ELEMENTS OF LAW

SECOND EDITION

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Second Edition

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DEDICATIONS

To John
— EHH

To Jean, Daniel, Zachary, and Rachel
— MEH

To Sara, Leah, and David
— SNN

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We reprint below the acknowledgements from the first edition. The debts we incurred in producing that edition remain, even though not all the material referenced does, and we renew our thanks to the many friends and colleagues who provided their support and assistance.

EHH
MEH

* * *

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[1] They were, in alphabetical order: Simon Anolick, A.C. Biddle, Melinda Cody, Peter Fante, Lisa Foy, Jennifer Geller, Sara Goldstein, Suzanne Kazenoff, Susan Kent, Victoria Kummer, Barry Marenberg, June Raegner, Judy Ross, James Schwalbe, Allen Sragow, and Mary Watson. Ms. Kummer, of course, wrote the Civil Procedure section in Chapter 1. Alan Wolf, our physicist-student-contributor (see the note on law and science in Chapter 1 and the footnote on the quark in Chapter 6) participated as an auditor.

these materials in draft form.

EHH
MEH
SSN

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EDITORIAL NOTE

We have deleted footnotes and citations in excerpted material without any indication. Additions are indicated by brackets, deletions by three asterisks (though deleted paragraphs are not separately indicated). Where the excerpt is itself quoting another source from which *it* has made a deletion, such a deletion is indicated by three dots.

We have numbered all footnotes, including those that are part of an excerpt, consecutively through each chapter. Thus, footnotes that are part of an excerpt do not bear their original numbers. A footnote within an excerpt is part of the original unless specifically indicated as "Ed. Fn."

FOREWORD

What do fear, frustration, anger, and a sense of isolation have to do with the study of law?

They are feelings experienced by almost all law students (including most likely your teachers, and most assuredly your authors, when they were students). They are feelings endemic to the first year and especially the first semester of law school.

We hope this book ameliorates those feelings. In our view the most important remedy for your law student's alienation and confusion is to understand what it is you are doing. *That is what this whole course is about.*

What follows are excerpts from a *Talk to Entering Students*, given some time ago at a renowned law school (the University of Chicago Law School) by a renowned member of its faculty (Professor James B. White). We use these extracts not primarily because they say what needs saying uncommonly well, although they do. The point is to show you that what is unsettling about this new experience is not caused by *your* being at *your* law school, but is near universal to all future lawyers at all law schools. We use Professor White's eloquence to show you that the suggested remedy is not merely the idiosyncratic prescription of your quixotic authors.

> I don't want to attribute to any of you the sort of ignorance I once had, but it is possible that some of you think — as many non-lawyers do — that the law is at bottom very simple. I once thought that what the word "law" referred to was, obviously enough, the laws themselves. And I naturally expected that the laws were all written down somewhere to be looked up and applied to life. The rules, once found, were simple enough; the mystery of the law had to do with their location. What mainly distinguished me from the lawyer, I thought, was that he knew where to find the rules and how to be sure he had found all of them. * * *
>
> But this simple view does not account for all the ways in which the law works, and omits entirely what is most interesting, difficult, and important in what we do. Think for a moment what would follow if it were true that the activity of law consisted of nothing more than memorizing certain clear rules and learning where to find the others. First, both law school and the practice of law would be intolerably boring. On the face of it, few things could be more dull than simply memorizing large numbers of rules or learning one's way about a bibliographical system. But the fact is that for many people the study and practice of law are both difficult and fascinating. Second, since the rules that must be memorized are not invented at the law schools but exist outside of them, generally available to the world at large, there would be no substantial or interesting difference between a good legal education and a poor one. (Indeed, it would not be plain under these circumstances why we should have law schools or formal legal training at all. We could publish lists of rules and examine students on their "knowledge" of them at a bar examination.) And if this view of the law were accurate, there would be little to distinguish a good lawyer from a poor one. But there is general agreement, among those who claim to know, that a good legal education is something important and special, something very difficult to attain; that a good lawyer has capacities and powers the poor one

lacks; and that in this field as in others excellence is rare and valuable.

The third consequence of this simple view of the law would be that the case method — "learning the law by reading cases" — would seem bizarre and perhaps sadistic. Why should one read these complicated and difficult cases simply to discover the general propositions for which they stand? But a great many lawyers regard their experience of learning how to read a case as a step of huge importance in their education as minds and as people, involving much more than learning to discover and repeat rules. Some, at least, would say that this training has helped them to find in the material of their daily professional existence a set of puzzles and difficulties that can interest them for life. * * *

Let me suggest that you regard the law not as a set of rules to be memorized but as an activity, as something that people do * * *. The law is a set of social and intellectual practices that defines a universe or culture in which you will learn to function; like other important activities, it offers its practitioner the opportunity to make a life, to work out a character, for herself or for himself. What you will learn in law school, on this view, is not information in the usual sense, not a set of repeatable propositions, but how to do something. Our primary aim is not to transmit information to you, but to help you learn how to do what it is that lawyers do with the problems that come to them. * * *

It might help if you were to compare the process of learning law * * * [to] learning a language. One must of course know the rules of grammar and the meanings of terms, but to know those things is not to know how to speak the language; that knowledge comes only with use. The real difficulties and pleasures lie not in knowing the rules of French or of law, but in knowing how to speak the language, how to make sense of it, how to use it to serve your purposes in life. * * *

In both language and law, learning has a double focus: if one is to live and act competently in a particular culture, one simply must learn how the language — or the law — is in fact spoken by others, by those whom one wishes to address, to persuade, to learn from, and to live with. But one also wishes to learn how to turn the language, or the law, to one's own purposes: to invent new sentences, to have new ideas, to do new things, perhaps to change the nature of the language itself. Your concern in law school is thus a double one: to learn as completely as you can how the legal culture functions; and to establish a place for yourself in relation to it from which you can attempt to use it in your own ways — in ways that increase your capacities and powers, ways that enable you to speak truthfully to the conditions of the world and to take positions (and offer them to others) which seem to you to be right.[2]

Like learning a language, we would add, learning law requires your participation. It is not passive. So speak up in class. A law school class is a joint undertaking between you and your classmates. *You will educate one another.* Each and every contribution is valuable — "right" or "wrong," especially since, as you will come to understand, in an important sense there are no "right" or "wrong" answers. For that matter, as you will also come to understand, it is the questions more than the answers that concern us.

[2] James B. White, *Talk to Entering Students*, Occasional Papers, The Law School, The University of Chicago (1977), pp. 2–4, 12–14.

FOREWORD

If you and your classmates will educate one another, what does your teacher do? She will guide you, with your active assistance. She knows, in a general way, what troubles you, what is difficult for you. But in a general way only, not at any given moment your particular trouble: is it that you do not understand a question or an answer or where the conversation is headed? That you think the court is wrong (legally? factually? ethically?), or your classmate is wrong or your teacher? Raise your hand and speak up: unless you do, your teacher cannot know what you think.

Professor White again:

> Of course, your first efforts will be halting, you will misunderstand things, you will make errors. That is not your fault; it resides in the nature of things.
>
> Your teachers know all this, and while you may sometimes understandably feel that the persistent and impossible demands of the classroom are intended to operate as a sort of bootcamp discipline or hazing exercise, that is not our purpose at all. The cases are hard for us as well as for you, sometimes I think harder for us than for you; our task is to lead a conversation, by question and observation, which will expose the difficulties of our common circumstance, the perplexities that do not at first appear. It is important for you to know that these are perplexities for all of us, and that your teachers have no handy solutions to purvey. * * * The difference between your teacher and you, after all, is only that he has read the case more often, thought about it longer, and has a somewhat larger set of legal materials to bring to bear on it. He has no patent from above that will guarantee his being right. And you can have no assurance, whatever he says, that he will not change his mind. The legal mind is marked, one might say, by an odd combination of three things: a capacity to organize the materials of argument, with great force, on either side of a question; a willingness to reach and state a conclusion; and an openness to persuasion that one is wrong. Law school is among other things an experience of making up and changing your mind. Behind all the rhetorical force is a deep sense of the tentative.
>
> The truth is that there are no experts in the law, in the sense that there are no persons upon whose judgment you may rely without understanding it; each of us is responsible for what he thinks and says, and it is no discharge of your duty to repeat to your professor what he has told you he thinks. You must make your own way.
>
> It may or may not be comforting to hear this, but the sense of inadequacy and isolation which you should have as you now contemplate this process will always, in one form or another, be with you. One never knows all the law; one never feels wholly confident about any step taken in the law. The lawyer lives in an uncertain and indeterminate world, and his profession is to survive and flourish in it.

Reread these paragraphs whenever you are in danger of forgetting that it is a *process* in which you are engaged. *Forgive yourself for not being able to immediately do perfectly what you could not possibly do perfectly, or perhaps even well, as you begin your journey.* As Justice Brandeis reportedly said to his daughter, "My dear, if you would only recognize that life is hard, things would be so much easier for you."[3]

[3] Anthony A. Lewis, *In Memoriam: Paul A. Freund*, 106 HARV. L. REV. 16, 18 (1992).

Finally, the world of law is a world of words. "Law is the intersection of language and power."[4]

Power clearly entails ethical responsibilities for those who exercise it. But so does language. Listen to Václav Havel, once dissident convict, then President of his country, and one of the few authentic moral heroes of the latter part of the 20th century:

> At the beginning of everything is the word.
>
> It is a miracle to which we owe the fact that we are human.
>
> But at the same time it is a pitfall and a test, a snare and a trial.
>
> More so, perhaps, than it appears to you who have enormous freedom of speech, and might therefore assume that words are not so important.
>
> They are.
>
> They are important everywhere.
>
> The same word can be humble at one moment and arrogant the next. And a humble word can be transformed easily and imperceptibly into an arrogant one, whereas it is a difficult and protracted process to transform an arrogant word into one that is humble. I tried to demonstrate this by referring to the tribulations of the word "peace" in my country.
>
> As we approach the end of the second millennium, the world, and particularly Europe, finds itself at a peculiar crossroads. It has been a long time since there were so many grounds for hoping that everything will turn out well. At the same time, there have never been so many reasons to fear that if everything went wrong the catastrophe would be final.
>
> It is not hard to demonstrate that all the main threats confronting the world today, from atomic war and ecological disaster to a catastrophic collapse of society and civilization — by which I mean the widening gulf between rich and poor individuals and nations — have hidden deep within them a single root cause: the imperceptible transformation of what was originally a humble message into an arrogant one.

Arrogantly, man began to believe that, as the pinnacle and lord of creation, he understood nature completely and could do what he liked with it.

> Arrogantly, he began to think that as the possessor of reason, he could completely understand his own history and could therefore plan a life of happiness for all, and that this even gave him the right, in the name of an ostensibly better future for all — to which he had found the one and only key — to sweep from his path all those who did not fall for his plan.
>
> Arrogantly, he began to think that since he was capable of splitting the atom, he was now so perfect that there was no longer any danger of nuclear arms rivalry, let alone nuclear war.
>
> In all those cases he was fatally mistaken. That is bad. But in each case he is already beginning to realize his mistake. And that is good.

[4] Fred R. Shapiro, *Preface, in* THE OXFORD DICTIONARY OF AMERICAN LEGAL QUOTATIONS ix (Fred R. Shapiro ed. 1993).