

DE MINIMIS CURAT LEX
SECRETS TO SUCCESS FOR 1ST YEAR LAW STUDENTS
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I. INTRODUCTION

Over one hundred years ago, Justice William Story opined that “[the Law] is a jealous mistress.”¹ Not only is this a quintessential example of political incorrectness, but also I submit that Justice Story had it basically wrong. A mistress expects her lover’s attention intermittently and, as it were, in staccato bursts. A mistress is basically a diversion from a constructive life, i.e., from Story’s very own reality. The law, on the other hand, is more like one’s betrothed, always first, always in your mind, always commanding, although not demanding, your undivided attention. The study of law, which is a lifelong vocation, is an enduring endeavor. The student of law remains just that and, in a way, never really completes the education process. But as countless lawyers will attest, the study of law is a fascinating journey, occasionally dull, never ending, but fundamentally all engrossing.²

* I wish to acknowledge the unstinting efforts, in so many ways, of my research assistant Amy E. Keller in the preparation of this article. She helped me whenever I began to stray from my original intent: that is, to write an article that would be most beneficial to the entering law student. She helped me to maintain the perspective of the struggling student, rather than the didactic perspective of the professor on the far side of the podium. In short, her assistance was invaluable.

¹ THE OXFORD DICTIONARY OF AMERICAN LEGAL QUOTATIONS 240 (1993).

² Boris Blai, Jr. has noted that

[t]he way in which students study strongly influences how much they learn. And in this learning process, teachers can often help students develop better study habits. Ongoing research has very clearly identified several study skills used by good students that can also be taught to other students. Average students can readily learn how to use these skills. Low-ability students may need to be taught when, as well as how, to use them.

Boris Blai, Jr., *A Study Guide for Students*, 67 CLEARING HOUSE 98, 98 (1993).

When a student enters law school and begins the required course of studies,³ she usually comes with a great deal of enthusiasm. As the early semesters wear on, sometimes enthusiasm wanes as unforeseeable obstacles arise.⁴ The study of law, she quickly learns, differs radically from any course of studies in undergraduate school.⁵ There is a virtually

³ Most law schools in the United States have a core of required courses including, but not limited to, contracts, torts, criminal law, property, procedure, constitutional law and lawyering skills which, in turn, includes different types of legal writing and oral advocacy. LAW SCHOOL ADMISSION COUNCIL, THINK ABOUT LAW SCHOOL 2 (2008), *available at* <http://www.lsac.org/pdfs/2008-2009/ThinkAboutLawSchool2008.pdf>. These courses are usually looked upon as the “basic primary colors” of one’s entire legal education. *See id.*

⁴ One of the known obstacles is the undergraduate debt that looms over the head of the entering 1L student. About two-thirds of four-year undergraduate students graduate with some debt, and statistics for 1999–2000 indicate that the average amount borrowed by undergrads was \$19,300. NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEP’T OF EDUC., THE CONDITION OF EDUCATION NCES 2004, at 177 (2004) *available at* <http://nces.ed.gov/pubs2004/2004077.pdf>. For the years 2006 through 2007, students obtaining bachelor’s degrees averaged about \$22,700 in debt. COLLEGE BOARD, TRENDS IN STUDENT AID (2008), *available at* <http://www.collegeboard.com/html/costs/aid/>. The student can defer this debt while she finishes law school, but, of course, must start paying it—along with any law school debt incurred—within six months of graduation from law school. *See* ABA COMM’N ON LOAN REPAYMENT AND FORGIVENESS, LIFTING THE BURDEN: LAW STUDENT DEBT AS A BARRIER TO PUBLIC SERVICE 20, 34 (2003), *available at* <http://www.abanet.org/legalservices/downloads/lrap/lrapfinalreport.pdf> [hereinafter LIFTING THE BURDEN]. The latest data available indicate that private law school graduates incur an average of \$78,000 in law school debt, and public law school graduates incur an average of \$51,000 in debt. Craig Linder, *Student Debt Crisis: Lawmakers Take Action*, 36 STUDENT LAW. 18, 21 (2007). These loans are generally through federal subsidized and unsubsidized loan programs. LIFTING THE BURDEN, *supra*, at 33. Such debt militates against a law graduate taking jobs in the “comparatively low-paying public service legal positions . . . in federal, state and local government agencies.” *Id.* at 14. The median public law school tuition for residents rose from \$1,792 in 1985 to \$9,252 in 2002; and the median private law school tuition rose from \$7,385 in 1985 to \$24,920 in 2002. *Id.* at 17.

⁵ There is no pre-law major, as such, in undergraduate school. Pre-Law Comm. of the ABA Sec. Legal Educ. and Admissions to the Bar, Preparing for Law School, <http://www.abanet.org/legaled/prelaw/prep.html> (last visited Feb. 5, 2009). Undergrads seem to follow their own individual interests, which, in the author’s opinion, is as it should be. However, the more writing in undergraduate school the better, especially expository
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unlimited amount of material, most of it utterly foreign and seemingly unknowable, regardless of the efforts expended to master it. Worse, a student often comes to class with a good “feel” for what she believes the cases and statutes ostensibly mean, only to leave class with apparently less understanding than before. To say the least, the study of law for entering students can be frustrating.

However, there are tricks of the trade. Many students appear to expend a great deal of time studying. But, for a multiplicity of reasons, they often do not seem to realize the best results therefrom. Law students are adults with all the mental advantages and corresponding disadvantages of adulthood. One admitted shortcoming of a mature mind is its progressive loss of that sponge-like capacity that facilitates effortless learning in children, for instance, foreign languages.⁶ The beginning law

writing. Certain majors “are considered to be traditional preparation for law school, such as history, English, philosophy, political science, [and] economics or business.” *Id.*

⁶ See Hiromi Hadley, *Reviewing First and Second Language Acquisition: A Comparison Between Young and Adult Learners*, 8 NIIGATA STUD. FOREIGN LANGUAGES AND CULTURES 37 (2002) (citations omitted), available at http://www.nuis.ac.jp/~hadley/publication/languageacquisition_files/languageacquisition.htm. Children do not analyze; they absorb. Cf. MARIA MONTESSORI, *THE ABSORBENT MIND* 110 (1967). This may explain why adults who attempt to learn English as their second language find such difficulty mastering its spelling. No wonder that it is difficult; and, notwithstanding the numerous rules of grammar, syntax, etc. that were drilled into our heads, the English language is largely unpredictable. Thanks to centuries of French kings ruling native speaking commoners, our language is a hodgepodge of illogical spelling contradictions and lexical landmines. Children, however do not care. As long as they do not worry too much about so-called rules (“i before e, except after c,” etc.), they can just blunder into it and learn it. Meanwhile the foreign adult is in full analytic mode, trying to figure out why “*tough*,” “*through*,” and “*ought*” do not sound the same.

To account for a maturational decline in language learning, . . . one might suppose that this language faculty is entirely intact only in early life, and then undergoes decay or deterioration as maturation continues. On such a view, later language learners show less success in acquiring their language, and more variable mastery of its rules, because the constraints which permit successful acquisition are weakened.

Jacqueline S. Johnson & Elissa L. Newport, *Critical Period Effects in Second Language Learning: The Influence of Maturational State on the Acquisition of English as a Second Language*, 21 COGNITIVE PSYCHOL. 11–28 (1990).

student must realize that the law is a foreign land with a foreign language, and she must master it without the benefit of childlike innocence. Nevertheless, the adventure is well worth the effort.⁷

The following suggestions that I propose, after having taught first year law students for over thirty years, are probably most applicable to students in the first two or three semesters, where the professors use casebooks rather than other types of materials, such as problems and hypotheticals. Theoretically, the system should work even though the professor employs the “problem method,” provided that the problems and materials are logically organized so that as the semester progresses a legal story unfolds. If a beginning student follows these guidelines, and does so religiously, she will make the most of her time, and both the breadth and depth of her knowledge of the law will be hers forever.⁸

⁷ Hiromi Hadley notes:

At puberty, cognitive maturation from the concrete operational stage to the formal operational stage also takes place. The ability to abstract, classify and generalize gives adult learners an advantage to systematically solve problems. . . . adult language learners rely on their cognitive activities of general information processing, as a Language Acquisition Device gradually becomes unavailable for them. Cognitively developed learners, therefore, may benefit from deductive learning of language structures and grammar in the classroom, and meaningfulness in such learning is possibly far more important for those learners than for children.

Hadley, *supra* note 6, at 37.

⁸ Roy Simon recommends students do the following:

Take down the professor’s questions, not just the professor’s answers. Under the Socratic method, many professors seldom provide any answers. They want you to learn the key questions to ask, not just rigid, unchanging “answers.” As you learn more about how to “think like a lawyer” (or at least like a law professor), these questions will make more sense—and you’ll get a lot more credit for asking the right questions on a final exam than for spewing out something you memorized from a classmate’s outline.

Roy Simon, *How to Succeed in Law School*, N.Y. L.J., Aug. 23, 2002, at 16.

II. SEVEN STEPS TO SUCCESS

A. Brief the Cases Before You Come to Class

Most students today come to class armed with a laptop computer. These same students, prior to coming to class, will have “briefed” the cases for the coming day on their computer. A computer, the author argues, can be a mixed blessing, for too much can be entered into the computer without the student really comprehending the meaning of the court’s words.⁹ It really does the novice law student little good to type exactly what the court opinion says. It is up to the student to interpret the court’s often arcane language and convoluted logic. The law student is not supposed to be a human scanner. She is supposed to be an interpreter. Therefore, put into your own words and form your own ideas as to the essence of what the judge has written in the opinion.

There is also some evidence, somewhat self evident, that typing is not as pedagogically productive as writing out notes long hand. There appears to be more of a “connect” between penning one’s thoughts onto paper and the writer’s comprehension than there is between typing one’s thoughts and the understanding of a sophisticated argument.¹⁰ However, there is no holding back “progress,” and it would be quixotic of the author to urge law students to return to pen and paper for their briefs. But keep your briefs short, use your own words, and, if at all possible, individualize your own thoughts on your laptop.

A student, pressed for time, however will be tempted to simply underline or highlight the court’s words. After all, the court’s statement is the decisive utterance on the issue. The rhetorical question is: why would anyone want to change the judge’s definitive statement of both the principles and the underlying rationales for the court’s conclusion? It

⁹ Cf. Kevin Yamamoto, *Banning Laptops in the Classroom: Is It Worth the Hassles?*, 57 J. LEGAL EDUC. 477, 490–91, 501–04 (2007) (noting that students using laptops to take class notes fail to comprehend the material as thoroughly as students using a notebook and pen).

¹⁰ Marieke Longcamp, Céline Boucard, Jean-Claude Gilhodes, & Jean-Luc Velay, *Remembering the Orientation of Newly Learned Characters Depends on the Associated Writing Knowledge: A Comparison Between Handwriting and Typing*, 25 HUM. MOVEMENT SCI. 646, 652–53 (2006). This 2006 study tracked memory retention related to handwriting as opposed to typing. *Id.* at 647. The study showed that the motor skills involved with writing contributed to one’s ability to remember what was written. *Id.* at 652–53.

would be presumptive to try to improve on Beethoven, would it not? And so the argument goes.

Reason: “Book briefs” are of scant value in understanding a case. The student is doing little more than emphasizing in her mind—in effect memorizing—what someone else has written.¹¹ There is, of course, nothing wrong with rote memory. It can be, at least, momentarily impressive when a lawyer can rattle off chapter and verse of a leading opinion. But a lawyer rarely has to call on this skill. The skill required to master the multiplication tables is not highly prized within the profession. The irony of our memories is their knack of supplying us with trivia, and failing to come up with appropriate reasoning, when a professor—or, worse yet, a judge—is questioning us closely. For example, if the professor or judge needed to know the names of the Seven Dwarfs or the Brady Bunch kids, our memories might be more than up to the task. The bad news is that the memory’s short circuiting begins slowly in a student’s mid-twenties, and it inexorably proceeds through middle age to the random bits of senility which bedevil all who live long enough to experience them. Both law students and lawyers are expected to understand and be able to discern the reasoning behind a legal decision, not just memorize the language of the decision itself. But there are ways to fight this war, particularly during the intense mental skirmishes of first year law school.

When a student translates on her laptop or onto paper, in her own words, the thoughts and analysis of an appellate court, she uses more than her primary sense of sight. If she were to simultaneously read, write, and hear the same concept, that concept will more surely register on her mind

¹¹ Roy Simon recommends students:

Read every case twice before class.

There’s no substitute for being well prepared for class. The best single piece of advice I got when I began law school was to learn each case thoroughly before class. “If you do that,” my friend said, “you’ll fool yourself. You’ll think you’re learning the case during class—but while you’re learning the facts and the holding, the students who prepared before class will be learning law on a whole different level—and you won’t even know it.”

Simon, *supra* note 8, at 16.

than if she used but one sense.¹² Restating in one's own words the arguments and reasoning of the court takes work. As a cynical bumper sticker proclaims, "Everyone has a photographic memory; not everyone has film."¹³

It is, however, vitally important for the law student to be able to understand what the court has said and then to be able to translate the court's analysis into her own words and commit those words to paper.¹⁴ It seems that many people are quite verbal. However, when these same people are asked to explain a court's opinion in their own words, they seem incapable of doing so. This, I believe, indicates a lack of true understanding of the case.¹⁵

Since a lawsuit is an adversary process, when the student briefs a case it is advisable that she be able to understand the exact procedural process whereby this case arrived at this particular appellate court. Rudimentary understanding of a civil or criminal practice code is highly desirable when trying to ferret out the essential holding of a case. The reason for this is

¹² See, e.g., DOMINIC O'BRIEN, *LEARN TO REMEMBER: PRACTICAL TECHNIQUES AND EXERCISES TO IMPROVE YOUR MEMORY* 22–23 (2000). O'Brien discusses how the use of multiple senses in education (sometimes found in those with synesthesia) may improve memory function and capacity. *Id.* at 22. Using multiple senses, O'Brien argues, can unlock the door to enhanced and clearer memories. *Id.* at 84.

¹³ As pedagogic trends have come and gone, the practice of having school children memorize long passages of prose and poetry has fallen into disuse. Gene I. Maeroff, *Use of Memorization in Schools Fading*, N.Y. TIMES, June 8, 1982, at C1. At one time, not too long ago, most youngsters would have at least half-remembered snatches of everything from *The Gettysburg Address* to Frost's *Stopping by Woods on a Snowy Evening* still rumbling around in their heads as they graduated, and entered adult life. Whether this forced rote learning was a valuable practice is debated by educational theorists. See *id.* But it is undeniable that law demands more—namely understanding the *meaning* of the bare words learned by rote.

¹⁴ See Stephen L. Benton et al., *Encoding and External-Storage Effects on Writing Processes*, 85 J. EDUC. PSYCHOL. 267, 268 ("Notes . . . can be used as input to a further cycle of processing that does not simply add to what was produced before but transforms it." This transformation most likely varies from almost negligible effects in conventional note-taking to stronger effects in creating outline or matrix notes, because the latter require making decisions about where to place information.") (citations omitted).

¹⁵ "Only when you try to put something in writing do you truly discover what you don't know. If you can't explain something to yourself in writing, you won't be able to explain it to your professor on the final exam." Simon, *supra* note 8, at 16.

simple: when a case is affirmed on appeal, the legal issues governing the appellate opinion are not as accentuated; but when a case is reversed on appeal, the issues quickly rise to the surface. A reversal of a lower court's judgment, by definition, rests on one or more crucial issues of law, which in turn become the principle or principles of the case. Therefore the student should be as well-versed as possible in basic procedural rules, such as the principles governing motions to dismiss, summary judgments, directed verdicts, judgments notwithstanding the verdict, and motions for a new trial.¹⁶ Similarly, if the case under analysis is a supreme court decision, the student should be able to relate what decision, affirmance, reversal, or reversal and remand, was rendered at the appellate level. In this way, the essential law, and underlying rationale(s) of the case, will more surely be brought into bold relief.¹⁷

B. In Each Case Come to Some Conclusion as to the Principle(s) or Rule(s) of the Case

This, admittedly, is just the beginning. However, most first year law students find it necessary during an animated class discussion to start from somewhere, to launch, as it were, their speculative analysis into the unknown from the known, or at least from what they believe to be the known.

Many professors believe that it is crucial for the student to come to class with a firm opinion as to a case's meaning, plus, where possible, the court's underlying rationales.¹⁸ The student should have an opinion as to

¹⁶ When a case is appealed at an early stage in its procedural history, the law that surfaces in the appellate court opinion tends to be easier to comprehend. For example, when a case is dismissed on the pleadings, the sole issue on appeal is whether the facts as pleaded in the complaint—assuming they are true—state a cause of action. The later a case is appealed in the history of the trial, the murkier the issues tend to become. Thus, the law student should always endeavor to determine precisely at what stage of the trial the case was appealed; for example, after a motion to dismiss, after a summary judgment, after a directed verdict, after a jury verdict, or after a judgment notwithstanding the verdict (J.N.O.V.).

¹⁷ See Appendix A for an example of a brief of *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99 (N.Y. 1928).

¹⁸ See, e.g., RONALD A. GERLACH & LYNNE W. LAMPRECHT, *TEACHING ABOUT THE LAW* 6 (1975). If the law being analyzed happens to be a statute or ordinance the student should attempt to determine the public policy that moved the legislature to draft such a law.

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the “concrete” meaning of the case, even though the student suspects that there are numerous exceptions to that “black letter law.” On the other hand there are some professors who never come to a conclusion, and who lead others to believe that anyone’s opinion is just as good as anyone else’s opinion—even though those two opinions may be diametrically opposed to each other.¹⁹ In other words, leaving the class in a “fog” is considered a “good class” in these professors’ minds. It is the author’s opinion that the former approach is more educationally productive and will give the student a “jumping off point” so that she can actively engage in an animated class discussion.

Reason: To have read, analyzed and briefed a case, but to still be “at sea,” is inimical to forging a coherent framework within which to begin your comprehension of legal principles. Admittedly, just memorizing “rules,” “principles,” and “black letter law” is superficial at best. However, it is submitted that arriving at some conclusion as to the meaning of the case, however tentative, is a good place to start. It is psychologically difficult, if not impossible, to leap into the unknown from the equally unknown.

It is even more important to try to determine the court’s reasoning, that is, the underlying rationale for the court’s decision. An assumption underlying every court’s opinion is that the opinion is founded on logic.²⁰ The student may not agree with the logic or the public policy that motivates the court to arrive at its conclusion. But she must attempt to discern it. And that logic is supposed to be consistent from case to case, at least when the facts are substantially the same.²¹ Once she has come to a conclusion, not only as to the decisive utterance of the court but, more importantly, to its supporting rationale, she will have begun her comprehension of the legal system.

She will soon come to realize that virtually all statutes and ordinances are the result of compromise, *see* *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 93 (2002), and almost invariably contain ambiguous language that a court will eventually have to interpret.

¹⁹ *See, e.g.*, ALFRED G. SMITH, *COGNITIVE STYLES IN LAW SCHOOL* 108 (1979).

²⁰ *See* Orin S. Kerr, *How to Read a Legal Opinion: A Guide for New Law Students*, 11 *GREEN BAG* 51, 51 (2007) (“The opinion explains what the case is about, discusses the relevant legal principles, and then applies the law to the facts to reach a ruling in favor of one side and against the other.”).

²¹ *See id.* at 60.

Many beginning students are perplexed as to how to find the issue(s) in a case. Admittedly, this can be a problem because frequently the editors of casebooks include in the edited text many irrelevant facts.²² This, of course, mirrors reality. Never will a client present a lawyer with only the relevant facts. This would be too much to hope for. It is up to the student therefore to cull the wheat from the chaff in order that the truly relevant facts, the “critically operative facts” will rise to the surface. These facts in turn give rise to the legal issue(s) in the case.

A true legal issue is not an area that is simply a “problem” or a “controversy.” For example, health care in the United States, AIDS or the war in Iraq are not true “legal issues.” They are areas of immense controversy to be sure. However, a true “legal issue” is a question as to which the plaintiff and the defendant, or the prosecution and the defense in a criminal case, take diametrically opposite positions.²³ It is a simple question to which the plaintiff would argue “yes” and the defendant would argue “no.” In order to properly frame the question, the relevant facts that give rise to the issue must be woven into the question. For example: “Would the two-year statute of limitations still apply to a plaintiff who waited two years and three months to file suit against a defendant, considering the fact that the defendant had been voluntarily absent from the jurisdiction for six months? If indeed the case turns on only one such legal issue, then the student should limit her recitation of facts to only those “critically operative facts” that deal with the date of the accident, the length of the statute of limitations, the circumstances surrounding the defendant’s absence from the jurisdiction, and the date the plaintiff filed suit. Another example would be: “Under a system of modified comparative negligence, if the plaintiff’s contributory negligence is less than fifty percent but one defendant’s negligence is less than the plaintiff’s, may the plaintiff nevertheless recover against the defendant?” This is another question to which one party would answer “yes,” and the other party would answer “no.” These are the kind of legal issues that the student should endeavor to extract from the case.

²² See E. Allan Farnsworth, *Casebooks and Scholarship: Confessions of an American Opinion Clipper*, 42 Sw. L.J. 903, 906 (1988) (noting that some textbooks are more heavily edited than others).

²³ See GARY A. MUNNEKE, *HOW TO SUCCEED IN LAW SCHOOL* 50–51 (3d ed. 2001).

After a student has read and briefed the case, and knows the proposition(s) that the case stands for, the apparent logic of the opinion, plus the public policy underlying the principles, then class discussion will become meaningful. In short, the student will have become an advocate, a fighter for a cause. On the other hand, if the student comes to class without knowing what proposition(s) the case stands for, it is very likely that for her, class discussion will lose much, if not all, of its meaning. The attitude of: “I’ve read and briefed the case, I don’t understand what it means—but I’ll figure it out in class” will be quite unproductive.

It is better, in my judgment, to come to class with the wrong opinion as to the meaning of a case than with no opinion at all. Litigators will attest to the fact that they clearly remember virtually every case they lost, and probably know the reasons why they lost.²⁴ There is absolutely nothing wrong in coming to class with a firmly held opinion as to the meaning of a case or statute, and thereafter having one’s opinion be totally destroyed. It may seem humiliating to champion a cause, only to have the professor find that position wanting, weak, or vulnerable. However, humiliation is transitory. This aspiring lawyer will never forget having staunchly advocated a position, and only later realized her error.²⁵

C. Within an Hour Before Class, Review Your Briefs for That Day

Briefs should be a means to an end—not an end in themselves. Be familiar with the facts and the basic positions of the majority and, if any, minority holdings.

Reason: It is important that a student’s understanding of the cases for that day’s class be as keen as possible. She should not spend half her class time—while a dialogue may be taking place between the professor and another student—trying to recall what she wrote down in her brief, and worse yet, why. Immediate knowledge of the day’s material should be the springboard for class discussion. She should listen with a critical ear to her

²⁴ See, e.g., Stephen D. Easton, *My Last Lecture: Unsolicited Advice for Future and Current Lawyers*, 56 S.C. L. REV. 229, 246 (2004) (“When you lose, you remember every mistake.”).

²⁵ It will frequently happen that a student will not be persuaded that the professor himself has understood the opinion correctly. There is nothing wrong in courteously pressing the point after class. As a matter of fact, most professors like to be challenged and are not offended by a polite, persistent opponent.

classmate's recitation, trying to anticipate what question or line of inquiry will soon be forthcoming from the professor. If the student is able to predict the line of questions in which the professor finally engages, she can be assured that she is learning the material. So, while a professor is dialoguing with another class member, the student should not be preoccupied in trying to figure out from her own brief what she thought the case meant, or, even worse, the relevant facts of the case. She should, instead, be prepared to assume the role of the teacher, and draw up questions in her own mind that she would use to "cross-examine" her fellow student. It is a truism that the best way to learn any subject is to teach it.²⁶ Therefore, in the classroom, she should not only be learning, she should also be teaching.

D. Take Class Notes in a Separate Book, Preferably on Loose-Leaf Paper, but Definitely Not on the Brief Itself

Reason: In part, it is a matter of space. Some teachers dwell on one case for the whole period. Some will dismiss a case out of hand as unimportant. In the professor's mind, rest assured, all cases are not of equal importance. For example, there are over 250 edited major cases in Prosser, Wade, and Schwartz's *Torts – Cases and Materials* (10th ed. 2000), and countless follow-up footnote cases as examples of or exceptions to the principle(s) treated in the major cases. Depending on current legal affairs, the professor may choose to emphasize in one semester the identical case he had de-emphasized in a previous semester. Therefore, assuming that the professor finds a particular case extremely important, if the student confines note taking to her written brief, she simply will not be able to organize her ideas in a coherent manner.²⁷

²⁶ Cf. GERALD F. HESS & STEVEN FRIEDLAND, *TECHNIQUES FOR TEACHING LAW* 3–5 (1999) (“Students working in groups can collectively reach levels none of them could have reached alone.”).

²⁷ Cf. Benton et al., *supra* note 14, at 267 (“It seems logical that the ways in which notes are used (their functions) and the format of notes might affect the degree to which writers generate ideas and organize them into a cohesive and coherent structure.”).

E. Take Class Notes Only on One Side of the Spiral Notebook. Leave Plenty of Room Between Notes. As Soon as You Leave Class Go to the Library and Fill in Your Notes

Class notes should be the main source of review for the final exam. The briefs will have now served their purpose of keying the student in and, hopefully, up for the class discussion. Her briefs have ceased to be the prime source of her legal education.

However, unless the student can both comprehend novel concepts and simultaneously write or type exceptionally fast, there will be parts of the class discussion that she heard but did not fully grasp. She should take notes on one side of the notebook and, while the class is still fresh in her mind, add examples of her own on the blank page.

Reason: These notes must be able to teach. I would be willing to wager that many students, upon rereading their class notes a month or so later, simply do not understand what they wrote or, more importantly, why they wrote what they did.²⁸ Therefore as soon after class as possible, the student should fill in her notes and amplify them.²⁹

²⁸ Benton et al. recognize that “[b]ecause notetakers do not create new text, they are not actively engaged in planning, organizing, and monitoring the structure of their recorded ideas. On the notetaker’s first exposure to the lecture, therefore, his or her strategy is to record the most important ideas but not necessarily to organize them.” *Id.* at 268 (citations omitted). The authors bemoan the fact that too many notetakers simply transcribe but do not translate. *Id.* The notetaker tends to become a tape recorder, rather than a thinker.

²⁹ Roy Simon recognizes the importance of this approach:

First, by reviewing the material right after I learned it, I fixed it in my mind much better than reviewing it the next day or the next week.

Second, I filled in the gaps in my notes while my memory was still fresh, so when the time came to outline the course or study for my final exams, I had a complete set of notes to study from, which was a huge advantage. . . .

Third, by going over the notes shortly after class, I could identify the things I didn’t understand in time to ask questions in my study group or in class before we went on to other concepts. This gave me a solid foundation on which to build as each course progressed.

Simon, *supra* note 8, at 16.

Hoping to remember something later without having written it down is risky.³⁰ It is crucial that important material be written down right away.³¹ Psychologically, this is very difficult to do. Most students today, being essentially verbal, feel that they can explain to another law student what they just heard in class. Often, this may be true. However, ideas being essentially evanescent, it is crucial that a student's class notes be able to instruct, for example, a classmate who, perhaps, happened to miss that class.³²

When taking notes in class, the law student must determine what is of maximum importance, what is of average importance, and finally what concepts the professor considers it "nice to know" but which are basically peripheral to the course. It is analogous to the concept of triage.³³ A good

³⁰ A famous example of this occurred when the poet Samuel Taylor Coleridge struggled with one of his greatest works, *Kubla Khan*. Although perhaps best remembered for his *Rime of the Ancient Mariner*, Coleridge's poem *Kubla Khan* is the favorite of many. Beginning, "In Xanadu did Kubla Khan / A stately pleasure dome decree," it goes on to present the reader with some of the Romantic Period's most vivid and imaginative lines. Unfortunately, for the author—and for us—the extant work is only a fragment of his original inspiration. Although the veracity of Coleridge's account is suspect, according to him, he had developed the entire work in an almost dreamlike episode of inspiration and was rushing to commit it to paper. Elisabeth Schneider, *The "Dream" of Kubla Khan*, 60 PMLA 784, 784 (1945). The interruption of a visitor distracted the polite but impatient poet just long enough to let most of the poem evaporate. *See id.* When he could return to his work, only some wonderful fragments remained to be gathered up. *See id.*

³¹ *See* Stephen T. Peverly et al., *What Predicts Skill in Lecture Note Taking?*, 99 J. EDUC. PSYCHOL. 167, 167–68 (2007) (noting the difficulty students encounter when attempting to transcribe lecture information before it is forgotten).

³² Benton et al. recognize that

[t]hrough external storage, note-taking preserves lecture information, making it available later from the task environment. In most note-taking studies, external storage has been assessed by comparing recall performance of students who record and review their notes with performance of those who record notes but are forbidden from reviewing them. Results show that using recorded notes is more effective than not using them.

Benton et al., *supra* note 14, at 268.

³³ In a major medical disaster, or in a battlefield hospital, triage experts sort the incoming casualties into three or more major groups: those who can be helped quickly and
(continued)

idea, in addition to leaving a lot of room for filling in missed ideas and/or examples, is to prioritize notes on the page. This can be done by arbitrarily deciding that a particular area under discussion in class is of prime importance, and using the entire width of the page to take notes. Major ideas could be marked with Roman numerals, and thus deserve the full width of the page. Lesser concepts might be preceded by capital letters, but the note should start a third of the way in from the left side of the page. Finally, “throw away concepts,” hypotheticals, and examples could be preceded by Arabic numerals and notes dealing with these minor concepts should start two-thirds of the way across the page. In short, the third category of legal ideas is the equivalent of footnotes, concepts that are “nice to know” but which are not central to the course.³⁴

There is simply no way, in a high-powered, fast-paced class, that a student can grasp all the ideas that are discussed that day.³⁵ Nor should she be expected to do so. This is especially true if the professor “goes with the flow” and changes the direction of the discussion and analysis to accommodate another student’s questions. Therefore, it is incumbent upon the student to prioritize her note taking, giving prominence, via the assigning of Roman numerals and full-page coverage, to the major concepts covered that day, and successively lesser importance to the decreasingly significant ideas.

dismissed; those who can be helped with major effort; and those who are beyond help. While not so critical, a student’s categorizing of incoming ideas requires a similar sorting procedure.

³⁴ See Appendix B for an example of prioritizing notes in the famous case of *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99 (N.Y. 1928).

³⁵ Boris Blai, Jr. recommends students

Make notes brief. Don’t attempt to write down everything the instructor says. Look for information that involves “who,” “what,” “where,” and “when.” . . . Then, as soon as possible after the lecture, your notes may be rewritten in fuller detail. This serves two purposes: (1) it adds to the accuracy and completeness of your notes, and (2) it affords you an opportunity for restudy or review of your notes. This second function is most important as a solution to forgetting that learning is “distributed learning.”

Blai, Jr., *supra* note 2, at 100–01.

Laptop computers are omnipresent in law school classrooms today. However, the preceding comments apply just as readily to laptop notetakers as they do to those who take notes by hand. You must attempt to break up the professor's comments and class observations into three parts: important; less important; and finally, minor, or "throw away," concepts. The student should not attempt to learn as much as the professor. Possessing ninety to ninety-five percent of the professor's knowledge will guarantee an "A plus."

Like those taking notes by hand, do not append your class notes to the case briefs. Rather, keep them separate (with perhaps only parenthetical references back to the specific page of the opinion in the casebook). Unless your computer program is equipped with a program that allows you to sketch diagrams—if that is the professor's bent—you will have to do that on a separate sheet of paper. With the ability of today's computers to "cut and paste," classroom notes should be even crisper and ultimately more educational than handwritten notes.

In many respects, a laptop notetaker has an easier time rearranging classroom notes following class, as "cutting and pasting," changing indents, italicizing and bolding can be done with a few simple keystrokes. As a result, this revision of her class notes will constitute the beginning of her outline.

Therefore, when it comes time to study for the final exam, if she had a wall large enough, she could display all her notes before her. She would also be able to see, at a glance, all the major issues, the slightly less than major issues, and the definitely minor issues. Although it may not be apparent to the uninitiated, casebooks and class syllabi are laid out in a logical format. In short, by reading her organized class notes quickly she will begin to see a "story" emerging, and she will more easily be able to see into which gaps of the law the final exam's fact patterns will fall.

Having accorded differing values to different principles covered by the professor, a student should concentrate first on those notes preceded by Roman numerals, and then pay successively less attention to the second and third categories. A professor has organized his or her thoughts along lines of major, minor, and insignificant importance. It makes no sense for the diligent student to think that every concept, every hypothetical, every area of class discussion is of equal importance in the professor's mind. Many teachers "think in thirds"—major, minor, insignificant. Class notes should likewise reflect this "triage" hierarchy.

F. Before Briefing Cases for Tomorrow's Subject, Review the Class Notes of the Last Two Weeks for That Subject

Admittedly, this is the most difficult step of all.³⁶ A student is anxious to get on with tomorrow's work. However, reviewing the class notes of the previous two weeks is also the next logical step in the learning process and, after following the five steps above, without question the most fruitful.³⁷

Reason: As Colin Rose, in his book *Accelerated Learning*,³⁸ argued persuasively, if a student spent an initial forty-five minutes before and during class learning a subject matter, the student's subsequent periodic review will ensure the transfer of the information from short-term to long-term memory.³⁹ According to Rose, reviewing within ten minutes after the time of initial learning for a period of five minutes, then after twenty-four hours for another five minutes, then after one week for three minutes, then after one month for another three minutes, and finally after six months for a final three minutes would result in a "400- to 500- percent boost in learning from this learning plan."⁴⁰ He further stated that if the student expended this same nineteen minutes all at one time after the initial learning period, the boost in long term memory would be minimal.⁴¹ In short, the way to enhance long term memory is to break up the time

³⁶ Although difficult, this review is important. See Benton et. al., *supra* note 14, at 268 ("Without further opportunity for review, the notetaker cannot adopt a more qualitative strategy of organizing the recorded information. Consequently, the activity of note-taking, in the absence of opportunity for review, should not facilitate organizing in writing beyond that of simply listening."); Kenneth A. Kiewra et al., *Note-Taking Functions and Techniques*, 83 J. EDUC. PSYCHOL., 240-45 (1991) ("In terms of note-taking functions, results also indicated that taking lecture notes but not reviewing them . . . is no more effective than listening to a lecture without note-taking and without reviewing.").

³⁷ "Students who record and review notes generally outperform those who record but do not review notes. Over time, students forget a great deal of lecture information. Access to the lecture notes they have taken can aid in remembering 'forgotten' information." Benton et. al., *supra* note 14, at 268 (citation omitted).

³⁸ COLIN ROSE, *ACCELERATED LEARNING* (Dell Publishing 1987) (1985). "Colin Rose is a graduate of London University and a member of the British Association for the Advancement of Science." *Id.*

³⁹ *Id.* at 50.

⁴⁰ *Id.* at 51.

⁴¹ *Id.*

allotted for review into smaller segments and return again and again to the subject matter over an extended period of time.⁴²

The editors of casebooks take great pains to arrange their materials in a logical order. The cases and materials are not thrown together helter-skelter. By reviewing her class notes, a student will see that the cases and class discussions reveal a story. A thread, a pattern, and finally a tapestry will emerge as she moves progressively through the materials. When she is in the midst of the learning process in the classroom, she may not be able to immediately discern the “big picture.” It may seem like she is looking at the back of the tapestry, patiently weaving thread after thread. But by turning the tapestry over, and looking at it as a whole during periodic review, she will begin to see the big picture.⁴³

During the review of the last two week’s class notes, the student should attempt to see how each case relates to the two cases immediately before and the two cases immediately after it. She should ask herself if the instant case, vis-à-vis the cases before and after, stands for the same proposition, modifies it (and if so, how?), contradicts it, etc. She should also be able to understand *why* this case was placed by the editor in the book at this point, and how it relates to the particular section and specific chapter of the book. Frequently, a casebook will begin a section with a traditional case, and then by small, uneven, halting steps, travel 180 degrees out of phase so that the last case finally arrives at a point diametrically opposite to the first traditional or “seminal” case. She should endeavor to understand the transition and be willing to question the courts’ rationales along the journey. Only by frequently reviewing her class materials, supported by her briefs when the need arises, will she be able to see the law progress from case to case. The beauty of the common law, to

⁴² *Id.*

⁴³ According to Colin Rose,

Numerous researchers have conducted experiments which indicate that information which is not rehearsed in the short-term memory is rapidly forgotten. Conversely, there seems to be a direct correlation between the amount of rehearsal and the probability that the material will be recalled. . . . [T]he probability of recalling a word that had been listened to for two seconds was almost twice the probability of recalling a word that had been listened to for one second.

Id. at 32 (citation omitted).

paraphrase Lord Mansfield, is that it works itself clean from case to case.⁴⁴ No one can appreciate that progression without constant review.

It has been the author's experience over thirty years of teaching first year students that too many students become myopic regarding the individual cases briefed for a particular class. This is especially true if the professor concentrates for a longer than usual length of time on one case. The student feels that this case, problem, or hypothetical is central to the entire course—as indeed it may be. But as a consequence, she neglects to compare and contrast this “major case” with the other cases that precede and follow it. As a result, she loses the benefit of judging one case against another, which is where one's comprehension and legal reasoning and analysis are honed. If during class she is able to raise her hand and ask whether case A, studied two weeks ago, does not indeed contradict case F, handled just today, in its holding, reasoning, or public policy, she will have begun to think like a lawyer.

Many students are led to the false belief that all cases are tightly interconnected so that on the last day of the term, the last case will be the last piece of the puzzle and, once in place, will present a comprehensive picture of the course. All cases and statutes, the student fondly hopes, will fit nicely and tightly together. The truth is that all the cases, hypotheticals, and problems do fit together, but only loosely. The cases, problems, and materials interlock like a puzzle, but with many gaps, some wide, some narrow. Frequently the final exam is based on hypotheticals that otherwise would fall into these gaps. By constantly reviewing the materials from the

⁴⁴ See Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651, 1712 (1994). Lord Mansfield was actually born William Murray. JAMES OLDHAM, *ENGLISH COMMON LAW IN THE AGE OF MANSFIELD* 3 (2004). After being educated at Christ Church, Oxford, Mansfield raised himself through the political system; serving as an MP he held positions as the solicitor-general and attorney-general; in 1756, he became Chief Justice of the King's Bench. *Id.* at 3, 6, 9. In the case of *Omychund v. Barker*, while Lord Mansfield was acting as solicitor general, a question arose whether the testimony of a witness, who swore an oath based on a non-Christian religion, contrary to a statute of Parliament, was admissible. (1744) 26 Eng. Rep. 15, 15–16 (K.B.). Lord Mansfield argued that “reason, justice and convenience” dictated the admission of the questioned testimony. *Id.* at 22. Lord Mansfield, in arguing for the admissibility of the testimony, stated that “the common law, *that works itself pure* by rules drawn from the fountain of justice” should be preferred over an act of Parliament. *Id.* at 23 (emphasis in original).

previous two weeks and understanding how the cases and materials fit one with the other, or how and why they are inconsistent, and by reflecting on the interstices in this emerging picture, the student will have already totally prepared for the final exam.⁴⁵

Therefore, if the student (1) understands how one particular case relates to the cases before it and after it, (2) understands why this case is supposed to exemplify this particular aspect of the course, and (3) appreciates the supporting rationale of the court for its holding or the public policy driving it, she will understand the course to the fullest extent of her powers. She will never forget it.⁴⁶

Reviewing class notes six times over the two weeks following a class will likely reinforce comprehension to such a degree that one year later the student will have a deep-rooted understanding—not recall, not mere memory, but fundamental comprehension. In short, the course will be hers forever.⁴⁷

G. Brief the Cases for the Next Day

This is the last, not the first, step in the learning process.

⁴⁵ Kiewra et al. recognize that

[m]atrix notes particularly help students to build internal connections. Similar to linear notes, they accent superordinate-subordinate relations and tie recorded information to topic and subtopic. In addition, matrix notes emphasize cross-topical relations. With a matrix, a student can readily examine all information about a subtopic . . . by following that subtopic across the major topics . . . This permits a student to synthesize ideas across topics.

Kiewra et al., *supra* note 36, at 241.

⁴⁶ “When ideas are interconnected, the recall of one idea may prompt the recall of logically associated ideas as well. Such connections, made at acquisition, may also reduce potential interference among related lecture ideas and thereby support the accurate categorization of ideas at recall.” Kenneth A. Kiewra et al., *Providing Study Notes: Comparison of Three Types of Notes for Review*, 80 J. EDUC. PSYCHOL. 595, 596 (1988).

⁴⁷ “The efficacy of reviewing an external record of the lecture has been well documented. In [thirty-two] studies . . . [twenty-four] found that students who reviewed their notes had higher achievement on performance tests than those not permitted to review.” Kiewra et al., *supra* note 36, at 241.

Reason: Having given oneself the “benefit of a running start” by reviewing the previous two week’s class notes, the briefs of the cases for tomorrow’s class will be easier to draft and should make more sense. The student will also be able to participate more actively in the class discussion, for she will have a firm footing—or at least a relatively firm footing—on which to stand. Trial attorneys are wont to say that ninety percent of a trial is preparation.⁴⁸ Similarly, ninety percent of learning takes place before anyone briefs a case or attends a class.⁴⁹

III. CONCLUSION

The author has encountered many students who have said that they really know the subject matter but simply “could not get it across.” There are also students who, with the best of intentions, have spent far too much time in what they perceived to be study, but who were not efficient in the way that they studied. I can only say that when I have suggested the above program to a student whose progress does not reflect the effort she has been expending, the positive results have always been singularly dramatic.

⁴⁸ See, e.g., Andrea D. Lyon, *Investigating and Trying a Homicide Case*, CHAMPION, Sept./Oct. 1998, http://www.law.depaul.edu/centers_institutes/cjcc/pdf/homart.pdf.

⁴⁹ Alfred Hitchcock used to say that, as far as he was concerned, his movies were finished when he had prepared the detailed shooting script. See Scott Curtis, *The Last Word: Images in Hitchcock’s Working Method*, in CASTING A SHADOW: CREATING THE ALFRED HITCHCOCK FILM 15, 15 (Will Schmenner & Corrinne Granof eds., 2007). Every word, every camera angle, and every visual and psychological nuance had already been scrupulously committed to paper. See *id.* For him the film was done: the actual performances, filming and editing were mere formalities. *Id.* Saying “action” and “cut” to his cast was no more real than the interior scenes he had created inside his head. See *id.* Without the benefit of Hitchcock’s cinematic genius, perhaps, the beginning law student can learn from Hitchcock’s single-minded attention to organization, planning, and projection. She can use the methods outlined above to transform the materials of her law school courses into a fully realized version of what she needs to know.

APPENDIX A

Palsgraf v. Long Island R.R. Co.

162 N.E. 99

(Ct. of Appeals N.Y. 1928)

FACTS: Mrs. Palsgraf – P – was waiting for a train, standing on D’s platform. As a train was pulling away, two men – X and Y – ran forward to catch the train. X tried to board the moving train. X had a package under his arm, a package that was wrapped in newspaper. Two guards of the D—A and B—tried to help X onto the moving train. A was on the train and was pulling X onto the train. B was on the platform and was pushing X onto the train.

In this act of pushing and pulling, X’s package became dislodged. The package contained fireworks. You could not tell from the looks of the package that it contained fireworks. The package fell to the tracks. It exploded. The force of the explosion knocked down some weight scales many feet away. (Dissent estimates that the scales were 25–30 feet away). One scale hit the P, causing her injury. P sued the Long Island R.R.

PROCEDURAL HISTORY: Judg. for P. Affirmed in Appellate Court. Reversed in Ct. of Appeals. Complaint dismissed.

ISSUE: Was D’s careless act the “proximate cause” of P’s injuries?

MAJORITY DECISION. Justice Benjamin Cardozo.

Cardozo holds that D had no “duty” to the P. “The conduct of the defendant’s guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff . . .”

“Proof of negligence in the air, so to speak, will not do” Like contract law, there must be a one-on-one relationship between D and P.

The court concedes: the guard may have been careless towards the passenger X. However, the D’s careless act towards X “did not take to itself the quality of a tort [towards P] because it happened to be a wrong . . . with reference to some one else.” The carelessness towards X is not transferred to Mrs. Palsgraf. There may be transferred intent in intentional torts. But, there is no transferred negligence.

“What the [P] must show is ‘a wrong’ to herself” personally, not to someone else. “The risk reasonably to be perceived defines the duty to be obeyed and risk imports relation . . .” The D, via its servants, in pushing/pulling X onto the train, must have been able to reasonably foresee harm to the P. The P must have been within the D’s “range of apprehension.”

Whether D could have reasonably foreseen harm to the P is sometimes a question of law for the court and sometimes a question of fact for the

jury. There was nothing in the appearance of the package under X's arm that could have given the guard reason to believe that P's safety was in jeopardy. Under these facts, J. Cardozo holds that it was a question of law for the court. Therefore, D had no duty to the P.

"Negligence, like risk, is thus a term of relation." In the act of pushing/pulling X onto the train, D had no relation to P.

Justice Cardozo never reaches the question of "causation."

MAJORITY RULE OF LAW: For a D to be liable to a P, D must first have had a duty to the P. Duty extends only to those to whom a risk of harm was reasonably foreseeable when the D did the allegedly careless act.

DISSENTING OPINION: Justice Andrews.

If a D does a careless act—like pushing a passenger, X, onto a moving train – then this is negligence. It is a wrong not only towards X, but towards anyone who is damaged by the act, if the results to the P are proximate.

The only way that liability should be limited is via the concept of "proximate cause." "Proximate cause" is usually a jury question. To say that the R.R. owed a duty only to X, and not to someone who was directly affected by the R.R.'s careless act, is "too narrow a conception." "Where there is the unreasonable act, and some right that may be affected there is negligence whether damage does or does not result. . . . Should we drive down Broadway at a reckless speed, we are negligent whether we strike an approaching car or miss it by an inch. The act itself is wrongful."

Careless acts are "wrong[s] to the public at large." Andrews does admit that if there were NO ONE in the world, there could be no negligence. "In an empty world negligence would not exist."

But: "Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others," not just to those who are "reasonably foreseeable."

Is D then liable for ALL damage that his careless act causes? No. D's act must be the "proximate cause." "A cause, but not the proximate cause." Proximate cause is limited by "convenience, . . . public policy, . . . a rough sense of justice." The jury will draw the line and tell us where "proximate cause" ends. The jury's decision "is not logic. It is practical politics." In deciding whether the D's act was the proximate cause of the P's injuries, "[i]t is all a question of expediency." Basically, "common sense" on the part of the jury. Was there "a natural and continuous sequence between cause and effect"?

The D may not have foreseen the exact manner in which the P suffered his injury. "The fact that the injury occurred in a different manner than that which might have been expected does not prevent the chauffeur's

negligence (J. Andrews's hypo), from being in law the cause of the injury." But, D may still be found liable.

DISSENT'S RULE: A D is liable for all the proximate results of his negligent act. This is true, even though the manner and extent of P's injuries may not have been foreseeable.

APPENDIX B

*Palsgraf v. Long Island R.R. Co.**Cardozo – Majority*

- I. For a defendant to be liable to a plaintiff, defendant must first have a duty to the plaintiff.
- II. A duty extends only to those to whom an unreasonable risk of harm was reasonably foreseeable. Majority – Cardozo
 - A. Defendant’s employee’s actions were a wrong to the passenger—but not to the plaintiff.
 - B. There is no transferred negligence as “risk imports relation” between defendant and plaintiff.
 1. Had plaintiff been claiming battery, she could have a cause of action.
- III. Elements of a negligence action: Duty, Breach of Duty, Proximate Cause, Damages.
- IV. Plaintiff must establish a duty to her – not to someone else.
 - A. Plaintiff’s cause of action cannot be derivative. It must be original to her.
 1. Here, only property damage could be foreseen.
 2. Merely “unsocial” behavior is not grounds for a negligence cause of action.
- V. “The risk reasonably to be perceived defines the duty to be obeyed and risk imports relation”
 - A. The method of the accident and the extent of injury need not be reasonably foreseeable.
 1. There is such a thing as strict liability – but not here.

2. Transferred intent not applicable.
 3. Vicarious liability.
- VI. “Negligence . . . is thus a term of relation.”
- A. Majority opinion never reaches the question of causation – which is a jury question.
 - B. If plaintiff had been owed a duty, then the extent of the damages could be unforeseeable, and plaintiff could recover for these injuries.
 1. Open question – If defendant threatened P.D. to plaintiff but P.I. resulted.
- VII. The existence of a duty is a question of law for the court to determine.

Andrews – Dissent

- I. Defendant owes a duty to the world at large if he does a foolish act (carelessly pushing passenger onto the train). This equals “negligence,”
- II. Once defendant is found “negligent,” his liability is limited only by the proximate results he causes. Question of fact for the jury.
 - A. Damage is immaterial when deciding whether the act itself was “negligent.”
 - B. A careless act is a wrong to the public at large, regardless of harm to any one particular person.
 - C. Conceded: there could be no “negligence” if only one person existed on earth. There must be at least one other person to find the majority’s “duty.” But, get real, this is N.Y.

1. Mrs. O’Leary might be liable for all of Chicago’s fire.⁵⁰
Jury question.
- III. “Proximate Cause.” Jury decides based on “convenience, . . . public policy, . . . a rough sense of justice.” “[P]ractical politics.”
 - A. Proximate cause is a question of expediency; of common sense. Basically a jury question.
- IV. “[A] natural and continuous sequence.” This is what determines “proximate cause.”
 - A. Time and space play a part in the equation.
 - B. Intervening forces play a part in the equation of prox cause.
 - C. One jury could find prox cause; another might not. That’s OK. Times change.
- V. Defendant is responsible for the “direct” consequences of his negligent act, and beyond.
- VI. Plaintiff’s injury was direct.
 - A. Prof. X says: This problem arises only when the facts show a “direct” injury to a plaintiff who was not “reasonably foreseeable.” Rather rare in real life.

⁵⁰ See Richard F. Bales, *Title Insurance Records and The Great Chicago Fire*, 18 PROB. & PROP., Jan.–Feb. 2004, at 46.