

# *How to Use This Book*

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## **IF YOU HAVE NOT YET STARTED LAW SCHOOL**

If you have not yet started law school, you could read the book straight through. Depending on your learning habits, you may read or even scan the book quickly for an overview. If overviews are important for you, and even if they are not, examine the Summary Table of Contents and the Analytical Table of Contents, which present a general and then a detailed road map for you. Such quick reading or scanning may lead you to *focus on a particular chapter or two or three*: perhaps, learning for exams (Chapter Two) or issue spotting (Chapter Four) or writing formats (Chapter Five). *You may need only a few chapters in this book, depending on what you bring to the challenge.* Only you know what you bring.

If your inclinations are to read in a more meticulous way, do so after you have gone through both Tables of Contents. Meticulous readers need direction too. Give special attention to the brief Introduction and to Chapter One, which map the terrain through which you will be traveling.

Whether you proceed quickly or meticulously, embrace each section you select and do not be discouraged. Since you have not yet started law school, you do not bring legal understanding to your reading. You should expect to encounter concepts, categories, and terms that are not altogether clear to you. But the clarification you seek, the answer to your question, may emerge from the next section or a chapter down the road. Since *How To Do Your Best On Law School Exams* was conceived, designed, and written with holistic themes permeating each chapter, a concept, category, or term presented in one chapter may be presented again in a different context in a later chapter. All the more reason to proceed, not bog down.

Be encouraged too by the maxim, “The more you know the more you will see.” Be confident, therefore, that as law school unfolds for you in the initial weeks, you’ll see more in these chapters because you’ll bring increasing understanding to them, including important initial insights into your strengths and weaknesses. Hence, you may return, in *reference fashion*, to this book for particular needs: to the chapter on learning to review, to assess and enlarge your own learning methods and techniques; to the chapter on issue spotting, to refine your issue-spotting skill; to the chapter on outlining your courses; to the chapters detailing exam problems and answers.

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## **IF YOU ARE ALREADY IN LAW SCHOOL**

If you are in the opening months of law school before taking your first-term exams, you should proceed in one of the ways indicated above.

But if you have received initial grades, even on a practice exam or possibly a mid-term, and you did not do as well as you expected and as your effort promised, it is vital that you identify both your strengths and weaknesses. Improvement, indeed even the direction and priority of your correction efforts, presupposes such diagnosis, as well as the courage and persistence to ferret out your weaknesses as well as your strengths. In my experience, many summon this courage and persistence, struggle well, and improve, sometimes dramatically, even from a “C” level to an “A” level. But others do not summon this courage; they accept and are defined by their initial grades. They complain about the unfairness of life and fail to improve.

If you have not done well, I challenge you to forego wailing and other responsibility evasion schemes. I challenge you to confront that most elusive and resourceful opponent: the face in the mirror, your hiding-out self, your defense mechanisms, and your temptation not to do your best.

An initial diagnosis, even if refined later, enables you to *concentrate on the chapter(s)* in this book that addresses your weakness(es). To illustrate, if your weakness is in issue spotting, concentrate on Chapter Four and *practice* issue spotting. If you believe that your learning approach is not efficient and effective, one consequence of which is to weaken your issue spotting, devote yourself also to Chapter Two to determine which of the suggestions would enable you to learn better—and *practice* them. If instead, your essays are unlawyerly—disorganized, wordy, meandering—concentrate on the writing formats detailed in Chapter Five—and *practice* writing lawyerly answers.

Two brief stories illuminate how the above approach has worked for other students. First, years back at the Bar Examiners in Albany, New York, I reviewed the bar essays of a former student with him. He had failed the bar twice and was discouraged. His essays were consistently ranked just below what was required. His issue spotting was consistently impressive, but his rule statements were habitually very rough and, hence, his interweaving of element and fact was inevitably also poor. By correcting his single, core weakness in stating rules, he also improved his interweaving and passed the bar exam on his next try. He is not unusual. Very often, there are *one or two basic weaknesses* that are related and ripple out and result in sub-par performance.

Second, also years ago, a first-year student who was performing poorly told me that she felt her undergraduate college program had been relatively weak, and that, as a result, her analytical and other “school skills” were comparably weak. She worked hard at learning about her learning and by third year was performing at an “A” level. I remember congratulating her on her wonderful achievement while also feeling regret that she realized her potential so late in her law school career. “As” in the first year get you on the law review and open up vistas of opportunity.

Finally, *How To Do Your Best On Law School Exams* exemplifies themes, perspectives and methods that are also embodied in my book, *Learning Legal Reasoning—Briefing, Analysis And Theory*, which is used by many first-year students. The themes, perspectives and methods from both books are then also exemplified in my *Learning Criminal Law As Advocacy Argument*. The three books are designed to complement each other.

Have a good journey.

# Introduction

*The funny thing about law school is that we have you come to class and read cases, but you aren't tested over that. You need to learn how to take exams. The best way to do it is to take old exams, and talk about them with other students, and play with hypotheticals.*

Harvard Law School Professor

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## THE NEED FOR THIS BOOK IS FOUNDED ON THREE REALITIES

- You can be smart, go to class, know the cases well, and still do poorly on law school exams.
- To excel on these exams, you must not only study hard. You must study smart: you must understand, practice, and master a set of lawyerly skills to apply what you know on the exams by spotting issues and then resolving them with lawyerly arguments.
- If at first you did not do your best, you can, nevertheless, do better. Many students who initially did not do well have substantially improved their grades over time. They learned how to do better by painful “trial and error learning.” From decades of law teaching, I know you can learn these exam skills without the suffering and disadvantage inherent in unguided trial and error learning.

The exam skills you need to do well are not genetically acquired. Nor are they mysterious or exotic. These skills can be identified, understood, practiced, and refined. Once internalized, these skills apply in each law exam you take, with some adjustments for individual courses and professors. Once internalized, these skills enable you to do your best on the exams.

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## THE GOOD NEWS

You need not be a Holmes or Cardozo to master and apply these exam skills. The challenge is formidable but in no sense Herculean. Remember that battalions of law students have mastered these skills in decades gone. Many of these students were not as able as you. In the past, it was an easy matter to be admitted to law school and not too difficult to be admitted to the “best schools.” Today, it is far more difficult to be admitted to law school, and it is therefore an achievement to be in law school, one in which you should take a measure of pride. You are privileged to be in law school, to have this opportunity to transform yourself into a lawyer, a powerful position in our society that opens up vistas of opportunity and service.

What *exactly* are these exam skills? What *exactly* are the criteria by which you will be graded by your professors? How can you go about developing and perfecting these skills so that you can do your best on the exams? This book answers these questions in a systematic and integrated way. It is designed to present you with a *holistic approach* so that you can most effectively utilize the limited time available to equip yourself to do your best on the exams.

*If you learn and apply the approaches and methods from this book, that may mean the difference between “Cs” and “Bs” or “Bs” and “As”.* Remember that no student can write model arguments. Indeed, no professor can write model arguments in the allotted exam time. You can make mistakes on exams and still do very well. Don’t be discouraged at initial mistakes; be kind to yourself. With persistent practice over the semester, you can master these skills and perform well.

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## FAILURE OF LAW SCHOOLS TO PREPARE STUDENTS FOR EXAMS

Regrettably, while law schools can sometimes be impressive in what they do, most systematically fail to prepare students to take law exams. Many first-year students are painfully surprised by their first law-school exams. Their format and your professors’ expectations about your performance are *radically different* from what is expected in class and what you have faced in college and in most other exams. Even worse, the elaborated, discursive reasoning in the appellate cases you study in class is definitely *not* the type of writing required for most exams. In addition, you do *not* routinely have your exams returned to you with specific comments about your exam strengths and weaknesses, so that you can identify both and struggle to improve.

This routine failure by most law schools is an atrocious, even scandalous, pedagogy. It is axiomatic that taking exams should be a form of learning as well as measuring performance. The fact that many law professors allow students to review their exams, and that *some* have a model or outlined argument available, or that students can sometimes compare their responses with “A” arguments, ameliorates the harm, but is no substitute for the professorial comment, review, and return that is routine in most schooling and mandated by fundamental pedagogic principle.

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## MYSTIFICATION

The present practice reeks of mystification and obfuscation. I take pleasure in this book in helping to demystify the exam process, in dispelling the secrecy that surrounds it, and in making familiar what is unfamiliar.

Many students, who have looked at their exams and compared their responses to excellent arguments of others having “A” grades, or with a model argument, are puzzled. They have often told me that they made all or most of the points set forth in the “A” argument, or the model argument, but that the “A” response “said them differently.” Sometimes, these statements are accurate. What these students typically do not understand, however, is that differences in grades result from the application of special exam skills in issue spotting and arguing that are a *sine qua non* of the excellent student, the excellent exam taker, and the excellent lawyer.

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## INTEGRATED AND SYSTEMATIC APPROACH

In this book, I present then *an integrated and systematic approach to empower you to identify, learn, practice, and master the skills-centered learning and performance* that you need for law exams (and practice). In Chapter One, I specify the nature of the “beast”: the different challenge posed by law-school exams, the *six tasks* you must perform in issue-spotting and exam arguing, and the *six criteria by which your professor will grade you*. I also specify an overall approach designed to equip you to perform these six tasks to fulfill the six criteria. In Chapter Two, I detail attitudes, methods, and techniques to aid you to *learn how to learn law* most efficiently and effectively, both for exams and for practice.

In Chapter Three, a variety of methods and techniques for outlining your courses are specified. In Chapter Four, the art and craft of issue spotting are decoded. In Chapter Five, a series of formats for outlining, organizing, and writing out your exam arguments is detailed. In Chapter Six, an array of typical essay exam problems is set forth. In Chapter Seven, model as well as excellent and poor student responses to the problems are detailed with brief explanations of both strengths and weaknesses in the left margin, illustrating skills-centered performance flowing from skills-centered learning. In Chapter Eight I specify common pitfalls that can undermine student preparation.

I am transferring some material previously detailed in Chapter Two to www.JohnDelaneyPub.com. I have also done the same with the materials previously in Chapter Nine — FAQ about exams that are frequently asked of me by students and my responses and with the materials previously in Chapter Ten — a checklist for post-exam pinpointing of strengths and weaknesses in performance. I expect to refine and develop some of these and other materials and the *linking of this Book with the website offerings* presents, I believe, the most flexible and best method for doing so.

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## LAW AS ADVOCACY ARGUMENT

The law is a problem-solving procedure. So are engineering, social work, medicine, psychiatry, teaching, etc. In each area, a skills-centered panoply of concepts, categories, distinctive vocabulary, rules, and logic is applied to deal with different types of problems. As a law student, you immerse yourself in the legal panoply, just as you would other panoplies if you studied medicine, psychology, engineering, etc. The marked difference from these other areas, though, is that legal problem solving generally requires *advocacy arguments*. Lawyers are not neutral or objective: they are one-sided advocates for their clients.\*

Clients present legal problems rooted in torts, contracts, criminal law, etc. The appellate cases you study are a wellspring of one more rarefied version of such problem-solving and lawyerly argument. At the pre-trial and trial levels, however, lawyers engage in a different version. There, they apply a fact-driven set of skills that enable them to extricate the key legal facts, spot the issues, apply legal rules and principles to those facts to resolve the issues, sometimes utilize relevant legal policy to support their rule application, and do all of the above embodied in concise advocacy arguments. More simply stated, lawyers fit facts into legal categories provided by the rules by *spotting issues and resolving them with advocacy arguments*. In addition, lawyers daily solve client problems outside of the trial framework by employing their expert knowledge, resourcefulness, negotiating skill and their insight into human needs, hopes and foibles.

It is therefore sound legal theory, sound legal practice, and sound exam practicality to adopt a skills-centered, learning and performance approach aimed at issue spotting and argument-making to the study of law, the taking of exams, and the practice of law. The common beginner's view of law—as a set of black-letter rules to be memorized and almost mechanically applied—is *false* and entirely *misconceives* the practice of law and the nature of law-school education and exam taking.

A traditional, though possibly waning, aspect of the mystification inherent in beginning law school is an implicit demeaning of the prior accomplishments and experience of first-year law students, as if the study of law were unique, unrelated to other human endeavors, and as if no student had engaged in analytical reasoning before law school. The opening speech of Professor Kingsfield in the film *The Paper Chase* is a classic example. But the truth is that all of us bring much to the study of law. We spotted issues

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\* There are many exceptions to this advocacy role. To illustrate, advising clients in the role of “counselor” and probating wills are ordinarily not adversarial; nor is the mediation practiced by lawyers; divorces are sometimes not adversarial; and business lawyers are often engaged in a continuing advisory role about a wide range of legal/business matters. Mediation is also gaining ground as a remedy, instead of litigation, in a variety of areas. Prosecutors also have an obligation to ensure justice.

and resolved them in our prior education, work experience, and everyday lives. *All of this experience is relevant, since issue spotting and argument-making demand practical judgment that is a product of your experience.*

What you must do, though, is to adjust your present formulating and analyzing to accommodate legal vocabulary, concepts, categories, logic, knowledge, and experience. You must put on a “legal lens” for spotting the issues and then framing, analyzing, and resolving them with advocacy argument. In putting on this legal lens you do not throw away your other lenses for seeing. You put on and take off different lenses, as you need them. To illustrate, my standing advice is to take off your legal lens at the end of the day of law school or law practice and keep it off until the next morning. An advocacy lens is definitely *not* for relating to loved ones, friends, and the pursuit of personal happiness. *Be careful.*

In Chapter One, I specify the objectives of this book: the concrete differences between law school and other exams; the *six exam tasks* your professors expect you to perform; the *six criteria* by which your performance will be evaluated; and an outline of how you can proceed to develop the necessary skills.

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## ON LOOKING BACK

As I read this Introduction again years later, it is still valid for most exams. However, the correct emphasis on “rules” needs to be augmented with an additional emphasis on “principles.” Especially in courses such as constitutional law, civil procedure, family law, criminal law, torts and other areas, you also encounter broad, malleable principles that *contrast* with the concrete rules divisible into specific elements. Examples include due process, equal protection of the laws and interstate commerce in first-year constitutional law; minimum contacts and fairness for jurisdiction in civil procedure; and equitable distribution of marital property and best interests of the child in family law. Since principles do not have elements and are broader in scope, they resonate on different frequencies from the more concrete rules, as will be explained and illustrated throughout the book; and they offer almost *endless interpretive possibilities*.

Lastly, I see even more clearly now that my book, *Learning Legal Reasoning, Briefing, Analysis and Theory*, provides an important foundation for this book. Indeed, this *Exam* book echoes and presupposes many of the themes, perspectives and methods emphasized in *Learning Legal Reasoning*.<sup>\*</sup> In addition, my *Learning Criminal Law As Advocacy Argument* exemplifies them in the criminal law context. One shared theme of the three books to embrace is a pedagogical direction: study and apply fundamentals first, complexities later. Law exams include both realms.

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<sup>\*</sup> They include: the forty commonly asked questions of first-year law students in Chapter One; the sections on “Interpreting Federal Statutes” and “Principled Decision-Making” (36-37); “Narrow Versus Broad Statements of Holding and Precedent” (73-75); “Trial Judges’ Discretion” (75-76); “Appellate Judges’ Discretion” (76-78); “Narrow and Broad Views of a Holding” (104-105); “The Principle of a Case” (105); “The Interacting of Historical Context, Politics and Law” (106-07); and the jurisprudential insight detailed in the last chapter.