Praise for the Second Edition of *Getting to Maybe*

This is the best book I have ever seen on how law students should approach exams. It is stunningly insightful and will be useful for every type of law school exam. But the book is much more than just test-taking tips; it really is a wonderful guide for students on how to approach their courses in law school. Every law student will benefit from reading this book.

Erwin Chemerinsky
Dean and Jesse H. Choper Distinguished Professor of Law
University of California, Berkeley School of Law

This book is the definitive answer to that age-old 1L refrain… "I knew the law so much better than my study partner, so why did she get an A while I got a B?" An antidote to law professors who students claim 'hide the ball,' this book throws that ball right into their lap in easy-to-follow prose, which is equal parts humor, serious advice, and relatable examples drawn from common human experience and typical 1L hypotheticals. There are hundreds of guides to success in law school, but if I could recommend only one, this one wins by a landslide!

Nina Farber
Director, Academic Success Programs
Boston College Law School

There are many guides to success in law school, but *Getting to Maybe* is in a class by itself. Patient, friendly, and superbly clear and accessible, it teaches how to master law school exam-writing by an abundance of helpful examples from standard first-year subjects. Its secret formula is that—unlike many commercial outlines—its authors have a sure and sophisticated grasp of the structures of legal reasoning and of lawyers' techniques for analyzing and arguing their way through ambiguity. Absorbing the lessons of *Getting to Maybe* will help law students not only to perform better on exams, but to understand why.

Robert W. Gordon
Professor (Emeritus)
Stanford and Yale Law Schools

It is not enough to work *hard* in law school, you must work *smart*. *Getting to Maybe* tells you how to do exactly that. This comprehensive book is packed with practical wisdom and expert advice to guide you through every step of your law school journey. I highly recommend this exceptional book!

Ashley E. Heidemann, Esq.
Founder and CEO, JD Advising, Inc.

Jeremy Paul and Michael Fischl have incorporated decades of teaching experience in *Getting to Maybe*, a sparkling roadmap through the complexities of law school test-taking. For too long, most law students, flailing among thickets of dense knowledge, dark ambiguity, and leather-bound tomes heavy as cinder blocks, were advised to treat final exams like a game of Lincoln Logs: The mission was to pick out relevant issues from a dispersed cacophony of scattergrams and then to snap each issue together with "the" right rule. Rejecting such formulaic reductionism, Paul and Fischl provide a manual to excelling through strategic thinking, lively metaphor, and comprehensive problem-solving. With rich hypothetical problems and nuanced model answers, readers are shepherded through the habits of layered critical analysis—inspired to think, in other words, and not just "like a lawyer." *Getting to Maybe* is an indispensable guide, showing readers not simply how to pass tests but how to succeed at the highest levels—in law school, in legal practice, and ultimately in those tests of civic advocacy yet to be imagined in our rapidly changing, ethically challenged, and paradox-filled world.

Patricia J. Williams
University Distinguished Professor of
Law and Humanities, Northeastern University

Getting to Maybe

Getting to Maybe

How to Excel on Law School Exams

SECOND EDITION

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Contents

Acknowledgments

Helping law students cope with the mysteries of the law school exam captured our imagination from the moment we began our teaching careers at the University of Miami back in the mid-1980s. Our collaboration began with an invitation from Miami's Black Law Students Association to present a talk on exam-taking to One-Ls, and that occasion provided the opportunity to "put our heads together" and give sustained and careful thought to the anatomy of the law exam and the features of successful student answers. Over all the years since, the project has been informed and greatly improved by many talented and generous colleagues, students, and friends far too numerous to name, so we can do no more than offer our heartfelt thanks. You know who you are.

We would be remiss, however, not to give individual recognition to those who worked closely with us on this, our second edition. Julie Lipkin carefully read every word, offering us the ideal combination of precise editing and good humor that would warm any author's heart. Bob Enright brought a long-time practitioner's perspective to the manuscript and offered insightful criticisms of the material on law school success appearing for the first time in this edition. Carol McGeehan provided a keen and practiced eye that kept us focused on the reader's experience; she and Linda Lacy responded to our every anxious query with wisdom and equanimity; Book Designer Kathleen Soriano-Taylor painstakingly transformed a sprawling manuscript into a gorgeous volume; and they and all of our infinitely patient friends at Carolina Academic Press cheered us on every step of the way.

Above all, we owe a special debt to Duncan Kennedy, who inspired each of us as law students—and has done so ever since—by vividly demonstrating that great teaching and great scholarship are deeply

linked and can change the world by opening new ways for generations of students and scholars to understand it. We proudly dedicate this book to Duncan, without whom it could not have been written.

Finally, we are painfully aware that the legal education project we celebrate in these pages depends upon sustained commitments to social justice and the rule of law that face dire threats in contemporary life. It is the passion for those commitments that we see in our students every day that gives us what hope we have for the future. For law students everywhere eager to participate in the next chapter in the nation's legal history, we wrote this book for you.

Michael Fischl—Hartford, CT
Jeremy Paul—Boston, MA

What's New in the Second Edition?

As we drafted the original edition of *Getting to Maybe* back in 1999, we had a particular audience in mind: first-year students disappointed with their fall term grades and thus eager for advice on doing better the next time around. The book has indeed proved to be of great value to such students, as one of us has repeatedly witnessed first-hand by assigning it as the text for academic success courses offered in the spring of first year and the following fall. But it turns out that most of our readers encounter the book long before classes begin, many of them at the prompting of law schools that include the book in summer reading lists. We have accordingly added four chapters—which appear together as Part I of the new edition—that focus on how students can tackle their law school studies "from the get-go" in ways that will better prepare them for law school success. The new chapters stress the virtues of "slow learning" and include material on critical study techniques—including case-briefing and statute-outlining—but do so with a principal focus on how those techniques can improve exam performance.

The second edition also adds an exercise we developed for exam-taking workshops that we've conducted over the years for law student audiences at UConn, Northeastern, Harvard, Minnesota, Miami, and elsewhere. It begins with a classic "issue spotter" exam question, and then walks students through a series of answers that get progressively better from first to last. These answers help students see for themselves the most common "rookie" mistakes as well as the key characteristics of better answers, demonstrating to great effect the exam-taking techniques offered in the book. The second edition likewise includes a new set of sample exam questions—testing core topics in Property, Contracts, Torts, and Constitutional Law—as well as sample answers, each introduced by

a brief summary of governing legal principles (so students can think through the problem even if they haven't studied the topic under examination) and followed by a critique explicitly drawing on the lessons of the book.

As was the case in the first edition, we are unsparing in our criticism of even the most well-meaning efforts to reduce legal reasoning to a rigid multi-step one-size-fits-all formula. But two additional decades of classroom teaching—and the recent experience we've each had of watching our own kids suffer through law school—have made us more sympathetic to the eternal longing for a road map. We have thus expanded the single chapter on preparing for and taking exams that appeared in the original edition to separate chapters on exam prep (including note taking and course outlining); a chapter on issue spotting *in media res*; and—most responsive to all that longing—a chapter designed to demonstrate that the key to a successful exam answer lies not in the rote application of this year's trendy checklist but instead in learning to do what a good lawyer would do with the legal problem under examination.

Finally, the second edition adds an entirely new chapter on multiple-choice exams, recognizing (if not necessarily embracing) their increasing prominence in legal education and offering clear and useful advice for fitting the square peg of the law's many "maybes" into the tiny ovals on a multiple-choice answer sheet.

We are immensely grateful to the readers who made the original edition the best-selling book on law exams and hope that this new edition will prove more useful still to the next generation of lawyers-to-be and to those who teach them.

How to Use This Book

After an introductory chapter designed to offer an overview of our approach to law exams, *Getting to Maybe* has six parts, each with a sequence of lessons for students eager to excel on law school exams. Part I focuses on "the basics" of law school study—class attendance, case reading, and other building blocks for successful legal learning. Part II will show you how the so-called "issue spotter"—the type of exam question you'll encounter most frequently—tests what you've learned in the classroom, and Part III will help you bring that learning to the task of writing successful exam answers. Part IV focuses on the two other kinds of exam questions—policy questions and multiple choice—that law professors most often employ to supplement the ubiquitous issue spotter. Part V walks you through a series of sample exams and answers that put the book's lessons to work. And an Appendix appearing at the end of the book offers a multitude of exam-taking tips and answers to questions frequently asked by beginning students.

The book can certainly be read in one fell swoop—and be warned that we've aspired to make *Getting to Maybe* so engaging that it may prove difficult to put down. But our experience with the first edition has taught us that there are particular times during the first year of legal studies that each of these parts is likely to be most useful. Accordingly, in the next few pages we'll offer a more detailed map to the contents of the book even if it's scarily reminiscent of something you'd expect to find in an automobile owner's manual. We're betting you'll be grateful for the guidance at whatever point the felt need for exam-taking advice prompts you to give *Getting to Maybe* a try.

Part I—Exam Preparation Starts Early

This Part is designed to be most helpful just before you begin law school. (Light reading, perhaps, during one final weekend of late-summer fun.) It contains entirely new material we've added for the benefit of readers looking for a head start on "the basics" before classes meet. Because the focus of this book is exam success, however, Part I doesn't expound upon the importance of the basics "for their own sake"—tempting as that might be for two devoted educators!—but instead directly links the basics to the challenges of exam-taking.

Those of you who specifically chose this book for the exam focus suggested by its title may think you've already had your fill of general law school advice, either from friends and family who've been through it or from one of the many "how to survive law school" guides available on the market. Should that be the case, you may well decide to "cut to the chase" of exam-taking and thus begin with Part II, skipping Part I at least for now. Indeed, if you don't take a close look at *Getting to Maybe* until several weeks or more into your first semester of legal studies, turning directly to Part II is what we'd suggest as well. But you may want to put Part I in your "save for later" queue—perhaps for a leisurely read over winter break—for we'd be remiss if we didn't pass along the warnings of literally hundreds of students who learned the hard way that they should have tackled their legal studies in the manner recommended in Part I all along.

Part II—Taking Issues Seriously

Part II is ideally suited for diving in roughly midway through the first semester, around mid-October for the student who begins law school in the fall. Here's why. The exam question format you will most frequently encounter is called the "issue spotter," which tests the crucial lawyering skill of identifying legal issues presented by run-of-the-mill disputes, such as a breach of contract or an auto accident. This Part is brimming with examples and illustrations, and you'll find that they make much more sense after you've got a month or more of legal learning under your belt. At the same time, this material is not a "quick read"; getting the most from it requires serious and sustained engagement. So we wouldn't leave it until semester's end either.

Part III—Prepping for and Tackling the Issue Spotter

While Part II helps you learn what an issue *is*, the point of Part III is to assist you in figuring out what to *do* with issues as you prepare for and take exams. Here we cover some exam-prep strategies that will be familiar to most readers—e.g., taking good class notes and preparing course outlines—but do so in a manner specifically designed to help you anticipate the issues your professors are likely to test and to recognize them when they show up on the exam. We finish Part III with concrete advice about writing successful exam answers, and for obvious reasons these materials are likely to be most helpful in the final weeks of the first semester, as exams are approaching.

Part IV—Beyond Issue Spotting

Part IV is likewise end-of-term material and explores two kinds of exam questions that are less common but still used frequently enough to make it worth your while to learn how to tackle them: policy questions and multiple choice. The policy chapter will prep you for straightforward policy questions—e.g., "You are a legislative aide to U.S. Senator Gomez, and she has asked you to draft a memo outlining the pros and cons of a bill…." But the chapter has a second and equally important payoff, which is to help you draft better answers on "issue spotter" questions by incorporating policy analysis into your arsenal of legal arguments. The multiple-choice chapter, for its part, will aid you in anticipating the particular kinds of issues professors are likely to examine in this way and in coping with a test format that forces black-and-white choices in a field of study that is all about shades of gray.

Part V—Sample Questions and Answers

This Part offers you a chance to see the lessons of this book "in action" via a series of genuine law exam questions accompanied by "A" answers. It also provides a guide to practicing with a professor's old exams and suggests an approach to getting the most out of that exercise via group study. Like Parts III and IV, this is "end game" material that will benefit you the most toward the end of the semester.

Appendix: Exam-Taking Tips and Frequently Asked Questions

We have prepared this Appendix as a lifeline to students who have turned to this book at the last minute, perhaps the night before their first exam. Some may have purchased it early on and—like generations of law students before them—quickly discovered that the assigned readings for their courses ate up all the time and energy they had for schoolwork. Others may have picked up a copy in response to the urging of a fellow student or law school instructor recounting a first-hand experience of the benefits gained from *Getting to Maybe*. But if you find yourself removing the shrink wrap at the last minute, there just won't be time to work through Parts I through V of the book. Not to worry. We don't think you should even try. Your limited time would be far better spent reviewing material specific to the looming exam—like class notes, case briefs, or a course outline. So what we offer instead is this Appendix, which because of its "quick and easy" style—a multitude of concrete "tips" and answers to "frequently asked questions"—can be read in a couple of hours, thus reducing distraction from all-important subject-specific study. We do think this material is well worth the time, for at the very least it may help you avoid some common exam-taking errors. The Appendix may also be of great use to eager beavers who had read the book over the summer or early in the term and are seeking a brief review as they hunker down for finals.

However and whenever you decide to use this book, we hope you'll find it as helpful as the generation of readers who, well, got to maybe before you. When we were law students—a million years ago—we found that fear and confusion about exams all too frequently displaced the joy of learning the law and engaging with the profound issues of the day. This book represents our heartfelt effort to diminish that fear and confusion for those whose hard work—and tuition dollars!—make the jobs we love possible.

An Introduction to the Law School Exam: You're Not in Kansas Anymore

Every law student craves the answers to a few big questions. Can I handle the pressure? Will I make the Law Review? What kind of job can I get when I graduate? Does law school leave room for romance?

We suspect, however, that one question burns deepest in the hearts of all but the few students at the top of every class: How come Student X did better on (say) the Torts exam than I did, even though I studied twice as hard and knew the material much better than she did?

The point of this book is to provide you with an answer to that question from a law professor's perspective—a perspective we think you'll find useful, since it is invariably a professor who decides whether to give you or Student X the higher grade! But we want to begin by considering answers our *students* often give to this "burning question," since we think those answers reveal some common misunderstandings about law exams:

(a) Student X had a copy of a Torts outline put together by the star who "booked" last year's class and who is now the professor's research assistant.
(b) Student X was in a mega-study group, a dozen confident eager beavers who divvied up the Torts course into 12 topics and each produced a magnificent 100-plus-page summary of her assigned topic.
(c) Student X ignored everything the professor said and pulled an all-nighter streaming Quimbee just before the exam.
(d) Student X shamelessly found ways to smuggle political perspectives aligned with the professor's into her exam answers.

We hear these answers—or slight variations on them—all the time from students disappointed with their law school grades. We can safely say after decades of experience that students cannot shine on exams simply by parroting a professor's perceived political views. And we'll explain in detail in Part I of the book why commercial study aids and outlines prepared by others are likely to be of little use in the quest for exam-taking success. Indeed, our disappointed test-taker may or may not have "studied twice as hard" as Student X, but his assumption that canned resources are the key to high grades suggests that he may not have been studying *smart*.

Here's a painful truth about the law school experience. Even students who do the *right* things during the semester—those who study the assigned texts with great care and impress classmates and professors alike with their seeming grasp of the materials during class discussion—even those students more than occasionally come up short at exam time. Yet observers who conclude from this phenomenon that "grades are random," or at least impervious to the amount of work you do over the course of the semester, are basing that view on the faulty assumption that the key to excelling on law school exams lies in what you "know" coming into the test.

In point of fact, you *do* need to "know the material"—the seemingly endless collection of cases, rules, policies, and theories examined in each of your courses—in order to succeed on your exams. But the rub is that knowing the material is only a starting point, for the typical law exam doesn't simply test your ability to recall (or even to understand really well) the many things you learned from the course in question. Rather, the typical exam tests your ability to *use* the material you've learned and to *apply* it to problems you've never seen before—just as practicing lawyers are called on to do every day of their professional lives, which is precisely the reason law professors persist in testing our students in this way.

To get a sense of what we mean, forget about law for a moment. Assume instead you are taking a graduate course in engineering and have spent the semester studying the properties of various building materials and a host of theories of design. You have dedicated virtually every waking moment to this course. You have read and re-read every assignment and taken copious notes; you have come to each class session meticu-

lously well prepared; you have taken down almost every word the instructor has uttered; you have saved and annotated every handout; and—during the two weeks just before the final exam—you have organized and reorganized and outlined and committed everything to memory with such success that, in the highly unlikely event that someone were to ask you to explain the differing properties of (say) plastic vs. glass, you could quickly rattle off everything that could possibly be said on the subject.

You enter the room for the final examination, and—to your astonishment—the proctor presents you with a large box containing a seemingly random assortment of materials of the sort studied in the course. On the blackboard, the proctor writes the following instructions: "Using the materials in the box before you, design and construct a widget according to the principles we studied in the course." (Unlike law students, engineering students know exactly what widgets look like!) Confronted with this daunting task, you would no doubt find the mass of information you have mastered in preparation for the exam helpful—indeed, crucial. But you would obviously be making a serious mistake if you left the contents of the box untouched and proceeded instead to compose an essay detailing "everything you know" about the fundamentals of materials and design, submitting the essay instead of a widget for the grade. The point of the exercise is not, after all, to regurgitate what you know, but rather to use what you know on what you find inside the box.

Perhaps the most important lesson we can offer about law exams is that each question you encounter is a lot like the engineering student's box: It's what you do with what you find *inside* the question that counts the most. In all likelihood, what distinguished Student X's performance from everybody else's on that Torts exam was less what she "knew" coming into the exam—let alone which outline she had or which commercial study aid she worked with—than *what she did with the questions she encountered on the exam itself*. And the intellectual skills that enabled her to handle the questions so well can be learned and developed by virtually any student who has secured entrance to law school and is willing to put in the time.

But truth be told, we law professors generally don't do a very good job of teaching exam skills, at least not directly. Classroom discussion often focuses on the intricacies of legal reasoning and argument—and on the

policies and theories that organize and complicate each area of the law—but we seldom, if at all, explore in any depth the connection between those lessons and the challenge of law exam-taking. So even the most enterprising student has little choice but to draw upon sources that turn out to be less than fully reliable, for it's almost impossible to master law school exam-taking by relying on undergraduate habits, tips from fellow students, or even impressions drawn from the Socratic dialogue in the classroom. In the section that follows, we'll explain why those sources may send the wrong messages, and then we'll offer a better approach.

Some Lessons You May Need to Unlearn

Lesson #1—Undergraduate Exams and the "Information Dump"

Consider, first, the exam-taking habits you developed as an undergraduate and perhaps even before that. College-level testing often involves a demonstration of student knowledge. Who was William the Conqueror, and what country did he invade and when? How many hydrogen atoms make up a water molecule? Such questions conform to a vision of "memorize-and-regurgitate" learning, and, to many students, law school initially appears to be the ideal spot for raising this kind of testing to new heights. How many days do I have to file that appeal? How many witnesses must there be for the will to be valid? Given the gargantuan number of laws "on the books," law professors could easily give closed-book exams filled to the brim with nothing but questions calling for esoteric knowledge of memorized legal intricacies. *But we don't*.

It's true that failing to grasp the basic points of your courses will prove fatal to your exam performance. In Constitutional Law, for example, you need to know that *Marbury v. Madison* established our tradition in which the federal courts have the power to invalidate acts of Congress in the name of the Constitution. Going beyond the basics, however, to attempt to memorize verbatim every little rule and subrule you encountered during a course is unlikely to be particularly helpful, because law school exams will not reward mere accumulated knowledge. Indeed, testing principally for such knowledge would be foolish. As an attorney, you can almost always "look it up" if you need to; in fact, on most occasions, it would be irresponsible *not* to look it up, even if you were abso-

lutely positive you remembered "it." Besides, to invoke once again our engineering exam analogy, a client seeking a lawyer's advice doesn't need someone who can recite legal rules from memory. Rather, she needs someone who will use all that knowledge to help her solve her "box" of problems.

Exam-taking skills developed before law school, however, cause many students to persist in treating our questions *as if* they called for a memorized answer. To see what we mean, let's watch as a well-prepared student—let's call her Ketanji—works her way through a question that is typical of the sort you are likely to encounter on a first-year Property exam:

> Katie Mathews has long owned a lovely home in a suburban neighborhood in Emerald City, the capital of Oz. (*Oh no,* Ketanji thinks. *We're in an imaginary jurisdiction, so how are we supposed to know what the law is?*) When Mathews decides to place the home on the market, it sits for a few months before the Brady family comes calling. The Bradys have two elementary school-age children and are attracted to the home because of its proximity to LaPierre Public Elementary School, about which the Bradys have heard good things. As the Bradys' broker takes them through the home, they encounter Ms. Mathews in the kitchen. The Bradys tell Mathews how much they like the home and say they hope to reach an agreement on a price soon. They also mention that they plan to send their children to LaPierre. "All three of my children attended that school," Ms. Mathews truthfully tells the Bradys. (*Okay*, Ketanji thinks. *Something about the school is going to be important here, since it's a major drawing point for buyers. But we're told that seller spoke "truthfully," so we're not dealing with misrepresentations of the sort we read about in the residential real estate sales cases we studied. What other dispute might there be?*)
>
> The Bradys reach an agreement with Mathews and take title to and possession of the home in August 2019. That October, however, the Bradys' oldest daughter is attacked and stabbed by a fellow student at LaPierre. She is traumatized and left with limited use of her left arm. A thorough investigation reveals that Ms. Mathews's oldest son, Sam, was badly beaten by

a fellow student at LaPierre just three years ago. (*Wow*, Ketanji thinks. *Seller didn't mention that terrible incident when she told buyers that her children had attended the school. Not a lie, exactly, but not the whole story either, and seller knew firsthand that buyers planned to send their kids there. But this is confusing. Under traditional property law, it's* caveat emptor*—"the buyer beware"—and sellers can keep quiet about problems so long as they don't actually lie. Yet under the modern rule adopted in many states, sellers have a duty to disclose facts about the property that are "not readily observable" and that "materially affect the value of the home." But how can we say which approach the courts will take if we don't know what state we're in? And besides, is this a fact "about the property" or just a fact about the school or about the seller's family?*) No record of the earlier assault could be found at the police station, because the incident had been kept private. Similarly, no official at LaPierre was authorized to disclose information about Sam's beating or his injuries. (*Okay*, Ketanji says to herself. *I guess this means the facts weren't "readily observable," even if someone tried to look into them. But does the earlier incident "materially affect the value of the home"? Local schools matter a lot to buyers with young children but might not matter much to the childless or to empty nesters. How can we be certain about the home's value without knowing more about the local housing market or, for that matter, the size and layout of the Mathews home?*)

If the Bradys sue to rescind the deal and get their money back, what are their chances of success, and what arguments is Ms. Mathews likely to raise in response? (*Oh boy*, Ketanji thinks. *Buyers are really going for broke here. The cases we read awarded monetary damages for such things as fixing hidden termite damage or compensating for diminished value resulting from an undisclosed problem with the septic field. But it's another thing altogether for a buyer to try to back out of a fully consummated sale of real property after title has passed, the mortgage loan funds have issued, the debt has likely been sold to a third party, seller has moved on and purchased a new*

home, etc. Will the courts in Oz be willing to "unwind" all of those transactions?)

As we will shortly explain, the point of an exam question like this one is to get the test-taker to identify each of the ambiguities identified by Ketanji's italicized musings, to discuss possible resolutions of those ambiguities, and to analyze the difference all that makes to the rights and obligations of the respective parties. But in the face of exam pressure, many students respond by ignoring the ambiguities—indeed, by ignoring the facts stated in the question altogether—and treating the problem as an invitation to offer a short history of the rise and fall of *caveat emptor* or to begin writing down everything they know about the rules governing the sale of residential real estate.

We refer to an answer that replaces analysis of the question with disquisitions on the origins or state of the law as an "information dump." The student interprets the question actually asked—involving multiple issues, complex facts, and competing equities—as an opportunity to do what he used to do (and no doubt did very well) in college: Write an essay designed to persuade the grader that he "really understands" the area of law tested by the question. But what he has done instead is persuaded the grader that he couldn't—or, perhaps, that he just preferred not to—grapple with the vexing difficulties presented in the exam problem. And, like the engineering student who writes an essay rather than building a widget out of the box of materials, chances are he won't be very happy with the grade he gets as a result.

Lesson #2—Sorting Through the Law School Rumor Mill

Students begin to hear that "law exams are different" from almost the moment they set foot on their law school campus. As with most "rumor mills," however, there's a good bit of misleading advice lurking within the conventional wisdom imparted by second- and third-year students.

Imagine a rookie basketball player whose teammate's advice on covering a superstar is "force him left." The rookie enters the game and invites the star to drive left. The star promptly does so, putting the ball in the basket with a beautiful left-handed shot. During the next timeout, the rookie presses his teammate, "I thought you told me to force him

left!" Without batting an eyelash, the teammate responds, "You should see what happens when he goes right!"

Law students who trade the "information dump" for the "helpful hints" from their classmates and from upper-level students may have a similarly unsettling experience. "You told me to spot the issues," a student was recently overheard complaining to a colleague, shortly after first-semester grades were released. "And the professor acknowledged that I saw most of them. But I only got a C+ on the exam!" The predictable response: "You should see what you'd get if you *didn't* spot the issues!"

Like "knowing the material," the ability to "spot the issues" is crucial to a successful exam performance; but like knowing the material, issue spotting is nowhere near enough. Recall, for a moment, our hypothetical home sale. An answer that read something like the following would almost surely get a passing grade at virtually any law school:

> The first thing we need to know is whether we are in a jurisdiction that adheres to *caveat emptor* or one that has adopted the modern rule of liability for nondisclosure. If we're in a nondisclosure state, then there is a further issue about whether the incident involving seller's child is "about the property" and, if so, whether it materially affects the value of the home. If it is and if it does, we'll also need to know whether the courts will be willing to grant rescission of the deal or limit the buyer's remedy to damages.

This student has indeed "spotted the issues" and would no doubt get credit for doing so. But like the student who "dumps" information rather than *using* it, the student who merely "spots" the issues—without going on to explain why they are issues, what difference they make, and the pros and cons of resolving them one way or another—will at best end up somewhere in the undistinguished lower middle of the class. (In Part III of the book, we will explore in great length what you *should* do with issues once you spot them.)

There are two other exam-taking bromides frequently promoted by well-meaning fellow students that may be equally misleading to a beginner. First, there is the suggestion that all you need to do on the final is to show the professor that you've "grasped the fundamentals of the course." This approach does have one thing going for it: You can organize and

draft your answers well in advance of the exam, and you won't have to waste any time during the exam period itself reading—let alone thinking about—the professor's pesky questions! The downside, of course, is that this is simply a variation on the "information dump" we talked about earlier, except this kind of undifferentiated "dump" is likely to get you an even lower grade. Thus, the student who responds to our hypothetical question by "writing everything she knows" about *caveat emptor* and nondisclosure in residential real estate sales might get at least some credit for signaling to the professor that she recognizes the basic legal problem raised by the question. By contrast, the student who responds by attempting to demonstrate that she's grasped the "fundamentals" of *the entire Property course* is likely to lead the grader to the conclusion that she didn't have the faintest idea what the question was about.

The other strategy you are likely to hear about from your classmates is the so-called "IRAC" method. The idea here is that exam-taking can be reduced to four simple steps: (1) spot and state the Issue; (2) identify the Rule that governs the issue; (3) Apply the rule to the facts presented; and (4) offer a Conclusion that answers the question. We will have a lot to say about the dangers of IRAC (and other paint-by-numbers approaches with trendy acronyms) later in the book, but for now we'll just say this: We've worked with hundreds of wonderfully talented lawyers over the years and studied thousands upon thousands of judicial opinions and legal analyses, and we have never encountered one—not one—that grappled with a legal problem by attempting to reduce it to four simple steps. And since the overwhelming majority of law professors test legal reasoning skills on their exams, it is no surprise that answers deploying a submediocre form of reasoning are highly likely to earn submediocre grades. Indeed, you could write a book about the many important legal reasoning and exam-taking skills that simply cannot be captured in IRAC or in any other one-size-fits-all formula. (We have, and you're reading it!)

Lesson #3—The Dark Side of the Socratic Method: The Rulebook vs. The Loose Cannon

Perhaps the cruelest aspect of the law school exam process is visited upon students who look for lessons in the place you legitimately should expect to find them—inside the law school classroom. Many students

enter law school expecting to memorize a massive quantity of legal rules for regurgitation-on-command—much in the manner that the interns and residents on *Grey's Anatomy* or *House* are asked to rattle off the names of a million and one body parts, symptoms, and diseases while making rounds with their senior colleagues. We have no idea whether those popular shows accurately capture the rigors of medical training, but the law student who anticipates a memorize-and-regurgitate model of education is in for some big surprises at most U.S. law schools.

One surprise is that most of the "rules" you are expected to master are buried in the text of judicial opinions. In spite of the fact that you're paying thousands of dollars a year to have a faculty of experts teach you the law, it turns out that your professors expect *you* to figure out the rules—often referred to as "case holdings"—on your own. What's worse, you never seem to get them right. Does the holding of *District of Columbia v. Heller* guarantee a Second Amendment right to possess handguns, or does it apply more broadly to machine guns, AK-47s, and other military-grade ordnance? Does *Hawkins v. McGee* govern damages for every breach of contract; or for broken promises in the context of medical treatment gone awry; or just for "hairy hands"?

Nor can you find the solace of certainty in the statutory supplement. It may seem that at least *these* are rules you don't have to figure out on your own; after all, they are written down in black and white. But before you've even had time to breathe a sigh of relief, you discover that it is just as difficult to determine the meaning of a statute—or a provision from the Constitution or a section from the Restatement of Torts—as it is to figure out the holding of a case. When you offer an interpretation based on the "plain meaning" of the rule ("no vehicles permitted in the park" means *all* "vehicles," period), the professor is bound to respond with a series of perplexing questions. Is the "meaning" really so "plain"? Are tricycles among the "vehicles" to which the rule refers? What did the drafters *intend*? Were they even *thinking* about tricycles? What policies were the drafters trying to further? Do tricycles produce the noise, pollution, and risks to pedestrians we associate with automobile traffic?

Worse still, if you came to law school expecting simply to memorize and regurgitate rules, the biggest surprise may be that "determining the meaning of the rule" is just the starting point in legal analysis. A lot of time is also spent "applying the rule to the facts," a task that turns out to

be every bit as daunting as determining the meaning of the rule itself. Was the uncle's promise to give his nephew a large sum of money if the nephew refrained from smoking an offer proposing a bargain? Or was it merely a conditional promise to make a gift? If the host invites you but not your boyfriend to a party, and your boyfriend shows up anyway—injuring himself on his way in through an unlocked back door—is he considered a licensee or a trespasser? A significant part of what law professors teach *and test* is designed to help you learn to cope with these kinds of questions. But many students find classroom discussion maddening, because it's a rare professor who will stop to highlight or explain at any length the difference between good and bad efforts at rule identification or application.

What happens next is at the root of more exam disappointment than almost anything else we can describe. Students grow increasingly frustrated by the lack of hard-and-fast "answers" emerging from the so-called Socratic classroom, and, as a result, many are drawn toward one or the other of two highly simplified approaches to legal analysis and exam-taking. We'll refer to those approaches here as *the rulebook account* and *the judge as loose cannon*.

Simply put, the rulebook account is shorthand for the belief that once you know the rule, "the rule decides the case." On this view, "legal reasoning" is one part memorization and one part logic: The job of the judge, or the lawyer who appears before her, or the student on the exam, is simply to identify the governing rule, apply it to the facts at hand and then announce the result. ("A seller of residential real estate has a duty not to lie to buyers about defects materially affecting the value of the property. But under the doctrine of *caveat emptor*, a seller has no affirmative duty to advise buyers of such defects, even if they are not readily observable. Buyer's case—which rests not upon what seller said but instead on what she didn't say—must therefore be dismissed. Next case, please!")

With the possible exception of law enforcement personnel and others who've had frequent contact with the legal system, most nonlawyers—and thus most beginning law students—seem to think that the law works in this way, at least when it's working properly. As a consequence, the experience of the first semester of law school can come as quite a shock, since it typically consists of the study of case after case in which the rules, the facts, and the connection between the two can be

argued in more than one way. (Recall, for example, all of the ambiguities and complexities in our home sale hypothetical—ambiguities and complexities that the simple syllogism at the end of the previous paragraph completely glossed over.)

Students respond to this "gestalt shift" in different ways. One approach is to cling to the rulebook account. We suspect this is an instinctive reaction because "the rules" offer a lifeboat of seeming certainty in the raging sea of ambiguity explored in the law school classroom. (You know you're not swimming, but at least you won't drown.) Some students may even begin to think of the professor as a heretic and the Socratic inquiry as a form of religious persecution. Paradoxically, this stance sometimes provokes a firmer resolve and a strengthened belief in the importance of the rules. "Okay," they think. "Maybe some smarty-pants overeducated preppy law professor can score picky debating points on helpless neophyte law students. But rules just *have to* decide cases, since the only other alternative is that judges are free to do whatever they want and to run utterly amok."

Yet another group of students comes to agree with this last point—i.e., that the only alternative to "rules deciding cases" is "judges doing whatever they want"—but from that premise they are drawn toward a more cynical conclusion. Having studied case after case in which "the rules" could easily lead to more than one result, these students embrace the approach we refer to as the judge as loose cannon—the notion that judges decide cases on the basis of values, or politics, or policy, or "what they had for breakfast," or some combination of such factors having nothing whatsoever to do with legal rules.

In point of fact, as our students line up on each side of this divide, they are in their own way reenacting a long-standing debate in American law—a debate the roots of which go back at least as far as the beginning of the last century. Fortunately for you (and for us as well), we don't have to rehearse or resolve the debate between formalism and legal realism here. Instead, what we want to do is to show you how the extremely oversimplified versions of these positions that beginners frequently espouse—that is, "naive" formalism (the rulebook account) and "vulgar" realism (the judge as loose cannon)—can undermine your capacity to make persuasive legal arguments and, with it, your ability to excel on law school exams.

In a nutshell, the students who embrace the rulebook account tend to write exams that substitute rule regurgitation for reasoning and analysis. On the upside, they frequently come to the exam having mastered, or even memorized, every little rule, subrule, and exception that was covered in the course—and, "just in case," some that the professor never even mentioned! But the trouble begins when they read the first question and encounter the sort of ambiguity that is typically present on a law exam. Perhaps it is a case in which more than one rule might govern (e.g., our residential real estate case, which might come out one way under *caveat emptor* and another under the modern rule of liability for nondisclosure). Or perhaps it is a case in which a single rule clearly governs, but the rule might be interpreted in one of two ways (e.g., one judge thinks the controlling rule requiring disclosure of hidden facts "about the property" demands that sellers reveal hidden physical characteristics of the land while a different judge expects spilling the beans on anything that might alter the economic value of the property). Or perhaps it is a case in which the rule and its meaning seem fairly clear, but the facts might be interpreted in more than one way (e.g., a transaction—like the uncle's promise to give his nephew $5,000 if the latter gives up smoking—that might fairly be characterized either as an offer proposing a bargain or as a conditional promise to make a gift).

Confronted with ambiguities like these, our rulebook devotee is stymied because there is no "rule" telling him how to resolve them. There is no small irony here: Since law professors almost invariably try to test what they teach, chances are that the student's instructor spent substantial class time working through these very problems—or problems quite like them—attempting to demonstrate through lecture and/or Socratic discussion that there was more than one way of looking at each of them. Yet our student may well have stopped taking notes at the time because he was waiting patiently through all the argument and counterargument for a punch line—waiting, that is, for a rule to come to the rescue with some definitive resolution.

As a result, when he encounters such a problem on the final, he may well experience a sense that he is the victim of a malicious bait and switch: After spending the semester teaching the class rule after rule after rule, how could the professor have decided to test the very questions for which the rules don't produce clear winners and losers? Unsure of how

to deal with problems that the law doesn't seem to solve, the rulebook devotee may retreat to his natural habitat and draft answers designed to demonstrate his mastery of the rules, all the while avoiding the ambiguities that would arise in attempting to apply them to the facts presented in the question. Yet the point of the typical law exam is precisely to see whether students can identify, analyze, and argue thoughtfully about such ambiguities, and so an answer that has simply wished them all away is unlikely to distinguish itself.

By contrast, a student who embraces the judge-as-loose-cannon approach tends to write exam answers that discuss everything *but* the rules. Once she picks up on what she sees as the principal lesson of the Socratic method—that rules don't decide cases because there is always another way of looking at things—she stops taking notes every time a legal rule is discussed. "What's the point in focusing on *that*," she thinks, "since the decision is always based on something else?" That "something else" may vary from professor to professor, and even from case to case: Sometimes it seems to be "policy" (e.g., the security of transactions in Contracts or loss-spreading in Torts); sometimes it's the "equities" presented by the facts (e.g., the vulnerability of the impoverished tenant at the hands of the wealthy absentee landlord); sometimes it is the judge's "values" (when the professor agrees with her) or her "politics" (when he doesn't). Since in the view of such a student these extralegal considerations are what *really* drive judicial decisions, she sees no need to spend precious study time mastering the intricacies of the seemingly pointless array of rules.

Come the final exam, she may well be in for a complete disaster. For one thing, since most exam questions test the student's ability to use legal rules to make arguments, it is now our unsuspecting student who has become the "loose cannon," ironically entering the battle virtually unarmed. A central task of lawyering is to translate the facts, policies, equities, and values that support her client's case into the language of the law (e.g., "the landlord breached the warranty of habitability and therefore the tenant should be able to withhold her rent"), and you simply can't do this unless and until you develop a facility with the rules that form the basic rhetoric of legal argument. For another thing, when it comes to a task that separates the best answers from the merely mediocre—i.e., dealing with the ambiguities that complicate the legal analysis of the

question—the loose-cannon student may not even be able to identify those ambiguities, since she has not taken the rules seriously enough to see how they might lead in several directions. (She is unlikely, for example, to figure out that the uncle's promise could be interpreted as proposing either a bargain or a conditional gift unless she understands the legal requirement of consideration.)

Of course, many students find themselves drawn simultaneously in both directions. Some offer randomly alternating approaches—consciously or unconsciously—in the hope that *something* they say will please the grader. Others try to embrace both approaches at the same time. Like the atheist who hedges his bets by sending the children to church, the rulebook proponent may conclude an extended regurgitation of rules with an abrupt loose-cannon appeal: "Of course, it depends on your politics," he writes. "I champion the weak against the strong—just like the professor!—so I think the court should rule in favor of the family farmer and against the coal company. But a more conservative judge might come out the other way."

Ironically, in the end the two approaches leave the student in much the same sorry fix. The rulebook devotee may see the ambiguities on the exam, but he ignores them because he thinks the law requires an answer and he doesn't have one; the loose-cannon student cannot even spot the ambiguities, for she has ignored the rules because they lead only to (wait for it) *ambiguities*. But like Dorothy in *The Wizard of Oz*, they've each had the ruby slippers all along, for if they had learned to embrace the ambiguities they have been so busy ignoring and denying, they'd be on their way to Law Review.

We said at the beginning of this introduction that the most important lesson we could teach you about law exams is that it's what you do with what you find inside the question that counts the most. The second most important lesson should be apparent from the foregoing discussion: What you will find inside the typical law exam question is *ambiguity*, and we think that learning to live with it—indeed, learning to search it out, embrace it, and exploit it—is the key to doing well on law school exams.

In Part I of the book we offer our best advice on how to approach law study generally. But in Part II the law exam will resume center stage as we attempt to translate the basic lessons of this chapter into a blueprint

for concrete action as you pursue your legal studies and prepare for and take exams. Our aim is to *clarify*—not simplify—the examination process, and, accordingly, this book will require sustained effort on your part. We are confident, however, that there will be a big payoff in terms of improved academic performance. As for the burning question of whether law school leaves room for romance, you're on your own!