

Getting to *Maybe*

Getting to Maybe

How to Excel on Law School Exams

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and

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For Pam and Laurie

Contents

Preface	xiii
Acknowledgments	xix
Chapter 1 You're Not in Kansas Anymore	3
A Place Where "Knowing the Material" Is Not Enough	3
Some Lessons You May Need To Unlearn	6
Lesson #1 — Undergraduate Exams and the "Information Dump"	6
Lesson #2 — Sorting Through the Law School Rumor Mill	8
Lesson #3 — The Dark Side of the Socratic Method: The Rulebook vs. The Loose Cannon	11
Part I Issues in Living Color	
Chapter 2 Issues as "Forks in the Road"	21
Chapter 3 Forks in the Law: Rule vs. Counter-Rule Issues	27
A. Patterns to Watch For	28
1. Traditional Rule vs. Modern Rule	28
2. Different Strokes for Different Folks	30
3. Common Law vs. Statute	31
B. How Professors Test Rule vs. Counter-Rule Issues (and Why Students Frequently Miss Them)	32
Chapter 4 Forks in the Law: Competing Interpretations of Statutes	37
A. Patterns of Ambiguity	39
1. Plain Meaning vs. Purposes Issues	39

2. Where Do Purposes Come From?	40
a. Legislative intent	40
b. Policy analysis	42
3. Purposes as a Source of Statutory Ambiguity	43
a. Competing purposes	43
b. The pattern of conflict: Broad vs. narrow purposes	46
4. Language as a Source of Statutory Ambiguity: Competing Meanings	48
B. Fact Situations To Watch For	52
Chapter 5 Forks in the Law: Competing Interpretations of Caselaw	55
A. Desperately Seeking Similarity: When To Follow Precedent	56
B. Searching for Distinctions that Make a Difference	57
C. Patterns of Ambiguity To Watch For	59
D. Dealing with Multiple Cases	64
Chapter 6 Forks in the Facts	67
A. How Law Creates Forks in the Facts: Why Categories Matter	68
1. Rule vs. Exception	70
2. Statutory Boundaries	71
3. Sequential Categories	71
4. Crossing the Line	72
5. Categories as Elements of Legal Rules: Running the Gantlet	73
6. Open-Ended or “Evaluative” Categories	74
B. Why Categories Don’t Settle Things: Sources of Factual Conflict and Ambiguity	75
1. Facts on Both Sides of the Category	75
2. Differing Standpoints	76
3. Differing Time-Frames	77
4. Differing Ways To Make Sense of the Facts	79
a. Take things one at a time or view them as a totality	79

b. Lenses of generality	80
c. Linguistic ambiguity	82
Chapter 7 Taking It to the Next Level: “Twin Forks”	87
A. Linked Forks: One Good Fork Deserves Another	90
B. Reciprocal Forks: Back-and-Forth between Law and Facts	92
C. Concurrent Forks: Straddling a Statutory Boundary	94
D. Proliferating Forks: Competing Domains	96
E. Hidden Forks: Dodging the Statute	100
F. Background vs. Foreground: Variations on the Twin Forks Theme	102
 Part II Strategies for Issue-Spotting, Analysis, and Argument: Heart, Brains, and Courage 	
Chapter 8 Taking Exams Seriously: A World Full of Wicked “Whiches”	109
Chapter 9 How To Spot Issues, and What To Do Once You Spot Them	117
A. Issue-Spotting	119
1. What the Course Will Tell You If You Listen	119
a. Classnotes and outlines	119
b. Themes and “issues”	122
c. Old exams and study groups	124
2. What the Exam Will Tell You If You Let It	125
a. Map the parties’ claims and conflicts	125
b. Don’t stop with the first issue you see	127
c. If the answer seems too easy, it probably is	128
d. If you finish early, “check your work”	130
B. What To <i>Do</i> with Issues Once You Spot Them	131
1. You Already Know More than You Think You Do	131
2. From Issue-Spotting to Issue Analysis	133
3. The Recipe for Argument Construction: Just Add Reasons	135
a. Keep in mind who the <i>real</i> judge is	136

b. Once again, you already know more than you think you do	137
(i) Patterns of argument for forks in the facts	137
(ii) Patterns of argument for competing interpretations of statutes and cases	141
c. The crucial role of policy arguments	142
4. Where To Focus Your Fire	143
a. Focus your fire on points in conflict	143
b. Focus your fire on points that make a difference	144
c. Focus your fire on issues emphasized by the professor	145
d. Write till the facts run out	146
C. What <i>Not</i> To Do With Issues: Herein of “IRAC”	147

Chapter 10 Czars of the Universe (Otherwise known as “Policy Wizards”) 151

A. To Know and Not To Know—That Is the Answer	153
B. Touching All Parts of the Policy Kingdom	156
1. “Shaping” Society	156
2. Administering Policy	157
3. Doing the Right Thing	159
a. The unfairness of change (consistency over time)	160
b. Treat like cases alike	161
(i) Consistency over space	161
(ii) Consistency across social categories	162
(iii) The distribution of wealth (consistency across economic class)	163
4. What Kind of Czar Are You?	165
5. Government Non-Interference and the Prime Directive: Even Czars Have Limits	166
C. Heads and Tails You Win	168
1. Getting Past the Obvious	169
2. One Good Argument Deserves Another	171
3. When in Doubt, Just Say No	173

4. Learning To Mix and Match	174
5. Accentuate the Multiple	177
D. Find the Fun and <i>Snap</i> the Test's a Game	180
1. Trade-Off vs. Paradox	181
2. The Pattern of Paradox	184
a. The short run and the long run	185
b. Intent vs. effects	186
c. Law on the books vs. law in action	188
d. Categories are many-splendored things	188
3. Paradox Is an Attitude	190
4. When in Doubt, Write It Down	192

**Part III Test-Taking Tips—
Your Very Own Ruby Slippers**

Introduction	197
Chapter 11 Preparing for the Exam	199
Tip #1. Exam Preparation Takes All Semester	199
Tip #2. Focus Your Exam Study on Your Classnotes	202
Tip #3. Prepare Your Own Outline of the Course	203
Tip #4. Review the Professor's Old Exams	207
Tip #5. Consider What Questions <i>You</i> Would Ask	210
Chapter 12 Writing Exam Answers	215
Tip #6. Carefully Read the Exam Instructions and Follow Them to the Letter	215
Tip #7. Read Each Question Carefully, and Answer the Question Asked	219
Tip #8. Organize and Outline Before Writing Your Answer	223
Tip #9. Provide the Reader with a Brief Roadmap	226
Tip #10. Explain Your Reasoning	228
Tip #11. Draw Conclusions When They Are Called For	232
Tip #12. Argue Both Sides	234
Tip #13. Stick to the Facts and Circumstances Presented	239

Tip #14. Remember Who Your “Judge” Is	242
Tip #15. Watch Time/Credit Allocations	244
Chapter 13 Mistakes to Avoid	249
Tip #16. Don’t Regurgitate Legal Rules and Principles	249
Tip #17. Don’t Repeat the Facts	252
Tip #18. Avoid Conclusory Answers	255
Tip #19. Avoid Disquisitions on Topics Outside the Course	257
Tip #20. Don’t Leave Your Common Sense at the Door	259
Tip #21. Avoid Writing Jurisprudence Lectures	262
Tip #22. Don’t B.S.	264
Chapter 14 Frequently Asked Questions	267
FAQ #1. Do You Need to Cite Cases by Name?	267
FAQ #2. Should You Type Your Exams?	269
FAQ #3. Does the IRAC Method Help?	271
FAQ #4. What If You Realize You’ve Made a Mistake in Your Answer?	274
FAQ #5. What If You Think the <i>Professor</i> Has Made a Mistake?	276
FAQ #6. What If You Don’t Know What a Word Means?	278
FAQ #7. Does the Professor Want “Black-Letter” Answers?	280
FAQ #8. Should You Use Commercial Study Aids?	282
Chapter 15 Putting Maybe to Work: Sample Questions and Answers	287
A. Torts	289
B. Property	295
C. Constitutional Law	305
D. Contracts	314
Sources	323
About the Authors	327

Preface

This book is aimed at every law student who has ever wondered how to progress beyond her teachers' repeated warnings that "learning the rules is not enough" to a sound idea of exactly what it takes to perform well on law school exams. This is no small question. Law students are expected to demonstrate top performance in a setting where everyone agrees that "knowing the answer" is the wrong way to think about excellence. For most entering law students, however, the obvious alternative to "knowing the answer" is "*not* knowing the answer." And clearly "I don't know" isn't what your professors are looking for either. So what lies between getting it right and not getting it at all? What kind of intellectual work is required to cope with exams on which some questions yield yes-or-no answers, but where the real trick is *Getting to Maybe*?

Both of us wondered about such questions a great deal as we traveled through Harvard Law School many years ago, and neither of us found much guidance beyond the occasional paraphrase of Justice Stewart's famous remark about obscenity, "I know it when I see it." So when we began teaching together at the University of Miami in 1983, we decided soon thereafter that we would devote the same level of analytical rigor to the exam process that our colleagues expected us to deploy in our more traditional research. We have been working on this book, off and on and mostly clandestinely, ever since.

We have believed all along that the law school exam is a topic worthy of academic interest. Law professors give the kind of exams they do precisely because they believe that students who perform well have demonstrated the skills identified with good

lawyering. So we decided that if we could succeed in providing an accurate description of those skills, we would have helped legal educators everywhere to define more precisely the content of a first-rate legal education.

But we also knew from the start that mere academic concerns would not be enough to spark interest in our work among many in our intended audience. So we have devoted particular care to sharpening observations about exams that we believe will be directly useful to student readers seeking to improve their own performance. We don't believe that any book on exams can substitute for hard work and learning the law. But we are confident that the conscientious student who works through our book will be rewarded at the end of every semester. This is, after all, a "how-to" book.

What proved most gratifying to us as we progressed with our project was that we discovered no clash between our desire to challenge teachers and students to think seriously about what goes into exams and our goal of helping students write better answers. Indeed, it's the combination of these goals that we hope will earn *Getting to Maybe* a place among the classic books aimed at beginning law students. This is not a book about legal reasoning generally, because its focus is solely on exams. But neither is it a book of simple exam-taking tips—although you'll find many within—because law school exams involve complicated legal reasoning, a fact astonishingly ignored in the many current books that purport to tell students how to write top-flight answers.

What we have done instead is to tackle the exam process by breaking it down into discrete analytical components. Many people describe law school exam questions as hiding legal issues within complicated fact patterns. We compare it with Martin Handford and his wonderful drawings that hide Waldo in a maze of design and color. By watching other people, and practicing on one's own, virtually anyone can get pretty good at locating Waldo. Imagine, however, if you could sit down with Mr. Handford and have him describe for you how he hides Waldo in the first place. That's our task in Part I of the book—"Issues in Living Color"—in which we seek to explain why "issues"

(rather than merely chaos and confusion) lurk within those long hypotheticals. We identify aspects of the legal system that create patterned ambiguity where newcomers arrive expecting to find a rulebook instead. Such ambiguity is at the core of law school exams, and virtually every practicing lawyer to whom we have spoken has applauded the idea of figuring out what makes something an “issue.” Issue recognition, they tell us, is crucial to subsequent success at the bar.

To put Part I to work for our readers, however, we needed to go well beyond merely describing what an issue *looks like*. We want students to develop study habits that actually fit the skill of spotting issues expected on the typical exam. Like virtually every other guide to exam-taking, this one recommends that our readers study hard, outline their courses, practice on old exams, and discuss the material with classmates. But in Part II, we go beyond the conventional advice to explain how to connect these familiar study techniques to the kinds of performance your professors expect. We hope in the process to vindicate professorial warnings about the dangers of hornbooks and commercial outlines, warnings that too many students ignore at their peril.

Our colleagues often remind us that spotting an issue is only half the battle and that many students fall down when the task turns to analysis. We agree. We doubt, however, that analytical difficulty is a product of students’ moral or intellectual failings. Rather, we attribute many perceived student inadequacies to a breakdown in communication between students who expect to be judged on whether their answers are “correct” and professors who want discussion of both sides of difficult questions. So in Parts II and III we seek to remedy the communication gap.

The long, complicated exam question throws many students for one loop and then another. First, because each question contains multiple sources of ambiguity, students must write about how different parts of the law fit together in situations where the student is unsure whether each component of the law applies or not. There is nothing unfair about this. Clients arrive with difficult problems, just as medical patients sometimes end up in an emergency room with more than one complaint. It’s hard enough to diagnose a single problem—is that pain in the patient’s ab-

domen an ulcer, appendicitis, or what? But if the patient has multiple complaints, each with many possible diagnoses, then things get really complicated.

Legal problems are often similarly complex, and exam questions always are. So throughout the book we explore techniques for putting together the many components of a question in ways that will help the student organize and streamline the analysis. Just as the emergency room doctor must learn to focus on which patient complaints are relevant to proper diagnosis, the successful law student must keep her eyes on how each ambiguity in the question will or will not affect the ultimate outcome of a potential legal dispute.

The second way that student expectations are disrupted is a by-product of the first. Questions that pose multiple, interrelated issues will prove extremely frustrating to the student eager to proceed to a result. Once you get a feel for law school, you realize that you should celebrate every ambiguity you see within an exam question because you have that much more to discuss. But in the beginning, as you hurry through to reach conclusions, the temptation is to be annoyed, if not overwhelmed, by all the uncertainty. We show you how you can turn that uncertainty to your advantage by pausing long enough on each of the many ambiguities to provide the kind of discussion your professor wants.

In the end, of course, the proof of our method is in the pudding. So we close the book with sample exam questions from each of the basic law school courses we have taught—Constitutional Law, Contracts, Property, and Torts. We provide sample answers that illustrate the substantive techniques the book describes and some stylistic advice about how to write answers as well. There is no one way to write a good exam answer, and, as we say throughout the book, if you must choose between our advice and the specific instructions of the professor giving the exam, toss our book out the window every time. Our educated guess, however, is that much of what you read here will fit very well with what most of your professors expect on the exams you have taken or will be taking soon.

So relax, enjoy our book for what it is, and remember that the doubts you may feel today will be the issues you'll be confidently dissecting tomorrow. Not knowing the "right answer" is very different from having "no answer." And sometimes "maybe" may be the best answer of all.

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We owe an equally large debt to the many scholars whose work has taught us and inspired us to identify and embrace ambiguity as it appears on law school exams and elsewhere. The nature of this “how-to” book counsels against adherence to the familiar academic style of prolific citation, yet the absence of references to specific sources may make it appear as though we invented the ideas in this book from whole cloth. Nothing could be further from the truth. Indeed, we see this book as a third-generation contribution to a style of legal education begun in the era of Karl Llewellyn and revived in the era of Duncan Kennedy. We have been particularly influenced by the work of those two scholars, which we cite formally in our list of sources at the end. We should also add that it was Duncan who first persuaded us that great teaching and great scholarship are not dichotomous categories.

We have also been influenced by and borrowed liberally from a host of talented scholars too numerous to mention. A few people, however, have done work making our task so much easier that we wanted to offer special acknowledgment. They are Terry Anderson, Jack Balkin, Jamie Boyle, Steven Burton, Jerry Frug, Peter Gabel, Morty Horwitz, Jennifer Jaff, Mark Kelman, Karl Klare, Edward Levi, Laura Little, Soia Mentschikoff, Fran Olsen, Pierre Schlag, Joe Singer, Deborah Stone, Irwin Stotzky,

William Twining, Pat Williams, and Steve Winter. Formal citations to their work can also be found in the back, and we urge those of you intrigued by what you find here to consult them for a deeper look than a book about exams can plausibly offer.

Finally, we would like to extend special thanks to the late Claude Sowle, Dennis Lynch, and the University of Miami School of Law for bringing the two of us together in a rare and extraordinary setting a decade and a half ago, and to the law schools at both Miami and the University of Connecticut for generously supporting our work on this project.

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