LETTERS TO A LAW STUDENT

A GUIDE TO STUDYING LAW AT UNIVERSITY

FOURTH EDITON

NICHOLAS J. McBRIDE

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Letters to a Law Student

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Letters to a Law Student

Fourth edition

Nicholas J. McBride

Jason N.E. Varuhas

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To the magical

Isabel, Ines, and Luca

I miss you very much, dear friends;
you are my joy and my crown
(Phil. 4:1)

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Preface

This book has been written for anyone who is doing, or thinking about doing, a law degree at university. The book comprises a series of letters to an imaginary law student, Jamie. The first letter is sent to Jamie while Jamie is still at school and thinking about doing a law degree at university. The final letter gives Jamie advice about preparing for life after university, having done a law degree. The 26 letters in between track Jamie's progress from school to university, giving advice to Jamie on various issues such as how to study law, how to write legal essays, and how to revise for exams. Inspired by the brilliant *Top 10 Show* hosted by John Rocha and Matt Knost on the SK Plus YouTube channel and Podcast, I have inserted into this edition of *Letters to a Law Student* a number of Top 10 lists, which provide a fun and efficient way of giving law students a lot of useful information that they will find helpful in their studies, and deliberations as to whether to study law or not.

Jamie does not exist, and no one who is thinking about studying law or is studying law will share all of the concerns that prompt the letters to Jamie set out in this book. Some letters will be of more relevance to you than others:

(**1**) If you are considering studying law at university then you should read letters 1–4, 8, and 23, and the Top 10 Myths About Studying Law to get a feel for what law is about and what sort of skills studying law will require you to have and develop. Letters 9 and 13–15 will give you more of a sense of what studying law is like.

(**2**) If you have made up your mind to study law at university, and are in the process of making applications to study law, then letters 1–4 and 8 would still be useful as reinforcing and deepening your choice to study law, and letters 5–7 will be highly relevant to you. If you are applying to a university that requires you to have an interview as part of the application process, you should also read letter 8, the Top 10 Fallacies and Stupidities, and letters 22–23.

(**3**) If you have been accepted to study law at university, then you should still read letters 1–2, 4, and 8 to help you get ready for the experience of studying law. You should also read: letters 9–23 and 25 (as well as all but the

first and last Top 10 lists) before you go to university. You can leave letters 24 and 26–28 until later and read them as required. You will also find it helpful to read, and go back to, the Mini-Dictionary of Law that is in Appendix A of this book.

One of the themes of this book is that to remember information, it is not enough to read it; you have to use it as well. Anyone who reads letters 9–27 just the once is likely to forget quite quickly what they have to say about how to study law and how to write well as a lawyer, and as a result their studies and their legal writing will not benefit at all from the advice contained in those letters. Aim instead to re-read constantly letters 9, 13–15, 18, 23, and 25 in the early stages of your legal studies, to ensure that you are putting the lessons of those letters into practice. If you do this, you'll soon find that you'll never have to read those letters again to remember what they say; the habits of study and writing that they seek to inculcate will have become completely natural to you.

Because Jamie doesn't exist, it was necessary to give Jamie an identity – to make certain assumptions about Jamie. I've assumed that Jamie is doing a normal three-year law degree. So Jamie is not doing a mixed law degree, such as a degree in Law & Politics or Law & Criminology; and Jamie is not doing a degree that involves going somewhere on the Continent for one or two years to find out what the law says over there. I've also assumed that Jamie is studying law at an English or Welsh university, and not a university in Northern Ireland or Scotland.

There are only a handful of books in this world that are incapable of being improved and this book is definitely not one of them. Students or teachers who have read this book and have constructive suggestions as to how it might be changed for the better shouldn't hesitate to get in touch with me at njm33@cam.ac.uk. I would very much welcome hearing from you.

Nick McBride
Pembroke College, Cambridge
March 2017

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My little girl, and my wonderful mother and father.

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About the author

Nick McBride is a Fellow at Pembroke College, Cambridge. He was formerly a Fellow at All Souls College, Oxford, having studied Law at Brasenose College, Oxford both as an undergraduate and for the Oxford BCL exam. As well as *Letters to a Law Student*, he has written (with Roderick Bagshaw) a textbook on *Tort Law* (6th edition, Pearson Education, 2018) and (with Sandy Steel) an introductory book on studying jurisprudence called *Great Debates in Jurisprudence* (2nd edition, Palgrave Macmillan, 2018). He is the editor of a forthcoming series of books called *Key Ideas in Law* (published by Hart Publishing) for which he will be writing a book on *Contract Law*.

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1
What is law?

Dear Jamie,

Thanks for your email. Your question – Why should I study law at university? – is a pretty big one, and deserves a letter rather than just a quick emailed response. For what it's worth, my quick answer would be: People should do a law degree because studying law is interesting, important, and educational. That doesn't necessarily mean that *you* should do a law degree. Law isn't for everyone. But as a subject for study, I think it's tough to find another subject that is as fascinating, and as significant, and as transformative as law is. So – that's the quick answer, but it's going to take me two letters to give you the long version. To understand what is so great about studying law, you first need to understand a bit about what law *is*. That's what I will talk about in this letter. I'll then send you a follow-up letter explaining why studying law at university is something you should give serious consideration.

Law as a conversation

The question of 'What is law?' is one that continues to vex philosophers. But we might be able to make the concept of law more understandable through the following analogy. Suppose that you and I and a whole bunch of other people decide that we are going to go on holiday together. We all like each other, and we like spending time with each other, and a holiday is a great opportunity to do more of that. So – we're going on holiday, but we still have to decide where to go, when to go, where to stay, what to do, how we are going to get there, how much everyone is going to contribute to the cost of the holiday, who is going to be in charge of what. Loads of things. To work out the answers to these questions, *we need to talk to each other*. There are some issues that all of us may have to talk about together, such as where we are

going to go and when. There are other issues (such as transportation and accommodation) that we might be able to delegate to a few members of our party – and they will work those issues out together and report back to us. But however the various issues arising out of our plan to go on holiday are resolved, resolving them will require lots and lots of *conversations*.

What I want to suggest is that we can draw an analogy between the notion of law and the process of talking to each other in order to decide on the details of the holiday we are all going to go on. Instead of talking to each other to determine what sort of holiday we should go on, our law-makers talk to each other to determine *what sort of society we should live in*. So when we say 'What does the law say on such-and-such an issue?', we are really asking, 'Where are our law-makers at the moment in their conversation about what sort of society we should live in? Have they decided this issue already? If they have, what did they decide and is there any possibility of this issue being re-opened? If they haven't, then what does the state of conversation indicate at the moment about how our law-makers might resolve this issue?' The conversation is ongoing and intergenerational. The fact that a previous generation of law-makers may have taken a particular position on what sort of society we should live in does not mean that future generations cannot take a different position, thereby bringing about a change in the law. However, the views of previous generations of law-makers do not die with the law-makers; the record of those views lives on and has the potential to influence the views of the current generation. So great law-makers of the past such as Sir Edward Coke (1552–1634), Lord Mansfield (1705–1793), Lord Shaftesbury (1801–1885), and Lord Denning (1899–1999) continue to have a voice in the conversations that go on today among our law-makers as to what sort of society we should live in.

Those conversations are conducted among and between two classes of law-maker: *judges* and *legislators*. Judges decide concrete *cases*, telling the parties to that case what the law says in that particular case. Legislators lay down general rules in the form of *statutory provisions*, both for people's guidance as to how they should behave and in order to empower people to act in socially productive ways. Both judges and legislators are engaged in determining what sort of society we should live in, and in performing their functions each give effect to visions of what sort of society we should live in. Law that emerges from the way judges decide concrete cases is known as *common law*. Law that is laid down by legislators is known as *statute law*.

The ultimate power to decide what sort of society we should live in rests with the legislators: in deciding cases, the judges must give effect to any relevant legislative provisions that have been validly laid down by the legislators.

Judges are subject to a further constraint that legislators are not. In deciding a case, a judge is required to give effect, not to his or her own *personal* vision of what sort of society we should live in, but to the vision that seems to be supported by the way the conversation among law-makers on this issue has evolved so far. For example, in *R (on the application of Nicklinson)* v *Ministry of Justice* (2012), a man who was completely paralysed and wished no longer to live sought a declaration from the courts that it would be lawful for a doctor to kill him. The judges who decided the case may have *personally* thought that we should live in a society where this sort of thing is allowed to be done. However, there was absolutely no support for the idea that we should live in a society that practises euthanasia either in statutory provisions created by legislators or cases previously decided by the judges. So the idea that euthanasia is acceptable is not one that had so far found any support in the evolving conversation between law-makers as to what sort of society we should live in. Given this, the court in *Nicklinson* had no option but to turn down the application, ruling that it could not hold that euthanasia was lawful until legislation had been passed making it lawful.

The requirement that judges not give effect to their own personal views as to what sort of society we should live in, but rather the emerging consensus among law-makers on this issue is a salutary one – however frustrating a particular judge (for example, one who believes strongly in the acceptability of euthanasia) might find it. The question of what sort of society we should live in is a very large and difficult one, and no one judge (or, indeed, any human being) can claim a monopoly of wisdom on this subject. Given this, a wise judge will listen with respect to the views of other law-makers – both past and present – on the issue of what sort of society we should live in, and will give greater weight to those views than his own, possibly mistaken, convictions on this issue. Of course, there are some judges (I could name a few . . .) who are determined to give effect to their own convictions, come what may – but there exist procedures for marginalising them: their judgments can be overturned on appeal, and they tend not to get promoted to the higher courts where they can have more influence on the direction of the conversation among law-makers as to what sort of society we should live in.

A concrete example

Let me now give you an example to make clearer the idea I am advancing here of seeing law as an ongoing conversation that is aimed at determining what sort of society we should live in. In the *Belmarsh* case, *A* v *Secretary of*

State for Home Department (2004), the issue was whether the government was entitled to detain indefinitely non-nationals whom it suspected of being involved in terrorism. (The non-nationals were detained in Belmarsh Prison; so that's why the case is referred to as the *Belmarsh* case, for short.) Part of what makes the *Belmarsh* case fascinating is that so many different (though not necessarily incompatible) views as to what sort of society we should live in were relevant to deciding the case. All of these views have found their place in the ongoing conversation among our law-makers as to what sort of society we should live in. In deciding the *Belmarsh* case, the House of Lords had to determine which view should take precedence.

(1) The rule of law

There is, first, the view that we should live in a society that places strict controls on how government power is exercised, so as to ensure that it is not exercised tyrannically or arbitrarily. This view – expressed by the ideal that we should be governed 'by law, and not by men'; in other words, that we should live under the *rule of law*, and not be ruled by arbitrary government fiat – is wonderfully expressed in both the arguments and judgment in the case of *Entick* v *Carrington*, which was decided way back in 1765. In that case, Entick sued Carrington and three others for trespassing on his land: they had gone into his house and searched it for papers, in pursuance of a warrant issued by a Secretary of State that purported to authorise them to make searches to find out who was publishing 'very seditious papers intitled *The Monitor*, or *British Freeholder*'. Entick's barrister argued:

> A power to issue such a warrant as this, is contrary to the genius of the law of England, and even if they had found what they searched for, they could not have justified under it . . . the verdict says such warrants have been granted by Secretaries of State ever since the Revolution; if they have, it is high time to put an end to them, for if they are held to be legal the liberty of this country is at an end; it is the publishing of a libel which is the crime, and not the having it locked up in a private drawer in a man's study; but if having it in one's custody was the crime, no power can lawfully break into a man's house and study to search for evidence against him; this would be worse than the Spanish Inquisition;

> for ransacking a man's secret drawers and boxes to come at evidence against him, is like racking his body to come at his secret thoughts. The warrant is to seize all the plaintiff's books and papers without exception, and carry them before Lord Halifax; what? has a Secretary of State a right to see all a man's private letters of correspondence, family concerns, trade and business? this would be monstrous indeed; and if it were lawful, no man could endure to live in this country.

The Lord Chief Justice, Lord Camden, found in favour of Entick:

> The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole . . . By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action . . . If he admits the fact, he is bound to show by way of justification, that some positive law has empowered or excused him. The justification is submitted to the judges, who are to look into the books; and if such a justification can be maintained by the text of the statute law, or by the principles of common law. If no excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment. According to this reasoning, it is now incumbent upon the defendants to show the law by which this seizure is warranted. If that cannot be done, it is a trespass. Papers are the owner's goods and chattels: they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection . . . Where is the written law that gives any magistrate such a power? I can safely answer, there is none; and therefore it is too much for us without such authority to pronounce a practice legal, which would be subversive of all the comforts of society.

On this view, any government power to detain people indefinitely on suspicion of being involved in terrorist plots is legally suspect as it places too much power in the hands of the government to act oppressively and arbitrarily.

(2) Necessity

On the other hand, there is a view that we should live in a society where the government is empowered to do what is necessary to ensure the safety and security of the populace. This view – expressed by the Latin tag *salus populi suprema lex est* ('the safety of the people is the supreme law') – actually finds some support at the end of Lord Camden's judgment in *Entick* v *Carrington*:

> One word more for ourselves; we are no advocates for libels, all Governments must set their faces against them, and whenever they come before us and a jury we shall set our faces against them; and if juries do not prevent them they may prove fatal to liberty, destroy Government and introduce anarchy; but tyranny is better than anarchy, and the worst Government better than none at all.

The view that in an emergency, the government should be empowered to act in ways that would ordinarily be regarded as oppressive and tyrannical in order to secure public safety underlies the Civil Contingencies Act 2004, which purports to allow the government in an 'emergency' (defined as an event or situation 'which threatens serious damage' either to 'human welfare in', or to 'the environment of', 'a place in the United Kingdom') to make emergency regulations 'to make provision for the purpose of preventing, controlling or mitigating an aspect or effect of the emergency' when there is an urgent need to do so. This view also underlay the decision of the House of Lords in *Liversidge* v *Anderson* (1944), holding that where someone was detained under wartime regulations allowing the Home Secretary to order the internment of someone whom he had 'reasonable cause to believe [was] of hostile origin or associations', the courts would not inquire into whether there *was* reasonable cause to believe the detainee was 'hostile'; it would be enough that the Home Secretary *said* there was reasonable cause to believe this:

> The appellant's counsel truly say that the liberty of the subject is involved. They refer in emphatic terms to Magna Carta and the Bill of Rights, and they contend that legislation dealing with the liberty of the subject must be construed, if possible, in favour of the subject and against the Crown . . . I hold that the suggested rule has no relevance in dealing with an executive measure by way of preventing a public danger.

So, on this view, the ordinary requirements of the rule of law – which suggest that the exercise of government powers should be strictly controlled – should be relaxed where the public safety is at stake. On this view, then, giving the government power to detain people indefinitely when they are suspected of involvement in terrorism might not be so objectionable.

(3) Democracy

A third view that was of crucial importance to the outcome of the *Belmarsh* case was the view that in our society difficult questions of how to balance the need for security against the need to respect people's liberties should be decided through democratic institutions that can fairly reflect the desires of the majority as to where that balance should be struck. This view underlies the doctrine of *Parliamentary sovereignty*, according to which the courts are not allowed to set aside or refuse to give effect to an Act of Parliament. (Note that – consistently with the theme of this letter – 'Parliament' literally means 'talking shop'.) The doctrine of Parliamentary sovereignty is felt to be so important that when Parliament passed the Human Rights Act 1998 and committed the UK to being a society in which the State observes people's human rights, as set out in the European Convention on Human Rights – even then, Parliament took care to provide in section 4 of the Act that the courts would still have to give effect to an Act of Parliament which the courts thought was inconsistent with the European Convention on Human Rights; all they could do in such a case was issue a 'declaration of incompatibility' and leave it up to Parliament to decide whether or not to amend the offending legislation and, if so, how.

The relevance of this third view to the outcome of the *Belmarsh* case is that Parliament had legislated to authorise the detention of the non-nationals whose detention had given rise to the litigation in *Belmarsh*. Under the Immigration Act 1971, the Home Secretary had a power to detain a non-national in custody while he was awaiting deportation. So a non-national who was suspected of being involved in terrorism could be deported from the UK and detained in custody under the 1971 Act while awaiting deportation. But many non-nationals who were suspected of being involved in terrorism could not be deported from the UK as there was a real fear that they would be tortured in the countries to which they would be deported. Such non-nationals could not be detained while awaiting deportation under the 1971 Act because deportation was not a prospect for them. Section 23 of the Anti-terrorism, Crime and Security Act 2001 dealt with this problem by providing that a non-deportable non-national who was a 'suspected international

terrorist' could still be detained in custody 'while awaiting deportation' under the Immigration Act 1971 even though in practice he or she could never be deported.

The effective result of this provision was to allow the government to detain indefinitely in custody a non-national who was a 'suspected international terrorist' but who could not be deported from the UK. In creating this power, Parliament made it clear that it thought the need to ensure the security of the British people by detaining in custody non-nationals who were suspected of being involved terrorism outweighed any concerns about depriving such non-nationals of their liberty. Given this, how could the courts justify taking a different view?

(4) Discrimination

But there is, fourthly, a view that we should live in a society where the government and other important institutions are not allowed to discriminate against people for morally arbitrary reasons. This view has only comparatively recently found its way into the conversation among our law-makers about what sort of society we should live in. It finds expression in Lord Denning MR's great judgment in *Nagle* v *Feilden* (1966), where the Court of Appeal held that a horse owner could sue the Jockey Club for denying her a licence to act as a trainer merely because she was a woman:

> The common law of England has for centuries recognised that a man has a right to work at his trade or profession without being unjustly excluded from it. He is not to be shut out from it at the whim of those having the governance of it. If they make a rule which enables them to reject his application arbitrarily or capriciously, not reasonably, that rule is bad. It is against public policy. The courts will not give effect to it. Such was held in the seventeenth century in the celebrated case of the *Tailors of Ipswich* [1614] where they had a rule that no person was to be allowed to exercise the trade of a tailor in Ipswich unless he was admitted by them to to be a sufficient workman. Lord Coke CJ held that the rule was bad, because it was 'against the liberty and freedom of the subject' . . . I have said before, and I repeat it now, that a man's right to work at his trade or profession is just as important to him as, perhaps more important than, his rights of property. Just as the courts will intervene to protect his rights of property, they will also intervene to

> protect his right to work . . . When an association, who have the governance of a trade, take it upon themselves to license persons to take part in it, then it is at least arguable that they are not at liberty to withdraw a man's licence – and thus put him out of business – without hearing him. Nor can they refuse a man a licence – and thus prevent him from carrying on his business – in their uncontrolled discretion. If they reject him arbitrarily or capriciously, there is ground for thinking that the courts can intervene.

(Note how Lord Coke can be seen here as talking to Lord Denning across a 300-year interval to shape Lord Denning's vision of what sort of society we should live in.) Lord Denning's theme was taken up by Parliament in passing the Equal Pay Act 1970 (requiring employers to pay their employees the same amount for work of equal value, regardless of their sex), the Sex Discrimination Act 1975 (requiring employers, education providers, shops, and landlords not to discriminate unjustifiably between people on grounds of their sex), and the Race Relations Act 1976 (banning discrimination on grounds of race by employers, education providers, shops, and landlords). The view that we should live in a society where the government and other important social institutions do not discriminate against people on morally arbitrary grounds has most recently been given expression in the Equality Act 2010, which brings together many earlier anti-discrimination provisions. It also underlies Article 14 of the European Convention on Human Rights, which provides that:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The relevance of this view to the *Belmarsh* case was that the power to detain suspected international terrorists that was under scrutiny in *Belmarsh* only applied to non-nationals: that is, people who were not UK citizens. So a UK citizen could not be detained indefinitely under s. 23 of the Anti-terrorism, Crime and Security Act 2001 even if he was also a 'suspected international

terrorist'. One can understand why Parliament ended up in this position. On one view, Parliament may have thought that it was simply plugging a loophole in the original Immigration Act 1971, under which the government could only detain suspected terrorists who it wanted to deport if deportation was a practical option. As the power to deport only applied to non-nationals, Parliament's 'fix' of the Immigration Act 1971 also only applied to non-nationals. On another – more cynical – view, it may be that Parliament intended that s. 23 of the 2003 Act should operate in a discriminatory fashion. Parliament may have thought that the people in the UK would not put up with the indefinite detention of a UK citizen on mere suspicion of being a terrorist, but might be relatively indifferent to someone who was not a UK citizen suffering a similar fate. Either way, the effect of s. 23 was that the power to detain suspected terrorists indefinitely in custody applied in an unacceptably discriminatory fashion – it worked against non-nationals but not against UK citizens when there might have been no morally significant difference between them.

The outcome of the case

The doctrine of Parliamentary sovereignty made it inevitable that the House of Lords would have to rule that the indefinite detention of non-nationals who were suspected international terrorists was lawful under s. 23 of the 2001 Act. However, the House of Lords also made it very clear that the existence of such a power was repugnant to *their* vision of what sort of society we should live in, and declared that the power to detain indefinitely non-nationals who were suspected of involvement in terrorism was incompatible with the European Convention on Human Rights. Lord Hoffmann gave the most outspoken judgment:

> This is one of the most important cases which the House has had to decide in recent years. It calls into question the very existence of an ancient liberty of which this country has until now been very proud: freedom from arbitrary arrest and detention. The power which the Home Secretary seeks to uphold is a power to detain people indefinitely without charge or trial. Nothing could be more antithetical to the instincts and traditions of the people of the United Kingdom . . .
>
> Freedom from arbitrary arrest and detention is a quintessentially British liberty, enjoyed by inhabitants of this country when most of the

population of Europe could be thrown into prison at the whim of their rulers. It was incorporated into the European Convention in order to entrench the same liberty in countries which had recently been under Nazi occupation. The United Kingdom subscribed to the Convention because it set out rights which British subjects enjoyed under the common law . . . This country, more than any other in the world, has an unbroken history of living for centuries under institutions and in accordance with values which show a recognisable continuity . . .

[A] power [to detain on suspicion of being involved in terrorism] is not compatible with our constitution. The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these.

Though it was under no obligation to do so, Parliament listened to the House of Lords' views and repealed s. 23 of the 2001 Act, replacing it with a power under the Prevention of Terrorism Act 2005 to impose 'control orders' on an individual in order to prevent or restrict 'involvement by that individual in terrorism-related activity.'

Where we are now

The *Belmarsh* case was just one episode in the great, centuries-long conversation between our law-makers about what sort of society we should live in. Stepping back a bit, it might be worth giving you an overview of where we are at the moment in this conversation. Our law-makers seem to agree at the moment that we should live in a society where . . .

Persons

(1) . . . people are required to observe certain minimum standards of decent conduct in the way they treat other people, and will be able to obtain effective remedies from the courts when those minimum standards are not observed. These requirements and remedies are set out in the *law of tort.*

(2) . . . people who deliberately fail to observe these minimum standards may be punished by the State. The conditions under which such a person may be so punished are laid out in the *criminal law.*

(3) . . . people have the power to make binding promises, and enter into binding agreements, with other people, and effective remedies will be available from the courts when such binding promises or agreements are broken. These powers and remedies exist under the *law of contract*.

(4) . . . people are able to recover the value of money or other benefits that they have conferred on other people by mistake or under unacceptable pressure or in the confident expectation of getting something in return which never came. This power to recover a benefit one has conferred on someone else exists under the *law of restitution* or the *law of unjust enrichment* (different people prefer different titles for this area of law).

(5) . . . the sort of education people get, or where they work, or where they live, or what goods and services they can buy, or the way they are treated by the government will not be affected by their gender, or their race, or their sexual orientation, or any other morally irrelevant characteristic. Provisions ensuring that this is the case make up *anti-discrimination law*.

Property

(6) . . . people are able to acquire and dispose of property, and will have effective powers to control, retain, and recover such property after they have acquired it and before they have disposed of it. The powers to acquire and dispose of property, and to control, retain, and recover it are the subject matter of the *law of property* (which area of law is usually split up into *land law*, *the law of personal property* (or *commercial law*), and *intellectual property law*).

Markets

(7) . . . people are able to trade goods and services with each other, and are left free to determine for themselves the terms of trade – at least where they are of equal bargaining power. These powers to trade with each other and determine the terms of trade (and the limits on these powers) are also dealt with by the *law of contract*.

(8) . . . people are free to combine together to form companies, through which they can trade goods and services, sharing in the profits made by the company, while limiting their liabilities if the company is unsuccessful. These powers are dealt with by *company law*.

(9) . . . traders in the marketplace are required not to conspire together to rig their prices, or to abuse a dominant position that they have acquired in the marketplace to drive out any remaining competitors. These limits are dealt with by *competition law*.

Families

(10) . . . people are empowered to enter into life-long commitments of care and support to each other by marrying each other; on dissolution of the marriage, the courts will enforce those commitments by fairly redistributing the assets and future incomes of the parties to the marriage. The power to marry and the conditions for, and consequences of, a dissolution of a marriage are dealt with by *family law*.

(11) . . . parents have special responsibilities to look after their children, and powers to control what happens to their children; and non-parents are empowered to take on parental responsibilities towards children who are no longer cared for by their natural parents. Again, these aspects of social life are dealt with by *family law*.

The State

(12) . . . the State is empowered to define certain forms of anti-social conduct as punishable, and to punish those who engage in such forms of conduct. These forms of conduct and the punishments applicable to those engage in them are laid out in the *criminal law*.

(13) . . . the State operates under the rule of law, which means that exercises of government power (other than the power to pass Acts of Parliament) are subject to strict controls to ensure that such powers are exercised rationally and in a way that is consistent: (i) with the reasons why those powers were created in the first place, (ii) with people's legitimate expectations as to how those powers will be exercised; (iii) with certain fundamentally important values such as the need to respect people's liberties and the importance of observing due process before making decisions that have a major impact on an individual's life. These limits on the exercise of government power are dealt with by *administrative law* or *public law* (different people use different titles for this area of law).

(14) . . . foreigners who have a well-founded fear of persecution in their own countries will be able to seek asylum here. The power to seek asylum in the UK is dealt with by *immigration law*.

(15) . . . Parliament is free to change any aspect of (1) – (14) above. As we have seen, this is known as the *doctrine of Parliamentary sovereignty*, and forms part of what is known as *constitutional law*.

Two points need to be made about this overview.

First, being an overview, it is necessarily extremely superficial. The study of law involves getting a much more detailed understanding of all of these different areas of law, finding out for example, *what* we are required to do for each other under the law of tort, *what* sort of things are capable of amounting to property and what are not, *what* will happen when a marriage is dissolved, and so on. Studying law also involves getting an understanding of how tensions between these different areas of law are resolved. For example, what happens when you and I enter into a contract under which you agree that I can treat you in a way that would normally be forbidden by the law of tort? And what happens when Parliament legislates to relax the controls that the courts would normally place on the exercise of government power?

Secondly, if this overview seems very familiar – and, dare I say it, a little bit boring (don't worry, the law gets a lot more interesting the more you know about it) – that is because it's basically describing the society you live in. Our law-makers made it that way, making a reality of their visions of what sort of society we should live in. Things could have been different. There were plenty of alternative visions of what sort of society we should live in available to our law-makers which they might have gone for, with the result that we would live today in a very different kind of society. And it may be that things will be very different in future: the conversation between our law-makers as to what sort of society we should live in may evolve in surprising directions in the next fifty years or so, with the result that our society will become unrecognisably different from the sort of society we live in at the moment.

To be continued . . .

That's enough from me for the time being. I hope you've got a good idea from this letter of what we are talking about when we talk about 'law' and obtained a few insights into the current state of the law in this country. If you have, you'll be in a much better position to understand my next letter – in which I'll explain why Law is such a great subject to study at university. Until then,

All best wishes,

Nick

2
Four reasons for studying law

Dear Jamie,

As promised, here's my follow-up letter setting out the various reasons why I think people should be interested in studying Law at university. I've got four of them. Let's get straight into them.

Brain training

The first reason for studying Law at university that doing a Law degree is great at helping you learn how to think *carefully*, *imaginatively*, and *sensibly*. I am not sure how much schools do nowadays in helping their students to *think* – students I meet say that much more emphasis is placed on rote learning and regurgitating information. Certainly, when I ask them to discuss a situation raising some issue of law, their responses seem to be much more guided by their instincts and emotions, rather than by carefully and imaginatively reasoning their way to a sensible conclusion. I find this really sad. In these benighted times, we need more than ever people who can think properly – and if you haven't acquired that ability at school, then doing a Law degree is a great way to catch up.

So how does studying law help you to think properly? Well, consider the following situation which I sometimes ask students I meet to consider. You are told that:

> Someone commits murder if his or her actions cause another to die and he or she performed those actions intending to kill someone or to cause someone to suffer serious bodily harm and he or she had no lawful justification or excuse for acting he or she did.

In light of this information, consider whether D has committed murder in the following situation:

> T, a notorious terrorist, kidnaps D's wife and two children and threatens to kill them unless D delivers a package containing a bomb to V, the ambassador at an embassy to which D has access. D delivers the package. When V opens the package, it explodes and V dies.

So – what do you *think*? If you are thinking carefully, you will note that the definition of murder with which you have been supplied has three elements – and *all* of them need to be present for murder to be committed. So we need to establish that: (1) D's actions caused V to die; and (2) D acted as he did with an intent to kill or an intent to cause serious bodily harm; and (3) D had no lawful justification or excuse for acting as he did.

Taking each element in turn, it is clear that D's actions did cause V to die – had he not done what he did, V would not have been killed. But did D have an intent to kill when he acted as he did? This is where a lot of students trip up – they say that if D knew that the package contained a bomb, then he intended to kill V when he delivered the bomb. In that situation, D will certainly have *foreseen* that V would very probably die if he delivered the package – but if we are thinking *carefully* we will wonder whether we can always be said to intend what we foresee will happen as a result of our actions. After all, why would we have two different words for what we intend and what we foresee if they were the same thing? In order to test out whether we can always be said to intend something that we foresee will happen as a result of our actions, we have to use our *imagination* to come up with a *hypothetical example* to test this out. For example, I foresee that writing this letter to you will result in my getting quite tired. (Thinking *is* hard work!) But does that mean that I intend to get tired when I write to you? That sounds pretty implausible. Intending something to happen seems to be different from foreseeing that something will happen. If you intend something to happen, you *try* to make it happen – and when D delivers the package, he isn't trying to kill V. He is just trying to deliver the package. So if we are careful in the way we think about the situation presented above, we will conclude that D is not guilty of murder.

But what about this situation?

> T, a notorious terrorist, kidnaps D's wife and two children and threatens to kill them unless D kills his best friend, V, who is an important politician. D kills V.

Here D's actions have caused V to die, and D acted as he did with an intention to kill – he was trying to kill V when he killed V. So D will have committed murder in this situation *unless* he had a lawful justification or excuse for acting as he did. At this point instincts or emotions will lead a lot of students to say that he did have a justification or excuse for acting as he did. After all, if he hadn't done what he did, three people would have died, and surely three people surviving and one person dying is better than three people dying and one person surviving?

Well, let's *think* about it. If we were thinking carefully, we would note that the definition of murder refers to someone having no lawful *justification* or *excuse* for acting as they did. The fact that two different words are used here might indicate that they are referring to two different things. When we say that X's actions are justified, we seem to be saying that X did the *right thing*, in the circumstances. But when we say that X's actions are excused, we seem to be saying something different. Doing the right thing needs no excuse. It's only when you do the wrong thing that you might seek to be excused for what you did. And when people ask to be excused, they almost always do so on the basis that their conduct, while wrong and regrettable, was so *understandable* that it would be *wrong to blame them* for acting as they did.

So this indicates that D has two ways of arguing that the final element in the definition of murder was not present in his case. He could argue that: (1) he did the right thing in acting as he did; or (2) he did the wrong thing in acting as he did, but his actions were so understandable that it would be wrong to blame him for acting as he did. So let's think about whether he can make either of these claims.

First of all, did D do the right thing in doing what he did? As we have just seen, a lot of students instinctively think that he did – three people living and one person dying is better than three people dying and one person surviving. But let's *think* about that for a second, with the help of another hypothetical example. Suppose that you suffer from some medical condition which means that you only have one year to live. But you are told that your condition can be completely cured by a full body blood transfusion, which would involve replacing your entire blood supply with blood extracted from X's body. The

transfusion would have the effect of killing X – who would, as a result, have to be forced into donating his blood – but will save your life. Would you want to go ahead with the blood transfusion? I think most people would say 'no'. They would not want their continued existence to be paid for with the killing of an innocent person like X. If this is right, then D's wife and two children might each prefer that D not preserve their lives by killing V. And if that is right, then it becomes much harder to argue that D did the right thing in killing V – if the very people for whose sake he was killing V would have preferred him not to do so, then it's hard to find a basis for arguing that he did the right thing in killing V.

D might find it easier to argue that he should be excused for doing what he did. He would claim that while he might have done the wrong thing in killing V, it was understandable that he found it difficult, if not impossible, to stand up to T's threats and allow T to kill his wife and children. Different people might have different views on this. This is what Lord Hailsham thought, in rejecting the idea that an ordinary person could not be expected to stand up to T's threats and that it would have required D to exhibit an extraordinary degree of heroism to do so:

> I must say that I do not at all accept in relation to the defence of murder it is either good morals, good policy or good law to suggest . . . that the ordinary man of reasonable fortitude is not to be supposed to be capable of heroism if he is asked to take an innocent life rather than sacrifice his own. Doubtless in actual practice many will succumb to temptation . . . But many will not, and I do not believe that as a 'concession to human frailty' the former should be exempt from liability to criminal sanctions if they do. I have known in my own lifetime of too many acts of heroism by ordinary human beings of no more than ordinary fortitude to regard a law as either 'just or humane' which withdraws the protection of the criminal law from the innocent victim and casts the cloak of its protection upon the coward and the poltroon in the name of a 'concession to human frailty'.

What do *you* think? Note that Lord Hailsham is only talking there of a situation where someone kills an innocent person in order to save his *own* life. Might things be different where you kill in order to save the lives of other people whom you love?

This is just one example of how studying law encourages you to think straight. If you want some other examples, my college – Pembroke College,

in Cambridge – has set up a 'virtual classroom' in law on its website. You can access it most easily through *my* website – www.mcbridesguides.com. Hover the cursor over the 'Legal skills' section of the website and click on the 'Virtual classroom' part of the drop-down menu. All of the exercises under the 'Legal skills' section of the classroom test out various different reasoning skills that become second nature to those who study law.

Rhetoric

So the first reason for studying law at university is that it helps sharpen your mind. The second reason for studying law is that it helps sharpen your tongue and pen as well. Studying law is the closest you can come to getting a course in what the ancient Greeks and Romans would have called *rhetoric*: the art of persuading someone to adopt a particular point of view by speaking and writing effectively.

Rhetoric is not something that is taught any more in schools, and it shows when my students come to university. As a general rule, they don't know how to write effective essays: essays that argue effectively for a particular point of view. Their essays are full of 'On the one hand . . . on the other hand'; 'It is necessary to bear the following points in mind . . .'; 'It might be argued that . . . ' They are very painful to read, and must be pretty boring to write. There is no sense of any spark of life or inspiration behind them; no sense that the essay is animated by a positive desire to change the way the reader thinks about things. It is all just lifeless going through the motions.

Studying law at university helps change all that. Because law is, at base, all about a conversation about what sort of society we should live in, the one immutable rule for lawyers is: *Express yourself clearly or die.* Let's call this the *iron rule of lawyering*: If you cannot express yourself clearly, there is no room for you in the law. So, for example, if you are a law-maker, obscurity will doom all your efforts at making law to failure. Lon Fuller makes this point vividly in a parable about a would-be law-maker, Rex:

> Rex . . . announced to his subjects that henceforth he would act as a judge in any disputes that might arise among them. In this way . . . he hoped that [by] proceeding case by case, he would gradually work out a system of rules that could be incorporated in a code.

> Unfortunately . . . [t]he venture failed completely. After he had handed down literally hundreds of decisions neither he nor his subjects could detect in those decisions any pattern whatsoever. Such tentative toward generalization as were to be found in his opinions only compounded the confusion, for they gave false leads to his subjects and threw his own meagre powers of judgment off balance in the decision of later cases . . .
>
> Rex now realized that there was no escape from a published code declaring the rules to he applied in future disputes . . . Rex worked diligently on a revised code, and finally announced that it would shortly be published. This announcement was received with universal gratification. The dismay of Rex's subjects was all the more intense, therefore, when his code became available and it was discovered that it was truly a masterpiece of obscurity. Legal experts who studied it declared that there was not a single sentence in it that could be understood either by an ordinary citizen or by a trained lawyer. Indignation became general and soon a picket appeared before the roya1 palace carrying a sign that read, 'How can anybody follow a rule that nobody can understand?'

I don't know of any judge whose voice is still listened to in the ongoing conversation among law-makers about what sort of society we should live in who was not a master at expressing himself (or herself) clearly. (Have a look at any of the judgments quoted in my last letter to see some examples of judges expressing themselves extremely clearly.) Obscure and unclear judgments have a very short shelf-life. The same is true of statutory provisions. Any statutory provision that is not expressed clearly enough to be understood is soon withdrawn or revised, or attracts such a wealth of case law trying to make it clear what the statutory provision says that you might as well just retain the case law and throw away the underlying provision.

The *iron rule of lawyering* also applies to legal academics writing about the law. A legal academic who cannot make him- or herself understood by his or her peers will have no future as an academic. I can count on the fingers of one hand the number of legal academics who have achieved some kind of world renown without being able to write really clearly – but as soon as they retire, their renown will quickly fade as people become less and less willing to make the effort to try to understand what they were trying to say. Law has seemed immune from the modern fad for identifying obscurity with profundity that

has invaded other disciplines such as English, or Theology, or Philosophy or any of the social sciences other than law. Students in those disciplines have to weary their minds trying to make sense of rubbish like this:

> Both Pound's 'Portrait [d'une Femme]' and Eliot's ['Portrait of a Lady'] constitute a kind of *epyllion* which, as we shall see, is a pattern they used a great deal – the parallel actions function as a plot and counterplot which enrich each other by their interplay. Poe's 'Descent into the Maelstrom' has structurally much in common with the vortices of the Cantos. Similarly, the 'Sargasso Sea' is a vortex that attracts multitudinous objects but which also tosses things up again in recognizable patterns which serve for survival.

Law students, in contrast, get to feast on gems like this:

> A search warrant has to be specifically justified or it gives no authority to enter premises or take away goods. So held Lord Camden. A Good Thing. The policeman may, however, seize any suspicious goods he finds. So holds our Court of Appeal. A Bad Thing. Lord Denning MR explains that there are more wicked people about now; more innocent people, consequently, must suffer without redress. Diplock LJ refuses to follow the liberal reasoning of *Entick* v *Carrington* on the ground that our police forces are better today; might they not become better still if they had to pay for their mistakes? Salmon LJ said that the warrant could have been drawn so as to protect the police; his decision means that they needn't bother: *Chic Fashions (West Wales) Ltd* v *Jones* [1968] 2 WLR 201.
>
> Can it be said on occasion . . . judges give effect in court to political views which might fairly be described as right-of-centre-upper-middle-class? I think it is possible to argue that they do, and that, on occasion, when free to do otherwise they either go out of their way to protect the well-to-do, or make decisions within the framework of tolerated debate which is congenial to that group only. Some litigation is conducted with little overt sensitivity to the political context in which it takes place. It is not that two views are debated and one rejected but rather, as in a

one-party state, only two variants of one view. Some judges like to say that the most important person in court is the party who is going to lose. Every effort must be made to persuade him that his views have been listened to. They are also often aware that there are parties not before the court for whom the matter is at least as important. What has to be said is that there are sometimes political non-party losers whose views are wholly unrepresented in the debate. We are all of us in favour of protecting the rights of the individual, but it is possible to disagree as to what those rights are when they meet with the novel demands of a welfare state. Collectivism will not hold the same terror for the down-and-out as it holds for the up-and-in.

Practising lawyers such as solicitors (who represent clients in legal matters outside court) and barristers (who represent clients in legal matters inside court) are also bound by the *iron rule*. Solicitors who cannot advise their clients clearly as to their legal rights will lose those clients very quickly. A barrister who cannot argue a case effectively in court will soon find him- or herself running short of briefs.

Finally, law students are not exempt from the *iron rule*. Law students are expected to write essays that make effective arguments in favour of a particular view of what the law says, or what it should say. In exams, these essays tend to have to be written in as little as 40 minutes to an hour. So law students who want to be successful as law students need to learn how to say a lot, and to say it clearly, in two or three pages. This is very difficult: brevity is always much harder to achieve than loquaciousness. (Blaise Pascal, the French mathematician and philosopher, once joked: 'I have made this letter longer than usual, because I lack the time to make it short.') But you cannot do well as a law student without learning how to get to the point quickly and make every word count.

It is no accident, I think, that so many of the greatest orators of all time – such as Demosthenes, Cicero, Daniel Webster, Henry Clay, Abraham Lincoln, William Jennings Bryan (and even Barack Obama, in our own time) – were all lawyers before going on to achieve fame as great speech-makers. It's no accident either that the speech for which Abraham Lincoln is most famous – the Gettysburg Address – is only 272 words long. (In contrast, the Professor of Greek Literature who spoke before Lincoln at the Dedication Ceremony at Gettysburg spoke for two hours.)

Politics

The third reason for studying law is that it helps you to form your own views as to what sort of society we should live in, and puts you in a good position to provide an informed contribution to the future shaping of our society – whether simply by voting in elections, or by working within politics yourself. Of course, it might be argued that studying philosophy at university would serve just as well to prepare you for a career in politics. However, there is a crucial difference. When you study philosophy, you are looking at a set of thinkers' *abstract* ideas as to how society should be ordered. But law exists at the cutting edge of shaping society. As a result, law makers have a special responsibility that philosophers are not subject to – the ideas for arranging society that law makers give effect to *have to work in practice*. They have to do more good than harm. If they don't, then the law makers' efforts will eventually be overturned. Once the law-maker is off the scene (either fired or retired), his or her contributions to the law will be reversed and the law will be put on a more beneficent path. Dr Martin Luther King Jr liked to say that 'the arc of the moral universe is long, but it bends towards justice'. Whether that is true or not of the 'moral universe', it is certainly true of legal systems. In Lord Mansfield's striking phrase, the law eventually 'works itself pure' of its past failures. So when you study law, you develop a practical sense of what works and what doesn't work in ordering society. That, I think, is a very important thing to know if you are going to get involved in politics – and that is not something that studying abstract political theories on a philosophy course can give you. Indeed, it is striking how many philosophical ideas, once put into practice, have proven to have terrible consequences.

Moreover, studying law – and, in particular, English law – introduces you to a particular *method* of effecting social change. This is perhaps English law's greatest contribution to the world – the *common law method* of making law. All law-makers are faced with the problem of their lack of omniscience – the fact that they cannot anticipate all the consequences of their law-making activity, and can end up doing much more harm than good through that activity. The common law method of making law was the English lawyers' solution to this problem. Until the twentieth century, the English law was primarily *common law*; that is, law that had been developed as a result of the decisions of the courts in concrete cases. And in developing the law, the courts would decide on a *case by case basis* what the law said. This method of making law – the *common law method* – allowed the English courts a lot of leeway to experiment with the law.

In a particular case, one judge might suggest that the law said *x*. In later cases, other judges would have a look at this suggestion and ignore it, modify it, apply it, or expand on it. And then other judges in further cases would see what they made of that development, and adjust it accordingly. In this way, the common law – the law as developed in the courts – emerged out of a process of trial and error, where only rules and doctrines that generally satisfied the judges as being reasonable would survive to become part of the established common law. In this way the law-maker's problem of lack of omniscience was avoided. If new situations came up that had not been anticipated before, the rules and doctrines of the common law could be adjusted to take account of them, and a new but necessarily temporary understanding of what those rules and doctrines were would come into existence.

As I said, up until the twentieth century, this was *the* way in which law was developed in England. One consequence of this was that it was difficult to say with any certainty *what* the law said on a particular question – for that, you would have to look at all the previous cases that had some bearing on that question, and make educated guesses as to what the courts would say on that question given those previous decisions. But this method of law-making was the humble tribute that English lawyers paid to their own fallibility and inability to predict the future – they adopted a method of law-making that was flexible enough to make their incapacity irrelevant. And this recognition that law-makers could not completely anticipate the future, and the consequent desire for lots of flexibility in administering the law, had a huge political effect. It may be the most important reason why the UK managed to get through the nineteenth and twentieth centuries without any kind of revolution, unlike virtually every country on the Continent. The preference that English lawyers had for changing the law through a cautious, step-by-step, process made English society as a whole resistant to, and suspicious of, revolutionaries who claimed that with one 'big leap forward' society could be transformed into a utopian ideal.

Of course, in the twentieth century, things changed. *Legislation* – laying down general rules and provisions for people to abide by and take advantage of – became a much more dominant source of law; and this reflected a utopian turn in political thinking, whereby it became much more acceptable to think that a more perfect society could be magicked into existence through legislative *fiat*. But it is precisely because this utopian turn still remains very dominant in our politics – and philosophical discussions of politics – that those entering politics should be exposed to the alternative, more organic and incremental, approaches to changing society that were once second nature to

our law-makers. But you can only be exposed to this alternative approach by studying it in action, in the development of the common law.

Legal training

I've left until last the reason you might have expected me to start with – that doing a law degree is the best preparation you can have for becoming a practising lawyer. This is for three reasons. First, I didn't want you to get the impression that you should only consider studying law if you want to become a practising lawyer. The skills and knowledge that you acquire as a law student are invaluable for a range of different careers. Secondly, I'm not sure that people should choose to study a subject at university based purely on careers-based considerations: you should use your time at university to study a subject you would love to explore in depth. Thirdly, there are people who endorse what we can call the *astonishing hypothesis* that studying law at university is *not* the best preparation for becoming a practising lawyer. (I call this the '*astonishing hypothesis*' because I think people would be astonished to be told that doing a degree in medicine is *not* the best preparation for becoming a doctor, or that doing an engineering degree is *not* the best preparation for becoming an engineer; so it would be similarly astonishing if studying law at university were not the best preparation for becoming a lawyer.) And I didn't want you to think that if the *astonishing hypothesis* turned out – astonishingly – to be correct that there was no reason to study law at university.

For the purposes of this letter, I'll just take the commonsensical position that the *astonishing hypothesis* isn't true. If you want me to deal with it, I'll address that in another letter. But for the time being, let's assume that doing a law degree *is* the best preparation for becoming a practising lawyer. But this only gives you a reason to study law if you want (or think you might want) to become a practising lawyer. And you may have your doubts about that. Many people think that you have to sell your soul to become a lawyer. I understand why people might think that way. Anyone who has the power to argue convincingly on either side of a case will always attract suspicion. (One of the first philosophers in history, Socrates, was executed in Athens in 399 BC. One of the charges in the indictment against him was that he had the power to make the weaker case seem stronger.) The lawyer's ability to take either side of a case seems to indicate an unprincipled indifference to right and wrong. Lawyers – it is suspected – sell out their consciences and simply seek to represent whichever side in a dispute is willing to pay them the most for their services.

Let me act like a typical lawyer and put the other side of the case. Deciding to become a lawyer is just as morally worthwhile as choosing to become a doctor, or a teacher. This is because you can't have a functioning legal system without lawyers, and a society's legal system is as vitally important to the flourishing of the people living in that society as are that society's health or education systems. We tend to forget this in Western societies because we take our legal systems – and the benefits we obtain from living under our legal systems – for granted. To appreciate how important our legal systems are, I want you to do two things.

First of all, imagine what it would be like to live in a society where everything is permitted. We don't have to try too hard to do this: we just have to watch or read the news from other parts of the world to see examples of societies that have no legal systems worth speaking of – where there are no effective limits on what the State may do its citizens, or what its citizens may do to each other. Life in such societies is 'solitary, poor, nasty, brutish, and short', in the words of the philosopher Thomas Hobbes, who lived through the breakdown of social order triggered by the English Civil War. People who live in such societies are condemned to live in chaos and disorder and to experience all the evils that flourish in conditions of chaos and disorder: murder, rape, arson, theft, starvation, despair, suicide. The fact that we don't live in such a society is due to the fact that we live under the rule of law. That is, we live under a legal system that sets strict limits on what the State may do to us and what we may do to each other, and those limits are – by and large – observed.

Secondly, imagine what it would be like to live in a society where there is no trade. In other words, imagine a society where each of us has to grow, or make, everything we need for ourselves and our families. Again, it's not too hard to do this – thinking about what life is like in the poorest areas of the world should give you some idea of what this sort of existence would be like. There would be no shops, no buildings bigger than those that could be built by a few pairs of hands, no guaranteed water supply, no food other than what you and your family could grow on land that you are lucky enough to have inherited, no tools to grow food other than those a single person could make for him- or herself, no books, and no retirement in old age. Life in such a society would not necessarily be marked by chaos and disorder, but it would still involve a desperate and continuous struggle to stay alive. Again, the fact that we don't live in such a society is due to the fact that we live under a legal system that helps people to trade with each other. Our legal system helps people to trade with each other by doing two things in particular. First of all,

it gives people something to trade by granting them legally enforceable rights over such things as their bodies, land, things, and ideas. Secondly, our legal system allows people to enter into binding contracts with each other, under which contracts their legal rights can be transferred to other people. Almost everything around you owes its existence to the fact that our legal system helps people trade with each other. Just think, for example, of the immense network of transactions that was required simply to produce the computer on which I am typing this letter.

So we in the West owe everything to the legal systems under which we live. Without them, our lives would be unimaginably different, and unbelievably difficult. And as you can't have a legal system without lawyers to run it, it follows that we should regard the lawyers who help to keep our legal system running as public heroes, in the same way that we regard doctors and nurses and teachers as heroic for the work they do. That, then, is my positive argument for thinking that becoming a lawyer is a morally worthwhile thing to do. But like any good lawyer, I won't close my argument without first considering, and dismissing, three arguments that might be made on the other side.

(1) Defending evil

A question criminal lawyers are often asked is, 'How can you defend someone you know is guilty?' And a question corporate lawyers are often asked is, 'How can you work for a company that pollutes the environment/pays its workers so little/does as much as it can to avoid paying taxes?' The implication of both questions is that the work that the lawyer does is, at least on occasions, morally disreputable. The implication is unjustified. The short answer to both questions is that our legal system simply won't work properly if people are denied access to its benefits by lawyers who stand in judgment on them and refuse to work for them on the ground that they are not entitled to those benefits, or don't deserve them. The rule of law would be fatally undermined if the mere fact that you looked guilty ensured that you were found guilty without a proper trial. Freedom to trade under the law would be similarly undermined if the mere fact that people disapproved of the way you ran your business meant that you could not find adequate representation. If our legal system is going to work properly, and provide us with the benefits set out above, then lawyers have to be willing to represent unpopular or unpleasant clients, and do their best for them.

(2) Irrelevance

It might be argued that the UK is no longer a country that lives under the rule of law. Whatever limits UK law does place on what the State can do to us, and what we may do to each other, these limits are largely theoretical. In practice, these limits are regularly transgressed without any sanction or redress. As a serving police officer has observed,

> Crime doesn't get investigated properly and it hasn't done for a long time now . . . Just about every single reported theft of a mobile phone is recorded as lost property. You will find very, very few recorded attempted burglaries because they all get recorded as criminal damage . . . Crimes only get detected if they're easily solvable . . . There just [aren't] enough people to investigate crimes properly. If, say, there is a queue of 20 jobs and you have five officers to deal with them, it's impossible to fully investigate a crime properly.

And there are some crimes that the police, seemingly, simply will not investigate: the last successful prosecution of police officers for their involvement in a death in police custody was in 1969; almost 50 years ago. This is despite the fact that over 1,000 people have died in police custody in the last 12 years.

So it might be argued, then, that the games lawyers play are largely irrelevant to the vast majority of society and make little or no contribution to ensuring that we don't slide into living in a society where everything is permitted. To borrow the legal philosopher Roberto Mangabeira Unger's striking language, lawyers are 'like a priesthood that [has] lost [its] faith and kept [its] jobs . . . [standing] in tedious embarrassment before cold altars.' But even if this were true (which I don't think it is), then you have even more of a reason to want to become a lawyer. If it is true that the UK cannot be said at the moment to live under the rule of law, and it's only morality or custom that currently stands between us and our living in a society where everything is permitted, then your generation can turn things around and start rebuilding the rule of law in the UK. If the rule of law is as important as I say it is – and it is – then no enterprise could be more valuable, or more urgent, or make more of a contribution to people's welfare. But to get involved in this great enterprise, you have to become a lawyer.

(3) Corruption

The third argument against the view that becoming a lawyer is a morally worthwhile thing to do goes as follows:

> Becoming a lawyer is morally dangerous. In theory, you could do a lot of good as a lawyer in exactly the ways Nick McBride describes – you could help to uphold (or rebuild) the rule of law in the UK by becoming a criminal lawyer or a tort lawyer, or you could help foster commerce within the UK by becoming a commercial lawyer, or a corporate lawyer, or a land lawyer. But lawyers also have the potential to do great evil. They can use their position to help destroy the rule of law in the UK, for example, by telling lies to the courts to ensure that guilty clients go free. And they can use their position to damage commerce, for example, by threatening their clients' competitors with expensive and potentially ruinous legal actions if they attempt to market a new invention that would transform the lives of millions. Unfortunately, the likelihood is that someone who becomes a lawyer will end up doing evil, rather than good. The power of money is too great to resist – a client who offers a lot of money to a lawyer in return for their doing something wrong or unethical will usually not be turned away. So whatever good you could do as a lawyer, it's better to do something else where you could do an equivalent amount of good (if not more), and not be exposed to the temptations to do evil that lawyers are routinely exposed to, and to which many lawyers succumb.

This argument fails, at two levels. First of all, it's simply not true that lawyers are more likely than not to end up acting immorally. If that were true, decent lawyers would be extremely hard to come by. That is not my experience: most lawyers I come across are decent people, who haven't been corrupted by money, but instead seek to fulfil their professional responsibilities as best they can. Secondly, even if the factual basis of this argument were correct, and if this argument were accepted, it would mean that no one should become a lawyer, which – as we have seen – would be ruinous for our society. A society without lawyers is one without any kind of future. If it is true that lawyers are very susceptible to being tempted to do the wrong thing, the proper response to that fact is not for people to stop becoming lawyers, but

for us to strengthen the sanctions against lawyers who do the wrong thing, so as to encourage them to resist temptation.

So far as morality is concerned, then, there is absolutely nothing wrong with becoming a lawyer. Quite the opposite: lawyers are just as important to the functioning of society as teachers or doctors. However, I should sound a warning note here. Precisely because the idea of becoming a lawyer is so attractive to a lot of people, the market for jobs as lawyers – particularly to become a solicitor in a top city law firm, or a barrister in a good set of chambers – is now extremely competitive. So if you think you might want to become a lawyer, you have to be realistic about what the chances are of your achieving that ambition after you leave university. A useful website to look at for this purpose is www.unistats.co.uk. This will give you some information about what percentage of law graduates from a particular university obtain jobs once leaving university, and general levels of student satisfaction with the courses they receive. Look at the universities you are likely to be applying to and see how they rate for law. (Also ask the universities themselves for any statistics that they might have on this.)

If they don't rate so highly, don't despair! Just be careful – think about what other careers you might be interested in, and what sort of skills and qualifications they would require, and think about whether a law degree would put you in a good position to pursue those other careers, if a career as a lawyer doesn't happen to work out for you. If the other careers you are interested in require you to have done a degree other than a law degree at university, remember it is always open to you to do a non-law degree at university and then qualify to practise as a lawyer. Having said that, I should also warn that the rules on how to qualify to practise as a lawyer are currently under review. At the moment, someone who does not do a law degree at university can do a one year 'conversion course' (called a 'Graduate Diploma in Law' or GDL for short) – studying seven 'core' legal subjects – before moving on to do a one year professional training course that will ready them for life as a solicitor or a barrister – in the case of a would-be solicitor the 'Legal Practice Course' (or LPC for short) and in the case of a would-be barrister the 'Bar Professional Training Course' (or BPTC for short). People who do a law degree as an undergraduate obviously have exemption from having to do the one year conversion course and can proceed straight to the professional training part of qualifying to be a lawyer and thereby get a one year jump on becoming a practising lawyer on their counterparts who did not study law at university (as well as avoiding the pain involved in trying to cover seven different legal subjects in just one year).

Now – this is where it gets tricky. The Solicitors Regulation Authority (or SRA for short) is the body that, among other things, determines who does and does not qualify to practise law as a solicitor in England and Wales. At the time I am writing this the SRA has decided to change the procedures for qualifying as a solicitor. (To see what the latest position is on these changes, look at the SRA's website at www.sra.org.uk.) What the SRA currently proposes is that virtually *everyone* who wants to practise as a solicitor will have to do a 'Solicitors Qualifying Examination' (or SQE for short). The SQE will be split into two parts. The SQE1 would be sat before the would-be solicitor enters a law firm as a trainee solicitor and would test his or her expertise in six different subjects that relate to the sort of things solicitors have to know about if they are going to be solicitors – the legal system, dispute resolution, property law, commercial and corporate law, wills, and criminal law. The SQE2 would be sat after the would-be solicitor has had a chance to get some real-life experience of working as a trainee solicitor and would focus on the sort of skills – in things like client interviewing and legal drafting – that they are expected to pick up in the course of working as a trainee solicitor. If and when these proposals are implemented (and I should emphasise that it is still not clear whether they will be) – the current suggestion is that they should come into force from August 2020, and will therefore affect anyone starting (and perhaps even finishing) a law degree after that date – what will be the implications for someone who thinks that they might like to work as a lawyer after leaving university? It is hard to predict, but my guess is the following:

(**1**) The Bar Standards Board (or BSB for short) may follow the SRA's lead, and require everyone wanting to become a barrister to do a 'Standard Bar Exam' which everyone – law graduate and non-law graduate alike – will need to study for and pass.

(**2**) The one year advantage that students doing a law degree currently possess over students not doing a law degree in terms of qualifying as a solicitor or a barrister – by virtue of students doing a law degree being exempted from the GDL – will therefore disappear as all students leaving university will be in the same boat in terms of what exams they need to study for and pass in order to qualify as a solicitor or a barrister.

(**3**) *However*, students who have done a law degree are very likely to find passing SQE1 – or the equivalent for barristers – considerably easier than students who are approaching the job of studying for the SQE1 cold, with no prior legal knowledge. *Moreover*, it may be that university

law faculties will provide their students with special training for passing the SQE1 that will not be available to students who have chosen not to study law at university.

(4) *In addition*, it is questionable whether city law firms will want to take the risk of employing people whose only legal knowledge is the knowledge they have picked up for the purpose of passing SQE1. It is hard to see any reputable city law firm thinking that someone with the mere smattering of legal knowledge that they will need to pass SQE1 could be relied on not to screw up in some important case because of their overall ignorance of the law, or will not need a lot of hand-holding when they enter the law firm to get them up to speed on all aspects of the law that they did not cover for the SQE1. *Moreover*, the same would apply *a fortiori* (even more strongly) to sets of chambers' evaluations of would-be barristers seeking pupillage (the equivalent of a law firm's training contract) with them. Preparing for, and doing, a 'Standard Bar Exam' would not be enough to equip a would-be barrister with the kind of legal knowledge that a good set of chambers would want to see its pupils possess when they enter chambers. Given this, one could expect such chambers to have a strong prejudice in future in favour of applicants who have done a law degree rather than applicants who have not.

However, all this speculation should not distract you from the main point. Whatever happens in the future, it still remains, and will always remain, the case that the best preparation for becoming a practising lawyer is to do a law degree. And if and when the SRA's proposals *are* implemented, then – given points (3) and (4) above – I think it will become essential to do a law degree if you are planning to become a practising lawyer. Which then, in turn, will place an unfortunate burden on students at the age of 16 or 17 who are thinking about what kind of degree to do at university. If they think they *might* want to become a lawyer, but are uncertain, they will – in theory – retain the freedom to do some other kind of degree and then qualify as a practising lawyer. But in practice, graduates without a law degree will – so far as I can see – find it hard to do well as practising lawyers, at least if they aspire to a very good job with a city law firm or a good set of chambers. So if and when the SRA's proposals are implemented, you need to think very carefully about what the potential implications of *not* studying law at university might be if you think that being a lawyer is something you *might* want to do in future.

Summary

You don't have to want to become a lawyer to do a law degree. The analytical and rhetorical skills you will acquire in doing a law degree means that doing a law degree can provide excellent training for working in politics, or journalism, or business, or public service. But you shouldn't let all the lawyer jokes we both know and the caricatures of lawyers projected in the media put you off the idea of becoming a lawyer after you leave university. Lawyers perform an extremely important role in society. If you do want to become a lawyer, then doing a law degree would obviously provide you with everything you needed to become a very good and successful lawyer – even more so if and when the SRA's proposals for a common exam to qualify as a solicitor end up being implemented. However, you should be aware of how competitive it is now to become a lawyer, and you should think carefully about how likely it is that your law degree will provide you with a reliable launchpad for entering the legal profession, and how useful a law degree would be to you for other careers you might be interested in pursuing if it turned out that you weren't able to pursue a career in law.

If you haven't made up your mind whether or not you want to become a lawyer, you should read a book by a journalist called Jonathan Harr. The book is called *A Civil Action*. It may well inspire you to become a lawyer. If you want to get a bit of a taste of what it is like to study law, and get a better idea of how important law is to our daily lives, then I recommend that you have a look at *What About Law?*, a book edited by three of my colleagues here in Cambridge: Catherine Barnard, Janet O'Sullivan, and Graham Virgo. Each chapter introduces you to a different area of law by focusing in great detail on a particular case that is relevant to that area of law.

Please don't hesitate to get in touch if you have any more questions.

All best wishes,

Nick

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3
The astonishing hypothesis

Dear Jamie,

Thanks for your email. So, if I've got it right, you've been encouraged by my last letter to think you might want to become a lawyer, but now your History teacher is telling you that the *astonishing hypothesis* is, astonishingly, true – that doing a law degree is not necessarily the best preparation for becoming a practising lawyer. And he's been telling you that Lord Sumption, one of Justices in the UK's top court, the UK Supreme Court, agrees with him. Well, let's leave Lord Sumption aside for a second and remind ourselves of a few fundamentals.

First, even if the *astonishing hypothesis* is correct, there are still plenty of other reasons, which I identified in my last letter, for studying law at university. Secondly, if and when the SRA's proposals (discussed at the end of my last letter) for introducing a common exam for qualifying as a solicitor are implemented, then that might be – of and in itself – enough to disprove the *astonishing hypothesis* as doing a law degree may become the only practical preparation for practising as a lawyer in a city law firm or a good set of chambers. Thirdly, 99.999 per cent of teachers working in the secondary sector have *no idea whatsoever* what is involved in studying law at university, and any statements that they make about this must be treated with corresponding caution and scepticism. Fourthly, none of your teachers have to take responsibility for the choices you make in your life, and that can sometimes result in the advice you get from them about those choices being made with a lack of responsibility.

But let's leave these points aside – in particular, let's disregard the effect of the SRA's proposals being implemented – and directly address the *astonishing hypothesis*, which I hope to show in this letter is simply wrong. But first I have to clarify something. The *astonishing hypothesis* comes in two forms: a strong form and a weak form.

The *strong* form of the *astonishing hypothesis* says that if you want to be a practising lawyer, it would be positively *better* to do some degree other than law at university, and then qualify as a practising lawyer. The *weak* form of the *astonishing hypothesis* says that if you want to be a practising lawyer, you have no reason to want to do law as opposed to any other degree at university. In other words, doing a law degree provides *no better* preparation for becoming a lawyer than doing any other degree does. So in this letter, I'll be explaining why I think both the strong and weak forms of the *astonishing hypothesis* are incorrect. Let's start with the strong form of the *astonishing hypothesis*.

Lord Sumption seems to be a supporter of the strong form of the *astonishing hypothesis*: if you want to practise law, it would be positively better if you did some degree other than law at university. Your History teacher probably came across a report of Lord Sumption's views that was carried in the *Daily Telegraph* on July 8, 2012, and which you can easily look up online. But the *Telegraph* was reporting on an interview which Lord Sumption gave to the barristers' magazine *Counsel*, and which was published in July 2012. That interview is not available online, but *Counsel* magazine have kindly agreed to allow me to reproduce the relevant portion of the interview here:

Would you recommend people coming to the Bar to do a law degree or would you say there is as much value in doing an arts subject as an undergraduate?

I've made a lot of enemies, though I have to say very kindly enemies, by saying publically on a number of occasions that I think it is best not to read law as an undergraduate. I've sometimes been misinterpreted when I say this as suggesting that law is not well taught to undergraduates in British universities. That is not my view: I think it's superbly well taught to undergraduates in British universities. The problem is that we have a generation of lawyers, and this applies to solicitors as well as barristers, who are coming into the profession with much less in the way of general culture than their predecessors. It is very unfortunate, for example, that many of them cannot speak or read a single language other than their own. I think the difficult thing about practising law is not the law but the facts. Most arguments which pretend to be about the law are actually arguments about the correct analysis and categorisation of the facts. Once you've understood them it's pretty obvious what the answer is. The difficulty then becomes to reason your

way in a respectable way towards it. Of course sometimes you just can't, in which case you change your mind.

This is why the study of something involving the analysis of evidence, like history or classics, or the study of a subject which comes close to pure logic, like mathematics, is at least as valuable a preparation for legal practice as the study of law. Appreciating how to fit legal principles to particular facts is a real skill. Understanding the social or business background to legal problems is essential. I'm not sure that current law degree courses train you for that, nor really are they designed to. That is not a criticism of the course. It's simply a recognition of the fact that a command of reasoning skills, an ability to understand and use evidence, and a broad literary culture are all tremendously valuable to any advocate. If you don't have them, you are going to find it more difficult to practise. If you don't know any law that is not a problem: you can find it out.

Notice how the interviewer is simply asking about the weak version of the *astonishing hypothesis*: Is it true that there is just 'as much value' in doing a degree such as history if you want to become a barrister? But Lord Sumption goes much further and says that if you want to be a barrister 'it is *best not to read law* as an undergraduate' (emphasis added). There he is endorsing the strong version of the *astonishing hypothesis* – that if you want to become a practising lawyer, you should positively *not* study law at university, but should do something else.

In order to explain why I reject the strong version of the *astonishing hypothesis*, I want to pick up on two things Lord Sumption says in the passage above.

(1) A generation of lawyers . . . with much less in the way of general culture than their predecessors

At the moment, law firms and sets of chambers tend to recruit from students who have done a law degree and students who have done a degree other than law on a 50:50 basis – that is, about half of the people to whom they offer a training contract (if they are a law firm) or a pupillage (if they are a set of barristers' chambers) will have done a law degree, and the other half will have done some law degree other than law. So if Lord Sumption is right (and I'm in no position to say that he is wrong) that there is a *whole* generation of lawyers 'coming into the profession with much less in the way of general culture than their predecessors', that would seem to suggest doing a degree

other than law is not the solution to this problem. Those who are coming into the law profession with non-law degrees suffer from the *same* lack 'of general culture' as those who have done law degrees. If this is right, then it seems that the source of the problem that Lord Sumption is worried about has nothing much to do with what *degree* the new generation of lawyers did at the university and is more rooted in our *culture* which tends not to encourage people to use their spare time to read Tolstoy, or learn a foreign language, or attend a set of evening lectures on astrophysics. If Lord Sumption wants to do something about this problem, then he would do better to address this general feature of our culture rather than offer the completely inadequate solution of urging would-be lawyers to do a degree other than law at university.

So Lord Sumption's only argument in favour of doing a degree other than law at university doesn't get off the ground. And in fact, it could be argued that one part of the solution to the problem Lord Sumption identifies is to encourage prospective lawyers to study *law* at university. Law is so multi-faceted – involved as it is with every different aspect of our society – that studying law at university *requires* you to make much more of an effort to acquire more 'in the way of general culture' than you would have to if you were studying, say, mathematics or classics. Studying criminal law or criminology requires you to know something about economics, philosophy, psychology, and sociology. You can't study contract law or tort law without knowing something about economics and philosophy. Studying constitutional law or jurisprudence requires you to know something about political theory. The same is true of international law; and students of international law would also be well-advised to take an interest in game theory. Game theory is also relevant to family law (particularly in the way family law handles breakdowns of relationships), as is sociology and psychology. Intellectual property law can only be done well by students with a combined interest in science, economics, art, and literature. Comparative law encourages you to take an interest in the legal systems of countries on the Continent. Many universities offer their law students the option of spending a year in a foreign country studying law in that country, which helps to expand their horizons, and develop their foreign language skills. And history is relevant to all of these subjects because when we study law we are looking at how past decisions – and the influences that were brought to bear on those decisions – have influenced where we are now as a society. So if a would-be lawyer wants to enter the legal profession with much *more* 'in the way of general culture' than his or her contemporaries, then studying law at university would be an ideal way of doing that.

(2) If you don't know any law that is not a problem, you can find it out.

I want to make two points about this statement.

First, I've already mentioned that Lord Sumption is a judge in the UK's highest court, the UK Supreme Court (or 'UKSC' for short). I wonder, when he and his colleagues are faced with a difficult legal question (which is the only sort of question that gets to the UKSC), whether he tells them, 'I don't know what the problem is: we can just find out what the law says on this issue!' Of course he doesn't. That's because there is nothing to find out: when faced with a difficult legal question, the UK Supreme Court has to *decide* what the law says on that question. But they aren't free to adopt any method they like of deciding this question. They can't, for example, toss a coin to decide what the law says. They have to decide the case in a way that best guarantees that they will make a *reasonable* decision. That requires them to show some humility and take account of any views that have been expressed by other law-makers in the past that might be relevant to the decision that they have to make. It also requires them to think hard about what implications their decision might have: Will it have undesirable effects on people's civil liberties, or be harmful to the public interest in some other way? Will it make it harder for people to understand what the law says? Will it encourage future judges to develop the law in undesirable directions? Will it undermine Parliament's intentions as to what the law should say in this area? Learning to reason in this way takes time and discipline. Doing a law degree helps you to do this; and doing some other degree does not come even close to helping you to apply your mind to legal questions in this kind of way. Of course, you could argue: But only judges need to learn how to reason in this way. But barristers who want to get a judge to decide a difficult legal question in favour of their client also need to know how the judge is likely to approach that decision. And solicitors who need to advise their clients on difficult legal questions need exactly the same skill. And that skill – of knowing how to think like a lawyer – is best acquired by doing a law degree.

Second, consider the following situation:

> An explosion occurs at a huge petrol refinery. The explosion damages the fabric of a number of houses nearby. The owners of the houses want compensation for the damage done to their houses. Someone who was renting a room in one of the houses has had to move out and
>
> >

is finding it difficult to find equivalent accommodation at the same rent elsewhere. She also wants to sue for compensation.

You don't know anything about what the law says in this area, but Lord Sumption says that isn't a problem – you can just find it out. So – go on: find it out. How would you go about finding out whether or not the people involved in this situation are entitled to compensation? You would obviously need access to a law library, so let's assume you've got that. But where do you go then? There is no book on 'explosions at petrol refineries'. And there is no book on 'the law of compensation'. You might, in wandering through the library, find some books on land law which tell you about the rights of owners of houses, and tenants who lease property, but they don't deal with this situation. At this stage, you might get a bit desperate and ask someone who actually knows something about the law where on earth you should be looking, and he or she might point you in the direction of the books on tort law. But when you get to those, you will be dismayed to find that they are around 1,000 pages long – so short of reading all 1,000 pages of the book, how do you find out which part of the book you should be looking at? In fact, you should be looking first of all at the section of the book on the 'rule in *Rylands* v *Fletcher*'. But if you haven't done a law degree, you almost certainly won't know about the rule in *Rylands* v *Fletcher* because it is very likely that whatever bits of law you were taught in order to allow you to qualify as a practising lawyer did not cover the rule in *Rylands* v *Fletcher*. So how would you know to find out what the law says about the rule in *Rylands* v *Fletcher* when you don't even know that the rule exists? The truth is that the best way of putting yourself in a position to find out what the law says on any given legal issue is to do a law degree. Anyone who doesn't do a law degree and wants to find out what the law says on a particular question will almost inevitably find themselves depending at some point on other people who *have* done law degrees to give them a helping hand. I think if I wanted to be a practising lawyer, I would rather be the kind of lawyer who has, through doing a law degree, acquired a good overview of the different areas of law and knows how legal knowledge is arranged in a law library so that I can work on my own to research a legal issue and reach a reliable conclusion on that issue. And I wouldn't want to be the kind of lawyer whose state of knowledge depends on the vagaries of what I was taught in qualifying to become a practising lawyer and any titbits of knowledge that I had been able to pick up from other people after entering the profession.

I think I've said enough by now to show that Lord Sumption's arguments in favour of the strong form of the *astonishing hypothesis* simply don't stand up.

(1) Doing a law degree is at least as good as any other degree in helping a would-be lawyer acquire the sort of 'general culture' that Lord Sumption thinks that it is so important that a practising lawyer have; and there is good reason to think that, in these benighted times, doing a law degree does a much better job than most other degrees of encouraging a would-be lawyer to develop the kind of hinterland that Lord Sumption would like to see practising lawyers have.

(2) Doing a law degree is a far better way of helping a practising lawyer acquire the knowledge and skills that he or she will need to find out what the law says on any given issue; or in cases where the law is uncertain, to make an educated guess as to what the courts are likely to decide the law says.

If points (1) and (2) are correct, then we should also reject the weak form of the *astonishing hypothesis*. It is *not* the case that a would-be lawyer has *no reason* to prefer studying law at university as opposed to doing some other kind of degree. There are a number of reasons why someone who has made up their mind that they want to be a practising lawyer should positively want to do a law degree at university. Not just the reasons I've already mentioned, but also:

(3) Law students at university get lots of opportunities, through things like law societies and law events, to make valuable connections with law firms and sets of chambers that can help them pursue a legal career later on. They are also given far more opportunities than non-law students to develop the sort of skills that will make them attractive to law firms and sets of chambers. So for example, a decent university law society will regularly organise *moots* – that is, opportunities to argue a legal point in front of a judge – which provide good preparation for life as a barrister. Whenever a law firm contacts me to ask if it can put on an event for my law students, I always ask them to do some sessions on commercial awareness and negotiating skills, as those abilities are particularly prized by law firms: but it's my law students who profit from those sessions, not students who have opted to do some other degree.

(4) It is increasingly the case that students are expected to have done a post-graduate degree in law if they want to pursue a career as a barrister.

It is obviously much, much easier for a student to do such a degree if they have already studied law as an undergraduate. And if and when the Graduate Diploma in Law (GDL) 'conversion course' in seven core legal subjects is abolished as a result of the SRA's proposals on creating a common exam for qualifying to be a solicitor being implemented then it will be *extremely difficult* for someone who has not done law as an undergraduate to do a post-graduate degree in law as such a person will have no means of acquiring enough knowledge of the law to put themselves in any kind of position to do a post-graduate degree in law.

(5) Even now, when people have the option of doing the GDL, it should be remembered that: (i) The conversion course is tough – someone who does the conversion course has to master seven different subjects in one year that students who have done a normal law degree get to spread out over three years. This doesn't stop people doing the conversion course, and doing it well, but it is not a pleasant experience and one that could have been avoided by simply doing a law degree. (ii) Someone who does a conversion course *only* gets to study seven legal subjects. In contrast, a student doing a three year law degree could expect to study *at least* twelve different areas of law during the course of his or her degree. This gives a law student a much broader understanding of the law, and a much greater opportunity to discover what sort of areas of law really excite him or her and that he or she would like to specialise in after leaving university. (iii) The fact that students with law degrees do not have to do the GDL gives them a one year head start over their non-law contemporaries in pursuing a legal career. They can go straight on to the professional training component of qualifying as a solicitor or a barrister. At a time when education is becoming increasingly expensive, it is not clear why someone who knew that they wanted to be a practising lawyer would incur a whole extra year's worth of fees and expenses doing the GDL, and put off by a year the date when they can actually start earning some money, so that they could study some other subject at university.

(6) As I said above, law firms and sets of chambers tend to recruit law and non-law graduates on a 50:50 basis. That might indicate that they endorse the weak form of the *astonishing hypothesis*: they don't care what degree you have done at university, so why should you? But remember: even if the doors for entry into the legal profession are the same size for law graduates and non-law graduates alike, law graduates are only

> competing with other law graduates to get through the law graduate door. By contrast, non-law graduates are competing with *all* other non-graduates to get through the non-law graduate door. So historians who want to become lawyers are not just competing with other historians, but also classicists, mathematicians, graduates in English, philosophers, engineers, physicists, chemists, theologians, and so on. So the market for law jobs among non-law graduates is *much* more competitive than it is among law graduates – and given how competitive the overall market for law jobs is already, it seems strange that someone would choose to *reduce* their odds of getting a law job by doing a non-law degree.

To sum up, I'm afraid to say that your History teacher is wrong. The *astonishing hypothesis* that there is no particular reason why someone who wants to be a practising lawyer should study law at university turns out, not so astonishingly, to be incorrect. That is why there is no other country in the world (other than China, I'm told) that allows someone to practise law without having done a law degree first, just as we here in the UK would never dream of allowing someone to practise medicine without having first done a degree in medicine. The continuing cachet that the *astonishing hypothesis* enjoys among some people in the UK has a lot to do, I think, with the very English *cult of the amateur* – the belief that it is possible to achieve great things without really trying, and without engaging in any specialised preparation or training. Wherever it rears its head, this cult of the amateur always has baleful effects. It explains why, in the last European Championships, England were knocked out as a result of losing 2–1 to *Iceland*. It accounts for the UK's long industrial decline compared with other countries that take more seriously the need to ensure that a proportion of its population develops technical skills in engineering and the sciences. The UK needs to be immunised against this cult. Rejecting the *astonishing hypothesis* would be a very good start.

All best wishes,

Nick

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But is law the right subject for me?

Dear Jamie,

You're quite right: I *did* say in my first letter to you that law isn't for everyone. Doing well as a law student requires a specific set of skills, and not everyone has those skills. In fact, I think the number of 17 or 18 year olds who have a natural aptitude for studying law is gradually getting smaller and smaller. I think that's down to a combination of two things. (1) I think the sort of society we live in doesn't really encourage children to develop the kind of skills that they need to have if they are to do well as law students. (2) People of your age don't really know what sort of skills successful law students need to have, and so have no idea that they need to work on themselves to develop those skills. But the good news is that most of the skills I'll be talking about in this letter *can* be acquired, if you want to develop them. So doing well in studying law shouldn't be beyond anyone; whether someone does well or not depends on whether they *want* to become the sort of person who can do well at law. Not everyone does; and it follows that law isn't for them.

So what I'll do in this letter is set out 12 qualities that I think are important for a law student to have, if they are going to do well in their studies. I'll also give you some tips as to how you can develop these qualities if you don't have them already. And then you can think about how many of these qualities you have already, and whether you are prepared to do what it takes to acquire the others. Here we go –

Self-belief

Henry Ford (the founder of the Ford Motor Company) had a saying: 'Whether you think you can, or think you can't, you're probably right.' In other words, you won't be able to do anything that you don't believe you can do.

This applies in spades to studying law. Law is very different from any other subject you will have studied so far (including Law A-Level if that's one of your A-Levels). There are going to be times when you are going to feel that law is so strange and unfamiliar that it is never going to make sense. It will, eventually – but to get to the other side where the law becomes much more comprehensible you will need to believe that you have what it takes to get to the other side.

So – how do you develop a belief in yourself or your abilities if you don't have it already? In his closing address to the jury in the film *The Verdict*, Paul Newman's character says: 'In my religion, they say, act as if ye had faith. Faith will be given to you.' Aaron Sorkin later borrowed this line for *The West Wing*. Jed Bartlet is running for President and confesses to his campaign manager, Leo McGarry, that he isn't sure that he's the right man to become President. Leo replies: 'Ah, act as if ye have faith and faith shall be given to you. Put it another way, fake it 'til you make it.' If you lack faith in yourself, it doesn't really matter. Just act as though you did – do whatever you would do if you believed in yourself. And when things eventually come right, you'll see that you should have believed in yourself all along, and that will stand you in good stead the next time the chips are down.

Sang froid

Sang froid literally means 'cold blood'. Someone with *sang froid* is able to stay cool and composed under pressure. I think *sang froid* is a very important quality for a law student, particularly at the start of one's studies. When you are starting out as a law student, you come under a seemingly relentless barrage of information that you have to master, and you are expected to be able to do so many new things such as read a case or write an essay about the law in such a short period of time. In order to come through this 'blooding' relatively unscathed, you need to be able to keep cool, focus on what needs to be done, and get on with doing it.

Acquiring *sang froid* is just a matter of deliberately not looking at the bigger picture: on breaking everything you need to do down into much smaller steps and then focusing relentlessly on the little steps you need to make and not thinking about how far you have to go or how much more you have to do. I write a very big textbook on a particular area of law, and the textbook is about 1,000 pages long. When I started out writing the textbook, if I had ever thought about how long it was going to be, I would never have been able to write it – I would have been overwhelmed by the sheer size of the task. But by

focusing on writing one page, or one chapter, and always just focusing on that, it was eventually finished – and pretty quickly, too.

Organisation

The last point takes me on to the next quality required to be successful as a law student: the need to be organised. Look at this letter or my three previous letters. Look at how they are laid out, with headings and sub-headings and with some kind of order between the various different headings. Look at how whenever I set out a list of points, I number each point. The way I write is a reflection of my personality, which is very organised and methodical in its approach to everything. I think that this is an important quality that anyone who wants to be successful as a law student needs to have. I'm *definitely* not saying that spontaneity and a bit of messiness in your thinking won't be valuable to you as a law student. People who only think in straight lines aren't capable of seeing the indirect connections that exist between different ideas and subjects. But in the end, you won't be able to express yourself clearly as a law student (remember the *iron rule of lawyering*: express yourself clearly or die) if you can't organise your thoughts; and you won't be able to cope with all the demands that studying law makes on you if you can't organise your time.

If you are a pretty disorganised person (and most teenagers are), the secret to changing that is again to act *as though* you are an organised person; if you do that for long enough, being organised will become the norm for you, and you will gradually become intolerant of disorganisation. So tidy up your room, and make an effort to keep it tidy. Start making lists of things you have to do and check them off as you do them – and make sure you do everything on your list. Take pride in any work you do for school and make it look classy. Take on jobs that require a lot of planning and organisation to be done properly (such as helping out backstage in a school drama production) and make sure no one has reason to criticise your performance.

Focus

The great French philosopher and mathematician, Blaise Pascal, once remarked that 'the sole cause of man's unhappiness is that he does not know how to stay quietly in his room.' Whether that's true or not of mankind generally (I tend to think it is), it's definitely true of law students. Any student

who is restless and easily distracted will tend not to do very well in studying law. Focus is vital for a law student – the ability to work for sustained periods of time, concentrating on difficult legal issues that require sustained attention before they will yield and become comprehensible. Unfortunately, focus is something in small supply nowadays among students your age. There are so many distractions available to you – particularly from your computer and your mobile phone – that it is hard just to *stay still* for a long period of time and give your full attention to just one thing.

Your capacity to focus is like a muscle – the more exercise it gets, the stronger it gets. It follows that if you suffer from a weak attention span, the way to deal with that is to isolate yourself from possible sources of distraction so that the only thing you can focus on is whatever you are supposed to be paying attention to. So if you can't focus on your work because Facebook or YouTube are constantly calling to you, you need to work somewhere that you don't have access to those things. Gradually, the more you allow yourself to operate without distractions, the power of those distractions will gradually become weaker and your capacity to focus will become correspondingly stronger.

Self-control

Of course, there's a reason why Facebook and YouTube are distracting – it's because they are fun and interesting. I can lose myself for hours surfing on YouTube, following one link to another and then another. So an essential quality that a law student needs is the capacity to say 'no' to things that any reasonable person would normally want to say 'yes' to. In other words, to be successful, a law student has to be able to defer gratification – to put off what is attractive now in order to achieve the sort of success that will allow him or her to obtain even more attractive things in the future.

On this quality, it isn't totally clear whether there is a way to improve your capacity to defer gratification. In 1972, a study known as the 'marshmallow experiment' was conducted at Stanford University. A child would be left in a room with a marshmallow (or some other comparable treat) and told that if he or she waited 15 minutes without eating the marshmallow, then he or she would get another marshmallow. The children who ate the marshmallow as soon as they were left alone tended to do significantly less well later on in life than the children who were able to put off eating the marshmallow for 15 minutes. This may tend to indicate that the children's capacities for self-control remained unchanged as they grew up. However, the good news is that a very recent study indicates that children's capacity to defer gratification

increases the more certain they can be that deferring gratification will result in their obtaining a reward later. If this is right, then the more often law students see that their long hours of study have resulted in their achieving some concrete reward, then the more willing they will be to continue to put the hours in for future rewards. So it may be that a law student can build up his or her capacity for deferred gratification by setting up a programme of rewards for him- or herself – 'If I put the hours in this week, I'll reward myself with . . .' But someone who lacks even the capacity to follow through such a programme of rewards is unlikely to be able to do well as a law student.

Curiosity

Deferring gratification becomes much easier the more motivated you are to study law. Unfortunately, law is such an unfamiliar subject, any motivation you might have to study it is necessarily weak – you may like the idea of studying law in theory, but a theoretical attraction is hard to sustain when faced with the messy reality of what studying law involves. Most law students discover their motivation for studying law *after* they have started studying it – they fall in love with the subject and become fascinated with it. But this only happens if they really get stuck into studying law and start grappling with the details of the law instead of remaining content with a more broad brush overview of the subject. As I said in my first letter to you, the law tends to be pretty boring when you view it from a great distance – it's only when you get close up to the law and see it in all its glory that you can give yourself a chance of getting really interested in it. So to do well as a law student you need to feel driven not to approach the subject superficially, but to try to achieve a very detailed understanding of the law. In other words, you need to feel *curious* about the law. It is fundamentally curiosity which provides a law student with the initial push that they need to get on the road to success in studying law: if they feel curious about the law, then they will try to understand it in detail; and if they understand it in detail, they will want to know more and more about it. In contrast, someone who just wants to find out enough about the law to 'get by' will never get anywhere in their studies.

I assume that being curious about the law isn't really a problem for you – if you weren't interested in finding out more about law, you would hardly be reading this letter. So I don't need to give you any tips on how to overcome a basic lack of curiosity about the law. However, one thing I would advise is that you be careful not to *kill* your curiosity about law. If you are reading a book about law that bores you, then put it aside – you won't get anything out

of it, and it could be very harmful. Some of the books I was told to read before starting to study law as an undergraduate at Oxford were shockingly tedious: but I must have been so excited about the prospect of studying law that that didn't put me off. However, you may not be so lucky. So avoid boring books and seek out interesting ones instead.

Love of reading

If you study law, you are going to be reading *a lot* of material. So you have to have a basic love of reading if you are going to be successful as a law student. If reading is, for you, a bore and a drag then law is not for you and you should do something that doesn't involve spending so much time with your head stuck in a book, such as science or engineering. Unfortunately, if reading *is*, for you, a bore and a drag then there isn't much I can suggest to engender a love of reading for you. Maybe starting to read *a lot* might help – but it's probably likely to do more harm than good. So I think this is one quality that, if you don't have it, it might be best to think about doing something other than law.

Foxiness

In an observation that is now so clichéd, you won't be able to believe how much I hate myself for repeating it, the ancient Greek poet Archilochus distinguished between the fox, who 'knows many things', and the hedgehog, who 'knows one big thing'. (The philosopher Isaiah Berlin borrowed the distinction to distinguish between writers ('hedgehogs') who attempt to explain the world in terms of one big idea, and writers ('foxes') who refuse to view the world in such simplistic terms.) Successful law students need to be foxy – they need to know about lots of different things. This is because the law has been, and will always be, influenced by lots of ideas coming from disciplines outside the law – such as philosophy, economics, psychology, political theory, history, even anthropology – that are taken into account by law-makers in their ongoing conversations about what sort of society we should live in. So if you truly want to understand why the law is the way it is, and to help shape the law in future by contributing to those ongoing conversations – you need to know something about those extra-legal disciplines.

Let me give you a couple of examples. First, you can't understand why competition law exists or why the law has been reformed since 1925 to make land more marketable without understanding something about economics,

and how a society's economic health is affected by the existence of monopolies and by rules and regulations which make it hard to trade goods and services in the marketplace. Secondly, recent research in the field of what is called 'hedonic psychology' (basically, the study of human happiness) shows that human beings' levels of happiness are resilient. In other words, a human being who suffers an adverse event such as an injury soon recovers to the level of happiness that he or she was at before the adverse event. This research may have important implications for the law. For example, if our aim in imprisoning criminals is to reduce their levels of happiness, this research may show that we are imprisoning them for no good reason as their levels of happiness will in the long run be unaffected by their being imprisoned. Again: when the courts order that a defendant compensate a claimant for an injury that the claimant has suffered as a result of the defendant's actions, their aim is to give the claimant enough money to make up for the diminution in their quality of life that the claimant is supposed to have suffered as a result of being injured. However, it may be that there is no good reason for making the defendant pay compensation to the claimant as the claimant's level of well-being will eventually rebound back to his or her pre-injury levels whether or not he or she is compensated for that injury.

So someone who wants to be a successful law student needs to maintain an active interest in other disciplines, such as economics or political theory or psychology. How can you do this? Well, you are living at a very privileged time in human history where you can get a good grounding in the current state-of-the-art thinking in these disciplines very quickly and very cheaply. You only have to walk into a good bookshop and go to its social sciences section to find lots of very well-written and interesting books about all sorts of topics in politics, psychology, and economics. To give you a guide as to what sort of books you might like to look out for, go to my website: www.mcbridesguides.com. Click on 'Reading lists' and then click on 'Pre-U'. You'll then be supplied with a list of interesting books that you can buy on Amazon and that deal with issues in politics, philosophy, psychology, economics and thinking skills that are relevant to studying law. (You might also be able to get hold of any books that interest you very cheaply on the second-hand books site www.abebooks.com – but Amazon also gives you the option to buy second-hand copies of the books you want.) Or alternatively, just wander into a good bookstore and just flick through the books in the social sciences section and see what seems interesting to you. But the important thing is only to read books that interest you – anything that is boring is simply not going in, and you might as well chuck it and move on to something else.

Expressiveness

As I said in my first letter, law is fundamentally a conversation between different law-makers about what sort of society we should live in; and the study of law is a study of that conversation – where it has got to at the moment and where it might go in the future. So law is a talking game, and you have to be willing to express yourself if you are going to be able to get anywhere in that game. You have to be willing to express yourself in your written work, in discussing the law with your teachers and fellow students, and in confessing any difficulties you may be having with the work. If you find it hard to open up to other people about what you think then you are going to find it hard to succeed as a law student.

If you *are* someone who finds it hard to express yourself, then it's probably fear of what will happen if you do tell people what you think or what is going on with you that is holding you back. The only way to overcome any fear is to do the thing you are scared of, and see what happens. Almost always, nothing bad will happen and you'll see that you had nothing to be afraid of. And even if something bad does happen, you'll usually see that what happened wasn't *so* bad, and not bad enough to hold you back in future from doing the thing you were scared of doing. So if you do find it hard to express yourself, take a leap of faith, say what you want to say and see what happens. In almost every case, that's all you'll need to do to become more confident about expressing yourself in future.

Accuracy

Accuracy is vital to success as a law student. You cannot do well as a law student if you misstate the law where it is clear, or if you apply the law wrongly to a concrete situation, or if your arguments don't stand up to logical scrutiny. Being close to being right is nowhere near good enough in this game. For example, suppose that you are asked to determine whether someone is guilty of murder in the following situation:

> D sent his enemy, A, a parcel bomb, which was designed to explode and kill A when A opened it. Shortly after he posted the bomb, D repented of his plans and 'phoned the police to warn them of what he had done. He gave the police detailed instructions as to how to disarm the bomb.

> B, a member of the Bomb Squad, was given the job of defusing the bomb but in doing so he accidentally cut the wrong wire. As a result, the bomb blew up and B was killed.

You are told that a defendant will commit the crime of murder if his or her actions cause another to die and he or she performed those actions intending to kill someone or to cause someone to suffer serious bodily harm and he or she had no lawful justification or excuse for acting as he or she did.

You would be amazed (or I hope you would be amazed) at how many students your age are incapable of applying this definition accurately to the above situation. Either they say that D is not guilty of murder because at the time B was killed, he did not intend that anyone should die; when the definition makes it clear that it was his intentions at the time he did the thing which caused someone else to die which count. Or they say that D is not guilty of murder because when D sent the parcel bomb he intended to kill A, not B; when the definition makes it clear that all D has to have intended when he sent the parcel bomb was that *someone* should be killed or caused serious bodily harm. A student who applied the definition accurately to the above situation would realise that the only real issue here is whether D's sending of the parcel bomb *caused* B's death; if it did, then all the other elements in the definition are in place (D intended to kill someone when he sent the parcel bomb, and he had no lawful justification or excuse for doing so) for D to be found guilty of murder.

I think there must be something in the culture in which we live in nowadays that does not encourage the kind of accurate thinking that would allow *all* students your age to answer the above question correctly. Maybe schoolchildren are now led to think that getting close to being right *is* good enough, or are led to think that what is important is the way *they* react to a piece of writing rather than what the piece of writing *actually says*. Whatever the reason, it is very important that if you are going to be successful as a law student that you get rid of any bad habits that you have fallen into which mean that you fail to be clear, logical, and rigorous in understanding the law or in discussing and applying the law. For example, it may be that you are very good at debating, and that has encouraged you to think that you would do very well as a law student. But in fact, debating encourages precisely the sort of inaccuracy that can be fatal to your prospects for success as a law student. This is because debating encourages you to dismiss other people's

arguments with flip one-liners that put the other side down. But in law, you have to be much more careful in analysing other people's arguments and exposing precisely where they have gone wrong. Dismissing someone's arguments in a legal essay with a flip one-liner will result in your being dismissed yourself as a know-nothing dilettante. This isn't to say that if you are good at debating, you won't be a good law student – it just means you have to be careful to be on your guard against bad habits that your success in debating might have led you to acquire.

So how do you improve your abilities to be logical and rigorous? Doing logic puzzles – in particular Sudoku puzzles (easily available for free on the internet: just Google 'Sudoku puzzles') – is very helpful. Also reading books on thinking skills (of the types you will find on the book list that I have posted for you on www.mcbridesguides.com) will give you some pointers as to common sorts of mental errors that you and other people might tend to fall into. Also reading beautifully reasoned books will help you think clearly and logically yourself. One book in particular I would recommend is Derek Parfit's *Reasons and Persons* (Oxford University Press, 1986) – a model of clear writing that everyone should seek to imitate. Other writers whose crystal clear prose should encourage you to think clearly and logically yourself are: (among law academics) Peter Birks, HLA Hart, Philip K Howard, and Tony Weir; (among thinkers generally) Daniel Kahneman, Peter Kreeft, CS Lewis, Peter Singer, and David Stove; (among journalists) Nick Cohen, Theodore Dalrymple, Nick Davies, Ben Goldacre, Clive James, and Bernard Levin.

Flexibility

A successful law student will be *flexible* – he or she will be able to see both sides of an argument. Which is not to say that a successful law student will be incapable of coming to a conclusion as to which side of an argument is stronger – but he or she won't fall into the trap of thinking that only one side of the argument has any merit at all. Consider, for example, the following situation:

> Peter and Mary are told that their newborn son Adam has a medical condition which may mean that he needs a bone marrow transplant later on in life to save his life. Peter and Mary are both tested but unfortunately their bone marrow would not be suitable for Adam if the

need arose for him to have a transplant. So they decide to have another child, in the hope that that child's bone marrow will match Adam's needs. After three years of trying, Mary gives birth to a daughter, Eve, whose bone marrow – it turns out – is a match for Adam's. Adam is now 12 and will die without a bone marrow transplant. But Eve is unwilling to undergo the operation, which is painful and difficult and will require a period of hospitalisation for her. There is no other suitable donor available. Should Peter and Mary be allowed to force Eve to have the operation to save Adam's life?

If your instinctive reaction is to say, 'No – Eve has a right not to be made to undergo a medical operation', then think again. The question is *whether* Eve has such a right – and you cannot answer that question satisfactorily with the mere assertion that she *does* have such a right. Merely saying that Eve has a right not to be forced into giving up some of her bone marrow is a way of inflexibly closing one's mind down to the possibility that she might *not* have such a right.

So let's not close our minds – but instead consider the possibility that her parents should be allowed to force Eve to have this operation. A good starting point would be to consider whether there are any situations where it seems obvious that Eve's parents should be allowed to force her to have a medical operation. For example, what if Eve has a diseased tooth which needs to be extracted before it causes serious medical problems, but Eve is so scared of dentists she is refusing to visit one? It seems obvious in this situation that Eve's parents should be allowed to compel her to visit the dentist. But why? Well, in this situation it seems obvious that the operation would be in Eve's best interests.

This gives us some kind of intelligible basis for judging whether forcing Eve to have the bone marrow operation would be justifiable. We can ask whether the operation would be in Eve's best interests. A good law student with the ability to think flexibly will realise that things can be said on both sides of this issue. On the one hand, it would presumably not be in Eve's interests to lose her elder brother, and all the benefits of his help and companionship. Moreover, it could prove psychologically damaging to Eve to have to live with the knowledge that she could have saved his life but choose not to. At the same time, it might not be in Eve's interests to be left with the feeling that her parents had no respect for her interests, and that they regarded her as

simply a resource to be exploited when the time came that Adam needed what Eve had got. Moreover, the fact that Eve would have to go through the trauma of being physically forced to have the operation might count against our finding that it was in Eve's best interests to go through the operation. The question is finely balanced – but a good law student would realise that, and would not seek the refuge of the false certainty that a bold assertion about Eve's rights affords.

If you are someone who finds it hard to see both sides of an issue, you can easily expand this capacity by exposing yourself to alternative points of view. So if you tend to read *The Guardian*, try to read the *Daily Telegraph* as well. And if don't read either, then start making a habit of reading the comments pages on both. Similarly, if you read *The Economist* or the *New Statesman*, also read *The Spectator* or *Standpoint*. If you are reading a book which advances a particular point of view on some political or social or economic issue, take a note of whose views the book is opposing, and try to read something by the people whose views are being criticised and see what they have to say for themselves.

Judgment

It's not enough for a law student to be able to see both sides of a particular issue: a law student also has to be able to *judge* which side is stronger so as to form a view on that issue. The need for a law student to have good judgment crops up all over the place. For example, if you are taking notes – whether in a lecture or on materials you have been told to read – you have to be able to *discriminate* between what is important and what is not. In order to test your skills at doing this, consider the following passage, which is taken from Frederic Bastiat's pamphlet, *The Law* (published in 1850):

What is Law?

What, then, is law? It is the collective organization of the individual right to lawful defence.

Each of us has a natural right – from God – to defend his person, his liberty, and his property. These are the three basic requirements of life, and the preservation of any one of them is completely dependent upon the preservation of the other two. For what are our faculties but the extension of our individuality? And what is property

but an extension of our faculties? If every person has the right to defend even by force – his person, his liberty, and his property, then it follows that a group of men have the right to organize and support a common force to protect these rights constantly. Thus the principle of collective right — its reason for existing, its lawfulness – is based on individual right. And the common force that protects this collective right cannot logically have any other purpose or any other mission than that for which it acts as a substitute. Thus, since an individual cannot lawfully use force against the person, liberty, or property of another individual, then the common force – for the same reason – cannot lawfully be used to destroy the person, liberty, or property of individuals or groups.

Such a perversion of force would be, in both cases, contrary to our premise. Force has been given to us to defend our own individual rights. Who will dare to say that force has been given to us to destroy the equal rights of our brothers? Since no individual acting separately can lawfully use force to destroy the rights of others, does it not logically follow that the same principle also applies to the common force that is nothing more than the organized combination of the individual forces?

If this is true, then nothing can be more evident than this: The law is the organization of the natural right of lawful defence. It is the substitution of a common force for individual forces. And this common force is to do only what the individual forces have a natural and lawful right to do: to protect persons, liberties, and properties; to maintain the right of each, and to cause justice to reign over us all.

A Just and Enduring Government

If a nation were founded on this basis, it seems to me that order would prevail among the people, in thought as well as in deed. It seems to me that such a nation would have the most simple, easy to accept, economical, limited, non-oppressive, just, and enduring government imaginable — whatever its political form might be.

Under such an administration, everyone would understand that he possessed all the privileges as well as all the responsibilities of his existence. No one would have any argument with government, provided that his person was respected, his labor was free, and the

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fruits of his labor were protected against all unjust attack. When successful, we would not have to thank the state for our success. And, conversely, when unsuccessful, we would no more think of blaming the state for our misfortune than would the farmers blame the state because of hail or frost. The state would be felt only by the invaluable blessings of safety provided by this concept of government.

It can be further stated that, thanks to the non-intervention of the state in private affairs, our wants and their satisfactions would develop themselves in a logical manner. We would not see poor families seeking literary instruction before they have bread. We would not see cities populated at the expense of rural districts, nor rural districts at the expense of cities. We would not see the great displacements of capital, labour, and population that are caused by legislative decisions.

The sources of our existence are made uncertain and precarious by these state-created displacements. And, furthermore, these acts burden the government with increased responsibilities.

The Complete Perversion of the Law

But, unfortunately, law by no means confines itself to its proper functions. And when it has exceeded its proper functions, it has not done so merely in some inconsequential and debatable matters. The law has gone further than this; it has acted in direct opposition to its own purpose. The law has been used to destroy its own objective: It has been applied to annihilating the justice that it was supposed to maintain; to limiting and destroying rights which its real purpose was to respect. The law has placed the collective force at the disposal of the unscrupulous who wish, without risk, to exploit the person, liberty, and property of others. It has converted plunder into a right, in order to protect plunder. And it has converted lawful defence into a crime, in order to punish lawful defence.

How has this perversion of the law been accomplished? And what have been the results?

The law has been perverted by the influence of two entirely different causes: stupid greed and false philanthropy. Let us speak of the first.

A Fatal Tendency of Mankind

Self-preservation and self-development are common aspirations among all people. And if everyone enjoyed the unrestricted use of his

faculties and the free disposition of the fruits of his labor, social progress would be ceaseless, uninterrupted, and unfailing.

But there is also another tendency that is common among people. When they can, they wish to live and prosper at the expense of others. This is no rash accusation. Nor does it come from a gloomy and uncharitable spirit. The annals of history bear witness to the truth of it: the incessant wars, mass migrations, religious persecutions, universal slavery, dishonesty in commerce, and monopolies. This fatal desire has its origin in the very nature of man — in that primitive, universal, and insuppressible instinct that impels him to satisfy his desires with the least possible pain.

Property and Plunder

Man can live and satisfy his wants only by ceaseless labor; by the ceaseless application of his faculties to natural resources. This process is the origin of property.

But it is also true that a man may live and satisfy his wants by seizing and consuming the products of the labour of others. This process is the origin of plunder.

Now since man is naturally inclined to avoid pain — and since labor is pain in itself — it follows that men will resort to plunder whenever plunder is easier than work. History shows this quite clearly. And under these conditions, neither religion nor morality can stop it.

When, then, does plunder stop? It stops when it becomes more painful and more dangerous than labor.

It is evident, then, that the proper purpose of law is to use the power of its collective force to stop this fatal tendency to plunder instead of to work. All the measures of the law should protect property and punish plunder.

But, generally, the law is made by one man or one class of men. And since law cannot operate without the sanction and support of a dominating force, this force must be entrusted to those who make the laws.

This fact, combined with the fatal tendency that exists in the heart of man to satisfy his wants with the least possible effort, explains the almost universal perversion of the law. Thus it is easy to understand how law, instead of checking injustice, becomes the invincible weapon of injustice. It is easy to understand why the law is used by the

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> legislator to destroy in varying degrees among the rest of the people, their personal independence by slavery, their liberty by oppression, and their property by plunder. This is done for the benefit of the person who makes the law, and in proportion to the power that he holds.

This passage is about 1,300 words long. Try and summarise it in about 100 words – and then compare your summary with mine, at the end of this letter. If you find this exercise difficult, or end up producing a summary that is very different from mine, don't worry about it. Schools seem to have given up on the idea of helping students your age acquire the skill of summarising long passages. But this is an essential skill that law students need to have, and one you can acquire through practice. Just take any article from a serious newspaper or magazine and try to reduce it to 10 per cent of its length. With enough practice, you will soon acquire a facility for discriminating between what is important and what is not important.

This facility is only one side of the general quality of good judgment that law students need to be successful. Another dimension of having good judgment is being blessed with practical wisdom – the ability to know what is the right thing to do when faced with a variety of options. For example, suppose that you are given an essay to do that asks you to suggest some reforms to the law on murder. You have 96 lines – what you could expect to write in the time available – to play with. What would it be best to do: (1) write an essay suggesting 16 reforms, devoting 6 lines to each; (2) write an essay suggesting 8 reforms, devoting 12 lines to each; (3) write an essay suggesting 3 reforms, devoting 32 lines to each. Other things being equal, which essay is likely to impress the examiner the most? The answer is (3). There is no way that you will be able to make out a convincing case for reforming an aspect of the law on murder in 6 or 12 lines – so essays (1) and (2) are going to strike the examiner as being lightweight. Only essay (3) has any chance of getting a high mark from the examiner. A law student who is blessed with practical wisdom will realise this and confine him- or herself to suggesting three reforms and spend quite a lot of time on each one. A law student who is not so blessed may well decide to adopt a 'scattergun' approach, suggesting lots of reforms, hoping that the examiner will be amazed by his thoroughgoing critique of the law of murder. Sadly, the examiner will probably *not* be impressed.

So – those are the 12 qualities I think a law student needs to be successful. You can see why really good law students are so special: they have a combination of skills which doesn't naturally present in most people. However, most of these skills can be worked on and developed. Hence my point at the start of this letter that a major reason why it is getting harder to find students who will do very well studying law is that students your age simply don't know what sort of skills they will need if they want to study law and so don't do enough to help develop those skills. Now that you do know what sort of skills are required, if you do want to study law at university, then work on developing any of the skills that you currently think you are weak on.

As a summary – and a slight expansion on – what I've said in the last few letters, I enclose a Top 10 list: the Top 10 Myths About Studying Law. I hope you will bear this list in mind whenever someone talks to you about studying law. The harsh truth is that they probably don't know what they are talking about – it's funny how everyone feels entitled to have an opinion about the law when they would never dare venture an opinion on quantum physics, or the root causes of the English Civil War – and that you need to be very careful about just uncritically going along with what teachers at school or relatives of yours tell you about studying law. The enclosed Top 10 list, together with the letters that I've already sent you, should give you a much better idea than they can about the reality of what is involved in studying law.

All best wishes,

Nick

P.S. Here is my summary of the passage from Bastiat's *The Law*:

> The law exists to protect people's rights to life, liberty and the enjoyment of their property. If the law simply concerned itself with protecting people's rights, then no one would have any cause to blame the state for his misfortunes, and people would be free to satisfy their needs without any interference from the government. Unfortunately, the law has to be made and enforced by men, and because men are naturally greedy, those who are in charge of the law abuse it to deprive other people of their rights. (89 words)

Top 10 Myths About Studying Law

1. Law is boring

This is the most boring of the myths about studying law. I'm with the Roman playwright Terence: '*homo sum, humani nihil a me alienum puto*' ('I'm human, so nothing human is uninteresting to me'). Something which is so fundamental to both the existence and shape of human civilisation cannot possibly be boring. Of course, if all you have is a superficial knowledge of the law, then law may seem pretty boring in the same way that ballet seems pretty boring to me. But deeper knowledge brings greater appreciation and interest. Now this isn't denying that there are aspects of law which are very difficult to find interesting – particularly those areas that are dominated by statute law. But even the boring nature of these areas of law is interesting. Why are they so boring? Who benefits from making these areas of law boring?

2. You should only study law if you want to be a lawyer

As I explained in my second letter, this is untrue – the kind of thinking, arguing, and writing skills that you develop as a law student are vital for a wide variety of careers and professions.

3. You shouldn't study law if you want to be a lawyer

This is the nonsense put about by Lord Sumption and criticised in my third letter on 'The Astonishing Hypothesis'.

4. You don't have to study law if you want to be a lawyer

This is not technically a myth, in the same way that it is not a myth that you can jump off a skyscraper without a parachute – you can do it, but it's not a good idea. And it will become even less of a good idea if the Solicitors Regulation Authority dilutes the amount of legal knowledge someone is required to have before they can practise as a solicitor.

5. You have to be good at debating

This is untrue. In fact, the sort of skills that are prized in the debating context – in particular, the ability to put down an opposing position with a flip one-liner – are the very antithesis of the sort of skills that a law student needs to develop; in particular, the ability to carefully analyse the strengths and weaknesses of a legal argument. While you do not have to be good at debating to make a good law student, you do have to be willing to *speak up* and *express your opinions*. So if you are *bad* at debating, you have the right stuff required to be a good law student – bad though you may be, you are still willing to get up there and say what's on your mind.

6. You haven't done the right subjects at school to study law

There are no 'right' subjects that equip a school student to study law at university. As I have observed, law is very different from any other subject you might study at school, including Law A-Level. Given this, there is no subject, or set of subjects, that provides a particularly good preparation for what studying law is like. So long as, among the subjects that you study at school, you study at least one subject that promotes analytical abilities, and one subject that requires you to write essays, then you are doing as much as you can to put yourself in a good position to study law at university.

7. Law is for the rich

There is no doubt that rich individuals and big companies benefit a lot from the existence of the law, and spend a lot of money on lawyers to protect and

promote their interests. But – as people currently living in Chicago can tell you – no one suffers more from the *lack* of law than the poor, for whom the law is their only protection against their being pushed to the wall by those with the power to do so.

8. Law is about courts

The myth that you have to be good at debating to be good at law is rooted in a *court-centric* view of law: the view that law is all about people making arguments in court and judges deciding between those arguments. While this is an important aspect of a legal system, it could be argued that whenever a case ends up in court, that represents a *failure* on the part of the legal system – where the failure in question is either a failure to get people to obey the law, or a failure to make it clear to people what they are required, or allowed, to do under the law. So law is much more about what goes on *outside* the courts – where millions of people go about their daily business enjoying the protections of the law and taking advantage of the facilities that it provides them without ever seeing the inside of a court – than it is about what goes on *inside* the courts.

9. Law is about justice

University application personal statements almost always start by observing that the applicant has been interested in justice since they were young and that's why they want to study law, or that the way that justice depends on law accounts for why the applicant is so interested in studying law. But 'justice' is one of those positive-sounding words that people throw around without thinking much about what exactly they are talking about. Three views on this are possible: (1) justice involves properly and fairly distributing things that need to be distributed; (2) justice involves giving people what they are entitled to, or what is due to them; and (3) justice requires that a society's political institutions observe certain norms in the way they operate. Law seems to be concerned with all of these things, but justice cannot be about *all* of these things because otherwise our concept of what justice is about would become hopelessly muddled. So law is not *just* concerned with whatever justice is concerned with, but other things as well.

10. Everything you've heard about studying law is untrue

Not true! I wouldn't want everything I have said to create a new myth, that everything you hear from other people about studying law is untrue. Of course that's not the case – but don't accept anything you are told about studying law without checking it out first. Be like a lawyer – questioning and sceptical.

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Choosing a university

Hey Jamie,

Thanks for your e-mail, asking me for advice on applying to university. Before I say anything about this, I want to emphasise that there is plenty of really helpful advice out there for you on choosing which universities to apply to:

(1) There is the unistats website (www.unistats.co.uk) that I told you about in my second letter to you.

(2) The UCAS website (www.ucas.com) provides a lot of information about all the universities that you might be interested in applying to (go to www.ucas.com/?schemes=Undergraduate&theme=all_stages) and UCAS also publishes a guide to applying to university.

(3) *The Guardian* university website is very helpful: www.theguardian.com/education/universityguide.

(4) The Student Room (www.thestudentroom.co.uk) might also contain useful inside information about universities that you are thinking of applying to – though I find it a bit hit and miss whether I'm able to get the information I want from the Student Room.

(5) The websites of the universities you are thinking of applying to will also be well worth looking at, especially for the dates of open days which would allow you to get a real flavour of what the universities you are interested in applying to are like.

So these should be your first ports of call in seeking advice on what universities you should apply to. But maybe I can say a few things that you might not learn from these other sources of information. Let's start with some economics.

How universities make their money

There are basically five ways for universities to make the money they need in order to pay for the staff and facilities they need to function:

(1) *Student fees.* Cuts in government funding of universities were partly offset by allowing the universities to charge UK/EU undergraduates higher tuition fees. The universities were initially limited in how much they could charge their UK/EU undergraduates by way of tuition fees – the initial limit was up to £9,000 a year – and most universities (to the government's surprise) took full advantage of the option to charge their UK/EU undergraduates the full £9,000 a year. (It should be emphasised the initial cost of paying the fees will usually fall on the State, which will lend UK/EU students the money to pay these fees. The loans will then be gradually repaid after the student starts earning more than about £21,000 a year. It should also be emphasised that students from poorer backgrounds may well be able to take advantage of university bursaries and other forms of assistance to reduce the amount of tuition fees that they have to pay.) Some universities started lobbying the government to be allowed to charge their UK/EU undergraduates more than £9,000 in fees, and the government will relax this limit and allow universities that have shown that they provide students with a decent education – something which is to be assessed through a process called the Teaching Excellence Framework (or 'TEF') – to increase their tuition fees in line with inflation. Students coming from outside the EU are not subject to any government cap on how much they may be charged by way of tuition fees, and may provide a very useful source of income for universities as they can be charged much higher fees than UK/EU students pay. Further income can be made by running short summer school courses for students visiting the university for the summer from other institutions.

(2) *Government funding.* For English universities, this is administered by the Higher Education Funding Council for England (HEFCE). Universities receive a range of different types of awards from HEFCE; but the principal forms of funding are for (i) teaching and (ii) research. How much money a university receives from HEFCE to help fund its teaching activities depends on the numbers of students it admits and how much it costs the university to teach its courses and – going forward – how well the university does in the Teaching Excellence Framework (TEF).

How much money a university receives from HEFCE in respect of its research work depends on HEFCE's assessment of the quality of the university's research 'outputs' in the form of books and articles. This assessment exercise is known as the Research Excellence Framework (REF). Under the REF, every four or five years, universities that compete for REF money – and it is a competition – submit the 'outputs' produced by their various faculties for assessment by REF panels, which award a number of stars for those outputs – four stars for world-leading research, three stars for work that is internationally excellent, two stars for work that is internationally recognised, and one star for work that has not made an impact outside the UK. Whoever gets the most stars, proportionate to the number of outputs they have submitted per number of academics who produced those outputs, wins the most funding.

(**3**) *Investment income.* Universities that have existed for a number of years will usually have built up some investment capital – known as the university's 'endowment' – that provides it with a yearly, though variable, source of income.

(**4**) *Donations.* A university can add to its endowment, or help cover its yearly running costs, through donations. Usually, donations come from a university's old members; though they can also come from companies or multi-millionaires who wish to be associated with a university in some way. A notable example of this was the donation of £20m to the School of Law at King's College London (KCL) by Dickson Poon, the Hong Kong businessman and philanthropist. This has helped endow a number of scholarships for law students at KCL, and the School of Law at KCL was renamed the 'Dickson Poon School of Law' in recognition of Poon's generosity.

(**5**) *Renting out facilities.* A university can also earn money through renting out its facilities – for example, by charging its students for their accommodation and access to computer facilities, and renting out its halls for conferences and weddings.

Once you understand how universities make their money, you can understand what a huge advantage Oxford and Cambridge have over other universities – because they (and their constituent colleges) can rely on all five sources of income to keep themselves running. High student numbersmean that they receive about £55m a year towards their teaching costs, and their academic reputation results in their being paid about £120m for their

research. Their academic reputation also means that they can run the sort of postgraduate courses that are very likely to attract high-fee-paying students from across the world. Huge endowments (about £4bn in each case) bring in a lot of investment income; and the strong feelings of loyalty that ex-students feel towards their university and especially their former colleges mean that many ex-students are happy to donate money to support their university or their college. (For example, I owe my job to the money that was donated by former students of James Campbell, who taught Law at Pembroke College, Cambridge for almost 40 years, to provide Pembroke with enough money to fund the James Campbell Fellowship in Law.) The cachet of the Oxford and Cambridge name attracts corporate sponsors and support, and the beauty of both cities means that there is no lack of people wanting to rent out the universities' facilities for their events. As we'll see, the fact that other universities have to rely on more limited sources of funding has a big effect on how they operate – and it's useful to bear that in mind in choosing what university to apply to.

Three types of law faculty

In light of what's just been said, let's compare three different law faculties. I'll assume in each case that the faculty is based in a university that doesn't have much of an endowment, and doesn't have much income coming in from donations or from renting out its facilities. So each of the faculties below is faced with the problem – how do you make enough money to sustain yourself given that sources of income (3), (4), and (5) aren't really available to you?

For *Faculty A* the answer is obvious: you maximise sources of income (1) and (2). But there's a problem. Accepting a lot of law students will help boost the faculty's income from student fees, and – to a limited extent – bring in some grants from HEFCE to contribute towards the cost of teaching those students. However, students need teaching; and teaching makes it harder to do the kind of research and produce the kind of work that will score highly on the REF and bring in lots of funding from HEFCE in recognition of the faculty's research excellence. *Faculty A* solves that problem by recruiting a lot of academics whose job is *principally* to write books and articles. Of course, these books and articles have to be *good*. So the academics *Faculty A* recruits will be stars – the sort of academics who can be expected to produce really interesting work on a regular basis. These star academics will be expected to do some lecturing – particularly on postgraduate courses where the academic's star status will help to attract high-fee-paying non-EU students. But they

won't be expected to mark essays or see students on a one-to-one basis or give them some feedback on their work or progress. *That* will be left to other people – usually graduates fresh out of university who are just starting out in their careers, don't have any kind of 'star' reputation, and are just looking to get on the first rung of the academic ladder. *Faculty A* might, as a result, take a bit of a hit to its government funding for its teaching as it may not do so well on the TEF – but it may make so much money in other ways (and save so much money in employing young graduates to do most of its teaching) that it can absorb that hit without too much of a problem.

Faculty B might like to do what *Faculty A* is doing but for some reason or another it can't. One reason might be that there are only so many star academics in the world, and it only takes a few *Faculty A*s (not to mention the law faculties at Oxford and Cambridge) to gobble them all up. Another reason might be that *Faculty B* just doesn't have the academic reputation or the kind of location that would help it attract the sort of star academics who would boost its research profile. So *Faculty B* can't hope to get that much money by way of funding for its research. Instead, *Faculty B* has to rely primarily on student fees to keep itself going. But again there's a problem. By definition, not that many law faculties will be in a position to pursue the sort of strategy that *Faculty A* is pursuing – as I've just said, there aren't that many star academics in the world, and there are only enough to boost the research profile of a few *Faculty A*s. So most law faculties will be in the position of *Faculty B* – of having to rely primarily on student fees to keep themselves going. And that fact means *Faculty B* will face *a lot* of competition from other law faculties for the law students that it needs to come through its doors every year to keep itself afloat. *Faculty B* reacts to this competition by aiming to distinguish itself from its competitors by getting a reputation for providing its law students with a really first-class education. So while *Faculty A* is looking to recruit star researchers, *Faculty B* looks to recruit star teachers who can be relied upon to provide its students with inspirational lectures and guidance.

Faculty C is in the same position as *Faculty B* – it has to rely primarily on student fees to survive. But unlike *Faculty B*, it doesn't feel the need to distinguish itself for the quality of its teaching. Maybe it's based in a big city and it thinks that a lot of students from the city will apply to it to study law, attracted by the idea of economising on the costs of their education by living at home while studying at university. Maybe it's relying on the fact that it has the sort of name and historic reputation that could be expected to attract applicants, come what may. Or maybe it just can't be bothered – what *Faculty B* is doing is just too much like hard work. Whatever the reason, *Faculty C* is

on the slide. As Abraham Lincoln said, 'You can fool all of the people some of the time, and some of the people all of the time, but you can't fool all of the people all of the time.' Eventually students will realise that they are receiving a second-class education from *Faculty C* – and if they don't, law firms and other employers will – and that will cause a gradual decline in the number of applications to study law at *Faculty C*. That in turn will kick off a vicious circle where *Faculty C* is forced to react to that decline by cutting costs, which in turn hurts its educational standards even more, thus causing even fewer people to apply to *Faculty C*. The only way *Faculty C* will be able to save itself in the long run is to wise up and turn itself into an example of *Faculty B* and start competing for students on the basis of the quality of its teaching.

So I'm very optimistic about the future for law faculties. I think it won't be long – particularly with students demanding to see some value for the kind of money they pay in tuition fees, and the introduction of the TEF backing up those demands – where all the law faculties that aren't based in Oxford or Cambridge, and aren't able to pursue *Faculty A*'s strategy for making money, will have to operate in the way *Faculty B* does and attract law students through the quality of their teaching. Of course, this will mean some law faculties will go to the wall. Just as there cannot be more than a few *Faculty A*s, there simply aren't enough good law teachers to allow a very large number of law faculties to provide their students with an amazing legal education. But the future is bright for law students – the competition for law students among law faculties should result in educational standards among law faculties being driven ever upwards.

Factors to look out for in deciding where to apply

Now we're in a better position to talk about what factors you should take into account in deciding where to apply.

(1) Entry requirements

This is fundamental. Pitch your choice of university according to what sort of results you can expect to get at A-Level. You can find out what sort of entry requirements you would have to satisfy to study law at a particular university by going to the UCAS website at www.ucas.com and then clicking on 'Course Search' – you should be able to find your way to the information you want

from there. If you are expecting to get at least 3As at A-Level, then you should be thinking about applying to Oxford or Cambridge as one of your choices. But I'll talk more about that in a separate section.

(2) Type of faculty

When considering what non-Oxbridge universities to apply to, think about what sort of law faculty you would like to study in. The advantage of studying at a *Faculty A* type law faculty is that you get lectured by a lot of high-quality academics who do interesting work; the trouble is, you don't get the benefit of being taught up close by them – though there may be opportunities later on in your time at university to work with them as a research assistant. The advantage of studying at a *Faculty B* type law faculty is the quality of the teaching and guidance you receive; but the courses might lack the sort of stimulation and cutting-edge excitement that a *Faculty A* can provide. I can't see much reason to study at a *Faculty C* – but if a law degree from a *Faculty C* has a good reputation among employers, and the faculty provides its students with good resources and facilities, there is no reason why you shouldn't be able to do well so as long you are willing to work hard and push yourself to do your absolute best in your studies.

You can find out what a particular university's law faculty is like by attending an open day and asking some pointed questions: How much contact do the students have with their teachers? How much help does the university give students who are struggling with their studies? How many lectures do the students get each week, and in how many subjects? How many small group teaching sessions do the students have each fortnight, and in how many subjects? How much written work are students required to do? (You are NOT looking for the answer, 'Not much' – the more written work you can do, the better; though, obviously, there are limits.) Do students get good feedback on their written work? How much assistance do the students get in preparing them for the exams?

(3) Prospects after leaving university

What do law students who graduate from the university tend to do after they leave? Do those who are predicted to get Firsts or 2.1s in law from that university find it easy to land a training contract (a two-year stint at a law firm, after which you will qualify as a fully fledged solicitor) or pupillage (a one-year stint at a barrister's chambers, after which – if they like you – you'll be offered a tenancy and allowed to practise out of those chambers)? You can

find out some information on this from the websites I referred you to at the start of this letter – but you can also ask the university admissions office for this kind of information.

(4) Legal facilities

Law is one of the most self-taught courses you can do at university. You do need some help and guidance – but ultimately, it is down to you how well you do at the end of your time studying law. But you can't study law without access to proper facilities. So – How good is the university's law library? Are the textbooks up to date? How many areas of law are covered, and in what kind of depth? What are the law library's opening hours? Is it easy to get something to eat and drink if you're working there? Is it easy to get to from where you would be living? Are there good computer facilities? Is it easy to hook up to the internet at the law library or elsewhere in the university (particularly in any student accommodation you might live in)? What sort of online legal resources does the university give you access to? In particular, are you given free access to Westlaw (for cases, case commentaries and academic journals) and HeinOnline (a wonderful database of legal journals from all over the world)? Can you use these resources from your room in the university, or are they limited to the law library only?

(5) Opportunities to polish your CV

How much scope would you have to engage in law-related activities that would enhance your legal skills and your attractiveness to potential employers? For example, would you get the opportunity to work in a free legal advice clinic? Does the university regularly hold mooting competitions, where law students get to act like barristers and argue legal points before a judge (usually an academic)? Is there a university student law review that is run by the university's law students, and to which the university law students can contribute articles? Is there any scope to work as a (paid or unpaid) research assistant to one of the university's law academics during the holidays?

(6) General university-related factors, such as location, accommodation, facilities, and security

Do you want to study at a university that is near home, or further away? Do you want to study at a university that is near the centre of town, or you happy

with one which is some distance away from the nearest town centre? How easy is it to travel from your home to the university? How close is the nearest supermarket/bookstore to the university? What's the town or city that is closest to the university like? Would you be happy spending time there? Does the university promise to accommodate you throughout your time there? If not, how easy/cheap is it to secure good, alternative accommodation? What is the accommodation like? What are the kitchens, toilets, and washing facilities (both bathrooms and laundry) that come with the accommodation like? What are the facilities that the university lays on for its students like generally? What are the bars/common rooms like? How active (and popular) is the Student Union? What is the library like? What are the facilities for accessing the internet like? Is there much to do in the evenings? How safe is the university campus? Is it well-lit, and well-populated? What measures does the university take to ensure the security of its students? If something goes wrong, what sort of support does the university provide?

(7) Support

Being at university, and being away from home for long periods of time, can be difficult for a lot of students. How much support does the university provide its students to help them adjust to living at university, and to help those who are having problems with coping either with their studies or other problems arising out of spending time at university?

Two or three years?

One question that I think won't really be an issue for you, but which may become more important in the future, is whether you should do a law degree in two years or three years. The vast majority of universities require students studying law as a first degree to do it in three years. But the College of Law – which has now renamed itself, oxymoronically, as 'The University of Law' (a university doesn't just teach one subject: it teaches a huge range of different subjects, reflecting the *universe* of human knowledge) – and the BPP University both now offer undergraduates the option of doing an accelerated two-year law degree. The option of getting a law degree in just two years may prove quite attractive to students wanting to save money and get on with their lives; and it may be that other universities – in an attempt to remain competitive with institutions like the University of Law and BPP – may be tempted to offer first-time students

the option of doing a two-year law degree. But at the moment, other universities will only allow a student to do a law degree in two years if they have done some other degree first.

My own view – for what it's worth – is that it is a really bad idea to do a law degree in two years. You simply won't get as much out of your law degree – in terms of all the benefits from studying law that I listed in my second letter to you – if you do a law degree in two years rather than three. Any money you might save by doing a two-year law degree simply won't be enough to compensate for the loss of those benefits. (Though this point applies more weakly to students from outside the EU who face having to pay a lot more money to study law at a UK university; in their case it's more understandable why they might seek to get a law degree in just two years rather than three, though if they could afford it I would always urge that they do the full the three years.) Institutions like the University of Law and BPP might counter by arguing that their two-year law degrees offer students a different *kind* of legal education – one much more oriented towards preparing students to become practising lawyers – and that that can be done effectively over the course of a two-year law degree. Fair enough: but I don't think that's what legal education *should* be about. Legal education should be about *expanding* students' potentialities by helping them to think more rigorously, express themselves more effectively, understand their society more deeply – while picking up a lot of legal knowledge along the way which will be of some practical use to those students who go on to become practising lawyers. Someone who has studied law at university should not graduate with the ability to do just *one thing* well, but should instead leave university equipped with a range of skills and abilities that will allow him or her to accomplish *lots* of different things. And an 18-year-old who might not have a clear idea what they want to do in life would be well advised to do a law degree that leaves them free to do lots of things in the future rather than one which puts them on a conveyor belt heading towards a particular profession. But doing such a law degree takes three years (and some would say that even three years is not enough), not two.

Oxford or Cambridge?

Okay – let's talk about Oxford and Cambridge. I teach in Cambridge, but did my law degree (and a postgraduate Bachelor of Civil Law degree) in Oxford and taught in Oxford for five years before moving to Cambridge, so I'm well qualified to talk about both. Everybody runs Oxford and Cambridge together in their minds, but in fact the two law schools could not be more different,

and in choosing between the two universities you should be aware of these differences. At the moment, there are five key differences – though these may change in future as the respective law schools review and change their courses and the way they deliver those course in order to make them as attractive and as beneficial as possible for their students.

(1) Entry requirements

The standard Oxford A-Level offer is still 3As at A-Level. The standard Cambridge offer is A*AA. That may make a difference to your choice of whether to apply to Oxford or Cambridge. However, there is another point about entry requirements that you have to bear in mind. The system of admissions to study law at Oxford is a lot more centralised than the system at Cambridge. Students applying to study law at an Oxford college are subject to an initial sifting process, which is based purely on the students' paper records. If a particular college has had a lot of applicants – say 40 applicants – then the students who rank in (say) the top 20 after this initial sift will be summoned for interview at that college, and the others will either be reallocated for interview at another college or will not be interviewed at all. So to get through that initial sift, it's important that your paper record (which will include your score on the legal aptitude test – the LNAT – which applicants to study law at Oxford have to sit) be as strong as possible. If there is some aspect of your paper record which is not that strong – for example, you might have underperformed at GCSE before knuckling down to work hard at your A-Levels – then it might be worth thinking about applying to Cambridge rather than Oxford to study law. In Cambridge there is no centralised initial sift of the candidates applying to study law. Instead, it is up to each individual college to decide which of the students applying to study there it will summon for interview. The Cambridge colleges still have a prejudice in favour of interviewing people who have applied to them, rather than turning them down flat without interview based purely on their paper file, so one weakness in your file will not necessarily prove fatal to your being interviewed at your preferred college, especially if that weakness is addressed and explained in your personal statement or your school's reference for you.

(2) Format of exams

An Oxford law student does exams ('Moderations') in three subjects at the end of his first two terms, and then he will have no exams at all until the end of his third year, when he sits 'Finals' – that is, exams in nine different

subjects. A Cambridge law student will sit exams ('Tripos exams') at the end of each of the three years she studies law at Cambridge, with the result that she'll end up taking exams in about fourteen different subjects. So studying law at Oxford tends to be a less stressful affair – at least until the time to sit Finals comes around – and affords greater opportunities to think about the law and develop some interesting views about it than is the case with studying law at Cambridge. But at the same time, a Cambridge law student will study more subjects than an Oxford law student. As a result, a Cambridge law student will have greater scope to choose what subjects she is going to study than her Oxford counterpart. Moreover, she'll leave university with a wider (though not deeper) knowledge of the law than someone with a law degree from Oxford.

(3) Format of teaching

Law students in both Oxford and Cambridge are taught through a mixture of lectures and small group teaching sessions (called 'tutorials' in Oxford; 'supervisions' in Cambridge) with an academic. However, in Oxford the main way you are taught law is through tutorials – lectures are an optional add-on, meant to supplement the teaching that you get in tutorials, and there's no real pressure to attend them. Lectures are also optional in Cambridge, but they are regarded as the main vehicle for teaching students law, and it's the supervisions that are regarded as supplementary (though they are most definitely compulsory): supervisions in Cambridge are designed to make sure that students are doing okay and not falling behind, and give students the opportunity to get help with resolving any problems that they are having with their studies.

(4) Emphasis in teaching

I think it's fair to say that the Cambridge law degree places a lot of emphasis on ensuring that the students develop a detailed knowledge of the law, while the Oxford law degree is a lot more interested in ensuring that students understand the principles and ideas that underlie different areas of the law, and are able to talk intelligently about how the law should be developed, rather than worrying about whether the students are completely up to date with the most recent developments and cases. This is reflected by the fact that Cambridge law exams contain a lot of problem questions, which usually test your knowledge of the details of the law. In contrast, Oxford law exams contain plenty of essays, which invite the students to show how much they

understand about why the law says what it does, and talk about what the law should say on various issues.

(5) Environment

Finally, just in case it does make a difference, I think Cambridge is a much nicer place to live in than Oxford. Having said that, Oxford is a lot more vibrant. But visit both places and make your own mind up about that.

I hope that provides you with a few more things to think about in deciding which universities to apply to – but, as I said, there's no substitute for researching all the information on this topic which is available to you on the web and in hard copy. Good luck!

All best wishes,

Nick

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6
The LNAT and other law tests

Dear Jamie,

As a follow-up to my last letter, I thought I'd send you one about the various legal aptitude tests that you might have to sit if and when you apply to do law at university. The principal such test is the LNAT (the 'National Admissions Test for Law'), which you will have to take if you are applying to any of the following universities: Bristol, Durham, Glasgow, King's College London, Nottingham, Oxford, SOAS, and University College London. (Though check on the LNAT site – www.lnat.ac.uk – what the current position is: the list of universities that require and do not require you to have done the LNAT changes over time.) Applicants to Cambridge aren't required to do the LNAT, but will – on coming up to interview – instead have to sit the 'Cambridge Law Test'. I'll talk about both tests in this letter.

The LNAT

If you're going to be taking the LNAT, you should definitely have a look at the LNAT website at www.lnat.ac.uk. The website provides a lot of helpful information, as well as a couple of practice papers.

As you'll see from the website, the point of the LNAT is to test students' aptitude to study law. Now – this doesn't mean that if you do badly on the LNAT, no one will accept you for a place to study law. Your performance on the LNAT is only one of the things that admissions tutors at the above universities will take into account in deciding whether or not to offer you a place. By the same token, if you do really well on the LNAT, that does not necessarily mean you are guaranteed a place to study law at whatever universities you are applying to. Having said that, a poor performance on the LNAT won't help your case for admission to a place at university to study law; and a

good performance could catch the selectors' eye and win you a place that you might not have obtained otherwise. So if you are applying to a university that requires you to take the LNAT, it is important that you do as well as you can on it – and to do well, you have to prepare for it.

The LNAT is made up of two parts. There is a multiple choice section where you are given a passage to read and asked two or three multiple choice questions about that passage. You will be asked questions on 12 different passages. The total number of multiple choice questions you will be asked to answer is 42, and you will have 95 minutes to answer them. This doesn't sound like very much time. However, it should in fact be ample. The second part of the LNAT is an essay section. You will be required to write one essay in 40 minutes. You will be given the choice of three different topics or quotes to write about. Unlike the multiple choice section of the LNAT, your essay will not be marked centrally by the people who run the LNAT. Instead, it will be forwarded to the admissions tutors at any universities to which you are applying that require their applicants to do the LNAT. It will then be up to those admissions tutors to assess the quality of your essay.

If you are going to do the LNAT, you should have a look at the 'How to Prepare' section of the LNAT website, which contains some fantastic resources for getting ready for the test. The multiple choice section of the LNAT has a great deal in common with 'critical thinking' tests, so in theory it might be worth having a look at some books on critical thinking as preparation for the LNAT. However, in practice I'm not that impressed by the books on critical thinking that I've seen – so I can't recommend a specific book for you to read. But have a look in the bookshops yourself, and if there is a book on critical thinking that appeals to you, then use that. There are a quite few books that have now been published to help people with the LNAT. Check them out on Amazon and make your own choice of which one looks best. Be careful with books that are a few years old, as the LNAT is constantly evolving and guidance from a few years ago may now be out of date.

I'll now get on with giving you some advice on doing the LNAT. (Very strong disclaimer at this point: my publisher owns the company (Pearson VUE) that currently runs the LNAT test. However, what follows definitely does not at all represent any 'inside knowledge' on my part on how to do well on the LNAT. These are my views, not anyone else's.)

On the multiple choice section of the test, my main piece of advice to you would be – *be careful.* Be careful in reading and answering the questions. For example, suppose you are asked: 'Which of the following is an unstated assumption that the writer makes in the passage?' When you are going

through the possible answers supplied, remember that you are not just looking for an answer that identifies an assumption that the writer has made in making out his argument in the passage supplied. You are looking for an answer that identifies an assumption that the writer has made in making out his argument in the passage supplied that is *also not stated* in the passage supplied. So don't mark as correct an answer that identifies an assumption that the writer has expressly said that he is making in the passage supplied. That statement may represent an assumption that the writer made in making out his argument – but it's hardly unstated, is it?

You will have to decide for yourself – by doing practice tests such as the ones on the LNAT website or in the available books about the LNAT – what sort of approach to the multiple choice questions will best allow you to get through the multiple choice section of the LNAT in the time allowed. Most people seem to adopt the following approach to answering multiple choice questions on a given passage in the LNAT. They first of all read the passage carefully; they then look at the questions; and they then refer back to the passage to help them select the correct answers to those questions. You might want to think about adopting a different approach. This is to look at the questions first, and then search the passage for the answers. This seems to me a great timesaver if you get a question like 'What is the main point that the writer is making in the last paragraph?' To answer that question, you don't have to have read the whole of the passage supplied. You simply have to look at the last paragraph of the passage. Similarly, if you get a question like 'Which of the following is not a reason why the writer refers to the 1990s as the "golden age of television"?' you don't have to have read the whole of the passage to answer that question – just look in the passage for the phrase "the golden age of television" and then look around that phrase for the reasons why the writer thinks that the 1990s were the "golden age of television". And if you get a question asking 'Which of the following is not a statement of opinion' or 'Which of the following is a statement of opinion?' – well, you don't need to have read the passage at all to answer that one.

I think this approach to doing the multiple choice section of the LNAT is a lot faster, and allows you to spend much more time on the really tricky questions. But you will have to find out for yourself whether this approach works for you – or whether you are more comfortable adopting the more conventional approach to going through the multiple choice section.

Finally, it is important – to give yourself the best possible chance of doing well in the multiple choice section of the LNAT – to do the practice tests on the LNAT website. This will get you used to the sort of questions that you

might be asked in this section of the LNAT, and also the kind of tricks the question-setters get up to in an attempt to find out how good your legal abilities really are.

Turning to the essay section of the LNAT, I would again advise that you be careful in choosing what essay to do in this section. Make sure that the essay title you pick allows you to write an interesting and effective essay that will impress an admissions tutor reading it. So pick an essay title that allows you to make some strong arguments – or, even better, an essay title that allows you to make an unexpected or surprising point. For example, if you had a choice between doing an essay on 'Would you agree that travel and tourism exploit poorer nations and benefit only richer ones?' and doing an essay on 'What is your response to the view that the purpose of education is to prepare young people for work?' (both of which were essays set in the first year of the LNAT), I think you should go for the second essay as it's hard to see much of interest that you could say in response to the first. (Though I suppose it might be fun to read an essay arguing that travel and tourism involve exploiting the tourists' inability to sit quietly in their rooms (© Blaise Pascal), with the result that it is the poorer nations that exploit the richer through travel and tourism.)

And in writing an essay on (say) 'What is your response to the view that the purpose of education is to prepare young people for work?', please, please do NOT adopt the sort of structure for writing an essay that you might have been encouraged to adopt at school. That is: (1) Introduction; (2) Arguments for thinking that the purpose of education is to prepare young people for work; (3) Arguments for thinking that the purpose of education is *not* to prepare young people for work; (4) Your opinion, given the balance of the arguments, on whether the purpose of education is to prepare young people for work; (5) Conclusion. This is a terrible structure for an essay (though if you have been told to write your essays like this at school, then make sure you do as your school knows best what sort of essay format will be most rewarded by the people marking your exams) – it is almost guaranteed to send the reader into a coma, and is likely to result in your reaching the very weak conclusion that while preparing young people for work is an important part of education, it is not the whole purpose of education.

Remember that in writing an essay, you are supposed to be making a *case* for adopting a particular point of view – just like a barrister in court makes a case for thinking that the court should find in favour of whoever he or she is representing. (This is why I, and most of my colleagues, think that the quality of someone's essays is the best guide to how well they are likely to do as law

students.) A barrister in court doesn't stand up and say 'Well, on the one hand, these arguments favour my client, but on the other hand, these arguments favour the other side, and on balance I think the arguments in favour of my client are stronger.' So neither should you, in writing your essay for the LNAT. Instead, *start with your conclusion* – make it clear right at the start what point you want to make in response to the essay. (For example, I think an interesting 'line' to take on the purpose of education essay would be to say that the purpose of education is not to prepare young people for *work*, but for how they should spend their *leisure* time.) And then make the case for thinking that your point is correct. (For example: 'Work is, by definition, non-fulfilling and non-meaningful activity. If you find your 'work' fulfilling and meaningful you no longer regard it as 'work'. It would seem strange then if the point of education were to prepare people for performing non-fulfilling and non-meaningful tasks. Rather the point of education is to prepare people to lead lives that are the opposite of work – that are filled with fulfilling and meaningful activities. The opposite of work is leisure. So the point of education is to prepare people for leisure.' And so on.)

Having made out the case for thinking that the overall point that you are trying to make is correct, it's a good idea *at that point* to consider some counter-arguments to the point you are making. But don't just set out those counter-arguments: demolish them at the same time so that they no longer represent a threat to the point you are making. (For example: 'Some might argue that the national interest demands that people be equipped, through their education, to acquire the skills that they need in order to perform the non-fulfilling and non-meaningful tasks that have to be performed if our economy and society is to continue functioning properly. However, it is not clear that there any skills that are particularly associated with being able to perform non-fulfilling and non-meaningful tasks. If this is right, then preparing people for leisure will also equip them with all of the skills they would also need to perform non-fulfilling and non-meaningful tasks. It might be argued, against this, that a capacity to put up with being bored is a skill that is only useful for performing non-fulfilling and non-meaningful tasks. However, it would be strange if the purpose of education was regarded as being to bore students so much that their abilities to withstand being bored are considerably enhanced. In any case, young people have many other opportunities, outside school (and, in particular, at home), to work on developing resilience to boredom.)

Then, having made out the case in favour of your overall point and having demolished any counter-arguments that could be made against that point,

you can conclude (again) by restating the overall point you were trying to make. *That*'s how to write an essay, and how you should write essays at university. If you can show in your LNAT essay that you already know how to write an essay properly, that can only work in favour of your application.

The Cambridge Law Test

That's all I want to say about the LNAT. I'll briefly say a few things about the Cambridge Law Test (CLT). This is an aptitude test for legal ability that students applying to study law at Cambridge have to do. So if you are applying to Cambridge and one or more universities that make their applicants do the LNAT, you'll end up doing both legal aptitude tests! (This is not, I should say, a reason for *not* applying to Cambridge – to decide not to apply to a university that could provide you with the best legal education and future that you could possibly hope for because doing so will involve you in doing one more test is, frankly, pathetic. The fact that if you apply to Cambridge you will have to do a different admissions test is actually a reason *for* applying to Cambridge – if you screw up the LNAT, you get another bite at the cherry by doing the CLT.) Full details about the CLT can be found on the Cambridge law faculty's website at ba.law.cam.ac.uk/applying/cambridge_law_test/. With the abolition of AS exams by the government, all faculties in Cambridge have been reviewing what kind of admissions teststhey set applicants in order to ensure that the tests give them the best possible information about the academic potential of a particular applicant – and the law faculty at Cambridge is no exception to that. So the format of the CLT is in flux at the moment and you should make sure to check on the Cambridge law website for the most up to date information about what form the CLT will take. For applications to start studying law in October 2018, the CLT will take the form of a one hour test, requiring the applicant to write one essay (from a choice of three). So if you are one of those applicants, then follow the advice I gave above, in the section on the LNAT, about writing essays.

That's enough guidance from me. Good luck with all your applications and any tests you might have to do. Let me know how you get on.

Best wishes,

Nick

7
Tips for interview

Hey Jamie,

Good luck for your admissions interview! I'm sure you'll do very well. It's inevitable that you're going to be nervous – but I hope you'll be able to give a good account of yourself. To help you with that, here are some tips:

The interviewer is on your side

I guarantee that your interviewers will be eager to see you do well. Don't think for a second that they will be out to trip you up, or trap you into making a fool of yourself. All your interviewers will be desperate to find some really good students among all the candidates they are interviewing – so they will want to do as much as possible to help you do justice to yourself in the interview.

Be straightforward

Common sense is a key quality that your interviewers will be looking for in the people they interview. So if you are given a legal rule and asked to apply it to a given situation, be straightforward in applying the rule. Think about what the common sense meaning of the rule is, apply it to the situation and see what the outcome is. Don't try and prejudge what the outcome 'should' be, and don't try and detect any hidden traps, or meanings, or exceptions in the rule you've been asked to apply. If there are any, they will soon be pointed out to you – until that happens, just apply the plain, common sense meaning of the rule to determine how it applies in the situation you have been given.

Think!

The ability to think for yourself is another thing your interviewers will be looking out for. To test for this, your interviewers may well give you a situation, ask what you think the legal outcome should be in that situation, then give you a slightly altered situation, and ask you again what the legal outcome should be. If they do this, they are testing to see whether you can identify the distinctions between the two situations, and see whether you are capable of thinking for yourself whether those distinctions make a difference. For example, you might be asked to consider the following situation:

> (1) Two severely premature babies, Baby A and Baby B, are born at the same time. Neither of them can survive without being put in an incubator, but there is only one free incubator in the hospital. Who should be placed in the incubator?

Your answer will almost certainly be: whoever has the better chance of survival if they are placed in the incubator unit. Okay – consider now this next situation:

> (2) Two severely premature babies, Baby A and Baby B, are born within a few hours of each other. Neither of them can survive without being put in an incubator. Baby B is born first, and placed in the one remaining free incubator in the hospital. Baby A was born a few hours later, but there is no free incubator for him to be placed in. The chances of Baby B surviving in the incubator have been assessed at 25%. It is clear that if Baby A were placed in Baby B's incubator, instead of Baby B, Baby A's chances of survival would be 75%. Should the doctors take Baby B out of her incubator, and replace her with Baby A?

Your response to situation (1) might suggest that you would favour Baby B being taken out of the incubator, and being replaced by Baby A. But your interviewers have not asked you to consider situation (2) just so that you can repeat – whoever has the higher chance of survival in the incubator should be placed in the incubator. They want to see if you can think for yourself: what

are the distinctions between situations (1) and (2), and do those distinctions make a difference?

Well, let's consider the distinctions first. The key distinction is that in situation (2), Baby B is *already* in the incubator. So if you are going to put Baby A in the incubator, you have to do something positive to Baby B (take Baby B out of the incubator) that will have the effect of making Baby B worse off than she is at the moment. This is very different from situation (2), where if you put Baby A in the incubator, you are not doing anything positive to Baby B – you are merely failing to do something that would have the effect of saving Baby B's life. So: that's the distinction identified. The next issue is – does that distinction make a difference? Is doing something positive to Baby B, as a result of which act Baby B will die, worse than failing to do something for Baby B, as a result of which failure Baby B will die? Let's assume that you do think that it makes a difference. So you say that in situation (2), Baby B should not be taken out of the incubator. You might be asked to then consider this situation:

> (3) The same situation as situation (2), except Baby B was born five minutes before Baby A, and had only just been put in the incubator when Baby A was carried into the ward for severely premature babies. Should Baby B be taken out of the incubator, and replaced with Baby B?

In this situation, Baby B has only just been put in the incubator. Does this make a difference? Given that you thought Baby B should not be taken out of the incubator in (2), do you also think that Baby B should not be taken out of the incubator in (3)? Or does the fact that Baby B has not been in the incubator for very long make it more acceptable to take Baby B out of the incubator and replace her with Baby A?

Argue!

Once you have taken a position, you will be expected to argue in favour of it. And by argue, I mean genuinely argue – present reasons for thinking that your position is correct. Don't just say 'Well, that's my opinion': that's not an argument, that's an assertion.

So – suppose you've said that Baby B should not be taken out of the incubator in (2), but that she should be in (3). You will be asked to account for this apparent inconsistency in your views. What you will need to do is show how

you are not being inconsistent at all, but identify why there is a material difference between the two situations. One way might be to argue that in some sense, the incubator becomes part of Baby B the longer she stays in it – it becomes part of her life system, and it would be just as wrong to deprive her of that, as it would be for me to rip out your heart to give it to someone else who may, with your heart, enjoy a better chance of long-term survival than you do. So in (3), the incubator and Baby B are not yet – at the relevant level – 'attached' to each other, so it would not be wrong to take the incubator away from Baby B in the same way that it would be wrong to take the incubator away from Baby B in (2). Okay – this argument seems a bit mysterious and metaphysical, but at least it's an argument. And you are going to have to draw on some argument like that to establish that there is a significant difference between (2) and (3) – if you can't do that, you'll just be reduced to incoherent babbling.

Alternatively, let's suppose that you think that Baby B should *not* be taken out of the incubator in either situation (2) or situation (3). In that case, an objection will be made to your view – and you will be expected to argue that that objection does not work. The objection would go like this: 'If you think that Baby B should not be taken out of the incubator in situation (3), then you are letting the morally arbitrary fact that Baby B was born a mere five minutes before Baby A determine who gets the incubator – surely this is unsatisfactory?' How do you overcome this objection? You have to establish that you are basing your position that Baby B should not be taken out of the incubator in situation (3) on something more than just the fact that Baby B was born first. Well, one way of establishing this would be to observe that in situation (3), the people running the ward for severely premature babies have taken on the job – in lawyers' language, 'assumed the responsibility' – of looking after Baby B, and have not (yet) taken on the job of looking after Baby A. So the people running the unit are 'attached' to Baby B in a way that they are not to Baby A. This is not a morally arbitrary fact. Attachments matter. Once an attachment has been formed, it counts for something, and this is so even if the attachment would never have been formed but for an initial, arbitrary, twist of fate. Again, the argument is a bit mysterious and metaphyical – but, again, at least it's an argument that helps you demolish the objection being made to your position.

Don't stick to a hopeless position

But what if you are uninspired? What if you can't see an argument that will save your position? What if you've said that Baby B should not be taken out of the incubator in situation (2), but she should be in situation (3) – but you can't

come up with a good argument to explain why there is a material difference between these two situations? If that's the case, then please, please don't 'stick to your guns'. Don't just blindly assert that there is a difference between (2) and (3), and that's your opinion and you are sticking to it. This will go down really badly – it will show a basic failure to think on your part. If you can't present a decent argument for thinking that there is a material difference between situations (3) and (3), you don't have a choice: you have to concede that there is no material difference between situations (2) and (3). And having made that concession, there are two ways you can go. You can stick with saying that in situation (2), Baby B should not be taken out of the incubator, and shift to saying that in situation (3), Baby B should also not be taken out of the incubator. Or you can shift your position on situation (2) and say that in that situation, Baby B should be taken out of the incubator, and say that, given this, it's obvious that in situation (3) as well, Baby B should be taken out of the incubator. Don't think for a second that doing that will get you out of trouble – you will be expected to argue in favour of the new position that you have adopted. But it will at least show the interviewers that you are not a nutcase who sticks rigidly to a position even though you cannot come up with a single good reason for doing so.

Don't avoid the issue

A lot of students – perhaps because they intelligently perceive the dangers of taking a position which they will then be asked to defend – try and avoid taking a position on an issue that they have been asked to address. They evade the issue, rather than tackling it head on. So, for example, let's go back to situation (2), where Baby B is in the incubator, and Baby A comes along, with a much better chance of survival if he is put in the incubator, in place of Baby B. The issue is whether Baby B should be taken out of the incubator and Baby A put in her place. Many students will avoid addressing that issue by saying something like, 'Well, I think in this situation the hospital authorities should try and find another incubator for Baby A to go in.' It's just a waste of time saying that – the interviewers will simply say, 'Let's assume that there isn't another incubator: what should happen then?', thus forcing the interviewee to address the issue. So don't avoid the issue. If you want to show the interviewers that you are aware there might be alternative solutions to the problem they are making you consider, then say something like, 'Assuming that there isn't another hospital nearby that would be able to care for Baby A, I think . . .'

Don't assume that there is a clear right answer

I don't want to say that there is *no* right answer to the issue of what should be done in the incubator cases we have been considering – I believe in right answers, especially in the field of morality. However, I do want to say that there is no *clear* right answer to these issues. Whatever answer you come up with, objections and counter-arguments can be made to your position. So don't think that there is a clear right answer to the questions you are being asked to consider and that you are being expected to come up with that answer and that if someone comes up with an objection to something you've said, that shows you answered the question wrongly. That involves a complete misunderstanding of why your interviewers might ask you to consider a series of situations such as the incubator cases set out above. They are not so much interested in your answers, as they are in probing your answers to gauge how intelligent you are. Can you come up with an argument to support a position you are taking? Can you deal with an objection to that argument? Can you recognise when your position is hopeless, and shift your position accordingly? These are the questions that your interviewers will really be interested in getting some answers to – not what your views are on whether Baby B or Baby A should get the last incubator on the ward for severely premature babies.

Current affairs

Of course, you might not be asked at all about some hypothetical case and what should happen in that case. You might be asked about some recent incident or development that has made the news, and asked for your opinion about it. The interviewer's aim in asking you about this incident/development will be exactly the same – to probe your answers with a view to getting some idea as to how intelligent you are. But if you are asked about some recent incident/development in the news, you will be left hanging in the wind if you don't actually know much about it. So at least a couple of months before you attend your interview, make sure that you regularly read at least one of *The Spectator*, *The Economist*, and *The New Statesman* each week, and that you read the news and opinion sections of a decent daily newspaper – that is *The Times*, *The Guardian*, *The Daily Telegraph*, *The Independent* or *The Financial Times* – each day. Doing this will not only keep you up to date with

the news, it will also give you ideas for intelligent things to say in the interview if you are asked about something that has happened in the news.

Be prepared for the obvious questions

Your interview will probably open with a couple of questions about your personal statement on your UCAS form. These are meant to be 'soft' questions, designed to relax you and get you talking. But they can turn into a nightmare if you aren't prepared for them.

So if you have expressed an interest in reading fiction, be ready to say what you have read recently, and what you thought of it. If you say that you spent your summer holidays last year backpacking around Eastern Europe, be prepared to say something a little bit more enlightening about your experiences than just 'Yeah – it was great.' If you have said that you are deeply fascinated by the work of the International Criminal Court and you want study law because you would like to work there one day, be prepared – be very prepared – to talk about the International Criminal Court, what it does, why it's important, and what sort of cases it might handle in the future. That last example shows that you should be very careful in writing your personal statement not to make any claims that you cannot back up. So, for example, I have seen more than one personal statement in the past that has said something along the lines of, 'I spent a week working in my local solicitors and my experience there has given me a great insight into the workings of our justice system.' Yeah, right. If you say something like that in your personal statement, you had better be ready to back it up with some examples of some 'insights' that you gained on your week's work experience – because you will definitely be asked for them.

There are other pretty obvious questions that you should have prepared to answer before your interview. Why do you want to do law? How easy do you find it to balance your work with all your extra-curricular commitments? (Dangerous one, that: the interviewers don't want to admit someone who will be too busy with all sorts of extra-curricular activities to put in the effort required to do well in their legal studies.) Why do you want to take a gap year? (If you do.) What was it about Chemistry that meant you got a C in that subject at GCSE when you got As in everything else?

Having said that you should prepare for these questions to come up, don't over-prepare for them. Don't try and memorise an answer that you'd give for each of these questions – you'll just come across all unnatural in the interview. Just come up with a rough idea of what you would say, and then don't worry about again.

It's a conversation, not an interrogation

The best interviews are conversational in nature – there's a back and forth quality to them, where the interviewers say something, the interviewee says something that actually addresses what the interviewers have said, the interviewers then reply to the point that has been made to them, the interviewee responds, and so on, and so on. So try your best to go into the interview with the mentality that you are there to have a chat with the interviewers about some subjects that they are interested in talking about. Don't think that you are there to show off how clever you are, or to be pummelled into submission, or to be tested on how much you know about a particular subject. You are just there to have a chat for half an hour or so. So relax; listen to what's being said to you, and respond to it; and if you don't know what to say, be frank about that so the conversation can move on to some other topic that might be more productive.

The interview isn't make or break

Finally, remember that the interview isn't the most crucial part of your application. Many interviewers are sceptical as to how valuable the interview actually is as a way of determining how well someone is going to do as a law student. I have certainly interviewed people who were completely disastrous in interview, but they were still admitted because the rest of their application – their reference and their exam results to date – was so outstanding, and they proved to be absolutely fine law students. So if you don't have such a good interview, it's not a disaster: there is lots of other information about you available to the interviewers that they can take into account in judging your application.

There are some other words of advice I'd like to give you, on how to argue properly, and warning you against certain bad arguments that seem to be particularly popular among people going to university. But because the advice isn't just relevant to your upcoming interview, but will also be relevant for when you actually go to university, I'll deal with it separately in another letter. Read this one, think about it, and I'll be in touch again very soon.

Best wishes,

Nick

8
How (and how not) to argue

Hi Jamie,

As I've said before, probably the most important skill that you'll acquire as a student – and the skill that your interviewers will be looking for in you, albeit in an embryonic form – is the ability to argue. So let's talk about that in more detail.

There is a standard distinction between two kinds of argument – *deductive* arguments and *inductive* arguments. All arguments proceed from a set of *premises* to reach a *conclusion*. But with valid deductive arguments (such as (1) All children like chocolate, (2) Max is a child, therefore (3) Max likes chocolate – where (1) and (2) are the premises of the argument, and (3) is the conclusion), the conclusion follows *logically* from the premises, so that if the premises are correct then the conclusion *must* also be correct. In contrast, with a valid inductive argument (such as (1) Max has got chocolate smeared all over his face, and (2) Max is feeling really ill, therefore (3) Max has eaten far too much chocolate, where (1) and (2) are the premises of the argument, and (3) is the conclusion), the conclusion is *supported* by the premises of the argument, in that the conclusion provides the *best explanation* of the premises, so that so long as the premises of the argument are correct, they provide *evidence* that the conclusion of the argument is correct.

Two further distinctions between deductive and inductive arguments are worth noting. First, a deductive argument *must* have at least two premises for it to be useful. A deductive argument that only has one premise (such as (1) All children like chocolate, therefore (2) I liked chocolate when I was a child) is like a rocket that never leaves the launch pad – the conclusion doesn't give you any information that you didn't already know from the premise. By contrast, there is nothing wrong with an inductive argument that has only one premise. For example, the premise '(1) Max is lying on the floor holding

his stomach and groaning' can support, all on its own, the conclusion '(2) Max has eaten something that didn't agree with him'. Secondly, the premises of a deductive argument support the conclusion of the argument in that they explain why the conclusion of the argument is true. By contrast, the conclusion of an inductive argument supports the premises of the argument in that the conclusion explains why those premises are true. Hence the flow of a deductive argument is downwards – from certain truths to another truth that follows from those first truths – while the flow of an inductive argument is upwards – from certain truths to another truth which accounts for the existence of those first truths.

Law students tend to have to handle deductive arguments when *evaluating the law*. For example, the argument '(1) Reintroducing the death penalty for murder would reduce the number of murders in the UK, and (2) we should do everything possible to reduce the number of murders in the UK, therefore (3) capital punishment should be reintroduced as the penalty for murder in the UK', purports to reach a conclusion about how we should punish murderers in the UK. Law students tend to have to deal with inductive arguments when *reaching conclusions about what the law says*. In a common law system – where a lot of the law emerges from decisions made by judges as to what the law says in a particular case – we can only determine what the law emerging from those decisions actually says by asking ourselves: What account of the law best explains the raw data of what the judges said in cases A, B, C, D, E, and F. But whenever we are looking for an explanation, we are basically in the business of making an inductive argument where we try to argue that the fact that the judges said such-and-such in cases A, B, C, D, E, and F provides evidence that the law says X rather than Y.

If you are confronted with a deductive argument, there are *only* two ways to refute it: you either show that one of the premises of the argument is incorrect, or you show that the argument's conclusion does not follow from the premises. For example, suppose someone makes the argument '(1) Reintroducing the death penalty for murder would reduce the number of murders in the UK, and (2) we should do everything possible to reduce the number of murders in the UK, therefore (3) capital punishment should be reintroduced as the penalty for murder in the UK'. If you want to rebut an argument like this, you *must not* say what I suspect 99 out of 100 students who were confronted with an argument like this would say: 'Well, I don't think that we should have capital punishment.' Honestly, no one could care less what you think. The *only* thing that matters is whether the above argument is valid. If it is, you *must* accept it – if you don't, then you are stupid or crazy and

no one wants to be stupid or crazy. If you don't want to accept the above argument, you *must* show that *either* one of the premises of the argument is incorrect, or that the conclusion does not follow from the premises. Fortunately for those who object to capital punishment, it is doubtful whether premise (1) is correct, and even if that premise is correct, premise (2) is certainly not correct.

If you are confronted with an inductive argument, there are *three* ways to refute it: you show that one of the premises of the argument is incorrect, or you show that the conclusion of the argument does not do *anything* to explain the premises of the argument, or you show that there is a *better* explanation of the premises of the argument than the conclusion that the argument draws from those premises. So the argument '(1) Max is lying on the floor holding his stomach and groaning, therefore (2) Max has eaten something that didn't agree with him' can be refuted by either pointing out that Max is happily watching TV, or by showing that '(2)* Max's older brother kicked him in the stomach when they were playing at fighting karate-style' provides a better explanation of (1) than (2) does. And the argument '(1) Max is lying on the floor holding his stomach and groaning, therefore (2) Max has red hair' can be refuted by pointing out that the redness of someone's hair provides no explanation at all of someone's holding their stomach and groaning.

In judging whether the conclusion of an inductive argument supports its premises – or whether there is a better explanation of those premises – you have to use your judgment and common sense. An important aid to both is what is called 'Occam's Razor' (sometimes alternatively spelled 'Ockham's Razor) – named after a theologian called William of Occam/Ockham (1287–1347). Occam's Razor tells us that a simpler explanation of certain premises is more likely to be correct than a more complicated explanation. So, for example, an explanation of a particular set of cases which goes 'The way these cases were decided shows that all judges are seeking to bring about a world government dominated by the Illuminati' provides us with an explanation of the cases that is just too complicated (in terms of how judges are supposed to form and go along with a conspiracy to bring about a world government that remains completely secret to everyone who is not a judge) to be plausible. For the same reason it is highly unlikely that judges decide cases the way they do in order to maximise the wealth of society. (Many academics, particularly in the United States, believe this. Academics who take this view belong to what is called the *law and economics* school of legal thought.) This explanation also involves so many complications (in terms of how judges are supposed to acquire the economic knowledge required to decide cases in a

wealth-maximising way, and uniformly and secretly conspire to base their decisions on economic grounds, rather than any other grounds) that it is highly unlikely to be correct.

There is only one form of inductive argument – '*This* (the conclusion of the argument) provides the *best explanation* of *that* (the premise or premises of the argument)'. But there are a number of different forms of deductive argument that you might want to make yourself familiar with as a sort of toolkit to draw on when you need to evaluate the law. There is, first of all, a *kill all the alternatives argument*. This goes as follows: (1) Either A or B or C is true, (2) neither A nor B are true, therefore (3) C must be true. This sort of argument underlay Sherlock Holmes' principle (as expressed in Arthur Conan Doyle's novel *The Sign of Four*) that 'Once you have eliminated the impossible, whatever remains, however improbable, must be the truth'. The Professor in CS Lewis' *The Lion, The Witch and the Wardrobe* used a *kill all the alternatives argument* to establish that Lucy was telling the truth when she said that she had entered a magical world through the back of a wardrobe in the Professor's house. He argued: (1) Either Lucy is telling the truth, or she is lying, or she is mad; (2) we know that Lucy isn't a liar, and that she is not mad; therefore (3) Lucy is telling the truth.

An *argument from contradiction* goes: (1) For A to be true, B would also have to be true; (2) but we know B is not true; therefore, (3) A is not true. So if someone had attempted to refute the Professor's *kill all the alternatives argument* in favour of the conclusion that Lucy was telling the truth by pointing out that premise (1) was incorrect – for Lucy to say what she did, it isn't necessarily the case that she is either telling the truth, lying, or mad: the fur coats stored in wardrobe might have given off some fumes that caused Lucy to hallucinate all her experiences – the Professor could have countered with an *argument from contradiction*: (1) For that to be true, it would also have to be the case that Lucy stayed long enough in the wardrobe to hallucinate all the experiences she said she had after she entered into the wardrobe; (2) but we know she did not stay long enough in the wardrobe for that to happen – she came out of the wardrobe a few seconds after she entered into it; therefore (3) we cannot put what happened to Lucy down to a chemically induced trance.

A very common type of deductive argument that is made in evaluating the law is a *cost-benefit argument*. The basic structure of this kind of argument is: (1) We should do *x* if the benefits of doing *x* outweigh the costs; (2) the benefits of doing *x* outweigh the costs; therefore (3) we should do *x*. In making a cost-benefit argument, you should be on the lookout for a number of potential flaws in the argument. First, is (1) untrue – is it the case that it would still be *wrong*

to do *x* even if the benefits of doing *x* outweigh the costs? (If it were, lawyers sometimes express this point by saying that someone has a *right* that *x* not be done.) Secondly, in assessing whether (2) is correct, watch out for *sentimentalism* and *incommensurability*. An example of sentimentalism is when someone argues in favour of some security measure (such as ID cards) by saying 'If it just saves one life, it's worth it.' No, it's not. If life were that infinitely precious, then we would ban cars – doing so would save thousands of lives each year, and this saving of life would more than offset the colossal sacrifice in wealth and happiness that banning cars would involve. Two things are incommensurable if there is no common standard of measurement that we can use to compare the two. For example, suppose that it is proposed that we should raise taxes to fund a nationwide programme of home care for the mentally ill. The cost of doing this would be to retard economic growth by 0.5 per cent a year. The benefit of doing this would be that the healthcare system in this country would treat the mentally ill with a greater level of respect and dignity than is currently possible. These two things cannot be weighed against each other: they are so completely different that there is no common standard of measurement that would allow us to say that the costs of raising taxes to fund this healthcare programme outweigh the benefits, or vice versa. So it's not possible to resolve the question of whether taxes should be raised to fund this programme through a cost-benefit argument. We simply have to *choose* which of these things – economic growth, and treating the mentally ill with dignity and showing them some respect – we value more.

Finally, a deductive argument that is a big favourite of lawyers is an *argument from analogy*. This kind of argument goes as follows: (1) In situation A, B is true; (2) situation C is identical to situation A in all material respects; therefore (3) in situation C, B is true. For an example of this kind of argument, here is a very famous argument in favour of the view that pregnant women should be allowed to have an abortion if they wish to, based on the philosopher Judith Jarvis Thomson's article 'A defense of abortion', published in 1971, in the first volume of the journal *Philosophy and Public Affairs*.

> Consider the situation where Samantha has become extremely drunk one night, and has ended up in hospital. The doctors treating Samantha realise that she has the same blood type as Frederick, a world famous violinist who is in the same hospital because he is in dire need of a kidney transplant. The doctors realise they have a way

of saving Frederick's life. They insert a tube into the main artery leading away from Frederick's heart, and insert the other end of the tube into the renal artery leading into one of Samantha's kidneys. They then insert a tube into the renal vein leading away from the same kidney and pump the blood coming through that tube into Frederick's body. As a result, Frederick's blood is 'cleaned' by Samantha's kidney, thus removing the need for him to have an immediate kidney transplant. When Samantha wakes up, she asks why she is hooked up to the patient in the next bed in this way, and her doctors tell her, 'We've done this so he can survive until we get him a new kidney.' When Samantha protests, the doctors say, 'Look – if we disconnect you, he'll die, and he doesn't deserve that. Everyone has a right to live. Anyway, you can't complain – if you hadn't got so drunk last night, you wouldn't be in this position.' When Samantha asks how long she has to wait for Frederick to have a kidney transplant, the doctors say, 'Given his position on the waiting list, we think you'll have to stay like this for nine months.'

If we assume that Samantha should be allowed to tell the doctors to get lost and disconnect her from Frederick, whatever the consequences for Frederick, then what about the case where Mandy gets extremely drunk one night, has unprotected sex, and discovers a few days later that she is pregnant? The following argument from analogy might be made for saying that Mandy should be allowed to have an abortion: (1) Samantha should be allowed to disconnect herself from Frederick, even though Frederick will die as a result, (2) Mandy's case is identical to Samantha's in all material respects – after one drunken night, Mandy has discovered that someone else's life (the life of the foetus inside her) is dependent on her not disconnecting herself from that someone else (the foetus inside her), and that if she does not disconnect herself from that someone else, she will have to remain connected to that someone else for nine months; therefore (3) Mandy should be allowed to disconnect herself from the foetus inside her by having an abortion.

Test your argumentative skills by asking yourself – does this argument work? The crucial step in the argument is premise (2) – is Mandy's case really identical to Samantha's in all material respects? Think about it, and I'll let you know my view below my signature. In the meantime, have a look at the

enclosed – a list of Top 10 Fallacies and Stupidities that people can fall into in making arguments. Remember these, and avoid falling into them yourself.

All best wishes,

Nick

PS One big difference between Samantha and Mandy's cases that might make it impossible to say that their cases are identical in all material respects is that the doctors violated Samantha's rights in hooking her up to Frederick, while no one violated Mandy's rights when she got pregnant. So requiring Samantha to remain hooked up to Frederick for nine months would perpetuate an injustice that would not be perpetuated if Mandy were required to continue her pregnancy to term. Where the argument from analogy in Samantha and Mandy's case becomes compelling is if Mandy were raped and that is why she became pregnant. In such a case, forbidding her from having an abortion would come very close to not allowing Samantha to disconnect herself from Frederick.

Top 10
Fallacies and Stupidities

1. Circularity

A circular argument assumes the truth of what it is trying to establish. For example, if we are debating whether or not the UK should have the death penalty for murder, someone would make a circular argument (and therefore no argument at all) if they argued 'We shouldn't have the death penalty for murder because it is wrong for the State to execute people'. But whether it is wrong for the State to execute people is precisely the issue at stake when we are debating whether we should have the death penalty for murder. A circular argument is often said to 'beg the question' – the question being the question that the argument is supposed to be addressing. Note that a lot of people misuse the phrase 'beg the question' to mean 'raises the issue of . . .'. Nope – 'beg the question' means, and means only, 'assumes what we are trying to determine'.

2. *Post hoc, ergo propter hoc*

This is Latin for 'after this, therefore because of this', and describes a fallacy. The fact that B happened after A does *not* establish that B happened *because* of A. For example, Jim Fixx who popularised running to get fit in America in the 1970s, dropped dead of a heart attack at the age of 52 after having gone for a run. One would fall into the *post hoc, ergo propter hoc* fallacy if one thought that because Jim Fixx died just after having gone for a run, it was the run that killed him (and therefore, that running is bad for you). This is an important principle to bear in mind in studying various law-related social sciences, such as criminology: the fact that certain social trends (such as a rise in the murder rate) occurred after a particular change in the law (such as the suspension and eventual abolition of the death penalty for murder from 1965 onwards) does not mean that those social trends occurred because of the change in the law.

3. Deriving an ought from an is

Generally impermissible: you can't move from a statement of fact about what *is* the case to making an argument about what *ought* to be the case without first supplementing your statement of fact with a statement about what *ought* to be the case. David Hume is generally credited with being the first to expose this fallacy in his *A Treatise of Human Nature* (1739) (III.1.1): 'In every system of morality, which I have hitherto met with, I have always remarked, that the author proceeds for some time in the ordinary ways of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when all of a sudden I am surprised to find, that instead of the usual copulations of propositions *is*, and *is not*, I meet with no proposition that is not connected with an *ought*, or an *ought not*.' So you can't establish that capital punishment is wrong (an ought statement – otherwise known as a *normative* statement) by simply observing that the death penalty deprives the executed person of the chance to repent their crimes and lead a better life (an is statement) – you need to supplement this statement of fact with an ought statement along the lines of 'It is a bad thing to deprive people of the chance to develop as human beings'. Of course, this ought statement will have to be defended, which is why normative arguments – arguments about what ought to be the case – are often inconclusive, as they themselves rest on controversial normative statements. But it's far worse to derive an ought from an is, than it is to make an inconclusive normative argument.

4. Tunnel vision

Tunnel vision involves failing to see all the aspects of a particular issue or question. An excellent example of this is provided by Henry Hazlitt's brilliant book *Economics in One Lesson* (1946). A boy breaks the window of the local baker's shop. The baker has to pay for a new window to be installed, which is good for the glazier as there is now more money in his pocket that he can spend, and that is good for the people whose goods and services the glazier spends that money on, and those people will in turn spend the money from the glazier on further goods and services. And so on. Reflecting this future cascade of wealth throughout the whole community, the townspeople looking at the baker's broken window remark that the boy who broke the window actually performed a public service in so doing and should be

commended. These people suffer from tunnel vision. They can only see what is in front of them and cannot see what would have happened *had the window not been broken*. Had the window not been broken, the money that the baker ended up having to spend on repairing the window would have gone to paying the tailor to make him a new suit. This would have been good for the tailor as there would have been more money in his pocket, which he could then have spent on various goods and services, with would have been good for the providers of those goods and services, who could then have spent that money on various goods and services, and so on. So had the window not been broken, *exactly the same* cascade of wealth would have occurred as did occur as a result of the window being broken – with this difference: had the window not been broken, the community would have been better off by the amount of one new suit. As it was, the new suit was never produced because the breaking of the window meant that the baker could not afford anymore to pay for a new suit. So the breaking of the window has deprived the community of a new suit – but the townsfolk can't see that, because the new suit was never produced. Because they lack imagination – the ability to see what is not there, to think of what might have been – they suffer from tunnel vision.

5. *Ad hominem* arguments

Ad hominem is Latin for 'towards the man'. The most common example of an *ad hominem* argument is one which attempts to attack an argument by pointing out or attacking the character of the person making the argument, rather than addressing the actual substance of the argument. So 'We shouldn't pay any attention to what X says because X is an adulterer/a racist/a fascist/a communist' is an *ad hominem* argument. Such an argument is also sometimes known as a 'poisoning the well' argument as it rests on the idea that if you throw enough dirt at X, everything that comes from X (including X's views) will be tainted. While *ad hominem* arguments are almost always negative in nature, as a matter of logic it must also be possible for there to be *ad hominem* arguments that are positive in nature: 'We should agree with anything X says because X is good-looking/cool/just like us/on our side.' *Ad hominem* arguments are always fallacious: just because a bad person takes a particular view does not mean that view must be incorrect, in the same way that the fact that a good person takes a particular view does not mean that view must be correct.

6. Arguments *ad populum*

The same is true of *ad populum* ('to the people') arguments that appeal to popular opinion, or 'what everyone thinks', or 'what right-thinking people think'. Just because everyone believes *x* does not necessarily mean that *x* is true. Where *x* is a normative statement, such as 'Capital punishment is wrong' an argument *ad populum* to the effect that 'Everyone believes that capital punishment is wrong; therefore it is wrong' falls foul of the rule that you can't derive an ought from an is – just because it is a *fact* that everyone believes that capital punishment is wrong cannot establish that the normative statement that 'capital punishment' is wrong is correct. And where *x* is a factual statement, it cannot possibly be the case that what everyone believes provides a reliable basis for believing that *x* is true or not. Just because everyone believes the world is flat does not make it so.

7. Apophenia

Bet you've never heard that term before! Neither had I until I tried to find out what the word was to describe the fallacy of seeing patterns in random behaviour. Apophenia is what underlies the 'gambler's fallacy' of thinking that if a tossed (and fair) coin has turned up 'heads' 5 times in a row, it is bound to turn up 'tails' next time – the belief that a long streak of 'heads' *must* be followed by a streak of 'tails' so that the coin turns up 'heads' or 'tails' the same number of times. But every time a fair coin is tossed, there is a 50:50 chance of it turning up 'heads' or 'tails', no matter what has happened in the past. Apophenia is also what underlies conspiracy theories – the idea that a set of events which might have just been a matter of chance were actually being directed by a sinister cabal that stood to profit from the outcome of that series of events. Apophenia is a particularly important fallacy for law students to know about because it is possible that in interpreting or explaining the law we are seeing patterns that aren't actually there but that we are constructing because we have an inbuilt tendency to prefer to see patterns and design in whatever we are looking at rather than simply dismissing what we are looking at as being the product of random chance.

8. Relativism

Someone is a relativist if they take the view that there is no truth, that applies impersonally to you and to me, on moral (and even factual) issues which allows us to say on such an issue that my view is *correct* and your view is *wrong*,

or *vice versa*. As Allan Bloom observes at the start of his book *The Closing of the American Mind*, 'almost every student entering the university' is a relativist. This is understandable. Students want to be nice, open-minded, and tolerant (though note that 'being tolerant' is not such a nice attitude as you might think: if I say 'I tolerate what you are doing', what I am actually saying is 'I find what you are doing disgusting and objectionable, but I am going to put up with it') and being a relativist makes it easy to be these things. Going around saying I am right and you are wrong does not seem to be particularly nice, or open-minded or tolerant. But relativism is also indefensible. The idea that there is no truth of the matter, which applies impersonally to you and me, on the issue of whether it is wrong to stub out a lit cigarette in a baby's eye is one that can only be entertained by someone who has completely lost their humanity. So you can choose to be a relativist, or a human being – but you can't be both. The last word on this matter goes to the philosopher Roger Scruton, who observes, 'A writer who says that there are no truths, or that all truth is "merely relative" is asking you not to believe him. So don't.'

9. Wishful thinking

Relativism is rooted in wishful thinking – the idea that because it would be nice to live in a non-judgmental world where no one can be judged to have made bad or wrong lifestyle choices, we live in such a world. Wishful thinking always involves thinking that the world is the way you wish it would be. In your studies you will come across examples of occasions where the law is both aware of people's tendencies to engage in wishful thinking, and tries to stamp it out where it threatens other people's interests. For example, if you are given the job of investing a £1m trust fund on my behalf, you are not allowed to make any investments from which you personally would profit – if you were so allowed, the temptation to think that a particular investment from which you would profit is also in my best interests would become overwhelming. In order to ensure that you are as clear-sighted as possible in making investment decisions on my behalf the law simply rules out the possibility of your making investments from which you would profit. The courts thought it so important to stamp out wishful thinking in this area that in 1874, in a case called *Parker* v *McKenna*, James LJ said that the 'safety of mankind' would be endangered if the rule against making a profit from investing other people's money were relaxed. If you think that is a piece of Victorian exaggeration, I strongly urge you to read Michael Lewis' *The Big Short* (also a film), on the roots of the 2008 economic crisis.

10. Rights

The language of 'rights' is productive of so many fallacies and stupidities that one almost wishes we did not have such a concept. (You may in your studies be told that the different kinds of legal rights – rights *in rem*, rights *in personam* – that we can have are derived from Roman law; but in fact the Romans didn't talk about rights, but actions. The notion of a right is a medieval invention, imposed on Roman law as a way of explaining it. The notion of a *human* right only entered popular parlance in the 1970s, though it had been knocking around among philosophers since the seventeenth century.) For the time being, be aware of the following. Rights function either as red lights, or amber lights. A red light right places an absolute bar on someone's treating you in a particular way (unless, of course, you choose to remove the bar). An amber light right works as a warning – don't come any closer unless you have a compelling reason to do so. So an amber light right does not place an absolute bar on someone's treating you in a particular way: it just requires them to have a very good reason for treating you in that way if they do so. The European Convention on Human Rights (or 'ECHR' for short) contains both red light and amber light rights – Article 3 recognises that we have a red light right against our being tortured or our being subjected to 'inhuman or degrading treatment' and Article 10 recognises that we have an amber light right to freedom of expression which means our freedom of speech should not be interfered with unless it is necessary to do so for various reasons set out in the Article. Generally speaking, rights *that* someone act in a particular way operate as red light rights, while rights *to* a particular good operate as amber light rights. So – whenever you or someone else is talking about rights, ask yourself: 'Are they talking about red light rights or amber light rights?' And don't treat – and don't allow anyone else to treat – an amber light right as though it is a red light right (which is what happens when someone says 'I have a right to freedom of speech, *so* you are not allowed to stop me speaking') or a red light right as though it is an amber light right (which is what happens when someone says 'People have a human right not to be tortured, but if we need to extract information from a terrorist about an impending attack we need to do whatever is necessary to get that information'). Once you get the distinction between red light and amber light rights, you will see so many people – including very distinguished academics – who ride roughshod over it in their arguments. Try not to do the same.

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9
General tips on studying law

Dear Jamie,

Now you are just about to start your studies, I thought I'd give you some general tips on how you should go about studying law. I'll give you some more detailed guidance later on how you should approach such things as reading textbooks, or cases – but for the time being, I just wanted to lay down general guidelines to help you study as effectively as possible.

The need for deliberate speed

Don't get bogged down in your studies. To get to the right depth in terms of your knowledge of a particular area of the law, you need to read a lot. Generally speaking, you need to circle that area of the law three times, where each circle takes you deeper into understanding that area of the law.

The first circle involves reading a textbook treatment of the area of law you are studying. While, when you were at school, reading a textbook would tell you everything you needed to know about what you were studying, that isn't true at university level – at least when you are studying law. The textbook is only your introduction to the subject. The second circle involves reading cases dealing with the area of law that you are studying – cases which should be familiar to you from your textbook reading but which, in their discussion of the law, add much more to your understanding of what the law says and why it says what it does. The third circle involves reading some articles about the area of the law that you are studying, again to deepen your understanding of why the law says what it does and how it might be improved.

You need to go round each of these three circles to really get to grips with the area of law that you are studying. To get complete all of these circles in the time available to you, you need to get round them fairly quickly. You can't

afford to get stuck on the textbook circle, or get lost in a morass of cases. So use your textbook to get a good overview of the subject – after you've done all three circles, you can always go back to the textbook to cover the fine details that you passed over first time round. And in reading the cases, prioritise the most recent cases (especially if they are decided by the House of Lords or the UKSC, the UK's highest court), as they will sum up previous developments in the law, and cases marked out as particularly important by your textbook. But you need to keep moving, keep moving, to get to that third circle where you get into really substantive discussions of the law.

But in going round these circles (while not going *in* circles), you mustn't mindlessly rush round them. You need to act with *deliberate* speed, knowing what you are doing and what you are trying to achieve, and making sure you have achieved it before moving on.

Organising your time

The fact that studying law involves circling around different areas of law multiple times means that time is probably the most valuable thing that you have at university. You need to treat it with respect – conserving and looking after the time available to you and making sure you make the absolute most of it. So when you go to university and have a better idea of your schedule, draw up plans for each week that you will be at university – I draw up 7 x 12 grids for myself (with the page on which the grids are drawn set to 'Landscape' mode) with the days of the week listed on the right-hand side of the grid, and each day split up into 12 one-hour blocks, so I can track where I am supposed to be and what I am supposed to be doing in any given hour on any given day – where you block out the times you are committed to lectures and small group teaching sessions and then work out what you are going to do in the hours that are left to you. I am not by any means saying you have to work at studying law all the hours God sends you – that would be pretty disastrous. Like everything else in life, the key to success in studying law is maintaining a proper balance in life between your studies and everything else. But what is essential is that you don't waste time by not having a plan for how you are going to spend your time, with the result that you spend a lot of time trying to make up your mind what you are going to do. If you have a plan, you will feel happier and more in control of your life and how things are going for you – and if things happen which mean that you need to change your plan, you can always do that. So having a plan for your time allows you to strike the perfect balance between being organised and being flexible – you are organised until you need to be flexible. But you are never lost for what to

do, which is when you become vulnerable to temptations just to while away an hour or two (or three) checking email and Facebook and videos on the internet.

Organising your notes

Just as you need to organise your time to make the most of it, you need to organise your notes to make the most of those. If you are going to create your notes on a computer (though note that if you are going to be handwriting your exams, my advice is to try to handwrite as much as possible at least three months before the exams), then do the following (or some variation of the following – whatever works for you).

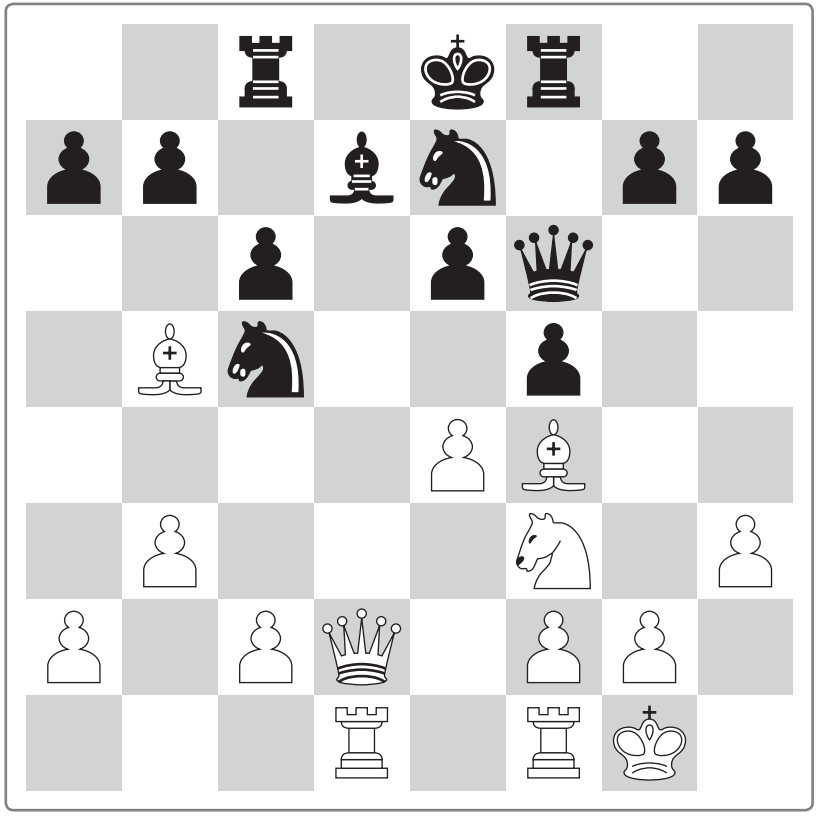
Say you are studying Criminal Law. Create a folder on your computer labelled 'Criminal Law'. Within that folder create two sub-folders, 'Study' and 'Downloads'. Within the 'Study' sub-folder create sub-folders to carry your notes on the textbook, cases, and articles you will be reading in the course of studying Criminal Law. (You will be told what to read in the reading lists you are provided by your lecturers and small group teachers.) Within the 'Downloads' sub-file, create two sub-folders 'Cases' and 'Articles' for you to store pdfs of any cases and articles that you download onto your computer from the online resources that are available to you. If you are going to handwrite most of your notes on Criminal Law, then store them in a ring-binder with dividers marking the various different topics and subjects you will be studying, and with each divider containing your notes on the textbook, cases and articles that you are supposed to read on a particular topic or subject. Make sure your notes on a particular case or a particular article are on a new sheet of paper or electronic document so as to ensure that you can locate those notes as quickly and as easily as possible.

And make sure you have back-ups of your notes. If they are on a computer, save them regularly onto a memory stick, or keep them on Dropbox and on the hard drive on your computer. If they are handwritten, then regularly scan them or photograph them, and download the scans/photographs onto a computer. Do not think that your computer can't be corrupted, or your handwritten notes can't be lost – they can be, and you need a back-up if that happens.

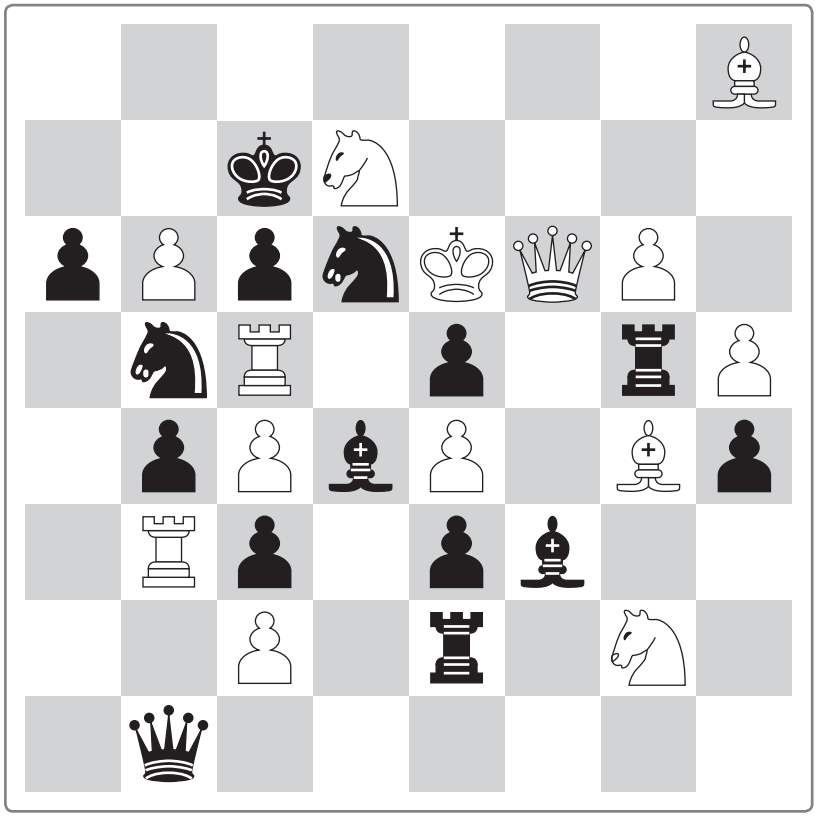
Organising your knowledge

The key to remembering any information is to *use* it – if you just sit back and receive information and don't do anything with it, it will soon disappear from your mind. (Think of how many books you have read in the past that you can't

remember anything about – that's because you haven't been thinking about them, and making use in your daily life of what was in those books.) So the more you can do to organise the knowledge that you are acquiring from your reading by the way of making links between different topics or issues that you are studying within a particular subject, or seeing how the law in the books applies in real life, or seeing how different authors take different views of the same area of law and forming some views of your own as to whose view is better – anything you can do along these lines will help you hugely in remembering what the law says and what might be said by way of analysing or criticising the law. Remember what I said in my last Top 10 list about apophenia – about the human tendency to see patterns and order everywhere. Let that tendency loose when it comes to learning the law – the more patterns and order you can see in the law, the more memorable it will be. You can always question the patterns and order *after* you



Memorable



Unmemorable

have got the law in your head – but to get it into your head, you need to see *some kind* of patterns and order in the law. For example, chess players are able to remember thousands of different chess positions – but that's only because they can see patterns in the positions that link different pieces together, and it's those patterns which enable them to remember the positions. A chess player – no matter how good – would not be able to remember a position where the pieces on the board were scattered randomly around the board.

In the same way, the law will never get into your head unless it comes there in an organised form. So seize on any explanations of a subject that you come across and try to see the cases and materials *through* that explanation, to see how they look against that explanation. I'm not saying for a second that you should agree with that explanation – its value is as a way of helping you organise your knowledge of the subject and put it in some kind of context

that will help you retain it. Again, once it's in your head, you can question the explanations of the law as much as you like.

Working together

Law will be a completely new subject for you – even if you have done Law A-Level at school. In studying law, you are introduced to a new way of talking (with lots of terms such as *novus actus interveniens* or duty of care or *mens rea* that ordinary people simply don't tend to use in normal life), a new way of thinking (reasoning to conclusions about what the law says in a particular subject which are based on inductive arguments as to what statements about the law are best supported by the available sources of law), and new ways of arguing (such as the different types of deductive argument that I introduced you to in a previous letter). It can be difficult to cope with the shock of all this novelty, but you don't have to cope with it alone. You will get help from the books you read, these letters, and your teachers. But the best help comes from the people who are going through the experience of having to cope with all these changes in the way they speak, think, and argue alongside you – your fellow students. Try to work together and help each other find a way together through what will be, initially, a confusing jumble of facts and arguments. You will be stronger together, and get further together, than you could working alone. Of course, there is the odd outlier who is such a genius that all he or she needs is their brain and their books, and they get along fine just with those. But most of us aren't like that – we do better together. So make time in your schedule to spend time with others talking about what you've covered, or essays that you need to write, or points you are confused about. *Don't* think it's uncool to talk about law socially – remember the basic law is *use it or lose it*. Unless you use the information you are gaining from your reading by thinking about it and discussing it with others, it will simply leave your head and all your reading will have been for nothing.

Never get discouraged

And it is easy – early on – to get discouraged in studying law. Unlike your fellow students in English, or history, or classics, or economics, or one of the sciences, you don't have a basic level of knowledge and understanding that provides some kind of platform for your studies. You are starting with nothing and building yourself up all over again as a student. And while that

process of rebuilding goes on, you will be constantly confronted with evidence of your own incompetence – your essays and problem answers won't be very good, your knowledge of the law will be generally patchy and incorrect in places, and your views on what the law should say will be unsophisticated and usually unsupportable. Faced with this, it is easy – as I said – to become discouraged and to think you will never make any progress as a lawyer. But you must be positive. Remember that what you are going through, thousands of people go through every year and for the most part, very successfully – and you have no reason to think that you are exceptional in this regard and that you cannot do what thousands of other people are able to do. The best comparison to what you are going through is putting someone with only a smattering of French in the middle of Paris and making them live there for a year. At first, they won't get on very well and there will be lots of days that are dispiriting. But there is equally no doubt that at the end of the year they will be very fluent in French and comfortable living in Paris. Mastery will come in time, but it needs time – and it needs you not to give up on yourself and to keep plugging away at trying to master the legal language and its concepts, at trying to express yourself like a lawyer, and at writing essays and answering problem questions about the law. Just as someone who hid themselves away in their room in Paris wouldn't ever become fluent in French, you can't succeed in becoming a great law student unless you constantly put yourself in a position to fail as a law student. Success will come in time, but failure must come first.

Think about the exams

Much as I would like to operate in Ye Goode Olde Days when studying law involved marinating yourself in whatever aspects of the law happened to interest you and end of year exams were there simply to check on your progress and give you the chance to test out your prowess in law, those days are well and truly gone. Nowadays, your exams make a big difference to your future prospects, so you need to take them seriously and prepare for them properly. That process of preparation has to be year-long: if you only start thinking about the exams in the weeks before they are due to happen, you will not do very well. And, in truth, you should want to start thinking about the exams as soon as possible as the past papers in any subject you are studying (if you can get hold of them) provide a good guide as to what sort of issues you should be thinking or looking into in the course of your reading. So past paper questions provide a good way of focusing your reading and

I always recommend to my students that before studying a particular subject within (say) Criminal Law, that they should look at the past paper questions that are directed at that subject to get some idea as to what they should be really paying attention to in their reading. And when you have finished your reading on that subject, you should spend some time thinking about how you might answer the past paper questions on that subject and plotting out plans for answers to some of those questions. Doing this will not only help you to avoid running up against the 'lose it' part of the *use it or lose it* law that you are subject to in your studies – it will also help you develop the writing and planning skills you need in order to answer legal questions properly. Do NOT underestimate how important this is. All the knowledge of the law won't help you in the exams if you don't know how to write an essay or go about doing a problem answer. I am sure I will talk more about this to you later on – but you need to be very clear even at this early stage that a big difference between school and university is that at school *what you knew* was the most important thing when it came to exams, while at university it is *what you are able to do with what you know* which makes the biggest difference in terms of how well you will do in your exams. So don't neglect the side of your game which is devoted to being able to write good, effective answers in your exams. I cannot understate how important this is.

Be ready to change

That last observation takes me onto my final point, which has been implicit in everything I have said in this letter: be ready to change. What worked for you at school is probably not going to work for you in studying law at university. Doing well as a law student will require you to acquire a whole new set of skills – so be open to making the changes that you need to make to acquire those skills. Unfortunately, a lot of the students I see strike me as being about 65 years old on the inside. They are deeply suspicious of change, and mistrustful of anyone who suggests that change is imperative. Needless to say, these students tend not to do so well at university, just like actual 65 year olds wouldn't do that well.

So how old should you aim to be on the inside when you are studying law? I think 10 years old is a good age to aim to be on the inside. There are a number of features that 10 year olds have that make them ideal students. First, they have no fear. They trust that if they do the right things and behave themselves, then everything will be okay. They don't waste their time worrying about things that are out of their control anyway. Secondly, they

are extremely curious about just about everything. They ask lots of questions, and have an insatiable desire to know. Being ignorant about anything infuriates them, and they are always trying to make up any gaps in their knowledge. Thirdly, they have a very straightforward attitude to themselves and the world – life is to be enjoyed and it's stupid not to make the most of the time you have to enjoy it. They haven't yet entered the winding and confusing hall of mirrors in which people who worry about what other people think of them, and people who try to fit in with what everyone else is doing, spend so much time. Fourthly, they get enthusiastic about things, and aren't afraid to show that they are enthusiastic about things. They are enchanted with what the world has to offer them. They are not interested in being cool, or indifferent, or bored with life. And finally, they are willing to follow other people's advice – they acknowledge that they don't know it all, and others have more experience than them and might know better than them the best thing to do. So try to cultivate your inner 10-year-old when you are studying law at university.

I'm sure this all sounds very nice and inspiring – but you shouldn't underestimate the obstacles that lie in the way of your implementing the advice in this letter. I'm going to send you two more letters on this. The first will be devoted to some hard truths that you would do well to acknowledge before you start studying law in order to avoid the traps that failing to acknowledge these truths create for the unwary student. The second will be devoted to some common, but not very well-understood, problems that students encounter when studying at university and how to avoid those problems. So I'll be in touch soon. Until then –

Best wishes,

Nick

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10
Some hard truths

Dear Jamie,

I warned in my last Top 10 list, Fallacies and Stupidities, about the importance of avoiding wishful thinking. Given that, I thought that it might be helpful if I laid out some hard truths – truths that we would all wish are not true – that you will have to deal with, and take on board, if you are to avoid the kinds of traps that not being aware of these truths can expose you to. I think your instinct – anyone's instinct – would be to deny these truths, because they are difficult to accept, but that would be a mistake: if you fail to face up to reality, reality has a way of shoving itself in your face and *that* is always more painful than facing up to reality would have been in the first place.

Brain development

Recent studies have shown that human brains stop developing not at the age of 18, as previously thought, but more around 25 – fully 3 or 4 years *after* you will have graduated with a law degree. These studies surprised a lot of people, but I find some confirmation for them from talking to ex-law students who look back on their time at university and are mystified as to why they didn't do much better in their end of year exams. It's not that they don't know what they needed to do to perform better in their exams – it's that they *do* know, and they are mystified as to why they didn't do it. But the fact is, they didn't know *then*, when they were studying at university. It's only later on, with greater maturity, that everything falls into place and they think, 'Ah – why didn't I write more straightforward essays?' or 'Why didn't I adopt a more structured and focused approach to doing problem questions?' or 'Why did I waste so much time going out night after night? Where did it get me?'

The fact that they didn't know *then* what they had to do to do well in their exams wasn't for lack of being told – but they weren't mature enough to take what they were being told to heart and give effect to it. Try as hard as you can not to follow their example. (It is a nice question whether it is possible *not* to follow their example, given what I have just said about brain development, but it may be the case that being aware that your brain might not be helping you do as well as you could do might give you the edge in overcoming the limitations your brain is attempting to impose on you.) *Realise* that you may not be the best judge of what is in your best interests, and *listen to* and *implement* the advice you are given as to how to conduct yourself in studying law.

Gaps in your knowledge

You are only 18. Assume that you started becoming *really* aware of things like world history and culture at the age of (say) 9. That means you only had 9 years to accumulate what knowledge you currently have of such things. The result is that there will inevitably be huge gaps in your knowledge – things that any educated, civilised person really ought to know about but which you don't know about because there simply hasn't been enough time in your life to be able to find out about them. This problem gets worse every year because, of course, every year adds to the stock of historical and cultural events and achievements that people ought to know about. For example, you are only about 18 at the time I am writing this, which means you were born just before the turn of the millennium. So you were only a toddler when 9/11 happened, and not even a teenager when the economic crisis of 2008 occurred. So in your own lifetime huge world-changing events have occurred that you have had to come to terms with and understand – and that's even before you had a chance to learn about the fall of the Berlin Wall and collapse of communism in Eastern Europe (10 years before you were born); or Margaret Thatcher's becoming Prime Minister of the UK, Ronald Reagan becoming President of the USA, and Karol Wojtyla becoming Pope John Paul II (about 20 years before you were born); or the start of the Cold War (about 50 years before you were born); or World War II (about 60 years before you were born) or World War I (about 80 years before you were born). And that's just the bare bones history of the twentith century – I haven't even mentioned the huge, unprecedented in world history, outpouring of music, films, and books that occurred last century and continues (less so in the field of music) to this day. And that's just the twentith century – who, at the age of 18, has had time to hear of

(let alone learn very much about) figures such as Plato, Aquinas, Rumi, Dante, Caravaggio, Donne, Bach, Vermeer, Pascal, Austen, Jefferson, Lincoln, Dostoevsky, Eliot (George and TS), and Wagner? And that list is simply skimming the surface of names of people who any educated person would have been expected to know about just a few years ago, but that 18-year-olds nowadays will probably simply have not had time to encounter.

You may ask – what has any of this to do with studying law? Everything. The law of a society is a product of the historical and cultural events that have helped shape that society. If the law of contract is strongly wedded at the moment to the ideas that commercial certainty and 'party autonomy' (hateful phrase) are extremely important values that the law of contract needs to respect, it is because in the UK and USA in the 1980s, right-wing political parties won power preaching the importance of facilitating the existence of free markets and we are still living with the impact that victory had on our societies. And those parties won power in the 1980s because just after the end of World War II, a group of economists – principally Friedrich Hayek and Ludwig von Mises – founded the Mont Pelerin Society with the object of contributing 'to the preservation and improvement of the free society', and ended up having a huge influence on the politicians who would come to power in the 1980s. And if the law of tort started giving much greater protection to privacy in the twenty-first century than it had in the twentith century, that was in part because of the vicious assaults on the family and other private institutions perpetrated by the Nazi German government from 1933 onwards. The result was that after the defeat of the Nazis in 1945, European countries vowed, by signing the European Convention on Human Rights (ECHR), never to fall into such barbarism and recognised in Article 8 of the ECHR that everyone has a (amber light) right to 'respect for his private and family life, his home and his correspondence'. Consequently, calls for the UK legal system to do more to enhance such respect grew more and more powerful over the second half of the twentith century (at the same time, paradoxically, as technological developments meant that preserving people's privacy would become harder and harder). However, the greater protection of privacy in the UK legal system also reflects the coming to fruition of a much longer wave of intellectual trends dating back to Jean Jacques Rousseau (1712–1778), who argued that society, and the pressures imposed on people as a result of mixing with others in society, is a threat to people's flourishing as human beings and that a much more solitary existence is healthier; and also the writer Virginia Woolf (1882–1941), who argued that privacy – or having 'A Room of One's Own' – was crucial to a woman's being able to fully realise her talents.

The writer CLR James asked, 'What do they know of cricket who only cricket know?' and we can ask the same of law – 'What do they know of law who only law know?' The answer is not very much – they certainly can't discuss the law with any kind of insight or understanding. So you need to do what you can – within the limitations to which you are subject – to make up for the gaps in your knowledge that you will inevitably have as a result of the fact that you are only 18. To do that, you need guides as to what is worth knowing and experiencing, and what is best left alone. My guide when I was a teenager was a journalist called Bernard Levin – the epitome of a cultured, civilised person, and someone whose books (especially his book *Enthusiasms*) and newspaper columns provided me with a wonderful guide both to culture and history, and in particular the history of the twentith century. On my website – www.mcbridesguides.com – I've created a section called 'Pre-U Reading' where I have provided links to a variety of books on politics, philosophy, economics, and culture, which might help with filling in gaps in your knowledge. But that's only a start. More generally, keep your eyes and ears open. Read educated, cultured magazines like *The Spectator* or *Standpoint* as a way of becoming educated and cultured yourself. Reading book review papers such as the *New York Review of Books* or the *London Review of Books* cover to cover is also a fantastic way of acquiring a huge amount of knowledge very quickly. Look for lists of the top 500 films or top 500 albums to see what you haven't seen or heard and need to – remember that the chances of whatever is coming out this week, film- or music-wise, being even one-quarter as good as the films and albums on those lists are vanishingly small. So prioritise checking out the films and music of the past over the present. Wikipedia – which is great for anything you don't want to be an expert on (which is why it is very dangerous to rely on it for studying law) – will provide you with quick and relatively comprehensive introductions to virtually anything you might want to know about. And walk into good bookstores (especially second-hand bookstores) or libraries whenever you get the chance and just look around at the books that are there, and pick out any books that seem particularly interesting to you.

Your teachers

You also have to realise a hard truth about the people who will be teaching you at university. Your teachers at school only had one job – to help you realise your abilities as a student. This is not true of the people who will be

teaching you at university – they will have many responsibilities, some of which will count as more pressing and important than helping you develop as a law student. For example, almost all academics – other than those who have reached a place of greater safety through getting to very senior positions within the university – are under immense pressure to publish books and articles on the law. But for them to do this requires time away from teaching and the demands of students like you for help with their studies. A lot of academics will have many heavy administrative responsibilities, not least in administering, setting and marking the exams that you will do in the course of your studies – unlike your school, universities don't get to delegate that sort of job to an exam board. Of course, none of this means that your university is entitled not to give you any assistance with your studies, but there are limits – and don't resent it if those limits are pointed out to you any occasion you overstep them with your expectations as to how much help you will get with your work from the people who teach you. The primary responsibility for your development as a law student falls on *you* – you have to put in the hours of work (figure eight hours a day, including lectures, seven days a week) that you need to put in to become as a good a law student as you can be. So long as you have access to a decent law library, the opportunity to have your reasonable questions about the law answered in small group teaching sessions, the opportunity to get guidance on how to approach legal essays and problems, and the opportunity to get feedback on your own reasonable efforts at doing such essays and problems – you have everything you need to realise your abilities as a law student.

Self-interest

The truths are getting tougher and tougher to accept. The next one is very tough. Back in 2007 I noted a definite change in my law students' attitudes. They became much more focused on their own development, and a lot more indifferent to how their fellow law students were doing. It became harder and harder to foster any sense among the students of their being a team, a team who won or lost their battles with the law together. This trend has continued to this day, and my students have suffered for it – as I said in the fifth point in my previous letter, law students who work together will generally do better than law students who work alone. Going back to 2007 and counting back 18 years, is it a coincidence that that first tranche of students who adopted a much colder attitude towards their fellow law students were born in 1989,

which was the year that the Berlin Wall fell? There may be a connection – people who grow up in relative prosperity, under no sense of common threat or challenge, tend to grow apart from each other. If such tendencies exist, I don't know how to reverse them – any change in reversing such tendencies has to come from within, not without. So if you detect such tendencies in yourself, I hope you will work hard to stop thinking just of yourself, and instead focus on fostering a sense of camaraderie and togetherness between you and your fellow law students. I promise that doing so is in everyone's interests. Every time I hear of a particular college in Cambridge having an excellent year of results in the law exams, I ask – 'What was the secret?' And the answer is always – 'Everyone got on so well, they spent all of their time together, and worked so well together on discussing the law and working out answers to essays and problem answers.' Try to foster that sort of atmosphere among your fellow students.

Your education

Don't worry – there is only one hard truth left. It is this – your education (and this is true wherever you were educated) has not prepared you well for studying law at university. This is particularly obvious when it comes to writing essays. In my letter on doing the LNAT and other law tests I warned against writing essays (for the LNAT or some other law test) along the lines that students at school seem to be taught to do essays – on the one hand . . . , on the other hand . . . , on balance it seems to be the case . . . I repeat that warning here: use your essays to make a case for adopting a particular point of view, usually by making it clear right at the start what position you will be arguing for, setting out the arguments for adopting that position, and attacking any counter-arguments that might be made against that position.

Your education will also have left you predisposed to expect 'correct' answers to the questions about the law that you might be asked to consider in your studies. There are, of course, correct answers in the law – occasions when the law on a particular issue is abundantly clear. But there are equally occasions when the law is unclear, and it would be dishonest to suggest that there is a 'correct' answer to what the law says on a particular issue. The lack of clarity can be caused by *gaps*, or *vagueness*, or *contradictions and tensions* in the law. *Gaps* exist in the law where a particular legal question has not been settled by any source of law, such as a statute or a judicial decision. *Vagueness* exists in the law partly because the law is expressed in language, and the

language used to set out the law is sometimes vague (see, for example, s. 62 ('s.' is short for 'section') of the Consumer Rights Act 2015, providing that a term in a contract between a business and a consumer will be 'unfair' and therefore potentially not binding on the consumer if 'contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer'); but vagueness also exists because in a common law system it is often a matter of debate as to what principles or rules of law underlie a particular set of cases. *Contradictions and tensions* exist in the law because different cases can give effect to different values in determining what the law says on a particular issue. So, for example, one judge might interpret s. 62 of the Consumer Rights Act very restrictively so as to promote commercial certainty. Another judge might interpret it very expansively so as to promote the interests of consumers in not being exploited by the businesses that they deal with. The result is that in determining how s. 62 applies, a *choice* as to be made between these different approaches – and the law won't tell you how that choice should be made, as the decided cases are unable to agree on that issue. More generally, when it comes to discussing what the law *should* say on a particular issue, expecting there to be a 'correct' answer on that question is as foolish as expecting a 'correct' answer to the question of how a particular house should be designed. There are only better or worse answers – not one correct answer.

Your education will also have left you thinking that the law is straightforward – that, in the words of Lord Sumption that I quoted in an earlier letter, if you want to find out the law on a particular issue you can just 'look it up'. But this is simply not true. The law is often manipulated by barristers seeking to win a case for their client, or by judges wanting to stretch the law to reach a particular result without appearing to do so. This process of manipulation often leaves the law in an intellectually disreputable state, where it becomes hard to say clearly what the law says on a particular issue.

For example, the law of murder says that if you do something that causes another's death, you will only be guilty of murder if you acted as you did with an intent to kill or an intent to cause someone to suffer grievous bodily harm. Now – intent straightforwardly means 'aim or purpose'. You intend to do something if it is your aim or purpose to do it. I intend in typing these words to tell you something about the law of murder because it is my aim or purpose in typing these words to do that. I don't intend in typing these words to make my fingers tired – even though it's perfectly obvious to me that that is what will happen if I type these words (I type fast!) – because that's not my aim or purpose in typing these words.

Now – consider this case, where D ('D' is a common legal abbreviation for 'defendant' – someone who is being sued or prosecuted) owns a plane and is hard up for money. He has the idea of putting a bomb on the plane so that it will blow up mid-air. He can then claim on the insurance policy on the plane, arguing that the explosion was the work of terrorists. The crew and any passengers on the plane will obviously die, but – D reflects – that's just too bad. D puts his plan into effect, and it works perfectly. The plane blows up, and all six people who were on the plane die. Is D guilty of murder? Don't try to guess – act like a lawyer and apply the definitions I gave you, carefully and methodically. D has certainly done something that caused other people to die – he put a bomb on the plane. But when he did that, did he have an intent to kill? The answer is actually 'no'. It wasn't part of D's aim or purpose in putting the bomb on the plane that anyone *die*. You can test for whether this is true by asking – 'What would D's reaction have been if, by some miracle, all the people on the plane had survived the explosion?' 'Would he have been disappointed or frustrated?' Again, the answer is 'no' – which shows that he wasn't trying to bring about the deaths of the people on the plane. And that means he didn't intend to kill them.

But I don't think anyone would be happy with finding D guilty of a lesser homicide offence in this case, such as manslaughter. Prosecutors want to *argue* that D is guilty of murder, and the courts want to *find* that D is guilty of murder. And the way they do this is by manipulating the definition of 'intent', arguing and finding that someone has an intent to kill not just in the case where it was their aim or purpose to cause someone's death, but *also* in the case where they foresaw that it was virtually certain that their actions would result in someone's death. In the latter kind of case, they say that D had an 'oblique' intent to kill – and you know as soon as someone starts talking gibberish like this that something is up and the law is being manipulated. So D is found guilty of murder by virtue of the device of arguing and finding that he had an intent to kill even though we wouldn't ordinarily say that he had such an intent. This device then creates difficulties in cases where, for example, two mountaineers, A and B, are climbing up a mountain, with a rope attached between them for safety, and B, who is lower down on the mountain slips and falls into a crevasse. A, and the rope between A and B, are the only things preventing B from falling to his death. Night is now closing in, and A (and B) will freeze to death on the mountain if they remain in their positions with B hanging in the crevasse and A trapped on the mountain, holding B in place. So A makes the difficult decision to cut the rope, and B falls to his death. Is A guilty of murder? We wouldn't want to say so, but it

seems that by the logic of how we found D guilty of murder, we also have to find A guilty of murder because A, like D, acted as he did knowing that it was virtually certain that B would fall to his death if he cut the rope. So A, seemingly, had an 'oblique intent' to kill B when he cut the rope. In order to save A from a murder conviction, the courts then have to resort to further devices, such as (i) ruling that in the case where someone acts knowing that their actions are virtually certain to result in another's death, the courts are only 'entitled' to find that they had an intent to kill and don't necessarily *have* to find that they had an intent to kill (which allows them to say that D *did* have an intent to kill, but A *did not* – without, however, explaining the difference between them) or (ii) ruling that A can take advantage of a defence of self-defence, based on the threat that B posed to A's life, however innocently. And these devices create their own complications.

All these devices and complications make the law on murder much less straightforward to state and understand than it could be (my proposals for how the law on murder could be simplified are set out in an essay on the *mens rea* of murder in the 'Criminal Law' section of my website www.mcbridesguides.com), but they are typical of how the law develops – the law more often moves forward under the cover of night than it does in the bright daylight, with the result that it can be very difficult to know where it is now. But so long as you are aware of this, and not constantly expecting the law to be easy to find out and state, then you should be absolutely fine.

So those are the hard truths that you need to take on board, and take forward with you in your studies, if you are to do well as a law student. I will write again, and soon, to talk about some other problems that might disrupt your studies, and how to avoid them.

All best wishes,

Nick

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11
Avoiding problems

Hi Jamie,

Taking on board the points that I made in the previous letter may make you aware of some traps that you might otherwise fall into as a student, but there are plenty of other pitfalls which you need to be aware of if you are going to make the most of your time at university. I think the main problem for students is that they simply aren't aware of some of the forces that are acting on them, and which can cause them to act in ways that aren't in their best interests. If they were bit more aware of those forces, they could have a great degree of control over what they do and how things go for them, and ensure a happier outcome to their studies. So I want in this letter to talk about some of these forces, what problems they can cause for you, and how you can counteract those forces so as to avoid those problems.

Fear

The first force you have to be aware of is fear – probably the factor which is most responsible for law students underperforming at university. Let's run through some characteristic student fears that hurt their prospects, and how those fears might be overcome and dealt with.

The first fear is the *fear of failure*. This fear isn't the fear of failing exams: not many students are silly enough to think that that is a realistic possibility. No – the fear of failure kicks in at the opposite end of the spectrum, among students who know that they have it in them to do really well but fear that if they work hard to realise their talent, their efforts might not end up being rewarded and they will end up getting the same kind of averagely good mark that they could have got with very little effort. A lot of students, confronted with this fear, opt not to go for the gold but instead settle for bronze. There is

some consolation in that: you cannot be said to have failed if you never really tried. But it results in such a waste of potential. If you find yourself being affected by this fear, think about all the things that would be missing from your life if people didn't try to achieve something great for fear that they would never achieve it: all the amazing music, and books, and films that have touched you, all the relationships that were responsible for your being here in the first place and for your developing into the person you are, all the wonderful tools and gadgets that people laboured over for thousands of hours to make your life easier or to allow you to do things that were previously impossible. And ask yourself: 'Am I really going to enjoy all these things and not make the same leap that was responsible for these things existing? Am I really going to sit life out for fearing of not achieving everything that I might be capable of achieving?'

The second fear is the *fear of being different.* A lot of people have a fear of standing out in a crowd – of being different from everyone else. But the fear of being different is a killer for students. Because being excellent means being different. If you are excellent, you excel – you rise above the norm, the average. If you are excellent, you are, by definition, different. So if you are scared of being in any way marked out as being different from everyone else, then you cannot ever achieve any kind of personal excellence. The only way of overcoming this fear, like most other fears, is to experience what you are scared of and realise that what you are scared of is ultimately – nothing. If you are scared of being different, be different and see what it's like. You'll find it's not so bad, and in fact it's a lot better than always being one of a crowd.

The third fear is the *fear of being judged.* This probably underlies the fear of being different – if you are the same as everyone else then no one else can judge you, and look down on you. The fear of being looked down on is perhaps the most distinctively human fear. It accounts for all the time people spend acquiring status symbols, and worrying where you stand in relation to other people. Life becomes a huge arms race, with people attaching status and significance to one set of things after another in an endless quest for high ground from which they will be immune from others' sneers and be able instead to look down on others themselves. But the fear of being judged, however human, is another killer for students. It shuts you up and prevents you expressing yourself in class or on paper – for fear of what other people will think of what you have to say. But in law in particular it is essential to learn how to express yourself, because law is a speaking game above everything else. If you cannot express yourself, you cannot be a lawyer.

So how can you overcome this most human fear and allow yourself, by expressing yourself, to make yourself vulnerable to being judged by other people? Just as with the previous fear, the only way is to take the plunge and realise – even if you screw up and other people look down on, it's actually not that bad. It hurts a bit, and you feel a bit wounded – but it's not so bad. And any smart to your soul that you may experience is more than outweighed by the feeling of liberation you simultaneously experience when you realise that you don't have to worry about being judged by other people any more. That you can express yourself and be yourself without being concerned about whether other people will look down on you as a result. So take the plunge and then you'll see. But you need to make an act of faith and take that plunge.

The fourth fear is the *fear of change*. This is another big fear that afflicts students entering university. And why shouldn't it? They have been relatively successful in their studies so far – so why mess with what has been, up to now, a winning formula? As a result, students entering university tend to hug quite closely patterns of studying and revision that have worked for them at school, only to find that what worked for them then is radically inadequate for dealing with the quite different challenge of studying at university. Most students – by going through the bitter experience of failure early on in their university studies – find it quite easy to give up on their fear of change. Failure makes them willing to embrace change. But why wait that long? Be open from day one of your studies to making changes to the way you approach your work that will help you study more effectively and happily at university.

Voices

All of us (almost all of us?) carry on an internal dialogue with ourselves. We put up for our own private consideration various plans or ideas, or things we have done in the past, or things that other people have done to us – and chatter away to ourselves, trying to get to a correct judgment of whatever it is we are thinking about. And we don't necessarily just have one voice in our head, judging everything. We may have our own Court of Appeal – three judges – in our head, three different voices, all judging in slightly different ways, all contending for victory over the other voices. But however many voices it is that we have chattering away in our head, *all of them are persuasive* because the fact that a particular voice is in *our* head causes us to *identify* with what that voice has to say. But this is very dangerous: just because a particular voice that is casting judgments is in your head does *not* mean that that voice is

yours, and does *not* mean that what that voice is saying is true. So it *may* be that you *shouldn't* be listening to a particular voice chattering away in your head, but you *do* because you automatically identify with what that voice has to say because it is inside your head.

So when should you be listening and when shouldn't you be listening to a particular voice that is going on in your head? A useful test is to ask – 'Would a friend say this to me?' So suppose that you are feeling down on yourself and inside your head you've got a voice saying, 'You're such a waste of space. You might as well give up on what you're doing – it'll never come to anything. Just stay in bed and keep out of trouble.' Ask yourself – 'Would a friend say this to me?' Obviously, the answer is 'no', a million times 'no'. So if that voice inside your head is not the voice of a friend, why on earth would you listen to it? If someone followed you around saying the same thing, you'd tell them to get lost – so do the same to the voice in your head. Or suppose you are feeling pretty up about how things are going for you generally, and you've got a voice inside your head saying, 'You're so amazing. You have so many fantastic insights – I don't know why you bother wasting time listening to other people's opinions. You should just do whatever you want, and start demanding that people rally round and help you get what you want.' Would a friend say that to you? Again – 'no', a million times 'no': so why listen to that voice? Only listen to the voices in your head that sound like they are coming from someone who has your best interests at heart. If you follow this one piece of advice, you will do far better than if you act on every passing notion that finds itself rattling around in your head. And, in time, the stupid voices may just quieten down, so that all you ever hear is sweet reason. But until then, be on your guard and try to visualise someone saying the things that go through your head and ask yourself: 'Is this really a friend?' If they aren't, then don't listen.

Freedom

A final problem that can hinder students in realising their potential at university is the amount of freedom that they are (rightly) given to determine how and when they will go about their studies. There is nothing wrong *per se* in students having that kind of freedom but it can result in students sabotaging their prospects, in a couple of ways.

First, having that amount of freedom gives the voices in your head a lot of scope to give you some truly terrible advice as to how you should use that freedom. Employing the friend test set out above may help quite a bit to

weed out the bad advice that the voices in your head are giving you. But you can avoid almost all of the bad advice by taking a great and terrible vow that, whatever happens, you will *do the right thing*. And by 'do the right thing', I mean do the things that almost all students in the world have to do in order to achieve anything in their time at university: go to lectures, go to small group teaching sessions, do and hand in the written work that you have been asked to do when you have been asked to hand it in, eat properly, sleep at least six hours a day, don't sleep more than ten hours a day, spend some time in the library or in your room quietly reading and making notes on books that you have been asked to read. These are the basics: the non-negotiables of life as a student. If at any point any part of you starts to think or feel that, 'I don't have to do that', or 'I've got something better to do than that', or 'I can skip doing that' in relation to these basics or non-negotiables, you can know for certain that that part of you is wrong, plain and simple, and you shouldn't listen to that part of yourself. Of course, there are exceptions to every rule and the exception to the rule I am setting down here applies if you are ill. Obviously, if you are ill then your body has to come first and you have to put everything else second. But if you are physically capable of undertaking the basics, the non-negotiables, of life as a student then not to do so is an obvious and unforced mistake that you simply shouldn't be making as an intelligent person.

Secondly, when you are given the freedom to decide for yourself how to go about studying law, there is a great temptation at any given moment to simply do what you feel like doing. Succumbing to this kind of temptation is very dangerous, and for this reason. The problem is that your feelings are like children. If you indulge them too often by doing whatever you feel like doing, your feelings get bigger and bigger and harder and harder to bring under control. And soon enough, you find yourself trapped by your feelings, incapable of doing anything unless your feelings permit you to do it. You become incapable of making plans and following them through because everything becomes subject to the passing whims and fancies of your feelings. Eventually, you become literally flattened by your feelings – incapable of even mustering sufficient will-power to get out of bed. Anyone who doubts whether this is true should reflect on how dictators and celebrities often act like utterly spoiled children – allowed by circumstance to indulge all of their feelings, they become incapable of doing anything else and go back and forth like spoiled children, swayed only by the promptings of their impulses. This is obviously no way to live and a disastrous way of conducting yourself as a student – but that's the almost inevitable result of doing whatever you feel like doing.

The way to avoid this grim fate is to follow this very strange-sounding advice: *spend most of your time doing things that you don't feel like doing.* I estimate that 90 per cent of my time is spent doing things I don't feel like doing. Getting out of bed in the morning, getting ready for work, writing references, marking work (I really, really hate doing marking), writing books, dealing with bits of business that have cropped up, going to meetings to discuss college affairs – all of these things I don't feel like doing. But doing these things that I don't feel like doing is good for me – it helps keep my feelings under control, and helps me remain someone who gets to choose what kind of life I will lead. It will always be a life where I am spending most of my time doing things that I don't feel like doing, but what kind of life it will be will be my choice, and not all of it will be spent doing things I don't feel like doing. So it's important that you get used to doing things that you don't feel like doing. You should welcome the fact that you may have to get up at 7 am to go to a lecture, and embrace the prospect of staying up late to get some written work done. Paradoxically, your life will go much better if you spend most of your time doing things that you don't feel like doing, than it will if you 'go with the flow' at every opportunity.

I hope if you follow the advice above you will avoid most of the problems that can pull students down to disaster and cause what should be a hugely enriching time of their life to turn into a very hard experience. But I would also recommend that you read Shawn Achor, *The Happiness Advantage.* It's a marvellous book about how adopting a positive mind-set can help you achieve your full potential in life. I require all of my students to read it before they come to university. Achor's TED talk on his research into the 'happiness advantage' is also really worth checking out – it is easily found on YouTube. However, there is one last, very common problem among university students (and anyone above the age of 18, for that matter) that I need to address – the problem of coping with stress, particularly the stress that students feel in the run up to exams. I'll deal with that in my next letter.

All best wishes,

Nick

12
Coping with stress

Hey Jamie,

So this is the last letter from me giving you general advice on approaching your studies at university – I'll write later on with much more specific guidance on particular aspects of studying law. In this letter I want to talk about how to cope with stress, particular the very natural stress that you will feel when you have to deal with big challenges, such as end of year exams.

The first point is the importance of keeping a positive mind-set. Don't run yourself down and start thinking that you're not going to be able to deal with any of the challenges that you have to deal with in studying law. Of course you are – there's absolutely no reason why you shouldn't be absolutely fine, just like thousands of other people up and down the country who are studying law at the same time as you. So with any exams, for example, don't build them in your mind into a bigger, or harder, thing than they are. Reassure yourself of this by having a look at the exam questions that were set in previous years. At first sight, they make look pretty intimidating and undoable. But on a second look, you should find a way 'in' and figure out a good answer to most of the questions. This should calm you down a bit and help you to see that the forthcoming exams are the equivalent of a steep hill that you have to walk up and over, not a towering mountain.

And if you are feeling stressed out about things, whatever else you do, don't shut yourself away. There's a great temptation to think that no one else wants to know, or cares, how you're feeling and that even if they do, there's nothing they can say to you that will help you. Again, that's simply not the case. Reach out to your personal tutor, and whoever's the main person in charge of your studies and see if they've got anything to say to you that will provide you with some help or reassurance. (But make sure you *listen to* and *accept* the help or reassurance they offer you – if you can't, then there was no

point in going to them in the first place, and no point either in endlessly going back to them in the hope that this time they will find the magic form of words that will make you feel okay.) Also make it clear to your friends how you're feeling – they may feel the same way, and it will make you feel better to know that you're not on your own in this, and it will also make them feel better to know that they aren't alone either.

And don't forget to relax! One of the damaging things about stressing about your work is that it makes you feel guilty about taking time off to socialise with your friends, or go to the cinema, or just go mad clubbing. Any time you think about doing something like that, a little stress-related voice in your head will say, 'I CAN'T do that – I can't waste my time like that when I've got so much to do.' But you *can* and you *won't* be wasting your time. If, in a desperate attempt to obtain a washboard stomach, I decided to spend an entire day doing sit ups, I wouldn't end up with a decent set of abs – but I would end up doing my abdominal muscles some severe damage. To exercise your muscles effectively, you need to give them a rest every now and then, to allow them to recover from the work you've been making them do. It's the same with your brain – it needs regular periods of downtime, if it's going to work effectively. So it's really important that between now and the exams, you regularly take some time off your studies and do something completely different. Don't allow your feelings of stress to put you off doing this. (To help you with this, I enclose a Top 10 list of Films About Law that you might want to check out sometime.)

Those are all fairly obvious points, all of which I hope you will take on board. But many students do follow all of the above advice, but still feel really high levels of stress. Why is this? I think part of the reason is that they don't understand where stress comes from, and so are ill-equipped to deal with it effectively. So – let's address this issue and see what comes of it. Why do people get stressed? Well, I think the answer is that people get stressed about things that are important to them but that they can't control. Stress is a reflex reaction to feelings of powerlessness over things that are important to you. For example, people tend not to get stressed about whether they'll wake up late on the first day of the exams, or stressed that their pens won't work in the exams. (I really hope that giving these examples hasn't made you start to feel stressed about these things . . .) That's because people are able to do something to stop those things happening: they can set loads of alarm clocks to wake them up on the morning of their exam, and they can take loads of pens with them into the exam. But people *do* getting stressed over whether they'll 'freeze' in their exams and not do themselves justice, or whether the 'right'

questions will come up in the exam. These are things that people have no control over, and that's precisely why they get stressed out about them.

This means that stress is a predictable emotion. You will be tempted to feel stressed if you feel powerless over something that is important to you. So stress isn't something that just happens – it happens for a reason. And if that's right, then it follows that you can take steps to avoid getting stressed about things. Try to avoid getting into situations where you will feel powerless to affect things that are important to you. Going back to a point made in the last letter, do the right things that will help enhance your feelings of power over your work and understanding of the law so that you will feel ready for anything that even the most hostile examiners might throw at you in the exams. Don't leave things to the last minute so that you put yourself in danger of starting to feel stress over whether you *can* meet that deadline that you originally had all the time in the world to meet but kept putting off. (This is advice I follow myself whenever I have a deadline for submitting a book or an article – I always finish the work way of ahead of deadline and have a much easier time of things than some of my colleagues, who leave things to the last minute and turn grey and haggard through the stress involved in trying to meet their deadlines.)

Another reason why students feel high levels of stress is that they allow their feelings of stress to grow out of control. There are two main reasons why stress has a tendency to grow over time. The first is that stress encourages you to waste your time. Instead of using the time left to you before the exams to improve your chances of doing well in the exams by working on the things that you still can do something about, you instead spend your time worrying about things that you can no longer do anything about, or about things that you could never have done anything about. The second reason why stress grows is that when you realise how much time you are wasting to stress, if you are unable to let go of your feelings of stress, then you will start experiencing feelings of powerlessness in respect of your stress (it's important to you to get rid of it, because it's using up your time unproductively, but you can't get rid of it), and as a result you'll start getting stressed about feeling stressed. And then you'll get stressed about feeling stressed about feeling stressed. And in this way a vicious upward cycle of stress develops.

Don't allow this to happen to you. Your feelings of stress can only grow if you allow them to distract you from what you have to do right *now*, which is *focus* on the things you can do between now and the exams to improve your position for the exams. So make a list of practical things you can do between now and the exams to help yourself do well in the exams, and concentrate on getting those things done. And, as you are doing these things, try and shut out any voices that may go off in your head, saying, 'But what about . . .?' and 'There's no point . . .'

There *is* a point, and there is *nothing else* that you need to think about other than getting through your list of things that you can do to help yourself. Focus on that, and your feelings of stress won't be a given a chance to grow.

If you follow all this advice, then you should enjoy a relatively stress-free existence as a law student. But following the above advice will only help you avoid *unnecessary* stress – it won't mean that you'll *never* feel worried about things. There will always be some things that are important to you, and that you can't control. For example, if a firm offers you a job when you leave university, but makes the offer conditional on your getting a 2.1 in your final year exams, none of the advice above will help you avoid feeling *some* stress about whether you will get the 2.1 you need. That's because whether you get a 2.1 in your final year exams won't be completely under your control: the examiners will have the final say on that. If you want to avoid stressing about that kind of thing, the only way to do that is simply to let go of the worry. Try to train your mind to think along the following lines: 'I can't ultimately control whether the examiners will recognise all my efforts with at least a 2.1, so there's no point worrying about it. If I get a 2.1, all my worrying will have been for nothing. If, in spite of everything I've done to prepare for the exams, things don't work out and I don't get a 2.1, then there will have been nothing I could have done about that, and so again all my worrying will have been for nothing. So – I'll just let go of the worry and try and think of something else.' Some people find it helps while they try and think along these lines to do something symbolic to represent letting go of the worry – like writing the worry down on a piece of paper and burning the paper, or letting it float away on a stream. It sounds crazy, I know, but apparently it does help.

I hope all this helps you a bit. If you want to read anything further that might help you cope with stress, I'd recommend the *Discourses* of a Greek philosopher called Epictetus. You may well think that a disabled slave who lived almost 2,000 years ago won't have much to say to you – but you'd be surprised. The US Army makes its soldiers study Epictetus to train them to cope with stressful situations they may find themselves in (such as being captured and imprisoned by the enemy) – so you may well get something out of reading him as well. This is from the first chapter: 'What, then, is to be done? To make the best of what is in our power, and take the rest as it naturally happens.' Reading the *Discourses* helps you to do that: I strongly recommend it.

Be thinking of you,

Nick

Top 10
Films About Law

1. Young Mr Lincoln (1939)

'I expect I could make head or tails out of it, if I set my mind to it.' A wonderful portrayal by Henry Fonda of Abraham Lincoln making a start in his career as a lawyer, defending two brothers accused of killing a man in the aftermath of a fair. Steven Spielberg's *Lincoln* (2012) makes a nice bookend to this film, focusing as it does on Lincoln's efforts at the end of his life to pass the 13th Amendment to the US Constitution, which will abolish slavery in the US.

2. 12 Angry Men (1957)

Another film starring Henry Fonda, and an all-time classic. One juror argues in favour of an accused's innocence in the face of the other jurors' indifference and hostility. A powerful statement in favour of the ability of human beings to reason, and reach correct conclusions, together. A film in a much lighter vein, but in the same genre as *12 Angry Men*, is *My Cousin Vinny* (1992).

3. Anatomy of a Murder (1959)

Like most of the films in this list, this is a film with a trial at its heart. James Stewart defends a man accused of murder, who admits the murder but claims that he committed it because the deceased raped his wife. Other, inferior, films in the same genre are *Presumed Innocent* and *Reversal of Fortune* (both 1990).

4. To Kill a Mockingbird (1962)

Probably more responsible for people wanting to become lawyers than any other film in history. Gregory Peck turns in his greatest ever performance as Atticus Finch, a just man who defends a black man who has been accused of rape in a 1930 era Alabama that is racist to the core. Also check out *Mississippi Burning* (1988), where two FBI agents investigate the disappearance of three civil rights workers in Mississippi in the 1960s – a film that was, sadly, based on a true story.

5. Breaker Morant (1980)

Another trial, but this time a court martial: the true story of three Australian lieutenants who are court-martialled for executing prisoners. A brilliant lead performance by Edward Woodward, and a gripping tale. *A Few Good Men* (1992) is nowhere near as good. Also check out *The Court-Martial of Billy Mitchell* (1955), another true story of the court martial of the visionary Billy Mitchell, who after World War I saw the potential for air power to transform the US's fighting capabilities.

6. The Verdict (1982)

A brilliant performance by an older Paul Newman, playing a broken-down drunk lawyer who stumbles on a medical malpractice case, which involves bringing a claim against a very powerful hospital for putting one of its patients into a vegetative state. The film is directed by the legendary Sidney Lumet, who also made the police corruption dramas *Serpico* (1973) and *Prince of the City* (1981). The part of the down at heel lawyer has also been effectively played by Matthew McConaughey in *The Lincoln Lawyer* (2011) and Billy Bob Thornton in the TV series *Goliath* (2016).

7. True Believer (1989)

A fantastic film starring James Woods as a crusading civil liberties lawyer who has been reduced to defending drug dealers and Robert Downey Jr as an idealistic young lawyer who, inspired by Woods' previous reputation,

volunteers to work for him. James Woods in the TV series *Shark* (2006–2008) is also well worth checking out.

8. Indictment: The McMartin Trial (1995)

Another great and inspiring James Woods film, this time based on a true story about the McMartin family, who were unjustly accused of being at the centre of a paedophile ring. Unfortunately, the film is only available as a Region 1 (US) DVD.

9. Sophie Scholl: The Final Days (2005)

An extremely powerful, and true, story about the trial of Sophie Scholl, one of the leaders of the White Rose movement, a group of German students who protested against the German Nazi government at the height of World War II. The sacrifices involved in standing up to barbarism have never been more graphically displayed on screen; nor has the disgraceful conduct of the judges who went along with, and helped to support, Nazi 'laws' that amounted to a crime against humanity. *Judgment at Nuremberg* (1961) – which focuses on the trial of Nazi judges after the end of World War II – is relatively tame by comparison. Within the same genre, I would also recommend the TV movie *Conspiracy* (2001) – a brilliant, and completely faithful, depiction of the 1942 Wannsee Conference, where the extermination of the Jewish population in Europe is discussed and decided on. This is another very powerful film that demonstrates the limits of law's abilities to restrain evil people's ambitions to do harm to others.

10. Puncture (2011)

Another true story, about a drug addicted lawyer who takes on the entire American medical establishment and its unwillingness to use needles that cannot accidentally puncture the skin of, and infect, nurses and doctors. Other law-related films in the same David vs Goliath genre as *Puncture* or *The Verdict* are *Erin Brockovich* (2000), *A Civil Action* (1998), *The Insider* (1999), and *Kill the Messenger* (2014).

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13
Making the most of your time

Dear Jamie,

So far, the guidance I've given you on studying law has been pretty general – it could apply equally to someone studying any other subject at university. This is the last letter of general advice that I'll give you – after this, I'll get into the details of how to study law. I'll use this last letter of general advice to talk about the most precious thing you have as a law student, which is *time*. As a student, you have so much to do (both in studying law and in doing other things at university) and so little time in which to do it. So time is like gold for a student, and you should treat it accordingly – don't waste it. Here are some basic tips on how not to waste your time:

Timetables

As I advised in my letter to you giving you some general tips on studying law, draw up a timetable of your weekly, or fortnightly, schedule and look at it. Work out a plan of what you are going to be doing and when by way of studying and other activities. There may be on your timetable some gaps in your schedule where you have a lecture, then nothing for an hour, and then another lecture. Don't waste that hour – work out in advance what you are going to be doing at that time. (Reading some cases? Photocopying some articles? Looking on the internet or through your faculty's library for useful materials?) There will also be long stretches of time on your timetable that are free – particularly at weekends. Again, decide in advance how you are going to use that time, so when that time comes round, you will know exactly what you are supposed to be doing and get on with it. Of course, if something else comes up that you have to attend to, then do that – but the important thing is not to drift, not to waste time thinking, 'What shall I do now?'

Checklists

Make a checklist at the start of the day of your objectives for that day. Doing this has a number of benefits. It encourages you to get on with things and get everything on the checklist ticked off by the end of the day. Getting through your checklist will give you a sense of satisfaction and allow you to get to sleep without worrying about your work. And if you find yourself regularly not being able to get through everything on your daily checklist, that will force you to think – are your plans for the day too ambitious, or are you unable to get through your list because you are wasting too much time?

Studying multiple subjects

It may be that, as a law student, you are expected to read about, or study, three or four different areas of law at any one time. If this is the case, the great temptation you will be exposed to is to set aside a couple of days for one subject, a couple of days for another, a couple of days for a third, and so on – and in that way get through the work you are supposed to get through. This is a bad idea. In order to come to grips with a particular subject within the law, you have to expose yourself to it, and give yourself the opportunity to think about it, for *as long as possible*. Studying subjects in two- or three-day blocks won't allow you to do this. So if you have to study multiple subjects, instead of setting aside two days to study subject A and two further days to study subject B, think about organising your timetable so that you set aside *four* days to study subject A and subject B *at the same time* – by, for example, studying subject A in the afternoon, and subject B in the evening. This will allow you a much greater opportunity to spend time with both of these subjects, and consequently develop a much better understanding of those subjects.

Relevance

In studying any legal subject, you want to spend the most time focusing on issues within that subject that are most relevant to your studies, and the least time focusing on issues that are really only of interest to academics or professionals who have (and have to have) a very deep knowledge of the subject you are studying. But in (say) going through a textbook treatment of a particular subject, how can you tell which bits are most relevant to you, and which bits

are not worth bothering with? It takes time and experience (and a lot of mistakes) to develop a sense for this kind of thing, but a handy short cut is to have a look at what sort of questions students at your university have tended to be asked in their exams about the subject you are studying. In other words, you need (if you can) to get hold of some past exam papers in the subjects you are studying, and have a look at them in order to get a feel for the 'hot topic' issues that tend to come up over and over again in the exams. In some universities, these past papers will be available online, on your faculty's website. In other universities, they will only be available in hard copy form – and you will have to ask at your university library where you can get hold of them. However you obtain them, you should get hold of them *before* you start reading up on a particular subject within the law, so you can see what sort of questions tend to get asked about that and direct your reading accordingly. Other guides as to what sort of issues you should be focusing on will be your reading itself (if a textbook or an article that you have been told to read spends ages discussing a particular issue, then it's likely to be important), your common sense (a very detailed discussion of some statute from the 1870s is not likely to be that important for the purposes of your studies), and your teachers (any reading lists you get may tell you to think about particular questions, and which subjects your lecturers choose to focus on and which they skip over is a good indication of which subjects you should be focusing on and skipping over).

Work avoidance

I am the world's #1 champion work avoider. If there is something I have to do, I will do anything to avoid having to knuckle down and get on with it. I'm always flicking through the channels on the TV next to my computer on which I'm typing this, checking out newspaper sites on the internet for blogs or the latest news, and fiddling with iTunes to find a good album or piece of music to accompany the work I have to do. This is because most of the time what I have to do is write, and writing is difficult. Filling up a blank page with words that have to come out of your own head is tiring, and frequently dispiriting when the right words don't come. So I try to avoid putting off the unpleasant moment where I have to get down to writing as long as possible. Try to recognise when you are doing the same thing – wasting time to avoid having to do something that is going to be hard to do. Recognise what is happening and pull yourself out of it. *Just start* doing what you are trying to avoid doing, and you'll soon find that whatever you are doing is not so bad,

and that it actually feels good to be getting on with what you have to do – and before you know it, you'll have it done. But you do have to *just start*.

FOMO

The fear of missing out is a great source of time wasting. You've been working away in the library for a full 20 minutes and someone comes along and says, 'Fancy a coffee?' There is no way that you should be taking a break after just 20 minutes, but FOMO kicks in and you end up saying, 'Why not?' You have an essay to do on a particular evening, but a group of your friends are planning to go out. You should stay in, but FOMO makes you think, 'Well, I could go out for a couple of hours, and then really get stuck into the essay when I come back.' You need to be working at least four evenings in seven during the week to do well in your studies, but FOMO means you are out five evenings a week. You really only have scope for involvement in one or two university societies or activities, but FOMO means that you end up doing three or four extracurricular things every week. The difficulty with FOMO is that it does have some rational basis – you *could* be missing out on something amazing if you don't go out, or you don't get involved with a particular sport or other activity in which you have some talent. So FOMO is never going to go away. The key to dealing with FOMO is to make FOMO work *in favour* of sticking to your studies, and not getting needlessly distracted. Instead of fearing missing out on what could happen *right now* if you went out tonight, or got involved with this society, start to think about what you might miss out on *in future* if you lose focus on your studies and end up doing less well in your exams than you could have done. Don't end up like a few of my former students, who are now stuck with permanent feelings of what might have been had they worked harder at university and got the sort of grades that would have enabled them to walk into any job they liked. So cultivate long-term FOMO to counteract any short-term FOMO that might encourage you to fritter away your time at university on doing virtually anything other than studying law.

Holidays

As a university student, you can't regard your holidays as holidays – you have to make the most of the chances they provide to consolidate the knowledge you have acquired so far, and prepare for any upcoming exams. But the

vacations contain a whole host of potential distractions – seeing your mates from home, going away with your new friends from university, spending time catching up with your family (who may not understand how hard you have to work as a university student), maybe earning some money doing a part-time job, and just generally relaxing and enjoying the comforts of being back at home. The best way of dealing with any pressures you might feel during your holidays to take time off from your studies is to have a plan. During the vacation, act as though you have a day-time job: your day-time job is to study law. So get up in the morning, ready to start work at 9 am, working through to lunchtime, and then start again at 1.30 pm and work through to 5.30 pm. After that, your time is yours to do with whatever you please. If you do that every day in the holidays, then you should be able to make everyone happy.

As your time is so precious, I won't take up any more of it with this letter – but will instead leave you for the moment. I'll be in touch soon with a series of letters advising you on how to read the kinds of things you are going to have to read when studying law: textbooks, cases, statutes, and articles.

All best wishes,

Nick

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14
Using a textbook

Hey Jamie,

Okay – so this is the first of a series of letters about the specific sources of legal information that you'll be drawing on in your studies. We'll start with some advice on using textbooks.

Circles

I said in my letter giving you some general tips on studying law that studying a particular subject within the law involved doing at least three circles around it – reading a textbook, reading cases, and reading articles. The same idea of performing repeated circles applies to reading a textbook.

When you go through a chapter or chapters from a textbook *for the first time*, your aim should just be to *read it*. What you have to avoid is getting stuck making very detailed notes that will slow down your progress, frustrate you, and prevent you ever getting onto anything else in the time available to you. But when you read a chapter or chapters from a textbook for the first time, you do actually have to *read* the textbook. That means going through it somewhere you can actually concentrate on the book and won't get distracted by other people or other things. So find somewhere that works for you to allow you to read without distraction – a library or your room (with the TV and computer *off*) or a comfortable chair in a coffee shop. But find *somewhere*. And when you go through the book, remember: always be thinking – why is this important? What are the key points here? What is this area of law about? What problems is it trying to solve? What are the key cases/statutory provisions?

After you have gone through everything else you are supposed to read in the form of cases and articles, you should (if you have time) circle back to the

textbook, and have another look at it with the benefit of all the knowledge you've picked up in the meantime. This time round you will make notes on various points that you come across in the textbook (1) that are important, and (2) that you are not already familiar with from your other reading. Past paper questions (which you should look at before you start any reading) and your lectures will provide a guide as to (1). On (2), try to avoid wasting time making notes of the obvious. For example, if you are studying contract law, you will soon find out that promises aren't automatically legally binding, and that usually something (consideration) has to be given in return for a promise to make that binding. Neither of those points is worth wasting a scrap of paper or a second of your time on noting: they are so foundational to the subject that you won't need to make a note of them to remember them. You will be reminded of them by everything else you read. That's one reason for leaving detailed notetaking of your textbooks to much later in your reading: it's only then that you are able to differentiate between points that are important but so obvious they're not worth noting, and points that are important but not so obvious or memorable that you'll be able to get away with not making a note of them.

And when you make notes, make them fun and interesting, so that you are constantly creating and thinking while making notes on your textbook. So the more diagrams and tables and mind maps you can put into your notes, the better.

Don't rely too much on your textbooks

One of the most important differences between doing A-Levels and doing a law degree is the attitude you should have towards your textbooks. At A-Level, you could count on your textbooks to be correct and to tell you everything you needed to know to get a good grade in your exams. Neither of these things is likely to be true of the textbooks you will be looking at when doing a law degree.

First of all, legal textbooks frequently get the law wrong or make statements or assumptions about the law that are debatable. So if a textbook says 'The law says x', you shouldn't necessarily think that the law does actually say x. Secondly, most textbooks do not tell you everything you need to know about the law to get a good mark in the exams. For reasons of space, most textbooks do not spend much time discussing how the law should be developed or reformed – and any discussion of such issues is likely to be quite superficial. For in-depth discussions of how the law should be reformed or

developed, you need to look at monographs (short books on a single issue) or articles. In addition, most textbooks 'play safe' and spend almost all of their time simply reporting what the decided cases say; they spend very little time going beyond the cases and discussing what the legal position is in various hypothetical, problematic situations. But these are precisely the sort of situations you are likely to be confronted with in your exams.

So you should treat textbooks as fallible introductions to the various subjects you are studying. They get you started and give you some idea of the terrain over which you are going to be moving – but it's dangerous to overrely on them.

Picking which textbook to make your principal guide

In any subject, there are going to be lots of different textbooks about that subject. Which one should you use? Your teachers will probably have a recommendation, and if so, go with that. But in some cases, they will just list a variety of textbooks and leave it up to you to choose. So – how do you choose? Asking students in the year above you for their advice might be an idea – though watch out for slackers who recommend a really slim volume as telling you 'all you need to know' (if you want to do badly in the exams, that is); and also look out for someone who is just trying to sell you his or her textbooks regardless of whether they were any good. Going to your university law library (or a good university bookstore with a wide selection of law books) and looking through the range of recommended textbooks to see if any of them catch your eye as being particularly readable and interesting would also be a good idea. Try not to select a textbook on price alone: £5 or £10 extra is a very small price to pay for getting a book that will make a major difference to the quality of your understanding of the law. Some textbooks that might appear on your reading lists or lecture handouts tend to be more oriented towards legal professionals – *Treitel on the Law of Contract* or *Megarry and Wade: The Law of Real Property* are two examples. Don't be put off by the fact that they are mainly for professionals. The level of detail could really help you with your studies. However, if you use one of those textbooks you have to be prepared to skip past major chunks of text as not being relevant to your studies. Again, looking at past papers' questions will help you decide which bits to skip past.

Consult more than one textbook

So, let's assume you are now armed with your principal textbook. However, for the reasons stated in (2) above, it's dangerous to rely on just one textbook. No one textbook can be the font of all wisdom on a particular subject. (Though some textbooks come closer than others . . .) If you take virtually any legal textbook, there are going to be some chapters where the writers did a really good job and some chapters where the writers weren't quite on their game. So you shouldn't just ignore or write off the other textbooks that deal with the subject you are studying. If you have time, after you have done everything else you have to do, you should have a look at any other relevant textbooks stocked in your university library to see what they have to say about the particular area of law you are studying.

Remember that textbooks get out of date

This point may be a bit too obvious to be worth making – but it sometimes catches out inexperienced students. There are some areas of law that change quite a lot over short periods of time – tort law and criminal law are examples – with the result that textbooks in those areas get out of date quite quickly. If you are studying one of these areas, be careful about using a textbook which is more than three or four years old – many of its statements about what the law says could be out of date. (Though if you are, as I advise, consulting a variety of textbooks, you'll soon detect any out-of-date statements.) And if you are buying a textbook second-hand – particularly from a student in one of the years above you – *make sure* that it hasn't been superseded by a later edition. If it has, then be careful. Certainly don't buy it if it is four or five years out of date. If it's only two years out of date – a lot of publishers now like to bring out new editions of legal textbooks every two years – then it might still be serviceable for your purposes; but don't pay more than about £10 for it.

Look at the footnotes

Don't ignore the footnotes in a textbook. They can often be the source of: (a) very useful observations about the law which didn't fit easily into the flow of the main text and were therefore relegated to the footnotes; (b) suggestions as to articles and other books that it might be helpful to read – and, if you are

really lucky, summaries of what those articles and books say, thus saving the trouble of looking at them yourself; (c) criticisms of other writers' views which will come in handy when trying to make up your mind whose views you agree or disagree with.

Boredom

If you're getting bored reading a textbook, what should you do? (Note that this is highly unlikely to happen if you adopt the above approach to going through the textbook.) The answer is: stop reading. If you're bored, you won't be taking anything in, and there's no point in carrying on reading when you're not taking in anything of what you're reading. Deal with the source of the boredom before you carry on reading. It may be that you've been working too long and your brain has decided it's had enough. In which case, take a break. Or it may be that the textbook is at fault: the writer hasn't made enough effort to make the bit of the textbook you are reading interesting enough. In which case, search out another textbook that covers the same area but is more interesting. Or it may be that there's something on your mind that stops you focusing on what the textbook has to say. In which case, deal with the thing that's on your mind and then come back to the textbook. (Easier said than done in many cases, I know.)

That's all I have to say on going through textbooks. Reading cases is next . . .

Best wishes,

Nick

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15
Reading cases

Hi Jamie,

In this letter, I'm going to talk about one of the most important parts of a law student's legal education – reading and making sense of cases. Up until the twentieth century, most English law was case law – law that emerged from the concrete decisions of the courts. Out of thousands and thousands of cases, each presenting a set of facts and a question: 'What does the law say in this situation?', there emerged the body of rules and principles that is known as 'the common law'. The tidal wave of legislation in the twentieth century has reduced the importance of the common law, but large swathes of our law (especially administrative law and tort law) are still very much based on case law. So you will be expected to read cases and be able to discuss them in your legal essays and problem answers.

Taking notes on a concrete case

Let's start with a concrete case: *Century Insurance Co Ltd* v *Northern Ireland Road Transport Board*. I'm sending you a copy of the report of the case in 1942 Appeal Cases.[1] Don't worry about what 'Appeal Cases' means – I think I'll write you another letter about the whole history of law reporting, so that you can make sense of all the different sets of law reports. For the time being, let's just say that the 'Appeal Cases' (or 'AC' for short) report cases decided by the highest court in the UK legal system – previously the Judicial Committee of the House of Lords (or 'House of Lords' for short), and now the UK Supreme Court. So *Century Insurance* is a case decided by the House of Lords.

[1]See Appendix B.

Now – if you were making a note on this case, you would start at the top of the page with the names of the parties, the citation of the case, and the court that decided the case. So –

Century Insurance v Northern Ireland Road Transport Board [1942] AC 509 HL

(Again, don't worry about why the year is written down as [1942], with square brackets, rather than (1942), with round brackets – I'll tell you about that in the next letter as well.) The next thing we want to make a note of is the facts of the case. Now – two points in particular need to be borne in mind in summarising the facts of the case.

First, we are NOT AT ALL interested in who the 'appellants' and 'respondents' in the case were. Technically, the 'appellant' is the person who lost in the court below and is now appealing against that decision. The 'respondent' is the person who is responding to the appeal, and hoping that the court will uphold the decision of the court below. But the technicalities of who was appealing and who was responding to the appeal are completely irrelevant to us. So your summary of the case MUST NOT make any reference to 'appellant' and 'respondent'. If you use those terms, you won't have a clue who you are actually talking about. What matters for our purposes is who is bringing the action (a claim for damages, a criminal prosecution, an application for judicial review) and who the action is being brought against. And ideally, we'd like to put actual names to those people as a summary of the facts is easier to write and easier to remember if we can put a name to the people involved.

Secondly, the headnote to the case will normally provide you with a good starting point for your summary of the case. If you turn to your copy of the report in the *Century Insurance* case, the headnote is the summary of what happened in the case and what was decided that is on the first page of the case (page 509). The headnote starts 'Under a contract with a petroleum company . . .' and ends '. . . entitled to be indemnified under the policy.' But you must not just copy out the headnote's summary of the facts of the case and adopt that summary as your own. The headnote will normally tell you enough about what happened in the case for you to produce a summary of the facts of the case, but the headnote's summary of the facts will probably be too long and overcomplicated for your purposes. You need to produce a summary of the bare essentials of the case.

As it happens, the headnote of the *Century Insurance* case isn't that great at making it clear what exactly happened in the case. We start off with a

'transport undertaking' which entered into a contract with a 'petroleum company' to deliver the petrol company's petrol in the transport undertaking's lorries. I'm already getting a bit irritated with the lack of names here, so let's just try to see if we can put some names to some people here. For that we need to skip forward to the judgments for a more detailed account of the facts. As it happens, that more detailed account is set out on the very next two pages – pages 509–10 – but that starts unhelpfully by talking about 'The respondents' being 'insured by the appellant company'; and no names. So we need to go back to the first page and look at the title of the case to see who the appellant and respondents were – and we see that Century Insurance were the appellants and Northern Ireland Road Transport Board were the respondents. The Northern Ireland Road Transport Board must be the 'transport undertaking' but what's the name of the petrol company? Going back to page 509 we eventually find a reference to 'a consignment of three hundred gallons of petrol at the Larne depot of Holmes, Mullin & Dunn Ld.' That must be the petrol company. So – 'The Northern Ireland Road Transport Board entered into a contract with a petrol company, HMD, to deliver HMD's petrol in its lorries.' Fine. So what happened next? Back to the headnote to find out. According to the headnote, the Transport Board (for short) undertook to do various things for the petrol company – but we know now that the petrol company isn't involved in the case, so that might not be worth making a note of. Okay. So what happened next? This is what the headnote says –

> While one of the lorries belonging to the undertaking, in respect of which a policy had been issued by an insurance company against liability to third parties arising from damage to property caused by its use by the undertaking, was being used to deliver petrol at a garage in accordance with the agreement, the driver, while transferring petrol from the lorry to an underground tank, struck a match to light a cigarette and threw it on the floor, causing a conflagration and an explosion.

Okay – how could we sum this up? We know the 'undertaking' is the Transport Board. The 'insurance company' is almost certainly Century Insurance. So: 'Century issued an insurance policy to the Transport Board (TB) under which it would cover any liabilities incurred by TB to third

parties arising from damage to property caused by . . .' Hmm . . . the next bit of the headnote says 'its use by the undertaking'. What does the 'its' refer to? Looking at the sentence 'its' seems to refer to 'one of the lorries belonging to the undertaking.' So: 'Century issued an insurance policy to the Transport Board (TB) under which it would cover any liabilities incurred by TB to third parties arising from damage to property caused by TB's use of its lorries. When one of TB's lorries was being used to deliver petrol to a garage, the driver – while transferring the petrol from the lorry to the garage's tanks – struck a match to light a cigarette, threw it on the floor, and caused an explosion.' Fine – and then what happened? The headnote says:

> Claims in respect of consequent damage having been made against the undertaking, the insurance company contended that they did not fall within the scope of the policy.

Putting this in another, less abrupt, way: 'TB was sued for the damage caused by the explosion. It sought to claim on its insurance policy, but Century said it wasn't liable under the terms of the policy.' But this isn't completely satisfactory as a summary of the facts. We don't know *why* Century said it wasn't liable. To find that out, we again need to flip over the page to the more detailed statement of the facts in Viscount Simon's judgment, and look through it for something that will tell us why Century thought they weren't liable under their insurance policy with the Transport Board. And at the bottom of page 510, we find that:

> One of the grounds on which the appellants resisted the claim of the respondents under the policy was that, in view of the terms of an agreement of October 11, 1934, between the respondents' predecessors, the Irish Road Transport Co., Ld., whose undertaking they acquired on April 30, 1937, and Messrs/Holmes, Mullin & Dunn, Ld., the liability for the damage did not rest on the respondents.

Ignoring all the stuff about the Irish Road Transport Co, which doesn't seem relevant at all, the important thing to take away from this is that Century said they weren't liable under their insurance policy with the Transport Board

because the *Transport Board* wasn't liable for the damage caused by the explosion. So: 'TB was sued for the damage caused by the explosion. It sought to claim on its insurance policy, but Century said it wasn't liable under the terms of the policy because TB wasn't liable for the damage caused by the explosion.' Putting all this together, here's our summary of the facts:

> The Northern Ireland Road Transport Board entered into a contract with a petrol company (HMD) to deliver HMD's petrol in its lorries. Century issued an insurance policy to the Transport Board (TB) under which it would cover any liabilities to third parties incurred by TB arising from damage to property caused by TB's use of its lorries. When one of TB's lorries was being used to deliver petrol to a garage, the driver – while transferring the petrol from the lorry to the garage's tanks – struck a match to light a cigarette, threw it on the floor, and caused an explosion. TB was sued for the damage caused by the explosion. It sought to claim on its insurance policy, but Century said it wasn't liable under the terms of the policy because TB wasn't liable for the damage caused by the explosion.

Now – if you compare this summary with the summary of the facts in the headnote, I think you'll agree that our summary is much clearer and more straightforward. And all the work we have done trying to get the facts clear in our head will be helping get those facts into our head for the long term, so that we'll never forget what happened in the *Century Insurance* case. (This is one of the reasons why it's good to read cases in their original reports rather than packaged up in a cases and materials book – sometimes it's not good for you to have someone else do all the hard work for you. Having said that, there are some cases where the facts are so hard to make sense of that you'll need some help from academic authors to get an idea of what actually happened in the case.)

So now we have the facts straight, let's pause for a second and think – what do we think the result should have been? The whole case turns on whether the Transport Board was liable for the damage caused by the explosion that happened when one of its drivers, who was delivering HMD's petrol to a garage, lit a cigarette and threw the match away. Thinking about this is helpful for three reasons. First, doing this sort of thing helps educate your legal instincts – it gets you thinking like a lawyer instead of just being a

passive recipient of legal information. Secondly, it helps you test the legal knowledge you have picked up so far from your textbook reading – can you remember enough to make an educated guess as to what the outcome of the case would have been? Thirdly, it gives you 'some skin in the game' (as the saying goes): if you have already taken a side in the case, it makes the judgments much more interesting to read and get through.

So – we've got our facts straight and we've had a think about what the outcome of the case should have been. The next job is to make a note of what the outcome actually was. Again, the headnote will tell us this, in the bit of the headnote which comes after '*Held*'. There it tells us that the House of Lords found that Century was liable under its insurance policy with the Transport Board: the Transport Board was liable for the damage caused by its driver because (1) he was employed by them at the time of the explosion and (2) he was acting in the course of his employment when he carelessly caused the explosion.

Now that we have noted the outcome of the case, we can turn to the judgments. When we go through the judgments, we are looking for *added value*. We are looking for anything in the judgments that adds something of value to what we already know about the case. So, for example, we are not looking for bare statements that the employee in *Century Insurance* was acting in the course of his employment when he lit his cigarette and threw his match away. We already know that. We are looking for explanations as to *why* the court held that he was acting in the course of his employment when he did this.

So – we skip past pages 510 and 511, as they just deal with the facts of the case, and we already have those straight. We move past page 513, as that contains the barristers' arguments in the case, and we're not really interested in those. We just want to get onto the judgments – and they start with Viscount Simon's on page 514. So let's start noting that. As we go through the judgment, we are looking for statements of principle or observations about the law. We are not really interested in quotations from other cases – we want to know what the judges said in *this* case. So whenever you see a judge quoting from another case, you can skip past that bit of the judgment. Don't feel bad about not reading it. It's an essential skill for getting through cases quickly – the ability to skip the bits you don't need to know about and focus on the really important parts. It's a skill that students take time to develop, which is why they are so slow in reading cases initially. But once you get the hang of it, you can get through a serious number of cases in a day. (And, of course, if you never read cases you will remain for the rest of your life a real slowcoach in reading cases – not a great thing to be if you are a practising lawyer who needs to master a lot of legal information very quickly.) What I want you to do is to set aside this letter and

just look at Viscount Simon's judgment and make some notes on the judgment. Then come back here, and look at my summary. Just to make sure you don't look at mine before you've done yours, here's a picture of Viscount Simon to provide a break in the text before I launch into my summary of his judgment. Now – go away and only come back when you have done your summary.

Source: © Alamy Stock Photo/LOC

Okay – here's my summary:

Viscount Simon

First issue (who was driver employed by?):

> M can be generally employed by X but because of arrangements between X and T, M can at the time he was careless be held to have been T's employee, so as to make T liable for M's carelessness.
>
> Test for whether X or T was employer at time M acted depends on who had power to control what M did.

>

→ Employee in this case was under Transport Board's control: never lent their lorries and drivers to HMD.

Second issue (was driver acting in course of employment?):

driver's duty to watch petrol as it flowed from lorry into tank, and it was while he was watching that he lit cigarette

– so was acting in course of employment: plainly negligent in discharging duties he was employed to perform.

And that's it. How did you do? If your summary is quite a bit longer, don't worry about it. As I said, it takes time and practice to learn how to note cases properly. Just by trying to make a summary of Viscount Simon's judgment, you are taking a first step down that road towards becoming an expert on noting cases.

In looking at my summary, I want you to observe in particular how I've noted Viscount Simon's judgment. My notes are written in an abbreviated style, with no attempt to write in full grammatical sentences. And they are presented in a broken up form with dashes and arrows to indicate the chain of reasoning. While we are not particularly looking for a fun or interesting way of making notes on cases, we are looking to ensure that our notes are easy to follow and take in at a glance. So avoid big chunky paragraphs of text – break the text up so that the eye can slip over your note like a skier slaloming down a mountain.

Having noted Viscount Simon's judgment, you can move on to the following judgments and note them as well. But remember that you are always looking for *added value*: so if a judge says essentially the same thing as a judge whose judgment you have already noted, then there's no point in making notes of the second judge's decision. It doesn't add anything to what has already been said. There's actually only one more substantive judgment in this case (from Lord Wright), and it doesn't seem to add very much to Viscount Simon's judgment. There is one passage that looks like it might add something, on the issue of whether the Transport Board's driver was acting in the course of his employment when he lit his cigarette and threw his match away. The passage goes as follows:

> The duty of the workman to his employer is so to conduct himself in doing his work as not negligently to cause damage either to the employer himself or his property or to third persons or their property, and thus to

impose the same liability on the employer as if he had been doing the work himself and committed the negligent act. This may seem too obvious as a matter of common sense to require either argument or authority. I think what plausibility the contrary argument might seem to possess results from treating the act of lighting the cigarette in abstraction from the circumstances as a separate act. This was the line taken by the majority judgment in *Williams* v. *Jones* (2), but Mellor and Blackburn JJ. dissented, rightly as I think. I agree also with the decision of the Court of Appeal in *Jefferson* v. *Derbyshire Farmers, Ld.* (3), which is in substance on the facts indistinguishable from the present case.

But in fact it's very hard to see what point is being made here. Remember the iron rule of lawyering that I talked about in my second letter to you – *express yourself clearly or die.* Here Lord Wright has not expressed himself clearly, so his judgment must die and remain unnoted by us.

So let's put the whole case note together and see what it looks like:

Century Insurance v Northern Ireland Road Transport Board [1942] AC 509 HL

The Northern Ireland Road Transport Board entered into a contract with a petrol company (HMD) to deliver HMD's petrol in its lorries. Century issued an insurance policy to the Transport Board (TB) under which it would cover any liabilities to third parties incurred by TB arising from damage to property caused by TB's use of its lorries. When one of TB's lorries was being used to deliver petrol to a garage, the driver – while transferring the petrol from the lorry to the garage's tanks – struck a match to light a cigarette, threw it on the floor, and caused an explosion. TB was sued for the damage caused by the explosion. It sought to claim on its insurance policy, but Century said it wasn't liable under the terms of the policy because TB wasn't liable for the damage caused by the explosion.

The House of Lords found that Century was liable under its insurance policy with the Transport Board: the Transport Board was liable for the damage caused by its driver because (1) he was employed by them at the time of the explosion and (2) he was acting in the course of his employment when he carelessly caused the explosion.

>

Viscount Simon

First issue (who was driver employed by?):

M can be generally employed by X but because of arrangements between X and T, M can at the time he was careless be held to have been T's employee, so as to make T liable for M's carelessness.

Test for whether X or T was employer at time M acted depends on who had power to control what M did.

→ Employee in this case was under Transport Board's control: never lent their lorries and drivers to HMD.

Second issue (was driver acting in course of employment?):

driver's duty to watch petrol as it flowed from lorry into tank, and it was while he was watching that he lit cigarette

– so was acting in course of employment: plainly negligent in discharging duties he was employed to perform.

With that note in your files, you'll never have to look at the case again.

Casenotes

Casenotes are different from your case notes; in other words, your notes on the cases you have been told to read. Casenotes, as I explained in my letter giving some general tips on studying law, are summaries and comments on cases – usually written by academics for journals such as the *Law Quarterly Review* and the *Cambridge Law Journal*. Casenotes are hugely useful. They can provide you with a handy summary of the facts of a very complex and convoluted case. They also provide you with a bit of critical perspective on a case, which it can often be difficult for a student to achieve on their own. And at a time when, frankly, a lot of judges write in such a boring and prolix way, they can provide with you with a short cut to understanding what exactly were the key points of the judgments in the case. So I would strongly recommend that you get used to reading casenotes, particularly on the most important cases on your reading list that are the most likely to be relevant to essay questions in the exam paper.

So how do you find a casenote on a case? Suppose you are looking for casenotes on the case I mentioned in my very first letter to you – *A* v *Secretary of*

State for the Home Department (the 'Belmarsh case'). How you find some casenotes on that case depends on whether you have access to Westlaw or not. If you have access to Westlaw, then go to Westlaw's home page, click on 'Cases' and type in 'A v Secretary of State for the Home Department' in the box for 'Party names'. That name is pretty generic, so you might also want to type 'Belmarsh' into the 'Free text' box so as to help narrow the search down. Press 'Search' and Westlaw will then bring up the details of quite a few cases where *A* v *Secretary of State for the Home Department* matches your search.

You'll know from your textbook that the case was reported in 2005, so you should scroll down the list of cases, looking for cases decided in 2004–5 (with some reports of cases, they come out a year after the case was actually decided), with the right name and the right sort of keyword headings underneath the name. Eventually you'll find the case – it's number 39 on the list that Westlaw has brought up for me. Click on the 'Case analysis' link underneath the name of the case, and then in the left-hand menu click on 'Journal Articles'. This will bring up a list of all the journal articles that deal with *A* v *Secretary of State for the Home Department*. Only a few of these will be the casenotes we want. Casenotes are written very shortly after a case has been decided. So we want to scroll down the list of journal articles until we get to some that have been written in 2004–5, and we are looking in particular for short articles (two to four pages) written in the *Law Quarterly Review* ('LQR' for short) and the *Cambridge Law Journal* ('CLJ') – they are our primary source of casenotes.

After a bit of scrolling we eventually find a journal article entitled 'Proportionality and discrimination in anti-terror legislation' which has the citation 'C.L.J. 2005, 64(2), 271–3' and an article entitled 'Rights brought home?' which has the citation 'L.Q.R. 2005, 121(Jul), 359–364'. The briefness of both of these articles makes us hopeful that these are the casenotes we want. Click on each of these links and you will be taken to a page with a brief outline of what the article says. Click on the link under the author's name, and you will be taken to the complete article, which you can download onto your computer by clicking on the little envelope at the top right-hand corner of the screen. (Not all journal articles mentioned on Westlaw are available online through Westlaw, but articles in the CLJ and LQR are.) With those two notes safely downloaded onto your computer, you can explore the other journal articles to see whether any of the other articles published around 2004–5 contain useful casenotes. Journals particularly worth looking out for are the *Oxford Journal of Legal Studies* ('OJLS', for short) (though that tends not to be publish casenotes), the *Modern Law Review*

('MLR'), *Public Law* ('PL') (specialising in the area of law dealt with in the Belmarsh case – control of government action), and the *Conveyancer and Property Lawyer* ('Conv') (useful for casenotes on land law or trusts law). But don't spend too long doing this – it's easy to get lost in a blizzard of journal articles, and to start fooling yourself that you are actually achieving something by looking through these articles and downloading them to your computer when you haven't actually started reading any of them. (The philosopher Arthur Schopenhauer once observed that many people mistake the act of buying a book for actually reading it, and the same could be said of the act of downloading an article.)

If you don't have access to Westlaw, you'll have to do a physical search of the journals in your university law library, again focusing on the *Law Quarterly Review* and the *Cambridge Law Journal* before having a look through other journals. Pick out the volumes for 2004 and 2005 and simply look at the 'Table of cases' at the front of these journals to see where the case you are looking for is mentioned. But make sure you don't end up reading a casenote on the wrong court's decision – you want to find casenotes on the House of Lords' decision in the Belmarsh case, not the Court of Appeal's!

Now – a few words of caution. First, you won't be able to find casenotes on every case you are told to read. Casenotes on cases decided before (say) 1980 and cases decided very recently are thin on the ground. If you want to get any critical commentary on pre-1980 cases, you have to look at the textbooks and proper full-length journal articles. To see what a textbook has to say about a particular case, just look in the 'Table of cases' at the front to see where the textbook deals with that case. To see whether there are any full-length journal articles dealing with the case you are interested in, Westlaw is again the best place to search – though it is very important, again, that you place a strict time limit on how long you search for articles on a case. Critical commentary on very recent cases will be hard to come by. The best way of seeing if there is anything 'out there' on a particular case that has just been decided is to do a Google search for it. Occasionally, barristers' chambers or academics will rush out a blog entry on a case that has just come out. A lot of legal publishers now run 'update websites' to accompany the textbooks that they publish and those websites might be worth looking at for comments on recent cases. So, for example, the website that accompanies my tort book (www.mylawchamber.co.uk/mcbride) contains twice-yearly updates on recent tort cases.

Secondly, as I said earlier, casenotes tend to be written very quickly after a decision in a particular case has been handed down, and they also – by

convention – tend to be quite short. Neither of these things exactly helps academics produce intelligent commentary on the cases they are writing about. (Though they can generally be relied on to summarise the case well.) So don't believe everything you read in a casenote, and try to get a balance of views by reading more than one casenote on a particular case.

Further tips

Here are four more tips on reading cases:

(1) Dissents

Students often ask whether they should take notes on dissenting judgments in cases – that is, judgments where the judge disagrees with his or her colleagues who are deciding the case (and who are in the majority) as to what the outcome of the case should be. I think it depends. If you are reading a recent-ish case – say, one decided after 2000 – then I think it's important to read any dissenting judgments, so as to help you see how the case could have been decided and help you get some sort of critical perspective on the majority's decision. If the case is older than that, then I think it's only important to read the dissent if: (1) the textbooks make it clear the dissent is important; or (2) the judge who is dissenting is always worth reading (Reid, Diplock, Denning, Hoffmann, Bingham, Brown, Sedley are the only post-1945 judges who come to mind as being good value for money whatever case they are deciding).

(2) Remembering cases

Students often find it a challenge to remember cases. Cases are a lot like small, shiny beads. If I told you to hold out your hand and I poured 50 such beads into it, it's doubtful whether you'd be able to keep hold of more than 10 of them. All the rest would simply bounce out of your hand and fall onto the floor. But if I ran a string through 50 beads and tied the two ends of the string together, you'd have no problem keeping hold of all of the beads in one hand. In fact, all you'd have to do is hold one of the beads, and all the rest would be under your control.

Cases are the same. If you try and remember them individually, the likelihood is that you'll only remember one-fifth of them. But string them together and you won't forget a single case. So how do you string cases together? Well, what you've got to do is come up with a story that helps explain why the cases

were decided the way they were. Say you've got 15 cases to remember and those cases were decided over 40 years. There are a number of different stories that you could tell to try to link these cases together.

You could try to find some basic principle which explains the outcome of the cases. If you can, then you've got a story that can link all of your cases – even the ones that don't give effect to the principle in question. You could say, 'Almost all of these cases give effect to the following principle . . . For example, in case A . . . Similarly, in case B . . . This is also true of case C . . . However in cases X, Y, and Z the courts chose not to give effect to this principle. For example, had the courts given effect to this principle in case X, we would have expected them to find in favour of . . . But they didn't . . . Similarly, in case Y . . .'

A more radical version of the same story would identify a fundamental conflict in the law – with roughly half of your 15 cases giving effect to one principle and the other half giving effect to a completely different and opposed principle. A 'battle of the cases' story line can prove very effective at helping you to remember a large number of cases because battles are always interesting and therefore memorable. But don't invent battles where none exist – the story that you come up with to link your cases must actually work. Otherwise the story will have no plausibility and will be extremely hard to remember – just as it's hard to remember the details of a crazy dream where all sorts of people were acting in odd ways.

Alternatively, you could try to find some *political links* between the cases – seeing them as reflecting various basic political views: either *libertarian* (the only thing the State should do is to protect us from being harmed by other people) or *utilitarian* (the State should take steps to maximise the net welfare or happiness that exists in society as a whole) or *right-wing liberalism* (the State should generally act to maximise everyone's freedom to live their lives as they want) or *left-wing liberalism* (the State should generally act to minimise inequalities of income and opportunity in society) or *perfectionism* (the State should encourage people to live morally worthwhile lives) or *communitarianism* (the State should protect, elaborate, and give effect to the shared understandings, practices and traditions that are essential features of our community).

A third possible story line is to link your 15 cases to one 'master' case, which all your 15 cases have 'descended' from. For example, a very effective story line that would link your 15 cases together might go: 'In *Roe* v *Doe*, the House of Lords decided that . . . Applying this decision has created huge problems for the courts ever since. In case A, the courts applied *Roe* v *Doe* to

find . . . But in the very similar case B, the courts came to a very different conclusion, holding that . . .' and so on.

So – if you want to remember lots of cases, remember them in *groups*, where each group of cases is linked by a story that helps explain why they were decided the way they were. (This is why it's so important to ask the third of the seven questions that you should ask yourself whenever you are reading a case – Where does this case fit in?) Remembering cases in this way will not only work wonders for your ability to recall cases in the end of year exams – but it will also, of course, help deepen your understanding of, and interest in, the law. Which is all to the good.

And of course, don't miss out on any opportunity to use cases. Talk about them with your fellow lawyers. Participate in moots where you will be called upon to use cases. Write as many essays and problem answers as you can – even if no one else ever sees them. Take advantage of any chance you get to talk about or write about cases you have studied. The more you use cases, the more deeply they will penetrate into your memory.

(3) Casebooks/cases and materials books

Generally speaking, I'm not a fan of casebooks or books that gather together a lot of 'cases and materials'. They are useful when you don't have ready access to a law library, but I don't think that even as huge as they generally are, they cover as much material as you would want to be familiar with for the exams, and I do think it's more helpful to your long-term memory of the cases not to be presented with them on a plate. The acts involved in: (1) settling down to try to make sense of the facts of the case, (2) finding out what the case decided, (3) trying to figure out why the judges decided the case they did, (4) determining which bits of the case you are going to make a note on, and which can be safely ignored – all these things help get the case into your memory, and help you start thinking about it and using it.

(4) Ratio decidendi

If you've read any introductory books on studying law, you may have been expecting me to give you some advice in this letter on how you discover the *ratio decidendi* of a case. (Just in case you haven't read any introductory books on studying law, the *ratio decidendi* – or *ratio* for short – of a case is the rule of law that underlay the decision in that case.)

In practical terms, the only time you'll ever have to worry about finding the *ratio* of a case is after you've left university and you've started practising

law. If you are arguing a case in court, you may well be called upon to discuss what the *ratio* of a case was. For example, suppose there is a *dictum* in a previously decided case that is unhelpful to your argument. If you can establish that the *dictum* was *obiter* – that is, not essential to the outcome of the case (in other words, not part of the *ratio* of the case) – then you can invite the court deciding your case to disregard that *dictum*. Alternatively, suppose there is a *dictum* in a previously decided case that is very helpful to your argument. In that situation, you will want to establish that that *dictum* was part of the *ratio* of the case – with the result that the court before which you are arguing your case may be bound to apply it.

But as a law student, you'll never have to spend time determining what the *ratio* of a case was. You obviously need to know what the judges' reasons were for deciding a case in a particular way, but you don't need to know how to take the further step of determining from those reasons what we can say was *the* reason for the decision. So I'm not going to waste your time (and mine) discussing such things as how you determine what the *ratio* of a case was when three judges all decided the case in the same way but they all gave different reasons for their decision. Instead, I'll finish now and write to you in a few days about the different kinds of reports that we find cases in. This is pretty important for you to know – it'll help you to make sense of the systems for citing cases that lawyers use.

All best wishes,

Nick

16
A brief history of law reporting

Dear Jamie,

I thought it might be quite useful for me to give you a very quick history of how cases have been reported in this country, so as to help you make sense of the system for citing cases that lawyers use.

The Law Reporters

For our purposes, we can begin with the Law Reporters – brave souls who would sit in the various courts and write reports of the decisions in the cases they were listening to. These reports would be put together into volumes published under the name of the reporter or reporters who had composed them. You can find lists of the names of these reports on Wikipedia (search for 'Nominate reports') or by going to http://www.commonlii.org/uk/cases/EngR/.

If you scroll down the list of names of reports, you'll come to Ellis, Blackburn and Ellis' Queen's Bench Reports and Ellis and Blackburn's Queen's Bench Reports. The 'Blackburn' in the title was Colin Blackburn (1813–1896), who was eventually made a judge – and became one of the most distinguished judges in English legal history. It was Blackburn J who in 1866 formulated the 'rule in *Rylands* v *Fletcher*' that I've had occasion to mention before, and who made seminal contributions to the shaping of the English law of contract in cases like *Taylor* v *Caldwell* (1863), *Smith* v *Hughes* (1871), *Hughes* v *Metropolitan Ry Co* (1877), and *Foakes* v *Beer* (1884).

Blackburn may have owed his appointment as a judge to the esteem in which the reports that he wrote with Thomas Ellis were held. Not all such reports, or their reporters, enjoyed such a great reputation. The reports written by Isaac Espinasse (1758–1834) were generally regarded as not wholly

reliable: in *Small* v *Nairne* (1849), Lord Denman CJ said that 'Espinasse's Reports . . . were never quoted without doubt or hesitation'. This may have been due to the fact that he was very deaf: the great English lawyer Frederick Pollock joked that Espinasse only heard half of what was said in court, and he reported the other half. An example of this is provided by Espinasse's report of the decision in *Stilk* v *Myrick* (1809), on whether seamen who had been promised a bonus if they – as they were already contractually obliged to do – sailed a ship back to its home port, could sue for the bonus. Espinasse's report can be found in the sixth volume of his reports, on page 129: so 6 Esp 129. If you compare Espinasse's report with the report published by John Campbell, on page 317 of the sixth volume of *his* set of reports – so 6 Camp 317 – you will see that their account of the reasons for the court's decision to turn the seamen's claim down were very different. Espinasse has Lord Ellenborough saying that 'public policy' demanded that the seamen's claim be turned down. Campbell has Lord Ellenborough saying that the seamen's claim should be turned down because they had not given anything in return (a consideration) for the promise to pay them the bonus if they got the ship safely home. Campbell's report is regarded as more accurate; even though Espinasse was actually the lawyer for the seamen in the case. (The lawyer for the defendant was William Garrow, whose name and criminal practice has been used as the basis of the BBC series *Garrow's Law*.)

All the reports produced by the Law Reporters were eventually put together into one set of English Reports (or 'E.R.', for short). So the sixth volume of Espinasse's reports, and the sixth volume of Campbell's reports, can both be found in the 170th volume of the English Reports. This gives us two alternative citations for the case of *Stilk* v *Myrick*, depending on whether you are referring to the report of the case by Espinasse, or the report by Campbell:

Stilk v *Meyrick* (1809) 6 Esp 129, 170 ER 851

Stilk v *Myrick* (1809) 2 Camp 317, 170 ER 1168

You'll see that Espinasse and Campbell couldn't even agree on how to spell the name of the defendant; again Campbell has prevailed on this point.

All of the cases that are in the English Reports are now available online. Simply go to: www.commonlii.org/uk/cases/EngR/ and start searching for whatever case you want. So if you click on 'S' (under 'Decisions beginning with . . .') and scroll down for long enough, you will eventually come to the two alternative versions of the decision in *Stilk* v *Myrick*. Click on the name of

a case and you will be taken to a copy of the report, which you can then download onto your computer by right-clicking on the report and selecting 'Save as . . .'

The Official Law Reports

The Law Reporters operated from the thirteenth century until the middle of the nineteenth century – that's why there are so many volumes of the English Reports. But by the middle of the nineteenth century, the powers that be decided to formalise the process of law reporting in this country. The Incorporated Council of Law Reporting ('ICLR', for short) was founded in 1865, and started producing official reports of the most important decisions decided by the 'Superior and Appellate Courts in England and Wales'. These reports – known as the 'Official Law Reports' – are still the most authoritative and complete law reports that lawyers operating in England and Wales have access to. Each case in the Official Law Reports comes complete with a headnote, a summary account of the barristers' arguments in the case, and – of course – the judgments in the case.

The Official Law Reports are split into different series. The two most important that you need to know about are:

(1) The Appeal Cases Reports (or 'A.C.', for short). These contain reports of the decisions by the highest court in England and Wales – previously the House of Lords, but now the UK Supreme Court.

(2) The Queen's Bench or King's Bench Division Reports ('Queen's' or 'King's' depending on who is on the throne at the time) contain reports of important decisions of the Court of Appeal and selected first instance decisions (where one judge, sitting alone, hears a case for the first time). These are referred to as 'Q.B.' or 'K.B.' for short.

It took a little while for the ICLR to settle down on how it wanted to present its Official Law Reports. For example, contrast the way these two cases – both dealing with the issue of when A's consent to being injured by B will give B a defence to being criminally prosecuted for injuring A – are normally cited:

R v *Coney* (1882) LR 8 QBD 534

R v *Donovan* [1934] 2 KB 498

Both cases are in the same series of Official Law Reports – the Queen's Bench/King's Bench Division Reports – so what accounts for the difference in the way they are referred to?

Well, when the Official Law Reports were first starting, the ICLR decided that a volume of reports of cases decided in a particular year would be given a unique number. So the volume of QB reports for 1882 had the number 7; the same volume of reports for 1883 had the number 8; the same volume of reports for 1881 had the number 6. So with the start of every new year, the number on the volume of the reports of cases decided in that year would go up by 1. And because, at that time, each volume of reports had a unique identifying number, the year of the case was not so essential to identifying where the case was reported – and that's why the year in the citation for *R* v *Coney* is in round brackets. All you need to know is that *R* v *Coney* is on page 534 of the 8th volume of the Queen's Bench Division Reports, and you can find it.

But at some point, pretty early on, the ICLR realised that if they carried on giving each successive volume of official reports a unique identifying number, then by 1982, they would be on the 108th volume of Queen's Bench Reports – and the numbers for each volume would get unfeasibly large. So they scrapped that system and identified volumes of reports exclusively by the year in which they were issued. That's why the year in the citation for *R* v *Donovan* is in square brackets – you have to know the year of the volume in which that case is reported in order to locate the volume. The number '2' that comes after '[1934]' merely indicates that it is in the second volume of King's Bench Reports issued in 1934.

The All England Reports and the Weekly Law Reports

The next big development in law reporting was the publication of the All England Reports (or 'All E.R.', for short), from 1936 onwards. The problem with the Official Law Reports was that they were so good, they took some time to produce. A case will frequently only be reported in the Official Law Reports a year after it has actually been decided. The All England Reports – which were published on a commercial basis by Butterworths (now Butterworths LexisNexis) – were intended to give practising lawyers a quicker way of accessing reports of cases that had been recently decided. The reports came out every week – about ten cases per week – and because they did not include the barristers' arguments, the turnaround time between a case being

decided and its featuring in the All England Reports was much quicker than it was for the Official Law Reports. And because the All England Reports were reporting about ten cases per week, by the end of the year, they had reported on far more cases than a lawyer could find in the equivalent year's Official Law Reports. The sheer volume of cases being reported each year through the All England Reports meant that each year's reports had to be split at first into two volumes, and then three, and eventually four. But the cases were – just as with the Official Law Reports – identified just by the year in which they were reported, with a volume number after the year to identify which volume of All England Reports for that year the case could be found in. So, for example, *R* v *Brown* – another case which deals with the same point of law as *Coney* and *Donovan* – was reported in [1993] 2 All ER 75. This simply means the case is on page 75 of the second volume of the All England Reports issued in 1993.

The comprehensiveness and convenience of the All England Reports meant they were a big success, and the ICLR eventually decided it wanted a bit of Butterworths' action. So from 1953, it started to issue the Weekly Law Reports (WLR, for short), which operated in exactly the same way as the All England Reports. So in the Weekly Law Reports, *R* v *Brown* can be found in [1993] 2 WLR 556 (with it coming out in the Official Law Reports a year later in [1994] 1 AC 212). The fact that *R* v *Brown* came out in the second volume of the Weekly Law Reports for 1993 is of some significance. Because the ICLR publishes both the Official Law Reports and the Weekly Law Reports, it knows in advance which cases that it is publishing in the Weekly Law Reports will eventually also be published in the Official Law Reports. Cases which will eventually be coming out in the Official Law Reports – because they are so important they deserve the Rolls Royce treatment that the Official Law Reports provide – go into the second or third or fourth volumes of the Weekly Law Reports. Cases which are not going to be reported in the Official Law Reports – because, while noteworthy, they aren't regarded as that hugely important – go into the first volume of the Weekly Law Reports. So if you see a case cited as [2013] 1 WLR xxx, then you know that the ICLR does not regard that case as important enough to go into the Official Law Reports. But they occasionally get it wrong, with the result that they park a case that it is actually really important in the first volume of the Weekly Law Reports. An example would be the case of *Re Selectmove* [1995] 1 WLR 474, which is a major decision on when A will be contractually bound by a promise not to sue B for money that B owes A. However, most of the time they get it right, and they got it right with *R* v *Brown* – a major decision which was put in the second volume of the Weekly Law Reports because it was also going to come out in the Official Law Reports.

I think it's fair to say that whatever competition existed between the Weekly Law Reports and the All England Reports has been decisively won by the Weekly Law Reports: 'the Weeklies' are far more popular and more regularly cited than the 'All Englands'. The reason is partly to do with comprehensiveness: the Weeklies seem to cover many more cases than the All Englands. And it's also partly to do with accessibility: you can access all the cases in the Weekly Law Reports (and in the Official Law Reports) on Westlaw; whereas for the All England Reports you need to use Butterworths' own (and not terribly user-friendly) website. However, occasionally there will be a case that turns out to be noteworthy that doesn't appear in the Weekly Law Reports, but does get into the All England Reports. So you do still need to be familiar with the All England Reports.

Specialist reports

The All England Reports and Weekly Law Reports report on a lot of cases decided in England and Wales; but only a fraction of the total number of cases decided in any one year. Reports of other cases not to be found in the Weeklies or the All Englands may be found in a series of reports that specialise in particular areas of law. Particularly important are the Lloyd's Law Reports (cited as [year] Lloyds Rep xxx), which specialise in reports on contract law, commercial law, and shipping law; and the Criminal Law Review (cited as [year] Criminal LR xxx), which does not carry full reports of any cases but does contain detailed summaries of, and comments on, a comprehensive range of cases dealing with criminal law and punishment. The Criminal Law Review is available online, on Westlaw, but the Lloyd's Law Reports are not unless your library has taken out a subscription to them. You won't need to worry about any other specialist law reports unless you are specifically referred to them.

Neutral citation

The advent of the internet – and the increasing availability of reports of decided cases on the internet – created a problem for law reporting in this country (as in other countries). How can you refer to the decision in a case where that decision has been published on the internet, which has no years and no page numbers? The solution was to invent a system of neutral citation, where every case was given a unique identifying citation, which referred to the year in which it was decided, the court, and when it was decided. This

system of neutral citation came into force from 2002 onwards. Since then, cases have been given citations like the following:

> [2004] UKHL 35 – which means the case was the 35th case decided by the House of Lords in 2004.
>
> [2011] UKSC 24 – the 24th case decided by the UK Supreme Court in 2011.
>
> [2010] EWCA Civ 135 – the 135th case on civil law or public law decided by the Court of Appeal in 2010.
>
> [2010] EWCA Crim 135 – the 135th case on criminal law decided by the Court of Appeal in 2010.
>
> [2011] EWHC 351 (QB) – the 351st case decided at first instance on an issue of civil or criminal law.
>
> [2011] EWHC 351 (Admin) – the 351st case decided at first instance on an issue of public law.

So now any case you come across in the Official Law Reports, or the Weekly Law Reports, or the All England Reports, will have an alternative, neutral citation. And the sheer volume of cases that are decided nowadays means that you may be referred to some cases that *only* have a neutral citation. This means that these cases have not been reported anywhere else. Fortunately, these cases will almost certainly be available online, on Westlaw. Less fortunately, when you download the reports of these cases, all you will get is a transcript of the decision in those cases – so you will need to figure out what happened in those cases and what was decided without the assistance of a helpful headnote.

I think I've said enough now to help you make sense of almost all references to cases that you will come across on reading lists, or in your reading. But just in case you get into any further difficulties, there is always the Cardiff Index to Legal Abbreviations (available at www.legalabbrevs.cardiff.ac.uk). If you come across an abbreviated reference to a set of law reports that mystifies you, you can always find out what the abbreviation means by using this very handy website.

All this talk of history has put it in my mind to send you a list of the Top 10 Figures in English Legal History – that's coming up next!

All best wishes,

Nick

Top 10 Figures in English Legal History

1. King Henry II (1133–1189)

Henry II introduced various reforms to centralise the administration of justice in England – for example, by creating the General Eyre, a panel of royal justices who would visit all the counties in England to hear both civil and criminal cases, and expanding the range of cases that would be heard by his own, exchequer, court. As a result, he is widely regarded as the father of the English common law. He also introduced reforms to the administration of criminal cases which laid the foundations for such cases to be decided by juries in later centuries. He attempted to shore up the security of land holdings in England by creating new writs (a form ordering a court to hear a particular case) – the writ of novel disseisin and the writ of mort d'ancestor – that enabled those who had been wrongfully dispossessed of land to recover their land. These writs laid the foundation for the centralised administration of a system of land law.

2. Sir Edward Coke (1552–1634)

Edward Coke (pronounced 'cook') was an immensely influential lawyer, judge, and politician who was responsible for many significant developments in English law. As a barrister, he successfully argued for the plaintiff in *Slade's Case* (1596–1602) that in a case where A owed B money, A shouldn't have to sue for the money by bringing an action in debt (which action would be defeated if B could find 11 friends to swear that B didn't owe the money) but could instead bring a claim in assumpsit, with A claiming 'B owed me money, and he promised (assumed) to pay it to me, and he should be made to keep his promise!' (which claim would only be defeated if B could convince the court

that he did not owe A the money). This development both modernised the administration of claims for debts in England, and allowed the law on when one person would owe another money to be rationally discussed and developed.

As a judge, Coke sought to assert the supremacy of law over the king and Parliament. In the *Case of Proclamations* (1610), he ruled that the king had no power (or 'prerogative') to change the law – that had to be done through Parliament. And in *Dr Bonham's Case* (1610), Coke suggested that 'in many cases, the common law will control Acts of Parliament, and sometimes ajudge them to be utterly void; for when an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and ajudge such an Act to be void'. This suggested limitation on the sovereignty of Parliament did not catch on in England, but was to prove influential in the United States, where it was ruled in *Marbury* v *Madison* (1803) that an Act of Congress would be invalid if it was unconstitutional – a ruling that eventually led to the US Supreme Court, and the process of nominating Justices to serve on the US Supreme Court, becoming deeply politicised. Coke clashed with the King's Chancellor, Ellesmere, arguing that Ellesmere, administering the king's 'Equity', should not be allowed to grant petitions that undermined rulings issued by the royal, common law, courts. King James I settled the dispute by ruling in 1616 that where Equity contradicted the common law, Equity should prevail; and Coke was dismissed as a judge.

Coke entered Parliament in 1620, and played a leading part in confrontations between Parliament and James I's successor, Charles I – establishing Parliamentary privilege (that MPs could not suffer any kind of legal sanction for what they said in Parliament) and drafting the Petition of Right (1628), which laid down the principles that no one could be forced to pay a tax that had not been created by an Act of Parliament, and no one could be imprisoned without legal cause. He died eight years before the outbreak of the English Civil War that he helped pave the way to, on the anti-monarchist side.

3. Lord Mansfield (1705–1793)

Having worked as a barrister and an MP, William Murray was made Lord Chief Justice in 1756 and was ennobled as Baron Mansfield. As Lord Chief Justice, Mansfield made a huge mark on English commercial law, frequently hearing cases with panels of merchants, to ensure that his decisions were informed by the commercial practice and opinion of the day. He was also

very active in reinforcing and extending the intellectual property rights of traders. His judgment in *Moses* v *Macferlan* (1760) – summing up the situations in which a claim for 'money had and received' (a species of the wider claim for 'indebitatus assumpsit' first allowed in *Slade's Case*) could be brought – is widely credited as laying the foundations of the modern law on when A can sue B for money on the basis that B has been *unjustly enriched* at A's expense. Not all of Mansfield's innovations caught on – an attempt in *Carter* v *Boehm* (1746) to suggest that contracting parties had duties to act in good faith towards each other ended up being limited to the facts of *Carter* v *Boehm* (an insurance contract); and his suggestion in *Pillans* v *Van Mierop* (1765) that a promise made in writing would be legally binding even if nothing (no consideration) were given in return for it was rejected by the House of Lords in *Rann* v *Hughes* (1778). Perhaps Lord Mansfield's most significant judgment was in *Somersett's Case* (1772), ruling that slavery was illegal in England and Wales, with the result that any slave who landed on English or Welsh soil was automatically free. The judgment paved the way to slavery being abolished in the British Empire in 1834.

4. William Blackstone (1723–1780)

Blackstone is the father of the academic study of law in England. He combined being a Fellow of All Souls (from 1743) with being a barrister (from 1746) and the combination of academia and life as a practising lawyer resulted in him becoming convinced of the need for someone to set out the law in an organised and principled fashion. Encouraged by Lord Mansfield in the view that he could be that 'someone', he quit the practice of law as a barrister in 1753 and started giving lectures on English law – lectures that resulted in his first publishing *An Analysis of the Laws of England* in 1756, and then his huge four volume *Commentaries on the Laws of England* from 1766 onwards. The University of Oxford appointed him the first Vinerian Professor in English Law in 1758. Blackstone's *Commentaries* had a huge impact wherever the common law was practised – not least in the English colonies in America. When the American colonies gained their independence, and formed themselves into the United States, in 1783, it was the influence of Blackstone's *Commentaries* on many of the Founding Fathers that led them to adopt the common law as the legal system of the United States even after throwing off every other vestige of English rule; and it was Blackstone's *Commentaries* that provided the basis for educating American lawyers (including Abraham Lincoln) for decades afterwards.

5. Lord Blackburn (1813–1896)

Colin Blackburn was a fairly undistinguished barrister who had made a name for himself as a legal author – both of a book on the sale of goods (1845) and a series of law reports, prepared by him and Thomas Ellis from 1852 to 1858. He was then unexpectedly appointed a judge by Lord Campbell in 1859. His appointment was greeted with a great deal of surprise, but Blackburn proved himself one of the most outstanding common law judges in English legal history – making huge contributions to the development of English law in cases such as *Taylor* v *Caldwell* (1863) (liberalising the law on when a contractor could escape the contract on the ground that a change in circumstances had made it impossible, or unduly onerous, for him to perform his contractual obligations), *Rylands* v *Fletcher* (1865) (setting out a rule making landowners strictly liable for harm resulting from using their land in dangerous ways), and *Smith* v *Hughes* (1871) (directing how cases where someone was unhappy with the quality of the goods they had bought should be dealt with). Blackburn was elevated to the House of Lords in 1876 as a 'Lord of Appeal in Ordinary', and he continued in that capacity to deliver judgments in landmark cases such as *Hughes* v *Metropolitan Railway Co* (1877) (granting relief to tenants who had been led to believe that a requirement that they repair the premises within six months had been waived while they negotiated over the landlord purchasing their leasehold interest) and *Foakes* v *Beer* (1884) (refusal to grant relief to a debtor who believed that a creditor, in agreeing to staged repayments of a sum owed, had agreed not to sue for interest on debt).

6. Albert Venn Dicey (1835–1922)

Dicey was a profoundly influential legal academic, whose discussions of Parliamentary sovereignty (arguing that 'The sovereignty of Parliament is (from a legal point of view) the dominant characteristic of our political institutions' and that 'The principle of Parliamentary sovereignty means . . . that Parliament . . . has, under the English constitution, the right to make or unmake any law whatever . . .) and the rule of law (identifying the 'rule of law' as having three distinct meanings: (1) that 'no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land'; (2) that 'no man is above the law [and] every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the

jurisdiction of the ordinary tribunals'; and (3) that these features of the constitution result from judicial decisions, and are not granted from on high by a written constitution) in his *Introduction to the Study of the Law of the Constitution* (1885) are still cited to this day by constitutional scholars as starting points for their own analyses of those concepts. Dicey was appointed Vinerian Professor in English Law three years before publishing his *Introduction*, and went on to publish a treatise on the *Conflict of Laws* in 1896 – a treatise which is now in its fifteenth edition (under the title of *Dicey, Morris & Collins on the Conflict of Laws*) and is still regarded as the most authoritative work in its field.

7. Frederick Pollock (1845–1937)

If Dicey dominated the field of public law (the law relating to the government and its powers), Pollock did the same in private law (the law governing the relationships between private individuals). Like Blackstone, lack of success at the bar drove Pollock to produce clear academic treatments of the law of contract (1876), the law of tort (1882), and land law (1883). He also produced more specialised works on the law of possession (1880), jurisprudence (1886), and the Indian Contract Act (1905). He was a lifelong friend of the legal historian Frederic William Maitland (a very strong contender for inclusion in this list), with whom he collaborated on a *History of English Law* (1895), though the vast majority of the work on that was done by Maitland. Pollock was also very close to the American jurist Oliver Wendell Holmes, and their letters to each over 60 years (1872–1932) were published in 1942. Pollock also created the *Law Quarterly Review* in 1885, a law journal which is still the most eminent in the UK over 130 years later. He was responsible for determining the presentation and content of the *Official Law Reports*, acting as editor-in-chief of the *Law Reports* from 1895 to 1935.

8. Lord Denning (1899–1999)

Lord Denning was the most influential English judge of the twentieth century. Appointed to the Bench in 1944, he retired as a judge 38 years later, at the age of 83. As a barrister, he helped to edit *Smith's Leading Cases* and was the last judge who could claim to have read every case on English law that had ever been decided. Drawing on this vast legal knowledge, he used his

position as a judge to make an imprint on virtually every area of English law one could think of – beginning with his decision in *Central London Property Trust Ltd* v *High Trees House* (1947) where, completely disregarding the arguments of counsel on either side, he resurrected the long neglected *Hughes* v *Metropolitan Ry Co* (see the entry for Lord Blackburn, above) to argue that 'promises intended to be binding, intended to be acted on, and in fact acted on' are binding 'in equity' so that the person making such a promise is not allowed to act inconsistently with it. Denning's eagerness to modernise the law and do justice in the particular case sometimes resulted in his adopting a cavalier attitude towards precedent (for example, Denning's judgment in the *High Trees* case seems inconsistent with *Foakes* v *Beer* (again, see the entry for Lord Blackburn, above) – Denning disposed of that case in *High Trees* by saying that equity's treatment of promises 'intended to be binding, intended to be acted on, and in fact acted on' was 'not considered in *Foakes* v *Beer*') – and earned him repeated rebukes from the House of Lords throughout his career. As a judge, Denning rose to the House of Lords in 1957, but five years later made the then unprecedented move down back into the Court of Appeal as Master of the Rolls; a move which allowed him a lot more control over what cases he heard (and gave him a much wider array of cases to choose from), and gave him much greater chances of not being in the minority in deciding particular cases. While having the reputation of being a non-conformist free thinker who was instinctively on the side of the 'little man' against companies and the State (see, for example, Denning's judgment in *George Mitchell* v *Finney Lock Seeds* (1982)), he could be very Victorian in his attitudes, routinely ruling against trades unions and what he regarded as immoral activities, while being very pro-police in his judgments (in particular, in dismissing the appeals of the wrongfully convicted Birmingham Six). These attitudes eventually forced him into retirement, but English law is still profoundly affected by the inheritance he left behind in the form of 38 years' worth of decisions.

9. HLA Hart (1907–1992)

Hart was the most influential legal philosopher of the twentieth century, and one whose impact will – like Denning's – reverberate long into the twenty-first. Having studied classics at Oxford, he became a barrister in 1932, and then worked with MI5 when war broke out. After the end of World War II, he became a Fellow in philosophy in Oxford, a position which then led to his

being appointed Professor of Jurisprudence at Oxford in 1952. Nine years later, he published *The Concept of Law*, a work which was intended to help the general public understand better the nature of law and, in particular, that there was nothing in the nature or definition of law that meant that people had a moral obligation to obey the law, and that certain tyrannical and oppressive countries had just as much claim to have a system of law as more benign and democratic countries like the UK and the USA. This *positivistic* view of law could be seen as both looking back to the experience of Nazi Germany – where an undue reverence for law made it too easy for the Nazi party to bend all arms of the German government to its ends – and as fitting in with the spirit of the times in the 1960s where all established forms of traditional authority (traditional morality, the church, the law, and the police) were coming under question. Hart's liberal spirit was also reflected in his debate with Lord Devlin over the need for the law to enforce 'conventional' morality (that is, the moral standards accepted at any one time – whether rightly or wrongly – by a society), where Hart's side of the debate (against the legal enforcement of conventional morality) took the form of his small book *Law, Liberty, and Morality* (1963) – a book which helped pave the way to the decriminalisation of private homosexual acts in 1967. Hart also wrote extensively on the criminal law, and on general issues of moral and political philosophy. Hart's influence is not only felt in the enduring relevance of his writings, but also the generation of brilliant legal philosophers he helped raise up and that succeeded him – in particular, Ronald Dworkin (1931–2013), Joseph Raz (b. 1939), and John Finnis (b. 1940), all of whom went on to write classic works of legal and political philosophy that may never have been written but for Hart's influence and example.

10. Sir Edward Heath MP (1916–2005)

Heath earns his place on the list simply by virtue of his role, as Prime Minister of the UK (1970–1974) in taking the UK (in 1972) into what was then the European Economic Community (EEC), and is now the European Union (EU). In 1960, the then Prime Minister, Harold Macmillan, appointed Heath as the lead negotiator to take the UK into the EEC. After three years of negotiations, the French President, Charles de Gaulle, vetoed the UK's membership of the EEC on the basis that the UK was simply too different a country to accept what membership of the EEC involved – the relative loss of national sovereignty. After de Gaulle's retirement in 1968 (and death in 1970), and

with Heath having unexpectedly won power in the 1970 general election, Heath tried again, this time successfully. The result was a complete transformation of the UK legal order, where power to decide what was law and what was not, and what was going to be law and what was not, shifted from the UK courts and Parliament to supra-national bodies. Notions such as 'Parliamentary sovereignty' or the 'rule of law' either became outmoded under the weight of the vast increase in the amount of law flooding the UK legal system from those supra-national bodies (cf Lord Denning's judgment in *Shields* v *E Coomes (Holdings) Ltd* (1978): 'the flowing tide of Community law is coming in fast. It has not stopped at high-water mark. It has broken the dykes and the banks. It has submerged the surrounding land. So much so that we have to learn to become amphibious if we wish to keep our heads above water') or needed to be drastically redefined to retain any relevance to UK law. It remains to be seen whether this revolution in the UK legal order can be undone in the wake of the UK referendum result in June 2016 in favour of leaving the EU.

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17
Making sense of statutes

Hey Jamie,

After two letters about caselaw, just one on reading statutes. Students usually find reading statutes extremely boring. Unlike cases, statutes tend to be very dry and technical. As a result, it is hard to work up any enthusiasm for reading a statute, and it's even harder to remember a statute once you've read it. I'm not going to pretend that I have any magic method for taking the pain out of reading statutes, but the approach below will inject a little bit of interest into the job of reading a statute, and make the job of remembering what that statute says a little bit easier.

The basic approach

Suppose you have been told to read a statute, or some sections from a statute. (You may not be familiar with the term 'section', so I'll briefly explain. Every Act of Parliament is made up of sections, or 's.' for short. A section in an Act of Parliament is usually divided up into sub-sections, where each sub-section is denoted by a number in brackets. So if you want to refer to sub-section 1 of section 1 of the Guard Dogs Act 1975, you would simply write 's.1(1) of the Guard Dogs Act 1975'.) Of course, you shouldn't just read the statute – you should also make some notes about the statute.

Now, in making notes on the statute, you shouldn't try to summarise what the statute *says*. There's a very good saying that 'You can't paraphrase a statute'. In other words, if you attempt to summarise what a statute says, your summary will always omit some crucial details. And if you attempt to avoid missing out any crucial details in making your summary, you will usually simply end up copying out the statute. And copying out the statute is the last thing you want to do. Copying out a statute is such a passive activity that you

will simply get bored, your brain will shut up shop and you won't take anything in of what the statute says.

So – how should you make notes on a statute? The answer is – by *thinking* about it while you are reading it. As you are going through a particular statute, ask yourself – 'Why was this statute enacted?' 'How does this statute apply in concrete situations?' 'Why does the statute go as far as it does?' 'Why doesn't the statute go further?' 'Is this statute in need of reform?' And make notes on anything that is relevant to those kinds of questions. Doing this sort of thing will help make going through a statute more interesting, help you to see what issues are raised by the statute, and help cement the details of the statute into your mind.

The approach applied

Let's now apply this approach by looking at the first five sections of the Theft Act 1968. We'll look at one section for each of the questions you should be thinking about in going through a statute.

(1) Why was the statute enacted?

Section 1(1) of the Theft Act 1968 (title: 'Basic definition of theft') provides that:

> A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it; and 'theft' and 'teal' shall be construed accordingly.

Why does the law criminalise the dishonest appropriation of property belonging to another when that property was appropriated with the intention of permanently depriving that other of it? Why doesn't the law simply allow the owner to sue for his or her property back – why does the criminal law have to get involved here at all? Use your textbook, your brain, any relevant articles you have read, and any relevant *dicta* in any relevant cases you have read to come up with some answers to these questions, and make notes of the answers in the appropriate place in your case file. No doubt the answers to these questions are pretty obvious. However, the important thing is that by asking these questions, you are thinking about s.1(1) of the Theft Act 1968 instead of just passively reading it.

(2) How does the statute apply in concrete situations?

Section 2 of the Theft Act 1968 (title: 'Dishonestly') provides that:

> (1) A person's appropriation of property belonging to another is not to be regarded as dishonest–
>
> (a) if he appropriates property in the belief that he has in law the right to deprive the other of it, on behalf of himself or of a third person; or
>
> (b) if he appropriates the property in the belief that he would have the other's consent if the other knew of the appropriation and the circumstances of it; or
>
> (c) (except where the property came to him as trustee or personal representative) if he appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps.
>
> (2) A person's appropriation of property belonging to another may be dishonest notwithstanding that he is willing to pay for the property.

In thinking about how the statute applies in concrete situations, you should come up with a number of different hypothetical scenarios, and see how the section applies in each of them. Try and think up the scenarios yourself and make them as memorable as possible by using the names of people you know about, preferably doing things that they would never do in real life. (These kinds of scenarios will stay longer in your memory than scenarios that might have been supplied to you by a textbook.) Here are some examples of scenarios you might come up with:

(1) Peter realises that a DVD in a shop has been wrongly priced as being for sale for £1.59, rather than £15.99 (which is what other identical DVDs are being sold for in the shop). He takes the DVD up to the counter and pays £1.59 for it.

(2) Hannah finds a wallet that has been dropped in the street by Siobhan. There is a £20 note in it. She hands the wallet in at a nearby police station but keeps the £20 note as a 'finder's fee'.

(3) Megan, a student living in college, makes a cake for everyone on her staircase using ingredients that she has found in the fridge that everyone on the staircase uses to keep their food in. None of the ingredients belong to her, but she figures that as everyone on the staircase is going to get to eat some of the cake, the rightful owner of the ingredients won't mind her using them.

(4) Hugh owes Beka £5 but is refusing to pay up. Beka takes one of Hugh's DVDs out of his room when he isn't looking and auctions it on eBay. Someone pays her £10 for the DVD. Beka keeps £5 and slips the remaining £5 into Hugh's wallet when he isn't looking.

(5) Maryam has read a textbook on 'Natural Law' which says that 'no law is valid if it is contrary to the will of God'. Believing that God desires all living creatures to be free, she releases Clare's parrot into the wild.

Having come up with some such scenarios, work out when s. 2 will apply to acquit someone of being dishonest in these scenarios – and when it won't. (To do this, make use of your textbooks, any relevant articles, your brain and – importantly – any cases that have helped clarify how s.2 of the Theft Act 1968 is to be applied.) In your notes, make a note of these scenarios, how s.2 will apply in those scenarios, and the reason it applies or does not apply in each of those scenarios.

It may be pretty obvious how s.2 will apply in the above scenarios. But the point of going through these scenarios isn't to anticipate potential problem questions that you might be asked in the exam – questions which will probably pose more tricky issues than the scenarios set out above. The point of going through these scenarios is to get a solid grasp of how s.2 of the Theft Act 1968 applies in concrete situations. This will help you to remember how s.2 works. This, in turn, will help you apply s.2 with confidence when you are faced with trickier problem questions about s.2 in the end of year exam.

(3) Why does the statute go as far as it does?

Section 3(1) of the Theft Act 1968 (title: 'Appropriates') provides that:

> Any assumption by a person of the rights of an owner amounts to an appropriation, and this includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as owner.

You will have discovered in the course of your reading that the case law seems to suggest that merely touching an item of property will amount to an 'appropriation' of an object. So think about why the definition of 'appropriation' goes that far (if it does). In other words, why should merely touching an item of property potentially amount to a criminal act? Or was s.3(1) never intended to have that effect – have the courts misinterpreted it?

Again, make notes on the answers to these questions using your textbooks, any relevant articles, any relevant *dicta* in any relevant cases, and your brain. Asking and answering these questions will help you to remember what s.3(1) says; deepen your understanding of, and interest in, s.3(1); put you in a good position to think about whether s.3(1) needs to be reformed; and put you in a great position to answer any essay questions that might be set on s.3(1) in the end of year exam.

(4) Why doesn't the statute go further than it does?

Section 4 of the Theft Act 1968 (title 'Property') provides that:

> (1) 'Property' includes money and all other property, real or personal, including things in action and other intangible property.
>
> (2) A person cannot steal land . . .
>
> (3) A person who picks mushrooms growing wild on any land, or who picks flowers, fruit or foliage from a plant growing wild on any land, does not (although not in possession of the land) steal what he picks, unless he does it for reward or for sale or for other commercial purposes.
>
> For purposes of this subsection 'mushroom' includes any fungus, and 'plant' includes any shrub or tree.
>
> (4) Wild creatures, tamed or untamed, shall be regarded as property; but a person cannot steal a wild creature not tamed nor ordinarily kept in captivity, or the [carcass] of any such creature, unless either it has been reduced into possession by or on behalf of another person and possession of it has not since been lost or abandoned, or another person is in the course of reducing it into possession.

In considering why the 1968 Act doesn't go further than it does, s.4 raises a host of questions related to that issue. Dead bodies don't normally count as 'property' – so why doesn't the law of theft cover someone's taking

away a dead body? Is it because there are already other areas of law that criminalise this sort of conduct? Information doesn't normally count as 'property' – so why doesn't the law of theft cover the situation where someone sneaks an advance peak at an exam paper, or gives out advance copies of an exam paper to his friends? Why can't someone steal land? (Note, however, that you can in certain situations – s.4(2) is quite long and to save space I have cut it down.) What would stealing land involve? Is this sort of conduct covered by some other area of the law? Why are you potentially guilty of theft if you pick wild mushrooms on someone else's land for reward but not if you pick them to deprive the owner of the land of the opportunity to pick them himself? Is doing something for reward worse than doing something out of malice?

The point of asking and trying to answer these kinds of questions should be obvious by now. Doing this will: help cement the details of s.4 into your memory; deepen your understanding of – and therefore interest in – s.4; put you in a good position to think about whether s.4 needs to be reformed; and put you in a great position to answer any essay question that you might be set on s.4.

(5) Is the statute in need of reform?

Section 5(1) of the Theft Act 1968 (title: 'Belonging to another') provides that:

> Property shall be regarded as belonging to any person having possession or control of it, or having in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest).

Your reading will have told you that s. 5(1) means that someone can be convicted of theft for stealing his own property. This happened in one case where a man left his car with a garage to be repaired, and after it had been repaired, he drove the car away without paying for the repairs. Because the garage had possession and control of the car at the time the car-owner drove the car away, the courts held that the car 'belonged' to the garage under s. 5(1) at the time it was driven away, with the result that the car's owner could be convicted of stealing it

The fact that you can be founded guilty of stealing your own property naturally prompts the question of whether the Theft Act 1968 is in need of

reform. Is it right that someone can be convicted of stealing his own property? Should the law of theft go beyond protecting the ownership of property and help protect people's possession of property? Asking these questions and trying to answer them (again, with the help of your textbooks, any relevant articles, any relevant *dicta* in any relevant cases, and any thoughts you yourself might have) will help deepen your understanding of – and therefore interest in – the law of theft as a whole and its functions and put you in a great position to answer essay questions either specifically on s.5 of the Theft Act 1968, or on the law of theft as a whole.

Three more points

So – that's the basic approach you should adopt in reading statutes (or statutory instruments, for that matter). I don't have any further tips for you on how you should approach the job of reading a statute. However, there are three more points that I want to make.

(1) Statute books and the exams

Almost all universities now allow their law students to take statute books into their exams so that they can consult them in the course of answering problem questions or writing essays. Given this, you may wonder if there is any point doing work which is geared to helping you to remember what particular statutes say. I think there is. The more time you spend in the exam looking through a statute book trying to find out what a particular statute says and trying to figure out how it applies, the less writing time you will have in the exam. You want to maximise the amount of writing time you have in your exams – so it is very important that by the time you do your exams, you have a good knowledge of all the statutes that you will need to know about for the exams.

(2) Only look at statutes that you are going to be examined on

While I normally encourage you to do more reading than you are actually asked to do by your teachers, this doesn't apply to statutes. There is no real point in knowing about a statute that isn't going to figure in the exam – so unless you have been told about or asked to read a particular statute, the chances are that it's not worth knowing about and you shouldn't bother looking it up.

(3) Statutory interpretation

Again, if you've read any introductory books on studying law, you may have been expecting me to say something in this section on various techniques that can be used to interpret statutes, such as the 'literal rule' (where words in a statute are interpreted according to their plain meaning) or the 'mischief rule' (where words in a statute are interpreted in light of the problem or evil that the statute was trying to address) or the 'golden rule' (where the courts try to avoid interpreting words in a statute in a fatuous or stupid way). Again, I'm not going to waste your time by talking about such things. If a particular word in a statute is ambiguous or needs to be interpreted, your textbooks will give you sufficient guidance as to how that word has and should be interpreted. You won't need to worry about what rule you should apply to interpret that word. This is something you may need to worry about if you are a practising lawyer advising people on how a new statute applies – but for the time being, you have better things to worry about.

I will be in touch again soon about reading articles in the course of your legal studies.

Best wishes,

Nick

18
How to get through an article

Hey Jamie,

It's important that you read lots of articles written by legal academics. Other than writing legal essays yourself, there is no better way of improving your legal essay writing skills than to read legal articles. They provide you with models of how to argue properly when you are writing an essay, and are a fertile source of ideas and arguments that you can draw on or react against in writing your essays. So – here are my tips on getting the most out of reading articles.

The basic approach

Okay – so you are going to read a particular article. What should be your basic approach? Go through the article twice.

The first time, you are trying to get an idea of what the article is basically saying – what the overall point of the article is, and what arguments are being made (or dismissed) in order to make that point. The second time, you should look through the article to see if it has anything interesting to say about any particular cases; you can then make a note of these observations in your case file, under the name of the case in question.

Your aim in going through the article for the first time should be to enhance your understanding of the law, thereby helping you to critically evaluate the law and write good, solid essays about it. Your aim in going through the article for the second time should be to enhance your knowledge of the law, thereby helping you to appreciate the full range of legal issues raised by a specific legal problem.

The first run-through

When I say 'run-through' I mean it. *Hustle* through the article. Don't make notes as you go through it – that will just slow you up and make you feel miserable. Read the article at speed, asking the following key questions all the time:

(1) What is this article basically saying?

(2) What arguments are being made in favour of the article's basic point?

(3) What are the arguments against the article's basic point, and how does the author dismiss them?

(4) What do I think of the author's arguments? Those are the only things you want to know on the first run-through.

Once you've read the entire article through, getting an idea of what it has to say (if it has anything to say) on these issues, then take a fresh A4 piece of paper and make some notes about the article from memory, organised around these key questions, referring back to a specific part of the article only if necessary to refresh your memory. Let's now look at the above four questions in more detail.

(1) *What is the article basically saying?* In making a note on question (1), try and reduce the basic message of the article down to five or six lines at most. If you can't do that, then it's doubtful whether the article is going to be that much help: either it is very unclear in what it wants to say, or you are very unclear about what it wants to say, and either way the article's not going to be of much help to you. If you have a nagging feeling that you have completely missed the point of what the article has to say, Google search it to see what other people have to say about it, or ask your fellow students what they thought of it, or ask your teachers what they think its basic message is.

(2) *and* (3) *What are the arguments being made/being dismissed?* In making notes on questions (2) and (3), use numbers to identify the different arguments that the author makes in favour of his/her basic point, and the reasons why the author thinks that an argument that might be made against his/her basic point should be rejected. If the author is making four arguments for what he/she wants to say, then your notes should

reflect that and number those arguments 1–4. Numbering the arguments helps you get clearer about what the author is actually saying – instead of a mish-mash of jumbled assertions, you have four crisp (and make sure that when you make a note of the author's arguments, you express them as crisply as possible) arguments on which the worth of the article will depend.

(**4**) *What do I think?* In making notes on question (4) (and in reading the entire article), *be aggressive*. In the excellent film *Searching for Bobby Fischer* (highly, highly recommended), Laurence Fishburne's street speed chess player intimidates his opponent with some trash talk:

> What's that . . . Is that the best you got? Is that the best you got? Uh-huh . . . you ain't got nothin' . . . No . . . that ain't it . . . Hmmm . . . that ain't it either . . . You're going to have to do much better than that, boss . . . Much better than that . . . C'mon, show me something . . . show me something, grandmaster . . .

That is *exactly* the sort of mentality I want you to adopt on going through an article for the first time. You should be hustling through the article, challenging it to 'show me something' – to tell you something interesting about the law. If the article doesn't seem to have anything worthwhile to say (which may well be the case), don't be afraid to conclude that it doesn't actually have anything worthwhile to say. Maybe check first with some other people to see if the article was actually saying something, but you missed it. But if no one can clearly express what the article was trying to say, then throw it aside as a failure. It's no good and not worth noting.

You should adopt the same aggressive mentality in making notes on question (4), which requires you to evaluate the arguments that the writer makes in favour of his/her basic point, and seeing whether the writer does a good job of dismissing the arguments against his/her position. Don't let the writer walk all over you with his/her claims. Resist. Ask yourself: Do the writer's arguments stand up? Are they circular? Are they based on a false premise? Are they illogical? Don't assume the arguments are any good. Be aggressive: test the writer's arguments out, and see if they collapse under scrutiny. Don't be afraid to say, 'That ain't it . . . that ain't it either . . . ' to the author, no matter how revered they might be.

Some harsh words about articles

As an aid to helping you adopt the sort of mentality about articles that I want you to adopt, it might help you to know the current state of play within universities on writing articles. I've already mentioned – in my letter on 'Choosing a university' – that how much money a university (and the particular faculties within the university) receives by way of research funding from the Higher Education Funding Council for England (HEFCE) depends on how highly its research is rated under the 'Research Excellence Framework' (or 'REF', for short). Under the REF, each university's faculty that wants research funding from HEFCE will submit articles and books (no more than four, and preferably four) written by members of the faculty for evaluation by panels of academics, and each faculty's 'research output' will be given an overall star rating: four stars, three stars, two stars or one star. The more stars a faculty gets, the more money it gets from HEFCE.

In the preface to the first edition of his book *Unjust Enrichment*, Peter Birks recalls some advice that he was given at the start of his career by Barry Nicholas, the distinguished Roman lawyer and principal of Brasenose College, Oxford where Birks was teaching (my old college, as well): 'Teach, do not worry about writing, nobody wants to hear from you till later.' Birks admits that the advice 'seems to come from a world which is no more'. And that is largely due to the REF. There is now intense pressure on academics to produce 'research outputs' that can be used to earn research funding from HEFCE. In the greatest assault on academic freedom that the UK has known since the seventeenth century, some faculties convene their own internal panels to evaluate their employees' work; thus none too subtly conveying the message that their academics can either shape up and start producing 'outputs' that other people think are worthy of four stars, or they can ship out and be replaced by other, more conformist, academics. And academics looking for promotion or a better job elsewhere know that they won't get anywhere unless they have a good 'research profile', so they also put pressure on themselves to churn out books and articles (with a strong bias towards articles as they are quicker to write) in the hope that some of them will hit the four-star jackpot.

So academics have now been turned into journalists. In large part, they write not because there is anything they passionately want to say, but because the nature of their job requires them to write. And the result – at least within law departments – has been a significant degrading of the quality of academic writing. This is absolutely no reflection on the quality of the academics

producing this work. It is just a reflection of four aspects of the way life is under the REF.

First, a lack of passion kills. If an academic is writing about a topic not because he or she is desperately interested in it, but because he or she thinks that this would be a good topic to write about for REF purposes, then that will show through in the writing. The ideas will be boring, and boringly expressed.

Secondly, an academic who is pretty good is probably capable of producing two really good books and about ten really good articles in the course of his or her academic lifetime – so 12 pieces in all. For an academic who is a genius (and they are very rare), you can probably double that – 24 pieces over a lifetime. But the REF – and the pressures associated with the REF – demand a much higher rate out of output from academics: nominally, four pieces every four years, but in reality (because not every piece of work will be evaluated as four star-worthy) at least eight pieces every four years. The result is that even good academics end up producing works which are, frankly, forgettable – they are only capable of producing a limited number of pieces that are of very high quality, but are being made to write far more than that.

Thirdly, it takes time to produce high-quality work. You need time to think ideas out, and time to consider how best to express those ideas. But the pressure to churn out material means that a lot of academics are never given, and never give themselves, the time to produce high-quality work. It's far better for an academic's career to spend three years writing eight articles, than spend three years working on one book – especially as in terms of 'research outputs' an article counts as being as significant as a book.

Fourthly, good ideas for books and articles are hard to come by. That's the major reason why even good academics are limited in how many high-quality books or articles they can hope to produce in their academic lifetime. So academics who are under pressures to produce material have to cast around for ideas as to what they might work on. In doing this, it is very tempting for legal academics to focus on *recent developments in the law*. Recent developments – new cases and new legislation – make for tempting research fodder because they are easy to write about, and so long as you get in early enough, no one else will have written about them and stolen your thunder. So the last ten years or so have seen a proliferation of articles about recent developments in the law. A lot of this work is good, and a lot of it useful for students trying to come to terms with a particular area of law – but man, it's boring as hell as well. Other academics get tempted to focus on *law and*… – that is, to write articles that seek to link law with some other subject. (Sedley LJ once wrote a parody of such

articles entitled 'Law and plumbing' – it's available online for free if you Google it.) The more obscure the other subject is, the better for the academic as it's less likely that anyone else will have written about the relationships between that subject and law and made it more difficult to say anything else about those relationships. Again, these articles tend to be really boring and pretty irrelevant to anything that really matters. Finally, a third group of academics feed off other people's good ideas – they write articles summarising and criticising ideas that other people have come up with about the law. This is very flattering for those other people (who can then convince their faculties that their work is having the sort of 'impact' that merits a high star rating), but ultimately 'My response to Professor X's theory' type articles descend into a morass of technicalities and fruitless point scoring that doesn't actually help anyone.

So it's entirely appropriate for you to approach any article you are reading in a sceptical spirit. You shouldn't assume that the article *must* be good and *must* be worth reading: the institutional pressures under which academics now sadly work mean that isn't the case. So hustle through the article, always asking 'show me something' – and if it doesn't: forget it.

The second run-through

Okay – let's assume you've read a particular article, and made a note on it on a piece of A4 paper, summing up the basic point of the article and the key arguments made in favour of that point. Now you can go through the article again, this time looking to see whether it has any points to make about particular cases that you have already made a note on. What you are looking for are:

(1) (good) accounts of what happened in the case and how it was decided;

(2) explanations of why the case was decided the way it was; and

(3) criticisms of the decision in that case, or the way it was decided.

It may also be that the article mentions a particular case that you don't yet have a note on. If the case seems interesting enough, then use what the article has to say about that case as the basis for creating a note about that case.

Once you've completed the second run-through, you can put the article aside and not bother looking at it again. You've got what you need from it, and it's time to move on to something else. If you come across a subsequent

article that trashes the article you've just noted, then obviously go back to your A4 note on the original article and make a note of the subsequent article's criticisms (also making a note of whether you think those criticisms are valid or not), so that all the relevant notes on that article are all in the same place.

Finding more articles to read

The reading lists that your teachers give you will refer you to a few articles relevant to the areas of law you are studying, but it is always worthwhile looking around to see whether there are any other relevant articles 'out there' that might be worth a look. Try the following:

(1) Go onto Westlaw, click on 'Journals', and type a few key terms related to the area of law you are looking into, or want to research, into the 'Free text' box and then press return. Get ready to turn up *a lot* of articles that will have *no* relevance to what you are looking for – but there may be a few downloadable articles that will be helpful.

(2) HeinOnline provides a wonderful database of legal journals, particularly from the United States. If you have access to that, then click on 'Law journal library' on the left-hand menu, and then type some key terms into the 'Search' box and set HeinOnline to search 'Text'. You will again turn up a huge amount of irrelevant material, but there may be a few things out there that will be helpful.

(3) 'SSRN' stands for the Social Sciences Research Network. A lot of legal academics now post on SSRN articles that they are working on. Go to SSRN (www.ssrn.com) to see if there is anything on the area of law you are interested. Click on 'Search' and type some key terms into the 'Search terms:' box, making sure that SSRN is set to search 'Title, Abstract, Abstract ID or Keywords'.

(4) Doing a Google search for key terms related to the area of law you are studying may well turn up some relevant materials.

(5) One problem with doing (1)–(4) is that it is unlikely to turn up details of papers that have been written for published collections of essays on various legal topics. Information about what is 'out there' in such collections has traditionally been difficult to track down. If you know the title of a particular collection of essays, then Amazon or the publisher of the collection may give you a list of essay titles – but it will be almost always

the case that you don't even know of the existence of a particular collection of essays. One partial solution to this problem is the Index to Common Law Festschriften (collections of essay in honour of a particular figure, distinguished in the legal world). You can find this at http://magic.lbr.auckland.ac.nz/festschrift/. However, most published collections of legal essays are not *festschriften* (literally, 'celebration writings') and so don't fall within the Index. The Index is also not particularly user-friendly. In order to try to begin to fill this hole in our abilities to know what is 'out there' in the field of research on legal topics that might interest us, I created on my website (www.mcbridesguides.com) the 'PCC Law Library Database'. This basically lists all the significant legal essays published in collections of essays that are held in the Pembroke College Cambridge Law Library. So if you are working on a particular area of law, look up the corresponding list of essays relating to that area of law on the database, and look through the list to see if there are any essays that seem to relate to the particular issue or topic that you are interested in. If there are, then you can look up the essay in your own library, if it has the collection of essays in question. If it doesn't then you can always request your library to obtain the collection in question, or see if there is a pdf of the essay available on the internet (either on SSRN, or via a Google search).

Looking for material on the internet can be very time-consuming and involve you in making huge numbers of searches for different combinations of keywords. In order to stop this happening, I would advise that you set yourself a time limit of three minutes to search a particular source of legal material – whatever you can't find within three minutes probably isn't worth wasting your time on searching for it.

I hope this is helpful. The last section makes me think I should write to you about the various legal materials that are available on the internet for you to use. I'll get back to you about that as soon as possible.

Best wishes,

Nick

19
Using the internet

Hi Jamie,

This letter can be short and sweet. For lots of useful law-related links to help you with your studies, go to my website www.mcbridesguides.com and click on ‘Useful links’.

Happy exploring, and I’ll be in touch soon!

All best wishes,

Nick

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20
Getting the most out of where you are

Hey Jamie,

So far, the letters I've been writing about how you should approach studying law have focused on the work you'll be doing in your own time: reading textbooks and cases, looking at statutes, making notes on articles, and using the internet. This letter will be about how to get the most out of the guidance and teaching you receive in the form of lectures and small-group teaching sessions, as well as other activities that you may be able to engage in at university that will help you with your studies and general development as a lawyer.

A preliminary point

Before I get onto lectures and small-group teaching sessions, I want to emphasise one point. I once read somewhere that the difference between school and university is that at school you are a pupil and at university you are a student. Pupils learn by being taught; while students learn by studying – by finding out things for themselves. The distinction holds especially true of law students – as I said in a previous letter, law is probably the most self-taught subject that you can study at university. So you shouldn't rely too much on lectures and small-group teaching sessions as a vehicle for finding out about the law. You should rather regard lectures and small-group teaching sessions as providing you with opportunities to pick up useful titbits of information and to test out your blossoming legal skills.

But you mustn't misunderstand me. I don't want to encourage you to skip lectures and the small-group teaching sessions that have been laid on for you. While they are not an essential component of your legal education, they provide a very useful service that you should take full advantage of. But

please remember that it is how much work you put in on your own – or in conjunction with your fellow students – that will determine how well you do in your exams, not how many lectures you have been to. If you are spending 60 per cent of your 'working time' as a law student at lectures and small-group teaching sessions, and only 40 per cent of the remaining time working on your own or with your fellow students – then you are in trouble. You are not giving yourself enough of an opportunity to develop as a law student by working away at the law yourself, rather than having it spoon-fed to you by your teachers. A healthier distribution of your working time that you should aim for is: spend 70 per cent of your 'working time' studying on your own, or with your fellow students, and only 30 per cent of your time attending lectures or small-group teaching sessions.

Lectures

Okay – let's get on with some guidance as to what you should be doing in lectures. Basically, you should be looking to make notes of points that will make useful additions to your secondary materials and your cases and statutes files. So keep your ears open for:

(1) *Summaries of cases.* These can be really useful, particularly if the lecturer is talking about a case which is very difficult to understand. Lecturers will usually work really hard to make cases comprehensible to the students that they are lecturing to – if only because it's really embarrassing for a lecturer to speak to an audience that is looking at her with blank incomprehension. If a lecturer is explaining a case and some aspect of his or her explanation seems particularly obscure, do not hesitate to stick your hand up and ask him to express himself more clearly. Some lecturers don't like to be interrupted by questions. But you shouldn't care about that – your lecturers are working for you, not the other way around. If you want to ask a question, you have a right to ask it and have it answered. Having said that, if you start asking too many and too obscure questions, you should also remember that your fellow students also have a right to hear what the lecturer has to say without unnecessary interruptions.

(2) *Summaries of articles.* Again, these are very useful – a really good summary of what an article says can make the actual article a breeze to read through subsequently. I should emphasise that if an article has been

summed up very effectively in a lecture, I wouldn't advise skipping the article in your subsequent reading, on the basis that you already know what it says. However effective the summary, it is only a summary and there may be more in the actual article that you may find worth taking a note on – perhaps a summary of a case, or an interesting argument.

(3) *Evaluations of the law.* It is always useful to note what your lecturer thinks of a particular area of the law – and what arguments she makes in support of her views.

(4) *Aids to remembering cases.* You should also be looking to take notes on any 'story lines' that you can make use of to remember a string of cases, following the advice I gave you in my letters on 'Reading cases' and 'Making sense of statutes'. So – make notes of any general principles that the lecturer has identified as underlying a number of cases, or any speculations that the lecturer has as to why a number of cases were decided the way they were.

You shouldn't be looking to make notes on the following:

(1) *Statements of basic legal rules.* Suppose your lecturer says, 'A defendant will have the *mens rea* of murder if he has an intention to kill or an intention to cause grievous bodily harm.' There's absolutely no point in your making a note of that. Your textbook reading will tell you that – so why wear out your hand trying to scribble this piece of information down in the middle of the lecture? It would be better to put your pen down and give your hand a rest and wait for the lecturer to tell you something that you won't necessarily find in a textbook.

This takes me onto a more general point. If your lecturer on a particular subject is consistently not telling you anything that you couldn't find in a textbook, then you should consider stopping going to his or her lectures. This is for a very simple reason: you can read faster than your lecturer can talk. So you would make better use of the hour that the lecture will last reading a textbook rather than attending the lecture. You will find out more in that hour by reading the textbook than you will by attending the lecture.

(2) *History.* Lecturers often like to preface their discussion of a particular area of law with a quick run-through of the history of that area. So, for example, if you are being lectured by your tort law lecturer on the law on 'Occupiers' Liability', he may well spend a bit of time talking about what

the law said before the Occupiers' Liability Acts of 1957 and 1984 were enacted. Making notes on this is a complete waste of time. You are interested in what the law says now, not in what it said 50 or 20 years ago. You are interested in what reforms should be made to the law as it is now, not in what reforms were made to the law as it was 50 or 20 years ago.

Having said that, history does have its place. As I've said before, it can help you to remember a string of cases if you see them as part of some historical trend or pattern. Arguments that a particular reform to the law has proved unsuccessful and that the law should return to where it was before that reform was implemented are always interesting and worth noting. But if the lecturer is talking about the history of a particular area of law for no other reason than as a way of introducing that area of law, or because he or she is loath to abandon a set of carefully composed lecture notes that have been made completely redundant by a recent reform, then put your pen down and give yourself a rest.

When a lecture is over, take the notes that you have made on the lecture and use them to make fresh notes in the appropriate places in your files of notes. This will serve a number of useful purposes. First, your lecture notes are likely to be quite scruffy and messy – making fresh notes will mean you don't have to rely on your lecture notes. Secondly, making fresh notes will help you remember in the long term what was said in the lectures. Thirdly, making fresh notes will give you a chance to look over your lecture notes and see how many of the lecture notes you made actually seem, on reflection, worth entering into your files. If the answer is 'Not many', you are taking too many notes in the lectures and you need to be more discriminating in your note taking.

Small-group teaching sessions

That's all I have to say about taking notes in lectures. What about small-group teaching sessions? Any university will arrange for these to take place throughout the year, in parallel with the lectures, as a way of checking the progress you are making as a law student and giving you an opportunity to raise any concerns or questions that you might have about the subjects you are studying. The advice I can give you on these sessions is quite limited because I have no idea what format they will take. However, whatever format they do take, the following advice should always hold good:

(1) Be prepared

You won't get anything out of your small-group teaching sessions if you aren't prepared for them. If you're not prepared for a small-group teaching session, then it will turn into a small ordeal for you. You'll be lost, confused, and praying desperately that you aren't called upon to speak – and every minute of the session will seem like ten minutes. Why put yourself through that kind of torture? Come prepared and then you can make the most of the session and actually get something out of it. And if you're not prepared – for whatever reason – it's far better to admit that and ask if you can come along to a later session than put yourself through the agony of sitting in the session, pretending to be better prepared than you are.

(2) Ask questions

Try and take advantage of any small-group teaching session that you attend to get whoever's holding the session to answer your questions about the area of law that you'll be focusing on in the session. So come to the teaching session armed with a list of questions that you want answered. Make sure you have actually got a list – don't rely on your memory to tell you that you have such-and-such a question to ask. The pressure of a small-group teaching session means that your memory will often fail you.

(3) Take your books and notes along

That last point takes me onto a separate point. A small-group teaching session isn't a memory test – so take your textbooks and your notes along to the session so that you can consult them in the course of a general discussion of a particular legal point.

(4) Make notes

When I hold small-group teaching sessions with first-year students, I notice that a lot of them don't take notes when I'm talking to them. This could be because they think that what I'm saying is rubbish. However, I find that hard to believe. More likely explanations are either: (i) they think that they'll be able to remember what I'm saying without making a note of it; or (ii) they think that I'd be offended if they took their eyes off me and started writing in their notebook while I was talking.

Neither of these things is true. On (i), unless a student is blessed with an absolutely exceptional memory, he or she will not be able to remember very

much of what was said in a small-group teaching session unless he or she has made good notes of what was said. On (ii), there is no way any of your teachers will be offended if you make notes on what they are saying as they are saying it – they are far more likely to be offended if they make some really brilliant argument and their students just stare at them and don't make any notes to help them remember the pearls of wisdom that have just been scattered before them.

As to what you should be making notes on, what I said in connection with lectures also applies here – you should be looking to make notes of points that will make useful additions to your topic and case files. And when the small-group teaching session is over, you should take your notes and use them to enter a set of fresh notes at appropriate points in your topic and case files.

(5) Exercise your right of freedom of speech

I've already made this point in an earlier letter, but I'll repeat it here: do *not* be inhibited about speaking up in small-group teaching sessions. If there is some point you are unclear on, *do* say: 'I don't understand this, could you help me?' You're not going to get another opportunity to get some help on clearing up that point – so why not take advantage of it?

Don't be put off asking a question because you think, 'I'll look like an idiot if I ask about that.' You probably won't: your question is likely to be a really good one, and everyone else in your teaching group will profit from having your question answered (and might have wanted to ask that question themselves but been too afraid to ask). And even if you do look like an idiot, so what? It's good for you to make yourself look like an idiot once in a while. It'll stop you being arrogant – which is never an attractive quality. It'll make everyone else feel better about themselves – they'll think, 'Oh, at least I'm not doing as badly as Alex'. And it'll make everyone else feel a bit more comfortable about asking questions themselves – they'll think, 'Well, it might be a bit embarrassing to ask this question, but at least I won't be as embarrassed as badly as Alex was'.

(6) Make the most of the opportunities that small-group teaching sessions give you

Suppose that you are being taken for small-group teaching sessions in a particular area of law by Professor White, who is a renowned scholar in that area of law. Use your time with Professor White to get her to talk about her views – not only her views about the area of law she specialises in, but also her views of what other academics have to say about that area of law.

Suppose alternatively that you'll be expected to submit an essay in advance of a particular small-group teaching session with Professor Black – the session will then be used to talk about people's essays and how they might be improved. Try and make your essay the best it can possibly be so you can take full advantage of any feedback you will get from Professor Black in the session on how your essay might have been improved. Don't come up with an average piece of work which will be returned to you with some really obvious criticisms that even you knew could be made of your essay.

Again, suppose that in a small-group teaching session with Professor Green you'll be considering what the law says in a particular fact situation. Prepare well for the session by thinking of as many points as you can that might be made about that situation. Then in the session, make those points – and learn from what Professor Green has to say about them. Also use the opportunity provided by the small-group session to get some guidance from Professor Green about how one should approach the task of writing about problem situations in the exams – what are the examiners looking for you to do? What are they not looking for you to do?

Remember that the more you put into a small-group teaching session, the more you will get out of it. Even if you are being taught by an academic who has zero interest in teaching you, he or she will not fail to respond to the interest you show in getting the most out of your session with him or her. He or she will soon 'warm up' and start giving of his or her best to you.

(7) Be nice

This is a point that I've made before, but I'll make it again – be warm, bubbly and enthusiastic in your small-group teaching sessions. No one enjoys teaching a surly or uncommunicative student and even the most dedicated teacher will soon lose interest in doing anything for you if you persistently come to his or her small-group sessions with a bad attitude. Of course, if you're feeling down on a particular day when you have a small-group teaching session, it's okay to make that clear – but your normal attitude in going into a small-group teaching session should be positive, friendly and outgoing.

Other activities

One of the good things about being a law student is that you will have lots of opportunities outside the class or lecture room to engage in a lot of activities that will help you develop as a lawyer. And if you don't have

the following opportunities, think about creating those opportunities for yourself:

(1) Mooting

A 'moot' is a mock case argued in front of a 'judge' (normally, an academic or maybe an actual judge who has been persuaded to hear the arguments in the case). The case normally raises two different legal points, allowing four students to argue the case – 'Senior Counsel' on both sides arguing the first point, and the 'Junior Counsel' on both sides arguing the second point, with the 'Senior Counsel' on both sides sometimes being allowed to make responses to the arguments on both points.

If you participate in a moot, you and your fellow counsel will be expected to submit a list of authorities (probably no more than five on each point) that you intend to cite in support of your points. Also feel free to include articles in your list of authorities as there is nothing wrong (nowadays) with invoking legal authors in support of a particular point.

On the day of the moot, you should come equipped with a file (actually, three files – one for you, one for the judge, one for the counsel on the other side) containing labelled photocopies of the pages from your set of authorities/articles that you intend to cite, with the relevant passages on those pages highlighted. And then just calmly take the judge through the authorities and articles, explaining how you think they support the point you have to make. Don't think that any rhetorical flourishes are required of you – this is a moot, not a debate. Just make your point. If you want to see how real life barristers do this, go to the 'Decided cases' section of the UK Supreme Court website, click on 'Decided cases', then click on the name of any decided case, and you can watch an archive of the arguments in front of the Supreme Court in that case. Doing this is very useful for reassuring you that you too can argue cases like a barrister – barristers are not that eloquent as advocates.

There are a few books you can buy which give you tips on mooting – but they are so long and so expensive, I doubt whether they are really worth it. (If you want to check them out, simply type 'mooting' into the search box on Amazon.) *Glanville Williams' Learning the Law* – which is bound to be in your university library – has a chapter on mooting that is worth checking out. If you go on YouTube and type 'mooting' into the YouTube search box you'll find lots of videos both giving you tips on how to moot, and showing you moots in action. But the best way of learning how to moot is to attend a few yourself, attend any training sessions your university law society holds, and participate in some moots yourself!

Even if you don't intend to be a barrister, I would advise you – if you have the time to do it – to participate in some moots. It is a great way of getting into the mind-set of seeing how a lot of legal issues don't necessarily have a 'right' answer, but good arguments can be made on both sides of the issue. It is also a great encouragement to learn how to express yourself clearly as a lawyer, and to incorporate references to the case law in your legal arguments.

(2) Your university law society

Your university will almost certainly have a law society, which you should look to get involved in – either at a low level, attending talks and dinners put on by the law society, or at a higher level, helping to organise law society events. At whatever level you choose (or can afford, given your other commitments) to get involved – get involved! Being involved with your university law society is a great way of exposing yourself to other people's views and ideas, but also making contacts that might have lifelong impacts on you (while allowing other people to obtain a similar benefit from being brought into contact with you). If your university law society runs a student law journal, it would also be worth considering getting involved with that – though you should be cautious about how much time would be involved in doing this. Being involved with publishing and writing for a law journal is a very impressive accomplishment which will help you develop as a legal writer and thinker, and wouldn't look so bad on your CV either. And there is the chance of making valuable contacts with eminent lawyers who might be persuaded to write for, or be interviewed for, the student law journal.

That's enough advice from me. To help you a bit more with getting the most out of where you are, I've enclosed a list of the Top 10 Controversies in English law – keep an eye and ear out for them in your reading and your lectures, and try to ensure that you address them in any relevant small-group teaching sessions.

All best wishes,

Nick

Top 10 Controversies in English Law

1. Parliamentary sovereignty

Parliamentary sovereignty – the idea that Parliament has the power to make or unmake any law whatsoever – is a very controversial concept. Its critics argue that Parliamentary sovereignty means that the UK is governed by – in Lord Hailsham's phrase – an 'elective dictatorship', where every few years a new dictator with unlimited powers is voted into office. Fans of Parliamentary sovereignty argue that without it, we don't have a democracy – that the powers of the people to determine how they are governed are automatically limited in the absence of Parliamentary sovereignty. However, the critics counter that for a democracy to function properly, we need to place limits on Parliament's powers to pass laws, so that Parliament cannot use those powers to undermine democracy by – for example – taking away certain basic rights from certain sections of the population.

2. The Human Rights Act 1998

The future of the Human Rights Act 1998 (HRA) currently looks very fraught. The effect of the Act was to make it 'unlawful for a public authority to act in a way which is incompatible' with any one of the 'human rights' set out in the European Convention on Human Rights (ECHR). If a public body violates someone's 'human rights' under the ECHR, a range of remedies can be sought from a UK court, including judicial review – which involves the court setting aside what the public body has done – and damages – to compensate for losses resulting from what the public body has done. If *Parliament* passes an Act that is incompatible with the ECHR, the only remedy is to seek a declaration from the courts that the Act is incompatible – in this way the doctrine of Parliamentary sovereignty is respected by the HRA.

The main controversy surrounding the HRA attaches to s. 2 of the HRA, which says that in determining whether a public body has acted in a way that it incompatible with the ECHR, a UK court must take into account the way the ECHR has been interpreted by the European Court of Human Rights (ECtHR), which sits in Strasbourg, France. Given that the judges sitting on the ECtHR are drawn from all the countries that are signatories to the ECHR, including some countries with a less than stellar record of observing human rights at home, there is some resentment that judges from those kinds of countries get to 'dictate' to the UK courts when they should and should not find that a UK public body has acted incompatibly with the ECHR. Another criticism of the HRA is that there is plenty of potential in the language of the ECHR for the ECHR to be interpreted in a 'political' manner, with the result that it is too easy for a judge who is sitting in a UK court or the ECtHR who wishes to compel a public body to act in accordance with the judge's political views to find that the public body will violate someone's 'human rights' under the ECHR if the public body does not do what the judge wants the public body to do. Against these points, it is argued that the ECHR can only work, in particular to constrain the activities of countries with horrible histories when it comes to human rights, if *all* the signatories to the ECHR get to participate in interpreting the ECHR and *all* the signatories agree to abide by the decisions of the ECtHR. And any vagueness in the language of the ECHR which creates the potential for it to be interpreted in a 'political' manner is inevitable – law always has some vagueness attached to it, as language is inherently vague.

3. The basis of tort law

Talking of rights, an ongoing controversy among academics is the basis of tort law, which allows strangers to sue each other for compensation for harms they have suffered. The popular view in the 1970s and the 1980s was that tort law simply represented the judges' views (supplemented by various Acts of Parliament) as to when it would be 'fair, just and reasonable' for one person to pay compensation to another. However, from the 1990s onwards, it was argued that this view was far too loose, and that a claim for compensation could only be brought in tort by someone who could argue that their *rights* had been violated by someone else. On this view, if I want to sue you in tort, I have to show that I had a *right* that you not act in a particular way, and that you violated that right – and if I cannot do that, I cannot sue you in tort no matter how 'fair,

just and reasonable' it might be to make you pay me compensation for some harm I have suffered. Those who take this *rights-based view* of tort law have, in turn, fallen into two camps. The first camp argues that the *kind* of right that has to be violated for me to be able to sue you in tort is a *Hohfeldian claim right* (named after the American jurist, W.N. Hohfeld), which exists when the law imposes a duty on you for my benefit. The second camp argues that the kind of right has to be a *Kantian* right (named after the philosopher Immanuel Kant), which gives effect to the underlying right that we are all supposed to have that other people not interfere with our *independence as persons*. So in the case where I delay your getting to hospital by failing to get out of the way of the ambulance that is carrying you to hospital, with the result that you suffer some kind of harm, on the first camp's view, whether you can sue me in tort depends on whether, as a matter of positive law, the law imposed a duty on me – for your benefit – to get out of the way of the ambulance. On the second camp's view, you cannot sue me in tort – by failing to get out of your way, I did nothing to interfere with your independence as a person and so cannot be said to have violated a Kantian right of yours in acting as I did.

4. The basis of judicial review

There is equal controversy over the basis of judicial review (JR), which refers to the power the courts have to set aside the actions of a public body where the public body is found to have acted unlawfully. One camp thinks that JR exists to ensure that a public body acts in accordance with the intentions of Parliament, either in setting that body up or in allowing that body to exist. So, on this view, JR upholds Parliamentary sovereignty – it ensures that Parliament has the last word on how public bodies operate. Another camp thinks that JR exists to ensure that public bodies observe certain minimum standards of good behaviour in the way they operate, which standards derive from values and principles inherent in the common law. On this view, JR upholds the rule of law – the idea that no one can claim to be above the law, or exempt from being subject to certain legally enforceable minimum standards of decent behaviour.

5. The scope of anti-discrimination laws

It is interesting how politics can turn language upside down. One example is the way in which the words 'discrimination' and 'tolerance' are currently regarded. 'Discrimination' used to be regarded as a good thing – a 'person of

discrimination' was a person with good taste. The truth is – we *all* discriminate because we all make choices: you cannot make a choice without discriminating between the things being chosen. Discrimination is only bad when a bad choice is being made, or is being made for bad reasons. But the impact of anti-discrimination laws has been such that virtually *all* discrimination is nowadays regarded as suspect. The word 'tolerance' has made the opposite journey – from something that should be regarded with suspicion, to something that is regarded as a good thing. When you 'tolerate' X you are basically saying, 'I regard X as repulsive and would rather it didn't exist, but I won't act on those feelings and won't act to damage or destroy X.' While there are worse attitudes you could adopt towards X, being 'tolerant' of X is not a particularly pleasant stance to take towards X – but nowadays being 'tolerant' is regarded as a synonym for welcoming or celebrating X.

Thinking intelligently requires that we turn the right way up the words and concepts that politicians have turned upside down. This is particularly important when it comes to the 'hot topic' of the scope of anti-discrimination laws, because if we regard all discrimination as bad and something that should be made unlawful, we are essentially adopting the very illiberal position that people should not be allowed to make any choices at all. The Equality Act 2010 sets out the current state of play on what choices people are not allowed to make when it comes to deciding who to treat with more or less favour: very roughly speaking, anti-discrimination laws apply to public bodies, employers, landlords, shops, and other businesses dealing with the public, schools, universities, and clubs, and prevents those bodies (subject to large numbers of exceptions) from treating people less well on grounds of their age, sex, disability, marital status, religion or belief, or LGBT status. Debates over the scope of anti-discrimination laws focus on whether certain 'protected characteristics' should be added to or subtracted from the list of grounds on which someone is not allowed to treat someone less favourably, and whether the range of bodies that are subjected to such laws should be expanded.

6. The harm principle

One important limit on the law's power to limit what choices people can make was suggested by John Stuart Mill in his book *On Liberty* (1854), and has come to be known as the 'harm principle': that the law should not limit someone's choices as to how to live their life unless its object in so doing is to prevent

harm to others. Controversy surrounds whether the harm principle can be justified, as it prevents the law being used for 'perfectionist' ends – that is, to encourage people to live good or worthwhile lives. Another aspect of the harm principle guarantees that it will always be attended with controversy – which is that it tends always to be invoked by members of a minority lifestyle to protect that lifestyle being interfered with by the majority. This was true of Mill himself, who was writing at a time when there was agitation (which resulted in legislation in 1832, 1867, and 1884) to expand the number of people who were entitled to vote in Parliamentary elections, and fears that the newly enfranchised voters would use their new political powers to mount an assault on the privileges and lifestyle of the aristocratic minority. So those who are in favour of, and opposed to, the harm principle will constantly change as certain lifestyles become majority lifestyles and other lifestyles become minority lifestyles. This ensures a constantly shifting constituency of thinkers who are either in favour of, or opposed to, the harm principle.

7. The significance of marriage

One controversy over the significance of marriage – whether its significance was such that the institution of marriage should only be available to heterosexual adult couples – has now been settled in favour of allowing gay couples to take advantage of the institution, at least in its civil form. Controversies over whether it should also be made available to people engaged in polygamous or incestuous relationships have not yet taken hold, or are unlikely to do so. However, a continuing controversy over the significance of marriage is whether the power to redistribute assets between parties to a marriage who have divorced should be extended to couples who were living together in a house that was in one of the couple's names and who have now broken up. The arguments are finely balanced. In a case where A and B were not married and have broken up, and the house in which they were living was in A's name and not B's, the legal rules that determine whether B can claim he had an interest in the house are not designed to take account of A and B's relative needs in the aftermath of the breakup of their relationship, and B may have been completely ignorant of those rules and unable to arrange his affairs so as to ensure that he would be protected in the event of his relationship with A breaking down. However, where A and B were living together in A's house, but regarded their relationship as casual and exploratory in nature and not involving any long-term commitments, it would be unfair on A to make the

break-up of the relationship a source of financial detriment to her. How to distinguish between a 'casual and exploratory' relationship and a relationship which involved long-term commitments without focusing on whether the relationship involved getting married is a very difficult issue.

8. The treatment of criminals

The treatment of criminals – in terms of deciding how (if at all) to punish them for what they have done – is a matter of perennial controversy. It is continually debated whether criminal punishment should be targeted at exacting retribution for what the criminal has done, or deterring others from doing the same as the criminal has done, or rehabilitating the criminal so that he or she will be persuaded not to act in the same way in the future, or some mixture of two or more of these objectives, or something else altogether. But there are also controversies over whether, and if so to what extent, criminals should be deprived of their civil rights because of their criminal conduct. Obviously, a criminal who has been sent to prison loses his right to freedom of movement for the duration of his sentence. He also loses the right to vote in any election that takes place while he is in prison – though it has been questioned whether this is compatible with the ECHR. There is also ongoing controversy over whether someone who has been engaged in committing a serious criminal offence should be deprived of private law rights that he might otherwise have had – for example, if a burglar climbing onto the roof of your house falls off the roof because (as you well knew) the roof is in a dangerous state and needs to be repaired, should he be able to sue you in tort for damages to compensate him for his injuries?

9. The doctrine of consideration

The doctrine of consideration – which says that a promise that is not made in a deed will not be legally binding unless something ('consideration') is given in return for the promise – has long been an object of criticism within English law. Libertarians and moralists see no reason why a promise that was intended to be legally binding should not be legally binding. Others have criticised the doctrine of consideration as leaving people who have relied on another's promise without any protection if that promise is broken. Even people who support the doctrine, as working to ensure that only promises as part of a

transaction between two players in the marketplace are legally binding, fault the doctrine for allowing parties to a commercial transaction to break a promise that was intended to *vary* the terms of that transaction if nothing was given in return for that promise.

10. The role and appointment of judges

We are long past the days of believing that judges simply 'apply' the law – a belief dismissed as a 'fairy tale' as long ago as 1972 by Lord Reid – and any judge who nowadays says that their decision is simply a matter of 'pure law' is either naïve or disingenuous. Judges cannot avoid being involved in a lot of the controversies listed above, and as a result their role is increasingly politicised. So far, the UK has avoided the excesses associated with the treatment of judges in the US, with nominees for the US Supreme Court having to undergo Congressional hearings where they have to pretend that their nominations – and their future conduct as a Supreme Court Justice – have nothing to do with their willingness to implement the political agenda of the President who nominated them. However, as people become more aware of the power of the judges – and how far the judges have developed the law to expand their own powers, in particular to judicially review the actions of public bodies – it is hard to see how the judges can avoid their decisions, and who sits on the UK Supreme Court, becoming a matter of intense political interest.

21
Your fellow students

Dear Jamie,

I talked in the previous letter about the need to be aware that you aren't being taught on your own – and mentioned a couple of ways in which the way you act can either disrupt or help your fellow students' education. I thought it might be an idea to write you a letter about how you should deal generally with your fellow students. Here are three pieces of advice:

Kindness and consideration

The bottom line is that you must always treat your fellow students with kindness and consideration. Remember that as a law student you are being equipped with a set of skills – the ability to argue effectively in favour of a particular point of view, the ability to see clearly any flaws in a particular line of reasoning, the ability to determine when someone should be forced to act in a particular way – that, in the wrong hands, will make you someone who is not particularly nice to know. You must ensure that the skills you are acquiring are tempered with kindness and consideration so that those skills work to help other people, and aren't used to drag them down.

So if one of your fellow students is making an argument that strikes you as flawed in some way, don't stick the boot in and tell them they are talking rubbish. If you want to say anything, try to help them discover for themselves what the problem might be with their argument by asking them a question ('But what about x?') that will make them think about the weak point (as you see it) in their argument. If they still persist in their views – and they can't convince you that their views are correct – then leave it: there's no point in continuing the discussion.

And when you are with other students in a small group teaching situation, and you get the chance to ask some questions of your teacher, try to share the questions around, and don't hog the floor. It would be a good idea if the students in your group met together beforehand to review the issues you all want to discuss and get some clarification on, so that everyone gets as much as possible out of the session when it happens.

Study groups

I'm not sure whether trying to form study groups with your fellow students is a good idea. In principle, it's good to share ideas, and work through problem questions, and develop lines of argument for essays together – but the problem is that forming an official study group is fraught with problems. The problems are mainly those of exclusion – telling people that your study group doesn't have room for them, and dealing with members of the study group who aren't contributing very much, or are actually a negative influence on the group. So I think a better idea is to form informal associations with two or three like-minded souls, who you can meet when required to discuss ideas, or to try to clear up some difficult area of law.

Competition

Some students get very competitive in their studies: they try to ensure that they will do better than others by doing as little as possible to help others with their work. Try to avoid falling into this mentality. Unless you are a genius, you will do better working with others than you can do working in isolation from everyone else. Even doing something as seemingly one-sided as helping someone who is struggling to understand a particular area of law will actually end up helping you with your work, because having to explain that area of law in the clearest possible terms will help make that area of law clearer in your mind, and force you to confront any confusions about that area of law that you suffer from.

All best wishes,

Nick

22
On free speech

Dear Jamie,

Thanks for your email – I'd already seen reports about the student protests in your university against the controversialist Mark Jones's being allowed to hold a speaker meeting there, but it was interesting to get your account of what happened.

I think the whole affair shows the barrenness of thinking about issues of freedom and the limits of law in terms of rights – Mark Jones can say he has a right to freedom of speech, and the protestors they have a right not to be offended or 'triggered' by what he says, and then where do we go from there? In order to think intelligently as a law student about these kinds of issues – and we desperately need *law* students to be able to think intelligently about these issues, because who else can? Historians? Physicists? – we need to realise that statements about rights are almost always *conclusions* about what should or should not be done. So when Mark Jones says he has a right to freedom of speech he is basically saying, 'When all is said and done, I should be allowed to speak.' And when the protestors are saying that they have a right not to be offended, they are basically saying, 'When all is said and done, he should not be allowed to speak.' Given these directly contradictory *conclusions*, there is nothing either party could say to the other to get them to change their mind – hence the mutually incomprehending stand-off between them. And your university's statement that 'It is important to weigh against each other the rights of freedom of speech and students' rights to experience the university as a safe learning environment' struck me as completely obtuse. It is no more possible to weigh directly opposing conclusions about whether Mark Jones should be allowed to speak than it's possible to weigh your belief that the moon is made of cheese against my belief that it is not.

If we are to reach intelligent and reasonable conclusions on the issue of whether Mark Jones should be allowed to speak at your university – or any other issue where one person seeks to limit another's freedom to do what they want, we have to start with *non-conclusions*: *premises* that allow us to work out how they apply in cases like that of Mark Jones. I think a good starting point in discussing freedom of speech would be to distinguish between three different cases that raise free speech issues:

(1) the case where someone (call them 'A') is required to say something that A does not want to say ('forced speech');

(2) the case where A is prevented from saying something that A wants to say ('curtailed speech'); and

(3) the case where someone, or some institution, declines to help A to say something that A wants to say by providing A with a 'platform' for what A wants to say ('no-platformed speech'). Let's consider each in turn.

Forced speech

The one form of forced speech that I think is really objectionable is forcing A to say something that A does not believe to be true. I think making A do that kind of thing is an affront to human dignity and, in particular, the fact that human beings are *truth-seeking creatures*. Turning A into (in A's own eyes) a liar seems to me to involve such a deformation of A's basic nature that if that sort of deformation took physical form, we would instantly see how wrong it is. Does this mean that a biology teacher cannot be compelled to teach the theory of evolution if she doesn't agree with it? Not at all – teaching a *theory* that you don't agree with doesn't involve you in saying anything that you don't believe to be true: a biology teacher can still communicate to her students the elements of the theory of evolution without endorsing the theory.

Outside the case of forcing A to say something that A does not believe to be true, I think the acceptability of forcing A to say something depends on the circumstances – it depends on the costs and benefits involved. Certainly, biology teachers should be required to teach the theory of evolution – it is no cost to them, and of huge benefit to their students. Similarly with cigarette companies being forced to post warnings on their packets. When it comes to the issue of whether university teachers should be required to give 'trigger warnings' to their students, telling the students that the material that they will be covering may prove disturbing and uncomfortable to some of them,

I think things are more finely balanced. There is some evidence that such warnings – in this form – do more harm than good, in that they *encourage* students to feel bad about the material they are looking at. A more positive-sounding 'trigger warning', which encourages students to feel good about confronting material that is disturbing and uncomfortable, may be more beneficial.

Curtailed speech

When it comes to situations where A has been positively prevented from saying something that A wants to say, it seems to me that there are two fundamental principles at play:

(i) It is *not* acceptable to prevent A from saying *x merely* because his saying *x* will result in other people believing something that isn't true. Speaking freely to each other is our most reliable method for determining what the truth is. So curtailing A's ability to say *x* in the name of protecting people from being led into error is self-defeating: we do much better, in terms of getting at the truth, if we live under a regime where people's ability to speak (what is in our eyes) falsehood is *not* curtailed merely because it is false.

(ii) It is *not* acceptable to prevent A from saying *x merely* because someone else (call them 'B') does not want A to say *x*. I would hope that the good sense of this point is obvious: there is absolutely nothing about B which means that B should have an automatic veto over what A says, and so B doesn't get a veto.

A couple of things follow from point (ii):

(iii) It is not acceptable to prevent A from saying *x merely* because A's saying *x* will be *offensive* to B. If (iii) were not true, then B *would* enjoy a veto over what A says: B could simply prevent A saying *x* by saying that she finds A's saying this offensive.

(iv) It is not acceptable to prevent A from saying *x merely* because A's saying *x* will result in a *violent reaction* by B. If (iv) were not true, then – again – B *would* enjoy a veto over what A says: B could simply prevent A saying *x* by threatening to engage in acts of violence if A is not shut up.

Some might try to bring (iii) and (iv) into question. They might ask – 'If (iii) were correct, then would that not show that laws against people having sex in public (see, for example, ss. 66 and 71 of the Sexual Offences Act 2003) are illegitimate?' No: people having sex in public are not saying *anything*, so arresting them for having sex in public does not curtail their speech. Even if the people having sex were inviting passers-by to join in, so long as they were arrested for having sex and not inviting passers-by to join in, this would not be inconsistent with (iii). They might also ask – 'If (iv) were correct, then would that not prevent us from acting to shut down A who intends, by saying *x*, to provoke his listeners (B) into committing acts of violence (thereby possibly committing an offence under s. 4 of the Public Order Act 1986)?' Again, the answer is 'no' – if we stop A from saying *x* in this sort of case, we don't do so *merely* because A's saying *x* will result in a violent reaction from B but because A is *trying* to provoke that reaction. A's intentions make all the difference, and take this sort of case outside the kind of case where (iv) would prevent us from acting against A to stop him saying *x*.

Outside cases where the above points apply, the question of whether it would be acceptable to prevent A from saying *x* again depends on the circumstances – whether preventing A from saying *x* would do more good than harm. So there is no problem with requiring A not to say 'Fire!' in a crowded theatre (thereby provoking a stampede) because doing so will obviously do more good than harm. It is an open question whether our laws of *defamation* – which require people not to make false and damaging statements about other people, on pain of being sued for compensation by those whose reputation has been damaged as a result – do more than good than harm.

No-platformed speech

In the case where C has declined to provide A with a platform for A to say *x*, it seems to me that there are no principles that protect A's freedom of speech. The platform belonged to C, and so C was free to decide whether or not A could use it. However, if the reason why C denied A the platform was:

- **(i)** that A's saying *x* would result in people believing something that was not true; or
- **(ii)** that B did not want A to say *x*; or
- **(iii)** A's saying *x* would be offensive to B; or
- **(iv)** that A's saying *x* would result in a violent reaction by B,

then C *cannot* say that C is in the business of *promoting* freedom of speech. Where C is a book publisher – and C declined to publish a book written by A because any of (i)–(iv) applied – there is no problem. Book publishers are not in the business of promoting freedom of speech, but making money for themselves by providing information and entertainment to their customers. But if C is a university, and C denies A a platform for any of reasons (i)–(iv), then there is a problem because universities *are* supposed to be in the business of promoting freedom of speech. So if a university denies A a platform for any of reasons (i)–(iv), it loses its integrity and makes hypocrites of its leaders. The same applies to online platforms such as YouTube or Twitter – if they start deleting videos or tweets for any of reasons (i)–(iv), they automatically disqualify themselves from claiming that they are in the business of promoting freedom of speech; and we may then ask what sort of business they *are* in.

Now that we have these basic premises battened down, we can reach some conclusions in the case of Mark Jones. As should be obvious by now, this is a 'no-platformed speech' case: the students protesting against Mark Jones are arguing that he should not be given a platform for his views. Given this, the first question – it seems to me – is: to whom does the platform belong? A group of students have invited him to give a talk in a university lecture theatre, so the platform belongs to the university. It does *not* belong to the protestors, who – again, it seems to me – are quite wrong to claim that they should have some kind of say in whether Mark Jones is allowed to speak at the university. Given that the platform Mark Jones has been offered belongs to the university, it is for the university to decide whether to allow him to speak from that platform – and the university would be perfectly entitled to withdraw that platform for any reason whatsoever. But if the university has no better reason for doing this than one of reasons (i)–(iv), above, then the university will essentially have committed suicide as a university. It will have decided that it is no longer in the business of promoting freedom of speech, and is therefore no longer a university. In that event, any of the university's past members who were in the habit of donating money to the university should cancel their direct debits, as the university they once attended will no longer exist. I don't know enough about Mark Jones to be able to say whether the university does have a better reason for cancelling him than reasons (i)–(iv), above. I hope, in any event, that it makes a wise decision, and one that respects the university's vocation for promoting freedom of speech.

And I hope the above discussion has given you a bit of an insight into how, as a lawyer, you should discuss and analyse controversial issues, such as those

that have arisen in relation to Mark Jones. You have to make careful distinctions: distinctions that matter because different principles apply as you move across these distinctions. And you have to be careful about seeing how these distinctions apply, given the circumstances of the case you are considering. All this is a million miles away from the chanting and sloganeering that surrounds the Mark Jones case, but it is vital for the survival of our civilisation that the still, small voice of the lawyers – classifying, distinguishing, and analysing – is listened to, and with respect. I hope that is a voice you will soon learn to speak in, and appreciate.

All best wishes,

Nick

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How to write an essay

Hey Jamie,

Thanks very much for the copy of your first ever legal essay! I think it's a very promising first effort, but there is obviously lots of room for improvement. Here are ten rules for writing essays that you should always observe – look at your essay and see how far it complies with these rules. Where it falls short of complying with them, that's where there is room for improvement.

1. Don't be lazy

This is the most fundamental rule. Writing good essays involves a lot of effort. A really good essay will look as though it was effortless to write – but that is an illusion, produced by the fact that a really good essay will be effortless to read. Being able to write a good essay is a skill, just like being able to play the piano is a skill – and just as you can't learn to play the piano overnight, neither can you write good essays just like that. Learning to write good essays takes time, and self-discipline, and constant practice – and all that is hard. And that is the single most important reason why a lot of students never learn to write good essays – they are not willing to take the time and put in the work required to acquire that skill. But it is vital for your long term future that you not follow their example. How you do in your exams will depend crucially on how good you are at writing essays. And how you do in your exams will affect everything about your future – what sort of job you can get, how happy you will be in your work, how much money you will earn, who your friends will be in the future, whether you will get married and, if so, to whom. It's incredible to think that all of that depends on whether you are, or are not, willing to observe the rules set out below. But it does.

2. Answer the question

This is the second most fundamental rule. It seems such a simple and straightforward rule, and such an obvious one as well – but it is amazing how often students fail to observe this rule. I was talking some time ago to a colleague of mine about her experience marking essays that students had written for a particular exam. She must have marked over 200 students' papers. She told me that only three of those students actually tried to answer the question in writing their essays. Incredible, but true. But the fact that so few students actually bother to answer the question in writing an essay gives you a big advantage: if you make the effort in writing an essay to actually answer the question, your essay will automatically look really good compared with everyone else's.

So – suppose you are given the following essay to write:

> 'The law on homicide is in a mess.' Discuss.

This is what we call a *discursive* essay – an essay that asks you to evaluate a particular area of the law. This is the most common sort of essay you might be asked to write. (The other kind of essay that you might be asked to write is a *descriptive* essay – an essay setting out the key elements of a particular area of the law. An example of a descriptive essay would be: 'When will one person be held liable in tort for failing to rescue another?')

So – this essay is asking you to say whether or not the law on homicide (which deals with when someone will be criminally punished for causing another's death) is in a mess or not, and to present some arguments in favour of your view. And that's precisely what you should do – make up your mind whether or not you are going to say that the law on homicide is in a mess, and then come up with some arguments in favour of your point of view. But many students don't do that – they don't answer the question. Instead they turn their essay into a descriptive essay and spend 90 per cent of their time setting out what the law on homicide says. (They usually excuse themselves for doing so by first saying, 'Before we can address this issue, it is first necessary to set out the law on homicide . . .' Whenever you find yourself writing 'it is first necessary . . .' ask yourself: 'Am I drifting off the point here?' The answer will almost always be 'yes'.) They then realise

that actually they were supposed to be writing a discursive essay on whether the law on homicide is in a mess and try and rescue the essay by saying in the very last paragraph 'So, as we can see, the law on homicide is [is not] in a mess . . .' when that is the very last thing we can see from what has been said so far. Of course, in writing an essay on whether the law on homicide is in a mess, you are going to have to talk about what the law on homicide currently says, but in the context of a discussion of whether the law on homicide is in a mess. So a good response to the following question might start:

> The law on homicide is in a mess – it is unclear, inconsistent, and serves no rational purpose.

And then all you need to do for the rest of the essay is come up with examples of the law on homicide's being unclear, inconsistent, and serving no rational purpose. You don't need to set out the whole of the law on homicide to do this – you just have to switch a flashlight on elements of the law that help demonstrate your overall point.

This second most fundamental rule – that in writing an essay, you should answer the question – has a sub-rule: in writing an essay, you should *only* answer the question. Don't drift off the point for a second. If you are set an essay on a particular topic, and given some reading to do on that topic, there is a great temptation to try and refer to all the things that you have been told to read on that topic in your essay. Resist that temptation: only bring into your essay cases and articles that are relevant to the point you are making in your essay.

If you approach an essay thinking, 'I should mention the case of *X* v *Y*, and I must get in somewhere a reference to Professor Z's interesting argument that . . .' then you are flirting with disaster: it's very likely that your essay will just turned into an unfocused, messy hodgepodge of observations and arguments. When you are writing an essay on a particular topic, work out what you are going to say in response to the question that has been set and then focus like a laser on making out what you want to say. It doesn't matter if a lot of interesting stuff that you've read about is left unsaid – the agony of not being able to show off to the reader just how much you know about your subject is the price you have to pay for writing a really good essay.

3. Write clearly

Again, this is such an obvious rule, but it is very rare for students to make the effort to observe it. An infallible way of telling whether you are writing clearly enough is to employ what I call the 'friend test'. Imagine that a friend has asked you the question that you are responding to in writing your essay. Would your friend understand what you are saying? If the answer is no, you have failed the friend test and you are not writing clearly enough.

The two most common causes of unclear writing are: being in a hurry, and over-complication. Students often fail to write clearly because they are in too much of a hurry to take the time to make some sense of what they want to say. This is particularly the case, I find, when students write about cases. For example, consider the following:

> An example of the courts forcing people to act in good faith is the *Interfoto* case, where the defendants did not have to pay the extra charge because they had not been warned about it.

Would anyone reading this have much of a clue as to what happened in the *Interfoto* case? What makes this sort of bad writing completely unforgiveable is that it is just so unnecessary – there is absolutely no reason why the student who wrote this had to rush over the facts of the *Interfoto* case. They could easily have written:

> There are many cases which can be interpreted as examples of situations where the courts have required people to act in good faith when contracting with other people. For example, in the case of *Interfoto Picture Library* v *Stiletto Visual Programme*, the defendants hired some slides from the claimants. The small print in the claimants' standard terms said that if the defendants did not return the slides on time, they would have to pay the claimants £5 per slide for every extra day they kept them. This term was not brought to the defendants' attention. The defendants returned the slides 13 days late and were sent a bill for £3,000 as a result. The Court of Appeal held the defendants did not have to pay the bill. One way of looking at this case is that the Court of

> Appeal took the view that the claimants had acted in bad faith in failing to draw such an onerous term to the defendants' attention, and should not be allowed to profit from this.

Isn't that much clearer? But don't think it's clearer just because I wrote it. You don't need to be particularly clever to write as clearly as this: the only reason our student didn't write this is that he/she wasn't willing to take the time to do so.

As I've just said, the second reason why students often fail to write clearly is that their essays are over-complicated. They try and make points that are far too subtle and difficult to make out convincingly. The best essays are quite simple in what they have to say. You should be able to reduce what you want to say in your essay down to a five- or six-sentence 'soundbite'. If you can't, then your essay is too complicated to be worth writing, and you should rethink your essay. Some academics might be horrified at this advice, but they aren't trying to do what you have to do. They have the luxury of writing an article on a particular topic, or an entire book. In an exam, you will probably have about 45 minutes or an hour to write a convincing essay on a particular issue. You can't afford to act like an academic in that sort of situation. The following advice – given by an Oxford Fellow, Bruce McFarlane, to a student in 1956 who was just about to sit his history exams – has always struck me as completely correct:

> It's no use treating an examination as if it were the Last Judgment; your scrupulous weighing of the pros and cons, your unwillingness to decide, would be admirable . . . if you were writing serious history. [But you're] not supposed to be doing that; you're supposed to be showing how clever you are or aren't, and it's absolutely suicidal to be modest, unsure, diffident or muddled . . . You've got to have a fairly simple, fairly plausible, intelligible 'attitude' and you've got to plug it confidently.

So if you have to write a discursive essay on a particular topic, try and think of a simple and straightforward 'line' (but still interesting) that you can take in response to that essay question and avoid like the plague any temptation to depart from that line or overcomplicate it. Similarly, if you have to write a descriptive essay on a particular area of the law, try and think of a very

straightforward and simple way of setting out the law – for example, presenting the law as the product of a clash of two competing principles or philosophies, or presenting the law as giving effect to one or two very simple ideas.

And when you write your essay, do everything you possibly can to make your essay easy to follow. Make sure that the first paragraph makes it clear what you are going to say in the rest of the essay. Don't make your essay into the equivalent of a conjuring trick where what you are saying is only revealed (ta-da!) at the end of the essay. If you have three points to make, number them: (1) . . . (2) . . . (3). And make sure it's clear that these are three different points, and that points (1) and (2) aren't the same points just written in different ways – don't force the reader to do the work of figuring out why points (1) and (2) are actually different points. If your essay has a number of different parts (for example, one part of your essay sets out a number of different arguments in favour of the overall point you are making, while another part considers an argument that is commonly made against the point you are making and shows why that argument doesn't stand up), then use headings to distinguish the different sections of your essay.

4. Use concrete examples

A great aid to writing clearly – and also writing succinctly – is to use concrete examples. For example, suppose you have been set the following essay:

> 'There is no reason why constitutional conventions should not have the force of law; in fact, some constitutional conventions already do.' Discuss.

(Just in case you haven't covered constitutional conventions yet, examples of constitutional conventions are:

(1) that the Monarch will only dissolve Parliament 'early' on the advice of the Prime Minister;

(2) that the Monarch will not refuse assent to a Bill that has been passed by both Houses of Parliament;

(3) that the Prime Minister will resign or seek a dissolution of Parliament if his party loses a vote of confidence in the House of Commons;

(**4**) that a member of the Cabinet will not question the correctness of a decision reached by the Cabinet as a whole without first resigning his position as a member of the Cabinet;

(**5**) that the Prime Minister will not disclose to other people the advice he/she has received from the Monarch at one of his/her weekly meetings with the Monarch;

(**6**) that if the current Speaker of the House of Commons is a Conservative MP, the next Speaker will not be a Conservative MP.)

Suppose, in writing the descriptive part of the essay (whether some constitutional conventions have the force of law) – which I would advise you to do first (there's no reason why, in considering the issues raised by an essay title, you should consider them in the order in which they have been raised by the essay title if it would make more sense to do them in a different order) – you want to argue:

(**1**) Constitutional conventions do not have the force of law because the courts will not award any remedy or impose any kind of sanction in response to the mere fact that a constitutional convention has been departed from.

and

(**2**) If the courts do award a remedy or impose a sanction when a constitutional convention is departed from that is because the person who has departed from that convention has in doing so breached some independent rule (such as that statutory powers should not be exercised in a way which is wholly unreasonable, or that people should not disclose information imparted to them in confidence) that does have the force of law.

This is pretty abstract stuff that can be made a lot easier to understand by bringing it down to earth through a concrete example. For example, you could consider what could happen if the Prime Minister leaked to a newspaper information about what the Queen had told her at their last weekly meeting, and make the point that if the Prime Minister were successfully sued for damages by the Queen, that would not be because she had breached a constitutional convention in leaking the details of their conversation to the newspapers, but because in leaking that information she breached an

independent legal rule that says that if A tells B something in confidence, then A is not allowed to disclose that information to a third party unless it is in the public interest to do so.

Again, suppose in writing the discursive part of the essay (whether constitutional conventions should have the force of law) you want to argue that constitutional conventions should not have the force of law, because:

> **(1)** If the courts were to award a remedy or impose a sanction in response to the breach of a constitutional convention, there are only four different kinds of remedies/sanctions that they could award/impose: (i) criminal punishment; (ii) an award of damages; (iii) an injunction; (iv) a declaration that failing to observe the convention was unlawful.
>
> **(2)** It would be unthinkable – for various constitutional reasons – for the courts to respond to the breach of a constitutional convention in ways (i), (ii) or (iii).
>
> **(3)** If the courts merely responded to the breach of a constitutional convention by issuing a declaration that failing to observe the convention was unlawful, the courts would be brought into disrepute – it would look like the courts were powerless to back up their words ('this action is unlawful . . .') with concrete action ('. . . and we forbid you to do it on pain of being sent to prison if you disregard our order'), or did not seriously mean what they said ('we're saying that this action is unlawful, but not so unlawful that we want to do anything about it').

This is quite a complex point to get across, but focusing on some concrete examples could really help to make what you are saying a lot clearer. For example, you could make out point (2), above, by considering a hypothetical situation where the Prime Minister has refused to resign on losing a vote of confidence in the House of Commons, and show that even if constitutional conventions did have the force of law, the most the courts could possibly do in that situation would be to issue a declaration that the Prime Minister was acting unlawfully in refusing to resign.

The essay on constitutional conventions demonstrates another reason why concrete examples can be so useful. You can sometimes make a particular concept or idea immediately intelligible by drawing an analogy with a

real-world situation. For example, students sometimes find it difficult to understand what a 'convention' is and what it might mean for a 'convention' to have the 'force of law'. But this difficulty can normally be immediately solved by pointing out that in football, there is a custom that if your team has kicked the ball out to allow an injured player to be treated, once play has resumed with the opposing team taking a throw-in or a goal kick, the opposing team will give the ball back to your team. This custom is like a constitutional convention – it is a practice that is normally observed, and on the few rare occasions that it is not observed, the failure to observe it is severely disapproved of by everyone else. And the question of whether a constitutional convention should have the force of law is analogous to the question of whether the referee in a football game should have the power to punish a side that fails to give back the ball to the other team after the other team has kicked the ball out of play in order to allow an injured player to be treated. So using homely concrete examples like this can be a very good way of making the points you want to make a lot clearer to the reader.

5. Write something interesting

To get a really good mark for an essay, particularly an essay written in an exam, you will have to write something interesting. Boring may get you a 2.1 – but it won't get you a First.

So if you are writing a descriptive essay, make the effort to come up with an interesting way of setting out the area of law you've been asked to write about. Think about:

(**1**) centring your description of the law around a concrete example that you can constantly refer back to;

(**2**) using a table or tables to set out the key elements of the law; and

(**3**) organising your description of the law around some core principles that (you will argue) the law gives effect to.

But whatever you do, don't just repeat what is in the textbook. That is boring – you have got to come up with something that is better than what is in the textbook. (Which is actually not as hard as it sounds.)

And if you are writing a discursive essay, make the effort to come up with an interesting 'line' in response to the question. In doing so, it's worth thinking about adopting a *contrarian* position, where you adopt a line of

argument which goes against the current, fashionable trend of thinking. An essay that takes that kind of line will automatically be much more interesting than an essay which just repeats the well-worn arguments that everyone else has been making for years, and as a result have a much better chance of getting a First than the second kind of essay. (If you don't believe me, I strongly recommend you either read Alan Bennett's play *The History Boys* or watch the DVD.)

But don't be contrarian just for the sake of it. Only adopt a line of argument that goes against the current orthodoxy if you actually believe in that line of argument – if your essay lacks conviction, that will be pretty clear and your essay will suffer for it. Also be aware that the person marking/reading your essay may well be a true believer in the current orthodoxy, and will take some convincing that your argument is correct. So make sure, if you do adopt a contrarian position in your essay, that you take time to consider the strongest possible arguments in favour of the current orthodoxy and then show how those arguments do not stand up. Note that I said: 'the strongest possible arguments . . .' If you try to pull a fast one and put up some really weak (what are called 'straw man') arguments against your position, that isn't going to impress anyone and your easy knock-outs will be rewarded with a pretty poor mark.

Two qualifications need to be made to what I've just said. First, don't adopt a contrarian position in writing an essay if doing so will require you to do the impossible. For example, let's go back to the essay on whether the law on homicide is in a mess. Okay – now everyone thinks that the law on homicide is in a mess, so it would make for an interesting essay to argue that the law on homicide is in fact in perfect working order. However, it's impossible to argue that effectively, because to do that you would have to go through the entire law on homicide and argue that every single element of the law makes perfect sense. It's just not possible to do that in an essay. You could maybe do that in a book – but in an essay there simply isn't the space to make your essay convincing. So if you are going to do an essay on whether the law on homicide is in a mess, you won't have a choice about what line you will take in response to that question. You will have to argue that the law is in a mess – and make your essay interesting through the points you come up with to show that the law is in a mess.

Secondly, don't adopt a contrarian position in an exam essay if the exam essay expressly excludes you from adopting such a position. For instance, a few years back, I was pretty confident that my tort students would get an essay asking them to talk about what's called the 'rule in *Rylands* v *Fletcher*'

(which basically says that if you bring a dangerous thing onto your land, and it escapes, and does damage to your neighbour's land, you'll be liable for that damage even if you weren't at fault for the escape) – there had been a very big and recent case on that rule, and examiners often set questions around recent developments in the law. (We'll talk about that some other time.) Not many people think very much of the rule in *Rylands* v *Fletcher*, so I gave the students some arguments in favour of the rule, so that they could write an interesting essay on it if it came up, instead of a boring '*Rylands* v *Fletcher* is rubbish' essay. So – come the day of the exam, there was indeed an essay on *Rylands* v *Fletcher* on the paper, but it was a quote from an Australian judge saying that the rule in *Rylands* v *Fletcher* should be abolished and then after that, the question said something like, 'In light of this, critically assess the decision of the House of Lords in *Transco plc* v *Stockport MBC*' (which decision had upheld the existence of the rule in *Rylands* v *Fletcher* in English law). So anyone wanting to say that the rule in *Rylands* v *Fletcher* was a good thing was left with nowhere to go – the examiner was basically saying, 'I want you to trash the rule in *Rylands* v *Fletcher* (and the decision of the House of Lords in *Transco*) for 45 minutes.' So it just wasn't possible to write a contrarian essay in response to that particular question.

If your essay is going to be non-contrarian in nature and argue in favour of a position that pretty much everyone agrees with, you can still make it interesting enough to stand out from the crowd by making as strong a case in your essay as you can against the position you are arguing for, and then demolishing that case. So, for example, suppose that you are writing an essay which is aiming ultimately to argue that prison doesn't work (whatever that means). The most interesting way of doing this essay is to set out as carefully as you can the strongest arguments that can possibly be made for the position that prison works, and then do a really great demolition job on those arguments. Again, remember that this kind of essay will only be as strong as the arguments that you set out to demolish, so don't succumb to the temptation to confine yourself to considering the weakest arguments against your position.

One final point about writing interesting essays: if you are writing a discursive essay to be marked by a supervisor or a tutor, or simply for practice, it's essential that you go beyond the reading list, and have a look to see whether there are any other articles or short books that you haven't been referred to, but are relevant to the essay. The more ideas and arguments you expose yourself to, the more likely it is that you will be able to come up with an interesting line in response to the essay question that you have been set. If you just stick with what you've been told to read, then it's not very likely that

you will have anything interesting to say in response to the essay question – you'll just be repeating what you've read in articles that are really well-known and familiar. So the very first thing you should do when you've been asked to write a discursive essay on a particular topic is do a Google search of terms relevant to the essay and see what's 'out there' on the internet that might be relevant to your essay. Of course, you'll turn up a lot of irrelevant stuff – but just an hour's searching should turn up some very useful material. And following all the other advice I gave you, in my letter on reading articles, on how to find other articles relevant to your studies should help you turn up further material that is relevant to the essay you are planning to write.

6. The first paragraph is vital

Your first paragraph has a bigger influence on what final mark you get for an exam essay than any other part of the essay. To see why this is, you've got to understand a bit about how essays are marked.

The final mark you get for an exam essay will be a percentage mark – usually, 70 per cent or more is a First Class mark, between 60 per cent and 70 per cent is a 2.1, between 50 per cent and 60 per cent is a 2.2, and beyond that it will depend on the particular university you are at what the boundary is between a Third and a Fail. (Of course, I hope you'll never have to worry about where that boundary is.) Now – while the mark you get is a percentage mark, the examiner won't mark your essay by giving you points as he/she reads your essay, and then give you a percentage mark by seeing how many points you got compared with a notional maximum number of points that you might have got for your essay. No – this is how it works.

The examiner will form a view on reading your essay whether it is a First Class essay, a 2.1 essay, a 2.2 essay, or worse than that. Having formed this view, the examiner will then ask him/herself: 'Was it a high or a low First/2.1/2.2/whatever?' And if he/she thinks it was a First Class essay (it answered the question, was interesting, had good arguments), but not a high First (but it didn't blow my mind), you'll get 71 per cent or 72 per cent. If on the other hand, he/she thinks it was not only a First Class essay but a really high First (it was the best essay I've ever read on this subject), you could get 80–85 per cent for an essay like that. (Only God gets more than 85 per cent for an essay – don't ask why; that's just the way it is.) Similarly if he/she thinks it was a 2.1 essay (it was okay, not very interesting), but a low 2.1 (the arguments seemed to be a bit flimsy, failed to mention a couple of relevant cases) then you'll get 62 per cent or 63 per cent for that. If, on the other hand, he/she

thinks it was a high 2.1 (the arguments were pretty solid, and the essay mentioned the relevant cases) then you could get 68 per cent or 69 per cent for that.

Now – note that there is an absolute gulf between getting 70 per cent and 69 per cent for an essay. Someone who gets 69 per cent for an essay might think – argh, I only just missed a First. Wrong: you didn't just miss a First; you were never in with a chance of getting a First. And that's because the overall impression that the examiner got from your essay was that it was not First Class quality. It was a 2.1 at best. It was a really good 2.1 essay – but it was never going to be a First. So whether you get a First or not depends on what overall impression the examiner forms of your essay. And the first paragraph is the most important paragraph of your essay in shaping the overall impression that the examiner forms of your essay.

To see why this is so, let's go back to the essay on whether the law on homicide is in a mess. Let's just look at two alternative first lines:

> (**A**) 'The law on homicide is in a mess – it is unclear, inconsistent and serves no rational purpose.'
>
> (**B**) 'To address this issue it is first necessary to set out the law on homicide.'

I can tell you for a fact that an examiner reading line (A) will immediately think: 'This is going to be a First Class essay.' And an examiner reading line (B) will immediately think, 'Ugh – 2.1 at best.' It should be pretty obvious why this is. Line (A) tells the examiner: this candidate is going to answer the question, they know what they want to say, and they are going to give me some good arguments in support of their answer. Line (B) tells the examiner: this candidate doesn't really know what to say in response to the essay question and is trying to avoid having to answer it by fleeing to the safety of a boring description of the law.

Now – first impressions are hard to budge. If the examiner starts off thinking that your essay is a First Class essay, then you'll have to do something seriously wrong somewhere in the rest of the essay to dislodge that first impression and end up getting a 2.1. If you keep your nose clean and do what you promised to do in your first line – that is, highlight some elements of the law on homicide that establish that it is unclear, and inconsistent, and serves no rational purpose – then you will get a First at the end of the essay. (Whether

it's a high First or a low First depends on how great the execution of the essay is.) If, on the other hand, the examiner starts off thinking that your essay is a 2.1 essay, then you're going to have do something seriously impressive in the rest of the essay to dislodge that first impression and get him/her to start thinking that maybe your essay is a First Class essay after all.

That's why the first paragraph is absolutely vital. And that's why most of the time you spend writing practice essays should be spent on learning how to write impressive opening paragraphs – that is, an opening paragraph that makes it clear how you are going to respond to the essay title and sets the stage for the rest of the essay by introducing the key ideas that will underlie your response. Some examples:

'The doctrine of consideration is in need of reform.' Discuss.

The philosophy underlying the doctrine of consideration is simple enough: only promises that form part of a commercial deal – what we can call 'bargain promises' – should be enforced. It is essential that the courts enforce bargain promises if our society is to enjoy any kind of sophisticated market economy. In contrast, a gratuitous promise – for example, A's promise to pay B £100 on his next pay day, or his promise to pay B £100 a year for the rest of her life to reward her for saving his life, or his promise to waive part of a debt that B owes him – is economically 'sterile' and there is consequently no public policy reason why it should be enforced. Critics of the current state of the doctrine of consideration reject the idea that only bargain promises are worth enforcing. They fall into three camps. (1) 'Social critics' argue that gratuitous promises that have been relied upon should be enforced, in certain circumstances. (2) 'Libertarian critics' argue that gratuitous promises that were intended to be legally binding should be enforced. (3) 'Economic critics' argue that there are some gratuitous promises that it is important to enforce for the purpose of ensuring the smooth running of our market economy. I will argue that none of these criticisms of the current state of the doctrine of consideration are valid.

'Prison works.' Discuss.

The catchphrase 'prison works' is capable of being interpreted in a number of different ways. (1) The prospect of being imprisoned is a

more effective deterrent to crime than any other form of punishment available to us. (2) Imprisoning people for serious offences is a more effective way of cutting crime rates than any other form of punishment available to us. (3) Imprisoning people for serious offences is a more cost-effective way of cutting crime rates than any other form of punishment available to us. I will argue that while claim (1) is true, it is also immaterial whether or not (1) is true. I will go on to argue that while claim (2) is untrue, that is also immaterial. What actually matters is whether claim (3) is true. I will argue that claim (3) is not likely to be true. So while prison may 'work' at some level, it does not work at the level that matters to us – cutting crime rates in the most cost effective manner possible.

When will one person be held liable in tort for failing to rescue another?

The normal rule in English law is that if I fail to save you from harm, you will not be able to sue me in tort for compensation for that harm – no matter how easy it might have been for me to rescue you. However there are a number of well-established exceptions to that rule. If: (1) I put you in danger of suffering that harm, or (2) I stopped someone else saving you from that harm, or (3) you were harmed by a child or an animal that was initially in my control, or (4) I 'assumed a responsibility' to you to save you from that harm, or (5) you were on my land at the time you suffered that harm, and you suffered that harm because my land was in a dangerous condition, then I will be held liable to compensate you for the harm you suffered if I failed to take reasonable steps to protect you from that harm. There have been attempts to expand the categories of exceptions to the 'no liability for omissions' rule to cover the case where: (6) it was my job, as an employee of the State, to save you from harm. So far there is only tortious liability in situation (6) where I intentionally chose not to save you from harm, knowing that I was required to do so under the terms of my employment: in such a case you could sue me for committing the tort of misfeasance in public office. But in cases where I carelessly failed to save you from harm, the current state of the law is that there is no tortious liability (though there may be liability under the Human Rights Act 1998) in situation (6): the general rule of 'no liability for omissions' applies.

7. Make sure your essay stands up to scrutiny

Again, a pretty obvious rule which is routinely ignored by students. Don't make any old point or argument in your essay – make sure that the points and arguments that you do make do not suffer from any obvious flaws. Always ask yourself – 'Is what I am saying true?' 'What objections could be made to what I'm saying?' 'Do those objections stand up?'

For example, take the interpretation of the case of *Interfoto Picture Library* v *Stiletto Visual Programme* that was set out a few pages back. According to this interpretation, in that case the Court of Appeal refused to allow the claimants to charge the defendants £5 a day per slide for returning their slides late because the claimants had acted in bad faith in inserting that charge for late return into their contract with the defendants. But if you were relying on that interpretation of the case to argue that the courts require contracting parties to act in good faith towards each other, you should be asking yourself: 'Is that interpretation of the *Interfoto* case correct?' 'What objections could be made to it?' 'Do those objections stand up?'

So someone who objected to the above interpretation of the *Interfoto* case might argue:

> The Court of Appeal in the *Interfoto* case *didn't* say to the claimants, 'Well – you sure pulled a fast one on the defendants sneaking that term into the contract; but we're not going to allow you to get away with that – we're going to find that that term is unenforceable and of no effect.' Instead, they said, 'Sadly for you, you never even managed to get the term as to payment for late return of the slides into your contract with the defendants. That term wasn't actually validly incorporated into your contract with the defendants because the defendants didn't think that such a term would be part of their contract with you: while they were happy to deal with you on your standard terms, they never thought that such an onerous term would be part of those terms, and you never told them that it was.' So the *Interfoto* decision had nothing to do with sanctioning bad faith behaviour – the Court of Appeal in that case was giving effect to the much more basic idea that you can't be bound by a contract term which you didn't agree to, and which you didn't give the appearance that you were agreeing to.

Does this objection stand up? If it does, then you can't use *Interfoto* as support for the idea that the courts require contracting parties to act in good faith towards each other. You'll have to cast around for some other, stronger, authorities in favour of that view. And if you think you've found them: test them out. Ask again – 'Is there a more plausible interpretation of these cases?' Doing this is hard work, but it is essential that you do this work if you are going to construct a solid argument that will stand up to scrutiny.

In testing the arguments that you are making in favour of a particular position that you are taking, look out in particular for whether they are circular or incomplete or based on a false premise. (You may want to look again at my letter on how (and how not) to argue at this point.) For example, suppose that you are criticising the law for saying that a teacher does not have a duty to take any steps to stop a child being bullied as she goes home from school. To try and make your discussion of the issue clearer, you wisely follow my earlier advice and introduce a concrete example where B is being consistently bullied on her way home by other people in her class, and A, the class teacher, knows about this but has done nothing to reprimand or discipline the bullies. Now you want to find a way of criticising the law for not holding A liable for failing to protect B. Don't just seize on any old argument in favour of saying the law is deficient. Try and find one that isn't flawed in some obvious way.

Suppose, for example, that you are thinking of arguing:

> The law in this area is deficient because the law should say that A has a duty to take steps to stop B being bullied.

Unfortunately, that's a circular argument. It simply assumes that the point you are trying to establish – that A should have a legal duty to protect B – is correct. Alternatively, you might think of arguing:

> The law in this area is deficient because B has a right not be bullied.

However, this argument is incomplete. B does have a right *against the bullies* not to be bullied, but that does not establish that she should have a legal right that A take steps to protect her from being bullied. Maybe you'll try to argue:

> The law in this area is deficient because A should protect B from being bullied.

Sadly, again, that argument is incomplete because while we can accept that A should protect B from being bullied, that does not – all on its own – establish that the law should step in to encourage A to do the right thing by imposing a legal duty on her that requires her to take steps to protect B from being bullied. Trying a different approach, you could try to argue:

> The law in this area is deficient because A should protect B from being bullied, and the law should encourage us to do the right thing.

However, that argument seems to rest on a false premise. It is not at all clear that the law should always encourage us to do the right thing. We don't have laws against adultery, or being rude to people, or letting your children down, or failing to rescue strangers who are drowning. Finally, we come to an argument that actually seems to work:

> The law in this area is deficient. The law should encourage us to do the right thing where doing so will not have any seriously adverse consequences. That is the case here: A should protect B from being bullied, and encouraging A, and other teachers, to do the right thing in this sort of situation will not have any seriously adverse consequences.

This argument isn't circular or incomplete. However, you still have to test it out to see whether it rests on a false premise. You've got to ask yourself whether imposing a legal duty on someone like A to protect someone like B from being bullied may in fact have some seriously adverse consequences.

8. Don't avoid a fight

Students sometimes seem to think that if they mention any arguments that run counter to the point that they are trying to make in their essay, that will somehow undermine and weaken their essay. So they just concentrate on the

arguments that support their case, and ignore any opposing voices. The truth is quite different: if you don't mention any obvious arguments that run counter to the general thrust of your essay, that will look like a sign of weakness. It will look like you are avoiding dealing with those arguments because you know you have no response to them. A strong essay will make the arguments in favour of its position, and then consider the arguments against its position and demolish those opposing arguments. And again – don't try and pull a fast one by introducing some weaknesses into your opponent's position that will make it much easier for you to dismiss him/her. Doing so will only weaken your essay.

9. Pay attention to the details

There's a saying: 'Don't sweat the small stuff.' That is: don't get worried about small things. Please, please do sweat the small stuff when you are writing an essay. Little slips in spelling, grammar, and punctuation can create a terrible impression and result in your getting a lower mark than the content of your essay deserves.

So – it's 'Act of Parliament' not 'act of parliament'. And 'it's' always means 'it is' or 'it has'. So never write 'it's' if you don't mean to say 'it is' or 'it has'; write 'its' instead. It's the European Court of Human Rights that ultimately decides whether someone's rights under the European Convention on Human Rights have been violated, not the European Court of Justice. Avoid run-on sentences – sentences that squash together two or more different sentences into the same sentence – they make you look illiterate. (See what I did there?) Don't refer to Hoffmann LJ's decision in *Stovin* v *Wise* – his decision in that case was given in the House of Lords, not the Court of Appeal, and so it was Lord Hoffmann's decision, not Hoffmann LJ's. If you want to refer to the major reason for the decision in a case, talk about the princip*al* reason for the decision. If you want to refer to the idea or theory underling the decision in a case, talk about the princip*le* underlying the decision. Defendants in tort cases are sued – they are not prosecuted. An unsuccessful defendant in a criminal case is found guilty of committing a particular offence; he is not held liable for committing that offence.

10. Don't plagiarise

I can't believe I have to say anything about this, but as plagiarism is a growing concern for university authorities, I guess I should. Plagiarism involves stealing someone else's ideas and passing them off as your own. The 'someone else' is normally an academic who has published a book or an article.

Plagiarising an academic's work usually involves either: (1) copying out chunks from his/her book or article into your essay without acknowledging that those chunks did not come from your head, but came from someone else's published work; or (2) setting out an idea or concept that he/she came up with without acknowledging the source of that idea or concept. Plagiarising someone else's work is just dumb, dumb, dumb – and not just because you might be caught out and embarrassed, or worse.

Let's take the first form of plagiarism – writing an essay by copying out chunks from a book or article that someone else has written. This is not going to help you in the long run. As I said before, writing essays is a skill that requires a lot of time and practice to acquire. Copying out chunks from someone else's work is not going to help you acquire that skill. So any essay that you write that contains substantial sections from someone else's work is just a waste of time – you may have saved yourself some effort by lifting someone else's work, but you are guaranteeing that when you are asked to demonstrate your essay writing skills in the exams, you will have nothing to show.

As for the second form of plagiarism – stealing an idea or concept from someone else's work and passing it off as your own – again this is just pointless. No one is expecting you to write something wildly original in an essay. There is absolutely no reason for you to want to pretend that some idea or concept came from you, rather than someone else. You will get just as much credit for acknowledging that you came across that idea or concept in an article or book written by some academic – at the very least, it shows that you have done some reading around the subject and been able to appreciate someone else's work.

So those are my ten rules for writing essays. It might be an idea to write out the rules – just the rules, not the explanations of the rules – on a bit of a card, that you can have with you whenever you write an essay, so as to remind you of what you ought to be doing in writing an essay.

Before I finish, I just have one last word of advice. I can't claim any credit for this bit of advice (no plagiarism here!) – it was actually a suggestion of a colleague of mine here at Pembroke College, Professor Loraine Gelsthorpe, which struck me as being very sensible. She suggested that in writing practice essays for exams, students should not write them on computers, but should instead write them longhand.

The idea behind this is that writing essays in longhand is a very different skill from writing essays on a computer. If you write an essay on a computer, you can write a sentence, see what it looks like, delete bits of it if you are unhappy, and try it again. You can also insert text into the middle of an essay, if you think a

particular point needs expanding, or you suddenly realise that you should have mentioned a particular case at a particular point in the essay. And you can move text around the essay if you think that it would be more appropriate to have a particular section appear earlier or later on in the essay than it currently does.

You can't do ANY of this if you write an essay longhand. You have to work out what you want to say, and how you want to say it, before you start writing – because once you start writing, there is no going back. So you have to make sure that your essay plan is a good one before you put pen to paper. Now writing an essay on a computer doesn't encourage you to acquire this skill – you don't need to have a particular plan when starting writing an essay on a computer: you can just start writing, see how it goes, let a plan emerge as you go along, and revise the text in light of your emerging understanding of what the essay should look like. But it's essential that you do acquire this skill because you're going to need it for the exam, where – unless you have special circumstances – all your essays have to be written longhand.

However, for the time being I would suggest that you continue to write your essays on a computer to enable you to get into the habit of writing some really good, effective essays. Once you've shown yourself able to do that, then I would advise abandoning the computer and writing your essays longhand to acquire the special skills required to write really good, effective essays in exam conditions.

If you want to read anything else on how to write good, effective essays, you should definitely get hold of the excellent *A Short Guide to College Writing* (fifth edition) by Sylvan Barnet, Pat Bellanca, and Marcia Stubbs. It's also worth reading George Orwell's essay on 'Politics and the English language' (now freely available on the internet). You should also have a look at Chapters 9 and 10 of Thomas Dixon's excellent book *How to Get a First*.

All this talk about writing essays makes me think it might be an idea to give you some tips on writing dissertations. A lot of universities now make their students write dissertations as part of their course, or at least give their students the option of doing one of their papers in the form of a dissertation. The trouble is, I've never written a dissertation in my life. But I know a guy who has, and he'll be able to give you some tips. In the meantime, I'll think about what advice I could give you on answering problem questions – the other main type of question, other than essay questions, that you will be expected to answer in your exams.

Best wishes,

Nick

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Writing a dissertation

(By Jason N. E. Varuhas)

Dear Jamie,

Nick has asked me if I could give you some tips on writing a dissertation. I'm more than happy to help out. Many of the tips that Nick has given you in his letter on writing an essay – for example, in respect of writing style – will come in handy when you come to writing a dissertation. However, dissertations differ in a number of respects from essays. For example the word length is markedly longer (generally between 8,000 and 15,000 words). You will have a longer period of time to write the dissertation (perhaps the whole academic year). The dissertation will probably not be designed to assess what you have learned over a course, but is rather a self-directed project. You will be required to conduct your own research in order to write a dissertation, and perhaps even decide upon your own dissertation topic. In general you will likely have greater freedom to shape your approach to the topic and your line of argument than in a course or exam essay. There is also a greater expectation that your piece of writing will put forward original ideas and arguments, and entail original research.

What follows are a number of key points that you need to bear in mind if you ever have the pleasure of writing a dissertation.

Picking a topic

The first task is to decide upon a topic. This decision is of the utmost importance, because it will shape the destiny of your entire project. Now you may have a topic set for you. In this case, you will probably still find the points in this section helpful, not least because set topics can deliberately be framed in broad terms to allow students the freedom to take their own distinctive 'angle' on the dissertation topic. For example a topic such as the following allows for

a range of different angles to be taken: 'Parliament ought to be sovereign. Discuss.' The process of deciding the 'angle' you take or the 'focus' of your dissertation will likely be similar to the process someone goes through in selecting and refining a topic for themselves. A few points to bear in mind are:

(1) Interests: yours and others'

The topic should be one that interests you. If a topic bores you, you may find it difficult to motivate yourself to spend long hours researching it and thinking about it. In contrast if you are interested in a topic you are more likely to find the process stimulating and will get more out of it (and probably produce a better dissertation). Two further points. First, note that an interest in a subject is not the same as feeling passionate about a subject. There is no rule against researching something that you have strong feelings about. However, there is greater risk that you may not bring an objective mind and scholarly approach to your research. It is generally the case that people write their best work about topics they find intellectually stimulating and interesting, but which they come to with no strong views one way or the other. Second, if you are set a topic that does not initially appeal to you: give it a chance. Most topics become far more interesting once you get 'stuck in' and you may find your own 'angle' on the topic which you find stimulating. If the topic still does not appeal to you, then simply treat the dissertation as a means to an end, get on with the job, and do the best that you can; at the very least it will be a character-building exercise, and you will learn a great deal from the process, whether you are enthused by the topic or not.

In selecting your topic it may be worth thinking about whether there will be a wider interest in your topic. A good piece of work is a good piece of work regardless of whether there is a wider audience for it. However, consideration of whether there is likely to be a wider audience for your work is relevant if you would like to eventually submit your dissertation or a revised version of it for publication, say, in a student law review. Thus, you may want to consider whether and how your proposed topic links in with contemporary academic debates, whether it addresses a significant issue which is likely to come before the higher courts, or whether it relates to ongoing debates about possible legislative reform. However, don't spend too much time speculating about whether a topic is likely to be of wider interest. If a dissertation presents an original, thought-provoking and well-researched argument it ought to be of interest to others who are academically minded, regardless of the specific subject-matter it addresses, while the most important thing is what you learn through the dissertation process.

(2) Originality

A critical consideration in deciding upon your topic is the degree to which any given topic affords the opportunity for original thinking and research. This is important because, all things being equal, you will receive a higher grade if your dissertation evinces original thought; the grading system rightly places a premium not only on your ability to understand legal materials but also your ability to formulate and develop new ideas and arguments. More generally, research which advances legal knowledge is clearly far more valuable than research that does not.

Having emphasised the importance of originality, it is important to emphasise that you ought to have realistic expectations of yourself. No one expects an undergraduate dissertation to present some novel theory that will unify the whole of the law of obligations, or settle disputes about the basis of law. You can produce good, original and thought-provoking research without revolutionising legal thought. Indeed, there are dangers in seeking to be too profound, in that you may end up 'overreaching', and confusing yourself and your audience.

There are various sources of originality. You may choose to analyse a novel legal development which has not yet been the subject of serious analysis, such as an emergent line of cases or a new statute. You can adopt a new approach to analysing an established area of law, such as an historical analysis of how the body of law has developed over time, or a comparative approach which considers how different legal systems approach the same legal issue. You may contribute an innovative line of argument to a pre-existing legal debate, or provide an original critique of an established line of academic thinking about a particular subject.

(3) Viability

However interesting and original a topic, it must also be viable. The viability of a topic is determined by whether it is possible to write a good dissertation on that topic given certain parameters, the most important being time frame and word limit. To illustrate this point let us consider the following possible topics:

(1) A critical evaluation of the law of damages across the law of torts.

(2) A critical evaluation of the law of damages in the tort of false imprisonment.

(3) A critical evaluation of the damages principle in *R (Lumba)* v *Secretary of State for the Home Department* (a case in the field of false imprisonment which holds that where the claimant suffers an unlawful imprisonment on the facts, and therefore establishes liability for false imprisonment, they may nevertheless be denied substantial damages if the defendant – often a public officer or public authority – in theory had the power to detain them lawfully).

Assuming a word limit of 8,000 words, topic (1) ought to be rejected as simply not viable. Any attempted analysis of the law of damages across the whole of tort law, including negligence, nuisance, defamation, the trespassory torts, the economic torts, and statutory torts, could only be done very superficially, and therefore very badly, within 8,000 words. Further, it would take far longer than one academic year to conduct the research required for this topic, bearing in mind the time you need to dedicate to other courses and extra-curricular commitments.

Therefore the choice is between (2) and (3). In making this choice we face an inevitable trade-off between 'breadth' and 'depth'. This trade-off ought in general to be resolved in favour of depth, and thus in favour of topic (3). You will generally find that what, on the surface, may appear to be the narrowest of topics, will end up raising a plethora of complex and interesting issues, and that the broader your topic, the more difficult it will be to engage in the topic as thoroughly as you might a narrower topic.

Let us take topic (2) as an example. The law of damages within false imprisonment is a large body of law. It includes rules and principles relating to compensatory damages, exemplary damages and nominal damages, including those rules and principles which govern when each type of damages ought to be awarded and the assessment of quantum. That this is a large body of law will cause significant problems within an 8,000 word dissertation. On the one hand, there is a risk that you will spend a significant portion of the dissertation describing what the law of damages is, leaving yourself an insufficient quantity of words within which to conduct a thorough critical examination of the state of the law. In this way you will have deprived yourself of the opportunity to demonstrate to the examiner your capacity for original criticism. On the other hand, in seeking to leave yourself enough words in which to do a thorough job of critically evaluating the relevant rules and principles, there is a risk of presenting an overly simplistic description of

those rules and principles, for example by passing over the reality that the law is not clear in certain respects. Not only is superficial description of the law a cause for concern in itself, but analysis based on an account of the law which passes over its nuances and complexities is unlikely to be convincing.

(4) Reading and talking

In order to identify a potential topic or range of potential topics and test it/them against the foregoing guidance, you must know something of the substance of the topics under consideration. It is, therefore, important that you do some general reading around the topics before settling upon one. You might want to read relevant parts of a leading textbook, the leading case in the field or a significant recent case, and/or two or three leading articles. This will help you to determine whether you are interested in the topic, and will also help you to start thinking about the line of argument you might take in the dissertation.

Importantly, the more you know about a field, the more you will be able to refine and narrow your topic. So, you may start with a general interest in the law of damages in tort, then after reading a number of articles or cases find that you are particularly interested in the law of damages in false imprisonment. From a little further research you may discover that the case of *Lumba* raises very interesting and significant issues, and has not yet been the subject of serious analysis in the literature, leaving the door open for an original contribution.

You will also find it helpful to talk to people about your topic, in particular your dissertation supervisor, who will be able to offer you some 'inside knowledge' of the field. They may be able to advise you how much has been written on your proposed topic, suggest how you might narrow your topic, and/or suggest some initial readings. Although your supervisor is your first port of call, you may also want to test out your proposed topic and line of argument on a range of people with some knowledge of the relevant legal field, including fellow students. This advice – about talking to people – is equally relevant to the process of researching and writing the dissertation. Some of the most significant insights I have had in relation to my research have come during a 'stop and chat' (to quote Larry David) in the corridor or over a coffee with a friend.

At the end of this process of talking, reading and reflecting you should have a clear research question, to which your dissertation will seek to provide an answer. Illustrative examples are: (1) 'Should the law of negligence

recognise that public authorities owe duties to take reasonable steps to protect an individual where the relevant authority knows of a real and immediate threat to that individual's life from the acts of a third party?'; (2) 'Should exemplary damages be available for a breach of contract?'; and (3) 'Should the law require a newspaper to give prior notice and an opportunity to comment to an individual before the paper publishes a story about that individual?'

Finding an approach to the topic

Intimately connected to the task of deciding your topic, and of ongoing relevance as you research and write the dissertation is your *approach* to your topic (in more technical terms, your *methodology*). An awareness of different approaches is important for several reasons. First, your approach will often provide the original element of a dissertation. Second, you need to have a clear idea of the approach or approaches you are taking in order to articulate clearly your central lines of argument. Third, although the matter cannot be discussed in detail here, different approaches entail different techniques and different potential pitfalls, and it is important that you are aware of the salient features of any particular approach so that you implement the approach rigorously and avoid any pitfalls. Before going on I should note that, while it is important that you are aware of your approach, it is equally important that you do not become fixated upon it, otherwise you may never get on with the tasks of researching and writing the dissertation.

This letter is not the place for a detailed exposition of the different approaches that may be taken to legal research. However, it is worth briefly outlining a few different approaches in order to illustrate the variety of approaches open to you. I focus particularly on doctrinal and theoretical approaches as these are the most common approaches to legal research.

(1) Doctrinal approaches

The most prevalent form of legal research is 'doctrinal'. This approach involves the examination of legal 'doctrine' – doctrine being the body of rules and principles based in legal sources such as legislation and judicial decisions. Usually a doctrinal researcher is concerned with one body of doctrine, such as the law of contract or administrative law, and typically a particular sub-body of doctrine within these general fields such as the law of expectation damages or of legitimate expectations.

The first task of a doctrinal scholar is to state what the law is.

This may seem an easy task on the face of it but it will require the researcher to locate all of the relevant case law, read those cases and distil the rules and principles enunciated therein, and sort that collection of rules and principles into a coherent and intelligible order, so far as one exists. In undertaking this task you must be open to the possibility that the law, shaped as it has been by many hands over many years, may in certain respects lack coherence or consistency; if this is the case you ought to say so. A common challenge in doctrinal research is that it can often be the case that the law is not clear in some respect – for example because of apparently conflicting precedents, or because an issue has not been squarely addressed by the courts, leaving scope for argument and original analysis as to what the best account of the legal position is.

There may also be different ways of sorting and categorising the law, and scope for original argument as to which way is best, while we may wish to categorise the law differently for different purposes. For example, you might provide a statement of the law according to the nature of legal obligations, for example separating tort from contract on the basis that contract is based on consent whereas tort is an obligation imposed by the law. Another person might structure their statement of the law in a different way – for example according to the subject-matter that the law addresses, such as the law as it relates to ships or to the media.

The second task of the doctrinal scholar is one of critical analysis, and in particular critical analysis by reference to established legal values, such as coherence, consistency, rationality, and justification. For example, you might criticise a Supreme Court judgment in the field of false imprisonment because it is inconsistent with an important line of House of Lords precedent which was not considered or which you believe was misinterpreted by the Supreme Court; you might criticise the judgment on the basis that it creates an incoherence in the law by establishing a new rule that cannot be reconciled with other long-standing rules within false imprisonment; or you might criticise the decision on the basis that the reasoning adopted by the Court is unconvincing – for example because it is based on arguments that on closer analysis conflict with one another, or premised upon assumptions which can be shown to be false.

(2) Theoretical approaches

Another common approach to legal research is 'theoretical'. Theory is a difficult idea to pin down, but one useful way of thinking about it is in terms of

levels of abstraction. When we are engaged in theoretical research we are seeking to explain or evaluate the law from a bird's eye view, and therefore will be less engaged with the messy detail of particular legal rules and principles. The bird may be flying higher above the doctrinal landscape, such that our analysis is far removed from doctrine and we are considering the law in much more abstract or philosophical terms. For example, we might ask what the possible rationales are for having a law of vicarious liability in tort, or why damages should ever be an appropriate legal remedy. The bird may be flying lower, in which case our theory will engage more closely with doctrine. For example, a dissertation may argue that we can explain the significant doctrinal features of the tort of false imprisonment by reference to the distinctive underlying function of the tort, which is to afford strong legal protection to the fundamental right to liberty. Note that although the dissertation will be more engaged with doctrine, it is concerned with 'significant features' of doctrine, such as whether liability is in general strict or fault-based or whether the tort is actionable without proof of loss, rather than the outcomes of particular cases or the intricate details of particular rules.

(3) Other approaches

There are many other possible approaches. You might undertake *comparative* research. For example, you might consider how different legal systems approach analogous legal issues, assessing the degree of divergence or convergence among the relevant legal systems, and seeking to understand why, for example, different approaches may have emerged, given distinctive contextual features within each jurisdiction. You may take an *interdisciplinary* approach, using insights from other disciplines to help analyse legal issues. Thus, we might consider research into behavioural psychology in assessing the claim that the prospect of damages liability for defective products may incentivise product manufacturers to take more care in the production of their goods. You might take an *historical* approach, considering how changing social, economic and/or political conditions have shaped the development of a particular body of legal doctrine over a particular period of time. Or you might prefer a *contextual* approach, considering how legal rules operate in context. For example, a researcher may want to examine whether and how public officials take into account human rights law in exercising their powers, discretions and duties. This sort of research will usually require *empirical* research such as conducting interviews with officials, or spending time at a public authority observing bureaucratic behaviour.

(4) Combining approaches

In a great many dissertations a number of approaches will be utilised. For example, we will need to know what the law is, using orthodox doctrinal techniques, before we are able to develop a theory to explain the law. In conducting a critical analysis of a new rule enunciated in a recent Supreme Court decision we may wish to look at the approach taken to the same legal issue in other comparable common law jurisdictions, such as Australia or New Zealand. The courts in these jurisdictions may have adopted a different rule, and you might find that the courts' reasoning helps to demonstrate the weaknesses of the UK Supreme Court's approach. You may wish to critically examine a court's reliance on the argument that the imposition of a duty of care on a police authority will help to incentivise good practice within the police forces. On the one hand, you may criticise the court's reasoning on the basis of established legal values, for example on the basis that the use of policy arguments may undermine the coherence of the law of negligence. On the other hand, you may also wish to criticise it on the basis of empirical studies which demonstrate that the effects of imposing liability on police forces are not at all clear, suggesting that the court's assumption that imposition of a duty will have positive behavioural effects may be misplaced. Thus different approaches can be combined to powerful effect. However, it is important to remember that in order to avoid confused analysis you need to have a clear idea of when you are utilising one approach or the other.

(5) Positive and normative analysis

Lastly, I ought to draw your attention to one significant distinction which cuts across all of the aforementioned approaches and with which all legal researchers ought to be familiar. That is the distinction between *positive* and *normative* analysis. Put simply, positive analysis is an analysis of what the law *is*. Examples of positive analysis include (i) the doctrinal task of describing what the law of false imprisonment is, and (ii) the development of a theory which seeks to explain the law of false imprisonment at a certain level of abstraction. Normative analysis is an analysis of what the law *ought* to be. In other words, it is a prescriptive form of analysis, seeking to argue for what the law should be ideally. Examples of normative analysis include (i) the argument that the damages principle in *Lumba* ought to be rejected because it affords insufficient protection to liberty, and (ii) the argument that courts ought not to be given the power to strike down legislation passed by Parliament because this would be inconsistent with democratic principles.

Importantly, an 'ought' cannot be derived from an 'is'. Thus, it does not follow from the fact that the damages principle in *Lumba* is the law of England at the moment that it represents a sound or justifiable principle, such that it *ought* to be the law of England. Equally, when you are conducting positive analysis, such as articulating a theoretical explanation of the law, you must be careful not to allow your explanation to be captured by your normative views of what the law ought to be, as this would be to confuse two different tasks – explanation and prescription. This is not to say that positive and normative analysis cannot feature in the same dissertation; they almost always will. For example, you might engage in a doctrinal analysis of a body of case law and find that conflicting rules emerge from two lines of authority, and then go on to articulate a normative argument as to which rule you think ought to be preferred. The important point is to keep clear in your mind and in your dissertation when you are engaged in positive analysis and when you are engaged in normative analysis.

Researching the dissertation

So let's assume you now have your topic and an idea of the general approach you want to take to it. The time has come to begin the process of researching and writing the dissertation. I will discuss researching and writing the dissertation separately – research in this part and writing in the next – as some structure has to be imposed on the discussion. However, it is worth recording that it is somewhat artificial to address the two separately. The two processes are inherently intertwined (as I say below, the writing process is a core aspect of the research process), and while you must begin the research process before you start writing, putting pen to paper by no means marks the end of the research process.

(1) Sourcing material: one thing leads to another . . .

When faced with the task of researching a new topic it can be difficult to know where to begin. It is easy to respond by procrastinating. This ought to be avoided. In my experience the best way to get into a topic, particularly if you are unfamiliar with it, is to begin with reference works. These include textbooks, legal encyclopaedias such as *Halsbury's Laws of England*, or research handbooks, such as the *Oxford Handbook of Empirical Legal Research* or the *Oxford Handbook of Comparative Law*. Thus, your first step might be to go to the library and round up a number of the leading textbooks and reference works in your field.

Just as valuable as the material in the text of these reference works, if not more valuable for your purposes, are the references in the footnotes. Within the footnotes you might find references to books which specifically address your topic, which you can then look up and read. From reading the relevant chapters in a number of reference works you will start to see which journal articles are frequently cited and relied on by the authors. Some textbooks even have a list of further reading at the end of each chapter which can be a useful resource for locating relevant articles and books. You can seek out articles, either by looking up the paper copies of the journals in the library or searching online resources such as Westlaw or HeinOnline. From reading the reference works and scouring the footnotes you will similarly get a clear idea of the leading cases in your field of research, which you can then look up in the law reports or in legal databases such as Westlaw or LexisNexis.

One thing will lead to another. From each book, article, or case you look up in the course of your initial 'research sweep' you will learn more about your topic and find references to further relevant material. You will also start to get a feel for resources which are likely to be a source of further relevant material. For example, if you are researching a topic in constitutional or administrative law, you will no doubt begin to see that many of the articles written on your topic appear in specialist public law journals such as *Public Law* and *Judicial Review*, while some appear in generalist journals such as the *Modern Law Review* or the *Cambridge Law Journal*. You can then use Westlaw or LexisNexis to conduct keyword searches of past volumes of these journals, or you can go to the library shelves and flick through the contents pages of past volumes to see if you can spot anything of interest.

As your research goes on you will find that you move from general reading around a subject to distinct 'streams' of research, each of these streams correlating with sub-topics in your dissertation. For example, part of your dissertation may address how the area of law you are looking at has developed over time, which will require you to locate and read the most important cases decided in the field. Another aspect of your dissertation may be a critical comparative analysis of the area of law you are concerned with, meaning that you will need to read relevant cases from other jurisdictions. Yet another aspect of your dissertation may be a consideration of different theoretical explanations of that area of law, such that you need to locate and read articles and books written by leading theorists in the field.

It is important to emphasise that there will often be material that is relevant to your topic which is not contained in textbooks or in articles written within your field of research. Indeed, an important source of originality in a

dissertation will be the inclusion of original research. For example, there may be cases which bear on your topic which have not been analysed in the existing academic commentary and which have been missed in later court decisions, or there may be literature in other fields, such as political science, which might help you to analyse your topic in an original way. A key to conducting this sort of original research is to figure out where to look.

If you are seeking out relevant political science literature, you can start with reference works in political science, such as the *Oxford Handbook of Political Science*, and move on from there. If you are searching for cases, you will probably need to run keyword searches on electronic legal databases, and carefully analyse the results for relevant material. There are other facilities on electronic databases which can be helpful. For example, if you uncover a relevant case on *Westlaw* it is possible to bring up a screen which lists later cases which have applied or distinguished that case. There may be specialist law reports which report cases in your field of interest, have reasonably detailed tables of contents, subject indexes and helpful headnotes, and which you can spend an afternoon flicking through at the library. For example, if you are researching an area in constitutional or administrative law, the *Administrative Court Digest*, which provides summaries of public law cases, would be a useful resource; while if you are researching European human rights law, the *European Human Rights Reports* would be an important resource.

While the most common sources in conducting legal research will be primary materials such as cases and legislation, and secondary materials such as textbooks and journal articles, you should bear in mind that the sources that you ought to consult will vary with your approach and the subject-matter of your dissertation. For example, if you are conducting historical research you may have to visit archives, such as the National Archives, to go through historical papers, such as letters or newspapers, read autobiographies or biographies of important figures from the period you are researching, and/or read cases and academic commentary from the relevant time period. If you are conducting research into the meaning of provisions of a statute you may have to consider background material, such as policy documents prepared by the government department which was responsible for proposing the legislation, the record of the Parliamentary debates on the Bill (known as 'Hansard'), and the reports of Parliamentary Committees which scrutinised and heard evidence on the Bill. Some legislation implements reports produced by bodies such as the Law Commission or *ad hoc* special inquiries set up by the government. Helpfully, much of this material is published online on governmental or Parliamentary websites.

An important and challenging aspect of the research process can be keeping up with current developments. You cannot rely on textbooks or articles to provide an up-to-date statement of the law or repository of academic commentary; as soon as a textbook or article is published, it is almost invariably out of date. New judgments are constantly being issued, new statutory measures enacted, new government reports produced, and new academic commentary published. It is critical that you do not miss out on an important development such that your dissertation appears incomplete, while a new case or article might greatly aid your argument.

There are various ways to try to keep up to date. As regards articles, you can periodically check the latest issues of the leading journals in your field, while there are various updating services which you can sign up to and through which you will be sent an email when a new issue of a selected journal is published. In terms of textbooks, it is now very common for textbook writers to publish online updates or small hardcopy supplements which detail the most recent developments in the field. It is worth noting that new editions of a textbook may come out while you are writing your dissertation, and it is important to refer to the most recent edition. In terms of cases, a very helpful resource is the *Weekly Law Reports*, which reports the most recent and important judgments and is published on a weekly basis, such that there is only a short lead time between the issuance of a judgment and its appearance in the *Reports*. Similarly helpful are the 'recent decisions' lists on the Bailii website, and the 'decided cases' section of the UK Supreme Court website – you can find the relevant links by going to the 'Useful links' section on Nick's website (www.mcbridesguides.com). Various update services are available, for example through electronic databases such as Westlaw, which usually give you the option of subscribing to content based on your interests. Although many posts on legal blogs resemble sound-bite journalism rather than academic scholarship, they can be useful in drawing your attention to recent developments in your field – again, Nick's website will give you some relevant links. You can also sign up to relevant Twitter feeds, such as that of the UK Supreme Court (@UKSupremeCourt).

From this discussion it ought to be apparent that to conduct effective legal research you will need to know how to use a law library and how to use electronic databases. It is important that you seek out and get the training that you need. A linked point is that librarians and IT helpdesks are there to help you and although they cannot do the research for you (regrettably), you should not hesitate to ask for help if you are having difficulty locating books on fifteenth-century tort law or struggling to find an obscure case on Westlaw.

(2) Focus, reflection and when to stop reading

So far we have discussed how you might go about locating relevant sources. What follows are a few tips you should bear in mind when it comes to reading the material you have located.

First, it is important to read key materials, such as leading cases in your field of research, *for yourself*, and not rely on secondary accounts in articles or in textbooks. Each person understands material slightly differently and each person reads material for a different purpose. A textbook writer is concerned to state the most important rules and principles within a particular field of law. This is different from your task, which is to answer a specific research question. There may be material in a particular case that is relevant to your topic which is not flagged up in textbook discussions of the case; the textbook writer may not have considered the material relevant to his or her task, or possibly overlooked the material. Furthermore, you can only truly understand a body of law if you have spent time reading the relevant cases for yourself, and taken time to form your own understanding of the rules and principles they entail. This sort of deep understanding will ultimately shine through in your dissertation and can only increase your grade.

Second, it is imperative that you read with focus. In other words, when you are reading an article or case you should constantly be thinking about how the material you are reading is relevant to your overarching research question. Linked to this point is that you should try to make notes of points in the article or case that are relevant to your topic. It is all too easy to spend days and days reading material, find a number of really important points in the material, and then not remember where you saw those points or simply forget the points because of all of the information you have taken in. When you are reading you will often find that you have your own important observations on the material, which you will ultimately wish to include in your dissertation. It is critical that you note these points down. In this respect, it is a good idea to have a dedicated Word document in which you record any important ideas you have while reading.

Third, take time to reflect. Each time you read a case or article you need to afford yourself sufficient space and time to properly digest and think about what you have read, particularly if the case or article is of particular significance to your project. You need to think about the relevance of the material to your topic, the implications it has for your argument and, if it is salient, how you might integrate it into your dissertation. During periods of reflection you may feel like you are not achieving a great deal because you are not

physically doing anything and you are not producing tangible outcomes. However, these periods of reflection are fundamental aspects of the research process; no one has ever produced a great piece of scholarship without engaging seriously with their source materials and thinking deeply about their subject. Indeed, deep reflection is a fundamental characteristic of academic scholarship, which marks it out from other types of writing.

Fourth, you need to know when to stop reading. It is difficult to give concrete advice on this issue because the decision to stop reading will require the exercise of your own judgment. However, a few points may help you to make the call. In making your judgment it is important to bear in mind the reality that there will always be more to read and you could, in truth, go on reading for years. It is also important to bear in mind that you need to afford yourself enough time to reflect on all of the material you have read, how it all fits together and relates to your argument, and to write the dissertation. A reasonable litmus test for when you ought to stop reading might be when the readings start to get repetitive, because you are coming across the same sorts of arguments and observations being made over and over again by different authors. Put another way, you ought to stop reading when you become acutely conscious of 'diminishing returns' – i.e. the marginal benefit you derive from each extra piece of reading is getting less and less.

Writing the dissertation

So you have a topic, you have an approach, and you have made progress with your research. All that is left to do is write the dissertation. In this part I will provide some tips on structuring the dissertation, and important aspects of the writing process. Nick's letter on essay-writing addresses a number of topics that are also relevant to writing a dissertation, including the importance of writing clearly, paying attention to details and not avoiding a fight (i.e. ensuring your argument is balanced). In the interests of avoiding repetition I will not be addressing those points again here, and I would recommend that you read Nick's letter together with what follows.

(1) Structuring the dissertation

The structure of a dissertation is, on the face of it, a formal aspect of writing; it is about the form that the argument takes rather than the substance of the argument. Nonetheless, there is a strong interrelationship between the structure of your argument and its power to convince. Rational arguments that are

likely to convince a reader generally follow a rational structure, and confused arguments which are likely to baffle a reader generally follow a confused structure.

As you go through the initial research process and you reflect upon what you have read you will find that you have a collection of arguments that you wish to make. Your task is to forge these arguments into a coherent and rational structure. One way of forging this structure is to think about the sub-questions or sub-topics you need to address in order to answer your overarching question.

Let's say your overarching research question is a normative inquiry into why Parliament ought to be the ultimate arbiter of human rights issues, rather than the courts. At first blush, you might say that to convincingly establish this argument you need to demonstrate that:

(1) there are good arguments against the judiciary having the power to finally determine human rights issues;

(2) arguments in favour of the judiciary having this power are not convincing;

(3) there are good arguments for why Parliament ought to be given this power; and

(4) arguments against Parliament having this power are not convincing.

Now it may be that these broad divisions provide a natural way of sorting your collection of arguments into the sections. You might then possibly go on to identify sub-sub-topics within each sub-topic and further divvy up your arguments.

On the other hand, the way you first identify your sub-questions or sub-topics may not provide a natural template for your structure. Going back to our example, if you find that all of your arguments or a significant proportion of them cut across sub-topics (1)–(4), it may lead to a great deal of repetition if you address the same arguments in different sections, and it may be difficult to decide where particular arguments ought to be housed. It may also be artificial to split your discussion of important lines of argument across different sections. For example, if you find that many of your arguments in favour of Parliamentary supremacy also serve as strong arguments against judicial supremacy, it might be artificial to deal with these arguments in different sections. You may thus find that another way of stating your sub-topics or sub-questions may provide a more natural template for your structure. For instance, instead of defining your sub-topics according to type

of argument (e.g. arguments for Parliamentary supremacy or against judicial supremacy) you might define them according to subject-matter. Thus you might say that to make out your overarching argument you need to consider (a) the relative democratic legitimacy of Parliament and the courts; (b) the relative institutional competence of Parliament and the courts; and (c) compare and contrast the practical consequences, negative and positive, of each different model. You might find that categorising your arguments into a structure which mirrors these sub-topics helps to resolve the problems of repetition and artificiality. Sorting your arguments in this way does not mean that the task of making out propositions (1)–(4) is no longer relevant, only that you will seek to establish these propositions in the course of considering each subject-matter.

Structure changes over time. The way you think you might structure your argument after your initial research sweep may be quite different from your final structure, and you need to be flexible enough to allow your structure to evolve for the better. Returning to our Parliamentary supremacy example, you may at first contemplate a structure modelled on sub-topics (1)–(4). However, as you continue your research you may find that groups of arguments related by subject-matter, such as democratic legitimacy or practical consequences, clearly start to emerge, such that subject-matter becomes a viable basis for your structure, and boasts the benefit of solving the problems you might have been having with the structure based on (1)–(4).

The use of headings and sub-headings is critical in structuring a piece of writing that is between 8,000 and 15,000 words. Indeed, a good litmus test for whether your dissertation follows a rational structure will be whether an observer familiar with your field of research can garner a rough idea of your overarching argument from a list of your headings. A common question asked by students is how many headings you ought to have and how many levels of headings are permissible. You will have to rely upon your own common sense. For example, it seems fairly obvious that you will be more likely to use three levels of headings (i.e. major headings, sub-headings, and sub-sub-headings) in a 15,000 word dissertation than in an 8,000 word piece of writing. In terms of the frequency of headings, a general piece of guidance is that you should avoid having so many headings that it disrupts the flow of your argument, while you should only generally be using headings, or at least major headings or sub-headings, to demarcate divisions between *groups* of arguments, grouped according to some feature such as subject-matter, rather than to separate single arguments.

(2) Aspects of the writing process

So you have a preliminary structure for your dissertation, but when should you start filling in the detail? *As early in the process as is possible.* There is a common tendency amongst students to postpone the beginning of the writing process until they feel they have read everything relevant to their topic. One can understand the tendency but it ought to be consciously resisted.

One of the most important reasons for beginning the writing process as early as possible is that it is an integral part of the research process. In your mind your arguments may be crystal clear and utterly convincing. However, it is inevitable that when you try to commit them to paper and reason them out fully you will begin to see gaps that need to be filled, issues that are more complex than you originally thought, and weaknesses in your argument that need to be addressed. It is typically the case that each of these issues will require you to get back to the grindstone and conduct further, more detailed, and more focused research, possibly in fields you may not have otherwise thought you needed to research. If you delay the beginning of the writing process for too long you risk not allowing yourself sufficient time to conduct the further research required to get your argument up to scratch.

Another closely linked reason not to delay writing is that you need to afford yourself adequate time to reflect on what you have written if you are to produce top-quality scholarship. Draft sections which at first appear difficult to fault may, upon further reflection or upon completion of further research, require refinement or a complete re-write. Indeed, it is hardly ever the case that the first draft of any part of the dissertation will end up, in its original form, in the final version. It may take reasonably long periods of reflection, time away from the dissertation, and discussions with others about your research for you to recognise weaknesses in your argument, which aspects of your argument are redundant or add little, ways in which your argument may be further strengthened, or how your argument might be presented more tightly and succinctly. In this way the writing process is an iterative process, and each successive draft should entail a further refinement of your argument. You may feel that discarded arguments and drafts which end up needing a complete re-write denote wasted time and effort. This is not the case. Those discarded arguments and abandoned drafts are part and parcel of writing scholarly work. If we all managed the perfect argument the first time round, writing a dissertation would not be much of a challenge (and there would be a lot more good scholarship out there than there is!).

Strive to write with focus. Always bear in mind the task at hand: that you are seeking to convincingly answer your research question. Every word, sentence and paragraph that you write ought to be geared to that task. Common temptations which can work against focused writing include the temptation to include material because you personally have found the material interesting or stimulating, or the temptation to demonstrate the breadth of the research you have done or that you understand a difficult idea. You ought to resist these temptations because succumbing to them will not help to make your dissertation more convincing; indeed the inclusion of material that is not relevant will probably annoy the reader, disrupt the flow and momentum of your argument, and most significantly, entail the squandering of words that could have been used for original analysis and argument, and that would have helped you to more convincingly address your research question. Someone once usefully described this insight to me as separating 'your story' from 'the dissertation story'. You will learn a great deal over the course of the research process, but you should only include material that advances your argument.

A dissertation is not a whodunit novel. You should not keep your reader in suspense as to the conclusions you are arguing towards or why you are advancing particular arguments, holding this information back for a thrilling finale in the last few pages. You should always signal to the reader why you are making a particular set of arguments, the conclusion you are arguing towards, and how this set of arguments advances the dissertation's central argument. This helps the reader to follow your line of argument; no reader enjoys wading through a great deal of written material with no idea as to why they are being asked to read it or where the analysis is going. This advice applies to the dissertation as a whole and also to sections of the dissertation. Thus in the Introduction to the dissertation you should clearly state the overarching argument you are advancing and the conclusion you are arguing towards: in a dissertation considering whether Parliament or the judiciary should be supreme over human rights issues, you should state clearly in the Introduction whether you will be arguing that Parliament or the judiciary ought to be supreme. Equally, in each major section of the dissertation you should include a relatively brief introduction stating what you will be arguing in that section and why.

Make your argument. It is not uncommon for students to get bogged down setting out the views of other commentators on a particular topic, with the consequence that their own 'voice' is lost and the dissertation resembles a review of relevant commentary rather than a clear and coherent argument.

As a general proposition, the views of other commentators ought not to be the centrepiece of your dissertation. Rather, your argument should be the centrepiece, and you ought to discuss or criticise the views of other academic commentators *in the course of* advancing your own argument.

Define key concepts. If a particular concept, which is open to various interpretations, such as 'democracy' or 'rights' is fundamental to your overarching argument – for example, if you are advancing a rights-based conception of the democratic state – you ought to stipulate definitions of these concepts. Otherwise the examiner might infer that you have not done the relevant research and thinking required to properly define these terms. Further, your argument will inevitably be weakened to the extent that reliance on undefined terms plunges it into ambiguity.

Footnoting is a key feature of dissertation-writing that distinguishes it from a short course or exam essay. When should you footnote? In general, footnotes should be used only to make necessary citations rather than to provide additional text. If a footnote includes text that is more than a couple of lines long you will need to consider whether the inclusion of that text is necessary for your argument. If it is, it should go in the main text; otherwise it should probably be cut out. An exception applies where (1) the text is important to your argument but (2) including it in the main text would seriously disrupt the flow of your argument. Examples of when it is necessary to footnote include the citation of authority in support of a legal proposition in the main text, and citation of an article or book from which you have sourced an idea or concept referred to in the main text. It may also be permissible to use footnotes for illustrative purposes. For example in the main text you might state: 'Many have argued against the availability of exemplary damages for breach of contract'. In the footnote you could list a number of the articles or books that propound this argument.

Students often ask what style they should follow in referencing cases or articles. Some law schools have their own style guide which you will be required to follow. Others do not. In the latter case the key is to ensure your referencing style is consistent, and that you include sufficient information to enable readers to easily locate the material you are citing. It will probably be a good idea to have a look at and possibly follow the citation style adopted in one of the leading journals, such as the *Cambridge Law Journal* or *Law Quarterly Review*. A last point on referencing is that if you are citing a case or an article for a specific point, which you often will be, you ought to provide a pinpoint citation such as a reference to the paragraph number of the case in which the point is made or the relevant page number of the article. This will make it

easier for the reader to locate the relevant passage you are referring to and reassure the examiner that you have in fact read the material you are citing.

A final piece of advice before you get started: the dissertation is first and foremost a learning process. No one is born an expert researcher or with the gift of polished prose. Skills of research, writing and argumentation can only improve with experience. The dissertation provides you with an opportunity to gain such experience. Make the most of it.

All the best,

Jason

PS Nick here – as we've been talking about writing quite a lot recently, I thought you might like the following Top 10 list, of various metaphors, allusions and phrases that it would be good for you to be aware of as a law student.

Top 10
Metaphors, Allusions, and Phrases

1. Crossing the Rubicon

As in (among 138 cases where the phrase is mentioned) *Re Castle New Homes Ltd* [1979] 1 WLR 1075, at 1089 (per Slade J): 'I can well see that, as Mr. Lindsay submitted, "the Rubicon is crossed" if and when a liquidator makes a firm decision that he has got a valid claim which he intends to pursue in proceedings. After such crossing of the Rubicon, the onus on him may in practice be a heavy one if he seeks to establish the need for a section 268 order against a proposed defendant . . .'; and (among 124 articles where the phrase is used) Barker and Steele, 'Drifting towards proportionate liability: ethics and pragmatics' (2015) 74 CLJ 49, at 76: 'New Zealand should be particularly wary of the second of these points as it now considers whether or not to cross the Rubicon and abandon its long-standing joint and several liability rule.'

The phrase means 'passing a point of no return', and dates back to 49 BC. In order to ensure that Rome remained under civilian rule, Roman law stated that a governor of a Roman province was not allowed to take the Roman soldiers under his command and move them across the Rubicon, a river marking the boundary between Gaul and Italy. It was this law that Julius Caesar disobeyed in 49 BC, when he marched on Rome with a legion of soldiers, seeking to make himself the dictator of Rome. As he crossed the Rubicon, Caesar was heard to say '*alea iacta est*' ('the die [singular of dice] is cast') – a phrase which crops up in four law articles published in the UK.

Other classical phrases that you may come across in your reading are: 'this was a case where *Homer nodded*' (meaning 'in this case, a great expert made a mistake') or *Pyrrhic victory* (a victory which is obtained at such cost that it really amounts to a defeat).

2. Catch 22

As in (among 178 cases where the phrase is used): *R (Woolfe)* v *Islington LBC* [2016] EWHC 1907 (Admin), at [59]: 'Islington thus interpret and apply their New Generation scheme in a way that creates something of a "catch-22" for an applicant such as this claimant'; and (among 196 times the phrase is used in articles) Draghici, 'The blanket ban on assisted suicide: between moral paternalism and utilitarian justice' (2015) 3 EHRLR 286, 288: 'If courts sanction a provision as legitimate merely because no alternative has yet been perfected, there will be no stimulus for Parliament to consider change; therefore, what the majority proposes is very much a "Catch-22".'

This phrase goes back to Joseph Heller's 1961 novel of the same name. It is basically used to describe a 'no win' situation, where you are given a particular opportunity but under conditions that effectively prevent you taking advantage of that opportunity. Heller's original example was: American pilots who want to be excused from conducting any more bombing raids can do so, but only if they can prove that they are insane; however, if you apply to be excused from conducting any more bombing raids, that proves you are sane. Other phrases which denote 'no win' situations are *Morton's fork* (where we draw the same conclusion C if either X is true, or not-X is true (the original example of Morton's fork at work, attributed to John Morton, Archbishop of Canterbury in the fifteenth century, was 'People who seem to have lots of money can obviously afford to pay taxes; but so can people who don't seem to have much money as they must be saving money') and *Hobson's choice* (where you are given no choice at all (Thomas Hobson, who owned a stable of horses in Cambridge in the seventeenth century, gave the customers the 'choice' of taking the horse nearest the door or going without a horse; a more modern example of Hobson's choice was provided by Henry Ford who told customers wanting to buy one of his cars that they could have it in any colour they liked provided it was black).

These are all phrases used to describe a paradoxical situation created by some *inconsistency* in someone's situation or what they are being offered. Phrases which focus on the need to be *consistent* or the consistency of someone's arguments are: *what is sauce for the goose is sauce for the gander* (meaning 'you can't object to someone treating you in a particular way if you treat other people in that way yourself') and a *seamless web* (that is, something that forms such an organic whole that it will be destroyed if any part is undermined or destroyed).

3. Occam's (or Ockham's) Razor

We have already come across this – in my letter to you on 'How (and How Not) to Argue' – but it is worth being reminded of this phrase (which crops up in 32 cases and 52 articles), which is used to express the point that the simplest explanations of a given phenomenon are usually the best.

4. Humpty Dumpty argument/school of interpretation

As in (among 85 cases) *Liversidge* v *Anderson* [1942] AC 206, at 245 (per Lord Atkin): 'I know of only one authority which might justify the suggested method of construction: "'When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean, neither more nor less' . . ."' (*Through the Looking Glass* c. vi.); and (among 129 articles) Greenberg, 'Dangerous trends in modern legislation' [2015] *Public Law* 96, at 102: 'As Humpty Dumpty put it in response to Alice's objection that she did not know what he meant by "glory": "of course you don't – till I tell you . . ."'

These quotes make it obvious what a 'Humpty Dumpty' argument is about or what is meant by a 'Humpty Dumpty' school of interpretation (nothing to do with falling off walls and being unable to be put back together again). We have already come across – in my letter on 'Making sense of statutes' – some alternative methods for interpreting provisions in a statute, including the *golden rule* that such provisions should not be interpreted in a particular stupid or fatuous manner. This 'golden rule' has nothing to do with the other *golden rule*, set out in Matthew 7:12 – 'do to others what you would have them to do to you', which underlies observations like 'what is sauce for the goose is sauce for the gander' (a 'gander', incidentally, is a male goose).

5. What you gain/lose on the swings, you lose/gain on the roundabouts

As in (among 178 cases), *In re D (a child) (care proceedings)* [2013] Fam 34, at [23] (per Ward LJ): 'The budgets of the social services departments are already stretched enough by meeting the cost of care that they should not be further

depleted by squabbles of this kind: better remember that there are swings and roundabouts and you may win one today but you will certainly lose another tomorrow'; and (among 88 articles), Smith, 'Trust, choice and money: why the legal aid reform "U-turn" is essential for effective criminal defence' [2013] Crim LR 906, at 911: 'The core rationale of the fixed fees model is the concept of "swings and roundabouts" . . .'.

The origin of this phrase is obscure, but its meaning is obvious: it is intended to summon up the image of a gain being made in one way being offset by a loss suffered some other way. Another feature of children's playgrounds that is sometimes put to use in legal discourse is a *seesaw*: where the arguments on either side of a quest tilt in favour of one particular answer, the image of a seesaw is sometimes used to express that point. A 'balancing' metaphor is also provided by old-fashioned *scales* (which you see in pictures of 'Justice', where 'Justice' is depicted as a blindfolded woman holding a pair of scales – the blindfold indicates her lack of bias, and the scales depict her weighing the conflicting arguments that are being put to her against each other). These old-fashioned scales would require you to put whatever you wanted to weigh on one side of the scales, and then put weights in the other side until the two sides were perfectly balanced. Other defunct items of technology which still provide words and concepts used by lawyers to summon up images of making mathematical calculations, or working things out to a high degree of accuracy, are an *abacus* (used for making calculations by sliding beads along different wires) and a *slide rule* (used to calculate the logarithms of numbers in the days before personal calculators). Another phrase which dates back to a different time, when thousands of people would work as coal miners, is *working at the coalface* – which is used to describe people who are doing the real work that other people are commenting on. These other people (usually based in universities or the government) are sometimes said to *live in ivory towers* – that is, in splendid isolation from people doing 'real' work.

6. More honoured in the breach than in the observance

As in (among 49 cases) *Brett* v *DPP* [2009] 1 WLR 2530, at [21] (per Leveson LJ): 'the requirements of the Criminal Procedure Rules have been more honoured in the breach than in their observance'; and (among 29 articles) Aronson, 'Misfeasance in public office: some unfinished business' (2016)

132 LQR 427, at 439: 'Whilst *Calveley* remains more honoured in the breach than the observance, its concern remains to be formally resolved by courts at the highest levels.'

We owe this phrase – like so many other phrases in the English language – to Shakespeare. In the first Act of *Hamlet*, Hamlet observes of his uncle's custom of getting up in the middle of the night for drinking and dancing that 'it is a custom/More honour'd in the breach than in the observance'. What Hamlet meant was that there was a greater honour in disregarding the custom than observing it. But nowadays that phrase 'more honoured in the breach than in the observance' is used to describe a rule that is more often breached than it is observed. Another phrase that is commonly used for such a rule is that it is a *dead letter*.

Another phrase that comes from *Hamlet* and which is sometimes used by lawyers (it appears in 15 cases and 14 articles) is *hoist with his own petard* (end of Act III). This phrase describes the situation where something has backfired on you – an argument that you thought was winning for your side actually turns out to be a winning argument for the other side. (A 'petard' was a bomb, and being 'hoist by your own petard' was being blown into the air by your own bomb.)

7. Turn a blind eye

This is a very common phrase (appearing in 963 cases, and 765 articles) which is intended to cover the situation where someone deliberately avoids doing something that they suspect would result in their acquiring information that they don't want to acquire. It goes back to the Battle of Copenhagen (1801), where the British admiral in charge decided to break off the battle and posted up some signal flags which instructed the British ships engaged in the battle to retreat. The flags were drawn to the attention of Horatio Nelson, who was in charge of one of the British ships. Nelson deliberately raised his telescope to his blind eye and said, 'I see no flags', and pressed forward with the attack, winning the battle.

8. Writing on the wall

As in (among 51 cases) *Cintas Corp No. 2* v *Rhino Enterprises* [2015] EWHC 1993, at [33] (per Newey J): 'the application could, he said, have been disposed of more cheaply had the defendants seen the writing on the wall and so

accepted the principle underlying the application'; and (among 51 articles) Sufrin, 'Comment on the *Magill* case' (1992) 3 Ent LR 67, at 68: 'there was some writing on the wall in the *IBM* proceedings . . .'. The phrase means 'a warning of impending doom or disaster' and comes from the fifth chapter of the Book of Daniel, where King Belshazzar of Babylon holds a feast and sees in the course of the feast a finger writing on a wall 'Mene, mene, tekel, parsin'. Daniel explains that these words mean that Belshazzar has been 'weighed on the scales and found wanting' and that he would lose his life and his kingdom that night.

Another phrase that has a religious origin is *devil's advocate*, which is a term used to describe someone who takes on the role of arguing against a popular position, or arguing in favour of an unpopular position, so as to thoroughly test the case for adopting, or being opposed to, the position in question. The phrase has its origins in the Catholic Church, where a 'devil's advocate' would be appointed to make the case *against* canonising a particular person, so as to ensure that the merits of the candidate for sainthood would be thoroughly tested.

9. Schrödinger's cat

In 1959, the scientist and novelist C.P. Snow delivered a lecture called 'The Two Cultures', decrying the rigid divisions that he then detected between the humanities and the sciences. The modern day existence of such divisions was well illustrated by the reaction to Lord Hoffmann's making a reference to 'Schrödinger's cat' in *Kleinwort Benson Ltd* v *Lincoln CC* [1999] 2 AC 349, at 399: 'The distinction [between payments under a mistake of fact and payments under a mistake of law] . . . turns upon the purely abstract proposition that in principle (and leaving aside the problem of Schrödinger's cat) the truth or falsity of any proposition of existing fact could have been ascertained at the time, whereas the law, as it was subsequently declared to have been, could not.' A number of private lawyers expressed themselves extremely puzzled as to what Lord Hoffmann could have been talking about when he referred to 'Schrödinger's cat'.

'Schrödinger's cat' refers to a thought experiment, invented by the physicist Erwin Schrödinger to show that Niels Bohr's view of quantum mechanics must be wrong. On Bohr's view, a quantum system such as an atom does not exist in any one state until it is measured, at which point it collapses into a particular state. Schrodinger asked – what would happen, then, if we put a cat

in a box rigged in such a way that the cat would die if a particular radioactive atom decayed? If Bohr's view were correct, it would follow that until we opened the box to see whether the atom had decayed and killed the cat, the atom would be in a decayed *and* non-decayed state, with the result that the cat would be both dead *and* alive – which Schrödinger thought was absurd. This is the problem that Lord Hoffmann was setting aside when he assumed that 'any proposition of existing fact' could be ascertained to be true or false at any given time.

10. Latin phrases

So far we have limited ourselves to English phrases that it would be good for you to know about, but legal discourse is littered with Latin phrases. Here are some you should be aware of.

(1) *'Caveat emptor'* – 'let the buyer beware'. This maxim expresses the idea that if you purchase an item that turns out not to be any good, you cannot have any recourse against the person who sold you that item. The idea does not apply in the context of business sales of consumer products, where the Consumer Rights Act 2015 gives a consumer extensive remedies should goods that he or she has purchased turn out to be no good. In this sort of context, the rule is, rather, *caveat venditor* – 'let the seller beware'. But in the case of sales of land, *caveat emptor* still remains the dominant rule.

(2) *'Cui bono'* – 'Who benefits?' This is a phrase that was used by Cicero to cast doubt on the guilt of his clients, casting suspicion elsewhere by asking, 'Who actually benefited from this crime being committed?'

(3) *'Consensus ad idem'* – 'a meeting of minds'. This phrase is usually used in the context of English contract law to say that English law does *not* require a *consensus ad idem* to exist for a contract to arise between two parties; the two parties can actually have different views as to what the terms of their contract were, but a contract may still exist.

(4) *'Non haec in foedera veni'* – another phrase used in English contract law, and borrowed from Book IV of Virgil's *Aeneid*. It means 'I did not agree to make these vows' – Aeneas uses these words to excuse himself for leaving his lover Dido: he is basically saying, 'I never promised to stay forever'. The phrase is used in English contract law to attempt to

describe the kind of situation where a change in circumstances will entitle a contractor to argue that he is no longer bound by his contract because the contract has been frustrated by the change of circumstances.

(**5**) *'Mutatis mutandis'* – 'with the necessary changes made'. The phrase is normally used in the context of arguing that what is true of X will also be true of Y, *mutatis mutandis* – so even if we make all the changes to X that we need to make in order to transform X into Y, the thing that was true of X still remains true through these changes and is therefore true of Y.

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How to write a problem answer

Dear Jamie,

A problem question presents you with a set of facts and asks you to discuss what legal conclusions we might be able to draw from those facts.

What sort of legal conclusions we are seeking to reach in doing a problem question will depend on what kind of subject the question relates to. When you are doing a criminal problem question, you will usually be expected to look at a set of facts to determine who, if anyone, has committed a crime on those facts. When you are doing a tort problem question, you are usually looking to see what remedies, if any, are available to someone who has suffered some kind of harm. There are a number of different issues that you might be expected to address in doing a contract problem question: it could be asking you whether a particular promise is legally binding, or whether someone can get out of a deal that has now proved to be a bad deal for them, or what remedies are available to someone who wants to hold someone to a deal, or what the parties to a deal are required to do for each other given the nature of that deal and its terms. And so on, across the range of different subjects you will study at university.

In what follows, I will give you some general guidance on how to do problem questions. I must emphasise that the general guidance below does *not* apply in the case where you are a doing a tort or criminal problem question. There are specific methods for doing tort or criminal problem questions, and I'll explain those later on in this letter. But I'll start by setting out a general approach to doing legal problem questions.

General guidance

The most basic word of advice I can give you on doing problem questions that are not tort or criminal problem questions is: *identify the issue or issues that the examiner wanted you to discuss in answering the question.* Issue spotting is a

crucial talent that you need to develop if you are going to do problem questions well. Here are a couple of different approaches to issue spotting that you might want to adopt in doing a problem question. (I emphasise again that what I am about to say does *not* apply to tort or criminal problem questions – nothing I say in this section is of any relevance to doing those kinds of questions.)

(1) Get inside the head of the examiner

One way of issue spotting is to ask yourself – why did the examiner think this was a *good* problem question to set? What sort of difficulties did the examiner think that this problem question gave rise to? For example, consider the following mini-problem:

> Henry was infatuated with Jenny and would do whatever she told him to do. She used her influence to get him to make a loan to her friend, Clara, who was setting up a hairdressing business. Clara's business is now in severe financial trouble. Advise Henry.

Why did the examiner think this was an interesting question to set? He or she could hardly think that there was an issue here over whether Henry could get out of (or, in lawyer's language, rescind) the contract of loan between him and Clara, as it's fairly obvious that he could (provided Clara knew or ought to have known that Henry was only lending her the money because Jenny wanted him to – which she almost certainly did). No – there must be something more here that the examiner wanted you to address. And in fact there is: Can Henry sue Jenny for compensation for the loss that he is likely to suffer as a result of lending money to Clara? That's the issue you would need to focus on if you were doing the above question.

In trying to get inside the head of the examiner in order to see why he or she thought their problem question was a *problem*, it is useful to approach the question on the basis that *every word counts*. Ask yourself – Why did the examiner write the problem question in the way he or she did? For example, in the above question, why didn't the examiner make it that Henry was infatuated with Clara and Clara used her influence over him to get him to lend her money for her business? Why is Jenny in this problem question? In thinking about that, you would quickly come to the conclusion that Jenny is actually crucial to the resolution of the issue that the examiner wants you to address

in doing this question. However, I should enter two words of caution here. The first is that not every word *actually* counts. For example, the fact that Clara was setting up a *hairdressing* business, as opposed to some other kind of business, is not really relevant – it's just there for colour. So you should only *presume* that every word counts. The second point is that examiners sometimes plant red herrings in their problem questions – words that are designed to mislead the less able students into thinking that the problem question raises a particular issue when in fact it doesn't. I strongly disapprove of this practice, but it does happen. So you have to be tough-minded in spotting issues in a problem question – if you think a particular feature of the problem question is irrelevant to its outcome, then stick by your judgment and don't second guess yourself. (Though you may want to explain why that feature of the problem question is irrelevant – I address this point later on in this letter.)

(2) What do the parties want?

Another way of spotting the issues raised by a problem question is to ask – What do the parties want? This will usually give you a good clue as to what sort of issues the problem question has been set up to raise. For example, in the mini-problem set out above, if Henry wants anything, he wants to get his money back. Henry won't be able to get his money back from Clara because she's evidently got no money. If he wants to get his money back, he has to go against Jenny and find some way of arguing that she should compensate him for the loss he has suffered on his deal with Clara. So focusing on what Henry wants allows us to spot the issue that the examiner really wanted us to address in doing this problem question.

Once you have identified the issues raised by the problem question (and it would be a good idea to start your answer by saying something like 'This question raises three issues: (1) . . . (2) . . . (3) . . .' to make it clear what those issues are), then you need to discuss what the law says about those issues. Some academics advocate that you do this by identifying the *rule* that governs that issue, and then *apply* the rule to that issue, and in light of that reach a *conclusion* as to what the law says on that issue. This is the so-called 'IRAC' method of answering problem questions – spot the Issue, state the Rule governing the issue, Apply the rule, and reach a Conclusion. I'm not much of a fan of IRAC because: (1) it is not often clear whether there *is* a rule that governs the particular issue you want to resolve; and (2) there may be more than one rule that is relevant to the resolution of a particular issue. For example, the real difficulty that the problem question about Henry gives rise to is whether there exists any rule that would allow Henry to sue Jenny for compensation for inducing him to make a bad

loan to Clara. There is a rule that wrongdoers should compensate the victims of their wrongs, but even if that rule doesn't apply here it may still be the case that there is another rule that will help Henry out.

My preferred approach to discussing the issues raised by a problem question is to focus on the possible *legal arguments* that are relevant to those issues, and work through those arguments – explaining whether they are valid or invalid. For example, in the problem question involving Henry, having first identified the issue you are going to discuss as being whether Henry can sue Jenny for compensation for inducing him to make a bad loan to Clara, you should then go on to say that there are two possible bases for Henry's claim: (1) that Jenny committed a legal wrong in using her influence over Henry to get him to lend money to Clara; and (2) that even if Jenny's use of her influence didn't amount to a legal wrong, she is still liable to compensate Henry for any losses suffered by him as a result of getting him to act in a particular way. And you would then discuss whether either of these arguments is valid or not. So the first argument turns on whether there is any legal support for the idea that someone who possesses influence over someone else has legal duties not to exercise that influence to the detriment of the person being influenced. The second argument turns on whether there is any legal support for the idea that if A induces B to act in a particular way, and B suffers loss as a result, A can still be held liable for that loss even if A didn't do anything wrong to B in inducing B to act in the way B did. Answering the problem question properly will require you to address both of these points, through detailed discussion of the law as it stands at the moment.

So that's the general approach that I think you should adopt to doing legal problem questions. There are a few more general tips that I want to give you on answering problem questions, but first I'll keep my promise to set out the specific approaches you should adopt in doing a tort problem question and a criminal problem question.

Doing tort problem questions

The basic approach that you should adopt in doing a tort problem question is this:

(1) Identify a claimant (someone who wants to sue someone else for compensation).

(2) Identify a defendant whom that claimant might be interested in suing.

(**3**) Identify a cause of action (tort or rule of liability) under which the claimant might try to bring a claim against the defendant.

(**4**) Consider whether, given what has to be established for the claimant to bring a claim under that cause of action, the claimant has a good claim against the defendant.

(**5**) If the claimant does not have a good claim under that cause of action, go to step (6). If the claimant does have a good claim under that cause of action, go to step (7).

(**6**) Go back to step (3) and identify another possible cause of action that the claimant might have against the defendant. If you have exhausted all possible and plausible causes of action that the claimant might have against the defendant then go to step (7).

(**7**) Go back to step (2) and identify another possible defendant whom the claimant might be interested in suing, and repeat steps (3), (4) and (5) in relation to that defendant. If you have exhausted all possible and plausible defendants that the claimant might want to bring a claim against then go to step (8).

(**8**) Go back to step (1) and identify another possible claimant, and repeat steps (2), (3), (4) and (5) in relation to that claimant. If you exhausted all possible and plausible claimants that might want to bring a claim in the problem question you are considering, then stop writing.

This is all a bit abstract, so let's apply this approach to a particular problem question:

> Jeffrey, a world famous violinist, decided to put on a concert to raise funds for his local school, Sunshine College. He hired out a hall owned by the local council for the night of the concert. Admission was free but notices outside the hall informed concertgoers that they would be invited to make a financial contribution to Sunshine College at the end of the concert. Concertgoers were also warned that 'No responsibility is accepted for the safety of concertgoers' person or property while they attend the concert'. It turned out that far more people wanted to attend the concert than there were seats in the hall and many people had to stand crowded together at the back of the hall while Jeffrey performed. Matilda, an 80-year-old, turned up late and, as no one
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> >

offered her a seat, she had to stand at the back of the hall. She soon fainted due to the heat and cramped conditions and twisted her ankle in the fall. Donald, a music lover who came to the concert but never intended to donate anything to Sunshine College's funds at the end of the concert, wandered round the hall in an attempt to find a seat and in doing so slipped on a patch of oily water which was in one corner of the hall; he grazed his knee as a result. Jeffrey had arranged with the council that their cleaning contractors – Easy Clean – would clean the hall before the performance but no one in the council had bothered to tell Easy Clean, and Jeffrey had been too busy on the day of the concert to notice that the hall had not been cleaned. The concert was a resounding success and £8,000 was collected at the end of the concert. The money was collected by Wendy, a friend of Jeffrey's. Wendy then promptly disappeared with the money.

If you follow the approach to doing tort problem questions set out above, your problem answer will be structured as follows, with the following headings:

Matilda's claim for compensation (for fainting and twisting her ankle)

(1) Claim against Jeffrey
  (1a) in negligence
  (1b) under the law on occupiers' liability
(2) Claim against Sunshine College under the law on occupiers' liability

Donald's claim for compensation (for grazing his knee)

(1) Claim against Jeffrey
  (1a) in negligence
  (1b) under the law on occupiers' liability
(2) Claim against Sunshine College under the law on occupiers' liability
(3) Claim against Easy Clean in negligence

Sunshine College's claim for compensation (for loss of the £8,000)

(1) Claim against Wendy in conversion

(2) Claim against Jeffrey in negligence

There are three points I want to make in particular about this method of doing tort problem questions.

(1) *No issue spotting.* Under this approach, you don't need to do any issue spotting. All you have to do is identify a claimant, someone they may want to sue, and – and this is the crucial bit – a tort or rule of liability under which they might bring their claim. Then all you have to do is apply the law on when one person can bring a claim for that tort or under that rule of liability to the situation you are considering. It is the law which will tell you what the issues are that you need to be considering – you don't have to spot them yourself. So when you are doing a tort problem question, let the law guide you as to what you should be discussing. Don't try to decide for yourself what you need to be talking about: just let the law take you home.

(2) *But lots of issue weighing.* Having said that, you need to decide how much time you are going to spend on each of the issues raised by the problem question. The key here is to dispose quickly of the issues that can be straightforwardly resolved, and invest most of your time on the tricky issues that require a lot of discussion of the relevant authorities and academic opinion. Five minutes spent writing about one such tricky issue will get you far more credit with the examiner than five minutes making a point about the law that is so obvious it could be made in one or two lines.

(3) *The need for rigour.* This takes me onto the third point, which is the absolute need to be completely rigorous in doing tort problem questions. If you are not going to miss any issues, you have to consistently follow the step-by-step approach to doing tort problem questions set out above *and* you have to apply the law rigorously in determining whether a particular claimant can bring a claim against a particular defendant. This is the primary reason why students find tort problem questions much more difficult than any other problem questions, even though the fact that they don't have to spot any issues should make tort problem questions much easier than other problem questions. Students find it very, very hard to be rigorous in answering tort problem questions. But

you have to learn: a lack of rigour in doing a tort problem question is always fatal, without exception.

Doing criminal problem questions

The basic approach that you should adopt in doing a criminal problem question is this:

(1) Identify a defendant (who might be charged with having committed a criminal offence).

(2) Identify an offence that he might have committed.

(3) Consider whether he has committed the *actus reus* of that offence. If he has, or arguably has, go to step (4). If he has not, go to step (6).

(4) Consider whether he has the *mens rea* of that offence. If he has, or arguably has, go to step (5). If he has not, go step (6).

(5) Consider whether he has a defence to being found guilty of committing that offence. If he does, then go to step (6). If he does not, then conclude that he will be probably be found guilty of committing that offence, and go to step (7).

(6) Conclude that the defendant will probably not be found guilty of the offence you are considering, and go to step (7).

(7) Go back to step (2) and identify another offence that that defendant might have committed and repeat steps (3), (4) and (5) in relation to that offence. If you have exhausted all possible and plausible offences that that defendant might have committed, then go back to step (1) and identify a different defendant who might be charged with having committed a criminal offence, and repeat steps (2), (3), (4) and (5) in relation to that defendant. If you have exhausted all possible and plausible defendants, then stop writing.

Again, this is a bit abstract so let's apply this approach to a concrete criminal problem question:

> Albert was HIV+. No one other than Albert and his doctor was aware of that fact. Albert had always fancied Britney, who was engaged to Charlie. One night Albert and Britney were at a party together, and

Albert spiked Britney's orange juice with very strong alcohol. Britney got very drunk and told Albert that she was scared that Charlie had been unfaithful to her. Albert lied to Britney, telling that he had found out that Charlie had slept with Britney's best friend, Debra, a week ago. Albert suggested that Britney get her revenge by having sex with him. Britney said, 'Okay – but only if you use protection and pay me £300 cash in advance.' Albert didn't have the money, but approached his very rich friend Ernest, who was also at the party, and told him, 'Look – I'm in a tight spot. I sold some cocaine to a friend of mine and he was caught by the police, and he's threatening to tell them I was his supplier unless I pay him £500 tonight.' This was untrue. Ernest – who has often bought drugs from Albert – went to a cashpoint and withdrew the £500 needed, which he then gave to Albert back at the party. In the meantime, Albert bought a pack of condoms from a machine, using counterfeit coins to buy them. Albert then gave Britney £300, telling her, 'Don't tell Ernest I gave you this – I borrowed some money off him recently by telling him I was strapped for cash, and he wouldn't like it too much if he heard I'd been flashing this much money around.' Britney then had sex with Albert. Unfortunately, the condom they used was defective and Britney is now HIV+.

If you follow the above approach to doing criminal problem questions, then your answer to this question will be structured as follows, with the following headings:

Albert

(**1**) Maliciously administering noxious substance with intent to injure, aggrieve or annoy

(**2**) Fraud (by lying to Britney)

(**3**) Fraud (by lying to Ernest)

(**4**) Theft of £500 given him by Ernest

(**5**) Fraud (by using counterfeit coins)

(**6**) Rape

>

(7) Causing a person to engage in sexual activity without consent

(8) Malicious infliction of grievous bodily harm

Britney

(1) Handling stolen goods

There are three points I want to make about this method of doing criminal problem questions.

(1) *No issue spotting.* Again, if you follow this method of doing criminal problem questions you won't need to spot any issues. Rigorously asking whether the defendant had the *actus reus* and *mens rea* of the offence you are considering, and whether the defendant had a defence will highlight for you all the issues that the examiner meant you to consider in setting the problem question. But you will again have to decide how much time you will spend on each issue (spending more time on the tricky issues than the obvious ones) and . . .

(2) *The need for rigour.* You have to be rigorous. You can't afford to get the law wrong in stating what the *actus reus* or *mens rea* of a particular offence is, and you can't afford to jump around and consider whether the defendant has the *mens rea* for a particular offence before you consider whether he or she has committed the *actus reus*. Once again, a lack of rigour will inevitably prove fatal.

(3) *Limitations.* While the basic approach to doing criminal problem questions in this way is sound, it should be noted that there are times when you have to make a slight adjustment in applying it. First, there are some offences that you can't divide neatly into having an *actus reus* and a *mens rea* – gross negligence manslaughter (committed when (1) A breaches a duty of care; (2) A's breach causes B's death; (3) A's breach is so serious as to be worthy of punishment) and constructive manslaughter (committed when A commits an unlawful and dangerous act which causes B's death) are two good examples. But in those cases, you simply apply the definition of the offence. Secondly, when you are considering whether a defendant has committed an offence *as an accomplice*, you can't ask whether the defendant has committed the *actus reus* and *mens rea* of that offence, but must instead apply the rules on when someone can be

held to have committed an offence that someone else committed on the basis that he was an accessory to that offence. (But if you are going to consider whether a defendant is guilty of an offence as an accomplice, make sure you first consider whether some other defendant is guilty of that offence as a principal offender!)

Further words of advice

Now that I've laid down the basic guidelines for doing *all* problem questions, here are some further tips for doing *any* problem question.

(1) Uncertainty in the law

Don't be afraid of admitting that the law on a particular issue is uncertain. Sometimes a problem question will be set precisely because it raises issues on which the law is uncertain. Uncertainty in the law is due to vagueness, gaps, or contradictions in the authorities. So long as you can argue convincingly that the law on the issue you have to consider is uncertain because of one of those three factors, then you shouldn't be at all afraid to say that it's difficult to know how the problem question would be resolved. Having said that, you shouldn't rest content with simply saying that the law as it applies to your problem question is uncertain because it might say *x* or it might say *y* – you should then go on to explain: (i) what the answer would be to your question if the law said *x* and what the answer would be if the law said *y*; and (ii) whether you think the law *should* say *x* or *should* say *y*, and why.

(2) Uncertainty in the facts

You shouldn't be afraid either to say that 'we need more information' where the examiner hasn't supplied you with facts that you require in order to determine what the law says in a particular situation. For example, suppose you were asked to consider the following situation:

> A is thinking of buying a particular car. B tells A that if A buys the car, B will service the car for free every year. A buys the car.

Whether B is bound by his promise to service A's car will depend crucially on whether B was making his promise with the object of inducing A to buy

the car. So if B was selling the car, then B would be bound. But if A and B were friends, and B made the promise over a drink in the pub, and B was relatively indifferent as to whether A bought the car or not, then B would not be bound by his promise. The examiner hasn't supplied you with that information. So you have to say, 'We need more information as to the circumstances under which B made his promise before we can determine whether B is bound by his promise.' But don't just say that – explain what information is required, and what the legal position would be in the various different scenarios in which B might have made his promise.

(3) The importance of being straightforward

In answering a problem question, just focus on the facts that have been set and don't make any unlikely suppositions as to what might have been going through the actors' heads when they acted as they did. For example, in the criminal problem question above involving Albert, the examiner has not said that Albert was aware that the condom he used in having sex with Britney was defective – so answer the question on the basis that he wasn't aware. It's highly unlikely that the examiner deliberately meant to leave that issue open for you to discuss what the position would be (i) if Albert was aware; and (ii) if Albert was unaware. So why make more work for yourself – and overcomplicate, and possibly screw up, your answer – by considering possibility (i)? One way of helping you decide whether or not you were 'meant' to consider a particular possibility is to ask yourself, 'If I don't consider this possibility, will the examiner think "I can't believe they didn't consider that issue!"' If the answer is 'no', then don't consider it. Remember that problem questions are, by and large, set so that the best answers to those questions will be easy to identify. So the best answer is unlikely to rest on some very subtle and obscure interpretation of the facts.

(4) Negative outcomes

It can be just as important, in answering a problem question, to show that you are aware that applying the law to a particular question will result in a negative outcome, as it is to show when you are aware that applying the law to a particular question will result in a positive outcome. What I mean by that is that sometimes a question will be set in order to test you on whether you can see that a particular claim *can't* be brought in that situation, or whether you can see that a particular defendant *isn't* guilty of a particular offence. For example, when Britney has sex with Albert without knowing of his HIV+

status, the examiner might have been expecting you to consider (however briefly) whether or not Albert committed the crime of rape in having sex with Britney. The fact that the cases are clear that Albert did *not* commit rape in this situation is irrelevant: the examiner wants to know whether you know that. On the other side of the divide, my plan for answering the tort problem question on Jeffrey's violin concert doesn't consider whether anyone might be able to sue Sunshine College on the basis that they are vicariously liable for any torts committed by Jeffrey. This is because it seems so obvious that Jeffrey isn't an employee of Sunshine College that it's highly unlikely the examiner who set this problem intended someone answering this question to make that point. When it comes to negative outcomes, it can be difficult to judge whether the examiner wanted you to show that you were aware that the law did *not* make anyone liable in a particular situation. If in doubt, err on the side of caution and mention the fact that a particular actor is not liable – you can only get marked on what you write on the page, and you won't get credit for points that you saw but thought were too obvious to mention.

(5) Obvious points

But where a point is obvious, don't dwell on it. It is tempting, when you see a point that you are sure of, to make the absolute most of it before going onto more uncertain terrain – but once a point is made and established, you won't get any credit for writing any more about it.

(6) Headings

It is *so* important, in writing a problem answer, that you use headings to organise your answer. This helps you keep track of what issues and points you have considered so far, and – more importantly – what you still have to consider. And it helps the examiner see what issues and points you have dealt with, and encourages him or her to give you proper credit for dealing with them. Do everything you can to show off how good your answer is – don't make the examiner do *any* work to see that you have provided a proper, comprehensive answer to the question set.

(7) Statutes

You will almost certainly be allowed to take a statute book into the exam with you. Given this, *do not* – I repeat, *do not* – copy out any provision from the statute book in doing a problem answer. You won't get any credit for doing so,

and you will waste valuable time. Simply get on with applying the provision in the statute book to the situation you are presented with, and in your answer refer just to numbered sections or sub-sections from the statute book to make it clear which bit of a statute you are referring to, or applying. For example, here's a bit of a model answer I wrote for my students to a problem question which raised the issue, among other things, as to whether A could sue B, the owner of a dog ('Rex') which had a tendency to attack people wearing red, under the Animals Act 1971:

> In order to sue B, as the keeper of Rex (because owner: s. 6(3)(a)), A has to show (because Rex does not belong to a dangerous species) that his bite marks were a result of Rex having a characteristic that: (1) meant that he was likely to cause the kind of harm that A suffered, or that if he caused A that kind of harm, it was likely to be severe (s. 2(2)(a)); (2) was not normally found in dogs, or only normally found at certain times or in certain circumstances (s. 2(2)(b)); (3) was known to B. There seems no problem arguing that all these conditions are satisfied. Rex's tendency to attack people wearing red meant that he was likely to cause A the kind of harm that A suffered; it was an unusual characteristic for dogs to have; and it was known to B.

(8) Cases

There's an old story about either the Oxford or Cambridge law faculty (I can't remember which) that students were told to underline the names of cases they mentioned in their problem answers so as to make it easier for the examiners to mark their answers – the more cases they mentioned, the higher their mark! Of course, things are very different now, but it couldn't do any harm to underline the names of the cases you mention in your problem answer, just to make it clear how many you have actually mentioned . . . And talking of names of cases, sometimes you just won't be able to remember the name of a particular case that you want to refer to. That's absolutely fine: simply mention some other feature of the case to identify it. So, for example, *Felthouse* v *Bindley* (1862) is a case which always seems to be sitting just beyond the reach of my memory when I want to refer to the case which helped to establish that you can't accept an offer of a contract through silence. But if the name of that case eludes you as much it does me, it's perfectly fine to refer to it instead as 'the case where the uncle offered to buy his nephew's horse'.

(9) Advise the parties

Oftentimes a problem question will say 'Advise the parties' or 'Advise X'. (Our first problem question, involving Henry, did precisely that.) When a problem questions tells you to 'Advise X', it is *not* telling you that you should write in your answer, 'I would advise X that . . .'. What it means is that you should answer the question looking at it from X's point of view – that is, you should consider what claims, if any, X can bring; or what offences X might have committed; or what the law might have to say on whether X can get what he or she wants to get. It follows that a question that instructs 'Advise the parties' isn't saying anything – there is no particular angle or point of view from which you should approach the question, and you should simply answer it straightforwardly, adopting the approaches set out in this letter.

Essays or problem answers?

My students sometimes ask me, 'If we have a choice in the exam between doing an essay or a problem question, which should we go for?' It's tricky.

I think it's easier to write an essay that will get a high mark than a problem answer that will get a high mark. (I'm talking here about discursive essays, which are the principal kind of essays you might get asked to write in an exam.) The reason for this is that the general standard of essay writing among students is so low that an essay that is well-written, interesting and well-argued will be seized on by the examiner with tears of gratitude and awarded with a very high mark.

In contrast, to get a high mark for a problem answer it's essential that you cover all the issues raised by the problem question and don't make a mistake in discussing those issues. If you miss even one issue or misstate the law on one point, that will drag your mark down. So I often compare writing a problem answer with defusing a bomb – one false step and it's all over. And when I'm marking a problem answer that has started off well, I often find myself holding my breath – I'm in such suspense to know if the writer is going to be able to get to the end of the answer without it all going horribly wrong. In contrast, if you make one weak argument in an essay that is otherwise of a high standard, the examiner will usually be indulgent and think, 'Well, so what if he or she made one weak argument? The overall standard was so good, this should definitely get a high mark.'

Given that, you might think my advice to my students would be to choose to do an essay over a problem answer every time. But there is a downside to

that choice. It's this: marking an essay involves a lot more judgment on the part of the examiner than marking a problem answer. So if you write an essay, you're always taking a bit of a chance with what mark you get for it. It may be that your essay is, objectively, really good – but it's given a poor mark because it rubbed the examiner up the wrong way or because the examiner was in a bad mood when he or she marked it. In contrast, if you write a problem answer that covers all the issues raised by the question, does so in an intelligent way, doesn't misstate the law, backs up every legal statement by reference to a case or a statute – you can be sure you are going to get an excellent mark for your answer whoever the examiner is.

To sum up, then: it's easier to guarantee a high mark for a problem answer than it is for an essay – you can never be sure that an essay you write will get a high mark. But, on the other hand, it is easier to get a high mark for an essay than it is for a problem answer.

So – what should you do if you have a choice between writing an essay and a problem answer? If you are confident that you could write a better essay than a problem answer (or vice versa), then obviously go for the essay (or problem answer, as the case may be). If you are so talented that you think you could do both really well, go for the essay if you don't think there's much chance that what you say will rub anyone up the wrong way. (You'll just have to take a chance on the examiner not being in a bad mood when he or she marks your essay.) If, on the other hand, what you have to say is quite controversial and might annoy the examiner if he or she takes a different view, there's no point in taking a chance – do the problem answer instead.

All best wishes,

Nick

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Tips on revising

Hi Jamie,

Thanks for your e-mail, and good luck with your revision for your upcoming exams. Here are some tips on how to make the absolute most of the time remaining to you. You should be aiming in your revision to do two things: (1) get the details of the law, and ideas about the law, into your long-term memory; (2) improve your essay-writing and problem-answering techniques.

Both of these are crucial to your being successful in the exams. If you can't write good essays and problem answers, then you won't do well, no matter how much you might know about the law. If you don't know anything about the law, or have nothing to say about it, you won't be able to write good essays or problem answers, no matter how good your technique is.

You already know from everything I've already told you how to improve your essay-writing and problem-answering techniques: practice, practice, practice. But what's the best way of getting information about the details of the law, and ideas about the law, into your long-term memory? As I told you in my letter on 'The Challenges Ahead', the answer is: use the information, over and over again. This is just common sense. If you need to learn the layout of a town, you could spend hours and hours staring at a map of the town, trying to burn it into your brain. But why make it so hard on yourself? – Just walk around the town a few times, and you'll learn the layout of the town without even trying. Why do people who move to France learn in months to speak French far more proficiently than schoolchildren who can spend years trying to learn French and forget everything they've learned in half the time it took them to learn it? The answer is: people who move to France are using the language all the time, and that helps them pick it up so much more quickly than children who are taught French by being made to study it, rather than use it.

So if you can find ways in your revision of constantly using information about the law, that information will go into your head without your even realising it, or your having to try to remember it. But what ways are there of doing this? Well, that's what I'm here to tell you.

The primary revision method

Your primary way of revising for the exams should be – writing answers to essay questions and problem questions that have been set in your university's exams in previous years. What you should do is this. If you want to revise a particular topic in, say, criminal law, look at the last five years' criminal law exam papers (they should be available in your university library, if not online), see what sort of questions have been set on that topic, pick a couple of questions that are fairly representative of the sort of questions that tend to be asked on that topic, research the hell out of them both by using your existing notes and looking up new material (either in books in your law library, or online), and then write some really good answers to those questions. As a revision method, this has some huge advantages:

(1) The past paper questions alert you to what you really need to know about the topic you are revising, and so direct your revision to the most important issues relating to that topic.

(2) Exams in some subjects tend to have the same sort of questions come up year after year – so if you can figure out how to answer a good selection of questions that have been set in previous years, that can really set you up to turn in some brilliant answers to the questions that are set in your exam.

(3) In researching how to answer the past paper questions that you have chosen to do, you are using the information that your researches turn up because you will be constantly thinking about how the information that you are looking at relates to the questions you are going to answer; using the information in this way should help it get into your long-term memory.

(4) In writing out answers to past paper questions, you will again be using the information that your researches have turned up, this time in the course of writing your answer, and using the information in this way will again help it get into your long-term memory without your really trying.

(5) By writing out answers to past paper questions, you will be improving your essay-writing and problem-answering techniques.

This last point illustrates why answering past paper questions should be your primary revision method. No other revision method combines the two things you should be aiming for in your revision – to get information about the law into your long-term memory, and improve your essay-writing and problem-answering techniques.

Supplementary revision methods

Doing past paper questions is an effective way of getting information about the law into your long-term memory, but it's not the only way. I'd also recommend that you think about employing some of these other methods in the course of your revision. You'll note that all of them are geared around the idea of learning information by using it:

(1) Definitions

In some of your subjects, you will need to learn definitions. For example, if you are studying criminal law, you need to learn the definitions of all the offences that you are studying as part of your course. To learn a definition, first of all write it out as clearly as possible. For example, if you are trying to learn the definition of the elements of the offence of maliciously wounding or inflicting grievous bodily harm, contrary to s. 20 of the Offences Against the Person Act 1861, this is not a clear definition:

> *Actus reus*: wounding or inflicting grievous bodily harm.
>
> *Mens rea*: maliciously.

This is not clear enough: we all know what wounding means, and we can all have a pretty good idea of what grievous bodily harm means, but what is 'inflicting' and what is 'maliciously'? A clearer definition will go something like this:

> *Actus reus*: wounding or causing grievous bodily harm.
>
> *Mens rea*: intending to cause some physical harm, or being subjectively reckless as to whether your actions will cause some physical harm.

Once you've got a clear definition, write it down in the middle of a piece of A4 paper (turned on its side), and then get jazzy with it! Have the facts and names of cases coming off the central definition to illustrate and support the key terms (for example, what case established that 'inflicting' means 'causing'? What cases said there was a difference? Do these cases survive at all?). Draw the facts of the cases if possible rather than write them down – the added creativity involved in drawing should help fix the facts into your head. Around the edge of the paper, write down (or draw) some hypothetical situations and say whether a s. 20 offence would be committed in those situations. Before you know it, and without even trying, the central elements in the definition will be fixed into your head.

(2) Cases

I've already given you some tips on remembering cases. But just to recap briefly, you will most effectively remember cases if you can arrange them into some kind of pattern. So think of issues or ideas relating to a particular subject that you are studying, write the issue or idea down in the centre of a piece of A4 paper (turned sideways), and then try and arrange as many cases as you can around that issue or idea. So, for example, the issue might be 'Is Parliament sovereign?' Write that down in the centre of a piece of A4 paper (turned sideways) and then think about all the cases that you've come across (and look for more that you haven't yet come across) and try and arrange them (with drawings or key words to illustrate their facts, or what they say) under a set of answers to the key question. So think about what cases take the line: 'An Act of Parliament will always be valid unless it is repealed by another Act of Parliament'; and what cases take the line: 'An Act of Parliament will not be valid insofar as it purports to bind future Parliaments, or change the rules governing how an Act of Parliament is passed'; and what cases take the line: 'An Act of Parliament will not be valid insofar as it contains provisions that violate the rule of law'; and what cases take the line: 'An Act of Parliament will not be valid insofar as an earlier Act provides that it will not be valid, and that earlier Act has not been expressly repealed by Parliament', and arrange the cases around the central issue 'Is Parliament sovereign?' according to what answer they support.

(3) Filling gaps in your knowledge

Make a list of issues or questions that you are hazy about, arrange the list into a rough order of importance, research the hell out of those issues or questions starting with the ones at the top of your list, and then write

mini-essays or textbook entries about those issues or questions. Again, the process of researching and writing will help get the details relating to the issue or question you are working on into your long-term memory without your really trying. When you are doing this, concentrate in particular on issues or questions that tend to crop up regularly in the exams (for example, What counts as a non-natural use of land for the purposes of the rule in *Rylands* v *Fletcher*? or, When will someone's consent to having sex/being touched be so vitiated that they will not be regarded as having consented to have sex/be touched at all?) because they are issues on which the law is very uncertain or problematic. Use the past paper questions as a guide to help you with this.

The importance of having a plan

Work out a revision plan for between now and the end of the exams. This is very important, for a number of reasons:

(1) Having a plan will help ensure that you cover everything you need to cover between now and the exams. Haphazardly revising whatever you're in the mood for on a particular day will likely leave you with some big gaps in your knowledge and understanding.

(2) Having a plan will give you a stimulus to work. You won't be able to put off revising a particular topic to another day if you can see that doing this will have knock-on effects on what else you will have time to revise before the exams.

(3) Having a plan will help you not to panic about your revision. If you start thinking about everything you need to do between now and the exams to prepare for the exams, you will tend to feel overwhelmed and helpless. You need to stop thinking about everything you have to do, and just focus in on what you have to do today to get ready for the exams. Having a plan helps you to do this – it gets your mind off the bigger picture and helps you just to think about what has to be done today. Plus, having a plan is reassuring – it helps you to think that you know what you are doing, you are in control, and the possibility for things going wrong has been minimised.

So, sort out a plan for yourself. But to make a plan, you have to be prepared. You have to think about what topics you want to revise. You have to have

gone through the past paper questions, and picked out some representative questions that you are going to attempt. You have to have thought about what other revision methods you are going to employ, and how you are going to use them. So take three or four days to do this, and then spend a day putting together your plan of attack.

In making your revision plan, make sure that you don't overload yourself. Don't give yourself four or five tasks to accomplish each day if you have no chance of getting through that many tasks. And leave yourself some room for things to go wrong. Have some free days scheduled where you can catch up on any aspects of your revision plan for which it turned out that you didn't have time. And on each day of your plan, give yourself some free time that you can cut into if a particular task is taking longer than expected, or more interesting than you might have expected! (Though if you follow my advice, I hope all your time spent revising will be relatively interesting.)

The importance of taking time off

Remember what I said in my previous letter about the importance of taking time off, and not working your brain all the time. If you spend all your time revising, then you'll burn yourself out, and approach the exams feeling tired, jaded and listless – when you need to feel enthused and sparky. And it's important that when you do take time off, make sure you enjoy it – that you do something nice for yourself, and don't spend the time worrying about the exams, or feeling guilty that you are taking time off from your revision.

Now – the best way of ensuring that you do take adequate time off from your revision, and of ensuring that you have some quality time off that is free from worries or guilt feelings, is to build your time off into your revision plan. Set yourself goals, and plan what rewards by way of spending some time off revising you will give yourself for achieving those goals. If you build your time off into your revision plan in this way, you'll help ensure that you do get adequate time off from revision, and your breaks from revision will start to seem like something you are entitled to enjoy in recognition of how hard you've been working, rather than a guilty or worry-filled treat.

Work together

Where you can, work with other people in your revision:

(1) Picking questions

Get together with your fellow students to work out together what sort of questions you should be focusing on in your revision. Two minds are better than one, and they may have some useful advice for you (and you may have some useful advice for them) as to what sort of topics might come up in the exams.

(2) Send your written work around

If you've written an essay or problem answer, send it to them for their comments and advice. This will help to ensure that you work hard at making the essay or problem answer as good (and in particular, as clear) as possible, and reading your essay or problem answer and thinking about whether it is correct, and sending you comments on it, will provide your fellow students with another useful (because it involves using information) method of revising.

(3) Share information

If you've come across in the course of your revision a really useful article on a particular subject, then let other people know about it. You'll benefit from your generosity when someone else finds something useful that you haven't heard of.

(4) Ask each other questions

You and your fellow students should get into the habit of asking each other questions that have cropped up in the course of your work and that you don't know the answer to. Maybe someone else in the group knows the answer. If no one does, then you could collaborate on looking into it. Either way, your group's knowledge of the law will be improved.

Predicting what will come up on the paper

Wouldn't it be great if you could get an advance peek at what the questions will be in this year's exam? Well, you can't. But you can make some educated guesses as to what might come up in the exam, and prepare for those questions to come up in your revision. Here are some tips on spotting what sort of questions are likely to come up in the exam.

(1) Past papers

Look at the past papers that have been set over the last few years on the subject you are revising. Is there an issue that tends, time and time again, to form the basis of a question in the exam? If so, be prepared for a question on that issue to come up again.

(2) Last year's paper

Pay particular attention to last year's paper. Examiners tend not to set the same sort of essay questions two years in a row, so if there was an essay question on last year's paper on a particular issue, it's not likely you will get a similar essay question this year. So preparing for such a question to come up will normally be a complete waste of time. But only normally. There are some papers where the same sort of questions get set time and time again. In which case, last year's paper will be as good a guide as any as to what is likely to come up in this year's paper.

(3) Recent developments

Examiners are human beings. When an examiner sits down to write an exam, he or she can often feel very jaded and uninspired. Lacking in ideas for good essay and problem questions, he or she will often turn to recent cases and articles for inspiration. So, in your revision, pay a lot of attention to recent developments in the subject you are revising.

A case decided in the past year is far more likely to form the basis of a problem question in the exam than a case that was decided five years ago. An article that was published in the past year is far more likely to supply a quote for an essay question than an article that was published five years ago. An issue that has made the newspapers in the past year is far more likely to form the basis of an essay question or a problem question than an issue that was dominating the headlines five years ago.

So make sure that your revision concentrates a lot on improving your knowledge of:

(1) recent cases relating to the subject you are revising (and what academics have to say about them);

(2) recent articles on the subject you are revising (don't limit yourself to the articles you have been told to read: explore the journals and recently published books for articles that the examiner might have come across);

(3) recent issues relating to the subject you are revising that have made the news.

Some common questions

Now to address some questions that my students tend to ask me when I suggest they revise in the above way:

(1) Revision notes

'I've tended to revise in the past by just making summaries of my notes – shouldn't I do the same for my law exams?' The answer is: 'No'. When I was a student, I used to make revision notes, and I hated the time I spent making them, and I'm not sure I got anything out of them. Drawing up revision notes – by which I mean bare summaries of your notes, rather than anything more creative – is a really ineffective way of revising. It's boring, which means your brain isn't taking much, if anything, into its long-term memory, and it doesn't help at all with improving your essay-writing and problem-answering techniques, which is 50 per cent of the battle so far as getting ready for exams is concerned.

(2) Essay plans

'If I am attempting to write an essay in response to a past paper essay question, would it be okay if I just wrote an essay plan rather than a complete essay?' The answer is: 'In an ideal world – no.' If you have time to write a full essay, then do that. There is a huge difference between being able to draw up an essay plan and actually being able to execute it. Writing essay plans won't get you ready for the task of writing full essays in the exam. However, if you don't really have time to write a full essay, then an essay plan is better than nothing – but make sure that you always, always write a full first paragraph for the essay. As I've said before in my guidance on writing essays, the first paragraph of an essay is crucial: so make sure you get as much practice in as possible at writing really good, effective, attention-grabbing first paragraphs.

(3) Timed answers

'If I am attempting to answer a question, should I write my answer in the time I'd have to write it if I were doing it in an exam?' The answer is: 'Not at the moment.' At the moment, we are looking to improve your essay-writing and problem-answer techniques. To do that, you need to take time – a lot of time – over your essays and problem answers, trying to make them as good as possible. It would be a good idea to work out how much you can write in

45 minutes or an hour (depending on how long you get to answer each question in your exams) and learn to write to that kind of length – but so far as learning how to write an answer in 45 minutes or an hour is concerned, leave doing that until the run-up to the exams. At the moment, we have to focus on quality. So if you are aiming to writing an answer to a particular question, give yourself a couple of days to do it – one day to research, one day to write. Really take your time to make it as good as possible.

(4) Scope of revision

'Do I have to revise everything relating to a particular subject, or are there some topics or issues that I can disregard?' The answer is: 'It depends.' If the exam in a particular subject will require you to answer four questions, then you only have to know enough to be able to do four questions on the day. To ensure that this is the case, you will generally only have to revise six topics or issues that regularly crop up in the exam – you can dump everything else. However, it may be that a particular exam tends to mix up in its questions a lot of different topics or issues – in which case, you will probably have to cover everything to make sure you are covered in the exam.

Okay – that's enough from me. Good luck with your revision, and let me know how you get on in the exams!

Best wishes,

Nick

27
Last advice before the exams

Hey Jamie,

The very best of luck for your exams! I'll be thinking of you! As for whether I've got any last minute words of advice, I do have a few things I want to say to you – but first, a word of warning. You've probably had loads of advice from your teachers as what to do in the exams. If any of my advice contradicts what they've told you, then ignore my contradictory advice. They will know far better than me the best approach for you to adopt in the exams – after all, they are going to be marking them. That said, here are a few tips for you to bear in mind in doing your exams.

Timing

Spend equal time on all the questions you have to do in the exam. Suppose, for example, that you have to answer four questions in three hours, which gives you about 45 minutes for each question. Make sure that you don't spend more than 45 minutes on each question. Do not succumb to the temptation to spend 'just five more minutes' on any question. The extra marks you will pick up by spending 'just five more minutes' on the question will be dwarfed by the marks you will lose by spending only 40 minutes on the next question. Be disciplined. If the 45 minutes for doing a particular question are up, finish your sentence and then move on to the next question. Leave about a page space between your answers to allow you to add extra material to any of your answers if you have time at the end of the exam.

Writing essays

I've said this before, but I'll say it again – if you are writing a discursive essay (discussing a particular area of the law's merits or demerits), make sure your essay has a point and that you make that point clear right at the start of the

essay and that you spend the rest of the essay making out that point. If you find yourself writing things like, 'First, it is necessary to discuss the history of this area of the law' or 'A brief survey of the cases reveals how complicated this area of the law is' or any other phrase that invites you to engage in a boring and pointless run through the case law in the area, stop and think: 'Surely there's a better way of doing this?'

Plan your essays

Don't rush into doing any essay. Even if you think, 'Yes, this essay is on something I know about. I can do this essay!' – stop and think: 'What's the best way, the most effective way, the most impressive way of doing this essay?' Your first instincts as to how to do the essay are usually going to be wrong. Stop and think: 'Is there a better way, a more effective way, a more impressive way of doing this essay?' Five minutes spent thinking and planning at the start of your writing time will pay far more dividends than five extra minutes spent writing.

The importance of first impressions

Remember what I told you in my letter on writing essays: pay extra special attention to the first paragraph and make sure it's a winner. Make the examiner think, on reading the first paragraph, 'This is going to be a first class essay'. If you can do that, you will be far more likely to get a first class mark for your essay than you will if the examiner thinks after your first paragraph, 'This is going to be a second class essay.' I cannot emphasise too strongly how important it is that start your essay in an interesting and arresting way. Just read what Thomas Dixon has to say in his excellent *How To Get a First*:

> Speaking from the point of view of someone who regularly marks . . . exam essays, I cannot tell you how welcome it is to pick up a script and find that its author has made an effort to engage your attention, arouse your interest, provide you with a thought-provoking, arresting or unexpected opening paragraph or two. If this attention-grabbing opening is followed by or includes an account of a key scholarly dispute to which the essay relates, and a brief map of the essay itself, then, speaking for myself, I will be so overwhelmingly grateful that I will be predisposed to give the essay a first if I possibly can.

And he is not just speaking for himself: he is speaking for all examiners who mark essays, everywhere.

Leave your weakest answer to last

The law of first impressions – that first impressions are hard to dislodge – applies also to the whole of your answer paper. Say you have to do four questions in your exam. You have picked your four questions, but you feel that your answer to one of the questions is going to be significantly weaker than your other answers. Leave your weakest answer to last. If, in your first three questions, you have established yourself in the mind of the examiner as a top student, that might make her inclined to overlook or go easy on any failures or omissions in your last answer. Who knows? Maybe she will surmise that your last answer was weaker than the others because you were exhausted or running into time trouble, and out of sympathy give you a higher mark for your last, weak answer than she would have done had you written that answer first, before any of the others.

Another reason for leaving your weakest answer to last is this. Suppose that at your university a first class script is one which gets a mark of 70 per cent or above. And suppose that you have to do four questions in your exam, and the exam is marked out of 100, with each question being marked out of 25. Suppose that for your first three questions, you get marks of 18, 19 and 18 – so, 55 in total. This will only leave you needing a mark of 15 on the last question to get an overall first class mark for your paper. The examiner would have to have a heart of stone to give you a mark of 13 or 14 out of 25 for that last question, when you only needed a mark of 15 to get an overall first. So even if your last question, objectively, deserves a mark of 13 out of 25 because it's so weak, it's likely that the examiner will bump up the mark to 15 to get you over the first class boundary. So – that's another reason for leaving your weakest answer to last. Your opening strong answers can actually give the examiner an incentive to inflate the mark for your concluding, weak answer.

Try to finish with an essay

This was one of the first tips for the exams I was ever given as a student (by Professor Hugh Collins) – but it's a tip that is subject to the preceding bit of advice, that you should always leave your weakest answer last. If your answers to all of the questions on the paper are likely to be equally strong, you should

aim to finish with an essay. The reason for this goes as follows. Suppose you have to do four questions in your exam, and you have decided to do two essays and two problems. Try and make one of the essay questions the last question you will answer. The reason is that if you are running into a bit of time trouble, an essay can be compressed to fit the remaining time available without too much loss of quality. In contrast, a problem answer is less susceptible to being compressed. As a result, it's much harder to write a problem answer to a high standard in a shortened period of time.

General guidance on problem answers

Don't make your problem answers overcomplicated. Don't make ridiculous assumptions/arguments as to what the actors thought/why the actors did what they did. Always have in mind the sort of answer the examiner would have had in mind when setting the question: relatively straightforward, addressing five or six key issues with reference to the relevant case law, easy to mark when done right.

Never stop thinking

I wish I had £10 for every time a student has told me, 'I can't believe the marks I got in the exams. I thought I did really well in the exam on X law, but I got my worst mark for that. And I thought my exam in Y law was a disaster, and I got my best mark in that subject.'

It's so common for students to say this, there must be a reason for it. There must be a reason why students do worst in the papers they think they've done the best in, and why they do best in the papers they think they've done the worst in. After many years of pondering this mystery, I think I've got the answer. How you do in the exams is related to how hard you think during the exams.

If you're having a really torrid time in an exam and really having to fight to do well, then you are being made to think very hard. In writing problem answers, you are so desperate to find anything relevant to say that you start seeing points that you might otherwise have missed. In writing essays, you work very hard to make some intelligent points, hoping that your doing so will redeem what is, in your eyes, an otherwise disastrous performance.

In contrast, if you are sitting a paper that seems very straightforward to you, your brain tends to switch onto 'autopilot' and you stop really thinking

about what you are doing in the exam. In writing your problem answers, you get sloppy and complacent and start to miss some relevant issues. Your essays tend to be more directed towards what you think the essay question is about rather than what it is actually about.

The end result is that you will get a much better mark for your performance in the exam where you had a really tough time than you will for your performance in the exam that seemed very straightforward to you.

The lesson you should draw from this is not to switch off during the exam. If the exam seems very straightforward, be on your guard. Stop and think: 'Are there some issues I'm missing in doing this problem question?' 'Any relevant cases that I haven't thought about?' 'What is this essay really about?' 'Is there some way I could improve on the essay I was thinking of writing on this topic?' Never stop thinking along these lines.

Style

Use headings, numbers and underlining throughout to make your exam as easy to mark and follow as possible. If you can remember to do so, write on every other line only. This will make it very easy for you to insert corrections into your answers if you need to do so.

In the exam

Try to remain calm, especially at the start of the exam when you experience the shock of seeing a lot of brand new questions for the first time. When doing a problem question, don't panic. Just think – 'I have covered the material that will allow me to do this question. I just have to be calm and I will see the issues raised by the question and I will remember what cases and statutes are relevant to those issues.' When thinking about how to approach an essay, just think – 'I have thought about this before. I just have to be calm and the ideas will come as to what points I should make in my essay and how the essay should be structured.'

Jot down any ideas/cases/issues as they come to you on a bit of rough paper: don't rely on your memory to bring them back to you when you need them – under stress you will be particularly prone to the phenomenon of being completely unable to remember something that you were thinking about just two minutes ago. On the same lines, it might be a good idea at the start of the exam to scribble down quickly any key rules or names of cases

that you are very likely to need to use in the exam. You then won't have to worry about forgetting these rules or names in the course of the exam.

After the exam

When the exam is over, leave the exam paper in the exam hall. There's absolutely no point in taking it away with you and looking at it and worrying about what you should have said. By then it will be too late. And try and avoid getting into any extended discussions about what you wrote in the exam – again there's no absolutely no point. Just a simple 'It went okay' should suffice. Certainly don't do what I did after my contract law exam in Oxford, when I foolishly went through the paper with one of my lawyer friends who had also sat the exam. He said that he had done a particular question. 'I didn't do that question,' I said. 'It was obvious it was all about *The Super Servant (No 2)* and I hadn't revised that case.' 'What's *The Super Servant (No 2)*?' my friend replied. The rest of his day was ruined – and so was mine.

Whatever happens, be philosophical

Even the best of students can get unlucky in the exams. You may prepare really well for the exams but then get caught cold by a really unfair exam and end up getting a mark that your efforts simply didn't deserve. This can happen. Examiners are human and can foul up, just like the rest of us. My advice is – try and be philosophical and put it behind you. You've just got to believe that everything will work out well for you in the end, and this bit of what looks like bad luck will at some point in the future turn out to be a real blessing. I've found that to be true in my own life, and that of many people I know – and I have no doubt it'll be true of you as well.

But let's hope it won't come to that and that your examiners will do a good job and you will receive the credit you deserve! Good luck with the exams, Jamie – and let me know your results when they come through.

Best wishes,

Nick

28
Moving on

Hi Jamie,

Congratulations on getting through your exams! We'll have to see how you got on with your marks, but I think it's about time that you started thinking about the future. You may think it's far too early for that, while you've still got a couple of years plus to go before you graduate – but in fact you need throughout your time at university to be (1) *positioning* yourself to pursue whatever career you'll want to pursue once you leave university; and (2) *researching* what you want to do after university. And the 'downtime' that you enjoy after the exams is the ideal time to start that process going. So I'll talk in this letter about these two aspects of preparing for life after university: positioning, and researching.

Positioning

You've already started this process by taking your first set of exams. Your exam results are very, very important in terms of putting yourself in a position to be able to do whatever it is you want to do when you graduate. The competition for good jobs is increasingly tough nowadays, and you have to have decent grades in order to give yourself a chance in that competition. The days of people being able to leave university with a 2.2 and land a very good job at a very good firm are over. But it's increasingly the case that achieving very good marks in your exams is the minimum that employers are looking for when giving out the kinds of jobs that you might be going for when you graduate. You also have to think about, and start working on:

(1) Extra-curricular activities

Employers want to see that you are a well-rounded individual with a range of different interests: not someone who is just focused on studying law to the

exclusion of everything else. So allow yourself to get passionate about spending time doing things other than law, and pursue those passions. But the emphasis is on *doing*. No one is going to be impressed by your saying that you are passionate about watching box sets of *Scrubs* or that you spend all your spare time listening to Justin Bieber. Get passionate about doing things that get you out of your room. And don't worry about whether what you are doing is 'interesting' or not – the fact that you are passionate about what you are doing automatically makes what you are doing interesting.

(2) Commercial awareness

This is a very important quality that law firms look for in people applying for jobs – but one which law students generally have to work on to develop. 'Commercial awareness' is an awareness of how businesses operate, what objectives they seek to pursue, and how best those objectives might be achieved in any given situation. There are a variety of ways of developing commercial awareness. Working in a business in your holidays, and trying to develop a deep understanding of how the business is run, why it's run in the way it is, and how it might be run more effectively, would be one way. Keeping abreast of the business news, and doing a bit of research to get behind the headlines – for example, trying to understand why a particular merger might make sense to the players involved, and whether it does actually make sense all things considered – would be another way. The latest editions of the books written by Chris Stoakes should also be helpful: *Commercial Awareness*, *Know the City* and *All You Need to Know About Global Financial Markets*.

(3) Verbal reasoning

Big law firms nowadays often make job applicants do a verbal reasoning test as part of the application process. It's important that you do well on this kind of test, because you can't rule out the possibility that if you fall below a certain mark, your application will be automatically turned down by a computer without a human being ever getting to see all the wonderfully interesting aspects of your application. So if you are going to be applying for a job with a big city law firm you need to get used to these tests beforehand. You can find a number of free-to-access verbal reasoning tests online – the University of Kent very helpfully provides a number of such tests (and other kinds of tests such as numerical, and non-verbal, reasoning tests) at http://www.kent.ac.uk/careers/psychotests.htm.

(4) Negotiation skills

Another skill that law firms might be looking for in potential recruits is negotiation skills – the ability to achieve an acceptable agreement with someone who may be pursuing goals that are very different from, or even opposed to, yours. Law students tend to be very weak on these skills because when you study law you are – for the most part – working on your own, and not with others. Moreover, in studying law, you are learning how to persuade other people to agree with a fixed position that you have adopted by making rational arguments in favour of that position. This is hugely different from learning how to move towards an as yet undefined position that will turn out to prove mutually acceptable to you and to the other people with whom you are dealing. There are a number of online introductions to developing negotiation skills, as well as a number of books that you could buy and read (just search for 'negotiation skills' on Amazon). But there is a big difference between knowing something in theory and being able to apply it in practice. So look out for opportunities to enhance your negotiation skills. For example, get involved with a university society or event that requires the organisers to use negotiation skills in dealing with suppliers or the university. Try to get yourself elected onto a committee to learn how to operate in that sort of arena. If there is an institute of mediators – who try to see if a settlement can be achieved between parties who are involved in some kind of civil dispute without their having to go to court – write to them to see if they would be willing to allow you to sit in on a mediation to observe how a skilled mediator sees if the parties between whom he or she is mediating can achieve any common ground.

(5) Mooting

I mentioned in a previous letter – the one on 'Getting the most out of where you are' – that you should think about getting involved with mooting. But if you have any aspirations to be a barrister, you shouldn't even think about it – you should definitely get some experience of mooting under your belt. Even if you aren't particularly successful, it is important that you be able to show on your CV that it is something that you have engaged with – it is an important indicator of your commitment to a career as a barrister. And if you have been successful in mooting, that it is a good selling point on your CV. More generally, if you are interested in becoming a barrister, it would be well worth looking at the latest editions of Wolfe and Robson, *The Path to Pupillage*, or Kramer and Higgins, *Bewigged and Bewildered? A Guide to Becoming a Barrister*

in England and Wales for further guidance on the best ways of positioning yourself to get where you want to go in what is an increasingly competitive and overcrowded area of legal practice.

(6) Contacts

While contacts are not so important for obtaining training contracts with law firms, or pupillages with sets of barristers' chambers – the competition for those things tends to be very meritocratic – if you are interested in getting into the charitable sector, or working for an international organisation, or a non-governmental organisation, then contacts tend to be very important, sadly. So put yourself in positions to make as many useful contacts as possible. Attend speaker meetings where the speaker is doing the kind of thing you would like to do, and see if you can get a chance to talk to them. Work for a university newspaper, or a student law journal run by your university, and interview people who are doing the kind of interesting work you would like to be doing. Join university societies that are likely to provide opportunities to meet people who might be able to help you get onto the first rung of your chosen career ladder when you leave university.

(7) Further study

If you want to work as a solicitor, it isn't very important to go on to do a postgraduate degree, such as a Master's in Law (LLM), or some other kind of Master's degree, or the Oxford Bachelor of Civil Law (BCL) degree. But competition for places at barristers' chambers is now so intense that it's increasingly important to have done (and done well in) some form of postgraduate study if you want to catch the eye of their application committees. Many international, and non-governmental, organisations also require that their recruits have done a postgraduate Master's degree. So if you want to do the kind of work for which a postgraduate degree is important, it's vital that you keep your grades up at the kind of level that will enable you to be accepted to do such a degree – and at the kind of institution that will command a great deal of respect from prospective employers.

Researching

Doing the kinds of things listed above to put yourself in a position to do whatever it is that you will want to do when you leave university may also help you get a bit clearer as to what you want to do when you leave university.

If the idea of becoming more 'commercially aware' is anathema to you, then life at a big city law firm probably isn't going to be for you. But if you're the kind of person I think you are – someone who is interested in lots of different aspects of law, and lots of different potential careers – then you are going to have to make some choices as to (1) what sort of career you are going to pursue and, having made that choice, you are also going to have to make some choices as to (2) where you want to work.

Fortunately for you, there are now a large number of websites that can help you with both (1) and (2). You should check out the following sites:

thegatewayonline.com/law – a website focused on careers in commercial law.

lawyer2b.com – mainly focused on city law firms.

lawcareers.net – a hugely useful source of information about law jobs.

targetjobslaw.co.uk – again, very useful as source of information about law jobs.

chambersstudent.co.uk – the same again.

rollonfriday.com – *lots* of insider information about law firms.

www.lawgazette.co.uk – a useful source of information about law firms and developments in the world of being a solicitor.

lawsociety.org.uk – the Law Society's website.

barcouncil.org.uk – the Bar Council's official website.

jobs.thirdsector.co.uk – click on 'Careers Advice' for guidance on jobs working for charities or non-governmental organisations.

Your university careers service should also be a very helpful source of information, as well as giving you tips on constructing your CV and filling out application forms. You should also look out for any law fairs held at your university and talk to as many people as possible at those. But nothing substitutes for getting a taste of what it's actually like to work as a solicitor, or a barrister, or in whatever other career you are thinking of. So far as solicitors are concerned, this involves doing a *vacation placement* at a law firm; and in the case of barristers, a *mini-pupillage* at a set of chambers. As a law student, you would usually be looking to do one or two vacation placements and/or mini-pupillages in the summer holidays after the end of the second year of your studies. (But the deadline for applications for summer vacation placements and mini-pupillages is usually much earlier – as soon as your second

year Christmas holidays begin, start looking into making applications, and consulting the websites of individual firms and sets of chambers for deadline details.) Competition for these opportunities is very intense – I'm often told it's usually harder to get a vacation placement with a big city law firm than it is to get a training contract with them. So be prepared to make *lots* of applications – and don't be disappointed if you don't get anywhere with them; and certainly don't think that means you'll never be able to work as a solicitor or a barrister. Instead, think about casting your net more widely: perhaps applying to do a few days' work in a firm in the area where your family lives; or trying to spend some days visiting courts and sitting in the public galleries, observing the barristers and getting some idea of what it's like to work as a barrister. Doing these kind of things can often show a more impressive degree of commitment to, and interest in, working as a lawyer than someone who has easily picked up a couple of vacation placements or mini-pupillages.

I hope this is helpful and that once you leave university, you'll find yourself doing something you really love. And to help you on your way, I enclose a final Top 10 list – my Top 10 Final Words of Advice. Good luck with everything, Jamie!

All best wishes,

Nick

Top 10
Final Words of Advice

1. Don't ever lose sight of what matters

Life has a way of distracting you from what really matters. We get sucked into thinking that we need to attend to this or that problem or task, and soon forget the big picture of what's important and what we're meant to be doing. We see this on a daily basis with lawyers – the day-to day-challenges of life as a lawyer mean that soon nothing else matters but the day-to-day challenge, and any sense of their life having some overarching meaning or importance is lost. And law academics are the worst of all. Almost all such academics are now on a treadmill of churning out article after article without having any sense of what all this effort and activity is actually *for*. Don't ever be like that – try always to think of your life in terms of being a *vocation*: something that you are called to do. If you can't think of your life in that way, then something's gone wrong and you need to readjust and find a new bearing for the course of your life that will allow you to think of your life as having some meaning and importance and value.

2. Keep challenging yourself

Life also constantly tempts us to take things easy, and stop pushing ourselves to achieve more, and do better than we did yesterday. Resist that temptation and never stop challenging yourself to improve. At the moment, this won't be a problem – you're just starting out in your career, and you'll need to push yourself in order to get anywhere. But someone as talented as you will eventually get to the position where you won't have to change or work hard to achieve your goals – and at that point you'll have a choice. Either you fold your hands and rest up and take it easy, and atrophy. Or you push yourself on, and grow.

3. Be honest with yourself

You can't challenge yourself to change and improve unless you are honest with yourself about where you are falling down at the moment. We all have a tendency to lie to ourselves about ourselves – to think that we were right to do something that was actually quite wrong, or to absolve ourselves from responsibility for a particular failure by thinking to ourselves that it was 'inevitable' or 'natural' that we would do what we did. Try to see these rationalisations for what they are, and set them aside in favour of a more penetrating understanding of how we should have acted, or our responsibility for the fact that things went the way they did.

4. Avoid self-righteousness

A huge obstacle to being honest with yourself is self-righteousness: the temptation that because what you are *doing* is particularly virtuous or just, *you* are particularly virtuous or just. It doesn't work like that: people can do the right thing without being particularly righteous themselves. (The philosopher Immanuel Kant gave the example of a merchant who gives the correct change to his customers because he fears that he will lose business if he gets a reputation for short-changing his customers.) This is something you will particularly have to look out for, given the kind of work you hope to be doing in future: don't ever let the quality of the work you do make you puffed up or proud of yourself.

5. Don't go with the flow

The last four pieces of advice can all be summed up in a very easy phrase: '*Don't* go with the flow.' Of course, today's society is more likely to advise that you should 'go with the flow'. This *is* good advice when we are talking about things that are done best when you think least about *how* you are doing them – putting a golf ball into a hole, or playing a guitar, or dancing, or making someone laugh. You'll tend to screw up doing these kinds of things if you become self-conscious, and start to dwell on all the things that you need to do to get from point A to point B. So in doing these things, the best advice is to get out of your own way, and go with the flow of what comes naturally. *But* outside these contexts, the advice to 'go with the flow' is almost always disastrous. It's easy to hate people who treat you badly, and hard to forgive them – so if you 'go with

the flow', you'll end up hating when forgiving is the right thing to do. I can tell you from experience that there won't be a single good thing in your life that you won't be tempted at some point to walk away from, like it was the most natural thing in the world – so if you 'go with the flow' you'll end up depriving yourself of everything good in your life. It's easy to go along with the consensus that everyone else has arrived at, and hard to stand against the crowd – so if you 'go with the flow' you will go along with the majority view, even when the majority view is disastrously mistaken. So outside situations where self-consciousness would just result in your getting in your own way, *don't* go with the flow – but instead be suspicious of any urgings from either inside or outside you that you should just do what comes naturally.

6. Be honest with other people

This may seem like an odd piece of advice for a law student as lawyers are identified so closely with liars in popular consciousness. But lying to other people is always corrosive – of your relationships with those people, and your ability to think well of yourself. In talking to other people, try to steer clear of the platitudes and clichés that make it easy for you to lie because no one is that clear what exactly it is you are saying. And never, ever engage in the kind of 'management speak' – for example, 'I hear what you're saying' or 'These changes will add value to our client experience' – which is designed to allow people to be dishonest about what they think, or what they intend to do, or what is important to them. As George Orwell observed in his great essay 'Politics and the English language': 'The great enemy of clear language is insincerity. When there is a gap between one's real and one's declared aims, one turns as it were instinctively to long words and exhausted idioms, like a cuttlefish spurting out ink.' You have been trained, as a law student, to write and express yourself clearly. So if you catch yourself later in life writing or expressing yourself obscurely – think about why you are doing that, and whether you haven't fallen into the trap of misusing your talent for language to conceal than to reveal; to obfuscate rather than to communicate.

7. Be careful with your words

On the subject of communication, the career you are now embarking on will involve a *lot* of talking. Anyone involved in a career that involves a lot of talking should bear in mind two things. (1) It's very difficult to talk a lot

without screwing up once in a while and saying the wrong thing. (2) We live in a society that is incredibly – almost hysterically – intolerant of people who happen to have said the wrong thing. In order to avoid (1) getting you into trouble with (2), try to cultivate a more deliberate, measured way of expressing yourself, which will allow you to check and weigh your words before they come out of your mouth and can't be taken back.

8. Embrace your limitations

Reinhold Niebuhr's 'Serenity Prayer' – which was subsequently adopted by Alcoholics Anonymous – goes as follows: 'God, grant me the serenity to accept the things I cannot change, the courage to change the things I can, and the wisdom to know the difference.' So long as you can say that you have done your best in relation to the things that you had the power to change, then that's all that matters. If you have done your best to bring about a particular change, and someone else gets in the way of that happening – that's on them, and really has nothing to do with you. Resenting them for what they did is just pointless – it makes you feel bad, poisons your relationship with them, and doesn't do anything to help bring about the change that you did your personal best to achieve. Someone who realised this too late was President Richard Nixon. The day after he resigned the Presidency in disgrace – under threat of being indicted for helping to cover up the White House's involvement in criminal activities against Nixon's opponents – Nixon gave a farewell speech to his staff. The speech – apparently delivered without any preparation – is one of *the* great speeches of the twentieth century, and in it Nixon achieved a level of wisdom and insight that had signally eluded him up until then. One of the final lines of the speech expresses precisely the point I want to make here: 'Always give of your best, never get discouraged, never be petty; always remember, others may hate you, but those who hate you don't win unless you hate them, and then you destroy yourself.' If you attempt to do anything worthwhile in this world, there will always be people who will get in your way, and a lot of the time they will succeed in frustrating what you want to do. But that's their problem, and don't allow it to become your problem by hating them for getting in your way.

9. Be kind

The author Henry James is quoted as saying that 'Three things in human life are important: the first is to be kind; the second is to be kind; and the third is to be kind.' I think this is a particularly important point for law students to

remember, skilled as they are in the unkind arts of exposing stupidity and compelling people to agree with them. Remember that you don't have to use those skills all the time, and that using them to humiliate someone who hasn't been taught how to think or argue properly is unacceptable.

10. It's your life

I can give you all the advice you like – and I hope I've given you some helpful advice in these letters – but ultimately the best teacher in life is life itself, and your experience of seeing how the decisions you make turn out. So don't be afraid to go your own way, even though that will involve you in making mistakes. So long as you follow my third piece of advice, and be honest with yourself, you will learn far more from your mistakes than your successes. So I wish you success, but I also wish you failure; the sort of failure from which you can rebound and achieve far greater success than if you had never experienced that failure in the first place.

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Appendix A
A Mini-Dictionary of English Law

Act of Parliament. See 'Legislation', below.

Civil law. The term 'civil law' has a couple of different meanings.

First of all, the term 'civil law' is used by English lawyers to describe that part of English law that determines what rights (in the first sense of the word 'right' (q.v.)) private individuals enjoy against each other. Of the subjects you might study at university, tort law, contract law, land law, trusts law, family law, and labour law all belong to the field of 'civil law'. 'Civil law', in this sense, is opposed to 'public law' which is the area of law which specifically governs relationships between public bodies and private individuals, and 'criminal law' which governs when the government may punish someone for behaving in a anti-social fashion.

Secondly, 'civil law' is often used (along with 'Roman law') to refer to the law of the old Roman Empire, on which the legal systems of many countries on the European mainland are based. These countries are often known as 'civilian' or 'civil law' jusrisdictions as a result. Because of the importance of civil law (in this secondary sense) for the development of legal systems on the European mainland, many universities offer courses in 'civil law' (or 'Roman law').

Claimant. Someone who commences litigation against someone else. Before 2000, someone who commenced litigation against someone else would be known as a 'plaintiff'. The person against whom litigation is brought has always been known as a 'defendant'.

Common law. The term 'common law' is used to refer to a few different things.

First of all, the term 'common law' is often used, loosely, to describe 'judge-made law'. This is law that does not derive from a statute, but from the decisions of the judges as to what the law says in concrete cases.

Technically, such decisions only amount to evidence of what the law says – with the judge in his or her decision expressing his or her opinion as to what the law says (which opinion is then binding on the parties to the case, and creates a mini-law for their case). However, if it is clear that a particular opinion that the law says x would be accepted as correct by all the judges, then for the time being we can confidently say that the law does say x. And if the proposition x cannot be found in a statute then we say that it is a piece of judge-made law, and part of the 'common law'. Such propositions include: 'A promise will only be legally binding if something of value in the eye of the law is given in return for it, or if it is made in a deed'; 'Manufacturers of consumer products owe those who will ultimately use those products a legal duty to take care to see that those products are reasonably safe to use'; 'A decision of a public authority can be set aside as invalid and of no effect if no reasonable public authority would ever make such a decision'. There is no statute that says any of these things; but these propositions are still part of our law because they would be accepted as correct by the judges.

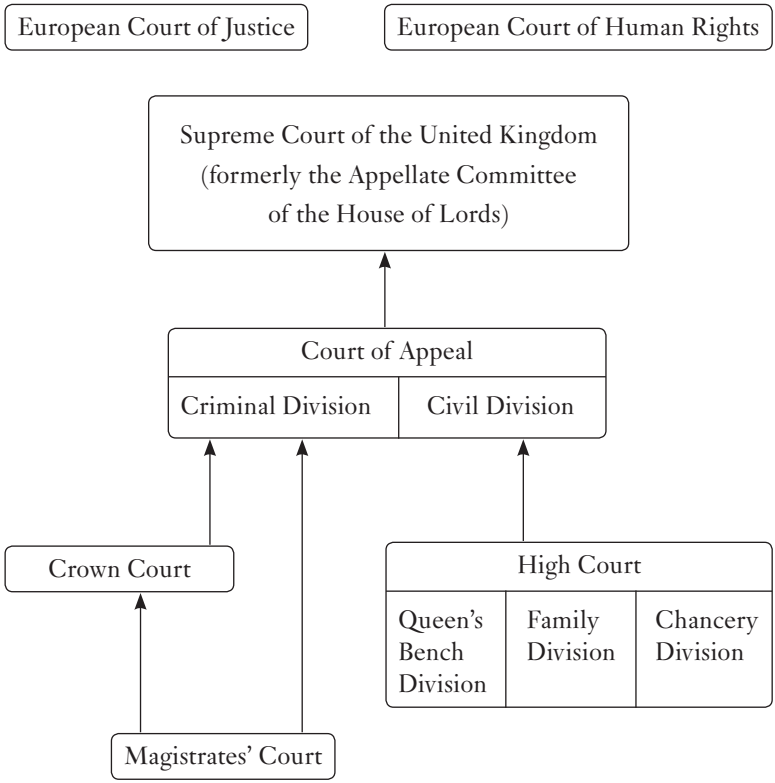
Secondly, the term 'common law' is sometimes used, more strictly, to describe areas of 'judge-made law' that derive ultimately from the decisions of judges in concrete cases heard by the courts of Common Law, in the days when the English legal system had separate courts of Common Law and courts of Equity. The Common Law courts would have general jurisdiction to hear all cases raising a legal issue. In contrast, the courts of Equity would only hear a case if – in the view of the Equity judges – there was a danger that applying the rules of the Common Law to the case would result in a serious injustice being done. So the courts of Equity acted as a corrective to the Common Law courts – either granting a remedy to a deserving claimant who would not be entitled to a remedy from the Common Law courts, or by ordering (on pain of going to prison for contempt of court if the order were disregarded) a claimant who would be entitled to a remedy from the Common Law courts not to pursue that remedy if it would be 'unconscionable' to do so. In the nineteenth century, the distinction between courts of Common Law and courts of Equity was abolished and from then on the rules of Common Law and Equity were supposed to be applied by a unified set of courts. But if a given bit of law has its origin in the decisions of the old courts of Common Law, lawyers will still mark that fact by referring to a 'common law interest' or 'common law action' or 'wrong at common law'; and if it has its origin in the decision of the old courts of Equity, lawyers will again mark that fact that by talking about an 'equitable interest' or an 'action in equity' or an 'equitable wrong'.

Thirdly, the term 'common law' is sometimes used as a catch-all term to describe those countries whose legal systems that are ultimately based on English law. So the United States, Canada, Australia, and New Zealand are the major common law countries outside England and Wales. In contrast, so called 'civilian' jurisdictions are those countries whose legal systems are ultimately based on 'civil law' (q.v.)[1] – that is, the law of the old Roman Empire. Most countries in Europe count as 'civilian jurisdictions'. There is an entire subject – comparative law – that is devoted to comparing the common law approaches to various legal issues, with the civilian approaches to those legal issues. Many universities offer their students the chance to interrupt their studies for a year to go to a civilian jurisdiction – usually France – to get acquainted with its distinctive system of law.

Contract. Many people would say that a contract is a promise that is legally binding. However, there are many occasions when a promise will be legally binding on an individual without there being any kind of contract involved. It would be better to say that contract law provides people with a facility for making undertakings to each other that will be legally binding, and that a contract is what two people enter into when they take advantage of that facility.

Courts. Below is a very simplified diagram setting out the names and relationships between the main types of courts that decide cases in England and Wales. The courts are arranged in a hierarchy, so that if you are unhappy with the result of your case, it may be possible to appeal to a higher court either to have the result in your case reversed in your favour, or to have the higher court order that your case be reheard by a lower court. The highest court in the land is the Supreme Court of the United Kingdom. (The highest court in the land was formerly known as the Appellate Committee of the House of Lords, but it was thought desirable on separation of powers (q.v.) grounds that there should not be any kind of link between the highest court in the land and the House of Lords, and that members of the highest court in the land should not have the power to sit in the House of Lords and contribute to its discussions of legislation. So the Constitutional Reform Act 2005 abolished the Appellate Committee of the House of Lords and put in its place the Supreme Court of the United Kingdom, which started hearing cases in 2009.)

[1]'q.v.' is short for 'quod vide', which means 'go to see' and simply indicates that this term is one which is dealt with elsewhere in the Mini-Dictionary.



Criminal cases are heard in either the Crown Court or Magistrates' Court, with appeals from those courts ultimately going to the Court of Appeal Criminal Division, and from there (if the Supreme Court gives leave to appeal) to the Supreme Court.

Most of the non-criminal cases you will read as a student will have originated in the High Court. The Queen's Bench Division of the High Court typically hears cases involving disputes over land (q.v.) and claims for damages (q.v.). A subdivision of the Queen's Bench Division is the Administrative Court, which considers applications for judicial review (q.v.). The Family Division, as the name suggests, deals with all matrimonial disputes, and child custody cases. The Chancery Division deals with a wide range of cases, typically centred around issues that would have been dealt with by the old courts of Equity (q.v.). So issues relating to equitable claims or interests, companies, and intellectual property will be dealt with by the Chancery Division. Appeals against decisions of the

High Court can be made to the Civil Division of the Court of Appeal, and from there (if, again, the Supreme Court gives leave to appeal) to the Supreme Court.

(A quick note on names: if Adam Smith were a High Court judge, he would be known as 'The Hon. Mr Justice Smith' or 'Smith J' for short. If Adam Smith were a judge in the Court of Appeal, he would normally be known as 'Lord Justice Smith', or 'Smith LJ'. However, if Adam Smith were in charge of the Court of Appeal Criminal Division, he would be known as 'Lord Chief Justice Smith', or 'Lord Smith CJ'; and if he were in charge of the Court of Appeal Civil Division, he would be known as 'Lord Smith, Master of the Rolls', or 'Lord Smith MR'. If Adam Smith were a judge in the Supreme Court of the United Kingdom, he would be known as 'Lord Smith'.)

Standing over all of these courts are the European Court of Justice, and the European Court of Human Rights.

The European Court of Justice is the ultimate authority on all issues relating to European Union (q.v.) law and (for the time being, and until the UK leaves the EU) the UK courts must follow its decisions in deciding any legal cases that raise issues of European Union law. Any UK court is free to refer a case raising a tricky issue of European Union law to the European Court of Justice, which will give its opinion and then refer the case back to the UK court from where it came.

The European Court of Human Rights is the ultimate authority on how the European Convention on Human Rights (q.v.) should be interpreted. Under the Human Rights Act 1998 (q.v.), the UK courts are required to take into account the decisions of the European Court of Human Rights in determining whether someone's rights under the Convention have been violated. But they are, in theory, free to disregard those decisions where they think the European Court of Human Rights has got it wrong.

Crime. A crime is an act or omission which is punishable under the law in some way – either through imprisonment, or a fine, or an order to perform community service, or through some other sanction. It is often the case that the act or omission does not in itself amount to a crime; instead the act or omission will only amount to a crime if it is accompanied by a so-called 'guilty mind' or *mens rea*. For example, it is not a crime to take a bar of chocolate off a supermarket shelf and put it in your pocket; but it is if you do so dishonestly, and with the intent to keep the bar of chocolate for yourself or somebody else.

There are thousands of crimes recognised under English law. The crimes that make up the core of the criminal law are acts which involve someone's deliberately or recklessly violating someone else's rights (in the first sense of the word 'right' (q.v.)). Crimes of this type include murder, rape, assault, battery theft, criminal damage to property, and fraud. Around this core are thousands of crimes that do not necessarily involve the violation of anyone else's rights, but involve some form of anti-social conduct that Parliament has thought it necessary to discourage by making it criminal. Such crimes include speeding, possessing dangerous drugs, false advertising, selling goods by weight without providing a price by metric unit, travelling on a train without a valid ticket, and possessing a firearm without a licence.

Damages. Damages are a monetary remedy (q.v.) that may be sued for in a case where someone has violated someone else's rights (in the first sense of the word 'right' (q.v.)). There are a few different types of damages.

The principal form of damages is compensatory damages. These are designed – as the name suggests – to compensate a claimant (q.v.) for some or all of the losses that he or she has suffered as a result of someone's rights being violated. They aim to put the claimant in the monetary equivalent of the position that he or she would have been in had the rights-violation not occurred; of course, they often fall short of achieving that aim.

English courts sometimes – though rarely – award exemplary damages against a defendant. These are designed to punish a defendant who has deliberately and outrageously violated a claimant's rights. Exemplary damages perform the same function as the criminal law, though without the controls that exist on when someone will be subjected to criminal punishment. For example, someone can only be held guilty of committing a serious crime (q.v.) if their guilt is established 'beyond a reasonable doubt'. In contrast, someone can be held liable to pay exemplary damages if it merely seems 'more likely than not' that he or she deliberately and outrageously violated a claimant's rights.

Delegated legislation. Delegated legislation is legislation that is created by someone – almost always a government minister – who has been given the power to make law by an Act of Parliament. The power to make delegated legislation is usually exercised by issuing what is called a statutory instrument.

(Delegated legislation that is of some constitutional significance is usually created by the Queen's issuing an Order in Council. (Of course, the

Queen will do as her government advises.) The Terrorism (United Nations Measures) Order 2006 was created in this way. This gave the Treasury the power to freeze someone's bank accounts if there were 'reasonable grounds' for believing that he or she was involved in terrorist activities. This provision was later (and rightly) condemned by the courts as incompatible with people's rights under the Human Rights Act 2008 (q.v.).)

There were 3,485 statutory instruments issued in 2014, in contrast to 30 Acts of Parliament. (Mercifully, the pace of law creation has slowed down since then, with 1,242 statutory instruments issued in 2016, and 25 Acts of Parliament – it may be the dramatic drop in the number of statutory instruments in 2016 reflects the UK government's slow-walking the implementation of various EU law rules because of the 2016 referendum decision to leave the EU; or simply reflects the disruption to government business caused by the process of holding the referendum.) The creation of law through statutory instruments undermines the existence of the rule of law (q.v.) in the UK: the fact that so many statutory instruments are issued each year makes it impossible to keep track of what the law actually says.

See also 'Henry VIII clause', below.

Duty (legal). Someone will have a legal duty to act in a particular way if they are required under the law to act in that way.

If A has a legal duty to do x, we can say that that duty is a private law duty if it was imposed on A for the benefit of a particular individual, B. In such a case, B is usually said to have a 'right' (q.v.) that A do x, and if A does not do x, B will normally be entitled to sue A for damages (q.v.).

A's legal duty to do x can be said to be a public law duty if A is a public body, and that duty was imposed on A to help ensure that A acts in the public interest. A breach of a public law duty is normally remedied through an application for judicial review (q.v.), though it may also amount to a crime (q.v.) for which A can be prosecuted.

Equity. See 'Common law', above.

European Convention on Human Rights. The European Convention on Human Rights ('ECHR' for short) was created by the 47 member states of the Council of Europe in 1950. Signatories to the Convention (which include the United Kingdom, as well as non-EU countries such as Russia, Switzerland and Norway) agreed to observe certain fundamental rights and freedoms, including the right to life (Article 2), the right not to be tortured or subjected to 'inhuman and degrading treatment' (Article 3),

the right to liberty and security of person (Article 5), the right to a fair trial (Article 6), the right to respect for one's 'private and family life' (Article 8), and the right to freedom of expression (Article 10). Since its inception, the Convention has been supplemented by a number of Protocols. Signatories to Article 1 of the First Protocol undertake to respect people's rights to peaceful enjoyment of their possessions.

The European Court of Human Rights (ECtHR for short) was set up in Strasbourg, France, to monitor whether signatories to the Convention were in breach of their obligations under the Convention and to provide a satisfactory remedy in cases where someone had suffered loss as a result of a signatory's failure to abide by its obligations under the Convention. For example, a prisoner in the UK who was denied access to a solicitor could complain to the ECtHR that the UK government was violating his right to a fair trial, and if the Court found that the complaint was made out, it would order the UK to compensate the prisoner for the violation of his rights and to cease violating his rights. If the UK did not comply with this order, it would be in breach of its obligations under the ECHR, which would be embarrassing both at a political and public relations level. So in practice the UK does comply with orders of the ECtHR.

The need for UK citizens to take cases to the ECtHR has been lessened by the enactment of the Human Rights Act 1998 which imposes on public authorities a legal duty (q.v.) not to violate people's rights under the ECHR. A claimant (q.v.) who alleges that he has suffered loss as a result of a public authority breaching this duty may now take his case to be heard by an English court, which will grant a satisfactory remedy if – taking into account the ECtHR's interpretation of the ECHR – it is persuaded that the claimant's rights under the ECHR have been violated. The UK Parliament (q.v.) is exempt from this duty – if it were not, the traditional rule of Parliamentary sovereignty (q.v.) over the courts would have been abolished – but in cases where it is alleged that Parliament has passed legislation (q.v.) that violates people's rights under the ECHR, the courts have the power to issue a declaration of incompatibility, saying that the legislation is in violation of the ECHR. In such a case, political and public relations considerations could be expected to force Parliament to repeal the relevant legislation.

It is a common mistake of students (and journalists) to think that the ECHR has something to do with the European Union (q.v.). This is quite wrong: the ECHR has nothing to do with the EU. At the time of writing, the EU (as distinct from the member states of the European Union) is still not a signatory to the ECHR – though it is in the last stretch of negotiations

to accede to the ECHR. In the past, this meant that the institutions of the EU were not bound by the ECHR, and were therefore not required to respect, for example, the freedom of speech of whistleblowers exposing corruption within the EU. To eliminate this loophole, the Lisbon Treaty gave effect to a Charter of Fundamental Rights that was binding under EU law both on the institutions of the EU, and the member states of the EU; though the UK insisted on a Protocol being inserted into the Charter which would stop the Charter applying to the UK's 'laws, regulations or administrative provisions, practices or actions'.

European Union. The European Union (EU for short) is an organisation of 28 European states, including (for the time being) the United Kingdom, which are bound together by a series of treaties (such as the Treaty of Rome 1957, the Maastricht Treaty 1992, and the Lisbon Treaty 2007) that commit the member states of the EU to maintain a single market within the borders of the EU (within which borders there is to be free movement of peoples, goods, services and capital) and to pursue common policies on a range of other areas, such as agriculture and fishing.

To achieve these objectives there exist a range of different European institutions. The EU is run on a day to day basis by the European Commission, which comes up with suggestions for legislation that might be created by the EU's legislature. The EU's legislature is made up of the European Parliament (which is, in turn, made up of elected representatives from all regions of the EU) and the Council of Ministers (which is made up of ministers from each of the member states of the EU, with the ministers making up the Council at any one time varying according to what the Council is discussing at that time).

The United Kingdom has been a member of the EU (at the time, the 'European Economic Community') since 1973. After the historic vote on 23 June 2016 to leave the EU it is possible that the UK will leave the EU by March 2019; and everything I say below should be read with that point in mind.

Under the European Communities Act 1972 (which is still in force at the time of writing), provisions in any treaty entered into by the member states of the EU automatically become part of English law (and override any inconsistent parts of English law) once the treaty is approved by the UK Parliament.

Any regulations created by the EU's legislature automatically became part of English law (and automatically overrode any inconsistent elements

in English law, irrespective of whether those elements pre-dated or post-dated the regulation in question), again as a result of the European Communities Act 1972.

The EU's legislature is also empowered to issue directives to the member states of the EU, requiring the member states to change their national laws so that the law on a particular point or issue is the same across the EU. For example, Council Directive 85/374/EEC directed each member state of the (then) European Economic Community to change its law so that the manufacturer of a dangerously defective product that did harm to someone's person or property would be held strictly liable for that harm (that is, without the need to prove that the manufacturer was at fault for the existence of that defect). That Directive was implemented in the UK by passing the Consumer Protection Act 1987. (Directives are more usually implemented through the issuing of a statutory instrument, which is a form of delegated legislation (q.v.).) That Act will remain valid even after the UK leaves the EU, though after the UK leaves the EU the UK courts will no longer be obliged to interpret the Act in a way that implements the goals of the Directive.

If a member state of the EU fails to implement a directive correctly, it is required under EU law to compensate anyone who suffers financial loss as a result of that failure. Who says so? The European Court of Justice (ECJ for short) which so ruled in the case of *Francovich* v *Italy*. The ECJ, which is based in Luxembourg, is the ultimate authority on all issues of EU law. It interprets the treaties of the EU and the legislation issued by the European legislature, and decides such issues as whether a member state has failed to implement a directive correctly, or whether a particular aspect of the domestic law of a member state is inconsistent with a EU regulation or treaty provision. In theory, a member state of the EU is free to disregard an order issued against it by the ECJ (just as a member state of the EU is free to disregard a directive that has been issued by the European legislature) – but doing so would put it in breach of its obligations as a member of the EU, and put its continued membership of the EU in question.

Henry VIII clause. A 'Henry VIII clause' is a provision in an Act of Parliament (q.v.) that empowers a government minister to change the terms of an Act of Parliament or a statutory instrument (q.v.). (Such a provision is called a 'Henry VIII clause' because the Statute of Proclamations 1539 gives us a very early example of such a provision. That Act provided that Henry VIII's 'proclamations' had the full force of law 'as though they were made by act of parliament'.)

Examples of very wide Henry VIII clauses are provided by:

(1) Section 1 of the Legislative and Regulatory Reform Act 2006 ('A Minister of the Crown may by order make any provision which he considers would . . . remov[e] or reduc[e] any burden, or the overall burdens, resulting directly or indirectly for any person from any legislation').

(2) Sections 19–24 of the Civil Contingencies Act 2004, which provide that 'Her Majesty by Order in Council' (i.e. the government) may create 'emergency regulations' that have the effect of 'disapply[ing] or modify[ing] an enactment or a provision made by or under an enactment' if it is urgently 'necessary to make provision for the purpose of preventing, controlling or mitigating an aspect or effect of [an] emergency.' (An 'emergency' is defined as, among other things, 'an event or situation which threatens serious damage to human welfare in the United Kingdom or in a Part or region.')

Human Rights Act 1998. See 'European Convention on Human Rights', above.

Judicial review. A claimant (q.v.) who brings an application for judicial review is asking a court to determine whether or not a public body exceeded its powers (in Latin, acted '*ultra vires*') in making a particular decision or in acting in a particular way or in failing to act in a particular way.

If the court finds that the public body is exceeding, or has exceeded, its powers in acting in a particular way, there are a variety of remedies (q.v.) that the court could award. In the case where a public body has made a decision that is *ultra vires* (for example, deciding to grant planning permission to a company to construct a supermarket), the court could issue an order of *certiorari*, quashing the decision. In the case where a public body has exceeded its powers by failing to act in a particular way (for example, by refusing to consider someone's objections to the construction of a new supermarket in a particular location), the court could issue an order of *mandamus*, ordering the public body to act in that way. In the case where a public body a public body is continuously exceeding its powers by acting in a particular way (for example, by making a yearly grant to a company in return for its running a supermarket in a particular location), the court could issue an order of prohibition, ordering the public body to cease acting in excess of its powers.

There are a number of different reasons why a court might find that a public body has acted, or is acting, in excess of its powers. The public body may have misinterpreted the powers granted it by a particular piece of legislation (thereby making an error of law), or made an error of fact which made it think it was empowered to act in a particular way, when in fact it was not. The public body may have used the powers granted it by a particular piece of legislation for an improper purpose or may have exercised those powers in a way that no reasonable person would have exercised them. The public body may have exercised its powers without granting someone affected by them a fair hearing before deciding what to do, or the person making the decision as to how the public body should exercise its powers may have had a financial interest in the public body's exercising its powers in the way it did. Finally, the public body may have acted in a way that violated someone's rights under the European Convention on Human Rights (q.v.), something which it is barred from doing under the Human Rights Act 1998 (q.v.).

Virtually all public bodies are susceptible to having their decisions and actions challenged through an application for judicial review. The major exception to this rule is that no one can make an application for judicial review to ask the courts to quash an Act of Parliament on the ground, for example, that no reasonable person would have created such an Act, or that it violates someone's rights under the European Convention on Human Rights. (Though in the latter case, it is open to the courts to make a declaration of incompatibility between the Act and the Convention.) This is because of the doctrine of Parliamentary sovereignty (q.v.). No such bar to judicial review applies in the case of delegated legislation (q.v.). For example, if a Minister creates a statutory instrument (q.v.) under legislation empowering her to do so, a claimant could make an application to the courts asking for the statutory instrument to be quashed on the ground that the Minister exceeded her powers in creating that instrument, for one of the reasons set out above.

Jurisprudence. In ancient times, the term 'philosophy' was used to describe the study of the entire field of human knowledge. (The word 'philosophy' is derived from the Greek philos (meaning 'love') and sophia (meaning 'knowledge').) But then different branches of knowledge acquired their own titles – mathematics, physics, biology, chemistry . . . – and were hived off from 'philosophy', which as a term simply came to describe 'whatever we study when we don't study mathematics or physics or biology or

chemistry or . . .'. The same thing has happened to the term 'jurisprudence', which as a term used to describe the entire field of legal studies (so that an undergraduate who obtains a law degree from Oxford is still said to obtain a BA in 'Jurisprudence'). But as different branches of the study of law have acquired their own titles – contract law, tort law, criminal law, public law . . . – those branches have become distinct from 'jurisprudence', which as a term has simply come to describe 'whatever we study when we study law but don't study contract law, tort law, criminal law, public law . . .'. As such, 'jurisprudence' as a subject is now concerned with theoretical issues affecting the other branches of legal study such as – What is law? How do we tell what the law says on a particular issue? Can the law on a particular issue ever be certain? Is it ever justifiable to punish someone for acting in a particular way? What is the basis of the remedies that courts award when someone's rights (q.v.) have been violated?

Legislation. Legislation is law that has been deliberately created by a law-making body. There are two forms of legislation in English law. First: primary legislation, which is made up of laws contained in Acts of Parliament passed by Parliament (q.v.). Second: delegated legislation (q.v.), which is made up of laws created by someone (usually a government minister) empowered to make law by an Act of Parliament.

Some say that judges act in a legislative capacity when they decide cases where the law is uncertain: that they make new law in deciding the case. The better view would seem to be that judges hardly ever act as legislators. In other words, a judge hardly ever decides a case with the conscious intention, 'I will now lay down what the law will say on this particular issue from now on'. Instead, he will express his opinion on what the law says on that issue, and then wait to see if his fellow judges will accept their opinion. If they do, then his opinion will represent the law (for the time being). If they do not, then his opinion won't be worth the paper it was written on. But, unlike a true legislator, no judge acting alone has the power to affect what the law says.

Omission. English law draws a big distinction between acts and omissions. Roughly speaking, acts make people worse off; omissions merely fail to make people better off. If I run you over in my car, that is an act. If I fail to shout out a warning when I see that you are in danger of being run over by someone else, that is an omission.

Under English law, you have lots of rights (in the first sense of the word 'right' (q.v.)) that other people not make you worse off; but rights that other

people make you better off are much rarer. You have a right against everyone that they take care not to do something that foreseeably would cause you physical injury. But if you are in danger of suffering some kind of physical injury, you will only normally have a right against someone that they take care to save you from that danger if you are in a special relationship with them. A complete stranger will not normally be under any kind of duty (q.v.) to save you from that danger. As a result he will not normally commit any kind of tort (q.v.) or crime (q.v.) if he leaves you to your fate.

Parliament. Under the UK constitution, the Parliament of the United Kingdom has the power to make law for the UK. Under the doctrine of Parliamentary sovereignty (q.v.), there are no restraints on how this power may be exercised.

The Parliament of the United Kingdom is made up of three parts:

(1) *The House of Commons.* This is currently made up of 650 Members of Parliament (MP for short), each of whom represents a constituency within the UK and was elected to Parliament by that constituency. Almost all MPs belong to a party. The party that has an absolute majority of MPs makes up the government, with the leader of that party acting as Prime Minister.

(2) *The House of Lords.* This is currently made up of about 800 members, almost all of whom were appointed to serve in the House of Lords by the Sovereign, acting on the advice of the Prime Minister, who in turn allows the other parties in the House of Commons to nominate people to represent their interests in the House of Lords.

(3) *The Sovereign.* The Sovereign is the UK's Head of State and is currently Queen Elizabeth II.

Parliament makes law by considering proposals to change the law, known as Bills. Bills are almost always introduced into Parliament by the government, though MPs are also given some Parliamentary time to offer their own Bills for approval by Parliament.

Normally, for a Bill to become an Act of Parliament, it has to be approved by all three parts of the Parliament of the United Kingdom. The Parliament Acts of 1911 and 1949 placed a limit on the power of the House of Lords to stop a Bill becoming an Act of Parliament by refusing to approve it. A Bill dealing with taxation, and a Bill that has been approved by the House of Commons in two separate sessions, can become an Act of

Parliament without the approval of the House of Lords. The approval of the Sovereign – known as the Royal Assent – is always required for a Bill to become an Act of Parliament. In practice, the Sovereign never refuses to give the Royal Assent to a Bill that is presented to him or her for approval. However, the fact that the Royal Assent is required to turn a Bill into law is thought by some to be a residual bulwark against a government using its majority in the House of Commons to install itself permanently in power as a dictatorship.

Parliamentary sovereignty. The 'doctrine of Parliamentary sovereignty' has two sides to it: the first deals with the relationship between Parliament and the courts; the second deals with the relationship between the current Parliament, and future Parliaments.

The doctrine of Parliamentary sovereignty says, first of all, that the courts will be required to give effect to each provision in an Act of Parliament until that provision is repealed by a subsequent Act of Parliament; and this is so no matter how objectionable that provision may be. In other words, the courts are subordinate to Parliament.

The doctrine of Parliamentary sovereignty says, secondly, that any Act of Parliament can be repealed by Parliament, and that an Act of Parliament that has been repealed will no longer have any legal effect. In other words, Parliament cannot bind its successors. It follows from this that Parliament cannot place any hurdles in the way of a future Parliament repealing a given Act of Parliament, that would make that Act harder to repeal than it was to pass. In other words, Parliament cannot entrench legislation, protecting it against successor Parliaments that might want to repeal it.

The doctrine of Parliamentary sovereignty is fundamentally democratic in nature: it proclaims the supremacy of the elected legislature over unelected judges, and the current legislature – which represents the current views of the people – over previous legislatures. Given this, it might be wondered whether there should be an exception to the doctrine of Parliamentary sovereignty where a Parliament attempts to undermine democracy by, for example, passing laws against public demonstrations, or by passing laws that make it easier to engage in corrupt electoral practices. But (so far we know) the courts would not make an exception to the doctrine of Parliamentary sovereignty in such cases. Having said that, there are two major *exceptions* to the doctrine of Parliamentary sovereignty.

First, a provision in an Act of Parliament would not be given effect to by the courts if it was inconsistent with European Union (q.v.) law (as incorporated into English law by the European Communities Act 1972) unless Parliament made it absolutely clear that it is to be given effect to even if it is so inconsistent. This exception will pass into history if and when the UK leaves the EU.

Secondly, Parliament is free – within as yet unspecified limits – to pass legislation that will have the effect of changing the definition of what counts as an Act of Parliament. It remains uncertain whether this power can be used to entrench either other legislation (for example, 'An Act purporting to repeal the Human Rights Act 1998 will not count as a valid Act of Parliament') or the very legislation that has the effect of changing the definition of what counts as an Act of Parliament (for example, 'An Act that purports to repeal this legislation but does not command the support of 75% of the House of Commons will not count as a valid Act of Parliament').

Precedent. A precedent is a legal case that has been decided by some court in the past.

A binding precedent is a legal case that was decided by a court on the basis of some rule or principle which other courts must give effect to under the rules of precedent if they have to decide a case where that rule or principle applies. Under the rules of precedent:

(1) Decisions of the Supreme Court of the United Kingdom (and the Appellate Committee of the House of Lords) are binding on all UK courts (q.v.) other than the Supreme Court of the United Kingdom unless and until they are overruled (declared no longer to be correct) by the Supreme Court (or have already been overruled by the Appellate Committee of the House of Lords).

(2) Decisions of the Court of Appeal are binding on future Court of Appeals, and all courts lower than the Court of Appeal, unless and until they are overruled by the Supreme Court (or have already been overruled by the Appellate Committee of the House of Lords).

A *persuasive* precedent is a case that was decided by a court on the basis of some rule or principle which another court is not bound to give effect to under the rules of precedent, but the legal wisdom and authority of the judges who decided that case is such that it is likely that other courts will accept that rule or principle as being correct.

The rules of precedent are rendered less important than you might think because of the fact that it almost always a matter of debate what rule or principle underlay a decision of a court in a particular case. So, for example, if the Supreme Court decides in *Doe* v *Brown* that Doe must pay Brown damages (q.v.), the Court of Appeal will be bound by that decision. At the same time, it will usually be a matter of debate what rule or principle underlay the decision of the Supreme Court in *Doe* v *Brown*. If this is so, it will be up to the Court of Appeal to decide for itself what rule or principle underlay the Supreme Court's decision in *Doe* v *Brown* and therefore what rule or principle it is going to be bound by under the rules of precedent.

Property. Lawyers use the term 'property' to refer to three different things, and are not always careful enough about distinguishing between them:

(**1**) They use the term 'property' to refer, first of all, to the things that can amount to property. These things are separated into two categories. First, tangible property. This category is made up of things that can amount to property that you can touch such as land, and cars, and computers, and CDs. Secondly, intangible property. This category is made up of things that can amount to property that you cannot touch. Intangible property always takes the form of a right (in the second and third senses of the word 'right' (q.v.)) of some kind. For example: copyrights (which give someone the right not to have their work copied by someone else), patents (which give someone the exclusive right to exploit a particular invention), rights to draw money from a bank account, and rights to sue someone for money.

(**2**) Lawyers also use the term 'property' to refer, secondly, to the interests that one can have in a thing that amounts to property. The greatest interest one can have in such a thing is legal ownership. But English law recognises many other interests that one can have in a thing, such as equitable ownership (otherwise known as a beneficial interest), a lease, and a charge. These interests can be traded, and can be held simultaneously in the same thing by different people. So a piece of land could be legally owned by A, but at the same time B has a beneficial interest in it (in which case A is said to hold the property on trust for B), and the land is leased out to C for a year, and D Bank has a charge over the land to secure the money D Bank lent A to acquire the land.

(3) Lawyers also use the term 'property' to refer, thirdly, to the rights (in the first sense of the word 'right' (q.v.)) that someone who has an interest in property will have that others not interfere with that interest. So someone who legally owns a thing will have rights against virtually everyone else that they not interfere with his ability to enjoy and exploit that thing. If B has a beneficial interest in a thing that is legally owned by A, B will have a right against A that A exploit that thing for B's benefit. If C leases a thing that is legally owned by A, C will have a right against virtually everyone else (including A) that they not interfere with her ability to enjoy and exploit that thing for the duration of the lease. If D Bank has a charge over a thing legally owned by A, it will have a right against A that A sell that thing and use the money realised by the sale to pay off a debt that A owes D Bank. (D Bank will not, of course, seek to enforce this right unless it becomes worried about A's ability to pay off his debt to D Bank without selling the thing that D Bank has a charge over.)

Remedy. 'Remedy' is a catch all term for the range of orders, awards, and sanctions that a claimant (q.v.) who brings a case to court may be seeking.

In a case where a claimant complains that a defendant has violated his rights (in the first sense of the word 'right' (q.v.)) have been violated, the normal remedy that he will be seeking is damages (q.v.). But in a case where a defendant is continuously violating the claimant's rights, the claimant may also seek an injunction – an order of the court that the defendant stop violating the claimant's rights. (Disregarding such an order after it has been issued will amount to a contempt of court, which is a crime (q.v.) punishable by imprisonment.)

A claimant may bring a case seeking a declaration that he has an interest in a particular piece of property (q.v.) that is being held or exploited by the defendant, and that as a result he has certain rights against the defendant (in the first sense of the word 'right' (q.v.)).

A claimant may also bring an application for judicial review (q.v.) against a public body, seeking a range of remedies designed to ensure that that public body does not exceed its powers.

Right (legal). Confusingly, lawyers use the term 'legal right' to describe three different things:

(1) The situation where the law imposes on B a duty to do x, and that duty is imposed on B purely for A's benefit. In such a situation lawyers

say that A has a legal right that B do x. For example: 'A has a legal right that B not harass him', or 'A has a legal right that B take care not to injure him'.

(2) The situation where the law gives A the power to perform a particular legal act, such as suing someone, or entering into a contract with someone else, or making someone your agent. In such a situation, lawyers say that A has a legal right to perform the act in question. For example: 'A has a legal right to sue B for damages', or 'A has a legal right to terminate his contract with B'.

(3) The situation where the law protects to a limited degree some freedom or interest of A's against being interfered with by other people. In such a situation, lawyers say that A has a legal right to enjoy that freedom or interest. For example: 'A has a legal right to freedom of speech', or 'A has a legal right to enjoy his property', or 'A has a legal right to bodily integrity'.

The fact that the word 'right' is used in these different ways creates room for confusion – either on the part of the person using the word, or the people he or she is speaking to. For example, suppose that Freddie is making a controversial speech at Nantwich University, and some student protestors are trying to shout him down. Freddie may try and silence the protestors by claiming (either to them or the police) that he has a 'right to freedom of speech', and that they should respect that. But in saying this, he is trying to pull a fast one. He does indeed have a 'right to freedom of speech' because the law – to a limited extent – protects his freedom of speech from being interfered with by the government. But that has nothing to do with the protestors. Unless the law gives Freddie a right (in sense (1), above) that the protestors not shout him down (which it does not, unless their conduct amounts to unreasonable harassment), the protestors are free to make as much noise as they want.

Rule of law. Academics use the term 'rule of law' in a number of different ways.

First, some use the term 'rule of law' to describe the conditions that have to be satisfied if a legal system is to work effectively as a legal system – that is, as a system for guiding people's behaviour by laying down rules for them to follow. Such people say that the rule of law demands that a legal system's laws be certain, consistent, prospective, easy to understand, easy to remember, easy to find out. It also demands that people generally must be

inclined to obey the law, and there must exist effective remedies and sanctions that are applied to those who are not willing to obey the law.

Secondly, some think of the 'rule of law' as the antithesis of the 'rule of men' – as in the phrase, 'we live under the rule of law, not men'. According to this view, we can only say that we live in a country governed by the rule of law if: (1) our country's legal system places strict limits on when the State may use coercive force against someone; (2) those limits are normally observed; and (3) when those limits are violated, there exist effective remedies and sanctions that are applied against the State.

Thirdly, others think that if the ideal of living under the 'rule of law, not men' is to be achieved, the power to make law must be constrained, so that those who make the law are themselves subject to a higher law in the way they exercise their power. On this view, we can only say that we live in a country governed by the rule of law if – in addition to (1), (2) and (3), above – (4) there exist mechanisms in our country that work effectively to ensure that the power to make law is not exercised arbitrarily or irrationally or immorally.

Separation of powers. The French philosopher, Montesquieu (1689–1755), praised the British constitution for splitting the government into three different branches: the legislature (which makes the law), the executive (which enforces the law, and employs the power of the State within the limits placed on it by the law), and the judiciary (which interprets the law, and resolves legal disputes). This arrangement, he claimed, prevented governmental power being concentrated in the hands of any one person, or one group of people, and therefore helped to ensure that governmental power was not abused.

It seems obvious that Montesquieu's analysis of the British constitution no longer holds true (if it ever did). There is no longer an effective separation of powers within the UK of the type Montesquieu advocated. The fact that the leading figures in the government are drawn from the majority party in the House of Commons (and the fact that the House of Lords cannot block legislation that the majority party in the House of Commons is determined to introduce) means there is no longer any solid dividing line in the UK constitution between the legislature and the executive. The line is dissolved even further by the existence of delegated legislation (q.v.), which is legislation created by government Ministers, and Henry VIII clauses (q.v.), which allow government Ministers to rewrite Acts of Parliament after they have been passed. Turning to Montesquieu's third

branch of the government, while the judiciary is theoretically independent of the executive under the UK constitution, the law reports contain very few cases where the courts have decided a case in a way that is seriously embarrassing for the government; there are, in contrast, plenty of cases where the courts have re-interpreted and twisted the law to avoid deciding cases in a way that would embarrass the government. In practice, the courts are careful not to exercise their powers in a way that might provoke a seriously adverse reaction from the all-powerful executive.

Statute. See 'Parliament', above.

Statutory instrument. See 'Delegated legislation', above.

Tort. A tort involves the violation of a legal right (in the first sense of the word 'right' (q.v.) that does not arise from a contract (q.v.) and which may be remedied through the award of damages (q.v.).

There are a large number of different torts recognised under English law, corresponding to the large number of legal rights that English law endows people with even before they have entered into a contract with someone else. The range of torts recognised under English law include: trespass to the person (touching someone else without justification) (battery), threatening someone else without justification (assault), and locking someone else up without justification (false imprisonment); trespass to land (going onto someone else's land without justification); negligence (failing to take care not to injure someone or protect their interests when they had a right that you take such care); and defamation (damaging someone's reputation without justification).

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Appendix B

Century Insurance v *Northern Ireland Road Transport Board* [1942] A.C. 509

[HOUSE OF LORDS.]

CENTURY INSURANCE COMPANY, LIMITED . . . . . } APPELLANTS;

AND

NORTHERN IRELAND ROAD TRANSPORT BOARD . . . . . } RESPONDENTS.

H. L. (N. I.)* 1942 *Jan.* 19, 22, 23; *Mar.* 4.

Master and servant—Transference of employment—Agreement by transport undertaking with petroleum company—Delivery of petrol in vehicles of undertaking—Obligation of employees of undertaking to obey orders of company.

Negligence—Scope of employment—Employee delivering petrol from tanker to storage tank—Smoking—Lighted match thrown on floor.

Under a contract with a petroleum company for the carriage and delivery of their petrol in its lorries, a transport undertaking agreed (*a*) to keep the petrol while in transit insured against fire and spillage; (*b*) to dress its employees engaged in the delivery in such uniforms as the company might direct; and (*c*) that its employees engaged in the delivery were to accept the orders of the company "regarding such delivery, the payment of accounts "and all matters incidental thereto," provided that this should not be taken as implying that its employees were the employees of the company. While one of the lorries belonging to the undertaking, in respect of which a policy had been issued by an insurance company against liability to third parties arising from damage to property caused by its use by the undertaking, was being used to deliver petrol at a garage in accordance with the agreement, the driver, while transferring petrol from the lorry to an underground tank, struck a match to light a cigarette and threw it on the floor, causing a conflagration and an explosion. Claims in respect of consequent damage having been made against the undertaking, the insurance company contended that they did not fall within the scope of the policy:—

Held, that (1.) the contract did not contemplate any transference of servants as contrasted with transference of service, and the driver at the time of the accident was acting as the servant of the undertaking; (2.) the careless act of the driver was done in the course of his employment so that the undertaking was responsible for the consequences, and, accordingly, entitled to be indemnified under the policy.

Jefferson v. *Derbyshire Farmers, Ld.* [1921] 2 K. B. 281 followed.

Williams v. *Jones* (1865) 3 H. & C. 602 considered. Judgments of dissenting minority (Blackburn and Mellor JJ.) preferred.

Decision of the Court of Appeal in Northern Ireland [1941] N. I. 77 affirmed.

**Present:* Viscount Simon L.C., Lord Wright, Lord Romer and Lord Porter.

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CENTURY INSURANCE CO. v. NORTHERN IRELAND ROAD TRANSPORT BOARD.

APPEAL from the Court of Appeal in Northern Ireland.

The facts were stated by VISCOUNT SIMON L.C. as follows. The respondents were insured by the appellant company under s. II. of a policy of insurance against liability to third parties arising from damage to property caused by the use by them of a petrol tanker belonging to the respondents. On August 2, 1937, this tanker, which was being driven by their employee, one Davison, had taken on board a consignment of three hundred gallons of petrol at the Larne depot of Holmes, Mullin & Dunn, Ld., for delivery into the storage tank of one Catherwood, a garage proprietor, of Belfast. Davison drove the tanker to Belfast, backed it into Catherwood's garage, inserted the nozzle of the delivery hosepipe into the manhole of Catherwood's tank and turned on the stopcock at the side of the tanker. While the petrol was flowing from the tanker into the tank, Davison lighted a cigarette and threw away the lighted match. The match ignited some material on the floor of the garage and a fire was caused forthwith where the nozzle of the delivery hose was discharging into the tank. Catherwood seized a fire extinguisher and started to play it on the fire which appeared at the manhole, at the same time shouting to Davison to turn off the stopcock. Davison did not do so, or attempt to do so, but started up the tanker and drove it out of the garage until the fore wheels had about reached the water channel in the street. Davison then stopped the tanker and jumped to the ground. The fire, although extinguished at the manhole by Catherwood, pursued the trailing hose and the escaping petrol, and Davison had barely reached the ground when a very violent explosion occurred. The explosion destroyed the tanker, the motor car of Catherwood which was parked in the street, and also damaged several houses which were the property of other parties. The claims in respect of the motor and houses were settled for 1001*l.* 16*s.* 7*d.*, which was paid by the appellants without prejudice to their ultimate rights, but they contended that they were not liable. One of the grounds on which the appellants resisted the claim of the respondents under the policy was that, in view of the terms of an agreement of October 11, 1934, between the respondents' predecessors, the Irish Road Transport Co., Ld., whose undertaking they acquired on April 30, 1937, and Messrs. Holmes, Mullin & Dunn, Ld., the liability for the damage did not rest on the respondents. By cl. 1 of this agreement the respondents, when requested to do so by Holmes, Mullin & Dunn, Ld.,

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were bound to deliver petroleum spirit which Holmes, Mullin & Dunn, Ld., had for disposal to any destination within Northern Ireland. The delivery was to be by tank lorries at an agreed scale of freights. The lorries were to be loaded at the installation of Holmes, Mullin & Dunn, Ld., at Larne, and the respondents were to keep sufficient tank lorries at Larne to transport all the spirit which might be given to them for delivery. The respondents were to keep the spirit, while in transit, insured against fire and spillage (cl. 5) and were to dress all their employees engaged in such delivery in such uniforms as Holmes, Mullin & Dunn, Ld., might direct (cl. 6). The respondents undertook to effect all necessary insurances under the Workmen's Compensation Acts (cl. 11) and to be accountable to Holmes, Mullin & Dunn, Ld. for the product entrusted to them for delivery (cl. 12). The clause of the agreement mainly relied on by the appellants as establishing that, at the time of the accident, Davison was the servant, not of the respondents, but of Holmes, Mullin & Dunn, Ld., was cl. 9, which provided that all the employees of the respondents engaged in or about such delivery should accept and obey the orders of Holmes, Mullin & Dunn, Ld., "regarding such "delivery, the payments of accounts and all matters incidental "thereto," and that the respondents should dismiss any employee "disregarding or failing to obey such orders." There followed the proviso that nothing contained in the clause should be taken as implying that such employees were in any way the employees of Holmes, Mullin & Dunn, Ld. The dispute whether the appellants were liable under the policy was referred to the arbitration of Mr. Lowry K.C., who stated his award in the form of a special case. The relevant questions formulated in the special case were: (1.) Was Davison at the time of the accident acting as the servant of the respondents or of Holmes, Mullin & Dunn, Ld.? (2.) Was the admittedly careless act of Davison in lighting a cigarette and throwing the match on the floor of the garage an act done in the course of his employment as such servant, for the consequences of which his master was responsible? The arbitrator, subject to the special case, answered the first question by saying that at the time of the accident Davison was acting as the servant of the respondents and the second question in the affirmative. Brown J., before whom the special case came, was of a different opinion as regards the first question, and

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held that Davison was at the relevant moment the servant of Holmes, Mullin & Dunn, Ld. He agreed with the arbitrator as to the answer to the second question. The Court of Appeal in Northern Ireland (Andrews L.C.J., Babington and Murphy L.JJ.) unanimously reversed Brown J. on the first question and affirmed the answers arrived at by the arbitrator (1). The appellants appealed to the House of Lords.

Macaskie K.C. and *Patton* for the appellants. The respondents, and, consequently, the appellants, were not liable to meet the claims for the damage caused by the fire and explosion since, on the true construction of the contract, and in particular giving effect to cl. 9, Davison was the servant of Holmes, Mullin & Dunn, Ld., in respect of the operation then being performed. Effect must be given to every part of the contract and it is not permissible to strike out or nullify any clause: *In re Strand Music Hall Co., Ld.* (2). Under the contract the tanker and driver were lent to the company by the respondents for a consideration. The right to control them in respect of the relevant operation was vested in the company. Such control may exist side by side with the general control exercised in other respects by the general master over his servant, and in this way there may be a dual control. [They referred to *Quarman* v. *Burnett* (3); *Sadler* v. *Henlock* (4); *Donovan* v. *Laing, Wharton, and Down Construction Syndicate, Ld.* (5); *Waldock* v. *Winfield* (6); *M'Cartan* v. *Belfast Harbour Commissioners* (7); *Bain* v. *Central Vermont Ry. Co.* (8); *G. W. Leggott & Son* v. *C. H. Normanton & Son* (9).] The appellants rely in particular on cls. 6, 9 and 11 of the contract. Further, the careless act of Davison was not an act done in the course of his employment so as to make his employers liable. He was negligent at the time of his employment but not in the course of it: see Salmon on Torts, 9th ed., p. 104. This was merely a case of smoking negligently; not one of working negligently. They relied on *Williams* v. *Jones* (10) and contended that *Jefferson* v. *Derbyshire Farmers, Ld.* (11), was distinguishable on the facts.

(1) [1941] N. I. 77.
(2) (1865) 35 Beav. 153.
(3) (1840) 6 M. & W. 499.
(4) (1855) 4 E. & B. 570.
(5) [1893] 1 Q. B. 629.
(6) [1901] 2 K. B. 596.
(7) [1911] 2 Ir. R. 143.
(8) [1921] 2 A. C. 412.
(9) (1928) 98 L. J. (K. B.) 145.
(10) (1865) 3 H. & C. 602.
(11) [1921] 2 K. B. 281.

Whitaker K.C. (of the English Bar and K.C. of the Irish Bar), *Fox K.C.* and *L. E. Curran* (both of the Irish Bar) for the respondents were not called on to argue.

The House took time for consideration.

1942. Mar. 4. VISCOUNT SIMON L.C. My Lords, in this appeal I should be well content to adopt the unanimous judgments delivered in the Court of Appeal in Northern Ireland, which appear to me to provide a conclusive answer to the argument for the appellants.

As to the first question formulated in the special case, no one disputes the proposition that a man may be in the general employment of X. and yet at the relevant moment, as the result of arrangements made between X. and a third party, may be the servant of the third party so as to make the third party and not X. responsible for his negligence, and I agree that the test to be applied is the test formulated by Bowen L.J. in *Donovan* v. *Laing, Wharton, and Down Construction Syndicate, Ld.* (1), namely, "in whose employment the man was at the "time when the acts complained of were done, in this sense, that "by the employer is meant the person who has a right at the "moment to control the doing of the act." If it were true that the effect of the written agreement under which the Board's petrol tanker was to carry and deliver Holmes, Mullin & Dunn, Ld.'s petroleum spirit to its destination was to lend the vehicle and its driver to Holmes, Mullin & Dunn, Ld., it might well be that while making delivery at the garage Davison was not acting as the servant of the respondents but as the servant of Holmes, Mullin & Dunn, Ld. Bowen L.J., in *Moore* v. *Palmer* (2), emphasized that "the great test was "this, whether the servant was transferred, or only the use and "benefit of his work," but, as Andrews C.J. observes (3): the provisions of the agreement point irresistibly to the conclusion that the agreement was one of carriage and delivery to be performed by the predecessors of the respondents with their own servants. It was not a contract for the hiring out of lorries and men, or of lending them to Holmes, Mullin & Dunn, Ld., to enable them to effect delivery. Clause 9 of the agreement does not, in my opinion, run counter to this view. The provision that the transport company's employees

(1) [1893] 1 Q. B. 629, 633, 634.
(2) (1886) 2 T. L. R. 781, 782.
(3) [1941] N. I. 77, 84.

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shall accept and obey the orders of Holmes, Mullin & Dunn, Ld. regarding delivery means that they shall carry out delivery orders, not that at some moment of the transit and delivery (Mr. Macaskie prefers to fix the moment no later than the time when they take on their load of spirit at Larne) they became servants of Holmes, Mullin & Dunn, Ld. In truth, the position of the respondents under the contract is not that of people who lend vehicles and drivers for the hirers to direct, but of independent contractors who undertake by the use of their own vehicles and by the activities of their own servants to produce the results, i.e., the deliveries, as ordered by Holmes, Mullin & Dunn, Ld. The decision of the Court of Appeal, overruling Brown J. on this matter, cannot be successfully impeached.

On the second question, every judge who has had to consider the matter in Northern Ireland agrees with the learned arbitrator in holding that Davison's careless act which caused the conflagration and explosion was an act done in the course of his employment. Admittedly, he was serving his master when he put the nozzle into the tank and turned on the tap. Admittedly, he would be serving his master when he turned off the tap and withdrew the nozzle from the tank. In the interval, spirit was flowing from the tanker to the tank, and this was the very delivery which the respondents were required under their contract to effect. Davison's duty was to watch over the delivery of the spirit into the tank, to see that it did not overflow, and to turn off the tap when the proper quantity had passed from the tanker. In circumstances like these, "they "also serve who only stand and wait." He was presumably close to the apparatus, and his negligence in starting smoking and in throwing away a lighted match at that moment is plainly negligence in the discharge of the duties on which he was employed by the respondents. This conclusion is reached on principle and on the evidence, and does not depend on finding a decided case which closely resembles the present facts, but the decision of the English Court of Appeal twenty years ago in *Jefferson* v. *Derbyshire Farmers, Ld.* (1), provides a very close parallel. As for the majority decision, nearly sixty years before that, of the Exchequer Chamber in *Williams* v. *Jones* (2) it may be possible to draw distinctions, as the court in *Jefferson's* case (1) sought to do, but this House is free to review the earlier decision, and for my part I prefer the view

(1) [1921] 2 K. B. 281. (2) 3 H. & C. 602.

expressed in that case by the minority, which consisted of Blackburn and Mellor JJ. The second question must also be answered adversely to the appellants. I move that the appeal be dismissed with costs.

I am authorized by my noble and learned friend Lord Romer, who is not able to be present, to say that he concurs in this opinion.

LORD WRIGHT. My Lords, my noble and learned friend the Lord Chancellor has fully stated the facts. I agree with his reasoning and conclusions, and I may add with the judgments of the Lord Chief Justice and the lords justices. I should be content simply to express my concurrence with the Lord Chief Justice's convincing judgment. I add a few words merely on the two questions of law.

First comes the question in whose employment Davison was. This problem and its decision have produced a good many reported cases in the books. In *M'Cartan* v. *Belfast Harbour Commissioners* (1), this House emphatically stated that it is a question of fact how the maxim respondeat superior is to be applied in any particular case of this character. The problem is to determine who is the "superior" in the particular instance. Lord Dunedin said categorically that the facts of one case can never rule another case and are only useful so far as similarity of facts (for identity, the word so often used, is really a convenient misnomer) are a help and guide to decision, but, all the same, it has been sought to find some general idea, or perhaps mere catchword, which may serve as a clue to solve the problem, and for this purpose the idea or the word "control" has been introduced. Thus Lord Dunedin in *Bain* v. *Central Vermont Ry. Co.* (2), quotes the following language of Bowen L.J. in *Donovan* v. *Laing, Wharton, and Down Construction Syndicate, Ld.* (3): "We have "only to consider in whose employment the man was at the "time when the acts complained of were done, in this sense, "that by the employer is meant the person who has a right "at the moment to control the doing of the act." If that were a complete statement of what Bowen L.J. said, I should be driven to question whether it was not too vague and indeterminate to afford any useful guidance, but Bowen L.J. did not stop there. Indeed, Lord Dunedin merely gives the

(1) [1911] 2 Ir. R. 143.
(2) [1921] 2 A. C. 412, 416.
(3) [1893] 1 Q. B. 629, 633.

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quotation as the first sentence of what Bowen L.J. said. The Lord Chief Justice in the present case quotes the remainder of the passage, and this indicates that the word "control" needs explanation and gives some notion of what is necessary before one man's servant becomes pro hac vice the servant of another man. It seems to be assumed in all these cases, no doubt rightly, that the man acquiesces in the temporary change of master, though that may have consequences to him in regard to wages, workmen's compensation, common employment and the like. Bowen L.J. completes his statement thus (1): "There are two ways in which a contractor "may employ his men and his machines. He may contract "to do the work, and, the end being prescribed, the means of "arriving at it may be left to him. Or he may contract in a "different manner, and, not doing the work himself, may place "his servants and plant under the control of another—that "is, he may lend them—and in that case he does not retain "control over the work." It was held on the facts of that case that the latter description applied.

In his judgment in *Moore* v. *Palmer* (2) Bowen L.J. stated a more concise criterion that "The great test was this, whether "the servant was transferred or only the use and benefit of "his work?" Control is not here taken as the test. There are many transactions and relationships in which a person's servant is controlled by another person in the sense that he is required to obey the latter's directions. Such was the case of *Quarman* v. *Burnett* (3), the authority of which has never been questioned. The defendants there were sued for the negligent driving of a coachman employed by a jobmaster who had contracted with the defendants, who were two ladies, to send horses and a driver for their coach. It is clear that the ladies were intended to direct the times when and the places to and from which they took their drives. That was certainly a measure of control, but what, it was held, was transferred was the use and benefit of the coachman's work. The coachman did not become the servant of the defendants. Instances of this sort are common. In *M'Cartan's* case (4) the use and benefit of the harbour company's crane and its driver were transferred. The driver of necessity had to obey the directions as to lowering and hoisting given by those conducting the operation, but it was held that there was no

(1) [1893] 1 Q. B. 629, 633, 634.
(2) 2 T. L. R. 781, 782.
(3) 6 M. & W. 499.
(4) [1911] 2 Ir. R. 143.

transfer of employment. Another illustration is afforded by *Cameron* v. *Nystrom* (1). The question there was whether stevedores could plead the defence of common employment against a servant of the shipowner whose vessel they were discharging. The plaintiff had been injured by the negligence of one of the shipowner's servants. It was held that there was no common employment because the negligent employee had not become the shipowner's servant. No doubt, he had in many respects to obey the directions of the shipowners. Lord Herschell L.C., however, thus summed up the position (2): "There was no express agreement with regard to the extent "to which the master and mate should have control over "them [sc. the stevedore's servants]. That control is only to "be implied from the circumstances in which they were "employed. The relation of stevedore to shipowner is a well-"known relation, involving no doubt the right of the master of "the vessel to control the order in which the cargo should be "discharged, and various other incidents of the discharge, but "in no way putting the servants of the stevedore so completely "under the control and at the disposition of the master as to "make them the servants of the shipowner, who neither pays "them, nor selects them, nor could discharge them, nor stands "in any other relation to them than this, that they are the "servants of a contractor employed on behalf of the ship to "do a particular work." Lord Herschell there emphasizes that it is the extent of control which is material to be considered, but he also stresses the other elements which make up the relationship of master and servant and which have to be considered before it can be held that there has been a transfer of the man's service from his general employer to the other who is said to be his temporary employer.

It is, I think, clear that the presumption is all against there being such a transfer. Most cases can be explained on the basis of there being an understanding that the man is to obey the directions of the person with whom the employer has a contract, so far as is necessary or convenient for the purpose of carrying out the contract. Where that is the position, the man who receives directions from the other person does not receive them as a servant of that person, but receives them as servant of his employer. Where the contract is a running contract, for the rendering of certain services over a period of time, the places where, and the times at which, the services

(1) [1893] A. C. 308. (2) Ibid. 312.

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are to be performed, being left to the discretion (subject to any contractual limitations) of the other contracting party, there must be someone who is to receive the directions as to performance from the other party and they are given to the employer, whether he receives them personally or by a clerk or by the servant who is actually sent to do the work. That I think is the position here. The contract is of a character very common between the owner of lorries or other vehicles and one who wants to hire them for the conveyance of his goods. In principle the facts here are indistinguishable from those in *Quarman* v. *Burnett* (1). Davison was subject to the control of Holmes, Mullin & Dunn, Ld., only so far as was necessary to enable the respondents to carry out their contract. In doing so he remained the respondents' servant. They paid him and alone could dismiss him. Even in acting on the directions of Holmes, Mullin & Dunn, Ld., he was bound to have regard to paramount directions given by the respondents and was to safeguard their paramount interests. This appears from the course of business followed, and is confirmed by the agreement dated October 11, 1934, made between Holmes, Mullin & Dunn, Ld., and the respondents' predecessors in title in whose shoes it is admitted that the respondents stand. It is a contract which was intended to remain in force and has remained in force over a period of years, and provided for the carriage of petrol or like products to any destination within Northern Ireland at the request of Holmes, Mullin & Dunn, Ld. Clause 9 provides that the employees of the respondents or their predecessors engaged in the delivery should accept the orders of Holmes, Mullin & Dunn, Ld., "regarding such "delivery, the payment of accounts and all matters incidental "thereto." These are just the matters in respect of which, for the convenient performance of the contract, the lorrymen employed would naturally be required to obey the wishes of those for whom the petrol was being carried. I do not find anything in the rest of the agreement to lead to any other conclusion. It is not, however, necessary to make any nice examination of its terms. A question of this sort must be decided on the broad effect of the contract. I do not attach any decisive effect to the proviso to cl. 9 that nothing in the agreement is to be construed to mean that the respondents' employees are to be taken as employees of Holmes, Mullin & Dunn, Ld., because it could not bind third parties. I think,

(1) 6 M. & W. 499.

on the whole, that the agreement goes to support the view that the parties did not contemplate that what the agreement stipulated should involve any transference of servants, as contrasted with transference of service.

Each case of this character must be decided on its particular facts. I, therefore, do not think it necessary to refer to any other of the cases which have been cited. In the great majority the conclusion has been against the servants being transferred from the general employer. Nor do I consider the cases where a man has been held to have become the servant of someone who was not otherwise his employer by voluntarily doing work for him.

On the other question, namely, whether Davison's negligence was in the course of his employment, all the decisions below have been against the appellants. I agree with them and need add little. The act of a workman in lighting his pipe or cigarette is an act done for his own comfort and convenience and, at least generally speaking, not for his employer's benefit, but that last condition is no longer essential to fix liability on the employer: *Lloyd* v. *Grace, Smith & Co.* (1). Nor is such an act prima facie negligent. It is in itself both innocent and harmless. The negligence is to be found by considering the time when and the circumstances in which the match is struck and thrown down. The duty of the workman to his employer is so to conduct himself in doing his work as not negligently to cause damage either to the employer himself or his property or to third persons or their property, and thus to impose the same liability on the employer as if he had been doing the work himself and committed the negligent act. This may seem too obvious as a matter of common sense to require either argument or authority. I think what plausibility the contrary argument might seem to possess results from treating the act of lighting the cigarette in abstraction from the circumstances as a separate act. This was the line taken by the majority judgment in *Williams* v. *Jones* (2), but Mellor and Blackburn JJ. dissented, rightly as I think. I agree also with the decision of the Court of Appeal in *Jefferson* v. *Derbyshire Farmers, Ld.* (3), which is in substance on the facts indistinguishable from the present case. In my judgment the appeal should be dismissed.

(1) [1912] A. C. 716.
(2) 3 H. & C. 602.
(3) [1921] 2 K. B. 281.

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LORD PORTER. My Lords, I agree with the speeches just delivered by the noble and learned lords who have preceded me, and would dismiss the appeal.

Appeal dismissed.

Solicitors for appellants: *Berrymans, for George L. Maclaine & Co., Belfast.*

Solicitors for respondents: *Blyth, Dutton, Hartley & Blyth, for J. C. W. Rea & Son, Belfast.*

[HOUSE OF LORDS.]

H. L. (N. I.)* 1942 *Jan.* 13, 14; *Feb.* 9; *Mar.* 4.

BENSON . . . . . APPELLANT;

AND

NORTHERN IRELAND ROAD TRANSPORT BOARD . . . . . RESPONDENTS.

Criminal law—Appeal—Dismissal of summons—Order for payment of costs by complainants—No appeal—Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935 (25 & 26 Geo. 5, c. 13), s. 24, sub-s. 1—Road and Railway Transport Act (Northern Ireland), 1935 (25 & 26 Geo. 5, c. 15), s. 15, sub-s. 1.

By s. 24, sub-s. 1, of the Summary Jurisdiction and Criminal Justices Act (Northern Ireland), 1935, "an appeal shall lie to a "court of quarter sessions against an order of a court of summary "jurisdiction, in cases of a civil nature by either party whether "he is the complainant or defendant, and in other cases by any "party against whom an order is made for payment of any penal "or other sum, or for any term of imprisonment, or for the estreating "of any recognizance to a greater amount than twenty shillings."

A court of summary jurisdiction in Northern Ireland having dismissed a summons under s. 15, sub-s. 1, of the Road and Railway Transport Act (Northern Ireland), 1935, for contravention of which a fine of 100*l.* might be imposed, and ordered the complainants to pay a sum in respect of costs, the complainants appealed to quarter sessions, which dismissed the appeal. On a case stated, the Court of Appeal in Northern Ireland held that an offence had been committed and that the decision of the court of summary jurisdiction should be reversed. On appeal by the defendant to the House of Lords:—

Held, that the order for payment of costs was not "an order

**Present:* VISCOUNT SIMON L.C., LORD ATKIN, LORD WRIGHT, and LORD PORTER.

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End notes

Letter 1. What is law?

Law as a conversation. This section is heavily influenced by Scott Shapiro's 'planning theory of law' as set out in his book *Legality* (Harvard University Press, 2010), according to which law can be seen as a plan for achieving social goals. If in the text I have avoided the language of 'plans', that's because we tend to see plans as final, whereas law is much more open-ended and ever-changing. The idea of law as a conversation is intended to convey that idea. Socrates' mysterious definition in the pseudo-Platonic dialogue *Minos* that 'Law wishes to be the discovery of what is' (315a) actually fits very well with the idea of law being advanced here. If we see law as a conversation targeted at determining what sort of society we should live in, then law is animated by a desire to discover something objective – what sort of society of society we *should* live in. The dialogue *Minos* is notable for its rejection of the positivist identification of law with a set of laid-down or socially accepted rules. I referred to the dialogue as pseudo-Platonic as most Plato scholars think that the dialogue is not good enough to have come from Plato. However, Leo Strauss argues that it is by Plato, and was intended as a preface to Plato's *Laws*: Strauss, 'On the *Minos*' in Pangle (ed), *Roots of Political Philosophy* (Cornell University Press, 1987). For some recent discussions of *Minos*, see V. Bradley Lewis, 'Plato's *Minos*: the political and philosophical context of the problem of natural right' (2006) 60 *Review of Metaphysics* 17 and T. Lindberg, 'The oldest law: rediscovering the *Minos*' (2007) 138 *Telos* 43.

The fact that a previous generation of law-makers may have taken a particular position on what sort of society we should live in does not mean that future generations cannot take a different position, thereby bringing about a change in the law. This process of change is well described in Lord Devlin's book *The Judge* (Oxford University Press, 1979), 1 (also Devlin, 'The judge as lawmaker' (1976) 39 *Modern Law Review* 1, 1):

> . . . law is the gatekeeper of the status quo. There is always a host of new ideas galloping around the outskirts of a society's thought. All of them seek admission but each must first win its spurs; the law at first resists,

> but will submit to a conqueror and become his servant. In a changing society (and free societies that are composed of two or more generations are always changing because it is their nature to do so) the law acts as a valve. New policies must gather strength before they can force an entry; when they are admitted and absorbed into the consensus, the legal system should expand to hold them, as also it should contract to squeeze out old policies which have lost the consensus they once obtained.

You and I and a whole bunch of other people . . . I've borrowed here from the first line of G.A. Cohen's *Why Not Socialism?* (Princeton University Press, 2009), 3: 'You and I and a whole bunch of other people go on a camping trip.'

Entick v *Carrington*. The quoted section is taken from the version of Camden LCJ's judgment that appears in 19 Howell's State Trials 1029 (1765). The actual law report of Camden LCJ's judgment (at (1765) 2 Wils KB 275, 95 ER 807) is somewhat different:

> our law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law . . . we can safely say there is no law in this country to justify the defendants in what they have done; if there was, it would destroy all the comforts of society; for papers are often the dearest property a man can have.

The version of the judgment that appeared in Howell's State Trials was claimed by the editor of Howell's to be based on Camden's own notes of the judgment; as opposed to the version of the judgement in the law report, which was written down by a law reporter called Serjeant Wilson while the judgment was being delivered.

Parliament listened to the House of Lords' views. The mechanisms that now exist for fostering dialogue between legislators and judges over what sort of society we should live in are well treated in Po Jen Yap's 'Defending dialogue' [2012] *Public Law* 527 – another piece of legal writing that has had a big influence on my thinking in writing this letter.

There were plenty of alternative visions. The classic work on the most popular of these alternative visions (those of Plato and Marx) is still Karl Popper, *The Open Society and Its Enemies* (Routledge Classics, 2011). Also F.A. Hayek, *The Road to Serfdom* (Routledge Classics, 2001).

And it may be that things will be very different in future. Francis Fukuyama's thesis in *The End of History and the Last Man* (Penguin, 1993) is that – barring a disaster – things won't be so very different in the future as the sort of society we current live in is the sort of society we should live in because no other form of society could be conceivably better. The financial crisis that began in 2008 might have prompted us to re-think the basic structure of our society but as John Lanchester points out in his excellent article, 'Marx at 193', *London Review of Books*, April 2012, 'all we've seen are suggestions for ameliorative tweaking of the existing system to make it a little less risky'. If Fukuyama is right, then the future of law-making in our society will simply involve refining and defining the details of a basic structure that is effectively unalterable.

Letter 2. Four reasons for studying law

Lord Hailsham. See *R* v *Howe* [1987] AC 417, 432.

Rhetoric. For a very good book on this relatively neglected subject, see Sam Leith, *You Talkin' To Me? Rhetoric from Aristotle to Obama* (Profile Books, 2011).

Lon Fuller and Rex. See Fuller, *The Morality of Law* (Yale University Press, 1964), 33–36.

Both Pound's 'Portrait [d'une Femme]' and Eliot's ['Portrait of a Lady'] . . . M. McLuhan, 'Pound, Eliot and the rhetoric of *The Waste Land*' (1979) 10 *New Literary History* 557, at 557. For other examples, see the website for *Philosophy and Literature*'s Bad Writing Contest, which ran for four years from 1995 to 1998: http://denisdutton.com/bad_writing.htm

A search warrant has to be specifically justified . . . J.A. Weir, 'Police power to seize suspicious goods' (1968) 26 *CLJ* 193.

Can it be said on occasion . . . Hackney, 'The politics of the Chancery' [1981] *Current Legal Problems* 113.

Blaise Pascal. See his *Lettres Provinciales* (1657), no. 16.

The Gettysburg Address. Delivered by President Abraham Lincoln on November 19, 1863 at the dedication of the Soldiers' National Cemetery at Gettysburg, where four and a half months before the soldiers of the Union Army scored a decisive, but bloody victory (roughly 50,000 Americans were

killed in three days of fighting) over the rebel Confederate forces. This is regarded as the definitive text of Lincoln's address:

> Four score and seven years ago our fathers brought forth on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal.
>
> Now we are engaged in a great civil war, testing whether that nation, or any nation so conceived and so dedicated, can long endure. We are met on a great battle-field of that war. We have come to dedicate a portion of that field, as a final resting place for those who here gave their lives that that nation might live. It is altogether fitting and proper that we should do this.
>
> But, in a larger sense, we can not dedicate – we can not consecrate – we can not hallow – this ground. The brave men, living and dead, who struggled here, have consecrated it, far above our poor power to add or detract. The world will little note, nor long remember what we say here, but it can never forget what they did here. It is for us the living, rather, to be dedicated here to the unfinished work which they who fought here have thus far so nobly advanced. It is rather for us to be here dedicated to the great task remaining before us – that from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion – that we here highly resolve that these dead shall not have died in vain – that this nation, under God, shall have a new birth of freedom – and that government of the people, by the people, for the people, shall not perish from the earth.

Dr Martin Luther King Jr. 'The arc of the moral universe is long but bends towards justice' features in his 1967 speeches 'Why I am opposed to the war in Vietnam' (delivered at Ebenezer Baptist Church in Atlanta, Georgia on April 30, 1967) and 'Where do we go from here?' (to the Southern Christian Leadership Conference on August 16, 1967). The phrase comes from Theodore Parker's sermon 'Of justice and conscience', published in his *Ten Sermons of Religion* (1810).

Lord Mansfield. The concept of the common law working itself pure comes from the case of *Omychund* v *Barker* (1744) 1 Atk 21, 26 ER 15. Before becoming Lord Mansfield, Sir William Murray was Solicitor-General and argued in *Omychund* that evidence given by Indian witnesses in an Indian court should

be admissible even though the testimony was not preceded by the witnesses swearing an oath on the Bible. The relevant portion of his argument went as follows:

> Here is a . . . court erected in Calcutta, by the authority of the crown of England, where Indians are sworn according to the most solemn part of their own religion. All occasions do not arise at once; now a particular species of Indians appears; hereafter another species of Indians may arise; a statute very seldom can take in all cases, therefore the common law, that works itself pure by rules drawn from the fountain of justice, is for this reason superior to an act of parliament.

(All emphases in the original.) 'Superior' here meant superior in the sense of being better able to adapt to changing circumstances.

More organic and incremental approaches to changing society. For such an approach to questions of justice see Amartya Sen's *The Idea of Justice* (Penguin, 2010), eschewing attempts to produce abstract definitions of what a just society would look like, and instead focusing on whether a particular change in society would make society more just than it was before. The classic work on this approach to ordering society is Edmund Burke's *Reflections on the Revolution in France* (1790). See, for example, his statement:

> The science of constructing a commonwealth, or renovating it, or reforming it, is, like every other experimental science, not to be taught a priori . . . it is with infinite caution that any man ought to venture upon pulling down an edifice which has answered in any tolerable degree for ages the common purposes of society, or on building it up again, without having models and patterns of approved utility before his eyes.

(Page 152 in the Penguin Classics edition (1986), edited by Conor Cruise O'Brien).

Thomas Hobbes. In Hobbes' *Leviathan*, Hobbes describes the natural state of mankind (i.e. the state of mankind in a world without legal systems) as involving a 'warre of every man against every man'. In such a state, he explains:

> there is no place for Industry; because the fruit thereof is uncertain; and consequently no Culture of the Earth; no Navigation, nor use of the commodities that may be imported by Sea; no commodious Building; no Instruments of moving, and removing such things as require much force; no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society; and which is worst of all, continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short.

A serving police officer. See *The Independent*, 25 January 2013 ('Blowing the whistle: the inside story of how targets make policing worse').

Roberto Mangabeira Unger. See *The Critical Legal Studies Movement* (Harvard University Press, 1983), 119. His quote was originally about legal academics.

Letter 3. The astonishing hypothesis

Lord Sumption. See *Counsel*, July 2012, page 16.

UK's long industrial decline. See Corelli Barnett's *Pride and Fall* sequence of books: *The Collapse of British Power* (1972), *The Audit of War* (1986), *The Lost Victory* (1995), and *The Verdict of Peace* (2001).

Letter 4. But is law the right subject for me?

Blaise Pascal. See his *Pensées* (trans. A.J. Krailsheimer), no 136.

Marshmallow experiment. See, generally, http://en.wikipedia.org/wiki/Marshmallow_experiment.

Making lists. On the importance of making checklists, see Atul Gawande, *The Checklist Manifesto: How To Get Things Right* (Profile Books, 2011).

Isaiah Berlin. See his *The Hedgehog and The Fox: An Essay on Tolstoy's View of History* (1953).

Recent research in the field of hedonic psychology. For applications of this research to law, see: Bronsteen, Buccafusco and Masur, 'Retribution and the experience of punishment'; and Essert, 'Tort law and happiness'. Both articles are available on the Social Sciences Research Network website: www.ssrn.com.

Writers whose crystal clear prose should encourage you to think clearly and logically yourself. Peter Birks: *Unjust Enrichment*, 2nd edn (Oxford University Press,

2005). H.L.A. Hart: *The Concept of Law*, 3rd edn (Oxford University Press, 2012). Philip K. Howard: *The Collapse of the Common Good: How America's Lawsuit Culture Undermines Our Freedom* (Fawcett Books, 2002); *Life Without Lawyers: Liberating Americans from Too Much Law* (W.W. Norton, 2009); *The Death of Common Sense: How Law is Suffocating America* (Random House, 2011). Tony Weir: *An Introduction to Tort Law*, 2nd edn (Oxford University Press, 2006). Daniel Kahneman: *Thinking, Fast and Slow* (Penguin, 2012). Peter Kreeft: *Making Choices: Practical Wisdom for Everyday Moral Decisions* (Servant Books, 1990); *Philosophy 101 by Socrates: An Introduction to Philosophy* (Ignatius Press, 2002). C.S. Lewis: *Mere Christianity* (1952); *The Abolition of Man* (1943). Peter Singer: *Practical Ethics*, 3rd edn (Cambridge University Press, 2011). David Stove: *What's Wrong with Benevolence: Happiness, Private Property and the Limits of Enlightenment* (Encounter Books, 2011); *Against the Idols of the Age* (Transaction Publishers, 2011). Nick Cohen: *You Can't Read this Book: Censorship in an Age of Freedom* (Fourth Estate, 2012). Theodore Dalrymple: *Not With a Bang but a Whimper: The Politics and Culture of Decline* (Ivan R. Dee, 2010); *In Praise of Prejudice: The Necessity of Preconceived Ideas* (Encounter Books, 2007). Nick Davies: *Flat Earth News* (Vintage, 2009). Ben Goldacre: *Bad Science* (Harper Perennial, 2009); *Bad Pharma* (Fourth Estate, 2012). Clive James: *Cultural Amnesia* (Picador, 2012). Bernard Levin: *Enthusiasms* (Coronet Books, 1986).

Top 10. Myths About Studying Law

The Roman playwright Terence. Quotation from his play *Heauton Timorumenos.*

Justice. See McBride and Steel, *Great Debates in Jurisprudence* (Palgrave Macmillan, 2014), 184–90.

Letter 8. How (and how not) to argue

In writing this letter, I was heavily influenced by Peter Kreeft's excellent *Socratic Logic* (St Augustine's Press, 2004).

Occam's Razor. Named after William of Ockham, who was a friar who lived in England in the fourteenth century and was interested in logic.

Top 10. Fallacies and Stupidities

Allan Bloom. See his *The Closing of the American Mind* (Simon & Schuster, 1987), 25.

Roger Scruton. See his *Modern Philosophy* (Pimlico, 2004), 6. For a slightly different attack on the idea that 'all truth is relative' – and the desire to be open-minded – see G.K. Chesterton, *Heretics* (1905), chapter 20:

> The human brain is a machine for coming to conclusions; if it cannot come to conclusions it is rusty. When we hear of a man too clever to believe, we are hearing of something having almost the character of a contradiction in terms. It is like hearing of a nail that was too good to hold down a carpet; or a bolt that was too strong to keep a door shut . . . Man can be defined as an animal that makes dogmas. As he piles doctrine on doctrine and conclusion on conclusion in the formation of some tremendous scheme of philosophy and religion, he is . . . becoming more and more human. When he drops one doctrine after another in a refined scepticism, when he declines to tie himself to a system, when he says that he has outgrown definitions, when he says that he disbelieves in finality, when, in his own imagination, he sits as God, holding no form of creed but contemplating all, then he is by that very process sinking slowly backwards into the vagueness of the vagrant animals and the unconsciousness of the grass. Trees have no dogmas. Turnips are singularly broad-minded.

Letter 10. Some hard truths

Brain development studies. See the MIT Young Adult Development Project at http://hrweb.mit.edu/worklife/youngadult/

C.L.R. James. See his *Beyond a Boundary* (1963, reprinted by Yellow Jersey Press, 2005), Preface.

Letter 15. Reading cases

Arthur Schopenhauer. See his *Counsels and Maxims* (1851), Volume 2, §296a: 'Buying books would be a good thing if one could also buy the time to read them in: but as a rule the purchase of books is mistaken for the appropriation of their contents.'

Letter 16. A brief history of law reporting

Stilk v *Myrick*. See Luther, 'Campbell, Espinasse and the sailors: text and context in the common law' (1999) 19 *Legal Studies* 526.

Letter 18. How to get through an article

Advice to Peter Birks. See his *Unjust Enrichment*, 2nd edn (OUP, 2005), xi.

Top 10. Controversies in English Law

Lord Reid and fairy tales. Reid, 'The judge as law maker' (1972) 12 *Journal of the Society of Public Teachers of Law* 22, 22.

Letter 23. How to write an essay

Interfoto case. See *Interfoto Picture Library* v *Stiletto Visual Programmes* [1989] QB 433, CA.

Bruce McFarlane. Letter to Michael Wheeler-Booth, 18 September 1956. See Harriss (ed), *Bruce McFarlane's Letters to Friends 1940–1966* (Magdalen College, Oxford, 1997).

Letter 25. How to write a problem answer

IRAC method. A particularly good exposition of the IRAC method of answering legal problem questions can be found in Friedman and Goldberg, *Open Book: Succeeding on Exams from the First Day of Law School* (Wolters Kluwer, 2011).

Letter 27. Last advice before the exams

Thomas Dixon. See his *How To Get A First* (Routledge, 2004), 145–146.

Appendix A. A Mini-Dictionary of English Law

Condemnation of Terrorism (United Nations Measures) Order 2006. See *Her Majesty's Treasury* v *Ahmed* [2010] UKSC 5, [2010] 2 AC 534.

Legislation. See further John Gardner, 'Some types of law' in Douglas Edlin (ed.), *Common Law Theory* (Cambridge University Press, 2008).

A provision in an Act of Parliament will not be given effect to by the courts if it is inconsistent with European Union law. See *Macarthys Ltd* v *Smith* [1979] 3 All ER 325, 329; *R* v *Secretary of State for Transport, ex p Factortame Ltd* [1990] 2 AC 85; and *Thoburn* v *Sunderland City Council* [2003] QB 151.

Parliament is free – within as yet unspecified limits – to pass legislation that will have the effect of changing the definition of what counts as an Act of Parliament. See *Regina (Jackson)* v *Attorney General* [2006] 1 AC 262.

Rule of law. For the first view of the rule of law, see Lon Fuller, *The Morality of Law* (New Haven, 1969), chapter 2; also Joseph Raz, 'The rule of law and its virtue' (1977) 93 *Law Quarterly Review* 195 (reprinted in Raz, *The Authority of Law* (Clarendon Press, 1979), chapter 11). For the second and third views of the rule of law see Friedrich Hayek, *The Constitution of Liberty* (Chicago, 1960).

Montesquieu. See his *The Spirit of the Laws*, Book XI, chapter 6 ('On the constitution of England'):

> When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.
>
> Again, there is no liberty, if the judiciary power by not separated from the legislative and the executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined with the executive power, the judge might behave with violence and oppression.
>
> There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.

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