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“WHEN YOU COME TO A FORK IN THE ROAD, TAKE IT,” AND OTHER SAGE ADVICE FOR FIRST- TIME LAW SCHOOL EXAM TAKERS

Patrick Wiseman*

INTRODUCTION

The inimitable Yogi Berra once advised, “When you come to a fork in the road, take it.”¹ He presumably did not intend these wise words for first-year law students anticipating their first exam, but better advice is hard to imagine, as I’ll explain.² Long before you take that first exam, though, you need to prepare for it, so I’ll describe some of the things you need to be thinking about as the semester progresses. I’ll illustrate some of what I say with examples from Real Property, a first-year course I teach, but the advice is applicable to all of your first-semester courses and their essay exams.³ Getting through law school is a matter of learning to “think like a lawyer,” preparing early and well, outlining substantive law, practicing the application of law to facts, and keeping your wits about you at all times, but especially at exam time.

It will quickly become evident that following this advice will require that you manage your time well, but presumably you knew before you started law school that time management would be key to success. I offer no shortcuts, indeed I reject a few. This essay is not about how to “play the game” or “beat the system.” It’s about taking

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1. YOGI BERRA, WHEN YOU COME TO A FORK IN THE ROAD, TAKE IT! INSPIRATION AND WISDOM FROM ONE OF BASEBALL’S GREATEST HEROES 1 (Hyperion 2001).

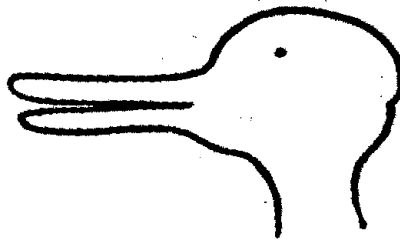
2. As Yogi Berra himself explains, “no matter what decision you make . . . you shouldn’t look back. Trust your instincts.” *Id.* at 2. As will become obvious, as advice to law students taking an exam, I interpret the fork advice rather differently: *always* look back.

3. Anything other than an essay exam is quite rare in the first year of law school. My advice *may* have some value to second-semester students and even to 2Ls and 3Ls. But, as you progress through law school, you’ll figure out what works best for you.

law school seriously from the outset so that you can be the best law student and, eventually, the best lawyer you can be.⁴

I. GO WITH THE FLOW

From the beginning of law school, do not resist learning to “think like a lawyer.” Thinking like a lawyer entails a willingness to make distinctions which do not make a difference to most people, a very high tolerance for ambiguity, the capacity to see ambiguity where others do not, an ability to see issues from all sides, and an indifference to which of those sides is right. In short, thinking like a lawyer is *superficially* amoral and perverse.⁵ Nonetheless, don’t resist it.⁶ You may be familiar with the Duck-Rabbit. This is the version from Wittgenstein’s *Philosophical Investigations*:⁷



A legal mind is a mind comfortable with the Duck-Rabbit being both and neither at the same time.

4. Taking law school seriously does not preclude its being fun; quite the contrary, in fact.

5. The apparent perversity of legal thinking is one of the reasons that legal education has a tendency to promote cynicism about law. For a more in-depth discussion see Patrick Wiseman, *Legal Education and Cynicism About the Law: Practicing Ethical Jurisprudence in the Classroom*, 25 CUMB. L. REV. 1 (1994-95).

6. You will not have much time during your first year to reflect on how (or if) law school is changing you. So, after the first year is over, take the time to reflect on whether the person you were when you arrived would like the person you have become. It may be that the answer is yes. But if you have any reservations about it, you really *do* have control and can wrest it back before beginning your second year.

7. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 165-69 (Blackwell Publishers 3d ed. 2002). Wittgenstein uses the Duck-Rabbit to make a point about language, ambiguity, and context; I use it to make a point about the legal mind. The Duck-Rabbit was originated by American psychologist Joseph Jastrow. See Joseph Jastrow, *The Mind's Eye*, 54 POPULAR SCI. MONTHLY 299, 312 (1899).

II. ANTICIPATE

You should be thinking about your final exams from the first day of law school. In most first-year courses, you will receive no feedback on your understanding of the material during the semester; everything rests on the final examination.⁸ This being so, it is imperative that *you* do everything possible to provide your own feedback as the semester progresses. There are many resources available to help you do that.⁹

Your first law school examination is likely to be different from any exam you have taken before. Law school exams do not test your ability to memorize material and to regurgitate it back to your teacher, using your teacher's favorite turns of phrase in an effort to ingratiate.¹⁰ Some law professors (I'm one) give only open-book exams, in part to emphasize that we are not asking you to tell us what the law is. We know that you know what the law is; you have it right there beside you.¹¹ Rather, we want to see what you can *do* with the law, given a set of facts different from any set of facts you've seen before. Your ability to apply the law to facts is what's being tested; and the best way to prepare for an exam which tests that skill is to practice. But in order to practice applying law to facts, you need first to outline the applicable law.

8. No one justifies this fairly standard practice. It defies recent educational theory, but law schools tend to stick with tradition. See Terri LeClercq, *Seven Principles for Good Practice in Legal Education: PRINCIPLE 4: GOOD PRACTICE GIVES PROMPT FEEDBACK*, 49 J. LEGAL EDUC. 418 (1999).

9. Among the resources for self-assessment are online lessons with many opportunities for self-testing, available from the Center for Computer-Assisted Legal Instruction (CALI) at <http://www.cali.org/>. Your school is probably a member of CALI (most law schools are) in which case the lessons are free to you. (In the interests of full disclosure, I am on both the CALI Board of Directors and the CALI Editorial Board. That being so, I can testify to the rigorous review process to which CALI lessons are subject. Nonetheless, if your professor and a CALI lesson disagree, the lesson is wrong!) Other useful resources include the EXAMPLES AND EXPLANATIONS series from Aspen Publishers, the PROBLEMS AND ANSWERS series from Aspen Law and Business (a subsidiary of Aspen Publishers), the QUESTIONS AND ANSWERS series from LexisNexis, and the STUDENT'S GUIDE series from Matthew Bender. All, as most of their names suggest, are rich in opportunities to assess your understanding. There are also various treatises and hornbooks available, covering all your first-year courses.

10. I do not mean to suggest that all undergraduate exams *are* like that, but I've seen enough first-semester exams to recognize the "technique!"

11. You should prepare for an open-book exam just as you would prepare for a closed-book exam. Even in an open-book exam, do not expect that you will have time to look anything up.

III. OUTLINE

When preparing an outline of the course material, err on the side of detail. Do not extract from the cases the most abstract rule; rather, note the legally significant *facts* of each case and how the rules are applied to those facts.¹² Which facts are legally significant? That's a judgment you will become adept at making as you read more cases, but essentially they are those facts which, if changed, might change the outcome of the case given the applicable legal rules. Incidentally, when upper-class students tell you that they stopped briefing cases after a couple of weeks, don't believe them! It's *possible* that they stopped writing out formal case briefs fairly early on, but they were able to do that only because they had learned to distinguish rule from holding from dictum from procedure from significant fact. It's to master those distinctions that you brief cases.¹³ And those case briefs, if you continue to write them out during the semester, will prove very useful when it comes time to write your outline. So, the student who "saves time" by not writing out a brief for each case will have less raw material to work with when it comes time to outline. These days, of course, most students work on a computer. That's all the more reason to be creating raw material for your outline from the very start of school.

Just as you should write your own case briefs, so should you write your own outline, the point of doing an outline being to internalize the law. Relying on others' outlines will not serve the same purpose.¹⁴ Work with a study group, certainly, but do not divide

12. Where I went to school, the outline was called a "synthesis." Although I consider that a little pretentious, it has a point. It *is* your job, in your outline and on the final exam, to pull together, to synthesize, material which was presented discretely.

13. For this reason you should *never* use commercially-prepared case briefs (or any other pre-prepared case briefs, for that matter). Other than the fact that they are often inaccurate, reliance on them defeats the purpose of learning to brief cases yourself. Do use any other secondary sources (treatises, hornbooks), but use them only and always as a *supplement* to, and never as a *substitute* for, primary sources. You are trying to develop the habits of a professional lawyer, and no decent lawyer relies exclusively on secondary sources.

14. Commercial outlines are available, of course, and there are probably student-prepared outlines floating around your school. *Rely* on them at your peril; if you find them of some use in helping you to prepare your own outline, then by all means use them, but there is no substitute for preparing your own outline.

responsibility for the course outline; that division of labor, while it might seem to save time, defeats the purpose of doing an outline. As the semester progresses, prepare a preliminary outline of each block of material as you move to the next. Then, as the end of the semester approaches, you will have most of the material for your outline already prepared. Do not postpone preparation of your outline to the last few weeks of the semester. By then, the task will seem daunting and will indeed be impossible to do well.

Most areas of law—if not all—can be usefully flow-charted, with predictable decision points identified. Each of those decision points, when it comes time to apply your outline to the particular facts on the exam, represents a fork in the road.

When you have a good outline, it's time to prepare a checklist, essentially an outline of your outline. This will provide you with a list of potential issues. Let me illustrate with a very simple example. Your first-semester Property course will almost certainly cover adverse possession.¹⁵ Your outline of adverse possession will make reference to the cases which illustrate how the elements work. So, for "continuity," perhaps, you'll have read the *Kunto* case.¹⁶ Your outline will make reference to the facts ("The property, suitable only for summer use, was occupied only during the summer months."), the question of law ("Is the continuity requirement for adverse possession satisfied by such seasonal occupancy?"), and the answer to that question ("Yes."). There will probably be other cases or problems relevant to the continuity requirement. Make sure that your outline includes all of them. Let me repeat myself: Err on the side of detail in your outline. Your checklist, a distillation of your outline, will simply list continuity as an element; your outline itself will provide essential detail.

15. It is the very odd law school that does not include Real Property among its first-year required courses! (I am aware of only one.)

16. *Howard v. Kunto*, 477 P.2d 210 (Wash. Ct. App. 1970), in case you're unfamiliar with it, involves adverse possession of seasonal property. One of the issues in the case is whether seasonal possession of the property satisfies the continuity requirement. *Id.* at 213. As the property was only suitable for seasonal use, the court held that the continuity requirement was satisfied. *Id.* at 214.

IV. PRACTICE

With your outline, perhaps a flowchart, and checklist in hand, work through old exam questions, alone and in your study group. If your teacher provides “model” answers, avoid looking at them until you’ve worked through the problem yourself.¹⁷ Treat the exercise seriously by working through at least some old questions in “exam mode,” without interruption, and by giving yourself just the right amount of time in which to complete an answer. If old exams are not available, use the resources mentioned in footnote nine for practice. The more you practice, the less daunting the actual exam will seem and the less likely it will be that your professor can surprise you with anything.

V. THE EXAM - DON’T PANIC!¹⁸

As the dreaded moment approaches, try not to dread it. Keep things in perspective. It’s likely that this first exam counts for only three credits or so, maybe some three percent of the credits required to graduate. I know from personal experience that first-semester grades are not necessarily a good predictor of later law school performance. (Of course, in your case, they might be; I didn’t have the benefit of this advice!)

Okay, you’re settled in to take the exam. Read the instructions and take care to follow them.¹⁹ Read the exam from beginning to end; the mind is a wonderful thing and will be working on later parts of the

17. Although I provide almost all of my old exam questions to my first-year Property students (almost 20 years worth!), I usually do not provide either a “best” answer or a “model” answer. The best answer would just be the best a prior class was able to produce, and my current students should aspire to do better; a “model” answer is really not something to which they *can* aspire (although, once or twice, the best has approached perfection). I provide the questions so that, if they take practice seriously, they will be able to deal with anything I throw at them. There are, after all, only so many variations on the themes of adverse possession!

18. DOUGLAS ADAMS, *THE HITCHHIKER’S GUIDE TO THE GALAXY* (Del Rey reissue ed. 1995).

19. My exam instructions used to say “points may be lost for failure to follow any of these instructions.” A student once asked, “Are points lost for failure to follow instructions?” I asked, “What, you’d change your behavior if the instructions said that points *will* be lost?” “Yes,” she replied. My instructions now say that points *will* be lost for failure to follow instructions, and they are.

exam even as you're consciously working from the beginning. Don't panic if no issues are immediately evident to you. You've prepared a good outline, with a checklist of potential issues.

Be sure to read the question carefully; factual errors are inexcusable and also lead you to identify issues not actually presented. Make marginal notes of the issues you think presented. An "issue" is a legal question which could be decided one way or another—a fork in the road. But not everything which needs to be said in your answer presents an "issue" in this sense. For example, if on your Property exam you encounter a grant which reads "O to A for life," A has been granted a life estate, no ifs, ands, or buts about it. There is no occasion to write "on the other hand . . ." ²⁰ But you *should* note that A has a life estate, even though that's not "in issue," i.e., in doubt.

Do not make up facts; base your identification of issues on the facts provided. If you believe a fact needs to be known in order to resolve an issue, say so, but do not *assume* any facts. If there's a fact the significance of which you cannot fathom, you may well be missing an issue.

Once you have identified a list of potential issues, take the time to put them in a logical order. It *may* be that the logical order is the order in which the issues are presented in the narrative, but this is not very likely. ²¹ Logical order may be *chronological* order, i.e., the order in which events in the narrative occur over time; or, it may be that the most logical order in which to present the issues is neither of these, but perhaps the order suggested by your flowchart. ²²

20. There is a school of thought you will probably encounter along the way called Critical Legal Studies (CLS). CLS scholars are even more adept than most lawyers (and law professors) at spotting ambiguity, and so I would not be surprised if at least some of you find "O to A for life" ambiguous. If you are among those few, you have a bright scholastic future ahead of you! E.g., whose life? O's? A's? "Life" in general? Be cautious, though, of finding ambiguity where none is intended. You might waste a lot of time pursuing a fork which really isn't there.

21. Many law professors are frustrated novelists, and their exams give them the opportunity to practice their narrative techniques. The exam, in other words, is a little work of fiction; what it lacks in dramatic integrity, it makes up for in issues to be spotted. Be prepared to suspend disbelief.

22. As it happens, some of my best exams have *not* been the ones in the most logical order. But that's only because the student saw *every* issue and treated it with some depth, even if "out of order." Don't rely on being able to do that.

Students tend not to believe it, but we law professors really are all looking for the same thing, more or less. We're looking to see what you can *do* with the law, given a set of facts you've not seen before. But we might have different *stylistic* preferences; some professors, for example, like an exam which reads like dueling briefs, with the *most forceful* argument on one side followed by the *most forceful* argument on the other. Others (I count myself among them) find that extremely annoying.²³ Respond to the "call of the question"—does it explicitly ask you to write a brief, complete a judicial opinion, or write a client letter? Then do so. But do be sure to *ask* your teachers if they have any stylistic preferences on the exam: Do they prefer that the exam read more like a memo than a brief? Do they expect complete, grammatical sentences? Do they want to see reference to elements of a rule which are not at issue? Do they allow use of abbreviations? Do they expect to see cases cited by name? Do they want explicit statements of issue, rule, application, conclusion (IRAC)?

Speaking of IRAC, no doubt you've heard of it by now. The notion that legal issues can be dealt with by stating clearly the *Issue*, articulating carefully the applicable *Rule*, engaging in sensible *Application* of the rule to the facts, and so reaching an appropriate *Conclusion*, actually has some profound truth to it. But you should use it with caution. Again, if your teacher expects to see explicit use of IRAC on the exam then, by all means do it. But compare the following two examples, addressing, as in our earlier hypothetical, a continuity issue in adverse possession:

23. You do *not* want to annoy the person who's reading your exam along with 60, 70, 80 or more others! This is not to say that grading is subjective (see more on this below), but it is subject to *some* idiosyncratic variation. So you don't want your professor ticked off when grading your exam!

<p>The issue in this case is whether occupation of the cottage only during the summer months satisfies the continuity requirement for adverse possession. The rule is that seasonal occupation of property suitable only for seasonal use is "continual" for purposes of this element.</p> <p>Applying that rule to the facts of this case, the seasonal use here is "continual" in the appropriate sense. Therefore, we can conclude that the continuity element for adverse possession is satisfied.</p>	<p>The continuity element of adverse possession is satisfied by seasonal, in this case summer, use of property suitable only for such use.</p>
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Some professors might give full credit only for the long-winded version. *I* give full credit for the concise version, as it shows quite clearly that the student has understood what the issue is, knows the applicable rule, has applied the rule, and has reached the correct conclusion (not forgetting, of course, that the rule may not be followed everywhere, which is, you guessed it, a fork in the road).

That brings me to another important piece of advice: Do not jump to conclusions. I won't say that to *every* rule there is an equal and opposite rule, as might an adherent of CLS. But I will say that you should at least consider the possibility that the conclusion you've reached is not the only possible conclusion. For every declarative sentence you write, at the very least *think* "on the other hand . . ." and think it seriously. So, our concise application of the continuity rule above might continue, "on the other hand, not all jurisdictions follow the rule that seasonal occupancy of seasonal property satisfies the continuity requirement." But do *not* make up law. If the rule you're applying is universally applied, then there is no occasion for "on the other hand," at least as to the applicable rule. Then again, rarely is application of a rule, even one universally followed, so formalistically straightforward, and so you *should* consider the possibility that perhaps, in the circumstances of the particular case, the *purpose* of the rule might be ill-served by its application. This is a

degree of subtlety, by the way, not often seen on first-semester exams.

If something occurs to you—other than what toppings to have on your pizza tonight—write it down. At least as important as any conclusion you reach is the thought process which led you there. You do not want to be in the position, reviewing the exam after the fact with your teacher, of having to say, “well, I thought of that, but it didn’t seem relevant.”

It will not be the case that every potential issue listed in your checklist will be presented on the exam. The facts in the narrative dictate the relevant law. Think of the facts as a sticky colander. Drop the law (your checklist) on it, and whatever sticks is relevant.²⁴ Do not waste time addressing issues which are not presented; and, unless your teacher has indicated that you *should* list every element of a particular cause of action, do not waste time doing so, except in the most summary way, but address only those which are in issue.

While it may be the case that “jurisdictions differ,” it is not enough just to point that out. Apply the competing rules, unless explicitly told the rule in your jurisdiction. It doesn’t matter if a rule is followed by a “majority” or a “minority.” If there’s more than one rule applicable to a particular fact, you’ve reached a fork in the road. Take it, i.e., apply the one rule and follow where it leads you. Then apply the *other* rule and see if it leads you somewhere different.²⁵ You are essentially constructing a decision tree with every branch made explicit.

Manage your time carefully. If you’re told a question counts for 30%, don’t spend half your exam time on it. And don’t end your exam with a note that you’re out of time. If your answer is woefully short, you’ve just drawn attention to the fact that you did not manage your time well. Besides, if you were not out of time presumably you’d still be writing.

24. If the Rule Against Perpetuities doesn’t “stick” to the facts on your Property exam, you were probably shaking too hard (assuming it was covered)!

25. Unlike real life, where having once taken a path you cannot return and take the other, on a law school exam you both can and should.

Now that your exam is over, forget about it and move on to whatever's next on your agenda. Do not engage in any "post mortem" with other students; it will just drive you nuts. And do not try to predict how you did on the exam; often the exams you feel the worst about will turn out to have been your best. You have earned whatever grade you have earned, and there's nothing you can do about it now. Being in law school, you were probably a pretty good student in college or university. You are probably not accustomed to getting grades in the mid-range. Get used to the idea that that may be about to change. You are among and competing with the smartest people you've ever been among.

A last word about the grading process, as students seem to find it deeply mysterious. Most large first-year classes are graded on a curve. Although there are a few innumerate faculty members who eschew converting "raw" scores to scaled scores, it is the most reliable and fair method of grading for large-section courses.²⁶ Faculty have various methods of assigning raw scores, from the relatively objective use of a detailed list of potential issues, discussion of which earns from one to several points, depending on its depth, to the rather more subjective "holistic" method, whereby the faculty member reads each answer in its entirety and assigns it a score. Some faculty do not initially assign points at all, but rather *rank* the answers to each exam question by dividing them into five or more piles of answers of similar quality, then ranking within the piles until the exams are in order from best to worst. At that point, of course, a grade (which, in large-section courses, should be treated as a raw score, later to be scaled) must be assigned to each answer.

You may be surprised to learn that there is a very high degree of what's called "inter-rater reliability," i.e., you will find, especially in large-section courses, that your grades will fall within quite a narrow

26. It is reliable and fair only so long as faculty are given guidelines which tend to "normalize" their scores across first-year sections and courses. At the very least, those guidelines should specify a mean for the scaled curve; ideally, so as to avoid either wide or narrow grade ranges, those guidelines should also specify a standard deviation.

range. This is so regardless of the method of grading, i.e., the method of assigning *raw* scores.²⁷

It remains the practice in most law schools to release first-semester grades when you are already well into your second-semester studies. Grades are not *deliberately* released at a time when they're likely to have little to no reinforcement value, positive or negative, even though it sometimes feels that way to students. Whatever your first-semester grades look like, assume nothing about your future success in law school. People "get it" at different rates, and your "A" this semester may be a "B" next as the fog lifts for your colleagues; or your "C" this semester may be a "B" next as the fog lifts for you. But overall, your grades in large-section courses will probably fall into a fairly narrow range.

Your law school faculty, having admitted you to law school, want you to succeed. Accordingly, most faculty will give you an opportunity to review your exam. If you think that you would find it helpful, by all means do it. But prepare yourself for a shock when you read your exam; you will quite probably be incredulous that you could have written it! As long as you're performing satisfactorily, my best advice to you is to move on.

VI. FINALLY

When your exams are over, take some well-earned time off, and spend it with those loved ones whom you've been ignoring too much for the last few months! When you return to school refreshed, enjoy the rest of your time in law school; while hard work, law school really can be fun.

27. That this *is* so does not undermine my earlier point about fairness. Especially within sections of the same course, fairness *requires* that each teacher use approximately the same mean and standard deviation when scaling those raw scores. Consider two students in a school which uses numerical grading on a scale of 55-100. Assume that each student performs at a level two standard deviations above the mean. Given that we can assume these large-section classes are each a good sample of the class as a whole, each student should get the same grade. But Professor A sets the mean at 78, with a standard deviation of 5, and so the student in that section gets an 88. Professor B sets the mean at 79, with a standard deviation of 8, so that that student gets a 95. That's hardly fair.