TO: **Contracts Class**

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Introductory Memorandum

Welcome to *Contracts*. This memorandum will cover:

(1) **Class Mechanics**;
(2) **Learning Outcomes;**
(3) A brief note on **How to Read a Case;**
(4) **Assessments**; and
(5) A brief note on **How to Study Law.**

Reading Assignments are provided in a separate handout.

Let's start with some **Expectations**.

(1) Attendance at each session is **expected**.

(2) You are **expected** to be prepared for each session by reading the assignments thoroughly. In the beginning of the semester, we may go slowly. Nevertheless, stay up with the readings. If we get too far behind, I will slow down the assignments. And, most importantly,

(3) you are **expected** to actively participate in each session. Sometime that participation will mean responding to questions posed in class. At other times, your participation will be through "actively listening" to the ongoing class discussions. It is through your participation in the discussions that the learning takes place.

(1) Class Mechanics

The Casebook. The required book is Charles L. Knapp, Nathan M. Crystal & Harry G. Prince, *Problems in Contract Law: Cases and Materials* (9th ed. 2019). To keep expenses down, only the casebook is required and no additional book of statutory or other

materials is required. The casebook is thorough and contains all we will need. Still, to the extent that you may wish to refer to the Uniform Commercial Code, there are versions available on the web and a good one can be found at http://www.law.cornel.edu/ucc.table.html.

The casebook fully explores the role that *Contracts* plays in the common law and in our market system. Additionally, the book contains some of the historic common law cases and amply updates the development of the common law with contemporary cases including cases influenced by new technologies and statutory materials.

By examining *Contracts* in relation to the common law and in relation to markets, we are examining *Contracts* from a theoretical perspective. The casebook also explores *Contracts* from a practical perspective, from the perspective of the practicing lawyer. You have all, most likely every day, encountered *Contracts*. You will continue to encounter them. As a practicing lawyer, or as any professional for that matter, *Contracts* will be a fundamental aspect of your professional lives. Consequently, *Contracts* will look at the law both theoretically and practically.

Grading. The grade for the course will be based on a final examination administered in December. The examination will be three hours long and will consist of three essays. The examination will be based on the casebook and on class discussion. As the end of the semester nears, I will have more to say about the examination.

Class Preparation and Discussion. The rules of the College of Law require regular attendance. I would expect no less from you. Rather, in addition to regular attendance, I also expect that you will be prepared to discuss the assignments. I will have more to say about participation below. The key to understanding law and applying legal rules is discussion. As lawyers, we must be able to communicate, orally and in writing. Communication is our chief stock in trade.

Without the ability to communicate, we have little if anything, to offer. We can sharpen our communication skills by both listening to class discussions and by participating in them. Most often, legal work is done in teams; it is not a solitary activity. Listening, talking, and writing are necessary skills to be an effective lawyer. Therefore, class discussions help you hone your lawyering skills.

(2) Learning Outcomes

Contracts as Foundational. *Contracts* is a foundational course in two specific senses. First, *Contracts* can be seen as a set of rules establishing relationships between and among persons. I, for example, have a contractual relationship with University of Cincinnati College of Law. And, for that matter, so do you.

Second, *Contracts* is foundational in the creation and operation of social institutions ranging from corporations to philanthropies even to the establishment of government itself. By way of example, the U.S. Constitution is a contract between the people and its established government; and the charter of a corporation is a contract between management and shareholders and between management and labor. Another way of conceiving the foundational rules of contracts is that *Contracts* provides the legal architecture for both the private and public ordering of society.

Although we will have some things to say about contracts in this second foundational sense, this course concentrates on *Contracts* as a subject that orders relationships between and among persons. Contracts especially orders market relationships.

Contracts and the Common Law. *Contracts*, along with *Torts* and *Property*, is based on the common law imported from England and the common law has its own peculiar method and attributes. To start, the common law is essentially judge-made law. Cases are brought to court for resolution one case at a time. The decisional rules for the case before the court are, for the most part, past cases. In this way, law changes and develops incrementally.

Understanding the common-law method entails understanding and interpreting a developing line of cases; understanding policy, its formation and its utilization; understanding politics, its theory and role in law; understanding judicial theory and the judicial mind; and having some sense of legal philosophy and history.

Another way of conceiving this approach to law is by considering the study of law as walking up and down a ladder of abstraction. The first rung in the ladder is understanding the facts of a case; the second rung is understanding the legal issues before the court and understanding the court's rationale for its holding. After we understand the legal issues involved, we can ask questions about what constitutes the policies behind those legal rules. Finally, once we have articulated the policies behind a rule, then we can ask how those policies fit the broader political economy or how they fit into a broader scheme of jurisprudence or legal philosophy.

In brief, we will see that in every case, we move from facts to law then we move from law to policy and then to jurisprudence or political theory. While all these issues are involved in every case, I can assure you that we will focus on the facts and the legal rules of *Contracts* with only some side excursions to policy and political theory.

The common law subjects of *Contracts*, *Torts* and *Property* form the basis of our political economy. Think of it this way. *Property* defines the relationship of persons to things as concrete as a motorcycle or as ephemeral as an idea. The concept of the legal protection of ideas is that some forms of ideas constitute intellectual property. *Torts* is a set of rules intended to protect persons and property from injury or damage. Should such injury or damage occur, however, *Torts* rules provide protections including financial compensation for such harms. *Contracts*, then, provides a set of rules for the transfer and exchange of the legal rights to property.

This triumvirate of courses effectively establishes a market economy in which property is defined, protected, and exchanged. Some scholars make larger claims arguing that this common law baseline is intended to promote efficiency and, therefore, is basically a private ordering of society for economic purposes. *See e.g.* NATHAN B. OMAN, THE DIGNITY OF COMMERCE: MARKETS AND THE MORAL FOUNDATIONS OF CONTRACT LAW (2016).

I should hasten to add that the economic view of *Contracts* is one general perspective. An alternative perspective for *Contracts* is that common law rules enable us to exercise our moral autonomy as individuals in society. Consider, for the moment, the phrase "I promise." We will study promises early in the semester. The significance of promising is noteworthy. It enables individuals to create legal duties and obligations towards each other and, in that way, enables individuals to exert their autonomy. *See. e.g.* CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (1981).

The Contracting Process. In addition to learning the fundamental tools of contract law, we will also learn about the contracting process. One way of conceiving the subject of *Contracts* is as a set of rules of communication between persons engaged in transactions. What are the necessary elements for the formation of a contract? How are contracts formed? And, once formed, what are the parties' obligations and duties? What happens if one party does not perform? Must parties always perform or is performance ever excused, and if so, why? If someone fails to honor a contract and performance is not excused, then what consequences follow? In the absence of a formal contract, can one person be liable to another?

Contracts, then, introduces you to that peculiarly Anglo-American system of law by examining four things: (1) the *basic materials* of the law particularly cases and statutes; (2) the *basic institutions of law* in which those materials are found and utilized – courts, legislatures, and the political process; (3) the *basic analytic methods of law* used in those institutions particularly case analysis and statutory interpretation and construction; and (4) *basic lawyering skills* through which those methods and materials are applied in the institutions identified above.

(3) How to Read a Case.

There are two steps in the process of reading a case. First, we must learn to read a single case at a time. Second, we need to understand how cases relate to each other and how they affect the development of law.

Reading One Case at a Time. Generally, there are four steps in learning how to read and brief a case. First, and most importantly, you must understand and absorb **the facts** of the case. I cannot emphasize the importance of facts enough. Facts are essential to understanding and applying law. When a lawyer interviews a client about a case, she first elicits the facts of the case because the facts will determine the outcome as much, if not more than the rule of law.

I must, however, qualify that statement in a very important particular. A lawyer must understand the facts, more importantly, a lawyer must understand what facts can be proven in court. If a client tells a lawyer that her neighbor told her that she would sell her Corvette for $5,000, then the lawyer must have some evidence of that oral agreement in order to persuade a court of the facts of the case. By way of another example, I have defended clients on DUI charges who claim that they have had the proverbial "two beers." To successfully defend them, that amount of alcohol had to be proven with evidence. Too often in the law school classroom, we take facts as given. We should, though, be sensitive to the necessity that facts need to be proven and that they cannot be accepted as given.

Second, you must identify **the legal rule or rules** under consideration in the case. Choosing the proper legal rule is as much an art as it is a skill. As law students, we tend to look for the most objective, neutral rule available. As lawyers, however, we attempt to look for a rule that will favor our particular theory of the case and will favor our client. Consider a complicated insurance contract and an insurance company's denial of

coverage. A lawyer representing a consumer will argue that not only did the consumer/client believe that he had coverage but there is language in the contract to indicate that there was coverage and therefore to deny coverage in a complex insurance form amounts to a deception, if not a fraud. A lawyer representing the insurance company, however, will choose the rule that imposes an obligation on consumers to read, but not necessarily understand, the documents and that a failure to do so does not invalidate obligations under the contract. In other words, as a consumer – You are stuck! Notice, then, that more than one rule is available for legal argumentation.

Third, you must then identify **the holding** of the case. How did the court rule on the legal issue before it? Here again we must be sensitive to reading cases and understanding their rules. Not infrequently, one case will have several statements some of which constitute rules of law, some of which constitute the holding of the case, and some of which are just commentary or, in legal jargon, dictum, which has no precedential, or legally binding, value. For our purposes, it is necessary to identify and articulate the holding of the case, i.e., who won.

And, finally, you must understand **the reasons (and reasoning)** behind the court's ruling. What legal reasons did the court give for ruling in favor of the plaintiff or the defendant? In this last step, we will learn that the reasons for a decision can involve varying degrees and combinations of law, policy, politics, and judicial philosophy.

The Development of Case Law. The second way of reading a case is to understand how cases relate to each other and how the rule of law develops. Assume, for example, that a court is confronted with a novel legal question such as: Should a party to a contract be held to all of its terms even though that party did not read the entire document? Assume further that the court rules that the party is bound by all of the contract terms and that a failure to read the document is no defense. Thus, **Case One** sets out a fairly clear rule – read the contract or not at your peril.

Now let's imagine **Case Two** in which another court is faced with a slightly different legal question: Should a party be held to an onerous contract term that imposes a cost when during negotiations, that party was told (and believed) that such a term was not in the contract? The second court should have no difficulty in distinguishing **Case One** by ruling that in **Case Two** the party is not bound because it was a fraud committed during the negotiations.

Now let's imagine **Case Three** and a third court is faced with a different legal question based on different facts: Should a consumer be bound to a harsh clause in a

long, complex contract that they neither read, nor if they read, could not understand? Well, it should come as no surprise to learn that courts have confronted this question and continue to confront it. It should also come as no surprise to learn that the courts have answered the question both ways. In some instances, the party is excused from the harsh term and in other instances they are held to it.

These three cases, then, form a simple example of how the common-law operates. First, a general rule is established; then exceptions are made to the rule; and then sometimes the rule is so riddled with exceptions that it must be abandoned or reformulated. *See e.g.* EDWARD LEVI, AN INTRODUCTION TO LEGAL REASONING (1948); MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW (1988). Additionally, such a line of cases reveals how a lawyer argues about cases in court. Quite simply, as a lawyer brings the next case to court, she must be able to compare and distinguish previous cases and show how her case is consistent (or inconsistent) with the way that law is developing. *See e.g.,* LLOYD L. WEINREB, LEGAL REASON: THE USE OF ANALOGY IN LEGAL ARGUMENT ((2005); STEPHEN E. TOULMIN, THE USES OF ARGUMENT **(**2003); Gerald Lebovits, *Say It Aint't So: Leading Logical Fallacies in Legal Argument - Part 1*, N.Y. STATE BAR JOURNAL 64 (July/August 2016).

(4) Assessments

We will engage in two forms of assessment in this course – formative and summative. The difference between the two is that formative assessment is an ongoing process while summative assessment measures how well you did in the class.

Formative assessment will occur every day through questions and answers about the cases. Sometimes referred to as the Socratic method, daily class conversation is essential for your ability to learn and understand the materials in the course. Each day I will ask a few students to recite and comment on the cases. Through questions and answers, students who participate in that part of the class discussion will be receiving immediate feedback regarding how well they understand the materials. For those students who are not actively involved in the discussion, they should be engaged in active listening. By paying attention to the questions and answers, then all students can measure and assess how well they understand the materials and how well they are following the course.

Also, during the semester, we will examine hypotheticals and problems as set out in the casebook. Discussing hypotheticals and problems, in turn, involves a skill of

applying law to new facts. It is one thing to understand the law; it takes lawyering skills to apply it. Additionally, discussion of both the hypotheticals and the problems measure how well you are absorbing the materials. In addition, the problems serve as mini-examinations and, thus, prepare you for the summative assessment.

Finally, summative assessment comes in the form of a classic law school examination at the end of the semester. You will be given a fact pattern and will be asked to solve a specified problem. Your analysis of the facts and the solutions that you discuss will demonstrate your ability to synthesize the semester's worth of materials and again apply those materials to the solution of a legal problem.

(5) The Study of Law

I have included three essays about legal education and the study of law in the handouts. The Holmes essay is assigned for the first day and although published over a century ago, to my mind, retains its importance. The two other essays are recommended reading. The 50-year old Kennedy essay is a critical look at law school, and the George & Sherry essay is a recent look at law study.

Regarding Holmes, here is a short discussion of that essay from my book, CREON'S GHOST, LAW, JUSTICE, AND THE HUMANITIES (2009):

> Holmes intended to shock his audience with his first principle. He told his audience that law and morality are, and should be kept, separate. He [said that] he wanted to "dispel a confusion between morality and the law." Holmes's point is a simple one. The languages of law and of morality overlap and led to unnecessary confusion, particularly when first studying law. This first principle is troubling as Holmes recognizes in his speech because separating law and morality has never been popular for the familiar reason that immoral laws are unjust laws, and unjust laws sustain an unjust society.
>
> We should think of law and morality as distinct ways of thinking, talking, and behaving in the world. The Kantian categorical imperative or the Golden Rule is widely accepted as moral principle: we should not do unto others what we do not want done unto us. Morality may well benefit society; it certainly influences law. But morality is not coextensive with law. Morality guides the inner life, the life of the conscience. Law guides our outer life, our sociopolitical arrangements. The moral command *Be Nice* cannot attain legal status. We may have a moral duty to *Be Nice*; we do not have a legal duty to do so. What is so often overlooked in *The Path* is that Holmes repeatedly qualifies his statement about separation. *The separation*

between law and morality is necessary for the study of law; the separation is necessary to understand the limits of the law; the separation is the first step on the path. Later, after we at least learn to identify and name the law, then we can return to and assess the relationship between law and morality. Moral principles may teach us about law's limits and about law's justness. Moral principles may inform and evaluate law—they cannot and should not define it.

In support of his . . . argument, Holmes invokes the infamous bad man. Holmes's bad man is the perfect foil for testing law's limits as well as for accomplishing Holmes's central purpose—the "right study and mastery" of the law. The bad man looks to law's material consequences and does not look for reasons outside of law to obey. . . . Holmes argues that moral language simply, and singularly in his mind, confuses the matter of learning, understanding, applying, and, ultimately, building a theory of law. Holmes does not deny that immoral laws are on the books and are enforced, but he emphasizes the point that immorality neither negates a law's validity nor invalidates its sanctions for disobedience.

Holmes's bad man simply wants to avoid fines, penalties, and jail time. The bad man wants to avoid liability, a liability that can only be imposed and enforced by the state. How, then, should the bad man behave to avoid sanctions? We begin by separating the language of morality from the language of law. To prove his point, Holmes gives the example of the efficient breach of contract. "The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it. . . ." Keeping contracts may well be a morally worthy thing to do. It may also be a socially nice thing to do, but the law does not think so. Keeping contracts just for the purported moral goodness behind the idea is not legally required. The legal actor here, the bad man, or the efficient *homo economicus,* honors contractual obligations to avoid sanction. Holmes ends this principle with the challenge that if we could banish from the law every word of moral significance, then our study and understanding of it would improve.

Holmes's separation argument is a warning about confusing legal duty and moral obligation and confusing the future development and application of law. This confusion must be dispelled if one is to study and know the law on the books before applying it in the streets. The bad man (and the student of law) cares not a whit about grand theory, she rather needs to know, "[t]he prophecies of what the courts will do in fact, and nothing more pretentious. . . ." The prediction thesis has identifiable legal consequences. Clients go to lawyers to predict when the state may impose or refuse state power. Legislators and presidents pay at least occasional attention to constitutionality. Judges pay attention to how their decisions comport with existing and developing law. All of these activities involve legal predictions of what courts will do.

Even here, when he intends to shock by banning moral talk from law talk, Holmes claims the higher law ground when he writes that law is the "witness and external deposit of

> our moral life;" and is the "history of the moral development of the [human] race." Holmes even believes that the observance of the law, "tends to make good citizens and good men." For Holmes, law and morality may be related, yet the relationship should not come at the cost of a better understanding of law and of building a better legal system. To understand the law and to study it and practice it, one must first learn what the law is rather than what it ought to be. Evaluative judgments can be made later.

Thus, it is of maximum importance that we understand what the law *is* before we can assess to determine whether it is morally worthy for what the law *ought* to be.

I am looking forward to meeting you and looking forward to a very enjoyable semester.

READING ASSIGNMENTS

CONTRACTS FALL 2022

Knapp, Crystal & Prince, Contracts (9th ed. 2019)

August	**16**	Introductory Memorandum; Preface and 1-18; Holmes, *The Path of the Law*
	18	*Lucy v. Zehmer* (handout)
	22	35-46
	23	46-60
	24	60-77 (Problem 2-1)
	29	77-99 (Problem 2-2)
	30	101-120
	31	120-147
Sept.	**6**	147-154; 163-183
	7	195-219
	12	225-247
	13	247-265
	14	265-284; 294-296
	19	296-327
	20	327-341 (Problem 3-4)
	21	345-368; 380 (Problem 4-2)
	26	395-427
	27	427-451
	28	451-473
Oct.	**3**	481-508
	4	508-538
	5	546-567
	17	571-591

	18	591-610
	19	610-638
	24	638-664
	25	664-680
	26	680-710
	31	719-741
Nov.	**1**	741-768
	2	771-789 (Problem 8-4)
	7	803-827
	8	829-849
	9	849-867
	14	873-901 (Cases 1-3 P. 878-79)
	15	902-921
	16	921-948
	21	948-971
	22	982-994
	23	1001-1020
	28	1020-1045 (Problem 11-1)
	29	1045-1069
	30	

Sept.	**1**	77-99 (Prob. 2-2)
	7	101-120
	8	120-147
	13	147-154; 165-183
	14	195-219

	14	225-247
	21	247-265
	22	265-284; 294-296
	27	296-327
	28	327-341 (Prob. 3-4)
	29	345-368; 380 (Prob. 4-2)
October	**4**	395-427
October	**5**	427-451
	6	451-473
	18	481-508
	19	508-538
	20	546-567
	25	571-591
	26	591-610
	27	610-638
Nov.	**1**	638-664
Nov.	**2**	664-680
	3	680-710
	8	719-741
	9	741-768
	10	771-789 (Prob. 8-4)
	15	803-827
	16	829-849
	17	849-867
	22	873-901 (Cases 1-3 p. 878-79)

	23	902-921
	24	921-948
	29	948-971
	30	982-994; 1001-1020
December	**1**	1020-1059

Lucy v. Zehmer
Supreme Court of Appeals of Virginia
84 S.E.2d 516 (Va. 1954)

BUCHANAN, J., delivered the opinion of the court. This suit was instituted by W.O. Lucy and J.C. Lucy, complainants, against A.H. Zehmer and Ida S. Zehmer, his wife, defendants, to have specific performance of a contract by which it was alleged the Zehmers had sold to W.O. Lucy a tract of land owned by A.H. Zehmer in Dinwiddie county containing 471.6 acres, more or less, known as the Ferguson farm, for $50,000. J.C. Lucy, the other complainant, is a brother of W.O. Lucy, to whom W.O. Lucy transferred a half interest in his alleged purchase.

The instrument sought to be enforced was written by A.H. Zehmer on December 20, 1952, in these words: "We hereby agree to sell to W.O. Lucy the Ferguson Farm complete for $50,000.00, title satisfactory to buyer," and signed by the defendants, A.H. Zehmer and Ida S. Zehmer.

The answer of A.H. Zehmer admitted that at the time mentioned W.O. Lucy offered him $50,000 cash for the farm, but that he, Zehmer, considered that the offer was made in jest; that so thinking, and both he and Lucy having had several drinks, he wrote out "the memorandum" quoted above and induced his wife to sign it; that he did not deliver the memorandum to Lucy, but that Lucy picked it up, read it, put it in his pocket, attempted to offer Zehmer $5 to bind the bargain, which Zehmer refused to accept, and realizing for the first time that Lucy was serious, Zehmer assured him that he had no intention of selling the farm and that the whole matter was a joke. Lucy left the premises insisting that he had purchased the farm.

Depositions were taken and the decree appealed from was entered holding that the complainants had failed to establish their right to specific performance, and dismissing their bill. The assignment of error is to this action of the court.

W.O. Lucy, a lumberman and farmer, thus testified in substance: He had known Zehmer for fifteen or twenty years and had been familiar with the Ferguson farm for ten years. Seven or eight years ago he had offered Zehmer $20,000 for the farm which Zehmer had accepted, but the agreement was verbal and Zehmer backed out. On the night of December 20, 1952, around eight o'clock, he took an employee to McKenney, where Zehmer lived and operated a restaurant, filling station and motor court. While there he decided to see Zehmer and again try to buy the Ferguson farm. He entered the restaurant and talked to Mrs. Zehmer until Zehmer came in. He asked Zehmer if he had sold the Ferguson farm. Zehmer replied that he had not. Lucy said, "I bet you wouldn't take $50,000.00 for that place." Zehmer replied, "Yes, I would too; you wouldn't give fifty." Lucy said he would and told Zehmer to write up an agreement to that effect. Zehmer took a restaurant check and wrote on the back of it, "I do hereby agree to sell to W.O. Lucy the Ferguson Farm for $50,000 complete." Lucy told him he had better change it to "We" because Mrs. Zehmer would have to sign it too. Zehmer then tore up what he had written, wrote the agreement quoted above and asked Mrs. Zehmer, who was at the other end of the counter ten or twelve feet away, to sign it. Mrs. Zehmer said she would for $50,000 and signed it. Zehmer brought it back and gave it to Lucy, who offered him $5 which Zehmer refused, saying, "You don't need to give me any money, you got the agreement there signed by both of us."

The discussion leading to the signing of the agreement, said Lucy, lasted thirty or forty minutes, during which Zehmer seemed to doubt that Lucy could raise $50,000. Lucy suggested the provision for having the title examined and Zehmer made the suggestion that he would sell it "complete, everything there," and stated that all he had on the farm was three heifers.

Lucy took a partly filled bottle of whiskey into the restaurant with him for the purpose of giving Zehmer a drink if he wanted it. Zehmer did, and he and Lucy had one or two drinks together. Lucy said that while he felt the drinks he took he was not intoxicated, and from the way Zehmer handled the transaction he did not think he was either.

December 20 was on Saturday. Next day Lucy telephoned to J.C. Lucy and arranged with the latter to take a half interest in the purchase and pay half of the consideration. On Monday he engaged an attorney to examine the title. The attorney reported favorably on December 31 and on January 2 Lucy wrote Zehmer stating that the title was satisfactory, that he was ready to pay the purchase price in cash and asking when Zehmer would be ready to close the deal. Zehmer replied by letter, mailed on January 13, asserting that he had never agreed or intended to sell.

Mr. and Mrs. Zehmer were called by the complainants as adverse witnesses. Zehmer testified in substance as follows: He bought this farm more than ten years ago for $11,000. He had had twenty-five offers, more or less, to buy it, including several from Lucy, who had never offered any specific sum of money. He had given them all the same answer, that he was not interested in selling it. On this Saturday night before Christmas it looked like everybody and his brother came by there to have a drink. He took a good many drinks during the afternoon and had a pint of his own. When he entered the restaurant around eight-thirty Lucy was there and he 3 could see that he was "pretty high." He said to Lucy, "Boy, you got some good liquor, drinking, ain't you?" Lucy then offered him a drink. "I was already high as a Georgia pine, and didn't have any more better sense than to pour another great big slug out and gulp it down, and he took one too."

After they had talked a while Lucy asked whether he still had the Ferguson farm. He replied that he had not sold it and Lucy said, "I bet you wouldn't take $50,000.00 for it." Zehmer asked him if he would give $50,000 and Lucy said yes. Zehmer replied, "You haven't got $50,000 in cash." Lucy said he did and Zehmer replied that he did not believe it. They argued "pro and con for a long time," mainly about "whether he had $50,000 in cash that he could put up right then and buy that farm."

Finally, said Zehmer, Lucy told him if he didn't believe he had $50,000, "you sign that piece of paper here and say you will take $50,000.00 for the farm." He, Zehmer, "just grabbed the back off of a guest check there" and wrote on the back of it. At that point in his testimony Zehmer asked to see what he had written to "see if I recognize my own handwriting." He examined the paper and exclaimed, "Great balls of fire, I got 'Firgerson' for Ferguson. I have got satisfactory spelled wrong. I don't recognize that writing if I would see it, wouldn't know it was mine."1

After Zehmer had, as he described it, "scribbled this thing off," Lucy said, "Get your wife to sign it." Zehmer walked over to where she was and she at first refused to sign but did so after he told her that he "was just needling him [Lucy], and didn't mean a thing in the world, that I was not selling the farm." Zehmer then "took it back over there * * * and I was still looking at the dern

thing. I had the drink right there by my hand, and I reached over to get a drink, and he said, 'Let me see it.' He reached and picked it up, and when I looked back again he had it in his pocket and he dropped a five dollar bill over there, and he said, 'Here is five dollars payment on it.' * * * I said, 'Hell no, that is beer and liquor talking. I am not going to sell you the farm. I have told you that too many times before.'"

Mrs. Zehmer testified that when Lucy came into the restaurant he looked as if he had had a drink. When Zehmer came in he took a drink out of a bottle that Lucy handed him. [The rest of Mrs. Zehmer's testimony largely supported her husband's story.]

* * * * *

The defendants insist that the evidence was ample to support their contention that the writing sought to be enforced was prepared as a bluff or dare to force Lucy to admit that he did not have $50,000; that the whole matter was a joke; that the writing was not delivered to Lucy and no binding contract was ever made between the parties.[1]

It is an unusual, if not bizarre, defense. When made to the writing admittedly prepared by one of the defendants and signed by both, clear evidence is required to sustain it.

In his testimony Zehmer claimed that he "was high as a Georgia pine," and that the transaction "was just a bunch of two doggoned drunks bluffing to see who could talk the biggest and say the most." That claim is inconsistent with his attempt to testify in great detail as to what was said and what was done. It is contradicted by other evidence as to the condition of both parties, and rendered of no weight by the testimony of his wife that when Lucy left the restaurant she suggested that Zehmer drive him home. The record is convincing that Zehmer was not intoxicated to the extent of being unable to comprehend the nature and consequences of the instrument he executed, and hence that instrument is not to be invalidated on that ground. 17 C.J.S., Contracts, § 133 b., p. 483; Taliaferro v. Emery, 124 Va. 674, 98 S.E. 627. It was in fact conceded by defendants' counsel in oral argument that under the evidence Zehmer was not too drunk to make a valid contract. . . .

The appearance of the contract, the fact that it was under discussion for forty minutes or more before it wassigned; Lucy's objection to the first draft because it was written in the singular, and he wanted Mrs. Zehmer to sign it also; the rewriting to meet that objection and the signing by Mrs. Zehmer; the discussion of what was to be included in the sale, the provision for the examination of the title, the completeness of the instrument that was executed, the taking possession of it by Lucy with no request or suggestion by either of the defendants that he give it back, are facts which furnish persuasive evidence that the execution of the contract was a serious business transaction rather than a casual, jesting matter as defendants now contend.

On Sunday, the day after the instrument was signed on Saturday night, there was a social gathering in a home in the town of McKenney at which there were general comments that the sale had been made. Mrs. Zehmer testified that on that occasion as she passed by a group of people, including Lucy, who were talking about the transaction, $50,000 was mentioned, whereupon she stepped up

[1] [Elsewhere in the opinion, the court notes that these mistakes in spelling are not "readily apparent" from the writing.]

and said, “Well, with the high-price whiskey you were drinking last night you should have paid more. That was cheap.” Lucy testified that at that time Zehmer told him that he did not want to “stick” him or hold him to the agreement because he, Lucy, was too tight and didn’t know what he was doing, to which Lucy replied that he was not too tight; that he had been stuck before and was going through with it. Zehmer’s version was that he said to Lucy: “I am not trying to claim it wasn’t a deal on account of the fact the price was too low. If I had wanted to sell $50,000.00 would be a good price, in fact I think you would get stuck at $50,000.00.” A disinterested witness testified that what Zehmer said to Lucy was that “he was going to let him up off the deal, because he thought he was too tight, didn’t know what he was doing. Lucy said something to the effect that ‘I have been stuck before and I will go through with it.’”

If it be assumed, contrary to what we think the evidence shows, that Zehmer was jesting about selling his farm to Lucy and that the transaction was intended by him to be a joke, nevertheless the evidence shows that Lucy did not so understand it but considered it to be a 5 serious business transaction and the contract to be binding on the Zehmers as well as on himself. The very next day he arranged with his brother to put up half the money and take a half interest in the land. The day after that he employed an attorney to examine the title. The next night, Tuesday, he was back at Zehmer’s place and there Zehmer told him for the first time, Lucy said, that he wasn’t going to sell and he told Zehmer, “You know you sold that place fair and square.” After receiving the report from his attorney that the title was good he wrote to Zehmer that he was ready to close the deal.

Not only did Lucy actually believe, but the evidence shows he was warranted in believing, that the contract represented a serious business transaction and a good faith sale and purchase of the farm.

In the field of contracts, as generally elsewhere, “We must look to the outward expression of a person as manifesting his intention rather than to his secret and unexpressed intention. ‘The law imputes to a person an intention corresponding to the reasonable meaning of his words and acts.’” First Nat. Bank v. Roanoke Oil Co., 169 Va. 99, 114, 192 S.E. 764, 770.

At no time prior to the execution of the contract had Zehmer indicated to Lucy by word or act that he was not in earnest about selling the farm. They had argued about it and discussed its terms, as Zehmer admitted, for a long time. Lucy testified that if there was any jesting it was about paying $50,000 that night. The contract and the evidence show that he was not expected to pay the money that night. Zehmer said that after the writing was signed he laid it down on the counter in front of Lucy. Lucy said Zehmer handed it to him. In any event there had been what appeared to be a good faith offer and a good faith acceptance, followed by the execution and apparent delivery of a written contract. Both said that Lucy put the writing in his pocket and then offered Zehmer $5 to seal the bargain. Not until then, even under the defendants’ evidence, was anything said or done to indicate that the matter was a joke. Both of the Zehmers testified that when Zehmer asked his wife to sign he whispered that it was a joke so Lucy wouldn’t hear and that it was not intended that he should hear.

The mental assent of the parties is not requisite for the formation of a contract. If the words or other acts of one of the parties have but one reasonable meaning, his undisclosed intention is

immaterial except when an unreasonable meaning which he attaches to his manifestations is known to the other party. Restatement of the Law of Contracts, Vol. I, § 71, p. 74. . . .

So a person cannot set up that he was merely jesting when his conduct and words would warrant a reasonable person in believing that he intended a real agreement, 17 C.J.S., Contracts, § 47, p. 390; Clark on Contracts, 4 ed., § 27, at p. 54.

Whether the writing signed by the defendants and now sought to be enforced by the complainants was the result of a serious offer by Lucy and a serious acceptance by the defendants, or was a serious offer by Lucy and an acceptance in secret jest by the defendants, in either event it constituted a binding contract of sale between the parties.

* * * * *

The complainants are entitled to have specific performance of the contracts sued on. The decree appealed from is therefore reversed and the cause is remanded for the entry of a proper decree requiring the defendants to perform the contract in accordance with the prayer of the bill.

Reversed and remanded

An Address delivered by Mr. Justice Holmes, of the Supreme Judicial Court of Massachusetts, at the dedication of the new hall of the Boston University School of Law, on January 8, 1897.

Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897)

THE PATH OF THE LAW

When we study law we are not studying a mystery but a well known profession. We are studying what we shall want in order to appear before judges, or to advise people in such a way as to keep them out of court. The reason why it is a profession, why people will pay lawyers to argue for them or to advise them, is that in societies like ours the command of the public force is intrusted to the judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees. People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared. The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.

The means of the study are a body of reports, of treatises, and of statutes, in this country and in England, extending back for six hundred years, and now increasing annually by hundreds. In these sibylline leaves are gathered the scattered prophecies of the past upon the cases in which the axe will fall. These are what properly have been called the oracles of the law. Far the most important and pretty nearly the whole meaning of every new effort of legal thought is to make these prophecies more precise, and to generalize them into a thoroughly connected system. The process is one, from a lawyer's statement of a case, eliminating as it does all the dramatic elements with which his client's story has clothed it, and retaining only the facts of legal import, up to the final analyses and abstract universals of theoretic jurisprudence. *** The primary rights and duties with which jurisprudence busies itself again are nothing but prophecies. One of the many evil effects of the confusion between legal and moral ideas is that *** a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court;--and so of a legal right. ****

I wish, if I can, to lay down some first principles for the study of this body of dogma or systematized prediction which we call the law, for men who want to use it as the instrument of their business to enable them to prophesy in their turn, and, as bearing upon the study, I wish to point out an ideal which as yet our law has not attained.

The first thing for a business-like understanding of the matter is to understand its limits, and therefore I think it desirable at once to point out and dispel a confusion between morality and law, which sometimes rises to the height of conscious theory, and more often and indeed constantly is making trouble in detail without reaching the point of consciousness. You can see very plainly that a bad man has as much reason as a good one for wishing to avoid an encounter with the public force, and therefore you can see the practical importance of the distinction between morality and law. A man who cares nothing for an ethical rule which is believed and practised by his neighbors is likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can.

I take it for granted that no hearer of mine will misinterpret what I have to say as the language of cynicism. The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race. The practice of it, in spite of popular jests, tends to make good citizens and good men. When I emphasize the difference between law and morals I do so with reference to a single end, that of learning and understanding the law. For that purpose you must definitely master its specific marks, and it is for that that I ask you for the moment to imagine yourselves indifferent to other and greater things.

I do not say that there is not a wider point of view from which the distinction between law and morals becomes of secondary or no importance, as all mathematical distinctions vanish in presence of the infinite. But I do say that that distinction is of the first importance for the object which we are here to consider,--a right study and mastery of the law as a business with well understood limits, a body of dogma enclosed within definite lines. I have just shown the practical reason for saying so. If you

want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience. *** The law is full of phraseology drawn from morals, and by the mere force of language continually invites us to pass from one domain to the other without perceiving it, as we are sure to do unless we have the boundary constantly before our minds. The law talks about rights, and duties, and malice, and intent, and negligence, and so forth, and nothing is easier, or, I may say, more common in legal reasoning, than to take these words in their moral sense, at some stage of the argument, and so to drop into fallacy. For instance, when we speak of the rights of man in a moral sense, we mean to mark the limits of interference with individual freedom which we think are prescribed by conscience, or by our ideal, however reached. Yet it is certain that many laws have been enforced in the past, and it is likely that some are enforced now, which are condemned by the most enlightened opinion of the time, or which at all events pass the limit of interference as many consciences would draw it. Manifestly, therefore, nothing but confusion of thought can result from assuming that the rights of man in a moral sense are equally rights in the sense of the Constitution and the law. No doubt simple and extreme cases can be put of imaginable laws which the statute-making power would not dare to enact, even in the absence of written constitutional prohibitions, because the community would rise in rebellion and fight; and this gives some plausibility to the proposition that the law, if not a part of morality, is limited by it. But this limit of power is not coextensive with any system of morals. For the most part it falls far within the lines of any such system, and in some cases may extend beyond them, for reasons drawn from the habits of a particular people at a particular time. I once heard the late Professor Agassiz say that a German population would rise if you added two cents to the price of a glass of beer. A statute in such a case would be empty words, not because it was wrong, but because it could not be enforced. No one will deny that wrong statutes can be and are enforced, and we should not all agree as to which were the wrong ones.

******* Take the fundamental question, What constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law. ***

Nowhere is the confusion between legal and moral ideas more manifest than in the law of contract. Among other things, here again the so called primary rights and duties are invested with a mystic significance beyond what can be assigned and explained. The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,--and nothing else. *** But such a mode of looking at the matter stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can. ***

I think it would be better to cease troubling ourselves about primary rights and sanctions altogether, than to describe our prophecies concerning the liabilities commonly imposed by the law in those inappropriate terms.

I mentioned, as other examples of the use by the law of words drawn from morals, malice, intent, and negligence. It is enough to take malice as it is used in the law of civil liability for wrongs,--what we lawyers call the law of torts,--to show you that it means something different in law from what it means in morals, and also to show how the difference has been obscured by giving to principles which have little or nothing to do with each other the same name. ***

In the law of contract the use of moral phraseology has led to equal confusion, as I have shown in part already, but only in part. Morals deal with the actual internal state of the individual's mind, what he actually intends. From the time of the Romans down to now, this mode of dealing has affected the language of the law as to contract, and the language used has reacted upon the thought. We talk about a contract as a meeting of the minds of the parties, and thence it is inferred in various cases that there is no contract because their minds have not met; that is, because they have intended different things or because one party has not known of the assent of the other. Yet nothing is more certain than that parties may be bound by a contract to things which neither of them intended, and when one does not know of the other's assent. Suppose a contract is executed in due form and in writing to deliver a lecture, mentioning no time. One of the parties thinks that the promise will be construed to mean at once, within a week. The other thinks that it means when he is ready. The court says that it means within a reasonable time. The parties are bound by the contract as it is interpreted by the court, yet neither of them meant

what the court declares that they have said. In my opinion no one will understand the true theory of contract or be able even to discuss some fundamental questions intelligently until he has understood that all contracts are formal, that the making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs,--not on the parties' having meant the same thing but on their having said the same thing. ***

This is not the time to work out a theory in detail, or to answer many obvious doubts and questions which are suggested by these general views ***, but what I am trying to do now is only by a series of hints to throw some light on the narrow path of legal doctrine, and upon two pitfalls which, as it seems to me, lie perilously near to it. Of the first of these I have said enough. I hope that my illustrations have shown the danger, both to speculation and to practice, of confounding morality with law, and the trap which legal language lays for us on that side of our way. For my own part, I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law. We should lose the fossil records of a good deal of history and the majesty got from ethical associations, but by ridding ourselves of an unnecessary confusion we should gain very much in the clearness of our thought.

So much for the limits of the law. The next thing which I wish to consider is what are the forces which determine its content and its growth. You may assume, with Hobbes and Bentham and Austin, that all law emanates from the sovereign, even when the first human beings to enunciate it are the judges, or you may think that law is the voice of the Zeitgeist, or what you like. It is all one to my present purpose. Even if every decision required the sanction of an emperor with despotic power and a whimsical turn of mind, we should be interested none the less, still with a view to prediction, in discovering some order, some rational explanation, and some principle of growth for the rules which he laid down. In every system there are such explanations and principles to be found. It is with regard to them that a second fallacy comes in, which I think it important to expose.

The fallacy to which I refer is the notion that the only force at work in the development of the law is logic. In the broadest sense, indeed, that notion would be true. The postulate on which we think about the universe is that there is a fixed quantitative relation between every phenomenon and its antecedents and consequents. If there is such a thing as a phenomenon without these fixed quantitative relations, it is a miracle. It is outside the law of cause and effect, and as such transcends our power of thought, or at least is something to or from which we cannot reason. The condition of our thinking about the universe is that it is capable of being thought about rationally, or, in other words, that every part of it is effect and cause in the same sense in which those parts are with which we are most familiar. So in the broadest sense it is true that the law is a logical development, like everything else. The danger of which I speak is not the admission that the principles governing other phenomena also govern the law, but the notion that a given system, ours, for instance, can be worked out like mathematics from some general axioms of conduct. This is the natural error of the schools, but it is not confined to them. I once heard a very eminent judge say that he never let a decision go until he was absolutely sure that it was right. So judicial dissent often is blamed, as if it meant simply that one side or the other were not doing their sums right, and, if they would take more trouble, agreement inevitably would come.

This mode of thinking is entirely natural. The training of lawyers is a training in logic. The processes of analogy, discrimination, and deduction are those in which they are most at home. The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form. You always can imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions. Such matters really are battle grounds where the means do not exist for determinations that shall be good for all time, and where the decision can do no more than embody the preference of a given body in a given time and place. We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind. No concrete proposition is self-evident, no matter how ready we may be to accept it, not even Mr. Herbert Spencer's Every man has a right to do what he wills, provided he interferes not with a like right on the part of his neighbors.

Why is a false and injurious statement privileged, if it is made honestly in giving information about a servant? It is because it has been thought more important that information should be given freely, than that a man should be protected from what under other circumstances would be an actionable wrong. Why is a man at liberty to set up a business which he knows will ruin his neighbor? It is because the public good is supposed to be best subserved by free competition. Obviously such judgments of relative importance may vary in different times and places. *** There is a concealed, half conscious battle on the question of legislative policy, and if any one thinks that it can be settled deductively, or once for all, I only can say that I think he is theoretically wrong, and that I am certain that his conclusion will not be accepted in practice semper ubique et ab omnibus. ***

I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious, as I have said. *** I cannot but believe that if the training of lawyers led them habitually to consider more definitely and explicitly the social advantage on which the rule they lay down must be justified, they sometimes would hesitate where now they are confident, and see that really they were taking sides upon debatable and often burning questions.

So much for the fallacy of logical form. Now let us consider the present condition of the law as a subject for study, and the ideal toward which it tends. We still are far from the point of view which I desire to see reached. No one has reached it or can reach it as yet. We are only at the beginning of a philosophical reaction, and of a reconsideration of the worth of doctrines which for the most part still are taken for granted without any deliberate, conscious, and systematic questioning of their grounds. The development of our law has gone on for nearly a thousand years, like the development of a plant, each generation taking the inevitable next step, mind, like matter, simply obeying a law of spontaneous growth. It is perfectly natural and right that it should have been so. Imitation is a necessity of human nature, as has been illustrated by a remarkable French writer, M. Tarde, in an admirable book, “Les Lois de l’Imitation.” Most of the things we do, we do for no better reason than that our fathers have done them or that our neighbors do them, and the same is true of a larger part than we suspect of what we think. The reason is a good one, because our short life gives us no time for a better, but it is not the best. It does not follow, because we all are compelled to take on faith at second hand most of the rules on which we base our action and our thought, that each of us may not try to set some corner of his world in the order of reason, or that all of us collectively should not aspire to carry reason as far as it will go throughout the whole domain. In regard to the law, it is true, no doubt, that an evolutionist will hesitate to affirm universal validity for his social ideals, or for the principles which he thinks should be embodied in legislation. He is content if he can prove them best for here and now. He may be ready to admit that he knows nothing about an absolute best in the cosmos, and even that he knows next to nothing about a permanent best for men. Still it is true that a body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words.

At present, in very many cases, if we want to know why a rule of law has taken its particular shape, and more or less if we want to know why it exists at all, we go to tradition. We follow it into the Year Books, and perhaps beyond them to the customs of the Salian Franks, and somewhere in the past, in the German forests, in the needs of Norman kings, in the assumptions of a dominant class, in the absence of generalized ideas, we find out the practical motive for what now best is justified by the mere fact of its acceptance and that men are accustomed to it. The rational study of law is still to a large extent the study of history. History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know. It is a part of the rational study, because it is the first step toward an enlightened scepticism, that is, toward a deliberate reconsideration of the worth of those rules. When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal. For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics. It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past. ***

Everywhere the basis of principle is tradition, to such an extent that we even are in danger of making the role of history more important than it is. ***

[I]f we consider the law of contract, we find it full of history. The distinctions between debt, covenant, and assumpsit are merely historical. The classification of certain obligations to pay money, imposed by the law irrespective of any bargain as quasi contracts, is merely historical. The doctrine of consideration is merely historical. The effect given to a seal is to be explained by history alone.--Consideration is a mere form. Is it a useful form? If so, why should it not be required in all contracts? A seal is a mere form ***. Why should any merely historical distinction be allowed to affect the rights and obligations of business men? ***

I trust that no one will understand me to be speaking with disrespect of the law, because I criticise it so freely. I venerate the law, and especially our system of law, as one of the vastest products of the human mind. No one knows better than I do the countless number of great intellects that have spent themselves in making some addition or improvement, the greatest of which is trifling when compared with the mighty whole. It has the final title to respect that it exists, that it is not a Hegelian dream, but a part of the lives of men. But one may criticise even what one reveres. Law is the business to which my life is devoted, and I should show less than devotion if I did not do what in me lies to improve it, and, when I perceive what seems to me the ideal of its future, if I hesitated to point it out and to press toward it with all my heart.

Perhaps I have said enough to show the part which the study of history necessarily plays in the intelligent study of the law as it is today. *** We must beware of the pitfall of antiquarianism, and must remember that for our purposes our only interest in the past is for the light it throws upon the present. I look forward to a time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them. As a step toward that ideal it seems to me that every lawyer ought to seek an understanding of economics. The present divorce between the schools of political economy and law seems to me an evidence of how much progress in philosophical study still remains to be made. In the present state of political economy, indeed, we come again upon history on a larger scale, but there we are called on to consider and weigh the ends of legislation, the means of attaining them, and the cost. We learn that for everything we have to give up something else, and we are taught to set the advantage we gain against the other advantage we lose, and to know what we are doing when we elect.

There is another study which sometimes is undervalued by the practical minded, for which I wish to say a good word, although I think a good deal of pretty poor stuff goes under that name. I mean the study of what is called jurisprudence. Jurisprudence, as I look at it, is simply law in its most generalized part. Every effort to reduce a case to a rule is an effort of jurisprudence, although the name as used in English is confined to the broadest rules and most fundamental conceptions. One mark of a great lawyer is that he sees the application of the broadest rules. *** If a man goes into law it pays to be a master of it, and to be a master of it means to look straight through all the dramatic incidents and to discern the true basis for prophecy. Therefore, it is well to have an accurate notion of what you mean by law, by a right, by a duty, by malice, intent, and negligence, by ownership, by possession, and so forth. ***

The way to gain a liberal view of your subject is not to read something else, but to get to the bottom of the subject itself. The means of doing that are, in the first place, to follow the existing body of dogma into its highest generalizations by the help of jurisprudence; next, to discover from history how it has come to be what it is; and, finally, so far as you can, to consider the ends which the several rules seek to accomplish, the reasons why those ends are desired, what is given up to gain them, and whether they are worth the price.

We have too little theory in the law rather than too much, especially on this final branch of study. *** Sir Henry Maine has made it fashionable to connect the archaic notion of property with prescription. But the connection is further back than the first recorded history. It is in the nature of man's mind. A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man. ***

I have been speaking about the study of the law, and I have said next to nothing of what commonly is talked about in that connection,--text-books and the case system, and all the machinery with which a student comes most immediately in contact. Nor shall I say anything about them. Theory is my subject, not practical details. The modes of teaching have been improved since my time, no doubt, but ability and industry will master the raw material with any mode. Theory is the most important part of the dogma of the law, as the architect is the most important man who takes part in the building of a house. The most important improvements of the last twenty-five years are improvements in theory. It is not to be feared as unpractical, for, to the competent, it simply means going to the bottom of the subject. For the incompetent, it sometimes is true, as has been said, that an interest in general ideas means an absence of particular knowledge. *** But the weak and foolish must be left to their folly. The danger is that the able and practical minded should look with indifference or distrust upon ideas the connection of which with their business is remote. I heard a story, the other day, of a man who had a valet to whom he paid high wages, subject to deduction for faults. One of his deductions was, "For lack of imagination, five dollars." The lack is not confined to valets. The object of ambition, power, generally presents itself nowadays in the form of money alone. Money is the most immediate form, and is a proper object of desire. "The fortune," said Rachel, "is the measure of the intelligence." That is a good text to waken people out of a fool's paradise. But, as Hegel says,[6] "It is in the end not the appetite, but the opinion, which has to be satisfied." To an imagination of any scope the most far-reaching form of power is not money, it is the command of ideas. If you want great examples read Mr. Leslie Stephen's "History of English Thought in the Eighteenth Century," and see how a hundred years after his death the abstract speculations of Descartes had become a practical force controlling the conduct of men. Read the works of the great German jurists, and see how much more the world is governed to-day by Kant than by Bonaparte. We cannot all be Descartes or Kant, but we all want happiness. And happiness, I am sure from having known many successful men, cannot be won simply by being counsel for great corporations and having an income of fifty thousand dollars. An intellect great enough to win the prize needs other food beside success. The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.

Legal Education and the Reproduction of Hierarchy

Duncan Kennedy

Law schools are intensely political places, in spite of the fact that the modern law school seems intellectually unpretentious, barren of theoretical ambition or practical vision of what social life might be. The trade-school mentality, the endless attention to trees at the expense of forests, the alternating grimness and chumminess of focus on the limited task at hand—all these are only a part of what is going on. The other part is ideological training for willing service in the hierarchies of the corporate welfare state.

To say that law school is ideological is to say that what teachers teach along with basic skills is wrong, is nonsense, about what law is and how it works; that the message about the nature of legal competence and its distribution among students is wrong, is nonsense; that the ideas about the possibilities of life as a lawyer that students pick up from legal education are wrong, are nonsense. But all this is nonsense with a tilt; it is biased and motivated rather than random error. What it says is that it is natural, efficient, and fair for law firms, the bar as a whole, and the society the bar services to be organized in their actual patterns of hierarchy and domination.

Because students believe what they are told, explicitly and implicitly, about the world they are entering, they behave in ways that fulfill the prophecies the system makes about them and about that world. This is the link-back that completes the system: students do more than accept the way things are, and ideology does more than damp opposition. Students act affirmatively within the channels cut for them, cutting them deeper, giving the whole a patina of consent, and weaving complicity into everyone's life story.

In this article, I take up in turn the initial first-year experience, the ideological content of the law-school curriculum, the noncurricular practices of law schools that train students to accept and participate in the hierarchical structure of life in the law, and the problem of deciding what

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implications for political practice we can draw from the analysis of the existing structure of hierarchy. The next part suggests ways in which progressive or left students who are determined not to let law school demobilize them can deal with the experience. A final section gives an example of a utopian proposal for the transformation of one law school.

I. Ideology and Hierarchy in Legal Education

A. The First-Year Experience

A surprisingly large number of law students go to law school with the notion that being a lawyer means something more, something more socially constructive than just doing a highly respectable job. There is the idea of playing the role an earlier generation associated with Brandeis, the role of service through law, carried out with superb technical competence and also with a deep belief that in its essence law is a progressive force, however much it may be distorted by the actual arrangements of capitalism. There is a contrasting, more radical notion, that law is a tool of established interests, that it is in essence superstructural, but that it is a tool which a coldly effective professional can sometimes turn against the dominators. In the first notion the student aspires to help the oppressed and transform society by bringing out the latent content of a valid ideal; in the second the student sees herself as part technician, part judo expert, able to turn the tables exactly because she never lets herself be mystified by the rhetoric that is so important to other students.

Then there are the conflicting motives, which are equally real for both types. People think of law schools as extremely competitive, as a place where a tough, hard-working, smart style is cultivated and rewarded. Students enter law school with a sense that they will develop that side of themselves. Even if they disapprove, on principle, of that side of themselves, they have had other experiences in which it turned out that they wanted and liked aspects of themselves that on principle they disapproved of. How is one to know that one is not "really" looking to develop oneself in this way as much as one is motivated by the vocation of social transformation?

There is also the issue of social mobility. Almost everyone whose parents were not members of the professional/technical intelligentsia seems to feel that going to law school is an advance, in terms of the family history. This is true even for children of high-level business managers, so long as their parents' positions were due to hard work and struggle rather than to birth into the upper echelons. It is rare for parents actively to disapprove of their children going to law school, whatever their origins. So taking this particular step has a social meaning, however much the student may reject it, and that social meaning is success. The success is bitter-

sweet if one feels one should have gotten into a better school, but both the bitter and the sweet suggest that one's motives are impure.

The initial classroom experience sustains rather than dissipates ambivalence. The teachers are overwhelmingly white, male, and deadeningly straight and middle class in manner. The classroom is hierarchical with a vengeance, the teacher receiving a degree of deference and arousing fears that remind one of high school rather than college. The sense of autonomy one has in a lecture—with the rule that you must let the teacher drone on without interruption, balanced by the rule that he can't do anything to you—is gone. In its place is a demand for pseudo-participation in which one struggles desperately, in front of a large audience, to read a mind determined to elude you. It is almost never anything like as bad as *The Paper Chase* or *One-L,* but it is still humiliating to be frightened and unsure of oneself, especially when what renders one unsure is a classroom arrangement that suggests at once the patriarchal family and a Kafka-like riddle-state. The law-school classroom at the beginning of the first year is culturally reactionary.

But it is also engaging. You are learning a new language, and it is possible to learn it. Pseudo-participation makes one intensely aware of how everyone else is doing, providing endless bases for comparison. Information is coming in on all sides, and things that you knew were out there but you didn't understand are becoming intelligible. The teacher offers subtle encouragements as well as not-so-subtle reasons for alarm. Performance is on one's mind, adrenalin flows, success has a nightly and daily meaning in terms of the material assigned. After all, this is the next segment: one is moving from the vaguely sentimental world of college, or the frustrating world of officework or housework, into something that promises a dose of "reality," even if it's cold and scary reality.

It quickly emerges that neither the students nor the faculty are as homogeneous as they at first appeared. Some teachers are more authoritarian than others; some students other than oneself reacted with horror to the infantilization of the first days or weeks. There even seems to be a connection between classroom manner and substantive views, with the "softer" teachers also seeming to be more "liberal," perhaps more sympathetic to plaintiffs in the torts course, more willing to hear what are called policy arguments, as well as less intimidating in class discussion. But there is a disturbing aspect to this process of differentiation: in most law schools, it turns out that the tougher, less policy-oriented teachers are the more popular. The softies seem to get less matter across, they let things wander, and one begins to worry that their niceness is at the expense of a metaphysical quality called "rigor," thought to be essential to success on bar exams and in the grown-up world of practice. Ambivalence reasserts itself. As between the conservatives and the mushy centrists, enemies who

scare you but subtly reassure you may seem more attractive than allies no better anchored than yourself.

There is an intellectual experience that somewhat corresponds to the emotional one: the gradual revelation that there is no purchase for left or even for committed liberal thinking on any part of the smooth surface of legal education. The issue in the classroom is not left against right but pedagogical conservatism against moderate, disintegrated liberalism. No teacher is likely to present a model of either left pedagogy or vital left theoretical enterprise, though some are likely to be vaguely sympathetic to progressive causes, and some may even be moonlighting as left lawyers. Students are struggling for cognitive mastery and against the sneaking depression of the preprofessional. The actual intellectual content of the law seems to consist of learning rules, what they are and why they have to be the way they are, while rooting for the occasional judge who seems willing to make them marginally more humane. The basic experience is of double surrender: to a passivizing classroom experience and to a passive attitude toward the content of the legal system.

The first step toward this sense of the irrelevance of liberal or left thinking is the opposition in the first-year curriculum between the technical, boring, difficult, obscure legal case, and the occasional case with outrageous facts and a piggish judicial opinion endorsing or tolerating the outrage. The first kind of case—call it a "cold" case—is a challenge to interest and understanding, even to wakefulness. It can be on any subject, so long as it is of no political or moral or emotional significance. Just to understand what happened and what's being said about it, you have to learn a lot of new terms, a little potted legal history, and lots of rules, none of which is carefully explained by the casebook or the teacher. It is difficult to figure out why the case is there in the first place, whether one has grasped it, and what the teacher will ask and what one should respond.

The other kind of case—the "hot" case—usually involves a sympathetic plaintiff, say an Appalachian farm family, and an unsympathetic defendant, say a coal company. On first reading, it appears that the coal company has screwed the farm family, say by renting their land for strip mining, with a promise to restore it to its original condition once the coal has been extracted, and then reneging on the promise. And the case should include a judicial opinion that does something like awarding a meaningless few hundred dollars to the farm family, rather than making the coal company do the restoration work. The point of the class discussion will be that your initial reaction of outrage is naive, nonlegal, irrelevant to what you're supposed to be learning, and maybe substantively wrong into the bargain. There are "good reasons" for the awful result, when you take a legal and logical "large" view, as opposed to a knee-jerk passionate view, and if you can't muster those reasons, maybe you aren't cut out to be a lawyer.

Most students can't fight this combination of a cold case and a hot case.

The cold case is boring, but you have to do it if you want to become a lawyer. The hot case cries out for a response, seems to say that if you can't respond you've already sold out, but the system tells you to put away childish things, and your reaction to the hot case is one of them. Without any intellectual resources, in the way of knowledge of the legal system and of the character of legal reasoning, it will appear that emoting will only isolate and incapacitate you. The choice is to develop some calluses and hit the books, or admit failure almost before you've begun.

B. The Ideological Content of Legal Education

One can distinguish in a rough way between two aspects of legal education as a reproducer of hierarchy. Much of what happens is the inculcation through a formal curriculum and the classroom experience of a set of political attitudes toward the economy and society in general, toward law, and toward the possibilities of life in the profession. These have a general ideological significance, and they have an impact on the lives even of law students who never practice law. Then there is a complicated set of institutional practices that orient students to willing participation in the specialized hierarchial roles of lawyers. In order to understand these, one must have at least a rough conception of what the world of practice is like. Students begin to absorb the more general ideological message before they have much in the way of a conception of life after law school, so I will describe this formal aspect of the educational process first. I will then try to sketch in the realities of professional life that students gradually learn about in the second and third year, before describing the way in which the institutional practices of law schools bear on those realities.

Law students sometimes speak as though they learned nothing in school. In fact, they learn skills, to do a list of simple but important things. They learn to retain large numbers of rules organized into categorical systems (e.g., requisites for contract, rules about breach). They learn "issue spotting," which means identifying the ways in which the rules are ambiguous, in conflict, or have a gap when applied to particular fact situations. They learn elementary case analysis, meaning the art of generating broad holdings for cases, so they will apply beyond their intuitive scope, and narrow holdings for cases, so that they won't apply where it at first seemed they would. And they learn a list of balanced, formulaic, pro/con policy arguments that lawyers use in arguing that a given rule should apply to a situation in spite of a gap, conflict, or ambiguity or that a given case should be extended or narrowed. These are arguments like "the need for certainty" and "the need for flexibility," "the need to promote competition" and the "need to encourage production by letting producers keep the rewards of their labor."

One should neither exalt these skills nor denigrate them. By comparison with the first-year students' tendency to flip-flop between formalism

and mere equitable intuition, they represent a real intellectual advance. Lawyers actually do use them in practice. And when properly, consciously mastered, they have "critical" bite. They are a help in thinking about politics, public policy, and ethical discourse in general, because they show the indeterminacy and manipulability of ideas and institutions that are central to liberalism.

On the other hand, law schools teach these rather rudimentary, essentially instrumental skills in a way that almost completely mystifies them for almost all law students. The mystification has three parts. First, the schools teach skills through class discussions of cases in which it is asserted that law emerges from a rigorous analytical procedure called "legal reasoning," which is unintelligible to the layman but somehow both explains and validates the great majority of the rules in force in our system. At the same time, the class context and the materials present every legal issue as distinct from every other, as a tub on its own bottom, so to speak, with no hope or even any reason to hope that from law study one might derive an integrating vision of what law is, how it works, or how it might be changed (other than in an incremental, case-by-case, reformist way).

Second, the teaching of skills in the mystified context of legal reasoning about utterly unconnected legal problems means that skills are taught badly, unselfconsciously, to be absorbed by osmosis as one picks up the knack of "thinking like a lawyer." Bad or only randomly good teaching generates and then accentuates real differences and imagined differences in student capabilities. But it does so in such a way that students don't know when they are learning and when they aren't and have no way of improving or even understanding their own learning processes. They experience skills training as the gradual emergence of differences among themselves, as a process of ranking that reflects something that is just "there" inside them.

Third, the schools teach skills in isolation from actual lawyering experience. "Legal reasoning" is sharply distinguished from law practice, and one learns nothing about practice. This procedure disables students from any future role but that of apprentice in a law firm organized in the same manner as a law school, with older lawyers controlling the content and pace of depoliticized craft training in a setting of intense competition and no feedback.

1. *The Formal Curriculum: Legal Rules and Legal Reasoning.* The intellectual core of the ideology is the distinction between law and policy. Teachers convince students that legal reasoning exists, and is different from policy analysis, by bullying them into accepting as valid in particular cases arguments about legal correctness that are circular, question-begging, incoherent, or so vague as to be meaningless. Sometimes these are just arguments from authority, with the validity of the authoritative premise put outside discussion by professorial fiat. Sometimes they are

policy arguments (e.g., security of transactions, business certainty) that are treated in a particular situation as though they were rules that everyone accepts but that will be ignored in the next case when they would suggest that the decision was wrong. Sometimes they are exercises in formal logic that wouldn't stand up for a minute in a discussion between equals (e.g., expectations damages represent the will of the parties).

Within a given subfield, the teacher is likely to treat cases in three different ways. There are the cases that present and justify the basic rules and ideas of the field. These are treated as cursory exercises in legal logic. Then there are cases that are anomalous—"outdated" or "wrongly decided" because they don't follow the supposed inner logic of the area. There won't be many of these, but they are important because their treatment persuades students that the technique of legal reasoning is at least minimally independent of the results reached by particular judges and is therefore capable of criticizing as well as legitimating. Finally, there will be an equally small number of peripheral or "cutting edge" cases the teacher sees as raising policy issues about growth or change in the law. Whereas in discussing the first two kinds of cases the teacher behaves in an authoritarian way supposedly based on his objective knowledge of the technique of legal reasoning, here everything is different. Because we are dealing with "value judgments" that have "political" overtones, the discussion will be much more free-wheeling. Rather than every student comment being right or wrong, all student comments get pluralist acceptance, and the teacher will reveal himself to be either a liberal or a conservative, rather than merely a legal technician.

The curriculum as a whole has a rather similar structure. It is not really a random assortment of tubs on their own bottoms, a forest of tubs. First, there are contracts, torts, property, criminal law, and civil procedure. The rules in these courses are the ground-rules of late nineteenth-century laissez-faire capitalism. Teachers teach them as though they had an inner logic, as an exercise in legal reasoning with policy (e.g., promissory estoppel in the contracts course) playing a relatively minor role. Then there are second- and third-year courses that expound the moderate reformist program of the New Deal and the administrative structure of the modern regulatory state (with passing reference to the racial egalitarianism of the Warren Court). These courses are more policy oriented than first-year courses, and also much more ad hoc. Teachers teach students that limited interference with the market makes sense and is as authoritatively grounded in statutes as the ground rules of laissez faire are grounded in natural law. But each problem is discrete, enormously complicated, and understood in a way that guarantees the practical impotence of the reform program. Finally, there are peripheral subjects, like legal philosophy or legal history, legal process, and clinical legal education. These are presented as not truly relevant to the "hard," objective, serious,

rigorous, analytic core of law; they are a kind of playground or a finishing school for learning the social art of self-presentation as a lawyer.

This whole body of implicit messages is nonsense. Teachers teach nonsense when they persuade students that legal reasoning is distinct as a method for reaching correct results from ethical and political discourse in general (i.e., from policy analysis). It would be an extraordinary first-year student who could, on his own, develop a theoretically critical attitude toward this system. Entering students just don't know enough to figure out where the teacher is fudging, misrepresenting, or otherwise distorting legal thinking and legal reality. To make matters worse, the two most common kinds of left-wing thinking the student is likely to bring with her are likely to hinder rather than assist in the struggle to maintain some intellectual autonomy from the experience. Most liberal students believe that the left program can be reduced to guaranteeing people their rights, and to bringing about the triumph of human rights over mere property rights. In this picture, the trouble with the legal system is that it fails to put the state behind the rights of the oppressed or that the system fails to enforce the rights formally recognized. If one thinks about law this way, one is inescapably dependent on the very techniques of legal reasoning that are being marshalled in defense of the status quo.

This wouldn't be so bad if the problem with legal education were that the teachers misused rights reasoning to restrict the range of the rights of the oppressed. But the problem is much deeper than that. Rights discourse is internally inconsistent, vacuous, or circular. Legal thought can generate equally plausible rights justifications for almost any result. Moreover, the discourse of rights imposes constraints on those who use it that make it almost impossible for it to function effectively as a tool of radical transformation. Rights are by their nature "formal," meaning that they secure to individuals legal protection for arbitrariness—to speak of rights is precisely not to speak of justice between social classes, races, or sexes. Rights discourse, moreover, simply presupposes or takes for granted that the world is and should be divided between a state sector that enforces rights and a private world of "civil society" in which atomized individuals pursue their diverse goals. This framework is, in itself, a part of the problem rather than of the solution. It makes it difficult even to conceptualize radical proposals such as, for example, decentralized democratic worker control of factories.

Because it is logically incoherent and manipulable, traditionally individualist, and willfully blind to the realities of substantive inequality, rights discourse is a trap. As long as one stays within it, one can produce good pieces of argument about the occasional case on the periphery where everyone recognizes value judgments have to be made. But one is without guidance in deciding what to do about fundamental questions and fated

to the gradual loss of confidence in the persuasiveness of what one has to say in favor of the very results one believes in most passionately.

The other left stance is to undertake the Procrustean task of reinterpreting every judicial action as the expression of class interest. One may adopt a conspiracy theory, in which judges deliberately subordinate "justice" (usually just a left liberal-rights theory) to the short-run financial interests of the ruling class, or a much more subtle thesis about the "logic" or "needs" or "structural prerequisites" of a particular "stage of monopoly capitalism." But however one sets out to do it, there are two difficulties. The first is that there is just too much *drek,* too much raw matter of the legal system, and too little time to give everything you have to study a sinister significance. It would be a full-time job just to give instrumental Marxist accounts of the cases on consideration doctrine in first-year contracts. Just exactly why is it that late nineteenth-century capitalism needed to render an uncle's promise to pay his nephew a handsome sum, if he didn't smoke 'til age 21, a legal nullity? Or was it the other way around: that capitalism needed such promises to be enforceable?

The second difficulty is that there is no "logic" to monopoly capitalism, and law cannot be usefully understood, by someone who has to deal with it in all its complexity, as "superstructural." Legal rules the state enforces, and legal concepts that permeate all aspects of social thought, constitute capitalism as well as responding to the interests that operate within it. Law is an aspect of the social totality, not just the tail of the dog. The rules in force are a factor in the power or impotence of all social actors (though they certainly do not determine outcomes in the way liberal legalists sometimes suggest they do). Because it is part of the equation of power rather than simply a function of it, people struggle for power through law, constrained by their limited understanding and limited ability to predict the consequences of their maneuvers. To understand law is to understand this struggle as an aspect of class struggle and as an aspect of the human struggle to grasp the conditions of social justice. The outcomes of struggle are not preordained by any aspect of the social totality, and the outcomes within law have no "inherent logic" that would allow one to predict outcomes "scientifically" or to reject in advance specific attempts by judges and lawyers to work limited transformations of the system.

Left liberal-rights analysis submerges the student in legal rhetoric but, because of its inherent vacuousness, can provide no more than an emotional stance against the legal order. The instrumental Marxist approach is highly critical of law but also dismissive. It is no help in coming to grips with the particularity of rules and rhetoric, because it treats them, *a priori,* as mere window dressing. These theories fail left students because they offer no base for the mastery of ambivalence. What is needed is to think about the law in a way that will allow students to enter

into it, to criticize without utterly rejecting it, and to manipulate it without self-abandonment to an alien system of thinking and doing.

2. *Student Evaluation.* Law schools teach a small number of useful skills. But they teach them only obliquely. It would threaten the professional ideology and the academic pretensions of teachers to make their students as good as they can be at the relatively simple tasks that they will have to perform in practice. But it would also upset the process by which a hierarchical arrangement analogous to that of law-school applicants, law schools, and law firms is established within a given student body.

To teach the repetitive skills of legal analysis effectively, one would have to isolate the general procedures that make them up and then devise large numbers of factual and doctrinal hypotheticals with which students could practice those skills, knowing what they were doing, and learning in every single case whether their performance was good or bad. As legal education now works, on the other hand, students do exercises designed to discover what the "correct solution" to a legal problem might be; those exercises are treated as unrelated to one another; and students receive no feedback at all except a grade on a single examination at the end of the course. Students generally experience these grades as almost totally arbitrary—unrelated to how much you worked, how much you liked the subject, how much you thought you understood going into the exam, and what you thought about the class and the teacher.

This is silly, looked at as pedagogy. But it is more than silly when looked at as ideology. The system generates a rank ordering of students based on grades, and students learn that there is little or nothing they can do to change their place in that ordering or to change the way the school generates it. Grading as practiced teaches the inevitability and also the justice of hierarchy, a hierarchy that is at once false and unnecessary.

It is unnecessary because it is largely irrelevant to what students will do as lawyers. Most of the process of differentiating students into bad, better, and good could simply be dispensed with, without the slightest detriment to the quality of legal services. It is false, first, because in so much as it does involve the measuring of the real and useful skills of potential lawyers, the differences between students could be "leveled up" at minimal cost, whereas the actual practice of legal education systematically accentuates differences in real capacities. If law schools invested some of the time and money they now put into Socratic classes into developing systematic skills training and committed themselves to giving constant, detailed feedback on student progress in learning those skills, they could graduate the vast majority of all the law students in the country at the level of technical proficiency now achieved by a small minority in each institution.

In communicating class-rank information to each student, law schools convey the implicit corollary that place is individually earned and therefore

deserved. The system tells each student that he learned as much as he was capable of learning. If he feels incompetent or that he could have done better, it is his own fault. Opposition is sour grapes. Students internalize this message about themselves and about the world and so prepare themselves for all the hierarchies to follow.

3. *Incapacitation for Alternative Practice.* Law schools channel their students into jobs in the hierarchy of the bar according to their own standing in the hierarchy of schools. Students confronted with the choice of what to do after they graduate experience themselves as largely helpless: they have no "real" alternatives to taking a job in one of the conventional firms that hires from their school. Partly, faculties generate this sense of student helplessness by propagating myths about the character of the different kinds of practice. They extol the forms that are accessible to their students; they subtly denigrate or express envy about the jobs that will be beyond their students' reach; they dismiss as ethically and socially suspect the jobs their students won't have to take.

As for any form of work outside the established system—for example, legal services for the poor, and neighborhood law practice—teachers convey to students that, although morally exalted, the work is hopelessly dull and unchallenging and the possibilities of reaching a standard of living appropriate to a lawyer are slim or nonexistent. These messages are just nonsense—the rationalizations of law techers who long upward, fear status degradation, and above all hate the idea of risk. Legal services practice, for example, is far more intellectually stimulating and demanding, even with a high case load, than most of what corporate lawyers do. It is also more fun.

Beyond this dimension of professional mythology, law schools act in more concrete ways to guarantee that their students will fit themselves into their appropriate niches in the existing system of practice. First, the actual content of what is taught in a given school will incapacitate students from any other form of practice than that allotted graduates of that institution. This looks superficially like a rational adaptation to the needs of the market, but it is in fact almost entirely unnecessary.

Law schools teach so little, and that so incompetently, that they cannot, as now constituted, prepare students for more than one career at the bar. But the reason for this is that they embed skills training in mystificatory nonsense and devote most of their teaching time to transmitting masses of ill-digested rules. A more rational system would emphasize the way to learn law rather than rules and skills rather than answers. Student capacities would be more equal as a result, but students would also be radically more flexible in what they could do in practice.

A second incapacitating device is the teaching of doctrine in isolation from practice skills. Students who have no practice skills tend to exaggerate how difficult it is to acquire them. There is a distinct lawyers'

mystique of the irrelevance of the "theoretical" material learned in school and of the crucial importance of abilities that cannot be known or developed until one is out in the "real world" and "in the trenches." Students have little alternative to getting training in this dimension of things after law school. It therefore seems hopelessly impractical to think about setting up your own law firm and only a little less impractical to go to a small or political or unconventional firm rather than to one of those that offers the standard package of postgraduate education. Law schools are wholly responsible for this situation. They could quite easily revamp their curricula so that any student who wanted it would have a meaningful choice between independence and servility.

A third form of incapacitation is more subtle. Law school, as an extension of the educational system as whole, teaches students that they are weak, lazy, incompetent, and insecure. And it also teaches them that if they are willing to accept dependency, large institutions will take care of them almost no matter what. The terms of the bargain are relatively clear. The institution will set limited, cognizable tasks and specify minimum requirements in their performance. The student associate has no other responsibilties than performance of those tasks. The institution takes care of all the contingencies of life, both within the law (supervision and backup from other firm members; firm resources and prestige to bail you out if you make a mistake) and in private life (firms offer money, but also long-term job security and delicious benefit packages designed to reduce risks of disaster). In exchange, students renounce any claim to control their work setting or the actual content of what they do and agree to show the appropriate form of deference to those above them and condescension to those below.

By comparison, the alternatives are risky. Law school does not prepare students to run a small law business, to assess realistically the outcome of a complex process involving many different actors, or to enjoy the feeling of independence and moral integrity that comes of creating their own job to serve their own goals. It tries to persuade them that they are barely competent to perform the much more limited roles it allows them and strongly suggests that it is more prudent to kiss the lash than to strike out on your own.

4. *The Modeling of Hierarchial Relationships.* Law teachers model for students how they are supposed to think, feel, and act in their future professional roles. Some of this is a matter of teaching by example; some of it a matter of more active learning from interactions that are a kind of clinical education for lawyerlike behavior. This training is a major factor in the hierarchical life of the bar. It encodes the message of the legitimacy of the whole system into the smallest details of personal style, daily routine, gesture, tone of voice, facial expression, a plethora of little p's and q's for

everyone to mind. Partly, these will serve as a language—a way for the young lawyer to convey that he knows what the rules of the game are and intends to play by them. Partly, it is a matter of ritual oaths and affirmations—by adopting the mannerisms one pledges one's troth to inequality. And partly it is a substantive matter of value. Hierarchical behavior will come to express and realize the hierarchical selves of people who were initially only wearers of masks.

Law teachers enlist on the side of hierarchy all the vulnerabilities students feel as they begin to understand what lies ahead of them. In law school, students have to come to grips with implications of their social class, sex, and race in a way that is different from (but not necessarily less important than) the experience of college. People discover that preserving their class status is extremely important to them, so important that no alternative to the best law job they can get seems possible to them. Or they discover that they want to rise or that they are trapped in a way they hadn't anticipated. Students change the way they dress and talk; they change their opinions and even their emotions. None of this is easy for anyone, but progressive and left students have the special set of humiliations involved in discovering the limits of their commitment and often the instability of attitudes they thought were basic to themselves.

Students learn that law teachers are intensely preoccupied with the status rankings of their schools and show themselves willing to sacrifice to improve their status in the rankings and to prevent downward drift. They approach the appointment of colleagues in the spirit of trying to get people who are as high up as possible in a conventionally defined hierarchy of teaching applicants, and they are notoriously hostile to affirmative action in faculty hiring, even when they are quite willing to practice it for student admissions and in filling administrative posts. Assistant professors begin their careers as the little darlings of their older colleagues. They end up in tense competition for the prize of tenure, trying to accommodate themselves to standards and expectations that are, typically, too vague to master except by a commitment to please at any cost. In these respects, law schools are a good preview of what law firms will be like.

Law professors, like lawyers, have secretaries. Students deal with them off and on through law school, watch how their bosses treat them, how they treat their bosses, and how "a secretary" relates to "a professor" even when one does not work for the other. Students learn that it is acceptable, even if it's not always and everywhere the norm, for faculty to treat their secretaries petulantly, condescendingly, with a perfectionism that is a matter of the bosses' face rather than of the demands of the job itself, as though they were personal body servants, utterly impersonally, or as objects of sexual harassment. They learn that "a secretary" treats "a professor" with elaborate deference, as though her time and her dignity

meant nothing and his everything, even when he is not her boss. In general, they learn that humane relations in the workplace are a matter of the superior's grace rather than of human need and social justice.

These lessons are repeated in the relationships of professors and secretaries with administrators and with maintenance and support staff. Teachers convey a sense of their own superiority and practice a social segregation sufficiently extreme so that there are no occasions on which the reality of that superiority might be tested. As a group, they accept and willingly reinforce the division of labor that consigns everyone in the institution but them to boredom and stagnation. Friendly but deferential social relations reinforce everyone's sense that all's for the best, making hierarchy seem to disappear in the midst of cordiality, when in fact any serious challenge to the regime would be met with outrage and retaliation.

All of this is teaching by example. In their relations with students, and in the student culture they foster, teachers get the message across more directly and more powerfully. The teacher/student relationship is the model for relations between junior associates and senior partners and also for the relationship between lawyers and judges. The student/student relationship is the model for relations among lawyers as peers, for the age cohort within a law firm, and for the "fraternity" of the courthouse crowd.

In the classroom and out of it, students learn a particular style of deference. They learn to suffer with positive cheerfulness interruption in midsentence, mockery, ad hominem assault, inconsequent asides, questions that are so vague as to be unanswerable but can somehow be answered wrong all the same, abrupt dismissal, and stinginess of praise (even if these things are not always and everywhere the norm). They learn, if they have talent, that submission is most effective flavored with a pinch of rebellion, to bridle a little before they bend. They learn to savor crumbs, while picking from the air the indications of the master's mood that can mean the difference between a good day and misery. They learn to take it all in good sort, that his bark is worse than his bite, that there is often shyness, good intentions, some real commitment to students learning something behind the authoritarian facade. So it will be with many a robed curmudgeon in years to come.

Then there is affiliation. From among many possibilities, each student gets to choose a mentor, or several, to admire and depend on, to become sort of friends with if the mentor is a liberal, to sit at the feet of if the mentor is more "traditional." The student learns how the mentor is different from other teachers and to be supportive of those differences, as the mentor learns something of the student's particular strengths and weaknesses, both trying to prevent the inevitability of letters of recommendation from corrupting the whole experience. This can be fruitful and satisfying or degrading or both at once. So it will be a few years later with the student's "father in the law."

There is a third, more subtle, and less conscious message conveyed in student/teacher relations. Teachers are overwhelmingly white, male, and middle class, and most (by no means all) black and women law teachers give the impression of thorough assimilation to that style or of insecurity and unhappiness. Students who are women or black or working class find out something important about the professional universe from the first day of class: that it is not even nominally pluralist in cultural terms. The teacher sets the tone—a white, male, middle-class tone. Students adapt. They do so partly out of fear, partly out of hope of gain, partly out of genuine admiration for their role models. But the line between adaptation to the intellectual and skills content of legal education and adaptation to the white, male, middle-class cultural style is a fine one, easily lost sight of.

While students quickly understand that there is diversity among their fellow students and that the faculty is not really homogeneous in terms of character, background, or opinions, the classroom itself becomes more rather than less uniform as legal education progresses. You'll find Fred Astaire and Howard Cosell over and over again, but never Richard Pryor or Betty Friedan. It's not that the teacher punishes you if you use slang or wear clothes or give examples or voice opinions that identify you as different, though that might happen. You are likely to be sanctioned, mildly or severely, only if you refuse to adopt the highly cognitive, dominating mode of discourse that everyone identifies as lawyerlike. Nonetheless, the indirect pressure for conformity is intense.

Students, alone in their seats, feel alienated in this atmosphere, but it is unlikely that they will do anything about it in the classroom setting itself, however much they gripe about it with friends. Typically, they will find a way, in class, to respond as the teacher seems to want them to respond—to be a lot like him, as far as one could tell if one knew them only in class, even though the imitation is flawed by the need to suppress anger. And when some teacher, at least once in some class, makes a remark that seems sexist or racist, or seems unwilling to treat black or women students in quite as "challenging" a way as white students, or treats them in a more challenging way, or cuts off discussion when a woman student gets mad at a male student's joke about the tort of "offensive touching," it is unlikely that the typical student will do anything then either.

It is easy enough to see this situation of enforced cultural uniformity as oppressive but somewhat more difficult to see it as training, especially if you are aware of it and hate it. But it is training nonetheless. The students will pick up mannerisms, ways of speaking, gestures, which would be "neutral" if they were not emblematic of membership in the white, middle-class, male universe of the bar. They come to expect that as a lawyer they will live in a world in which essential parts of them are not represented, or are misrepresented, and in which things they don't like will be accepted to the point that it doesn't occur to people that they are

even controversial. And they come to expect that there is nothing they can do about it. One develops ways of coping with these expectations—turning off attention or involvement when the conversation strays in certain directions, participating actively while ignoring the offensive elements of the interchange, even reinterpreting as inoffensive things that would otherwise make one boil. These are skills that incapacitate rather than empower, skills that help the student imprison himself in practice.

Relations among students get a lot of their color from relations with the faculty. There is the sense of blood brotherhood, with or without sisters, in endless speculation about the Olympians. The speculation is colored with rage, expressed sometimes in student theatricals, or the "humor" column of the school paper. ("Put Professor *X*'s talents to the best possible use: Turn him into hamburger." Ha, ha.) There is likely to be a surface norm of noncompetitiveness and cooperation. ("Gee, I thought this would be like *The Paper Chase,* but it isn't at all.") But a basic thing to learn is the limits of that cooperativeness. Very few people can combine rivalry for grades, law review, clerkships, good summer jobs, with helping another member of their study group so effectvely that he might actually pose a danger to them. You learn camaraderie and distrust at the same time. So it will be in the law firm age cohort.

And there is more to it than that. Through the reactions of fellow students—diffuse, disembodied events that just "happen," in class or out of class—women learn how important it is not to appear to be "hysterical females," and that when your moot court partner gets a crush on you and doesn't know it and is married, there is a danger he will hate you when he discovers what he has been feeling. Lower middle-class students learn not to wear an undershirt that shows and that certain patterns and fabrics in clothes will stigmatize them no matter what their grades. Black students learn without surprise that the bar will have its own peculiar form of racism and that their very presence means affirmative action, unless it means "he would have made it even without affirmative action." They wonder about forms of bias so diabolical even they can't see them and whether legal reasoning is intrinsically white. Meanwhile, dozens of small changes through which they become more and more like other middle- or upper middle-class Americans engender rhetoric about how the black community is not divided along class lines. On one level, all of this is just high school replayed; on another, it's about how to make partner.

The final touch that completes the picture of law school as training for professional hierarchy is the placement process. As each firm puts on, with the tacit or enthusiastically overt participation of the schools, a conspicuous display of its relative status within the bar, the bar as a whole affirms and celebrates its hierarchical values and the rewards they bring. This process is most powerful for students who go through the elaborate procedures of firms in about the top half of the profession. These include,

nowadays, first-year summer jobs, dozens of interviews, fly-outs, second-year summer jobs, more interviews, and more fly-outs.

This system allows law firms to get a social sense of applicants, a sense of how they will contribute to the nonlegal image of the firm and to the internal system of deference and affiliation. It allows firms to convey to students the extraordinary opulence of the life they offer, adding the allure of free travel, expense account meals, fancy hotel suites and parties at country clubs to the simple message of big bucks in a paycheck. And it teaches students at "fancy" law schools, students who have had continuous experience of academic and careerist success, that they are not as "safe" as they thought they were.

When students at Columbia or Yale paper dorm corridors with rejection letters or award prizes for the most rejection letters and for the most unpleasant single letter, they show their sense of the meaning of the ritual. There are many ways in which the boss can persuade you to brush his teeth and comb his hair. One of them is to arrange things so that almost all students get good jobs, but most students get their good job through twenty interviews yielding only two offers.

By dangling the bait, making clear the rules of the game, and then subjecting almost everyone to intense anxiety about their acceptability, firms structure entry into the profession so as to maximize acceptance of hierarchy. If you feel you've succeeded, you're forever grateful, and you have a vested interest. If you feel you've failed, you blame yourself, when you aren't busy feeling envy. When you get to be the hiring partner, you'll have a visceral understanding of what's at stake, but it will be hard even to imagine why someone might want to change it.

Insomuch as these hierarchies are generational, they are easier to take than those baldly reflective of race, sex, or class. You, too, will one day be a senior partner and, who knows, maybe even a judge; you will have mentees, and be the object of the rage and longing of those coming up behind you. Training for subservience is training for domination as well. Nothing could be more natural and, if you've served your time, more fair, than that you as a group should do as you have been done to, for better and for worse. But it doesn't have to be that way, and remember, you saw it first in law school.

I have been arguing that legal education causes legal hierarchy. Legal education supports it by analogy, provides it a general legitimating ideology by justifying the rules that underlie it, and provides it a particular ideology by mystifying legal reasoning. Legal education structures the pool of prospective lawyers so that their hierarchical organization seems inevitable and trains them in detail to look and think and act just like all the other lawyers in the system. Up to now, I have presented this causal analysis as though legal education were a machine feeding particular inputs into another machine. But machines have no consciousness of one

another; inasmuch as they are coordinated, it is by some external intelligence. Law teachers, on the other hand, have a vivid sense of what the profession looks like, and of what it expects them to do. Since actors in the two systems consciously adjust to one another, and also consciously attempt to influence one another, legal education is as much a product of legal hierarchy as a cause of it. To my mind, this means that law teachers must take personal responsibility for legal hierarchy in general, including hierarchy within legal education. If it is there, it is there because they put it there and reproduce it generation after generation, just as lawyers do.

5. *The Student Response to Hierarchy*: Students respond in different ways to their slowly emerging consciousness of the hierarchical realities of life in the law. Looking around me, I see students who enter wholeheartedly into the system—for whom the training "takes" in a quite straightforward way. Others appear, at least, to manage something more complex. They accept the system's presentation of itself as largely neutral, as apolitical, meritocratic, instrumental, a matter of craft. And they also accept the system's promise that if they do their work, "serve their time," and "put in their hours," they are free to think and do and feel anything they want in their "private lives."

This mode of response is complex because the messages, though sincerely proffered, are not truly meant. People who accept the messages at face value often seem to sense that what has actually transpired is different. And since the law is neither apolitical nor meritocratic nor instrumental nor a matter of craft (at least not exclusively these things), and since training for hierarchy cannot be a matter merely of public as opposed to private life, it is inevitable that they do in fact give and take something different than what is suggested by the overt terms of the bargain. Sometimes people enact a kind of parody: they behave in a particularly tough, cognitive, lawyer-like mode in their professional selves and construct a private self that seems on the surface deliberately to exaggerate opposing qualities of warmth, sensitivity, easygoingness, or cultural radicalism.

Sometimes one senses an opposite version: the person never fully enters into "legal reasoning," remaining always a slightly disoriented, not-quite-in-good-faith role-player in professional life and feels a parallel inability ever to fully "be" his private self. For example, they may talk "shop" and obsess about the day at work, while hating themselves for being unable to "relax" but then find that at work they are unable to make the tasks assigned them fully their own and that each new task seems at first an unpleasant threat to their fragile feelings of confidence.

For progressive and left students, there is another possibility, which might be called the deunciatory mode. One can take law-school work seriously as time serving and do it coldly in that spirit, hate one's fellow students for their surrenders, and focus one's hopes on "not being a

lawyer" or on a fantasy of a leftist legal job on graduation. This response is hard from the very beginning, since rejection of what teachers and the student culture communicate about what the first-year curriculum means and how to enter into learning it leaves the student adrift as to how to go about becoming minimally competent. He has to develop a theory on his own of what is valid skills training and what merely indoctrination, and his ambivalent desire to be successful in spite of all is likely to sabotage his independence. As graduation approaches, it becomes clearer that there are precious few unambiguously virtuous law jobs even to apply for, and the student's situation begins to look more like everyone else's, though perhaps more extreme. Most (by no means all) students who begin with denunciation end by settling for some version of the bargain of public against private life.

I am more confident about the patterns that I have just described than about the attitudes toward hierarchy that go along with them. My own position in the system of class, sex, and race (as an upper middle-class, white male) and my rank in the professional hierarchy (as a Harvard professor) give me an interest in the perception that hierarchy is both omnipresent and enormously important, even while I am busy condemning it. And there is a problem of imagination that goes beyond that of interest. It is hard for me to know whether I even understand the attitudes toward hierarchy of women and blacks, for example, or of children of working-class parents, or of solo practitioners eking out a living from residential real-estate closings. Members of those groups sometimes suggest that the particularity of their experience of oppression cannot be grasped by outsiders but sometimes that the failure to grasp it is personal rather than inevitable. It sometimes seems to me that all people have at least analogous experiences of the oppressive reality of hierarchy, even those who seem most favored by the system—that the collar feels the same when you get to the end of the rope, whether the rope is ten feet long or fifty. On the other hand, it seems clear that hierarchy creates distances that are never bridged.

It is not uncommon for a person to answer a description of the hierarchy of law firms with a flat denial that the bar is really ranked. Lawyers of lower middle-class background tend to have far more direct political power in the state governments than "elite" lawyers, even under Republican administrations. Furthermore, every lawyer knows of instances of real friendship, seemingly outside and beyond the distinctions that are supposed to be so important, and can cite examples of lower middle-class lawyers in upper middle-class law firms, and vice versa. There are many lawyers who seem to defy hierarchical classification and law firms and law schools that do likewise, so that one can argue that the hierarchy claim that everyone and everything is ranked breaks down the minute you try to give concrete examples. I have been told often enough that I may be right

about the pervasiveness of ranking but that the speaker has never noticed it himself, treats all lawyers in the same way, regardless of their class or professional standing, and has never, except in an occasional very bizarre case, found lawyers violating the egalitarian norm.

When the person making these claims is a rich corporate lawyer who was my prep-school classmate, I tend to interpret them as a willful denial of the way he is treated and treats others. When the person speaking is someone I perceive as less favored by the system (say, a woman of lower middle-class origin who went to Brooklyn Law School and now works for a small struggling downtown law firm), it is harder to know how to react. Maybe I'm just wrong about what it's like out there. Maybe my preoccupation with the horrors of hierarchy is just a way to wring the last ironic drop of pleasure from my own hierarchical superiority. But I don't interpret it that way. The denial of hierarchy is false consciousness. The problem is not whether hierarchy is there, but how to understand it, and what its implications are for political action.

II. A Strategy for Legal Education

The strategy I am advocating is that of building a left bourgeois intelligentsia that might one day join together with a mass movement for the radical transformation of American society. The great movements of liberation in the history of the West (and also of the third world) have always had in their service cadres of class turncoats from the intelligentsia, who provided them everything from a few ideas, to some knowledge of tactical use, to leadership itself. Without such a cadre of bourgeois intellectuals, it is unlikely that a mass movement could ever be permanently successful in the United States, where ideology is a particularly important instrument of domination and a majority of the population identifies itself as middle class.

In the absence of a mass movement of the left, the way to organize a left intelligentsia is around ideas, and around the concrete issues that arise within the bourgeois corporate institutions where the potential members of such an intelligentsia live their lives. By organization around ideas, I don't mean the propagation of an ideology in the mode of Marxism in Western Europe, or, say, fundamentalist Christianity in the United States. Organizing around ideas means developing a practice of left study, left literature, and left debate about philosophy, social theory, and public policy that would give left intellectuals the sense of pacticipating in a community. Periodicals perform this function in a desultory and, these days, demoralized way. What is needed is the social organization of study and debate at the "local" level.

Along with organization around ideas at the local level there goes organization around the specific issues of hierarchy that are important in the experience of people in these institutions. These have in the main to do

with the authoritarian character of day-to-day work organization, and particularly with the use of supervisory power. Selection, promotion, and pay policies, along with a whole universe of smaller interventions, many of which are merely "social," maintain class/sex/race stratification within the organization, while at the same time disciplining everyone to participate willingly in the complex of hierarchical attitudes and behaviors.

This point of view is not at all revolutionary: it has nothing to do with preparations for a violent mass uprising or a coup d'etat, and it is certainly not based on a theory that capitalism is doomed by its own internal contradictions to succumb to the rising proletariat. On the other hand, what I am proposing doesn't fit the usual mold of reformism either. First, it involves risk taking, insubordination, defiance—in a word, rebellion. It is intensely difficult for a member of the American middle-class meritocratic elite to behave in ways that presuppose and affirm the invalidity of the existing structure of hierarchy. Because hierarchy is bred so deep into our bones, there is something shocking, almost parricidal, in the moment when you actually do something that clearly opposes it.

Second, the premise of this strategy is that we would go as far as possible toward the total dismantling of the existing system. The idea is that our society is rotten through and through, so that no adjustment of the rules of the game to make them fairer, or to make hierarchy more socially rational, would be enough. The demand is for a new society. Third, this strategy is based on the idea that reformism is in fact a hopeless endeavor. Once one accepts this idea, there is no reason at all to sacrifice the long-term goal of building a movement for radical transformation to short-term gains. It is important always to take short-term gains when they are offered, but the only reasons to take them are that it's nice to win something occasionally and that through the coalitions that achieve them one gets access to people who may be converted to more radical commitments.

The core of a law-school organizing strategy should be the left study group. It is not that hard to set one up. The teacher-organizer makes an announcement in class of an initial meeting or distributes a flyer. Not many people will show up, probably, but some will. What they'll have in common, more likely than not, is a sense of outrage at the authoritarian style of at least one first-year teacher, and a vague uneasiness that somehow the first-year curriculum is heavily ideological even though no one can say exactly how it is biased. Then there is the sense that law school means selling out, and that one has to find somehow an extracurricular activity that will keep one in touch with one's ideals.

A group of people loosely united by sentiments like these develops into an organization by talking about their law-school experiences, reading texts together, and trying to relate the texts to their institutional situation. The authoritarian character of the first-year classroom, even when it's not

run by a mythic tyrant like Kingsfield, is a good starting point. There is now a fairly substantial literature about legal education that looks at this phenomenon critically, and that may be the place to begin reading together. There is also a growing body of work about the subject matter of the first-year curriculum. Reading texts of this kind gives the group a direct relevance to day-to-day life as a law student. But it makes sense to read general left social theory texts as well, whether it be Marx on the Jewish Question, or maybe Genovese's discussion of the law of slavery, or E.P. Thompson's on legality in eighteenth-century England.

At the same time, it is important to link up with other people concerned about the issue of hierarchy in your institution and the surrounding community. There will almost certainly be at least one fellow teacher who is at least vaguely sympathetic, and it is crucial to link up with that person and act jointly. Student allies are not enough. You need a political soulmate with whom you can grow as a left activist over a long period of time. But you have to create such a relationship. It won't just happen. If there is no school chapter of the National Lawyers Guild, it makes sense to think about starting one and using that activity as a way to get in touch with left members of the local bar. Another possibility is a speakers program, through which you bring to the school local or more distant left practitioners, left law professors or nonlegal left academics and organizers. Events of this kind are likely to draw new members, as well as being intellectually stimulating. The Conference on Critical Legal Studies organizes annual meetings aimed at Marxist and non-Marxist law teachers trying to radicalize their work lives. Also, it's quite easy, from a technical and financial point of view, to start an insurgent underground newspaper, raising your issues in a polemical way directed both at students and at possibly sympathetic teachers, staff, and local lawyers. This might seem impossibly ambitious at first, but it is surprising how little work is involved and how much fun it can be for those with that kind of bent.

None of these activities can be expected to convert a large segment of the institution to resistance to hierarchy, but once they get started they are likely to build slowly and to affect school politics. What one does with this possibility of influence depends on circumstances—the contingent ebb and flow of school issues. It also depends on even more fundamental issues, like, Do you have tenure? I'm suggesting activism, not self-immolation. But there are three kinds of projects that are likely to be useful at some point: helping students organize an act of resistance of some kind against the authoritarian classroom; curriculum change to reduce its political bias to the right and its incapacitation for alternative forms of practice; and the establishment of a politically sensitive legal services clinic for poor people operated by the school.

These three intitatives—an action against the authoritarian classroom, a proposal about the curriculum and the placement process, and a legal services clinic—touch directly on law school and life as a lawyer. Only the

third has an equally direct relation to the politics of the society at large. Study groups should at least make an effort to find local labor-union insurgents, radical feminist networks and activist groups in the black community. Law students may have something to offer them in the form of legal work, and they have a lot to gain from contact with them. The group shouldn't see itself as existing for their sake, but it shouldn't let itself be isolated either. The slogan of resistance anywhere, any time, on any issue, doesn't imply that one should resist all alone, and it may be the case that there are specific actions in the "real world" through which law teachers and students can do more for the cause of the left than they can do by concentrating on their own issues. There is no way to know about this *a priori.*

A final aspect of study group practice is utopian thinking. By this I mean, not the attempt to discover an ideal form of social arrangement which would put an end to historical struggle and uncertainty, but a practice of formulating demands so as to reveal the hidden ideological presuppositions of institutional life. An effective utopian proposal honors all the "practical" constraints that center liberal administrators appeal to when asked to explain the way their institutions work, so that it can't be dismissed as flatly impossible or beyond the capacities of those who would have to carry it out. On the other hand, an effective utopian proposal has no chance at all of being adopted (at least in the near future) because it violates the unspoken conservative norms that guide administration in fact, if not in name. It should represent small scale and middle term, rather than "final" programmatic thinking, based on a rough assumption that the world outside the institution in question remains unchanged, and subject to revision in every detail as the process of left study and action clarifies our thinking about how we might actually change things if we had some measure of power.

This kind of work has value in the rhetorical battle against those who alternately portray the left as hopelessly visionary and as practically unoriginal. But its deeper importance is as an aspect of the life of the group. People ought to quarrel and then try tentatively for closure about what to do, about whether a given proposal would make things better or make them even worse. It helps in figuring out what's really wrong with the way things are, even if there is little chance of carrying out any radical change in the short run. It is crucial to form coalitions based on a relatively vague consensus that things should be different, and it is a mistake to carry programmatic thinking to the point of hardness where it excludes potential allies. But it is never too early to start building a much sharper consensus about what we would do if we could.

What follows is an example of this kind of thinking: a summary of a proposal to the Harvard curriculum committee written last year. It is addressed to an elite private law school, and doesn't address the overall organization of legal education. (For example, it doesn't take up the idea

of random assignment of teachers and equalization of financial resources as a way to abolish the hierarchy of schools.) But even with these allowances, it already seems to me dated and inadequate, mainly because it doesn't pay enough explicit attention to the modeling of hierarchy through teacher-student and student-student relationships. I offer it not as a blueprint, but as a contribution to a dialog that is already under way, and that will gain depth and sharpness with the growth of our power.

III. A Utopian Proposal

A. The New Model Curriculum

A required program to be taken in a prescribed sequence over two years and one summer, covering all basic doctrinal areas and skills, clinical experience, and interdisciplinary study, followed by a diversified third year.

1. *The Doctrine Course:* An aggregate of three semesters of programmed instruction in doctrine, including learning rule systems and learning the skills of case manipulation, rule manipulation and pro/con policy argument, conveyed through "cases and materials," computer learning-machine exercises, facilitation classes run by faculty members, videotaped lecture series, and tutorial.

2. *The Clinical Program:* A required sequence of clinical experiences, spaced over the two years, and aggregating one semester and one two-month summer stint, covering most practical and ethical aspects of law practice, using simulations, extensive legal writing, small scale experience in hearing-type settings, and two months in the school's large legal clinic modeled after a university teaching hospital.

3. *The Interdisciplinary Course:* A required course running parallel to the doctrine course, meeting three or four hours a week, covering materials in history, jurisprudence, economics, sociology of law and the legal profession, social psychology, social theory, and political philosophy, closely integrated with both doctrinal and clinical study, and taught so that each student is exposed to two formally distinguished "streams," one representing the left and the other the right political tendencies in approaching the materials.

4. *The Third Year:* A third year resembling what we have now, with no formal requirements and great faculty flexibility in deciding what to teach, but with the addition of three options, each of which could take up some or all of a student's time: a Research Institute, advanced clinical work in the Clinic, and concentration in one or more practice specialites or conceptually defined fields of study.

B. The Law School as a Counterhegemonic Enclave

This is a set of proposals designed to reduce illegitimate hierarchy and alienation within the school, and to reduce or reverse the School's role in

promoting illegitimate hierarchy and alienation in the Bar and the country at large.

1. *Admissions:* There should be a test designed to establish minimal skills for legal practice and then a lottery for admission to the school; there should be quotas within the lottery for women, minorites, and working-class students. There should be a national publicity campaign about our goal of modifying the social composition of the Bar.

2. *Hierarchy among Students:* A program designed to reduce disparities in educational attainment of students while at law school, through a combination of redesign of the curriculum (see the new model curriculum above) and investment of large sums of money and resources in students at the bottom of the academic hierarchy. Abolition of the current law-review selection system; modification of the grading system to eliminate perverse incentives; new forms of feedback at all levels.

3. *Channeling of Students:* A program to give students accurate information about hierarchical and moral realities of different kinds of practice, combined with training designed to give them technical, social, and psychological resources necessary for real freedom of choice between large law firms and other kinds of work. Overhaul of the placement system to equalize the chances of competitors of large firms, even at the price of making our graduates less attractive to the large firms. Studies aimed to discover possiblities for viable publicly oriented and small-scale practice, including development of proposals for curricular or statutory reform where necessary.

4. *Faculty Hierarchy:* Hire most qualified women, minority, and working-class candidates until those groups occupy a reasonable number of faculty positions. Abolish the distinction between tenured and untenured faculty—all tenured or none tenured. Democratize hiring through an elected appointments committee with representation of all groups in the school. Develop a program to reduce existing disparities in teaching and scholarly capacity of different faculty members, analogous to the attack on disparities among students.

5. *General School Hierarchy:* Equalize all salaries in the school (including secretaries and janitors), regardless of educational qualifications, "difficulty" of job, or "social contribution." Encourage (without violating the applicable labor law) the formation of unions of employees at all hierarchical levels. Faculty should push for: (a) everyone should have some version of the faculty's unscheduled work experience, or the faculty should have less of that experience; (b) the division of labor should be reduced by adding functions within existing job classifications and reducing the total number of kinds of jobs; (c) every person should spend one month per year performing a job in a different part of the hierarchy from his normal job, and over a period of years everyone should be trained to do some jobs at each hierarchical level.

What Every Law Student Really Needs to Know: Introducing New Law Students to the Study of Law

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Tracey E. George & Suzanna Sherry[*]

ABSTRACT

Law school is an exciting and enriching experience but also an intimidating and difficult one for students. Students and professors want students to succeed. We have written this essay and a book[1] *in order to decrease students' anxiety and increase their chances of achieving academic success. We offer here a short introduction to how a new law student can succeed, taken from the Introduction and first chapter of the book. The full book serves as a law school success guide, featuring insight into how and why law school works the way it does and the tools and techniques to fully understand first-year substantive law. In addition to teaching techniques for getting the most out of reading and out of class, the book also conveys information about the American legal system and court structure, and about cross-cutting legal concepts such as burdens of proof and standards of review. By reading this book before law school, students will be able to not only get by, but thrive in the classroom. We want to help law students feel more confident starting their new academic endeavor and be better prepared with the knowledge of what is to come and how to conquer it. We provide a foundation on which law teachers can build in the first year.*

INTRODUCTION

Picture yourself in your first law school class. After some wandering around, you find the classroom. Students already occupy many of the seats in the tiered rows. Everyone looks nice, if a bit anxious. You slip into an empty chair and pull out your laptop. A few more students, lugging massive books, trickle in. There is some chattering and a sense of excitement in the room, but mostly everyone is focused on the front of the room or on their books.

The professor walks in and the room falls silent. You know her name is Professor O'Connor — it was printed on your class schedule. She sets down a book like those most of your classmates have on their desks, and unfolds a large piece of paper that appears to have small photos and names on it.

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[1] *What Every Law Student Really Needs to Know: An Introduction to the Study of Law* (Wolters Kluwer 2d ed. 2016).

Suddenly, you hear your name. The professor is talking to you, asking you a question: ''Will you please recite the facts and the holding of Pierson versus Post?'' Every head in the classroom turns to look at you.

You panic. Your heart begins to race. What are ''facts'' and ''holding''? How are you supposed to know anything about Pierson versus Post before the professor begins lecturing? Did you miss something? You find yourself speechless (perhaps for the first time). Another student raises her hand. You feel relieved — for a moment.

But then she begins to talk about ''the plaintiff'' and ''the New York Supreme Court'' and some foreign words you don't even catch, as the professor nods approvingly. You can't follow the conversation very well — except that a fox is somehow involved — and feel a sense of shock. You still haven't taken any notes because you don't have a clue what to write. Your neighbor kindly shows you her textbook, open to a page that says ''Pierson v. Post.'' Apparently, you were supposed to have read an assignment before class — before the very first class! How did those other students know that?

You begin to read, desperate to catch up. But things only get worse. The material is even more mystifying than the conversation between the professor and the student. The text is written in English, but is otherwise impossible to follow. It is filled with words that are either unfamiliar or don't seem to make any sense in the context in which they are being used. While you read, you are missing what's being said in class. Professor O'Connor has continued to ask questions of students. Sometimes they sound confident about their answers, but just as often they seem as confused as you feel. You can't figure out whether you should write down everything that is said or prepare for the possibility that she'll call on you again.

It is your first day of law school, and you are already behind.

After your first class, you find where the class assignments are posted and begin to read for your next class. But this reading is equally baffling. You can't possibly memorize everything you're reading, so how can you tell what's important? How do you determine what the ''facts'' and ''holding'' are if you're asked again (and you wonder whether a different professor will ask that same question)? What should you do if you don't understand a word and you can't find it in the dictionary? What is a ''standard of review'' or a ''precedent,'' and how are they relevant?

We have written a book to help you avoid this frightening prospect. *What Every Law Student Really Needs to Know: An Introduction to the Study of Law* (Wolters Kluwer 2d ed. 2016) takes some of the guesswork out of the first year of law school, providing information on a variety of levels:

- Basic, like how do I know what to read?

- Foundational, like why are professors asking questions instead of answering them?

- Practical, like what am I supposed to get out of the reading assignment?
- Technical, like what do those unfamiliar words and concepts mean?

It offers a carefully organized account of what you need to know and why. The text and graphics offer you resources to which you can turn as you prepare for classes in your first year and beyond. Frequent illustrations and exercises allow you to apply what you are learning and practice using it while you read. The book reflects input from law professors and students about what they wish first-year law students knew when they began law school.

Whether you are about to start law school or are just thinking about applying, we will help you prepare. You may think that you're ready for law school. You've probably excelled at school for much of your life. You read well, have developed good study habits, and know how to learn. That's a great start, so why would you need a book to help you prepare for law school? The answer is that law school is different from any of your previous educational experiences, and not just because it is about an unfamiliar subject. The reading assignments, the classroom dynamic, the purpose of your classes, and the professors' expectations will be different from anything you have experienced before.

We have been teaching first-year law students for a combined total of more than 50 years. We understand that the first year can be intimidating, but we believe that it can also be exhilarating and rewarding. We wrote our book to reduce the intimidation and increase the excitement and satisfaction. This book helps beginning law students become productive and effective as quickly as possible. We've also included resources to help students maintain an edge throughout their law school careers. Think of the book as your secret weapon for doing well in law school.

THE FIRST YEAR OF LAW SCHOOL: AN OVERVIEW

Imagine that you are suddenly sitting in the cockpit of an airplane without knowing how to fly. Some things look familiar: There's a computer screen in front of you, along with a metal object that looks like a steering wheel and dials that look vaguely like the speedometer of a car. Some things are marked with words you can read but whose meaning or use baffles you: rudder, altimeter, wind speed, ground speed. You don't know the first thing about getting the plane off the ground, much less successfully flying it — but there's no one there to help you learn.

The first year of law school can seem similar. You don't know the concepts, the vocabulary, or the context for the material that you are supposed to be learning. Even if you can understand the words of a sentence, you can't figure out what the sentence means or what you should be learning from it. We seek to solve that problem. We'll tell you what to expect from your first year of law school, provide you with the background you need, and give you the tools to succeed.

In law school, you will learn in two primary ways: by reading and by doing. Your classes, especially in the first year, are designed as much to teach you how to approach the law — to ''think like a lawyer'' and to learn law on your own — as to teach you the substantive content of the law. To do that, your professors will expect you to be able to use what you have read. In other words, you must be an active learner. You cannot expect to sit back and passively absorb information.

Law, at its core, is about solving problems. In practice, you will be solving real clients' problems. In law school, you will be solving hypothetical problems (although those hypothetical problems are often based on real ones). After reading carefully to glean information, you will have to take what you have learned and apply it to solve a problem. Here are some examples of the kind of problem solving you will be asked to perform:

- A court holds that a certain punishment attaches for people who purposely harm an animal. Does the same punishment attach to someone who lets her dog ride in the back of a pickup truck and then has a car accident in which the dog is injured? Should it matter whether the accident is her fault or not?

- A statute imposes a higher tariff on imported ''dolls'' than on imported ''action figures.'' Which tariff applies to a 12-inch Harry Potter toy with a soft body and movable plastic arms, legs, and head?

- The Federal Reserve issues a regulation providing that banks must make funds from a ''U.S. Postal Service money order'' available for withdrawal by ''the second business day following the banking day on which funds are deposited.'' If a customer deposits such a money order on a Friday at a bank that is open Monday through Saturday, when can she withdraw the money? What if the customer deposits the check at an ATM rather than at the counter inside the bank?

- A cupcake shop wants to enter into a contract to purchase its eggs from a farm. The cupcake shop needs fresh eggs every day, but only knows how many it will need the day before it places its order. How do you draft a contract for an unspecified number of eggs, especially if you know that courts usually enforce only contracts in which a party promises to take a specific action?

As you can see, these sorts of exercises require active thinking rather than passive learning. Law school is thus not about identifying the ''right answers'' to legal questions, but about developing abilities, tools, and processes for constructing those answers and solving problems. You can't do that just by listening and reading. You have to be an active participant in your own legal education.

Law school's different focus — on learning how to be a lawyer rather than just on learning the law — is reflected in three different aspects of the first-year experience. The first-year curriculum, the method of classroom instruction, and material you read are all designed to serve the purposes of a legal education. All three require your active participation. The next sections describe each of these aspects of your first year of law school.

A. Courses Taught in the First Year

All your first-year courses will have similar goals, but they will focus on different topics. Although they share a place in the first-year curriculum, and the goal of teaching legal tools as well as basic substantive law, first-year courses otherwise vary a lot. Different schools make different choices about which courses to offer (although there is a great deal of overlap) and about whether the courses are required or elective. Courses may bear any number of credits from one to six and may meet for the entire year, one semester (or quarter), or part of a semester. The number of credit hours and whether courses are taught in the fall or spring (or both) varies. Here we describe the most common 1L courses:

Civil Procedure (often shortened to ''Civ Pro'') will help you understand how a lawsuit works: how parties initiate and respond to a suit (pleading), where the suit may be brought (jurisdiction), who may sue whom (joinder), how the parties obtain information (discovery), and when in the litigation a case will be resolved (motions to dismiss and summary judgment). Think of it as the course for when someone says ''so sue me.''

Constitutional Law (or ''Con Law''), if it is taught in the first year, examines how the U.S. Constitution allocates decision-making authority among government institutions and grants (or limits) the substantive powers of government. It's often called Con Law I, and usually leaves individual rights and liberties for a later class, frequently called Con Law II. This is the course about who gets to decide what.

Contracts is about promises — why, when, and how to enforce them. Along with Property and Torts, Contracts is a mainstay of the 1L year and has been immortalized in books and movies as the most painful class. Typical topics include contract formation, interpretation, performance (or breach), and remedies. If someone says ''but you promised,'' this course will help you respond.

Criminal Law (or ''Crim'') examines criminal liability but *not* criminal procedure (which is a separate course(s)). You likely will explore the purposes of punishment and the sources and limitations of the government's power to punish. In addition, the course will examine the relevance of mental state (or mens rea) and the elements (that is, the things that have to be proven for a conviction) of specific crimes. It's the ''Do not pass go, go directly to jail'' course.

Property deals with land ownership, possession, and use, and may be called Real Property to distinguish it from courses on Personal Property and Intellectual Property. (The professor may make time for the latter subjects.) Common law estates and present and future interests in land are classic subjects in this course. You may also examine landlord-tenant law, environmental law, and government regulation of land use. A wide range of topics may reasonably come within the boundaries of this class. This is the course for the ''it's mine and I can do what I want'' crowd.

Torts is about harms. Tort claims may arise from injuries to people or property. Your Torts class will cover strict liability and negligence (including duty, breach, and causation), and might also explore malpractice, products liability, defamation, and other civil wrongs for

which the law gives a remedy. Torts teaches you when and how the exclamation ''you hurt me!'' translates into ''and now you have to pay.''

Legal Research and Writing is typically the only 1L course that focuses directly on practical skills rather than substantive law. You will probably learn how to conduct legal research, how to write legal documents (including memoranda and appellate briefs), and how to present oral arguments. The course usually covers two semesters and goes by many names. The first semester might be called Legal Research and Writing, Legal Methods, Lawyering Skills, or something similar. The second semester might be called Appellate Advocacy or Moot Court.

While the first-year curriculum of law schools has remained remarkably stable over the last century, schools continuously innovate and try out new classes in the first year. Some schools have brought upper-level subjects such as international law and administrative law into the first year or created overview courses designed to provide students with a bigger picture of law and legal methods (these overview courses might be called Legal Methods, Legal Process, Legislation and Regulation, or the Regulatory State, among other names). Others offer expanded hands-on experience or some choice of elective courses in the first year. Some of these changes will stick — Civil Procedure only became a regular part of the first-year curriculum in the 1970s and now is standard — while others will evolve into something new or disappear.

B. Reading Assignments

Almost all first-year classes rely on the case method of instruction. Instead of reading about the law, you will read the law itself. Your law school textbooks offer an immediate, obvious, and visible contrast between law school and undergraduate education. The books primarily contain judicial opinions, called cases,[2] which have been selected and edited by the author(s) of the textbook. The books themselves, fittingly, are called casebooks. Because judicial opinions are not the only source of law, most casebooks also contain or refer to statutes, regulations, and rules as well as cases. Some may include other primary source materials, such as treaties or contracts. Casebook authors might also add commentary, questions, and information about related issues in text preceding or following the cases. But the most important material is the law itself — the cases and other primary sources — not the additional text. You will learn the law and how to think like a lawyer by studying these primary legal materials.

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[2] The term ''case'' is used in several senses in legal education and law. It can refer, as it does in the text above, to the judicial decision resolving a dispute. It can also mean the legally salient facts that resulted in the parties' dispute. The word ''case'' is also used to refer to the lawsuit itself (and not just the court's resolution of it), an argument supporting a particular position (''make the case for tenant''), and a criminal investigation.

Law school courses use primary legal materials because lawyers do so. Remember, law school isn't just about teaching you the law, it's about teaching you how to learn and use the law. Reading cases and other primary sources helps you develop the skills you will need as a lawyer. When clients need answers to legal questions or solutions to legal problems, lawyers have to turn to the law itself — to cases, statutes, and other legal materials. Only rarely will they be able to rely on their existing knowledge or on descriptive texts.

Primary source materials, in law as in other fields, are often harder to understand than descriptive text. The purpose of descriptive text is to educate the reader. The purpose of a judicial opinion (or a statute or contract) is to accomplish a different goal. So while a legal text might describe legal doctrine, a judicial opinion decides a dispute, a statute sets the governing rules, and a contract records the agreement of the contracting parties. The opinion, statute, and contract embody and/or use legal doctrines rather than describing them.

Reading cases (and other legal primary sources) is a special skill. It requires you not only to understand the information conveyed, but also to extract legal principles from that information, and to evaluate the source itself. We discuss each of these tasks in more detail in the next chapter, but let's begin here with the one that is probably the most unfamiliar: extracting legal principles.

Consider the following three legal materials that you might read for a first-year class: excerpts from a judicial opinion, a statute, and a contract. Each reflects the same legal principle. Try to identify that legal principle and state it in a simple sentence or two.

LARRY LANDLORD V. TERRY TENANT
Supreme Court of Floribama (2006)

… When one party breaches a contract, the other party may recover reasonable damages arising from that breach. The wronged party, however, is not ordinarily entitled to sit back and make the breaching party compensate him for losses that he can easily prevent. Thus, in circumstances such as the present case, where a tenant breaches a lease agreement, but the landlord can easily mitigate his damages by finding another tenant, he is required to do so.… Judgment for the defendant, Terry Tenant.

RESIDENTIAL LEASE BREACH AND MITIGATION ACT
Floribama Civil Code §1423 (2008)

Section 1. Breach; remedies. If a lease on residential property is for a period of greater than 1 month and the tenant repudiates the lease by (1) notifying the landlord of his intent to repudiate or (2) vacating the leased property and failing to pay one installment of the contractual lease amount, then the landlord is entitled to collect from the tenant any unpaid rent due under the lease, except as provided by section 2.

Section 2. Mitigation. A landlord may collect unpaid rent under Section 1 only if he first takes reasonable steps to rent the property to another tenant. If he rents the property to another tenant, the amount he is entitled to collect from the breaching tenant shall be reduced by the amount of rent that he receives from the new tenant over the period of the original tenant's lease, less any sums he is required to expend to make the property habitable after the departure of the original tenant.

HOLMES PLACE APARTMENTS LEASE AGREEMENT

Paragraph 27. If the tenant fails to pay rent, the landlord is entitled to evict the tenant, to re-rent the property to another, and to collect from the tenant any unpaid rent not obtained through subsequent rental. The landlord must make a reasonable effort to lease the property to a substitute tenant.

It would have been a lot easier if we had simply described the principle: A tenant who breaks her lease is liable to the landlord for the remaining unpaid rent, but the landlord is required to try to find another tenant to relieve the first tenant from all or part of her obligation. (Did you identify that principle? Don't worry if you didn't — our book and your first-year classes will help you develop that skill.)

If we had given you a textual description instead of the primary sources, you would have learned only the principle, that is, only the basic legal doctrine. That knowledge might have helped you advise a client who wanted to break her lease or a landlord whose tenant had done so, but it would have been utterly useless for any other purpose. Wrestling with the language of the law — the opinion, the statute, and the contract — was much more valuable because it began the process of teaching you how to read and learn from legal materials on other topics. It is the difference between giving a man a fish and teaching him how to fish.

B. Teaching Methods

The case method is only one of the hallmarks of legal education. The other is the Socratic method. Both were promoted by Christopher Columbus Langdell, dean of the Harvard Law School from 1870 to 1895. Before that time, law students read treatises about the law and then listened to lectures by their professors. (Many lawyers — including U.S. Supreme Court justices — did not go to law school at all, but learned law by apprenticing themselves to practicing lawyers.) Langdell changed both what the students read and what they did in class, and his innovations quickly spread to other law schools. By the early years of the twentieth century, virtually all law schools had adopted the case and Socratic methods. And although there have been changes and variations, most schools still use some form of both today.

Using the Socratic method, the professor asks sustained and increasingly penetrating questions of students rather than lecturing on the cases that the students have read. In its paradigmatic form, the Socratic method involves calling on a student without warning. The student is usually first asked to ''state'' (or ''recite'') ''the case'' — to describe as succinctly and precisely as possible the facts of the dispute, the issue addressed by the court's decision, and the resolution of this issue. The professor then asks a series of follow-up questions, each building on the student's answer to the prior question. ''Why?'' is the most common question. The professor will eventually focus on the basis for the court's decision, and slowly and carefully try to unpack the court's reasoning by revealing its assumptions and implications. The court is unlikely to have answered most of these questions — at least not explicitly. To answer them, then, you will have to read the court's opinion actively and critically.

While this is an accurate description of the Socratic method in general, it probably doesn't accurately describe any single application of the method. Professors vary in every aspect of the method. For example, not every professor uses ''cold calling'' — calling on random students without warning. Some will assign students to panels that will be ''on-call'' on specified days. Others will rely (mostly) on volunteers, or will call on students alphabetically or according to where they are seated. But many professors still rely on the element of surprise at least some of the time, so you should always be prepared to be in the ''hot seat.''

The pattern of questioning also might vary. Here are some examples of the questions a professor might ask in a class discussing the Landlord v. Tenant case we excerpted earlier:

- What is the issue? (A: Must the tenant pay the rent?)
- What is the holding? (A: The tenant need not pay the rent because the landlord did not try to find a replacement tenant.)
- What is the legal rule or principle? (A: A landlord must try to mitigate damages by finding a replacement tenant.)
- Does the legal rule extend to other types of parties or contracts? For example, what should happen if a parts supplier breaches a sales contract with a manufacturer by

failing to supply parts needed in the production of the manufacturer's goods? (A: Maybe the manufacturer should have to try to find the parts elsewhere before suing for breach. It depends on how broadly the principle reaches — which is likely to be the next question, regardless of how you answer this one!)

- How is the judicial case different from the statute? (A: One important difference is that the statute applies only to landlords and thus does not apply to other types of parties like the manufacturer in our example above. By contrast, the legal principle expressed in the court's opinion may be relevant in other contract disputes, including the hypothetical dispute between the parts supplier and the manufacturer.)

- Why should a landlord (or other non-breaching party) have to take steps to mitigate — does such a rule let the breaching party off too easy? (A: It depends on what the law governing breach of contract should be trying to accomplish — again, a natural follow-up question.)

Some professors might start with the first of these questions, or with even more basic questions; others might jump directly to the later questions.

All of these sorts of questions require you to think — to actively engage with ideas — at two different points in time. First, you should come to class having thought about the reading and having tried to anticipate the professor's questions (we'll help you learn to do that in later chapters). But you will also have to think in class before answering a question. You should not assume that the answer to a question is somewhere in the casebook or in your notes. A Socratic class is not about regurgitating what you have read or learned; it is about helping you to ''think like a lawyer.'' The professor's job is to direct and channel your thinking.

Socratic dialogue and the case method define American legal education. And because they are rarely used outside of law schools, you may wonder why we use them. We do so because they are effective at accomplishing the goals of law school that we mentioned at the outset of this chapter. As one anonymous reviewer of Langdell's Contracts casebook noted, the purpose of this type of legal instruction ''is to teach the student the habit of legal analysis and synthesis, not to make the student's mind a mere dictionary of decisions.'' (Book Review, Langdell's ''Selected Cases on Contracts,'' 6 Southern L. Rev. n.s. 448, 449 (1880).) Using both Socratic questioning and primary legal sources instills the type of close analysis required for legal work.

The Socratic method is probably unfamiliar to you, and you may find it difficult at first. You may become frustrated by the professor's failure to give an answer to the big questions that she asks. One legal scholar humorously likened the first year of law school — and the Socratic method — to ''horror movies in which somebody wearing a hockey mask terrorizes people at a summer camp and slowly and carefully slashes them all into bloody little pieces . . . except it's worse, because the professors don't wear hockey masks, and you have to look directly at their faces.'' (James D. Gordon III, How Not to Succeed in Law School, 100 Yale L.J. 1679, 1684 (1991).) The author — a seasoned professor — was surely joking.

The Socratic method is an effective and useful means of instruction. You will find it less frustrating if you remember that the professor isn't hiding the ball when she refuses to provide an answer — in fact, the lack of an answer is the answer. Legal rules and legal analysis rarely produce unequivocal answers, and you should not expect to learn law the way you might memorize chemical formulas or historical facts. While a court may declare a rule in a particular opinion, the debate over whether that was the correct conclusion will continue. Moreover, questions will remain as to whether the rule should apply in a slightly different or new setting.

Some of you will enjoy being called on and speaking in class. For others, speaking in front of so many classmates may be embarrassing, even painful. To those who dread being called on, we encourage you to relax. The purpose of this means of instruction is for you to learn and improve. You will make mistakes. There is nothing wrong with making mistakes, only with failing to learn from them. Try to view speaking in class as an opportunity to improve your mental acuity and analytic skill. Your professors want you to learn, and they will try to tailor their questions to help you do so, even (or especially) if you start out with a wrong answer. We promise that you are far more likely than your classmates or teachers to remember your mistakes or verbal stumbles. And because effective communication — to clients, judges, and other lawyers — is an important key to being a successful lawyer, speaking in class will help you improve your legal skills.

The Socratic method can be difficult for students and professors alike. The student who is being closely questioned in front of 50 or 100 classmates is often uncomfortable, even if she is learning. Her classmates may feel her pain, or may be bored or frustrated if they think they know the answers (be careful — we put ''think'' in this sentence for a reason!). The professor cannot rely on a prepared lecture but has to be ready for any response and tailor her next question to it. A Socratic class also covers much less material than a lecture class. We believe that the pedagogical advantages of the Socratic method outweigh these disadvantages, but others reach a different conclusion. Some of your professors may lecture instead of or in addition to using Socratic questioning.

Whatever form your classes take, be an active participant. Listen critically to the professor and your classmates. Do you agree with what is said? Can you answer the questions that are asked? Do not take verbatim notes. Trying to type everything that's said (or even everything the professor says) will prevent you from thinking while in class, and you will miss a crucial part of the classroom experience.

CONCLUSION

Success in law school requires preparation as well as regular review and reflection of the foundations of law and legal education. We offer here a basic introduction to the purposes and pedagogy of law school. This is a good first step. But new law students should also gain the techniques and strategies for learning the law and learn essential background concepts. These background concepts include:

- Non-legal basics that professors expect students to have learned before law school but that many students do not know, such as the structure of American government or central events in American history.

- Basic information about reading cases, such identifying the court and the parties, and briefing a case.

- Other concepts that arise in many different first-year courses and that each professor treats as though it is taught in another course, such as the difference between law and facts, the difference between rules and standards, and the different standards of review.

- More sophisticated concepts that underlie much of legal analysis but are rarely made explicit in first year courses, such as economic analysis of law and behavioral economics.

Our goal in this essay and our book it to make students more confident and better prepared for law school. More than that, though, we hope it will make them excited about the prospect of becoming a lawyer. Law is a noble profession. Lawyers are often leaders in their communities, large and small. Most of the men who wrote the Constitution were lawyers. Twenty-six of our 44 presidents have been lawyers, and many of the current members of the House and Senate are lawyers. Lawyers are mayors and university presidents, cabinet members and members of neighborhood associations, heads of major corporations and owners of small businesses. The large number and wide range of leadership posts filled by attorneys is no surprise. Lawyers are trained to think analytically, communicate effectively, and consider all sides of an issue. As law professors, we are proud to train the next generation of leaders.