

## Chapter 1

# THE WHAT AND WHY OF EXAMS

- ✓ Why law school exams look the way they do.
- ✓ How exams test for skills that are essential to law practice.
- ✓ What it means to “think like a lawyer”—because that is what exams are testing.

**T**his is a book about doing well in law school. In particular, our aim is to help you to do the best that you can do on your exams. For that reason, we are going to jump right in and start talking about them.

“But wait,” you may be thinking (depending on when you are reading this book), “I don’t know much about law or law school classes yet. How can I start learning about exams?” Good question! Immediately after this chapter, we are going to drop back and teach you some basics about law and law school. By way of overview, though, we want you to start thinking about your short-term and longer-term goals. The short-term goal is, of course, to do your very best on your exams. The longer-term goal is to harness your talents as a trained lawyer to do work that you find rewarding. It turns out that these two goals are related.

Law students dislike law school exams, and it is not hard to understand why. They are stressful. They come after weeks of classes in which vast amounts of material are covered and little feedback is provided. There is enormous time pressure, especially for in-class exams. Professors rarely are clear on exactly what they are looking for. And a

lot seems to turn on exams; for many courses this is the primary determinant of the grade, and everyone will tell you that grades matter.<sup>1</sup> Even students who do well often are surprised, wondering what separated them from their peers. Students see exams as some sort of torture that professors delight in inflicting on them. Worse yet, law students often complain that exams don't test what real lawyers do. Were that true, it is difficult to imagine a more damning condemnation of the entire process.

Well, we want to start by letting you in on a little secret. Law professors dislike exams, too. They agonize over writing them. And no part of the job is more distasteful than grading them. Reading one answer after another to the same question is mind-numbing. Law professors envy colleagues in other departments who rely heavily on teaching assistants to grade exams. They fantasize about giving pure multiple-choice exams graded by a computer. (Some do; we discuss these sorts of exams in Chapter 15.)

We're not trying to evoke pity. Law professors have terrific jobs. Our point is that if there weren't something valuable about the traditional format of law school essay exams, law professors would be the first to abandon them.

Here's the thing: law professors believe that they *are* testing for a skill critical to being a good lawyer. In fact, they believe that understanding—*really* understanding—the skill that is at the heart of the practice of law is essential to doing well on exams. Your professors might even tell you that this skill is the main thing that law school is designed to teach. And we agree with all this. We are pretty certain that what law schools teach, what exams test, and what lawyers do all fit together. It would be surprising, would it not, if things were otherwise?

Still, we understand that the connection between taking exams and the practice of law can seem pretty elusive. The point of this chapter is to make explicit why law school exams look the way they do, and the

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1. For what it is worth, even though we are selling a book about exams, we think all the talk of the importance of grades should be taken with a grain of salt. Grades are important, particularly in tough times, when hiring slows. Yet we know plenty of people who have not done as well as they would have liked in law school and have gone on to enormously satisfying careers. For more on the subject of perspective, see the Afterword.



way that those exams relate to what it is lawyers do. Then, the next part of the book will explain how classes fit into the picture.

## THE JOB OF A LAWYER

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Obviously there are important things lawyers do that exams don't test. Lawyers talk a lot on the phone, but law school exams do not measure phone skills. Successful lawyers have to juggle their cases and calendars, and learn how to delegate work to others. Exams don't test these things either. Exams don't reward the ability to interview a client, let alone find one. Deposition-taking and deal-making skills also go unexamined. Many very successful lawyers were not great law students, which is to say they did not do terrifically well on their exams. We're sure there are some poor lawyers who did well on exams.

And yet the criticism that exams don't test what lawyers really do misses the core of what exams are supposed to test, and what most lawyers are actually called on to do.

Imagine that you are a lawyer. (You will be one soon enough!) There are all kinds of practice settings, a point we return to in a moment. For now, suppose you are a lawyer in a small, local firm that takes business as it comes. A person—a client—walks into the office. She isn't a lawyer. She's just a person with a problem. She tells you a story. Or perhaps she tells the story to a senior attorney, who then relates it to you. The neighbor's dog bit her son, who is seriously injured. Or the bookkeeper stole all the money from her small business. Or her new business partner promised to cover certain expenses if she contributed to get the business going, and then the partner reneged.

Note what your client does not do. She does *not* walk in the door and say, "I have a Contracts problem. There's clearly going to be an issue whether my agreement with my partner was supported by adequate consideration. I think, however, that I can take advantage of the doctrine of promissory estoppel as defined by Section 90 of the Second Restatement of Contracts. What do you think?"

Most people who seek out lawyers have no clue about this sort of thing. They are laypeople, with their stories and their circumstances. They need a lawyer's help to decode their story and translate it into law. The person who walks in the door has a problem but she has no idea what the law has to say about it. *That is your job.*

From page 4:

[Law school exam] questions are stories -- "fact patterns," in law school lingo -- that look just like the sort of thing a client might come tell her lawyer. At the end of the story, the exam-taker is [asked to analyze the fact pattern, identify the issues raised by the fact pattern, recall the relevant rules of law, and apply those rules to the fact pattern.]

## ADVISING CLIENTS

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As you might guess, some stories that clients tell their lawyers are relatively easy to analyze; others are more difficult. Once in a while you will hear a story that rather obviously does not give rise to a legal claim. “That’s too bad,” you’ll say sympathetically, “but there is nothing I can do to help you.” By the same token, you will occasionally encounter a client who has so plainly been wronged (at least if you have been told the facts correctly) that you cannot wait to jump into action.

In many cases, however, it will not be obvious—and certainly not immediately—whether the case is a winner or a loser. Real-life events and transactions are complicated. The law is similarly complicated. Maybe it is uncertain. Or maybe the law is clear, but what is uncertain is how precisely it applies to your client’s case. It’s a puzzler, and it will require some research, thinking, and creativity to help your client out.

This is a good moment to drag onstage Oliver Wendell Holmes, Jr. Holmes was a Supreme Court Justice at the turn of the twentieth century, but he was much more than that. He remains to this day one of our most acclaimed lawyers and legal scholars.<sup>2</sup> In 1897, he gave a remarkable speech to law students, later published as an essay titled *The Path of the Law*.<sup>3</sup>

One aim of the speech was to administer a modest shock to a group of “green” students as they prepared to emerge from the cloistered classroom; a shock that would help them appreciate how law looks to an actual practitioner.

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2. Like the law itself, Holmes was complicated. An abolitionist in his youth, he fought bravely in the Civil War, in which he was thrice wounded. While still a young practicing lawyer, he wrote an important scholarly book—*The Common Law* (1881)—that, along with other writings, has long been praised for introducing “pragmatism” into academic analyses of law. Holmes later served as a Justice on the Massachusetts Supreme Judicial Court and the U.S. Supreme Court, earning the reputation of a “progressive” primarily because of his unwillingness to invoke the U.S. Constitution to strike down reform legislation. Ironically, Holmes was by this time a committed Social Darwinist who had little sympathy for the progressive reforms he voted to uphold.

3. 10 Harv. L. Rev. 478 (1897).



What Holmes told the students was that if they were going to be good lawyers, they had to imagine that they were representing the "Bad Man." What distinguishes the Bad Man from others, Holmes explained, is that he—unlike most of us—is completely indifferent to whether a given course of action is morally right or wrong. He just wants to do what he wants to do, and he wants to do it without getting arrested, sued, fined, or imprisoned. (Just imagine hearing this speech at your law school!) In short, what the Bad Man wants from his lawyer is an expert assessment of his odds for avoiding or facing legal trouble if he acts this way, or that way, or some other way.



Oliver Wendell Holmes, Jr.

Holmes's point was not to praise amoral client behavior or immoral lawyering. Rather, he used the Bad Man as a device to get his audience to see that the practice of law can profitably be thought of as an exercise in *prediction*. What counts as "knowledge" of the law, he insisted, is the ability to predict whether a certain course of conduct will result in the person who engages in that conduct being subjected to a court-ordered sanction or penalty. At times lawyers will be able to make precise and

highly confident predictions. More commonly, however, because of law's complexity and ambiguities, they will only be in a position to make provisional and qualified predictions. In short, the Bad Man's lawyer will typically tell his client that if he (the Bad Man) does x or y, there is a 30 percent or 50 percent or 75 percent chance that he will go to jail, or be subject to an injunction, or pay a fine or money damages.

There's a way in which Holmes's stylized picture of legal advice is too passive—good lawyers do more than merely report a set of odds that their clients are facing. They also advise their clients, and argue on behalf of their clients, in order to improve those odds. Nonetheless, the basic point is sound. It is extremely helpful to think about practicing law in terms of making provisional predictions about how judges—in light of the case law and statutory law that they are required to apply—will respond to various *arguments* about certain *sets of facts*.

So, how does one make these predictions? Well, *that* is what law school is all about. It is not simply about learning or memorizing black-letter law. It is about developing “judgment,” an informed feel for how judges and other “deciders” are going to resolve legal claims.

The analogy holds true no matter what the practice setting. Most of you won't sit in a storefront waiting for a client to come in with a story. Some of you might, in small towns or in Legal Aid settings. Others will work in law firms, or for corporations, or in public interest litigation groups. Others will be transactional lawyers, assisting with deals to sell property, buy companies, or convert rivers into hydroelectric energy. You'll become tax lawyers and criminal prosecutors. You'll work for a government agency. It doesn't matter what you end up doing. In the course of your day, whether you are the most junior associate at a law firm, or counsel to the President of the United States, you are going to hear stories and be asked you to offer *legal advice*; that is, your assessment of the best arguments, and whether they are likely to prevail.

We hope you can now see how law school exams connect to this core aspect of law practice. Day in and day out, lawyers listen to their clients' stories. They then apply their knowledge of the law, and develop arguments to assist their clients. Finally, they offer an informed prediction about whether those arguments are likely to



prevail. That is exactly what you will do on law school essay exams. And it is what law school is going to prepare you to do.

## LEARNING TO THINK LIKE A LAWYER

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To be clear, law school will teach you more than how to make good predictions of legal consequences. Indeed, it is going to teach you precisely what you thought it would: the law. You will learn rules: lots and lots of rules. But learning the rules is the easy part of law school. If that is all there was to it, we'd give you a book of rules and have you memorize it. (Bar exams are a bit like this.)

The hard part of law school is learning how to make effective legal arguments on your client's behalf, and how to predict whether those legal arguments will succeed or fail. And it is this ability to make legal arguments, and to separate good ones from bad ones, that law school exams are all about.

In short, the one central, yet elusive, skill that law school exams test is whether you are able to "think like a lawyer." This is a phrase you are going to hear until you are sick to death of it. But there is a reason it gets repeated. It nicely captures the heart of what law professors are trying to teach, what they will test on law school exams, and what they believe is the core skill for a practicing lawyer.

Let's start with the basic idea. Thinking like a lawyer refers to the ability to give a client legal advice. It means being able to digest a set of facts (the client's "story"), to identify the legal problems or issues posed by those facts, to apply governing legal principles to those facts, and to come to a conclusion about the possible consequences for the client under the law given those facts.

But as you now know—because that is what Holmes was explaining—in real life (and thus on law school exams), legal issues usually do not admit of definitive answers. Instead, there are *provisional*, *probabilistic* answers. And because the answers are not clear and pat, the most essential skill to being a lawyer is learning to make *arguments* about what those answers should be—to identify what might persuade a judge or other decisionmaker. What matters most for lawyers, and for exams, is the ability to make cogent arguments about how legal rules apply or should apply to a certain set of facts. As

we said, law school classes aim to convey all sorts of information about the legal system, the law itself, and the ways lawyers practice law. But if there is one skill your professors universally hope to teach you, it is to make legal arguments based on a set of facts, and to get a sense of what makes for a weak or strong legal argument.

We're going to say this again, because it is the most important point. And yet, for some reason law students resist hearing it. *Law and law school are not about reciting legal rules or spouting information; they are about reasoning cogently and making careful and convincing arguments, on the basis of legal materials, for particular conclusions.* In this respect, legal education is somewhat unique, and probably unlike much of the learning you have done in the past.

So now you know: Being able to sift through and identify salient facts, and make the best arguments for your client, and to assess with some accuracy their chance of success, is what people mean when they speak of "thinking like a lawyer." And guess what? Doing this well isn't so easy. If making good arguments was a snap, law school would be unnecessary, and lawyers could not claim the professional status that they do.

### LINKING LAW SCHOOL AND WHAT LAWYERS DO

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Law students often are frustrated by what they see as coyness on the part of their professors. Questions are met only with other questions. Every issue discussed in class has another side to it. Nothing ever seems to be wholly settled or indisputable. New law students in particular are understandably hungry for simple rules and conclusive answers. Still, they rarely get them. This is what makes law school maddening and law exams frightening.

By now you should see why professors do this. They are not sadists. They do it because that's precisely how it is in the real world of law practice. The law is constantly in flux. Today's settled doctrines—like "promissory estoppel" in Contracts and "comparative fault" in Torts—didn't always exist. The law has evolved because smart lawyers helped judges to see the need to deviate from existing doctrine to help shape rules that met (in Holmes's words) "the felt necessities of the times." Should representing the Bad Man seem dismal to the altruistic among



you, there is hope in the fact that even he might have the equities with him, even when the law is against him. In any event, a good lawyer must make cogent legal arguments on behalf of her client, which in turn requires an ability to distinguish arguments that are strong from arguments that are weak.

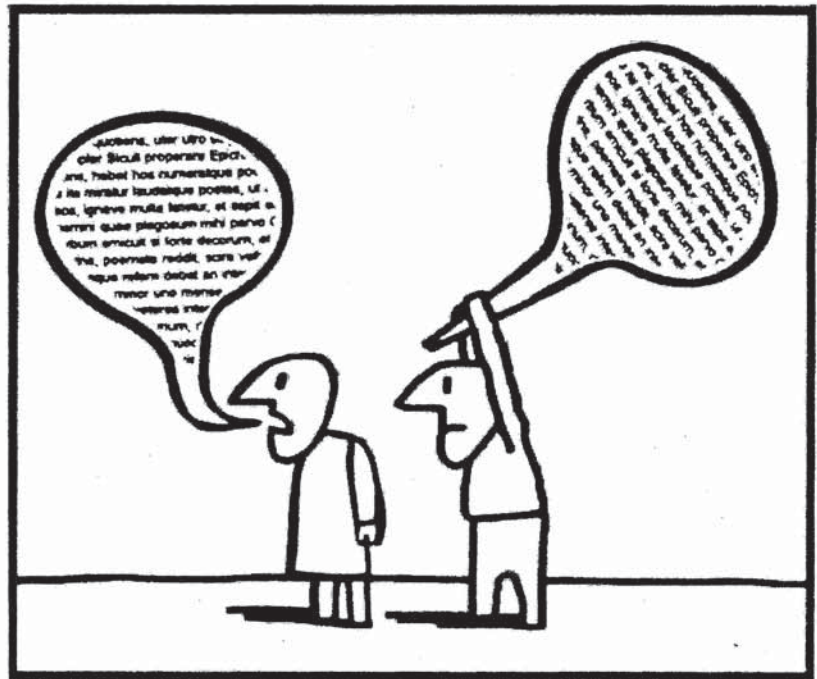
Students constantly want their professors to tell them what the answer is. Not only is that impossible — because many legal questions have no clear answer — but it would be doing you a disservice. The real world is just not that pat.

To do well on exams, and in the real world, you have to embrace a certain degree of uncertainty. Law is in equal parts knowledge and ongoing analysis. Good lawyers, no matter what the practice setting, spend their days making and analyzing arguments. Good lawyers know the difference between an argument that is likely to be a winner and one that will fail. Great lawyers recognize how to take an argument that seems weak and make it as strong as it can be. Star lawyers think of an argument no one ever has, or push an argument that most others thought couldn't possibly prevail, and in doing so change the path of the law.

Consider this story: When one of us (Friedman) was a 1L, he went to see a professor to ask some questions about the course. The professor asked, "So, how's it going?" Friedman remarked on the noticeable anxiety around the law school about exams. Friedman was anxious too, but he was feeling ready. Given how stressed out everyone else was, though, Friedman was worried he was missing something. The professor responded, "All I can tell you is that most of the people coming to my office still think there are answers to their questions."

What Friedman's professor was trying to underscore is that law students often misunderstand what they are supposed to be learning. Even after a year of being told the contrary, they still think that their job is to find "the" answer to a legal puzzle, when in fact there is no single answer. Rather, it is their job is to use legal concepts and categories to break down these puzzles into an orderly sequence of questions, to identify plausible answers to those questions, and to work through the strengths and weaknesses of the arguments for those answers.

If you think about it for a moment, you already knew all of this, although it is easy enough to forget while contemplating exams. You watch television, you go to the movies, you read books — lawyers and legal disputes are frequently the subject matter of good dramas.



Law is about making arguments

Why? Because we have an “adversarial” legal system: There are always two sides (or more) to a dispute. Legal disputes are entertaining precisely because the sides are in tension, each making arguments about why their side should win. That’s why there are many more shows about lawyers than, say, computer programmers. So if you find the “arguments-not-answers” idea perplexing, think about that adversarial process, and realize it is all about each side making the best arguments it can.

Indeed, what primarily sets judges apart from other lawyers is that it is their job to pronounce the winner and loser. (If you think about it, *that* must be a stressful job.) Judges aren’t necessarily smarter than the rest of us, or in possession of greater wisdom. But they *have* to decide, no matter whether a case is easy or difficult. They impose clarity on uncertainty.

Yet, to prove our point, judges often disagree. Judges in different times and places reach different answers. Judges on the same court frequently dissent. Speaking of the U.S. Supreme Court, Justice



## Chapter 2

### THE MISSING LINK

- ✓ Why law school classes can seem disconnected from exams.
- ✓ Classes require you to analyze judicial opinions; exams require you to analyze fact patterns.
- ✓ What you need to know for a strong start in law school.

In Chapter 1 we mentioned that law students sometimes complain that exams seem like random exercises that do not test what lawyers actually do. We also explained why this complaint is off the mark. We confess, though, that we've long puzzled over the source of the complaint. Most 1Ls don't really know much about the practice of law. So why do many of them have strong views about the supposed "artificiality" of exams?

It took us awhile—and a lot of conversations with law students—but we think we now understand the source of the confusion. And this realization has helped guide this edition.

What really throws off law students, we have come to believe, is not a gap between exams and practice, but a gap between exams and *classes*. Law school is an intense, immersive experience. You will spend hour upon hour in the classroom and preparing for the classroom. As you do—and with a little help from us—you will quickly get a sense of the skills you must master and display for class. It turns out, however, that these skills, though ultimately connected to the skills that must be displayed on exams, are quite distinct. *In short, while*

*classes prepare you for exams, they do so indirectly.* Exams require you to take what you have learned and apply it in a new and different way. It is thus understandable that students experience a disconnect between exams and everything that comes before them, and hence regard exams as “artificial.”

Now this is a problem we can get our heads around! It is also one we can help you deal with. So, having said a few general words about exams in Chapter 1, we’re now going to go back to the beginning—of the semester—to talk about classes. The goal of this part of the book is to allow you to see, from the outset, how the skills you will be learning in class relate to what you will be asked to do on exams. To complete this task fully, you’ll have to read Part II as well—that’s where we talk about exams. Part I is mostly about how to be the sort of student who will get the most out of law school, in order to do well on exams. But we want to begin—you should begin—by getting some insight into why classes look different than the exams you will take.

### **HOW CLASS IS *NOT* LIKE EXAMS (OR PRACTICING LAW)**

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We saw in Chapter 1 how exams are usually fact patterns, mirroring the sorts of stories that clients tell their lawyers. The job of the lawyer, as with the exam taker, is to take that story and translate it into a set of legal issues, then analyze the issues, by recognizing and making good legal arguments.

Here’s the odd thing. When it comes time for class, and preparing for class, you probably will not be given fact patterns, nor asked to analyze them. Instead, most law school classes are taught via what’s called the “case method.” According to this method, law professors require their students to read edited judicial opinions (the “cases”), and to come to class prepared to explain the disputes that gave rise to those opinions, the content of those opinions, and the reasoning deployed by the judges who wrote them. This method of discussing cases has a relationship to what lawyers and exam takers do: It is meant to develop the set of necessary skills, as we’ll explain. But this is a very different kind of exercise than the exercise of analyzing a fact pattern or advising a client.

These days, more law professors are employing alternative teaching methods, including problem-based methods. When they



do, it's often for the reason we've just been discussing. Solving problems is closer to what lawyers do than slogging through scores of judicial opinions. But most of the books you will use in law school are designed around the case method, and the problem-based approach is not the norm, particularly in core 1L classes such as civil procedure, contracts, criminal law, property and torts.

So there you have it. We law professors usually teach one way (by having you read cases), yet test another way (by having you analyze fact patterns). While this might seem crazy, there is a method to our madness. In fact, "method" is exactly what there is. That's why the way that law professors teach is referred to as the "case method" or the "Socratic method." Its development at the turn of the twentieth century still is heralded as a great advance in legal education. Prior to that time, law students learned by being lectured to about legal rules, and by sitting in court and listening to lawyers argue. (Yawn.) But, in 1870, Harvard Law School appointed a new dean with the formidable name of Christopher Columbus Langdell. (How about that facial hair!)



Christopher Columbus Langdell

Langdell, a contracts scholar, was firmly convinced that his subject, and pretty much every legal subject, would be best taught

by having students read a bunch of judicial decisions in which judges applied and developed legal rules in the context of deciding particular disputes. Only by seeing law in its concrete application, and only by appreciating how later decisions built on, or departed from, earlier ones, would students come to understand the rules and principles around which each field of law is organized. Landgell's inspiration came from the natural sciences. His idea was that extensive, meticulous review of judicial decisions would permit a rational and useful classification of law's general rules or principles, much like extensive, meticulous observation permitted the biologists of his time to organize the natural world by reference to kingdoms, phyla, classes, families, and so forth.

Even though most legal scholars don't accept Landgell's biological analogy (law is not a natural science!), they continue to embrace his teaching method. In fact, the case method remains central to law school education for reasons already emphasized in Chapter 1: the case method is designed to show you how law is as much (or more) about arguments than answers, and to teach you how to make the sorts of good (and bad) arguments that lawyers make.

Through the case method, students are exposed to scores of judicial decisions. In the process, they learn the applicable legal rules. As importantly, they see *examples* of judges and lawyers reasoning through legal issues, making the sorts of arguments that lawyers make, day in and day out, in negotiations, in briefs, and in the give and take of the courtroom. (Indeed, debates in court over the law and its application to a case are called "*oral arguments*.") Each judicial decision represents the triumph of one side's arguments over the other. A good professor, by asking the right questions, can elicit the competing arguments from students, and help them—through these discussions—get a feel for what makes for a good legal argument or a poor one.

Make no mistake, the case method is intended to prepare you—and will prepare you—to be a lawyer and, before then, an exam taker. Nonetheless, your professors' use of this method means that daily discussions in class are going to look and feel quite different from the practice of law and the taking of exams. Probably the single most important skill, and most difficult-to-master skill, in taking an exam—and in practicing law—is spotting the critical legal issues within a set of facts. (As you'll see, much of our exam-taking advice concerns how to



spot issues.) Yet, analyzing the cases that you read in class does not require this skill. Why not? Because judicial opinions usually state the issue(s) raised by the case right up front, saving you the need of figuring that out for yourself. Then the balance of the opinion is given to analyzing it to reach a conclusion.

## WELCOME TO CLASS

Every professor teaches in his or her own way. Some use the Socratic method—lots of questions and few answers—while others lecture. Some “cold call” on students, meaning you never know when you’ll be called upon to respond to questions. Some have students on a “panel” who know that they are “up” that day; and so on. Yet, no matter which methodology your professor employs, most still use the case method, and most classes follow a certain pattern. Probably, then, things will go like this . . . .

Class starts with announcements, pleasantries, and a summary of what happened the day before. Or not. Maybe the professor just jumps in. And then the drill begins.

The professor announces the assigned case. (Here, we’re going to use *Baker v. Farmer*, the short case we discussed last chapter.) And then she asks a set of questions that will be very common from class to class, especially in the early days.

Quite likely, the professor will ask you to describe—crisply and accurately—the events that gave rise to the litigation. What the professor wants to know are the key *facts* of the case. How is it that

See below.

Baker (Plaintiff/Appellant) v. Farmer (Defendant/Appellee)  
79 Ill. 798 (1875)

**Major, J.** The appellant, Baker, a resident of Jasper County, sued the appellee Farmer, also a resident of said county, alleging damages from Farmer's failure to deliver wheat under an oral agreement between them. In the trial court, Farmer successfully moved for dismissal on the ground that, even if there were such an agreement, the suit must fail because the courts of this state cannot take cognizance of an agreement unless it is in writing. The Court of Appeals affirmed.

We reverse. The trial court committed an error of law in granting Farmer's motion. As long as there is reliable evidence from the parties or other sources as to the existence and terms of an agreement, a writing is not necessary.

Baker's suit shall proceed to trial to determine if in fact there was an agreement and, if so, its precise terms.

*So ordered.*



these parties ended up in court? What was the basis of their dispute?<sup>12</sup>

This part of the discussion should not be taken lightly. One of the most important things about law school is learning what within a case is important and what is not. The fact that the contract between Baker and Farmer was not written down is crucial. The fact that Baker and Farmer both resided in Jasper County probably is not. Also, note that some judicial opinions *omit* key facts. This means that, as you read opinions, you should be thinking about not only what you do know about the case, but also what you *don't know, but should know*.

After a discussion of the facts you may get some questions about the *procedural posture* of the litigation. How did this case get to *this* court? As you know, *Baker* came up through the Illinois appellate courts. The trial judge dismissed the case for want of a written contract. These things, too, are very important. As you will learn in Civil Procedure, the fact that the case was dismissed on this ground means that: (a) there never was a determination of whether there actually was an agreement; and (b) for purposes of resolving the question of law—whether a writing is necessary—all of the facts are assumed to be true as the plaintiff, here Baker, alleged them in his complaint.

After these essential matters are dealt with, the professor will ask: “What’s the issue in the case?” Here she wants you to describe—again, accurately and concisely—the question(s) of law that the court aimed to resolve with its decision. Each case has its own issue or issues. In *Baker v. Farmer*, for example, one could frame the issue as follows: “whether a contract must be in writing to be enforceable.”

The nifty thing about judicial opinions—what makes them great for training neophyte lawyers in legal analysis—is that students usually don’t have to work too hard to identify, at least in a rough way, the issue(s) raised by a given case. This is because opinions will usually do

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12. In the first days of law school, before you get to the facts, you might spend time on preliminary issues, some of which we have covered in prior chapters. For example, you might be asked to identify the plaintiff and defendant, or appellant and appellee, or you might be asked to explain the information that is provided in the case caption.

it for them. True, a given opinion might not contain a sentence that reads: "The issue in this case is \_\_\_\_\_." Moreover, at times it can be maddeningly difficult to describe issues with precision. (Was the issue in *Baker* whether *all* contracts must be in writing, or whether *some* contracts must be in writing?) Still, these caveats aside, it is *much* easier to identify issues in opinions than in fact patterns. As we will discuss in a moment, this is one of the key differences between classes and exams.

After the class is clear on the issue(s), the professor moves to the substance of the case: "What did the court *hold*?" Here she wants to know the *rule* that the court used to dispose of the case. Technically, each case is simply a resolution of the parties' dispute: the plaintiff or the defendant wins. But as we saw in *Baker v. Farmer*, the court also will have stated a rule that, when applied to the facts of the case, generates a victory for the prevailing party and a loss for the losing party.

One interpretation of the rule in *Baker v. Farmer*—the one you would almost certainly give if you'd read no other cases—is that a contract does not have to be in writing to be enforceable.

Finally—at least for this still preliminary part of class (and why it is preliminary you will see in a moment)—you might get some questions that ask you to discuss *why* the court adopted the rule that it adopted. In other words, you will be asked to discuss the *justification* or rationale for the court's holding. Perhaps this will involve reviewing what the court actually says on this question. Often, however, it will involve a more speculative or open-ended inquiry into *possible* justifications for the holding, including justifications not explicitly stated in the opinion. One could plausibly justify *Baker's* holding, for example, on the ground that, at least in 1875, a hard-and-fast requirement of a writing to render any agreement enforceable would be impractical—it would introduce too much uncertainty in an era in which a lot of business was conducted on a relatively informal basis.

When you read an assigned opinion, you will sometimes think that the court did a lousy job of justifying its holding. (Perhaps you thought that about the imagined opinion in *Baker*.) It's perfectly fine to have that reaction. Some judicial decisions are badly reasoned, and your professor might occasionally assign you such an opinion just so that you can see what it looks like. But be careful! Before you trash a court's decision you should, in your own mind, make the best case that you



can for it. And you should also come to class prepared to give reasons in support of your critical reaction. Simply asserting that “I don’t like this decision,” or “this doesn’t seem fair” won’t cut it.

### EXPLORING RULES THROUGH HYPOTHETICALS: WHAT YOU’RE HERE TO LEARN

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Thus far we have envisioned your professor walking you through a judicial opinion in a somewhat self-contained manner. In other words, the focus of the envisioned discussion has been on the text of an assigned judicial opinion. But at some point in the discussion, usually when you get to the holding of case and its justifications, you and your fellow students will be hit with the dreaded *hypotheticals*. The professor will ask, “Okay, I think we understand how the court reasoned through the case. But what if we change some of the facts? Would the holding still apply? Or, “What if the issue had been presented in a different procedural posture?” Or, “What, if anything, do changes in social and political circumstances tell us about the soundness of the court’s holding?”

This aspect of class frustrates many students, especially in the early days of law school. For one thing, your professor might ask hypotheticals that seem odd, if not bizarre. (It wouldn’t surprise us if you were to encounter some hypothetical questions featuring alien life forms.) For another thing, the professor often won’t give definitive answers to the hypotheticals that she raises—or sometimes any answer at all. (A ‘hard-core’ Socratic professor might ask only questions.) It might seem as if you are being teased or toyed with, and it may be hard to see the point to these exercises.

Given the mystifying aspect of what is going on, your inclination may be to scribble or type as fast as you can, simply trying to get it all down. Unless you are different than most students we encounter, for the first few weeks of law school this is no easy task. You won’t

understand many of the key terms in the cases, and the professor will be speaking a language you only partially understand. It is like learning how to construct or disassemble an automobile, which would be challenging enough, except the directions are being provided in a foreign language that you barely know. Worse yet, it will feel like there are all sorts of parts and implications of the case that others somehow had seen, but you hadn't. Then, to make matters completely impossible, the professor may not be answering any questions; she seems only to be asking them. Nothing fits together in an evident way, nothing seems clear or certain, there is just a lot of nodding and "what if" going on.

Getting dizzy? That's okay. Let's pause and take a breath. Remember what we have been saying from the outset. Law school is not merely about learning rules. It is about learning how to think and argue like a lawyer. *That* is what the questions, the challenges, and the weird hypotheticals are all about. Don't make the mistake of treating these as distractions that are getting in the way of you learning "what you need to know." They *are* what you need to know.

Hypotheticals and their discussion teach you two crucial things. First, they force you to realize that legal rules cannot simply be plucked from a rule book. When you initially read *Baker v. Farmer*, you understandably might have taken it to stand for the rule that *no* agreement needs to be in writing to be enforceable. But [there are] additional cases where there [are] at least plausible arguments for the proposition that *some* agreements do need to be in writing to be enforceable, even if not the agreement in *Baker* itself. However, if some agreements are enforceable without a writing and others are not, which are which? These are the rules you are so hungry to learn when you come to law school. But, as we hope you now see, they may not be presented in a list, one after another. Rather, they are the conclusions you draw only by working through cases and hypotheticals.

The second function of hypotheticals is even more important. Wrestling with hypotheticals teaches you how to make legal arguments, and how to tell good arguments from bad ones. In the case method, the contours and justifications for a rule are explored by making arguments. And as those arguments are made and accepted or rejected (by the professor, by the class, or even just in your own mind), you begin to see what makes an argument strong or weak.



Again, to see this, you need only consider our old friend *Baker v. Farmer*. It is only by reasoning through the imagined “next case”—the case involving an agreement for the sale of land for personal use, or land for commercial use, or for shares of corporate stock, or for something else—that you develop the ability to defend and critique legal rules.

## FINDING THE MISSING LINK

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We promised we would connect law school classes to exams and to practicing law. If you have been following closely, you will see that we already have. But there’s a lot to be said for making explicit what is implicit, so here goes.

Think back to Chapter 1. That is where you learned that in law there are as many arguments as answers. Argument is the name of the game. Arguments are what lawyers make to further their clients’ interests. They insist that under the law (the rules) and their client’s situation (the facts), the client should prevail.

What you are learning through the case method is how to make good arguments and recognize and avoid bad arguments. Yes, you are here to learn the rules themselves. But as we’ve said repeatedly, to state basic legal rules (at least roughly) is relatively easy. To *understand* them at the level at which you can bring them to bear for your clients is difficult. Through the process of thinking through hypotheticals, class is where you learn to think like a lawyer in just the way we described in Chapter 1.

As we’ve said again and again, countless law students get confused and think they are just in class to learn black-letter law. The reason we keep saying it over and over (and over) is precisely because—despite many people telling them this—law students have trouble hearing it. They are desperate to avoid this conclusion. They hold out the hope that all they need to learn are a simple set of rules that are amenable to clear application. But that is not how things are. The main point of the

1L year is to learn the methodology of law: how law works, how to make arguments like lawyers, how to know a good argument from a bad one.

It's more difficult than you might imagine teaching apprentice lawyers which arguments are good, which are bad, and how to tell them apart. This is because the differences are subtle and at times hard to articulate. It is a question of developing *judgment*. To help you do this, what your professors do—and perhaps all they can do—is put you through your paces, and then gently (or not so gently) reinforce or criticize what students say in response. Professors ask questions; students make arguments. The only way you can learn to tell good arguments from bad arguments is from observing the cumulative responses of your professors, and your classmates, to many, many arguments. Or, if the professor is one who only lectures, from listening to what that professor highlights or ignores in the reading, and what arguments he or she makes. That is how you come to understand the structure of legal argument in this specific subject, and more generally.

This point about learning to make arguments through the question-and-answer of the case method yields an interesting point about the rigor of law school. If you've watched a movie like *The Paper Chase*, or heard stories about the 1L year, law professors might seem to be terrifying creatures. The truth is that over time we've become (on average) less so. Law professors of old prided themselves on intimidating their students; today, many of us understand that it is easier to listen, and learn, if one is a bit more relaxed.

And yet, because there is something ineffable about learning what good and bad arguments consist of, we teach the way we do so you can see in action what we can't fully describe. For this reason, very sharp indications of approval and disapproval to answers proffered by students have their value. They make clear the lines between a good and bad argument. To the extent we've softened our responses to students to make them more comfortable—and we'll concede we have—we may not be fully doing the process justice.

All of which is to say: leave your ego behind in class. You're trying to learn by listening to and engaging with the sorts of arguments that work best in the law. This means labeling arguments—not students—as better or worse. It is about the argument, not the student, and it is best not to lose sight of that. Indeed, be grateful to your fellow students



who are game to have their arguments shot down: they are helping to teach you.

Having explained why and how classes teach you the central skill for law school exams and for being a good lawyer, we want to revisit the puzzle of why exams seem so different and disconnected from classes. We mentioned it to you earlier, briefly, and we've alluded to it throughout. But we're pretty confident that you are now ready to take this on board fully. It's what we realized as we talked with students about their confusion concerning exams.

Although law school classes are a terrific vehicle for learning to make arguments, they are not a good venue for learning the most basic and important skill for taking exams: *issue spotting*.

As we told you at the conclusion of Chapter 1, there are four steps to giving legal advice, whether on an exam or as a practicing lawyer. We'll repeat them here: (a) identifying the issue; (b) stating the rule(s) that may apply to that issue; (c) making arguments as to whether and how the rule(s) might apply to the issue; and (d) drawing a conclusion.

These four steps provide the basis for the all-important acronym: IRAC. We are going to begin Part II by discussing this acronym in greater depth. For now we hope you can see clearly that law school classes do a great job of teaching three quarters of the formula: "RAC" without the "I." You learn legal rules, you learn to make arguments about how to interpret and stretch them, and in assessing good and bad arguments, you can evaluate the probabilistic conclusions we discussed in Chapter 1.

Where the case method does a disservice, though, is in spotting issues and prioritizing among them (the latter being what we will later call "issue-sorting"). *This is because judicial decisions typically will frame one issue or a couple of issues for you.* It may be tough specifying those issues precisely, but they are right there, front and center, in the case. What you don't get in class is a fact pattern, in which no one even begins to identify the issues for you. On exams, typically, it is for you to spot and sort the issues.