**Legal Reasoning**

**Its Relevance and Limitations**

**For Any Decision-Maker**

**Fall Semester, 2016**

**(Prepared July7, 2016)**

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1. **Course Description.**

This is a course about language and thinking. We will try to understand **how** legal analysis works and to discover its relevance and limitations for anyone who has decisions to make. This is not a course “about” law; it is a course about relationships, roles, influences, and the subjectivity of what might appear to be certain.

What is peculiar about legal reasoning?

We will work to identify how lawyers might think and reason differently than (and similarly to) layman. Sometimes, do we all “think like lawyers” without realizing it?

Lawyers, like all of us, work with “facts,” “words,” “principles” and “rules.” We will see if we can identify the relationship among these words, and consider how lawyers grapple with them in their own professional way. We will dig beneath the surface and consider if there are such “things” as facts, principles and rules, or are they merely amorphous concepts which we invent?

Is there a place for morality in this conversation about how to make sense with facts, principles and rules? Whether or not a lawyer thinks differently than a layman, is there something peculiar about a lawyer’s moral values, the moral stance that a lawyer brings to a problem? Indeed, can we ever separate one’s “moral position” from one’s “thoughtful position” on any issue?

By looking at fact situations, loaded with conflicts and questions, and representative of the messes we find in life, we will try to develop skills to think about them in new ways. Most of these “messes” will come from everyday life (if there is such a thing), but we also will focus on two controversies which have tested the dividing line between the application of law (“Legal Reasoning”) and just plain politics: e.g., the saga of Paul Levy as CEO of Beth Israel Deaconess Medical Center, and the fight of Rahm Emanuel to be listed on the ballot as a candidate for Mayor of the City of Chicago.

We will look at statutes, hypothetical and real, as examples of rules which we never can understand entirely. Why must they be ambiguous, never clear enough, when we attempt to apply them to facts--- to situations in which we are involved?

We will consider how various professionals, particularly managers and lawyers, would relate to, discuss, examine and resolve the problems differently. Can we identify the sources which lead to these ultimate differences? Are the sources differences in education? Language? Temperament of the individuals? The perceived duties and scopes of the professions? As we discuss each situation, we also will not hesitate to ask, “what if?” (Hypotheticals are the lifeblood of legal thought.)

We all say that we believe in the “Rule of Law,” but does this mean that one should never break the law? Can an honest person ever consider breaking the law? What does it mean “to break the law”?

We will examine the relationship among the law, the client, the lawyer and the “legal problem”; and, of course, ask still more questions. What is the difference between learning the law and obtaining legal advice? Would you be surprised if two different lawyers gave you very different legal advice?

As we consider ways to think, we shall be self-conscious of our own thought *processes*. We will ask, “What is happening in our class sessions?” “How do you *feel* when you are confused, and how do you *know* when that confusion has abated (somewhat)? To promote such introspection, we generally will focus on each problem for more than one class period, and most likely will come back to the early ones throughout the semester. We will watch how our thoughts and perspectives change as we consider and reconsider the problems. A literary critic once suggested, “Good Writing is Re-Writing.” Is it also true that “Good Thinking is Rethinking”?

1. **Purpose.**

The purpose of the course is to encourage students to think; to think in new ways about the kind of issues that they have encountered repeatedly in work, and in life.Exploring the relevance, meaning and utility of “Legal Reasoning” is the method through which this broader purpose will be accomplished.

1. **Who Should Take This Course?**

Obviously, people whose interest has been piqued by the description and purpose, stated immediately above. Though this course is not “about” how to communicate better with lawyers or how to use (and discard) legal advice more effectively, understanding a lawyer’s way of thought and the underpinnings of “legal reasoning” will have the advertent effect of improving certain practical skills.

1. **The Case Method, As Applied**.

We will consider real-sounding problems, and then develop an array of hypotheticals and variations on each problem in order to see which new “facts” and “perspectives” cause us to think, and maybe even conclude, differently. The goal will **not** be to find a (one single) solution to any problem. (If you are looking for the “right answer” to anything, don’t enroll in this course!) Rather, the purpose of the cases will be to provide dilemmas for which we can seek many solutions. Our inquiry will be, “How does one search for answers?” as opposed to “What is the right answer, or even a set of possible answers?” Stated another way, we will be looking for questions, not answers. We will be looking for ways to look for questions; ways to talk about our questions; ways to develop understandings. As you can see, whenever possible, we will add an “S” to the end of a word.

1. **The Readings; Relevance Of.**

I am assigning one book, some court decisions, public press reports, and law journal articles. The book is **not** a textbook; and, frankly, I am not suggesting that it be memorized or studied. The purposes of the book (and other materials) are to give us some common vocabulary; to introduce us to the community which has considered the kinds of issues which will consume us; to give us something to talk about in class. Though our classes will be centered on thinking about the problems, and not analyzing the specific texts, we will refer to the readings as we develop our own ways to think about the cases. I presume that you all are “sophisticated readers,” meaning that you know how to skim a text for relevant meaning; know when to put down a book (or article) and think for a moment; and when to jot down some of your own thoughts and questions. To the extent that the class is particularly troubled by any of the readings, we certainly will discuss them in some detail. I do reserve the right to ask you what you think about particular readings, for though not part of the “case method,” analyzing what one has read is a proven way to learn something. I also will post some supplemental readings on the course’s web site. These readings are purely optional, and they are intended to respond to the interest of any students who want to read more about certain topics.

1. **Preparation for First Class and Obtaining the Course Materials.**

Before the first class, students should read the short book, Thinking Like a Lawyer: A New Introduction to Legal Reasoning, by Frederick Schauer, and also think about the first problem. (Beware that there is another book with a very similar title. Make sure you order the book by Frederick Schauer.) The book should be available at the Harvard Coop, or from any on-line book seller. In addition, each student should purchase a course pack from University Readers (which contains all of the other readings listed on the syllabus), and bring this booklet to class every week. The following directions might help: (a) Log on to [www.universityreaders.com](http://www.universityreaders.com) ; (b) click on the “Students Buy Here” button located in the “Student Store” section (upper right-hand corner of the page); (c) Create an account or log in if you have an existing account to purchase; and (d) Instructions will guide you through the rest of the ordering process. If you experience any difficulties, you can email [orders@universityreaders.com](mailto:orders@universityreaders.com) or call 800-200-3908. These materials will be mailed to you in a binder, and the price includes your ability to download a substantial portion so that you might begin to read before you receive your package in the mail.

1. **Students’ Responsibilities.**
2. **Attendance.** Attendance is mandatory. The course is the classroom experience. If there were a book which you merely could read, I would assign it, and we all just could go to Mr. Bartley’s. Quite seriously, you should plan to attend every session, and participate**. If you expect to be absent, because you are sick, traveling or receive an incontrovertibly better offer for the day, you should send me an e-mail in advance of class.**
3. **Participation.** If you don’t participate in classroom discussion, I am certain that you will not learn. There is nothing to memorize in this class, but rest assured: There is quite a bit to learn. I wish to introduce you to a method of mind to practice. You can’t learn to play baseball while sitting on the bench. This is not a lecture class for the note-taker, seeking to write down what the professor “says.” This professor will do more asking than telling. As students, you will be expected to do “the telling”; hence, the need for participation.
4. **Class Preparation.** The weekly outline presented below presents the problems, some opening questions for each, and some readings. Prior to each class, you should: (i) read the current problem; (ii) think about it; (iii) think about it, and the questions, some more; (iv) discuss what you’re thinking with some colleagues and friends, whoever will listen; (v) come up with a few better questions to share with the class; and (vi) do read the assignments. If you are not confused, you have not yet thought about the materials enough. Come ready to think.
5. **Assignments.** Your assignment is to be prepared for class each week. In advance of each class, I reserve the right to ask you to submit answers to the questions which follow each problem. (Indeed, whether or not you are asked to submit your thoughts, jotting down some answers before class would be an excellent way to prepare for class.)
6. **Mid**-**Term Writing.** As you will see in the description below of Week Eight, I will request you to submit a brief essay, just a couple of pages in length. I would not classify this as a “mid-term exam,” because anyone’s performance on the essay only will “count” toward the final grade if its effect would be to raise that grade. I will return all papers with comments, so this should be a constructive way to learn what I am thinking about what you are thinking, and for each student to evaluate himself or herself.
7. **Final Exam.** The exam will be during our second to last class session at which time I will present you with a hypothetical fact situation and ask you to consider it in light of a law (real or hypothetical). More particularly, I will ask you to resolve the conflict by writing an Opinion, as if you were a judge. Then, during the last class period (the one specifically reserved for exams on the Registrar’s calendar), we will discuss the exam.
8. **Grading.** I am interested in your effort and the quality of it. Please come prepared for class. To determine a student’s course grade, I will consider the grade on the final exam, and I may raise (or lower) any student’s course grade by a half unit (a plus or a minus), or even a full letter, based upon attendance and class participation. (As noted above, your course grade may be raised, but not lowered, by the quality of your mid-term essay.) Generally, I would expect a strong correlation between your class participation evaluation and your final grade.
9. **Further Thoughts.**

a. **Enjoyment.** Something will be wrong if you do not enjoy coming to class. As an undergraduate at Amherst College, I always attended class, because it was the most interesting thing I could do with my time. That is my goal for us. Like physical training or stretching, it should be work, but pleasurable; and there should be a sense of accomplishment and pride in that. We also should enjoy each other’s company.

* 1. **Teacher’s Accessibility.** As a practicing lawyer, I earn my living by being accessible, and I should extend this habit of courtesy to teaching. On a weekly basis, I would expect to be physically available for individual consultation immediately before and after class. Finding me and accessing my full attention will not be a problem.
  2. **“Feedback”.** If you are concerned about how you are doing, or otherwise want some particular guidance, I encourage you to contact me. I am quite willing to meet with any of you privately before class, after class or in a scheduled telephone call. Don’t fret or worry; talk to me.

**X. Some “Announcements” from the Registrar**

The Registrar has requested that the following points be presented in this syllabus:

**a. Accessibility.** *The Extension School is committed to providing an accessible academic community. The Accessibility Office offers a variety of accommodations and services to students with documented disabilities. Please visit* [*www.extension.harvard.edu/resources-policies/resources/disability-services-accessibility*](http://www.extension.harvard.edu/resources-policies/resources/disability-services-accessibility) *for more information.*

**b.Cheating and Plagiarism.** *You are responsible for understanding Harvard Extension School policies on academic integrity (*[*www.extension.harvard.edu/resources-policies/student-conduct/academic-integrity*](http://www.extension.harvard.edu/resources-policies/student-conduct/academic-integrity)*) and how to use sources responsibly. Not knowing the rules, misunderstanding the rules, running out of time, submitting the wrong draft, or being overwhelmed with multiple demands are not acceptable excuses. There are no excuses for failure to uphold academic integrity. To support your learning about academic citation rules, please visit the Harvard Extension School Tips to Avoid Plagiarism (*[*www.extension.harvard.edu/resources-policies/resources/tips-avoid-plagiarism*](http://www.extension.harvard.edu/resources-policies/resources/tips-avoid-plagiarism)*), where you'll find links to the Harvard Guide to Using Sources and two free online 15-minute tutorials to test your knowledge of academic citation policy. The tutorials are anonymous open-learning tools.*

**XI. Finally, Our Agenda, The Course Schedule and Syllabus.**

Below is the statement of our agenda for fifteen weeks, and the readings. As you can see there are problems, reading assignments; and a brief essay at mid-term. The exam will be during the second to last period (i.e., *not* during the “official” exam week), and it will consist of your responses to a hypothetical problem. We will discuss the exam during the last class period (designated as the date “for the exam” on the School’s calendar.)

**Week One**

We will introduce ourselves and begin to consider Problem One, presented directly below. (What better way to introduce ourselves than to start to learn how we each think? And what better way to become acquainted with our thought processes than to start to examine some facts and ask some questions?)

**Readings:** If possible, before the first class, I would like you to have read the book: Schauer, Frederick, Thinking Like a Lawyer: A New Introduction to Legal Reasoning, Harvard University Press, 2009. (Be sure to order the book by Frederick Schauer. There is another book with a very similar title which was published about the same time.) I expect that you all are sophisticated readers, knowing when to skim and when to focus intently. The sooner you become familiar with the vocabulary of our subject matter, the better.

**Problem One**

***Rothman & the Rodents***

Robert Rothman is the Director of Warehouses for Value Processing, Inc. (“VPI”), a national food processing company headquartered in Memphis. Value makes syrups and fillings used in finished baked goods.

Rothman and his boss, Sharon Grant, a Harvard M.B.A., and the Executive Vice-President of VPI, are in Boston to view a newly installed robotic shelving system in a VPI warehouse. While walking through the warehouse with Grant, Rothman, notices some suspicious substances ahead that he suspects are dropping of a mouse or something worse. He quickly changes their path so that Sharon does not see anything. “That’s all I need is to get fired before lunch,” he thinks to himself.

Unfortunately, the rodents are not concerned with Bob’s career path, and they change direction too. So, when Sharon and Bob cross the next aisle, a small mouse runs across his shoe. Bob jumps, but manages to stifle a surprised shout.

“What was that?” Sharon asks.

“A mouse,” Bob replies.

“A mouse? This place isn’t a barn. We’re not supposed to have field mice in here. “You know,” Sharon turns dead serious, “we might have to close this facility for a month, and throw out all of the inventory…….”

“Probably not the stuff in the cans,” Bob grimaces.

“Great,” she replies sarcastically. “How big do you think the loss will be? Only eight million instead of ten?”

“Sharon, we have over $15.0 million in goods in this warehouse at any time. In fact, now that it’s summer, a lot of the goods are perishable.”

“Unwrapped,” she adds. “You better find a solution.”

Unfortunately, Bob (who was running his first warehouse while Sharon was still in high school) knows that there is no “solution,” no good solution. He knows that the F.D.A. expects a food warehouse to be more sanitary than a hospital.

“What do you think I should do?” Bob asks.

“I have no idea,” Sharon quickly replies, remembering their respective jobs and ranks. “But you better have a full report and Action Plan on my desk within a couple of days. You’re going back to Memphis tonight aren’t you?”

“Yes. I had planned to.”

“Well, maybe that’s still the best idea. Before you *do* anything you can talk to our counsel at the home office.”

In fact, VIP’s in-house counsel sits in an office a couple of doors away from Bob in Memphis, and Bob’s next door neighbor at home in suburban Memphis is a corporate lawyer with a local Memphis firm.

**Particular issues and questions**: Should Bob discuss the problem with either of the lawyers? Maybe Sharon is wrong. After all, this isn’t a “legal problem.” He knows how to get rid of a few rodents. What’s the big deal? How are the lawyers likely to respond? How will they look at the situation differently from Bob? From Sharon? Certainly, the lawyers will see “legal questions.” Can we distinguish the “legal questions” from the “non-legal questions”? What is the difference between the two types? When Bob consults a lawyer, what can he expect the lawyer to *do* for him? When a lawyer addresses a legal problem, what are the unique skills that he brings to the endeavor? What is the nature of Legal Reasoning? What will be the likely strengths and weaknesses of the lawyers’ analyses? Might Bob get a different answer from his neighbor at home and his counsel at work? As they are both lawyers, how is this possible?

**Week Two**

We will continue to consider Problem One, and in preparation for class, I would like you particularly to consider additional questions which you might like to ask (and answer) about the condition of the warehouse. Would any additional facts change your answers? And, of course, the only way one can learn any additional facts is to ask some additional questions.

**Readings:**

As soon as you finish the book, you should start the readings listed under “Week Four” below. They are worthy, and it will take you more than one week to assimilate them.

**Week Three**

We will consider Problem Two.

**Readings:** Please start the readings listed under “Week Four” below, if you have not already done so. They are extensive, and more than “one week’s work.”

**Problem Two**

***The Escape: Guns or Words (But Which Ones)***

Marty Diamond is a corporate lawyer who lives in Newton, MA. As he pulls out of his garage one morning at about 6:45a.m. heading to work, he almost strikes another car blocking his driveway. He gets out of his car to discover a client, Harold Strauss, Ph.D., an engineering professor at M.I.T. Marty is more than a little startled to see Harry, at this time and place.

“What’s up?” Marty asks, as politely as possible, remembering that he is the other fellow’s attorney.

“I want you to go with me to McLean’s right now,” Harry replies.

“That explains it. The guy’s had a breakdown, and needs to check in,” Marty thinks to himself, but simply replies, “Why?”

“My son David, he hasn’t been feeling well…. He’s only a sophomore in high school, but being sixteen isn’t so easy these days… He checked himself into McLean’s a couple of days ago….. and now they won’t let him leave. I’m going to get him out.” Harry’s voice first quivers and then becomes firm, as he finishes his explanation. “Get in my car, please.”

Against his better instincts, Marty turns off his ignition and jumps in his client’s car.

What’s wrong with the picture? There’s a gun on the front seat, next to the driver.

“What’s with the gun?” Marty asks as casually as possible.

“I told you I’m getting my boy out of there!”

Wondering if he’s about to star in a remake of *Bonnie & Clyde*, Marty heads to Belmont with Harry. During the drive he learns that son David, himself a sophomore at M.I.T., had been having a “lot of problems.” His father does not think that drugs were involved, but isn’t sure. But, he is certain that his son is much more likely to get better at home than locked up against his will.

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Harry and Marty arrive at McLean’s. First, they gain admission to the locked ward where they are permitted to meet with David, and then his attending psychiatrist. David is a mess. He shuffles down the hall to meet his father and guest, and avoids all eye contact with Marty as he extends a limp hand for greeting. He appears to be drugged. But, although his speech is slow and unnaturally quiet, David makes his desire clear: He emphatically states that he made a big mistake going to the hospital. He wants to come home, ASAP.

Marty then meets alone with the psychiatrist. The psychiatrist asks Marty if he “represents” his patient, and after they dance around that thorny question for a couple of minutes, the psychiatrist decides to give his prognosis anyway. In so many words, he advises that David needs one or more years of incarceration (to protect him from himself) and intensive psychotherapy.

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Marty convinces Harry to leave McLean’s without brandishing the weapon (which was left in the car.)

“I’ll call you before the day is over,” Marty promises as he gets out of Harry’s car in the Financial District near his office in Boston.

“You don’t mind if I talk with my neighbor, Mark Hall, who’s a senior manager at Harvard Pilgrim Health, and maybe I’ll call my doctor and see what he thinks,” Harry calls back.

**Particular issues and questions**: Harry wants a strategy to cause his son to be released from McLean’s. What do you think that the advice will be of his friend (the manager at Harvard Pilgrim), his personal physician, and his lawyer Marty Diamond? Even if you can’t guess each person’s answer -- indeed different lawyers might have different recommendations--itself an interesting fact to observe and examine -- can you consider *why* their responses might be different. Is it a matter of different *points of view*? By the way, what *is* a “point of view”? How is such a thing established? By education? By role? By how each person was raised? By the expectation of the fellow on the other side end of the phone?

**Week Four**

We will consider Problem Three. The new readings are a series of law review articles, spawned by a particularly provocative one written by Richard Wasserstom. *This article and its progeny are worth reading, if only for the intellectual colloquy they represent. However, they demonstrate more than fine intellectual jostling, for their aggregate subject matter is on point.*

**Readings:**

* 1. Richard Wasserstrom, *“Lawyers as Professionals: Some Moral Issues*,” 5 Human Rights 1 (1975).
  2. Stephen L. Pepper, “*The Lawyer’s Amoral Ethical Role: A Defense, A Problem and Some Possibilities,”* 1986 American Bar Foundation Research Journal, 613 (1986).
  3. David Luban, “*The Lysistratian Prerogative: A Response to Stephen Pepper,” 1987* American Bar Foundation Research Journal, 637 (1987).
  4. Andrew L. Kaufman, “*A Commentary on Pepper’s ‘The Lawyer’s Amoral Ethical Role’,”* 1987 American Bar Foundation Research Journal, 651 (1987). {Professor Kaufman has been teaching ethics at Harvard for many decades.}
  5. Stephen L. Pepper, “*A Rejoinder to Professors Kaufman and Luban,” 1987* American Bar Foundation, 657 (1987).
  6. William H. Simon, *“The Past, Present, and Future of Legal Ethics: Three Comments for David Luban,”* 93 Cornell LawReview 1365 (2007-2008*).*
  7. Charles Fried, *“The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation,”* 85 Yale Law Journal 1060 (1976). *Professor Fried is a former Solicitor General of the United States. The second and third sentences read: “We would, most of us, also be good people if we could. It would be sad, socially and personally, if the act of being a lawyer {using “legal reasoning”} necessarily conflicted in some way with being ethically ‘good.’”*
  8. Edward A. Dauer, *“Correspondence: The Lawyer as Friend {A* *Reply to Charles Fried*},” 86 Yale Law Journal, 573 (1977).

**Problem Three**

**Don’t Ever Be a Witness**

Moses “Mickey” Metz was born without luck---and never found any in his life.

Addicted to hard drugs at birth, he struggled in an incubator for nearly three months. He never met his father, and he would tell anyone who listened that he would have been better off if he had never met his mother, either. Abused by her as a small child, he eventually came to live with his aunt in the Bronx.

In the year 2010, he moved to Boston.

His one claim to fame was that he went to high school with Aaron Ramon, the famous New York Yankees slugger. Over the years, they remained in touch. When “A-Ram,” as the fans called him, came to Fenway Park, they sometimes would get together; and when Mickey needed help with bail money once, A-Ram came to his rescue.

Mickey presently works as a security guard at the Five Seasons Hotel-Retail Complex in Boston. (In applying for that job, Mickey failed to mention that he was on parole from a drug conviction in New York State, and his employer never discovered that fact.)

During his break one night from the front desk of the complex, he wandered into the “camera station,” a room with dozens of small video screens, each monitoring various points in the buildings.

He could not believe what he saw on a monitor: His friend A-Ram, in an elevator, repeatedly punching a woman in the face whom Mickey recognized as A-Ram’s wife.

The next day, Mickey saw A-Ram after the ball game, as previously planned. Neither said anything to the other about the incident.

Three weeks later, A-Ram assaulted his wife in public, but according to the newspaper, A-Ram’s wife was refusing to press charges, and the Suffolk County District Attorney was hopping mad.

“This Commonwealth cannot protect its citizens unless they are willing at least to speak up for their rights. The assailant’s wife has a duty to all of the other women of this Commonwealth to press charges, and any witness has an obligation to come forth. It is a crime for anyone who sees an assault and battery to fail to report it.”

The D.A.’s final words rang in Mickey’s ears: *It is a crime for anyone who sees an assault and battery to fail to report it.*

During his break that night at work, Mickey took the elevator up to see Marty Diamond, a corporate lawyer with whom he had become friendly over the years. (Marty regularly kept irregular hours, working late into the night, and when the law firm’s security system malfunctioned, Mickey always had rushed to the rescue.)

After Mickey told Marty what he saw on the screen, Marty pulled a volume of Massachusetts General Laws off the shelf of his office. He read the applicable statute aloud to Mickey:

“Whoever has personal knowledge that a husband or wife has physically abused his or her spouse shall report the same as soon as practical to the nearest police station. Whoever violates this statute may be fined in an amount not to exceed ten thousand dollars, and may be subject to a criminal prosecution with a term of jail not to exceed one year.”

**Particular Issues and Questions:** How would each of these writers advise Marty Diamond to see his role in a similar (or different) fashion when he advises Mickey. How could an attorney’s perceived “role” change his advice? Should the attorney be obligated to advise his client how he sees his role? What difference does it make how Marty “sees his role”? Whenever *you* receive advice about *anything* does it matter how the “advice-giver” sees his or her role? What might be the first question that Marty asks Mickey?

**What would *you* advise Mickey to do? Would your answer change if you were Mickey’s lawyer or his “friend”? What if you were his lawyer and his friend?**

**Week Five**

We will conclude our discussion of Problem Three and begin to consider Problem Four. The new readings consist of two Supreme Court cases, one decided very recently and the other decided over one hundred years ago. We will see how the Supreme Court “works with words.” You never thought that fishing could become so complicated.

**Readings:**

(a.) United States v. Kirby, 74 U.S. 482 (1868).

(b.) Some articles explaining the predicament of John Yates.

(i.) “Fisherman Convicted of Violating Sarbanes-Oxley Will Be Heard by the Supreme Court,” ABA Journal, November 2, 2014.

(ii.) “Post-Enron Law Snags Fisherman,” The National Law Journal, November 3, 2014.

(iii.) “Justices to Weigh Prosecution of Fisherman under White-Collar Law,” Greenwire, November 3, 2014.

(c.) Excerpts from Title 18 of the United States Code. (Certain criminal statutes.)

(d.) Yates v. United States, No. 13-7451, Decided February 25, 2015 by the Supreme Court of the United States.

(e.) United States v. Yates, United States Court of Appeals, Eleventh Circuit, No. 11-16093, Decided August 16, 2013. (Obviously this Appeals Court decision preceded the Supreme Court decision, but one might read the Supreme Court case, cited immediately above in (d) first, as the Supreme Court case offers a much better statement of the facts and issues.)

(f.) Report on the Decision of the United States Supreme Court, “One Fish Two Fish Red Fish Blue Fish,” CNN Supreme Court Reporter, February 25, 2015.

**Supplemental Reading:** Persons who have an interest in the outcome of a Supreme Court case (but who are not parties) may file documents with the Court in which they argue their point of view. They are are called “amicus curaie briefs,” and they can be very instructive to read. Indeed, generally, they are written to “teach” the issue to the Supreme Court Justices, though they each certainly argue a particular outcome. You might find it interesting to read the briefs submitted by Michael Oxley (the co-sponsor of the so-called Sarbanes-Oxley law which was at issue in Yates); and the briefs filed by the Pacific Legal Foundation and the Cato Foundation, a so-called conservative think-tank.

In addition, if the string of articles, beginning with Wasserstrom, has wet your interest to think more about this matter of “professionalism,” I suggest you read an article by Rob Atkinson, *“How the Butler Was Made To Do It: The Perverted Professionalism of The Remains of the Day,”* Yale Law Journal, 1995. The writer relates the philosophical problems faced by a “professional” butler, with another type of professional servant, a lawyer.

**Problem Four**

***A Real Fish Tale***

While fishing in the Gulf of Mexico, John Yates did not expect to see a mermaid, nor did he expect to become the subject of a case before the United States Supreme Court. Though he never did see a serpent, he was arrested, faced a possible twenty-year prison sentence, received considerable national publicity and had his day at the Supreme Court---eight years later!

What was the source of all of the fuss?

He caught some red grouper which were less than twenty inches long.

Not to diminish the importance of laws intended to protect the environment, fish and wildlife, one still might think it’s odd that a case of this dimension became the subject of nationally prominent litigation.

But, the charge was not simply illegal fishing. It seems that after a federal agent discovered under-sized grouper on Captain Yates’ vessel, that agent curiously left the evidence (the fish) in a sealed container on the ship. After the feds sailed away, Yates took an opportunity to get off the hook (pun unintended), as he ordered a crew member to toss the suspect catch sequestered catch overboard.

Therefore, the charge was not merely catching small fish; now, it was destroying evidence of a crime. More particularly still, the charge was knowingly destroying “a tangible object” to hinder an investigation.

Just so you do not think that I am making this up, I quote the applicable statute in full:

18 United States Code Section 1519:

“Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency or the United State or any case filed under title 11, or in relation or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.”

Where did such a law come from?

Does anyone remember the financial “crimes” of the turn of the last century, and the legislation enacted to combat the same, most notably the Sarbanes-Oxley Act of 2002? The above Section is part of that law.

Query: Is a small red grouper a “tangible object”?

**Particular Issues and questions:** What is this case *really* about? A fisherman who unfortunately caught a few unfortunate grouper---who could go to jail for twenty years? Does the answer depend upon why you are asking the question? Perhaps we should start with some easier questions: Can you state the “facts” of this case? What did Captain Yates do wrong? Can you find the *exact* words in the quoted statute that Captain Yates allegedly violated? What do *you* think constitutes a “tangible object”? Is an infant “tangible object”? What did your mother think when you were born? How about a physicist? Justice Ginsburg? Justice Thomas? Can you think of everyday words, the meaning of which shift every day? Over a period of years? What does the word “do” mean if one says, “I’ll ‘do’ a fish taco, extra spicy.” *Yates* was a 5-4 decision. What does this tell you about “the law”? The meaning of words? As you read the Supreme Court case, you might circle the incidences of “Legal Reasoning” which you recognize.

By the way, who’s right? The Majority or the Dissenters? How would you vote?

An “extra credit” assignment: Make a list of the bad puns in the Supreme Court Opinions.

**Week Six**

We will conclude our discussion of Problem Four. Consider, again, how you would decide this case if you were on the Supreme Court. Did Yates violate 18 USC Section 1519?

**Supplemental Reading:** We have seen how the Supreme Court of the United States suffered as it tried to explain the meaning of the words “tangible object” (in a certain context.) Would you like to read how it recently suffered trying to understand the meaning of “houseboat,” another simple word? If so, consider *Lozman v. City of Riviera Beach, Florida,* United States Supreme Court, decided January 15, 2013.

**Week Seven**

We will begin to consider Problem Five. The new readings include an old case decided by the Supreme Court of the United States, and excerpts from two articles which began a famous legal colloquy that continues to this day.

**Readings:**

1. McBoyle v. United States, 283 U.S. 25 (1931.) {A classic Opinion of Mr. Justice Holmes in a Supreme Court case.}
2. H.L.A. Hart, *“Positivism and the Separation of Law and Morals,”* 71 Harv. L. Rev. 593 (1957); edited by William J. Eisen.
3. Lon L. Fuller, *“Positivism and Fidelity to Law: A Reply To Professor Hart,”* 71 Harv. L. Rev. 630 (1957); edited by William J. Eisen.

**Supplemental Readings:**

Indeed, the debate framed by Hart and Fuller has continued, and there have been many articles written about vehicles, parks—and lobsters, too!

(a.) Pierre Schlag, *“No Vehicles in the Park,”*  Seattle U. L. Rev. 381 (1999-2000).

(b.) Robert E. Keeton, *“Essay: Statutory Analogy, Purpose, and Policy in Legal Reasoning: Live Lobsters and a Tiger Cub in the Park,”* 52 Maryland Law Review 1192.

(c.) Frederick Schauer, *“A Critical Guide to Vehicles in the Park,”* 83 New York University Law Review 1109 (2008).

(d.) Bernard S. Bell, “*‘No Motor Vehicles in the Park’: Reviving the Hart-Fuller Debate to Introduce Statutory Construction,”* 48 Journal of Legal Education, 88 (1998).

**Problem Five**

**Do We Really Know (What) Anything (Is)?**

David Jensen is the owner of a start-up company known as “DWRI, Inc.” (The name is an acronym for “Don’t Walk, Ride Instead.”) The Company’s invention is a device on which one can stand and be propelled down the road by a small electrical engine at a speed not exceeding ten miles an hour.

As luck would have it, while an employee Becky Green was showing off a prototype of DWRI’s machine known as “The Mover,” she hit an older person who was walking. Becky, a veteran of the first Iraq war, commonly known as “Desert Storm,” lost her left leg in that conflict. The by-standers all agree that Becky honked her old-fashioned squeeze horn several times, but the pedestrian Jerrold Carl failed to get out of the way. Jerrold claims that he never heard the horn. This is probably true as it subsequently became known that he is nearly completely deaf.

The mishap occurred near the entrance to the Park Street subway station (at the corner of Park Street and Tremont Street) in the Boston Common at about 2:00 in the afternoon on lovely weekday as Becky started her journey through the Common and the Public Garden, trying to attract the attention of passers-by and to drum up business for the new device from average people and those with special needs like her.

The Solicitor of the City of Boston has sought to enforce a $100 fine against DWRI, based upon a state statute which reads:

**“No person shall operate any motorized vehicle in a public park which endangers pedestrians. Any person who violates this statute is subject to a $100.00 fine by the city or town in which such violation occurs.”**

**Particular Issues and Questions:**

Has Becky violated the statute such that DWRI should be fined? (You should presume that if Becky has violated the statute, DWRI has violated it as well, as she was acting as its agent within the scope of her employment, and hence DWRI, and not Becky, should be liable for the payment of any fine assessed.)

Before answering that simple question, however, I would like you to consider if there might be some questions which you would like to ask; some additional facts which you would like to learn? (For instance, would you like to know if Becky had two Bloody Mary’s for lunch? Or, perhaps that would be irrelevant.)

Please make a list of these questions, and the answers (which you can make-up, as you choose).

**Week Eight**

Each student should complete the Mid-Term Writing Assignment (described below), as soon as possible, and forward the same to me by e-mail. Unless there is an extenuating circumstance, such as illness or travel, the exams should be so submitted by 2:00 p.m. on Sunday, before our next class on Wednesday. During this class session for week eight, I would like to focus our attention upon the variety of answers. Obviously, this only can be accomplished if you submit your papers sufficiently in advance, so I have time to read them, make some comments, and organize my thoughts about the group’s submissions.

**Mid-Term Writing:**

Each student should write an essay in the form of an Opinion, only two or three of pages in length, in which he or she either takes the position that Becky and DWRI have not violated the statute; **or** that the City of Boston should be permitted to assess the fine. Before advocating either outcome, you may first posit some additional questions, and answer them, as suggested at the end of Problem Five itself. Be sure to argue in the alternative; that is, do not decide the case only upon one point. For instance, do not simply conclude that the contraption is not a motorized vehicle, and hence the statute was not violated, but rather argue in the alternative: “First, I decide that the device is not a ‘motorized vehicle,’ and hence it can be used; but if it is a motorized vehicle, it still can be used and the ordinance was not violated because…..” This is just an example. As I mentioned in Section VIII above in the Introduction to this Syllabus, your performance on the essay only will “count” toward the final grade if its effect would be to raise that grade. I will return all papers with comments, so this should be a constructive way to learn what I am thinking about what you are thinking, and for each student to evaluate himself or herself. **Please submit these writings to me via e-mail in advance of the class. I would appreciate receiving them as soon as possible, but no later than 2:00p.m. on Sunday, unless you have an extenuating circumstance such as illness or travel. I need time to read them, make comments, and organize a presentation for you.**

**Week Nine**

We will begin our discussion of Problem Six. The reading list looks long, but I note that nearly all of the readings are brief newspaper articles.

**Readings:**

1. Boston *Globe* article headlined, “Levy Ignored Warnings to End Relationship; Hospital Chief Apologizes for ‘Worst Mistake,’ but Has No Plans to Resign,” May 15, 2010.
2. Letter from the Office of the Attorney General of the Commonwealth of Massachusetts to Stephen Kay, Chair of Beth Israel Deaconess Medical Center, dated September 1. 2010.
3. Massachusetts General Laws, Chapter 12, Section 8.
4. Boston *Globe* article headlined, “AG Urges Beth Israel to Rethink CEO’s Fitness,” dated September 2, 2010.
5. Boston *Globe* article headlined, “National Organization for Women and Healthcare Union Call for Hospital CEO Levy to Resign,” dated September 9, 2010.
6. Comments from readers of the Boston *Herald*, published September 10, 2010.
7. Boston *Globe* article headlined, “Protestors Demand: Levy Out to Dry,” published September 24, 2010.

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1. Letter of Resignation from Paul Levy, circa January 2, 2011.
2. Boston *Globe* article headlined, “Levy Steps Down, Success Shadowed by Controversy….,” published January 8, 2011.
3. Boston *Globe* editorial headlined, “Levy: Damaged Advocate for a Crucial Idea,” published circa January 8, 2011.
4. Boston *Globe* column by Brian McGrory headlined, “No Words for Severance,” published January 19, 2011.
5. Boston *Globe* article headlined, “Levy’s Exit Cushioned by $1.6 million Severance Deal,” published January 22, 2011.
6. Boston *Globe* column by Brian McGrory headlined, “Trust? It’s on Life Support,” published February 9, 2011.
7. Postscript:
   1. Boston *Herald* article headlined, “Ex-Hospital Big’s Marriage Flatlines,” published March 22, 2011.
   2. Boston *Herald* article headlined, “Paul Levy Sees Big Returns from Nonprofit; Earns $91,000 for Six-Hour Week,” published March 23, 2011.
   3. Boston *Globe* article headlined, “Levy Bid for ISO Raises Concern,” published March 23, 2011.

**Problem Six**

**Paul Levy and Beth Israel Deaconess Medical Center**

Controversy erupted at the Beth Israel Deaconess Medical Center (“BIDMC”) in the spring of 2010 on account of the personal relationship between Paul Levy, the institution’s chief executive officer, and a female employee. Several months after the controversy appeared to have been settled, Dr. Levy resigned his position.

According to the Attorney General, as reported in the *Boston Globe* in an article dated September 2, 2010, “the situation at Beth Israel Deaconess provides an ‘eminently teachable moment’ for all nonprofit boards….” And, for us as well!

We will read several newspaper articles, beginning with the first reports of the controversy; an eleven page letter from the Office of the Attorney General of the Commonwealth of Massachusetts; a press release from the National Organization of Women (“NOW”); some random comments by readers of Boston’s *Herald Tribune* newspaper; and some concluding press reports (including a Boston *Globe* editorial) upon Dr. Levy’s resignation.

Then, we will consider the following issues and questions; and, of course, anything else you might choose to pose:

1. What are the “facts” of this controversy?
2. Perhaps, we find need to reconsider what *is* a “fact”?
3. Are some facts relevant, and some irrelevant? What is the difference? How does one know the difference?
4. What *is* the relevant law?
5. Does the Attorney General claim that Paul Levy broke a law? Did he break a law?
6. Find evidences of Legal Reasoning in the Attorney General’s letter.
7. How would you characterize the Attorney General’s letter?
8. *Could you write a “better letter”*? How would it be different?
9. Finally, next class, I will distribute to you a series of very brief hypothetical statutes, and ask to you consider, in light of the facts, as understood by us, whether Dr. Levy, and/or the Board of Trustees of BIDMC (or any other person) might be guilty of having violated any of these hypothetical statutes.

**Week Ten**

We will conclude our discussion of Problem Six. No new readings.

**Week Eleven**

If you are confused at this point as to *exactly* what constitutes Legal Reasoning, you should find solace in the entertaining, highly literate, but difficult article titled, *“The Player and the Cards: Nihilism and Legal Theory,”* in which the writer, Joseph Singer, observes, in passing, “…. that both the legal rules in force and the arguments that are presented to justify and criticize them {i.e., our method of legal reasoning and the justifications for it} are incoherent.” Singer, supra, at 59.

**Reading:**

Joseph William Singer, *“The Player and the Cards: Nihilism and Legal Theory,”* 94 Yale Law Journal, 1 (1984).

**Supplemental Readings:** As you might imagine, there is a vast literature on “legal theory,” and the dilemma which some “philosophers” might claim we have been crudely considering. Below are two articles which are difficult, not entirely accessible, but might interest you.

(a.) Brett B. Scharffs, *“The Character of Legal Reasoning,”* 61 Wash. & Lee L. Rev. 733 (2004).

(b.) Vern R. Walker, *“Discovering the Logic of Legal Reasoning”*  Hofstra Law Review, 2006.

**Problem Seven**

**Morality: The Lawyer and the Client**

***Legal Reasoning to What End?***

To what end should a lawyer use his or her “legal reasoning skills”? How can a lawyer set an ethical boundary, or should the lawyer leave this (entirely) up to the client? Can we talk about the difference between “right” and “wrong”?

We have read a number of writers, beginning with Richard Wasserstrom, each of whom has considered the lawyer’s stance, his or her obligations to the client, and to his or her own conscience.

Ready to become uncomfortable? The next hypothetical (and variations on it) moves close to home. Here we go:

Situation One- the Back Round

Jane Grant is a student at the Extension School. She is struggling financially, holding a job, paying rent and tuition, studying, and trying to have a life, all at the same time. Her father is a rather successful businessman, and although he has offered to help her, she has not accepted his assistance. However, when she had questions about her personal income tax return (which she was unwilling to share with her father), he advised her, “I’ll tell my lawyer, Bill Diamond, to talk to you. He’s a nice guy. You’ll like him.”

So, Jane visits Bill Diamond with a draft of her income tax return.

{I’ll save you the initial faux dialogue between her and Diamond, if you accept the proposition that for a number of reasons, she does not use the standard deduction, but rather she itemizes her deductions….}

Situation One-Part One

The draft return shows that she is scheduled to receive a refund of $1,200, but she still asks Diamond, “Is there any way that I can reduce my taxes, increase my refund?”

He glances at her return. He sees that she donated $50 to Rosie’s Place, a homeless shelter in Boston.

Should Diamond suggest that if she changed the $50 contribution to $500, she would receive a bigger refund?

Situation One- Part Two:

Same facts as above, to the point of Jane Grant’s first words to Diamond. This time, however, as she hands Diamond her draft federal income tax return, she says, “As you can see, I made total charitable contributions of $50. What would happen if I increased that amount to $1,000? A friend of mine told me that the IRS never would catch that mistake, and so what if they did?”

How should Diamond reply?

Situation One- Part Three: Same facts, as above, to the point of Jane Grant’s first words to Diamond, *except* let’s also posit that her draft return shows that she owes $1,200, instead of being entitled to a refund. Their conversation begins as follows:

“Mr. Diamond, you gotta figure something out…I owe $1,200 that I do not have. Is there anything I can do?”

How should Diamond reply?

Situation One- Part Four:

Let’s change the facts, a bit. She shows Diamond her draft income tax return. Although she only owes the IRS $187, she asks Diamond if there is any way that she can reduce her taxes, as she would love to obtain a refund! He notices that she is taking a charitable deduction for a $1,000 donation to Rosie’s place. That seems like a lot of money. Should Diamond ask, “Did you make a mistake on your return? Is the amount of the donation supposed to be only $100?”

Does your answer change if she asked him to “Check her return”?

If you were Bill Diamond how would you respond in each of these situations?

If Bill Diamond had asked each of Wasserstrom, Pepper, Luban, Kaufman, Simon, Fried and Dauer how he should respond in each of the above situations, what would each of these writers have recommended?

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Are you ready for a more difficult set of problems?

Situation Two - Back Round

Jane Grant is a student at the Extension School. She is struggling financially, holding a job, paying rent and tuition, studying, and trying to have a life, all at the same time. Her father is a rather successful businessman, and although he has offered to help her, she has not accepted his assistance. However, when she had questions about her personal income tax return (which she was unwilling to share with her father), he advised her, “I’ll tell my lawyer, Bill Diamond, to talk to you. He’s a nice guy. You’ll like him.”

Suppose, over the previous summer, Jane had worked for her sister’s business, a bicycle messenger service. She earned exactly $5,000, as her sister’ corporation wrote her a check for $500, for ten weeks in a row.

Situation Two – Part One

The draft return shows that she is scheduled to receive a refund of $1,200, but she still asks Diamond, “Is there any way that I can reduce my taxes, increase my refund?”

Diamond knows that she worked for her sister. He also knows that the sister’s business actually lost money, so it does not need the deduction of the wages paid to Jane Grant, if you can follow that…..

Should Diamond ask Jane, “What about the money you earned from your sister’s business?” Should he add, “You have an obligation to report that!”

Situation Two – Part Two

Same as “Part One,” except that rather than expecting a refund, the draft tax return shows that Jane owes $800---and she has not reported the income from her sister’s business.

“Mr. Diamond,” Jane pleads. “What should I do? I already owe the government $800 that I don’t have; and I haven’t put down the money I earned last summer from my sister. Do I have to report it?”

What is Diamond supposed to tell her? That she has a moral obligation to report the income? That there is almost a zero chance of her being audited? That if she is audited, she probably only will have to pay back taxes, and a nominal amount of interest?

Situation Two –Part Three

Same as Part Two, immediately above, except after conferring with Diamond, Jane decides not to report any income from her sister’s company.

Jane visits him a second time. She is angry and scared. “Look at this!” she shouts at him, as she tosses a piece of paper across his desk.

“It’s a notice from the IRS. Somehow, they discovered the missing income of $5,000, and now they want me to pay taxes, interest--- and a penalty of $1,500. You never warned me about a penalty!”

Diamond knows that the sister has not yet filed her business’s income tax return, as it reports on a fiscal year; he also knows that if these checks from Jane’s sister were a loan or a “gift,” they would not be taxable. Should Diamond suggest some “ways out”? Should he be influenced by the extent to which he encouraged, or discouraged her, in the first instance from not reporting the summer’s earnings?

If Bill Diamond had asked each of Wasserstrom, Pepper, Luban, Kaufman, Simon, Fried and Dauer how he should respond in each of the above situations, what would each of these writers have recommended?

**Week Twelve**

We will consider a “mess” from the great City of Chicago, as an example of a “political problem” cast as a legal problem—or is it a “legal problem” with immediate political consequences---or can you think of a better description of the “relationship” between law (Legal Reasoning) and politics in the following controversy?

**Readings:**

1. Excerpts from applicable Illinois Law.
2. Report of the Hearing Officer Joseph A. Morris, Esq. of the Board of Election Commissioners of the City of Chicago, December 6, 2010, upholding the right of Rahm Emanuel to be listed on the ballot as a candidate for the office of Mayor of the City of Chicago.
3. Newspaper story, circa December 23, 2010, reporting upon said Hearing Officer’s Report.
4. “Findings and Decision” of the Board of Election City of Chicago, adopting said Hearing Officer’s recommended findings and conclusions of law and ordering that the name of Rahm Emanuel be printed on the ballot for the office of Mayor of the City of Chicago.
5. “Opinion and Order” of the Circuit Court of Cook County, Illinois, affirming the findings of said Board of Election Commissioners, January 4, 2011.
6. “Opinion” of the Appeals Court, reversing said Circuit Court’s “Opinion and Order,” and thereby removing Rahm Emanuel from the ballot. (This was a 2-1 decision, and the reported materials include the Dissent.)
7. Unanimous “Opinion” of the Supreme Court of the State of Illinois, reversing the Appeals Court, and ordering that Rahm Emanuel’s name appears on the ballot for the office of Mayor of the City of Chicago.
8. News story, dated January 25, 2011, reporting said decision of said Supreme Court.
9. Article from the Sunday *New York Times* by Scott Turow, February 20, 2011.

**Problem Eight**

**Where You Live Ain’t Such a Simple Concept**

Rahm Emanuel, former Congressman from Illinois, and most immediately former Chief-of Staff of the President of the United States, resigned his White House to run for Mayor of the City of Chicago. However, he encountered an immediate problem: A number of constituents and two (and only two!) well placed jurists thought that he was not a “Resident” of Chicago, and hence not qualified under Illinois law to run for such office.

As you might imagine, the case began with a few people challenging his legal qualifications to run for office in Chicago, and it ended with the Supreme Court of the State of Illinois. Indeed, the ball bounced, quite a few times: First, a Hearing Officer hired by the Board of Election Commissioners of the City of Chicago found him qualified; Second, the Board of Election Commissions adopted the Hearing Officer’s report; Third, a local court affirmed; Fourth, an Appeals Court held 2-1 against Mr. Emanuel, thus ordering him off the ballot; and, Finally, the state Supreme Court unanimously held he met all of the criteria to run.

Much of this “colloquy” proceeds in the language of “Legal Reasoning.” We ask again: What is “Legal Reasoning”? A way to talk? Nothing more?

**Week Thirteen**

We will conclude our discussion of Problem Seven. There is no further reading assignment. Consider in particular: What do you think about the concurring Opinion of Justices Freeman and Burke to the decision of the Illinois Supreme Court? How would you characterize the (unarticulated) position of these Justices about the role and methods of Legal Reasoning?

**Week Fourteen**

The exam. I will distribute to you a written problem, similar to those above, and ask you to consider some questions, similar to those above, in the form of a written essay.

**Week Fifteen**

We will discuss the exam. With your permission, I will distribute to you everyone’s exam essay, without names, of course, to help us gather everyone’s points of view. I will leave you to ponder, at your leisure, why different people might pose different answers (all worthy) to the same question.