.

[Note. There are definite rules respecting what *is* and *is not* permissible in "lawyerlike analysis." Such rules are known to courtroom lawyers—litigators. They are more or less known to law professors. However, *professors typically are not consciously aware they are applying these rules*. They merely judge that aspects of analysis are "not lawyerlike." Tellingly, unfairly, *these rules are not known by first year law students!*][14]

Disestablishing (showing lack of) "implied consent" is more difficult than establishing "actual consent." PN must persuade that whatever "manifestations" existed would not lead *most* to infer consent. "Chanced upon" is useful. As noted, it establishes the encounter was not prearranged. "Unrequited love" strongly suggests PN has not been affectionate to DH in the past. Absent past affection, the mere circumstance of PN being asleep should not imply permission for a kiss. Moreover, PN's reaction is now relevant as a "manifestation." It strongly suggests no present or prior contemplation of such intimacy.

[Note use of *"suggests."* Similar to *"probably,"* it is a waffle, a hedge, a way of allowing for other possible views. Typically, *in making arguments one cannot, should not assert to a certainty*. Words/phrases such as "clearly," "obviously," "definitely," "without question," "as a matter of fact," "without doubt," and the like have little or no place in courtroom argument. Nor exam argument!]

The goal in a courtroom is normally *not* to establish certainty, but (in civil matters) a preponderance. (Beyond a reasonable doubt by a prosecutor.) Facts are *facts!* They may be stated as such (!!). However, presentation of *argument* (based on facts) as fact—something "certain," "without doubt"—is to dictate to judge/jury that which is their province alone to decide. A lawyer who asserts argument as fact invades that province, thereby violating rules of evidence/decorum. A judge would likely take offense. A jury would be

instructed to "disregard counsel's *opinion* respecting fact. Facts are the province of the jury to evaluate."

Likewise, a law professor or bar grader will react adversely to presenting argument as something "clear," "obvious," etc. This is another example of rules of the courtroom (unknown to law students yet to take evidence law or participate in "moot court" or a mock trial) coloring impression created by analysis.]

You must *never care which side in a hypothetical scenario wins*. Merely argue within reason without overstating. ANALYSIS IS A GAME OF MAKING ARGUMENTS ON BOTH SIDES OF ISSUES.

[Note. THE *GAME* ITSELF—demonstrating one's legal knowledge and skill at playing—IS THE MAIN EVENT, THE ULTIMATE OBJECTIVE, THE *CORRECT* ANSWER. (What one wants to show a professor [less so a bar grader].) It is what a professor wants to see in a response—a competent lawyer (facsimile thereof), knowledgeable in the subject tested coming off the exam page. PLAY THE GAME!]

> Taken singly, it is unlikely any of the foregoing manifestations persuades to 51 percent (a preponderance). Taken together, however, it is kind of like a series of base hits resulting in a run in baseball. PN's (her lawyer's) persuasion seems well beyond her 51 percent burden. Run scores![15]
>
> DH can counter (argue) that a woman (or girl) *possibly* lying alone in a "meadow," arguably an idyllic, romantic setting, "much as Snow White" (reasonable analogy), invited such attention, particularly given her name—"Pucker Nicely." [It is reasonable to assume DH knows the name of his beloved.]

[Note. This, arguably (undoubtedly?), is an unfair, chauvinist argument. Students have been surprised, even offended when it is posed. However, they are reminded—LITIGATION IS WAR WITHIN RULES! DH's lawyer (likely female per strategy?) would surely attempt to impugn PN. It seems appropriate to recognize such argument exists. [Be alert to professor sensibilities.] It likely would not succeed, given persuasiveness of PN's arguments. However, DH's attorney is unlikely to readily concede contact was unprivileged.]

At this juncture one may (should) be thinking, "What, exactly, *was* the nature of DH/ PN's prior relationship, if any?" "Was anyone else in the meadow?" "What time of day was it?" "What was PN *wearing?*"...

[Note. Is what PN was wearing relevant? Is it a proper inquiry? The typical (politically correct) law student will likely feel the inquiry is out of bounds. (I.e., "She has a right to wear whatever she wants, or nothing at all, and still be left alone!") However, that is a political position, a view of how things *should* be, not necessarily how they are. Moreover, it improperly colors judgment, creates bias in making arguments. "Most people" (jurors, for example) would *probably* (!!) want to know what PN was wearing. DH's lawyer, if such information was useful in suggesting a measure of fault on PN's part, would surely try to introduce it.]

Of course, what PN was wearing cannot be known. [As noted (fn. 13), what PN is wearing could be posited, *arguendo*. However, as suggested, one would be wandering far afield.] There are many facts corollary to a hypo fact pattern that one might like to know, but cannot. As noted—fn. 6, 10—, in the (real) world that lawyers inhabit one *could* find out. Additional facts could (and should be) be sought. However, not in a law school or bar exam situation.

This is an important distinction in understanding the *Game* posed by a law school hypothetical. As explored in fn. 6, UNLIKE REAL LIFE AND ACTUAL LAW PRACTICE (where one can investigate and gather additional relevant facts), FACTS ON A LAW SCHOOL EXAM ARE A CLOSED UNIVERSE. THE NAME OF THE GAME IS *WHO CAN DO MORE*—i.e., formulate more insightful, persuasive arguments—*WITH JUST FACTS GIVEN, REASONABLE INFERENCES THEREFROM.*

The challenge at bottom is to *make the most of facts given*. The underlying, unspoken thought in a professor's mind is, "Who exhibits greater [lawyerly] skill within parameters of legal knowledge I've imparted, facts I've taken the time to create, emphasis I have conveyed in class?"—The Ballpark! A professor (or bar examiner) checks off knowledge items—issues identified, law correctly stated. Beyond that, harkening back to law practice, however limited, a professor recognizes (and rewards) lawyerly analytic skill.

> What of the final element—"intentional?" "Intent" would seem to need little elaboration. It is understood to mean planned, purposeful. However, how would one argue for or against establishment of intent?

[Note. One may not state, "DH *planned* to kiss PN," or "DH kissed PN *intentionally*." Both statements illustrate a cardinal sin of analysis—"*conclusory!*" I.e., substituting a conclusion—"planned," "inten-

tionally"—for deductive reasoning, based upon fact, reasonable inference, that would lead to such conclusion. One *tells,* but does not *show*. In effect one asserts, "the kiss was intentional, because DH *intended* it." BIG, BIG NO-NO!]

> Nor is it sufficient to deduce intent, as many do, from the circumstance that (after all) "DH *did it*." (For then intent would never be an issue [!!]. Think about this.) The circumstance (fact) that DH kissed PN is indeed *some* evidence of intent. Perhaps it is presumptive. Perhaps it amounts to 33 of the needed 51 percent? However, more is needed.

Exercise:

Work out the analysis of (only) intent on paper, formulating arguments (on both sides!). It should be a close call. Compare with model in Appendix (pp. 140-141).]

Absent more information (more facts), one *should* determine that the answer (conclusion) to "Did DH batter PN?" could go either way. The issue is in doubt, a close call. And that's okay. ON A *LAW SCHOOL EXAM* THE CONCLUSION IS GENERALLY UNIMPORTANT. WHAT COUNTS, WHAT THE PROFESSOR IS MORE INTERESTED IN, IS REASONING *EN ROUTE* TO THE CONCLUSION. LAWYERLIKE ABILITY IS DEMONSTRATED PRIMARILY BY QUALITY OF FOCUSED, LOGICAL, BALANCED (!!) *THINKING REFLECTED IN ANALYSIS*.[16]

The foregoing example illustrates the precise, meticulous balanced back and forth that characterizes lawyerlike analysis. If an informed prediction of issue resolution is to be made, a lawyer must explore the feasibility of every element (of the overall legal precept/premise at issue) in light of known and reasonably inferred facts, from the point of view of *both sides* to the conflict. This constitutes *"objective analysis."*

The lawyer who fails to be objective in analysis is unlikely to be prepared for an opponent's arguments in court (both legal and factual). He is likely to bring fruitless lawsuits. There is a perceptiveness and imaginativeness, a "looking-at-the-facts-from-all-angles" mindset evident in such analysis. The experienced practitioner has a methodical, nitpicking cast of mind that the (academically-trained and inclined) law student/recent law graduate is unaccustomed to, and must strive to attain. Omnipresent "case method" instruction necessarily comes up short in this regard.[17]

Identifying the "Real Issue"

The issue overall (in the sense of "issue spotting") normally presents as whether a premise will succeed. The proper focus of analysis, however, as (hopefully) demonstrated, typically devolves to elements, even sub-elements of a premise. It is apparent in the foregoing PN battery analysis that establishment of some elements is more problematic than that of others. (E.g., unprivileged versus contact.) Elements (or sub-elements) whose establishment is necessary to the resolution of the issue overall, and *also* problematic, give rise to what may be termed *"real issues."* Often existence of the problematic element and "real issue," not the premise overall, is the focus for analysis a professor is interested in. This must be quickly recognized.

Consider the definition of contract, page 148. Note such elements as consideration, offer, acceptance. One spends days, even weeks in a contracts course on such topics as adequate consideration ("more than a peppercorn"), what constitutes an offer, what constitutes valid acceptance. Entire cases and sections of the Uniform Commercial Code (UCC) are devoted to such inquiry. Whether or not a (valid) contract exists may be the issue overall. However, existence of a component element of contract is often the chief, proper focus of investigation—the "real issue." Failure to distinguish trees (contract elements) from the forest (contract overall) as the proper focus of investigation likely causes the especial confusion evident when examinees address premises with elements requiring further elaboration (definition).

[Note. Failure to distinguish trees from forest is typically a problem respecting issues relating to constitutional law, which includes such broad precepts needing further defining as freedom of speech, due process, vagueness. Elements, sub-elements created by such definition much each be assessed/understood in applying such precepts to facts. E.g., what exactly is meant by "due process," "vagueness?" What is the test for prohibited speech?]

Suppose, for example, respecting contract, a fact pattern describes a "valid agreement," and subsequent failure of one party to make good on his promise. The typical examinee might posit, "Aha! The issue is

existence of contract!", and begin discussing whether all elements of contract are satisfied. This is a grave error. Given "valid agreement," the existence of contract, *per se,* is probably not at issue. Rather, proper focus of inquiry is likely a possible ground (counter-premise, element[s] thereof) to excuse the apparent breach. (E.g., anticipatory breach.)[18] The examinee who rambles on about whether there is a contract before coming to this realization will do poorly, simply because he will run short of time.

How can such an error be avoided? Having correctly identified a premise giving rise to an issue (e.g., battery in Pucker Nicely situation), given limited time, how can one move quickly, surely, to what is properly germane in resolving the issue? (E.g., respecting PN's battery, whether implied privilege was lacking, and, especially, intent.)

First, understand that EXISTENCE OF *ALL* ELEMENTS OF A PREMISE (and sub-elements of an element of a premise) NEED NOT BE EXPLORED *AT LENGTH* IN ORDER TO ESTABLISH A PREMISE (OR ELEMENT THEREOF) DOES OR DOES NOT OBTAIN.

Recall, for example, the necessary contact element in establishing PN's battery premise. Recall that "awakened [PN] with a kiss" conclusively establishes this sub-issue. In order to minimize focus on what cannot be successfully contested, DH's lawyer is not likely to contest whether contact occurred. He likely will *"stipulate"* (concede as true) the point. (E.g., "Your honor [ladies and gentlemen]. We concede contact occurred.") As previous exploration of this premise suggests, the key contest is whether DH had requisite "intent." [As "intent" seems the (only) possible weak link, trust that a lawyer would contest it fiercely.] Just as this sub-issue would be the main event in a courtroom, so should it be the highlight of discussion of battery overall. Intent, not battery, is the *real issue*.

WHERE OPPOSING LAWYERS WILL CLASH, WHERE FACTS ALLOW FOR PERSUASIVE ARGUMENTS ON BOTH SIDES OF AN ELEMENT OR SUB-ELEMENT—THERE ONE FINDS *REAL ISSUE(S)* AND PROPER FOCUS OF DISCUSSION. A simple test for determining whether what one is about to discuss merits significant attention (i.e., is a real issue) is posing the question: *"Is either party contesting this?"* IF NEITHER PARTY (to conflict pair) WOULD SERIOUSLY CONTEST THE POINT (because facts admit of no contest), IT IS A "*NON-ISSUE*." Either don't discuss it, or give it short shrift.

Returning to the foregoing contracts example, as neither party can contest the *given fact* of "valid agreement" (implying contract exists!), existence of contract overall is a non-issue (!!). PRECIOUS TIME MUST NOT BE SQUANDERED EXPLORING NON-ISSUES! Simply state (to accommodate a professor who wants to know one is aware a contract must first exist), "'*Valid agreement'* appears to establish existence of a contract. It is also given that one party did not perform—i.e., breached." Now state the premise, if any, that breaching party might advance to justify non-performance. (E.g., "*Anticipatory breach* occurs when…") [How to consistently introduce and explore a premise will be explored presently. Note use of italics to flag legal topics.] Here is the real issue and proper focus of one's time and discussion. Move quickly to where party lawyers will fight! Here, we shall see, is the best opportunity to impress with one's skill at the *lawyering game* and *art of analysis*.

This—identifying *real issue(s)*—is difficult to grasp *prior* to becoming skilled at analysis. More time will be spent on it in forthcoming discussion of Step Three. It is strongly suggested *this section be read again* (perhaps later). Note. ISSUES (as in, "spot issues," the issue raised by "will a premise succeed?") IMPLY *OVERALL* TOPICS FOR INVESTIGATION. *REAL ISSUES* ARE THE PROPER FOCUS OF DISCUSSION *WITHIN* INVESTIGATION OF OVERALL ISSUES.

Shape, Content of the Exam Outline Post Step Two (+ more on Movant/Respondent)

It merits re-emphasis that AN (EXAM) OUTLINE IS MERELY A SKELETON OF THE RESPONSE. It is to be brief, sketchy! Do not waste time on the (exam) outline! It is enough that (using abbreviations!) premises various parties may assert in seeking to attain objectives be noted. (Also, possibly, indication of what Step Three portends happening in discussion of each premise. E.g., missing elements, real issues.) Then on to the main event, paragraphs of the response itself.

The diagram that follows presents two columns for each pairing, one corresponding to *movant* (PN) and objective(s), the other to *respondent* (DH) and objective(s). [Note. Some are counter-objectives, some not.] Premises are noted under the appropriate party. It seems useful to list *movant* [the more aggrieved party, the party that must initiate, act affirmatively if an objective is to be attained] first, on the left.

Initiating party may well be "plaintiff" in the conflict, and the opposing side "defendant." However, not necessarily. "PLAINTIFF/DEFENDANT" IS NOT A USEFUL WAY OF LOOKING AT OR THINKING ABOUT OPPOSING SIDES IN CONFLICT PAIRS. As initiating party may be a defendant (e.g., when making a motion during the course of litigation, when raising a defense, when bringing a counterclaim), as noted, it is more useful to employ *"movant"* and *"respondent"* when referring to the party initiating, the party responding.

[Note. Movant/respondent roles (unlike plaintiff/defendant) shift depending upon which party's objective (overall or intermediate) requires taking the initiative. (E.g., PN money objective, vs. DH money objective. Also within this larger framework motions to postpone proceedings, exclude evidence, etc.) Certainly, the party taking the lead in asserting a premise is a movant.]

Your ordering of parties respecting outlining one's response and movant/respondent ordering of arguments, etc. should follow a perception of who, affirmatively, wants something, and must advance a premise and/or argument in furtherance of obtaining it (movant), and who is on the receiving end of the initiative (respondent).

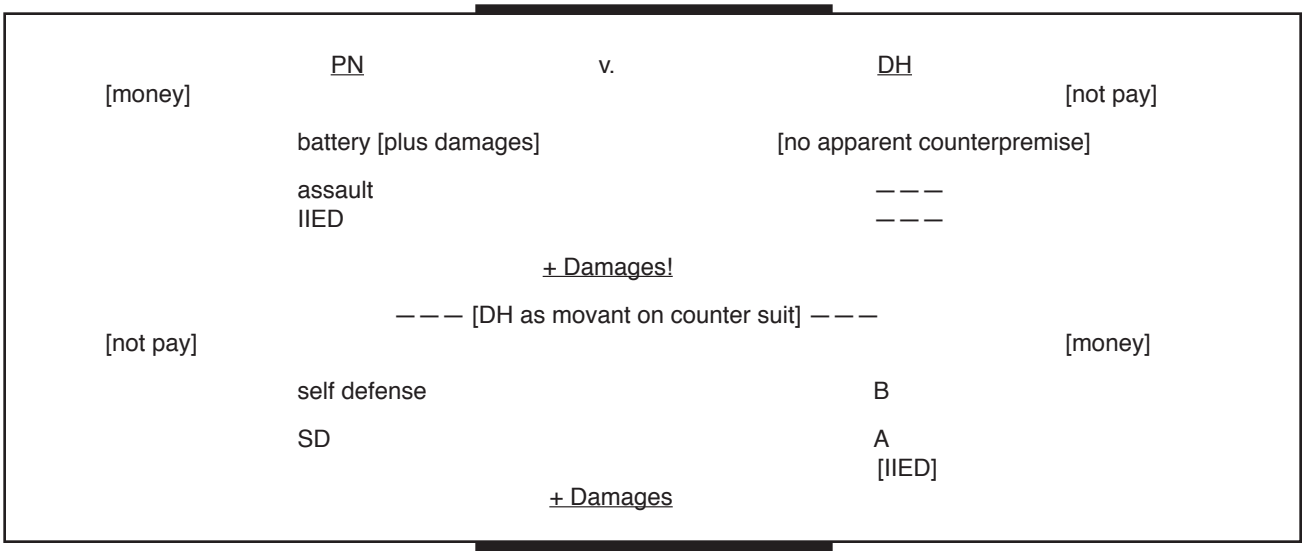
In the following example of (response) outline (to this point) of the PN/DH conflict pair (post Step Two), PN, as seeming primary aggrieved party, gets first billing:

[Note. Objectives of parties are placed in brackets. *Objectives may or may not be noted*. If an objective—e.g., PN money, DN not pay—is easily borne in mind as one seeks premises, one needn't write it down. Note also use of abbreviations. THE LESS PUT IN THE RESPONSE OUTLINE, THE BETTER. It is but a sketch, a roadmap that *only the one creating it need understand*. Then, as noted, <u>on to the main event</u>, the response itself. The idea is that *within 10-15 minutes* (planning segment) *one generates a (partial) list of relevant topics to discuss*. THE RESPONSE IS ALWAYS THE FOCUS OF ONE'S EFFORTS.]

Damages is emphasized as a reminder not to overlook this often neglected, but relevant topic of analysis. Damages is rarely touched upon in law school classrooms. Yet, as one may judge from principles accompanying the Torts Hypo, there is a considerable body of law respecting damages, giving rise to potential issues. (Opportunities to show off knowledge!) A professor may be looking for this law and discussion. If not, some credit should be received for recognition and knowledge of this important subject. As indicated by "[plus damages]" following PN's battery premise, damages is part of each movant premise. (E.g., battery + damages = complete premise.) However, to save time, and because a single discussion of damages likely suffices, "+ Damages" is added after noting all premises.

"No apparent counterpremise" is placed in brackets, because this needn't be noted. If no colorable counterpremise, merely leave the space blank.

[Note. Students often note "consent" and/or "unprivileged" as possible counters to PN's battery. However, as neither is a complete legal basis of entitlement, neither is a counterpremise.[19] Likewise, the seeming obvious (dispositive in DH's favor) retorts to PN assault and IIED premises, respectively, 1) requisite



element of apprehension lacking, as PN "asleep;" 2) requisite calculation to cause severe distress lacking (because, at least at this juncture [as opposed to later, when he gets angry] DH's only motive appears to be "great love" and "passion") are counter*arguments, not* counterpremises. The distinction is *factual* versus *legal* rejoinder. See discussion following.]

Respecting DH v. PN, IIED is placed in brackets to suggest this discussion may be superfluous—for two reasons. First, the premise seems only marginally colorable. Second, as IIED will have already been discussed in the context of PN as movant, there is little urgency to raise it again. Generally, as noted (recall Mantra No. 2), SHOW PROFESSORS *NEW LAW, NEW THINKING!*

Counterpremise versus Counterargument

The distinction between "counter*premise*" and "counter*argument*" is initially difficult to grasp. [As noted, it only becomes clear as one gains skill at analysis. Therefore, more in-depth discussion in Chapter 12 likely will prove more helpful.] Suffice at this point, counter*premise* is a *legal* rejoinder, counter*argument* is a *factual* rejoinder. A counter*premise* is a *legal* precept that, if established, supersedes/defeats an opposing side's premise (against which it is raised). (E.g., self-defense raised in opposition to battery or assault.) *A* counter*argument is not legal in nature*. It derives from relevant given (and reasonably inferred) facts. It is a *factual* response (argument) advanced in opposition to (factual) argument made in support of or against establishment of underlying elements (sub-elements) of a premise.

Counter*arguments*, arise *within* the give and take of analysis of premises. By contrast, counter*premises* initiate discussion (containing arguments and counterarguments) of overall legal precepts. THE ONE IS *LEGAL*, THE OTHER *FACTUAL*.

Counter*premise* in effect implies a secondary retort/defense. In a courtroom a counter*premise* arises only *after* counter*arguments* raised in seeking to defeat a premise (or counterpremise!) have proved unavailing.[20] Given one will want to demonstrate (show off) *all* relevant knowledge during an exam, counter*premises will be raised/discussed whether or not* counter*arguments have been successful in defeating an opposing side's premise*.

[Note. Analysis should not have progressed in Step Two to specifics (arguments/counterarguments) respecting whether elements (of premises and counterpremises) can be established.]

SECTION TWO, CHAPTER 8 FOOTNOTES

[1] Per usual, bar exam format poses less of a problem. Bar Q/I's are rarely open ended, whimsical, cute. They are typically straightforward, of the type, "How should a judge rule on the following motion?"

[2] **Non-traditional law exams.** Given many have PhDs in subjects other than law, beware the professor whose inclination respecting exams is non-legal—e.g., economic, sociological, historical. He may want discussion placed in an economic or historical framework. If tenor of the class raises questions in this regard, talk to former students. Of course, look at old exams if any are available. One might query the professor about what he expects. Nonetheless, apply The Blender!

[3] **Problem with The Blender.** If such exists, it is that students report identifying more issues than professors are looking for. Obviously, this can create a time management problem. Step Three assists here. One must prioritize in terms of major and minor issues, and issues the professor is likely interested in. On the other hand, identifying extra (but relevant) issues can impress. More than a few professors have queried of a LEEWS grad, "How did you see this issue?" (Overlooked by the [non-practicing lawyer?] professor.) The answer has to do with the careful sifting inherent in applying The Blender, and having a facsimile of client-goal-oriented, practicing lawyer perspective versus academic perspective.

[4] Note. Subsequent circumstances—e.g., partial performance, reliance—may "*cure*" or substitute for defects or such missing elements in a contract as inadequate consideration, even a statute of frauds violation. (The *policy* basis for this is that, lest chaos result in the marketplace, law generally favors enforcement of contract.) In other words, a body of legal substitutes for elements of a contract exists (and must be reflected in one's contracts outline).

[5] **Clarification of terms,** definitions, development of clarifying or limiting tests, establishment of parameters re reach of legal precepts, all of which is corollary to "black letter rules" set forth in a particular case, is very much a province of judicial opinions in cases one reads. Be careful to distinguish between primary components/elements of a legal rule or precept (premise!), and corollary, clarifying aspects.

[6] *Ability to seek and develop new facts (via investigation, discovery) is the single major distinction between real life and a law hypo.* (Also time.) Facts in hypos are fixed. They can only be added to by (reasonable) inference. (See footnote following.) Whereas a lawyer is free to seek additional facts that may assist development of arguments, even new legal avenues (premises). Indeed, a conscientious lawyer

has a duty to do so when necessary... **The name of the game on law school hypos is "who can do more with given facts, reasonable inferences therefrom."** The field of play is kind of a closed arena. (This will be better understood when one has practiced and gained skill at the analysis game.)

[7] **Reasonably inferred facts.** "Reasonable" is a legal term of art that, as a practical matter, may be thought of as "the view of people in general," or "most people." In other words, "reasonably inferred," or "reasonable view" does not necessarily mean how *you*, *personally*, view or interpret matters. [Your view may be very unlike that of others—i.e., people in general.] **"Reasonable" invites consideration of how *most* would view or react to something.** This presupposes a standard view or behavior. If such exists, it may give rise to a fact. For example, most people don't like to be awakened. (Simple fact!) Therefore, given Pucker Nicely was "awakened," absent evidence to the contrary, it may be posited as fact that PN was *likely* annoyed at being awakened. [Note. Reasonable rarely translates to certainty.] "REASONABLE" MEANS DRAW ON LIFE EXPERIENCE. Then infer the normal view, if such exists, as a *likely* or presumptive fact.

[8] **Importance of using LEEWS terminology.** LEEWS has evolved unique, specific terms to describe aspects of approach to exams and preparation. Lest there be confusion in attempting to implement various and differing advice and approaches, it is important that *only LEEWS terms* be used. For example, the somewhat loose (un-lawyerlike) use of "question" by professors and law students to describe hypos has been contrasted with LEEWS' use of the term to mean the Q/I typically following a fact pattern. Many, at least initially, seek to substitute "cause of action," meaning basis for bringing a legal action, for "premise." Although a movant basis for achieving an objective that is the end result of a legal action will likely also be a cause of action (e.g., battery, assault), a movant basis for achieving an *intermediate* objective, such as keeping evidence out of court, would never be a cause of action. Nor would a premise raised *defensively* by a respondent ever be a cause of action (e.g., self-defense).

In general, attempting to substitute terms heard in law school and elsewhere for LEEWS terms makes understanding and implementing LEEWS methods and approaches more difficult. Try to avoid doing so.

[9] There is no precise **order in which elements must be investigated**. As one will learn in Step Three, one should begin by *quickly* trying to determine whether any element is *clearly* absent—i.e., clearly cannot be established. Failing that, it is reasonable to begin with an element whose establishment seems less problematic.

[10] **"FACTS" of a hypothetical** ARE PRECISELY THAT—FACTS! It is as if they were proven in a courtroom. "Facts" are not subject to conjecture (e.g., "assuming there was a kiss") or contradiction (e.g., "possibly DH did not kiss PN"). Facts, especially in a law school hypothetical, are typically incomplete. (E.g., where or precisely *how* DH kissed PN is not indicated.) However, it may not be assumed that, for example, DH *blew* PN a kiss, although such is a possibility. *In the absence of a basis in facts for positing an unusual interpretation*—e.g., "kiss" means blowing a kiss—, *follow the reasonable view or interpretation.* (I.e., "kiss" means DH's lips touched PN.) (Revisit foregoing footnote 6.) Indeed, that DH's lips touched PN is supported by the additional (given) fact that the kiss "awakened" PN.

[11] **Use of "Probably."** Note use of the word "probably." It is appropriate to "lawyerlike" arguments. PN's lawyer cannot state his position with certainty. Nor must or need he. The civil standard of proof—"to a preponderance" or "more likely [or *probable!*] than not"— falls far short of certainty (or proof beyond a reasonable doubt—prosecution burden in a criminal proceeding). It is something above 50 percent [perhaps 60-65 percent; however, 51 can be used for discussion purposes], which is not a high standard. "Beyond a reasonable doubt," for example, is much higher—over 90 percent? "Probable" = over 51 percent!

[12] **Judicial notice.** Term of art for the circumstance where something of relevance that no one would seriously dispute may be introduced in evidence by leave of the court. Examples would be the existence of gravity, that water is wet, that DNA and fingerprints are reliable indicators of identity, and that in general people do not like to be awakened. (However not, at this point in time, that global warming exists and is a product of man-made factors.) The court or judge must be requested to "take judicial notice." (E.g., "I would request that the court take judicial notice that …") In making arguments on a law essay exam, one need merely state something that is obvious, undisputed, and relevant. For example, "a kiss is an intimate act;" "most people do not like being awakened;" "a knife is a dangerous instrument."

[13] **Introducing new facts to a hypothetical.** This *is* possible. However, only rarely should one do it. The way to accomplish this is to state, "assuming, *arguendo'"* (for purpose of argument),… Here one can introduce whatever facts one wishes. It is a way of manipulating a hypothetical to create opportunities to show off additional (relevant) knowledge. (Refer to discussion of Major Mistake No. 2, *supra,* p. 52.) Again, however, rarely would one do this. A grader is unlikely to be impressed with new facts and what they may portend, unless one has exhausted all possibilities from given and reasonably inferred facts. (I.e., one has made the arguments the grader seeks.) Moreover, one is unlikely to have time for tangents. One must normally be skilled indeed at the game of exam taking to risk introducing new facts. An example of doing so might be the following: "The facts do not indicate whether…,"; "However, assuming, *arguendo,* [new facts introduced], one might reasonably infer…"; "Indeed, such would introduce the possibility of [certain law referenced that one thinks the professor might be interested in]…." [Note. One would *never* introduce new facts on a bar exercise.]

[14] **Unknown (therefore unfair) rules of analysis.** Rules respecting what can and cannot occur in analysis are very clear. They are precisely the rules governing admissibility of evidence in a courtroom. For example, arguments that are irrelevant, speculative, conclusory, and without foundation, generally inadmissible in a courtroom, will be marked down or disregarded when presented in analysis on a law exam. A professor (or bar grader) reacts in the same way a judge or opposing lawyer would—"objection!," "Inadmissible!" (Violates the rules!) And here's the rub, a glaring example of the unfairness of law essay exams, particularly in first year. RULES OF EVIDENCE ARE INTRODUCED IN THE (ABA) REQUIRED COURSE OF THE SAME NAME—"EVIDENCE"—, AND THIS COURSE IS NEVER OFFERED BEFORE SECOND YEAR OF LAW SCHOOL! (Therefore woe to most 1Ls; advantage to those who learn necessary rules of evidence before classmates.)

[15] **Analysis—Baseball analogy.** The analogy has been made between cumulating evidence to a preponderance—*arguendo,* 51 percent—and scoring a run in baseball. Same as in a live program, any professing unfamiliarity with baseball are admonished to think of the baseball "diamond"—home plate, first base, second, third, back to home plate, forming a diamond (or square on one of its points). If first base may be thought of as amassing, say, 15 of the necessary 51 percentage points of proof in a courtroom, and second base 25-30 points, then crossing home plate—scoring a run—may be thought of as arriving at, surpassing 51 percent proof.

Sometimes in analysis only one item of evidence suffices to achieve the necessary 51 percent (or more) proof. Thus, for example, the kiss establishes contact between PN and DH. Analogous in baseball would be a home run, a single hit of the ball that enables one to round the bases and cross home plate safely. More often, however, in baseball home runs are not hit. A batter reaches first base via bunt

or single. Perhaps she reaches second on a double. The runner is advanced by another batter's hit, or a steal or sacrifice fly. Via such increments, the goal of rounding bases and crossing home plate is achieved.

So it is in (lawyerlike) analysis. Rarely are there home runs—a single item of evidence or argument that, standing alone, suffices to establish requisite proof of that which is contested. Rather, evidence and arguments cumulate to achieve 51 percent proof—round the bases, cross home plate. They are drawn from various facts and reasonable inferences, and they add up. The law student who exhibits skill at this process, all the while abiding by rules of evidence, impresses with "lawyerlike analysis."

[16] All, of course, in accordance with rules (largely unknown to 1Ls) respecting what can and cannot be argued [in a courtroom].

[17] **Training the practitioner mind.** As noted previously, facts in (exclusively) appellate opinions that law students read and brief are established ("settled"). Parsing application of law to (established) facts assists in shaping lawyerlike thinking. However, it cannot train the attention to factual nuance that occurs in the back-and-forth contests of litigation. So-called *"what if" exercises* professors introduce in class, wherein they posit changes to facts set forth in cases and query what differences in outcome may result, seek to instruct the requisite mindset. However, lacking adequate instruction in the art of analysis (as is [hopefully] occurring at present!), such exercises are lost on all but a scarce few of the academic-minded students sitting in classrooms. Indeed, in that more and more professors lack adequate grounding in actual law practice, especially litigation, the likelihood that something approaching the lawyer mindset will be adequately conveyed in a law school classroom further diminishes.

[18] **Anticipatory breach.** Doctrine whereby a party to contract with good reason to believe the other side cannot fulfill his end of the bargain can mitigate loss by modifying, even halting his own performance of terms of the agreement.

[19] As illustrated by analysis pp. 71-74, *supra,* consent and privilege are *factual,* not legal propositions. "PREMISE" IMPLIES A LEGAL PRECEPT. Given that defenses to torts are sometimes said to create a "privilege" for the tortious conduct [See p. 136, especially "defense of others."], it is understandable that "privilege" may be confused as constituting a defense. However, standing alone, privilege (and consent) have to do merely with *factual* establishment of an element of battery. A counterpremise would require a *legal* basis for the privilege, such as self-defense, defense of others. (See discussion of counter*premise* versus counter*argument* in Chapter 12.)

[20] Following back-and-forth argument/counterargument in a courtroom respecting a premise (and evidence for and against introduced), a judge may make a determination regarding the premise. (E.g., "Given the evidence, and having heard the arguments, it is my determination that [movant has or has not met his burden; evidence is sufficient (*prima facie* case) to warrant determination by the jury (if there is such); decision is reserved; etc.]") If the determination is favorable to movant, the matter ends (in a courtroom, but not necessarily in an exam response). It is at this point that respondent, now become movant, would advance a counterpremise, and evidence and arguments respecting that topic or issue would commence.

CHAPTER NINE

PLANNING PHASE—STEP THREE

Major versus Minor (Overall) Issues

Step One (requiring mere seconds, 1, 3, 5 minutes or less?) should be completed well within the first 10-15 minute planning segment. As one commences the actual exam response—analysis of first premise in a first paragraph—, *Step Two may or may not be completed*. (Likely not, if more than a 45 minute exercise. [Therefore more than one 10-15 minute planning segment.]) What is certain is that at conclusion of Step Two a list of relevant topics for discussion—premises/issues—has been systematically revealed.

Additional premises (issues) may emerge during close analysis of facts while executing the response. [EXAM OUTLINES RARELY REPRESENT THE SUM OF THE RESPONSE.] However, before beginning the response it is important to *gain perspective in terms of priority of discussion*. Some premises, because analysis is problematic (owing to presence of *real* issues), require and deserve more time for discussion. MORE TIME FOR DISCUSSION DENOTES *"MAJOR ISSUE,"* LESS TIME *"MINOR ISSUE."* So as to properly allocate limited time, *just before beginning your response*, quickly preview so far as possible which premises constitute major issues, which minor. Here the final planning step—*"Step Three"*—comes into play.[1]

Step Three is largely *mental*, and presupposes skill at analysis (!!).[2] It is performed just before beginning the exam response. FOCUS ON ONE PREMISE (OR COUNTERPREMISE) AT A TIME [identified to that point]. *QUICKLY* PREVIEW IN LIGHT OF RELEVANT FACTS, *FIRST,* WHETHER SOME ELEMENT IS SO CLEARLY LACKING (i.e., easily defeated, incapable of establishment) AS TO IMMEDIATELY DISPOSE OF THE PREMISE (which, typically, concludes a Step Three analysis), *SECOND,* WHETHER ANY *REAL ISSUES* ARE RAISED IN THE RESOLUTION OF THE PREMISE.

In other words, will resolution of a premise be simple, straightforward, by reason of a necessary element being incapable of establishment under any reasonable view of facts (e.g., "asleep" defeating apprehension element of PN's assault premise), or more complex/problematic, by reason of *no element being clearly lacking, and establishment of one or more elements likely proving a close contest* (e.g., PN's battery premise)? If, as with PN's assault premise, one can quickly defeat an element, unless there is reason to think the professor wants more exploration of the issue (e.g., the premise introduces a pet interest), it would be pointless and time wasting (non-lawyerlike) to dwell on the premise. Such a premise constitutes a "minor issue." Analysis should proceed directly to the missing link, conclude, then on to the next premise/paragraph. [How to express this on paper will be demonstrated presently.] Dispose of minor issues fast!

If no element of a premise being reviewed seems capable of easy defeat/disposal, continue with a *cursory* evaluation to determine whether one or more elements are problematic of establishment. Elements requiring further definition (therefore exploration of sub-elements), and/or whose establishment is likely to be closely contested (one previews persuasive arguments can be made from both sides), raise (of course) *"real issues."*[3] Examples are "intent" and "unprivileged" elements of PN's battery premise.

Only on a bar essay (where primary emphasis is on knowing relevant law, not ability to flesh out competing arguments), are all elements likely to be capable of establishment in straightforward fashion. (I.e., no close calls.) Should one perceive that all elements are capable of easy establishment, it may be that one is not examining facts closely, objectively enough to detect a competing argument. However, *don't waste time in Step Three probing facts*. Save searching analysis for execution of response paragraphs.

Best Opportunity to Impress and Earn (Rare) A's

Where contest over an element is close—real issue!—, one wants to display the most creative, logical, insightful arguments opposing parties (their lawyers!) can make within confines of given, reasonably inferred facts. Here is the best opportunity to distinguish yourself in a professor's eyes as knowing *how* to play *"The Lawyering Game."* (I.e., apply nitpicking logic, deductive reasoning to build persuasive [51 percent!] arguments on both sides of a construct at issue.) Here is where raising an esoteric policy consideration noted in a law review article or the minority view in a leading case may tip the balance in favor of one side. Such demonstration both of in depth knowledge of law and close, objective scrutiny of facts, to build competing arguments (as a lawyer would), is what impresses any law professor.

IDENTIFYING *MOST* RELEVANT ISSUES, DISTINGUISHING MAJOR FROM MINOR ISSUES (via emphasis), AND REASONABLE ANALYSIS EARNS B+

to A- GRADES. DISPLAYING IN ADDITION IMPRESSIVE—searching, objective, insightful, "lawyerlike"—ANALYSIS EARNS RARE SOLID A's (and best exam in class—"CALI," "AM JUR"—awards).

Close give-and-take analysis of *real* issues adds weight to discussion of premises. Such in-depth discussion naturally forms the bulk of response to a hypothetical under consideration. Thus, it is evident *some premises (issues) have more importance than others*. Gaining perspective on this hierarchical ordering greatly assists in proper time allocation. STEP THREE IS ABOUT SETTING PRIORITIES

In sum, *Step Three contemplates cursory, not exhaustive survey of elements and facts—one premise at a time*. Preview absence or likelihood of arguments. Attempt to gain perspective. However, do not assay to construct precise wording of arguments. (The latter would be far too time consuming, especially for complex arguments. Moreover, specific wording likely will be forgotten by the time a point is returned to in the response.) ALL THAT IS WANTED AT THIS JUNCTURE IS A *SENSE* THAT AN ELEMENT IS LACKING, OR THAT COMPETING ARGUMENTS EXIST. Then on to the main event—the response—with all due haste.4

Again, facility at Step Three must await skill at analysis. Practice analyzing and presenting analysis of premises—in concise paragraphs—is key!

Shape/Content of the Exam Outline Post Step Three

Step Three, once again, is a *cursory* review. Immediately following, begin your response. (First paragraph, analyzing first premise/issue.) Post Step Three (for premises identified), the outline of the PN/DH conflict pairing might appear as follows:

	PN	v.	DH	
money	B		—	
	– intent?			
	– priv.?			
	[A]		—	
	– no apprehension! (asleep)			
	[IIED]		—	
	– no calc.	+ D		
				money
	SD		B	
	– reasonable force?		– intent?	
	~~[SD]~~		[A]	
			– no appre.!	
			~~[IIED]~~	

D
– compensatory (speculative)

[— punitive (no malice)]

Contrast this (completed) outline with that on page 76, *supra*. Note additions reflecting Step Three. Note use of abbreviations that need only be comprehensible to the author. Elements projected as real issues are indicated with a question mark. Premises adjudged minor issues to be disposed of quickly are now bracketed. Notations and/or elements accompanying bracketed premises are a reminder/guide respecting swift resolution. USEFUL ANALYSIS FROM THE PLANNING STAGE SHOULD BE REFLECTED IN THE EXAM OUTLINE. (Not "in margins of hypos," as suggested by some CW.) *One does not want to forget or lose track of useful thinking*.

Other constituent elements of various premises may or may not have been reviewed. It suffices to pull them from the course outline (or one's memory) when and if required. COMPLETE RULES OF LAW ARE *NEVER* SET FORTH IN THE EXAM OUTLINE.

Note. PN's *second* self-defense (counterpremise) and DH's IIED have been stricken as not meriting (a second) discussion (and paragraph). Recall the rule of thumb (Mantra No. 2) respecting whether to discuss or no—*(show) New Law, New Thinking!*

If the outline is continued for remaining conflict pairs—*[Stay within 10-12-15 minute planning segment limits by abruptly stopping, paragraphing what has been outlined to that point, then continuing with a fresh 10-12-15 minute segment!]*—, a roadmap exists providing easy reference to issues and key points to be covered, and appropriate time allocation. This is all you want to achieve during a planning segment. *Do not become obsessed with the form of the outline*. Merely reflect the three Steps. GET ON WITH THE RESPONSE!

Running Out of Time

As noted, time limits allotted by professors are mere *estimates* of necessary time, usually low estimates. As suggested previously, should you find yourself running out of time, with a number of outline topics remaining to be addressed, *in lieu of a fully developed response,* quickly recreate the portion of the outline not yet reflected in the response. However, *more fleshed out*. Alert the professor to additional issues (premises) one is prepared to discuss. Quickly sketch key points one would make respecting each such issue—real issues, dispositive arguments. Briefly conclude. In this way credit for issues and points identified is maximized. One avoids the familiar (unavailing!) excuse for incompleteness appended plaintively to the end of many exam responses—"Ran out of time!"

Exercise in Application of Step Three

Not now, but later (*after practicing (lawyerlike) analysis* [by actually writing out paragraphs following format and instructions set forth in chapters that follow, then comparing one's efforts to models in the Appendix]), refer to "relevant legal principles" accompanying each hypo and model outlines that follow. Complete outline of response to Torts, Combination Law, and Corporations Hypos by performing Step Three.

Speed is not critical at this juncture. However, 15, 15, and 10 minutes are probably appropriate time guidelines, respectively. When satisfied you have a) identified a missing element, or, failing that, b) identified real issues, thereby distinguishing major from minor (overall) issues/premises, compare your Step Three analysis with the model for each hypo in the Appendix.

[Note. No models of (exam) outlines, *per se,* are provided beyond those on pp. 76 and 81. *It is enough that one's outline reflect relevant conflict pairs/parties/objectives* (Step One); *relevant premises* (Step Two); *one's preview of what will likely happen respecting premises* (Step Three)—*ordered in a way that makes sense (to you!)*. The watchword is brevity!—A LIST OF PREMISES, NOTATIONS REFLECTING INSIGHT INTO EACH, THEN *QUICKLY ON TO THE MAIN EVENT*, WHICH MUST REMAIN THE RESPONSE ITSELF!]

RECAP OF PLANNING STEPS OF APPROACH, MAJOR MISTAKES

The watchword in implementing LEEWS is *discipline*. The goal is imposing orderly resolution on a confusing, seeming chaotic task via orderly, disciplined steps. The idea is to make addressing *every* exam, *every* hypo *predictable and manageable*—series of premises (issues), series of concise paragraphs analyzing each. *EVERY* EXAM. *EVERY* HYPO, ONE PROCEEDS SURELY, WITH DISCIPLINE AND CONFIDENCE, TO BREAK THE EXERCISE DOWN INTO MANAGEABLE COMPONENTS—PREMISES!

There follows a recap of (disciplined, stepped) approach and major mistakes.

First Order of Business (following timely arrival, getting settled)—*Quickly*—1-2 minutes!—review any (cover) instructions.

Preliminary Overview (p. 38)

Phase One—Flip/scroll—30-45 seconds—page-by-page (panel-by-panel) through entire exam to gain perspective on overall format. (Number of hypos, time allotments, etc.) *Don't look at facts of any hypothetical!*

Phase Two—Return to first hypo. *Skip over facts* (discipline!) to Q/I's typically (not always) at end. Gather any clues offered re performing Step One. (E.g., "all parties.") [Perform Steps. Execute response. Repeat for each successive hypo.]

Step One (p. 44)

Identify conflict pairs relevant to Q/I's, and objective(s) of each party to each pairing. (With practice [and discipline], this should take no more than 5 minutes for the longest hypo.)

Step Two (p. 54)

One pairing, party, objective at a time, referring to categories of your course outline (toolbox), cull through (just) facts relevant to pairing/party/objective

under consideration—word(s), phrase(s), sentence(s), a paragraph—to discover premise(s) that *may* assist in achieving the objective, OR, where such is apparent, overriding premise(s) that will control resolution of the conflict. (See fn., p. XXX.)

Step Three (p. XXX)

At the end of 10-15 minute planning segments, focus on one identified premise (or counterpremise) at a time. Quickly preview in light of relevant facts *first,* whether an element is so clearly lacking as to immediately dispose of the premise, *second,* whether any real issues are raised in the resolution of the premise.

Major Mistakes

One—(p. XXX)—*Attempt to Comprehend the Whole*. Refers to plunging immediately into a fact pattern to, in haphazard, hit-and-miss fashion, identify or "spot" issues. Substitute disciplined steps of approach—The Blender! (Above.)

Two—(p. XXX)—*Improper Attitude*. Refers to trepidation and reluctance with which most law students approach exams. By contrast, view exams as *opportunities*—to show off knowledge of relevant law (by identifying *all* relevant issues [premises!]), to demonstrate skill at the *game of lawyering*. (Probing, objective analysis.) Approach exercises aggressively, confidently, even eagerly (albeit with discipline).

Three—(p. XXX)—*Lack of Objectivity*. Refers to tendency to pick a winner or quickly reach a conclusion as to outcome, then seek to justify that conclusion. Analysis, such as it is, tends to be one-sided, shallow, conclusory. Opposing/competing arguments are typically overlooked. The name of the game—the correct answer!—is building persuasive arguments on both sides of (narrowly defined) legal constructs at issue.

Perspective on the Solution Thus Far

EVERY ESSAY HYPOTHETICAL PRESUPPOSES DISCOVERY AND ANALYSIS OF A SERIES OF RELEVANT ISSUES. Accomplishing this with discipline, skill, and efficiency is the task in a nutshell.

At this juncture you are hopefully intrigued with the promise of the disciplined LEEWS approach. There is here afoot a science light years beyond "IRAC" (p. XXX) and CW (conventional [exam writing/preparation] wisdom). However, you are also likely overwhelmed, perhaps unnerved by the prospect of implementing the instruction. The hypothetical-type exam is a significant challenge. Mastery requires a confident, skilled response by one thoroughly versed in relevant law. No question but there is much work to be done. However, as one will do in preparing for and taking exams, *take it in stages*.

ONE CANNOT MASTER THE MANY FACETS OF LEEWS IN ONE SITTING OR SEVERAL.

[Note. The very complexity and difficulty of the challenge posed by law essay exams is a positive! It ensures that *mastery* of LEEWS will provide significant advantage. One can easily surpass the low performance bar of clueless classmates.]

One must devote oneself to mastery of facets of LEEWS *one at a time*, over a period of days, weeks. Genuine understanding (and appreciation and confidence) comes only with practice. Review advice on page XXX, *supra,* respecting a practice regimen. Follow it!

At all times keep in mind (as beacon and unifying principle) the overall objective the Steps, methods, and instruction are designed to achieve—MAKE HANDLING OF *ANY* HYPO IN *ANY* SUBJECT PREDICTABLE/MANAGEABLE (no matter Q/I's posed). Namely, systematically, efficiently *reduce every hypo to a series of manageable components*—relevant issues that will be addressed roughly one paragraph per. The list of premises revealed via The Blender (Preliminary Overview, Steps One and Two) largely define and constitute those components/issues.

As oft set forth, ONE'S TASK, DAY-BY-DAY, WEEK-BY-WEEK THROUGH TERM IN PREPARATION FOR ALL-IMPORTANT FINAL EXAMS IS TO GATHER (in course outlines) AND UNDERSTAND (by applying them) PREMISES. Extract premises from assigned readings (cases, etc.). Organize them (weekly) in "toolboxes" (course outlines) for speedy reference during Step Two. Master them by using them. (I.e., apply them in the context of cases, etc. in which they are encountered. Think about change[s] in facts that would cause the majority to go with the dissent, the dissent with the majority, a concurring judge with the majority opinion, etc. [See instruction in this regard, Chapter 14, *infra*.] "Food for thought" material following each case should make sense and be helpful.)

The preceding instruction, in sum, sets forth an approach designed to *reveal in disciplined fashion, within 10-15 minutes of the start of any exam, a list of premises* = relevant issues! Some of that instruction and instruction that follows, is designed to make one adept at analyzing and presenting analysis of prem-

ises/issues in a series of concise, orderly paragraphs (roughly one per premise/issue). As noted several times, having the disciplined, structured LEEWS approach enables management of *any* exam, rather than mere (defensive) reaction to it. YOU TAKE CONTROL, NOT THE EXAM!

This should provide confidence—great confidence! If nothing else, you have definite things to do at *all* times on *any* exam—a major plus! Carry on. (No one said this would be easy.)

SECTION TWO, CHAPTER 9 FOOTNOTES

[1] Note. *One cannot be altogether certain in Step Three which are major, which minor issues.* An argument, counterargument, or additional law may emerge during close analysis while executing the response that transforms what seemed a straightforward, minor issue into something time consuming, therefore major. Knowing a professor is interested in the topic can make an issue major (!!).

[2] **One cannot at this point perform Step Three!** Step Three requires that one *predict* what is likely to happen respecting analysis of a premise—i.e., element lacking, "real issues." Therefore, until one becomes skilled at analysis—formulating arguments, element by element "as a lawyer"—, it will not be possible to perform (perhaps even *understand*) Step Three with facility. Indeed, grasping at this point what is conveyed here may be impossible (!!). Therefore, THIS SECTION—ALL SECTIONS!—SHOULD BE REVIEWED FOLLOWING PRACTICE WITH EXERCISES IN THE APPENDIX.

[3] Note again the distinction between "real issues" (elements of premises likely to be closely contested) and "relevant issues" (overall premises/issues a grader—law school, bar—wants identified and discussed).

[4] Wait until fingers tap keyboard (pen is put to paper?) to piece together precise language of arguments and counterarguments.

CHAPTER TEN

ANALYSIS / RESPONSE—PRELIMINARY ASPECTS

Apart from an example, description, and indications of what it is and is not, the critical skill of (lawyerlike) analysis—*how,* exactly, to perform and execute it—continues largely to remain a question mark. The good news is that familiarity leading to proficiency can be acquired hand-in-hand with presentation in the often-mentioned "concise paragraphs."

Having (in a 10-15 minute planning segment) identified at least *some* premises, it's time to begin the response. Anxiety has built up. There is no time to lose. However, reflecting on PN v. DH (the outline, premises), would you know how to begin? Can you visualize the first sentence and content of a paragraph discussing, for example, PN's battery premise? Do you know how to introduce an issue and "interweave law and fact" in resolving it? In short, given a list of premises, how does one proceed with efficiency and assurance to produce concise paragraphs of analysis that impress (one issue—will the premise succeed?—after another)?

Examinees have more difficulty executing analysis than they do untangling relevant issues from fact patterns. The typical effort is a hodgepodge, usually unrelieved by labels, sometimes even paragraph stops. (Typing has at least eliminated the problem of legibility.)[1] "Analysis," such as it is, is further marred by run-on sentences and all-round grammatical anarchy. [Where/how in the age of e-mail, Twitter, teacher unconcern with fine points of expression at all levels does anyone learn to express thoughts with competence?!]

The following instruction, heeded, *practiced,* will bring response on paper to the level of assured competence, even *mastery,* that advice of foregoing chapters should accomplish respecting planning.

No Literary Masterpieces

Assuming one is capable of producing a literary masterpiece, such would be impossible given time constraints of a typical law exam. Moreover, such is unnecessary to achieve a top grade. Neither professor, nor bar grader seeks or expects literary flourish. One will seem pompous attempting to do more than respond matter-of-factly to the exercise. Moreover, literary embellishment [whatever that is] would cost time, therefore points. Thus, *abandon at the outset any notion of or aspiration to "Holmesian" legal prose*. The task at this point is straightforward, without need or opportunity for frill and "art." What is required is A SERIES OF CONCISE PARAGRAPHS INTRODUCED BY HELPFUL LABELS, EACH BEGINNING WITH LAW CONSTITUTING A PREMISE (OR COUNTERPREMISE), FOLLOWED BY ANALYSIS OF WHETHER THE PREMISE SUCCEEDS. All else is mere cosmetic adjustment to specific format instructions of the professor[2] and/or wasted motion.

Toward Effective, Grammatical Prose—A Quick Fix

It has been asserted often that "good writer" bears minimal relation to law exam success.[3] The idea and attempt here/now will be merely to assist you in becoming a *good-enough* writer for law exam paragraph-of-analysis purposes.

Somewhere around third grade your prose probably took a turn for the worse. You learned to write compound, complex sentences. Therein was sown the misconception that "good writing" implies convoluted sentence structure. This misconception is reinforced in law school by encounters with paragraph-long, "lawyerlike" sentences. (E.g., "Whereas Mr. Jones, hereinafter 'party of the first part,' intends to enter into ..., and Mrs. Jones, hereinafter 'party of the second part,' being desirous of...," etc.) Add to these impressions the characteristic lack of schooling in fundamentals of grammar, punctuation, spelling, and paragraph/sentence structure of today's scholastic product, and a rambling, ungrammatical essay response is nigh inevitable.

The quick fix is to return to writing style of *early* third grade. SHORT, CHOPPY SENTENCES MAKE FOR EFFECTIVE EXPRESSION. (E.g., "See Spot run," "I like Spot," "Spot is a good dog.") In other words, <u>write as you speak!</u> This neatly avoids demonstrating lack of acquaintance with grammar and punctuation skills needed to properly execute longer sentences.

Consider the following:

> He went to the store, then to various aisles and shelves selecting items, took them to the checkout counter, paid for them, and went home.
>
> versus
>
> He went to the store. [Period!] He went to various aisles and shelves. [Period!] He selected items. [Period!] He took them to the checkout counter. He paid for them. He went home.

Read the two versions *aloud* several times. Can you appreciate that the latter is more forceful and effective? If you can, further appreciate how simple it is to make your own expression more effective. *If it feels ever so slightly like a pause,* stop! Drop a period! Capitalize the next letter! Continue. The result may in places seem abrupt, herky-jerky. However, meaning will be clear. You will make no important (distracting) grammar errors. Your prose will be at least *okay*. The format and exercises introduced presently will assist a return to simple, direct expression.

Consideration for Grader

The exam response grader will normally be a law professor for law students, several unknown lawyers [one per hypo] for bar examinees. In either case he/she is a forbidding figure, not someone one thinks about extending consideration to. However, put yourself in that person's position for a moment. Imagine grading 50, 80 and more exam responses, each (for professors) with multiple essay exercises. Hardly an inviting task.[4]

Which brings us to the point. TO THE EXTENT ONE EASES THE GRADER'S TASK—by alerting the topic being discussed (labels!), by organizing the response, by avoiding irrelevancy and meandering—ONE MAKES A GOOD IMPRESSION. One earns gratitude, and perhaps with it "brownie points."

This is natural. Law professors are human. Their response, having slogged through several disorganized, mediocre efforts, to coming upon something orderly, that they can follow in terms of issues being (effectively) discussed, will doubtless be to award a presumption in favor of the *anonymous* author.[5] Not that a neatly labeled response, *per se,* earns an A or B. However, you will not lose a deserved grade because the grader didn't feel like digging through a disorganized response. One gets the benefit of borderline calls.

Make the grader's job easy! If you know what you're doing, you have nothing to hide.

[Note. The thought has been entertained of introducing a Fourth Mantra—*HELP THE PROFESSOR!* (Or bar grader.) Suffice, make it easy to follow your orderly progression, to appreciate your mastery of the exercise.]

Labelling, Spacing, Other Fine Points of Exam Response Etiquette

An exam exercise methodically approached and reduced to units a professor/bar grader seeks—premises/issues— , then addressed one unit after another in concise, lawyerly paragraphs will impress in and of itself. This is especially so, given comparison with near-universal abysmal law exam responses. If, in addition, a certain etiquette and consideration for the grader is observed, so much the better.

Observance of the following do's and don'ts considerably eases a grader's task in reviewing a response. It also better enables you to monitor progress in following your exam outline.

[Note. You must get into the habit of these practices (when practicing), if you expect to automatically (i.e., with a minimum of head scratching) put them into effect during the pressure and confusion of an exam.]

1—PRESENT LEGIBLY. Predominance of typed responses has rendered this aspect largely moot. However, should you find yourself *writing* an exam (because a professor so instructs; because computer systems crash), what is the point of discussion that can't be read? [Seeking to obscure?] Most of us can write better *if we so choose.* If your penmanship qualifies you to author medical prescriptions, then print or arrange to type the exam.[6]

2—CLEARLY LABEL OR OTHERWISE INDICATE—via spacing, underlining, italics, indentation, etc.—WHAT YOU ARE DOING. Let the grader know what hypo is being addressed. [Seriously! Some examinees don't.] Also, what issue, etc. Label the response overall [at the outset of the exam] in the manner instructed (in cover instructions or otherwise). [Students occasionally forget to identify exam responses before turning them in. Unconscious disavowal?] The format introduced in the following chapter will result in a desirable clarity. Once again, make the grader's job easy!

[**Chronology.** Note in this regard that so long as what is being done is clearly labeled, *there is normally no particular chronology in which one must present discussion of hypos, issues, etc*. However, unless there is good reason for altering, *one (naturally) assists the grader by following exam chronology.*]

3—TYPE/WRITE ON EVERY OTHER LINE unless space restrictions do not permit. (E.g., professor limits the number of bluebooks or space in which to respond.) [Should one type (usual case), exam software is normally programmed in accordance with a professor's preference. (E.g., double, triple spacing.)] "Double space" used to be standard instruction on many handwritten exams. [Makes for clarity from a grader's standpoint. Provides space for comments.] The practical advantage of spacing, if writing by hand, is that should one want to go back and insert a word, phrase,

even entire discussion [of an issue overlooked, a point likely to impress], one can do so conveniently. [Not a problem, of course, if word processing. Simply open space, cut and paste.] Again*, become accustomed to such techniques in practice, so they are automatic during exams.*

4—PREFACE ABBREVIATIONS WITH WORD(S) THEY REPRESENT. A tax professor immediately comprehends "tp" to mean "taxpayer." However, it is not appropriate to use an abbreviation without first prefacing with the word it stands for. First, write the word to be abbreviated—e.g., "taxpayer." Follow it with the abbreviation in parentheses—"(tp)." Note. "Hereinafter"—as in "('hereinafter, tp')"—is unnecessary, time-wasting. Nor are quotation marks necessary—e.g., ("tp"). This is so not just for law school and bar exams, but *for briefs one day to the United States Supreme Court!* By identifying the abbreviation, one shows oneself to be courteous and lawyerlike. *Beware of prohibitions against abbreviations.*[7]

5—MAKE (proper!) USE OF LATIN EXPRESSIONS—E.g., *"SUPRA"* (that which went before [as in "…the point made, *supra."*]); *"INFRA"* (that which follows [as in "…the point made, *infra."*]); *"ARGUENDO"* (for purpose of argument [as in "Assuming, *arguendo,…"*]); *"INTER ALIA"* (among other things [as in, "*inter alia,* a necessary element of battery is intent"]); *"SUA SPONTE"* (on its own initiative [as in, "The court, *sua sponte*, found that…"]). These (Latin) words should be underlined or italicized, and bracketed by commas. They are useful and add a lawyerly aspect to discussion. Note, however, that occasionally a professor, concerned lest students substitute legalisms for analysis, will instruct, "No Latin in responses!"

Once again, one may want to avail oneself of the stratagem set forth in footnote 7 (following).

SECTION TWO, CHAPTER 10 FOOTNOTES

[1] **Typed exam, written exam?** Most law school/bar exams are typed, not written. Where appropriate, substitute "type" for "write."

[2] E.g., "Put conclusions at the beginning," "Put the conclusion at the end," "Don't state conclusions," "Follow IRAC," "Follow CIRAC." Note: **"Do *not* state a conclusion" is what *should* be instructed.** It puts emphasis on analysis (where it belongs). It mitigates tendency (of most) to come to conclusions after superficial, faulty (non-lawyerlike) analysis. It points to analysis, not the conclusion as the "correct answer." However, very few law professors give this instruction. (Yet another indication of failure to properly instruct lawyerlike thinking, failure to examine mechanics of exams.) Your author recalls a professor asking, "How do I get students to be less conclusory?" He revealed—teaching to the bar!—that he instructed: "Enter your conclusion at the start of analysis [of an issue]." (So-called "CIRAC.")

[3] **No need to be a "good writer!"** the seeming greater success of math/science types on law exams (versus English majors) has been noted several times. They are probably not "good writers" in the sense that is understood. However, they likely tend more to be *close, analytic thinkers, who express themselves concisely,* which is more the requirement, given typical time pressure of a law exam.

[4] In point of fact, given that the burden of deciphering scribbled written responses has largely abated, given that fewer D and F grades need be justified, given the standard for A's is so rarely approached, the task of grading law school exams has been considerably eased.

[5] **Anonymous grading.** Law professors can identify the author of an exam *if they want to.* However, given numerous lawsuits charging discrimination or other impropriety, and the sensitivity of law professors and bar examiners lest even the appearance of discrimination or favoritism in grading give rise to charges of same, it is a virtual truism that LAW SCHOOL AND BAR EXAMS WILL BE GRADED ANONYMOUSLY.

[6] Years ago your author was advised by a student from the University of Chicago Law School that a professor had permitted someone to type his handwritten response *after the exam,* on the assurance that the typed version reproduced the (illegible) written version verbatim. Interesting. U. Chicago Law, I believe, similar to a few other law schools, operates on an honor system.

[7] **"No abbreviations!"** Because students tend to abuse or misuse abbreviations, occasionally a professor prohibits abbreviations. If you were to approach this professor privately, show that you know how to properly introduce an abbreviation, and ask if *you* might use abbreviations after all, you may well be given permission to do so—a significant time benefit. It would also be a good excuse to talk to the professor personally. GET TO KNOW PROFESSORS PERSONALLY! You may want a recommendation from one.

CHAPTER ELEVEN

EXECUTING THE (PARAGRAPHED) RESPONSE—A FORMAT FOR ALL SEASONS

Perspective

During 30+ years conducting live programs (talking to students from all law schools), your author became acquainted with every manner of law school exam, every professor preference. (E.g., "My professor is really into policy," "My professor prefers this," "My professor prefers that.") Professors have held up flyers advertising LEEWS and sniffed dismissively, "He can't know what I want on my exam!"

The illogical notion that an exam testing progress in becoming a lawyer is going to differ meaningfully has been addressed. Given that more and more professors, especially at "top tier" law schools have non-law-related PhD's, some exams may have segments for which LEEWS is inapplicable, unnecessary—e.g., exercises calling for regurgitation of historical, economic, sociological/psychological aspects of law. [If so, approaches that were successful prior to law school will apply.] However, if the exercise involves legal problem solving, then *any differences will be largely cosmetic*. Response to *all* exams, at base, will be paragraphs analyzing issues "as a lawyer."

You have hopefully appreciated the folly of thinking about exams, even segments of exams—hypos, for example—*as a whole* from a response planning standpoint. Likewise, abandon, at least initially, the notion of *"How do I execute an exam response (overall)?"* If lessons to this point have been even partially absorbed, one's perception/conception of *any and all* essay exercises should be a series of premises identified via The Blender, thus, *a series of issues needing resolution*. Similarly, ONE'S CONCEPT OF RESPONSE SHOULD BE A *SERIES OF PARAGRAPHS*, each roughly exploring an issue/premise.

[Note. In its essence LEEWS is about reducing complex wholes to manageable components, addressing each component with skill, and, ultimately, aggregating components to a masterful, overall whole. If one can execute a series of concise paragraphs, each a lawyerly analysis/resolution of a premise/issue, then the problem of executing a concise, lawyerlike analysis/resolution of an entire hypothetical is solved! THE OBJECTIVE IS ONE CONCISE, EFFECTIVE PARAGRAPH OF ANALYSIS AFTER ANOTHER.]

At this juncture you've learned how to approach and take control of *any* law essay (hypothetical-type) exam. [With practice, addressing *any and all* such exams becomes predictable. The only variable is legal tools are to be applied—e.g., evidence law (toolbox) for evidence exam, criminal law for..., agency law for…, etc.] Having (with discipline) applied The Blender, 15-20 minutes in[1] you're nervous, but *in control*. Your exam outline (hastily scribbled on scratch paper) is a roadmap reflecting one or more premises, therefore one and more relevant issues, each to be analyzed in roughly a paragraph. [Response overall—*always!*—is going to be a series of paragraphs.] You're ready to introduce discussion of the first issue in the first paragraph of response. What remains is nailing down *how, exactly,* to craft each paragraph to satisfy, for example, an instruction to "Follow IRAC," or "IRAC the exam. Indeed, *any* instruction respecting presentation.

IRAC, of course, is the omnipresent law exam writing instruction acronym standing for Issue, Rule, Analysis, Conclusion. IRAC is not a "system," far from a science. IRAC is more a *formula*., a mere *what!*—the four (4) elements of analysis of individual issues professors and bar graders want to see. As noted, IRAC falls far short respecting instructing the *how*. For reasons now better understood, IRAC has never proved of significant benefit transitioning academic thinkers/learners to something resembling lawyer thinker/learners. It has never raised exam performance from characteristic (sub)-mediocrity. However, given abject confusion regarding how to address essay exams, introduction to IRAC is understandably an "Aha!" moment for new law students.

IRAC cannot be ignored. It *does* have utility as a guidepost in structuring issue analysis. Indeed, we shall use IRAC as a reference. [Note. CIRAC, CIRA, other variations on IRAC merely have to do with *ordering* of presentation of the 4 issue analysis/presentation elements.]

Labeling the Response Overall and in General

Consideration for the grader has been discussed. Labeling what one is doing, what will likely follow, what the grader is about to see exemplifies consideration. Of course, if you don't know what you're doing and where discussion is heading, it becomes hard to create labels (until *after* discussion is finished). Indeed, if one is embarrassed by one's efforts (as most

law students should be!), if one seeks, accordingly, to obscure or hide what one is doing, labeling is also problematic. Such should not be the case for anyone versed in LEEWS. The Blender provides a clear roadmap. You know where you're going, what is to be covered en route. *You've nothing to hide*. Indeed, once *how* to analyze and *how* to present analysis concisely is in place—soon, soon!—, you should be eager to demonstrate with clarity your command of the exam.

First things first. Immediately upon commencing the response, identify the exam as instructed—e.g., "Torts, Section 1, Professor X." (Possibly also your SS number [portion thereof], some other typically anonymous identifier.) Next, clearly indicate (with appropriate concise labels) the hypo (or other segment) being addressed. E.g., "1," "First," "Third," "Torts Hypo," etc. [Note underscoring for emphasis.] If, as with the Combination and Civ. Pro Hypos in the Appendix, a fact pattern is followed by a series of numbered or otherwise labeled questions/instructions/topics, one naturally echoes these numbers/labels/topics in the response—e.g., "No. 1, [duplicate professor's heading]," "A," etc. The grader is looking for, expecting to see these numbers/labels/topics. (Consideration! Common sense!)

Having guided the grader with helpful, appropriate labels, introduce discussion/analysis of issues/premises that would be expected to be found under the label. As noted many times, discussion/analysis of an issue/premise can and should be accomplished/presented in roughly a single paragraph. Thus, RESPONSE UNDER A LABEL WILL BE A SERIES OF ONE OR MORE PARAGRAPHS, each roughly analyzing/discussing a single issue/premise.

Digression is necessary now to more closely explore the nature of labels introducing paragraphs of analysis.

Labels When Questions(s)/Instruction(s) (Q/I's) Have a Format

Beyond identification of the exercise being addressed—hypo, objective segment, etc.—, the objective (*always!*) is to POINT THE GRADER TO PREMISES/ISSUES ABOUT TO BE DISCUSSED. If, as with the 5 numbered "actions" following the Combination Hypo (p. 146), a specific format is set forth, *this format cannot be ignored*. The grader will be expecting, looking for labels indicating 1, 2, 3, 4, 5. (Again, common sense!) Another example of a format that should be reflected in the response would be the six "events and motions" following the Civ. Pro Hypo (p. 155).

The Q/I following the Torts Hypo ("Discuss rights and liabilities…") is open-ended. However, suppose instead one encountered a more pointed format—e.g., "1) Discuss PN's rights against DH;" "2) Discuss Ms. N's rights against DH;" "3) …." Naturally, mere numbers as labels corresponding to conflict pairs indicated could (and *should*) be introduced—e. g., "1," "2," "3," or "1) PN/DH," 2)…, etc. An even more narrowly focused question—e.g., "1) Did Direct Hit batter Pucker Nicely?"—, would be a direct lead into paragraphs (following label "1") beginning, "Battery is ....; Assault is …."[2] Again, common sense. WHAT IS EFFICIENT AND ALSO ASSISTS THE GRADER SHOULD GUIDE LABELING.

[Note the underscoring. LABELS SHOULD BE SET OFF WITH UNDERSCORING, BOLDFACE, ETC.]

The question following the Criminal Law Hypo (p. 160)—"What crimes, if any, are A, B, and C guilty of?"—suggests several label options. Following your exam outline, labels might be "State (S) v. A," "S v. B," "S v. C." Under each a grader would expect to find paragraphs introducing discussion of…

[Note. The question mentions "crimes." However, *"crimes"* is misleading.[3] Given "guilty of," the grader also wants discussion of *anything that might defeat* crimes—"defenses!" Step Two, of course, reveals not just crimes, but defenses to crimes—counter-premises!]

Exercise. Think about the Crim. Law Hypo and Q/I—"What crimes, if any, are A, B, and C guilty of?" What label scheme other than conflict pairs would be both appropriate to the Q/I, *and* provide helpful guidance to the grader? Write the labels down. Then see fn. 4 at end of chapter.[4]

Labeling When No Format (Open-ended Q/I)

Respecting hypos with open-ended Q/I—e.g., "Discuss rights and liabilities of…," "Discuss all issues arising…," "Prepare a memo exploring...," "What result?"—, a (helpful) labeling scheme must be created. One's first thought might be, *"What about conflict pair(s)?"* Following Step One, there will be at least *one* conflict pair—always! Would, for example, "Pucker Nicely v. Direct Hit" be helpful in pointing to issues to be discussed? Respecting the Q/I following the Torts Hypo, conflict pair labels seem helpful.

Nonetheless, thought must be given to whether a conflict pair label might be *confusing*.

For example, given that Q/I for the Corporations Hypo (p. 166) are narrowly focused—e.g., "How should the court decide [each of three specific motions]?"—, the label "Meddle v. RIPCORP" might puzzle a grader. (E.g., "What is this about?") Here, one may *think*, "Meddle v. RIPCORP." (One surely would!) However, the more appropriate, helpful label (relevant to the question) would be "Motion No. 1."

Another example where a conflict pair label would likely confuse is provided in live and audio versions of LEEWS. Instructing the advantages of viewing all legal problem-solving exercises via the prism of finding conflict pairs [Mantra No. 1—"Who's against whom?"], a scenario is described in which a proposed business/sports/entertainment complex in a waterfront, residential neighborhood requires a zoning variance to go forward. The matter is before a (municipal) zoning board to be put to a vote. The instruction is, "You are a lawyer on retainer to the zoning board. Advise on the proposed variance."

The point is made respecting Step One that a zoning board, similar to a judge making determinations, is a neutral arbiter, a kind of referee, *not* normally a party.[5] Thus, positing "Board v. X" or "Y v. Board" is inapposite. Rather, parties would be those who (in real life) would be *in favor* of the variance being granted versus *any opposed*. (E.g., on the pro side developers, investors, business interests, the few residents standing to make a profit selling their land [!!], versus most residents, environmentalists, preservationists, possibly also opposing business interests.)

[Note. IT IS USEFUL TO THINK IN TERMS OF REAL LIFE! (And of oneself as a lawyer advising a client!)]

If one were to introduce "Those favoring variance v. Those against," (or "Developer v. Environmentalists, etc.) as labels, a grader would likely be confused. When considering labels, think, always, "WILL THE GRADER UNDERSTAND THE LABEL? WILL IT ASSIST THE GRADER?"

[Note. Respecting the foregoing example, one would surely posit the suggested conflict pairs in Step One for purposes of *thinking* about the Q/I, organizing the exam outline, and arriving at relevant premises in Step Two. Respecting labels, however, one likely should opt for (non-conflict-pair) topical labels under which discussion of relevant legal precepts would be expected. E.g., "Reasons favoring grant of variance," and the reverse. (As if one were advising the board!)]

[Note. Whether appropriate to set forth a conflict pair as label or no, ALWAYS PLAN, ALWAYS *THINK,* ALWAYS BE GUIDED BY STEP ONE CONFLICT PAIRS!]

In sum, respecting labels employ common sense. Think, "What will assist in guiding the grader to discussions/issues likely on her checklist?" (As noted, common sense is the most important attribute brought to the task of addressing law exams.)

Crafting the Paragraph ("I" of IRAC)—Are Issue Statements Needed?

Having introduced appropriate labels, the matter of *how, exactly* to begin the first paragraph presents itself. Students are understandably unsure in this regard. Typically, they preface remarks and otherwise temporize. (E.g., "An interesting topic for discussion is…" "One of the things I would like to discuss is…") This is wasted time and motion! Checklist at the ready, the grader wants discussion of issues! Get on with it! As per "I" of IRAC, introduce the issue.

CW, reflecting a "follow IRAC," "IRAC the exam" orientation (which many professors endorse) instructs prefacing analysis with a "statement of issue." I.e., state [and underscore], "Question," or "Issue," followed by a query positing whether the [premise under consideration] will succeed. E.g., respecting PN v. DH, "Issue: Did DH commit a battery?" (Or, "Issue: Is DH liable for battery?")[6] Then, "Issue: Did DH commit assault?" Etc. Respecting the Criminal Law Hypo, "Issue: Is A [B, C] guilty of robbery [conspiracy, felony murder, etc.]?"

Introducing every premise and issue with an issue statement is time consuming. (Imagine typing a separate issue statement for each of the many PN/DH premises.) It is also unnecessary. LEEWS [does this surprise you?] proposes a more efficient approach.

Crafting the Paragraph ("I" of IRAC)—*Implying* (not Stating) the Issue!

Given the Q/I following the Torts Hypo—"Discuss rights and liabilities [of all parties]"—, the grader is primed to see discussion of *rights and liabilities*. Should the label "Pucker Nicely (PN) v. Direct Hit (DH) be encountered, the grader expects discussion of topics—issues!—relating to PN and DH's *rights and liabilities*. [Note. Will also expect

the abbreviations "PN" and "DH"!] Likewise, should (alternative) labels "Pucker Nicely (PN)," "Direct Hit (DH)," "Mrs. Nicely (Ms. N)," etc. be encountered, the grader expects to see, respectively, discussion following of issues relating to each such party's rights and liabilities. This expectation can be made use of!

If, under the label "Pucker Nicely (PN) v. Direct Hit (DH)," right off the bat—*no preamble, no issue statement!*—the grader encounters a paragraph beginning, "Battery occurs when…," won't she immediately think, "There's the battery issue relating to PN/DH rights and liabilities!", and award a checkmark? [Note underscore of battery to make it readily apparent.] For example, immediately following "Issue [or Question]: Is DH liable for the kiss?", a paragraph begins, "Battery is… [analysis following]." Next paragraph begins—Boom! Abruptly! (*No preamble or introduction*.)—"Assault occurs when…." Yet a third paragraph begins, "Intentional infliction of emotional distress (IIED) will lie when…." Are relevant battery, assault, IIED issues not thereby *implicit?* Is there need for separate issue statements prefacing each paragraph? Very likely not!

In other words, given labels creating expectation of issues to follow, won't—Boom! Abruptly! (B!A!)—coming upon law giving rise to the issue—a premise!—prompt the thought, "There's the issue!"? (And a checkmark!) Given proper labels, BEGINNING A PARAGRAPH WITH LAW PROMPTING A RELEVANT ISSUE *IMPLIES* THE "I" OF IRAC?! (Yes?… Surely!)

It follows that, having introduced an appropriate label, simply—Boom! Abruptly! (B!A!)—launch into a paragraph, beginning with a statement of law constituting the premise under consideration! The issue—"I" of IRAC—is *implied,* making a separate issue statement unnecessary as redundant. (Thereby saving considerable time!)

Again, underscore or boldface (or otherwise flag) key (legal) words in the statement of law as a courtesy and guide to the topic/issue being addressed.

However, hold on a moment! In the instance of PN v. DH there is a problem. (As always, legal thinking is intolerant of ambiguity.) Assuming a battery issue *implied* by a paragraph beginning, "Battery is…," does the issue implied relate to PN's premise versus DH, or DH's versus PN? The label Pucker Nicely v. Direct Hit, absent more, doesn't make this clear.

"Umbrella" Issue Statements (as Alternative)

If one thinks about it [LEGAL THINKING IMPLIES CONSTANT CLOSE (NITPICKING) THINKING!], *two events define the PN/DH relationship* (and Step's One and Two investigation)—the kiss, the bloody nose. Although one wants to avoid numerous, time-wasting statements of issue, (by implying issues by beginning paragraphs—B!A!—with statements of relevant law [premises!]), whether the initial paragraph relates to PN's battery against DH or the reverse needs clarification. In this instance a statement of issue may indeed be necessary. However, the purpose is not so much to announce that the paragraph following is related to PN's battery versus DH, as to clarify that paragraphs following relate to rights and liabilities having to do with the *kiss,* as opposed to the *bloody nose*.

Thus, beneath the label Pucker Nicely (PN) v. Direct Hit (DH), one might introduce the broader issue statement, "Issue: Liability for the kiss."[7] This primes the grader to expect paragraphs discussing encompassed, relevant *issues, rights, liabilities relating to the kiss,* without need for more specific issue statements. The broad statement of issue at the outset may be termed an "*umbrella issue statement.*"

[Note. Later (still under the PN v. DH label) one will introduce a second (umbrella) issue statement—"Issue: Liability for the bloody nose." Paragraphs introducing and addressing relevant rights and liabilities thereunder—more pointed issues!—follow.]

In sum, an issue statement *may* be necessary. However, as in the above example, one can often *broaden* the statement of issue (introduce an umbrella issue statement) to encompass/alert to paragraphs to follow, each introducing relevant, encompassed (more pointed) issues implied by premises (B!A!) beginning paragraphs. E.g., "Battery is…," "Assault is…," "Intentional infliction… (IIED)…

The point is that APPROPRIATE (HELPFUL) LABELS ENABLE ONE TO IMPLY THE "I" OF IRAC BY SIMPLY—B!A!—BEGINNING PARAGRAPHS WITH LAW (PREMISE!), thereby avoiding wasting precious time on unnecessary issue statements.

If, of course, a professor insists on "issue statements," one must comply. However, even then time can be saved by broadening to umbrella issue statements. E.g., instead of "Issue: Is C guilty of robbery," "Issue: Is C guilty of felony assault?" etc., one posits, "Issue: What crimes, if any, is C guilty of?!" One

thereby encompasses *all* premises relevant to C's guilt in a single (umbrella) issue statement.

Beauty/Benefit of—B!A!—Beginning Paragraphs with Law ("R" of IRAC, Mantra No. 3)

Beginning a paragraph—Boom! Abruptly! (B!A!)—with law (setting forth a premise giving rise to an issue) doesn't merely substitute for an issue statement. As will be demonstrated shortly, such abrupt beginning perfectly sets up analysis comprising the body of the paragraph. It avoids temporizing and uncertainty respecting *how to begin*.

[Note. Setting forth a premise to begin paragraphs—rule, principle, statute, policy ground, *legal basis of entitlement* (respecting objective in question)—satisfies *both* the "I" of IRAC *and* the "R" requirement of "State the rule."]

Additional examples of—B!A!—beginning paragraphs with law/premises would be as follows:

> Battery is 1)…, 2)…, 3)…, 4)… [Numbers indicating four elements of legal definition of battery]
>
> Adverse possession occurs when 1)…, 2)…, 3)…, etc.
>
> Long arm jurisdiction is established when 1)…, 2)…, 3)…
>
> UCC provides that.... [STATUTES CAN BE PREMISES! Normally, source—e.g., Section 2-202—needn't be cited.
>
> An act of a corporation is *ultra vires* when... [see p. 167.]
>
> Indecent expression is not protected under the First Amendment. It occurs when…

[Note. COMPLETE LAW COMPRISING PREMISES IS *NOT* SET FORTH IN THE (hastily scribbled on scratch paper) *EXAM* OUTLINE. There, one abbreviates. (E.g., "b" for battery.) *Set forth complete law only to begin paragraphs of analysis*. As noted, this satisfies the "R" of IRAC. ("State the rule [of law].")]

If, during analysis, new or additional law comes to mind meriting introduction (e.g., because needed to complete analysis, because facts suggest its relevance), generally, start a new paragraph!

Indeed. Here is a **THIRD MANTRA!** Repeat it aloud three times! "**NEW LAW** [occurs to you, start a] "**NEW PARAGRAPH!**" Conversely, [if beginning a] "**NEW PARAGRAPH,**"[open with/set forth] "**NEW LAW!**"

Chant (during the exam [!!], under your breath), "**NEW LAW, NEW PARAGRAPH!… NEW PARAGRAPH, NEW LAW!… NEW…**" Literally!

One thereby avoids wordy, needless introduction and transition. The issue under consideration is immediately apparent. [Perhaps "Boom! Abruptly!" (B! A!) should be a mantra!]

[Note. Preamble of law preceding and introducing analysis but follows structuring of judicial opinions.][7]

Crafting the Paragraph Body—Analysis ("A" of IRAC)—Preamble

The initial, obvious problem respecting analysis is insecurity and anxiety respecting *writing*. "OMG! I have to write something! I'm a lousy writer," aptly sums up the problem. [Note. "I am a good writer!" is equally problematic!] Here, as in other aspects of exam writing and preparation, LEEWS offers an innovative solution going far beyond CW. (A true system/science ensuring concision and at least "good-enough" analysis presentation.) Grasp of this solution/format aids in instructing and performing objective analysis. It ensures such, while enabling concise presentation. As always, *mastery* requires practice.

You have been provided *some* instruction respecting improving exposition on paper. You were instructed in the previous chapter to wholly abandon the notion of literary flourish (fancy expression of any kind), to avoid lengthy, convoluted sentences, and that short, simple sentences—*as one talks*—points in the right direction. An example was provided. The analogy might be made to presenting in front of a jury. The adage, KEEP IT SIMPLE, STUPID!, has meaningful resonance respecting both juries and writing a law exam response. We'll now push the simplicity envelope further by *abandoning Standard English for the time being!* (I.e., no proper sentences.)

Crafting the Paragraph Body—Analysis ("A" of IRAC)—What is *Not* (and Is) Wanted

Having—B! A!—begun a paragraph with law constituting a premise (thereby implying the issue), *how to continue from that point* yet remains a mystery. Unsure what is wanted, near clueless respecting "analyze as a lawyer," the typical law student, having set forth law to begin a paragraph, would again lapse into temporizing, prefacing, irrelevant discourse. E.g., "Applying this [stated rule, statute, principal, etc.], it would seem that…" "This [rule, statute, principle, etc.] raises an interesting issue of…" [Note! The issue is *already* apparent!] Very often, as a way of marking time while deciding what to say (read temporizing),

students *restate facts*. Thus, "The facts tell us Pucker Nicely was asleep in a meadow, and… [blah-blah recitation of given facts]." Restating facts at the outset of analysis is such a common error that cover instructions typically admonish against it. Professors instruct, "I already know the facts. Don't repeat facts to me, except insofar as they are part of analysis." (Which instructions, of course, do little to allay confusion.)

[Note! Facts (as in "*The* facts,") have prompted premises (law) giving rise to issues (in Steps One and Two). FACTS SHOULD NOW BE REFERENCED ONLY INSOFAR AS RELEVANT TO MAKING ARGUMENTS FOR AND AGAINST (counterarguments!) EXISTENCE OF ELEMENTS OF LAW (of the premise) BEGINNING THE PARAGRAPH. Similar to CW, however, this advice is merely an example of *what* to do, which is still unclear. Even more unclear is *how, exactly,* to do whatever the *what* is! E.g., how is law applied to ("interwoven with") facts in the process called "lawyerlike analysis?!"]

Paragraph Length

As often noted, the objective is to present analysis in concise paragraphs. Ideally, analysis of an issue is completed in a single, concise paragraph. Courtesy, etiquette, and time constraint dictate that paragraphs be concise, not overly long. CW (and professors) often instruct, "Paragraph frequently."

The format now introduced for presenting analysis greatly aids in concision. Nonetheless, completing analysis in a single, concise paragraph may not be possible. Should such prove the case, *should a paragraph begin to get too long,* break it up by elements. Abruptly stop. (As when New Law occurs to you.) Begin analysis of a succeeding element (or elements) in a new paragraph. In this regard, a brief preamble in the following vein may be advisable, helpful in beginning the paragraph—"Respecting element(s) of…" Proceed with analysis.[8]

Form/Content of Body of Paragraph of Analysis

Having solved the problem of how to—(B!A!)—begin paragraphs, there remains the daunting problem of shaping, executing the remainder of the paragraph—i.e., concise, effective application of law (set forth at outset) to relevant facts en route to conclusion. Such, of course, is the body of the paragraph—all-important analysis/discussion.

Logically, *the paragraph body reflects arguments/counterarguments addressed to component elements (and/or sub-elements) of the premise beginning the paragraph*. Imagine in this regard that elements of a premise are each represented by a number. E.g., Battery is 1) an intentional act, 2) resulting in an offensive, 3) unprivileged, 4) contact. Given a preface of precise relevant law (premise) to begin a paragraph, content and structure of discussion becomes apparent. Arguments for and against each element (counterarguments) will be presented. However, this raises an immediate quandary.

Should progression of arguments for and against elements present *all* movant arguments in favor [of elements 1, 2, 3, etc.], followed by all respondent counterarguments (if any)? Or should movant's argument in favor of an element be immediately followed by respondent counterargument, if any, respecting that element? (E.G, PN argument[s] establishing intent element of battery v. DH counterargument[s], if any. [Movant going first, of course.]) Then movant v. respondent respecting next element, and next…

Six of one, half dozen of the other. The important thing is that *arguments be relevant, insightful, concise, and the grader can easily follow the train of thought*.

Expressing Analysis—Arguments/Counterarguments—Concisely

Given that back and forth of argument/counterargument—what has been termed "*lawyering dialectic*"—is to be presented, the considerable problem of presenting concisely, yet effectively, remains. How does one avoid rambling exposition? "Three-to-four hour exam" seems a long time. However, time flies. How does one present no more or less than need be said? How does one get quickly to the point, yet say enough?

Here we seem returned to the murky area of *how to write,* and there would appear no quick fix. Most law students do not write well. [Nor, for that matter, most lawyers.][9] Not, as often noted, that students with strong English or journalism backgrounds (presumably "good writers"), do better on law exams. The point bears emphasis and repeating—CONCISE, EFFECTIVE (LAWYERLIKE) ANALYSIS HAS LITTLE TO DO WITH "GOOD WRITING!"

It has been noted that students with math/hard science backgrounds—not likely good writers (how-

ever, likely analytical, concise in expression)—tend to get better grades. Herein is the nub of the matter. CLOSE, NITPICKING ANALYTIC THOUGHT, CONCISELY EXPRESSED, IS WHAT IS REQUIRED. *Not good writing, but near mathematical expression of arguments is the path to solution!* Matters will now be put on a very practical plane.

The reason most examinees cannot express analysis concisely is uncertainty about what they are doing. Thinking is not focused. If focused, there is uncertainty discussion is complete, that enough has been said. Thus, students tend to overstate the case. In effect, students wander around the barn puzzling how to enter, instead of confidently walking through the open door. At bottom, *they haven't learned how to "think and analyze as lawyers," much less present such thinking concisely*. Mastery of both skills advances now!

Ugly, But Effective (UBE) Format—A Device that Instructs Analysis and Concise Presentation

Similar to The Blender, the following format for expressing analysis concisely is revolutionary and unique to LEEWS. It instructs lawyerly analytic skill by instructing *exactly how* to make and present arguments/counterarguments. It instructs concision by reducing expression of arguments (and counterarguments) to bare bones, to *math!* It renders "conclusory" nigh impossible. It ensures objectivity via a structure of formulaic, math-like balance. It forces one to *show, not merely tell*. It enables one to walk straight through the open barn door!

This format will be termed "*Ugly, But Effective*" (UBE). And be very clear about something! ONE DOES *NOT* EMPLOY OR EXHIBIT UBE ON AN ACTUAL EXAM—EVER! Repeat—EVER![10]

Correct. The first thing to understand respecting learning/implementing UBE is that, so as to eliminate concerns respecting "how to write," "good writing," and the like, *Standard English will be temporarily abandoned*. (I.e., *NO ATTEMPT TO PRESENT IN PROPER SENTENCES!*) Rather, the process of presenting arguments/counterarguments is reduced to a barebones core—something akin to mathematical expression.[11]

[Note. Is UBE a miracle remedy? Assuredly. As much as The Blender is for systematically identifying issues. However, as ever, here in particular, one must practice, practice, practice! to gain facility at what UBE instructs.]

[Note. 20-30 minute exercises, 3-4 times a week, executing *single* paragraphs of analysis—first UBE format, then Standard (concise) English, then comparing with models in the Appendix, is key in comprehending both concise paragraphing format, and, indeed, the overall LEEWS approach.][12]

You have been instructed to begin paragraphs (B! A!) with concise statements of law constituting the premise under consideration. At least initially (in order to focus attention on elements of rules and for the purpose of learning, implementing UBE), we shall *number* elements in this statement of law. (E.g., "Battery is 1)…, 2)…, 3)…, 4)…") Having done so, UBE instructs that one literally match numbers with evidence/arguments for and against establishment of the element represented by each number. Do *not* attempt to express in proper sentences. Rather, literally express the matchup (element—argument[s] / numbers—evidence) with equal, not-equal signs—e.g., "=, ≠." Link evidence *for* the proposition (element) being considered, later *against* with plus symbols (+). Literally!

The following examples illustrate the format. They are drawn from the Torts and Criminal Law Hypos. If need be, refer to relevant hypothetical, law, model response in the Appendix. (E.g., model paragraph responses (for the most part in Standard English) are on pages 140 *et seq*., and 163 *et seq*.)

[Note. Movant evidence/arguments in favor of establishment normally precede respondent counter (if any). Sentences beginning paragraphs (presenting premises) are set forth in Standard English. Note further that much of what follows is explanatory (in brackets and parentheses), not part of UBE format analysis.]

UBE Example: (Analysis of PN battery premise v. DH)

> Pucker Nicely (PN v. Direct Hit (DH)
>
> Battery is 1) intentional act resulting in 2) an offensive, 3) unprivileged, 4) contact. *[Issue implied!]*
> 4 = "kiss."

[That's it!—complete UBE analysis of (non-issue) element 4! As there is no viable counter to the *fact* of the kiss,[13] nothing more need be presented. In general, "*non-issue elements*"—elements that cannot be seriously contested—*should be given short shrift at the outset*. "Contact" is such a non-issue element. Thus, "4 = kiss. 3 =…."]

[Contrast UBE's math-like succinctness (e.g., 4 = kiss)

with what normal analysis might posit—"The element of contact is established by the circumstance that DH awakened PN with a kiss." The latter is not incorrect. However, it is lengthy, time-wasting. It reflects inability to confidently state what little needs to be said respecting contact's establishment/disestablishment—namely, fact of "kiss!" By making plain barebones, necessary evidence/argument—kiss!—, UBE (when grasped!) enables confident presentation of much more concise Standard English barebones of what needs be said. E.g., "Contact is shown by the kiss," "Contact is established by the kiss."]

[Exercise! (Literally) write out all versions above—e.g., "4 = kiss," "The element of…," "Contact is…'—so as to understand (and appreciate) how the UBE version makes the concise versions possible.]

> 2 = a) that which would offend b) a reasonable person = intimate act (kiss) + by someone not loved ("unrequited love") + fact of being awakened would annoy most *versus* mere expression of affection. *[Evidence* for *element 2)—this + this + this…—v. (single argument) against.]*

[Note. Ambiguous elements—e.g., offensive (a.., b…)—must be further defined/clarified.]

> 3 = unconsented to = a) no actual consent, b) no implied consent. (I.e., 1] no manifestations 2] that would lead a reasonable person to infer consent). a = PN "asleep." *[Enough said!]* b = PN's reaction + "chanced upon" (accidental encounter) + "unrequited love" + simply "asleep" *versus* asleep in public, idyllic, flowery setting ("meadow"), a la Snow White + name, "Pucker Nicely."
>
> 1 = *[Generally, save "real issues"—where parties (their lawyers) will really fight—for last.]* DH kissed PN + hard to kiss accidentally + "awakened her" (denoting purposefulness) + presumably had to bend over to kiss *versus* accidental encounter + "object of passion" + "great love" + idyllic setting + Snow White imagery.

[Note. In general ONE NEEDN'T OFFER CONCLUSIONS RESPECTING COMPETING POSITIONS AND ELEMENTS *WITHIN* THE BODY OF DISCUSSION. Such conclusions can, likely *should* be mentioned (or not) in an overall conclusion *at the end* of the discussion. (See following section, following chapter.) This (overall) conclusion, of course, in accordance with professor preference, will be inserted at the beginning (CIRA), the end (IRAC), at both beginning *and* end (CIRAC), or not at all. Placement, as noted, is mere cosmetic detail.) On a bar exam conclusions almost always are wanted at the outset of discussion (CIRA). However, see discussion of statement of conclusion in Chapter Twelve following.]

Respecting foregoing PN v. DH UBE battery analysis, the conclusion might be stated as follows:

> Conclusion: All elements of battery appear to be satisfied. Respecting intent, however, DH can argue, possibly persuasively [hedging!], that he was swept away by emotion and the romantic setting. DH's arguments respecting implied consent are unlikely to impress a modern jury. *[Note hedging use of "appear."]*

[Note. In general, avoid absolutes—"yes, no"—in stating conclusions (unless very, very sure). Although a "yes" or "no" is rarely wanted on a law school exercise (versus bar exam), professors do sometimes, often in fact (naturally), lean to one position or the other. Therefore, lest one cause a professor to shake her head in disagreement, one should be loath to commit fully to either view. The solution, illustrated above, and as will be further explored shortly, is to hedge one's conclusion—albeit leaning one way. I.e., *allow for possibility of the opposite result*. (E.g., "It would appear that…," "On balance it would seem…," "Possibly….") Such is altogether lawyerlike. It is akin to a lawyer being cognizant of reactions of a judge she is before, and attempting carefully to tread a middle ground.]

Given that you always wants to make the grader's job as easy as possible, where movant/respondent positions are lengthy, as with elements 3 and 1 above [Note how numbers can be used as a shorthand!], you may want to sum up your position before moving on to the next element. (See model response, p. 140 .)]

UBE Example: (Analysis of PN assault premise v. DH)

[Note. Paragraph—NEW LAW, (START A) NEW…—(B! A!) immediately follows paragraph of analysis of intent element of PN's battery.]

> Assault is 1) an intentional act 2) creating apprehension 3) of a battery.
>
> No 2 = PN "asleep." *[End of analysis/discussion! Nothing more to add!]*

[Note. Step Three posits one *first determine whether any element is so obviously lacking* (i.e., can easily be shown not to exist) *as to immediately dispose of the premise*. If so, remaining elements needn't be addressed. Go immediately to the weak link and dispose of it! The premise falls with it. Establishment of remaining elements becomes moot. Only if it is felt a professor wants exploration of something more in the context of assault would one dwell on it further. Even then, consider (judging from one's exam outline)

whether a better opportunity for exploring the topic is not present elsewhere.]

Query—Given that absence of element 2 is dispositive of PN's assault premise, is it necessary to even mention elements 1 and 3 in the opening statement of premise? Could one, for example, simply begin (and end) discussion by stating: "Assault requires apprehension. PN was asleep. Therefore, no apprehension, no assault?" [Note. This is the (concise) Standard English equivalent of "No 2 = asleep!"] The answer is yes. However, such short shrift is feasible/advisable *only after setting forth all elements of two or three premises previously discussed*.

You should play it conservative for at least the first two or three discussions a grader (especially professor) will see. Set forth *all* elements in at least the first two discussions, even if one element is easily defeated ("missing"). The reason is that, as grading is anonymous, and given the mediocre quality of most exam responses, a grader is unlikely initially to presume in favor of the author of a response. She likely comes to an exam response pessimistic as to ability, and this needs rebutting. Therefore, show the grader in the first two discussions (minimum) *first*, that you can set forth complete, accurate law—all elements, *second*, that you know how to play the analysis game. Having thereby established a presumption in your favor (and/or rebutted an unfavorable presumption), you can begin to cut corners in the interest of saving time. (E.g., by omitting discussion, even mention of moot elements in subsequent premises/issues.)

Respecting the *very rare* instruction, "No statements of black letter law," a professor tries to (dramatically) make the point that analysis, not regurgitation of rules is wanted.[14] Here flexibility of the paragraphing format is demonstrated. *Think* the opening law/premise statement. However, omit stating it. Move directly into analysis.

E.g., respecting PN's assault premise vs. DH:

> PN was asleep. Therefore, she could not apprehend DH's kiss. Therefore, there was no assault.
> [maintain same (left) indentation for these (2) lines.]

[Note. Assault is underscored to guide/assist the grader. Analysis is properly fact oriented. Relevant law is not stated, but is implicit. The professor's ("crazy") directive has been complied with.]

UBE Example: (Analysis of State's robbery premise v. C.)

> Robbery is the 1) forcible taking 2) of property 3) from another.
>
> 1 = B and C brandished guns + C clubbed the shopkeeper + C "grabbed" money.
>
> 2 = money, cash.
>
> 3 = "from shopkeeper or detective."

There being no apparent evidence or *plausible* arguments to counter 1, 2, or 3, none is mentioned.[15]

Once again, in the interest of concision, of disciplining to *show, not*—in conclusory fashion—*tell*; of presenting (objectively) but barebones evidence/arguments relevant to establishing/disestablishing existence of elements of premises, UBE contemplates one not be concerned [at present] with expressing analysis in proper sentences. Practice on numerous premises, first analyzing in UBE format, then assaying to express the same analysis in concise, simple (proper) sentences. Compare efforts with model paragraphs in the Appendix.[16] Simply load in evidence/arguments in favor of establishment of an element… versus evidence/(counter)arguments against. No proper sentences! Evidence/argument(s) (EA) + EA + EA (in favor) vs. EA + EA + EA (in opposition).

Such exercises—tedious, yes!—instruct the *"lawyering game."* They instruct objectivity, nitpicking of facts—element by element, if need be sub-element by sub-element—, how to express oneself concisely. Playing the *"Game of Lawyering"*—discerning evidence/arguments; building, bit by bit, five percent here, eleven percent there, toward 51 percent persuasion (depending upon which side has paid one's fee!)—, becomes, as it should be, the primary focus. (Versus rambling toward hastily conceived conclusions.) The Game (of lawyering!) eventually becomes, as it surely is, engrossing, even *fun!*

Once a UBE paragraphing exercise is completed, express the same analysis in Standard English—simple, concise sentences. One quickly becomes more confident, more certain about what needs to be said (no more, no less), thereby more concise in expression.

Statement of Conclusion Prelims ("C" of IRAC, CIRAC, etc.)

Where/how/*whether* to state a conclusion (*after* analysis!) will be addressed in Chapter Twelve following. Where?—e.g., *following* analysis of premise/issue (*per* IRAC), at the outset (CIRA… ICRA?), both at beginning and end (CIRAC), or not at all (IRA)—, being mere cosmetic rearranging of format, can be easily accommodated.[17] However, *how, exactly*, to state

a conclusion is a topic deserving of further, separate exploration. It will depend upon where the conclusion is placed. This, together with finer points of analysis, will be addressed in the chapter following.

Again, practice until the format becomes second nature.

[Note. Where to state a conclusion (if at all), whether to state the issue or no, *the heart of a response, the true measure of lawyering skill and aptitude, the primary vehicle for impressing and earning a top grade is application of law to fact—the paragraph of analysis!* Skill at analysis and ability to present in concise paragraphs is the critical area in which mastery must be strived for. It is the fundamental building block. Once this ability is securely in place, as indicated in the foregoing, even the wildcard instruction "No statements of black letter law on my exam!" can be easily accommodated.]

Statement of Conclusion Prelims Cont. (It's unimportant. Get good at "The Game [of Analysis].")

The point has been made that conclusions on law essay exams are relatively unimportant. In law school (less so on the bar) exam exercises are not so much about outcome—who wins—, but exploring (analyzing) everything relevant en route to determining outcome. Indeed, the student focused on outcome/conclusion—most 1Ls!—demonstrates lack of insight into, lack of appreciation for the lawyering game. As suggested, *THE GAME*—give and take of adversarial process, analytic detective work, nitpicking building toward 51 percent persuasion on both sides of legal constructs at issue (premise, element, sub-element, etc.), *objective thinking through of possibilities*—, IS FAR MORE ENGAGING, INTERESTING THAN OUTCOME.

It is doubtful one can yet appreciate this. That is a measure of the distance yet to be traveled to have a meaningful chance at (solid) A's. The fact is that the great majority of law students, even in third year, are relatively clueless respecting "analyze as a lawyer." However, instructed *properly,* lawyerlike analysis is an imminently learnable skill.

As advised, begin with UBE format just introduced. Execute analysis of one premise at a time, modeling on paragraphs in the Appendix. Some will acquire skill faster than others. However, *anyone with reasonable intelligence* (smart enough to gain admission to law school!) *can learn to nitpick toward 51 percent on both sides of an element,* then present this analysis in a concise paragraph. Certainly, he/she can learn to do this with greater skill than the vast majority of clueless classmates.

Become focused on analysis—the thinking process of applying (relevant) law to (relevant) facts in determining outcome. It is intellectually challenging. It is the most enjoyable aspect of law practice (!!). *Fascination with the Game of Making Arguments,* with exploring all possibilities as an end in itself, will likely result in arguments, insights, surprises!—issues a professor may have overlooked, but should have noted on her checklist—that impress and earn the elusive (solid) A.[18]

There is no reason not to begin writing practice paragraphs of analysis immediately. However, one may first want to digest instruction of Chapter Twelve. Chapters Twelve and Thirteen complete the theoretical framework and practical instruction respecting how to plan/execute the response to *any and all* essay hypothetical-type exercises.

SECTION TWO, CHAPTER 11 FOOTNOTES

[1] Allowing a few minutes beyond the initial 10-15 minute planning segment for reading cover instructions and performing the Preliminary Overview.

[2] **Q/I sets forth a conflict pair (even a premise).** Nevertheless, do a Step One, Step Two analysis!. The grader will (always) be interested in (relevant, possible) additional conflict pairs and premises (therefore issues), as well as counterpremises. **A Q/I is but a guide to–always!–applying The Blender.** [Discipline!! *You* be in control of exercise!] The goal is to identify and address ALL relevant premises/issues. As will be explored presently, identifying a premise a professor may not be aware of but should be (!!) (therefore an issue *not* on the checklist!), puts one on the path toward a top grade. The goal, always, is to IMPRESS!

Again, don't be misled by the *form* of the question. ALL Q/Is ARE AT BASE THE SAME. In effect, "Discuss what a Step One, Step Two analysis suggests to be relevant." The grader wants to see *all* relevant topics!

[3] **Misleading Q/I.** The instruction at the close of the Crim. Law Hypo points up another problem with addressing Q/Is *as is.* This instruction misleads by putting a focus on "crimes." "Guilty of" signals the grader wants discussion of anything that might mitigate or defeat guilt of crimes–e.g., counterpremises (defenses). *ALL* RELEVANT DISCUSSION IS ALWAYS WANTED! Yet another reason (apart from confusion, etc.) to PROCESS *ANY AND ALL* Q/Is VIA THE BLENDER (!!). [Note. The Crim. Law exercise and all others in the Appendix were created by your author.]

[4] **Crim. Law Hypo label alternatives to "S v A,B,C."** Clearly, three groupings–A,B,C–makes sense. The question asks for "crimes." Therefore, "Crimes of A," "Crimes of B," "Crimes of C." Step Two would reveal counters to crimes raising issues to be discussed. (E.g., Fourth Amendment, abandonment, self-defense.) As noted, "guilty of" implies identifying, discussing such non-crime issues. Thus, more appropriate, accurate labeling would be "A's guilt," "B's guilt," "C's guilt." THE IMPORTANT THING IS TO PROVIDE HELPFUL GUIDANCE TO THE GRADER.

[5] Another point made is the immediate confusion likely engendered by "Advise on the proposed [zoning] variance," and the benefit of, in effect, ignoring the Q/I in the form encountered–i.e., processing it via the Steps. As with *all* Q/Is–ALL!–, bottom line, The Blender reveals premises/issues graders want discussed. LEARN TO TRUST THE BLENDER!

[6] Note. This question embodies (raises) *two* issues, requiring (at least) two paragraphs of discussion/analysis! First is whether DH committed a battery, second the issue of damages. Discussion (analysis) of damages brings into play legal precepts corresponding to the several kinds of damages that may be awarded. (See Torts Legal Principles, p. 135, and model response, p. 140 *et seq*.)

[7] **Structure of judicial opinions.** Cases typically open with facts, issue, result (holding). At some point legal precepts that frame resolution of the case are introduced, often seriatim at the beginning of a paragraph to begin analysis (!!). Then follow paragraphs analyzing facts/issues to justify the outcome in light of the preface of guiding legal precedent.

[8] **Breaking up paragraphs**. Given a premise is a *complete theory* of entitlement, A PREMISE MAY, OFTEN WILL CONSIST OF A COMBINATION OF LEGAL PRINCIPLES. E.g., PN's complete theory of recovery from DH is not just battery, but battery + damages. (Also assault + damages, etc.) The state's premise against A cannot be merely robbery, as A was not present during the robbery. It must be "robbery, acting in concert." Where a premise consists of more than one legal precept, it may be advisable to address separate portions of the premise in separate paragraphs, each beginning with one of the component precepts. Likewise, if a premise is comprised of numerous elements, and/or elements themselves require definition (creating sub-elements), and/or arguments and counterarguments respecting elements are numerous and lengthy, thereby necessitating an overly-long paragraph of analysis, as suggested in the main text, it is probably a good idea to stop. Initiate discussion of the next element in a new paragraph. (E.g., on page 141, *infra,* the "unprivileged" element of PN's battery premise introduces a new paragraph.) The important thing is that THE (LEGAL) TOPIC FOR INVESTIGATION (be it premise, portion thereof, or element) BEGINS THE PARAGRAPH. Frequent paragraphing aids the grader in following discussion.

[9] Such is demonstrated by the circumstance of major law firms (typically hiring from the top 10-20 percent of the class of top law schools) hiring writing instructors to tutor new associates in effective communication on paper.

[10] **UBE format is for practice purposes only!**–on one's own. UBE is but an instructional tool, a disciplinary device, simplification of what is aimed for–(less ugly) concise, conventional presentation of one's (lawyerly) thinking. It instructs *how* to analyze, *how* to present with confidence and concision. *On an actual exam one presents in proper, but concise Standard English sentences!*

[11] **Legal analysis as mathematical/scientific inquiry.** Yet another unique LEEWS insight is that application of law to fact–analysis–is analogous to mathematical inquiry. Legal precepts may be thought of as akin to math/science theorems, formulas. Facts are the data to be plugged in and/or examined in light of a theorem/formula. However, the difference–what makes legal analysis truly engaging–is that drawing meaning and inference from facts, especially nuance of fact, requires, in addition to close examination, familiarity with language, culture–life! Thus, applying law to facts is far more nuanced and challenging than plugging numbers and raw data into math/science formulas/theorems.

Suffice that UBE gives concrete form to this analogy. UBE has long engendered confidence in the (formerly) worst of writers. Indeed, it takes "good writer" out of the equation. As with all other aspects of LEEWS, master it via practice! Concise presentation ceases to be a problem. Skill at analysis is honed. (As noted, fn. 10, *supra,* this in turn informs how one "knows the law." It assists 2-4 line case briefing and construction of effective course outlines. [Preparation approaches yet to be instructed.]) Once again, the critical importance of *actually writing out practice paragraphs* must be emphasized.

[12] **Multiple benefit of writing practice paragraphs.** It is surely tedious to sit and actually write (or type) a practice paragraph analyzing a premise. Your author has spoken to many over the years who admitted that they did not get around to this exercise. Major mistake! 15-20 minutes, 3-4 times a week, is a small amount of time, and dividends are enormous. In fact, *there is nothing one can do more important in terms of grasping LEEWS!* [Note. One needn't set aside an hour or more to address an entire hypo, certainly never assay to address an entire exam for practice purposes. (Await the actual event, when flow of adrenaline provides energy to go 3, 4, and more hours.)] WHAT ONE MUST BECOME ADEPT AT IS ANALYZING AND CONCISELY PRESENTING ANALYSIS OF A SINGLE PREMISE (in roughly a paragraph). It is re-emphasized that *response to all exams, all hypos will be but a series of premises (issues) addressed in a series of paragraphs.*

Beyond instructing *how* to present objective, concise paragraphs of analysis, such exercises instruct whether one *really* knows the law–a rule, principle, etc. [For example, one cannot begin a paragraph without precisely knowing law constituting the premise to be addressed!] Such exercises accustom one to thinking *element by element*. They instruct how to formulate and extract law (tools) from cases (read in conjunction with a commercial outline, as we shall see) for placement in toolboxes (course outlines). Such exercises reinforce what a premise is, instruct how to perform lawyerlike analysis, make one comfortable and efficient responding. One better understands and implements The Blender. The exercise is essential!

[13] **Facts are–facts**! Facts presented in hypos are simply that–facts! They happened. They cannot be disputed. In that DH kissed PN, and a kiss denotes contact, the existence of the contact element of battery would not be contested in a courtroom. (To query, say, before a judge/jury, "What, after all, is contact?" would incur annoyance and undermine credibility. Such a query, inviting a philosophical posture, has no part in the common sense, logical progression that is lawyerlike analysis.) The operative question when a fact plainly establishes (or dis-establishes) an element at issue is *how to make the point succinctly.* UBE cuts to the chase, the bare bones. Having stated (UBE analysis), "4 = kiss," one feels confident stating (Standard English), "Contact is shown by the [fact of] kiss." Or, "Contact is established by the kiss." One saves time for discussion that needs and merits more time–intent, for example. Uncertainty that enough has been said is what prompts lengthy, meandering discussion. Practice with UBE aids greatly in reducing such uncertainty.

[14] **"No statements of law!"** Such an instruction is heard *only* in law school, and seems… outlandish! On not a few occasions students have brought precisely this instruction to your author's attention. It reflects exasperation at endless regurgitation of legal precepts in exam response, with little or no analysis. The professor hopes that by foreclosing this avenue, students will be forced to devote efforts to analysis. Of course, what is usually accomplished is further confusion and intimidation respecting exams. Should one receive such a wildcard instruction, **welcome the advantage it confers in terms of competition–classmates–being confused.** To comply, simply adjust the paragraph format–cosmetics! Omit the statement of law–premise–that normally begins the paragraph. Having this law in mind (but not stated), move directly into analysis (the form and content of which will now be described and instructed). One has complied with the professor's edict. Knowledge of relevant, appropriate law is implied via on-target, impressive analysis.

[15] Is it realistic, for example, that because the shopkeeper was a detective, he was not "another," or that since the money was initially in the cash register, it was not taken "from another?" Such hyper-technical thinking borders on philosophy, on naval contemplation. It has no place in the logical, *common sense* reasoning and argumentation that lawyers engage in before juries, or in an exam response. The test is, "*How would this reasoning fly in front of a judge or jury?"*

[16] **Practice hypos in Appendix.** Each of eight practice hypotheticals in the Appendix is followed by legal precepts needed to apply Step Two. Therefore, one who has not yet taken any of the subject areas (not started law school!) can address any exercise. Then follows a model of what application of The Blender should produce in the way of an exam outline–conflict pairs, premises, insights (Step Three) re analysis of premises. Then follows a complete model response to the hypo, following the paragraphing format that has been introduced. Most paragraphs analyzing premises/issues are presented (solely) in Standard English (concise) proper sentences. However, enough are prefaced with UBE format to offer guidance respecting execution in this format.

[17] **Placement of conclusion.** Little uncertainty exists respecting where bar examiners want to see a conclusion. A correct or "right" answer is anticipated. Typically, it is to be stated *at the outset* of analysis. Perhaps influenced by this, also seeking to prepare students for the bar, not a few professors instruct that conclusions be stated at the outset–CIRA (or ICRA). This instruction has the negative consequence of overemphasizing importance of the conclusion. It reinforces the (incorrect) idea that a "right answer" on a law essay exercise is other than identifying and properly analyzing relevant issues. It encourages "conclusory" analysis. [A professor who instructed students to put conclusions "at the beginning" asked your author how he could get students to be "less conclusory." The answer–instruct that the conclusion not be entered until the end! Better, instruct, "I do not want to see your conclusion!"]* The solution, should a professor want conclusions stated at the outset is a mere cosmetic adjustment. (The one your author employed on [successful] bar essays.) Literally leave several blank spaces at the outset of analysis. Complete analysis (in accord with paragraphing format here introduced). Come back at the end. Fill in the conclusion (at the beginning).

*Emphasis is now where it belongs–on analysis.

BTW. If uncertain as to professor preference respecting where (and whether) to state a conclusion, ask! It is a reasonable question. It is an opportunity to get to know the professor.

[18] **Example of impressing for the "A."** A contracts exam was brought to your author's attention in which every student who identified a *second* way in which acceptance occurred received an "A." The professor, despite having created the hypo, had not recognized this possibility. Doubtless, some students who made this discovery identified no more, possibly fewer issues than did other students. It often happens that one puzzles that a certain student received a higher grade, because one believes (possibly knows) this student has less legal knowledge than others, less than oneself. However, identification of an argument or issue the professor missed, but should have noted, and that few other students identify, may vault that student past classmates. It impresses the professor. It suggests everything a professor is looking for in a student—e.g., knows relevant law; more important, knows what to do with it, *knows how to play the Lawyering Game.* The professor experiences an "Aha!" moment—perceives coming off the exam page something approaching a lawyer knowledgeable in the subject area tested, paying close attention to facts the professor took the trouble to concoct.

CHAPTER TWELVE

RESPONSE CONT.—STATEMENT OF CONCLUSION; MORE ON ANALYSIS

It has been noted that in order to emphasize the unimportance of conclusions, a very few professors instruct that one *not* state a conclusion. However, although a "correct answer" gains little, if any credit on the great majority of law school essay responses, a statement of conclusion is not unimportant. Most professors want a statement of conclusion. Thus, where does one put it? How does one state it?

As per IRAC, Conclusions Normally Follow Discussion/Analysis

Some professors want conclusions stated at the outset, *before* discussion/analysis. Thus:

> Issue: Is DH liable for battery?
>
> Conclusion: Probably yes, because, *inter alia,* the element of intent appears to be satisfied.
>
> Discussion/Analysis

[Note. I've termed this "CIRA," clearly a misnomer. However, "ICRA" has never been encountered. All is mere rearranging of I-R-A-C.]

In rare instances a professor may also want the conclusion repeated at the end—CIRAC.

The problem with placing conclusions at the outset, as noted, is the message conveyed. It suggests who wins is more important than analysis, which is *never* the case. (Certainly not in law school.) Students are already predisposed to a one-sided (non-objective) approach. (E.g., having stated a conclusion, having set it in concrete so to speak, one is unlikely to uncover arguments that would cause one to alter that conclusion.) In other words, a close-minded, biased approach to analysis is promoted. Discussion becomes a superficial exercise justifying a conclusion arrived at quickly—often more gut reaction than careful thought. It has been noted that professors who instruct that conclusions be placed at the outset typically are following (and preparing students for) the desired bar essay format.[1]

Facts of law school hypos, in contrast to the bar, tend to be ambiguous and/or incomplete. The conclusion is often a close call. Emphasis is on discerning analysis, and one should not move hastily to a conclusion. Normally, as per IRAC, state conclusions immediately *following* the discussion. Thus:

> Issue:
>
> Discussion
>
> Conclusion:

Having read and (presumably) been impressed by lawyerlike quality of discussion, it should matter little to a professor what is said in a conclusion *at the end*, or how one states it. However, as set forth below, it may. If a conclusion is stated at the outset (inserted *only after discussion has been completed!*), how it is stated will certainly matter. (See section immediately following.)

[Note. Professors may not advise one way or other respecting placement of conclusion. This is something to be investigated in researching the exam.[2] However, *unless instructed otherwise, conclusion follows discussion*. This accords with the admonition of many professors to "follow IRAC."]

Wrong and Right Way to State a Conclusion

Given relative unimportance of conclusions (on law school responses), and *if it follows the discussion* (normal practice), it generally will not much matter how one states a conclusion. The impression created by discussion/analysis will predominate. However, there *is* a wrong and right way to state a conclusion. This is especially so should a professor insist that conclusion *precede* discussion. That professor likely has a conclusion in mind.[3] Should one merely conclude, "Yes/No"—in response, say, to a question that calls for deciding whether party Z was liable—, and the professor thinks the reverse, it's an inauspicious beginning. Likewise, should one state in response to the question, "Who should prevail?", "Party X," but the professor thinks, "Party Y," the impression created is unfavorable.

In general, avoid what amount to "yes/no" conclusions. (E.g., "The court's ruling was correct;" "Y clearly battered Z;" "The motion should be granted.") Little legal insight and zero analysis is evident in such a 50/50 proposition. Moreover, should such conclusion be presented at the outset and be viewed as "[dead] wrong," an unfavorable bias against subsequent analysis likely takes hold. (Not so much a problem if such a conclusion is presented *following* analysis.)

The way to avoid the potential pitfall of contradicting a professor's view of how an issue should be resolved (apart from placing the conclusion follow-

ing discussion), which is altogether lawyerlike, is to *waffle*—hedge the conclusion. Thus, state, "*Probably* no ...," "*It would appear* yes ...," "*On balance,* no ...." Simply do not commit strongly to the conclusion. Allow for possibility of an alternative result.

In thus qualifying the conclusion, one mitigates possible confrontation with a contrary professor view. Indeed, one allows for possibility of agreement with the professor. If in error (in the professor's view), one is only somewhat in error. As hedging language is characteristic lawyer speak—e.g., "If it please the court," "May I humbly submit the possibility that ..."—, little note will be taken of it, certainly no offense.

Further mitigate confrontation with a contrary professor view by *previewing the key point of analysis*. In other words, allude to the aspect of analysis pivotal in arriving at the conclusion. Thus, respecting PN's battery premise against DH, one might allude to the problematic (sub) issue and finding of intent. I.e., "Battery *seems* established, as the kiss was intentional."

Previewing the (apparent) key aspect of one's discussion deflects a professor's attention from a conclusion she may disagree with. It reminds the professor that analysis is the main event, not outcome. If one has targeted the "real issue," it announces that, right or wrong respecting conclusion, one understands the game. A professor likely nods her head, thinking, "I disagree with this outcome. However, yes, intent is what this is all about."

However, hedge even here. The Latin expression, *inter alia,* means "among other things." (Again, underscore Latin expressions (if you cannot italicize). *Inter alia* implies, in the event one has failed to allude to what a professor regards as pivotal in analysis, that one has other useful points to make in the body of the discussion. Thus, "Conclusion: DH is probably liable for battery, because, *inter alia,* the kiss was intentional."

Inter alia is also useful when one cannot recall all elements of a legal precept. (I.e., the complete definition.) For example, respecting the tort, intentional infliction of emotional distress, it may be that you only recall (at the moment) that "calculation to distress" is required. Perhaps, however, calculation to distress seems dispositive. One might begin the paragraph of discussion as follows: "Intentional infliction of emotional distress (IIED) requires, *inter alia,* calculation to distress." Assuming calculation to distress is indeed pivotal, dispositive, it would likely not occur to a grader that one doesn't know other elements of IIED, or matter.

[Note. Foregoing hedging strategies will be largely unavailing and unnecessary on the bar. As noted, bar examiners seek a "correct" answer. Assuming one knows relevant law and has learned how to play the analysis game, all should progress in straightforward fashion to a clear (and correct) conclusion.]

It bears repeating that both on a bar exam, also when a professor instructs that conclusions be stated at the outset, CONCLUSIONS SHOULD NEVER BE STATED, EVEN THOUGHT ABOUT *BEFORE* COMPLETING ANALYSIS. Literally leave blank space preceding (above) the discussion. Come back. Fill in the conclusion *after* completing discussion. In this way you avoid negative consequences of committing too soon to a conclusion.[4]

Thus:

Conclusion: [... blank space left …]

Discussion

It may be that during cursory analysis of Step Three planning you form a conclusion regarding what is likely to happen with a premise. One often does—e.g., that PN cannot establish assault against DH, because she was asleep. Do not think about or commit to such a preliminary conclusion, however certain you may be. Certainly, do not state it to begin your response. YOUR BEST ANALYSIS WILL OCCUR DURING EXECUTION OF THE ACTUAL RESPONSE.[5] Only by keeping an open mind during this process can a nuance of fact or argument that may be pivotal in determining a conclusion be discerned.

Yet again, NITPICKING FASHIONING OF ARGUMENTS ON *BOTH* SIDES OF A PROPOSITION AT ISSUE—*THE GAME*—IS THE MAIN EVENT!

Ebb and Flow of Litigation Model (Plus More on Lawyerlike Analysis, Difference Between Premises, Counterpremises, Arguments, Counterarguments)

The point has been made that essay exercises—hypos—are exercises in what lawyers do (albeit, as it were, on steroids). Just as a lawyer would, you seek premises to assist a party to a conflict—a client, in ef-

fect—in attaining objective(s). The same as a lawyer, you nitpick facts to formulate arguments in support of these premises (each element thereof).[6] Simultaneously, so as to better prepare your client's position, you anticipate/raise possible arguments, premises in opposition. In effect, *you alternate in the role of advocate (lawyer) for the opposing parties*.

Should a conflict in real life proceed to litigation and a courtroom, the pattern of argument v. counterargument, premise v. counterpremise would similarly ebb and flow. Thus, "*ebb and flow of litigation*" is an apt model for one's thought process, conflict pair by conflict pair, objective by objective, premise by premise, element by element.

An objective one side advances and the other contests gives rise to a corresponding counter-objective. For example, if Party Y's objective is to change venue (jurisdiction in which a case is initiated and litigated) or obtain damages, and Y's opposite number contests, counter-objectives would be the reverse—maintain same venue, deny damages. As touched upon previously, for purposes of ordering discussion, affirmatively advanced (movant) objectives are typically considered before corresponding (respondent) counter-objectives.

The distinction is that obtaining the former (movant objective) normally requires affirmative behavior on the part of the party seeking it. In contrast, counter-objectives may be secured by default. For example, changing venue would require that Party Y above (likely a defendant, but now movant) bring a motion before the court. Should Y do nothing, the (opposing party) counter-objective of maintaining venue is realized by default. No action by the court or Y's opposite number is required. Query: If one party seeks to introduce an item of evidence in court, and the other side objects, what is the affirmative, movant objective, what the counter-objective in response?[7]

As noted, given that either party to conflict may take the initiative in seeking an objective, it is useful to refer to this proponent—possibly plaintiff, possibly defendant—as "movant," and the opposing party (re this particular objective) as "respondent." In a courtroom the significance of this distinction is that *movants* (plaintiff *or* defendant) *carry the initial burden of persuasion*. The "court"—judge—literally looks first to movant to advance a legal basis of entitlement (premise) and evidence/arguments in support thereof.

Thus, a judge may say to the party objecting to introduction of evidence, "State the [legal] basis of your objection." At a hearing, or following opening statements in a trial, a judge typically turns to the initial movant and says, "Call your first witness," or, simply, "You may proceed." (I.e., begin the process of introducing evidence [facts] and arguments to establish your premise[s]).

Movant's burden in a *civil* case or proceeding is to persuade judge/jury by a *"preponderance of the evidence"*—"evidence" being admitted testimony, photographs, documents, etc.; "preponderance" meaning facts (evidence), reasonable inferences therefrom, accruing to over 50 percent persuasion—, that legal bases (premises) relied upon are established. (E.g., battery/assault in a tort action.) In a criminal proceeding the burden of the initial movant respecting *guilt of a crime*—the state ["People" in New York]—is proof *"beyond a reasonable doubt."*[8]

As movant goes forward seeking to meet her burden—offering testimony, photographs, documents, data, exhibits, etc., then fashioning *arguments* based upon this evidence—, respondent seeks to thwart this effort (i.e., reduce persuasion to 50 percent or less) by cross-examining movant's evidence to discredit its persuasiveness. (E.g., persuade that a witness's view was impaired or a document is unreliable.) Respondent in turn fashions *counterarguments* to disestablish elements of premise(s) being advanced. Ebb and flow of litigation is reflected in argument followed by counterargument.

If, in the view of the court, movant *clearly* fails to meet his burden respecting a premise (i.e., fails to establish to over 50 percent *even one element* of a premise advanced), the matter ends as to that premise. Movant is said to have failed to establish a *"prima facie* case."[9] Thereupon, the judge may say, "I'll entertain a motion to dismiss." (Respondent's motion for "summary judgment" dismissing that theory of entitlement—e.g., count of an indictment, pleading, etc.—will be granted.)[10] The judge may, *sua sponte* (on her own initiative), dismiss the premise.

Respondents rather routinely rise and move to dismiss following completion of movant *prima facie* presentation. Should the court deny this motion to dismiss, movant has met his (*prima facie)* burden of proof. However, he has not yet prevailed. Burden now shifts to respondent in what is termed "rebuttal phase" (of evidence, arguments, counterpremise[s]).

A judge literally looks to respondent, as if to say, "Anything—evidence, argument, competing legal precept (counterpremise)—before I decide in favor of [movant]?" Respondent, now shouldering the burden of proof, can oppose in two basic ways.

*First, s*he may continue *arguing* against aspects (elements) of movant's premise. (E.g., PN [her lawyer] vs. DH's battery against *her.*) She may introduce additional facts—evidence—*via* her own witnesses, documents, exhibits. She fashions arguments from this additional evidence to further counter movant (DH's) arguments in support of (elements of) the premise contested. Such would be additional *counter*arguments. Movant (DH), responding in his turn, cross-examines respondent's evidence—witness testimony, documents, photos. He seeks thereby to counter—discredit, diminish—respondent's (counter) arguments, thereby buttressing original arguments in support/establishment of his premise.

Should respondent be unsuccessful in further *arguing* against establishment of movant's premise, a *second (fallback)* option may be to assert a *counterpremise* (*a separate, competing legal rejoinder*) in an attempt to supersede initial movant's (DH's) premise. In other words, if she can, respondent advances a *competing legal basis of entitlement* that, if established, would render establishment of movant's premise moot. (E.g., self-defense in response to DH's battery in a torts context, or in response to murder in a criminal context.)

Advancement of a counterpremise creates a new ballgame (reflected in a new paragraph of analysis). Roles reverse respecting burden. *Respondent,* in introducing a legal precept with elements needing establishment, *in effect becomes movant respecting the counterpremise. Movant becomes respondent.* For example, should DH, in a suit against the son, Ruthless Nicely (RN), be successful in establishing battery (very likely), facts suggest RN acted in defense of another, his mother. If RN can establish this, it doesn't mean a battery did not occur. It means that it is legally "moot" (of no consequence) that RN battered DH. The battery occurred, but is *superseded* (excused, negated, rendered moot) by interposition of the (defense of other) counterpremise. Likewise, robbery may be superseded by counterpremeise, entrapment (a/k/a "defense"). Negligence may be superseded by assumption of risk, which in turn may be countered by last clear chance doctrine[11]—counter to a counterpremise!

Arguments—Factual! Premises—Legal!

Respecting arguments and premises, arguments (and counterarguments) are *factual* in nature. They derive from, relate to, are always based in facts. They marshal and interpret facts—evidence—to persuade that elements (and sub and sub-sub-elements) of premises and counterpremises are established, or no. Arguments/counterarguments make up the body of paragraphs of analysis. They explore whether a premise or counterpremise (at issue) can be established.

Premises, by contrast (and counterpremises—premises raised in opposition to another premise), are *legal precepts*. They are legal rules, principles, statutes, even policy *arguments*[12] advanced to persuade (of entitlement to an objective). A single premise is sufficient in itself to achieve the objective (or counter-objective) in support of which it is advanced. Each is a *complete legal theory of entitlement*. *(M*eaning, standing alone, if established—all elements present—, the premise suffices to entitle the party to the objective. [Or party's lawyer, in the instance of innumerable intermediate objectives arising in the course of litigation. E.g., getting evidence admitted or excluded.])

It may be noted (reiterated) that sometimes, often in fact, a premise (or counterpremise) consists of a *combination of legal precepts*. In other words, two or more legal precepts must be combined to constitute the complete premise. (E.g., battery *plus* damages is a PN premise for getting money from DH. [I.e., *complete* theory of entitlement]; robbery *plus* acting in concert is the necessary complete premise for putting A in jail. [As, given A's flight, elements of robbery alone cannot be established.]) Premises are the *complete law* constituting a theory of entitlement. And are made up of elements (and sub or sub-sub-elements, if elements and sub-sub-elements need further defining).

Ebb and Flow Continued

Given that, typically, facts provided in an exam hypo *cannot be added to* (lest one create a new exercise!), note in contrast to real life and a courtroom, that the first option described for challenging a premise—fashioning *additional* counterarguments via introducing additional facts (via new witnesses, exhibits, etc.)—normally does not exist. Only the second option comes into play—advancing a counterpremise. I.e., ONCE ARGUMENTS/COUNTERARGUMENTS RELEVANT TO A PREMISE HAVE BEEN

EXPLORED [typically in a single paragraph], A NEW PARAGRAPH INTRODUCES EITHER A RESPONDENT COUNTERPREMISE OR ANOTHER MOVANT PREMISE.

Note also in contrast to real life that even were respondent's (counter)arguments persuasive in defeating movant's premise (thereby resulting in a successful motion to dismiss in a courtroom), given the *overriding objective* (on a law school exam) *of showing a professor new law, new thinking*, one would nonetheless proceed to explore relevant, possible counterpremises.

Having explored respondent's counterpremise, consider whether the burden (of proof) shifts yet again. Possibly facts suggest a legal basis available to the original movant to counter respondent's counterpremise. (E.g., hot pursuit in response to 4th Amendment retort to CPW versus A. [See model response, Appendix, p. 165.]).

[Note. We could term such a "counter-counter-premise." (Or just counterpremise. It is a premise set against another premise.) *New law, of course, implies a new paragraph*. *O*riginal movant is movant once more!]

Thus does the tide of litigation, of objective versus counter-objective, of premise versus counterpremise, of argument versus counterargument, of movant versus respondent ebb and flow. It is much as a tennis match, ball first in one court, then the other, the referee—judge!—looking to one side, then the other, as the burden of persuasion shifts, as arguments and premises of one side and then the other persuade more or less [51%]. Ebb and flow should be reflected in the outline of the exam response. (Also in presentation of premises [one paragraph after another], in presentation of arguments in the body of paragraphs, *in one's thinking!*)

[Note. The "counter" prefix merely indicates a premise or argument is raised in opposition to a premise or argument.]

Cutting to the Chase (Amid Ebb and Flow)—Dispositive Arguments / Premises

Sometimes a judge, *sua sponte*, interrupts litigants to point out an argument, principle, policy ground that possibly overrides competing arguments, and either disposes of the controversy or moves litigation along. For example, in the Combination Law Hypo Mr. Breezy wants a desk from the nephew, Ican Getum, or the aunt, Canei Soakum. His premise is contract. He'll argue breach thereof. As set forth, page 148, *supra*, contract has many elements. Should competing attorneys (or you in a response) launch into an investigation of whether every element is satisfied, it would consume much of the court's time (and much of one's time on an exam). Upon learning that Getum is a "high school junior to be," a judge would surely truncate discussion to inquire whether the requisite element of competency (age sufficiency) can be satisfied. This would move the discussion beyond contract to agency, where it is properly focused. (See model discussion, p. 152.) Similarly, if facts indicate renunciation or entrapment as possible defenses (counterpremises) in a criminal prosecution, or assumption of risk as counter to a negligence claim, a court will likely initiate a preemptive inquiry into whether those topics are not "dispositive." (I.e., will control outcome of the matter.)

In like manner, as instructed by Step Three's admonition to preview "real issues," be prepared to depart from an orderly movant/respondent ebb/flow to *zero in on arguments and/or legal precepts that may preempt/supersede matters*, that would likely interest a professor (or bar grader), as they would a judge. Introduce the new precept *(new law, new paragraph!)* by abruptly starting a new paragraph with the element or premise in mind. (E.g. [alluding to the above contract/high school junior-to-be example], "Generally, minors, in most jurisdictions persons under 18, may not enter into binding contracts. Ican Getum, a 'high school junior-to-be,' would likely be 16, 17 at most." [The conclusion, if not adequately implied, can be stated elsewhere. Then move to the main event. Begin the next paragraph.] "Under agency law [Flag key words/law!] the minor agent of a major principal may enter into a binding contract, provided...." [See Appendix, p. 148, for this law.])

On the other hand, do not miss an opportunity to impress by concluding a discussion too quickly. Continuing with the above example, it may be that the grader *wants* a discussion of contract and breach. [Be attuned to a professor's particular interests. Old exams as well as classroom emphasis are useful in this regard.][13] The (missing) element that moots discussion of contract overall (and all other elements) may have been overlooked by the professor. Should you quickly conclude the discussion, you may have been lawyer-like (judgelike). However, points may have been left on the table.

[Note. *Professors miss arguments, even premises in fact patterns they have created. Your author certainly has.* Nothing is likely to impress more than bringing to a professor's attention something apropos she missed in her own hypo.]

Such a situation is unlikely on a bar exercise. On a law school exam, however, depending upon your read of a professor's interests, you may wish to milk an opportunity for showing off knowledge by assuming (for purpose of argument—*arguendo*), that *whatever resolves the discussion does not (!!)*. E.g., having summarily disposed of contract owing to Ican Getum being underage (thereby, hopefully, impressing by zeroing in on a dispositive element), backtrack and state—new paragraph!—, "Assuming, *arguendo,* Ican Getum *did* have legal capacity to enter into a binding contract…" Continue with the discussion of contract and breach you surmise the professor may be looking for.

"Assuming, *arguendo,*" is a useful device. Try to incorporate it in practice exercises. However, *be wary of introducing unwarranted facts that, in effect, create a new hypo*. (E.g., "assuming, *arguendo,* DH and PN were next door neighbors," is unwarranted, non-reflective of anything reasonably implied in the model response. It would cause a grader to think, impatiently, "Where does he get this?" On the other hand, "assuming, *arguendo,* DH and PN had a prior, possibly romantic relationship," resonates with "object of passion," etc., and, argument-wise, possibly introduces something relevant.)

In general, avoid going far afield. Time is usually a concern. Professors (certainly bar graders) are not likely interested in scenarios and analysis that lacks resonance in the model response. As demonstrated by the first paragraph of the Torts Hypo, there is usually more than enough fodder for analysis in given facts and reasonable inferences therefrom. Certainly, be sure to exhaust given facts and reasonable inferences before assuming anything, *arguendo*.

Use of Paragraphing Format (and *supra, infra)* to Save Time

Apart from the concision UBE and the paragraphing format of Chapter Eleven should produce, an advantage of clearly labeling or otherwise indicating what is being discussed (by underlining, paragraphing) is ability to easily refer the professor[14] to discussions past (*supra*) or yet to come (*infra*). Most hypos (e.g., Corporations and Combination Law exercises) will likely involve no overlap or repetition of discussion. However, consider outlines of the Torts and Criminal Law Hypo responses. Several premises occur more than once, even within a single conflict pairing.

Given the objective of showing a professor *new law, new thinking,* repeating an argument or legal definition adds little and wastes time. Having defined battery in the context of PN v. DH, when discussing DH's battery premise against PN, merely state, "Applying the law of battery, *supra* (that which went before)…" Then discuss only what is new—*new thinking!* (See model discussion, p. 142.)

Because battery was clearly labeled in discussing PN v. DH, (indicated at the start of a paragraph with underscore or boldface), because the discussion occurred just a few paragraphs prior, a mere "*supra"* seems sufficient. Of course, *if discussions are farther apart, more guidance should be provided*. For example, transferred intent arises both in the context of Ms. Nicely v. DH, and much later—Diddle v. Ruthless. When it appears again at such remove, state, "Under the doctrine of transferred intent [Always flag law!], as discussed in Ms. N v. DH, *supra,* Ruthless' intent to hit Bernstein Woodward will be transferred to Diddle." [The professor is reminded that this law was explored previously. If need be, she can locate Ms. N v. DH easily enough.]

Should the professor have a second "transferred intent" on her checklist, one gets the check mark and credit. If there is something new to add to the discussion, do so. However, if no *new law* or *thinking,* why not take advantage of the clarity of one's presentation to save time?

In the Criminal Law Hypo, discussion of B's guilt of robbery will be virtually identical to that of C. Simply stating, "For reasons set forth in the discussion of C, *supra,* (or *infra* [that which is to follow], as the case may be), B is (or is not) guilty of robbery [and (list) other crimes]," saves considerable time and discussion.

Referring a professor to a discussion she hasn't yet seen (*infra*) is somewhat dicey. One is relying, of course, on the overview provided by the (hastily scribbled) exam outline of what is to be covered. [An important function of the outline!] One tests the professor's patience. However, given that so much of what professors encounter in exam responses is abysmally disorganized and lacking in lawyerly aspect, a

professor should experience a gush of appreciation, admiration, good will from the moment she begins reading your response.

[Really! Excellent news! As often noted, COMPETITION, AS MEASURED BY WHAT IS PRODUCED DURING EXAMS, IS NOT AT ALL SEVERE IN LAW SCHOOL.][15]

Another example. IIED occurs in the context of PN v. DH, but should be quickly, easily disposed of. [Necessary element, "calculation to distress," seems easily defeated, yes? See model discussion, p. 141.] One may know IIED to be of particular interest to the professor. In that a Step Three preview should indicate a far more interesting discussion of IIED in the context of Ms. Nicely v. DH, at the close of your (abbreviated) discussion of IIED in the context of PN v. DH, you might state, "However, please see discussion, IIED, in context of Ms. Nicely v. DH, *infra*."

A professor seeking greater depth of exploration of IIED (possibly policy blah blah?) is alerted she will indeed get more. Given clear labeling, she can easily find it. Therefore, she reserves judgment. Indeed, the response thus far is so lawyerlike, she doubtless looks forward to it (!!).

Exercises

Your objective is to become disciplined and adept applying The Blender (thereby making *every* hypo, in *any* subject on *any* exam a predictable exercise). This includes *the exercise with no fact pattern* (i.e., no hypo!)[16] [Review footnote 16 at this time.] Given the variety of Q/I types and hypo formats, *practice with many and a variety of exams is crucial to this end*.

You are perhaps poised at this juncture to execute a response to the Torts, Combination Law, or Corporations exercise (or go get a pizza). Do so *one premise at a time*. *Think about labels*. *(What will help the grader?!)* Stop after presenting analysis of each to compare with model paragraphs in the Appendix.

Initially, don't worry about time. (You'll become faster with practice and familiarity.) Present analysis of no more than one or two premises at a sitting. (A 20-30 minute exercise?) As noted, begin with UBE format. Then express in brief, proper sentences. (Compared with the model, were important arguments/counterarguments missed? Could you have expressed yourself more concisely? [Was something relevant identified that your author missed?!])

Don't hesitate to rewrite a paragraph that is far off the mark. Indeed, rewrite the same paragraph until what needs to be conveyed is complete and concise. (Practice makes perfect!)

Initially, you likely will be tentative—very tentative. Many students are unsure expressing themselves, and this is altogether new. (Those who are assured, who "write well," will lack analytic skill. They'll likely express too much, yet not say enough.)

Precisely the point of practice exercises—paragraphs analyzing premises—is not simply to instruct analytic skill (which will rapidly develop), but to make you comfortable, eventually *confident* presenting (concise) paragraphs that impress. (Such confidence will emerge sooner than you suspect.)

Within 3-4 practice sessions, you perhaps become curious to compare your effort with the model. A few more sessions—*eager* to make the comparison. Focus shifts from presentation (no longer a problem) to analysis—nitpicking facts on one side, then the other. You become curious to match your nitpicking with that of the model. (Yes, mine—your author.)

Now you're into the *Game of Lawyering*. Now you're engaged in the searching, focused, *analysis-for-the-sake-of-analysis* that impresses and earns elusive law school A's.

You may want to review material in the following chapter (13) before beginning practice exercises. However, do not put off writing practice paragraphs! As noted, skills acquired thereby (especially analysis) enable one to understand and better appreciate all aspects of LEEWS, including advice yet to come on 2-4 line case briefing, and compiling—ideally, weekly—30-50 page course outlines. Be sure to address *all* hypos in the Appendix.[17]

[Note. It is not possible to simulate the intensity and pressure of an actual exam in a practice exercise. However, it is advisable to begin imposing time limits as one progresses, in order to become accustomed to working under some pressure.]

GET STARTED!

SECTION TWO, CHAPTER 12 FOOTNOTES

[1] **Bar exam vs. law school.** Bar essay conclusions are deemed valid indicators of reasonable lawyerly competence. Examiners are more interested in "Do you know the law… [particularly recent developments in state law]* and how to apply it to straightforward facts?" than creativity in developing arguments and counterarguments. Policy is *never* wanted. (Examiners aren't interested in what a candidate thinks law of the state could or should be.) Providing one knows applicable law, arguments line up rather matter-of-factly for or against establishment of the proposition at issue. Thus, a right or wrong answer should be apparent.

In contrast, as noted in the main text, facts of law school hypos are often ambiguous and/or incomplete, inviting competing interpretations. Policy considerations may (*rarely*) enter in. Minority/majority positions respecting law can and often should be invoked (as premises useful to one side or the other!). One may encounter the instruction, "Contrast majority/minority positions on the rules set forth in the cases of X and Y." [Note. Of course (!!), do not assay to address instructions in the form encountered. Process all questions/instructions through The Blender.] Therefore, just as learned courts A and B can arrive at different conclusions on the same law and facts, so the conclusion (often a close call) sometimes can go either way on a law school issue. Analysis is the main event. Only after completing searching analysis of facts from both sides of a conflict pairing should a conclusion emerge.

* The one-day, multi-state portion of bar exams (now Uniform Bar Exam—UBE) is common to virtually all states. [Note! LEEWS "UBE" acronym predates this one by at least two decades.] It tests legal knowledge [majority view] in contracts, torts, real property, constitutional law, criminal law, and evidence. Therefore, **in the essay portion of the exam individual states tend to test knowledge unique to the state,** especially jurisprudence reflected in recent legislation and decisions of the state's highest court. This is logical. State A wants to limit ability of one who prepares for State B's bar to easily become licensed to practice in State A.

[2] Whether/how/where to state a conclusion is a pointed question, deserving an answer from a professor. It has been advised that one should take advantage of opportunities to engage professors personally. Although a broad question respecting exams may irk—e.g., "What advice would you offer on writing exams?"—, pointed questions reflecting understanding of the exam/study process should not only impress, but one may edify the professor (!!).

[3] Note. Despite insistence of most professors that, "There are no right or wrong answers on the exam," *few professors go through the trouble of creating a hypothetical and a model answer* (which, naturally, the professor will deem definitive [brilliant!]), *without coming to some sort of conclusion respecting each issue.*

[4] **Negative consequence of committing too soon to a conclusion.** Committing too soon to a conclusion closes one's mind to possibilities that may emerge (possibly, likely, can *only* emerge) during the nitpicking give and take of full, proper (objective) analysis. (Such a possibility may influence, even alter the conclusion.) One also avoids the temptation to overstate a conclusion. (I.e., merge what properly belongs in the discussion into the conclusion.) Moreover, should one craft a conclusion before completing analysis, one may, indeed, one very likely will offer explanations in the body of the conclusion itself (analysis actually) that properly belong in the paragraph of analysis. (E.g., "Conclusion: PN will probably prevail, because the kiss establishes contact, most people don't like to be awakened, especially in an intimate way [the kiss] by someone, and …. Time is wasted!)

[5] **When best thinking occurs.** When one puts finger to keyboard (or pen to paper), executing the response to be submitted, focus is heightened and facts are probed and arguments fashioned in the most nitpicking, searching, painstaking (lawyerly!) manner. At such time, something overlooked during the more cursory examination of planning Steps Two and Three may emerge that alters thinking and preconception of how an issue turns out. A prime example is emergence of the *2nd* assault premise in the context of PN v. DH. This so-called "gold nugget" is never discerned via The Blender—not a single instance in over 1,000 live programs during over three decades! Indeed, it came to your author's attention (and I wrote the hypo!) only thanks to the acuity of a student, and this during the nitpicking process of exploring an aspect of PN's self-defense counterpremise, in a program many, many years ago. (In Los Angeles. The exact moment is etched in memory, so startling and impressive was this "surprise.") It has been noted that precisely this sort of "find" impresses, marks the discoverer a "sharp legal mind" (possessed of The Right Stuff!), and garners not only "A" grades, but often top honors in a class. (Note. If this 2nd assault in the context of PN v. DH does not ring a bell, continue one's own efforts crafting a response to the Torts Hypo. This aspect will be found in the model response.)

[6] Note. Facts available for marshaling in support of arguments is one important difference between real life and a law school hypothetical. In real life a lawyer has the option (indeed, duty!) to seek additional facts, if existing facts are inadequate to support arguments. On an exam facts are limited to those provided in hypos. In fashioning arguments, one is limited to these facts, reasonable inferences therefrom. To cite the PN v. DH example, no information is provided respecting nature of the prior relationship, if any, of PN and DH. To speculate much beyond the likelihood of PN and DH being acquainted—e.g., that they dated or were boyfriend/girlfriend—would be unreasonable. In real life the prior relationship would be explored in depth.

[7] This is tricky. Although introduction of evidence requires court permission, such permission is routinely granted absent objection. Only when introduction of evidence is opposed does an objective/counter-objective *conflict* arise. And who initiates such a contest? Who seeks (moves for) a court ruling? The active, initiating party is the one rising (by his attorney) to say, "I object." This may be either plaintiff or defendant in the proceeding. (Thus, the utility of "movant.") The objective for conflict purposes is keeping the proposed evidence out. The counter-objective is getting it admitted. (An example is provided by Q/I #5 of the Combination Hypo, p. 146 *et seq*.)

[8] **Beyond a reasonable doubt.** What is meant by this standard is somewhat a moving target. It is certainly not *no doubt,* as judges are at pains to explain to juries. It is more *no reasonable basis for doubt.* (In live programs your author has *in jest [!!]* noted that the standard in, say, Texas or Alabama—"looks guilty?" [Ho, ho.]—is off the mark.) More than likely, the burden is proof in the 90 percent and more range, a very high threshold for the prosecution. Certainly, persuasion to 90 percent and more is an apt standard for purposes of proof one would seek to accumulate on a criminal law exercise in seeking to establish that elements of a crime are established.

[9] ***Prima facie* case.** *Prima facie* means "sufficient at first impression." In a courtroom it means that viewing facts and arguments *in a light most favorable to the proponent (movant),* a judge and/or jury *could* (not necessarily will) find the proposition (premise) established to a preponderance (51%). The case or matter is found to have sufficient merit to continue.

[10] **Summary judgment.** A judgment (by the court) that facts are sufficient, and there are no facts in doubt or at issue (to be tried), nor issues of law, and that relevant law, evidence, arguments point (to a preponderance) in favor of the party seeking SJ.

[11] **Last clear chance doctrine.** Proposition whereby although negligence be superseded by an injured party's having assumed risk of an injury (e.g., climbing a fence posted "no trespassing" and falling into an unfenced, uncovered pit), if the negligent party (property owner) may yet avoid or mitigate the injury (e.g., by intercepting the trespasser before the fall into the pit without risk to himself), he has a (last clear chance) duty to do so, lest he yet be found liable for his initial negligence (in not fencing or covering the pit).

[12] **Policy *argument* as premise.** The discussion of argument v. premise typically confuses live program attendees until they begin analyzing premises. To assert that a policy *argument* can be a premise but adds to confusion. Thus, table likely puzzlement at this point. Suffice that policy argument (why/wherefore of a legal rule [premise]) is but another tool in a lawyer's toolbox. If facts and existing law suffice in a lawyer's quest to obtain an objective, a lawyer has no interest in policy. Only if stymied by a legal precept (e.g., inability to employ transferred intent in seeking to establish IIED), does a lawyer reach for a policy argument in her toolbox. It is a last resort, a Hail Mary of sorts. The lawyer can possibly challenge the law thwarting achievement of whatever objective is at issue *via* policy—arguing that for policy reasons the law is being misapplied, it should not be applied, it should be changed, it should be overturned and discounted altogether. In so doing the lawyer seeks a new, different (more helpful) version of the premise in question for determining the outcome—in effect, a *new* premise. Thus can policy *argument* in the LEEWS scheme morph into a new legal precept, a new premise. (*One starts a new paragraph with the altered [via policy argument] legal precept!*)

Yes, this gets confusing. "Argument" versus (policy) "argument." Semantics! Nitpicking minutiae. Lawyerlike *thinking!*

[13] **Knowing one's professor.** Especially, do an Internet search for any recent law review articles your professor may have written. His/her particular concerns, positions, primary interests, *best thinking* will be reflected there. You'll want to acknowledge, adopt, possibly challenge (Be careful here!), etc. these positions in your analysis. As one former student put it, "A professor's articles are a superhighway to his brain."

[14] "Professor," because bar hypotheticals are highly unlikely to involve overlap of discussion. You're unlikely to have occasion to refer a bar grader to previous or future discussions.

[15] **Exploiting the "steaming pile of mediocrity."** Even at smaller law schools 1L classes are large—75-100+ students. As described, exam responses are in the main disappointing. Moreover, whether a professor has significant practice experience as a lawyer or no, "lawyerlike" language and analysis is distinct, easily recognizable. The point has been made to live classes that deadlines for submitting grades are imposed on law professors for good reason. They need prodding over holiday break to get on with the unpleasant task of wading through, as I like to put it, "a steaming pile of mediocrity."

Imagine a law professor confronted with a pile of responses, respecting which 25 points out of 100 must be accorded not just a passing grade, but likely a B! Grading has to be boring, disappointing. (Professors must think, "Why hasn't my brilliant instruction borne more fruit?") Note, however, that owing to checkmark approach and reluctance to give D's and F's, grading is not so difficult. Moreover, professors will acknowledge that **whether or not an exam has potential to compete for a top grade is manifest in the first 2-3 pages!** (Professors have admitted to only reading "the first three pages.") **Either a semblance of lawyerly competence coming off the exam page is manifest, or no.** If no, simply award a B or B-, and that's it. (Returned exams are notorious for having few, if any comments.) Or move quickly through the remainder tallying checkmarks. Against such a backdrop, coming upon a response that reflects planning, organization, legal knowledge, close attention to the professor's facts—a semblance of lawyerly competence!—has to be a most pleasant surprise. As I am fond of saying to classes, "Your task is merely to get the professor's attention in a positive way, to emerge from the pile of mediocrity."

[16] **No hypo, *no facts*!** (A graduate exercise in applying LEEWS.) On rare occasions brought to your author's attention (never on the bar), a (lazy?) professor merely poses a question/instruction as an exercise. No hypo, *no facts*! E.g., a torts professor posed the question, "What are your thoughts on 'no fault' insurance [NFI]?" [That was it!] Another (in constitutional law) queried, "What do you think about the Equal Protection Clause [EPC]?" A professor of property at Florida State Law got play on the internet when he posed as an exercise the simple query, "Who owns the moon?" My favorite is the following two-hour exam many years ago from a wills/trust/estates professor at Duke Law—"The words 'if not, then' in the context of the Rule Against Perpetuities, [RAP] … What do you have to say about that?" That was it, the entire exam. No facts. Just the Q/I.

OMG! What to do? **How does one apply The Blender when there is no fact pattern?!** (Perhaps you'd like to contemplate this dilemma before continuing to the solution. Understand that WHAT LEEWS IS ALL ABOUT IS THAT AT NO POINT ON ANY EXAM DO YOU NOT KNOW *EXACTLY* WHAT TO DO!)

Such exercises will only be encountered in law school. The professor, as always (!!), wants two things demonstrated—knowledge of relevant law (in the professor's subject area), ability to think and analyze "as a lawyer." *This must be kept foremost in mind.* In a real sense your aim is to *exploit the exam (!!)* for this purpose. (I.e., make it your… [Rhymes w/...]) However, how, exactly, do you go about demonstrating this when there is no fact pattern, no grist for applying The Blender, no grist for analysis?

In the foregoing instances a professor very likely wants emphasis placed on policy aspects. However, *no facts!* If you simply begin discoursing on NFI, EPC, the moon, or RAP, discussion will likely ramble, lack focus, be superficial. What to do?

The solution is to first create, make up a fact scenario to which the question can be applied! Create a factual context or backdrop. E.g., "Suppose we had the following fact scenario. …;" OR, "Assuming, *arguendo,* there was the following scenario.…") Perhaps facts of an assigned case or discussion in class come to mind that fit/frame the Q/I. (E.g., "As set forth in the case of…," "In a class discussion the following hypothetical was posed…") Make up an accident scenario, an equal protection situation—say, two groups of protestors treated differently when seeking a parade permit—, an expedition of American and Chinese space ships converging on the moon at the same time, a will situation in which a patriarch sets up a trust for his grandchildren's grandchildren, and a child or the state objects.

Now you have grist for applying The Blender, leading to focused, in-depth discussion. Now you have conflict pairs and competing objectives. [To begin a paragraph] you state the law of no fault, the law prior to no fault *(showing off legal knowledge!!)*, the EPC, relevant property law principles, the RAP. Then analyze what happens given your fact scenario. One party wins, the other loses. Loser argues against the law, for an exception to the law, in favor of the law that preceded no fault, or a minority Supreme Court view (that would aid him—*counterpremises!*). You can explore what is good or bad about the law in question, and the results under your fact scenario—policy aspects, what the law *could* or *should be*. A far more effective discussion emerges than would result from winging it—i.e., running with the question posed and whatever pops into your head. (The sloppy, academic approach!) **Always, you want facts! You need facts.** Bottom line: YOU GAIN CONTROL OF THE EXERCISE (versus … bewilderment and intimidation!) **Exam exercises are but vehicles for demonstrating**

the two things all professors are looking for. (Must be looking for!) Take charge of the exam! Use it for your own purposes. *Emerge from the steaming pile of mediocrity!* (See footnote previous.)

[17] **Addressing the (eight) model hypos in the Appendix.** The circumstance you have not yet studied the legal subject tested in a given hypo (e.g., evidence, wills) is no reason not to attempt it. So far as the LEEWS science is concerned, **all hypos are the same, all exams are the same, no matter professor or subject matter**. (There will be *at least* one conflict pairing, one pair of objectives; there are premises to be explored, one paragraph after another.) **The only variable course to course is the toolbox you bring to the exam and exercise.** (Full of premises, organized for speedy reference!) (E.g., torts exam implies torts toolbox, property—property toolbox; agency—agency tools, administrative law—administrative law tools, etc.) In that law needed [toolboxes] is provided, as well as precise models of both planning and written response in accord with the LEEWS approach, you are ready to go on all sample hypos.

In that practice hypos come in different forms encompassing multiple subjects, doing each not only enhances comprehension of The Blender, but you gain flexibility applying it. Then move on to exams on file in the library or (better, easier option) posted by professors (often with model answers you can compare with—*later*!) at law school websites. You'll primarily test ability to identify premises (thereby testing efficacy of growing course outline/toolbox). Old exams of professors, if such can be found, provide an idea of likely subjects to be tested, gaps in your knowledge.

CHAPTER THIRTEEN

RESPONSE EXECUTION CONT.— MISCELLANEOUS MATTERS

Common Errors to Avoid

The following errors are so prevalent and easy to fall into that it will require considerable discipline to avoid them. The LEEWS approach overall, in particular the paragraphing format will help. So will being aware of them.

1 — Overdoing first discussion: One is naturally nervous at the start of an exam. Also cautious, tentative. Time pressure is not yet a problem. One accordingly tends to overdo initial discussions.[1] As time becomes a factor, responses tend to be truncated (and usually more to the point). Be aware of this tendency as you begin a response. Give short shrift to minor issues (previewed in Step Three). Beware of time limits. Overview provided by the exam outline is helpful here.

2 — Restating facts: As discussed in Chapter 11, opening discussion with "The facts tell us [Pucker Nicely was asleep in a meadow when] ..." is something of a temporizing tic, indicating uncertainty how to proceed. Repeating facts contributes nothing to analysis and wastes precious time. (The grader knows the facts! As noted, professors often caution against restating facts in cover instructions). *Facts are to be introduced only following a preface of law, as part of analysis*. This but accords with LEEWS paragraphing format. Beginning each paragraph—B! A!—with law and following UBE analysis format largely solves the problem.

3 — Conclusory Statements: By this is meant statements of outcome absent support (argument/evidence). E.g., respecting PN v. DH, "There was contact" vs. [derived from "4 = kiss," law/facts UBE format] "contact is shown by the kiss." Or, "It is clear Ruthless battered Diddle, because all elements of battery are satisfied." (Or "because Ruthless established contact intentionally, offensively, and without privilege.") No facts, no back and forth argument (analysis)! In a courtroom (always the model!) opposing counsel would object—"Conclusory!" A professor or bar grader reacts similarly. (Not good! In live classes I say, "Conclusory = C [grade]!") Conclusory often occurs because a conclusion is obvious, and you are in a haste to move on to another topic. You simply forget to set forth analysis already performed in your head. Adherence to UBE format solves the problem. You're forced to show, not simply tell.

Citation of Cases, Statutes, Etc. (Generally, don't.)

Such is *never* necessary in a bar response. Law students often think case, code section, or other authority whence a legal proposition derives must be set forth. (E.g., "UCC Section 9, Subdivision 2a," or "as set forth in the case of ___ v. ___.") They imagine this adds a lawyerlike aspect to (characteristically non-lawyerlike) analysis.

Citing sources of legal precepts (premises) is cumbersome, and generally neither required, nor expected. It is sufficient merely to (B! A!) state relevant law (premise) with reasonable accuracy. (E.g., "Battery is 1] ... 2] ...;" "Renunciation is 1] voluntary disengagement … 2] …;" "The law is that ...;" "Cases have held that ....") Move into analysis (per format).

Apart from obvious difficulty of recalling and matching case names, statute references, etc. with legal precepts, there are practical reasons citations are not (and *should not be*) normally required. First, cases

typically stand for more than one legal proposition. Therefore, unless one is prepared to cite not only case, but page (possibly footnote) on which a proposition is found (as one would in a legal brief!), such citing is hardly lawyerlike. Indeed, it is likely inaccurate.

Second, requiring source citations presumes/requires that the professor know sources of various (all) legal propositions—unlikely. Third, should one be unable to resist showing one has memorized not only law, but also sources of law, one soon encounters a dilemma. Apart from time wasted trying to recall and state sources, can this be done for every principle (premise!) set forth? You've likely embarked on a pattern that can't strictly be adhered to.

This is not to say that case names, even statute references should *never* be cited. If a professor says (inappropriately), "I want sources cited," that settles matters. (Or does it?)[2] It may be that a particular case is synonymous with a rule of law. (E.g., Marbury v. Madison; Erie v. Tompkins; Miranda warnings.) But if so, why cite it? The better practice is to avoid citing sources. B! A! Just set forth law to begin paragraphs.

Previewing a Logical Sequence for Discussion

"Logical sequence for discussion" refers to the order in which you address conflict pairs and issues/premises set forth in your exam outline. Should you proceed chronologically, or is there (sometimes) a different sequence that is more logical in terms of efficiency and impact?

The point has been made that so long as you clearly label or otherwise indicate what you're doing, generally, the order in which issues, questions, even hypos are addressed doesn't matter. Normally, a chronological sequence following one's outline is as good as any, and likely best.

Step Three should provide a sense of relative weight of premises. (I.e., major versus minor issues.) This serves as a guide respecting time you likely devote to discussion of each premise. Where premises bear no relationship to one another in terms of overlap of discussion, simply devote attention to one after the other in the sequence set forth in your (exam) outline. Sometimes, however, an opportunity for saving time and/or making a more effective presentation is offered by rearranging the sequence of discussion.

Neither the Torts nor Combination Law hypos falls into the latter category. Chronological ordering and discussion of pairings and premises seems as logical as any. The Criminal Law Hypo, however, provides an example in which rearranging the sequence of discussion produces advantages.

During planning Steps C should emerge (clearly) as the primary actor. His guilt of certain crimes—especially those associated with shooting the police officer—must be established before that of A and B can be determined. Therefore, although chronological ordering posits first addressing A's guilt, it makes sense to explore C's guilt prior to that of A or B. Consider also, for example, overlap of premises and discussion likely to occur in the context of the Torts Hypo.

In general, where there is *overlap* of premises and discussion, it is probably a good idea to start with the conflict pair containing more premises/discussion common to other conflict pairs. Naturally, if the Q/I format of the hypo establishes a sequence of discussion—e.g., numbered, specific questions—, it is probably unwise to depart from that sequence.

Impress the Professor Early (I.e., in the first 2-3 pages)

Typically, different bar essays are graded by different individuals (normally lawyers). Moreover, emphasis on the bar is more on application of accurate, up-to-date law leading to a correct conclusion. Analysis tends to be straightforward. Therefore, the following is relevant only to law school exams.

As noted, such is the mediocrity of the great majority of exam responses, that only newly-minted law professors will not come to the task of grading exams with pessimistic expectation. Moreover, pessimism is quickly confirmed. The standard of what is or is not "lawyerlike" is clear. A professor can usually tell within 2-3 pages whether an exam is in the running for an "A" grade.[3] If "lawyerlike" aspect is lacking—e.g., relevant law is absent or inaccurately stated, facts are not properly used in analysis—, a professor need merely skim the remainder of the response, tallying points using a checklist. (And grade in accord with broad C-B+ [even A-!] curve guidelines.) There will be few, if any comments.

In a very real sense, ONE HAS A 2-3 PAGE WINDOW OF OPPORTUNITY TO REMAIN IN THE RUNNING FOR A TOP GRADE!

Numerous students who've done extremely well using LEEWS[4] have told me they make a special effort

to impress in the opening pages of exam response. One said: "I try to produce something [in the first two pages] that will *intellectually engage* my professor, on an issue I know to be of interest to him. I want to start off with something I know he is going to like. I give it a little extra time."

On the other hand, early in an exam, adrenalin pumping, it is a rare student who can produce something impressive in the first page or two. Your author submits it is all that can be expected, if one can set forth a straightforward, orderly discussion of one or two premises meriting B-B+. For this reason, no matter a professor's instruction or exam format, ALWAYS LEAVE BLANK SPACE (a blank 1/2 page, if writing) AT THE VERY BEGINNING OF THE EXAM RESPONSE. Always! At least room for a paragraph that impresses.[5]

Who knows when, during several hours of crafting an exam response, the address of an issue or formulation of an argument will be so insightful, of such quality that one impresses oneself and thinks, "This will surely impress my professor!" Discipline aside, such is unlikely to occur during the nervous scramble of the first half hour. However, during two, three, four hours of exam-taking (more for take-home exams), for even students untutored in LEEWS, discussion likely emerges that surprises in focus and insight.

For one tutored in LEEWS, an "Aha!" moment likely will occur as one is nitpicking facts in the context of what begins as straightforward, mundane discourse. An example is discussion of PN's self-defense counterpremise, leading to realization of the *2nd* assault premise against DH (!!). (Perhaps a warm feeling of self-affirmation causes you to smile in self-congratulation.) Here is an issue/argument that will impress (!!). It will demonstrate you know not just relevant law, but how to play the Lawyering Game!

You'll want to make sure a professor sees this "nugget of gold" that proclaims, "Here is a lawyer!" (Or, "This is a genius of the law, possessed of The Right Stuff."); that makes a professor think, "Possible 'A' exam!" Here is where blank space at the outset finds its utility.

[Note. Such a discussion inserted at the outset is likely out of order. It is an abrupt *non sequitur*. No matter. As a courtesy (help the professor!), one might preface the inserted discussion with an introduction—e.g., "*Please* note! This discussion is out of order. It has to do with [here guide the professor]." In the era of writing exams long hand, your author advised students to bring a red marker or highlighter for purposes of such flagging. Of course, one will now employ boldface, italics, and/or change font or color.]

Toward More Lawyerlike Analysis—Imagine Each Party/Client is Real

It has been advised that if subtle, insightful arguments lurking in a fact pattern are to be discerned, practice nitpicking facts will be required. Apart from practice and having more time, an important reason practicing lawyers are better at nitpicking law and facts than law students is fear of being bested by an adversary attorney in court. The smallest oversight—a nuance or new development in the law, an aspect of testimony deep in a pile of deposition transcripts, a misplaced comma in a contract (!!)—can mean losing in court. [= grade of F!] The practicing lawyer is highly motivated to pay attention to detail.

Another reason (even mediocre) practicing lawyers attend to detail more carefully than law professors is they represent real clients—individuals [a corporation is personified in the liaison to outside counsel], who are distressed, angry, who look to their lawyer for assistance. Far beyond keenness for intellectualizing and analysis-for-the-sake-of-analysis that motivates a law professor, concern for client motivates a conscientious attorney to be exhaustive and creative in advocacy. Concern for client motivates the (good) lawyer to sweat all possibilities, legal and factual.[6]

By structuring approach to exams as practical exercises in lawyering—conflict pairs, competing parties/objectives, alternating as attorney for one side, then the other—, one goes a long way toward recognizing, exploring *all* possibilities. Should you further imagine the parties on whose behalf you search relevant (limited) facts for premises in Step Two are *real*—PN and, alternatively, DH, are *actual people* who've come to your office seeking assistance—, you progress even further in this respect.

For example, before throwing in the towel (conceding) on an element or premise, perhaps you squeeze, explore facts and reasonable inferences just a little more. Perhaps you rummage in the toolbox a bit more carefully. In so doing, you may come up with something few others see (including the professor!), that impresses and earns a higher grade. Such a (practicing lawyer) mindset is also effective in writing papers, briefs, moot court advocacy, and—soon!—interviewing a potential client.

Role play as lawyer for actual client! Thereby, you naturally adopt a lawyer perspective for *both sides* of conflict pairs, objectives, premises, arguments—objectivity! DON'T CARE WHO WINS! Play The Game!

A knowledgeable lawyer (facsimile thereof, armed with The Blender, UBE, etc.) will always best a knowledgeable law student/academic (however smart and diligent the latter). Rather easily.

Know Your Professor (E.g., does she really want policy discussion?)

After practicing and digesting the foregoing techniques, you'll be very knowledgeable respecting ins and outs of law essay exam writing. This knowledge may be for naught, however, if one is not attuned to strong preferences some professors have regarding the law, what they want discussed, and their preferred format for exam response. Some, for example, have a unique view of how a principle or element thereof should be interpreted—law according to Professor Johnson! On the exam you may want to present both analysis following standard interpretation of that principle/element, then, more favorably of course, analysis following the professor's view. Indeed, some professors will regard as intelligent nothing short of their own thinking coming back at them off the exam page. Talk to former students in this regard.

Quite often professors, not just at top-ranked law schools, but, more and more at *all* law schools, stress policy aspects of law in class, rather than black letter application. (I.e., underlying purpose[s], societal influences, social impact of law.)[7] Such discussion is comfortingly reminiscent of classroom life prior to law school. Understandably, 1Ls in particular anticipate policy discussion will be wanted in the exam response. In general, however, such will not be the case. POLICY DISCUSSION IS RARELY WANTED, particularly in large, first year, survey classes.

As previously noted, in the main even the most policy-oriented professor will give a traditional "issue spotter." (I.e., identify the issue, state the law, perform element-by-element black-letter-law analysis, move on to the next issue.) One need only apply The Blender per usual. If policy is wanted, this will be specifically instructed either in cover instructions, or respecting a particular exercise. (E.g., "Consider/explore any policy considerations.") In no more than one, possibly two of four and more hypo-type essay exercises will policy discussion be expected.

As also noted, there are two practical reasons for this. First, few students, even in third year, are skilled at element-by-element application of black letter rules to facts. Professors who have invited policy discussion on exams know this encourages even more confused, rambling (disappointing) response than is the norm.[8] Second, policy emphasis tends to result in more lengthy response. Thus, fewer issues can be discussed. More attention is needed to assess quality of response. As a consequence, (easier) checklist grading is of less benefit. More time is required to grade exams. Inviting "policy" means substantially more work for law professors, especially in large (1L) classes.

Whether or not a professor *really* wants policy discussed is something you must research—by talking to former students, by looking at a professor's old exams. [Of course, you can also ask a professor, "Do you want policy discussed on the exam?" If so, "How much?" But good luck with that.][9]

Policy discussion is, of course, never called for on bar exams. Bar examiners aren't interested in what an aspirant lawyer thinks about the law of the state, or what that law could or should be.

If policy discussion is indeed wanted, the likelihood is that *but one* of several hypos will raise issues requiring same. Consistently over three decades, students from supposed "policy-focused" schools—Yale, Harvard, Stanford, U. Chicago, Columbia, NYU, UVA, U. Michigan, etc.—have acknowledged that *at most* 1/4 to 1/3 of their exams involved policy. The seeming truism bears reiterating—*the professor who conducts the fuzzy (often interesting, fun), policy-oriented class*—in which everything but black letter law is discussed, that one need not prepare for, the one most akin to a college or grad school political science or social studies class—*often confounds by giving an exam that places a premium on knowledge of black letter rules*. It's as if in the eleventh hour, realizing he hasn't instructed substantive law, the professor must impress upon students what lawyering is all about—applying black letter precepts to facts to resolve issues.

Again, one needn't guess respecting whether policy discussion will be wanted, whether a professor wants conclusions stated before or following discussion, or cases cited, etc. Begin drawing up a list of very specific questions you want answers to prior to the exam. (E.g., Open or closed book?, any multiple choice or short answer exercises? [if yes, what portion of the exam?], roughly how many issues?)[10]

Just as a diligent lawyer researches the judge before whom she is to appear—e.g., Will brief or oral argument carry more weight?; does one sit or stand when making objections?—research professor preferences and predilections. Pay attention in class when/if the exam is discussed. Pay special attention to such prefaces as "I feel," "I think," "In my view." Don't be afraid to ask a professor about the exam.[11] Talk to former students.

You may hear, "[Professor X] hasn't given a policy question [sic] in five years," or, "He never wants to see conclusions," or, "He really likes ...," or, "Pay attention in class when she prefaces her remarks with 'it is very interesting that…'" Look at old exams the professor has given (online, on file at the library desk, in the professor's possession).[12] Apply The Blender to such exams. Perhaps you can detect issues that tend to repeat. What are questions/instructions like—open ended, narrowly focused? Because professors tend not to give much thought to specifics of the exam process ["Oh, don't worry about exams," they often say.], *former students and old exams, not professors, are the more reliable sources*.

Suggestion. Whether policy is called for or not, following the first couple discussions (paragraphs), or where it seems appropriate, add an additional, follow-up paragraph labeled, "Policy aspects," and discuss policy implications of the preceding paragraph. (E.g., opine on good or bad results, what you think about the law.) One covers the possibility of policy being wanted. If policy is not wanted, perhaps a few points are gained.

"Policy"—What is it? If a Professor (Really) Wants Policy Discussion—Where, How?

"Policy" has to do with custom, tradition, morality, especially the public good and practical aims served by and underpinning a legal construct. Another word for policy is *"rationale"*—reasoning, thinking behind a legal precept. Very simply, it is the *why* justifying a legal precept.

For example, until the 1960's it was settled law that no warranty of habitability (W of H) attached to rental property, including apartments in buildings. Tenants took the "leasehold" as found. This had been so since feudal England, where the leasehold contemplated was typically land, which could not be warranted to produce crops. As for a cottage on the land, the yeoman farmer was deemed able to fix the roof, etc. However, what of an apartment in a modern high-rise, where the tenant has no control over plumbing, heating etc.? [Here comes the policy consideration! Does the law *and its why* make sense? Does the law comport with current reality, cultural mores, public good, reasonableness? If not, perhaps it should be modified, changed altogether or done away with.] Manifestly, the landlord of a high-rise is in the best position to bear responsibility for heating, plumbing, etc. Thus, law was changed to accord with modern reality. A W of H was found to "run" with an apartment lease.[13]

Never be content to think, merely, "*What* is the law?" Query *why?*—rationale! This aids in remembering law. If the *why* makes little or no sense, perhaps policy rationale underpinnings justifying a precept have shifted and the law needs modification.

"*Policy discussion,"* then, has to do with exploring the *why*, *how, wherefore* of law. Does a rule's application and/or outcomes dictated thereby serve practical, societal aims intended? Are underlying aims themselves suspect? (E.g., does the law unfairly benefit one class of the populace?) Is modification needed to better achieve those aims? Do competing aims or unintended results enter the calculus respecting what should occur in a just, equitable universe? (The latter being the proper aim of a fair legal system.) Is a modified or new rule required? Clearly, here is grist for philosophizing, for class discussion spiraling into abstraction and fuzziness.

Students, of course, enjoy policy blah-blah. The problem is that such tenor and emphasis encourages precisely the rambling, spiraling abstraction that must be avoided in an exam response. *If* a professor wants policy on an exam—*big* if!—, how is it be incorporated into the LEEWS Science?

Incorporating Policy Into LEEWS

Recognize that POLICY IS BUT ANOTHER TOOL AVAILABLE TO A LAWYER ADVOCATING FOR A CLIENT. So long as law and its application achieves a desired result, why should a lawyer care about the *why* of that law (i.e., policy)? Should a lawyer find himself at an impasse respecting existing law and facts, however—about to lose—, perhaps argument for modification of law, for exception to the rule, for even overthrow of existing law and precedent provides an avenue to yet prevail. Such argument would likely derive from policy.

[Note. Facts are facts! They cannot normally be changed or added to in a hypothetical. However, law may be subject to challenge—via policy.]

BTW. Is a "policy *argument*" legal or factual?[14] If it seeks modification or reinterpretation (or overthrow) of law advanced by an opposing party, then policy *argument* is in effect a *legal* proposition, a counter-*premise!* (If advanced by a movant it is a premise.) If raised merely to expand context or place a certain slant on arguments, thereby having to do solely with facts (how they should be Interpreted respecting law in question), then a policy argument may indeed be but an argument, albeit with a policy aspect. (See discussion, fn. 15. [Yes. Matters can get cloudy.])

Generally, in the LEEWS scheme A POLICY ARGUMENT PRESENTS AS A PREMISE (or counter-premise, depending upon order of presentation). Should you determine policy discussion is indeed wanted by a professor (or should opportunity present to demonstrate your command of this aspect from your legal toolbox), introduce policy as *argument* by asserting it in the course of making arguments/counterarguments relating to an element or elements. (Therefore, in the body of a paragraph of analysis.)

More the norm will be introduction of policy as premise or counterpremise in its own right. Introduce a policy argument as counterpremise (or premise, if advanced by a movant) by simply stating it to begin its own paragraph of analysis. (E.g., [B! A!] "The rationale underpinning [legal precept] is…")

Whether introduction of policy (as factual or legal proposition) achieves the objective of the party asserting it or no, resulting discussion of basis/feasibility of this modification will be policy discussion.

[Note. However policy is introduced, bear in mind it is but another tool in the toolbox of a creative lawyer.[15] MAINTAIN THE CONTEXT OF COMPETING PARTIES ADVOCATING FOR COMPETING OBJECTIVES (within which policy arises).]

Example of Policy Incorporation

Recall Ms. Nicely (Ms. N) v. DH, and Ms. N's premise of IIED. Ms. N's attorney runs into the problem that DH's calculation was to distress PN, not the mother, and IIED *may not be established via transferred intent*. (If necessary, review facts and law of Torts Hypo.) In that other ways of establishing IIED exist (See model response. Better, *reason through the exercise yourself!* [arguments/counterarguments]), Ms. N's attorney likely would not challenge this bar to third-party IIED claimants. However, what if no other option existed? What if IIED in this instance could only be established via transferred intent? The aspect barring transferred intent for IIED would have to be challenged. To do so one would look to the *why*—policy underpinning—of the rule.

[Think about the rationale—the *why*—for barring use of transferred intent to establish IIED before continuing. Why is it that third parties, possibly equally distressed by an act, cannot sue for IIED?]

The rationale for disallowing third-party IIED suits is the eminently practical consideration of too many lawsuits likely resulting. ("Open floodgates" *policy* concern.) This rationale might seem impervious to challenge. However, could one not argue for an exception, a narrow, expanded application of the tort that would not open the floodgate? Might one argue that DH's particular conduct (flashing on someone's doorstep) is so egregious as to be deserving of punishment, irrespective of victim, that Ms. N is closely related to the intended victim, that it occurred where a relative might be anticipated, that it was a one-on-one encounter, all of which warranted an exception; that such additional requirements (elements needing establishment) would reduce likelihood of unwarranted third-party lawsuits to near zero?

From similar reasoning was born [in South Carolina, 1986] the tort of *negligent* infliction of emotional distress.[16] Out of such policy balancing—deterrence and punishment of unseemly, harmful behavior versus floodgate concern—was presumably born the IIED exception for "reckless, shocking or extreme, and outrageous" conduct. (Finding of IIED is permitted absent intent toward specific victim.)

[Note. *The reason students (typically) have difficulty following policy discussion in class is not knowing relevant black letter law—cold!* Only if one knows what the law *is* (and how to apply it), can one think with profit about what law could or should be (!!). Policy emphasis of many professors misleads students into thinking black letter rules are unimportant. A LEEWS grad knows better.]

As exercises in policy reasoning, think about why the degree of murder is higher for killing a policeman or prison guard than for killing an ordinary citizen (discussed in model response). Why are "excited utter-

ance," "dying declaration," "admission against interest," and "business records" exceptions to the hearsay rule?[17] What is the rationale for their admittance in evidence?

[Note. *If* policy is (indeed) wanted, and you have difficulty working it into discussion as either argument or premise (or counter thereof), as suggested previously in the chapter, simply add, following standard analysis, a postscript paragraph entitled, "Policy considerations." Here (in a paragraph or so) you can provide larger thinking about the law and results of your analysis—i.e., critique the outcome of your (black letter, element-by-element UBE) analysis respecting larger societal implications, discuss whether it seems good law or bad, a good result or no, rationale underpinnings, etc. Such should satisfy a professor's academic (non-lawyer!) inclinations.]

SECTION TWO, CHAPTER 13 FOOTNOTES

[1] At the same time, **a conservative start *is* recommended.** As presently will be instructed ("Impress the Professor Early"), you should proceed somewhat conservatively in the first 2-3 paragraphs—set forth complete law, present complete analysis. You want to overcome any negative presumption a professor may have when initially viewing the response. Demonstrate immediately you know how to state *complete* law, and you are aware of non-(real)-issue elements (that in later paragraphs [when presumption is in your favor] may not only *not* be addressed, but may even not be mentioned).

[2] Given that **grading is anonymous,** perhaps you can do the class and yourself a favor by using the foregoing rationale to dissuade such a professor. (Here is also another opportunity to get to know the professor personally.) Naturally, you will research a professor's view prior to the exam.

[3] **The first 2-3 pages.** As noted in Chapter 12 previous (fn. 15), **some professors have admitted they "only read the first three pages."** Quite a few years ago the then LEEWS rep at University of Southern California School of Law tested such a pronouncement made openly by a (high profile, former presidential campaign chair) professor. As he was first in his class and had already secured a prestigious federal clerkship following graduation, he had little to lose. He polished the first three pages, gave short shrift to the remainder. Sure enough, he received one of the few A's awarded. (It may be noted that this rep took LEEWS as a 1L.)

The lesson imparted by such a practice (which but accords with students being relatively clueless re "lawyerlike" and what they are doing), is that a professor can quickly judge whether something approaching "lawyer knowledgeable in my subject" is coming off the page. If not, an "A" is out of the question. (Presumably, B-B+'s are awarded to the also-rans, and lower.) The paucity of solid A's awarded offers proof that "lawyerly or no" is clearly discernable. Moreover, respecting the instant example, that few A's would be anticipated and awarded even in an upper-level class, given the intelligence and likely diligence of USC law students, reinforces the point that law school instruction enables even few upperclassmen to make the critical transition from academic thinker/learner to the lawyerly sort professors laud and award A's to.

[4] **Evidence of LEEWS success, transferring law schools.** Over the years so many LEEWS grads have come to your author's attention who achieved straight-A's and ranked at the top of their class, that such a result is basically "ho-hum." In the initial year of LEEWS existence (1981!), when research revealed 8 from UCLA were found to have made law review, and a bunch from Harvard, we basically stopped researching. What we learn is mostly accidental, usually while recruiting reps, and when "grads" get back to us. (E.g., one year over half the members of LR at Wash U in St. Louis, incl. the ed-in-chief, had taken LEEWS as 1Ls, and 1/3 of members of LR at Duke.) Examples come to mind from Harvard, Stanford (incl. an ed-in-chief of the LR), Columbia (incl. another ed-in-chief), Boalt, U. Penn., U. Michigan, Northwestern, NYU, UVA, Duke, U. Texas, Georgetown, Boston U., USC, Washington U., UNC, U. Minnesota, U. Miami, GWU, U. Florida (three ed-in-chiefs of the LR!), U. of the Pacific (McGeorge), U. Connecticut, Villanova, U. Colorado, U., Wake Forest, Missouri–KC, U. Arkansas–Little Rock, Mercer, U. Cincinnati, St. Louis U., Chicago-Kent, Brooklyn Law, New York Law, Nova-Southeastern, Pace U., Hofstra, Benjamin Cardozo, Ohio Northern, Lewis & Clark, and Oklahoma City U. (one of whom transferred to OU Law). Many years ago 5 of 8 from the University of Bridgeport (now Quinnipiac) School of Law who took LEEWS in their 2nd semester finished the year 1,2,3,5,and 6 in their class! They then transferred to higher ranking schools. 4 of 5 from U. Tulsa Law who attended a live program years ago transferred to Georgetown Law following first year. (The fifth, who stayed, made LR.) Ditto 5 one year from Hofstra. [Georgetown has 2,000 students and accepts a large transfer 2L group.] **Alternative to transferring**. If you get high grades, casually mention *thinking* about transferring (to professors/administrators). Ask about the possibility of scholarship aid. (First important negotiation exercise!) Schools don't want to lose their stars. (A recent LEEWS grad at Northwestern received a 45K scholarship second year.)

[5] **Blank space at the outset.** Obviously, when word processing one can easily open space, move paragraphs around, etc. However, literally leave blank space nonetheless, if only a few lines. Blank space at the outset serves as a reminder when one reviews the response to possibly insert a gem discovered later.

[6] **Creative legal thought and change in the law—lawyer v. law professor.** It may be noted that apart from legislation born of societal events and citizen efforts*, the lion's share of change in existing law, the truly creative uses and interpretations of law derive* not *from intellectual (academic) musings of law professors in countless, mostly unread scholarly articles. Rather, it stems from practicing lawyers seeking advantage and solutions for clients.* (E.g., Brown v. Board of Education; Miranda; Roe v. Wade; Citizens United; etc.) Lawyers often consult with professors in areas of concern (and scientists and sociologists and others who may assist). However, impetus for innovative angles, perspectives, creative use of law and fact, derives in the main from near 24/7 involvement (weeks, months, years!) with clients'

cases, objectives, problems, need—sweating details, possibilities. Lest someone point to The Innocence Project, originated at Benjamin Cardozo Law School in New York City, now spread to other locations (using DNA testing to free innocent prisoners), it may be noted that founders and prime engines of this worthy, creative endeavor—Barry Scheck, Peter Neufeld—, were practicing lawyers before affiliating with a law school [Scheck is a Cardozo professor], and continue to be practicing lawyers.

[7] **Increasing policy emphasis in law schools/classrooms.** This chapter will explore "policy"—what it entails, whether professors really want it on exams, and, if wanted, how to incorporate it applying LEEWS. It was once the case that "policy" was the province only of the top echelon of law schools. Yale (your author's *alma mater*) remains the leader in this regard, recently introducing the first PhD degree in law, and heavily promoting "cross-disciplinary" legal education. [E.g., following first year ABA-required subjects, Yale students can get credit for courses at the schools of forestry and public health.] "Critical legal studies," wherein arguably blameworthy underpinnings of law are exposed and examined, roiled the Harvard law faculty some years ago. Owing to "reputation for scholarship" being a factor in influential (for recruiting students) *US News* law school rankings, so-called "policy emphasis" is now evident in almost all (American) law school classrooms. (In live LEEWS programs in recent years when the question was posed, "Whose professors are into policy," almost all hands would go up. This was a sea change from previous decades.) Nevertheless, for reasons set forth in the main text, little, if any, policy discussion will be wanted on law school exams. This is especially so in large first year classes.

[8] It has been noted that one year professors at Emory Law School (Atlanta) reportedly termed policy discussion "a license to BS."

[9] A professor is unlikely to want to be pinned down on this. He/she will likely fob you off with something on the order of, "Well, you should be prepared to discuss whatever you think is needed to fully resolve issues (smile)." [Query: Is someone who has been emphasizing policy in class going to admit there will be little, possibly no policy discussion wanted on the final exam?]

[10] **Number of issues on an exam.** Knowing roughly how many issues can be expected on an exam is useful. A lot—20, 30, 40 (your author has heard of exams with "200 or more possible issues")—suggests less in-depth analysis wanted (and no policy!). Few issues—ten, fewer?—suggests the reverse. As noted, a professor is likely to be non-committal in this regard. However, one might badger a bit to get a ballpark idea. (Cross examine the professor?) Old exams, model responses, and former students provide useful indications.

[11] **Professor advice re exams.** Law professors are not accustomed to specific questions that require them to commit definitively. However, do not be fobbed off with such generalities as, "Just learn the law and follow IRAC. You'll be okay." Pin the professor down, even at the risk of being a nuisance (within reason). Very likely, a professor will advise that she will make a general announcement re such matters to the class (in order to be fair) and "at an appropriate time" (close to exams). Remember that grading is anonymous.

[12] **Old exams of new, unknown professors.** If a professor is new or just visiting, and cannot (or will not) provide sample previous exams, contact students and/or the librarian at his/her former school. Do a Google and/or Lexis Nexus search. Certainly, read any law review articles this professor has written. The internet and computerized legal research tools make this fairly easy.

[13] Green v. Superior Court, 10 Cal. 3d 616.

[14] **Policy *argument*—legal or factual?** A policy *argument* can be both legal *and* factual as it relates to LEEWS (and analysis). First, it comes into play only *after* analysis of law and fact (in straightforward, common sense fashion) proves unavailing for one side or other to a conflict. If employed in determining how a (factual) argument relating to an element of a premise should be resolved, then a policy argument may indeed be factual in import (as part of argument or counterargument). For example, as a matter of public policy, law generally eschews violent behavior. One may only (justifiably) be violent in response to violence, even then only in reasonable proportion. Whether DH kissing PN rises to a level of violence sufficient to justify force employed by PN in arguing self-defense (force sufficient to bloody DH's nose) falls within this policy context. Policy may be used by DH's attorney to argue bloodying a nose was excessive force. Which PN's attorney would surely counter by using the facts of possibly alone in the meadow and possibly fear engendered by the kiss to argue that in the circumstances a kiss could be considered violent, a possible prelude to the violence of rape, thereby justifying even more force. (Students in classes of one Catherine McKinnon, professor at U. Michigan Law, much-cited feminist legal thinker/author [and classmate of your author], would surely want to incorporate this theme in analysis.) Policy argument here enhances and is part of factual *argument.*

In the instance of warranty of habitability discussed in the text, the policy argument of who best bears responsibility for plumbing, heat, etc. in a modern high-rise building is raised as a counter to existing law itself, prompting for change, even complete overthrow of the existing rule (thereby creating *new law!*). It prompts (B! A!) a *new* paragraph of analysis, and therefore amounts to a counter*premise.*

Yes. This begins to get deep. However, such [policy thrust] is a highly creative avenue for achieving results in law practice. (E.g., discovering a "penumbra of privacy" in the 5th, 9th, 14th Amendments to the Constitution. See Griswold v. Connecticut, 381 U.S. 479 [1965]) The student who can negotiate black letter, element-by-element, back and forth, *and* in addition weave policy into the discussion as relevant, useful argument and/or premise ("as a lawyer") will indeed impress and garner a top grade.

[15] Judges tend to be conservative respecting disturbing existing law and precedent based upon that law (*stare decisis*). Persuading a judge to modify or overturn law and precedent based upon policy (e.g., using sociological studies to overturn "separate but equal" [southern schooling] in Brown v. Board of Ed.)—whether as factual or legal gambit—is one of the most creative things a lawyer can do.

[16] Kinard v. Augusta Sash, 336 SE 2d 465.

[17] Which excludes [as unreliable] statements of an out-of-court declarant sought to be admitted for their truth.

CHAPTER FOURTEEN

PREPARING FOR THE (LAW SCHOOL) EXAM[1]

If you've grasped that *the essential objective on exams is identifying and analyzing premises (and presenting that analysis in concise paragraphs),* it should be apparent that successful preparation for *any* exam entails 1) gathering premises that may be relevant on the exam, 2) knowing them well and how to apply them, 3) organizing them in an outline for speedy reference. (And *mastering* LEEWS!)

No longer should one experience bewilderment of purpose and misdirection of energy and effort, as term progresses and a mountainous volume of law cascades from casebooks, articles, class discussion in several courses. Premises have been termed "tools," course outlines "toolboxes." As described previously, one's task is to 1) (day-by-day in preparation for each course) fashion law encountered into tools and begin to master use of those tools, 2) (weekly) synthesize tools into a well-organized toolbox for speedy reference, 3) (periodically throughout the term, especially in days leading up to exams) write practice paragraphs of analysis, practice The Blender, test utility of toolboxes on old exams.

Practice paragraphs of analysis instruct that not only must one know rules, principles, statutes, but one must know *elements* thereof. (And if need be, elements of elements—sub-elements.) You must know, for example, what constitutes "breaking," also "entering," respecting the "breaking and entering" element of burglary.[2] You must know the liability difference between "general" and "limited" partners. Such concepts as "strict scrutiny," "limited review," "transitory action" (p. 156), "holder in due course" must not only ring a bell, but translate into specific definitions and tests, divisible into elements and sub-elements. (Thereby making them capable of application to facts.) This presupposes very precise knowledge of law.

The question then arises, "How can one know law with such precision?" [Partial answer—*not* by memorizing, memorizing… E.g., with flash cards.] The answer is use the law! Get to know it (and recall it) by using it! As a carpenter knows tools intimately via *use*—their feel, heft—, so, REQUISITE PRECISE KNOWLEDGE OF LAW COMES ONLY FROM USE. You must practice applying legal precepts to facts... in every assigned case!

Cases assigned in courses are akin to blocks of wood a carpenter might address with a chisel (thereby becoming adept with that tool's use).[3] MOST LAW LIKELY TO BE RELEVANT ON EXAMS DERIVES FROM CASES. You become familiar with this law—how to use/apply it—by applying it *in the very cases in which it is found*. In so doing you get to know law intimately and recall it. You gain skill at precisely the nitpicking, element-by-element, "lawyerlike" analysis all professors want to see.

Finding/Mastering Law via (Proper) Preparation of Cases

Imagine the following case—*Used Auto Sale* (UAS)—has been assigned in first term Contracts: (Party) A offers jalopy (old car) to B for $2,500. B expresses interest, doesn't get back to A for two weeks, whereupon he tenders (offers) $2,500. A, meantime, has discovered online that others will pay $5,000 for the car as is. She informs B, "Sorry. You waited too long. The price is now $3,500. Still a good deal!" B insists on $2,500 to no avail. B sues in small claims court for specific performance. Court [judge/magistrate] decides the issue is whether A's $2,500 offer is valid two weeks later, or has lapsed. Rule to be applied is that offers lapse after a reasonable period of time. Two weeks held to be reasonable for $2,500 offer to stay open. Judgment for B.

[Note. UAS is an abbreviated, simple case. Normal assigned cases will be longer, more complex. UAS is representative, however. Lessons and approaches respecting UAS will apply to *all* cases!]

What may be termed "*conventional [case] brief*" (CB) is instructed at *all* law schools, by nearly all professors, and by virtually all study/exam-writing aids apart from LEEWS.[4] CBs require that students summarize facts, issue, rule (of law), holding (outcome), and rationale (the *why*) of assigned cases. Some professors in addition want "procedure" included in a CB, especially early on first term. (E.g., "How did the case come to occupy this posture [on appeal]?")

[Note. Almost without exception, cases assigned in law school are "appellate," meaning appeal has been taken from a lower court judgment. "Procedure" is the path whence a case arrives at the posture in which encountered. (E.g., "on appeal from judgment of X Superior Court.") Unless a course title contains "procedure"—"Civil Procedure," "Criminal Proce-

dure"—procedural aspects of cases have *zero* relevance to exams!]

A CB of UAS would be as follows:

> FACTS—A offers car to B for $2,500, wants $3,500 two weeks later. ISSUE—Is the $2,500 offer valid two weeks later? RULE—Offers lapse after a reasonable period of time. HOLDING—Two weeks reasonable for offer to remain valid. Judgment for B. RATIONALE (reasoning)—B should have a reasonable time to think things over. Two weeks isn't long respecting an auto purchase. PROCEDURE—First impression lawsuit in small claims court.

[Note. This is a fairly complete CB. If called upon in class to respond respecting UAS, one would feel "prepared." However, it is not enough in terms of properly preparing a case and preparing for (all-important) final exams. It's *not nearly* enough!]

Here is extreme irony. AS MUCH WORK AS PREPARING A CONVENTIONAL BRIEF ENTAILS, IT IS NOT ENOUGH RESPECTING PREPARATION FOR THE FINAL EXAM. Not near enough!

However, back up a moment. It has been advised that cases are sources of law (premises!) one is likely to be responsible for on exams. Mindful of the importance of exams (not class participation) and the importance of gathering and mastering premises, the [per usual unique, innovative, revolutionary] LEEWS approach is to FLIP NORMAL "BRIEF THE CASE" FOCUS TO FIRST (FOREMOST) SEEK LAW INTRODUCED IN THE CASE! Thus, respecting UAS, immediately upon opening the [contracts] casebook to UAS (or any case!) your initial, *only* thought is, *"What law is introduced by this case? Where is it?"*

Thus, *skim* the entire case *solely* to find law, to pinpoint any/all legal precepts—rules, statutes, parts thereof introduced! You seek all law that might be relevant on an exam weeks, possibly months distant.

[Exercise: Do this for UAS before continuing. What law is introduced?]

There are *two* potentially relevant legal precepts—"specific performance," also "offer lapses after reasonable period of time." This is the only information wanted in a first (skim!) read of the case. No reading/studying facts! Issue, holding, rationale, procedure is irrelevant at this juncture. Just *single-minded focus on finding law!* (I.e., *Elephant* here is law. [Remember elephant?]) The same discipline applied to addressing exams here also comes into play.

Next, temporarily leave the case altogether. Look up law you've pinpointed in the case in your commercial outline (CO). [You should have a CO for *every* course (in addition to casebook, etc.). Correct—the very CO law professors sometimes (often!) caution students not to get. Get one! ASAP if in school.][5]

[Note. UAS has to do with contracts law. Given the (two) legal precepts found, what sections of a contracts CO seem relevant? (If you haven't started law school, you likely have no idea. However, you would survey the table of contents for what seems *colorable*. Here you would likely turn to sections having to do with performance element of contract, also offer and acceptance.)]

CASES CANNOT BE SOLE SOURCES OF (BLACK, LETTER) LAW! Appellate cases in particular often present but parts of legal precepts relevant to resolving issues in the case. (E.g., UAS posits only portions of the larger contract precepts—performance of contracts, offer and acceptance. [Themselves elements of contract overall.]) One's purpose in (immediately) referring to a CO is to view the law discovered in its larger context. (I.e., see complete rule/statute/etc. fleshed out.)

Having located and focusing on larger CO context, think about the law! Notice elements, sub-elements of larger precept(s) [related to law found in the case]. (When you return to the case, you'll notice what parts/elements, if any, are missing in the case.) Think about *why* such law exists, whether it makes sense (rationale). Familiarize yourself with the *complete* law. Query whether/how law from the case is corollary to larger precepts? (E.g., "lapse of offer" as sub-category of "offer," itself a sub-category—element—of "contract".) At this juncture (of addressing a case) FOCUS IS STRICTLY/SOLELY ON LAW FOUND IN THE CASE IN ITS LARGER CONTEXT.

[Note. More on construction, use of the CO is explored later in the chapter.]

Returning to the case (still disregarding CB aspects!), focus on how the (now better understood) precept(s)—tool(s)—were applied. Are any elements missing? Which are contested? [As suggested, uncontested aspects of legal precepts often are not mentioned in cases on appeal when guiding rules and statutes are set forth.] What facts were pivotal in making arguments for and against establishment of (contested) element(s)? What facts/arguments

were persuasive to the majority? Did a dissenting or concurring judge see things differently? (How, why, with what result?) ONE'S FOCUS IS *NOT* ON FACTS, *per se* (e.g., memorization for a CB or in the event one is called on in class to "give the facts of UAS."), nor issue, holding, etc., but on *how relevant law was applied in arriving at the outcome*.

[Note. What you are doing at this point is making use of the assigned case as grist for practice *using* your new tools! (Much as a carpenter would practice on a block of wood with a chisel.) In this way you gain familiarity with the tools—their individual elements. *The only writing to this point is notes relating to law found in the case and (possibly) related law in the CO!* All else is mental—*thinking!*]

When you feel you have a handle on the law, how it was applied in the case—E.g., respecting UAS you've thought about the meaning of "specific performance," where it fits in the overall scheme of performance of contracts, how "offers lapse after a reasonable period of time" is a sub-element of "offer and acceptance," itself an element of contract overall, and how these two precepts were applied in UAS—, the case [UAS and any other case] is not properly prepared until *three additional tasks* are performed.

First, having performed the thinking just described *(for any case!),* which should bring you to an understanding of the result arrived at (e.g., judgment for B in UAS), think about, ask *why?* *Why* was two weeks adjudged reasonable for the offer of $2,500 to remain valid? Apply common sense and life experience. (E.g., time to raise $2,500; time to consider such additional costs as insurance, garaging; time to comparison shop, bring in a mechanic, etc.)

Second, alter facts (to enhance practice with and use of new tools). Meaning, if certain facts were changed, how might the outcome be altered? E.g., when might *less than two weeks* be reasonable for an offer to stay open? What if the item offered in UAS was something simpler—a whiteboard marker, say, or used toy or clothing item?… For a far lesser amount—50 cents, several dollars? What then would be a reasonable time for the offer to stay open? (Minutes, an hour?)… What if the item offered were more complex—a house, for instance, or a business? For a far greater sum of money? What then might be a *reasonable* time for an offer to stay open? (A month, several months?) Such changes in facts that may alter a case outcome are called "*what-ifs.*"

In this way (posing what-ifs) you focus on, become conversant with the key precept—"*reasonable* period of time." (E.g., what is *reasonable?*) Imprint precepts in memory via *use*. Prepare for the task on exams—application of legal tools to new, different facts.

[Note. *(Precise) facts of assigned cases*—e.g., two-week auto sale—*are unlikely ever to be seen again!* Apart from in class, the instruction, "give me the facts of [assigned case]" will never be given. What-ifs "liberate" understanding of and ability to apply tools introduced by cases. For example, what if a used bicycle is offered at a yard sale for $75, someone offers $75 but doesn't have the cash, comes back hours later and tenders the $75, the price has been raised to $100, or the bicycle was sold to another? (Similar to Combination Law Hypo scenario.) What result?][6]

YOU MUST NOT MARRY COMPREHENSION OF LAW TO FACTS WHEREIN ENCOUNTERED! GRASP/UNDERSTANDING OF LEGAL TOOLS MUST BE SUCH AS TO BE ABLE TO APPLY TOOLS TO *NEW* FACTS (as will be encountered in an exam hypo).

Third [Fifth task overall!], having [*first* task] located (in the case) and (using CO) become familiar with legal tools, having [*second*] thought about their application in the case, having [*third*] posed the question *why?* (respecting understanding the decision), having [*fourth*] altered facts (created what-ifs) for additional practice and to free understanding and use of tools from specific facts of the case, [*fifth*] step back and mull the case overall. E.g., establishment/disestablishment of which element(s) [of controlling legal precept(s)] was persuasive to the judge or majority [of judges] in the determination (ruling)? [Note. (Appellate) cases one reads in law school are often decided by a panel of judges.] If there was dissent or concurrence, *why*? What elements or facts were interpreted differently and/or deemed more persuasive? What change in facts might persuade the dissent to go with the majority, and vice-versa?

At this point [part and parcel of remaining (*third*-actually-fifth!) task described above] consider and think about so-called "food for thought" questions (typically posed by the casebook author at the end of cases).

[Note. Apart from jotting down notes respecting law

(tools) discovered in a case, your preparation of the case—the various steps of approach set forth—has consisted largely of *thinking exercises!*]

We shall see that one now goes to class with (in depth) understanding of cases that not only enables confident, competent response if called upon to "Tell us about the case of [UAS, etc.]," but ability to respond confidently, competently to such questions as, "What do you suppose the thinking is underlying this particular ruling?", "What if facts of this case were changed as follows,…?" [What-ifs posed by the professor.]

Moreover—most important!—, YOU'LL BRING INTO CLASS 2-4 LINE (EXAM-FOCUSED) CASE BRIEFS, AND TAKE NO MORE THAN 1/2 TO ONE PAGE OF NOTES PER CLASS HOUR!, which you will incorporate weekly into your 30—50 page (total!) toolbox (i.e., course outline). Clueless classmates, meanwhile, typically take 3-4 pages of notes per class hour. (Because they can't understand and follow what is going on. They think, "I'll make sense of this later." However, there is no *later* in law school! Information keeps coming; class notes [first term in particular] soar into the hundreds [for each course!], and in the end are cold, and there is no time to wade through them. [They're useless! A reflection of old habits and lack of grasp of the game afoot. A busywork waste of time!])

[Note. NEVER GO TO CLASS EXPECTING TO HAVE LAW EXPLAINED! A mistake first-term 1Ls make (almost universally) is thinking the professor is going to set forth and clarify black letter law. They almost never do! Law professors do not regard instructing rules to be their role. "This is not a bar review course," is a sentiment heard. The dismissive assumption seems to be, "anyone can memorize legal rules." If you do not already have the kind of understanding suggested—complete, relevant legal tools clearly in mind, which tools are known (relatively) intimately via (mental) use, practice in application—, then you'll be lost or playing catchup during class discussion. Therefore, if, after researching it in a CO, law in a case is unclear, look up the precept in a "hornbook."][7]

The (Exam-Focused) 2-4 Line Alternative to CBs and "Book Briefs"

Respecting the conventional case brief (CB), advocated and instructed almost without exception by law school administrators, professors, other study aids, sundry "experts," LEEWS' reaction is simple, unequivocal—unproductive, superficial busywork, emblematic of ineffective case method instruction!

If one grasps that extracting law (from cases) that may be relevant on the final exam, knowing it intimately, and knowing how to apply it (to new facts) is the paramount objective (vs. the shallow, non-lawyering exercise contemplated by CBs), then the very different approach described in the foregoing segment not only makes sense, but is imperative. It also makes possible a far more condensed case brief, that not only enables more-than-competent class performance and (as we shall see) getting more from class discussion, but points directly toward the only thing that counts in law school—the final exam! This brief will be no more than *2-4 lines!* It is another unique, revolutionary, proven-effective aspect of the LEEWS science. It also reflects (and requires) acquisition of skills that likely still need practicing.

[Note. Although much is mental (*thinking*), the (5-step?) approach described in the foregoing segment is admittedly somewhat *more* work prior to class. However, it is necessary work. Moreover, as just suggested (somewhat a catch-22), it is possible *only* if one possesses analytic skill and perspective implicit in a grounding in LEEWS.]

The approach described pays the immediate dividend of enabling one to get *much more* out of class, while taking far fewer notes. Indeed, your 2-4 line case brief will reflect far greater understanding and information than page-long (and more) CBs of first term classmates (often carefully typed). (Which briefs will be abandoned as cumbersome and too time-consuming several weeks into law school in favor of the expedient of "book briefs.")

[Note. "Book briefing" means, simply, highlighting CB aspects of cases in the casebook itself—e.g., yellow for facts, green for holding—, augmented by notes in margins. Suspend from the ceiling of a law school classroom, and one looks down on a rainbow of color in opened casebooks. (See also fn. 4.)]

How is a 2-4 line brief possible? Mention "2-4 line case brief" to any not versed in LEEWS and reaction is dismissive. "Not possible!", "gim-

mick!" many might say. However, think about this a moment. A practicing lawyer, focused on what can assist a client, can digest a case, reflect this in just a few notes, and easily describe CB aspects of the case! If you've focused on and thought about *just* the law introduced in a case, then thought about its application, its elements, use of facts in argument and counterargument, asked *why* re the outcome, altered facts to create what-ifs, thought about why a judge concurred or dissented, and how changes in facts or law might cause that judge to join the majority, won't facts, issue(s), holding, law (in spades!), rationale, procedure (if such is wanted) *be in your head as a byproduct* of such preparation?! (Associative learning and memorization!) How much needs to be recorded on paper?

Inevitably, as byproduct of the described (proper!) preparation of a case, virtually *all CB information is in your head!* All that need be reflected on paper is a few words—ten words or less?—to trigger recall of what is in your head. In addition, law (premises!) that may be relevant on the exam must be noted. (And *all will be transferred to the growing course outline at week's end.)* Thus, the following 2-4 line (exam-focused) brief of UAS:

> [UAS, p.__] Offers lapse after reasonable period of time. Specific performance is [definition]. Two weeks reasonable for 'jalopy' offered at $2,500. *[Eight word memory trigger!]*

That's it!—complete brief! And it reflects far more understanding and grasp of law and facts than the UAS conventional brief (CB).

[Note. It may well be that more set forth in a brief would enable smoother response if called upon to "give the facts of (UAS)." However, the point has been made that class participation is generally a non-factor in grading. You will surely not be "unprepared." If a half grade point may be gained for contribution to class discussion, it will not come from reciting facts of cases, but from insightful comments and participation in discussion, which you will be well-poised to offer. Note also that in addition to abbreviated name of the case is the page on which it is found. (In case you need to refer back to it.)]

[Note. Briefs and class notes will, of course, be set forth in computer or handwritten. If the latter (far more manageable given 2-4 line briefs and far fewer class notes), suggestion: acquire a notepad with margin 1/3 across the page. (Or simply put a margin 1/3 across.) Put briefs in the left margin, class notes opposite. As briefs and class notes will be "*synthesized*" into course outlines (an ongoing [weekly!] process described presently), ONE SHOULD HAVE FEW OR NO CLASS NOTES AT TERM'S END!]

Precisely! Having incorporated briefs and class notes into the growing course outline [toolbox], literally delete and/or throw briefs and class notes into the trash—weekly!)

Is such—2-4 line briefs—possible for all cases? As noted, far more work in the form of researching and thinking about law is implied than the (non-lawyerly) effort required to produce a CB. However, it is only work that *should* be done. Moreover, the benefit on the back end in terms of abbreviated, but more effective briefs, fewer notes in class (as will presently be described), and construction of more concise, effective course outlines (also explored presently) is enormous! So, Yes!—2-4 LINE CASE BRIEFS ARE POSSIBLE FOR ALL ASSIGNED CASES!

Taking Far Fewer Class Notes (Reflecting Proper Class Preparation)

Having performed what is necessary to produce 2-4 line briefs, ONE'S PERSPECTIVE COMING TO CLASS SHOULD BE, "HAVE I GOT IT RIGHT (RESPECTING LAW)? IS THERE ANYTHING I MISSED?" (I.e., *new*.) And, of course, what is my professor's take on things? What is she interested in? [Know the professor!] Most important, *what is likely to be on the final exam?!*

[Note. Relationship of class content and focus to all-important final exams (therefore grades) will vary. *(Relationship of class to exam is something to ascertain in researching a professor.)* What is discussed in class is sometimes relevant, sometimes not, sometimes even misleading. Most discussion falls somewhere in between. What is near certain is that in the best of classes there is considerable wasted motion—blah-blah that can be ignored. (E.g., pontificating by "gunners," show-offs, know-nothings.) There is probably *at most 15-20 minutes of useful discussion in a 50 minute class* (!!). How can one zero in on the critical 15-20 minutes? What does one want to take away from discussion? (The answer to the former is to *be properly prepared going into class*. [Mission now accomplished!] The answer to the latter is con-

firmation you have gathered relevant [legal] tools and understand how to use them. Also, as suggested above, insight into what the professor is interested in.)]

[Note. It is an unfortunate, but typical circumstance that law professors are hired more for scholastic/publishing potential than teaching ability.[8] It is the case that some law students do well despite not attending certain classes. Rather than be confused by abysmal instruction,[9] one may be better off working at home with a commercial outline. (Some professors give the same lecture year after year. A good set of notes may be available.[10] Former students will be the best source of advice in this regard.)]

A student grounded in LEEWS—you!—, who has prepared for class as described, should easily be able to follow the train of class discussion. Responses by classmates should largely confirm *thinking one has already done*. At most, they add in small measure to one's grasp of law and how to apply it. (A question by a classmate may suggest a new line of thought. Perhaps you note the question down.) What-ifs posed by the professor (in effect mini-hypos, thought [erroneously] to instruct "lawyerlike thinking") can now be followed, understood, appreciated! (Anything added you may want to note? Did you miss an insight or argument?) *You shouldn't have to write down professor what-ifs!* Rather, merely think through them. (They should reinforce grasp of law and how to apply it, provide insight into the professor's thinking, interests.) Naturally, additions to and/or adjustments in the law, policy considerations and aspects given emphasis by the professor, the mention of an "interesting" law review article, etc. may be fit items to note.

This contrasts with classmates, who, unskilled at "analyzing as lawyers," ignorant of specifics of law [and larger context], much less how to apply law, will stare quizzically when what-ifs are posed, then type/scribble the what-if, succeeding discussion, etc., racking up copious notes! The aim is *not* to scribble all and sundry down. MORE THINKING, LESS SCRIBBLING!

ALWAYS STUDY THE PROFESSOR! Think! Reflect! Keep uppermost the perspective—*what is likely to be on the final exam?* Smile (with self-satisfaction?), perhaps nod when knowledge and thinking is confirmed. Occasionally take notes, but very few![11]

COPIUS NOTE-TAKING REFLECTS INADEQUATE PREPARATION *PRIOR* TO CLASS, AND CONSEQUENT CONFUSION DURING CLASS.

It has been suggested that note-taking be reduced to *1/2 to (at most) one page of notes per class hour*. Such dramatic reduction in note-taking is regularly confirmed by LEEWS grads.

[As noted, there is no *later* in law school respecting making sense of what transpires in class. Notes for most first-term 1Ls accumulate to hundreds of pages for each course, become stale, in the end must be set aside (as it is realized that limited time before exams must be spent cramming poorly grasped legal precepts into hastily compiled [(extensive] course outlines). Meantime, "book briefs" (a/k/a "rainbow briefs"), presumed to be (even touted as) an efficient alternative after 2-3 weeks attempting lengthy CBs, ultimately prove inefficient. Students realize (while compiling course outlines) they have to go back to each case to find relevant law!]

GET WHAT IS NEEDED FROM CASES THE FIRST TIME! Get complete (black letter) law (fleshed out with the help of a CO), master/memorize law via practice applying it *mentally* (to the case in which it is encountered, to one's own what-ifs, to professor what-ifs during class), tuck it (weekly) into appropriate categories of your growing course outline. "Synthesize" the 2-3 pages [at most!] of [2-4 line] briefs and class notes accumulated for the [entire] week in a course into the growing outline for that course. More succinctly, as noted, at the end of each week literally *toss all class notes in the trash!*—gone! Forever! No longer needed!)

[Note. Instruction on compilation of 30-50 page course outlines follows. Suffice, ideally, that you *come to the end of term with no class notes!*—nada! *All that may be relevant on the final exam is in your head (!!), and/or has been synthesized into a 30-50 page outline for each course*. (Organized topically into categories and sub-categories of [reasonably well grasped] premises.) Time between final class and the exam is spent (ideally) practicing The Blender on old exams in the subject to be tested, testing utility of the course outline (toolbox) in Step Two—Does it enable you to efficiently identify/throw down premises?!—, fine-tuning the outline. Perhaps at this time compare outlines with those of classmates. Anything missing? Does someone have a better topical,

categorical scheme? However, YOU MUST COMPILE YOUR OWN OUTLINE![12] Also, resist the urge to tutor classmates re aspects of LEEWS! (Too much effort! Too much to convey!)]

Hornbooks, Restatements

See footnote 7.

Role of Commercial Outlines

Professors typically advise against use of commercial outlines—e.g., *Gilbert's, Emanuels, Legal Lines, Glannon, Sum and Substance,* etc. (on Contracts, Torts, Evidence, Agency, Bankruptcy, etc.). In general, they discourage use of *all* study aids. Yet, should one visit a professor's office, one would likely see a CO on the bookshelf. They admonish against use of such outlines largely owing to concern lest students substitute a CO for reading (and purchasing) casebooks (as some upperclassmen do).

For reasons foregoing—identifying relevant tools, practice in their use, etc.—your author surely does not advocate *not* reading casebooks and cases. However, as noted, CASES CANNOT BE THE ONLY SOURCE OF BLACK LETTER LAW.

[Note. It is not the purpose of (ubiquitous) "case method" instruction to teach law, *per se*. Case method seeks to instruct (via judicial opinions, lawyer arguments, classroom what-ifs) how to think/analyze "as a lawyer." (I.e., art/skill of "applying law to facts.") It doesn't work! Certainly, not well.[13] (Note. This is now the problem of those untutored in LEEWS.)]

As advised, cases characteristically do not investigate, nor even present all elements of legal precepts they introduce. Almost always appellate opinions, cases only explore *real* issues—those aspects (elements) of legal rule(s) deemed determinative, contested beyond the trial level.

For example, an element of defamation (whether written [libel], or spoken [slander]) is "communication to a third party." Should facts of a case purporting to introduce defamation describe a defendant "in front of an audience" when uttering alleged defamatory remarks, it is unlikely communication to a third party will be discussed in an opinion on appeal. This necessary element will have been "*stipulated*" at trial. (I.e., conceded as fact [lest defendant risk arousing a judge's ire by contesting an obvious non-issue].) Very likely there will be no mention whatever of this element. Therefore, should one rely solely on a case introducing the precept, one's knowledge of what constitutes defamation would be incomplete.

This is where the CO comes into play. Quality of judicial opinions varies. At times you may find yourself wondering, "What the heck is the law?" This is avoided by first skimming the case for law, then looking it up in a CO! [There it is!—clear, complete.] Now you have perspective. You see *all* elements. You perhaps become aware of an exception not mentioned in the case (because not relevant). You perhaps note that a precept introduced by the case is corollary to a larger general rule. You place law in its larger, more complete context. This assists in better understanding and remembering law.

The purpose of the CO, then, is to provide a source of *complete* black letter law, clearly set forth in context. [Note. COs are 200-300 pages long. You will not be responsible for their entire content. (No more than a quarter to a third is likely relevant.)] If cases (abetted by class discussion) are a guide to law likely relevant on the exam, COs FLESH OUT LAW CASES POINT TO. They act as a check on whether law extracted from cases is correct, complete. COs further assist in framing, building the course outline/toolbox. (See following.)

More on Developing the Course Outline—Synthesizing, Content, Form, Length, Etc.

The course outline has been described as a "toolbox." CONSTRUCTION OF COURSE OUTLINES (ideally) SHOULD BE AN ONGOING PROCESS FROM WEEK ONE OF TERM. This is called "*synthesizing*." In other words, weekly (at most bi-weekly) sit down with any/all class notes, briefing notes, etc. generated in a given course. (Minimized, of course, via instruction of this chapter.) Transfer that information to a new source—your growing course outline!—, at the same time synthesizing, winnowing down to essentials. (Tools, what you need to be reminded of respecting use of those tools.) As advised previously, graphically—at week's end literally throw all class notes, briefing notes, etc. into a waste basket! Naturally, you won't do this until whatever is essential from notes/briefs has been extracted and put elsewhere—in the growing course outline.

The process of synthesizing, "*loading the toolbox,*" will be much simplified if you've prepared for class as instructed herein. If you have extracted and fleshed out legal tools (premises!) from cases,

endeavored to understand their application in cases (querying *why* outcomes occurred, creating what-ifs—so as to produce 2-4 line case briefs), then made notes in class only on what is *new*, you should accumulate *no more than 2-3 pages of material in a given course per week*. In other words, you are already far along respecting synthesizing. Building the course outline becomes as simple as bringing it up on your computer, deciding what categories to place various tools and related information in. Perhaps you start a new category.

Developing categories (compartments) of toolboxes for grouping legal precepts is a somewhat arbitrary process. You may want to follow chapter, subchapter headings of a casebook. If these prove too broad, subdivide them. [A CO may provide useful organizing headings.] You may want to look at a friend's outline headings. THE IMPORTANT THING IS TO BE ABLE TO FIND RELEVANT LAW QUICKLY, EASILY. When located, precepts—premises!—should be clear, comprehensible, *familiar, usable tools!*

Within categories of course outlines, all precepts should, of course, relate back to the topic heading of the category. Thus, "Intentional Tort, Defenses" describes relevant law for the Torts Hypo. "Objections to Admission" in an evidence law outline might contain "Assumes facts not in evidence," "Arguing with witness," "Hearsay," "Irrelevance," etc. Such complex, pithy subtopics as hearsay, due process, First Amendment, Fourth Amendment, etc., however, likely deserve their own separate category. Certainly, *most elements of contract*—e.g., agreement, consideration, promise, offer (also acceptance), possibly "two persons," etc.—*will deserve separate categories*. (Also warranties of fitness, anticipatory breach, "unequal bargaining position," etc.) Within such more narrowly focused categories (all information relating back to the topic heading in close, interrelated, organic fashion), the conceptual scheme of *trunk, branch, sub-branch* (sub-sub-branch?) becomes useful in constructing the category.[14]

Respecting *course outline length* and how much information they should contain, no hard and fast advice is offered. This will vary among individuals. Suffice that an outline be *long enough!* [Students have reported outlines of 75 pages and more. Others have said *all* was boiled down to 10-12 pages (!!). (See discussion following for how "trigger" information can make this possible.)] A COURSE OUTLINE SHOULD PRESENT/PROMPT ALL LAW YOU THINK MAY BE RELEVANT ON THE EXAM. To the extent information is in one's head, it needn't be recorded. *30-50 pages* seems a reasonable target. The operative inquiry is how much must be recorded to bring needed information to mind with reasonable precision?

For example, as you know, in the Appendix a number of tort principles are presented/defined under the heading, "Intentional Torts, Defenses Thereto." [Other headings in a torts outline might be "Unintentional Torts," "Torts Against the Land," "Defamation," "Negligence," etc.] Should one flesh out law (definitions) as fully as in the Appendix, a torts outline overall might exceed 100 pages—not so different from a CO. However, after you have explored battery in the context of working through PN v. DH, thereby becoming intimately acquainted with its elements and their application, it would likely suffice to put far less information in an outline. Perhaps you could get away with the following:

> Batt. ["B?"]—1) intent. act, 2) offensive (to reasonable or known unusually sensitive person), 3) unpriv. (no actual or implied consent), 4) contact. (E.g., DH kissing PN)

Over ten lines (including definition of consent) are reduced to less than two. Parenthetic reference to DH kissing PN is an "associative trigger" for recalling remaining aspects (and understanding) of the tool. Depending upon powers of memory and how much one has practiced using a tool, this might be reduced even further (with no loss of recall) by expressing elements in an acronym, buttressed by a brief factual reference—e.g.:

> B—i[ntent] o[ffensive] u[nprivileged] c[ontact] [DH kisses PN]. Or B—iouc DH kisses PN].

Likewise, after thoroughly exploring intentional infliction of emotional distress in the context of Ms. N v. DH, the twelve lines on page 135 (including transferred intent)[15] might be reduced to:

> IIED—1) conduct (intent. or R-S-O), 2) calc., 3) SED (tests = intensity, duration, reasonable person; more than hurt feelings, humil., etc.) Can't estab. w/ trans. intent. (E.g., DH flashing Mrs. N)...

Or, possibly, simply [As some few have great memories.]…

> IIED—(DH flashes Mrs. N)

The point is that BY USING LEGAL TOOLS—by

applying them (within facts of a case, by changing facts)—, ONE IMPRINTS THEM INTIMATELY (via association). Less need be reflected in the course outline.

In addition to synthesizing weekly, periodically test course outlines on old exams. (Sit down with an old exam. Apply The Blender.) IF AN OUTLINE ENABLES EFFICIENT IDENTIFICATION OF PREMISES, IT'S WORKING. If not, perhaps the outline contains insufficient law, or categories are too broad to permit easy reference, or you have presented law in such loose, disjointed fashion (e.g., rambling, imprecise definition of "negligence"), that concise black letter tools cannot easily be identified and stated. Testing outlines on old exams is an excellent, ongoing check of efficacy, completeness of outlines. It further builds familiarity with and confidence in outlines as exams approach. [Note. Implicit in the foregoing is you must not wait too late in the term to begin outlining.][16]

[Note. The notion is often promoted amid grumbling and confusion first term that "things will come clear (at the end)." One hears such professor comments as, "There comes a point when it clicks," and, "It will all work out. You'll see."[17] Temporarily lulled, placated, 1Ls focus on briefing and taking class notes. The result as exams approach is *not* time spent refining outlines, practicing on old exams (as should occur), but feverish attempts to assimilate/organize (synthesize!) the mountainous information that has accumulated. (Too late!)]

A 100+ page "outline" completed—"pant, pant"—at the last minute cannot be a well-organized toolbox. Much less will it be intimately known and a proven-efficient reference. It is, as your author says to classes, more "Uncle Harry's tool *sack*." Tools are there. However, they are jumbled, disorganized, not easily located. Moreover, if a tool is located, one lacks experience using it. Hence, the plaintive thought of so many law students upon belatedly completing a course outline—"I wish I had a couple more days!" (In which to organize and practice with the outline, and get to know it.)

The *"couple more days" (and more) must be squeezed out during term*. They are the extra minutes devoted to proper preparation that 2-4 line briefing requires. They are time devoted weekends to working on outlines. Get what needs to be done *done!*—day-by-day, week-by-week *during* term. DAYS IMMEDIATELY PRECEDING EXAMS ARE FOR PRACTICING WITH OLD EXAMS! Such practice reveals gaps in outlines, precepts needing to be better understood. Which raises an obvious question—what if, as you read this, you are well into the term, exams approach rapidly (days away!), and you have accumulated a pile of class and briefing notes?

What to Do When It's Late in the Game (I.e., exams a couple weeks, even days away)

ONE NEEDS THREE THINGS GOING INTO EXAMS. 1—*Skill* implementing The Blender, and skill at analysis and (UBE) paragraphing presentation. Thus, whether months, weeks, or mere days before exams, start practicing. (Begin with hypos in the Appendix.) 2—*Tools* at one's fingertips in Step Two. Therefore, immediately frame out and begin loading toolboxes. In this regard, BETTER TO KNOW 8-10 PREMISES COLD, THAN 35 SORT OF.[18]

If you don't already have a CO for each course, get one! (Used, if possible. [Cheaper!])[19] Compare class notes (or someone else's), voluminous though they may be, to the CO to get a fix on black letter law one is likely to be responsible for on the exam. Frame out the course outline with categories in the CO, and/or, as suggested by notes and casebook. Once you have topic headings in place, start loading in tools. Again, take your lead from class notes. (As notes likely won't contain clear, complete statements of black letter law, take law itself from the CO [once class notes have directed you to it].) You needn't copy *all* law in a CO. Lift only what class notes and casebook indicate a professor is likely to be interested in. Add anything by way of policy, new developments, etc. indicated by notes. Compare your outline with those of classmates. (Anything more to add?)

3—You need as much specific information about the likely nature/content of a given professor's exam as possible. Even a day is enough time for research. In this regard, follow preceding advice respecting "Know Your Professor."

[Note. A key problem will likely be not having time to go back to cases to practice applying law to facts therein. (So as to become as familiar with law as one would like.) In other words, one will have many tools one doesn't know very well under various categories. Get hold of old exams. Practice Step Two with your new toolbox(es). This builds familiarity with categories, suggests new ones, indicates where

and what additional tools are needed. Pressed as one is for time, nevertheless—key!—take time to actually write out paragraphs of analysis for some of the premises identified. This builds skill at analysis, one's knowledge of at least those premises, and confidence responding. In addition, key cases to go back and work through may be suggested.]

Obviously, the more time before exams the better. However, *much can be accomplished in a week, even days*. (DON'T FORGET HOW WOEFULLY UNPREPARED MOST OF THE COMPETITION IS! Classmates are clueless respecting law as "tools;" how, systematically, to find issues [premises] in fact patterns [even what "issues" are!]; how to analyze and present concisely, etc. Moreover, YOU ARE BETTER THAN YOU WERE! [If the foregoing doesn't engender confidence, what will?]) Given one's (now) knowledgeable perspective on exams and what is important, give some thought to not preparing for or even attending certain classes as a means of gaining extra time. You can perhaps rely on a friend's notes.

"Open Book" versus "Closed Book" Exams

Pre computers, virtually all law school exams were *"closed book,"* meaning take nothing into the exam beyond pen, pencil, possibly a technical reference—e.g., IRS Code, Federal Rules of Evidence or Civil Procedure, the UCC. Perhaps at your school they still are. [Something to ascertain for each professor.] However, in order to make (essay) exams seem more fair, less intimidating (and to ward off complaints), *"open book"* exams seem more and more the norm. This generally means one can bring any reference materials one chooses into the exam room (short of a tutor). [No online sources, of course. Online information access will be blocked.]

Law students relax somewhat given the prospect of an open book exam. They are comforted by the notion of having everything—casebook, commercial outline, course outline, class notes, possibly a hornbook—with them in the exam (brought in in roller bags). *This is a mistake!* [Note. Bar exams are strictly closed book.]

OPEN BOOK/CLOSED BOOK IS A MEANINGLESS DISTINCTION FOR THE STUDENT AIMING TO DO WELL ON (LAW SCHOOL) EXAMS. Only students seeking merely to survive benefit from poking into a hornbook, re-reading a case, referring to class notes. Anyone wanting to excel can spare little more time researching than it takes to refer to the course outline! Thus, apart from necessary, permitted technical references (e.g., IRS Code), normally take only your course outline into an open book exam!

IF AN EXAM IS CLOSED BOOK, YOU'LL STILL HAVE YOUR COURSE OUTLINE! You won't take it into the exam tucked in clothing or hidden in an electronic device! (Never!)[20] Rather, as (typically) you enter the exam room, grab a sheet of scratch paper, or tear a sheet or two out of a bluebook. [Ascertain in advance whether scratch paper is available. Normally it is.] Taking *no more than 5-7 minutes*,[21] reproduce a skeletal version of your course outline.

This doesn't mean reproducing 35, even 5 pages. Rather, as noted, *all law needed should be in your head (!!)*. It is difficult, however, given the adrenalin pump and swirl in one's brain at the start of an exam to find/focus on precepts (premises) needed, *when* needed. You merely want *enough (hurriedly scratched) on paper to assist in getting at what is in your head in systematic, orderly fashion*. Therefore, knowing in advance (as you should) an exam is closed book, practice recreating (abbreviated) category headings and mnemonics. (The latter to aid in recalling law within each category. E.g., "BAID" for battery, assault, IIED, damages.)

[Note. Furious recreation of a "*skeletal course outline"* during opening minutes of an exam is a great way to dissipate nervous energy, calm down, (and intimidate all around you). Now you have a security blanket, something to cling to as you apply The Blender. *(Be sure not to spend more than a few minutes at this!)* Skeletal outlines correspond to "checklists" (of legal topics) CW often advises creating.]

"Take Home" Exams,[22] Memorization Technique, Etc.

"Take-home exam" refers to final exams in law school (only) in which more than 3-4 hours are allotted for taking the exam, and students are allowed to take the exam at home, at a local eatery, in the library, etc. Such exams are typically 8-24 hours in duration, but may be more or less.[23]

Similar to open-book exam format superseding closed-book, take-home exams reflect concern that time pressure of traditional exams imposes an unfair burden. They seem more often encountered in (so-called) upper-tier law schools.[24] Traditional 3-4 hour, (more) time-pressured exams (seemingly) continue

to predominate at mid and lower–tier law schools.

Students, of course, nonetheless experience significant anxiety and time pressure respecting take-home exams. Lest students produce 40, 50, 60-page, treatise-like efforts during eight or more hours, limits on the number of words (usually five type characters) and pages (250 words) that one can turn in are normally mandated. [Yet another variable to be investigated in preparing for exams.]

Respecting *memorization,* it obviously helps to have a good memory when preparing for exams. The interactive process described in this chapter for extracting legal tools from cases and mastering their use should aid greatly in imprinting law in memory. Such learning via use in context is "*associative learning*," and is thought to be most effective in promoting long term retention. (E.g., weeks, months, years from now, association with DH flashing Mrs. Nicely may bring back content of IIED.) Merely reviewing a list of principles over and over is "*rote memorization.*" (E.g., using flashcards.) It may be effective for short term retention, but never mastery.

Another useful technique is to place law in a larger context. At the beginning of term (or now, as it is never too late to start doing things the right way) consider chapter and subchapter headings covered in the casebook. Think about the big picture. What is the common denominator of legal content of the course that distinguishes it from other courses? For example, tort law regulates *personally* injurious behavior between people, while contract law regulates *commercial* behavior. Why are a particular set of principles grouped together?[25] For example, why might a professor assign Sections 2 and 9 of the UCC in conjunction, rather than 2 and 4, or 8 and 9? Once posed, such questions and their answers provide perspective as term progresses and one explores cases.

Example/Approach to a Problematic Hypo Q/I

One of the more confusing instructions encountered on a law school exam (never on the bar) is of the order, "*Draft legislation* to resolve issues in the foregoing facts." What to do? [As always—discipline!—, do not attempt to address/answer Q/I's in the form encountered! You'll just get confused.]

"Issues in the foregoing facts" indicates one or more conflicts [Yes?], creating competing parties and objectives. [Legal problem solving *always* implies conflict!] "Legislation" one is to "draft" will be law relating to resolution of such conflict. Such law presumably does not at present exist. [The professor is testing ability to *think!* In this instance about creating a sensible precept that resolves (the conflict[s]).]

[Note. Legislation normally doesn't appear magically out of thin air. It derives from need (conflict[s], objectives of parties?!), and often derives from existing law, legislation, etc. that doesn't adequately address the problem. Does a plan going forward to address this cryptic instruction suggest itself?]

The solution, of course—*always!*—is (simply!) apply The Blender! [*Always* apply The Blender! It is one's go-to security blanket! It must become *how one rolls* respecting essay exercises.] The "legislation" the professor wants "drafted" will likely be but a variation on existing law that approximates (but doesn't quite fit) what is needed. "Foregoing facts" should suggest (in Step Two) a premise—rule, statute, policy ground, etc.—(perhaps more than one) that is *colorable* in terms of achieving movant party objective(s). Respecting given facts, this law doesn't adequately "resolve issues." However, if tinkered with, modified (so as to be fair, just, logical)—a thoughtful hammering out, appropriately addressing the situation given "foregoing facts" [*Thinking!*]—, one should arrive at ("draft") "legislation" (i.e., variation on existing law) the professor seeks.

You answer/address the professor's Q/I. However, always *on your terms!* (Via trusting, *always* applying The Blender.)

[Note. The professor here indeed *probably* wants to see policy thinking. Apart from what might naturally arise in the course of critiquing/modifying existing law, this seems an appropriate instance for adding the follow-up paragraph, "Policy considerations:"]

This concludes instruction on how to address, handle, and—day-by-day, week-by-week (or within days, if need be!)—prepare for *any* and *all* hypothetical-type law essay exams and exercises. A brief (3-page) section on multiple choice and other non-essay ("objective") exam exercise formats follows, and thereafter the Appendix.

Doubtless, at this juncture much advice seems blurred, disjointed, confusing. Understandable! Focus efforts at this point on practicing (the various facets of LEEWS). Bear in mind the key concept—*premise*. (Find premises! Analyze premises in con-

cise paragraphs!) Return to portions of text as needed for clarification. There is a fully integrated, proven effective approach, a true science herein. With practice (!!), and in less time than one may imagine, the many facets will fall into place.

SECTION TWO, CHAPTER 14 FOOTNOTES

[1] Preparation technique and strategy for the bar exam was offered in Section One. Much contained here will benefit the prospective bar examinee.

[2] **"Burglary" (as exemplar of the [extreme] nuancing of legal definitions):** Per *Wikipedia,* "common law burglary was defined (by Sir Matthew Hale) as 'the [1] breaking and [2] entering [3] of the house [4] of another [5] in the night time, with [6] intent to [7] commit a felony, [8] whether the felony be committed or not.' '*Breaking'* can be either actual, such as by forcing open a door, or constructive, such as by fraud or threats. Breaking does not require that anything be 'broken' in terms of physical damage occurring. A person who has permission to enter part of a house, but not another part, commits a breaking and entering when they use any means to enter a room where they are not permitted, so long as the room was not open to enter. *'Entering*' can involve either physical entry by a person, or the insertion of an instrument to remove property. Insertion of a tool to gain entry may not constitute entering by itself. Breaking without entry or entry without breaking is not sufficient for common law burglary."

Should the foregoing seem insufficiently precise, nuancing continues. To wit… "Although rarely listed as an element, the common law required that 'entry' occur as a consequence of the breaking. For example, if a wrongdoer partially opens a window with a pry bar—but then notices an open door, which he uses to enter the dwelling, there is no burglary under common law. The use of the pry bar would not constitute an entry even if a portion of the pry bar 'entered' the residence. Under the instrumentality rule the use of an instrument to effect a breaking would not constitute an entry. However, if any part of the perpetrator's body entered the residence in an attempt to gain entry, the instrumentality rule did not apply. Thus, if the perpetrator uses the pry bar to pry open the window the instrumentality rule did not apply. Thus, if the perpetrator uses the pry bar to pry open window and then used his hands to lift the partially opened window, an 'entry' would have taken place when he grasped the bottom of the window with his hands."

Further, there is definition of *"house"*—"includes a temporarily unoccupied dwelling, but not a building used only occasionally as a habitation," and *"night time,"*—defined as "hours between half an hour after sunset and half an hour before sunrise." And further, "Typically this [night time] element is expressed as the intent to commit a felony 'therein'. The use of the word 'therein' adds nothing and certainly does not limit the scope of burglary to those wrongdoers who break and enter a dwelling intending to commit a felony on the premises. The *situs* of the felony does not matter, and burglary occurs if the wrongdoer intended to commit a felony at the time he broke and entered."

[Indeed—whew! Note. Only use/application of the (burglary) "tool" (i.e., LEEWS premise!) enables one to set forth merely the opening definition, and then be ready to skillfully apply the tool to new facts.]

[3] **How to *really* know what a chisel or law is.** When the chisel analogy is made in live programs, your author inquires, "Who doesn't know what a chisel is?" (It may be noted that as decades passed, more and more hands raised.) I would ask, "Do you know what a screwdriver is?" (Adding [ho, ho, ho!],"not a drink!") "Yes," all knew what screwdrivers are. I'd say, "I can describe a chisel… It's similar to a screwdriver—handle, shaft, blade. But the blade of a chisel is normally wider, sharp! It's made to cut and shave wood." And they'd get it… I'd add, "Similarly, I can describe a legal tool, define it. You begin to understand it… But wouldn't you understand it *so much better* [motioning as if chisel in one hand, block of wood in the other], if you took the legal tool in hand and actually used it, applied it to facts?... Same as the carpenter, you'd get an intimate feel for it."

YOU MUST GET IN THE HABIT OF TAKING LEGAL TOOLS—PREMISES—IN HAND AND USING THEM, TRYING THEM OUT ON FACTS. In that way you become familiar with law, skilled at applying it, and (associatively!) you remember it.

[4] **Conventional case brief (CB).** CBs were instructed when your author started law school [Yale, fall 1969] and long before. Doubtless, you'll be taught to do CBs. [Little changes in the law school firmament. Computers and multiple choice questions on exams are the big changes in the last 40 years.] The only variation in CBs your author is aware of (apart from "procedure" or no) is an instruction by some "experts" to start off immediately with the supposed "short cut" and expedient of "book briefs." (Which most students start doing anyway mere weeks into first term.) See discussion of both (ineffective) options in main text.

[5] **Which commercial outline (CO)?** Students ask which CO I recommend. I offer no firm opinion in this regard. Once the concept of premise is grasped, which CO sets forth law completely, comprehensibly, in a way that appeals? [Note. COs CANNOT SUBSTITUTE FOR CASES AND CLASS. They may or may not offer fact patterns for practice in applying law. They normally don't offer policy aspects, recent developments, other insights that may be provided by a professor.] Try to purchase *used* outlines. (Locate the used book exchange at your school or bookstore.) Purchase used casebooks. (Sell casebooks purchased new as soon as you are finished with them. [I.e., before the next edition comes out.] You won't use them for the bar or in law practice.)

[6] **Bicycle offered for $75.** In facile fashion, the "B" student refers to UAS, recites the [offers lapse] rule, concludes, "As two weeks was held reasonable in [UAS], two days here should be reasonable. Judgment for buyer." The "A" student states the rule to begin a paragraph (case needn't be cited), perhaps explores the concept of *reasonableness* (to establish context), distinguishes UAS and two weeks from the much simpler situation of used bicycle, and likely concludes, *"Probably* [hedging!] judgment for seller." Both identify the issue, both know the law. However, only one focuses on the Lawyering Game—analysis (vs. reaching a [facile] conclusion). "A" students impress with nitpicking, adversary thinking, and intimate knowledge of law. (Gained via practice applying "tools.") Their response brings a smile to a professor's face. A lawyer going about her craft is perceived.

[7] **"Hornbooks"** are treatises (formal, systematic studies) on an area of law—e.g., *Williston, Farnsworth (Perelli?) on Contracts, Prosser on Torts, Wigmore, Weinstein on Evidence.* They trace historical evolution of certain concepts in the subject area. They review seminal cases, follow changes in the law, explore minority/majority views, offer the author's and others' learned opinions on how the law should be interpreted. Hornbooks tend to be easy reading compared with cases. (Up to 3/4 of a page is often footnotes one can ignore.) Generally, one needn't take notes. Merely read to enhance comprehension of difficult concepts. (E.g., parol evidence rule, rule against perpetuities.) Hornbooks should be a regular adjunct to preparation. However, one needn't buy them. Use library copies.

"Restatements" (of contracts, of torts, etc.) are a reference tool less often used. They are sets of volumes in certain areas of law in which groups of lawyers and legal scholars interpret, categorize, otherwise seek to make sense of so-called "common" or case law, also developments in statutory law. Legal precepts felt to need revision are addressed. Problems with existing law are illustrated via hypotheticals. Recommendations for change are made. The Uniform Commercial Code (UCC), for example, grew out of a restatement of common law of contracts effort in the early 1960's. Restatements can be helpful in prompting thinking about policy aspects of legal constructs. As with hornbooks, one need take few notes. Read to stimulate thinking and enhance understanding.

[8] This is certainly true of major (so-called "top tier") law schools and schools seeking to be "major." It is scholarly articles and textbooks authored by faculty (academic reputation), not faculty teaching prowess that brings repute to law schools.

[9] It may be, however, that with proper preparation—having black letter rules clearly in mind, having practiced with them going into class (creating your own what-ifs)—the professor who seemed confusing, etc., will now make more sense (!!).

[10] Check from time to time with someone who attends class to see if anything new has come up. (E.g., advice concerning the exam.) Perhaps you alternate attending class.

[11] **More on what (in fewer notes) you want to take away from class.** The advice offered (revolutionary 2-4 line LEEWS case briefing instruction in particular) makes clear that proper preparation *before class* is key in taking fewer notes. Having done what is needed to execute 2-4 line case briefs, ONE'S THOUGHT GOING INTO CLASS SHOULD BE, "IS THERE ANYTHING NEW?!" Did you miss or misinterpret parts of the law? Does a classmate's question prompt a new take on law and/or its use? (If so, note, perhaps simply digest the import of the question.) Does the professor have a different, unique take on a rule or part thereof? (Does she disagree with the law or parts thereof, and/or underpinning rationale [policy background]?) If so, take notes. On the exam you'll likely want to contrast results applying conventional application of law versus results applying the professor's [more enlightened, of course! Even brilliant?!] take.) [STROKE the PROFESSOR!] Is reference made to a law review article or other source that one should follow up on? Mostly, however, as described, listen, nod, confirm understanding, reinforce grasp of law likely relevant on the exam and how to apply it (to new facts). Such posture coming to and during class should result in far fewer notes. (1/2 to one page of notes per class hour!)

[12] **Construct your own course outline!** Advice offered, for example, in Scott Turow's book describing his (successful) first term at Harvard Law—*One L*—, that members of a study group assign each to do the outline in one subject for all members, has appeal. Such outlines would indeed likely be polished. However, to know where premises are located, to build organically and weekly, you must construct each outline yourself! That said, comparing outlines at term's end for additions, new ideas would surely be useful.

[13] **Failure of case method instruction.** As evidenced by exam responses, case method (plus Socratic teaching) fails abysmally in transitioning academic thinkers/learners (most 1Ls) to something approaching a practical, legal problem-solving lawyer on time-pressured essay exams. Failure of law schools to inculcate practical lawyering skills is recognized in the profession, and more and more in law schools. (Hence, interest in and offering of more clinical and work study programs.) However, absent a prove,n worthy successor, given the circumstance that case method arguably succeeds for a few [If 35-40 points out of 100 may be viewed as succeeding], the widespread, specious notion that only a few have "The Right Stuff" persists. This notion buttresses a continued forced march of the vast majority of law students through three and more years of confusion and discouragement (and boredom!).

[14] **Template of trunk, branch, sub-branch in constructing categories.** (Also as aid in grouping/finding law, and understanding and recalling law.) Category headings, of course, should be a guide to legal precepts that "hang together." (E.g., "Intentional torts.") Such headings may be thought of as baseline, defining constructs or themes. They may be thought of as "*trunks*," as in trunk of a tree. Trunk headings in a constitutional law course outline would (naturally) be "First Amendment," "Commerce Clause," "Due Process," etc. Legal precepts *within* trunk categories may be thought of as "*branches off the trunk*." Organized beneath and as part of those branches will likely be *"sub-branch"* precepts. Thus, in a criminal law outline under category/trunk, "Fourth Amendment," would be placed the definition thereof (from the Constitution), then a litany of branch sub-headings—legal precepts—derived from cases, etc., all interpretive of the broad Fourth Amendment. (E.g., Peyton Rule respecting "lawful entry." See Appendix, p. 161.) Thereunder also would be Miranda's requirements (and sub-branches relating thereto), the Exclusionary Rule and its many sub-branch aspects (including "good faith exception"), Chimel Doctrine etc.

One must seek to understand law not in isolation, but in its larger context of originating trunk precept(s), and related branches, sub-branches. Such context of related law aids immeasurably not only in understanding law, but remembering it. Understanding whence/why law—derivation from trunk to branch to sub-branch—also enhances thinking respecting what law could or should be—policy aspects. Respecting recall, if one knows roughly where in a truck-branch-sub-branch continuum relevant law falls, and one knows what comes before and after in that continuum, one likely will recall a rule temporarily forgotten. If called upon, say, to "draft legislation" (Omg!), and one knows law that somewhat relates to facts at issue, but not precisely—rule, statute, branch, sub-branch—, one is in good position to craft law that fairly, equitably, appropriately resolves the conflict. (I.e., "draft legislation.") (See segment of this chapter just before footnotes!)

[15] **Core (kernel) premise vs. corollary aspects.** Note that although over seven lines on page 135 are devoted to explication of IIED, the basic black letter definition of the tort is contained in the *first two lines*. All else is corollary to this kernel concept—definitions, tests, explanations, etc. (Sub and sub-sub-elements!) It is important when attempting to pull the law from cases and commercial outlines to distinguish between kernel legal precept and that part of opinion, discussion, etc. that introduces aspects corollary/explanatory to that kernel and parts (elements) thereof. Here again, if clarity and retention respecting elements vs. sub-elements vs. sub-sub-elements is to be achieved, practice in applying the law to facts (use of the tool!) is essential.

[16] **First term postponement of looking at old exams.** Viewing old exams without much more plan of appraoch than "spot issues" intimidates most in first term (and beyond). Perhaps for this reason, many seem consciously or unconsciously to postpone thinking about, much less preparing for final exams until late in term. This includes—first term only!—constructing course outlines. Professors, likely embarrassed (if only subconsciously) by disconnect between class and exams, abet such delay by cautioning students "[not to] worry about exams." Also, "it's too soon to begin [course] outlines." Once LEEWS is grasped (even Step One), there is no reason to postpone looking at old exams.

[17] **"It will all come clear."** Unspoken behind such remarks is the thought, "assuming you have The Right Stuff." In other words, if you are one of the (assumed very rare) few with "innate genius for the law," "natural aptitude [for the law]," then, yes, things will come together, come clear at some point. However, if not—if you are part of the great majority lacking such aptitude (even at Harvard, Yale, Stanford!)—then (also unspoken) "There is really nothing I can do for you!" [However, you *will* pass! You *will* become a (mere) lawyer!] All of which is self-serving nonsense (!!). It is an excuse for failure to instruct insights and skills necessary to function (on exams) as at least a facsimile of competent, practicing attorney. As noted, even the very few who earn solid A's generally score far below a level of competence—35-45 points out of 100!—that would be acceptable in any other professional school (!!).

[18] **Better to know 8-10 premises cold, than 35 sort of.** In order to apply law to facts in analysis, one must be able to present a black letter tool precisely—I.e., clearly defined elements (if need be, sub-elements). If such is not yet grasped, it will be as soon as (essential!) practice paragraphs of analysis are attempted. If rules/statutes are not set forth with precision (clear elements), analysis rambles and ultimately falters. Checkmarks for identifying issues will be had. (Good!) However, analysis cannot impress.

[19] Re-read fn. 5 herein respecting ***which* CO?**

[20] **No cheating! Ever!** It is hoped such advice is wholly unnecessary. It is important to understand that along with significant power lawyers wield over others' lives and trust reposed in an "officer of the court" (e.g., in the form of client funds held in escrow accounts), comes being held to a high standard of probity. After the bar exam is passed, one must be approved by a state bar "committee on fitness and character." They will require references from all employers back to high school (!!). One cannot have an unpaid parking ticket! There cannot be a whiff of untoward conduct in law school. Don't even *think* of cheating! And no need!

[21] Any longer, one begins to put too much time pressure on oneself.

[22] **Take-home exams.** To avoid complaints (or because they recognize unfairness inherent in time-pressured exams), some professors give "take-home" exams. At some (so-called) top tier schools, most first term exams may be take-home. These can be 6-8 hours, 24 hours, or longer. The idea, however, is never to enable production of a lengthy thesis. Invariably, word/page limits will be imposed on the length of response. As ever, beyond knowledge of law, the professor wants to see lawyerly thinking. Proceed as one would in a normal exam—Blender, etc. You simply have more time. One loses a bit of the edge one has in a time-pressured exam. However, analytic skill can be better displayed. A well-constructed toolbox remains key.

[23] A two-week, torts take-home exam (given by a professor at U. Iowa Law) was brought to your author's attention years ago!

[24] 8-24 hour take-home exams seem the norm for first-term Harvard 1Ls. Ditto, for example, Duke 1Ls (as least in a recent year according to Duke 1Ls in a live Durham program). Policy/practice at your law school is easily ascertained.

[25] E.g., intentional vs. unintentional torts vs. torts against property, crimes against persons vs. crimes against property.

SECTION THREE

MULTIPLE CHOICE, SHORT ANSWER, TRUE/FALSE, OTHER NON-ESSAY "OBJECTIVE" EXAM FORMATS

You are likely not yet expert at the LEEWS approach to essay exams. You probably have not had sufficient time or practice to become skilled at lawyerlike analysis. When you have, you should find that multiple choice, short answer, true/false, other so-called "*objective question*" exam formats encountered in law school or on a bar exam no longer pose a problem. The reason—ALL NON-ESSAY LAW EXAM FORMATS TEST THE SAME SKILLS REQUIRED FOR SUCCESS ON ESSAY EXAMS. Only, *one normally does not have to identify issues!* What is tested is ability to analyze applicability of legal precepts (often provided) to a finite set of facts, *element by element*. To select the better among several answer choices, to fill in missing information, to decide that a proposition is true or false, ONE MUST BE ABLE TO ANALYZE "AS A LAWYER." What follows provides a basic familiarity with the various objective question types, and (one hopes) confidence you are in the process of acquiring all skills needed. As with essays, what is required is *practice*.

Multiple Choice ("Multistate Bar Exam")

As of this *Primer* revision (summer, 2016) the so-called "*Multistate Bar Exam*" (MBE) continues to be part of the bar examination overall in almost all states.[1] The MBE consists of 200 multiple choice questions, testing six areas of [generally, national majority rule] law in approximate equal proportions.[2] It consumes a full day (6 hours) of a typical 2-3 day examination. A passing MBE score varies somewhat from state to state, and the score is transferable among most states. Books of practice MBE questions drawn from old exams are widely available.

[Note. The bar examining body of each state is the best source of up-to-date guidance respecting MBE use and requirements on its exam.]

The MBE became a fixture on bar exams in the mid 1970's. It had the immediate effect of legitimating what, until that point, had been unheard of on law school exams—multiple choice questions. Doubtless appreciating the comparative ease of grading multiple choice exercises, many professors and some few law schools moved almost entirely to a multiple choice format. This trend was short-lived. In that students given a diet of only multiple choice exams are especially vulnerable when essay exercises are encountered on the bar, the pendulum has long since swung back. The hypothetical-type essay exercise continues to be a staple in gauging fitness of law school graduates to practice law. However, a portion of many law school exams may be multiple choice. [Something to research!]

In seeking to discover insight and offer advice addressing multiple choice questions, the MBE-type question is an apt, complete exemplar. (Many law professors' multiple choice questions are drawn in whole or part from past MBEs.) The MBE's own directions, reprinted following, and a MBE-type question (relevant law provided) are a useful guide to what to expect in a multiple choice format.

> MULTISTATE BAR EXAMINATION
>
> Directions: Each of the questions or incomplete statements below is followed by four suggested answers or completions. You are to choose the *best* of the stated alternatives. [Emphasis added.] Answer all questions according to the generally accepted view, except where otherwise noted. For the purpose of this test you are to assume that…

[Here instruction is provided on what law controls, etc.]

Questions 1-3 are based on the following fact situation [criminal law component]:

> Easy Route and Hustle, a couple of good ol' boy sales reps for Bite 'Em Hard 'n Fast Computer Co., Inc., repaired to the employee lounge of AOK International, an account they had just visited, to "knock back a few" after failing to make a sale. One "Here's to ya" led to another until they were politely informed that not only the lounge, but the entire building was closing for the day. Mumbling incoherencies, Route and Hustle staggered from the lounge. They had almost reached the door when Route muttered, "Ya know, Hustle, we oughta pay A-O-K another visit. Ya know what I mean?" In truth, Hustle wasn't sure. His head was hurting. But he followed Route to the men's room, where the two camped comfortably in stalls for a half hour or so. When they emerged the

corridors were empty. Route used his pocket knife to jimmy the door to AOK's data processing center. Once inside, he proceeded to rewire circuits to several terminals supplied by a competitor. Hustle pocketed a calculator left on one of the desks and an expensive brass paperweight. Boozily unaware their movements had been monitored by a security camera, the men were apprehended by building security at the elevator to the AOK floor.

Relevant legal principles include the following [provided with the exercise, or one would presumably know and have in one's course outline]:

Criminal trespass: A person is guilty of criminal trespass when he knowingly enters or remains unlawfully in a building.

Burglary in the third degree: A person is guilty of burglary in the third degree when he knowingly enters or remains unlawfully in a building with intent to commit a crime therein.

Burglary in the second degree: Occurs when in addition to the above, *inter alia,* in effecting entry or while in the building the person or another participant in the crime is armed with a deadly weapon. (I.e., a loaded weapon from which a shot capable of causing death or serious injury can be discharged, a switchblade knife, dagger, blackjack, or metal knuckles.)

Larceny: A person commits larceny when, with intent to deprive another of property, he wrongfully takes or withholds such property from an owner thereof.

Grand larceny: A person commits grand larceny when he steals property and, *inter alia,* the value of the property exceeds $500.00.

[Note. The $500 felony grand larceny amount is doubtless now higher. ($2500?) As with law presented elsewhere in the *Primer, check it out!* It may be outdated. It may have changed. It may (likely will) differ in different jurisdictions. State law often differs from federal law.]

1. If the pair are charged with burglary in the third degree…

   (A) They will be found not guilty, because they were business invitees;
   (B) They will both be found guilty, because they stayed with intent to commit a crime;
   (C) Only Route will be found guilty, because only he had intent to commit a crime;
   (D) Only Hustle will be found guilty, because only he committed a crime.

2. Is Hustle guilty of grand larceny?
   (A) No, because he didn't get away with the property;
   (B) Yes, because his fellow participant in crime carried a knife;
   (C) No, because he was probably still intoxicated;
   (D) Cannot be determined from facts provided.

3. Is Hustle guilty of criminal trespass?
   (A) No, because he was drunk and didn't know what Route was up to;
   (B) No, because he had entered the building on a proper business matter;
   (C) Yes, because he was advised along with Route that the building was closing;
   (D) Yes, because he took the calculator and paperweight.

As one will note, multiple choice format, similar to essays, features a fact pattern. However, questions present specific issues for investigation. One is further alerted to specific legal precepts governing analysis. The test is somewhat of familiarity with applicable law, but *more* ability to perform analysis. PIVOTAL IN SELECTING THE *BEST* ANSWER[3] IS PINPOINTING THE DISPOSITIVE ELEMENT—i.e., the *real issue* element whose presence/absence is critical to the determination.

[Note. Model analysis follows. If you have not done so, attempt now to answer the three questions. If principles of approach are to become usable skills and not remain mere theory, there is no substitute for actual working through of exercises.]

Respecting foregoing questions, the best answer to No. 1 is C, because Route *knowingly* remained in the building in order to harm AOK. The best answer to 2 is D, as one is not told the value of the calculator and paperweight (only that the latter is "expensive"). 3 is a close call. (There are two appealing "correct?" answers.) The best answer is probably A, because it points up Hustle's lack of "knowing" unlawful presence in the building. However, an argument favoring C can be made.

[Note. One is called upon to select the *best* answer. That choice is not necessarily a perfect answer, nor an answer one agrees with. (At least not at first. One should come to discover the logic in it.) However, it is the best of choices offered. Typically, ONE OR TWO CHOICES CAN BE QUICKLY ELIMINATED AS OBVIOUSLY WRONG AND/OR SILLY, IRRELEVANT. (Which choices would you quickly eliminate in the three questions? See fn. 4 for suggested choices.)[4] Thus, one's choice often boils down to two. Determining which is the better of the two is where precise knowledge of applicable law and (especially) analytic skill distinguishes the lawyer—you!—from the layperson. (Your classmates!)]

Short Answer, True/False

Short answer and true/false formats also normally relate to a fact pattern, but not always. Here also, precise knowledge of applicable law and ability to analyze "as a lawyer" are keys to success. Drawing from the above facts and law, an example of a short answer type question would be the following:

> Question: Route is not guilty of burglary in the second degree because… [See fn. 5 for answer.][5]

The same question in true/false format would be as follows:

> True or false?: Route is guilty of burglary in the second degree. F [You may be asked to explain your answer.]

As noted at the outset, objective formats should not pose a problem once skills and techniques for handling essay-type exercises have been mastered. Books of MBE questions exist. Commercial outlines often have objective questions in the appendix. Old exams on file in the library, on the internet, or in a professor's possession are another source of such questions. Confidence and skill should come quickly with practice doing objective-type questions.

As always, PRACTICE IS KEY!

THE BEST POSSIBLE EXAM RESULTS!

SECTION THREE FOOTNOTES

[1] Not participating are Louisiana and Washington State. Both states, however, administer the Multistate Professional Responsibility Exam—"MPRE."

[2] Constitutional law, contracts, criminal law, evidence, real property, torts.

[3] Again, typically, one or two of four answer choices can easily be eliminated as incorrect. (They are manifestly wrong. They do not address the core determination.) Often, two answer choices are appealing. Each is relevant and at least technically correct. Neither is "incorrect." However, the better of the two [the "best" answer] is the one supplying information most critical to the determination. In LEEWS parlance it would be the answer choice that resolves the *real* issue.

[4] 1 = A and B; 2 = A and B; 3 = B and D.

[5] Answer: Route's "pocket knife" would not be considered a "deadly weapon."

APPENDIX

SAMPLE EXERCISE ONE

Torts Hypothetical

(90 min.)

Direct Hit Davis, he of 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.

Near beside himself with frustration and rage, Direct Hit eschewed telepathic zap (evil thoughts) for a frontal approach. When, to Direct Hit's surprise, Pucker's mother, prim Mrs. Nicely, opened her door to Direct Hit in his most revealing opened trench coat pose, she collapsed to her knees in mumbling hysteria. Her aggressive son, Ruthless, standing nearby, instantly trimmed the hedge with Direct Hit's dental work. Mr. Nicely, arriving home from an abysmal eighteen holes just as Direct Hit landed in the driveway, allowed his front wheel to brake against Direct Hit's rump.

A passing neighbor, Bernstein Woodward, who happened also to be a news photographer on his way to work, captured much of the drama in stills. Even a gardening implement aimed at his head by Ruthless could not deter Bernstein's ardor for the task. Indeed, he hardly noticed the missile. However, an on-looking neighbor, Diddle, was more than distracted. The resulting furrow in his brow required ten stitches at County Emergency.

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DISCUSS RIGHTS AND LIABILITIES OF ALL PARTIES.

_____

RELEVANT LEGAL PRINCIPLES FOR TORTS HYPO

(Possible course outline category heading—"Intentional Torts, Defenses Thereto")

Assault—1) Intentional act 2) creating apprehension of 3) a battery.

Battery—1) Intentional act resulting in 2) offensive, 3) unprivileged 4) contact. "Offensive" has been held to mean that which would offend the sensibilities of a reasonable person. The element may also be satisfied where an unusual sensitivity of the victim, known to the defendant, is acted upon.

"Unprivileged" means, generally, unconsented to. [See following page for elaboration of "consent."]

Intentional Infliction of Emotional Distress (IIED)[1]—Lies as a tort where 1) conduct is 2) calculated to cause 3) severe emotional distress. Conduct must be intentional or reckless, shocking or extreme, and outrageous, and result in emotional injury to the plaintiff. There needn't be physical contact, only emotional/mental disturbance.

Limitations—To be actionable the emotional or mental distress must be severe. In other words, it must be of such intensity and duration that no reasonable person should be expected to endure it.

Thus, mere hurt feelings, humiliation, insult, and the like will not be a basis for recovery.

Invasion of Privacy—1) Intrusion into 2) personal life 3) of another 4) without just cause.

Limitations—Celebrities are not protected in many instances, as they have voluntarily placed themselves already in the public eye, and their activities are considered newsworthy. Typical matters in which a non-public person has a right to privacy are public disclosure of embarrassing information and appropriation of one's name or picture for personal or commercial advantage.

Defenses—Relate in the main to legitimate reasons for the invasion. E.g., investigating a person's credit when that person has applied for a loan, insurance claim and divorce investigations, etc.

[Note. While "colorable" respecting BW photographs (also Ms. N), for reason of burgeoning complexity of this issue in a time of social media and other incursions into the personal privacy realm, this tort will not be raised or discussed in instruction or model response. However, as an exercise in understanding the nature of the hypothetical exercise, one may want to attempt crafting a fact pattern in which the tort might be explored, introducing possible conundrums posed by social media. E.g., if X posts Y on Facebook (or Twitter, Instagram, ___), and…]

Transferred Intent—Doctrine whereby if one intentionally strikes, throws, or shoots at A, and unintentionally hits a third person, B, one is not excused from liability on the ground that the act was an accident. The intent to strike, throw, shoot, etc. at A is deemed transferred to B. The rationale *[policy!]* is that one should be liable for the harmful consequence of one's antisocial act. Transferred intent may not be used to establish the tort of IIED.

Damages (battery)—Compensatory damages may be awarded for 1) pain and suffering, 2) loss of present or future earnings, 3) medical expenses, 4) humiliation, fear, shame, and embarrassment. Punitive damages may be awarded depending on the degree of malice involved.

Damages (assault)—As assault (in contrast to battery) involves mental invasion, compensatory damages for

mental disturbance, including fear and humiliation, as well as any resulting physical injury, may be awarded. Establishment of a technical cause of action, wherein no harm is apparent, may give rise to nominal damages. Thus, special damages needn't be pleaded. Punitive damages may be awarded

depending upon the degree of malicious intent involved. However, punitive damages can never be awarded where the assault is the result of an innocent mistake.

[1] **Beware of law herein!** Legal precepts may be dated. Law may have changed. Be sure to verify correct law in your jurisdiction. For purposes of this and all exercises pertaining to learning LEEWS, use and be guided by law provided (correct or no). In general, as noted elsewhere, one must be attuned to changes in existing law a professor may favor, have an opinion regarding, etc.

RELEVANT LEGAL PRINCIPLES FOR TORTS HYPO (CONT.)

Damages (IIED)—Compensatory damages may include recovery for both emotional distress and resultant bodily harm. This tort is fertile ground for punitive damages.

DEFENSES TO INTENTIONAL TORT

Privilege—A condition that serves to negate and/or justify the defendant's tortious conduct.

Types: **Self-defense**—When a person is 1) attacked, or has reasonable grounds to believe he is about to be attacked, he may 2) protect himself, 3) using such force as is reasonably necessary. Reasonablenesswill be determined from all the circumstances.

Defense of others—A privilege will exist whenever 1) the defense of another is 2) reasonably and 3) immediately necessary. Generally, the defender may take whatever action the person attacked may reasonably take to protect himself. Thus, the defender will himself be liable for force beyond what is reasonably necessary. The majority rule is that with respect to mistake, one goes to the rescue of another at his peril.

Consent—1) An actual or 2) implied willingness that the act occur. (Second element requires a manifestation upon which the defendant can reasonably rely.) Consent is not a defense, *per se. Rather, it* negates the wrongful intent element of the tort itself. Moreover, defendant's conduct may not exceed reasonable parameters of the consent. (E.g., if a fistfight is agreed to, there is no consent to biting or use of a knife.) Prior acquiescence in otherwise offensive conduct may establish consent.

NOTES

MODEL RESPONSE TO TORTS HYPO

PLANNING PHASE

(The Blender applied)

[Note. Embedded text in brackets and italicized (see just below re Preliminary Overview [vs. "Note" advice such as this]) is corollary, explanatory information, *not* planning thinking!]

Preliminary Overview—*[Immediately skip over facts to question(s)/instruction(s)—typically at the end, but not always.]* Reveals (very) open-ended instruction at end. A clue is "all parties." Fact pattern must be scanned for *all* conflict pairings. This includes possible unnamed parties (!!).

Step One—*[Identify relevant conflict pairs, objective(s) of each party to each pairing.]*

[1st para.]—Pucker Nicely (PN) v. Direct Hit (DH)—PN wants money damages. DH doesn't want to pay. Given bloodied nose, DH also likely wants money (!!). PN would not want to pay *him*.

[Note. PN (naturally) seeks "justice." DH wants PN's love. "Objectives" of Step One, however, imply specific, practical matters—things within a court's power to grant.]

[2nd para.]—Ms. N v. DH—Ms. N wants money, possible punitive damages. DH doesn't want to pay.

[2nd, 3rd paras.]—DH v. RN, DH v. Mr. N, BW v. RN, D v. RN—All plaintiffs/movants want money. Excepting BW v. RN *[see following],* and possibly DH v. RN, no colorable *affirmative* objectives *[as opposed to counter-objectives]* for defendant/respondents.

[Note. All members of Nicely family (NF), also DH, may seek damages from BW on account of unflattering photographs, possibly published. This suggests NF v. BW and DH v. BW, also an affirmative objective for RN within BW v. RN. Nothing in facts suggests DH v. Hospital! (Positing injury/harm/mistake by hospital requires speculation with no foundation.) Bringing in BW's employer would also be unwarranted speculation. Use only given facts, reasonable inferences therefrom. The way to bring in the newspaper, should doing so seem appropriate (e.g., introduce a premise one knows a professor is interested in, but that can nowhere else more naturally be introduced), would be to add to given facts as follows: "Assuming, arguendo, BW's newspaper published his photos…") In general, however, avoid adding facts.][2]

Step Two—*[One pairing, one party, one objective at a time (referring to toolbox), cull through (just) facts relevant to that pairing, party, objective (words, phrases, sentence, at most a paragraph?) to identify premise(s) that may assist that party in achieving that objective OR, possibly, an overriding premise.]*

PN v. DH—Battery, IIED, also assault are colorable to assist PN (+ damages). DH has no colorable counterpremise(s). DH, seeking money, can colorably assert battery, possibly assault (+ damages!), to each of which PN will respond with counterpremise self-defense.

[Note. Should you decide (correctly) assault cannot be established (apprehension lacking), note it nevertheless. It is colorable! (Occurs as possibility!) Don't stop to analyze in Step Two! Nevertheless, all relevant analysis should be shown. The (clearly) missing apprehension element merely suggests one should be able to dispatch assault quickly when it is addressed in the response. Note. Neither consent,

[2] **Adding to facts** [in somewhat unwarranted, speculative fashion]. Never do this on a bar exercise! (Waste of time!) Respecting law school hypos… In first year classes in particular, because they are large, grading tends to be cursory. (Checklist reigns!) Professors award points for (relevant) issues identified, somewhat quality of analysis. (Recall first 2-3 page advice, p.XXX.) They tend to be impatient with anything unwarranted, speculative, not in the model response. This is especially so if issues/aspects expected to be identified have not been. (I.e., existing facts have not been fully exploited.) However, as will emerge in the present [torts] exercise, occasion may arise for pointing up aspects of an exercise—a factual implication, an issue—possibly overlooked by the (professor) author of the exercise. When one has truly gained command of essay exercises as *opportunities to demonstrate skill at the Lawyering Game*, one may assay to create—*arguendo*—possibilities for discussion via minor factual changes and speculations. The idea would be to introduce something one thinks may interest/impress a professor. However, first order of business is to fully exploit what exists in a fact pattern and is likely on the checklist.

nor privilege are counterpremises. Each is a factual proposition having to do with element three—unprivileged—of battery. Being able to distinguish counterargument (factual) from counterpremise (legal) will take a while to come clear. (See, e.g., pp. XX [fn.X], XX, and XX, supra.) PN must also establish damages, as each premise is a complete theory of entitlement. Indeed, battery plus damages, IIED plus damages, etc. are PN's complete premises.]

> Ms. N v. DH—IIED and assault (+ damages, especially punitive) for Ms. N. No counterpremises.
>
> DH v. RN—Battery, possibly assault[3] (+ damages) for DH. RN counters with defense of another.
>
> DH v. Mr. N—Battery, assault, negligent tort (p. 32) (+ damages). Defense of others as counter.
>
> BW v. RN—Assault and no counterpremise. RN can assert premise of invasion of privacy. As damages will have been thoroughly explored at this juncture, damages can probably be safely left out of this and succeeding discussions.

[Note. Invasion of privacy, although "colorable" and among given "relevant principles," will not be explored in the model response.]

> D v. RN—Battery and assault under transferred intent theory by D. No colorable counter.
>
> NF and DH v. BW—probably nothing to add to privacy discussion in context of RN v. BW.

Step Three—*[Step Three is a quick preview! Focusing on one premise/counterpremise at a time (referring to course outline, possibly mnemonics scribbled at the start of the exam, drawing from memory. [Note. Outlines of exam response do not contain definitions!]), quickly preview in light of relevant facts first, whether some element is so obviously lacking as to immediately dispose of the premise (i.e., "dispositive element"), second, whether real issues are raised in resolving the premise.]*[4]

[Note. Step Three presupposes skill at analysis. One is initially unlikely to be quick/good at Step Three. (I.e., Step Three likely goes slowly. Practice required!) Preview first, whether a premise can be disposed of (defeated) quickly (= minor [overall] issue), second, whether it presents an opportunity to demonstrate legal knowledge and/or skill at the lawyering game. Such "opportunity" is normally generated by real (closely contested) issues. Real issues require that more time be devoted to discussion (= major [overall] issue).]

> PN v. DH—PN battery (intent, privilege seem real issues); assault (no apprehension); IIMD (no calculation to distress); damages (lack of malice defeats punitive; compensatory aspects speculative; nominal likely). DH battery (intent = real issue); assault (no apprehension); damages (pain and medicals speculative; likely superseded by PN self-defense counter[premise]). PN self-defense (whether force reasonable a likely real issue).
>
> Ms. N v. DH—IIED (calculation and intent problematic [real issues]); assault (easy. fear of possible rape completes); damages (compensatory for medicals, humiliation, mental disturbance; punitive on transferred malice? Innocent mistake? Policy discussion opportunity?)

[Note. Recall 10-15 minute planning segment guideline. One likely will not get much farther than the planning reflected above in 15 minutes, if that far. Simply, abruptly, break off planning. Begin the response. Numerous

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[3] **Discuss assault [again] or no?** Should you introduce a legal precept or not? This can be tricky, as relevant premises (issues) may appear more than once. The answer is to focus on your purpose in the exam (Mantra #2), which is to show the professor *new* law, *new* thinking! If you have already shown the professor you know the precept (e.g., assault), and you are satisfied there is nothing of importance to add by way of analysis, then perhaps you can leave out the second discussion. The professor probably isn't looking for it. However, if you know that *sheer number of issues identified* ("spotted") is important to the professor [more of a check-check-check ("checklist") weighted exam.], then you may want to identify it again. One way around the problem is to note the possible issue, but give it short shrift respecting analysis. (E.g., "Possible assault. Nothing to add to discussion in PN v. DH, *supra.*") Note ability to refer a professor back (*supra*) or forward (*infra*) when what one is doing is clearly labeled. [can't close space bet. Footnotes. ?? please do.]

[4] **LEEWS terminology** must be readily, immediately comprehensible. E.g., "issue"—relating to premise elements—, versus "overall issue"—relating to whether premise as a whole can be established—, versus "real issue"—relating to closely contested, element-related issues. (Yes. Practice is required!)

issues (premises) have been identified. One perceives likely overlap. Present as quickly and concisely as possible—roughly one premise, one paragraph at a time. Begin another 10-15 minute planning segment. (Note. Given repetition of premises and their relative straightforward analysis, it may be one decides to skip Step Three from this point and go directly to response [!!]. Note. Suggested 90 minutes for Torts Hypo is far off the mark. 2 to 2 1/2 hours is what the exercise actually takes. Therefore, one would likely have at least two additional 15 minute planning segments available. I.e., 1/3 of 120-150 min. = 40-50 min. for planning!)]

DH v. RN—Battery (easy); assault (no apprehension); damages (medicals clear, but punitive [malice required] an issue). Defense of other (the mother. Reasonable force contestable [sub] issue).

DH v. Mr. N—Battery (intent = real issue [contestable, close call]); assault (no apprehension); negligent tort (injury speculative); damages (compensatory speculative; punitive depends on degree of malice). Defense of other (no one needing defending at this point save DH? Reasonable force?).

BW v. RN—Assault (no apprehension). [Invasion of privacy. Not addressed in model response!]

D v. RN—Battery (by transferred intent); assault (no apprehension); damages (obvious medicals; degree of malice [transferred] for punitive an issue).

NF and DH v. BW—[Invasion of privacy; damages (requires speculation). Again, not addressed.]

Preview of logical sequence of discussion [See p. XX, *supra*.]—Chronological sequence of presentation seems logical as any. Repetition of premises suggests reference to prior discussion *["…, supra,…"]* will be useful. Therefore, clear labeling especially important.

[Note: Planning/thinking presented above likely seems lengthy, complex, time consuming. With practice, however, you'll move quickly through the Steps—The Blender. Thought process is *mostly in your head*. Additional thinking/ planning will occur as you actually execute the response. Recall how little was set forth in the planning outline (p. XX). In general, simply apply The Blender to reveal premises. Begin response paragraphs.]

———————

MODEL RESPONSE TO TORTS HYPO (CONT.)

RESPONSE EXECUTION PHASE
(What is actually typed/written)

[Note. Don't be daunted by the seeming complexity of what follows. Most (same as this) is bracketed (in italics) explanation of what is stated and repetition of important advice.]

[Helpful label] Pucker Nicely (PN) v. Direct Hit Davis (DH)

[Question/Issue statement?] Issue: Is DH liable for kissing PN? Alternatively, Liability for the Kiss. *[Note. These are useful (time-saving) as broader (more umbrella) statements encompassing all relevant issues. Versus, e.g., "Is DH liable for battery?... Is DH liable for assault?..." etc.)]*

[Following an appropriate (helpful!) introductory label, unless specifically insisted upon by a professor, issue statements should be unnecessary (!!). Simply—B! A!—begin paragraphs with premises. Underscore/highlight key/guiding words. The issue is thereby implied!]

[Conclusion?]

[Note. Some (few) professors want conclusions stated prior to discussion. (Conclusions on bar exams normally are stated at the outset, as there is a right/wrong response.) More often law school exam conclusions are stated at the end, reflecting relative unimportance. (Sometimes not at all.) Hence, IRAC! Wherever placed, DO NOT STATE, DO NOT THINK ABOUT A CONCLUSION BEFORE COMPLETING ANALYSIS! (Although you may have an outcome in mind.) Remain open to possibilities often emerging only during nitpicking/probing of facts during analysis. On the bar, should a professor insist one state the conclusion at the outset, literally leave several lines blank (or open space). Go back. Insert the conclusion upon completion of analysis.]

[Discussion. UBE (Ugly But Effective) format.]

> Battery *[Key word underscored!]* is 1) an intentional act resulting in 2) an offensive, 3) unprivileged, 4) contact. *[Note. Elements numbered to focus analysis, for possible shorthand. Issue—Was there a battery?... Did DH batter PN?—implied via opening statement with underscoring = (by grader) "Check!, Battery addressed!"]*
>
> 1 =
>
> 2 = (See UBE discussion of PN battery premise p. XX, *supra.*)
>
> 3 =
>
> 4 =

[Discussion. Standard, concise English.]

> Battery is 1) an intentional act resulting in 2) an offensive, 3) unprivileged 4) contact.

[Respecting analysis, generally, if feasible, go right to clearly lacking element(s); dispose of premise. If, as here, no element is easily defeated (shown lacking), get rid of non-issues quickly; move into heart (meat) of the discussion. (I.e., analysis that likely impresses the professor.) Thus…] Contact is shown by the kiss. Offensive means that which would offend the sensibilities of a reasonable person, not necessarily PN. *[If further definition is needed (e.g., of an element), simply introduce it as appropriate. If such definition introduces a complex new legal precept (e.g., unprivileged below), one should probably just abruptly—B! A!—begin a new paragraph with it. (NEW LAW = NEW PARAGRAPH!)]* Most people don't like to be awakened. *[Don't hesitate to bring to bear common sense and life experience. Take judicial notice, as it were, of basic truths (things most would accept as true). Introduce them as facts.]* To be awakened in an intimate way (a kiss) by someone not loved ("unrequited love") or liked (judging from PN's reaction) would probably offend most. *[Note parenthetic introduction of hypo facts and hedging—"probably").]* Arguably *[DH counterargument]*, a kiss, mere expression of affection, shouldn't offend anyone. However, this seems unrealistic. *[Recognize, but don't dwell on weak counterarguments.]*

"Unprivileged" means unconsented to. *[Paragraph frequently, especially where, as here, new law is introduced and, as anticipated (via Step Three), likely a considerable amount of discussion.]* Consent may be actual (express) or implied (a manifestation upon which a reasonable person may rely). *[One need not offer source or citation. Simply state law you think relevant (the premise) as best and concisely as possible.]* There was no actual consent, as PN was "asleep." Sleeping Beauty and Snow White aside *[Why not liven discussion with appropriate humor. Professors sometimes caution against humor. However, only because some students use it to mask (excuse) lack of knowledge, inadequacy at analysis, and other incompetence.],* the mere circumstance of sleeping should not imply consent to intimate contact from someone neither loved nor liked. It may be argued that a woman or girl asleep in a public place (a "meadow"), possibly alone, invites attention. However, without additional information (e.g., concerning any prior relationship), this argument is unlikely to persuade. The name, "Pucker Nicely," in and of itself should not imply consent to be kissed. *[Note the patient back and forth interweave of argument, counterargument.]*

Respecting intent, it seems *[hedging]* impossible to kiss someone accidentally. Moreover, PN was presumably lying down. DH therefore had to bend or kneel to kiss her. On the other hand, "chanced upon" establishes that DH wasn't looking for PN. Arguably, chancing upon her in such an idyllic, romantic setting (meadow), DH's "great love" and "passion" overbore self-restraint. Intent seems a close call. *[Don't be afraid to "talk" to the professor. Ambiguous and partial facts often produce close calls on law school exams.]*

Assault *[New law!]* is 1) an intentional act creating 2) apprehension of 3) a battery. *[UBE: No 2 = PN asleep. Done! Standard =…]* There could be no apprehension, as PN was "asleep." *[Done! Note. Present complete law in one's first 2-3 discussions, even if one does not intend to discuss all elements!]*

However… *[Here something may be inserted belatedly that is unlikely to come to mind at this point. Eventually, hopefully—possibly over an hour into the discussion—, it occurs as a new, wholly unexpected possibility. As such, it is a "nugget of gold"—the sort of insight that arrests a professor's attention early in a response and says, in effect, "Here is a possible 'A' exam! This person knows how to play this game!"]*

Intentional infliction of emotional distress (IIED) occurs where 1) conduct is 2) calculated to cause 3) severe emotional distress. *[UBE: No 2 = chance meeting + great love + object of passion.]* DH's love, passion, the chance nature of the encounter appear to negate element No. 2. Please see discussion of Ms. N v. DH, *infra,* for more exploration of this tort. *[Discussion of IIED is thin, because an element is easily defeated. (Ditto assault above.) You may feel the professor wants more. You know from your response outline and Step Three there is more to say about IIED in the context of Ms. N. Therefore, refer the professor to that section of the response! This is made feasible by clear labeling. The professor can find it easily.]*

Damages *[Don't forget this part of each torts premise. It seems feasible, expedient to cover everything relevant to foregoing discussion of the various torts respecting damages in a single discussion.]*

Compensatory damages may be awarded for 1) pain and suffering, 2) loss of present or future earnings, 3) medical expenses, 4) humiliation, shame, fear, and embarrassment, and where mental invasion is apparent (e.g., assault and IIED), 5) mental disturbance, including fear and humiliation. Where no harm is apparent, nominal damages may be awarded. Punitive damages may be awarded depending upon the degree of malice involved, but never where an assault is the result of an innocent mistake. *[Present all law you think relevant. String precepts one after another, showing off relevant legal knowledge. Analysis is thereby set up.] [UBE: No punitive = love, passion. Compensatory = 4 (embarrassment) possibly.]* There is only love and passion on DH's part prior to PN's reaction. Therefore, no punitive, but only compensatory and/or nominal damages would be awarded. Battery does not contemplate "mental invasion." Assuming, *arguendo,* a battery, judging from PN's reaction, only compensation for embarrassment would seem to be in the offing.

Conclusion: *[Normally, per IRAC, follows discussion on law school exams. However, could now (at this latter juncture) be introduced at the beginning. (Literally go back.) Conclusions almost always are set forth at the outset on bar exams.]* DH is probably liable for battery *[Hedging is lawyerlike, often a good idea.]*, as the kiss seems intentional, but not assault or IIED. Beyond compensation for embarrassment, damages nominal.

———————

Liability for DH's Bloody Nose *[Introducing new topic heading seems helpful/necessary. An alternative introduction (if instructed to "State the issue!") would be Question: Is PN liable for bloodying DH's nose?]*

Discussion

[UBE] Applying law of battery, *supra, [Flag key words with underlining. You should not have to repeat battery definition.]* 4 = bloody nose; 2 = most people offended by bloody nose; 3 = DH said nothing + law unlikely to imply consent to violent act from mere kiss; 1 = forceful enough to bloody + struck small, vulnerable nose (target?), suggesting aim + sentence structure—"…kiss, PERIOD! She reacted…"—suggests PN awakens, *then* reacts (time to form intent) + "by" ("reacted by bloodying") versus "and" implies choice of behavior + *[can you think of yet another argument that (pretty much) establishes intent to a certainty?]* versus *[PN counterargument]* "reacted" suggests spontaneous, unconscious reflex *as* she is awakening.

[Normal] Applying battery, *supra,* bloody nose establishes contact. Having one's nose bloodied would surely offend most. DH did not give express permission to have his nose bloodied. Moreover, *[policy!]* law is antithetical to violence. Force is permitted only in response to and in proportion to force. (E.g., self-defense.) For policy reasons, consent to having one's nose bloodied is unlikely to be implied from a mere kiss.

Respecting intent *[Real issue. Much to say. Likely deserves separate paragraph.]*, PN *[Her lawyer, of course.]* would likely contend "reacted" implies spontaneous reflex upon awakening that accidentally bloodied DH's nose. However, "bloody-*ing*" suggests force. The nose being small and vulnerable suggests *[doesn't prove]* PN aimed—target! Further, sentence structure, namely end of one, beginning of another *[Lawyering is a nitpicking business indeed!],* suggests PN awakened, *then* "reacted." The word "by" (versus "and") in "reacted *by* bloodying" also suggests choice of behavior.

[Note. Did you think of another argument establishing intent? If not, consider first line, second paragraph. Then see footnote 5 below.][5]

Respecting assault, *[UBE: No 2 = no time to apprehend.]* the bloodying likely occurred too quickly to be apprehended.

[Note. Again, discussion of damages is left to the end, especially as a counterpremise must be explored.]

Self-defense *[B! A!]* is established when 1) a person is attacked or has reason to believe he is about to be attacked, and 2) he protects himself 3) using reasonably necessary force. *[How does one introduce a counterpremise? Simple. New law = new paragraph. B! A! Statement of law implies the issue!] [UBE: 1 = kiss as prelude to further intimacy, even rape, if PN alone. 2 & 3 = blow to nose possibly exceeded force needed to thwart another kiss, but not a possible rape.] [Standard response:]* For policy reasons set forth re law and violence, the kiss, *per se,* probably could not be construed as an "attack" justifying a blow in self-defense. However, if PN was alone and DH was a relative stranger, the kiss might reasonably be construed as precursor to some further attempt at intimacy, even rape. PN surely would have a right to defend against this. Given normal disparity in strength between men and women, one blow, presumably with hand or fist, would not seem excessive force in response. "Unrequited love" suggests a prior relationship, however. If PN knew DH well, and her act was an expression of anger and disdain, even retaliation, then elements of self-defense would not be satisfied. More facts are needed.

Damages

Applying damages law, *supra*, if liability is found, certain medical expenses would be recoverable. (E.g., X-ray of his nose.) However, any malice discerned in PN's act would likely be deemed mitigated.

Conclusion: PN's bloodying of DH would likely be excused as an act of self-defense. No assault or IIED.

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[5] Consider DH's reaction to his nose being "bloodied." If, as PN would contend, the blow was merely reflexive, an accident, what would DH's likely reaction be? The argument one now (hopefully) discovers is both dispositive and an impressive bit of thinking. (Your author confesses to not seeing it, despite creating the hypo [!!]. When a student pointed it out many years ago, I immediately credited that student with having the "right stuff," as a professor would. How about you?) And *you can do this!* It takes practice. Doubtless, you are already better at playing the game! Nitpick facts! Precisely such *thinking* impresses and earns A's.

[Note. Did the foregoing exploration of self-defense suggest any additional possibilities (premises)? Think carefully before reading the following.]

[If the kiss created apprehension of a rape (likely), a second assault premise becomes possible (!!). This is too subtle to readily be identified during planning. (Note. An exam outline is rarely the sum of the response. *It is but a list of things to get started on*. *Move quickly to the main event—analysis*.) Yet, it demonstrates two things all professors look for. Recognition of assault while investigating self-defense suggests 1) thorough knowledge of law, 2) lawyerly skill at probing facts. Identification of such obscure (but relevant) premises and arguments can impress and result in an "A." Hence (if writing longhand), the value of skipping spaces and leaving blank space at the outset. The second assault may not be on the professor's checklist, but it should be! One makes sure she sees it by going back and inserting at the beginning in proper context. (See "However" paragraph under PN assault discussion, supra. Don't forget the effect on damages.)]

Mrs. Nicely (Ms. N) v. DH

[Question: Is DH liable for flashing Ms. N?] *[Such questions—ssue statements!—are unnecessary (given—B! A!—paragraphs abruptly beginning with [relevant] law.) Henceforth, they will be dispensed with.]*

Discussion *[Normal (unlabeled) format only from now on. However, by all means precede normal analysis (at least for a while) with a UBE format analysis.]*

Respecting IIED, *[Needn't repeat definition!]* DH's act of exposing himself is requisite conduct. Required "severe emotional distress" must be of such intensity and duration no reasonable person should be expected to endure it, more than mere hurt feelings, humiliation, insult, and the like. *[Again. Present clarification, additional law as needed.]* "Collapsed in mumbling hysteria" would seem to satisfy these tests. However, a problem arises respecting DH's calculation. It was toward PN, as evidenced by "surprise" upon seeing Ms. N.

Doctrine of transferred intent will normally deem tortious intent toward party A transferred to unintended victim B. However, not for the tort of IIED. *[New law occurs to you, start a new paragraph!]* Nonetheless, conduct in IIED need not be directed toward a specific victim (logical implication of transferred intent prohibition) so long as it is reckless, shocking, outrageous. Not waiting to see who answered the door seems reckless on DH's part. Flashing is surely shocking, outrageous behavior.

In addition, there is no indication DH closed his coat while Ms. N collapsed and before the son reacted. He was in a "pose." Ruthless might not have reacted had the coat been closed. Therefore, arguably, there was time for DH to form a new, culpable intent toward Ms. N. DH, of course, could contend it all happened so fast. Moreover, plausibly surprise, dismay over seeing Ms. N mumbling, hysterical transfixed, shocked him. Thus, no new intent. (Could DH possibly sue for IIED?!) *[Showing off the lawyering game!]*

Assault is 1) an intentional act creating 2) apprehension 3) of a battery. *[Seems advisable here to repeat the definition. There is a limit to a grader's patience respecting* supra *references.]* DH's "frontal assault" seems intentional ("eschewed . . . for"), albeit toward PN, and Ms. N's reaction indicates fear of something. DH can contend nothing more than flashing was intended. However, what Ms. N reasonably feared is what matters. Apprehension of rape—surely a battery—is not unreasonable.

Damages

Compensatory damages for IIED may include recovery for both emotional distress and resultant bodily harm. The tort is fertile ground for punitive damages, as malice is [apparently] presumed. Ms. N's "mumbling hysteria" reflects emotional distress that would likely result in physical debilitations. These conditions, as well as resulting medication, treatment, and counseling would be compensable. Whether punitive damages would be awarded is somewhat interesting in that DH's malice ("frustration and rage") was toward PN. *[Professors like you to be interested!]* Although IIED cannot be established by transferred intent, it may yet be established by an unintended victim. Moreover, there is no apparent bar to malice being transferred. Indeed, if the actor's malice is to be punished, this aim would be ill served by barring a third-party victim such as Ms. N. *[Thinking! Policy! Professors love this. Bar graders are wholly uninterested.]*

Conclusion: DH seems liable for IIED and assault. Damages will be punitive as well as compensatory.

DH v. Ruthless Nicely (RN) *[Streamline by omitting some labels.]*

RN's intentional shoving or dragging of DH face down ("dental work") through a hedge appears to satisfy all requirements of battery. *[Nothing new to show. Thus, summary, even conclusory analysis should suffice.]*

Defense of other creates a privilege for battery where 1) the defense of another is 2) reasonably and 3) immediately necessary. Generally, the defender may take whatever action the person attacked may reasonably take to protect himself, but not use force beyond that. RN arguably acted in defense of his mother, who could reasonably have been viewed as in imminent danger of sexual assault. The question is whether he used too much force. Had Ms. N violently shoved RN away from her door, hat would probably be viewed as a reasonable reaction. If "trimmed the hedge" means more than a violent shove, say, unnecessarily dragging DH along the hedge, then RN perhaps *[Hedging, no pun intended!]* went beyond reasonable defense to punishment.

Damages

If force was unreasonable, then medical bills for injury to DH's mouth/teeth would be compensable. Also pain and suffering. Punitive award would depend upon what "trimmed the hedge" entailed, resulted in.

Conclusion: RN probably acted reasonably in defense of his mother. However, more details are needed.

DH v. Mr. Nicely (Mr. N)

Respecting battery, having a car wheel brake against one's rump is surely contact that would offend most. DH did not consent to this. Merely being in someone's driveway does not imply consent to such an act. Respecting intent *[Flagging key element!]*, that Mr. N "allowed" this to happen strongly suggests that he had choice in the act. However, given that DH landed in the drive simultaneous with Mr. N's arrival home ("just as"), it could be argued that the contact was unavoidable and an accident. Mr. N could further argue that he was distracted by his "abysmal" round of golf. However, it could equally be contended that irritation over the golf round made Mr. N only too happy to assist his son. (It is hard to know what Mr. N saw while driving up.) The circumstance that Mr. N made no attempt to apply his brakes probably tips the scale against him. *[Back and forth, argument/counterargument, showing close involvement with facts, playing the lawyer game.]*

Negligent tort occurs when 1) one has a duty of care, and 2) violates that duty, 3) which violation is the proximate cause of 4) an injury. One should be careful when driving, especially when turning into a driveway. Mr. N could use the foregoing "just as" argument. However, his failure to even partially apply brakes strongly suggests violation of duty of care. At the very least bruising of DH's rump must have resulted.

Respecting assault, hitting the "rump" suggests DH's back was turned and he couldn't see or apprehend the oncoming car. Moreover, DH's senses were probably too confused for him to be aware of the car.

Mr. N could contend he was acting in defense of other (the son or wife), although such would concede the battery. However, there is no indication he observed the events preceding striking DH. Moreover, no one, arguably, was in need of defense besides DH. Further, use of a car here is likely *per se* unreasonable force.

Damages

Physical injury, pain and suffering, and medical expenses could have been minimal or substantial, depending upon how fast the car was moving when it struck DH. To "brake" one's car on someone seems a malicious act demanding a punitive award. However, Mr. N's lousy mood, his colorable defense of his family, and the rapid sequence of events would probably mitigate the degree of malice found.

Conclusion: Mr. N would likely be found liable for battery and negligent tort, because he utterly failed to apply brakes, but not assault. Nominal and compensatory damages would be awarded. Perhaps not punitive.

[Note. Does it become clear that analysis, *not* who wins (conclusion), is the main event?] [please remove line]

Bernstein Woodward (BW) v. RN

Respecting assault, BW "hardly noticed" the implement thrown at him. Arguably, he could have been apprehensive of being struck upon seeing Diddle's injury. However, permitting apprehension after the fact opens a floodgate of confusion and litigation, thereby contravening public policy of limiting litigation. (E.g., how long after the fact?) *[When possible/feasible, show you are thinking about the larger (policy) picture!]*

Conclusion: BW can sustain no claim against RN. *[Damages discussion is moot. Would add nothing new.]*

[Invasion of privacy occurs when…] *[New law, new paragraph! Again, opening a paragraph abruptly with law and highlighting key words both implies and flags the issue. It may be noted that advent of ubiquitous smartphone photographing and videoing, together with issues raised by social media and Internet information gathering about what really remains "private," creates increasingly murky legal territory respecting this tort.]*

Diddle (D) v. RN

All elements of battery are satisfied, including intent, given the implement was aimed at BW. *[Conclusory statement. However, at this point one may be pressed for time and wanting to move quickly. Initial paragraphs should have created presumptions in one's favor. The aim is never to repeat, but to discuss what is relevant, new, at issue. (Matters providing opportunity to play the game).]* Doctrine of transferred intent, noted previously, holds that where one intentionally strikes, throws, shoots at A, and unintentionally hits B, intent to strike A is deemed transferred to B. The rationale is that one should be liable for harmful consequences of one's antisocial act. RN "aimed" at BW. Therefore, his intent transfers to D.

Damages

Pain and suffering, medical expense, loss of earnings are likely compensable consequences of D's injury. Malice giving rise to punitive damages is arguably mitigated by RN's understandable anger and embarrassment. However, for policy reasons, intentionally throwing an implement capable of inflicting grievous harm likely warrants finding malice, *per se.*

Conclusion: RN is liable for battery via transferred intent, but not assault, as D probably did not have time to apprehend. Damages would be compensatory, likely also punitive.

[remove line]

Nicely Family (NF) and DH v. BW

Liability for invasion of privacy would be as set forth in the discussion of BW v. RN, *supra. [This discussion, of course, is not set forth. However, if it were, alert the professor you are aware of the possibility in this context as well. (Thereby garnering any points to be had). Generally, one need not repeat the same law and analysis.]*

SAMPLE EXERCISE TWO

Combination Contracts/Agency/Property/Evidence Hypothetical[6]

(90 min.)

For many years school teacher Canei Soakum had returned to verdant Getaway Valley for a summer of country air and profit. Just as regularly she rented a cottage owned by the neighbor next door, Ina Pigseye. On a level quarter acre plot, surrounded by pines and located at the end of the common drive that passed between the cottage and Mr. Pigseye's house, Ms. Soakum had for years conducted weekend "tagsales." The tagsales were in reality an antiques business. During the week Ms. Soakum would visit auction houses and scour surrounding communities for bargains. On weekends she would resell the items at "city prices" to tourists and weekenders. Indeed, "Soakum's Quarter Acre Antiques Bazaar," as she fondly referred to the enterprise, was known in a three state area.

Flush with previous year's profits, one summer Ms. Soakum took Ina Pigseye up on his longstanding offer to sell her the cottage and all appurtenances, including her one half of the quarter acre plot. They went to contract in July, with the closing set for the end of August. Meanwhile, Soakum went about the usual summer of weekend enterprise.

The first weekend Soakum was assisted by her visiting nephew, Ican Getum, a high school junior-to-be, eager to learn the ways of his savvy aunt. Almost immediately Ican consummated the sale of a roll-top desk to one Mr. Breezy, who was vacationing in the area. "Solid oak, a bargain at $895," proclaimed Ican. Contrary to his aunt's strict rule of "cash-n-carry only," the eager youth allowed Breezy to leave a $75 deposit, with the understanding that he would retrieve the desk and pay the remainder on the morrow. Breezy assured the boy that his aunt couldn't possibly mind a departure from her rule "just this once," and Ican agreed.

Later that same day Ms. Soakum sold the same roll-top as a "genuine antique" to Ima Gullible. Next day Soakum returned the $75 to the disgruntled Mr. Breezy. Feeling sorry for him, she promised him "first shot" at the next roll-top she found. Nevertheless, a week later, with another roll-top and a ready buyer in tow, she forgot all about Mr. Breezy. She also refused a refund to Ms. Gullible, who had found a "Crafted by Santa's Helpers" sticker under her desk.

From time to time during her buying peregrinations Ms. Soakum came across items for which she had received special requests. One such item was a scarecrow manufactured by the long defunct Surefire Company. She sold it to a delighted gentleman farmer named Brownthumb. Imagine her surprise when, a month later, Brownthumb came to her complaining that not only had the scarecrow, once proclaimed by the Surefire Company to be "all one needed for crop protection," not kept birds away from his strawberries, but a family of predators had actually nested in it.

Prior to closing on the cottage, an unused garage on the premises burned to the ground when oily rags spontaneously ignited. At the closing Soakum's lawyer demanded an adjustment in the purchase price to compensate for the loss of the garage. Ina Pigseye objected vigorously. Ms. Soakum reserved her right to sue on the issue, and the transfer of title was consummated. A week later, to teach Soakum a lesson (and possibly to avenge her rejection of his advances over the years), Mr. Pigseye began to erect a fence across the portion of the quarter acre that remained his property. Ms. Soakum immediately brought an action to enjoin the building of the fence. [need fn. Dividing line]

As if these were not enough problems to occupy her, upon returning to begin her school year Ms. Soakum found herself a defendant in a lawsuit arising out of an accident involving a chair she had sold. Desirous of resolving the suit quickly, despite its frivolousness, Soakum called the plaintiff and proposed a compromise for a reasonable sum. The plaintiff spurned the offer, and at the subsequent trial of the matter offered the settlement proposal as an admission against interest.

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[6] Alone among eight Appendix hypos, this one is more like a bar exam offering. Knowledge of several areas of law must be drawn from in responding. However, as is the case here, guidance is normally provided respecting what law applies to which questions/instructions. Q/I tend to be more focused, straightforward. *[Bar hypos are rarely followed by open-ended questions (e.g., "Discuss all rights ...").]* Facts tend to be unambiguous. Policy discussion—what you think the law of the state *could* or *should* be—is never wanted.

How should a court decide the following?:

(50 min. Contracts and agency law)

1) An action by Mr. Breezy respecting the two desks.
2) An action by Ms. Gullible respecting her desk.
3) An action by Mr. Brownthumb respecting the scarecrow.

(25 min. Property law)

4) An action by Ms. Soakum respecting the garage and fence.

(15 min. Evidence law)

5) An objection to the offer of the settlement proposal in evidence.

RELEVANT LEGAL PRINCIPLES FOR COMBINATION LAW HYPO

AGENCY

Agency Liability—As a general rule, a principal is liable to a third party for all contractual obligations incurred by his agent within the scope of the latter's authorized scope of employment. Where the agent lacks actual authority, but the acts of the principal lead the third party in good faith to believe the agent has authority, or the circumstances reasonably imply such authority ("apparent authority"), the principal will be liable.

Infants—Infants (under 18 in most jurisdictions) may be agents. The adult principal may not avoid a contractual obligation based on said infancy.

CONTRACTS

Contract—1) An agreement 2) entered into by two or more 3) legally competent persons (over 18 in most jurisdictions; over 21 in some) 4) for consideration (a bargained for gain or advantage), 5) embodying one or more promises to perform or forbear from specified acts 6) enforceable at law, which agreement is 7) offered and 8) accepted in a manner that 9) accords with lawful requirements. (E.g., Statute of Frauds requirement that contracts involving purchase or sale of real property or personal goods valued at $500 or more[7] must be in writing.)

Limitation—Subsequent actions in reliance of contract to the detriment of the party so relying may estop (bar) the other party from objecting to contract for lack of consideration, and may cure a Statute of Frauds violation. The detriment must be more than incidental.

Breach of contract—Occurs, *inter alia,* where there is failure to perform a contractual duty. A material breach (i.e., substantial, not incidental to the contract) will give rise to a cause of action for rescission and/or damages.

Fraud—Where there is a material misrepresentation relied upon by the other party to his detriment, a contract may be set aside by that party on the ground of fraud.

Promises—A mere naked promise unsupported by consideration is unenforceable. A promise made out of moral obligation lacks consideration.

Warranty of fitness—In general under the Uniform Commercial Code (UCC) a manufacturer or merchant/trader in a product or line of goods impliedly warrants that said product or line of goods is fit for the purpose or purposes for which it is intended. Such warranty, and all express warranties, particularly with regard to safety considerations, are increasingly held to "run" with the product, regardless of privity (direct dealing) with the manufacturer or merchant/trader.

EVIDENCE

Settlement offers—As a general rule, evidence of an offer of or the agreement to accept valuable consideration in settlement of a claim is inadmissible to show liability or the lack thereof, where the liability or amount of a claim is in controversy. To permit otherwise would contravene the public policy of encouraging candid negotiations and out-of-court settlement by guaranteeing that payment or acceptance of a given sum will not be used against a party should a trial become necessary. The Federal Rules of Evidence proscribe *all* matters, including admissions made in the course of settlement negotiations. Some state rules of evidence (e.g., New York) would permit an admission of a fact during unsuccessful negotiations to be introduced in court.

[7] Such amounts increase with inflation. E.g., the onetime $500 dividing point between grand and petit larceny was increased to $1,500 in most jurisdictions. It may well have increased again. DO NOT ACCEPT LAW PROVIDED HEREIN OTHER THAN FOR PURPOSES OF DOING EXERCISES HEREIN. It may be incorrect or (more likely) outdated. CHECK IT OUT!

RELEVANT LEGAL PRINCIPLES FOR COMBO LAW HYPO (CONT.)

PROPERTY

Easements—An easement is a non-possessory right without profit given by a landowner to another, whereby the latter is permitted to use or burden the owner's land for a specified and intended purpose. Easements may be created by prescription, implication, grant (requires a writing), and strict necessity. An easement by implication is implied in law (no writing required) and arises where 1) a common owner of land 2) conveys away part of the land, and 3) implied in the conveyance is a previously existing appurtenant easement over the retained servient estate. "Easements appurtenant" are apparent or visible easements (such as access to a lakefront over the servient estate), whose benefit is annexed to the dominant (benefitted) land, as compared to some personal benefit, right, or interest that inures to a person to use another's land.

Risk of loss in conveyance—At common law, in the absence of a provision in the contract, if property was destroyed between the time of contracting for sale and the transfer of the deed, and the destruction was not caused by either party, the risk of loss fell on the buyer, who was deemed to be the equitable owner after contract.

The Uniform Vendor and Purchaser's Risk Act *[Example of the kind of modification of law that emerges from a Restatements effort],* adopted by many states, places the risk of loss upon the seller until the buyer either takes title or takes possession. *[Can you think why? Can you imagine creating a hypo that would explore the contrasting positions?]*

MODEL RESPONSE TO COMBINATION LAW HYPOTHETICAL

PLANNING PHASE

Preliminary Overview—Five questions, each with a time limit, provides obvious guide to segmenting response. Within prescribed 1/4-1/3 planning period for each time limit it seems logical to apply Steps to questions *within each segment.* (E.g., 13-17 minutes for Nos. 1, 2, and 3). I note that each question provides guidance respecting conflict pairs and objectives. *[Any others?]*

Step One—*[Identify relevant conflict pairs and objectives of parties to pairings.]*

Question No. 1—Breezy v. Soakum, (also) Breezy v. Ican Getum. Breezy wants a comparable roll-top desk or compensation. Soakum, Getum don't want to pay. *[Note. Soakum v. Getum occurs to many. However, is such a pairing relevant to "action by Mr. Breezy?"]* Investigation of the question can probably be confined to the third and fourth paragraphs of the hypo.

No. 2—Gullible v. Soakum. Gullible wants not just a desk, but a "genuine antique" desk, or compensation. Fourth paragraph seems to contain all relevant information.

No. 3—Brownthumb v. Soakum *and* Surefire Company. Fifth paragraph only. Brownthumb wants a scarecrow that works or compensation.

[Note. Although Surefire Company is "defunct," therefore likely non-existent in real life for suit purposes, [please remove indentation in this segment.] HYPOS ARE NOT REAL LIFE! (Although, in effect, they invite resolution of real life simulations.) Brownthumb v. Surefire may provide opportunity to show off additional legal knowledge. E.g., you may want to discuss significance of "long defunct." (You surely do!) However, you need not be concerned with this at this juncture. For now, merely note the conflict pairing. Decide later what, if anything, to discuss respecting it. (BTW. Don't know what "long defunct" means? A lawyer-to-be should!) In such event—uncertainty re meaning of a word, fact—append a brief note indicating your confusion. Literally! Say, "Not sure what is meant by 'long defunct!" In effect, talk to the professor. Then make a stab—e.g., "assuming, arguendo, 'long defunct' means… stinky?… hidden?..." Perhaps the professor chuckles, cuts you some slack. YOUR EXAM RESPONSE IS AKIN TO ONE-ON-ONE COMMUNICATION WITH A PROFESSOR. (Perhaps one's only communication with a professor.) Don't be afraid to (as it were) communicate informally, clarify your take. E.g., "assuming, arguendo, by ____ is meant…, then…")]

No. 4—Soakum v. Pigseye. Soakum wants two things. First—pay less, because garage no longer exists; second—prevent Pigseye from erecting fence. Pigseye wants the reverse. Pertinent information contained mostly in second, sixth paragraphs.

[Note. Never (ever!) frame objectives in legal language—e.g., "enjoin" building of the fence (as many students suggest). You thereby likely impose limits on the discussion. E.g., "enjoin" (term likely not known to Soakum—not an objective in "common sense [client] language") would focus discussion on injunctions. We shall see that this is far off the mark. OBJECTIVES CONTEMPLATED BY STEP ONE ARE TO BE EXPRESSED IN COMMON SENSE, LAYMANLIKE LANGUAGE. (Lest at the outset one gets boxed into a legal corner.)]

No. 5—Soakum v. [unnamed party suing her—some… "plaintiff?"]. *[Yes, Soakum wants to settle, to pay as little as possible (as many in live programs assert as the objective). However, what more immediate objective is implied by the question? Use common sense reasoning.]*

Answer: Relevant to the *question*, doesn't Soakum (her lawyer) want her offer to settle excluded from evidence, plaintiff the reverse? *[Such, typically, are the objectives in evidence law exercises. One side wants evidence admitted, the other wants it kept out.]* Final paragraph provides all relevant facts.

MODEL PLANNING RESPONSE TO COMBINATION LAW HYPO (CONT.)

Step Two—*[One pairing after another, one party after another, one objective after another—A DISCIPLINED MARCH!—identify relevant premises.]*

[Question format is helpful in providing guidance to relevant legal toolboxes. (E.g., contracts and agency law for the first three questions.) One is able to focus largely on facts of one paragraph at a time.]

No. 1—*[Breezy asserts]* contract twice, and breach. *[At this point no counterpremises apparent. Format suggests agency may come into play, likely involving nephew.]*

No. 2—*[Gullible asserts]* contract, express and implied warranties, breach thereof.

No. 3—Implied warranties, breach.

No. 4—Garage—risk of loss in conveyance.[8] Fence—easement by implication.

No. 5—Admissibility of settlement offers. *[Another "overriding premise."[9] I.e., doesn't matter which side's perspective is taken. Same rule/principle/statute controlling resolution arises/emerges.]*

Step Three—*[Quickly consider each premise, previewing first, whether an element is clearly lacking (I.e., easily defeated), second, whether real issues are raised. Here Step Three is probably unnecessary.]*

[My impression at this point is that questions in first grouping deserve roughly equal time. Therefore, Step Three can be performed as part and parcel of analysis. Each question gets 1/3 of what is left of the 50 minutes. Likewise, Nos. 4 and 5 will receive what is left after their respective 1/4-1/3 planning periods.]

[... No. 1—Contract with Ican—nephew (HS junior-to-be) probably not legally competent! Agency arises. Apparent authority? Contract with aunt—consideration lacking, possible statute of frauds violation.

No. 2—All contract elements seem in place for Gullible.

No. 3—Soakum a trader in antiques, not scarecrows. If Surefire Company existed, probably liable.

No. 4—Garage—Soakum in possession? Policy discussion opportunity contrasting common law with modern doctrine? *[Here one must know whether grader wants policy discussion. If bar exercise, definitely not.]* Fence—did Soakum have "easement appurtenant?"

No. 5—No admission of fact involved, only an inference...]

Preview of logical sequence of discussion—Unless deficient in one of the relevant areas of law (which one would want to disguise), no persuasive reason for departing from chronological ordering of questions presents.

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[8] Step Two (p.54) speaks, *inter alia,* of identifying "the overriding premise(s) that will control resolution of the conflict." There was sufficient confusion and difficulty attendant to understanding premise, and how to identify one. Therefore, this portion of Step Two was not addressed in the main text of the *Primer.* What is meant, simply, is that sometimes it matters little whether a conflict is viewed from the perspective of movant or respondent. The legal doctrine(s) that controls is somewhat party neutral. One takes a birds-eye, party-neutral view (as a judge would!), and thinks, "What (overriding) premise do facts (and legal knowledge) suggest to control the resolution of the conflict?" (E.g., the instant "risk of loss in conveyance.") Don't let this concept trouble you. Continue to approach Step Two as you have—from the perspective of one party or the other. If no premise(s) occur as tools to assist one side or the other, step back, think, "What law applies here? What law guides resolution of this conflict?" THERE IS LAW TO GUIDE RESOLUTION OF ALL CONFLICTS! (Or should be.) An overriding premise should emerge.

[9] Re-read preceding footnote 8!

MODEL RESPONSE TO COMBINATION LAW HYPO (CONT.)

RESPONSE EXECUTION PHASE

Question No. 1 *[Reflect any identifying labels. Grader normally will be looking for such labels. Help the…]*

Desk No.1

[Although planned in terms of conflict pairings, it seems redundant, possibly confusing to reflect pairings in the response. Question refers to "two desks." That provides useful distinction in a discussion. However, continue to analyze/think in terms of competing parties, objectives, premises, arguments.]

[Discussion]

A contract is formed when… *[Does the grader want to see contract defined or no? This is the kind of insight one wants going into an exam. It would be time consuming to set forth and explore the many elements of contract. Step Three analysis points to a likely missing element—legal competence. The grader wants to know that you know what a contract is. However, she should also want to know you know how to play the game. One can convey (at least suggest) desired knowledge of contract, yet save time by beginning…]*

For a contract to be valid and enforceable, *inter alia [That useful expression suggesting one knows the additional knowledge, while moving directly to (speedy) disposition.],* both contracting parties must have legal capacity to enter into a contract, meaning in most jurisdictions 18 years old and mentally competent. Ican Getum, with whom Breezy reached agreement respecting the first desk, is described as a "high school junior-to-be." At most, therefore, he is 16 or 17, likely incompetent to enter into a binding (valid) contract.

[Note. Contract at this point is technically, easily defeated. One can imagine a judge looking at Breezy (his attorney), shaking her head. However, before conceding—Play the game!—one must adopt the role of advocate for Breezy. As this is a bar exercise, one considers not just one's contracts toolbox (knowledge), but agency law as well. Thus, continuing…]

[New law, new paragraph!] As a general rule, however, a principal is liable to a third party for all contractual obligations incurred by his agent within the latter's scope of employment. *[Flag key legal terms!]* The agent must be acting with authority, which can be actual or apparent (reasonably implied from circumstances or acts of the principal upon which the third party relies in good faith), and the adult principal may not avoid a contractual obligation based on the infancy of the agent. *[Present all relevant law one can think of as accurately as possible. No citations necessary.]* Ican, although an infant (under 18), was assisting his aunt. He therefore could reasonably be deemed acting with actual as well as apparent authority to sell merchandise on her behalf. However, Breezy's assurance to Ican that "just this once" he could depart from Soakum's "cash 'n carry only" rule, and that his aunt "couldn't possibly mind," establishes knowledge that the deposit arrangement was beyond the scope of Ican's authority.

Conclusion: There was no valid contract. Ican was likely incompetent to enter into a contract, and the deposit arrangement was beyond the scope of any authority reasonably implied as granted by Soakum.

Desk No. 2

Mere promise without consideration is unenforceable at law. A promise made out of moral obligation lacks consideration. However, subsequent actions in reliance upon said promise to the detriment of the party so relying may substitute for consideration. *[Again, provide all law (complete premise) needed.]* Soakum's promise of "first shot" to Breezy would appear to waive her cash 'n carry rule. However, she returned his $75. Had Breezy left a deposit, or acted in some way in reliance—e.g., made a special trip only to find the desk had been sold—, then the consideration requirement might have been satisfied. Such is not indicated.

Conclusion: The mere promise of a desk was unenforceable at law for lack of consideration.

Policy aspects: *[IF (!!) presenting such seems warranted—rarely, never on a bar exercise!—, here is how and where it can be introduced. A separately labeled paragraph following analysis paragraphs seems helpful.]*

Question No. 2 *[No need to identify the conflict pair or label the discussion! B! A!—Premise, paragraph!]*

A material (substantial) breach of a contractual duty will give rise to a cause of action for rescission and/or damages. Where there is a material misrepresentation relied upon by the other party to his detriment, a contract may be set aside by that party on the ground of fraud. Under the UCC a merchant/trader in a line of goods impliedly warrants that said goods are fit for the purpose for which they are intended. *[Set forth all law one can think of constituting movant premise. One may want to address the parts in separate paragraphs. Other legal aspects that merit inclusion may occur later. (= start new paragraph.)]* "Tagsale," or no, Soakum's long established, well known involvement in sale of antiques must cause her to be deemed a merchant or trader in antiques. As such, Gullible could and did rely on Soakum's representation that the desk she purchased was a "genuine antique." That it was "crafted by Santa's Helpers" strongly suggests Soakum either misrepresented a material fact, or failed to deliver what had been both expressly and impliedly warranted.

Damages

As a general rule, when a contract is breached the injured party is entitled to be made whole. In Gullible's case this means either a return of her money, plus any expense incurred in removing and returning the desk, or an equivalent replacement antique desk. There is no indication of willful misrepresentation on Soakum's part that would justify punitive damages.

Conclusion: Gullible is entitled to rescission of the transaction and a refund owing to breach and/or fraud, and compensatory damages.

Question No. 3 Brownthumb v. Surefire Co.

[Seems logical, useful label for dividing discussion, so pairing is set forth. "Defunct" or no, opportunity to show off legal knowledge is presented.]

Warranties, express or implied, are increasingly held to "run" with the product, regardless of privity with manufacturer. Thus, under authority set forth, *supra* (Question 2), based upon representation of Surefire Co. that the scarecrow was "all one needed for crop protection," *if the Surefire Co. exists or its assets can be traced,* Brownthumb can likely recover for losses suffered as a result of the scarecrow's failure to protect his crop. Such recovery, however, would be contingent upon showing that the scarecrow was substantially the same product sold many years and owners ago. *[Hmm. This last remark suggests additional law that should have been set forth at the outset—e.g., alteration of a product or an unintended use may void a warranty. OR begin a new paragraph!]*

Conclusion: Brownthumb can recover if Surefire exists and the product was much the same as when sold.

Brownthumb v. Soakum

Soakum's representation and warranty was only that the scarecrow was manufactured by Surefire Company, not that it would actually protect crops.

Conclusion: Brownthumb has no action against Soakum, who fulfilled her part of the bargain.

Question No. 4 The Garage

At common law, in absence of a provision in the contract, if property was destroyed between the time of contracting for sale and transfer of the deed, and destruction was not caused by either party, risk of loss fell on the buyer, deemed equitable owner after contract. However, the Uniform Vendor and Purchaser's Risk Act (Act), adopted by many states, places risk of loss upon seller until buyer either takes title or takes possession. Destruction of the garage in question was "spontaneous" in origin and occurred between contract and closing, placing the situation within the purview of the foregoing. Should common law control, Soakum must bear the loss. The Act recognizes the common sense of responsibility lying with the party having most control over the property. *[Show professor not only that you know law, but you understand reasoning (policy) behind law.]*

[Seems appropriate to start a new paragraph. (Paragraph frequently!)] Soakum took possession of the cottage prior to taking title and the fire. Doubtless, Pigseye would contend this satisfied "possession" within meaning of the Act, so as to absolve him of responsibility. However, we are told that the garage, while somehow

connected to the cottage ("on the premises"), was "unused." As lessee and possessor of the cottage, Soakum clearly would be responsible for destruction of the garage under the Act. However, if she neither owned, nor used the garage, it does not seem she "possessed it" in the sense of having responsibility to inspect for such potential hazards as oily rags, as the Act would seem to contemplate. *[Thinking!]* That responsibility of possession would seem to remain with Pigseye, who, being next door, was equally close, and, moreover, lived there year round (and likely created the combustible situation in the first place [!!]).

Conclusion: At common law Soakum could not recover. Under the Act she probably could adjust the purchase price, as Pigseye would likely be deemed in possession of the garage until closing.

The Fence

[You have been instructed to begin by setting forth ALL relevant law. E.g.…]

An easement is a non-possessory right without profit given by a landowner to another, whereby the latter is permitted to use or burden the owner's land for a specified and intended purpose. Easements can be created, *inter alia,* by implication. *[Cut to seeming relevant easement here.]* Where a common owner of land conveys away part of the land, implied in the conveyance will be any appurtenant easements over the retained servient estate that previously existed and would benefit the conveyed piece of property. An appurtenant easement is one whose benefit is annexed to the dominant estate (land benefitted by the easement's creation), as compared to some *personal* benefit, right, or interest that inures to a person to use another's land. An example of appurtenant easement would be the right to cross another's property to launch a boat at a lakefront, where the only access was over said property, and said access had existed at time of conveyance.

[Note: Setting forth all of the above would be time consuming, and is probably unnecessary. You've shown the professor you know how to play the game. Therefore, the following should suffice…]

Although easements may create a right of use of another's property that existed prior to conveyance of part of that property, the use benefitting the conveyed property can never be personal—i.e., a right or interest inuring to one person (as opposed to *any* owner) to use the other's property. *[I.e., tailor relevant law to the situation, especially when a necessary element seems missing.]* Soakum's use of Pigseye's portion of the quarter acre, although longstanding, was of purely personal benefit. Use of Pigseye's half was clearly contemplated or implied in the summer rental. However, "a week" after an "end of August" closing must have been at or within days of the presumable early September start of school and end of rental. *[The law given with this exercise only contemplates demonstration of knowledge of property law, easement in particular. However, note that the question and this latter point makes a discussion of injunctive relief marginally relevant.]* Use of Pigseye's portion beyond the current summer would depend upon new negotiations… perhaps over dinner or coffee. *[This dinner/coffee addendum is an attempt at humor that, given the parenthetic reference to rejection of advances, may or may not be appreciated. Know your professor! Many, doubtless, would deem it sexist.]* Conclusion: Soakum has no easement right, and but a *de minimus* contractual basis for challenging Pigseye's erection of the fence.

Question No. 5

As a general rule, evidence of an offer of, or agreement to accept valuable consideration in settlement of a claim is inadmissible to show liability or lack thereof, where liability or amount of claim is in controversy. The Federal Rules proscribe all such matters, including admissions. *[I would only introduce the policy rationale IF I thought the professor was interested in it, or if something in the facts created a real issue to which it would be germane.]* Plaintiff seeks to introduce Soakum's offer as an admission against interest, therefore some evidence of liability, falling squarely within the prohibition of the rule. Some states permit introduction of admission of a fact during unsuccessful negotiations. *[More knowledge demonstrated!]* However, there is no indication here of any facts admitted.

Conclusion: The objection would be sustained, as mere offers to settle are inadmissible in evidence.

SAMPLE EXERCISE THREE

Civil Procedure Hypothetical
(60 min.)

Serene Willapova, an occasional tennis player, fell while descending steps at the Only-For-Us Racquet Club in Long Island City, Queens County, New York. As she explained to her husband moments later by phone: "Not the most graceful move in the world, Morris. I got so mad, I smashed Mommy's new titanium stroker. Be a dear and bring home din-din. I'm going to be in the hot tub for hours." As she limped out to her Lexus, Serene ran into the club owner, Jett Setter. He grinned and remarked, "I saw that spill, Serene. Not the most graceful move in the world." At which point Serene determined to sue Setter personally, and his club.

Although a resident of Queens County, Serene, joined by her mother, Doris, a resident of Manhattan, New York County, brought suit against Only-For-Us Racquet Club, Inc. (OFU, Inc.) and Jett Setter personally in New York County, seeking damages for Serene's injury and the destruction of the tennis racquet.

Thereupon followed, *inter alia,* the following events and motions:

1—OFU, Inc. and Setter moved for change of venue to Queens County.

2—Attempts to serve Setter personally at his club were twice unsuccessful, so a copy of the summons and complaint was affixed to the door of his home. Another was mailed to him. [So-called "nail and mail" service.]

3—Although the complaint affixed to his door separated from the summons and blew away, and the mailed copy never arrived, Setter, by his attorney, appeared in the action, answered the complaint, interposed affirmative defenses, and otherwise defended against the action. Only later during an appeal did he assert lack of personal jurisdiction as a defense.

4—OFU, Inc. served notice of the deposition of a person who, while standing in the next phone booth, had overheard Serene's conversation with her husband. Serene moved for a protective order forbidding disclosure of anything overheard as a privileged conversation.

5—OFU, Inc. requested an admission from Doris that Serene has a tendency to negligent behavior. Doris ignored it.

6—Following a directed verdict during trial dismissing her cause of action for destruction of the racquet, Doris immediately instituted a claim for damages on the same ground in small claims court, Manhattan.

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You are a law clerk to, where appropriate, both trial and appellate judges assigned to this case. Prepare a memorandum of law respecting the issues raised in the above. Majority [NY] state law applies.

RELEVANT LEGAL PRINCIPLES FOR CIVIL PROCEDURE HYPO

Discovery (scope of)—In general, all information not otherwise privileged that is relevant to the subject matter of the action is discoverable, whether or not the material would be admissible as proof.

Communications between spouses—Confidential communications between husband and wife are privileged against disclosure by either spouse or by a third person. (E.g., an eavesdropper.)

Personal Jurisdiction—Generally, in order to determine rights and duties of parties to an action, and to bind parties personally to its determinations, a court must have *in personam* jurisdiction over said parties. Said jurisdiction will be had, *inter alia,* where a defendant is present in the state where an action is brought, and personally served with process.

Where personal service on a defendant cannot be effected through due diligence, a plaintiff is entitled to substitute such service by affixing a copy of the summons and complaint to the door or other conspicuous place at the defendant's last known address, and also mailing a copy of same by regular mail to said address (so-called "nail and mail"). A court has held that three attempts at "in hand" service at a defendant's place of business, without attempting to serve the defendant at home or leave the summons and complaint with a person of suitable age and discretion at the place of business does not satisfy the requirements of due diligence.

Waiver of—Where a defendant appears, answers the complaint, interposes defenses, and at no time during or after trial moves to dismiss based on, nor claims lack of personal jurisdiction, the defense will be deemed waived on appeal.

Requests for admission—A request for admission imposes a duty on the party served to acknowledge the existence of facts that are not in doubt and that should not be necessary to prove at trial. The party served normally has 30 days to respond. Failure to timely respond results in the matter being deemed admitted.

Inter alia, it is permissible to request that a party admit to a legal conclusion. (E.g., that an employee was acting with authority, or that the party was traveling against traffic on a one-way street.) However, it is not proper to request an admission to an abstract statement of law. (E.g., that allowing a minor without a license to drive is negligent, *per se.*)

Res Judicata—Doctrine that for reasons of economy, prevention of harassment, avoidance of inconsistent judicial rulings *[policy!],* the re-litigation of claims and issues is generally prohibited.

Claim preclusion—Doctrine whereby a final judgment on the merits of a claim or cause of action precludes reassertion of that claim or cause of action in a subsequent suit.

Venue—Refers to proper place for trial of a lawsuit. The purpose of venue rules is to prevent a plaintiff from forcing a defendant to trial where it would be burdensome for him to appear and defend. *[Policy!]*

Unless compelling reasons exist to direct otherwise, a **transitory action** (meaning the transaction which is the subject of the action could have happened anywhere) should be tried in the county where the action arose.

MODEL RESPONSE TO CIVIL PROCEDURE HYPOTHETICAL

PLANNING PHASE

Preliminary Overview—Six distinct events. Perform Steps (1, 2, 3) on each is initial perspective on how to proceed. *[Always the Steps!—a constant way of thinking, processing re legal problems.]*

Step One—*[Conflict pairs/party objective(s) for each of the six events/motions.]*

Conflict pairs for all six are Serene and/or Doris versus OFU, Inc. and/or Jett Setter, or vice versa.

[Consistent overall objectives are to obtain damages on one side, avoid liability on the other. However, NB! (Note bene, note well.) Given this is a civil procedure exercise, objectives for purposes of generating premises are intermediate in nature (!!). In the larger (intermediate) sense objectives are to keep litigation going versus termination on a procedural ground. More immediate re the six events/motions…]

1—Change venue to Queens County vs. keep it in Manhattan County.

2—Establish personal jurisdiction vs. not.

3—Have lack of personal jurisdiction defense ruled moot vs. exists and viable.

4—Preclude disclosure of overheard conversation vs. have it ruled discoverable.

5—Have fact admitted vs. not admitted.

6—Have claim heard in small claims court vs. dismissed.

[Preview at this point is each event/motion will generate no more than one or two premises, and will be relatively straightforward of analysis. Therefore, time allotted each will be roughly the same. (7-8 minutes?) As it would interrupt continuity of train of thought and be time wasting to continue applying the Steps to all six, from this point on I decide to work on each of the six to completion before going on to the next. (Planning!)]

Step Two—*[Consider each pairing, party, objective. Cull facts (and course outline) for relevant premises.]*

1—Venue of a transitory action is overriding. *(I.e., governs determination, no matter which party perspective/objective is considered. See definition of Step Two and footnote, page XXX.)*

[Note: I would now complete analysis/discussion of No. 1, then (only then) proceed to No. 2.]

2—"Nail and mail" service vs. due diligence rule.

[Complete analysis/discussion of No. 2 (7-8 minutes?), then on to No. 3… No. 4… 5… 6.]

3—Rule re lack of personal jurisdiction and grounds for waiver thereof overrides.

4—Rule re discovery of spousal communication overrides.

5—Requests for admission, and failure to respond thereto overrides.

6—*Res judicata* rules override.

Step Three—*[Consider each premise to note missing elements and/or real issues.]*

[As there appear to be but one or two premises to be considered for each event/motion, and as I'm working on each exclusive of the others, Step Three seems unnecessary as an independent exercise. It is part and parcel of inspecting law giving rise to the premise being considered to determine whether necessary to state all law to begin the first paragraph of analysis, or whether one or more elements can be focused on as pivotal.]

Preview of logical sequence for discussion—No overlap of discussion apparent. No reason apparent not to proceed chronologically.

MODEL RESPONSE TO CIVIL PROCEDURE HYPO (CONT.)

RESPONSE EXECUTION PHASE

1

[Note. When question(s)/instruction(s) offer a labeling format, one normally should employ same. The professor/bar grader likely looks for it. (Here—1 to 6.) It seems unnecessary, time wasting, probably confusing to mention conflict pairings. However, one is thinking of and guided by them. (Always!)]

[Discussion]

Generally, unless compelling reasons exist to direct otherwise, a transitory action should be tried in the county where the action arose. "Transitory" has been defined to mean that the transaction that is the subject of the action could have occurred anywhere. Serene's' fall and the destruction of the racquet could have occurred anywhere. Moreover, Serene, Only-For-Us, Inc. (OFU), and Jett Setter all reside in Queens County. The residence in New York County of Serene's mother, Doris, whose claim is minor, is the only apparent reason for trying the action in New York County. This would hardly seem "compelling."

Conclusion: Motion should be granted. *[No hedging, as this seems open and shut.]*

Policy aspects: *[If inclusion seems appropriate.]*

2

So-called "nail and mail" service will satisfy requirements of personal jurisdiction only where personal service on a defendant cannot be effected through due diligence. It has been held that three attempts at "in hand" service at a defendant's place of business, without attempting to serve the defendant at home or leave the summons and complaint with a person of suitable age and discretion at the place of business, does not satisfy the requirements of due diligence. *[Citation of source normally unnecessary.]* Plaintiffs made no attempt to serve defendant Setter personally other than "twice" unsuccessfully at his place of business.

Conclusion: Attempted "nail and mail" service was likely *[Hedging!]* ineffective for lack of due diligence.

3

Where a defendant who has not been properly served nevertheless appears in an action, answers the complaint, and interposes affirmative defenses, but never moves to dismiss for lack of personal jurisdiction, nor at any time claims lack of personal jurisdiction during or after trial, the defense of lack of personal jurisdiction will be deemed waived upon taking an appeal. Setter, as concluded above, was never properly served. Nevertheless, he appeared, answered the complaint, defended in the action, and at no time during or after trial claimed lack of personal jurisdiction. Arguably, raising the claim on appeal is "after trial." However, "waived upon taking an appeal" clearly indicates that the time for raising the claim would be deemed tolled.

Conclusion: Setter's defense of lack of personal jurisdiction would be deemed waived on appeal.

4

Generally, all information not privileged and relevant to the subject matter of the action is discoverable, even if not admissible as proof. Confidential communications between husband and wife are privileged from disclosure by either spouse and by a third party. (E.g., an eavesdropper.) Serene's statement that she smashed the racquet was relevant for its truth, as well as an indication of Serene's truthfulness. "Confidential" normally implies private or secret. *[Add clarification or law where needed and appropriate.]* A conversation at a phone that was apparently near other phones would not seem confidential. Moreover, given that Serene had not yet determined to sue, her statement in a context of remarks about dinner and a hot tub seems merely casual.

Conclusion: Motion will fail. The conversation with the husband was not confidential, therefore not privileged.

Policy aspects:…

MODEL RESPONSE TO CIVIL PROCEDURE HYPO (CONT.)

5

A request for an admission imposes a duty on the party served to acknowledge the existence of facts that are not in doubt and that should not be necessary to prove at trial. However, *inter alia,* it is not proper to request an admission to an abstract statement of law. (E.g., that allowing a minor without a license to drive is negligent, *per se.*) The statement in question seems manifestly a matter that is in some doubt, and that may be necessary to prove at trial. Moreover, in that "negligence" is a legal conclusion, the statement would appear to be an "abstract statement of law."

Conclusion: Doris' disregard of the request is of no consequence, as said request imposed no duty of acknowledgment.

6

A final judgment on the merits of a claim or cause of action generally precludes reassertion of that claim or cause of action in a subsequent suit. Doris' action in small claims court is grounded in the same facts (destroyed tennis racquet) and sets forth the same cause of action as the one dismissed in the primary action. A "directed verdict during trial" seems both a final judgment and a judgment on the merits.

Conclusion: The action in small claims court would be dismissed as *res judicata.*

SAMPLE EXERCISE FOUR

Criminal Law Hypothetical
(50 min.)

A, B, and C, hardened and broke, decide to knock over a local pawn shop. Unbeknownst to them, the shop is a front for an undercover police operation engaged in purchasing narcotics and fencing stolen goods.

A, standing lookout as B and C enter the shop, suddenly gets cold feet and briskly makes an exit. He was caught on camera, however, approaching the store in the company of B and C. He is followed and subsequently apprehended in his apartment. A loaded handgun is found in the top drawer of a nearby dresser.

B and C meanwhile circle the shop aisles, casing the place. Convinced the shopkeeper behind the counter is alone, they pull revolvers and demand the cash. As the shopkeeper, actually a detective, takes the cash from the register, another detective observes the affair from behind a one-way mirror. He signals a backup team to take positions outside the shop.

C grows impatient with the detective at the register, who seems to be stalling. Reaching over the counter, he clubs him to the floor with his gun and grabs the money. B is incensed. “Damn it, C,” he exclaims. “You promised no one would get hurt.”

The two men rush out of the shop directly into the gun-sights of ten police officers, who call for their surrender. B is immediately apprehended and disarmed, but C darts back into the shop. In a brief gun battle C kills one of the officers before being wounded and subdued.

– – – – / – – – –

What crimes, if any, are A, B, and C guilty of?

RELEVANT LEGAL PRINCIPLES FOR CRIMINAL LAW HYPO

Acting in Concert—Occurs when 1) one person commits a criminal act, and 2) another, acting with criminal intent, 3) knowingly aids the actor in engaging in said criminal conduct. The second person will be equally liable for the actor's criminal conduct and consequences thereof.

Conspiracy—1) agreement by two or more persons to commit an unlawful act, and 2) commission by any one of them of an overt act in furtherance of the act conspired, 3) beyond mere preparation.

Criminal Possession of a Weapon (CPW)—1) possession of a weapon, 2) possession of which is unlawful, *per se* (i.e., without license or permit), or with intent to use such weapon in an unlawful manner.

Chimel Doctrine—Permits police, 1) when making a valid arrest, 2) to search the immediate vicinity of the arrestee 3) to discover contraband or weapons 4) within his reach.

Entrapment—Occurs where 1) police create an opportunity to commit crime, 2) which opportunity would tend to induce a person not normally disposed to commit a crime to do so.

Felony Assault—1) injury of another 2) by means of a dangerous instrument, or in the course of committing a crime.

Felony Murder—1) killing of another 2) during the course of committing a felony, or during immediate flight therefrom. Knowing killing of a policeman is first degree murder.

Fourth Amendment—Guarantees the right to be 1) secure in one's person, home, papers, effects, and—expanded under Katz v. U.S.—, places where one has a reasonable expectation of privacy from unreasonable searches and seizures by police and their agents, and 2) such searches and seizures shall be based upon warrants sworn to under oath and supported by probable cause.

A search or seizure of a person or thing without a warrant is *per se* unlawful absent certain exigent and/or exceptional circumstances. (E.g., hot pursuit, inevitable discovery, Chimel circumstances [above], etc.) "Fruits" of an unlawful search or seizure will normally be suppressed and excluded from evidence (so-called "exclusionary rule"), the rationale being to deter unlawful police conduct. *[Policy!]* An exception will obtain where it is determined that despite the misconduct, the police acted in good faith. *[Why? What would be the rationale/policy here?]*[10]

Hot Pursuit—Doctrine whereby police officers may 1) follow an individual whom they have probable cause to believe committed a felony into his residence 2) for the purpose of making a warrantless arrest.

Payton Rule—[Payton v. New York] Prohibits police, 1) absent exigent circumstances (e.g., close pursuit of a likely felon), 2) from making a warrantless, non-consensual entry into a suspect's home 3) to make a routine felony arrest.

Renunciation—Occurs where there is 1) voluntary disengagement from a criminal enterprise 2) prior to commission of criminal acts contemplated, and 3) after making a reasonable and substantial effort to prevent commission of said criminal acts.

Robbery—1) forcible taking 2) of property 3) from another.

Self-Defense—Right to 1) protect oneself 2) from attack 3) using reasonable force.

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[10] Exclusionary Rule policy aim of deterring unlawful police conduct would not be served. At the same time the ongoing, always present, not insignificant, countervailing public policy of punishing and deterring unlawful citizen conduct is served.

MODEL RESPONSE TO CRIMINAL LAW HYPO

PLANNING PHASE

Preliminary Overview—Question and exam context *[criminal law!]* guide Step One.

Step One—*[Conflict pairs, objectives.]* Given a criminal law exercise *[!!]*, implicit in the question posed are the three relevant conflict pairs—State v. A, B, C. State's objective is to convict each of all crimes, put them in jail, vindicate society's rights. A, B, C want to stay out of jail. *[Step One shouldn't take more than 15-20 seconds. Facts needn't always be read to perform Step One!]*

Step Two—*[Relevant premises of parties. The following is how it might appear on scratch paper...]*

S	A
consp. *[conspiracy. abbreviations!]*	*[no counterpremise]*
CPW *[gun in dresser]*	4th Amend/Payton Rule *[apparent*
— HP *[hot pursuit counterpremise]*	*warrantless entry of apartment]*
	4th Am/Katz *[warrantless*
— Chimel *[counterpremise]*	*search of dresser drawer]*

[At this point it should be realized that in order to determine A's guilt for B and C's actions (acting in concert), State v. B and especially C must be addressed (thought about).]

rob., fel. assault, CPSP, fel. murder		renun., entrap. *[Counters to crimes charged against B and C.]*
S	v.	B
[Same as against A, excepting A's CPW.]		entrap., renun. *[Colorable*
CPW *[B's gun might suddenly come to mind.]*		*respecting C's violent acts.]*
S	v.	C
[Same as against B.]		entrap.
CPW *[C's gun],*		
first degree murder *[!!]*		self-def. *[And to felony murder also.]*

[I mentally note that A can be charged with B's CPW. Both A and B can be charged with C's CPW, also first degree murder (acting in concert). Standing in C's shoes, they can counter with self-defense to both felony murder and first degree murder charges.]

[Note. CERTAIN POSSIBILITIES WILL LIKELY ONLY BECOME APPARENT AS FACTS ARE VIEWED FROM THE PERSPECTIVE OF A DIFFERENT PARTY, DIFFERENT OBJECTIVE. The discipline of proceeding one party, one objective at a time causes one to sift through identical facts with different perspectives. New possibilities may thereby emerge.]

Step Three—*[Scan premises to quickly note missing elements and/or real issues. Don't belabor. One just wants a sense of how things will proceed—i.e., what goes quickly, where the real issues are.]*

S v. A—Straightforward as to conspiracy. 4th amendment is main event, and will consume time.

Must first determine C's guilt of various crimes.

S v. B—Seems 1-2-3. Renunciation somewhat interesting. Guilt is same as re C.

S v. C—1-2-3 as to various crimes. May spend more time on first degree murder.

Preview of logical sequence for discussion—C is primary actor. Makes sense, therefore, to explore his crimes and guilt first as reference point for A and B guilt.

MODEL RESPONSE TO CRIMINAL LAW HYPO (CONT.)

RESPONSE EXECUTION PHASE

[Note. Question following hypo—"What crimes ..."—suggests crime-by-crime approach to organizing and presenting one's response. The LEEWS ("Blender") approach may not be the only one suggested. The benefit/beauty of LEEWS, however, is it can be applied to ANY and ALL hypos (!!). Therefore, no matter the form of a question or instruction following a fact pattern, no matter the (often confusing) approach suggested by a question or instruction, one has a consistent, disciplined strategy for identifying relevant issues. Always (!!) process exercises through The Blender! In this instance, in that such premises as entrapment, renunciation, fourth amendment are not "crimes," note that crime-by-crime approach may be incomplete. Keep in mind, AT BASE ALL PROFESSORS' QUESTIONS ARE THE SAME! (always!)—"Find, discuss all (relevant) issues." The Blender, in revealing relevant premises, consistently guides one to relevant issues!]

State (S) v. C *[OR (better?), C's Guilt?] [Makes sense to begin with C. Either heading guides professor.]*

[Question: *[Necessary?]* What crimes, if any, is C guilty of? *[Versus, "Is C guilty of robbery, assault, etc.?"]*

[Discussion]

Conspiracy *[Flag law!]* occurs where 1) two or more agree to commit an unlawful act, and 2) any one of them commits an overt act in furtherance of the act conspired, 3) beyond mere preparation. *[B! A!—Law!]*

[UBE format]

[Premise preamble (PP), then…] 1 = A, B, and C "decide to knock over" (i.e., rob) the pawn shop. 2 and 3 = B and C pulled guns, demanded money. *[Done! Isn't this easy?]*

[Standard, but concise (proper) English]

[PP.] A, B, and C decided to "knock over," or rob the pawn shop. They went to the shop, B and C pulled guns and demanded money. *[Note. Analysis implies but does not present a conclusion. The conclusion here is rather obvious. (And perhaps others.) Seems appropriate and will conserve much time to combine conclusions for all crimes in one overall conclusion at the end.]*

Robbery is 1) forcible taking of 2) property 3) from another. *[UBE]* 1 = B and C pulled guns + clubbed the shopkeeper. *[Force!]* 2 = "grabbed" cash or money. 3 = from shopkeeper (or detective). *[Standard] [PP.]* B and C pulled guns and clubbed the shopkeeper in order to "grab" money from him.

[FROM THIS POINT STANDARD ENGLISH FORMAT ONLY WILL BE EMPLOYED. However, you should continue practicing with UBE until you habitually focus on one element at a time, and you feel no more or less is presented in terms of evidence, arguments, than is relevant to analysis of each element.]

Entrapment occurs where 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. *[Take time to understand a legal construct before attempting to analyze it. (E. g., who, exactly, is a "person not normally disposed to commit a crime?"… Not A, B, or C, described as "hardened and broke," but an average, law-abiding citizen.)]* It is unlikely the mere existence of the shop, police operation or no, would induce the average, law-abiding citizen to pull a gun and demand money. *[It is always appropriate to draw on common sense and life experience and state reasonably implied facts.]*

Policy aspects:... *[If one thinks/determines a professor wants "policy," here is a way to introduce and flag it, especially if not naturally introduced in the flow of analysis. (E.g., as a counterpremise of one of the parties.) Perhaps one does this once or twice, just to show broader thinking and interest. Never on a bar response!]*

Criminal possession of a weapon (CPW), *inter alia, [Needn't address license aspect of definition respecting C.]* is 1) possession of a weapon 2) with intent to use same in an unlawful manner. C and B produced revolvers for the purpose of robbing the shop. *[All conclusions at the end!]*

Felony assault is 1) injury of another 2) by means of a dangerous instrument, or in the course of committing a crime. C doubtless injured the shopkeeper/detective when he "clubbed" him to the floor with his gun. The injury occurred in the course of the robbery. Moreover, although not fired, the gun was nonetheless dangerous when used as a club.

Felony murder is 1) the killing of another 2) during the course of committing a crime or during immediate flight therefrom. The 1) knowing killing 2) of a policeman constitutes murder in the first degree. C killed the police officer while attempting to flee the robbery. We are not told that "ten officers pointing guns" were in uniform, therefore immediately recognizable as police. However, it seems C should reasonably have known when he began shooting that a group of ten with guns who called for his surrender and took B into custody were police officers. *[Conclusion is implied. Will be stated at the end.]*

[Seems appropriate to introduce counterpremise here. How? New law, new paragraph!]

Self-defense is the right to 1) protect oneself 2) from attack 3) using reasonable force. Reasonableness will normally be determined from the circumstances. C was not attacked, but merely told to surrender by lawful authority. It was C who attacked the officers by starting to shoot. He should not be able to claim he was defending himself from an attack he initiated. *[More law is needed here. E.g., it is further the law that self-defense is not normally available to one who has provoked or otherwise initiated an attack, unless he has first disengaged and made reasonable effort to avoid the conflict. Even without knowing and showing this, if analysis demonstrates thoughtfulness about what is reasonable (what the law should or could be), the grader will likely award almost full credit.]*

Acting in concert occurs 1) when one person commits a criminal act, and 2) another, acting with criminal intent, 3) knowingly aids the actor in engaging in said criminal conduct. The second person will be equally liable for the actor's criminal conduct and consequences thereof. *[Why do you think this is? What's the policy rationale? Thinking!]*[11] As shown in the foregoing, B committed various crimes together with C. A, as apparently planned, stood lookout. (Which he continued to do, for all B and C knew.) B and C assisted one another by casing the shop and pulling guns.

Conclusion: Based on foregoing analysis, C is pretty clearly *[slight hedging]* guilty of conspiracy, robbery, criminal possession of both his own and (acting in concert) B's gun, felony assault, felony murder, and murder in the first degree. Neither entrapment, nor self-defense can be established.

B's Guilt

[Seems preferable, more responsive to the question than S v. B. Having just shown the grader certain knowledge and analysis in S v. C, I feel I can refer back to it here. One needn't show a grader law twice. (See conclusion re B.) The aim (always!) is to show new law, new thinking. What's new is ...]

Renunciation is 1) voluntary disengagement from a criminal enterprise 2) prior to commission of the criminal acts contemplated, 3) after making a reasonable and substantial effort to prevent commission of said criminal acts. B's anger at C's violent behavior and statement indicates he did not intend that anyone be hurt. However, he did not disengage from the ongoing robbery. Nor did he attempt to take C's gun, or seek to stop further violent acts, beyond the expression of disapproval. Moreover, contemplation of robbery with guns without the prospect of violence, including killing, is unrealistic. *[There are other aspects to B's different circumstances worthy of mention. However, they can be addressed in the conclusion.]*

Conclusion: Under the acting in concert doctrine, for reasons set forth in discussion of C, *supra,* B is guilty of all crimes C is guilty of, and of his own possession of a weapon. *[Underscored, as wouldn't want grader to miss this.]* Although B did not intend certain consequences, C did, and B is tied to C's acts, including killing of the policeman during C's attempted flight, when B had already been apprehended. The reasoning that would justify this is that assistance of the other party doubtless emboldens each actor in going forward with the criminal enterprise. *[Some policy in case grader wants policy!]*

[11] Policy rationale for holding non-actor 2nd party equally liable is belief/reasoning that 2nd party's support and collaboration encourages/buttresses 1st party's actions. I.e., without support of 2nd party, 1st party behavior might not occur.buttresses 1st party's actions. I.e., without support of 2nd party, 1st party behavior might not occur.

A's Guilt

Respecting renunciation, *supra,* A left the pawn shop voluntarily prior to the robbery commencing. However, he made no effort to prevent the robbery. Indeed, A's presumed presence as a lookout doubtless reassured B and C in their criminal enterprise.

CPW is 1) possession of a weapon, 2) possession of which is unlawful, *per se* (i.e., without license or permit), or with intent to use such weapon in an unlawful manner. *[Seems advisable to repeat the definition, as it was presented some time ago, and because previous definition did not include license aspect.]* There is nothing to suggest the weapon found in A's dresser was taken to the pawn shop. Therefore, if A had a license or permit for the gun, the charge would likely fail. However, it seems unlikely that A, a "hardened" individual, would have a license or permit. Assuming, *arguendo,* possession was unlawful, propriety of the arrest and search producing the weapon comes into question. *[Latter statement is a segue into discussion of two Fourth Amendment counterpremises. Strictly speaking, in accordance with LEEWS abrupt, new-law-start-a-new-paragraph format, it is unnecessary. However, seems a useful (helpful!) guide and transition.]*

Entry and Arrest

[Seems helpful to distinguish the two components of Fourth Amendment analysis.]

Fourth Amendment to the Constitution generally prohibits warrantless searches and seizure. Payton rule prohibits police, absent exigent circumstances, from making warrantless and non-consensual entry into a suspect's home to make a routine felony arrest. Fruits of an unlawful entry (including anything found) will be suppressed. (So-called "exclusionary rule.") Facts ("later apprehended") do not indicate whether police had a warrant. It is unlikely A consented to entry. If there was no warrant, then, absent exigent circumstances, A's seizure was unlawful. If the gun found as a result were suppressed, there could be no conviction for CPW.

Hot pursuit of a probable felon is an exigent circumstance justifying a warrantless, non-consensual entry for the purpose of effecting an arrest. *[Note. ELEMENTS ARE NO LONGER NUMBERED. Sometimes it may be a useful shorthand to do so. The point of earlier numbering was merely to emphasize that analysis/thinking proceeds element by element.]* Presumably, as the police followed A, they became aware B and C had attempted a robbery and perpetrated other felony crimes, thereby making companion A a probable felony accessory. If "later apprehended" was not hours later, but means more or less the time it took to follow A to his apartment, the entry and arrest of A was probably lawful. The circumstance that C killed a police officer takes the situation beyond "routine felony arrest" aspect of Payton, presumably making circumstances more exigent.

[To extent possible, chew facts, back and forth. Show thinking, interest in the analysis game.]

Search of the Dresser

Fourth Amendment, as expanded by Katz v. U.S. *[Here, case citation seems appropriate. Katz, same as Payton, Miranda, is shorthand for a legal proposition.],* also protects against warrantless searches by police of places where an individual has a reasonable expectation of privacy. Arguably, the dresser in which the gun was found falls within the Katz ambit. If so, police should have sought a warrant, and the gun would be suppressed. However, it is likely that exigent circumstances once again justified acting without a warrant. *[Again, a segue guide to the next paragraph that is not strictly necessary.]*

Chimel doctrine permits police, when making a valid arrest, to search immediate vicinity of arrestee to discover contraband or weapons within reach. Chimel held that 10, even 15 feet distant ("lunging distance") constitutes "immediate vicinity." *[Note. This is a way in which cases are used—to give specific parameters to broad principles. Generally, cases needn't be cited.]* The "nearby" dresser would appear to fall within the immediate vicinity search zone of Chimel.

Policy aspects: …

Conclusion: For reasoning set forth in discussions of B and C, *supra,* A, acting in concert, would be guilty of the same crimes as B and C, including murder, and of possession of the gun found in his apartment. Fourth Amendment and renunciation defenses would be unavailing.

SAMPLE EXERCISE FIVE

Corporations Hypothetical

(50 min.)

The RIP Corporation, formed in 2013 by the Bottomline brothers, Ohmy, Padthe, and Savethe, for the purpose (as duly set forth in bylaws and articles of incorporation) of manufacturing and retailing so-called "landscape rape" accessories for four wheel drive and other "off-the-road" vehicles, quickly prospered and "went public." Between 2014, when 100,000 shares were first sold "over the counter," and 2016, total value of shares of RIPCORP (as the enterprise was affectionately known), following two splits, rose tenfold to 80 million dollars. Flush with success and invincible in their avarice, the Bottomline brothers led RIPCORP in the aggressive pursuit of profit wherever it might be found. The brothers held chief executive positions in the corporation, as well as majority seats on the board of directors. They further owned 30 percent of outstanding shares, by far the largest voting block. Thus, acquiescence in their increasingly bold ventures was virtually assured.

Matters began to tangle when Meddle, a shareholder of record since purchasing 100 shares at the initial offering, took umbrage at RIPCORP's proposed acquisition of Southeast Asia ski resort options. In fall 2016 Meddle sought permission to inspect RIPCORP minutes and other records relating to the ski resort venture. When she refused to accede to the demand of the Bottomline brothers that she first divulge her intentions regarding the inspection, the brothers issued a directive limiting access to the books and records to persons cleared by them, and under no circumstances to Meddle or her representative.

Thereupon Meddle brought suit in her own right and on behalf of RIPCORP against the corporation and the Bottomline brothers personally to gain access to the books and records, to block the ski resort venture as an *ultra vires* act, and for repayment by the RIPCORP board of directors of any expenses incurred in connection with the pursuit of said venture. RIPCORP moved 1) to dismiss the action for, *inter alia,* lack of standing, failure to first make a demand on the board of directors, and failure to state a cause of action; 2) in the alternative that the court require Meddle to post $100,000 security for costs as a precondition to continued maintenance of the suit. Meanwhile, 3) the RIPCORP board passed a resolution providing for indemnification of the directors in the event Meddle prevailed, and purchased insurance to provide for same, and Meddle immediately moved to quash these actions.

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

RELEVANT LEGAL PRINCIPLES FOR CORPORATIONS HYPO

***Ultra vires* acts**—Generally includes acts beyond the purpose or powers of the corporation, and sometimes acts within the purposes and powers of the corporation, but performed in an unauthorized manner or without authority. Many jurisdictions now restrict *ultra vires* challenges to the following: 1) the right of a shareholder to enjoin unauthorized corporate acts; 2) the right of the attorney general of the state to enjoin such activities; 3) the right of the corporation to recover damages from the officers and/or directors (present or former) responsible for the *ultra vires* act(s).

Shareholder inspection rights—Shareholders generally have a limited right, founded in common law and statute, to inspect corporate books and records which are relevant to a proper purpose. Courts will determine whether a purpose is proper. A shareholder may examine the stock book and minutes of stockholder meetings on demand if 1) he has been a stockholder of record for at least six months immediately preceding the demand; or 2) he is a holder of 5 percent of any class of outstanding shares.

Shareholder rights of action—Generally, a shareholder may sue the corporation in his own name to enforce his rights as a shareholder, and/or on behalf of the corporation to procure a judgment in favor of the corporation. The latter "derivative action" may be maintained only if 1) the plaintiff is a shareholder when the action is brought; 2) the plaintiff was a shareholder when the alleged wrong to the corporation occurred; and 3) the plaintiff shows in his complaint that he has demanded that the board of directors commence the action, or that there are sufficient reasons for not making the demand (e.g., the board members are the defendants). Note that in order to minimize the possibility of derivative actions without merit being brought merely for "nuisance value" settlements or counsel fee awards, the corporation may require the plaintiff to post security for costs, unless 1) the plaintiff or plaintiffs hold at least 5 percent of any class of outstanding shares; or 2) the value of their shares exceeds $100,000.

[Again, do not rely on law herein! It was correct at one time, is possibly (likely) now different. Use law provided here only for purpose of addressing exercises herein. Update for toolboxes!]

Indemnification—Generally, a director or officer may not be indemnified (reimbursed) against a judgment obtained against him in a direct action by the corporation, or a derivative action on behalf of the corporation, or for amounts paid in settlement thereof. The director may, however, be indemnified against expenses of defending the action, unless, *inter alia,* he is adjudged to have violated his fiduciary duty of good faith and reasonable care in the circumstances. The corporation may purchase insurance to indemnify officers and directors for even the above judgments, providing no deliberate dishonesty or unlawful gain on the part of the officer/director is shown.

MODEL RESPONSE TO CORPORATIONS HYPO

PLANNING PHASE

Preliminary Overview—The (three) motions referred to by the question are as three questions/instructions, each to be considered separately. *[Note the enormous benefit of immediately skipping over facts.]*

Step One—Conflict pairs: *[Quick review of motions in conjunction with sentence that precedes them reveals single conflict pairing throughout.]* RIPCORP, Inc. v. Meddle, etc., and/or vice versa for each motion/question.

Objectives: *[Somewhat confusing, as sentence immediately preceding motions reflects three ultimate objectives of Meddle. Objectives relevant to Step One, however, are implied in the three motions. Motion 1 also provides movant RIPCORP's premises (!!). Whether ultimate objectives (of Meddle) will be achieved depends upon resolution of the motions. Note. They are not relevant to Step One!]*

1) Dismiss action versus keep it going;

2) $100,000 security be required to be posted, versus not;

3) Quash board indemnification resolution and purchase of insurance, versus maintenance of same.

Step Two—*[RIPCORP is movant for motions 1 and 2, Meddle for 3. The motions themselves, especially the first, point to relevant overriding premises. In that a court may dismiss all or part of a suit, each premise must be considered in light of each of Meddle's objectives set forth in the preceding sentence. Facts in the first two paragraphs need only be considered for purposes of analysis.]*

1) Lack of standing, failure to first make a demand on the board, and failure to state a cause of action respecting *each* of Meddle's three objectives. Potentially nine discussions! *[9 paragraphs!]* But probably not.

2) *[Must refer to relevant portions of corporations law toolbox.]* Law respecting requirement that a shareholder plaintiff in action against corporation post bond. *[Noted in toolbox only. Needn't write it in outline.]*

3) Law respecting indemnification and/or insurance of directors in such a suit.

[Remember. *YOUR PURPOSE, ALWAYS, IS TO SHOW OFF KNOWLEDGE OF RELEVANT LAW, AND SKILL AT LAWYERLIKE ANALYSIS.]*

Step Three—*[Motions seem more or less equivalent in weight. Given complexity of premises noted in Step Two, effort necessary for a Step Three analysis seems needlessly duplicative of analysis to be performed in executing actual response. Therefore, seems advisable to skip Step Three, go directly to actual response phase.]*

Preview of logical sequence for discussion—No reason apparent for not proceeding chronologically.

MODEL RESPONSE TO CORPORATIONS HYPO (CONT.)

RESPONSE EXECUTION PHASE

Motion No. 1

Lack of standing/failure to state a cause of action

Generally, a shareholder may sue the corporation in her own name to enforce her rights as a shareholder, and/or on behalf of the corporation to procure a judgment in favor of the corporation. *Inter alia,* the latter "derivative action" can be maintained only if the plaintiff is a shareholder when the action is brought and when the alleged wrong to the corporation occurred. Meddle (M) is a current shareholder, and has been a shareholder since long before the ski resort venture.

Generally, shareholders have a limited right, founded in common law and statute, to inspect corporate books and records relevant to a proper purpose. Courts will determine whether a purpose is proper. A shareholder may examine the stock book and minutes of stockholder meetings on demand if she has been a stockholder of record for at least six months immediately preceding the demand; or she is a holder of five percent of any class of outstanding shares. *[Note lengthy premise preamble setting up (brief) analysis.]* M's 100 shares, presumably grown after "two splits" to 400, constitutes only one percent of any class of shares. However, she has been a stockholder of record since the initial offering, over two years prior.

So-called *"ultra vires" (UV)* acts—acts beyond the purposes or powers of the corporation, and sometimes acts within purposes and powers of the corporation, but performed in an unauthorized manner or without authority—may properly be challenged by shareholders. Moreover, the corporation may recover damages from officers and/or directors (present and former) responsible for *UV* act(s). Given that RIPCORP's stated corporate purpose is manufacture and retail of accessories for off-road vehicles, the Southeast Asian ski venture (Venture) has the appearance of a UV act for which damages may be sought.

Failure to first make a demand on the board

Another requirement for maintaining a derivative action is that the plaintiff demand that the board commence the action, or there be sufficient reasons for not making such demand. (E.g., board members are defendants.) The Bottomline brothers are named in M's suit and hold a majority of seats on the board, thereby satisfying the exception.

Conclusion: Motion should be denied, as all of RIPCORP's challenges lack merit.

Motion No. 2

In order to minimize the possibility of derivative actions without merit being brought merely for "nuisance value" settlements or counsel fee awards, corporations may require a shareholder plaintiff to post security for costs, unless the plaintiff or plaintiffs hold at least five percent of any class of outstanding shares, or the value of their shares exceeds $100,000. M's 100 shares constituted but 1/10th of one percent of the 100,000 initial share offering. Their value at the time of the suit, therefore, would have been on the order of 1/10th of one percent of 80 million dollars, or $80,000. *[Correct. Basic math is sometimes necessary on a "law" exam, corporations in particular.]* However, M has been a shareholder since the very beginning of the corporation, and, as set forth, *supra,* challenge to the Venture seems hardly "without merit."

[Policy aspects: …]

Conclusion: Although value of M's shares falls short of $100,000, the motion should probably be denied. M's $80,000 stake is substantial. Given shareholder status from the outset and likely merit of the case, policy justification requiring the full $100,000 seems lacking. It is unlikely, therefore, a court would permit RIPCORP to impose this financial impediment. *[Note use of policy underpinning as a basis for counterargument.]*

Motion No. 3

Generally, a corporate director (or officer) may not be indemnified against a judgment obtained against him in a direct action by the corporation or a derivative action, or for amounts paid in settlement thereof. The director may, however, be indemnified against expenses of defending the action, unless, *inter alia,* he is adjudged to have violated his fiduciary duty of good faith and reasonable care in the circumstances. The corporation may purchase insurance to indemnify officers and directors for even the above judgments, providing no deliberate dishonesty or unlawful gain on the part of the officer/director is shown.

[Given this much legal preamble, it seems appropriate to begin analysis in a new paragraph.]

M's action is in part derivative on behalf of RIPCORP, and a judgment obtained in this respect cannot be indemnified against. Facts are unclear about whether the resolution indemnifies against expenses of defending against the action. Assuming, *arguendo,* it does, the inherent improbability, indeed inherent folly of the Venture, coupled with its seeming obvious *ultra vires* aspect, strongly suggests a violation by the directors of duty to exercise reasonable care, if not a violation of duty to act in good faith. However, given RIPCORP appears to have been engaged for some time in a pattern of divers schemes wholly unrelated to its stated purpose, it is unlikely a court would be willing to take judicial notice of such a conclusion so early in proceedings.

Nothing in the facts suggests "deliberate dishonesty or unlawful gain" on the part of any RIPCORP director or officer that would preclude purchase of indemnification insurance.

Conclusion: Motion should be granted as to any portion of the resolution that purports to indemnify against judgments obtained on behalf of the corporation, denied as to portions that indemnify against judgments obtained by M, and denied with leave to renew at a later time with respect to all other portions.

SAMPLE EXERCISE SIX

Constitutional Law Hypothetical

(50 min.)

"Burn it! Trash it! Bash it! Smash it! Rip it! Off the pigs! Off the m'effing establishment! Power to the people! Unions forever! Death to Wall Street! Seize the time!"

With these concluding remarks to refrain No. 7 of his repertory of radical rhetoric, the aging agitator, Firebrand Freddie, white-grey dreads bouncing about, brandished his middle finger and directed other rather explicit gestures toward policemen standing nearby. His audience, for the most part a gaggle of the "silent majority," stood with mouths agape. Not even on cable had they heard such language, witnessed such behavior. However, a few in the audience clapped, hooted with fists raised. They were strangers to Mothball Forks, as was Freddie. The townsfolk wondered who they were, why they had come.

Police Sergeant Just, charged with monitoring Freddie's much ballyhooed appearance, had seen enough, heard enough. Freddie's reputation for instigating crowd misbehavior, including the actual razing of a suburban California bank many years prior, was known to him. He didn't want any such trouble in his town.

"I've got rights, you effing pig. I've got rights!" Freddie bellowed, as two police officers pushed him into a squad car. The strangers jeered and booed, but were quickly drowned out by cheers of the townsfolk.

Freddie's arrest made local headlines. Because "Firebrand Freddie" was a name recognized in many quarters, CNN, FOX, MSNBC, YAHOO and other outlets gave the incident moderate attention.

Freddie was arraigned before Magistrate Defacto on charges of "incitement to violence," "obscenity in a public place," "unlicensed demonstration," "conduct unbefitting a Mothball Forks public park," and "possession of obscene materials with intent to distribute." The latter charge stemmed from a raid on Freddie's hotel room that yielded a few well-thumbed porn magazines.

The ACLU flew in an attorney to represent Freddie. After a brief bench trial, Magistrate Defacto found Freddie guilty as charged, fined him $1,000, ordered him out of town that day.

Late that evening after Freddie had left, local radio station AMOK broadcast a tape of the Freddie rally, replete with Freddie quotes. AMOK's owner was promptly brought before Magistrate Defacto, found guilty of "indecent expression," and fined $2,500.

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Both defendants appeal. What result?

RELEVANT LEGAL PRINCIPLES FOR CONSTITUTIONAL LAW HYPO[12]

[Note. You are once again reminded that law provided in this book may be outdated or inapplicable in some jurisdictions. Use it for the exercises. Check it out before inclusion in an outline.]

Application of Constitution to States—By virtue of 14th Amendment.

Freedom of Speech—Right guaranteed by the First Amendment and consistently held to be a fundamental right, more important, deserving of greater protection than other rights guaranteed by the Constitution. Modern cases have required that expression point to specific, concrete acts of an illegal nature before punishable as advocacy of violence. The test is 1) direct incitement to imminent lawless action, and 2) likelihood that such action will occur.

While states *[and by inference, municipalities]* are normally unable to regulate *content* of expression, they have been held entitled to regulate time, place, and manner of expression. If it is to avoid successful challenge as being vague, overbroad, or applied unequally, such regulation must be reasonable, applied equally, and give adequate notice of what is required.

Obscenity—The Supreme Court has held that material *[and presumably conduct]* may be found to be obscene when a) applying local community standards, the work *[conduct]* as a whole appeals to prurient interests, b) the work *[conduct]* describes sexual conduct in a patently offensive manner, and c) the work *[conduct]* as a whole lacks serious literary, artistic, political, or scientific value. ("F—k the Draft" painted on the back of a jacket, for example, has been held to be symbolic speech, protected by the First Amendment.)

It is settled that "indecent expression," not rising to the level of obscenity because lacking in prurient appeal, is suppressible in broadcasting. The rationale *[policy!]* is that indecent expression falls "at the periphery of the First Amendment protection," and therefore the privacy interest in not having offensive broadcasts intrude into the home will supersede the interest in being able to make such broadcasts. However, it remains an open question *[perhaps no longer the case, given "Ask Doctor Ruth [Westheimer]" and other explicit sexual topic broadcasts]* whether indecent radio expression may be suppressed no matter the time of broadcast. Such broadcasting has only been held suppressible where it occurred during the afternoon, a time of day when, as noted by the Supreme Court, children are likely to be part of the audience.

Right of Privacy—Right interpreted to be granted by the Constitution. This right protects possession of obscene materials in one's own home. However, it will not extend to protect possession of obscene materials with intent to sell or distribute.

Right of Liberty—Fifth Amendment to the Constitution provides that, *inter alia,* no person shall be deprived of liberty without due process of law. "Liberty" has been held to include freedom to travel and move about. *[Doubtless, case law will provide more specific principles, parameters, tests, etc. in this area—e.g., when someone can be ordered out of town. (Perhaps when presence jeopardizes…)]*

Vagueness, Overbreadth, Unequal Application of Law—Avenues for attack of a statute as violative of the Constitution. (See "Freedom of Speech," above.)

[12] When constructing categories of course outlines, it is important that broad brush baseline precepts—freedom of speech, negligence, contract, service, equal protection, agent, ownership, etc.—be fleshed out respecting specifics and particulars. (I.e., definitions, tests, examples.) This is particularly so in constitutional law (and labor law, antitrust, etc., where there are major, guiding statutes). To use the tree trunk, branch, sub-branch analogy (fn., p. XX), one must move, for example, from the broad trunk precept, freedom of speech, to branch precepts relating to specific forms of expression, such as the test for incitement to violence, the test for "indecent expression," etc. Cases, hornbooks, codes, commercial outlines, etc. flesh out branch and sub-branch precepts.]

MODEL RESPONSE TO CONSTITUTIONAL LAW HYPO

PLANNING PHASE

Preliminary Overview—Question—"*Both* defendants appeal"—provides useful clue. Implies two movants, each seeking to reverse an adverse courtroom outcome. Adversary of each (respondents) will likely be whoever/whatever caused them to be defendants—i.e., plaintiff(s). Thus, I scan facts *solely to identify two defendants and plaintiff(s),* as well as respective objectives. *[Query. If a defendant is found in the facts who prevailed (won), would that party be relevant to the question?... (No!)]*

Step One—*[As anticipated, "both defendants" translates to two conflict pairs.]* Freddie (F) v. Mothball Forks (MF); (radio station) AMOK's owner (AMOK) v. MF.

[Think about it. Who was the plaintiff such that Freddie and AMOK are defendants? Who brought the charges?]

Both F and AMOK seek as a fundamental objective to overturn their convictions*. [Were you thinking, "vindicate rights?" This is very broad, the sort of thing professors love to expound on. A lawyer—you! —is more practical, focused on the client.]* Conviction(s) overturn would achieve (corollary!) objectives of dismissing fines and vindicating first amendment rights, reputations, etc. MF will seek to uphold the convictions and fines. Note that where AMOK was convicted on one charge (indecent expression), F was convicted on five charges (!!). Thus, relative to AMOK, F has 5X more objectives (!!). Vis-a-vis F, therefore, MF has, in effect, five counter-objectives. F may also contest the order to get out of town—a sixth objective-(for F)-counter-objective (for MF) pairing.

Step Two—F v. MF—First Amendment challenge to (3!) convictions—"incitement...," "obscenity...," "conduct…." *[In addition to a general statement of the First Amendment, the Con Law toolbox must contain more specific precepts/tests under this broad umbrella relevant to various kinds of expression that can arise (derived from cases, etc.). (E.g., test for impermissible advocacy of violence, p.172,* supra*.) Otherwise, analysis gets bogged down in broad, unwieldy, open-ended generalities about "free speech."]* Vagueness, overbreadth, unequal application of law are likely avenues of attack on "unlicensed..." conviction. First Amendment privacy right challenge to "possession..." conviction. Fifth Amendment challenge to order to leave town.

AMOK v. MF—"Indecent expression" branch within First Amendment challenge will be overriding premise. *[See fn., page 151, for refresher explanation of "overriding premise."]*

Step Three—F v. MF—"Incitement..."—imminence, likelihood, and other elements seem clearly lacking.

"Obscenity..."—probably protected political speech. "Conduct..."

[At this point I am prepared to move to the response. Seems feasible, will save time to continue analysis preview (Step 3) simultaneous with beginning response. Analysis of the several convictions promises to be straightforward. Any surprises, close calls, policy aspects, etc. can be dealt with when encountered. Time is fleeting. Get on with the response!]

AMOK v. MF—Apparent lateness of the broadcast may carry the day for AMOK. *[I note that although AMOK has only the one conviction to be addressed, discussion thereof will likely be more involved than any of F's five (plus order to leave town [= 6!]). Therefore, time allocation for the pairings is projected not as 5:1 or 6:1, but more 2:1 or 3:1 (!!).]*

Preview of Logical Sequence for Discussion—Nothing suggests feasibility of other than chronological ordering. However, must be mindful of seeming appropriateness of 2:1 or 3:1 time allocation between the two conflict pairings.

MODEL RESPONSE TO CONSTITUTIONAL LAW HYPO (CONT.)

RESPONSE EXECUTION PHASE

Firebrand Freddie (F) v. Mothball Forks (MF)

[Seems helpful identifying label. "Freddie's Convictions" also helpful, appropriate.]

Constitutional precepts that come into play in the appeal of both defendants are made applicable to the states, therefore MF, by the 14th Amendment to the United States Constitution.

[This is necessary, appropriate preamble that should garner a check mark and a couple points.]

Incitement to violence conviction

Freedom of speech is a right guaranteed by the First Amendment and consistently held to be a fundamental right, more important and deserving of greater protection than other rights. Modern cases have required that expression point to specific, concrete acts of an illegal nature before punishable as advocacy of violence. The test is 1) direct incitement to imminent lawless action, and 2) likelihood that such action will occur.

[Note. The umbrella (trunk!) First Amendment proposition is followed by a specific corollary (branch off trunk!) relevant to this particular free speech situation. As noted under Step Two above, the Con Law outline (toolbox) must contain, and one must be conversant with tests, definitions, corollary aspects, etc. established by case law, etc. for addressing specific situations that have arisen and may arise under such broad umbrella precepts as freedom of speech, right of assembly, etc. Likewise for other broad subjects in other toolboxes, such as Fourth Amendment in criminal law, "holder in due course" in property, "hearsay" in evidence.]

F apparently had a track record of at least one instance of violent acts following remarks. However, in MF F indicated no specific thing to be burned, trashed, etc. "Wall Street" is general, symbolic, presumably far removed from MF. Although some in the audience seemed to support F, they were a small minority. Given majority opposition to F and the lack of specific directives, it is improbable that "imminent lawless action" was in prospect. *[Hold conclusion until the end as I do here, or quickly (separately) label and state it.]* Therefore, the conviction should be overturned. *[No hedging, as pretty certain, and conclusion follows analysis.]*

Obscenity in a public place

The Supreme Court *[needn't cite case]* has held that material (and presumably conduct) may be found to be obscene when a) applying local community standards, the [conduct] as a whole appeals to prurient interests; b) the [conduct] describes sexual conduct in a patently offensive manner; and c) the [conduct] as a whole lacks serious literary, artistic, *political* [emphasis supplied], or scientific value. Some of F's gestures were doubtless sexual and patently offensive by MF standards. MF would likely contend F's performance overall was debased and prurient in its appeal. However, F is a well-known agitator, a political figure, apparently serious in his purpose. His gestures were but part of his anti-establishment "show." They were intended to shock, offend, and raise consciousness. Considered *as a whole* (as one must), his conduct was political expression with arguable value, much like "F___ the Draft," painted on the back of a jacket, held to be protected symbolic political speech. *[Again, normally no source citation necessary. Just state law!]*

Unlicensed demonstration

Although states (and by inference municipalities) are normally unable to regulate content of expression, they have been held entitled to regulate time, place, and manner of expression. If it is to avoid successful constitutional challenge as being vague, overbroad, or applied unequally, regulation must be reasonable, applied equally, and give adequate notice of what is required.

Assuming, *arguendo,* this was a "demonstration," and MF had an applicable licensing regulation, the circumstance that F's appearance was known in advance ("much ballyhooed"), and that police were content to merely "monitor" it, suggests either that F had no advance or adequate notice of the license requirement, that MF customarily waived such requirement, or that MF was content to waive it in this instance. This, and the circumstance F was charged only after Sergeant Just took exception and arrested him, strongly suggests unequal application of the regulation to punish speech. F can further contend the regulation was vague and/or applied in an overbroad manner, in that he, speaking alone, was not a "demonstration." It was being used merely

to regulate time, place, and manner of expression of an individual.

Conduct unbefitting MF public park

Authority and arguments advanced in the foregoing discussion should suffice to have this conviction struck down. It further seems clear that "unbefitting a MF public park," *per se,* unless spelled out more precisely, both gives inadequate notice of what is proscribed and is overly vague.

Possession of obscene materials with intent to distribute

A constitutional right of privacy has been recognized. That right has been held to protect possession of obscene materials in one's home. The right does not extend to possession of obscene materials with intent to sell or distribute. Although F was in a hotel rather than home, it would appear contrary to the spirit and underlying rationale of the right to privacy—presumably protection of one's right to possess obscene materials for personal, private use—not to extend its protection to a "home away from home." *[Policy! Rationale! Deeper Thinking!]* The small number of the magazines and their "well-thumbed" aspect would seem to establish lack of intent to sell or distribute. Burden would be on MF to demonstrate otherwise.

Order to leave town

Fifth Amendment to the Constitution provides, *inter alia,* that no person is to be deprived of liberty without due process of law. "Liberty" has been held to include movement and travel. Convicted or no, the order to leave town would appear to abridge this right.

However, ... *[If aware of a principle (doubtless such exists) whereby persons reasonably adjudged a public nuisance or hazard by their continued presence, or whose continued presence may constitute a danger to themselves or others, may be ordered to leave, one would raise this as a counterpremise in a succeeding paragraph. However, absent such basis in the facts, the order would likely still fail the due process of law requirement of the Fifth Amendment.]*

Conclusion: Under foregoing analysis it appears that all of F's convictions, and therefore the fine and order to leave town, will be overturned on appeal.

AMOK conviction for indecent expression

It is settled that "indecent expression" not rising to the level of obscenity, because lacking in prurient appeal, is suppressible in broadcasting. The rationale is that indecent language falls "at the periphery of First Amendment protection," and therefore the privacy interest in not having offensive broadcasts intrude into the home supersedes interest in being able to make such broadcasts. However, it remains an open question whether indecent expression may be suppressed no matter the time of broadcast. Such broadcasting has only been held suppressible where it occurred during the afternoon, a time of day when, as noted by the Supreme Court *[possibly insert case name IF known]*, many children were likely part of the audience.

There seems no question but "a tape of the Freddie rally, replete with Freddie quotes" would qualify as indecent expression in a radio broadcast. (We shall assume, *arguendo,* that the broadcast was obscene.) The circumstance that the broadcast occurred "late" in the evening, however, preserves the constitutional issue. Depending upon the day of the week, and whether or not MF children were in their school term, MF could possibly argue persuasively that children were likely among the listening audience, and therefore the broadcast was suppressible under the above rule. The type of radio station (e.g., "rock," "jazz," "classical," "adult talk," etc.) would be an important factor in whether children were in the audience. However, unless MF was the sole listening audience and could point to an ordinance giving notice of dates and times children were likely to be in a late listening audience, a blanket late evening prohibition would likely be struck down as overbroad.

AMOK would argue the rally was a matter of public record, that it was of historical significance to the community, and AMOK was performing a public service. Moreover, consideration for youthful ears had been demonstrated by the lateness of the broadcast. MF could counter that whatever public need existed was well served by the local press, which must also observe restraint in what it prints, and which is likely to be read only by persons of appropriate maturity. Respecting whether children had been present at the rally, MF could successfully distinguish speech in public [a fundamental right] from speech intruding into the home.

Conclusion: Conviction and fine will likely *[hedging!]* be overturned owing to the lateness of the broadcast.

[Note that as predicted, the ratio of discussion, F versus MF, is roughly 3:1, not 6:1.]

SAMPLE EXERCISE SEVEN

Evidence Hypothetical
(35 min.)

Upon disembarking Able Airline's "redeye run" from Las Vegas to New York City, and slogging along Able's "jet-way" from its exclusive arrival/departure area to the main terminal, Mr. Smartstep tripped on a raised carpet divider, fell, and badly sprained his knee. Ms. Sympathetic, an Able Airline ticketing agent on her coffee break, happened along just as the accident occurred. "Oh, you poor man," she said soothingly, as she assisted Mr. Smartstep to his feet. "Such a terrible fall!" As she helped the now limping Smartstep gather his scattered belongings, she further remarked, "You must be the fourth or fifth person I've seen or heard about falling at this exact spot today."

During the inevitable subsequent personal injury action, plaintiff Smartstep sought to introduce as direct proof that Able Airline had had actual or constructive notice of the dangerous condition of the carpet divider, the statements of the now unavailable Ms. Sympathetic.

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How should the court rule?

RELEVANT LEGAL PRINCIPLES FOR EVIDENCE HYPO

Relevance/admissibility—To be admissible evidence must, generally, be relevant (i.e., tend to establish or disestablish something relevant sought to be proved), and more probative than prejudicial.

Hearsay—Is 1) a statement 2) by an out-of-court declarant 3) offered for its truth. Hearsay is normally inadmissible evidence. The rationale *[policy!]* is that absent the declarant, the truthfulness of the statement cannot be tested. Nevertheless, there are recognized categories of exception. Moreover, if an otherwise hearsay statement is 1) probative of a material fact, 2) the interests of justice would be served by its admission, and 3) it has circumstantial guarantees of trustworthiness equivalent to those of the recognized exceptions (e.g., excited utterance, admission against interest, public document, business record, etc.), then it will normally be admitted.

Admission against interest by a party agent—The hearsay statement of a party's agent offered against the party/employer is admissible as an exception to the hearsay rule, but only if the making of the statement is an activity within the scope of the declarant's authority as agent.

Many jurisdictions hold that if such a declaration was 1) made on personal knowledge, 2) during the course of the agency or employment of the declarant, and 3) with regard to a matter within the scope of the declarant's employment, then these indicia of reliability will render the statement admissible as an exception to the hearsay rule.

———————

MODEL RESPONSE TO EVIDENCE HYPOTHETICAL

PLANNING PHASE

Preliminary Overview—Question indicates courtroom conflict between two parties. *[Given an evidence exam, predictably. someone seeks to have something admitted in evidence. The other side seeks to have it excluded. I'll now scan the facts expecting to find such pairing and objectives.]*

Step One—*[Straightforward.]* Mr. Smartstep (S) vs. Able Airlines (AA). S seeks to introduce each of Sympathetic's statements in evidence—three! AA seeks to exclude them. *[Note the three separate statements. Each must be considered separately. Therefore, three pairs of objectives.]*

Step Two—*[If you did not previously, you hopefully now note S's three separate statements, each to be evaluated independently as to admissibility for the purpose cited by the offeror. Indeed, one must be alert to the possible admissibility or non-admissibility of parts of each statement (!!). I move quickly to the hearsay category of my evidence law toolbox. Hearsay surely deserves a category.]*

Hearsay Rule is overriding premise. However, it is a *counter*premise (of AA). S, as movant, would (must) advance exceptions to the hearsay rule as possibilities (premises!) to overcome AA's hearsay objection. E.g., excited utterance, admission against interest by a party agent (!!), and the catchall, overall trustworthiness exception. *[Query. Is each a trunk precept deserving its own category?]* The first two statements can also be challenged on grounds of relevance and prejudice—counterpremises! They can probably be considered simultaneously.

Step Three—Statements 1 and 2—Straightforward analysis. No "real issues" apparent. Statement 3—*Ballgame!*

Party agent admission exception. "Scope of employment" likely a real issue.

Preview of logical sequence of discussion—No reason not to proceed chronologically.

[Only 20-25 minutes or so remaining. Statements 1 and 2 are mere opportunities to show off legal knowledge. They can and must be disposed of quickly. Statement 3 needs more time. It presents the best opportunity to impress respecting ability to play the analysis game. (Note importance of early perspective.)]

[One should be no more than 9-12 minutes into the exercise.]

MODEL RESPONSE TO EVIDENCE HYPO (CONT.)

RESPONSE EXECUTION PHASE

Admissibility of "Oh, you poor man," and "Such a terrible fall." *[Quoting 1 & 2 seems appropriate. (Helpful!)]*

A statement by an out-of-court declarant offered for its truth is hearsay, normally inadmissible in evidence. The rationale is that without the declarant, the truthfulness of the statement cannot be tested. *[Policy awareness.]* Exceptions to the rule have been recognized where nature and circumstances of the statement offer sufficient guarantees of trustworthiness. (E.g., when a person makes an inculpating statement.) *[Showing off legal knowledge while setting up discussion of all three statements.]* Both statements in question meet the hearsay criteria, as Ms. Sympathetic (Ms. Sym) is unavailable, and Smartstep (S) offers them for their truth. Both appear to fall into one of the recognized exceptions. The first statement seems an "excited utterance," the second a "present sense impression."

However, to be admissible evidence must also be relevant and more probative than prejudicial. A statement that is otherwise hearsay must in particular be probative of a material fact. Also, interests of justice must be served by its admission. Given S's limited objective of proving that Able Airline (AA) had notice of the dangerous condition of the carpet divider, neither statement appears to satisfy these latter requirements. Neither is probative of AA having notice. Both are objectionable as merely tending to create sympathy for S.

Conclusion: Both statements should be excluded as irrelevant and prejudicial.

"You must be the fourth…today." *[Needn't waste time quoting the entire statement or introducing issue.]*

The hearsay statement of a party's agent offered against the party/employer is admissible as an exception to the hearsay rule only if the making of the statement is an activity within the scope of the declarant's authority as agent. Many jurisdictions *[majority view]* hold that if such a declaration was 1) made on personal knowledge, 2) during the course of agency or employment of the declarant, and 3) with regard to a matter within the scope of declarant's employment, then these indices of reliability will render the statement admissible as an exception to the hearsay rule. *[Time for new paragraph, as paragraphs should not be too long.]*

The statement is clearly that of an employee/agent offered against a party/employer. However, remarks about persons falling at a particular place, albeit property owned by her employer, would not seem to be "an activity within the scope" of authority of a ticketing agent "on her coffee break." Applying the majority standard above, it is unclear what portion of the statement is based on Ms. Sym's personal knowledge, and what is clearly inadmissible as double hearsay ("or heard about"). Assuming, *arguendo,* the statement were ruled generally admissible, interests of justice would seem to dictate that it be restricted to just the fall or falls that Ms. Sym actually saw. If Ms. Sym is unavailable for clarification on this point, then the prejudice to AA of the statement, as is, would seem to outweigh its probative value.

Assuming Ms. Sym saw someone other than S fall, presumably she would be duty bound to bring this to the attention of her employer, AA. Therefore, the statement would be probative of AA having actual or constructive notice of the dangerous condition of the carpet. Although Ms. Sym was on a coffee break, she was within the premises of her employment (an "exclusive" AA area), and therefore arguably within "the course of" her agency/employment relationship to AA. Although a ticketing agent, most airline employees are presumably trained to be attentive to passenger safety and comfort concerns. For example, Ms. Sym would seek to book a family in adjoining seats. She would not allow a carry-on item that posed a danger to others. Therefore, arguably a dangerous condition in the jet-way from the ticketing counter to the "exclusive" AA airplane gates would fall within the scope of her employment.

[The professor should be impressed at this point that I am deeply into the Game of Lawyering—the back and forth of analysis, versus coming to a facile conclusion.]

AA could counter that it would stretch common sense to suppose that all airline employees are charged with vigilance as to passenger safety at all times, especially where matters of terminal maintenance are concerned. Doubtless, in many, if not most airline terminals, cleaning and maintenance are handled by contractors engaged by the municipality that owns the facility. *[Taking judicial notice of certain facts based on life experience. The important thing is to impress the professor that you are interested, thinking.]* Therefore, absent an AA directive or guideline to employees that they should concern themselves with and report any and all matters, including carpet tears, irregular elevator operation, etc., Ms. Sym should be deemed well outside the scope of her employment in assisting and making remarks to S. *[It may be that more law or clarification regarding "scope of employment" is needed.]*

Conclusion: Unless Ms. Sym can be contacted to clarify what she personally observed respecting persons falling at the place in question (which circumstance might render the hearsay problem moot), the statement should *probably* be excluded as being more prejudicial than probative. *[This is a close call. The professor may have a different view. However, since the conclusion follows a thoughtful, balanced discussion, it should have no effect on the grade awarded.]*

NOTES

SAMPLE EXERCISE EIGHT

Wills Hypothetical
(50 min.)

T properly executed a will in 2011, by terms of which he distributed his entire estate in the following manner:

First I bequeath my racehorse, Swayback, to my friend, X.

Second: I bequeath $100,000 to my brother, Y.

Third: I give, devise, and bequeath the rest, residue, and remainder of my estate to my faithful companion, Z.

In 2015, having fallen out with Z, T properly executed a new will with the following terms:

First: I bequeath $100,000 to my brother, Y.

Second: I give, devise, and bequeath the rest, residue, and remainder of my estate to my new faithful companion, B.

In 2016, having reconciled with Z and spurned B, T properly executed a codicil to his 2011 will, by terms of which he increased the legacy to Y to $150,000, and in all other respects he ratified, confirmed, and republished the 2011 will.

T died in 2016. In a probate proceeding the evidence established the following:

1) Although sober when he made the codicil in 2016, T was "drunk out of his mind" when he executed the 2011 will.

2) T sold Swayback to a syndicate in 2014 for $200,000.

3) Inadvertently in 2016, T, falling asleep at his desk with cigarette in hand, set fire to some papers. One of the papers destroyed was the original copy of the 2016 codicil, which T had been reviewing.

4) Y died in 2016.

5) S, the son of Y, was one of several witnesses to T's execution of the 2011 will.

— — / — —

Discuss rights of various parties in terms of who takes what from T's estate.

RELEVANT LEGAL PRINCIPLES FOR WILLS HYPO

[You are once again reminded law may have changed.]

Ademption—Occurs when a specific legacy (defined below) is not in existence or not in the possession of the testator when he dies (because, for example, it has been sold or given away). When an ademption occurs, the legatee takes nothing.

Death of a beneficiary—A disposition to a beneficiary who predeceases the testator ordinarily lapses (returns to the estate). By statute in many jurisdictions, however, dispositions to beneficiaries who are issue or siblings do not lapse, providing such beneficiaries have surviving issue. Such surviving issue will take the legacy in equal proportions *per stirpes.*

Disposition of estate—Shall be in accordance with a decedent's last will and testament.

Execution of a will—A properly executed will implies at least two (2) witnesses thereto who do not stand to take under said will.

Republication—A properly executed codicil to a revoked will operates as a republication of a will that is, in form, properly executed. This is so despite that the will so republished may have been invalid for want of testamentary capacity at the time of making.

Revocation—As a general rule, a subsequent will entirely inconsistent with a prior will, or a later will that makes a complete disposition of the testator's property, shall be deemed to have revoked the prior will by implication. A will may further be revoked by means of its physical destruction. Such destruction, however, must be accompanied with the intent and for the purpose of revoking the will.

Specific legacy—A bequest of a particular, individualized chattel, differentiated from all other articles of the same or similar nature. It must be taken by the legatee as and where he finds it.

Testamentary capacity—Absent evidence to the contrary, testamentary capacity will be presumed where the testator, in executing a will or other document, accurately recites the nature and extent of his property, and recognizes the natural objects of his bounty.

Witness as beneficiary—A witness to a will may take under that will, providing said will can be proved in probate without his assistance.

MODEL RESPONSE TO WILLS HYPO

PLANNING PHASE

Preliminary Overview—Instruction points to parties who stand to take from T's estate. Each will be in opposition to anyone/anything that would prevent taking from T's estate.

Step One—X, Y, Z, B, S vs. anyone or thing (including each other, T, state, or estate) that stands between them and taking from T's estate. B v. Z seems a key conflict.

Step Two—*[Each claimant must establish that will or codicil upon which claim is based is valid and controlling. Each seeks to defeat competitor claims. Legal precepts governing testamentary disposition set forth in wills toolbox come into play. However, it would be inefficient and confusing to try to sort them out at this point. Better to focus on one conflict at a time in the response phase. Possibly there will be overlap of premises/discussion.]*

[Note. My aim, as always, is to demonstrate knowledge of relevant law and ability to apply it to facts a professor took time to create!]

Step Three—*[Not having set forth premises of various parties in Step Two, may as well go straight to the response. My impression is that once controlling rules are set forth, analysis will be relatively uncomplicated.]* Ability of a *per stirpes* witness, S, to take may be interesting.

Preview of logical sequence of discussion—Resolving which instrument controls is key and seems obvious first step. Therefore, beginning with B v. Z makes sense.

RESPONSE EXECUTION PHASE

B and Z's rights *[This label conforms to the instruction. B v. Z may confuse. I'm thinking, of course, "B v. Z!"]*

As a general rule *[B! A!—law!]*, a subsequent will that is entirely inconsistent with a prior will, or a later will that makes a complete disposition of the testator's property, shall be deemed to have revoked the prior will by implication. The 2015 will was inconsistent with the 2011 will and made a complete disposition of T's property, thereby revoking the 2011 will and Z's legacy.

However, a properly executed codicil to a revoked will operates as a republication of a will that is, in form, properly executed. This is so despite that the will so republished may have been invalid for want of testamentary capacity at the time of making. The "properly executed" 2016 codicil republished the "properly executed" 2011 will, thereby restoring Z's legacy. The fact that T was sober when making the codicil moots any effect of T having been drunk when making the 2011 will. There being no evidence to the contrary, the circumstance that T, in executing the codicil, accurately recited the nature and extent of his property and recognized the natural objects of his bounty will establish his testamentary capacity in making the codicil. *[Necessary additional law introduced as needed!]*

Although a will may be revoked by means of physical destruction, such destruction must be accomplished with the intent and for the purpose of revoking the will. The circumstance that the original copy of the codicil was destroyed "inadvertently" in 2016 is thus of no avail to B.

Conclusion: The 2015 will is revoked. B takes nothing. Z takes the "rest, residue, and remainder" of T's estate under the 2016 codicil that revived the 2011 will. *[Note. Phrase at end—"under the…"—is unnecessary. However, previewing, or, in this instance, summarizing key aspect of discussion seems… appropriate.]*

X's rights

An ademption occurs when a specific legacy (i.e., bequest of a particular, individualized chattel,

differentiated from all other articles of the same or similar nature) *[Clarification!]* is not in existence or not in the possession of the testator when he dies. When an ademption occurs, the legatee takes nothing. The racehorse, Swayback, appears, clearly, to be such a particular, individualized chattel. In that Swayback was sold prior to T's death, the republication of the 2011 will is of no avail to X.

Conclusion: X takes nothing from T's estate, as his legacy adeemed.

Y and S's rights

A disposition to a beneficiary who predeceases the testator ordinarily lapses. By statute in many jurisdictions, however, dispositions to beneficiaries who are issue (children) or siblings do not lapse, providing such beneficiaries have surviving issue. Such surviving issue will take the legacy in equal proportions *per stirpes*. Therefore, although Y predeceased T, Y's son, S, would take the $150,000, providing he is not disqualified by having witnessed the now republished 2011 will. *[Segue to next —B! A!—paragraph.]*

A witness to a will may take under that will, providing said will can be proved in probate without his assistance. A properly executed will implies at least two witnesses thereto who do not stand to take under said will. S was one of "several witnesses" to the 2011 will, implying that more than two persons witnessed the will. Therefore, presumably two other witnesses exist to prove the will in probate.

Policy Aspects: Arguably, S should be permitted to take under the 2011 will *per stirpes,* even were he one of only two witnesses to the will. The rationale for not allowing a necessary witness to take under a will is presumably the conflict of interest posed. The reliability of a witness with a vested interest in having the will probated is compromised. Y, however, not S stood to take under the 2002 will. Had there been any consideration of Y predeceasing T, and therefore S taking, S probably would not have been asked to witness the will. It could also be contended, however, that that was then, and now S does have a compromising vested interest.

[The latter paragraph is unnecessary. However, it demonstrates interest and thoughtfulness that may catch a professor's attention and garner an A+. Probably it should be highlighted in some way—italics, change font?]

Conclusion: Y, having predeceased T, takes nothing. However, Y's intended legacy goes to the son, S, *per stirpes.* S having witnessed the 2011 will under which he takes should not disqualify him, providing two others of the "several" witnesses to this will exist to prove it in probate.

This concludes the *LEEWS PRIMER Tenth (likely final!] Edition*. I trust you've found it interesting, more important, edifying. (Also confidence building.) Skill at approaches herein requires (of course!) *practice!* LEEWS overall is complex. [You are likely overwhelmed. However, also hopefully inspired that a path to certain success unfolds.] The key to understanding, bringing it all together is writing practice paragraphs of analysis. (Modeling on examples in the foregoing Appendix.) Immediate improvement (progressing to eventual true lawyerly skill) is within reach of any who've progressed this far. After so many years and editions, *answers to all questions are herein!* (Indeed!) Nonetheless, should questions, contacting us (me!)—1-800-765-8246; wmiller@leews.com. [this in black, not blue!] Information respecting live programs (no longer regularly scheduled), the equally effective audio program, etc. may be obtained at leews.com.. (While there be sure to read the free-download book—*Gaming Emperor Law School*.)

At this juncture in books of a helping genre, the reader is wished good luck. Not here! Providing what is contained herein is grasped and implemented, luck is removed from the equation (!!). (Truly!) I do WISH YOU WELL ON YOUR NEXT SET OF EXAMS, IN LAW SCHOOL, IN YOUR LAWYERING LIFE!

WENTWORTH MILLER